

Trude Haugli and **Mona Martnes** (Eds.)

PERSPECTIVES ON CHILDREN, RIGHTS, AND VULNERABILITY

Perspectives on Children, Rights, and Vulnerability

Trude Haugli and Mona Martnes (Eds.)

Perspectives on Children, Rights, and Vulnerability

Scandinavian University Press

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This book is published with financial support by

The Publishing Fund at UiT – The Arctic University of Norway
Faculty of Law, UiT – The Arctic University of Norway
Research Council of Norway, under the project Children's Right to Health, 300973 Fripro

Printed edition (print on demand): ISBN 978-82-15-06951-7

Electronic PDF edition: ISBN 978-82-15-06950-0

DOI: 10.18261/9788215069500-25

Cover: PHi Business Solutions Ltd.

Prepress: PHi Business Solutions Ltd.

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Preface

In June 2022 the Child Law Research Group, at the Law Faculty (UiT – The Arctic University of Norway), arranged a workshop under the title “Rethinking Vulnerability within a Children’s Rights Approach”. The participants were child law researchers from north-western European countries. All contributed with their different perspectives on children, vulnerability, rights, and capacity, and the result is this book. The planning for the workshop started in the middle of the COVID-19 lockdown. When choosing to gather a small group of experts, instead of holding an open conference, there were obviously practical issues to consider, such as the fact that we did not know whether we would be allowed to meet in person. Although it might have been useful with an even wider representation, from the Global South and East as well, we believe this book offers important perspectives in understanding and further developing children’s rights. The aim is to obtain insight into how vulnerability as an underlying norm and logic for children’s rights is understood and how this can affect the safeguarding of rights.

Inspired by the theories of Professor Martha A. Fineman, in this volume we wanted to go deeper into theories about vulnerability and explore the connection between vulnerability and children’s rights. Fineman has previously mentored some of the authors in this volume, and others have cooperated with her. In addition, all the authors relate in diverse ways to her research and theory.

The idea for this book originates from a research project, Children’s Right to Health (ChildRight), funded by the Research Council of Norway.¹ That project investigates how various legal instruments contribute to safeguarding the right of the child to the enjoyment of the highest attainable standard of health (UN Convention on the Rights of the Child Art. 24) in its widest sense. One aim of the ChildRight project is to contribute to the development of theoretical foundations for children’s rights and, more particularly, to develop a theoretical model on how to understand children’s rights in health law from a Nordic welfare state perspective. The ChildRight project covers several topics which are dealt with in other publications. A central theme is the balancing between participation and

1 Project code 300973.

protection. In this context, the view on children as a specifically vulnerable group is highly relevant.

During the workshop, the saying “the path is made in the walking” was used. Path dependency is a theory in which one preferably follows well-trodden paths. In this book, we sought to avoid this. We wanted to challenge old ideas and interpretations and ask new questions. How well we succeeded with this may be best judged by the readers; however, we do think we have at least walked along some new paths, and perhaps some old ones have been broadened a little. Still, some paths are made because they are the only suitable place to tread. They may weave between cliffs and marshes. Although they cannot easily be moved, they can sometimes be improved – possibly by a bridge. The same could be said for vulnerability and children’s rights.

We would like to thank the Research Council of Norway, the Publishing Fund at UiT – The Arctic University of Norway, and the Faculty of Law, UiT, for financial support. We are also grateful for the administrative support from the Law Faculty, and especially to Lise Myrvang for helping with arrangements for the workshop. Master’s student Klara Bugge Kaspersen performed an impressive and valuable job as assistant in the final phase of the project – thank you so much. The positive experience with cooperating with the Scandinavian University Press, represented by editors Camilla Mevik and Ida Almestad and the manuscript coordinator Hedda Barratt-Due, also deserves special mention. Finally, we would like to express our gratitude to all the contributors to this book. It has been a privilege and a great pleasure to get to know you and to work with all of you. And a special thanks to Ton Liefaard for creating such a good summary of our last day at the workshop.

Tromsø, January 2025

Trude Haugli and Mona Martnes



Abbreviations

CRC	United Nations Convention on the Rights of the Child
CRIA	Children's Rights Impact Assessment
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GC	General Comment
HR	Høyesterett (Supreme Court of Norway)
Int	International
J	Journal
L	Legal
NGO	Non-governmental organisation
Rep	Report(s)
Rt Norsk Retstidende	(periodical publishing Norwegian Supreme Court rulings)
UN	United Nations
WHO	World Health Organization

PREPARATORY WORK, LEGISLATION

NOU	Official Norwegian Reports
Ot. Prop.	Draft resolution
Prop. L.	Draft resolution
Innst.	Recommendation from the parliamentary committee
Innst. L.	Recommendation from the parliamentary committee
Meld. St.	White paper



1. Vulnerability and Children's Rights

Trude Haugli and Mona Martnes

Abstract The main topic discussed in this volume is whether vulnerability theories bring any added value to children's rights discourses. A child-rights-based approach is based on an understanding of children as specifically vulnerable. Yet, such a conception of children's vulnerability has increasingly been called into question. The new dimension is that this is now being discussed from a legal perspective. In this chapter, we introduce several vulnerability paradigms and present subsequent chapters in the book.

Keywords children | rights | vulnerability | legal perspectives

1.1 INTRODUCTION

Children's rights and legal status have been the subject of discussion for decades.¹ Children are often considered a specifically vulnerable group, dependent on adults and in need of protection. As Lundy states, "Children's vulnerability is one of life's givens – at least in the eyes of adults".² Analysis of children's rights is often based on general assumptions about vulnerability and dependency and how this affects their rights and capacity: "Vulnerability is deeply entwined in the justification for and history of human rights".³

Children's rights are regularly discussed without any thorough analysis of what it means to be vulnerable, why and in what way children might be vulnerable, and

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- 1 See, for instance, Michael Freeman, *Magna Carta for Children? Rethinking Children's Rights* (Cambridge: Cambridge University Press, 2020), 13–18; Jens M. Scherpe and Stephen Gilmore, *Family Matters, Essays in Honour of John Eekelaar* (London: Intersentia, 2022), 1–27.
 - 2 Laura Lundy, "Vulnerability Should Not Eclipse Agency: Children's Perspectives on Their Own Lives," in *Perspectives on Children, Rights and Vulnerability*, eds. Trude Haugli and Mona Martnes (Oslo: Scandinavian University Press, 2025), chapter 2.
 - 3 E. Kay M. Tisdall and Fiona Morrisson, "Vulnerability under COVID-19: Children's Human Rights under Lockdown," in *Perspectives on Children, Rights and Vulnerability*, eds. Trude Haugli and Mona Martnes (Oslo: Scandinavian University Press, 2025) chapter 5, last page.

whether or how this differs from the vulnerability of adults.⁴ Highlighting vulnerability without any such analysis risks leading to paternalistic interpretations of children's rights or ignoring other strengths, characteristics, and individual differences among children. It might also lead to questioning the relationship between images of the vulnerable child and those of the autonomous child.

This book examines and analyses assumptions about children's vulnerability from a northwestern European perspective. A common characteristic for most of the countries in northwestern Europe is a strong welfare state. The European perspective thus distinguishes itself from the United States. The legal understanding of children's rights and vulnerability will probably differ from perspectives from the Global South and East.

In the following chapters, different perspectives on children's rights, vulnerability, and capacity are presented, assessed, and discussed. The aim is to obtain insight into how vulnerability as an underlying norm and logic for children's rights is understood and exerts influence on rights and how this can affect the safeguarding of rights.⁵ Reynaert et al. write that critique can be "understood as a practice of questioning and analysing presuppositions underlying practices in the broad field of children's rights" and that such a critical approach means that basic assumptions fundamental to children's rights are not considered as "truths".⁶ Hence their attempt to "understand and interpret different social construction of children's rights, bringing into dialogue these different understandings and interpretations in order to comprehend better children's rights and how the children's rights framework can contribute to a greater respect for children".⁷ With different perspectives on vulnerability as a basis for critical reflections, the intention with this book is to contribute to new understandings on children and their rights.

The conception of children's vulnerability has increasingly been called into question.⁸ A view on children as specifically vulnerable might share similarities

4 Michael Freeman, *Magna Carta for Children?*, 64.

5 Didier Reynaert, Maria Bouverne-De Bieb and Stijn Vandeveld, "Between 'Believers' and 'Opponents': Critical Discussions on Children's Rights," *The International Journal of Children's Rights*, no. 20 (2012): 155–168, 166.

6 Didier Reynaert et al., "Between 'Believers' and 'Opponents,'" 155–168, 156.

7 Didier Reynaert et al., "Between 'Believers' and 'Opponents,'" 155–168, 156.

8 Jonathan Herring, *Vulnerability, Childhood and the Law* (Oxford: Springer, 2018); Jonathan Herring, "Vulnerability and Children's Rights," *International Journal for the Semiotics of Law*, vol. 36 (November 2022): 1509–1527; Lucinda Ferguson, "The Jurisprudence of Making Decisions Affecting Children: An Argument to Prefer Duty to Children's rights and Welfare," in *Law in Society: Reflections on Children, Family, Culture and Philosophy: Essays in Honour of Michael Freeman*, eds. Alison Diduck, Noam Peleg and Helen Reece (Leiden: Brill Nijhoff, 2015), 141–189.

with how other groups believed to lack sufficient capacity, independence, or resources are described as particularly vulnerable. Martha A. Fineman challenges such a view where a vulnerable population or group “operates as a proxy for need and dependency and renders those within it susceptible to monitoring and supervision” and offers an alternative theory.⁹ Fineman sees vulnerability as “inherent in the human condition”; this leads to a need for a responsive state “built around the recognition of the vulnerable subject”.¹⁰ Fineman’s theory reflects her background as an American law and society scholar working with critical legal theory and feminist jurisprudence. Influenced by her thoughts, this book is an attempt to go deeper into the connection between children’s rights and vulnerability within a northwestern European context and from a children’s rights viewpoint.

Our analysis is based on a variety of methods and perspectives. Several chapters are built on empirical studies, including interviews with children, online surveys, research on and with children, and interviews of professionals working with children. Some chapters adopt a traditional doctrinal character, while others take on a more theoretical or critical approach. Some use vulnerability theories to form critical reflections on a traditional rights-based view of vulnerability. Others are more positive about seeing children as a particularly vulnerable group and advocate for children’s rights based on this understanding. Most of the chapters are based on a variety of research methods.

This book addresses a range of fundamental questions about children’s rights and vulnerability. One crucial question is whether and how vulnerability theory provides added value to the understanding of children’s rights. Another question is whether children in general should be described as specifically vulnerable, or if there are any risks with this view. Related to this, a question also arises about whether certain groups of children are more vulnerable than others. These groups may include migrant children, children with disabilities or health issues, or children of different ages or with different identities and/or genders. And further, what are the risks of not being defined as vulnerable?

A deeper understanding of these questions may contribute to the safeguarding of children’s rights.

9 Martha Albertson Fineman, “Beyond Identities: The Limits of an Antidiscrimination Approach to Equality,” *Boston University Law Review*, vol. 92(6) (December 2012): 1713–1770, 1748.

10 Martha Albertson Fineman, “Equality, Autonomy, and the Vulnerable Subject in Law and Politics”, in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, eds. Martha Albertson Fineman and Anna Grear (New York: Taylor & Francis, 2013), 13–27, 13.

1.2 THE UN CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

The CRC was adopted by the UN General Assembly in 1989 and is regarded worldwide as an extremely important instrument in advancing the legal position of children. The fact that the CRC has been almost universally ratified – the United States being an exception – lends the Convention moral and legal strength. The indivisibility and interdependence of all rights give the CRC a genuine and comprehensive child rights approach. Article 1 of the CRC defines children as “every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier”. Thus, the Convention, and the rights within it, encompasses a broad group in divergent situations and phases of childhood, and with unique needs. Still, the reference to children as all under 18 years old reflects the view that it is necessary to have special rights to this broad and divergent group. General human rights might not suffice to safeguard their needs.

The research front is closely and inextricably connected to the CRC.¹¹ Still, the necessity of further developing the theoretical understanding of children’s rights is worth investigating, reflecting on, and rethinking.

The comprehensive character of the CRC and its worldwide scope have some weaknesses. Like all international legal agreements that are reached by consensus, the CRC can be characterised as an “incompletely theorized agreement”.¹² This has led to discussions and different views on the underlying values, principles, and character of children’s rights.¹³ The conceptual foundation and moral justification of children’s rights are often linked to the notion of human dignity

11 Michael Freeman, *A Magna Carta for Children?*; Jaap E. Doek, “The Human Rights of Children: An Introduction,” in *International Human Rights of Children*, eds. Ursula Kilkelly and Ton Liefwaard (Springer, 2019), 3–29; Alexandra Timmer, Moritz Baumgärtel, Louis Kotzé and Lieneke Slingenberg, “The Potential and Pitfalls of the Vulnerability Concept for Human Rights,” *Netherlands Quarterly of Human Rights*, vol. 39(3) (September 2021): 190–197; J.H.H.M. Dorscheidt, J.E. Doek, ed., *Children’s Rights in Health Care* (Leiden: Brill Nijhoff, 2019); J.E. Doek, “Children’s Rights in Health Care and the General Principles of the CRC,” in *Children’s Right to Health Care*, eds. J.H.H.M Dorscheidt, and J.E Doek (Leiden: Brill Nijhoff 2019), 48–70.

12 John Tobin, “Justifying Children’s Rights,” *The International Journal of Children’s Rights*, vol. 21 (2013): 395–441, 395; Cass R. Sunstein, “Practical Reason and Incompletely Theorized Agreements,” *Current Legal Problems*, vol. 51(1) (December 1998): 267–298; Rosalind Dixon and Martha C. Nussbaum, “Children’s Rights and a Capabilities Approach: The Question of Special Priority,” *Cornell Law Review*, vol. 97(3) (2012): 549–593, 549.

13 J.E. Doek, “Children’s Rights in Health Care”; Michael Freeman, *A Magna Carta for Children?*

and vulnerability.¹⁴ However, the most innovative change brought about by the CRC was the inclusion of participation rights in an attempt to uphold autonomy, which can be seen as an important factor of human dignity. This shift in the view on children from being merely vulnerable and dependent to being autonomous is central to recognising children as rights holders.

Reynaert explains how both “the childhood image of the incompetent child and the autonomous child were embedded” in the CRC, “translated as protection and participation rights.”¹⁵ Furthermore, we would add that the image of the vulnerable child, also embedded in the Convention, adds another dimension to the incompetent child with protection rights. Vulnerability seems to cover more than just lack of competence.

The CRC Committee first mentions “vulnerability” in General Comment no. 2. First, it is explained how children, compared to adults, are “particularly vulnerable to human rights violations” because their opinions are rarely taken into account, they have no vote or access to political process, and they lack access to justice.¹⁶ Second, the concept describes children believed to belong to the most vulnerable and disadvantaged groups, such as children in care or detention; minority and indigenous groups; children with disabilities or living in poverty; refugee, migrant, and street children; and children with special needs in areas such as culture, language, health, and education.¹⁷ Although the focus mainly seems to be on the second comment, this two-dimensional concept of vulnerability can also be retrieved in other General Comments.¹⁸

14 Jürgen Habermas, “The Concept of Human Dignity and the Realistic Utopia of Human Rights,” *Metaphilosophy*, vol. 41(4) (July 2010): 465–480; David Archard, *Children: Rights and Childhood* (London: Routledge, 2004); Conor O’Mahony, “There Is No Such Thing as a Right to Dignity,” *International Journal of Constitutional Law*, vol. 10(2) (June 2012): 551–574, Randi Sigurdson, “Children’s Right to Respect for Their Human Dignity,” in *Children’s Constitutional Rights in the Nordic Countries*, eds. Trude Haugli, Anna Nylund, Randi Sigurdson and Lena R.L. Bendiksen (Leiden: Brill Nijhoff, 2020), 19–36.

15 Didier Reynaert, Maria Bouverne-De Bieb and Stijn Vandeveld, “Between ‘Believers’ and ‘Opponents’: Critical Discussions on Children’s Rights,” *The International Journal of Children’s Rights*, no. 20 (2012): 155–168, 158.

16 UN Committee on the Rights of the Child, *General Comment no. 2 (2002) The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child*, CRC/GC/2002/2, (November 15, 2002), para. 5.

17 CRC/GC/2002/2, para. 15.

18 UN Committee on the Rights of the Child, *General Comment no. 3 (2003) HIV/AIDS and the Rights of the Child*, CRC/GC/2003/3 (March 17, 2003); UN Committee on the Rights of the Child, *General Comment no. 4 (2003) Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, CRC/GC/2003/4 (July 1, 2003); UN Committee on the Rights of the Child, *General Comment no. 14 (2013) On the Rights of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, para. 1)*, CRC/C/GC/14 (May 29, 2013); UN Committee on the Rights of the Child, *General Comment no. 25 (2021) On Children’s Rights in Relation to the Digital Environment*, CRC/C/GC/25 (March 2, 2021).

What seems clear is that the term “vulnerability”, when used by the CRC Committee, is not only a question of lack of competence – it affects the very reason that children have their own human rights. In addition, vulnerability is often a question of children in difficult situations, children at risk of discrimination, and children at higher risk of having their rights violated than others (be they adults or other children), perhaps when an intersectionality lens could have been more useful. The “vulnerable child” as understood by the CRC Committee often seems to be the “discriminated child”.

1.3 UNIVERSAL, SOCIETAL, AND INDIVIDUAL VULNERABILITY

1.3.1 Universal Vulnerability Theory

“Without vulnerability, there would be no need for healthcare, or law, or ethics.”¹⁹

The legal theorist Martha A. Fineman has developed the concept of the vulnerable subject in which “to be human is to be vulnerable.”²⁰ This entails looking at all humans – not just particular groups, such as children – as vulnerable. Her theory is an alternative to the liberal theory of rights and seeks to replace “the rational man of liberal thought” with the vulnerable subject.²¹ Fineman’s theory is founded on a different perspective on vulnerability than that on which the CRC seems to build.

In vulnerability theory, the body is asserted as a universal concept, and this is where theory should begin.²² By beginning with the body, its inevitable dependency is exposed.²³ Fineman has stated:

We are vulnerable. Our vulnerability arises from the material and ephemeral nature of the body itself and is constant throughout life. Vulnerability is also universal—it is the human condition. Vulnerability, therefore, is not a characteristic of only some individuals or groups, nor does it differ in quality or degree from

19 Mary Neal, “The Idea of Vulnerability in Healthcare Law and Ethics: From the Margins to the Mainstream,” in *Embracing Vulnerability: The Challenges and Implications for Law*, eds. Jonathan Herring and Daniel Bedford (Routledge, 2020), 91–113, 91.

20 Martha A. Fineman, “Reasoning from the Body: Universal Vulnerability and Social Justice,” in *A Jurisprudence of the Body*, eds. Chris Dietz, Mitchell Travis and Michael Thomson (Palgrave Socio-Legal Studies, 2020), 17–34, 19.

21 Martha A. Fineman, “Vulnerability and Social Justice,” *Valparaiso University Law Review*, vol. 53(2) (Winter 2019): 341–370, 342.

22 Fineman, “Reasoning from the Body,” 17–34, 18.

23 Fineman, “Reasoning from the Body,” 17–34, 18.

one individual or group to another. We are all always vulnerable—there is no position of invulnerability.²⁴

By this, Fineman's legal subject ("the imagined, ordinary being around whom law and policy are formed") is different from the traditional liberal subject, who is autonomous, independent, and self-sufficient.²⁵ At the individual level, we are positioned differently, and Fineman expresses that human vulnerability is also particular: "it is experienced uniquely by each of us and this experience is greatly influenced by the quality and quantity of recourses we possess or can command".²⁶

Fineman argues that states would be more responsive to the realities of people if the vulnerable-subject approach were adopted.²⁷ Still, according to Fineman, "the foundational difference between the manner in which equality is understood in the United States and how it is understood in much of the rest of the world arises from the recognition and acceptance in other countries that human need and vulnerability are not only an individual responsibility but also a state responsibility".²⁸

In the Nordic welfare state model, the state, in accordance with human rights standards, takes more responsibility for the vulnerability of its citizens than in the United States. However, it is arguable that this responsibility is only partial and is sometimes only superficial. In the Nordic states, vulnerability can be denied in a similar way to that described by *Kilkelly* and *Tisdall/Morrison* in their chapters from Ireland and Scotland.²⁹ From a Nordic perspective, *Martnes* asserts that the education regulation in Norway does not seem to build on and accept that all humans are vulnerable and that children have a fundamental need for caring relationships.³⁰ *Moldenæs* also questions the situation for asylum-seeking children in this matter.³¹

24 Fineman, "Reasoning from the Body," 17–34, 21.

25 Fineman, "Reasoning from the Body," 17–34, 19.

26 Martha A. Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law and Feminism*, vol. 20(1) (2008): 1–18, 10.

27 Martha A. Fineman, "Beyond Identities: The Limits of an Antidiscrimination Approach to Equality," *Boston University Law Review*, vol. 92(6) (December 2012): 1713–1719.

28 Fineman, "Beyond Identities," 1713–1719.

29 Ursula Kilkelly, "Vulnerability Denied: The Rights of Children in Conflict with the Law," in *Perspectives on Children, Rights and Vulnerability*, eds. Trude Haugli and Mona Martnes (Oslo: Scandinavian University Press, 2025), chapter 7.

30 Mona Martnes, "The Caring Role of the School: A Discussion on the Relationship between Care, the Rights of the Child, and the School," in *Perspectives on Children, Rights and Vulnerability*, eds. Trude Haugli and Mona Martnes (Oslo: Scandinavian University Press, 2025), chapter 6.

31 Fredrikke Fjellberg Moldenæs, "Vulnerability and Discrimination: The State's Responsibility towards Asylum-Seeking Children's Right to Health and Care to Prevent Discrimination against Children," in *Perspectives on Children, Rights and Vulnerability*, eds. Trude Haugli and Mona Martnes (Oslo: Scandinavian University Press, 2025), chapter 8.

1.3.2 Societal and Individual Vulnerability

Views on the concept and theories of vulnerability vary. As previously noted, it is commonly emphasised that children are more vulnerable compared to adults. Such views can be seen as focusing on individual vulnerability, characterising children as holders of a particular and inherent vulnerability due to their age, immaturity, and dependency. However, as discussed extensively in this book, the vulnerability of children is often more a result of societal factors than children's inherent characteristics, which indicates that society may create structural inequality which is then characterised as vulnerability.

The inequality that children or groups of children experience is produced and reproduced by society and its institutions. And, as Fineman states, “neither inequalities nor the systems that produce them are inevitable, they can also be object of reform”.³²

The ECtHR frequently addresses vulnerability in a rather concrete way in its discussions of whether there has been a violation of the human rights of the applicant. If the court finds that the applicant has been living under especially vulnerable conditions or could be characterised as especially vulnerable, this leads to a closer scrutiny of the states and leaves the state a narrower margin of appreciation.³³ In its practice, however, it seems that the court has not been influenced by the theories of the universal vulnerability of humans, even if it could be argued that human rights law has no invulnerable subjects. However, in this volume, the practice of the ECtHR is not the focus of the discussions, and we only refer to other sources for further reading.³⁴

In this book, there is a divergence between whether being labelled as belonging to a vulnerable or especially vulnerable group stigmatises or marginalises a person or whether, on the contrary, being vulnerable is an argument for strengthening the human rights of that person. This divergence, however, might be the result of different understandings and perspectives on vulnerability.

32 Martha A. Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition,” *Yale Journal of Law and Feminism*, vol. 20(1) (2008): 1–18, 5.

33 The European Court of Human Rights, *Handyside v. The United Kingdom*, judgment of December 7, 1976, section 48–49.

34 Corina Heri, *Responsive Human Rights: Vulnerability, Ill-Treatment and the ECtHR* (Modern Studies in European Law) (Oxford: Hart Publishing, 2021) Retrieved May 19, 2023 from <http://dx.doi.org/10.5040/9781509941261>; Alexandra Timmer, “A Quiet Revolution: Vulnerability in the European Court of Human Rights,” in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, eds. Martha Albertson Fineman and Anna Grear (Ashgate Publishing, 2013), 147–170.

According to *Tisdall and Morrison*, few people wish to claim to belong to the category of vulnerable groups.³⁵ Similarly, based on decades of research on and with children, *Lundy* presumes that if children were to make an alternative conceptualisation of childhood – a new child-authored paradigm – they would probably not focus on their vulnerability.³⁶ This might indicate that common understandings of vulnerability, and especially of individual vulnerability used to describe particular groups, are seen as adverse. In *Herring's* chapter based on a different understanding on vulnerability, vulnerability is seen as a positive universal phenomenon that should be embraced.³⁷

Timmer et al. (2021) assess the potential and pitfalls of the concept of vulnerability, though not explicitly in relation to children's rights.³⁸ Still, their discussion is of relevance to ours. According to Timmer et al.:

The obvious risk of the concept of vulnerability is that it stigmatises and stereotypes those who are held vulnerable. In everyday use, “vulnerability” is mostly seen as something that makes you weak, as something to be avoided. The key problem with designating only specific categories of people as vulnerable in law and policy is that it “reinforces and valorizes” the ideal of the liberal subject who is conceived of as autonomous and independent. Vulnerable persons are then seen as deviant, as the exception to the norm.³⁹

They further note that this is “closely linked to an attitude of paternalism, whereby vulnerability is equated with the need for greater protection, not so much empowerment or participation.”⁴⁰ This pitfall indicates that when the CRC Committee defines some groups of children as especially vulnerable, there is a risk of further stigmatising these groups.

Another problem with the traditional paradigm on defining some individuals or groups as especially vulnerable is that it can veil the role of society and its institutions. *Moldenæs* argues that by stating that some children are more vulnerable than others, we are in danger not only of losing sight of the reasons for their vulnerability but also of only focusing on the child's characteristics rather than the

35 Tisdall and Morrison, “Vulnerability under COVID-19,” chapter 5.

36 Lundy, “Vulnerability Should Not Eclipse Agency,” chapter 2.

37 Jonathan Herring, “Vulnerability, Childhood and the Definition of Health,” in *Perspectives on Children, Rights and Vulnerability*, eds. Trude Haugli and Mona Martnes (Oslo: Scandinavian University Press, 2025), chapter 3.

38 Alexandra Timmer et al., “The Potential and Pitfalls,” 190–197.

39 Alexandra Timmer et al., “The Potential and Pitfalls,” 190–197, 194 et seq.

40 Alexandra Timmer et al., “The Potential and Pitfalls,” 190–197, 195.

broader context of the situation or the community the child should be a part of.⁴¹ While considering how vulnerability played out in policy responses to COVID-19 in Scotland, *Tisdall and Morrison* find that minimal data were gathered on children affected by domestic abuse.⁴² This highlights the risk of the vulnerabilities of children being subsumed into a general vulnerability category, so that their rights were overlooked or further marginalised. *Lundy* argues that categorising children in particular as vulnerable can render them even more vulnerable.⁴³ Still, she holds, vulnerability theories that focus on universal vulnerability, which classifies all as vulnerable, pose the risk that children once again are deprived of the dedicated attention that was denied for so long and that a children's rights approach mandates for. Thus, there seem to be risks of focusing on vulnerability, but also risks of ignoring or denying vulnerability. This is evident in *Kilkelly's* chapter.⁴⁴ *Kilkelly* argues that a rights-based approach to children in the justice system, including in detention, requires an appreciation of children's vulnerability if these children are to enjoy protection of their rights.⁴⁵ *Moldenæs*, too, while showing how unaccompanied minor asylum-seeking children above the age of 15 are treated differently from younger children, can be read in light of *Kilkelly's* chapter on vulnerability denied.⁴⁶

The connection between ensuring rights and vulnerability is evident in several chapters. *Aasen* states that although vulnerability is a common aspect of the human condition, individual and social factors may indicate that some people are particularly vulnerable to human rights violations.⁴⁷ In similar manners, *Sandberg* emphasises the double vulnerability of children: that children are particularly vulnerable to the effects of climate change and that their dependence on adults creates an additional vulnerability.⁴⁸ She holds that children's rights are a response to the inherent vulnerability of children and the various vulnerable situations(s) they may find themselves in. Still, there is no guarantee that these rights are ensured,

41 Moldenæs, "Vulnerability and Discrimination," chapter 8.

42 Tisdall and Morrison, "Vulnerability under COVID-19," chapter 5.

43 Lundy, "Vulnerability Should Not Eclipse Agency," chapter 2.

44 Kilkelly, "Vulnerability Denied," chapter 7.

45 Kilkelly, "Vulnerability Denied," chapter 7.

46 Moldenæs, "Vulnerability and Discrimination," chapter 8.

47 Henriette Sinding Aasen, "The Right of Children to Make Healthcare Decisions – Balancing Vulnerability and Capability in Norwegian Law," in *Perspectives on Children, Rights and Vulnerability*, eds. Trude Haugli and Mona Martnes (Oslo: Scandinavian University Press, 2025), chapter 11.

48 Kirsten Sandberg, "Children's Access to Justice in Climate Matters: The Role of Vulnerability," in *Perspectives on Children, Rights and Vulnerability*, eds. Trude Haugli and Mona Martnes (Oslo: Scandinavian University Press, 2025), chapter 10.

which is illustrated by *Tisdall and Morrison*.⁴⁹ They find that vulnerability did not offer the protection of children's rights that we might have anticipated during the pandemic.

Hakalehto argues that children's special vulnerability is more often connected to the deficient implementation of their rights in general than to them belonging to a certain group labelled as vulnerable.⁵⁰ *Martnes* poses a corresponding question in her chapter on the relationship between care, the rights of the child, and schools.⁵¹ She argues that a caring school, built on an acceptance of vulnerability as a universal human condition, is necessary for the fulfilment of children's rights. *Herring* goes further and suggests not only that vulnerability is at the heart of the human condition⁵², but also that it should be greatly welcomed and that our mutual vulnerability requires us to reach out to offer and receive help.

In one way or another, most of the authors recognise children as especially vulnerable, that they can be more profoundly vulnerable, and in different ways, than adults. However, there is a widespread understanding that vulnerability is almost a characteristic of childhood, rather than created by the system and structures of society. *Stoecklin* discusses how traditional social representations of childhood turn children into especially vulnerable beings in need of protection.⁵³ *Köhler-Olsen* argues that a focus on the societal structures and institutions in which the child grows up recognises that the child is held in a vulnerable position, rather than defining the child as being "vulnerable" as such.⁵⁴ *Rap* states that vulnerability from a children's rights perspective should be seen as a temporal state, caused by external circumstances, rather than a static inherent characteristic.⁵⁵ In a similar manner, *Lundy* suggests that children are not inevitably vulnerable, but that adults' perceptions can operate to render them vulnerable.⁵⁶ Equally, *Daly* finds

49 Tisdall and Morrison, "Vulnerability under COVID-19," chapter 5.

50 Suvianna Hakalehto, "From Problem Talk to Taking Action – Implementing the Rights of Vulnerable Children," in *Perspectives on Children, Rights and Vulnerability*, eds. Trude Haugli and Mona Martnes (Oslo: Scandinavian University Press, 2025), chapter 9.

51 Martnes, "The Caring Role of the School," 87–102.

52 Herring, "Vulnerability, Childhood," 37–50.

53 Daniel Stoecklin, "The Transactional Horizons of Child Vulnerability," in *Perspectives on Children, Rights and Vulnerability*, eds. Trude Haugli and Mona Martnes (Oslo: Scandinavian University Press, 2025), chapter 14.

54 Julia Köhler-Olsen, "Combating Vulnerabilities – the CRC's Role in Children's Social Well-Being and Right to Health," in *Perspectives on Children, Rights and Vulnerability*, eds. Trude Haugli and Mona Martnes (Oslo: Scandinavian University Press, 2025), chapter 4.

55 Sephanie Rap, "Vulnerability and Child Participation: A Reflection on the Involvement of Refugee Children in Asylum Procedures," in *Perspectives on Children, Rights and Vulnerability*, eds. Trude Haugli and Mona Martnes (Oslo: Scandinavian University Press, 2025), chapter 13.

56 Lundy, "Vulnerability Should Not Eclipse Agency," chapter 2.

that professionals working with children are operating in systems that frequently provide them with little space, time, and training for them to engage with children in a way that facilitates them to increase children's competence.⁵⁷ Failing to support children's competence makes children more vulnerable in systems where children already are lacking in power, as in criminal proceedings and medical questions. *Kilkelly* also holds that the justice system deepens the vulnerability of children in conflict with the law.⁵⁸ *Tisdall and Morrison* find that our systems and structures may ameliorate or increase inequalities, support, undermine, or ignore human rights, making certain individuals and groups of people more vulnerable than others.⁵⁹ *Herring* too agrees that there are different levels of vulnerability and believes that some of the dependencies of childhood are created by society.⁶⁰ It is the way our society is structured that disadvantages children.

Recognising society's role emphasises the need for state response. *Köhlner-Olsen* underpins the state's legal obligation to implement policies that combat structural dimensions of vulnerability detrimental to the child's social well-being and right to health.⁶¹ However, it is problematic that institutions, legislation, and policy are built without participation from children. As mentioned by *Sandberg* and *Stoecklin*, children are denied the right to vote.⁶² There is a lack of agency in many aspects of their life, for instance, in schools and migrant cases (*Hakalehto, Martnes, Moldenæs, and Rap*).⁶³ As *Tisdall and Morrison* state, children need to be included as social actors, not only dependent on adults, to address children's vulnerability and ensure their human rights.⁶⁴ The societal response to children's vulnerability should be with children.

57 Aoife Daly, "Rethinking Children's Competence through Children's Rights: Giving Professionals Space for Supporting Children," in *Perspectives on Children, Rights and Vulnerability*, eds. Trude Haugli and Mona Martnes (Oslo: Scandinavian University Press, 2025), chapter 12.

58 Kilkelly, "Vulnerability Denied," 105–118.

59 Tisdall and Morrison, "Vulnerability under COVID-19," chapter 5.

60 Herring, "Vulnerability, Childhood," chapter 3.

61 Köhler-Olsen, "Combating Vulnerabilities," chapter 4.

62 Sandberg, "Children's Access to Justice" chapter 10; Stoecklin, "The Transactional Horizons," chapter 14.

63 Hakalehto, "From Problem Talk to Taking Action," chapter 9; Martnes, "The Caring Role of the School," chapter 6; Moldenæs, "Vulnerability and Discrimination," chapter 8; Rap, "Vulnerability and Child Participation," chapter 13.

64 Tisdall and Morrison, "Vulnerability under COVID-19," chapter 5.

1.4 THE FURTHER CONTENT OF THIS BOOK

In Chapter 2, “Vulnerability Should Not Eclipse Agency: Children’s Perspectives on Their Own Lives”, *Laura Lundy* offers an alternative approach to understanding vulnerability from a children’s human rights perspective and grounded in children’s own understandings and experiences.⁶⁵ She suggests that children are not inevitably vulnerable, but that adults’ perceptions can operate to render them vulnerable and/or undermine the enjoyment of their human rights. She also questions whether an approach that conceptualises adults and child alike as vulnerable might impact children differently and disproportionately, removing a dedicated gaze on their rights and interests, reinforcing existing paternalistic responses to children, and undermining their ability to shape and inform their own lives.

Exploring the concept of childhood health through the lens of universal vulnerability and relational theory, *Jonathan Herring* offers an alternative approach, but from a totally different angle than Lundy.⁶⁶ In Chapter 3, “Vulnerability, Childhood, and the Definition of Health”, he illustrates the highly individualised and idealised nature of definitions of health. He argues that once we see childhood through the lens of universal vulnerability theory, the boundaries between adults and children collapse.

Introducing the 10 dimensions of vulnerability hindering the experience of health, *Julia Köhler-Olsen* discusses in Chapter 4, “Combating Vulnerabilities – the CRC’s Role in Children’s Social Well-Being and Right to Health”, to which extent state policies must address these dimensions of vulnerability due to their legal obligation under the CRC.⁶⁷ By including the right to non-discrimination and equality, the CRC provides legal mechanisms that bind states to implement policies that combat structural dimensions of vulnerability detrimental to the child’s social well-being and right to health. Compared to Herring, she has a different understanding both on health and vulnerability.

In Chapter 5, “Vulnerability under COVID-19: Children’s Human Rights under Lockdown”, *Kay M. Tisdall and Fiona Morrison* address both Fineman and Herring in a discussion on structural vulnerability and show how the academic discussion goes in different directions.⁶⁸ The COVID-19 pandemic has shown how vulnerable we are, individually, collectively, and globally. The pandemic caught many Global North countries by surprise, unused to such widespread and pervasive disaster. Despite Scotland’s commitment to children’s human rights, state responses show

65 Lundy, “Vulnerability Should Not Eclipse Agency,” chapter 2.

66 Herring, “Vulnerability, Childhood,” chapter 3.

67 Köhler-Olsen, “Combating Vulnerabilities,” chapter 4.

68 Tisdall and Morrison, “Vulnerability under COVID-19,” chapter 5.

the precarity of children's human rights under the pressures of responding to the pandemic and the vulnerability of considering the full range of children's rights to protection, provision, and participation.

By building on Fineman and Herring, *Mona Martnes*, in Chapter 6, "The Caring Role of the School: A Discussion on the Relationship Between Care, the Rights of the Child, and the School", explores the definition of care and discusses which role the school should have in caring for children.⁶⁹ She further explores whether a lack of care might be a problem for protection and fulfilment of the rights of the child in the CRC.

In Chapter 7, "Vulnerability Denied: The Rights of Children in Conflict with the Law", *Ursula Kilkelly* shows how the CRC recognises the rights of all children, including children in conflict with the law, who are entitled to age-appropriate treatment and respect for their dignity and right to reintegration into society.⁷⁰ Despite these standards, many states ignore the special vulnerability of these children, who often suffer poor individual, family, and community circumstances that are compounded by punitive responses that focus on their behaviour rather than their needs. Chapter 7 presents the view that rights-based responses to children in conflict with the law, which focus on rather than deny the vulnerability of these children, find greater support in the research. This chapter builds a bridge towards discrimination.

In Chapter 8, "Vulnerability and Discrimination: The State's Responsibility towards Asylum-Seeking Children's Right to Health and Care to Prevent Discrimination of Children", *Fredrikke Fjellberg Moldenæs* investigates whether the caregiving for unaccompanied asylum-seeking children between 15 and 18 years of age in Norway represents a breach of the rights set forth in the Convention on the Right of the Child, especially the right to health and caregiving, and whether it constitutes discrimination against these children.⁷¹

In Chapter 9, "From Problem Talk to Taking Action – Implementing the Rights of Vulnerable Children", *Suvianna Hakalehto* presents the recent findings on the health and well-being of Finnish schoolchildren who belong to certain vulnerable groups.⁷² She further discusses the responsibilities of the state to act to realise the rights of these children. As far as children's rights in general lack effective implementation, it is difficult to define what it means to give special attention to realising the rights of the vulnerable groups.

69 Martnes, "The Caring Role of the School," chapter 6.

70 Kilkelly, "Vulnerability Denied," chapter 7.

71 Moldenæs, "Vulnerability and Discrimination," chapter 8.

72 Hakalehto, "From Problem Talk to Taking Action," chapter 9.

In Chapter 10, “Children’s Access to Justice in Climate Matters: The Role of Vulnerability”, *Kirsten Sandberg* holds that children and young people are particularly vulnerable to the effects of climate change and that their rights are strongly affected. However, children do not have the right to vote and thus have no formal say.⁷³ To compensate for this added vulnerability and hold the state accountable for their rights, they should have a right to take decisions regarding the climate to a complaint-mechanism or the courts. Chapter 10 explores children’s limited access to justice in the light of theories of vulnerability and legal empowerment.

Henriette Sinding Aasen, in Chapter 11, “The Right of Children to Make Healthcare Decisions – Balancing Vulnerability and Capability in Norwegian Law”, analyses how the Norwegian regulation of children’s right to make decisions in the health field reflects the challenge of balancing competing perspectives of protection and children’s right to autonomy and privacy.⁷⁴ International and constitutional human rights law as well as theoretical perspectives on vulnerability and capability provide frameworks for the analysis of provisions in the Norwegian Patient and User’s Rights Act on the rights of children below 16 years to make decisions without parental involvement.

Following several chapters focusing on discrimination, in Chapter 12, “Rethinking Children’s Competence through Children’s Rights: Giving Professionals Space for Supporting Children”, *Aoife Daly* brings the discussion back to agency.⁷⁵ Like Lundy, Daly holds that children’s competence is fundamental to their rights but little understood. The CRC emphasises the right of children to be supported in the exercise of their capacities. Failing to support competence, it is argued, serves to make children more vulnerable in systems where they are already lacking in power.

The question of agency is also central in Chapter 13, “Vulnerability and Child Participation: A Reflection on the Involvement of Refugee Children in Asylum Procedures”. *Stephanie Rap* notes that the concept of vulnerability is often inherently tied to children, who are in development and therefore not fully matured.⁷⁶ When regarding vulnerability from a children’s rights perspective, it becomes clear that it should be seen as a temporal state, caused by external circumstances, rather than a static and inherent characteristic. The child’s right to participation provides children with a vehicle to overcome the vulnerable situation they might find themselves in. The power imbalance between adults and children, and the fact that procedures are not adapted to the age and level of maturity of the child, can lead

73 Sandberg, “Children’s Access to Justice,” chapter 10.

74 Aasen, “The Right of Children to Make Healthcare Decisions,” chapter 11.

75 Daly, “Rethinking Children’s Competence,” chapter 12.

76 Rap, “Vulnerability and Child Participation,” chapter 13.

to refugee children being in a particularly vulnerable situation when applying for asylum.

In Chapter 14, “The Transactional Horizons of Child Vulnerability”, *Daniel Stoecklin* discusses vulnerability from a *sociological* perspective. He argues that vulnerability is bound to social arrangements.⁷⁷ Children’s moving social positions depend on their reactions to these mostly adult-driven arrangements. This is illustrated in the chapter with observations from two major social crises: the COVID-19 pandemic and climate change. Children respond to these major crises differently; however, they do so with innovative strategies. Their agency and “modes of action” are analysed along the theory of “transactional horizons”, conducive to better inclusion of children’s rights in participatory public policies.

In the concluding chapter, “Vulnerability as an Underlying Norm for Children’s Rights: Conclusions and Further Outlook”, the editors reflect on the question of whether theories of vulnerability and the different ways of understanding this phenomenon bring added value to the discussions on children and children’s rights.⁷⁸

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77 Stoecklin, “The Transactional Horizons,” chapter 14.

78 Trude Haugli and Mona Martnes, “Vulnerability as an Underlying Norm for Children’s Rights. Conclusions and Further Outlook,” in *Perspectives on Children, Rights and Vulnerability*, eds. Trude Haugli and Mona Martnes (Oslo: Scandinavian University Press, 2025), chapter 15.

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2. Vulnerability Should Not Eclipse Agency: Children’s Perspectives on Their Own Lives

Laura Lundy

Abstract Drawing on research with children, this chapter suggests that children are not inevitably vulnerable, but that adults’ perceptions of that – often different from children’s own – can work to render them vulnerable and/or undermine their enjoyment of their human rights. It also questions whether an approach that conceptualises both adults and children as vulnerable might impact children differently and disproportionately, displacing the dedicated gaze on children’s rights and interests, reinforcing existing paternalistic responses to children, and undermining their ability to shape and inform their own lives.

Keywords children | rights | participation | vulnerability

2.1 INTRODUCTION

Children’s vulnerability is one of life’s givens – at least in the eyes of adults. I begin every one of my Master’s classes in children’s rights by asking my students to identify what it is that they think distinguishes children from adults, posing the question: “How are children and adults different?” Year after year, one of the top answers is that children are more vulnerable than adults. I have also asked the same question to children many times, and not once has a child said that the major difference is that children are more vulnerable than adults. This might be expected, since “vulnerability” is not a word that is usually part of children’s vocabulary, but nor do they identify the key features of vulnerability, such as susceptibility to harm. Just as adults define children in a deficit, children, in return, do the same to adults. In fact, they often feel sorry for adults on account of, *inter alia*, our worries, work, responsibilities, ageing bodies, closeness to death, and apparent lack of time to play and have fun.

In this chapter, I will explore the relationship between vulnerability and children’s rights further, with a particular focus on children’s own perceptions of their

risks of harm. I begin by tracking its role in international child rights law historically, from being a primary impetus in the origin of children's rights (translating into a plethora of "protection" rights) to its current articulations within a modern children's human rights legal framework, and in particular the way in which it has engendered a steady and ongoing stream of scholarly discussion on its relationship with children's autonomy (or so-called "participation" rights).¹ This debate has been aired many times, and one conclusion, rightly, is that we cannot protect children if we do not listen to them.² However, it remains a fact that adults continue to make decisions for children without engaging them, and, based on a body of co-produced research with diverse children in a range of social and geographical contexts, I suggest that the more vulnerable the child, the more likely this is to happen. To shed further light on how this plays out in practice, from the hitherto neglected aspect of children's own perspectives, I draw on data from a range of studies in which we captured children's perspectives on their own lives, focusing on situations where adults categorised the children, for different reasons, as vulnerable. All of these studies, bar one, were conducted using a children's-rights-based approach to research (CRBA), working with children as co-researchers. The chapter concludes by reflecting on the impact of the perception of childhood vulnerability on children's enjoyment of their human rights and questions whether classifying everyone – adult and child alike – as vulnerable might impact children differently and disproportionately, reinforcing existing paternalistic responses to children, undermining their ability to inform and shape their own lives, and thus creating what could be described as a perverse and unintended outcome – enhanced childhood vulnerability.

2.2 VULNERABILITY AND AUTONOMY (A.K.A. PROTECTION AND PARTICIPATION)

Recognition of children's vulnerability is the golden thread that runs through children's rights law. The impetus for the child rights movement that emerged almost one hundred years ago was based on the recognition of children's vulnerability to harm: the response of Eglantine Jebb and others to the suffering of

1 See, for example, Aoife Daly, *Children, Autonomy and the Courts: Beyond the Right to Be Heard* (Leiden: Brill Nijhoff, 2018).

2 See, for example, Camille Warrington and Cath Larkins, "Children at the Centre of Safety: Challenging the False Juxtaposition of Protection and Participation," *Journal of Children's Services*, vol. 14(3) (October 2019): 133–142.

children post-WWI was to “save” the children.³ Indeed, the preamble to the 1924 Declaration on the Rights of the Child states that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”. Moreover, the text of the 1924 Declaration is a testament to a range of childhood vulnerabilities, its text laden with well-intentioned paternalism: “the child that is hungry must be fed, the child that is sick must be nursed, the child that is backward must be helped, the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succoured.”⁴ That stance was continued into the 1959 Declaration on the Rights of the Child, underscoring a perception of childhood vulnerability that formed the bedrock of and springboard to the CRC.⁵

It is notable, yet rarely noted, that the CRC was negotiated and drafted by adults for children. Michael Freeman was one of the first to capture one of its key ironies: The legal instrument that gives children the right to be heard in all matters affecting them was drafted without them having any meaningful input into it.⁶ It is, in essence, an adult’s vision of what children need. As discussed at the outset of the chapter, when asked about childhood, most adults’ instinctive response is that children are vulnerable and in need of protection. It is not surprising then that, reflecting its ancestors, the CRC is laden start to finish with provisions that are designed to protect children from harm. Its preamble paints a picture of childhood vulnerability, asserting that “childhood is entitled to special care and assistance” and affirming that “in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration”. There is a plethora of articles dedicated to protecting children. Article 19, which covers all forms of violence and neglect, is the most comprehensive, but there is also a series of provisions protecting all children from specific harms (illicit transfer, traditional practices prejudicial to health, drugs, sexual exploitation) or specific children from general harms (refugees, children with disabilities, children deprived of their liberty). Furthermore, this is supplemented by two additional

3 W. Kerber-Ganse, “Eglantyne Jebb – A Pioneer of the Convention on the Rights of the Child,” *The International Journal of Children’s Rights*, vol. 23(2) (2015): 272–282. Zoe Moody, “Transnational Treaties on Children’s Rights: Norm Building and Circulation in the Twentieth Century,” in *Children’s Rights*, eds. Ursula Kilkelly and Laura Lundy, (Routledge, 2017), 37–50.

4 League of Nations, *Declaration on the Rights of the Child*, (Geneva: League of Nations, 1924).

5 Zoe Moody, “The United Nations Declaration of the Rights of the Child (1959): Genesis, Transformation and Dissemination of a Treaty (Re)Constituting a Transnational Cause,” *Prospects*, vol. 45(1) (2015): 15–29.

6 Michael Freeman, “The Future of Children’s Rights,” *Children & Society*, vol. 14(4) (2000): 277–293, 282.

protocols that expand on the protections for children who may be vulnerable to sale and exploitation and those in armed conflict. In fact, it is fair to say that the Convention, like its ancestors, is predicated on an assumption that all children are vulnerable and that certain children are especially vulnerable, or vulnerable in specific ways.

Even so, there is also no question that the CRC marked a turning point in children's human rights discourse. For the first time, children were recognised as the subject of rights, not only entitled to (almost) the full spectrum of civil and political rights, but also afforded a unique and additional entitlement – the right to have their views sought and given due weight in Article 12 of the CRC. It seems likely that this unique human right may also have been generated from an understanding that was influenced – possibly sub-consciously, but at least in part – by an assumption around children's vulnerability, in this case emanating from their lack of autonomy. Can there be anything that would make a person feel more vulnerable than depending completely on others to make the major decisions in their own lives? Later in the chapter, I discuss the connection between dependency and vulnerability further. However, at this point, it is worth emphasising that the decision to include the child's right to have their views given due weight in Article 12 reflects an understanding that, to afford dignity, equality, and respect for their worth as human beings, children should be given opportunities to shape and influence the decisions that affect them.⁷

Many claims have been made about the significance and innovation of this one Article, yet Article 12 remains not just one of the most widely cited but least understood of all the CRC provisions; it also remains one of the least implemented.⁸ Based on data from children and adults, in a study for the first Children's Commissioner in Northern Ireland, I suggested that part of the problem with its implementation was that it was abbreviated to terms such as “voice of the child”, a dilution that fails to capture the full extent of the obligation and therefore undermines obligation.⁹ Over 17 years later, and in spite of much progress, in some cases strides, to improve children's enjoyment of this right, research across the world continues to confirm that in most cases, children's views are not sought and/or are not taken seriously in the decisions affecting them as children and adolescents. The fact that adults continue to find compelling reasons not to give children's views

7 Michael Freeman, “Why It Remains Important to Take Children's Rights Seriously,” *The International Journal of Children's Rights*, vol. 15(1) (2007): 5–23.

8 Laura Lundy, “‘Voice’ Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child,” *British Educational Research Journal* vol. 33(6) (2007): 927–942.

9 Ibid.

due weight strengthens the case for the discourse to be firmly located within the framework of children's rights.¹⁰ That resistance to engaging with children remains the case today in many instances, as does my call for recognition that it is not "the gift of adults" – it is an entitlement.¹¹ Yet, the old adage of "adults know best" is alive and well in many different contexts and cultures, with education, health, and child protection decision-making arguably heading the paternalistic pile. One irony here (and there are so very many in children's rights) is that children were given this right by adults, in part due to a recognition of the vulnerability generated by their lack of autonomy, yet it is then adults who control and, in many instances, deny the enjoyment of the right, often justifying this with reference to children's vulnerability. An additional irony is that children are usually absent from these discussions. In the section which follows, I take the opportunity afforded by this volume of chapters to explore children's own experiences of what adults would classify as "vulnerability".

2.3 CHILDREN'S VIEWS ON THEIR "VULNERABILITY" OR RISK OF HARM

As mentioned at the beginning of the chapter, I have never heard a child define themselves or other children using the adjective "vulnerable", although I have carried out many studies, working with children as co-researchers, capturing the experiences of diverse groups of children, often classified by adults as especially vulnerable, that have attempted to capture their views and experiences of actual and potential harm. In the discussion that follows, I want to highlight some examples of this from children's own perspectives rather than that of the many adults who would automatically deem these children to be "vulnerable". It is striking that almost all the academic discussion on children's vulnerability, particularly but not exclusively led by legal academics, has been undertaken without any attempt to engage with children themselves. The need to include children's own perspectives in discussion on childhood vulnerability was previously identified by John Tobin, who in his exploration of the relationship between children's rights and vulnerability, albeit also undertaken without children's input or engagement with their perspectives, nonetheless recognises that the effect of Article 12 is that it demands "a reorientation of the historical tendency for children's vulnerabilities

10 Laura Lundy, "In Defence of Tokenism? Implementing Children's Right to Participate in Collective Decision-Making," *Childhood*, vol. 25(3) (2018): 340–354.

11 Laura Lundy. "Voice," 927–942.

to be defined and addressed exclusively from the perspective of adults”.¹² In the following sections, I have chosen to draw on a body of research with children, conducted with children as co-researchers along with my colleagues at the Centre for Children’s Rights at Queen’s University Belfast, that captures children’s own perspectives on what causes them harm, contrasting this with the perceptions of the adults who are influential in their lives. This dissonance, between what children and adults perceive in relation to children’s vulnerability to harm, forms an empirical basis to further explore the relationship between childhood vulnerability and children’s rights.

2.3.1 “The Yellow Bus”

My understanding of child participation (now known widely as the Lundy model) was shaped by a study conducted in 2003–4 for the Northern Ireland Commissioner for Children and Young People.¹³ It was where I learnt that there was so much that children thought about their lives that differed from adults’ understanding and perceptions.¹⁴ However, one piece of data stood out. It was a drawing of a yellow school bus with the caption “the banana bus”, “the custard bus” and the statement “we are embarrassed on that bus. We hide under the seats.” The image was drawn by children attending a school for students with moderate learning difficulties. In Northern Ireland, they are (unfortunately still) the only children who go to school on a bus that is painted yellow. When the education authority was asked why that was the case, the adults in the transport service emphasised that it was to keep the children safe: the bus was painted bright yellow so that other road users would know that the children had learning difficulties and drivers would proceed cautiously around it. So, this decision was taken by adults as a direct consequence

12 John Tobin, “Understanding Children’s Rights: A Vision beyond Vulnerability,” *Nordic Journal of International Law* vol. 84(2) (2015): 155–182, 180.

13 Ursula Kilkelly, R. Kilpatrick, L. Lundy, L. Moore, L. Scraton, P. Davey, C. Dwyer, & S. McAlister, *Children’s Rights in Northern Ireland* (Belfast: NICCY, 2004).

14 This study gave rise to the Lundy model and, in turn, to a reflection on our own research processes. This is the only study cited that did not involve children as co-researchers. In the wake of this study, we began to reflect on how we could produce data in ways that were child-rights compliant. We proposed a model of child-rights-based research, a core aspect of which is working with children as co-researchers. All of the studies cited, other than this, adopt this approach. See Laura Lundy and L. McEvoy, “Childhood, the United Nations Convention on the Rights of the Child, and Research: What Constitutes a ‘Rights-Based’ Approach?,” *Law and Childhood Studies: Current Legal Issues Volume 14*, ed. Michael Freeman (Oxford University press, 2012), 75–91; Laura Lundy and L. McEvoy, “Children’s Rights and Research Processes: Assisting Children to (In)Formed Views,” *Childhood*, vol. 19(1) (2012): 129–144.

of the adults' perception of the children's vulnerability. It was also taken without any consultation with children. The reality is that the risk to the children disembarking is minimal – the bus goes right to their door of their home and a chaperone will accompany children until they are safely in the presence of their parents/guardians. But the impact of this vulnerability-driven decision is profound: from children's perspective, it does not keep them safe. The distinctive colour of the bus causes them harm since it exposes them to stigma, shame, and bullying. This one piece of data, and this study generally, was for me a professional Rubicon. Had we not spoken to these children about the issues that mattered to them in their lives, I would not have questioned, and in fact may have approved and applauded, the fact that the bus was painted bright yellow to keep these "vulnerable" children safe from traffic danger. Moreover, this study marked the beginning of an academic journey that has since focused on creating the space to capture and understand the unique perspectives of children who are routinely deemed "vulnerable" by adults.

2.3.2 Online Dangers for Children with Disabilities

Children with disabilities are widely understood to be some of the most vulnerable children of all. There is, for example, a huge body of research that shows that they are more likely than other children to be abused.¹⁵ A 2019 study of children with disabilities in the digital environment, commissioned by the Council of Europe, explored children's own perspectives on their experiences online.¹⁶ A common theme in the data from children with different types of disabilities was that they were all restricted from engaging in the digital environment because their parents had adopted a common understanding that they were at enhanced risk of harm, including from bullying and sexual grooming. The latter was rejected by many of the children. In fact, the co-researchers in our children's research advisory group of children with hearing impairments said that they had been so warned and alerted to the dangers of the online world that "we are the safest children on the planet". The group of children with disabilities who were subject to most restrictions by parents/guardians were those with learning disabilities. They were, almost invariably, not online at all, as their parents were so concerned that they would be targets

15 Kirsten Stalker, and Katherine McArthur, "Child Abuse, Child Protection and Disabled Children: A Review of Recent Research," *Child Abuse Review*, vol. 21(1) (2012): 24–40; Janet Njelesani, "A Child Who Is Hidden Has No Rights': Responses to Violence Against Children With Disabilities," *Child Abuse & Neglect*, vol. 89 (2019): 58–69.

16 Laura Lundy, Bronagh Byrne, Michelle Templeton, and Gerison Lansdown, *Two Clicks Forward, and One Click Back: Report on Children with Disabilities in the Digital Environment* (Council of Europe, 2019).

for bullying, for example. However, one girl told us: “I am not online, but I am online”. By that, she meant that other girls in her school were saying mean things about her on social media, and she attributed that to the fact that she was more likely to be bullied because she was not online to check and respond. This example is not offered to suggest that she and other children with disabilities are not vulnerable to online bullying and other harms. Research confirms that they are.¹⁷ However, the approach taken by her parents without her input or awareness of her lived experiences created a different, albeit unintended, harmful consequence.

2.3.3 Children Human Rights Defenders

This research took the form of a global consultation with children human rights defenders – children who are acting for their own rights or the rights of others.¹⁸ These children report verbal and physical abuse in their activities and are aware that it puts them in danger, often in ways that would not happen to adults. They do not see themselves as “vulnerable”, and they would not fit any public perception of that. They are confident, articulate, and brave. Their concern is not the abuse that they might encounter – they are aware of it and are prepared to take the risks that go with that. However, the reality is that children are seen as so vulnerable as a group that many states have minimum age requirements that do not let them form or join an association, organise a peaceful assembly, etc., thus breaching their human rights.¹⁹ Moreover, what these children want is not a classification of vulnerability but a recognition of their entitlement and capacity to exercise their civil and political rights through positive steps to enable them to act safely as human rights defenders and/or to seek redress when they experience harm. In this instance, a widespread perception that children are too vulnerable to be involved in human rights activism severely restricts them or shuts them out of the most basic of all human rights – the right to claim them. The consequence of that, too, can be construed as enhancing their vulnerability, leaving them unable to highlight or directly seek redress for a breach of their human rights, including the

17 Sumera Saleem, Naurin Farooq Khan, Saad Zafar, and Najla Raza, “Systematic Literature Reviews in Cyberbullying/Cyber Harassment: A Tertiary Study,” *Technology in Society*, vol. 70 (2022): 102055.

18 Laura Lundy and M. Templeton, *Children Human Rights Defenders: The Views and Perspectives of Children* (Geneva: Child Rights Connect, 2018).

19 Laura Lundy, *The Rights of Child Human Rights Defenders: Implementation Guide* (Geneva: Child Rights Connect, 2020).

many entitlements in the CRC to be protected from harm identified above.²⁰ What children want is supportive adults, not usurping ones who prohibit their exercise of their rights due to their perceived vulnerability.²¹

2.3.4 Life under Coronavirus

The final study of children's perspectives draws on the views and experiences of children captured during the early stages of the COVID-19 pandemic. This study, in partnership with Terres des Hommes and the UN Secretary General's Special Representative on Violence against Children, captured the views and experiences of over 27,000 children in 135 countries.²² This example bucks the trend, however. Children at this stage of the pandemic were largely perceived as "invulnerable" to the worst effects of COVID-19 compared to adults. Indeed, they were often portrayed as a danger to others (as the "virus vectors"). Decisions were once again made about them without them. In the study, children warned of the adverse impacts of lockdown time and time again – highlighting outcomes that would only much later be recognised and addressed by governments. The response to children during the pandemic also provides insights into children's supposed "vulnerability" or lack of it, since the interests of adults took precedence and children's widely recognised vulnerability was suddenly not high on the agenda. Our conclusion was that "children's rights, including their right to have their views sought and given due weight, are not a dispensable luxury but an indispensable entitlement."²³ But, if anything, the findings of this study can also explain why a vulnerability discourse might play out differently for children. They were easily ignored and silenced even in countries with otherwise good track records of involving children in public decision-making. There is no question that this refusal to engage with children meant that their concerns were not heard and that this in turn caused many children profound and avoidable harms, the most serious of which undoubtedly stems from the extended closure of schools. In contrast to governments, one 15-year-old

20 Nico Brando and Laura Lundy, "Discrimination and Children's Civil and Political Rights," *Harvard Human Rights Journal*, 35(2) (2022).

21 Karen Orr, Lesley Emerson, Laura Lundy, Lucy Royal-Dawson, and Erika Jimenez, *Enabling the Exercise of Civil and Political Rights: The Views of Children* (Save the Children International, 2016).

22 The #CovidUnder19 initiative reports are available here: <https://www.tdh.ch/en/projects/covidunder19> (last accessed 19 October 2024).

23 Laura Lundy, B. Byrne, K. Lloyd, M. Templeton, N. Brando, M. Corr, S. McAlister, E. Heard, L. Holland, E. Symington, and L. H. V. Wright, "Life Under Coronavirus: Children's Views on Their Experiences of Their Human Rights," *The International Journal of Children's Rights*, vol. 29(2) (2021): 261–285.

girl in the study had a clear understanding as to the connection between vulnerability and the right to be heard during the pandemic. Her advice to government was as follows:

Talk to children themselves and ask them what they need. The government needs to remember that there are many vulnerable children out there that need to be listened to. The government should not assume what children need but ask them. A child's right to be listened to is crucial at the moment. (girl, 15, UK)

These studies with children in diverse contexts and with diverse “vulnerabilities” provide examples of instances where children's perspectives on their own vulnerability and/or their views on how it should be addressed do not align with the adult decision-makers in their lives. Of course, this is not always the case – there are many instances where children and adults have the same understandings of the risks and responses. There are also many areas where research demonstrates that children are indeed vulnerable and that their vulnerability is enhanced because of their age. However, in each of these cases, adult perceptions of children's vulnerability and a concomitant failure to engage with them have resulted in decisions that have rendered the children even more vulnerable, often to harms that adults did not or could not anticipate. In the section that follows, I draw on these experiences – “vulnerable” children's own understanding of “vulnerability” – a perspective often absent from the scholarship, particularly legal scholarship, on both children's human rights and vulnerability theory, to reflect on the role that “vulnerability” can and should play in practice and academic discourse on children's rights.

2.4 WHAT ROLE FOR VULNERABILITY IN CHILDREN'S RIGHTS DISCOURSE?

We have a conundrum. There is little question that children are more vulnerable to most harms and that the impact of those harms may affect them disproportionately compared to adults. There are decades of research demonstrating this in almost every context of children's lives. A current example is the impact of climate change, which is widely recognised to have disproportionate adverse impact on children and their rights.²⁴ While acknowledging this, it also needs to

24 United Nations General Assembly: Human Rights Council, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, A/HRC/37/58 (February–March 2018).

be recognised that one of the major ways in which children are left vulnerable to harm is the fact that they are often not considered competent to make decisions in their own interests and have most decisions not only made for them but made without their input. Based on children's lived experiences described above, it is arguable that this act of exclusion and denial of autonomy and agency is not just a harm in itself (and, of course, a breach of their human rights) but also potentially a way of creating or enhancing vulnerability. Thus, I suggest that the almost universal perception of childhood vulnerability, closely linked to adult perceptions of children's immaturity and incompetence in decision-making, generates a perverse effect: categorising children as vulnerable in itself can render them even more vulnerable. Moreover, the more vulnerable the child, the more likely it is that they will be excluded from involvement in the decisions that impact on them with adults readily taking decisions for them, purportedly in their best interests.

The case for recognising everyone, adult and child alike, as "vulnerable" as a means of addressing the evident shortcomings in, inter alia, a human rights-based approach has been cogently argued by eminent legal scholars, including Professor Martha Fineman²⁵ generally and Professor Jonathan Herring with specific reference to childhood.²⁶ While their approaches differ (see Herring in Chapter 3), the case they make is cogent. This chapter is not offered as a critique of or indeed a response to vulnerability theory. My focus is on the role of vulnerability within children's human rights law and its implementation in practice. My intention is to draw on a body of empirical evidence with children to demonstrate that any approach to law and policy that focuses primarily or exclusively on a conception of universal human vulnerability may not play out in practice for children's realisation of their human rights in the same way for children as it will for adults. Some of the questions that a focus on childhood vulnerability raises for me include whether some humans (children) will still be seen as more vulnerable than others; whether a focus on vulnerability can attend to and adequately address the social

25 At this point, I wish to acknowledge my friend and mentor, the inimitable Professor Martha Fineman. I would simply not be writing this chapter or have come up with the Lundy model but for her influence and guidance. When we met, I was happily pursuing an academic career as a legal academic focusing largely on doctrinal analysis of domestic education law. She urged me (gently, in retrospect) to think conceptually. In my naivety, I had not even realised this was an option. She happened to be in Belfast at the time the first data came back from the children in the NICCY study. I remember looking at it with Martha and Professor Barbara Bennet Woodhouse. Observing their reactions to the raw data confirmed for me that this was a turning point – my Rubicon. At Martha's suggestion, I began to think beyond the legal text of Article 12, drawing on the empirical data to think conceptually. The result was a conceptualisation of Article 12 – space, voice, audience, and influence, now widely called the Lundy model.

26 Jonathan Herring, *Vulnerability, Childhood and the Law* (Oxford: Springer, 2018.)

fact that adults generally get to make decisions in their own lives in ways that children do not; and whether these two factors combined will mean that an approach that conceptualises children as vulnerable, as opposed to one that emphasises their capacity and entitlement to influence their own lives, will have a disproportionate adverse impact on children who will continue to have decisions made for them without them, with more of the types of unanticipated or unintended consequences that children described in the studies discussed in the previous section.

Of course, addressing this is not insurmountable in any of the established frameworks, whether that is a children's human-rights-based approach or, indeed, within vulnerability theory. However, it requires paying specific attention to the particularity of childhood and in particular the widespread acceptance of enhanced vulnerability and the realities of how decisions are made in children's lives. Within human-rights-based approaches, despite some progress, there is no question that this remains an ongoing struggle. There is widespread recognition that rights to participation and to protection are linked. However, this tends to be presented unidirectionally – we cannot ensure children's protection without participation. The experience of decades of child abuse across every continent underlines this; it is now well recognised that we need to listen to children to keep them safe. And yet, most often we do not in fact do this, and we most definitely do not do this when children are especially vulnerable to harm, for example in conflicts, natural disasters, or pandemics, or where they are perceived as more vulnerable due to their status as migrants, as children in detention, or because they have a disability. Paradoxically, children who have in fact suffered the most harm are also often excluded from decision-making with adults concerned that engaging them in decisions about their own lives will in itself cause harm; for example, it will “retraumatise” them.²⁷ It is striking that few would suggest that adults who have suffered harm cannot choose to speak to their own experience (or not).

Thus, I suggest that a source of childhood vulnerability is not just their size, maturity, or lack of experience but also their dependence on adults to make decisions on their behalf (due, *inter alia*, to their size, maturity, lack of experience, etc.). This plays out in several ways. The first, and arguably worst, is in an abuse of power with children neglected, exploited, and/ or maltreated – the very reason why the panoply of protections is included in the CRC. The second is in what has always been paternalistic decision-making that is intended to promote child welfare. Decades of research indicate that well-meaning adults will do this without

27 Mary Mitchell, Laura Lundy, and Louise Hill, “Children's Human Rights to ‘Participation’ and ‘Protection’: Rethinking the Relationship Using Barnahus as a Case Example,” *Child Abuse Review*, vol. 32(6) (2023):e2820.

any attempt to involve children. Our research, always with children, tells us that this very approach is one of the things that can render or enhance children's susceptibility to harm. And finally, one manifestation of this vulnerability that has received little attention to date is the fact that, when children are not asked their views and offer them unbidden to those upon whom they depend, and are thus perceived to be challenging adult authority, they can also be rendered vulnerable. Children frequently report being victims of rebuke or, worse, reprisal when they express their views on their own lives without being invited to do so. This response cuts across culture and context (with many cultures having a saying akin to "children should be seen and not heard"). Moreover, aggressive – including violent – responses are at their most marked when children are at their most assertive – acting as human rights defenders and calling out breaches of their human rights. Children human rights defenders "may experience stigmatization and resistance, including violence, when defending human rights, just because they are children and perceived by some to be breaking social and cultural traditions that expect them to be passive and to leave advocacy to adults. Adverse reactions can be exacerbated because of the child's gender, disability, race, language, religion, ethnic and social origin".²⁸ As discussed earlier, this mismatch between children's perceived vulnerability and their confident assertion of their rights attracts repression, which creates fresh vulnerability. As I write this chapter, the world is looking on in horror at the repression and violence meted out to children and young people, especially girls, protesting state violence in Iran or the denial of education in Afghanistan.

An outstanding issue to address is whether children might benefit if there were to be a universal understanding of and approach to human vulnerability. Research, including my own, does not suggest that children and adults are equally or perhaps similarly vulnerable, and it is also not certain that conceptualising them as such will necessarily be of benefit to children. There is a danger that a vulnerability paradigm "may provoke protectionist agendas that are difficult to reconcile with the evolving capacity and child participation paradigms that underpin the CRC", as suggested by John Tobin.²⁹ The studies I describe above underscore this. Children's vulnerability can be distinguished from that of most adults by the scope and depth of their dependency on adults to make decisions for them. As evidenced above, that dependency in itself can create further

28 Laura Lundy, *The Rights of Child Human Rights Defenders: Implementation Guide* (Geneva: Child Rights Connect, 2020), 16.

29 John Tobin, "Understanding Children's Rights: A Vision Beyond Vulnerability," *Nordic Journal of International Law*, vol. 84(2) (2015): 155–182, 175.

vulnerability, including the often unintended harms that stem from a failure to engage with their views and experiences.

Tobin suggests that the key distinction between adults' and children's vulnerability is children's susceptibility to both endogenous and exogenous harm: "Although international human rights treaties accept that all human beings are vulnerable to exogenous harm, the CRC assumes that children are vulnerable to the risk of self-inflicted or endogenous harm *and* that adults must take measures to protect children against this risk". What this perhaps does not fully capture is the fact that children's exogenous harm is often created by adults (some of whom who are trying to address what they perceive to be children's endogenous harm). He gives a range of scenarios, including that of a child running out into a road to get a football ("A young child may only see the ball on the road whereas an older person will (hopefully) see the oncoming car").³⁰ In this example, the child is not mature enough to understand the danger and should be protected by adults, presumably by not being allowed to play ball near the road. However, if children were asked about this, they would most likely identify the harm as endogenous – the harm is not the result of their immaturity but the fact that traffic is allowed to speed in an area where children are playing. The children's preferred solution would likely be to create safe spaces for children to play, including in front of their own homes. However, we generally do not ask children and instead prioritise the perceived needs of adult car users. My point is that children playing with a ball are not *per se* vulnerable (to endogenous harm). They have been made vulnerable – *vulnerabilised* – by urban planning decisions from which they have been excluded and over which they have no political clout. Engaging with them to learn of their needs and solutions would likely render them less vulnerable to traffic danger.

Any approach that seeks to protect and provide for children's vulnerability, in law, policy, or practice, whether that is a human rights or other paradigm, must be one which fully acknowledges that childhood and adult vulnerability is not the same due to children's distinctive lack of autonomy and enables children to participate meaningfully in the decisions affecting them. In this regard, Katherine Federle's take on the relationship between vulnerability and a children's rights framework is compelling. She suggests that "Rethinking the construct of 'children' through the lens of rights would enable us to see the ways in which we have disempowered and harmed children" and then argues that "If, however, vulnerability is another way of acknowledging powerlessness, then it may further children's

30 Ibid. 165.

rights discourses”.³¹ In her analysis, vulnerability is a lens to expose children’s lack of power. For me, that lack of power is founded in and manifests itself through children’s dependency. Thus, when approached from a children’s rights perspective, an important response to childhood vulnerability should begin with and be grounded in Article 12(1) of the UN Convention on the Rights of the Child, which is the recognised human rights attempt to compensate for children’s lack of autonomy and dependency on adults, both as individuals and as a group.

A different concern I raise here, but do not have evidence for, is whether children could lose out in other ways if all humans, adults and children, are seen to be similarly vulnerable. One question that this poses for me is whether children would lose out from the lack of a dedicated gaze, especially in research. The childhood sociology movement has spent decades building the case that children need to be considered in their own right. Previously, children were largely invisible in social policy, hidden within family units or twinned with the needs of their mothers, with significant adverse consequences for their distinctive needs and rights.³² To classify all as vulnerable poses the risk that children once again are deprived of the dedicated attention that was denied them for so long and that a children’s rights approach mandates. For a start, it is unclear whether it would in fact undermine one of the distinctive and bedrock principles of children’s human rights – that in all actions affecting children, their best interests are a primary consideration.³³ While the best-interests principle is much critiqued, there is little question that it plays an important role in ensuring that children’s distinctive interests and needs are not only considered but prioritised.³⁴ That principle, accepted and embedded in law across the world, exists for a reason – children not only need special attention (as do some other adult groups), but are often denied it in the decisions that are *made for them by others* – a condition that is not exclusive to childhood, but is a predominant characteristic of it. A universal conception of vulnerability could blur, erase, or minimise this, a consequence that many, including myself, would consider retrogressive. While some would argue that a universal vulnerability approach would capture this, centuries of suffering and exclusion, the hallmark of which has been children’s exploitation and subservience to the needs of adults, suggest otherwise.

31 K. H. Federle, “Do Rights Still Flow Downhill?” *The International Journal of Children’s Rights*, vol. 25(2) (2017): 273–284.

32 Berry Mayall, “The Sociology of Childhood in Relation to Children’s Rights,” *The International Journal of Children’s Rights*, vol. 8 (2000): 243.

33 Article 3 of the CRC.

34 John Eekelaar, “Do Parents Know Best?” *The International Journal of Children’s Rights*, vol. 28(3) (2020): 613–631.

2.5 CONCLUSION

Children's human rights are and have always been founded on adults' perceptions of their enhanced vulnerability to harm. Indeed, vulnerability was the primary motivation for giving children bespoke rights. Over time, this has evolved to include recognition of children's entitlement to autonomy and self-determination, with the most comprehensive of the international children's rights treaties – the CRC – underscoring children's right to have their views sought and given due weight, both individually and as a group. My conclusion, drawing on a body of research capturing children's own experiences, is that whatever the chosen paradigm or conceptual frame, in medical, educational, or social decision-making as elsewhere, vulnerability should not eclipse agency. An understanding of children's capacity for and entitlement to influence the decisions that affect them is fundamental to any approach that seeks to provide for those who are or may be "vulnerable". The more vulnerable the child, the more important it is that active steps are taken to provide them with space, voice, audience, and influence – meaningful opportunities to influence the decisions that impact on their lives.³⁵ Moreover – and this is also often underplayed – the more opportunity they have to act, the more competent, less dependent, and therefore less vulnerable they will be. Thus, it might be argued not only that vulnerability should not eclipse agency, but that enhancing children's agency (protected and enhanced through robust implementation of Article 12) will in turn reduce vulnerability.

