

# Constitutional Rights for Children in Norway

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## 1 Introduction

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

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

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

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

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

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

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

## 2 The Human Rights Act and the CRC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 3 Human Rights for Children in the Constitution

#### 3.1 *Human Rights for All also Applies to Children*

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

#### 3.2 *Why a Separate Provision for Children?*

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

14 Ot.prp. nr. 45 (n 12) 23–24.

15 Dok. 16 (n 2) para 32.1.

16 Dok. 16 (n 2) para 32.1.

17 Innst. 186 S (2013–2014) Innstilling til Stortinget fra Kontroll- og konstitusjonskomiteen, para 2.1.10.

18 Constitution s 108: 'The authorities of the state shall create conditions enabling the Sami people to preserve and develop its language, culture and way of life.'

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

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

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

### 3.3 *The CRC and the Constitution*

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

19 Charter on fundamental rights of the European Union 2012/C326/02 (EU Charter).

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

21 Dok. 16 (n 2) para 32.1.

22 Dok. 16 (n 2) para 32.1.

23 Dok. 16 (n 2) para 11.4.1.

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

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

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

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

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

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

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

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

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

## 4 Provisions on Children's Rights in the Constitution

### 4.1 *Section 104—an Overview*

The Norwegian Constitution, section 104:

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

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

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

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

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

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

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

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

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

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

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

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

#### 4.3 *The Right to Participation*

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

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

29 Dok. 16 (n 2) 35.5.2.

30 Venice Report (n 5) 21.

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

32 EU Charter (n 19) article 1.



due weight shall be attached to their views in accordance with their age and development.<sup>33</sup>

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

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

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

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

#### 4.4 *The Best Interests of the Child*

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

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

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

34 Constitution s 50.

35 Venice Report (n 5) 21.

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

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

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

The principle of the best interests of the child is surprisingly only explicitly included in the constitutions of two other member states of the Council of Europe.<sup>40</sup>

#### 4.5 *Personal Integrity*

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

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

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

37 Dok. 16 (n 2) para 32.5.4.

38 Dok. 16 (n 2) para 32.5.4.

39 Sandberg (n 27).

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

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

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

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

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

#### 4.6 *Development, Economic, Social and Health Security*

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

42 Dok. 16 (n 2) para 32.2.5.

43 Dok. 16 (n 2) para 32.5.5.

44 Dok. 16 (n 2) para 32.5.5.

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

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

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

#### 4.7 *Education; Section 109*

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

45 Dok. 16 (n 2) para 32.5.6.

46 Dok. 16 (n 2) para 32.5.6.

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

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

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

50 Venice Report (n 5) 19.

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

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

Everyone has the right to education. Children have the right to receive basic education. The education shall safeguard the individual's abilities and needs, and promote respect for democracy, the rule of law and human rights.

The authorities of the state shall ensure access to upper secondary education and equal opportunities for higher education based on qualifications.

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

## 5 Rights Indirectly Protected

### 5.1 *Family Life; Section 102*

Everyone has the right to the respect of their privacy and family life, their home and their communication. Search of private homes shall not be made except in criminal cases.

The authorities of the state shall ensure the protection of personal integrity.

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

### 5.2 *Child Labour*

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

<sup>52</sup> Bendiksen (n 49).

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

### 5.3 *Protection from Harm*

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

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

## 6 Limitations of Rights Recognized in s 104?

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

53 Dok. 16 (n 2) para 32.5.7.

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

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

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

57 Fell by 86 to 82 votes.

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

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

## 7 Children's Constitutional Rights, Implementation and Enforcement

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

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

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

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

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

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

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

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

64 Dispute Act (n 62) s 2–4.

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

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

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

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

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

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



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

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

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

## 8 Finally

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

68 CRC/C (n 65) para 3.

69 SOM-2016-2886.

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

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

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

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