

International Family Law, Policy and Practice

Child Law in an International Context

**A Commemorative Collection of Articles Based on Themes from
the University of Tromsø's International Conference
21-25 January 2013**



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Editor's Message

Welcome to this first issue of our new journal *International Family Law, Policy and Practice*, which begins in truly international fashion with a commemorative collection of articles based on themes from the International Child Law Conference at the University of Tromsø, Norway, in January 2013.

Editing this collection has been of the greatest interest to me because of the distinct flavour of the Northern European approach to Family Law which is not as often encountered in academic or practitioner literature as those of either our common law colleagues in America, Australia, New Zealand and other English speaking jurisdictions, or of our more southerly European colleagues in the enlarged EU.

However not all writers in this issue are Scandinavian, and our comparative approach to specialist Family Law in the complementary fields of academics' and practitioners' perspectives has been maintained by contributions from England, Wales, Ireland and New Zealand as well as from Norway, Sweden and Finland. Nevertheless the opportunity to obtain a corpus of uniquely Scandinavian perspectives on Family and Child Law has been enlightening, in particular when we consider the Scandinavian approach to research which is spelt out in the initial Research section.

But it must also be remembered that this collection was not of my own selection but that of Professor Trude Haugli, the Convenor of the Conference, for whose inspiration in the concept and realisation of the conference, and for asking us to prepare a commemorative volume of the resulting articles, we are grateful. For this reason it is her Message which draws out the essence of the themes which this issue covers, and which have given us the opportunity to discover some uniquely Scandinavian points of view.

Our next issue, our first of 2014, will be the first of a global approach to two of the key topical concepts of 2013, that of equality and gender, particularly apt following the enactment of the equality statute, the Marriage (Same-Sex Couples) Act 2013, and the consideration of the other major piece of legislation of the year, the Children and Families Bill, which continues the same theme in encouraging the concept of genuinely shared parental responsibility for children regardless of the gender of the child's parents.

Meanwhile, I can do no better than to hand over introduction of this issue to Professor Haugli.

Frances Burton

Frances Burton, Editor

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Message from the Conference Convenor

Professor Trude Haugli

Introduction

Thirty-four researchers from nine different countries met in Tromsø, in the North of Norway, to discuss the topic 'Child Law in an International Context' during the week of 21-25 January 2013. The conference was organised by the Child Law Research group at the Law Faculty, University of Tromsø, and was partly funded by the Norwegian Research Council. For this commemorative journal issue, eighteen of the speakers have written articles based on their presentations. This message introduces these articles and explains the context in which they should be placed.

In Norway 'Child Law' is a relatively new research area where all questions concerning the child's legal status need to be considered. The purpose of defining 'Child Law' as a specific issue is to try to improve the position of the child in law and in reality. Researchers all over the world are grappling with questions concerning the rights of the child and the legal position of the child is an integral part of this. The conference aimed to go beyond the national legislative level by focusing on more theoretical and international dimensions. During the first part the emphasis was on how to define and understand 'children' for legal research purposes. The second part of the program included a range of international topics: The UN Convention on the Rights of the Child – implementation and interaction with other international instruments and national law; International Child Abduction and Relocation disputes; the part the European Court of Justice plays in securing children's rights; how the rights of children as asylum seekers are secured within the EU; and Children as Soldiers. A specific topic concerned human rights for Children in Education. Finally, with these general topic areas as a background, some issues about children's welfare and best interests were discussed.

Defining and understanding 'children' for legal research

The child population does not form a homogeneous group. Rather, children comprise different categories, such as girls and boys, rich and poor, varying ages and levels of maturity, as well as differences regarding religion, ethnicity and abilities. With this diversity in mind, do we think of children within the extended framework of normality towards deviation from that norm and, if we do, how do we measure this and take account of its implications for

child law? Who is the 'standard' or 'normal' child within child-law research? And do we need a more fine-meshed approach?

The norm in law seems to be the middle class competent child for the majority of the population. However, those children who are the subjects of legal research are often children in especially vulnerable situations, such as children in court proceedings, children in need of protection against neglect and abuse, abducted children and unaccompanied minor asylum seekers. These situations are, thankfully, not normally experienced by most children.

In Schiratzki's article (from Sweden) the focus is on understanding the best interests of the child as an interpretative legal principle. She investigates the understanding and importance of normality and exceptions, in living conditions, when assessing the best interests of the child. These are issues associated with equality law and welfare law. Common for all these legal fields is the need for balancing different interests as well as promoting fundamental values.

Svensson (from Sweden) reflects in her article on three contemporary discourses prevalent in the Nordic context which are important for defining and understanding children in legal research. The first is the discourse on children's rights based on children as competent agents and the second is the discourse on individual freedom of choice. The third discourse is about the role of the state and its relationship with individuals in society. These three discourses have been strengthened and consolidated over time in the Nordic context and have significantly impacted on contemporary family policy.

Developing child law research methodology includes developing interdisciplinary research. Does interdisciplinary work require certain skills? In the interdisciplinary field of Childhood Studies the diversity of childhood (and children's agency) is well recognized. Nilsson, Jacobsson and Wennberg (all from Sweden) problematize the defining and understanding of children as well as law and legal research, using theories on intersectionality, interdisciplinarity and intertextuality as analytical tools. They conclude that there will always be problems related to the "particularities" of children and child law. And they hold that it is essential to acknowledge the need for bridging knowledge in this field of law and for theoretical and methodological development. They believe that it is vital to develop an

alternative to a traditional (normative) approach and that it is important for researchers to problematize and reflect critically on their own point of departure, and the significance of their research subjects when producing new knowledge.

Norwegian child law researchers increasingly consider that they adopt a child perspective in their research, yet it is unclear what this actually entails. At a rhetorical level, such a perspective signals a positive attitude towards, and respect for, children and a willingness to consider the law, and its impact, from the children's point of view. However, what is the content and meaning of such a perspective and is it possible to track how this perspective influences different socio-legal studies, parents and the courts? Furthermore, the concept of a child perspective is used with a strongly fluctuating meaning within child law discussions. Is it possible to identify certain key criterions for a child perspective within different contexts? Haugli and Bendiksen (from Norway) reflect on these questions in their article.

Walsh (Ireland), in his article, seeks to show how the presentation of children as victims in certain situations can create cultural support for the development of a children's rights consciousness, through sentiment and empathy. He provides an overview of the cultural shift in the perception of children from objects of discipline to rights-bearing subjects in the context of the child's right to be protected from abuse in Ireland.

The UN Convention on the Rights of the Child – implementation and interaction with other international instruments and national law

The United Nation's Convention on the Rights of the Child (UNCRC) was ratified by the Norwegian Government in 1991 and incorporated into Norwegian law in 2003. The Convention is partly self-executing and takes precedence over any conflicting national legislation. Internationally the status and position of the UNCRC varies even though almost every state in the world has ratified it.

Important questions regarding the UNCRC include how the Convention may work as a tool when new challenges arise – for example, on surrogacy and on protection of the rights of the child in a virtual world? How can the UNCRC be used to identify and resolve tensions between child and adult interests when family law disputes arise? What are the challenges of including a living instrument like the UNCRC in national law? Could comparative studies contribute to the work on

implementing the UNCRC?

Hoffman (from Wales) draws on his experience to discuss how the Welsh incorporated the UNCRC via devolved governance. Using devolved legislative competence, the National Assembly for Wales has enacted a 'duty of due regard' for the UNCRC and its Optional Protocols. The intention of the new law is to mainstream the requirements for the UNCRC in all decision-making at the level of devolved government in Wales. The article shows how the impact of the new law can be maximised by making politicians and the administration accountable. Researchers will play an important role in improving the legal position of the child by providing information and offering strategies to politicians on how best to respond. The Wales Observatory on Human Rights of Children and Young People is a new and important forum in this respect.

The main issue considered in the article by Lile (from Norway) is how well the criteria for the competence of membership on the UN Committee on the Rights of the Child is harmonized with the mandate of the Committee.

The EU Commission has identified core areas for securing and promoting children's rights based on the Agenda for the Rights of the Child and the European Charter para. 24. The role of the European Court of Justice in this respect is evaluated by Lamont (from England). When it comes to cross-border families and conflicting families across borders, the European Court of Justice tries to protect the human rights of children. However, the Court is heavily influenced by the EU-values rather than by the concept of protecting children. New development is, however, taking place to build competence about human rights for children.

Frostad (from Norway) raises important questions about the recruitment, use and punishment of child soldiers. Children may be singled out as one of the groups that is most vulnerable to superior force. Children have always been negatively influenced by armed conflicts, and probably at least 300,000 child soldiers participate in hostilities at any given time. Several international instruments, including the UNCRC, are aimed at protecting children at war, yet there are still many serious problems to be addressed.

International child abduction and relocation disputes

Children may be crossing borders for several reasons. Some of these international movements may lead children into particularly vulnerable situations. Relocation disputes are recognised as one of the most

difficult and controversial issues in family law internationally. Taylor (from New Zealand) presents international research, policy and practice on relocation. She includes children's perspectives on relocation in her research which offers new insights on this topic. The long-term effects of relocation disputes are also being investigated.

Relocation and child abduction are phenomena which can be closely connected. Freeman (from England) discusses several links between child abduction and relocation. It is known from abduction research that abduction can have serious and long-lasting effects on the children involved and Freeman stresses the importance of preventing relocation cases from becoming abduction cases.

UNCRC and Children at School

Hakalehto-Wainio (from Finland) focuses on the importance of taking school-children's rights seriously as school is an important part of children's lives for many years. The UN Committee on the Rights of the Child has emphasized that children do not lose their human rights when going through the school gates.

The right to education is one of the most essential rights for the upbringing and development of children, and it is often called an "empowerment right" because of its significance for realizing one's rights. It is affirmed in most major international human rights instruments and national constitutions.

The overall aim of Vainik's article (from Sweden), highlighting the use of school-related police reports involving minors in Sweden, is twofold. The first is to describe and analyse how the Swedish compulsory school system works with the police in dealing with problems of disorderly conduct and degrading treatment among minor school children. The second aim is to discuss whether school-related police reports (as a way to respond to order problems and degrading treatment) are in accordance with UNCRC Article 3

Children's welfare and best interests

The principle of children's welfare and best interests is central to the approach of many jurisdictions. It also links with Article 3 of the UNCRC and was used to help integrate discussion on some of the theoretical and research themes of the conference. For example, how do we know - can we ever know - what is in a child's welfare and best interests? Is

sufficient flexibility built into parental and legal decision-making to ensure that the developmental needs of their children are met over time?

It is commonly accepted that it is best for everyone if the parents can arrange their children's future care arrangements harmoniously upon divorce or separation, instead of engaging in acrimonious and drawn-out custody conflicts. Koulu (from Finland) examines that assumption and ideal of negotiation behind it in light of the changing conceptions of family.

How does the legal system recognise and consider culture as a legal argument in child welfare cases and criminal cases? When is culture considered relevant and when is it not - and for what reasons? These are the questions discussed by Stang (from Norway) - her article brings us back to the questions about normality and deviation from that norm.

Petersson Hjelm's topic (from Sweden) is compulsory care and the BBIC (Barns Behov i Centrum) model implemented in order to strengthen legal security for children in Sweden. She questions whether this model has worked well or if it is only a paper tiger. The BBIC model was inspired by the English model Integrated Children's System (ICS). Its purpose was to strengthen the child's perspective and to strengthen legal security for a child since an individual decision on compulsory care is the most intrusive measure of state intervention into the child's integrity.

Conclusion

To define child law research as a separate topic, as Nordic researchers have started to do, is a relatively new step in an international context. The conference participants paid considerable attention to the importance of making child law visible as a specific area of research, not just keeping it as a part of family law or welfare law. Questions about children's legal position are much more widespread and it is vital to have a more coherent and general approach, to build a theoretical framework and to closely scrutinize questions about power relations. Research, policy and practice are, and should be, closely linked in this field both generally and in individual cases. A key purpose of the Conference was to foster international and interdisciplinary cooperation as both are necessary if we are all to work together to solve the many questions raised within this commemorative issue.

Defining and Understanding “children” for Legal Research in Scandinavia

Some reflections on the principle of the best interests of the child – in the light of normality and exceptions

Johanna Schiratzki*

Introduction

In this article the focus is on understanding the best interests as an interpretative legal principle. The issue investigated is that of the understanding and importance of normality and exceptions in living conditions when assessing the best interests of a child in social exclusion or with a minority identity. Children in social exclusion are understood to be children temporarily or permanently excluded from rights, opportunities and resources that are normally available to children of that society, e.g. because of lack of resources and poverty.¹ Children with a minority identity are understood in line with Article 30 of the United Nations Convention on the Rights of the Child (UNCRC) to be from *ethnic, religious, or linguistic minorities or persons of indigenous origin*.² It is claimed that there are several similarities in the assessment of the best interests of the child for children of minorities and children in social exclusion. The discussion is based on perception of the principle of the best interests of the child being

- (i) one of the four fundamental articles of the United Nations Convention on the Rights of the Child;
- (ii) a rule of procedure stating that whenever a decision is to be taken that will affect a child or a group of children, the decision-making process must consider the possible impacts

on children of the decision;

- (iii) the foundation for substantive rights to guarantee that the principle will be applied whenever a decision is to be taken concerning a child or a group of children, or the right of the child to have his/her best interests assessed;
- (iv) a fundamental, interpretive legal principle developed to limit the unchecked power of adults over children.³

In this article the focus is on understanding the best interests of the child as an interpretative legal principle. The matter investigated is that of the understanding and importance of normality and exceptions, in living conditions, when assessing the best interests of the child. These are issues associated with equality law and welfare law. Common for these legal fields is the need for balancing different interests as well as promoting fundamental values.⁴

1. Child Law – A Change of Perspective

The principle of the best interests of the child – or with notions used synonymously, the welfare or paramountcy principle – is a comparatively new issue. Although occasional references to the welfare of children in legal material can be traced back to the 17th

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¹ Although the CRC Article 4 obliges member states to combat child poverty it seems idle to deny that child poverty exists. See for example Rättsrådet. Barnfattigdomen i Sverige. Årsrapport 2012. http://www.rb.se/SiteCollectionDocuments/Rapporter/Barns_ekonomiska_utsatthet_2012.pdf. Visited 2012-11-21.

² Schiratzki, Johanna. Children's rights in EU – a tool for autonomous citizenship or patriarchy reborn?, *Europarättslig tidskrift* 2011/1 pp 70-80.

³ Zermatten, Jean. "The Best Interests of the Child Principle: Literal Analysis and Function." *The International Journal of Children's Rights*. (17)18: 4 (2010): 483-499. See also General Comment No. 14 (2013) on the right of the child to have his or her best interest taken as a primary consideration (art. 3, para 1)

⁴ Blaker, Vibeke Strand "En diskrimineringsrettslig tilnærming versus en velferdsrettslig tilnærming for bedring av utsatte grupper og individers rettstilling. Retfærd 2012 nr 1/136 pp 55-80.

century, and more frequently to the late 19th and early 20th century, the emphasis on the principle of the best interests of the child as a tool in law and policy making is a recent phenomenon.⁵ The development towards an emphasis on the principle of the best interests of the child as a frequently used legal instrument is related to the emergence of “child law” as a sub-subject of law during the last decades of the 20th century. The arrival of child law as an independent legal subject obviously does not mean that the law had not dealt with children before the turn of the 20th century: it had, but then the child and its legal relations were rarely at the centre for decision making. Instead the legal position of the child tended to be seen as a by-product of adults’ relations, be it parents’ or others’. Contemporary child law has provoked a shift of perspective.⁶ Its perspective is now the child’s own legal relations with surrounding society and its members. The distinguishing feature, compared to “adult law” is the focus on the child as a person of a somehow less independence and in need of a higher degree of protection than adults, although a person in its own right. Eva-Maria Svensson discusses this elsewhere in this volume⁷. A manifestation of this change of perspective is the United Nations Convention on the Rights of the Child 1989, (UNCRC) and the legal activities it has generated. These activities include efforts to understand and implement the best interests of the child, Article 3 UNCRC.

As changes tend to do, the emergence of child law has proved a challenge to well-established legal concepts and mindscapes. An example is how to integrate into the law knowledge as well as legal scholarship from *non-legal disciplines* with a bearing on child well-being, such as economics, psychology and sociology. A third issue is how to adjust the core concept of the human rights doctrine, which has strongly influenced child law - each individual is *independent* - to the child’s flagrant *dependency*, at least during part of its childhood.

One tool for handling these issues is the principle of the best interests of the child. The principle of the best interests of the child has an impact on policymaking as well as in decisions and court proceedings involving children. The principle has generated a great deal of interest across several disciplines, i.e. social policy,

philosophy, anthropology, medicine, sociology and law. Within the legal field the principle is applied in all areas of child law, e.g. in relation to issues on parental responsibility including custody, contact and shared parenting, abduction, alienation, adoption, migration, child protection, juvenile justice, etc. The significance of the principle depends on the legal issue in question as well as the jurisdiction in which the principle is applied. Procedural safeguards to identify the best interests of the child in decision-making are often included in national child protection systems.

2. The best interests of the child and human rights

Although the principle of the best interests of the child has roots that precede the discourse of children’s human rights, the principle is an integrated part of children’s human rights, and one of the general principles of the UNCRC. The UNCRC has a close to universal recognition among the world’s states, the only exceptions being Somalia and the United States of America. The widespread acknowledgment of the UNCRC is an important recognition on a policy level of the importance of children. States parties to the UNCRC are also encouraged to ratify other international instruments with a bearing on children’s rights.

The challenge of how to define the best interests of the child in Article 3 UNCRC has been left unfinished by those drafting the convention. It has to some extent been clarified by the UNCRC Committee which has stated that the best interests may not be interpreted in a way that infringes the rights granted to the child by the UNCRC. Notwithstanding the lack of a closer interpretation of the best interests of the child, Article 3 UNCRC states that the best interests of the child shall be a primary consideration. State Parties undertake to ensure for the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of the child as well as the child’s parents. These rights include traditional human rights, such as freedom of religion and protection against cruel and inhuman treatment, as well as more innovative and child-oriented concepts, such as the

⁵ Margolin, Cynthia Rae. “Salvation versus Liberation: The Movement for Children’s Rights in a Historical Context.” *Social Problems*, 25 (1978). See further Boyden, Jo. “Childhood and the Policymakers: A Comparative Perspective on the Globalization of Childhood.” In *Constructing and Reconstructing Childhood*. Edited by Allison James and Alan Prout, 184-229. A. eds. *A History of Child Welfare*. New Brunswick, N.J.: Transaction Publishers, 1996. Ennew, Judith. “A History of Children’s Rights: Whose Story?”, in *Rethinking Childhood. Perspectives on Children’s Rights*. 1999 *Cultural Survival Quarterly*, 24. Ekeelaar, John. “The emergence of children’s rights”. (1986) 6(2) *Oxford Journal of Legal Studies* pp 161-182.

⁶ Krause, Harry.D. (1992), *Child Law*, New York, University Press.

⁷ See Svensson, Eva-Maria, “Children in Legal Research”, (2013) 1 IFLPP 1, pp. 14-19.

principle of the best interests of the child (Article 3) and the right of the child to express her/his views freely (Article 12).

The UNCRC, including Article 3 on the best interests of the child is, or should be, a persuasive authority when interpreting other human rights instruments, i.e. regional instruments such as the European Convention on Human Rights as well as sources of law of the European Union⁸. The UNCRC is, in accordance with the Vienna Convention on the Law of Treaties, a source of law in the Member States. This implies that the Member States are bound to respect the UNCRC when applying its national law. This does not imply, however, that there is a common global stance on the interpretation of the best interests. Important tools, however, are the General Comments that have been issued by the United Nations Committee on the rights of the child.⁹ The next General Comment by the United Nations Committee will be on Article 3, the best interests of the child. Regardless of this important work by the United Nations' Committee for the rights of the child the interpretation of the best interests of the child depends on the policy and practices of the various member states. The national strategies are shaped against the background of national legal and social traditions as well as available financial resources.¹⁰

Numbers of States are, by way of implementing the UNCRC, introducing various forms of child-oriented legislation, often centered round the concept of the best interests of the child. An example is Swedish legislation, in which enactments on the paramountcy of the best interests of the child and the child's right to be heard have been successively introduced in almost all relevant enactments during the last decade. However, the implementation of the best interests of the child is not

uniquely tied to, or dependent of the UNCRC, as shown by actions towards "child-awareness" in the United States, the only one of the United Nations member states which has not ratified the UNCRC.

In a human rights perspective the principle of the best interests of the child could also be seen in the light of the debate on universalism and relativism. Simplified, the discourse of universalism and relativism is about whether or not human rights should have one interpretation - applicable to everyone in any society - or if human rights could involve competing content in some cases and should thus be interpreted in accordance with local cultures. In their more rigid forms, universalism holds that those cultures perceived as more "primitive" should adapt to the same system of norms as Western cultures, whereas cultural relativists hold that a traditional culture is unchangeable. In a national context this debate is echoed in issues on acceptance of traditions and norms of indigenous groups, minorities and subcultures in relation to the best interests of the child. Some answers to these challenges are found in Article 2 UNCRC on the right of the child not to be discriminated against and Article 30 UNCRC which states that children belonging to a minority or one who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion or to use his or her own language.¹¹ The Committee on the Rights of the Child has stressed that positive actions might be necessary to ensure the rights of minorities.

In relation to the best interests of the child the Committee on the Rights of the Child states that:¹²

The Committee considers there may be a distinction between the best interests of the individual child, and the best interests of

⁸ Kilkelly, Ursula. *The Child and the European Convention on Human Rights*, Ashgate (1999), pp 15-16. See also European Court of Human Rights, the case of *P. and S. v. Poland*. Application no. 57375/08, 30 Oct 2012. See the European program. Building a Europe for and with children. <http://www.coe.int/t/dg3/children>. Visited 21 Nov 2012.

⁹ So far 17 General Comments have been issued: The aims of education 2001; The role of independent human rights institutions; 2002, HIV/AIDS and the rights of the child 2003; Adolescent health 2003, General measures of implementation for the Convention on the Rights of the Child 2003; Treatment of unaccompanied and separated children outside their country of origin 2005; Implementing child rights in early childhood 2005; The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment 2006; The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment 2006; Children's rights in Juvenile Justice 2007; Indigenous children and their rights under the Convention 2009; The right of the child to be heard 2009; The right of the child to freedom from all forms of violence 2011; The right of the child to have his or her best interests taken as a primary consideration 2013; The right of the child to the enjoyment of the highest attainable standard of health (Article. 24); On State obligations regarding the impact of the business sector on children's rights 2013; The right of the child to rest, leisure, play, recreational activities, cultural life and the arts 2013.

¹⁰ Van Bueren, Geraldine (1998). *International Law on the Rights of the Child*. Amsterdam: Kluwer. Dixon, Rosalind, Nussbaum, Martha C, "Children's rights and a capabilities approach: the question of special priority". (2012) 97 *Cornell Law Review*, pp 549-591.

¹¹ See for an in depth analysis Sandberg, Kirsten "Barns diskrimineringsvern, særligt om utdannelse" (in Hellum A., Ketscher K. (red.) *Diskriminerings- og likestillingsrett*), Universitetsforlaget 2008 pp 92-109. In addition to the Convention on the Rights of the Child, various human rights treaties, have played an important role in addressing the situation of indigenous children and their right not to be discriminated against, namely; the International Convention on the Elimination of all forms of Racial Discrimination, 1965, the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966.

¹² The Committee on the Rights of the Child General Comments on Indigenous children and their rights under the Convention. No 11 2009. CRC/C/GC/11, # 32.

children as a group. In decisions regarding one individual child, typically a court decision or an administrative decision, it is the best interests of the specific child that is the primary concern. However, considering the collective cultural rights of the child is part of determining the child's best interests.

According to the Committee on the Rights of the Child there is thus room for considering collective cultural rights of a child related to a minority. An important line, however, is drawn in relation to harmful practices against children which could never be justified by their being traditional.¹³

3. Best Interests of the Child – Normality and Exceptions

The lack of a closer interpretation of Article 3 explains why the best interests of the child have been characterized as an “open concept”¹⁴. By way of narrowing the scope for interpretations it has been suggested that the best interests of the child should be interpreted in the light of objective as well as subjective aspects of the child's life.¹⁵ The principle of the best interests of the child further falls within the category of what has been labelled “emotive arguments of law”, i.e. arguments that are not descriptively, specified but depends on the interpretation for a concrete content.¹⁶ The best interests of the child can thus be given a diverse content, a content that is often culturally and socially determined.¹⁷ This indicates that the principle is often interpreted on the basis of what empirically is the most common form of life for children in general.¹⁸ The principle of the best interests can thus be interpreted as the normal becoming the norm. Put another way, the child's best interests are understood as the legal system integration of social consensus. In a Nordic context the importance of normality has been underlined by the former Norwegian Child Ombudsman¹⁹:

Although no child is “average” in the sense of being exactly like any other child, most children in the world are alike in the standard kinds of care they need. Only on the basis of what children are normally like is it possible to consider the position of abnormal children or children in abnormal conditions.

This way of understanding the best interests of the child has been challenged as stereotyping children that do not meet the criteria of what has been labelled as “vision of normality that might not even exist”²⁰. All the same, the impact of normality on the assessment of the best interests of the child is visible. An example is a tendency to interpret the best interests of the child as well as childhood in the light of what is considered to be “normal”. An example is the construction of childhood and children by age, maturity and experience. Normality has also been expressed in terms of children's needs. These needs consist primarily of the “innocent child's” need of protection and the need for representatives to protect their interests.²¹ It has further been suggested that the image of children having experienced serious criminal actions; be it either as a perpetrator or a victim, is incompatible with society's general image of childhood as a time of innocence and un-experience.²² Criticism has been leveled against the tendency among lawyers and others speak too generally on children and children's needs without specifying which age group referred.²³

In Swedish policy and law making the idea that the best interests of a child should be understood as developing under circumstances resembling typical conditions in society is stressed in some legal fields. An example is adoption. An argument against adoption by same sex couples was that the trauma of adoption should be worse if the child was brought up in a family considered “abnormal”²⁴. Normality is an argument against accepting older persons as adoptive parents. In cases on parental responsibility the fact that children were not living under “normal” conditions has been

¹³ General Comment No. 13 (2011). The right of the child to freedom from all forms of violence. CC/C/GC13.

¹⁴ Schiratzki, Johanna., *Barnets bästa i ett mångkulturellt Sverige*, Iustus förlag, 2005.

¹⁵ Eekelaar, John, The Importance of Thinking that Children have Rights (in Alston P., Parker S., Seymour J. (eds.), *Children, Rights and the Law*) Clarendon Paperbacks, Oxford, 1992. It has been suggested that this comprises the core aspects of evidence-based social work. Tärnfalk, Michael, “Sociala insatser i skuggan av samhällsskyddet – ideologiska, juridiska och vetenskapliga brytpunkter när barn har begått allvarliga brott” (in *Rätt, social utsatthet och samhälleligt ansvar. Festskrift till Anna Hollander*), Norstedts juridik 2012 pp. 219-239.

¹⁶ Zahle, Henrik, *Bevisret oversigt. Jurist- og Økonomiforbundets forlag*, (1994) p. 27.

¹⁷ See An-Na'im, Abdullahi Ahmed. “Cultural Transformation and Normative Consensus on the Best Interests of the Child.” *International Journal of Law and the Family*, 8 (1994): 62-81.

¹⁸ Eriksson, Maria. *I skuggan av Pappa. Familjerätten och hantering av fäders våld*, Förlags AB Gondolin, (2003)..

¹⁹ Flekkoy, Grude. Psychology and the Rights of the Child, (in *Children as equals: Exploring the rights of the child* 74, Kathleen Alaimo & Brian Klug eds., University Press of America 2001).

²⁰ Egelund, Tine, *Beskyttelse af barndommen: Socialforvaltningers Risikovurdering og indgreb*

²¹ Coyne, Imelda, “Research with Children and Young People: The issue of Parental (Proxy) Consent”, (2010) 24 *Children & Society*, pp 227-237.

²² See in regard to delinquent children ECHR T, V v.UK 1999 and on child victims ICTY – Kunarac, Kovac and Vukovic 2000

²³ Se Smith, Lucy, Lødrup, Peter. (2004). *Barn og foreldre*, Gyldendal.

²⁴ Regeringsrättens årsbok, RÅ 1993 ref. 102.

quoted as an argument for transferring physical parental responsibility to a parent the children had not seen for four years.²⁵

A legal area in which it has been explicitly cautioned against making decisions based on a child's perceived irregular living conditions is, however, compulsory care.²⁶ It is worth noticing that legislation has been enacted to reduce social exclusion. One example is amendments in the Act of Social Services stating that minor incomes of children from holiday jobs etc. should not reduce a family's financial aid. Another example is right to education for "hidden" asylum-seeking children. These amendments seem to be informed less by lawsuits than by public opinion in the civil society and by assessments of children's rights – regardless of normality.

4. The best interests of the child – a legal tool for which children?

The principle of the best interest of the child is a legal tool that as a consequence of the UNCRC has a world wide application and is applicable in a variety of measures. Simplified, these measures can be divided into law and policymaking and legal decisions in individual cases. General laws and policy in relation to the best interests is a legal instrument by which all children are affected. For a child to be affected by an individual legal decision on the best interest of the child, that child must be participant in a legal process.

5. Normality, exceptions and minority

So what then is normality in Sweden? From a national statistical perspective it is to live in a nuclear family with a level of income above the poverty threshold. Normality further implies two parents born in the country of Lutheran faith. It is anomalous for a child to be part of lawsuits.

However, quite a few children live under conditions that could be defined as exceptions from what is statistically normal. In relation to family patterns, 28 percent of Swedish children do not live in a nuclear family.²⁷ Another example concerns country of origin. Although the majority of people in Sweden were born in the country as many as 18 percent of children in Sweden were either born outside of the country or have two parents born outside of the country.²⁸

Sweden has relatively strong income growth. The proportion of the population at risk of poverty, e.g. individuals with a disposable income per consumption unit below 60 percent of the country's median income, however, has increased more rapidly in Sweden than in most other countries.²⁹ According to the Swedish Save the Children, 13 percent of all Swedish children live in relative poverty 2009 i.e. in households with less than 60 per cent of a median income. Among children living with a sole parent the poverty rate reached 28.2 percent and among children born outside the country or with parents born outside the country 31.9 percent lived in poverty.³⁰

Notwithstanding the secular basis of the public debate, the five Nordic states share a long history of religious homogeneity. Religious homogeneity was historically upheld by limiting settlement by followers of other religions. An estimated 75 percent of the Swedish population of 9.1 million are members of the Lutheran Church of Sweden. Approximately 5 percent are Muslims although the officially sanctioned Muslim Council of Sweden, for Swedish government funding purposes, only reports 110,000 active participants. The number of Jews is estimated at 18,500 to 20,000, half of whom are members of Jewish communities. The number of active participants in Buddhism is less than 6,000.³¹ All in all, Buddhist Jews and Muslims together amount to less than three percent of the Nordic

²⁵ Stockholms Tingsrätt mål nr T 19036-10

²⁶ Proposition 1989/90:28 Vård i vissa fall av barn och ungdomar.

²⁷ Barn- och familjestatistik. www.scb.se. Visited 19 Nov 2012.

²⁸ www.scb.se/Pages/TableAndChart____255864.aspx. Barn- och familjestatistik. Visited 19 Nov 2012.

²⁹ www.scb.se/Pages/PressRelease____343758.aspx. Pressmeddelande från SCB. Visited 19 Nov 2012.

³⁰ Rädda barnen. Barnfattigdomen i Sverige. Årsrapport 2012.

http://www.rb.se/SiteCollectionDocuments/Rapporter/Barns_ekonomiska_utsatthet_2012.pdf. Visited 19 Nov 2012.

www.ssta.se. Visited 19 Nov 2012.

³¹ With the conclusion of the Danish Reformation in 1536, Jews were in principle prohibited entry until the end of the 17th century. A hundred years later they were allowed to settle in certain towns in the then jointly governed Sweden and Finland. Norway banned Jewish immigration until the 19th century. Muslim migration to the Nordic states is basically a late 20th century phenomenon. Currently, 82 percent of the Danish population of 5.4 million belongs to the official Evangelical Lutheran Church. The second largest religious community is the Muslim community (210,000). The Jewish Community amounts to 7,000. An estimated 83 percent of the Finnish population belongs to the Evangelical Lutheran Church. There are approximately 1,500 members of the Jewish communities and 30,000 Muslims in Finland, most of who arrived in the last decade. Approximately 82 percent of the Norwegian population of 4.75 million belongs to the Evangelical Lutheran Church, Muslims number 80,000, and Jews 1,500. U.S. State Department, Report on International Religions Freedom (2008). www.state.gov/g/drl/rls/irf/2008/108474.htm. See Swedish Commission for Government Support to Religious Communities.

population, most of which are first or second generation immigrants.³² Taking these numbers, it seems clear that Christianity presents a form of Swedish normality.³³

Individual assessments of an individual child's best interests presume that the child is part to or subject of a lawsuit. This in itself is atypical and might be prone by social exclusion. This seems particularly likely in relation to cases on compulsory care. The Swedish child population consists of slightly less than 2 million children less than 18 years. In the year 2011, 4,586 cases on parental responsibility were decided, 1,045 paternity cases and 3,590 cases on compulsory care cases were heard.³⁴ Out of 1,000 children between 15-17 years, 31 have been prosecuted for crimes.³⁵ In the same age group 14,300 children were suspected of crimes.³⁶ Fewer than 7 out of 1,000 children are placed for out-of-home-care.³⁷

6. Conclusion

The issue investigated is that of the understanding and importance of *normality* and *exceptions* in living conditions when assessing the best interests of a child

in or at risk for *social exclusion*. The correlation between this concern and the human rights' discourse on universalism and relativism is particularly challenging in regard to the principle of the best interests of the child given that the best interests of the child is intended to be an open assessment.

A finding of this article implies that one way of understanding the best interests of the child suggested in literature and legal history is that normality should be looked for. The assessment of normality does not, for better or worse, always appear to be evidence-based. This should be seen in light of the fact that when looking into areas such as family relations, level of income, country origins and religion significant number of children do experience living conditions that might be regarded as exceptions. For a legal decision to be made in relation to a child that child must be party to a legal process. There is an ambiguity to the use of lawsuits in child law. On the one hand, litigation is the procedure predicted for solving legal issues and combat social exclusion affecting the best interests of the child. On the other hand, it is a hallmark of contemporary child law that children as far as possible should not be involved in lawsuits.

³³ See, however, Köhler-Olsen, Julia (2011) *Barnets rett til selvbestemmelse i forhold til religiøse normer*, Oslo University.

³⁴ www.domstol.se/Publikationer/Statistik/domstolsstatistik_2011.pdf . Visited 19 Nov 2012.

³⁵ www.barnombudsmannen.se/max18/statistik-per-omrade/stod--skydd/indikator/indikator/6_5_andel-barn-lagforda-for-brott/ . Visited 19 Nov 2012.

³⁶ BRÅ. <http://www.bra.se/bra/publikationer/arkiv/publikationer/2012-09-28-kriminalstatistik-2011.html>. Visited 19 Nov 2012.

³⁷ http://www.barnombudsmannen.se/max18/statistik-per-omrade/stod--skydd/indikator/indikator/6_6_andel-barn-i-institutionsvard. Visited 19 Nov 2012.

Children in Legal Research

Eva-Maria Svensson*

1. Introduction

In this article I will reflect on three contemporary discourses prevalent in the Nordic context with importance for the question of defining and understanding children in legal research. The first is the discourse on children's rights based on *children as competent agents* and the second is the discourse on *individual freedom of choice*. The third discourse is about the role of the state and its relation to individuals in society. The three discourses are strengthened and consolidated over time in the Nordic context and have had impacts on contemporary family policy. My explicit example will be the Swedish context.

My argument is that the three discourses taken together go hand in hand with and, what is more, facilitates a process *which increases the differences in economic situation and well-being between children*. Save the Children and other organisations have highlighted and criticised the negative development in Sweden. With help from a theoretical framework borrowed from feminist legal studies and relational theory I will highlight the problems explicitly notable in the Swedish economic family policy. Moreover, I will try to point out an alternative way to avoid the negative consequences with focusing *individuality* in a *neo-liberal frame*. With the help of feminist legal theory and relational theory I reflect on replacing the norm of the autonomous capable legal subject to a norm of a *relational legal subject*.¹

2. The theoretical and methodological framework

The analytical tool is a theoretical and methodological framework in which three levels are seen as related to each other, the individual, the structural or societal and the epistemological / ontological. The understanding of the human being as primarily an autonomous individual on the epistemological and ontological level is consolidated in

law and in legal scholarship on the structural or societal level, and has effects for the self-understanding of the individual and his or her understanding of others on the individual level. Joan Wallach Scott introduced this methodological framework in 1986² for tracing, describing and understanding gender formations and the processes which constitute and maintain them. The organizing principle of the formations of gender is based on sex differences and it is used to mark relations of power. Yvonne Hirdman has developed the framework in a Swedish context. She has identified two organizing principles for the gender system, the segregation between the sexes and the male norm.³ The methodological framework can be transferred to the relation between adults and children, with adults as superior and children as the subordinated. Children are in a greater extent subordinated adults than women are to men, but the principles are similar. Children are segregated from adults in legislation, even formally, and the norm for regulation is the adult. The theoretical and methodological framework with the three levels and the organizing principles are useful also when thinking of how "children" is defined and understood in law and legal scholarship.

The theoretical perspective which I use, borrowed from feminist legal studies⁴, has some basic presumptions.

1. Knowledge is perceived as something social and contextual, which means that the abstract rationalism and objectivism in the mainstream Nordic perspective in legal scholarship, legal dogmatics, is questioned.
2. Law is seen in and out of its context. For instance (state) *policies* are considered as much important to study for a legal scholar, as the law is.
3. The legal subject is perceived as concrete and not abstract and has characteristics like sex,

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¹ Svensson, Eva-Maria (1997). *Genus och rätt. En problematisering av föreställningen om rätten*. Uppsala: Iustus förlag, p. 106. Nedelsky, Jennifer (2011). *Law's relations: A Relational Theory of Self, Autonomy, and Law*. Oxford University Press, p. 86.

² Scott, Joan Wallach (1986). Gender: A Useful Category of Historical Analysis. In: *The American Historical Review*, Vol. 91, No. 5 (Dec., 1986), pp. 1053-1075.

³ For a presentation in English, see Hirdman, Yvonne (2002). State Policy and Gender Contracts. The Swedish Experience. In: *Women, Work and the Family in Europe*. Drew, Emerck & Mahon (eds.). Routledge.

⁴ Gunnarsson, Åsa & Svensson, Eva-Maria (2009). *Genusrättsvetenskap*. Lund: Studentlitteratur.

gender, ethnicity, age and so on. The subject as an abstract and autonomous individual is criticised because the notion hides that it is actually permeated by some norm, the male norm or, as what is in focus here, the adult norm. The alternative is to think of the legal subject as something having different characteristics.

4. A concept which captures law's partiality and reproduction of power patterns is the 'male norm'. When we want to highlight the child perspective we can instead talk about the 'norm of the autonomous and competent subject'.

With help of this theoretical framework, I will reflect on the broader context of family policy. Family policy has, at least in the Swedish context, undergone ideological changes during recent years, ideological changes that are in accordance with a shift in legislation towards more emphasis on individual rights, on freedom of choice and on equality in possibilities rather than equality in results.⁵

3. What is a child – needing or competent?

Every known society has perceptions of children and what it means to be a child. Also, every grown up person has his or her own experiences of being a child. However, the perceptions and the experiences vary. "Childhood" is a social institution and this institution is not universal, in contrast to the factual period of biological immaturity.⁶

Through legal instruments such as the UN Convention on the Rights of the Child (UNCRC) and other international and national legislation, a boundary is construed between childhood and adulthood. The definition of a child is a person under the age of 18 years. This distinction has become almost universal, but what it means to be a person under 18 years old varies depending on where in the world and where in the social, cultural and religious context a person actually lives.

The distinction between the adult and the child is made out of a norm, the norm of the autonomous and competent subject, possible only for the adult to fit in to. The adult person is a person with full capacity and a bearer of rights, protected in legislation. The child is not fully a person of that kind; it is understood as a restricted subject, as someone lacking something.⁷

This means two things. First, the child cannot fully claim his or her rights because the western world's notion of what rights are and who can be the competent subject of a right is based on the *theory of the free will*. The child cannot fully exercise its rights, IF ownership of rights presupposes a competent subject with a free will. With the *theory of interests* the problem can be solved, however as an exception, children's rights have to be provided by someone else.

Secondly, the child *needs* protection because it cannot protect itself, at least not fully. The legal responsibility is shared between the parents and the society, with a subsidiary role for the society.

This perspective is called the *need-oriented* perspective and it is more present in law and in Nordic legal scholarship on children, than the contradictory competence-oriented perspective, according to Anna Hollander and to Anna Singer.⁸

Both perspectives are prevalent in the UNCRC, and the balance between children's needs and their capability are to be considered and captured in the concept of the best interest of the child. The child is understood as a lacking subject which increasingly conquers capacity and finally ends up as an autonomous subject, with an individual free will.

My impression is, that the competence-oriented perspective seems to be more prevalent in public rhetoric and in other scholarship than legal, but that it is gaining space also in legal scholarship. The child's ability to have a free will, or free opinion, is more focused today than earlier. The need-oriented perspective, framed as a 'paternalistic view on children', is understood as contradictory towards a view on children as competent (*the competent child*) and as agents with power.⁹ The need for the theory on rights based

⁵ See e.g. Trägårdh, Lars (ed.) (2007). *State and Civil Society in Northern Europe. The Swedish Model Reconsidered*. Berghahn Books.

⁶ Schiratzki, Johanna (2005). *Barnets bästa i ett mångkulturellt Sverige: en rättsvetenskaplig undersökning*. Uppsala: Iustus förlag, p. 35; Norman, Karin (1996). *Kulturella föreställningar om barn, Ett socialantropologiskt perspektiv*. Rädda Barnen, p. 24.

⁷ See Eva Nilsson (2007). *Barn i rättens gränsland*. Uppsala: Iustus förlag, p. 22 with references to Bridgeman and Monk, 2000, 5.

⁸ See Eva Nilsson (2007). *Barn i rättens gränsland*. Uppsala: Iustus förlag, p 22 with references to Hollander 1998, 194 and *Barn i kläm – hur uppmärksammas barn i mål om verkställighet av umgänge*, Stiftelsen Allmänna Barnhuset, skriftserier 2007:1 with references to Singer 2001 (2000?).

⁹ Olsen, Lena (ed.) (2004). *Barns makt. Barn som aktörer*. Uppsala: Iustus förlag.

on interest instead of *free will* ¹⁰, as a means for recognizing children's (full) capacity as legal subjects, is perhaps not as important as earlier.¹¹

Promotion of children's rights is a hallmark in contemporary modern democratic states. Children's rights are increasingly focused in the Nordic context as well as in a European and international context. Ratified in 1989 in Sweden it took some years before the Convention became well known. Even if the principle of the best interest of the child has been a recognized principle since the beginning of the 20th century, the UNCRC became used as a legal source for arguments quite late. UNCRC has perhaps been more of a pedagogical and political than legal tool. The principle the best interest of the child has gradually been consolidated in different acts. The same situation is visible also in Norway, the references to UNCRC in a legal context have increased gradually since 1995.¹²

The UNCRC is ratified by most states in the world. The obligations for States Parties are far-reaching; the rights set forth in the convention shall be respected and ensured to each child without discrimination of any kind. States Parties shall also take all appropriate measures to ensure that the child is protected against all forms of discrimination. The best interests of the child shall be a primary consideration in all actions concerning children undertaken by public or private institutions, and each child shall be ensured such protection as is necessary for his or her well-being.

The Council of Europe has recently adopted a Strategy for the Rights of the Child 2012-2015. The objective for the programme is to promote children's rights and to protect children from violence.¹³

4. Law in context

Of course the promotion of children's rights must be understood as something positive for children. However it must at the same time be reflected in a broader context. It is not self-evident that the

promotion of children's rights in any form or framing in practice will promote the situation of children. The goal should not be mixed up with the means. The promotion of children's rights in the contemporary Nordic context, most obvious in Sweden, is framed within an ideological context in which rights are understood as individual rights, freedom of choice overshadows different social and economic living conditions and the role of the state has changed from one of an ally to one of an antagonist.

The discourse on rights can in this broader context be problematic because the ideology presupposes strong individuals able to act for themselves. Children are not always able to do so, but often in the hands of the parents. The discourse on rights is anchored in a liberal tradition which emphasises the autonomous individual and the principle of state non-interference. Individuals are seen as subjects who should be protected against state intervention. The liberal tradition focuses on the individual level and perceives inequalities as results of people's choices. The tradition is contradictory to the tradition of the Nordic welfare state model which during many years has focused on structural inequalities, sometimes called communal.¹⁴

In the international context of human rights a notion of individual autonomy and freedom of choice has been constructed as a way to obtain equal opportunities. Even though the Nordic welfare state also recognises individual autonomy as important for achieving equal opportunities, the Nordic tradition of egalitarian social citizenship has focused more on social institutions and structures than on individual rights. The Nordic welfare state model has for a long time demanded equality of *outcome* or *real* opportunities rather than equality of formal opportunities.

However, it is also true that the Convention on Rights for Children promotes some substantive equality, (as CEDAW does for women) which opens the way for proactive positive measures, sanctions and for monitoring.¹⁵

¹⁰ See e.g. Eva Nilsson (2007). *Barn i rättens gränsland*. Uppsala: Iustus förlag.

¹¹ See for a discussion e.g. Sandberg, Kirsten (2008). Barns rett til omsorg. In: *Socialretlige udviklinger og udfordringer*. Jørgensen, Stine & Kristiansen, Jens (eds.). København.

¹² The information about the increasing references to UNCRC comes from the presentations of Johanna Schiratzki and Karl Harald Søvig at the conference in Tromsø 21-25 of January 2013.¹³

¹³ <http://www.coe.int/t/dg3/children/>

¹⁴ Pylkkänen, Anu (2009). *Trapped in Equality. Women as Legal Persons in the Modernisation of Finnish Law*. Suomalaisen Kirjallisuuden Seura/Finnish Literature Society. Helsinki. See also Svensson, Eva-Maria (2006). *Contemporary challenges in Nordic gender equality policy and law*, Equality and Diversity in Europe, International Interdisciplinary Conference, Helsinki 12 – 13 January 2006, <http://www.helsinki.fi/oik/tdk/rpol/naisoikeus/tulevat%20tapahtumat/Programme.htm>

¹⁵ Pylkkänen, Anu (2009). *Trapped in Equality. Women as Legal Persons in the Modernisation of Finnish Law*. Suomalaisen Kirjallisuuden Seura/Finnish Literature Society. Helsinki, pp. 201-212.

Even if the tensions between the two ideologies, the liberal and the communal, are more obvious in the international and the EU law framework, designed for welfare economies influenced by neo-liberalism, changes on the Nordic arena are prevalent. The understanding of the state is also changing, from a notion of a *friendly* state to an *intervening* state. The close connection between the civil society and the state is in increasing degree replaced with a boundary between them.

And how is the situation for children in the Nordic countries today? Has the increased focus on the best interest of the child made the situation better?

Every five years Sweden has to report to the UN Monitoring Body The Committee on the Convention on the Rights of the Child. The fifth report was sent in August 2012. The Committee has not responded to that report yet.¹⁶ However, in the comment to the fourth report (CRC/C/SWE/4) in June 2009 about the standard of living, the Committee “expresses its concern at the large disparities in the level of child poverty within and between municipalities, and urban boroughs. It also notes with concern the very high proportion of immigrant children living in households with a persistently low income and the continuing deterioration in the economic situation of children from non-Swedish backgrounds and children living in single-parent households” (CRC/C/SWE/CO/4, section 52).

According to the Child Development Index launched in 2008 by Save the Children¹⁷ and the UNDP’s Human Development Index, Sweden, together with the other Nordic countries, occupy the position ‘very high’ in the index ranking. However, the organization Save the Children has criticised Sweden for its family policy during the last twelve years, and especially the economic family policy. The relative poverty (i.e. 60 % of median income in the country) has increased from the years 2003/2004 to 2009, from 10 to just over 15 percentages. The economic family policy has diminished its equalizing and its poverty reduction effect, according to Save the Children. The differences between the poorest and the richest children have increased, so have also the differences between children living in municipalities and districts respectively. What is more, the discrimination has increased especially for

three groups of children, children with foreign background, children in the suburbs of the big cities, and children with single parents. The latter is somewhat similar to views the Committee of CRC has expressed.

I think, one explanation is the ideological shift in family policy which tends towards increasing inequality among children in Sweden today. I will now turn to the family policy.

5. Family policy

In 2008, the main objective for the economic family policy in Sweden was replaced with a new one.¹⁸ The former objective focused on reduction of differences in economic standard between households with and without children. And moreover, for a long period the general policy was to reduce inequality in society.

The new objective became “The economic family policy shall contribute to improved prerequisites for a good economic living standard for all families with children”. Instead of comparing and focussing on the relation between the two groups - households with children and households without children - as before, the focus from 2008 is the substantial economic situation for families with children. According to the policy, the most important income source is paid work, and unemployment is seen as the main reason for low income. Hence, differences in income between different groups seem not to be considered a problem.

What is more, a modern family policy, it is stated, must take as a starting-point that families are different, have different wishes and needs and have the same value. Therefore, it is said, it is important to have freedom of choice and flexibility. The family policy must be respectful in relation to each family’s choices and be *supportive*, not *governing*. This rejection or lack of governing ambitions must be seen in the perspective of the last statement, which is that the *result* of the policy is not important to manage even if it brings with it differences between different groups.

The objective for the economic family policy is based on a view that focuses on “the preconditions rather than the outcome, which means *an acceptance of different outcomes for different families. Different outcomes can be the result of different preconditions, but it can also be the result of varying priorities and choices made by the families with economic*

¹⁶ The Committee will consider the report in their 68th session in the beginning of 2015. <http://www2.ohchr.org/english/bodies/crc/crcs68.htm>

¹⁷ http://www.savethechildren.org.uk/sites/default/files/docs/Child_Development_Index_2012_UK_low_res.pdf

¹⁸ Budgetpropositionen (Budget bill) Prop. 2011/12:1.

consequences” (p. 12, my translation). The former ambition, a hallmark for the Nordic welfare state, i.e. to strive for economic equality through a distribution policy, seems to be abolished.

This shift can be described as a paradigmatic shift in (Swedish) welfare state policy. The quotation shows that one of the main aspects of the welfare state in its Nordic shape, (namely *equality in result*, through redistribution, the tax system and a general public welfare sector) is thrown out and replaced by an ideology of equality in prerequisites (a formal equality), of freedom of choice and an acceptance of differences. But what is more, one other aspect of the Swedish (welfare) state, the ambition to ‘put-life-in-order’¹⁹ through politics and legislation, is abandoned. Politics should not, according to this policy, interfere with people’s choices.

This is perhaps acceptable when it comes to individuals with full capacity to choose, but what about the consequences for children? What if parents ‘choose’ to be unemployed, to be low-paid, to be uneducated, to be uninterested in the school for their children and so on?²⁰ Different priorities and choices among parents with economic consequences must be accepted, according to the economic family policy. But could not this policy lead to discriminatory consequences for children, children who are not in the position to choose, but must accept the choices and priorities of their parents?

6. The ideological base

The ideological base for this Swedish contemporary economic family policy is in accordance with libertarian, neo-liberal or ultra-liberal philosophy. The quotation is almost exactly the same as a statement the American Republican Paul Ryan made when he presented the republican budget resolution *The Path to Prosperity: A Blueprint for American Renewal*.²¹ Ryan is in his turn influenced by the American philosopher Ayn Rand.²² Rand had an extreme preference for *laissez-faire* politics and a minimal state. Rights for Rand are basically rights

to action, not to things or outcomes, and can be violated only through the initiation of force or fraud. All natural rights are negative, that is, claim on others’ non-interference, and not claim on them to provide one with certain goods or outcomes.²³ This view on rights corresponds to the view expressed by Nozick and other libertarian philosophers. Rand is a popular inspiration for neoliberal politicians in Sweden today and the publishing house Timbro, a think-tank and an opinion-former in Sweden publish her. Timbro has a special webpage on Ayn Rand.

This shift in ideology for family policy, seen in combination with changes in society such as the ones I mentioned above, puts the focus on children as competent and individual agents in a paradoxical situation. How does this shift in direction relate to the increasing focus on children’s rights? How can it be explained? And how can the acceptance of the shift be understood as it so obvious opens for discriminatory practices and processes of not well being for children, well-being based on economic exposedness and increasing relative poverty.

Save the Children highlights the correlation between economic exposure and ill being in a report in 2004.²⁴ It is also shown that children in households exposed to economic vulnerability are also to a greater extent exposed to violence in the home, to harassment in school, and have a lower degree of access to sports and other activities outside school.²⁵

7. Freedom of choice

The increasing focus on the promotion of children’s rights and children as individual agents goes well together with a general paradigmatic shift in policy and legislation from a structural way of dealing with problems to an individual way. Structural problems are transformed into *people’s choices, preferences and individual actions*. The presumption of the child as a competent and active autonomous individual, in a context of a general ideological change towards individualisation and acceptance of differences and the tribute to freedom of

¹⁹ Hirdman, Yvonne (1989). *Att lägga livet till rätta; studier i svensk folkhemspolitik*. Stockholm: Carlsson.

²⁰ Cf. Schiratzki, Johanna (2012). *Barnets bästa, utsatthet och ekonomi*. In: Alexius, Katarina & Ryberg-Welander, Lotti (eds.). *Festskrift till Anna Hollander*. Stockholm: Norstedts Juridik.

²¹ <http://budget.house.gov/fy2013prosperity/>

²² Gary Weiss, “Is Paul Ryan for or against Ayn Rand?” CNN August 14, 2012

²³ Rand, Ayn (1964/1967). *Man’s rights*, in *The Virtue of Selfishness*. New York: New American Library; and in *Capitalism: The Unknown Ideal*. New York: New American Library.

²⁴ Rädde Barnen (2004). *Barns hälsa i Sverige*.

²⁵ Svensson, Birgitta, Långberg, Bodil & Janson, Staffan (2007). *Väld mot barn 2006-2007. En nationell kartläggning*. Stiftelsen Allmänna Barnhuset och Karlstads universitet, skriftserie 2007:4.

choice, have certain impacts on children.²⁶

Differences between *children* are more accepted in the Swedish context than before. Some of the differences are aspects of discriminatory patterns with the result of a growing gap between children, so that some children come out of childhood well fitted to act as an autonomous individual, while some children come out of the childhood badly fitted to do the same. Is this an issue for legal scholars? Is it not a political question? Well, the decision of what ideological way the society should take is a political question. But, the consequences of certain changes for children are absolutely an issue for legal scholarship. So what are the alternatives?

8. Alternatives

An old African proverb is; *it takes a whole village to raise a child*. The positive connotation of this common responsibility for children in a society has become outdated. Today how to raise a child is more of a private matter. The parent's responsibility seems to have been strengthened, but so also is power over their children. The responsibility of the state is perceived as intervention in the private sphere and it seems to me that it is only in very severe cases that the interest of the parents are challenged. Children's rights are, at least when they are small, in the hands of the parents. When more and more choices are made private and free to choose, and when inequalities are perceived as results of people's choices, the situation for children is increasingly dependent of their parent's ability.

The notion of the 'state' has changed; the 'state' shall not interfere in the family. In the economic family policy it's said; the family policy shall be respectful in relation to each family's choices and be *supportive*, not *governing*.

The African proverb also says something else and that is that human beings are relational. The conceptualisations of the relation between individuals and between the individual and the collective are perhaps something essential that can be a watershed and

help us to combine the positive ambition with the promotion of children's rights with a shared *responsibility* for both parents and the rest of the society to secure *all* children's well-being, and not only formally but towards equal opportunities in reality.

The relational theory offers a different notion of the individual than an autonomous and independent subject law and legal scholarship are used to recognise. The individual is not competent *or* incompetent, not autonomous or dependent, not capable or dependent. The individual is both, and this applies to children as well as adult persons. The human being is relational, which means that the human being is driven by an antagonism, i.e. the striving for relations and the striving for individuality.²⁷

"Relationship must therefore be central rather than peripheral to legal and political thought and to the workings of the institutions that structure relations", as Jennifer Nedelsky puts it.²⁸

Relations have formative effects on an individual, structural and epistemological / ontological level. Individual relations, as the relation between the child and the parent, will shape and be shaped by wider patterns of relationship, such as for instance gender norms, class expectations and ethnicity patterns. These relationships are affected by structures of economic relations, cultural heritage, organisation of society and so on.

All these relational patterns on different levels cannot be met with individual choices, often taken by the parents and not the child. The child has not chosen an unemployed or poor father or mother, a violent father or mother, a mother or father that do not prioritise to pay someone to help the child with the homework, nor a mother or father that are religious fundamentalists. Moreover, the child has not chosen which kind of society to be born into. A relational perception of human beings puts pressure on all of us to secure individual autonomy within the relations all of us are dependent on, both within the family and in society as a whole.

²⁶ One example of individualisation of problems earlier perceived as violence and harassments in school, is the topic presented in the article by Anne-Lie Väinik in this issue. The increasing numbers of reports to the police of violence performed by children during the years 2002-2009 is probable not due to more violence, but to the fact that violent incidents in greater extent are considered important to report to the police. The child was not held responsible for the violence in the same extent earlier. A perception of children as competent can also have the effect that they are held responsible for their actions in greater extent.

²⁷ Svensson, Eva-Maria (1997). *Genus och rätt. En problematisering av föreställningen om rätten*. Uppsala: Iustus förlag, p. 106.

²⁸ Nedelsky, Jennifer (2011). *Law's relations: A Relational Theory of Self, Autonomy, and Law*. Oxford University Press, p. 86. See also Minow, Martha (1991). *Making All the Difference: Inclusion, Exclusion, and American Law*. Cornell University Press.

Children As Victims: How sentimentality can advance children's rights as a cultural concept

Kieran Walsh*

Introduction

Children's rights are, obviously, important for advancing the interests of children. This is especially true of the right to be free from violence, as the ability to frame this claim to protection as a right allows victims or potential victims to claim a specific legal remedy.¹ In essence, the claim of the victim to be deserving of protection is transformed from an assertion of moral entitlement to possession of a legally recognised obligation.

However, what I want to explore in this article is the social process that shapes rights claims. Why are children recognised as deserving rights? What social processes occurred in order for children to be thought about differently? While the history of the children's rights movement has been well covered elsewhere,² as has the changing sociological perception of the child,³ this paper seeks to explain the cultural shift in the perception of children from object of discipline to rights bearing subject. It will do so within one geographic context – Ireland – and the context of a single children's rights claim – the right to be protected from abuse. It is necessary to limit the exploration in this way, not only owing to space, but, as I will argue, owing to the particular cultural context within which these social processes take place. As such, the particular process mapped out in this article may not be a ready template for all states, or even for all children's rights.

What this article thus seeks to do is to use this particular example to make the case that the presentation of children as victims in certain situations can create cultural support for the development of a children's right consciousness through sentiment and empathy.

The Perception of Children in the Late Nineteenth and Early Twentieth Centuries

Child abuse, or more accurately what we regard as abusive behaviour towards or maltreatment of children, has existed throughout history. Thomas' overview of the phenomenon provides examples of such behaviour from almost every epoch of western history.⁴ While it is important to bear in mind Pollock's arguments that child abuse was regarded socially problematic long before late-nineteenth legislative interventions,⁵ it was only with the development of governance over childhood as a concept itself that child abuse became a significant social concern. Traditionally, the late seventeenth century has been regarded as the historical turning point in the development of a "concept of childhood", and consequently the point at which it would first be possible to speak legitimately of concern at the manner in which children, as a separate social category, were treated.⁶ Yet it was not until the nineteenth century that significant moves towards the governance of childhood by the state began.

Governance in this sense is comprised of legislative and other governmental interventions in children's lives. Parton has highlighted the nineteenth century as the earliest point at which we can see the governance of childhood emerging, further arguing that the purpose of this governance was "until the 1970s ... focused primarily on the protection of society from children and the control of delinquent youth".⁷ Therefore, the traditional focus of "child protection" was not on protecting children themselves but on protecting society from children who were seen as likely future criminals.

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¹ This article (developed from a paper given at the Tromsø conference) will proceed on the basis of the interest theory of rights rather than the will theory. For a discussion of these concepts within the European context, see Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law* (Hart Publishing 2010) 102-103.

² Andrew Bainham, *Children: The Modern Law* (Jordan's Publishing 2005) 97-114, Jane Fortin, *Children's Rights and the Developing Law* (3rd edn, Cambridge University Press 2009) ch 1.

³ Allison James and James Prout (eds), *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociology of Childhood* (2nd edn, Routledge 1997).

⁴ Mason Thomas, 'Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix and Social Perspectives' (1972) 50(2) *North Carolina Law Review* 293.

⁵ Linda Pollock, *Forgotten Children: Parent-Child Relations from 1500 to 1900* (Cambridge University Press 1983).

⁶ See Phillipe Aries, *Centuries of Childhood* (Jonathon Cape 1962); David Archard, *Children: Rights and Childhood* (2nd edn, Routledge 2004).

⁷ Parton (n 1) 20. On the question of governance, see Parton's use of Donzelot's tutelary complex in Nigel Parton, *Governing the Family* (Macmillan 1991).

As a result, any attempt to uncover social attitudes to children that uses child protection as a frame of reference must attempt to reconcile what contemporary attitudes regard as the radically different ideas of protection and punishment. To many in the late nineteenth and early twentieth centuries, these concepts would not have signified diametrically opposed concepts.⁸

The earliest legislation dealing specifically with child protection in Ireland can be traced to 1889, when the Cruelty to Children Act was passed.⁹ This was followed by further legislation in 1894, 1904 and by two landmark Acts in 1908 – the Children's Act and the Punishment of Incest Act. While these legislative interventions were designed to target child cruelty, and so could be considered as an uncomfortable fit with a paradigm of disciplining children, their practical effects indicate that they are indeed compatible with this paradigm. The claim that there was a shift in ideology within the child protection system from a punishment model to a case-work model in the wake of the 1908 legislation is only supportable when dealing with the ideologies of the nascent child protection services.¹⁰

By contrast, the ideological position adopted by the institutions of the state, and by legal institutions in particular, remained firmly entrenched in the punishment model. In addition, those most frequently charged with the care of children, such as members of religious orders, also cleaved to a disciplinary view of their task. As a result, children protected under these Acts, and other children dealt with under school attendance legislation as well as juvenile offenders,¹¹ were committed to reformatory or industrial schools, which are discussed in detail below.¹² The former was designed to deal with children convicted of criminal

offences, while the latter dealt with non-criminal children deemed to be at risk of engaging in crime. These were originally designed by Quaker groups to train children for future reintegration into society,¹³ thereby indicating that even when children were placed in institutions owing to abuse within the home, they were still regarded as objects of discipline that were to be subjected to a regime of moral rehabilitation.¹⁴

At this juncture it is also necessary to deal with the argument that the late nineteenth century marked the transformation of attitudes to children. Public opinion began to regard child abuse as highly problematic, and it was thought that children's welfare ought to be promoted by state or philanthropic intervention,¹⁵ a view legitimised by the passing of the Children Act 1908. While it is important to recognise the importance of Victorian attitudes to child saving in Irish society, and it is certainly true that Victorian ideals did play a role in the development of the Dublin branch of the National Society for the Protection of Cruelty to Children, insufficient attention has been paid to the Victorian ideals of punishment when speaking about conceptualisations of children in this era.

The Victorian attitude to punishment was premised on utilitarian ideals, whereby prisoners were to be motivated to reform themselves by way of a complex of rewards and retributory acts. Therefore, the very point of punishment was to achieve "a rebirth, a new being, a person purged of criminal instincts and malign attitudes."¹⁶ This was coupled with the separating out of punishment from other forms of social interaction, the process of placing the distasteful act of punishment behind the scenes of social life.¹⁷ The importance of this attitude to punishment is seen in Garland's contention that penal practices play an active part in the

⁸ It is also important to recognise the danger of historical essentialism when undertaking such an exercise. It is not possible to assert that all people thought in this fashion – the work done by the various Societies for the Prevention of Cruelty to Children are testament to this. However, this chapter will proceed on the basis that a conflation between protection and punishment did exist at social and governmental levels due to the belief that in punishing children, both they and society were being protected from further harm.

⁹ Other Acts, such as the Criminal Law Amendment Act 1885, which raised the age of consent to 16, can be viewed in a child protection context, although they dealt with other issues as well.

¹⁰ Harry Ferguson, 'Protecting Irish Children in Time: Child Abuse as a Social Problem and the Development of the Child Protection System in the Republic of Ireland', in Harry Ferguson and Tony McNamara (eds), *Protecting Irish Children: Investigation, Protection and Welfare* (Institute of Public Administration 1996) 9; Valerie Richardson, 'Children and Social Policy' in Suzanne Quinn, Patricia Kennedy, Ann O'Donnell and Gabriel Kiely (eds) *Contemporary Irish Social Policy* (2nd edn, University College Dublin Press 2005).

¹¹ School Attendance Act 1926 and Section 57 of the Children Act, 1908 as amended by section 9 of the Children Act, 1941 respectively.

¹² The passing of the Reformatory Schools (Ireland) Act 1858 and the Industrial Schools (Ireland) Act 1868 gave these institutions a statutory basis.

¹³ Michael Freeman, *The Rights and Wrongs of Children* (Continuum 1983) 66.

¹⁴ Linda Mahood and Barbara Littlewood, 'The "vicious girl" and the "street-corner boy": sexuality and the gendered delinquent in the Scottish child-saving movement 1850–1940' (1994) 4(4) *Journal of the History of Sexuality* 549.

¹⁵ See for example, Anthony Platt, *The Child Savers: the Invention of Delinquency* (University of Chicago Press 1969), Harry Hendrick, *Child Welfare: Historical Dimensions, Contemporary Debates* (2nd edn, Policy Press 2003) and Myers who outlines developments in the United States. See John Myers, *Child Protection in America: Past, Present and Future* (Oxford University Press 2006).

¹⁶ Sean McConvill, 'The Victorian Prison' in Norval Morris and David Rothman, *The Oxford History of the Prison* (Oxford University Press 1998) 122. See also the comments made by Smith with respect to the ideology underpinning the development of mother and baby homes in early twentieth century Ireland. It was argued that such homes were necessary "where by appropriate training and example, self-respect is restored." See James Smith, *Ireland's Magdalen Laundries and the Nation's Architecture of Containment* (Manchester University Press 2008) 48–50.

¹⁷ Norbert Elias, *The Civilizing Process, Volume I: The History of Manners* (Blackwell 1969) 121.

process by which shared meaning, value and culture are generated.¹⁸ In particular, it “teaches, clarifies, dramatizes, and authoritatively enacts some of the basic moral-political categories and distinctions which help form our symbolic universe.”¹⁹

The view, prominent in legal discourse, that children were to be disciplined helped to generate a wider cultural belief that institutions ought to be established for their punishment. The process of institutionalisation indicates that children’s cultural identity was constituted by the very act of disciplinary confinement. The frequent use made of these institutions themselves reproduced the cultural belief that children, even victims, ought to be treated suspiciously, and that these institutions were the appropriate mechanism by which the twin social aims of discipline and reform could be achieved.²⁰ Ferriter is right to point out that the 1908 Act dictated that the courts should be agencies for the rescue as well as the punishment of children.²¹ Therefore, the legacy of Victorian child welfare movement cannot be viewed apart from the disciplinary function. It is also important to consider the longevity of this cultural paradigm. When discussing the related issue of the history of Irish sexuality, Inglis argues that what was unique to Ireland was how long Victorian attitudes lasted and how deeply they seeped into the minds of the Irish.²² Therefore, the paradigm of children as objects of discipline enjoyed a lifespan in Ireland that far exceeded that enjoyed by it elsewhere.²³

The State’s Problematisation of Child Victims

Reform and industrial schools, institutions tasked by

the state with the care of children deemed in need of protection, were operated by religious institutions. Of the 61 industrial schools in the future territory of the Free State, 56 were under the auspices of the Roman Catholic Church, with 5 under the control of Protestant denominations.²⁴ The reasons for the high level of church involvement in these schools stems in part from the desire to instil a socially ordained moral rectitude in the children resident there. In addition, political, cultural, and interdenominational rivalry inhibited the co-ordination of services at a governmental level,²⁵ giving greater autonomy to the religious orders involved. Catholic organisations were also particularly concerned at the prospect of proselytisation by Protestant groups.²⁶

However, it must be remembered that what would nowadays be regarded as state duties to protect vulnerable individuals was, during the nineteenth and early twentieth centuries, regarded as a largely philanthropic enterprise. The development of these schools and the delegation of responsibility to private groups must be understood in the context of the history of philanthropy itself.²⁷ In addition, the principles of classic political liberalism prevalent at this time tended to prioritise a kind of minimal state rooted in Lockean social contract theory, as it had not yet evolved into the social justice liberalism that would be more familiar in the post-Rawlsian era.²⁸ Therefore, the religious influence seen in these schools should be regarded as unsurprising. It can also be argued that the aim of social discipline, rather than being an example of struggle between church and state, represented a uniformity of approach in how children in these schools were viewed by government and civil society.²⁹

¹⁸ David Garland, *Punishment and Modern Society: A Study in Social Theory* (Clarendon Press 1991) 251.

¹⁹ *Ibid* 252.

²⁰ The scale of the industrial school system was vast – between 1868 and 1969 some 105,000 children were committed to industrial schools by the courts, an average of almost two a day over the course of a century. See Mary Rafferty and Eoin O’Sullivan, *Suffer the Little Children: The Inside Story of Ireland’s Industrial Schools* (New Island Books 2000) 20.

²¹ Diarmaid Ferriter, ‘Suffer Little Children? The Historical Validity of Memoirs of Irish Childhood’ in Joseph Dunne and James Kelly (eds) *Childhood and its Discontents* (The Liffey Press) 2002.

²² Tom Inglis, ‘Foucault, Bordieu and the Field of Irish Sexuality’ (1997) 7 *Irish Journal of Sociology* 235.

²³ Compare, for example, the way in which Britain began to move away from institutionalisation of children in the 1930s.

²⁴ Report of the Commission to Inquire into Child Abuse, (Stationery Office 2009) (Ryan Report) 36-37.

²⁵ Fred Powell, Martin Geoghegan, Margaret Scanlon and Katherine Swirak, ‘Child Outcasts: The Ryan Report into Industrial and Reformatory Schools’ in Kenneth Burns and Deborah Lynch, *Children’s Rights and Child Protection: Critical Times, Critical Issues in Ireland* (Manchester University Press 2012) 16.

²⁶ Ryan Report (n 24) 38

²⁷ Caroline Skehill, ‘Child Protection and Welfare Social Work in the Republic of Ireland: Continuities and Discontinuities between the Past and the Present’ in Noreen Kearney and Caroline Skehill (eds), *Social Work in Ireland: Historical Perspectives* (Institute of Public Administration 2005).

²⁸ See, for example, the comments of Kelly who argues that “if one generalizes and if one ignores the degree to which some states were more or less authoritarian or democratic in the working of their systems, one might say the dominant theory of the nineteenth-century state supported its emergence from the minimal role which social-contract theory had suggested, and its acceptance of a large role of social interventionism and economic control both exceeding and conflicting with the protective function once seen as its sole reason to exist.” See JM Kelly, *A Short History of Western Legal Theory* (Clarendon Press 1992) 307.

²⁹ As indeed Clark argues, when she speaks of Catholic charitable institutions being used to challenge the state’s moral hegemony – see Anna Clark, ‘Wild Workhouse Girls and the Liberal Imperial State in Mid-Nineteenth Century Ireland’, (2005) 39(2) *Journal of Social History* 389. While the state was not, at this time, inclined towards Roman Catholicism, on the question of moral discipline, it is arguable that more united church and state at this time than separated them.

