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The Child's Right to Participation – Reality or Rhetoric?

REBECCA STERN

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The Child's Right to Participation

- Reality or Rhetoric?

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Dissertation presented at Uppsala University to be publicly examined in Grotiusalen, Uppsala, Friday, September 22, 2006 at 10:15 for the degree of Doctor of Laws. The examination will be conducted in English.

Abstract

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This dissertation examines the child's right to participation in theory and practice within the context of the United Nations Convention on the Rights of the Child and other international human rights instruments.

Article 12 of the Convention establishes the right of the child to express views and to have those views respected and properly taken into consideration. The emphasis of the study is on the *democracy aspects* of child participation and on how the implementation of the right to participation could become more effective. For these purposes, the *theoretical underpinnings* of the child's right to participation are examined with a particular focus on the impact of power structures. In order to clarify how state parties to the Convention have implemented article 12 and the way they argue regarding possible obstacles for implementation, jurisprudence and case law (practice) of the Committee on the Rights of the Child, as well as supervisory bodies of other international human rights instruments, are studied. In particular, the importance of *traditional attitudes* towards children on the realisation of participation rights for children is analysed. The case of India is presented as an example of how a state party to the Convention can argue on this matter.

The conclusion drawn from the analysis is that the problem lies not in certain societies/cultures (often labelled traditional) being less inclined to allow and facilitate matters for children to participate in decision-making than in other more "modern" societies. Instead, the same view of the child prevails, regardless of the society in question. The challenge thus lies in changing adult attitudes towards children and child participation. In the final chapter, suggestions are presented in relation to how state parties can be encouraged to find the political will essential for effective treaty implementation and for bridging the gap between theory and practice.

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This is a dissertation on the child's right to participation. In the course of its writing, parents in my vicinity have pointed out to me the fact that child participation is something easier said than done. Accordingly, I dedicate this work to my godchildren, Junia Rees and Viggo Espinoza, and to Elisabeth Tengroth – all of whom have made me realise that dealing with reality is always far more complex than theory.

Rebecca Stern
Stockholm, August 2006

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Main Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
ECHR	European Convention for Human Rights and Freedoms
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
EU	European Union
GA	General Assembly
UNGASS	United Nations General Assembly Special Session
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
HRC	Human Rights Committee
NHRC	National Human Rights Commission (India)
OAS	Organisation of American States
OAU	Organisation of African Unity
OHCHR	Office of the High Commissioner for Human Rights
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNDP	United Nations Development Fund
UNICEF	United Nations Children's Fund
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties

1 Framework of the Inquiry

All animals are equal, but some animals are more equal than others.

George Orwell, *Animal Farm*

1.1 Introduction

George Orwell's words were intended as a satirical comment on a socialist society. His words could also usefully describe the relationship existing between adults and children in international human rights law. Traditionally, children have been regarded as objects in need of or deserving protection, and not as individuals with rights equal to the rights of adults. Article 1 of the Universal Declaration of Human Rights (UDHR) – the foundation of modern international human rights law – proudly proclaims, however, that all human beings are born free and equal in dignity and rights.¹ The 1989 United Nations Convention on the Rights of the Child (CRC) is to date the most ambitious attempt to create a universal standard for the rights of the child, and the first to present children's rights as a legally binding imperative.² Its fundamental objectives are to establish the status of children as rights-holders and for their rights to be considered equally important to respect and fulfil as those of adults. The Convention has put children's rights on the international political agenda and it is the most widely ratified international human rights instrument ever. At the time of writing, it had been ratified by 192 states.³

The Convention can roughly be said to comprise two main perspectives: the right to protection and the right to participation.⁴ The goal is to ensure that the world's 2.2 billion children have the same opportuni-

¹ Universal Declaration of Human Rights, 1948, GA Resolution 217A(III).

² Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by GA Resolution 44/25 of 20 November 1989, 1577 UNTS 3. The Convention on the Rights of the Child entered into force 2 September 1990.

³ Somalia and the United States are the only states that are not parties to the Convention. Both countries, however, are signatories to the Convention: the USA on 16 February 1995 and Somalia on 9 May 2002. See <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty19.asp> (as visited 22/6/2006).

⁴ Geraldine Van Bueren, however, for the sake of clarity proposes four categories, which she refers to as "the four P's": participation, protection, prevention and provision. Geraldine Van Bueren *The International Law on the Rights of the Child* The Hague, Kluwer, 1995, p. 15.

ties as adults to exercise their rights according to the Universal Declaration.⁵ The Convention's preamble specifically refers to the Universal Declaration in which it is stated that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind.⁶ Some human beings should simply not be more equal than others. This vision, however, is yet to be realised. There are a number of questions to be asked, not least whether or not complete equality concerning the possibility of exercising rights for adults and children alike is attainable in practice. This is, perhaps, a particularly important issue in relation to participation. The right to participation according to the Convention, which can be defined as the right to take part in decision-making processes affecting one's life and the life of the community in which one lives, is a fundamental part of citizenship and the means by which a democracy is built.⁷ In contemporary human rights discourse, the concepts of human rights and democracy are becoming increasingly interdependent and are seen as presupposing each other.⁸ Following the adoption of the Convention in 1989, the participation rights of children, not least in a democracy perspective, have been afforded increased attention. This is no doubt because these rights, following the introduction of the Convention, became part of a legally binding instrument. The democracy aspects of the right to participation are important both to the individual child and to society as a whole. It is asserted that learning to take part in decision-making processes and to demand the right to do so – to be able to take an active part in the shaping of one's life choices – is an element in the development and education of the individual child.⁹ For society as such, child participation is valuable (presuming it is a society that considers the participation of its citizens as being something positive) because a society benefits from having well educated and committed citizens. The reason is

⁵ Statistics taken from UNICEF report The State of the World's Children 2005: *Childhood under threat*.

⁶ Preamble, para. 4.

⁷ The definition is proposed by Roger A. Hart in *Children's participation. From tokenism to citizenship*. Innocenti essays No. 4, Florence, UNICEF, 1992, p. 5.

⁸ The relationship between human rights and democracy is discussed in Chapter 3.

⁹ The availability of choice is central to what Martha Nussbaum has called "the capabilities approach", which is a fundamental tool in Nussbaum's project of "providing the philosophical underpinning for an account of basic constitutional principles that should be respected and implemented by the governments of all nations, as a bare minimum of what respect for human dignity requires." Martha C. Nussbaum *Women and Human Development. The Capabilities Approach* Cambridge, Cambridge University Press, 2000, p. 5. The capabilities approach has also been developed and applied by Amartya Sen, not least in his work with the United Nations Human Development Reports. Nussbaum, however, points out that there are several differences between their respective approaches to the concept of human capabilities. *Women and Human Development. The Capabilities Approach* pp. 11-15.

that by participating children can not only contribute to the society in which they live, but in so doing such participation serves as a way of deepening democracy for the future, ensuring respect for democracy and thus contributing to the establishment of peace and security in the world.

In the Convention on the Rights of the Child, the right to participation is most clearly stated in article 12. Related rights are established and enumerated in articles 13 through 17. Article 12 establishes that every child has the right to have his or her views respected and that these views are to be taken into account in all matters affecting the particular child in relation to age and maturity. The article thus refers to the child as being an autonomous individual, not as one being above all in need of care and protection. This focus on the child as an individual with a right to exercise influence over his or her own life is the reason for article 12 to have gained a reputation for being not only one of the most innovative articles of the Convention, but also as one of the most controversial.

The right to participation, however, is not only progressive but also one of the rights that the Convention has established that is considered to be the most difficult to implement. This gap between law and practice on this point – between reality and rhetoric – is remarkably wide in most of the state parties to the Convention. The gap is well recognised by state parties themselves in their various reports to the Convention's monitoring body, the Committee on the Rights of the Child, as well as in the Committee's comments.¹⁰ This disparity – this gap – finally, is the starting point of this dissertation.

1.2 Subject Matter

1.2.1 Aims and Objectives

Article 12 is one of the core principles of the Convention on the Rights of the Child. It establishes that children have rights equal to those of adults to make their voices heard and have their views respected and taken into account. The extent of impact of the child's views is made dependent on the age and maturity of the individual child. As regards the right to be heard and respected as such, however, adults and children are to be treated as equals. The ratifying states have agreed on this in accepting the wording of article 12. The article is applicable, depending on how it is interpreted, to a wide scope of situations and contexts, ranging from family life to issues involving all members of a

¹⁰ See Chapter 6.

society. Emphasising the view that the child is an autonomous individual, however, is controversial in most of the world's countries and societies where traditional attitudes and perceptions of children portray the child not primarily as being a rights-holder so much as someone in need of or deserving protection. At least, the child are not seen as an individual with similar rights as an adult. The important impact of traditional attitudes and cultural norms on how children and childhood are perceived and treated should not be underestimated.

In this dissertation, the child's right to participation – as expressed in article 12 of the Convention on the Rights of the Child – will be analysed, as will certain difficulties concerning its implementation. The aim of the study is also to clarify the importance of child participation in a democratic society, to contribute to a better understanding of the meaning of child participation, to investigate the obstacles to effective implementation of article 12 with a particular focus on arguments related to traditional practices and cultural differences, and to discuss how the article's implementation could become more effective. To provide an example of how a state party to the Convention has chosen to argue regarding the implementation of the child's right to participation a short analysis of how India has dealt with the implementation of article 12 is presented. The purpose of this is to show how a country itself describes its accomplishments, how the Convention's monitoring body comments on them and if – and in such case how – arguments referring to culture and traditional attitudes are used in the context of a society as culturally diverse as that of India. In conclusion, the overarching objective of this work can thus essentially be described as attempting to find explanations as to why the right of children to have their views heard, respected and taken into account, though considered to be such a good idea in theory, has proved to be so very difficult to put into practice – and to try to find the answer to the question of why this disparity between rhetoric and reality exists.

The issues addressed by the aforementioned aims are important because in my view an increased understanding of, and emphasis on, the right to participation is essential for the integrity of the Convention itself as such, as well as for the protection of children's rights in general. The current gap between the text of the Convention and the way it is implemented in practice – in the everyday lives of children – has to be bridged or at least this disparity reduced for the Convention to maintain credibility.

1.2.2 Delimitations

“Participation rights” can be seen as being a generic term for several different rights. Elements of participation in decision-making proc-

esses are included in almost every right protected by the Convention on the Rights of the Child: the right to information, the right to freedom of thought, conscience, religion and the right to assembly are just a few examples. These rights, important as they are, will not be examined independently in this study. In an effort to limit the scope of this work and to focus solely on the right to participation, the field of economic, social and cultural rights (or environmental rights and the right to development) will not be included. This exclusion is admittedly somewhat problematic since all human rights are considered to be interrelated and interdependent to various degrees and extents. It is, for example, difficult to participate effectively in society without having had access to education or to an adequate standard of living and health. The traditional division of rights in different categories is equally problematic as it has its origins in a theoretical perspective attributing more weight to classic “negative” rights than to “positive” rights without considering how these individual rights are in practice interconnected. At the 1993 World Conference on Human Rights, the Vienna Declaration and Programme of Action was adopted which recognises the “universality, indivisibility, interdependence and interrelation”¹¹ of all human rights, a standpoint that is considered to be the dominant discourse in human rights today.¹² This does not mean to imply that the universality and equal value of all human rights has not been contested – it has, both by both states and non-state actors.

The Convention on the Rights of the Child is to date one of the few global human rights instruments comprising both civil and political rights as well as economic, social and cultural rights, something that could be seen as evidence of a tendency towards a more holistic view of what human rights actually are and how they are interdependent.¹³ With this in mind, the difficulties are recognised of excluding rights, such as the right to education, from the study – a right particularly relevant in relation to children. As a means of limiting and focusing the analysis on participation as a right in itself I have, however, chosen not to address immediate rights other than as a point of reference where appropriate. The interrelation and intertwining between different

¹¹ World Conference on Human Rights, Vienna Declaration and Programme of Action, adopted 25 June 1993, UN Doc. A/CONF. 157/23, para. 5.

¹² An example from Sweden is the government report *Mänskliga rättigheter i svensk utrikespolitik*, SKR 2003/04:20.

¹³ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 18 December 1979, 1249 UNTS 13, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by GA Resolution 45/158 of 18 December 1990, Doc. A/RES/45/158, are other examples of human rights treaties applying a holistic perspective to human rights.

rights leading on to the exercise of the right to participation is a complete subject of study in itself.

1.3 Method and Material – Approaches

1.3.1 Perspectives Applied In the Study

In public international law, theory and method are closely related.¹⁴ Anne-Marie Slaughter and Steven R. Ratner commented in an article in the 1999 American Journal of International Law symposium on method in international law that “the application of theory to a concrete problem is at the core of our definition of method”.¹⁵ The majority of the authors contributing to the symposium also emphasised that it is not possible to provide one single answer to what the law is, or should be.¹⁶ Human rights are a field well suited for a “smorgasbord approach” to different methods when analysing and searching for solutions to a particular problem. Human rights scholar Jack Donnelly talks of the “necessarily multidisciplinary character of the study of human rights” which, in his view, is essential to “do justice to the scope and complexities of human rights”.¹⁷ Human rights issues are complex and diverse and are not well served by the researcher limiting herself to the use of one single model of analysis. It is instead more favourable to apply simultaneously different perspectives in order to elucidate a problem or process. It is to be hoped that such an approach will lead to a more complete analysis and nuanced answers than if one single method is used.¹⁸ It is, however, neither effective nor feasible to

¹⁴ The articles included in the special issue “Symposium on Method in International Law” *American Journal of International Law* Vol 93, No. 2, 1999, pp. 291-423 provide for a comprehensive overview of contemporary theories and approaches in public international law. For an overview of feminist theories and their relation and value in understanding international law, see Hilary Charlesworth & Christine Chinkin *The Boundaries of International Law. A Feminist Analysis* Manchester University Press, Manchester, 2000, pp. 23-38, and Doris Buss & Ambreena Manji (eds.) *International Law. More Feminist Approaches*, Oxford and Portland, Hart Publishing, 2005. For an introduction to feminist thinking in general, see, for example, Rosemarie Putnam Tong *Feminist Thought. A More Comprehensive Introduction*, 2nd ed., Boulder and Oxford, Westview Press, 1998.

¹⁵ Anne-Marie Slaughter & Steven R. Ratner “The Method Is the Message” in *American Journal of International Law* Vol. 93, No. 2, 1999, pp. 410-423 (423).

¹⁶ See Slaughter & Ratner “The Method Is the Message” p. 420 and, also, the articles included in the symposium issue of the *American Journal of International Law* (see n. 14 *supra*).

¹⁷ Jack Donnelly *Universal Human Rights in Theory and Practice* 2nd ed. Ithaca & London, Cornell University Press, 2003, p. 2.

¹⁸ See, for example, Eva Maria Svensson *Genus och rätt: en problematisering av föreställningen om rätten* Uppsala, Iustus, 1997 pp. 29-38 where such limitations are discussed.

try to cover every possible angle of approach on a subject.¹⁹ The idea instead should be to identify a few approaches especially suited for the research question at hand and to apply them in the subsequent analysis.²⁰

This is a doctoral thesis in international law, focusing on international human rights – the human rights of the child in particular. The main purpose of this analysis, however, is not to define and describe the human rights law relevant to the child's right to participation, nor is it to analyse the current situation for children in the world today in the field of participation. The objective instead is to find possible explanations for the existing gap between rhetoric and reality as regards the core principle of the child's right to participation. This does not mean that the traditional positivistic legal method – including analyses of legislative texts, court decisions, policy documents and legal doctrine – is not used.²¹ The positivistic method, however, does not alone supply the necessary tools for providing answers to the issues outlined above. These research questions concerns not only the information yielded by the material used as a source for the research, but also, which is perhaps more interesting, the way in which this information is selected and presented by those providing it. It is thus not only *what* is said, but *how* it is said that is of interest.

An analysis of not only the straightforward information provided by the material but also the way it is presented – and, equally interesting, what is left out – calls for a “critical ear” to what is actually being said. What meaning is ascribed to concepts such as “participation”, “childhood” and “culture”? In examining the sources, feminist international legal studies have been a source of inspiration, since they offer an alternative to the traditional positivist approach to legal research.²² A

¹⁹ Westberg emphasises this in his advice to the ambitious doctoral candidate. Peter Westberg “Avhandlingsskrivande och val av forskningsansats – en idé om rättsvetenskaplig öppenhet” in *Festskrift till Per Olof Bolding*, Stockholm, Juristförlaget, 1992, pp. 421-446 (440).

²⁰ On advice to the doctoral candidate choosing an approach to a specific area of research: see Westberg “Avhandlingsskrivande och val av forskningsansats – en idé om rättsvetenskaplig öppenhet”. For doctoral theses where Westberg's ideas about a problem-oriented approach are applied, see Anna Singer *Föräldraskap i rättslig belysning* Uppsala, Iustus, 2000 and Christina Johnsson *Nation states and minority rights: a constitutional law analysis* Uppsala, Faculty of Law, Univ., 2002.

²¹ Jan Hellner *Metodproblem i rättsvetenskapen. Studier i förmögenhetsrätt* Stockholm, Jure, 2001, pp. 117-128.

²² The literature on feminist international legal studies is comprehensive. A few examples are: Eva Brems “Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse” *Human Rights Quarterly* 19.1, 1997 pp. 136-164, Jo Bridgeman & Susan Millns *Feminist Perspectives on Law. Law's Engagement With the Female Body* London, Sweet & Maxwell, 1998, Buss & Manji (eds.) *International Law. More Feminist Approaches*, Hilary Charlesworth “Feminist Methods in International Law” *The American Journal of International Law*, Vol. 93, No. 2, 1999,

feminist analysis of legal materials points to the fact that the law most often is not, even though it might so appear on the surface, gender neutral or impartial when applied. Recognising, as is done in a feminist legal analysis, that law on all levels can operate differently depending on the gender of the person to whom it is applied, that vocabulary using the generic male pronoun when referring to individuals conserves the male as the norm and the female as the Other, or that the public/private dichotomy is upheld resulting in women being excluded from the protection provided by the law, are all insights that challenge the view of the law as being objective.²³ Having this approach in mind is useful to any kind of analysis, not only in a strictly feminist approach to law, as it is a reminder of the values and objectives underpinning a law – or any other kind of source of material – and must always be considered in an analysis.²⁴ Also of interest is the emphasis that feminist legal theory puts on the interconnectedness between law, politics and institution building, as well as the impact on international law of ideologies and values governing international politics and the international community.²⁵

With these critical approaches to the material forming a backdrop, three perspectives are used as analytical tools in the present study. These three perspectives are the following. Of fundamental importance for this work is the *child- and child-rights-centred perspective*, which means focusing on consequences for the rights of the individual child

pp. 379-394., Charlesworth & Chinkin *The Boundaries of International Law. A Feminist Analysis*, Hilary Charlesworth, Christine Chinkin & Shelley Wright "Feminist Approaches to International Law" *The American Journal of International Law* Vol. 85, No. 4, 1991, pp. 613-645, Maja Kirilova Eriksson "Att gå på två ben eller ett. Beträktningsätt på mänskliga rättigheter" *Feministiskt perspektiv* 1/2000 pp. 5-12, Sari Kouvo *Making just rights?: Mainstreaming women's human rights and a gender perspective* Uppsala, Iustus, 2004, Anne Orford "Feminism, Imperialism and the Mission of International Law" *Nordic Journal of International Law* 71, 2002, pp. 275-296, Julie Peters & Andrea Wolper (eds.) *Women's Rights, Human Rights – International Feminist Perspectives* New York, Routledge, 1995, Ursula O'Hare "Realizing Human Rights for Women" *Human Rights Quarterly* Vol. 21, 1999, pp. 364-402, Svensson *Genus och rätt: en problematisering av föreställningen om rätten*. For a general perspective of gender and law and how a gender perspective can be used when questioning the presumed objective nature of law see, for example, Eva-Maria Svensson *Genusforskning inom juridiken* 2 ed. Höskoleverket, Kalmar, 2001. Svensson has a Swedish perspective but her conclusions are applicable to legal research in general. For an introduction to feminist thinking in general, see, e.g., Putnam Tong *Feminist Thought. A More Comprehensive Introduction*.

²³ Charlesworth & Chinkin *The Boundaries of International Law* pp. 48-52.

²⁴ Certain parallels can be drawn between feminist legal analysis and how one in a discourse analysis examines texts, their meanings and underlying values, based upon the context in which they are produced and applied. Mats Alvesson & Kaj Sköldberg *Tolkning och reflektion. Vetenskapsfilosofi och kvantitativ metod* Lund, Studentlitteratur, 1994, pp. 279-287.

²⁵ Kouvo *Making Just Rights* p. 20.

as well as for children as a collective entity when analysing treaty provisions, policies, implementation measures, domestic law and additional sources.²⁶ Applying a child-centred perspective means respecting the child's integrity and human dignity. It also means trying to see things from a child's point of view, and not stop at what in the eyes of an adult is in the child's best interests. The *active-agent perspective* means to consider the child first and foremost as being an individual with the capability to act independently, irrespective of whether or not such capability is limited to any extent. It should be stressed that this perspective, while emphasising the right to participation of the child in decision-making processes, does not exclude the right to protection.

A third perspective that is important to this study is that of *gender*, since the rights of the child are often implemented – and sometimes interpreted – differently depending on whether they are applied to girls or boys.²⁷ The application of a gender perspective when analysing human rights norms and how they are implemented can illuminate inconsistencies and injustices in how a rule is designed and applied that would otherwise remain obscure. Children face different expectations, opportunities and choices throughout childhood depending on whether they are born as girls or boys. The discrimination of girls is a global problem, recognised in international human rights instruments, policy documents, action plans, reports and similar texts, and it is therefore of interest in a study such as this to pay attention to the differences in how boys and girls are treated within the context of participation rights.²⁸ Furthermore, applying a gender perspective is relevant when one considers that there are a number of issues that children's and women's rights have in common because of the traditional subordinate

²⁶ Ellen Key, the famous Swedish pedagogue and writer, was one of the first to argue the use of a child-centred perspective. Key's influential work *The Century of the Child*, originally published in 1900 (Stockholm, Albert Bonniers förlag), has often been regarded as the starting point for this new perspective, focusing on child-oriented rights in a way not previously seen. Whether *The Century of the Child* was the revolutionary beginning of something completely new has been discussed. The importance of the ideas Ellen Key and her fellow pedagogues promoted, however, cannot be overestimated. Key's vision is discussed in Jeroen J. J. H. Dekker "The Century of the Child Revisited" *International Journal of Children's Rights* Vol. 8, 2000, pp. 133-150.

²⁷ One way of describing this difference is that a man in general is defined as "a person", no more and no less, while a woman is often first defined and categorised on the basis of her sex and only afterwards as an individual. Simone de Beauvoir in her 1949 pioneer work *Le Deuxième Sexe* argued that one is not born "a woman", one becomes it – a statement that has inspired a multitude of followers and has set its mark on the philosophical and the feminist discourse ever since. Simone de Beauvoir *Det andra könet* Norstedts, 2002. There are naturally numerous exceptions to this rule, but the segregation between the sexes which starts almost before a child is born is still a fact. The practice of female foeticide and infanticide, still prevalent in, for example, India (despite it being criminalised for many years) is a sad reflection of this imbalance.

²⁸ See Chapter 2.6.4 and Chapter 4.

position that these groups occupy in relation to men and adults respectively. It has long been assumed in international human rights law that women's and children's rights are, at least within the family, interconnected – and that if women's rights are protected so are those of children.²⁹ This connection, however, is not without problems.³⁰ To take the view that interconnectedness between women and children as groups is inevitable is hazardous, since it is an argument traditionally used to justify the notion that neither women nor children should possess full legal capacity because of social inferiority.³¹ The supposed inevitability of a connection between children's and women's rights sends signals that children are merely appendages to women. To reduce the woman to the role of being a mother is a categorisation contradictory to the way the Convention on the Elimination of All Forms of Discrimination Against Women defines maternity: not as an identifying characteristic, but as one of many aspects of what the concept of “woman” embraces.³² However, all these apprehensions considered, there is still a point to drawing parallels between women's and children's rights – which is done, when relevant, throughout this study. This is because the child rights proponents can benefit from the experiences made in the struggle for women's rights and, at least to an extent, use the same tools when advocating the rights of the child – for example, on issues of participation, adult/child power relations, and empowerment.³³

In conclusion, one could say that the analytical tools I use have their justification in the questions asked, which is at the core of the multidisciplinary approach proposed by Donnelly. A critical approach to the legal discourse is necessary when dealing with research questions such

²⁹ Van Bueren *The International Law on the Rights of the Child* p. 52. On the compatibility of the CEDAW and the CRC, see Savitri Goonesekere *Women's rights and children's rights: The United Nations conventions as compatible and complementary treaties* Innocenti Occasional Papers Child Rights Series, Number 1, UNICEF, September 1992.

³⁰ Frances Olsen “Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child” pp. 192-220 (192-193) in Philip Alston, Stephen Parker & John Seymour (eds.) *Children, Rights and the Law* Oxford, Clarendon Press, 1992 and Cynthia Price Cohen “The United Nations Convention on the Rights of the Child: A Feminist Landmark” *William and Mary Journal of Women and Law* Vol. 3, 1997, pp. 29-78 (68-77).

³¹ Van Bueren *The International Law on the Rights of the Child* pp. 52-53.

³² See, for example, CEDAW article 5(b).

³³ Issues of power and empowerment are discussed in Chapter 4. Frances Olsen has in her aforementioned article (n. 30 *supra*) described four feminist approaches to children's rights, which she has called Legal Reformism, Law as Patriarchy, Feminist Critical Legal Theory and Post-Modern Feminism. See also Eva Nilsson “*Children Crossing Borders: On Child Perspectives in the Swedish Aliens Act and the Limits of Law*”, article, forthcoming, for a discussion on how feminist approaches can supply valuable knowledge a legal study.

as the present. This is because the answers to these questions are presumably to be found not only in the interpretation of legal materials, but also in an analysis of the underlying values influencing how texts are formulated and implemented. Whenever questions concerning rights are asked, the answers will inevitably need to include considerations of the values forming the foundations of named rights. If, as in the present case, children as rights holders are discussed, the values underpinning the idea of children as possible bearers of rights must be seen as being an essential element to that discussion. The very notion of ‘the child’ and ‘childhood’ are not entities whose content can be established objectively, but instead are very much the result of the many and varying traditions and values underpinning different societies.³⁴ At the same time it should be remembered that the main features deciding who is considered to be a child and, more importantly, what capabilities and rights a child is seen as having, are roughly the same all over the world. Therefore, general conclusions about the implementation of children’s rights can be drawn despite the diversity of children’s living conditions.

1.3.2 The View Through Whose Spectacles?

In accounting for the perspectives and points of departure chosen for a research project there lays a willingness to acknowledge that the presumed objectivity of academic knowledge and research is neither uncomplicated nor uncontested. Questioning the objectivity of academic knowledge-production and instead emphasising its situated (a researcher’s work is affected by, for example, his or her race, age, sex, sexuality, culture, religion, class and geographic location) and partial (reality is too complex to be fully explained) nature is a common denominator, not least for feminist theory.³⁵ A critical approach encourages the researcher to be aware of his or her own presumptions and hopefully leads to self-reflection on how such presumptions and prejudices influence the research performed.³⁶ In a doctoral thesis in international human rights law, where issues of culture and traditional atti-

³⁴ A parallel can be drawn with how the concepts of “sex” and “gender” are constructed – how they are defined depends on the contexts in which they are applied. See, for example, the discussion of gender and law and feminist perspectives on law in Svensson *Genusforskning inom juridiken*.

³⁵ The subjectivity of the researcher is discussed from a feminist perspective in, for example, Svensson *Genus och rätt: en problematisering av föreställningen om rätten* pp. 20, 30, and Kouvo *Making Just Rights* pp. 20-21 with references.

³⁶ Even if Westberg has not (I would not know) had feminist theory in mind when formulating his thoughts on the problem- and interests-oriented approach to research, the two fit together very well. Westberg “Avhandlingsskrivande och val av forskningsansats – en idé om rättsvetenskaplig öppenhet”.

tudes are examined as part of the analysis, a self-reflective stance is necessary – especially when discussing the impact of the socio-cultural context on the implementation of treaty provisions. It would be impossible for any author to dismiss totally the view through the cultural lens inserted by personal context and background. Therefore, I have simply tried to be aware of my assumptions and the extent to which they tend to tint the analysis that I present.³⁷

In this context, it seems appropriate to comment on the terms relating to different parts of the world, terms that might be criticised for their generality. For example, reference is made to ‘developing’ and ‘developed’ or to ‘post-industrialised’ states; to ‘the West’, ‘the North’ and ‘the South’. These terms lack specificity and gloss over significant differences between states as well as the changes that have taken place within them and in relation to other states, not least in a post-colonial context. Nevertheless, the terms are used, since they are a part of the existing vocabulary and because the way in which they are used in existing texts can in itself be of further interest to the analysis.

1.3.3 Sources

This study relies on a wide range of sources of material, and a few words should therefore be said about how they are applied. The common denominator for the material that has been examined is that it relates to child participation. Universal and regional human rights treaties that in some way address children, the jurisprudence of these instruments, policy documents, action plans, reports from intergovernmental agencies and nongovernmental organisations, legal doctrine and interviews with academics and human rights activists are all important sources. The documentation of the work of the Committee on the Rights of the Child from 1989 onwards – state party reports, correspondence between the Committee and state parties, summary records from the sessions where the state party reports are discussed, the Committee’s concluding observations, and any additional information such as reports from non-governmental organisations – is of fundamental importance for this analysis.

The jurisprudence developed by the human rights monitoring bodies in the universal and regional systems is vast. Accordingly, such material from monitoring bodies, courts and tribunals other than the Committee is referred to when considered relevant and primarily as a com-

³⁷ See, for example, Charlesworth & Chinkin *The Boundaries of International Law* p. 22 where they discuss the matter of objectivity. See also Nussbaum *Women and Human Development. The Capabilities Approach* pp. 10-11 on her experiences and reflections on research work in India, a context in which she in many aspects is an outsider.

parison with the material originating in the monitoring process of the Committee on the Rights of the Child. The aim has been to consider available materials up until April 2006. The examples that are cited in the analysis have been chosen by taking geographical aspects into consideration – that is, with a particular mind to securing the greatest geographical diversity.

The sources of material that have been examined are used in multiple ways in this study. One such way is as a straightforward source of information of the situation of children in a particular state party. The material, however, is also examined with the intention of penetrating beneath the surface of what is actually said. The material, in particular the state party reports, further information provided by the state parties and, in addition, state party delegates' answers to Committee members' questions are therefore analysed in order to find out which arguments were used by state parties to explain how article 12 was being implemented in their particular countries, how these arguments were presented and which aspects of the article had been emphasised and seen as being most important. The aim of this part of the analysis is to understand not only the situation for, and status of, child participation rights in a particular state party, but also to understand the values, attitudes and deliberations underpinning *i)* how a state implements article 12 and *ii)* how it explains the process and results of that implementation to the Convention's monitoring body – if, for example, certain arguments seem to be considered to be more valid in certain contexts or countries than in others. This in turn can provide valuable clues to answering the research questions posed in this work.

1.4 Previous Research

Previous research conducted on children's rights is comprehensive, dealing with a number of different subjects from the theoretical underpinnings of children's rights as such to the practical implementation of individual rights in different contexts. Geraldine Van Bueren, whose *The International Law on the Rights of the Child* is considered a standard work, Michael D. A. Freeman, John Eekelaar and Philip Alston are all examples of writers whose work has been influential in this field of research. Different aspects of the child's right to respect for his or her views and to participation in decision-making processes has been discussed by all of the aforementioned authors, and has also been the topic of an article by Marie-Francoise Lückér-Babel – "The right of the child to express views and be heard: An attempt to interpret

Article 12 of the UN Convention on the Rights of the Child”.³⁸ Furthermore, a comprehensive number of reports have been published by, for example, UNICEF. The theme under investigation in this study, however, has not been the topic of an in-depth study before. In particular, the connection between the difficulties of implementing article 12 of the Convention on the Rights of the Child, the democracy aspects of the article and the possible impact of culture and traditional attitudes has not been previously analysed to any extent.

1.5 Outline of the Study

The purpose of this first chapter has been to introduce the research subject and the analytical tools applied in the search for answers to the questions that this topic creates. In *Chapter 2*, the main features and perspectives of the Convention on the Rights of the Child are described, as are the implementation and monitoring procedures of the treaty. A short survey of how child participation is addressed in the main universal and regional human rights treaties is also included in the chapter. The intention is to set the framework for the analysis and to illustrate the increased emphasis on the child’s right to participation that has emerged in the latter half of the twentieth century, and onwards. In *Chapter 3*, the democracy aspects of the child’s right to participation are analysed against the background of the close relationship existing between human rights and democracy and the following conclusion that democratic values are impossible to exclude from a discussion of how human rights should be implemented. The status of the citizen-child is an important part of this analysis. From a strictly legal point of view, children are seen as full citizens. When the actual content of their citizenship is examined, however, the picture is somewhat different. Children, when it comes to participation in formal political decision-making processes on any level, are considered to be “semi-citizens” who are not entrusted with the power to exercise influence, regardless of the benefits this might have both for the individual child and for society as a whole. This exclusion of a large group of citizens from the *demos* is, however, in general seen to be of no particular concern and accepted as a fact.

Chapter 4 continues the analysis by focusing on the importance of empowerment for real and effective participation. A prerequisite for participation in decision-making processes to be seen as something

³⁸ *The International Journal of Children’s Rights* Vol. 3 (1995) pp. 391-404. Lückerbabel’s conclusions are discussed in Chapter 5.

other than a tokenism is to realise that such participation actually has an impact on the decisions made. Effective participation means exercising a certain power, the extent of which, naturally, varies. The impact of power structures and empowerment on the effective implementation of the child's participation rights is thus the topic of this chapter. In *Chapter 5*, article 12 of the Convention is thoroughly analysed with an emphasis on its democracy-related aspects. The fact that the article refers to the right of children to have their views respected in *all* matters affecting them indicates that no matter, big or small, can justifiably be excluded from the scope of issues to which the right to participation applies. This fact, however beneficial in theory, has nevertheless not made implementation on a domestic level less complicated.

In *Chapter 6*, arguments based upon culture presented by state parties to the Convention as representing explanations why the implementation of article 12 has proved to be difficult, are examined. The purpose is to analyse the validity of arguments referring to culture and traditional attitudes as justifications and/or explanations for an ineffective implementation of the child's right to participation, and to discuss why some state parties, but not others, use these kinds of arguments. In *Chapter 7*, India is examined as an example to illustrate how a state party to the Convention on the Rights of the Child deals with tradition and culture in relation to article 12. *Chapter 8*, finally, presents the conclusions drawn from the analysis. Based upon these conclusions, certain suggestions are offered on what measures can be taken to make implementation of the right to participation – and the Convention as a whole – more effective.

2 Framework of the Protection of Children's Rights to Participation

2.1 Introduction

Traditionally, children in most legal systems in the world have been regarded as objects of protection, as parts of the family unit and, first and foremost, as recipients of welfare. Early legal statements in Europe are mostly silent on children's rights in general. References to child-parent relations are occasionally made, but usually in terms of respect for parents and/or guardians, rather than in relation to parental obligations towards the child.³⁹ As the influence of the Roman Catholic Church grew strong in Europe, having an enormous impact on the legal systems in the region, one of the most important issues regarding children was whether or not a child was born within matrimony.⁴⁰ The differences in status and rights, not least inheritance rights, for children born in or out of wedlock respectively were considerable.⁴¹

It was not until the eighteenth century Enlightenment that any substantive changes in the perceptions of children occurred.⁴² In this period, new thoughts on the relationship between parents and children and on children as developing human beings surfaced, and the child slowly began to be seen as an individual.⁴³ The ideas of the Enlightenment in relation to the civil rights of the individual took centre stage in the century's two revolutions; the American and the French. The traditional, patriarchal exclusion of women and children from the category of "human being and rights-bearer" was, however, not challenged by the majority.⁴⁴

³⁹ Michael D. A. Freeman "Introduction" p xi-xlii (xi-xii) in Michael D. A. Freeman (ed.) *Children's Rights Volume 1* Ashgate Dartmouth, Aldershot, 2004.

⁴⁰ Singer *Föräldraskap i rättslig belysning* pp. 57-58.

⁴¹ See Göran Inger *Svensk rättshistoria* 4th ed. Malmö, Liber Ekonomi, 1997 pp. 28-34 for a Swedish example that is also relevant within other European jurisdictions.

⁴² See e.g. Karin Norman *Kulturella föreställningar om barn: ett socialantropologiskt perspektiv* Stockholm, Rädda Barnen, 1996 pp. 49-50.

⁴³ Jean-Jaques Rousseau's famous novel *Émile*, published in 1762, is one of the most prominent works of this period and has had an enormous influence on child education.

⁴⁴ Female pioneers as, for example, Olympe de Gouges, however, argued for the rights of women in her 1791 *Déclaration des droits de la femme et de la citoyenne*.

In the nineteenth century the focus was on “child-saving” rather than on the child as an individual. An important reason for this changed perspective was the industrialisation of the West and the diminished need to use children as cheap labour.⁴⁵ As concerns legislation, children were being increasingly perceived as forming a category of their own, requiring new standards to be set. This development, for example, is shown in the creation of documents by the International Labour Organisation (ILO) referring specifically to working children.⁴⁶ The changes in attitude towards children, their rights and status both legally and in general, continued into the twentieth century and laid the ground for the creation of law and specialised human rights instruments protecting children’s specific interests and rights.

