

Children's Right to Participate in Decision-Making in Norway: Paternalism and Autonomy

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1 Introduction to Children's Participation Rights in Norway

Under Norwegian law, the right of the child to be heard is widely recognised. Nevertheless, children's voices are sometimes absent in decision-making or, alternatively, hearing children is treated as a formality with little impact. The 2014 constitutional reform introduced an explicit provision on children's right to participation, which is a shorthand version of the United Nation's Convention on the Rights of the Child (CRC), art 12. Since the Human Rights Act of 1999 already incorporated the Committee on the Rights of the Child, giving it a semi-constitutional status, the constitutional reform codified the status quo.¹ The question is whether including a specific provision on children's participatory rights signifies a reform or cements existing ideas and concepts.

Section 104, subsection 1, second sentence reads: '[Children] 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'.

This text explores the relationship between the Constitution, legislation and practices involving children in decision-making, both individually and collectively. The main question is how children's participation is defined in Norwegian legislation. Does the definition refer to nominal, instrumental, representative and transformative participation? The definition of participation is likely to be reflected in whether and how children participate in decision-making in practice, including the role of the adults involved.

First, I will discuss the right to participate from a theoretical perspective. Second, I will analyse which theoretical assumptions the Norwegian Constitution relies on. Third, I will examine Norwegian legislation on the child's right to participation in light of these theoretical models. I will cover participation

¹ For a more detailed discussion on this topic, see Trude Haugli, 'Constitutional Rights for Children in Norway' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

both as a collective and an individual right. The main focus will be on parental responsibility, child welfare and health care.

2 Theoretical Perspectives on the Right to Participate

Our image of children and childhood has transformed from viewing children as dependent and in need of protection, as ‘human becomings’, to viewing children as capable subjects vested with knowledge and rights, as ‘human beings’ with different and evolving capabilities and desires than adults. Children are autonomous agents and have also a right to make mistakes. As human beings, children should be respected here-and-now, rather than emphasising children as ‘an investment in the future’. Naturally, children have the right to protection, but it should not prevent them from exercising self-determination, voice and choice.²

The shift in our notion of children requires us to reposition our view of children’s participation in decision-making. Active participation is a quintessential element in respecting human dignity of the child. It empowers and teaches children self-determination and decision-making skills. Children have as diverse needs and preferences as adults, thus, the method and level of participation may vary, and agency must be balanced with protection.³ Children often have good insight of their own needs and benefit personally from involvement in decision-making.⁴ Therefore, including the child is likely to produce better outcomes, improved services and enhanced skills and self-esteem. Respecting children as individuals also means respecting their right to make choices adults regard as ‘misguided’. Otherwise, we will eliminate the children’s right to

2 Eg David Archard, *Children: Rights and Childhood*. (3rd edn, Routledge 2015).

3 Allison James, Chris Jenks and Alan Prout, *Theorizing Childhood* (Teachers College Press 1998); Allison James, ‘To be (come) or not to be (come): Understanding children’s citizenship’ (2011) 633 *The Annals of the American Academy of Political and Social Science* 167; Karen Smith, *The Government of Childhood: Discourse, Power and Subjectivity* (Springer 2014); Aoife Daly, *Children, Autonomy and the Courts: Beyond the Rights to be Heard* (Brill Nijhoff 2018).

4 See eg Mark Henaghan, ‘Article 12 of the UN Convention on the Rights of Children’ (2017) 25 *International Journal of Children’s Rights* 537, at 541; Jane Fortin, *Children’s Rights and the Developing Law* (Cambridge University Press 2009) 240. Sinclair has made a summary of eight reasons for hearing children, see Ruth Sinclair, ‘Quality Protects Research Briefing No 3 Young People’s Participation’ (London: Department of Health 2000).

make choices until adulthood, when they are expected to make rational choices with limited experience in decision-making.⁵

I utilise Sarah White's theory on participation, which distinguishes between four forms of participation: nominal, instrumental, representative and transformative.⁶ Nominal and instrumental participation are inherently tokenistic, whereas representative and transformative participation are classified as true participation.

Nominal participation functions to fulfil legal obligations, to legitimise adult decision-making. The term 'the right to be heard' may be indicative of a nominal approach. The child is heard because the decision-maker has a duty to do so and because the opinion of the child, when concordant with the decision-maker's assessments, helps to legitimise the outcome. The voice of the child risks becoming muted unless the child gives a 'rational' answer, which requires sufficient cognitive, emotional and linguistic maturity. Younger children and children with a disability risk being denied a voice. The duty to hear the child is often delegated, and the conflicts of interests between the person representing the child and the child's best interest is overlooked or downplayed.

Instrumental participation is a means to an end, such as to gain information from the child to enable adults to make informed decisions that are in the best interest of the child. The approach to interview the child is often primarily forensic, but may include aspects of therapy or giving the child a right to participate. For younger children, observation may serve the purpose of participation.

In representative participation, adults run the decision-making process, but children are consulted and their opinions are taken seriously. Hearing the child involves ideally a dialogue where the adult and child discuss, share information on, and deliberate the issues at hand. The child's view is broadly defined as the child's perspectives on the matter. A representative of the child promotes the views of the child rather than its best interests. Depending on the issues at stake, even a fairly young child could participate, as a child may express his or her view through play or behaviour rather than words.

Finally, participation could be transformative, where children share power and responsibility for decision-making. Children shape the agenda and

5 David Archard, *Children: Rights and childhood* (n 2) 71–79; Michael Freeman, 'Why it remains important to take children's rights seriously' (2007) 15 *The International Journal of Children's Rights* 5, 14.

