

Children's Rights in Norwegian Courts

Seminar on Children's Rights, Kathmandu 25th June 2015

1. The UN Convention on the Rights of the Child – CRC – is based on, and expresses, the fundamental principle that children are, in their own capacity, the subjects of rights.¹ In line with this, the Convention prescribes extensive provisions on children's civil, political, economic, social and cultural rights.²
2. Moreover, Article 2 CRC establishes that the Contracting States shall *respect* and *ensure* these rights to each individual child within their jurisdiction, *without discrimination*; they must be provided on an equal footing to every child, irrespective of – *inter alia* – gender, ethnicity or religion.
3. The duty to “respect” implies that the Contracting States – including of course the judiciary – must refrain from violating the rights (“negative obligation”). Moreover, the duty to “ensure” indicates that the Contracting States must afford adequate protection against violations carried out by others, and to see to it that the rights are implemented and developed to the highest possible extent, due account taken to the available resources and other practical obstacles and limitations (“positive obligation”).

¹ The UN General Assembly adopted CRC on 20th November 1989. In total 195 States have ratified; all the Member States to the UN, except Somalia and The United States of America. CRC is in force for Nepal and Norway from 1990 and 1991, respectively.

² There is, in addition, an *Optional Protocol to the convention on the sale of children, child prostitution and child pornography* (in force from 18th January 2002) and an *Optional Protocol on the involvement of children in armed conflict* (in force from the 12th February 2002). Both Optional Protocols are ratified by Nepal and Norway.

4. As part of the Contracting States' positive obligations, Article 4 CRC says that the Contracting States shall take all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention. This includes giving access to effective remedies for the enforcement of the Convention Rights.³ An important aspect is to facilitate that *the rights and freedoms can be enforced through independent and impartial courts*: The implementation of human rights is, more generally speaking, dependent on courts taking them seriously, transforming them from abstract ideals to operative norms with a bearing on real world lives.
5. The Contracting States' compliance with their duty to respect and ensure the rights within the CRC is monitored by the *UN Committee on the Rights of the Child* – consisting of 18 independent members – based on reports from the State Parties, cf. Articles 43 and 44 CRC.⁴ The Committee's concluding observations are, of course, assumed to have significant weight as to the pertinent State Party's future policy regarding children. Moreover, the final observations from the Committee will be of importance as to the application of the Convention in that particular Member State, and can also affect the general interpretation of the Convention for all Contracting Parties.⁵
6. The Committee prepares *General Comments* on key topics of interpretation and application of the Convention, cf. Article 45 *litra d*. So far, 18 General Comments have been prepared. These are *recommendations* to the Contracting States. They are not, as such, formally binding.

³ *General Comment No. 5* "General measures of implementation of the Convention on the Rights of the Child", section 24 and *General Comment No. 14* "The right of the child to have his or her best interests taken as a primary consideration", section 6, paragraph 15 *litra c* and section 98.

⁴ Nepal gave its most recent report in 2012. Norway is supposed to give its next report in 2016. See also the Committee's *Rules of procedure*, in particular Part Two XIV.

⁵ Thoughrough information on, and from, the Committee is provided on <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>.

7. However, they still have a considerable authority: The General Comments are based on the Committee's collective experience and insight. They are normally worked out through the cooperation with other organizations and according to broad consultation processes. The General Comments are based on a comprehensive approach to the CRC, carried out in the light of the Convention's and the particular right's object and purpose. It is to be expected that the Committee on the Rights of the Child itself, and any other United Nation agency, will adopt the interpretation expressed in the General Comments.
8. The third Optional Protocol to the CRC establishes a *right to petition*, which allows individual children to submit complaints regarding specific violations of their rights under the Convention to the UN Committee on the Rights of the Child.⁶ The Committee can, upon such a petition, decide in the individual case whether there has been a breach of the Convention and to make recommendations as to rectification measures.
9. Norway has – so far – not ratified the Optional Protocol on the individual right to petition; the issue is still under consideration in the Norwegian government. I understand that this is also the situation for Nepal. In any case, as the Committee develops *case law* in relation to such individual complaints, this case law will probably become an important source of law for the interpretation of the CRC.
10. The CRC is from 2003, through the Human Rights Act, incorporated into Norwegian law, with *primacy* over any other legislation. So, the rights according to the CRC will be directly applicable before Norwegian Courts, and shall – in the event of any conflict with other legislation – prevail.

