

Care as a Prerequisite for the Realisation of Rights

An analysis of Care and the role of “Well-being” and Legal Theories

Abstract

Care is both a fundamental right for children, and central for a holistic realisation of other rights in the UN Convention on the Rights of the Child. Children have a right to care as is necessary for his or her ‘well-being’. Therefore, an analysis of the right to care, require an understanding of the term well-being. In jurisprudence, well-being is underexamined. Still, there are several legal theories that are connected or relevant to care and well-being. Nevertheless, children’s rights are not based on one single theoretical fundament. In this article we examine the right to care by exploring the role of well-being and three legal theories, vulnerability theory, care theory and the capability approach.

Keywords

Capability, Care, Children, Development, Health, Rights, Vulnerability, Well-being

1 Introduction

This year, we look back at 35 years from the adoption of the UN Convention on the Rights of the Child (CRC). Still, we are far from realisation of all the rights. Children’s rights are interconnected and interrelated (General Comment No. 5 section 6, General Comment no. 14 section 16a, and General Comment No. 16 section 12). However, the legal framework and institutions are not necessarily in line with this view on rights. In many legal systems each sector primarily focuses on a few rights to cover their responsibility. For instance, the school focuses on the right to education, child protection on the right to protection and health care on the right to health.

Rights assessed isolated from each other, might be one of the reasons for a lack of realisation of children’s rights. The best interest of the child principle in CRC Article 3 (1) was intended to function as an umbrella right, contributing to an interrelating approach to all the other rights. Still, the principle is criticized as too vague. We argue that there is still need for exploring how to ensure an interconnected view on rights. One example is that the relationship between CRC Article 3 (1) and Article 3 (2) is poorly developed in legal research. A central question in this context is whether the right to care can contribute to the function of the best interest of the child. Another example where the clearly is a need for an interconnected view, is the connection between the right to care and the rights to health and development. It is hard to see how children’s right to health and development can be realised without children receiving care. The connection between care and rights, is rarely explored in depth and needs to be further explored. We explore whether the right to care may be the prerequisite for realisation of *all the rights* and can contribute to a better and more holistic realisation of children’s rights.

Children's right to care is reflected in various articles in the CRC, including Article 3, 7 and 18. Article 3 (2) explicitly connects the right to care with well-being. Well-being is not a well-established legal concept. Research on well-being is primarily a topic in other disciplines. Thus, if we should see care as a prerequisite to fulfil other rights, the realisation of rights to their fullest extent seems to require an understanding of the normative reach of the concept well-being as a part of care.

Legal theories might contribute to the understanding of the legal function of well-being and the interrelated nature of children's rights. However, different rights might be connected to different theories. As an example, vulnerability theory might be easy to harmonise with protection rights, and the capability approach with participation rights and care theory with provision rights. Such an approach presents a risk of missing the close relationship between all the rights in the convention and might narrow down the content of the rights. Due to the close relation between all children's rights, well-being as a part of care needs to be clarified for the understanding of the Convention as a whole.

If care can be seen as a prerequisite to fulfil other rights of children, we wonder how care and the interdependent connection between rights, the term well-being, and different theories, contribute to a holistic realisation of children's rights. We ask whether well-being strengthens children's legal position beyond the best interest of the child, and how different theoretical perspectives connect to the CRC's interrelated view on children's rights. Building on a child-rights approach, all the rights and the four general principles in the convention will be an underlying fundament in our review (See General Comment No. 13, para 59, General Comment No. 21 para 11 and 12, General Comment No. 20, para 4, and Joint General Comment No. 3/22, para 32 k).

The paper starts by describing' care and the interrelated connections between children's rights. Thereafter, we examine the connection between well-being and the right to care. The literature on well-being is extensive and we will only give a surface review of general definitions before we move on to a legal discussion. After that, we discuss the right to care and the concept of well-being in connection to three theoretical perspectives. The theories that seem particularly relevant for care and realisation of rights are vulnerability theory, care theory and the capability approach. Finally, we ask how the right to care as a prerequisite for ensuring children's rights, can strengthen children's legal position.

2 Care and the Interrelated Connections Between Children's Rights

Care is a fundamental human need. The need for care is particularly present in certain phases of life, such as childhood. Children, although to various degrees, are dependent on care. Thus, children are also dependent on adults and social institutions. Because children often are dependent on adults providing care, children have a fundamental and unconditional right to care. However, children are not passive receivers of care. Caring is the relationship and dynamic between the one who receives and the one who gives care. Acts of care is a two-way

communication where the child is also an important contributor (Hundeide, 2004). In this article we see both care giving and receiving as covered by the right to care.