Going back to the question I posed at the beginning: What makes children different from adults? The second most common answer (from adults) is that they are dependent on adults. A connection that is rarely made is the fact that this form of dependency is inextricably linked to children's vulnerability. It is adults' role to take steps to ensure that children are safe – the founding rationale and outcome of paternalism. However, what is very rarely acknowledged is that it is this very dependency that provides the foundation for children's vulnerability in the first place. Dependency is a cause of vulnerability, yet is often presented as a cure (i.e., "adults know best" and will handle the major decisions in the child's life in order to protect them). So, readjusting slightly, my conclusion is not just that vulnerability should not eclipse agency. Of course it should not, for adults and children alike. Equally, children are not exclusively or inevitably vulnerable or vulnerable in every way. However, they are differently vulnerable. My contention is that they are, as a group, uniquely rendered vulnerable by their dependence on adults to make decisions for them. This dependency, although sometimes inevitable and necessary,

35 Laura Lundy, "Voice," 927–942.

contributes to them being “*vulnerabilised*”. Children are not just innately vulnerable – they are made vulnerable. Categorising them as vulnerable justifies their exclusion from decision-making. Listening to them and considering their own concerns could help to reduce this, but pre-existing adult perceptions of their vulnerability often operate to preclude this.

To conclude, most of the scholarship on children’s rights and vulnerability to date has been generated without any substantial engagement with children’s own views and experiences. The CRC was written without any meaningful input from children, and, thirty years on, it is still routine for academics to continue to develop frameworks and theories without attending to children’s unique perspectives or experiences. In fact, it remains common practice in child rights scholarship for authors to stress that children should be heard without engaging substantively with their views and experiences on the issue being considered, including, for example, their purported vulnerability. Imagine the uproar if all the writing on women was produced by men; on persons with disabilities by those without disabilities; on racial minorities by those who have colonised them, etc. Then imagine if all law and policy were also produced without the input of those most affected. We need to acknowledge that this has always been the case for children. The discussion in this chapter is offered as an attempt to address this gap in the literature on children and vulnerability – harnessing children’s own accounts of their experiences to shed light on what may and may not make them vulnerable to harm. It has not, however, been written with or by children. An important next step in this discussion would be for children to develop or co-produce an alternative theoretical conceptualisation of childhood – a new child-authored paradigm. Who knows how this would address vulnerability, if at all? My hunch (informed from two decades of carrying out research on childhood with children as co-researchers) is that it would not focus solely on, or indeed forefront or focus on, their vulnerability.

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3. Vulnerability, Childhood, and the Definition of Health

Jonathan Herring

Abstract This chapter explores the concept of childhood health through the lens of universal vulnerability and relational theory. It argues that these illustrate the highly individualised and idealised nature of definitions of health. Once we see childhood through the lens of universal vulnerability theory, the boundaries between adults and children collapse. We can then see health as communal and inter-relational, a place where mutual vulnerability and lack of capacity can be celebrated.

Keywords vulnerability | autonomy | health | childhood | relationality

3.1 INTRODUCTION

This chapter explores the definition of children's health through the lens of vulnerability. To do so, we need to consider two key questions. First, how is health to be understood? Second, how is childhood to be understood? I will outline some of the key debates that emerge from the literature. I will then look again at these questions in light of two key themes: the universal vulnerability of all people and the significance of relationality. These will give us powerful insights into our understanding of childhood and health, and therefore of children's health.

3.2 DEFINITION OF HEALTH

There is an extensive literature on the definition of health. I will offer a very brief overview of the main perspectives. Later in the chapter I will set out what an alternative vulnerability and relationality-based approach would look like. The standard debates around the definition of health tend to centre around two key models.

3.2.1 The Medical Model

To many, the medical model is the natural way to understand health. You are unhealthy if you have a disease or medical condition; you are healthy if you do not.

Rodolfo Saracci explains, “Health is a condition of well-being free of disease or infirmity and a basic and universal human right.”¹ This approach typically involves a list of medical conditions, as recognised by the medical profession. These tend to be diseases that are able to be diagnosed. Where a person is assessed as having no disease, they can then be seen as healthy. Where a person has a disease, they are unhealthy, and medicine is used to cure the disease and return them to full health.² Key to this approach is acceptance of a norm (the healthy person), any departure from which can be regarded as unhealthy. We see this in many forms of diagnosis in medicine where a person is tested to see if their results are “normal” and any “abnormalities” are seen as a cause for concern.

Implicitly built within this approach is the understanding that not every departure from a norm will be illness. A person might have longer or shorter hair than is common, but this will not be seen as an illness unless it is seen as causing a harm or disadvantage. Here, hidden judgements may come into play. Baldness might not be seen as an illness for men, but might be so for women. Being overweight will be seen as an illness, but (generally) being underweight will not. And so forth.

More sophisticated versions of this understanding of health have been developed. Norman Sartorius even suggests that “health depend[s] on whether a person has established a state of balance within oneself and with the environment”. This means that a person with a disease may be able to establish an “internal equilibrium” so they can “get the most they can from their life despite the presence of the disease”.³ This approach still seems to be based on the understanding of a disease; it is merely open to the idea that a person may be able to overcome the negative impact of their condition and so be able to have health.

3.2.2 The Well-Being Model

An alternative model sees health as a positive state. According to the preamble of the 1946 World Health Organization (WHO) Constitution, health is “a state of complete physical, mental, and social well-being and not merely the absence

1 Rodolfo Saracci, “The World Health Organisation Needs to Reconsider Its Definition of Health,” *British Medical Journal*, no. 314 (1997): 1409–1410.

2 This approach is commonly found in the medical model of disability.

3 Norman Sartorius, “The Meanings of Health and Its Promotion,” *Croatian Medical Journal*, no. 47 (August 2006): 662.

of disease or infirmity”⁴. Or, as Hiko Tamashiro⁵ puts it, “It is not the absence of disease that sets the stage for health but the fullness of life.”

The WHO and the United Nations (UN) see the “right to health” as “the right of everyone to the highest attainable standard of physical and mental health.”⁶ The UN explains that the right to health

embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.⁷

These social determinants of health also include healthy working conditions, reproductive health, and “non-discrimination and equal treatment.”⁸

Critics of such broad understandings of health argue that with them the word loses its meaning. All kinds of things might be said to promote “well-being”. Why, even high-speed broadband or cheaper ice cream could be argued to do this! It is claimed that the broad definition smuggles controversial social, political and cultural factors into the concept of health. It leaves the concept of well-being undefined, in particular by failing to identify whose understanding of well-being is to be used. Is it enough if the bodily feature is seen as harmful to well-being by the individual themselves? Or must an objective understanding of harm be used? Thana De Campos complains that “the ‘well-being conception of health’ conflates the distinct ideas of basic and non-basic health needs, as well as those of individual autonomy and freedom.” There is a real danger of setting up a goal of “complete well-being” which few if any can reach. As Gillon observes, by that definition “none of us is, has ever been, or is ever likely to be healthy.”⁹

In part, the debate between these two approaches to health depends on the purpose to which the word is being used. De Campos is particularly writing in the

4 World Health Organization, *Preamble to the Constitution of World Health Organization* (World Health Organization, 1946).

5 Hiko Tamashiro, “Definition of Health Revisited in the Era of COVID-19,” *Japanese Journal of Education and Health Promotion*, vol. 29(4) (2021): 335.

6 International Covenant on Economic, Social and Cultural Rights 1966.

7 Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health* (Art. 12), E/C.12/2000/4 (August 11, 2000), para. 4.14.

8 Thana De Campos, *The Global Health Crisis: Ethical Responsibilities* (Cambridge: Cambridge University Press, 2017).

9 Raanan Gillon, “On Sickness and on Health,” *British Medical Journal*, vol. 292 (February 1986), 318.

context of a “right to health”, which we might take as the minimum entitlement that a citizen can expect from the state. Such a use is likely to require a narrow definition. She also refers to its use in debates over rationing, where again we seek to distinguish health matters that are entitled to a higher drawdown on resources than “luxury” non-health matters. If, however, we were engaging in a discussion about an aspirational understanding of health – a goal to which we should be striving but will never reach – then the wider definition might be more appropriate.

Later, I will return to this debate and explain how, in fact, I think neither the medical nor the well-being model properly captures our understanding of health.

3.3 CHILDHOOD

We next need to consider childhood. Some of the key perspectives around childhood are as follows.

3.3.1 Childhood as Deficit

For some commentators, childhood should primarily be understood as a means to achieving adulthood. So, a successful childhood is one that leads to a successful adulthood. In other words, children are imperfect adults who need to be helped to overcome this disadvantage and reach adulthood. Aristotle saw children as imperfect, unfinished adults.¹⁰ Todres¹¹ summarises this popular image of childhood well:

the dominant view of children today is that they are adults in the making—that is, dependent individuals who are not yet capable of mature and autonomous thought or action and who need to be socialized to conform to the world.

Those taking this approach tend to highlight two particularly common “imperfections” that children need to overcome: vulnerability and a lack of mental capacity.¹² They are seen as lacking the mental abilities to have full mental capacity or to protect themselves from harm. As Hannah¹³ claims:

10 Anca Gheaus, “Unfinished Adults and Defective Children: On the Nature and Value of Childhood,” *Journal of Ethics and Social Philosophy* 1, vol. 12 (2015).

11 Jonathan Todres, “Independent Children and the Legal Construction of Childhood,” *Southern California Interdisciplinary Law Journal*, vol. 23 (2014): 261–304.

12 Patrick Tomlin, “Saplings or Caterpillars? Trying to Understand Children’s Wellbeing,” *Journal of Applied Philosophy*, vol. 35 (2018): 29.

13 Sarah Hannah, “Why Childhood Is Bad for Children,” *Journal of Applied Philosophy*, vol. 35 (2018): 11.

Children's vulnerability is more profound and asymmetric than the vulnerability associated with most adult relationships. Moreover, children are often unaware of their vulnerability, insensitive to facts about the world and those they are in relationships with.

On this understanding, childhood health will focus on taking steps to overcome these disadvantages. Indeed, childhood might be something we wish a child to speed through as quickly as possible so they can "grow up" and escape these disadvantages.

This "deficit" model of childhood is relevant for health in two ways. First, it gives our understanding of child health a particular goal which is not present for adults. Our focus in terms of health is that the child should develop "normally" and reach adulthood. There is no equivalent goal for adult health.

A second argument is that children's lower mental capabilities impact on our understanding of their health.¹⁴ That is because we cannot rely on their assessment of what counts as "healthy" for them. For adults, the person's own assessment of their condition, and response to it, can play an important role in determining their health. However, children, it is said, lack that ability. To be clear, when people claim that children lack decision-making autonomy, they do not claim that children are unable to make a decision but rather that the decisions that children take are not entitled to the kind of respect due to decisions taken by adults with capacity. Generally speaking, for a decision to be protected by autonomy, the decision must be taken by a person who has an understanding of the relevant facts and is able to apply their own values and reasoning to these facts in order to reach a conclusion. It is commonly said that children lack these abilities in a range of ways. They will not understand the necessary information, or will not be able to exercise their will free from the influence of parents or others, or will lack the foresight and intellectual skills for rational thought, or will not be able to have clear values they have adopted for themselves.¹⁵ There is some debate over the extent to which this is true, but there is no space to discuss it here.

These concerns over autonomy are seen to justify a different approach to medical decision-making for children, as compared with adults. Skelton, Forsberg and Black¹⁶ write, "There is strong reason to believe that a great measure of what makes

14 Andrée-Anne Cormier and Mauro Rossib, "Is Children's Wellbeing Different From Adults' Wellbeing?" *Canadian Journal of Philosophy*, vol. 49 (2019): 1146.

15 Gareth Matthews and Amy Mullin, "The Philosophy of Childhood," in *The Stanford Encyclopaedia of Philosophy*, ed. Edward Zalta (University of Stanford, 2018).

16 Anthony Skelton, Lisa Forsberg, and Isra Black, "Overriding Adolescent Refusals of Treatment," *Journal of Ethics and Social Philosophy*, vol. 20(3) (November 2021): 221.

an adult's life go well depends on what she wants or what she values." So, they argue, whether an adult's life will go well depends much more on these subjective goods, while in relation to childhood the "objective" goods are emphasised because the child has less chance to develop them for themselves. In particular, where issues arise involving children, we should, therefore, postpone decisions until later, when they are able to make the decision. Where decisions must be made, we should make decisions which will not unduly limit the child's options when they reach adulthood.¹⁷ In the meantime, we should ensure that the child receives the training and skill to exercise autonomy.¹⁸

3.3.2 Special Goods

A second view emphasises that there are very special goods that are distinct for children. Cormier and Rossib¹⁹ suggest the following as examples:

unstructured play, freedom of experimenting with different selves, sexual innocence, an ability to love and trust without apprehension, purposeless imagination and a sense of being care-free.

The debate is complex, and much depends on precisely what is meant by a good of childhood. As Tomlin²⁰ notes, we might take four views:

- i. Childhood goods are a sub-set of adult goods
- ii. Adult goods are a sub-set of childhood goods
- iii. Adult and childhood goods overlap
- iv. Childhood and adult goods are completely different

Further, we need to consider whether the claim is that these are goods that are particularly beneficial to children or that children are more adept at accessing.²¹ So we might value play in childhood, but not recognise it as an activity that is beneficial for adults. Or, we might say that children lack inhibition and so can enjoy free play,

17 John Eekelaar, *Family Law and Personal Life* (Oxford University Press, 2017), chapter 2.

18 John Rawls, *A Theory of Justice* (Oxford University Press, 1971).

19 Andr  e-Anne Cormier and Mauro Rossib, "Is Children's Wellbeing Different", 1146.

20 Patrick Tomlin, "Saplings or Caterpillars?", 29.

21 Harry Brighouse and Adam Swift, *Family Values* (Oxford University Press 2014), 65.

which the burdens of adulthood prevent us from enjoying. Anca Gheaus²² distinguishes childhood goods that are intrinsically beneficial from those which have developmental value. In other words, the distinction is between those goods which are good for children in themselves and those which are good in the way they help a child develop. The right to play might be a good example to use here. We might see play as good in and of itself; or we might see play as beneficial because it helps the child to be healthy and develop social and intellectual skills that will be helpful in adulthood.²³ Cornier and Rossib²⁴ claim the kinds of good mentioned are just as instrumental to other things, such as pleasure and happiness. If that is correct then health or well-being is the same concept for children and adults, although there may be difference in achieving them.

There is no space to explore these issues further. However, it is clear that if the arguments for such childhood goods are accepted, then this could have quite some significance for our understanding of children's health. It would include, certainly with a more than minimalist definition, that we need to be promoting these goods. So, a child who was not able to access these goods of childhood would not be healthy.²⁵

3.4 SUMMARY OF THE MAINSTREAM ARGUMENTS

To summarise the points made thus far, debates around children's health can – over-simplistically, no doubt – be reduced to two core themes. The first is the extent to which health is seen as the absence of a disease or impairment and the extent to which it is seen in positive terms, living a thriving life. For those taking the medical line, a successful childhood is one that is disease-free, where the child has developed in line with normal expectations. Those who see health in positive terms will focus on whether the child has thrived. What that means depends on the second issue. The second is the extent to which childhood is seen as impairment, though it provides an effective route to adulthood, or whether it is seen as a time of unique goods. For those who see childhood as a time of deficit, a successful childhood is one where a child learns the skills they need to reach adulthood and is well placed to succeed as an adult. For those who see

22 Anca Gheaus, "The 'Intrinsic Goods of Childhood' and the Just Society," in *The Nature of Children's Well-Being: Theory and Practice*, ed. Alexander Bagattini and Colin Macleod (Springer, 2014), 35–52.

23 Naomi Lott, *The Right to Play* (Nottingham: University of Nottingham 2020).

24 Andr  e-Anne Cormier and Mauro Rossib, "Is Children's Wellbeing Different", 1146.

25 Ibid.

special goods in childhood, health is found in enjoying these special goods. The positive state model is linked with the special goods model. It sees health in positive terms and identifies the goods of childhood such as play, innocence and carefreeness as goods we need to ensure children receive so that they thrive in childhood.

I believe all the models discussed so far are misguided. In particular, they see health in terms of individual attributes rather than being a communal and relational thing. I now seek to unpack that concept.

3.5 RETHINKING HEALTH: THE IMPORTANCE OF VULNERABILITY

Understanding vulnerability to be at the heart of the human condition opens up new ways of thinking about childhood and health. There has been an exciting and fertile increase in the literature on universal vulnerability in recent years. Traditionally, vulnerability has been used to identify particular individuals or groups of people as particularly at risk of being harmed and therefore in need of state protection or services.²⁶ Children are often included in such groups.²⁷ There might, therefore, be a natural reticence among child rights advocates to the language of vulnerability for fear that doing so will justify paternalistic interventions against children. Indeed, the vulnerability of children is regularly used to justify restricting children's freedoms. However, those promoting universal vulnerability, most notably Martha Fineman, have argued that vulnerability is an inevitable aspect of the human condition.²⁸ She writes:

The vulnerability approach recognizes that individuals are anchored at each end of their lives by dependency and the absence of capacity. Of course, between these ends, loss of capacity and dependence may also occur, temporarily for many and permanently for some as a result of disability or illness. Constant and variable throughout life, individual vulnerability encompasses not only damage that has been done in the past and speculative harms of the distant future, but also the possibility of immediate harm. We are beings who live with the ever-present possibility that our needs and circumstances will

26 Jonathan Herring, "Foreword," *University of New South Wales Law Review*, vol. 41 (2018): 22.

27 Sabine Andresen, "Childhood Vulnerability: Systematic, Structural, and Individual Dimensions," *Child Indicators Research*, vol. 7 (May 2014): 699.

28 Martha Albertson Fineman, "'Elderly' as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility," *The Elder Law Journal*, vol. 20(1) (2012): 86–87.

change. On an individual level, the concept of vulnerability (unlike that of liberal autonomy) captures this present potential for each of us to become dependent based upon our persistent susceptibility to misfortune and catastrophe.²⁹

Fineman makes it clear that all humans are constantly vulnerable, but we are positioned differently. This can be in terms of our embodiment or in terms of economic, relational and social circumstances. This does not negate the essential vulnerability underlying us all, but can impact on the lived experience of it. This is an issue I will need to return to shortly, but first, more needs to be said about vulnerability as a key feature of humanity.

There is much that universal vulnerability might teach us about legal norms, conceptions of the self and the importance of autonomy.³⁰ For now I will focus on what it means for health and bring out three particularly relevant themes.

3.5.1 Our Fleshy, Fragile Nature

First, our bodily and fleshy nature makes us vulnerable. Our bodies are frail, naturally wear down, and are “profoundly leaky”.³¹ It is in their nature to wear down. Inevitably, they are susceptible to sickness, illness and injury. As Fineman puts it, “we are born, live, and die within a fragile materiality that renders all of us constantly susceptible to destructive external forces and internal disintegration.”³² Ultimately, our bodies are programmed to die. They are not designed for eternal living. We are in a constantly precarious nature.

As Rogers et al. claim “... all human life is conditioned by vulnerability, as a result of our embodied, finite, and socially contingent existence. Vulnerability is thus an ontological condition of our humanity.”³³ Indeed, as Leonardi points out, “common experiences in life suggest that a long period free of physical and mental symptoms is highly improbable: scientific evidence shows that the average adult experiences about 4 symptoms in a 14-day period.”³⁴ A normal healthy lifespan will contain times of “illness”.

29 Martha Albertson Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition,” *Yale Journal of Law and Feminism*, vol. 20(1) (2008): 12.

30 Jonathan Herring, *Law and the Relational Self* (Cambridge: Cambridge University Press, 2019).

31 Margrit Shildrick, *Embodying the Monster: Encounters with the Vulnerable Self* (Sage, 2002).

32 Martha Albertson Fineman, “Elderly’ as Vulnerable”, 89.

33 Wendy Rogers, Catriona Mackenzie and Susan Dodds, “Why Bioethics Needs a Concept of Vulnerability,” *International Journal of Feminist Approaches to Bioethics*, vol. 5 (2) (2012): 12.

34 Fabio Leonardi, “The Definition of Health: Towards New Perspectives,” *International Journal of Health Services* vol. 48(4) (June 2018): 735.

We need an understanding of health that has disease and illness built into it. This is a fundamental flaw at the heart of the medicalised model of health. We should reject the view that there is a “healthy norm” from which ill health is a departure. Dealing with fatigue, disease, infirmity and limitations is a natural part of the human life.

3.5.2 Dynamic

We sometimes imagine our bodies to be static and as providing a barrier to the dangers outside us. In fact, our bodies are constantly changing, with new material being added to them and old material being discarded. By the end of each day we have lost a whole host of cells and grown new ones. By our deaths there is little of us that is biologically the same as when we were born. Further, our bodies are not all human. Inside they are dependent on a wide range of non-human organisms to survive. Outside they are constantly interacting with the environment.³⁵ As COVID-19 has made so clear, biological material passes easily from one body to another. The truth is our bodies are in constant flux, profoundly leaky, and deeply dependant on other bodies and the broader environment.³⁶

Human life is dynamic. There is a real danger of assuming a particular aspect of our life course as our “prime” – typically middle age – and of presenting that as a norm, and that any departure from it is a failure. We see this in the understanding of childhood as a deficit: the idea that there is an “ideal” of adulthood we are reaching for and that if a child fails to achieve the standards then they have “failed”. We see it too in how childhood health goals are fixed in terms of what they mean for middle age. Similarly, a successful old age is commonly presented as one where the individual is able to mimic middle age as much as possible.

3.5.3 Care

Given our bodily and emotional vulnerability, our caring relationships are key to our survival and well-being.³⁷ Dependency is an inevitable facet of human life.³⁸ It is because of dependency that care is so important. The degree of dependency

35 P.-L. Chau and Jonathan Herring, “My Body, Your Body, Our Bodies,” *Medical Law Review*, vol. 15 (2007): 34.

36 Jonathan Herring, “Why We Need a Statute Regime to Regulate Bodily Material,” in *Persons, Parts and Property: How Should We Regulate Human Tissue in the 21st Century?*, eds. Imogen Goold, Jonathan Herring, Loane Skene and Kate Greasley (Hart Publishing, 2014), 215–230.

37 Jonathan Herring, *Caring and the Law* (Hart Publishing, 2013), chapter 2.

38 Ibid.

may vary at different points in our lives. But, at all point in our lives, we are dependent on others for care. Feder Kittay wrote of our interdependence:

My point is that this interdependence begins with dependence. It begins with the dependency of an infant, and often ends with the dependency of a very ill or frail person close to dying. The infant may develop into a person who can reciprocate, an individual upon whom another can be dependent and whose continuing needs make her interdependent with others. ... By excluding this dependency from social and political concerns, we have been able to fashion the pretense that we are independent – that the cooperation between persons that some insist is interdependence is simply the mutual (often voluntary) cooperation between essentially independent persons.³⁹

In relationships of care, our interests become intermingled. A harm to one is a harm to the other. The boundaries between me and you break down. Indeed the categories of carer and cared for break down when the relationship is marked by interdependency. Caring relations often involve a complex interplay of dependencies and vulnerabilities. As Fine and Glendinning have argued:

Recent studies of care suggest that qualities of reciprocal dependence underlie much of what is termed “care”. Rather than being a unidirectional activity in which an active caregiver does something to a passive and dependent recipient, these accounts suggest that care is best understood as the product or outcome of the relationship between two or more people.⁴⁰

Ultimately, as Bridgeman puts it, “[h]umans are vulnerable ... because we care, love, are intimately connected to others”.⁴¹ This leads us to a crucial point about health.

Caring relationships are key to health, and so health can only be understood in a relational context.⁴² Robinson Crusoe, living alone on his desert island, might

39 Eva Feder Kittay, *Love's Labor: Essays on Women, Equality and Dependency* (New York University Press 1999), xii.

40 Michael Fine and Caroline Glendinning, “Dependence, Independence or Inter-Dependence? Revisiting the Concepts of Care and Dependency,” *Ageing and Society*, vol. 25 (June 2005): 601–621, 616.

41 Jo Bridgeman, “Relational Vulnerability, Care and Dependency,” in *Vulnerabilities, Care and Family Law*, eds. Julie Wallbank and Jonathan Herring (Routledge, 2014), 201.

42 Emmanouela Mandalaki and Marianna Fotaki, “The Bodies of the Commons: Towards a Relational Embodied Ethic of the Commons,” *Journal of Business Ethics*, vol. 166 (2020): 745.

have the most wonderful physique and a BMI to die for, but loneliness and lack of human interaction meant he was healthy in only the narrowest sense. As our identity is found in our relationships, and our selves emerge from those relationships, it is therefore key to health that our relationships and communities are healthy.⁴³ This is the flaw at the heart of the medicalised model of health. It is not bodies that are unhealthy, but communities and relationships.

So, then, our health is not found in capacity or autonomy or self-sufficiency but rather in our vulnerable, interdependent and relational selves.⁴⁴ It is recognising that we are in our nature vulnerable; that caring relationships are core to our being human; and that we need each other that we might begin to find true health. We must never seek to hide from or be embarrassed by our precarious, leaky, interdependent bodies. True health is found not in the scalpel of the surgeon or the pill of the pharmacist but in the touch of a lover, the smile of a child and the wind in the hair.

So, what might these insights provide us when thinking about childhood and children's health? That is the question that will be considered next.

3.6 RETHINKING CHILDHOOD

As already mentioned, one major reason for seeing childhood health as separate from adulthood is that children (i) lack rationality and mental capacity as compared to adults and (ii) are more vulnerable than adults. I think that this is a misguided understanding for two reasons.

First, this view overemphasises the autonomy and rationality of adults. Normally when people argue that children have similar mental capabilities to adults, this is based on the argument that the abilities of children are underestimated. For example, Gopnik writes:

we used to think that babies and young children were irrational, egocentric, and amoral. Their thinking and experience were concrete, immediate and limited. In fact, psychologists and neuroscientists have discovered that babies not only learn more, but imagine more, care more, and experience more than we would ever have thought possible. In some ways, young children are actually smarter, more imaginative, more caring and even more conscious than adults are.⁴⁵

43 Kenneth Gergen, *Relational Being* (Oxford: Oxford University Press, 2009).

44 Janet Delgado, "Re-Thinking Relational Autonomy: Challenging the Triumph of Autonomy Through Vulnerability," *Bioethics Update*, vol. 5 (2019): 5065.

45 Alison Gopnik, *The Philosophical Baby* (Random House 2009), 5.

I think the argument is better made on the basis that adults' mental capabilities are commonly exaggerated. The reality is that few of us have the capacity to be genuinely autonomous.

To be autonomous, a person must not only understand the information about a decision but also be able to use it. Most adults make decisions with an awareness of few of the relevant facts about the decisions they make. Even if they do know the facts, their rationality is deeply flawed. Levy⁴⁶ refers to a wide range of psychological studies which reveal "fallibilities of human reasoning" (including "myopia for the future", "motivated reasoning" and "biases" in "assessing probabilities ... exacerbated ... under cognitive load"). He concludes that "Human beings are, under a variety of conditions, systematically bad reasoners, and many of their reasoning faults can be expected to affect the kind of judgements that they make when they are called upon to give informed consent". To similar effect, Conly⁴⁷ writes:

As has by now been discussed convincingly and exhaustively (notably by Nobel Prize-winning Daniel Kahneman and Amos Tversky), we suffer from common, apparently ineradicable tendencies to "cognitive bias," which means that in many common situations, our decision-making goes askew. These biases are many and varied, but they have in common that they interfere with our appreciation of even quite simple facts, and lead us to choose ineffective means to our ends.

The contrast drawn between the autonomous, well-informed, rational adult and the ill-informed, immature, impetuous child is a gross exaggeration. Adults, just like children, fail to understand the necessary facts, are heavily influenced by the views of others, and have not developed their own values. We need to reject the law's assumption that the norm is the autonomous, liberal individual and replace them with the vulnerable person.

Second, as mentioned, childhood is commonly presented as a time of vulnerability, contrasted with the independence and self-sufficiency of adulthood. Hence, it is said, children need resources to be healthy. However, it is the provisions of society around the body that privilege the status and use of some bodies while disadvantaging others. This is true for childhood. In particular, a child's gender, race, (dis)ability and class can hugely impact on the child's experience of young age. The

46 Neil Levy, "Forced to Be Free? Increasing Patient Autonomy by Constraining It," *Journal of Medical Ethics*, vol. 40 (2014): 293–300, 295.

47 Sarah Conly, "Against Autonomy: Justifying Coercive Paternalism in Healthcare," *Journal of Medical Ethics*, vol. 40 (2014): 349.

dialogue around the weakness or frailty of child bodies is in part due to the social structures around it, which privilege some and disadvantage others. The reality is that all of us are vulnerable and dependent on others for assistance for survival.

It is striking that we identify certain conditions as disabilities and offer accommodations for those with certain bodies but overlook the wide range of structures and forms of assistance that disguise our mutual dependence. Indeed, we are forced by a wide range of societal pressures to disguise or mitigate our vulnerability so that we can behave in an acceptable way in the public realm. As Lindeman⁴⁸ notes:

Colleagues, professional staff members, and other adults are unconscious of the numerous accommodations that society provides to make their work and life style possible. ATM's, extended hours in banks, shopping centres and medical offices, EZpass, newspaper kiosks, and elevators are all accommodations that make contemporary working life possible. There are entire industries devoted to accommodating the needs of adult working people. Fast food, office lunch delivery, day time child care, respite care, car washing, personal care attendants, interpreters, house cleaning, and yard and lawn services are all occupations that provide services that make it possible for adults to hold full time jobs.

So the emphasis on adult independence, by contrast with childhood vulnerability, overlooks the considerable vulnerability that adults face.

3.7 RETHINKING CHILDREN'S HEALTH: BRINGING THE THEMES TOGETHER

So where does that get us with understanding children's health? I offer five points by way of conclusion.

First, there is a real danger in these debates that the concept of health becomes adult-centred – that adults come to set the agenda for a healthy, successful childhood. There are many things wrong with this approach, but a key one is that it assumes we adults have it right, that we need to teach children and children need to be protected. There is no openness to the idea that children might have things to teach adults; that children perform important work in the care of adults; that children can teach, care for and mould adults. We presume that autonomy, capacity

48 Kate Lindemann, "The Ethics of Receiving," *Theoretical Medicine and Bioethics*, vol. 24 (2003): 501–509, 502.

and independence are key to a successful life and that impediments to these are harms. That, however, is misguided.

Second, mainstream arguments about the definition of health seek to find health in the individual. Instead, we should be seeking to find health in our communities and our relationships. Children's health and adults' health cannot be separated. One of the ironies of use of vulnerability as marking the child/adult divide, as described in the previous section, is that it creates vulnerabilities for adults. If adults are expected to look after children, this is particularly so for parents in relation to their children. Parents will go to extraordinary lengths to look after children because "that is what parents do". It is no doubt why new parents are willing to go through the sleeplessness, toils and strains of the early years of parenthood. Yet, that renders parents themselves vulnerable. There has been a growth in recent years of the literature exploring the insecurities of parents. This insecurity felt by parents is influenced by the message reinforced by public bodies, including the government, about the significant impact of decisions of parents on children's welfare. This message that parents are core to their children's welfare and health generates considerable pressure on parents. Where things go wrong, it is parents towards whom the blame is directed. Parents are clearly feeling under pressure to "succeed" as a parent, interpreted as producing well-rounded, well-educated, high-achieving children. This is also reflected in the increased attention to hyper-parenting, where parents go to excessive lengths to make their child the best possible child. Alvin Rosenfeld and Nicole Wise explain: "This is happening because many contemporary parents see a parent's fundamental job as designing a perfect upbringing for their offspring, from conception to college. ... That is why the most competitive adult sport is no longer golf. It is parenting."⁴⁹

Bridgeman has written particularly powerfully of the responsibilities parents feel towards their children and how this impacts on their engagements with health-care professionals. She writes of the power of these caring responsibilities.⁵⁰ This itself creates vulnerabilities for parents as they struggle to negotiate the demands of professionals, their grief and children. The pain of the children generates pain, sometimes great pain, in the adults. The vulnerability of the child constitutes vulnerability in the adult. The misdeed of a parent seeking to genetically engineer or hyper-parent their child is not just that the parent is seeking to impose a particular view of what is a good life on their child, although that is wrong. It is the error of

49 Alvin Rosenfeld and Nicole Wise, *The Over-Scheduled Child: Avoiding the Hyper-Parenting Trap* (New York: St. Martin's Press, 2001).

50 Jo Bridgeman, *Parental Responsibility, Young Children and Healthcare Law* (Cambridge: Cambridge University Press, 2007).

failing to be open to change as an adult, failing to learn from children, failing to see that the things you thought were important are, in fact, not. It is failing to find the wonder, fear, loneliness, anxiety, spontaneity, and joy of children, and to refine them for oneself.

Third, an important theme we see in these debates surrounds power. Some commentators are critical of a highly medicalised model of health, which purports to use objective criterion against which to judge people to be healthy or not. Those deemed disabled or ill can be returned to the norm. As this indicates, determining who is healthy or not involves an exercise of power. If one is “ill”, one needs the state’s protection and therapy; if one is disabled, one’s body needs to be corrected to return it to the norm.⁵¹ Indeed, any attempt to deny one is ill is seen as clear proof that one is. As Turner puts it:⁵²

... the doctor has replaced the priest as the custodian of social values: the panoply of ecclesiastical institutions of regulation (the ritual order of sacraments, the places of vocational training, the hospice for pilgrims, places of worship and sanctuary) have been transferred through the evolution of scientific medicine to a panoptic collection of localised agencies of surveillance and control. Furthermore, the rise of preventive medicine, social medicine and community medicine has extended these agencies and regulation deeper and deeper into social life.

Garland Thomson⁵³ is particularly powerful in terms of disability, where the “able” get to glorify the status of their own bodies and label those with different bodies as disabled or “abnormal”. Cassidy et al. wrote that children

are stifled and excluded from a society formed and defined by adults’ interests until they — the children — are trimmed and shaped in a way that allows adults to find children agreeable. This demonstrates the power relation between adult/child quite clearly.⁵⁴

51 Tom Koch, “Disability and Difference: Balancing Social and Physical Constructions,” *Journal of Medical Ethics*, vol. 27 (2001): 370–376.

52 Bryan Turner, *Medical Power and Social Knowledge* (Sage, 1995), 35–36.

53 Rosemarie Garland Thomson, “Misfits: A Feminist Materialist Disability Concept,” *Hypatia*, vol. 26(3) (2011): 591–609, 592.

54 Claire Cassidy, Sarah-Jane Conrad, Marie-France Daniel, Maria Figueroia-Rego, Walter Kohan, Karin Murris, Xiaoling Wu and Tsena Zhelyazkova, “Being Children: Children’s Voices on Childhood,” *The International Journal of Children’s Rights*, vol. 25 (2017): 698–715, 702.

And this feeds into a debate among vulnerability theorists. Even if we accept that we are all universally vulnerable, is it not true that some people experience different levels of vulnerability? This, it seems, is accepted by vulnerability theorists. Martha Fineman writes:

There are two relevant forms of individual difference in a vulnerability approach—those that arise because we are embodied beings and those that arise because we are social beings embedded in social institutions and relationships.⁵⁵

I agree there are different levels of vulnerability. But I am not sure I agree with the source of that vulnerability, included embedded differences. Fineman gives an example of different vulnerabilities over the life course:

In addition to the bodily differences that are manifest across various members of society at any given time, are those differences that evolve within each individual body. These differences reflect the progressive biological and developmental stages within an individual human life. Individual bodies will mature and grow, as well as age and decline. We can think of these differences as occurring along a vertical and temporal dimension of analysis—within the individual over time.

In particular she writes:

Infancy and childhood should be understood as merely inevitable developmental stages in the life of the vulnerable subject, not as the occasion for the creation of distinct and diminished categories of state responsibility.

Here, I respectfully disagree with her. First, because I think that some of the dependencies of childhood are created by society. It is the way our society is structured that disadvantages children. The perceived particular vulnerabilities of children mask the vulnerability of adults. The dangers posed by children are dangers posed by adults.

Finally, in some vulnerability literature there is an emphasis on resilience. Fineman writes:

55 Martha Albertson Fineman, "Vulnerability and Inevitable Inequality," *Oslo Law Review*, vol. 4(3) (2017): 133–149, 143.

While a vulnerability analysis begins with a description of universal vulnerability, it is the particularity of the manifestations of vulnerability and the nature of resilience that are of ultimate interest. Resilience is the critical, yet incomplete, solution to our vulnerability. Social resources give us a sense of belonging and community and are provided through the relationships we form within various institutions, including the family, social networks, political parties and labour or trade unions.

However, I am nervous about the language of resilience. It posits vulnerability as something to be overcome rather than rejoiced in. Feder Kittay's daughter, Sesha, has cerebral palsy. She is profoundly cognitively and physically impaired. She will always be dependent on others for life's basics. She is not given to sentimentality, but still she writes:

Sometimes I wonder if Sesha is a special being sent to us from elsewhere, for there is an impossible-to-articulate sweetness, graciousness, and emotional openness about her— qualities we rarely find in others.⁵⁶

Vulnerability is to be greatly welcomed. Our mutual vulnerability requires us to reach out to others to offer and receive help from them. The virtues of beneficence and compassion are encouraged and necessary. We have to become open to others and our own and others' needs. A recognition of our mutual vulnerability leads to empathy and understanding. It creates intimacy and trust. It compels us to focus on interactive, cooperative solutions to the issues we face. As Carse puts it: "Our vulnerability is inextricably tied to our capacity to give of ourselves to others, to treasure and aspire, to commit to endeavours, to care about justice and about our own and other's dignity."⁵⁷ Our vulnerability requires us to meet out to others to meet their needs and to have our needs met. Our very vulnerability provides us with the seeds for our growth through relationships with others.⁵⁸

In short, health is found not in individuals but in communities and relationships. So there should not be a conception of a healthy child, but rather a healthy network of relationships which include children. It is in building up caring relationships that true health is found. It comes from recognising that bodies and

56 Eva Feder Kittay, "Forever Small: The Strange Case of Ashley X," *Hypatia*, vol. 26 (2011): 610–631, 621.

57 Ann Carse, "Vulnerability, Agency and Human Flourishing," in *Health and Human Flourishing*, eds. Carol Taylor and Alberto Dell'Oro (Georgetown University Press, 2006), 48.

58 Daniel Bedford and Jonathan Herring, *Embracing Vulnerability: The Implications and Challenges for Law* (London: Routledge, 2021).

people come with different strengths and weaknesses that can vary over time, as is human nature. This is true for children and for adults. We need to reject the view that adults “know it all” and acknowledge the vulnerable and incapable nature of adulthood. Our health is found in pooling our vulnerabilities and caring together. Then adults and children can learn from each other, care for each other and find true health.

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4. Combating Vulnerabilities – the CRC’s Role in Children’s Social Well-Being and Right to Health

Julia Köhler-Olsen

Abstract Children are not vulnerable. Children are held in vulnerable situations due to societal structures and institutions keeping them from experiencing strength, social well-being and health. This chapter discusses whether state obligations according to the UN Convention on the Rights of the Child (CRC) Art. 24 on the right to health require policy work on societal structures and institutions read in light of CRC Art. 2 on the right to non-discrimination and the theory of substantive equality.

Keywords right to health | substantive equality | dimensions of vulnerability

4.1 INTRODUCTION

This chapter’s aim is to explore whether children’s human rights as laid down in the UN Convention on the Rights of the Child (CRC) play a role in keeping children in a place of vulnerability or whether they support children’s strength and as such enhance children’s social well-being. The main research question is, thus, whether the CRC’s legal rights and its relevant legal sources include mechanisms to support children’s experience of strength and, thus, support the child’s right to health. To answer this question, the term “vulnerability” is defined as it is understood and used in Section 4.2. Without a viable and reliable definition of the term “vulnerability”, the discussion on the CRC’s human rights impact on the rights holder’s experience of vulnerability and health would lack a benchmark. In connection with the discussion of the term “vulnerability”, the term “strength” will also be addressed. In addition, the term “social well-being” in relation to the child’s right to health will also be discussed in Section 4.2.

The analysis of whether the CRC has what it takes to combat vulnerability and enhance children’s strength is performed through two sub-questions: What is the

scope of states' legal obligation to combat children's vulnerability? And does the CRC contain human rights norms that address and combat the child's experience of vulnerability? Furthermore, is the state not only obliged to combat the child's experience of vulnerability but also positively obliged to enhance the strength of a child?

The interpretation of the CRC's human rights is based on the "general rule of interpretation" of treaties as described in the Vienna Convention on the Law of Treaties, stating that "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 light of its object and purpose."¹ With human rights treaties, such as the CRC, however, there is a special nature that makes their interpretation lean toward teleological and effectiveness elements over the textual approach.² Human rights treaties are not based entirely on the contractual principle of reciprocity. Although states bind themselves to human rights treaties and expect other parties to do the same, the beneficiaries of the quasi-contractual relationship are not necessarily the states themselves but the individuals within those states.³ Considering the purpose of protecting individuals, "the generally recognized rule [...] of interpretation for human rights texts calls for a liberal interpretation of rights, and a narrow interpretation of restrictions. Furthermore, rights are not to be interpreted statically but rather dynamically in the light of relevant societal developments."⁴

Next to the wordings of the CRC's articles, the interpretation of the human rights norms will include so-called soft law instruments, such as General Comments published by the UN Committee on the Rights of the Child (the CRC Committee). These General Comments express the interpretation of legal rights and obligations laid down in the CRC by its supervisory body, the Committee. Including such soft

1 Vienna Convention on the Law of Treaties, Art. 31(1).

2 James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), 48–74; Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press, 2nd Ed., 2004) 28 ("It is generally recognized that human rights texts should be interpreted liberally, so corresponding limitations are to be construed narrowly"). See also ECtHR, *Soering v. UK* (Series A, No. 161, 1989), 34; ECtHR, *Artico v. Italy* (Series A, No. 37, 1980); ECtHR, *Loizidou v. Turkey* (Series A, No. 310, 1995), 23 (interpreted to make safeguards practical and effective).

3 Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (Oxford: Oxford University Press, 1995), 3.

4 Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: N.P. Engel, 2nd Revised Ed., 2005), XXVII; see also United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (UN Doc. E/CN.4/1985, Annex, 1985), Art. I. A. 4 & 5.

law sources as relevant sources of interpretation ensures an interpretation that is in line with the treaty's context in the light of the treaty's object and purpose.

4.2 THE CONCEPTS OF “HEALTH” AND “SOCIAL WELL-BEING”

Article 24(1) of the CRC obligates state signatories to the Convention to recognise the right of the child to the enjoyment of the highest available standard of health and to facilities for the treatment of illness and rehabilitation of health. It further obligates states to strive to ensure that no child is deprived of his or her right of access to such healthcare services. The wording shows that the right to health for the child covers three areas. Firstly, the child shall enjoy the highest available standard of health. Secondly, the child shall receive treatment for illness and rehabilitation. Thirdly, no child shall be deprived of access to healthcare services.

The term “health” in the CRC Article 24 is to be understood in line with the World Health Organization's (WHO) understanding of this term.⁵ In the Constitution of the WHO, states have agreed to regard health as a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity.⁶ According to the CRC Committee, this approach emphasises the need to eliminate exclusion and reduce social disparities in health; organise health services around people's needs and expectations; integrate health into related sectors; pursue collaborative models and policy dialogue; and increase stakeholder participation, including the demand for and appropriate use of services.⁷ The WHO has not defined the term “social well-being”. Yet, by including not only physical and mental well-being but also social well-being in its definition of the term “health”, the WHO's definition of “health” is in consistency with the biopsychosocial model of health. Whereas the traditional medical model defines health as the absence of illness or disease and emphasises the role of clinical diagnosis and intervention, the biopsychosocial model includes physiological, psychological and social factors in health and illness.⁸

5 UN Committee on the Rights of the Child, *General Comment no. 15 (2013) The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24)*, CRC/C/GC/15, (April 17, 2013), para. 5.

6 Preamble of the Constitution of the World Health Organization (WHO) as adopted by the International Health Conference, New York, 22 July 1946.

7 CRC/C/GC/15, para. 4.

8 Iain Crinson, “Section 3: Concepts of Health and Wellbeing,” Faculty of Public Health, Health Knowledge (last accessed 21 October 2024), <https://www.healthknowledge.org.uk/public-health-textbook/medical-sociology-policy-economics/4a-concepts-health-illness/section2/activity3>.

Graham Scambler, professor of sociology at the University College London specialising in medical sociology, argues that 10 dimensions of vulnerability exist with potential relevance to people's health, health-related quality of life and longevity: i) anomie, ii) alienation, iii) powerlessness, iv) marginalisation, v) exclusion, vi) stigmatisation, vii) deviance, viii) cultural imperialism, ix) loneliness, and x) symbolic violence.⁹ These types of vulnerabilities are not mutually exclusive and can be interconnected, overlap, or be experienced simultaneously. And they can all make you sick.¹⁰

The WHO's and the CRC Committee's understanding of the term "health" coincides partly with Scambler's view of dimensions of vulnerability heightening the risk of lack of well-being. The inclusion of *social well-being* in the term "health" represents an understanding that the social contexts in which children live affect the child's experience of well-being. Thus, negative social contexts – or, as the Committee puts it, "social disparities" – can express and even enhance a child's illness. If these negative social contexts, these vulnerabilities, are not addressed and worked against, the child will not experience social well-being; in contrast, the child will experience illness. Scambler's 10 identified vulnerabilities have an impact on the social well-being of the child. Therefore, addressing these dimensions of vulnerabilities supports the recognition of the right of the child to the enjoyment of the highest attainable standard of health; ref. CRC Article 24(1).

4.3 THE CONCEPTS OF "VULNERABILITY" AND "STRENGTH"

Legal scholars have discussed and contested the norm of vulnerability, specifically in human rights discourse.¹¹ Children are understood as vulnerable, having limited powers of agency. This understanding represents a "deficit conception of childhood".¹² Martha Fineman and others have questioned whether specific understandings of vulnerability in human rights discourse increase, instead of

9 Graham Scambler, "Dimensions of Vulnerability Salient for Health: A Sociological Approach", *Society, Health and Vulnerability*, vol. 10(1) (January 2019).

10 Scambler, "Dimensions of Vulnerability", 1.

11 Marie Elske C. Gispén, "Vulnerability and the Best Interests of the Child in Tobacco Control," *The International Journal of Children's Rights*, vol. 29 (August 2021): 589–608.

12 Tamar Schapiro, "What Is a Child?" *Ethics*, vol. 109(4) (April 2024): 715–738; Gareth B. Matthews, "Getting Beyond the Deficit Conception of Childhood: Thinking Philosophically with Children," in *Philosophy in Schools*, eds. Michael Hand and Carrie Winstanley (London: Continuum, 2008), 27–40.

decrease, the presumed vulnerable position.¹³ If human rights are linked to the label of the vulnerable child, human rights norms support a stigmatising and victimising effect.¹⁴ Even though the child as an embodied vulnerable individual receives support and assistance through a human-rights-based approach, this approach can also increase the risk of stigmatisation, identity politics and the denial of agency. Legal norms that are understood only to address embodied vulnerability can become a control mechanism on the child rather than empowering it.¹⁵ Thus, sceptics of the norm of vulnerability in human rights discourse question whether human rights “have what it takes” to support the child’s experience of strength.

The term “the child’s strength” or “the child’s experience of strength” is based on a variety of research on the interconnectivity of vulnerability and strength. In the field of public health, for example, researchers explore preconditions for transforming demanding experiences of risk and weakness to strength and resources.¹⁶ The relationship between the experience of vulnerability and strength is also discussed in research related to ethics and healthcare.¹⁷ Also in research on children’s health, development, and education, the interconnectivity and relationship of vulnerability and strength are visible, often linked to resilience studies.¹⁸ These

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- 13 Martha A. Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition,” *Yale Journal of Law and Feminism*, vol. 20(1) (May 2008): 1–23; Lourdes Peroni and Alexandra Timmer, “Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law,” *International Journal of Constitutional Law*, vol. 11(4) (December 2013): 1056–1085.
 - 14 Kate Brown, “‘Vulnerability’: Handle with Care,” *Ethics and Social Welfare*, no. 5 (August 2011): 313–321, 316; Martha A. Fineman, “Equality, Autonomy, and the Vulnerable Subject in Law and Politics,” in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, eds. Martha A. Fineman and Anna Grear (London: Routledge, 2013), 16; Peroni and Timmer, “Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law,” 1056–1085.
 - 15 Veronika Flegar, “Who Is Deemed Vulnerable in the Governance of Migration – Unpacking UNHCR’s and IOM’s Policy Label of Being Deserving of Protection and Assistance,” *Asiel- & Migrantenrecht*, vol. 8 (May 2019): 374–383, 383.
 - 16 Kirsti Malterud and Per Solvang, “Vulnerability as Strength: Why, When and How?” *Scandinavian Journal of Public Health*, vol. 33, Suppl. 66 (October 2005): 3–6, 3.
 - 17 Elizabeth Mollard, Holly Hatton-Bowers and Julie Tippens, “Finding Strength in Vulnerability: Ethical Approaches When Conducting Research with Vulnerable Populations,” *Journal of Midwifery & Women’s Health*, vol. 65(6) (November/December 2020), 802–807.
 - 18 Lori Peek, “Children and Disasters: Understanding Vulnerability, Developing Capacities, and Promoting Resilience – An Introduction,” *Children, Youth and Environments*, vol. 18(1) (2008): 1–29; Patrice L. Engle, Sarah Castle and Purnima Menon, “Child Development: Vulnerability and Resilience,” *Social Science & Medicine*, vol. 43(4) (September 1996): 621–635.

various research areas lead to the decision to include “strength” as part of the understanding of children’s social well-being and health and to ask whether the CRC includes legal obligations that enhance the child’s experience of strength, respectively the child’s strength.

Scambler’s dimensions of vulnerabilities largely address structural deficits in society and societal institutions. Though the dimensions of vulnerability are experienced by the individual child, such as loneliness or powerlessness, they are inflicted on the child by societal structures and institutions. The dimensions of vulnerability focus on situational and structural vulnerabilities, rather than on embodied factors.¹⁹ This focus on the societal structures and institutions the child grows up in recognises that the child is held in a vulnerable position, rather than defining the child as being “vulnerable” as such. From this it follows that a human-rights-based approach supports the altering of societal structures and institutions responsible for the child’s social well-being, supports the child’s experience of, and as such supports the child’s right to the highest attainable standard of health.

In what follows, the analysis answers the question of whether the CRC’s legal rights and its relevant legal sources include mechanisms for addressing and combating the societal structures and institutions upholding dimensions of vulnerabilities and supporting the child’s experience of strength or whether it cements the connotations of the embodiment of the “vulnerable child” per se. The analysis starts by presenting Scambler’s dimensions of vulnerabilities that are linked to societal structures and institutions – dimensions of vulnerabilities that affect the child’s social well-being and therefore the child’s health.

4.4 DIMENSIONS OF VULNERABILITIES AND THE CHILD’S HUMAN RIGHT TO HEALTH

“Anomie” is a dimension of vulnerability that refers to the sense of being *lost*, without compass, drifting, or being estranged. In sociology nowadays it is transcribed as “normless”, often due to the lack of sense of belonging to a community and lack of narratives that afford comfort and protective security.²⁰ The dimension of “alienation” refers to the child becoming alienated from its very humanity as it becomes a thing-like part in the machinery of production. This dimension is clearly linked to the worker’s experience of alienation, but one might ask

19 Flegar, “Who Is Deemed Vulnerable,” 374–383, 380.

20 Scambler, “Dimensions of Vulnerability,” 2. This dimension is linked to the work of Durkheim; Emile Durkheim, *Suicide* (London: Routledge & Kegan Paul, 1897).

whether the vulnerability dimension may also be related to a child's experience of societal institutions and structures to which it belongs. Both alienation and anomie can be regarded as correlates of, and at times causal mechanisms inducing, powerlessness.²¹

The dimension of "powerlessness" describes the child's lack of any material but often also social and cultural capital, which leads to lack of power.²² The lack of any of those capitals causes a lack of influence, but not only that. Scambler and Tjora point out that powerlessness can in fact be a function of the absence of those "familiarity bonds" that bring solace, comfort and community- or network-based, health-bestowing sustenance.²³ Habermas points to the experience of powerlessness when all parties are acting in good faith but in accord with a pre-set agenda to the advantage of one or more or none of the participants.²⁴

"Marginalisation" and "exclusion" relate to the experience of collectivities pushed to the edge of societies, putative "misfits" represented by stereotypes. The collectivities are "othered" to reinforce definitions of what is normal and acceptable.²⁵ Furthermore, "exclusion", especially "social exclusion", disguises the inconvenience of enduring structural inequalities.²⁶

The dimension of vulnerability called "stigmatisation" denotes non-conformance with norms governing how people should "be" rather than how they should behave. Scambler and Hopkins suggest that stigma be defined in terms of "ontological" rather than "moral" deficits. A child rendered vulnerable by stigmatisation is, thus, a child who possesses a socially undesirable and unacceptable attribute, trait or condition.²⁷

"Deviance" describes the experience of being blamed for morally unacceptable behaviour. In this understanding of vulnerability, the child finds itself in a situation where it experiences discrimination on the grounds of moral unacceptability.

21 Scambler, "Dimensions of Vulnerability," 2.

22 Pierre Bourdieu, *The Logic of Practice* (Cambridge: Cambridge University Press, 1980).

23 Scambler, "Dimensions of Vulnerability," 2, referring to Graham Scambler and Aksel Tjora, "Familiarity Bonds: A Neglected Mechanism for Middle-Range Theories of Health and Longevity?" *Medical Sociology Online* (October 2012): 161–178.

24 Scambler, "Dimensions of Vulnerability," 2, referring to Jürgen Habermas, *Theory of Communicative Action, Vol 2: Lifeworld and System: A Critique of Functionalist Reason* (Cambridge: Polity Press, 1989).

25 Scambler, "Dimensions of Vulnerability," 2.

26 Scambler, "Dimensions of Vulnerability," 2.

27 Scambler, "Dimensions of Vulnerability," 3, referring to Graham Scambler and Anthony Hopkins, "Being Epileptic: Coming to Terms with Stigma," *Sociology of Health and Illness*, vol. 8 (March 1986): 26–43.

This discrimination leads to a sense of self-blame.²⁸ Children experience “cultural imperialism”. This dimension of vulnerability refers to echoes of historical and imperialist notions of ethnic superiority and superordination over those of ethnic inferiority and subordination.²⁹ Referring to the work of Pinderhughes, Scambler states that “racism is a conspicuous product of cultural imperialism and frequently translates into ‘internal colonialism’”.³⁰

At first sight, “loneliness” would appear to be an individual phenomenon. However, it has strong social determinants and can be the product of social structure and culture.³¹ The final dimension of vulnerability is “symbolic violence”, first discussed by Bourdieu. The term “symbolic violence” refers to the subordinating effects on people of hidden structures that reproduce and maintain social domination in covert ways. Symbolic violence is at its most basic level an unequal relationship, a power imbalance between people, the effects of which involve voluntary submission to relations of domination.³² Described as a vulnerability by Graham, it is the experience of the “tacit understandings” of how to conform, and those failing to conform are rightly castigated and exposed to public condemnation and sanctioning.³³

These dimensions of vulnerability do not exhaust any other biological or psychological mechanisms that induce vulnerability and, when in place, present a risk to well-being. The social dimensions of vulnerability presented, however, elucidate the interconnectedness between biological, psychological and social dimensions. A top athlete’s genes are crucial ingredients for winning performances, yet “only ‘people’ have emerged victorious, and personhood can only be fully articulated in the context of social relations.”³⁴ When the athlete has a winning performance, a combination of biological, psychological and social mechanisms comes into play, and each one contributes to causal tendencies.³⁵

28 Scambler, “Dimensions of Vulnerability,” 3.

29 Scambler, “Dimensions of Vulnerability,” 3.

30 Scambler, “Dimensions of Vulnerability,” 3, referring to Charles Pinderhughes, “Toward a New Theory of Internal Colonialism,” *Socialism and Democracy*, vol. 25(1) (March 2011): 235–256.

31 Scambler, “Dimensions of Vulnerability,” 3. See also Fay B. Alberti, *A Biography of Loneliness – The History of an Emotion* (Oxford: Oxford University Press, 2019).

32 Claudio Colaguori, “Symbolic Violence and the Violation of Human Rights: Continuing the Sociological Critique of Domination,” *International Journal of Criminology and Sociological Theory*, vol. 3(2) (June 2010): 388–400, 389, 392.

33 Scambler, “Dimensions of Vulnerability,” 3, referring to Bourdieu, “The Logic of Practice”.

34 Scambler, “Dimensions of Vulnerability,” 1.

35 Scambler, “Dimensions of Vulnerability,” 1.

Moreover, none of these social dimensions of vulnerability in any sense stand alone; rather, they can be causally interrelated in complex ways. A child belonging to the marginalised Sámi population can be stigmatised and subsequently develop experiences of alienation, which again can lead to loneliness. Being shamed for belonging to the Sámi population might lead to deviance, blaming oneself for not being or acting “right”, with a conscious commitment to counter and defeat enacted and felt deviance.³⁶

The 10 dimensions of vulnerabilities are closely linked to the types of assets by which a child’s life (and an adult’s life, for that matter) is characterised: social, cultural, spatial, symbolic, and material assets.³⁷ Access to these assets supports the child’s experience of strength. Certainly, access to and enjoyment of these assets may vary over time, spread throughout the “life course”. Yet, the life course of a child is no longer than 18 years, according to the CRC, and the childhood years are exceptionally important. For the individual child, there is not much time for any alteration or change of assets. Can the CRC contribute in any way to enhance the child’s access to certain assets closely linked, on the one hand, to the experience of dimensions of vulnerability and, on the other, to the experience of strength and by that the experience of social well-being?

4.5 THE SCOPE OF LEGAL OBLIGATIONS AND THE RIGHT TO HEALTH

The right to health is part of a group of human rights often referred to as “social rights”. Though it is broadly recognised that all human rights are interconnected and that no right has more or less worth than the other, there are scholars that question whether social – and economic – rights are “real rights” or whether these types of human rights are merely about politics. This discussion addresses the question of where to draw the line between legal rights, legal obligations, and policies. It is probably not possible to find a definite answer to where to draw the line, but it is important to discuss the blurry line as it informs the scope of discretionary power a state may have when designing social policies, policies that are highly relevant to the child’s social well-being and thus to the realisation of the child’s right to health. Thus, the answer to the question of “real rights” or “mere politics” matters because it answers the question of when a state can be held legally

36 Scambler, “Dimensions of Vulnerability,” 3.

37 Scambler, “Dimensions of Vulnerability,” 5, referring to Graham Scambler and Sasha Scambler, “Theorizing Health Inequalities: The Untapped Potential of Dialectical Critical Realism,” *Social Theory and Health*, vol. 13 (2015): 340–354.

accountable for policy choices and for its ways of implementing policies or lack thereof.³⁸ Can the state be held legally accountable for violating the child's right to health if it does not implement policies and concrete steps regarding structures and institutions that would support the child's strength instead of leaving the child in a vulnerable position?

In general, social rights, such as the right to health, are understood to be "contextual, contingent and continuing".³⁹ The legal obligation to provide a child's right to health is "generally considered to be incapable of immediate implementation owing to the considerable expense involved in realisation."⁴⁰ This understanding is visible in the wording of the UN Covenant on Economic, Social and Cultural Rights (ICESCR) Article 2(1). It requires merely that a party "undertakes to take steps ... to the maximum of its available resources" toward "achieving progressively the full realisation" of the rights contained in the ICESCR. However, even though there is a conditioned obligation on economic, social and cultural rights allowing states to achieve the full realisation progressively, the wording of ICESCR

38 The discussion is often linked to the question if social rights are enforceable in the courts, and if social rights can be part of constitutional rights. See, for example, Cass R. Sunstein, "Against Positive Rights," in *Western Rights? Post-Communist Application*, ed. András Sajo (Kluwer Law International, 1996), 225–232, 225; Wiktor Osiatynski, "Social and Economic Rights in a New Constitution for Poland," in *Western Rights? Post-Communist Application*, ed. András Sajo (Kluwer Law International, 1996), 233–272; Cass R. Sunstein, *Designing Democracies: What Constitutions Do* (Oxford: Oxford University Press, 2002); Frank B. Cross, "The Error of Positive Rights," 48 *UCLA Law Review*, vol. 13 (2000–2001): 858–923; Katherine Eddy, "Welfare Rights and Conflict of Rights," *Res Publica*, vol. 12 (2006): 337–356; David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford University Press, 2007); Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008); Malcom Langford, "The Justiciability of Social Rights: From Practice to Theory," in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Malcom Langford (Cambridge: Cambridge University Press, 2008), 3–45; Katherine G. Young, *Constituting Economic and Social Rights* (Oxford: Oxford University Press, 2012); Gustavo Arosemena, "Retrieving the Differences: The Distinctiveness of the Welfare Aspect of Human Rights from the Perspective of Judicial Protection," *Human Rights Review*, vol. 16(3) (2015): 239–255. For a short summary of the discussion, see also Julia Köhler-Olsen, "Growing Up in Families with Low Income – The State's Legal Obligation to Recognize the Child's Right to an Adequate Standard of Living," in *Transformative Law and Public Policy*, eds. Sony Pellissery, Babu Mathew, Avinash Govindjee and Arvind Narrain (New York: Routledge, 2019), 151–170.

39 Michael Dennis, and David Stewart, "Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?," *American Journal of International Law*, vol. 98 (2004): 462–515, 479.

40 Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development*.

Article 2(1) also contains an unconditioned obligation to “take steps”. The UN Committee on Economic, Social and Cultural Rights (UNESCR) interprets these two types of state obligations as, on the one hand, a “progressive obligation of results” and, on the other, an “immediate obligation”. The former obligation accepts that ensuring the social well-being of all children, and thereby the realisation of the child’s right to health, is a process over time. The latter obligation requires states to actively pursue the obligation to progressively realise the child’s right to health by taking steps and by guaranteeing that the child’s right to health “will be exercised without discrimination”.⁴¹ The CRC Committee has adopted this understanding when it comes to states’ obligation to realise economic and social rights.⁴² In General Comment no. 15 on the child’s right to the enjoyment of the highest attainable standard of health, the CRC Committee defines the scope of states’ legal obligation by stating that “[a]ll States, regardless of their level of development, are required to take immediate action to implement these obligations as a matter of priority and without discrimination of any kind”.⁴³

Based on both UN Committees’ analysis and interpretation of the scope of state obligation regarding the realisation of the right to health, it is reasonable to argue that although financial and economic constraints might hinder the full implementation of policies that restructure societal structures and institution, states are obligated to take immediate active steps to implement the child’s right to health without any form of discrimination.

Legal scholar Sandra Fredman has contributed to dismantling the right to non-discrimination, moving beyond the concept of prohibiting discrimination on certain grounds towards the ultimate aim of achieving equality. Fredman introduces the term “substantive equality”. Substantive equality, according to Fredman, can only be achieved by tackling four dimensions that uphold inequality rather

41 UN Committee on Economic, Social and Cultural Rights, *General Comment no. 3: The Nature of States Parties’ Obligations* (Art. 2, para. 1 of the Covenant), E/1991/23 (December 14, 1990), p. 1, para. 1 and 2.

42 UN Committee on the Rights of the Child, *General Comment no. 5 (2003) on General Measures of Implementation of the Convention on the Rights of the Child* (Arts. 4, 42 and 44, para. 6), CRC/GC/2003/5 (November 27, 2003), para. 6–8.

43 CRC/C/GC/15, para. 72. The reference to “these obligations” regards the states’ three types of obligations relating to human rights, including children’s right to health: to respect freedoms and entitlements, to protect both freedoms and entitlements from third parties or from social or environmental threats, and to fulfil the entitlements through facilitation or direct provision, see CRC/C/GC/15, para. 71.

than tackling grounds of discrimination.⁴⁴ These four dimensions are first, the redistributive dimension which addresses and recognises classifications that lead to detriment and disadvantage and permits affirmative action and expressly differential treatment to redress previous disadvantage; second, the recognition dimension, which addresses stigma, stereotyping, prejudice and violence and requires long-term policies to decrease stigma and stereotyping; third, the participatory dimension of the right to non-discrimination and equality, which requires the combating of social marginalisation and exclusion; and fourth, the transformative dimension, which recognises that equality, also an equal right to health, is not necessarily about sameness but that different identities and characteristics should be respected and even celebrated.⁴⁵

Fredman's four dimensions correlate to Scambler's 10 dimensions of vulnerability. For example, Scambler's dimensions of powerlessness, stigmatisation, exclusion and marginalisation are addressed by Fredman's dimensions of recognition and participation. Both dimensions of substantive equality address and recognise stigma and stereotyping and call for policies that combat social marginalisation and exclusion. Also, the aim to achieve substantive equality based on the right to non-discrimination and equality requires policies that contain a transformative dimension. This dimension recognises that the realisation of the right to health is not about sameness, but that different identities and characteristics should be respected and even celebrated. Scambler writes about the vulnerability dimension of cultural imperialism referring to echoes of historical and imperialist notions of ethnic superiority and superordination over those of ethnic inferiority and subordination. Fredman's dimension of transformation requires targeted policies in healthcare that not only respect and celebrate different identities and characteristics but also combat the "othering" of collectivities to reinforce definitions of what is normal and acceptable. Policies that implement the right to health for children must work to change enduring structural inequalities.

Although Article 2(1) of the CRC does not explicitly mention the aim of substantive equality, the right to non-discrimination shall protect each person's right to equal access to their rights. Equality is an intrinsic part of the right to non-discrimination. This can also be seen in the Human Rights Committee's General Comment no. 18, which underlines the importance of taking special measures to diminish or eliminate conditions that cause discrimination. The Human Rights

44 Sandra Fredman, "Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights," *Human Rights Law Review*, vol. 16(2) (2016): 273–301.

45 Sandra Fredman, "Emerging from the Shadows," 273–301.

Committee emphasises that states should take specific actions to correct general conditions of a certain part of the population that prevent or impair the enjoyment of human rights.⁴⁶ The CRC Committee, moreover, addresses underlying structural and social factors that might keep children from experiencing social well-being and infringing the right to health.

So far, it has not been discussed whether the CRC can bolster access to assets that might support the child's strength and lead to the diminishing of dimensions of vulnerabilities that are counterproductive to the child's health. Relevant norms in such a discussion are, among others, CRC Article 12 on the child's right to participation, Article 27 on the right to an adequate standard of living, Articles 28 and 29 on the right to education, and Article 30 on the child's right to enjoy his or her own culture, profess and practise his or her own religion, and use his or her own language.

In general, there is little reason to question whether implementing these rights and others supports the diminishing of the 10 dimensions of vulnerabilities that threaten the child's social well-being. However, the diminishing, or even elimination, of the vulnerabilities that support the child's experience of strength can only be achieved if these rights are realised and implemented in a way that ensures substantive equality.

4.6 THE RIGHT TO HEALTH AS A TOOL FOR THE SOCIAL WELL-BEING OF THE CHILD

Having analysed the scope of state obligations regarding the child's right to health, the next question to pose and discuss is whether the child's right to health implies that states have the legal obligation to combat vulnerabilities, support the child's strength, and as such enhance the child's social well-being. Human rights are individual rights. States are obligated towards the rights holder staying in the state's territory. Health is individual, perceived as an individual experience, often linked to the individual's choices, or is foreordained and fated. The human right to health in CRC Article 24(1) might be read as to address the embodied vulnerability of the child. In case of a sick child, the state must strive to ensure the child the right to access to healthcare services. The state must also implement measures that prevent the child from becoming sick.

Article 24(2) demands that states pursue the full implementation of the right of the child to the enjoyment of the highest attainable standard of health. It explicitly

46 Human Rights Committee, *General Comment no. 18: Non-discrimination* (November 10, 1989), para. 10.

mentions concrete aims that increase the states' chance of fulfilling their obligation of conduct to fully implement this right and even suggests some appropriate measures. Article 24(2)(c) highlights the application of readily available technology, the provision of adequate nutritious foods and clean drinking water, and awareness of environmental pollution, whereas letter (e) mentions access to education and the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation, and the prevention of accidents. Also, guidance for parents and family planning education and services are suggested as appropriate measures; ref. Article 24(2)(f).

The non-exhaustive suggestions in Article 24(2) on states' measures to pursue the full implementation of the child's right to health relate to some extent to the assets linked to the dimensions of vulnerability. The application of readily available technology, the provision of adequate nutritious foods and clean drinking water, the awareness of environmental pollution, information and education point to measures that address matters of structural and social types, all having an influence on the well-being of children.

The types of measures suggested in Article 24(2) might be especially relevant to those collectivities that are pushed to the edge of societies, experiencing social exclusion and enduring structural inequalities. Children in these collectivities can experience the "marginalisation" and "exclusion" dimensions of vulnerability, as well as stigmatisation and often "cultural imperialism", which can even lead to self-blame and "deviance". Indeed, the measures suggested as appropriate in Article 24(2) will not be able to alter these dimensions of vulnerability. However, structural and institutional changes can contribute to diminish negative consequences of a lack of social, spatial and symbolic assets in the community to which the child belongs.

The UN Committee on the Rights of the Child seems to acknowledge that the pursuit to implement the child's right to health must "address the underlying determinants of health".⁴⁷ Structural determinants mentioned explicitly by the Committee are the global economic and financial situation, poverty, unemployment, migration and population displacements, war and civil unrest, discrimination and marginalisation, climate change, and rapid urbanisation.⁴⁸ Simultaneously, strong evidence exists for effective structural interventions.⁴⁹

Several dimensions of vulnerability are closely related to children, their families and communities being discriminated against. Societies marginalise certain communities – often communities that are lacking material, social and cultural capital.

47 CRC/C/GC/15, para. 2.

48 CRC/C/GC/15, para. 5.

49 CRC/C/GC/15, para. 5.

The marginalisation expresses cultural imperialism, echoing historical and imperialist notions of ethnic and cultural superiority and superordination over those of ethnic inferiority and subordination. A lack of material, social and cultural capital and a resultant marginalisation and stigmatisation supported by cultural imperialism leave communities on the edge of society powerless. These communities are often left with few social, spatial, material, cultural and symbolic assets.

The CRC Committee emphasises states' obligation to ensure that the child's health is not undermined as a result of discrimination.⁵⁰ According to CRC Article 2(1), grounds for discrimination are related to assets, or lack of such assets, and thereby closely linked to dimensions of vulnerability. States are obliged to ensure the child's right to health without discrimination of any kind, irrespective of the child's or his or her parents' race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. Experiencing discrimination based on these statuses mentioned in CRC Article 2(1) is likely to create several of the dimensions of vulnerabilities that work against the aim of ensuring the child's social well-being and health.

The Committee recognises that children in disadvantaged situations, children growing up with few assets and in underserved areas (lack of spatial assets), should be a focus of efforts to fulfil children's right to health. In General Comment no. 15, the Committee states furthermore that factors should be identified at national and subnational levels "that create *vulnerabilities* for children or that disadvantage certain groups of children".⁵¹

Certainly, the Committee's comments regarding what states should "do", what policies they should adopt, are not to be understood as legal obligations. However, the realisation of economic, social and cultural rights not only comprises, as stated above, an obligation to progressively achieve results, but also comprises certain immediate obligations of conduct, taking steps with all appropriate means and without any form of discrimination. The immediate obligations of conduct exist irrespective of a state's resources at hand for the realisation of economic, social and cultural rights. It is therefore reasonable to require and expect that states take steps that combat structural and social institutions and practices that uphold discrimination against children and groups of children belonging to collectivities pushed to the edge of societies, and, as such, positively support the child's experience of strength. Otherwise, vulnerabilities created by these discriminatory structures, as well as social institutions and practices, work against the obligation to progressively realise the child's right to health.

50 CRC/C/GC/15, para. 8.

51 CRC/C/GC/15, para. 11.

4.7 CONCLUDING REMARKS

The main question for this chapter is whether the CRC's legal rights and its relevant legal sources include mechanisms to support children's experience of strength and, thus, support the child's right to health. The experience of strength, as well as that of being vulnerable, is not a fixed position one finds oneself in. There are days and periods where one experiences strength; the same applies for vulnerability. These experiences are personal to everyone. That said, these individual experiences can be linked to external factors, factors Scambler has called the 10 dimensions of vulnerabilities. These 10 dimensions have a direct influence on individuals' social well-being. Children's – and adults' – social well-being has a major impact on their experience of health. Therefore, the establishment of factors that enhance social well-being, and, conversely, the elimination or at least diminishing of 10 dimensions that make us all vulnerable and affect our social well-being in a negative way, is paramount to our experience of health.

Member states to the CRC are obliged to realise the child's right to health in a non-discriminatory way, according to CRC Article 2. This obligation immediately requires states to actively take steps to progressively realise the child's right to health. From this, it follows that activities taken by the state authorities must decrease or even abolish factors that hinder the child from experiencing the right to health in a non-discriminatory way. The scope of the state's obligation to realise the child's right to health is, thus, to take active steps that are in accordance with the child's right to substantive equality. The state's obligation on the child's right to health is, furthermore, not merely understood as covering the individual child's right to healthcare. Article 24 of the CRC and its interpretation by the UN Committee on the Rights of the Child, read together with other relevant rights of the CRC, emphasise the state's obligation to realise that the right to health must include work on societal structures and institutions that lead to non-well-being and hinder the fulfilment of the child's right to health.

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5. Vulnerability under COVID-19: Children's Human Rights under Lockdown

E. Kay M. Tisdall and Fiona Morrison

Abstract The COVID-19 pandemic has shown how vulnerable we are, individually, collectively and globally. The pandemic caught many Global North countries by surprise, unused to such widespread and pervasive disaster. Despite Scotland's commitment to children's human rights, state responses show the precarity of children's human rights under the pressures of responding to the pandemic, and the vulnerability of considering the full range of children's rights to protection, provision, and participation.

Keywords COVID-19 | children's rights | human rights | vulnerability | disaster

5.1 INTRODUCTION

A familiar narrative has arisen about the policy responses to the COVID-19 pandemic.¹ As nation-states struggled to respond to what became a global pandemic, to try and protect their population's survival and health, the ensuing policy responses highlighted and exacerbated existing inequalities and created new ones. Evidence has steadily accumulated of the negative impacts on those who experienced poverty or insecure work and/or those who were groups at risk of discrimination by sex, race, disabilities or other forms.² The COVID-19 policy responses have shone a light on and accelerated the increasing dominance of digital access across key aspects of people's lives – from access to services, to relationships, to

- 1 Clare Bambra, Ryan Riordan, John Ford, and Fiona Matthews, "The COVID-19 Pandemic and Health Inequalities," *Journal of Epidemiology and Community Health*, no. 11 (2020): 964–968; Nirmala Rao and Philip A. Fisher, "The Impact of the COVID-19 Pandemic on Child and Adolescent Development Around the World," *Child Development*, vol. 92(5) (2021): 738–748.
- 2 Bambra et al., "The COVID-19 Pandemic," 964–968; see also Teodor Mladenov and Ciara Siobhan Brennan, "Social Vulnerability and the Impact of Policy Responses to COVID-19 on Disabled People," *Sociology of Health & Illness*, vol. 43(9) (2021): 2049–2065.

learning – and the growing divide between those who have such access and those whose access is lacking or insecure.³ COVID-19 has underlined that we are all vulnerable to such disasters and that our systems and structures may ameliorate or increase inequalities, support, undermine or ignore human rights, making certain individuals and groups of people more vulnerable than others.