6 The scale of four approaches to participation used in children's rights literature is based on Sarah C White, 'Depoliticising development: the uses and abuses of participation' (1996) 6 *Development in practice* 6.

alternative solutions available, bringing in their unique perspectives, empowering them to make a significant impact on their lives. Children may choose how to participate and set the agenda. This approach gives children the right to meaningful participation, where the children themselves define 'meaningful' and could be characterised as 'true' participation.

The first two, tokenistic, approaches focus on the adult making the decision for the child, and the adult's need for (legally or psychologically) relevant information, whereas the true participation approach stresses the value of the child's unique perspective, regardless of whether it will aid the adult in making decisions.⁷

The approach to participation assumed will be likely to influence the definition of the right to participation, the implementation of the right in legislation, and practices. It is likely to influence when children are allowed to participate, and the methods used to involve the child and its views in the decision-making process. It will also indicate how the view of the child is represented in decision-making, and whether the child participates directly or indirectly. The more instrumental the view, the more likely the adult representing the child will promote the best interests of the child rather than the child's views (best-interests representation). At worst, it results in a failure to recognise the tension between best-interests representation and representing the voice of the child. The more empowering the participation and more the specific views of the child are weighted, the more likely a representative will represent the views of the child.⁸ An emphasis on autonomy is likely to result in including the voice of the child.

However, participation requires that the child understands the issue and is capable of having views on it. If the child is not sufficiently mature, the adult can only represent the best interests of the child, not the child's views.

The view on participation rights answers the question why children should be given voice and choice. The 'why' question influences, in turn, the answer

7 See, eg, Nigel Thomas, 'Towards a theory of children's participation' (2007) 15 *The International Journal of Children's Rights* 199; Harry Shier, 'Pathways to participation: Openings, opportunities and obligations' (2001) 15 *Children and society* 107; Ruth Sinclair, 'Participation in practice: Making it meaningful, effective and sustainable' (2004) 18 *Children and society* 106.

8 See, eg, Rebecca H. Hertz, 'Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Role to Improve Effectiveness' (1993) 27 *Family Law Quarterly* 327; Andy Bilson and Sue White, 'Representing Children's Views and Best Interests in Court: An International Comparison' (2005) 14 *Child Abuse Review* 220. On the concepts of best-interest representation and representing the views of the child, see Aoife Daly, *Children, Autonomy and the Courts: Beyond the Rights to be Heard* (n 3) 235ff.

to who, where, when and how to include children in decision-making.⁹ Next, I will analyse how the Norwegian Constitution and statutory law answers these questions.

3 Participatory Rights in the Norwegian Constitution

The preparatory works of the Norwegian Constitution,¹⁰ a key tool for interpretation, acknowledges the interconnection between the right to human dignity and participation rights. Human dignity entails exercising autonomy, being able to influence one's life by participating in decision-making.¹¹ Participation is quintessential for teaching children to be and become responsible citizens, able to exercise self-determination. The preparatory works stress that the right to be heard and influence decisions is an autonomous right. Thus, it must be specifically included as a right, not merely an obligation for the authorities. A specific provision for participatory rights must be included because the right to participation cannot be derived from other human rights. The right to participation also signifies that the child has a right to refrain from participating.

The rationale for introducing a specific provision on participation rights was to emphasise the human dignity of children and to highlight self-determination as an imperative step towards fostering citizenship and as a means to become a self-sufficient, responsible adult. However, the preparatory works fail to draw a closer connection between the ideals and practices producing the desired outcomes. The relationship between participation and the best-interests standard and other rights is not discussed. Nor is the question raised what respecting human dignity of children entails in practice. The preparatory works do not discuss what 'hearing the child' and 'the views of the child' mean. Do the terms refer to giving children merely the right to state their opinion on the issue at hand or does it refer to a duty to respect children's perspectives, their preferences and experiences? Do adults have the duty to facilitate participation and empower children to participate or merely a duty to give the child some

9 Andrew West, 'Children and Participation: Meanings, Motives and Purpose' in David Crimmens and Andrew West (eds), *Having Their Say Young People and Participation: European Experiences* (Russell House Publishing 2004).

10 Dokument 16 (2011–2012) Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven, avgitt 19. desember 2011, 190–191.

11 For a more detailed discussion of human dignity, see 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).

voice and choice? What are the prerequisites of meaningful participation, for instance, in terms of access to information?

The Constitution and the preparatory works¹² use the term ‘the right to be heard’. The right to be heard could potentially denote a narrower scope than the right to participate does. It implies that the child is allowed to state his or her opinion on a matter, not that children should be involved in shaping the decision-making process, defining the relevant issues and options available. Limiting participation to the right to state one’s opinion will probably result in less involvement of children. The question is whether the wording impacts on the interpretation of the Constitution and consequently children’s right to participation in Norway.

Some parts of the text could be read as a manifestation of existing views on the rationale for and the principle of including children in decision-making. Yet the introductory part on children’s rights and the first paragraphs on participation rights indicate a more progressive, empowering approach. It expresses an equivocal view on children’s participation. In its ambiguity, it serves to legitimise existing nominal and tokenistic practices in some contexts, such as mediation in cases on parental responsibility, and to promote true participation in others, such as child welfare cases.

According to section 104 of the Constitution, the right to be heard is limited to ‘questions that concern [the child]’. The delimitation is simultaneously self-evident and contradictory. It is self-evident that the right to be heard is mostly limited to persons with sufficient interest in the outcome. It is contradictory because it may narrow the matters where children have the right to participate. The Constitution does not enshrine a right to collective participation for adults, but adults have unquestionably a right to participate in decision-making. For instance, the Public Administration Act¹³ mandates informing and consulting persons and organisations with an interest in the outcome. Moreover, exercising the right to freedom of speech, enshrined in section 100 of the Constitution, does not guarantee sufficient participation, neither for children nor for adults, but the issue of the relationship between participation and

12 An unofficial English translation of the Norwegian Constitution is available at <<https://lovdata.no/dokument/NLE/lov/1814-05-17>> accessed 8 February 2019. Dokument 16 (2011–2012) Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven (19 December 2011) <<https://www.stortinget.no/Global/pdf/Dokumentserien/2011-2012/dok16-201112.pdf>> accessed 8 February 2019.