Industrial schools became far more prevalent than reformatory schools,³⁰ demonstrating a significant emphasis on attempting to prevent children from engaging in what was seen as inappropriate behaviour. The most common reason for admission to industrial schools was “lack of proper guardianship”, which Rafferty and O’Sullivan argue was a catch-all term that tended to have more to do with the circumstances in which children lived (such as the imprisonment of their parents or being the children of unmarried women) than the behaviour of children themselves or of parents towards their children.³¹ O’Toole has also argued that children found themselves in these institutions due to a more general “criminalisation of poverty”.³²

Although this is not necessarily a complete account of the reasons for admission,³³ it supports the idea that the children concerned were removed from their families in order to instil in them a particular view of moral discipline because to leave children in such family environments would lead to other forms of social harm once, and possibly before, they reached adulthood.³⁴

This even extended to incarcerating in industrial schools children who had been sexually abused, on the basis that they were seen as morally corrupt. The concept of childhood corruption can be seen as the diametric opposite of the concept of childhood innocence common during the Victorian and Edwardian eras, and as such it can be understood as “being prematurely exposed to adult knowledge.”³⁵ Among the forms of forbidden adult knowledge was sexual knowledge, even where that had been acquired by young children as a result of sexual abuse. Children who had been sexually abused were therefore committed to

institutions, with section 58(1)(c) of the Children Act 1908 permitting a girl who had been the victim of sexual abuse by her father to be sent to an industrial school.

The Ryan Report also recounts evidence of how children who were abused while in care were problematised as “ringleaders” in the “corruption of the whole school” and were thus subjected to continued investigation and surveillance, and were eventually transferred to different institutions in order to “protect” the other children.³⁶ Indeed, a reformatory school was established specifically to accommodate girls who were considered a risk to other children owing to their previous sexual experiences, which were virtually all abusive.³⁷ The view that child abuse had a significant moral dimension is consistent with the view expressed by leaders of religious orders that child abuse was seen as a moral rather than criminal issue.³⁸ While Ferguson argues that children were “seen as future threats to social order as much as victims”,³⁹ it may be that, in actuality, the supposed threat that they were said to pose to the social and moral order was regarded as more important than their victimhood. Rather than the moral status of such children being ambiguous, the Ryan Report would seem to indicate that the moral status of children was instead fixed quite firmly as a moral threat to the social order.

Child Abuse and the Culture of Denial

One of the most striking aspects of Irish approaches to child abuse was what Ferriter describes as a culture of denial. In some cases, it was openly acknowledged that children were being abused, yet this was regarded as unproblematic. Prosecutions of cases involving physical assaults on children make strikingly

³⁰ In 1900, there were 150 children in reformatory schools, whereas in 1898 there were almost 8,000 children resident in industrial schools. See Ryan Report (n 1) Volume 1, 35-36.

³¹ Rafferty and O’Sullivan (n 20) *ibid*.

³² Fintan O’Toole, *Irish Times*, 14 May 1999. As this brief outline makes clear, children were admitted to these schools for a wide variety of reasons. Some debate has arisen on whether the statistics adequately reflect the number of children who were in these institutions due to abuse and neglect in their own homes as well as those who were viewed as social threats – see Rafferty and O’Sullivan (n 20) and Harry Ferguson, ‘States of Fear, Child Abuse and Irish Society’ (2000) 50 (1) *Doctrine and Life* 20. What is important for present purposes is the social view of these children, with the reasons for their initial admission to reform or industrial schools being of secondary importance.

³³ See Ferguson *ibid*; Harry Ferguson, ‘Abused and Looked After Children as ‘Moral Dirt’: Child Abuse and Institutional Care in Historical Perspective (2007) 36(1) *Journal of Social Policy* 123 and Ryan Report (n 20) Vol I, ch 3. It is important to recognise that children were sometimes admitted to these institutions because of what we would now consider child protection reasons. Yet whatever the reason for admission, children were subject to the same regime of disciplinary confinement.

³⁴ It is important to recognise that children were sometimes admitted to these institutions because of what we would now consider child protection reasons. Yet whatever the reason for admission, children were subjected to the same regime of disciplinary confinement.

³⁵ Ferguson (n 33) 132 relies on Jackson’s understanding of the term as based on sexual precocity. See Louise Jackson, *Child Sexual Abuse in Victorian England* (Routledge 2000) 6.

³⁶ See Ryan Report (n 20) vol II, St. Joseph’s Kilkenny, 501-509. Gordon makes a similar point when discussing the history of child abuse in the United States, whereby sexually abused children were thought of as delinquents and more likely to be promiscuous – Linda Gordon, *Heroes in their own Lives: The Politics and History of Family Violence* (Virago 1989) 217. This view was also expressed by the Carrigan Committee, which saw child victims of sexual offences as accomplices. See Report of the Committee on the Criminal Law Amendment Acts (1880-1885) and Juvenile Prostitution (1931) National Archives of Ireland (NAI), Department of Justice (D/Jus) file 247/41 A-E (Carrigan Report).

³⁷ Ryan Report (n 20) Volume I, 3.10 and comment in Carole Holohan, *In Plain Sight: Responding to the Ferns, Ryan, Murphy and Cloyne Reports* (Amnesty International Ireland 2011).

³⁸ For a synopsis of these views see Diarmaid Ferriter, “Report by Dr. Diarmaid Ferriter for the Commission to Inquire into Child Abuse” (Dublin 2006) 1-2.

³⁹ Ferguson (n 33) 132.

clear that even courts regarded it as a parental duty to beat children, thereby demonstrating scant regard for the child's well being.⁴⁰ Of particular concern is the fact that sexual abuse was regarded as unproblematic, largely owing to "a traditional order, characterised by cultural denial, patriarchal social relations and repression" which meant that sexual abuse was not classified and worked with in practice.⁴¹

The crucial moment in the history of cultural denial of sexual abuse was the Report of the Carrigan Committee. Following lobbying from the Roman Catholic Church for legislation on "sexual immorality",⁴² WT Cosgrave appointed a committee to review the legislation then in force, known as the *Report of the Committee on the Criminal Law Amendment Acts (1880-85) and Juvenile Prostitution*,⁴³ more commonly known as the Carrigan Committee. The Committee was concerned with discipline and control of sexual activity by children rather than attempting to protect children from the sexual abuse or examining the conditions that led to children becoming prostitutes in the first place.⁴⁴ The report was insistent on denying that social problems were significant contributing factors in the high rate of criminal offences disclosed by witnesses appearing before the committee, but also clear in its view that sexual offending was due to moral rather than social reasons. Certain aspects of the evidence to the Committee help to demonstrate the deep suspicion in which child victims were held,⁴⁵ among others District Court Judge George Cussen remarked that young men undoubtedly need some protection from young girls, fearing that they be targets for blackmail.⁴⁶

The report was later suppressed by government, with Finnane arguing that this was part of an increasing trend towards a more authoritarian style of

government.⁴⁷ Others posit, though not necessarily in contradiction to Finnane's view, that the rationale for suppression was rooted in the desire to avoid foreign scandal.⁴⁸ There is general agreement in the secondary literature however, that the refusal to publish the report probably helped to perpetuate the lingering suspicion over children as victims of sexual crime. In the aftermath of the decision to suppress the report, minister for Justice PJ Ruttledge commented that in the context of sexual offence trials, "the sympathies of the court may be more in favour of the accused than the accuser".⁴⁹

Both the Report and its suppression therefore demonstrate a fundamental lack of concern for the interests of child victims. Indeed, the commonality of views expressed in both testimony to the committee and the decision to suppress it recognised certain troubling realities – sexual offending was uncomfortably common, morality was placed at the centre of any reform of sexual offences law, and that victims were considered to be of secondary importance. Both the Report and its suppression helped to shift the focus away from the more troubling analysis of the causes of offending that was rooted in understanding social problems, especially those surrounding gender and class. Both the act of reporting and the act of suppression therefore contributed to a more general culture of denial of social problems, rooted in what Garvin calls a "politics of cultural defence" that permitted the continuing conceptualisation of child victims as appropriate targets for disciplinary action rather than as victims of abuse.⁵⁰

Consequently, the Carrigan Committee's Report represented a critical moment in the establishment of what Smith labels the Free State's newly established culture of containment.⁵¹ While Smith's assertion that

⁴⁰ Maguire and Ó'Cinnéide illustrate a number of these cases and implicate child welfare agencies in the systematic neglect of children's rights when they state, at 639, that "in cases where evidence of 'cruelty' or ill-treatment existed, the ISPCC often brushed it off as insignificant or justified given the child's behaviour." See Moira J Maguire and Séamus Ó Cinnéide, "A Good Beating Never Hurt Anyone": The Punishment and Abuse of Children in Twentieth Century Ireland' (2005) *Journal of Social History* 635.

⁴¹ Harry Ferguson, 'Child Abuse as a Social Problem in Post Traditional Ireland' in CN McElwee (ed), *Irish Society: A Reader in Applied Social Studies* (StreetSmart Press, Waterford 1997) 31.

⁴² James Smith 'The Politics of Sexual Knowledge: The Origins of Ireland's Containment Culture and the Carrigan Report (1931)' (2004) 13 (2) *Journal of the History of Sexuality* 208.

⁴³ See Carrigan Report (n 36), Mark Finnane, 'The Carrigan Committee of 1930-31 and the moral condition of the Saorstát' (2001) 32(128) *Irish Historical Studies* 519 and Smith, *ibid*.

⁴⁴ Maguire argues that juvenile prostitution was only a secondary aim of the Committee, with a broader examination of the moral standards of the criminal law being more important. Arguably, not a lot turns on which of these views is more correct. What is more important is the approach which the Committee took – the adoption of a morality based mode of analysis to sexual offending which neglected to consider the impact on victims and instead regarded child victims suspiciously. See Moira Maguire, 'The Carrigan Committee and Child Sexual Abuse in Twentieth-century Ireland' (2007) 11(2) *New Hibernia Review* 79; Moira Maguire, *Precarious Childhood in Post-Independence Ireland* (Manchester University Press 2009)

⁴⁵ It is important not to see the testimony as uniform in its views – witnesses also called for more care based approaches to women who had engaged in prostitution as well as to victims of child abuse. These voices tended to come from social workers and medical personnel who had worked with these women and children. The dominant trend however, was towards morality based discussion.

⁴⁶ NAI, Criminal Law Amendment Committee 26 June 1930 D/J 90/4/3, cited in Maguire (2007) (n 44).

⁴⁷ Finnane (n 43)

⁴⁸ Maguire (2007) (n 44).

⁴⁹ NAI, Department of Justice memo, D/J/ 90/4/3, cited in Maguire, *ibid*.

⁵⁰ Tom Garvin, 'The politics of denial and cultural defence: The referenda of 1983 and 1986 in context' (1988) 3 *Irish Review* 1.

⁵¹ Smith (n 42).

the Report signals the origin of the culture of containment is overly simplistic,⁵² the Report did have a significant impact on the development of the law and practical handling of sexual abuse cases. The establishment of such an infrastructure, heavily dependent on reform and industrial schools as well as Magdalene institutions, was possible owing the use of morality as a justification for discipline and containment. By focussing on morality and discipline, there was little credence given to the idea of protecting children as a vulnerable group who may be exploited.⁵³

One explanation for the success of this disciplinary containment strategy was the manner in which the committee sidelined the evidence of professional social workers and female doctors who argued against both Victorian ideals of philanthropic and evangelistic intervention on the one hand and punitive measures advocated by the Catholic hierarchy and the Gardaí whose views,⁵⁴ as expressed to the Committee, came to dominate later law reform efforts such as the Criminal Law (Amendment) Act 1935. This preference for clerically imposed discipline over the developing scientism of professional social work bolsters Lee's argument that the obsession with sex permitted a blind eye to be turned to the social scars that disfigured the face of Ireland.⁵⁵

This concept of a culture of defence must be interrogated in light of the prevailing attitude to childhood itself. Therefore, it must be asked what Irish society's view of children was at this time so that the manner in which the culture of defence changed into a culture of remembering can be more fully appreciated. The manner in which the Carrigan committee operated and the manner of its suppression highlight that children

were not regarded as morally sympathetic actors who had been victimised, but as morally suspect actors to be disciplined. Powell et al have adopted O'Toole's concept of unknown knowns, "things that were understood to be the case and yet remained unreal",⁵⁶ in order to explain how Irish society was capable of performing such a *volte face* with respect to the abuse within industrial and reform schools, despite the fact that abuse took place being relatively well known.⁵⁷ Abuse was known, but ignored on the basis that the children subject to it comprised an outcast population. Indeed, this view was prevalent at governmental level as well as in society at large. The Ryan Report recounts how the severe corporal punishment of children was known to Department of Education officials for two decades despite departmental guidelines having stated that the practice should cease. It was only after the Kennedy Committee became involved that this happened.⁵⁸

The dominance of the disciplinary paradigm well into the twentieth century is exemplified by the response of the Minister for Education to a Dáil question concerning an incident in an industrial school where a boy was hospitalised due to injuries inflicted in the course of punishing him. The Minister framed his response in terms of the need to ensure the proper discipline of unruly children with difficulties of character.⁵⁹ Specifically, any guarantee given to parents of the full protection of their children in such schools could not be taken as licence for the children concerned to do as they like demonstrating that the "individual emotional and physical welfare of children was rarely a priority".⁶⁰

This way of framing a response indicates that when punishment became abuse, it was regarded as an unfortunate error on behalf of those charged with the

⁵² Smith *ibid*. See also Maguire's challenge to this claim at new hib rev above, where she argues that the conflation of male sexual licence with the greater good is of greater importance when attempting to understand the ramifications of the report. This view also suffers from being overly simplistic – while it is vital to apply feminist discourses of dominance rooted in the methodological framework pioneered by McKinnon – see Catherine McKinnon, *Towards a Feminist Theory of the State* (Harvard University Press 1989) – Maguire's analysis ignores the voices of other witnesses, such as those of social workers and medical personnel who challenged the morality based orthodoxy of the Committee.

⁵³ The main forms of exploitation that were feared were exploitation of young people's innocence by foreign cultural imports such as the motor car and dance hall, and the proselytising activities of the Church of Ireland. See generally Diarmaid Ferriter, *Occasions of Sin: Sex and Society in Modern Ireland* (Profile Books 2009).

⁵⁴ Smith (n 42) 239.

⁵⁵ JJ Lee, *Ireland 1912 – 1985: Politics and Society* (Cambridge University Press 1991) 159. It should also be acknowledged that the views of the Gardaí were not in perfect harmony with clerical approaches. While Garda Commissioner General Eoin O'Duffy argued, in line with the Catholic clergy, that "[t]he present state of the law is disgraceful in a Christian country, and the whole question of morality crimes should be now dealt with from an Irish point of view." (O'Duffy memo, NAI D/Jus H247/41 A, 2, quoted in Smith *ibid* 223.) However, he also pointed out the high rate of offences against children, especially those under ten, but the committee chose to minimise the graphic nature of his testimony opting instead for a bowdlerised version where the central thrust of his testimony was accepted without any significant discussion of the detail. For a thorough review of O'Duffy's testimony, see Maguire (2007) (n 44).

⁵⁶ Fintan O'Toole, *Ship of Fools: How Stupidity and Corruption Sank the Celtic Tiger* (Faber and Faber 2010) 181, cited in Powell et al (n 25). See also the similar, but less Rumsfeldian idea of Gene Kerrigan that "there were things that we not talked about back then, though they were no secret". See Gene Kerrigan, *Another Country: Growing Up in 50s Ireland* (Gill & Macmillan 1998) 205.

⁵⁷ Powell et al (n 25).

⁵⁸ See Ryan Report (n 20) Vol I 15.224, 15.227.

⁵⁹ Minister Moylan, Vol 145 Dáil Debates Col 949-952, 23 April 1954.

⁶⁰ Ferriter (n 38) 5.

reform of wayward children and that the appropriate remedy was to ensure that punishment was properly administered rather than interrogating its use and form as a matter of principle. The possibility that punishment may have been a cloak for sadism was regarded as inconceivable not just because of the relatively powerful social position of those dispensing punishment but also due to the belief that those receiving punishment were appropriate objects of such treatment.

The Developing View of Children: From Denial to Recognition

The belief that children were to be disciplined and controlled eventually subsided in favour of “the middle-class cult of childhood, with its celebration of the time-warped and its sentimentalization of the nursery”.⁶¹ Taking this sentimentality and belief in childhood innocence as our starting point, we can see how child abuse began to be framed differently. Rather than being a justification for incarceration in institutions where they were subject to further degradation, it became a reason to protect children; children who had been abused were now to be regarded as victims rather than threats. Child abuse itself underwent a transformation from a matter of private concern to a public, social problem.

During the mid to late 1980s, limited media coverage of child sexual abuse began to emerge. For example, Magill magazine referred to an unpublished Department of Health report highlighting that one in four Irish girls may be sexually abused before the age of 18.⁶² The Irish Council of Civil Liberties also released a report on the issue in 1988.⁶³ Governmental attention had sporadically been focussed on the issue since the late 1970s when the first guidelines for the reporting of what was then termed “non-accidental injury” to children were published,⁶⁴ with specific reference to child sexual abuse added in 1987.⁶⁵ The Law Reform Commission published a consultation paper on child sexual abuse in 1989,⁶⁶ and a report on the same subject in 1990.⁶⁷ The

Child Care Act 1991 was also passed. This legislation was designed to replace the Children Act 1908 as the statutory basis for child protection in Ireland while also bringing Irish child protection practice in line with a welfarist ideology. Kenny also highlights the influence of British media influence in raising Irish consciousness of child sexual abuse, given that many Irish people consume British as well as Irish media output.⁶⁸

It was against this backdrop that the Kilkenny incest case came to dominate the public space. Beginning as the trial and imprisonment of a Kilkenny man who had sexually abused his daughter for 16 years, it rapidly became something of a *cause célèbre*, as the level of public interest it generated in child sexual abuse was unprecedented. Indeed, the report of the public inquiry instituted in the wake of the trial’s revelations became the focus of extraordinary public anger.⁶⁹ Much of the discourse that developed in the wake of its publication focused on attempts to ensure that similar events could not reoccur.⁷⁰

The Kilkenny Inquiry was the first in a series of scandals that came to influence the re-conceptualisation of child protection in Ireland. Following in its wake were the scandals over the Catholic priest, Father Brendan Smyth, whose delayed extradition to Northern Ireland played a role in the collapse of Irish government in 1994,⁷¹ the abuse of children in care in Madonna House,⁷² the abuse that took place in Goldenbridge Orphanage,⁷³ and the death of Kelly Fitzgerald.⁷⁴ These scandals ensured that public attention was centred upon child abuse, resulting in social work practice and the risks that children faced being critically examined for the first time. As Greer noted, “the collective impact of the media exposure of these cases was to increase social awareness and to transform sex crime, and child abuse in particular, from an issue of private to public concern.”⁷⁵ The public was now more finely attuned to the sense that children were constantly in danger, and that as a result strategies had to be adopted to reduce the risks

⁶¹ Raphael Samuel, *Theatre of Memory: Past and Present in Contemporary Culture* (Verso, London 1994) 93.

⁶² Fintan O’Toole, ‘The Betrayal Of The Innocents’, Magill, July 1986.

⁶³ Irish Council for Civil Liberties, *Report of the ICCL Working Party on Child Sexual Abuse* (Irish Council for Civil Liberties 1988).

⁶⁴ Department of Health, *Memorandum on Non Accidental Injury to Children* (Stationery Office 1977).

⁶⁵ Department of Health, *Guidelines on Procedures for the Identification, Investigation and Management of Child Abuse* (Stationery Office 1987).

⁶⁶ Law Reform Commission, *Consultation Paper on Child Sexual Abuse* (Stationery Office 1989).

⁶⁷ Law Reform Commission, *Report on Child Sexual Abuse* LRC-32 (Stationery Office 1990).

⁶⁸ Colum Kenny, ‘Significant Television: Journalism, Sex Abuse and the Catholic Church’ (2009) 11 *Irish Communications Review* 63.

⁶⁹ Harry Ferguson, ‘Child Abuse Inquiries and the Report of the Kilkenny Incest Investigation: A Critical Analysis’ (1993-1994) 41 (4) *Administration* 385, 389 commenting on Catherine McGuinness, *Report of the Kilkenny Incest Investigation* (Stationery Office 1993).

⁷⁰ For example, the commitment to fully implement the Child Care Act 1991 in order to ensure that social workers had the proper legislatively based powers and remedies available to them.

⁷¹ See Chris Moore, *Betrayal of Trust: The Father Brendan Smyth Affair and the Catholic Church* (Marino 1995).

⁷² Department of Health, *Report on the Inquiry into the operation of Madonna House* (Stationery Office 1996).

⁷³ Discussed in the documentary, *Dear Daughter*, RTE, 22 February 1996.

⁷⁴ Owen Keenan, *Kelly – A Child is Dead: Report of a Committee of Inquiry, Interim Report of the Joint Committee on the Family* (Stationery Office 1996).

⁷⁵ Chris Greer, *Sex Crime and the Media: Sex Offending and the Press in a Divided Society* (Willan Publishing 2003) 108.

posed by such dangers.

The broadcast of, and reaction to, the documentary *States of Fear* in 1999 was to be equally as important as the Kilkenny scandal in shaping social attitudes to child abuse.⁷⁶ This three-part documentary examined the abuse perpetrated in industrial and reform schools earlier in the century, and helped to expose the systematic nature of this abuse. As the last of the three episodes was to be broadcast, then Taoiseach Bertie Ahern made a public apology on behalf of the State “to the victims of childhood abuse for our collective failure to intervene, to detect their pain, to come to their rescue”.⁷⁷ In addition, the government agreed to establish a commission of inquiry into the matter, with the Commission to Inquire into Child Abuse Act 2000 eventually leading to the publication of the Ryan Report in 2009. Later documentaries, such as *Cardinal Secrets*⁷⁸ and *Suing the Pope*,⁷⁹ also helped to cement the image of the abused child in the public imagination.

Gradually, and partly as a result of these scandals, the concept that children should no longer be regarded as objects of discipline informed constitutional change. After a series of judgments in which the rights of children were consistently placed below those of parents,⁸⁰ and importantly a judgment highlighting unconstitutionality of the law governing statutory rape,⁸¹ constitutional change for children was placed on the political agenda. After a series of false starts,⁸² a referendum to insert a clause dealing with children’s rights was passed on November 10.⁸³ Having described the change in attitudes towards children, it now remains to attempt a tentative explanation of why this change occurred.

Framing Children: Meaning, Memoir, and Membership of the Moral Community

When attempting to trace why children’s rights gained currency in Ireland comparatively quickly, the question of the media’s presentation of child abuse must be examined in depth. It could be assumed that the

media presented child abuse as a matter of concern, and that society then simply reacted to this. However, this section will seek to demonstrate that this is not what happened. It will employ a model developed by Jenny Kitzinger, who utilises the related concepts of media framing of issues coupled with active audience participation. The interaction of these traditionally separate approaches to media influence resulted, it will be contended, in the development of empathy towards the victims of abuse. This empathy was not merely individual, but occurred at a socio-cultural level, and therefore led to a paradigm shift in how children were seen.

When discussing the influence of media reporting of child sexual abuse in Ireland, the idea of framing is particularly useful. Most studies of Irish media and sex abuse adopt an approach that lies somewhere between the hypodermic model of media influence, adopted by Adorno, and agenda setting. The hypodermic model argues that ideas are effectively injected into popular culture by the mass media – people “attempt to make [themselves] a proficient apparatus, similar (even in emotions) to the model served up by the cultural industry”.⁸⁴ This rather crude approach is mollified somewhat by the agenda-setting model. Theorists of this school argue that it may not be possible to measure the media impact on what people think, but it is possible to identify the media’s impact on what people think about and how they think about it.⁸⁵ Both of these approaches are problematic in that they adopt a media centred view that assumes the effective passivity of audiences as consumers of media information.

Kitzinger has attempted instead to utilise the concepts of frame analysis and templates in order to make room for active audiences when attempting to understand public reactions to child abuse.⁸⁶ Framing has its roots in Goffman’s work, where he defines a framework as something that allows “its user to locate, perceive, identify and label a seemingly infinite number of concrete occurrences defined in its terms.”⁸⁷ This has been understood as a way to provide audiences with

⁷⁶ *States of Fear*, RTE, 27 April 1999, 4 May 1999, 11 May 1999

⁷⁷ An Taoiseach, Bertie Ahern TD, 11 May 1999.

⁷⁸ *Cardinal Secrets*, RTE, 17 October 2002.

⁷⁹ *Suing the Pope*, BBC 2, 19 March 2002.

⁸⁰ See *Northwestern Health Board v HW and CW* [2001] IESC 90, [2001] 3 IR 635 and *N v HSE* [2006] IESC 60, [2006] 4 IR 375.

⁸¹ *CC v Ireland* [2006] IESC 33, [2006] 4 IR 1.

⁸² Detailed in Aoife Nolan, ‘The Battle(s) over Children’s Rights in the Irish Constitution’ (2007) 22 *Irish Political Studies* 495.

⁸³ However, the turnout for the referendum was 33.49%, with 58% voting in favour of the amendment and 42% against.

⁸⁴ Theodor Adorno and Max Horkheimer, ‘The culture industry: enlightenment as mass deception’, in *The Dialectic of Enlightenment* (Herder and Herder 1972).

⁸⁵ See Maxwell McCombs and Donald Shaw, ‘The Agenda-Setting Functions of the Mass Media’ (1972) 36 *Public Opinion Quarterly* 58; Denis McQuail, ‘The Influence and Effects of Mass Media’ in James Curran, Michael Gurevitch and Janet Woolcott (eds), *Mass Communications and Society* (Sage 1979).

⁸⁶ Jenny Kitzinger, *Framing Abuse: Media Influence and Public Understanding of Sexual Violence against Children* (Pluto Press 2004)

⁸⁷ Erving Goffman, *Frame Analysis: An Essay in the Organization of Experience* (Harper and Row 1974) 21.

cognitive windows through which stories are to be seen,⁸⁸ or maps to navigate the multiple realities presented in media accounts of socio-cultural phenomena.⁸⁹

These frames often rely on tacit understandings of the ideologies at work in these phenomena, and seek to influence public understandings of them through suggestion rather than explication. Therefore, templates can be used to give meaning to a story by referring back to some well-known prior event. Examples of templates include “Vietnam” to refer to a protracted military conflict, or the use of the suffix “-gate” to indicate political corruption. In the child abuse context, the image of the infamous paedophile priest Brendan Smyth has taken on the role of template, providing a reference point for audiences containing a number of coded meanings for an audience to unravel, but that generally close down dialogue as the meanings are not contested.⁹⁰

The question of decoding was considered by Hall who pointed out the ways in which media texts are polysemic, rendering them susceptible to multiple meanings.⁹¹ This is crucial to the effective operation of frame analysis as it recognises that an audience member is not *tabula rasa* on which meanings can be inscribed, but rather is an active participant in the construction of members’ own understandings of texts. The concept of an active audience does not imply that, in Barthes’ phrase, the author is dead.⁹² This is important when attempting to understand how media influence works.

Kitzinger’s empirical work has highlighted the importance of the media’s discovery of child sexual abuse to victims and survivors of abuse.⁹³ As a result of the use of survivors’ stories in particular, a new identity of victimhood was created.⁹⁴ Three results emanated from this.

First, survivors actively used the media to help them think through their experiences. In this way, the audience actively participated in the continuing social construction of child abuse by adding layers to the narrative

introduced by the media, thereby becoming authors themselves. Secondly, when attention began to focus on child sexual abuse it became possible for victims of abuse to appropriate media representations of the phenomenon. Until that point, the power to define the problem was ultimately left with abusers themselves, who sought that it remain a matter of private rather than public concern. Increased media focus therefore empowered victims to “go public” creating a domino effect whereby further victims would feel comfortable telling their own stories. Thirdly, this new wave of victims’ stories helped to set policy agendas. This does not rely on the crude hypodermic model adopted by the Frankfurt school, but serves as the creation point of new discursive repertoires.⁹⁵ An individual’s experience of abuse and interaction with media as both an audience member and potential author thereby allows the new cultural narrative of child sexual abuse to “spiral into further social change, mobilising professional and expert knowledges and policies, which, in turn, impact on” the way abuse is viewed and policies adopted to combat it.

Irish literature on the question of media effects on child abuse policy has so far not adopted this more sophisticated model of media influence. Breen attempts to utilise an agenda setting model that refers to Kitzinger’s approach but neglects the role played by the audience as active participants.⁹⁶ In particular, he relies on the assertion by Shoemaker and Reece that media actively shape and mould public opinion,⁹⁷ and on Iyengar and Kinder’s concept of “tacit theories”, opinions held by the public relating to causes of social problems that are largely shaped by media content.⁹⁸ In a later article, Breen et al rely heavily on agenda setting theory when attempting to explain the effects of the screening of the *Suing the Pope* documentary on public attitudes to clerical sex abuse.⁹⁹ As a result, little attention has been paid by media scholars to the role of the audience, and of victims in particular, in claiming

⁸⁸ Zhongdang Pan and Gerald Kosicki, ‘Framing Analysis: An Approach to News Discourse’ (1993) 10(1) *Political Communication* 55, 59

⁸⁹ William Gamson, *Talking Politics* (Cambridge University Press 1992) 117.

⁹⁰ See Kitzinger (n 86) ch 4 for a discussion of the role that templates play.

⁹¹ Stuart Hall, ‘Encoding and Decoding in the Television Discourse’ in Stuart Hall (ed) *Culture, Media, Language: Working Papers in Cultural Studies 1972-1979* (Hutchinson 1981).

⁹² Roland Barthes, ‘The Death of the Author’ in Roland Barthes (ed), *Image-Music-Text* (Fontana 1977)

⁹³ See, for example, Jenny Kitzinger, ‘Transformations of Public and Private Knowledge: Audience Reception, feminism and the experience of childhood sexual abuse’ (2001) 1(1) *Feminist Media Studies* 91.

⁹⁴ This had both positive and negative effects. One the one hand, consciousness raising by the media helped people to label their earlier experiences as child abuse (see Ian Hacking, *Rewriting the Soul: Multiple Personality and the Sciences of Memory* (Princeton University Press 1995) while on the other, the survivor has become psycho-pathologised and made subject to a variety of expert systems.

⁹⁵ Debra Grondin and Thomas Lindloff, *Constructing the Self in a Mediated World* (Sage 1996).

⁹⁶ Michael Breen, ‘Through the Looking Glass: How the Mass Media Represent, Reflect and Refract Sexual Crime in Ireland’ (2007) 10 *Irish Communications Review* 5

⁹⁷ Pamela Shoemaker and Stephen Reece, *Mediating the Message: Theories of Influence on Mass Media Content* (Longman 1996)

⁹⁸ Shanto Iyengar and Donald Kinder, *News that Matters: Television and American Opinion* (University of Chicago Press 1987); Shanto Iyengar, *Is Anyone Responsible? How Television Frames Political Issues* (University of Chicago Press 1991).

⁹⁹ Michael Breen, Hannah McGee, Ciaran O’Boyle, Helen Goode and Eoin Devereux, ‘“Suing the Pope” and Scandalising the People: Irish Attitudes to Sexual Abuse by clergy Pre- and Post-Screening of a Critical Documentary’ (2009) 11 *Irish Communications Review* 77.

ownership of the representation of child abuse. This has been crucial in bringing about a shift in the social paradigm of how children were seen.

Ferriter has made extensive use of the importance of memoir in reconstructing our understanding of child abuse as a social problem. In this context, memoirs refer not just to published accounts of child abuse,¹⁰⁰ but to the evidence presented by victims of abuse to inquiries such as the Commission to Inquire into Child Abuse. This is necessary in order to respond to the challenge set by Inglis to present a history of Irish sexuality that examines biographies, diaries, letters and literature.¹⁰¹ Writing in the context of interrogating what constitutes legitimate research material for the historian of twentieth century Ireland, Ferriter argues that “memoirs are crucial ... an important and legitimate source material if treated with the same care and sometimes scepticism that we should treat all documentary evidence ... in placing them alongside ‘official’ documentation we can have a history that is ultimately more complete and human.”¹⁰²

Memoirs have proved to be crucial in bringing about the paradigm shift due, first, to the increase in public awareness of the phenomenon and, secondly, due to the development of a sense of empathy with the victims behind these autobiographical accounts. It is possible that the increased number of memoirs has operated parallel to the development of greater concern for children’s wellbeing, and that they ought to be seen more as correlative than causative factors in any shift in public perceptions of child abuse.

However, to argue this would be to deny the real impact that they have had on the audiences that consume them. Crowe has commented that the increasing flow of memoir based accounts of child abuse indicates that the private domain of personal experience has been at odds with the official stories promoted and encouraged by state and the Catholic Church, and that they complement the official documentary record with their personal immediacy and vibrancy, ensuring that we know what it felt like to be subject to abuse. They therefore had a “corrective” effect in dismantling the atmosphere of secrecy and shame that surrounded such incidents.¹⁰³ In effect, it was memoirs that helped to replace the

attitude of “general complacency” that existed over children’s issues with one of concern,¹⁰⁴ and the end of the politics and culture of denial with respect to child abuse.

However, the preceding section merely explains how the public reacted to revelations of abuse in memoir; it has not addressed the question of why they reacted in this way. In order to do this, we must consider the manner in which audiences received the information and emotional insights provided by memoir based accounts. First, other survivors of abuse were prompted to come forward to tell their own stories. Second, the ownership of the problem was wrested from perpetrators of abuse and institutions that facilitated the view that child abuse was a moral rather than a criminal problem. Finally, as already indicated, they helped to shape government reaction to the problem.

In order to address why government in particular was prompted to react to the revelations contained in memoir based accounts, it is necessary to uncover the reactions that the public had to these accounts. The corrective effect outlined by Crowe effectively constituted the development of society-wide empathy with the victims. This was the key causative factor in the paradigm shift, as empathy effectively replaced complacency and suspicion as the dominant social emotional response to abused children.

Empathy is a difficult concept to define. One of the earliest modern attempts at a definition was provided by Adam Smith, who regarded it as an ability to understand another person’s perspective plus a visceral or emotional reaction.¹⁰⁵ This view provided the basis for later psychological understandings of the term.¹⁰⁶ Confusion exists over whether it is a trait that someone exhibits consistently in a variety of situations, or whether the level of empathy felt depends on the state or situation in which one finds oneself. Current literature on whether child sex offenders suffer from an empathy deficit that enables abuse tends to promote the state perspective.¹⁰⁷ In addition, there has been some dispute over whether empathy is a cognitive state or an emotional response. Sometimes empathy and sympathy are discussed as if they were the same thing, while at other times they are

¹⁰⁰ See, for example, Susan McKay, *Sophia’s Story* (Gill and Macmillan 2004).

¹⁰¹ Tom Inglis, ‘The Constitution of Sexual Subjects in Irish Religious and Moral Discourse’, paper presented to Theory, Culture and Society Conference, Berlin August 1995, cited in Ferriter (n 61) 25. See also Tom Inglis, ‘Foucault, Bordieu and the Field of Irish Sexuality’ (1997) 7 *Irish Journal of Sociology* 5.

¹⁰² Ferriter (n 53) 6.

¹⁰³ Catriona Crowe, ‘On the Ferns Report’ (2006) 22 *Dublin Review* 5.

¹⁰⁴ See Department of Health, *Final Report of the Task Force on Child Care Services* (Stationery Office 1980) 182.

¹⁰⁵ Adam Smith, *The Theory of Moral Sentiments* (first published 1759, Penguin 2010).

¹⁰⁶ See for example Moore’s view that it involves cognitive abilities (e.g., perspective-taking) and the vicarious matching of another person’s emotional state. Bert Moore, ‘The origins and development of empathy’ (1990) 14 *Motivation and Emotion* 75.

¹⁰⁷ See WL Marshall, R Jones, SM Hudson and E McDonald, ‘Generalised Empathy in Child Molesters’ 1993 2(4) *Journal of Child Sexual Abuse* 61; WL Marshall, D Anderson and Y Fernandez, *Cognitive Behavioural Treatment of Sexual Offenders* (2nd edn, Wiley and Sons 2000).

differentiated.¹⁰⁸ In the discussion that follows, the terms will be used synonymously, as any potential differentiation in their meaning is unimportant for present purposes.

A significant problem with the use of empathy as discussed in psychological literature is that it takes the individual as the focus of analysis. Yet it is possible to rely on empathy when discussing social attitudes by recognising that empathy can be viewed as a relational concept. Keenan discusses the importance of empathy as a relational concept rather than one of individual capacity in the context of her clinical experience in dealing with child sex offenders. She argues that “when used in a relational manner, the empathy theory suggests that in situations involving the immediate victim, perpetrators of child sexual abuse are at least partially or selectively blind to the possible effects of their actions.”¹⁰⁹ This can be extrapolated to a social level by replacing the perpetrators of abuse with the society in which abuse takes place, so that we can fruitfully ask whether a society that is partially and selectively blind to the abuse of children in its midst suffers from an empathy deficit.

The importance of establishing the empathy at a social level is discussed at length by Rorty.¹¹⁰ In his attempt to present a theory of human rights that does not depend on the kind of philosophical foundationalism found in Plato or Kant, Rorty argues that we should instead look to Hume’s moral philosophy which promoted the idea of sentimentality, rather than rationality, as the foundation for morality. Underpinning this idea is the belief that social conceptions of the self are inherently plastic,¹¹¹ meaning that who is regarded as part of the morally relevant community and who is regarded as Other is in flux.

Placing sentiment and empathy at the centre of moral philosophy provides us with the “imaginative ability to see strange people – those who are oppressed

by humiliation, cruelty and pain – as fellow sufferers.”¹¹² Their key strategy to be deployed when doing this at a cultural, rather than individual level, is sentimental education. This would not emphasise the commonality between members of the human race, a tactic which he argues had continually failed, but the suffering of the oppressed. If this is emphasised sufficiently, it would be possible to develop a strong sense of social solidarity between groups that have previously thought in terms of “us” and “them”. The appeal to common humanity, he argues fails, because while “they” are regarded as human, “they” are frequently regarded as “the wrong sort of human”.¹¹³ The telling of sad stories to develop social solidarity through empathy allows the other to be “thought of as ‘one of us’, where ‘us’ means something smaller and more local than the human race.”¹¹⁴

The net result of this is to widen the number of actual or potential participants in a community of conversation.¹¹⁵ The fluctuating definitions of “us and them”, the telling sad stories and the development of solidarity all take place at the cultural rather than individual level. Therefore, in the analysis that follows, it is argued that Rorty’s idea of plasticity of images of the self and the Other explains how the image of the abused child has shifted and that the telling of sad stories, the memoir based accounts of abuse, have caused this shift.

Habermas has recently adopted a similar position with respect to the way in which an experience of a violation of human dignity has what he terms a “discovery function”, in that violations of human dignity act as a seismograph allowing us to discover “just those rights that the citizens of a political community must grant themselves if they are to be able to respect one another as members of a voluntary association of free and equal persons.”¹¹⁶ Therefore, the telling of sad stories of victimhood presents an opportunity to shape cultural understandings of child abuse, as it is only when confronted with the intolerable consequences of the use

¹⁰⁸ Hogan (R Hogan, ‘Development of an Empathy Scale’ (1969) 33 *Journal of Consulting and Clinical Psychology* 307) used both terms when describing his empathy scale, and ND Feshback (‘Studies of Empathic Behaviour in Children’ in BA Maher (ed), *Progress in Experimental Personality Research Volume 8* (Academic 1978) also used these terms as synonymous. However, P Miller and N Eisenberg, ‘The Relation of empathy to Aggression and externalizing/antisocial behavior’ (1988) 103 *Psychological Bulletin* 324 distinguish these two concepts in terms of the match of the emotional response to another person’s distress: empathy is an approximately identical response, whereas sympathy is not, but rather reflects feelings of concern.

¹⁰⁹ Marie Keenan, *Child Sexual Abuse and the Catholic Church* (Oxford University Press 2012) 84.

¹¹⁰ Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge University Press 1989); Richard Rorty, ‘Human Rights, Rationality and Sentimentality’, in Septhen Shute & S. Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures 1993* (Basic Books 1993). For an overview of his arguments, see Jose Manuel Barreto, ‘Rorty and Human Rights: Contingency, emotions and how to defend human rights telling stories’ (2011) 7 (2) *Utrecht Law Review* 93. For criticism of Rorty’s approach to human rights generally, see Siobhán Mulally, *Gender, Culture and Human Rights: Reclaiming Universalism* (Hart 2006).

¹¹¹ Richard Rorty, ‘Feminism and Pragmatism’ in GB Peterson (ed) *The Tanner Lectures on Human Values* (University of Utah Press 1990) 1, 26.

¹¹² Rorty, *Contingency* (n 110) xvi

¹¹³ Rorty, *ibid* 190-191.

¹¹⁴ *Ibid*

¹¹⁵ Richard Rorty, ‘Solidarity or Objectivity’, in John Rajchman and Cornel West (eds) *Post-Analytic Philosophy* (Columbia University Press 1985) 9.

¹¹⁶ Jurgen Habermas, ‘The Concept of Human Dignity and the Realistic Utopia of Human Rights’ (2010) 41 (4) *Metaphilosophy* 464, 469

of physical violence can the necessity of such moral recognition becomes clear.

It is necessary, however, to have a working model of empathy onto which the social reactions to child sexual abuse can be mapped. A multistage model of empathy was developed by Marshall in order to assess whether sex individual sex offenders suffer from an empathy deficit.¹¹⁷ Marshall's model views empathic responses as comprising four stages. The first stage involves emotional recognition which "requires that the observer be able to accurately discriminate the emotional state of another person."¹¹⁸

The ability to recognise the emotional state of another person allows one to gauge one's behaviour appropriately. Therefore, on observing that a child is distressed, the abuser would presumably cease their distressing behaviour if they were capable of recognising and responding to the emotional state of child. If this recognition is absent, the subsequent stages of empathic response simply do not unfold. Extrapolating this to a socio-cultural level, recognition of a victim's emotional state serves as a Habermasian discovery function, in that for the first time, it is recognised that the dignity of the child has been violated. The absence of the recognition of suffering is crucial to understanding how child abuse was allowed to continue unchecked for so long in institutions and why governmental inspections did not highlight the importance of the issue. It was not only that information relating to abuse was suppressed, it was that the suffering of children was instead thought about as a moral failure on their part, ensuring that they were re-victimised through continuing discipline and surveillance.

After the Kilkenny Inquiry and States of Fear prompted the increasing flow of memoirs that detailed abuse, and media audiences began better to understand how it felt to be a child in such a situation, children became morally relevant, ensuring that the emotional

recognition of child abuse as a problem was present.

The second stage involves "perspective taking", the ability to see and comprehend the world from the other person's perspective. This necessarily involves a degree of similarity between the social world inhabited by the two parties concerned. This links with Rorty's approach to barriers that exist between "us and them". Marshall highlights that laboratory testing on aggression, where the subject delivers a putatively painful stimulus to another person, it has been found that the more alien the victim is perceived to be, the more aggressive responses the subject will display.¹¹⁹ This need not, however indicate that the affected group is regarded as not human, but the wrong sort of human. Therefore, "Men who consistently aggress against a particular group (e.g., children or women) may see members of this group as quite different from themselves and, therefore, may be unable to adopt the perspective of their chosen victims."¹²⁰

This mirrors the Irish social experience of child abuse. Given that children, including those who were abused, were frequently thought of moral dirt, they were not so much dehumanised, but thought of as members of a morally problematic community of humans.¹²¹ It was only with changes in the construction of childhood, through the reactions caused to memoir based narratives of abuse and survival, that children were de-problematised so that they no longer constituted the Other. Once this was done Irish society could begin to take the perspective of the abused child.

Emotional replication, or the capacity to generate an emotional response, is the third stage of Marshall's model. This requires having a deep emotional repertoire that allows one to mirror (or nearly mirror) the emotional response of the victim. If a society is dominated by morality based discourse and adopts a traditional social order based in large part on patriarchal social relations, it is unlikely to be able to develop the

¹¹⁷ WL Marshall, SM Hudson, R Jones and Y Fernandez, 'Empathy in Sex Offenders' (1995) 15 *Clinical Psychology Review* 99; WL Marshall, 'Historical foundations and current conceptualisations of empathy' in Yolanda Fernandez (ed) *In their Shoes: Examining the Issue of empathy and its Place in the Treatment of Offenders* (Wood N Barnes Publishing 2002)

¹¹⁸ Marshall *ibid* 101.

¹¹⁹ *Ibid* 102.

¹²⁰ *Ibid*.

¹²¹ This approach also allows the apparent contradiction in Marshall's later work, where he argued that the lack of empathy in sexual offenders did not result from an empathy deficit but from the belief that the victim has not been harmed at all meaning that it is faulty thinking rather than a psychological deficit that leads to the non-development of empathic responses, to be overcome. The social inability to take the perspective of victim resulted not from some collective psychological flaw, but from the belief that these children were less deserving of our sympathy. See Marshall et al (n 107).

kind of emotional reaction that mirrors that of victims. As already discussed, the concept of a culture of denial was central to the maintenance of the first paradigm. This was not just the denial of the facts of abuse, but the denial that the emotional reaction of the victims was valid or morally relevant. Through repeated accounts of abuse, control over the language in which abuse was described was wrested from abusers. This allowed society to develop an adequate emotional response by deepening the reservoir of emotions that it was possible to express. The “progress of the sentiments” within Irish culture generated ‘the capacity to make others’ joys and sorrows our own’.¹²²

The final stage involves empathic responding, or the decision as to whether and how to act to ameliorate the suffering of the victim. While an offender may be able to progress successfully through the earlier three stages, they may withhold expression of concern or continue to cause suffering. The net effect for the victim is the same – owing to an offender’s failure successfully to complete all four stages of developing an appropriate emotional reaction, the victim’s suffering continues. At a social level, a decision to ameliorate suffering often involves the state either directly taking action through the formulation and implementation of new policies or through facilitating the coordination of action by individual agents. Governmental decisions to ameliorate

the suffering of child victims, and to increase the standing of children’s rights, were only taken once empathy was felt towards them at a social level, and child victims had ceased to hold the status of other.

Conclusion

This article has argued that the image of childhood prevalent in Ireland has shifted from being one of moral threats to vulnerable, rights bearing, subjects. Initially, and for the better part of a century, children were regarded as legitimate targets for discipline and surveillance. Consequentially, child abuse was not problematised; victims were instead problematised, resulting in their incarceration in institutions where they were often re-victimised. With the impact of audience reaction media reporting of child abuse stories, in particular the Kilkenny Incest Inquiry and abuse in reform and industrial schools, Irish society was forced to re-evaluate its view of children. Empathy began to develop with the survivors of abuse, their first-hand accounts instructing us in how to feel about abuse. Strategies therefore had to be developed to ensure that their protection was guaranteed as best it could. While the strategy of presenting children as subjects and not as victims is crucial to advancing children’s rights, sometimes representing children as victims is equally important.

¹²² Annette Baier, *A Progress of Sentiments: Reflections on Hume’s Treatise* (Harvard University Press 1991) on whom Rorty relies in *Human Rights, Rationality and Sentimentality* (n 137).

Children and Child Law at Crossroads: Intersectionality, Interdisciplinary and Intertextuality as Analytical Tools for Legal Research

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Introduction

Child law is a relatively new area of law in Sweden, which has mainly been developed in recent years, after the inception of the United Nations Convention on the Rights of the Child (CRC)¹ in 1989.² There has, however, been a long tradition of engagement in the children's rights movement in Sweden,³ and Sweden was also one of the first states to ratify the Convention in 1989.⁴ The Convention is, however, neither incorporated nor self-executing in Swedish law. In fact, there were no specific legislative measures taken at the time of the ratification, as it was considered that the Swedish legislation already was compatible with the Convention – and even extended farther.⁵ After a widespread criticism leveled at the applications in different child matters, where it was questioned *inter alia* whether Sweden was meeting its obligations under the Convention, an examination of the Swedish legislation was undertaken a few years later.

This led to some of the Convention's key articles being transformed into Swedish law. It is commonly accepted, however, that treaties must be incorporated into Swedish law, in order to be applied by Swedish courts and

authorities. It means that when there is a conflict between a rule in the Convention and an explicit regulation in law, the Swedish regulation takes precedence and that it is the Swedish law and preparatory work that are the primary basis for interpretation.⁶

This is something that has prompted repeated criticism from the Committee⁷ on the Rights of the Child. The Committee has also addressed recurring criticism of the application in various child matters, e.g. concerning child poverty, how children at risk are treated differently in different municipalities and concerning the legal status of children in different law processes, including the asylum process.⁸ Following the recent criticism, the Government has appointed a commission to investigate the possibilities of incorporating the Convention, comparing experiences from other countries.⁹

The issue of incorporation has been discussed for many years in Sweden, but it seems now that there is a political majority for it.¹⁰ As mentioned, previous objections have been based for instance on the notion that Sweden already met the requirements of the

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¹ Convention on the Rights of the Child, New York, 29 November 1989, UN Doc A/Res/44/25.

² See also J Schiratzki, *Barnrättens grunder* [The Basis of Child Law] (Studentlitteratur, Lund 2010, fourth edition), pp 5 and 9.

³ Already in the beginning of the last century the Swedish author Ellen Key published the book *Barnets århundrade* [The Child's Century] (Bonniors förlag, Stockholm 1900), in which she argued for the rights of children, and when Eglantyne Jebb, the driving force in the development of children's rights, along with her sister Dorothy Buxton founded Save the Children Fund in 1919 in the United Kingdom, it only took six months before the Swedish equivalent was formed. See <http://www.savethechildren.org.uk/about-us/history> and <http://www.raddabarnen.se/om-oss/var-historia/>, accessed 9 October 2013. A year later the International Save the Children Union was founded, with the British Save the Children Fund and the Swedish Save the Children as leading members. See <http://rb.se/CategoryOverview.aspx?tagName=eglantyne%20jebb&source=http://rb.se/omraddabarnen/Pages/historia.aspx>, accessed between 27 November 2012 and 7 February 2013.

⁴ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtldsg_no=IV-11&chapter=4&lang=en.

⁵ See prop 1989/90:107 *om godkännande av FN-konventionen om barnets rättigheter* [Government's proposal, on the Consent to be Bound by the UN Convention on the Rights of the Child], particularly on pp 22 and 27 f, as well as recent evaluation made by the Government in Ds 2011:37 *Hur svensk lagstiftning och praxis överensstämmer med rättigheterna i barnkonventionen – en kartläggning* [How Swedish Law and Practice Conform to the Rights in the Convention on the Rights of the Child – A survey], p 20.

⁶ See e.g. prop 1996/97:25, *Svensk migrationspolitik i globalt perspektiv* [Government's proposal, Swedish Migration Policy in Global Perspective], p 245.

⁷ According to Article 43 in the Convention, the Committee is the monitoring body examining the realisation of the Convention in domestic law.

⁸ For the latest critique, see CRC, Concluding Observations of the Committee on the Rights of the Child: Sweden CRC/C/SWE/CO/4, 12 June 2009.

⁹ <http://www.regeringen.se/sb/d/15512/a/202475> accessed 9 October 2013. See also Dir 2013:35 *Översyn av barnets rättigheter i svensk rätt* [Committee's Terms of Reference, Review of the Rights of the Child in Swedish Law].

¹⁰ <http://unicef.se/projekt/gor-barnkonventionen-till-lag>, accessed 9 October 2013.

Convention, but also that the articles in the Convention are too weak to be directly applied by courts and authorities.¹¹

As we see it, there is a strong public discourse that Sweden is already good enough; that we are the ones leading the development and being proactive in the work with these issues.¹² This positive self-image is possibly connected with the historical background described and that the Swedish Government also has contributed in various ways to this work, but it can also be rooted in notions of the good state; meaning that the state positively is understood to have duties in relation to its citizens and that (social) rights indirectly are mediated to persons and families through authorities.¹³

Today, however, economic, political and social processes increasingly work on a global level.¹⁴ As a consequence of this, it seems the Swedish state is under transition, from the substantial welfare regimes modelled on the nation-state (“politicisation”) to new governance, anti-discrimination and individual rights claims (“juridification”). These changes have led to an emphasis on liberal freedoms and rights and ‘rule of law’, at the same time as welfare state resources in the child and family policy areas have undergone retrenchments.¹⁵

This raises questions as to what the practical importance of incorporation may be, when the legislation also is dependent on material and other conditions. Furthermore, studies in other Nordic countries show that, although incorporation may have positive effects, there are still problems.¹⁶ The question to be asked is therefore perhaps not how far we can get with incorporation, but how far we can get with law. So far,

child law scholars in Sweden have been pessimistic. Paradoxically, as with the law, it seems as if legal research has also come to a dead end. Accordingly, owing to the limitations with the traditional legal tools in the child law area, research has not progressed in the analysis of what the law is or should be, or, to be more precise: analyses have often stopped at the insoluble dilemma that legal certainty (with limited scope for interpretation) also implies limited scope for taking consideration of the best interests of the individual child. How then, do we move on?

Our aim with this article is to problematise the defining and understanding of children as well as law and legal research, using theories on intersectionality, interdisciplinary and intertextuality as analytical tools.¹⁷ Our ‘route’ starts out from the defining and understanding of children, passes through the child law area as a knowledge regime and research area and ends up with findings from our respective research and some common observations and the conclusions that we draw from this.

Intersectionality

It was early recognized that children cannot be seen as ‘one’, independent of their age and maturity. Eventually it has also become obvious that what it means to be a child also differs depending on gender, class and race etc. Intersectionality is the scientific term introduced by Kimberlé Crenshaw to address the interaction of different social divisions. This perspective, based in post-structural thinking, has its historical roots in feminism but expresses an understanding that gender does not include

¹¹ See references in note 5, above, and SOU 1997:116 Barnets bästa i främsta rummet: FN:s konvention om barnets rättigheter förverkligas i Sverige [Government Commission, The Best Interests of the Child, a Primary Consideration: The UN Convention on the Rights of the Child Implemented in Sweden], p 15, as well as discussion by the Constitutional Committee Commission of the Swedish Parliament in bet 1998/99:KU2y Konstitutionsutskottets yttrande till socialutskottet: Strategi för att förverkliga FN:s konvention om barnets rättigheter i Sverige [Committee on the Constitution, Opinion to the Committee on Health and Welfare: Strategy to implement the UN Convention on the Rights of the Child in Sweden].

¹² See e.g. prop 1989/90:107, pp 19 f, and recent rhetoric on the Government’s webpage about human rights, <http://www.manskligarattigheter.se/sv/manskliga-rattigheter-i-varlden/manskliga-rattigheter-i-svensk-utrikespolitik/samverkan-i-internationella-organisationer>, accessed 9 October 2013, as well as discussion by R Stern, M Jörnruud, Barnkonventionens status: En utvärdering av för- och nackdelar med barnkonventionen som svensk lag [The Status of the Convention on the Rights of the Child: An Assessment of Advantages and Disadvantages with Incorporation of the Convention on the Rights of the Child as Swedish Law] (UNICEF and Raoul Wallenberginstitutet, 2011), p 22, according to which Norway is best in class when it comes to the implementation of human rights documents, also available at <http://www.barnsattigheter.com/wp-content/uploads/2011/11/rapport-om-barnkonventionens-status.pdf>, accessed 9 October 2013.

¹³ See L Wennberg, ‘Exclusion of Solo Mothers in the Welfare State’ in Å Gunnarsson, E-M Svensson and M Davies (eds) *Exploiting the Limits of Law: Swedish Feminism and the Challenge to Pessimism* (Ashgate, Aldershot 2007), pp. 171-190, on p 180.

¹⁴ N Fairclough, *Analysing Discourse: Textual Analysis for Social Research* (Routledge, New York 2003, in reprint 2005), p 217.

¹⁵ See also critique by the Committee, CRC, Concluding Observations of the Committee on the Rights of the Child: Sweden CRC/C/SWE/CO/4, 12 June 2009, e.g. para 11.

¹⁶ See e.g. assessment carried out by K H Sovig, *Barnets rettigheter på barnets premisser – utfordringer i møtet mellom FN’s barnekonvensjon og norsk rett* [The Child’s Rights on the Child’s Premises – Challenges in the Meeting Between the Convention on the Rights of the Child and Norwegian Law] (Barne- og likestillingsdepartementet, 2009), on behalf of the Norwegian Government, as well as recent research by J Köhler-Olsen, *Barnets rett til selvbestemmelse i forhold til religiøse normer* [The Child’s Right to Self Determination in Relation to Religious Norms] (Institutt for offentlig retts skrifter, No 9, 2012).

¹⁷ The article builds on parts of an article previously published in Swedish by M Jacobsson, E Nilsson and L Wennberg, ‘Barnrätten som kunskapsregim och social praktik’ [Child Law as Knowledge Regime and Social Practice] in L Ryberg-Welander (ed) ‘Rätt, social utsatthet och samhälleligt ansvar: Festskrift till Anna Hollander’ [Law, Social Vulnerability and Societal Responsibility: Festschrift to Anna Hollander] (Norstedts Juridik, Stockholm 2012), pp 53–72.

one social position but many and focuses on the interaction between various power structures.¹⁸

In child law theory it has also been observed that feminist perspectives on gender relations in many ways have illuminated power relations other than those concerning gender and that there are indeed parallels between the subordination of women and children.¹⁹ The analogy between women and children is flawed, however, as children, in contrast to women, have not been able to redefine themselves as competent beings.²⁰ Children are instead considered ‘particular’, differing from the standards of ‘ideal legal subjects’, which has motivated the introduction of a ‘particular child law’ or simply exclusion from law.

In contrast to power analysis based on the asymmetric position of different groups in a hierarchical order, however, an intersectional perspective, seeks to examine the context in which the definition of groups and the separation into different (and unequal) categories becomes meaningful and a basis for the exercise of power. From this perspective, it is not only the relationship between different categories which is of interest; the question is rather how these categories are created and given meaning in specific contexts.²¹ As it appears, this is a perspective that challenges the category of the child as being ‘natural’. Instead it presumes that attitudes towards children, expectations of them, and

understandings of their capacities, are not unitary, fixed or static, but historically and culturally specific, that is socially constructed.²² The implications of this world view, and what it means for a scholar in law to embrace a social constructionist theory of law, will be discussed in the following section.

Interdisciplinary

As already stated, child law is a relatively new area of law in Sweden, which has mainly been developed in recent years. It is also during the last decade that child law has become a defined research area, after a number of theses with particular focus on the legal status of children.²³ Legal research on the status of children has, however, been conducted earlier but in those cases often as part of family law or in social welfare law.

In Sweden, the purpose of traditional legal research has been said to ‘assist case law’, i.e. to ‘generate an answer’. This has also been considered to be the purpose of jurisprudence. Accordingly, the method is considered to be the same in legal scholarship as it is in legal decision-making. Legal science is therefore usually described as a ‘normative science’.²⁴ Law, the doctrine of legal rules and their application, is nevertheless based on the idea of ‘unsituatedness’ (‘objectivity’, ‘reason’ and ‘rationality’). Hence, the law and the legal practitioner are seen as separate from political, historical and cultural contexts,

¹⁸ See K Crenshaw “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” [1989] *University of Chicago Legal Forum*, pp 139–167, particularly on p 140. See also K Crenshaw “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color” [1991] 43 *Stanford Law Review* 6, pp 1241–1299. For more recent international literature on intersectionality, see e.g. E Grabham, D Cooper, J Krishnadas, D Herman, *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish, New York 2009), N Yuval-Davis “Intersectionality and Feminist Politics” [2006] 13 *European Journal of Women’s Studies* 3, pp 193–209 and L McCall “The Complexity of Intersectionality” [2005] 30 *Journal of Women in Culture and Society* 3, pp 1771–1800.

¹⁹ As observed by Frances Olsen it may, however, also be problematic to treat women and children as a homogenous group. See F Olsen, “Children’s rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child” in P Alston, S Parker and J Seymour (eds) *Children, Rights and the Law* (Clarendon Press, Oxford, 1992, in reprint 1995), pp 192–220, on p 192 f.

²⁰ See E Nilsson, “Children Crossing Borders: On Child Perspectives in the Swedish Aliens Act and the Limits of Law” in Å Gunnarsson, E-M Svensson, M Davies, (eds) *Exploiting the Limits of Law: Swedish Feminism and the Challenge to Pessimism* (Ashgate, Aldershot 2007), pp 105–126, on pp 107 ff, with further references [Nilsson (2007a)]. It may be noted that some of the activists in the Swedish children’s rights movement mentioned above also were engaged in the women’s rights movement.

²¹ See E Nilsson “The ‘Refugee’ and the ‘Nexus’ Requirement: The Relation between Subject and Persecution in the United Nations Refugee Convention” [to be published] *Women’s Studies International Forum*, in reference to P de Los Reyes and S Gröndahl, “Introduktion: Framtidens feminism: Vägar bortom törnsoralandet” [Introduction: Future Feminisms: Roads Beyond the Land of the Sleeping Beauty] in P de Los Reyes, S Gröndahl, P Laskar, L Martinsson and T Rosenberg (eds) “Framtidens feminism: Intersektionella interventioner i den feministiska debatten” [Future Feminisms: Intersectional Interventions in the Feminist Debate] (Tankekraft Förlag, Hägersten 2007), pp 11–22, on p 14, and P de Los Reyes, “Rosengård är min Shatila, Hegemoniska berättelser och gränsöverskridande erfarenheter” [Rosengård is my Shatila, Hegemonic Narratives and Transnational Experiences] in de Los Reyes, Gröndahl, Laskar, Martinsson and Rosenberg (2007), pp 101–115, on p 102.

²² See Nilsson (2007a), pp 109 ff, with further references.

²³ See e.g. J Schiratzki, *Vårdnad och vårdnadstrister* [Custody and Custody Disputes] (Norstedts Juridik, Stockholm 1997), A Singer, *Föräldraskap i rättslig behyrning* [Parenthood in Legal Light] (Iustus förlag, Uppsala 2000), T Mattsson, *Barnet och rättsprocessen: Rättssäkerhet, integritetsskydd och autonomi i samband med beslut om tvångsvård* [The Child in Statutory Care Proceedings: Legal Security, Protection of Personal Integrity and Autonomy in Connection with Decisions on Statutory Care] (Juristförlaget, Lund 2002), L Dahlstrand, *Barns deltagande i familjerättsliga processer* [Children’s Participation in Family Law Proceedings] (Universitetstryckeriet, Uppsala 2004), R Stern, *The Child’s Right to Participation – Reality or Rhetoric?* (Universitetstryckeriet, Uppsala 2006), E Nilsson, *Barn i rättens gränsland: Om barnperspektiv vid prövning om uppehållstillstånd* [Children in the Borderland of Law: On Child Perspectives in the Determination of Granting Residence Permits] (Iustus förlag, Uppsala 2007) [Nilsson (2007b)], A Kaldahl, *Parallella processer: En rättsvetenskaplig studie av riskbedömningar i vårdnads- och LVU-mål* [Parallel Processes: A Legal Study of Risk Assessments in Custody and Child Protection Cases] (Jure Förlag, Stockholm 2010), P Leviner, *Rättsliga dilemman i socialtjänstens arbete* [The Legal Dilemmas Inherent in the Child Protection Work of the Social Services] (Jure Förlag, Stockholm 2011), M Forsman, *Rättsliga ingripanden vid föräldrars våld och övergrepp mot barn* [Legal Interventions for Child Abuse Victims] (Norstedts Juridik, Stockholm 2013).

²⁴ See Nilsson (2007b), pp 18 f, with further references.

implying loyalty to the legal system.²⁵

This is the traditional perspective, but as it presumes ‘unsituatedness’ it is, however, generally not described as a perspective. Instead, what is known as perspectives on law are perceived as being based in a position. The perspective is often on what is excluded and marginalised in law (e.g. children), while the position presumes a critical starting point.²⁶ Often, but not always, there is also a focus on unequal power relationships, aiming to change the prevailing order. In other words, the starting point is emancipatory.²⁷ In those cases, inspiration is often retrieved from feminist theory regarding power relations between women and men. Hence, within feminist legal scholarship it is accepted that power relations between men and women are also reflected in law.²⁸ From this point of view, the law does not exist in a vacuum. Instead it exists, is created and reformed, in a context.²⁹ In other words, the argument is that law and society are intertwined, and, as described, an intersectional perspective also embraces this epistemology.

Law and traditional legal doctrine, however, are based on the premise that it is possible to separate law from society and it is also common to elaborate with such a division.³⁰ This presumed separation has been defined by Eva-Maria Svensson as ‘the logic of detachment’ [‘avskiljandets logik’].³¹ From this point of view law is ‘just’ and ignores that power-relations form both law and its applications.

Furthermore, the jurisprudential starting points are often taken-for-granted within the knowledge regime. Accordingly, long descriptions of the theoretical and methodological starting points are also unusual within traditional jurisprudence,³² which means that it may, based on general scientific requirements, appear as ‘unscientific’.³³

Following from the knowledge regime and the separation is also a perception that some areas of law are considered special, particularly ‘politicised’, and hence not ‘real law’ and something ‘a real lawyer’ should be occupied

with. This is e.g. the case in areas of law that are of a pronounced ‘framework legislation’ [‘ramlag’] character, which means that it allows extensive scope for assessing the circumstances in each case, or in cases with ‘declarative regulations’ [‘portalparagrafer’] such as ‘the child’s best interests’, as in child law, or in areas of law that are lacking judicial review in the highest courts (and hence case law) or where decisions are often made by others than jurists, as in social law.

In line with this, the research subsequently conducted in child law has also often led to conclusions about law being a dead end and that it leads nowhere because of the dilemma with vague rules and flexibility versus legal certainty, i.e. ‘juridification’ presents opportunities but also limitations. This conclusion, however, also implies that a traditional (normative) jurisprudential approach is a dead end and leads nowhere.

The need for interdisciplinary approaches and bridging knowledge was recognized by Anna Hollander & Staffan Marklund within the area of family law as early as 1983. According to them, family law had changed owing to the development of the welfare society, which they defined as ‘therapeutic law’, signifying that the wording of the law had become more vague and difficult to examine.³⁴ For instance, ‘the child’s best interests’, is a term associated with something positive, values that we all share at an overall level. The question is how it is concretised and constructed by social/medical experts and jurists. According to Hollander and Marklund vague formulations like this make it difficult for legal actors to interpret its content. This makes the jurists more dependent on assessments of psychological and psychiatric expertise, which in turn has made it difficult to scrutinize the expert opinions in relation to requirements in the law.³⁵

Internationally, there is also a movement that advocates that law should be more therapeutic. According to the legal philosophy ‘therapeutic jurisprudence’ the therapeutic aims should be strengthened in the law and its

²⁵ Jacobsson, Nilsson and Wennberg (2012), p 55.

²⁶ *Ibid.*

²⁷ Nilsson (2007a), Nilsson (2007b), L Wennberg, “Exclusion of Solo Mothers in the Welfare State” in Gunnarsson, Svensson, and Davies (2007), pp 171–190, L Wennberg, *Social Security for Solo Mothers in Swedish and EU Law: on the Constructions of Normality and the Boundaries of Social Citizenship* (Iustus förlag, Uppsala 2008). See also Gunnarsson, Svensson, and Davies (2007) and Å Gunnarsson, E-M Svensson, *Genusrättsvetenskap* [Jurisprudence on Gender and Law] (Studentlitteratur, Lund 2009).

²⁸ See Nilsson (2007b), pp17 f, with references.

²⁹ Jacobsson, Nilsson and Wennberg (2012), p 56.

³⁰ See e.g. H Hydén, T Hydén, *Rättsregler: En introduktion till juridiken* [Legal Rules: An Introduction to Law] (Studentlitteratur, Lund 2011, sixth edition), pp 15 ff.

³¹ Svensson (1997), pp 53–69.

³² Svensson (1997), p 30.

³³ Jacobsson, Nilsson and Wennberg (2012), p 56.

³⁴ A Hollander, S Marklund, “Den terapeutiska rättens framväxt – om barnlagstiftningens förändringar och samhälleliga karaktär” [The Emergence of Therapeutic Law – On the Changes of Child Law and its Societal Character] [1983] 4 *Rejfaerd* 24, pp 7–29.

³⁵ S Sjöström, M Jacobsson, A Hollander “Kollegialitet, terapi och medling: Om expertmedverkan i psykiatrimål” [Collegialism, Therapy and Mediation: The Contribution of Experts in Swedish Mental Health Cases] [2002] 38 *Sociologisk forskning* 3–4, pp 86–115.

applications. This philosophy was developed in the field of mental health by David Wexler and Bruce Winick at the end of 1980s, with the aim to protect the human rights of the mentally ill. Their point of departure was that both the law and its applications should be therapeutic for the individual. Legal actors, such as lawyers and judges, should act as social forces that can affect the well-being of the patient/client. To fulfil this task a legal practitioner must fully understand the social and psychological consequences.³⁶

In Sweden, in comparison to the USA, the therapeutic perspective can be considered to be quite strong. The social welfare legislation is, for example, based on different therapeutic values and the practice of child law can to some extent be defined as therapeutic.³⁷

A prominent view within therapeutic jurisprudence is that the legal process itself can, and should, be harmless for the client. It is, however, often in difficult decisions to be taken by jurists where the starting point for the judicial review is based in a judicial logic rather than a therapeutic approach. It is also important to problematise asymmetric relationships between different subjects/actors, as vague formulations in law may allow for marginalisation, paternalism and moralisation.³⁸ This raises in turn questions in relation to the transition, described earlier, from welfare state to anti-discrimination and individual rights claims, when it comes to children as legal subjects: how is the child constructed in relation to other subjects and actors and how is the responsibility for the child placed (on the child, the parents or the society)?

In our opinion, it is therefore necessary to ask the law new questions and for there to be new approaches to the law. As we see it, the primary task for us as scholars, however, is not to 'define' and 'delimit' law, by using knowledge from other disciplines. Instead, the academic point of view would be critically to scrutinise and problematise the law; how it is constructed (the values, notions and other premises that it is based upon), why it is constructed that way (causes) and what implications

(consequences) this has (for children, e.g.). But above all, it would be about scrutinising and problematising the law as a knowledge regime (as well as other knowledge regimes) and our own importance as research subjects when we reproduce or produce new knowledge.³⁹ To do so requires other theoretical and methodological tools than the traditional, but also an epistemological framework for understanding knowledge and how to make use of bridging knowledge in a theoretically consistent manner.

Intertextuality

In recent years, discourse analysis, which with inspiration from Foucault⁴⁰ primarily was developed among sociologists and within language and cultural studies, also has emerged as a useful method in the analysis of legal texts.⁴¹ In discourse analysis, theory and method are intertwined in a theoretical and methodological totality, building on social constructionist theory. Within discourse theory, however, there is not one single approach but a series of interdisciplinary and multidisciplinary approaches. Furthermore, there is no consensus on what discourses are or how to analyse them.⁴² Some of these include detailed linguistic analysis; some do not.⁴³

In discourse analysis it is generally believed that social structures define what is possible; texts, being part of social events, constitute what is actual; and the relationship between potential and actual is mediated by social practices. One consequence of this for a discourse analytical method is that texts are analysed as elements of social events.⁴⁴ Discursive acts or symbolic practices are understood as being embedded in other discursive acts or symbolic practices and so forth. As a result of this, the aim must be an analytic balance between text and context. In simplified terms, discourse is understood as 'text in context'. Texts and discourses are not seen as being isolated in space. It is rather the case that individual texts always relate to past or present texts, which can be

³⁶ See e.g. D Wexler, B Winick, J Bruce, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, Durham, North Carolina 2003), pp 3–10.

³⁷ M Jacobsson, *Terapeutens rätt: rättslig och terapeutisk logik i domstolsförhandlingar* [The Therapist's Rights: Judicial and Therapeutic Logic in Court Hearings in relation to Coercive Intervention] (Studier i socialt arbete vid Umeå universitet: avhandlings- och skriftserie, No. 52, 2006) [Jacobsson (2006a)], S Sjöström, *Party or Patient? Discursive Practices Relating to Coersion in Psychiatric and Legal Settings* (Boréa bokförlag, Umeå 1997).

³⁸ Jacobsson, Nilsson and Wennberg (2012), p 58 f.

³⁹ Jacobsson, Nilsson and Wennberg (2012), p 60. See also Nilsson (2007a), pp 110 and 121, with further references.

⁴⁰ M Foucault, *Vetandets arkeologi* [The Archaeology of Knowledge] (Arkiv förlag, Lund 2002) [Swedish translation of *L'Archéologie du savoir*, Gallimard, Paris 1969].