This chapter considers learning from the independent Children’s Rights Impact Assessment (CRIA) undertaken in Scotland on the emergency measures impacting children in Scotland from April to June 2020. This was undertaken for the Commissioner for Children and Young People in Scotland,⁴ due to the considerable concerns growing in the children’s rights sector about breaches to children’s rights. The CRIA was undertaken by a group of “experts” organised by the Observatory of Children’s Human Rights Scotland.⁵ Completed in a very tight timeframe to inform subsequent action by the Commissioner’s Office and others, it involved reaching out to organisations and other expertise (including children and young people and their advocacy groups, such as the Children’s Parliament⁶ and the Scottish Youth Parliament⁷) at the start, middle and end of the drafting. This maximised the exchange of available and emerging evidence and identification of issues. The independent CRIA concentrated on a selection of relevant emergency legal and policy measures legislated for and introduced in Scotland by the Scottish and UK Parliaments, in response to the pandemic. Many of these measures were specifically related to the “lockdown” that was enforced, where children and adults were required to stay in their residences and mobility through public spaces, and access to them, was severely if not entirely restricted.⁸

3 Afnan N. Alkhalidi, “Digital Exclusion during the COVID-19 Pandemic: A Review of How Developed Countries Responded to Support Their Citizens,” *International Journal of Electronic Government Research*, vol. 18(1) (2022): 1–19.

4 The Commissioner is a statutory, independent office appointed by the Scottish Parliament. The main function of the Commissioner is to promote and protect the rights of children and young people in Scotland. For more information about the Commissioner and the Commissioner’s Office, see <https://www.cypcs.org.uk/> (accessed October 13, 2024).

5 The Observatory is a collaborative of Scottish organisations working to drive implementation of children’s human rights in Scotland, with local impact and global learning. For more information about the Observatory, see <https://www.ed.ac.uk/education/observatory>. (accessed October 13, 2024).

6 For more information about the Children’s Parliament, see <https://www.childrensparliament.org.uk/about-us/> (accessed October 13, 2024).

7 For more information about the Scottish Youth Parliament, see <https://syp.org.uk/>. (accessed October 13, 2024).

8 For more information on the independent CRIA’s methodology and content, see <https://www.cypcs.org.uk/coronavirus/independent-impact-assessment/>. (accessed October 13, 2024).

CRIAs are a General Measure for implementing the UN Convention on the Rights of the Child (CRC), recommended by the UN Committee on the Rights of the Child.⁹ They seek to ensure children's human rights are considered when decisions are made – such as when reviewing and developing policy or service provision. An authoritative definition of CRIAs is provided by the European Network of Ombudspersons for Children:

A Children's Rights Impact Assessment examines the potential impacts on children and young people of laws, policies, budget decisions, programmes and services as they are being developed and, if necessary, suggests ways to avoid or mitigate any negative impacts.¹⁰

While the report was called a CRIA, it was in fact done largely after policies had been determined, so could be described more accurately as a Children's Rights Impact Evaluation.

The Scottish Government had been voluntarily undertaking a form of CRIAs on its own policies for some time. Their form also included children's well-being, leading to the acronym CRWIAs. Scotland thus should have been sharply observant of children's human rights in its policy responses. The United Kingdom, as the State Party, ratified the CRC in 1991 and has thus been obligated for over 30 years to operationalise the CRC in practice and policy. Scotland has long had separate legislation and legal jurisdiction in areas such as education, social services, health, family, and criminal law, and this has extended since Scottish devolution and the (re)establishment of the Scottish Parliament in 1999.¹¹ The Scottish Government has articulated a commitment to human rights generally, with the establishment of the First Minister's Advisory Group on Human Rights Leadership, and to children's human rights specifically.¹² For nearly two decades, the Scottish Government has used variations of the slogan "making children's rights real" as an organising

9 UN Committee on the Rights of the Child, *General Comment no. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, Para 6)*, CRC/GC/2003/5 (November 27, 2003).

10 European Network of Ombudspersons for Children (ENOC), *A Guide on How to Carry out CRIA*, (ENOC, 2020), 11, <http://enoc.eu/wp-content/uploads/2020/12/ENOC-Common-Framework-of-Reference-FV.pdf>.

11 E. Kay M. Tisdall and Malcolm Hill, "Policy Change under Devolution: The Prism of Children's Policy," *Social Policy and Society*, vol. 10(1) (December 2011): 29–40.

12 For example, see Scottish Government website on human rights, <https://www.gov.scot/policies/human-rights/#:~:text=In%20Scotland%2C%20civil%20and%20political,treaties%20which%20apply%20to%20Scotland.> (accessed October 13, 2024).

principle of its childhood policy.¹³ During the COVID-19 pandemic, the Scottish Government was legislating for CRC incorporation into domestic law; this has now been achieved through the UNCRC (Incorporation) (Scotland) Act 2024.¹⁴ In this policy environment, children's human rights should have been a central feature of policymaking under COVID-19.

The chapter continues by reviewing how vulnerability is conceptualised in legal philosophy, childhood studies and critical disaster studies. Drawing on analysis from the independent CRIA, we consider how vulnerability played out in policy responses to COVID-19 and the extent to which notions of vulnerability helped advance or impede children's human rights. The chapter concludes by discussing the potential for vulnerability in advancing children's human rights. We offer key areas for attention, if we are to ensure that notions of vulnerability do not inadvertently marginalise children and their human rights.

5.2 VULNERABILITY, CHILDHOOD STUDIES AND DISASTER STUDIES

As has been well rehearsed by other authors in this edited book, legal philosophers such as Fineman have developed "vulnerability" as an alternative to liberal theories of rights.¹⁵ Following on from long-standing feminist critiques, liberal theory is criticised for conceiving individuals as autonomous, independent and self-sufficient.¹⁶ Instead, all people are potentially vulnerable and dependent: vulnerability is universal and an inevitable condition of being human because all people are embodied.¹⁷ Rather than perceiving vulnerability as inevitably negative, it can also inspire creativity and trust and develop or deepen relationships.¹⁸ The state has positive obligations, when vulnerability is recognised, to ensure protection is provided to people as they need it and to promote resilience by providing resources.¹⁹

13 For example, see Scottish Government, *Incorporating the UN Convention on the Rights of the Child into Scots Law: consultation* (2019), <https://consult.gov.scot/children-and-families/uncrc/> (accessed November 11, 2022).

14 See <https://www.parliament.scot/bills-and-laws/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill/stage-1> (accessed October 13, 2024).

15 For example, Haugli and Martnes, chapter 1; Herring, chapter 3; and Martnes, chapter 6.

16 Daniel Bedford, "Introduction: Vulnerability Refigured," in *Embracing Vulnerability*, eds. Daniel Bedford and Jonathan Herring (Abingdon: Routledge, 2020), 1–28.

17 Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law and Feminism*, vol. 20(1) (2008): 1–18.

18 Danielle Petherbridge, "What's Critical about Vulnerability? Rethinking Interdependence, Recognition, and Power," *Hypatia*, vol. 31(4) (2016): 589–604.

19 Fineman, "The Vulnerable Subject: Anchoring Equality," 1–18.

Indeed, questions are raised about why some people have so many resources while others do not.²⁰

Herring has particularly developed these ideas with a childhood and children's rights lens.²¹ Law, he argues, has emphasised children's lack of capacity, protecting children from harm, and has confined children to institutional or private spaces. Children are constructed as being inherently vulnerable, with insufficient attention to how structurally, situationally and relationally they are made particularly vulnerable. Instead, if universal vulnerability were the premise, we would recognise commonalities between children and adults.²² The distinctions would be blurred or erased between them, as people are all interdependent, all people have impaired capacity and lack rationality, and people's values are all influenced by others. The results would treat adults more like children rather than children more like adults.²³ Significant legal changes would follow. Particular concessions for disadvantaged groups, for example, would become the norm. Attention would be given to why special accommodations and advantages are given to able-bodied people or some adults. The state would have a role in social provision, addressing people's vulnerability.

A different use of vulnerability is prevalent in disaster management, social care practice and related literature. There are "vulnerable groups", specific groups of people who are at particular risk. For example, in the European Commission's index for risk management, vulnerable groups merit a complete section and start with the definition:

... the population within a country that has specific characteristics that make it at a higher risk of needing humanitarian assistance than others or being excluded from financial and social services. In a crisis situation such groups would need extra assistance, which appeals for additional measures ... as a part of the emergency phase of disaster management.²⁴

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

21 Herring, "Vulnerability, Children," 243–263; Jonathan Herring, *Vulnerability, Childhood and The Law* (Cham Switzerland: Springer, 2018); Daniel Bedford and Jonathan Herring, eds., *Embracing Vulnerability: The Challenges and Implications for Law* (London: Routledge, 2020).

22 Herring, *Vulnerability, Childhood*.

23 Herring, *Vulnerability, Childhood*.

24 European Commission, Joint Research Centre, M., Marin-Ferrer, K. Poljanšek, and L. Vernaccini, *Index for Risk Management – INFORM: Concept and Methodology, Version 2017* (European Union: 2017), 34.

In social care, “vulnerable groups” is very common, referring to groups that previously might have been referred to as “at risk” or “in need”. It has protection overtones in the UK, because there is protection of “vulnerable groups” legislation, which is primarily about criminal records checks on those who might work with such vulnerable groups. These groups include children and young people under the age of 18 as well as adults who are provided with care, health, community care or welfare services. Rather than recognising that all people are vulnerable, this discourse identifies particular groups of people as specifically vulnerable.

This discourse has not gone without critique. Sherwood-Johnson,²⁵ for example, develops a fascinating comparison within Scottish policy for those considered “vulnerable” or “at risk”. This showcases how child protection policy does not challenge power relationships. Children are seen as inherently at risk of harm and dependent on others. Parental control of children is typically accepted unless a parental failure is identified and the state then becomes a “benign intervenor”. Adult power is not the problem within child protection policies. Sherwood-Johnson contrasts this with domestic abuse policy, which is not based on women being vulnerable. The problem lies with male partners as perpetrators, within a wider context of problematic gender inequalities. Unlike children, women are not seen as inherently at risk of harm or dependent on others. The state is not necessarily benign and can rightfully be challenged for allowing gender inequalities to persist. The question, then, if a similar approach were applied to child protection policy, is what would the policy look like? Would it address childhood inequalities, conceptualising responsibility of the problem as lying with the abusers and structural inequalities²⁶ rather than inherently vulnerable children? To what extent would a vulnerability lens attend to structural inequalities that produce the conditions where children are harmed? And would this be sufficient to protect and implement the rights of individual children and ensure accountability for those who harm children?

Another powerful critique is developed by researchers such as Brown,²⁷ who have undertaken research with people who are included within so-called vulnerable groups. Their research underlines that few people wish to claim this category, as it is not a position of strength – albeit it may gather philanthropic

25 Fiona Sherwood-Johnson, “Constructions of ‘Vulnerability’ in Comparative Perspective: Scottish Protection Policies and the Trouble with ‘Adults at Risk,’” *Disability & Society*, vol. 28(7) (2013): 908–921.

26 Brid Featherstone, Anna Gupta, Kate Morris and Sue White, *Protecting Children: A Social Model* (Bristol: Policy Press, 2018).

27 Kate Brown, “Vulnerability: Handle with Care,” *Ethics and Social Welfare*, vol. 5(3) (2011): 313–321.

or government sympathy. The discourse of vulnerability can be oppressive and paternalistic; it can stigmatise and exclude; it can be used to widen control over certain people.²⁸ Vulnerability can be used to constrain someone's rights to make decisions, separating them from their social networks, which in turn makes them more vulnerable.²⁹ Vulnerability then may not be emancipatory or address power relations, but instead entrench power imbalances.

Children are vulnerable to being constructed as vulnerable. A well-known concept within childhood studies is that childhood is socially constructed. As famously written by Prout and James, "A child's immaturity is a biological fact: but how this immaturity is understood and how it is made meaningful is a fact of culture".³⁰ This form of social construction does not deny that there is a reality of a child's immaturity, but points out that certain aspects of this are considered important, and these create particular understandings of children and childhood. In the Global North, such constructions "traditionally" perceive children as vulnerable, innocent, dependent and incompetent.³¹ While such constructions may well persist, they have been joined by some valuing of children – but often as future capital and human investments.³² Such constructions of childhood remain persistent.

Disaster responses frequently perpetuate such constructions of childhood. Reviews of climate change research,³³ for example, find that children very commonly are positioned as passive victims and not recognised for their potential to help address climate risks. The international non-governmental organisation Plan International writes that based on their experience:

28 Brown, "Vulnerability: Handle with Care," 313–321; Danielle Petherbridge, "What's Critical about Vulnerability? Rethinking Interdependence, Recognition, and Power," *Hypatia*, vol. 31(4) (Summer 2016): 589–604.

29 Barbara Fawcett, "Vulnerability: Questioning the Certainties in Social Work and Health," *International Social Work*, vol. 52(4) (June 2009): 473–484.

30 Alan Prout, and Allison James, "A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems," *Constructing and Reconstructing Childhood*, eds. Allison James and Alan Prout (London: The Falmer Press, 1990), 7–33, 7.

31 Jo Moran-Ellis and E. Kay M. Tisdall, "The Relevance of 'Competence' for Enhancing or Limiting Children's Participation: Unpicking Conceptual Confusion," *Global Studies of Childhood* 9(3) (2019): 212–223.

32 See Peter Moss, "Beyond the Investment Narrative," *Contemporary Issues in Early Childhood*, vol. 14(4) (2013): 370–372.

33 Kristoffer Berse, "Climate Change from the Lens of Malolos Children: Perception, Impact and Adaptation," *Disaster Prevention and Management*, vol. 26(2) (2017): 217–229; Ana Sanson, Karina V. Padilla Malca, and Judith Van Hoorn, "Impact of the Climate Crisis on Children's Social Development," in *The Wiley-Blackwell Handbook of Childhood Social Development*, 3rd Edition, eds. Peter K. Smith and Craig H. Hart (London: John Wiley and Sons, 2022), 206–223.

During a disaster, the physical survival needs of children (safe water, food, shelter, clothing, primary health care) are usually given a very high priority. But observation indicates that other needs and rights, which are also essential for children, like being protected from abuse and harm, education, rest, leisure, privacy and the right to participate freely in matters which affect them are too often overlooked.³⁴

Children and childhood are restricted to three areas, according to Plan's analysis, within disaster literature. One, they are subsumed under studies of women. Two, the children's situation is "medicalised", limiting children to trauma and social work responses. These focus on professionals returning children to their "normal lives" as soon as possible. Three, children easily become the media's representation of disasters, as icons of needy and passive victims who need rescuing.³⁵ None of these three areas perceive children as social actors, capable of contributing to their families and communities, in times of disaster.

A rich seam within disaster studies problematises the notion of a disaster. This is summarised neatly by García-Acousta:

Anthropological studies of disasters using a historical perspective have shown that we should not confuse natural hazards with disasters; that disasters are the result of external rather than internal processes; that growing social and economic vulnerability is the main culprit in disaster events; and that disasters are processes resulting from pre-existing critical conditions in which accumulated vulnerability and social risk construction, understood as ways in which society constructs vulnerable contexts in its interaction with ecosystems, play a crucial role through their association with a certain hazard.³⁶

Disasters, then, are not natural or inevitable; disasters are socially situated (what might be a disaster in one context may not be in another).³⁷ Albris goes as far as to say that structural inequalities, which create the vulnerabilities and risk, are

34 Amer Jabry ed., *After the Cameras Have Gone: Children in Disasters* (2005), 1.

35 For a similar analysis, see Jonathan Todres, "Mainstreaming Children's Rights in Post-disaster Settings," *Emory International Law Review*, vol. 25(3) (2011): 1233–1261.

36 Virginia García-Acosta, "Disasters, Anthropology of," in *The International Encyclopaedia of Anthropology*, ed. Hilary Callan (London: John Wiley and Sons, 2018), 1–8, 3.

37 Doug Henry, "Anthropological Contributions to the Study of Disasters," in *Disciplines, Disasters and Emergency Management*, eds. David McEntire and W. Blanchard (Maryland: Federal Emergency Management Agency, 2005).

more important to a disaster than the hazard itself.³⁸ This literature emphasises the historicity and process of disasters, rather than seeing them as a dramatic event, as they arise from this patterned vulnerability and have implications far after the publicised event.³⁹ Thus, in this literature, vulnerability and risk are tied to the construction of disaster and are caused by social, political and cultural inequalities and power relations. Authors in the anthropology of disaster have very firmly applied this to the COVID-19 pandemic; as one of the seminal authors in the field writes, “The COVID-19 pandemic is a disaster, and disasters do not just happen”.⁴⁰ Disaster studies, then, would point out that COVID-19 and its policy responses were not inevitable, and before, during and after were entwined with structural and patterned inequalities and vulnerability.

There are thus tensions within academic literature discussions of vulnerability. The legal philosophers, such as Fineman and Herring, are developing vulnerability as a universal concept, with ensuing implications for policy and practice. This conceptual reclaiming of vulnerability intersects with a pervasive use of vulnerability to refer, instead, to particular and usually disempowered groups of people who require special policy and practice attention. This use does not necessarily address power relations or structural reasons, so that vulnerability is not often a category people are wanting to claim. Children are the quintessential examples of a “vulnerable” group, with ensuing positioning, policies and practices. The anthropology of disasters focuses on structural vulnerabilities, that can make people individually and/or collectively vulnerable, which are socially constructed, created and exacerbated. We trace these contestations around vulnerability through discussions of the COVID-19 policy responses for children, particularly in the first stages of the pandemic.

5.3 VULNERABILITY AND POLICY RESPONSES

Policy responses to COVID-19 had and continue to have dramatic impacts on children’s human rights. The independent CRIA examined the impact of the

38 Kristoffer Albris, “Disaster Anthropology: Vulnerability, Process and Meaning,” in *Defining Disaster*, eds. Marie Aronsson-Storrier and Rasmus Dahlberg (Elgar online, 2022), 30–44.

39 Andy Horowitz and Jacob A.C. Remes, *Critical Disaster Studies* (Philadelphia: University of Pennsylvania Press, 2021).

40 Anthony Oliver-Smith, “The Social Construction of Disaster: Economic Anthropological Perspectives on the COVID-19 Pandemic,” *Economic Anthropology*, vol. 9 (2022): 167–171, 167. For another example, see Louis Cord and Margaret Arnold, *Natural Disasters and Vulnerable Groups: Insights for an Inclusive and Sustainable Recovery From COVID-19* (World Bank, 2020), <https://blogs.worldbank.org/climatechange/natural-disasters-and-vulnerable-groups-in-sights-inclusive-and-sustainable-recovery-from-covid-19-coronavirus>.

immediate policy response to the pandemic on the rights of children in Scotland. It highlighted key areas that raised significant concerns. The analysis spanned a range of children's rights issues – education, play, children who are in conflict with the law, domestic abuse, and poverty – exploring the impacts that measures had on children's human rights. Through the analysis, the independent CRIA found that adult-oriented systems and institutions, and assumptions about normative childhoods, made it difficult to ensure that children's rights or indeed the vulnerabilities of children were adequately addressed during policy responses. Rather, responses meant that there were groups of children who were inadvertently discriminated against.⁴¹

The COVID-19 policies closed public spaces and institutional places for children and confined children physically to their family households, making children increasingly dependent on their parents or other caregivers in their households. With this shift from public to private spaces for children, implementation of children's human rights depended even more on their households' living circumstances and parents/carers, with less direct reach from the state in terms of supporting services. While family households might generally be the best way to protect children, the Scottish Government recognised that for some children the increased reliance on them made children more – rather than less – vulnerable.⁴²

While Fineman argues that a vulnerability framework will increase positive state support, instead in the COVID-19 policy responses we saw that such state obligations became tenuous – and the rights of the most vulnerable became increasingly at risk of being breached. For example, the move to online learning in schools placed too much hope that children had access to internet, devices, space and support at home for this – and disadvantaged those children who did not.⁴³ Early on, the Scottish Government recognised the need to ensure devices and data were available to more vulnerable households and financed schemes to do so. What the CRIA unveiled were further issues that limited children's access, such as families needing to share limited numbers of devices amongst themselves or younger children needing support to engage with school learning online, but one or both of their parents being expected to be working from home at the same time themselves.⁴⁴

41 E. Kay M. Tisdall and Fiona Morrison, "Children's Human Rights Under COVID-19: Learning From Children's Rights Impact Assessments," *The International Journal of Human Rights*, vol. 27 (2023).

42 Scottish Government, *Vulnerable Children Report 15 May 2020* (May 27, 2020).

43 Morag Treanor, *Poverty, Food and Digital Access* (Edinburgh: Commissioner for Children and Young People Scotland, 2020), <https://cypcs.org.uk/wp-content/uploads/2020/07/CRIA-appendix-poverty-food-insecurity-digital-exclusion.pdf>.

44 Treanor, *Poverty, Food and Digital Access*.

Institutions and spaces of state intervention, support and services were closed, including schools and early-years provision.⁴⁵ There were restrictions, delays, and the suspension of specific legal rights for children in areas such as criminal justice, family law and child protection.⁴⁶ The state retreated, and children became “hidden” within their family households.

The independent CRIA found that the state’s actions produced and had disproportionate and negative consequences for children and even more so for particular groups of children, demonstrating a form of discrimination. While vulnerability may be universal, it was more acute for children as a group, and even more acute for particular groups of children.⁴⁷ For example, restrictions in young offenders’ institutions left young people confined to their cells, with very limited or no contact with family members, and education and other activities stopped.⁴⁸ The vulnerabilities of young people to suicide and mental health problems in these institutions were not specifically considered, even though there was considerable evidence of these pre-pandemic.⁴⁹ Despite international human rights frameworks requiring children to be treated differently from adults,⁵⁰ no special consideration was given to the young people in young offenders’ institutions being given early release.⁵¹ Indeed, most young people in such institutions were (and are) on remand and thus had not been found guilty of a crime.⁵² While all these points were raised with decision-makers at the time, the rights of young people involved in the criminal justice system, as young people, were not addressed in the emergency policy responses. Here, the association with (potential) criminality was stronger than the “vulnerable” status of the young people as children. Being recognised

45 Except for children deemed “vulnerable” and/or had parents who worked as key workers.

46 E. Kay M. Tisdall, Mary Ann Powell, Katie Reid and Grace Kong, *Independent Children’s Rights Impact Assessment on the COVID-19 Response in Scotland* (Edinburgh: Commissioner for Children and Young People Scotland, 2020).

47 For a similar finding in the United States, see Lori Peek and Simone Domingue, “Recognizing Vulnerability and Capacity: Federal Initiatives Focused on Children and Youth Across the Disaster Lifecycle,” in *Government Responses to Crisis*, eds. Stefanie Haeffele and Virgil Henry Storr (Cham: Palgrave Macmillan, 2020), 61–87.

48 Clair Lightowler and Debbie Nolan, *Children in Conflict with the Law and Children in Secure Care* (Edinburgh: Commissioner for Children and Young People Scotland, 2020).

49 Fiona Dyer, Clair Lightowler and Nina Vaswani, “Exacerbating, Illuminating and Hiding Rights Issues: COVID-19 and Children in Conflict with the Law,” *The International Journal of Human Rights*, vol. 27(9–10) (2023).

50 United Nations, *Rules for the Protection of Juveniles Deprived of Their Liberty* (1990) ‘the Havana Rule,’ Office of the High Commissioner for Human Rights. Adopted by General Assembly Resolution 45/113 (December 14, 1990).

51 Lightowler and Nolan, *Children in Conflict with the Law*.

52 Dyer, Lightowler and Vaswani, “Exacerbating, Illuminating,” 1426–1441.

as particularly vulnerable was not a protection for these children's rights to be addressed.

In some contrast to the limited policy attention to young people caught up in the criminal justice/penal system, domestic abuse was an active concern for policy makers (substantially influenced by the very active civil society organisations in this field). For example, the Coronavirus (Scotland) Act 2020 had placed a duty on ministers to take account of the nature and incidents of domestic abuse during the pandemic. It was not clear whether this duty extended to children, and, in practice, minimal data were gathered on children affected by domestic abuse. There was and is a lack of data on the incidence or nature of domestic abuse affecting children – and a lack of evidence on how their rights to protection were breached or upheld in this context. This highlights the risk of the vulnerabilities of children – their position and status – being subsumed into a general vulnerability category, so that their particular rights risk being overlooked or further marginalised.

The paralysis of legal systems had severe impacts on children's human rights. The restriction of criminal trials resulted in major and ongoing delays to the conclusion of criminal cases.⁵³ These delays and the uncertainty in proceedings were reported as a significant source of fear and anxiety for child witnesses.⁵⁴ The independent CRIA found concern about lapses in communication and notifications from the criminal justice system, as well as breaches in bail conditions with little reparation.⁵⁵ Methods for virtual participation in the children's hearings system⁵⁶ developed at pace. In subsequent research, Porter and colleagues note the convenience for many children and their families of not having to travel to hearings, but also the pressures of unreliable internet connections, the lack of privacy for children to communicate (e.g., in their family home, with other family members present) and children feeling a particular lack of information and advocacy support.⁵⁷ Thus, delays and attempts to address these by virtual justice often caused difficulties for children's protection and access to justice and made them potentially more at risk in their homes.

53 E. Kay M. Tisdall, Mary Ann Powell, Katie Reid, and Grace Kong, *Independent Children's Rights Impact Assessment on the COVID-19 Response in Scotland*.

54 Fiona Morrison and Claire Houghton, "Children's Human Rights in the Contexts of Domestic Abuse and COVID-19," *The International Journal of Human Rights*, vol. 27(9–10) (2023): 1353–1368.

55 Morrison and Houghton, "Children's Human Rights," 1353–1368.

56 In Scotland, the children's hearing system is for children who offend and/or are in need of protection, and for whom compulsory supervision orders are being considered.

57 Robert B. Porter, Fern Gillon, Fiona Mitchell, Nina Vaswani and Emma Young, "Children's Rights in Children's Hearings: The Impact of COVID-19," *The International Journal of Children's Rights*, 29(2) (2021): 426–446.

Most civil proceedings that dealt with disputes about residence and child contact were suspended. Ongoing cases were temporarily suspended or adjourned, and only “urgent and necessary” cases were heard remotely.⁵⁸ Lengthy delays to new or ongoing disputes about child contact jeopardised a range of children’s rights. The head of the Scottish judiciary, the Lord President, issued guidance to parents on complying with child contact orders during the suspension of civil proceedings.⁵⁹ The guidance made no reference to domestic abuse (one of the most common reasons for contact disputes⁶⁰), children’s best interests (Article 3 of the CRC) or children’s participation rights (Article 12 of the CRC). It directed that, if it were not possible to comply with a court order due to COVID-19 restrictions, parents could temporarily vary contact orders.⁶¹ It encouraged indirect contact and the use of video technology to facilitate contact.⁶² This prioritised maintaining child contact rather than considering what was in a child’s best interests. Changing the boundaries of court-ordered contact could be dangerous. Indirect and virtual contact opened opportunities for surveillance, psychological abuse and harassment.⁶³ It was unsuitable for some groups of children – for example, younger children or children with additional needs.⁶⁴ The particular vulnerabilities of children, or even “standard” considerations within Scottish law on the paramountcy of children’s best interests, were not adhered to; policy responses very quickly reverted to a parental lens and favoured parental decisions.

During the pandemic, there were strong policies for and media discourses on ensuring children, who were known to be vulnerable, would be protected despite lockdown and service restrictions.⁶⁵ Children categorised as vulnerable were permitted to attend school and early-years provision. In this context, attendance was largely a safeguarding measure, prioritising children’s protection and safety, rather than a means to realise children’s rights to education, social relationships, or other rights, such as play.⁶⁶ However, far fewer children attended school and

58 Morrison and Houghton, “Children’s Human Rights,” 1353–1368.

59 Lord President, *Coronavirus Crisis: Guidance on Compliance with Court Orders Relating to Parental Responsibilities and Rights* (Edinburgh: Scottish Courts, 2020).

60 E. Kay M. Tisdall, Fiona Morrison and Judy Warburton, “Challenging Undue Influence? Rethinking Children’s Participation in Contested Child Contact,” *Journal of Social Welfare and Family Law*, 43(1) (2021): 8–22.

61 Lord President, *Coronavirus Crisis*.

62 Lord President, *Coronavirus Crisis*.

63 Morrison and Houghton, “Children’s Human Rights,” 1353–1368.

64 Morrison and Houghton, “Children’s Human Rights,” 1353–1368.

65 Tisdall and Morrison, “Children’s Human Rights under COVID-19,” 1475–1491.

66 Therese Casey, *Rest and Play* (Edinburgh: Commissioner for Children and Young People Scotland, 2020).

early-years provision than had been anticipated in this first lockdown, with indicative evidence of families not recognising themselves as vulnerable, not accessing information on the support available, not wanting to be labelled as “vulnerable” and/or experiencing practical barriers like problems with transportation to and from hub schools.⁶⁷ Provision for “vulnerable children” was not accessed as the state had anticipated.

The experiences of a particular group of children – those with caring responsibilities – shone a light on how policy responses could make children more rather than less vulnerable, underlying the societal and structural reasons that make children vulnerable. Lockdown policies were oriented towards adults, not children, having access to limited public spaces. Grocery shopping in person, for example, was initially restricted to one adult, resulting in children with caring responsibilities having to defend their presence in shops.⁶⁸ Online grocery shopping tended to have a minimum spend, which was not always financially possible for the children with caring responsibilities.⁶⁹ Adult-centric policies were introduced that structurally disadvantaged children with caring responsibilities, making them more rather than less vulnerable.

Some positive findings from children and their families were about not being under state surveillance. For example, certain families reported feeling more self-reliant without such active social work interventions, demonstrating to themselves and others that they could function well themselves.⁷⁰ Some children reported enjoying spending more time with their families, free from the pressures of bullying at school and/or following their own learning interests.⁷¹ These positive findings show how supposedly “vulnerable” children (or “vulnerable” families) sometimes were less vulnerable than they were perceived pre-pandemic, that the state systems and institutions had made them more vulnerable rather than less so. But these positive findings were not as common as the negative ones, where children were made only more vulnerable by losing access to public spaces and state support.

67 For evidence see Tisdall, Powell, Reid and Kong, *Independent Children’s Rights Impact Assessment*.

68 See 38. Carers Trust, “#Supermarkets for Change Campaign”, (2020), <https://carers.org/news-and-media/news/post/40-supermarkets4change> (accessed November 13, 2022).

69 See Joint Letter to Supermarkets from the Commissioner and Parenting Organisations (2020), <https://www.cypcs.org.uk/resources/joint-letter-supermarkets/> (accessed October 13, 2024).

70 Scottish Government, *Vulnerable Children Report 15 May 2020* (Edinburgh: Scottish Government, 2020).

71 Paige, Omima, Brodie, Katie Reid, Christina McMellon and Mary Ann Powell, “My Corona: Listening to Children in Corona Times,” *The International Journal of Human Rights*, vol. 27(9–10) (2023).

5.4 CONCLUSION

This chapter has drawn on learning from the independent Children's Rights Impact Assessment undertaken in Scotland on the emergency measures impacting children in Scotland. It has considered the potential that the concept of vulnerability has to advance the implementation of children's human rights. Through our analysis we find that, in the current policy and legal context, vulnerability did not offer the protection to children's human rights that we might have anticipated. We suggest that three key areas need to be addressed to ensure that under vulnerability children's human rights are not marginalised.

First, a proactive state is needed, that is attuned to children and addresses the inequalities which lead to children being vulnerable. Fineman⁷² argues that inequalities are far from inevitable: rather, society and its institutions produce and reproduce them. Thus, in its actions, the state has the potential to address and reverse inequalities. However, as discussed above, under COVID-19 policies the state largely retreated from children's lives and confined children to their families. Fineman argues families alone cannot mitigate or ameliorate individuals' vulnerability. As a structure, families are themselves vulnerable, and, as the independent CRIA confirmed, families are not necessarily "safe havens" for children. The independent CRIA showed that in retreating, rather than addressing inequalities, the state produced and exacerbated certain inequalities experienced by children.⁷³

An analysis of disabled people's rights under COVID-19 is even more robust in critiquing the individualisation of vulnerability. Mladenov and Brennan⁷⁴ rehearse Fineman's universality of vulnerability, but find it insufficient. They suggest it remains unduly individualistic, focusing on everyone being potentially vulnerable rather than on its social construction. They prefer the "social vulnerabilities" approach of disaster studies, which they describe as "a condition of pre-existing social structures where certain social factors ... exacerbate the effects of natural disasters on marginalised groups".⁷⁵ Their analysis of COVID-19 policy responses is that disabled people's social suffering increased because they were framed as "being at risk" and thus individually vulnerable. This gave an excuse for ignoring their human rights, whether it was being able to leave their homes, very negative

72 Martha Albertson Fineman, "The Vulnerable Subject and the Responsive State," *Emory Law Journal*, vol. 60(11) (2010): 251–275.

73 Fiona Mitchell, *Child Protection, Children's Hearings and Care* (Edinburgh: Commissioner for Children and Young People Scotland, 2020); Claire Houghton, Fiona Morrison and Leah McCabe, *Domestic Abuse* (Edinburgh: Commissioner for Children and Young People Scotland, 2020).

74 Mladenov and Brennan, "Social Vulnerability," 2049–2065.

75 Mladenov and Brennan, "Social Vulnerability," 2049–2065.

experiences in some residential institutions, or their access to health and social care. They juxtapose this to the approach to homelessness in the UK, where great and largely successful efforts were made to find housing for all homeless people. Their analysis underlines the messages of disaster studies: that underlying patterns of vulnerability are integral to disasters, are exacerbated by disasters, and disasters are processes rather than events. They provide a haunting analysis about how individualising risk, through vulnerability discourses, can undermine people's human rights to their considerable detriment. Social vulnerabilities need to be addressed socially and by the state.

Second, radical reconfiguration of law and policy is necessary, to be inclusive of children, conceptualising children as social actors, not only dependents of adults. The independent CRIA underlined the persistence of adult-oriented systems and institutions even in a policy climate that is supportive of children's human rights. The absence of children and their interests in policymaking made it difficult to address children's vulnerabilities and ensure that their human rights were given priority during policy responses. Children were systematically disadvantaged, not necessarily because of adults' bad intentions but because of the pervasiveness of adult systems and resulting unbalanced power relations for children. Children were not always recognised as rights-holders and so their rights were not always supported and promoted. Much work is needed to ensure policy-making processes become inclusive of children. For vulnerability to help advance children's rights, there is a need for systems and institutions to shift conceptualisations of children – from dependents subsumed in families to social actors. Without this sort of shift, there is danger that policy continues to be made without children in mind and is thus exclusionary of children's interests and risks marginalising their human rights.

Third, vulnerability does not adequately protect children's human rights; human rights instruments like the CRC and other forms of rights' accountability are needed. Some children and their families resisted their classification as vulnerable, in not accessing options for state support in educational care provision. The CRIA's findings that children and their families can reject the categorisation of vulnerability, even if it would provide them with services, echo those of Brown and Petherbridge.⁷⁶ We suggest that for vulnerability to advance children's human rights, work is necessary to destigmatise vulnerability – to transform its connotations from those of disempowerment to those of empowerment. Without doing so, ideas of universal vulnerability risk being rejected rather than embraced by children who would be identified as particularly vulnerable. Further, state recognition

76 Brown, "Vulnerability: Handle with Care," 313–321; Petherbridge, "What's Critical about Vulnerability?," 589–604.

that children are vulnerable as a group, and that some children are particularly vulnerable, did not ensure children's rights were protected in policy responses to the pandemic. The independent CRIA found the construction of childhood vulnerability in COVID-19 policies to be inadequate in ensuring the state met its obligations to children; the safeguards we may have hoped vulnerability would bring did not always materialise. A vulnerability lens offers the potential to upend the structural inequalities that produce children's disadvantage and systematic discrimination against children. However, progress to advance children's interests risks being limited without robust systems to ensure accountability for the protection and participation of children. Therefore, we suggest that without a human rights' framework and instruments like the CRC, ready access to justice and child rights' monitoring to underpin understandings of vulnerability, there is a danger that through vulnerability, children's rights become obscured.

Vulnerability is deeply entwined in the justification for and history of human rights. Grear,⁷⁷ for example, provides a searing analysis of how human rights were galvanised by the horrors of the two world wars, with the need to protect victims and the dispossessed. The initial Declarations of the Rights of the Child, in 1924 and 1959, were founded on claims to children requiring specific protection, with the wording of the 1959 Declaration then echoed in the preamble to the CRC: "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". While perhaps arguments *for* human rights based on vulnerability help such rights to gain recognition and acceptance, a *status* of being particularly or inherently vulnerable risks undermining the realisation of rights. Our analysis suggests that claims based on inherent human dignity – or, in childhood studies' discourse, recognising children as social actors – and a structural analysis of vulnerability and inequalities are currently more likely to ensure that children's human rights are respected, fulfilled and supported in times of crisis.

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77 Anna Grear, "Embracing Vulnerability: Notes Towards Human Rights for More-Than-Human World," in *Embracing Vulnerability*, eds. Daniel Bedford and Jonathan Herring (Abingdon: Routledge, 2020), 153–174.

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6. The Caring Role of the School: A Discussion on the Relationship between Care, the Rights of the Child, and the School

Mona Martnes

Abstract Childhood is believed to be a phase of inevitable dependency on physical and emotional care. Care is a relational concept, connected to the role and relationship between children and their parents. However, most children spend considerable time at school, and their relationship with other children and the school staff can be of fundamental importance. This chapter discusses the school's caring role and whether lack of care might be a problem for protection and fulfilment of children's rights.

Keywords care | relationship | rights | school | vulnerability

6.1 INTRODUCTION

Children are often described as vulnerable and dependent. As Jonathan Herring explains, “[a]t the heart of the law’s protective role is an assumption that children are vulnerable”, and it is almost definitional.¹ As a consequence, children are believed to need protection.² In Norway, vulnerability is a central concept in many legal and political discussions about children and the role of institutions, including schools. Schools are believed to prevent vulnerability and especially mental health problems.

1 Jonathan Herring, *Law Through the Life Course* (Bristol: Bristol University Press 2021), 85.

2 Herring, *Law Through the Life Course*, 85.

Martha A. Fineman's vulnerability theory addresses human vulnerability. In her approach, vulnerability is not centred on specific individuals, on specific groups or on human rights.³ To be human is to be vulnerable.⁴ Fineman focuses on what we share as human beings and what we should expect of the law, the underlying social structures and our institutions. Dependency is central in vulnerability theory.⁵ Fineman explains that "[b]ecause we are embodied creatures, we are also dependent on social institutions and relationships throughout the life course".⁶ She describes two types of dependency: inevitable and derivative.⁷ Inevitable dependency on physical and emotional care from others is episodic – typically in childhood, sickness, and old age – and may vary along factors such as the child's development and capacity. Derivative dependency captures that those who care for others, such as parents, are dependent on access to sufficient material, institutional and physical resources in order to accomplish that care successfully.⁸ In this chapter, the focus is on children's inevitable and parents' derived dependency on the school as an institution, and more particularly their dependency on a caring school.

Schools are, in addition to the family, the most important institution for the majority of Norwegian children over six years of age. For a period of over 10 years, most children spend considerable time in school. Therefore, it makes sense to highlight the school's potential to have a positive effect in children's lives. Although in legal terms all children have an equal right to education, the reality is that the right is not safeguarded on an equal basis for all children. Neither is the right to health. Some children, for instance, neurodivergent children, including children with learning disabilities, autism and/or ADHD, may be at greater risk than others of not having their rights ensured.⁹ Nevertheless, the group of children whose

3 Martha Albertson Fineman, "Vulnerability and Social Justice," *Valparaiso University Law Review* (2019): 341–370, 342.

4 Martha Albertson Fineman, "Reasoning from the Body: Universal Vulnerability and Social Justice," in *A Jurisprudence of the Body*, eds. Chris Dietz, Mitchell Travis and Michael Thomson (Palgrave Macmillan, 2020), 17–34, 19.

5 Fineman, "Reasoning from the Body," 17–34, 27.

6 Martha Albertson Fineman, "Beyond Equality and Discrimination," *SMU Law Review Forum*, vol. 73(1) (2020): 51–62, 51.

7 Fineman, "Vulnerability and Social Justice," 341–370, 360.

8 Fineman, "Vulnerability and Social Justice," 341–370, 360.

9 See, for instance, Ellen Kathrine Munkhaugen, Elen Gjevik, Are Hugo Pripp, Eili Sponheim and Trond H. Diseth, "School Refusal Behaviour: Are Children and Adolescents With Autism Spectrum Disorder at a Higher Risk?," *Research in Autism Spectrum Disorders*, vol. 41–42 (September 2017): 31–38; Marie-Lisbet Amundsen, Anne Kielland and Geir Møller, "School Refusal and School-Related Differences among Students with and without Diagnoses," *Nordisk tidsskrift for pedagogikk og kritikk*, vol. 8 (2022): 34–48; Official Norwegian Reports (NOU) 2019: 23, *Ny opplæringslov* [New Education Act], 155–156.

rights are not being safeguarded is far from heterogenous and may include children that would not necessarily be described as belonging to a “vulnerable group”. Lack of care in schools might contribute to these problems. Therefore, a fundamental discussion about what role the school should have is necessary.

In this chapter, I explore the school’s role in caring for the child and discuss whether lack of care might be a problem in protecting the child’s right to education. An important question is how children’s need for physical and emotional care might influence the protection of the right to education. Another question is what the United Nations Convention on the Rights of the Child (CRC)¹⁰ says about children’s need for care: how care is connected to rights, how care is defined in the Convention, and how the division between the duty of the state (and school) and the responsibility of the parents is drawn. Before I examine caring in the CRC (Section 6.3) and the school’s role (Section 6.4), I start with how care is defined (Section 6.2). Sections 6.2 and 6.3 have a theoretical and general character, while the discussion in Section 6.4 has more practical content. In the final section, I draw on Norwegian legislation, with the discussion being influenced by the values within the Nordic welfare state model. The topic of this chapter is extensive. Therefore, I will only be able to go into some central aspects.

6.2 DEFINITIONS OF CARE AND CARING

It is not just children for whom being cared for is a basic need. Caring is believed to serve a *fundamental human need*.¹¹ Care is a broad concept. Although every human has a relation to care, care is, as Herring states, “notoriously difficult” to define.¹² However, a good starting point is Bernice Fisher and Joan C. Tronto’s suggestion that care on the most general level is viewed as a “species activity that includes everything that we do to maintain, continue, and repair our ‘world’ so that we can live in it as well as possible”.¹³ Included in that world is “our bodies,

10 Adopted by the United Nations, 20 November 1989.

11 See Kathleen Lynch, “Affective Equality: Who Cares?” *Development*, vol. 52(3) (2009): 410–415, 410; Jonathan Herring, *Caring and the Law* (Oxford: Hart Publishing, 2013), 11; Daniel Engster, “Rethinking Care Theory: The Practice of Caring and the Obligation to Care,” *Hypatia*, vol. 20(3) (2005): 50–74, 56.

12 Jonathan Herring, “Compassion, Ethics of Care and Legal Rights,” *International Journal of Law in Context*, vol. 13(2) (2017): 158–171, 159.

13 Berenice Fisher and Joan C. Tronto, “Toward a Feminist Theory of Caring,” in *Circles of Care*, eds. Emily K. Abel and Margaret K. Nelson (Albany, New York: SUNY Press, 1990), 36–54, 40; See also Joan C. Tronto, *Caring Democracy: Markets, Equality and Justice* (New York: New York University Press, 2017), 19.

our selves, and our environment”.¹⁴ Suggestions have been made over the years to narrow or nuance this broad definition in different ways.¹⁵

Central to caring is *meeting needs*. Daniel Engster highlights how the first aim of caring is connected to meeting needs.¹⁶ He states that “we care for others when we help them to satisfy the basic biological needs necessary for survival and basic functioning”, such as food, clothing, shelter, protection from harm and “at least among infants and children for physical contact and holding”.¹⁷ As a second aim, which I think also could be seen as a way of meeting needs, Engster places *fostering capabilities*: “caring is helping others to develop or sustain their basic capabilities for sensation, emotion, movement, speech, reason, imagination, affiliation, and in most societies today, literacy and numeracy”.¹⁸ He elaborates the goal to “enable individuals to develop and sustain as much as they are able the capabilities necessary for basic functioning in society and to pursue their conception of the good life”.¹⁹ The third basic aim of caring he draws up is *avoidance/alleviation of pain*, meaning “helping individuals to avoid or relieve suffering and pain so that they can carry on with their life as well as possible”.²⁰ And again, these aims seem to be connected to meeting needs.

Herring has suggested four markers of care, with “meeting needs” as the first.²¹ Herring argues “that care should be understood broadly to include the meeting of the full range of a person’s needs”.²² He includes “not only basic biological needs such as food and shelter; but also broader social needs for emotion, relationship and play”.²³ Herring sees Engster’s definition as narrower since he seems to focus on bodily and rational activities and to exclude emotional well-being. However, as Herring also states, well-being could be a part of the reference to “affiliation”, and in my opinion also “emotion”. I believe it is important to expressly highlight the need for emotional well-being – not just because it is fundamental and might be a prerequisite for other needs to be met but also because care and well-being are

14 Fisher and Tronto, “Toward a Feminist Theory of Caring,” 36–54, 40; and Tronto, *Caring Democracy*, 19.

15 See, for instance, Tronto, *Caring Democracy*; Engster, “Rethinking Care Theory,” 50–74, 50–57.

16 Engster, “Rethinking Care Theory,” 50–74, 51.

17 Engster, “Rethinking Care Theory,” 50–74, 51.

18 Engster, “Rethinking Care Theory,” 50–74, 52.

19 Engster, “Rethinking Care Theory,” 50–74, 52.

20 Engster, “Rethinking Care Theory,” 50–74, 53.

21 Herring, “Compassing, Ethics of Care and Legal Rights,” 158–171, 159; and Herring, *Caring and the Law*, 45.

22 Herring, *Caring and the Law*, 16.

23 Herring, *Caring and the Law*, 16.

connected to rights under Article 3 of the CRC and could thereby serve as a bridge between care theory and children's rights.

In addition to meeting needs, Herring suggests "respect, responsibility and relationality" as the other three markers of care.²⁴ This partly overlaps with what Engster calls the "virtues of caring".²⁵ These are attentiveness (entailing empathy and the ability to anticipate needs), responsiveness (engaging with the person receiving care and monitoring their response) and respect (the idea that others are worthy of attention and responsiveness and presumed capable of understanding and expressing their own needs).²⁶ If we add *caring for a child* to Engster's summary, caring includes everything we do directly to help children meet their needs, develop or sustain their basic capabilities and alleviate or avoid pain or suffering, *in an attentive, responsive and respectful manner*.²⁷ As Engster states, this definition captures central aims and virtues of activities such as parenting and teaching.²⁸ Tronto and Fisher also highlight attentiveness (caring about) as the first quality of care.²⁹ In addition, they see responsibility (caring for) as the second (someone must take responsibility for meeting the needs) and competence (caregiving) as the third (the actual caregiving, involving a moral element) quality of care.³⁰ They see responsiveness (care receiving) as the fourth ethical quality of care.³¹

To draw on Herring's definition, caring for a child means meeting the child's needs in a way that respects the child as a person and acknowledging the responsibilities that come with caring. This must be understood in the context of mutual relationship.³² As the definition clarifies, Herring sees care as a *relational concept built on mutuality*. This is important. Children are often described as passive recipients of care in a way that underevaluates their relational capacity. Children can (and, I would also argue, are entitled to as part of their right to family and private life)

24 Herring, "Compassing, Ethics of Care and Legal Rights," 158–171, 159; and Herring, *Caring and the Law*, 45.

25 Engster, "Rethinking Care Theory," 50–74, 54.

26 Engster, "Rethinking Care Theory," 50–74, 54.

27 Engster, "Rethinking Care Theory," 50–74, 55.

28 Engster, "Rethinking Care Theory," 50–74, 55.

29 Joan Tronto, *Caring Democracy: Markets, Equality, and Justice* (NYU Press, 2013), 34–35; Fisher and Tronto, "Toward a Feminist Theory of Caring," 36–54.

30 Tronto, *Caring Democracy: Markets, Equality, and Justice*, 34–35; Fisher and Tronto, "Toward a Feminist Theory of Caring," 36–54.

31 Tronto, *Caring Democracy: Markets, Equality, and Justice*, 34–35; Fisher and Tronto, "Toward a Feminist Theory of Caring," 36–54.

32 Herring, "Compassion, Ethics of Care and Legal Rights," 158–171, 159.

engage in caring in ways that meet all the ethical qualities of care.³³ As Kathleen Lynch states, all people have the capacity for intimacy, attachment and caring relationships, and “[b]onds of friendship or kinship are frequently what bring meaning, warmth and joy to life”.³⁴ In primary care relations (often between parents and their children), Lynch, together with Sara Cantillon, places nurturing, involving mental and emotional work, physical work, commitment, time, trust, belongingness, presence and mutuality.³⁵ However, since the topic in this chapter concerns the school’s role in caring, the focus here is not on primary care relations alone. An important subject in this context is the division between caring relationships in families and at school and the connection between caring and children’s human rights.

6.3 CARING IN THE CRC

6.3.1 The Connection between Care and Rights

As described above, meeting needs is central in caring. The way I see it, care might contribute to (or be crucial for) fulfilling many fundamental human rights. Bruce Abramson states that “[r]ights are social constructions for protecting the interests of people”.³⁶ He elaborates that when talking about rights, the word “interests” is used to “refer to the particular aspect of human dignity that is being injured”.³⁷ He places “well-being” as the “sum total of all of a person’s interests put together”. The well-being of the child is mentioned in several places in the CRC, including Article 3(2) concerning care. Interests and needs are strongly related. An individual’s strong interest, which is protected by rights, is often linked to needs, and caring is central to *realising* these needs. For instance, caring might be fundamental to realising biological needs such as an adequate standard of living (food and shelter) (CRC Art. 27), relationship, affiliation and play (CRC Arts. 8, 16 and 31), avoidance/alleviation of pain (CRC Arts. 19 and 24) and developing capabilities for literacy and numeracy (CRC Arts. 28 and 29). This underlines that caring is necessary for ensuring a range of rights, and the next question is who is responsible in this context.

33 See Jonathan Herring, “Children Care,” in *Disability, Care and Family Law*, eds. Beverley Clough and Jonathan Herring (Routledge, 2021), 51–65.

34 Lynch, “Affective Equality,” 410–415, 410.

35 Sara Cantillon and Kathleen Lynch, “Affective Equality: Love Matters,” *Hypatia*, vol. 32(1) (2017): 169–186, 174.

36 Bruce Abramson, “Article 2. The Right of Non-Discrimination,” in *A Commentary on the United Nations Convention on the Rights of the Child*, eds. Ton Liefwaard and Julia Sloth-Nielsen (Leiden: Martinus Nijhoff Publishers, 2008), 26.

37 Abramson, “Article 2,” 26.

6.3.2 The Division between the Parents' Responsibility and the Duty of the State

As a human rights instrument, the CRC compels State Parties to respect, protect and fulfil the rights recognised in the Convention. Therefore, it is the state that is responsible in the first instance for ensuring the child's rights. However, as Wouter Vandenhoe writes, "in children's rights law, an intermediary level of parents or legal guardians has been included".³⁸ This level is explicitly connected to care.

The CRC highlights children's need for care, safeguards, and assistance as early as in the preamble. CRC Article 3(2) states that the parties shall "undertake to ensure the child such protection and care as is necessary for his or her well-being". The article is concerned with both the state and the parents' role.³⁹ In Article 18(1) it is stated that "[p]arents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child". And further that "[t]he best interests of the child will be their basic concern". Here, care is connected to the child's development, upbringing and best interests, and the parents shall have primary responsibility.

Together, Articles 3 and 18 show that parents shall protect and care for the child and have responsibility for upbringing and development in the best interests of the child. However, they are "holders of what has been defined as limited and functional rights".⁴⁰ Parents' rights are limited both by the evolving capacities of the child after Article 5 and the child's full range of the other rights recognised in the CRC.⁴¹ On a general basis, this indicates that in caring for their children, parents should be guided by the child's rights. In addition, if parents are unable to fully care for their children alone, Article 18(2) clarifies that the state has a duty to assist.⁴² Furthermore, the state must take "all appropriate legislative and administrative measures" to "ensure the child such protection and care as is necessary

38 Wouter Vandenhoe, "Distinctive Characteristics of Children's Human Rights Law," *Children's Rights Law in the Global Human Rights Landscape*, eds. Eva Brems, Ellen Desmet and Wouter Vandenhoe (Oxfordshire, 2017), 21–51, 29.

39 See also Article 5.

40 Roberta Ruggiero, Diana Volonakis and Karl Hanson, "The Inclusion of 'Third Parties': The Status of Parenthood in the Convention on the Rights of the Child," *Children's Rights Law in the Global Human Rights Landscape*, eds. Eva Brems, Ellen Desmet and Wouter Vandenhoe (Oxfordshire, 2017), 71–89, 75.

41 Ruggiero, Volonakis and Hanson, "The Inclusion of 'Third Parties,'" 75; Elaine, E. Sutherland, "The Enigma of Article 5 of the United Nations Convention on the Rights of the Child," *The International Journal of Children's Rights*, vol. 28 (2020): 447–470, 448.

42 See also John Tobin and Florence Seow, "Article 18 Parental Responsibility and the State Assistance," in *The UN Convention on the Rights of the Child*, ed. John Tobin (Oxford: Oxford University Press, 2019), 646–686, 663.

for his or her well-being”; cf. Article 3(2). So, although the Convention directs the state to place care primarily in the responsibility of parents, this does not imply that parents alone are responsible for meeting the full range of the child’s needs, fostering all capabilities, and making sure that pain is avoided or alleviated. States have a duty to enable parents to fulfil their responsibilities.⁴³ Still, some needs might be best met in families, and the division between parents’ responsibilities and the state’s role is unclear and complex.

The division becomes even more complex when considering the connection between meeting needs, children’s full range of rights, and thereby the intersection of care and rights. Therefore, the connection between the state’s duty and the parents’ responsibilities must be fluid, dynamic and situational. For instance, children separated from their parents are entitled to public care, and, more pertinent to the topic here, children in health institutions, day care or school must receive care that is necessary for their well-being *when they are there*. This is partly reflected in Article 18(3), which states that the authorities shall “take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible”. Further, both Article 23 (rights for disabled children) and Article 24 (the right to the highest attainable standard of health) focus on health *care*. However, neither Article 28 nor 29 (both about the right to education) mentions the need for care. Nor is children’s need for care explicitly mentioned in General Comment no. 1 (Article 29(1): The Aims of Education). Nevertheless, Articles 28 and 29 must be interpreted in the light of the other rights in the CRC, and especially the four principles. When developing and shaping legal frameworks and institutions, such as education regulation and schools, the state has a duty to respect, protect and fulfil these rights, and this cannot be done without ensuring that the child is actually cared for.

6.3.3 Caring as a Concept in the CRC

By its wording, Article 3(2) seems to be key to the responsibility for caring and the obligation to ensure the child’s well-being. Since childhood is often linked to dependency and the need for care, one would think that this article was thoroughly analysed by the CRC Committee. However, as John Eekelaar and John Tobin state, the CRC Committee has done little to address the function and

43 See, for instance, Mona Martnes, “The Child’s Right to Information on Sensitive Topics – Ensuring a Child-Rights Approach by Balancing the Right to Information and the Best Interests of the Child,” *Nordisk Socialrättslig Tidskrift*, 34 (2022): 67–95.

meaning of Article 3(2) and has largely overlooked it in its work on Article 3.⁴⁴ They elaborate that this “is understandable given that the principal aim of this provision, which is to impose a general obligation to protect children’s well-being, might be considered an unnecessary inclusion in a treaty containing forty substantive articles which each aim to achieve this same end”.⁴⁵ This illustrates the connection between caring and rights, where both have the same aim, namely, the child’s well-being. Despite the partial overlap between the aims, Eekelaar and Tobin recognise Article 3(2) to be of fundamental importance as an “umbrella provision which aims to guarantee children’s well-being generally”.⁴⁶ In addition, I would add that a conceptualising of care/caring could bring important elements to the discussion on how to ensure the substantive rights in the Convention. A discussion about the practice of caring could also highlight how different needs, and in the elongation also different rights, are connected to each other. Therefore, one important question is how to define care in relation to the Convention.

The preamble to the CRC highlights “that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding”. In addition, it is stated that “the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity”. These statements must be read in connection; they illustrate that needs must be met in an atmosphere of happiness, love and understanding and that an important need is to be prepared for living in society – and, in my opinion, as an important part of preparing children to live in society, society must meet them with, at the very least, happiness and understanding. Since love is connected to more intimate relationships such as families, it cannot be expected between participants in other institutions, but other markers of care, such as respect, responsibility and relationality might serve as important substitutes.

Although General Comment no. 14 is about the best interests of the child (Article 3(1)), the committee also briefly commented on Article 3(2). The CRC Committee stated:

44 John Eekelaar and John Tobin, “Article 3 The Best Interests of the Child. Analysis of Article 3,” *The UN Convention on the Rights of the Child*, ed. John Tobin (Oxford: Oxford University Press, 2019), 73–107, 101.

45 Eekelaar and Tobin, “Article 3 The Best Interest of the Child,” 73–107, 101.

46 Eekelaar and Tobin “Article 3 The Best Interest of the Child,” 73–107, 101.

When assessing and determining the best interests of a child or children in general, the obligation of the State to ensure the child such protection and care as is necessary for his or her well-being (art. 3, para. 2) should be taken into consideration. The terms “protection and care” must also be read in a broad sense, since their objective is not stated in limited or negative terms (such as “to protect the child from harm”), but rather in relation to the comprehensive ideal of ensuring the child’s “well-being” and development. Children’s well-being, in a broad sense includes their basic material, physical, educational, and emotional needs, as well as needs for affection and safety.⁴⁷

By this, the committee highlights the close connection between the best interests of the child, and care and well-being. In addition, the committee’s statement indicates that well-being (as the goal) and thereby care (as the tool, practice and action) must be understood broadly to include meeting the full range of needs. This further indicates that the Convention can be seen as building on the broad understandings of care of the kind discussed above.

The CRC Committee further highlights that emotional care is a basic need of children.⁴⁸ However, it only mentions parents or other primary caregivers’ role in this context and states that

if parents or other primary caregivers do not fulfil the child’s emotional needs, action must be taken so that the child develops a secure attachment. Children need to form an attachment to a caregiver at a very early age, and such attachment, if adequate, must be sustained over time in order to provide the child with a stable environment.⁴⁹

Since the best interests of the child shall be a primary consideration “[i]n all actions concerning children”, it may be necessary to assess emotional needs and how care is necessary for meeting these needs also in different contexts, for instance, in school. This is particularly important if we consider that the school might be of fundamental importance in preparing the child for life in society.

When assessing the expectations for parents in caring for their child after CRC Article 18, Tobin and Florence Seow highlight the guidance from Article 5 on the evolving capacity of the child, the right to freedom from all violence, the best

47 UN Committee on the Rights of the Child, *General Comment no. 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art. 3, Para. 1)*, CRC/C/GC/14, (May 29, 2013), para. 71.

48 CRC/C/GC/14, para. 72.

49 CRC/C/GC/14, para. 72.

interests of the child and the right to an adequate standard of living conditions, including “nutrition, clothing and housing”.⁵⁰ In addition, I believe it is difficult to rule out the right to development in Article 6, which, together with “upbringing”, is explicitly mentioned in Article 18.

Development and upbringing are elements that differ, at least in intensity, from caring between adults. However, caring in general, not just in connection to children, is also connected to development.⁵¹ Both meeting needs and fostering capabilities may lead to a development for all, not just for children. Nevertheless, the expectation that caring shall facilitate and shape the child’s future differs from caring between adults. Development of the child is seen as such a central part of the CRC that the right in Article 6 is considered as one of the four general principles in the Convention (together with Articles 2, 3, and 12).⁵² As a fundamental principle, it is meant to guide the interpretation and implementation of other rights and contribute to a child rights perspective.⁵³ The fundamental character of the right to development is important for the child’s well-being in the future, but might also create tension between having a present-time perspective and a long-term perspective. If such tension arises, the best interests of the child and the child’s right to be heard (Article 12) might help harmonising the different perspectives.

When adding the state’s duty to care, *all the rights* in the Convention may be relevant. So, caring in relation to the Convention must be understood broadly, in line with the definitions above. In addition to the meeting of needs and who is responsible for meeting these needs, also other markers/virtues of care are present in the Convention. As already highlighted, several rights in the Convention are concerned with children’s *relationship* to their families. In addition to Articles 3, 5 and 18, Articles 7, 8, 9 and 16 also direct and commit the state to respect and support family relationships.⁵⁴ Further, as Eekelaar and Tobin state, in promoting a child’s best interests, “maintain[ing] the child’s relationship with his or her parents and other members of their community will be a key feature, since relationships

50 Tobin and Seow, “Article 18 Parental Responsibility and the State Assistance,” 646–686, 657.

51 Engster, “Rethinking Care Theory,” 50–74, 51.

52 UN Committee on the Rights of the Child, *General Comment no. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child (Art. 4, 42 and 44, para. 6)*, CRC/GC/2003/5 (November 27, 2003), para. 12.

53 See CRC/GC/2003/5, para 12; UN Committee on the Rights of the Child, *General Comment no. 12 (2009) The Right of the Child to Be Heard*, CRC/C/GC/12, (July 20, 2009), para. 2; CRC/C/GC/14, para. 1.

54 See also CRC/C/GC/14, para. 58–70; see further Herring, *Caring and the Law*, 235, on caring, and the European Convention on Human Rights Article 8 on the right to respect for private and family life.

are central to most people's well-being".⁵⁵ But, as they also elaborate by referring to Herring, "no one has a right to be subject to a relationship that damages their well-being", and in my opinion this is important not just for intimate relationships but also, for instance, in schools.⁵⁶ Articles 2, 5 and 12 (in addition to 19) seem to be especially relevant for caring to be done in a *respectful and responsive* manner, by ensuring that the child's opinion is heard and emphasised and in a manner consistent with the evolving capacities of the child, without discrimination. Article 5 is also relevant in training the child in caring for themselves and being attentive to their own needs. Article 3(1) might be important to ensure *attentiveness* in caring, by directing both parents and the state to anticipate the child's needs. This is also connected to *competence*, particularly when the task is carried out by public authorities.⁵⁷

To sum up, the CRC clearly recognises children's need for care, and there is a distinct connection between care and rights. This connection needs to be further analysed, especially on how caring is necessary for protecting and fulfilling children's rights. In the following sections, I will go into some aspects of this issue, but only in relation to school.

6.4 CARE IN SCHOOL, AND EDUCATION AS A CARING ACTIVITY

6.4.1 The School's Main Mandate

The school's social task is extensive. Both national legislation and the CRC show that the school shall meet a wide range of needs, including fostering capabilities. According to CRC Article 29(1), the education shall be directed to "[t]he development of the child's personality, talents and mental and physical abilities to their fullest potential". The aim clarifies, in line with Article 3, that the needs of the individual child shall be met at school. The CRC Committee has stated that the goal is "to empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence".⁵⁸ Further, the committee has highlighted "that education is not only an investment in the future, but

55 Eekelaar and Tobin, "Article 3 The Best Interest of the Child," 73–107, 106.

56 Eekelaar and Tobin, "Article 3 The Best Interest of the Child," 73–107, 106, with reference to Jonathan Herring, "Forging a Relational Approach: Best Interests or Human Rights?" *Medical Law International*, vol. 13(1) (2013): 32–54.

57 CRC/C/GC/14, para. 86.

58 UN Committee on the Rights of the Child, *General Comment no. 1 (2001), Article 29 (1), on Aims of Education*, CRC/GC/2001/1 (April 17, 2001), para. 2.

also an opportunity for joyful activities, respect, participation and fulfilment of ambitions”, and this also brings in the importance of a present-time perspective.⁵⁹

The Norwegian Constitution and the Education Act express the school’s main mandate as twofold. First, schools shall provide an education that ensures the individual child’s capabilities and needs, and second, they shall ensure the needs of a democratic society.⁶⁰ In the preparatory work to the constitutional right to elementary education, it is stated that education is important for the freedom of the individual, self-realisation and the ability to participate in society.⁶¹ So, both the Norwegian Constitution and the CRC clarify that education should meet the child’s needs, and thereby education is in principle meant to be a caring activity. However, between the needs of the child and society, there might be tensions, depending on – and varying according to – how society’s needs are defined. Further, the underlying politics and values always influence the education system and its regulation. In addition, economic resources and priorities, influenced by municipal government, might also create tensions and lead to schools not being able to ensure individual children’s needs. Although education and schools might be expensive, the clause in CRC Article 4 regarding economic, social and cultural rights is only partly relevant, since the right to education is also a civil and political right. In addition, for Norway, with its resources, Article 4 is of even less relevance. Still, economic priorities are an element influencing the school and the protection of the right to education.

Adriana Jesenková writes from a Slovakian perspective that “there is a neoliberal discourse in which the economic needs of the market and the labor market dominate in the formulation of the goal and measures of the education strategy of the government and the state”.⁶² This has become increasingly evident in Norway too. There is a strong focus on what society needs.⁶³ In Norway, the legislation and the education framework plan are fixed and specified in detail, leaving little room for individual adaptations. Thus, schools normally have little room to meet the needs of the child if those needs do not harmonise within the overall educational

59 CRC/C/GC/14, para. 79.

60 See Kongeriket Norges Grunnlov [The Norwegian Constitution] 17 May 1814 section 109 and Act 17 July 1998 No. 61 om grunnskolen og den vidaregåande opplæringa (opplæringslova) [relating to Primary and Secondary Education and Training, the Norwegian Education Act]), section 1-1.

61 Doc. 16 (2011–2012), 222.

62 Adriana Jesenková, “Deficit of Democratic Care in the Education System in Slovakia,” in *Care Ethics, Democratic Citizenship and the State*, eds. P. Urban and L. Ward (International Political Theory, 2020), 259–276, 271.

63 See, for instance, Official Norwegian Reports (NOU) 2015: 8, *Fremtidens skole* [The School of the Future].

framework, something that might further become a problem for the fulfilment of rights. In addition, there is very little autonomy left for the individual child. The tensions between the child's needs and society's interests become more complex when adding in both a present-time and a long-term perspective on the child's needs and different children's needs having to be met in different ways. Some, for instance, need more support than others, and some have health issues. Without caring schools, there is a high risk that children's needs become or remain unmet.

6.4.2 Unmet Needs in School

Contrary to a general assumption, recognition or understanding of children (and adults) as vulnerable, the overriding rule in the education regulation seems to be that children can manage school without too much support and care.

The Norwegian Education Act is built on the idea that most children can pursue the same education in a classroom with about 25 other children and one or two teachers.⁶⁴ Any need for more support than the ordinary level is viewed as an exception, emphasised by the term "special education".⁶⁵ A child has the right to special education when the child does not satisfactorily benefit from ordinary education. However, every child has a right to an adapted education.⁶⁶ This means that before a child has the right to special education, the school must try to adjust the ordinary education to the child's capabilities. Because the ordinary education is regulated in detail in law, administrative regulations and a framework plan determined at the national level, such adjustments might be difficult in individual cases. Therefore, the detailed regulation expands the need for special education. In addition, many schools are largely underfinanced, and this means that they have difficulty fulfilling the right to special education, with children who need most support potentially being handed over to assistants without any educational training. These factors might lead to unmet needs among children, particularly children who learn in other ways than ordinarily expected or who have difficulty concentrating, have health problems or for any other reasons require more support or time than the larger group. Furthermore, all children are exposed to some sort of learning pressure and repeated evaluations. In school, all children are strongly

64 This depends on how the school practices the norm for how many children per teacher. Around 17% of schools did not manage to follow the norm at all, <https://www.utdanningsforbundet.no/nyheter/2021/minstenormen-har-fort-til-bedre-larertetthet/>. See the Norwegian Education Act section 8-3 and Regulations [forskrift] 23 June 2006 no. 724 til opplæringslova [on the Norwegian Education Act] section 14A-1.

65 See the Norwegian Education Act section 5-1.

66 See the Norwegian Education Act section 1-3.

considered as being in the process of becoming something (“becomings”), and this might take up too much space at the expense of their need (and right) to be beings.⁶⁷

When looking at the education legislation, Fineman’s description of the legal subject is relevant. Fineman states that the “liberal subject is a fully functioning adult – in charge and capable of making choices”.⁶⁸ She elaborates that this subject, “[u]nrestrained by the state, [...] will be rewarded according to his particular talents and individual efforts”. Obviously, the legal subject in the Education Act is not a fully functioning adult, but I believe that the main subject is a normally developed, healthy and fully functioning child, capable of managing the duties, task and demands of school (but with little autonomy). With the help of her fully functioning parents, she will be rewarded according to her talents and individual efforts. Even though there is legislation aimed at regulating the exceptions, the ordinary child norm creates strong pressure to conform (for children, parents and the school alike). Combined with the narrow room for developmental differences and the little autonomy, this leaves children open to the risk of failing to master school.

Ole Martin Moen has written an article about child maltreatment in schools, encompassing both neglect and abuse/mistreatment, from a Norwegian perspective.⁶⁹ He refers to maltreatment as the gap between what the child needs and what the child receives, regardless of the reason for the unmet needs.⁷⁰ The WHO defines neglect as “both isolated incidents, as well as a pattern of failure over time on the part of a parent or other family member to provide for the development and well-being of the child – where the parent is in a position to do so – in one or more” specific areas.⁷¹ These areas are health, education, emotional development, nutrition, shelter and safe living conditions. The first three are particularly relevant, not just for parents but also for schools. The specification of “where the parents are in a position to do so” is important when assessing whether there is neglect in the family. However, there must be a stronger obligation on the school to ensure that the child’s needs are met, especially since the child has an obligation to attend primary education and lower secondary school. I would argue that

67 See Michael Freeman, *A Magna Carta for Children? Rethinking Children’s Rights* (Cambridge: Cambridge University Press, 2020), 35, 37 and 39, about children as becomings and beings.

68 Fineman, “Vulnerability and Social Justice,” 356.

69 Ole Martin Moen, “Skolens omsorgssvikt,” in *Skolens mening. 50 år etter hvis skolen ikke fantes av Nils Christie* [The Meaning of School. 50 Years Since If School Didn’t Exist by Nils Christie], eds. Espen Schanning and Willy Aagre (Universitetsforlaget, 2022), 91–115, 94.

70 Moen, “Skolens omsorgssvikt,” 91–115, 94.

71 World Health Organization, *Preventing Child Maltreatment* (Genève, 2006), 10.

schools are obligated to meet any need that the parents cannot provide for from a distance. In addition, the child must under no circumstances be exposed to physical, emotional and psychological abuse in school.

The Norwegian Education Regulation chapter 9A emphasises that all children have the right to a good physical and psychosocial environment conducive to health, well-being and learning.⁷² The regulation involves elements of care, protection, and respect for the individual child. However, the number of children reporting being bullied or worrying about going to school is persistently high.⁷³ In addition, the approach in the legislation is somewhat narrow. It mainly points to offences and violations from others, not unmet needs such as lack of support and good relationships, or stress related to education or how the school day and education is constructed.⁷⁴ Moen is particularly concerned about children in lower secondary school and their emotional and social needs.⁷⁵ He points out that teachers have very little time to follow up on the children beyond their educational needs. Class teachers and counsellors have only a total time of two to three hours per child in a six-month period.⁷⁶ He further points out that children appear to be systematically malnourished in schools.⁷⁷ Of course, parents can send a packed lunch with the child, but the school must at least ensure there is time to eat. In Norway, breaks for children in school are not regulated, and it is reported that many younger children are not given the recommended 20 minutes to eat every day.⁷⁸ Perhaps more serious are the points Moen makes under the topic of mistreatment by schools, where he particularly looks at emotional abuse through persistent exposure to harmful stress.⁷⁹

As Moen highlights, children are under constant evaluation at school.⁸⁰ Grades may be a continuous confirmation for a child that he or she is not mastering the schoolwork. Also, children are often reminded that lack of mastery at school will have a negative effect on their later lives. Over recent years, the public debate has been concerned in a rather narrow way about all the negative effects of not mastering

72 See Norwegian Education Act chapter 9A.

73 Official Norwegian Reports (NOU) 2019: 23, *Ny opplæringslov*, 156; Moen "Skolens omsorgssvikt," 91–115, 97.

74 See Mona Martnes, "Ufrivillig skolefravær hos autistiske barn. Er bestemmelsene i opplæringslova egnet til å ivareta retten til inkluderende utdanning?" [Involuntary School Absence Among Autistic Children], *Kritisk Juss*, vol. 48(3) (2022): 190–212, 207.

75 Moen, "Skolens omsorgssvikt," 91–115, 95–98.

76 Moen, "Skolens omsorgssvikt," 91–115, 96.

77 Moen, "Skolens omsorgssvikt," 91–115, 96.

78 Official Norwegian Reports (NOU) 2019: 23, *Ny opplæringslov*, 156.

79 Moen, "Skolens omsorgssvikt," 91–115, 98.

80 Moen, "Skolens omsorgssvikt," 91–115, 98.

school, the importance of good grades, and the risk factors of not finishing high school. Little attention has been paid to the fact that this system is a social construction and there is a lack of alternatives for those who cannot find their way through it.

Since homework is a major requirement from the school, and children's social life is strongly connected to school, there is no clear division between school and leisure time. This seems to be a deliberate policy, connected to the important role the school as an institution is meant to have for children. The downside is that for children who do not master or thrive in school, there is no sanctuary, except, perhaps, for in their home. A further potential risk factor for harmful stress is that constant evaluation does not consider other factors that hinder or obstruct learning, such as lack of care in school or education that is not adapted to the child's needs. Even if the child is sick over a longer period, the grades are based on the activities and performances from the time the child was not able to do any schoolwork.⁸¹ Although children in Norwegian primary schools are not graded, they are nevertheless evaluated and tested. For the youngest children, the need for emotional and responsive care from adults and from other children is even more precarious than for the older children.

When Lynch writes about the inevitability of interdependency not just in personal relationships "but also in workplaces, in public organisations, in voluntary groups or other social settings", she elaborates that "[a]lthough it is obvious that we cannot flourish personally without support, encouragement and affirmation, even in our paid-work lives, we can only flourish fully if we work with others who are nurtured, fed and supported so they are willing and able to work".⁸² This is also true if we replace "work" with "school". All the children and the adults must have their needs ensured for the school to be a caring place. For instance, if one child does not get his or her need for support, breaks or shielding, and therefore is constantly overwhelmed and acts out, this will affect the whole class. Therefore, a good start would be if the legislation clearly reflected that care is essential, and in a way that also reflects the central marker of care, including responsibility. The regulation on day care is a good example in this context.