The right to care in the CRC Article 3 (2) is defined as ‘care as is necessary for his or her ‘well-being’’. Care is not limited to meeting basic biological needs, such as food, shelter, and protection from harm (General Comment no. 14, section 71). It also covers broader social needs for emotion, relationship, play, and fostering capabilities. This broad range of needs can be seen as different aspects of children’s well-being. All these are needs that are covered by the wide range of rights in the CRC, and all the rights in the Convention are equally important and interdependent. Caring would also cover helping children ensuring all the rights, in a manner consistent with the child’s evolving capacity in CRC Article 5. Therefore, the right to care might function as a key to carry out an interrelated utilization of all the rights, as the Convention requires (e.g. General Comment No. 5 section 6). Here we illustrate the connection between care and other rights by using the right to development and health as examples. As we will argue, these rights are particularly dependent on each other to cover children’s needs, realise the best interest of the child and reach the aim of children’s well-being.

Similarly to the right to care, ensuring children’s needs are central for the realisation of the right to health (CRC Article 24). Another similarity between the right to care and the right to health is that the definition of health also explicitly includes well-being (Herring, 2023). The World Health Organisation (WHO) defines health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity” (The preamble in The Constitution of the World Health Organization). The Committee on the Rights of the Child has built on this broad and positive definition (General comment No. 15, para 4).

The right to development is meant to be interpreted in its broadest sense, as a holistic concept that includes the “child’s physical, mental, spiritual, moral, psychological and social development” (General Comment No. 5 para 12). To be a holistic concept the right to development must cover the wide range of children’s needs. In addition, these common elements that represent needs intricately link development to the right to health and care. Children lacking care will obviously have less opportunity to get their development safeguarded. This is illustrated by the statement from The European Court of Human Rights; ‘it is clearly also in the child’s interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child’s health and development’ (Strand Lobben v. Norway para 207). According to the Child Committee, Article 24 includes a right ‘[...] to grow and develop to their full potential [...]’, which illustrate the connection to the right to development (General Comment No. 15 para 2). These statements show the interconnection between the right to care, development and health. The interconnection and interrelation of these rights require a broad understanding of the right to care, health and development, which all include children’s needs.

Children’s right to care is both a private and public duty. Although the Convention recognises the responsibility of the parents to care for the child, the state clearly has a duty to ensure that

the wide range of needs is being met. This is illustrated by the wording 'States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents' in CRC Article 3 (2). Children have a right to care primarily within their family (Article 18), and in addition a right to care provided by the state. Public care shall be provided to all children in certain situations, such as school and kindergarten (See CRC Article 18, 28 and 29). All public care shall, and must, contribute to the realisation of children's right to health and development. For some children, all care is provided as public care, in foster homes or institutions. As stated in the quote from the ECHR, the public has a duty to provide alternative care when parents measures would harm the child's health and development.

The content of the right to care does not differ between children receiving public or private care. However, building strong and close relationships in public care might be more difficult than in private, caring relationships. Without caring relationship, it is difficult to ensure social development and mental health. Jonathan Herring and Charles Foster have suggested that 'Well-being can only sensibly be defined by reference to the nexus of relationships in which humans exist' (Foster and Herring, 2012, 491).

Considering this, the broad range of needs must be met, including emotional and relational needs in public care. The CRC Committee exemplifies emotional care as:

[A] basic need of children; if 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 to provide the child with a stable environment (General Comment no. 14, section 72).

Therefore, public institutions have the duty to provide and safeguard children a broad inclusive and individual adapted right to emotional care. Such interpretation of the right to care is needed to realise the best interests of the child in CRC Article 3 (1) and children's well-being in CRC Article 3 (2). The best interests of the child require that public care ensures the broad range of children's needs (General Comment no. 14). According to CRC Article 12, the children's views must be taken into account to the define their needs. If not, children's dependency may lead to adults having the sole power to define their need for care and well-being. However, despite Article 12 and the development of children as rights holders', children still have very limited agency. The risk is that adults and such institutional-made dependency might lead to paternalistic views on children's needs, or worse, be used to justify coercion disguised as care.

The interrelated connection between the rights, and well-being considered as a part of the right to care, health and development seems to promote well-being as an element in many of children's rights. Both the strong and broad duty to provide care, and the possible function of care to carry out a utilization other rights, leads to a need for the right to have a clear content. Even though the duty and the right to care is fundamental, the content of the obligation is

limited to care *necessary* for his or her *well-being*. The terms “necessary” and “well-being” must be interpreted in conjunction with each other, to give content to the right to care. This may lead to difficulties. While the wording necessary is a well-known legal standard often pointing at the need for balancing interests or a proportionality assessment, well-being requires clarification. In the following we discuss the concept of well-being, and well-being in relation to the right to care.