⁴¹ U Andersson, *Hans (ord) eller hennes? En könsteoretisk analys av straffrättsligt skydd mot sexuella övergrepp* [His (Word) or Hers? A Gender Theoretical Analysis of Criminal Protection against Sexual Abuse] (Bokbox förlag, Lund 2004), M Burman, *Straffrätt och mäns våld mot kvinnor – om straffrättens förmåga att producera jämställdhet* [Criminal Law and Men's Violence against Women – The Ability of Criminal Law to Produce Gender Equality] (Iustus förlag, Uppsala 2007), Nilsson (2007a), C Ulander-Wänman, *Företrädesrätt till återanställning* [Priority Right to Re-Employment] (Iustus förlag, Uppsala 2008), Wennberg (2008).

⁴² M Winther Jørgensen, L Phillips, *Diskursanalys som teori och metod* [Discourse Analysis as Theory and Method] (Studentlitteratur, Lund 2000), p 7.

⁴³ Fairclough (2003), p 2.

⁴⁴ Wennberg (2008), p 41, with reference to Fairclough (2003), p 223.

characterised as intertextuality.⁴⁵ Discourse analysers claim that discursive changes are taking place when conceptual elements are articulated in new ways.⁴⁶

Discourse analysis can e.g. be used to get an understanding of how the legal subject is positioned and constructed, which affects the interaction between various subjects, such as the relationship between the child and its parents as well as the professional actors. In discourse analysis it is problematised that certain discourses, or ways of representing the world, is assigned a level of truth or common sense, something that raises questions about power relations as some of these representations seem to have an oppressive or restrictive effect on certain groups in society.⁴⁷ In our opinion, this is particularly the case with legal discourses, owing to their privileged status among social discourses in that they have state power behind them.⁴⁸ In the following, we will give some examples from our respective research of how discourse analysis can be used as a tool to critically scrutinize and problematize law and legal practices.

In the asylum determination process, there are rules contained in The Aliens Act (SFS 2005:716) [Utlänningslag] about 'the child's best interests' and 'hearing children in the course of proceedings', which are based on Articles 3 and 12 respectively, in the CRC. These rules were transferred into the law in 1997, with the intent to implement the spirit and intentions of the Convention. In the preparatory work it was established that children's particular liability and needs in many ways justifies special treatment in relation to adults. It was pointed out at the same time, however, that children have a good life in Sweden and that many children in other countries, particularly in the poor ones, in one sense would have a better life if they came here. The determination of 'the child's best interests' cannot, the Government stressed, reach so far that it basically becomes a separate criterion for a residence permit to be a child. It would in such case be tempting to exploit children when there is a strong desire to reside here without having adequate reasons for protection. One element of this is when children are hidden and when several new applications are submitted so that the asylum process is prolonged or when the identity is withheld. In these cases there is a burden of expectations and responsibilities placed on the child,

which is unlikely to be consistent with its best interests. The most tragic situation, the Government concluded, is when children without grounds for asylum are sent off to find themselves a better future in a strange country without their parents, with or without the intention that they may later be reunited in the new country.⁴⁹

These statements in the preparatory work epitomise the dominant discourses available to asylum-seeking children in the current rules, i.e. as passive and will-less objects, used by their parents in order to obtain a residence permit where the application is unfounded to begin with. In other words, children are understood as innocent victims, in contrast to their parents who are understood as bogus, luck-seeking and harmful for their children. In both these categories, understandings of age, ethnicity and class are embedded. It is interesting that – in these cases – it is constructed as more important to protect the child from being used by their parents in the asylum determination process, than from the abuse that the asylum is intended to protect in the first place. The consequence being that the child in reality bears the responsibility for its parents 'immorality' and that it thus does not get the protection children are entitled to under the CRC; a determination that takes into account that it concerns a child, i.e. a child sensitive determination (cf. 'a separate criterion').

Cynically, the only deviant discourse in the preparatory work regarding the relationship between children and parents (where parents are not construed as harmful for their children) is associated with a forced return. In this case, parents are instead presumed to be well able to support their children.⁵⁰

Another example concerning children that reflect how discourse analysis can be used to get an understanding of how the legal subject is positioned and constructed, which affects the interaction between various subjects, is discourses on unaccompanied asylum-seeking children coming to Sweden. A debate on the level of truth of the age these children have declared when entering into Sweden – mostly boys coming from Afghanistan, Iraq and Somalia – has resulted in medical tests to prove their age. Such tests have been criticised⁵¹ and can be questioned in the light of the human right to integrity.

⁴⁵ Wennberg (2008), p 42, with reference to R Wodak, G Weiss, "Analyzing European Union Discourses: Theories and Applications" in R Wodak, P Chilton (eds) *A New Agenda in (Critical) Discourse Analysis: Theory, Methodology and Interdisciplinarity* (John Benjamin Publishing Company, Philadelphia PA 2005), pp 121-135, on p 127.

⁴⁶ Wennberg (2008), p 42, with reference to Winther Jørgensen and Phillips (2000), pp 80–81.

⁴⁷ V Burr, *An Introduction to Social Constructionism* (Routledge, London 1995), p 15.

⁴⁸ See also J Niemi-Kiesiläinen, P Hunkatukia, M Ruuskanen, "Legal Texts as Discourses" in Gunnarsson, Svensson and Davies (2007), pp 69-97, on p 84, C Smart, *Feminism and the Power of Law* (Routledge, London 1989), pp 9 ff, 81, and discussion by Burr (1995), p 55.

⁴⁹ Prop 1996/97:25, p 246.

⁵⁰ Nilsson (2007b), p 90.

⁵¹ <http://avpixlat.info/2013/06/23/socialstyrelsen-kritiserar-migrationsverkets-aldersbestamningar-av-ensamkommande/>, accessed 9 October 2013.

The division of responsibility among the different actors on state and municipality levels for the reception of unaccompanied children, and the financial burden for the reception, has been expressed to constitute a derogation of the municipality's autonomy in relation to the state. The lack of political will to accept unaccompanied children in many municipalities has resulted in an official inquiry⁵² that has proposed a new regulation that could be used by the state to force an unwilling municipality to accept the reception of unaccompanied children.

Moreover, healthcare for undocumented migrants represents another pronounced discourse that affects the relationship between the child and its parents as well as the professional actors.⁵³ Until recently, there has been no right to healthcare for undocumented persons in Swedish law. A new Act on Health Care to some Foreigners who Reside in Sweden Without the Necessary Permits (SFS 2013:407) [Lag om hälso- och sjukvård till vissa utlänningar som vistas i Sverige utan nödvändiga tillstånd] governs the county council's obligation to offer people staying in Sweden without the necessary permits health care, including dental care. The reform means that the county will be required to offer to adults residing in the country without a permit the same subsidised healthcare as adult asylum seekers, i.e. care that cannot be deferred, including dental care, maternity care, contraceptive counselling, care for abortion and a medical examination. County councils should additionally be able to provide care to the same level as for residents. Children staying in the country without permission are offered the same care as residents and asylum-seeking children, i.e. subsidised comprehensive health care including regular dental care.

These examples show how social rights for all children and their parents in the Swedish jurisdiction are a contested issue which also has been commented on and of concern in the CRC conclusions about Sweden.⁵⁴ The examples also make visible how power relations between different actors can have an oppressive and restrictive effect on certain groups of children and families in society.

A further example of how law could be considered as a text in a context is retrieved from oral court hearings in relation to The Care of Alcoholics, Drug Abusers and Abusers of Volatile Solvents Special Provisions Act (SFS 1988:870) [Lag om vård av missbrukare i vissa fall]. The

Act is one of the laws that are based on therapeutic values. According to the legislation the court should i.e. take into account if the person 'runs an obvious risk of destroying his or her life' [our translation] (4 Section 2b §). These are values that are difficult for both experts and the court to consider. Most of us run a risk to destroy our life in one or another way, but when is it time for coercive care? The oral court hearing can be seen as a discursive practice where the criteria in the law (the text) should be interpreted. Owing to the fact that the criteria in the law are vague, the judge and the jurors cannot only look at 'hard facts'. There is an obvious risk that the actors in this discursive practice are guided by moral values. One of the interviewed judges in the study expressed for instance that 'addict abusers in general are in denial' and that they 'always blame the social welfare if they haven't been helped'. The judge also talks about the importance of 'common sense' in relation to court decisions:

It's a kind of common sense /.../ we can't just listen to their words, so to speak. Behind every word we have the opportunity to make our own valuations /.../ we are often very surprised when the person sitting [private parties] there seems to be "an ordinary citizen" [as any Smith]. Many drug users look completely unaffected. They are mainly young, up to twenty-five years old. Many have used drugs for years but it does not seem to appear on them. Before the hearing they have made a break of a few weeks. Most often they are sitting there dressed up, just like ordinary people. It is causing problem many times. It has happened quite often that the jurors do not see anything. Then I have to go in and try to explain the whys and why it is as it is. Not to convince directly but [our translation].⁵⁵

One problem with the judge's approach is that common sense is, to a greater extent, based on moral values rather than legal arguments. These moral values (mainly based on class), which he supposedly shares with other members in society can have a great impact on how he will judge in judicial matters related to drinking behaviour and addictive people. The moral context in which the law is interpreted can in these cases be of great importance.

Another example where moral values seem to

⁵² SOU 2011:64 Asylsökande ensamkommande barn: En översyn av mottagandet [Government Commission, Unaccompanied Asylum Seeking Children: An Overview of Reception Conditions].

⁵³ SOU 2011:48 Vård efter behov och på lika villkor – en mänsklig rättighet. Betänkande av Utredningen om vård för papperslösa m.fl. [Government Commission, Health Care related to need and on equal terms – A Human Right. Report of the Inquiry on Health Care for Undocumented Persons and Others].

⁵⁴ CRC, Concluding Observations of the Committee on the Rights of the Child: Sweden CRC/C/SWE/CO/4, 12 June 2009, para 60.

⁵⁵ SOU 2004:3 Tvång och förändring – Rättssäkerhet, vårdens innehåll och eftervård [Government Commission, Coercion and Change – Legal Certainty, the Content of Health Care and Aftercare], p 98.

influence the court's decision making is in relation to compulsory care of children and youths in accordance with The Care of Young Persons Special Provisions Act (SFS 1990:52) [Lag med särskilda bestämmelser om vård av unga]. Both in oral court hearings and written investigations by social services we found moral values based on gender (and class). Drinking and socialising with the opposite sex seems, for instance, to be a risk behaviour that is more problematic for girls than boys.

These examples express moral values that are common, not only in these court hearings. It is instead ideological beliefs that are situated in our time, at least in the Swedish historical and cultural context. Ideological beliefs in these cases become power factors that can be imposed on children and their families. It is interesting to notice that moral values based on how addicts and youths behave seem to be more important than to discuss 'the child's best interests' or the those of the addicted. If arguments in the court hearings are based on moral values about people's behaviour instead of trying to find out what is in the best interests of the person it affects, it is hard for the child or its family to get their voices heard.

The common observations that we have made, on the basis of our respective research and the earlier theories referred to, is that 'globalisation' and the transition of the Swedish welfare state implies that children's social rights (how children are included or excluded) need to be studied and understood in interaction with different discursive and social practices. Moreover, a child perspective and child law imply that the 'the logic of detachment' between different areas of law, such as social law, administrative law, family law, migration law and discrimination law, is challenged.

The social rights of children, including the migrating child's, also imply that Swedish law need to be problematised and analysed in the light of international law, and the different logics that the welfare state and 'the rule of law' is based upon.

We also note that the law is dependent on other skills such as medicine and social work. This can lead to 'confusion of languages' between the various professions; the therapeutic logic is not able to communicate with the legal and vice versa, and as a result, practitioners either reject or adopt the therapeutic assessment, without scrutinising it, as the skills to understand the other logic is missing. If the expert knowledge is not critically examined, it risks allowing for a different logic from the therapeutic, such as a moralising or disciplining and

normalising logic.⁵⁶ These issues in turn raise the question of the power of the different actors in the process, and the possibility of counter-power of the legal subjects that are subjected to assessment.⁵⁷

The Future of Child Law Research

As we have argued in a previously published article about the child law knowledge regime (see reference in note 15, above), we do not want to make claims of what the future child law research should or will engage in.⁵⁸ What we do hope is that it should not be limited to "defining" and "delimiting".

Although we embrace incorporation, in our opinion, "juridification" is not the solution to problems that concern children and their legal relations. As argued in this article, problems will always remain. To start with, there is the insoluble dilemma of legal certainty versus flexibility. In this article we have shown that there is also the dilemma of autonomy versus protection. Hence, when children are made subjects of law it also poses problems, because of this basis in liberal thinking about autonomous subjects, with the consequence that children often end up as subjects of responsibility, although they are supposed to be subjects of protection. In our opinion, however, "politicisation" is not the solution either, as children and their interests might not be able to assert themselves in relation to other interests in this case.

The conclusion we draw is that there will always be problems related to the "particularities" of children and child law. We therefore consider that it is essential that we acknowledge the need for bridging knowledge in this field of law and for theoretical and methodological development.

In this article we have used discourse analysis to reveal how unequal power relations are reflected in law and legal practices. We believe that this is a critical approach to law that contributes to new and important knowledge. It is our hope that it in turn may lead to the development of "a child perspective" that serves children, which again raises questions about the meaning of "the child's best interests": what it means and who has the power to define it. Also in this case, we believe that there is a need for an alternative to a traditional (normative) approach and that it is important that we as researching subjects problematize and critically reflect on our own point of departure and significance as research subjects when we produce new knowledge.

⁵⁶ M Jacobsson, "En ritual som ger tyngd – om muntliga förhandlingar i mål om tvångsvård" [Oral Court Hearings as Rituals; In Cases of Coercive Interventions] in O Grape et al (eds) *Organisation och omvärld – nyinstitutionell analys av människobehandlande organisationer* [Organisation and Society – New Institutional Analysis of Human Service Organisations] (Studentlitteratur, Lund 2006) [Jacobsson (2006b)], pp 119-146.

⁵⁷ Jacobsson, Nilsson and Wennberg (2012), p 67.

⁵⁸ For a discussion of problems in the use of future metaphors, see de Los Reyes and Gröndahl (2007), p 22.

The child perspective in legal research

Trude Haugli* and Lena R. L. Bendiksen**

1. Introduction¹

It has become more common over the years for researchers to claim to have a child perspective, although it is not quite clear what this means. It seems to be positively charged, politically correct and not to be criticised if one claims that the research is based on a child perspective. As a rhetorical strategy this indicates that the researcher is supportive or positive towards children, as opposed to the stance of scientists, who do not explicitly take this perspective. If something appears to be politically correct and not to be criticised, it requires in particular a further investigation of the phenomenon. This analysis is intended to contribute to an increased awareness of the term 'child perspective'.

(In this paper, we distinguish the concepts 'child perspective' from the concept 'the child's perspective', the latter meaning the view as it is expressed by a child. The meaning of the former is what we are searching for in this paper. In Norwegian, these two concepts may be expressed with the same term, 'barneperspektivet', which makes it rather difficult to identify the meaning intended by its application.)

Our interest in the issue was reinforced when we in a group of five - two lawyers, two pedagogues and a sociologist, all with doctoral degrees in child welfare/child protection studies - attempted to make a proposal for a multidisciplinary research project, based on a child perspective. We discovered that the same formulations often had different meanings across the disciplines. This may cause misunderstanding and confusion, which is significant if the aim is to cooperate and to understand one another's research across disciplines. We realized the importance of clarifying what the child perspective or child's perspective is, or is not, and initiated a multidisciplinary dialogue on child perspective as a research perspective. Our purpose was not to agree on a definition, but to bring out the nuances and various

assumptions that were built into the meanings of this concept as it was applied in different disciplines. We wanted to analyse the many facets of a child perspective.

As a research perspective, the child perspective has especially developed through social science research. Even there, however, it lacks a unique content. The understanding will depend on the theories, directions and methodologies within which the work is carried out. Although we focus on the child perspective in a legal context in this paper, the work is rooted in interdisciplinary cooperation, and the structure and methodology of the paper is influenced by discussions with social scientists.

The theme and purpose of the paper are:

- 1 To discuss what a scientist refers to when s/he claims to adopt a child perspective in his or her legal research. We presume that this could have an impact on four conditions: (a) the choice of topic, (b) the purpose of the study, (c) the choice of methodology, and (d) the issue of children's participation in the study.
- 2 To illustrate how the concept 'child perspective' is used with a strongly fluctuating meaning in legal research.

In Norway, 'child law' is a relatively new research area where all questions concerning the child's legal status are included. The purpose of defining child law as a specific area is to try to improve the position of the child in law and in reality.

When our study took place in 2010, eight doctoral dissertations on child law were available. Those dissertations constituted our research material, in addition to two selected articles. The authors of four of the theses explicitly claimed to have a child perspective.² These theses are analysed in order to assess whether their child perspective may be identified by: (a) the choice of topic, (b) the purpose of the

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¹ This article is substantially based on a co-authored article published in Norwegian in *Retfærd – Nordic Journal of Law and Justice*, 2011, under the title: 'Barneperspektivet i rettsvitenskapelig forskning'. (*Retfærd* 34. Årgang 2011 nr. 4/135 pg. 79-100). This English version is adapted for present purposes by Trude Haugli. For readers who understand Scandinavian languages, we refer to the article mentioned for more details and for references to literature in Scandinavian.

² Kirsten Sandberg, *Tilbakeføring av barn etter omsorgsovertakelse*, (Revocation of a care order) Oslo 2003; Sandberg claims to have both a child perspective and a women's perspective, page 32; Elisabeth Gording Stang, *Det er barnets sak. Barnets rettsstilling i sak om hjelpetiltak etter barnevernloven* § 4-4 (It is the case of the child. The child's legal position in cases regarding assistance for children and families with children) Oslo 2007; Lena R.L. Bendiksen, *Barn i langvarige fosterhjemsplasseringer*, (Children in long term foster-care) Bergen 2008; Ragnhild Collin-Hansen, *Barns rett til opplæring og til vern mot marginalisering i skolen*, (Children's right to education and to be protected against marginalism at school) Universitetet i Bergen 2008. Collin-Hansen claims to make her analysis from both a child perspective and a system-perspective, page 94-95.

study, (c) the choice of methodology, and (d) the issue of children's participation in the study. To assess whether these works differ from the other theses in child law, those without an explicit child perspective, we compared these works with the remaining four theses.³ Toward the end of this paper, we illustrate by examples from two scientific articles how scientists themselves use, explain and understand the concept of child perspective, this not being limited to the child perspective as a researcher's perspective.⁴ The two articles are analysed with the aforementioned questions as a background, however not as a limitation of the discussion. Finally, we review our material and state our conclusions on the basis of the findings we have made.

The term 'perspective' refers to a particular way of thinking of something, often as the way something will appear from a specific place. From a linguistic understanding, a child perspective should then mean the way that something will appear from the child's position. The question is whether this is what the term means when scientists refer to it, and whether this makes sense or whether there are other meanings of the term in legal science.

2. Theses with an explicit child perspective

2.1. Topic, purpose, methodology and children's participation

2.1.1 Topic

Kirsten Sandberg was the first explicitly to state that there was a child perspective in her research in her doctoral dissertation of 2003.⁵ Sandberg's theme is the rejection of state care and return to parental upbringing through the provisions of the Child Welfare Act (bvl.) sec. 4-21.⁶ The theme is central in Norwegian child protection legislation. Sandberg also

places her subject as part of special administrative law and as a part of social welfare law. Elisabeth Gording Stang and Lena R. L. Bendiksen also make use of the term child perspective in their dissertations, both published in 2007.⁷ Like Sandberg, both deal with key issues in child welfare law – respectively, support measures according to sec. 4-4 and deprivation of parental responsibility and adoption according to sec. § 4-20. The fourth researcher who explicitly refers to a child perspective is Ragnhild Collin-Hansen in her thesis from 2008.⁸ She discusses children's right to education and the right to protection against marginalisation in schools, focusing on school, home and child care responsibilities.

Thematically, all four theses deal with questions within the core area of child law, and all are fully or partially linked to the most central Norwegian legislation regarding children's rights: the Child Welfare Act and the Children Act.⁹

2.1.2 Purpose

All four researchers aim to illuminate issues concerning children's legal status.

Sandberg claims that her mission is to contribute to the clarification and improvement of the grounds for decision making in revocation of a care order, and in coercion in child welfare questions more generally, and to contribute to the development of legal theory within child law.¹⁰ Stang determines that one of the purposes of her work is to investigate, analyse and assess the child's legal status when the child is in need of supportive measures from the child welfare system, with the aim of helping to improve such provision.¹¹ This is a similar formulation to what is considered to be the purpose of child law as a separate legal area.

Bendiksen aims at providing a legal analysis of issues related to how parents may exercise their parental responsibility when the child is in foster-care,

³ Lucy Smith, *Foreldremyndighet og barnerett*, (Parental responsibility and child law) Oslo 1980; Trude Haugli, *Samværsrett i barnevernssaker*, (Right to access when children are in foster care) Oslo 1998; Mons Oppedal, *Akutthjemlene i barnevernloven*, (Interim orders in emergencies) Oslo 2008; Torunn Elise Kvisberg, *Internasjonale barnefordelingssaker. Internasjonal barne bortføring*, (International child custody-cases. International child abduction) Oslo 2009.

⁴ Elisabeth Gording Stang, 'Rett til returvern og rehabilitering etter FN's barnekonvensjon for mindreårige asylsøkere utsatt for tortur, umenneskelig eller nedverdiggende behandling', (The right to be protected against expulsion and the right to rehabilitation according to the CNCRC for minor asylum seekers subjected to torture, inhuman or degrading treatment) *Kontur* nr. 15 2009. Karl Harald Sovig, 'Barnets rettigheter på barnets premisser - utfordringer i møtet mellom FN's barnekonvensjon og norsk rett.' En utredning gjort på oppdrag fra Barne- og likestillingsdepartementet. (Rights of the child on the child's terms - challenges in the meeting of the UNCRC and Norwegian law. A study on behalf of the Ministry of Children and Equality. *Det juridiske fakultets skriftserie*, UiB nr. 115 2009 - (UJURS-2009-115).

⁵ Kirsten Sandberg, *Tilbakeføring av barn etter omsorgsovertakelse*, (Revocation of a care order) Oslo 2003

⁶ Act relating to child welfare services [Child Welfare Act]. <http://www.regjeringen.no/en/doc/Laws/Acts/The-Child-Welfare-Act.html?id=448398>

⁷ Elisabeth Gording Stang, *Det er barnets sak. Barnets rettsstilling i sak om hjelpetiltak etter barnevernloven § 4-4* (It is the case of the child. The child's legal position in cases regarding assistance for children and families with children) Oslo 2007; Lena R.L. Bendiksen, *Barn i langvarige fosterhjemsplasseringer*, (Children in long term foster-care) Bergen 2008

⁸ Ragnhild Collin-Hansen, *Barns rett til opplæring og til vern mot marginalisering i skolen*, (Children's right to education and to be protected against marginalism at school) Universitetet i Bergen 2008.

⁹ Act relating to Children and Parents. [The Children Act]. <http://www.regjeringen.no/en/doc/Laws/Acts/The-Children-Act.html>*

¹⁰ K Sandberg (2003) pp. 24- 25.

¹¹ E G Stang (2007) p. 19.

the rules on deprivation of parental responsibility, and adoption as a child protection measure.¹² Her intention is to analyse current law and to generate a normative discussion of these rulings for the sake of the best interests of the child.¹³ She also maintains that the work is rooted in child law, which requires and entails that children's interests and needs are the main focus for her reasoning.¹⁴

Collin-Hansen's main research question is: How suitable are the legal mechanisms that govern the school, the home and the child welfare service responsible for the child's education, both individually and collectively, for ensuring that the child's right and duty to education is realised and to prevent the child from being marginalised at school?¹⁵ She says that her purpose is to analyse how children's interests have been, and are being, balanced in the meeting point between the forces that work to strengthen children's rights and the mechanisms to combat such strengthening. Collin-Hansen shows that it is necessary to understand societal conditions in order to strengthen the child's legal position.¹⁶

They all have a purpose to discuss the child's legal status, and they all have a desire that the work will lead to improvement in this field.

2.1.3 Methodology

The choices of method and methodology used in the work have many similarities. They all make analyses of current law, and they all discuss and consider possible changes. However, all have ambitions beyond analysing current law, as the researcher's role is different from the role of a judge. The work reflects this, among other things, by focusing on the history, core values and considerations, and more general legal norms. See, for example, Sandberg's chapters on different principles, Stang's emphasis on the core values upon which her work is based and that the child should be the focus, Bendiksen's chapter on children's basic right to adequate care and protection of family life and the chapter on overarching legal norms, and Collin-Hansen's thorough historical review.

A methodological aspect is that three of the authors have included empirical studies, and further empirical evidence is used to describe 'law in action'. Sandberg makes use of her examination of judgments and expert reports from custody-cases; Stang utilises findings from her own empirical study of cases from two child welfare offices; and Bendiksen makes use of her investigation of

practice from the county social welfare board. Another methodological aspect is that the researchers utilise the results of research from other disciplines, especially social science research. Sandberg has a chapter on psychological perspective, including blood ties, continuity and stability in the child care context. Stang has made use of social science research on the practice of support-measures, and Bendiksen has involved research into how children grow up under various conditions. Collin-Hansen has analysed issues of importance for successful schooling of children.

2.1.4 The participation of children

Within the methodology of legal research, there is no expectation of children's participation. This applies both to the design of the study and the nature of the informant. Children were not participants in any of the four dissertations. None of the researchers talked to the children included in their material, nor did they conduct surveys including the voices of the children. This has to do with methodology, as it can hardly be argued that a legal researcher must master the tools and the methods necessary to allow children to participate directly in a study. Despite this finding, Sandberg, Stang and Bendiksen all found it necessary to some extent to justify and excuse the fact that the children's voices were not included in their work.

One of these pieces of work differs somewhat in this context. To a greater extent than the others, Elisabeth Gording Stang has attempted to allow children to participate more directly in her work. She notes that, although she initially had a desire to interview children who had been in contact with the child welfare authorities, she did not find it possible within the framework of the project. The children's thoughts and wishes were available only from the files. To compensate for the lack of conversations with the children involved Stang attempts to include what she calls the 'child's voice' in her presentation, although these are not the voices of the same children that the material covered.¹⁷ She describes how she includes the voice of the child:

Where I have come across literature that refers directly to children's own experiences, texts and thoughts when facing the child welfare system, I have tried to include these as illustrations and arguments. I have also from time to time asked myself: Which opinion would a child have in response to this question? By repeatedly asking such

¹² Lena R.L. Bendiksen, *Barn i langvarige fosterhjems plasseringer*, (Children in long term foster-care) Bergen 2008.

¹³ L. R. L. Bendiksen, above, pp. 35-36.

¹⁴ L. R. L. Bendiksen, above, p. 77.

¹⁵ R. Collin-Hansen (2008) p. 17.

¹⁶ R. Collin-Hansen, above, p. 41.

¹⁷ E. G. Stang (2007) pp. 94-95.

questions, I tried to force myself to be more aware of the perspective I have at any given time. In addition, I have to some extent made use of my own children's statements. The goal has been to provide some small insight into how children think.¹⁸ (The present writer's translation).

Her intention is good. However, does her attempt to include children make the thesis more 'child friendly', and are there questionable methodological aspects in how Stang makes use of the voice of the child? It is difficult to see the impact that this inclusion of children may have on the legal analysis, and questions on verification and documentation may also be raised.

2.2 The researchers' own assessment of the importance of the child perspective

We have provided an overview of the topic, purpose, method and participation of children in scientific work with an explicit child perspective. In addition, it may be interesting to see how the researchers themselves justify the choice of this perspective, and finally what they say about the meaning of the perspective.

Sandberg gives several reasons for her desire to adopt a child perspective in her thesis.¹⁹ Firstly, the interests of the child are set forth as the fundamental considerations upon which the central legislation on children's rights and especially the United Nations Convention on the Rights of the Child (UNCRC) are built. The issues that she treats concern the child's situation and future. Although the questions are also important to the parents and foster parents, the child is the central character. Sandberg emphasizes further that the child is the weakest and most vulnerable of persons, and that the matter of adult perspective is addressed through the legal focus of the rule of law, in that those who make decisions are adults, that the public and politicians are adults, who easily identify with the parents' situation, and through the media's treatment of such cases. Hence, Sandberg says that the child perspective means in this context that one should try to see the questions from the child's point of view with empathy in the child's situation.²⁰

She refers to the child's perspective in social science research, where central elements are how to listen to children's voices, trying to see the world as it appears to the children and being responsive to the children as participants. Sandberg, however, makes certain reservations, as there is a limitation in the legal methodology and research. She states that such research

is based on the study of documents, and she has not tried to collect the children's views on various issues. The legal language implies a distance which can lead to the result moving away from the child as a person. Her 'child perspective' is not the same as in social science; it is in a more subdued form. She will try to see the questions from the child's point of view and with empathy for the child's situation.

Stang has several arguments for her child perspective: this perspective has been oppressed historically; it is important for children that someone is on their side, pleading their case; and, first and foremost, that the child's perspective provides the best opportunity to reach appropriate child law provision.²¹ According to Stang, to have a child perspective makes it possible to adjust law to the life of the child and to how children themselves experience and communicate their reality.

Stang assumes that a child's perspective involves seeing something from a child's point of view. This means that the child must remain in the focus of the methodology, analysis and reviews, and even more that the text must be related to and influenced by the child and the child's reality. Stang tries to get closer to the child perspective by using examples from fiction and other researchers' work and by forming questions to put to her own children. She further describes different types of child perspectives. If one tries to discover the child's own perspective, this requires that the child's own thoughts and feelings be expressed directly or indirectly in the text. She refers to this as inside perspective. Referring to women's studies, she describes a perspective in which one examines the position of women through empirical methods and then examines how law affects women's lives. Her conclusion is that the combination of seeking the thoughts of the child and examining how law affects children is what she calls a child perspective. In her work, she tries to include children's own thoughts and experiences in relation to child protection as far as possible without talking to the children that her material covers. To compensate for the missing conversations with the children involved, she tries to show us what she calls the children's voice, even if this is not the voice of the children that her material covered. This means that her child perspective implies that some children's voices should be visible in the work without it being clear what impact these voices should be given in the analysis.

Finally, Stang claims that the child perspective in her work implies that concern for the child takes precedence over other considerations where there is conflict between

¹⁸ E G Stang, above, p. 95.

¹⁹ K Sandberg (2003) pp. 31- 32.

²⁰ K Sandberg, above, p. 32.

²¹ E G Stang (2007) pp. 86-95.

the child and such other considerations, both in terms of specific legal interpretation, issues of statutory rights/entitlements, and legal policy discussions

Bendiksen assumes that a child perspective linguistically means that the theme is discussed from the child's perspective, that is, on the child's terms, reality, wishes and needs. As her work is based on a study of various documents, as well as on discussions and reviews of various legal sources, no children were consulted and children's views are thus not directly reflected in her work. Bendiksen maintains nonetheless that her work is based on a child perspective, although '... an adult's perspective on a universal and abstract child'. Bendiksen admits that the chosen perspective can lead to regard the child as an icon and that it does not show children the respect and participation to which they are entitled as a group or as individuals. She adds that, in her doctoral work, it was neither practical nor methodologically possible to determine children's perspective directly. She argues, however, that, as she claims that her work is rooted in child law research, this requires and implies that reasoning from the children's interests and needs is essential. This implies that her own view on children is significant. Hence, as she claims to have a child perspective, the consequence is that, as a researcher and when she says that her focus is the interests and needs of children, she includes her knowledge about children. In a footnote she adds that her perspective rather should be named 'a child law perspective'.²²

When Collin Hansen analyses regulations aimed to ensure the child's right to education and to prevent children from marginalisation at school, she chooses two perspectives, a child perspective and a system perspective.

To analyse legislation from a child perspective is to examine whether it is constructed so that it is suitable to protect all children against marginalisation in school. The child's legal position must be a central focus. (The present writer's translation).²³

The child's legal position is thus central. According to Collin-Hansen, this implies that the child is recognised as a subject and not as someone's property. Since the question is what it means to analyse legislation from a child perspective, one can assume that this refers to her position as a researcher, that she recognises the child in this way, and not that the law or the community should do this. As she proceeds, she says that the right to be

heard is part of a child perspective. However, it is not the right to be heard by the researcher to which she is referring.

Her research questions are formed to identify the child's legal position, and she asks critical questions about how the interests of children are ensured by the legislation.

3. Theses without an explicit child perspective – comparison

3.1 Introduction - comparison basis

In the previous section, four theses have been examined in which the researchers explicitly claim to have a child perspective. As shown, however, it is difficult to identify the specific meanings of such a perspective. Therefore a further four doctoral theses have been looked into – those without an explicit child perspective - to see if differences could be identified.²⁴

For this analysis, works were chosen that affect key aspects of children's legal position regardless of whether the researchers identify themselves as child law researchers. Work concerning children where the researchers explicitly placed their work within studies of women's rights have been omitted, such as, for example, Brækhus and Vigerust.²⁵ Also excluded are works where children are affected, but where the child's legal position was not the subject. The four theses below were those which remained.

The first was Lucy Smith's 'Parental authority and children's rights', which referred to the legal relationship between parent and child and to such themes as parental authority, government intervention therein, and the treatment of child custody and visitation rights. Secondly, Trude Haugli's thesis about the right to contact between children and parents when the child is in foster care, thirdly Mons Oppedal's on acute intervention from the child welfare authorities, and Torunn Elise Kvisberg's work on international child custody disputes and international child abduction.

3.2 Topic, purpose, methodology and children's participation

3.2.1 Topic

The topics are already articulated in the subject matter mentioned, and all topics are closely linked to children's legal status. Smith handled the legal relationship between parent and child. Haugli and Oppedal discussed central

²² L R L Bendiksen (2007) footnote 144, pp. 77.

²³ R Collin Hansen (2008) p. 95.

²⁴ Lucy Smith, *Foreldremyndighet og barnevern*, (Parental responsibility and child law) Oslo 1980; Trude Haugli, *Samværsrett i barnevernssaker*, (Right to access when children are in foster care) Oslo 1998; Mons Oppedal, *Akuttthjemlene i barnevernsløven*, (Interim orders in emergencies.) Oslo 2008; Torunn Elise Kvisberg, *Internasjonale barnefordelingssaker. Internasjonal barne bortføring*, (International child custody-cases. International child abduction) Oslo 2009.

²⁵ Hege Brækus, *Mor kan ikke bli syk*, ('A mother cannot become ill.' About the right to disability pension for mothers), Oslo 1996 and Elisabeth Vigerust, *Arbeid, barn og likestilling* (Work, children and equality), Oslo 1998.

issues connected to the Child Welfare Act. Torunn Elise Kvisberg treated international child custody and abduction. Therefore, thematically, nothing separates work with an explicit child perspective from this other legal work.

3.2.2 Purpose

The purpose of Smith's work was to present and analyse current law about the relationship between parents and children.²⁶ She notes that this topic had so far been discussed from the parental point of view, but that there had been a trend among lawyers increasingly to recognise children as legal subjects. Smith's purpose was to contribute to a further shift of interest from parental rights to children's rights.²⁷

Haugli also contributed to this shift of interest in her thesis 18 years later. She identifies the purpose of child law research as 'to describe, explain and understand the child's legal status, with a particular objective to improve the position of children in law and in reality.'²⁸ Haugli emphasised the importance of separating child law from other legal disciplines, such as women's rights. Her purpose influenced her research questions and her assessments.

Oppedal forms his research question as '... what is the current law with respect to the substantive and procedural regulation of emergency provisions in the Child Welfare Act, the extent to which current law is followed in practice, and whether there is any reason or need to make changes to the current law'.²⁹ His questions are more neutral or openly designed. His focus is not particularly on children's legal position. Nevertheless, Oppedal's particular emphasis is on children's legal position as one of several elements of the thesis, especially when he discusses how the interests of children are ensured by the legislation.

Kvisberg says that, in addition to analysing current law with an emphasis on the relationship between the different rules, she will assess whether legislation protects children's rights, especially the child's best interests.³⁰ This is further explained by the fact that her purpose is to analyse how the interests of the individual child are weighed against the interests of children as a group. Kvisberg wants to find a proper balance between internationally effective regulations and the protection of the individual child.

Smith, Haugli, and Kvisberg have a clearly defined purpose related to the child's legal status, as does Oppedal to a certain extent. There is clearly a similarity between

the purposes of these works and of those with an explicit child perspective.

3.2.3 Method

The work with which we are dealing here, in the same way as the works discussed in the previous section, is based on a legal dogmatic method with elements of *de lege ferenda* - what the law ought to be.

Both Haugli and Oppedal have made empirical investigations of practice of the county welfare board, while Kvisberg had access to archives at the Ministry of Justice and thus all unpublished decisions in this area. In addition, all three researchers describe and discuss both law in books and 'law in action'. Haugli has also included psychological theory in her work. It is not possible to distinguish a dissertation with a child perspective from the other theses when it comes to methodology.

3.2.4 The participation of children

No children participated in the research conducted by Smith, Haugli, Oppedal or Kvisberg. Unlike Sandberg, Stang and Bendiksen, however, these researchers find no reason to justify, explain or excuse this omission. Herein, there is thus a difference.

3.3 Comparison summarized

The question is whether it actually involves some difference to the research if the researcher declares a child perspective or not. From what has been said about the topic, purpose, method and children's participation, it is difficult to see much difference. Neither the researchers' own reasons for the choice of perspective and the importance they claim that this should have seems to mean that the thesis with a child perspective differs from the other child law thesis.

Based on our analyses, we conclude that the child perspective is a positively charged term, but it has not much real substance in a legal context. A reference to a child perspective has little explanatory value with regard to the study's topic, purpose, and method or the participation of children in the study. It seems that the researchers themselves believe that a real child perspective must involve children as informants and that they try to find ways to circumvent it, but still maintain that they have a child perspective. The use of the term 'child perspective' implies that researchers feel the need to apologise for not drawing children directly into the research process, an excuse that should be quite unnecessary to perform, given the nature of legal research.

²⁶ L. Smith (1980) p. 24.

²⁷ L. Smith above, pp. 26-27.

²⁸ T. Haugli (1998) p. 434.

²⁹ M. Oppedal (2008) p. 21.

³⁰ T. E. Kvisberg (2009) p. 25.

4. The strongly fluctuating meaning of the term 'child perspective'.

The term 'child perspective' is used in legal research with a strongly fluctuating meaning. It is not always clear to which subject the authors are referring, whether it is one's own perspective or it is the perspective of the child, the legislator, the system or the legal practice.

Based on two different academic texts, we found that the child perspective meant:³¹

- An argument comparable to other arguments;
- A perspective that takes precedence over other perspectives;
- Identical to the term 'the best interests of the child';
- To see something from the child's point of view;
- As a child-sensitive approach, which appears to contain elements of paternalism, that one should take into account the child's special needs, level of development and vulnerability, and certainly also the child's own expertise;
- Illumination of the interests of the child;
- That the child has been heard; and
- A child focused approach.

One could also discuss whether and how enacting legislation from a 'child perspective' differs from making individual decisions from the same perspective. However this is another discussion.

5. Conclusion

We have shown through some examples that the term 'child perspective' is used in different senses. The term is taken for granted and rarely challenged. When a researcher claims to make her research from a child perspective, the explanatory value is low. Researchers must therefore be expected to clarify further what this means, at least until we have a unified scientific understanding of the meaning in the context of jurisprudence. Moreover, it should be apparent how the choice of perspective is reflected in the work as a whole,

which should be explicitly expressed.

To push terminology from other disciplines into legal scientific work without a basic clarification of whether the terminology is transferable is not recommended, as this creates confusion rather than clarification and connotes associations that actually do not match reality.

Let us assume that one may define child law research to describe, explain and understand the child's legal status, with a particular objective to improve the position of children in law and in reality. Let us summarize the researcher's arguments for having a child perspective, as follows:

- (i) that the child's interests are set forth as the fundamental objective behind the main children's rights laws, and especially behind the CRC;
- (ii) that the questions relate to children's quality of life and future;
- (iii) that the child is the central character and the weakest and most vulnerable;
- (iv) that 'adult perspective' is whatever is safeguarded through the legal focus on the rule of law, in that those who make decisions are adults, through the media's treatment of such cases, and that the public and politicians are adults who easily get into the parents' situation;
- (v) that the child's perspective has been suppressed historically;
- (vi) that it is important that someone represent children and plead their cases; and
- (vii) that this perspective provides the best opportunity to reach the correct law.

Although we might not have formulated everything in quite the same way, all of the arguments posited as justification to adopt a child perspective in the research are consistent with the arguments to characterize research as child law research. If the researcher can provide a perspective of choice for distinguishing between different approaches, it would then be more appropriate to specify that that researcher has a child law perspective rather than a child's or child perspective.

³¹ Elisabeth Gording Stang, 'Rett til returvern og rehabilitering etter FN's barnekonvensjon for mindreårige asylsøkere utsatt for tortur, umenneskelig eller nedverdiggende behandling', (The right to be protected against expulsion and the right to rehabilitation according to the UNCRC for minor asylum seekers subjected to torture, inhuman or degrading treatment) Kontur nr. 15 2009. Karl Harald Sovig, 'Barnets rettigheter på barnets premisser - utfordringer i møtet mellom FN's barnekonvensjon og norsk rett.' En utredning gjort på oppdrag fra Barne- og likestillingsdepartementet. ('Rights of the child on the child's terms - challenges in the meeting of the UNCRC and Norwegian law.' A study on behalf of the Ministry of Children and Equality. *Det juridiske fakultets skriftserie*, UiB nr. 115 2009 - (UJURS-2009-115). See Lena Bendiksen og Trude Haugli, 'Barneperspektivet i rettsvitenskapelig forskning'. 'Child perspective in Legal research' (Retfærd 34. Årgang 2011 nr. 4/135 pg. 79-100). For readers who understand Scandinavian languages, we refer to this article for more details.

The UN Convention on the Rights of the Child – Implementation and Interaction With Other International Instruments and National Law

The beauty of “due regard”: incorporating the CRC in devolved governance

Simon Hoffman and Jane Williams*

Implementation of the UNCRC requires action to be taken across many areas of policy and administration. In federal or federal-type systems, where governmental responsibility is allocated between internal levels, accountability for vital areas such as health, education, social services, child care and employment may lie with governments beneath or within the State party. These governments may exercise substantial autonomy within overall constitutional parameters. In this situation an internal tier of government which seeks to promote the UNCRC more vigorously than the State party government must take care to observe constitutional proprieties whilst maximising legal impact of the treaty obligations. In the UK, devolution laws passed in 1998 delegated legislative and executive powers to Scotland, Wales and Northern Ireland without ceding the sovereignty of the UK Parliament. Using devolved legislative competence, the National Assembly for Wales has enacted a ‘duty of due regard’ for the CRC and its Optional Protocols. The duty binds devolved government: that is to say, Welsh Ministers, who are accountable to the 60-member, elected National Assembly for Wales. This duty is not replicated elsewhere in the UK. The intention of the new law is to ‘mainstream’ the requirements of the CRC in all decision-making at the level of devolved government in Wales – not only in areas traditionally associated with children, but across all devolved policy fields, including such diverse topics as transport, spatial planning, agriculture, sport, tourism and economic development. This paper will explain the way the new law works and will suggest ways in which the impact of ‘due regard’ can be maximised using a variety of mechanisms of accountability. The paper will invite consideration of the application of this legislative model at different levels of government and in different legal and political systems.

Introduction

Subsidiarity has been described as a ‘structural principle of international human rights law’, of central importance for resolution of the tensions between universality and legitimate pluralism and between state sovereignty and the authority of international institutions.¹ In academic discourse about subsidiarity, the principle is understood to be rooted in fundamental values such as political liberty, self-determination, accountability, dignity and diversity and thus imbued with the moral force which underpins the international legal order.²

Subsidiarity favours local control over creation and implementation of law and policy, except where local controls cannot effectively deliver goals which are consistent with those values. As such, the principle is associated with the allocation of responsibility between tiers of governance in systems as various in form as federalism in the United States, devolution in the United Kingdom and, most explicitly, the European Union.³

The principle of subsidiarity emerges in western philosophical thought long before the emergence of modern international human rights law.⁴ Although not authoritatively defined the principle requires as a minimum that governmental authority is exercised at the level closest to those affected by it.⁵ Higher level intervention is only justified to the extent necessary to achieve a particular aim which cannot be effectively

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¹ Carozza, P.G., ‘Subsidiarity as a Structural Principle of International Human Rights Law’ [2003] *American Journal of International Law* 97:38 – 79.

² For example, Bermann, G.A. ‘Taking subsidiarity seriously: federalism in the European Community and the United States’ 94 *Colum. L. Rev.* 331.

³ O’Connor, S. Day, ‘Altered States: Federalism and devolution at the “real” turn of the millenium’ [2001] *Cambridge Law Journal*, 60(3) 493 – 510.

⁴ Carozza, above n. 1, 40 – 42.

⁵ Bermann, above n. 2.

achieved by a lower tier of government.⁶

The principle of subsidiarity may also be taken to include the notion that the exercise of governmental authority is justified only where necessary to achieve the goals of human dignity and freedom.⁷ Since international human rights treaties are agreements reflecting choices for global governance directed at protection and respect for human rights, human dignity and human freedom, they fit with the principle of subsidiarity and its consequences for the exercise of government authority.

The exercise of governmental authority to legislate for the UNCRC in Wales is an example of subsidiarity in practice. The Welsh Government, as a subordinate sub-national governance institution, resolved upon a particular legislative approach to give further effect to the human rights of children and young people in Wales. In January 2011 the National Assembly for Wales passed the *Rights of Children and Young Persons (Wales) Measure 2011* (the 'Measure').⁸ The Measure is the first general legislative measure of implementation of the United Nations Convention on the Rights of the Child (UNCRC) in the UK. The National Assembly for Wales passed the Measure implementing an international human rights treaty in Welsh domestic law at a time when the UK government shows no sign of doing the same.⁹

At UK level political debate is focused on the possibility of substantive revision of rights, coupled with concern about the legitimacy of supra-national adjudication.¹⁰ Therefore, at UK level, those who are calling for legislative incorporation of the UNCRC are swimming against the tide. In this context, and of discourse on subsidiarity and children's human rights, the Measure is significant for a number of reasons:

- (1) The policy process, legislative passage and mechanisms for implementation of the Welsh Measure illustrate the principle of subsidiarity in action.
- (2) It is legislation passed by a devolved legislature

effecting a form of legal incorporation of the UNCRC despite absence of equivalent action at the UK level.

- (3) The method of transposition is innovative, using 'public officer's law'¹¹ offering a constructive response to difficulties about implementation and enforcement of UNCRC obligations.
- (4) The Measure offers mechanisms for accountability which may serve to ameliorate concerns about the legitimacy of supra-national or judicial control particularisation over children's rights implementation.

The Purpose of the Measure

The accompanying Explanatory Memorandum to the Measure sets out the background of political commitment to the UNCRC manifest in the Welsh Government's 'Seven Core Aims' dating back to 2002, providing 'the basis of multi-agency planning at national and local level for services for children and young people aged 0 – 25'.¹² The Memorandum further references the Welsh Government documents, *Rights to Action* and *Getting It Right*,¹³ the latter deriving its direction from the process of reporting to the Committee on the Rights of the Child and the Concluding Observations on the UK's third and fourth combined State Party report in 2008.¹⁴

The Measure was designed to be 'the central plank of an on-going commitment to progressive realisation of a rights-based approach to policy development in respect of children and young people in Wales'.¹⁵ 'The objective', the Explanatory Memorandum explains, 'is to ensure that those requirements will have an even greater prominence in respect of devolved matters in Wales than has so far been the case'.¹⁶ The desire to ensure a prominent place for children's rights in policy is important when situating the story of the Measure in the conceptual context of subsidiarity.

⁶ Schilling, T., 1995, *Subsidiarity as a Rule and a Principle, or: Taking Subsidiarity Seriously*, Jean Monnet Center for International and Regional Economic Law and Justice, New York.

⁷ Carozza, above n.1.

⁸ Royal Approval, 16 March 2011

⁹ The UK Government maintains a position that while consideration could be given to children's rights in the context of a future British Bill of rights and responsibilities the preference is for incremental, sectoral reform; see, Joint Select Committee on Human Rights, Tenth Report of Session 2009-10, HL Paper 65, HC Paper 400 and the statement of Sarah Tether, UK Government Minister of State, to House of Commons European Committee C, 12 September 2011: <http://www.publications.parliament.uk/pa/cm/cmtoday/cmstand/output/euro/co110912-01.htm>

¹⁰ See the terms of reference of the Commission on a Bill of Rights, established by the UK Government in March 2011: <http://www.justice.gov.uk/about/cbr>

¹¹ See further: Williams, J. 2012, 'General measures of implementation, individual claims, 'public officer's law' and a case study on the UNCRC in Wales', *International Journal of Children's Rights* 20: 224 – 240.

¹² Paragraph 3.2 of the Explanatory Memorandum. <http://www.assemblywales.org/ms-ld8085-em-e.pdf>.

¹³ Welsh Government, Cardiff 2004, 2009.

¹⁴ CRC/C/GBR/CO/4.

¹⁵ Explanatory Memorandum, above n.12, para. 3.12.

¹⁶ Ibid, para. 3.14.

Children's rights have been presented as an emblem of devolved governance in Wales.¹⁷ Certainly Welsh political willingness explicitly to embrace the UNCRC stood in contrast to the stance of the UK Government.¹⁸ A pre-Measure audit of rights-focused law and policy in Wales would suggest a progressive stance on children's rights attracting cross-party support,¹⁹ and which was welcomed the Committee in its 2008 Concluding Observations. But the Committee also noted that in many areas there was a gap between policy and the reality of children's lives.

At the time when the legislative opportunity for the Welsh Measure arose, domestic and international observers had noted that the intentions of successive Welsh administrations were being frustrated by a persistent implementation gap. Both the UN Committee and civil society protagonists in Wales were urging that a general legislative measure of implementation was needed to address this gap.²⁰

The Measure

The Measure incorporates the specified requirements of the Convention and its Protocols into 'public officer's law' rather than creating a new type of individual legal claim for victims of a rights violation.²¹ The intention is to secure incremental, programmatic reform of the kind necessary to realise the UNCRC's wide-ranging requirements about provision, protection and participation by establishing rules which frame the decision-making processes within government.²²

The approach has particular traction in relation to two types of treaty obligation; first, obligations concerning social, economic or cultural rights, where the appropriate role for judicial determination is heavily contested;²³ second, obligations which do not confer a right but require State party action to bring about stipulated conditions.²⁴ In Wales, as in numerous other countries where federal or federal-type arrangements exist, policy levers which may be used to implement these two types of obligation are under the control, or partial control, of a sub-national institution governance institution.

The authority for legislation in Wales is the Government of Wales Act 2006 (GWA 2006) which governs legislative competence.²⁵ The Welsh Government took advantage of its competence to legislate in the field of 'Co-operation and arrangements to safeguard and promote the well-being of children or young persons',²⁶ where 'well-being' includes securing children's rights.²⁷ Section 1 of the Measure - when fully in force²⁸ - imposes a duty on the Welsh Ministers to have 'due regard' to the requirements of Part 1 of the UNCRC and specified articles of its Optional Protocols, when exercising any of their functions.²⁹

Additional duties supporting the due regard duty are: a duty to draw up a children's scheme setting out how Welsh Ministers will give effect to the due regard duty; a duty to report and account to the National Assembly for Wales on compliance with the due regard duty; and a duty to engage with relevant statutory and non-statutory

¹⁷ Butler and Drakeford have characterised the reasons for this by reference to the 'policy, people and politics' of post-devolution Wales; Butler, I. and Drakeford, M. 2012, 'Children's rights as a policy framework in Wales' in J. Williams (ed.) *The United Nations Convention on the Rights of the Child in Wales*, University of Wales Press.

¹⁸ Williams, J. 2007, 'Incorporating children's rights: the divergence in law and policy' *Legal Studies* 17 (2): 171-359.

¹⁹ See Appendix accompanying this paper.

²⁰ CRC/C/GBR/4 para.6; Croke, R. and Crowley, A. *Stop, Look, Listen, The road to realising children's rights in Wales*, NGO alternative report, Save the Children, Cardiff, 2008.

²¹ An alternative is to allow a victim to claim a remedy if a public body acts incompatibly with UNCRC guaranteed rights. This is the approach taken by sections 6 and 7 of the Human Rights Act 1998 which allow a victim to claim a remedy if a public body acts incompatibly with the rights set out in the European Convention on Human Rights.

²² Williams, J. 'Multi-level governance and CRC implementation' in A. Invernizzi and J. Williams, *The Human Rights of Children, From Visions to Implementation*, 2011, Farnham, Ashgate.

²³ Even though the once-dominant view of non-justiciability is now outdated. For example: Van Bueren, G. 2002 'Including the Excluded: The Case for an Economic, Social and Cultural Human Rights Act' *Public Law* 456; Ewing, K. 1999, 'Social Rights and Constitutional Law, *Public Law*, 104 - 123; Fredman, S. 2008 *Human Rights Transformed*, Oxford University Press; King, J. 'The Justiciability of Resource Allocation' (2007) 70(2) *Modern Law Review* 197-224; O'Connell, P., 2012, *Vindicating Socio-economic rights*, Routledge; King, J. 2012, *Judging social rights*, Cambridge Studies in Constitutional Law; Palmer, E., 2007, *Judicial review, socio-economic rights and the Human Rights Act*, Hart Publishing; Nolan, A. 2011, *Children's socio-economic rights, Democracy and the courts*, Hart Publishing.

²⁴ For example, Article 17 UNCRC, which requires government action to stimulate good behaviour by the largely privately-owned media, to facilitate provision of information to children conducive to realisation of their rights.

²⁵ Superseding the Government of Wales Act 1998. At the time of introduction of the Measure the relevant provisions were contained in Part 3 of and Schedule 5, since replaced by Part 4 of and Schedule 7 to the Act.

²⁶ Government of Wales Act 2006, Schedule 5, para. 15.6, inserted by the National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2008 (S.I. 2008/ 3132).

²⁷ Ibid, para. 15.10.

²⁸ From 1st May 2014.

²⁹ Section 1 of the Welsh Measure: Welsh Ministers must have due regard to Part 1 of the Convention, articles 1 to 7 (except article 6(2)) of the Optional Protocol on involvement in armed conflict and articles 1 to 10 of the Optional Protocol on the sale of children, child prostitution and child pornography.

bodies in drawing up the children's scheme.³⁰

The Measure creates a positive and pervasive duty applicable across the range of governmental decision-making. It creates new binding legal rules governing the conduct of Welsh Ministers and through them their officials – such as advisers, administrators, case workers and inspectors – when making decisions. Case law on the public sector equality duty confirms that a due regard duty³¹ means that a decision-maker must attend to the substance of a right; must be properly informed and aware of what must be considered before and at the time of making a decision; must exercise the duty with 'rigour and an open mind'; and, that the due regard duty must be 'integrated within the discharge of the public functions' of the decision-maker.³²

Rationale for the Mechanism adopted by the Measure

Structural factors - constraints of devolved law-making competences, the fused legal system for England and Wales - may have inhibited the creation of a stand-alone individualised legal remedy for violation of the UNCRC for children in Wales. But regard to these factors is not what suggested the 'public officer's law' approach as a mode of incorporation of the UNCRC in Wales. The UNCRC contains a range of provisions aimed at securing social, economic and cultural rights, and several of these provisions are phrased in terms of programmatic action. Several UNCRC articles (re)affirm civil and political rights which are often viewed as more readily actionable by individuals, but enforcement in practice is often impeded by prohibitive costs, limited expertise, inaccessibility of legal representation, delay, or judicial caution. These difficulties are exacerbated for excluded social groups, and in the case of under-18s, by lack of legal capacity rendering them dependent on others for support in making a legal claim.

The 'public officer's law' approach thus focuses on implementation of rights through policy, this includes civil and political rights, as well as social, cultural or economic rights. The import of the Measure is to require consideration of the UNCRC and the obligations it generates to be mainstreamed in Welsh Government

decision-making processes. This represents a deliberate policy choice to address the mischief of lack of clear direction from Westminster and Welsh government beyond the rhetoric of high level political strategies.

Accountability

To comply with section 1 of the Measure Welsh Ministers must have due regard to some 42 Articles of the Convention together with relevant articles of the Optional Protocols. There is the possibility of judicial review if Welsh Ministers fail to have due regard to the UNCRC when exercising their functions (i.e. they fail to follow the guidance) offered by the courts on the meaning of due regard in equality cases.

A child, protective adult, organisation or other person with sufficient interest may seek a judicial review, or the Children's Commissioner for Wales might support a child in making an application for judicial review. Legal challenge would open the way for development of domestic interpretation of the specific requirements of the UNCRC,³³ depending on how far the courts might be prepared to enter into consideration of the obligations created by the UNCRC which arise for consideration by Welsh Ministers as part of the due regard process. However, in the legislative passage of the draft Measure there was an assumption that legal challenge would be rare, and that administrative and political accountability was to be preferred.³⁴

An aspect of administrative and political accountability is the requirement on Ministers to set up a children's scheme. In so doing Ministers must have regard to reports, suggestions, general recommendations or other documents issued by the Committee on the Rights of the Child.³⁵

Taken together with the substantive due regard duty this places a significant burden of interpretation on 'public officers' (Welsh Ministers, their civil servants and expert advisers). Whilst the possibility of legal accountability will only arise in the event of an application for judicial review, other forms of accountability for interpretation are provided by the Measure. Section 4 of the Measure requires Welsh Ministers to submit periodic reports to the National Assembly for Wales showing how

³⁰ Sections 2 – 4 of the Welsh Measure.

³¹ Section 149 of the Equality Act 2010 places a duty on public authorities to have due regard to the need to eliminate discrimination, promote equality of opportunity and foster good relations between persons in different groups.

³² *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158, per Scott Baker LJ.

³³ Just as litigation using the Human Rights Act has produced a municipal law of human rights protected by the ECHR: Masterman, R., 2005, 'Taking the Strasbourg Jurisprudence into account: developing a 'municipal law of human rights' under the Human Rights Act', *International and Comparative Law Quarterly*, 54 (4). pp. 907-931.

³⁴ Legislation Committee 5, evidence and transcript:

http://www.assemblywales.org/bus-home/bus-committees/bus-committees-perm-leg/bus-committees-third-lc5-agendas/lc520101125fv-lc5_3_-19-10.pdf?langoption=3&ttl=LC5%283%29-19-10%20%3A%20Transcript%20%28PDF%2C%20504KB%29

³⁵ Section 3 of the Measure.

they have complied with the duty – parliamentary accountability.³⁶ In addition, the Children's Commissioner, who is already empowered to make inquiries into and report on the exercise of Welsh Ministers of their functions,³⁷ will be able to incorporate in any such inquiries questions about compliance with the due regard duty.

Legitimacy

A question arises as to how the task of interpreting and applying the textual system of the UNCRC will be carried out. The problem is not one of deficit in expertise but of participation if interpretation is entrusted to public officers working within the tangled labyrinths that support the Welsh Ministers. In a study on internal controls within the executive Daintith and Page refer to 'public officers' law' as internal rules which regulate the conduct of the executive, as opposed to 'lawyer's law' which focuses solely on the interpretation and application of rules by the courts.³⁸ A characteristic of the British constitution is that many of these internal rules are not statutory law; but some are and others may be created making it possible to introduce external controls in the form of public law challenge through process of judicial review, complaints procedures, audit, investigation by relevant appointed bodies or parliamentary scrutiny processes.³⁹ The Measure establishes internal rules or public officer's law for executive action at the level of the Welsh Government, and introduces potential for deliberative engagement with NGOs.

The potential for deliberative engagement lies in the imperative established by the Measure and the due regard duty to develop an understanding of the rights and obligations (on Ministers) arising from the UNCRC. If this challenging process is seen to be conducted in a superficial or one-sided way, there is a risk that local interpretation will be deficient, and lacking in legitimacy. A potentially useful approach to ensuring internal but also external legitimacy is Tobin's notion of the 'interpretive community'. Tobin argues that the act of interpretation of international human rights treaties provisions is partly

a process of attributing meaning but also 'an attempt to persuade the relevant interpretive community that a particular interpretation is the most appropriate meaning to adopt'.⁴⁰ Tobin cautions that in developing meanings for human rights there is a danger that advocates will refer to personal preferences, and that it is therefore preferable for interested parties to 'engage' with and consider the views of divergent interests.⁴¹

In the context of children's rights and the Measure, the Welsh Ministers and their officials will have to interpret the UNCRC articles as they become relevant to policy and programmatic action, but so will non-governmental actors, relevant stakeholders and 'persuaders' within the Wales 'interpretive community'. This community cannot be confined to government as policy implementation in contemporary society is dependent on the input and resources of a range of non-governmental participants.⁴² If this were not the case, government would find it extremely difficult to deliver its social programmes in an age of fragmented service provision. The 'communitarian paradigm' therefore requires the interests and contributions of non-governmental actors to be taken into account in deciding what meaning is to be attributed to substantive articles of the UNCRC.⁴³ This is consistent with the view of the Committee on the Rights of the Child which argues that in order to make children's rights a reality government needs to engage all sectors of society, including, it should be noted, 'children themselves'.⁴⁴

Tobin's account is illuminating not only because it recognises diversity of understanding of children's rights, but also because its acknowledges that 'shared understandings' of rights can emerge as a consequence of an 'evolutionary interpretive process' which takes account of concurring as well as dissonant voices.⁴⁵ He argues for principled, clear and practical, coherent interpretation, which is consistent with the system of international law and which is sensitive to the socio-economic context within a state.⁴⁶

The notion of a principled, coherently reasoned interpretation consistent with international law suggests

³⁶ Provision is made for variation by subordinate legislation of the timing of these reports, with the aim of enabling them to be coordinated with the State party reporting cycle under Article 44 of the UNCRC.

³⁷ Section 72B of the Care Standards Act 2000, as amended by section 3 of the Children's Commissioner for Wales Act 2001.

³⁸ Daintith, T., and Page, A., (1999), *The Executive in the Constitution*, OUP, Oxford.

³⁹ Williams, J., 'General legislative measures of implementation: individual claims, 'public officer's law' and a case study on the UNCRC in Wales', *International Journal of Children's Rights*, Volume 20, Number 2, 2012, pp. 224-240(17).

⁴⁰ Tobin, J., 2010, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation', *Harvard Human Rights Journal*, Vol.23, pp.1-50: 4.

⁴¹ Ibid, p.10.

⁴² Ibid pp.8 – 13.

⁴³ Ibid, p.9.

⁴⁴ UN Committee on the Rights of the Child, General Comment No. 5 on General measures of implementation of the Convention on the Rights of the child CRC/GC/2003/5, para. 56.

⁴⁵ Tobin, above n.40, p.11.

⁴⁶ Ibid, p.14.

a mechanism for negotiating divergent views both within and external to government, and for reconciling such views around agreed principles. With reference to the Measure, the most obvious source of jurisprudence and principles to ensure coherence and consistency is the textual output of the Committee on the Rights of the Child. The requirement to take into account the socio-economic context guarantees consideration of a key concern for government, that of resources, and suggests an important role for government departments within the interpretive community as information holders on the availability and distribution of resources at the programmatic level.

Conclusion

This article has sought here to explain a new law and a novel approach to UNCRC implementation within the parameters of devolved legislative competence in Wales. We have argued that the 'public officer's law' model is a useful one given the particular characteristics of the UNCRC and the barriers to individual legal claims brought by children and young people. It is a model that seemed apt at a particular place and time but it will repay close attention in the context of other devolved, federal or federal-type systems. The initiative in Wales speaks in a growing global conversation about human rights implementation in the context of multi-level governance.

It is argued, using Tobin's model, that stakeholders external to government will need to play a vital role in shaping understanding and promoting implementation of the new law and children's rights. Informed vigilance and scrutiny as well as collaborative learning and negotiation are indicated so that the interpretive community that emerges measures up to the considerable challenge that lies ahead. This challenge is to internalise children's human rights values in government decision-making, incorporating in local policy and practice the rules and understandings generated by local negotiation of the treaty obligations, informed and guided by the outputs of the treaty system. It is an exercise in subsidiarity, privileging the role of the level of governance closest to those affected, whilst preserving the role of institutions at remoter levels as guardians of the international human rights norms.

Success may be measured over time by analysis of the composition and nature of the interpretive community that emerges, by the extent of democratic engagement and especially by the ability of non-governmental actors to engage successfully in the processes established by the Welsh Measure. Ultimately, of course, for children and young people in Wales, the most important test is whether real consequences can be

discerned in terms of addressing the issues that engage human rights obligations. Effectiveness, as well as democratic mandate, is a core ingredient of legitimacy.

Appendix

2001: Welsh Assembly Government promoted the UNCRC as the overarching framework for local service planning and delivery for children and young people in Wales - WAG 2001 Children and Young People A Framework for Partnership, Cardiff, Welsh Assembly Government.

2001: National Assembly for Wales, first reference to the UNCRC in legislation within the UK in the form of regulation 22, Children's Commissioner for Wales Regulations 2001, S.I. 2001/2787: regulation 22 requires the Commissioner, when exercising his functions, to have regard to the UNCRC.

2004: Welsh Government, National Assembly for Wales resolved to adopt the UNCRC as the overarching framework for policy on children and young people in Wales, Record of Proceedings, National Assembly for Wales, 14 January 2004.

2004: explicit connections with articles of the UNCRC in strategy document on general service provision, Children and Young People: Rights to Action, 2004, Cardiff, Welsh Assembly Government.

2004: explicit connections with articles of the UNCRC in strategy document on youth justice, All Wales Youth Offending Strategy, 2004, Cardiff, Welsh Assembly Government and Youth Justice Board of England and Wales).

2005: explicit connections with articles of the UNCRC in strategy document on child poverty, A Fair Future for Our Children: The Strategy of the Welsh Assembly Government for Tackling Child Poverty, 2005, Cardiff, Welsh Assembly Government.

2008: National Assembly for Wales supported the establishment of the Children and Young People's Assembly for Wales, Funky Dragon, which made a seminal contribution to the third and fourth reporting round for the UK under the Convention, Funky Dragon, 2008, 'Our Rights, Our Story: Funky Dragon's Report to the United Nations Committee on the Rights of the Child', in J. Williams (ed.) The United Nations Convention on the Rights of the Child in Wales, University of Wales Press.

2011: National Assembly for Wales confirms its progressive stance on the issue of physical chastisement of children by reiterating its support for removing the defence of physical chastisement as a defence to assault in Wales, Record of Proceedings 19 October 2011.

The Committee on the Rights of the Child: A Review of its mandate and members

Hadi Strømmen Lile*

1. Introduction

The main question considered in this article is this: Does the criteria for the competence of membership in the Committee on the Rights of the Child ("CtRC") harmonise well with the mandate of the committee? The criteria for membership have not been adapted to the mandate-development that has occurred over the years. The mandate of the committee has over the years developed from an advisory role to becoming more resembling an international court. It is not officially a court, but the committee offers advice, concluding observations, general comments and views on how the convention should be legally interpreted by the states. Recently the CtRC has been granted competence (mandate) to consider individual complaints, similar to that of other UN treaty bodies. Despite the fact that the mandate of the committee has become more legal and court like there are no requirements for the members to have any judicial experience. Today only 50% of the members have a legal background. Should the criteria for membership in the committee change?

This article will focus on the relationship between membership and mandate. The basic hypothesis is: As the mandate of the CtRC is becoming more like a judicial court the members should have qualifications similar to that of an international court, meaning that they should be professional judges. For instance article 21 (1) of the European Convention on Human Rights specifically pinpoints that the members of the The European Court of Human Rights should have: *Qualifications required for appointment to high judicial office or be jurisconsults of recognised competence*. Should the criteria for membership in the CtRC be the same? We might ask the same question in relation to all the UN treaty bodies, but the CtRC have the lowest number of members with judicial experience, thus it is a good example to focus on.

2. Supervision of human rights law

United Nations ("UN") human rights committees hold an ambiguous position in international law. Although they are at the centre of the UN human rights system, they lack the ability to determine issues of fact, or to issue legally binding decisions.¹

From the very beginning, during the negotiations of the two covenants that were going to substantiate and realize the framework of the Universal Declaration of Human Rights (UDHR), there was reluctance among many states to adopt any far reaching supervisory mechanisms. Eastern European states for instance argued that any reporting procedures as a means of supervision would be contrary to The UN Charter article 2 (7), which states that: *Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state [...]*.²

Their arguments might be seen in light of the Soviet School of International Law. The Soviets argued that international law was solely based on explicit or silent agreements between states. The self-determination of states was (and to a large degree is) the paramount premise for international law. Decisions by international courts or supervisory organs were not considered sources of international law by the Soviets, since such decisions were not based on concrete agreements between sovereign states. A state that did not agree to a provision could, in principle, not be forced to enter into agreements with other states.³ One of the primary motives underlying this insistence on the importance of self-determination was the need to protect states from international laws created to serve capitalistic societies and ideologies.⁴

The West was more open to monitoring and supervisory bodies. This resulted in two very different views on how to implement international human rights. Mathew Craven explains that:

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¹ Kelly, Tobias. The UN Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty. (2009) Vol. 31(3) *Human Rights Quarterly*, p. 781.

² Boerefijn, Ineke. Towards a Strong System of Supervision: The Human Rights Committee's Role in Reforming the Reporting Procedure under Article 40 of the Covenant on Civil and Political Rights. (1995) Vol. 17 (4) *Human Rights Quarterly*, p. 769.

³ UN Charter article 2 (6) would thus be in breach of international law, according to this logic.

⁴ Bull, Henrik. Den sovjetiske lære om normdannelse i folkeretten. (1983) *Lov og Rett*, pp. 298-307.

When the West spoke of 'implementation', it was clear that what they really meant was international 'supervision' or 'enforcement' premised upon the need to 'mobilize shame'. By contrast, the Soviet states understood 'implementation' as 'active realization' in which international institutions and processes would serve the function of encouraging the provision of assistance and fostering cooperation, but would not lead to 'passing of judgment' over states.

However, in terms of socio-economic rights the views of both the West and the East were more harmonized on the issue of implementation. Following the adoption of the Universal Declaration of Human Rights ("UDHR") the original plan was to draft one covenant, a binding legal convention, based on the UDHR.⁵ The state parties could not agree on one covenant, but ended up with two covenants: The Covenant on Civil and Political Rights ("CCPR") and The Covenant on Economic, Social and Cultural Rights ("CESCR"). A decisive reason leading the state parties to this split was the issue of 'implementation'. Ineke Boerefijn explains that:

The division of the two covenants was motivated at the time by the idea that civil and political rights were directly applicable and judicially enforceable, whereas economic, social, and cultural rights merely constituted programmatic rights to be implemented progressively. This differing degree of implementation duties resulted in different sets of monitoring instruments: inter-state communications before a quasi-judicial organ of experts for civil and political rights, and a procedure for considering state reports by the Economic and Social Council (ECOSOC) on economic, social, and cultural rights.⁶

Civil and political rights were viewed to be more legal and enforceable, which resulted in a different and weaker monitoring system for socio-economic rights. Mathew Craven also explains that:

It was not expected that ECOSOC would 'assess' the state reports, or evaluate state performance with respect to the implementation of their obligations under the Covenant. Nor, indeed, was it expected

that any of these institutions would involve themselves in standard-setting or normative development.⁷

Economic, social and cultural rights were viewed to be unsuitable for judicial or quasi-judicial implementation. The UN was an arena for international cooperation and supervisory bodies were seen as supportive institutions designed to help each state to implement socio-economic provisions. Monitoring and supervision was a much bigger issue when the Human Rights Commission negotiated the mandate of the Human Rights Committee.

The picture I am trying to carve out is that originally there was a deep ambivalence among many states to create supervisory bodies with any authority to challenge states autonomy. This scepticism came especially from the self-proclaimed champions of socio-economic rights, the socialist and communist countries. The scepticism towards monitoring and supervision of human rights were shared by both the East and the West regarding socio-economic rights. Socio-economic rights were not seen as legal rights that could be monitored and enforced internationally.