The need for emotional care is clearly acknowledged in the Norwegian legislation concerning day care. In the Kindergarten Act⁸³ section 1, it is stated that "[t]he Kindergarten must, in collaboration and close understanding with the home, safeguard the children's need for care and play". The preparatory works highlight that the day care must build on existing knowledge about children's development

81 See Moen, "Skolens omsorgssvikt," 91–115, 100.

82 Lynch, "Affective Equality: Who Cares?" 410–411.

83 Act 17 June 2005 No. 64 om barnehager [Norwegian act relating to kindergartens].

and needs and ensure individual follow-up, support and stimulation.⁸⁴ The framework plan for day care also highlights children's need for care. It states that care is a prerequisite for the children's safety and well-being and for the development of empathy.⁸⁵ Interestingly, the framework plan highlights that day care shall *actively facilitate caring relationships* between the children and the staff as well as between the children.⁸⁶ This should serve as a basis for well-being, joy and mastery. So here the need for caring relationships is explicitly recognised. The personnel shall meet all children with openness, warmth and interest and show care for each individual child in a sensitive way.⁸⁷ Further, they shall work for an environment that not only makes the children recipients of care, but also values the children's own acts of care.⁸⁸ Despite the lack of similar provisions in the Education Act, children's need for care is not completely overlooked in connection to school.

The Norwegian Directorate for Education and Training has stated that schools have a responsibility of care for all children during school time.⁸⁹ In the Official Norwegian Report about the new Education Act, it is stated that schools have both a right and duty to exercise guardianship and caring responsibility, including when it involves the use of necessary, accepted physical and verbal measures.⁹⁰ The responsibility of care is linked to children's right to feel safe at school.⁹¹ At the same time, the directorate elaborated that school's responsibility means that it might use force against children in some situations. Situations mentioned are when force is necessary to stop children from hurting themselves, other children, employees or objects at the school.⁹² Here, the responsibility of care is understood as intervening when necessary.⁹³ A paradox is that the necessity of interventions might occur

84 Draft resolution No. 72 (2004–2005) para. 5.1 and 5.2.1.

85 Regulations 24 April 2017 No. 487 Rammeplan for barnehagen [on the framework plan for Norwegian kindergartens' content and tasks], para. 3.

86 Regulations 24 April 2017 No. 487 para. 3.

87 Regulations 24 April 2017 No. 487 para. 3.

88 Regulations 24 April 2017 No. 487 para. 3.

89 The Norwegian Directorate for Education and Training and the use of intervention measures in school, <https://www.udir.no/regelverkstolkninger/opplaring/Skoleeiers-ansvar/Bruk-av-nodrett-og-andre-inngripende-tiltak/> (last visited 03.10.2022).

90 Official Norwegian Reports (NOU) 2019: 23, 484.

91 See the Norwegian Education Act chapter 9A concerning the school environment. See also second vote in the Supreme Court of Norway, judgment Rt. 2012, 146.

92 The Norwegian Directorate for Education and Training and the use of intervention measures in school, <https://www.udir.no/regelverkstolkninger/opplaring/Skoleeiers-ansvar/Bruk-av-nodrett-og-andre-inngripende-tiltak/> (last visited 03.10.2022).

93 See also Official Norwegian Reports 2019: 23, 478.

because a child has unmet needs.⁹⁴ Lack of care might lead a child to react with anger and violence, which again leads to the use of force against that child.⁹⁵

To a certain extent, the right to inclusive education might ensure that individual children's needs are met and thereby contribute to care in schools. Article 24(1) of the United Nations Convention on the Rights of Persons with Disabilities (CRPD)⁹⁶ holds that states shall secure "an inclusive education system". No article in the CRC explicitly mentions inclusive education, and, as Philip Veerman has stated, the concept seemed not to exist in the drafting period of the Convention.⁹⁷ He elaborates that since 2006 the CRC Committee has interpreted Articles 23, 28 and 29 as though the Convention has a provision of inclusive education.⁹⁸ The Committee has stated that, at its core, inclusive education is "a set of values, principles and practices that seeks meaningful, effective, and quality education for all students, that does justice to the diversity of learning conditions and requirements not only of children with disabilities, but for all students".⁹⁹ The Committee has further elaborated that "inclusion should not be understood nor practiced as simply integrating children with disabilities into the regular system regardless of their challenges and needs".¹⁰⁰

The ECtHR seems to acknowledge the centrality of schools for the foundation of relationships and the importance of inclusive education in this context.¹⁰¹ In a judgment where the ECHR found a violation on the right to education without discrimination for an autistic girl, the Court stated that "the discrimination suffered by the applicant is particularly serious as it occurred in the framework of primary schooling, when the foundations are laid [wh]ich provides the bases for overall education and social integration and the first experiences of living together".¹⁰² However, inclusive education might not be in all children's best interests. As stated in a concurring opinion in the same ECHR judgment, for some children "inclusive education may cause great suffering and be detrimental to their personal development, whereas special schools achieve much better results and can

94 See, for instance, Ross Greene, *Lost at School: Why Our Kids with Behavioral Challenges Are Falling Through the Cracks and How We Can Help Them* (Scribner Book Company, 2014).

95 See Moen, "Skolens omsorgssvikt," 91–115, 100–101, about symptoms of neglect in school.

96 Adopted by the United Nations, 13 December 2006.

97 Philip Veerman, "The Best Interests of the Child and the Right to Inclusive Education," *The International Journal of Children's Rights*, vol. 30 (2022): 499–523, 516.

98 Veerman, "The Best Interest of the Child and the Right to Inclusive Education," 516.

99 UN Committee on the Rights of the Child, *General Comment no. 9 (2006) The rights of children with disabilities*, CRC/C/GC/9 (February 27, 2007), para. 67.

100 CRC/C/GC/9 para. 67.

101 See ECHR judgment, 10 September 2020, *G.L. v. Italy*, Application no. 59751/15.

102 *G.L. v. Italy*, para. 62 and 70.

reduce their suffering”.¹⁰³ Verman is also concerned with the need for some special schools and that not all children can benefit from regular education. He states that “[t]he best interests of the child should remain the guiding principle for children”.¹⁰⁴ Although I am in agreement, more children could benefit from regular education if inclusion were understood as real inclusion, not as a formalistic approach of integration. As Jesenková mentions, there is a need to understand and consider the complexity of inclusion processes in schools.¹⁰⁵

Identity is formed by the relationships to others.¹⁰⁶ When children experience failing in school, this is assumed to be among the most serious risk factors for mental illness.¹⁰⁷ I believe this applies both for lack of mastering schoolwork and for the social part of the school. With more caring schools, much suffering could be avoided. Therefore, it is a paradox that the Norwegian education legislation, created within a Nordic welfare state model, has so little focus on children’s need for care. I think there is a need to highlight that ensuring the right to inclusive education requires caring schools that acknowledge the responsibilities that come with caring and that meet the needs of the child in an attentive, responsive and respectful manner, and this must be understood in the context of a mutual relationship.

6.4.3 Derived Dependency

Parents’ derived dependency on caring schools is not explicitly stated in Norwegian legislation, although this is of course recognised as an underlying premise and is part of the aim of ensuring the needs of the democratic society, not just the individual child. Other institutions are also dependent on schools. Health institutions and child welfare authorities, for instance, are both dependent on schools that ensure children’s individual needs. However, as Fineman points out, a weakness in one system can be compensated for in another. Fineman uses the example of a strong family being able to help minimise the impact of a less sterling education system.¹⁰⁸ At the same time, flaws with one institution, such as health institutions, can have a negative impact on education or family life, so there is a risk of a

103 See concurring opinion of judge Wojtyczek in *C.L. v. Italy* para. 5.

104 Veerman, “The Best Interest of the Child and the Right to Inclusive Education,” 517.

105 Jesenková, “Deficit of Democratic Care in the Education System in Slovakia,” 271.

106 See inter alia Sandra Fredman, “Substantive Equality Revisited,” *International Journal of Constitutional Law*, vol. 14(3) (2016): 712–738, 731; Herring, *Forging a Relational Approach: Best Interests or Human Rights?* 34.

107 Official Norwegian Reports (NOU) 2019: 23, 155.

108 Fineman, “Reasoning from the Body,” 17–34, 29.

negative cumulative effect. And flaws with schools may shift the problem to health institutions or the child welfare authorities. Given the central and important role of schools in society and for individual families, the cost and burden of schools that do not meet the child's needs can be huge – not just for the child, but also for the child's parents and for society.

6.5 CONCLUDING ASSESSMENT: A CHILD RIGHTS APPROACH TO CARING SCHOOLS?

In the introduction, I posed the question of whether lack of care might be a problem for the protection of the child's right to education. My conclusion to this is yes. Needs, as rights, are interrelated and interdependent. Unmet needs can hinder or block learning. The education legislation in Norway fails to see that children's inevitable dependency on caring schools is not restricted to certain areas or only some children, but is a fundamental human need that should lay the groundwork for how schools are constructed. Merely focusing on the right to education will not fix this problem. Instead, focusing on all the rights of the child – and, as the sum of all of a child's interests, their “well-being” – is central. In my opinion, the education legislation must be built on the universal need for care, in addition to the rights contained within the CRC. A caring school, built on ensuring rights and thereby meeting needs, could be a school that meets the needs of all children, including the needs of those who are sick, injured, traumatised or neurodivergent. In addition, such schools could be able to meet the needs of a child whose parents are sick, are in a difficult situation, or for other reasons need extra support in caring for their child. Caring depends on knowledge of the individual child's needs and being sufficiently flexible to meet those needs in a relational, attentive, responsive and respectful manner. The responsibility for this, when the child is at school, rests with the school – and the state must ensure that schools are able to assume this responsibility.

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7. Vulnerability Denied: The Rights of Children in Conflict with the Law

Ursula Kilkelly

Abstract The Convention on the Rights of the Child (CRC) recognises the rights of all children, including children in conflict with the law, who are entitled to age-appropriate treatment and respect for their dignity and right to reintegration into society. Despite these standards, many states ignore the special vulnerability of these children, who often suffer poor individual, family and community circumstances which are compounded by punitive responses that focus on their behaviour rather than their needs. This chapter presents the view that rights-based responses to children in conflict with the law that focus on rather than deny the vulnerability of these children find greater support in the research.

Keywords youth justice | vulnerability | children's rights | punishment | reintegration

7.1 INTRODUCTION

Children in conflict with the law frequently present with a complexity of needs that has a profound impact on their lives. Their vulnerability – shaped by negative educational experiences, poor mental health and inadequate family support – brings them into contact with a justice system which deepens their vulnerability even further.

The UN Convention on the Rights of the Child (CRC) recognises the rights of all children, defined in Article 1 as everyone below the age of 18 years, and makes specific provision for children in conflict with the law. Under the CRC, these children are entitled to age-appropriate treatment that takes into account the desirability of promoting their reintegration into society (Article 40). Despite the almost universal ratification of the CRC, however, youth justice approaches in many jurisdictions ignore these rights, subjecting children in conflict with the law to processes and approaches that have little regard for the burden of vulnerability that they carry. Many states choose prosecution to protection – either for all

children in conflict with the law or for those who commit more serious crimes – imposing punitive sanctions that respond more to their behaviour than to their needs. For many, this results in the imposition of the ultimate sanction, imposing detention sometimes for very long periods up to and including a sentence of life.

Set against this backdrop, this chapter seeks to question why, unlike children in other circumstances, many states deny the vulnerability of children in conflict with the law, choosing to hold them fully accountable before the law, imposing punishment rather than protection and care. Having established the clear vulnerability of children in conflict with the law as underpinned by a large body of research, the chapter goes on to argue that, rather than responding with punishment, states should take account of this vulnerability by relying on approaches that respond to children's needs. An important way to do this, it is submitted, is through reliance on the CRC. Although not a perfect approach, the CRC highlights the importance of treating children in conflict with the law in an age-appropriate manner, paying particular attention to their complex needs and the explicit priority of reintegrating them into society. Framed thus, the Convention advocates an approach that not only recognises the rights of the child but equally highlights the need to safeguard their rights in the process. While the rights of children in conflict with the law can legitimately, it appears, be subjugated to the rights of others – victims and society as a whole – this chapter argues that a rights-based approach to children in the justice system, including in detention, requires an appreciation of children's vulnerability if these children are to enjoy protection of their rights.

7.2 THE VULNERABILITY OF CHILDREN IN CONFLICT WITH THE LAW

Extensive research confirms that children in conflict with the law have experienced adversity and disadvantage at a personal, family and community level, often with a convergence of complex circumstances and factors in their backgrounds.¹ At an individual level, children who end up in trouble have been found to suffer poor mental health, substance use (often connected), and both disabilities and

1 See Jerome Reil and Ian Lambie, "Profiles of Children and Young Persons Who Commit Serious Offences," in *Responses to Serious Offending by Children Principles, Practice and Global Perspectives*, eds. Nessa Lynch, Yannick van den Brink and Louise Forde (Routledge, 2022), 41–54.

psychiatric disorders. Studies highlight that children with mental health problems are over-represented in youth justice systems,² and a significant proportion of young people involved in juvenile justice meet the criteria for at least one psychiatric disorder, with studies reporting prevalence rates ranging from 30% to 70%.³ Studies indicate that neurodevelopmental disorders – including intellectual disability, language disorders, autism spectrum disorders and foetal alcohol spectrum disorders – are “vastly elevated” among the youth-offending population relative to the general public.⁴ The prevalence of traumatic brain injuries is also substantially greater among children in the justice system than their non-offending peers.⁵ The relationship between early childhood trauma and high rates of offending behaviour in young people is also clear, with one US study finding that of the young people in conflict with the law, 90% had experienced a traumatic event in childhood.⁶ A more recent Irish study reached an identical finding with respect to children involved in a police diversion programme.⁷ This interplay of multiple adverse circumstances in a child’s life is a common theme in the literature,⁸ with studies finding that the accumulation of psychosocial burdens results in post-traumatic distress and highly complex needs,⁹ connecting to the child’s involvement in

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- 2 Kelly N. Graves, James M. Frabutt and Terri L. Shelton, “Factors Associated with Mental Health and Juvenile Justice Involvement among Children with Severe Emotional Disturbance,” *Youth Violence and Juvenile Justice*, vol. 5(2) (2007): 147–167; Kim Reising, Maria M. Tfofi, David P. Farrington and Alex R. Piquero, “Depression and Anxiety Outcomes of Offending Trajectories: A Systematic Review of Prospective Longitudinal Studies,” *Journal of Criminal Justice*, vol. 62 (2019): 3–15, 3; Sara Goodkind, Jeffrey J. Shook, Kevin H. Kim, Ryan T. Pohligh and David J. Herring, “From Child Welfare to Juvenile Justice: Race, Gender, and System Experiences,” *Youth Violence and Juvenile Justice*, vol. 11(3) (2013): 249–272.
 - 3 Larking S. McReynolds, Craig S. Schwalbe and Gail A. Wasserman, “The Contribution of Psychiatric Disorder to Juvenile Recidivism,” *Criminal Justice and Behavior*, vol. 37(2) (2010): 204–216.
 - 4 Reil and Lambie, “Profiles of Children,” 41–54, 44–45.
 - 5 Ibid., 45.
 - 6 Carly B. Dierkhising, Susan J. Ko, Briana Woods-Jaeger, Ernestine C. Briggs, Robert Lee and Robert S. Pynoos, “Trauma Histories among Justice-Involved Youth: Findings From the National Child Traumatic Stress Network,” *European Journal of Psychotraumatology*, vol. 4(1) (2013): 1–12.
 - 7 Aoife Dermody, Sharon Lambert, Anne Rackow, Juliana Garcia, and Caroline Gardner, *An Exploration of Early Life Trauma and its Implications for Garda Youth Diversion Projects* (Dublin: Youthrise / Quality Matters, 2020).
 - 8 Sinead Freeman, “The Experience of Young People Remanded in Custody: A Case for Bail Support and Supervision Schemes,” *Irish Probation Journal*, vol. 5 (2008): 91–101.
 - 9 Reil and Lambie, “Profiles of Children,” 41–54, 43.

offending behaviour.¹⁰ Substance use has also been highlighted as a particular problem driving criminal involvement,¹¹ although it can also overlap with other adverse circumstances such as experience of state care and homelessness, both of which can increase the likelihood of criminal justice system contact.¹²

Family support is vital for children undergoing this level of personal adversity and trauma, and yet parental loss and bereavement are also common to children who come into conflict with the law. Parental conflict is found to increase the risk of involvement in offending behaviour¹³, and family turbulence and deprivation can be significant factors in the backgrounds of children who get into trouble.¹⁴ Children exposed to domestic violence, especially as young children, risk compromised attachment and healthy development, which can give rise to a host of other problems later in childhood, including poor self-regulation, behavioural problems and learning difficulties.¹⁵ Exposure to domestic violence has been found to be the best predictor of adolescent male aggression and violence, and female victimisation in intimate relationships finds violence as an accepted part of relationships.¹⁶ One major longitudinal study found a complex interaction between early experiences of crime victimisation and later experiences of crises within the family, suggesting that later involvement in violent offending is predicted by sustained adversity over time.¹⁷ More generally, poor parental monitoring and low levels of

10 Barbara Lay, Wolfgang Ihle, Günter Esser and Martin H. Schmidt, "Juvenile-Episodic, Continued or Adult-onset Delinquency? Risk Conditions Analysed in a Cohort of Children Followed Up to the Age of 25 Years," *European Journal of Criminology*, vol. 2(1) (2005): 39–66, 61; André M. van der Laan, Martine Blom, and Edward R. Kleemans, "Exploring Long-Term and Short-Term Risk Factors for Serious Delinquency," *European Journal of Criminology*, vol. 6(5) (2009): 419–438, 431–432.

11 Colin Webster, Robert MacDonald, and Mark Simpson, "Predicting Criminality? Risk Factors, Neighbourhood Influence and Desistance," *Youth Justice*, vol. 6(1) (2006): 7–22, 16.

12 Jade Boyd, Danya Fast and Will Small, "Pathways to Criminalization for Street-Involved Youth Who Use Illicit Substances," *Critical Public Health*, vol. 26 (5) (2015): 530–541, 530.

13 Lay, Ihle, Esser and Schmidt, "Juvenile-Episodic," 39–66, 61; David P. Farrington, "Cross-National Comparative Research on Criminal Careers, Crime and Punishment," *European Journal of Criminology*, vol. 12(4) (2015): 386–399, 392; David J. Smith and Susan McVie, "Theory and Method in the Edinburgh Study of Youth Transitions and Crime," *British Journal of Criminology*, vol. 43(1) (2003): 169–195, 188; Alexander T. Vazsonyia, Gabriela Ksinan Jiskrova, Albert J. Ksinan and Marek Blatný, "An Empirical Test of Self-Control Theory in Roma Adolescents," *Journal of Criminal Justice*, vol. 44 (2016): 66–76, 70.

14 Lesly McAra and Susan McVie, "Youth Crime and Justice: Key Messages from the Edinburgh Study of Youth Transitions and Crime," *Criminology and Criminal Justice*, vol. 10(2) (2010): 179–209, 187.

15 Reil and Lambie, "Profiles of Children," 41–54, 44.

16 Ibid.

17 McAra and McVie, "Youth Crime and Justice," 187.

parental support are linked to involvement in offending,¹⁸ with parental absence, however caused, associated with increased childhood delinquency.¹⁹

A family's low socioeconomic status is known to be a further risk factor for victimisation and offending, although the literature suggests this is interrelated with other factors like race and family structure.²⁰ Children's experience of sexual abuse²¹ or repeated bullying can be linked to involvement in offending too.²² Experiences of marginalisation are especially problematic as cycles of exclusion become self-perpetuating, and a history of system contact can disrupt efforts to access legitimate employment or training opportunities.²³ More worryingly, perhaps, early intervention programmes, rather than keeping the child away from the justice system, can have the opposite effect of drawing young people into repeated cycles of contact.²⁴

Brain science research further reveals the link between developmental factors and children's involvement in offending behaviour, with studies finding that the development of the brain can impact behaviour during adolescence in a manner which exposes children's chances of coming into contact with the justice system.²⁵ In particular, research has found that poor impulse self-regulation and high sensation-seeking can contribute to children's involvement in risky behaviour,

18 Ibid.; Smith and McVie, "Theory and Method in the Edinburgh Study of Youth Transitions and Crime," 173; M. van der Laan, Blom, and Kleemans, "Exploring Long-Term and Short-Term Risk Factors for Serious Delinquency," 431; Venla Salmi and Janne Kivivuori, "The Association between Social Capital and Juvenile Crime: The Role of Individual and Structural Factors," *European Journal of Criminology*, vol. 3(2) (2006): 123–148, 140.

19 Salmi and Kivivuori, "The Association between Social Capital and Juvenile Crime," 134–135.

20 Robin M. Hartinger-Saunders, Barbara Rittner, William Wiecezorek, Thomas Nochajski, Christine M Rine and John Welte, "Victimization, Psychological Distress and Subsequent Offending Among Youth," *Children and Youth Services Review*, vol. 33(11) (2011): 2375–2385.

21 Ella Cockbain and Helen Brayley, "Child Sexual Exploitation and Youth Offending: A Research Note," *European Journal of Criminology*, vol. 9(6) (2012): 689–700.

22 George E. Higgins, David N. Khey, Brenda Cherie Dawson-Edwards and Catherine D. Marcum, "Examining the Link Between Being a Victim of Bullying and Delinquency Trajectories among an African American Sample," *International Criminal Justice Review*, vol. 22(2) (2012): 110–122; Silvia Staubli, and Martin Killias, "Long-Term Outcomes of Passive Bullying during Childhood: Suicide Attempts, Victimization and Offending," *European Journal of Criminology*, vol. 8(5) (2011): 377–385.

23 Mary-Louise Corr, "Young People's Offending Careers and Criminal Justice Contact: A Case for Social Justice," *Youth Justice*, vol. 14(3) (2014): 255–268.

24 Lesly McAra and Susan McVie, "Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending," *European Journal of Criminology*, vol. 4(3) (2007): 315–345, 337.

25 Charlotte Walsh, "Youth Justice and Neuroscience: A Dual-Use Dilemma," *British Journal of Criminology*, vol. 51(1) (2011): 21–39.

including offending behaviour.²⁶ This pattern – demonstrating teenagers’ heightened propensity towards risk taking – has been found to be similar across a variety of countries.²⁷

Finally, it is important to note that one of the most prevalent factors in the treatment of children in conflict with the law is the role played by race, gender and minority status. In terms of gender, many studies note that being male is associated with higher levels of involvement in criminal behaviour.²⁸ Being male was found in one study to be a moderate predictor of involvement in prolonged, intensive forms of offending²⁹ which might be attributable to a combination of boys experiencing simultaneously more risk and less protection than girls.³⁰ The influence of race on the justice system is well established, and black and minority children – across jurisdictions – come into contact with the justice system disproportionately more than their white counterparts.³¹ Evidence of the structural inequality faced by black and brown boys in particular can be found in the recent evidence that, while

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- 26 Laurence Steinberg, “Adolescent Brain Science and Juvenile Justice Policymaking,” *Psychology, Public Policy, and Law*, vol. 23(4) (2017): 410–420; Laurence Steinberg, Grace Icenogle, Elizabeth P. Shulman, Kaitlyn Breiner, Jason Chein, Dario Bacchini, Lei Chang, Nandita Chaudhary, Laura Di Giunta, Kenneth A. Dodge, Kostas A. Fanti, Jennifer E. Lansford, Patrick S. Malone, Paul Oburu, Concetta Pastorelli, Ann T. Skinner, Emma Sorbring, Sombat Tapanya, Liliana Maria Uribe Tirado, Liane Peña Alampay, Suha M. Al-Hassan and Hanan M. S. Takash, “Around the World, Adolescence Is a Time of Heightened Sensation Seeking and Immature Self-Regulation,” *Developmental Science*, vol. 21(2) (2018): 13.
 - 27 Natasha Duell, Laurence Steinberg, Grace Icenogle, Jason Chein, Nandita Chaudhary, Laura Di Giunta, Kenneth A. Dodge, Kostas A. Fanti, Jennifer E. Lansford, Paul Oburu, Concetta Pastorelli, Ann T. Skinner, Emma Sorbring, Sombat Tapanya, Liliana Maria Uribe Tirado, Liane Peña Alampay, Suha M. Al-Hassan, Hanan M. S. Takash, Dario Bacchini and Lei Chang, “Age Patterns in Risk Taking Across the World,” *Youth Adolescence*, vol. 47 (2018): 1052–1072.
 - 28 Josine Junger-Tas, Denis Ribeaud and Maarten J. L. F. Cruyff, “Juvenile Delinquency and Gender,” *European Journal of Criminology*, vol. 1(3) (2004): 333–375, 355; Michael Rocque, Chad Posick, Ineke H. Marshall, and Alex R. Piquero, “A Comparative, Cross-Cultural Criminal Career Analysis,” *European Journal of Criminology*, vol. 12(4) (2015): 400–419, 413.
 - 29 Daniel Seddig and Jost Reinecke, “Exploration and Explanation of Adolescent Self-Reported Delinquency Trajectories in the *Crimoc* Study,” in *The Routledge International Handbook of Life-Course Criminology*, eds. Arjan Blokland and Victor van de Geest (London & New York: Routledge, 2017), 159–178, 175.
 - 30 Abigail A. Fagan, M. Lee Van Horn, J. David Hawkins and Michael W. Arthur, “Gender Similarities and Differences in the Association between Risk and Protective Factors and Self-Reported Serious Delinquency,” *Prevention Science*, vol. 8 (2007): 115–124.
 - 31 Nancy E. Dowd, “Black Boys Matter: Developmental Equality,” *Hofstra Law Review*, vol. 45(47) (2016).

justice systems have contracted and numbers in detention have fallen, the impact of this has not been enjoyed equally by black and ethnic minority children.³²

In summary, then, a very substantial body of research over many decades has confirmed an undeniably strong link between vulnerability in childhood – defined by experiences of trauma, adversity and disadvantage of multiple, complex forms – and a child’s later involvement in offending or anti-social behaviour. What is less clear, however, is how states account for this vulnerability in how they respond to offending behaviour. This question is addressed in the section that follows.

7.3 THE RIGHTS OF CHILDREN IN CONFLICT WITH THE LAW

So where does the international human rights framework stand on the treatment of children in conflict with the law, amidst this picture of adversity, trauma and vulnerability? What approaches does the CRC prescribe, mandate or recommend in light of these circumstances, and to what extent do the international standards take account of children’s vulnerability when they come into contact with the law? In general, the CRC has two key approaches that could be said to take account of children’s vulnerability – the first is an emphasis on diversion, through increasing the age of criminal responsibility and advocating the use of informal adjudication and community sanctions, and the second is the requirement of specialisation and adaptation in a way that mitigates the harshness of the justice system for children while at the same time helping the arc of justice to bend towards their needs and circumstances.³³ This following section sets out these two elements in more detail.

7.3.1 Diversion

The CRC recognises the importance of protecting children’s rights when they come into conflict with the law and draws out the principle of diversion in a number of ways. In this regard, the Committee on the Rights of the Child has recognised that “[e]xposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults”.³⁴ Highlighting its desire therefore to “promote key strategies for reducing the especially harmful effects of contact with the criminal justice system, in line with increased

32 Chris Cunneen, “Youth Justice and Racialization: Comparative Reflections,” *Theoretical Criminology*, vol. 24(3) (2020): 521–539.

33 Ursula Kilkelly, “Youth Justice and Children’s Rights: Measuring Compliance with International Standards,” *Youth Justice*, vol. 8(3) (2008): 187–192.

34 UN Committee on the Rights of the Child, *General Comment No 24 (2019) on Child Rights in the Child Justice System*, CRC/C/GC/24, (September 18, 2019), para. 2.

knowledge about children's development",³⁵ the Committee draws attention to measures that divert children from the justice system, including raising the age of criminal responsibility, diverting children from formal justice processes, and ensuring detention is used as a measure of last resort.³⁶

In particular, the Convention recommends that children are diverted from the criminal justice system altogether and, as a first step, requires the establishment of a minimum age below which children cannot be held criminally responsible (Article 40(3)(a)). This, the Committee says, should be set at a minimum age of 14 years, although it commends states that apply higher ages of 15 and 16, which better reflect recent evidence about child development.³⁷ Significantly, the Committee has formed the view that "[c]hildren with developmental delays or neurodevelopmental disorders or disabilities (for example, autism spectrum disorders, fetal alcohol spectrum disorders or acquired brain injuries) should not be in the child justice system at all, even if they have reached the minimum age of criminal responsibility".³⁸

The Committee recommends that interdisciplinary approaches are in place to protect the rights of children below the age of criminal responsibility, including approaches that emphasise family support, address the need for psychosocial support, and build resilience.³⁹ Separately, the Committee recommends that states engage in a process of decriminalisation, so that pathways into the justice system are closed to children engaging in only minor offending.⁴⁰

For children above the age of criminal responsibility, the Convention requires states to apply measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected (Article 40(3)(b)). According to the Committee, diversion should be the preferred way to respond to children who come into conflict with the law, and opportunities for diversion should appear early and frequently throughout the process.⁴¹ Article 40(4) requires states to make available "[a] variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care" to ensure that children are dealt with "in a manner appropriate to their well-being and proportionate both to their circumstances and the offence." Consistent with

35 CRC/C/GC/24, para. 2.

36 CRC/C/GC/24, para. 6.

37 CRC/C/GC/24, para. 22.

38 CRC/C/GC/24, para. 28.

39 CRC/C/GC/24, para. 11.

40 CRC/C/GC/24, para. 12.

41 CRC/C/GC/24, para. 16.

the principle of imposing detention only as a last resort, the CRC strongly advocates for community-based, progressive approaches that respond to the needs of the child. In doing so, the Convention implicitly accepts that detention is harmful to children, requiring in detention that they are separated from adults for their own protection, enjoy the right to maintain contact with family through correspondence and visits, and have the right to prompt access to legal and other appropriate assistance (Article 37(c) and (d)) in ensuring the legality of their detention. The Committee on the Rights of the Child highlights the need for a specialist form of detention for children; this is explained further in the section below.

7.3.2 Specialisation

While many children who come into contact with the law experience multiple forms of adversity and vulnerability, such as those described here, their circumstances may also make engagement with the justice system additionally challenging. This is recognised by the CRC and other instruments, which advocate for a specialist and adapted criminal justice system for children.⁴² In particular, Article 40(3) of the Convention requires that states promote the establishment of laws, procedures, authorities and institutions specifically applicable to children accused of infringing the penal law, in a measure that highlights the imperative of specialist and separate treatment of children in conflict with the law. In addition, the Convention addresses the right of the child in the justice system to be treated

in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. (Article 40(1))

Building on these standards, the Committee on the Rights of the Child recalls that children are different from adults “in their physical and psychological development” and that such differences “constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualised approach”.⁴³ In addition, they are entitled under Article 40(2) to have matters against them determined by a fair hearing without delay before a competent,

42 For details of these international standards, see further Kilkelly, “Youth Justice and Children's Rights,” 187–192.

43 CRC/C/GC/24, para. 2.

independent and impartial tribunal in the presence of “legal or other appropriate assistance” and, unless it is contrary to their interests, in the presence of their parents. The provision goes on to recognise the child’s due process rights, including the right to be presumed innocent, to examine and cross-examine witnesses, to the assistance of an interpreter and to an appeal in accordance with law. Importantly, the child has the right to have their privacy respected “at all stages of the proceedings”.

Focusing on the risks to children of engaging with a justice system ill-equipped to meet their needs, the Council of Europe adopted the Guidelines on Child-friendly Justice in 2010 in recognition of the need to make justice systems more “accessible and understandable to children”.⁴⁴ This important instrument draws on Article 12 of the CRC (the child’s right to be heard in decision-making) and the case-law of the European Court of Human Rights on the application of Article 6 (the fair trial right) to children in criminal justice proceedings to draw attention to the child’s participation rights in the justice system.⁴⁵ The Guidelines highlight the importance of providing children with access to information, legal assistance and the important supportive role played by parents in such proceedings. They pay particular attention to child-specific training for professionals, the use of child-appropriate language and supports, and the need to adapt the environment to the child’s needs and circumstances. Overall, they advocate for a fundamentally altered system of justice, in order to ensure children’s needs, circumstances and rights are protected when they come into conflict with the law.

As noted above, the Convention prohibits detention other than as a last resort and the Committee is clear that specialist measures must be adopted to ensure the harms of detention are minimised and the protections enhanced. The Committee on the Rights of the Child advocates for a specialist system of child detention, envisaging “separate facilities for children”, “staffed by appropriately trained personnel” that “operate according to child-friendly policies and practices”.⁴⁶ It sets out clear direction regarding the kind of conditions children should enjoy when deprived of their liberty and details the requirements on states to deliver on those rights including:

44 Ton Liefwaard, “Child-Friendly Justice and Procedural Safeguards for Children in Criminal Proceedings: New Momentum For Children in Conflict with the Law?,” *Bergen Journal of Criminal Law and Criminal Justice*, vol. 8(1) (2020): 1–17, 2.

45 Liefwaard, “Child-Friendly Justice,” 1–17, 7.

46 CRC/C/GC/24, para. 15.

- A physical environment conducive to reintegration, with opportunity for peer interaction, social and leisure activity and privacy.
- A right to education suited to the child's needs and abilities and designed to prepare the child for return to society, with vocational training likely to prepare them for future employment.
- A right to health assessment on admission and adequate healthcare in detention.
- Frequent communication with the wider community, with friends and family, and the opportunity to visit home, with no restrictions on communication with the child's lawyer.
- The use of restraint limited to when the child poses an imminent threat to himself or others and never involving deliberate infliction of pain or use as a punishment.
- Discipline consistent with the inherent dignity of the child with a prohibition on corporal punishment, solitary confinement or other punishment that compromises the child's physical or mental health.
- A right to make requests or complaints, to know their rights and have independent and qualified inspections of the detention setting, including consultation with the children detained.

7.4 STATES' RESPONSE TO VULNERABILITY AND RIGHTS

Having set out the literature on the vulnerability of children in conflict with the law and the corresponding provision in international standards for the rights of the child, this next section considers the response of States Parties to the Convention on these issues. While the picture is mixed and arguably not susceptible to generalisation, there is nonetheless clear support for the view that rather than take account of the evidence, many states choose punitive responses that downplay or ignore the exceptional vulnerability of children in conflict with the law, especially those accused or convicted of serious offences.

Many states have progressive approaches in place that divert children in conflict with the law from the criminal justice system, ensuring their needs and circumstances are met with special protection and care.⁴⁷ However, more common than systems that do not prosecute children at all are those approaches that use the justice system to address the factors associated with children's offending – mental

47 Louise Forde, "Welfare, Justice, and Diverse Models of Youth Justice: A Children's Rights Analysis," *The International Journal of Children's Rights*, vol. 29(4) (2021): 920–945.

health, lack of family support and poor education – while holding children accountable for the harm caused by their offending.⁴⁸

Too frequently, however, despite their extraordinary vulnerability, children in conflict with the law encounter not protection but a justice system that is rarely adapted to their circumstances. Their rights are downplayed or ignored during police questioning, and when prosecuted, they encounter judicial proceedings or sentencing practices that take little account of their age or their circumstances. Decisions to investigate, prosecute or sentence children frequently fail to take account of their vulnerability or needs, as is the case in other areas of child law or policy, and instead priority is given to community safety, vindication of victims' rights and the public interest in the administration of justice.⁴⁹ Low ages of criminal responsibility persist in many states, with the age of 10 still applicable in jurisdictions including England and Wales.⁵⁰ Other states have even lower ages of criminal responsibility, or even no minimum age, as is applicable across many US states, meaning that children can be tried at any age.⁵¹ Separately, some states "limit the applicability of the child justice system to children under the age of 16 years (or lower), or [...] allow by way of exception that certain children are treated as adult offenders", especially in the case of a serious offence.⁵² Ireland is a case in point, with a law that permits children to be prosecuted with some violent crimes at 10 years old; the regular age of prosecution is 12.⁵³ The age of criminal responsibility, however framed, is the gateway to the justice system, and setting the age at too low a level not only is contrary to international standards,⁵⁴ but results in children being inappropriately held to account in a justice process likely to be incomprehensible to them.⁵⁵ This general concern about the child's capacity to understand the criminal process, augmented by development science outlined

48 Forde, "Welfare, Justice and Diverse Models of Youth Justice."

49 Ursula Kilkelly and Ton Liefwaard, "International Children's Rights Principles and Responses to Serious Offending by Children: Recent Developments, Topical Issues and Global Challenges," in *Responses to Serious Offending by Children: Principles, Practice and Global Perspectives*, eds. Nessa Lynch, Yannick Van den Brink and Louise Forde (Routledge, 2022), 11–26.

50 Aaron Brown and Anthony Charles, "The Minimum Age of Criminal Responsibility: The Need for a Holistic Approach," *Youth Justice*, vol. 21(2) (2021): 153–171.

51 Barry C. Feld, "Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences" *JL & Fam Stud*, vol. 10 (1): 11.

52 CRC/C/GC/24, para. 30; and further Kilkelly and Liefwaard, "International Children's Rights Principles and Responses," 11–26.

53 The Irish Children Act 2001.

54 Ursula Kilkelly and Ton Liefwaard, "International Children's Rights Principles and Responses," 11–26, 14.

55 Claire McDiarmid, "An Age of Complexity: Children and Criminal Responsibility in Law," *Youth Justice*, vol. 13(2) (2013): 145–160.

above, has led the Committee on the Rights of the Child to recommend raising the age of criminal responsibility to 14 years, at minimum.⁵⁶

The particular vulnerability of children in conflict with the law means that they have difficulty comprehending police questioning, a process fraught with legal risk. Kilkelly and Forde illustrate the difficulties that children can have navigating such situations, even where measures are taken to adapt the approach in line with their age.⁵⁷ Some jurisdictions use “appropriate adults” or intermediaries to support the child,⁵⁸ taking into account that language impairment can “impede, or even destroy, an individual’s ability to receive due process and effectively participate in the criminal justice system”.⁵⁹ It is pertinent in this regard that the CRC does not address the area of police questioning at all and, even in the general terms of youth justice, does not mandate legal representation for children preferring “legal or other appropriate assistance” instead.⁶⁰ Whether demonstrating a distinct lack of awareness of the vulnerabilities under which children labour in such processes or an unexpected optimism in the capacity of states to adapt their justice systems to the needs of children, both perspectives appear problematic. The reality is that even where such procedures are adapted as the Convention requires, they can be too complex and formal for children to comprehend, doubly so where children have suffered disadvantage, trauma and the other circumstances highlighted above.⁶¹

It is evident from the research that children with complex, unmet needs commonly come into contact with the justice system, and that this impacts disproportionately on children (boys) of minority and ethnic backgrounds. While the majority of children grow out of such behaviour, their vulnerability often means that they are more likely to be drawn deeper into the justice system. Research points to the additional vulnerability of children who are involved in serious or

56 CRC/C/GC/24 (2019), para. 22.

57 Louise Forde and Ursula Kilkelly, *Children’s Rights and Police Questioning: Qualitative Study of Children’s Experiences of being interviewed by the Garda Síochána* (Policing Authority, 2020).

58 Roxanna Dehaghani, “Interpreting and Reframing the Appropriate Adult Safeguard,” *Oxford Journal of Legal Studies*, vol. 42(1) (2022): 187–206.

59 Michelle LaVigne and Sally Miles, “Under the Hood: Brendan Dassey, Language Impairments and Judicial Ignorance,” *Albany Law Review*, vol. 82(3) (2019): 873–947, 890.

60 Ton Liefwaard, “Child-Friendly Justice: Protection and Participation of Children in the Justice System,” *Temple Law Review*, vol. 88(4) (2016): 905–927.

61 Ursula Kilkelly, “Youth Courts and Children’s Rights: The Irish Experience,” *Youth Justice*, vol. 8(1) (2008): 39–56; Stephanie Rap, “A Children’s Rights Perspective on the Participation of Juvenile Defendants in the Youth Court,” *The International Journal of Children’s Rights*, vol. 24(1) (2014): 93–112.

violent behaviour in this respect.⁶² For these children, experience of formal justice both during police questioning and during the trial process results in poor outcomes, including the imposition of punitive measures.⁶³ Despite the international standards advocating for more child-friendly approaches, the high levels of formality and legal process present a particular challenge for children labouring under extreme vulnerability. As Kilkelly and Liefwaard note, a gap has now emerged in the application of the Convention to children “at the deeper end of the justice system” with the result that children charged or convicted of a serious crime, despite their acute vulnerability, “are more likely to be denied the specialised interventions to which they are entitled under international children’s rights law”.⁶⁴ Despite their circumstances, such children are less likely to be selected for a diversion programme and more likely to be deemed worthy of a sentence of detention.⁶⁵ They are also highly likely, even in the most progressive jurisdictions, to be tried in the adult court system, where they face an environment and a process that has adapted little to their age and needs.⁶⁶ The more the child needs protection and care, it seems, the more likely they are to receive punishment.

Extending the contradiction further, despite the harms of detention, it remains permitted under the CRC, up to and including a sentence of life, as long as there is a possibility of release. As the Global Study on Children Deprived of Liberty makes clear, children continue to suffer breaches of their rights in detention around the world.⁶⁷ In such circumstances, it appears, their vulnerability is downplayed in favour of the public interest in punishment and retribution. Among the concerns highlighted by the Committee on the Rights of the Child are the poor material conditions of child detention, the overuse of detention on remand/pre-trial detention, and the absence of adequate health and education services that meet children’s needs.⁶⁸ The risks to children’s protection is highlighted, including by children themselves, in the Global Study on Children Deprived of Liberty, through the use of solitary confinement and exposure to violence.⁶⁹ The recommendations of the global study focus predominantly on methods to avoid, reduce and where possible

62 Reil and Lambie, “Profiles of Children,” 41–54.

63 Kilkelly and Liefwaard, “International Children’s Rights Principles and Responses,” 11–26.

64 Kilkelly and Liefwaard, “International Children’s Rights Principles and Responses,” 11–26, 23.

65 Kilkelly and Liefwaard, “International Children’s Rights Principles and Responses,” 11–26.

66 Rachel Martin, “Waiving Goodbye to Juvenile Offenders: A Multi-State Analysis of Juvenile Transfer Laws,” *ULC John Marshall Law Review*, vol. 54(2) (2021): 481–526.

67 Manfred Nowak, *UN Global Study on Children Deprived of Liberty* (United Nations General Assembly, 2019).

68 Ursula Kilkelly and Pat Bergin, *Advancing the Rights of Children in Detention* (Bristol University Press, 2022), 20–34.

69 Nowak, *UN Global Study on Children Deprived of Liberty*, 76–113.

eliminate the detention of children, by drawing attention to the root causes and pathways that lead to the deprivation of liberty.⁷⁰ States are recommended to “rigorously apply” the requirements of Article 37(b) of the CRC to ensure detention is a measure of last resort, requiring that children shall only be detained in “truly exceptional cases”. Where detention is unavoidable, the study recommends that states apply “child-friendly and gender-sensitive” conditions and protect children from abuse, neglect and exploitation, providing children with access to “essential services aimed at their rehabilitation and reintegration into society, including education, vocational training, family contacts, sports and recreation, adequate nutrition, housing and health care”.⁷¹

Admittedly, some progressive approaches have been adopted to take better account of children’s circumstances when they appear before the courts charged with a breach of the criminal law. For instance, in a series of judgments, the United States Supreme Court developed a line of developmental jurisprudence that was informed by the scientific evidence that children are not fully culpable for criminal acts on account of their immaturity.⁷² In truth, remarkable as these judgments are, they merely bring US sentencing into line with the CRC in prohibiting the imposition on a child of life without parole, no more.⁷³ Moreover, the requirement that a young person must be found to be “permanently incorrigible” before such a sentence could be imposed was diluted in the recent case of *Jones v Mississippi* (2021), and, in a separate development, courts have pointed to “trauma” in finding that young people cannot be rehabilitated.⁷⁴

Equally, some good practice is evident with respect to detention also, notably in Ireland, where a child-centred, rights-based approach has been embedded in the national children facility for children.⁷⁵ Given the complexity of implementing such an approach, it is perhaps not surprising that most jurisdictions committed to a progressive approach favour the elimination or reduction of detention rather than its reform.⁷⁶

70 Nowak, *UN Global Study on Children Deprived of Liberty*, 668.

71 Nowak, *UN Global Study on Children Deprived of Liberty*, 669.

72 Laurence Steinberg, “Adolescent Brain Science and Juvenile Justice Policymaking,” *Psychology, Public Policy, and Law*, vol. 23(4) (2017): 410–420.

73 Ursula Kilkelly, “Advancing the Rights of Young People in Juvenile Justice: The Impact of Juvenile Law Centre,” *Temple Law Review*, vol. 88(4) (2016): 629–652.

74 Marsha Levick and Susan Vivien Mangold, “Responses to Children Who Commit Serious Offending in the United States,” in *Responses to Serious Offending by Children*, eds. Nessa Lynch, Yannick van den Brink and Louise Forde (Routledge, 2022), 202.

75 Ursula Kilkelly and Pat Bergin, *Advancing the Rights of Children in Detention* (Bristol University Press, 2022).

76 Kilkelly and Bergin, *Advancing the Rights of Children in Detention*.

In this regard, reforms in sentencing are key. In Scotland, a progressive approach has emerged with the adoption of a new sentencing guideline for the sentencing of young people covering any person under 25 years. According to the Sentencing Young People Sentencing Guideline, consideration must be given to a range of factors in this process, including the young person's best interests, their maturity (taking account of factors such as development as well as age) and rehabilitation, including the young person's amenability to change.⁷⁷ Separately, in identifying the most appropriate sentence, the Guideline provides that a whole range of factors particular to the young person should be taken into account. Particularly novel is the requirement that the court, in selecting the most appropriate sentence, should ensure that it has "sufficient information to assess the maturity of the young person". According to the Guideline, this may include information about "addiction; physical and mental health; speech, language, and communication needs; trauma; adverse childhood experiences; the living environment, including whether the young person is or has been in care".⁷⁸ The Guideline also requires that the sentence imposed should take account of "the particular and individual circumstances of the young person" and have regard to the fact that "some sentences could have more of an adverse effect on a young person than on an older person because of the young person's age, maturity, and/or personal circumstances".⁷⁹

Overall, however, despite some emerging good practice in youth justice, including the move by states to increasingly divert children from the justice system and from detention, the extent of the vulnerability of children in conflict with the law appears to have had relatively little impact on the implementation of the CRC in this important area.

7.5 CONCLUSION

Established research now confirms, categorically, that children in conflict with the law present with extraordinary vulnerability. Frequently from impoverished backgrounds, with experience of disadvantage, and personal and family trauma, children in conflict with the law have experience of adversity with circumstances that converge to bring them into contact with the justice system. In addition, and as the requirement to set an age of criminal responsibility makes clear, international standards require the removal of young children from the justice system, in

77 Scottish Sentencing Council, *Sentencing Young People Sentencing Guideline*, effective from 26 January 2022.

78 Scottish Sentencing Council, *Sentencing Young People Sentencing Guideline*, 2022, para. 15.

79 Scottish Sentencing Council, *Sentencing Young People Sentencing Guideline*, 2022, para. 17.

acknowledgement of their heightened vulnerability. Research makes clear that fulfilling children's basic needs for education, health and family support can prevent them from getting into trouble. Despite the research pointing towards the need for greater protection for these children, states continue to bring them into the justice system, in a manner that is structurally unequal and disproportionate in impact, in order to satisfy the public interest for accountability. It is this politicisation (and racialisation) of youth justice that ultimately explains why states choose punishment over protection for these most vulnerable children.⁸⁰

The good news is that we know more about a child's vulnerability than ever before – with global studies, interdisciplinary research and the new frontier of developmental brain science providing evidence that is as clear as it is powerful. This evidence reflects existing international standards, including the CRC, which emphasises the imperative of diversion – from offending, from the justice system, and from detention – so that children can be provided with appropriate support, fulfilling lives and full enjoyment of their rights. It also highlights the need for specialist approaches when children come into contact with the justice system, although this, of itself, raises a question as to whether even an adapted system of justice can ensure that the rights of children are protected.

Importantly, the continuing emergence of research evidence – including recent brain science – has given rise to a refresh of international standards. The Committee on the Rights of the Child's revised General Comment on Children's Rights in the Child Justice System and newly developed standards such as the European Guidelines on Child-Friendly Justice are excellent examples of this. The capacity of the international community to ensure that the international standards remain up to date with the latest research is a source for some optimism, even if the implementation of those standards remains elusive at times. In this regard, it is important that these standards advocate for an approach that views the child in the justice system as a child, strongly supporting an approach that takes account of the child's vulnerability and mandating treatment that is child-centred and rights-based, regardless of the child's offending (or perhaps because of it). The assertion of the CRC as a treaty of rights for all children is vital in this context.⁸¹

It is important too that the children's rights standards outline the measures that, if implemented, will take account of the child's vulnerability. Connecting research to international law, the international standards must include an imperative to train

80 Laura Piacentini and Reece Walters, "The Politicization of Youth Crime in Scotland and the Rise of the 'Burberry Court,'" *Youth Justice*, vol. 6(10) (2006): 43–59.

81 Ursula Kilkelly, "All Children, All Rights in All Circumstances," in Nessa Lynch, ed. *Children's Rights in Aotearoa New Zealand – Reflections on the 30th Anniversary of the Convention on the Rights of the Child*. (Wellington: Law Foundation of New Zealand, 2019), 82–84.

police, lawyers, judges and other youth justice professionals in order to ensure that interactions with, communication with and treatment of children are informed by their vulnerability and circumstances, taking account of their stage of development and their adverse life experiences. The importance of systematic training on anti-discrimination and unconscious bias is vital here. Here, the Scottish approach presents a progressive model for other states to follow. It also needs to be accompanied by a commitment to training, which takes account of the impact of these circumstances and experiences on a child's mindset, attitudes and behaviours.

Ultimately, however, it is difficult not to conclude that children labouring under this level of vulnerability have no business being in the justice system at all, least of all one which traumatises them further. What the CRC makes clear is that children in conflict with the law are rights holders, not simply due to their participation in the justice system but because they are children, with equal rights regardless of age, other characteristics or background. Contrasting with other areas where protection or vulnerability can eclipse agency, we need to find ways to ensure that the reverse is not always the reality for these children whose vulnerability is so frequently ignored or underplayed. This is a right of every child, without discrimination, on an equal basis with all children.

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8. Vulnerability and Discrimination: The State's Responsibility towards Asylum-Seeking Children's Right to Health and Care to Prevent Discrimination against Children

Fredrikke Fjellberg Moldenæs

Abstract Reports show that many unaccompanied asylum-seeking children above 15 years of age struggle and are vulnerable. This chapter investigates whether caregiving for these children in Norway constitutes discrimination against them. Further, I ask whether the understanding of children's unique vulnerability is reflected in the legislation concerning unaccompanied asylum-seeking children 15–18 years of age – or whether the state is rather creating a vulnerable situation for them.¹

Keywords unaccompanied asylum-seeking children | health | discrimination | caregiving | vulnerability

8.1 INTRODUCTION

8.1.1 Starting Point

In 2023, 504 unaccompanied children sought asylum in Norway on the basis of protection²; cf. the Norwegian Immigration Act sec. 28.³ While waiting for an

1 This chapter is based on my ongoing PhD project about children's right to health and care at UiT The Arctic University of Norway.

2 UDI, Asylsøknader fra enslige mindreaktige etter søknadsmåned og statsborgerskap (2023). See <https://www.udi.no/statistikk-og-analyse/statistikk/asylsoknader-fra-enslige-mindreareige-etter-soknadsmaned-og-statsborgerskap-2023/> (accessed March 7, 2024).

3 Act 15 May 2008 no. 35 om utlendingers adgang til riket og deres opphold [The Norwegian Immigration Act].

answer to whether or not the child is qualified for protection as a refugee, the child has a right to care from the state; see Arts. 3 and 22(2) CRC.⁴ Children who are not accompanied by their caregivers are often considered to be the most vulnerable among refugees.⁵ In this chapter, I intend to highlight the connection between the Norwegian Immigration Act's regulation of caregiving for unaccompanied children above 15 years of age and the state's responsibility for securing all children's right to care, development and health, in accordance with, among others, Art. 24, Art. 22(2), Art. 20, Art. 6, Art. 3, Art. 2 CRC and the Norwegian Constitution.⁶ UDI⁷ is responsible for the daily care of unaccompanied children living in asylum centres (see the Norwegian Immigration Act sec. 95 (2)), not, as is the case for other children under the care of the state, the Child Welfare Authority. For over 20 years, questions have been raised about whether the regulation of care for asylum-seeking children above 15 years of age in Norway represents discrimination against these children's right to care.⁸ Over the years, the CRC Committee⁹ has, in its concluding observations to Norway's periodical reports, expressed concern about the situation of unaccompanied asylum-seeking children¹⁰ in Norway,

4 United Nations Convention on the Rights of the Child of 20 November 1989 (hereinafter CRC).

5 See, among others, Ilse Derluyn, Valesca Lippens, Tony Verachtert, Willy Bruggeman, Eric Broekaert, "Minors Travelling Alone: A Risk Group for Human Trafficking?" *International Migration*, vol. 48(4) (2010): 164–185; Tammy Bean, Ilse Derluyn, Elisabeth Eurelings-Bontekoe, Eric Broekaert and Philip Spinhoven, "Comparing Psychological Distress, Traumatic Stress Reactions, and Experiences of Unaccompanied Refugee Minors with Experiences of Adolescents Accompanied by Parents," *The Journal of Nervous and Mental Disease*, vol. 195(4) (2007): 288–297. Also, The European Court of Human Rights, sitting as a Grand Chamber 4 November 2014, *Tarakhel v. Switzerland* sec. 119, and *Popov v. France*, 19 January 2012 sec. 91.

6 Kongeriket Norges Grunnlov 17 May 1814 [The Norwegian Constitution].

7 The Norwegian Directorate of Immigration (hereinafter UDI).

8 See Recommendation from the Parliamentary Committee no. 92 (2002–2003) Innstilling til Odelstinget fra justiskomiteen om lov om endring i menneskerettsloven mv. (innarbeiding av Barnekonvensjonen i norsk lov), 13. From recent years, see among others: Silje Sønsterudbråten, Guri Tyldum and Magne Raundalen, "Et trygt sted å vente Omsorgspraksiser på asylmottak for enslige mindreårige," Fafo-report 2018:5; Norges nasjonale institusjon for menneskerettigheter, *Omsorg for enslige mindreårige asylsøkere*, Temarapport NIM-R-2016-003, 2016; Malin Namdal, "Utsettes enslige asylbarn på mottak for diskriminering i strid med FN's barnekonvensjon?," *Lov og Rett*, vol. 54(2) (2015): 87–105.

9 The UN Committee on the Rights of the Child (hereinafter CRC Committee).

10 Hereinafter unaccompanied children.

including that children 15 years of age and older may not receive the same quality of care as those under 15 years of age.¹¹

8.1.2 Research Questions

The main question in this chapter is whether the Norwegian Immigration Act sec. 95(2) represents a breach of the child's right to not be discriminated against following Art. 2 and 22(2) CRC.

To answer this question, I ask what constitutes the differences in care and why Norwegian legislation distinguishes between children under and over 15 years of age and between unaccompanied children and other children. Setting aside residence status, what is the difference between an unaccompanied asylum-seeking child and a child in need of help from a child welfare institution? Further, I ask how these differences are justified by the state and whether the justification is proportionate.

Another question is whether the understanding of children's unique vulnerability is reflected in the legislation concerning unaccompanied children 15–18 years of age. Bringing vulnerability into the legal discussion could be a way of securing equality and justice by achieving a more realistic view of the legal subject and those responsible for ensuring equality. Is the state meeting the child's unique vulnerability, or is it rather creating a vulnerable situation for asylum-seeking children above 15 years of age?

8.1.3 Structure

In Section 8.2 I will give an account of the legal and theoretical framework forming the basis for the discussions in Section 8.3, focusing on the right to health, care, and protection against discrimination. I will highlight the connection between human rights for children and the concept of vulnerability, including how the child is seen as a vulnerable subject and how this is reflected in both national and international legislations concerning children's rights. Further, I look briefly into vulnerability as a theoretical framework for working towards better conditions for

11 UN Committee on the Rights of the Child: *Concluding Observations on the Fifth and Sixth Periodic Reports of Norway*, CRC/C/NOR/CO/5-6 (July 8, 2018), paragraphs 31 and 32, 4 July 2018. Other committees have expressed similar concerns; see Recommendation from the Parliamentary Committee no. 344 L (2020–2021) *Innstilling fra kommunal- og forvaltningsskomiteen om Endringer i utlendingsloven (lovfesting av omsorgsansvaret for enslige mindreårige som bor i asylmottak)*, 9.

children without stigmatising them. In Section 8.3 there follows an explanation of the national regulation regarding care for asylum-seeking children above 15 years of age in Norway and the legislation's impact on children's well-being. Lastly, I will discuss whether the national law discriminates against asylum-seeking children above 15 years of age, followed by a conclusion in Section 8.4.

8.2 LEGAL AND THEORETICAL FRAMEWORK

8.2.1 The Right to Health and Care

The state is obligated to secure the child's right to health and care. In Norway, the child's right to health and care can be interpreted from both sec. 104 of the Constitution and various binding conventions to which the Norwegian state is a signatory, most importantly Art. 24, Art. 22(2), Art. 20, Art. 6, Art. 3, Art. 2 CRC and Art. 12 ICESCR.¹² According to the Constitution sec. 104(2), the child's well-being shall be the fundamental consideration in any act or decision affecting the child. In accordance with sec. 104(3) the state shall pave the way for the child's development, preferably within their own family. The duty to secure the child's economic, social, and health-related safety is stated in connection with the state's responsibility for the child's development; see sec. 104(3).

Every child has a right to enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health, often described as the right to health; see Art. 24 CRC. Health is understood as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."¹³ Even though the state's obligations to ensure the child's health are determined by the state's resources, the state is obligated to secure the right to care and health equally for every child within the state's jurisdiction; see Art. 24(1), 4 and Art. 2(1) CRC.

The right to health is understood by the UN Committee on Economic, Social and Cultural Rights and the CRC Committee as including a wide range of

12 The International Covenant on Economic, Social and Cultural Rights of 16 December 1966 (hereinafter ICESCR).

13 Among others, the "Preamble to the Constitution of the World Health Organization" as adopted by the International Health Conference, New York, 19–22 July, 1946, signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, 100), entry into force 7 April 1948. "Health" in Art. 24 CRC is to be understood likewise, see UN Committee on the Rights of the Child, *General Comment no. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24)*, CRC/C/GC/15, (April 17, 2013), para. 3 and 4.

socio-economic factors that promote conditions leading to a healthy life.¹⁴ The CRC Committee interprets children's right to health as including:

a right to grow and develop to their full potential and live in conditions that enable them to attain the highest standard of health through the implementation of programs that address the underlying determinants of health.¹⁵

This implies that the child's right to health is closely connected to the child's right to caregiving, including how the child's vulnerability is affected by its surroundings. Seen from a different point of view, caregiving is important for ensuring the child's right to survival and development as stated in Art. 6(2) CRC. The child's right to caregiving follows from several articles in the CRC – most notably the state's obligation to secure the child's right to protection and caregiving necessary for the child's well-being, in accordance with Art. 3(2). The fulfilment of the child's right to well-being depends on the institutions around the child, including the presence of caring adults.

Children temporarily or permanently deprived of their family environment, as unaccompanied children are, shall be entitled to special protection and assistance provided by the state, and alternative care for such a child shall be provided; see Art. 20 CRC. Further, the state shall take appropriate measures to ensure that a child who is seeking refugee status or considered a refugee receives appropriate protection and humanitarian assistance in the enjoyment of rights set forth in the CRC or in other human rights or humanitarian instruments; see Art. 22(1) CRC. Art. 22(2) establishes that in cases where no parents can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of their family environment for any reason, such as other children under the care of the state.

8.2.2 Children's Special Protection Against Discrimination

According to sec. 98 of the Constitution, all are equal before the law, and no human shall be exposed to arbitrary or disproportionately unequal treatment. The principles of equality before the law and non-discrimination are central human rights

14 UN Committee on Economic, Social and Cultural Rights, *General Comment no. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, E/C.12/2000/4 (August 11, 2000), para. 4, and CRC/C/GC/15, para. 4 and 5.

15 CRC/C/GC/15, para. 2.

principles representing a fundamental claim for equality, justice, and respect for human dignity.¹⁶

The central assessment for deciding whether a treatment is discrimination under sec. 98 is whether the treatment is unequal and, if so, whether such unequal treatment is either arbitrary or disproportionate.¹⁷ In other words, sec. 98 protects against any arbitrary or disproportionately unequal treatment of anyone within the state's jurisdiction and not merely discrimination affecting specific people, or the rights given by the Constitution.

As a State Party, Norway is also responsible for respecting and ensuring every right set forth in the CRC for each child within its jurisdiction without discrimination of any kind; see Art. 2(1) CRC. According to Art. 2(1) CRC, the differential treatment of children must not be based on the grounds of, among others, race, national, ethnic, or social origin, birth, or other status. Further, it must not impair the enjoyment of the child's rights; see Art. 2(1) CRC.¹⁸ The CRC Committee has expressed that

... [a]ny differential treatment of migrants shall be lawful and proportionate, in pursuit of a legitimate aim and in line with the child's best interests and international human rights norms and standards. Similarly, States parties should ensure that migrant children and their families are integrated into receiving societies through the effective realization of their human rights and access to services in an equal manner with nationals.¹⁹

16 Doc. 16, Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven, avgitt 19 Desember 2011 page 143. Children are entitled to respect for their human dignity, see sec. 104 (1) (1), and as UDHR states, "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world", see the Universal Declaration of Human Rights (1948) Preamble. Much has been written about the concept of human dignity, among others, Henriette Sinding Aasen and Mette Harlev, "Human Rights Principles and Patient Rights," in *Health and Human Rights*, 2nd edition, *Global and European Perspectives*, eds. Brigit Toebes, Mette Harlev, Aart Hendriks, Katharina Ó Cathaoir, Janne Rothmar Herrmann and Henriette Sinding Aasen (Intersentia, 2022), 53–57.

17 Doc. 16 (2011) page 150.

18 See, among others, Bruce Abramson, *A Commentary on the United Nations Convention on the Rights of the Child. Article 2. The Right of Non-Discrimination* (Leiden: Brill Nijhoff, 2008), 19.

19 United Nations, *Joint General Comment no. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and no. 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration*, CMW/C/GC/73-CRC/C/GC/22 (November 16, 2017), para. 22.

The Human Rights Committee has stated that if the criteria for the differentiation are reasonable and objective, and if the aim is to achieve a purpose which is legitimate under the Covenant, then the differentiation is not considered discrimination.²⁰ At the same time, the Committee emphasises that “any distinction, exclusion, restriction or preference which is based on any ground” mentioned in the Convention and “which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms” is considered discrimination in the eyes of the Committee.²¹ From this, one could argue that not all unequal treatment is considered discrimination, but the differential treatment must at least be legitimate and proportionate.²²

Art. 2 of the CRC is similar to other non-discrimination acts in international law.²³ This similarity could be interpreted as the CRC giving the same amount of protection against discrimination as the other conventions. On the other hand, the CRC could also be interpreted as giving children special protection against discrimination, implying that some specific actions could be seen as discrimination against children even if the same acts might not be seen as discrimination against adults. The preface to the CRC states “that childhood is entitled to special care and assistance”, and “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection”.

Further, the state must sometimes take special actions to ensure that every child receives the same opportunities. As the CRC preamble highlights, the States Parties signing the Convention are *recognising* that “in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration”. This could apply to children coming alone to Norway as refugees.

20 UN Human Rights Committee, *General Comment no. 18: Non-discrimination* (November 10, 1989), para. 13.

21 UN Human Rights Committee, *General Comment no. 18: Non-discrimination* (November 10, 1989), para. 7.

22 See also, among others, Kirsten Sandberg, “Barnekonvensjonens vern mot sammensatt diskriminering,” in *Like rettigheter – ulike liv. Rettslig kompleksitet i kvinne-, barne- og innvandringsperspektiv*, eds. Anne Hellum and Julia Köhler-Olsen (Oslo: Gyldendal, 2014), 69–149, 69.

23 Such as the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) Art. 14, International Covenant on Civil and Political rights (1966) Art. 2(1), and International Covenant on Economic, Social and Cultural Rights (1966) Art. 2(2). All of them protect against discrimination of any kind on the basis of listed statuses, but also other statuses, affecting the rights set forth in the Convention.

To summarise, the CRC is built on the idea that children need protection, and this could be an argument for giving children special protection against harmful acts such as discrimination. Bearing in mind the importance of care for the child's development and health, and the special situation of being a child, different treatment of unaccompanied children and other children in Norway might have more severe consequences than different treatment of adults. Discrimination of children could occur on different levels, including between children and adults, between children and youths, and between children and children.²⁴ Moreover, discrimination is not only a result of an act against an individual; it can also result from underlying structures in society.²⁵ All legislative measures affecting refugee children should in my opinion therefore focus more on the subjects' status as children rather than on their status as refugees.

Further, the principles of the Convention shall be viewed in connection with each other. Each child's right not to be discriminated against is one of the four general principles of the Convention.²⁶ As stated in Art. 6, States Parties shall ensure to the maximum extent possible the development of the child, and, as stated in Art. 3(1), in all actions concerning the child, the best interests of the child shall be a primary consideration. It could be argued that unequal treatment of children affecting their rights in the CRC is unlikely to be in the best interests of the child and, in many cases, will likely not be good for the child's development. The CRC Committee has also stated that "discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child".²⁷

8.2.3 Children's Unique Vulnerability

There are certain pitfalls of labelling people as vulnerable, including, among others, the risk of stigma and paternalism.²⁸ When labelling individuals or a group

24 Samantha Besson, "The Principle of Non-Discrimination in the Convention on the Rights of the Child," *The International Journal of Children's Rights*, vol. 13 (2005): 433–461, 445.

25 Frøydis Heyerdahl, "Retten til ikke-diskriminering," in *Barnekonvensjonen, Barns rettigheter i Norge 4 utgave*, eds. Njål Høstmælingen, Eli Saga Kjørholt and Kirsten Sandberg (Universitetsforlaget, 2020), 34–53.

26 UN Committee on the Rights of the Child, *General Comment no. 1 (2001) on the Aims of Education*, CRC/GC/2001/1, (April 17, 2001), para. 6.

27 CRC/GC/2001/1, para. 10.

28 Pointed out by, among others, Alexandra Timmer and Lourdes Peroni, "Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law," *International Journal of Constitutional Law*, vol. 11(4) (2013): 1056–1085, 1057.

of people as vulnerable, one might ask who is defining the other's vulnerabilities. Asylum-seeking children are labelled as part of a vulnerable group, but do they consider themselves vulnerable? Despite these pitfalls, I use the concept of vulnerability because the use of the word *vulnerability* in different settings has grown in recent years, including in connection with human rights, and is therefore of interest.²⁹ Further, as I will explain in the following, it could be in the child's best interest that the state acknowledge their vulnerability.

One way to potentially avoid applying the concept of vulnerability in a stigmatising way would be to consider every human as vulnerable and dependent. This view is based on the vulnerability theory presented by Martha A. Fineman. Fineman understands vulnerability as "a universal, inevitable, enduring aspect of the human condition".³⁰ According to Fineman, we are all vulnerable.³¹ Being vulnerable is a part of being human, and human vulnerability arises in the first place from "our embodiment".³² Moreover, in addition to the universal, biological, and constant nature of human vulnerability, vulnerability is also to be understood as complex, particular, varied, and unique at the individual level.³³

In other words, we are all differently situated, and the theory calls attention to the fact that differences arise from the individual's experiences within societal institutions and relationships over the life course, which are "embedded" in webs of social and political structures.³⁴ As Jonathan Herring writes, all people are vulnerable and dependent on each other, and health is found in our relationships, not our selves.³⁵ In addition, the state must be responsive to its own central role in contributing to or maintaining vulnerability at the individual level. This theory has been developed over many years, in numerous articles by Fineman and others,

29 See, among others, Timmer and Peroni, "Vulnerable Groups," 1056–1085, or Daniel Bedford and Jonathan Herring, eds., *Embracing Vulnerability: The Challenges and Implications for Law* (Routledge, 2020).

30 Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law & Feminism*, vol. 20(1) (2008): 8.

31 In agreement with, among others, Jonathan Herring, "Are Children More Vulnerable Than Adults?," in *Vulnerability, Childhood and the Law*, ed. Jonathan Herring (Springer Cham, 2018): 27–46, 27.

32 Martha Albertson Fineman, "Equality, Autonomy, and the Vulnerable Subject in Law and Politics," in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, eds. Martha Albertson Fineman and Anna Gear (London: Routledge, 2013), 13–28, 20.

33 Fineman, "Equality, Autonomy," 13–28, 21.

34 Fineman, "Equality, Autonomy," 13–28, 22.

35 Jonathan Herring, "Health as Vulnerability; Interdependence and Relationality," *The New Bioethics*, vol. 22 (2016): 18–32, 21.

and the theory in its entirety is beyond the scope of this chapter.³⁶ For the purposes of this chapter, the most important elements of the theory are the views that all humans have in common the conditions of vulnerability and dependency and that the state has a responsibility to address this vulnerability.

However, while every human is vulnerable, children are vulnerable in a unique way, as they are dependent on care from adults to survive and develop in a healthy way.³⁷ Human rights can be seen as a protection of every human's vulnerability; at the same time, some people are seen as in need of special care and protection; see Art. 25 UDHR.³⁸ Children are often considered vulnerable and in need of protection, and legal measures have been taken to protect children as vulnerable subjects.³⁹ Children's unique vulnerability is used as an argument for the presence of a separate section in the Constitution safeguarding children's rights; see sec. 104.⁴⁰ As Lucinda Ferguson states, "children are not just more vulnerable, but uniquely vulnerable in their relationships within their families and society more generally".⁴¹

36 The list of scholars using vulnerability theory in connection with or as an alternative to a human rights approach is long. Here are some of them: Aysel Küçüksu, "Fineman in Luxembourg: Empirical Lessons in Asylum Seeker Vulnerability from the CJEU," *iCourts Working Paper Series* no. 286 (2022), 6; or Francesca Ippolito, *Understanding Vulnerability in International Human Rights Law* (Edition Scientifica, 2020); Daniel Bedford and Jonathan Herring, eds., *Embracing Vulnerability: The Challenges and Implications for Law* (Routledge, 2020); Alexandra Timmer, "A Quiet Revolution: Vulnerability in the European Court of Human Rights," in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, eds. Martha Albertson Fineman and Anna Grear (London: Routledge, 2013), 147–170; Alexandra Timmer, Moritz Baumgärtel, Louis Kotzé and Lienneke Slingenberg have also pointed towards the potential and pitfalls of the vulnerability concept in Alexandra Timmer, Moritz Baumgärtel, Louis Kotzé and Lienneke Slingenberg, "The Potential and Pitfalls of the Vulnerability Concept for Human Rights," *Netherlands Quarterly of Human Rights*, vol. 39(3) 2021; Alexandra Timmer and Lourdes Peroni have also examined the concept of vulnerable groups while approaching the case law of ECtHR; see Timmer and Peroni, "Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law," *International Journal of Constitutional Law*, vol. 11(4) (2013): 1056–1085. Further, Mikaela Heikkilä, Hisayo Katsui and Maija Mustaniemi-Laakso have, in an article about disability and vulnerability, studied vulnerability as a tool within human rights with a comparative approach to the vulnerability theory by Fineman; see Mikaela Heikkilä, Hisayo Katsui and Maija Mustaniemi-Laakso, "Disability and Vulnerability: A Human Rights Reading of the Responsive State," *The International Journal of Human Rights*, vol. 24(8) (2020): 1180–1200.

37 See, among others, Lucinda Ferguson, "An Argument for Treating Children as a 'Special Case,'" in *Philosophical Foundations of Children's and Family Law*, eds. Elisabeth Brake and Lucinda Ferguson (Oxford University Press, 2018).

38 The Universal Declaration of Human Rights 10 December 1948 (hereinafter UDHR).

39 See, among others, The Preamble to the CRC.

40 Doc. 16 (2011), 186.

41 Ferguson, "An Argument for Treating Children as a 'Special Case,'" 23.

Even though all humans are vulnerable and children are not necessarily more vulnerable than others, one might still use this idea of children's unique vulnerability. As Ferguson mentions, treating children as a special case could be a way of implementing equal consideration.⁴²

Herring has proposed three unifying elements which capture a core notion of vulnerability. This could be of help in acknowledging that while all humans are vulnerable and face similar risks, people are differently situated, resulting in different opportunities and responses to risk.⁴³ According to his definition, P is vulnerable if P (1) "faces a risk of harm", (2) "does not have the resource to be able to avoid the risk of harm materializing", and (3) "would not be able to adequately respond to the harm if the risk materialized".⁴⁴ Using this definition on asylum-seeking children could demonstrate why they are in need of more follow-up from the country they arrive in as refugees.

Unaccompanied children face a risk of harm because they are without caretakers; they may be seeking to escape war, poverty, or other hardships and/or facing uncertainty; and they are all young humans in their early years.⁴⁵ These children do not necessarily have the resources to be able to avoid the risk of harm materialising due to a variety of reasons, two of them being lack of social support from adults in the host country and their natural transition from childhood to adulthood.⁴⁶ Further, they would not necessarily be able to adequately respond to the harm if the risk materialised, because they are waiting for residence in a foreign country without their primary caregivers.⁴⁷ As an example, NIM⁴⁸ points towards research showing that unaccompanied children living in asylum centres seem to be in need of a great amount of care and continuous observations while their asylum case is under evaluation.⁴⁹

42 Ferguson, "An Argument for Treating Children as a 'Special Case,'" 41.

43 Jonathan Herring, "What Is Vulnerability?," in *Vulnerability, Childhood and the Law*, ed. Jonathan Herring (Springer Cham, 2018), chapter 2.6 Proposed Definition.

44 Jonathan Herring "What Is Vulnerability?," chapter 2.6 Proposed Definition.

45 See, among others, Tine K. Jensen, Ane-Marthe Solheim Skar, Elin Sofia Andersson and Marianne Skogbrott Birkeland, "Long-Term Mental Health in Unaccompanied Refugee Minors: Pre- and Post-Flight Predictors," *European Child and Adolescent Psychiatry*, vol. 28 (2019): 1671–1682, 1672.

46 Jensen, Solheim, Andersson and Birkeland, "Long-Term Mental Health," 1671–1682, 1672 with further references.

47 Norges nasjonale institusjon for menneskerettigheter, *Omsorg for enslige mindreårige asylsøkere*, Temarapport 2016, NIM-R-2016-003, 4.

48 The Norwegian National Human Rights Institution (Norges nasjonale institusjon for menneskerettigheter) (hereinafter NIM).