3. The connections between well-being and the Right to Care

3.1 Definition of Well-being

There is limited research on “well-being” in relation to care and rights. Nonetheless, the topic “well-being” is increasingly popular and much analysed by researchers in general (Sirois and Molnar, 2016). At the same time, it is also a criticised concept due to methodological, political and pragmatic issues (Camfield, Streuli and Woodhead, 2009). Despite the huge amount of research on the topic, a consensus on a single definition of well-being is lacking (Dodge, Daly, Huyton and Sander, 2012). Early conceptualisations of well-being focused on the absence of distress as the key defining quality of well-being (McDowell, 2010). Over the years, research on children’s well-being has gone through a series of paradigm shifts, ‘from survival to well-being, from negative to positive, from well becoming to wellbeing, and from traditional to new domains’ (Ben-Arieh, 2005, 574).

Well-being as a concept can be conceived of as a transitory state of positive feelings and satisfaction, also understood under the term “subjective well-being” (subjective turn). The concept can also be understood as a continuing process of growth and adaptation to changing life circumstances (Sirois, 2011). Well-being arises, not from the pursuit of pleasure, but from the pursuit of goals (Waterman, 2008). This understanding is proposed to contain three core dimensions—personal growth, purpose in life, and positive relations with others (Ryff and Keyes, 1995).

Today, the term “well-being” is often viewed as being synonymous with related terms such as contentment, happiness, wellness, mental health, and quality of life (McDowell, 2010). It is also connected to life satisfaction and thriving (Huebner, 2004 and Camfield, Streuli and Woodhead, 2009). Therefore, the wording well-being in the right to care might lead to a view on CRC Article 3 (2) as an ideal rather than a substantial right. Although not necessarily explicitly mentioned in definitions of ‘well-being’, all these subjective factors are strongly connected to relationships, and more particularly caring relationships. In addition, the final paradigm explicitly connects the subjective turn with a children’s rights agenda, where children are active participants in the measurement of their well-being (Ben-Arieh, 2005, and Camfield, Streuli and Woodhead, 2009).

The fact that well-being has no fixed definition might be an advantage for legal questions that require flexibility, such as the right to care. Care needs to function in a diversity of contexts and be adapted to the views and needs of the individual child. Well-being is a flexible concept that can be developed, adapted, and debated (Tisdal, 2015). As Ian Dowel states about well-being, it

is 'subjective and is a relative, rather than an absolute, concept' (McDowell, 2010, 70). Well-being can include the cultivation of virtues, such as relationships, the achievement of worthwhile goals, and the satisfaction of one's obligations (Foster and Herring, 2012).

The child's subjective experience is a reasonable starting point in defining well-being for the realisation of the right to care. However, subjective views on well-being cannot be the only parameter in defining well-being. Firstly, the normative expectations of children vary in different societies. Therefore, what societies demand of children for them to be seen as a respected part of the community might be too high or too narrow. If the demands are too high and adult centric it might lead to children not being able to cope with the normative expectations. Broad, positive, and inclusive terms may contribute to unrealistic expectations both to the content of rights and to life itself. This might influence children's sense of well-being. In this context there is a risk that the subjective, individual ideal (the liberal subject) has gone too far and will increase such discrepancy. In addition, we suspect that expectations, and adult's presumptions of children vary according to the various rights, such as the capacity or maturity to have a view, vulnerability and need for care, development, and protection.

Due to these aspects, flexibility can be problematic in a legal context. Flexibility might not meet requirements of due process rights (rule of law) such as predictability and transparency of the content of rights, and the interconnection between them. A lack of definition might lead the concept of well-being to be inapplicable for clarification of content of the right to care. It might also give room for subjective, paternalistic attitudes and bias towards children. We see the need for further clarification of the concept of well-being, and hereby the relation to children's right to care. In the following section we clarify the connection between the right to care and well-being.

3.2 The Legal Function of Well-being

The lack of a legal definition, combined with the subjective turn, can lead to legal assessments being impossible. Therefore, a legal function of the term "well-being" cannot be built solely on a wide and subjective definition of the general concept. Thus, a central question is how well-being contributes to the understanding of children's rights and thereby children's legal position. Michael Freeman states that the CRC 'offers an infrastructure upon which the well-being can be built' (Freeman, 2020, 347, see also Lundy, 2014). He elaborates that all 'the substantive provisions of the Convention are about well-being even if the concept does not appear as such' (Freeman, 2020, 349). We agree, a child rights approach must contain a goal of rights leading to well-being. Nonetheless, well-being is a central concept in some of the rights in the CRC.