The Convention on the Rights of the Child (CRC) contains both civil and political rights and socio-economic rights. The Committee on the Rights of the Child (CtRC) did not from the start have a mandate to review individual complaints. What was basically agreed to from the start was that the CtRC should be an advisory committee similar to that of the Committee on Economic, Social and Cultural Rights ("CtESCR").

By the turn of the century, and especially this last decade, things have started to change. Socio-economic rights are increasingly being regarded as enforceable legal rights that should be monitored. Both the CtESCR and the CtRC has been given competence to review individual complaints, just like the Human Rights Committee.

2. The mandate

The original purpose of CtRC is formulated in CRC article 43 (1). It is stated that:

For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child.

⁵ General Assembly Resolution 543 (VI), 5 February 1952.

⁶ Boerefijn, Ineke. Towards a Strong System of Supervision: The Human Rights Committee's Role in Reforming the Reporting Procedure under Article 40 of the Covenant on Civil and Political Rights. (1995) 17.4 *Human Rights Quarterly*, p. 769.

⁷ Craven, Matthew. 'The Committee on economic Social and Cultural Rights' in Eide, Asbjørn, Catarina Kraus and Allan Rosas (eds) *Economic, Social and Cultural Rights: A textbook*. Second edition (Kluwer Law International, 2001), p. 458.

Thus the main purpose of the committee is to examine the progress by states to realize the convention. What is meant by *examining the progress* is further elaborated in CRC article 44 and 45. I am not going into all the details of that. I am most interested in the part of the mandate that gives the committee authority to interpret the convention. It is not stated in the text of the convention explicitly what kind of authority the committee should have on interpreting the convention. In article 45 (d) it is stated that: *The Committee may make suggestions and general recommendations based on information received.* Based on the periodic state reports and the dialogue following the reports the committee issues *concluding observations*. These concluding observations are used by states and courts as a kind of *quasi case law*. Also the committee issues general comments. They have no direct and specific mandate to do that from the text of the convention. However it is stated in article 43 (8) that: *The Committee shall establish its own rules of procedure.* In its own rules of procedures (article 77) it is stated that:

The Committee may prepare general comments based on the articles and provisions of the Convention with a view to promoting its further implementation and assisting States parties in fulfilling their reporting obligations.

General comments and concluding observations are not legally binding, but at least in Norway and similar countries, they are given significant legal weight by courts when interpreting the CRC.

2.1 Individual complaints

At its adoption in 1989, no individual complaint procedure was adopted in relation to the CRC. The NGO Ad Hoc Group on the CRC had earlier attempted to persuade States of the advantages of an individual petition system. However, the proposals were never formally tabled and discussed in the sessions of the Working Group.⁸ But, that was not the end of the discussion. The discussion continued as the years went by, and on the 28th of February 2012 The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure ("OPIC") was opened for signature. 20 states signed the protocol. Two states have so far ratified the protocol. It needs eight more ratifications before it enters into force.⁹

The OPIC gives the CtRC competence to review individual communications (complaints) similar to the

individual complaint mechanism of the Human Rights Committee and the other core UN treaty bodies.

According to OPIC article 5 communications may be submitted by or on behalf of an individual or group *claiming to be victims of violations by the State party of any of the rights* set forth in the CRC or the optional protocols. And according to OPIC article 10 the committee shall *consider communications received*, they shall hold closed meeting *when examining communications* and when examining violations of economic and cultural rights they shall *consider the reasonableness of the steps taken by the State party in accordance with article 4 of the Convention*. Finally according to the last section of article 10 the committee shall *transmit its views on the communication, together with its recommendations, if any, to the parties concerned*. It seems clear that when the committee receives a communication, according to OPIC, the committee have to determine and conclude if a state has violated the convention.

2.2 Sources of law

Could some of the decisions of the CtRC be regarded as valid sources of law? It is stated in the Vienna Convention on the Law of Treaties ("The Vienna Convention"), article 31 that:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. [...]

The CtRC must be regarded as part of the contexts of the CRC (second paragraph). It is an *instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty*. According to the Ministry of Justice in Norway most of the principles in the Vienna Convention, including article 31, are to

⁸ Langford, Malcolm and Sevda Clark. 'The New Kid on the Block: A Complaints Procedure for the Convention on the Rights of the Child', working paper no. 1, (Norwegian Centre for Human Rights, 2010), p. 4.

⁹ See OPIC article 19.

be regarded as part of international customary law.¹⁰

What is international law? There are, as I have mentioned, different views on this, but let me take a conservative position and define it as “agreements between states”. One might argue that each state has the freedom to define what they have agreed to – that every state by virtue of their self-determination and autonomy can define what they meant and successively mean by their ratification of the convention. However what kind of agreement is that? If each state can interpret conventions as they choose the whole purpose of human rights as international law (defined as agreements between states) would be meaningless. If conventions are to be defined as agreements between states there has to exist some common understanding of what that agreement is – how that agreement should be defined in different circumstances.

Giving an impartial and neutral treaty body competence to interpret the legal meaning of the agreement makes it possible to talk about an authoritative and unified interpretation of what that agreement is about. The treaty body must then of course be seen as *de facto* neutral and competent. However, when a state recognises the competence of a treaty body they have agreed to the whole package.

2.3 How legal are the decisions by the CtRC?

How are the decisions of the CtRC respected as law by national courts? I cannot answer for other countries, but will look at what the Supreme Court of Norway has done. Formally the decisions by the CtRC are not legally binding. But would the Supreme Court of Norway dismiss a statement from the CtRC arguing that the committee has made a mistake, that they have made a wrong interpretation of the CRC? Even if they are formally free to do so the Supreme Court has never done so, thus far.

The Supreme Court has on a general basis argued that recommendations from The Committee Against Torture (“CAT”) and the Human Rights Committee should be given *great* and *substantial* weight.¹¹ Then in 2009 the court concluded that since the CtRC does not have the competence to review individual complaints the conclusions from the CtRC should have a somewhat lesser weight.¹² However, as the

CtRC gets this competence to handle individual complaints there should be no more need to give their statements lesser weight. Given the line of argument from the Supreme Court one would thus expect them to give ‘great’ or ‘substantial’ weight to the decisions of the CtRC. At least one might expect the Court to give more weight to some of their decisions. On the other hand if the government of Norway decides not to ratify the optional protocol it might play out negatively in the Court.

2.4 Would the court really disagree?

However, setting aside the nitty-gritty details of how much weight the Court should give the decisions of CtRC, the question remains if the court would in fact dismiss a clear statement or decisions from the committee, even if they are formally free to do so?

In 2009 the Court had to deal with a rather tricky case. The case concerned a 16-year-old boy from Sri Lanka. His application for asylum had been rejected by the government. According to the government the boy was typical of *anchor children*, meaning a child that had been sent by his parents to get permanent residence so that they could later apply for family reunification. Strong migration control considerations were at stake. The defence for the boy argued that migration control considerations could not be given priority over considerations for the best interest of the child (CRC article 3). The trump card for the defence was a general comment from the CtRC. General Comment No. 6 stated that:

Exceptionally, a return to the home country may be arranged, after careful balancing of the child’s best interests and other considerations, if the latter are rights-based and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations.¹³

It is especially the last sentence here which is of great importance. Should the best interests of the child always override non-rights-based general migration

¹⁰ Ot. prp. nr. 3 (1998-99): Om Lov om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven), p. 66.

¹¹ The Court used the word “great weight” (stor vekt) in the case of CAT: The Norwegian Supreme Court: Rt-2008-513 (Dahr-dommen), section 58. In relation to the HR-Committee the Court used the word “substantial weight” (betydelig vekt), The Norwegian Supreme Court: Rt-2008-1764, section 81.

¹² The Norwegian Supreme Court: Rt-2009-1261, section 41.

¹³ Committee on the Rights of the Child, General Comment No 6 (2005) UN doc CRC/GC/2005/6, section 86.

control considerations? It is stated in CRC article 3 *In all actions concerning children, [...] the best interests of the child shall be a primary consideration.* What does it mean that the best interest should be *a primary consideration*? In the original proposal by Poland the text was stronger emphasising that the best interest *shall be the paramount consideration*.¹⁴ There is a difference between something being *a primary consideration* among other important considerations, and something being *the paramount consideration*. The parties agreed that the best interest of the child should be central, but not an absolute principle overriding all other considerations.¹⁵

The Supreme Court of Norway could have argued that the CtRC in this particular general comment had gone too far, that they had made a mistake. But they did not do so. Instead the Court wrote in great length on what the CtRC actually meant and went into a discussion about what was really in the best interest of the child. In the end the Court concluded that the government had administrative freedom to assess what was in the best interest of the child against his own will and his guardians here in Norway.¹⁶ Judge Bårdsen expressed some doubt in a concurring opinion emphasising the importance of general comments from the CtRC and stressing that his decision was not based on any support for the argument that general migration considerations would override the consideration of the best interest of the child.¹⁷ Later too the court had to grapple with this question. In a recent case, in which it was no doubt that it would be in the best interest of the child to stay in Norway, the court again managed to avoid a front to front collision with the CtRC. In this case they argued that General Comment No. 6 only concerned *Unaccompanied and Separated Children*, not children in company with their parents.¹⁸ Thus for *unaccompanied and separated children* general migration control cannot override the best interest of the child, but for those other children it can? The conclusion seems shady in light of CRC article 2, which states that: *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.*

The point to be made here is that the Court is very reluctant to dismiss opinions from the CtRC expressed in general comments and Concluding Observations.¹⁹

Although the Court is not formally bound to interpret the CRC in line with the CtRC they tend to do so, and they go to great lengths to avoid conclusions in contradiction with the statements of the CtRC.

The CtRC is the authoritative international expert body of the CRC. Norway is just a small country among 193 other countries that have ratified the convention. One might argue that, based on the principle of subsidiarity, the Supreme Court of Norway is in a better position to interpret how the CRC should be implemented in Norway given the context and society nationally. On certain issues the Supreme Court will have a wide margin of appreciation. However, on principal issues regarding how the CRC should be interpreted universally, it would be strange if the Supreme Court of Norway was to argue that it was more competent than the CtRC.²⁰ Despite the fact that the Supreme Court would be seen as very arrogant were it to challenge the CtRC on these issues some scholars and judges have hinted at the possibility (at some conferences). The argument is that the CtRC cannot act as an international court if its members are not competent judges. There seems to be some murmuring among many lawyers that the judges of the Supreme Court of Norway are more competent than the members of the CtRC.

2.5 Opinions on the means of realizing the CRC

The CtRC does not only issue legal advice on how to interpret the CRC, they also issue recommendations on how to implement the provisions of the CRC. These recommendations on implementation might not be based on legal analysis, but stems from the expert knowledge of the CtRCs assessments of how to achieve certain legal aims enshrined in the CRC. For instance the committee has many times recommended that the state should adopt national plans for the implementation of the rights and obligations in the CRC. Sometimes these non-legal recommendations are logical and well founded, other times they are not so logical. We need to remember that the committee only meets for a few weeks in Geneva and they have a very heavy work load. Also we need to keep in mind that the CtRC does have an international agenda. They

¹⁴ Commission on Human Rights (1980) UN doc. E/CN.4/1349, p 3.

¹⁵ Haugli, Trude. 'Hensynet til barnets beste' in: Høstmølingen, Njål., Elin Saga Kjørholt and Kirsten Sandberg (eds) *Barnekonvensjonen: Barns rettigheter i Norge* Second edition. (Universitetsforlaget, 2012), pp. 54-55.

¹⁶ Norwegian Supreme Court: Rt-2009-1261

¹⁷ Ibid, section 84-98

¹⁸ Norwegian Supreme Court: Rt-2012-667, section136-138.

¹⁹ The Court made a point about how important Concluding Observations are, arguing that Concluding Observations are even more important than general comments. Judge Bårdsen disagreed with that though.

²⁰ For a good critical article on the principle of subsidiarity see: Føllesdal, Andreas. The Principle of Subsidiarity as a Constitutional Principle in International Law (2013) *Global Constitutionalism*, Vol. 2/ issue 01, pp. 37-62.

are very concerned about the rights of children. Sometimes the combination of these factors leads to some odd recommendations. For instance the CtRC has argued that states should teach children about children's rights in order to promote respect for indigenous peoples. In a concluding recommendation to Guatemala they wrote that:

The Committee recommends that the inclusion of children's rights in the school curricula be pursued as a measure to enhance respect for the indigenous culture and multiculturalism and to combat paternalistic and discriminatory attitudes which, as recognized by the State party, continue to prevail in society.²¹

And they repeated this same claim in one year later in a recommendation to Panama, arguing that:

The Committee recommends that children's rights be included in the school curricula as a measure of enhancing respect for indigenous culture, promoting multiculturalism and combating the paternalistic attitudes prevailing in society.²²

If the committee had taken a few minutes extra to reflect on these statements they would have realised that indigenous peoples are not children. Teaching children rights as a means to combat paternalistic attitudes towards indigenous peoples would most likely make attitudes much worse. In fact, if an attitude based on the assumption that indigenous cultures are *child-like* is not paternalistic then what is paternalistic? This example shows that the recommendations of the committee of how to achieve or realize the CRC are not always as elegant. One might ask if the committee is in the best position to have opinions on how to realize the provisions in the convention. Again based on the principle of subsidiarity one might argue that the state or local authorities are in a better position to judge what means that should be adopted to achieve the best results, not the CtRC.

The Committee on Economic, Social and Cultural Rights ("CESCR") issued in 1990 a general comment stating that a state in relation to economic and social

rights have both *obligations of conduct* and *obligations of result*.²³ Since that general comment they have never again mentioned the issue, indicating that the principle is not rock solid. However the European Court of Human Rights, in a case concerning the right to a fair trial concluded that: *The Court's task is to determine whether the Contracting States have achieved the result called for by the Convention, not to indicate the particular means to be utilized*.²⁴ CRC article 2 stipulates clearly that the state 'shall [...] ensure the rights set forth in the present Convention. I do think that in most cases concerning clear legal obligations enshrined in the CRC the state does have an obligation of result.²⁵ I agree with Mathew Craven who says that:

The compliance of a State with its obligations ultimately is to be measured not merely by compliance with some notion of 'due process', but by the degree to which it has achieved the full realization of the rights.²⁶

If the state is only bound by some notion of conduct one might argue that the CtRC must be competent to review if the conduct of states is effective. But, as I have already said, the state and local authorities are sometimes in a better position to assess what means that should be adopted in their society, because they are closer to the ground.²⁷ I do think that the committee can make suggestions on how to implement the CRC, based on their overview of how other states have acted, however such recommendations cannot be regarded as obligatory law. As long as the state achieves the results required by the CRC they are not in violation of the convention.

There are other UN agencies and bodies that have the same international overview of how the different states have gone about to realize the provisions of the CRC. The United Nations Children Fund ("UNICEF"), The United Nations Education, Science and Cultural Organisation ("UNESCO") and The Office for the High Commissioner on Human Rights ("OHCHR") for instance provide help and advice to governments on these issues. But these bodies do not have any substantial authority on the legal

²¹ Committee on the Rights of the Child, Concluding observations: Guatemala (1996) UN doc CRC/C/15/Add.58, section 30.

²² Committee on the Rights of the Child, Concluding observations: Panama (1997) UN doc CRC/C/15/Add.68, section 27.

²³ Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1991) UN doc E/1991/23, section 1.

²⁴ European Court of Human Rights, *De Cubber v. Belgium* (1984) Case No. 9186/80, section 35.

²⁵ I use the words "clear legal obligations" because some of the provisions have a non-legal character. They are more like political aims or may be categorized in some countries as non-self-executing. For instance CRC 24 (1) states that: "States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health." It would be absurd to argue that the state is violating the CRC because some children are sick.

²⁶ Craven, Matthew C. R. *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press, 1995), p. 109.

²⁷ Follesdal, Andreas. The Principle of Subsidiarity as a Constitutional Principle in International Law (2013) *Global Constitutionalism* Vol. 2/ issue 01.

interpretation of the convention.

3. The members of the CtRC

The committee has 18 members that, according to CRC article 43 (2) should be: *Experts of high moral standing and recognized competence in the field covered by this Convention*. The members are elected by States Parties from among their nationals and shall serve in their personal capacity. In the election process, in contrast to many other supervisory UN-committees, consideration must be *given to equitable geographical distribution, as well as to the principal legal systems*. Thus the members must be selected from all the continents. This geographic criterion secures a certain diversity of perspectives among the members, but it might make it more difficult to select the very best experts on children rights around the world.

The CRC does not include any sentence similar to the CCPR about the usefulness of having *some persons having legal experience* (CCPR article 28). While the Human Rights Committee has a clear majority of members with extensive legal experience, similar to that of the European Court of Human Rights, only 50% of members of the CtRC have a legal background. Each member has their own style of writing their CV and there are big differences between the members on what they consider important to include. Some of the members have included lectures that they have held. One member has also included in his CV, as an important qualification, that he has attended a two weeks course on the CRC at the Ghent University in Belgium.²⁸ I have also attended that course, but I would not include it on my CV, at least not on my official CV if I was a member of the CtRC. This member is in a powerful position given the mandate of the committee. If the committee is supposed to have authority on how to interpret the convention it is relevant to question the qualifications of the members. In many countries the qualifications of Supreme Court judges are scrutiny to extensive public debates. And I think this is how it should be in a democracy. People in power must be able to defend the legitimacy of their position.

Children rights are not a very popular theme among lawyers and legal scholars. In Norway typically the most popular legal fields of practice are corporate law and other similar fields of business law. If this is the trend in many countries it might prove difficult to find highly qualified legal experts on children rights. But there are many professional judges around the

world and many of them have experience with children rights. It should not be that difficult to find highly qualified members with extensive legal qualifications liable for transparent public scrutiny.

3.1 The Human Rights Committee

The Human Rights Committee is composed of a majority of persons that would qualify for high judicial offices. They are mostly people with a PhD in law. Some think that all of the members have a legal background. But there is at least one exception; the chairperson, Zonke Zanele Majodina, from South Africa is a psychologist by training, not a lawyer.

According to the CCPR article 28 (2):

The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

The qualifications of the members were extensively discussed in the Human Rights Commission. Some States argued that a certain number of members should possess a legal education, since the Committee would often have to deal with violations of law and settle disputes. The opponents of excessive legal or judicial experience argued that what was desired was not a judicial organ, but rather a committee of experts. The non-binding reference to the *usefulness if the participation of some persons having legal experience* in CCPR article 28 was a compromise.²⁹

Because it is a body of experts largely independent of the UN and States parties, and considering its decision-making powers in individual and inter-State communications and the manner in which these procedures have thus far been conducted in practice, Manfred Nowak argues that the Human Rights Committee may be considered a “quasi-judicial organ”. In addition it should be mentioned that every member, according to CCPR article 38, has to make a pledge declaring that he or she will *perform his functions impartially and conscientiously*. Nowak argues that: *The commitment to impartiality underscores the independence of the members and the Committee’s “quasi-judicial” nature*.³⁰ For this reason the Soviet delegate in the General Assembly’s 3d Committee requested that this Article should be struck, since such a solemn declaration would implicitly recognize that the Committee had

²⁸ International Interdisciplinary Course on Children’s Rights: <http://www.iccr.be/>

²⁹ Nowak, Manfred. U.N. *Covenant on Civil and Political Rights: CCPR Commentary*. Second edition (N.P. Engel Publisher 2005), pp. 669-670.

³⁰ Ibid, p. 702.

some judicial attributes.³¹

The HR-committee was given the mandate to consider individual complaints from the very beginning. Both the optional protocol giving the HR-committee this competence and the CCPR entered into force 23 March 1976. It was from the start a “quasi-judicial” body. The quasi-legal nature of the HR-committee was a compromise between those who wanted an international court and those who merely wanted an advisory body. The big difference between the HR-committee and the CtRC used to be that the CtRC lacked the competence to review individual complaints. Now the CtRC has been granted this competence.

3.2 The UN Committee on Economic, Social and Cultural Rights

In the text of The Covenant on Economic, Social and Cultural Rights (CESCR) there is no mention of any separate supervisory body. It is stated in Article 16 that *reports shall be submitted to [...] the Economic and Social Council (ECOSOC)*. The Committee on Economic, Social and Cultural Rights (“CtESCR”) was established in 1985 to carry out the monitoring functions assigned to the Economic and Social Council (“ECOSOC”).³² The issue of a committee was simply not on the agenda when the Human Rights Commission drafted the covenant.

However, following the establishment of the CtESCR it became clear that States may do as much to obstruct or negate the enjoyment of economic, social and cultural rights as they may ensure their fulfilment. The practice and mandate of the CtESCR has developed more and more in the direction of the Human Rights Committee. Today the CtESCR issues general comments, concluding observations and have also been granted competence to review individual complaints.

The number of professional judges and members with legal experience is a bit higher than that of the CtRC. There are today 12 members with a legal background and six members that have other backgrounds. There has been no discussion about changing the criteria for membership in the CtESCR either, adapting the competence of the members to the new mandate. To a large extent the

theme in this article is also very relevant to that committee.

3.3 Lay Judges and Expert Witnesses

Many argue that it is a good thing that the CtRC has members that are not lawyers, because they have competence on other issues of importance. Psychologists, teachers, sociologists and medical doctors may bring in expertise of relevance that a lawyer does not have. However, then again what are the CtRC and other UN treaty bodies? Can these treaty bodies be compared to courts? In courts there are normally two ways nonprofessional judges can be included, either as lay judges or as expert witnesses.

In Norway, following the trial against Anders Behring Breivik, the role of expert witnesses has been debated extensively; however none have argued that the expert witnesses should replace the judges altogether. They are brought into the court when it is needed and their opinion is only important on areas in which they are experts. Expert witnesses have no authority when it comes to the legal questions.

Lay judges are used in Norway and many other countries in certain cases. The main logic of having lay judges, at least in Norway, is that a person on trial has a right to be judged by people from your own community or class. The main reason is to preserve the legitimacy of the court, to prevent the court from becoming elitist and far removed from the reality of those who are on trial.³³ In Greenland having lay judges, as opposed to Danish professional judges, was a success for many years. However, as the society has changed, becoming more global and industrialised, the call for professional judges have grown stronger also in Greenland.³⁴

The non-professional judges of the CtRC cannot be defined as either expert witnesses or lay judges. They are permanent members of the committee. They participate in legal judgments alongside with the professional judges. But contrary to other lay judges they are not any closer to the individuals affected by their decisions.

As I have mentioned there are other UN agencies and bodies that have the same international overview of how the different states have gone about to realize the provisions of the CRC (UNICEF, UNESCO and

³¹ Ibid. And see: UN doc. A/C.3/SR.1425, section 53.

³² Economic and Social Council resolution 1985/17.

³³ NOU 2011: 13, section 8.3.3.

³⁴ Hoigård, Cecilie. ‘Realistiske inspirasjoner – noen grønlandske erfaringer’ in: Hofer, Hanns von. and Anders Nilsson (eds) *Brott i välljorden: om brottslighet, utsatthet och kriminalpolitik: festskrift till Henrik Tham* (Kriminologiska institutionen, 2007), pp. 110-113.

The OHCHR).³⁵ Thus, the non-legal expert members of the committee do not really have a unique role compared to the legal experts of the committee. I am not saying that the committee does not benefit from their expertise, but I am just asking if it is wise for these experts to be members of the committee. I mean if the committee had only legal experts it could bring in experts on non-legal topics when needed, as is normal in judicial bodies around the world.

4. Trustworthiness

An important attribute that every judicial body need is trustworthiness. A judicial body needs judges with judicial experience. A judicial body that does not have trustworthiness will lack authority and lose much of its function. From the start it was not intended that the CtRC should be a judicial body. The Human Rights Committee was from the start a “quasi-judicial” body. The quasi-legal nature of the Human Rights Committee was a compromise between those who wanted an international court and those who merely wanted an advisory body. Today almost all the members of the Human Rights Committee are professional judges or professors of law. Soon the CtRC will be granted competence to review individual complaints. The mandate and competence of the CtRC will then be very similar to that of the Human Rights Committee. However, as opposed to the CCPR there is no sentence in the CRC indicating that the members of the committee should have legal experience. Today only 50% of the members have a legal background. The question is how the Supreme Court of Norway and other supreme courts around the world should be able to trust and take seriously such a treaty body? On the one hand the committee have the official mandate to interpret and determine if states have violated the convention, or more precisely to give their non-obligatory “views” it. On the other hand the members are not required to have any legal experience.

Tobias Kelly has written an interesting article on the Committee Against Torture (CtAT). Among other things he has conducted interviews with State representatives, NGOs and UN-staff in Geneva to

find out how the CtAT is viewed. He writes that:

Common complaints include the claim that the Committee’s members do not have the necessary levels of expertise to grasp complicated legal issues, and that they do not understand the implications of their formal independence.³⁶

Also NGOs criticize the CtAT for constantly shifting its jurisprudence, and argue that the Committee makes some claims and drops them later. There are some significant differences between CtAT and CtRC. CtAT has only ten members and they have issued only two general comments. However, I do not think one can claim that members of CtRC are significantly more competent than the members of the CtAT.

The trustworthiness of the members comes on top of a range of other problems that I have not mentioned in this essay. The UN treaty bodies, including the CtRC lack resources, there is a constant overload of work, they have weak mechanisms for checking facts, they rely heavily on NGOs, their decisions are not legally binding, etc.

One might see the limitations of the CtRC as a failure or one might see it as a deliberate policy of States. The CtRC was never intended to monitor and protect the rights of children in reality. In fact one might wonder if most states actually intended to implement the provisions of the CRC. Human rights laws are often more symbolic than laws with a real effect. There are strong NGO’s on children rights. Pictures of crying children on campaign posters have a strong emotional effect on the public. Ratifying the CRC might have given politicians a bit of rest from the crying NGO mob. However, were they ever really committed?

5. A World Court

As a last point it might be added that the whole UN treaty body system is under review. None of the UN treaty bodies are courts and none of them issue legally binding statements. None of them have only members with legal judicial experience. Mathew Craven writes that it was not *expected that any of these*

³⁵ See above subtitle: “2.5 Opinions on the means of realizing the CRC.”

³⁶ Kelly, Tobias. The UN Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty. (2009) 31 *Human Rights Quarterly*, p. 785.

*institutions would involve themselves in standard-setting or normative development.*³⁷ The Human Rights Committee is the most court-like of the treaty bodies. Moving into the second decade of the 21st century all the UN treaty bodies have gradually been given a mandate similar to that of the Human Rights Committee. The CtRC was the last of the treaty bodies granted competence to review individual complaints.

Faced with a multitude of treaty bodies, which all of them are responsible for the interpretation of their own convention there has been a growing worry among scholars of the tendency for fragmentation of international human rights law. Although the treaty bodies are independent bodies and they should only interpret the provisions of their own convention they often look to each other for inspiration. Many of the provisions in the CRC and other conventions are similar and based on the same topic. For instance CRC article 30 and CCPR article 27 are very similar articles. The CtRC have looked to the Human Rights Commission to interpret that article in the CRC.³⁸ If they did not do so it would create a difficult situation in which different treaty bodies interpret the same provisions differently. Given the fact that each body is independent and the object and purpose of each convention is slightly different there is a clear danger of fragmentation. Marti Koskeniemi writes that:

The choice of one among several applicable legal regimes refers back to what is understood as significant in a problem. And the question of significance refers back to what the relevant institution understands as its mission, its structural bias. [...] Even if the institutions were to apply the same rules, they would apply them differently owing to differences in the perspective context, object and purposes, subsequent practice of parties and travaux préparatoires. Everything depends on the bias of the institution.³⁹

Each treaty body is biased and international human rights law is becoming more and more fragmented.

What is needed is maybe some sort of world

human rights court. As leaders of a research project on a World Human Rights Court, Manfred Novak and Julia Kozma argue that there is a need for a “World Court” because: 1. there is no human right without a remedy. 2. The World Court does not require any treaty amendment. 3. The principle of complementary jurisdiction strengthens domestic jurisdiction. 4. Non-State actors must be held accountable. 5. Victims have a right to adequate reparation. 6. The Human Rights Council needs a judicial counter-part.⁴⁰ I do agree that there should be some unified court, at least within the UN human rights system. However, in this essay my main focus has been on one just one of the treaty bodies, the Committee on the Right of the Child.

6. Conclusion

If we define international law as agreements between states, it seems natural that there should be an independent expert body that could determine what the states have agreed on and how that agreement should be interpreted in light of the evolving legal norms of the international community. If the Convention on the Rights of the Child (“CRC”) is meant to be a legal agreement between states we have to have a neutral international body to clarify what that legal agreement is. It would be meaningless to talk about a legal agreement if each state adopted its own unique interpretation in contradiction with other states. The mandate of the Committee on the Rights of the Child (“CtRC”) is not conclusively giving the committee this role. However, soon the CtRC will be granted competence to review individual complaints. Then they will have to determine if states have violated the convention in relation to individuals or groups. The mandate will then be very similar to that of the Human Rights Committee, which has been labelled a *quasi-judicial organ* or a *quasi-court*.

A court on an international level needs competent professional judges liable to public scrutiny. Non-judicial experts normally have two roles in courts: As lay judges or as expert witnesses. Lay judges have no natural role on an international level. Expert advisors on non-legal topics may have a key role to play in the

³⁷ Craven, Matthew. ‘The Committee on Economic Social and Cultural Rights’ in: Eide, Asbjørn, Catarina Kraus and Allan Rosas (eds) *Economic, Social and Cultural Rights: A textbook* Second edition, (Kluwer Law International, 2001), p. 458.

³⁸ See for instance: Committee on the Rights of the Child, General Comment No. 11 (2009) UN doc. CRC/C/GC/11, section 16-22.

³⁹ Koskeniemi, Martti. The Fate of Public International Law: Between Technique and Politics. (2007) 70 *Modern Law Review*, pp. 6 and 7.

⁴⁰ Novak, Manfred and Julia Kozma. ‘A World Court of Human Rights’ (2009): <http://www.udhr60.ch/report/hrCourt-Nowak0609.pdf>

realisation of certain aspects of the law, but not in determining the legal scope of the law. One does not have to be a lawyer to understand and determine the legal scope of the convention, but facing the fact that almost 200 supreme courts around the world will have to take a stance on how much weight they should give the views of the committee it seems only reasonable that the members of the committee should fulfil some minimum legal competence requirements. Normally judges of supreme courts are required to have extensive legal experience, but for the members of the CtRC there are no such requirements at all.

One might argue that the views and recommendations of the CtRC are not legally binding and that the committee is not a judicial body. However, The Supreme Court of Norway takes general comments and concluding observations from the CtRC very seriously and they have never argued against the CtRC. One might expect the Court to take the views of CtRC even more serious when it is granted competence to review individual complaints. The Supreme Court finds it difficult to disregard the views of the CtRC. They find it difficult to take the position that they are more competent to interpret how the CRC should be interpreted universally. That is, they find it difficult to take that position officially, but they might be thinking privately something else. When only 50 % of members of the CtRC have judicial experience it creates cognitive dissonance. On

the one hand the committee has the official international mandate to interpret the convention and determine if states have violated the convention, but on the other hand the members are not required to have any legal experience.

On the one hand the committee is seen as an advisory body for states on how to implement the CRC and on the other hand it is seen as a somewhat authoritative interpreting body on the legal scope of the convention. Based on the principle of subsidiarity one might question the usefulness of having a committee that only give states advice and recommendations on how to implement the CRC, when the states themselves sometimes are in a better position to assess what means that will work in their own society. One might argue that the committee gains experience from other countries and have the international overview compared to each state. But then again so does UNICEF, UNESCO and the OHCHR. Besides the mandate of the committee is not limited to that of only advising states on how to implement and realise the provisions of the convention according to the states own interpretation of the convention. The committee is mandated to interpret the legal scope of the convention. And given the fact that the mandate of the committee has become more court-like it is high time to review the qualification criteria for the members of the committee.

Children's Rights in the European Union: Evaluating the Role of the European Court of Justice

Ruth Lamont*

Introduction

The EU has become an increasingly important forum for the discussion and debate over the effective protection of children's rights. The European Commission has recently adopted an Agenda for the Rights of the Child¹ which identifies concrete areas for law and policy developments in relation to children at EU level, and the Charter of Fundamental Rights of the European Union² has specific rights for children expressed in Article 24.

There have been efforts to mainstream children's rights into legislation which has resulted in measures containing specific reference to fundamental rights obligations.³ This is evident in Brussels II Revised⁴, which addresses jurisdiction and recognition and enforcement of judgments in matrimonial and parental responsibility cases, and international child abduction within the EU. This Regulation directly affects the rights and interests of children, and has a significant impact on cross-border family life, and children's rights and interests in cross-border disputes.

As the EU's role as a protector of children's rights is developing, the role of the Court of Justice of the European Union (CJEU) in adjudicating on cases raising questions of fundamental rights protection will become more significant. This paper will therefore examine the Court's case law under Brussels II Revised to consider the interpretation of the Charter and the approach of the Court to children's rights. It will be suggested that, whilst the Court has been prepared to engage with children's rights, the level of analysis and the Court's interpretation is heavily shaped by the interests of EU law, rather than focusing on the protection of children's rights.

Children's Rights in the EU Charter

Following the Treaty of Lisbon, the Charter has legal force.⁵ The institutions must comply with the Charter when they act, including creating legislation, and the Member States to protect the rights in the Charter when implementing EU law.⁶ Included in the Charter are specific provision for children's rights under Article 24. Article 24(1) protects the right of the child to be heard and have their views taken into account in decisions affecting them. In all actions relating to children, the child's best interests should be a primary consideration under Article 24(2). Article 24(3) states that every child has the right to maintain a personal relationship with both parents unless this is contrary to his or her interests.

These rights expressed in Article 24 are underpinned by the rights expressed by the Convention on the Rights of the Child 1990 (CRC), specifically Articles 3, 9 and 12.⁷ The Court has referred directly to the CRC in its case law⁸ but the Court has an important role in developing the application of children's rights in practice through the interpretation of Article 24 in the context of EU law. Article 24 does not adopt exactly the wording of the underlying provisions of the CRC, instead reformulating the rights for use in the Charter.

The inclusion of rights of the child in the Charter is a significant development in acknowledging distinct children's interests and, in interpreting and applying these rights, the CJEU will be developing the protection of children's rights within Europe and the Member States.⁹ McGlynn has suggested that:

Article 24(1) is a curious mix of what might

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¹ Communication from the Commission 'An EU Agenda for the Rights of the Child' COM(2010) 60 final

² [2010] OJ C 83/389

³ See Drywood, E. 'Child-proofing EU Law and Policy: Interrogating the law-making processes behind European Asylum and Immigration Provision' (2011) 19 *International Journal of Children's Rights* 405.

⁴ Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility OJ [2003] L 338/1

⁵ Article 6(1) TEU

⁶ Article 51(1), Charter

⁷ Explanation on Article 24 – The Rights of the Child [2007] OJ C 303/25

⁸ Case C-540/03 *Parliament v Council (Family Reunification Directive)* [2006] E.C.R. I-05769.

⁹ Stalford, H. *Children and the European Union: Rights, Welfare and Accountability* (Hart Publishing: Oxford, 2011), 41.

loosely be termed children's 'protection' and 'empowerment' rights, which are often found to be in conflict.¹⁰

The potential for internal incoherence of the rights expressed is evident in Articles 24(1) and (2), where decisions taken in the child's best interests may conflict with the child's views, and there is a significant risk of prioritisation of one right, to the detriment of the other. There is no internal hierarchy in the terms of Article 24; it appears to be assumed that the rights will work together as an expression of the rights of children.¹¹

The inclusion of rights specific to children is a significant development on the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR). The ECHR does not contain reference to children's rights, although the European Court of Human Rights has interpreted the Convention to account specifically for children's interests.¹² The CJEU will normally refer to the ECHR in its reasoning in fundamental rights cases¹³ but Article 24 does not have this direct form of relationship with the ECHR. The CJEU is therefore going to play an important role in defining and interpreting Article 24, and resolving questions of internal coherence.

Article 24 is reflected directly in the provisions of Brussels II Revised¹⁴ and the Court has referred to Article 24 in its reasoning on cases on international child abduction. These cases provide an opportunity to examine the approach that the CJEU has taken in interpreting Article 24.

Interpretation of Article 24 in Brussels II Revised

The CJEU has been criticised for its approach to family relationships and family life¹⁵ and Brussels II Revised and its interpretation requires a certain level of understanding and sensitivity to its role in a national family law context.¹⁶ The definitions of key terms of the Brussels II Revised need to be clear and respond

to the increasingly mobile nature of some families' lives. The Court should be aware of the need for a legal approach which effectively manages ongoing family relationships across European borders, whilst protecting the fundamental rights of the parties. In family law cases the difficulty of predicting the variety of new complexities added by the international element means a fundamental rights floor is necessary to protect individuals in novel legal situations.¹⁷

The Brussels II Revised Regulation is a measure of private international law adopted by the EU as a way of encouraging further migration and integration in the EU. The Regulation harmonises grounds of jurisdiction and facilitates the mutual recognition of judgments. Each Member State trusts the process and law of the other Member States, so a judgment should be recognised without questioning its content, reasoning, process, or similarity to domestic laws and procedures, except in exceptional circumstances.

The cases raising fundamental rights concerns referred to the CJEU have largely concerned the rules for the return of the child to their habitual residence following an unlawful abduction. Brussels II Revised adopts the Hague Convention on the Civil Aspects of International Child Abduction 1980 (Hague Convention 1980) remedy of returning the child to the jurisdiction of its habitual residence following an unlawful abduction.¹⁸ However, where return of the child is refused,¹⁹ the Regulation adopts a new mechanism whereby the parties can litigate the substantive custody issues in relation to the child in the State of origin.²⁰ If this judgment subsequently requires the return of the child and is certified in the State of origin, the judgment is automatically enforceable in the State to which the child was abducted, requiring their return despite the initial refusal.²¹

The aim of the Regulation was to increase the effectiveness of the return remedy between the Member States. The complex nature of the

¹⁰ McGlynn, C. 'Rights for Children?: The Potential Impact of the European Union Charter of Fundamental Rights' (2002) 8 *European Public Law* 387, 397.

¹¹ Schiratzki, J. 'Children's rights in the EU – A Tool for autonomous citizenship or patriarchy reborn?' (2011) *Europarättslig tidskrift* 70, 87.

¹² See Kilkelly, U. *The Child and the European Convention on Human Rights* (Ashgate, 1999).

¹³ Article 52(3), Charter states that where the rights in the Charter correspond with those in the ECHR

¹⁴ Recital 33; Articles 11(5) and 12(3).

¹⁵ McGlynn, C. *Families and the European Union: Law, Politics and Pluralism* (CUP, 2006), 120-126.

¹⁶ See Walker, L., Beaumont, P. 'Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice' (2011) 7 *Journal of Private International Law* 231.

¹⁷ Stalford, H. 'Brussels II and Beyond: A Better Deal for Children in the European Union?' in Boele-Woelki, K. (ed) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia: Antwerp, 2003), 482.

¹⁸ Article 12(1), Hague Convention 1980; Article 11(1) BIIR

¹⁹ Under Article 13 Hague Convention 1980

²⁰ Articles 11(6)-(8), BIIR

²¹ Article 11(8), Article 40(1)(b), Article 42 BIIR

jurisdiction, which may shift between Member State courts, and the automatic enforcement of custody judgments requiring the return of the child, without any defences, makes the potential conflict between the protection of rights, most evident.²²

The scope of the Charter's effect and its relationship with national law has been considered in Case C-400/10 PPU *McB*.²³ *McB* identifies the extent to which fundamental rights should shape the interpretation of Brussels II Revised to counteract the effect of national law. In *McB*, the mother had removed the children from Ireland to England. The parents were unmarried and under Irish law the father did not have automatic rights of custody over the children. To take advantage of the return remedy under Brussels II Revised the applicant must have rights of custody over the child and the CJEU was asked whether Article 2(9), Brussels II Revised, which defines rights of custody, and Article 2(11), which defines when an abduction occurs, should be interpreted as to attribute rights of custody to the unmarried father. The Court found that the Regulation itself does not determine which person has rights of custody, but instead refers to the national law of the child's habitual residence to determine the acquisition of custody rights.²⁴

The CJEU cannot intervene to alter substantive national family law based on the provisions of Brussels II Revised and the rights expressed in the Charter.²⁵ The division between EU law defining the meaning of the category of 'custody rights' for the purpose of the operation of Brussels II Revised, and national law in defining who holds rights of custody, is clearly maintained but the case demonstrates that the Charter may create pressures to extend the scope of fundamental rights protections beyond EU law.

The importance of mutual recognition of judgments and the enforcement of the return remedy in abduction cases suggests that fundamental rights obligations will be made to work alongside and to support these principles. This is in evidence in Case

C-403/09 PPU *Deticek*.²⁶ The mother had removed the child from Italy to Slovenia following divorce proceedings in which custody had provisionally been granted to the father, although the court had ordered that the child be placed temporarily in a children's home. The Slovenian court enforced the Italian custody order, which meant the child should return to Italy, but the mother subsequently applied to the Slovenian court for a provisional and protective measure granting her custody of the child under Article 20. Article 20 provides jurisdiction for a Member State court, Slovenia in this case, to take provisional including protective measures under national law, even if another Member State court, Italy, has jurisdiction over the substance of the matter. Provisional measures must be urgently needed, they must be taken in respect of a child on the territory of the Member State and they must be provisional, although the procedures and measures provided are a matter for national law.²⁷

The child had expressed a wish to remain with her mother during the Slovenian proceedings.²⁸ The Slovenian court granted custody to the mother on the grounds that the child had settled in Slovenia and return to a children's home in Italy would be cause her both physical and psychological trauma.²⁹ On appeal, the Slovenian court made a preliminary reference to the CJEU. The Court found that to use Article 20 to defeat the return of the child to Italy was inappropriate because, as an exception to the jurisdictional rules in Brussels II Revised, it must be interpreted strictly.³⁰ To permit a change in the child's circumstances to undermine the enforcement of the Italian judgment and prevent the return to their habitual residence would *run counter to the principle of mutual recognition of judgments*.³¹

In supporting these arguments the Court refers explicitly to Article 24 Charter,³² but only to the right under Article 24(3), the right of the child to maintain a personal relationship with both parents which is *...undeniably merging into the best interests of any child*.³³

²² McEleavy, P. 'The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?' (2005) 1 *Journal of Private International Law* 5, 15.

²³ [2010] E.C.R. I-08965.

²⁴ *McB*, para 43

²⁵ Article 51(1), Charter

²⁶ [2009] E.C.R. I-12193.

²⁷ Case C-523/07 A, [2009] E.C.R. I-02805, para 47.

²⁸ *Deticek*, para 25.

²⁹ Based incorrectly on Articles 13(b) and 13(2), Hague Convention 1980.

³⁰ *Deticek*, para 38.

³¹ *Ibid*, para 45.

³² *Ibid*, para 53.

³³ *Ibid*, para 54.

The Court accepts that Article 24(3) may be limited if another interest of the child is of such importance that it takes priority. The judgment clarifies that, if contact with one parent is not in the best interests of the child, it may be limited.³⁴

The reasoning in *Deticek* is defensible, although the outcome for the child concerned might be regarded as problematic since she will return to Italy into the care of a children's home.³⁵ The use of Article 20 by the Slovenian court to undermine the recognition of the substantive Italian custody judgment was inappropriate and the Court could be applauded for engaging with the wider principles of fundamental rights supporting their conclusion. The Court focuses on ensuring the underlying principles of the Regulation are respected, rather than on the practical outcome for the child.

Despite engaging with the Charter in *Deticek*, reference to Article 24(3) is used to support mutual recognition, rather than providing a standard against which international family law can be assessed. Article 24 is interpreted within the wider context of European integration and the resulting structure of Brussels II Revised. The use of Article 24(3) is selective and there is no examination of the internal contradictions of Article 24, with its emphasis on both the welfare and autonomy of children.³⁶ The right of the child to have contact with both parents is considered as an aspect of the welfare principle and in this case the implication is that child's welfare lies in having contact with both parents, despite the other factors identified by the Slovenian court. However, from the perspective of the CJEU, the Italian court is the most appropriate court to decide the question of contact, and in ensuring the return of the child the correct jurisdiction is seised of the decision, whatever the other factors.

Most notably the Court effectively ignores the views of the child expressed to the Slovenian court, but only briefly mentioned by the CJEU. The role of the child's right to be heard under Article 24(1) and the impact of her views on the domestic court's decision is not considered. Where the child should be heard under the terms of Brussels II Revised, the procedure is defined by national law,³⁷ but the

resulting views should be taken into account by the CJEU. The lack of engagement with her views may reflect the shift from the domestic to the supranational court; the child will not be heard by the CJEU under the preliminary reference procedure, their views are incidental and may be overridden by the wider the welfare concerns.

The welfare principle expressed in Article 24(2) has been generally used engaged to reinforce and support the CJEU's reasoning and the approach of Brussels II Revised in allocating jurisdiction and requiring the mutual recognition of judgments. In *McB*, the Court again considers Article 24(3) of the Charter and the right of the child to maintain personal relationships with both parents, reiterating the link to child welfare outlined in *Deticek*.³⁸ The nature of Article 24(2) requires the Court to engage with the requirement of the child's best interests as an aspect of family law disputes in the national court, but the nature of 'welfare' is not closely examined and is left to the discretion of national courts in both *McB* and in *Deticek*.

The most difficult challenge in managing fundamental rights obligations within the context of Brussels II Revised has arisen where the Regulation adopts a strong mutual recognition of judgments focus. This problem is acute where the Regulation requires automatic enforcement of a judgment requiring a child to return to their habitual residence under Article 11(8) and Article 42 when the return of the child has initially been refused.

In Case C-491/10 PPU *Aguirre Zarraga*³⁹ the parents divorced in Spain and the Spanish court awarded custody of the child to the father. The mother moved to Germany with her new partner and, following a period of contact in Germany, the child did not return to Spain in breach of the Spanish custody order. The father applied for the return of the child, who wanted to live in Germany, and her return was refused by the German court. The Spanish court then conducted a full welfare hearing on the custody of the child, and ordered her return to Spain.⁴⁰ This judgment was certified under Brussels II Revised⁴¹

³⁴ Ibid, para 59.

³⁵ Returning a child to a State where they will enter the care system has a precedent in English law see *Re S (Abduction: Return into Care)* [1999] 1 FLR 843.

³⁶ Stalford, H. 'Brussels II and Beyond: A Better Deal for Children in the European Union?' in Boele-Woelki, K. (ed) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (2003, Intersentia, Antwerp), 476.

³⁷ E.g. Article 11(4) on hearing a child of appropriate age and maturity in return proceedings following child abduction.

³⁸ *McB*, para 60

³⁹ [2010] E.C.R. I-14247.

⁴⁰ Under Articles 11(6)-(8) BIIR

⁴¹ Article 42(2) BIIR

which requires the court of origin to certify that a child of appropriate age and maturity has been given the opportunity to be heard, the parties were given an opportunity to be heard, and the national court had accounted for the reasons behind the initial refusal to return, here the child's objections. Only if a judgment has been certified is it subject to automatic enforcement.

The child had not been heard in these proceedings as she did not wish to return to Spain to give evidence. She had been given the opportunity to be heard and on this basis the Spanish court issued a certificate. The German court subsequently refused to enforce the return of the child on the ground that the child had not been heard in the Spanish custody proceedings. A reference to the CJEU was sought to determine whether the court may oppose the enforcement of a judgment ordering the return of the child certified in the Member State of origin where the child has not been heard in the proceedings, contrary to Article 24(1) Charter.⁴²

The CJEU began by stating that in cases of child abduction the rapid return of the child is normally in the child's best interests and that mutual recognition of judgments is central to achieving that goal.⁴³ If enforcement of the judgment could be avoided where a child was not heard in the full custody proceedings, this would undermine the purpose of the mechanism in trying to ensure the return of the child following an abduction. A judgment ordering the return of the child from the court with jurisdiction, is to be recognised and automatically enforced if certified in the country of origin. The recognising State, Germany, only has jurisdiction to declare that a certified judgment is enforceable, it cannot refuse enforcement once the judgment has been certified.⁴⁴ It is possible to apply to the court of origin for rectification of the certificate⁴⁵ but there is no appeal against issuance of a certificate.⁴⁶ Any queries about the procedure or issuing the certificate have to be raised in the court of origin, here the Spanish court, and the court enforcing the judgment, the German court, cannot review the conditions of the certificate and has no power to oppose either recognition or enforceability of the

judgment.⁴⁷

The Court recognises that Article 42 must be interpreted in the light of Article 24 of the Charter but states that hearing the child *...cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case...*⁴⁸ The court in the Member State of origin does not have to hear the child, but procedures must be made available to enable the child to be heard by the court, providing a genuine and effective opportunity to express his or her views.⁴⁹

If that opportunity was available, the court of origin is entitled to issue the certificate for automatic recognition. Article 42 strongly reflects the principle of mutual recognition of judgments as it abolishes any procedure in the State enforcing a judgment entailing the return of the child based on the existence of the certificate from the State of origin. The judgment in *Aguirre Zarraga* accepts that recognition cannot be stopped if the judgment is certified, even on fundamental rights grounds. The emphasis is on the role of the court of origin to ensure compliance with Article 24 and protect the right of the child to be heard before issuing the certificate. The Court suggests that

...the systems for recognition and enforcement of judgments handed down in a Member State... are based on the principle of mutual trust between Member States in the fact that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights...⁵⁰

Fundamental rights protection is worked into a system of protection located in one jurisdiction, resolved during the national procedure. The effectiveness of this solution is open to question. In *Aguirre Zarraga* the German courts had evidence that the child objected to returning to Spain from their own proceedings, but had to respect the Spanish judgment despite the fact that the child had not been heard in those proceedings. The protective reaction of national courts in family cases means that they may seek to undermine mutual recognition with a positive

⁴² *Aguirre Zarraga*, para 42.

⁴³ *Ibid*, para 46.

⁴⁴ The judgment may be certified if the child was given an opportunity to be heard, in light of their age and maturity, the parties have been given an opportunity to be heard, and the reasons for the refusal to return the child have been taken into account, Article 42(2) BIIR.

⁴⁵ Case C-256/09 *Ponse* [2010] E.C.R. I-06673 where a change in circumstances meaning that return is no longer in the best interests of the child is not a basis for refusing enforcement of a judgment under Article 42(1) which must instead be argued in the courts of the member state of origin.

⁴⁶ Article 43(2) BIIR

⁴⁷ *Zarraga* para 54-56

⁴⁸ *Zarraga* para 64

⁴⁹ *Zarraga* paras 65-66.

⁵⁰ *Zarraga*, para 70

outcome of protecting the best interests of the child in mind; requiring blind trust of foreign proceedings may push mutual trust of the outcome of foreign proceedings to its limits.

The underlying principle of Brussels II Revised in securing the mutual recognition of judgments is shaping the Court's approach to fundamental rights protection. Particular rights, especially Article 24(3) protecting the right of the child to have contact with both parents, have been used to support the Court's reasoning, and the value of different national approaches is accepted and encouraged by the Court. This may stem, in part, from the division between substantive family law and the provisions of Brussels II Revised, which is highlighted by *McB*, so the Court is willing to make the protection of rights the responsibility of the national court.

Conclusions: Reflections on the Court of Justice

The CJEU is not a court with a history of jurisprudence on fundamental rights⁵¹ and it is not a specialist family law court. It has little experience of adjudicating on children's rights and interests, but the EU's regulation of private international family law and the role of Article 24 of the Charter mean that these types of disputes are increasingly likely to come before the Court.

The Court has engaged with Article 24 of the Charter as part of the interpretation of Brussels II Revised. In interpreting Article 24 it is developing fundamental rights protection for children which will apply across the 27 Member States of the EU when they implement EU law measures such as Brussels II Revised. Despite the importance of this role, the Court has not engaged closely with the relationship between the different elements of Article 24, particularly the tension between the child's right to be heard in proceedings, and the obligation to make the child's best interests the primary consideration. The Court needs to elucidate this relationship further and

to explore the tensions between the rights. The child's right to be heard in proceedings has played a relatively minor role in the Court's reasoning. This is in part because this right is realised at the national level and according to national procedures and the weight to be placed upon it will depend on the age and maturity of the particular child.

The Court is leaving a lot of discretion to Member State courts in how to implement and protect these procedural rights. However, this approach may also reflect a more general approach to children's rights in the EU that is based on protecting children without a similar focus on securing their participation.⁵² As the CJEU and the EU grows in expertise on children's rights, the Court's jurisprudence may have more to contribute but it should be prepared to engage with the General Comments from the Committee on the Rights of the Child and other sources on children's rights to develop its case law.

The Court also needs to be more prepared to engage with the Charter as a basis for assessing the compliance of EU law with the rights expressed in the Charter, rather than using the rights in the Charter to support existing interpretations of EU law. The mutual recognition of judgments in Brussels II Revised has been emphasised in the case law and the fundamental rights obligations expressed in the Charter are cited as justification for the interpretation of the law supporting this principle. Whilst this may be legitimate, the Court must be open to the potential for challenge to its approach based on fundamental rights claims.

As yet, the Court's role is relatively undeveloped in the field of children's rights. It has the potential to play an important role as a protector of children's rights, as it has the jurisdiction to develop the protection of rights across the EU through the rights expressed in Charter but this will evolve over time. Hopefully the Court will address the initial concerns expressed about its fundamental rights case law and come to be a valuable forum for the protection of children's rights.

⁵¹ Concern has been expressed about its reasoning in fundamental rights cases in other contexts, see Spaventa, E. 'Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU' in Dougan, M, Currie, S. (eds) *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing, Oxford, 2009).

⁵² Stalford, H. *Children and the European Union: Rights, Welfare and Accountability* (Hart Publishing 2012), 224.

Child Soldiers: Recruitment, Use and Punishment

Magne Frostad *

1. Introduction

All are vulnerable to superior force, but children may be singled out as one of the groups which are most vulnerable to such. Children have thus been negatively influenced by armed conflicts since time immemorial, and during 1807-1814 a number of individuals as young as 10 to 12 years old were found among the Danish-Norwegian prisoners of war held by the United Kingdom of Great Britain and Ireland, the children having served on vessels later confiscated by British forces.¹ Stories of intentional cruelty to children probably have a long history as well, making the stories of children tortured at the hands of Syrian authorities sadly familiar.²

Some claim that at any given time at least 300,000 child soldiers participate in hostilities,³ but this number is probably insufficiently substantiated.⁴ However, 20 states would seem to have used children for this purpose during 2010-12,⁵ not counting the many non-state entities beyond state control doing the same. 2011 thus saw 316 instances of child recruitment in Afghanistan,⁶ and 22 incidents of children being used by armed groups in Afghanistan as vehicles for suicide bombs – some of

them not even aware of the fact that they were carrying explosives.⁷ One of these was a boy merely 8 years old.⁸ Also illustrating is the forced recruitment of children by The Lord's Resistance Army in 3 African states from July 2009 to February 2012 in no fewer than 591 cases.⁹

Two reasons are typically given for the enhanced attention child soldiers have been provided with during the last two decades: An increase in the use of such soldiers, where the use is moving away from auxiliary functions to active participation in hostilities, and a change in society's perception of when a person moves from childhood to adulthood.¹⁰

Children are generally understood as people below the age of 18.¹¹ However, different thresholds are found in the law of armed conflict (LOAC) regarding the termination of the special protection offered to children; from 12, via 15 to 18.¹² In general, though, the 1949 Geneva Conventions on the protection of victims of international armed conflicts can be said to apply a threshold of 15,¹³ whereas the 1977 Additional Protocol I to the Geneva Conventions¹⁴ would seem to apply 18 as the general cut-off point with 15 as the relevant

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¹ Carl Roos, *Prisonen: Danske og norske krigsfanger i England 1807-14*, Gyldendal København 1953, p. 213. The special problems faced by these boys became apparent after a while and many of them were then set free, id.

² Ragnhild Sofie Rygg, *Syriske barn tortureres til døde*, obtainable from <http://www.reddbarna.no/nyheter/syriske-barn-tortureres-til-doede>, and Save the Children, *Untold Atrocities: The Story of Syria's Children*, obtainable from <http://www.savethechildren.org.uk/resources/online-library/untold-atrocities-stories-syrias-children>. Unless otherwise stated, all urls were last checked on 1 October 2013. For an overview of children's current suffering in armed conflicts, see Children and armed conflict, Report of the Secretary-General, UN Doc. A/66/782-S/2012/261, 26 April 2012.

³ EU guidelines on children and armed conflict, 2008, Sec. I.1, obtainable from http://europa.eu/legislation_summaries/human_rights/human_rights_in_third_countries/r10113_en.htm

⁴ Mark A. Drumbl, *Reimagining child soldiers in international law and policy*, Oxford University Press Oxford 2012, p. 26

⁵ Child Soldiers International, *Louder than words: An agenda for action to end state use of child soldiers* (London 2012), p. 18, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562.

⁶ Children and armed conflict, Report of the Secretary-General, UN Doc. A/66/782-S/2012/261, 26 April 2012, p. 2.

⁷ Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN Doc. A/67/256, 6 August 2012, para. 63. The number is given as 11 in Children and armed conflict, Report of the Secretary-General, UN Doc. A/66/782-S/2012/261, 26 April 2012, p. 2, whereas 11 children were used in the commission of suicide attacks in Pakistan, id., p. 27.

⁸ Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN Doc. A/67/256, 6 August 2012, para. 63.

⁹ Report of the Secretary-General on the situation of children and armed conflict affected by the Lord's Resistance Army, UN Doc. S/2012/365, 25 May 2012, p. 5.

¹⁰ Matthew C. E. Happold, *Child soldiers in international law: The legal regulation of children's participation in hostilities*, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, p. 28.

¹¹ See Convention on the Rights of the Child, 1577 UNTS 3, Art. 1, first alternative, the African Charter on the Rights and Welfare of the Child, OUA Doc. CAB/LEG/24.9/49 (1990), Art. 2, and the International Labour Organization's Convention No. 182 from 1999 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 2133 UNTS 161, Art. 2.

¹² See e.g. the following provisions in 1949 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (GCIV), 75 UNTS 287, Articles 14, 24(3), and 51(2). As of 10 March 2013, this agreement has 195 ratifications. See Roberta Arnold, *Children and Armed Conflict*, Max Planck Encyclopedia of Public International Law, obtainable at <http://www.mpepil.com>, para. 4.

¹³ Matthew C. E. Happold, *Child soldiers in international law: The legal regulation of children's participation in hostilities*, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, p. 28.

¹⁴ 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3. As of 10 March 2013, the agreement has 173 ratifications.

threshold for the prohibition of recruitment etc.¹⁵

Numerous international agreements regulate aspects of the issues considered in this note. Chief among them are the 1977 Additional Protocols to the 1949 Geneva Conventions (API and AP II),¹⁶ the 1989 Convention on the Rights of the Child (CRC),¹⁷ the 1998 Rome Statute of the International Criminal Court (RSICC),¹⁸ the 1999 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour,¹⁹ and the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (OP).²⁰ Also, the United Nations Security Council (UNSC) has recognized that the widespread impact of armed conflict on children is an important peace and security concern.²¹ The obligations of a state in relation to its use of child soldiers therefore vary according to the treaties the said state has ratified.²²

The aim of this article is to provide an overview of the prohibition on recruitment and use of child soldiers, as well as indicating and assessing clarifications offered by relevant international case law in 2012. The article will therefore first address some preliminary issues such as extraterritoriality, before it considers the illegality of employing children within state or non-state armed forces/groups, their treatment should they fall into the hands of another armed force/group, the prosecution of those who recruit or use child soldiers, and the prosecution of child soldiers for violations of international criminal law during the course of the conflict.

2. Preliminary issues

2.1 Extraterritorial application

A preliminary question here is the extent to which human rights conventions, especially the CRC, are applicable extraterritorially. This issue has generated much

writing in relation to other global and some regional human rights agreements, but has been comparatively less considered in relation to the CRC. The question is then whether a state party is bound by the relevant obligations when it deploys troops abroad, i.e. not on territory to which the said state itself has made the CRC applicable thorough a declaration,²³ e.g. when recruiting local youth as interpreters to its troops or as outer perimeter guards at its foreign bases.

Under CRC Art. 2 parties “shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction...”. The general trend with the extraterritoriality of UN human rights conventions is to make them applicable abroad when a state party holds sufficient control over a person or territory.²⁴ It is only to be expected that the Committee on the Rights of the Child will subscribe to this view.

2.2 Which entity is responsible?

Additionally, one must consider whether another entity than the state actually undertaking the relevant acts or omissions may be held solely responsible for them. It is also here to be expected that the Committee on the Rights of the Child will adopt the approach of the Human Rights Committee. That committee held in its General Comment No. 31 from 2004 that a party’s responsibility remains even where its public servants only constitute a national contingent assigned to an international peace-keeping or peace-enforcement operation.²⁵

Responsibility may even arise for recruitment and use by non-state entities, on the state’s home territory or where it is deemed to hold extraterritorial jurisdiction. This follows from the requirement in CRC Art. 2 to “ensure” the relevant rights – so called positive obligations – and will have to be decided on a case by case basis.

¹⁵ Compare API Art. 77(2) and (5), and consider the heading of that provision. A similar view is held by Matthew Happold, *Child soldiers in international law*, Manchester University Press Manchester 2005, pp. 58-59, although he indicated earlier that 15 might be the threshold under AP I: Matthew C. E. Happold, *Child soldiers in international law: The legal regulation of children’s participation in hostilities*, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, p. 32. The ICRC commentary to AP I would seem to hold 15 as the relevant threshold; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross and Martinus Nijhoff Publishers Geneva 1987, pp. 899-900, paras. 3178-3179.

¹⁶ Additional Protocol II: 1125 UNTS 609. As of 10 March 2013, this agreement has 166 ratifications.

¹⁷ 1577 UNTS 3. As of 10 March 2013, this agreement has 193 ratifications.

¹⁸ 2187 UNTS 90. As of 10 March 2013, this agreement has 121 ratifications.

¹⁹ 2133 UNTS 161. As of 10 March 2013, this agreement has 177 ratifications.

²⁰ 2173 UNTS 222. As of 10 March 2013, this agreement has 150 ratifications.

²¹ See e.g. UNSC Res. 2068 (2012), 19 September 2012, UN Doc. S/RES/2068 (2012), p. 1, preambular para. 2.

²² Matthew Happold, *Child Prisoners in War*, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 238.

²³ For a list of such declarations (territorial application), see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

²⁴ See e.g. the view of the Human Rights Committee in relation to the International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, Art. 2 in General Comment No. 31 (2004) *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2006, para. 10. As of 10 March 2013, the ICCPR has 167 ratifications.

²⁵ General Comment No. 31 (2004) *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2006, para. 10.

2.3 The relationship of international human rights law to the law of armed conflict

The provisions of LOAC naturally apply to armed conflicts, but some of them – like the prohibition on recruiting children into armed forces in AP I Art. 77(2) – would also seem to apply in peace time.²⁶ As regards the applications of international human rights law to instances of armed conflicts, the short answer is that they will also apply there, to the extent that states have not validly derogated from them or LOAC has modified them through the *lex specialis* principle. The main differences between these disciplines are their age limits on recruitment and use, and their rules regarding the treatment of detained child soldiers.

As regards different age limits, the more restrictive age threshold in the CRC or its OP would not be modified during an armed conflict by LOAC. The very title of the OP – Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts – makes it clear that its rules also apply to armed conflicts.

Although the CRC does not say anything on the treatment of detained child soldiers, Happold points out that it provides some guidance on the detention of children in general.²⁷ An interesting question is thus whether the CRC may influence the legality of detention under LOAC and whether it provides additional procedural rights to the child.²⁸ With some reservations, one might concur with Happold's finding that "there seems no objection to applying the CRC to interpret the provisions in API and APII dealing with children detained or interned for reasons relating to an armed conflict or to regulate issues not covered by international humanitarian law."²⁹

3. The prohibition on recruitment and use of child soldiers, and their treatment should they fall into the hands of another armed force or group

3.1 The prohibition

The prohibition analyzed here establishes

international responsibility for the state party whose personnel have carried out the prohibited recruitment or use. Although AP I also establishes individual criminal responsibility for some of its breaches, the recruitment and use of child soldiers is not one of these.³⁰ The direction international customary law and treaty law have taken on individual criminal responsibility will be addressed in sections 4 and 5, whereas the focus of this section will primarily be on acts generating state responsibility.³¹

The two Additional Protocols from 1977 were the first treaties to regulate the issue of children participating in some way in hostilities. AP I on international armed conflicts provides the following regulation in Art. 77(2):

"The Parties to the conflict shall take all *feasible measures* in order that children who have not attained the age of fifteen years do not take a *direct* part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In *recruiting* among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give *priority* to those who are oldest."³²

As regards the reference to "all feasible measures", it should probably be interpreted in a similar way to corresponding phrases used elsewhere in that treaty, like in Art. 57(2)(a)(i). The latter provision was extensively discussed during the negotiations of the treaty, and through the reference in the commentaries of the International Committee of the Red Cross (ICRC) to the expression being understood in its dictionary meaning, Happold focuses on whether something is possible or practicable.³³ States must therefore abstain from recruiting persons under 15 into their armed forces, whereas they must take all feasible measures to avoid that such children in other ways directly participate in hostilities.³⁴

A separate issue is here where the difference lies between indirect and direct participation in hostilities. This is also central to Art. 51(3) of that treaty and has been discussed extensively during the last few years, in preparation of and following the ICRC's interpretative

²⁶ Matthew C. E. Happold, Child soldiers in international law: The legal regulation of children's participation in hostilities, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, p. 33.

²⁷ Matthew Happold, Child Prisoners in War, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 240.

²⁸ Matthew Happold, Child Prisoners in War, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 240. Such a potential right could be found in Art. 37(d).

²⁹ Matthew Happold, Child Prisoners in War, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 240.

³⁰ See AP I Art. 85.

³¹ An act may nevertheless establish both individual criminal responsibility and state responsibility. This will often be the case for crimes committed by military personnel of a state.

³² Italics by the author.

³³ Matthew C. E. Happold, Child soldiers in international law: The legal regulation of children's participation in hostilities, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, p. 34.

³⁴ Matthew C. E. Happold, Child soldiers in international law: The legal regulation of children's participation in hostilities, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, p. 35.

guidance thereon.³⁵ This issue will not be explored here, as the focus of a later section will instead be on the related concept of active participation in hostilities.³⁶

Another relevant issue is the reference in Art. 77(2) to the act of recruiting. Some suggest that the term does not include voluntary enlistment,³⁷ but it is submitted that it covers both voluntary enlistments and conscription.³⁸

Moving on to another instrument, it follows from AP II on non-international armed conflicts Art. 4(3)(c) that “children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities”. This would include taking indirect part in hostilities, and the provision is therefore stricter than AP I Art. 77(2). Happold submits that the difference between these provisions is a result of inadvertence on behalf of the founding fathers,³⁹ and this would seem to be a plausible explanation. Moreover, as AP II Art. 4(3) does not include a reference to “all feasible measures”, it would also here seem to require more than AP I does.⁴⁰

CRC Art. 38 also regulates the exposure of children to armed conflicts and its central paragraphs provide that “States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities” (para. 2), and that “States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into

their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest” (para. 3). The article was seen as unsatisfactory by some states and NGOs since it provides little expansion of the protection offered by AP I.⁴¹ In general, the objections are threefold: Firstly, the provision does not differentiate between conscription and enlistment for those between 15 and 18, seemingly subsuming both under recruitment. Secondly, as the provision does not differentiate between international and non-international armed conflicts, the fact that children under 15 were not prohibited from indirect participation in hostilities requires less of the parties than AP II does. Thirdly, any direct participation of children under 15 were not strictly prohibited, as the provision simply obligated states to take all feasible measures to prevent it.⁴² As to the objection of the CRC backtracking from ground won by LOAC, Arnold nevertheless argues that a literal and teleological interpretation of Art. 38(1) suggests that LOAC will nevertheless constitute the *lex specialis* rules during an armed conflict.⁴³

For its sake, OP Art. 1 requires states to take “all feasible measures” to stop children under 18 within their armed forces from participating directly in armed conflict.⁴⁴ Two limitations are thus of relevance: Firstly, that the obligation is merely one of effort and secondly

³⁵ International Committee of the Red Cross, ‘Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law’, (2008) 90 *International Review of the Red Cross* pp. 991-1047, downloadable from <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>. See also Matthew C. E. Happold, *Child soldiers in international law: The legal regulation of children's participation in hostilities*, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, p. 36.

³⁶ See nevertheless the short consideration of this issue in relation to OP Art. 1 in Section 3.1. Here it will suffice to say that war-sustaining activities like the production of weapons and logistical functions like the provision of food are held by the International Committee of the Red Cross (ICRC) to merely constitute indirect participation. See International Committee of the Red Cross, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law*, 2009, pp. 50, 52, 54 and 55, downloadable from <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

³⁷ Geraldine Van Bueren, *The international legal protection of children in armed conflicts*, (1994) 43 *International law and comparative law quarterly*, pp. 809-26, p. 814.

³⁸ Matthew C. E. Happold, *Child soldiers in international law: The legal regulation of children's participation in hostilities*, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, p. 37 and id., n. 39. The ICRC seems to lump enlistment and conscription together, see Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross and Martinus Nijhoff Publishers Geneva 1987, pp. 900-901, paras. 3184-5, and J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: Rules, Cambridge University Press Cambridge 2005, pp. 482-485. The latter work has nevertheless come under criticism for its methodological approach, see J. B. Bellinger III & W. J. Haynes II, ‘A US Government Response to the International Committee of the Red Cross Study on Customary International Humanitarian Law’, (2007) 89 *International Review of the Red Cross*, pp. 443-471.

³⁹ Matthew C. E. Happold, *Child soldiers in international law: The legal regulation of children's participation in hostilities*, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, pp. 39-41. See also Geraldine Van Bueren, *The international legal protection of children in armed conflicts*, (1994) 43 *International law and comparative law quarterly*, pp. 809-26, p. 815, and William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press Oxford 2010, p. 252.

⁴⁰ Sylvain Vit , *Prosecuting children during armed conflict: international humanitarian law*, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 14-39, p. 25.

⁴¹ Matthew C. E. Happold, *Child soldiers in international law: The legal regulation of children's participation in hostilities*, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, pp. 41-43.

⁴² For a largely similar view, see Matthew Happold, *The optional protocol to the convention on the rights of the child on the involvement of children in armed conflict*, (2000) 3 *Yearbook of International Humanitarian Law*, pp. 226-244, p. 228.

⁴³ Roberta Arnold, *Children and Armed Conflict*, *Max Planck Encyclopedia of Public International Law*, obtainable at <http://www.mpepil.com>, para. 12.

⁴⁴ Under Art. 3(5) the raising of the age threshold does not influence the age threshold for application to schools operated by or under the control of the armed forces of the States Parties.

that the obligation only relates to direct participation.⁴⁵ As regards feasible measures, the USA has defined this threshold in its understanding issued upon ratification as “those measures that are practical or practically possible, taking into account all the circumstances ruling at the time, including humanitarian and military considerations”.⁴⁶ In relation to direct participation, the Committee on the Rights of the Child admittedly holds that the focus should rather be on preventing children from participating in any activity which put them at risk, thereby seemingly interpreting away the term direct. The Committee has thus voiced its concern where states have not prohibited also indirect participation in hostilities.⁴⁷ Beyond their roles as soldiers participating in hostilities, the committee has noted with concern *inter alia* the use by armed forces and groups of children as sex slaves, human shields, spies/informants, cooks, and to carry goods and weapons.⁴⁸ In comparison, the USA stated in the above mentioned understanding that direct participation “does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment”.⁴⁹

OP Art. 2 on the other hand prohibits compulsory recruitment of those under 18, whereas Art. 3 regulates the possibility of voluntary recruitment of children under 18. The latter provision raises the minimum age for

voluntary recruitment to 16.⁵⁰ NGOs typically point out how hard it is for states to establish sufficiently strong control mechanisms in order to stop their under 18s from participating directly in hostilities,⁵¹ thereby arguing against enlistment of 16-17s. It is nevertheless a fact that the OP allows for such enlistment and by doing so it also accepts that a risk for such participation will remain, as the obligation on the state is merely to take “all feasible measures” for its avoidance. There is currently a strong drive for raising this threshold to 18, as seen *inter alia* in resolution 1215 (2000) of the Parliamentary Assembly of the Council of Europe.⁵² The Special Representative of the Secretary-General for Children and Armed Conflict has also argued strongly for the “straight-18 position” in relation to the depositing of binding declarations on the minimum age for voluntary recruitment under the OP.⁵³

Here, OP Art. 4 (1) seemingly prohibits armed groups distinct from the armed forces of the state from recruiting persons under 18 and from using similar persons in hostilities. Due to the use of the term “should” in this provision as opposed to “shall”, it is not clear whether the provision establishes a ban binding directly on such groups, or whether this is merely a non-binding appeal to such groups whereas the obligation to establish the prohibition lies with the state as part of its “feasible measures” obligation under Art. 4(2).⁵⁴ It might seem odd that a human rights instrument like the OP should

⁴⁵ Compare here with the 1990 African Charter and the Rights and the Welfare of the Child which obligates states parties in Art. 22 (2) to “take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.” NGOs often emphasize stronger limitations on state parties by stating that children should be protected against any kind of involvement in armed conflicts, see e.g. Child Soldiers International, *Louder than words: An agenda for action to end state use of child soldiers* (London 2012), p. 124, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562.