13 Act relating to procedure in cases concerning the public administration of 10 February 1967 (Lov om behandlingsmåten i forvaltningsaker). An unofficial English translation is available at <<https://lovdata.no/dokument/NLE/lov/1967-02-10>> accessed 8 February 2019.

freedom of speech is not raised. Hence, the question is whether the threshold for the sufficient interest is different for children than for adults.

The preparatory works state that the duty to hear the child and give due weight to the views of the child according to the age and maturity of the child means that each child and each situation must be individually assessed. No general age limit is set, because the limit is necessarily contextual. Considering the debate on the requirements on age and maturity, particularly for disabled children, younger children and adolescents¹⁴ and the criticism from the UN Committee on the Rights of the Child on the implementation of children's participatory rights in practice,¹⁵ one would have expected a comment emphasising the right to direct participation for adolescents and older children and a discussion on how to involve young and children with a disability in a meaningful way.

The Public Administration Act is an example of a narrow understanding of children's participatory rights. Section 17 limits the right to be heard to children who have the formal status as parties. A party is the person to whom the decision is directed or who is directly concerned, according to section 2. In practice, the term directly concerned is interpreted narrowly. Monetary welfare benefits serve as an example. Often only the adult who is the formal beneficiary is heard, although the child is directly concerned and involving the child could improve the child's situation.¹⁶ The same applies to services and benefits offered to parents whose children have a long-term, serious illness or disability. The practice of not hearing children is widespread, although the administration has a duty to secure sufficient information on the case thoroughly before making decisions.

The preparatory works for the Constitution must obviously be brief and general. However, even short comments indicating how these questions should

14 UN Committee on the Rights of the Child, *General comment No. 20 on the implementation of the rights of the child during adolescence* (6 December 2016) CRC/C/GC/20; UN Committee on the Rights of the Child, *General comment No. 9 The rights of children with disabilities* (27 February 2007) CRC/C/GC/9; UN Committee on the Rights of the Child, *General comment No. 7 Implementing child rights in early childhood* (20 September 2006) CRC/C/GC/7.

15 UN Committee on the Rights of the Child, *Concluding Observations: Norway* (3 March 2010) CRC/C/NOR/CO/4 5.

16 Helsetilsynet, Glemmer kommunene barn og unge i møte med økonomisk vanskeligstilte familier? Kartlegging og individuell vurdering av barns livssituasjon og behov ved søknader om økonomisk stønad. Oppsummering av landsomfattende tilsyn 2012. Helsetilsynets rapport 2/2013. <https://www.helsetilsynet.no/globalassets/opplastinger/publikasjoner/rapporter2013/helsetilsynetrapport2_2013.pdf> accessed 8 February 2019.

be answered would be helpful. For instance, the Government Report could have stated that children should be afforded direct participation in decision-making processes concerning themselves, or when that is not appropriate, children should have the right to effective indirect participation. Equally, the report could have stated that the delimitation of issues concerning children should be interpreted broadly to include *inter alia* services for children.

The absence of discussions on what the right to be heard or the right to participate entails and clear indications supporting true participation can serve to legitimise a limited, tokenistic approach to participation and manifest current views and practices. Regrettably, the commission drafting the Constitution did not properly recognise the complexities of granting children the right to participation, nor apprehend the deficiencies of existing practices.

Until today, the provision has not been subject to direct interpretation by the Supreme Court. The Supreme Court has, however, indicated that the provision has an impact on the application of existing provisions on hearing children and that the right to be heard is fundamental.¹⁷ Nonetheless, it has also stated that the right to be heard may be limited in exceptional cases when the best interests of the child so require.¹⁸ The Parliamentary Ombudsman (*Sivilombudsmannen*) has stated that the right to participate in decision-making is absolute.¹⁹ The Supreme Court has a pivotal role in interpreting the law and in exercising judicial review, therefore, its views on the participation rights prevail despite criticism.

In sum, section 104, subsection 1 of the Norwegian Constitution is a paradox. It refers to the innate human dignity of children, yet the preparatory works reflect an ambiguous understanding of participatory rights. It could be interpreted to encompass instrumental participation only or to advocate empowering participation.

4 No Constitutional Right to Collective Participation

Under Norwegian law, participatory rights have often been treated as primarily an individual right. The wording of the Constitution does not indicate who the

17 HR-2017-18-U and HR-2016-2314-U have an indirect reference to section 104. In the *Maria* case (HR-2015-206-A), the Supreme Court gave a child independent legal standing in a case where the decision to deport her mother was challenged. However, in later immigration cases, children have been refused standing, see, eg, HR-2017-1130-A. None of the immigration cases has a direct reference to children's participatory rights.

18 HR-2016-2314-U.

19 SOM-2016-1152.

holders of participatory rights are. Neither the CRC, nor the Norwegian Constitution grant children political (voting) rights. The preparatory works explicitly state that an age-limit applies to voting rights but does not state the precise limit.²⁰ In the 2015 municipal elections, the voting age was lowered to 16 years in 20 municipalities. The outcome of the elections was that youngsters had similar voting patterns as adults. Lowering the age-limit does not influence the outcome. Therefore, further reforms have not been advanced.²¹ The Ombudsman for Children, however, advocates lowering the age limit to 16 years in all elections to increase the influence children have on important societal decisions.²² In spite of the fact that adolescents lack voting rights, many municipalities and counties have youth councils. However, these have practically no power to make binding decisions and cannot, therefore, compensate for the lack of political power in municipal elections.