49 NIM-R-2016-003, 29.

However, a core notion of vulnerability would be more precisely used in an individual child's situation, as Herring implies. For asylum-seeking children, differences might occur not only based on age, gender, background, and capabilities but also based on the different types of residence status given to them in Norway and whether they are accompanied or alone.⁵⁰ An intersectional approach to the child's situation is necessary if we are to find out which specific risks of harm the particular child is facing, in order to reduce those risks.⁵¹ For instance, several studies indicate that girls are more at risk for developing PTSD than boys.⁵² Research also indicates that high rates of resilience are reported among unaccompanied refugee minors, and not all of them develop mental health or somatic problems.⁵³ Despite differences, when an unaccompanied asylum-seeking child arrives in Norway, the Norwegian state is responsible for the child's well-being. The child is labelled as vulnerable and has likely suffered traumatic experiences.⁵⁴ It could be argued that this vulnerability comes from the child's situation, including how the child is treated by the responsible state.⁵⁵

8.3 THE NATIONAL REGULATION OF THE CARE TO ASYLUM-SEEKING CHILDREN ABOVE 15 YEARS OF AGE

8.3.1 How Care for Asylum-Seeking Children in Norway Is Regulated

The Norwegian Child Welfare Act⁵⁶ applies to all children living in Norway, including refugees (see sec. 1-2(2)). This means that the Child Welfare Service is responsible for ensuring that all children living under conditions that could harm their health and development receive timely help, caregiving, and protection

50 See, among others, Jensen, Solheim, Andersson and Birkeland, "Long-Term Mental," 1671–1682, 1672.

51 For intersectional theory, see, among others, Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color," *Stanford Law Review*, vol. 43(6) (1991): 1241–1299.

52 Jensen, Solheim, Andersson and Birkeland, "Long-Term Mental Health," 1671–1682, 1672 with further references.

53 Jensen, Solheim, Andersson and Birkeland, "Long-Term Mental Health," 1671–1682, 1672 with further references.

54 Recommendation from the Parliamentary Committee no. 344 (2020–2021), 1.

55 This is also highlighted in decisions from the European Court of Human Rights, as mentioned in Alexandra Timmer and Lourdes Peroni, "Vulnerable Groups," 1056–1085.

56 Act 18 June 2021 no. 97 om barnevern (barnevernsloven, bvl., hereinafter the Norwegian Child Welfare Act).

(see the Child Welfare Act as mentioned in sec. 1-1). Children have a right to necessary measures in accordance with sec. 1-6.

UDI is responsible for the caregiving of all unaccompanied children living in asylum centres in Norway.⁵⁷ The asylum centres exercise that caregiving for those over 15 years of age (see the Norwegian Immigration Act sec. 95(2)). Bufetat⁵⁸ is responsible for the caregiving of unaccompanied asylum-seeking children, children with refugee status, and children given provisional collective protection, if they are below the age of 15 (see the Norwegian Child Welfare Act sec. 11-1). This has been the case since 2008, when the responsibility for unaccompanied children below the age of 15 was transferred from the immigration authority to the Child Welfare Authority.⁵⁹

In principle, UDI is mainly responsible for children between 15–18 years of age, and these are therefore the only children in Norway without anyone with parental responsibility whose care is not the responsibility of the Child Welfare Authority.⁶⁰ Still, the Child Welfare Act is meant as a safety net for those above 15 years of age as well. In practice, this is not necessarily the case, as the Child Welfare Service is experiencing a lack of resources.

According to the Child Welfare Act, the child welfare institution shall give the child staying at an institution justifiable care and necessary treatment (see sec. 11-2(2) and sec. 10-1). The caregiving centres for unaccompanied children below 15 years of age are obligated to give the same level of care and rights to unaccompanied children as to other children living in other child welfare institutions (see sec. 11-5).

The regulation of the care given to those under UDI's responsibility is called *Omsorgsforskriften*.⁶¹ It follows from this regulation that the care given to children living in asylum centres should be justifiable (see *Omsorgsforskriften* sec. 1). In other words, it is the same wording as for those living in caregiving centres, except that treatment and therapy are not included in the responsibility for care at asylum centres.⁶²

57 Recommendation from the Parliamentary Committee no. 344 (2020–2021), 2.

58 Barne-, ungdoms- og familieetaten (the Office for Children, Youth and Family Affairs, hereinafter Bufetat).

59 Draft Resolution no. 28 (2007–2008) Om lov om endringer i lov 17. juli 1992 nr. 100 om barneverntjenester mv. (Omsorgen for enslige mindreårige asylsøkere inntil bosetting eller retur).

60 Recommendation from the Parliamentary Committee no. 344 L (2020–2021), 4.

61 FOR-2021-05-12-1520. om omsorgen for enslige mindreårige som bor i asylmottak (hereinafter *Omsorgsforskriften*).

62 Draft resolution no. 82 (2020–2021) Endringer i utlendingsloven (lovfesting av omsorgsansvaret for enslige mindreårige som bor i asylmottak, 7.

According to the Ministry of Justice and Public Security, justifiable care at asylum centres means providing a simple but acceptable offering.⁶³ Stays in asylum centres are marked by temporality and are only intended to last for a limited period of time, which can affect the care provided at the centres.⁶⁴ This is also one of the arguments behind why there could be some differences in the care provided to those in asylum centres compared to other children living in institutions.⁶⁵ It is following settlement in municipalities that the most important follow-up of the children must take place.⁶⁶ The asylum centres must still ensure that the children receive necessary follow-up and are given good care and a child-friendly environment during their stay at the asylum centres.⁶⁷ Justifiable care includes meeting basic needs such as food, clothing, and housing; ensuring safety; setting boundaries; and providing fellowship and activities.⁶⁸ Further, other requirements for asylum centres, such as their physical design, staffing, individual follow-up, input from the children, activities, etc., are intended to ensure that proper care is provided.⁶⁹

One might ask whether different regulations of “justifiable care” in, respectively, the Child Welfare Act and Omsorgsforakften lead to different understandings of “justifiable care” within the child welfare institutions and asylum centres. The law does not necessarily state that there should be a different understanding, but the different systems have the potential to lead to differences in practice. For the scope of this chapter, I will not look further into the understanding of “justifiable care” and whether the different regulations of the concept lead to different understandings of the content of the term.

8.3.2 Differences in the Care Provided and Vulnerability

In this part, I will look further into some of the differences in care for asylum-seeking children above 15 years of age compared to those under 15 and other children under the state’s care. What constitutes the differences in care? Is the state meeting the child’s unique vulnerability, or is the state rather creating a vulnerable situation for asylum-seeking children above 15 years of age? To find out what constitutes the differences in care, I will point out some findings from two inspections at asylum centres in Norway from the last two years. The findings

63 Draft resolution no. 82 (2020–2021), 18.

64 See Recommendation from the Parliamentary Committee no. 344 (2020–2021), 7–8.

65 Recommendation from the Parliamentary Committee no. 344 (2020–2021), 7–8.

66 Draft resolution no. 82 (2020–2021), 7.

67 Draft resolution no. 82 (2020–2021), 7.

68 Draft resolution no. 82 (2020–2021), 7.

69 Draft resolution no. 82 (2020–2021), 18.

support the criticism of Norway from, among others, the CRC Committee, which has expressed concern about what it claims are “(s)ignificant variations among reception centers in terms of living conditions, such as access to adequate food and nutrition.”⁷⁰ Further, the CRC Committee is concerned about reports of children in reception centres being frequently absent from school and often suffering from mental health issues resulting in self-harm.⁷¹ Other reports from Norway indicate similar observations of children’s health and well-being at the asylum centres.⁷² Their situation seems to be characterised by temporality, precariousness, and lack of caregiving.⁷³

According to the Immigration Act sec. 95(3), the County Governor shall supervise that the care provided to unaccompanied minors living in reception centres is exercised in accordance with the Immigration Act and associated regulations. Inspections at the centres and institutions are important for figuring out whether the care that is provided meets the standards given by the law and the needs of children. As of February 2024, there have only been two inspections by the County Governor at asylum centres where unaccompanied children live. Independent inspections by the County Governor became a legal obligation in 2022.⁷⁴ Therefore, it is difficult to interpret certain practices based solely on inspections. It is remarkable that there has been no legal basis for conducting inspections at asylum centres until recently, as it is an important guarantee for the legal protection of children who live at the centres.

In contrast, inspections at child welfare institutions and care centres have been conducted by the County Governors for many years (see the Child Welfare Act sec. 16-7(a) and sec. 17(3)(2)).⁷⁵ Thus, in child welfare institutions there is a good level of standardisation for concluding whether the caregiving is justifiable or not.

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

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

72 See, among others, Berit Berg and Kristian Rose Tronstad, eds., *Levekår for barn i asylsøkerfasen* (Trondheim: NTNU Samfunnsforskning, 2015); Sønsterudbråten, Tyldum and Raundalen, “Et trygt sted å vente”; NOAS, Redd Barna and Norsk Folkehjelp, “Hvert år må jeg søke på nytt: Enslige mindreårige som får begrenset oppholdstillatelse fordi de ikke kan legge frem pass som dokumentasjon på identitet” (Oslo: NOAS 2020), chapter 7.

73 Among others, Namdal “Utsettes enslige asylbarn.”; NIM-R-2016-003; Sønsterudbråten, Tyldum and Raundalen, “Et trygt sted å vente”; NOAS, Redd Barna and Norsk Folkehjelp “Hvert år må jeg søke på nytt.”

74 See FOR-2022-06-26-1193. Regulation om tilsyn med omsorgen for enslige mindreårige som bor i asylmottak.

75 See FOR-2022-12-16-2272. Regulation om tilsyn ved tjenester og tiltak til barn i barnevernsinstitusjoner m.m. (tilsynsforskriften). Previously FOR-2003-12-11-1564. Regulation om tilsyn ved barn i barnevernsinstitusjoner for omsorg og behandling (repealed).

The latest report concerning the situation at child welfare institutions in Norway is based on more than 2,000 institutional inspections in 2020 and 2021.⁷⁶ The general assessment of the County Governors is that many children receive good care and that the institutions try to facilitate safe and caring measures.⁷⁷ Nevertheless, there are also aspects of concern, such as more children and young people perceiving the institution as unsafe.⁷⁸ Further, some County Governors consider that the institutions face challenges in providing children and young people with sufficient security.⁷⁹

The two inspections at the asylum centres led to the conclusion that the centres did not provide justifiable care to the children living there.⁸⁰ Neither of the centres had enough staff with sufficient expertise to provide proper care for the children, which is a violation of Omsorgsforakrften sec. 7 and sec. 2. According to the County Governor, none of the children at Kongsvinger asylum centre had their own contact person whom they knew, in accordance with Omsorgsforakrften sec. 7 (3).⁸¹ Also, at Toten asylum centre, several young people said that they neither knew the name of their representative nor knew who their special contact at the centre was.⁸²

Further, the County Governor believed one of the asylum centres did not treat the unaccompanied minors considerately and with respect for the children's integrity; see Omsorgsforakrften sec. 3 and sec. 2.⁸³ Among other things, the young people described a fear of being expelled from the country if they did not do as expected and a fear of consequences if they complained about staff.⁸⁴ The County

76 Helsetilsynet, *Oppsummering av statsforvalters tilsyn med barnevernsinstitusjoner i 2020 og 2021 (2023)* chapter 8, https://www.helsetilsynet.no/publikasjoner/rappport-fra-helsetilsynet/2023/oppsummering-av-tilsyn-med-barnevernsinstitusjoner-et-tilstandsbilde/8avsluttende-oppsummering-og-forslag-til-utvikling?b=toc_785836#toc_785836 (last accessed March 7, 2024).

77 Helsetilsynet, *Oppsummering av statsforvalters tilsyn*, chapter 8.

78 Helsetilsynet, *Oppsummering av statsforvalters tilsyn*, chapter 8.

79 Helsetilsynet, *Oppsummering av statsforvalters tilsyn*, chapter 8.

80 See Statsforvalteren i Oslo og Viken, *Rappport fra tilsyn ved Toten asylmottak, avdeling EMA 17.12.2022*. <https://www.helsetilsynet.no/tilsyn/tilsynsrapporter/oslo-og-viken/2022/toten-asylmottak-avdeling-ema-tilsyn-med-omsorgen-for-enslige-mindreaarige-2022/> (last accessed November 13, 2023) and Statsforvalteren i Oslo og Viken, *Rappport fra tilsyn ved Kongsvinger mottak 14.02, 15.02 og 17.02.2023*. <https://www.helsetilsynet.no/tilsyn/tilsynsrapporter/oslo-og-viken/2023/kongsvinger-mottak-tilsyn-2023/> (last accessed November 13, 2023).

81 Statsforvalteren i Oslo og Viken, *Rappport fra tilsyn ved Kongsvinger mottak 14.02, 15.02 og 17.02.2023*, chapter 5.

82 Statsforvalteren i Oslo og Viken, *Rappport fra tilsyn ved Toten asylmottak, avdeling EMA 17.12.2022*, chapter 3.

83 Ibid., chapter 4 and chapter 5.

84 Ibid., chapter 4.

Governor points out that many young people reported living with insecurities that would be stressful to live with over time.⁸⁵ The inspection report states that the young people are in a particularly vulnerable life situation and have a great need to be met by caring and warm adults who treat them with respect. Therefore, being met with what the County Governor believes to be aggression, threats of eviction, and verbal abuse can inflict further trauma on them and contribute to a deterioration of an already very challenging life situation.⁸⁶

An important part of ensuring the care of the children living at asylum centres is to ensure that the adults who work there are competent to provide the care to which the children are entitled. The law does not provide further information about what the competence of the adults working at asylum centres should be, and more detailed requirements for employees at asylum centres for unaccompanied minors are managed by UDI.⁸⁷ UDI has stricter requirements for staffing and follow-up of those living in asylum centres for unaccompanied minors than in ordinary asylum centres.⁸⁸ In comparison, the professionals working in the child welfare institution need to have at least a relevant bachelor's degree, regulated by law (see the Child Welfare Act sec. 10-16(21) and sec. 11-5). Research shows that the regulation of institutions through the Child Welfare Act and through the Immigration Act forms the basis for different perspectives on the follow-up of young people.⁸⁹ According to Berit Berg and others, the gap in availability of adults at asylum centres compared to other institutions under Bufetat means that children over the age of 15 do not have their care needs considered as well as other children under the state's care.⁹⁰

There are also some cases in the media that reflect the current care situation for asylum-seeking children. NRK's investigations show that the National Police

85 Ibid., chapter 4.

86 Ibid., chapter 4. Findings from this inspection also received some attention in media; see Astrid Gerds, Kari N. Tvilde, Stine Bækkeli, Silje Rognsvåg, and Maja M. Aarbakke, "Varslar om alvorlege funn på mottak for mindreårige asylsøkarar," NRK, January 18, 2023, <https://www.nrk.no/norge/statsforvaltaren-varslar-om-alvorlege-funn-etter-tilsyn-pa-asylmottak-1.16261918> (last accessed November 17, 2023).

87 Justis- og beredskapsdepartementet, *Rundskriv nr. GI-05/2023 (15/4259) – Instruks til Utlendingsdirektoratet om innkvartering av asylsøkere*, 2022. See Utlendingsdirektoratet, *Krav til drift av plasser for enslige mindreårige*, June 2023, 7, and Utlendingsdirektoratet, *Krav til drift av plasser for enslige mindreårige*, March 2022, 7.

88 UDI, *Asylmottak Regelverk for ulike typer asylmottak: Mottak og avdelinger for enslige mindreårige asylsøkere*. See *Asylmottak: Regelverk for ulike typer asylmottak – UDI* (last accessed December 15, 2023).

89 Berg and Tronstad, *Levekår for barn i asylsøkerfasen*, 135. This will also apply today, despite Norway adopting a new Child Welfare Act after this report.

90 Berg and Tronstad, *Levekår for barn i asylsøkerfasen*, 137–138.

Immigration Service notified almost 50 local child welfare services about more than 70 children and young people moving to private individuals when they arrived in Norway in 2023, and 18 of them were of particular concern.⁹¹ UDI notified about 13 young people between the ages of 15 and 18 moving from asylum centres to private individuals in 2023, and in addition, Bufdir⁹² notified about four children moving from caregiving centres in 2022 and 2023.⁹³ In the summer of 2023, a working group consisting of the Police Directorate, UDI, and Bufdir concluded that no one takes responsibility for providing care to asylum-seeking children who arrive alone and choose to live privately.⁹⁴

This indicates that there are many unaccompanied minors in Norway who are without anyone with care responsibilities and that the regulations do not adequately safeguard the children's right to protection, despite them being in a particularly vulnerable position. This could be seen as the state creating a vulnerable situation for asylum-seeking children above 15 years of age.

8.3.3 Pro and Cons

In the preparatory work, it is stated that the differential treatment of unaccompanied minors under and over the age of 15, as well as those over the age of 15 and other children under the child welfare services, is reasonable and based on a legitimate purpose.⁹⁵ At the same time, it is stated that unaccompanied children above 15 years of age receive limited care and attention compared to both unaccompanied children below 15 and other children living in child welfare institutions.⁹⁶ The two reasons mentioned for providing less care to unaccompanied children from 15–18 years of age are that different age groups require different care needs and that the asylum centres have been designed to meet the needs of unaccompanied asylum-seeking children.⁹⁷ From the preparatory work it follows that the requirement for mapping and individual follow-up, including the right to participation, ensures that the individual needs of asylum-seeking children are secured at the

91 Eline Johnsen Helledal, Maja M. Aarbakke, Silje Rognsvåg, Ronald H. Fossåskaret and Anders Nøkling, "Politiet varslet: Jente skulle bo hos 'truende' mann med våpen," *NRK*, December 13, 2023, <https://www.nrk.no/vestland/80-asylbarn-har-flyttet-privat-uten-foreldre.-redd-barnafrykter-overgrep-og-menneskehandel-1.16603998> (last accessed January 11, 2024).

92 Barne-, ungdoms- og – familiedirektoratet (The Norwegian Directorate for Children, Youth and Family Affairs; hereinafter Bufdir).

93 Helledal, Aarbakke, Rognsvåg, Fossåskaret, Nøkling, "Politiet varslet."

94 Helledal, Aarbakke, Rognsvåg, Fossåskaret, Nøkling, "Politiet varslet."

95 Recommendation from the Parliamentary Committee no. 344 (2020–2021), 5.

96 Recommendation from the Parliamentary Committee no. 344 (2020–2021), 5.

97 Draft resolution no. 82 (2020–2021), 22–23.

asylum centres.⁹⁸ In the following I will look further into the arguments behind the differential treatment of asylum-seeking children above 15 years of age and other children under the state's care responsibility. The main questions are how the differences are justified by the state and whether the justification is proportionate.

One argument pointing towards UDI being the right institution to take care of refugee children is that UDI has years of experience of developing and operating reception systems specially adapted to unaccompanied minor asylum seekers.⁹⁹ Therefore, they are seen by the Ministry of Justice and Public Security and the Standing Committee on Local Government and Public Administration as the right institution to meet the needs of these children.¹⁰⁰

Seen from a different point of view, one might ask what specific needs an unaccompanied asylum-seeking child might have that a child welfare institution cannot meet. The asylum centre shall only provide justifiable and necessary care and safety, not tender treatment or therapy. Bufdir has more experience in offering and following up on care for children living in institutions than UDI does. Perhaps the preparatory work is referring to the special situation for asylum-seeking children. One of the main differences between asylum-seeking children and other children in Norway is that asylum-seeking children are in a special situation because of the basis for their residence in the country. Could it be that the adults working at the asylum centres know more about the asylum system and rules related to the residence permits that apply to these children and can thus be a resource for the children in a special legal situation? Findings from one of the previously mentioned inspections suggest otherwise, at least at the asylum centre in question. According to the County Governor, several of the staff at Toten asylum centre had little or no knowledge of the asylum process, and as a result, the children did not receive sufficient information and guidance.¹⁰¹

Further, UDI has developed a reception system with detailed requirements for asylum centres related to staffing, competence among the staff, and providing justifiable care to the children, adapted to their needs.¹⁰² According to the preparatory works, these requirements have improved the situation for asylum-seeking children living in asylum centres.¹⁰³ This argument implies that asylum-seeking children are

98 Draft resolution no. 82 (2020–2021), 22.

99 As pointed out in Recommendation from the Parliamentary Committee no. 344 (2020–2021), 7.

100 Recommendation from the Parliamentary Committee no. 344 (2020–2021), 6.

101 Statsforvalteren i Oslo og Viken, *Rapport fra tilsyn ved Toten asylmottak, avdeling EMA 17.12.2022*, chapter 4.

102 Recommendation from the Parliamentary Committee no. 344 (2020–2021), 11.

103 Recommendation from the Parliamentary Committee no. 344 (2020–2021), 11.

an exceptional group of children, with special and differential care needs than other children under the care of the state. In general, one might argue that children seeking asylum have different care needs than others living in the child welfare institutions. At the same time, they are not necessarily in need of less care, as stated. It should be specified in the preparatory works which dissimilar needs the Ministry of Justice and Public Security are referring to, as the right to care also applies to asylum-seeking children, and children unable to receive caregiving from their own family are considered particularly vulnerable.¹⁰⁴ It is rather clear that limited care and attention are not the same as differential care and attention.

Age is another argument for different treatment of children. Regarding the differential treatment between unaccompanied minors under and over the age of 15, it is assumed in the preparatory work that older children need less attention and continuous follow-up from adults than younger children do.¹⁰⁵ The preparatory work also mentions that older children need more time for themselves than younger children do, so that they can be better prepared for life as adults.¹⁰⁶

It is not necessarily a breach of the state's obligations under the CRC to offer differential treatment based on different care needs, including age.¹⁰⁷ Research shows that care needs are different for those over the age of 15 than for those under the age of 15.¹⁰⁸ However, several of the consultative bodies pointed to research and experience indicating that young people have just as great a need for care and follow-up as younger children, and this includes asylum-seeking children over the age of 15.¹⁰⁹

As an example, one consultation letter from an asylum centre for unaccompanied minors referred to their almost 30 years of experience working with unaccompanied minors, stating that most of the children aged 15–18 had experienced many traumatic events before, during, and after their escape to Norway.¹¹⁰ Therefore,

104 As previously mentioned. See also Official Norwegian Reports 2016: 16 Ny barnevernslov – Sikring av barnets rett til omsorg og beskyttelse attachment 4, 331.

105 Draft resolution no. 82 (2020–2021), 22.

106 Draft resolution no. 82 (2020–2021), 22.

107 See, among others, UN Committee on the Rights of the Child, *General Comment no. 6 (2005) Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6 (September 1, 2005), para. 18.

108 Sønsterudbråten, Tyldum and Raundalen “Et trygt sted å vente,” 55.

109 Draft resolution no. 82 (2020–2021), 19.

110 Consultation letter from Salangen municipality, *Sjøvegan asylmottak enslige mindreårige avdeling*, 05.03.2020. See <https://www.regjeringen.no/no/dokumenter/horing---forslag-til-endringer-i-utlendingsloven-og-forskriften-om-omsorgsansvaret-for-enslige-mindrearige-asylsokere-mellom-15-og-18-ar-i-mottak-mv/id2681080/?uid=4219ae3e-515e-40d5-815d-2a98fa56624e> (last accessed March 8, 2024).

the asylum centre believed it to be very important that employees had the competence to be able to uncover the needs of the individual child.¹¹¹ Their experience indicated that the centres need more adults, especially in the evening and on weekends.¹¹² Furthermore, they write in the consultation letter that the vast majority of children have challenges with their mental health, which is especially evident when they do not participate in activities, in the evening and at night.¹¹³

According to a report from Fafo¹¹⁴, young people in general have difficulties with their judgement, planning, self-awareness, abstraction, impulse control, and risk assessment, especially those who are subjected to severe pressure, stress, and the absence of a safe environment.¹¹⁵ In order to make informed choices, they have a greater need to be looked after and for guidance than adults do.¹¹⁶ A survey from 2015 showed that only 50% of young people in the asylum centres stated that they felt safe where they live, while over 90% of young people in the caregiving centres felt safe.¹¹⁷ Furthermore, the survey shows that employees at asylum centres are concerned about lack of staffing and follow-up of unaccompanied minors and believe that these young people need a lot of follow-up to cope with their new everyday lives.¹¹⁸ During the inspection at Toten asylum centre, the children themselves said that they want care and love, and many of them felt as if they did not have adults to talk to when they were sad and scared.¹¹⁹

From this, one might argue that young people above 15 years of age also have a great need for care from adults while living in the asylum centres. As Herring puts it, they face a risk of harm, they need the resources to be able to avoid that risk of harm materialising, and they would not be able to adequately respond to the harm if the risk materialised.¹²⁰ In other words, they need adults to talk to and a safe environment. This is not really reflected upon in the preparatory work, as

111 Consultation letter from Salangen municipality, *Sjøvegan asylmottak enslige mindreårige avdeling*, 05.03.2020.

112 Consultation letter from Salangen municipality, *Sjøvegan asylmottak enslige mindreårige avdeling*, 05.03.2020.

113 Consultation letter from Salangen municipality, *Sjøvegan asylmottak enslige mindreårige avdeling*, 05.03.2020.

114 Fafo Research Foundation (Fafo).

115 Sønsterudbråten, Tyldum and Raundalen, "Et trygt sted å vente," 59.

116 Sønsterudbråten, Tyldum and Raundalen, "Et trygt sted å vente," 59.

117 Berg and Tronstad, *Levekår for barn i asylsøkerfasen*, 137.

118 Berg and Tronstad, *Levekår for barn i asylsøkerfasen*, 137.

119 Statsforvalteren i Oslo og Viken, *Rapport fra tilsyn ved Toten asylmottak, avdeling EMA 17.12.2022*, chapter 3.

120 Herring "What Is vulnerability?," chapter 2.6 Proposed Definition.

it only briefly refers to the fact that older children do not have as great a need for follow-up as those under the age of 15.

Another argument not specifically mentioned in the same context as UDI's capability to provide justifiable care and differential needs based on age is financial. Finances could be a reason behind the two different systems concerning the care of asylum-seeking children. A report from NIM states that they found no other publicly stated justification for the differential treatment other than budgetary reasons.¹²¹ NIM's assumption that there were financial reasons why the responsibility for this group of children had not been transferred to the child welfare services is supported by statements made by former Minister of Immigration and Integration Per Sandberg to the Norwegian Parliament in 2017.¹²² He pointed out that any decision to transfer responsibility for the care of unaccompanied minor asylum seekers 15–18 years of age to the child welfare services is assumed to have significant financial and administrative consequences that would not improve the situation in the asylum centres in the short term.¹²³ In the preparatory work, some of the members of the Standing Committee on Local Government and Public Administration also mention that transferring this responsibility to the Child Welfare Authority could trigger significant financial costs if more asylum-seeking children above 15 years of age were to come to Norway.¹²⁴

However, budgetary considerations alone are not legitimate reasons for differential treatment of children under and over the age of 15. If such a consideration is behind the differential treatment, it is striking that it is not mentioned in the preparatory work alongside the other reasons.

8.4 CONCLUSION

One could argue that the preparatory work of the Act lacks thorough assessment and argumentation for why unequal treatment of unaccompanied minors 15–18 years of age does not constitute discrimination based on age and/or residence permit in the country. In the preparatory work, few references are given to research in the field of children and no references to conversations with

121 NIM-R-2016-003, 26.

122 Letter from former Minister of Immigration and Integration Sandberg to the Standing Committee on Local Government and Public Administration 11. mai 2017, Recommendation from the Parliamentary Committee no. 474 (2016–2017) *Innstilling fra kommunal- og forvaltningskomiteen om representantforslag om bedre vilkår for enslige mindreårige asylsøkere*.

123 Letter from former Minister of Immigration and Integration Sandberg to the Standing Committee on Local Government and Public Administration (2017).

124 Recommendation from the Parliamentary Committee no. 344 (2020–2021), 8.

unaccompanied minors consulting their opinion about their situation, in accordance with Art. 12 CRC. The lack of references to the situation for children living in asylum centres undermines the main reason that has been put forward for the unequal treatment of children, namely, that the services are adapted to meet the needs of this group. It does not appear to be legitimate because the evidence is not there. It is problematic that the state is not meeting the ongoing criticism from the CRC Committee and others concerning the situation for asylum-seeking children living in asylum centres with evidence to prove this criticism wrong.

In addition, there is other research showing that the provision of care as it is today does not support the well-being of the child, creating a vulnerable situation for the children living there. The findings from the two inspections at asylum centres for children 15–18 years of age support the findings from previous reports and surveys at asylum centres for unaccompanied minors.

To fulfil the state's national and international obligations, the institutions within the state must live up to the obligations provided by the Constitution, the CRC, and other human rights conventions. This implies that the state must meet the child's needs when the child is within the state's jurisdiction. The reasons given for the differential treatment of children within Norwegian jurisdiction as mentioned in this chapter could be viewed as illegitimate reasons for providing less care to some children than to others who are in need of care from the state, especially when all children are entitled to caregiving in an environment that is good for their health and development.

Therefore, I conclude that, following 22(2) and Art. 2 CRC, the state is discriminating against unaccompanied children 15–18 years of age. This does not necessarily imply that Bufdir should be responsible for caregiving to all children under the state's responsibility of care. Differential care systems could be in accordance with the state's obligations if that differential treatment is lawful and proportionate, is in pursuit of a legitimate aim, and is in line with the child's best interests and international human rights norms and standards, as the CRC Committee stated in 2017.¹²⁵ Today, this is not the case.

Further, the vulnerability approach implies that neither children nor humans in general shall be divided into groups but seen as vulnerable and dependent persons with different needs that the state shall meet. From this, one might extrapolate the idea not to focus on asylum-seeking children as a special group of children, but rather to look at them as young humans who need special protection and care. The welfare system, combined with human rights, could be an effective way of doing so, by meeting different needs rising from human vulnerability throughout the

125 As previously mentioned, see CMW/C/GC73-CRC/C/GC/22, para. 22.

lifetime, for instance, by offering almost free healthcare and education. This idea of equality is rather clear; children have for many years been given special protection in Norway in an attempt to ensure them equal opportunities. Perhaps that is why the gap between what is provided to most children compared to what the asylum-seeking-children above 15 years of age receive appears unethical.

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9. From Problem Talk to Taking Action – Implementing the Rights of Vulnerable Children

Suvianna Hakalehto

Abstract This chapter presents the recent findings on the health and well-being of Finnish schoolchildren belonging to certain vulnerable groups and discusses the responsibilities of the state to act to realise the rights of these children. Insofar as children's rights in general lack effective implementation, it is difficult to define what it means to give special attention to realising the rights of vulnerable groups. It is argued that children's special vulnerability is more often connected to the deficient implementation of their rights in general than to them belonging to a certain group labelled as vulnerable.

Keywords vulnerability | children's rights | legal protection

9.1 INTRODUCTION

Feeling mentally and physically well is a necessary precondition for learning and going to school. To enable pupils to enjoy their right to education, their basic physical, emotional, and social needs must be sufficiently met. The right to education has widened to include not solely learning but also several other elements that support the holistic well-being of pupils at school.¹ According to the Committee on

¹ These include, for example, the right to a physically, mentally and socially safe learning environment, the right to health, the right to non-discrimination, the right to privacy, the right to freedom of expression, and the right to freedom of thought, conscience and religion. On pupils' fundamental rights and human rights at school, see Suvianna Hakalehto-Wainio, "The Best Interests of a Child in School," *Family Law & Practice*, no. 1 (2014): 105–112. See also Katarina Tomasevski, *Human Rights Obligation in Education: The 4-A Scheme* (Woolf Legal Publishers, 2012); Patricia O'Lynn and Laura Lundy, "Education Rights," in *The Human Rights of Children*, eds. Ursula Kilkelly and Ton Liefwaard (Springer 2018); Laura Lundy, "Children's Rights and Educational Policy in Europe: The Implementation of the United Nations Convention on the Rights of the Child," *Oxford Review of Education*, vol. 38 (2012): 393–411; Katherine Covell, Brian R. Howe and Anne McGillivray, "Implementing Children's Education Rights in Schools," in *Handbook of Children's Rights: Global and Multidisciplinary Perspectives*, eds. Martin D. Ruck, Michele Peterson-Badali and Michael Freeman (Routledge, 2017).

the Rights of the Child (the Committee), providing healthcare services at school is essential to promote children's health, follow up on possible illnesses, and increase pupils' access to healthcare (CRC/C/GC/15, para. 36).

In Finland, education shall be provided according to the pupil's age and capabilities, as well as to promote healthy growth and development in the pupil and to ensure study skills (Basic Education Act, sec 3; 628/1998). The Student Welfare Act (1287/2013) lays down the provisions regarding receiving student welfare services. According to the Student Welfare Act (sec 2), school healthcare aims to promote learning, health, well-being, and participation; prevent problems; provide early support for pupils in need; and secure the quality of health services as well as equality of access to these services.²

Since 1996, statistics published by the Finnish National Institute for Health and Welfare (THL) have provided diverse and high-quality follow-up data on the well-being and health of schoolchildren, their experience of school attendance and studies, their participation, their access to help, and how well services respond to their needs. The statistics are based on an overall sample produced from the School Health Promotion (SHP) study conducted every two years covering the whole of Finland. Comparable data is collected from pupils in four grades (fourth, fifth, eighth, and ninth)³ in basic education, pupils in upper secondary school, and students at vocational education institutes.

In recent years, the SHP study has paid special attention to children and young people in particular life situations. In each study, the results of some vulnerable groups, such as adopted children or children with disabilities, are examined. In 2021, data concerning pupils of foreign origin, pupils belonging to sexual or gender minorities, and pupils placed outside the home were examined separately.

This chapter aims to consider the role of the state as a signatory to the UN Convention on the Rights of the Child (CRC) in promoting and protecting the health and well-being of pupils who belong to vulnerable groups. First, I wish to understand how the concept of "vulnerable" is used in the context of the CRC and how it has been understood in Finland in the context of pupils. Secondly,

2 Individual school healthcare monitors and promotes the growth, health, and well-being of each pupil and supports the pedagogical work of parents and guardians. Its aims also include identifying pupils' needs in support and health examination, referring pupils to further examinations and treatment if necessary, supporting the care of children with chronic illnesses, and providing examinations to establish the state of learners' health. Individual school healthcare is free of charge and consists of the school healthcare services and services of school social workers and psychologists, in addition to certain social and health services.

3 In Finland, children begin their fourth year of school at the age of 10, fifth year at the age of 11, eighth year at the age of 14, and ninth year at the age of 15.

I am interested in what kind of challenges concerning health and well-being have been found in the SHP study in the case of the vulnerable groups. Finally, I aim to present what the results of the SHP study mean for the responsibilities of the state when implementing the CRC. Due to the setting of the SHP study, I focus on pupils in the eighth and ninth grades of Finnish basic education, who are usually aged 14–16.⁴

9.2 WHO ARE VULNERABLE CHILDREN?

Vulnerability has long been associated with the biological and physical development of a person, and thus also associated with childhood. The nature of a child's vulnerability has been described as fluid, socially constructed, and dependent on a child's personal and social circumstances.⁵ It is generally accepted that minors experience special vulnerabilities due to their state of development and their status within society; this is one of the main reasons to provide them with special rights.⁶ First, *children's developmental state makes them particularly vulnerable to several risks and human rights violations*. The consequences of violations at home and at school, for example, can be more severe and longer lasting compared to adults.⁷ Secondly, *children lack full legal competence*, making them dependent on the decisions and actions of adults. *Minors are not capable of reacting themselves* and cannot be expected to react when their rights are not respected. These elements make the state's duty to protect children's rights especially vital and oblige states to consider minors as a vulnerable group of rights holders.⁸ The vulnerability that is present in the lives of all minors can affect the health and well-being of

4 The response rate in the 2021 study was 75% in grades 8 and 9.

5 John Tobin, "Understanding Children's Rights: A Vision Beyond Vulnerability," *Nordic Journal of International Law*, vol. 84(2) (June 2015): 155–182, 180.

6 Tobin, "Understanding Children's Rights," 155–182.

7 David Archard, *Children: Rights and Childhood* (Routledge, 2015), 111. Vulnerability is nowadays also considered a fundamental part of being human, and the concept is also widely used in contexts other than with minors. Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law & Feminism*, vol. 20(1) (2008); Martha Albertson Fineman, "The Vulnerable Subject and the Responsive State," *Emory Law Journal*, vol. 60 (2010): 251–257. It has been argued that states must recognise relationships and positions of universal vulnerability and dependency, acting as an instrument of social justice.

8 Herring, Jonathan, "Vulnerability, Children and the Law," in *Law and Childhood Studies*, ed. Michael Freeman (Oxford University Press, 2012), 243–263; Sigurdson, Randi, "Children's Right to Respect for Their Human Dignity," in *Children's Constitutional Rights in Nordic Countries*, eds. Lena Bendiksen, Trude Haugli, Anna Nylund and Randi Sigurdson (Brill Nijhoff, 2019), 32–24, 19–36.

any child. In this chapter, vulnerability is understood as the state of being at risk of having one's rights violated.

The notion of vulnerability is also connected to the certain groups of people *facing higher risk of harm* but is also extensively applied, especially in the context of expressing concern for the well-being of people who belong to certain *minority groups*. It most often seems to refer to a *status or circumstances* of a variety of groups or individuals and is often used as *grounds for receiving additional protections of rights*, for example, in the form of certain benefits or services.⁹

In practice, the term “vulnerability” is frequently used in social policy arenas in the context of interventions targeted at those who are “less well off”.¹⁰ This way of thinking and acting in the health and social care services can be considered both typical and a tool for political guidance. In child law, it is widely recognised that one of the main aims of the CRC is to compensate for children's vulnerability by providing them the same level of human rights protection as adults, plus several special rights guaranteed only for minors.¹¹ In general, both minors and adults are considered vulnerable in cases of disability, refugee status, immigrant background, ethnic group, language, or cultural minority. However, there are some vulnerabilities that only minors face: children placed in out-of-home care, children who face violence or abuse from their parents, or children living with parents who have mental health or substance abuse problems.

In order to ensure children their right to development, there is in the context of the CRC a strong emphasis on special protection of the rights of children considered as especially vulnerable.¹² In the titles of the articles of the Convention, the following groups have been identified as vulnerable: children deprived of their family environment (Art. 20), adopted children (Art. 21), refugee children (Art. 22), children with disabilities (Art. 23), minorities and indigenous children (Art. 30), children in armed conflict (Art. 38), and children in the juvenile justice system (Art. 40). It is the duty of the state to recognise these children and to actively ensure the realisation of their rights.

9 The division of people into vulnerable groups is typical in social and health policy as well as in humanitarian policy.

10 Kate Brown, “Questioning the ‘Vulnerability Zeitgeist’: Care and Control Practices with ‘Vulnerable’ Young People,” *Social Policy & Society*, vol. 13(3) (2014): 371–388.

11 Rosalind Dixon and Martha C Nussbaum, “Children's Rights and a Capabilities Approach: The Question of Special Priority,” *Cornell Law Review*, vol. 97(3) (2012): 549–594.

12 Noam Peleg and John Tobin, “Article 6. The Right to Life, Survival, and Development,” in *The UN Convention on the Rights of the Child. A Commentary*, ed. John Tobin (Oxford University Press 2019), 231–233.

In General Comment no. 20, adolescence is defined as a life stage characterised by “significant vulnerability” (para. 2). The pupils in the SHP study are adolescents and are as such especially vulnerable, in addition to being minors. According to the Committee, certain groups of adolescents may be subject to multiple vulnerabilities and violations of their rights, including discrimination and social exclusion (para. 26). The Committee mentions adolescents with disabilities (para. 31), from minority and indigenous groups (para. 35), in alternative care (para. 52–53), and refugee and asylum-seeking adolescents (para. 77). According to the Committee, mental health and psychosocial problems, such as suicide, self-harm, eating disorders and depression, are primary causes of ill health, morbidity, and mortality among adolescents, particularly among adolescents in vulnerable groups.¹³

Sormunen has noted that vulnerability seems to be a common denominator in the context of many of the Committee’s concluding observations. This is especially true concerning migrant children, children of imprisoned parents, children with disabilities, children in street situations, children in conflict with the law, and the sale and trafficking of children.¹⁴ In the Concluding Observations to Finland (2005), the Committee expressed concern regarding the lack of coordination and regularity of statistics on children, “in particular with regard to the most vulnerable groups of children such as disabled children, asylum-seeking children, children in conflict with the law and children belonging to minority groups, among others” (para. 13). In the subsequent Concluding Observations (2011), the Committee recommended that Finland pay more attention to children belonging to minorities (e.g., Sámi children, Roma children, and migrant children), disabled children, children in foster care, and minors in prisons.¹⁵

13 See UN Committee on the Rights of the Child, *General Comment no. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24)*, CRC/C/GC/15 (April 17, 2013), para. 38. When mentioning the dissemination of the CRC among vulnerable groups and the importance of providing training for professionals who work with children, the Committee mentions immigrants and indigenous, ethnic or linguistic minorities (para. 16). When paying attention to the implementation of Articles 28 and 29, the Committee especially emphasises children belonging to the most vulnerable groups, mentioning Roma children as an example (para. 43).

14 In recent concluding observations, the Committee has, instead of referring generally to children in vulnerable situations, begun to address these groups separately, making children’s – for example, asylum-seeking children’s – needs visible. Milka Sormunen, “A Focus on Domestic Structures: Best Interests of the Child in the Concluding Observations of the UN Committee on the Rights of the Child,” *Nordic Journal of Human Rights*, vol. 38(2) (2020): 100–121, 115.

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

In 2005, the Committee recommended that Finland collect data on children belonging to the most vulnerable groups to allow detailed analysis of their living conditions and the implementation of their rights (para. 14). In 2011, the Committee repeated its concern, adding children affected by poverty and immigrant children to the list of examples of vulnerable groups (para. 17). In the SHP study, children belonging to the certain vulnerable groups mentioned above have been in focus. No information is available as to why these groups have been chosen and whether the Concluding Observations to Finland have played any role in selecting the groups.¹⁶

9.3 RESULTS ON THE WELL-BEING AND HEALTH OF FINNISH PUPILS

9.3.1 Introduction

The aim of the SHP study is to monitor the well-being, health and schoolwork of Finnish children and adolescents and to strengthen the planning and evaluation of health-promoting activities at school, municipal, and national levels.¹⁷ Children and young people are asked about their welfare, participation and leisure time, health and functional capacity, lifestyle, health-related behaviour, school attendance and studies, family and living conditions, safety of their growth environment, and school health services and access to assistance.¹⁸

In the 2021 SHP study results for pupils with a foreign background (N = 5,296), those placed outside the home (N = 1,284) and those belonging to sexual minorities (N = 11,797) were analysed separately. The SHP study includes over 100 questions. In this chapter, I examine the results of some questions that are clearly linked to

16 In the Finnish national programme of non-violent childhood, children are considered vulnerable if they belong to the groups at higher risk of encountering violence. These groups are noted to be disabled children, children belonging to ethnic groups, children with a sexual orientation other than heterosexual, children placed outside of their home, and minorities based on language or culture. In Finland's First National Child Strategy, vulnerable children are mentioned several times, but there is no definition of vulnerability in the strategy. Implementation Plan for the National Child Strategy, Government publications 2021:8.

17 The data is gathered from fourth and fifth graders from comprehensive school, eighth and ninth graders from comprehensive school, first and second graders from upper secondary school, and vocational institutions. Data gathering is anonymous and voluntary via a classroom-administered questionnaire.

18 Even though most of the pupils in Finland are satisfied with their life and consider their health to be good, the figures have seen a decrease in recent years. While in 2017 about 54% of pupils were very satisfied with their life, in 2021 the number had decreased to 45%. In 2017, for example, 19% of girls assessed their health as average or poor compared to 34% in 2021.

pupils' health and well-being. I chose questions that can be easily connected to the rights of the CRC: *non-discrimination and protection from violence and harmful treatment* (experiences of bullying), *participation* (experiences of being able to exert influence in matters at school), *right to health* (experience of own health), *social well-being* (experience of loneliness; sense of belonging to the class and school), *right to education* (experience of enjoying school; experience of having difficulties with learning skills; experience of opportunities at school to discuss any troubling matters with an adult; experience of caring and fair treatment from teachers).

9.3.2 Pupils with Foreign Backgrounds

The Committee has noted that the inadequate attention paid to, and insufficient respect shown for, the cultures, values, and world vision of adolescents from minority and indigenous groups may lead to discrimination, social exclusion, marginalisation, and non-inclusion. This increases the vulnerability of minority and indigenous adolescents to poverty, social injustice, and mental health issues, including disproportionately high suicide rates, poor educational outcomes, and high levels of detention within the criminal justice system (CRC/C/GC/20, para. 35).

In the SHP study, the results concerning this group of pupils were mostly like the results of pupils in this age group generally. For example, there were no major differences in experience of learning skills and enjoying school. Experience of loneliness was only a little more common in this group compared to other pupils (42% vs. 39%). First-generation pupils with immigrant backgrounds also perceived their health to be poorer a little more often than others (28% vs. 25%). There were some differences in experiences of anxiety (24% vs. 19%) and school fatigue (24% vs. 20%).¹⁹

Pupils with foreign backgrounds had considerably more experiences of being bullied (11% vs. 5%) as well as experiences of bullying peers (8% vs. 2%). These pupils also reported more often than others that adults at school had bullied them (11% vs. 4%). Boys with foreign backgrounds had experienced physical violence from their parents or caretakers three times more often than boys with Finnish backgrounds (24% vs. 8%).

19 Rekar Abdulhamed, Kirsti Lonka, Lauri Hietajärvi, Riikka Ikonen and Reija Klemetti, "Anxiety and Depression Symptoms and Their Association with Discrimination and a Lack of Social Support among First- and Second-Generation Immigrant Adolescents," *International Journal of Intercultural Relations*, vol. 87 (2022): 193–205.

It is interesting that pupils in this group felt more often than others that they were able to influence more matters at school (22% vs. 10%). They also experienced a little more often that they had been treated in a caring and just way by teachers (57% vs. 53%). Their sense of belonging to the school community was also a little higher compared to other pupils (44% vs. 40%).

9.3.3 Pupils Placed in Out-of-Home Care

In General Comment no. 20 (para. 53) the Committee notes that there is significant evidence of poor outcomes for adolescents placed in out-of-home care. The problems include lower educational attainment, dependency on social welfare, and higher risk of homelessness, imprisonment, unwanted pregnancy, early parenthood, substance misuse, self-harm, and suicide. The results of the SHP study show that the health and well-being of this group of minors differs in many respects from that of their contemporaries with other living arrangements.

According to the SHP study, pupils in this group had more difficulties with learning skills compared to their peers (56% vs. 39%) and they enjoyed school less than others (49% vs. 59%). There was more school fatigue in this group (29% vs. 20%) as well as more experiences of average or poor health (39% vs. 25%). In this group, challenges with mental well-being, such as anxiety, were more common (30% vs. 19%) than generally, as was the feeling of loneliness (27% vs. 15%).²⁰

Experiences of violence from parents or another caretaker were also more common in this group (28% vs. 12%).

Pupils placed in out-of-home care were bullied significantly more often compared to their peers (15% vs. 5%). These pupils also reported more often that adults at school had bullied them (13% vs. 5%) and that they themselves had bullied their peers (9% vs. 2%).

Like pupils with foreign origins, pupils placed in out-of-home care experienced more often than others that they are able to influence matters at school (16% vs. 10%). Their experiences of being able to talk to school personnel and be treated in a caring and just way by teachers were the same as that of other pupils.²¹

20 39% of the pupils placed in out-of-home care had experienced symptoms of depression for at least two weeks, compared to 24% of other pupils. They had also been more often worried about their own mental state during last year compared to the other pupils (53%/36%).

21 Riikka Ikonen, Pia Eriksson and Tarja Heino, "Sijoitettujen lasten ja nuorten hyvinvointi ja palvelukokemukset. Kouluterveyskyselyn tuloksia" [Well-Being and Experiences of Services of Children and Adolescents Who Have Been Placed in Out-of-Home Care. Results of the School Health Promotion Study], *National Institute for Health and Welfare (THL)*, Discussion Paper 35/2020 (Helsinki, Finland 2020).

9.3.4 Pupils Belonging to Sexual and Gender Minorities

In the latest SHP study, 14% of youths (14–15-year-olds) considered themselves to be something other than heterosexual, with 5% saying they felt different from their official sex.²² Pupils belonging to these groups were significantly more often dissatisfied with their lives (36%) than other pupils (15%). They more often considered their health average or poor (59% vs. 25%). Symptoms of depression lasting at least two weeks (57% vs. 24%) and concerns about mood (73% vs. 36%) were also considerably more common. Anxiety levels were more than twice as high among pupils belonging to sexual and gender minorities.

These pupils experienced many difficulties related to school attendance. They much less often felt that they were part of a class or school community. More than half of pupils belonging to this group had problems with their learning skills, and school fatigue was more common than among other young people (35% vs. 20%)

Experiences of physical violence from parents or other caretakers were twice as common as among other pupils (19% vs. 9%). Mental violence was also more common. Especially those belonging to gender minorities reported that they had experienced bullying and physical threats at school more often than other young people. Experiences of sexual harassment were more common, and experiences of sexual violence were twice as common as with other young people (15% vs. 6%). The results also show that it is more difficult for pupils belonging to these groups to get support and help for problems when they need it.²³

22 From 2019 on, the SHP study has paid attention to gender diversity with two questions concerning gender: “What is your official gender?” (alternatives 1) boy, 2) girl). The second question was “Do you feel you are” a 1) boy, 2) girl, 3) both, 4) neither, 5) it varies.

23 Experiences of rainbow youth have been examined in a research article by Satu Jokela, Pauliina Luopa, Anni Hyvärinen, Tupu Ruuska, Tuija Martelin and Reija Klemetti, “The Well-Being of Young People Belonging to Sexual and Gender Minorities,” *Results of the School Health Promotion Study 2019*. National Institute for Health and Welfare. Discussion Paper 38/2020 (Helsinki, Finland 2020). There are several research articles based on the SHP study’s results regarding sexual and gender minority. Kurki-Kangas Leena, Sari Fröjd, Henna Haravuori, Mauri Marttunen and Riittakerttu Kaltiala, “Associations Between Involvement in Bullying and Emotional Symptoms: Are There Differences Between Heterosexual and Sexual Minority Youth?,” *Journal of School Violence*, vol. 19(3) (2020): 309–322; Riittakerttu Kaltiala-Heino, Nina Lindberg, Sari Fröjd, Henna Haravuori and Mauri Marttunen, “Adolescents with Same-Sex Interest: Experiences of Sexual Harassment Are More Common Among Boys,” *Health Psychology and Behavioral Medicine*, vol. 7(1) (2019): 105–127.

9.4 DUTIES OF THE STATE CONCERNING CHILDREN BELONGING TO VULNERABLE GROUPS

9.4.1 Are Vulnerable Children Being Recognised?

The gathering of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realisation of rights, is an essential part of implementing the CRC (CRC/C/GC/11, paras. 23–24, CRC/C/GC/5, para. 12). The SHP study is about taking this step. Research findings show significant differences in the health and well-being between pupils belonging to different groups. It must be noted that only a few vulnerable groups have been recognised for the study. It is evident that there are several other vulnerable groups of pupils facing special difficulties concerning their rights. For example, some outcomes differ remarkably according to sex. In 2021, 30% of girls but only 8% of boys in grades 8 and 9 reported moderate or severe anxiety.²⁴ This means that girls seem to be more vulnerable concerning risk to anxiety.

In addition to the “traditional” vulnerable groups, attention should be paid to the other life situations that might add to the probability of problems in well-being. Social problems, mental health problems, and parents’ substance abuse as well as violence in the family can cause traumatic crises for any child. Pupils with chronic illnesses and those living with disabilities, children who have experienced long-term or sudden crises or trauma (e.g., divorce, death, or severe illness in the family), and children from families struggling for a variety of reasons, such as poverty, may need support. Many children are bullied at school or live with learning difficulties even when they do not belong to any of the traditionally vulnerable groups. At the same time, it must be noted that children in certain vulnerable situations or with certain special needs do not comprise a homogenous group. Not even children placed into a certain group of vulnerable people have all the same needs and challenges.

In Finnish court praxis, it is common to refer to the vulnerability of a child in immigration cases due to the concept of vulnerability being included in the Finnish Immigration Act. Recently, the Finnish Supreme Court referred to the vulnerable status of a child also in criminal cases with child victims (KKO 2018:18; KKO 2021:82). In both cases, the rights of the child had been violated by parents/step-parents. In its praxis the Parliamentary Ombudsman has often referred to the vulnerability of the child, for example, in the context of child protection and education.

24 In 2013, the figures were 10% and 5%. It is probable that the consequences of the COVID-19 epidemic influenced the results, but the results have been developing in a more worrying direction for many years.

It has been noted that the constitutions of the Nordic countries, unlike several other European constitutions, do not include specific rights for children from ethnic, religious, and sexual minorities or children with disabilities.²⁵ It has been argued that specific provisions recognising the groups of vulnerable children would be more powerful tools than general provisions on children's rights or on equality.²⁶ On the other hand, it has also been argued that instead of marking groups or individuals as vulnerable, the focus should be on vulnerable life situations and the role of, for example, education or health services in reducing vulnerability.²⁷

It can be argued that many problems in children's well-being are related to the lack of implementation of children's rights in general, not just those of children belonging to certain vulnerable groups. If adults – parents and professionals – do not act according to their legal duties, children are at continuous risk of experiencing violations of their rights. This is partly due to the ineffective implementation of the existing legal duties and poor system of legal protection. In other words, children are often especially vulnerable because their rights have not been realised according to the norms protecting their rights.

9.4.2 What Should Be Expected from the Implementation Measures?

From the children's rights perspective, it is not enough to point out the challenges that children or certain groups of children face. The most important thing is what happens once we are aware of these challenges. This seems to be the Achilles' heel when protecting and promoting children's rights in general.²⁸ Furthermore, it is not enough to note that special attention must be given to vulnerable groups.

25 Trude Haugli and Anna Nylund, "Children's Constitutional Rights in the Nordic Countries: Do Constitutional Rights Matter?," in *Children's Constitutional Rights in the Nordic Countries*, eds. Trude Haugli, Anna Nylund, Randi Sigurdson and Lena R. L. Bendiksen (Brill Nijhoff, 2019), 391–422, 396.

26 Haugli and Nylund, "Children's Constitutional Rights," 391–422, 397.

27 Elina Vironkangas, Suvi Liski, and Marjo Kuronen. "The Contested Concept of Vulnerability – A Literature Review," *European Journal of Social Work*, vol. 23(32) (2020): 327–339. In this context, the classification of temporal, situational, relational, and structural vulnerabilities has been used.

28 It has been noted that, around the world, states have generally failed to incorporate the CRC into, for example, education legislation and policy, to incorporate children's rights into teacher training, and to advance the teaching and practice of children's rights and human rights in schools. Katherine Covell, R. Brian Howe and Anne McGillivray, "Implementing Children's Education Rights in School," in *Handbook of Children's Rights: Global and Multidisciplinary Perspectives*, eds. Martin D. Ruck, Michele Peterson-Badali and Michael Freeman (Routledge, 2017), 296–311, 298.

It must be clarified who has a duty to give that attention and what are the measures that should be taken.

States have committed to undertake *all appropriate legislative, administrative, and other measures* for the implementation of the rights recognised in the CRC, Article 4. The CRC Committee has emphasised that states must see their role as fulfilling clear obligations to each child (CRC/C/GC 5, para. 11). According to Article 3(2) of the CRC, states must take all appropriate legislative and administrative measures to ensure children “such protection and care as is necessary for his or her well-being”. The aim is to protect children from all forms of violence and harmful treatment.²⁹ I argue that this means also protecting children from the inefficient implementation of their rights.

Implementing Article 2 of the CRC involves paying special attention to certain groups of children who might experience difficulties enjoying their rights. The duty to prohibit discrimination includes recognising children who are in need of special measures concerning the enjoyment of their rights and taking active, effective measures to secure their rights. States shall respect and ensure the rights included in the CRC to each child without discrimination of any kind and take all appropriate measures to ensure that the child is protected against all forms of discrimination.³⁰ When addressing discrimination, changes in legislation, administration, and resource allocation, as well as educational measures to change attitudes, may be required (CRC/C/CG/5, para. 12).

The principle of non-discrimination must be reflected in all domestic legislation and must be directly applied. The realisation of non-discrimination must be appropriately monitored and enforced through judicial and administrative bodies (CRC/C/GC/11, paras. 23–24). Regardless of the possible existence of non-discrimination legislation, these laws are not always effectively implemented. In Finland, the Non-Discrimination Act (1325/2014) includes a duty to promote equality also in schools and in early childhood education. The Finnish Governmental Proposal of the Non-Discrimination Act states that promoting equality at school requires giving special attention to the needs of pupils

29 Article 3(2) has been considered as an umbrella provision constituting an important reference point for interpreting general obligations under the CRC. John Eekelaar and John Tobin in *The UN Convention on the Rights of the Child. A Commentary*, ed. John Tobin (Oxford University Press, 2019), 73–105, 101.

30 Even though Article 2 does not mention equality, the Committee refers to equality when interpreting the non-discrimination principle, and sometimes uses both principles interchangeably. Samantha Besson and Eleonor Kleber, “Article 2: The Right to Non-Discrimination,” in *The UN Convention on the Rights of the Child. A Commentary*, ed. John Tobin (Oxford University Press, 2019), 41–72, 57.

in danger of being discriminated against as well as preventing and recognising discrimination.³¹ It is not specified what this “special attention” might be or which groups are in danger of being discriminated against.

Even though the right to equality is protected by the Constitution and several human rights conventions, legislators have seldom established specific legal duties to intervene against discrimination. However, in order to make equality a reality for children and to tackle the existing experiences of inequality, there should be a clear legal requirement to take certain measures when inequalities are recognised. For example, the Finnish Basic Education Act lacks the means to tackle bullying, which is problematic from the perspective of pupils’ safety, especially when there has been awareness of the prevalence of bullying for a very long time.³²

In addition to legislation, there are several means that can be used to strengthen the legal protection of children: raising awareness of rights among children and their parents, identifying children in need of special measures, cooperating with parents, providing early support, preventing problems with health and well-being, referring pupils to the school health services, and developing processes and services adapted for children.³³ In addition to legislation, the essential element of protecting and promoting children’s rights is to make sure that all stakeholders are being educated and there are systematic monitoring and follow-up procedures that include children’s participation. Effective legal protection of children requires monitoring to ensure that rights are realised in practice in children’s everyday lives.³⁴

It is crucial to note that children in general might not recognise violations of their rights and will not always talk about them to adults. The CRC Committee emphasises that, in many cases, only children themselves can indicate whether their rights are being fully recognised and realised. Article 12 of the CRC obliges states to ensure that the child is capable of forming his or her views and is given the right to express those views freely in all matters affecting him or her. The views of the child must be given due weight in accordance with the age and maturity

31 Government Proposal, HE 19/2014 vp. *Hallituksen esitys eduskunnalle yhdenvertaisuuslaiksi ja eräiksi siihen liittyviksi laeiksi*, 62–63.

32 Suvianna Hakalehto, “Constitutional Protection of Children’s Rights in Finland,” in *Children’s Constitutional Rights in Nordic Countries*, eds. Trude Haugli, Anna Nylund, Randi Sigurdsen, Lena R. L. Bendiksen (Brill Nijhoff, 2019), 58–82.

33 Jokela, Luopa, Hyvärinen, Ruuska, Martelin and Klemetti, “The Well-Being of Young People.”

34 Suvianna Hakalehto, Lotta Lerwall and Niina Mäntylä, “Disciplinary Measures in School – Finland and Sweden,” *Nordisk Socialrättslig Tidskrift*, no. 27–28 (April 2021): 85–118; Suvianna Hakalehto, Niina Mäntylä and Maria Refors Legge, “School Supervision in Finland and Sweden: Taking Pupils’ Rights More Seriously?” *Nordiskt Socialrättsligt Tidskrift*, no. 33 (2022): 27–61.

of the child.³⁵ According to the Committee, assessment of a child's best interests must in all matters affecting the child include respect for this right (CRC/C/GC/14, para. 43).³⁶ The views of children themselves are essential in both recognising the need for help and also planning and implementing methods to tackle the problems that have been noted. It is also important to examine children's views on the concept of vulnerability and on placing them into certain groups considered vulnerable.³⁷

Sormunen has identified six main measures the Committee focuses on when describing what kind of active measures states need to take to implement the obligation to consider the best interests of the child: legislative measures, integration in practices, cooperation, awareness-raising and training, budgeting, and monitoring.³⁸ This is a solid starting point also when paying attention to the challenges of vulnerable pupils' well-being and health.

9.5 CONCLUDING REMARKS

In this chapter I have used the results of the Finnish SHP study to show how the results on health and well-being of pupils belonging to certain vulnerable groups differ from those of pupils in general. While examining the results of the vulnerable groups, it might be forgotten that the worrying results on health and well-being

35 On participation rights of children at school, see Laura Lundy "'Voice' Is Not Enough: Conceptualising Article 12 of the UN Convention on the Rights of the Child for Education," *British Educational Research Journal*, vol. 33(6) (2007): 927–942; Aisling Parkes, *Children and International Human Rights Law: The Right of the Child to Be Heard* (Routledge 2015), 123–149. Fortin has highlighted the importance of education in ensuring that children can develop their own views separate from the opinions of their parents or from the groups into which they were born. Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 2009), 411.

36 Action must be taken to build opportunities for children to express their views regarding a range of issues, including the planning of curricula, prevention of bullying, and disciplinary measures, and for those views to be given due weight (UN Committee on the Right of the Child, *General Comment no. 12 (2009) The Right of the Child to Be Heard*, CRC/C/GC/12 (July 20, 2009), paras. 105–111). The Committee has stressed that respect for the right of the child to be heard within education is fundamental to the realisation of the right to education.

37 In the Finnish Youth Barometer 2021, 42% of participants felt that they belong to at least one minority group. These groups in the survey were ideological conviction, religious/nonreligious conviction, ethnic background, appearance, sexual orientation, disability or chronic illness, gender identity, and other minorities. Tomi Kiilakoski, *Nuorisobarometri 2021: Kestävää tekoa [Youth Barometer]* (Hansaprint, 2022).

38 The Committee suggests that states should create structures that advance the implementation of human rights in general. Sormunen, "A Focus on Domestic Structures," 100–121.

of pupils found in the SHP study are not all about vulnerable groups. The study shows remarkable challenges concerning the health and well-being of pupils in general.

My argument is that if children's rights in general lack serious and effective implementation, it is problematic to settle on paying special attention to the vulnerable groups. When concentrating on the implementation of the rights of all pupils, the rights of vulnerable pupils will also be implemented. It is not only in the case of chosen vulnerable groups of pupils that it is important to tackle bullying or mental health – it is the legal right of all pupils.

I am concerned that even though the use of the concept of vulnerability aims to strengthen children's rights, there is little evidence that the aim is achieved in practice. I wish to pose the question: Is the paradigm of vulnerability hiding the real problem – that the rights of children in general lack effective implementation? The focus of the CRC is promoting and protecting the rights of all children. When strengthening, for example, pupils' safety at school, possibilities for participation, access to high-quality healthcare services, social skills, and support for learning, the rights of all pupils – also those belonging to vulnerable groups – will become stronger.

My conclusion is that the concept of vulnerability must more often be used not only in cases of children belonging to minorities or facing special risks due to their situations, but also for all minors as regards their legal protections.³⁹ It is dependency on others that makes children vulnerable. In the context of rights, it is their dependency on adults who have legal duties to realise children's rights that makes children vulnerable. We might call this legal vulnerability: children cannot independently secure their rights, and they are at constant risk of lacking adequate legal protection.⁴⁰ Is children's special vulnerability more often connected to the deficient implementation of their rights than to their belonging to certain groups labelled as vulnerable?

In Finland, as well as in many other countries, there is more and more data available on the problems concerning children's well-being and rights. However, adequate regulation and effective policies that aim to secure the full realisation of rights of the vulnerable groups are missing. Support for children's rights is often symbolic, but devoid of genuine commitment. The government and other actors

39 It is the view of the CRC Committee that all children aged 0–18 are considered vulnerable at the universal level (CRC/C/GC, para. 72).

40 See Jonathan Herring, "Vulnerability, Children and the Law," in *Law and Childhood Studies*, ed. Michael Freeman (Oxford University Press 2012), 243–263; Sigurdson "Children's Right to Respect for Their Human Dignity," 32.

might express support for promoting equality, but the actual implementation of policies is sorely lacking.⁴¹

Herring has noted that it is difficult to realise the idea of equal treatment for persons who lack the legal tools to claim their rights.⁴² This is also why all minors have a legal right, secured in the CRC, to be recognised as vulnerable as a subject of rights. This concerns the legal protection of all children. In my opinion, if there is no real pressure on states to turn rights in books into rights in action, and the system lacks accountability, we cannot expect much to change regarding the realisation of children's rights – not in general and not in terms of vulnerable groups. The human rights of all people are meant to be realised in an effective way. If the implementation of the CRC is not effective and children's rights are not realised, we should be talking not only about deficient implementation but also about long-lasting – in fact, chronic – violations of children's human rights.

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41 R. Brian Howe and Katherine Covell, *Empowering Children: Children's Rights Education as a Pathway to Citizenship* (University of Toronto Press, 2005), 174–180.

42 See Jonathan Herring, *Vulnerability, Childhood and the Law* (Springer Verlag, 2018).

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10. Children's Access to Justice in Climate Matters: The Role of Vulnerability

Kirsten Sandberg

Abstract Children and young people are particularly vulnerable to the effects of climate change, and their rights are strongly affected. This chapter explores children's access to courts and complaints mechanisms in the light of theories of vulnerability. Issues of legal standing, extraterritoriality and legal capacity are discussed. The author argues that legal empowerment is necessary for children to obtain real access to justice in this area and to be able to influence decision-making.

Keywords access to justice | climate change | legal empowerment | legal capacity | complaints

10.1 INTRODUCTION

Children and young people are particularly vulnerable to the effects of climate change.¹ This now appears to be accepted as a fact² and was taken as a premise by the Committee on the Rights of the Child in Sacchi et al.³ In 2021 it was confirmed by UNICEF's report presenting "the first comprehensive view of climate risk from

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- 1 Karin Arts, "Children's Rights and Climate Change," in *Children's Rights and Sustainable Development: Interpreting the UNCRC for Future Generations*, ed. Claire Fenton-Glynn (Cambridge University Press, 2019), 216–235, 217–218; Francesca Ippolito, *Children's Environmental Rights under International and EU Law: The Changing Face of Fundamental Rights in Pursuit of Ecocentrism* (The Hague: Asser Press, Springer, 2023), 309; UNICEF, *The Climate Crisis Is a Child Rights Crisis: Introducing the Children's Climate Risk Index*, 2021.
 - 2 See, e.g., UN Human Rights Council, *Resolution adopted by the Human Rights Council on 1 July 2016, 32/33 Human Rights and Climate Change*, A/HRC/RES/32/33, preambular para. 13; UN Committee on the Rights of the Child, *Report from the 2016 Day of General Discussion, Children's Rights and the Environment* (December 23, 2016), 4–6, 23, with further references.
 - 3 UN Committee on the Rights of the Child, *Sacchi et al. v. Argentina*, CRC/C/88/D/104/2019, Decision by the Committee on the Rights of the Child (October 8, 2021), para. 10.13.

a child's perspective".⁴ As stated in the report, children are physically more vulnerable to floods, droughts, severe weather and heatwaves; physiologically more vulnerable to toxic substances and other forms of pollution, even at lower doses of exposure; and at greater risk of death from diseases that are likely to be exacerbated by climate change, such as malaria and dengue. Children have their whole life ahead of them, and "any deprivation as a result of climate and environmental degradation at a young age can result in a lifetime of lost opportunity".⁵

For this reason, children and youths demonstrate a particular engagement regarding climate change. However, in most countries children below the age of 18 do not have the right to vote and thus have no formal say in these matters. They are fully dependent on the decisions of adults, which creates an additional vulnerability. To make up for this dual vulnerability they need other formal channels for making their voices heard. One avenue is to be involved in the political system. Children and youth could either be represented in relevant decision-making bodies at the local, national or international level, or they could form separate bodies that give advice to decision-makers, such as children's municipal advisory boards or national youth parliaments. Another avenue is to use complaints mechanisms or the courts to challenge decisions made by the authorities in this area. This avenue, which is part of the broader issue of children's access to justice in climate matters, is the topic of this chapter.

In that respect, a third aspect of children's vulnerability enters the scene. Children are largely considered too vulnerable to bring cases themselves. In other words, they lack capacity and need to be represented by adults – either their parent(s), other guardian(s), or an organisation. Vulnerability is often used by adults as a reason for denying children autonomy, so as to protect them from the risks it may imply. The perceived inherent vulnerability of being a child has led to formal limitations to their ability to act in the legal system. In addition, there are several aspects of complaints mechanisms, and particularly of courts, that create a situation of vulnerability for children trying to use them. Also, the requirement of legal standing may be a challenge, including across borders.

For several years, climate change and children's rights has been the topic of recommendations to states in concluding observations issued by the UN Committee on the Rights of the Child.⁶ In 2016, the Committee held its Day of General Discussion on Children's Rights and the Environment.⁷ The event laid the

4 UNICEF, *The Climate Crisis Is a Child Rights Crisis*, 13.

5 UNICEF, *The Climate Crisis Is a Child Rights Crisis*, 11.

6 See, e.g., Committee on the Rights of the Child, *Concluding Observations on the Combined Second to Fourth Periodic Reports of Fiji*, CRC/C/FJI/CO/2-4, (October 13, 2015), para. 23 d.

7 CRC Committee, *Report from Day of General Discussion 2016*.

foundation for more systematic work in this area, leading to the development of General Comment no. 26 on children's rights and the environment, with a special focus on climate change, which was launched in September 2023.⁸

Below, I present the use of vulnerability theory in this context, before looking into what kind of climate cases may be brought before a complaints mechanism or a court, accompanied by an outline of the relevant substantive children's rights. The concept of access to justice is subsequently discussed. A central part of the chapter is to explore children's human right to access to justice, with the CRC as a natural starting point. Possible barriers to children's access to justice at the national level are examined with a vulnerability approach, including the issues of legal standing and extraterritorial consequences of climate change. Special attention will be given to the requirement of legal representation and how to solve it. In the concluding remarks, I will point to possible ways forward.

10.2 VULNERABILITY THEORY IN THIS CONTEXT

10.2.1 Fineman's Theory and Children's Rights

One might explain the rationale behind human rights as being to compensate for the vulnerability of human beings, as a response to it,⁹ or to protect them from the risk of harm.¹⁰ Martha A. Fineman's vulnerability theory takes as its starting point that we are all vulnerable and emphasises the need for states to take measures to respond to our universal vulnerability. Her theory was developed as a critique of theories focusing on the "liberal subject", presuming that humans are by nature autonomous and independent actors.¹¹

8 UN Committee on the Rights of the Child, *General Comment no. 26 (2023) on Children's Rights and the Environment, with a Special Focus on Climate Change*, CRC/C/GC/26 (August 22, 2023).

9 Martha Albertson Fineman, "The Vulnerable Subject and the Responsive State," *Emory Law Journal*, vol. 60 (2010): 251–275, 254–255.

10 John Tobin, "Understanding Children's Rights: A Vision beyond Vulnerability," *Nordic Journal of International Law*, vol. 84(2) (2015): 155–182, 162, who adds to the risk of "exogenous" harm. Later in the same article (164–166) he opposes the presumption that children in general additionally need protection against the risk of endogenous harm, i.e., originating from within as opposed to having an external cause.

11 Fineman, "The Vulnerable Subject and the Responsive State," 251–275, 263, 274; Ellen Gordon-Bouvier, "The Vulnerable Subject: Anchoring Equality in the Human Condition (Martha Fineman)," in *Leading Works in Law and Social Justice*, eds. Faith Gordon and Daniel Newman (London: Routledge, 2021).

Children share the universal vulnerability inherent in the human condition.¹² Yet, universal vulnerability does not mean that we are all vulnerable to the same extent all the time. Fineman recognises that “human reality encompasses a wide range of differing and interdependent abilities over the span of a lifetime.”¹³ There is an extra vulnerability inherent in being a child, and even within a person’s childhood their vulnerability differs with age and maturity. In addition, there are vulnerabilities that depend on the circumstances or the situation that the child is in and the type of issue at stake. In the context of climate change, some children – for instance, indigenous children – face additional risks due to their close relationship with the environment.¹⁴

Children’s rights are a response to the inherent vulnerability of children and the various vulnerable situation(s) in which they may find themselves. Taking each child as the starting point, rights serve to uphold the child’s dignity even in vulnerable situations. Without rights, children’s vulnerability may be used as a reason to keep them down and provide them with goods as charity only, leaving them to the benevolence of others. In the words of Liefwaard, with the adoption of the CRC in 1989 and its almost universal ratification,

the international community agreed to move away from the child being perceived merely as a vulnerable and dependent human being in need of special care and assistance, and accepted that a child is, in the first place, a rights holder like any other human being.¹⁵

Thus, the CRC represents a paradigm shift from viewing children as merely vulnerable to acknowledging them as rights holders. As Tobin points out, with a rights-based rather than a vulnerability approach, the focus shifts from protection to the child’s evolving capacities and right to participation.¹⁶ Ippolito states that the image of the competent child is related to the CRC as a transformative instrument guiding policy on children.¹⁷

12 Fineman, “The Vulnerable Subject and Responsive State”; Gordon-Bouvier, “The Vulnerable Subject,” 226–239, 227.

13 Martha Albertson Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition,” *Yale Journal of Law and Feminism*, vol. 20 (2008): 1–24.

14 CRC Committee, *Report from Day of General Discussion 2016*.

15 Ton Liefwaard, “Access to Justice for Children: Towards a Specific Research and Implementation Agenda,” *The International Journal of Children’s Rights*, vol. 27 (2019): 195–227, 196.

16 Tobin, “Understanding Children’s Rights.”

17 Ippolito, *Children’s Environmental Rights*, 76.

Yet, although it should not be the only or overarching perspective, the concept of vulnerability may be helpful in the implementation of rights. Even with a rights-based approach, an examination of the specific vulnerability of children or the vulnerable situations they may find themselves in may contribute to an understanding of what needs to be done.¹⁸ For example, for a child to express their views freely, the setting has to be adapted to the situation of that child, including any specific vulnerability. This is relevant with regard to children's access to justice as well. Children cannot be expected to use the same channels for challenging rights violations as adults, without these channels being adapted to the more vulnerable situation of children in general and that child specifically.

10.2.2 Climate Change, Resilience and Autonomy

As all human beings are vulnerable to its consequences, climate change creates a universal vulnerability that we all share. In this case the vulnerability is caused by an external factor creating a threat to human existence (not to mention nature), yet the risk of harm may depend on the specific vulnerability of each human being. Although children in general are particularly vulnerable to the effects of climate change, their vulnerability varies with their age and the various situations of vulnerability they are in, including the geographical area in which they live.

According to Fineman, building resilience is essential to ameliorating the harmful effects of human vulnerability and should be a state responsibility. I agree with critics that one should take a step back and look at states' responsibility for creating harm in the first place,¹⁹ or, in the case of climate change, for not doing enough to stop it. The resilience approach may be seen as related primarily to adaptation, whereas it does not fit so well with the obligation to take mitigation measures. On the other hand, the ability of individuals, including children, to take action to influence the government's mitigation efforts may be seen as an aspect of their resilience. I will return to this in relation to access to justice.

A few words should be added about autonomy. As mentioned, Fineman's vulnerability theory was developed in opposition to liberal theories based on the autonomy of a rational and self-sufficient person. Although she does not totally dismiss the idea of autonomy, she has been criticised for interpreting autonomy in too individualistic a way and for overlooking the value for the individual of being able to make their own life choices. Other authors have argued that, instead,

18 Sandberg, Kirsten, "The Convention on the Rights of the Child and the Vulnerability of Children," *Nordic Journal of International Law*, vol. 84(2) (2015): 221–247.