⁴⁶ Available from http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidsg_no=IV-11-b&chapter=4&lang=en#EndDec.

⁴⁷ See e.g. Committee on the Rights of the Child, Consideration of reports submitted by state parties under Article 8 of the optional protocol to the convention on the rights of the child on the involvement of children in armed conflict, Concluding observations: Nicaragua, UN Doc. CRC/C/OPAC/NIC/CO/1, 21 October 2010, para. 15.⁴⁸

⁴⁸ See *inter alia* Committee on the Rights of the Child, Consideration of reports submitted by state parties under Article 8 of the optional protocol to the convention on the rights of the child on the involvement of children in armed conflict, Concluding observations: Nepal, UN Doc. CRC/C/15/Add.261, 21 September 2005, para. 81, Committee on the Rights of the Child, Consideration of reports submitted by state parties under Article 8 of the optional protocol to the convention on the rights of the child on the involvement of children in armed conflict, Concluding observations: Uganda, UN Doc. CRC/C/OPAC/UGA/CO/1, 17 October 2008, para. 24, Committee on the Rights of the Child, Consideration of reports submitted by state parties under Article 8 of the optional protocol to the convention on the rights of the child on the involvement of children in armed conflict, Concluding observations: Israel, UN Doc. CRC/C/OPAC/ISR/CO/1, 4 March 2010, para. 24, and Committee on the Rights of the Child, Consideration of reports submitted by state parties under Article 8 of the optional protocol to the convention on the rights of the child on the involvement of children in armed conflict, Concluding observations: Colombia, UN Doc. CRC/C/OPAC/COL/CO/1, 21 June 2010, para. 37.

⁴⁹ Available from http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidsg_no=IV-11-b&chapter=4&lang=en#EndDec. As to the discussion on whether this understanding is in conformity with the OP, see Child Soldiers International, *Louder than words: An agenda for action to end state use of child soldiers* (London 2012), p. 47, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562.

⁵⁰ Matthew Happold, The optional protocol to the convention on the rights of the child on the involvement of children in armed conflict, (2000) 3 *Yearbook of International Humanitarian Law*, pp. 226-44, p. 238.

⁵¹ Child Soldiers International, *Louder than words: An agenda for action to end state use of child soldiers* (London 2012), pp. 12 and 48-49, obtainable from http://www.childsoldiers.org/global_report_reader.php?id=562. As regards the reasons for changing the law so that even voluntary enlistment of under 18s is prohibited, see *id.*, p. 52.

⁵² Council of Europe, Parliamentary Assembly Resolution 1215 (2000) Campaign against the enlistment of child soldiers and their participation in armed conflicts, No. 5 (i). See also Child Soldiers International, *Louder than words: An agenda for action to end state use of child soldiers* (London 2012), p. 52, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562.

⁵³ Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, Radhika Coomaraswamy, UN Doc. A/HRC/21/38, 28 June 2012, p. 16.

⁵⁴ For the discussion, see Wouter Vandenholde, Stephan Parmentier and Ilse Derluyn, Editorial introduction – International law on children and armed conflict: the interface between various normative frameworks, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 2-13, pp. 5 and 12 with further references, and Sylvain Vit , Prosecuting children during armed conflict: international humanitarian law, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 14-39, pp. 27-8.

establish obligations for non-state entities, as obligations under international human rights law are generally held by states. To the extent that such an obligation is nevertheless found to bind these groups, this would be due to the provision mixing international human rights law and LOAC, as under the latter obligations may also be held by non-state parties.⁵⁵ Be that as it may, Happold correctly points out that the formulation chosen is wide enough also to cover forces allied with the government,⁵⁶ although the understandings of some of the ratifying states would seem to indicate otherwise.⁵⁷ The obligation on state parties in Art. 4 (2) to “take all feasible measures to prevent such recruitment and use” probably means that the greater the level of state control or influence over the relevant armed group, the more measures would be feasible.⁵⁸ Moreover, the very mentioning of non-state entities in OP Art. 4 strongly suggests that the protocol applies to both international and non-international armed conflicts,⁵⁹ as well as in peace time.

The different treatment of state forces and non-state groups is owing to the latter being unable to become parties to the OP, and since the existence and effectiveness of their safeguards to avoid recruitment cannot therefore be monitored by the Committee on the Rights of the Child.⁶⁰ However, this differential treatment does not motivate non-state entities to abide by the law. Admittedly, to the extent that recruitment or use is done by non-state groups outside of state control, these groups may anyway find domestic law of little normative importance, as they act in defiance of the current government, might plan on toppling it and will anyway be punished – if they are caught and no amnesty is at hand – severely for their rebellion, killing and destruction. That they also risk added punishment due to illegal recruitment or use of children is probably of little importance to

them.

The responsibility for recruitment and use of child soldiers by other entities is also regulated by OP Art. 7 (1), which provides *inter alia* that “States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary thereto..., including through technical cooperation and financial assistance.” Furthering illegal recruitment or use through support of parties in breach of their obligations has unsurprisingly been condemned as a breach of this provision.⁶¹ In this context the non-binding Paris principles provide in Sec 6.24 that relevant entities “should seek to limit the supply of arms and other support to parties unlawfully recruiting or using children in armed conflict. Control of the availability of small arms and light weapons may be especially important in reducing children’s capacity to participate in armed conflict.”⁶² Such limitations would be welcome.

It might here be useful to mention that the ILO’s Worst Forms of Child Labour Convention only prohibits the “forced or compulsory recruitment of children for use in armed conflict”.⁶³ Thus, to the extent that children enlist voluntarily, the situation is not covered by this convention. This is probably also the case where children are not conscripted for use in armed conflicts before they turn 18, as would seemingly be the case if they undergo education and training but are not to be used in combatant roles until they reach the age threshold. That such a separation might be hard to enforce during hostilities, is a different matter.

The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms,⁶⁴ commonly referred to as the European Convention on Human Rights (ECHR), does not explicitly regulate the issue of child soldiers. However, Art. 4 (3)(b) establishes military service

⁵⁵ For the similar view, see Matthew Happold, The optional protocol to the convention on the rights of the child on the involvement of children in armed conflict, (2000) 3 *Yearbook of International Humanitarian Law*, pp. 226-44, p. 236. The parties negotiating the OP discussed whether a reference to non-state entities should be made, or whether such a reference would give these groups unwarranted legitimacy, see *id.*, p. 233 with further references.

⁵⁶ Matthew Happold, The optional protocol to the convention on the rights of the child on the involvement of children in armed conflict, (2000) 3 *Yearbook of International Humanitarian Law*, pp. 226-244, p. 239.

⁵⁷ The US thus “understands that the term “armed groups” in Article 4 of the Protocol means nongovernmental armed groups such as rebel groups, dissident armed forces, and other insurgent groups”; Understanding No. 4 issued upon ratification, obtainable from http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en#EndDec.

⁵⁸ Child Soldiers International, *Longer than words: An agenda for action to end state use of child soldiers* (London 2012), p. 86, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562.

⁵⁹ *United States of America v. Omar Ahmed Khadr*, Defence motion for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, 18 January 2008, p. 9, para. iii.

⁶⁰ Provided as reason for this rule in *United States of America v. Omar Ahmed Khadr*, Amicus Brief filed by Sarah H. Paoletti on behalf of Canadian parliamentarians and law professors, international law scholars with specific expertise in the area of international humanitarian law, international criminal law and international human rights law, and foreign legal associations, 18 January 2008, pp. 7-8.

⁶¹ Child Soldiers International, *Longer than words: An agenda for action to end state use of child soldiers* (London 2012), p. 102, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562.

⁶² The Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, Sec. 6.24, obtainable from <http://www.unhcr.org/refworld/docid/465198442.html>. This has also been held to be important by the Parliamentary Assembly of the Council of Europe, see Council of Europe, Parliamentary Assembly Resolution 1215 (2000) Campaign against the enlistment of child soldiers and their participation in armed conflicts, No. 3.

⁶³ Art. 3(a).

⁶⁴ ETS No. 005 (with later amendments). As of 10 March 2013, this agreement had 47 ratifications.

as a valid exception to its prohibition of slavery and forced labour, but a literal interpretation of this exception would seem to limit its coverage to only compulsory military service. The issue of voluntary military service was raised in the *W, X, Y and Z v. United Kingdom* case, where the European Commission of Human Rights rejected the application since Art. 4(3)(b) was found also to cover voluntary enlistment, and since voluntary enlistment did not constitute “servitude” under Art. 4(1) as the protection of minors was secured through parental consent to the children’s voluntary enlistment.⁶⁵ Moreover, it would seem farfetched for family members of a conscripted or enlisted child, as well as for the child itself, to claim that their or its right to family life under Art. 8 is being breached as a consequence thereof. As regards the issue of use in hostilities, a question might arise in relation to the state party’s positive obligations under Art. 2, especially as regards its failure to stop non-state groups from recruiting or using children in hostilities.

As to the question of how this issue is regulated by customary international law, the Special Court for Sierra Leone (SCSL)⁶⁶ held in the *Norman* case that “[t]he widespread recognition and acceptance of the norm prohibiting child recruitment in Additional Protocol II and the CRC provides compelling evidence that the conventional norm entered customary international law well before 1996. The fact that there was not a single reservation to lower the legal obligation under Article 38 of the CRC underlines this, especially if one takes into consideration the fact that Article 38 is one of the very few conventional provisions which can claim universal acceptance.”⁶⁷ This reasoning has been questioned since widespread ratification and upholding of treaty obligations only show that these states abide by their treaty obligations, not that they have also taken on customary law obligations.⁶⁸ However, the widespread participation in the negotiations of the APs and the CRC, as well as the lack of real objections to their rules on child soldiers, might suffice to establish the relevant state

practice and opinion juris for an international customary law rule banning the recruitment of children under 15 into the armed forces of states and obliging these states to use all feasible measures to prevent children under 15 from taking a direct part in hostilities.⁶⁹

3.2 The treatment

There are few rules explicitly regulating the treatment of child soldiers after they have been captured. It would seem as if states and NGOs have preferred to focus on the formal prohibition of child soldiers, as opposed to facing the reality of their actual use.⁷⁰ Illustrating is here AP I Art. 77 which refers to captured children as “exceptional cases”.

In relation to international armed conflicts, child soldiers are not excluded from status as combatants and thus as prisoners of war should they be captured. They will also be entitled to protection against “any form of indecent assault” under Art. 77(1). The same paragraph entitles them additionally to “the care and aid they require, whether because of their age or for any other reason”. This would seem to include items for schooling, and, as appropriate, psychological help.⁷¹ Moreover, not only protection from transgressions on the side of the holding power is included, but also transgressions undertaken by likewise detained children and adults, as well as from anybody else.⁷² This would probably require a separation of adults and children, as well as dividing both groups according to sex.⁷³ The separation of children from adults, save when families are accommodated as family units, follows explicitly from Art. 77(4). Art. 77(3) furthermore establishes that such children will “continue to benefit from the special protection accorded by [Art. 77], whether or not they are prisoners of war.”

AP II has even less to say about the treatment of child soldiers. Art. 4(3) merely states that children are entitled to “the care and aid they require”, which includes *inter alia* education.⁷⁴ This “special protection” is not forfeited by taking direct part in hostilities.⁷⁵

As CRC Art. 37(b) establishes that children shall only

⁶⁵ *W, X, Y and Z v. United Kingdom*, Appl. No. 3435-3438/67, Decision 19 July 1968. See Geraldine Van Bueren, The international legal protection of children in armed conflicts, (1994) 43 *International Law and Comparative Law Quarterly*, pp. 809-826, p. 817, and R.C.A. White & C. Ovey, *Jacobs, White & Ovey The European Convention on Human Rights*, 5th ed., Oxford University Press Oxford 2010, pp. 202-204.

⁶⁶ Established by an agreement between Sierra Leone and the UN on 16 January 2002.

⁶⁷ SCSL, *Prosecutor against Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on preliminary motion based on lack of jurisdiction (child recruitment) (appeals chamber), 31 May 2004, p. 7396, para. 20.

⁶⁸ Matthew Happold, *Child soldiers in international law*, Manchester University Press Manchester 2005, pp. 94-95. The case is also analyzed in *id.*, pp. 128-132.

⁶⁹ Matthew C. E. Happold, Child soldiers in international law: The legal regulation of children’s participation in hostilities, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, pp. 43-48.

⁷⁰ Matthew Happold, Child Prisoners in War, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 237.

⁷¹ Matthew Happold, *Child soldiers in international law*, Manchester University Press Manchester 2005, p. 104 with further references. Entitlement to teaching may also follow from GC IV Arts. 24 and 50.

⁷² Matthew Happold, Child Prisoners in War, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 239.

⁷³ Matthew Happold, Child Prisoners in War, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 239.

⁷⁴ Litra a.

⁷⁵ Litra d.

be detained as a “measure of last resort and for the shortest appropriate period of time”, Happold holds that this obligates states to make good-faith efforts to conclude agreements for repatriation of such prisoners of war before the cessation of hostilities in accordance with 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War⁷⁶ Art. 109(2).⁷⁷ This presumes on the other hand that the receiving state is not acting in breach of its obligations on the use of children in armed conflicts. If that is so, the detaining state might be in violations of its own obligations if it seeks to return the children home and thereby expose them to the risk of treatment in violation of the relevant instruments.

An interesting issue is raised here by OP Art. 6(3) which states that “States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.” Is a state capturing illegally recruited child soldiers then obliged to demobilize or otherwise release them from captivity? If children are entitled to release at an earlier point in time than would otherwise be the case due to OP Art. 6(3),⁷⁸ this would provide for a significant exception to the general regime of detention during armed conflicts. If that is so, Happold correctly states that this would impose considerable positive obligations on the detaining power.⁷⁹

As regards the reference to “social reintegration” in OP Art. 6 (3), it might again be illustrative to refer to No. 2 (A) of the understanding issued by the USA upon ratification: “[T]he term “feasible measures” means those measures that are practical or practically possible, taking

into account all the circumstances ruling at the time, including humanitarian and military considerations”. It has been claimed that the term “appropriate assistance” will include opportunity to pursue an education,⁸⁰ and that the term “necessarily entails criminal justice procedures tailored to the unique needs of children and designed to ensure their rehabilitation and reintegration into society”,⁸¹ should a child be prosecuted. The provision itself is nevertheless so generally phrased that it provides little concrete guidance.⁸²

The provision was raised before the US Military Commission in the *Khadr* case, where the defense sought to have evidence obtained from *Khadr* suppressed since he had been designated as unlawful combatant, and not as a child entitled to special protection under Art. 6 (3).⁸³ The Commission nevertheless found that no such obligation existed under the OP or relevant national law.⁸⁴

Which protection may then be offered to a child soldier by the new third optional protocol to the CRC?⁸⁵ That protocol also covers obligations under the OP (Art. 5(1)(c)), and it provides victims with a right to individual petition (Art. 5), and the Committee with a right to initiate an inquiry in relation to “reliable information indicating grave or systematic violations” (Art. 13) of inter alia the OP. However, the latter procedure may be limited by the opt-out clause in Art. 13(7).

4. Prosecuting those who recruit or use child soldiers

The SCSL was the first non-national tribunal or court to establish recruitment and use of children under 15 as a war crime under international customary law,⁸⁶ although the crime was already mentioned as a “serious violation of laws and customs applicable in international armed conflict/armed conflicts not of an international

⁷⁶ 75 UNTS 135.

⁷⁷ Matthew Happold, *Child soldiers in international law*, Manchester University Press Manchester 2005, p. 103.

⁷⁸ This would seem to be the view of The Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, Sec. 3.11, obtainable from <http://www.unhcr.org/refworld/docid/46519842.html>.

⁷⁹ Matthew Happold, *Child Prisoners in War*, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 241.

⁸⁰ *United States of America v. Omar Ahmed Khadr*, Defense motion to suppress evidence of statements (violation on child soldier protocol), 29 May 2008, p. 6. This is also held by the Committee on the Rights of the Child, Consideration of reports submitted by state parties under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Concluding observations: United States of America, UN Doc. CRC/C/OPAC/USA/CO/1, 25 June 2008, p. 7, para. 30 (h).

⁸¹ *United States of America v. Omar Ahmed Khadr*, Defense motion to suppress evidence of statements (violation on child soldier protocol), 29 May 2008, p. 4.

⁸² Matthew Happold, *Child Prisoners in War*, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 247.

⁸³ Matthew Happold, *Child Prisoners in War*, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 244. See *United States of America v. Omar Ahmed Khadr*, Defense motion to suppress evidence of statements (violation on child soldier protocol), 29 May 2008, pp. 1-8. Information on the US military commissions may be found at <http://www.mc.mil>. In relation to the *Khadr* case, information may also be found at <http://www.defense.gov/news/commissionsKhadr.html>.

⁸⁴ *United States of America v. Omar Ahmed Khadr*, Ruling on defense motion to suppress evidence of statements (violation on child soldier protocol), 15 August 2008, p. 1.

⁸⁵ 2011 Optional protocol to the convention on the rights of the child on a communications procedure, UN Doc. A/RES/66/138. Under Art. 19 the protocol requires 10 ratifications before it enters into force. As of 10 March 2012, 35 states have signed the protocol, but only 3 states (Gabon, Thailand and Germany) have acceded to or ratified it. Information obtained from http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en.

⁸⁶ *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc. A/67/256, 6 August 2012, para. 4.

character" in the chapeau of RSICC Art. 8(2)(b) and 8(2)(e).⁸⁷ The International Criminal Court (ICC) has in a number of cases referred to such crimes, for example in relation to the activities of the Lord's Resistance Army,⁸⁸ and its first judgment solely dealt with the war crime of such recruitment and use of children.⁸⁹ Furthermore, Trial Chamber II of the SCSL found Charles Taylor guilty inter alia of the war crime of recruiting and using child soldiers. The acts were admittedly committed by an armed group not under his direct command and control, but he had nevertheless supported the relevant group in numerous ways.⁹⁰ This was the first time a former head of state had been found guilty of such acts.⁹¹

Some find that these indictments and judgments usefully deter recruitment of child soldiers in armed conflict,⁹² and the Special Representative of the Secretary-General for Children and Armed Conflict has stated that parties to conflicts seem to be "cognizant of the [Lubanga and Taylor] cases and the implication on their own behavior."⁹³ However, others are far more skeptical to the preventive effects of such prosecutions.⁹⁴

The main provisions for the crime of using and recruiting children under 15 as soldiers are RSICC Arts. 8(2)(b)(xxvi) and 8(2)(e)(vii). These provisions were the first to establish such acts as war crimes.⁹⁵ They nevertheless build on the abovementioned provisions of the APs, CRC and OP, and the ICC has held that those provisions recognize that children are particularly vulnerable and that they require privileged treatment as compared to the rest of the civilian population.⁹⁶ The

principal objective of those provisions has allegedly been to protect children under the age of 15 from the risks associated with armed conflicts, hereunder securing their physical and psychological well-being. The latter is said to include not only protection from violence and fatal or non-fatal injuries during fighting, but also any potentially serious trauma that may accompany recruitment.⁹⁷ Interpretation of the short-phrased provisions of the RSICC is left with the ICC, and it will typically rely on the jurisprudence of other international tribunals when establishing what constituted international law when the relevant acts or omissions took place.⁹⁸

These RSICC provisions cover international and non-international armed conflicts respectively⁹⁹ and the prohibitions are formulated largely similar: "Conscripting or enlisting children under the age of fifteen years into the national armed forces/armed forces or groups or using them to participate actively in hostilities." Thus, during an armed conflict any recruitment, both involuntary and voluntary,¹⁰⁰ of children under 15 is prohibited by any armed force or group. It is therefore unnecessary for the purposes of the RSICC to go into the definitions of these different recruitment scenarios.¹⁰¹ It might nevertheless be of interest to note that the SCSL has construed enlistment broadly to "...include any conduct accepting the child as part of the militia",¹⁰² whereas it has also applied a flexible understanding to conscription, which it recognizes as covering "acts of coercion, such as abductions and forced recruitment, by an armed group [or armed force] against children, committed for the purpose of using them to participate

⁸⁷ The crimes themselves are defined in Art. 8(2)(b)(xxvi) and Art. 8(2)(e)(vii) respectively.

⁸⁸ See *Report of the Secretary-General on the situation of children and armed conflict affected by the Lord's Resistance Army*, UN Doc. S/2012/365, 25 May 2012.

⁸⁹ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber), 14 March 2012.

⁹⁰ *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc. A/67/256, 6 August 2012, para. 4.

⁹¹ *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc. A/67/256, 6 August 2012, para. 4.

⁹² *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc. A/67/256, 6 August 2012, para. 7.

⁹³ *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc. A/67/256, 6 August 2012, para. 3.

⁹⁴ Mark A. Drumbl, *Reimagining child soldiers in international law and policy*, Oxford University Press Oxford 2012 pp. 135 and 162-166.

⁹⁵ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber), 14 March 2012, p. 261, para. 569.

⁹⁶ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber), 14 March 2012, pp. 262-263, pp. 276-277, para. 605.

⁹⁷ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber), 14 March 2012, pp. 262-263, pp. 276-277, para. 605.

⁹⁸ This indirectly follows from RSICC Art. 20(1)(b). Admittedly, the only reference to jurisprudence relates to the case law of the ICC itself, and it found in the Lubanga case that "[a]lthough the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute, the wording of the provision criminalising the conscription, enlistment and use of children under the age of 15 within the Statute of the SCSL is identical to Article 8(e)(vii) of the Rome Statute, and they were self-evidently directed at the same objective. The SCSL's case law therefore potentially assists in the interpretation of the relevant provisions of the Rome Statute"; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber), 14 March 2012, pp. 262-263, para. 603.

⁹⁹ This even includes armed conflicts which are not covered by the APs, as AP II only covers some non-international armed conflicts – see AP II Art. 1(1). See Matthew Happold, *Children participating in armed conflict and international criminal law*, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 82-100, p. 88.

¹⁰⁰ The term "recruitment" is used in the APs, CRC and OP, and is considered to cover both voluntary enlistment and compulsory conscription. See ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber), 14 March 2012, pp. 262-263 and 276-278.

¹⁰¹ As to their understanding by the Special Court for Sierra Leone, see SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 165, paras. 441-442 with further references. As it is nevertheless more blameworthy to conscript than to enlist, this should be taken into consideration in sentencing the perpetrators, see Mark A. Drumbl, *Reimagining child soldiers in international law and policy*, Oxford University Press Oxford 2012, p. 148.

¹⁰² SCSL, *Prosecutor v. Moinina Fofana and Allieu Kondewa*, SCSL-04-14-A, judgment (appeals chamber), 28 May 2008, para. 144.

actively in hostilities.”¹⁰³ It is similarly prohibited to let children actively participate in hostilities. Although the wording of Art. 8(2)(b)(xxvi) might be somewhat ambiguous, the Elements of Crimes (Elements) provide that “[t]he perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.”¹⁰⁴ As a consequence, a child’s consent to enlist is only of interest in relation to sentencing or reparations.¹⁰⁵ Thus, the prohibition in Art. 8 covers three types of offences: Enlistment, conscription and use.¹⁰⁶

As regards conscription and enlistment, both scenarios would seem to require that the child is recruited with the purpose of carrying out functions which constitute active participation in hostilities.¹⁰⁷ Otherwise, the prohibition would also cover activities which are normally carried out by civilian services, but which are now carried out partially by younger persons in uniform due to a breakdown of these civilian services, like garbage handling or assistance work during a natural catastrophe.

Another issue is what constitutes “national armed forces” under the provision dealing with international armed conflicts. Although “national” is not necessarily synonymous with “governmental” under a literal interpretation, it would nevertheless seem as if the term was chosen to exclude responsibility for e.g. children participating in the *intifada*.¹⁰⁸ Also, the use of terms as armed forces and armed groups would seem to establish a distinction between them.¹⁰⁹ However, the ICC interpreted in the *Lubanga* case the term “national” wide enough to also cover non-governmental armed forces.¹¹⁰

Although conscription etc. of child soldiers is illegal in any armed conflict under customary international law, and a restrictive interpretation would in effect shield perpetrators from prosecution by the ICC due merely to the RSICC suffering from insufficient draftsmanship, it is submitted that this is nevertheless probably a too flexible interpretation of the very wording used by the RSICC itself.¹¹¹ The problem does not arise in relation to non-international armed conflicts as the terms used there (“armed forces or groups”) are wide enough to cover most armed entities.

Here, a single case of recruitment will actually suffice,¹¹² although such a perpetrator who has not additionally committed any of the other crimes found in the RSICC would hardly be important enough for prosecution before the ICC.¹¹³ The offences are furthermore of a continuous nature and only end when either the child leaves the force or group, or turns 15.¹¹⁴

The Elements shall under Art. 9 “assist the Court in the interpretation and application” of the RSICC, and beyond the part addressed above, they provide the following guidance in relation to Art. 8(2)(b)(xxvi):

2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual

¹⁰³ SCSL, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL-04-16-T, judgment (trial chamber II), 20 June 2007, p. 227, para. 734.

¹⁰⁴ The Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B. Italics by author. The Elements of Crimes for Art. 8(2)(e)(vii) are largely identical.

¹⁰⁵ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, pp. 262-263, pp. 281-282, para. 617.

¹⁰⁶ See ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, pp. 262-263, pp. 276-277, para. 609.

¹⁰⁷ For a similar view, see SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 165, para. 441, and p. 502, para. 1378.

¹⁰⁸ Matthew Happold, Children participating in armed conflict and international criminal law, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 82-100, p. 90.

¹⁰⁹ Matthew Happold, Children participating in armed conflict and international criminal law, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 82-100, p. 91.

¹¹⁰ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, decision on the confirmation of charges (pre-trial chamber I), 29 January 2007, pp. 94-8, paras. 268-285. The trial chamber avoids addressing the issue, see e.g. ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber), 14 March 2012, p. 261, para. 568. The issue was explicitly referred to in the Separate and dissenting opinion of judge Odio Benito in that case, pp. 4-5, paras. 9-14, attached to *ibid*. She stated in para. 13: “As I previously stated, the recruitment of children under the age of 15 is prohibited under international customary law, regardless of whether this was committed in the context of an international or non-international armed conflict and regardless of the nature of the armed group or force that recruited the child. It would be contrary to the “object and purpose” of the Rome Statute and contrary to internationally recognised human rights (and thus contrary to Article 21(3) of the Rome Statute) to exclude from the prohibition of child recruitment, and armed group, solely for the nature of its organization (State or non-state armed group).”

¹¹¹ For a seemingly similar view, see Matthew Happold, Children participating in armed conflict and international criminal law, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 82-100, pp. 90-93 and 100.

¹¹² A similar prohibition in the statutes of the SCSL has been understood in the same way; SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 164, para. 439 with further references.

¹¹³ RSICC Art. 17(1)(d).

¹¹⁴ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, pp. 262-263, p. 282, para. 618, and SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 165, para. 443.

circumstances that established the existence of an armed conflict.

The information provided by the Elements for Art. 8(2)(e)(vii) is largely identical, merely referring to armed conflict not of an international character instead of international armed conflict, and armed groups instead of national armed forces.¹¹⁵

Does the relevant recruitment or use require an intentional mind set, or will gross or other negligence suffice? The Elements indicate that “should have known” will suffice as *mens rea*, whereas the perpetrator must also have been aware of the factual circumstances which established an armed conflict. RSICC Art. 30 (1) nevertheless requires “knowledge and intent”, although the ICC seems to focus primarily on the negligence standard.¹¹⁶ Here, the SCSL has found it sufficient with a mere reference to the actual age of the relevant child at the time of recruitment, and the use of this general formulation: “Given the prevalence of children under the age of 15 in the RUF [Revolutionary United Front], the Trial Chamber is satisfied that the members of the RUF knew or should have known that [the child] was under the age of 15 years.”¹¹⁷

As regards No. 4 of the Elements, the conduct must have taken place “in the context of and was associated with an international armed conflict.” This requires a nexus between the act and the armed conflict at hand, and this will be the case where “the perpetrator acted in furtherance of or under the guise of the armed

conflict”.¹¹⁸ In the *Lubanga* case, the ICC held that “[g]iven the plain and ordinary meaning of this provision, it is unnecessary to discuss its [the issue of context] interpretation in detail: it is sufficient to show that there was a connection between the conscription, enlistment or use of children under 15 and an armed conflict that was not international in character.”¹¹⁹

The central terms of the prohibition, highlighted in No. 1 of the Elements, are referred to in the *travaux préparatoires* in the following manner: “The words “using” and “participate” have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer’s married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.”¹²⁰ Be that as it may, this does not mean that both direct and indirect participation are covered,¹²¹ as the phrases compared in the quote above are rather direct participation and active participation. Although there have been efforts to hold these terms to be identical,¹²² the above quote seems to find active participation in hostilities to be broader than mere direct participation in hostilities, where the latter phrase

¹¹⁵ Similar understandings were made by the SCSL in inter alia SCSL, *Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL-2004-16-A, judgment (trial chamber II), 20 June 2007, pp. 225-226, para. 729.

¹¹⁶ Matthew Happold, *Children participating in armed conflict and international criminal law*, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 82-100, pp. 96-98 with further references to case law. See also William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press Oxford 2010, pp. 252 and 255. An example from the ICC is ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, decision on the confirmation of charges (pre-trial chamber I), 30 September 2008, p. 77, paras. 251-252.

¹¹⁷ An example is SCSL, *Prosecutor v. Charles Ghanakay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 512, para. 1410.

¹¹⁸ SCSL, *Prosecutor v. Charles Ghanakay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 206, para. 566 with further references, especially to case law from the International Tribunal for the former Yugoslavia (ICTY). This would typically be the case where the recruitment or use of children “can be said to have served the ultimate goal of a military campaign”, see SCSL, *Prosecutor v. Charles Ghanakay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 206, para. 567.

¹¹⁹ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, pp. 262-263, para. 571. Note that the relevant armed conflict of that case was non-international.

¹²⁰ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the preparatory committee on the establishment of an international criminal court, Addendum, 14 April 1998, UN Doc. A/CONF.183/2/Add.1, p. 21, n. 12. See William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press Oxford 2010, p. 253 for reference to the three different formulations being considered during the negotiations of the RSICC.

¹²¹ As claimed by Child Soldiers International, *Louder than words: An agenda for action to end state use of child soldiers* (London 2012), p. 45, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562. The NGO refers in id., n. 4 to the ICRC’s customary international humanitarian law study Rule 137, as found in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: Rules, reprinted with corrections, Cambridge University Press Cambridge 2009, pp. 485-488. Rule 137 states rather categorically that “[c]hildren must not be allowed to take part in hostilities”. No differentiation is here made between direct and indirect participation in hostilities. This view is supported by Sylvain Vité, *Prosecuting children during armed conflict: international humanitarian law*, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 14-39, pp. 28-29, but it is submitted by the present author that the ICRC study on this issue would have benefitted from additional analysis.

¹²² For information on this, see Matthew Happold, *Child soldiers in international law*, Manchester University Press Manchester 2005, pp. 97-8, and Matthew Happold, *Children participating in armed conflict and international criminal law*, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 82-100, pp. 94-95. See also the International Committee of the Red Cross, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law*, (2008) 90 *International Review of the Red Cross*, pp. 991-1047, pp. 1013-4, downloadable from <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>. This is allegedly also the view of the defense in the *Lubanga* case, see ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Prosecution’s Response to Thomas Lubanga’s Appeal against Trial Chamber I’s Judgment pursuant to Article 74, 18 February 2013, p. 89, para. 198.

regulates whether civilians supporting the war effort lose their legal protection from direct targeting by the enemy. In the *Lubanga* case, the ICC found that a different formulation from the APs “was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence of using children under the age of 15 actively to participate in hostilities.”¹²³ It would thus seem as if individuals are held criminally responsible for acts which would not establish ordinary state responsibility – AP I, CRC and OP using direct participation in hostilities as the relevant threshold.¹²⁴

The active participation formula has also been analyzed by the SCSL which found that, generally, “[a]ny labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation.”¹²⁵ In a more illustrative manner, the SCSL has held that “[u]sing’ children to participate actively in the hostilities encompasses putting their lives directly at risk in combat, but may also include participation in activities linked to combat such [as] carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields. Whether a child is actively participating in hostilities in such situations will be assessed on a case-by-case basis.”¹²⁶ Likewise, providing guard duty to military objectives suffices.¹²⁷ Moreover, in the context of Sierra Leone, the SCSL found diamond mines to be crucial to the war effort of all the relevant armed groups, thereby generating a high risk of enemy attacks on these objects. Since children providing guard duties here were in direct danger of being caught in hostilities, they were found to

have participated actively in hostilities.¹²⁸ Similarly, safeguarding the physical safety of a military commander, particularly when used as bodyguards, will suffice.¹²⁹ Also, current case law holds the threshold to have been reached where children carry arms and commit crimes against civilians in the context of food-finding missions.¹³⁰ Additionally, using a child to amputate limbs¹³¹ or flog civilians¹³² would constitute active participation, as would their capture of girls for sexual purposes,¹³³ their looting,¹³⁴ and their burnings.¹³⁵ The very carrying of arms and ammunition would seem to suffice as well.¹³⁶ The SCSL has even found that the mere sending of trained child soldiers to a fighting area sufficiently places the children at risk for them to participate actively in hostilities.¹³⁷

As regards criminal responsibility, one of the central questions is now where to draw the line between non-active and active participation, i.e. what does active mean, or negatively phrased: Which activity is not covered by this prohibition and can thus take place without generating individual criminal responsibility under this prohibition?

In relation to food-finding, the SCSL has held that “not every instance in which a child participated in a food-finding mission constitutes active participation in hostilities”.¹³⁸ Whether the relevant threshold is reached will depend upon whether there is a “clear link” between the mission and the hostilities.¹³⁹ As regards domestic chores, the SCSL has found that this did not constitute active participation in hostilities, since such activities were not sufficiently related to hostilities and did not directly support the military operations of the relevant armed

¹²³ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, p. 285, para. 627.

¹²⁴ Matthew Happold, *Child soldiers in international law*, Manchester University Press Manchester 2005, pp. 134-135.

¹²⁵ SCSL, *Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL-2004-16-A, judgment (trial chamber II), 20 June 2007, p. 359, para. 1266.

¹²⁶ SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 166, para. 444 with further references.

Footnotes in the original text have been omitted. It has been reported that Syrian armed forces have used children as human shields, see *Children and armed conflict*, Report of the Secretary-General, UN Doc. A/66/782-S/2012/261, 26 April 2012, p. 23.

¹²⁷ SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 528, para. 1459 with further references.

¹²⁸ SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, pp. 528-529, para. 1459, and p. 541, para. 1495.

¹²⁹ SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 532, para. 1468.

¹³⁰ SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 536, para. 1479, p. 546, para. 1509, and p. 550, para. 1519.

¹³¹ SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 539, para. 1490, and p. 543, para. 1502.

¹³² SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 569, para. 1581.

¹³³ SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 543, para. 1502.

¹³⁴ SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 553, para. 1526.

¹³⁵ SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 553, para. 1528.

¹³⁶ SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 537, para. 1486, and p. 551, para. 1524.

¹³⁷ SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 535, para. 1476.

¹³⁸ SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 536, para. 1479. See also *id.*, para. 1478.

¹³⁹ SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 536, para. 1479. See also SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, SCSL-04-15-T, judgment (trial chamber I), pp. 517-518, para. 1743.

groups.¹⁴⁰

Moreover, in the *Lubanga* case, the ICC avoided to decide whether sexual violence may constitute “use”. The Special Representative of the Secretary-General for Children and Armed Conflict had nevertheless argued for considering sexual exploitation of boys and girls by armed forces or groups as an “essential support function”.¹⁴¹

From the above it would seem as if all acts constituting “direct” participation in hostilities would qualify as “active” participation. However, this criminal law prohibition does not redefine the threshold for losing legal protection as civilian in LOAC, and it is important that no influence is let to flow in that direction.¹⁴² Nevertheless, the SCLS seemingly equate “actively participating in hostilities” with the situation when a person turns a “legitimate military target”.¹⁴³ This is a dangerous mixing of two conceptually different concepts.

Furthermore, a somewhat problematic finding was made by the SCLS in 2007 in the *Brima, Kamara and Kanu* case, where the court held that “regardless of the specific duties of the children at the [Armed Forces Revolutionary Council Secretariat in Kenema], the presence of children in locations where crimes were widely committed was illegal.”¹⁴⁴ Although the quote requires that crimes are “widely” committed, it is surprising that more than mere presence is not required before the children are found to participate actively in hostilities.

One may also ask whether merely putting children at risk of injury or suffering is sufficient to constitute their active participation in hostilities. It is submitted that this

is probably a too flexible reading of the provision, but both the SCSL and the ICC seem comfortable in doing exactly that. Thus, the SCSL found in the *Brima, Kamara and Kanu* case that “[u]sing” children to “participate actively in the hostilities” encompasses putting their lives directly at risk in combat,¹⁴⁵ whereas the ICC held in the *Lubanga* case that “[t]he decisive factor in deciding whether an indirect role [i.e. supporting the combatant] is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger by becoming a potential target.”¹⁴⁶ There are admittedly other parts of the *Lubanga* judgment which seem to indicate that the risk potential is not in itself enough,¹⁴⁷ and it’s only to hope that this issue is addressed in a convincing manner during the appeal round.¹⁴⁸

For the purpose of comparison, state parties to the ECHR are bound to have sufficiently accessible and clear descriptions of prohibited acts.¹⁴⁹ On the other hand, ECHR Art. 7 explicitly recognizes international law as a valid source for such prohibitions, thereby arguably opening up to some degree for more vaguely circumscribed crimes than this court would have let pass had the crimes been founded in national law. Some domestic legal systems nevertheless require the prohibited acts to follow from domestic law and do not accept mere references to international law, even where the international crime itself might be well-delimited.¹⁵⁰

As regards international criminal law, the nullum crimen principle seems admittedly to have been applied in a flexible manner by the International Tribunal for the former Yugoslavia (ICTY).¹⁵¹ Be that as it may, RSICC Art. 22 (2) provides that “the definition of a crime shall

¹⁴⁰ SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, SCSL-04-15-T, judgment (trial chamber I), p. 516, para. 1739 and SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 512, para. 1411, p. 535, para. 1477, p. 551, para. 1522. The ICC does not seem to explicitly say this, but it nevertheless only seems to consider domestic work as active participation when undertaken together more military-oriented activities like acting as bodyguards, see ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, p. 385, para. 882.

¹⁴¹ As referred to in ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, p. 288, para. 630 and id., n. 1811.

¹⁴² For a similar view, see Sylvain Vité, *Prosecuting children during armed conflict: international humanitarian law*, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 14-39, p. 25.

¹⁴³ SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 581, para. 1604, and id., n. 3688.

¹⁴⁴ SCSL, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL-04-16-T, judgment (trial chamber II), 20 June 2007, p. 359, para. 1268.

¹⁴⁵ SCSL, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL-04-16-T, judgment (trial chamber II), 20 June 2007, p. 228, para. 736. The putting-lives-directly-at-risk formula is also mentioned in SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 166, para. 444.

¹⁴⁶ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, p. 363, para. 820.

¹⁴⁷ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, pp. 285-286, para. 628.

¹⁴⁸ The issue is referred to in ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Prosecution’s Response to Thomas Lubanga’s Appeal against Trial Chamber I’s Judgment pursuant to Article 74, 18 February 2013, p. 91, para. 201.

¹⁴⁹ See e.g. Robin C.A. White and Clare Ovey, *Jacobs, White and Ovey’s The European Convention on Human Rights*, 5th ed., Oxford University Press Oxford 2010, pp. 301-303 and 312-315.

¹⁵⁰ An example is Norway, where Art. 96 of the Constitution is held to require the prohibition being found in acts of the Norwegian parliament. See e.g. Eivind Smith, *Konstitusjonell demokrati*, Fagbokforlaget, Bergen 2009, pp. 436-439.

¹⁵¹ Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmschurst, *An introduction to international criminal law and procedure*, Cambridge University Press Cambridge 2010, p. 19. The ICTY was established by UNSC Res. 827 (1993).

be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.” A strict construction is therefore to be expected from the ICC. However, as Art. 22(2) may not constitute a statement of customary law, the SCSL is not bound by the rule behind that provision. Nevertheless, it will arguably be in the SCSL’s best interest to abide by a strict construction of this principle as this will lessen its exposure to criticism smearing its aftermath.

Admittedly, in relation to many of the above findings the SCSL has held that they constitute active participation in hostilities “in the context of the conflict in Sierra Leone”.¹⁵² This may limit the transferal value of these findings to other conflicts, but it is submitted that the phrase is used to address the nexus issue more than limiting the possibility of using SCSL findings as authoritative, if strictly non-binding, by other tribunals and courts. Nevertheless, one exception to this is probably whether violent acts by children against civilians constitute active participation in hostilities. Here, the SCSL went to some length to provide arguments for this conclusion in para. 1604 of the *Taylor* judgment. The court built its conclusion, which was provided by the abovementioned context-phrase, on the following aspects: The violent acts were directly linked to hostilities; the children were armed and accompanied by adult fighters and commanders; the violence typically took place in the context of guerrilla warfare; and the purpose of the crime was to damage or harm the adversary. It is uncertain whether all of these issues would have to be present before the ordering etc. of such violent acts would constitute a relevant “use” of a child outside the context of the conflict in Sierra Leone.

It should also be highlighted that in addition to the requirements considered above, the SCSL demands the following before it may establish guilt in relation to Art. 4 on other serious violations of international humanitarian law, hereunder *litra c* (child soldiers): “(ii) that the victim was not directly taking part in the hostilities at the time of the alleged violation and (iii) that the perpetrator knew or had reason to know that the victim was not taking a direct part in the hostilities at the time of the alleged act or omission”.¹⁵³ The court addresses this *inter alia* in para. 1606 of the *Taylor* judgment. However, this begs the question as to why such issues should at all

be relevant in relation to the recruitment or use of child soldiers. An armed group would presumably be no more allowed to recruit or use captured child soldiers, than it would children it has recruited or used itself who had previously not taken any direct part in hostilities. Moreover, the very use of the phrase “directly taking part in hostilities” regulates as mentioned the extent to which a civilian loses his legal protection against attacks, something which calls for a more narrowly cast net than that which generates individual criminal responsibility for a person who recruits or uses child soldiers. It is not obvious why the court would need to address this issue in relation to recruitment and use of child soldiers.

As regards criminal responsibility, a central question is how close the relationship between the state/group and the relevant child must be before it is proper to speak of the child as being used by that party. The focus is here on situations where the child has not been recruited and responsibility would probably not arise where a child during an attack on his village takes a weapon from a dead soldier and shoots some children who have bullied him. Even if these bullies were in the process of defending the village, and the child’s attack thus supports the attacking force, this would seem insufficient to constitute proper use by the relevant force/group. Amongst other reasons, the potential “perpetrators” of child soldering would probably not even know of this individual fighter. But what if the child afterwards follow the armed group at some distance, visits places the group has just left and then plunders or kills if opportunities arise, and the leader of the armed group is aware of this and finds it useful that the child strikes additional terror in the previous victims of the armed group? Is it too much to place the threshold for constituting use as high as “overall control” or even “effective control”?¹⁵⁴

In relation to penal procedures against those who recruit or use child soldiers, the non-binding Paris principles provide that “[a]ll feasible measures should be taken to protect the rights of child witnesses and victims who may be called upon to provide evidence of any sort against or on behalf of alleged perpetrators of crimes against them or others. In no circumstances should the provision of services or support be dependent on a child’s full participation in justice mechanisms.”¹⁵⁵ For its purposes, the ICC had to be innovative in upholding the best interests of the child in the Lubanga case. It thus

¹⁵² See e.g. SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 552, para. 1526.

¹⁵³ SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, judgment (trial chamber II), 18 May 2012, p. 209, para. 579.

¹⁵⁴ Thresholds used to ascribe responsibility for acts or omissions of others to the relevant “perpetrator” in relation to individual criminal responsibility or state responsibility, respectively.

¹⁵⁵ The Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, Sec. 8.4, obtainable from <http://www.unhcr.org/refworld/docid/465198442.html>.

used screens between the witnesses and the accused, and counseling.¹⁵⁶ In this case it also contributed to the development and definition of the right to reparations.¹⁵⁷

Lastly, mention must be made of the obligation to criminalize relevant recruitment and use under OP Art. 6(1).¹⁵⁸ As the OP established limitations upon states which go beyond the APs and ICC, its special limitations are nevertheless not yet representative of international customary law.

5. Prosecuting child soldiers

Although the opposite is often stated,¹⁵⁹ some children have indeed been prosecuted under national law for their actions in armed conflicts, and some prosecutions have also been undertaken in relation to breaches of international criminal law.¹⁶⁰ Arnold nevertheless correctly points out that children may escape domestic prosecution in states where war crimes are reserved for military courts and where these may have limited their jurisdiction to persons who were at least 18 at the time of the relevant act or omission.¹⁶¹

Although the Committee on the Rights of the Child holds that “[t]he conduct of criminal proceedings against children within the military justice system should be avoided”,¹⁶² it would not seem as if there is any prohibition as such on the prosecution of juveniles for war crimes.¹⁶³ Actually, both AP I Art. 77 and AP II Art.

6 indirectly admit of the possibility to prosecute perpetrators who were under 18 at the time of the relevant act or omission, as these provisions merely prohibit the execution and pronouncement respectively of a death sentence in such situations.¹⁶⁴ Moreover, an absolute “immunity” for child perpetrators of international crimes might have the perverse effect of organizers giving tasks in violation of international criminal law to 15 to 17s, whereas soldiers aged 18 or above are set to undertake ordinary military operations.¹⁶⁵ On a similar note, the UNSC simply “[s]tress[es] the need for alleged perpetrators of crimes against children in situations of armed conflict to be brought to justice through national justice systems and, where applicable, international justice mechanisms and mixed criminal courts and tribunals in order to end impunity”.¹⁶⁶ It is not explicitly stated that the perpetrator himself must have been older than 18.

The issue was addressed by a military commission in the Khadr case, where the judge held that “[h]aving considered the motion, response, and reply, and the amicus briefs, the commission finds that neither customary international law nor international treaties binding upon the United States prohibit the trial of a person for alleged violations of the law of nations committed when he was 15 years of age.”¹⁶⁷

Although one may be skeptical towards international

¹⁵⁶ For a short breakdown of the relevant innovations, see *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc. A/67/256, 6 August 2012, paras. 12-3.

¹⁵⁷ For a short breakdown of ICC's contribution on this topic, see *Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict*, Radhika Coomaraswamy, UN Doc. A/HRC/21/38, 28 June 2012, paras. 28-33.

¹⁵⁸ See Child Soldiers International, *Louder than words: An agenda for action to end state use of child soldiers* (London 2012), pp. 64-66, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562.

¹⁵⁹ See e.g. *United States of America v. Omar Ahmed Khadr*, Defence motion for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, 18 January 2008, p. 2, para. 4, and p. 5, para. 5, and *United States of America v. Omar Ahmed Khadr*, Amicus curias brief filed by McKenzie Livingston, Esq. on behalf of sen. Robert Badinter, et al., 18 January 2008, p. 11, para 15.

¹⁶⁰ See *United States of America v. Omar Ahmed Khadr*, D22 Government response to the defence's motion for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, 25 January 2008, p. 17, *United States of America v. Omar Ahmed Khadr*, D-022 Defence reply to government response to motion [...] for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, 31 January 2008, pp. 8-9, Matthew Happold, Child Prisoners in War, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 241 with further references, and Mark A. Drumbl, *Reimagining child soldiers in international law and policy*, Oxford University Press Oxford 2012, pp. 17-8.

¹⁶¹ Roberta Arnold, Children and Armed Conflict, *Max Planck Encyclopedia of Public International Law*, obtainable at <http://www.mpepil.com>, para. 36.

¹⁶² Committee on the Rights of the Child, Consideration of reports submitted by state parties under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Concluding observations: United States of America, UN Doc. CRC/C/OPAC/USA/CO/1, 25 June 2008, p. 7, para. 30 (g). See also the Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child*, Congo, para. 75 i.f., U.N. Doc. CRC/C/15/Add.153 (2001). The Paris Principles even hold that “[c]hildren should not be prosecuted by an international court or tribunal”; The Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, Sec. 8.6 i.f., obtainable from <http://www.unhcr.org/refworld/docid/46519842.html>.

¹⁶³ *United States of America v. Omar Ahmed Khadr*, D-022 Defence reply to government response to motion [...] for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, 31 January 2008, p. 1.

¹⁶⁴ As also pointed out by the US in its second report under the Optional Protocol submitted 22 January 2010, UN Doc. CRC/C/OPAC/USA/2, p. 48, para. 220. The same rule also applies for “protected persons” under 1949 Geneva Convention IV Art. 68.

¹⁶⁵ The organizers themselves would nevertheless risk prosecution for command responsibility. A somewhat similar example is given by Mark A. Drumbl, *Reimagining child soldiers in international law and policy*, Oxford University Press Oxford 2012, p. 150.

¹⁶⁶ UNSC Res. 2068 (2012), 19 September 2012, UN Doc. S/RES/2068 (2012), p. 2, preambular para. 10.

¹⁶⁷ *United States of America v. Omar Ahmed Khadr*, D-022 Ruling on defence motion for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier, 30 April 2008, p. 6, para. 18. Italics in original have not been reproduced. The commission found that arguments regarding the rehabilitation and reintegration of children “should be addressed to a forum other than a military commission”, id., p. 7, para. 22. Omar

and national criminal law prosecutions of child soldiers since the primary penological goals of such prosecutions are seldom rehabilitation and reintegration, such prosecutions are thus nevertheless to a large degree legal under current international law.¹⁶⁸

As regards prosecution before an international tribunal, RSICC Art. 26 provides that “[t]he Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.” It is obviously irrelevant that the defendant is no longer a child by the time the case is brought to the courts, since “[a] person cannot be held fully responsible for a crime if he or she was not fully responsible at the time he or she committed it.”¹⁶⁹ Although both the statutes of the ICTY and the International Criminal Tribunal for Rwanda (ICTR)¹⁷⁰ lack formulations explicitly prohibiting the prosecution of children,¹⁷¹ there nevertheless seems to be a rule under development which prohibits children from being prosecuted before international courts or tribunals.¹⁷² At the SCSL, 15 admittedly constitutes the age threshold for criminal responsibility, but under Art. 7(1) people between 15 and 18 are to be “treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.” The prosecutor at the SCSL has also stated that his office will not indict a person for crimes committed when he was a child.¹⁷³ Thus, the increasing

focus on rehabilitating child soldiers and their reintegration into society seem to distract from the prosecution of young offenders.¹⁷⁴ SCSL Art. 19(1) further supports this trend by prohibiting imprisonment for juvenile offenders. Art. 7 (2) on the other hand shows the wide selection of tools on offer to the SCSL should it sentence child soldiers. It would therefore seem as if the prosecution of those under 18 at the time of the relevant act or omission is largely left with the states themselves.

Should such prosecutions be undertaken before national courts, it is vital to note CRC Art. 40 (3)(a) which requires a state party to establish “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”. Although the CRC does not establish an exact minimum age for criminal responsibility, the Committee on the Rights of the Child has stated “that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable.”¹⁷⁵ Also, the relevant criminal procedure will need to take into account the special judicial guarantees bestowed on children. These follow from CRC Art. 40 and the 1966 International Covenant on Civil and Political Rights (ICCPR) Art. 14 (4). Some would even hold that “[a]bsent specific provision in the statute of a [national] law of war tribunal permitting the rehabilitative exercise of criminal jurisdiction international law precludes prosecution.”¹⁷⁶ Moreover, if the court system is not likely to handle the amount of cases generated by an armed conflict in a

Ahmed Khadr was in 2010 the sole remaining person at the detention facility at Guantanamo Bay captured when he was younger than 18, and he was also the only person prosecuted before a military commission for crimes he committed before he turned 18. See here the second US report under the Optional Protocol submitted 22 January 2010, UN Doc. CRC/C/OPAC/USA/2, p. 45, para. 212, and p. 47, para. 219. Khadr was sentenced in 2010 to 8 years of incarceration following a plea agreement and was repatriated to Canada on 29 September 2012, see http://en.wikipedia.org/wiki/Omar_Khadr.

¹⁶⁸ Mark A. Drumbl, *Reimagining child soldiers in international law and policy*, Oxford University Press Oxford 2012, pp. 21 and 178-180.

¹⁶⁹ *United States of America v. Omar Ahmed Khadr*, Amicus Brief filed by Sarah H. Paoletti on behalf of Canadian parliamentarians and law professors, international law scholars with specific expertise in the area of international humanitarian law, international criminal law and international human rights law, and foreign legal associations, 18 January 2008, p. 21.

¹⁷⁰ Established by UNSC Res. 955 (1994).

¹⁷¹ As regards most of the hybrid tribunals, see *United States of America v. Omar Ahmed Khadr*, Amicus Brief filed by Sarah H. Paoletti on behalf of Canadian parliamentarians and law professors, international law scholars with specific expertise in the area of international humanitarian law, international criminal law and international human rights law, and foreign legal associations, 18 January 2008, pp. 12-16. The following is provided in the *travaux préparatoires* for the ICTY: “The International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations.” The quote is found in Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, UN Doc. S/25704, p. 15, para. 58.

¹⁷² Reflected also in the Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, Sec. 8.6, obtainable from <http://www.unhcr.org/refworld/docid/465198442.html>.

¹⁷³ Public Affairs Office, Special Court Prosecutor Says He Will Not Prosecute Children, press release, 2 November 2002, obtainable at <http://www.sc-sl.org/LinkClick.aspx?fileticket=XRwCUe%2baVhw%3d&tabid=196>.

¹⁷⁴ Matthew Happold, Child Prisoners in War, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, pp. 237-250, p. 242.

¹⁷⁵ Committee on the Rights of the Child, General Comment No. 10 (2007): Children’s rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, para. 32. For the view that prosecutions are allowed, see also Mark A. Drumbl, *Reimagining child soldiers in international law and policy*, Oxford University Press Oxford 2012 p. 106.

¹⁷⁶ *United States of America v. Omar Ahmed Khadr*, Amicus Brief filed by Sarah H. Paoletti on behalf of Canadian parliamentarians and law professors, international law scholars with specific expertise in the area of international humanitarian law, international criminal law and international human rights law, and foreign legal associations, 18 January 2008, p. 16.

sufficiently speedy way, priority should among others be given to child perpetrators.¹⁷⁷ As regards LOAC, little reference is made to the prosecution and punishment of child offenders in AP I and AP II,¹⁷⁸ and their most central provisions are the abovementioned ones on death penalty.

Although alternatives to incarceration should be sought for child offenders,¹⁷⁹ such alternatives may not sufficiently address the gravity of the international crimes for which child soldiers might have to answer. The authorities will naturally have to consider the best interests of the child and its reintegration, but it would seem improper to revoke the possibility of incarceration for the more serious violations of international law.¹⁸⁰ If for nothing else, the respect which victims of international crimes are entitled to will occasionally require judicial proceedings with imprisonment as the likely punishment upon a finding of guilt.¹⁸¹ One should on the other hand avoid prosecuting children solely for their membership of armed forces or armed groups.¹⁸²

During incarceration, CRC Art. 37(c) requires child offenders to be separated from adult offenders “unless it is considered in the child’s best interest not to do so”. This limitation should be interpreted narrowly.¹⁸³ The authorities must also keep in mind their obligation under CRC Art. 40 (1) to reintegrate the child into society.¹⁸⁴ Partially for that reason the death penalty is prohibited for offenses committed before the child turned 18,¹⁸⁵ whereas life imprisonment is only allowed if periodic

review is undertaken.¹⁸⁶ As regards the latter, the Committee on the Rights of the Child actually “strongly recommends the States parties to abolish all forms of life imprisonment for offences committed by persons under the age of 18.”¹⁸⁷

6. Conclusions

It is not necessarily so that we need new law.¹⁸⁸ Rather, we need some clarification of existing law, especially as regards active participation, but more importantly we need to have the law as it stands implemented.

As regards the abovementioned clarifications, the *Taylor* and *Lubanga* cases provided us *inter alia* with additional clarification as to what constitutes relevant uses of child soldiers. However, it is reasonable to ask whether these courts went in these and earlier cases a couple of steps too far as regards what may constitute such use. It is to be hoped that the appeals round of the *Lubanga* case will provide the required clarifications.¹⁸⁹

Generally, it would seem as if there are three ways to prevent the recruitment of child soldiers: Effective legal prevention mechanisms at the national level, strengthening community protection mechanisms at the local level and providing children with alternatives to mobilization.¹⁹⁰ As to the current developments, the Special Representative finds that “considerable progress has been made...in eliciting commitments from armed forces and groups to end the recruitment and use of children.”¹⁹¹ However, she also points out that “[a]

¹⁷⁷ The Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, Sec. 8.10, obtainable from <http://www.unhcr.org/refworld/docid/465198442.html>.

¹⁷⁸ Matthew Happold, Child Prisoners in War, in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press Oxford 2010, p. 237-250, p. 239-240.

¹⁷⁹ CRC Art. 37(b).

¹⁸⁰ The Committee on the Rights of the Child would seem to hold a slightly different view, see Committee on the rights of the child, General Comment No. 10 (2007): Children’s rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, para. 71 in fine.

¹⁸¹ For a seemingly different view, see The Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, Sec. 8.9, obtainable from <http://www.unhcr.org/refworld/docid/465198442.html>. Any participation of children in truth-seeking and reconciliation mechanisms must under these principles be voluntary, id., Sec. 8.16.

¹⁸² The Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, Sec. 8.7, obtainable from <http://www.unhcr.org/refworld/docid/465198442.html>.

¹⁸³ Committee on the rights of the child, General Comment No. 10 (2007): *Children’s rights in juvenile justice*, UN Doc. CRC/C/GC/10, 25 April 2007, para. 85.

¹⁸⁴ See also Committee on the rights of the child, General Comment No. 10 (2007): *Children’s rights in juvenile justice*, UN Doc. CRC/C/GC/10, 25 April 2007, para. 29.

¹⁸⁵ CRC Art. 37(a).

¹⁸⁶ CRC Art. 37(a) and Committee on the rights of the child, General Comment No. 10 (2007): Children’s rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, para. 77.

¹⁸⁷ Committee on the rights of the child, General Comment No. 10 (2007): Children’s rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007, para. 77.

¹⁸⁸ Potential changes could be to let the prohibition in international armed conflicts also cover the space between indirect and active participation for under 15s in state armed groups/forces. Active participation could also be incorporated in the provisions dealing with state responsibility. Furthermore, the age threshold could be raised to 20 or 21.

¹⁸⁹ As the mail appeal document of the defense is only available in French (ICC Doc. ICC-01/04-01/06-2942 of 26 November 2012), the current author has had to construct their arguments based on the prosecution’s comments on those arguments, see ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Prosecution’s Response to Thomas Lubanga’s Appeal against Trial Chamber I’s Judgment pursuant to Article 74, 18 February 2013, paras. 197-213. It does not seem as if this issue has been raised in relation the appeal round in the Charles Taylor case, see SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-A, Prosecution’s Notice of Appeal, 19 July 2012, and SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-A, Notice of Appeal of Charles Ghankay Taylor, 19 July 2012.

¹⁹⁰ *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc. A/67/256, 6 August 2012, para. 39.

¹⁹¹ *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc. A/67/256, 6 August 2012, para. 14.

growing concern is the number of persistent perpetrators of grave violations against children. Currently, 32 parties to conflict have been listed by the Secretary-General for at least five years and are therefore considered persistent perpetrators.¹⁹²

One of the relevant measures is therefore the enactment of domestic legislation which penalizes *inter alia* the recruitment of child soldiers.¹⁹³ This must nevertheless be done in a way which does not breach international human rights law, especially as regards how clearly the prohibition is phrased. This issue was raised by the defense in the *Lubanga* case,¹⁹⁴ but the ICC found that the formulation of the prohibition was sufficiently clear, especially when taking into consideration the Elements.¹⁹⁵

As an illustration: In Norway, the CRC and the OP constitute parts of domestic law and will generally outrank other parliamentary acts due to the 1999 Human Rights Act Sec. 3. However, this in itself would not suffice for establishing recruitment or use of child soldiers as a crime, as this would require a specific criminal provision in or delegated from a parliamentary act. The necessary provisions for our purposes are found in the 1902 Criminal Act Sec. 104a and the 2005 Criminal Act Sec. 103 (f). The latter considers it a war crime if in connection with an armed conflict someone recruits children under 18 to armed forces or uses them to participate actively in hostilities. The Norwegian legislation is therefore stricter

than *inter alia* the RSICC, but the jurisdictional principle of universality only covers those parts of Sec. 103 (f) which do not go beyond international customary law.¹⁹⁶

Obviously, such legislation must also be enforced, and to a large extent this is regrettably not the case.¹⁹⁷ Furthermore, although it is not in line with the majority view, international law does not prohibit the prosecution of child soldiers before national courts and international tribunals, to the extent that the statutes of the latter do not explicitly limit their competence in that respect. It is the view of this author that such prosecution may occasionally be necessary. For the majority of young perpetrators, however, non-judicial truth and reconciliation mechanisms may be preferable for holding them responsible.¹⁹⁸ Such a mechanism may also help the reintegration of child perpetrators in their respective environments.¹⁹⁹

Additionally, the need for addressing socio-economic reasons behind child recruitment includes education,²⁰⁰ vocational and skills training. These tools require economic support from the world community,²⁰¹ as well as recognition of the fact that “insecurity and displacement propel children, especially those who have become separated from their families, to voluntarily join an armed group for protection and survival.”²⁰² Likewise will the establishment of administrative reparation programs to address the needs of children affected by conflict require funding. Both for national and

¹⁹² Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN Doc. A/67/256, 6 August 2012, para. 17.

¹⁹³ Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, Radhika Coomaraswamy, UN Doc. A/HRC/21/38, 28 June 2012, para 83, and Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN Doc. A/67/256, 6 August 2012, para. 65.

¹⁹⁴ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, p. 266-7, paras. 581-582.

¹⁹⁵ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, judgment (trial chamber I), 14 March 2012, p. 279, para. 609.

¹⁹⁶ Sec. 5(4).

¹⁹⁷ Child Soldiers International, *Louder than words: An agenda for action to end state use of child soldiers* (London 2012), pp. 67-68, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562.

¹⁹⁸ Mark A. Drumbl, *Reimagining child soldiers in international law and policy*, Oxford University Press Oxford 2012, pp. 168-208.

¹⁹⁹ Mark A. Drumbl, *Reimagining child soldiers in international law and policy*, Oxford University Press Oxford 2012, pp. 196 and 200. See also Wouter Vandenholde, Stephan Parmentier and Ilse Derluyn, Editorial introduction – International law on children and armed conflict: the interface between various normative frameworks, (2011) 5 (1) *Human Rights & International Legal Discourse*, pp. 2-13, p. 11 with further references.

²⁰⁰ Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, Radhika Coomaraswamy, UN Doc. A/HRC/21/38, 28 June 2012, p. 12.

²⁰¹ Children and armed conflict, Report of the Secretary-General, UN Doc. A/66/782-S/2012/261, 26 April 2012, p. 46. To the extent that the problem is one of motivation rather than ability, the suggestion of the Parliamentary Assembly of the Council of Europe of requiring abolition of child soldiers before a reduction of a state's foreign debt is agreed to may be an avenue to pursue; Council of Europe, Parliamentary Assembly Resolution 1215 (2000) Campaign against the enlistment of child soldiers and their participation in armed conflicts, No. 12.

²⁰² Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, Radhika Coomaraswamy, UN Doc. A/HRC/21/38, 28 June 2012, p. 10. See also Geraldine Van Bueren, The international legal protection of children in armed conflicts, (1994) 43 *International law and comparative law quarterly*, pp. 809-826, p. 816, Matthew C. E. Happold, Child soldiers in international law: The legal regulation of children's participation in hostilities, (2000) 47 (1) *Netherlands International Law Review*, pp. 27-52, p. 51, Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN Doc. A/67/256, 6 August 2012, para. 49, and The Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, Sec. 6.0, obtainable from <http://www.unhcr.org/refworld/docid/465198442.html>.

international/ hybrid tribunals, such funds may be absent.²⁰³ Here, it is of importance that some degree of international support is actually mandated by OP Art. 7.²⁰⁴

In addition to these fundamental activities, the international community should apply sanctions against entities breaching the rules on the use of children in armed conflicts. One way of doing this is through the sanctions regimes established by the UNSC under its UN Charter chapter VII powers.²⁰⁵ An example is here the sanctions established against Somali “...political or military leaders recruiting or using children in armed

conflicts in Somalia in violation of applicable international law” in UNSC Res. 2002 (2011).²⁰⁶ To the extent that no armed force is authorized, sanction regimes may also be established by regional organizations,²⁰⁷ and this road should be taken alongside the UN path. Also, further prosecutions before relevant international tribunals and courts may have to be considered, e.g. with the UNSC referring situations to the ICC.²⁰⁸ A well-considered multi-dimensional set of severe consequences is probably the only way to motivate the 32 persistent perpetrators to change their ways.

²⁰³ As requested by *Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict*, Radhika Coomaraswamy, UN Doc. A/HRC/21/38, 28 June 2012, paras. 80-82.

²⁰⁴ Child Soldiers International, *Louder than words: An agenda for action to end state use of child soldiers* (London 2012), p. 107, obtainable from http://www.child-soldiers.org/global_report_reader.php?id=562.

²⁰⁵ This route of action is explicitly mentioned in inter alia UNSC Res 2068 (2012), p. 2, para. 3 (b). In UNSC Res. 1612 (2005) p. 2, paras. 2-3, and p. 3, para. 8 the UNSC gave its consent to establish a monitoring and reporting mechanism on children and armed conflict, and established itself a working group of the Security Council to review the reports of the said monitoring and reporting mechanism, respectively. For the suggestion of establishing a designation criteria on grave violations against children for all sanctions regimes, see Children and armed conflict, Report of the Secretary-General, UN Doc. A/66/782-S/2012/261, 26 April 2012, p. 42.

²⁰⁶ UNSC Res. 2002 (2011), p. 3, para. 1 (d) and its predecessor UNSC Res. 1844 (2008).

²⁰⁷ Nigel White and Ademola Abass, Countermeasures and sanctions, in Malcolm D. Evans (ed.), *International Law*, 3rd ed., Oxford University Press Oxford 2010 531-558, p. 551.

²⁰⁸ Indirectly referred to in Children and armed conflict, Report of the Secretary-General, UN Doc. A/66/782-S/2012/261, 26 April 2012, p. 46.

International Child Abduction and Relocation Disputes

Relocation Following Parental Separation: International Research, Policy and Practice

***Nicola Taylor**

Introduction

Relocation disputes are widely regarded as one of the most difficult and controversial issues in family law internationally.¹ They arise when, following parental separation or divorce, the resident (or a shared care) parent seeks to relocate with the children and that move will have a significant impact on the contact the children will have with their other parent. In recent years these disputes have prompted greater domestic and international attention due to the higher rates of relationship breakdown, increased population mobility and debate about whether the courts should allow or restrict relocations.

This paper outlines the legal context governing relocation disputes in New Zealand and then briefly reviews the research literature on the impact of parental separation and relocation. Children whose parents seek to relocate experience the 'double whammy' of both parental separation and relocation (either concurrently or following a delay), so it is important to consider both contexts when legal disputes arise. I then set out the key themes that emerged from our three-year study (2007 to 2009) with 100 New Zealand families where one parent had sought to relocate with their child(ren) either within New Zealand or internationally.² With the assistance of my colleague, Megan Gollop, we conducted interviews with 114 parents and 44 children and young people from these families about their experiences. The paper concludes by traversing the efforts being made in the international legal policy context to adopt a more consistent approach to relocation disputes in common law jurisdictions.

Family Law in New Zealand

The Family Court was introduced in New Zealand in 1981 and provides a range of dispute resolution processes including counselling, counsel-led mediation and defended hearings for parents in dispute over their children's care.³ Most private family law disputes are resolved by the parents themselves reaching agreement or through legal negotiation, counselling or mediation. Only 6% of applications to the Family Court are determined by a judge, and they are assisted in this task through the appointment of lawyers to represent children and the availability of specialist psychological, social work, medical and cultural reports.

The Care of Children Act 2004 which took effect on 1 July 2005 significantly modernised the law governing guardianship, day-to-day care (formerly 'custody') and contact (formerly 'access') and placed much greater emphasis on respecting children's right to participate. Section 6 considerably widened the requirement for the Family Court to provide reasonable opportunities for children to express their views and for these views to be taken into account by the Court:

In proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child; ... a child must be given reasonable opportunities to express views on matters affecting the child; and any views the child expresses (either directly or through a representative) must be taken into account.

This new world-leading statutory provision dispensed with the traditional 'age and maturity' criteria in section 23(2) of the Guardianship Act 1968, changed 'wishes' to

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¹ Thorpe, L.J. (2010). Relocation – The Search for Common Principles. (2010)1*Family Law and Practice* 36.

² Taylor, N.J., Gollop, M., & Henaghan, R.M. (2010). *Relocation Following Parental Separation: The Welfare and Best Interests of Children*, Dunedin: University of Otago, New Zealand.

³ Boshier, P., Taylor, N.J., & Seymour, F. (2011). Early Intervention in New Zealand Family Court Cases. *Family Court Review*, 49(4), 818-830; Taylor, N.J. (2006). Establishment of the New Zealand Family Court. *New Zealand Family Law Journal*, 5(7), 169-180.

the broader concept of 'views', and now requires the Court to take any of the child's expressed views into account regardless of the age of the child. However, the child's views are not determinative, but rather contribute to the weight of evidence considered by the judge. The Principal Family Court Judge considered that the Care of Children Act 2004 "represents an unmistakable shift towards the recognition of greater rights for children and allows for their greater input into decision-making processes."⁴

Section 7 of the Act provides for the appointment of a Lawyer for the Child in private law proceedings. When appointed, that lawyer must meet with the child unless there are exceptional circumstances.⁵ The lawyer's primary role now is to provide independent representation and advice to the child. He or she has a duty to put before the Court the views of the child (usually via a written report) and can call and cross-examine the parties and any witnesses. Following the Court decision, the lawyer must explain the effect of any parenting order to the child in a way that the child can understand.⁶ The child also has a right of appeal.⁷

Since the Care of Children Act took effect, judicial meetings with children have become increasingly common and "an invaluable part" of the judges' 'toolbox'.⁸ Some judges engage in a 'meet and greet' role with the child, while most others use the opportunity to directly hear the child's views and to better understand the child as a person. The child's lawyer will usually also be present. Judges have received skills-based training in child interviewing techniques and report very positively about their experiences of meeting with children.