The preparatory works for the Constitution explicitly do not give children collective participatory rights. The constitutional right to be heard is an individual right and can only be bestowed on small, closed groups of children, such as siblings.²³ Therefore, authorities have no obligation under the Constitution to hear children as a group, even when a decision concerns a specific group of children, such as the pupils in a specific school or children living in a specific neighbourhood.

The general comments on the CRC require collective participatory rights, albeit not a constitutional guarantee for those rights.²⁴ Letting children participate in decision-making will bring new perspectives, render better outcomes for children and participation in decision-making teaches children democracy and general civic skills. The preparatory works also acknowledge this but fail to draw the link to advocating a broad understanding of rights concerning the

20 Dokument 16 (2011–2012) 186.

21 Approximately the same percentage of youngsters voted as adults did, and youngsters voted on the same parties as adults did. <<https://www.regjeringen.no/no/aktuelt/stemmerettsforsok/id2521804/>> accessed 8 February 2019.

22 <<http://barneombudet.no/dine-rettigheter/delta-og-bli-hort/stemmerett-for-16-aringer/>> accessed 8 February 2019.

23 Dokument 16 (2011–2012) 191.

24 UN Committee on the Rights of the Child, *General Comment No. 12: The Right to be Heard* (1 July 2009) CRC/C/GC/12, para 10, where 'the Committee strongly recommends' that children are included as a group even when the assessment of the age and maturity of the group is difficult and General comment No. 20 (n 14) on the implementation of the rights of the child during adolescence, paras 24–25. See also criticism from the CRC Committee in its *Concluding observations on the combined fifth and sixth periodic reports of Norway* (4 July 2018) CRC/C/NOR/CO/5–6, Part III para 14.

child. Children can practice participating in democratic processes in mock-councils, but such limited participation will not enrich current decision-making with their (fresh) perspectives.

In 2011, a government report accentuated the importance of including teenagers in policy-making and decision-making at various levels.²⁵ It advocated participation rights in the public sphere by highlighting the value of existing mechanisms and the need to implement them elsewhere. The report could have served as a source of arguments for the Human Rights Commission in drafting the Constitution. Instead, the commission uses vague language and is partly self-contradictory in advocating participation and denying it simultaneously by recognising the virtues of affording children collective participatory rights and still delimiting the constitutional right to participation to an individual right. Thus, the view on children's participation in collective matters seems to conform with an instrumental perspective, at best.

In absence of a constitutional right to participate in decision-making, children still have rights enshrined through the status of the CRC as semi-constitutional law. Additionally, the right to participation is, to some extent, included in ordinary legislation. The Education Act serves as an example.²⁶ Each primary and secondary school must have a coordinating committee and an environment committee consisting of representatives of faculty, parents, pupils, staff and the municipality or county. Schools must also have a pupil's council, but only pupils in year five and above have a right to participate in the council. The Day Care Institutions Act²⁷ gives children the right to express their views and participate in planning and evaluating activities. Thus, young children have a right to participation at their day-care institution, but once they enter school, they have no right to participate in decision-making, neither during school hours nor in after-school care. The Day Care Institutions Act is from a more recent date and could, therefore, reflect a shift in the views on participation. However, if that would be the case, the Education Act could have been amended to obtain coherence. Another explanation could be that pupils in schools participate in formal decision-making in the school board, whereas

25 NOU 2011:20 Ungdom, makt og medvirkning.

26 Lov om grunnskolen og den vidaregåande opplæringa (opplæringslova) 17 July 1998 no 61. Unofficial translation available at <<https://www.regjeringen.no/contentassets/b3b9e92cce6742c39581b661a019e504/education-act-norway-with-amendments-entered-2014-2.pdf>> accessed 8 February 2019.

27 Barnehageloven 17 June 2005 no. 64. Unofficial English Translation available at <<https://www.regjeringen.no/globalassets/upload/kilde/kd/reg/2006/0037/ddd/pdfv/285752-barnehageloven-engelsk-pdf.pdf>> accessed 8 February 2019.

children in day care do not. Nevertheless, even this problem could have been overcome. These two acts display lack of coherent regulation of participation rights.

5 Participation Rights in Individual Matters

In this part, children's right to participation in parental responsibility cases is contrasted with their rights in child welfare and protection cases to illustrate the prevailing understanding of children's participation and the influence of the Constitution on legislation. Recent changes to legislation on health care are discussed to enrich the picture.

5.1 *Processes Concerning on Parental Responsibility*

The Children Act regulates *inter alia* issues on child custody, residence and contact.²⁸ Parents have a duty to hear the child in all matters affecting the child and to give the opinion weight according to the maturity of the child, section 31. Section 33 states the parents have a duty to increasingly extend the child's right to make his or her own decisions. From the age of seven and younger, children capable of forming their own opinions have the right to information and to state their opinion. The opinion of children above the age of 12 should be given particular weight, section 31, subsection 2.

5.1.1 Out-of-Court Processes

All separating couples, whether married or cohabiting, with children under the age of 16 must attend mediation for at least one hour, usually at a Family Counselling Office (*Familievernkontor*), a state organisation. The services are offered free-of-charge. Most parents reach agreement before, during or shortly after mediation. After unsuccessful mediation, a parent may instigate court proceedings within six months. After six months have passed, parents must attend mandatory mediation to be able to file a case.²⁹

28 Lov om barn og foreldre (barnelova) 8 April 1981 no 7. An unofficial English translation is available at <<https://www.regjeringen.no/en/dokumenter/the-children-act/id448389/>> accessed 8 February 2019.

29 For a more detailed account on resolution of conflicts on parental responsibility, see Anna Nylund, 'A Dispute Systems Design Perspective on Norwegian Child Custody Mediation' in Anna Nylund, Kaijus Ervasti and Lin Adrian (eds), *Nordic Mediation Research* (Springer 2018).