The 1989 UN Convention on the Rights of the Child is the main human rights instrument protecting the rights of children, providing a framework for children’s civil, political, economic, social and cultural rights. Apart from the substantive articles, the Convention contains an extensive preamble in which the background, aims and purposes of the treaty are explained as well as twelve articles covering monitoring and formal provisions.

In this chapter, the development within international law leading up to the adoption of the Convention is examined, as are the main objectives of the Convention and its mechanisms for implementation and monitoring. A short survey of how the child’s right to participation is addressed in other international human rights treaties is also included in order to show if, and in such case how, the concept has been addressed in other human rights instruments. The purpose of the chapter is to provide a framework for the analysis of the child’s right to participation to follow. An important objective is to show the existence of a strong commitment to the importance of establishing rights for children underpinning the international human rights instruments referring to children. Another objective is to show that many of the obstacles for implementing their rights have their roots in problems that were discussed as early as before and during the drafting of the Convention on the Rights of the Child.

The focus of this section is mainly on legal developments relevant to the child as they have appeared in Europe. Eurocentric as this may seem, the reason is that philosophical and legal developments in this part of the world have had a substantial effect upon how most of today’s international human rights law instruments are designed, and

⁴⁵ See Marianne Dahlén *The Negotiable Child. The ILO Child Labour Campaign 1919-1973* Doctoral thesis (working title), Faculty of Law, Uppsala University – forthcoming.

⁴⁶ Ibid.

which rights they protect. This is not meant to imply that philosophies and traditions emanating from cultural contexts other than Western ones are less important or valuable, nor that thoughts regarding human dignity and rights in these cultures have not existed or would be fundamentally different from those that evolved in Europe. Welshman Ncube, for example, has pointed out that the philosophy and values underlying the children's rights discourse are as much African as they are Western.⁴⁷ Nonetheless, regional human rights instruments tend to show evidence of the influence, by culture and tradition, particular to a region – the African Charter on the Rights and Welfare of the Child is one excellent example.⁴⁸ In general, however, international human rights law instruments tend mainly to trace their roots back to what is commonly referred to as a Western tradition of liberal political thought – thus the focus on this part of the world.

2.2 The Development of International Child Rights Instruments

2.2.1 Seeing Children as Rights-Holders

The development of international law on the rights of the child since the beginning of the twentieth century has run parallel to the development of international human rights law in general. The rights and freedoms ensured and protected by the general instruments of human rights law, such as the Universal Declaration of Human Rights and the two Covenants, are at least in theory as applicable to children as they are to any other category of humanity. Geraldine Van Bueren describes the growth of both the general body of international human rights law and international law on the rights of the child in particular as being

⁴⁷ Welshman Ncube “Prospects and Challenges in Eastern and Southern Africa” pp. 1-10 in Welshman Ncube (ed.) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*, Ashgate, Dartmouth, 1998. However, in another contribution to the same volume “The African Cultural Fingerprint? The Changing Concept of Childhood” pp. 11-27, Ncube recognises that behind the apparent harmony between the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child lie ideological and conceptual differences between the two documents that may suggest that all questions are not yet settled (pp. 12-13). Furthermore, Karin Norman points out that the West seems to presume that lessons learned from its history can be directly applied to the present situation in the South. She reminds us that even if there are similarities, countries in the South are not reproductions of a Western past but have their own unique history and behavioural patterns determining attitudes on, for example, children's rights. Norman *Kulturella föreställningar om barn* p. 44.

⁴⁸ OAU Doc. CAB/LEG/24.9/49 (1990). Entered into force 29 November, 1999. See section 2.6.7.

divided into three stages.⁴⁹ The first is the recognition by the international community that all individuals, including children, are objects of international law and require international protection. The second is the granting of specific substantive rights to individuals. The third stage is the acknowledgement that individuals must possess adequate procedural capacity in order to be able to exercise and claim such rights and freedoms. The difference in how children's rights are treated in comparison with human rights in general, van Bueren argues, lies in the development of the second and third stages. It may be recognised in principle that children should enjoy the full range of rights, but this is not always sufficiently acknowledged in the case law and practice of various states and international courts and tribunals. Neither is the child's procedural capacity to act on his or her own behalf an undisputed issue.

The first international instrument dealing specifically with the rights of the child is the 1924 Declaration of the Rights of the Child, also known as the Declaration of Geneva. The Declaration was unanimously adopted at the Fifth Assembly of the League of Nations.⁵⁰ The Declaration of Geneva was the first time an intergovernmental organisation adopted a human rights declaration. The adoption of the Declaration started the process of establishing the concept of the rights of the child on an international level.⁵¹ The Declaration of Geneva did not speak of the "rights of the child" nor of state obligations towards children. Instead, it sought to establish the duties of "men and women of all nations". It is clear that the Declaration was never intended to be a legally-binding instrument, but more of a prelude to the development of legally-binding norms. The failure of the League of Nations, however, ended those expectations.⁵²

The Declaration of the Rights of the Child concentrated primarily on the social, economic and psychological needs of the child, such as

⁴⁹ Van Bueren *The International Law on the Rights of the Child* p. 1.

⁵⁰ Declaration of the Rights of the Child, adopted 26 September 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924).

⁵¹ The first draft of the Declaration was drawn up by the Save the Children International Union and submitted to the League of Nations. Simultaneously, the International Council of Women had also begun working for a charter on the rights of the child. These activities combined led to the 1924 resolution. Sharon Detrick *A Commentary on the United Nations Convention on the Rights of the Child* The Hague, Martinus Nijhoff Publishers, 1999 p. 13. See also Philip Alston "Children's Rights in International Law" *Cultural Survival Quarterly* 10.4, 1986, pp. 59-61. Other instruments relating to the protection of children adopted by the League were the 1921 International Convention for the Suppression of the Traffic in Women and Children (Reg.No. 269, 9 LNTS 415 and the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (Slavery Convention of 1926), 60 LNTS 253.

⁵² Glenn A. Mower *The Convention on the Rights of the Child: international law support for children* Westport, Conn., Greenwood Press, 1997 pp. 10-11.

emphasising that the child must be protected from every form of exploitation and be given the means required for normal development. Children were seen as recipients of help and treatment rather than as autonomous individuals and holders of specific rights. The 1924 Declaration was a good example of how the child was regarded as being an object, not a subject, of international law - a view consistent with the then dominant perception of the child as being first and foremost in need of protection. However, regardless of its limitations, the 1924 Declaration was important because it established the concept of children's rights on an international level and illuminated the fact that their rights represented a new development in international law, a development moving towards setting general standards on children's rights. It is also noteworthy that the Declaration made no distinction between economic, social and cultural rights and civil and political rights as regards status, although (possibly as a result of the world war that had just been endured) it emphasised the child's need of protection and material help.⁵³

The United Nations, as the successor to the League of Nations, continued the development of children's rights.⁵⁴ The necessity of paying special attention to these rights was discussed in connection with the drafting of the 1948 Universal Declaration of Human Rights (UDHR). The Social Commission of the Economic and Social Council (ECOSOC), however, concluded that the special needs of children required a separate declaration supplementing the UDHR. The General Assembly adopted the new Declaration of the Rights of the Child without abstentions in 1959.⁵⁵ The revised and extended text reflects how views on the rights of the child had developed since the 1924 Declaration. The 1959 Declaration consists of a preamble and ten principles.⁵⁶ The preamble refers to the United Nations Charter as well as to the Universal Declaration of Human Rights. In the 1959 Declaration, no references are made to the views of the child, nor whether the

⁵³ Van Bueren *The International Law on the Rights of the Child* p. 8.

⁵⁴ In 1946, the Temporary Social Commission of the Economic and Social Council (ECOSOC) stated that the principles of the Declaration of Geneva should be as binding as they had been in 1924, which in practice was a statement of lesser importance.

⁵⁵ Declaration of the Rights of the Child G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959). On the Declaration, see e.g. van Bueren *The International Law on the Rights of the Child* pp. 9-12.

⁵⁶ The Declaration's preamble "[...] calls upon parents, upon men and women as individuals, and upon voluntary organisations, local authorities and national Governments to recognize these rights and strive for their observance by legislative and other measures [...]". The principles include the prohibition of discrimination, the principle that the child shall enjoy special protection, and that in the enactment of laws for this purpose, the best interest of the child shall be the paramount consideration. Civil rights are provided for in principle 3 "The child shall be entitled to a name and a nationality".

views of the child are of any importance.⁵⁷ The child is still regarded as being an object of protection. Fundamental changes to the view of children's rights were instead introduced with the adoption of the 1989 UN Convention on the Rights of the Child.

2.2.2 Drafting process of the Convention on the Rights of the Child

The debate on children's rights continued in the years following the adoption of the 1959 Declaration. At the thirty-fourth session of the UN Commission on Human Rights in 1978, Poland formally proposed that the United Nations should adopt a convention on the rights of the child.⁵⁸

Several speakers at the 1978 session pointed out the importance of making an instrument on the rights of the child legally binding as well as the need of putting the rights of the child in the developing world into proper perspective.⁵⁹ There were no direct objections raised against the need of ameliorating children's access to their fundamental rights, but many commentators – states, intergovernmental organisations and other competent bodies – did not accept the standing proposal, which would more or less turn the 1959 Declaration into a le-

⁵⁷ During the drafting of the 1959 Declaration, certain countries (such as Poland and Mexico), although not a majority, stated that they would have instead preferred adopting a convention on children's rights and that they would like to have seen directives incorporated in the text on the implementation of the rights proclaimed (E/CN.4//780/Add.1).

⁵⁸ For the proposal, see E/CN.4/L.1366/Rev.1. The Polish representative, introducing a draft at the session, declared that almost twenty years after the proclamation of the principles of the 1959 Declaration by the General Assembly, it was time to take further and more consistent steps by creating an internationally binding instrument in the form of a convention. Chapter XIX of the Report of the Commission on Human Rights on its thirty-fourth session, Official Records of the ECOSOC, 1978, Supplement no.4 (E/1978/34), para. 306. Poland had strong traditions of promoting children's issues and had often stated its special concern for them in international fora. The initiative, therefore, came as no surprise. During the drafting of the 1959 Declaration, Poland expressed its support for a convention on the rights of the child. The first Polish draft was more or less a duplication of the 1959 Declaration, enhanced with a section on implementation. The draft presented leaned heavily towards the protection of economic, social and cultural rights, and thus consistent with a conception of human rights as advocated by Socialist states. On the Polish initiative, see, for example, Nigel Cantwell "The Origins, Development and Significance of the United Nations Convention on the Rights of the Child" pp. 19-31 in Sharon Detrick (ed.) *The United Nations Convention on the Rights of the Child. A Guide to the Travaux Préparatoires* Dordrecht, Martinus Nijhoff, 1992.

⁵⁹ Chapter XIX of the Report of the Commission on Human Rights on its thirty-fourth session Official Records of the ECOSOC, 1978, Supplement no.4, E/1978/34, para. 308.

gally binding document.⁶⁰ Major objections were raised in relation to the vagueness of the proposal and the general view was that the proposed Polish draft should be subjected to careful examination and heavy modification in order to extend the scope of a possible convention.⁶¹

At its thirty-ninth session in 1979, the Commission on Human Rights established an open-ended working group to work on a draft Convention on the Rights of the Child.⁶² The Group's work took place at both plenary meetings and informally, with consensus being the ultimate goal.⁶³ Operating on the basis of consensus had several important consequences. It contributed considerably to the length of the drafting process, as every text and proposed modification had to be discussed until the delegates at least had agreed not to disagree. The tense political climate of the Cold War had an important influence on these discussions. The first years in particular of the drafting process were characterised by the conflicting interests of East and West, which effectively slowed down the negotiations. This marginalised other debates such as that on the impact of culturally related differences on the future Convention and the divide between the industrialised and the developing countries. Additionally, striving for consensus meant that certain controversial proposals were abandoned even though they had had the support of a clear majority of participating states.⁶⁴ A positive

⁶⁰ There were some objections to the very creation of a human rights instrument for a particular group as it was feared that every group in society then would demand "their own convention", thus fragmenting the UN human rights monitoring system into ineffectiveness. Cantwell "The Origins, Development and Significance of the United Nations Convention on the Rights of the Child" p. 21. The same view is expressed by Göran Håkansson, Swedish delegate to the drafting process (interview 18/5/2001).

⁶¹ Thirty-fifth session of the Commission of Human Rights, Report of the Secretary-General E/CN.4/1324.

⁶² The Working Group was formalised in 1981 (Official Records of the Economic and Social Council (ECOSOC), 1979, Supplement no. 6 (E/1979/36), Chap. XI, para. 242). All member states of the UN, members and non-members of the Commission on Human Rights alike, could send delegates with the right to take the floor, as could inter-governmental organisations. Non-governmental organisations with consultative status with the ECOSOC were allowed to participate as well, but without an absolute right to speak. This right, however, was rarely denied. Meetings were open to the public. A report was issued on each of the Working Group's sessions. This report was discussed and approved by the Commission on Human Rights and included in the Commission's annual report to the ECOSOC. The ECOSOC then reported to the General Assembly. Cantwell "The Origins, Development and Significance of the United Nations Convention on the Rights of the Child" pp. 21-25.

⁶³ On the delegates participating in the drafting process, see Cynthia Price Cohen "Drafting the United Nations Convention on the Rights of the Child" pp. 323-353 (344) in Eugen Verhellen (ed.) *Understanding Children's Rights: Collected Papers Presented at the First International Interdisciplinary Course on Children's Rights*, Gent, University of Gent, Children's Rights Centre, 1996.

⁶⁴ One proposal that was put aside was the introduction of severe limitations on the possibilities of medical experimentation on children. Cantwell "The Origins, Devel-

aspect of working under the consensus principle was that only one provision during the drafting was taken to a final vote.⁶⁵

During the early years of the drafting procedure, never more than thirty state delegations were active in the Working Group, due partly to lack of interest, but also for financial reasons and because other drafting processes were going on simultaneously.⁶⁶ Western states were in the majority throughout the process. The drafting of the Convention was in this respect no different from the ones of other universal human rights instruments. The countries of Africa, Asia and, to a lesser extent, Latin America, were not represented proportionally, and only a small number of (then) developing countries were permanently active.⁶⁷ This imbalance led to apprehensions that the Convention would become a Eurocentric text instead of being a document taking different cultures and the living conditions and needs of children in all countries into account. The discussion on what would become article 5 and how the concept of the family and respect for the authority of parents would be affected by the provisions of the Convention is a good example of these apprehensions.⁶⁸ Apart from the discussion on cultural values in relation to the family, however, the impact on the implementation of the Convention from cultural differences between societies does not seem to have been discussed to any particular extent.

During the second reading of the draft Convention, a number of changes were made in the text.⁶⁹ It has been claimed that as a consequence of the Working Group's desire to complete the drafting procedure and to get the draft convention ready for adoption in 1989, the tenth anniversary of the 1979 International Year of the Child, certain questions were dealt with very swiftly while others were simply dropped, with no time for a thorough discussion.⁷⁰ On 20 November

opment and Significance of the United Nations Convention on the Rights of the Child" p. 22.

⁶⁵ Convention on the Rights of the Child draft article 43, para.11, final text art 43, para.12.

⁶⁶ The drafting process of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was completed in 1984 (the Convention entered into force 10 December 1984). 1465 UNTS 85.

⁶⁷ Examples include Bangladesh, Venezuela, Algeria, Senegal, Mozambique, and Argentina.

⁶⁸ Van Bueren *The International Law on the rights of the Child* p. 50 and, also, her chapter on the family and the rights of the child in international law (pp. 67-116).

⁶⁹ E/CN.4/WG1/L.4.

⁷⁰ Van Bueren in *The International Law on the rights of the Child* discusses the implications of medical experimentation on children and the consent of the child for medical treatment (p. 15) Swedish delegate Göran Håkansson notes the lack of discussion concerning certain regarding provisions on implementation and monitoring (n. 60 *supra*). Regarding the draft article 21 on adoption, for example, the Venezuelan delegate said that the fact that the draft article had only been studied in its existing form by the plenary group for a few minutes without the delegates being able to consult experts

1989 the Convention on the Rights of the Child was adopted by consensus by the General Assembly. On 2 September 1990 it entered into force. The Convention has been nearly universally ratified, the exceptions being Somalia and the United States.⁷¹ The Convention has so far been annexed with two optional protocols – the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict⁷² and the Optional Protocol on the sale of children, child prostitution and child pornography.⁷³

Against the backdrop of what, in this context, has to be considered a speedy process of drafting and adopting the Convention, the question of what was actually agreed upon becomes particularly interesting and important. Were all of the possible consequences of a treaty on the rights of the child apparent to the accessing states?

2.3 The Convention: A Leap Forward

2.3.1 An Innovative Treaty

The Convention on the Rights of the Child both as a whole, and in particular articles, is innovative and represents a large step forward for the development of human rights law for children. The ideas behind many of the proposals made during the drafting process and contained in the Convention might not have been new. Many of the ideas – as for example participation rights – had not previously been incorporated in a child-oriented international instrument. However, some child rights issues were considered to be more controversial than others during the process of drafting. Two examples are the right to freedom of religion,

or theory on the subject could only lead to serious confusion (1989 Report of the Working Group, E/CN.4/1989/48, part IV).

⁷¹ <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty19.asp> (as visited 6/7/2006). The United States signed the Convention on the Rights of the Child 16 February 1995, but has so far not ratified it. The legal effects of signature are authentication and that the signatory state is qualified to proceed to ratification, acceptance or approval, creating an obligation of good faith to refrain from acts calculated to frustrate the objects of the treaty. Signature, however, does not establish consent to be bound by the treaty. See article 18 of the Vienna Convention on the Law of Treaties, 1155 UNTS 331 (entered into force 27 January 1980) and Ian Brownlie *Principles of Public International Law* 6th ed. Oxford, Oxford University Press, 2003 p. 582 with references.

⁷² Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict G.A. Res. 54/623, annex I, 54 UN GAOR Supp. (No. 49), UN Doc. A/54/49 (2000), entered into force 12 February 2002.

⁷³ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography G.A. res. 54/263, annex II, 54 U.N. GAOR Supp. (No. 49), U.N. Doc. A/54/49 (2000), entered into force on 18 January 2002.

in relation to which it was discussed whether or not the right of the child to choose a religion was included, and on the rights of children in armed conflict.⁷⁴ Article 14 on the freedom of religion in particular has been made subject to a number of state party reservations and declarations.⁷⁵ These rights, the right to choose one's religion not least, are still the subject of debate. Furthermore, these rights also proved more difficult to turn into specific articles of the Convention, articles that could be accepted by all participants. As the Working Group consisted of delegates determined to promote their various countries' special interests, as well as drafting a functioning instrument, consensus was particularly difficult to reach in issues challenging different sets of cultural values or available resources.

The initial intention of the drafters was not to create a treaty as all-embracing as it in fact eventually turned out to be. It was in realising the potential of a binding legal instrument with which to improve the daily life and well-being of children that led the negotiators to create a more substantive treaty than was first intended, a treaty creating "new" rights for children.⁷⁶ The Convention is one of the few global human rights treaties embracing political and civil rights as well as economic, social and cultural rights in the same text without placing them in a hierarchy.⁷⁷ It is the only global human rights treaty so far to include references to humanitarian law. This holistic approach to rights is one of the hallmarks of the Convention on the Rights of the Child, and a cornerstone in its interpretation.

⁷⁴ See United Nations Centre for Human Rights & Save the Children Sweden *Legislative History of the Convention on the Rights of the Child (1978-1989) Article 14 (Right to freedom of thought, conscience and religion)* HR/1995/Ser.1/article. 14 and United Nations Centre for Human Rights & Save the Children Sweden *Legislative History of the Convention on the Rights of the Child (1978-1989) Article 38 (Children in armed conflicts)* HR/1995/Ser.1/article.38 for a compilation of the *travaux préparatoires*.

⁷⁵ Several states applying Islamic law proclaimed during the drafting process that they would not acknowledge the child the right to adopt a religion of his or her own choice, as it would be contradictory to Islamic laws and values. The discussion and objections subsequently led to certain countries either making reservations focusing specifically on the child's right to freedom to choose his or her religion, or making interpretative statements on article 14, stating that the article would be interpreted in such a manner that is consistent with Islamic law. Countries that have made reservations to article 14 include Bangladesh, Jordan, Morocco and the Maldives. Countries that have made interpretory statements include Algeria, Iran and Mauretania. Several countries submitted objections to these reservations with reference to their wide scope. An updated list of reservations, objections and withdrawals is available at http://untreaty.un.org/humanrightsconvs/Chapt_IV_11/RightsOfTheChild.pdf. Cf. Chapter 6.3.2 on declarations to article 12.

⁷⁶ Van Bueren *The International Law on the Rights of the Child* p. 16.

⁷⁷ The Convention on the Elimination of All Forms of Discrimination Against Women and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families are also described as treaties with a holistic approach to rights.

2.3.2 Main Perspectives of the Convention

The Convention on the Rights of the Child has four general objectives: participation of children in decision-making, protection against discrimination, the prevention of harm, and the provision of assistance for basic needs. The substantive articles of the Convention can be arranged in groups under these general objectives. An even more simplified description is to view the Convention as being based around the two themes of *protection* and *participation*. These two concepts have sometimes been seen as being on the opposite sides of a dichotomy, a view that could be seen as somewhat limited. A more appropriate interpretation would be that these perspectives balance each other and are interrelated – it is difficult to imagine one concept being satisfactorily fulfilled without the other also being taken into account and given due weight.

The protection perspective is visible in most of the substantive articles.⁷⁸ It is, however, the inclusion of participation rights in a human rights treaty on children that has been considered to be the most radical and progressive. Neither of the two perspectives is to be appreciated as more important or relevant than the other, since their fundamental purpose is the same: to improve the lives and living conditions of children.⁷⁹

The two perspectives can also be arranged into what Anna Singer has called a *needs-oriented* and a *competence-oriented* perspective on how the will of a child can be valued, depending on how his or her capacities as an individual are perceived.⁸⁰ Following Singer's categorisation, the perspective where emphasis is put on protection and care falls within a needs-oriented field. The needs-oriented perspective on children and their wishes sees them primarily as having needs that have to be fulfilled by adults, who must take such needs and wishes into consideration. But it is for the adult to decide whether the views of the child are relevant and are to be considered in relation to any decision finally made on behalf of the child. Children are thus not seen as being capable of making independently important decisions as they neither have the capacity for making rational choices nor are sufficiently mature to do so. It is therefore considered to be unreasonable to ask children to take on such a responsibility. Article 3(1) of the Convention can be seen as an example of this perspective since it states the importance of making the *best interest of the child* a paramount con-

⁷⁸ A few examples: the right to life (article 6), the rights of refugee children (article 22), the right to health (article 24), the right to protection against sexual exploitation (article 34).

⁷⁹ Van Bueren *The International Law on the Rights of the Child* p. 15.

⁸⁰ Singer *Föräldraskap i rättslig belysning* pp. 83-98.

cern in all actions concerning children – not the fulfilment of the child’s wishes. It is thus both the responsibility and the privilege of the adult to make the final decision of what is best for the child in question. However, the best interest principle in article 3(1) is not a straightforward application of a traditional welfare approach to children, but rather a remoulded version of the concept because it means that the best interests of the child, for the first time, have been seen fit to be included in a human rights treaty, creating obligations for states to fulfil.⁸¹

Article 3(1) can be seen as an innovation presented in the Convention, although references, explicitly or not, to the child’s best interests have been included earlier in some form or another in international documents such as the previously mentioned Declarations on the Rights of the Child, as well as being common in prior domestic legislation.⁸² During the drafting process, the concepts of respect for the views of the child and the best interests of the child were discussed simultaneously. Initially, what would become articles 12 (respect for the views of the child) and 3 (the best interests of the child) were put in the same draft article 7.⁸³ This points to the interconnectedness between the two perspectives, which is important to bear in mind when interpreting and implementing the Convention.

The best interests of the child is also one of two new principles of interpretation in international law, reshaping the traditional welfare approach to children by relating to them not only as objects of protection and recipients of help, but as rights-holders. Certainly, article 3(1) does not refer to “rights” but to “interests” which are not the same thing: “interests” are a broader concept. However, “interests” arguably could be considered to be a precondition of rights. The important point is that article 3(1) in itself does not create rights or duties, but is applicable to all of the rights protected by the Convention on the Rights of the Child and also reaches *beyond* it. The principle embraces *all* actions concerning children, whatever they may be. No particular definition of what “the best interests of the child” actually means has been supported by the drafters of the Convention or by, for example, academics. Neither has the Convention’s monitoring body, the Committee on the Rights of the Child, provided any authoritative interpretation of

⁸¹ Cf., e.g. Philip Alston (ed.) *The best interests of the child: reconciling culture and human rights* Oxford, Clarendon Press, 1994, Van Bueren *The International Law on the rights of the Child* pp. 45-50, Joachim Wolf “The Concept of the Best Interest in Terms of the UN Convention on the Rights of the Child” pp. 125-135 in Michael Freeman & Philip Veerman (eds.) *The Ideologies of Children’s Rights*, Dordrecht; London, Martinus Nijhoff, 1992.

⁸² Specific references to the best interests of the child are also found in other articles of the Convention: articles 9, 18, 20, 21, 37 and 40.

⁸³ E/CN.4/L.1575 para.19-21, 27-32 and 73-81.

the concept. It should, however, be pointed out that the Committee initially did not have the same mandate as, for example, the Human Rights Committee, to issue General Comments – which can be a part of the explanation.⁸⁴ The Committee’s first General Comment (on the right to education) was not issued until after the Convention had been in force for more than a decade – in 2001 – and at the time of writing, only eight general comments have been presented.⁸⁵ There seems to be consensus on the notion that it is more meaningful to accept that cultural or other circumstances will, and should, have an impact on what is best for the child in its particular context, as long as the outcome is compatible with the values of the Convention.⁸⁶

For the competence-oriented perspective on the other hand, the starting point is that the child has capacities equal to those of an adult to express wishes and to influence matters of individual importance. The obligations of the first paragraph of article 12, to respect the views of the child and give them due weight – in relation to the child’s age and maturity – is a most prominent example of this perspective. As

⁸⁴ The mandates are stated in the International Covenant on Civil and Political Rights, articles 40(4) and 40(5) and the Convention on the Rights of the Child, article 45(d) respectively.

⁸⁵ 2001 General Comment 1 “The aims of education” (CRC/GC/2001/1), 2002 General Comment 2 “The role of independent human rights institutions” (CRC/GC/2002/2), 2003 General Comment 3 “HIV/AIDS and the rights of the child” (CRC/GC/2003/3), 2003 General Comment 4 “Adolescent Health” (CRC/GC/2003/4), 2003 General Comment 5 “General measures of implementation for the Convention on the Rights of the Child” (CRC/GC/2003/5), 2005 General Comment “Treatment of unaccompanied and separated children outside their country of origin” (CRC/GC/2005/6), 2005 General Comment “Implementing child rights in early childhood” (CRC/C/GC/7) and General Comment 8 (2006) “The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (articles 19, 28(2) and 37, *inter alia*)” (CRC/C/GC/8).

⁸⁶ The literature in which the best interest principle is discussed is very comprehensive. A few examples of the rich literature on the best interests principle are Philip Alston, Stephen Parker & John Seymour (eds.) *Children, Rights and the Law* Oxford, Clarendon Press, 1992, Alston (ed.) *The best interests of the child: reconciling culture and human rights*, Detrick *A Commentary on the United Nations Convention on the Rights of the Child* pp. 85-94, Gillian Douglas & Leslie Sebba *Children’s Rights and Traditional Values* Aldershot, Ashgate, 1998, Michael D. A. Freeman & Philip Veerman (eds.) *The Ideologies of Children’s Rights* Dordrecht, Martinus Nijhoff, 1992, Savitri Goonesekere “The Best Interests of the Child: A South Asian Perspective” *International Journal of Law, Policy and the Family* 8(1), 1994, pp. 117-149, Rachel Hodkin & Peter Newell *UNICEF Implementation Handbook for the Convention on the Rights of the Child* 2nd ed. UNICEF 2002 pp. 39-53, Laura M. Purdy *In Their Best Interest?* Ithaca, NY, Cornell University Press, 1992, Johanna Schiratzki *Barnets bästa i ett mångkulturellt Sverige – en rättsvetenskaplig undersökning* 2 ed. Uppsala, Iustus, 2005, Singer *Föräldraskap i rättslig belysning*, Van Bueren *The International Law on the Rights of the Child*, Eugen Verhellen (ed.) *Understanding Children’s Rights: collected papers presented at the fourth International Interdisciplinary Course on Children’s Rights held at the University of Ghent, December 1999*, Ghent, Children’s Rights Centre, 1999.

article 12 will be analysed thoroughly in the following chapters, it will not at this point be discussed further.

2.3.3 Principles of Interpretation

The two themes of protection and participation, both of which demands the Convention attempts to satisfy, also form the basis of the four core articles containing general principles underpinning the Convention.⁸⁷ The articles - the prohibition of discrimination (article 2), the best interest of the child (article 3), the right to life and development (article 6) and the right to be heard (article 12) – together form the backdrop against which all actions of the state parties are to be measured. The Convention furthermore presents two key principles essential to its interpretation. These are *the best interest of the child* as stated in article 3(1) – which doubles as a core article of the Convention – and *the evolving capacities of the child* as incorporated in article 5, the approach of the Convention being that “as the child progresses from infant to late adolescence, different classes of rights assume greater significance”.⁸⁸ The concept of “evolving capacities” is an acknowledgement that children’s successive development on every level towards independent adulthood must be respected and promoted throughout. It also recognises that the concept of “childhood” differs considerably from culture to culture in different parts of the world. It is linked, for example, to the provision in article 12 stating that the views of the child should be given due weight according to age and maturity and to article 14(2) which refers to the child’s right to freedom of thought, conscience and religion “in a manner consistent with its evolving capacities”. The principle acknowledges the responsibilities and duties of parents to provide their children with appropriate guidance and direction. Thus, the principle does not challenge the authority of parents. This was an important achievement for the drafters, since the Convention’s view of the child as an active subject of rights had been seen as being “anti-family” and pitting children against their parents. But it is made clear that the exercise of parental authority should be performed in a spirit of dialogue and partnership – that communica-

⁸⁷ The Committee on the Rights of the Child has identified these articles as the Convention’s general principles. *General guidelines regarding the form and content of initial reports* (CRC/C/5), *General Guidelines for periodic reports* (CRC/C/58), *Overview of the reporting procedures* (CRC/C/33).

⁸⁸ Deidre Fottrell *Revisiting children's rights: 10 years of the UN Convention on the Rights of the Child* The Hague; Boston, Kluwer Law, 2000 p. 4. On the evolving capacities of the child and its significance in relation to article 12, see Chapters 4 and 5 *infra*.

tion and mutual respect between parent and child is the key.⁸⁹ Geraldine Van Bueren calls the two principles “umbrella principles underlining the exercise of all the rights in the Convention” asserting that:

it is only by considering the two principles of interpretation together that the best interest standard becomes an instrument of progress for children’s rights.⁹⁰

The principles are intertwined and their mutual dependency as regards application are a good example of the holistic perspective, as advocated by the Committee on the Rights of the Child, that should be borne in mind when analysing, interpreting and realising the Convention.⁹¹

2.4 Implementing the Convention

2.4.1 Status of the Convention in Domestic Law

As mentioned in the previous section, the Committee on the Rights of the Child, in its General Comment on implementation, stated that it is of particular importance “to clarify the extent of applicability of the Convention in States where the principle of self-execution applies”.⁹² The term “self-executing” may be used to describe a provision that does not require incorporation to have internal effect.⁹³ It is also a way of describing the nature of the articles themselves.⁹⁴ A self-executing treaty provision can be invoked by an individual in a municipal court, providing that individual with additional protection. This is because it allows for a person to obtain rights validated by a norm established at international level. A self-executing provision can also be applied by a

⁸⁹ See, for example, Hodkin & Newell *UNICEF Implementation Handbook* pp. 85-92, Marta Santos Pais “The Convention on the Rights of the Child” in *The Manual on Human Rights Reporting* Geneva, United Nations, 1997, pp.393-504 (446), Van Bueren *The International Law on the Rights of the Child* pp. 49-51 with references.

⁹⁰ Van Bueren *The International Law on the Rights of the Child* p. 51.

⁹¹ Statement by Ms. Karp at the session discussing Cuba’s 1997 initial report CRC/C/SR.374 para. 41.

⁹² Committee on the Rights of the Child General Comment 5 General measures of implementation for the Convention on the Rights of the Child, CRC/GC/2003/5 para. 19. As a comparison, see the Human Rights Committee General Comment No. 3 on implementation at the national level (29/7/81). See, also, e.g. Benedetto Conforti “National courts and the international law of human rights” pp. 3-14 in Benedetto Conforti & Francesco Francioni (eds.) *Enforcing International Human Rights in Domestic Courts* The Hague & London, Martinus Nijhoff, 1997.

⁹³ Brownlie *Principles of Public International Law* p. 48.

⁹⁴ *Ibid.*

magistrate in an individual case without reference to domestic law being necessary.⁹⁵

In the end, it is the judge in each individual case that makes the final decision on whether or not a treaty provision is self-executing. The judge decides if a case can be solved directly on the basis of an international treaty, or whether other solutions are better suited. The conclusion depends upon the legal tradition of the particular state party and the clarity and comprehensibility of both the treaty and the provision in question. The complex nature of the Convention, with its emphasis on the interdependence of different rights, makes it complicated to determine which, if any, of its provisions are self-executing. The *travaux préparatoires* of the Convention do not provide much guidance.

When interpreting the Convention, it is thus essential to consider the object and context of the treaty and pay due attention to the principle of effectiveness. As emphasised above, the self-executing character of a treaty depends upon the particular legal system where it is to be applied, and also on the material rights involved. Some rights also require more action to be taken by national authorities than others.

Eugen Verhellen has suggested that at least part of the Convention could be of a self-executing character, arguing that it contains a number of provisions that obviously are legally binding and that could therefore be invoked in court in countries that have recognised the direct effect of the Convention.⁹⁶ The wording of these particular articles employs expressions such as “recognise”, “respect” and “ensure” – language that demands and requires a state party to act in a certain way. These provisions, according to Verhellen, all fall into the category of “first-generation rights” – that is, civil and political rights. According to this theory article 12, which states that the state parties shall assure that the child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child, and for those views to be taken into account, could thus be argued to be a provision that qualifies as being self-executing. Such an interpretation of article 12 has, however, not been recognised by any domestic court and has as yet not been discussed by the Committee on the Rights of the Child.⁹⁷ If such an interpretation were to be acknowledged by a domestic court, the imaginable consequences would be far-reaching – it would mean that if children’s views were not taken into account in a particular case, the decisions made could be questioned

⁹⁵ *Ibid.* Eugen Verhellen *Convention on the rights of the child. Background, motivation, strategies, main themes* 3rd ed. Leuven/Apeldoorn, Garant, 2000 pp. 84-86.

⁹⁶ Verhellen *Convention on the rights of the child. Background, motivation, strategies, main themes* pp.84-86.

⁹⁷ On the future drafting of a General Comment on article 12, see Chapter 8.

and, consequently, also revoked on the basis of the demands of article 12 not being properly fulfilled. Such consequences might be one reason why this interpretation of the article has not been acknowledged – it would seriously challenge the power structures between adults and children.

Other provisions are not worded in such commanding language, and speak more of “promoting”, “encouraging” and “striving for” – that is, intentions, although some binding declarations are made in these provisions as well. The latter provisions are classified by Verhellen as being mainly economic, social and cultural rights.⁹⁸ The differences as regards plausibility of implementation are also shown in this aspect.

In the adjusting and rewriting of provisions contained in an international treaty so that they blend into a domestic legal system there lies a danger of changing or misinterpreting the original meaning and intentions of those provisions. This is precisely what the monitoring bodies of a treaty wish to avoid when emphasising the importance of incorporating the treaty itself into a domestic legal system. The most effective starting point for the Convention to be realistically implemented on a national level, giving real value to its principles and provisions, is therefore its incorporation in domestic legislation. The Committee on the Rights of the Child has accordingly welcomed all steps taken by state parties towards this goal.⁹⁹ From a Convention point of view, the easier it is to implement and apply its articles on a domestic level the better, as it leaves less room for misinterpretation and, additionally, increases the status of the Convention in relation to national legislation. On the other hand, many of its articles are vaguely formulated and therefore rather difficult to use directly in court, which might result in the Convention being seen as rather a toothless instrument at this level. This latter argument has been presented as one of the reasons to why Sweden, so far, has decided not to give the Convention status as Swedish law.¹⁰⁰ As a comparison it can be noted that Norway (as stated above) has made the Convention a part of its domestic legislation. The same apprehensions as in Sweden were presented in the Norwegian debate but, finally, the interest of the implementation of the

⁹⁸ Verhellen *Convention on the rights of the child. Background, motivation, strategies, main themes* pp. 84-87.

⁹⁹ The Committee on the Rights of the Child in its concluding observations to the state party reports makes a point of complementing states that have incorporated the Convention into their domestic legislation.

¹⁰⁰ SOU 1997:116 *Barnets bästa i främsta rummet. FN:s konvention om barnets rättigheter föreverkligas i Sverige* pp. 112-115.