Children's participation in Alternative Dispute Resolution (ADR) processes still remains relatively uncommon in New Zealand, despite its more widespread use overseas. Yet child-inclusive ADR processes have the potential to benefit so many more children whose parents

are in dispute over their post-separation care. Just one child-inclusive mediation model has been empirically piloted in New Zealand.⁹ However, consequential amendments to the Care of Children Act 2004, as a result of the 2008 passage of the Family Court Matters Bill, do now allow for the inclusion of children in counselling and mediation. While their implementation was stalled due to the lack of resourcing during the economic recession, the current reform of the Family Court by the Government has foreshadowed interest in child-inclusive/family-facilitated dispute resolution processes as a means of better assisting parents to reach agreement without the need for litigation over their children.¹⁰

The Statutory Context Governing Relocation Disputes Between Parents

In New Zealand, relocation law applies to proposed moves within and between provinces of New Zealand, as well as to proposed international moves. The child's welfare and best interests are the paramount consideration and there is no presumption for or against relocation in statute or in the case law. Guardians must agree on a change of the child's residence that may affect the child's relationship with their parents or guardians.¹¹ If they cannot agree, permission for the proposed relocation must be obtained from the Family Court.¹² This approach contrasts with the situation in England/Wales where permission is required only for international relocations or where a Court has made a prohibited steps order. Moves within the United Kingdom are usually regarded as the prerogative of the parent who is primarily caring for the child. Clear policy differences are thus evident between these jurisdictions. In England/Wales, applicants are routinely granted permission to relocate based on the likely effect of a "refusal of the application on the mother's future psychological and emotional stability"¹³, although more recently a different approach has applied

⁴ Boshier, P. (2009, May 29). *The child's voice in process: Which way is forward?* Presentation by the Principal Family Court Judge to the Association of Family and Conciliation Courts Annual Conference, New Orleans, USA, p. 1.

⁵ Section 7(3) Care of Children Act 2004.

⁶ Section 55(4) Care of Children Act 2004.

⁷ Section 143(3) Care of Children Act 2004.

⁸ See n 4, Boshier, p. 6; a recent study with all 53 New Zealand Family Court Judges documented their practice regarding meetings with children in defended private law cases – see Taylor, N.J., & Caldwell, J. (2013). Judicial meetings with children: Documenting practice within the New Zealand Family Court. *New Zealand Law Review*, Part 3, 445-463.

⁹ Goldson, J., & Taylor, N.J. (2009). Child-inclusion in dispute resolution in the New Zealand Family Court. *New Zealand Family Law Journal*, 6(7), 201-209.

¹⁰ Ministry of Justice. (2011, September 20). *Reviewing the Family Court: A Public Consultation Paper*. Wellington: Ministry of Justice; Office of the Minister of Justice. (2012). *Family Court Review Cabinet Paper – Proposals for Reform*. Wellington: Minister of Justice and Cabinet Social Policy Committee; Family Court Proceedings Reform Bill, 2012.

¹¹ Section 16(2)(b) Care of Children Act 2004.

¹² By an application under section 47(1)(a) of the Care of Children Act 2004 for a parenting order with a condition that the child may move, or by an application under section 44 of the Act for the Court to resolve a dispute between guardians.

¹³ "In most relocation cases the most crucial assessment and finding for the judge is likely to be the effect of the refusal of the application on the mother's future psychological and emotional stability" *Payne v Payne* [2001] 1 WLR 1826; [2001] EWCA 166, para 32 per Thorpe I.J. Note that a different approach has more recently occurred when relocation disputes have arisen in the context of shared care – see: Freeman, M., & Taylor, N.J. (2011). The Reign of Payne. *Journal of Family Law and Practice*, 2(2), 20-27.

in the context of shared care cases. Conversely, in New Zealand the courts have tended to refuse more applications as they work through a broader range of statutory principles to take account of the child's relationship with others and their current environment.¹⁴

The Effects of Parental Separation on Children

There is now a substantial body of research examining the impact of parental separation on children. Several early reviews of the research evidence have concluded that parental separation does pose a risk to children's well-being.¹⁵ However, while short-term distress at the time of the separation is common, long-term negative outcomes are only experienced by a minority of children whose parents separate. These children, however, have approximately twice the risk of having adverse outcomes than those children from intact families.¹⁶ Essentially, the majority of children from separated families do not experience long-term negative outcomes, but as a group, children whose parents have separated or divorced are more likely than those from intact families to have poorer outcomes.

The contemporary approach is more concerned with evaluating which factors contribute to poorer outcomes for children and which ones act as buffers or protective mechanisms – a risk and resilience perspective¹⁷, that views parental separation as a stressor for children. It is now also widely recognised that separation and divorce is not a discrete event but rather an ongoing process of family transition and adjustment which children and young people negotiate.¹⁸ As such, the impact of separation on children and their adjustment to it is also an ongoing process with “multiple changes and potential challenges for children.”¹⁹ It is the presence of unalleviated or multiple stressors that can increase the risk of adverse outcomes for children²⁰ with the number of stressors that children experience predicting their post-

separation well-being and adjustment.²¹

Many such stressors have been identified including: inter-parental conflict, loss of important relationships, economic hardship, poor parental adjustment and parenting competence, remarriage or repartnering, and stressful or negative life experiences, such as the initial separation, moving, or changing schools. Protective factors that can moderate these risk factors include: support from family and friends, the child's coping skills and resilience, therapeutic support, competent parenting, contact with non-resident parents, diminished inter-parental conflict, the quality of the parent-child relationship, and parents' ability to co-parent authoritatively.²² It is therefore the particular combination of risk and protective factors in each child's individual situation that will determine how their parents' separation will initially impact on them and will then affect their adjustment and well-being over time.

Relocation as a Risk Factor Following Parental Separation

One particularly significant risk factor for children following their parents' separation is relocation. Residential mobility is often an inevitable consequence of relationship breakdown, with divorced parents being far more likely to shift and to change residences more often than those who remain married.²³ However, children tend to act as anchors in their separated parents' movement decisions. So while moving is common, the distance is usually restricted to enable each parent to continue playing a role in their child's life.²⁴ Legal disputes over relocation therefore arise when the distance is much greater and will affect the child's ability to easily retain contact with their non-moving parent.

While there is a substantial research literature on the effects of residential mobility on children in intact families and following parental separation, the findings are somewhat mixed.²⁵ Some studies reveal beneficial effects

¹⁴ See n 2, Taylor, Gollop & Henaghan – the success rates of relocation applications to the New Zealand Courts have been analysed annually since the late 1980s; The importance of the six principles set out in s5 of the Care of Children Act 2004 as relevant to a child's welfare and best interests have also been affirmed by the NZ Supreme Court in its decision of *Kacem v Bashir* [2010] NZSC 112.

¹⁵ Rodgers, B., & Pryor, J. (1998). Divorce and Separation: The Outcomes for Children. York: Joseph Rowntree Foundation; Amato, P. R. & Keith, B. (1991). Consequences of Parental Divorce for Children's Well-being: A Meta-analysis. *Psychological Bulletin*, 110, 26.

¹⁶ Ibid, Rodgers & Pryor.

¹⁷ Kelly, J.B. & Emery, R.E. (2003). Children's Adjustment Following Divorce: Risk and Resilience Perspective. *Family Relations*, 52, 352.

¹⁸ See n 15, Rodgers & Pryor.

¹⁹ See n 17, Kelly & Emery, 352.

²⁰ Ibid.

²¹ Amato, P.R. (2000). The Consequences of Divorce for Adults and Children. *Journal of Marriage and Family*, 62, 1269.

²² Amato, P.R. (2004). Parenting Through Family Transitions. *Social Policy Journal of New Zealand* 23, 31.

²³ Austin, W.G. (2008). Relocation, Research, and Forensic Evaluation, Part 1: Effects of Residential Mobility on Children of Divorce. *Family Court Review*, 46, 137.

²⁴ Smyth, B., Temple, J., Behrens, J., Kaspiew, R., & Richardson, N. (2008). Post-separation Mobility in Australia: Some Preliminary Data on Behaviour, Disputes and Attitudes. In J. Behrens, B. Smyth & R. Kaspiew, (Eds.) *Symposium Proceedings: Relocation Disputes in Australia: What Do We Know, What are the Implications for Family Law and Policy?* Canberra: The Australian National University, at p. 13.

²⁵ For a review see Horsfall, B., & Kaspiew, R. (2010). Relocation in Separated and Non-Separated Families: Equivocal Research Evidence From Social Science Literature. *Australian Journal of Family Law* 24, 34.

of relocating while others report negative outcomes for children.²⁶ The research in this field is highly diverse and negative outcomes associated with relocation may be explained by other factors that lead to frequent residential mobility.²⁷

Overall, research findings indicate “heightened risk” for a child who relocates, particularly when there been multiple moves and changes to family structure,²⁸ which can increase or exacerbate the instability and disruption created by parental separation.²⁹ The risk of negative outcomes can be mediated by such factors as moving due to family disruption, a negative parental attitude towards the move, the number of moves and their frequency, the distance moved and the existence of multiple stressors.³⁰ Whether relocation will have a positive or negative impact on a child depends on many variables,³¹ and will be determined by the combination of risk and protective factors present in each individual case.³² The principles and factors to be taken into account are generally identified in various statutes, caselaw, professional commentaries and custody evaluation protocols.³³ However, no research has yet been conducted to specifically identify the key risk and protective factors which can account for individual differences in outcomes for children who relocate after their parents’ separation or who are the subject of a relocation dispute.³⁴

Qualitative Research on Relocation Following Parental Separation in New Zealand

Our qualitative research project (2007-2009) was the first conducted in New Zealand,³⁵ and amongst the first worldwide,³⁶ to explore family members’ perspectives on post-separation relocation disputes within the Family and Appeal Courts. One hundred New Zealand families were recruited through family lawyers, newspaper articles and advertisements, and word of mouth. The participants

comprised 114 parents (73 mothers and 41 fathers; in 14 families both parents took part), and 44 children (23 girls and 21 boys) from 30 of the 100 families. The parents were interviewed twice, separated by 12-18 months, and the majority of the children were interviewed at the time of their parent’s first interview. The interviews were transcribed and a content analysis of the transcripts was undertaken to identify common themes.

New Zealand Parents’ Perspectives on Relocation Disputes

At the time of the initial interview over half (52%) of the adult participants were resident parents (50 mothers, 9 fathers); and just over a quarter (28%) were the contact parent (8 mothers, 24 fathers). Ten parents (9%; 8 mothers, 2 fathers) had a split care arrangement whereby one parent had the day-to-day care of one or more children and the other parent had the day-to-day care of the other children in the family. Seven per cent of the parents interviewed shared the care of their children with their ex-partner (4 mothers, 4 fathers). Five of the participants (3 mothers, 2 fathers) had children who were living independently at the time of the interview, but they had previously been the contact parent (3%) or the resident parent (2%). In nearly three-quarters (73%) of the families the resident parent had moved.

Just over half (51%) of the families had their relocation disputes determined by the Family Court, or the High Court on appeal, with five families having involvement with an overseas Court, and a further 6% of the families having their relocation attempt stopped through the granting of a non-removal order by the Family Court. Approximately one-third (34%) of the families reached agreement by consent after consulting their lawyer or undergoing Family Court conciliation (counselling/mediation) or without any legal involvement at all.

²⁶ Taylor, N.J., & Freeman, M. (2010). International research evidence on relocation: Past, present and future. *Family Law Quarterly*, 44(3), 317-339.

²⁷ Ibid, Taylor & Freeman.

²⁸ Kelly, J. (2009). Relocation of Children Following Separation and Divorce: Challenges for Children and Considerations for Judicial Decision-Making. Paper presented at the 5th World Congress on Family Law and Children's Rights, 23-26 August, Halifax, Canada.

²⁹ Waldron, K. (2005). A Review of Social Science Research on Post Divorce Relocation. *Journal of the American Academy of Matrimonial Lawyers*, 19, 337; See n 23, Austin, at p. 142.

³⁰ Humke C., & Schaefer, C. (1995). Relocation: A Review of the Effects of Residential Mobility on Children and Adolescents. *Psychology, A Journal of Human Behaviour*, 32, 16.

³¹ Gindes, M. (1998). The Psychological Effects of Relocation for Children of Divorce. *Journal of the American Academy of Matrimonial Lawyers*, 15, 119.

³² See n 23, Austin.

³³ See, for example, Duggan, W.D. (2007). Rock-paper-scissors: Playing the Odds with the Law of Child Relocation. *Family Court Review*, 45, 193, who identifies 36 factors distilled from American Court decisions on relocation.

³⁴ See n 13, Freeman & Taylor.

³⁵ See n 2, Taylor, Gollop & Henaghan.

³⁶ See n 2, Taylor, Gollop & Henaghan. Other similar studies have been conducted in England/Wales – see Freeman, M. (2009). Relocation: The reunite Research. Research Report. London: Research Unit of the Reunite International Child Abduction Centre; and Australia – see Behrens, J., Smyth, B., & Kaspiew, R. (2009). Australian Family Law Court Decisions on Relocation: Dynamics in Parents’ Relationships Across Time. *Australian Journal of Family Law*, 23(3), 222-246, and Parkinson, P., Cashmore, J., & Single, J. (2010). The Need for Reality Testing in Relocation Cases. *Family Law Quarterly*, 44, 1.

The retrospective nature of our study allows a more longitudinal view of patterns of mobility within post-separation families and reveals the complex and diverse nature of relocation issues in the New Zealand context. Within our sample it was not possible to simply categorise families as those where the proposed relocation had either been allowed or declined, and whether the proposed move had occurred or not. Twelve different relocation sequences emerged which expanded beyond the more standardised patterns of successful or unsuccessful applicants and opposers.³⁷ Not all of our families actually disputed and/or legally challenged a proposed relocation, there were multiple relocations within some families (either proposed or actual, some opposed and some not), and in several families both parents relocated. Within our sample it is therefore evident that a relocation 'dispute' is not a discrete, one-time-only event, but is instead illustrative of an ongoing process of family post-separation transition(s). Many families described non-opposed relocations before the disputed move, and the families' situations did not always remain static after the relocation in issue was resolved, sometimes impacting on the durability and enforcement of court orders. For example, amongst those families where the relocation proceeded and one parent moved with the children there were instances where:

- The other parent subsequently also moved to be in the same location as their children;
- The other parent subsequently moved elsewhere;
- The resident parent moved again to another location with the children;
- The move was only temporary due to work or study opportunities;
- The intact family had relocated without the father prior to the separation and the mother and children subsequently remained in the new location, but the father did not also relocate and remained in the original location;
- The relocating parent eventually returned with the children to live back in the original location;
- The care of the children was split between both parents, resulting in some siblings relocating and others not;
- Children were involved in international child abductions or were unilaterally relocated without the consent or prior knowledge of the other parent (and in some cases the children themselves);
- After a unilateral move the parent was

ordered back and either returned with the children, or the children returned but the parent did not;

- Both parents moved to new locations at the time of the separation;

Hence it was not always the resident parent and the children who moved, sometimes the entire family (both parents and children) moved, the mother or father moved (with or without the children), or it was the children (some or all) who moved while the parents did not.

There were several instances where a resident or shared care mother moved *without her children* after the Family Court declined her application to relocate, granted a non-removal order, or ordered her back following a unilateral move. In these 12 families this meant that the care of the children was reversed, with the father becoming the resident parent. In several troubling cases the father had undertaken only a limited parenting role prior to this change of day-to-day care, had sometimes not sought, wanted or expected the full-time responsibility for his children, and was living with a new partner and step-children. The children were therefore removed from their mother's primary care (when she opted to proceed with her relocation) and placed with their father (sometimes in a new locality) in a relatively unfamiliar blended family. It was not surprising that five of these situations broke down within a two-year period and the children were eventually returned to their mother's care. The distress and trauma described to us by the parents and children involved was most anguishing.

Amongst those families where a relocation application had been declined, or the relocation did not proceed, one-third had parents who had another attempt at relocating which was sometimes successful and sometimes not. Occasionally, the original opposer subsequently relented and allowed his ex-partner to relocate with the child(ren) without any further legal intervention. Six cases involved appellants (three mothers and three fathers) appealing the Family Court decision to allow or decline the relocation. These cases were characterised by either an international element, multiple relocations or changes of care arrangements within the family.

Other key themes that emerged from our 114 parent interviews included:

- The role of **non-removal orders** in contributing to a rapid deterioration in inter-parental relationships and the instigation of litigation over the proposed relocation.
- The impact of **being required to live in a defined locality** following an unsuccessful relocation

³⁷ Taylor, N.J., Gollop, M., & Henaghan, R.M. (2010). Relocation following parental separation in New Zealand: Complexity and diversity. *International Family Law*; March, 97-105.

application. Mothers generally described this as an infringement of their civil rights even though they could understand why their child's relationship with the other parent was being prioritised at this time. Most mothers anticipated 'biding their time' and making a further application to relocate when their child was older (and therefore more likely to have greater weight accorded to their views by the Court) and was facing a school transition anyway (e.g., moving from intermediate to secondary school).

- The **impact that the relocation had brought to the lives of left-behind parents and their extended family**. Many fathers spoke of the uncertainty and distress they experienced when they first became aware their ex-partner planned to move away with the children. This feeling of devastation was further magnified if her application to the Family Court to relocate was successful and the father-child contact arrangements had then to change significantly, owing to the geographical distance between homes. Fathers sometimes felt like expendable accessories in their children's lives and spoke movingly of the changed (usually more distant / less involved) nature of their relationships with their relocated children. They were also very concerned about the way the relocation could severely affect the children's relationship with their paternal extended family members.
- Where lawyers and the Family Court had been involved in a relocation dispute, many parents expressed strong dissatisfaction about the **delays** they faced and the **expenses** (especially legal fees) they incurred. Some parents experienced serious financial impediments (including mortgage sales) as a result of their litigation. Most parents found the Court process highly stressful and disliked having their lives kept on hold for so long while a decision was reached. They also reported dissatisfaction with the **detrimental impact the adversarial nature of the proceedings had on their relationship with their ex-partner**.
- Some children were enduring **lengthy car, bus, ferry or unaccompanied plane trips** to remain in contact with their non-resident parent. The cost of contact (petrol, fares) sometimes led to changes over time as parents found themselves unable to afford the trips and either reduced their frequency or altered the mode of travel.
- Generally children and non-resident parents preferred regular face-to-face visits or telephone contact rather than **'virtual' communications**.

However, parents found email and texting a useful and less intrusive means of keeping in touch with their ex-partner. We found little use of webcams, Skype and MSN – although where these were successfully used the parents mostly reported great satisfaction with them. Some, however, found such contact to be superficial in nature. Yet other parents reported that technology can be just another 'weapon' to frustrate an ex-partner and children (for example, through a refusal to purchase/connect the equipment, or through such close surveillance of its use that the children felt they had little privacy to communicate freely with their other parent). Texting could be a welcome means of older (usually teenage) children and non-resident parents keeping in touch – the child's mobile phone enabled contact to be more independent since it no longer needed to be mediated by the resident parent. However, some other resident parents refused to allow their child to utilise the mobile phone given to them by their other parent or insisted that the non-resident parent ring/text them first before contacting the child.

- **Parental attitude and ability to co-parent** was critical to the success or otherwise of post-separation/post-relocation care and contact arrangements. While relocation disputes were clearly emotionally distressing for the parents we interviewed, we were heartened by the positive examples many gave us about the strategies they used to manage the sometimes significant geographical distance between them. Each parent's willingness to recognise and encourage their child's relationship with the other parent was a powerful influence on the degree of co-operation that existed following the relocation dispute and its impact on the child. Where parents could be creative in promoting and maintaining direct (face-to-face visits) and indirect means of contact (e.g., reading story books to their children over the phone; marking a calendar with the child so they knew when the next visit/phone call would be; allowing children the flexibility to contact their non-resident parent whenever they wished) then relocation could be a more positive experience.

New Zealand Children and Young People's Perspectives on Relocation

Most existing research on the impact of parental separation and relocation on children has not directly engaged with those most directly affected – the children

themselves. Our study was therefore novel in contributing this significant new perspective.³⁸ The 44 children and young people (23 girls and 21 boys), from 30 of the 100 families in our study, ranged in age from 7.6 to 18.1 years (mean age = 12.1 years).³⁹ The interviews ascertained their views on their:

- Current and past contact and residence arrangements and how they felt about these;
- Knowledge of and involvement in the relocation decision;
- Experience with and understanding of any professionals involved;
- Experiences of moving if applicable;
- Advice they would give other children and parents in similar circumstances.

Three quarters of the children had experienced a residential move as a result of a relocation issue or dispute emerging in their family; while the remaining 25% had not. For seven of the 33 children who had moved, the move was not permanent. For those children who had moved, seven had memories of an international move. Several children had had multiple relocations (some which did not impact on their contact with their other parent) and seven had had several multiple international relocations – either moving to or from New Zealand more than once. At the time of their interview, the majority (91%) of the children had a parent who lived in a different country, city or town to themselves, with 9% living in the same location as both of their parents.⁴⁰ Ten children (from seven families) had parents who lived in a different country.⁴¹

Three themes dominated the children's accounts – the importance of family and friends; the importance of being consulted and listened to; and children's resilience and ability to adjust to family transitions.

The importance of family and friends: Moving to be with extended family was regarded as a positive aspect of moving, while shifting away from a parent and wider family members, and missing them, was considered one of the hard things about moving. Similarly, saying goodbye to friends was the most common difficulty the children reported when they moved to a new location. Being able to maintain these friendships was valued, while making new friends was a significant factor in helping the

children and young people settle in after a move. The children told us that getting involved in sports and extra-curricula activities was a good way of making new friends.

- * *I half wanted to go and I half wanted to stay. Cos I wanted to stay at my school. I love my school. (Luke, aged 8)*
- * *It was the first time I saw my Dad cry. ... He wasn't very happy. (Bridget, aged 13)*
- * *I was really upset. Mum said, 'well, we're moving to [city]' and I just burst into tears. I want to stay here. I cried cos I'm going to miss all my friends. (Libby, aged 9)*

Most of the children were satisfied with the contact they had with the parent they did not live with – a few would have liked more contact or for their parents to live closer together, but the distance and in some cases infrequent face-to-face contact was something the children appeared to grow accustomed to. Some children travelled extensive distances in order to have contact but they did not really complain about this, and just got used to it. Quite a few of the children did use of technology (such as texting, email, Skype, MSN) to maintain contact with their non-resident parent between visits, but many described problems with it which was a source of frustration and could mean the communication became superficial between them. Face-to-face contact was generally preferred.

- * *My conversations with him now are so brief. 'Hello Dad, how are you?'. 'School work going well?'. 'Yes, what are you doing?' 'Homework.' 'Okay, bye.' That was the ritual, the telephone conversation. (Nina, aged 13)*
- * *It's more light and fluffy. We don't really talk about anything, any actual problem. ... If you really talk to him, face to face it's better. (Christine, aged 17)*

The children gave mixed accounts about how the relocation impacted on their relationships with their contact parent. Some thought it had made no difference, while a few thought the relationship had become more distant and less parental. Several children had distant, difficult or strained relationships with their contact parent but this appeared to be due to factors independent of the relocation, such as the contact parent's behaviour or failure to maintain regular contact. However, for the most

³⁸ While Parkinson, Cashmore & Single, see n 36, had difficulty initially recruiting children in the first wave of their research with Australian families experiencing relocation disputes, they have subsequently been able to interview more children during the second and third follow-up interviews with the parents in their sample.

³⁹ It should be noted that the parents of children who had had a particularly difficult and/or traumatic family experience regarding the relocation dispute did not tend to give consent for their children to participate in our study – although they did speak articulately to us, during their own interview, about the impact of the relocation dispute and outcome on their children. Hence, the 44 children we interviewed may have been a particularly well-adjusted group.

⁴⁰ Either the proposed relocation had not proceeded, or in some cases the non-resident parent followed their children or the resident parent and/or children had returned.

⁴¹ Gollop, M., & Taylor, N.J. (2012). New Zealand children and young people's perspectives on relocation following parental separation. In M. Freeman (Ed.), *Law and Childhood Studies* (Current Legal Issues, vol. 14, pp. 219-242). London: Oxford University Press.

part, the relocation did not appear to change the existing nature of the parent-child relationship in a detrimental way and in some instances, for children who had more fraught relationships with their contact parent, the relationship had actually improved due to the move. Only a small number of children were having no contact at all with their non-resident parent and this had also been the case prior to the relocation.

- * *He doesn't really have any control over us any more. So he's kind of a bit taken aback when he finds out the changes [in us]. ... Not like a parental relationship anymore because they're not there. Like you know how parents are there 24/7, watching, kind of control you. There's nothing like that anymore, like it's completely different. (Olivia, aged 15)*

The importance of being consulted and listened

to: The children's experiences of the legal processes were mixed. Some liked their lawyers, while others did not feel their lawyer had listened to them or accurately reported their views. Those who spoke about the Family Court had a reasonably correct understanding of its role in the decision-making process. In accord with previous research,⁴² having a say and being listened to was important to the children and young people. Those who had had a say and contributed to the relocation decision valued this opportunity. Those who had not, or who had felt they were not listened to, were unhappy about this.

Children's resilience and ability to adjust to family transitions: The children understood and appreciated why their resident parent wished to relocate, but also empathised with the parent who would be left behind. Generally, the prospect of moving was regarded positively. The children spoke of being excited and happy to be moving, seeing it as an adventure, with new experiences and opportunities.

- * *It was an adventure. I was definitely excited. (Will, aged 17)*
- * *It was real good cos I was travelling across the world. One time we stopped off in LA and did the whole Disneyland thing, which was awesome. And you can go the other way through Singapore and get to see all these different countries. (Fraser, aged 16)*

However, they did acknowledge the negative aspects – moving away from friends and family, the nervousness

of starting a new school and having to make new friends. For the most part, the children and young people were relatively happy, well-adjusted and satisfied with how things had worked out for them and their families. This is not to say that the relocation experience was not initially difficult or traumatic for some, but rather there was the sense that they had adjusted and become accustomed to their new situations. This was particularly true of those children for whom the relocation issue had occurred some years previously where the passage of time was probably a factor in the positive nature of their adjustment.

- * *I kind of get a city life and a country life – a bit of both. (Helen, aged 11)*
- * *I don't mind the travel. You get used to it after a while. (Emily, aged 11)*
- * *She'd pick us up on Friday and we'd like be in the car most of the afternoon. We'd go to sleep straight away as soon as we got home because it was dark. And then on Sunday it was pack our stuff and go. So it was like one day we saw Mum. (Paul, aged 15)*
- * *Dad used to come down so that was real cool. Big surprise cos Mum never told us. ... then Dad turned up outside the door so it was really cool. I went and stayed in a motel with him. I did lots of stuff with him so that was real fun. (James, aged 12)*

The International Legal Policy Context

The international jurisprudence regarding relocation/parental mobility cases indicates the vexing nature of this area of family law. In most Western jurisdictions the Court's paramount consideration is the child's welfare or best interests. While some adopt a more neutral, all-factor, approach, others have a presumption either in favour of, or against, relocation. The approach taken to determining the child's best interests also varies depending on whether the Courts consider that children are more likely to attain their potential when they are in the care of a happy, well-functioning primary parent or benefit from security and stability in their existing environment where they can easily maintain relationships with both of their parents: Over recent years, as cross-border disputes have become more frequent within the Courts, specific efforts have been made to achieve greater international consistency in

⁴² Taylor, N.J. (2006). What do we know about involving children and young people in family law decision making? A research update. *Australian Journal of Family Law*, 20(2), 154-178.

the resolution of relocation disputes. In summary, these include:

The International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions, 4-8 August 2009, hosted by Lord Justice Thorpe, Head of International Family Justice for England and Wales, at Cumberland Lodge, Windsor, England. Forty-two judges and several academics participated from 23 jurisdictions. One of the Conclusions and Resolutions related to relocation:

8. The search for common principles to be applied in the judicial resolution of relocation disputes in the best interests of the children concerned be pursued both nationally and internationally. Participating jurisdictions shall use their best efforts to ensure such disputes are resolved in a timely fashion. More research and longitudinal studies should be carried out into the impact of relocation decisions on the children and parents concerned, whether relocation is permitted or not (including comparative studies as to the impact of the non-custodial parent's decision to relocate).

The International Judicial Conference on Cross-Border Family Relocation, 23-25 March 2010, hosted by the Hague Conference on Private International Law and the International Center for Missing and Exploited Children, with the support of the US Department of State, in Washington DC, USA. The conference aimed to develop a better understanding of the dynamics of relocation and the factors relevant in judicial decision making, to explore the possibility of developing a more consistent judicial approach towards relocation cases, and to examine the potential for closer international judicial co-operation in such cases. The Washington Declaration on International Family Relocation recorded the agreements the judicial delegates reached.⁴³

The International Child Abduction, Forced Marriage and Relocation Conference, 30 June to 2 July 2010, hosted by the Centre for Family Law and Practice at London Metropolitan University, England. The Conclusions and Resolutions were agreed to by 150 participants from 18 jurisdictions.⁴⁴

The Relocation Working Group, convened in 2012 by Lord Justice Thorpe, comprises legal practitioners and academics from England/Wales and New Zealand who are collaborating to develop guidance on the most effective means of adopting a consistent international approach. The Working Group is building on the qualitative research findings from New Zealand and England;⁴⁵ the research on New Zealand caselaw adjudication trends undertaken by Professor Mark Henaghan;⁴⁶ and Dr Robert George's doctoral, and subsequent, studies.⁴⁷ In addition, the Working Group is mindful of the work currently being conducted to develop Relocation Advisory Guidelines in Canada.⁴⁸ The Working Group's findings will be presented at the forthcoming 2nd International Family Law and Practice Conference, Parentage, Equality and Gender, being hosted by the Centre for Family Law and Practice at London Metropolitan University from 3-5 July 2013.

Conclusion

This article has traversed many of the current research and policy developments relating to relocation disputes within the family law system, both within New Zealand and internationally. It is exciting to acknowledge the potential for empirical research (particularly when it also includes children's perspectives), caselaw analyses, and collaborative interdisciplinary efforts across jurisdictions, to help strengthen and guide future relocation law and dispute resolution processes so as to better advance the welfare, rights and best interests of children.

⁴³ http://www.hcch.net/upload/decl_washington2010e.pdf; See also: n 13, Freeman & Taylor, at p. 21.

⁴⁴ <http://www.londonmet.ac.uk.flp/conference/papers>.

⁴⁵ See n 2 – Taylor, Gollop & Henaghan, and Freeman.

⁴⁶ Henaghan, R.M. (2011). Relocation Cases: The Rhetoric and Reality of a Child's Best Interests: A View From the Bottom of the World. *Child and Family Law Quarterly*, 226

⁴⁷ George, R. (2010). *Reassessing Relocation: A Comparative Analysis of Legal Approaches to Disputes Over Family Migration After Parental Separation in England and New Zealand*, DPhil Thesis, University of Oxford.

⁴⁸ Bala, N., & Wheeler, A. (2012). Canadian Relocation Cases: Heading Towards Guidelines. *Canadian Family Law Quarterly*, 271, 316.

Abduction and Relocation – Links and Messages

Marilyn Freeman*

1. Introduction

Having worked for more than twenty years in the area of parental child abduction, I have been struck by the connections between aspects of this emotive family situation, and another, equally emotive, set of familial circumstances, that of relocation, in which I have also been involved for a considerable time. Abduction has been subject to a greater level of empirical research,¹ including my own,² than the area of relocation disputes³ and, because of some of the similarities between the circumstances of abducted and relocated children, it may be that some of the research on the effects of abduction on the child may be of some interest in considering what the effects of relocation may be on the children who have relocated following relocation disputes.

It is also well recognised that there is, at least in theory, a close connection between the incidence of abduction and relocation. It is difficult to know, in practice, how closely the theory is reflected in reality. If we try to consider this from a starting point of what we

know about relocations, we find that, in England and Wales, very little is known about the details of relocations including how many relocation cases are heard each year, how many succeed and how many fail, how many applications are by mothers, and how many by fathers. Much of what we know is anecdotal in nature⁴ and, therefore, we cannot rely on the relocation records to assist in our understanding of the possible connections with abduction.

If, instead, we try to approach this from the starting point of what we know about abductions, we are again hampered by the lack of large-scale, detailed empirical research which considers the reasons for the abduction, and specifically whether a proposed relocation was involved. In December 2001, Chiancone, Girdner and Hoff⁵ stated that: “Little social science research has been conducted on international parental child abduction”, and there has been no significant change since that time.⁶ The left-behind parents’ survey in the Chiancone et al study found that a high level of planning had been involved in

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¹ See Chiancone, Girdner and Hoff, fn 5 below, for helpful account of the then-current abduction research literature but note their comment at p3 regarding the paucity of social science research in this area, stating: This study is one of the first attempts to learn extensively about experiences of left-behind parents, practices of Hague Convention Central Authorities, and the strategies that can be used by attorneys, judges, law enforcement personnel, and other professionals to assist in recovering abducted children quickly and safely”.

² M.Freeman, Pilot Project Concerning Return Orders, Primary Carers and their Children, 2001 [2001] *IFL* 153; M. Freeman, The Outcomes for Children Returned Following An Abduction, 2003. www.reunite.org (hereafter Outcomes), M.Freeman, International Child Abduction – The Effects, 2006. www.reunite.org (hereafter Effects)

³ The social science research in this area was reviewed in N.Taylor and M.Freeman, ‘International Research Evidence on Relocation: Past, Present and Future’ (2010) 44(3) *Family Law Quarterly* 317-339, including 4 empirical studies: (i) Parkinson, Cashmore, Chisholm and Single, which has produced various publications due to its ongoing nature (ii) Taylor, Gollop and Henaghan, see fn 9 below (iii) Behrens, Smyth and Kaspiew, Experiences of parents after court decisions about relocation: An empirical study focusing on parents’ experiences (iv) M.Freeman, ‘Relocation: The Reunite Research Project’ [2010] *International Family Law* 161 (hereafter Freeman, Relocation) described by Gilmore and Glennon as follows: “There is only one published empirical study in England of individuals involved in relocation cases, work undertaken for the child abduction charity, Reunite, by Marilyn Freeman”, Hayes and Williams’ *Family Law*, 3rd edition, Oxford, 2012, at p547. Although both the New Zealand project and the Parkinson et al project involved a small sample of children, none of the empirical studies were designed to focus directly on the outcomes for children in relocation disputes. Dr. Rob George is currently engaged in trying to “find out more about relocation cases which do not reach the Court of Appeal and so to broaden our understanding of the everyday realities of relocation disputes” - Researching Relocation Disputes in First Instance Courts, <http://www.familylawweek.co.uk/site.aspx?i=ed97056>

⁴ See Dr. Rob George <http://legalliberal.blogspot.co.uk/2012/03/relocation-disputes-in-family-courts.html>

⁵ Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, at p3 <https://www.ncjrs.gov/pdffiles1/ojdp/190105.pdf>

⁶ Greif and Bowers, Unresolved Loss: Issues in Working with Adults whose Siblings were Kidnapped Years Ago, *The American Journal of Family Therapy*, Volume 35, Issue 3, 2007; Greif, G. L. (2009). The long-term aftermath of child abduction: Two case studies and implications for family therapy. *The American Journal of Family Therapy*. 37, 273-286. See Marlene L. Dalley, PhD, The Left-Behind Parents’ View of the Parental Abduction Experience, Its Characteristics and Effect on the Canadian Victims, 2007 <http://www.rcmp-grc.gc.ca/pubs/omc-ned/leftbe-laisderr-eng.pdf> which was a small study limited to left-behind parents who contacted not-for-profit agencies for help finding their missing children. In the analysis at p33 where the left behind parents were asked “.. what they thought had prompted the abduction, only 10 of the 19 respondents gave some explanation. Mothers most often reported the father wanted revenge, whereas fathers reported that the mother needed to control”

the abductions⁷ including liquidating assets, and quitting or changing jobs, and this might suggest actions which are inconsistent with a relocation dispute where potentially left-behind parents are often arguing that the child should not relocate and should stay, instead, in the familiar surroundings in which she had been living so would not wish to engage in activities such as liquidating assets which might give the impression either of instability, or of planning to abduct. My own abduction research does not indicate that a relocation dispute was a noteworthy trigger to the abductions which occurred.⁸

Nevertheless, it is not difficult to see why concerns exist about the connection between relocation disputes and the incidence of abduction, and it is likely that some abductions will occur for this reason.

The conventional wisdom⁹ is that a restrictive relocation jurisdiction will result in increased abductions by the parent wishing to relocate, usually the mother, and a liberal relocation jurisdiction will result in increased abductions by the prospective left-behind parent, usually the father. There is no substantive evidence that this is the case, and it is also not incontrovertible that such an outcome is the inevitable result of having a policy towards relocation which is either restrictive or liberal. It is submitted that, although the spectre of a child's relocation may well produce the thought, or the reality, of abduction in the potentially left-behind parent, or indeed the inability to relocate may produce the thought, or the reality, of abduction by the would-be relocating parent, in most cases this will not be the outcome. Most people do not abduct their children, tending to suffer the fall-out of

failed relationships with resigned realism, and try to make the best arrangements possible for a continued relationship with children who have relocated. Nonetheless, as already suggested, there may be some 'hard' cases in which this will be the result and, once again, the research on abduction plays a useful role in the relocation debates. What we know from the abduction research is that abduction can have serious and long-lasting effects on the children involved.¹⁰ What this means is that we need to be aware of the links and the possible consequences, and avoid relocations becoming abductions by addressing the issues at any early stage. This paper considers how this may be achieved.

2. Reasons for Focusing on the Links Between Relocation and Abduction

- i. There is a recognised lack of a solid evidence base relating to the outcomes for children in relocation disputes¹¹. We do have some greater evidence relating to outcomes for abducted children¹² and it may be that this can be of some assistance in particular aspects of the relocation context, specifically concerning what are the likely effects of relocation on children. There are many similarities between abducted children and relocated children. Often the abduction is by a primary carer, as is the relocation. Other similarities are equally important, like the loss of important relationships, and the familial conflict which exists. Of course, there are also differences. Usually a relocation is, in whatever small way, collaborative

⁷ Under a grant from the Office of Juvenile Justice and Delinquency Prevention (OJJDP) researchers at the American Bar Association (ABA) Center on Children and The Law carried out a study to identify barriers to resolving cases of international parental child abduction which included a survey of parents in the United States whose children were abducted to or retained in other countries, a survey of Central Authorities, and documentation of good practices from leading agencies, organisations, and practitioners. The ABA worked with three national missing children's organisations to survey parents in order to document the problems parents encountered in trying to recover their children. The study was completed in 1998, drawing responses from 97 parents. See *Juvenile Justice Bulletin*, fn 5 *supra* at p6. For authors' full report see, *Issues in Resolving Cases of International Child Abduction*, *Juvenile Justice Clearinghouse*.

⁸ See Outcomes at p23. No specific reference was made to relocation disputes being a trigger for the abduction although "going home" was given as a reason by both left-behind parents, and abductors, in some cases. Several mothers spoke of their feelings of isolation and misery at being unable to leave countries where they had no support and where they lived only because of the relationship with the child's father which had now broken down, but none linked the abduction to the restrictive nature of the relocation jurisdiction in the country from which they had abducted. The sample did not include father abductors.

⁹ Taylor, Gollop and Henaghan noted: "More recently, a link between international child abduction and relocation has been increasingly recognized.. it is possible that, if the relocation process is too restrictive, parents wishing to relocate may be encouraged to take the law into their own hands and simply leave the country without the required consents. Conversely, if the process is too liberal, potential left behind parents may feel that they have nothing to lose by abducting the child before the Court has a chance to make the relocation decision". See N.Taylor, M.Gollop, and M.Henaghan, *Relocation Following Parental Separation: The Welfare and Best Interests of Children Research Report*, Centre for Research on Children and Families and Faculty of Law, University of Otago, Dunedin, June 2010, at p.18.

¹⁰ See Effects report, see fn2 *supra*.

¹¹ This was noted in Preliminary Note on International Family Relocation, drawn up by the Permanent Bureau to the Hague Conference on Private International Law, January 2012, Preliminary Document No. 11, , for the attention of the Special Commission of January 2012 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, fn 73 and accompanying text: "Accordingly, the need for more empirical research into the effects of relocation on children has been acknowledged as a priority to move the debate forward". Also see Hayes and Williams, fn 3 *supra*, at 547: "There is, however, a paucity of empirical evidence concerning the impact of relocation on parents and children". Conversely, extensive social science research has been applied by analogy to relocation dispute cases, which has produced very mixed results. This is detailed in N.Taylor and M.Freeman, 'International Research Evidence on Relocation: Past, Present and Future' (2010) 44(3) *Family Law Quarterly* 317-339

¹² See fns 1,2 *supra*

insofar as it is not done in secret, and both sides are aware at the same time that it is happening; and it has the legal seal of approval, so it is not against the law. That does not mean, of course, that the relocated child lives openly and is not in hiding. There are many cases where, because of the acrimony between the parents, the relocated parent does not want the left-behind parent to know where she is now living with the child, and the child herself may not want that information disclosed for fear of the father turning up and embarrassing her (a real example from the current abduction research where, following the abduction, the mother relocated with the child) so, there are similarities between the experience of the abducted child and some relocated children even here.

This leaves other important relocation questions unanswered, including the effect on children of being involved in a relocation dispute and not relocating but, accepting these limitations, the abduction research may be still have some legitimate value.

- ii. The abduction research tells us that abduction can have serious consequences in terms of the effects on the abducted (and previously abducted) child.¹³ Children report a lack of trust, and strategies like blanking out as a way of dealing with their unhappiness.¹⁴ They hate the conflict, and have found the return, when it happened, as distressing as the original abduction. Although we know that abductions happen for a variety of reasons, including those of protection, from abuse for the child, or from domestic violence for the mother,¹⁵ the effects for the child may still be similar, and significant. The current long-term effects research is already producing some interesting initial snapshots of the effects which the research sample is describing and attributing to their abductions, many years before. The data analysis is still at an early stage, and caution must be exercised regarding any conclusions which can be drawn in terms of the general effects of abduction. However, these snapshots provide food for thought as they repeat and expand on some of the

issues which were raised in the earlier research about the serious problems which previously abducted children experience regarding trust, relationships, and the strategies for dealing with conflict and which, on the basis of these research snapshots, appear to survive into adulthood with, very often, significant impact on adult lives and relationships.

What does that mean in terms of what we need to do about it? It surely means that we should try to prevent abductions occurring. How do we do this when the proximate trigger to the abduction is the relocation?

2.1 Preventing Relocation-Related Abductions

To answer this question, we need to explore a little further the link between the incidence of relocation and abduction. The debates on this issue relate to the restrictive or liberal nature of the relocation jurisdiction, and its impact on the incidence of abduction. The theory of how this link works is that a restrictive relocation jurisdiction results in more abductions by those wishing to relocate (usually mothers),¹⁶ and a liberal relocation jurisdiction results in more abductions by those who would be the left-behind parents (usually the fathers). There are currently many different approaches to relocation being exercised around the world, and there is much debate about the use of presumptions in favour or against relocation which have, for some time, lacked support. Indeed, the Washington Declaration specifically stated that no presumptions were to be used in relocation disputes.¹⁷ The question has arisen as to whether there are significant benefits from the greater certainty that such positions bring, such that they may be a preferred way to approach the vexed question of whether a parent should be permitted to relocate with a child following relationship breakdown with the child's other parent. Certainty need not, of course, be brought about only by presumptions, and other ways of introducing a more certain approach are attracting academic commentary and endeavour, including the use of guidance and disciplines,¹⁸ although some scholars still appear to advocate the use of presumptions.¹⁹

¹³ See Effects report, fn2 supra.

¹⁴ See Effects report (Child Report, p55 et seq).

¹⁵ M.Freeman, Primary Carers and The Hague Child Abduction Convention, *International Family Law* (2001), 140.

¹⁶ See Effects report, p9. Almost 70% of sample involved abductions by mother, which supports previous research findings of the profile of abductors.

¹⁷ The Washington Declaration on International Family Relocation, 2010 see (2010) 2 *International Family Law* 211

¹⁸ M Henaghan, 'Relocation Cases: The Rhetoric and the Reality of a Child's Best Interests: A View from the Bottom of the World' [2011] *Child and Family Law Quarterly* 226.

¹⁹ N.Bala and A. Wheeler, 'Canadian Relocation Cases: Heading Towards Guidelines' [2012] *Canadian Family Law Quarterly* 271

2.2 What Impact Does Such Certainty Have On The Conventional Wisdom About the Links Between the Incidence of Relocation and Abduction?

- (i) Knowing that the relocation is unlikely to be allowed (a restrictive jurisdiction) will not, in my submission, necessarily lead to an abduction by the primary carer mother. It is quite possible that it could lead, instead, to a different approach being taken by the mother to the problems being encountered, perhaps with the overly controlling father from whom she wishes to get away, or perhaps with her new boyfriend from a different country with whom she would like to spend more time. Similarly, knowing that the relocation is likely to be allowed (a liberal jurisdiction) will not necessarily lead the father to abduct the child, but possibly to engage in a different way to the problems being encountered, perhaps with the mother who has all her family and support networks in another country, where she is able to work with the support of her family, and to provide a better life for their child. Necessity is, after all, the mother of invention. If we have to face situations, we are often very capable of doing so. This would be a very positive benefit from the use of presumptions or greater certainty achieved through some other means. People would assess their situations and options differently in the knowledge of what was going to happen.
- (ii) It is possible, however, that the conventional wisdom is correct and that certainty, in the form of presumptions or some other means, may have a less positive impact in the context of relocation and abductions, encouraging abductions because, whilst people do not know how courts are going to decide the issue, they still have hope and, therefore, will not resort to abduction. If it is clear from the beginning what is going to happen, there may be no hope, and therefore a greater incentive for abduction.
- (iii) Again, less positively, when we think we have alternatives, we often feel driven to grab them without really taking the time to explore the context of the conflict and problems being experienced, and the potential consequences and

fall out of the decisions being made. Some interviewees in the relocation research I undertook told me that they wished that more time had been taken to help them consider the implications of the applications they were making to relocate. One mother said that she felt bulldozed towards the court hearing once she raised the issue of relocation with her legal adviser. She was told what to expect, i.e. that with a proper plan in place, she would get leave to remove. She began to feel that this was, therefore, right. If it was so accepted, it must be the right thing. She did get leave to remove and, in her case, it turned out to be the wrong thing. Her child is well-adjusted and has good relationships with both parents but no longer lives with her in another country, having been returned by her to the father in England so that the child could continue his specialised education and, in her words, to benefit from the close relationship with his father which he was in danger of losing following the relocation.²⁰

- (iv) Additionally, if the use of presumptions were to be supported, we would need to be able to decide whether any presumption should be in favour of allowing relocation, or of denying relocation, save in exceptional circumstances. As already discussed, the empirical evidence on outcomes of relocation disputes is not available now, and will take a considerable time to produce. I believe that research on relocation outcomes would be very helpful in determining which way any presumption should go.

2.3 Is Certainty Enough?

So, knowing how to influence the incidence of relocation-related abductions is not simple, and it is probably necessary to do more than introduce presumptions, one way or another, and for that we would need to know which way was better to go. Neither on its own, in my submission, is likely to prevent abductions occurring. According to the conventional wisdom a liberal jurisdiction encourages fathers to abduct. But you don't prevent abductions on this theory by imposing a restrictive relocation jurisdiction because that encourages mothers to abduct. The same can be said in reverse. If you introduce a restrictive jurisdiction, according to the conventional wisdom, this encourages mothers to abduct,

²⁰ See Freeman, Relocation at p17 (fn3 (iv) above).

but you don't prevent abductions by introducing a liberal jurisdiction because this encourages fathers to abduct. This is just "push and pull" at work. My submission is that the way forward may well be to introduce greater certainty, not necessarily through the use of presumptions, but through one of the other methods currently being debated internationally, but to do this in conjunction with providing meaningful support to parents and families in this situation. The environment will need to be truly supportive in order to produce the positive change in approach which greater certainty can provide, and this is where we need to consider the possibilities of specialised mediation as a method of delivering the support which is required.

The context is well described by Professor Mark Henaghan who said:

"[w]hen inter-parental relationships are marked by ongoing conflict and bitterness, then that bitterness is likely to continue, whether the relocation occurs or not. The crucial point is that the reality of the relationship has to be confronted, rather than an idealised view of what post-separation families should be like". Henaghan, R.M. (2011). *Relocation Cases: The Rhetoric and the Reality of a Child's Best Interests: A View from the Bottom of the World*. *Child and Family Law Quarterly*, 226-249 at 237.

Relocation disputes are often bitter continuations of unresolved relationship breakdown. It may be one way of confronting the reality of the relationship to have greater certainty in relocation cases; for families to know it, and to confront, with whatever supportive help is available, the realities of what that means, and of the relationship generally. Presumptions would not be easy to introduce in England and Wales because of the reliance on the best interests principle in S1(1) Children Act 1989 which ensures that the welfare of the specific child determines the question before the court. Presumptions do not sit well with that principle.²¹

3. Abduction Impacting on Relocation

As already discussed, the Conventional wisdom is that relocation impacts on abduction. We have often asked whether an abduction will also impact on the question of subsequent relocation, i.e. when the abductor returns to the state of habitual residence following return proceedings, and then commences proceedings to lawfully remove the child from the jurisdiction – will the abduction count against her in the subsequent proceedings? This was an issue that I considered in the Outcomes project²² and found in that sample that the abduction did not appear to have been held against the abductor in the substantive custody issue. However, it did appear to impact on the subsequent relocation decision in many cases.

Interestingly, this was an issue that received some attention in a Court of Appeal case in England in 2011²³ when the judge at first instance concluded that the situation for the mother upon return to Australia would give rise to an Article 13b risk under the 1980 Hague Child Abduction Convention, and referred to the stress that would be caused to the mother in having to issue a relocation application in Australia. He exercised his discretion not to return the child. The judgment was appealed, and the Court of Appeal was 'troubled' by the judge's view that the stress of the mother's anticipated relocation application upon return was a factor elevating the Article 13b risk. The Court of Appeal therefore allowed the appeal and ordered the return of the child. Interesting, however, that the first instance judge – and no doubt others – would see a link between the abduction and any subsequent relocation application.

4. Conclusions

With all the usual caveats about research rarely establishing causation, is there sufficient correlation in the abduction research (including the snapshots from my current project on the long-term effects of abduction) to draw useful conclusions about the effects of abduction? Even at this early stage of data analysis, it seems there may be.

²¹ For a current commentary on the meaning of welfare, see Lord Justice Munby in *re G (Children) (Education:Religious Upbringing)* [2012] EWCA Civ 1233 where he discussed the welfare principle as it applies in 2012, and emphasised at para 26 that a judge must peer into the future, perhaps indeed into the 22nd century, depending on the nature of the case. For relocation cases, this is especially pertinent. It is also interesting to consider the judgment of Lord Justice McFarlane in *Re W(Children)* [2012] EWCA Civ 999. This was a contact case but the judge's comments on the significance of parental responsibility may be significant in the relocation/abduction context as he emphasised the tough nature of some aspects of parenting which may be "a very big ask" but may be part of the responsibility of the parent with care, the duty and responsibility to deliver what the child needs, hard though that may be.

²² Outcomes, p37

²³ *S v C* [2011] EWCA Civ 1385

This, of course, is stand-alone research, but the next question is whether there are any lessons here for the relocation context? I would suggest again that there may well be – particularly with issues of identity and personal relationships. Much may depend on the context, and quality of the parental relationship both before and after relocation. If parents are able to work collaboratively in relocation cases, the loss and grief which may be experienced (relating to identity and personal relationships) may be managed in a caring and supportive way to help the child cope with the emotions which result from these events. In abduction cases, almost by definition, this collaboration is usually lacking, and the long-term outcomes for the previously abducted child may thus be correspondingly more severe. The lessons may therefore include what we already know – if the parents are at war, the child is likely to suffer, and that will be in the context of abduction, relocation, and virtually everything else.

Mediation

In addition to the debates about the need for, and the ways of, producing increased certainty, including the use of presumptions, in relocation cases, and the possible

impact which they may have on the incidence of abduction, specialist mediation may be a way of assisting parents to make more informed decisions than they are currently able to do. Many people feel that relocation and abduction cases are not susceptible to successful mediation because of the deeply entrenched positions of the parties – the stakes are so high that there can be no compromise. Of course, the stakes are truly very high, but that does not mean that parents are incapable of addressing the realities of their situations when they are well informed, and well supported.

The specialist mediation can provide information about what we know about the effects of relocation and abduction on children, and in this way may help to prevent, what are truly, relocation disputes from becoming abductions. It can help untangle old arguments from current decision-making, recognising that the current dispute might be a mere symptom of old, long-lasting family feuds,²⁴ and can help parents to remember the responsibilities of parenthood which Lord Justice McFarlane spoke about in *re W*²⁵.

For a family at war, this might make a very useful contribution towards being able to reconcile themselves to their situation and to accepting their lives as a separated family.

²⁴ See the 2012 Good Practice Guide issued by the Hague Conference in relation to the abduction context. http://www.hcch.net/upload/guide28mediation_en.pdf

²⁵ see fn 21 *supra*.

UNRC And Children At School

The Best Interests of a Child in School Suvianna Hakalehto-Wainio*

*'There are many reasons for incorporating children's rights within educational practices. The most obvious is that there is a legal imperative to do so.'*¹

Education and human-rights perspective

The right to education is one of the most essential rights for the upbringing and development of children. It is affirmed in most major international human rights instruments and national constitutions. The right to education is often called "empowerment right" because of its significance for realizing one's rights.

Children in general including schoolchildren are slowly being considered as rights holders. After the ratification of the United Nations Convention on the Rights of the Child (UNCRC) the international research on child law has extended its focus from the protection of a child to the protection of children's rights. Children are no longer seen only as family members and recipients of welfare services and benefits, but also as legal subjects and members of the society with their individual rights.² Children are acting in many different environments: in day care, in school, in their leisure time activities, as consumers, as patients, as media users.

In ratifying the UNCRC, a State has accepted an obligation to respect, protect, promote and fulfil the enumerated rights by adopting or changing laws and policies that implement the provisions of the Convention. It is the right of every child to have her or his universal human rights respected, protected,

promoted and fulfilled within the education system.³ Equality, freedom of expression, right to privacy, freedom of religion and access to justice, together with other constitutional and human rights, must be realized also at school. Because children lack the ability to execute their rights the responsibilities of school are paramount.

Education must be provided in a way that promotes children's human rights. A human rights approach should cover the curriculum, the educational process, the pedagogical methods and the school environment. Implementing the right to education does not only cover traditional areas such as access to school but additionally it looks at issues such as discrimination in the education system, access to health guidance at school, contents of the education curriculum and violence in schools.⁴

A child's human rights may be violated in various ways in the educational environment. There is a violation, for example, if school personnel do not take bullying seriously enough or if disruptive behaviour of some learners endangers the other children's ability to learn. Not having any human rights education at school is also a violation of the Convention. It is only recently that these kinds of challenges have been examined from the human rights and children's rights perspective.⁵

There is not much research on children's rights in school even though children's involvement with school comprises a significant part of their lives. This article aims to consider the obligations of the UNCRC when

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¹ J. Allan, J. P'Anson, S. Fisher, A. Priestley, *Promising Rights. Introducing children's rights in school* (Save the Children 2005), at p. 7.

² See M. Freeman, 'Towards a Sociology of Children's Rights' in M. Freeman (ed) *'Law and Childhood Studies. Current Legal Issues 2011'* (Oxford University Press 2012), at p. 30. See also A. Skelton, 'Constitutional Protection of Children's Rights' in T. Boezaart (ed) *Child Law in South Africa* (Juta, 2010), at pp. 275-276.

³ See K. Tomasevski, *Human Rights Obligations in Education* (Wolf Legal Publishers 2006). See also CRC/GC/2001/1.

⁴ CRC/GC/2001/1, para 8 and P. David, 'Implementing the rights of the child. Six reasons why the human rights of children remain a constant challenge' (2002) 48:3-4 *International Review of Education* 259-263, at p. 261.

⁵ For example in Finland many schools have mould problems, teachers are being temporarily laid off because of the lack of resources and access to health services is not being realised the way it is guaranteed by law. See S. Hakalehto-Wainio, *Oppilaan oikeudet opetustoimessa* (Lakimiesliiton Kustannus 2012). Children tend to be missing from the adult-centered, academic literature on human rights. See P. Alderson, 'Young Children's Human Rights: a sociological analysis' (2012) 20 *International Journal of Children's Rights* 177-198.

promoting children's rights in schools. I will concentrate on examining the main elements of the best interests principle in the school environment. As an "umbrella provision" of the UNCRC, Article 3 requires that the best interests of a child are a primary consideration in all actions concerning children. Before investigating the contents of the best interests I will consider some points on school as an environment and the role of a child (as learner) at school.

School as an environment

Some features of school

School can be separated from other areas of a society based on its aims and its established procedures. The main tasks of schools are teaching, raising, and taking care of the wellbeing of children. Schools have been described as a mixture of bureaucratic spaces and pastoral guidance concerning the pupil's development. In sociology the school system has been understood as one of the society's ways of using control, power and force: authority is hidden behind the neutralities of pedagogical practices.⁶

School is probably the single most prominent area of life outside home in which the child stands in a direct and intimate relationship with those in authority. Human rights are setting limits to the power of school authorities. Sometimes one faces a misconception that promoting children's rights would have a negative impact on the rights of the others. At school children's rights might be considered as a threat to the authority of the school personnel and their rights.⁷

A school is made up of numerous different spaces and relations. Physical spaces include, for example, classrooms, corridors, playgrounds and halls. Mental spaces consist among other things of the values, traditions, policies and hierarchies in school. It is the atmosphere of the school – "the school climate". The values of school culture and the relationship between a teacher and a learner might impact on the way human rights are understood in school environment.⁸

School is a special network of children, youth and adults: many different people with their individual rights and responsibilities are interacting with each other. Being a learner means having to perform different social roles with a large number of other actors.⁹ The school is a home base for competing, dividing and building hierarchies. Children have to be able to survive in a certain social group under the constant supervision, comparison and evaluation.

The school day is full of routines and schedules. The tempo in school is often busy and situations change quickly. Different kinds of conflicts exist in the everyday life of school.

According to Finnish teachers the most common problems they face in school have to do with school discipline, supervision of pupils, co-operation with parents and administrative secrecy rules. As to parents, the most serious problems include bullying, lack of learning support, problems of evaluation of pupils and health problems of pupils caused by mould problems in schools. Pupils are worried about bullying and evaluation – especially discrimination, lack of participating opportunities at school and poor access to health services. Many problems connected to school have a legal aspect which should be approached from the perspective of children's rights.¹⁰

It can be difficult to identify the violations of children's rights in school because the functioning of school is somewhat closed off from the public. The practices that are problematic from the perspective of children's rights, even clearly unlawful actions, are not often revealed outside the school. Even if children or parents are aware of the problems they might not complain for various reasons. Observing the school environment from the perspective of the UNCRC principles helps recognizing daily situations in school where children's rights are in risk of being violated.¹¹

The role of a pupil at school

In school, children have not traditionally been noticed as independent rights holders or active participants. It is their responsibilities that have been

⁶ See I. Hunter, *Rethinking the school: subjectivity, bureaucracy, criticism* (Palgrave Macmillan 1994) at pp. 259-263.

⁷ See P. David, 'Implementing the rights of the child. Six reasons why the human rights of children remain a constant challenge' (2002) 48:3-4 *International Review of Education* 259-263, at p. 261. 'The discussion of rights is often cloud-ed by misconceptions about what it means to have rights. This is particularly true of children's rights, where there is a prevailing view that children having an awareness of their rights undermines adult authority and encourages young people to behave selfishly and irresponsibly.' See *Children's rights. A teacher's guide* (Save the Children 2006), at p. 5.

⁸ See R. Malherbe, 'The Impact of Constitutional Rights on Education' in T. Boezaart (ed) *Child Law in South Africa* (Juta 2010), 420-455.

⁹ See S. Meadows, *The Child as Social Person* (Routledge 2010), at pp. 218-219.

¹⁰ The authorities in charge of supervising school receive complaints especially on school discipline, co-operation with parents, bullying at school, evaluation, supportive services relating to special-needs education and pupil welfare. See S. Hakalehto-Wainio, *Oppilaan oikeudet opetustoimessa* (Lakimiesliiton Kustannus 2012), at pp. 22-23.

¹¹ Shortcomings can often be found when examining the national legislation and other regulations which have not been prepared considering the responsibilities set in the Convention. For example the preliminary materials of the Finnish Basic Education Act (628/1998) do not mention anything on children's rights.

emphasised as shaping their status in school. The duty to attend classes, the duty to behave correctly and the duty to complete the tasks diligently show children their place in the school hierarchy.¹² Despite the huge amount of learners compared to the amount of school personnel children in school are relatively powerless and their role is rather passive. Adults make decisions about when, what and how children learn.¹³ Promoting children's rights is acknowledging that 'adults do not always know best, and may not always act in the most honourable ways, and to recognise that there must be some limits on adult power over children'.¹⁴

The United Nations Committee on the Rights of a Child (the Committee) has emphasized that children do not lose their human rights when going through the school gates.¹⁵ But what happens to their rights once they are through those gates? In general children have the same human rights as adults such as the right to equality, the right to privacy and integrity, freedom of expression, freedom of religion, protection of property and protection under the law. In addition to more traditional human rights the UNCRC includes special human rights tailored to children's needs and these rights are to be protected in school. The obligation to attend school does not abolish or reduce these rights. Taking children's rights seriously challenges the traditional teacher-learner relationship and has been described as a "risky process". Familiar ways of acting and traditional ways of approach are questioned and renegotiated.¹⁶

Schools have been regarded as remarkable actors in human rights education.¹⁷ The role of learners as rights holders and promoting their best interests is not possible without educators', parents' and children's knowledge of human rights. School is a natural place for carrying out the State's duty to make the principles

and provisions of the UNCRC known (Article 42).¹⁸ According to Article 29 education is to be directed to the development of respect for human rights and fundamental freedoms. The curriculum in school should include education on human rights, especially on children's rights and should make these rights a part of everyday life at school. While learning about their rights children also learn that they have a responsibility to respect the rights of others.¹⁹

The best interests principle in the UNCRC

The best interests of a child originally developed as a principle in the terms of which of the best interests of the child prevail in family law disputes over custody of and access to children. It has been applied in a limited sphere, mainly when deciding which parent is better able or suitable to promote and ensure the child's well-being. Only after coming into force of the UNCRC has the principle become an internationally accepted norm that guides authorities in all actions and decisions affecting children.

According to the Article 3(1) of the UNCRC, the best interests of a child shall be a primary consideration in all actions concerning children, whether undertaken by social welfare, courts of law, administrative authorities or legislative bodies.²⁰ This Article has been regarded as the most important Convention provision because it underpins all the other Articles²¹ Thomas Hammarberg emphasises that the best interests principle in the UNCRC is a significant departure from the traditional ways of child policy everywhere in the world.²²

In addition to the best interests principle the Committee on the Rights of a Child has named three other general principles as the central provisions of the Convention. These are the principle of non-

¹² In the Finnish Basic Education Act these duties are found in section 35.

¹³ See J. Smyth, J. Hattam, 'Early school leaving and the cultural geography of high schools' (2002) 28:3 *British Educational Research Journal*, 375-398.

¹⁴ See W. Stainton Rogers, 'Promoting better childhoods: Constructions of Child Concern', in M.J. Kehily (ed) *An introduction to Childhood Studies* (Open University Press 2004), 125-144.

¹⁵ CRC/GC/2001/1, para 8.

¹⁶ See J. Allan, J. P'Anson, S. Fisher, A. Priestley, *Promising Rights. Introducing children's rights in school* (Save the Children 2005), at p. 11.

¹⁷ See T. Hammarberg, A. Belemboago, 'Proactive Measures against Discrimination' in 'Children's rights. Turning principles into practice' (Save the Children Sweden 2000), at pp. 21-23.

¹⁸ Smith emphasizes the importance of making the UNCRC an obligatory part of the curriculum in all levels at school. See L. Smith, 'FN:n konvensjon om barnets rettigheter', in N. Hostmaeligen, E.S. Kjørholt, K. Sandberg (eds) 'Barnekonvensjonen. Barns rettigheter i Norge' (Universitetsforlaget 2012), at p. 21.

¹⁹ See *A Human Rights-Based Approach to Education for All* (Unicef 2007), at p. 22. According to a Nordic Study on Child Rights to Participate (Unicef Sweden 2009/2010), 9 % of their respondents felt they were well aware about the rights of the child. 46 % were somewhat familiar with them. The rest knew very little or nothing about them.

²⁰ For an overview of the drafting history of the Article, see P. Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' in P. Alston (ed) *The Best Interest of the Child* (Oxford 1994), 10-15.

²¹ See J. Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 3rd edition 2009), at p. 40.

²² 'The broader scope of the principle has very rarely been implemented anywhere.' T. Hammarberg, 'Viewpoint of the Council of Europe Commissioner for HR', 16.11.2009.; www.commissioner.coe.int.

discrimination (Article 2), principle of the right to life, survival and development (Article 6) and the principle of participation (Article 12). The Committee highlights the importance of these four principles when interpreting the Convention and when defining the contents of the best interests of the child. The Committee also emphasizes the uniformity of the interpretation with the whole Convention²³.

The best interests of a child can be defined as a sum of all rights safeguarded in the UNCRC. To make the best interests of a child a primary consideration in a decision-making means fulfilling all the Convention rights as far as possible.²⁴ Certain provisions of the UNCRC are especially relevant when defining the best interests of a child in an educational environment.

In addition to the general principles it is in my opinion the Article 3(2) which has a particular relevance in school. It obliges the State to ensure the child such protection and care as is necessary for his or her well-being. The school personnel are in charge of the safety and well-being of the children during the school day. In my view another important element of the best interests of a especially in school is the right to safe and accessible complaint mechanisms and other opportunities to address denials and violations of children's rights in school (for which there is legal protection).

The best interests of a child in the school environment

Participation rights

Article 12 of the UNCRC consists of two different elements. First of all it gives a child who is capable of forming his or her own views the right to express those views freely in all matters affecting her/him. In school this means that when adults are making decisions that affect children, children have the right to say what they think about the matter. It is important to provide enough information for children on which to base their views. This means among other

things education on children's rights and responsibilities.

At school age children can normally form their views in most matters relating to school and the situations where the school personnel would not need to call for children's views are exceptional. It is fundamental to be aware that there is no excuse for skipping this duty to consult children – it is absolute. It is always obligatory for school authorities and personnel to give learners the opportunity to have their say when the matter concerns them. This includes even situations in which the children concerned would not be sufficiently mature to have their views considered.²⁵

It is not enough that children can express their views. The second component of Article 12 obliges adults to give due weight to the views of a child/children in accordance with her/his/their age and maturity. Children must not only to be listened to but their thoughts and ideas must be taken seriously.²⁶ When talking about any basic education issue the children concerned have already reached the sufficient age to have the right to get their views considered.²⁷ Reasons should be given in case of any opposite interpretation.

It is especially mentioned in the Article 12 that a child must be given the opportunity to be heard in any administrative proceedings or decisions affecting her/him (e.g. choosing school subjects, disciplinary decisions, learning support, permitting/forbidding photographing, health services). This is a basic civil right of each person including children. In school all administrative decisions require the possibility of a child concerned to express her or his view in the matter. One challenging element is the fact that in practice it is often a guardian exercising the rights on behalf of a child. Fortin has notified that the willingness of policy-makers to assume that children's interests are united with those of their parents is most apparent in legislation governing education.²⁸ To fulfill

²³ CRC/C/GC/8, para 26.

²⁴ According to the strategy to strengthen the rights of the child in Sweden 'consideration is to be given to the totality of rights enjoyed by the child under the Convention and to the needs and interests of the individual child'. See *Strategy to strengthen the rights of the child in Sweden* (S2010.026), (Ministry of Health and Social Affairs 2010), at p. 6.

²⁵ See U. Kilkelly, 'Relocation: A Children's Rights Perspective', (2010) 1 *Journal of Family Law and Practice*, at pp. 27-28. 'When read together with articles 5 and 13, it reflects a move away from merely identifying what decisions children are not competent to take, to the consideration of how children can participate.' See T. Buck, A. Gillespie Alisdair, L. Rosse, S. Sargent, *International Child Law* (Routledge 2011), at p. 129.

²⁶ See CRC/C/GC/12 (2009) and U. Kilkelly, 'The impact of the Convention on the case-law of the European Court of Human Rights' in D. Fottrell (ed) *Revisiting Children's Rights. 10 years of the UN Convention on the Rights of the Child* (Kluwer 2000), p. 87.

²⁷ In Norway Bjerke has found that even though the idea of participation is present in school, the views of pupil are only seldom given due weight. The central activities of school are not discussed with children and their views do not have much influence on daily work. See B. Håvard, 'It's the way they do it: Expressions of Agency in Child-Adult Relations at Home and School', (2011) 25 *Children & Society*, at p. 100.

²⁸ According to Fortin the fact that children lack party status in the education appeals tribunals reflects the view that education is a service designed for adults. See J. Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 3rd edition, 2009), at p. 740. Freeman also notes that the message conveyed by the English education legislation is clear: 'the consumers of education are the parents, not the children'. See M. Freeman, 'The Convention: An English Perspective' in M. Freeman (ed) *Children's Rights. A Comparative Perspective* (Dartmouth 1996), at p. 95.

the children's rights of the Article 12 it is not enough to hear the parents and consider their views. According to the UNCRC parental rights to make decisions on their children's education are not absolute and are seen to decline as children grow older.²⁹

Building a school environment where children's involvement is a natural component promotes the best interests of learners in school. It starts with appreciation for children's contributions.³⁰ Learners should be invited to plan the activities of school, developing the school and be involved in all decision-making. Genuine participation requires school environment which promotes participation in all possible ways.³¹ Regular feedback from learners regarding e.g. the atmosphere in school, teaching, social relations among children and bullying should be collected and used for developing the school.

Non-discrimination

Discrimination is a threat to the human dignity of a child. The Committee has noted that discrimination can undermine or even destroy the capacity of the child to benefit from the education.³² According to the Article 2(1) of the UNCRC each child must be ensured protection of the Convention rights without discrimination of any kind, irrespective of the child's or his or her legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

The provision of non-discrimination in the UNCRC differs from the equality provisions of many other human rights treaties. It forbids discrimination also based on a status of the child's guardian. This prohibition may have significance in school because the teachers must raise the child in co-operation with the guardians.³³

It is a responsibility of the school personnel to respect and ensure the rights of each child without discrimination of any kind. Equality must be ensured for example in access to school, quality of education, school discipline, assessment and participation. In school it is important that children have enough social contacts with other children. The school personnel must promote an atmosphere which enables all

learners to have friends in school and to have the opportunity to be involved with peer groups.

It is a serious risk for a child's development if s/he is the target of discrimination in school. Despite attempts to tackle bullying in schools, this is still common in many schools all over the world. It is both commonly and scientifically known that bullying can have very drastic consequences for the rest of the life of an individual. Some children are particularly vulnerable to bullying.

It is a duty of the school personnel especially to support weaker groups such as children with learning difficulties, children in foster care, disabled children, children who belong to minorities, refugee children and asylum-seeking children. The Committee has emphasized that teaching human and children's rights can effectively prevent racism, ethnic discrimination, xenophobia and other intolerance.³⁴

The best interests of learners call for active measures from school authorities. It is necessary to build systems to prevent, to recognise and to tackle discrimination. It is not enough to have legislation and programs: children have the right to non-discrimination executed in many different methods paying regard to the role of a learner and the school as an environment.

Right to protection

One of the main messages of the UNCRC is to provide special protection to vulnerable, growing and developing human beings. At school children have the right to such protection and care that is necessary for their well-being. According to the Article 3(2) it is a responsibility of the State to take all appropriate legislative and administrative measures to ensure this. At school it means e.g. children's rights to a physically, mentally, socially and pedagogically safe environment. Planning and realising school activities such as lessons, breaks, discipline and school transportation must be based on safety and protection.

The right to protection must be secured in all circumstances, even when children are behaving in breach of school rules. It should be always kept in mind that adolescent learners are in need of protection

²⁹ The rationale behind parental choice is to prevent any state monopoly of education and to protect educational pluralism. See *A Human Rights-Based Approach to Education for All* (Unicef 2007), at p. 21.

³⁰ See H. Matthews, F. Tucker, 'Consulting children' (2000), 24(2) *Journal of Geography in Higher Education*, 441-460.

³¹ Shier has identified five levels of participation: 1) listening to children, 2) supporting children in expressing their views, 3) taking children's view into account, 4) involve children in decision-making processes, 5) sharing power and responsibility for decision-making. See H. Shier, 'Pathways to participation: Openings, opportunities and obligations', (2001)10 *Children and Society*, 107-117.