⁶ *Optional Protocol on a communications procedure* adopted 19th December 2011, in force from 14th April 2014. See also *Rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, adopted by the Committee at its sixty-second session (14th January – 1st February 2013).

11. Moreover, according to Article 92 of the Constitution (as amended in 2014), all governmental bodies in Norway – including *the courts* – are obliged to respect and ensure human rights, as they are prescribed within the Constitution itself or by the human rights treaties to which Norway is a party, *inter alia*, the CRC.
12. Norway has a three-tier court system, all three levels having general jurisdiction as to civil, criminal and administrative cases. Accordingly, every case – even if the case in one way or another concerns a child – is dealt with by a district court in the first instance, with the possibility of appeal to a court of appeal, and ultimately to the Supreme Court.
13. The district courts deal with a very large number of cases involving children; in particular parents' disputes over the children after divorce, child welfare cases and criminal cases where children are victims. The same holds true as to the courts of appeal, although the number of child welfare cases are low in the courts of appeal, due to very strict limitations as to the right of appeal in such cases.
14. We are, in Norway, continuously trying to improve the way we handle cases before the courts involving children, in particular as to securing their right to be heard according to Article 12 CRC, to reduce the adverse effects on a child being involved in a case before a court, and to see to it that the final outcome of the case proves to be in the child's best interest. Redesigning procedural rules and educating judges are two approaches. It is even discussed whether it would be better to establish particular courts specialised in handling child cases, instead of them being dealt with by the ordinary courts.

15. In order to have a case dealt with by the Supreme Court, the Supreme Court's Appeals Selection Committee must grant leave to appeal. Only one out of ten cases are admitted, as the Norwegian Supreme Court is a court of precedence only allowing cases of a more general interest. In recent years, there has been a clear tendency that the admitted cases that involve children are cases that raise principled issues connected to the interpretation and application of the CRC and other human rights instruments.

16. Until the end of May 2015, the CRC has been discussed in approximately 60 cases decided by the Supreme Court. One quarter of these are attributable to different substantive and procedural issues in *child welfare cases*. One-fourth of the cases are different types of *immigration cases* or cases regarding *extradition and expulsion* of aliens. One-fourth is connected to *sentencing* in criminal cases. The last fourth is mixed, including *family law*, *tort law*, *criminal procedure* and issues of *interpretation of material criminal law*. In approximately half of the 30 cases – Article 3 (1) CRC – “the best interest-rule”, has been involved.

17. In particular after 2009 there is a clear tendency that CRC is invoked by the parties more often than before and discussed more frequently by the Supreme Court in the rulings, by the majority or by one or more dissenting justices. The Supreme Court's deliberations related to “the best interests” of the child in conflicts with other rights and interests, is nowadays regularly quite thorough – demonstrating that the Supreme Court carries out at rather strict scrutiny, in order to secure that the best interests of a child are actually given due weight. In some cases, the Supreme Court's interpretation and application of Article 3 (1) has been crucial for the *systemic development of law*.

18. The Norwegian Constitution dates back to 1814. It is accordingly one of the oldest constitutions in the world still in function. Moreover, it has been established in the Supreme Court's case law for more than 160 years that constitutional rights are to be protected by the courts, the Norwegian Supreme Court being even a *constitutional court*. In fact, the Norwegian Supreme Court is the second oldest constitutional court in the world, the US Supreme Court being the oldest.
19. Since the 1st June this year, the Supreme Court's duty to set aside – or interpret narrowly – any governmental act, including legislation, which is not in accordance with the Constitution, is prescribed expressly in Article 89 of the Norwegian Constitution. The Parliament's approval of the Supreme Court's well-established case law on constitutional review is an up-to date and vivid confirmation of the legitimacy of the Supreme Court's role as a constitutional court.
20. As part of its bicentennial anniversary in May 2014 the Norwegian Constitution went through a considerable modernisation and expansion, so that Norway would have a full-fledged "Bill of Rights" comparable to that in the international human rights conventions, the EU Charter of fundamental rights and modern constitutions around the world. It was intended that the Constitution should "reflect our times" and be "adaptable and alive."⁷ The main purpose was – according to the words of the preparing committee – to "strengthen human rights in Norwegian law".⁸ Numerous of the classic civil and political rights as prescribed by the major human rights conventions, in addition to a few selected economic, social and cultural rights, were taken into the Constitution.

⁷ Innst. 186 S (2013-2014) page 20.

⁸ Dok. 16 (2011-2012) page 11.