In the main text of the CRC, well-being is mentioned five times (preamble, Article 3 (2), Article 9, Article 17 and Article. 40), but the Convention contains no definition of the concept.¹ It also seems difficult to find a positive definition in ECHR case law. A search for well-being shows that

¹ Well-being is also mentioned in Charter of the Fundamental Rights of the European Union Article 24 on the rights of the child and the African Charter on the Rights and Welfare of the Child Article 24 on adoption.

the concept appears in some judgements, mostly in relation to Article 8 (See for instance H.F. and others v. France para 213, Sahin v. Germany para 92, Elsholz v. Germany para 58, Neulinger and Shuruk v. Switzerland para 146 and 148, Sommerfeld v. Germany para 87 and 88 and Maslov. v. Austria para 58). The Committee on the Rights of the Child has some references to well-being in individual complaints,² often with references to CRC Article 3, but also to Article 7, 9, 10, 12, 16, 19 and 27 (See for instance CRC/C/77/D/3/2016, CRC/C/85/D/31/2017 and CRC/C/91/D/94/2019). Since well-being is a part of the wording and the definition of several rights, we argue that the *legal function* of well-being needs clarification.

In the Child Committee and the ECHR case law, well-being is mentioned in relation to living conditions, development, attachment, physical, psychological and mental health. The cases concern different topics, including child abduction, deportation, adoption and child custody and visitation. Nevertheless, the use of well-being implies a low level of actual well-being as the cases are related to severe situations for children. The severe nature of the cases before the Court and Committee lead to the positive and inclusive wording of the CRC Article 3 not being tried legally. The use of well-being seems undeliberate and does not contribute to any definition or clarification of the function.

Challenges with the concept well-being has also been noticed in jurisprudence. Kay Tisdall explores a tension between children's well-being and rights (Tisdall, 2015). She is critical of 'casually twinning children's rights and children's wellbeing together' (Tisdall, 2015, 785). She describes a Scottish bill where well-being indicators, strongly connected to early intervention and prevention, replace children's rights to achieve well-being (Tisdall, 2015, 779). In the legislation and system described, children's rights were seen as less applicable and less holistic, especially in connection to early intervention and prevention, compared to well-being (Tisdall, 2015). She illustrates that well-being, with its positive appeal, can be used in framing legislation, while rights are omitted. Well-being alone leads to vague duties on the state, lack legal strength and give the professionals the sole power to define children's needs. We also fear that well-being undefined can camouflage paternalistic views on children's needs from both professionals and parents. However, combined with rights, well-being can lead to better lives for children and making rights real.

Laura Lundy has explored 'the ways in which child rights differs from well-being both in terms of its rationale and its scope' (Lundy, 2014, 2439-2462). She points out that human rights commonly refer to encompassing basic needs and are modest standards whose dominant focus is said to be protecting minimally good lives for all (Lundy, 2014). A lower ambition level for rights than well-being is connected to rights imposing duties on states, and there 'are areas of well-being which fall completely outside the capacity of the state and therefore the scope of

² Optional Protocol to the Convention on the Rights of the Child on a communications procedure 19 December 2011.

the CRC' (Lundy, 2014, 2441). In addition, we argue that the subjective element of well-being in rights may increase the risk of unrealistic views on rights and duties.

This can be exemplified by the right to care with its references to well-being. It is unrealistic to expect care for children that ensures constant subjective well-being. Some acts of care will be experienced as short-term distressing, for instance a vaccine or a wound care. In addition, well-being goes beyond subjective happiness and may produce greater value, even if subjective and short-term distressing. Still, it might be for the long term good.

The same problem as with the right to care applies to the right to health in CRC Article 24. Alone, securing the 'highest attainable' standard of health for every child is unrealistic (Lundy, 2014, 2441). The lack of realism is enlarged by the definition of health as 'a state of complete physical, mental and social well-being' (Herring, 2024). Such standard is impossible to assess legally, and it is difficult to describe the duty of the state according to this wording. Furthermore, considering the WHO definition on mental health as 'a state of mental well-being that enables people to cope with the stresses of life, realise their abilities, learn well and work well, and contribute to their community', the legal problem becomes even clearer (WHO, 2022).