19 Gordon-Bouvier, "The Vulnerable Subject," 226–239, 236.

autonomy should be defined relationally, involving “social and reciprocal duties to others.”²⁰ This seems to be relevant in the context of this article and the discussion about resilience above. A feeling of a certain autonomy is a vital part of resilience and is closely related to the ability to take action.

10.3 WHAT IS A CLIMATE CASE AND HOW ARE CHILDREN’S RIGHTS AFFECTED?

The term “climate matters” covers anything that may influence the climate in a positive or negative way or is a consequence of climate change that has already happened. Access to justice is relevant where the matter has a legal aspect.

One type of case would concern compensation for damage already done. Such cases are backward-looking but may also have implications for the future. They may be brought against the government for not having done enough to prevent the particular event that led to the damage or against companies that have been actively involved, for instance, in discharging polluting materials or cutting down rainforest.

Cases may also be brought to try to prevent climate change before it happens, typically by challenging discharge permits given by the government to releasing polluting materials, be it to the air, water or the ground. Air pollution is the one most directly linked to climate change, but pollution of the sea or the ground may have indirect effects on the climate.

Another possibility is to challenge licences given by the government to activities that may damage the environment and contribute to climate change. One example is oil drilling licences in new areas, as in the Norwegian constitutional climate lawsuit concerning oil drilling in the Arctic, decided by the Supreme Court in the plenary in 2020.²¹ Another one is timber licences, as in the well-known case from the Philippines, where the plaintiffs claimed that excessive timber logging was a threat to a balanced ecology.²²

Yet another type of case involves those brought to challenge the climate goals of the government for being too modest and not meeting its international obligations. In the Dutch Urgenda case, with children among the applicants,²³ the government was required to take additional measures to reduce greenhouse

20 Gordon-Bouvier, “The Vulnerable Subject,” 226–239, 236.

21 Norwegian Supreme Court Plenary Judgment, HR-2020-2472-P.

22 Philippines Supreme Court, *Oposa vs. Factoran* (July 30, 1993).

23 Otto Spijker, “The Urgenda Case: A Successful Example of Public Interest Litigation for the Protection of the Environment?,” in *Courts and the Environment*, eds. Christina Voigt and Zen Makuch (Edward Elgar Publishing, 2018), 305–344.

gas emissions further.²⁴ In the German constitutional case, parts of the Federal Climate Protection Act were struck down for not setting sufficiently ambitious climate goals to be compatible with fundamental rights, interpreted in the light of the Paris Agreement.²⁵

If children are to bring a case to court or a complaints mechanism regarding a violation of their rights, they need to establish that their rights are or will be affected. The environment is mentioned in two of the articles of the CRC, Art. 24 on the right to health and Art. 29 on the aims of education. Art. 24 obliges states to “combat disease [...] taking into account the dangers and risks of environmental pollution.”²⁶ Thus, as pointed out by Ippolito, the “groundbreaking approach” of the CRC extends to the dangers and risks of environmental pollution.²⁷ Under Art. 29, education shall be directed to, among others, the “development of respect for the natural environment.”²⁸ Although they are not strong or comprehensive, these provisions indicate that the environment is relevant to children's rights, and they have been a starting point for further developing the legal thinking around children's rights in this area.²⁹

The climate emergency has been called a “child rights crisis.”³⁰ Climate change affects most of children's substantive rights: the right to life, survival and development under Art. 6; non-discrimination under Art. 2; the best interests of the child under Art. 3; as well as the right to health as mentioned; education (Art. 28); rest, leisure, play, recreational activities, cultural life and the arts (Art. 31); freedom from exploitation (Arts. 32–36); protection from all forms of violence (Art. 19); an adequate standard of living, housing, food, water and sanitation (Art. 27); and the right to identity (Art. 8).³¹ Art. 12 on the right to express views is of course highly relevant in this context.

24 *Urgenda Foundation v. State of the Netherlands*, HAZA C/09/00456689 (2015).

25 *Neubauer et al. v. Germany* (2020).

26 Art. 24, para. 2(c).

27 Ippolito, *Children's Environmental Rights*, 76.

28 Art. 29, para. 1(e).

29 Ippolito, *Children's Environmental Rights*, 84–103 and 116–122, offers an extensive presentation and discussion of those two provisions.

30 UNICEF, *The Climate Crisis Is a Child Rights Crisis*.

31 CRC Committee, *Report from Day of General Discussion 2016*; Thoko Kaime, “Children's Rights and the Environment”, in *International Human Rights of Children*, ed. Ursula Kilkelly and Ton Liefwaard (Springer, 2019), 563–585; Arts, “Children's Rights and Climate Change”; Ippolito, *Children's Environmental Rights*, in addition to the rights to health and education, highlights the right to an adequate standard of living, to rest, leisure and play and the four general principles, 122–142.

Climate change may also have indirect impacts on the ability of governments to protect children's rights. For example, in Bangladesh, some families have rushed to marry off girls in anticipation of losing their homes to river erosion.³² Furthermore, by aggravating existing inequalities in the use of and access to productive land and freshwater, climate change can cause violent conflicts, exploitation, and large-scale migration or displacements. Climate change poses an existential threat to indigenous children due to their close relationship with the environment.³³

Thus, a variety of children's rights may be affected by climate change. For the court to find a violation of children's rights, a causal link between the issue in question – the risk of harm or the harm already done, the measure taken or not taken or the insufficient policy goals – and one or more of these rights has to be established. In this chapter I will not follow the issue of children's substantive rights further but rather examine whether it is possible for children to demand that the question is tried at all.

10.4 ACCESS TO JUSTICE

10.4.1 Placing Access to Justice in Context

Children's access to justice is linked to the need to hold states accountable for violations of children's rights. Accountability may take various forms, but in this context it is about legal accountability, i.e., holding states accountable by legal means or in the legal system. Whereas the concept of accountability is directed at the state and how to make it uphold its obligations, the concept of access to justice takes the individual as its point of departure.

Although the CRC represented a leap forward in recognising the child as a rights holder, having rights on paper is only a first step. It is up to states to create institutions, policies and measures to implement those rights. However, the implementation often leaves something to be desired, and children do not fully enjoy their rights. Thus, a second step for being recognised as a true rights holder is the ability to seek a remedy for the violation of those rights. Otherwise, the status as rights holder becomes symbolic. Without access to justice for rights violations, children are left in the vulnerable situation that their rights were meant to compensate for. A lack of access to justice may actually add to children's vulnerability because it renders the child with a feeling of helplessness and lack of control.

32 CRC Committee, *Report from Day of General Discussion 2016*, 12–13.

33 The examples are from the report from the CRC Committee, *Report from Day of General Discussion 2016*.

Not only have the child's rights been violated, but they are not able to take any action to improve the situation.

In the climate emergency that the world is facing, this feeling may be particularly strong, since the situation is urgent and children do not have a place at the table. In this situation, access to justice would be a way to build resilience in children. Being able to stand up for their own rights could at least to some extent make up for their strong vulnerability in this context. This of course comes in addition to possible substantive outcomes of the cases brought, in placing an obligation on the state to do more, which would contribute to ameliorating the consequences and, thus, children's vulnerability. Providing children with access to justice is a responsibility of the state.

10.4.2 Definition of Access to Justice

From the individual's point of view, the term "access to justice" would normally refer to "the right to seek a remedy before a court of law or a tribunal which is constituted by law and which can guarantee independence and impartiality in the application of the law".³⁴ The UN Human Rights Council (HRC), in its report on access to justice for children, defined access to justice somewhat differently, as the "ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards".³⁵ The differences are the focus on "obtaining" a remedy as well as this definition's wider scope, including customary and religious justice mechanisms and alternative and restorative dispute resolution mechanisms. It also includes children as victims or witnesses, or coming into contact with the justice system for other reasons, such as regarding their care, custody or protection.³⁶

My use of the term is closer to the definition first mentioned, though I find it useful to deal with children's access not just to courts and tribunals but also to an independent ombudsperson or administrative complaints mechanisms.³⁷ Such mechanisms may or may not be independent of the government, but they

34 Francesco Francioni, "The Rights of Access to Justice under Customary International Law," in *Access to Justice as a Human Right*, ed. Francesco Francioni (Oxford: Oxford University Press, 2007), 1–55, part I B.

35 UN Human Rights Council, *Access to Justice for Children, Report of the United Nations High Commissioner for Human Rights*. A/HRC/25/35, (December 16, 2013), para. 4.

36 A/HRC/25/35, para. 4.

37 Francioni, "The Right of Access to Justice," part I B is not opposed to using access to justice in this broader sense and mentions i.a. administrative agencies, if they are engaged in some form of administration of justice.

are still supposed to be impartial to the original decision while providing a low-threshold review of an administrative decision. For most people, not least children, it is more convenient to have an issue settled at a lower level by an administrative agency or an ombudsperson rather than having to take it to court. It is cheaper, less time-consuming and less overwhelming in terms of procedure and formalities. However, to some extent the same legal questions may arise with regard to children's access to these mechanisms as to the courts.

In human rights theory, there is a discussion of whether the right of access to justice is an individual right in itself or a procedural guarantee dependent on other substantive rights.³⁸ The HRC considers access to justice to be “a fundamental right in itself and an essential prerequisite for the protection and promotion of all other human rights”.³⁹ Francioni maintains that although in human rights treaties it is most often construed as a procedural right, in international practice the distinction is often blurred. He adds that this “happens especially when there is an unreasonable interference with the ability of the claimant to have access to courts, independently of the nature of the right for which judicial protection is sought”.⁴⁰

Denying children access to complaints mechanisms or courts may be viewed as an unreasonable interference in itself. In climate matters, however, access to justice for children is primarily important as a prerequisite for the protection of other rights. Thus, it is sufficient in this context to view access to justice as a procedural right.

10.4.3 Prevention and Strategic Litigation

The term “promotion” of rights in the HRC definition gives rise to another clarification, regarding the purpose of access to justice in the area of climate change. Litigation in climate matters may have the aim of preventing, rather than seeking redress for, environmental harm.⁴¹ Thus, the rights violations need not yet have occurred but may be potential future violations. The actual case litigated may be about preventing harm, e.g., by seeking to have a discharge permit for polluting materials declared invalid. As prevention of harm is a core principle in

38 Francioni, “The Right of Access to Justice,” part II C; Liefwaard, “Access to Justice for Children,” 195–227, 198–199.

39 A/HRC/25/35; Liefwaard, “Access to Justice for Children,” 195–227.

40 Francioni, “The Right of Access to Justice,” part II C.

41 Christina Voigt, ed., *International Judicial Practice on the Environment: Question of Legitimacy, Studies on International Courts and Tribunals* (Cambridge University Press, 2019); CRC Committee, *Report from Day of General Discussion 2016*.

international environmental law,⁴² the alleged future harm suffices as a basis for legal standing with regard to human rights violations if the harm was “reasonably foreseeable to the State party at the time of its acts or omissions”.⁴³

According to the Committee on the Rights of the Child, states have a due diligence obligation to “take appropriate preventive measures to protect children against reasonably foreseeable environmental harm and violations of their rights, paying due regard to the precautionary principle”.⁴⁴ For that purpose they should assess the environmental impacts of policies and projects,⁴⁵ with a special focus on consequences for children.

When used strategically, litigation may have the aim of providing effects outside of the specific case. It may also be a source of inspiration both for other national courts and for the international system.⁴⁶ This is particularly important with regard to climate change, where the point is harm prevention and that the harm occurs over the long term. If children are denied access to justice, they lose this opportunity to influence policy-making. One may possibly view this as discrimination on the grounds of age, and in any case there are policy arguments in their favour. Importantly, as pointed out by Nolan and Skelton, child-rights strategic litigators should ensure that their practice is consistent with the rights of the child to avoid risks of harm to children by the litigation itself.⁴⁷

10.4.4 Legal Empowerment of Children

The focus of this chapter is not what constitutes the result of “obtaining” an effective remedy; it is rather the process, particularly children’s place in the process through legal empowerment, meaning their ability to use the courts, ombudspersons or complaints mechanisms of their own accord in order to protect their own rights. In his article on children’s access to justice, Liefwaard refers to the HRC definition and zooms in on two core requirements: the legal empowerment of children and

42 Lesli Anne Duvic-Paoli, “Introduction,” in *The Prevention Principle in International Environmental Law*, ed. Lesli-Anne Duvic-Paoli (Cambridge University Press, 2018), 1–12; Nicolas de Sadeleer, “The Principle of Prevention,” in *Environmental Principles: From Political Slogans to Legal Rules*, 2nd ed., ed. Nicolas de Sadeleer (Oxford University Press, 2020).

43 UN Committee on the Rights of the Child, *Sacchi et al. v. Argentina*, CRC/C/88/D/104/2019, Decision by the Committee on the Rights of the Child. (October 8, 2021), para. 10.7.

44 CRC/C/GC/26, para. 69.

45 Ibid.

46 John H. Knox, “Constructing the Human Right to a Healthy Environment,” *Annual Review of Law and Social Science*, vol. 16 (2020): 79–95, 85–86.

47 Aoife Nolan and Ann Skelton, “The Case for Child Rights-Consistent Strategic Litigation Practice,” *Human Rights Law Review*, vol. 22 (2022): 1–20.

the availability of child-friendly or child-sensitive proceedings.⁴⁸ The latter will be mentioned below but not explored in any detail. Whereas Liefwaard's contribution deals with children's access to justice in general, this chapter applies the general thinking about children's legal empowerment to climate matters in particular.

I find the term "legal empowerment" useful in this context because the issue is that of empowering children to use complaints mechanisms and courts, i.e., how to make children able to promote their own rights in climate matters through a system for making decisions that governments have to abide by. The UN High Commissioner for Human Rights has described legal empowerment of children as relating to the legal capacity of children and the role of parents or others in legally representing their child.⁴⁹

In children's rights theory, Federle has emphasised power as a better concept for discussing rights than the theories of choice (will) or interest. In the theory of choice, capacity is a prerequisite for children having rights at all, and children are often seen as lacking capacity. The interest theory presupposes that someone else has the capacity to exercise the child's rights. In both cases, the focus on capacity serves to disempower the child and leave them to adults protecting their interests in a paternalistic way. Instead, we should recognise children as powerless and see rights as a way of giving them power and commanding respect.⁵⁰ Empowerment is used as a term to describe how rights flow downhill, from those with power to the powerless.⁵¹ Provided children are given the opportunity in a society that truly respects them, most of them "can and will assert their rights if we are willing to listen and take them seriously".⁵² For the youngest children, someone else must do it for them, but Federle sees this as a very different kind of intervention because it is not built on paternalistic considerations.⁵³

The term "empowerment" indicates an approach based on power relations, and I find Federle's theory and the characterisation of children as powerless useful in a discussion of children's access to justice in climate matters. The Committee on the Rights of the Child in General Comment no. 26 repeatedly speaks about the need to empower children.⁵⁴

48 Liefwaard, "Access to Justice for Children," 195–227, 204.

49 A/HRC/25/35.

50 Katherine Hunt Federle, "Rights Flow Downhill," *The International Journal of Children's Rights*, vol. 2 (1994): 343–368, 365.

51 Federle, "Rights Flow Downhill," 343–368, 365; Katherine Hunt Federle, "Do Rights Still Flow Downhill?," *The International Journal of Children's Rights*, vol. 25 (2017): 273–284, 282–283.

52 Federle, "Rights Flow Downhill," 343–368, 367.

53 Federle, "Rights Flow Downhill," 343–368, 367.

54 CRC/C/GC/26, paras 26, 30, 33, 53, 66.

10.5 CHILDREN'S RIGHT TO ACCESS TO COURTS, OMBUDSPERSONS OR COMPLAINTS MECHANISMS

10.5.1 The Right to Access to Justice under the CRC

The CRC has no explicit provision giving children the right to access to justice for violations of Convention rights, formulated as the right to an effective remedy or similar, as opposed to e.g. the European Convention of Human Rights Art. 13, which provides that everyone “whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority”. However, under Art. 4 CRC, states “shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention”. Arguably, without providing children with access to courts or similar to seek remedy for violations of their rights, a state does not undertake all measures as required by Art. 4.

Under the Vienna Convention on the Law of Treaties, Art. 31, a treaty shall be interpreted “in the light of its object and purpose”. This is considered an obligation under customary international law and is thus binding on states without regard to whether the state in question has ratified the Vienna Convention.⁵⁵ When states ratify a human rights treaty, they undertake an obligation to implement those human rights domestically and presumably intend to do so. The purpose of the CRC is to make states respect and ensure children's rights as expressed in the Convention. It supports the interpretation of Art. 4 to cover access to justice.

The Committee on the Rights of the Child is of the view that “[f]or rights to have meaning, effective remedies must be available to redress violations.”⁵⁶ The Committee further emphasises that states should pay particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives, including access to independent complaints procedures and to the courts.⁵⁷ General Comments issued by the Committee are soft law and not binding on states. However, as the Committee has been designated by the Convention to undertake the task of monitoring the implementation of the Convention in the States Parties, it is the most authoritative body in interpreting the CRC at the international level. The General Comments build on the broad

55 John Tobin, *The UN Convention on the Rights of the Child: A Commentary*, (Oxford Commentaries on International Law, 2019) in his commentary to the CRC takes the Vienna Convention as a starting point for the interpretation.

56 UN Committee on the Rights of the Child, *General Comment no. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, para. 6)*, CRC/GC/2003/5 (November 27, 2003), para. 24, under the heading “Justiciability of Rights”.

57 CRC/GC/2003/5, para. 24; CRC/C/GC/26, paras. 82–87.

experience of the Committee in undertaking this task and should be given great weight insofar as their interpretations are not contrary to the wording or purpose of the Convention.⁵⁸

The development and adoption of the third Optional Protocol to the CRC on a communications procedure may be seen as a recognition by states that the CRC requires states to establish an effective remedy, although the protocol is not binding on states that have not ratified.⁵⁹

Children's rights theory supports the view that the Convention contains the right of the child to seek a remedy before a court of law or quasi-judicial mechanism for violations of the rights established by the CRC, based on the arguments just mentioned.⁶⁰ In the following I will presume that children have this right. The issues of legal standing and extraterritorial jurisdiction will be presented briefly, leading to a discussion of whether the right to seek a remedy implies a right in certain situations to act independently, without being represented by a guardian.

10.5.2 Legal Standing and Extraterritoriality

The requirement of legal standing or *locus standi* may pose a barrier to children bringing a case to court.⁶¹ It may also be a barrier to the use of a complaints mechanism, although some of these have less strict requirements. In simple terms this means that a child has to demonstrate that they have a personal interest in or a real need for bringing the case.

One of the conditions for bringing cases to the Committee on the Rights of the Child under the third Optional Protocol on a communications procedure is that they have exhausted available domestic remedies. In the climate complaints

58 Tobin, *The UN Convention*, 110, points to the Committee's work as being "of particular importance" in the interpretation of Art. 4, and to General Comment no. 5 on general measures (and no. 19 on public budgeting) in particular.

59 Kirsten Kvalø, *Å ha rett eller å få rett. Gir norsk rett effektive rettsmidler ved krenkelse av FNs barnekonvensjon?* (UiO: Duo 2014), 17.

60 Kvalø, *Å ha rett eller få rett*, chapter 2, with a thorough discussion of the legal arguments; Laurene Graziani, "Access to Justice: A Fundamental Right for All Children," in *The United Nations Convention on the Rights of the Child: Taking Stock After 25 Years and Looking Ahead*, eds. Ton Liefwaard and Julia Sloth-Nielsen (Leiden: Brill Nijhoff, 2016); Liefwaard, "Access to Justice for Children"; Ton Liefwaard and Jaap. E. Doek, ed., *Litigating the Rights of the Child, The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Dordrecht: Springer, 2015) discuss children's access to justice for their CRC rights in a wider sense, looking at children's rights in litigation in various jurisdictions and regional courts, without focusing on the role of children themselves.

61 Nolan and Skelton, "The Case for Child Rights-Consistent Strategic Litigation Practice," 1–20, 14.

from *Sacchi et al.* to the Committee, the issue of standing in domestic courts was raised against three of the five countries as a reason not to have exhausted domestic remedies. The complainants referred to the exception that the application of the remedies would be unreasonably prolonged or unlikely to bring effective relief; see Art. 7(e).⁶² To Argentina, the children claimed that resolving the issue of their standing alone would take years of litigation. The Committee replied that directly or indirectly injured parties, the ombudsperson, civil society organisations, and national, provincial and municipal authorities could have standing to bring claims for environmental damage and that the children should at least have tried.⁶³ To Brazil, the children's argument was that they lack standing in court and that the "People's Legal Action" is limited to citizens over the age of 16. The Committee noted the argument that public civil suits would be filed at the discretion of the authorised entities in question and that the authors would not have direct standing as parties, but it found that this did not exempt the authors from attempting to engage authorised entities in a lawsuit.⁶⁴ To Turkey, the children claimed that none of them would be able to demonstrate legal standing in an administrative procedure because they were not born in the State Party and did not live or have assets there. A similarly restrictive requirement would apply before the Constitutional Court. The Committee replied that they did have possibilities for filing a suit before the domestic courts, including the Constitutional Court, as well as an administrative proceeding.⁶⁵

From the Committee's replies, one may apparently conclude that even where children do not have standing, or appear not to have it, they should make an attempt at having the case filed. Moreover, if they do not have standing themselves, they should try through institutions, organisations or authorities that may have standing. Thus, the Committee seems to indicate that it may be possible for a child to exhaust domestic remedies even without being able to file a lawsuit in their own name, with or without a legal representative. It is questionable whether having to convince an authority to sue the government or a business corporation actually is a way for children to promote their own rights. This solution does not seem to recognise the children as legal agents and thus does not build their resilience by empowering them. It rather leaves them powerless. Moreover, in these cases, time is of the essence, and asking children to venture a lawsuit that may in

62 Optional Protocol on a Communications Procedure, Art. 7(e).

63 *Sacchi et al v. Argentina*, para. 10.18.

64 UN Committee on the Rights of the Child, *Sacchi et al v. Brazil*, CRC/C/88/D/105/2019, Decision by the Committee on the Rights of the Child (October 8, 2021), para. 10.18.

65 UN Committee on the Rights of the Child, *Sacchi et al v. Turkey*, CRC/C/88/D/108/2019, paras. 7.2 and 9.17. The issue was not raised with Germany and France.

some instances be expected to take years will add to their vulnerability to the consequences of climate change.

Extraterritorial jurisdiction for transboundary harm was the essential discussion in *Sacchi et al.* According to the Committee, jurisdiction may be established if there is a causal link between the acts or omissions of the state in question and the negative impact on the rights of children located outside its territory, provided that the state of origin exercises effective control over the sources of the emission.⁶⁶ Regarding all of these complaints, the Committee found that the states had extraterritorial jurisdiction. This is an important clarification, making it possible for children to bring cases against other states and thus increasing their resilience.

10.5.3 Do Children Have a Right to Bring a Case on Their Own?

The issue here is whether a child has the right under the CRC to bring a case to court or a complaints mechanism without being represented by a guardian, which is often seen as a question of legal capacity.

The CRC gives parents primary responsibility for the upbringing and development of the child (see Art. 18). That responsibility includes a right to make decisions for the child, although delimited by the assumption that parents have the child's best interests as their basic concern. Art. 5 also gives a certain priority to parents in that it obligates states to respect the "responsibilities, rights and duties of parents". However, this is linked to the child's exercise of the rights in the Convention and only with regard to providing direction and guidance. The provision does not necessarily give parents the final say. Moreover, the way they give this guidance should be consistent with the evolving capacities of the child, meaning that it will be different for a 2-year-old than for a 14-year-old. Naturally, it will also depend on the individual maturity of the child and the complexity of the issue in question.⁶⁷ As mentioned earlier, emphasising the child's evolving capacities is important in a child rights approach in order to empower them instead of seeing them primarily as vulnerable.

Another essential aspect of a child rights approach as opposed to a vulnerability approach is the right of the child to express their views and have them given due weight according to age and maturity under Art. 12. According to Art. 18, parents should consider the child's best interests before deciding anything regarding the

66 *Sacchi et al v. Argentina*, para. 10.7.

67 Gerison Lansdown, "The Scope and Limitations of the Concept of Evolving Capacities within the CRC," in *Parental Guidance, State Responsibility and Evolving Capacities*, eds. Claire Fenton-Glynn and Brian Sloan (Brill Nijhoff, 2021), 36–51, 43.

child, and in doing so, they should take the child's own views into account. The Committee in General Comments no. 12 and 14 states that a consideration of best interests cannot be made without regard to the child's view. To be able to give the child's view due weight, the parents must take into account the evolving capacities of the child.⁶⁸ The direction and guidance mentioned above should gradually change into reminders and advice and, later, to an exchange on an equal footing. As the child matures, it follows from Art. 12 that his or her views shall have increasing weight in the assessment of his or her best interests.⁶⁹ When understood in this way, the right to be heard becomes closer to a right to decide, but not quite. It is more like an encouragement to reach a consensus. If, instead, parents emphasise the child's vulnerability and need to be protected, they may easily place too little weight on the child's views.

To what extent children may claim self-determination under the CRC is unclear. There is no explicit provision giving the child such right. Arguably, some of the rights may be interpreted to give children some degree of autonomy, subject to their evolving capacities. This has been argued for civil and political rights such as the right to identity under Art. 8, private life under Art. 16, freedom of expression under Art. 13, and freedom of association under Art. 15.⁷⁰ Whether any of these could be interpreted to give children the right to decide for themselves to bring a case to court may not be entirely dismissed, at least for older children. In particular, the right to private life is generally considered to encompass some degree of self-determination. Admittedly, bringing a case to court or a complaints mechanism is a step further than deciding for oneself in other matters. But if a certain right to self-determination may be argued from the articles mentioned, the ability to independently bring a violation of that right before a complaints mechanism or court could be seen as a natural extension of that right. In conclusion, a right of children to have legal capacity in their domestic system should probably not be entirely excluded all the way up to the age of 18.⁷¹ As mentioned above, the

68 UN Committee on the Rights of the Child, *General Comment no. 14 (2013) on the Right of the Child to Have his or her Best Interests Taken as a Primary Consideration* (Art. 3, para. 1), CRC/C/GC/14, (May 29, 2013), para. 43; UN Committee on the Rights of the Child, *General Comment no. 12 (2009) The Right of the Child to Be Heard*, CRC/C/GC/12, (July 20, 2009), paras. 70–74, General Comment no. 14 refers to Art. 3(1) on best interests, but the same applies to the parents' assessment of best interests under Art. 18.

69 CRC/C/GC/14, para. 44, CRC/C/GC/12, para. 84.

70 For some of these in relation to gender identity, see Kirsten Sandberg "The Rights of LGBTI Children under the Convention of the Rights of the Child," *Nordic Journal of Human Rights*, vol. 33(4) (2015): 337–352.

71 Similarly, Liefwaard, "Access to Justice for Children," at 4.2, 205.

possibility to challenge a violation of their rights would serve to empower children and increase their resilience, thus making them less vulnerable.

In the context of the third Optional Protocol under the CRC, the relationship between the child's own ability to act in domestic courts and the actions of the child's parent or other guardian is unclear. One might argue that where the child is barred from using domestic remedies because the guardian is not willing to consent, there is no domestic remedy available to the child. In case the child is allowed by the guardian to bring a case to court but otherwise is not supported by the guardian, the domestic remedy may be unlikely to bring effective relief. In both situations, the lack of support from the guardian in exhausting national remedies should not prevent children from bringing the case to the Committee. In Sacchi et al., the issue of parental consent and representation was not raised.

It would be hard to accept if children were prevented from bringing a case to the CRC Committee because their parents would not let them take it to national courts. That would underline and increase their vulnerability in case of a rights violation and be contrary to a child rights approach. It would leave them powerless.

10.5.4 Should Children Have Legal Capacity, and Why?

Generally speaking, being represented by their parents may be a good thing for children, be it in court or before a complaints mechanism. These are systems made for adults that, until they are made properly child-sensitive, do not take account of children's vulnerability due to their age and lesser degree of maturity. In the following, I will first deal with courts, as the court system has some features that may not be present to the same extent in relation to complaints mechanisms.

Legal Capacity in Relation to Courts

A court process may put the child in a vulnerable situation for various reasons. The child may feel awkward in the court setting, and appearing in court may be an emotional or psychological strain on the child. If in addition the litigation is about politically contested issues, as cases concerning climate change are likely to be, the child may encounter hostile reactions.⁷² Thus, the child may need the support of their parents if the child is involved in a court process. This does not apply in the same way to complaints mechanisms, as they are normally less formal and attract less attention.

72 Nolan and Skelton, "The Case for Child Rights-Consistent Strategic Litigation Practice," 1–20, 18.

It may also well be that, for good reasons, parents consider it not to be in the child's best interests to enter into a court process at all. In addition to the arguments already mentioned, litigation is time-consuming and may interfere with the child's schooling. The legal costs may be high, and the parents may not consider it in the child's best interests to risk spending this amount of money, be it from the child's own means or those of the parents. Besides, parents may have their own legitimate interests in not having to represent the child, in addition to possible costs. They may not have the time to spend on litigation or may not be willing to put themselves in the position of speaking in court for a view that they do not share.

The child, however, may be of a different view and want to bring a case in spite of their parents' resistance. In the best-interests consideration that parents should make under Art. 18, the child's own views should have due weight under Art. 12, and more so with higher age and greater maturity. In many countries, parental consent is needed for a child to bring a case all the way up to the age of 18; in other words, they have a veto. Such a categorical rule leans on a perceived general vulnerability of children and youth without any consideration of children's evolving capacities under Art. 5 CRC. Neither is there any guarantee that the parents will have taken the child's own views duly into account.

In some instances, there may be a conflict of interest in a legal sense between children and parents. In that case the child may have the right to have a guardian ad litem appointed, typically in a situation where the child sues the parents, e.g., for compensation due to maltreatment. In climate cases the situation would usually not be so clear-cut. Parents may, as described, have a different view of what is in the best interests of the child or may simply disagree with the child on substance. It is hard in these cases to untangle the parents' own interests from their view of the child's best interests. As long as the parents' grounds seem legitimate, it is difficult to establish a conflict of interest in a legal sense, and the child may not have a guardian ad litem.

So how to solve these issues? If children have neither legal capacity nor the right to a guardian ad litem, they are left with being represented by their parents. It may imply that they are prevented from bringing a case, which is difficult to accept in an area where children are particularly vulnerable to the effects of adults' passivity or wrong decisions. Their vulnerability may be a legitimate reason for giving the parents a say in whether a case should be brought and for assuming that children need the support of their parents in the first place. However, strict rules on legal capacity with a high age limit is one example of children's assumed vulnerability being the only consideration underlying the rules. There should be scope for taking children's evolving capacities and right to participation into account, as there

would be with a child rights approach. If their parents are neither willing nor able to represent them, the child should at least have the right to a guardian ad litem. Yet it is questionable, at least for older children, whether this sufficiently upholds the respect for children's autonomy in an area like this. They probably should have legal capacity from a certain age or subject to an assessment of maturity.

Alternatively, as suggested by Federle, one should do away with the concept of legal capacity. Children would still need to be represented when they are not able to do so themselves, but the approach then would be different. Clark, rather than doing away with the concept of legal capacity, sees it as a flexible legal concept capable of facilitating the legal agency of children.⁷³ In her view, with the Optional Protocol, their status as children no more determines legal capacity. This should be possible also at the national level.

General Comment no. 26 does not use the term "legal capacity". However, the Committee underlines that providing access to justice includes removing barriers for children to initiate proceedings themselves.⁷⁴ This implies making arrangements to make children less dependent on their parents in this respect.

The need for a lawyer and the costs of bringing a case would still be barriers. However, General Comment no. 26 on children's rights and the environment states that children in environmental cases should have access to free legal and other appropriate assistance, including legal aid and effective legal representation.⁷⁵ In addition, states are asked to consider protecting children from adverse costs orders, with the intention "to limit the financial risk to children who bring cases in the public interest regarding environmental matters".⁷⁶ These measures would alleviate the challenges of legal assistance and costs.

Legal Capacity in Relation to Complaint Mechanisms

With regard to complaints mechanisms, the issues of legal capacity, representation, costs, legal assistance and child-unfriendliness do not pose the same problems as discussed above. Complaint mechanisms normally are not, or need not be, as strictly structured as the court system with its formal procedures. They may more easily be approached directly, even by a child, although efforts may be needed to make children aware that they exist and explain how they may be approached.

73 Seveda Clark, "Child Rights and the Movement from Status to Agency: Human Rights and the Removal of the Legal Disabilities of Vulnerability," *Nordic Journal of International Law*, vol. 84 (2015): 183–220, 217.

74 CRC/C/GC/26, para. 83.

75 CRC/C/GC/26, para. 86.

76 CRC/C/GC/26, para. 86.

Since there is not the same risk of harm to children in using such a mechanism as with courts, a child should have the right to act without a guardian. Furthermore, even if the procedures are not as strict as those of the courts, those that do exist have to be made child-friendly. As emphasised in General Comment no. 26, states should provide children with complaint mechanisms that are “child-friendly, gender-responsive and disability-inclusive”.⁷⁷

In Norway, as an example, there is no central complaint mechanism for children in particular. However, the Parliamentary Ombud, who receives complaints regarding administrative authorities in general, has started a process of introducing more child-friendly procedures. The initiative is based on a comment in the preparatory works for the new Ombud's Act stating that the Ombud should accommodate for receiving more complaints from children.⁷⁸ The child may act on their own without being represented by an adult. This is the case even where the child does not have the right to act on their own vis-à-vis the administrative body in question. Increasing the number of complaints implies making the Ombud known to children as someone they may complain to, accepting complaints from children even if they do not fulfil the ordinary formal requirements, shorter time-frames, and training on how to communicate with children.⁷⁹

In many types of climate cases, the ordinary complaint mechanism is the County Governor, a state body keeping oversight of how acts are implemented in the municipalities. For child protection cases, the County Governors recently made a web-based portal for children's complaints, which is child-friendly in its appearance and language and easy to navigate.⁸⁰ In climate cases, however, under, e.g., the Act on Planning and Building, the Act on Pollution, etc., it is very difficult for children to make complaints. For one thing, the County Governor is not well known to children. Besides, the complainants have to follow procedural rules, including standards on producing evidence, etc., that are not easy to navigate, let alone fulfil. To make this mechanism more child-friendly, there is major work to be done.

On several occasions the CRC Committee has recommended that Norway establish an independent complaints mechanism for children,⁸¹ but the government

77 CRC/C/GC/26, para. 83.

78 Doc. 21 (2020–2021) and Recommendation from the Parliament committee no. 409 (2020–2021).

79 Sivilombudet (2022), chapter 1. Klagesaker, Klager fra barn. On the homepage of the Parliamentary Ombud (www.sivilombudet.no) “Klagehjelp til barn og unge” (complaint assistance to children and young people) is easy to spot on the front page, with child-friendly information and good examples (www.sivilombudet.no/klagehjelp-til-barn/) (visited March 10, 2024).

80 Statsforvalteren, *Barn og unges rett til å klage på barnevernet*.

81 CRC/C/NOR/CO/5-6, para. 8, CRC/C/NOR/CO/4, para. 14.

has so far not been willing to do so.⁸² In the meantime, the Parliamentary Ombud could be well placed to deal with complaints from children in climate cases. The public authorities that make decisions in such cases have obligations under the CRC, and part of the Ombud's mandate is to look into possible violations of human rights. Legal standing would not be a barrier. However, as the cases are complex, they might need legal assistance, and free legal aid could be desirable.

In order to increase their resilience, children need to have access to a low-threshold, child-friendly complaints mechanism. Preferably, they would then not have to face the heavier burden of bringing the case to court.

10.6 CONCLUDING REMARKS AND WAY FORWARD

Arguably, legal empowerment of children is particularly important in areas where their future is at stake, as in relation to climate change, where children are especially vulnerable. Their lack of voting rights implies that they do not have the same possibility as adults to influence political decisions in the direction of mitigating climate change and thus reducing their vulnerability. Children need structures for influencing decisions in this area. These structures may be in the political arena, such as in children's local councils or parliaments, provided they are listened to and their views taken into account. Political participation in this way is important in order to compensate, to some extent, for their lack of voting rights.

However, there is no contradiction between political and legal means of obtaining influence; rather, they complement each other. In the climate emergency, children need the possibility to make use of all means available, including legal avenues, to hold governments accountable to children's rights and the promises governments have made in international agreements. For that reason, they should have the ability to challenge decisions in the legal system. Environmental NGOs in many countries have standing to sue, and joining them may be seen as an easy way to participate in a lawsuit. However, NGOs have their own agendas, and it would no longer be the child's case. It might be different if it was a child-led organisation, but typically there would be (young) adults in the organisation as well. Thus, referring children to NGOs or other institutions or bodies means we do not recognise the child's own legal agency. In the face of their vulnerability in this urgent situation, this is not a response empowering children and increasing their resilience. It is only when their own legal agency is recognised with regard to claiming their own rights that they will be acknowledged as true rights holders.

82 Doc. 8:56 S (2021–2022) and Recommendation from the Parliament committee no. 179 (2021–2022).

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11. The Right of Children to Make Healthcare Decisions – Balancing Vulnerability and Capability in Norwegian Law

Henriette Sinding Aasen

Abstract The chapter analyses provisions in the Norwegian Patient and User's Rights Act on the rights of children to consent to healthcare without parental involvement, with a focus on children between 12–16 years old. The regulation serves as a case study to explore the balancing of children's rights and parental responsibility. Theoretical perspectives on vulnerability and capability form the basis of the assessment of the legal balancing of children's and parents' interests and the role of health providers.

Keywords healthcare | vulnerability | capability | consent | parental responsibility | best interests of the child

11.1 INTRODUCTION

Children, especially the very young, are often portrayed as vulnerable and in need of protection. However, according to both international and domestic law, children are independent holders of rights, including autonomy and privacy rights according to age and maturity. Thus, children are to some extent seen as legal subjects capable of protecting their own interests and exercising rights on their own.¹

¹ Kirsten Sandberg was early to point out the child's position as an independent rights holder in the health context and the underlying tensions in CRC provisions between respectively autonomy and protection: Kirsten Sandberg, "Children's Right to Participate in Health Care Decisions," in *Human Rights, Dignity and Autonomy in Health Care and Social Services: Nordic Perspectives*, eds. Henriette Sinding Aasen, Rune Halvorsen and António Barbosa da Silva (Intersentia, 2009), 71–89, 71–72. See also Anna Nylund, "Introduction to Children's Constitutional Rights in the Nordic Countries," in *Children's Constitutional Rights in the Nordic Countries*, eds. Trude Haugli, Anna Nylund, Randi Sigurdson and Lena R. L. Bendiksen (Brill/Nijhoff, 2019), 3–19. She observes the potential dilemma between seeing children as holders of rights and the danger of treating children as adults and thereby neglecting their particular needs (3–4).

The Norwegian Patient and User's Rights Act² regulates children's right to access necessary healthcare and the extent of their right to make independent healthcare decisions. This act, and the Norwegian Constitution,³ is inspired by provisions in the Convention on the Rights of the Child (CRC).⁴ Both international and domestic regulations reflect notions of child vulnerability and capability, the challenge of balancing these perspectives and the competing rights and duties involved: children's rights, parental responsibility, and duties of health providers.

In this chapter, I explore provisions in the Norwegian Patient and User's Rights Act regarding children's right to be informed about and consent to healthcare. Particular attention is given to special provisions concerning children between 12–16 years old (adolescents). The analytical objective falls in to three related parts: 1) analysis of legal provisions concerning children's right to make healthcare decisions, 2) discussion of the relevance of theoretical perspectives on vulnerability and capability, and 3) reflection on whether vulnerability and capability arguments and perspectives contribute to and add new dimensions to the legal analysis of rights and duties.

11.2 CHILDREN'S HUMAN RIGHTS IN THE HEALTH CONTEXT – OVERVIEW

The protection of children's health, integrity and well-being is essential in all social settings of relevance for children, not least the healthcare service. Securing access to health services could have an impact on children's health and well-being not only at the time of intervention but also over the longer term.⁵ Children's rights should be understood in a context of power, where powerful or influential actors may have great impact on children's enjoyment of their human rights, including the right to health.⁶ Cathaoir asserts that rights of children "can reframe health as a shared responsibility of the state, parents and the child"⁷ and that states should seek "to protect children's open future".⁸ These are significant observations

2 Act June 2, 1999 no. 63 on pasient- og brukerrettigheter [Norwegian Patient and User's Rights Act].

3 Kongeriket Norges Grunnlov, May 17, 1814 [The Norwegian Constitution]. In May 2014, the Constitution was updated with a new chapter on human rights, including section 104 on children's rights.

4 Adopted by the United Nations 20 November 1989.

5 John Tobin, *The Right to Health in International Law* (Oxford University Press, 2012), 255–267.

6 Katharina Q Cathaoir, *Children's Rights and Food Marketing: State Duties in Obesity Prevention* (Intersentia, 2022) 12–14.

7 Ibid., 10–11.

8 Ibid., 13, with reference to Joel Feinberg, "The Child's Right to an Open Future," in *Whose Child?*, eds. W. Aiken and H. LaFollette (Totowa, NJ: Rowman & Littlefield, 1980, 125).

relevant for the discussions in this chapter on the rights of children in the health context and the balancing of rights and responsibilities of, respectively, children, parents and health providers.

When revising the Norwegian Constitution in 2014, a special section on children's human rights was adopted (section 104), emphasising rights of children not covered by other constitutional provisions.⁹ Section 104 contains overarching guarantees of children's rights in line with similar provisions in the CRC, which is given a semi-constitutional status by the Norwegian Human Rights Act.¹⁰ As pointed out by the Law Commission preparing the constitutional reform, formal equality with adults does not necessarily address children's particular vulnerabilities and specific needs and therefore is no sufficient guarantee of substantive equality.¹¹ Section 104 guarantees children respect for their human dignity, a right to be heard in decisions affecting them according to age and development, and a general duty of protecting the best interest of the child in actions and decisions concerning them. Children are entitled to protection of their personal integrity,¹² and the state is obliged to facilitate the child's development and ensure necessary economic, social and health security, preferably within the family. These are general and overarching provisions protecting children as vulnerable human beings in need of social protection and assistance. Mentioning of children's right to be heard according to age and development, and their right to integrity protection, signifies state responsibility for securing children's autonomy and privacy rights.

Both adults and children have a constitutional right to privacy,¹³ which includes autonomy and confidentiality in healthcare.¹⁴ However, the right to privacy is not absolute and can be balanced against conflicting rights and interests. Children's

9 Trude Haugli, "Constitutional Rights for Children in Norway," in *Children's Constitutional Rights in the Nordic Countries*, eds. Trude Haugli, Anna Nylund, Randi Sigurdson and Lena R. L. Bendiksen (Brill/Nijhoff, 2019), 39–58, 43.

10 Act May 21, 1999 no. 30 om styrking av menneskerettighetenes stilling i norsk rett [The Norwegian Human Rights Act], See sections 2 no. 4 and 3, stating that the CRC is to be seen as part of Norwegian law with priority over conflicting legislation.

11 Doc. 16 (2011–2012), *Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven* (December 19, 2011), sections 32.1, 32.5.1 and 32.5.2, and Recommendation from the Parliament committee no. 169 (2012–2013), *Innstilling fra kontroll- og konstitusjonskomiteen om rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven*, section 1.8.14.

12 The right to privacy, as protected in Article 16 of the CRC, is covered by this provision.

13 Section 102 of the Norwegian Constitution.

14 Henriette Sinding Aasen and Mette Hartlev, "Human Rights Principles and Patient Rights," in *Health and Human Rights: Global and European Perspectives*, 2nd edition, eds. Brigit Toebes, Mette Hartlev, Aart Hendriks and Henriette Sinding Aasen (Intersentia, 2022), 53–91, 57–60 and 70–82.

rights are to be protected with regard for parental rights and responsibilities; cf. CRC Article 3 second paragraph and Article 18 first paragraph. Article 5 of the CRC proclaims that States Parties “shall respect the responsibilities, rights and duties of parents [...] 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 recognised in the present Convention.” This provision recognises parental rights as well as children’s evolving capacities when it comes to exercising Convention rights.

11.3 VULNERABILITY AND CAPABILITY – THEORETICAL PERSPECTIVES¹⁵

11.3.1 Introduction

The discussion in this chapter concerns the right of adolescents to give consent to healthcare. The Norwegian Patient and User’s Right Act contains 1) the main rule of entitling children to consent to healthcare from the age of 16, with the corresponding right of parents to consent on behalf of children below 16, and 2) special regulation entitling adolescents 12–16 years to consent on their own if certain conditions are fulfilled. Concepts of vulnerability and capability are informative for understanding the legislative objectives underpinning the regulation. Therefore, before turning to the specific legal provisions in the Patient and User’s Rights Act, I briefly present the basic ideas of the vulnerability and capability theories and their implications for human rights and the legal issues discussed in this chapter.

11.3.2 Vulnerability and Human Rights

The term “vulnerable” originates from the Latin word *vulnus*, which means “wound”.¹⁶ As human beings, both children and adults are vulnerable. We may all be harmed in different ways: physically, emotionally, socially, financially and in our relations with others. We may be victims of violence, discrimination, accidents, natural disasters, pandemics, diseases, etc., and we are destined to become

15 This section builds on my chapter: Henriette Sinding Aasen, “Vulnerability and Autonomy: Competing Perspectives in Human Rights,” in *Health and Human Rights: Global and European Perspectives*, 2nd edition, eds. Brigit Toebes, Mette Hartlev, Aart Hendriks and Henriette Sinding Aasen (Intersentia, 2022), 221–255.

16 Lourdes Peroni and Alexandra Timmer, “Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law,” *International Journal of Constitutional Law*, vol. 11(4) (October 2013): 1056–1085, 1058.

old, lose physical and mental capacity, and depend more on caring relationships.¹⁷ As pointed out by Fineman,¹⁸ vulnerability is an inherent and constant aspect of the human condition, applying to all human beings in all social and political systems, calling for responsive legal and social structures. Mary Neal observes that “[w]ithout vulnerability, there would be no need for healthcare, or law, or ethics”.¹⁹ The Universal Declaration of Human Rights (UDHR) and the adoption of human rights conventions and monitoring bodies are founded on concerns regarding embodied (universal) vulnerability and particular vulnerabilities related to certain groups.²⁰

Despite human beings’ vulnerability – and not least that of children – the liberal idea and notion of free and independent subjects capable of pursuing their own interests is also strong in the human rights doctrine, with its historical roots in the Enlightenment and theories of the social contract:

Society is constituted through a social contract, and autonomous and independent individuals interact with the state and its institutions, as well as with each other, through processes of negotiation, bargaining, and consent.²¹

Principles of respect for individual autonomy (consent) and privacy rights are strong in medical law protecting patient rights. These rights also protect children’s interests in the health context.²² Still, it is fair to say that the idea of liberal and independent subjects falls short in many situations, relations and contexts, not corresponding to the realities of many people,²³ including children.

17 Jonathan Herring, “Ageing and Universal Beneficial Vulnerability,” in *Embracing Vulnerability. The Challenges and Implications for Law*, eds. Daniel Bedford and Jonathan Herring (Routledge, 2020), 63–79. Herring observes that in old age, “we become most apparently what we always have been: vulnerable, frail and mutable” (75).

18 Martha Albertson Fineman, “Equality, Autonomy, and the Vulnerable Subject in Law and Politics,” in *Vulnerability. Reflections on a New Ethical Foundation for Law and Politics*, eds. Martha Albertson Fineman and Anna Grear (Ashgate, 2013), 13–29.

19 Mary Neal, “The Idea of Vulnerability in Healthcare Law and Ethics: From the Margins to the Mainstream?” in *Embracing Vulnerability. The Challenges and Implications for Law*, eds. Daniel Bedford and Jonathan Herring (Routledge 2020), 91–114, 91. Neal challenges the idea that vulnerability is something harmful and undesirable to be reduced as far as possible (97–99). She points out that vulnerability traditionally has been understood “through the lens of the ‘ideal’ of the autonomous, self-determining patient, and seen as an obstacle to that ideal” (99).

20 Peroni and Timmer, “Vulnerable Groups,” 1056–1085.

21 Fineman, “Equality, Autonomy,” 13–29, 17.

22 See section 11.4 below, where consent and privacy issues are discussed.

23 Fineman, “Equality, Autonomy,” 13–29, 17–24; Peroni and Timmer, “Vulnerable Groups,” 1056–1085, with further references, 1061–1063.

Even if vulnerability is a common aspect of the human condition, certain individuals or groups are considered more vulnerable to human rights violations than others.²⁴ Individual and social factors may indicate that some people are particularly vulnerable to human rights violations. Over time, the international community has recognised the need to supplement the general human rights conventions²⁵ with more focused instruments targeting the vulnerabilities and needs of various groups. The CRC is a specific instrument addressing children's human rights and special vulnerabilities. The strategy of separate instruments for different groups, despite protecting the same basic rights, renders visible the great variations in the human condition and the different ways in and different reasons for which humans are vulnerable.²⁶

Many factors may impact on children's vulnerability,²⁷ such as family environment and socio-economic situation, health and functioning, age, level of development and maturity, social support and relations. Some factors are of a structural nature, while other factors are associated with individual characteristics or behaviour, such as individual maturity or engaging in unsafe sex.²⁸ The vulnerability of children is especially due to their dependency on adults to take care of them and/or protect their interests, which makes them exposed to exploitation, violence, abuse and neglect.²⁹ Therefore, many of the CRC provisions oblige states to protect children against various harmful actions³⁰ and to ensure their basic needs through appropriate information and health and social services.³¹ Children's dependency on parents makes them particularly vulnerable to human rights violations in the family setting. But even responsible and well-intended parents could make decisions with potential harmful consequences, e.g., if they fail to listen to

24 Peroni and Timmer, "Vulnerable Groups," 1056–1085, 1060–1061 and 1063–1070, with references to ECtHR case law.

25 International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR), both adopted by the UN on 16 December 1966.

26 Fineman, "Equality, Autonomy," 13–29, 20–22.

27 Mary Neal argues that vulnerability "is a prerequisite for, and a component of, the value of human dignity", in the same way as autonomy is only one aspect of dignity; Neal, "The Idea of Vulnerability," 91–113, 108.

28 UN Committee, on the Rights of the Child, *General Comment no. 4 (2003), Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, CRC/GC/2003/4, (July 1, 2003), para. 34.

29 CRC/GC/2003/4, para. 12. See also Doc. 16 (2011–2012), 191.

30 See, for example, Articles 16, 19, 22 and 24(3).

31 See Articles 13, 20, 23, 24, 26 and 27. See CRC/GC/2003/4, paras. 10, 26, 28, 35 and others.

the child and neglect their needs and perspectives. Also, in such situations, the child's dependency and lack of autonomy create vulnerability for damage.

However, a general assumption that all children are vulnerable and not able to protect their own interests creates risks of generalisations and victimisation which could be potential barriers for realising children's rights.³² The overarching duty of securing the best interests of the child, the right to participate in decisions affecting them, and the right to make decisions according to age and maturity all require individual assessments of the particular circumstances, needs and capacities of each child, thereby counteracting dangers of generalisations.³³

11.3.3 Capability and Human Rights

In the 1980s, the Indian economist and philosopher Amartya Sen,³⁴ followed by the American ethicist and legal scholar Martha Nussbaum, developed new knowledge on the importance of including human capabilities in the reasoning of welfare state economics, social choice theory and social justice ("the capability approach"). *Capabilities* are possible types and levels of individual functioning which are feasible for a person to achieve. Sen observed the close connection between human rights and human capability, asserting in his theory of justice that human rights values, freedoms and entitlements contribute to the enhancement of human agency and capability.³⁵ This approach indicates the perspective that human rights should be understood as instruments of enhancing and strengthening human capability, including the capability to live a healthy life.³⁶ Among the core capabilities which according to Nussbaum should be supported by all democratic societies are those connected to life, health and integrity, including the capability of survival and dignified existence, the ability to pursue a healthy life, the ability to make reproductive choices, and the ability to live free from violence and oppression.³⁷

The capability approach, understood as a systematic approach of strengthening human capabilities to live dignified lives according to individual preferences,

32 Peroni and Timmer, "Vulnerable Groups," 1056–1085, 1070–1073.

33 Mona Martnes, "Barns autonomi og barnevaksinasjonsprogrammet," in *Menneskerettigheter i helse- og omsorgstjenesten*, eds. Henriette Sinding Aasen and Marianne Klungland Bahus (Universitetsforlaget, 2022), 329–351, 346–350, with further references.

34 Amartya Sen, *Inequality Reexamined* (Clarendon Press, 1992).

35 Amartya Sen, *The Idea of Justice* (Penguin Books, 2009), 321–388, 381.

36 Brigit Toebes, "Synergies and Tensions in the Health and Human Rights Frameworks," unpublished manuscript.

37 Martha Nussbaum, "Capabilities as Fundamental Entitlements: Sen and Social Justice," *Feminist Economics*, vol. 9(2–3) (2003): 33–59.

provides a quite different perspective than the focus on vulnerability. Rather, the capability approach is oriented towards strengthening individual capacities and is thereby more connected to individual autonomy and agency. Both vulnerability and capability perspectives and approaches are important to capture essential aspects of human rights values, principles and objectives. They should be seen as supplementary rather than contradictory in the human rights discourse.³⁸ The vulnerability and capability perspectives applied to children in the health field imply respectively adequate protective measures as well as the securing of avenues for individual empowerment and strengthening of individual capabilities.

Building on Rogers et al., Neal points out that when persons are both vulnerable and capable of autonomy, an appropriate balance must be found between protection and support for autonomy. Theories of *relational autonomy*, premised on human dependency but still recognising the human need for individual choice and autonomy, seem adequate in healthcare due to the intimate nature of the subject.³⁹ Rogers et al. argue that “a relational approach is committed to the view that the obligations arising from vulnerability extend beyond protection from harm to the provision of the social support necessary to promote the autonomy of persons who are more than ordinarily vulnerable”.⁴⁰ In that sense, vulnerability and capability perspectives supplement each other.

In the following, I explore provisions mainly in the Norwegian Patient and User’s Rights Act, using vulnerability and capability perspectives in the assessment of the balancing of rights and duties of adolescents, parents and health providers.

11.4 CHILDREN AND HEALTHCARE DECISIONS – THE NORWEGIAN REGULATION

11.4.1 Points of Departure

Generally, children have a right to receive care and consideration from their parents, while parents have a right to make decisions for children in personal matters, within limits specified by law.⁴¹ Parental authority shall be exercised based

38 Toebes, “Synergies and Tensions in the Health and Human Rights Frameworks.”

39 Neal, “The Idea of Vulnerability,” 91–114, 108–109, with reference to Wendy Rogers, Catriona Mackenzie and Susan Dodds, “Why Bioethics Needs a Concept of Vulnerability,” *International Journal of Feminist Approaches to Bioethics*, vol. 5(2) (Fall 2012): 11–38. See also Francesca Ippolito, *Understanding Vulnerability in International Human Rights Law* (Editoriale Scientifica, 2020), 12–15.

40 Quoted from Neal, “The Idea of Vulnerability,” 91–114, 108.

41 Act April 8, 1981, no. 7 on barn og foreldre [Norwegian Act on Children and Parents], section 30 first paragraph.

on the interests and needs of the child and with regard for the child's right to participation and self-determination according to age and development.⁴² Parents have a duty to recognise children's evolving capacities; cf. section 33 of the Act on Children and Parents, saying that parents shall give the child increasing self-determination in personal matters ("sjølvråderett") as he or she grows older, until majority is reached at the age of 18.⁴³

When it comes to healthcare decisions, the Patient and User's Rights Act applies *lex specialis*. While the ordinary age of majority is 18, it is 16 in the health context, due to the recognition of health issues as particularly personal or intimate. The main rule is that adolescents *from the age of 16* are seen as generally capable of giving informed consent to or rejecting healthcare. Parents⁴⁴ are entitled to give informed consent or reject treatment on behalf of children below 16.⁴⁵ The right of adolescents to consent on their own from the age of 16 applies unless special legislation or the nature of the intervention (e.g., invasiveness or minor interventions) dictates or indicates otherwise.⁴⁶

The Sterilisation Act⁴⁷ requires a capable person of sound mind who seeks *sterilisation* to be 25 years of age (section 2). A new provision in the Patient and User's Rights Act sets an age limit of 18 for cosmetic surgery or interventions without medical indication, not even with parental consent (section 4-5a). Moreover, only patients above 18 have a right to reject treatment with blood due to a serious conviction or to reject life-extending treatment.⁴⁸ In cases of *emergency*, health providers according to the Health Personnel Act⁴⁹ section 7 are under an obligation

42 Sections 31 and 33. See parallel obligations in the CRC, Articles 3, 5, 12 and 18(1).

43 See corresponding provision in Article 5 of the CRC.

44 In the following, the term "parents" means persons with parental responsibility for the child, normally the mother and father, a legal guardian or the child protection service.

45 Section 4-3 first paragraph *litra* (b) and section 4-4 first paragraph. Section 4-4 gives detailed regulations for situations when parents are divorced or disagree about proposed treatment, which will not be discussed here. See Trude Haugli and Randi Sigurdson, "Om foreldreansvar og barns rett til helsehjelp" [On parental responsibility and children's right to healthcare], in *Likestilling, barn og velferd, rettsfelt i utvikling* [Equal rights, children and welfare], eds. Sigrid Eskeland Schütz, Ragna Aarli and Henriette Sinding Aasen (Gyldendal, 2020), 366–384.

46 Section 4-3 first paragraph *litra* (b).

47 Act June 3, 1977, no. 57 om sterilisering [Norwegian Act on Sterilisation].

48 Norwegian Patient and User's Rights Act section 4-9 first and third paragraph. Concerning complex issues related to life/death decisions involving children, see Marianne Klungland Bahun, "Beslutningskompetanse og barnets beste ved liv/død- avgjørelser til barn" [Life/Death Decisions Involving Children], in *Menneskerettigheter i helse- og omsorgstjenesten* [Human Rights in Health and Care Services], edited by Henriette Sinding Aasen and Marianne Klungland Bahun (Universitetsforlaget, 2022), 351–379.

49 Act July 2, 1999, no. 64 om helsepersonell [Norwegian Health Personnel Act].

to provide healthcare irrespective of age or consent, with a few exceptions. Parents are entitled to give informed consent on behalf of patients between 16 and 18 years *without consent capacity*, as long as the patient does not oppose the treatment.⁵⁰ If a patient aged 16–18 opposes treatment, the treatment must be allowed by particular legislation.⁵¹ The alternative *nature of the intervention* in Patient and User's Rights Act section 4-3 first paragraph *litra* (b) concerning patients between 16 and 18 is typically applicable in case of a serious procedure, such as a risky or potential life-changing or threatening operation, which a 16- or 17-year-old child is not seen as competent to consent to alone. The above-mentioned legislation will not be discussed further in this chapter.

All children are entitled to information necessary for meaningful participation in the decision-making process concerning healthcare.⁵² They have a right to age-appropriate information according to the individual child's capacity, maturity, language, etc.,⁵³ and a right to express their views about proposed healthcare. The child's right to be informed and participate does not depend on a particular age but rather on the ability of each child to give and receive information. Children who are able to form their own opinions shall receive information and be heard. Their views shall be taken into account in accordance with age and maturity.⁵⁴ According to section 4-4 last paragraph (last sentence), the opinion of a child who has reached 12 years *shall* be given great weight.

This absolute requirement could be somewhat problematic if the child is clearly immature for their age. Even younger children's opinions should be given great weight if the understanding and maturity of the child indicate so. Previous experiences could play a significant role and in fact be more important than age.⁵⁵ The reference to a particular age could hide the most essential aspect of child participation, namely, that the child understands what is at stake and is able to make up their own mind.⁵⁶ Neither the Constitution Section 104 nor the CRC Article 12 mentions a particular age for when the opinion of the child should have great

50 Norwegian Patient and User's Rights Act section 4-5 first and last paragraph.

51 Ibid., last paragraph. For psychiatric healthcare, the Act July 2, 1999, no. 62 om etablering og gjennomføring av psykisk helsevern [Norwegian Act on Psychiatric Healthcare] applies concerning consent and requirements for coercive interventions. These provisions will not be discussed further.

52 Norwegian Patient and User's Rights Act sections 3-1 first paragraph and 3-2 first paragraph.

53 Ibid. section 3-5.

54 Norwegian Patient and User's Rights Act sections 3-1 first paragraph last sentence and 4-4 last paragraph.

55 Haugli and Sigurdson, "Om foreldresvar," 366–384, 383.

56 Sandberg, "Children's Right to Participation," 71–89, 88.

influence on decisions. Age limits are not in direct conflict with the CRC;⁵⁷ however, referring to evolving capacities would be more in line with Article 5 in the CRC.⁵⁸

In the following, we will concentrate on the special rules in the Norwegian Patient and User's Rights Act regarding adolescents aged 12–16.

11.4.2 Special Regulation for Adolescents Aged 12–16 Years

Overview

The term “child” includes individuals from 0–16 years of age in the health context (cf. section 4–3 of the Patient and User's Rights Act),⁵⁹ thereby covering a broad range of ages and stages of development. Maturity is a gradual phenomenon and with great individual variations. Adolescents, in contrast to younger children, will often be able to make rational and reasonable choices and decisions for themselves. Furthermore, certain healthcare decisions may be of a particular sensitive or personal nature. This is why the Patient and User's Rights Act has special regulations in sections 3–4 and 4–3 concerning information and consent for adolescents between 12 and 16 years of age. The regulation indicates the view that parental involvement in some situations may conflict with the wishes and even the best interests of a young person. In the following, the focus will mainly be on children aged 12–16, although younger children will be mentioned a few times when relevant.

Overall Legislative Objective: Securing the Right to Health

The Norwegian regulation is, in line with Article 24 of the CRC, motivated by the objective of securing children's right to health. More specifically, the legislative intention is to enable persons between 12 and 16 years of age to access healthcare, information and advice, for example, from the school nurse or a community doctor, without fearing that parents will be automatically informed.⁶⁰ The assumption is that adolescents may choose not to use the health service if they fear parental

57 The CRC Committee states that “laws or regulations should stipulate an age [...] or refer to the evolving capacity of the child,” UN Committee on the Rights, *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, CRC/GC/2003/4, (July 1, 2003) para. 29.

58 Sandberg, “Children's Right to Participation,” 71–89, 88.

59 For the purposes of the CRC, a child means “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier” (Article 1).

60 Draft resolution no. 75 (2016–2017) 86.

involvement. Securing accessibility to all is a leading principle in health service provision.⁶¹ A related objective is to secure trust in the health service, which is a fundamental principle in securing that people use the health service,⁶² also emphasised in the Norwegian Patient and User's Rights Act.⁶³ Thus, despite the main rule that parents have a right to consent on behalf of their children below the age of 16, in situations where the consequence could be that young people will not use the health service, or not be open about health issues and therefore not receive adequate care, priority is given to adolescents' privacy.⁶⁴ The balancing of parental rights versus the rights of adolescents is formulated in the Patient and User's Rights Act section 3–4 second paragraph in the following way: information *shall not be given to parents* when the child for *reasons that should be respected* ("av grunner som bør respekteres") is against it.

"Reasons That Should Be Respected"

All healthcare provision must be based on valid consent from the patient or a legal representative.⁶⁵ One consequence of entitling adolescents to give informed consent and not involving parents is that parental informed consent is not obtained.⁶⁶ Section 4–3 first paragraph *litra* (c) entitles adolescents to give informed consent without parental involvement in situations covered by section 3–4 second paragraph, i.e., when the young person expresses *reasons that should be respected* for not involving parents. In such situations, the law acknowledges that a person between 12 and 16 years of age may have sufficient personal capacity to give informed consent, given that age-appropriate information and support from the health service are provided. If there is reason to believe that parents should not be involved, the child must as soon as possible be informed about 1) parents' right to information and 2) the exceptions from the main rule.⁶⁷ The preparatory work stresses the importance of informing children that what they tell will not automatically be shared with

61 Committee on Economic, Social and Cultural Rights, *General Comment no. 14, The Right to the Highest Attainable Standard of Health* (Art. 12), E/C.12/2000/4 (August 11, 2000) paragraph 12 *litra* (b).

62 See statements in the European Court of Human Rights, *Case of Z v. Finland* (Application no. 22009/93, Strasbourg: Judgment February 25, 1997).

63 Section 1-1 second paragraph.

64 Draft resolution no. 75 (2016–2017) 23.

65 This is established in case law by the European Court of Human Rights and put forward in the Norwegian Patient and User's Rights Act sections 4-1, 4-4, 4-5, 4-6 and 4-7.

66 This is stressed several times in the preparatory work; see Draft resolution no. 75 (2016–2017) 27, 28, 32.

67 Section 3-4 fifth paragraph.

parents. Such assurance should be given as early as possible to establish necessary trust and security for children to talk about their concerns.⁶⁸

The preparatory work emphasises that the alternative *reasons that should be respected* supplement the *nature of the intervention* alternative (in the same provision in section 4–3) which would typically allow children aged 12–16 to consent to minor, non-serious and non-controversial interventions, e.g., in the school setting. An example given for *reasons that should be respected*, however, reflects a far more serious situation where cultural norms are involved: a young girl seeking health-care due to a previously performed genital mutilation, requesting confidential healthcare.⁶⁹ Female genital mutilation is strictly forbidden in Norway.⁷⁰ Despite the fact that such mutilations often happen before the girls arrive in Norway,⁷¹ they are still controversial and stigmatising for both victims and parents. Healthcare will naturally aim to reduce pain and problems for the patient as much as possible. Involving parents could lead to additional problems for the girl. Therefore, her wish not to inform them should be respected.

The alternative *reasons that should be respected* apply in situations where parents would prefer to be contacted, or ideally should be involved in assisting their child, but where the young person for legitimate reasons does not want this. The preparatory work mentions mistreatment, parents' strong convictions, the need for advice on contraceptives or abortion, and non-serious psychological problems due to bullying as examples of such legitimate reasons.⁷² The wording (reasons that should be respected) indicates some kind of assessment of the child's expressed wishes. The preparatory work indicates the same, e.g., by using the formulation that parents should not *automatically* be contacted⁷³ and stressing that this is a special case or an exception from the main rule of parental consent for children below 16.⁷⁴

The child must be perceived as sufficiently competent to understand relevant age-appropriate information necessary for valid consent. If the child clearly does not understand the situation, for example, the seriousness of his/her health condition or the implications of a particular health intervention, parents must be

68 Draft resolution no. 75 (2016–2017), 86.

69 Ibid., 28.

70 Act May 20, 2005, no. 27 om Straff [Norwegian Act on Criminal Offences], sections 284 and 285.

71 Official Norwegian Reports (NOU) 2024: 13 *Lov og frihet: Negativ sosial kontroll, æresmotivert vold, tvangsekteskap, kjønnslemlestelse, psykisk vold og ufrivillig utenlandsopphold – juridiske problemstillinger og forslag til regelverksendringer* [Law and freedom: Negative social control, forced marriage, genital mutilation, psychological violence and involuntary stay abroad – legal issues and suggested legislative changes], 222.

72 Ibid., 17, 86.

73 Ibid., 26, 86.

74 Ibid., 17, 29, 32.

contacted to ensure informed decision-making and valid consent. Parents are entitled to the information they need to fulfil their parental responsibility.⁷⁵ Likewise, if the adolescent is seen as incapable of safeguarding his/her best interests in a reasonable manner, the health provider must contact the parents. This would be the case if the child needs to go to hospital, e.g., due to life-threatening or serious illness, risk of suicide or serious injury. Injury after drinking and driving is an example where parents should be contacted even if the child has reason to be afraid of strict reactions. Serious mental conditions, danger of self-harm, use of illegal drugs and serious physical injuries due to involvement in criminal activities are also examples where parents should be contacted to be able to fulfil their parental responsibilities, unless the child protection service should be contacted.⁷⁶ Another situation could be a 14-year-old girl having a sexual relationship with a much older man or a child who it seems is being abused or mistreated in a relationship. Parental involvement may be urgent to take care of the child and prevent further harm. However, if the parents are themselves abusive or seriously neglect the child, health staff must contact the child protection service.

The preparatory work refers to a statement by the Health Directorate saying that in a situation where the child is found to be capable of handling its own interests in a sensible manner, *and* it is questionable whether parents are acting in the best interest of the child, the justification for the rights of parents lapses.⁷⁷ This statement could indicate that if the health provider, after having listened to and discussed with the child, is not convinced that the parents will behave inadequately, the conditions are not fulfilled. Thus, if the health provider finds that it would most likely be in the best interest of the child to contact parents after having considered the situation carefully, the justification for leaving the decision to the child seems to be lacking, according to statements in the preparatory work. This understanding is supported by statements⁷⁸ referring to the right and duty of parents to make decisions on behalf of their children in personal matters and that in most situations parents are in the best position to take care of their children's best interests, given that the child's evolving capacities are acknowledged. In section 4.2.5 below, we will come back to the question of how to balance the different considerations and interests at stake in these situations.

75 Norwegian Patient and User's Rights Act section 3-4 fourth paragraph.

76 Draft resolution no. 75 (2016–2017) 17, 86. According to the Health Personnel Act section 33, health staff are obligated to report to the child protection service immediately if there is reason to believe that a child is mistreated, seriously neglected, or suffering from a life-threatening illness or injury which is not taken care of or if a child shows serious behavioural problems.

77 Draft resolution no. 75 (2016–2017), 28.

78 Draft resolution no. 75 (2016–2017), 23.

“Weighty Regard to the Child”

Irrespective of the child’s age, health personnel may not inform parents in situations where weighty regard for the child (“tungtveiende hensyn”) speaks against it. The provision is meant to be a narrow exception from the main rule of parental consent. The preparatory work mentions serious neglect and intimate issues such as gender identity, sexuality, psychosocial problems or other severe problems experienced by the child.⁷⁹ The main concern is to include situations where the child is either below 12 years old or is not capable of expressing particular reasons for not involving parents, but where the health personnel have evidence (e.g., due to earlier contact with the parents) to conclude that it would not be in the child’s best interest to involve parents. This could be the case if informing parents would put the child in danger or in a more difficult situation, in cases of parental abuse or serious neglect, or if parental involvement would prevent the child from giving information that could help the child to access necessary healthcare.⁸⁰

If the child is below 12, health personnel are entitled to make decisions about strictly necessary interventions which are not intrusive regarding nature or duration. Such decisions may only be taken for a limited period until a valid consent from a legal representative can be obtained.⁸¹ If the child is between 12 and 16, and parents are not to be involved, the child should consent alone, or the child protection service must be contacted if the conditions in the Health Personnel Act section 33 are fulfilled.⁸² In the following, the difficulties of balancing rights and duties will be further discussed.

Balancing Rights and Duties

The preparatory work emphasises that both the second and third paragraphs in section 3-4 aim at balancing considerations of, respectively, young patients’ autonomy and parental care and responsibility, stressing the importance of securing parents’ information necessary for fulfilling their parental responsibility.⁸³ The *reasons that should be respected* alternative in the second paragraph is rather vague and could open up for different practices, for example, more liberal in certain areas and more restrictive in others. The preparatory work and administrative guidelines provide some direction, especially by giving examples (see above). But still,

79 Draft resolution no. 75 (2016–2017), 85.

80 Ibid., 86.

81 Section 3-4 third paragraph of the Norwegian Patient and User’s Rights Act.

82 See note 76 above.

83 Ibid., 17–18.

the legal situation is not clear and predictable regarding when it is justified to leave parents out. What about situations where there is no reason to believe that parents are neglecting the child or are otherwise problematic parents? How far should health providers go in respecting the wishes of adolescents not to inform parents when they are below the age of 16? And how should health staff act if the child opens up in confidence that parents will not be contacted, but the health provider after all finds that parents should be involved?

Regarding the alternative *weighty regard to the child* (see above), the preparatory work emphasises that in a situation where a child opens up about his/her problems, and the health personnel find that worries are exaggerated and that it would be best to involve parents, they should explain why and try to convince the child to agree to inform the parents.⁸⁴ This strategy should also be used in situations where adolescents aged 12–16 express legitimate views for why parents should not be involved according to *the reasons that should be respected* alternative, i.e., where the consultation reveals that worries seem exaggerated and that non-involvement of parents may not be in the child's best interest. Clearly, these situations require a concrete and thorough assessment of the information available, and health personnel might experience difficulties in finding the right solution.⁸⁵

However, if the child is above the age of 12, and the child has opened up trusting that parents will not be contacted, it is essential to preserve the child's trust and secure her/him access to professional care. Health personnel cannot first encourage the child to open up under the promise of confidentiality and thereafter contact the parents. This would be a breach of the promise and a violation of the Patient and User's Rights Act section 3-4 second paragraph.⁸⁶ The dilemma confronting health personnel is at the same time an illustration of the child's dependency and vulnerability due to insecurity of how health personnel will respond.⁸⁷

An example illustrating this dilemma is if a 14-year-old girl who is being sexually active with her boyfriend of the same age⁸⁸ contacts the health service for

84 Draft resolution no. 75 (2016–2017), 24, and Health Directorate, *Regulation: Patient and User's Rights Act with comments*, updated November 16, 2021, <https://www.helsedirektoratet.no/rundskriv/pasient-og-brukerrettighetsloven-med-kommentarer> (visited November 23, 2022).

85 Henriette Sinding Aasen, "Barnets rett til medvirkning, selvbestemmelse og privatliv ved helsehjelp" [The Child's Right to Participation, Self-Determination and Privacy in Relation to Healthcare], in *Barnekonvensjonen i norsk rett. Prinsipper og praksis*, eds. Ingun Fornes, Anna Nylund and Kari Sperr (Gyldendal, 2023), 141–165, 158.

86 Ibid., 159.

87 See section 11.5 below.

88 In Norway, sexual intercourse with a person below 16 is illegal according to the Norwegian Act on Criminal Offences, May 20, 2005 No. 28 section 302. Sexual intercourse or relations with a person below 14 is defined as rape (section 299).

contraceptives. The penalty for sexual intercourse may according to the Act on Criminal Offences lapse⁸⁹ when “victim” and “offender” are of the same age and maturity⁹⁰ and the relationship is obviously voluntary. If the partner is much older, sexual intercourse or activity will be a criminal offence. In that case, health personnel cannot avoid reporting to parents, and even to the police if necessary, in order to prevent serious harm.⁹¹ If the relationship is with a partner of the same age and maturity, and no exploitation or pressure is suspected, reporting to parents, the child protection service or police may conflict with both confidentiality rights and the best interests of the child. Respecting the needs of the child would involve securing access to contraceptives and guidance from health professionals on safe sex and other relevant issues brought up in a confidential setting. In this situation, the girl has *reasons that should be respected* for not involving parents, if she is clearly worried that contacting them could lead to punishment or other harsh reactions.

If the girl is below 14, however, according to the law she is not capable of giving consent to sexual intercourse or relations.⁹² However, in 2020, section 196 in the Act on Criminal Offences on the general duty to avert such relations – e.g., by reporting to parents or police – was amended. The situation now is that the duty to avert sexual relations does not apply when the children are of the same age and maturity, specified in the preparatory work as around two years’ difference.⁹³ The Supreme Court has specified that when the parties are of the same age and maturity, only particular reasons (abuse, exploitation) can justify punishment. If the child is below 14, an age difference greater than three to three and a half years will be seen as punishable.⁹⁴ Holmboe points out that for health personnel it could be challenging to apply section 196 in the Act on Criminal Offences.⁹⁵

When it comes to sexuality, the legal regulation clearly presumes a close examination by health personnel of the nature of intimate relations, maturity and age of partner when young patients seek assistance to avoid unwanted pregnancies.