Convention's articles was considered important enough to counteract such arguments.¹⁰¹

2.4.2 Measures of Implementation: Article 4

The Convention on the Rights of the Child is regarded as an innovative international human rights instrument. One reason for this is the emphasis that is put on the child as a rights holder, not merely an object of protection with no right or possibility of exercising influence over his or her own life. Some of the Convention's articles have been considered radical – for example article 12 – and thereby perhaps more difficult to implement, not least in societies where a traditional view of the child and children's rights prevails. These possible difficulties, however, do not seem to have been subject to any serious debate during the drafting process even though, for example, the inclusion of the right to participation is considered to be one of the most radical and progressive innovations of the Convention as a whole. The drafters of the Convention do not seem to have paid any particular attention to the possibilities of a gap existing between the objectives of the Convention and how they can actually be implemented in practice.

Another difficulty with certain of the articles of the Convention is that they are formulated in a manner that provides for different interpretations of what the right described actually consists of and thus what obligation a state has to fulfil. The mechanisms guiding the implementation – and monitoring, which is discussed in a subsequent section – of the treaty should therefore be designed to provide clear guidelines on how implementation is to be achieved. Whether this is the case in the Convention on the Rights of the Child is open to discussion. Another interpretation might be that the guidelines do exist but that the problem instead lies in making state parties do more than paying them lip service.

When ratifying a treaty, a state enters into an agreement with the other contracting parties and accepts the obligation to implement the treaty.¹⁰² A state that is party to a treaty is obliged to interpret¹⁰³ the treaty it has ratified in good faith and in the light of its object and purpose and not submit reservations¹⁰⁴ to the treaty incompatible with its

¹⁰¹ Ot.prp. (2002-2003) nr. 45 Om lov om endring i menneskerettsloven mv. (innarbeiding av barnekonvensjonen i norsk lov), Chapter 4.

¹⁰² The principle of *pacta sunt servanda* is thus as applicable to these kinds of agreement as to any other kind. See article 26 of the 1969 Vienna Convention on the Law of Treaties (VCLT).

¹⁰³ Article 31(1) of the VCLT. See, also, the following paragraphs of article 31 as well as articles 32 and 33 on interpretation

¹⁰⁴ Article 51(2) of the CRC, see also article 19(3) of the VCLT.

object and purpose. In the Convention on the Rights of the Child, the framework for the implementation of the treaty is set forth in article 4:

State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, State Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 4 is of fundamental importance for the Convention because together with articles 42¹⁰⁵ (the obligation to make the content of the Convention widely known) and 44(6)¹⁰⁶ (the obligation to make state party reports widely available within the state) it describes the general legal obligations of state parties regarding implementation. The Committee on the Rights of the Child, in its Reporting Guidelines for Periodic Reports,¹⁰⁷ has arranged the provisions of the Convention in clusters, grouping these rights together as “general measures of implementation”, to which the Committee pays particular attention.¹⁰⁸ These general measures of implementation are intended to promote all children’s enjoyment of all rights of the Convention, through legislation, the establishment of coordinating and monitoring bodies on several levels of society, data collection, awareness-raising and training as well as development of suitable policies, services and programmes.¹⁰⁹ In addition to the abovementioned articles, articles 2 and 3(2) also establish general obligations of implementation.¹¹⁰

As pointed out earlier, the Convention makes no distinction between different rights as regards their status.¹¹¹ Neither the Convention itself nor the Committee on the Rights of the Child defines which of the articles include civil or political rights and which include economic, social or cultural rights. However, due to the holistic nature of the Convention, most of its articles include an element that amounts to either civil or political rights. To underline the mutual dependency of rights, the Committee on the Rights of the Child in its General Comment on implementation emphasises that the “enjoyment of economic, social and cultural rights is inextricably intertwined with enjoyment of civil and political rights”¹¹² and that “there is no simple or authoritative

¹⁰⁵ See Chapter 2.5 *infra*.

¹⁰⁶ *Ibid.*

¹⁰⁷ CRC/C/58.

¹⁰⁸ General Comment 5 CRC/C/GC/2003/5, para. 2.

¹⁰⁹ *Ibid.*, 5 para. 9.

¹¹⁰ *Ibid.*, 5 para. 3-4. See also Hodkin & Newell *UNICEF Implementation Handbook* p. 53.

¹¹¹ *Ibid.*, para. 6. See also n. 13 *supra* on the CEDAW and the MWC.

¹¹² General Comment 5 CRC/C/GC/2003/5 para. 6.

division of human rights in general or of Convention rights into the two categories”.¹¹³

The distinction that *is* made, however, lies not in terms of value but in conditions for implementation. The wording of article 4 is the result of a compromise seeking to accommodate the different demands of different kinds of rights, without assigning them different worth. During the drafting process, developing countries in particular argued that the fulfilment of economic, social and cultural rights should be made conditional upon the availability of resources, since they feared that their efforts to fulfil the rights of the Convention otherwise might not be properly appreciated, and that unrealistic demands on them would be made.

Which “norm of implementation” applicable to which article can be somewhat difficult to determine, as some of the articles in the Convention can be argued to contain elements of both “sets” of rights – the right to education in articles 28 and 29 and protection for refugee children in article 22 are two examples. Yet another example is article 19, with its right to protection from all sorts of violence, injury or abuse and the establishment of social programmes for the necessary support of the child and those caring for the child. Articles similar to article 4 are to be found in article 2 of the International Covenant on Civil and Political Rights¹¹⁴ (ICCPR), and in article 2 of the International Covenant on Economic, Social and Cultural Rights¹¹⁵ (ICESCR). Both establish the overall measures of implementation to be observed in their respective treaties and most likely the drafting of article 4 was inspired by both.¹¹⁶ The articles are, however, worded somewhat differently. Article 2 of the ICCPR does not contain any references to circumstances that can justify exceptions to a state party’s obligation to give immediate effect to the rights established by the Covenant.¹¹⁷ Article 2

¹¹³ *Ibid.*

¹¹⁴ The International Covenant on Civil and Political Rights (ICCPR) was adopted and opened for signature, ratification and accession by GA Res. 2200A (XXI) of 16 December 1966, 999 UNTS 171. The ICCPR entered into force 23 March 1976.

¹¹⁵ The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted and opened for signature, ratification and accession by GA Res. 2200A (XXI) of 16 December 1966, 993 UNTS 3. The ICESCR entered into force 3 January 1976.

¹¹⁶ See United Nations Centre for Human Rights & Save the Children Sweden *Legislative History of the Convention on the Rights of the Child (1978-1989) Article 4 (Implementation of Rights)* HR/1995/Ser.1/article 4.

¹¹⁷ Article 2 of the ICCPR: 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provi-

of the ICESCR on the other hand allows for and approves of the progressive realisation of the Covenant's articles and contains a reference to "available resources".¹¹⁸ In General Comment 3 of the Committee on Economic, Social and Cultural Rights, the concept of "progressive realisation" is described as recognising that the instant realisation of certain rights might not be possible for economic reasons and that, therefore, it can be done successively.¹¹⁹ This argument thus reoccurs in the discussion on the wording of article 4 of the Convention on the Rights of the Child.

It can, however, be argued that the concept of available resources is also relevant in relation to civil and political rights, even though according to article 4 it cannot be used as an excuse for not implementing civil and political rights as soon as possible. Very few rights, be they about the state having an obligation to refrain from certain actions or a positive obligation to actually do something, are possible to realise without incurring costs. The right, for example, to a fair trial for young offenders – article 40 in the Convention – requires adequate training for judges and lawyers. To realise the right of respect for one's views and how these views are listened to – article 12 – for children of an ethnic minority might imply the employment of interpreters. In general, proper implementation of article 12 is likely to require resources

sions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. 3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

¹¹⁸ Article 2 of the ICESCR: 1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

¹¹⁹ Committee on Economic, Social and Cultural Rights General Comment 3 *The nature of State parties' obligations (article 2(1), of the Covenant*. See, also, the Committee on Economic, Social and Cultural Rights General Comment 9 *The domestic application of the Covenant* and the Human Rights Committee General Comment No.3 *Implementation at the national level (art.2)*.

for the education of, for example, lawyers, social workers, teachers, medical staff, the police force, judges and many other categories in what it means to have respect for the views of the child and to take those views into account. There are many more examples of when the availability of resources are an important prerequisite for the implementation in practice of civil and political rights as well, thereby once again showing the holistic nature of the Convention and the limiting approach of dividing up rights into various categories with different preconditions.

A state that has ratified the Convention is under an obligation to ensure that its domestic legislation is compatible with it.¹²⁰ The *legislative* measures required according to article 4 are perhaps the first to be taken by states when becoming party to the Convention. In General Comment 5 on implementation, the Committee on the Rights of the Child emphasises that it

believes a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention is an obligation. Its [the Committee's] experience in examining not only initial but now second and third periodic reports under the Convention suggests that the review process at the national level has, in most cases, been started, but needs to be more rigorous. The review needs to consider the Convention not only article by article, but also

¹²⁰ See Jutta Gras *Monitoring the Convention on the Rights of the Child* Helsinki, Publications of the Faculty of Law, University of Helsinki, 2001 p. 11. As regards Sweden, the general attitude was that there was no need for any fundamental changes in Swedish legislation for it to be compatible with the provisions of the CRC. Sweden ratified the Convention on the Rights of the Child in 1990. The ratification was not, according to the *travaux préparatoires*, made conditional to any changes in the Swedish legislation as the objectives of the Convention were considered to be already fully accommodated. Prop. 1989/90:107 *om godkännande av FN-konventionen om barnets rättigheter*. The only exception was article 37(c) on the right of children being deprived of liberty to be separated from adults unless it is in the best interest of the child not to do so, where Sweden had to acknowledge that its legislation in fact was not in conformity with the Convention. However, the Swedish Riksdag when discussing the ratification of the Convention on the Rights of the Child concluded that "[...] allowance must be made for the purpose of the article which, in the Riksdag's view, is above all that very young persons incurring custodial sentences are not to be placed together with older and more hardened criminals. This purpose, in the Riksdag's opinion, is unquestionably provided for in Sweden's case, and so *no impediment* [author's italics] has been found to ratifying the Convention on this point as well. The Riksdag has, however, stated that further assessment should take place in order to ascertain the full extent of the Convention's stipulations on this point. Should an analysis reveal any deficiency of Swedish law or practice in this field, then, according to the Riksdag, a suitable amendment should, of course, be contemplated." Sweden's 1992 report to the Committee on the Rights of the Child, CRC/C/3/Add.1, para. 230. This might seem a somewhat surprising conclusion in the light of the critique the Committee on the Rights of the Child has presented on several issues in its comments to the Swedish reports. See Concluding Observations CRC/C/15/Add.2, CRC/C/15/Add.101 and CRC/C/15/Add.248.

holistically, recognizing the interdependence and indivisibility of human rights. The review needs to be continuous rather than one-off, reviewing proposed as well as existing legislation.¹²¹

On the basis of a thorough review of domestic legislation, there might be a need to adopt new laws or codes or to revise already existing legislation. The Committee has said that

in the context of the Convention, States must see their role as fulfilling clear legal obligations to each and every child. Implementation of the human rights of children must not be seen as a charitable process, bestowing favours on children.¹²²

A 2004 UNICEF study, reviewing the implementation of the Convention in sixty-two state parties, showed that in different ways it had been included in the national legal framework of most of these countries.¹²³ The Committee on the Rights of the Child constantly encourages states, both in its concluding observations to state reports and in its General Comment on implementation, to make the Convention a part of domestic legislation, thereby making it possible to invoke it directly before municipal courts and for its application by national authorities.¹²⁴ It has also recommended that the Convention should prevail where there is a conflict with domestic legislation or common practice.¹²⁵ Norway is one state party that has taken the Committee's recommendations to heart. In 2003, the Convention on the Rights of the Child became part of Norwegian law through an amendment to the Norwegian Human Rights Act, which also accords the ICCPR, the ICESCR and the ECHR, the status of Norwegian law.¹²⁶ According to the Act, these conventions take precedence over any other legislative

¹²¹ General Comment 5 CRC/C/GC/2003/5 para. 18, see also para. 1. In general, it is not incumbent upon a state to implement all necessary changes before becoming party to a treaty, but the state concerned does have an obligation to comply with treaty provisions within a reasonable time after ratifying or gaining accession to a treaty. In the case of the Convention on the Rights of the Child, a period of two years, after the entering into force of the Convention for the state party concerned, is generally regarded as being the maximum time within which it is reasonable for compliance with the treaty. This is because the state party concerned is required to present an initial report within that period on implementation to the Committee on the Rights of the Child. Van Bueren *The International Law on the Rights of the Child* p. 380. See, also, article 44 (1) CRC.

¹²² General Comment 5 CRC/C/GC/2003/5, para. 11.

¹²³ Summary Report *Study on the Impact of the Implementation of the Convention on the Rights of the Child* Innocenti Publications UNICEF 2004, p. 3.

¹²⁴ General Comment 5 CRC/C/GC/2003/5, para. 20 which refers to the Vienna Convention on the Law of Treaties, article 27.

¹²⁵ General Comment 5 CRC/C/GC/2003/5, para. 20.

¹²⁶ Menneskerettsloven 1999 (LOV-1999-05-21-30), article 2.

provisions that might conflict with them.¹²⁷ The Committee has commended state parties that have incorporated special provisions for the protection of children's rights within their constitutions, since these provisions consolidate the status of the rights of the child and can promote their practical implementation. Examples of countries where children's rights are particularly mentioned in the Constitution are South Africa,¹²⁸ India¹²⁹ and Romania.¹³⁰ Even if the main focus of these articles lies on the protection perspective, they still reflect a perception of the child as being a rights-holder and not merely as a passive object. Recently drafted constitutions are more likely to include references to children than older ones, which could be interpreted as a result of the increased interest and awareness of children's rights following the adoption of the Convention. New provisions on the rights of the child have also been added to more "mature" constitutions through amendments.¹³¹ However, even though the revision of existing legislation and the adoption of new laws and constitutions presenting a child rights perspective is a very positive development, the truly important question is whether these legislative measures have any kind of impact in practice on the lives of children. If not, the measures taken lose much of their point.

The reference to "administrative and other measures" in article 4 does not imply that the Committee on the Rights of the Child can prescribe in detail for each and every state party how to implement the Convention most effectively. The Committee, however, has identified certain advice for states, which is elaborated upon in the General Comment on general measures of implementation.¹³² Initially, the Committee emphasised that it

believes that effective implementation of the Convention requires visible cross-sectoral coordination to recognize and realize children's rights across Government, between different levels of government and between Government and civil society – including in particular children and young people themselves.¹³³

¹²⁷ Menneskerettsloven, article 3.

¹²⁸ Article 28 of the Constitution of the Republic of South Africa, assented to in 1996, date of commencement 4 February 1997.

¹²⁹ Articles 15, 21(a), 24, 28 and 45 of the Constitution of India (adopted in 1949) all contain references to children. Indian legislation referring to children is examined in Chapter 7.

¹³⁰ Article 45 of the Constitution of Romania, adopted in 1991.

¹³¹ Summary Report *Study on the Impact of the Implementation of the Convention on the Rights of the Child* UNICEF 2004 study, p. 3.

¹³² Committee on the Rights of the Child General Comment 5 CRC/C/GC/2003/5, para. 26-73.

¹³³ *Ibid.*, para. 27.

Examples of key measures to be taken include developing a comprehensive national strategy rooted in the Convention, implementing cross-sectoral coordination to recognise and realise children's rights across government on different levels and between government and civil society, data collection, training and capacity building and most important – making the Convention known to adults and children. These are the kind of measures that are required to initiate attitude changes, not only on a state level but on all levels of society. The Committee emphasised that rigorous monitoring of the implementation of the Convention was required, and that it should be built into the process of government at all levels and should also include independent monitoring by national human rights institutions, NGOs and others.¹³⁴

2.5 Monitoring the Implementation of the Convention

The mechanisms of implementation and monitoring of a human rights treaty are the watchdogs of the treaty – without them being effective the text is nothing more than a paper tiger. It is in the context of implementation on the domestic level that the most serious problems of a treaty occur. Implementation in practice of rights to which many state parties are not completely dedicated, of treaty articles that are the result of compromises, will indefinitely lead to unsatisfactory results. The gap between the law and the practice is often vast. There are a multitude of aspects to consider, not least social and cultural differences must be taken into account. The importance of effective implementation on the domestic level and careful monitoring of how the state parties to the Convention actually fulfil their obligations according to the treaty cannot be over emphasised.

Monitoring is a concept which in some aspects is indistinguishable from implementation, depending upon what it is intended to contain. It can be a function of both social planning – monitoring as a measurement and evaluation of what has been achieved up until a certain time – or take on a watch-dog function, which means warning or even policing. In the latter context, information is gathered concerning whether the rights established in a certain treaty are being respected, and whether or not an acceptable standard is attained, with the responsible agent answering for any failures. This latter interpretation of what monitoring should signify corresponds with the purpose of the moni-

¹³⁴ *Ibid.*

toring body of the Convention – the Committee on the Rights of the Child.¹³⁵ Another desired effect of monitoring is that it will contribute to the improvement of the position of the child in general, and create discussion not only concerning legal matters but on social issues as well.

There are different approaches on how the Convention can be applied most effectively. These involve its use as a political, promotional and/or advocacy tool, or as an aid in policy planning and programming as well as being an instrument for legal action. Such multiple use is in itself not a problem, either for the Convention or for any other human rights instrument. The risk, however, lies in the different approaches becoming confused and with some aspects of the Convention being more promoted than others. Some concern has been expressed about the potential power of the Convention as a judicial tool entailing binding commitments on state parties with the risk of being neglected in favour of the political and social mobilisation aspects.¹³⁶ One reason for this presumed neglect is scepticism regarding the efficacy of enforcing human rights commitments on an international level. There is also concern on national and municipal levels about the limits of legal intervention on delicate issues such as the family and its relationship to society.¹³⁷ When emphasising the use of the Convention as a legal tool, it is important to note that the Committee on the Rights of the Child does not involve itself in the details of national monitoring. Its task is to “monitor the monitoring” – that is, to monitor the measures taken by the various state parties in order to achieve effective implementation of the Convention’s provisions. An international treaty monitoring body does not seek to determine and interfere with every aspect of a state party’s implementation of the treaty; it aims more at results than conformity in procedures.

The rules of monitoring are established in articles 42-45 of the Convention. When drafting the Convention, the intention was not to develop a reprimanding control system, but a monitoring system based “on the idea of mutual help, support and co-operation”.¹³⁸ It should be noted that the obligation to inform, as established in article 42, is an important aspect of the Convention’s monitoring system. According to article 42, state parties are obliged to make the principles and provisions of the Convention widely known, by appropriate and active

¹³⁵ See articles 43 and 44 of the Convention.

¹³⁶ James R. Himes “Monitoring Children’s Rights: Cutting Through the Confusion and Planning for Effective Action” pp. 113-129 (119) in Eugen Verhellen (ed.) *Monitoring Children’s Rights* The Hague, Martinus Nijhoff, 1996.

¹³⁷ See Chapter 4.3 *infra*.

¹³⁸ J. Vande Lanotte & G. Goedertier “Monitoring Human Rights. Formal and Procedural Aspects” pp. 73-113 in Verhellen (ed.) *Monitoring Children’s Rights*.

means, to adults and children alike. This is important as the exercise of rights by children themselves presupposes knowledge of their rights.

Article 43 establishes the structure of the Committee on the Rights of the Child and how its functions should be carried out. The functions to be performed by the Committee are outlined in articles 44 and 45. Article 44 sets the norm for the reporting procedure. According to article 44, state parties are to report regularly on the measures they have adopted to give effect to the rights recognised in the Convention and on the progress made on the enjoyment of those rights. The report system is intended to be a continuing reaffirmation of the commitment of the state parties to respect and ensure the observance of the rights set out in the Convention as well as providing the possibility of conducting a review of various measures taken to harmonise national law and policy with it.¹³⁹ The initial report must be submitted within two years of the coming into effect of the Convention for the state party concerned, and thereafter every five years. The Committee may request further information from state parties relevant for the implementation of the Convention. The Committee in its turn must submit reports every two years to the UN General Assembly on its work, thus updating the organisation and its members on the progress of the Committee's work.¹⁴⁰

The reports under article 44 must indicate any factors and difficulties affecting the degree of fulfilment of obligations under the Convention and should render sufficient information to provide the Committee with "a comprehensive understanding of the implementation of the Convention in the country concerned".¹⁴¹ In order to further specify the requirements of the particular reports, the Committee has drawn up general guidelines for state parties on what their reports should contain.¹⁴² There is, however, always a risk of country reports tending to focus on legislative, judicial and administrative measures taken at the expense of social and economic data. This means that such a report would not provide a complete picture of the situation of the country in question – a problem the Committee is well aware of.¹⁴³

¹³⁹ Mower *The Convention on the Rights of the Child* p. 101.

¹⁴⁰ See article 44(5).

¹⁴¹ Article 44(2).

¹⁴² See n. 87 *supra*. As the Guidelines are to be applicable to all state parties they are not very detailed, but allow for a liberty of choice of information submitted. This liberty, however, is circumscribed by the requested structure of the reports. The structure requires that information is submitted under eight headings: general measures of implementation, definition of the child, general principles, civil rights/reforms, family environment/alternative care, basic health and welfare, education/leisure/cultural activities and, finally, special protection measures for vulnerable children. The information requested is meant to give as full coverage as possible on the measures of implementation adopted in a state party.

¹⁴³ See the discussion on state party reports in Chapter 6.

When the Committee on the Rights of the Child examines a state party report, the procedure is as follows. First, a pre-sessional Working Group identifies important issues in the report and gathers additional information from the state party itself, or other agencies, in order to facilitate the review work of the Committee. The report is then discussed by the Committee in an open, public meeting in the presence of representatives from the state party in question and from non-governmental organisations. The aim is to establish a constructive dialogue on the information presented in the report. After this open discussion, the Committee then prepares its Concluding Observations based upon all accessible information. In these observations, the Committee comments on what it considers to be the “principal objects of concern”. These observations are intended to stimulate actions to bring about improvements in the country concerned, and are an essential part of the Committee’s work. Another aspect of the obligation to inform is found in article 44(6), according to which state parties are to make their reports to the Committee widely available to the public in order to further promote public awareness and respect for the rights of the child.

Article 45 sets out the framework for how international co-operation is to contribute to the effective implementation of the Convention. The pronounced role of non-governmental organisations in the monitoring of the Convention is, so far, unique to it. Their strong position is the result of their involvement at the time of the Convention’s drafting. This involvement was co-ordinated by the NGO Ad Hoc Group that was formed in order to express the concerns of the various organisations.¹⁴⁴ This co-operation enabled NGOs to exert considerable influence on the shaping of the final text of the Convention.

¹⁴⁴ The Ad Hoc Group was intended to dissolve once the Convention was adopted, but due to the wording of article 45 on the participation of “other competent bodies” it was decided that the Group was to be made permanent. The NGO Group for the Convention on the Rights of the Child has become a network with consultative status with the ECOSOC (in accordance with article 71 of the UN Charter), and its overarching concern is to facilitate the implementation of the Convention. This is to be done, for example, by raising the awareness of the CRC and making its implications known, being a source of information to the Committee on the Rights of the Child, other UN bodies and NGOs and by contributing to the creation of recommendations and strategies in the work of its sub-groups: in short, contributing to the setting of standards on children’s rights. Co-operation helps avoid overlapping work and is intended to influence changes where the organisations consider them needed, in that way achieving stronger social and political impact. It is also a major goal for the NGO Group to maintain a dialogue with the Committee to promote the two-way flow of information between the monitoring body of the CRC and the non-governmental community. On the role of NGOs in monitoring and implementing the Convention, see, for example, Luisa Maria Aguilar “The Role of the NGOs in Monitoring Children’s Rights” pp. 503-509 in Verhellen *Understanding Children’s Rights*, Laura Theytaz Bergman “NGO Group for the Convention on the Rights of the Child” pp. 537-541 in the same volume.

The possibility existing for NGOs to submit information to the Committee on the Rights of the Child has resulted in a number of so-called “shadow reports” that have made a valuable contribution to the Committee’s work.

2.6 Children’s Participation Rights in Universal and Regional Human Rights Instruments

2.6.1 “All Human Beings” – But Not Quite

The Convention on the Rights of the Child is so far, undoubtedly, the most important human rights treaty for children. Children’s rights are, however, protected in a number of other global and regional human rights treaties, both through being explicitly referred to and because the applicability of the treaties is not connected to the attainment of a certain age. The whole point of human rights treaties is, after all, that they apply to *all* human beings within the jurisdiction of the contracting state parties unless otherwise clearly specified, as is the case with the Convention on the Elimination of All Forms of Discrimination Against Women. The following section gives a short survey of international human rights instruments in some manner addressing children’s rights in order to provide an image of how children and their rights, the child as a rights holder with a right to participation in particular, are treated in these instruments and whether the interpretation of these treaties has been influenced by the Convention on the Rights of the Child. Children’s rights are, however, not only a matter for the treaty monitoring bodies within the human rights treaty system. It could, for example, be mentioned that the first warrants unsealed by the Prosecutor of the International Criminal Court were against five commanders of the Ugandan Lord’s Resistance Army, who were accused of – among other crimes – child conscription.¹⁴⁵

2.6.2 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly in 1948.¹⁴⁶ The Declaration ap-

¹⁴⁵ See Case 02/04 – 01/05 *The Prosecutor v. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen*. See also Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court Statement by the Chief Prosecutor on the Uganda Arrest Warrants The Hague, 14 October, 2005.

¹⁴⁶ At the time of the adoption of the UN Charter, many voices were raised that a Bill of Rights should be included. Although these demands were not satisfied, it was determined that a Commission on Human Rights would draft an International Bill of Rights. A draft Declaration was submitted to the General Assembly in 1948. After

plies, according to its preamble, to “all members of the human family” and aims at setting a “common standard of achievement”. This is repeated in the 1993 Vienna Declaration.¹⁴⁷ In the 1968 Proclamation of Teheran, the UDHR is referred to as “a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family”.¹⁴⁸

Articles in the Declaration referring particularly to children – or to the family – are articles 16(3) (on the family), article 25(2) (on motherhood and childhood) and article 26 (on education, which will not be discussed in this context). Article 25(2) is the article relating most directly to children, establishing that

Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

The reference to mothers (women as parents or parents-to-be) and children (persons below the age of eighteen) singles out these two groups of human beings as particularly in need of support. The article’s wording describes mothers and children as objects of protection more than as rights-holders. The Declaration’s drafters seem to have regarded motherhood and childhood as especially vulnerable stages in life and that human beings in these stages are in need of additional protection compared with other human beings. The rights of women and children were therefore linked to each other. This connection can be justified for a certain period in the life of every child and for women who choose to become parents. It makes it difficult, however, to separate the rights of the individual child or woman from the “good of the collective”.

Article 16(3) presents the family as the natural and fundamental group unit of society and its entitlement to protection by society and the State. Hilary Charlesworth and Christine Chinkin have noted that human rights documents, not least the Declaration, appears to “assume a certain model of the family, that is, a heterosexual married couple and their offspring” and that the purpose of marriage is seen to be first

some discussion, the Universal Declaration of Human Rights was adopted by the General Assembly in December 1948 (see n. 1 *supra*) by forty-eight votes in favour, none against and eight abstentions. On the drafting of the UDHR, see e.g. M. Glen Johnson & Janusz Symonides *The Universal Declaration of Human Rights: a history of its creation and implementation, 1948-1998* Paris, Unesco Publ., 1998.

¹⁴⁷ N. 11 *supra*.

¹⁴⁸ Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968), para. 2 of the preamble.

and foremost to have children.¹⁴⁹ They argue that emphasising the family as the fundamental unit of society “assumes its permanence and suggests that human rights are not applicable within the family circle”, and that emphasising the importance of the family as a unit increases the distinction between public and private worlds, a distinction with negative implications for women’s rights.¹⁵⁰ This is a thought-provoking view, in particular as the wording of article 16(3) has inspired similar articles in most human rights instruments adopted since 1948. Feminist legal theory as we know it today hardly existed in 1948. This, however, does not mean to say that there was no gender awareness at the time. Nevertheless, the possible negative consequences for women (and children) of preserving a conservative notion of “the family” were at the time not considered problematic.

In conclusion, it can be said that the Universal Declaration of Human Rights is a reflection of the time in which it was drafted when children more than anything else were regarded as objects of protection. The view of children as individuals with a right to participate in decision-making concerning them had yet to be developed in the late 1940s. The Social Commission of the United Nations, however, concluded, once the Declaration had been adopted, that children’s rights were in need of further protection than it provided.¹⁵¹ This was the starting point of the process leading to the 1959 Declaration on the Rights of the Child and, eventually, the 1989 Convention on the Rights of the Child.

2.6.3 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) and Optional Protocol 1 (OP1) were adopted by the General Assembly on 16 December 1966 and entered into force in 1976.¹⁵² The Optional Protocol 1 sets the framework for an individual complaints procedure allowing for individuals to register complaints with the covenant’s monitoring body, the Human Rights Committee.¹⁵³ The ICCPR is con-

¹⁴⁹ Charlesworth & Chinkin *The Boundaries of International Law* p. 232.

¹⁵⁰ *Ibid.*

¹⁵¹ E/CN.4/51.

¹⁵² On the ICCPR, see n. 114 *supra*. Optional Protocol to the International Covenant on Civil and Political Rights G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc.A/6316 (1966), 999 UNTS 302, entered into force 23 March 1976.

¹⁵³ The Human Rights Committee has three specific procedures for the effective monitoring of the rights catalogued in the Covenant. These procedures are the mandatory reporting procedure of article 40, the optional interstate procedure of article 41 – which at the time of writing has never been invoked – and the optional individual communications procedure of the Optional Protocol 1. The state parties to the OP1

sidered to be the most comprehensive and well-established United Nations treaty on civil and political rights.¹⁵⁴

The provisions of the ICCPR most relevant to children and the protection of their rights are articles 6(5), 10(3), 14(1), 14(4), 17, 23(1), 23(4) and 24. Article 6(5) prohibits capital punishment for persons below eighteen years of age.¹⁵⁵ Articles 10(3), 14(1) and 14(4) refers to juveniles deprived of their liberty or in the process of a trial – that is, young people presumed to be in conflict with society in some aspect. “Juveniles” in the context of these articles can also include young adults. The articles do not only apply to children. Article 17 provides protection from interference with family life and article 23(1) establishes the family as being “the natural and fundamental group unit of society and is entitled to protection by society and the State.”

Article 23(1) is identical with article 16(3) of the Universal Declaration on Human Rights. The concept of the family included in article 23 should be interpreted broadly; including different cultural understandings occurring in the state parties. The analysis of article 16(3) UDHR as representing a traditional concept of the family, presented by Charlesworth and Chinkin, is thus applicable in the context of the Covenant as well.¹⁵⁶ It is, however, important to remember that “the family” is a dynamic concept which changes when society evolves.¹⁵⁷

Article 24 is the article of the Covenant referring directly at the protection of children and their special needs.

have thereby recognised that communications may be submitted by individuals subject to the jurisdiction of the state party. All cases examined by the Committee thus emanate from the procedure established by the Optional Protocol. It should be emphasised that the HRC is a quasi-judicial organ, not a court, and that its decisions in cases are therefore not to be considered as legally binding.

¹⁵⁴ Sarah Joseph, Jenny Schultz & Melissa Castan *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary* 2nd ed. Oxford, Oxford University Press, 2004 p. 8. The ICCPR has so far been ratified by 156 states and signed by an additional 67 states. Optional Protocol 1 is ratified by 105 states and signed by 34 states. See <http://www.ohchr.org/english/countries/ratification/4.htm> (as visited 24/4/2006).

¹⁵⁵ See also the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), entered into force July 11, 1991.

¹⁵⁶ See Chapter 2.6.2 *supra*. It has also been pointed out that the family for its less powerful members – most often women and children – is not always a haven of peace but sometimes rather an arena for abuse and violence. See Charlesworth, Chinkin & Wright “Feminist Approaches to International Law” p. 636.

¹⁵⁷ On the family as a dynamic concept, see, for example, Savitri Goonesekere “Human Rights as a Foundation for Family Law Reform” *International Journal of Children’s Rights* 8, pp. 83-99, 2000. See also the report from the 1994 Day of General Discussion on the Role of the Family in the Promotion of the Rights of the Child (excerpted from CRC/C/24, 7th session, 10 October 1994).

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, the society and the State.

Every child shall be registered immediately after birth and shall have a name.

Every child has the right to acquire a nationality.

Article 24 does not define who is a child. It simply states that when a person is a minor, certain measures of protection are required on behalf of the family, the society and the state party. The Human Rights Committee in its General Comment 17 on article 24 has said that the age for when a person attains majority is unquestionably left to the state parties to decide, but that it should be noted that “the age for the above purposes should not be set unreasonably low and that in any case a State Party cannot absolve itself from its obligations under the Covenant regarding persons under the age of 18, notwithstanding that they have reached the age of majority under domestic law”.¹⁵⁸

The Committee has expressed concern where the age, for example, for criminal responsibility and the marriageable age are set very low. Two examples of such concern are found in the concluding observations on Sri Lanka 1995¹⁵⁹ and Cyprus 1994.¹⁶⁰ The Committee also has commented with concern on differences in age limits for girls and boys.¹⁶¹

The purpose of article 24 is to provide special protection for children in addition to the other rights covered by the Covenant. In its

¹⁵⁸ ICCPR General Comment No. 17 *Rights of the child (Art. 24)* (07/04/89), para. 4. Manfred Nowak in his commentary to the Covenant discusses the scope of the term “children” in the Covenant, saying that “minor” aim at all persons below the age of majority. He continues by defining “juveniles” as a term used mainly in connection with criminal law referring to the age of criminal responsibility, i.e. in most states around 14 or 15 years of age. Nowak concludes that the term “children” includes all those lacking legal capacity, as well as those below the age of criminal liability. He however continues by pointing out that this does not correspond neither with the ordinary meaning of the word “children” nor with the object and purpose of article 24 to include the protection of criminally liable individuals – juveniles – older than 14 or 15 years under the protection offered by article 24. The definition of the child in the Convention on the Rights of the Child as all persons below the age of eighteen is therefore, according to Nowak, extended in comparison with the ICCPR and cannot be directly applied when interpreting article 24. *U.N. Covenant on Civil and Political Rights. CCPR Commentary 2nd rev. ed.* Kehl, N.P. Engel Verlag, 2005 pp. 550-551.

¹⁵⁹ Concluding Observations CCPR/C/79/Add.56.

¹⁶⁰ Concluding Observations CCPR/C/79/Add.39.

¹⁶¹ The Concluding Observations to India’s reports are one example of where the inequalities between girls and boys are addressed as “areas of concern” by the Committee. See Chapter 7.

General Comment on article 24, the Human Rights Committee emphasises that:

the rights provided for in article 24 are not the only ones that the Covenant recognises for children and that, as individuals, children benefit from all of the civil rights enunciated in the Covenant.¹⁶²

The Committee thereby emphasises that children are not to be excluded from the scope of the rest of the Covenant because of their age. The measures to be taken by states for the protection of the child are not defined in the article. Instead, it is left to state parties to determine, in the light of their specific circumstances, what steps are to be taken for the implementation of the article to be effective. State parties are obliged to ensure that all children within their jurisdictions are provided protection, whether through direct action such as law-making or through support to families or private initiatives.¹⁶³ Article 24(1) thereby creates a horizontal effect as it imposes a duty on the family and the society, an effect that is, however, only indirectly binding as it has to be imposed through domestic legislation. In General Comment 17, the Committee stresses that the primary responsibility of protection lies with the family – interpreted broadly – and in particular on the parents to promote the development of the child’s personality and to create conditions for the child to exercise his or her rights recognised in the Covenant.¹⁶⁴ The perspective dominant in article 24 is thus the view of the child as an object of protection rather than as a rights holder.

The jurisprudence on article 24 is rather sparse as communications submitted to the Human Rights Committee in some way concerning children are often considered as alleged violations of family life according to Covenant articles 17 or 23.¹⁶⁵ It is, however, not too radical to presume that the HRC would be influenced by the Convention on the Rights of the Child – by the best interests principle in particular – both in specific decisions concerning children and as regards issues concerning the family in general. Human rights instruments are dynamic and are to be interpreted in accordance with international law

¹⁶² ICCPR General Comment No. 17, para. 2.

¹⁶³ Nowak *Commentary* p. 546-548.

¹⁶⁴ ICCPR General Comment No. 17, para. 6.