The Children Act does not regulate the mediation process or children's participation in it. Until recently, children were heard in less than 5 per cent of mandatory mediation cases. In 2017, the number was 21 per cent. The primary reason for not letting children participate is that parents are presumed to understand the best interests of their children and to act accordingly. By keeping the children out of mediation, children are supposedly protected against involvement in the potential parental conflict.³⁰ Mediators had, until recently, limited training and experience in involving children in decision-making and fear discussing with the children will harm their relationships with their parents. By not letting children participate, the mediator avoids these problems.³¹

In recent years, children have increasingly been included in mediation through the BIM model pilot project (*Barn i Mekling*, Children in Mediation).³² In the model, the mediator speaks with the children before commencing mediation with the parents. The view of the child is understood broadly to give the parents insight in the child's perspective on the situation and the future. The child's message has a transformative capacity. It shapes the agenda of the mediation and introduces new issues. Children from the age of four have participated in the model. The project significantly enhances children's participation, as it shifts from non-inclusion to empowerment. Although the model neither allows children to select the form of participation nor direct participation, it is created a giant leap forward.

The BIM model was originally developed by a single therapist and demonstrates the paramount roles of models for hearing children and training of adults involved in decision-making. Today, the model is used in some Family Counselling Offices. Other offices use another model where the discussion with the child is directly focused on the child's views related to residence and contact.³³ Despite the fact that two competing models for involving children

30 Fritz Leo Breivik and Kate Mevik, *Barnefordeling i domstolen: Når barnets beste blir barnets verste* (Universitetsforlaget 2012).

31 The author has been involved in the pilot project on child-informed mediation. Some of the participants in the pilot have expressed these opinions as reasons for excluding children from mediation. The results are currently unpublished.

32 For an English language overview of the project and its outcomes, see Renee Thørnblad and Astrid Strandbu, 'The Involvement of Children in the Process of Mandatory Family Mediation' in Anna Nylund, Kaijus Ervasti and Lin Adrian (eds), *Nordic Mediation Research* (Springer 2018).

33 Bufdir, Modell for høring av barn – Videreføring av utviklingstiltak Brukerundersøkelse. Familievernkontoret for Asker og Bærum. <https://www.bufdir.no/Global/Modell_for_hoering_av_barn_Videreføring_av_utviklingstiltak_Brukerundersøkelse.pdf> accessed 8 February 2019.

have been developed, almost 80 per cent of children are not allowed to participate in mediation.³⁴

5.1.2 Court Procedures

In Norway, the majority of families agree on parental responsibility outside courts. Only approximately 10–15 per cent of separated families instigate proceedings in courts. These families tend to have prolonged high levels of conflict.

Mediation is the routine method for disposing of cases on parental responsibility, Children Act, section 61. The court appoints an expert to (co-)mediate and mentor the parents. If the parents do not settle, the expert becomes an evaluator, assessing and promoting the best interests of the child. The expert hears the children on behalf of the court, together with a judge, for forensic purposes or any combination of these purposes.³⁵ Thus, the expert has a dual role in both representing the views of the child and assessing the best interests of the child. These two roles may be at odds, which diminishes the child's right to participate in decision-making. The child has the right to a dedicated representative only in exceptional cases, usually when the child has been subject to abuse. The representative is a lawyer and is primarily the legal counsel and best-interests representative (*guardian ad litem*), not the voice of the child. The multiple, partly contradicting roles of the expert and a focus on settlement may be contrary to the rights of the child.³⁶

The multiple, partly contradictory roles of the expert may result in downplaying, or even muting, the voice of the child and deter children from deliberating their views. The expert may meet the children or the judge can hear the children, but children do not attend the court hearing. Until recently, there were no specific guidelines on how to include children in mediation and court proceedings. The view of the child was construed narrowly, restricting it to the question of residence and contact, rather than allowing the child to discuss his or her views more

34 Bufdir, Årsrapport 2017. Barne-, ungdoms- og familiedirektoratet. <<https://www.bufdir.no/arsrapport2017/>> accessed 8 February 2019. See also criticism from the CRC Committee in its Concluding observations on the combined fifth and sixth periodic reports of Norway (n 24) Part III para 14.

35 For more details see Camilla Bernt, 'Custody Mediation in Norwegian Courts-A Conglomeration of Roles and Processes' in Anna Nylund, Kaijus Ervasti and Lin Adrian (eds), *Nordic Mediation Research* (Springer 2018); Nylund, 'A Dispute Systems Design Perspective on Norwegian Child Custody Mediation' (n 29).

36 See also Bernt, 'Custody Mediation in Norwegian Courts: A Conglomeration of Roles and Processes' (n 35).

broadly.³⁷ The education of court-appointed experts focuses on forensic methods, not methods to include children in the process.³⁸ However, new guidelines for judges emphasise hearing the views of the child in a broad sense to enable the court and the parents to include the child's perspective in their decision making.³⁹ They refer explicitly to the constitution in advocating open questions and a focus on the child's view in lieu of asking specifically about the child's opinion on residence and contact schedules. The question remains whether practitioners will change their practices rapidly, or whether a culture change could take years as it has in the Family Counselling Offices.

Another promising development is that the weight given to the opinion of the child has increased. In 2012, courts cited the opinion of the child as a determinant for the outcome in 40 per cent of the cases, three times as many as a decade earlier.⁴⁰ Courts tend to give particular weight to the opinion of children above the age of 10.⁴¹ The reason seems to be partly the criticism of earlier practices and the difficulties in determining the 'correct' outcome in cases on parental responsibility, which induces courts to let the child's opinion be decisive in difficult cases.