89 The formulation signals that the sexual relationship could be a criminal offence, which views adolescents as potential criminal offenders when they are sexually active.

90 Norwegian Act on Criminal Offences, section 308.

91 Norwegian Health Personnel Act, section 31.

92 Morten Holmboe, “Taushets- og opplysningsplikt i helsesektoren – menneskerettighet mot menneskerettighet” [Confidentiality and Information in Healthcare – Human Rights in Conflict], in *Menneskerettigheter i helse- og omsorgstjenesten* [Human Rights in Health and Care Services], eds. Henriette Sinding Aasen and Marianne Klungland Bahus (Universitetsforlaget, 2022), 96–122, 111.

93 Ibid., 119.

94 Ibid. with reference to Norwegian Supreme Court Judgement, Rt. 2003, 342 and HR-2017-579.

95 Ibid.

The potential threat of punishment makes the situation unpredictable, and young persons in need of contraceptives – also those above 14 – may choose to stay away from the healthcare service to avoid unwanted infringements by parents or even the police.

The CRC Committee emphasises the right of adolescents to give informed consent according to their maturity and the importance of schools and other venues to help the child develop a healthy lifestyle and to provide adolescents with essential information on safe sexual behaviour.⁹⁶ Youth-specific services tailored to the needs of young persons have proven to improve accessibility to young persons.⁹⁷ In Norway, municipalities have established health services for young persons to meet the need for information and advice. In Bergen, for example, there is a free-of-charge drop-in service for persons between 13–25, where they can get advice from a nurse or doctor about contraceptives, pregnancy and abortion. Moreover, issues like eating problems, depression, sorrow, loneliness, difficulties in the family, drugs, violence, abuse and bullying are emphasised.⁹⁸ These are issues where parents ideally should be involved, especially if the child is below 16. However, as described, parents are not always in a position to assist their children, and it is therefore necessary to provide confidential services for young people, in line with the requirements and limits outlined above.

As mentioned, the preparatory work to the Patient and User's Rights Act concerning the regulation of consent leaves the impression that the exceptional rule for adolescents aged 12–16 is somewhat linked to the notion of an irresponsible parent, situations of conflict between the child and their parent(s) or parents with strong convictions that are likely to be a barrier to the child's access to particular health services.⁹⁹ But what about the situation where none of these reasons exists? A girl aged 14/15 wants contraceptives to avoid pregnancy, and at the same time explains that her parents most likely would support her, but she does not want to bother them due to other social problems in the family, and she is also embarrassed and expresses the view that it is her body and she should be able to make that decision herself, especially since the outcome could be an unwanted pregnancy. It seems clear that she will continue to have sex with her boyfriend(s), and she seems able to protect herself from abusive relations. Most parents would

96 CRC/GC/2003/4, paras. 17, 28, 30 and 32.

97 Tobin, *The Right to Health*, with further references.

98 "Helsestasjon for ungdom, et gratis dropin-tilbud" [Health Center for adolescents, free of charge drop-in offer], Bergen Kommune, <https://www.bergen.kommune.no/innbyggerhjelpen/helse-og-omsorg/helsetjenester/helsestasjon-og-skolehelsetjeneste/helsestasjon-for-ungdom-et-gratis-dropin-tilbud> (Visited January 30, 2024).

99 See above in this section.

probably be worried about their child being sexually active at an early age with several partners. However, both parents and children often find it difficult to be open about sexuality and to discuss the matter in detail.

The overall objective of the legal regulation is to ensure that young persons have access to necessary health services, including sexual and reproductive care. Children have a right to necessary health services,¹⁰⁰ and girls have a right to seek abortion,¹⁰¹ which implies the necessity of legal protection from infringements which could imply barriers to access services. When it comes to intimate health concerns such as sexuality and reproduction, adolescents' right to autonomy, privacy and confidentiality is strongly emphasised by the CRC Committee:

In accordance with their evolving capacities, children should have access to confidential counselling and advice without parental or legal guardian consent, where this is assessed by the professionals working with the child to be in the child's best interests ... States should review and consider allowing children to consent to certain medical treatments and interventions without the permission of a parent, caregiver, or guardian, such as HIV testing and sexual and reproductive health services, including education and guidance on sexual health, contraception and safe abortion.¹⁰²

The conditionality following from "to be in the child's best interests" in the quote must be related not only to leaving parents out but also to the potential outcome that the young person will not use the healthcare service when needed in the future. This could mean a breach of the right to health; cf. CRC Article 24. This is clearly not in the best interest of the child, and should be a main consideration when interpreting the provisions in the Norwegian Patient and User's Rights Act section 3-4.

Vaccination is another theme which could potentially create conflict between children and parents. If a child is mature and expresses convincing reasoning for wanting a particular vaccination, which is also recommended by health authorities, but fears serious conflict or negative reactions from parents, it seems reasonable to assert that a child below 16 should be entitled to give informed consent

100 Norwegian Patient and User's Rights Act sections 2-1 a) and 2-1 b).

101 Act June 13, 1975, no. 50 om svangerskapsavbrudd [Norwegian Act on termination of pregnancy]. If the girl is under 16, parents are entitled to give a statement ("uttale seg") unless special reasons speak against it (section 4).

102 UN Committee on the Rights of the Child, *General Comment no. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24)*, CRC/C/GC/15, (April 17, 2013), para. 31.

independently.¹⁰³ In this situation, parents are acting against general advice from the health authorities, and in that regard could be seen as not fully living up to the ideal of a responsible parent. According to the logic in the preparatory work (the child's right to consent is justified when parents are not trusted to act in the best interest of the child), such a failing, though small, could justify that a mature and informed child is entitled to consent. However, if the parents are generally responsible but strongly against vaccination due to fear of potential health risks, such resistance should not be held against them. They could even be seen as very responsible parents. Such resistance is clearly within what must be accepted in a democratic society. The right of the child to consent to vaccination should therefore be justified not with reference to parental irresponsibility but rather with reference to child capability and autonomy. Sandberg seems to have a similar understanding based on the CRC, saying that if parents to a normally capable 14–15-year-old child object to a doctor-recommended and non-controversial treatment “without reasonable grounds”, the decision should be left to the child.¹⁰⁴ If parental objection is based on strong convictions not shared either by the health service or by the child, respect for the child's evolving capacity is in best harmony with the CRC and section 104 of the Norwegian Constitution.¹⁰⁵

The overall duty of health personnel and other public servants is to secure the best interests of the child in terms of health, well-being and future development. An important assumption also stressed by the CRC Committee is that responsible healthcare personnel will assist the child in making the best possible decision, by providing objective and age-appropriate information and professional advice and support. The health worker must assess the entire situation, including the age of the patient, maturity, scope of treatment and family relations, and consider what would be the best solution for the child under the circumstances. The health worker does not need to fully agree with the choices made by the child, but must, however, make sure that the child is protected from criminal offences and that the child is able to make reasonable and voluntary decisions, e.g., by using contraception when having sex with different boys of her own age. The doctor or nurse may find that the child's behaviour is not ideal or completely safe, but still believe after conversing with the child that it is in her best interests to have a safe place to receive proper advice on safe sexual behaviour and contraception rather than contacting parents against her will and with the potential outcome that she will stay away from the health service in the future. Such an assessment is within the

103 Martnes, “Barns autonomi.”

104 Sandberg, “Children's Right to Participate,” 71–89, 88.

105 See section 11.2.

discretionary space left to health personnel according to the Patient and User's Rights Act.

11.5 VULNERABILITY AND CAPABILITY – FINAL REFLECTIONS

While children are traditionally seen as inherently vulnerable and dependent on the care of others, especially that of parents, Norwegian law acknowledges that respect for children's autonomy and privacy rights in certain situations is the most adequate way of protecting essential health and welfare interests. Children (adolescents) are thus seen as both vulnerable and capable. These perspectives complement each other insofar that by securing autonomy and privacy rights, they may reduce the young person's vulnerability to ill health. The regulation implies that an adolescent's rights to autonomy and privacy are prioritised over parental rights when this is considered the most adequate way of securing the child's best interests in terms of facilitating access to necessary health services. The best interests of the child, put forward in the CRC and the Constitution, are thus the balancing principle in the regulation, even though this principle is not mentioned in the Patient and User's Rights Act.

The legal term "free informed consent" is the gateway for accepting the consent as a legal basis for effectuating healthcare.¹⁰⁶ The right reflects the notion of an independent legal subject assumed capable of handling his/her own interests. When a child is put in the position of giving informed consent, the child is as all patients entitled to receive information adapted to individual prerequisites. The child is given responsibility for taking care of his/her own interests with assistance from a professional health provider, which could be called "relational autonomy" due to the assumed dependency on the healthcare worker.¹⁰⁷ As emphasised by Rogers et al., "relational autonomy" implies that "the obligations arising from vulnerability extend beyond protection from harm to the provision of the social support necessary to promote the autonomy of persons who are more than ordinarily vulnerable".¹⁰⁸ The quote captures the essence of this chapter, seeing the notions of vulnerability and capability as mutually interdependent, which supplement and reinforce each other. Persons in vulnerable situations need additional assistance to strengthen their autonomy and capability to make sensible decisions in difficult life situations.

106 Norwegian Patient and User's Rights Act section 4-1.

107 See Rogers, Mackenzie and Dodds, "Why Bioethics," quoted in section 11.3.2.

108 Ibid.

The terms “capacity” and “competency”, used to determine whether the young person is capable of making healthcare decisions, do not equate with the word “capability” as used in Sen’s theory. Capability theory is a theory about how human rights, generally and at the individual level, could enable human beings to achieve better functioning and more dignified lives, including health and well-being. In relation to children’s rights in the health setting, capability theory implies that children’s right to health should be respected and protected to ensure their optimal functioning and quality of life. This is also the overall objective of protecting children’s autonomy and privacy rights at the expense of parental rights: to secure access to necessary health services in situations where children’s dependency on parents could imply barriers to service accessibility. This could be the case even if parents are responsible and supportive, typically if the adolescent for various reasons does not want them to be involved in personal and sensitive matters at a given time. Capability theory provides an argument for respecting children’s autonomy and privacy rights as long as they have capacity to make reasonable decisions and involvement of parents could prevent them from receiving necessary healthcare.

Children’s capacity is not necessarily linked to a particular age, although age is often an indicator of the level of maturity. The 12–16 age range as specified in the Patient and User’s Rights Act section 3-4 second paragraph covers a wide scope of development stages, which in fact could occur both before and after the mentioned ages. The intention is to acknowledge children’s evolving capacities, which is in line with Article 5 of the CRC; however, the specification of ages may blur the most important issue: the individual child’s personal capacity and maturity. Section 104 of the Constitution protects the integrity of children without linking this to particular ages. This could imply that autonomy and privacy rights of children should primarily be protected in accordance with their personal capacity and maturity. Integrity protection is especially important in relation to personal and intimate issues such as healthcare.¹⁰⁹

Capability theory reflects the basic objective of the legal regulation, i.e., to empower children and make them less dependent and vulnerable, with the overall goal of securing access to necessary health services. In the situations covered by section 3-4 in the Patient and User’s Rights Act, there is not necessarily a conflict between respecting the child’s autonomy and privacy rights on the one hand and the protection of the child’s life, health and/or development on the other. Rather, these rights reinforce each other in securing the assumed best interests of the child. This may be the case even when the adolescent makes decisions that are not seen as the best lifestyle or relational choice. If the involvement of parents could

109 Haugli and Sigurdson, “Om foreldreansvar,” 366–384, 382.

lead to a worsened situation, such as a more serious mental or physical condition, it is in the best interests of the child to receive necessary care without parental involvement. The vulnerability perspective is inherent in the assessment of the child's situation with the overall purpose of securing the child adequate support in a difficult life situation.

One problem with the legislation is the wording's discretionary nature, creating legal insecurity for children, parents and health professionals alike. Haugli and Sigurdson point out that children's right to health is linked to the rights of parents to make decisions on their children's behalf and that consent issues are seldom discussed in publicly available cases.¹¹⁰ Regarding the regulation of consent issues for adolescents, formulations like "nature of the intervention", "reasons that should be respected", "weighty regard to the child", as well as the "best interests of the child", are all open for a range of views, opinions and priorities which could lead to different interpretations and outcomes. Since all human rights of children aim at securing their best interests, while parents are children's primary caretakers, it is difficult to balance the various rights and duties, even for lawyers and experienced health staff.¹¹¹

Physical and mental health belong to the personal and intimate sphere of all individuals. Especially sexual and reproductive health issues and sexual behaviour of young people are typical areas of taboo, diversity, and tension between adolescents and parents, and even among health providers in different social contexts and with different backgrounds. The balancing of rights and interests is a challenging task, and practice may vary across the country among different health facilities and providers. In this situation, national administrative guidelines explaining the legal provisions for health providers are essential. One clear guideline should be that the child's own views must always be the starting point for establishing his/her best interests.¹¹² The capability approach is a helpful reminder that protection of autonomy and privacy rights of adolescents in the health context is the best way of securing trust and service accessibility. Moreover, the capability approach may contribute more to the notion of individual responsibility than the emphasis on child vulnerability.

110 Haugli and Sigurdson, "Om foreldreansvar," 366–384, 380–381.

111 Ibid., 381, concerning the Patient and User's Rights Act section 4-4.

112 Sandberg, "Children's Right to Participate," 71–89, with reference to John Eekelaar, "The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism," *International Journal of Law and Family*, vol. 8 (1994): 42–61.

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12. Rethinking Children's Competence through Children's Rights: Giving Professionals Space for Supporting Children

Aoife Daly

Abstract Children have a Convention on the Rights of the Child (CRC) right to be supported in the exercise of their capacities. In this chapter, interviews with a range of UK practitioners working with children (e.g., nurses, doctors and lawyers) are analysed. It emerges that professionals engage frequently with questions around children's competence, whether or not they are required to officially assess it. The professionals interviewed were deeply supportive of children's competence, but are operating in systems which frequently provide little space to increase children's competence – this may make children more vulnerable.

Keywords children's competence | capacity support | Gillick case | UN Convention on the Rights of the Child

12.1 INTRODUCTION

On a daily basis, professionals work in various roles supporting children's interests. Children's understanding and competence on various issues will undoubtedly arise for these professionals for various reasons. Children may communicate differently than adults, and they may see the world in different ways, which may have consequences for communication between adult and child. Because childhood is (to a large extent) defined legally by an absence of a presumption of capacity, issues such as consent to medical treatment can be challenging. In circumstances like this, children's autonomy rights depend on an assessment of their competence.

The most common competence question tends to be in the realm of medical law, because medical consent is treated with great seriousness.¹ The perceived

1 Priscilla Alderson, "Researching Children's Rights to Integrity," in *Children's Childhoods: Observed and Experienced*, ed. Berry Mayall (London: The Falmer Press, 1994), 45–62.

competence of children under the age of 18 years will depend on whether they can consent to medical treatment. In England and Wales, in the Gillick case ([1986] AC 112), it was established that doctors could provide contraceptives to those under age 16 where they were determined by the doctor to have “sufficient understanding and intelligence” to “understand fully what is proposed” (at 253). The term “competence” is now used interchangeably with “capacity” in England and Wales, seemingly because of the introduction of the Mental Capacity Act (MCA) 2005 – the statutory framework in England and Wales for adults whose capacity to make specific decisions is in doubt. I will continue in this chapter to refer to competence, however, because of the persisting prevalence of the Gillick competence standard.

There has been much written resisting the legitimacy of the competence/capacity framework. It can be argued that the human condition is too complex for competence to be measured accurately or that it is in the eye of the beholder, in that an assessment depends on the understandings and values of the assessor. Herring highlights, however, that an accurate assessment of competence can be important:

First, you could be assessed to lack capacity when you do not [...] You lose control over your life. But second, you could be assessed to have capacity when you do not have it. You could suffer harms and injuries and you would be told that that was your choice ...²

As competence issues are so prevalent, one would think that professionals and academics alike would have broad knowledge of the issues inherent in children's competence. One would also expect that there would be extensive efforts to define it. Yet this is far from the case at present. How professionals should understand and define competence is little understood,³ and assessment of competence appears to be done very intuitively rather than in accordance with set rules or guidance.⁴

2 Jonathan Herring, *Vulnerable Adults and the Law* (Oxford: Oxford University Press, 2016), 55.

3 Irma M. Hein, Pieter W. Troost, Robert Lindeboom, Imke Christiaans, Thomas Grisso, Johannes B. van Goudoever and Ramón J. L. Lindauer, “Feasibility of an Assessment Tool for Children's Competence to Consent to Predictive Genetic Testing: A Pilot Study,” *Journal of Genetic Counselling*, vol. 24(6) (2015): 971–977; Gerison Lansdown, *The Evolving Capacities of the Child* (Florence: UNICEF Innocenti Research Centre, 2006).

4 Aoife Daly, “Assessing Children's Capacity: Reconceptualising our Understanding through the UN Convention on the Rights of the Child,” *The International Journal of Children's Rights*, vol. 28(3) (2020): 471–499; Hein et al., “Feasibility of an Assessment Tool.”; Emma Cave and Zenon Stavrinides, *Medical Practitioners, Adolescents and Informed Consent: Final Report* (University of Leeds, 2013).

I argue elsewhere that it is important to consider competence in light of the Convention on the Rights of the Child (CRC) through CRC-informed concepts of autonomy, evidence, support and protection:

The intuitive approach is generally satisfactory but it is important that it is informed by the CRC. This, it has been argued here, should specifically require: an appreciation of autonomy, because this is so valued in the liberal democracy; evidence, because this will ensure that childhood is properly understood; support, because capacity is not static but can be maximised; and protection, because it must be emphasised that with childhood comes relative vulnerability.⁵

Yet this is not the framework in which professionals appear to generally work, nor the one on which domestic law appears to rely.

“Vulnerability” is frequently understood to apply to under-18s as opposed to adults. It is regularly relied upon as a reason why children should not enjoy various rights.⁶ Although there is an obvious power imbalance between children and adults, vulnerability is a fluid state. Support, information and education will make a difference and will in turn increase competence. Individualist notions of vulnerability place the onus on the individual rather than on the question of how professionals and institutions may increase children’s vulnerability by keeping them uninformed.⁷ Providing the means to children to increase their competence on matters such as their medical or legal situation can therefore render them less vulnerable.

In this chapter, semi-structured interviews with a range of practitioners working with children are analysed. It emerges that professionals engage frequently with questions around children’s understanding or competence, whether or not they are required to officially assess competence. The professionals interviewed were deeply supportive of children and their needs and for the most part recognised that competence can be increased, and vulnerability decreased, through information and support. It seems, however, that they are operating in systems which frequently provide little time, space or training for them to engage with children in a way that facilitates them to increase children’s competence.

5 Daly, “Assessing Children’s Capacity.”

6 Jonathan Herring, “Vulnerability, Children, and the Law,” *Law and Childhood Studies: Current Legal Issues*, vol. 14 (2012): 243–263.

7 Aoife Daly, Rachel Heah and Kirsty Liddiard, “Vulnerable Subjects and Autonomous Actors: The Right to Sexuality Education for Disabled Under-18s,” *Global Studies of Childhood*, vol. 9(3) (2019): 235–248.

Although the research is based in England and Wales as a jurisdiction, the findings will have relevance for work with children in other jurisdictions.

12.2 WHAT IS COMPETENCE AND HOW CAN IT BE SUPPORTED?

12.2.1 When Child Competence Arises in England and Wales

The term “competence” is far from straightforward. Historically, it appears to have been the preferred term to outline the concept of children adequately understanding something. In England and Wales it was encapsulated by the Gillick case ([1986] AC 112), a case relating to a legal conundrum whereby girls have to be protected when having sex under the age of consent. In this case it was established that doctors could provide contraceptives to girls in this situation, without parental involvement, where the girl was determined by the doctor to have “sufficient understanding and intelligence” to “understand fully what is proposed” (at 253). Presumably due to a lack of any other guidance in the area, the Gillick case ultimately proved very formative across laws relating to children beyond the area of contraception.⁸ It has even proved influential outside the jurisdiction of England and Wales, into other common law countries⁹ which were similarly confounded by how to deal with the paradox that children are legally defined by their lack of competence but there are certain areas in which their competence has to be assessed (often to protect their own interests). That the author was researching for over a decade in the system of England and Wales provided a rich opportunity to examine the workings of Gillick in practice.

In spite of the usefulness of the Gillick judgement, many questions and problems persist. First, in England and Wales the introduction of the MCA has presented some questions that have yet to be answered. Because of the importance and influence of this legislation, the term “capacity” is now for the most part used interchangeably with “competence”¹⁰ when it comes to children, although this is apparently no longer the case when it comes to adults in England and Wales. The word used in that context is now “capacity”, because of the influence of the MCA.

8 CS v sbh [2019] EWHC 634, (Appeal *fpr* 16.5: Sufficiency of Child's Understanding), para. 51.

9 Emma Cave, “Goodbye Gillick? Identifying and Resolving Problems with the Concept of Child Competence,” *Legal Studies*, vol. 34(1) (2014): 103–122, 114.

10 The term “competence” to denote the legal standard has decreased in use in recent years, presumably because of the introduction of the Mental Capacity Act 2005, which uses the term “capacity”. Confusingly regarding the legal standard in the case of children, the term “Gillick competence” is still used, although not exclusively. In *X (A Child)* [2014] EWHC 1871 (Fam): para. 12, for example, it was referred to as “Gillick capacity”.

The persisting importance of Gillick, however, means that the word “competence” sits alongside the word “capacity” for children, and either term may or may not refer to an actual legal standard. Conceptual confusion about competence abounds – as to whether it is a legal standard, and educational ideal, or something else.¹¹

When the terms “competence” and “capacity” are used colloquially, they refer to one’s cognitive abilities, i.e., mental processes such as knowing, judging and evaluating. For clarity, “competence” in this chapter will denote this colloquial meaning unless otherwise indicated. However, when one refers to “Gillick competence”, this enters the realm of denoting an actual legal standard of competence for children. It is perhaps not equivalent to, but certainly is along the same lines as, the term “legal capacity”, which is used in the legal sphere to refer to the standard for someone to make legally effective decisions, for example under the MCA. Yet the divide between adult and child is not clear-cut in this area – the MCA includes 16- and 17-year-olds, and in at least one England and Wales case has been deemed relevant even to those under the age of 16. This is perhaps unsurprising as it gives a level of guidance as to what capacity is in a way that the Gillick test does not (although the MCA 2005 requires impairment for incapacity to be present, whereas Gillick does not).

It is not always easy to define exactly what “capacity” entails in practice, however. The MCA requires that an individual understands information and that they can retain it, use it, weigh it, and communicate a decision (section 3[1]). It is challenging to pin down exactly what capacity for adults might be under the MCA,¹² and Herring notes: “This is clearly not a straightforward issue. The courts have avoided issuing general guidance”.¹³ As outlined above, there is a lack of clarity around defining “capacity” and applying the Gillick standard.¹⁴ For the most part the capacity of children to consent to medical treatment is determined by professionals implicitly¹⁵ “day in and day out ... as part of routine”¹⁶. They use their skills and experience to make a person-to-person judgement about a child’s capacity.

11 Jo Moran-Ellis and E. Kay M. Tisdall, “The Relevance of ‘Competence’ for Enhancing or Limiting Children’s Participation: Unpicking Conceptual Confusion,” *Global Studies of Childhood*, vol. 9(3) (2019): 212–223.

12 See, e.g., Natalie F. Banner, “Can Procedural and Substantive Elements of Decision Making Be Reconciled with Assessments of Mental Capacity?,” *The International Journal of Law in Context*, vol. 9(1) (2013): 71–86; Mary Donnelly, *Autonomy, Capacity and the Limitations of Liberalism: An Exploration of the Law Relating to Treatment Refusal* (Cambridge: Cambridge University Press, 2010).

13 Jonathan Herring, *Vulnerable Adults*, 46.

14 Daly, “Assessing Children’s Capacity”. See also Cave, “Goodbye Gillick?,” 103–122.

15 Hein et al., “Feasibility of an Assessment Tool,” 971–977, 852.

16 *Appendix to A (A Child)* [2014] EWFHC 1445 (Fam.)

It has been widely expressed that the Gillick competence standard is vague and subjective. To have “sufficient understanding and intelligence” to “understand fully what is proposed” does not provide much guidance to a professional trying to understand a child’s competence. It seems that it will be difficult for professionals working with children to have a clear definition of what children’s competence entails.

The issue may also arise in England and Wales where children may be required to instruct a lawyer. In this context, the case of *S v. SBH*¹⁷ provides some guidance. It was outlined (at para. 64) when assessing whether a child can directly instruct a lawyer in a family law case, one must consider: i) intelligence; ii) emotional maturity; iii) factors which might undermine their understanding such as their emotional state; iv) their reasons for wishing to instruct a solicitor directly; v) potential undue influence; vi) their understanding of the process of litigation; and vii) the risk of harm to the child from participation. These points appear sensible and intuitive when considering the competence of a child. They are, however, demanding a lot of a child compared to what is required from an adult wishing to instruct a solicitor.¹⁸ Many adults, for example, may be low in cognitive ability and emotional maturity, and yet they will be assumed capable of instruction.

Of course, children’s competence is very relevant in the area of children and criminal culpability. Minimum ages of criminal responsibility are public policy issues which are decided seemingly more by political factors than by objective evidence about a child’s development. In England and Wales it used to be the case that between the ages of 10 and 14 there was a rebuttable assumption that a child could not commit a crime (*doli incapax*). This was removed via section 34 Crime and Disorder Act 1998 in the wake of a case of boys aged 9 and 10 kidnapping and killing a toddler (Jamie Bulger) in Liverpool in 1992. This particular case so shocked the nation that it seemingly set the context for the removal of the assumption of *doli incapax*. This means that the age of criminal responsibility in England and Wales is now 10 years. In contrast, the age of criminal responsibility in Sweden, Finland and Denmark is set much older, at 15 years.

These examples indicate that laws and policies concerning children and their competence in the legal arena are driven seemingly by adult assumptions and by politics rather than clear evidence about child development. A tension also appears to be playing out between perceptions of children’s autonomy on the one hand and vulnerability on the other. Note, for example, inclinations towards holding children accountable in criminal law, and protective approaches in other areas

17 *S v SBH* [2019] EWHC 634 (Appeal FPR 16.5: Sufficiency of Child’s Understanding).

18 See further Daly, “Assessing Children’s Capacity”.

of the law. There is strong evidence that when children from middle childhood or older receive time and support, their decision-making is equivalent to adults. In Greenberg Garrison's research, children's decisions in hypothetical scenarios around arrangements for children on family breakdown were examined. The research indicated that nine-year-olds were objectively "as rational" in their reasons for decision-making as adults.¹⁹ Hein et al. conducted research indicating that children of 11.2 years and above appeared to generally have the mental capacity necessary to consent to medical treatment.²⁰ This is confirmed by modern neuroscience, which likewise indicates that thickening of the area of the brain which is used for judgement and planning peaks at around age 11 in girls and age 12 in boys.²¹ On the other hand, research indicates that when children are making decisions under circumstances which may be stressful and involve peer pressure, their decision-making will not be as objectively "good".²² Yet frequently laws, instead, require very high levels of capacity from children for personal decision-making to be respected, and on the other hand can hold very young children criminally responsible for their actions. Laws then tend to be punitive in the areas where children are most vulnerable.

12.2.2 Competence and the Framework of the CRC

The UN CRC is an international instrument outlining the basic rights of children around the world – it is the most ratified treaty in existence. Yet on this very fundamental issue of children's competence, it too is lacking in guidance. There are some vital provisions in the CRC to consider – in particular, Article 12, the right of children to be heard in all matters affecting them; Article 3, the obligation to consider children's best interest as a primary consideration in all matters affecting them; and, perhaps most importantly, Article 5, the principle of the evolving capacities of the child (as children mature they should increasingly exercise their own rights).

However, the lack of understanding about children's competence has an impact on the exercise of children's rights. Le Borgne and Tisdall emphasised that "One of the most persistent adult concerns is whether children are competent enough

19 Ellen Greenberg Garrison, "Children's Competence to Participate in Divorce Custody Decisionmaking", *Journal of Clinical Child Psychology*, vol. 20(1) (1991): 78–87, 78.

20 Hein et al., "Feasibility of an Assessment Tool," 971–977, 852.

21 Jay N. Giedd, "Structural Magnetic Resonance Imaging of the Adolescent Brain," *Annals of the New York Academy of Sciences*, vol. 1021(1) (2004): 77–85.

22 Sarah-Jayne Blakemore, *Inventing Ourselves: The Secret Life of the Teenage Brain* (London: Black Swan, 2019).

to participate.”²³ They emphasise that competency can be used as an exclusionary principle – children deemed incompetent are excluded from participation. This is due, the authors continue, to an emphasis by adults on the perceived deficit associated with children rather than a focus on the responsibilities and potential shortcomings of adults: “Adults perceive children as having limited or lesser competence than adults, with the concentration on children’s lack of competence to participate rather than adults’ lack of competence in enabling children to participate.”²⁴

I have argued elsewhere that efforts to understand competence should be grounded in the CRC. I demonstrated how considering children’s best interests is crucial, because children still require protection under the age of 18. I also highlighted how autonomy – a feeling of power and choice over one’s life – is very important for children, and therefore capacity must be considered in that context. I also emphasised the principle of non-discrimination, because those working with children and their capacity should operate on the basis of *evidence* in whatever area is in question, rather than relying on personal assumptions about children. I also highlighted the importance of Article 5, the right of children to exercise their own rights in accordance with their evolving capacities. This is crucial because it is not always well understood that capacity is not simply a quality to be found in a child – children’s competence can be increased with time and support by adults and others. I argue that “[t]hese points are not intended to be exhaustive however, as each capacity assessment will need to be tailored to the specific context, such as a determination of capacity to consent to medical treatment, to participate in legal proceedings, and so on.”²⁵

12.2.3 Can Competence Be Increased through Support?

Post-structuralist theorists have long criticised the liberalist construction of the universal, autonomous, rational subject.²⁶ Feminist theorists have emphasised that instead we should turn our attention to our common vulnerabilities, which are universal to the human condition.²⁷ Where this socially created vulnerability is recognised in children, we should emphasise the huge potential for enhancing children’s competence rather than assuming that competence is something to be found in the individual child. Le Borgne and Tisdall, for example, argue

23 Carine Le Borgne and E. Kay M. Tisdall, “Children’s Participation: Questioning Competence and Competencies?,” *Social Inclusion*, vol. 5(3) (2017): 122–130.

24 Ibid.

25 Daly, “Assessing Children’s Capacity”.

26 Joan Copjec, ed., *Supposing the Subject* (New York: Verso, 1994).

27 Martha Fineman, *The Autonomy Myth* (New York: The New Press, 2004).

“that competence is situationally and socially constructed rather than a set and individual characteristic.”²⁸

The notion of relational competence views the quality as originating from social interactions and relationships: “capacity is not something that simply appears but something that develops through communication, explanation and interaction with others.”²⁹ Competence is not a quality which sits inside a person but rather a social ability which can be promoted and learned.³⁰ Autonomy support – a concept from psychology – can and should be applied to children in legal contexts to enhance their decision-making abilities in matters affecting them.³¹ Autonomy support involves developing children’s psychological needs, interests and values through helping them to understand their environment and to solve their own problems.³² Children are regularly assumed to defer to undue influence from others,³³ yet it is important to remember that children and adults are not entirely different in this way, and there may be more overlap than one assumes – “adults largely defer their moral judgements to what are widely shared moral standards.”³⁴

“Scaffolding” is a term that was first coined by developmental psychologist Vygotsky (1978). He described the process as one that allows children to develop their current level of understandings to a more advanced one, supporting children to undertake activities that they would otherwise not be able to without the assistance of those around them. The social element of competence has been elaborated even further in recent years in relevant literature, including in relation to the legal arena. As Stalford and Hollingsworth outline, legal matters (family law proceedings and so on) will be enormously foundational in the development of children, and there is therefore a duty on those in the legal profession to consider the ways in which they could and should nurture children’s development

28 Le Borgne and Tisdall, “Children’s Participation,” n872.2.

29 Katharina M. Ruhe, Eva De Clercq, Tenzin Wangmo and Bernice S. Elger, “Relational Capacity: Broadening the Notion of Decision-Making Capacity in Paediatric Healthcare,” *Bioethical Inquiry*, vol. 13(4) (2016): 515–524.

30 Eva De Clercq, Katharina Ruhe, Michel Rost, Bernice Elgar, “Is Decision-Making Capacity an ‘Essentially Contested’ Concept in Pediatrics?,” *Medicine, Health Care and Philosophy*, vol. 20(3) (2017): 425–433.

31 Aoife Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Leiden: Brill, 2018).

32 See, for example, Wendy S. Grolnick, *The Psychology of Parental Control: How Well-Meant Parenting Backfires* (New York: Lawrence Erlbaum Associates Publishers, 2003).

33 Christopher Joseph An, “Participation, Not Paternalism: Moral Education, Normative Competence and the Child’s Entry into the Moral Community,” *Educational Philosophy and Theory*, vol. 52(2) (2020): 192–205.

34 Ibid.

and positive way.³⁵ Buss refers to the “child-rearing function” law can have.³⁶ This is particularly important considering how much more relational children are as compared with adults – children are more reliant on adults for basic survival, for example. They are also going to benefit more from social interaction, learning experiences and so on that legal proceedings and other key interactions such as medical treatment provide to them.

There is therefore a basic duty to provide children with the care and support they need during foundational life experiences such as those relating to legal proceedings and to medical treatment. There is also the enormous learning potential that arises from such experiences. This is theory which is not often placed in the sphere of attempts to understand children's competence in decision-making about themselves; however, an amalgamation of developmental psychology and law relating to children's rights is clearly necessary in an area which appears to have confused and perplexed lawyers and lay persons alike for some time.

12.3 METHODOLOGY

This research involved a small-scale, independent qualitative study which took place between November 2019 and August 2021. The research explored two main research questions for professionals working in various roles with children: *1. What are their views on, and experiences of, how and whether the competence of a child arises for them? 2. What are the consequences of their views and approaches for practice?*³⁷

A purposive sample of UK professionals working with children was invited to participate in the research. Professionals working as closely as possible with children, and with issues relating to competence/understanding, were sought. This was to ensure that all professionals had the necessary experience to inform their perspective on children's competence. A total of 33 individuals took part – these included 19 lawyers, eight medical professionals (four doctors and four nurses), three psychologists, a school counsellor, a pharmacist, and one member of support staff for an asylum-seeker charity.

35 Helen Stalford and Kathryn Hollingsworth, “‘This Case Is about You and Your Future’: Towards Judgments for Children,” *Modern Law Review*, vol. 83(5) (2020): 1030–1058.

36 Emily Buss, “What the Law Should (and Should Not) Learn from Child Development Research,” *Hofstra Law Review*, vol. 38(13) (2009): 13–68.

37 An article focusing solely on how these professionals tend to assess competence is also available – Aoife Daly, “What Is ‘Competence’ for Children in Legal Matters?—Views of UK Professionals,” *Irish Journal of Family Law* 92, vol. 26(4).

The data was collected through semi-structured interviews with professionals. Ethics approval was secured from the ethics committee at the University of Liverpool. Participants were engaged in an informed consent process, and their names are not included in this chapter. Some of the data has been further anonymised to avoid identification.

The data was coded using an informal thematic coding framework. Thematic analysis was used to identify themes and patterns of meaning in relation to the research questions of the project within the data and across the different professions. Consultation was conducted with Liverpool's youth advisory board – a board consisting of adolescents living in Liverpool who provide advice and guidance on research relating to children. They provided their views on the research project and influenced the questions asked of interviewees, as well as the analysis of the data. They are paid a wage for this work.

Research participants were sought from amongst the contacts of the researcher. This related to organisations and professionals ranging from legal firms and hospitals with whom the researcher had engaged in the past through other children's rights work. Some "snowball sampling" was involved whereby existing study participants recruited future participants from among their colleagues and other contacts. The sample of professionals was based in England and Wales, although one practitioner who was primarily based in Scotland was also included. His inclusion was justified due to his expertise on the issue. Although it was useful to limit geographically those interviewed, his inclusion appeared to outweigh the fact that he was not based in the England/Wales legal jurisdiction.

Because participants were not selected from a sampling frame, the data was subject to some bias. Those professionals particularly interested in competence, and possibly those most interested in and open to research, were undoubtedly more likely to respond to the email invitation to participate in the study. Because of the relatively small sample size, quantitative information on responses is not provided. Instead, the primary themes that emerged and which were most commonly touched upon are presented and analysed.

12.4 PROFESSIONALS' UNDERSTANDINGS OF WHAT CONSTITUTES COMPETENCE

Amongst the professionals interviewed in this study, they were trying to ascertain the level of understanding of children, whether they understood the many complexities of the situations in which they found themselves, whether it was in a criminal law, and asylum law, or a medical context. As this solicitor put it, "But from day one, the young person's competence is in issue, because the very moment

you meet them, you're having to try and explain the asylum process. So you're instinctively and professionally trying to determine if this young person can actually understand" (Interview 21: Asylum law solicitor in Midlands and East).

The passion of all professionals for their work with children was very evident from the interviews. This extended into the issue of competence – most professionals felt very strongly that competence was an incredibly important issue in their work, whether or not it was a day-to-day issue for them, and whether or not they felt they had a strong understanding of it. The importance placed on it by professionals is evident in this surgeon's views: "This is something I feel you know quite a lot of passion about ... I've spent the last few years sort of giving lectures and presentations to my colleagues, to sort of try and say this is our consent policy and you know here is the provision for the fact that some children should actually be making these decisions themselves" (Interview 18: Consultant paediatric surgeon in the North West).

For lawyers, the question of whether they would consider or assess competence depended on the area of the law. Most lawyers in non-criminal law proceedings were in a situation where they may have to consider whether a child could directly instruct them, rather than taking instruction from a children's guardian or a professional – usually a former social worker – whose job it is to represent the children's wishes and best interests. It was to the forefront of the minds of barristers, although it is the instructing solicitor who makes the determination as to whether a child has competence to instruct.

This Child and Adolescent Mental Health Service (CAMHS) nurse manager outlined that Gillick was very much a part of his daily work with children with mental health problems: "So the patient's journey, on admission, every patient would be assessed whether they were Gillick competent, usually specific around medication, so it would be recorded in their notes" (Interview 20: CAMHS nurse manager in the North West). He outlined that if a child were found not to be Gillick competent on a particular issue, consent to treatment would be sought from a parent or guardian instead. He also emphasised that in his area of medicine, he and his colleagues were dealing much more with the issue of Gillick competence than in other areas of medicine: "certainly we're dealing with it a lot more than the average, you know, in-patient type unit."

In criminal law, assessing children's competence was a prominent issue for them, because considering competence was crucial to considering whether children were competent to instruct and whether they understood the various elements of these important proceedings. This youth lawyer explained that competence is important in determining that children "understand the allegation against them, and that they are competent to give me instructions regarding

that” (Interview 27: Youth lawyer in London). The lack of attention to the issue of children’s competence was particularly dominant in family law. This barrister outlined: “For me if ... you know, I always feel like it’s just confined in medical law because you often where you’ve got the [refusing crucial medical treatment] kind of issue. But we don’t ... I don’t come across it, I don’t think I have since I’ve been in practice if I’m honest with you” (Interview 26: Family law barrister in the South East).

Even medical professionals, dealing with consent day in and day out, felt that Gillick competence was something to be assessed very intuitively: “Does it give enough? I mean at the bottom line what does Gillick say? You’re making a judgement call, you as an individual, you don’t get somebody else in to help you. And a little bit of it is gut instinct isn’t it, this child understands enough, versus no I don’t think this child understands enough” (Interview 18: Consultant paediatric surgeon in the North West).

There was a strong sense that the informal way in which capacity is assessed is a problem. This solicitor particularly felt this was an issue in the case of the immigration context where English was not the child’s first language. She felt that it would be better to “... assess that in a kind of more formal way rather than trying to do it on the hoof” (Interview 6: Solicitor with children’s legal centre in London). This barrister emphasised three variables – age, ability, and issue:

Well it’s a balance because you know you’ve got the variable of age on one side, you’ve got the variable ability of the child and you’ve also got a third variable, which is the nature of the decision being made. So you’re trying to adjust your decision-making and ... applying a level of force to what the child is saying based on those three factors. (Interview 2: Public children law barrister in London)

There was a strong sense across all professionals that an important part of determining whether a child can understand something involved the child being able to explain back to them details of the situation or choices that had been explained to the child: “I would be looking to see if that child could repeat back to me things that I’d explained to him or her” (Interview 1: Family law barrister in London).

There was a striking sense amongst professionals that competence was something that was vague and a concept that needed further elaboration. This barrister expressed: “Yeah, but I’d encourage you to focus on that, because I think it can be broadened out from there. I think if I may say so, competence is the right question, it’s just we only ask it in very defined circumstances, and that to me makes very little sense” (Interview 3: Criminal law barrister in the North of England).

This observation reflects the fact that competence appears only to arise in relation to a handful of discrete legal issues such as medical consent and instructing a solicitor.

12.5 SUPPORTING COMPETENCE

As outlined above, relational competence refers to the increase in our understandings and abilities which can arise from social interactions and relationships through for example communication and explanation.³⁸ Competence can be promoted and learned in this way. Therefore it was of interest to ascertain the extent to which a relational understanding of competence was part of the practice of the professionals interviewed for this research.

12.5.1 Professionals Supporting Competence

Medical professionals are aware that they needed not just to treat children's medical conditions but also to provide children with information and support to enhance their competence about their own conditions. As this doctor expressed: "it's not just about being given medication, it's about you know working with whoever you're seeing, about strategies and understanding you know how your condition might affect you!" (Interview 15: Paediatric specialist in the North West). This doctor expressed that in some situations where parent and child may disagree on the treatment options, she felt that it was her role to provide as much time and information as she could to help them come to an agreement about the way to proceed:

I'm going to say, OK, we've discussed this, I know what you're thinking parents, and I know what you're thinking child and they don't agree but actually they're both important, and I don't think it's right that we rush to a decision. So you go away and think about it, perhaps chat about it at home and come back and meet me again. So that's my approach to that situation, unless it's something where we really need to make a decision to prevent harm coming to the child, this is a ... we've got to keep talking about it until we can come to the compromise ... (Interview 18: Consultant paediatric surgeon in the North West)

38 Katharina M. Ruhe, Tenzin Wangmo, Eva De Clercq, Domnita Oana Badarau, Marc Ansari, Thomas Küne, Felix Niggli, Bernice Simone Elger and Swiss Pediatric Oncology Group, "Putting Patient Participation into Practice in Pediatrics: Results from a Qualitative Study in Pediatric Oncology," *European Journal of Pediatrics*, vol. 175(9) (2016): 1147–1155.

For this doctor, the issue of spending time communicating with the child was crucial to helping them understand their condition and consenting to treatment. She, as with many other medical professionals, expressed that the position of parents was a difficult one, in that sometimes parents want to gatekeep information in a perceived effort to protect their child: “I think there is that need for families as well to control the information shared” (Interview 11: Palliative care consultant). She described struggling to find the time and opportunity to build the relationship with the child in a way that’s necessary to understand their personality and level of understanding: “So you feel artificial, you’re trying to set up a scenario where you can realistically and actively understand that child and who they are and what they are and what they’re about, how much they’ve taken in and ... But that’s a whole week of work virtually” (Interview 11: Palliative care consultant). She also outlined that she felt medical professionals should be giving more information “in an understandable way, age-appropriate” to help children understand the medical situations: “So I think legal training just generally around capacity, consent, best interests, would be very powerful for medical professionals” (Interview 11: Palliative care consultant).

For those lawyers with experience of the Court of Protection, there was a sense that there was a disjoint between the approach to the competence of adults as opposed to that of children. This barrister, very accustomed to dealing with questions of adult capacity, was asked whether he felt that children’s capacity could be supported. He considered how adults’ capacity was treated, in that the MCA requires that capacity be supported, for example, question of residence options: “you actually have to be supplied with actual options to weigh and the pros and cons of each option, rather than would you like to live in a residential setting or would you like to live at home, because there are so many different types of residential setting ...” (Interview 14: Barrister in Court of Protection and care proceedings in London). Therefore, when he considered that in light of children, he felt that an equivalent approach was definitely possible.

Unsurprisingly, many lawyers spoke about supporting their children to understand the proceedings in which they found themselves. This was not necessarily for the purpose of assessing competence, but for guiding children through proceedings. This is, of course, part of the role of the legal representative. This asylum law solicitor, for example, expressed it as follows: “I always explain that ... it’s really important that you feel empowered to make your own decisions, and I’m here to help you and guide you” (Interview 21: Asylum law solicitor in Midlands and East). Similarly, medical professionals felt strongly that part of their role was to guide patients through understanding their medical situation and understanding possible treatment options.

However, the ability of professionals to support children’s competence appeared in many cases to be hampered by a lack of understanding of what exactly

competence is. Medical professionals who deal with consent tended to deal with the issue of Gillick competency more frequently and generally had received some element of training in it. However, even in this area, a lack of definition about what good competence is was prevalent, and likewise, training did not appear to be extensive in relation to children's competence. This child and adolescent mental health services nurse manager outlined that capacity training was available from his employer, but that was not specific to children (Interview 20: CAMHS nurse manager in the North West).

12.5.2 The Time Barrier to Supporting Competence

Time was also a key issue for this asylum law solicitor, who emphasised how, in spite of intense work and time pressures, she found ways to explain in detail to her child clients what their situation was and what the legal options were. She did this through innovative methods such as drawing:

So ... level of understanding is always an issue and I think that ... I mean the way we tend to deal with that is just go slowly, go really slowly. The Home Office hates me, you know I do go slowly, but I have to act in a way that I can stand by and put in something that I believe that the young person understands is thorough, is detailed... So [I draw] one circle and you know arrows and stuff coming out, because it's easier for them to have something to see, rather than just listening to your words. ... So I think a lot of those techniques you can use when just trying to talk to anybody in a vulnerable situation, just that idea of being very calm and centred yourself and ... not letting any pressures you have with time or Home Office deadlines or court deadlines impact on that hour or hour and a half that you're sat with that client, and making sure that it's very much their space, their time to give you that information. (Interview 21: Asylum law solicitor in Midlands and East)

We can see in this quote a reference to the system – in this case facilitated by the Home Office – being clearly inclined away from supporting children's understanding and competence. This lawyer had to take the initiative herself to find ways and time to support the competence of her clients. She wished that there was more time, and that her approach was more facilitated by the system in which she worked, to ensure the children fully understood the system that they were in.

This barrister expressed the issue that professionals in recent years have less time to spend with children. This meant that they could not get their views, wishes, and other important information and relationship-building which is necessary in cases:

The problem there is CAFCAS have introduced what they call a system of proportionate working, and you know that's dialect, that's code for don't do as much as you used to do. Because we can't afford it. And actually the work that's disappearing is the children's guardians spending time with the child. And if we don't do that then their voices won't be heard. (Interview 2: Public children law barrister in London)

This criminal barrister stated that she had built up much experience in psychiatric issues that might affect competence, but expressed her unease with her lack of formal training on such issues. She felt that a lack of time to spend with the client might compound this problem. Up until the cuts to legal aid that she expressed, every serious case had an assistant who would get to know the client well and be able to ascertain any issues relating to psychiatric disorders are competence, but now that was not the case:

So defence lawyers have to be alert to these issues around and ... we're not really trained how to do it.

Do you think you should be?

Yeah, it terrifies the bloody life out of me. And as Legal Aid gets stripped back ... Now, everybody, even if you get a solicitor, is meeting the client for the first time, you've never met them before, or maybe you've done another case for them, but you don't have any relationship to speak of, you don't know what they're like.

And so was that because ... since Legal Aid cuts came in?

Yeah. (Interview 3: Criminal law barrister in the North of England)

She expressed that this was particularly the case with children, who she did not feel confident that she would spot and understand such issues in relation to: "and I wouldn't ... wouldn't trust myself at all, not at all, because they just present so differently, and I am not computing it. So who knows?" (Interview 3: Criminal law barrister in the North of England).

12.5.3 Do Systems Facilitate Capacity Support?

In previous work, I have outlined the concept of autonomy support and how it could be employed to support professionals to enhance children's competence and

decision-making abilities.³⁹ However, the obvious problem is that no matter how determined a professional is to support a child's competence, they are frequently operating in systems – be they medical or legal – that incline against supporting competence.

Medical professionals interviewed considered that the systems in which they work could better work to provide children with information and support to boost their competence. As this doctor expressed, leaflets are not sufficient to do this well:

... we're still working on that. I don't think ... certainly in our service we're working on that for all of our bits, providing kind of age-friendly leaflets but also providing websites that are useful for them ... Because often just providing leaflets for young people, they just kind of don't look at them ... I don't know about you, I often put leaflets in my pocket and never look at them again! (Interview 15: Paediatric specialist in the North West)

This nurse also expressed that much of the building of competence in children about the medical treatment was left up to parents: "...if you went to A & E for instance, they would give you a parent information sheet of kind of what to do kind of if a child had broken an arm or something, but if a child's 12, 13, then why can't they have an information sheet to allow them to understand what's happened to them?... The onus is always put onto the parent, isn't it?" (Interview 12: Research nurse in the North West).

The frustration of this children/youth lawyer with the lack of support for young people accused of sexual offending also seemed relevant to this question of how systems support children. She expressed that, where children are accused of sexual assault, the system should be in place to have the time and care to support them back to a positive place in their behaviour. Instead, she seemed to emphasise, it attempts solely to punish them. She was of the opinion that the lack of effort to support children, and to help them understand their own proceedings, constituted detrimental treatment of children because this is a group that is so lacking in power:

So if you think about your [European Convention on Human Rights] Article 6 right to a fair trial, that means that you've got to effectively participate in a trial, right? ... It's not fair if you don't understand what's going on. Well why are we mucking around with it? Why are we not doing this? Well, because they're children, so they can't complain, they don't vote, so what do we care? You know it's ... it's all inextricably linked. (Interview 27: Youth lawyer in London)

39 Aoife Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard*.

This point brings to the fore the crucial link between competence and vulnerability. Children are indeed generally more vulnerable compared with adults, not least because they are excluded from ways of exercising power, such as the right to vote. This vulnerability is compounded by a failure by systems to support competence, for example, when it comes to competence to understand one's own trial. Supporting competence, then, is clearly crucial to children's rights, and yet there remains a lack of focus on this across numerous services for children.

12.6 CONCLUSIONS

Professionals have guidance for how to assess adult capacity, but very little for children. The adults' conception of capacity for adults under the MCA 2005 gives greater guidance to professionals, whereas the reliance on Gillick competence means that there is less to go on. Guidance is definitely needed on what Gillick competence actually is in the same way that the MCA provides guidance, albeit very imperfect. This is linked to the fact that for adults, the MCA requires that capacity be supported for a determination to be made (on whether an adult actually has capacity). There is no such requirement for children, in spite of the wealth of literature that we now have on how support and information will enhance how competent someone is on a particular subject. The perceived vulnerability of children appears to be a factor in this. In the medical arena, for example, it is frequently left to parents to decide how much involvement children have in decisions. This is apparently due to a lack of time and a lack of familiarity with Gillick. However, children's vulnerability is, ironically, likely increased where there is a failure to provide enough information to children to be empowered in decision-making concerning themselves.

Of the legal professionals with whom I spoke, not many consider the actual question of how they could support competence. There was much more emphasis on how they could ascertain whether a child does have competence. In some ways this is unsurprising as it is the children's interests (medical, legal, etc.) that these professionals are there to support, rather than children's competence to make a decision *per se*. However, professionals were very aware that they needed to know more about the Gillick competence standard, about communicating with children, and so on. Again, training and time appeared to be strongly desired by these professionals. Lawyers appear to be working in an environment that was not as well disposed to supporting children's competence compared with medical professionals. The structures and procedures of law meant that lawyers felt compelled to focus on more immediate concerns such as what evidence to present, how to mitigate a sentence, and so on.

The data clearly points to professionals who are very passionate about supporting children and representing their interests. However, they are operating in systems that do not define competence adequately and do not appear to give professionals adequate training or sufficient time to support children's competence. Given what we know about the relational nature of competence, states and adults more broadly have obligations under the CRC to support children enjoying their Article 5 right to exercise their rights in line with their evolving capacities across different legal issues.

ACKNOWLEDGEMENTS

This research was funded by the Independent Social Research Foundation. I would like to thank those who provided invaluable feedback at various stages of drafting. These included Hedi Viterbo, Kay Tisdall and Rachel Heah, and the participants of a 2022 workshop at the University of Tromsø on children's rights and vulnerability.

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13. Vulnerability and Child Participation: A Reflection on the Involvement of Refugee Children in Asylum Procedures

Stephanie Rap

Abstract The right to participate provides children with a vehicle to overcome vulnerable situations they may find themselves in. This chapter presents the results from an empirical study concerning the participation of refugee children in asylum procedures in the Netherlands. It shows that the nature and goal of the asylum procedure creates a vulnerable situation in which children cannot participate effectively. Refugee children, though, seem to overcome vulnerabilities by showing agency in the procedure.

Keywords refugee children | participation | agency | asylum procedures

13.1 INTRODUCTION

In the past decade, the concept of vulnerability has gained increased prominence in international human rights law, with international and regional standards, supranational bodies and human rights courts referring to this concept.¹ The notion of vulnerability is of relevance to consider specifically in relation to the rights of children because children are often seen as vulnerable by virtue of their age and level of maturity. In the preamble to the UN Convention on the Rights of the Child (CRC), it is noted that “the child, by reason of his physical and mental immaturity,

1 Alexander Timmer, Moritz Baumgätel, Louis Kotze and Lieneke Slingenberg, “The Potential and Pitfalls of the Vulnerability Concept for Human Rights,” *Netherlands Quarterly of Human Rights*, vol. 39(3) (2021): 190–197; Daria Mendola and Alessandra Pera, “Vulnerability of Refugees: Some Reflections on Definitions and Measurement Practices,” *International Migration*, vol. 60(5) (2021); Ana Beduschi, “Vulnerability on Trial: Protection of Migrant Children’s Rights in the Jurisprudence of International Human Rights Courts,” *Boston University International Law Journal*, vol. 36 (2018): 55–85.

needs special safeguards and care, including appropriate legal protection [...].” Tobin has noted that the vulnerability of children appears to have played a crucial role in having adopted a special human rights treaty for children.²

In dictionaries, “to be vulnerable” is often described in terms of susceptibility to injury or mischief.³ In everyday use, being vulnerable has the connotation of being weak and requiring protection.⁴ The term is regularly used in the context of children due to their ongoing and still incomplete physical and emotional development, but also in the context of the law in reference to the mental capacities of people and their ability to participate in proceedings. Unaccompanied refugee children are also often seen as vulnerable victims who are sent away by their parents and are in need of care and protection. However, in current debates around migration, unaccompanied children are not only seen as vulnerable victims but also regularly depicted as fortune hunters or dangerous young men from “safe countries” who are a threat to Europe’s security and social welfare system.⁵ It has been observed that with regard to the treatment of unaccompanied children, a tension is visible between “migration management and the normative imagery of liberal, human rights-respecting states.”⁶

In this chapter, I will first delve deeper into the concept of vulnerability in relation to children and their rights. Specifically, the connection is made between the concepts of vulnerability and participation in judicial and administrative proceedings. Second, I will apply these concepts to the specific situation of refugee children applying for asylum. In the third section, I will present findings of an empirical study concerning the participation of refugee children in asylum procedures in the Netherlands. In the conclusions, I will argue that the nature and goal

2 John Tobin, “Understanding Children’s Rights: A Vision Beyond Vulnerability,” *Nordic Journal of International Law*, vol. 84 (2015): 155–182.

3 *Oxford English Dictionary*. Oxford University Press, 2024.

4 Timmer et al., “The Potential and Pitfalls.”

5 Bella Kovner, Adar Zehavi and Daphna Golan, “Unaccompanied Asylum-Seeking Youth in Greece: Protection, Liberation and Criminalization,” *The International Journal of Human Rights*, vol. 25(10) (2021): 1744–1767; Annika Lems, Kathrin Oester and Sabine Strasser, “Children of the Crisis: Ethnographic Perspectives on Unaccompanied Refugee Youth in and En Route to Europe,” *Journal of Ethnic Migration Studies*, vol. 46(2) (2020): 315–335; Veronika Flegar, “Who Is Deemed Vulnerable in the Governance of Migration? Unpacking UNHCR’s and IOM’s Policy Label for Being Deserving of Protection and Assistance,” *Asiel & Migrantenrecht*, vol. 8 (2018): 374–383; Claire Fox, Jo Deakin, Jon Spencer and Necla Acik, “Encountering Authority and Avoiding Trouble: Young Migrant Men’s Narratives and Negotiation in Europe,” *European Journal of Criminology*, vol. 19(4) (2020): 791–810.

6 Nathan Wittcock, Laura Cleton, Robin Vandevoordt and Gert Verschraegen, “Legitimising Detention and Deportation of Illegalised Migrant Families: Reconstructing Public Controversies in Belgium and the Netherlands,” *Journal of Ethnic and Migration Studies*, vol. 49(2) (2021): 1–21.

of the asylum procedure creates a vulnerable situation in which children are not able to participate effectively.

13.2 VULNERABILITY AND CHILDREN'S RIGHTS

To better understand the concept of vulnerability in relation to children's rights, it is important to briefly consider the changing image of the child in society over recent centuries. The concept of childhood developed from seeing children as "mini-adults", being responsible for their behaviour from a young age, to individuals who had to be educated, prepared for adulthood, and protected against harm. Gradually the attention shifted towards the idea that children required protection due to their inherent vulnerability.⁷ In the second half of the twentieth century, the image of the child began to change, moving the attention towards the autonomy and independence of children.⁸ Following the International Year of the Child in 1979, the drafting process of an international children's rights convention started, which ultimately resulted in the adoption of the CRC in 1989.⁹

Since the adoption of the CRC, children are increasingly seen as holders of rights and participants in decision-making affecting their lives.¹⁰ The CRC gave children several participation rights (e.g., the right to be heard, freedom of expression, freedom of association and peaceful assembly) and played a key role in shaping

7 Eugene Verhellen, "The Convention on the Rights of the Child: Reflections from a Historical, Social Policy and Educational Perspective," in *Routledge International Handbook of Children's Rights Studies*, eds. Wouter Vandenhoe, Ellen Desmet, Didier Reynaert and Sara Lembrechts (London: Routledge, 2015), 43–59; Didier Reynaert, Ellen Desmet, Sara Lembrechts and Wouter Vandenhoe, "Introduction: A Critical Approach to Children's Rights," in *Routledge International Handbook of Children's Rights Studies*, eds. Wouter Vandenhoe, Ellen Desmet, Didier Reynaert and Sara Lembrechts (London: Routledge, 2015), 1–23.

8 Reynaert et al., "Introduction," 1–23.

9 John Tobin, "Introduction: The Foundation for Children's Rights," in *The UN Convention on the Rights of the Child: A Commentary*, ed. John Tobin (Oxford: Oxford University Press, 2019), 2–22.

10 Ton Liefwaard and Julia Sloth-Nielsen, "25 years CRC: Reflections on Successes, Failures and the Future," in *The United Nations Conventions on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead*, eds. Ton Liefwaard and Julia Sloth-Nielsen (Leiden: Brill Nijhoff, 2017), 1–13; Laura Lundy, "'Voice' Is Not Enough. Conceptualising Article 12 of the United Nations Convention on the Rights of the Child," *British Educational Research Journal* vol. 33(6) (2007): 927–942; E. Kay. M. Tisdall, "Children and Young People's Participation. A Critical Consideration of Article 12," in *Routledge International Handbook of Children's Rights Studies*, eds. Wouter Vandenhoe, Ellen Desmet, Didier Reynaert and Sara Lembrechts (London: Routledge, 2015), 185–200; Nigel Patrick Thomas, "Towards a Theory of Children's Participation," *The International Journal of Children's Rights*, vol. 15(2) (2007): 199–218.

understandings of children as members of a separate social category and as active agents in society.¹¹ However, the CRC simultaneously highlights children's dependency and autonomy.¹² As noted in the introduction, in the preamble to the CRC it is emphasised that children require special safeguards and care in order to protect their fundamental rights. For example, the best interests of the child principle requires states to "ensure the child such protection and care as is necessary for his or her well-being" (Article 3(2) CRC). Moreover, children's growing capacities should be taken into account in the exercise of their rights (Article 5 CRC). This implies that a balance must be struck between treating children as active agents who have the capacity to exercise their own rights and providing them with protection due to their ongoing development and immaturity.¹³ The idea that children are active agents is further substantiated by the participation rights enshrined in the CRC. The right to be heard implies that children who are capable of forming their own views have the right to express those views freely in all matters affecting them (Article 12(1) CRC). The views and opinions of the child should be taken into account giving due weight to the age and maturity of the child (Article 12(1) CRC). The CRC further specifies that children should be provided with the opportunity to be heard in any judicial and administrative proceedings affecting them (Article 12(2) CRC). The concept of child participation has challenged traditional views on children (i.e., as being dependent and vulnerable) and has questioned hierarchical structures and relations between adults and children.¹⁴ Therefore, the effectiveness of the implementation of child participation depends, in part, on the willingness of adults to share their power over the process with children.¹⁵

The UN Committee on the Rights of the Child (CRC Committee) has further conceptualised the right to be heard in *General Comment no. 12*.¹⁶ The Committee clarifies that when a child is heard, this should take place in a setting that

11 Verhellen, "The Convention," 43–59; Bruno Vanobbergen, "Children's Rights and Childhood Studies: From Living Apart Together to a Happy Marriage," in *Routledge International Handbook of Children's Rights Studies*, eds. Wouter Vandenhoe, Ellen Desmet, Didier Reynaert and Sara Lembrechts (London: Routledge, 2015), 60–76.

12 Verhellen, "The Convention," 43–59.

13 Sheila Varadan, "The Principle of Evolving Capacities under the UN Convention on the Rights of the Child," *The International Journal of Children's Rights*, vol. 27 (2019): 306–338.

14 Tisdall, "Children and Young People's," 185–200; Reynaert et al., "Introduction," 1–23; John Tobin, "Justifying Children's Rights," *The International Journal of Children's Rights*, vol. 21(3) (2013): 395–441.

15 Thomas, "Towards a Theory," 199–218.

16 UN Committee on the Rights of the Child, *General Comment no. 12 (2009) The Right of the Child to Be Heard*, CRC/C/GC/12 (July 20, 2009).

contributes to being able to give his¹⁷ opinion freely. This means that the environment may not be intimidating, hostile or otherwise inappropriate to the age of the child (paras. 23, 34, 60). An important implication of the right to be heard is that the child's opinion should be taken seriously and that the child should be informed about how his opinion was taken into account in the decision-making process (paras. 28, 45; 134(i)).¹⁸ This feedback must ensure that the child has not only been heard by way of formality, but that his opinion has been seriously considered by the decision-making authority (para. 45). Moreover, every child also has the right *not* to exercise their right to be heard – it is a choice, not an obligation (para. 16).

In *General Comment no. 14* the CRC Committee identified a number of elements that should be taken into account when assessing the child's best interests, among which are the child's views and the situation of vulnerability.¹⁹ With regard to the first element, it is mentioned that "[t]he fact that the child is very young or in a vulnerable situation (e.g., has a disability, belongs to a minority group, is a migrant, etc.) does not deprive him or her of the right to express his or her views [...]" (para. 54). Interestingly, the CRC Committee refers to the concept of a "vulnerable situation". Examples of vulnerable situations are provided in paragraph 75, such as being a refugee or asylum-seeker. The CRC Committee comments that children in vulnerable situations should be entitled to the full enjoyment of all their rights. Moreover, it is specified that "[a]uthorities and decisionmakers need to take into account the different kinds and degrees of vulnerability of each child [...]", preferably by means of an individualised assessment (para. 76). The use of the term "vulnerable situations" shows that the CRC Committee is mindful not to contribute to stigmatising or labelling children based on the situation in which they live.²⁰ This vision on vulnerability is also in line with the idea that the vulnerable situation may be temporary and not an "inherent feature of childhood".²¹

However, despite the innovative and progressive character of the right to be heard, concerns are raised by several scholars about its meaning and effectiveness

17 For practical reasons, in this chapter children and adults are referred to in the masculine form. Feminine children and adults are to be considered included in the references as well.

18 Laura Lundy, "In Defence of Tokenism? Children's Right to Participate in Collective Decision-Making," *Childhood*, vol. 25(3) (2018): 340–354.

19 UN Committee on the Rights of the Child, *General Comment no. 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art. 3, para 1)*, CRC/C/GC/14 (May 29, 2013).

20 See also Timmer et al., "The potential," 190–197.

21 Tobin, "Understanding Children's Rights," 155–182, 169.

in practice.²² A common criticism of child participation is, when involved at all, the *tokenistic nature* of children's involvement.²³ Lundy departs from the point of view that the child's right to be heard runs counter to the instinct and interests of adults and that conditions should be created which make it impossible for adults to ignore the views of children in decision-making.²⁴ She argues, however, that tokenistic ways of collective participation (not in individual decision-making) can sometimes be a starting point and are better than not involving children at all.²⁵ Tobin takes one step back by stating that an emphasis on the vulnerability of children "leads to their objectification and silencing".²⁶ As a result, children are predominantly seen as vulnerable and in need of assistance, and their evolving capacities and agency are easily overlooked by adults. This in turn may lead to a misinterpretation of children's needs, because the child is not asked about his views on the situation and whether he requires specific support or assistance.²⁷

13.3 VULNERABILITY AND REFUGEE CHILDREN

Refugee children are often seen as finding themselves in a "vulnerable situation". In the context of migration law, (unaccompanied) children are also often identified as a vulnerable group.²⁸ Mendola and Pera observe that both in UN and EU standards the vulnerability of migrants "[stems] from inherent individual characteristics such as age, gender or ethnicity, and from external factors that cause the migrants to experience precariousness, discrimination or other negative circumstances".²⁹ The definition of "vulnerable migrants" drafted by the International Organization

22 Lundy, "In Defence of Tokenism," 340–354; Tara M. Collins, "A Child's Right to Participate: Implications for International Child Protection," *The International Journal of Human Rights*, vol. 21(1) (2017): 14–46; Aoife Daly, *Autonomy and the Courts: Beyond the Right to Be Heard* (Leiden: Brill Nijhoff, 2017); Anthony Charles and Kevin Haines, "Engaging Young People as Partners for Change: The UR Community Project," *The International Journal of Children's Rights*, vol. 27 (2019): 140–175.

23 Tokenism refers to "those instances in which children are apparently given a voice, but in fact have little or no choice about the subject or the style of communicating it, and little or no opportunity to formulate their own opinions." Roger A. Hart, *Children's Participation: From Tokenism to Citizenship* (UNICEF, 1992); Lundy, "In Defence of Tokenism," 340–354.

24 Lundy, "'Voice' Is Not Enough," 927–942.

25 Lundy, "In Defence of Tokenism," 340–354.

26 Tobin, "Understanding Children's Rights," 155–182, 171.

27 Tobin, "Understanding Children's Rights," 155–182.

28 United Nations General Assembly (2016) *New York Declaration for Refugees and Migrants*, A/RES/71/1 (September 19, 2016), para. 23.

29 See, for example, Article 20(3) Asylum Qualification Directive, 2011/95/EU; Mendola and Pera, "Vulnerability of Refugees," 3.

for Migration seems, however, to be more in line with current ideas about the concept of vulnerability: “vulnerable migrants are migrants who are unable effectively to enjoy their human rights, are at increased risk of violations and abuse and who, accordingly, are entitled to call on a duty bearer’s heightened duty of care”.³⁰ This reflects the vision that vulnerability does not stem from individual and mostly static characteristics, but from the situation they find themselves in. The other side of the coin, however, is that refugee children are often portrayed as vulnerable and helpless victims who are not able to exercise agency and voice their opinion.³¹ They are seen as victims of migrant smugglers or traffickers, or even their own parents, who are desperate enough to send their children alone to a foreign country. Beduschi shows in her analysis of European Court of Human Rights case law concerning migrant children that the ECtHR uses the vulnerability of migrant children and the best interests of the child principle to emphasise the need for special measures of protection for these children.³² However, Beduschi also recognises that regarding children as a vulnerable group poses risks, such as not taking into account their agency and over-emphasising their dependency upon adults.³³

Refugee children also have the right to be heard, in line with Article 12 CRC. The CRC Committee has indicated that these children should have access to the procedures in a child-sensitive and age-appropriate manner.³⁴ Also, the child should have the opportunity to present his reasons that lead to the asylum application, either filed independently or by a parent.³⁵ The CRC Committee states that “[c]hildren should be heard independently of their parents, and their individual circumstances should be included in the consideration of the family’s cases”.³⁶

30 International Organization Migration, *Handbook in Protection and Assistance for Migrants Vulnerable to Violence, Exploitation and Abuse* (IOM: Geneva, 2019).

31 Lems et al., “Children of the Crisis,”; Flegar, “Who Is Deemed Vulnerable,”; Mendola and Pera, “Vulnerability of Refugees”; see also Jonathan Herring, “Vulnerability, Children and the Law,” in *Law and Childhood Studies: Current Legal Issues Volume 14*, ed. Michael Freeman (Oxford University Press, 2012), 157–172.

32 Beduschi, “Vulnerability on Trial.”

33 Beduschi, “Vulnerability on Trial.”

34 UN Committee on the Rights of the Child, *Joint General Comment no. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and no. 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration*, CMW/C/GC/3-CRC/C/GC/22, (November 16, 2017), para. 37.

35 UN Committee on the Rights of the Child, *General Comment no. 12 (2009) The Right of the Child to Be Heard*, CRC/C/GC/12 (July 20, 2009), para. 123.

36 CMW/C/GC/3-CRC/C/GC/22 para. 37.

The child's specific reasons for migrating should be taken into account, and child-specific forms of persecution should also be considered by the authorities.³⁷

In reality, however, refugee children experience many barriers to effectively participate in asylum procedures. Asylum application procedures are highly complex administrative procedures that are often not adapted to their capacities and level of maturity.³⁸ However, unaccompanied and separated children³⁹ usually have to go through the same asylum application procedures and asylum interviews as adult applicants. Generally, children lack access to information in relation to the authorities, procedures and access to rights and services.⁴⁰ Moreover, asylum procedures are often described in terms of being adversarial and hierarchical, with a narrow focus on evidence and truth-finding.⁴¹ Several studies have shown that children experience hostile interrogation techniques, that they feel attacked and

37 CMW/C/GC/3-CRC/C/GC/22 para. 37; Jason M. Pobjoy, *The Child in International Refugee Law* (Cambridge: Cambridge University Press, 2017).

38 Ciara Smyth, *European Asylum Law and the Rights of the Child* (New York: Routledge, 2014); Helen Stalford, "David and Goliath: Due Weight, the State and Determining Unaccompanied Children's Fate," *Immigration, Asylum and Nationality Law*, vol. 32(3) (2018): 258–283; Rap, S. E., "The Right to Information of (Un)Accompanied Refugee Children: Improving Refugee Children's Legal Position, Fundamental Rights" Implementation and Emotional Well-Being in the Netherlands," *The International Journal of Children's Rights*, vol. 28(2) (2020): 322–351.

39 Unaccompanied children have been defined by the UN Committee on the Rights of the Child, *General Comment no. 6 (2005) Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6 (September 1, 2005), para. 7, as "children, as defined in article 1 of the Convention, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so". Separated children have been defined as "children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members" (CRC/GC/2005/6, para. 8). For practical reasons, this article will refer to unaccompanied children; separated children are to be considered under this heading as well.

40 Elaine Chase, "Agency and Silence: Young People Seeking Asylum Alone in the UK," *British Journal of Social Work*, vol. 40(7) (2010): 2050–2068; Rap, "The Right to Information," 322–351; Anna Lundberg and Lisa O. Dahlquist, "Unaccompanied Children Seeking Asylum in Sweden: Living Conditions from a Child-Centred Perspective," *Refugee Survey Quarterly*, vol. 31(2) (2012): 54–75.

41 Stalford, "David and Goliath," 258–283; Julia Dahlvik, "Asylum as Construction Work: Theorizing Administrative Practices," *Migration Studies*, vol. 5(3) (2017): 369–388; Anna Lundberg and Jacob Lind, "Technologies of Displacement and Children's Right to Asylum in Sweden," *Human Rights Review*, vol. 18(2) (2017): 189–208; Lisa Shamseldin, "Implementation of the United Nations Convention on the Rights of the Child 1989 in the Care and Protection of Unaccompanied Asylum Seeking Children: Findings from Empirical Research in England, Ireland and Sweden," *The International Journal of Children's Rights*, vol. 20(1) (2012): 90–121.

intimidated, and that questions are asked to expose inconsistencies and question the credibility of their story.⁴² Immigration officials often do not possess extensive skills which pertain to communicating with children, due to a lack of training and specialisation.⁴³ Furthermore, power is unequally distributed in the asylum procedure between the state and the child, and the child bears the burden of proof.⁴⁴ The child's testimony and evidence play an important role in substantiating the asylum application.⁴⁵ However, unaccompanied children find it difficult to disclose their story to adults,⁴⁶ and they selectively share information with adults and peers, displaying a sense of distrust towards social workers and others who represent the asylum system.⁴⁷

13.4 REFUGEE CHILDREN'S VOICE AND AGENCY IN THE DUTCH ASYLUM PROCEDURE

The results presented in this chapter are based on two parts of a larger research project about the effective participation of refugee children in Dutch asylum

42 Stephanie Rap, "A Test That Is About Your Life': The Involvement of Refugee Children in Asylum Application Proceedings in the Netherlands," *Refugee Survey Quarterly*, vol. 41(2) (2022): 298–319; Grigoropoulos Iraklis, "Move On, No Matter What... Young Refugee's Accounts of their Displacement Experiences," *Childhood*, vol. 28(1) (2020): 170–176; Ruth Brittle and Ellen Desmet, "Thirty Years of Research on Children's Rights in the Context of Migration: Towards Increased Visibility and Recognition of Some Children, But Not All?," *The International Journal of Children's Rights*, vol. 28 (2020): 36–65; Daniel Hedlund, "Constructions of Credibility in Decisions Concerning Unaccompanied Minors," *International Journal of Migration*, vol. 13(2) (2017): 157–172; Elaine Chase, "Security and Subjective Wellbeing: The Experiences of Unaccompanied Young People Seeking Asylum in the UK," *Sociology of Health and Illness*, vol. 35(6) (2013): 858–872; Ravi K. S. Kohli, "The Sound of Silence: Listening to What Unaccompanied Asylum-Seeking Children Say and Do Not Say," *British Journal of Social Work*, vol. 36(5) (2006): 707–721.