¹⁶⁵ Two of the (few) examples of when communications arguing violations of article 24 have been argued and, not least, declared admissible, concern New Zealand (CCPR/C/70/D/858/1999) decision 16/11/2000 (guardianship rights) and Australia (CCPR/C/86/D/1184/2003) decision 27/04/2006 (detention of a juvenile). This sparse jurisprudence can be compared with the comprehensive case law of article 8 of the European Convention on Human Rights (on the right to respect and family life), the article most often referred to when children are involved (see Chapter 2.6.5.1 *infra*).

that has developed after the instrument in question has been adopted.¹⁶⁶ Geraldine Van Bueren asserts that “both in its draft and final form the General Comment on article 24, clearly took the Convention into account, even though at the time of the drafting of the General Comment the Convention on the Rights of the Child was only in draft form”.¹⁶⁷

Respect for the child’s freedom of expression and right to participation is not a subject on which the Committee has expressed its views. In its concluding observations to state party reports, the Committee on occasion expresses concern for the circumstances under which some children live – this is, however, most often related to discrimination of children due to their sex, birth or ethnicity or the exploitation of children or children living under especially difficult circumstances as, for example, street children.¹⁶⁸ However, the Committee does touch upon the subject of the “will of the minor” and the “evolving and maturing capacities of minors” when expressing its concern for laws on euthanasia and assisted suicide in its Concluding Observations to the 2000 Dutch report.¹⁶⁹ The Committee is not content with the fact that, according to the new law, the consent of parents or legal guardian is not necessarily required should a minor between sixteen and eighteen years of age choose to terminate his or her life under certain particular circumstances. The Committee

considers it difficult to reconcile a reasoned decision to terminate life with the evolving and maturing capacities of minors” and underlines that minors are in “particular need of protection.”¹⁷⁰

This conclusion could be interpreted as the Committee’s regarding that all persons in the Netherlands below the age of eighteen are incapable of deciding on the most important question of all – that is, one’s own life. Despite the reference made to the evolving and maturing capacities of the child, the Committee does not seem to have put any particu-

¹⁶⁶ Dynamic interpretation is, for example, one of the guiding principles of the ECHR. See *Tyrer v. the United Kingdom* Judgment 25 April 1978, Series A no. 26, *Marckx v. Belgium* Judgment 13 June 1979, Series A no. 31, D. J. Harris, M. O’Boyle & C. Warbrick *Law of the European Convention on Human Rights* Butterworths, London, 1995, pp. 7-9.

¹⁶⁷ Van Bueren *The International Law on the Rights of the Child* p. 76, n. 60. One case where the principle of the best interests of the child seem to have been taken into account, although not being specifically referred to by the Committee is *Winata and Li v. Australia* in 2000 (CCPR/C/72/D/930/2000) on a child’s right to residence.

¹⁶⁸ Cf., e.g. the Concluding Observations on the reports of Japan 1998 (CCPR/C/79/add.102), Venezuela 2001 (CCPR/CO/71/VEN), Czech Republic 2001 (CCPR/CO/72/CZE) and Zambia 1996 (CCPR/C/79/Add.62).

¹⁶⁹ Concluding Observations 2001 CCPR/CO/72/NET para. 5. State party report: CCPR/C/NET/99/3.

¹⁷⁰ Concluding Observations CCPR/CO/72/NET para. 5.

lar emphasis on the fact that a sixteen-year-old can perfectly well be a sufficiently mature person to decide on matters of life or death – just as much as it can obviously be the opposite. It all depends on the individual. It is interesting to speculate about whether the Committee would have reasoned in the same way had the age of majority in the Netherlands been set at sixteen, or if the law had been adopted in another socio-cultural context where children might be forced to make adult decisions long before attaining the official age of majority.

Even if the Human Rights Committee on occasion has taken the concept of the best interests of the child into consideration, the view of the child in the text of the Covenant and in the jurisprudence so far is quite traditionalistic. When special attention is paid to children, in most cases it is as objects of protection and not as independent individuals. The innovations of the Convention on the Rights of the Child to regard children as participants in society as well as individuals in need of additional concern were not subject to debate when the Covenant was drafted. It also does not seem, so far, to have been the most prominent guiding principle in the work of the Committee in individual complaints.

2.6.4 The United Nations Convention on the Elimination of All Forms of Discrimination Against Women

The development of women's and children's human rights over the centuries is quite similar. The 1979 UN Convention on the Elimination of All Forms of Discrimination of Women (CEDAW) and the Convention on the Rights of the Child are important manifestations of the recognition gained by the special interests of women and children on the international level in later years.¹⁷¹ The overarching purpose of CEDAW is to eliminate all discrimination between men and women, a necessity in order to elevate women's rights to justice and equity.¹⁷² CEDAW combines and expresses ideas discussed during five centuries

¹⁷¹ For a discussion on the relationship between the CEDAW and the CRC, see Goonesekere *Women's rights and children's rights: The United Nations conventions as compatible and complementary treaties*.

¹⁷² The CEDAW has to date been ratified by 182 countries and signed by 98 countries (<http://www.un.org/womenwatch/daw/cedaw/states.htm>, as visited 24/4/2006.) Of these countries, 78 are also state parties to the Optional Protocol to the Convention on the Elimination of Discrimination against Women (G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000), entered into force 22 December 2000) introducing an individual complaints procedure. (<http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm>, visited 24/4/2006.) At the time of writing, only three decisions have been made under the auspices of the Optional Protocol (see <http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm>, as visited 19/05/2006).

of debate on women's rights and puts a strong emphasis on the concept of equality not only in the public sphere but also in family matters.¹⁷³ CEDAW thereby transcends the traditional private/public dichotomy in international law by asserting equality in the family as well as affirming equal rights to participation in public decision-making bodies.

Of what relevance is the CEDAW for children? The term "woman" is not defined in CEDAW. However, the term "children" is used as distinct from "men and women", leading to the conclusion that the Convention is intended to apply primarily to adult women. On the other hand, the CEDAW articles on education and marriage contain clear references to girl children.¹⁷⁴ Therefore, arguably, the CEDAW at least in some respects is as applicable to girls as it is to adult women.¹⁷⁵ The necessity of disassociating women's issues from children's interests is sometimes emphasised, in order to stress that women's rights to justice and equality are irrespective of their procreative and care-giving roles – the traditional view of women and their role in the family and in society.¹⁷⁶ Such arguments, defining women only in terms of motherhood, have often in varying degrees been (and still are) used to justify assumptions that women and children lack full legal capacity. The many similarities between women's and children's rights and how they have developed, however, emphasises their interconnectedness and that the implementation of one category does not have to have negative implications for the other.¹⁷⁷

The role, status and wellbeing of women are today widely understood to be of fundamental importance for the realisation of children's rights and for human development in general.¹⁷⁸ Many of the discussions on women's rights are as relevant to girl children as the transition from "girl" to "woman" is fluid. This is because womanhood is prematurely imposed on many girls through different processes, procedures and social pressures and, also, because the situation of women has direct a bearing on that of girls.¹⁷⁹ This latter point was confirmed in the 1993 Vienna Declaration which states that

¹⁷³ For a survey of these ideas see, for example, Arvonne S. Fraser "Becoming Human: The Origins and Development of Women's Human Rights" *Human Rights Quarterly* Vol. 21, 1999, pp. 853-906.

¹⁷⁴ Articles 10 (education) and 16(2) (the betrothal and marriage of a child).

¹⁷⁵ Goonesekere *Women's rights and children's rights: The United Nations conventions as compatible and complementary treaties*. pp. 6-9.

¹⁷⁶ See Maja Kirilova Eriksson *Reproductive Freedom: In the Context of International Human Rights and Humanitarian Law* The Hague, Martinus Nijhoff, 2000, pp. 21-67.

¹⁷⁷ See Frances Olsen "Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child".

¹⁷⁸ *We the Children. End-decade review of the follow-up to the World Summit for Children* 4 May 2001 (A/S-27/3), para. 490.

¹⁷⁹ See e.g. Charlesworth & Chinkin *The Boundaries of International Law* p. 3.

the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights¹⁸⁰

as well as in the Platform for Action of the Fourth Conference of Women in Beijing 1995 which addresses the particular situation of girl children.¹⁸¹ The Platform for Action repeatedly refers to the Convention on the Rights of the Child. It is also established as a fact that girls are discriminated against and subject to violence from the earliest stages of life throughout their lives and that it is of vital importance that such discrimination ends.¹⁸² As a result, the promotion of the rights of the girl child was selected as one of the strategic objectives of the Beijing Platform for Action.¹⁸³

The question then is whether it is possible to interpret CEDAW as conferring additional rights to girl children beyond the Convention on the Rights of the Child. The girl child is not protected specifically by the provisions of the CRC, although certain articles in practice aim specifically at girls: article 24(3) on the state's obligation to "take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children" was drafted with genital mutilation practices in mind.¹⁸⁴ The complementary and mutually reinforcing nature of the two instruments have been recognised a number of times, the 1995 Committee on the Rights of the Child General Day of Discussion on the Girl Child being just one example.¹⁸⁵ The importance to focus on the girl child in order to break down the cycle of prejudice and harmful practices against women was emphasised during the discussions, as was the necessity of focusing on the active involvement of girls to initiate a movement for change of the

¹⁸⁰ Vienna Declaration and Programme of Action, para. 18.

¹⁸¹ A/CONF./177/20 Report of the Fourth World Conference on Women (containing the Beijing Declaration and Platform for Action (1995)).

¹⁸² Beijing Declaration and Platform for Action, para 39.

¹⁸³ In particular, see Strategic Objective L "The Girl Child". See, also, The General Assembly Resolution on Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action" (A/Res/S-23/3) adopted 2000/6/10 at the twenty-third special session of the General Assembly.

¹⁸⁴ On the *travaux préparatoires* of article 24(3), see Detrick *The United Nations Convention on the Rights of the Child. A Guide to the Travaux Préparatoires* pp. 343-360. See, also, Patricia Wheeler "Eliminating FGM: The Role of the Law" *International Journal of Children's Rights* 11, 2004, pp. 257-271, and Van Bueren *The International Law on the Rights of the Child* pp. 16, 307-310.

¹⁸⁵ See summary of the discussions at the 1995 General Day of Discussion on the Girl Child, CRC/C/38 1995. At the Day of Discussion, the Committee emphasised that gender inequality in general is based upon discriminatory practices, prejudice, traditions and the cause of neglect, violence and exploitation – all of which are equally relevant for adult women.

living conditions for all of female gender.¹⁸⁶ It can be argued that CEDAW can well be used as an instrument for the promotion of the rights of not yet adult women – girl children – in countries that have ratified both treaties. However, the most important aspect is that the mere existence of the treaties puts the spotlight on gender and equality issues for both adult women and girls as a group who are globally discriminated against. Advocating for women's and girl's rights is in many ways the same work. The Conventions also affirm and strengthen the rights of women and girls in order to improve their daily lives. It must be remembered that the girls of today are the women of tomorrow.

2.6.5 The European System

2.6.5.1 The European Convention on Human Rights¹⁸⁷

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is the most important human rights instrument in the European context.¹⁸⁸ The Convention was drafted within the framework of the Council of Europe and entered into force 3 September 1953.¹⁸⁹ The Convention has been supplemented with a number of Optional Protocols, which are all independent treaties that require separate ratification by state parties.¹⁹⁰ A guiding principle of

¹⁸⁶ CRC/C/38 1995 para. 284-285. In relation to reproductive rights, see e.g. Eriksson *Reproductive Freedom* on adolescent pregnancy and abortion pp. 295-300 and the UNFPA *State of the World Population Report 2003: Investing in the adolescent's health and rights* (UNFPA 2003), chapter 2 in particular.

¹⁸⁷ The European Convention for the Protection of Human Rights and Fundamental Freedoms 87 UNTS 103, ETS No. 005.

¹⁸⁸ Under the auspices of the Council of Europe, a number of human rights-related treaties have been drafted. The counterpart of the European Convention on Human Rights in the sphere of economic and social rights is the 1961 European Social Charter (ETS No. 035) which is gradually being replaced by the 1996 (revised) European Social Charter (ETS No. 163). The European Social Charter includes certain provisions relevant to children as, for example, the right to the social, legal and economic protection of the family and the social, legal and economic protection of employed children. The implementation of the Social Charter is monitored by two principal organs of control: the European Committee of Social Rights and the Governmental Committee (1991 Protocol amending the European Social Charter ETS No. 142). It is also, since 1998, possible to lodge collective complaints of the Charter in states which have ratified it (Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, ETS No. 158).

¹⁸⁹ On the drafting of the ECHR, see e.g. Harris, O'Boyle & Warbrick *Law of the European Convention on Human Rights* London, Butterworth, 1995 pp. 1-2, P. van Dijk & G.J.H. van Hoof *Theory and practice of the European Convention on Human Rights* 3rd ed. The Hague, Kluwer, 1998 pp. 1-2, Mark W. Janis, Richard S. Kay, Anthony W. Bradley *European human rights law: text and materials* 2nd ed. Oxford, Oxford University Press, 2000 pp. 16-22.

¹⁹⁰ Protocols of particular interest for children's rights is Optional Protocol 1 (ETS No. 009) article 2 on the right to education, Protocol 7 (ETS No. 117) article 5 (the equality of spouses in relation to their children) – the only clear reference to the best inter-

interpretation is the doctrine of a *margin of appreciation*. This means that the content of the human rights provisions of the Convention must be determined by a comparative analysis of the legal situation in the participating states and that differences and disparities must be recognised.¹⁹¹ Another fundamental principle of interpretation is that the Convention must be interpreted dynamically, taking social development into account.¹⁹² This means that attitude changes in society, for example, towards what constellations of individuals that are considered to be a family or the weight attributed to the views of the child, would be reflected in the deliberations of the European Court of Human Rights (the ECtHR).

The ECHR, according to its article 1, is applicable to everyone within the jurisdiction of the contracting parties. Some of the Convention and Protocol articles, however, are clearly not intended to apply to children. The most obvious examples are the right to free elections in article 3, Optional Protocol 1 and article 2, Optional Protocol 4 on the right to freedom of movement and freedom to choose one's residence.¹⁹³ The only direct references to children in the ECHR are found in articles 5(1)(d) and article 6(1).¹⁹⁴ Nonetheless, the ECtHR has delivered numerous judgements concerning children in some way, many of them relating to the right to protection of private and family life in article 8.¹⁹⁵ The case law of article 8 is an example of how the ECtHR

ests of children - and Protocol 12 (ETS No. 177) article 1 (the general prohibition of discrimination).

¹⁹¹ R. Bernhardt "Thoughts on the interpretation of human rights treaties" pp. 65-71, in Franz Matscher & Herbert Petzold *Protecting human rights: The European Dimension. Studies in Honour of Gerard J Wiarda* Köln, Heymann, 1988, Hans Danelius *Mänskliga rättigheter i europeisk praxis. En kommentar till Europakonventionen om de mänskliga rättigheterna* Stockholm, Norstedts Juridik, 2000 pp. 57-63, Harris, O'Boyle & Warbrick *Law of the European Convention on Human Rights* pp. 5-19. Olle Måråter *Folkrättsligt skydd av rätten till domstolsprövning* Uppsala, Uppsala Universitet, 2005, pp.61-105. See, also, the discussion in Chapter 6.

¹⁹² *Ibid.*

¹⁹³ On the First Optional Protocol see n. 190 *supra*. Optional Protocol 4 (ETS No. 046).

¹⁹⁴ Other articles particularly relevant for children are articles 2 (the right to life), 3 (the prohibition of torture and ill-treatment), the above mentioned 5(1)(d) (the detention of minors) and 6(1) (the exception from public hearings in the interests of juveniles), 8 (the respect for private and family life), 12 (the right to marry), and 14 (the prohibition of discrimination, applicable in conjunction with the substantive articles of the Convention).

¹⁹⁵ The following cases are a few examples: *Marckx v. Belgium* Judgment of 13 June 1979 Series A no. 31, *Johnston and Others v. Ireland* Judgment 18 December 1986, Series A no. 112, *Berrehab v. The Netherlands* Judgment 21 June 1988, Series A no. 138, *Olsson v. Sweden* (No. 1) Judgment 24 March 1988, Series A no. 130, *Moustaquim v. Belgium* Judgment 18 February 1991, Series A no. 193, *Olsson v. Sweden* (No. 2) Judgment 27 November 1992, Series A no. 250, *Hokkanen v. Finland* Judgment 23 September 1994, Series A no. 299-A., *Kroon and Others v. the Netherlands*, judgment of 27 October 1994, Series A no. 297-C, *Boughanemi v. France* Judgment 24 April

has applied the principle of dynamic interpretation as it little by little has recognised that article 8 applies automatically to the relationship between parent and child regardless of the nature of this relationship.¹⁹⁶ The definition of “family” is crucial in relation to article 8 as it decides which relationships the state has a duty to respect and protect and which relationships that are not entitled to the same concern.¹⁹⁷ Article 3 (on the prohibition of torture and degrading treatment) and article 6 (on the right to a fair trial) have also been referred to in cases involving children.¹⁹⁸ It is noteworthy that many of the cases concerning “family rights” in fact primarily concern parental rights – where parents bring a complaint to the Court claiming their parental rights to their children have been interfered with. The possible breach of the rights of the child itself often appears to be subsidiary to the rights of the parents in these cases. In cases concerning the right to family and private life, the participation rights of the child is not the most prominent of features.

The number of indirect references to children’s rights as individuals found in the jurisprudence, however, increased steadily. This is because the ECtHR – and, up until it was abolished, the European Commission on Human Rights (the Commission) – not least as a result of the 1989 adoption of the Convention on the Rights of the Child, has been inclined to look beyond the text of the Convention in order to find guidance in cases brought before it.¹⁹⁹ The child’s right (if inter-

1996, *Reports of Judgments and Decisions* 1996-II, *Söderbäck v. Sweden* Judgment 28 October 1998, *Reports of Judgments and Decisions* 1998-VII, *Fretté v. France* Judgment 26 February 2002, no. 36515/97, ECHR 2002-I, *Sahin v. Germany*, no. 30943/96, 11 October 2001, *Sommerfeld v. Germany* [GC], no. 31871/96, ECHR 2003-VIII (extracts).

¹⁹⁶ See, for example, Danelius *Mänskliga rättigheter i europeisk praxis* pp. 220-252, Harris, O’Boyle & Warbrick *Law of the European Convention on Human Rights* pp. 302-355, Ursula Kilkelly *The child and the European Convention on Human Rights* Aldershot, Ashgate, 1999 pp. 187-214, 239-295 Adriana Oromolla “Children’s rights under articles 3 and 8 of the European Convention: recent case law” *European Law Review* Human Rights Survey (2001) pp. 42-57 (46), Bea Verschraegen “The Right to Private Life and Family Life, the Right to Marry and to Found a Family, and the Prohibition of Discrimination” pp. 194-211 in Katharina Boele-Woelki & Angelika Fuchs (eds.) *Legal Recognition of Same-sex Couples in Europe* Antwerp, Intersentia, 2003.

¹⁹⁷ The concept of the family is discussed in Chapter 4.3.

¹⁹⁸ Some of the more well-known cases are regarding article 3 *Tyrer v. the United Kingdom* Judgment of 25 April 1978, Series A no. 26, and *Y v. the United Kingdom* Judgment of 29 October 1992, Series A no. 247-A, and regarding article 6 the so-called Bulger cases, *T v. the United Kingdom* [GC], no. 24724/94, 16 December 1999 and *V v. the United Kingdom* [GC], no. 24888/94, ECHR 1999-IX, 16 December 1999.

¹⁹⁹ Ursula Kilkelly “The Best of Both Worlds for Children’s Rights: Interpreting the European Convention on Human Rights in the Light of The UN Convention on the Rights of the Child” 23(2) *Human Rights Quarterly* (2001) pp. 308-326. Kilkelly analyses the use of the CRC in the jurisprudence of the Commission and the ECtHR. See also Lucy Smith “Children, Parents and the European Human Rights Convention” pp. 447-463 in John Eekelaar & Petar Sarcevic *Parenthood in Modern Society: Legal and Social Issues for the Twenty-first Century* Dordrecht, Martinus Nijhoff, 1993 and

preted widely) to participation is in theory protected by the provisions on the right to freedom of thought, expression and assembly as these rights, according to article 1, are applicable to “everyone”.²⁰⁰ However, neither the ECtHR (nor the Commission) has so far been obliged to consider the existence of a positive obligation for states to ensure that children can also enjoy these rights to the same extent as that which is possible for adults.²⁰¹

The Court (and when active, the Commission) have both emphasised the importance of acting in accordance with the wishes of the child whenever possible. Thus, the influence of the Convention on the Rights of the Child and its emphasis on seeing that the child is considered as a rights holder becomes visible. At the same time, however, states have been allowed a wide margin of appreciation regarding the degree of consultation in relation to the child on a domestic level, as well as to the importance accorded to the wishes expressed by the child. The principle of the evolving capacities of the child – to give due weight to the views of the child in relation to age and maturity – seems to have been more readily accepted by the Commission than by the Court.²⁰² Failure to consult the child or to ignore his or her wishes has so far not been considered to be a breach of the Convention. Such claims have yet to be brought before the Court by children in their own right for the matter to be tried properly.²⁰³

In conclusion, the starting point for the Court’s view on children’s rights in the ECHR is still primarily the need to protect the child – his or her health and morals, as well as rights and freedoms. A traditional view of children dominates the case law of the European Court of Human Rights, and the right of the child to participation in decision-making processes is seldom advocated. However, if attitudes change towards children as rights holders in European society, so, eventually will the case law of the European Court of Human Rights accordingly change.

2.6.5.2 The European Convention on the Exercise of Children’s Rights²⁰⁴

The 1996 European Convention on the Exercise of Children’s Rights, which entered into force in 2000, is intended as a complement to the

Lucy Smith “Om barn og menneskerettigheter” *Juridisk Tidskrift* no. 3 2005-06 pp. 503-513.

²⁰⁰ ECHR articles 9-11.

²⁰¹ Kilkelly *The child and the European Convention on Human Rights* pp. 117-118.

²⁰² Kilkelly *The child and the European Convention on Human Rights* pp. 116-126.

²⁰³ Kilkelly *The child and the European Convention on Human Rights* p. 118, pp. 123-126.

²⁰⁴ ETS No. 160.

Convention on the Rights of the Child in the European geographical context.²⁰⁵ The Convention is intended to facilitate the implementation of children's substantive rights by creating and strengthening the procedural rights that can be exercised by the child itself or through other persons or bodies. Its objective, as stated in article 1(2), is to promote the rights of children in their own best interests, to grant them procedural rights and to facilitate the exercise of those rights by ensuring that children, either themselves directly or through representatives, are informed and allowed to participate in matters affecting them in judicial proceedings. "Proceedings" in terms of the Convention clearly mean family proceedings, although states are free to apply this to other proceedings if they so wish.²⁰⁶ The Convention recognises the prime importance of parental authority.²⁰⁷ It also acknowledges, however, the role that the state has to play, not only in cases where the interests of parent and child collide, but because children have rights as citizens which entitle them to exercise a number of other rights.²⁰⁸ The Convention does not provide the child with a right to consent or to veto decisions concerning him or her, as it is not seen as always being in the best interests of the child to possess such rights.²⁰⁹ What it tries to do is to strengthen the participation rights of the child in family proceedings, thereby taking a step towards the fulfilment of one of the general principles of the Convention on the Rights of the Child.

The Convention at the time of writing has only been ratified by ten countries and signed, but not ratified, by fourteen – the numbers are not particularly overwhelming given that the Council of Europe had forty-six member states.²¹⁰ The actual effectiveness of the Convention is therefore so far difficult to assess. One can only speculate on the reasons for the low number of ratifications. Is it due to a lack of inter-

²⁰⁵ The starting point for the drafting of the Convention was the adoption of Recommendation 1121 (1990) on the Rights of Children by the Council of Europe Parliamentary Assembly. In the Recommendation, the Assembly welcomed the adoption of the Convention on the Rights of the Child and recommended the drafting of an appropriate legal instrument of the Council of Europe in order to supplement the UN Convention, thus fulfilling the requirements of article 4 CRC. The Explanatory Report to the European Convention on the Exercise of Children's Rights provides a guide to how the Convention is to be interpreted and implemented. On activities within the Council of Europe concerning child participation and citizenship, see for example the Council of Europe Recommendation No R (98) 8 by the Committee of Ministers to Member States on Children's Participation in Family and Social Life, 18 September 1998 and Council of Europe *Children, participation, projects. How to make it work!* Strasbourg, Council of Europe Publishing, 2004.

²⁰⁶ Article 1(3).

²⁰⁷ Explanatory Report para. 8.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid* para 35.

²¹⁰ <http://conventions.coe.int/treaty/> (as visited 20/06/2006).

est? Are the more generally worded provisions of the Convention on the Rights of the Child seen as sufficient? Is it because effective implementation of the European Convention on the Exercise of Children's Rights implies a certain transfer of power from parents to children, which makes the Convention a much more radical instrument than that seen at first glance? The answer, perhaps, is a mixture. It is interesting to note that not even Norway, one of the few countries where the Convention on the Rights of the Child has been made domestic law, has found it urgent enough to ratify the European Convention. Norway's example might imply that the rights in the Convention by many states are seen as already being provided for in existing domestic legislation.

2.6.5.3 The Charter of Fundamental Rights of the European Union²¹¹

In December 2000, the Charter of Fundamental Rights of the European Union was proclaimed by the heads of state. The EU Charter of Fundamental Rights summarises the rights of Union citizens.²¹² The Charter, so far, is not legally binding and is therefore primarily a political document, addressing the institutions of the Union and the member states while implementing European Community law.²¹³ The European Court of Justice, however, can use the Charter as a guide to general principles of Community law, thereby conferring upon it a semi-legal status.²¹⁴ The Advocates General of the Court regularly cite it in decisions – although emphasising that it is not mandatory to do so.²¹⁵

The provisions of the Charter draw on the wording of the ECHR and other international human rights treaties. Article 24 on the rights of the child states that every child has the right to every protection and care necessary for its well-being, and to be able to express views freely

²¹¹ Official Journal C 364, 18/12/2000 P. 0001 – 0022.

²¹² For a discussion on citizen rights versus human rights in the European Union, see Roy W. Davis "Citizenship of the Union...rights for all?" (2002) 27 *European Law Review* Apr. pp. 121-137. See also more generally Mats Linfelt "Europeiska Unionens grundrättighetsstadga: Fågel, fisk eller mittemellan?" *Mennesker & Rettigheter* 4/2002 and Helen Stalford "The Citizenship status of children in the European Union" *The International Journal of Children's Rights* 8 pp. 101-131, 2000.

²¹³ Cf. article 51 of the Charter of Fundamental Rights. Giorgio Sacerdoti "The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens' Europe" 8 *Columbia Journal of European Law* 37 (2002) pp. 37-52, and Philip Alston & Olivier De Schutter "Introduction: Addressing the Challenges Confronting the EU Fundamental Rights Agency" pp. 1-25 in Philip Alston & Olivier De Schutter (eds.) *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency* Oxford and Portland, Oregon, Hart Publishing, 2005.

²¹⁴ Alston & De Schutter *ibid.*

²¹⁵ See Linfelt, "Europeiska Unionens grundrättighetsstadga: Fågel, fisk eller mittemellan?"

and have them taken into consideration in relevant matters, in accordance with age and maturity. The article also states that the best interests of children must be a primary consideration in all actions affecting them. The influence of the Convention on the Rights of the Child, articles 3, 5 and 12 in particular, on article 24 is obvious and not surprising as all the member states are parties to the Convention on the Rights of the Child. The impact of article 24 – as with the EU Charter as a whole – is still yet to be seen, due both to the present status of the Charter and to the fact that the large majority of issues relating to children, their well-being and their rights, so far lies within the separate competence of the member states.²¹⁶

2.6.6 The Inter-American System

The Inter-American system of human rights protection has developed through the Organisation of American States (OAS). The system has a distinct dual structure, as all member states of the OAS have human rights obligations under the OAS Charter as well as the American Declaration on the Rights and Duties of Man²¹⁷, and some are further bound by the American Convention on Human Rights (ACHR).²¹⁸

At the 1948 Bogotá Conference the OAS adopted the American Declaration of the Rights and Duties of Man.²¹⁹ The American Decla-

²¹⁶ The situation of fundamental rights in the EU Member States and the Union (as protected by the Charter) is since 2002 monitored by the EU Network of Independent Experts on Fundamental Rights. The Network was set up by the European Commission at the request of the European Parliament. An annual report is prepared on every member state by a member of the network. A Synthesis Report is then prepared on the basis of the country reports, identifying the main areas of concern as well as making certain recommendations. The conclusions and recommendations are then submitted to the institutions of the Union. The content of the report is not binding on the institutions. The reports, opinions and additional documentation can be found at http://ec.europa.eu/justice_home/cfr_cdf/index and <http://cridho.cpd.r.ucl.ac.be/index.php?pageid=15> (national reports). On the necessity of an article on the rights of the child, see EURONET *Children in the EU Treaty. Does the EU need a competence for children in the treaty? To Members of the Convention Working Group on Complementary Competencies* Document from Euronet Brussels, 11 September 2002. On children's rights in the EU in general, see Sandy Ruxton *What about us? Children's Rights in the European Union. Next steps* Brussels, The European Children's Network, 2005.

²¹⁷ Res. XXX, Final Act of the Ninth International Conference of American States, Bogotá, Colombia 30 March – 2 May 1948.

²¹⁸ O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

²¹⁹ For a recapitulation of the process leading to the adoption of a document on human rights principles in the Americas, see Scott Davidson *The Inter-American Human Rights System* Aldershot, Dartmouth, 1997 pp. 11-13. The Declaration resembles the Universal Declaration of Human Rights (UDHR) (which it precedes by seven months)

ration was initially not considered to be a legally binding document.²²⁰ The status of the American Declaration, however, has evolved and it is today held by the Inter-American Court of Human Rights to be a normative document providing an authoritative interpretation of the OAS Charter.²²¹

Article VII of the American Declaration states that

All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.

Women – as mothers – and children are thus perceived in the article as being particularly in need of support. Their rights are thereby linked to their roles as particularly vulnerable persons. Other articles concerning children in particular are article V on the right to protection of one's private and family life, article VI on the right to establish a family and to protection thereof, establishing the family as a central constituent of society,²²² and article XII on the right to education.

The American Convention on Human Rights was adopted in 1969.²²³ References in the American Convention relating to children and their rights in some way are articles 4(1), 4(5), 5(5), 12(4), 17 and 19.²²⁴ Article 4 on the right to life establishes the right of every person to have his life respected from, in general, the moment of conception.²²⁵ The American Convention on Human Rights is thereby the only

in design and in terms of the rights contained therein. The American Declaration includes civil and political rights as well as economic, social and cultural rights.

²²⁰ Report of the Inter-American Council of Jurists Concerning Resolution XXXI of the Bogotá Conference, September 26, 1949. See Davidson *The Inter-American Human Rights System* p. 12 and Maja Kirilova Eriksson *Skydd av mänskliga rättigheter. Det interamerikanska systemet* 3rd ed. Uppsala, Iustus, 2002 p. 26.

²²¹ Inter-American Court of Human Rights Advisory Opinion OC-10/89 July 14, 1989 *Interpretation of the American Declaration of the Rights and Duties of Man within the framework of the American Convention on Human Rights* IACourtHR, Ser. A: Judgments and Opinions, No.10, para. 43.

²²² The wording can be compared with articles 12 and 16 of the Universal Declaration of Human Rights. See Chapter 2.6.2 *supra*.

²²³ OAS Treaty Series No. 36, 1144 UNTS 123, entered into force 18 July 1978. Buerghenthal describes the catalogue of rights of the ACHR as some of its provisions seeming to be more advanced than those of its European counterpart, as well as those of the ICCPR. Thomas Buerghenthal "The Inter-American System for the Protection of Human Rights" pp. 435-493 (442) in Theodore Meron (ed.) *Human Rights in International Law: Legal and Policy Issues Vol. II* Oxford, Clarendon Press, 1984.

²²⁴ Article 4(5) states that capital punishment shall not be inflicted on persons who were under the age of eighteen when the crime was committed. Article 5(5) regards minors subject to criminal proceedings. Article 12(4) speaks of the religious and moral education of children and the right of parents or guardians to provide for this education in accordance with their own beliefs.

²²⁵ In the Inter-American Court of Human Rights Advisory Opinion OC-17/2002 August 28, 2002 *Juridical Condition and Rights of the Child*, IACourtHR, Ser.A:

treaty elaborating on the question on the beginning of life. The Inter-American Commission, however, has concluded that the right to life of the foetus is not absolute and that abortion thus does not constitute a violation of article 4.²²⁶

Article 17 concerns the rights of the family. Its first paragraph establishes the family as the “natural and fundamental group unit of society”, entitled to protection by the society and the state.²²⁷ Article 19 aims exclusively at children:

Article 19. Rights of the Child

Every child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

The emphasis of the Inter-American system of human rights protection as concerns children was initially on the traditional “protection-aspect” rather than on the participation aspects of children’s rights. The way that the rights of children have been perceived in the Inter-American system, however, has evolved over the past decade, much of this due to the entry into force of the 1989 Convention on the Rights of the Child. Children’s rights are acknowledged and discussed in most of the American Commission on Human Rights’ country reports and annual reports.²²⁸ This originates from a 1991 OAS General Assembly resolution which recommended, *inter alia*, that the Inter-American Commission on Human Rights should devote special attention to respect for the rights of minors.²²⁹ In its 1991 annual report the Commission states that “the protection of the human rights of children has become an issue of priority concern in the hemisphere”.²³⁰

Judgments and Opinions, No. 17, para. 42, the Court states that a child is every person that has not yet turned eighteen years of age.

²²⁶ See *White and Potter v. USA* (also referred to as “the Baby Boy case”) Case 2141 (United States) Annual Report of the Inter-American Commission on Human Rights 1980-1981, OEA/Ser.L/V/II.54 Doc. 9 rev. 1. 1981.

²²⁷ Para. 2 refers to the right to marry of two persons “of marriageable age”. Para. 4 regards children in case of their parents’ divorce, stating that “provisions shall be made for the necessary protection of any children solely on the basis of their own best interests. The welfare of the child shall in these cases be the dominant concern (see Davidson *The Inter-American Human Rights System* p. 328). Para. 5 states that the law of a state party shall recognise that children born out of wedlock have equal rights to children born of married parents.

²²⁸ Examples of other topics that receive special attention in the reports are women’s rights and the rights of indigenous peoples.

²²⁹ Resolution AG/RES. 1112 (XXI-0/91), on “Strengthening of the OAS in the Area of Human Rights”, adopted by the OAS General Assembly at its Twenty- First Regular Session.

²³⁰ 1991 Annual Report of the Inter-American Commission on Human Rights OEA/Ser.L/V/II.81 Doc. 6 rev. 1, 1992, Chapter VI.

The changing view on the rights of the child is also increasingly visible in the country reports. In the 1999 report on Colombia, respect for the rights of the child is defined by the Commission as

a fundamental value in a society that claims to practice social justice and observe human rights [...] It also means recognizing, respecting, and guaranteeing the individual personality of the child as a holder of rights and obligations.²³¹

The view of the child as a rights holder – as in the Convention on the Rights of the Child – is prominent in the Commission's country reports of later date. References to the Convention on the Rights of the Child are numerous and the evaluation of how the country in question implements the rights of the child relates to the obligations under the Convention and its general approach to children's rights as much as to the instruments of the Inter-American system.²³² In 2002, the Inter-American Court of Human Rights adopted an Advisory Opinion on the rights of the child in which the Court established that article 19 of the American Convention on Human Rights should be the subject of dynamic interpretation, responding to new circumstances (thus referring to the universal development of children's rights) addressing the child as a true legal person and not only as an object of protection.²³³ The Court continues to establish that children have the same rights as all human beings, adults or minors, and that distinctions between different groups cannot be established unless they can be objectively and reasonably justified and have as their only objective the exercise of the rights of the child.²³⁴ The conclusion to be drawn from the Advisory Opinion is that the view of the child certainly has developed and that

²³¹ Third Report on the Human Rights Situation in Colombia OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 1999, Chapter XIII, para. 1.

²³² See, for example, the Report on the Situation on the Situation of Human Rights in Brazil OEA/Ser.L/V/II.97 Doc. 29 rev.1, 1997, Chapter V, Colombia's 1999 report (n. 231 *supra*), Report on the Situation of Human Rights in the Dominican Republic OEA/Ser.L/V/II.104 Doc. 49 rev. 1, 1999, Chapter XI, Second Report on the Situation of Human Rights in Peru OEA/Ser.L/V/II.106, Doc. 59 rev., 2000, Chapter VIII, Third Report on the Human Rights Situation in Paraguay OEA/Ser.L/V/II.110 Doc.52, 2001, Chapter VII, and Fifth Report on the Situation of Human Rights in Guatemala OEA/Ser.L/V/II.111 doc. 21 rev., 2001, Chapter XII. The desire to take children's rights seriously also shows in the creation of the Inter-American Children's Institute - a specialised organ of the OAS whose purpose is to further the study of problems relating to children and the family – and in the 1998 creation of a Special Rapporteurship on Children's Rights in response to pressure from NGOs. The Special Rapporteur carries out studies on issues of concern relating to child rights in the region, undertakes in-country visits, prepares specific chapters on child rights for country and annual reports, and examines individual violations of children's rights.

²³³ Advisory Opinion OC-17/2002 (n. 225 *supra*) para. 28.

²³⁴ Advisory Opinion OC-17/2002 (*ibid*) para. 54-55.

the Inter-American Court applies a dynamic and forward-looking approach to the concept of children's human rights. The right to participation, however, is not referred to except in relation to administrative or judicial proceedings – other more general aspects of the child's right to have his or her views respected and taken into account do not seem to be discussed.²³⁵

The acknowledgement and interest of a progressive view on children's rights thus seem, at least in some respects, to have entered into the Inter-American human rights system. However, a more "participation-oriented" approach to the rights of the child does not seem, at least so far, to have influenced the actual implementation of the Declaration or the Convention in the state parties. The situation for children in many of the state parties to the Convention and the Declaration is still difficult for many children in the Americas. The problems and dangers they are forced to face are serious and sadly enough, for many children apart of their daily living conditions.²³⁶ Many of the countries have problems such as child labour, violence, prostitution, street children and child soldiers in common.²³⁷ The protection aspect of children's rights is dominant whenever these issues are discussed, which is perhaps inevitable due to the general situation of children in the region. So far, the focus on children's rights at the implementation-stage has thus not targeted more participation-oriented rights to any extent.