Adapting participation to the age and maturity of the child depends on the attitude and skills of the expert and the judge.⁴² There is reason to believe that at least some experts still assume a tokenistic approach to hearing children, and that they define the opinion of the child narrowly. Letting children shape the agenda and issues and to select the form of participation is still utopia. Including children's right to participate in the Constitution has spurred some development that could in the long run lead to a major shift. Still, most changes are more appropriately attributed to the view of children in general.⁴³

37 Barneombudet, *Barnas stemme stilner i stormen: En bedre prosess for barn som opplever samlivsbrudd* (2012); Kristin Skjørten, 'Barns meninger om samvær' in Anne Trine Kjørholt (ed), *Barn som samfunnsborgere – til barnets beste?* (Universitetsforlaget 2010).

38 Agenda Kaupang, *Evaluering av utdanningsprogram for barnefaglige sakkyndige* (2017).

39 Domstolsadministrasjonen, *Den gode barnesamtalen i foreldretvistar* (Domstolsadministrasjonen 2017) <<https://www.domstol.no/no/domstoladministrasjonen/publikasjoner/veiledere/den-gode-barnesamtalen-i-foreldretvistar/>> accessed 8 February 2019.

40 Kristin Skjørten, *Samlivsbrudd og barnefordeling* (Gyldendal 2005) 67.

41 Kristin Skjørten, 'Mellom beskyttelse og selvbestemmelse: Barns rettigheter i foreldretvistar om bosted og samvær' in Ingunn Ikdahl and Vibeke Blaker Strand (eds), *Rettigheter i velferdsstaten: Begreper, trender, teorier* (Gyldendal 2016).

42 For similar observations in selected common law jurisdictions, see Aoife Daly, *Children, Autonomy and the Courts: Beyond the Rights to be Heard* (n 3) 252ff.

43 Skjørten, 'Mellom beskyttelse og selvbestemmelse: Barns rettigheter i foreldretvistar om bosted og samvær' (n 41).

5.2 *Child Welfare and Child Protection Decision-Making Processes*

The Child Welfare Act⁴⁴ gives children the right to participation, section 1-6. Participation is defined as giving the child sufficient and appropriate information and providing the child an opportunity to express his or her views freely, verbally and non-verbally.⁴⁵ The provision emphasises the perspective of the child and that participation should be deliberative and continuous.⁴⁶ To accentuate the importance of participation and that the right applies to all aspects of child welfare services and decision-making, the provision was moved from chapter 4 to chapter 1 of the Act in 2017.⁴⁷ Concurrently, the terminology used shifted, marking a turn to real participation, where the child's perspectives on its current situation and options for the future is paramount.

Participation in child welfare cases, in general, in both the administrative stage and in court proceedings is regulated in more detail in section 6-3. The provision enshrines a right to information and to be heard, either directly or through a representative. The Child Welfare Act operates with an age-limit of seven of giving children an unconditional right to be heard. Younger children who are able to form an opinion have also the right to be heard. Children age 12 or above are often invited to the hearing in the tribunal.⁴⁸ Children, who are at least 15-years-old and sufficiently mature younger children have legal standing in child welfare matters. Children with serious behavioural problems have legal standing independent of their age since more intrusive measures may be ordered against them. Children with legal standing have a right to be present at the proceedings and a right to a legal counsel of their choice, section 6-3, subsection 2.⁴⁹

The County Social Welfare Board (*Fylkesnemnda for barnevern og sosiale saker*) is a special tribunal that makes the initial decision on mandatory care. The County Social Welfare Board generally appoint a spokesperson (section 7-9)

44 Lov om barneverntjenster (barnevernloven) Lov 17. juli 1992 nr 100. An unofficial English translation is available at <<https://www.regjeringen.no/en/dokumenter/the-child-welfare-act/id448398/>> accessed 8 February 2019.

45 The Decree on Participation and Support Persons (Forskrift om medvirkning og tillitsperson) FOR-2014-06-01-697.

46 Government Bill Prop.106 L (2012-2013) Endringer i barnevernloven.

47 Government Bill Prop.169 L (2016-2017) Endringer i barnevernloven mv. (bedre rettssikkerhet for barn og foreldre) 141-142.

48 See HR-2013-1960-U where the Court of Appeals (*lagmannsretten*) did not hear a 13-year-old directly, only through a spokesperson. The Supreme Court found the lack of direct hearing was a breach of the procedural rights of the child and quashed the ruling. In a previous case, the Supreme Court found that appointing a spokesperson sufficed, see HR-2012-1198-U.

49 See HR-2014-1022-U.

to children above the age of seven, but not for younger children.⁵⁰ To be eligible to appear on the County Board's list of spokespersons, significant professional experience with children is required, e.g. as a teacher, social worker or nurse.⁵¹ The child welfare services have a duty to inform the child of the right to a spokesperson.⁵² The spokesperson represents the views of the child. He or she may not express any evaluation of the best interests of the child. Although the spokesperson usually does not know the child, he or she meets with the child as a rule only once. The dialogue with the child itself is to be 'child-friendly', and the spokesperson must attempt to use language understandable to the child. Based on this meeting, the spokesperson drafts a memorandum that must be submitted to the court. The spokesperson may not withhold information from the County Board or the parties to the case, i.e. the child's parents and the child welfare services. Thus, the child cannot use the occasion to deliberate whether and how certain information should be forwarded to the County Board.

The rules regulating the spokesperson ensues from a nominal approach to representative participation. The right to state one's opinion primarily serves the formal requirement of involving children, not involving the child because it could be beneficial and include new insights. The child is supposed to discuss a difficult, private matter with a stranger who, in turn, must share essential information with the parents, the child welfare services and the County Board.

In most cases, the County Boards do not refer to the child's opinion in their rulings, and even when they do so, they mention it only briefly. The Boards consider or elaborate on the child's opinion in 28 per cent of the cases. The child's perception of its situation is as a rule absent.⁵³ More weight is put on

50 Anne-Mette Magnussen and Marit Skivenes, 'The Child's Opinion and Position in Care Order Proceedings' (2015) 23 *The International Journal of Children's Rights* 705; Svein Arild Vis and Sturla Fossum, 'Representation of children's views in court hearings about custody and parental visitations: A comparison between what children wanted and what the courts ruled' (2013) 35 *Children and Youth Services Review* 2101.

