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## Right to Protection<sup>1</sup>

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

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

### 3.1 INTRODUCTION

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

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

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

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

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

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

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

## 3.2 THE NORWEGIAN SYSTEM OF CHILD PROTECTION

### 3.2.1 RIGHTS AND THE NORWEGIAN SYSTEM

The present legislative basis for protecting children is the Child Welfare Act of 1992.<sup>3</sup> The legal reform introduced a child-centric type of protection, granting each child far more protection compared to previous legislation, which was more family- and parent-oriented.<sup>4</sup> The new legal code gave a higher priority to the protection of the integrity of each child, and thereby a type of individual protection that was more in line with a normatively rights-based child protection system, albeit one that was not formally rights-based. By 1992, it was admitted that children carried a special membership within the state and that the state needed to respond accordingly if the individual child were subjected to detrimental care.<sup>5</sup>

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

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

4. Ot.prp.no.44 (1991–1992):12.

5. Ot.prp.nr. 44 (1991–1992).

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

In 2012, the public discourse on the rights of the child had developed further, when many fundamental rights norms for children became embedded formally as the Norwegian constitution, *Grunnloven*, was amended. It came into effect in 2014.<sup>8</sup> The authors of the reform claimed the new bill of rights operationalized the most important articles of the CRC into a new constitutional rule: Section 104 provides:

Children have the right to respect for their human dignity. They have the right to be heard in questions that concern them, and due weight shall be attached to their views following their age and development.

For actions and decisions that affect children, the best interests of the child shall be a fundamental consideration.

Children have the right to protection of their integrity. The authorities of the state shall create conditions that facilitate the child's development, including ensuring that the child is provided with the necessary economic, social and health security, preferably within their own family.<sup>9</sup>

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

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6. Ot.prp.nr. 44 (2002–2003).

7. Ot.prp.nr. 44 (2002–2003).

8. Dokument 16 (2011–2012).

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

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

### 3.2.2 THE NORWEGIAN SYSTEM IN A COMPARATIVE CONTEXT

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

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

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10. Prop. 169 L (2016–2017).

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

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

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

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

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

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

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

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

### 3.2.3 SERVICES AND INTERVENTIONS BY THE NORWEGIAN CHILD PROTECTION SYSTEM<sup>11</sup>

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

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

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

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

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

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



**TABLE 3.2** Statistics on children and the child protection system

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

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

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

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

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

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

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

A care order may be made

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

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

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

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

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

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

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

Source: Central Unity of the County Boards, 2017.

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

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

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

|                           | 2009  | 2011  | 2013  | 2015  | 2017  |
|---------------------------|-------|-------|-------|-------|-------|
| <b>Emergency removals</b> | 1,019 | 1,331 | 1,609 | 1,555 | 1,343 |

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

### 3.3 THE CHILD PROTECTION ORGANIZATION AND ITS STAFF

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

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

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

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

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

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

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

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

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

The County Boards operate as courts, and have an independent position to decide in all serious interventions into the family including all cases involving coercion of some kind. There are 12 County Boards in Norway, geographically placed to cover all municipalities. The County Boards reach decisions according to the same fair trial principles that govern the regular courts, and solve disputes through negotiation meetings<sup>16</sup> Similar to regular courts, the County Boards are independent of the Ministry and the county governor, and a decision made by the board may be appealed and reviewed only by the courts. The Norwegian County Board is, therefore, an independent *court-like* administrative body, reaching independent decisions through negotiations within the board. The board is inquisitorial as it is responsible for both clarifications of matters of fact and decisions once the petition is delivered (Skivenes and Søvig 2016). One main reason for establishing the County Board through the CWA was to secure the rule of law so that each child and family are treated equally before the law, and according to that particular child and family's care situation (Skivenes 2002; Falch-Eriksen 2012).<sup>17</sup>

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

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

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

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

### 3.4 EQUALITY AND LIBERTY

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

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

### 3.4.1 BLIND SPOT I: THE CHALLENGE OF PLURALISM – THE CASE OF MIGRATION<sup>18</sup>

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

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

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

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



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

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

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

**TABLE 3.5** Facts and numbers for the immigrant and non-immigrant child (0–17 years) populations. Total number and per 1000, end of year<sup>19</sup>

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

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

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

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

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

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

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

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20. CRC, Art. 19.1.

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

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

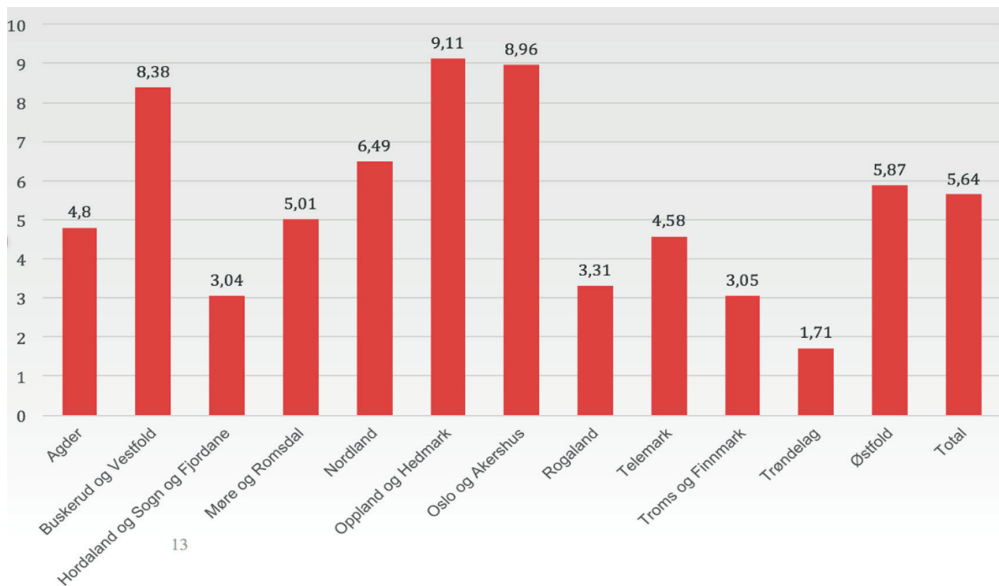
With each professional caseworker, a decision must simultaneously ascribe to the legal standards set by the delegated authority. Although a professional is autonomous, s/he must be held accountable for what type of action-norm s/he proceeds with. In this way, for any given care-context, a professional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

The Norwegian system of child protection is notoriously ill-equipped with national professional guidelines and instructions that would steer professional judgments, and particularly guidelines and instructions that are filtered through human rights standards. This is something the Committee on the Rights of the Child stresses as late as June 2018.<sup>21</sup> This does not mean that there is a lack of guidelines and instructions per se, but that they are not professional – they do not provide concrete instructions to assist professionals in reaching professional judgments. This, in turn, may result in variations in how rights- and legal criteria are interpreted within the space where professional practitioners use discretion.

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

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



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

Source: Central Unit of the County Boards.

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

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

### 3.4.3 BLIND SPOT III: EDUCATION AND BEST PRACTICE

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

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

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

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

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

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

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

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

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24. CRC Art. 3.1.

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

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

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

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

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



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

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

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

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

### 3.4.5 BLIND SPOT V: THE VOICE OF THE CHILD

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

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

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

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

### 3.5 CONCLUDING REMARKS

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

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

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

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