21. The Norwegian Supreme Court has, in its case law after the reform, stressed that the new constitutional rights and freedoms are to be understood “in the light of” their international background. Moreover, as to the interpretation, any applicable case law from the relevant international courts and tribunals must be taken into account. Although not formally bound by the international case law when interpreting the Norwegian Constitution, the Supreme Court is not supposed to deviate from it without good cause.
22. The Committee preparing the constitutional reform, urged for including children’s rights in the Constitution, and emphasized – in particular – that “the best interest-rule” in Article 3 (1) CRC had to be central, as one of “the most important legal principles that deal with children”.⁹
23. The Parliament agreed that children’s rights to a greater extent should be part of the Constitution, and emphasized that children are in a unique position, not only are they vulnerable and have special needs for protection in order to live free, safe and dignified lives; they are also in a special dependency position, “in a particularly formative phase”.¹⁰
24. The Parliament underlined, moreover, that “despite Norway’s status as a frontrunner for children’s rights” the government has not been willing to recognize the individual right of petition under the third Optional Protocol to the CRC, with reference to the fact that “we safeguard children’s rights well enough here at home”. This reasoning, the Parliament considered, “will appear inconsistent if Norway does not now protect children’s rights in the Constitution”.

⁹ Dok. 16 (2011-2012) page 192.

¹⁰ Innst. 186 S (2013-2014) page 29.

25. The new Article 104 of the Constitution declares:

“Children are entitled to respect for their dignity. They have the right to be heard in matters concerning them, and their opinion shall be given weight in accordance with their age and development.

By actions and decisions concerning children, the child’s best interests shall be a primary consideration.

Children are entitled to protection of their personal integrity. State authorities shall promote child development, including ensuring that the child receives the necessary economic, social and health security, preferably in its own family.”

Article 104 is thus a fairly comprehensive provision, with components of various kinds and with a considerable range, representing real challenges to the government and the Parliament. However, this provision also face the courts with demanding tasks as to adjudicating cases, in particular as the rights of the child according to Article 104 are formulated in a rather general, vague and relative manner, bordering to what might be considered to be issues of a political nature. The pure political choices that need to be done as to the distribution of limited resources are – of course – not for the courts to review. But the courts must probably see to it that even such choices are compatible with minimum standards of *rationality*, *due process* and *non-discrimination*. The challenges at this point are quite parallel to those represented by the corresponding provisions in the CRC on the child’s right to the highest attainable standard of health, social security, adequate standard of living and the right to education.¹¹

26. As an illustration on the current development in Norwegian law as to children’s rights, I would like to expound on Article 104, second paragraph according to which “the child’s best interests shall be a primary consideration”.

¹¹ See, in particular, Article 24, 26, 27 and 28-29, respectively. See also *General Comment No. 1* (2001) “The aims of education”, and *General Comment No. 15* (2013) “The right of the child to the enjoyment of the highest attainable standard of health”.

27. There is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance.¹² And the Norwegian Supreme Court has characterized Article 104, second paragraph as “the cornerstone” in children’s legal protection according to the Norwegian Constitution. Article 3 CRC was the model for Article 104, second paragraph.¹³ Moreover, as to the interpretation of Article 104, second paragraph, the Norwegian Supreme Court has – referring to it being a “parallel” to article 3 (1) CRC – declared itself prepared to use *General Comment No 14* from the Committee on the Rights of the Child as a sensible starting point, see Rt. 2015 page 93 (Maria) paragraph 64:

“In *General Comment No. 14* (2013) ‘on the right of the child to have his or her best interests taken as a primary Consideration’, the UN Children’s Committee explained the rules background and function, and undertakes a consolidated review of a number of issues of interpretation. The Committee’s opinion expressed herein constitutes in my view a sensible starting point for the interpretation of Article 3 (1) – and thus also for the interpretation of Article 104 second paragraph to the Constitution.”

That the *General Comment No. 14* is “a sensible starting point” implies that this is the source that one first turns to when the more detailed contents of the norm is to be clarified, without it being necessarily decisive at all points.

28. Article 104, second paragraph applies to “actions and decisions concerning children”, as a parallel to the phrase “actions concerning children” used in Article 3 (1) CRC. The Committee has emphasized that Article 3 (1) “does not only include decisions, but also all acts, conduct, proposals, services, procedures and other measures”.¹⁴

¹² The European Court of Human Rights (Grand Chamber), in *Jeunesse against Netherlands* (3 October 2014), section 109.

¹³ Dok. 16 (2011-2012) page 192.