51 Decree on the Spokesperson of the Child in the County Social Welfare Board. Forskrift om barnets talsperson i fylkesnemnda FOR-2013-02-18-203.

52 Q-11/2013 Rundskriv om barnets talsperson – kommentarer til forskrift 18. februar 2013 nr. 203 om barnets talsperson i saker som skal behandles i fylkesnemnda for barnevern og sosiale saker (Circular on the Spokesperson of the Child).

53 Magnussen and Skivenes, 'The Child's Opinion and Position in Care Order Proceedings' (n 50). See, *inter alia*, Randi Sigurdson, *Tvangsplassering av barn med utfordrende atferd: En sammenligning av regler i barnevernloven, helse- og omsorgstjenesteloven og psykisk helsevernlov* (Fagbokforlaget 2015) 447–451.

the child's opinion when it is concordant with the views of the child welfare services, and less weight when the views contradict.⁵⁴

In 2014, children in foster care gained a right to a support person (*tillitsperson*) of their choice, section 1-6. The support person has no formal role in the proceedings, but he or she facilitates participation *inter alia* by making the child more comfortable to express his or her views and by aiding the child in sharing perspectives. The child may choose any adult as its support person, for instance, a teacher, coach or relative.⁵⁵ The regulation of the support person appears to advocate true, empowering participation, or at least a consultative approach. The spokesperson was retained as a partially overlapping function.

In recent years, mediation has been introduced as an alternative to traditional proceedings in the County Boards. The County Board decides whether and how the child participates in mediation. The child may be invited to discuss the matter with the leader of the County Board or an expert. Children who have status as a party have a right to participate in mediation sessions.⁵⁶ The child's right to participate depends on the County Board.

Research on child participation reveals a dismal picture. Although the child welfare services have a duty to hear the child, the case manager often does not hear the child or hears the child for forensic purposes only.⁵⁷ The views of the child, in the broad sense, have limited impact on the outcome and placement arrangements and contact with family and friends. Thus, even when children are formally heard, the level of participation is often nominal or tokenistic. The obstacles to children's participation are attitudes towards hearing children (participation is not considered necessary), a desire to protect children, lack

54 Vis and Fossum, 'Representation of children's views in court hearings about custody and parental visitations: A comparison between what children wanted and what the courts ruled' (n 50).

55 Decree on Participation and Support Person; NOU 2011:20 (n 25) 104.

56 Retningslinjer for samtaleprosess i fylkesnemndene (Guidelines for discussion process in the County Boards) <<https://www.fylkesnemndene.no/globalassets/pdfer/samtaleprosess.pdf>> accessed 8 February 2019.

57 Elisabeth Gording Stang, *Det er barnets sak: Barnets rettsstilling i sak om hjelpetiltak etter barnevernloven § 4-4* (Universitetsforlaget 2007) 126–131, 272ff; Svein Arild Vis and Nigel Thomas, 'Beyond talking – children's participation in Norwegian care and protection cases' (2009) 12 *European Journal of Social Work* 155; Svein Arild Vis, Amy Holtan and Nigel Thomas, 'Obstacles for child participation in care and protection cases: why Norwegian social workers find it difficult' (2012) 21 *Child Abuse Review* 7; Øivin Christiansen, 'Hvorfor har barnevernet problemer med å se og behandle barn som aktører' (2012) 89 *Norges Barnevern* 16; Sissel Seim and Tor Slettebø, 'Challenges of participation in child welfare' (2017) 20 *European Journal of Social Work* 882.

of processes and methods facilitating children's participation, communication difficulties, insufficient training and heavy workloads.

The Constitution seems to have limited bearing on the right to participate in child welfare and child protection proceedings. Moving the provision on the right to participation from chapter 4 to the general provisions in chapter 1 of the Child Welfare Act is a symbolically important and tangible proof of increased weight given to children's participatory rights. Nevertheless, shifts in legislation emanate primarily from general attitudes towards children and development of manuals and training of professionals, not from the Constitution.

5.3 *Self-Determination in Health Care*

All health care requires informed consent. Parents or guardians make decisions on behalf of children under the age of 16, Health and Rights Act⁵⁸ sections 4-3 and 4-4. However, the parents have a duty to inform and consult the child before making decisions when the child has turned seven years of age or when the child is sufficiently mature to understand the matter, whichever comes first. The views of the child are given weight according to the age and maturity of the child, section 3-1. In 2017, children's right to participate in decision-making was strengthened. Children age seven and older, and younger children capable of forming an opinion on the matter, have a right to obtain information and to express their views. Parents and guardians are obliged to hear the child and give weight to the child's opinion according to the maturity of the child. Significant weight is given to the opinion of children age 12 and older.

For children under the age of 16, the parents or guardian of the child are to be informed of all health-related decisions, even when the child seeks medical help on his or her own. However, children age 12–15 have a right to self-determination limited to situations where the child wishes so for acceptable reasons, section 3–4. Acceptable reasons are limited to *inter alia* children wanting a vaccination although their parents are against vaccination and children who wish to use contraceptives. In these situations, information is withheld from the parents. In 2017, a possibility to withhold information from parents when the child is younger than 12 was enacted. The right is limited to exceptional circumstances, for instance, cases of child abuse or highly personal issues such as sexuality and sexual identity. Children must be informed

58 Act of 2 July 1999 no. 63 (Lov om pasient- og brukerrettigheter).

of their right to request an exemption from the rules on parents' access to information.⁵⁹

The 2017 amendments emphasise the child's right to receive information, which is an indication of how the view on participation has shifted from tokenistic to empowerment and involvement. By discussing health care with children, they can influence at least some aspects of care even when they are not sufficiently old and mature to influence whether and which type of care is given. The preparatory works expressly refer to the Constitution.⁶⁰ Unlike in the domain of child welfare, children's constitutional right to participation in decision-making has had a tangible effect on children's position in matters related to health care.