It seems clear that well-being and children's rights do not completely overlap. Lundy also points out a risk of a diluted approach to child rights "child rights light", with loose or inaccurate references to the CRC in discussion about well-being, can weaken children's status as right holders (Lundy, 2014, 2441). We tend to agree with Lundy. Replacing rights with well-being could lead to a lower degree of legal certainty. There is a risk that well-being is used as legitimization for unlawful interference in children's and their families' rights, without procedural guarantees. Ensuring the rule of law, due process and legality (*rechtssicherheit*) for children, means safeguarding all the substantive rights. These procedural rights also entail the positive duties for the state to balance all the rights as interdependent. Both the duty to provide care, and the subjective element of well-being, show the need to balance several rights of children in certain situations to cover the Convention as a hole.

Absences of a legal definition of well-being makes it difficult to see how well-being can constitute a part of the *content* of children's rights such as care. The question is whether the function must be limited to a *result and aim* of rights, such as care, development and health. Still, both best interests and the right to dignity also have been criticized for being undefined and vague. However, these are substantive rights that over time has evolved and serves as fundamental principles. Well-being, when defined and evolved, may also contribute to a holistic realisation of all the rights (see General Comment no. 14, section 16a). Nevertheless, lack of a definition does not exclude well-being filling *other* legal functions. It has been argued that well-being has potential as a bridging concept, highlighting inequalities, acknowledging diversity, and respecting children's agency (Camfield, Streuli and Woodhead, 2009). We argue that all these functions require a clearer legal content of well-being.

The discussion above leads to the conclusion that the legal function of well-being cannot constitute as a part of the *content* of rights. The function must be limited to *aims* of children's rights in the CRC. If well-being is meant to contribute to something substantive that is not already covered by other rights, its needs to be further developed and defined. In our view, the right to care in relation to the best interest of the child is the key to a more holistic realisation of children's rights than well-being. Therefore, the content of the right to care should be further developed for this purpose.

As described, well-being might be both redundant and misleading. Well-being without a legal content and a clear legal function, derails the focus from the core of the right to care, development and health into the realm of the subjective turn. For individual children, the assessment of such rights must be distinctly concrete, governed by the child's particular needs and what it takes for the child to feel well as the aim of children's rights in the long turn. In this function, well-being can foreground subjective meanings and experiences and provides the background for interpreting 'best interests' of the child (Camfield, Streuli and Woodhead, 2009, 66). This might represent legal functions of well-being. However, for now, it is unclear how well-being in CRC Article 3 (2) contributes to the content of rights in a manner that are not already covered by the best interests of the child in CRC Article 3 (1).

There are several legal theories that in one way or another are preoccupied with care and well-being. The interrelated connection between rights and the element of well-being, gives rise to the question of whether the right to care needs to be respected to realise other rights. A question is therefore whether legal theories can contribute to a deeper understanding of the right to care and well-being in relation to children's rights.

4. Conceptualisation of the Right to Care

4.1 Rights and Theories

Karl Hanson and Noam Peleg states that theories can be 'more-or-less useful or (im)practical. They can have analytical or prescriptive qualities' (Hanson and Peleg, 2020, 16). They argue that what is missing in children's rights studies is not so much the presence of theories, but rather reflections and discussions about the normative relevance, analytical qualities, or explanatory powers of the mobilised theories. We admit that our text will also be affected by such weaknesses. Our impression is that jurisprudence often lacks theoretical depth and insight, and theorists in other fields lack sufficient knowledge about the complexity of the law. Nonetheless, our aim in this section is to clarify how theories may have a normative relevance for understanding the interconnected children's rights and the right to care as a potential prerequisite for realisation of rights.

We focus on three different directions: vulnerability, care, and capability. In our view, all these directions are individually relevant to the rights of children. We speculate on how the theories are relevant for the content of rights, and whether an approach where theories are used one by one, might be too narrow to cover the complete range of children's rights. To fully understand

children's rights, we believe that a holistic approach to these theories and how they can build on each other are necessary. Our preconception is that theories used in isolation can undermine the interrelated connections of children's rights.

Vulnerability theory, care theory and the capability approach have a clear link to the right to care. Theorists have already connected these theoretical directions (Engster 2019; Engster 2009). From this fundament, we ask whether the theories together can build a more complete understanding of children's need for- and the right to - care, and the role of the right to care for a complete understanding of rights. In the following section we try to show the connection between these three theoretical directions.