43 Olga Keselman, Ann-Christin Cederborg, Michael E. Lamb and Örjan Dahlström, "Mediated Communication with Minors in Asylum-Seeking Hearings," *Journal of Refugee Studies*, vol. 21(1) (2008): 103–116; Olga Keselman, Ann-Christin Cederborg, Michael E. Lamb and Örjan Dahlström, "Asylum-Seeking Minors in Interpreter-Mediated Interviews: What Do They Say and What Happens to Their Responses?" *Child & Family Social Work*, vol. 15(3) (2010): 325–334; Nienke Doornbos, *Op Verhaal Komen: Institutionele Communicatie in de Asielprocedure* (Nijmegen: Wolf Legal Publishers, 2006); S. E. Rap, "Betekenisvolle participatie van vluchtelingenkinderen in de asielprocedure. Het doel van de asielprocedure, het recht om gehoord te worden en de rol van het kind," *Tijdschrift voor Familie- en Jeugdrecht*, vol. 10 (2021): 275–281.

44 Dahlvik, "Asylum as Construction Work," 369–388; Lundberg and Lind, "Technologies of Displacement," 189–208.

45 Shamseldin, "Implementation," 90–121; Stalford, "David and Goliath," 258–283.

46 Kohli, "Sound of Silence," 707–721; Keselman et al., "Asylum-Seeking Minors," 325–334.

47 Chase, "Agency and Silence," 2050–2068.

procedures.⁴⁸ First, results are presented based on observations of first instance asylum application interviews with children held by immigration officers. In total, 13 interviews held between 2012 and 2019 were observed.⁴⁹ Two cases in 2019 were observed by the researcher in person in a video-link room at the office of the Immigration and Naturalisation Service (INS). Of the other 11 interviews, the video recordings were observed. Observing video-recorded asylum interviews and through a live video link had the advantage of not interfering with the interview setting.⁵⁰ The sample of 13 interviews consists of four girls and nine boys. The average age of the children was 9.5 years, ranging from seven to 11 years. Nine of the 13 children originally came from Syria,⁵¹ while the others came from Eritrea, Iraq, Democratic Republic of the Congo (DRC), and Mongolia.⁵² The interviews lasted on average 49 minutes, ranging from 19 to 72 minutes.⁵³ Several immigration officers were observed in more than one interview. Next to the child, the immigration officer and the interpreter, a guardian (N=10) and/or family member (N=4) accompanied the child to the interview.⁵⁴

The second part of this study consisted of semi-structured interviews held with 21 refugee children who had applied or were in the process of applying for asylum in the Netherlands.⁵⁵ Respondents were selected through various methods, such as through a children's rights NGO, a high school for migrant children (International Transition Class), a gatekeeper, and snowball sampling. The sample consists of 12 girls and nine boys. At the time of the interview the young people were between 12 and 22 years old. Eight young people were unaccompanied minors when they arrived in the Netherlands. Three of these, however, arrived with other family members (i.e., grandparents, an adult brother and his family, and an uncle and aunt). The other 13 arrived in the company of their parent(s) and other siblings.

48 This work was supported by the Dutch Research Council (NWO) – Social Sciences and Humanities under Grant no. 451-17-007 4135.

49 Ten out of the 13 interviews took place in 2017–2019.

50 See Alan Bryman, *Social Research Methods* (Oxford: Oxford University Press, 2012).

51 Some of these children had resided in other countries before their arrival in the Netherlands, such as Turkey and Lebanon.

52 The older interviews from 2012 and 2013 involved children from DRC and Mongolia.

53 This excluded the one or two breaks that were taken in six out of 13 interviews. The breaks lasted between 2 and 45 minutes. This made the longest interviews take 108 minutes, with a break of 43 to 45 minutes.

54 Other family members were an aunt, grandmother, brother and father. It is not known why the child who was accompanied by his father was interviewed, because normally accompanied children are only interviewed when they are 15 years or older. It was decided to keep this interview in the analysis because it did not substantially differ from the other observed interviews.

55 Between February 2020 and June 2021. See also Rap, “‘A Test That Is About Life’” 298–319.

On their arrival, the children were between four and 17 years old (one respondent was born in the Netherlands). Six young people were involved in a family reunification procedure, and the other 15 applied for asylum (or their parent(s) did). The children originally came from Iraq, Iran, Armenia, Russia, Syria, Palestine (Gaza), Afghanistan, Yemen, Turkey, and Jordan.

13.4.1 Child-Specific Elements in the Dutch Asylum Procedure

In the Netherlands, the INS is responsible for administering the asylum procedure. The goal of the asylum procedure is to determine whether the applicant is in need of international protection based on the Refugee Convention, the European Convention on Human Rights, and the Common European Asylum System (CEAS). Therefore, it is expected that the applicant, including children, collaborates with research conducted by the INS (Article 3.113 Aliens Decree; 2.4 Aliens Circular 2000 (C)). Dutch immigration law prescribes that the INS needs to take into account the age, level of development and burden (*sic*) when interviewing a child below the age of 18 (Aliens Circular 2000 (C), the Netherlands, Article 2.11). In addition, it has been laid down by law that “If an educational or psychological examination reveals that a foreign national younger than 12 has problems that impede a further interview, the INS will not conduct a further interview” (Article 2.11; see also Article 3.113 Aliens Decree 2000). Unaccompanied children between the ages of six and 12 are interviewed in a specially designed child-friendly interview room by trained immigration officers and in the presence of an interpreter. These immigration officers usually have an affinity for working with children, and some of them have a social work degree (Aliens Circular 2000 (C), Article 2.11; Aliens Decree 23 November 2000, Article 3.113; Official Journal, 2015, 20705, Explanation part F).⁵⁶ Accompanied children between 15 and 18 years are also interviewed by the INS because they have to file an asylum claim independently from their parents.⁵⁷ Unaccompanied children between 12 and 18 years and accompanied children between 15 and 18 years are interviewed in the regular interview rooms that are also used for adults.

56 All immigration officers who interview minors have completed the EASO modules Interviewing techniques, Interviewing children, and Interviewing vulnerable persons, as well as the INS course Interviewing unaccompanied children of 6–12 years.

57 Note that accompanied children below the age of 15 are not interviewed as part of the asylum application procedure of their parents. Exceptionally, accompanied children between 12 and 15 can also apply for asylum independently from their parents, when they have child-specific asylum motives, and, that being the case, they are also interviewed, *Parliamentary Papers II* 2003/04, 19637, no. 824, 14; Aliens Circular 2000 (C), article 2.11.

When an unaccompanied child arrives in the Netherlands and reports to the authorities, he is immediately placed under the supervision of a legal guardian (i.e., a child protection officer employed by the guardianship organisation for unaccompanied minors, Article 3.109d(1) Aliens Decree 23 November 2000). In addition, the child is assigned a lawyer, and information about the procedure is provided by the guardian, the Dutch Council for Refugees, and the lawyer (Article 2.2 Aliens Act Implementation Guidelines 2000 (C); Article 3.109(2) and Article 3.108c(2) Aliens Decree 2000). The first interview takes place at the registration phase, and unaccompanied children are asked about their personal details and family composition (Article 2.11 Aliens Act Implementation Guidelines 2000 (C)). After registration, unaccompanied children have the right to a rest and preparation phase of three weeks (Article 3.109(1) Aliens Decree 2000). The purpose of the second interview is to identify the asylum narrative and flight motives of the child (Article 2.11 Aliens Act Implementation Guidelines 2000 (C)).

13.4.2 Interviewing Refugee Children below the Age of 12

In the Netherlands, asylum application interviews with children below the age of 12 take place at one location of the INS, where a specifically designed child-friendly interview room is designed, modelled after police interview rooms for child victims. The room is equipped with audio-visual recording equipment, and a video link is established with another room, where the guardian can observe the interview. The interview room of about 30 m² has a raised stage in the corner, a table with office chairs and a high children's chair, a separate desk with a computer, a cupboard with toys and tools, and a chalkboard. During the interview, special aids and tools can be used, such as puzzles depicting means of transport, a folder with photos of different countries, icons (for example, of family, religion, school and travel), and dots on the stage that can be used to depict the journey. The results of the observations of the interviews will be organised around three main themes: 1) the preparations and explanations provided to the child by the immigration officers, 2) the conversation techniques used by immigration officers, and 3) the content of the interview and the types of questions asked.

Preparations and Explanations

In most observed cases, an explanation was given to the child about the audio-visual recording (eight out of 13) and the video-link room (nine out of 13). Next to this technical explanation, the immigration officer should explain the

procedure of the interview and verify whether the child understands the interpreter. In 11 out of 13 of the observed cases, the child was asked if he understood the interpreter. The procedure of the interview itself, the aim of the interview, the role and expectations of the child, ground rules, and breaks, were not explained very extensively in most cases. Only in four cases did the interview contain an elaborate introduction. At the closure of the interview, it was observed whether explanations were given regarding the follow-up of the interview, with regard to the procedure and the decision that needs to be taken. However, usually the closure only contained some brief comments about the fact that the immigration officer would make a report of the interview and send it to the child's lawyer. The confusion among children about the intention and purpose of the interview often also became clear at the end of the interview, when children asked the immigration officer why they had the interview and if they could stay in the Netherlands. The following quote shows that the purpose of the interview was not fully clear to the child:

IO: Is there anything else you want to tell or ask?

C: Why am I here?

IO: Everybody who wants to stay in the Netherlands comes here. We always want to hear from the people themselves. Everybody gets a conversation, including children.

C: Can we stay?

IO: That will be decided soon. Do you understand?

C: Can my mother come here from Syria?

IO: That is the next step. Your guardian can explain all about that.

C: If we cannot stay, do we have to go back? (Interview 2, 10-year-old boy from Syria)

Conversation Techniques

During the interviews it was observed that immigration officers used certain conversation techniques, such as metacommunication, small talk, complimenting the child, summarising, and bringing the child back to reality, to adapt the interview to the level of maturity and conversation skills of the child. Most immigration officers explained that the child should say "I don't know" in case he did not know the answer to the question and should say it when he does not understand something that is asked. Sometimes during the interviews immigration officers gave feedback when a child did not know an answer or stayed silent:

IO: Do you know how old your father is?

C: No

IO: That is very good, if you don't know you can just tell me and you don't have to make something up. (Interview 3, eight-year-old boy from Syria)

Next to the usage of conversation techniques, immigration officers could also make use of the aids and tools that were available in the child-friendly interview room. Tools were used in half of the interviews. Most involved pencil and paper, such as when the child was asked to draw a map. In one case the blackboard was used to visualise the places where the child had lived. In another case the podium with dots in the carpet was used, explaining with every step to which countries the child had travelled.

Content of the Interview

The main part of the interview revolved around the child's asylum story, with questions to verify where the child came from, why he was seeking asylum, and whether the child was in need of international protection. Moreover, the child was asked in detail about his situation in the country of origin, whether he was in school, what he usually did during the day, what kind of house the family lived in, and the different places and countries the child lived in. Also, questions were asked about parents, siblings and other family members: their names and age, what kind of work they did, where they lived and where they were currently residing, and if they were still in contact with the child. For example, questions were asked about birth places and places of residence of (grand)parents:

IO: Do you know where your dad was born, in what city or village in Syria?

C: I don't know. Maybe he was born in X, but I don't know in which city.

IO: Do you know where the dad and mum of your dad live?

C: I don't know where they live. (Interview 3, eight-year-old boy from Syria)

The interviews also contained questions about the child's fleeing to the Netherlands, what means of transportation the child used, with whom he travelled, in which countries he had lived, and whether the child knew what a passport was. In order to verify whether the child is a refugee or otherwise in need of international protection, a question that was always posed was why the child had left his country of origin and whether that was connected to, for example, violence or war. The questions posed required the child to have detailed knowledge about his parents or other family members. Also, abstract topics were discussed, such as ethnicity, and

the immigration officer did not verify whether the child understood the notion of ethnicity:

IO: You were born in Syria, a very big country. There are different groups of people living there, Syrians, Kurds, Palestinians. Do you know which group of people you belong to?

C: I am Syrian. (Interview 3, eight-year-old boy from Syria)

It was observed that immigration officers relied heavily on closed-ended questions (e.g., “do/did you”), which were often factual by nature and highly detailed. Doornbos observed in her study involving adult asylum applicants that they had “great difficulty with the emphasis on facts, names, places, and dates”.⁵⁸ Moreover, applicants are expected to know about the geography or political situation in their country of origin, with a lack thereof often being seen as an indicator of incredibility, which plays an important role in assessing the asylum application.⁵⁹ It was also observed that many open directive questions were asked. These are questions that refocus the child’s attention on details or aspects of events that he has already mentioned, providing a category for requesting additional information using “wh-” questions.⁶⁰ In many instances the child was not able, however, to provide an answer, because he might not have had such detailed knowledge. Also, questions concerning the reasons for fleeing were predominantly posed in the “why” form. This can be difficult for the child to answer for various reasons.

IO: The war in Syria has been going on for a long time, at one point you left, do you remember why you left at a certain moment, did something happen or why did you leave?

C: Nothing happened, but to make sure nothing would happen to us, we left. (Interview 8, 10-year-old girl from Syria)

The child is asked to explain why he has left his home country, implying a form of accountability or responsibility for his actions or even the decisions made by others, such as parents. Moreover, young children cannot fully understand causal

58 Nienke Doornbos, “On Being Heard in Asylum Cases: Evidentiary Assessment through Asylum Interviews,” in *Proof and Credibility in Asylum Law*, eds. Gregor Noll and A Popovic (Leiden: Nijhoff, 2005), 103–122, 120.

59 Dahlvik, “Asylum as Construction Work,” 369–388.

60 Keselman et al., “Mediated Communication,” 103–116, 106.

relationships, which are often asked about when using a “why” question,⁶¹ which makes it difficult for them to provide an answer to these questions.

13.4.3 Interviewing Refugee Children Between 12 and 18 Years

Unaccompanied children between 12 and 18 years largely follow the same steps in the asylum procedure as adults. Based on the interviews with young migrants, it can be concluded that refugee children perceive the involvement in the asylum procedure as burdensome and stressful.⁶² Although they indicated that they received information before the start of the procedure, they had little knowledge concerning what to expect from the actual asylum interview and their role therein. One girl explained:

R: Yes, I thought it was nerve-wracking. Because I never experienced that before, I do not know what, yes, what they are going to ask there. Yes, you get an idea so to say of what they are going to ask, but I just felt very nervous. (R7: Girl, unaccompanied, from Syria)

Their feelings of stress continued throughout the proceedings and were sustained by ignorance about the reasons behind questions that were asked during the asylum interviews, the fact that the same questions were repeatedly asked, and the perceived poor quality of translations by interpreters. The results show that on the part of the children a good deal of uncertainties existed, which negatively impacted their feelings of control over the situation.⁶³

R: So I thought: okay, they are asking something, so I'll just answer. They went really deep, very deep. So I just sort of, so when I heard way too many details, that they want to know that, I had more stress like: okay, I don't know this [...] So I was usually like: I actually don't know, I can't remember it, I didn't pay attention to it, I don't know. (R5: Girl, accompanied, Palestine)

61 Martine F. Delfos, *Luister je wel naar mij? Gespreksvoering met kinderen tussen vier en twaalf jaar oud* (Amsterdam: SWP Uitgeverij, 2009).

62 See also Elaine Chase, “Transitions, Capabilities and Wellbeing: How Afghan Unaccompanied Young People Experience Becoming “Adult” in the UK and Beyond,” *Journal of Ethnic and Migration Studies*, vol. 46(2) (2020): 439–456.

63 Jennifer Allsopp, Elaine Chase and Mary Mitchell, “The Tactics of Time and Status: Young People's Experiences of Building Futures While Subjects to Immigration Control in Britain,” *Journal of Refugee Studies*, vol. 28(2) (2014): 163–182.

Some respondents indicated that they had to provide evidence to the immigration authorities and that their honesty was being questioned. Nevertheless, several respondents felt ambivalent about telling everything in the interview, and they explained that they choose not to say certain things or just to give the information that was asked of them, with no extra details.⁶⁴

R: No, I only do what the person asks me. Yes, that is everything, I think, because I, when I tell a little more, maybe something goes wrong. I feel a little scared. (R11: Boy, accompanied, from Yemen)

The results show that despite the stressful situation the children found themselves in, they were able to exercise some forms of control or agency during the process. They made deliberate choices about what to tell (and not to tell) the immigration officer, some even denied access to the interview to certain people or asked for the interpreter to be replaced. The respondents were also critical about the support that was available, with several feeling they did not need any support person during the interview.

R: Yes, for example, when children want to go to those meetings, then they should really be alone there. Then they have the freedom to tell everything and explain everything. But if they sit there with someone from the family, for example, it is a little awkward.

I: Was someone from your family there, then, during meetings?

R: Yes, it happened with my grandma, some things I did not want to say when she was there. She was there during one or two meetings and then I told the Nidos guardian that I would rather go alone. (R6: Girl, unaccompanied, from Syria)

This shows that some children had a clear goal in mind, that of being able to stay in the Netherlands and to apply for family reunification. This is in line with the idea that refugee children possess and display agency and are capable of making choices, which in turn can give them a sense of control over the situation.⁶⁵ The results also show that they made deliberate choices about what to tell (and not to tell) the INS; some even denied access to the interview to certain people or asked

⁶⁴ See also Kohli, "The Sound of Silence," 707–721.

⁶⁵ Jennifer Allsopp and Elaine Chase, "Best Interest, Durable Solutions and Belonging: Policy Discourses Shaping the Futures of Unaccompanied Minors Coming of Age in Europe," *Journal of Ethnic and Migration Studies*, vol. 45(2) (2019): 293–311.

for the interpreter to be replaced. Moreover, this contrasts with the image of the refugee child as a vulnerable victim who is not able to have any influence over the situation.

13.5 CONCLUSIONS

In this chapter the concept of vulnerability has been applied to the context of refugee children, who are involved in asylum procedures. To avoid stigmatisation of groups of children, the CRC Committee uses the notion of “vulnerable situation” in which children can be found. This takes into account the temporary and contextual nature of vulnerability. However, in the context of migration law, children, among other groups of refugees and migrants, are often seen as an inherently vulnerable group. In mainstream discourse, refugee children are depicted either as helpless victims or as a threat to Western society. In both instances, seeing and treating children solely as being vulnerable and in need of help or a threat carries with it the risk of not listening to them. In that sense the child’s right to be heard and to participate can be at jeopardy when regarding them this way.

In the second part of this chapter, empirical research into the participation of refugee children in the Dutch asylum procedure has been presented. It has been shown that because of the nature of asylum procedures, it is rather difficult for children to participate therein. In the case of unaccompanied children seeking asylum, their story plays a crucial role in the assessment of their asylum application.⁶⁶ The goal of the asylum procedure is to determine whether the child is in need of international protection and therefore the child’s identity and asylum motives need to be investigated. Truth-finding is an important element of the procedure, which determines the content of the questions asked. Based on the observations of asylum interviews with young children it can be concluded that, despite the adapted environment, it is very difficult for immigration officers to have a meaningful conversation about these difficult and abstract topics. The observations revealed that many children did not understand the purpose of questions, were not able to give detailed answers, and were lacking knowledge concerning the implications of the interview. Thorough explanations of the aim of the interview, ground rules for the conversation, what was expected from the child during the interview, and explaining the follow-up procedure after the interview were all lacking. Also, immigration officers did not devote much attention to verifying whether the child understood the explanations provided. The interviews with

66 Smyth, *European Asylum Law*; Stalford, “David and Goliath,” 258–283.

older children about their experience with the asylum interviews underpin these findings, indicating the precarious situation they find themselves in.

The goal of the Dutch asylum interview seems not to provide the child with an opportunity to be heard and express his views; rather, the objective is to determine whether the child is in need of refugee protection, and to that end, the immigration officer assesses the credibility of the child's story and asylum motives. Moreover, the asylum procedure can be characterised by a power imbalance between the state and the asylum applicant, whereby the burden of proof lies upon the child applicant to present evidence to prove his claim for refugee protection.⁶⁷ However, the results also show that children are in fact able to exercise some forms of agency and control in this situation, by making deliberate choices and requests to the INS. This confirms the assumption that vulnerability is not an inherent characteristic but a consequence of the situation in which these children find themselves. However, for some groups of children, such as young children, exercising agency might be even more difficult to realise.⁶⁸ This warrants critical reflection on the role and involvement of children in asylum procedures, specifically young children. In general, procedures could be improved, to better align with the age, maturity, and situation of refugee children.

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67 Dahlvik, "Asylum as Construction Work," 369–388; Lundberg and Lind, "Technologies of Displacement," 189–208.

68 Brittle and Desmet, "Thirty Years of Research," 36–65; Nick Gill, Jennifer Allsopp, Andrew Burridge, Dan Fisher, Melaine Griffiths, Jessica Hambley, Nicole Hoellerer, Natalia Paszkiewicz and Rebecca Rotter, "What's Missing from Legal Geography and Materialist Studies of Law? Absence and then the Assembling of Asylum Appeal Hearings in Europe," *Transactions of the Institute of British Geographers*, vol. 45 (2019): 937–951.

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14. The Transactional Horizons of Child Vulnerability

Daniel Stoecklin

Abstract This chapter analyses child vulnerability in two major crises: the COVID-19 pandemic and climate change. The strategies of children during the pandemic in Switzerland and children’s agency in climate demonstrations are captured in an online survey and in the speeches of Greta Thunberg. This shows that vulnerability is bound to how social arrangements – including human rights – mitigate natural frailty, and it advocates for better inclusion of children’s rights and agency in participatory public policies.

Keywords children | climate change | COVID-19 pandemic | transactional horizons | vulnerability

14.1 INTRODUCTION

Vulnerability is a relational issue, and consequently child vulnerability is bound to how social ties and human rights mitigate natural frailty. While all human beings are vulnerable, some are more so than others due to human factors, such as power relations, that can be seen in terms of differential social recognition and redistribution of economic resources. Children are particularly affected by these dynamics, and their social positionings are highly dependent on adult-driven arrangements, including the human rights of children. In the end, children’s rights are foremost designed and implemented by adults.

In this chapter, children’s moving social positionings are addressed with regard to their reactions to adult-driven arrangements in two empirical cases: the COVID-19 pandemic and climate change. Child vulnerability is highlighted through the theory of “transactional horizons”, a notion that captures the “symbolic landscapes channeling social interaction”.¹

1 Daniel Stoecklin, “The Transactional Horizons of Greta Thunberg,” *Societies*, vol. 11(2) (2021): 1–24, 2.

This theory, which will be presented in Section 14.2, allows a methodological understanding of social arrangements, captured through the notion of “modes of action”, that will be highlighted with the two cases of children’s experience in COVID-19 lockdown and mobilisation around climate change.

This theoretical framework is therefore used, in Section 14.3, for a secondary analysis of data gathered in Switzerland through an online survey in 2020 in which 157 respondents aged between 11 and 17 years talked about their experiences regarding their family and school life, their life with friends, their hobbies, and finally their activities during the COVID-19 lockdown.² The comparison with the “transactional horizons” that are used in the other major crisis, climate change, with a synthesis of a discursive analysis of Greta Thunberg’s speeches that shows the claims that are made by children differ according to who or what is supposed to raise their vulnerability.³ Children’s positionings change with regard to the social transactions that are implied in the definition of the danger.

This perspective opens a discussion, in Section 14.4, on the role of children’s participation rights in the social arrangements. In these two major crises, children and adolescents respond with innovative strategies and varying resilience but they rarely refer to their human rights. While the ratification of the United Nations Convention on the Rights of the Child (CRC, 1989) is almost universal (all states except the United States have ratified it), children hardly mention and mobilise the rights enshrined in the CRC to make their claims heard. This discrepancy between rights on paper and rights in practice indicates that the children’s rights framework plays a limited role in the social arrangements that either reduce or exacerbate children’s vulnerability.

The final Section 14.5 concludes with recommendations for research and policy. With the comparison of children’s positionings in the two crises, it appears that child vulnerability is structured along social arrangements, including children’s rights. The peculiarities of these social arrangements invite an interpretive approach to children’s rights that, integrated into public policies, is believed to contribute to the efforts to lower child vulnerability.

2 Daniel Stoecklin, “Les enfants face aux conséquences du COVID-19,” in *Coronavirus. Le regard des sciences sociales*, eds. Fiorenza Gamba, Marco Nardone, Toni Ricciardi and Sandro Cattacin (Zurich, Genève: Editions Seismo, 2020), 193–213; Daniel Stoecklin, Christine Gervais, Dagmar Kutsar and Catrin Heite, “Lockdown and Children’s Well-Being: Experiences of Children in Switzerland, Canada and Estonia,” *Childhood Vulnerability Journal*, vol. 3 (2021): 41–59; Daniel Stoecklin and Ludivine Richner, “Inégalités et contributions des enfants en temps de pandémie,” in *COVID-19: Les politiques sociales à l’épreuve de la pandémie*, eds. Emilie Rosenstein and Serge Mimouni (Genève/Zurich : Seismo, 2022), 239–253.

3 Stoecklin, “The Transactional Horizons,” 1–24.

14.2 THE THEORETICAL FRAMEWORK: TRANSACTIONAL HORIZONS AND MODES OF ACTION

To allow a qualitative comparison of children’s positionings in the COVID-19 crisis and in the climate crisis, the theoretical framework that is used must be able to capture the subjective views conveyed by children as they describe their experience. This is the case of the theory of “transactional horizons” based on the “actor’s system and modes of action”⁴ represented in Figure 1 (below).

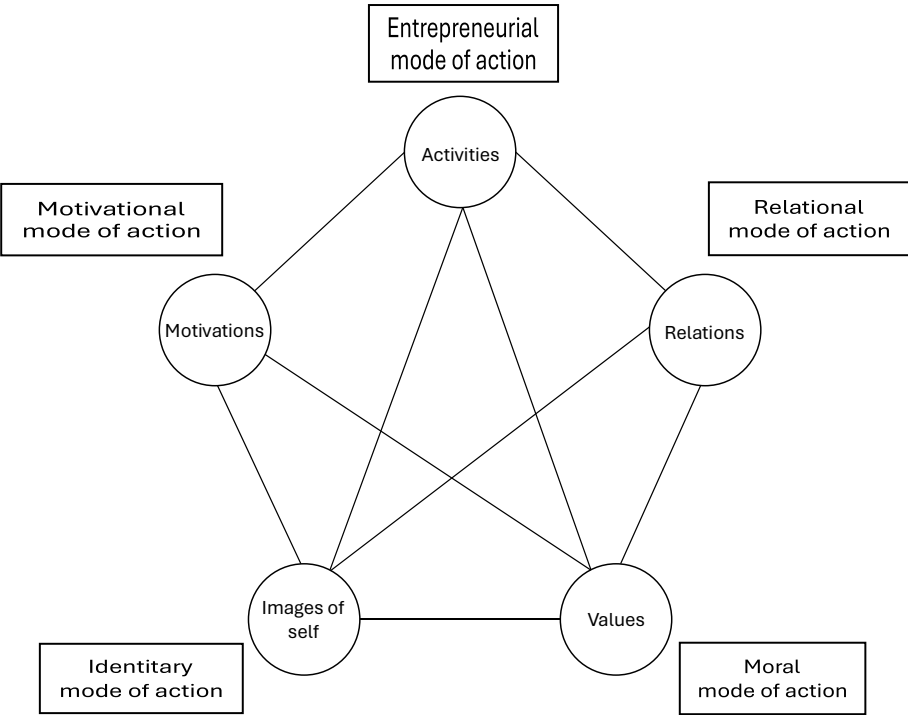


Figure 1: The Actor’s System: Transactional Horizons and Modes of Action⁵

The actor’s system is made of five components of personal experience, namely, activities, relations, values, images of self, and motivations. The five components of the actor’s system have been identified through cross-cultural observations

4 Stoecklin, “The Transactional Horizons,” 1–24.
5 Daniel Stoecklin, “Children’s Right to Participation and Well-Being within and for a Sustainable Development: Towards the Expansion of the Self,” in *Creating Green Citizens*, eds. Johannes Drerup, Franziska Felder, Veronika Magyar-Haas and Gottfried Schweiger (Berlin: J.B. Metzler, 2022), 215–237, 218.

with children in street situations.⁶ These concepts inductively emerged from hundreds of accounts of children in street situations in a dozen countries⁷ and were also observed in studies with other populations in Switzerland, like children in leisure facilities⁸, children during the COVID-19 lockdown⁹, an exploration of children's subjective understandings of well-being,¹⁰ and a discursive analysis of Greta Thunberg's speeches¹¹. They can be considered potentially universal as all human beings can refer to these notions (or synonyms) when reflecting on what they do (activities), whom they know (relations), what they believe (values), how they consider themselves (images of self), and what they want (motivations).

While respondents may use synonyms and not necessarily these concepts which are peculiar to the analyst – activities, relations, values, images of self, motivations (hereafter ARVIM) – they nevertheless always look in one or several of these directions as these can embrace an infinity of experience. These “directions to look at” are propositions with a content that is not given beforehand.¹² They are “sensitizing concepts”¹³, functioning like horizons of experience in the organisation of practical and discursive consciousness. Accordingly, social transactions imply these discursive horizons. Therefore, ARVIM are considered “transactional horizons”, defined as “symbolic landscapes channelling social interactions”.¹⁴

The theory of transactional horizons not only builds on Blumer's “sensitizing concepts”. It also draws on Giddens's structuration theory: the transactional horizons (ARVIM) constitute a symbolic matrix that is recursively involved in social interactions as both a medium for and an outcome of social practices. ARVIM are symbolic horizons ruling over the organisation of practical and discursive consciousness, hence forming the “structure” that Giddens defines as “rules and

6 Daniel Stoecklin, “The Agency of Children in Street Situations,” in *Children in Street Situations: A Concept in Search of an Object*, eds. Riccardo Lucchini and Daniel Stoecklin (Cham, Switzerland: Springer, 2020), 199–236.

7 Ibid.

8 Daniel Stoecklin, “Freely Expressed Views: Methodological Challenges for the Right of the Child to Be Heard,” *Child Indicators Research*, vol. 12(2) (April 2019): 569–588; Daniel Stoecklin, Ayuko Berchtold-Sedooka and Jean-Michel Bonvin, “Children's Participatory Capability in Organized Leisure: The Mediation of Transactional Horizons,” *Societies*, vol. 13(2) (2023).

9 Stoecklin, “Les enfants,” 193–213; Stoecklin et al., “Lockdown and Children's Well Being,” 41–59; Stoecklin and Richner, “Inégalités et contributions des enfants,” 239–253.

10 Stoecklin, “Children's Right to Participation,” 215–237.

11 Stoecklin, “The Transactional Horizons,” 1–24.

12 David Le Breton, *L'interactionnisme symbolique* (Paris: Quadrige/PUF, 2004), 41.

13 Herbert Blumer, *Symbolic Interactionism: Perspective and Method* (Berkeley: University of California Press, 1969).

14 Stoecklin, “The Transactional Horizons,” 1–24, 1.

resources, recursively implicated in the reproduction of social systems”¹⁵ Structure, in Giddens’s theory, is “a virtual order of transformative relations”¹⁶, situated in-between actors and social systems, as shown in Figure 2 (below).

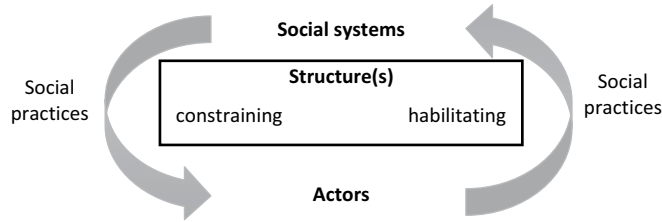


Figure 2: The Process of Structuration (adapted from Nizet 2007, 16).

Figure 2 represents the structuration theory¹⁷, and the definition of structure in terms of “rules and resources”, implicated as “a virtual order of transformative relations”, perfectly fits the concept of “transactional horizons”. They can be viewed as the constraining and habilitating structures, situated in Figure 2 (above), mediating the interactions among the actors and presiding over the institutionalisation of the social practices that are simultaneously building social systems and informed by them.

The links between transactional horizons form systems of action. Systems theory is applied here, as the actor’s system model assumes that any change in one dimension affects the others and the overall system of action. Accordingly, one’s predispositions at any stage of one’s life course are considered as an outcome of the recursive links between these dimensions of experience. Configurations of systems of action can be identified through cluster analysis to obtain broader images of the dominant modes of action in a given context. With transactional horizons (ARVIM), we can compare empirical cases on a collective level (as here, the COVID-19 crisis and the climate crisis) in terms of structures of action that actors tend to be favouring their preferences indicate the constraints on which they are built. In other words, children’s reactions to the COVID-19 pandemic and to climate change are indicative of structures, or systems of action, that are constantly evolving according to the constraints imposed by social systems. This is a logical premise because children’s social positionings can move only if structures

15 William H. Sewell Jr., “A Theory of Structure: Duality, Agency and Transformation,” *American Journal of Sociology*, vol. 98 (1) (1992): 1–29, 6.

16 Anthony Giddens, *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis* (London: The MacMillan Press Ltd, 1979), 17.

17 Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Berkeley: University of California Press, 1984.)

and social systems are unstable. Some more theoretical development on “structure” is necessary here to make this point clear.

Following Sewell, “structure is one of the most important and the most elusive terms in the vocabulary of current social sciences”.¹⁸ I contend that with the theory of transactional horizons, it is possible to overcome “the divide between semi-otic and materialist visions of structure”¹⁹ and hence the problems highlighted by Sewell regarding structuralist approaches.

As Sewell synthesises, in structuralist approaches, structure is viewed as something external to human beings: “Structures tend to appear in social scientific discourse as impervious to human agency, to exist apart from, but nevertheless to determine the essential shape of, the strivings and motivated transactions that constitute the experienced surface of social life”.²⁰ This view of external structures probably has its root in demiurgic accounts of creation, reducing social actors to “cleverly programmed automatons”.²¹ Transactional horizons (ARVIM) escape the “far too rigid determinism in social life”²² assumed by structuralists, because they reintroduce the agency of actors that has been lost with the materialist visions on structure as constituted by reified features of social life. These material contingencies are “treated as primary, hard and immutable, like the girders of a building, while the events or social processes they structure tend to be seen as secondary or superficial (...)”.²³ By contrast, transactional horizons (ARVIM) point out the internal capacity of social actors to reconstruct the meanings attached to social practices and hence modify them accordingly. In other words, what presides over change is not an external “programme” but something that is in-built in human ontology, namely transactional horizons, as they are endogenous to human discursive capacities.

Therefore, transactional horizons (ARVIM), considered as a matrix of symbolic horizons pervious to human agency, also resolve the second issue underscored by Sewell, which is the problem of “awkward epistemological shifts” bound to a notion of structure that implies stability. The assumption of structures as something stable necessarily locates change “outside of structures, either in a telos of history, in notions of breakdown, or in influences exogeneous of the system in question”.²⁴ By contrast, transactional horizons (ARVIM) allow locating

18 Sewell, “A Theory of Structure,” 1–29, 1.

19 Ibid.

20 Ibid.

21 Ibid.

22 Sewell, “A Theory of Structure,” 1–29, 2.

23 Ibid.

24 Sewell, “A Theory of Structure,” 1–29, 2–3.

change in the commuting reconstructions of reality made by social actors in their respective systems of action, as the “social systems” (see Figure 2 above) then become overarching systems of co-determinations among transactional horizons – that is, systems open for infinite change. In the actor’s system model, change is not located outside of the system but lies in the rules of direct and indirect co-determinations among the dimensions of the system (the “transactional horizons”) as represented by the lines among them in Figure 1 (above). These direct and indirect co-determinations take place at the interface of the material and subjective worlds. Here, social constructionism and social materialism are not no longer in opposition, but seen as combining. This is also coherent with the “ontologic turn” in childhood studies.²⁵

Last, but not least, transactional horizons (ARVIM) overcome the divide between structure and culture. Following Sewell:

Sociologists typically contrast “structure” to “culture”. Structure, in normal sociological usage, is thought of as “hard” or “material” and therefore as primary and determining, whereas culture is regarded as “soft” or “mental” and therefore as secondary or derived.²⁶

Sewell suggests that while sociologists tend to favour the material perspective, anthropologists insist more on the semiotic perspective and look at structure in terms of culture. It looks like Giddens is closer to this semiotic perspective when he writes that “Structure exists only as memory traces, the organic basis of human knowledge-ability, and as instantiated in action.” This still maintains a divide between culture and structure. I contend that symbol theory²⁷ allows this divide to be overcome.

With the latter perspective, human practices are viewed as symbolic arrangements, and hence we must consider the duality of human language: it is both instantiating the fluidity of thoughts and institutionalising some of them in solid forms like writings, conventions, laws, etc. Consequently, structure can be viewed as institutionalised language (conventions) and culture as language in process (thoughts). This perspective reconciles culture and structure as being the same social arrangements but viewed in two different ways: diachronically as processual and synchronically as institutional. This is why thoughts and conventions

25 Leena Alanen, “Are We All Constructionists Now?,” *Childhood* vol. 22(2) (2015): 149–153; Leena Alanen, “Childhood Studies and the Challenge of Ontology,” *Childhood*, vol. 24(2) (2017): 147–150; Spyros Spyrou, “An Ontological Turn for Childhood Studies?,” *Children and Society*, vol. 33(4) (2019): 316–323.

26 Sewell, “A Theory of Structure,” 1–23, 3.

27 Norbert Elias, *The Symbol Theory* (London: Sage, 1991).

co-determine each other: the diachronic fluidity of thoughts can both rely on institutionalised arrangements and rearrange them. In other words, institutions, stemming out of conventionalised language, are both constraining thoughts and habilitating them. This brings some more material-symbolic balance in the structuration theory.²⁸

What we observe then, in the discourses of social actors, are outcomes of this co-determination between fluid thoughts and solidified conventions. Their views cannot be entirely free from the institutionalised arrangements; they actually rely on (at least some of) them. This is what we can grasp with more scrutiny with the theory of transactional horizons: the elements of experience embraced by different transactional horizons (ARVIM) are actually traces of incorporated habitus²⁹ that recursively impact institutions. Yet, Bourdieu's notion of habitus, as "embodied dispositions", is overly deterministic and hence problematic for the understanding of the interplay between personal habitus and class habitus. A more phenomenological approach is needed to understand how actors situate themselves towards specific "modes of action" that are transversal to social classes. These modes of action are closer to the ideal-types of social action identified by Max Weber (1978), in his endeavour to understand the actors' subjective reasons to act. These modes of action are further described below:

The entrepreneurial mode of action focuses on activities that produce objects exterior to oneself (poiesis) and strategies believed to be the most efficient to achieve one's goals (corresponding to Weber's "rationally-purposeful action"). The relational mode of action puts emphasis on relational configurations (it is close to Weber's "traditional social action" when it favours habits and routines that reproduce the social status and positions of actors). The moral mode of action is based on the belief in the inherent worth of specific values (Weber's "value-rational action"). The identity mode of action bases on the inter-subjective definition of self (it partly corresponds to Weber's "affective social action" as drives also inform subjective identity). The motivational mode of action is the most complex one. It has no correspondence in Weber's typology of social action, it is closer to inquiry (Dewey, 1938).³⁰

28 Giddens, *The Constitution of Society*.

29 Pierre Bourdieu, *Practical Reason: On the Theory of Action* (Stanford: Stanford University Press, 1998).

30 Daniel Stoecklin, "Institutionalisation of Children's Rights: Transformability and Situated Agency," *The International Journal of Children's Rights*, vol. 26(3) (2018): 548–587, 564–565.

The predominance of one mode of action over the others (which in any case are still there in more or less discrete ways) is contextual. The context in which our observations took place is a country (Switzerland) with direct democracy (popular referendums and initiatives) and a liberal economy. The regime of truth³¹ in this type of capitalist society is bound to profit (maximising returns on investments) regulated by the rule of the state. This entrepreneurial ethos pervades all settings, including schools: pupils are evaluated by their scores, and this clearly makes the entrepreneurial mode of action predominant over the other modes of action (relational, moral, identitary, motivational). How does this predominance of the entrepreneurial mode of action impact children's vulnerability? This is what we are going to see, in the next section, with a secondary analysis of the modes of action of children under COVID-19 lockdown and climate change.

14.3 THE MODES OF ACTION OF CHILDREN UNDER COVID-19 LOCKDOWN AND CLIMATE CHANGE

If child vulnerability depends on social arrangements, it is important to capture the latter in appropriate ways. I contend that they can be captured as configurations of modes of action. Social arrangements are marked by five major modes of action – entrepreneurial, relational, moral, identitary and motivational – that preside over the ways in which things and people are defined and hence how social actors interact. These modes of action are framed by “transactional horizons”, a notion depicting the “symbolic landscapes channeling social interaction”.³² They give a more detailed picture of the impact of social arrangements on child vulnerability, as they include children's own participation in these social arrangements. In the crises under scrutiny (COVID-19 and climate change), children's agency is highlighted through the modes of action that children are mobilising to negotiate their forms of participation.

In this section, I propose a secondary analysis comparing the findings of a survey with children during the COVID-19 lockdown in Switzerland with the outcomes of a discursive analysis of Greta Thunberg's speeches about climate change, focussing on the transactional horizons conveyed by these social actors. This secondary and comparative analysis is made in a synthetic way as there is no space to reproduce the respective findings in more detail.³³

31 Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (London and New York: Routledge, 1989).

32 Stoecklin, “The Transactional Horizons,” 1–24, 2.

33 These can be found in former publications; see Stoecklin, “Les enfants,” 193–213; Stoecklin, “The Transactional Horizons,” 1–24; Stoecklin et al., “Lockdown and Children's Well-Being”: 41–59; Stoecklin and Richner, “Inégalités et contributions,” 239–253.

I first draw on the data gathered in Switzerland through an online survey in 2020 in which 157 respondents aged between 11 and 17 years talked about their experiences regarding their family and school life, their life with friends, their hobbies, and finally their activities during the COVID-19 lockdown.³⁴ This study showed that children have developed agency to reduce their own vulnerability. Yet, the predominance of the entrepreneurial mode of action, reinforced by the resuming school curriculum, has almost silenced children.

The online survey was conducted in the French-speaking cantons of Switzerland (namely, Fribourg, Geneva, Jura, Neuchâtel, Valais and Vaud) from 21 April to 31 May 2020, just after the first wave of contamination when the federal government enforced a “semi-lockdown”. For children, the situation changed dramatically: schools were closed and their contacts with the elderly (notably grandparents) as well as “non-essential” activities and shops were restricted. With distance learning and the massive reduction of outdoor activities, children began to feel vulnerable as their sociospatial radius shrank.

The respondents expressed concerns about their family life and school curriculum, their contacts with friends, and their hobbies. Their accounts focused on what they were still and not anymore “able to do”, hence framing their own experiences in entrepreneurial ways. The massive reduction in what one is able to achieve had important repercussions on the other dimensions of their personal system of action. While health was not their prior concern, but rather the consequences of health-related lockdown, they were especially frustrated to be viewed as “healthy carriers, yet vectors of the virus”. This stigma triggered an identity claim for being recognised as worthy, and consequently they undertook new solidarities and tasks, mostly within their families. Their entrepreneurial mode of action was somehow distracted from its concentration of school and leisure activities, and more directed towards the relational, identity and motivational modes of action than usual. They were critical towards school authorities who did not ask them about their opinions. Yet, no respondent referred to the child’s right to be heard (Art. 12 CRC).

Regarding children’s positionings, we thus see that in the COVID-19 pandemic, the child was reduced to his “epidemiological status” (little affected by the coronavirus but still contagious). Since children have returned to school, the main concern was how students would catch up on the curriculum. It was “back to normal”, meaning back to the usual dominance of the entrepreneurial mode of action. The solidarity activities within the families that appeared during the lockdown shrank

34 Stoecklin, “Les enfants,” 193–213; Stoecklin et al., “Lockdown and Children’s Well-Being,” 41–59; Stoecklin and Richner, “Inégalités et contributions,” 239–253.

after schools reopened. There has been no transfer of agentivity from the private to the public sphere, as pupils did not become political actors. Children were unheard during the COVID-19 crisis and remained voiceless as pupils were just asked to adapt to the situation. They were not heard regarding the difficulties they directly experienced due to the limit on their contacts. They were also voiceless regarding the tensions that health measures caused in the public sphere (COVID-19 pass) and the time and financial burden put on their families. Yet, they were inventive and dedicated, but the contributions of solidarity that children made and the new forms of sociability in which they participated were restricted to the private sphere. In short, during the COVID-19 crisis, children did not become political actors.

By contrast, the social positioning of children has evolved with the school strikes and demonstrations around climate change. They were heard as they marched on the streets because they were quite numerous: for instance, on 15 March 2019, an estimated 1.6 million people in 2,000 locations took to the streets. Between 2019 and 2020, innumerable pupils went on one-day school strikes, 4 million alone on the eve of the UN Summit for Climate Action in September 2019.³⁵ Therefore, one has to understand what it is that mobilised them so much for the cause of “saving the planet” and not at all during the COVID-19 crisis. While access to outdoor demonstrations was of course banned during the lockdown in order to contain the spread of the virus, other forms of contest could have taken place notably on social media. Why this did not happen has to do, I contend, with the transactional horizons that have been at play. During the COVID-19 crisis, the main transactional horizon was the entrepreneurial mode of action. Accordingly, the social order was not challenged. It takes a more balanced configuration of modes of action to induce social change. This is shown with the case of Greta Thunberg.

Greta Thunberg clearly positioned herself in the political world, hence not accepting the subordinated role of children in which she would be placed (beginning with school strikes). Her political agency does not lie, as for voters, in a voting capacity that she still did not have at the time, but in other powerful means: the speeches she delivered in different rallies, with and without Extinction Rebellion, and in major events and congresses such as, among others, the UN Climate Change Conference in Katowice, Poland (15 December 2018), the World Economic Forum in Davos, Switzerland (22 January 2019), the Goldene Kamera Film and TV Awards in Berlin (30 March 2019), the Houses of Parliament in London (23 April 2019), the French National Assembly in Paris (23 July 2019), the United States

35 Stoecklin, “The Transactional Horizons,” 1–24, 1.

Congress in Washington (18 September 2019), and the UN General Assembly in New York (23 September 2019).

The discursive analysis of the 16 speeches delivered by Greta Thunberg, and collected in her book *No One Is Too Small to Make a Difference*³⁶, shows that she mobilises all the five transactional horizons.³⁷ For each mode of action, the analysis identifies the reflexive operations that are implied in Greta's discursive style.

In the entrepreneurial mode of action, she objectifies wrong and good doings that affect climate change. In the relational mode of action, she personifies nature and denounces the human-induced relations of domination and the intergenerational betrayal that are affecting the earth. In the moral mode of action, she sanctifies the superior interest of nature and civilisation and calls for new rules to contain selfish ways of living. In the identity mode of action, she displays a vision of children unified as unheard victims, yet independent, able and responsible activists, close to scientists, and therefore hated and reduced to abnormal (she refers to attempts to discredit her due to her Asperger's syndrome). And finally, in the motivational mode of action, she calls for diversified alternatives and intensified willingness.³⁸ This analysis suggests that

(...) the more transactional horizons are involved in one's discourse, the more chances it has to attract attention from a wider audience. It looks like knitting transactional horizons is attracting a larger audience than apologetic rhetoric displaying just one horizon and mode action.³⁹

The analysis further suggests that each transactional horizon rests on a specific reflexive operation: the entrepreneurial mode of action rests on "objectification", the relational on "personification", the moral on "sanctification", the identity on "unification" and the motivational on "diversification". These reflexive operations are vectors of agency, as they embody the relation that subjects have with objects. It is important to note that "objects" are not only material things. They may be other persons and, conversely, oneself viewed as an "object for others", as in Cooley's perspective of the "looking-glass self", which holds that one's social identity is dependent on how one believes others view him or her.⁴⁰ The subject-object

36 Greta Thunberg, *No One Is Too Small to Make a Difference* (new expanded edition) (London: Penguin Books, 2019).

37 Stoecklin, "The Transactional Horizons," 1–24.

38 Stoecklin, "The Transactional Horizons," 1–24, 12.

39 Stoecklin, "The Transactional Horizons," 1–24, 12.

40 Charles Horton Cooley, *On Self and Social Organization* (Chicago: University of Chicago Press, 1998).

relation implies an action of transformation of the subject on the object that can be captured by transitive verbs depicting the reflexive operations made by the subject. Thereby, a new definition of agency is proposed:

Agency is being in the capacity of intervening on things through objectification, personification, sanctification, unification and diversification (...). This new definition of agency is more precise than “the capacity to make a difference” which does not indicate how this capacity is exerted.⁴¹

This analysis contributes to understanding Greta Thunberg’s success in the federation of probably the most important social movement involving children and young people. Greta Thunberg can be viewed as an oxymoron – a child with political agency – but this is not due solely to her personality. My analysis is not psychological, but sociological: It suggests that Greta Thunberg’s political agency depends less on her “character” than on the opportunities stemming out of different configurations of transactional horizons. This is the case with children in general, as they do not have the right to vote: Their political agency therefore evolves along transactional horizons that are not expressed in their own votes but in the votes of adults. Children, hence, are indirectly represented in the polls.

The climate marches exacerbated political cleavages, as children’s demonstrations were either integrated or rejected in the voters’ preferences. Children demonstrating and occupying the street in non-productive ways are either praised for their political agency or dismissed as being manipulated by political forces. Yet, the priorities of the latter (especially the corporate lobby groups) are the short-term returns on investments, and hence most of them are not inclined to give their profits away for the benefit of longer-term interests of future generations.⁴² This explains how child vulnerability is linked to the predominance of the “instrumental-rational social action”⁴³ favouring short-term investments and returns.

Child vulnerability is further reinforced as children’s and young people’s incapacity to transform their grievances into institutional change is taken as proof of their supposed immaturity. Lobbyists for big companies show duplicity when they despise children’s opinions on the grounds of their supposed immaturity viewed in terms of age: they qualify children’s claims and behaviours as excessive, which is supposed to prove their immaturity and manipulation, when it is actually their

41 Stoecklin, “The Transactional Horizons,” 1–24, 18.

42 Francois Gemenne, *L’écologie n’est pas un consensus. Dépasser l’indignation* (Paris: Fayard, 2022).

43 Max Weber, *Economy and Society*, eds. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978).

over-protectionist view on children, associated to their refusal of lowering the voting-age limit, that is exactly what impedes children's participation in the institutional order. This is not only morally perverse but also legally suspicious, as the reduction of maturity to age does not respect the distinction made between the two in the United Nations CRC (1989): Article 12, on the child's right to be heard, states that the views of the child shall be "given due weight in accordance with the age *and* [emphasis added] maturity of the child". Accordingly, one cannot just reduce maturity to age. Yet, this is what lobbies are permanently doing to safeguard their own interests: they treat young climate activists as immature on the grounds of their age.

The only way for children to break this vicious cycle is therefore to reject over-protectionist policymaking. This is what Greta Thunberg did, with impressive success: The political agenda has evolved like never before since her first school strike in 2018. This was possible not just due to personal charisma but mainly because her speeches contained powerful social levers: the relational, moral, identity, and motivational horizons necessary to challenge the dominant entrepreneurial mode of action. Nothing similar happened with the COVID-19 crisis because the entrepreneurial mode of action was not as much challenged by the other modes of action.

This difference in the balancing or unbalancing of modes of action suggests that children's positionings in the COVID-19 pandemic and in climate change still strongly depend on the social constructions of childhood.⁴⁴ Table 1 (below) synthesises these social projections about children along five aspects – namely, children's vulnerability, dangerousness, future, attitude, and role – showing how the two crises are marked by important differences in those projections.

Table 1: Main Social Projections about Children in the COVID-19 Pandemic and Climate Change.

Aspects of children	In the COVID pandemic	In the Climate change
Vulnerability	Minimally affected	Victims of current policies
Dangerousness	Contagious	Polluters
Future	Slightly compromised	Highly compromised
Attitude	Obedient	Protestors
Role	Voiceless pupils	Spokespersons for scientists

44 Allison James and Alan Prout, *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (Basingstoke: Falmer Press, 1990).

The projections on children differ to a great extent, but this is not strictly bound to children's actual behaviours. These differences can be explained by the transactional horizons that underlie children's positionings in given contexts. Accordingly, differences in projections about children's vulnerability, dangerousness, future, attitude, and role are contextually constructed around the kind of threat that is identified. When human frailty is associated with the spreading of a virus, the over-protection of children is reinforced. When the danger comes from irresponsible consumerism, children are either victimised if they just complain or stigmatised if they claim for change. This has practical consequences on children's positionings and, hence, vulnerabilities. In a way, the gradients of vulnerability evolve with the cause at stake.

As the performance of children at school was the main concern during the COVID-19 pandemic, the aspects of childhood that are projected on them still derive from the predominant entrepreneurial mode of action: one wonders how children can remain efficient pupils. With the demonstrations concerned with climate change, the aspects of childhood that show up are much more critical and politicised: one wonders what future children will have and what role they may have in shaping it. The problems (COVID-19 pandemic, climate change) that social systems are confronted with have different effects on children's vulnerability because they are mediated by the transactional horizons. According to the kind of danger, social systems constrain actors with different practices, and these social arrangements either reduce or exacerbate the vulnerability of children.

This is why we observe, conversely, that children's agency takes on a political form in the context of climate change, while it takes on a familial form in the context of the COVID-19 pandemic. It is the encounter of the transactional horizons of children and those of policy-makers that build up the configurations of child vulnerability: in the pandemic, children have an agency that is structurally restricted to the private domain, while in the climate crisis it structurally spills over into the public sphere. This shows that structural effects can be more precisely approached with the concepts of transactional horizons and modes of action.

In the end, the threats supposed to make humans vulnerable are also redrawing the borders within and among the species: During the COVID-19 pandemic, the threat (common to adults and children) is the virus (the enemy is biological in nature), while in the case of climate change the enemy is represented by previous generations who are accused of having done nothing or not enough. This is why only climate change allows for a social movement that includes children and young people: because it is a struggle within the same species, as the "enemy" is human. The human nature of the climatic danger favours the split between generations, and thus the redistribution of roles, whereas the viral nature of the COVID-19

pandemic favours the reinforcement of the community, united to fight a common enemy, and does not therefore call into question the traditionally differentiated roles devolved to the adults and to the children.

14.4 CHILDREN RIGHTS AND CLAIMS

In this section, I turn to children's rights to try to see what role they play in the social arrangements around COVID-19 and the climate. Comparing children's positionings and agency in the COVID-19 and climate crises reveals that the institutional framework of children's rights – the United Nations CRC (1989) – is only barely claimed by children. They mostly do not really know the rights to which they are officially entitled. Rather, when referring to their human rights, children evoke “living rights” – that is, rights as they are lived.⁴⁵ Children claim their “living rights” with rather vague formulations around the “right to have a future” (in the case of climate change) and the right to study and play (in the case of the COVID-19 pandemic).

Why do children hardly mention and mobilise the rights enshrined in the CRC to make their claims heard? I contend that this discrepancy between the Convention on paper, ratified by all but one state, and the rights in practice, claimed only marginally and vaguely within people's transactional horizons, indicates that social arrangements do not rely so much on children's participation rights but on more traditional social representations of what children and childhood should be. Consequently, it is these social representations, more than the CRC, that in fact shape children's vulnerability. Yet, there is always an interplay between formal and informal norms, as moral entrepreneurs strive to put their own sets of norms into the legal system.⁴⁶ This interplay between informal sets of norms (social representations) and specific formal sets of norms (here the CRC) can be more precisely grasped in terms of “translations”, as formulated by Hanson and Nieuwenhuys: “The concept of translations is about what happens with rights in the encounter of children's and other actors' perspectives, movements for social justice and the elites, authorities and opponents.”⁴⁷

45 Karl Hanson and Olga Nieuwenhuys, *Reconceptualizing Children's Rights in International Development: Living Rights, Social Justice, Translations* (Cambridge: Cambridge University Press, 2013).

46 Howard S. Becker, *Outsiders: Studies in the Sociology of Deviance* (New York: The Free Press, 1963).

47 Hanson and Nieuwenhuys, *Reconceptualizing Children's Rights*, 16.

Translations therefore depict processes of bottom-up meaning-making and top-down implementation of normative claims and standards and raise the following questions:

Whose interpretations, and whose priorities of children's rights, are being defended? How do children's living rights coalesce with top-down international child rights implementation strategies? What are the trajectories of both approaches to children's rights? Where and how do bottom-up and top-down interpretations meet, if they meet, and what are the consequences of such an encounter?⁴⁸

The fact that children hardly mention their "official" rights is itself an effect of the social arrangements in which they live. But the same goes for the expression of their "living rights", or rights as they are lived⁴⁹: these claims are an outcome of preformed social arrangements. Therefore, a closer look at these social arrangements is necessary and the analysis of the transactional horizons and modes of action used by social actors in a given context can be a powerful methodology to understand the "structured process translating specific claims into an institutionalised set of norms".⁵⁰

Our findings in the cases of the COVID-19 pandemic and climate crisis suggest that children are dependent on traditional social arrangements that filter their potential benefits from policies based on their official rights enshrined in the articles of the CRC. The contextual implementation of this international treaty proves quite variable in its effects, as the final recommendations of the Committee on the Rights of the Child to States Parties illustrate. This is especially evident with children's participation rights, notably their right to be heard. Children are entitled to participate in decisions affecting their lives according to their right to be heard, as enshrined in Article 12 of the UN CRC (1989):

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. (CRC, 1989)

48 Hanson and Nieuwenhuys, *Reconceptualizing Children's Rights*, 20–21.

49 Hanson and Nieuwenhuys, *Reconceptualizing Children's Rights*.

50 Hanson and Nieuwenhuys, *Reconceptualizing Children's Rights*.

This article is both a substantial right and a “general principle” that guides the interpretation and implementation of all the other rights incorporated in the CRC. As indicated in the General Comment on the right to be heard: “Article 12 manifests that the child holds rights which have an influence on her or his life, and not only rights derived from her or his vulnerability (protection) or dependency on adults (provision)” (CRC, 2009).

Moreover, the General Comment on the right to be heard adds that:

States parties must assure that the child is able to express her or his views “in all matters affecting” her or him. This represents a second qualification of this right: the child must be heard if the matter under discussion affects the child. This basic condition has to be respected and understood broadly.⁵¹

Meanwhile, there is a debate in the field of children’s rights as to what extent Article 12 goes beyond the “judicial and administrative proceedings affecting the child”, as expressed in paragraph 2 of Article 12 (quoted above). The Committee on the Rights of the Child, in its General Comment on Article 12 (CRC, 2009), favours a large interpretation:

The Open-ended Working Group established by the Commission on Human Rights, which drafted the text of the Convention, rejected a proposal to define these matters by a list limiting the consideration of a child’s or children’s views. Instead, it was decided that the right of the child to be heard should refer to “all matters affecting the child”. The Committee is concerned that children are often denied the right to be heard, even though it is obvious that the matter under consideration is affecting them and they are capable of expressing their own views with regard to this matter. While the Committee supports a broad definition of “matters”, which also covers issues not explicitly mentioned in the Convention, it recognises the clause “affecting the child”, which was added in order to make clear that no general political mandate was intended. The practice, however, including the World Summit for Children, demonstrates that a wide interpretation of matters affecting the child and children helps to include children in the social processes of their community and society. Thus, States parties should carefully listen to children’s views wherever their perspective can enhance the quality of solutions.⁵²

51 UN Committee on the Rights of the Child, *General Comment no. 12 (2009) The Right of the Child to Be Heard*, CRC/C/GC/12, (July 20, 2009).

52 CRC/C/GC/12.

Yet, the importance of traditional social representations of children and childhood, as testified in our findings about children in the COVID-19 and climate crises, shows that this large interpretation by the UN Committee on the Rights of the Child is far from being enforced in the decisions affecting children. It is hardly possible to deny that COVID-19 and the climate crisis are not “matters affecting the child”. So why are children’s official rights so weakly conveyed in people’s social transactions? This question pinpoints the role and influence of international treaties, such as the CRC, in the national legislations and practices.

Although in Switzerland, where our survey on COVID-19 was conducted, the rights of the child are fully translated into the national legal system, they are far from being fully applied in practice. The same situation actually prevails in all countries, with, of course, varying degrees of discrepancy between “formal freedoms” and “real freedoms”.⁵³ The level to which the correspondence between the latter and the former depends on conversion factors, is a question that is addressed in the “capability approach” in terms of individual and social factors acting as facilitators or obstacles to the realisation of formal entitlements.⁵⁴

The fact that even major crises (COVID-19 and the climate) are not conducive to more systematic attention to children’s rights, and not reducing the gap between children’s formal and real freedom, is indicative of the inertia of the social system. The children interviewed all had a sufficient level of maturity to understand the implications of the COVID-19 pandemic and of climate change. Hence, the obstacle to their participation in the decisions affecting them was not on the side of their individual awareness of the questions at stake. Rather, the obstacles are located on the social side, and how this happens can be specified with the analysis of transactional horizons.

The main obstacles are traditional social representations of childhood, turning children into especially vulnerable *becomings* in need of protection: they are seen as future citizens, not as present ones (*beings*). Children’s voices are shaped by these future-oriented social representations⁵⁵ that are legitimising paternalistic forms of child participation and delegitimising emancipatory ones.

The present analysis underlines the following: it is according to who or what is supposed to raise their vulnerability, in the eyes of adults, that children can become or are, on the contrary, barred from becoming political actors. In the case of COVID-19, as the danger is a virus, children are not supposed to know what

53 Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999).

54 Martha C. Nussbaum, “Capabilities and Human Rights,” *Fordham Law Review*, vol. 66(2) (1997); Sen, *Development*.

55 Karl Hanson, “Reinventing Children’s Rights,” *Childhood*, vol. 29(2) (2022): 149–156.

is best for them: the expertise is left to professional adults (mainly in the medical sector). In the case of climate change, as the danger comes from human behaviour inducing global warming (the “Anthropocene”), and as children are often on an equal footing with adults regarding their scientific knowledge of the phenomenon of climate change, the expertise on this matter is more disputed. Whereas children’s impact on combating the COVID-19 virus is linked to their obedience to the experts, in the climate crisis children are in a position where they might become the experts. This induces a dramatic change in children’s positionings and agency: like Greta Thunberg, other children are apt to lead a social movement that challenges the dominance of the entrepreneurial mode of action and instils more balance among different ways of being and doing (relational, moral, identity, motivational).

The social movement around climate change is probably the one that counts the largest number of child participants. Their claims for political, economic, and social rights, although expressed in terms of “living rights” and not in terms of the “official rights” of the CRC, are bound to the human responsibility behind global warming. The informal mobilisation of millions of children and young people is also an indicator of the limited support of formal implementation of the CRC for children’s agency: as long as the rights of the child are predominantly applied in a protectionist perspective, children will have no other choice than to act outside or despite of the official rights and the “real freedoms” they are given. A more emancipatory school of thought in children’s rights⁵⁶ is necessary for social systems to mainstream children’s agency into public policies. Therefore, children’s rights remain a powerful tool for social change. It all depends on how States Parties to the CRC are implementing them.

Meanwhile, from children’s side, things are evolving as global warming is threatening, and children do not wait for policy-makers to adopt an emancipatory approach with children’s rights: they do it themselves. The case of Greta Thunberg shows that the use of all transactional horizons in her rhetoric has a great power of mobilisation and hence gives more visibility to children and youth on the political arena.⁵⁷ Still, the comparison between children in confinement and Greta Thunberg shows that, while children’s rights are not explicitly used, the claims that are made by children differ according to who or what is supposed to raise their vulnerability. In the case of COVID-19, it is the virus, while climate change is happening

56 Karl Hanson, “Schools of Thought in Children’s Rights,” in *Children’s Rights From Below: Cross-Cultural Perspectives. Studies in Childhood and Youth*, ed. Manfred Liebel (Basingstoke: Palgrave MacMillan, 2012), 63–79.

57 Stoecklin, “The Transactional Horizons,” 1–24.

because of the behaviours of former generations. Only the latter is conducive to a social movement, because the enemy is human and hence susceptible to be altered by the movement. Human responsibility for the spread of COVID-19 is not as clearly established, and, accordingly, children are not in a position to claim for more political, economic and social rights being put in practice as is the case with climate change.

14.5 CONCLUSION

The transactional horizons of child vulnerability are revealed by major crises, like the COVID-19 pandemic and climate change. By comparing children's positionings in the two crises, it can be suggested that their vulnerability is socially structured along social arrangements. These arrangements, including the implementation of children's rights, can be methodologically understood through "transactional horizons", namely, the "symbolic landscapes that are channeling social interactions".⁵⁸ While I have not had space here to discuss Sewell's theory, I can only suggest that the theory of transactional horizons rejoins Sewell's "attempt (1) to recognise the agency of social actors, (2) to build the possibility of change into the concept of structure, and (3) to overcome the divide between semiotic and materialist visions of structure".⁵⁹ Whereas Sewell builds on Giddens's structuration theory and Bourdieu's notion of habitus, I first draw on Blumer's "sensitizing concepts" that actors use (ARVIM or synonymous notions) and consider them as forming a matrix or resources and rules that act both as mediums for and outcomes of social transactions. This is coherent with the premise that "structures can be identified as sets or matrices of rule-resource properties".⁶⁰ But I believe that the rather abstract Giddensian definition of structures can be replaced by a more pragmatic perspective centred on how social actors use language, and this is where the symbol theory of Norbert Elias (1991) is quite useful:

[...] the theory of symbol reinforces the view that structure and agency are not opposed but the same thing, a symbolic realm that must be viewed in its duality. The dual nature of language, constraining thoughts and habilitating them, is the concrete instantiation and reflection of the duality of the symbolic world we live in.⁶¹

58 Stoecklin, "The Transactional Horizons," 1–24, 1.

59 Sewell, "A Theory of Structure," 1–29, 3–4.

60 Giddens, *Central Problems*, 64.

61 Stoecklin, "Les enfants," 193–213, 204.

The secondary analysis of our data shows that the elements of experience embraced with different symbolic horizons (ARVIM) are actually traces of incorporated habitus⁶² that recursively impact institutions. In some cases, institutions are reinforced, and in other cases they are weakened. Our two empirical examples show that the school institution is reinforced by the COVID-19 crisis and weakened by the demonstrations concerned with climate change. This proves that child vulnerability evolves along the different configurations of transactional horizons that can be conveyed in social negotiations.

Contrary to both Giddens and Bourdieu, who tend to see structures as stable, I contend that it is because the “structure” made of transactional horizons is *not stable* that children’s social positionings can be moving. With transactional horizons, we are able to see that specific modes of action are recursively institutionalised when actors use differential combinations of entrepreneurial, relational, moral, identity and/or motivational modes of action. Their practices are tinted with these combinations. When they are balanced (like in the case of Greta Thunberg), challenging the predominance of one mode of action (here the entrepreneurial mode of action) over the others, then social change is likely to happen. Conversely, the more one mode of action prevails over the others, the more stable and unchallenged the system remains. The vulnerability of children therefore depends on how practices are tinted by these different configurations of modes of action.

A hypothesis can now be formulated in the following terms: child vulnerability may rise with the unbalance of modes of action (predominance of a dominant mode of action) and be contained thanks to more balanced modes of action. Balanced modes of action allow more agency because actors can diversify their reasons to act (entrepreneurial, relational, moral, identity and motivational) according to rationales that are deliberated democratically. In the end, child vulnerability is bound to the legitimisation of the symbolic landscapes channelling social interactions. This hypothesis of the transactional horizons of child vulnerability can be tested cross-culturally (we might also say “cross-structurally”) in order to compare contexts along their more or less well-balanced (or unbalanced) modes of action. This may contribute to further understand child vulnerability beyond natural frailty and accordingly adapt public policies to mitigate unbalanced social arrangements.

It is important to understand, rather than dismiss, the claims made by children and young people. An interpretive approach to children’s rights is required, probably more than ever, in order to understand how children themselves translate their rights into practice as they will not wait for states to do this for them. This is

62 Bourdieu, *Practical Reason*.

illustrated by the demonstrations for climate justice, which are a way for children to “vote with their feet”. When their actions cross the borders of legality, it is not because they are intrinsically deviant, but rather because adults fail to consider their claims properly. The analysis of transactional horizons can contribute to reducing the tension between generations as a proper understanding of the social determinants of children’s vulnerability may foster more participatory, and hence appropriate, public policies.

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15. Vulnerability as an Underlying Norm for Children's Rights: Conclusions and Further Outlook

Trude Haugli and Mona Martnes

The intention with this project was to obtain insight into how vulnerability as an underlying norm and logic for children's rights is understood and how this can affect the safeguarding of rights. To achieve this aim, theories about vulnerability are used to explore the connection between vulnerability and children's rights. Based on the findings in this book, we are convinced that the theories of vulnerability and the diverse ways of understanding this phenomenon bring added value to the discussions about children and children's rights. Read as a whole, the chapters shed light on how vulnerability has different meanings and paradigms; the way in which vulnerability is understood could influence the safeguarding of rights, both children's rights in general and specific rights for children in specific contexts. Since there is no common definition of vulnerability, when referring to the concept one should try to make clear which understanding one's argumentations are built upon.

Foster and Herring describe two types or understandings of vulnerability.¹ The first type they call "particularly deficient vulnerability". Here vulnerability is "seen as an undesirable condition suffered by particular individuals or groups of people", which should be eliminated or alleviated as much as possible.² Such a negative view, where vulnerability is seen as "an undesirable condition", is a logical result of the connection between discrimination and vulnerability. A second type of vulnerability that Foster and Herring embrace is termed "universal beneficial vulnerability": vulnerability seen as a desirable attribute of all humankind.³ This understanding is associated with Fineman's theories.

1 Charles Foster and Jonathan Herring, "Thriving, Care and Vulnerability," in *Human Thriving and the Law*, eds. Charles Foster and Jonathan Herring (Springer, 2018), 57–67, 58.

2 Foster and Herring, "Thriving, Care and Vulnerability," 57–67, 58.

3 Foster and Herring, "Thriving, Care and Vulnerability," 57–67, 58.

While some authors in this book mostly build on the first type, others, especially *Herring*, build more on the second type of vulnerability. However, there are also other paradigms on vulnerability in this book. Those different paradigms can be divided into the *universal vulnerability* paradigm, the *traditional child rights* paradigm – where children are seen as a particularly vulnerable group, and some children are believed to be even more vulnerable – and *societally created vulnerability*. In some chapters, these paradigms are used simultaneously. The different paradigms and views on vulnerability lead to different answers to the crucial questions about which are the benefits and pitfalls of considering children or groups of children as specifically vulnerable. And further, what are the risks for children if they are defined as vulnerable?

Our opinion is that all humans – and, therefore, children – are vulnerable. However, since children, like adults, are positioned differently, their vulnerability is both universal and particular. In addition, children – some more so than others – are met by adults, institutions, and regulations in ways that make them more exposed to harm and having their rights violated. As many of the authors effectively illustrate, external conditions such as legislation and policy, formed by adults, expose children to such risks.

While the idea of defining a child as vulnerable and belonging to a special vulnerable group is to strengthen the human rights of the child, with the “vulnerable child” in the traditional child rights paradigm there is also a risk. Lining up groups assumed to be particularly vulnerable leads to the risk of stereotyping, marginalisation, and biases. If combined with a view of children as lacking in competence, this might increase the elements that are often used as a reason for seeing children as more vulnerable than adults, rather than pointing at the factors leading to rights violations, including discrimination. As shown in this book, child law researchers are increasingly challenging such a one-sided approach to children as vulnerable. In most of the chapters, there is a consensus that individual vulnerability in the traditional paradigm has some problematic side effects. The vulnerability paradigm on which the CRC is based potentially obscures the state's role in creating vulnerability and can contribute to the stigmatisation of children or groups of children.

Although the paradigms seem to be difficult to fully harmonise, there are elements in all the paradigms that bring important nuances to the discussion about children, rights, and vulnerability. As Timmer et al. state, “[a]s part of the human condition, vulnerability is here to stay”.⁴ They further elaborate that because the

4 Alexandra Timmer, Mortiz Baumgärtel, Louis Kotzé and Lienneke Slingenberg, “The Potential and Pitfalls of the Vulnerability Concept of Human Rights,” *Netherlands Quarterly of Human Rights*, vol. 39(3) (2021): 190–197, 196.

concept is malleable and recognises the connections between humans and their surroundings, “vulnerability has at least the potential to rise to the status of a guiding principle of human rights law comparable to dignity or equality”.⁵

Although all the authors deal with both vulnerability and children’s rights, there are different starting positions in the debate on how rights in general can be safeguarded. One direction is to highlight autonomy as a central value, while another approach is to emphasise vulnerability, as an inherent virtue of being human, as opposed to autonomy. In the first direction, ensuring children’s right to participation is of fundamental importance for safeguarding children’s rights. As *Lundy* shows, one of the major ways in which children are left vulnerable to harm is the fact that they are often not considered competent to make decisions in their own interests and consequently have most decisions not only made for them but also made without their input. Information and support for children’s competence is, as *Daly* emphasises, a necessary means to ensure participation, reduce harm, and safeguard rights. Measures that are instituted due to an understanding of children as vulnerable subjects, to protect the child, can have the opposite effect and contribute to increased vulnerability, as shown by *Lundy*. On the other hand, measures that do not really consider vulnerability render children even more vulnerable, as argued by *Kilkelly* and *Moldenæs*.

The gap between having rights and having those rights fulfilled highlights that for children to have access to justice, we need child-friendly information and complaint mechanisms. Rights without remedies are not sufficient to meet the vulnerability created by society. Children’s rights are built upon a multilevel legal framework, and it is necessary to bring it all together to make real progress. Without enforcement mechanisms and the possibility for children to hold the state accountable, and without access to justice, there will continue to be a gap between rights and reality. It must be up to states to create institutions, policies, and measures to implement children’s rights. The acknowledgement of children as right holders must not be overshadowed by an image of the child as a vulnerable subject. The ability to seek a remedy for violations of one’s rights is a prerequisite for being recognised as a true rights holder. As Michael Freeman argues, “we must get beyond rhetoric. Rights without remedies are symbols, nothing more”.⁶

5 Timmer et al., “The Potential and Pitfalls,” 196–197.

6 Michael Freeman, “Why It Remains Important to Take Children’s Rights Seriously,” *The International Journal of Children’s Rights*, vol. 15(1) (2007): 5–24, 8; Conor O’Mahony, “Constitutional Protection of Children’s Rights: Visibility, Agency and Enforceability,” *Human Rights Law Review*, vol. 19(3) (November 2019): 401–434.

As a field of law, children's rights is young and dynamic, and there is a need to constantly reflect and rethink. In reference to the workshop that led to this book, the saying "the path is made in the walking" seems fitting. Let us all keep walking!

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This volume explores and challenges the concept of vulnerability in the way it is applied and discussed in relation to children from a northwestern European perspective. While the concept of vulnerability has been significantly explored in relation to childhood and children's rights, this volume adds a fresh lens by adding a predominantly legal perspective. The predominantly legal perspectives and the way many of the authors are taking their departure point from the work of Martha Fineman bring a new third dimension to the discussion of the concept of vulnerability.

This interrogation of the concept of vulnerability is deployed in discussions that cover wide ranging issues relating to the environment, immigration, healthcare, education and climate change. Health is a focus of several chapters. While some of the chapters challenge the concept of vulnerability, others mainly work from more dominant interpretations of child vulnerability and some also bring in the perspective of the multidisciplinary field of childhood studies. The chapters represent a mixture of theoretical and empirical pieces. In the last chapter, some of the key threads running through the whole volume are brought together with some concluding reflections.

The theoretical concepts and the questions raised by many of the chapters included in this volume have the potential to contribute to further thinking in this area.



Scandinavian University Press

ISBN 978-82-15-06951-7



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