6 Age, Maturity and Increasing Self-Determination

The autonomy and development of children would suggest increasing participatory rights with increasing age and maturity. The form of participation available should match the maturity and preferences of the child. The preparatory works recognise the role of age, but do not explain its implications. While age limits may be material when establishing participatory rights, they may still impede participatory rights and development of child-centric practices. Firstly, age limits may be applied mechanistically preventing younger children from participating. Second, the question of age may overshadow the nature of participation and, hence, hold back development of practices ensuing transformative participation. Third, the age-limit may result in a dichotomous approach to maturity, where the same process for participation is offered to all children above the age limit rather than developing a range of processes that match children of different ages and with different preferences. Finally, hearing the child does not suffice, the child's views must be given due weight.

The rationale of the specific age requirements in the Children Act and Child Welfare Act is not explained. The age limit of seven corresponds with the compulsory school age at the time of enactment. Similarly, teenagers have traditionally gained rights at the age of 15, which is the age of criminal responsibility. It is also the time of the first communion in the Evangelical Lutheran Church, the State church in Norway. These key events seem to have been decisive and are maintained without questioning. As a result, children under the

59 Prop. 75 L (2016–2017) *Endringer i pasient- og brukarrettslova, helsepersonellova m.m. (styrking av rettsstillinga til barn ved yting av helse- og omsorgstenester m.m.)* 86.

60 Prop. 75 L (2016–2017) 85–87.

age of seven are seldom heard and adolescents must adhere to rules adapted to younger children. In contrast, the Public Administration Act does not operate with age-limits but has tied the duty to hear children to their formal status as parties. Although there is a duty to clarify the relevant facts before making administrative decisions, children are often overlooked. Based on a comparison of these statutes, operating with age limits would seem to improve children's (constitutional) rights, at least when children have not been ensured participatory rights in practice previously. When involving children has become part of a general practice within a specific legal domain, age limits could perhaps be abolished to secure younger children the right to participate.

The current view on participation inadvertently stresses verbal communication, which gives a disadvantage to children with less developed verbal skills. In accentuating neutrality when transmitting the opinion of the child, guidelines fail to recognise the way younger children and children with verbal or cognitive disorders express themselves. Transmission of their subjective view to an audience who does not know them personally requires 'translation'.⁶¹ Assessment of their maturity is rarely problematized; how is maturity assessed, who assesses it and how does one assess maturity when it varies across different aspects of it.⁶²

Furthermore, the view on participation effects whether and how children are heard. The more hearing of the child signifies merely a right to discuss options available, the more advanced cognitive and linguistic skills are required. In contrast, if the decision-maker values the child's individual perspective and lets the child participate in setting the agenda, younger children may participate successfully.

The Decree on Participation and Support Person in child welfare and child protection cases is an exception in that it expresses a broad view of participation. It stresses non-verbal communication and a broad concept of 'view' that includes the child's perspective on its situation in general. The child's unique view is important regardless of whether he or she expresses the preference of an option or gives information directly relevant to establish the best interests of the child or the outcome. The child may express his or her views in many ways – in words, through play or art, or body language. However, a support person should be someone who the child knows and trusts, someone who is able to facilitate a deliberation, who understands the language of the individual child, not a stranger. Nonetheless, using support persons routinely probably

61 Kari Ofstad and Randi Skar, *Barnevernloven: Kommentarutgave* (Gyldendal 2009) 312–313.

62 See 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).

enhances participation for young children. The Decree should serve as a blueprint for involving children in all types of proceedings.

7 True Participation and Autonomy: Still Not There?

The analysis of children's right to participate in Norway indicates that although the wording of the Constitution is fairly clear, the preparatory works are ambiguous and vague. Norwegian law does not sufficiently distinguish between best-interests representation and representing the voice of the child, and the problems of combining the two roles. Thus, children's participatory rights are often nominal or tokenistic, affording children no right to direct participation and empowerment. Although the notion is changing, the old notion still permeates much of the provisions in the Children Act and the Child Welfare Act. The Constitution is rather vague.

Nonetheless, a shift in the view of children's right to participate has emerged in the last decade or so. Earlier, children were regularly excluded from decision-making. In recent years, the support person in child-welfare processes is an important step, representing a turn from hearing the child to participation as consultation. The BIM project and the amendment of health care law are other positive examples. The examples above illustrate how including the right to participation in the Constitution has resulted in advances in domains where children have had weak rights, such as in health law. In other areas, the results are so far meagre. Progress stems primarily from elsewhere, *inter alia*, increased awareness of children's rights and the need to include children's perspectives, vocal groups of children with experience from child welfare services and proceedings, critical research, and critical reports from the UN Committee on the Rights of the Child.

The main hindrances to consultative and empowering participation are paternalistic attitudes combined with a lack of understanding of the value and benefits of participation, along with insufficient training and skills of professionals involved in these processes. Moreover, crosspollination across the systems and stages of proceedings seems to be limited. Advances in one area do not seem to induce change in other areas. Mediation, in particular, is problematic because children are not routinely invited to participate in the mediation process or are heard before or during mediation.

The main progress in the area of children's participatory rights in Norway ensues from a shift in the view of children, not the Constitution. Nevertheless, promoting children's empowerment and self-determination at a constitutional level could expedite change in practices. The vague wording of the preparatory

works, particularly, the fact that they do not unequivocally endorse direct, empowering participation limits the use of the Constitution as an impetus for rethinking current practices.

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