²³⁵ Some cases involving children, either alongside their parents or as individuals in their own right have, however, been brought before the Inter-American Court. One of the most well-known is *Villagran Morales et al v. Guatemala* (Judgment 19 November 1999) (also referred to as the "*Street Children*" case) on the torture and murders of street children committed by police forces. The case concerned alleged violations of articles 4, 5, 8(1), 19 and 25 of the ACHR. In its judgement, the Court stated that the violations should be regarded with particular gravity since the victims were youths, in some cases children. In the *Street Children* case, the Court declared regarding the interpretation of the rights of the child in the ACHR that "...both the American Convention on Human Rights and the Convention on the Rights of the Child form part of a very comprehensive international corpus juris for the protection of the child that should help this Court establish the context and scope of the general provision established in article 19 of the American Convention"(para. 194). Examples from the Commission include *Perez v. Mexico* (Case 11.565, Report N° 129/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 232 [1999]) concerning the rape and torture of three sisters by military personnel, where the respondent was found guilty of violating the duty to protect the rights of the child and *Theissen v. Guatemala* (Case 12.101, Report No. 79/01, OEA/Ser.L/V/II.114 Doc. 5 rev. at 182 [2001]) on the forced disappearance of a fourteen-year old allegedly abducted by armed forces.

²³⁶ The difficult situation of many children in the Americas is described both in the aforementioned country reports and in the reports of the on-site visits of the Rapporteur on Children's Rights. See n. 232 *supra*.

²³⁷ See the country reports referred to in n. 232 *supra*.

2.6.7 The African System

Children's rights in the African regional system for human rights are protected in the African Charter on Human and Peoples' Rights²³⁸ and, more importantly, in the African Charter on the Rights and Welfare of the Child.²³⁹ Both treaties were adopted under the auspices of the Organisation of African Unity (OAU), now the African Union.²⁴⁰

²³⁸ OAU Doc. CAB/LEG/67/3 rev. 5 1520 UNTS 217, (1982), adopted 27 June, 1981, entered into force 21 October, 1986. The African Charter is also referred to as the Banjul Charter. On the African human rights system in general, *cf.*, e.g. Philip Amoah "The African Charter on Human and Peoples' Rights – An Effective Weapon for Human Rights?" *African Journal of International and Comparative Law* 1992 pp. 226-240, Evelyn A. Ankumah *The African Commission on Human and Peoples' Rights : practices and procedures* Dordrecht: Martinus Nijhoff, 1996, U. Oji. Umozurike *The African Charter on Human and Peoples' Rights* The Hague, Martinus Nijhoff Publishers, 1997, Bonny Ibhawoh "Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State" *Human Rights Quarterly* 22 (2000) pp. 838-860, Rachel Murray *The African Commission on Human and Peoples' Rights and international law* Oxford, Hart, 2000, Frans Viljoen "State Reporting Under the African Charter on Human and Peoples' Rights: A Boost From the South" *Journal of African Law* 150 44, pp. 110-118 (2000), Vincent O. Orlu Nmehielle *The African human rights system: its laws, practice and institutions* The Hague, Kluwer Law International, 2001, Malcom D. Evans & Rachel Murray (eds.) *The African Charter on Human and Peoples' Rights: the system in practice, 1986-2000* New York, Cambridge University Press, 2002, Inger Österdahl *Implementing human rights in Africa: the African Commission on Human and Peoples' Rights and individual communications* Uppsala: Iustus, 2002, Fatsah Ouguergouz *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* The Hague, Martinus Nijhoff Publishers, 2003, Rachel Murray *Human rights in Africa: from the OAU to the African Union* New York, Cambridge University Press, 2004.

²³⁹ OAU Doc. CAD/LEG/24.9/49 (1990), entered into force November 29, 1990. On children's rights in Africa, see e.g. Karin C. J. M. Arts "The International protection of Children's Rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child" in *Revue Africaine de Droit International et Comparé* 5 (1993) p. 139 *et. seq.*, Bankole Thompson "Africa's Charter on Children's Rights: A Normative Break With Traditionalism" *International and Comparative Law Quarterly* Vol. 4, April 1992, pp. 432-444, Frans Viljoen "Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" *Comparative and International Law Journal of Southern Africa* C36, 31, pp. 199-212 (1998) Welshman Ncube (ed.) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* Aldershot, Ashgate Dartmouth 1998, Chuma Himonga "Implementing the rights of the child in the African legal systems: The Mthembu journey in search of justice" *The International Journal of Children's Rights* 9: pp. 89-122, 2001, Amanda Lloyd "Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet" *The International Journal of Children's Rights* Vol. 10, No.2, 2002, pp. 179-198, Danwood Mzikenge Chriwa "The merits and demerits of the African Charter on the Rights of the Child" *The International Journal of Children's Rights* Vol. 10, No.2, 2002, 157-177, Dejo Oluwo "Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child" *The International Journal of Children's Rights* Vol. 10, No.2, 2002, 126-136, Julia Sloth-Nielsen "Children's Rights in the South-African Courts: An overview since ratification of the

The rights of the child have not been given any particular attention in the African Charter. The only article where children are specifically mentioned is article 18(3), stating that the protection of the rights of the child shall be ensured as stipulated in international declarations and conventions. The focus of article 18 is on the protection of the family, which is described as the natural unit and basis of society.²⁴¹

The African Charter on the Rights and Welfare of the Child is one of few general regional²⁴² children's rights instruments and has been praised as a "landmark document"²⁴³ as well as being a "radical departure from African cultural traditionalism".²⁴⁴ The UN Convention on the Rights of the Child was a major source of inspiration for the Charter – both regarding which rights were to be included in the UN treaty and which were not.²⁴⁵ The article of the Children's Charter most relevant as regards participation rights, article 4 (Best Interest of the Child), can be described as a combination of articles 3 and 12 of the Convention on the Rights of the Child:

1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.
2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be

UN Convention on the Rights of the Child" *The International Journal of Children's Rights* Vol. 10, No.2, 2002, 137-156.

²⁴⁰ The reform process begun with the adoption of the 1999 Sirte Declaration and in July 2000 in Lome, Togo, the Constitutive Act of the African Union was adopted by the Assembly of Heads of States and Governments. The Constitutive Act entered into force in March 2001 after being ratified by two-thirds of the member states of the OAU.

²⁴¹ Articles 27(1) and 29(1) of the Banjul Charter both confer duties on the individual towards the family; article 29(1) particularly refers to a duty to "respect his parents at all times".

²⁴² The 1996 European Convention on the Exercise of Children's Rights is not nearly as comprehensive as the African Charter on the Rights and Welfare of the Child and concerns only the procedural rights of the child. Chapter 2.6.5.2 *supra*.

²⁴³ Arts "The International protection of Children's Rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child" p. 139.

²⁴⁴ Thompson "Africa's Charter on Children's Rights: A Normative Break With Traditionalism" p. 433.

²⁴⁵ This desire of further attention to certain rights is said partly to derive from a frustration with the drafting process of the CRC, in which few African states actively participated and in which issues of special importance for Africa might not have been sufficiently addressed. Such issues, for example, discrimination of the female child, socio-economic conditions particular to Africa, African conceptions of family life and the duties of the individual and child soldiers. The CRC thus can be called a catalyst for the creation of a regional convention on children's rights (see Viljoen "Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" pp. 204-206 and Thompson "Africa's Charter on Children's Rights: A Normative Break With Traditionalism" p. 433).

provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

Despite of the influence of article 12 on the Charter's article 4, however, children's right to participation is not one of the Charter's most prominent features.

Children's rights in the African context, more visibly than in many other contexts, are influenced by customary law as well as by modern domestic law and international human rights provisions. Tradition and customary law are in several aspects not compatible with the provisions laid down in the African human rights treaties. Customary law is recognised as law in all African states alongside the western systems of law imposed during the colonial era; thereby creating a legal pluralism where the citizen can choose which of the parallel systems of law is to be applied.²⁴⁶ The application of customary law is especially common in family law and land law, thus touching upon children's lives in various aspects.²⁴⁷

As regards the view of children in the Charter, mention should perhaps be made of the importance of the family, as the emphasis put on this particular social construction affects the view of the child as an autonomous individual. Respect for the family is held to be a fundamental value in the Charter as well as in African society in general, where it plays an important part in its communal structure.²⁴⁸ Traditionally, children play a very important part in the family unit in African society, the ultimate purpose of marriage traditionally being procreation in order to continue the family line and, in a wider perspec-

²⁴⁶ These parallel systems can be compared with the Indian legal system, which is addressed in Chapter 7.

²⁴⁷ See, for example, Himonga "Implementing the rights of the child in the African legal systems: The *Mthembu* journey in search of justice" p. 95, Athaliah Molokomme & Keletso Mokobi "Custody and Guardianship of Children in Botswana. Customary Laws and Judicial Practice within the Framework of the Children's Convention" pp. 182-203 in Ncube (ed.) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* and Welshman Ncube "Re-evaluating Law, Tradition, Custom and Practice. Custody and Access to Non-marital Children in Zimbabwe" pp. 150-181 in Ncube (ed.) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*.

²⁴⁸ The importance of the family in African tradition cannot be overestimated, although urbanisation has caused changes in attitudes in African society as in all other societies. See e.g. Kwame Gyekye *African cultural values: an introduction* Philadelphia, PA, Sankofa Pub. Co, 1996, p. 75, 90, Himonga "Implementing the rights of the child in the African legal systems: The *Mthembu* journey in search of justice" p. 109, Welshman Ncube "The African Cultural Fingerprint? The Changing Concept of Childhood" pp. 13-27 in Ncube (ed.) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*.

²⁴⁸ Gyekye *African cultural values: an introduction* pp.76-84.

tive, to secure the continuity of human life and existence.²⁴⁹ This pattern is in no way exclusive to African society but is rather a *modus operandi* for communities without the state governed social security system of modern society, and has counterparts both now and historically in traditional societies.²⁵⁰ It must, however, be pointed out that the urbanisation of African life and changes in society in general during the twentieth century have severely challenged traditional values regarding parent-child relationships and related matters in various ways, moving the emphasis from the extended family towards smaller units.²⁵¹

The implementation of the African Charter on the Rights and Welfare of the Child is monitored by the African Committee of Experts on the Rights and Welfare of the Child.²⁵² The state parties to the Charter submit reports for the Committee to examine at their sessions, which are to be held twice annually.²⁵³ The Committee was established in July 2001 and has at the time of writing has been in session seven times.

²⁴⁹ *Ibid.*

²⁵⁰ One common denominator for some of these societies is poverty, but lack of economic resources is not a prerequisite for a social security net based around the family.

²⁵¹ See Bart Rwezaura "The Duty to Hear the Child: A View from Tanzania" pp. 57-95 (79) Ncube "The African Cultural Fingerprint? The Changing Concept of Childhood" generally on the changing concept of childhood and the nuclearisation of the African family.

²⁵² The Committee draws its mandate from articles 32-46 of the Charter.

²⁵³ See the Rules of Procedure, Cmttee/ACRWC/11.Rev. 2, Rule 2.

3 Children's Participation: An Issue of Democracy

3.1 Children as Rights Holders

Do children have rights? Under the law, both international law and under most domestic jurisdictions, the answer is yes. However, there is a difference between “positive” rights recognised by law and moral rights, recognised in moral theory.²⁵⁴ To have possession of rights, to be the beneficiary of someone else's obligation, to be *entitled* to something, gives a person status as someone to respect with the possibility of redress if those claims (rights) are not met.²⁵⁵ There is a close connection between rights and dignity and between rights and respect, a connection important not least in relation to children in their often vulnerable position *vis-à-vis* adults.²⁵⁶ A person not accorded dignity and respect is very easily reduced to an object of intervention, a commodity or someone's property. In its worst forms, not being accorded the status inherent in concepts such as rights, dignity and respect, it is dehumanising. A look at how women, children, ethnic groups and many other categories have been (and still are) treated by those in power reflect this all too well. The idea of the right to equal treatment, unless there is a good reason for treating persons differently, and conferring upon each person the same degree of concern and respect as on all other persons, has been described as a morally fundamental idea.²⁵⁷ It is also the fundamental idea upon which the human rights discourse rests.

Rights are fundamental. Without them, a person is not free but a means to the ends of others – a slave, a commodity. “Rights-talk” has been used as a means of strengthening the positions of so-called “marginalised groups” in society: women, indigenous peoples, ethnic mi-

²⁵⁴ David Archard *Children, Family and the State* Aldershot, Ashgate, 2003, p. 2.

²⁵⁵ Michael D. A. Freeman “Taking Rights More Seriously” *International Journal of Law and the Family*, 6, 1992, pp. 52-71 (54) in which he refers to Feinberg.

²⁵⁶ *Ibid.*

²⁵⁷ Freeman “Taking Rights More Seriously” pp. 61-63 where he discusses Dworkin's theory of rights from a child rights perspective.

norities are some examples.²⁵⁸ During the twentieth century children as a category were included in this discussion. A very important question in relation to children and rights has been to consider at which point a person becomes capable of autonomous choice. This is directly linked to the definition of a child based upon age. Thinking in terms of rights and integrity of the individual person as essential for a life with dignity, has its philosophical roots – at least in the West – in liberalism which focuses on the independent individual. In early liberalist thought, the absence of child autonomy was not discussed, but considered self-evident.²⁵⁹ As children were considered irrational *per se*, they were not seen as capable of informed consent and therefore presumed to be dependent on adults/parents until able to care for themselves. Hobbes, for example, wrote that children “lack reason” and therefore had an obligation to obey their parents who were to teach them the difference between good and evil.²⁶⁰

The end of the twentieth century saw a growing interest in issues concerning the moral and political status of children in political, moral and social philosophy.²⁶¹ There are several perspectives on children as rights-holders to consider, ranging from a denial of children as being capable of possessing rights at all to those who argue that there are no differences whatsoever between adults and children as holders of rights.²⁶² The supposed opposites of dependency and autonomy, and protection and participation, have been central to the debate, as has the meaning of capacity. For two major theories on rights, the will (or claims) theory and the interest (or welfare) theory, the issue of capacity is highly relevant.²⁶³ Following the will theory-oriented view on rights, the emphasis on the individual as being autonomous is essential. The will theory holds that a right essentially gives effect to or protects the rights-holder’s freedom of choice with respect to a particular cause *if* the person concerned has both a *claim* and a *power* to choose whether

²⁵⁸ Sometimes called “weak groups” which is problematic as it enhances a (lower) status not wished for.

²⁵⁹ Classic social contract theories of e.g. John Locke build on the vision of a contractual relationship existing between the individual citizen and the state, and presumes that the individual has the capacity to consent to the compact and of understanding its implications. John Locke *Two Treatises on Government*, first published in 1689.

²⁶⁰ Thomas Hobbes *Leviathan*, first published in 1651.

²⁶¹ Archard *Children, Family and the State* p. xi with references. See also the writers referred to in Freeman “Taking Rights More Seriously” (1992) and the selected essays in Michael D. A. Freeman (ed.) *Children’s Rights Vol. I & II* Aldershot, Ashgate Dartmouth, 2004.

²⁶² See Archard *Children, Family and the State* pp. 9-10, Cynthia Price Cohen “The Relevance of Theories of Natural Law and Legal Positivism” pp. 53-70 in Freeman & Veerman (eds.) *The Ideologies of Children’s Rights*, Katherine Hunt Federle “Rights Flow Downhill” *International Journal of Children’s Rights* 2, 1994, pp. 343-368.

²⁶³ Archard *Children, Family and the State* pp. 1-65.

that claim should be enforced or waived.²⁶⁴ Persons not considered as having the capacity to exercise independent choice, such as for example the mentally handicapped, the mentally ill and children, according to this theory thus cannot be rights-holders.²⁶⁵ The interest theory, on the other hand, sees a right as the protection of an interest sufficiently important to create a duty for someone else to fulfil. Education can serve as an example: to have access to education is considered an interest important enough for children to create an enforceable duty for adults (society) to fulfil this interest. McCormick has used the fact that in practice children *do* seem to have rights, to argue that (at least in relation to children's rights) the interest theory is the most coherent and most suitable as an explanatory model for rights.²⁶⁶ The best interest principle as expressed in article 3(1) of the Convention on the Rights of the Child expresses an interest-based or welfare approach to the child, although a modified one: article 3(1) does not state that the best interests of the child should be *the* primary consideration in all actions concerning children, but *a* primary consideration.²⁶⁷ This provides space for other interests to be taken into account as well but, also, for a will-oriented point of view to be argued.

John Eekelaar in a 1992 article argued that it is possible to apply the *will (claims) theory* to the idea of children's rights.²⁶⁸ He distinguishes between actions motivated solely by the purpose of promoting someone else's welfare and actions initiated by the recognition of someone else's claims, states that the idea of rights is related to the claims that individuals actually make and, also, emphasises that the claims made have to be specified to a certain degree to be regarded as proper claims. Simply asking that someone acts according to one's interests in general does not constitute a claim in this respect.²⁶⁹ Eekelaar asserts that the starting point when finding out if children have claims (rights) and what these claims might be is simply to listen to what they have to say:

Hearing what children say must [...] lie at the root of any elaboration of children's rights. No society will have begun to perceive its children as rights-holders until [the] adult's attitudes and social structures are

²⁶⁴ Rowan Cruft "Rights: Beyond Interest Theory and Will Theory?" in *Law and Philosophy* 23, pp. 347-397, 2004.

²⁶⁵ Archard *Children, Family and the State* p. 5.

²⁶⁶ Neil McCormick "Children's Rights: A Test-Case for Theories of Rights" *Archiv für Rechts-und Sozialphilosophie*, 62, pp. 305-316.

²⁶⁷ On article 3 CRC and the best interest principle, see chapter 2.

²⁶⁸ John Eekelaar "The Importance of Thinking That Children Have Rights" in *International Journal of Law and the Family* Vol. 6 No.1, 1992, pp. 221-235.

²⁶⁹ Eekelaar "The Importance of Thinking That Children Have Rights" p. 228.

seriously adjusted towards making it possible for children to express views, and towards addressing them with respect.²⁷⁰

Although emphasising those children themselves must be heard, Eekelaar does not ignore the fact that children can have difficulties in expressing their claims because of their young age.²⁷¹ He does not, however, consider this to be a sufficient reason for not granting children rights at all. Instead, he argues that for the claims to be regarded as reflecting rights there must be sufficient reason to plausibly assume that:

if fully informed of the relevant factors and of mature judgement, the children would want such duties to be exercised towards them.²⁷²

Thus, if a child is not capable of expressing his or her claim directly, the duty of the adult is to act in a way that the child when reaching adulthood and thereupon following maturity and capacity, would approve of.²⁷³ Eekelaar focuses on the process-oriented aspect of this hypothetical viewpoint of what the child as an adult would want and connects it to the child's development process, looking ahead to the future adult. While doing this, he also recognises that attention must be paid to what is best for the child in his or her particular social and cultural environment – general theories of what is best for children are not in themselves sufficient ground for decision-making concerning children. The actions taken must be ones that the individual child would plausibly want and it is thus of essential importance to find out what they might be – if possible, from the first-hand source, the child itself. In the context of the Convention on the Rights of the Child, Eekelaar comments that article 12 is the only provision that has a bearing on these issues.²⁷⁴

Michael Freeman, who has written extensively on children's rights, has also discussed the issue of children's autonomy and capacities and the questions that arise when analysing the grounds for children having rights at all. He recognises the importance of capacity for the idea of the autonomous individual, but at the same time reminds us of the words of John Stuart Mill:

²⁷⁰ Eekelaar "The Importance of Thinking That Children Have Rights" p. 228.

²⁷¹ Other things than lack of capacity can affect the possibilities a child has to express an opinion – see Chapter 5 *infra*.

²⁷² Eekelaar "The Importance of Thinking That Children Have Rights" p. 227.

²⁷³ *Ibid.*

²⁷⁴ Eekelaar "The Importance of Thinking That Children Have Rights" p. 233.

to believe in autonomy is to believe that anyone's autonomy is as morally significant as anyone else's.²⁷⁵

A person's age – or any other factor for that matter – as I see it thus should not be decisive of his or her autonomy. The autonomy to which every individual is entitled is part of the very essence of being a human being and should not be made conditional on external circumstances. To treat a child as a person and to respect that person's autonomy – which might be limited with regard to the child's individual capacity – is, according to Freeman, to recognise the child as a rights-holder *per se*.²⁷⁶ He by no means objects to the fact that children are more vulnerable than adults, with fewer and lesser abilities as well as being more in need of protection, and that therefore it is sometimes not in the child's best interests to be completely autonomous. He suggests, however, that dependency should not *per se* be seen as a reason to be deprived of respect and choice. Freeman justifies the interferences with the individual's autonomy that become necessary when a child is not yet capable of participating in decision-making processes by arguing in favour of what Dworkin has called a "future-oriented consent".²⁷⁷ This concept corresponds with Eekelaar's arguments on the process-oriented approach to the hypothetical views of children. Freeman, however, also emphasises that the differences between adults and children in terms of capacity are not as significant as had earlier been argued.²⁷⁸ Therefore, double standards are not acceptable to any great extent. The core issue, according to Freeman, is not to determine which theoretical underpinning most coherently explains the basis for children's rights, but to recognise the equal relevance of recognising for children both their need for protection and their status as individual rights-holders.²⁷⁹ He reminds us that:

to take children's rights more seriously requires us to take seriously nurturance *and* [author's italics] self-determination [...] it demands of us that we adopt policies, practices, structures and laws which both protect children and their rights.²⁸⁰

Perhaps the most pragmatic and constructive way to approach the "to be or not to be" of the right of children to participate, and issues of

²⁷⁵ Cited in Freeman "Taking Rights More Seriously" p. 64.

²⁷⁶ Freeman "Taking Rights More Seriously" p. 65. See, also John Eekelaar on parent's obligations to care in "Are Parents Morally Obligated to Care their Children?" pp. 51-64, in Eekelaar & Sarcevic *Parenthood in Modern Society: Legal and Social Issues for the Twenty-first Century*.

²⁷⁷ Freeman "Taking Rights More Seriously" p. 68.

²⁷⁸ Freeman "Taking Rights More Seriously" p. 66.

²⁷⁹ Freeman "Taking Rights More Seriously" p. 69.

²⁸⁰ *Ibid.*

autonomy, is to take what Freeman has called the “*via media* of liberal paternalism”²⁸¹ – that is, not to dwell too much on classifications of which perspective is the most important, but to pay equal attention to both the needs and the rights of children. However, if the right to participation and respect for one’s views is seen as a fundamental element of the rights of the child – and the acknowledgement of article 12 of the Convention on the Rights of the Child as one of the Convention’s general principles affirms this view – the will theory approach to children’s rights has a strong case. In my view, Freeman is right in saying that when arguing about theory it is somewhat missing the point: participation and protection in a children’s rights context are undoubtedly intertwined and therefore the matter must be addressed holistically. Acknowledging the child as a rights holder, thereby recognising the applicability of the will theory approach rather than the interest theory approach, is a precondition if one wants to argue the right of the child to participation in decision-making processes. This is because being able to exercise this right presupposes that the individual holds a certain measure of capacity. This said, it must be recognised that the will theory has its problems when applied to children. Eekelaar maintains, when applied to children, the image of “the competent individual” must take into account the fact that children do not possess the full experience and capacity of an adult and therefore cannot be expected to always make the ultimate decision (not, of course, that this can be presumed to be the case in every decision made by an adult either).

The matter is further complicated by the fact that the capacity and maturity of a person varies not only between different ages, but from individual to individual. Freeman has identified a number of concerns for the contemporary children’s rights movement to address, of which the need to problematise the relationship between age and status is one.²⁸² The discussion concerning what weight should be accorded to a child’s age and maturity and its effect on that child’s capacity to present claims and make informed decisions is of vast importance both for the issue of how to address the fundamental matter of whether or not children have rights, and for the proper interpretation of the Convention on the Rights of the Child. The fact that the Convention applies to an extremely heterogeneous group – every individual up to the age of eighteen – does not make the issue any easier to solve. Another element to be considered is the nature of behaviour connected with child-

²⁸¹ Freeman “Taking Rights More Seriously” p.69. In a more recent article, Freeman presents his critique of the arguments against children’s rights. Michael D. A. Freeman “The Future of Children’s Rights” *Children & Society* vol 14, 2000, pp. 277-293 (279-281).

²⁸² Michael D. A. Freeman “The sociology of childhood and children’s rights” *The International Journal of Children’s Rights* 6, 1998, pp. 433-444, (435).

hood in different societies. “Childhood” is a social construction and is given different cultural meanings in different contexts. In turn, these meanings depend on how a particular society conceives of concepts such as power, autonomy, authority and citizenship. In the following section, attention will therefore be directed to what constitutes “childhood” and the different ways of looking at who actually is a child.

3.2 Different Perspectives of the Concept of the Child

3.2.1 The Child as Defined in the Convention on the Rights of the Child

The Convention on the Rights of the Child defines the child in article 1 in the following way:

a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

This definition is now more or less globally accepted, at least in terms of legislation. The international law on the rights of the child, however, reflects a variety of tradition that has influenced how the concept “child” and “childhood” are interpreted.²⁸³

During the drafting of the Convention, several participating states took markedly different views on the beginning of childhood in relation to whether life begins – at conception or birth.²⁸⁴ This distinction is crucial to the discussion on abortion and other pre-birth issues. Many states, following the adoption of the Convention, aired views reflecting the controversial nature of this matter. Two examples were the initial reports submitted by Ireland and the Holy See, both emphasising “the right to life of the unborn”.²⁸⁵ The question of whether or not to include the time between conception and birth within the scope

²⁸³ Van Bueren *The International Law on the Rights of the Child* pp. xxi, 1-6.

²⁸⁴ See e.g. the proposal by Malta, Ireland, the Philippines and the Holy See on the wording of paragraph 9 of the preamble in E/CN.4/1989/WG.1/WP.8 and E/CN.4/1989/WG.1/WP.9, the proposal by Germany in E/CN.4/1989/WG.1/WP.6, the 1989 Report of the Working Group to the Commission on Human Rights E/CN.4/1989/48 para. 25-74, and the commentaries on article 1 by Barbados (E/CN.4/1324), New Zealand (E/CN.4/1324/Add.5) and the summary in the 1980 Report of the Working Group to the Commission of Human Rights E/CN.4/L.1542 paras. 28-36.

²⁸⁵ Ireland’s 1996 initial report CRC/C/11/Add.12 para.104 and the Holy See, CRC/C/3/Add.27, para.7-8 (1993). These reports not surprisingly reflect the traditional Catholic view on the issue of abortion.

of the treaty was discussed when drafting both the preamble²⁸⁶ and article 1.²⁸⁷ The preamble refers to the child's need for special safeguards and care before as well as after birth, but the final compromise adopted by the Convention's drafters seems to have been deliberately to not include a definition of when childhood begins. The drafters were even forward-looking enough to include a statement in the *travaux préparatoires* regarding the wording of the preamble. This emphasised that

In adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of article 1 or any other provision of the Convention by the State Parties.²⁸⁸

Consequently, the Convention does not restrict a state party's discretion, under domestic law, to set a limit in time for when childhood begins. One would have to concede that this was the most pragmatic solution, as any attempt at defining the moment when childhood begins would have had a substantial influence on the number of states expressing a positive view towards ratifying the Convention. The standpoint taken by the drafters, however, has not prevented state parties from making declarations and reservations concerning the interpretation of article 1.²⁸⁹ Definitions regarding the right to life, however,

²⁸⁶ Preambular article 9 “*Bearing in mind* that, as indicated in the [1959] Declaration of the Rights of the Child, the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”. The discussion can be followed in the compilation of *travaux préparatoires* in United Nations Centre for Human Rights & Save the Children Sweden *Legislative History of the Convention on the Rights of the Child (1978-1989) Title and Preamble* HR/1995/Ser.1/titleandpreamble.

²⁸⁷ See United Nations Centre for Human Rights & Save the Children Sweden *Legislative History of the Convention on the Rights of the Child (1978-1989) Article 1 (Definition of a Child)* HR/1995/Ser.1/article.1.

²⁸⁸ See the 1989 Report of the Working Group to the Commission on Human Rights, E/CN.4/1989/48, para. 43. This statement was commented on by the Legal Council of the United Nations, which pointed out the strangeness in including guidelines for interpretation of a treaty in the *travaux préparatoires*, especially considering the status of *travaux préparatoires* as a supplementary means of interpretation according to international treaty law. The Legal Council, however, concluded that there was no prohibition in law or practice against including an interpretative statement, although there were better ways of achieving the same effect. See annex to the 1989 Report of the Working Group to the Commission on Human Rights, E/CN.4/1989/48.

²⁸⁹ Some examples are the declarations by Argentina and the Holy See (declaration on the scope of the Convention) and the reservations by Indonesia, Iran and Malaysia which all limit the scope of article 1. The United Kingdom, on the other hand, clearly declared that “The United Kingdom interprets the Convention as applicable only following a live birth”. For a regularly updated list of declarations and reservations to the Convention on the Rights of the Child, see United Nations internet resources http://untreaty.un.org/humanrightsconvs/Chapt_IV_11/Rightsofthechild.pdf and <http://www.ohchr.org/english/countries/ratification/11.htm#reservations>.

have been made in regional treaties such as the American Convention on Human Rights, in which article 1 provides that the right to life is to be protected from the moment of conception.²⁹⁰ From the limited treaty law and case law available, however, it appears that the right to life in general is protected by international law from the moment of birth, and not earlier.²⁹¹

On the other hand, the end of childhood from a legal perspective, *is* determined by article 1 of the Convention on reaching the age of eighteen unless the age of majority under domestic law is attained earlier. It is obvious that determining a specific age as constituting the end of childhood and the attainment of adulthood is arbitrary, since there are enormous differences in how various societies look upon the duration of childhood.²⁹² However, setting an age limit was necessary for the treaty to be applicable. By linking the international definition of childhood to domestic law, the drafters of the Convention attempted to accommodate different cultural diversities reflected in national age limits.²⁹³ A similar line of argument could be presumed to have guided the drafters of the African Charter on the Rights and Welfare of the Child, which in article 2 defines “the child” as every human being below the age of eighteen years.²⁹⁴

3.2.2 “Childhood” in Sociological Research

3.2.2.1 A Dominant Paradigm – the Competent Child

Michael Freeman has suggested that a connection exists between the sociology of childhood and children’s rights that should be acknowledged more than it currently is and that these two disciplines have much to offer each other, pointing to what he considers to be their

²⁹⁰ See Chapter 2.6.6.

²⁹¹ Van Bueren *The International Law on the Rights of the Child* p. 35. On the possible conflict between the rights of the woman and the rights of the foetus (would the foetus be considered as a rights holder) see e.g. Elisabeth Rynning “Åldersgräns för mänskliga rättigheter? Om rätten till hälso- och sjukvård vid livets början” pp. 149-181 in Anna Hollander, Rolf Nygren & Lena Olsen (eds.) *Barn och rätt* Justus, Uppsala, 2004. For a European perspective, see e.g. the case *Vo v France* Judgment 8 July, 2004 in which the European Court of Human Rights does not accord the foetus with the status as a rights holder.

²⁹² See the discussion related in the 1980 report of the Working Group to the Commission on Human Rights, E/CN.4/L1542 para. 28-36 and in the statement by the International Committee of the Red Cross (see E/CN.4/1324) in which it was emphasised that who is considered to be “a child” varies from one culture to another.

²⁹³ Van Bueren *The International Law on the Rights of the Child* pp. 36-37. Examples of the multitude of age limits existing in domestic legislation can be found in the state party reports to the Committee on the Rights of the Child, mostly under the heading “Definition of the Child”.

²⁹⁴ See Chapter 2.6.7.

common ground.²⁹⁵ This is true since when venturing out of the strictly legal sphere – which in many cases is necessary when discussing children’s rights in a particular context – what is actually meant when using terminology such as the “child” and “childhood” becomes ever more complex.²⁹⁶ Who is considered to be a child, and what period in a person’s life can be labelled as “childhood”, have changed over time. There are many reasons for this, including social changes and the need to define certain ages in which those ages have attached rights and responsibilities.²⁹⁷ The traditional view of children has been to see them as objects in need of protection, not as persons with the rights and capabilities of autonomous individuals.²⁹⁸ Children more often than not have been regarded primarily as being part of the family unit, not as independently acting agents. Until the end of the 1970s, the prevalent understanding among historians was that historically, children did not constitute a category of their own.²⁹⁹ However, this view has since then been superseded and it has instead been argued by researchers that children, at least in the West, from antiquity onwards have been considered as to be group in society both separate and different from adults.³⁰⁰

The ways in which societies have regarded children obviously have not been – and still are not – the same all over the world. Awareness of the facts of biological immaturity is universal; it is how it is, and has been dealt with and reacted upon, that varies.³⁰¹ However, it is probably not particularly controversial to assert that the dominating definition of a child in most of the world’s societies today is that of a biologically immature person, not yet sufficiently competent to handle life and its responsibilities properly in every aspect – a “budding adult” who needs the protection provided by parental (or equivalent) guardi-

²⁹⁵ Freeman “The sociology of childhood and children’s rights”. In the article, Freeman seeks to define the primary concerns of the sociology of childhood and of the contemporary children’s rights discourse respectively.

²⁹⁶ For an overview of changes in Swedish legislation in the perception of children and of what constitutes the best interest of the child from a judicial point of view, see Singer, pp. 48-98. For tendencies on the international level, see Hugh Cunningham *Children and childhood in western society since 1500* London, Longman, 1995.

²⁹⁷ Eva Poluha, Karin Norman & Jónína Einarsdóttir *Children Across Time and Space* Stockholm, Rädda Barnen, 2000 pp. 9-11.

²⁹⁸ The international human rights instruments preceding the 1989 Convention on the Rights of the Child are just one example of this. See Chapter 2.2 *supra*.

²⁹⁹ In Philippe Ariès *Centuries of Childhood* London, Cape 1962, it is, however, argued that the view of “childhood” as we refer to it today is a contemporary phenomenon.

³⁰⁰ *C.f.*, e.g. Cunningham *Children and childhood in western society since 1500*.

³⁰¹ On “the child” in different cultures, see Karin Norman *Kulturella föreställningar om barn*. See also Freeman “The sociology of childhood and children’s rights” p. 438 with references.

anship.³⁰² How the child is perceived has been influenced by various aspects such as age (biological as well as social), maturity, ethnicity, religion, class and last, but not least, gender. A child's gender is of enormous importance for the opportunities, life choices and resources available to the child. In the twenty-first century, male and female children from the moment they are born still do not have the same possibilities in life, since complete equality between the sexes is yet to be universally obtained.³⁰³ How we see the child is thus a reflection of how society perceives both the human being in general and in the social order.³⁰⁴ The emphasis on age and maturity in modern societies and the constant need to categorise people based upon age, in order to define their rights and duties so that generally applicable rules can be created has promoted the development of age limits, however inflexible they might be when applied to individual cases.

However, a particular age defined in years does not necessarily constitute what it is to be a child or when the transfer to adulthood takes place. Entering puberty, taking on responsibilities or learning certain skills are some examples of events that can be equally important factors.³⁰⁵ In many regions and cultures other than in the West, young people are sometimes regarded as being adults much earlier than at the age of eighteen, and in some cultures, later in life.³⁰⁶ In so-called traditional societies, it is not uncommon for a more flexible system to be applied for the transfer into adulthood. The emphasis here lies more in

³⁰² Poluha, Norman & Einarsdóttir *Children Across Time and Space* pp. 14-15.

³⁰³ The gender-related development index published in each annual Human Rights Development Report by the United Nations Development Fund shows that equality between the sexes is far from being realised in the world. The reports are available on <http://hdr.undp.org/>.

³⁰⁴ See, for example, Karin Norman *Kulturella föreställningar om barn* and Poluha, Norman & Einarsdóttir *Children Across Time and Space* pp. 53-58. On universality in the perceptions of children and childhood, Ncube argues: "This limbo or lack of capacity attached to childhood is crosscultural and universal and provides perhaps the greatest challenge in the concretization of children's rights." Ncube "The African Cultural Fingerprint? The Changing Concept of Childhood" p.16 in Ncube (ed.) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*. On the view of the child in North American Indian tradition, see James W Zion "North American Indian Perspectives" pp. 191-221 in Abdullahi Ahmed An-Na'im (ed.) *Human Rights in Cross-Cultural Perspectives. A Quest for Consensus* Philadelphia, University of Philadelphia Press, 1991.

³⁰⁵ Age as counted in years is, for example, not the most relevant parameter for deciding a person's status or age – rituals other than birthdays can function as equally important rites of passage. See e.g. Thomas Hylland Eriksen *Små platser – stora frågor. En introduktion till socialantropologi* Falun, Nya Doxa, 2000 pp. 143-150.

³⁰⁶ See Ncube "The African Cultural Fingerprint? The Changing Concept of Childhood" pp. 19-21, Hylland Eriksen *Små platser – stora frågor* pp. 143-150, Norman *Kulturella föreställningar om barn* (in general). This said, it is obvious that becoming an adult is a process in "modern" societies as well: my point is that it is formally limited in a way that might be limiting and inadequate on an individual level.

a person's ability or capacity to perform acts normally reserved for adults, not on the basis of age as defined in years. Attaining "formal" adulthood in such societies is a gradual process of socialisation within the family combined with demonstrated physical developments such as puberty, rather than with being dictated by the attainment of a set age. Human rights instruments relying on age as a criterion for applicability in these contexts can be rather insensitive tools.