4.2 Three Theoretical Perspectives: Vulnerability, Capability and Care

Discussion on children's rights is often built on the assumption that children are vulnerable. As Jonathan Herring explains, 'in a sense it can almost be seen as definitional: to be a child is to be vulnerable and in need of protection' (Herring. 2022, 3). In legal theory, Martha Fineman states that *universal vulnerability* is the human condition, and adds an important dimension to the view on children as vulnerable. She argues that:

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 one individual or group to another. We are all always vulnerable—there is no position of invulnerability (Fineman, 2020, 21).

Humans' vulnerability is the 'unavoidable susceptibility to change, both positive and negative, in our physical and social wellbeing that we experience over the life course' (Fineman, 2019, 57; Dinner, 2018, 1151).

Also in the capability approach, vulnerability is described as the fundamental and ontological human condition and must be understood as the most fundamental capability (Lysaker, 2023). Amartya Sen and Martha Nussbaum describes capabilities as what people are actually able to do and to be (Nussbaum, 2003). The capabilities are intricately connected to freedom and human development (Nussbaum, 2000; Sen, 1999). Both vulnerability theory and the capability approach recognise that human vulnerability will vary in intensity and throughout the life course, for shorter or longer periods. There are differences, both demographic and developmental, for vulnerability to be more or less present during life (Fineman, 2020). This will influence both other capabilities and the amount of the care and support the child need.

Nussbaum has developed a list of central human capabilities, open to further adjustment. The list is meant to be a starting point for political planning and contain capabilities believed to be of central importance in any human life (Nussbaum, 1997). She states that capabilities are important to pursue in our choices and plans but also have value in themselves, making life fully human (Nussbaum, 1997). Included in this list are emotions, such as being able to have

attachments to people, to love those who care for us and friendship. Supporting and protecting such capabilities means ‘supporting forms of human association that can be shown to be crucial in their development’ and ‘protecting institutions that constitute such forms of affiliation’ (Nussbaum, 1997, 286).

Our vulnerability makes us all dependent on others. Herring explains that our mutual vulnerability requires us to reach out to others and to offer and receive help, it leads to empathy and understanding and creates intimacy and trust (Herring, 2022). Care and caring relationships will influence how our vulnerability and other capabilities emerge and evolve thorough our life course. Caring has deep roots in our culture and can be linked to universal human conditions in our interaction, such as trust, power, and communication (Løgstrup, 1956). Care is the dynamic between the person who receives and the person who gives care, and their situation.

Daniel Engster describes care as something basic, ‘caring makes the development and basic well-being of another its direct end’ (Daniel, 2009, 51). Engster states that ‘caring may thus be defined as everything we do directly to help individuals to meet their basic needs, develop or maintain their basic capabilities, and live as much as possible free from suffering, so that they can survive and function at least at a minimally decent level’ (Engster, 2009, 53-54). His definition is explicitly linked to the capability approach with 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’ (Engster, 2009, 52). He emphasises that capabilities in this context includes the ‘basic capabilities for sensation, emotion, movement, speech, reason, imagination, affiliation, and in most societies today, literacy and numeracy’ (Engster, 2009, 52).

All the three theories capture humans’ vulnerability and dependency, and the need for institutions and legal framework that acknowledge this and consequently humans’ fundamental need for care. Still, they provide three different angles for the understanding of care. One of the differences may be that the structural, societal factors are a clearer starting point for the understanding of care in the capability approach, while care theory and vulnerability start in human and relational factors.

In the following section we examine whether care, vulnerability, and the development of the capability approach, with a starting point in predefined capabilities such as Nussbaum’s approach, might narrow down the complexity in the human condition and the holistic understanding of the right to care.

4.3 The Theories contribution to the Normative Content on the Right to Care

As described, all the theoretical directions agree on human vulnerability as the fundamental human condition and that humans have a fundamental need for care. For children, this is even clearer. This underlines our assumption that the right to care must be seen as a prerequisite for all rights. Despite the huge amount of literature on ethics of care and care generally, the

definition and the content of the children's right to care is surprisingly undertheorized. We argue that this represents a legal problem and might weaken children's legal position.

Regardless of whether children receive care from their primary care givers or alternative provision from the state, children must accept the care they receive. The power imbalance is prominent in all relations between adults and children. Therefore, it is highly necessary that acts of care is seen as the two-way communication, as described above, in which the child also is an important contributor (Hundeide, 2004). According to care theory, care must be given in an attentive, responsive, and respectful manner (Engster, 2009). The inevitable element of communication in care leads us to conclude that autonomy for children is essential as a part of the content of the right to care. It is impossible to provide care without meeting the autonomous needs of others. Autonomy must be respected to counterweight the imbalance in the child/adult relationship, but also to realise the right to care.