¹⁴ *General Comment No. 14*, section 17.

29. It is also pointed out by the Committee that “inaction or failure to take action and omissions are also ‘actions’, for example, when social welfare authorities fail to take action to protect children from neglect or abuse”. The term “concerning” must also, according to Committee, be understood” in a very broad sense.”
30. Article 104, second paragraph of the Constitution says that the child’s best interests “shall” be a primary consideration. This corresponds to Article 3 (1) CRC. It is neither “may” or “should”, but “shall”. The wording does not invite for any discretionary assessments. The Committee on the Rights of the Child has, in accordance with the wording, emphasized that “the words ‘shall be’ place a strong legal obligation on States and means that States may not exercise discretion as to whether children’s best interests are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken”.¹⁵
31. The Committee has also stressed that “article 3, paragraph 1, create an intrinsic obligation of States, is directly applicable (self-executing) and can be invoked before a court”.¹⁶ Article 3 (1) CRC and Article 104, second paragraph of the Constitution, thus provide *a right* for the child to have its best interests assessed and made a fundamental consideration.
32. Article 104, second paragraph of the Constitution and the CRC Article 3 (1) use the indefinite form “a” primary consideration, not the particular form “the”. The Committee on the Rights of the Child has described the implications:¹⁷

¹⁵ *General Comment No. 14*, section 36.

¹⁶ *General Comment No. 14*, section 6. This is echoed by the Norwegian Supreme Court in the case reported in Rt. 2015 page 93 (Maria), section 65.

¹⁷ *General Comment No. 14*, section 37 and 39.

“The expression ‘primary consideration’ means that the child’s best interests may not be considered on the same level as all other considerations ...

However, since article 3, paragraph 1, covers a wide range of situations, the Committee recognize the need for a degree of flexibility in its application. The best interests of the child – once assessed and determined – might conflict with other interests or rights. ... If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child’s interests have high priority and are not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.”

33. In accordance with this, The Norwegian Supreme Court has in recent case law emphasized that in the balancing against other interests and considerations the child’s best interests must carry great weight, it is not only one of several factors in an overall assessment: The child’s best interest must be the starting point, and these interests shall be lifted to, and remain in, the forefront.¹⁸
34. Two judgments given by the Norwegian Supreme Court early 2015 may serve as illustrations on how this balancing is carried out – the *Maria case* and the *Rwanda case*:
35. Rt. 2015 page 93 (Maria) concerned, *inter alia*, the question whether Article 104 second paragraph to the Constitution and the CRC Article 3 (1) were obstacles to the expulsion of a Kenyan woman, who was a single parent for her four year old daughter. She had given incorrect information about her identity and had for a period been staying illegally in Norway. She should, according to the relevant law and administrative practice, be expelled from Norway. The daughter – Maria – is born in Norway and is a Norwegian citizen through her Norwegian father. Expulsion of the mother would cut the girl off from taking advantage of her Norwegian citizen rights, and –

¹⁸ Case reported in Rt. 2015 page 155 (Rwanda), citing from the case referred in Rt. 2015 page 93 (Maria).

since the father was in no position of taking care of her – de facto forcing her to accompany her mother to Kenya, a future that according to the Supreme Court’s view was “likely to be harsh, risky and in any case highly uncertain”. In the final balance between the immigration regulation that warranted expulsion of the mother, and the concerns for the girl’s best interest as a Norwegian citizen, the Supreme Court concluded as follows:

“There is an obvious tension between the need for effective and fair immigration administration on the one hand, and the requirement under the Article 104, second paragraph of the Constitution and the CRC Article 3 (1) that the child’s best interests shall be a primary consideration on the other hand. However, I cannot see that the reasons, which clearly indicate that action ought to be taken towards the mother and her offense, in this case, carries the weight, needed to offset the individual burdens for the daughter Maria by the mother being expelled to Kenya. It has for me bearing on the overall balance here that it is the utterly innocent party - [daughter Maria] - who is hit the hardest by such a sanction against the mother.”