The well-known work of Allison James, Chris Jenks and Alan Prout has described the *developmental perception* of the child as being that of a "defective" form of adulthood, social not in the actual present as a human being but only in future potential, which is a good illustration of the developmental-focused perspective.³⁰⁷ The development perspective with its future-oriented approach was for a long time the ruling paradigm in sociological child research.³⁰⁸ To see childhood as an apprenticeship implies a biological, social and psychological process of development into independent adulthood, with inadequacy, inexperience and immaturity being part of that present undeveloped state. This *future-oriented approach* defines childhood as a period of lacking abilities – which will gradually develop with age. The developmental perspective is, as discussed above, clearly visible in rights theory concerning the grounds for children being perceived as rights-holders. The connection to a protection-emphasising view of the child is not far-removed.

The development perspective of the child was challenged and criticised by newer sociological research in the 1990s for not appreciating the influence and effect of social structures on children and the stages of childhood and for undergoing the risk of disregarding the value of childhood, in itself, for children.³⁰⁹ By not discussing and analysing children as a separate category but by "familiarising" them through constantly referring to them as being a part of the family, these critics

³⁰⁷ Alison James, Chris Jenks & Alan Prout *Theorizing Childhood* Cambridge, Polity Press, 1998.

³⁰⁸ See James, Jenks & Prout *Theorizing Childhood* p. 6.

³⁰⁹ Such critique is presented in the above mentioned work by James, Jenks & Prout and in, for example, Jens Qvortrup (ed.) *Childhood matters: social theory, practice and politics* Aldershot: Avebury, 1994, Målfrid G Flekkoy & Natalie Hevener Kaufman *The Participation Rights of the Child. Rights and Responsibilities in Family and Society* London, Jessica Kingsley, 1997, Jeremy Roche "Children: Rights, Participation and Citizenship" *Childhood* Vol 6(4) 1999, pp. 475-493, Berry Mayall "The sociology of childhood in relation to children's rights", *International Journal of Children's Rights* Vol 8, 2000 pp. 243-259, Michael Wyness "Children, childhood and political participation: Case studies of young people's councils" *International Journal of Children's Rights* Vol. 9, 2001 pp. 193-212, Elisabeth Näsman "Barn, barndom och barns rätt" in Lena Olsen (ed.) *Barns makt* Uppsala, Iustus 2004 pp. 53-77, Jens Qvortrup *Studies in modern childhood: society, agency, culture* Basingstoke, Palgrave Macmillan, 2005.

meant that one risks overlooking issues of how power and resources are distributed and divided within the family. This can lead to miscalculations of children's own resources and how they are utilised. This newer research on the theory of childhood has focused increasingly on both the childhood agency and the social construction of childhood. The work by James, Jenks and Prout has been called a new paradigm establishing a discursive space where children are seen as individuals whose autonomy becomes a value in itself.³¹⁰ Another description of the new paradigm is that of "a call for children to be understood as social actors shaping as well as [being] shaped by their circumstances".³¹¹ It describes concepts such as "the child" and "childhood" as social constructions based upon age and the categorisations people make based upon this variable.³¹² The paradigm also emphasises that there is not just one "childhood", but that the diversity of childhood as well as its communality must be taken into account. It is therefore very important to remember that the social constructions referred to vary in content depending on time, culture and tradition in the particular society in which they exist.³¹³

Researchers following this line of reasoning have argued in favour of not relying solely on psychological knowledge – that is, developmental theory – with regard to children, and to approach children and childhood from a new set of perspectives. Berry Mayall has pointed out that the definition of childhood can be seen as a political issue, since theories about children's needs, development and appropriate adult input derive from studies of children contextualised and structured by the economic and social goals of adults themselves in different societies.³¹⁴ One example is the changed view of who is a child and proper occupations for children that occurred in the wake of industrialism in Europe: when children were no longer required to work in the fields, access to education and the benefits for all children, regardless of social class, of going to school became a much more politicised

³¹⁰ James, Jenks & Prout *Theorizing Childhood* pp. 5-7. For a discussion of the arguments presented by James, Jenks & Prout, see John R. Morss "The several social constructions of James, Jenks and Prout: A contribution to the sociological theorization of childhood" in *The International Journal of Children's Rights* 10, 2002, pp. 39-54.

³¹¹ James, Jenks & Prout *Theorizing Childhood* pp. 5-7.

³¹² Alison James at a discussion seminar at the conference *Childhoods 2005* (Oslo July 2005) discussed this issue, concluding that referring to pluralistic interpretations of "childhood" can be somewhat controversial and that "taking the 's' out of 'childhoods'" is a matter that is increasingly discussed by, amongst others, Jens Quartrup.

³¹³ See Cunningham *Children and childhood in western society since 1500* and Ariès *Centuries of Childhood* for a general history of children's rights. See also Norman *Kulturella föreställningar om barn* on the impact of culture on how children are seen in society.

³¹⁴ Mayall "The sociology of childhood in relation to children's rights".

issue.³¹⁵ Despite this, children are generally supposed to act, and childhood to be perceived, in an apolitical space. Mayall's conclusion is that by defining children as inferior, as objects of adult socialisation, they are thus depersonalised and denied the right to contribute to society and to participate in structuring their own childhood.³¹⁶ An important point in this line of research is that society has to "rethink" childhood and take children seriously as contributors to social thinking and social policies.³¹⁷

An intersecting critique of the future-oriented perspective is that of its influence on how children's rights are perceived and valued. If children are regarded as not yet being capable of exercising all the rights of an autonomous individual, adults are inclined to step in as interpreters of children's rights and views, thereby assuming the responsibility – and power – over their lives.³¹⁸ Childhood research focusing on childhood as a social construction instead aims at seeing children as a specific social category within society, and should be made a subject of interest in similar ways that other social categories are studied.³¹⁹ The issue of power, and how it is divided and distributed, forms an important part of such studies, not least within the family.³²⁰ The heart of this approach, advocated by e.g. Berry Mayall³²¹ and Elisabet Näsman³²² lies not in the separate individual but in children as a collective; on how childhood as a social category is created, the conditions that the category lives under and its potential to influence those conditions directly or indirectly. The degree of influence available to an individual child depends inevitably upon the general effect that, as a whole, children have on society. This approach also seeks to see children as

³¹⁵ Cf. Dahlén *The Negotiable Child. The ILO Child Labour Campaign 1919-1973*. For a contemporary Swedish example, see Anne-Li Lindgren & Gunilla Halldén "Individuella rättigheter; autonomi och beroende. Olika synsätt på barn i relation till FN:s barnkonvention" *Utbildning & Demokrati* 2001, Vol 10, Nr 2, pp. 65-79 where it is discussed how the child's perspective can be used as a political tool in the changed welfare state.

³¹⁶ Mayall "The sociology of childhood in relation to children's rights".

³¹⁷ *Ibid.*

³¹⁸ Parallels can here be drawn with Eekelaar's arguments on child rights and child capability – see Eekelaar "The Importance of Thinking That Children Have Rights".

³¹⁹ James, Jenks & Prout *Theorizing Childhood* pp. 30-31. On the discussion of women as a particular social group, see for example the discussion of Iris Marion Young's definition of social groups presented in Anna T. Höglund "Feminismens paradox – Kampen för gruppen kvinnors rättigheter och för varje kvinnas rätt att vara en individ" in Göran Gunner & Diana Amnéus (eds.) *Mänskliga rättigheter – från forskningens frontlinjer/Human Rights – from the Frontiers of Research* Studia Theologica Holmiensia No. 7, Iustus, Uppsala, 2003.

³²⁰ For a discussion on power relations within the family, see Chapter 4 *infra*.

³²¹ Mayall "The sociology of childhood in relation to children's rights" with references.

³²² Näsman "Barn, barndom och barns rätt" in Olsen (ed.) *Barns makt* with references.

competent, contributing social actors having the right to influence those structures surrounding their lives, and to have due weight given to their views and needs. The Convention on the Rights of the Child is an example of this “competence-oriented” view of children, although the Convention combines it with a protective approach towards children that is equally important.

However, this “new paradigm” – no longer being that new – of promoting the advantages and intrinsic value of the concept of the child’s autonomy together with underlining the relevance of treating children as being equally competent to adults and viewing them as a social group among others, is not left uncontested. It has been criticised on numerous occasions and from different standpoints. One line of criticism argues that the ruling paradigm of the international children’s rights regime disguises paternalistic, anti-humanist and authoritarian trends.³²³ Another example is the more conservative, traditional standpoint.³²⁴ This defends the child’s right to protection and emphasises the child’s lack of power through immaturity and incapability of decision-making due to biological reasons. Simultaneously, the rights of the family – or rather the parents – to decide on issues relating to their children, as opposed to state interference in private matters are defended. Such arguments, for example, have been cited as reasons why the United States has so far not ratified the Convention on the Rights of the Child.³²⁵

3.2.2.2 A New Direction?

The present dominant paradigm of “children as participants” and “the competent child” has in its turn been problematised. One approach has been to see “children and participation” as a distinct discourse which can be deconstructed in order to demonstrate its components.³²⁶ The

³²³ Vanessa Pupavac, “The International Children’s Rights Regime” pp. 57-75 in David Chandler (ed.) *Rethinking Human Rights: Critical Approaches to International Politics* Basingstoke; New York, Palgrave Macmillan, 2002. According to Pupavac’s point of view, today’s focus on children’s rights arises from the decline of moral, social and political values in contemporary Western society and culture. This has led to the throwing of suspicion on human relationships. Profound doubts over children’s carers has thus made parental authority conditional on whether parenting in general is considered appropriate. Pupavac criticises the fact that parents are no longer trusted with knowing and wishing what is best for their children. The preferential right of interpretation instead lays with a third party – the child professionals. However, this transfer of responsibility does not further the empowerment and participation of children, but only works to increase their dependency on adults.

³²⁴ One example of a traditionalist standpoint is expressed in Bruce C. Hafen & Jonathan O. Hafen “Abandoning Children to their Autonomy: The UN Convention on the Rights of the Child” *Harvard International Law Journal* 37, 1996, pp. 449-492.

³²⁵ *Ibid.*

³²⁶ Anne Trine Kjørholt, “The Participating Child – A Vital Pillar in this Century?” Keynote paper at the congress “Science of education in new relations. Time.

construction of “the participating child” as a vital pillar in society can thereby be described as emerging within a mixture of the discourse of consumerism within the economy, the discourse of democracy in general and the discourse of children’s rights. This mixture of different discourses, discussed for example by Kjørholt, can be understood in terms of contemporary global processes that have profound implications for the social construction of childhood, children’s rights and democratic participation.³²⁷ A number of elements are identified by this line of research as making up the “public narrative” of children as an endangered people – elements such as “children as democratic citizens”, “childhood in danger of extinction”, “the minority group child – children as a social category”, “the competent child” and “children as a resource”.³²⁸ Kjørholt argues that the identification of these elements exposes the mixture of different constructions of which the post-modern child is composed, pointing at its complex nature and at the fact that seeing children as participants establishes a fixed identity for them just as earlier paradigms have done; an identity that might not only serve the interests of children.³²⁹

As mentioned above, Kjørholt specifically refers to “children as democratic citizens” as one of the components of the contemporary image of the child. The dominant perspective on the child, at least in international law, is of participation as being beneficial for children in their process of development towards becoming responsible, autonomous adults – to learn the rules and processes of democracy. This perspective does not seem to be questioned as such to any large extent. The implementation of children’s rights to participation, i.e. putting the principles into practice, is, as we will see in forthcoming chapters, a completely different matter. In that context, dissident voices are heard. In the following section, however, arguments that have been presented in the human rights context as to why seeing the child as a citizen with participation rights is good for children as well as for society in general, will be discussed.

Space.Thought” Nordic Association for Educational Research 28th Congress 2000. (Nordbarn).

³²⁷ *Ibid.*

³²⁸ *Ibid.*

³²⁹ *Ibid.*

3.3 Interdependency: Democracy and Human Rights

3.3.1 The Growing Recognition of the Relationship Between the Concepts of Human Rights and Democracy

The right to participation in decision-making processes is fundamental to democracy. In the following citation, Geraldine Van Bueren points to the connection between child participation and democratic values:

if the hallmark of a democratic society is a plurality of expressed opinions and contributions by those living within it then the participation of children ought to be valued.³³⁰

This emphasises that children, as well as adults, are a part of society and should be recognised as a group which can make valuable contributions to that society. The manner in which article 12 of the Convention on the Rights of the Child has been formulated and interpreted – as including a right to take part in decision-making processes affecting the child – indicates that democratic values are one of the most important aspects of the rights that the article protects. The connection between the concepts of democracy and human rights for children as well as for adults can thus be argued to be established by the inclusion of the right to participation in the Convention through article 12. This interpretation is supported by the fact that “democracy”, “democracy skills” and “democratic values” are all concepts increasingly referred to in the children’s rights context.³³¹ This is most likely due to the insight that decision-making processes are a part of life at every level of society, from the family to the national government. Another reason is that basic democratic ideas on how decisions are made and how power is best distributed are relevant to all aspects of this process.

Participation rights are the human rights most directly connected with the concept of democracy. This is one important reason why, during the time of drafting of the Covenants on civil, political, economic, social and cultural rights, the (then) Socialist states on the one side and the capitalist Western states on the other, could not agree on the creation of one single instrument but divided the body of rights into two.³³² Principles underpinning human rights as well as the concept of

³³⁰ Van Bueren *The International Law on the Rights of the Child* p. 131.

³³¹ One example is the UNICEF report *The State of the World’s Children 2003. Child participation* UNICEF, 2003, in which the democracy aspects of participation for children are frequently referred to.

³³² On the background to the drafting of two Covenants, see e.g. Asbjorn Eide “Economic, Social and Cultural Rights as Human Rights” pp. 21-41 in Asbjorn Eide, Catarina Krause & Allan Rosas (eds.) *Economic, Social and Cultural Rights. A textbook*

democracy have been acknowledged in many of the human rights treaties adopted since 1945.³³³ The rights enshrined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and Fundamental Freedoms and the African Charter on Human and Peoples' Rights represent a few examples.³³⁴ However, despite the connection recognised to exist between human rights protection and democratic politics, general international law – as opposed to regional international law – continued to display a (at least official) neutrality as regards state constitutions: state sovereignty was still the ruling principle.³³⁵ One reason for this is that in the post-war era, “democracy” was a term somewhat problematic to use – not least in the context of international law – as it had become a concept that was considered to legitimise politics.³³⁶ The result was that no state would refrain from claiming the title of democracy, from the Soviet bloc and other socialist “people’s republics” in, for example, South-East Asia to the right-wing military juntas in Latin America. In the past two decades, however, following the fall of communism, related developments in national and international practice – not least the development of rhetoric in international politics after the events of 11 September 2001 and the following so-called war on terrorism – the emphasis put upon the interdependence and interconnectedness of human rights and democracy has followed a significant global trend.³³⁷ This tendency towards a norm of democratic government is also evident in public international law. The emergence of democracy as a possible norm of international law has been thoroughly discussed by, amongst others, Susan Marks.³³⁸

^{1st} ed. Dordrecht, Martinus Nijhoff, 1995, Manfred Nowak *U.N. Covenant on Civil and Political Rights. CCPR Commentary* 2nd rev. ed. Kehl, N.P. Engel Verlag, 2005 pp. xix-xxiv.

³³³ Anthony J. Langlois “Human Rights without Democracy? A Critique of the Separationist Thesis” in *Human Rights Quarterly* 25 (2003) pp. 990-1019.

³³⁴ See Chapter 2 *supra*.

³³⁵ Susan Marks *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* Oxford, Oxford University Press, 2000 pp. 31-32. Marks points out that in regional international law, for example in the context of the Council of Europe and the Organisation of American States, commitment to democratic government is explicitly referred to in human rights instruments.

³³⁶ *Ibid.*

³³⁷ See e.g. Clive Barnett & Murray Lowe “Geography and Democracy: An Introduction” pp. 1-22 with references in Clive Barnett & Murray Low (eds.) *Spaces of Democracy: Geographical Perspectives on Citizenship, Participation and Representation* Sage, London, 2004.

³³⁸ On the norm of democratic governance, see Marks *The Riddle of All Constitutions*, who discusses the emergence of democracy as an ideology in public international law. See, also, comments by Anna-Karin Lindblom in *The Legal Status of Non-Governmental Organisations in International Law* Faculty of Law, Uppsala University, Uppsala 2001 pp. 25-46.

Furthermore, there is a strong, if not uncontested, tendency within the contemporary international debate to consider democracy to be a universal value. In the words of Amartya Sen:

While democracy is not yet universally practiced, nor indeed uniformly accepted, in the general climate of world opinion, democratic governance has now achieved the status of being taken to be generally right. The ball is very much in the court of those who want to rubbish democracy to provide justification for that rejection.³³⁹

As Sen suggests, for a state to reject democratic governance as a norm and as the preferred form of rule is today problematic to say the least. However, as seen in many countries, “democratic rule” can be interpreted in numerous ways, legitimate or illegitimate.

Regardless of the fact that “democracy” can mean very different things in different political contexts, the relationship between democracy and human rights and the way that they interact is today referred to in numerous resolutions, instruments, policy documents, statements, reports, articles, books and other texts at both a global and a regional level. The following cited texts represent a few examples. The 1993 Vienna Declaration and Programme of Action on Human Rights states:

Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing....The international community should support the strengthening and promotion of democracy, development and respect for human rights and fundamental freedoms in the entire world.³⁴⁰

The United Nations Millennium Declaration acknowledges that:

men and women have the right to live their lives and raise their children in dignity, free from hunger and from fear of violence, oppression and injustice. Democratic participatory governance based on the will of the people best assures these rights.³⁴¹

In his 2005 reform program for the United Nations, Secretary-General Kofi Annan refers to democracy as “a universal right” and emphasises that

³³⁹ Amartya Sen “Democracy as a Universal Value” in *Journal of Democracy* 10.3, 1999, pp. 3-17 (5). See also Chapter 6 (pp.221-229) on democracy in Amartya Sen *Utveckling som frihet* Göteborg, Daidalos 2000 (English title *Development as Freedom*, 1st ed. published 1999 by Knopf, 2nd ed. published by Oxford University Press 2002).

³⁴⁰ 1993 Vienna Declaration and Programme of Action on Human Rights para. 8.

³⁴¹ General Assembly Res. A/RES/55/2, 18 September 2000, United Nations Millennium Declaration para. 6.

the protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves.³⁴²

On a regional level, mention can be made of the 2000 Constitutive Act of the African Union.³⁴³ Its declared function lies in respect for democratic principles, human rights, the rule of law and good governance (article 4). The Arabic 2004 Sa'na Declaration on Democracy, Human Rights and the Role of the International Criminal Court states

Democracy and human rights, which have their origins in faith and culture, are interdependent and inseparable [...] Democracy is achieved not only through institutions and laws but also through the actual practice of democratic principles, which should be measured to the degree to which these principles, norms, standards and values are actually implemented and the extent to which they advance the realisation of human rights.³⁴⁴

The Charter of Fundamental Rights of the European Union is described as

founded on the indivisible, universal values of human dignity, freedom, equality and solidarity [and] based on the principles of democracy and the rule of law.³⁴⁵

Although drafted in different contexts, these texts – the global as well as the regional – have in common an expressed belief in democracy as

³⁴² Report of UN Secretary-General Kofi Annan *In larger freedom: towards development, security and human rights for all* 21 March 2005 A/59/2005 para. 128, 149. Other examples from the United Nations are GA Resolutions 55/96 2000, 59/2001 2004, 57/221 2002, the Commission on Human Rights resolutions 2005/29, 2005/32, 2003/36, 2001/36, 2000/47, draft resolution “Democracy and the rule of law” E/CN.4/2005/L.45, The role of good governance in the Promotion of Human Rights: Note/by the the High Commissioner for Human Rights E/CN.4/2005/97, Report of the Office of the High Commissioner for Human Rights “Interdependence between democracy and human rights” E/CN.4/2004/54, Report of the second expert seminar “Democracy and the rule of law” Geneva 28 February – 2 March 2005 E/CN.4/2005/58.

³⁴³ N. 240 *supra*.

³⁴⁴ Issued at the Inter-Governmental Regional Conference on Democracy, Human Rights and the Role of the International Criminal Court held in Sa'na, Yemen, 10 -12 January 2004.

³⁴⁵ See preamble of the Charter of Fundamental Rights of the European Union (Chapter 2.6.5.3 *supra*). More examples of both global and regional documents on democracy and human rights can be found in a compilation put together by the Office of the High Commissioner for Human Rights (OHCHR) entitled “Interdependence between democracy and human rights: Compilation of documents or texts adopted and used by various intergovernmental, international, regional and subregional organizations aimed at promoting and consolidating democracy: Report of the Office of the High Commissioner for Human Rights.” The compilation is accessible at the OHCHR website www.ohchr.ch.

the way forward. The tendency seems to be to see democracy as a cure for all evils. The interdependence claimed to exist between human rights and democracy has, however, not gone uncontested.³⁴⁶ Neither has the existence of a norm of democratic governance in public international law and whether or not democracy is in fact a universal value.³⁴⁷ That a norm of democratic governance being the dominating paradigm and that a democratic government by default respects and protects human rights, is not something upon which consensus prevails.³⁴⁸ Various counter arguments have been presented. The most prominent of them asserts that democracy is not immediately needed for the observance of human rights, that democratic governance does not necessarily provide the best climate for economic and human development, and that the concepts of “democracy” and “human rights” do not represent universal values. Instead, the concepts are referred to as Western values that do not correspond with fundamental concepts of society, government and the individual as expressed in other cultures, and that the imposition of such values upon these “other” cultures come close to qualifying as a kind of neo-imperialism.³⁴⁹ This discussion will be returned to in Chapter 6.

The number of instruments and documents drafted on the global, regional and national level referring to the connection between democratic government and respect for human rights, not least the resolutions adopted by the UN General Assembly (the Millennium Declaration in particular) do, however, point to a general acceptance among states that democracy represents a general human right - at least, as pointed out above, on the surface. But the actual reverse of that rather positive image for the future is all too often shown. Certain states claiming to function according to democratic principles do so in nothing more than pathetic attempts to cover up blatant human rights abuses. North Korea, Belarus, Myanmar, Zimbabwe and Tadjikistan are a few examples of states where such hypocrisy as regards so-called forms of “democratic governance and respect for human rights” has reached new

³⁴⁶ See Langlois “Human Rights without Democracy? A Critique of the Separationist Thesis” for a survey of the critique presented.

³⁴⁷ On an emerging norm of democratic governance, see Susan Marks *The Riddle of All Constitutions*. See also Sen “Democracy as a Universal Value” pp. 3-17, Sen *Utveckling som frihet*.

³⁴⁸ Marks outlines the thesis that there exists such a thing as a norm of democratic government and, also, summarises the responses to such a view. Marks *The Riddle of All Constitutions* Chapter 2 (pp. 30-50).

³⁴⁹ Makau wa Mutua “Politics and Human Rights: An Essential Symbiosis” pp. 149-177 in Michael Byers (ed.) *The Role of Law in International Politics. Essays in International Relations and International Law* Oxford, Oxford University Press, 2000. See, also e.g. Langlois “Human Rights without Democracy? A Critique of the Separationist Thesis” with references. The matter is discussed in Chapter 6 *infra*.

heights.³⁵⁰ Furthermore, these countries do not form a minority. According to a 2005 report presented by Freedom House, of the world's 192 countries, only 119 qualified as electoral democracies.³⁵¹ As pointed out in the UNDP 2002 World Development Report *Deepening Democracy in a Fragmented World*, the mere holding of elections does not constitute democracy.³⁵² States with democratically elected leaders often face serious problems in respect of human rights protection, the rule of law and corruption. Of the 119 electoral democracies, 89 (75 per cent) are counted by Freedom House as being "free" liberal democracies.³⁵³ This means that in 103 countries, citizens still have limited access to fundamental civil and political freedoms. Against this background, the pledge of allegiance to human rights and democracy as being fundamental for governance rings more than slightly hollow.

However, although the statistics set out above present a not altogether positive picture of the state of democracy in the world today, the increased emphasis placed on the relationship between human rights and democracy is a positive development that could, it is to be hoped, benefit children in the long run. Realistically, children's participation rights are unlikely to be fulfilled unless adult citizens are provided with the genuine possibility of participating in political decision-making. Children's participation rights can therefore only benefit from an increased and proper acknowledgement among both decision makers and people in general of the principles of democracy, and the impact that these principles can have on people's daily lives.

3.3.2 The Norm of Democratic Governance in International Law

"Democracy" can thus be argued to have moved from being (at least from the point of view of international law) an internal matter for states into being a concept closely knitted to the existence and implementation of human rights. Parallel to this development, there is a growing agreement in international legal doctrine that democratic entitlement can also be a matter of interest for international law. The debate was initiated in 1992 by an article by Thomas Franck on the po-

³⁵⁰ See reports on human rights by, for example, the United States State Department (<http://www.state.gov/g/drl/rls/hrrpt/>), Human Rights Watch, (www.hrw.org) and Amnesty International (www.amnesty.org).

³⁵¹ *Freedom in the World 2005*, Freedom House, published at <http://www.freedomhouse.org/research/freeworld/2005/essay2005.pdf>, (as visited 2006/05/10).

³⁵² UNDP 2002 World Development Report *Deepening Democracy in a Fragmented World* New York, Oxford, UNICEF Oxford University Press 2002.

³⁵³ See n. 351 *supra*.

tentially emerging right to democratic governance.³⁵⁴ The topic has since then been a matter of discussion for several writers.³⁵⁵ In 2000, Susan Marks discussed the tendency of an emerging norm of democratic governance in international law and on the ideology underpinning such a norm in her book *The Riddle of All Constitutions*.³⁵⁶ She develops her analysis by introducing *the principle of democratic inclusion*, which – very shortly described – means that everyone should have the right to a say in decision-making affecting them and that barriers against such participation should be acknowledged and removed.³⁵⁷ For Marks, “inclusion” is a key term. The processes of decision-making and the aforementioned barriers that she refers to exist and include not only those existing on a national level, but also among states and in transnational arenas. She argues in favour of an universalisation of democracy as a concept, removing it from the limitations of processes particular to a specific nation state. Marks describes the principle as entailing

not only a particular set of institutions and procedures, but also, and more generally, an ongoing call to enlarge the opportunities for popular participation in political processes and end social practices that systematically marginalize some citizens while empowering others.³⁵⁸

She sees democratic inclusion as being built upon the ideal of popular self-rule and political equality – an ideal she considers applicable to all political settings, not only at national level. This corresponds with David Held’s proposed conception of politics as that found in and between all groups, institutions and societies.³⁵⁹ According to Marks, democratic inclusion

refers to the notion that democratic politics is less a matter of forms and events than an affair of relationships and processes, an open-ended

³⁵⁴ Thomas Franck “The Emerging Right to Democratic Governance” 86 *American Journal of International Law* (1992) pp. 46-91.

³⁵⁵ This discussion is commented on in Lindblom *The Legal Status of Non-Governmental Organisations in International Law* pp. 32-46.

³⁵⁶ See n. 335 *supra*.

³⁵⁷ Marks *The Riddle of All Constitutions* pp. 109-119.

³⁵⁸ Marks *The Riddle of All Constitutions* p. 109.

³⁵⁹ Marks explains the connection between the principle of democratic inclusion and the connection to the cosmopolitan democracy project by, for example, referring to the ideas of David Held. Marks *The Riddle of All Constitutions* pp. 101-109. There are several links between the human rights regime and the idea of cosmopolitan democracy, which have been explored by, for example, David Held in *Models of Democracy* 2nd ed. Cambridge, Polity Press/Blackwell, 1996 and *Democracy and the global order: from the modern state to cosmopolitan governance* Stanford, Stanford University Press, 1995 and by David Beetham in *Democracy and Human Rights* Cambridge, Polity Press/Blackwell 1999.

and continually re-contextualized agenda of enhancing control by citizens of decision-making which affects them and overcoming disparities in the distribution of citizenship rights and opportunities.³⁶⁰

Her intention in proposing the principle of democratic inclusion to be part of international law, is that the concept should function as a principle guiding the elaboration, application, and invocation of international law which might reshape

established international legal norms as the principle of sovereign equality of states and the principle of non-interference in domestic affairs, and also to orient future international legal developments in a particular direction.³⁶¹

She envisages the principle

as weaving into the fabric of international law a kind of bias in favour of popular self-rule and equal citizenship, that is to say, a bias in favour of inclusory political communities.³⁶²

A similar concept of “deepened” democracy has been advocated in the UNDP Human Development Reports, in which being able to participate in the life of one’s community – as in the sense of being respected by others and having a say in communal decisions – is to be seen fundamental to human development and existence.³⁶³

Marks does not refer to children in her analysis – it does not seem to be her intention to problematise the concept of the citizen. However, as is shown in the quotations included above, it could be contended that the principle of democratic inclusion – the core values that it advocates in particular – are as relevant for children as they are for citizens in general. As Marks asserts, one important aim of the principle is to enlarge opportunities for popular participation, to level out inequalities between citizens and to introduce a new, democracy-focused approach to international law. Her arguments in favour of the benefits of a principle of democratic inclusion may be found to be useful in the work of implementing and realising child participation rights in practice, in particular on emphasising the connection between children’s rights to

³⁶⁰ Marks *The Riddle of All Constitutions* p. 110. See Marks pp. 109-120 for an outline of the principle of democratic inclusion.

³⁶¹ Marks *The Riddle of All Constitutions* p. 111.

³⁶² *Ibid.*

³⁶³ UNDP Human Development Report 2002 pp. 52-61. See also UNDP Report 2000 *Human Rights and Human Development* New York, Oxford, UNICEF, Oxford University Press 2000. The concept of human development has been developed and elaborated by Amartya Sen and Martha C. Nussbaum, whose work will be discussed in Chapter 6.

participation and a democracy perspective and, also, in relation to citizenship rights.

3.4 Children and Democracy – A Complex Combination

3.4.1 A Conditional Right

The interconnectedness and interdependence between human rights and democracy is today, as discussed in the previous section, increasingly argued by many as a fact. So is the possible emergence of a norm of democratic governance in the international law discourse. The references in international instruments and texts indicate a widespread acceptance of the relationship between democracy and human rights. Article 21 of the Universal Declaration of Human Rights, article 25 of the International Covenant on Civil and Political Rights – which can both be interpreted as defining democracy as a human right – and those articles of human rights conventions that make any restrictions a particular right conditional to what is “necessary in a democratic society” are obvious examples.³⁶⁴ The principle of democratic participation and the values underpinning this principle can thus be presumed to be important for all aspects of human rights protection, not least the human rights of children. The inclusion of participation rights in the Convention on the Rights of the Child – and other child rights related texts and instruments – indicate that, at least theoretically, the right to participate in decision-making processes, to be heard and to have one’s views respected and taken into account, is seen as valuable and as a *right* also for children. The way that this right can be exercised, in practice, however, depends on the context in which it is meant to be applied. Democratic decision-making processes allowing for children to participate actively are less controversial (which does not mean to imply that they are completely accepted) when introduced in schools than in, for example, national politics. Another question that arises in this context is whether children can be regarded as “full” citizens, as the right to participate in decision-making in society is a fundamental part of citizenship. In conclusion, even if there is agreement in principle about children having a right to take part in decision-making processes affecting their lives in some way or another, there are a number of concepts that will need to be “reinterpreted” for them to be seen in practice as also including children.

³⁶⁴ In the regional system, such provisions are found in the ECHR (articles 8-11) and in the ACHR (articles 15, 16 and 22).

In the following, the meaning of democracy in a children's rights context, how it is referred to by state parties and the Committee on the Rights of the Child, what citizenship can mean to children and whether children can be argued to have political rights (as political rights are those rights traditionally related to and connected to democracy and democratic governance) will be analysed. We shall begin, however, with a brief examination of the meaning of "democracy", in order to understand its complex nature, and with a few words on the *demos* and citizenship.

3.4.2 Democracy – A Crash Course

The meanings that have been attached to the term "democracy" over the past century are numerous. The rule of the people, the rule of the people's representatives, the rule of the people's party, majority rule, maximum political participation, civil and political liberties, multi-partyism, the dictatorship of the proletariat, a free market economy, elite competition for the popular vote – to name just a few examples. Many of the suggested definitions overlap, but many are also inconsistent with one another.³⁶⁵ As political scientist Robert A. Dahl reminds us, the term "democracy" nowadays "is not so much a term of restricted and specific meaning as a vague endorsement of a popular idea."³⁶⁶

A never-ending task for political scientists is the attempt to find a working definition of democracy. Several approaches are possible. One is to start the discussion of what is required for a state to be considered a democracy with establishing the existence of certain institutions such as free and fair elections, political parties, a parliament, inclusive suffrage, the right to run for office and the right to freedom of expression and association. Another is to begin with identifying key principles constituting a presumed core meaning of democracy. Choosing this point of departure, it is only when respect for these key principles has been established that a state can be regarded as being democratic – political institutions as those referred to above are only the means by which the core meaning of democracy can be realised, not ends in themselves. This kind of argument can be seen as more process-oriented than institution-oriented and has been presented, for ex-

³⁶⁵ This has led to academic debate on the choices that supposedly have to be made between what are seen as incompatible conceptions of democracy. See e.g. Beetham *Democracy and Human Rights* p. 1 with references.

³⁶⁶ Robert A. Dahl *Democracy and its Critics* New Haven, London, Yale University Press, 1989 p. 2.

ample, by political scientist David Beetham.³⁶⁷ In international law, an important critique of the process-oriented concept of democracy has been outlined by Susan Marks.³⁶⁸ For Beetham, the starting point of democracy is the dignity of the person and the right of citizens, on equal terms with others, to exert an influence over decisions affecting their lives. He argues that

it is important to begin any consideration of democracy with the citizen, rather than with governmental institutions. It is *from* the citizens that democratic government receive their authorisation, and it is *to* the citizens that they remain accountable and responsive, both directly and through the mediating organs of parliament and public opinion. The citizen is both the starting point and the focus of the democratic process.³⁶⁹

The same ideas are found in a statement by the International Institute for Democracy and Electoral Assistance (IDEA):

Rather than assuming a given set of democratic institutions, IDEA tends to see democracy as a process involving political equality and popular control as basic characteristics....Preconditions for democracy include basic human security, rule of law and respect for basic human rights such as freedom of expression and assembly.³⁷⁰

To argue in favour of the existence of certain core values of democracy is interesting not least in a children's rights context where "democracy", "democracy skills" and "democratic values" are concepts increasingly used and referred to, without their content in this particular context being discussed in any depth – at least in the field of children's human rights law. Discussing these concepts might also make the connection between democracy and human rights more visible in a children's rights context. One of the reasons that Beetham has given for his preferred approach is that by defining democracy in terms of its basic principles it makes it possible to recognise expressions of democracy beyond the level of government. He points out that democratic processes are at work whenever people organise collectively in civil

³⁶⁷ See Beetham *Democracy and Human Rights* and "Democracy and human rights: contrast and convergence", introductory paper presented at the Office of the High Commissioner for Human Rights Seminar on the Interdependence Between Democracy and Human Rights in Geneva 25-26 November 2002. Beetham asserts that only when respect for the key principles has been established can we then begin talking about the existence of "democracy".

³⁶⁸ Marks *The Riddle of All Constitutions*.

³⁶⁹ Beetham "Democracy and human rights: contrast and convergence" para. 7.

³⁷⁰ See <http://www.idea.int/about/faq/#idx1> (as visited 14/08/2005). IDEA is an inter-governmental organization, supported by the United Nations, with member states from all continents. It has a mandate to support sustainable democracy worldwide.

society to solve problems, to influence fellow citizens or government policies, or to promote and protect their interests in whatever context it might be. This way of looking at the democratic process would be of particular interest in relation to child participation, whose main field of operation, at least today, is on the local rather than on the national level.³⁷¹

3.4.3 *Demos* and Citizenship

To understand the position of children in a democratic society it is useful to direct some attention to the concepts of the *demos* and citizenship. These concepts are fundamental to democracy and the democratic process. At least “*demos*” is a notion whose main features are applicable to all decision-making levels. In the Athenian city state, usually referred to as the cradle of democracy, the people (*demos*) had the right to participate in the life of the city state (*polis*) in order to maintain and support public life. The *demos* refers to those members of a community entitled to participate and to be represented in political decision-making. It is a widely accepted presumption that the *demos* comprised the citizens; it was the citizen-body.³⁷² This citizen-body, however, did not include women, children, resident foreigners and slaves, making the rights connected with membership accessible to only a limited number of Athenian-born men. This is the first example of the inherently exclusive character of democracy.³⁷³

Gender, age, ethnicity and social status are all criteria that have been, and still are, used to justify the inclusion or exclusion of individuals in the *demos*.³⁷⁴ The groups included in the *demos* vary with the ideological changes and shifting power structures of any given society. It was not so long ago that women in general were not consid-

³⁷¹ Beetham “Democracy and human rights: contrast and convergence”. The other two reasons Beetham presents for his approach are the following. First, that which justifies calling certain institutions democratic is to be found in the contribution they make to the underlying principles. Second, that defining democracy in institutional terms concentrates on the form, not on the substance of the concept. The elevation of means into that of ends means opening the field to manipulation and diluting the concept. Robert A. Dahl speaks of four criteria necessary for a democratic process: effective participation, voting equality at the decisive stage, enlightened understanding and control of the agenda. He then continues (after discussing competence in relation to inclusion in the *demos*) by adding a fifth criterion: the *demos* must include all adult members of the association except transients and persons proved to be mentally defective. Dahl *Democracy and its Critics* pp. 108-129. See also Johnsson *Nation states and minority rights: a constitutional law analysis* pp. 54-55 with references.