The capability approach focuses on the importance of autonomy in connection to inequality. Nussbaum acknowledged that 'rights language has value because of the emphasis it places on people's choice and autonomy' (Nussbaum, 1997, 296). She elaborates that:

The language of capabilities, as I have said, was designed to leave room for choice, and to communicate the idea that there is a big difference between pushing people into functioning in ways you consider valuable and leaving the choice up to them. At the same time, if we have the language of rights in play as well, I think it helps us to lay extra emphasis on this very important fact: that what one ought to think of as the benchmark are people's autonomous choices to avail themselves of certain opportunities, and not simply their actual functionings (Nussbaum, 1997, 296).

The legal and social status of children's autonomy is clearly addressed in Article 12. On the one hand, children lack the full autonomy of adults but, on the other hand, they are subjects of rights. The CRC assures, to every child 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 age and maturity. Article 12 is also one of the four general principles of the Convention. This establishes the requirement of considering Article 12 in the interpretation and implementation of all other rights, and thereby also for the right to care (General Comment no. 12).

To fully understand the right to care, autonomy for children as legal subjects must be realised while acknowledging their capacity and capability. The wording *capable* in CRC Article 12 has led to the need for the Committee to specify that the phrase implies an obligation for adults to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. As a result, adults should presume that a child has the capacity to form her or his own views and recognise that she or he has the right to express them; it is not up to the child to first prove her or his capacity (General Comment no. 12). Hence, Children should be seen as capable beings not only becoming's (Freeman, 2020).

CRC Article 12 used in conjunction with the capability approach can highlight that children lack equal opportunities to conduct their capabilities compared to adults (Peleg, 2013). However, used alone, there is a risk of perceiving children's capacity as measured in the same way as adult's capabilities. Children should be given the opportunity to communicate and influence the content of their own right to care in their own way.

At the same time, a conceptualisation of care and children's rights must build on the view of vulnerability as the fundamental and ontological human condition. If not, care will be a very narrow concept, only attainable for some, and in a short period of time. The right to care cannot be based on 'the liberal subject', as described by Fineman as 'a fully function adult – in charge and capable of making choices' (Fineman, 2019, 356). This also applies to children. As an example, some children with behavioural challenges may be perceived as in need for correction and coercion, when they in reality lack care adapted to their autonomous needs (either from their primarily care givers or alternative provision from the state). However, the vulnerability theory is complex and can be misunderstood, especially when used on children that already are seen as particularly vulnerable in need of protection in a more traditional rights-based approach. A misunderstood use of the theory might give room for paternalistic views on children to the detriment of autonomy. The risk of unnecessary control actions or coercion might be especially present when children are defined as difficult or even dangerous. However, this is also a risk within a rights-based paradigm if rights are used separately and with a strong focus on protection and the child's development. Missing the interrelated connection between all the rights, leads to a too narrow view on rights.

The dependency of care makes children's situation special and may contribute to their vulnerability. The use of the term *particularly* vulnerable about an individual child in case law, without further description and analysis of what the vulnerability concretely consists of has been criticised by the European Court of Human Rights (Strand Lobben and others v. Norway). Accordingly, a description of which conditions, demographic and/or developmental of the child or the child's situation must be expected in individual cases. In this context, the capability approach may promote concrete descriptions of situational capabilities and help avoiding paternalistic or biased assumptions of vulnerability.

Nussbaum contends that capabilities are linked closely to rights (Nussbaum 2003). We agree that children's capabilities will influence realisation of rights. Nevertheless, capabilities understood as components that *must* be present for a life fully human is problematic. Not every child is able to reach all the capabilities. On the other hand, the capabilities related to care understood as components that *should* be presented in every child's life, enhance the argument that the right to care is a prerequisite for the fulfilment of rights. The capabilities bring awareness to how variations in different structural factors such as societal, political, religious, and economic conditions, influence children's right to care. However, many of the capabilities are also covered by children's rights, such as life, bodily health and integrity, senses, imagination and thought, freedom of expression and play (Nussbaum, 2000; see Peleg, 2013).

Taking this into account, a new discussion might be needed on how the approach might contribute to the content of rights. Nonetheless we consider this outside the purpose and limit of this article.