36. In the second case – Rt. 2015 page 155 (Rwanda) – a man was charged in Rwanda for having participated in genocide and crime against humanity in 1994. He had stayed in Norway as a refugee since 1999, he was in regular work, and he was married and had three minor children. Prosecution in Norway was in principle possible and would be a much smaller burden for the children than extradition of the father to Rwanda, as the latter – for all practical purposes – would bar any future family life. The Supreme Court did not consider it doubtful that the consideration of children’s best interests taken in isolation indicated that the father should not be extradited. However:

“At to the proportionality assessment, I find it, however, imperative that we ... are facing an accusation for having committed particular serious offenses. In light of this and the other circumstances justifying extradition, I cannot see that there is a basis for giving considerations to the children’s best interests absolute priority. The need for international criminal cooperation and a proper treatment of the severe indictment do, in my view, require that the charge of genocide is tried in the country where the crime was committed and that the accused has escaped from. The individual burdens of a decision on extradition for the accused’s children cannot outweigh the reasons that clearly indicate that the accused is extradited.”

37. These two judgments illustrate that “the best interest-rule” basically is a norm of balancing, where the interests of the child does not have absolute priority. Legitimate and weighty interests – good and strong reasons – may have to prevail. However, other considerations can only win through if they can be considered as *rational and legitimate* and can stand the test of *proportionality*. The heavier burden on the child, the more compelling reasons must be presented to justify the measure.
38. It follows from the Supreme Court’s case law that “the best interest-rule” also have *procedural* aspects: In order to give “the best interests” due weight, one has to establish *what these interests are* in the particular case. In a case from 2009 it was thus stressed that the courts are under a duty to “clarify what is the Child’s interests and how these can be addressed, and to draw the results of these assessments into the centre of the decision-making process”.¹⁹
39. Moreover, the Committee on the Rights of the Child has, in *General Comment No. 14* provided a very thorough account of this aspect, also pinpointing what are to be considered the key issues, namely the child’s *own view*, the child’s *identity* related to such factors as gender, sexual orientation, ethnicity, nationality, belief, cultural identity and personality, the child’s *family relationships*, its specific needs for care, protection and security, and the right to *healthcare* and *education*.²⁰
40. The procedural aspect even has a bearing on the *justification* given in decisions and judicial rulings relating to children – they must be “motivated, justified and explained”.²¹

¹⁹ See the case reported in Rt. 2009 page 1261, section 85 – as approved by the Supreme Court in the case reported in Rt. 2015 page 155, section 47-48.

²⁰ See *General Comment No. 14*, section 48-84.

²¹ *General Comment No. 14*, section 97.

41. Not just any justification will suffice. The Committee on the Rights of the Child has formulated rather strict requirements: The justification must account explicitly for all aspects of the child relevant for the assessment of its interests. Furthermore: If the decision deviates from the child's own view, the reason for this must be stated. Any decision not in keeping with "the best interests" of the child must show that the child's best interest has in fact been fundamental, although not given decisive weight in the particular case. It is not sufficient to state this in more general terms. The competing considerations that have been found to be decisive in the particular case must be highlighted and explained. The justification must in this respect show "in a credible way why the best interests of the child were not strong enough to outweigh the other considerations".
42. I will close my intervention by referring to a Supreme Court judgment from 2010 that provides an example on the possible systemic impact of "the best interest-rule".²²
43. The case concerned sentencing of an under aged boy for robberies and attempted robberies. The question was whether he, in line with well-established case law from the Supreme Court, should be imposed imprisonment, or whether his age at the time of the offense made it appropriate to sentence him to community service only. The core issue in the case was whether the CRC, including "the best interest-rule" in Article 3 (1), indicated that in the determination of punishment for children who commit offenses one must apply a fundamental different starting point than the case is for adults, particularly with regard to the use of imprisonment. The Supreme Court answered in the affirmative, and formulated the following principle:

²² Case reported in Rt. 2010 page 1313.

“Where the convicted person was under 18 year of age at the time of the offense, the equilibrium in the balance of the individual concerns and deterrent considerations is relocated: what in the long run overall serves the child’s best interest comes first, and can only be set aside in so far as there are particularly weighty general deterrence considerations that are not satisfactorily safeguarded also by a sentence of community service. The younger the child, the more is required in order to justify imprisonment.”

This relocation of the equilibrium in juvenile criminal law quickly gained approval from the legislator, and has since then been followed in the Supreme Court’s case law as to the sentencing of minors.²³ I add that the CRC allows for the imprisonment of juvenile offenders as a measure of last resort, in the most serious cases. However, any detention of minors must, of course, be carried out with due account taken to their particular vulnerability.²⁴

²³ See the case reported in Rt. 2013 page 67, section 9-18.

²⁴ See, in particular, Article 37 CRC. I also refer to *General Comment No. 8* (2006) “The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment” and *General Comment No. 10* (2007) “Children’s rights in juvenile justice”.