³⁷² Dahl *Democracy and its Critics* p.108.

³⁷³ Held *Models of Democracy* pp. 27-130.

³⁷⁴ On inclusion and exclusion, see, for example, Robert A. Dahl *Dilemmas of Pluralist Democracy. Autonomy vs. Control* Yale Studies in Political Science 31, New Haven, Yale University Press, 1982 pp. 97-99.

ered to be full and worthy citizens, and it was inconceivable that they would ever have the chance of becoming equal citizens with men in terms of rights to political participation.³⁷⁵ The now abolished apartheid system of South Africa represented another example of this exclusion-based principle. However, in contemporary society the group of individuals that, at least formally, are included in the *demos* in a universal perspective is more comprehensive than ever before. Children, however, with a few exceptions, are still excluded.

A clear distinction between the “*demos*” and “citizens” cannot be made. This is because the two concepts refer in many ways to the same category of people. “Citizenship”, however, can be defined in legal as well as in political and philosophical terms.³⁷⁶ The legal definition does not separate nationality from citizenship.³⁷⁷ The legal definition of who is a citizen/national of a specific country is based upon the right of each state, in the manner prescribed by national law, to decide who is and who is not a national of that particular state.³⁷⁸ The legal definition of citizenship can be described as creating a kind of “national identity” for the person to whom it is attached.³⁷⁹ Two measures are applied to define in legal terms citizenship: *ius soli* and *ius sanguinis*. *Ius soli* means citizenship by state territory. At birth a person acquires citizen-

³⁷⁵ Women were long considered as to have insufficient intellectual capacities to be able to engage in politics. It has also been considered “inappropriate” for a respectable woman to take part in public life. John Stuart Mill, however, was an early exception, as can be concluded from his 1861 *The Subjection of Women*. Even Mary Wollstonecraft, who in her 1792 *Vindication of the Rights of Woman* criticised – and eloquently so – the political theory of her time for its lack of equality between men and women, did not seem to want to go as far as granting all women, irrespective of social status and income, the same rights. (See Derek Heater *What is Citizenship?* Cambridge, Polity Press/Blackwell, 1999 pp. 88-89 with references.) In some countries women still do not enjoy the same formal citizenship rights as men. For a discussion on the political repression of women and how the concept of political repression must take the experiences of women into account, see Conway W. Henderson “The Political Repression of Women” *Human Rights Quarterly* 26 (2004) pp. 1028-1049.

³⁷⁶ For a discussion on different types of citizenship, cf., e.g. Held *Models of Democracy*, Heater *What is Citizenship?*, Will Kymlicka & Wayne Norman “Return of the Citizen: A Survey of Recent Work on Citizenship Theory” pp. 283-322 in Ronald Beiner *Theorizing Citizenship*, State University of New York Press, 1995, Ruth Lister *Feminist Theory & Practice of Citizenship*: Paper presented at the annual conference of the German Political Science Association (DVPW) in Mainz, September 2003.

³⁷⁷ *Oxford Dictionary of Law* 5th ed. Oxford, Oxford University Press, 2002.

³⁷⁸ This is not to suggest that a state can arbitrarily deny a person citizenship. Article 15 of the Universal Declaration of Human Rights establishes the right of nationality of which no person shall be arbitrarily deprived, nor denied the right to change nationality. See also the ICCPR article 24 (3), the CRC articles 7 and 8 and the 1954 UN Convention on the Reduction on Statelessness 989 UNTS 175 (entered into force 13 December 1975); articles 8 and 9 in particular.

³⁷⁹ Article 19 of the Convention on the Rights of the Child establishes the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law.

ship of the country where he or she was born. *Ius sanguinis* is citizenship by inheritance, whereby a person acquires the citizenship of his or her parents. Most states apply a combination of both principles.³⁸⁰ The principles are decisive to the *de jure* limitation of the participants in democratic processes: non-citizens are excluded, as are prisoners in some countries, mentally disabled persons and children.³⁸¹

The legal definition of who is or is not a citizen, however, does not provide sufficient explanation for different aspects of citizenship. Numerous analyses of citizenship exist. The British sociologist Alfred Marshall, in his still influential 1950 essay, defined citizenship as being the membership of a community through participation in a set of political, civil and social rights and emphasised the necessary element of equality existing between the members of a community that possess citizenship status.³⁸² In a tripartite analysis, Marshall identifies three elements of citizenship: the *civil* element, composed of the rights necessary for individual freedom, the *political* element, as in the right to participate in the exercise of political power and the *social* element, ranging from the right to a modicum of economic welfare to the right to live as a civilised being according to the standards prevailing in society.³⁸³ Social citizenship was considered as being a vital underpinning for the other two. However, the question of who in practice enjoys or does not enjoy the status of citizenship is a topic that Marshall does not particularly take into consideration, which would have been interesting – undoubtedly, even if a person is entitled to a certain right, he or she may well be in a position where that right is impossible to exercise in practice. Minority groups and poor people are just two examples of social groups who might experience such difficulties.

Marshall's definition of citizenship has come in for a great deal of criticism over the past decades. Feminists and minority rights scholars have claimed that his definition of the concept of citizenship obscures inherent inequalities which need to be discussed in order for everyone's needs to be properly addressed.³⁸⁴ Jürgen Habermas has con-

³⁸⁰ Hedvig Lokrantz Bernitz *Medborgarskapet i Sverige och Europa: räckvidd och rättigheter* Uppsala, Iustus, 2004 pp. 70-72.

³⁸¹ Johnsson *Nation states and minority rights: a constitutional law analysis* pp. 56-57 with references.

³⁸² T. H. Marshall *Citizenship and Social Class* Cambridge, 1950.

³⁸³ Marshall's view of citizenship is discussed in a child rights perspective by, for example, Elizabeth F. Cohen "Neither Seen Nor Heard: Children's Citizenship in Contemporary Democracies" in *Citizenship Studies* Vol. 9; No.2, pp. 221-240, May 2005, Roche "Children: Rights, Participation and Citizenship" pp. 479-480 and Stalford "The citizenship status of children in the European Union".

³⁸⁴ In practice such a definition identifies "the citizen" with "the male white provider", turning for example women, indigenous peoples and ethnic minority groups into second-class citizens by enhancing the traditional public/private divide and in not paying adequate attention to the particular needs of so-called vulnerable groups. Out of the

tended, in commenting on Marshall's analysis, that the tripartite system is blind to the fact that the three types of right are not coequal and that the political rights are those that are crucial for citizenship as those are the rights that provide the individual with the possibility to democratically change his or her own status.³⁸⁵ Political citizenship would therefore be of a higher status than civil and social citizenship.³⁸⁶ Another criticism of Marshall's analysis that has developed in later years is in the arguing for a post-national citizenship which transcends national boundaries.³⁸⁷ The Council of Europe programme for Education of Democratic Citizenship (EDC) is one example of an attempt to re-define and deepen the understanding of "citizenship" by moving away from the limitations imposed by national boundaries and institutions and instead by emphasising the concept's core values. Democratic citizenship is identified in the Council of Europe programme as a skill needed by everyone and something that is

rich literature, cf. e.g. Heather *What is Citizenship?* p. 88 *et seq.*, Johnsson *Nation states and minority rights: a constitutional law analysis*, Will Kymlicka *Multicultural Citizenship* Oxford, Clarendon Press, 1995, Will Kymlicka & Wayne Norman "Introduction" pp. 1-41 in Will Kymlicka & Wayne Norman (eds.) *Citizenship in Culturally Diverse Societies* Oxford, Oxford University Press, 2000, Lister *Feminist Theory & Practice of Citizenship*, Ruth Lister *Citizenship: Feminist Perspectives* 2nd ed. Basingstoke & New York, Palgrave, 2003, Carole Pateman *The Sexual Contract* Stanford, Stanford University Press, 1988, Iris Marion Young *Inclusion and Democracy* Oxford, Oxford University Press, 2000. On fragmenting citizenship see e.g. Sallie A. Marsten & Katharyne Mitchell "Citizens and the State: Citizenship Formations in Space and Time" pp. 93-112 with references in Clive Barnett & Murray Low (eds.) *Spaces of Democracy. Geographical Perspectives on Citizenship, Participation and Representation* Sage, 2004, Micha de Winter *Children as Fellow Citizens. Participation and Commitment* Oxford, Radcliffe Medical Press, 1997.

³⁸⁵ Jürgen Habermas *Between Facts and Norms* Cambridge, Mass., MIT Press, 1996 as discussed in Jessica Kulynych "No Playing in the Public Sphere: Democratic Theory and the Exclusion of Children" *Social Theory and Practice* Vol. 27, No.2 (April 2001) pp. 231-264 (238).

³⁸⁶ *Ibid.*

³⁸⁷ See e.g. Gerald Delanty *Citizenship in a global age. Society, culture, politics*. Buckingham, Open University Press, 2000. A central argument for this citizenship concept is that because of the development of world affairs and contemporary politics, it is no longer an uncontested fact that the existence of a state is a prerequisite for citizenship. The European Union citizenship is one example of an attempt at creating this kind of trans-national citizenship. On European Union citizenship, see e.g. Jo Shaw "The Interpretation of European Union Citizenship" *The Modern Law Review* Vol. 61, No.3 (May, 1998) pp. 293-317, N. W. Barber "Citizenship, nationalism and the European Union" *European Law Review* 27, 2002, pp. 241-259, Roy W. Davis "Citizenship of the Union...rights for all?" 27 *European Law Review* 27, 2002, pp. 121-137. On European Union citizenship and its implications for children, see e.g. Stalford "The citizenship status of children in the European Union".

not limited to the citizen's legal status and to the voting right this status implies. It includes all aspects of life in a democratic society.³⁸⁸

3.4.4 The Citizen Child

The legal definition of citizenship draws no distinction between adults and children. Citizenship as such implies both rights and duties in relation to the state, and legal protection connected to citizenship applies to every citizen of a state, irrespective of age.³⁸⁹

The legal dimension apart, the citizen child occupies an undefined space between alienage and full citizenship. Children are assumed to be citizens, with a right to hold residence in the state of which they are citizens and with a right to that state's protection. At the same time, children are to a large extent judged to be incapable of exercising one of the fundamental aspects of citizenship: the right to participate in decision-making processes affecting their lives, most prominently the right to vote in general elections and to hold office but in many other situations as well. Other examples of rights that children are denied, completely or in part, are access to the media to make their voices heard, access to the courts, the right to choose a place of residence,³⁹⁰ the right to full control over one's property and the right not to be subjected to violence (in many countries it is not a crime to hit children in the name of discipline).³⁹¹ In short, it can be properly asserted that children hold a kind of semi-citizenship, a partial membership in the community to which they belong based on their youth – youth being

³⁸⁸ The Council of Europe program for education of democratic citizenship (ECD) is initiated as a response to the low election turnouts among young people and their decreasing participation in public and political life. It also targets the tendency among many adults to have lost interest in what they see as "politics". See <http://www.coe.int/T/E/Com/Files/Themes/ECD/>, <http://www.coe.int/T/E/Com/Files/Themes/ECD/concept.asp>, <http://www.coe.int/T/E/Com/Files/Themes/ECD/intro.asp> (on children and young people) and <http://www.coe.int/T/E/Com/Files/Themes/ECD/Q-R.asp> (on adults), as visited 25/07/2005.

³⁸⁹ Cohen "Neither Seen Nor Heard: Children's Citizenship in Contemporary Democracies" p. 222 with references.

³⁹⁰ In the EU context, Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (Official Journal L 251, 03/10/2003 P. 0012 – 0018) limits the possibilities for children aged over twelve years to accompany or join their parents who are residents of the EU. Preamble, p. 10, article 4(1)(d).

³⁹¹ Jacqueline Bhabha "The Citizenship Deficit: On being a citizen child" in *Development* Vol.46, No.3, September 2003, pp. 53-60. As regards physical and other forms of abuse, the Committee on the Rights of the Child in its 2006 General Comment No. 8 (CRC/C/GC/2006) "The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (articles 19, 28(2) and 37 *inter alia*)" strongly encourages state parties to the CRC to prohibit and eliminate all forms of corporal punishment and all other forms of cruel and degrading punishment of children (para.2).

seen as the equivalent of incapacity to make competent and sufficiently thought through decisions.³⁹² The “partial” in this sense suggests that there exist not simply citizens and non-citizens in a society – not only inclusion or exclusion – but rather groups that are partly included in, or partly excluded from, citizenship. The fact remains, however, that children, because they are in many ways excluded from processes that are integral to the exercise of democratic (as well as other kinds of) rights, are denied effective recognition as citizens. The conclusion to be drawn is that the child, even though possessing a *national* (legal) identity as a citizen of a country, in general does not possess a *political* identity as a citizen with the possibility to actively participate in a particular political system as a part of its *demos*.³⁹³ This last issue will be examined thoroughly in a following section. First, it is necessary to briefly examine on what grounds children can be considered as rights holders in general.

3.5 Democracy and Children: A Working Relationship?

3.5.1 “Democracy” in the Contemporary Child Rights Discourse

In a child rights context, the democracy aspects of child participation are today emphasised on both an international and national level. In the following, some examples of reasons in favour of this will be presented as they are argued in the contemporary child rights discourse. The case for child participation as being that of strengthening a commitment to, and understanding of, democracy is today argued so often in various contexts that it has come close to taking the form of a gospel. This is a process presumed to be of benefit by starting as early as possible in a child’s life – it is generally presumed that the implications

³⁹² On children’s partial citizenship *cf.* e.g. Bhabha “The Citizenship Deficit: On being a citizen child”, Cohen “Neither Seen Nor Heard: Children’s Citizenship in Contemporary Democracies”, Ruth Lister “Children and Citizenship” Paper presented at a Glasgow Centre for the Child & Society seminar, 3 November 2005, Roche “Children: Rights, Participation and Citizenship”, Daiva Stasiulis “The Active Child Citizen: Lessons from Canadian Policy and the Children’s Movement” *Citizenship Studies* Vol.6, No.4, 507-538, 2002, Wyness “Children, childhood and political participation: Case studies of young people’s councils”.

³⁹³ For a discussion on national/legal identity versus political identity in a children’s rights context, see Kulynych “No Playing in the Public Sphere: Democratic Theory and the Exclusion of Children”.

of democratic decision-making are best learned at an early age.³⁹⁴ The acknowledgement that child participation in decision-making processes can have a positive effect at all levels of society was in 2001 referred to by UN Secretary General Kofi Annan as being “one of the most significant advances made during the last decade.”³⁹⁵

In *A World Fit for Children*, the outcome document of the 2002 UNGASS, governments declared their commitment to changing the world for and *with* children, thereby emphasising the fundamental importance of including children in the work of building a better future for all.³⁹⁶ In the resolution, children and adolescents are referred to as being resourceful citizens capable of helping to build that future. Their right to be heard and for their participation ensured is presented as one of the future prime objectives of the participating states. These two statements exemplify child participation as being not only beneficial for children by improving their living conditions and creating feelings of self-esteem and self-confidence, but also in its importance for the task of promoting and building international peace and development.³⁹⁷ A number of arguments have been presented as to why it is important to listen to the voices of children. Many of these reasons are outlined in the UNICEF report, *The State of the World's Children 2003*, dedicated in its entirety to child participation.³⁹⁸ The report argues that when children experience respect and consideration for their views they then discover the importance of respect for the views of others. In this way they can acquire the capacity and willingness to listen to others, thereby initiating an understanding of the processes and the value of democracy. The report further states that an understanding of the structures of democracy, together with an authentic and meaningful participation in such processes, empowers children, thus making them

more likely to develop into citizen decision-makers as well as able income-earners [...] in open societies their concern and solidarity will extend to include others beyond the circle of their immediate family and friends.³⁹⁹

³⁹⁴ See e.g. Gerison Lansdown, *Promoting children's participation in democratic decision-making* UNICEF Innocenti Research Centre, Florence, 2001 pp. 6-7 and UNICEF report *The State of the World's Children 2003. Child Participation* p. 14.

³⁹⁵ *We the Children: End-decade review of the follow-up to the World Summit for Children* Report of the Secretary-General, 2001, A/S-27/3 para. 415. Sadly, there is little emphasis on children's participatory rights in the Secretary-General's report.

³⁹⁶ *A World Fit for Children* A/RES/S-27/2, adopted on 10 May 2002.

³⁹⁷ UNICEF 2003 report *The State of the World's Children 2003. Child participation* p. 9.

³⁹⁸ UNICEF 2003 report *The State of the World's Children 2003. Child Participation* (n. 331 *supra*).

³⁹⁹ Jo Boyden, Birgitta Ling & William Myers *What works for working children* Stockholm, Rädda barnen, Florence, UNICEF, 1998, p.329.

In conclusion, democratic participation, it is argued in the UNICEF report, has a number of positive consequences: it encourages a person's growth, increases the feeling of possession of political influence, reduces alienation in relation to power, stimulates an interest in the problems of the collective, and helps mould active and well-informed citizens who take an interest in state concerns. It can also help in creating a feeling of solidarity and responsibility towards the community in which the individual lives. If a person knows that effective participation in decision-making is a possibility, then it is more likely that the individual will consider it worthwhile becoming an active member of society and to consider it right and proper to be bound by collective decisions.⁴⁰⁰ It could thus be termed a 'win-win' situation: child participation benefits both the individual child and society. The kind of arguments presented in the UNICEF report can be described as formulating a dominant tendency in the contemporary discourse on children's human rights.

3.5.2 "Democracy" in State Reports and Comments

The emphasis on the democracy aspects of children's right to participation are, however, not very visible in the jurisprudence of the Committee on the Rights of the Child. The democracy aspects of article 12 are conspicuous by their absence in the state party reports to the Convention's monitoring body. There are few examples. The German 2003 report refers to the approach of article 12 as being

consistent with the fundamental principle of a democratic society, according to which those affected must have an opportunity to represent their own interests⁴⁰¹

and continues by referring to the consideration of child participation at local community level as increasing even

though it has yet to become established as a constituent principle of local government policy in particular [...] Participation in social and political processes and decisions should be an inherent part of a democ-

⁴⁰⁰ This is one of the main points of the UNICEF 2003 report *The State of the World's Children 2003. Child Participation*. Cf. SOU 1998:97 *Gör barn till medborgare! Om barn och demokrati under 1900-talet* Kristina Engwall Demokratiutredningens skrift nr 4, pp. 49-77, Lansdown *Promoting Children's Participation in Democratic Decision-making*, Roche "Children: Rights, Participation and Citizenship", Philip Veerman & Hephzibah Levine "Implementing children's rights on a local level: Narrowing the gap between Geneva and the grassroots" *The International Journal of Children's Rights*, Volume 8, Number 4, 2000, pp. 373-384.

⁴⁰¹ CRC/C/83/Add.7 para.253-254.

racy, however. Those affected – including children – should always have an opportunity to speak up for their own interests.⁴⁰²

In Japan's 2003 report it is stated that children are increasingly being involved in the process of drafting policies that directly concern them and that it is expected that "a child, as a person, will participate actively in these opportunities to express views".⁴⁰³ In its 2005 report Lithuania emphasises the importance of self-governance for pupils in schools as it "plays a very important role in developing their democracy and independence".⁴⁰⁴ A reference is also made to the democratic elections to the Pupils' Parliament of Lithuania held in 2000.⁴⁰⁵ A special mention should here also be made of Norway's very informative 2004 report. It contains a thorough survey of how Norwegian children can exercise their right to participate in such things as local planning, local decision-making, issues within schools, through the formation of youth forums for democracy, from the rank and file level up to that of central government, and in international forums.⁴⁰⁶

The direct references to democracy and democratic processes found in these reports, however, are exceptions to the rule. States mostly refer to how different channels and possibilities for children to express their views in the public sphere have developed, and to what extent children can participate for example in legal or administrative proceedings, decision-making in schools and within the family and, in some cases, in the municipality.⁴⁰⁷ The focus, however, does not seem to be on participation as a democratic right as such which children as well as adults should have the opportunity of exercising. This is not restricted only to non-democratic state parties to the Convention – as one might have expected – but is rather a general tendency in the reports. Instead, it is treated more as a matter of how freedom of expression is protected and exercised, which can be seen as a somewhat limited interpretation of the concept of participation compared to the options available.

The same can be noted with regard to the Committee's Concluding Observations. Though the Committee refers to the participation rights of children when commenting upon the implementation of article 12 of the Convention as well as on other civil rights enshrined in the treaty, particular references to democracy and the democratic aspects of child participation are rare. Whether this is a consequence of the attitude displayed by the state parties, or if it is simply a reflection of how the

⁴⁰² *Ibid* para.264-265

⁴⁰³ CRC/C/104/Add.2 para. 161.

⁴⁰⁴ CRC/C/83/Add.14 para. 94.

⁴⁰⁵ *Ibid* para. 98.

⁴⁰⁶ CRC/C/129/Add.1 para.181-205.

⁴⁰⁷ See n. 645 and n. 677 *infra* in the countries that have been examined.

Committee has prioritised between different aspects of article 12, is difficult to say without turning to speculation. Compared, however, with the emphasis placed upon the child's right to participation on different levels by UN Secretary General Kofi Annan in *We the Children* where he proclaims that progress in this area has been one of the most important achievements of the past decade and needed to be further promoted, the Committee's approach on this point seems more subdued.⁴⁰⁸ There is, however, a chance that this might change when the Committee progresses in its work on a General Comment on article 12 and takes a stand on which matters are included within its scope.⁴⁰⁹

Although somewhat discouraging for proponents of a wide interpretation of article 12, the absence of references to its democracy-related aspects in state reports and Committee comments are perhaps not very surprising, considering the difficulties of implementing democratic principles even for all adult citizens. That the democracy aspects of child participation – a matter considered controversial as such – are not prioritised neither by “the monitored nor the monitoree” therefore is understandable but, nevertheless, regrettable.

3.5.3 Children and the Exercise of Democratic Influence

3.5.3.1 Children and Political Rights

The 2003 UNICEF report not least refers to the feeling of possession of political influence as one of the positive consequences of democratic participation. Children's participation in political decision-making processes in society is one of the more controversial ways in which children can exercise their participation rights in a democracy, especially in discussing the possibility of children possessing formal political rights on equal terms with other citizens. As discussed earlier, the capacity to exercise influence through, for example, voting in general elections is contested in relation to children. Citizenship and its following competences are instead often seen in a development perspective. John Rawls, for example, defines the citizen as an autonomous, responsible being who can obtain personal freedom from identity.⁴¹⁰ This individual, placed in the original position, without trying to achieve personal gain, would deliberate on the principles on which a just society should be based.⁴¹¹ Two moral powers are essential in such a person: having a conception of the good and having a conception of justice. Children are not presumed to possess the latter but will eventu-

⁴⁰⁸ *We the Children* (n.178 *supra*).

⁴⁰⁹ See Chapter 8.

⁴¹⁰ John Rawls *En teori om rättvisa* Uddevalla, Daidalos, 1996, pp. 475-481 (first published in English in 1971 by Harvard University Press).

⁴¹¹ Rawls *En teori om rättvisa* pp. 127-195.

ally develop it – in the meantime, it is acceptable that other, more competent citizens, can act on their behalf.

That children in general are excluded from the *demos* – and thus from formal political power – in contemporary democracies, however, does not seem to have caused theorists much anxiety, even though the partial citizenship of children does not seem to be justified as such by theories of democratic justice. As Elizabeth Cohen puts it:

From Robert Dahl to John Rawls, children are seen as a justifiable and somewhat uninteresting exception to the rules of democracy rather than an instructive case of the ambiguity of membership meriting sustained academic attention.⁴¹²

Rawls's view is referred to above. Certainly Dahl has commented on children not being considered to be a part of the *demos*, saying in 1989 that it was an embarrassment for inclusive democracy that

no *demos* has ever included children, and those who contend that a more inclusive *demos* is better than a less inclusive one have no intention of demanding that children be included.⁴¹³

As one of the pillars of Dahl's thinking on democracy is that it should be of an inclusive character, enhancing the possibilities of all citizens to participate in political life, it is interesting to note that he makes a point of children not being part of the *demos*.⁴¹⁴ However, he has not elaborated further on the subject but has simply declared that one of the criteria necessary for a democratic process is that the *demos* must include all adult members of the association except transients and persons proved to be mentally defective.⁴¹⁵ Dahl appears – like many writers – to consider children's presumed lack of competence and capacity to engage in democratic processes as constituting sufficient reason not to explore the subject in any depth. In this context, even to suggest that children can possess political rights in many cases seems to have been a non-question. One problem, of course, is how the notion of political rights is to be defined. Political rights are often seen as only referring to the right to vote and the right to be elected in free and fair elections; rights that, once again, children are presumed not to have the compe-

⁴¹² Cohen "Neither Seen Nor Heard: Children's Citizenship in Contemporary Democracies" p. 223. See also Cohen on what she refers to as "philosophical pitfalls" in understanding children's citizenship, pp. 224-234.

⁴¹³ Dahl *Dilemmas of Pluralist Democracy. Autonomy vs. Control* pp. 97-99.

⁴¹⁴ On the importance of democratic inclusion in Dahl's work, see Dahl *Democracy and its Critics*, and Robert A. Dahl *Polyarchy. Participation and Opposition* New Haven University Press, 1971, p. 2.

⁴¹⁵ In *Democracy and its Critics*, pp. 108-129, Dahl simply notes that children are not part of the *demos* but does not seem to consider it as being either negative or positive.

tence to exercise. These rights are protected, for example, in the International Covenant on Civil and Political Rights but are not included in the Convention on the Rights of the Child.

The Human Rights Committee in its General Comment on article 25 (on the right to vote, the right to participate in public affairs and the right to equal access to public service) made no comment on the possibility of children having political rights, merely stating that the right to vote should be made available to every *adult* citizen.⁴¹⁶ As a result, it is generally presumed that children do not possess political rights. This presumption, however, can be problematised. The rights that are traditionally referred to as being civil rights (such as the right to freedom of expression, the right to freedom of thought and conscience, the right to freedom of assembly and the right of access to appropriate information) are included in both treaties. The possibility to exercise many of the rights traditionally labelled civil rights are also the prerequisites for the proper exercise of political rights – the right, for example, to vote in free and fair elections is useless unless a person can exercise his or her right to freedom of expression, assembly and to seek information. The parallel between the institutions necessary for a society to be considered democratic here can be noted. The result is that, obviously, it is not only problematic to draw a clear distinction between civil and political rights – it is also a quite pointless enterprise. It would, in the view of the author, seem to be more fruitful to conclude that civil rights and political rights are to a large extent intertwined and interdependent and to focus on the content and use of “the political” as such. Amartya Sen, for example, in his work on development refers to “political freedoms in a wide sense” including what is usually referred to as civil rights.⁴¹⁷ Sen also builds a strong case for the connection between effective development and political freedom in terms of democratic government. David Held has argued that the narrow conceptions of “the political” as equated with the business of rulership or the world of government excluded from view a vast domain of politics – the spheres of productive and reproductive relations in particular.⁴¹⁸ Held maintains that politics is essentially about power – capacities and resources – and that it is a phenomenon found in and between all groups, institutions and societies, cutting across public and private life, and that “the nature of politics is a universal dimension of human life”.⁴¹⁹

Adopting a broader conception of “the political” would leave room for arguing that the rights of individuals to have their views respected

⁴¹⁶ General Comment 25, Human Rights Committee, 1996, HRI/GEN/Rev.5. p. 157.

⁴¹⁷ Amartya Sen *Utveckling som frihet* Göteborg, Daidalos 2000, p. 57.

⁴¹⁸ Held *Models of Democracy* p.309.

⁴¹⁹ *Ibid* pp. 309-310.

and taken into account on matters concerning them on any level, as well as all rights and freedoms necessary to enable a person to form an opinion, could also be considered to be political rights. In turn, such an interpretation would be in accord with the objectives of the Convention which casts the child in the form of a full human being with agency, integrity and decision-making capacities – with his or her age and maturity taken into account – and not as a pre-citizen who can be justifiably excluded from a number of rights.⁴²⁰ This more extended interpretation of what can be seen as a political right appears also to be favoured by the Committee on the Rights of the Child, which in its General Comment on implementation has referred to political rights as being more or less intertwined with civil rights.⁴²¹

The point here is not really to elaborate upon the fine line to be drawn between civil and political rights but simply to suggest that adults *and* children actually might both have and be able to exercise rights that can be regarded as political rights. Interpreting the notion of political rights more generously could also be part of the solution of the problem of children not being considered to be possessed of a political identity – a deficiency in their citizenship status that prevents them from being able to make their voices heard in a political context. However, I am well aware of the fact that the problem of children's views and voices not being sufficiently taken into account cannot be solved through the renaming of certain actions. The important symbolic value of awarding a group political rights should, however, not be neglected. It could be argued that if children were considered to be holders of political rights, as well as other rights, the connection between children's rights, democracy and citizenship would become more obvious, and thereby more difficult to ignore, not least because citizens whose political rights are recognised can, provided the possibility of exercising such rights exists, exert pressure on governments and other decision-makers. Political power, how and wherever it occurs, empowers those exercising it both directly (as in having the ability to remedy, for example, injustice) and indirectly (in making possible individual awareness of one's own capacities and capabilities).

3.5.3.2 How Children Can Exercise Political Influence

As pointed out earlier, child participation in political decision-making processes can be realised in a multitude of ways. Classic political rights such as the right to vote and to run for public office in most states are directly related to the age of majority and thus in general not

⁴²⁰ See also Chapter 5, in which article 12 is thoroughly analysed.

⁴²¹ General Comment 5, CRC/GC/2003/5, para. 6 and 25 in particular.

considered to be available to children.⁴²² The logic of discriminating between citizens based upon the presumption that from a certain age onwards a person by default has sufficient competence to take part in political decision-making has, however, occasionally been criticised for being incoherent.⁴²³ Objections against giving children the vote focus mainly on the incapacities of the child. These include the notion of political ignorance. Children are seen to be incapable of being responsible voters, and more likely than adults to vote frivolously on the basis of the personality skills of the candidates rather than on the politics of a party. Furthermore, it is argued, there is a danger that parents might influence their children, coercing them to vote according to their own preferences. This would not only render childhood suffrage meaningless but also, most likely, confer political advantage on those with children. Bob Franklin has argued that if competence for making informed and well-thought through decisions were to be a precondition for voting rights, many adults would not stand a chance of being included in the *demos*.⁴²⁴ He contends that the exclusion of children from political participation on such grounds is accordingly indefensible. From a political theory standpoint, Ludvig Beckman has pointed out that the elements of meritocracy underpinning the arguments presented against voting rights for children are difficult to unite with the fundamental principles of democratic inclusion.⁴²⁵ Jessica Kulynych has argued that since children are today not considered to possess political citizenship, as a result they do not have equal citizenship status with adults. Her argument is that in politicising children – that is, providing children with a genuine political identity – “is a normative requirement

⁴²² See *infra* on voting age.

⁴²³ Cf. e.g. Ludvig Beckman ”Demokrati och kompetenskrav. Barn ungdomar och rätten till politiskt inflytande” in Britta Jonsson & Klas Roth (eds.) *Demokrati och lärande. Om valfrihet, gemenskap och övervägande i skola och samhälle* Studentlitteratur, Lund, 2003, Bob Franklin *The Rights of Children* 1986 Oxford, Blackwell, SOU 1999:13 *Etik och demokratisk statskonst* Hans L. Zetterberg Demokratiutredningens skrift Nr. 15 p. 11, on children and the right to vote in a Swedish perspective. See also Wyness “Children, childhood and political participation: Case studies of young people’s councils” pp. 194-195 where he describes the political child as the “un-child”, “a counter-stereotypical image of children that does not fit with the norms of childhood” and continues by commenting on children’s status in the following way: “full social status implies citizenship; both (of which) are preconditions of political participation. Children are judged to arrive at political maturity at the time they reach adulthood: when they are recognised as full citizens”.

⁴²⁴ Franklin *The Rights of Children* (who has changed his mind slightly since then). See also Bob Franklin “The case for children’s rights: a progress report” pp. 3-22 in Bob Franklin (ed.) *The Handbook of Children’s Rights* 1995 London, Routledge, in which he argues for a lowering of the voting age to sixteen.

⁴²⁵ Beckman ”Demokrati och kompetenskrav. Barn ungdomar och rätten till politiskt inflytande”.

of justice and a central element of genuine democracy.”⁴²⁶ Regardless of objections such as these, the case for giving children voting rights is not really argued at large in the academic debate.⁴²⁷

One example of the still prevalent focus on the child as being insufficiently capable of exercising political rights in terms of voting is clearly visible in a recent green paper by the Council of Europe.⁴²⁸ The paper, analysing the future of democracy in Europe, made a proposal aiming at making democracy and political participation more inclusive. Initially the proposal looked promising from a children’s rights perspective. It suggested the introduction of a “universal citizenship” with a view to increasing political participation within the member states of the Council. The authors suggested that full political rights should be granted from birth “to all born in a state, citizens living abroad, and to subsequently naturalised children.”⁴²⁹ However, the proposal then continued:

Children would be registered voters but their vote would be exercised by their parents until they reached the age of political maturity [...] Recognising the manifest *incapacity* [author’s italics] of children to exercise their formal rights directly and independently, this reform further proposes that *the parents of each child* [author’s italics] be empowered to exercise the right to vote until such time as the child reaches the age of maturity established by national law. Each child would be issued a voting registration card [...] and would be informed of his or her (deferred) right to vote.⁴³⁰

The aims of this proposed reform were to make the local, regional or national democracy more future-oriented and child-friendly by placing children’s rights issues higher on the political agenda, encouraging young people to develop an early interest in politics, stimulating inter-generational political discussion and by making young parents vote.

⁴²⁶ Kulynych “No Playing in the Public Sphere: Democratic Theory and the Exclusion of Children” p. 232.

⁴²⁷ Cf. Lister “Children and Citizenship”.

⁴²⁸ In the Green Paper, the Council of Europe does not select a particular model of democracy as being the most applicable but instead applies a generic working definition that does not “commit” to any specific institutional format or decisive rules: “Modern political democracy is a regime or system of governance in which rulers are held accountable for their actions in the public realm by citizens, acting indirectly through the competition and co-operation of their representatives.” *The Future of Democracy in Europe: Trends, Analyses and Reforms*. A Green Paper for the Council of Europe co-ordinated by Philippe C. Schmitter and Alexander H. Trechsel, Commissioned by the Secretary General of the Council of Europe, Integrated project “Making democratic institutions work” Council of Europe Publishing, 2004.

⁴²⁹ Schmitter & Trechsel *The Future of Democracy in Europe: Trends, Analyses and Reforms* p. 7.

⁴³⁰ Schmitter & Trechsel *The Future of Democracy in Europe: Trends, Analyses and Reforms* p. 88.

However, it still rested on a view of children as having insufficient capacity to participate in political decision-making at any level. It also ignored the possibility that children might actually contribute to the democratic process. The fact that the right to be able to influence decision-making processes that affect one's life is a basic human right that today is denied most children, does not seem to have formed any part of the discussion in the formulation of this proposal. The core principles of the Convention on the Rights of the Child are also conspicuous by their absence.

In other parts of the world attitudes towards children voting in general elections – and political participation in general – have been less conservative. A few countries have even opened up to the idea of giving children the right to vote. Brazil, Cuba and Iran have all reduced the voting age to below the age of eighteen.⁴³¹ One reason for this can be the fact that these countries all have quite young populations, and that sticking to a certain voting age would exclude a disproportionately large part of possible voters. A number of states have taken a variety of steps towards increasing children's participation by adopting laws and policies accommodating their rights to not only being governed but also to taking part in government at different levels of society. One example is the children's parliaments that have been set up in several countries, aiming at both listening to the voices of children and fostering democratic citizenship.⁴³² There are wide differences as to how effective these assemblies are and in how they are organised. Some of them lack preparation and follow-ups and are therefore more like forums for discussion for an elite body of children who are not representative of any "constituency". Others have been carefully established and organised. The National Youth Parliament in Thailand and the *Dáil na nÓg* in Ireland are two examples of the latter.⁴³³ Other ways of introducing children into government include consulting them on law reform processes, as was done in South Africa during the 1990s and initiated in Afghanistan and Timor-Leste at the beginning of the twenty-first century.⁴³⁴ Another example is The Swedish Local Government Act which since 2002 has provided all citizens, irrespective of age, who are registered in a municipality with the opportunity of ren-

⁴³¹ Brazil: minimum age 16 (2003 report CRC/C/3/Add.65, para. 151, 161) Cuba (CRC/C/SR.376, 26 May 1997) Iran: minimum age 16 (CRC/C/SR.618, 23 May 2000).

⁴³² UNICEF report *The State of the World's Children 2003. Child participation* pp. 54-57.