³² CRC/GC/2001/1, para 10.

³³ See S. Besson, 'The Principle of Non-Discrimination in the Convention on the Rights of the Child', (2005) *The International Journal of Children's Rights*, at pp. 446-447.

³⁴ CRC/GC/2001/1, para 11.

too. They can be especially sensitive because of their phase of development. The right to protection in school includes the right to be a child and the right to be a teenager.

The Convention includes special provisions safeguarding the protection of children. All these obligations have to be considered while planning, promoting and monitoring safety in school. The right to protection and care includes the protection from all forms of physical or mental violence, injury or abuse, neglect, negligent treatment, maltreatment or exploitation while in the care of school.³⁵ This means protection among other things from accidents, bullying, unsuitable teaching methods and excessive amounts of homework. Learners shouldn't have to tolerate any harmful treatment from other children or from the school personnel.

Children's right to rest and play (Article 31) is important for securing physical and mental health of a child. It is an entitlement and not an optional luxury to be enjoyed only where it is convenient. Play is important in its own right and can be seen as a self-protecting process that offers the possibility to enhance adaptive capabilities and resilience.³⁶ The right to protection includes the right to rest and play during the school day. Children have to be given enough time for these functions within the school environment. It is in the best interests of the children to have enough time off for playing between the lessons. The teaching methods can include elements that enable learning by playing. When planning school buildings, schedules and activities in school this right should be considered.

Balancing the autonomy of a child and her or his need for protection is often presented as one of the biggest challenges of children's rights and the best interests principle. Autonomy has in those contexts often been understood as a child's right to participate, especially as the right to participate in her/his own issue.³⁷

It has to be emphasised that exercising one's rights is an integral part of autonomy. Protecting children cannot usually justify limiting children in exercising

their rights in school environment. On the contrary, protection includes protecting children's human rights in school. There have to be clear arguments to justify restricting children's civil and political rights or participation in school because of the need to protect children from harm. School is one of the environments where the autonomy of a child and the right to participate should be fully put into practice.

The effect of the UNCRC is that the Committee wishes to give children special protection as compared to adults, and the principle of protection in the UNCRC highlights the responsibilities of the adults working with children. The functioning of school must be built on the idea that children are a special group of people in need of special care and protection. The best interests of a learner include that all signs of harmful behavior toward learners are taken seriously. The threshold to tolerate any safety risks at school must be set very low.

Legal protection

The rights are not much more than ink on the paper if not enough attention is paid to making them real. Monitoring children's rights is of great importance because of children's limited capacities to look after themselves. There must be legal protection when their rights are violated or neglected. The Committee has stressed the importance of effective and child-sensitive processes in case of conflicts.³⁸ Suspected violations of their rights must be examined and the violations must be compensated for. This is a common principle of human rights law and children's rights should not be an exception.³⁹ According to the Article 19 there must be effective procedures for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment and for judicial involvement.⁴⁰

All kinds of harmful treatment must always be prevented in school. This provision implies that the personnel, parents and learners are aware of the relevant procedures and know how to use them – even are encouraged to do so. A rights-based approach to

³⁵ Children shall not be subjected to any cruel, inhuman or degrading treatment or punishment (Article 37); the discipline in school must be organized according to the children's rights (Article 28); children must be protected from all kinds of abuse (Articles 34 and 36).

³⁶ See C. Davey, L. Lundy, 'Towards Greater Recognition of the Rights to Play: An Analysis of Article 31 of the UNCRC' (2011) *Children & Society*, 3-14 and S. Lester, W. Russell, *Children's right to play. An examination of the importance of play in the lives of children worldwide* Working paper No. 57 (Hague, The Netherlands: Bernard van Leer Foundation 2010).

³⁷ In Finland Markku Helin has noted that the most important novelty of the UNCRC for Finland was the child's right to participate in her or his own issue. See Perheoikeus — nykytiedon ja tulevaisuudenkuvia, *Lakimies* (1996) 983–1002, at p. 991. See also E. Svensson, 'Barnets bästa i främsta rummet. Reflektioner utifrån en konferens om Barnets bästa som rättsligt begrepp i Tromsø 4-7 januari 2001', 10:2 *Utbildning & Demokrati* (2001) 39-50, at pp. 46-47.

³⁸ See CRC/GC/2003/5, para 24.

³⁹ See P. David, (2002) *International Review of Education*, at pp. 259-260. See also D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2006, 2nd edition), at p. 269.

⁴⁰ The Committee has emphasised the importance of the independent national human rights institutions as ensurers of the implementation of the UNCRC. See CRC/GC/2002/2, para 1.

education requires accountability and respect for the rule of law.⁴¹ Having effective methods for tackling any faults is important in an educational environment, not least because of the nature of the school as a species of closed and authoritarian system. It is even more relevant in countries with no regular monitoring of schools, as in Finland.

Children in school should have the right to get their cases dealt with appropriately and without undue delay by a legally competent court of law or other independent authority. The mechanisms for learners should be child-friendly which might often require other than conventional procedures. Not much effort has yet been put on developing conflict resolution for school-related cases.⁴²

The Committee has been worried about countries where the mechanisms for examining the possible violations of children's rights are lacking. It is paramount to build efficient reporting mechanisms which are easily accessible to learner, parents and educators alike. Children lack the competence and knowledge to react to the violation of their rights so they might not even recognise the violations. It is important to make sure that children know who to complain to about their treatment.⁴³ Learners often have to depend upon the adults to provide, protect and enforce their rights. They should have someone to assert their rights on their behalf if they cannot do so for themselves.

Learners' protection under the law requires clear legislation, school authorities with knowledge on children's rights, children's awareness of their rights and legal services made for children's needs. The best interests of a learner in school are not fulfilled if there is a lack of appropriate legal protection. In a school environment a rapid intervention is paramount, e.g. because the learner has to continue going to school also during the investigation and after the decision, regardless of its outcome.

Towards taking children's rights seriously in school

Child impact assessment

Educational authorities must consider the human rights and basic freedoms of children in all the activities of school.⁴⁴ Making the best interests of children a primary consideration at school requires knowledge and understanding about children's rights, development and well-being. The Committee has recommended authorities to make a child impact assessment of all decisions and actions relating to children. According to the Committee there should always be a systematic attempt to analyze and evaluate the consequences of the proposed actions to children. It means map-ping the impacts of the decision to a child or to children especially regarding the rights guaranteed in the UNCRC.⁴⁵

Also in school all actions and decisions should include a child impact assessment when it concerns an individual learner, a group of learners, the whole school or all learners in the country. The decision-maker must examine if the decision might limit some rights of the learner and consider if the restrictions are necessary for the best interests of her/him in that context. For example it might be necessary to restrict the right to education of a child whose behavior is violating other learners' right to learn.

The process of making the best interests of a child a primary consideration should be transparent.⁴⁶ The school personnel should be able to prove that the assessment has been made. It is also required that the views of a learner or learners concerned are examined and they are given due weight. Mapping the views of children themselves is a central part of a child impact assessment.

Even though the best interests of a child must be assessed separately in each individual case it is useful to create policies in advance for typical situations in school. It is necessary to think what are the best

⁴¹ See *A Human Rights-Based Approach to Education for All* (Unicef 2007), p. 11 and 84. See also *Championing Children's Rights. A global study of independent human rights institutions for children – summary report* (Unicef 2012).

⁴² In Finland there is a widely spread (90 % of comprehensive schools) KiVa antibullying program which is used for preventing and tackling bullying. In Sweden an Ombudsman for Children, the Child and School Student Representative, safeguards the rights of children and students, for example by investigating complaints concerning degrading treatment.

⁴³ See Guidelines on child-friendly justice, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010. The guidelines aim at securing that the procedure and the decisions concerning children would be child-friendly.

⁴⁴ See P. David, 'Implementing the rights of the child. Six reasons why the human rights of children remain a constant challenge' (2002) 48:3-4 *International Review of Education*, at pp. 259-260: 'For most states this evolution from welfare motivated measures to ones based on legally recognized rights requires a fundamental change of legislation, policies, programmes and institutions, but even more importantly, of mentalities and beliefs.'

⁴⁵ CRC/GC/2003/5, para 45.

⁴⁶ See R. Joubert, S. Prinsloo, *Education law* (Van Schaik 2001), at p. 440.

interests of a learner regarding for example organizing a lunch break, giving disciplinary sanctions, solving conflicts, tackling bullying, giving feedback and taking care of the peaceful learning environment.

The aim of the child impact assessment is to ensure the realization of the best interests principle and the rights of UNCRC in practice. It is essential to choose the ways of acting that consciously promote the UNCRC rights in the educational environment. In this article I have examined certain aspects of non-discrimination, participation and legal protection which are among the elements of the best interests of a learner in school.

Human-rights-based approach in school

Finnish basic education has gained worldwide publicity because of the outstanding learning results in PISA studies.⁴⁷ At the same time only one out of ten Finnish children much likes going to school which is significantly less compared to other European countries. In Finland the disciplinary problems in school have increased and bullying is still a widespread phenomenon.⁴⁸ One reason for this negative result can be a lack of a child rights /human rights approach to education.⁴⁹ If the violations of human rights, such as safety in school, are not taken seriously enough children don't feel that their rights are respected, which influences their well-being in school.⁵⁰

In many places in the world access to school is still a privilege that is not available for everyone despite the human rights conventions. The traditional nature of this right as a privilege, as well as previously concentration on the aspect of access to school, might have slowed understanding of the importance of promoting and enforcing human rights inside education system.

Schools should uphold the human rights of children in a way that demonstrates the key role of education on society.⁵¹ School personnel must be knowledgeable about the rights of the child and put this knowledge into practice. A human rights culture can be cultivated successfully only if it is evident in our schools. The Committee has emphasized that the school environment itself must reflect human rights: freedom, tolerance, friendship among all peoples.⁵² Human rights based approach may challenge the traditional ways of the school administration and the school culture relating to how the idea of learner's rights is perceived. It will modify the teacher-learner relationship and the atmosphere of the school environment.

The new attitude can lead to a renewed sense of professionalism and of enhanced capacity among school personnel. Many studies have shown that learners are more engaged in school when they are in schools that respect children's rights in all aspects of the school's social and regulatory functioning.⁵³ Taking children's rights seriously requires the contribution of all adults involved in the school environment as well as the parents and children.

Nowadays a school often forms a safety net for children. Respecting, protecting, promoting and fulfilling children's rights at school are important for a growing, developing and learning child. Promoting best interests of learners in school can prevent marginalization of children, a phenomena becoming unfortunately common in many countries.

*"In the end, however, the fundamental right of a child is to grow up. Unlike other oppressed people, there is a light at the end of the tunnel. It is our job to make sure they get there."*⁵⁴

⁴⁷ PISA (Programme for International Student Assessment) is a survey in the OECD's assessment program that since 2000 aims to study students' learning outcomes in reading literacy, mathematical literacy and scientific literacy every three years- PISA tests are administered to 15 year olds in 65 countries.

⁴⁸ The Committee on the Rights of a Child has recommended that Finland should supply reasons for this. See CRC/C/FIN/CO/4 (17. June 2011), at para 54.

⁴⁹ Children's rights are human rights which makes human rights knowledge essential for promoting children's rights. See T. Buck, A. A. Gillespie, L. Ross, S. Sargent, *International Child Law* (Routledge 2011), at p. 20.

⁵⁰ *Nordic Study on Child Rights to Participate* (Unicef Sweden 2009/2010), pp. 25-37, shows that Finnish learners do not feel they can influence matters at school, such as by giving teachers feedback about their performance in teaching, influencing what is learned at school, influencing teaching practices and the structure of the lesson.

⁵¹ See R. Malherbe (2000), p. 455.

⁵² 'A school which allows bullying or other violent and exclusionary practices to occur is not one which meets the re-quirements of article 29 (1).' See CRC/GC/2001/1, para 19.

⁵³ See J. Allan, J. P'Anson, S. Fisher, A. Priestley, *Promising Rights. Introducing children's rights in school* (Save the Children 2005), at p. 9.

⁵⁴ B. Hale, (Baroness Hale of Richmond), 4th World Congress on Family Law & Children's Rights, March 2005, Cape Town.

Use of school-related police reports involving minors in Sweden: in accordance with the best interest of the child?

Anne-Lie Vainik*

Introduction

The overall aim of this article is twofold. The first is to describe and analyse how the Swedish compulsory school system works with the police in dealing with problems of disorderly conduct and degrading treatment among minor school children.¹ The second aim is to discuss school-related police reports as a way to respond to order problems and degrading treatment in accordance with UN Convention on the Right of the Child, (CRC) Article 3.²

Studies show that school-related police reports on minors' offences have increased in recent years.³ For example, the proportion of reported assaults, unlawful threats, molestations and insulting behaviour per thousand children in ten communities in Stockholm County increased almost four times during 2002-2009.⁴ Furthermore, a number of children in the studied sample have been reported on multiple occasions.

A first spontaneous explanation for the increase is that children simply have become more violent and threatening in school. However, previous research shows no evidence of this being the explanation, and instead, a likely reason for the increase is a change of attitude to order problems from a school perspective.⁶ Based on the above, the following questions will be addressed:

- The increased use of school-related police reports on minors indicates that this

method of response is seen as having some effect: what effect can be expected from a school-related police report in connection with authorities' legal responsibility to address minors' criminal behaviour?

- Is any political will expressed in legal documents and preparatory works that would explain the increased number of reports over time?
- How well does use of school-related police reports for minors harmonize with the principle of the best interest of the child?

The compulsory school system in Sweden consists of municipality schools and independent schools, and children are obliged to go to school from 7 to 15 years of age.⁷ School activities are set out through goal-related management and framework legislation in the Education Act and curricula. This means a legislative strategy is used in which interpretation of the Act is transferred to the application stage, with the purpose of achieving certain political goals.⁸ To various extents, this opens the way for free judgments and interpretations by teachers and headmasters as to how to perform the task of educating children.

The main goals for compulsory schooling are to provide education and to communicate respect for human rights and democratic values to the students.⁹ The latter is said to take place "through practical and everyday actions by fostering the children to achieve a

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¹ Children aged 7-14 years old who have not reached the age of criminal responsibility according to Penal Code 1962:700, Chapter 6, Section 1, and who are therefore a primary responsibility for the social services.

² According to Education Act 2010:800, Chapter 6, Section 3, the concept of degrading treatment is defined as conduct that violates a child's or a student's dignity and which could not be defined as discrimination according to the Discrimination Act 2008:567.

³ See for instance Estrada, F. (1999). Ungdomsbrottsligheten som samhällsproblem. Utveckling, uppmärksamhet och reaktion. pp. 85-122. Kriminologiska institutionens avhandlingsserie nr 3. Stockholm: Stockholms universitet.

⁴ The total sample of school-related reports (1,239) was taken from 2000-2010, and came from 158 compulsory schools. Average age when reported was 12.9 years, and the youngest group of children, 7-11 years old, constituted about 15 per cent of the reported children (Vainik, A. Skolbarnen i polisens register. Forthcoming 2014.).

⁵ Ibid. Ten per cent have been reported twice, five per cent three to four times, and one per cent five times or more.

⁶ Estrada, F. (1999). Ungdomsbrottsligheten som samhällsproblem. Utveckling, uppmärksamhet och reaktion. pp. 85-122. Kriminologiska Institutionens avhandlingsserie nr 3. Stockholm: Stockholms universitet; Estrada, F., Nilsson, A. & Wikman, S. (2007). Det ökade våldet i arbetslivet. En analys utifrån de svenska offerundersökningarna. no 94 pp. 56-73 Nordisk Tidsskrift för Kriminalvetenskap; The Swedish National Council for Crime Prevention (2009). Grövre våld i skolan. Rapport 2009:6. p.24. Stockholm: Brottsförebyggande Rådet.

⁷ Independent schools are privately owned schools, but they are still compelled to perform their education in accordance with the Swedish Education Act. For the obligation of parents to send their children to school, see Education Act 2010:800, Chapter 7, Sections 20-23.

⁸ Hollander, A. & K, Alexius Borgström (2009). Juridik och rättsvetenskap i socialt arbete. p.52. Lund:Studentlitteratur.

⁹ Education Act 1985:1100; Education Act 2010:800.

sense of justice”.¹⁰ The goal-related legislation also identifies goals for handling conduct problems and degrading treatment. All schools are obliged to have written plans showing how they will prevent and correct degrading treatment during school hours.¹¹ The plan must be updated and validated on a regular basis.

Every school is also supposed to establish general rules of order together with students. These rules are intended to make it easier for teachers and headmasters to decide what actions they can take when conduct problems occur.¹² How these plans and rules are designed may differ from school to school. To encourage the assurance of equal rights for children and students, and to combat discrimination and other degrading treatment, special amendments were introduced in 2006.¹³ The political purpose of introducing this law was to clarify the schools’ responsibility to guarantee the safety of all school children.¹⁴ In accordance with the law, an ombudsman, the Child and School Student Representative role, was introduced.

The Ombudsman can represent children and students who have been victims of degrading treatment in school and decide if a school should pay economic compensation to a child who has been exposed to degrading treatment. Since 2009, acts of discrimination are regulated in accordance with the national discrimination statute from 2008.¹⁵ Goals for preventing and acting on degrading treatment are now introduced in the Education Act 2010:800. Discriminatory treatment is investigated by the Equality Ombudsman. If the Ombudsman decides to take a case of discrimination to court it is possible for the child discriminated against to obtain economic compensation from the school. All schools are supervised by The Swedish National Agency of Education and the School Inspectorate.¹⁶

The compulsory school is to be understood as a workplace for the students. This means that they are covered by the Work Environment Act 1997:1160.¹⁷ Conduct problems and degrading treatment in school can lead to threats and violence, and this is supposed to be prevented. In accordance with the Act, the employer has a responsibility to investigate and prevent the risks of threats and violence as much as possible.¹⁸

Even Swedish penal law is applicable in connection with the responsibility to prevent and act against violence in school. The children suspected of crime described in this article are minors, which means that they are primarily a legal responsibility for their custodians.¹⁹ Since education in the schools is compulsory, custodians are obliged by law to ensure that their children are present at the school.²⁰ This leads to a shift of responsibility for protection, safety and correction of the child, from the custodians to the school. As temporary fosterer, the school is responsible for preventing violent actions among children on the same premises those of the ordinary custodians. This means school personnel must intervene to interrupt the actions of a child engaged in committing violence.²¹ It must be possible to intervene without risking the health and safety of custodians or temporary fosterers.²²

Since Sweden ratified the CRC in September 1990, the principle of the best interest of the Child (Article 3) is supposed to be used as guideline and as an element in national law, regional policies and local action plans about education.²³ The principle was introduced in the Education Act 2010:800, and is supposed to be applicable and valid for every child and for children as a group. The Convention is based on the Universal Declaration of Human Rights, which is commonly divided into two groups: *freedom from* improper governmental intervention and *freedom to*

¹⁰ Curriculum (1994) for the compulsory schools, preschool class and the leisure-time; Prop.2009/10:165 Regeringens Proposition Den nya skollagen. För kunskap, valfrihet och trygghet. Utbildningsdepartementet;

Curriculum (2011) for the compulsory school, preschool class and the leisure-time centre.

¹¹ Education Act 2010:800, Chapter 6.

¹² Skolverket (2006). Ordningsregler för en trygg och lärande skolmiljö. Stockholm: Skolverket.

¹³ Act of prohibiting discrimination and degrading treatment of children and students 2006:67.

¹⁴ Prop. 2005/06:38. Trygghet, respekt och ansvar – om förbud mot diskriminering och annan kränkande behandling. Utbildningsdepartementet

¹⁵ Act 2006:67 of prohibiting discrimination and degrading treatment of children and students which was repealed in The Discrimination Act 2008:567.

¹⁶ The School Inspectorate is a controlling agency regulated by the state; its mission is to ensure the quality of all schools in Sweden.

¹⁷ And the Work Environment Ordinance 1997:1166, Section 18.

¹⁸ The employer in this case is the group of the principal organizers, i.e. the community or the private owner.

¹⁹ Children and Parents Code 1949:381, Chapter 6, Section 2.

²⁰ Education Act 2010:800, Chapter 7, Sections 20-23.

²¹ Penal Code 1962:700, Chapter 23, Section 6.

²² Ibid.

²³ The interpretation of the convention is indivisible and four of the principles (articles 2, 3, 6 and 12) are supposed to be used as guidelines. Since 1993, this activity has been monitored by the Ombudsman for children.

benefit from welfare rights.²⁴ The CRC also consists of a third group of rights, the right to *protection*. Article 3, which is discussed here, belongs to this group of rights. However, the principle of the best interest of the child is by no means a self-evident concept; the best interest of a child varies from situation to situation and from child to child.²⁵

Legal responsibility and effects of school-related police reports

The Swedish authorities, social services, police force and schools are obliged by legislative force to collaborate regarding children in need.²⁶ The Social Service has the legal responsibility to ensure that collaboration takes place. Schools are obligated to report concerns about children's well-being to the Social Service.²⁷ According to Swedish penal law, a child under the age of fifteen years cannot be punished for a crime.²⁸ Instead, criminal acts committed by children under this age are primarily considered as a matter for the social services. However, the law grants the police the power to detain and/or interrogate minors, to various extents.²⁹ In Sweden, when a crime is reported to the police and the suspect is a minor, the police must report this to social services authorities.³⁰ Although social services are obliged to make a preliminary assessment as to whether further investigation is necessary, far from all reports result in a personal assessment meeting with the suspected child and its parents.³¹ In some cases, parents are offered contact with social services.³² In some communities the police officer has a meeting with the reported child and its parents shortly after the reported offence. In the majority of the police reports in the statistical study, the victim is a child under the age of 15 years, who attends the same school as the suspected perpetrator.³³ In some police districts, the victimized child is encouraged to

contact a support centre for young victims.

Earlier Swedish research implies that in most cases, police reports to social services regarding children's welfare do not lead to further investigations or any intervention from social services.³⁴ In that case, the procedure may lead to a system where the school makes a police report, and the police in turn make a report to social services expressing concern for the child's welfare. In an institutional perspective, the responsible authorities, i.e. the school, the police and social services, have then only administered the "case" by sending the "case" to another responsible authority. In connection with this, previous recommendations existed in 1998 regarding which one of these responsible authorities would be most suitable to handle minors' offences in compulsory schools.³⁵ These recommendations were made by the Swedish parliamentary representative for legal matters when police reports were investigated as constituting a possible offence against CRC Article 3 p.1. The recommendation was that schools should primarily investigate the incidents and then take necessary in-house measures and that a police report must not be used as a sanction/punishment against the child. If a police report is made, the crime must be investigated where it allegedly took place, by the police and a prosecutor; however, this seldom occurs when the child is under 15 years old and the offence is minor.

Political will in legal documents?

So far it has been seen that there has been an increase in school-related police reports on minors' offences, and that a number of children have been reported on multiple occasions during their schooling. Furthermore, previous research on youth violence indicates that the increase has not been caused by increased violent behaviour among children in school.

²⁴ Dunér, B. (1992). Fria och lika värde. Mänskliga rättigheter i ett samhällsvetenskapligt perspektiv. Stockholm: Natur & Kultur. p.41.

²⁵ Singer, A. (2000). Föräldraskap i Rättslig belysning. p. 50. Uppsala: lustus förlag; Mattson, T. (2002). Barnet i rättsprocessen. Rättssäkerhet, integritetsskydd och autonomi i samband med beslut om Tvångsvård. p. 35. Lund: Juristförlaget; Schiratzki, J. (2006). Barnrättsens grunder. 3:e uppl. p. 30. Lund: Studentlitteratur; Englundh, E. (2009). Barnets bästa i främsta rummet – en pedagogisk utmaning? p. 50. Stockholm: Liber.

²⁶ Administrative Act 1986:223, Section 6; Social Services Act 2001:453, Chapters 3 and 5.

²⁷ Social Services Act 2001:453, Chapter 14, Section 1.

²⁸ The Swedish Penal Code 1962:700, Chapter 6, Section 1.

²⁹ Act of Special Provisions for Young Offenders 1964:167, Section 31; SOU 2008:111.

³⁰ Social Services Act 2001:453, Chapter 14, Section 1.

³¹ The Swedish National Council for Crime Prevention (2008). Barn som begår brott: Socialtjänstens och polisens åtgärder. p.30-38. Stockholm: Brottsförebyggande rådet.

³² Ibid.

³³ Vainik, A. Barnen i polisens register. To be published 2014.

³⁴ Östberg, F. (2010). Bedömningar och beslut: Från anmälan till insats i den sociala barnvården. p.90. Doktorsavhandling Institutionen för socialt arbete. Stockholm: Stockholms universitet; BRÅ. (2008). Barn som begår brott: Socialtjänstens och polisens åtgärder. p.30-38. Stockholm: Brottsförebyggande rådet.

³⁵ The Parliamentary Ombudsman 1998 Dnr 352-1998 Angående polisanmälningar av minderårig i skolan. The Ombudsman especially questioned police reports on children under the age of twelve.

Moreover, it can be assumed that the chain of reports which normally follows a police report may not be a primary reason for using police reports to a greater extent. In addition, the recommendation from The Parliamentary Ombudsman is to avoid making police reports on minors' offences, so their use has not increased because of this recommendation. Is it possible, then, to find any guidance or political will in Swedish education acts and related documents, which could explain the increase in police reports?

During the era of the Swedish compulsory school system, three major legal reforms of the Education Act have taken place. The first reform was to the Act of 1962:319, when the modern compulsory school system was established; in the second, to the Act of 1985:1100; and in the third, to the Act of 2010:800, when the latest Education Act was established and implemented in July 2011. The three Acts have regulated approximately the last half-century of schooling in Sweden, and there is at least one curriculum and preparatory document connected to each Education Act reform³⁶.

The material in this study consists of a considerable amount of text, and this requires establishment of certain search criteria for conducting the study. Four concepts were chosen to structure the reading: (i) *police*, (ii) *threats/violence*, (iii) *conduct problems/conduct regulations*³⁷ and (iv) *degrading treatment*. The method used for reading the material has been to search for these (or related) concepts in the texts.

The first period: 1962-1985

In relation to school attendance, the involvement of the police is mentioned only once in the Education Act from 1962.³⁸ If a student did not attend school as a result of neglect on the part of the parents, the school's board had the right to charge a conditional fine against the parents. If this did not have the desired effect, the school had the right to require assistance from the police to retrieve and accompany the student to school. Nothing is mentioned about threats/violence or degrading treatment. There is nothing in this framework law that sets out any goals or detailed regulations

regarding conduct problems/conduct regulations. The Act states that the general goals for nine-year compulsory education were that education should aim to provide knowledge to the students and to encourage the development of students as harmonious, capable and responsible citizens.³⁹

The preparatory Bill from 1962 does not include the concepts of police, threats/violence or conduct problems. The discussion mostly concerns the responsibility of communities and rules for the transition from the old school system to the new nine-year compulsory system. Under the section regarding general provisions, the concept of degrading treatment is mentioned, but merely to clarify the prohibition against corporal punishment, a rule that had already been introduced in the old school system in 1958. The main message in the preparatory Bill is to clarify that teachers are obliged to win students' trust and to respect them as independent human beings.

During this same time period three curricula for compulsory schooling had an impact on the school situation. The first was formulated in 1962, the second in 1969 and the third in 1980.

In the first curriculum, the police are discussed in connection with collaboration between the police, the school and social services. The goals for the collaboration were considered to be both institutional and personal.⁴⁰ Teachers were encouraged to give the police the opportunity to take part in education during school hours and not engage them only for traffic education. The text emphasised that it is important for young people to form a positive opinion of the police, and that they learn that it is a natural choice to contact a police officer when they need help. In the content of the first curriculum, the words "threat" and "violence" are not mentioned. The concept of conduct problems is mentioned, however, and the view is that if the teacher conducts classes calmly and with restraint, he or she has a better chance of tackling difficult situations. Adults are recommended to behave in a passively interested manner and to intervene without disruption.⁴¹ Degrading treatment is not mentioned, though deviant treatment is mentioned; still, this is

³⁶ These are the curriculum (1962) for the compulsory school, curriculum (1969) for the compulsory school, curriculum (1980) for the compulsory school, general section, curriculum (1994) for the compulsory schools pre-school class and the leisure-time centre and curriculum (2011) for the compulsory school, pre-school class and the leisure-time centre. Three preparatory connected to the legal reforms: 1) 1962 Kungliga Maj:st proposition nr 136; Prop. 1985/86:10; Prop. 2009/10:165.

³⁷ Previous Swedish criminological research on youth violence uses the term order problem in relation to when the suspected criminal act probably is defined as criminal or not (Estrada, F. (1999). Ungdomsbrottsligheten som samhällsproblem. Utveckling, uppmärksamhet och reaktion. pp. 85-122. Kriminologiska Institutionens avhandlingsserie nr 3. Stockholm: Stockholms universitet)

³⁸ Education Act: 1962:319, Chapter 6, Sections 38 and 39.

³⁹ Education Act 1962:31, Chapter 1, Section 1

⁴⁰ Curriculum (1962) for the compulsory school, p.29.

⁴¹ Ibid p. 77.

mentioned only in relation to the contexts of common-sense behaviour in traffic situations, shoplifting and lack of truthfulness.

In the second curriculum and in connection with the concept of police involvement, general goals were set up for crime prevention work. Teaching tasks to be performed by the police are stated in detail (by the hour).⁴² The stated aim is to increase students' awareness of and familiarity with fairness, honesty, respect and tolerance, and the consequences of violating laws and regulations.⁴³ The main crimes in focus are traffic offences, shoplifting, vandalism and drug abuse. Threats/violence, conduct problems/regulations, and degrading treatment are not on the agenda in this curriculum, and nothing is mentioned about police reports about students' crimes.

The third curriculum does contain a section discussing students with learning and disciplinary difficulties, and in which the police are mentioned.⁴⁴ A close collaboration between the police, parents, social services, youth clubs and all school staff is mentioned as the best way to deal with these difficulties. The third curriculum also states that the school boards are responsible for making the collaboration work and endure.⁴⁵ The wish to engage police officers in teaching tasks, such as crime prevention discussions in school, is not found in the text of this curriculum. The concepts of threats/violence, conduct problems/regulation, and degrading treatment are not found in this text either. The content emphasises that the schools are obliged to give students increased responsibility and participation, in relation to their age and maturity.⁴⁶

The second period: 1985-2009

In the mid-eighties, the need for a linguistic and structural change of the Education Act from 1962 was considered necessary.⁴⁷ The police are mentioned only in connection with the right of headmasters and teachers to confiscate objects that can be a threat to safety⁴⁸. How the school should deal with threats and

violence or disciplinary problems is not stated. Degrading treatment is mentioned in connection with the responsibility of school personnel to promote gender equality and actively combat all forms of degrading treatment, such as bullying and racism.⁴⁹ The responsibility of the schools to prevent, investigate and correct degrading treatment was added to the Education Act in 2008.

The preparatory work contains an explicit wish to repeal the section that gave the police the right to fetch students from their homes if they did not attend school.⁵⁰ This is the only place where the police are mentioned in this text, and there is nothing that supports or discourages police reports about minor children's suspected school-related crimes.

The curriculum of 1994 is the first that really underlines the idea that one of the goals in school should be to prevent discrimination and degrading treatment.⁵¹ In the 1994 curriculum, nothing is said about the police, threats or violence, or conduct problems/order regulations. The concept of degrading treatment is found in the section where it is stated that teachers shall pay attention to all forms of degrading treatment, and cooperate with all school staff to take the necessary measures to prevent and combat this treatment.⁵² How this should be done is not formulated in this curriculum.

The third period: 2009 and onwards

In this Education Act 2010:800, the police are mentioned only in relation to disposal of dangerous objects. Nothing is mentioned about threats or violence. This is the first Act that contains a demand for conduct regulations in every school, to be established together with the students⁵³. In the regulation it is stated that the school is obliged to prevent, investigate and act against degrading treatment.⁵⁴ One of the general goals is that education should communicate and instil the respect for human rights and fundamental democratic values on which Swedish society is based.⁵⁵ The CRC is introduced in

⁴² Curriculum (1969) for the compulsory school, p.16.

⁴³ Ibid. p.13.

⁴⁴ Curriculum (1980) for the compulsory school, general section.

⁴⁵ Ibid. p.56 & p.21.

⁴⁶ Ibid. p.17.

⁴⁷ Prop. 1985/86:10, leading to the Education Act 1985:1100.

⁴⁸ Act 2007:378 of changes in the Education Act 1985:1100

⁴⁹ Act 1999:886 of changes in the Education Act 1985:1100

⁵⁰ Prop.1985/86:10 p. 48-49.

⁵¹ The curriculum of 1980, which is included in the first period 1962-1985, established the goals until 1994.

⁵² Curriculum (1994) for the compulsory schools preschool class and the leisure-time centre, p. 89.

⁵³ Ibid. Chapter 5, Section 5.

⁵⁴ Ibid. Chapter 6.

⁵⁵ Education Act 2010:800, Chapter 1, Section 4.

this Act, and it is stated that in all education and other activities in relation to the Act, the best interest of the child should be a starting point. A child is defined in the Act as a person under the age of 18. The child's attitude should be clarified to the greatest degree possible, children should have the opportunity to express their views freely in all matters affecting them, and a child's opinion should be taken into account in relation to the child's age and maturity.⁵⁶ In the regulation it is stated that the school is obliged to prevent, investigate and act against degrading treatment.⁵⁷

In the preparatory work 2009/10:165, nothing is mentioned about police or threats and violence. Conduct regulations and disciplinary actions are discussed. It is noted that any disciplinary rules must be applied with regard to the principle of the best interest of the child. Furthermore it is noted that disciplinary measures are not to be used as punishment.⁵⁸ Degrading treatment and the importance of preventing and acting on it is discussed.

The curriculum does not indicate if or when schools are to work together with the police. Nothing is mentioned about threats and violence or conduct problems. It is expressly articulated in the curriculum that all staff in school should combat all forms of discriminatory and degrading treatment.⁵⁹

The main part of the curriculum primarily concerns demands for educational knowledge levels, grades and how education should be provided. It is explicitly set out that students should be taught about their rights in relations to CRC.

Conclusions

This article has a twofold purpose. The primary purpose is to describe and analyse how conduct problems and degrading treatment are managed in the Swedish compulsory school system, with help from the police. The secondary purpose is to discuss school-related police reports among minors as a way to respond in accordance with CRC and the principle of the best interest of the child (Article 3). This concluding section is divided into chronological order in accordance with the three questions addressed.

First, the increased use of school-related police reports on minors indicates that this method of response to conduct problems and degrading treatment has some effect; what effect can be expected

of a school-related police report in connection with authorities' legal responsibility to address minors' criminal behaviour? As it seems, in most cases a school-related police report ends up in a "reporting chain" with an abrupt ending. At a first glance it does not seem to lead to any further support or effect for respective child (perpetrator or victim) or the school. There may be several reasons and expectations from the informer about what the police report really can achieve. Until further research has taken place, we can only guess what this really means. However, it may be reasonable to assume that the increased frequency of police reports on minors' offences is not built on experiences of quick and effective action, or care on the part of the police or social services – if quick action was one of the expected effects.

Secondly, since there is no evidence for an increased level of violence in schools which could help explain the increase in police reports, we have to look for explanations elsewhere. Is it possible to find any political will expressed in legal documents and preparatory works which would explain the increased proportion of reports over time? This study shows that the Acts of Education from 1962-2010 and related documents that govern the school system in Sweden do not contain anything about police reports as a way to respond to degrading treatment and/or conduct problems. The concepts of threats and violence are absent in the documents. It is never even mentioned that violence can occur, or what the school is supposed to do about it. The concept of degrading treatment is getting more and more attention in the documents over time, but police involvement is not mentioned.

The curriculum of 1962 states that schools should establish a close collaboration with the police force. It is even more pronounced in the ordinance of 1969, which stipulates that the police force is to be engaged as a tutor in traffic practices and law and order. The governmental wish is that young people and children should create good contact with the police, but the wish for close involvement of the police as a teaching resource disappears when we get closer to the eighties and the second legal school reform. After the second reform in 1985 and into the nineties, the police are mentioned in the Education Act only in relation to disposal of hazardous objects.

The concept of conduct problems receives

⁵⁶ Ibid. Chapter 1, Section 10.

⁵⁷ Ibid. Chapter 6.

⁵⁸ Ibid p. 92.

⁵⁹ Curriculum (2011) for the compulsory school, preschool class and the leisure-time centre, pp. 7-12.

considerable focus in the third and most recent school reform. Conduct regulations are properly motivated and formulated but do not involve the police at any stage. The studied documents provide no guidance about how the schools should act in relations to treats, violence and the use of police reports.

The compulsory school is a complex judicial field with different possibilities and room for disciplinary, authoritarian interventions to prevent and correct degrading treatment and conduct problems. With no guidance from the State, school headmasters are left to use their own judgment to decide if and when a police report should be made, for example when a fight between children should or should not be defined as a crime. This may be a result of the goal and framework regulation. For example, the Education Act states that a school must combat degrading behaviour and that every school shall have conduct regulations. But the Act or the curriculum does not tell the headmaster how this is to be managed. This leaves significant room for personal judgments by headmasters about how to respond to degrading treatment and conduct problems, i.e. when a report to the police is required.

The third question to be addressed here is this: how well does the use of school-related police reports among minors harmonise with the principle of the best interest of the child?

The use of school-related police reports has been called into question by The Parliamentary Ombudsman – especially regarding children under the age of twelve who are suspected of a crime – as not being in accordance with the principle of the best interest of the child. The interpretation here is that the principle is much more complicated to consider when both the perpetrator and the victim are children, since the CRC must be taken into consideration in respect of every child. In this case both children's best interests need to be weighed (i.e. those of both victim and perpetrator).

Swedish compulsory schools are committed to observe the principles of the CRC, both in relation to the rights of the individual child and in relation to children as a group. All children have the right to be ensured protection in accordance with Article 3, and furthermore, Article 19 specifies the child's right to freedom specifically from all forms of violence.⁶⁰ In

accordance with the latter, the state parties are obliged to prevent and respond to all forms of *physical or mental* violence, injury or abuse while the child is in the care of the parents, one or more legal representatives, or any other person, including those acting on behalf of the state.⁶¹

In a legal analysis of Article 19 and an overview of various forms of violence to which children can be exposed it is mentioned that “*violence also can occur among children*”.⁶² The interpretation in this article is that when children are in school they are under the care and responsibility of the temporary fosterer. This fosterer is obliged to protect and prevent children from being abused or degraded by other children, and even more, to respond if it happens. But – and now it is getting even more complicated – the right to be protected also covers children who act violently towards other children.

This takes us back to the Swedish parliamentary representative for legal matters (JO), who states that a police report must not be used as a sanction/punishment against the child, especially for a child under the age of twelve – because that would probably not be in accordance with the best interest of that child. Moreover, Article 40 in the Convention, regarding children suspected of crime, also states that: “States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth (...)”.⁶³

In relation to the “chain reporting” among authorities described earlier, which may be a result of the young age of children suspected of crime, and the mandatory system requiring reporting to social services,⁶⁴ the following question arises: is the best interest or dignity and worth of any child (i.e. the victim or the perpetrator) fulfilled when a police report is made, and no special action or care is the result?

Lastly, since 2010 (when Article 3 was introduced into the Education Act) to what extent and how do school headmasters take Article 3 into consideration when deciding whether a police report is the correct response to a situation of violence, and/or a threat amongst minor children? What effect is a police report supposed to have, and for whom? These are forthcoming research questions still to be answered.

⁶⁰ Barnrättskommitténs allmänna kommentarer 2011 nr 13. Barnets rätt till frihet från alla former av våld.

⁶¹ Ibid p.5.

⁶² Ibid p.11.

⁶³ CRC, Article 40 p. 1.

⁶⁴ Penal Code 1962:700, Chapter 6, Section 1; Social Services Act 2001:453, Chapter 14, Section 1.

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Children's Welfare and Best Interests

Arranging Child Care: the Autonomy of the Changing Family

Sanna Koulu*

1. Introduction

Divorce has become very popular. It is said that almost every other marriage nowadays ends in divorce, and many of those couples have children. It is commonly accepted that it is best for everyone if the parents can arrange the future harmoniously upon divorce or separation, instead of ending up in acrimonious and drawn-out custody conflicts. This paper examines that assumption and the negotiative ideal behind it in the light of the changing conceptions of family.

What is care,¹ and how is it ordered socially and legally? Specifically, how is children's care and upbringing arranged and re-arranged in the changing circumstances of their lives? The answers to this rather fundamental inquiry depend on the society in question. This paper focuses on the legal arrangements for children's care and upbringing in modern Western societies, and highlights their connections with two well-known conceptions of family: one picturing the family as stable, secure, rather authoritarian; and the other of the family as based on negotiated, affective bonds.² While much has been written on these conceptions, as well as on the sociology of the family in general, their implications for legal arrangements of children's care and upbringing have not received quite so much attention. Despite this relative disregard, arrangements for children's care and upbringing and the legal framework in which this takes place are of definite importance for the children concerned, as well as their parents and other carers.

The argument in this article is as follows.

1. In several jurisdictions the parents of minor

children have the opportunity to arrange the care and upbringing of those children as they wish, at least within the family. These arrangements are usually subject to legal regulation and state control.

2. Control of such care and upbringing is not only a question of law and legal mechanisms, as it can take softer and more pervasive forms as well. These other forms of control are partly situated within law but also within the practices of e.g. social work, policy and education. As our understanding of the family changes, so do our attitudes to and means of controlling families.
3. The regulation of arrangements for the care and upbringing of children thus reflects the historically changing views on the family and the extent of its autonomy *vis-à-vis* the state and society.
4. In the past few centuries there has been an on-going shift from an authoritarian conception of the family into an understanding of the family as something conciliatory, based on the constant negotiation of affectionate bonds.
5. Arrangements for care and upbringing share features of both ideals of the family, which can make these arrangements rather elusive, legally speaking.
6. Because of this elusiveness and the understanding of the family as based on negotiation rather than on relations of power, private arrangements may not have

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¹ "Care" in this article refers primarily to care within the family, that is (the carrying out of) the responsibility of parents to care for the child and to provide the child with a suitable upbringing. Care is a multifaceted concept which can be difficult to pin down and which has attracted increasing scholarly attention in the past few decades. Care is also the focal point of so-called "ethics of care", which will be discussed further below, in section 7. For sociological and socio-political viewpoints on care, see the work of e.g. Clare Ungerson and Joan Tronto.

² It is worth noting here that both conceptions tend to obscure the responsibilities and roles of children as also providers of care, instead of passive recipients of it. See V Morrow 'Responsible Children and Children's Responsibilities? Sibling Caretaking and Babysitting by School-age Children.' in J Bridgeman, H Keating and C Lind (eds) *Responsibility, Law and the Family* (Ashgate, 2008), at p 119, where the author notes that the high value placed on independence in adults is also likely to mask the interdependence between them.

sufficient regard to the position of the child. Also, the ways in which arrangements are supported and regulated can become an opportunity for controlling “normal” or “proper” families as well as “problem families” in a legal fashion yet few traditionally legal safeguards. I call this form of control *the negotiative ideal of parenting*.

This article is based on my research in the Finnish legal system,³ and I will use examples from Finnish case law. Arrangements for child care are affected by the (often gendered) divisions of labour in each society, as well as the social policies affecting early childhood education and care. My point of view is thus distinctly Scandinavian. However, the changing forms of the family are not limited to one jurisdiction only, and many features of the Scandinavian welfarist framework are also shared by other late modern states in the West. The interrogation of the fundamental concepts of care and upbringing, childhood and family autonomy can aid us in understanding the similarities of the distinct systems of each jurisdiction, as well as the nuances and complexities of the international debate on the family in law.⁴

2. A common background

Whenever we talk about arrangements for children’s care and upbringing we will have to talk about parents. Parents, especially those parents who are in agreement with each other, are often favoured over any other child carers in legal terms. This makes for a connection between what is called “family autonomy” and the personal autonomy of the parents. Baroness Hale of Richmond set the question out remarkably clearly in 1993:

How far should parents be free to do what they like when making arrangements for their children? Do we begin by trusting them to do their best? Until recently, most of the arrangements traditionally made by middle-class families have escaped control altogether. Historically, however, some

poorer families, particularly unmarried mothers, were driven to use baby-farmers and other highly unsatisfactory arrangements which led to the first child protection legislation in the late nineteenth century. Now, the same concern to “safeguard and promote” the welfare of all children has led to the introduction of some sort of control over almost every type of arrangement for children to be looked after outside their families.⁵

This quotation, though written in the somewhat different context of public law provisions, draws out many of the strands this article explores.⁶ The arrangements of care are clearly and strongly linked with what might be called the “primacy principle”, that is the prioritizing of the biological or other parents as providers of care. However, even if we accept that parents are in some way entitled to be carers, that right does not necessarily extend to having the child looked after by others. Insofar as the arrangements take place *within* the family, they appear relatively unproblematic, but once the arrangements extend outside the family, a need for state control becomes evident. The evaluative perspective of the above quotation, of course, instantly summons to mind someone who assesses the arrangements from outside the family: ‘Do we begin by trusting [the parents] to do their best?’ This we is, of course, most often some public official or, more abstractly, the state.⁷

That parents can arrange how their child should be cared for is almost self-evident. These arrangements are a question of ordinary daily life, in so far as parents need to decide who picks the child up from day-care, how to look after the child in the afternoons after school, or who the teenager left alone at home for a weekend can call for help or advice if something goes wrong. They also involve decisions with great impact for the whole family, as for instance deciding where the child should live, who should primarily take care of him or her, and how contact between the child and other family members should be arranged. Caring for children can

³ My dissertation on the topic at the University of Helsinki, Finland, will be published in 2014.

⁴ One of the key topics in European family law in the past few years has been the EU regulation “Rome III”, on the choice of law regarding divorce. The regulation itself was defeated in part by the strong disagreement between the Nordic countries and several countries in Western and Southern Europe, about the acceptability of various grounds for divorce. However, the success of the closer cooperation that followed this failure has pointed at an underlying harmony between at least some European jurisdictions.

⁵ B Hoggett, *Parents and Children* (4th edition, Sweet & Maxwell, 1993) p. 159.

⁶ The questions of class alluded in the quotation are also highly relevant and many-faceted. However, I will not address these directly, interconnected as they are with propriety. This is because Finnish society, on which I focus most closely, has a somewhat different and less clearly drawn view on class and socio-economic status. Thus I have chosen to refer directly to the ideal of the ideal family itself, even as I do want to acknowledge that issues of class and ethnicity can never be separated from the conceptions of what is “proper”. Indeed, fascinating work is being carried out in this field by e.g. Johanna Hiitola, who is analyzing the discourses in the decisions on taking children into care in Finland. She concludes that ethnicity of the individuals being evaluated plays a role in the ways families are constructed and interpreted by the social welfare agencies.

⁷ See D Archard, *Children. Rights and Childhood* (2nd edition, Routledge, 2004) pp 153 et seq.

take many forms as the children mature, and as the circumstances change so do the forms and arrangements for care.

In addition to its factual necessity, arranging care appears to be easy to justify ethically. If we accept that parents have the right to rear their children, in some form at least, it follows that they can arrange that rearing and the concomitant child care in different ways.⁸ However, the *extent* of the right to decide on care of their children is not so easy to pinpoint. Besides the moral and ethical concerns they evoke, arranging care is a legal issue as well. Caring for children is closely related to the legal concepts of e.g. contact, custody and parental responsibility. The legal framework then articulates, at least in part, the extent of arrangements for children's care and upbringing. In some countries, such as Finland and Norway, it is possible for parents to make an *agreement on custody and contact*, after divorce for example, and report it to the relevant social welfare agency. This has the effect that the agreement becomes binding and enforceable.⁹ In others, like France, a similar agreement would not become binding *per se*. Instead, the relevance of such agreements is decided by the court when the issues of custody and contact are resolved in court proceedings. In the Netherlands, the law requires that the parents also discuss their "parenting plan" with their children. However, in most jurisdictions the child, whom the arrangements concern most closely, is not involved at all.

Determining parental responsibility can be an issue of utmost importance for the child and the parents. One possible compromise is to allow the parents to agree on *the exercise* of parental responsibility even while the allotment of parental responsibility as a whole is left for the courts. This solution, adopted in France and Spain among others, points to a dichotomous understanding of legal parental responsibility and factual caring for the child involved. Arrangements of care are something more factual and day-to-day than the full extent of parental responsibility.

3. Legal aspects of caring for children

Care is not usually a legal term in and of itself. Caring activities can be conceptualised legally in many ways, but there remains a realm of day-to-day, personal caring for and looking after the child that eludes the structures of the legal. Law often comes in after the fact, when the arrangements of care reached within the family become problematic for some reason. Because of this, there are numerous different forms that law can take, implying different ways of interpreting the term "care" in a legal context. Perhaps the most fundamental distinction is one between privately arranged care and public care. A "child in care" is being cared for, not by the parents but by the state, usually after the care provided within the family has turned out to be lacking.

Even with the varying degrees of legal significance, parental agreements on custody and care play a role in most European jurisdictions. The reason for this lies in the legal significance of parenthood and parental autonomy in general. Parental agreement or consent is legally significant with regard e.g. to adoption, filiation and even *de facto* family life as described in the praxis of the European Court of Human Rights ("ECHR").¹⁰ At the same time it is worth noting that the legal relevance of care extends beyond the relations within the family or between the parents. Arrangements of care can ground legal responsibilities under criminal law or the law of tort. Broadly speaking, parents or other carers can become liable for damage caused by a child they should have been supervising; while criminal responsibility can be based on neglect of the child's wellbeing or, sometimes, on criminal behaviour on the part of the child.¹¹

Arranging care within the family can appear so natural and matter of fact that examining it in legal terms can seem like an undue intervention. The traditional and "self-evident" way of conceiving arrangements of care goes like this. Children are born "naturally" to heterosexual parents, who are in a meaningful relationship with each other. Children are in need of care, which the adults of the family naturally

⁸ See D Archard (2004) pp 137–149.

⁹ See K Boele-Woelki et al., *Principles of European Family Law Regarding Parental Responsibilities* (Intersentia 2007) pp 60–65, 75–76, 91–94, 180–184 and the associated country reports. The country reports are available on the web site of the Commission for European Family Law, <http://www.ceflonline.net/> [accessed on 13 March 2013].

¹⁰ Parental agreement is also significant in determining the habitual residence of the child in light of the Hague Convention on Child Abduction (1980). We could say that the concept of parental autonomy draws on fundamental liberal principles to solve the liberal conundrum of how to understand children as individuals. In other words, since children do not have the capacity for rational and independent thought presumed by liberal theories, they need someone to decide matters on their behalf. Parental autonomy offers a way around the difficulties inherent in this, by extending the autonomy of the parents also to their progeny.

¹¹ Holding parents responsible for their children's actions is possible in several US states. See for discussion E M Brank and V Weisz, 'Paying for the crimes of their children: Public support of parental responsibility' [2004] 32 *Journal of Criminal Justice* 465. Keating discusses parenting orders and parental responsibility in the same vein – see H Keating, 'Being Responsible, Becoming Responsible and Having Responsibility Thrust Upon Them: Constructing the "Responsibility" of Children and Parents.' in J Bridgeman, H Keating and C Lind (eds) (2008), at pp 131–132.

provide. The role of the parents as being responsible for child care, and entitled to arrange it how they wish, flows from the fact that care is something that belongs within the family, together with the understanding of adult-child relationships as non-reciprocal (since children are considered as needing, not providing, care).

However, this naturalness is not given. Instead it flows from the way we understand family as a private sphere, and from our overarching assumptions of the roles of the family, especially the parents, and the state. In the next section I outline two models of the family. Here my aim is to show that these two models construct the “natural” privacy of the family in rather different ways, with interesting implications for legal and social control of families.

4. Two conceptions of the family

The central dichotomy affecting arrangements of children’s care and upbringing has to do with how we understand the essence or nature of the family. Speaking in very general terms, there has been a sea change in the conceptions of the family since the beginning of the 19th century. The topic has attracted a lot of interest from a variety of viewpoints.¹² Roughly speaking, the family of the earlier centuries was hierarchical, based on the age and status of the persons within the family/household relationships. While affectionate bonds most certainly existed, the family was understood in authoritarian terms as the young and they were expected to respect their parents or masters (and the wife to obey the husband).¹³ The French sociologists Boltanski and Thévenot, who speak of “the domestic world” as one paradigm of justification, focus on the essential and static nature of the bonds it describes.¹⁴

In earlier work, I have outlined four possible legal discourses relating to care on the basis of Finnish law and jurisprudence – that is, four different answers the law can give as justification when asked who is to provide child care and why they are entitled to do so.¹⁵ The authoritarian conception of the family is served

best by the two older justificatory discourses. These discourses focus on *parental (or paternal) autonomy and on state power used for common good*. Both of these discourses are rather rigid and oriented towards securing justice rather than affectionate interpersonal relations. In this conception of the family the understanding of arrangements of care is authoritative and rights-oriented.

The 19th century in the Western world saw the birth of the *bourgeois* family, that is the family as the cradle of the nation. This family was both ideologically segregated from the public sphere and at the same time intrinsically tied up with it, as its natural task was that of fostering and shaping future citizens. While the bourgeois family ideal was still authoritarian, its focus on the nature of upbringing as something relevant for civic society paved the way for a further change in the 1900s. Thus the 20th century recreated the “proper nature” of the family as something conciliatory, natural, based on affective bonds of a very special kind. (Paradoxically this also brought the family sphere more strongly to the attention of the public).¹⁶

Here, the truism that justice and law cannot properly be brought into family relations is not so much a question of right or entitlement, as might be implied by the older conception, but a feature of the special, affectionate nature of the bonds between the family members. The new conception of family is better served by invoking the more fluid and more circumstantial discourses of *factual care* and *the best interests of the child*. Here, arranging children’s care and upbringing is left to the parents because of the ideal of negotiative and harmonious parenting that also extends to the circumstances after divorce or separation. Negotiated arrangements are preferred not because the parents would have the *right* to dispose of the child,¹⁷ but because these arrangements are expected to be *the best way* of ensuring the best interests of the child and of the whole family.¹⁸ Thus negotiated arrangements become linked to the ideal of “proper” or good post-

¹² For a concise overview, see D Archard, *The Family. A Liberal Defense* (Palgrave Macmillan, 2010).

¹³ See e.g R O’Day, *The Family and Family Relationships, 1500–1900. England, France & the United States of America* (Macmillan 1994) pp 52–53 and J Donzelot, *The Policing of Families* (Johns Hopkins University Press, 1997) pp xx–xxi. However, see also O’Day’s comments on the anachronistic nature of reflecting on power politics within the family (1994, pp 161–163). Donzelot’s argument has also been criticised in Finnish literature by professor Jaana Vuori, who notes that Donzelot describes the “old” family unproblematically as an autonomous, independent actor (J Vuori, *Äidit, isät ja ammattilaiset* (Jyväskylä University Press, 2001) p 55).

¹⁴ L Boltanski and L Thévenot, *On Justification. Economies of Worth* (Princeton University Press, 2006) pp 164 et seq.

¹⁵ See S Koulu ‘Justificatory Conceptions behind Custody Agreements - Bridging the Legal and the Real’ [2011] 34(3) *Retfaerd* 23, especially at p 25.

¹⁶ In the US, Lauren Berlant has analyzed the role of the intimate as something counterintuitively public (L Berlant, *Queen of America Goes to Washington City. Essays on Sex and Citizenship* (Duke University Press, 1997) pp 5–6): ‘In contrast [to the “intimate sphere” of modernity described by Jürgen Habermas], the intimate public sphere of the U.S. present tense renders citizenship as a condition of social membership produced by personal acts and values, especially acts originating in or directed toward the family sphere.’

¹⁷ As under the *ancien régime*, see Donzelot, above, pp 48 et seq. and J Eekelaar, *Family Law and Personal Life* (Oxford University Press, 2007) pp 11–12.

¹⁸ Cf. J Eekelaar, above, pp 11–12. The concept of “welfarism” as advanced by Eekelaar provides a justification for the exercise of power over others when that power is used in the interests of the governed. Thus it also offers a bridge between the two models of family.

separation parenting and child care. Even when legal regulation appears to prioritise the role of the family it aims at, and is contingent on, the family performing its task correctly.

5. A better family?

In this section, I will highlight two noteworthy cases from the Finnish Supreme Court. The first one, from 1995, illustrates the traditional notions of family autonomy and parental rights. The second one is much more recent, from 2010. By comparing the argument in these two cases we can clearly see a move towards a “softer” and more care-oriented way of regulating families.

The first case is from 1995 and was entitled KKO 1995:110. It concerned a Swiss man and a Finnish woman who had lived in Switzerland during their marriage. In 1993 they separated and the mother moved to Finland with their two children, who were 4 and 6 years old at the time. After the move, the parents signed an agreement in Finland that the children would live with their mother in Finland. The agreement also included provisions on contact. Later, the father applied for the children to be returned to Switzerland on the basis of the Hague Convention on the Civil Aspects of International Child Abduction 1980. He argued that he was pressured to sign the agreement as otherwise he would not have been allowed to meet the children at all. Because of this agreement, the courts had to consider whether the father had acquiesced to the relocation within the meaning of Article 13 of the Convention.

In brief, the Supreme Court considered that the father had acquiesced to the child abduction, and no return order was made. However, the argument at the Finnish Supreme Court was noteworthy. The court based its decision on considerations of party autonomy and employed arguments that verged on the law of contract. For instance, the court noted that the father had had legal counsel and that he had not been “forced” to sign the agreement. In marked contrast, there was no discussion at all about the best interests of the children, and no mention of family life or the importance of child care and contact for all concerned.¹⁹ Thus the decision turned on an interpretation of parental autonomy, and other discourses such as care and family life or the best interests of the children were notably absent.

The second case from 2010 was entitled KKO 2010:16. In the case, a lesbian couple had lived together

for several years and had a four-year-old daughter. The child had been born via artificial insemination and paternity could not be established, and the mother then applied for her partner to be granted joint custody with her. There are no specific provisions on this kind of case in Finnish law. There is, for instance, no presumption in favour of the social parent even if he or she had taken part in the decision to have a child. Thus the courts considered the matter specifically in light of the best interests of the child: was it in her best interests to have a second custody-holder?

The Supreme Court noted that the mother’s partner had acted as a parent for several years. It was also considered obvious that she would need to have legal custody in the future in order to share responsibility for the child’s education and medical treatment. The court decided to grant joint custody to both mothers. In the text of the decision, the prominent discourses were those of factual care and family life, the co-operation of the parties involved, and the best interests of the child. In marked contrast to the 1995 case, the discourse of parental autonomy was explicitly rejected.

In summary, the argument in the two cases was quite different. In the earlier case the arrangement at hand was construed in contractual terms, while in the latter case the considerations of continuity and necessity of care trumped those of party autonomy. The conceptions of family in these two cases are distinct. The latter conception of family is less rigid and, I would suggest, more affable to our intuitive feelings of what “family” should mean. We may even be tempted to call it “better”. However, it is important to note that the latter conception of family did not in and of itself determine the outcome of the 2010 case. In fact, the lower courts in the 2010 case had also prioritised care and family life, exactly like the Supreme Court, but ended up not granting custody to the non-biological mother. The court of first instance had noted that the purpose of decisions on custody was not to establish new families but to give legal recognition to previously existing family life.

Thus it is crucial to note that the latter conception of family, as well as the former, is something socially constructed and conceptualised. It is not natural as much as natural-seeming. Neither is it disconnected from the questions of power and politics it first seemed to repudiate. The change from an authoritarian understanding of the family to an affectionate, negotiative family has coincided and intertwined with a

¹⁹ The UK-based charity **reunite** has carried out research into the effects of child abduction on the family members. The lack of contact was experienced by many as one of the most traumatic aspects of the removal of the child; see M Freeman ‘The Effects of International Child Abduction’ (**reunite**, 2006) pp 13–15. The report is available online at <http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Effects%20Of%20Abduction%20Report.pdf> [accessed on 13 March 2013].

change in the role of legal regulation as regards the family. Before, the state and the church were concerned with families, especially when those families became visible because of problems of abuse or neglect. This control was, however, sporadic and often after the fact.²⁰ The forms of control afforded by our late modern understanding of family are more subtle and, I would argue, more pervasive than those associated with the idealised family of old.

Heather Keating expresses this change succinctly: 'Parenting in law has been transformed from an exercise of (paternal) authority where intervention in family life was permitted only to protect children from harm into something much more imprecise.'²¹ There are expectations about the way parenting is conducted, and if the children behave badly it is the family at fault whose privacy is then curtailed.²² While there is a remarkable range of variation in the ideals of parenting in different societies, I would add here that especially in Scandinavian countries the ideal of parenting is focused on consensus and agreement. Parenting today is expected to be conciliatory and negotiation-centred in order to serve its function of natural and proper upbringing of children.²³ Arranging care, contact and parental responsibility without recourse to court proceedings is expected and idealised.

This form of subtle control is of course remarkably close to the *biopower* of Foucauldian theory, though Foucault did not write specifically about the family. However, especially in the context of family law it is worth pointing out that here the mechanisms of normalizing governance are employed alongside more traditionally legal means of controlling and supervising families. Here we can refer especially to the writing of Foucault's student Jacques Donzelot, whose analysis of the rise of "the social" and the crisis of the family proceeds on Foucauldian lines.²⁴ Foucault's writing has been justly criticised, for example by Hunt and Wickham, for the way it equates law with the commands of the sovereign, backed up by threats of punishment.²⁵ Law has long embraced other ways of governing as well, and these have clearly become more and more relevant in late modern welfare societies. In the next section I

shall examine, then, how the regulation of arrangements on caring for children might work in this context.

6. Arrangements for care as an opportunity for control

It is clear that the provisions of family law involve ways to categorise and control families in several respects. At the same time, the regulation often takes into account the wishes and choices of the family or couple in question, as for instance in regulating co-habiting relationships or the distribution of property on separation. If we accept the significance of consent with regard to legal regulation in the field of child law, it is natural enough that the parents' consent should be persuasive for justifying regulation of the family: that is, to the extent that regulation gives weight to the arrangements made by the parents, it could be justified directly by referring to their consent and will.

However, with regard to the notion of biopower mentioned above, it is worth looking more closely into the effects of law in defining families. When law enables arrangements on children's care and upbringing, and favours certain arrangements over others, it may also enable the supervision and control of families in two more subtle ways. First, there is the question of who agrees on or arranges caring for children. The legal assumptions of who can agree on care are somewhat different from the question of who should care for children in the first place, as it is not at all clear that all carers have the right to determine future care. By giving parents a putative right to determine future care, and separating this determination from caring itself, this understanding reflects a kind of parental authority still sustained and realised by law. This ties into the naturalization of the biological parental role and works to delineate the "proper" family. Thus the legal options for arranging care can categorise families into ones that fit the mold and ones that do not.

In Finnish law, for instance, a stepparent cannot be party to agreements on contact between the child's parents, even when his or her participation would be very beneficial for getting the agreement to work in fact – for instance, by assigning them to escort the child

²⁰ See R O'Day, *The Family and Family Relationships, 1500–1900. England, France & the United States of America* (Macmillan 1994) pp 30–33. We might also consider whether and to what extent the change in normalizing techniques, described by Donzelot (above), has its seeds in the scriptural teachings and advice to families which O'Day analyzes (pp 44 et seq).

²¹ H Keating, above, p 128.

²² See H Keating, above, pp 131–132. There are of course political implications to blaming the family instead of broader social structures. It is clear that socio-economic status is highly inheritable even in relatively non-class-conscious societies like Finland. Low socio-economic status has been linked with worse outcomes for children from less privileged families, and with criminal behaviour in young adults.

²³ See also A Wade 'Being Responsible: "Good" Parents and Children's Autonomy' in J Bridgeman, H Keating and C Lind (eds) (2008) at p 212, as well as the literature referenced.

²⁴ See Donzelot, above, p 6.

²⁵ A Hunt and G Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto Press, 1994) pp 59 et seq. Cf. H L A Hart, *The Concept of Law* (2nd edition, Clarendon Press, 1994) pp 50 et seq.

from home to the visiting place when the legal parent is away on a work trip. As a more subtle example we can look at arrangements for care in the context of the child welfare system. The ideal in Finland, as in UK, is for the social welfare board and the parents to work together. Accordingly, contact between parents and a child in care is supposed to be arranged voluntarily if possible. As there can be external pressure on the parents to be co-operative,²⁶ there is a risk that some of the agreements on limiting contact may not reflect true consent and that all families are not treated equally from the best interests perspective.

Secondly, the boundaries of the law also create a new opportunity for control of the "proper families" in that they outline what are to be understood as natural or normal arrangements for children's care and upbringing. An easy example would be the way scheduling contact between parents and children has fallen into default patterns at least in Finland, despite the exhortation in the Custody Act of 1983 to arrange contact according to the best interests of the child. Of course, there may be nothing wrong with the current default pattern of contact every other weekend from (say) Friday 6pm to Sunday 6pm. However, when that pattern becomes, with predictable variations, almost a soft law rule for arranging contact, we might ask if it really is in each and every case the best schedule for the child as well as both parents. In addition, the provisions on the persons eligible for a contact order are, in several jurisdictions, more limited than the child's best interests might really warrant.²⁷

Of course, this control of normality may also assume more subtle forms, as well as extend to matters within other spheres. Thus we might refer to the way early childhood education and care work to create and shape the "proper" child and its natural development from infancy through the toddler years, school age, the latency period and teen years. This strong focus on

proper development is served by a complementing conception of the role of parenting. There is an abundance of self-help literature on parenting and family. Smith points to a kind of "soft totalitarianism", noting that

There are parenting classes, parenting Web sites on which you can find these classes, and parenting coordinators to help draw up and implement parenting plans. There are parenting practitioners who work with parents specifically around the parent-child relationship, and there are a variety of training opportunities for these practitioners.²⁸

In short, this form of governance relies less on direct orders or sanctions than on fostering a normative understanding on what a good life is about.

It would be tempting to relegate these issues of normality to the subject matter of sociology and educational theory, away from the clear structures of law and the just society it is meant to safeguard. However, it can be hard to separate the two. As Hunt and Wickham note in their critique of Foucault, such forms of disciplinary power 'have already or can potentially become subject to processes of legal rights and legal regulation' to quite some extent.²⁹ This is clear e.g. in the fields of social work and child welfare, as the emergent juridification of social work forces discussions of how such "soft" or fluid expertise could be controlled or directed by legal safeguards or procedures. On the other hand, the support provided to so-called problem families may imply legal measures as well, when talking e.g. about parents' responsibility for their children's criminal or tortious acts. It is my understanding that the arrangements for children's care and upbringing provide an especially illustrative example of the intertwining of law and the disciplines, as they simultaneously rely on idealised, negotiation-based parenthood as well as renew and recreate it.

²⁶ See e.g. B Lindley 'State Intervention and Parental Autonomy in Children's Cases: Have We Got the Balance Right?' in A Bainham and S D Sclater and M Richards (eds) *What is a Parent? A Socio-Legal Analysis* (Hart Publishing, 1999)

²⁷ There is interesting case law on this topic, such as the decision in *Schneider v. Germany* 15.9.2011 from the ECHR. In the decision, the Court emphasised the best interests of the child in determining who can apply for contact. Similarly, in a case from the UK Court of Appeal in spring 2012, the best interests of the child were held to be decisive for the decision whether to allow the biological father to apply for a contact order (*A v B and C* [2012] EWCA Civ 285). This focus on the best interests principle is, of course, a welcome trend in law, as the principle is better suited to safeguarding the interests of the child than strict legal rules. However, there is some room for concern here, since the ideal of the best interests of the child may be especially vulnerable to being influenced by considerations of what is "normal" or "proper".

²⁸ R Smith, 'Total Parenting' [2010] 60 *Educational Theory* 357, at p 359. See also J Eekelaar (2007) p 21 and H M Rimke, 'Governing Citizens through Self-Help Literature' [2000] 14(1) *Cultural Studies* 61.

²⁹ A Hunt and G Wickham, above, p 62. The authors point out that the second strand of Foucault's critique 'treats constitutionalism as a largely ideological device; it purports to describe the location of power and control, while in fact the distinctively modern forms of domination are actually constructed on the basis of the less visible but pervasive disciplines.' Cf. M Foucault, *Discipline and Punish* (Allen Lane, 1977) p 222.

7. In conclusion

The principal point of this article has been that arrangements for children's care and upbringing and their somewhat ambivalent legal implications reflect our changing understandings of family and of the quality of family autonomy. At the same time, I have argued that the legal recognition of some arrangements works to differentiate and divide families into proper ones that can negotiate and reach valid agreements, and ones where any agreements are made under ambiguous conditions, in the shadow of the law.

In order to assess arrangements for children's care and upbringing accurately we need to loosen our hold on an important ideal: the ideal that the new understanding of the family would be likely to be better or more ethically sound than the old one. While liberal and ethical concerns are certainly relevant with regard to families and to our understandings of the family, both models of the family can satisfy those demands in different ways. That is, the two understandings of the family reflect different approaches to the ethics of family relations and the ordering of the good life. Here we may find useful the distinction between an ethic of justice and an ethic of care, articulated originally by Carol Gilligan (1982) and developed further by Selma Sevenhuijsen and Virginia Held.³⁰

With our diminishing trust in the wisdom of the courts to arrange custody, contact, and care for children after divorce, there is a need for alternative ways of arranging and regulating those relations. At the same time the state is attempting to come to grips with these emergent sites of regulation and forms of power, and thus law, as the crucial mechanism for the justifiable use of power,³¹ is also changing in order to

retain a grasp on family relations.³² While this change is more or less inevitable, it is worth asking whether we could still retain the bright promise of law as justice³³ instead of mere rigid and authoritarian regulation or pervasive and all-encompassing governance.

The justificatory conceptions described briefly in section 4 support slightly different views of the family and on arranging children's care and upbringing. The conceptions of parental autonomy and state power are easily linked with the *ethic of justice* in that they describe the phenomenon in rather rigid, even rights-based, terms. The other two conceptions, of factual care and the best interests of the child, emphasise the affectionate interpersonal relations of the persons involved, and thus often reflect an ethic of care rather than justice. However, both ethics and both forms of family can fall short of grasping the situation, especially in light of the changing forms of law. Conversely, both patterns of justification highlight important concerns in legal and social regulation of families.

The rise of agreements in arranging child care after divorce is related to a current ideal of proper and normal parenting. However, this emergence of agreements and even specific contracts in arranging care is worthy of notice also as it is related to a resurgence of the role of consent and personal autonomy. In legislating for the arrangements of child care within the family, we need to adopt a congruence of an ethic of care and an ethic of justice as our ideal, so as to craft a more inclusive and sensitive understanding of autonomy and subjectivity within the family sphere.

³⁰ See for instance S Sevenhuijsen, *Citizenship and the Ethics of Care. Feminist Considerations on Justice, Morality and Politics* (Routledge, 1998) and V Held, *The Ethics of Care. Personal, Political, Global* (Oxford University Press, 2005). See also J Eekelaar, above, pp 89–94.

³¹ See R Dworkin, *Law's Empire* (reprinted by Hart Publishing, 1998) p 93.

³² Cf. A Hunt and G Wickham, above, pp 66–67.

³³ Baroness Hale of Richmond has stated this well: 'In the general enthusiasm for alternative dispute resolution of all kinds, we must not lose sight of the fact that some disputes can only be properly resolved by a court; and it may be that there are more of these in the family context than it is convenient to admit.' (The Hon. Mrs Justice Hale, *From the Test Tube to The Coffin. Choice and Regulation in Private Life* (Sweet & Maxwell 1996) p. 70).

Culture as a legal argument in cases of child welfare and violence against children in Norway

Elisabeth Gording Stang*

Introduction ¹

During the last couple of years, there has been a heated debate in Norway about the relationship between the child welfare services and minority families. One of the issues at stake is the use of corporal punishment in children's upbringing. The child welfare services have received massive criticism from members of different minority communities for not being able to communicate properly with minority parents, not understanding or recognizing their culture; as their way of living, family structures, traditions or their way of bringing up children. Language problems have been pointed out as one explanation.