There is a considerable overlap between the three theories (see Nussbaum, 2002). Theoretical perspectives can contribute to an understanding of the aim of the right to care, and therefore also on how the rights must be interpreted. Nonetheless, different theoretical perspectives should be used with caution. Used separately they can undermine the interrelated connections of children's rights and might give room for biased views on children or paternalistic assessments of children's rights. Dividing the CRC in such categories of rights as the "3 p's" has been criticised (Quennerstedt, 2010). Theories need to be used with caution to avoid reinforcing such divisions. Therefore, for the understanding of the right to care, the three theories must be combined.

To conclude, all three theoretical directions contain elements that are relevant for further development of children's right to care. This particularly applies to the emotional and relational elements in the theories. In line with care theory, care must meet the full range of children's needs, in an attentive, responsive, and respectful manner. This requires an acknowledgement of vulnerability as the fundamental human condition and children's capabilities that differs from adults. In addition, the rights perspective must be the central keystone. According to CRC Article 3 no. 1, both the aim and the actual caring activities must be done in a child friendly way that ensures all the other rights in the CRC. This means that the right to care must be interpreted in the light of the other rights.

5 Care as a Prerequisite for the Understanding of Rights

The rights in the CRC cover the human needs children have, and we argue that the right to care is fundamental for ensuring these rights. None of children's rights can be realised without children receiving care. As an example, if the right to care is realised, children will be assured the right to health which also includes well-being. This illuminates that all sectors and the legal framework must consider the right to care as a fundamental prerequisite for the fulfilment of all the rights. As the Committee on the Rights of the Child has stated, '[s]tates should identify factors at national and subnational levels that create vulnerabilities for children or that disadvantage certain groups of children' (General comment No. 15, section 11). The right to care is the crucial factor that if not recognised, may create disadvantage, increase vulnerability, and lead to other rights not being realised.

The full enjoyment of the right to care will lead to every right being safeguarded on equal basis among all children. However, the wording 'well-being' in Article 3 (2) is problematic. The subjective turn in child well-being research, the neo liberal ideals, including the liberal autonomous subject, might influence legal frameworks and social institutions, and create high and unrealistic standards. Well-being as a part of children's rights might become unrealistic due to a one-sided, individualistic, or subjective view on well-being.

The individual expectations of positively defined rights such as the right to care, health, and development, which all include children's well-being, will not necessarily be met in society. For instance, a frequent underlying assumption in pairing well-being and the right to health is that in experiencing good health, one may also expect to experience well-being. However, this also implies the converse; that without good health, well-being may be elusive. Such simple perceptions can lead to children neither living up to society's expectations nor feeling that they have a good life. We fear the ideal of subjective well-being may cause disappointments and experiences of rights violations among children.

With this as a background, including well-being in discussions about children's rights does not necessarily contribute to children's legal position. In addition, we argue that well-being partially overlaps and at the same time is vaguer compared to the principle of the best interest of the child. Our view is that the substantial provisions in the CRC and the general comments provides little guidance on this relationship. The CRC Committee includes well-being in the positive, broad definition of the best interest in relation to protection and care, but the normative reach of well-being or how to assess it, remains unclear (General Comment no. 14, section 71.).

The best interests of the child-principle in CRC Article 3 (1) is dynamic and well established in a child-rights framework. However, well-being indicators might be seen as elements in the concretisation of the best interest. Therefore, one function of well-being can be securing actual improvement of children's well-being in best interest's assessments and results. Another function of well-being might be untying best interest assessments from paternalistic attitudes. Children's experience of their well-being promotes the right to participation and indicates whether the action towards the child actually is in the child's best interest. Still, we conclude that the development of the best interest of the child, understood correctly, have the potential to cover both these functions. As a substantive right, the best interest already requires an improvement in children's life when assessed, and the interdependent relation between CRC Article 3 (1) and Article 12 will untie best interests' assessments from paternalistic attitudes (General Comment no. 14 and 12). However, for article 3 (1) to be fully realised the right to care needs to be respected as a prerequisite for all the rights, as shown by the examples on the interrelated connection between the right to care, health and development. We therefore conclude that there is need for a more holistic view of article 3.

With the clear link to care, the three theoretical perspectives have contributed to our conclusion and how we understand the rights content. This conclusion implies a new understanding of the wording in CRC Article 3 (2). A more accurate wording in Article 3 (2) would be 'children have the right to care necessary for ensuring all the rights in the convention, and state parties have the duty to ensure this right'. This would highlight that all sectors have an individual responsibility to realise the right to care. Ensuring such broad understanding of the right to care would also cover children's right to protection, without compromising the child's autonomy. If we truly want to strengthen children's legal position, the theories

combined can contribute to a more comprehensive understanding of the right to care as prerequisite for realisation of all rights.

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