There exists a range of different definitions of the term culture. In this article culture primarily refers to language, religion and traditions/practices. Having stated that, it is important to address the potential of a child-specific understanding of culture as well. It is not necessarily given that a child's culture is identical with his or her parent's culture of origin. For example, some children might be multi-cultural, while their parents are not. ²

Minority parents and child welfare professionals seem to agree on one point: that there is a need for strengthening cultural competence among child welfare workers in general.³ Furthermore, it has been argued that the social workers apply a paternalistic approach trying to fit minority families into a Norwegian 'template' of everyday life that goes with the Scandinavian image of the competent child in its own right being the centre of attention. This child-centered approach, with too little regard to the family as a whole, is based on a children's rights perspective that may be contrary to cultures considering the child as belonging to his or her family and cultural community.

On the other hand, representatives from both the majority and the minority parts of Norwegian society have criticised the child welfare services for ignoring serious neglect and mistreatment because of attribution to cultural differences, letting such arguments serve as excuses for adult behaviour that is harmful to children. A fair balance seems to be hard to find, between a cultural sensitivity approach and the importance of avoiding double legal standards in implementing regulations on child welfare and violence against children.

Three recent criminal court cases involving child welfare services (and which attracted extensive media coverage) have inspired the topic of this article. In all three cases, culture and cultural traditions were addressed or turned into legal arguments. From a legal perspective, the following questions emerge from these court cases and the discussion they have generated:

How does the legal system recognize and consider culture as a legal argument in child welfare cases and criminal cases?

When is culture considered relevant and when is it not – and for what reasons?

This article seeks to explore this question on the bases of Norwegian case law, research, practice and international human rights. The first part of the article will give a short survey of the relevant regulations on child welfare, violence against children and human trafficking. The second part will present a Norwegian study of the cultural arguments and its relevance in care order decisions. The third part of the article will present three criminal court cases in which culture was argued or addressed indirectly, but was considered irrelevant. Finally, the threads drawn from this will be pulled together in a final comment.

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¹ I am grateful to Hilde Lidén, Senior Researcher at the Institute for Social Research, Oslo, and Marianne Rugkåsa, Associate Professor at the Oslo and Akershus University College of Applied Sciences, for useful comments on the draft of this article.

² As to different understanding of culture, see e.g. Espen Marius Foss, Sahra Cecilie Hassan, Ida Hydle, Marie Louise Seeberg and Bettina Uhrig: ALTERNATIVE, Developing alternative understandings of security and justice through restorative justice approaches in intercultural settings within democratic societies, Deliverable 2.1: Report on conflicts in intercultural settings, (see section 3.1 Culture), Norwegian Social Research, NOVA, 2012.

³ Bente Puntervold Bø: Det flerkulturelle barnevernet – utfordringer, erfaringer og kompetansebehov (*The multicultural child welfare work – challenges, experiences and need for competence*), I Kaya S. Mehmed, Asle Høgmo and Halvor Fauske (eds.): Integrasjon og mangfold. Utfordringer for sosialarbeidere (Integration and diversity. Challenges for the social worker), Cappelen Akademisk forlag, Oslo 2010, pp. 213-214

The Norwegian Child Welfare system and regulation

According to the Child Welfare Act of 1992 (“CWA”) section 4-4, the child welfare services shall initiate measures to assist the child and the family in cases when the child, owing to conditions at home or for other reasons, is in particular need of assistance. Measures may consist of economical support for leisure activities and holidays, kindergarten, after school activities, respite care, a special contact person, family guidance/therapy, supervision in the home, or voluntary placement outside the home. Intervention is a legal duty under these conditions, but consent from the parents is also required. The threshold for child welfare interventions in the family was lowered by the CWA of 1992. The former Child Care Act of 1953 did not permit this kind of early intervention, but required a situation of neglect, which prevented the social services from assisting families before it was too late and the child had to be removed from home.

About 90 % of the total child welfare measures consist of voluntary, preventative measures. During 2011, 43,613 children received assistance measures from the child welfare services.⁴ Despite a general distrust of the child welfare system by many minority families, parents in general are shown to be statistically among those who contact the child welfare services most frequently, applying for assistance and support, or sharing concerns about their children. In the more serious cases the County Board – which is an administrative court - can make care order decisions. During 2011, 8,485 children were under coercive care.

According to the CWA section 4-12, a care order can be made if (a) there are serious deficiencies in the everyday care or in terms of the personal contact and security the child needs, (b) the parents fail to ensure that a child who is ill, disabled or in special need of assistance, receives necessary treatment and training, (c) the child is subjected to mistreatment or serious abuse, and (d) 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. As the three first alternative conditions are connected to a here-and-now-assessment, the last one

will be based on a more prognostic assessment.⁵ Typical areas for a care order on the basis of alternative (d) concern parents who are either mentally challenged, have serious psychological or drug abuse problems, or who have earlier proved not to be able to take proper care of a child.

It follows from the CWA section 6-4 that all employees in public services, and other professionals working with children, have an absolute duty to notify the child welfare services when there is a reason to believe that a child is being mistreated or exposed to other forms of serious neglect or abuse by their caregivers. The duty of notification prevails over the duty of professional secrecy.

The prohibition of violence against children and human trafficking

The regulation on violence

According to Article 19 of the United Nations Convention on the Rights of the Child (UNCRC), the State 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 parents or other care persons.⁶ Article 19 contains an obligation for the State Parties to protect children, as well as a corresponding individual right for the child to such protection.⁷

In 2011, the UN Committee of the Rights of the Child published its second General Comment on violence against children, clarifying what kind of actions Article 19 is meant to cover. The Committee particularly highlights children’s right to protection of their dignity and integrity:

The Committee has consistently maintained the position that all forms of violence against children, however light, are unacceptable. ‘All forms of physical or mental violence’ does not leave room for any level of legalized violence against children. Frequently, severity of harm and intent to harm are not prerequisites for the definition of violence. State parties may refer to such

⁴ Statistics Norway 2011, <http://www.ssb.no/en/sosiale-forhold-og-kriminalitet/statistikker/barnevernng> (English)

⁵ Alternative (d) was criticized in the hearing process of the CWA draft, for being too much based on uncertain prognosis and as such interfering with the parents’ right to a fair process.

⁶ Besides the CRC Arts. 19 and 37, several other human rights instruments contain provisions relevant for the protection against violence, i.e. European Convention on Human Rights Arts. 3 and 8 (alternative ‘private life’ – protection of personal integrity) and the European Court of Human Rights’ practice (i.e. *Z. and Others vs. UK* 2001), the UN Convention on Civil and Political Rights Article 7, the UN Convention Against Torture Arts. 1 and 16. Children are legally subject to all the international conventions of course, but the UNCRC offers something the others do not: a special protection of children, exclusively designed to fit children’s situation and meet their needs.

⁷ Sharon Detrick: *A commentary on the United Nations Convention on the Rights of the Child*, Hague/London/Boston, 1999 pp. 320-321

factors in intervention strategies in order to allow proportional responses in the best interests of the child, but definitions must in no way erode the child's absolute right to human dignity and physical and psychological integrity by describing some forms of violence as legally and/or socially acceptable.⁸

Many definitions of violence exist both in law and literature and will not be discussed here. The European Parliament stated in 1985 that 'there is violence in any act or omission which prejudices the life, the physical or psychological integrity or the liberty of a person or which seriously harms the development of his or her personality.'⁹ When that person is a child, the threshold for what is to be considered as violence should be lowered accordingly.

Parents' rights to discipline their children were abolished by law in Norway in 1972, but without a distinct prohibition of all forms of corporal punishment. To clarify this issue, the Act of Children and Parents ("ACP") of 1981 was revised in 1987.¹⁰ According to section 30, a child must not be subjected to violence or in any other way be treated so as to harm or endanger his or her mental or physical health. Nevertheless, in 2005, in a case of two boys being corporally punished by their step-father, the Supreme Court of Justice stated that a 'light slap' (lettere klaps) as a spontaneous reaction to improper behavior, was compatible with both the ACP section 30 and the UNCRC Article 19.¹¹

The judgment provoked strong reactions. Non-governmental organizations, legal scholars and child experts and the Children's Ombudsman argued that the Supreme Court in this case had interpreted national and international law incorrectly. The Ministry of Children, Equality and Social Inclusion then passed another proposal to Parliament. In 2010, the ACP was changed once again, to eliminate any possible doubt that all forms of physical force in children's upbringing are prohibited, unless the force is meant to protect the child from danger or harm. Section 30 received a new amendment: "This ['a child must not be subjected to violence..'] shall also apply when violence is carried out in connection with the upbringing of the child. Use of

violence and frightening or annoying behaviour or other inconsiderate conduct towards the child is prohibited'. It is notable that this amendment also covers psychological violence.

Nobody can be punished for violating the ACP without corresponding provisions in the Civil Penal Code of 1902 ("CPC").¹² According to CPC section 219, anyone who by threatens, duress, deprivation of liberty, violence or any other wrong grossly or repeatedly maltreats his/her spouse, the spouse's kin, kin in direct line or other persons in his/her care, shall be liable to imprisonment.

During the most recent revision of the CPC, the Ministry of Justice stated that according to the law, parental disciplining of their children must be regarded as inappropriate and illegal.¹³ A specific provision on violence against children was considered during the CPC revision, but found unnecessary, as children are protected under the same regulation of corporal offences as adults. It must be argued that children should be entitled to special protection as a consequence of their vulnerability, especially within their families, and of their total dependency on their parents. A similar protection as adults does not recognize that as a fact: thus the CPC ignores the potential child perspective which could have strengthened children's legal position.

The regulation on human trafficking

The UNCRC Article 35 states that State Parties shall take all appropriate measures to prevent the abduction of, the sale of, or traffic in, children for any purpose or in any form. According to the CPC section 224, a person will be guilty of human trafficking if he or she by force, threats, misuse of another person's purpose for prostitution or other sexual purposes, forced labour, war service in a foreign country, or removal of any of the said person's organs, or who induces another person to allow himself or herself to be used for such purposes. Persons guilty of trafficking are liable to imprisonment for a term not exceeding five years. Persons who make arrangements for such exploitation or inducement, or in any other way aid and abet such exploitation, or provide payment or any other advantage in order to obtain consent to such exploitation, shall be

⁸ CRC/C/GC/13 The right of the child to freedom from all forms of violence.

⁹ Recommendation no. R (85) 4 Of The Committee of Ministers to Member States on Violence in The Family (Adopted by the Committee of Ministers on 26. March 1985 at the 382nd meeting of the Ministers' Deputies).

¹⁰ Ot.prp. nr. 8 (1986-87). (Parliament proposal from the Government, Department of Family and Child Affairs).

¹¹ Rt. 2005, p. 1687 (Rt. = *Rettstidende* – a collection of published judgments from the Supreme Court).

¹² A full revision of the Penal Code has been passed, but will not enter into force before 2015-16, because of a delay in developing advanced ICT systems for the Police. In the aftermath of the terror-attack at Utøya on the 22. Of July 2011, this is considered as extremely important.

¹³ The Government's proposal to the Parliament, Ot.prp. nr. 22, p. 177. (My translation)

liable to the same penalty. If such acts as mentioned are committed against a child (i.e. a person under 18 years), the person committing the act is liable to a penalty independently of any use of force or threats, misuse of a person's vulnerability, or other improper conduct. Gross human trafficking is punishable by imprisonment for a term not exceeding ten years.

The relevance of culture in law – care order decisions

Regulations and case law

Children have a right to culture and cultural identity and education, both according to national law, and to Article 29 in the UNCRC which states that education shall aim at developing respect for the child's own cultural identity, language and values. Article 30 provides children of ethnic minorities with the right to live in accordance with their culture, to practise their religion and use their own language. According to Article 20, when considering solutions for alternative care, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background. The CWA section 4-15 states that the choice of placement shall be made in consideration of the child's personality and special need for care, education and stability, and that the County Board shall give due weight to the child's ethnic, religious, cultural and language background.

It follows from the UNCRC provisions mentioned, and the CWA, section 4-15, that culture is a relevant aspect of the assessment in care order decisions. Despite the lack of explicit expressions of culture as a legal criterion in other provisions of the CWA, culture is somehow relevant as a part of the general assessment of the child's best interest, in the consideration of the alternative criterions in section 4-12 mentioned above, and in decisions of visitation rights for biological parents.

For some children, their cultural identity will be influenced by languages, values and traditions from more than one culture (in the sense of national or ethnic belonging). Those children will often be labeled as multi-cultural, and the child's own culture might be understood in that perspective, as a part of a broader consideration of the child's best interests in appropriate cases.

A Supreme Court decision from 1997¹⁴ highlights the importance and relevance of culture when

considering whether a six year old Pakistani boy should be returned to his parents after having lived almost five years in an ethnic Norwegian foster home. He only knew the Norwegian language and lifestyle. The two psychological experts disagreed on what was in the best interest of the boy. The first one argued that the boy had grown to be closely attached to his foster parents, and that a return would imply a serious risk for heavy developmental damage and leave the boy very unhappy, and said: 'It will be of little comfort to him that he is going to share color of skin with his new caregivers'. The second expert highlighted the future consequences for the boy of not being able to grow up in a family of the same cultural background as himself, and that a future separation will cause identity problems and conflicts when he grows older. The Supreme Court considered the cultural aspects and future identity problems as arguments of greater importance than the boy's emotional attachment to his foster-parents and the risk of having to break away from the life he had lived since he was a baby. The boy was returned to his parents. The court defined the boy's culture as similar to his parents without questioning that as a fact.

According to Norwegian law and practice, it is generally considered to be in the child's best interest to grow up in the culture of his or her biological parents. Care orders can never be made on the basis of culture alone. Nevertheless, as soon as we cross 'the red line', the child's need for protection will override other needs and interests, both of the child and of the parents.

A study of care order decisions

Despite the Supreme Court decision of 1997, the UNCRC provisions securing the right to cultural development and belonging, and an encouragement in the CWA to pay attention to culture in care order decisions, the implementation of these legal norms in practice seems to be unsuccessful or at least insufficient.

According to a Norwegian review of care order decisions¹⁵, culture appears to be central and relevant in some of the cases involving minority children. In other cases, culture is mentioned, but not addressed as a part of the legal assessment, or culture is just not considered as relevant or mentioned at all, without any form of explanation of leaving out cultural aspects. The study does not identify common traits in the cases where culture was viewed as central and relevant for the outcome. The impression from the analyses is that,

¹⁴ Rt. (Rettstidende) 1997, p. 170

¹⁵ Sanne Hofman: Hensynet til kultur – til barnets beste? En analyse av 17 barnevernssaker om omsorgsovertakelse og plassering av minoritetsbarn (*The consideration of culture – in the child's best interest? An analyses of 17 care order decisions concerning minority children*), Kvinnerettslig skriftserie nr. 84, 2010 (University of Oslo, The Faculty of Law).

whether culture is considered or not, it is rather coincidental.

Official guidelines for good practice do address culture and the importance for the child to be able to develop his or her cultural identity, contact with the biological family, education and religion. The Norwegian Directorate for Children, Youth and Family Affairs has made efforts to recruit foster parents of minority origins, and it seems to be a difficult task. There is a general lack of foster homes with minority backgrounds. The guidelines do not specify how or when to take cultural aspects into consideration in individual cases or how to balance cultural arguments against contradicting arguments in the final consideration. As a consequence, it is left to the individual judges at the County Board and in the courts to handle these difficult interactions of law and culture. There is obviously a need for a more consistent practice.

A range of other fields of law, besides child welfare law, are affected by the discussion of culture as a legal argument. Cases of divorce, including parental responsibility and visitation rights, are relevant examples, as well as relocation decisions. Albertus and Sloth-Nielsen (2010) explore the importance of culture, language and religion in relocation decisions in South Africa.¹⁶ Interestingly, and quite similar to Hofman (2010), Albertus and Sloth-Nielsen found that, in spite of the cultural rights explicitly provided in both the South African Constitution and the Children's Act, 'an uneven pattern in which culture and language (in particular) have been brought to the fore in relocation cases. Religion has played a marginal role thus far and has not been central to the court's inquiry' (p. 96). Their final recommendation concerning South African relocation cases is easily adaptable to Norwegian cases of divorce, custody, access or care order decisions, involving minority children:

'It is recommended that in those instances where language, culture and religion are at stake, courts should be conscious of these rights being diminished as a consequence of relocation. These factors should independently form part of the balancing process to determine the best interests of the child, especially if the child is of school going age and his or her culture,

religion and language is established.'¹⁷

The consciousness of cultural rights, and that those rights are to be considered from the perspective of the child as a rights-holder, imply important challenges to decision makers. Additionally, there is probably a lack of fundamental cultural competence among decision-makers in general, which prevent them to make good assessments of the relevant cultural aspect of each case. The latter is to be addressed at an educational level. The legal regulations are in place, but obviously not fully implemented.

The non-relevance of culture in law – harmful practices

'The red line'

Children have the right to develop their cultural identity within their own cultural environment. At the same time children have a fundamental right to good care and protection from neglect, abuse and other violations of the child's physical or moral integrity, cf Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (European Convention). The limit of the relevance of culture goes with 'the red line', defining harmful practices and serious violations of the children's fundamental human rights as culturally irrelevant.¹⁸ Cultural arguments or cultural rights cannot override children's right to protection from violence, neglect and abuse. According to the UNCRC Article 24 no.3, State Parties shall take all appropriate measures with the view to abolishing traditional practices prejudicial to the health of the child.¹⁹ Consequently, the best interest principle, Article 3 no. 1, cannot be interpreted in a culturally relativistic way, to deny the rights guaranteed in the Convention nor to protect traditional practices or violent punishment.²⁰

The case of *Z. and Others v the UK*

In the case of *Z. and Others v the UK*,²¹ in the European Court of Human Rights (ECHR), four siblings were awarded compensation for having been exposed to serious neglect and abuse during their childhood, with the local social welfare authorities knowing, but not acting to protect the children. The

¹⁶ Latiefa Albertus and Julia Sloth-Nielsen: Relocation Decisions: Do Culture, Language and Religion Matter in the Rainbow Nation?, (2010) 1 *Family Law and Practice* 2, pp. 86-97.

¹⁷ Ibid p. 97

¹⁸ Johanna Schiratzki: 'The best interest of the child – in the light of normality and exceptions', (2013) 1 IFLPP 1 pp. 8-13.

¹⁹ For examples of traditional practices, see Sharon Detrick: *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers, The Hague/Boston/London 1999, p. 418, where she mentions traditional birth practices, forced feeding, early marriages and adolescent child bearing etc.

²⁰ Hodgkin and Newell: *Implementation Handbook for the Convention on the Rights of the Child*, 3r. ed., UNICEF 2007, p. 38

²¹ ECHR Appl. No. 2939/95, Judgement of 10 May 2001.

four children lived under conditions described as 'horrific' by the medical expert who examined the children, and she labeled the case as 'the worst case of neglect and emotional abuse that she had seen in her professional career.' The children were stealing food at night, locked outside the house for hours, locked into their filthy bedrooms, they would frequently appear with bruising on their faces, neighbours reported screaming at the children's home:

..A (boy born 1984) was shabby, ill-kept and often dirty and (...) he had been raiding the playground bins for apple cores. Z (girl born 1982) was pathetic, lacking in vitality and frequently and inexplicably tearful, becoming increasingly isolated from the other girls in her peer group with unfortunate incidents in which detrimental remarks were made about her appearance. B (boy born 1986) presented as withdrawn, pathetic and bedraggled. He regularly arrived cold, was frequently tearful and craved physical contact from adult helpers. He also appeared to crave for food.²²

The case may serve as an example of 'the red line'; although culture was not an issue in that case (and if it was, it would not have made any difference). ECHR establishes a clear responsibility for member states to take active steps to protect children living under conditions that amount to a violation of Article 3 of the European Convention – the prohibition of torture, degrading and inhuman treatment. The case of *Z and Others v UK* is the first case where the ECHR interprets Article 3 as covering serious abuse and neglect of children by their parents, and has had a significant impact on later case law:

Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. (...). These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge (...). The (...) children had been subject to appalling neglect over an extended

period and suffered physical and psychological injury directly attributable to a crime of violence (...). The present case, however, leaves no doubt as to the failure of the system to protect these applicant children from serious, long-term neglect and abuse. Accordingly, there has been a violation of Article 3 of the Convention.

By crossing 'the red line', we move from protecting culture to protecting the individual child against harmful practices, whether those are culturally based or not. A parallel to child neglect and abuse is to be found in the discussion of forced marriages, emphasizing the importance of protecting basic human rights for the children and young people involved:

[M]uch of the success story around forced marriage has come through challenging a previously over-deferential attitude towards cultural spokesmen and making the protection of young people (not the 'protection' of their communities or culture) the overwhelming priority.²³

Except from the most severe cases of human rights violations, like *Z and Others v UK*, it may be difficult to see where exactly to draw the red line, and if that line is constant and universal, or relative and individual. The Committee on the Rights of the Child explicitly condemns any form of physical and mental violence, however light. Based on the Committee's definition of violence, culture will not be relevant in dealing with, for example, slapping and spanking of children as a part of their upbringing either.

I will now turn to three recent Norwegian court cases which all address the subject of children exposed to abuse or violence, and the notion of culture. Despite the fact that all the three of them are substantially far beyond the 'red line', culture was present as a legal argument in favor of the parents/abusers in two of the cases. In the third case culture was not argued with, but present more indirectly and through demonstrations provoked by the case, from the Somali community.

The Indian Case

In December 2012 an Indian couple living temporarily in Norway was sentenced to 15 and 18 months of jail respectively by Oslo District Court, for having mistreated their 6½ year old son.²⁴ The mistreatment consisted of physical punishment and

²² The judgment paragraph 21

²³ Ann Phillips and Moira Dustin: 'UK Initiatives on Forced Marriage: Regulation, Dialogue and Exit', *Political Studies* 2004 VOL 52, 531–551 (on p. 546).

²⁴ Oslo District Court (Oslo tingrett), Judgment of 3 December 2012 (unpublished)

threats, including burning and beating.

The boy had told his teacher one day that he did not dare to go home after school because he was so afraid of being punished by his father for having wetted his pants. His father had threatened him with burning his tongue if he urinated in his pants. According to the sentence the boy was 'crying and shaking' while telling his teacher about the threats. As the teacher believed that the boy might be exposed to violence, he was (pursuant to the CWA) obliged to call the child welfare services. The child welfare services then removed the boy from home, and reported the suspected mistreatment to the police. According to the CWA, such immediate removal can be made if there is a risk that a child will suffer serious harm by remaining at home. The typical situations for such immediate decisions include maltreatment, sexual abuse and other forms of serious neglect like serious drug abuse.

The Indian parents were sentenced pursuant to the General Civil Penal Code, section 219. The parents argued that cultural differences in the upbringing of children had to be taken into consideration, but the Court did not find that cultural arguments could serve as mitigating circumstances in this case. As to the impact imprisonment of the parents will have on the children's situation, the Court remarked (my translation):

The Court recognizes the challenges for the children and their family situation that will follow an imprisonment of the parents. According to the character and seriousness of the case, the Court finds that both the parents should be sentenced to imprisonment of some duration. The Court is informed that the children are now living with other members of their family in India, and it must be presupposed that they will be in good care.

The Court also stressed that the maltreatment had taken place in the boy's home – in an environment where he was supposed to feel secure – and that the boy (according to witnesses) was beaten at night so that no one could hear it. Further, the Court focused on the difficult conflict of loyalty that derives from violence in close family relations and how stressful that must have been for the boy.

The People of Roma case

In July 2012, six persons from the Roma people, who were relatives, were sentenced to jail for child trafficking, for respectively two years and four months,

one year and ten months, three years and six months, two years and two months, one year and six months and for three years and six months.²⁵ The punishable actions involving child begging, sale of false jewellery, theft, robberies (in connection with pretending prostitution, and running off with the money), kidnapping of under-aged girls and forced marriages, including rape of an 11 year old girl.

Appointed expert witnesses on Roma culture argued that it is not to be considered as human trafficking when Roma people travel in family groups with their own children, or children in law, in the case of sales of jewellery, hats and flowers and the children are participating in the sale to support their family. It was argued for the defence that the accused had acted in accordance with the traditions of the Roma people, that begging, sale of jewellery and under-aged marriages is a part of Roma culture, and that they had been under the misapprehension that the actions were legal. Two of the expert witnesses of Roma culture denied the possibility of one of the girls being exposed to sexual abuse and rape (using the term 'unthinkable') because such acts would lead to exclusion from the Roma community. The expert witnesses suggested that the girl (13 years) had a strong wish to become 'western' and that her statement of rape had to be considered in that perspective.

The court considered, based on the evidence, that the girl was severely traumatized by nightmares, sleeping problems and other reactions compatible with sexual abuse, and that she had a need for long-term treatment and care. The court further concluded that Roma traditions and culture could not override the subjective criterions for penalty, and that the actions nevertheless had to be considered according to Norwegian law and the United Nations Convention against Transnational Organized Crime and the Protocols Thereto (2012). According to the court, the factual exploitation of the children must be decisive of what type of actions are considered to fall under the legal term human trafficking in the CPC section 224. Further, the court underlined the obvious fact that Roma children have the same right to protection and care as other children. The girls involved, who were under-age, explained that they sold the jewellery voluntarily. The court did not consider that a valid consent, and deemed the girl's involvement in the sale as a situation where they had no possibility to escape since they were completely dependent on their carers, with no money of their own and limited writing and reading skills. As one of the girls (aged 13) said:

²⁵ Bergen District Court (Bergen tingrett), Judgement of 5 July 2012 (unpublished)

‘With whom would I go?’ The court stated that a possible misapprehension of law did not exempt the perpetrators from punishment, but might have an impact on sentencing.

The Somali case

In March 2013 five Somali parents were sentenced to imprisonment according to the Civil Penal Code section 219, for gross mistreatment of 11 children, from six to 22 years old.²⁶ One of the parents was the mother of seven of these 11 children, and responsible for the most serious violence in the case. She was sentenced to four years and three months of imprisonment for serious mistreatment over a period of several years (1993-2011), besides which she had to pay economical compensation to her children. The ill-treatment included biting, pulling by the hair, holding the head under water, hitting the children in their faces and over their bodies, with her hand, with a shoe, a broomstick, a cord (under the feet), a belt and other objects. It also included burning the children’s lips with heated spoons and knives. The mother had also threatened to kill herself in front of her children by pouring inflammable liquid over her body holding a matchbox in her hand to scare them, and she had threatened to cut the children into pieces and to throw them into the rubbish. Further, she forced the older siblings to beat the younger ones. The mother denied the most serious actions, but agreed that she had disciplined her children when they did not listen to her, answered her in a rude way, destroyed things, or turned the TV on and off. She explained that ‘children are to show respect for and listen to adults.’ She told her husband that ‘children have to learn respect, they have to be scared of us, you are a man, you have to scare them.’

It was the school which notified the child welfare services of the violence, and the child welfare services reported the case to the police. The children were placed in foster care.

Culture was not addressed in the court’s assessment at all. The court stressed that in this case, there has been

violence during a period of 18 years, against seven children who were completely dependent on their mother. The violence was performed in their home where they were supposed to feel secure, and to receive care and love. The court considered the psychological effects on the children to be severe and long-lasting, and two of the children had documented severe traumatic reactions (one of the children was diagnosed with post traumatic stress syndrome, and one with severe learning difficulties). Further, the court could not find any mitigating circumstances. That the mother herself had been exposed to violence as a child, and that she had two turbulent marriages behind her, was not seen as relevant: ‘In a case of this character, with extensive violence towards one’s own children, such circumstances are not to be given weight.’

The case triggered extensive media attention and demonstrations from the Somali community, arguing that there was a lack of understanding for their culture and traditions and their way of raising children, and that the Norwegian authorities had to respect cultural differences.²⁷

Final comment

It seems that many of the cases attracting media attention, concern the use of corporal punishment. A part of this complex problem has to do with culture, or practices that are associated with culture. A Somali mother, who lost the care of her children, expressed her situation like this:

I came from war. I had two children during the war and managed to get us all here. But I’d rather be in the war in Somalia than experience this. In Somalia it is common to slap children. I didn’t know it was illegal in Norway. We didn’t get any information about that when we arrived here. I cannot read or write, I am an analphabet.²⁸

A Somali author²⁹ living in Norway is calling for the Somali minority parents to adjust their culture and stop hitting their children. She states:

²⁶ Gjøvik District Court (Gjøvik tingrett), judgement of 22 March, 2013 (unpublished).

²⁷ Kadra Yusuf: *Sviket mot våre barn* (The betrayal towards our children), *Utrop* (Outburst – a the newspaper of multicultural issues), 11 February 2013. Kadra Yusuf has publically confronted harmful cultural practices within the Somali community, and participated in public debates. As a consequence of her brave voice in the public domain, she is obliged to live at a secret address, and receiving serious threats from the Somali community is a part of her life.

²⁸ Norsk Rikskringkasting (Norwegian State TV Channel - NRK), 29 May 2011.

²⁹ Amal Aden has in her books confronted issues such as suppression and control of women, violence against children and homosexuality within the Somali community. Like Kadra Yusuf, serious threats are a part of her life, she lives at a secret address and needs police protection every time she is participating in public events, such as seminars, book launches etc.

Violence is still a part of child upbringing in many Somali families, and many children do not get any freedom. They can't stand their parents culture of origin, they want friends, freedom, and to live an ordinary life, but are not allowed to.³⁰

Evidently, there exist cultural differences and opposing ideologies in the upbringing of children, and in the perception of children as individual members of society in their own right. Kriz and Skivenes (2012) found that child welfare workers in the USA, UK and Norway perceived challenges for minority parents when raising children. The challenges were grouped in three categories: poverty and welfare problems, racism, and cultural differences. 'Cultural differences' was found to be more frequently identified as a challenge by the Norwegian workers than by the US or UK workers.³¹

On the one hand, the Norwegian authorities are supposed to recognise and take the differences and the experiences of minority parents into account. Culture may often be a relevant aspect to consider in child welfare work, preventive measures as well as care orders, and cultural competence must be strengthened, guidelines and legal norms providing cultural rights must be implemented. At the same time it has to be addressed as a fact that in Oslo for example, families of cultural minorities are over-represented in the child welfare statistics,³² and violence is more frequently expressed as the reason for residential care of minority children than for ethnic Norwegian children.³³

On the other hand, from a legal perspective it must be argued that the national legal decision system (courts and administrative authorities) cannot allow cultural arguments to serve as mitigating circumstances in cases of maltreatment and abuse. Particularly the courts have a responsibility to avoid double legal standards based on cultural differences in such cases, as it would amount to

a violation of the non-discrimination principle set forward in the Article 2 of the UNCRC.

The national and international legislation is in place, addressing both the relevance of culture directly, and the non-relevance of culture indirectly by defining a 'red line'. The latter – the 'red line' in case law and legislation – is probably more developed than the former. The challenge is to identify and form a good practice that can cover and implement cultural rights when appropriate, as well as protect children's fundamental human rights when those rights are at stake.

In Norway, and also internationally, domestic violence and abuse is a priority political issue. Despite all the research in the field that has been published during the last 10-20 years, documenting the significant, and often lifelong, psychological effects of being exposed to domestic violence as a child, we still face major challenges when it comes to giving children – be they ethnic Norwegian or other children living with violence – effective protection, both practically and legally. One of the reasons for the lack of real protection, has to do with the children not telling, and the adult world not believing, or not wanting to know. Another reason may be that not all parents are equipped with alternative child raising skills, nor knowledge of the consequences of punishment and violence, so as to handle their children without the use of corporal punishment. This does not necessarily connect to cultural mores. There are (ethnic) Norwegians as well who argue that corporal punishment is good and in the child's best interests.³⁴ To start with, we might have to sort out what constitutes culture, what does not, and what are rather differences in parents' own background, family traditions, attitudes, views of children's position in society and the impact of children's individual rights. These are questions which need to be subjected to further cross-disciplinary research.

³⁰ NRK 29 May 2011

³¹ Katrin Kriz and Marit Skivenes: 'Challenges for marginalized minority parents in different welfare systems: Child welfare worker's perspectives', International Social Work online 17. October 2012, Sage pbl

³² Trygve Kalve og Tone Dyrhaug: Barn og unge med innvandrerbakgrunn i barnevernet i 2009 (*children and young people with immigration background in child welfare in 2009*), Statistisk sentralbyrå (Statistics Norway), rapport 29/2011

³³ Bø 2010, s. 202.

³⁴ Recently, a mother and a step-father (both ethnic Norwegian) were sentenced to jail, for having respectively not prevented (mother) and performed (step-father) serious mistreatment that caused the death of a eight year old boy (Christoffer). The school, as well as the doctors at the hospital, were all concerned, but failed to notify the child welfare services in time.

The BBIC model to strengthen legal security for children in Sweden – a paper tiger?

Ann-Christine Petersson Hjelm*

The introduction of the Swedish model

The Integrated Children's System ("BBIC")¹ has been implemented in Sweden in order to strengthen the child's perspective and improve the ability to give children adequate care under the Care of Young Persons Act (1990:52).² The BBIC model was introduced as a further step to strengthen legal security³ for a child, as an individual decision on compulsory care is a last-resort measure by the state intervening in the child's integrity.⁴

This administrative care system is based on social workers' documentation and court decisions in cases where it is feared that children are exposed to a substantial risk of injury. The BBIC model introduced a national, formalized process for strengthening legal security in the investigation of the child's welfare, and as long as the need for compulsory care remains for the child. The quality of the decisions concerning the needs of the child, referred to in the Act, is supposed to increase a holistic perspective on the child's situation and is supposed to help identify and respond to the needs of the child. In this article it is crucial to discuss whether and in what way the BBIC model actually increased legal security for a child taken into compulsory care, or if it is a paper tiger.

The National Board of Health and Welfare ("Socialstyrelsen") has been positive and proactive in introducing the BBIC model in Sweden.⁵ Researchers

and legislators are more sceptical, and still point out the lack of legal security, especially in the investigations that will form the basis for court decisions. One of my concerns is to discuss the meeting between social workers, the municipal authorities and the judicial system, or perhaps the lack of meeting, and how we need to achieve a more accurate protection of children in the confluence of those systems.

In a noteworthy case⁶ the Equality Ombudsman ("DO") has chosen to pursue a case concerning compulsory care, because the investigation, according to the Supreme Administrative Court ("HFD"), suffers from deficiencies.⁷ The DO thinks that the investigation is subjective and that the family has not been involved in the process.⁸ The DO believes that the social workers have not investigated the mother's parenting skills and blame the municipality for an inadequate investigation – systemized by the BBIC model – and an investigation that is discriminating against the parents. The DO believes that the social worker acted on the basis of a preconceived opinion that people with mental disabilities cannot take care of their children. The DO considers it serious that this decision was based on general perceptions and vague reviews.⁹ Compulsory care became a reality for this family until the Supreme Administrative Court dismissed the municipal authority's request. This indicates that the dilemma of legal security persists or has taken other forms such as a strong belief in standardization itself.

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¹ BBIC (Barns Behov i Centrum) was inspired by the Integrated Children's System (ICS). The introduction of the English model was relatively unproblematic given that the system is based on the English common law tradition.

² Lag (1990:52) med särskilda bestämmelser om vård av unga (LVU).

³ Swedish *rättsäkerhet*, Cf. German *Rechtssicherheit*; This is sometimes translated into English as 'rule of law', which is too broadly defined in this context. I have translated it here as 'legal security'.

Swedish Government Official Reports, SOU 2009:68, *Lag om stöd och skydd för barn och unga*. A. Hollander, *Children in Care: The Responsibility of the Society. A Critical View of SOU 2000:7* (Socionomen 1, p. 37–43, 2001). A. Hollander, M. Jacobsson, and S. Sjöstrand, 'Defender, Spokesperson, Therapist: Representing the True Interest of the Client in Therapeutic Jurisprudence' (*International Journal of Social Welfare*, 2007). M. Jacobsson, *Terapeutens rätt. Rättslig och terapeutisk logik i domstolsförhandlingar* (Umeå; Umeå universitet, 2006).

⁵ Social barnavård i förändring: slutrapport från BBIC-projektet (Stockholm; Socialstyrelsen 2008).

⁶ <http://www.do.se/sv/Om-DO/Forlikningar-domstolsarenden/Sigtuna-kommun-ANM-2011274/>

⁷ HFD (case no. 3211-11).

⁸ <http://www.do.se/sv/Press/Pressmeddelanden-och-aktuellt/2012/DO-stammer-kommun-som-tvangsomhandertog-barn-utan-att-ha-utrett-moderns-foraldrasformaga/>.

⁹ Ibid.

Highlighting the dilemma of legal security and the transition to the BBIC model

The United Nations Children's Rights Committee has expressed concerns regarding Sweden's high number of children in administrative custody.¹⁰ It states that requirements concerning legal security are not satisfied, i.e. that the laws governing compulsory care do not contain adequate guarantees of the legal security of the individual.¹¹ The investigation of children which forms the basis for the process should ensure that the grounds for intervention are not arbitrary, so that children are not taken into care on insufficient or irrelevant grounds.¹² The courts in Sweden are in some cases known for following on the proposals of the social services.¹³ According to Chapter 1, Article 9 of the Instrument of Government (Regeringsformen), the authorities must consider equality before the law and observe objectivity and impartiality. Investigations are criticized for being inadequate, since they are both biased and unfair; social workers concentrate most on what is negative in the case.¹⁴ The Administrative Procedure Act (Förvaltningslagen) is not sufficiently considered, for example Article 20 governing the justification for decisions by social authorities.¹⁵

The BBIC model was introduced as a survey tool at the beginning of the 2000s, based on Bronfenbrenner's bio-ecological theory of human development.¹⁶ This new investigation model was transferred from England, not only to a different legal concept but also to a different legal family; the common law tradition (England) and the civil law tradition (Sweden) or, as it is often addressed today, a comparison between different legal cultures, without much discussion in this matter. The lack of this kind of discussion in Sweden is noteworthy and the authorities

approved the BBIC model in a couple of test districts – among them the jurisdiction I chose in 2006 – without significantly problematizing the different legal cultures. In Sweden, for example, preparatory material in the legislative history of an Act is significant as a normative source when deciding on compulsory care, which is not clarified in the BBIC model.

Today, the investigation process is formalized when carried out using the survey instrument: the BBIC model. The National Board of Health and Welfare, among others, believes that legal security increased a sense of predictability and similarities improved between municipalities' and social administrators' documentation. In the preparatory works the dilemma has concerned whether social workers, using the BBIC model, perform investigations with greater coherence and structure; this has not yet been answered.¹⁷ BBIC does not only influence the structure but also the gathering of information.¹⁸

However, a conceptual explanation of legal security is not found in the BBIC model or its manuals. Legal security emerges as something required but it is vaguely defined. The standardization *per se* should be regarded as a guarantee of its predictability (formal legal security). Material legal security, illuminated in other areas of social law, is less obvious in this context. This ambiguity indicates that difficulties remain after the introduction of the BBIC model.

In this article an illustrative discussion uses cases concerning compulsory care of infants. The purpose is to highlight the transition to the enforcement of the BBIC model. Here this is discussed through an investigation by the social worker and a court decisions prior to the BBIC model¹⁹ and with an illustrative case from the Supreme Administrative Court in Sweden (2012). The aim is to discuss the impact BBIC has had

¹⁰ CRC/SWE/CO/4, Avs. C paragraph 38 and 39.

¹¹ In the Swedish debate, compulsory care of children has been compared to a witch trial owing to deficiencies in the legal system. G. Lysén, *Trängsombändertagande av barn i Sverige: En häxprocess?! (The International Commission of Jurists, ICJ, 2008).*

¹² For example in Olsson mot Sverige the European Court ruled that the reasons given were not sufficient, i.e. that the child was better off with foster parents than its own parents. Cf. *Margareta and Roger Andersson v. Sverige* art 8(2). G. Svensson, *Högsta förvaltningsdomstolen och tvångsvården: Om betydelsen i rättssäkerhets hänseende av domstolens domar angående LVU och LVM* (Stockholm; Norstedts Juridik, 2012).

¹³ G. Svensson, *Högsta förvaltningsdomstolen och tvångsvården: Om betydelsen i rättssäkerhets hänseende av domstolens domar angående LVU och LVM* (Stockholm; Norstedts Juridik, 2012, p. 191, 206). A. Hollander, *Taking Children into Care. A Study of Child Care Cases in Administrative Courts in 1974, 1977 and 1982* (Stockholm; Aktuell Juridik Förlag, 1985, p. 345).

¹⁴ P. Leviner, *Rättsliga dilemman i socialtjänstens barnskyddsarbete* (Stockholm; Jure, 2011, p. 343).

¹⁵ G. Svensson, *Högsta förvaltningsdomstolen och tvångsvården: Om betydelsen i rättssäkerhets hänseende av domstolens domar angående LVU och LVM* (Stockholm; Norstedts Juridik, 2012, p. 188).

¹⁶ Since the bio-ecological perspective provides the theoretical background the National Board of Health and Welfare describes more thoroughly how Bronfenbrenner's model applies to the BBIC model in *Grundbok: Barns behov i centrum (BBIC)*, (Stockholm; Socialstyrelsen, 2006b, p. 20) and *Barn och unga i socialtjänsten: utreda, planera och följa upp beslutade insatser* (Stockholm; Socialstyrelsen, 2006a, p. 21 and 62).

¹⁷ Cf. Börjeson in SOU 2009:68, *Lag om stöd och skydd för barn och unga*, appendix 7, p. 286.

¹⁸ A. Kaldal, *Parallella processer – En rättsvetenskaplig studie av riskbedömningar i vårdnads- och LVU-mål*, (Stockholm; Jure Förlag AB, 2010, p. 86).

¹⁹ I have studied all the cases and documentations – 40 in all – from 2006 in a chosen jurisdiction. This chosen district was among one of the jurisdictions that tried out the new BBIC model. Several studies show that implementation of this model is a reality in Sweden 2013. The transition is now completed, a statement also based on a report from this jurisdiction in 2010 (Cf. Engström and Ovall).

on children taken into compulsory care and in what way, if so, BBIC has actually increased legal security. In these illustrative cases it is of interest to see how legal security is clarified, for example by the social workers and the court, in documents and court cases in relation to normative sources.

To provide the framework for the discussion, research, legal rules and concepts are treated briefly in the following section. Legal revisions with a more prominent role that have occurred during the last few years are discussed for the same reason.

Legal security

The legal concept of legal security is discussed here partly from a traditional legal dogmatic approach to the sources, such as law, preparatory work, practice and doctrine, partly from a broader viewpoint based on documentation underlying the decision in court. This allows a profound understanding of the legal issues in this work. Since 2010, legal security has been defined by the formulation in Chapter 2, Article 9 of the Instrument of Government:²⁰

Rule of law

Also those who for reasons other than those specified in paragraph one, have been taken forcibly into custody, shall likewise be entitled to have the matter of custody examined before a court of law without undue delay.

A legal discussion is particularly relevant in the case of exposed children but there is no uniform definition of the concept of legal security *per se*. The legacy of German law tradition has a firm grasp on the law, and one important task is still to assist the court's judgment.²¹ Swedish lawyers have been trained in the legal positivistic tradition in a relatively similar conceptual understanding where legal security is a cornerstone. Understandably, interpretation by the authorities²² differs somewhat, but the point is that a court decision should have been anticipated by the clarity and expected application of the law.²³ The

principle of predictability is given importance as regards legality, uniform law, etc., and the right of appeal sometimes recognized as formal legal security while it is sometimes regarded as a guarantee and not a value in itself.²⁴ The legislator also has a social responsibility for material legal security.²⁵ Peczenik increased application but warned against misuse in this matter.²⁶

The fact that material legal security has been established in social law we can now conclude to be a non-controversial point. In recent decades, material legal security is based on arguments about ethically acceptable applications. The complexity remains because the concept is given different meanings and scope in areas such as the result, efficiency and consistency of the decision. When the concept of legal security was discussed in preparatory work in the early 2000s, an understanding was reached of the concept of material legal security.²⁷ Concerning administrative care, reference is often made to Socialtjänst i utveckling and Vahlne Westerhäll's conceptual understanding of legal security.²⁸ Socialtjänst i utveckling stated that "it has also been argued" that this kind of [material] legal security would be a priority in the Social Services Act,²⁹ as it better reflects the intentions of the law with a holistic approach in social work." It is further highlighted that:

Material legal security is considered to entail a greater freedom of interpretation to allow for more individually adapted solutions, which in itself reduces predictability and legal security for the individual. The traditional concept of legal security is considered better able to satisfy the requirement of predictability since it assumes that the norms state the conditions which must be fulfilled for a correct decision. The scope for interpretation is then smaller.³⁰

A reflection worth considering is made in the conclusion to the preparatory work for the new administrative law concerning a rational investigation

²⁰ Cf. Chapter 8 Article 22, Instrument of Government (2010:1408).

²¹ K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (third edition, Oxford; Oxford University Press 1998).

²² A. Peczenik, *Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation*, (Stockholm; Norstedts juridik, 1995, p. 92).

²³ H. Gustafsson, *Rättens polyvalens. En rättsvetenskaplig studie av sociala rättigheter och rättssäkerhet*, (Lund; Lund studies in sociology of law 14, 2002, p. 20).

²⁴ E.g. H. Gustafsson, 2002, pp. 315–317).

²⁵ A. Peczenik, *Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation*, (Stockholm; Norstedts juridik, 1995, pp. 92 and 94).

²⁶ A. Peczenik, (1995, p. 100).

²⁷ SOU 2004:3, *Trång och förändring: Rättssäkerhet, vårdens innehåll och eftervård*. SOU 1999:97, *Socialtjänst i utveckling*, Kerstin Wigzell. SOU 2009:68, *Lag om stöd och skydd för barn och unga*.

²⁸ SOU 1999:97, *Socialtjänst i utveckling*, p. 179. L. Vahlne Westerhäll, *Den starka statens fall? En rättsvetenskaplig studie av svensk social trygghet 1950–2000* (Stockholm; Norstedts Juridik, 2002).

²⁹ Socialtjänstlagen (SoL), 2001:453.

³⁰ SOU 1999:97, *Socialtjänst i utveckling*, p. 179.

(Article 7). It was submitted that the individual's legal security should be in writing. This is because people uninitiated in law tend to think primarily about "the protection of life, health and property". Nor is it clarified whose security is in question, that of the public or the individual. The choice of words indicates a reluctance to use the word 'legal security' in legal text, which would give a clearer picture according to the preparatory work. The proposal states the following form: A case should be handled as smoothly, quickly and economically as possible, without the individual's legal security being neglected.³¹ Tendencies were stated in the Governmental reports identified tendencies for the administrative authorities failing to find support in law, other regulations and objectivity, therefore clarifying the need for administrative authorities to observe the principles of legality, objectivity and proportionality in all administrative work.³²

Current law and court system: influences on legal security

The Care of Young Persons Act (LVU) is over 20 years old.³³ In June 2012 the Swedish government decided not to proceed with a new Act on Support and Protection of Children and Young People, proposed in the Swedish Government Official Reports about strengthening legal security³⁴ for exposed children, but to continue to apply the Social Services Act ("SoL") and LVU.³⁵ Despite the lack of an overall grasp of the law, reinforcements have been made since the implementation of the BBIC model that will have affected the legal situation of the children involved. In 2011 the legal aim to emphasize the role of children was introduced in Chapter 1, Article 2 of the Instrument of Government. Furthermore, in the directive from 2012 the need for changes and clarifications to the regulations was underlined.³⁶ In the preparatory work concerning support and protection of

children and young people the aim, to further strengthen the situation for children taken into compulsory care, was clarified.³⁷ Some of the more crucial legislative changes according to the implementation of the BBIC model that have led to enhanced legal security after 2006 are discussed here.

Legal security underlies the specification of the criterion of mistreatment and abuse, in Article 2 of the LVU.³⁸ However, in the provision of compulsory care, so-called environmental cases Article 2 and behavioural cases Article 3, the wording is the same before and after implementation of the BBIC. In Article 1 of the LVU the legislator strengthened the child's right to relevant information and that his or her attitude to the process should be clarified as far as possible.³⁹ Similarly, changes were made in Article 4 of the LVU in which further demands were made not to exclude the child: it provided that the application should also ensure that the relevant information was provided as well as the nature of the information, and the child's attitude to the process. In the investigation the possibility exists to gather information and consult without consent. With an emphasis on legal security the opportunity to talk to children without guardians/parents is discussed in the preparatory work.⁴⁰

Today, studies show that the implementation of the BBIC model has had an impact in Sweden and the model has contributed to national agreement.⁴¹ According to the National Board of Health and Welfare, this has strengthened legal security concerning efforts to enhance coherence in how children are dealt with nationally so as to reduce differences between municipalities. Then, the question is how legal security is made visible - or not - in the actual application of the law.⁴² The National Board's review of the legislative changes in the SoL and LVU from 2008 shows that the provision of safe and cohesive care has improved.⁴³ In the report the above-mentioned changes in the legislation, alongside the

³¹ SOU 2010:29, *En ny förvaltningslag*, p. 229.

³² SOU 2010:29, pp. 24 f.

³³ See Article 4 paragraph 2 of the LVU. Prop1989/90:28, *Vård i vissa fall av barn och ungdomar*. SOU 1989/90:15 and Riksdagens skrivelse 1989/90:112.

³⁴ "Samhällets sociala barn- och ungdomsvård har ett särskilt ansvar för att ge skydd och stöd till barn och ungdomar som befinner sig i ett utsatt läge. Samtidigt kan samhällets åtgärder och ingripanden upplevas som både integritetskränkande och hotfulla för enskilda familjer. Detta ställer krav på tydliga lagregler, ett rättssäkert förfarande, kunskap och ett professionellt bemötande. Socialtjänstens agerande måste upplevas som legitimt, kompetent och tillförlitligt." <http://www.regeringen.se/content/1/c6/19/50/46/7a9a9e65.pdf>, p. 31.

³⁵ SOU 2009:68, *Lag om stöd och skydd för barn och unga*. (Barnskyddsutredningen S 2007:14).

³⁶ Directive 2012/13:10, *Översyn av lagen med särskilda bestämmelser om vård av unga, m.m.*

³⁷ Prop. 2012/13:10, *Stärkt stöd och skydd för barn och unga*.

³⁸ Prop. 1989/90:28, *Vård i vissa fall av barn och ungdomar*, pp. 63.

³⁹ Prop. 2006/07:129, *Utveckling av den sociala barn- och ungdomsvården m.m.*, p. 38.

⁴⁰ Prop. 2009/10:192, *Umgångsstöd och socialtjänstens förutsättningar att tala med barn*, pp. 17.

⁴¹ L-G. Engström and H. Ovall, *Implementering av BBiC i Värmland*, (FoU, 2010). *Social barnavård i förändring: slutrapport från BBiC-projektet*. (Stockholm: Socialstyrelsen, 2008, pp. 40 and 98).

⁴² SOU 2009:68, *Lag om stöd och skydd för barn och unga*. P. Westerman, 'Governing by Goals: Governance as a Legal Style', "(2007) *Legisprudence International Journal for the Study of Legislation*, pp51-72, Hart Publishing, (Hart Journals on line)..

⁴³ *Lagändringar i SoL och LVU den 1 april 2008: Har de slagit igenom i socialtjänsten?* (Stockholm: Socialstyrelsen rapport, 2011). This is based on a study that establishes increased legal security; details were not provided here and a consistent meaning of legal security for those who responded in the municipality has not been analysed. <http://www.socialstyrelsen.se/nyheter/2011september/lagandringharbidragitillattokabarnochungasrattssakerhet>

introduction of the BBIC model, are said to have contributed to this positive development.⁴⁴

The (lack of) meeting between systems

In the process of taking a child into compulsory care the care system, the political system and the legal system meet through the BBIC model.⁴⁵ Firstly, investigations conducted by the municipal social workers are the basis for decisions by the administrative process (the care system). This work is an exercise of public authority. Secondly, the political system – represented by the municipal authorities – makes a decision concerning the child mainly based on the social worker's BBIC documentation. Thirdly, the administrative courts (the legal system), which do not explicitly deal with these cases, make the decisions about whether a child should be taken into compulsory care or not. Despite the efforts by the court to apply a uniform practice, the Swedish National Courts Administration (Domstolsverket) points out differences between the courts.⁴⁶ It is stressed that the social workers' decisions are not reviewed on an adequate scale and the "investigations rarely subject to audits, i.e. if grounds for the decision are stated, the facts are correct etc. it is assumed to be satisfactory."⁴⁷

In Sweden the effects of the BBIC model are nuanced and the confluence, or lack of confluence, of the systems is discussed. Several factors influence the estimated risk of the decision, such as the interpretation of the criteria in the law, the documentation of the child's situation itself, attitudes to and knowledge of the subject and the view of the child based on the assessor's preferences, and actual need. Researchers, including Hollander, question individual actors' objectivity and impartiality in the handling and decision making in

contact with exposed children.⁴⁸ Research points to a built-in tension between the care system and the legal system that affects legal security.⁴⁹ A holistic approach to the situation of children also requires awareness of how legal concepts and skills are used in the investigation.

In 2010 Sweden obtained a new map for the court system. The Administrative Court (Förvaltningsrätten) replaced the former provincial courts and the new jurisdiction covers a larger area. Furthermore, influences of therapeutic law in the legal process are being discussed today, affected by the common law tradition. The topic is discussed only briefly here.⁵⁰

Hollander et al have argued that legal security in the courts should be strengthened as a therapeutic culture has developed in compulsory care negotiations among judges and social workers. The starting point here is the well-meaning "we are all here to accomplish what is best for the individual."⁵¹ Instead of emphasizing the individual's legal security, the importance of "having a voice" at the hearing is stressed. In the negotiations the authorities' decision is not sufficiently critically examined, instead it is dominated by questions to the litigant. The conclusion is that the well-intended therapeutic culture erodes legal security. Jacobson argues that there has been a shift in that the legal system has come closer to the social workers' attitude towards their clients.⁵² This differs from the image of the English legal system where King claims that social workers adapt investigations to a legal context. The legal system representatives maintain formal legal security while social administration is more focused on material legal security. The care system and the legal system have basic differences in the application, which make the systems incompatible.⁵³

In Sweden, compulsory care and problems at the intersection between social work and the courts decision

⁴⁴ *Lagändringar i SoL och LVU den 1 april 2008: Har de slagit igenom i socialtjänsten?* (Stockholm; Socialstyrelsen rapport, 2011).

⁴⁵ BBIC can be used in cases concerning Chapter 4 Article 1 of the SoL and Articles 2, 3 and 6 of the LVU.

⁴⁶ http://www.domstol.se/templates/DV_Press.aspx?id=4580. *Strategisk inriktning, 2010–2020* (Domstolsverket, Jönköping 2010).

⁴⁷ 2009/10:RFR3, *Forskning som berör socialtjänstlagen och kompletterande regelverk* (Riksdagstrycket, p. 6).

⁴⁸ <http://www.dn.se/debatt/rattssakerheten-kranks-i-tvangsvardsarenden/>. Cf. A. Kaldal, *Parallella processer – En rättsvetenskaplig studie av riskbedömningar i vårdnads- och LVU-mål*, (Stockholm; Jure Förlag AB, 2010).

⁴⁹ A. Hollander, *Taking Children into Care. A Study of Child Care Cases in Administrative Courts in 1974, 1977 and 1982* (Stockholm; Aktuell Juridik Förlag, 1985). A. Hollander, M. Jacobsson and S Sjöstrand, 'Defender, Spokesperson, Therapist: Representing the True Interest of the Client in Therapeutic Jurisprudence' (*International Journal of Social Welfare*, 2007). M. King and J. Trowell, *Children's welfare and the law: The limits of Legal Intervention* (London; Sage Publications, 1992). M. King and C. Piper, *How the law thinks about children* (second edition, Aldershot; Arena 1995).

⁵⁰ P. Leviner, *Rättsliga dilemman i socialtjänstens barnskyddsarbete* (Stockholm; Jure, 2011, part 1.4.3). M. Jacobsson, *Terapeutens rätt. Rättslig och terapeutisk logik i domstolsförhandlingar*, (Umeå; Umeå universitet, 2006) finds that therapeutic law (prevention and proactivity) involves risks concerning legal security.

⁵¹ A. Hollander, *Taking Children into Care. A Study of Child Care Cases in Administrative Courts in 1974, 1977 and 1982* (Stockholm; Aktuell Juridik Förlag, 1985, p. 342). <http://www.dn.se/debatt/rattssakerheten-kranks-i-tvangsvardsarenden/>.

⁵² Jacobsson, M. *Terapeutens rätt. Rättslig och terapeutisk logik i domstolsförhandlingar* (Umeå; Umeå universitet, 2006). C. Diesen, *Terapeutisk juridik* (Malmö; Liber, 2011). Diesen emphasizes that the solutions in the legal process become more efficient and accurate if social aspects are concerned in legal work. Otherwise, a holistic view gets lost and the legal work might act in a vacuum.

⁵³ M. King and J. Trowell, *Children's welfare and the law: The limits of Legal Intervention* (London; Sage Publications, 1992, p. 35). M. King and C. Piper, *How the law thinks about children* (second edition, Aldershot; Arena 1995). L. Ponnert, *Mellan klient och rättssystem: tvångsvård av barn och unga ur socialsekreterarnas perspektiv* (Lund; Socialhögskolan, 2007, pp. 11, 40, 261 and 207).

are discussed in research. The effects of the BBIC model are nuanced in Leviner's thesis about the legal dilemmas in social care; even if structure is created, the legal deficiencies remain.⁵⁴ Leviner finds that the application *per se* can be described as predictable, but there seems to be "a large degree" of interpretational possibilities where the lack of objectivity can affect the investigation.⁵⁵ Leviner maintains that decisions based on LVU are made, to a large extent, on the material that has been compiled by social workers.⁵⁶ Leviner believes that "the lack of generally accepted theory in the social and behavioural sciences" means that it is difficult for social services and the court to "integrate knowledge in consistent and predictable terms."⁵⁷ Leviner maintains that the study reveals more a consensus process than an investigation in itself.⁵⁸ She argues that the creation of special courts for children would be desirable. In addition, children and parents should have access to qualified legal counsel during the investigation.⁵⁹

Also Kaldal discusses predictability in an interesting light concerning risk as a legal dilemma in these cases.⁶⁰ This legal area is characterized by legislation in the field between flexibility and predictability, especially that every case is considered *in casu* out of the concern that legal security should be predictable.⁶¹ In Svensson's book on "The Supreme Administrative Court and compulsory care", he discusses the importance of legal security in decisions. Svensson argues that the prospects for compulsory care can be considered as relatively general. His premise is that if the Supreme Administrative Court clarifies the meaning of these conditions in general statements, this means increased potential for predictability and thus strengthened legal security. Svensson believes that BBIC has improved

legal security in the sense that the form of the inquiry process has been strengthened.⁶² However, the BBIC is not an instrument for predicting risk; the authorities must assess environmental and/or behavioural criteria according to LVU.

Investigations and decisions according to the BBIC model

The intention here is to discuss the application of the BBIC model through cases in conjunction with the implementation of the standardized procedure. In both the cases addressed, it concerns the circumstances of infants. These cases are primarily about deficiencies in the care of infants. Note that this is not a comparison between cases; instead it is a discussion about awareness of quality and legal security concerning the cases. Likewise, there is documentation from the cases examined in this paper and not the reality.⁶³

In this first example the Administrative Court (2006) found the investigation inadequate.⁶⁴ A prematurely born boy had been documented for a long period of time, for example by a hospital. The family was known to the social services.⁶⁵ Social workers initially proposed assistance and placement, Chapter 4, Article 1, The Social Services Act. They obtained help primarily with care such as assistance in eating habits at an infant and maternity home. Sometimes the child stayed in hospital and then he gained weight, as opposed to when he was at home with his parents. When the boy was about one and a half years old he received a severe head injury. The parents denied mistreatment while doctors believed that the parents' explanation was inadequate for this type of injury (several independent blows to the head). A week after the accident the parents

⁵⁴ P. Leviner, *Rättsliga dilemman i socialtjänstens barnskyddsarbete* (Stockholm; Jure, 2011, p. 355).

⁵⁵ P. Leviner, (2011, p. 343).

⁵⁶ P. Leviner, (2011, p. 26).

⁵⁷ P. Leviner, (2011, note 17).

⁵⁸ P. Leviner, (2011, p. 285).

⁵⁹ P. Leviner, (2011, p. 361).

⁶⁰ A. Kaldal, *Parallella processer – En rättsvetenskaplig studie av riskbedömningar i vårdnads- och LVU-mål*, (Stockholm; Jure Förlag AB, 2010, pp. 28 and 31).

⁶¹ A. Kaldal, (2010, p. 34).

⁶² G. Svensson, *Högsta förvaltningsdomstolen och tvångsvården: Om betydelsen i rättssäkerhetsbänsseende av domstolens domar angående LVU och LV/M* (Stockholm; Norstedts Juridik, 2012, p. 214).

⁶³ Based on a critical methodological perspective, it is important to note the difficulties and limitations in this kind of research. Although copious documentation is gathered in the court files there is always an element of uncertainty as to whether all relevant material has been found.

⁶⁴ I have studied all 40 cases from the administrative court, in a chosen jurisdiction, in the year 2006. The BBIC model has not been implemented in these cases.

⁶⁵ For example, the parents' situation in the investigation is described and reflected upon by research in the field. It is argued in the documentation that "What is a good parent is defined differently in every culture and migration can threaten the parental role" (reference is made to cross-cultural encounters from known reference for social workers).

declined support from social services and the child was immediately taken into compulsory care. A police investigation started at the same time. The Social Welfare Committee resolved on immediate compulsory care for the boy, affirmed by the court a week later. The court decided to wait for further investigation, especially the forensic investigation by the police. The court stated that it was not an interim decision, where the court can settle for a lower standard of proof than was required for the court order regarding provision of care. The problem arises that the court's ruling on the Committee's application makes the judgment final. Instead the court stated that the investigation was not complete and compelling in order for the court to take a final decision on appeal. The child continued to be taken into immediate care and the court waited to proceed with a decision in the case.

With regard to the case from the Supreme Administrative Court (2012) initially mentioned in this article, it was stated that the mother was believed to have defects in her caring capacity. The mother had a minor mental disability. The social services conducted an investigation using the BBIC model. The father was placed with the child in an investigation home to establish the father's parenting skills (directly after birth) in accordance with the power to impose immediate compulsory care, Article 6 of the LVU. At the hearing in court, the father declared that the social services' assertions were subjective and that the mother had not had a chance to show her ability. The father received as an explanation that resources were lacking for alternative care. Furthermore the father claimed violations, as a social worker had said disparagingly: "it is not normal to have a child with a person with disabilities". According to the court's verdict the father too had deficiencies in his caring capability because he did not see the mother's shortcomings. The parents did not approve of the care plan as it assumed that the mother would not live with the father. The administrative court decided that the child should be given further treatment in foster care.

According to the next administrative instance (kammarrätten), it was a deficiency in the investigation that the mother was not initially placed and investigated

together with her child.⁶⁶ Several witnesses referred to by the social workers withdrew their opinion or believed that insufficient attention had been paid to their statements. However, the supported activities the parents agreed upon could not ensure the child's needs, and care deficiencies were pointed out by the court.

In this case the Supreme Administrative Court (HFD) annulled the compulsory care order and rejected the Social Welfare Committee's application for custody of the child.⁶⁷ HFD pointed out major deficiencies in the investigation. HFD emphasizes that the criterion risks in LVU should not be hypothetical.⁶⁸ The criterion substantial risk requires a high threshold to show that this is clear in the investigation: "It should be emphasized that the problems with parents themselves should not cause compulsory care."⁶⁹ Instead, concrete evidence is required to indicate that the child might be harmed. In this case the problem was the lack of a thorough investigation and an individual assessment of parenting ability. It is noteworthy that the result of this investigation lacked depth and was based on general observations from the preschool where the mother had had her practice. HFD found that the mother's maternal parenting skills had not been examined enough. The Supreme Administrative Court upheld the appeal by the custodians.

Conclusion: legal security and standardization of investigations

The result highlights a dilemma in the confrontation between the social workers and the legal scholars – a lack of holistic ethos – based on the different backgrounds of the professions. The National Board of Health and Welfare reports indicate that the BBIC model's aim to strengthen quality and legal security has succeeded, while research is more divided on the matter. Legal security is important, in particular in compulsory care, cases often involving injury to a family even if a decision is later reversed. In the cases discussed here, the courts did not find investigations complete. This kind of investigation problem in the authorities is always a possibility with – or without – the implementation of the BBIC model. Moreover there was an awareness of

⁶⁶ RÅ 2009 ref. 64.

⁶⁷ HFD (case no. 3211-11).

⁶⁸ RÅ 2009 ref. 69

⁶⁹ HFD see Prop 1989/90:28, *Vård i vissa fall av barn och ungdomar*, pp. 62 and 107. HFD 2011 ref. 6.

quality and legal security before the implementation of the BBIC model in Sweden. Meanwhile, the standardization pinpoints the importance, for instance, of specifying consent in the matter and further awareness of quality and legal security. The highlighted cases illustrate that standardization in itself is not adequate without the need for continuing action to create quality in the process.

Grassroots bureaucrats, such as a social worker in the role of legal authority, often get the blame for incomplete interventions while the politicians who have the decisions in their hands are more invisible. At the same time, research and cases in this article indicate the social workers' tendency to pursue the issue in order to "win" the case.

General legal security – objectivity, impartiality, and treating similar cases equally – is applied according to the principle of objectivity in the Instrument of Government, but parents have a problem in showing that they are suitable in accordance with the municipal authorities' decision. In addition, there are studies showing that the court has accepted the findings by the social workers both before and after the implementation of the BBIC model. This is because the basis is dependent on the social workers' investigation. In both cases, the court has recognized,

in various ways, the issue of the quality of the investigations from a perspective of legal security.⁷⁰

In social legal research, it is also customary to discuss material legal security: the Achilles heel is a reduction in predictability. Legal security in social law has been questioned during the past 20 years. The criticism is summarized by Gustafsson in his attempt to create a complementary meaning of the concept in social law.⁷¹ The importance of a modern concept of legal security: An acceptable process includes values which provide effective decision making before and during compulsory care.⁷² It is often emphasized that framework legislation for several reasons is difficult to reconcile with legal security. In the preparatory work for the new Administrative Law it was expressed that individual legal security should have been written on to avoid misinterpretation in terms of "protection of life, health and property". A clarification of the criteria in LVU and standardization of the BBIC model does not naturally lead to the strengthening of legal security, i.e. predictability does not automatically mean that legal security is strengthened. Should the system which has been described above proceed, it is essential to give the social workers, as an important link in the system, legitimacy, time and knowledge to accomplish their work in order to avoid a paper tiger.

⁷⁰ M. Jacobsson, *Terapeutens rätt. Rättslig och terapeutisk logik i domstolsförhandlingar* (Umeå; Umeå universitet, 2006).

⁷¹ H. Gustafsson, *Rättens polyvalens. En rättsvetenskaplig studie av sociala rättigheter och rättssäkerhet*, (Lund; Lund studies in sociology of law 14, 2002, p. 25).

⁷² A. Staaf, *Rättssäkerhet och tvångsvård: En rättssociologisk studie* (Lund; Lund studies in sociology of law 22, 2005, pp. 106). SOU 1998:32, *Rättssäkerhet, vårdbehov och samhällsskydd vid psykiatrisk tvångsvård*, pp. 193.

International Family Law, Policy and Practice

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These are discouraged but if used should be provided electronically in a separate file from the text of the article submitted and it should be clearly indicated in the covering email where in the article such an item should appear.

Headings

Other than the main title of the article, only headings which do substantially add to clarity of the text should be used, and their relative importance should be clearly indicated. Not more than three levels of headings should normally be used, employing larger and smaller size fonts and italics in that order.

Quotations

Quotations should be indicated by single quotation marks, with double quotation marks for quotes within quotes. Where a quotation is longer than five or six lines it should be indented as a separate paragraph, with a line space above and below.

All quotations should be cited exactly as in the original and should not be converted to *International Family Law, Policy and Practice* house style. The source of the quotation should be given in a footnote, which should include a page reference where appropriate, alternatively the full library reference should be included.

Cross-references (including in footnotes)

English terms (eg above/below) should be used rather than Latin (i.e. it is preferable NOT to use 'supra/infra' or 'ante/post' and similar terms where there is a suitable English alternative).

Cross-referencing should be kept to a minimum, and should be included as follows in the footnotes:

Author, title of work + full reference, unless previously mentioned, in which case a shortened form of the reference may be used, e.g. (first mention) J Bloggs, *Title of work* (in italics) (Oxbridge University Press, 2010); (second mention) if repeating the reference - J Bloggs (2010) but if the reference is already directly above, - J Bloggs, above, p 000 will be sufficient, although it is accepted that some authors still use "ibid" despite having abandoned most other Latin terms.

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Latin phrases and other non-English expressions

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Abbreviations

If abbreviations are used they must be consistent. Long titles should be cited in full initially, followed by the abbreviation in brackets and double quotation marks, following which the abbreviation can then be used throughout.

Full points should not be used in abbreviations. Abbreviations should always be used for certain well known entities e.g. UK, USA, UN. Abbreviations which may not be familiar to overseas readers e.g. 'PRFD' for Principal Registry of the Family Division of the High Court of Justice, should be written out in full at first mention.

Use of capital letters

Capital letters should be kept to a minimum, and should be used only when referring to a specific body, organisation or office. Statutes should always have capital letters eg Act, Bill, Convention, Schedule, Article.

Even well known Conventions should be given the full title when first mentioned, e.g. the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 may then be abbreviated to the European Convention. The United Nations Convention on the Rights of the Child should be referred to in full when first mentioned and may be abbreviated to UNCRC thereafter.

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Words using 's' spellings should be used in preference to the 'z' versions.

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Full points should not be used in abbreviations.

Dates

These should follow the usual legal publishers' format:

1 May 2010

2010–2011 (not 2010-11)

Page references

These should be cited in full:

pp 100–102 (not pp 100–2)

Numbers

Numbers from one to nine should be in words. Numbers from 10 onwards should be in numerals.

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The full case names without abbreviation should be italicised and given in the text the first time the case is mentioned; its citation should be given as a footnote. Full neutral citation, where available, should be given in the text the first time the case is cited along with the case name. Thereafter a well known abbreviation such as the Petitioner's or Appellant's surname is acceptable e.g. *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424 should be cited in full when first mentioned but may then be referred to as *Livesey* or *Livesey v Jenkins*. Where reference is to a particular page, the reference should be followed by a comma and 'at p 426'.

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English judges should be referred to as eg Bodey J (not 'Bodey', still less 'Justice Bodey' though Mr Justice Bodey is permissible), Ward, LJ, Wall, P; Supreme Court Justices should be given their full titles throughout, e.g. Baroness Hale of Richmond, though Baroness Hale is permissible on a second or subsequent reference, and in connection with Supreme Court judgments Lady Hale is used when other members of that court are referred to as Lord Phillips, Lord Clarke etc. Judges in other jurisdictions must be given their correct titles for that jurisdiction.

Legislation

References should be set out in full in the text:

Schedule 1 to the Children Act 1989

rule 4.1 of the Family Proceedings Rules 1991

Article 8 of the European Convention for the Protection of Human Rights 1950 (European Convention)

and in abbreviated form in the footnotes, where the statute usually comes first and the precise reference to section, Schedule etc follows, e.g.

Children Act 1989, Sch 1

Family Proceedings Rules 1991 (SI 1991/1247), r 4.1 (SI number to given in first reference)

Art 8 of the European Convention

'Act' and 'Bill' should always have initial capitals.

Command papers

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(Title) Cm 1000 (20--)

NB Authors should check the precise citation of such papers the style of reference of which varies according to year of publication, and similarly with references to Hansard for Parliamentary material.

Contributions in edited books should be cited as eg J Bloggs, 'Chapter title' (unitalicised and enclosed in single quotation marks) in J Doe and K Doe (eds) 'Book title' (Oxbridge University Press, 2010) followed by a comma and 'at p 123'.

Journals

Article titles, like the titles of contributors to edited books, should be in single quotation marks and not italicised. Common abbreviations of journals should be used

whenever possible, e.g.

J. Bloggs and J. Doe 'Title' [2010] Fam Law 200

However where the full name of a journal is used it should always be italicised.