⁴³³ *Ibid.*

⁴³⁴ UNICEF report *The State of the World's Children 2003. Child participation* pp. 40-41.

dering proposals to local government.⁴³⁵ This provides children with an opportunity to participate in political decision-making, or at least provides a formal possibility to exercise a certain amount of influence. The Indian *bal* or *makkala panchayats*, “children’s councils”, set up within the framework of the adult *gram panchayats* or *panchayati raj* (local councils), is yet another version and also an example of when adult and child empowerment can go hand in hand: first, women were introduced to the decision-making institutions of the village councils, then the doors opened for child participation as well.⁴³⁶

Examples of children participating in what could be called, using the wide definition, political decision-making outside state or local government are numerous. Student councils, political interests groups working against racism or gender-based discrimination and the animal rights movement are just a few. Working children’s unions in India are other interest-based organisations with a clear agenda of influencing society and making the children’s voices heard.⁴³⁷ Yet another interesting example of a child-initiated, child-managed organisation working for children’s rights with a strong focus on child empowerment is the international network called Free the Children, founded in 1995 by the then twelve-year-old Canadian Craig Kielburger. The organisation describes itself as

an international network of children helping children at a local, national and international level through representation, leadership and action. The primary goal of the organization is not only to free children from poverty and exploitation, but to also free children and young people from the idea that they are powerless to bring about positive social change and to improve the lives of their peers.⁴³⁸

⁴³⁵ See Swedish Local Government Act (1991:900) Chapter 5, para. 23 p. 5 and prop. 2001/02:80 *Demokrati för det nya seklet* pp. 51-55.

⁴³⁶ The different names depend on where in India the panchayats are set up. On the panchayats, see the 2003 report of India to the Committee on the Rights of the Child (CRC/C/93/Add.5) para. 273-278 and the documents *Working children as protagonists* and Nandana Reddy & Kavita Ratna *A journey in children’s participation*, both courtesy of The Concerned for Working Children, (www.workingchildren.org). For a description of how a *bal panchayat* can work in Rajasthan, see e.g. Rasheeda Bhagat “Empowering Children” in *Frontline* Vol. 18, Issue 20, September 29 – October 12, 2001. For a survey of the panchayati raj system in India in general, see George Mathew “Panchayati Raj Institutions and Human Rights in India” in *Economic and Political Weekly*, Vol XXXVIII, No 2, January 11, 2003 pp. 155-162. The children’s panchayats are also discussed in Chapter 7 *infra*.

⁴³⁷ See e.g. *Bhima Sangha and the Makkala Panchayats – Chroniclers of Our Own Histories*, a report authored by Bhima Sangha and Makkala Panchayats with assistance from the Concerned for Working Children. India, 2004.

⁴³⁸ <http://www.freethechildren.com/aboutus/index.html> (as visited 14/07/2006). See also Stasiulis “The Active Child Citizen: Lessons from Canadian Policy and the Children’s Movement”, who paints a very positive picture of the organisation.

In that extract, the focus is on the connection to empowerment as a tool for the improvement of children's living conditions. The connection between empowerment, participation and democracy – regardless of how it has been put into practical use – is, however, clearly visible in most of the examples presented.

3.6 Child Participation: An Independent Democratic Value in Society

In this chapter, the interconnectedness between the two concepts of human rights and democracy and different aspects of democracy and citizenship in a child perspective has been presented. How the idea of the child as a rights holder has been discussed in rights theory as well as different ways of defining who actually is a child has also been examined. The main aim of addressing these somewhat diverse issues in the same context has been to emphasise and clarify the importance of child participation in a democratic society.

Conclusions to be drawn are that human rights and democracy are values that, even though it is not uncontested, are seen as being interconnected. What this means in practice naturally depends on how the concepts are interpreted and, not least, implemented in practice. Still, in a multitude of instruments and documents of international law, human rights and democracy are considered to be interdependent and mutually reinforcing. This implies that democratic skills and values are components that are impossible to exclude from any discussion on the implementation of human rights, regardless of which group of humanity that is referred to. It can in that context be noted that article 12 of the Convention on the Rights of the Child in which the right to participation is stated, is sometimes referred to as the Convention's "democracy article". The acknowledgement of the connection between children's right to participation in decision-making processes and democratic values increases the status of this right for children, which in turn is also a strong argument for the proper implementation of that right. In this context it is important to remember that, according to article 12, children's views are to be respected and taken into account in all matters affecting them and must involve *all* levels of society, which can be interpreted to mean including every situation from family matters to issues of national interest. Democratic values thus can and should influence all aspects of the life of the individual in a community.

The right of the child to participate in decision-making processes is argued to benefit the child in his or her development on the journey towards autonomy and responsibility. The future-oriented, develop-

mental perspective, even though sociological research in later years has problematised the definitions of “the child” and “childhood”, is still dominant, at least in the field of international law on the rights of the child. The 2003 UNICEF report *State of the World's Children* discusses participation mainly in terms of preparing children for their future lives as adults:

engaging them [children] in dialogue and exchange allows them to learn constructive ways of influencing the world around them. The social give and take of participation encourages children to assume increasing responsibilities as active, tolerant and democratic citizens in formation.⁴³⁹

Children's participation as an important aspect of democratic society is the other side of the coin. The active participation of children in decision-making processes can thus be seen as being not only beneficial for the individual child but also as forming the cornerstone for cohesive societies. This in turn is an essential element for peace and development in the modern world.⁴⁴⁰ Many of the proposed reasons as to why child participation is important from a democratic perspective thus relate not only to allowing children to have more of an influence on decisions affecting them, but also to confirming the faith of young people in established democratic processes. This is because democracy is seen to be the best way so far through for society to be governed.⁴⁴¹ This can be interpreted as constituting deliberate tactics in response to serious concerns expressed by governments, as well as intergovernmental and non-governmental organisations, over the lack of interest and trust shown on the part of young people in the democratic process.⁴⁴² Disenchantment over domestic and international politics creates feelings of exclusion and disempowerment. In extreme cases this can lead to distrust and actual rejection of the democratic system as such, threatening security and development in the world as a whole. Frustration and a sense of powerlessness, as is all too well known, can lead to extremism and violence. The conception of a deepening democracy,

⁴³⁹ UNICEF *The State of the World's Children 2003. Child participation* p. 4.

⁴⁴⁰ Millenium Declaration A/RES/55/2, Millenium Development Goals. UNICEF *The State of the World's Children 2003. Child participation* pp. 9-10.

⁴⁴¹ Or, as Winston Churchill is supposed to have said: “...democracy is the worst form of government except all the others that have been tried.”

⁴⁴² UNICEF *The State of the World's Children 2003. Child participation* pp. 13, 50-51. On the European context, see e.g. Lawrence Pratchett & Vivien Lowndes *Developing Democracy in Europe. An analytical summary of the Council of Europe's acquis* Council of Europe, Strasbourg, 2004 pp. 24-25 on the concerns of the Council of Europe regarding the growing democratic deficit in the region and the importance of fostering greater youth participation and Schmitter & Trechsel *The Future of Democracy in Europe: Trends, Analyses and Reforms* in general.

making it more inclusive by educating young people in relation to its processes and values, can thus be seen to be an important step towards ways of working for a secure and peaceful world. The Council of Europe project on education in relation to democratic citizenship referred to in the chapter and the Council initiative on “Children, democracy and participation in society” provide good examples of this way of thinking.⁴⁴³

But it is not all about preparing for what is to come. The importance of child participation as a value in itself, and not just as a means of creating well-adjusted citizens for the future, should also be taken into account. It could also be argued that if one sees the concept of democracy in the way described, for example, by Susan Marks – as a process that presupposes participation and “equal citizenship” – it would seem to be somewhat illogical to exclude persons below a certain age based only upon traditional presumptions about capacity and competence. Such views could just as easily be applied to argue that ignorant adults should also not be allowed to exercise influence. Decision-making processes with political or social implications exist on every level of society – presuming, of course, that by “political” does one not refer only to formal political processes but to a more generous interpretation (as has been discussed in the present chapter). It would in this perspective perhaps be a more interesting and adequate solution to also allow children – with reference to their citizenship status – to participate in decision-making processes, thereby contributing both to the broadening and the development of democracy as such. This approach corresponds with the sociological child research that talk of new paradigms of childhood and of childhood being a value in itself. Such participation, naturally, has to be implemented by taking the individual child’s capacities and competence into account, as well as achieving the necessary balance between the right to protection and the right to participation. The important thing is that an assessment has to be made in relation to the child as a rights holder, and not as an object.

The exclusion of citizens below a certain age can, the way I see it, be problematic in two ways. One is that it could be considered to constitute a problem for democracy itself by undermining the legitimacy of the concept in the same way that exclusion from the *demos* based upon gender, class or ethnicity diminishes its status and worth. Another problem relates to the Convention on the Rights of the Child, article 12 in particular. If what the article says (about the child’s right to respect for his or her views and to have these views taken into account) is to be interpreted as having a “democracy dimension” – is it

⁴⁴³ Sandy Ruxton *What about us? Children’s Rights in the European Union .Next Steps*, Council of Europe *Children, participation, projects. How to make it work!*.

possible to consider the article as possessing little more than a very limited legitimacy? Or even for it to be applicable in a society where the individuals referred to in the article *per se* are not considered to be able to participate in a majority of the decision making-processes affecting their lives? What are the implications of this for the legitimacy of the Convention on the Rights of the Child as a whole, if one of its core articles has a very limited practical applicability?

The scope of children's participation is, not surprisingly, one of the most controversial aspects of implementing their right to participation as it addresses the issue of capacity and competence of the child compared with that of the adult. The discussion above on whether children can be said to have political rights – and what those rights in such case include – illustrates the complex nature of this issue. Furthermore, if children are to be recognised as rights holders with the possibility of exercising an influence, the matter of power relations and power structures between adults and children and between different groups of children cannot be avoided. The question of power and empowerment in a children's rights context, therefore, is the topic of the next chapter.

4 Participation Equals Power

4.1 Introduction

Fundamental to genuine participation in decision-making is that the individual (or group) has influence over the decisions that are made. Exercising influence is a way of exercising power. In the previous chapter, the importance of child participation in a society that wishes to call itself fully democratic was analysed. The possibility of enlarging the scope of rights that are referred to as political was discussed as an example of such participation, as was the meaning of “the citizen child”.

A conclusion to be drawn from that discussion is that the element of power in decision-making processes is controversial, and perhaps problematic, in adult-child relations on every level. This is because at the core of the child’s right to participation is the perception of the child as a human being with sufficient competence and capability to take part in important decisions affecting him or her – which would imply that such person is both able to and has the right to exercise at least a certain amount of power. The combination of “children” and “power” therefore challenges a social order where children by definition are subordinate to adults. The active and genuine participation of children in decision-making processes asks questions concerning personal autonomy, and by whom power can be exercised – questions that are as relevant in the family as they are in the context of national politics.

In this chapter, the aim is to explore the element of power in adult-child relationships and how it is dealt with in the context of the child’s right to participation. The intention is to discuss certain underlying structures affecting the realisation of the child’s right to participation in order to further clarify the meaning of the concept of participation as well as to direct attention to obstacles to the implementation of the right as expressed in article 12 of the Convention on the Rights of the Child.

The process of becoming someone who can exercise influence and control over one’s own situation, of going from “object” to “agent”, is often referred to as “empowerment”. Empowerment is a concept most

often used in relation to the advancement of women's rights.⁴⁴⁴ One could, however, argue that it is as equally applicable to the process through which any group of individuals in a society, that in some way is disadvantaged in relation to other groups, increases its opportunities to make independent life choices and to change the status both of the group and of its individual members. Children could be seen as such a group.

"Empowerment" is a concept that has appeared in various contexts over the past decades. Within the context of women's human rights, this notion has been increasingly referred to in recent years. Empowerment is now an important element in contemporary feminist analysis of society, not least in legal analysis.⁴⁴⁵ It is also referred to in such fields as minority rights discourse, pedagogical research, and environmental debates as well as in relation to patient doctor interaction.⁴⁴⁶ Within the human rights discourse, gender equality and the tardy insight that "women's rights are human rights" has gained its place on the global political agenda over the past decades, thus introducing the concept of empowerment on several levels within the human rights system.⁴⁴⁷ The very acknowledgement of participation rights for certain groups could, in my view, be seen as an expression of empowerment of the individuals of which these groups consist. This in turn makes it interesting to discuss empowerment in a children's rights context.

⁴⁴⁴ See e.g. Barbro Wijma & Karin Siwe "Empowerment i gynstolen. Teori, empiri och möjligheter" in *Kvinnovetenskaplig tidskrift* 2-3/2002 pp 61-73. See, also, the enumeration of official documents where "empowerment" is referred to further on in the Chapter.

⁴⁴⁵ Hilary Charlesworth and Christine Chinkin have stated: "The empowerment function of rights discourse for women [...] is a crucial aspect of its value. As has been observed in the context of South Africa, rights talk can often seem naïve and unpragmatic, but its power relies on a deep faith in justice and rightness." Charlesworth & Chinkin *The Boundaries of International Law* p. 211. Charlesworth and Chinkin however continue by pointing out that the rights discourse exists in a limited referential universe – the international legal order – and that "the need to develop a feminist rights discourse so that it acknowledges gendered disparities of power, rather than assuming all people are equal in relation to all rights, is crucial." *Ibid.*

⁴⁴⁶ See examples in Ola Holmström "Funktionshindrade och folkhögskolan: Perspektiv på empowerment genom folkbildning" in *Folkbildningsinstitutet Utvärderar* no 1 2002 pp 15-20, 15.

⁴⁴⁷ For a discussion on how women's human rights and a gender perspective are "mainstreamed" in the UN system, see Kouvo *Making Just Rights*.

4.2. Empowerment – Its Relevance for Children’s Rights

4.2.1. Identifying the Concept of Empowerment

Empowerment is considered to be an essential tool for realising rights and attaining equality by altering existing unequal power structures. The question to be considered is what relevance “empowerment” can have for children’s rights, particularly for the rights of the girl child, since “empowerment” is a concept often connected to the advancement of women and girls. The answer is somewhat complex, as children in general are more vulnerable and in need of protection than the average adult. Neither does “power” mean exactly the same thing for children as it does for an adult. Sufficient attention therefore has to be accorded to a particular society’s perceptions of “children” and “childhood”, as discussed in a previous chapter. Such perceptions play an important role as to what kind – if any – of influence (power) children can be accorded. Social structures and traditions also play an important part.

But what precisely *is* “empowerment”? What does it mean? A dictionary definition of the term “empower” is “to give someone more control over their own life or situation”.⁴⁴⁸ Some examples of what the concept means are found in texts drafted within the international human rights system. The 1993 Vienna Declaration and Programme of Action,⁴⁴⁹ the Programme of Action of the 1994 United Nations International Conference on Population and Development (the Cairo Conference),⁴⁵⁰ and the 1995 Beijing Declaration and Platform of Action⁴⁵¹

⁴⁴⁸ Longman Dictionary of Contemporary English 3rd ed., 7th impression, Pearson Education Limited 2003.

⁴⁴⁹ (See n. 11 *infra*.) Para. 18 refers to “...the full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex [as] priority objectives of the international community” and para. 36 emphasises “...the importance of the integration and full participation of women as both agents and beneficiaries in the development process”. Even though the term “empowerment” is not specifically used the underlying message promoting the benefits of empowerment stands quite clear.

⁴⁵⁰ A/Conf.171/13 (1994) Report of the International Conference on Population and Development, A/Conf.171/13/Add. 13 Report annexes I – IV. A section of the final Programme of Action was devoted to “Gender Equality, Equity, and Empowerment of Women”, laying the focus, both in the particular section and in the document as a whole, on the significance of empowerment for advancement in the field.

⁴⁵¹ In the Platform of Action empowerment of women is translated as the removal of “all the obstacles to women’s active participation in all spheres of public and private life through a full and equal share in economic, social, cultural and political decision-making.” Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995), Mission Statement para.1. The Beijing Declaration and Platform for Action despite its focus on empowerment of women and their liberation from gender-related

provide a few alternatives. Mention should also be made of the UNDP 1995 Human Development Report Gender and Human Development, in which empowerment is identified as one of four essential elements of the human development concept.⁴⁵² Women's empowerment is one of the Millennium Goals identified by the Member States of the United Nations for the organisation's work in the twenty-first century.⁴⁵³ These examples, taken from official UN documents and reports show how the concept of empowerment has become a recognised element of the international human rights discourse. The concept is also referred to in the regional systems of human rights protection, as for example in the programme for Education of Democratic Citizenship (EDC) mentioned above.⁴⁵⁴

"Empowerment" and what it entails and encompasses, and how it should best be defined, has also been extensively discussed not least in academic debate. A general agreement on what it actually means has yet to be reached (the necessity of such a consensus can also be questioned) and as a result different definitions or interpretations of the concept are being applied. The following two citations are, however, fairly representative examples of how empowerment is defined in the general discourse:

Empowerment is the process by which the powerless gain greater control over the circumstances of their lives. It includes both control over resources (physical, human, intellectual, financial) and over ideology (beliefs, values, and attitudes). It means not only greater extrinsic control, but also a greater intrinsic capability – greater self-confidence, and an inner transformation of one's consciousness that enables one to overcome external barriers to accessing resources or changing traditional ideology. Genuine empowerment includes both these aspects and can rarely be sustained without both.⁴⁵⁵

A second definition describes the main elements of empowerment as

constraints, has been criticised by Hilary Charlesworth and Christine Chinkin from a feminist perspective as presenting women in a "limited, encumbered way"; their major role in society still being that of a wife and mother, and: "The attempts to raise the diversity of women's identities, most particularly with respect to sexual orientation, were unsuccessful." *The Boundaries of International Law* p. 248. When scrutinising the text of the Beijing document, it does become obvious that "the woman" referred to is a heterosexual being, and that the reproductive aspect of her sexuality is what is in focus.

⁴⁵² In the report, empowerment is related to development in terms of active participation in decision-making processes.

⁴⁵³ United Nations Millennium Declaration A/RES/55/2.

⁴⁵⁴ See Chapter 3, section 3.5.3.

⁴⁵⁵ Gita Sen & S. Batliwala, "Empowering Women for Reproductive Rights" in Harriet B. Presser & Gita Sen (eds.) *Women's Empowerment and Demographic Processes* New York, Oxford University Press, 2000, pp. 18-19.

the power to enable; ability to be in control (of tangible/physical resources or intangible/ideological constraints); self-confidence: the inner power to overcome external adversities involving a process of interaction.⁴⁵⁶

The essence of these attempts to define the meaning and content of empowerment could be concluded as representing the following: “empowerment” is a process and a tool by which disadvantaged, oppressed or marginalised individuals or groups through different strategies gain control over their lives by taking part alongside others in the development of activities and structures that allow people increased involvement in those matters affecting them. This process is applicable to the daily lives of people as well as to their more fundamental life choices. Additionally, empowerment is the “end product” of this process – that is, the evidence of control of one’s life.⁴⁵⁷

4.2.2 Power Relations: Interplay Between Children and Adults

The process of gaining control over one’s life is more problematic in relation to children because of their vulnerability and their unavoidable dependency on adults. Children are subordinate to adults in the hierarchy of power, influence and status that constitute a society’s social order. How adult power over children can manifest itself in different situations and how that can be related to child participation will be discussed in this section after a few words have been said about “power” as such and the ways in which the concept can be analysed.

Power can be characterised as a relational concept. It is exercised in interaction or transaction with another actor, be it an individual or a group. “Relational” does not necessarily have to imply a two-way communication: the parties involved might have some power *vis-à-vis* each other but that does not need to be the case. A distinction can be made between *objective* and *subjective* power: *objective* bases of power being economic resources, laws, institutional rules and norms held by others, interacting with the *subjective* bases of power, self-efficacy and entitlement. These dimensions interact and influence the effective exercise of power: one can possess the objective bases of power but not be or feel able to exercise them. This is where empow-

⁴⁵⁶ Bina Pradhan “Measuring Empowerment: A methodological approach” in *Development*, Vol.46, No.2 June 2003, pp. 51-58 (52).

⁴⁵⁷ See Sunita Kishor “Empowerment of Women in Egypt and Links to the Survival and Health of Their Infants” pp. 119-159 in Sen & Batliwala *Women’s Empowerment and Demographic Processes* Kishor distinguishes between empowerment as a process and as an end product, but simultaneously considers the evidence of empowerment, i.e. the end product, as the final step in the process.

erment as a means of enabling an actor to explore his or her actual possibilities becomes valuable.⁴⁵⁸

Another way of analysing power is in defining its different modes of expression.⁴⁵⁹ First, it can be seen as a *mode of operation*, which in turn yields three distinct aspects: power as oppression, which applies both on an individual and a collective level; power as challenging, in the form of counter-movements to oppression, and last, but not least, power as a creative force - as an incitement to realise one's individual potential.

The second approach is to consider its *mode of appearance*, the conditions in which power appears on various levels of human existence: from written texts of law to daily practices in the individual household.

The third way is to consider power and its *mode of visibility* – that is, how power manifests itself. Several dimensions are relevant to this perspective.⁴⁶⁰ First, there is the “power to” effect change. These are processes that are open and manifest, such as the use of force, direct orders and rebellion. Second, there is “power over”: the power to set the agenda for which issues are to be discussed, prioritised or even recognised. Third, we turn our attention to the level of “the natural”: that which is generally accepted, uncontested, considered as being the natural state of things. This mode of exercise of power is concealed and its rules can even be embraced by those very individuals or groups suffering from its consequences. Women who accept being abused by their husbands because “it is his conjugal right”, women who support and exercise harmful practices such as female genital mutilation, adults who turn a blind eye when children are abused by their carers because it is considered to be an accepted component of child education: all these are different aspects of the same phenomenon. This particular exercise of power, building on what is considered to be the natural order of things is the most difficult to reach and alter, as it forms part of the collective psyche of a society and is often supported and conserved by influential institutions such as the law, the media and religious and cultural institutions. “Power” in this context does not reveal itself, but rather presents itself as “common sense” and as the way things are and should remain. Conceptions and perceptions of children,

⁴⁵⁸ See Paula England “Conceptualizing Women’s Empowerment in Countries of the North” pp. 37-69 in eds. Presser & Sen *Empowerment and Demographic Processes*.

⁴⁵⁹ J. Charms & S. Wieringa “Measuring Women's Empowerment: an assessment of the Gender-related Development Index and the Gender Empowerment Measure” *Journal of Human Development*, Volume 4, Number 3, November 2003, pp. 419-435 (17).

⁴⁶⁰ All three are found in Charms & Wieringa, *Measuring Women's Empowerment: an assessment of the Gender-related Development Index and the Gender Empowerment Measure* pp. 421-423.

childhood and the nature of the relationship between children and adults are often referred to in this way – as facts, as the will of nature, and not as something rooted in societal structures.

Adult power over children can be exercised in a number of ways. Between adults and children, power operates on practically all of the levels described above. It is based upon objective as well as subjective elements. It can be exercised openly – as when an adult tells a child what to do, expecting to be obeyed without having to explain the reasons why. Other ways are more subtle: such as respect for elders and for parental authority – which are power values impressed upon most of us, even though we do not always choose to respect them. The more traditional and conservative a society, the stricter its power hierarchies usually are and the more likely it is that children's views and wishes are not regarded as being particularly important. This can be illustrated by the following citations from Concluding Observations by the Committee on the Rights of the Child. The citations are fairly typical examples of how traditional power hierarchies are referred to by the Committee as having negative implications for the child's right to participation. On the implementation of article 12 in Mongolia it expressed the view that

the Committee remains concerned that the traditional attitudes in the State party may limit children's right to freely express their views within the family, schools and the community at large.⁴⁶¹

And in Nigeria:

Given the prevalence of the traditional views on the place of children in the hierarchical social order, the Committee is concerned that children's opinions are not given sufficient consideration and that respect for the views of the child remains limited within the family, at schools, in the courts and before administrative authorities and in the society at large[...].⁴⁶²

As suggested by these citations, the old saying "children should be seen and not heard" is still an adequate description of the child's social status and position in many societies.⁴⁶³ To suggest that children have the right, at least to a certain extent, to influence decisions affecting their lives in such a context is controversial because it challenges traditional attitudes to children and what they can and cannot do. For indi-

⁴⁶¹ Concluding Observations on the 2004 report of Mongolia CRC/C/15/Add.263 para. 25.

⁴⁶² Concluding Observations on the 2004 report of Nigeria CRC/C/15/Add.257, para. 34.

⁴⁶³ See the discussion in Chapter 6.

viduals, exercising power is a way for them to address their conditions of life, to submit or object to oppressive relations. The result is either the creation of new power relations, be they oppressive or more egalitarian, or the preservation of existing structures.⁴⁶⁴ Inherent in the concept of “empowerment”, if empowerment is to be seen as a process, lies the notion that when a certain group gains more power than it initially had been able to exercise, it is likely to lead to an alteration in existing power relations. In the current social order where the subordination of children is not seriously problematised but seen as “natural”, a change leading to children having more influence undoubtedly is experienced as radical. With this backdrop, it is not surprising that the right to participation as expressed in article 12 of the Convention on the Rights of the Child is by many states considered problematic to implement.

Changes in power relations, however, do not necessarily need to imply that the previously superior party completely loses its influence. Instead, it can open up the possibility of distributing and exercising power more equally among those concerned (which, of course, presupposes that this is perceived to be something positive). In the human rights discourse, the restructuring of unequal power relations and the recognition of the equal worth of all human beings is considered to be a prerequisite for the further development of human rights – the prohibition of discrimination is at the very core of the human rights concept. This is an important point to make not least in the context of the family, where the applicability of human rights was long questioned as a result of the sharp distinction between the public and the private sphere.⁴⁶⁵ In the contemporary human rights discourse, however, the tendency is to transcend this divide – the Convention on the Elimination of All Forms of Discrimination Against Women being one of the most obvious examples. Family relations, medical counselling and treatment – the latter is here seen as including counselling and treatment related to reproductive freedom – are the issues discussed below

⁴⁶⁴ Charmes & Wieringa “Measuring Women's Empowerment: an assessment of the Gender-related Development Index and the Gender Empowerment Measure” p. 421 with references. For examples taken from the context of women's rights, see e.g. Maznah Mohamad “The Politics of Gender, Ethnicity, and Democratization in Malaysia: Shifting Interests and Identities” pp. 347-384, Anne Philips “Multiculturalism, Universalism, and the Claims of Democracy” pp. 115-141, Ramya Subrahmanian “Engendering Education: Prospects for a Rights-Based Approach to Female Education Deprivation in India” pp. 204-239, and Aili Mari Tripp “The Politics of Women's Rights and Cultural Diversity in Uganda” pp. 413-441, all in Maxine Molyneux & Shahra Razavi (eds.) *Gender Justice, Development, and Rights* Oxford University Press, New York, 2002. See, also, Jan Jindy Pettman *Worlding Women. A Feminist International Politics* Routledge, London & New York, 1996 pp. 181.

⁴⁶⁵ Charlesworth & Chinkin in *The Boundaries of International Law* discuss the matter thoroughly: pp. 30-31, 43-44, 56-59.

in order to illustrate the adult-child power structure. The first example, power relations within the family, permeates almost all parts of the child's life and the examples that follow can therefore be seen as reflecting particular aspects of the relationship between parents and children. Relationships within the family community are also among those that are the least regulated by the state, traditionally seen, as they still are, as belonging to the private sphere in which state interference should be kept to a minimum.⁴⁶⁶

4.3 In the Family: Power Relations at Its Most Delicate

4.3.1 Definitions of “the Family”

In the figure above illustrating how children's possibilities to participate in decision-making expands and develops, the family is placed firmly in the middle. International human rights law acknowledges the family as the basis of society and a basic institution for the survival, protection and development of the child.⁴⁶⁷ The concept of the family as presented in international human rights law has been criticised by feminist scholars for identifying the family with the heterosexual married couple with their offspring, for establishing the family as an entity belonging to a private sphere in which human rights are not applicable and for operating in order to silence the voices of women, as women traditionally are seen as belonging primarily to the private sphere.⁴⁶⁸ A more contemporary approach of international law to “the family” is to see it as a “community of individuals possessing specific rights”⁴⁶⁹ and as appearing in a myriad of shapes and constellations: the extended family, the single parent family, the nuclear family, and the polygamous family to mention a few.⁴⁷⁰ The case law of the European Court

⁴⁶⁶ On the private and public spheres of law, see e.g. Andrew Clapham *Human rights in the private sphere* Oxford, Clarendon Press, 1998 (New print 2002).

⁴⁶⁷ See Chapter 2 on different human rights instruments and their provisions referring to “the family”.

⁴⁶⁸ Charlesworth & Chinkin *The Boundaries of International Law* pp. 232-233 with references.

⁴⁶⁹ Van Bueren *The International Law on the Rights of the Child* p. 72.

⁴⁷⁰ See Eekelaar & Sarcevic (eds.) *Parenthood in Modern Society. Legal and Social Issues for the Twenty-first Century* for a discussion on different aspects of parenthood and the family in different parts of the world. On family relations in India in a gender perspective, see Margit Pernau “Family: A Gendering and Gendered Space” pp. 9-33 and Imtiaz Ahmad “Between the Ideal and the Real: Gender Relations within the Indian Joint Family” pp. 36-63, both in Margit Pernau, Imtiaz Ahmed & Herlmut Reifeld *Family & Gender: Changing Values in Germany and India* New Delhi, Sage 2003.

of Human Rights (ECtHR) concerning article 8 of the ECHR is an important source of inspiration when discussing the concept of the family. It is important to note that article 8 provides protection for family life rather than for the family itself as a unit. The right to marry and found a family are protected by article 12 ECHR. The concept of “family” in the view of the ECtHR appears to include a variety of constellations, ranging from the traditionally married heterosexual couples and children dependent on them (the classic definition of the nuclear family, today seen as including children born out of wedlock and adopted children) to variations on the extended family-theme, more frequently occurring in, for example, many African cultures.⁴⁷¹ In between, we find non-married couples with children, the mother-child relationship irrespective of the mother’s marital status, the relationship between unmarried fathers and their children (to a certain extent) as well as relationships between siblings and, in some cases, between grandparents and grandchildren.⁴⁷² Step by step, the Court in its jurisprudence appears to have recognised that article 8 generally applies automatically to the relationship between parent and child regardless of the nature of the relationship. The evolution of modern family structures based not on blood ties but on de facto ties of family life inevitably bring about changes in attitudes and opinions, embracing a more liberal vision of family than would have been foreseen fifty years ago when the ECHR was drafted.⁴⁷³ Basically, it is the substance and nature of a relationship that is considered worthy of protection, not a formalistic set of rules.⁴⁷⁴

The way the concept of the family is interpreted in the Convention on the Rights of the Child and in the Convention on the Elimination of All Forms of Discrimination Against Women is quite similar, an interpretation likely to have been inspired at least to an extent by the deliberations of the ECtHR as no interpretation of human rights norms exist

⁴⁷¹ On the traditional African family, see Gyeke *African cultural values: an introduction*. As for the European Union’s position on these matters and what constitutes the immediate family, see Amended Proposal for a Council Directive on the Right to Family Reunification, Official Journal C 203 E, 27/08/2002 P. 0136 – 0141, especially article 4. The proposed Directive presents a rather strict position on family reunification and which family members that should have this opportunity. The focus clearly is on the nuclear family.

⁴⁷² Examples of case law on these matters are presented in Chapter 2.6.5.1. See, also Danelius *Mänskliga rättigheter i europeisk praxis* on article 8 pp. 220-252, Kilkelly *The child and the European Convention on Human Rights* 187-214.

⁴⁷³ Kilkelly *The child and the European Convention on Human Rights* pp. 194-195.

⁴⁷⁴ Cf. Harris, O’Boyle & Warbrick *Law of the European Convention on Human Rights* p. 313, Verschraegen “The Right to Private Life and Family Life, the Right to Marry and to Found a Family, and the Prohibition of Discrimination” pp. 202-203.

in a vacuum.⁴⁷⁵ Both conventions relate to the family as a fundamental unit of society, but at the same time do not ignore its darker features. The social realities of oppression and discrimination within families that also form part of the picture are recognised in the texts. In CEDAW, the need for a changed view of the family concept is emphasised by its denial of the family as a patriarchal hierarchy. CEDAW instead views the family as a relationship between equal men and women, sharing the responsibilities for the nurture and care of children and family members in general.⁴⁷⁶ In the Convention on the Rights of the Child the emphasis on joint and shared parental responsibility gives evidence of the same underlying analysis.⁴⁷⁷ This nuanced view of the family helps draw attention to the power structures operating within the family context and how they influence family members in exercising their individual rights. To recognise the impact of both visible and hidden power structures is important not least when discussing the child's right to participation, as claiming to have the right to take part in decision-making processes can be seen as challenging those in power in the family, i.e. the parents or other adults responsible. Such challenges can be a major cause of conflict.

4.3.2 The Scope of Parental Rights

When discussing the power relations within the family, it is important to be absolutely clear about the distinction between the right to supported and active participation and the right to self-determination, a term which implies not only the right to take part in decision-making but the right to have a final say.⁴⁷⁸ Increased participation of children in family decision-making does not remove all authority and “final say-so” from the parent or other adult person legally responsible for the child. What it aims to do is to change the way conclusions should be reached and decisions made. This is also the main point of article 5 of the Convention on the Rights of the Child, which clearly states that the

⁴⁷⁵ The preamble of the CRC describes the family as “the fundamental group of society and the natural environment for the growth and well being of all its members and particularly children”. The preamble of the CEDAW: repeatedly refers to “the family” and its fundamental position in society. See also Goonesekere *Women's Rights and Children's Rights: The United Nations Conventions as Compatible and Complementary International Treaties* p.10 for an analysis of the relationship between the two treaties.

⁴⁷⁶ Goonesekere *Women's Rights and Children's Rights: The United Nations Conventions as Compatible and Complementary International Treaties* p. 10.

⁴⁷⁷ See CRC articles 5, 18, 20, 27 and preamble.

⁴⁷⁸ Van Bueren *The International Law on the Rights of the Child* p. 138. On the child's status in the family in a Swedish perspective, see e.g. SOU 1998:97 *Gör barn till medborgare! Om barn och demokrati under 1900-talet* pp. 49-77.

responsibilities, rights and duties of parents or other persons responsible for the child shall be respected, but also that their task is to provide “in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”

The article thus represents a change from parents having rights *over* their children to instead having rights they hold *on behalf* of them.⁴⁷⁹

This is a very important point: accepting and acknowledging that parents have the right to decide over their children, according to the perspective represented by article 5, is based upon the assumption that *a*) children are vulnerable and need protection (a need, however, that decreases the older the child gets) *b*) parents are in general the ones best suited to provide this protection, unless proved otherwise, where the state may be obliged to step in and *c*) that parents exercise power over their children with the best interests of the child as their guiding principle. Parental power, however, according to article 5, is limited by the respect that has to be accorded to the evolving capacities of the child and the rights recognised in the rest of the Convention. The rights of parents to decide what is best for their children should thus not be confused with a right to decide over the child as if he or she is some kind of property. A child is not owned by the parents, who are not at liberty to do what they please with their children as an extension of their rights as individuals.⁴⁸⁰ John Stuart Mill commented on the limit of the freedom of the individual in the context of parent-child relationships by saying:

A person should be as free to do as he likes in his own concerns; but he ought not to be free to do as he likes in acting for another, under the pretext that the affairs of the other are his own affairs.⁴⁸¹

⁴⁷⁹ See, e.g., Flekkoy & Kaufman *The Participation Rights of the Child. Rights and Responsibilities in Family and Society* p. 62, Singer *Föräldraskap i rättslig belysning* pp. 521-542 and Paul Vlaardingerbroek “The Rights of Parents and Children in the Netherlands: Seeking a New Balance” pp. 463-477 in Eekelaar & Sarcevic (ed.) *Parenthood in Modern Society*. Vlaardingerbroek stresses the significance of the phrasing of the article, and concludes that the Convention on the Rights of the Child has set out an objective specification of what constitutes children’s interests, and that parents etc. cannot derogate from these in their direction and guidance. See also Hafen & Hafen “Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child” p. 458 on article 5 of the CRC and UNICEF *The State of the World’s Children 2003. Child participation* p. 4.

⁴⁸⁰ See the discussion in Brian Barry *Culture and Equality* Harvard University Press, 2002, pp. 200-201.

⁴⁸¹ John Stuart Mill *On Liberty* as cited in Barry *Culture and Equality* p. 201.

4.3.3 In Whose Interests?

Sadly enough, basic statements such as Mill's on respect for the individual are not in accord with how most parents over the centuries, in practically all societies, have treated their children, and still do for that matter. An extreme example of where the collective interests of the family or the community are allowed to override the individual interests of the child is seen to be in communities where female genital mutilation is practised. In such communities, the interests of maintaining family and community cohesion is considered to be more important than protecting the girl child in protection from practices that are harmful to health.⁴⁸² The right to freedom of religion is another area in which the right of parents to decide for their children is seldom seriously contested, irrespective of the child's own views.⁴⁸³

Challenging traditional paternalistic structures in the relationship between adults and children within the family as well as beyond its boundaries is thus a sensitive business.⁴⁸⁴ Child empowerment – striving to alter power relations within the family and elsewhere in society and seeing the child as an active participant in decision-making processes (and not treating this right as a mere token that can easily be removed, but as something to which children are incontestably entitled) – challenges the very foundations of the family structure as it is traditionally perceived. Within the family, the right of children not to be abused, to be treated with respect in relation to their evolving capacities, and to have their views respected and taken into account in general, is dependent upon the attitudes and benevolence of the parents (or their counterparts). How parents or other persons legally responsible for a child perform their duties can be monitored by the state through various measures such as social services, compulsory school attendance and child protection laws. All the same, the inherent imbalance of power in the family is what mainly dictates the living conditions of the child. Many rights that are considered to be the “rights of the child” are in fact adapted to what best suits the parents. One example is where parents have legal rights of access to their children in cases of separation but where children have no legally enforceable right of access to their parents. A parent who is no longer interested in having contact with his or her child is not breaking any laws. A child

⁴⁸² see e.g. Janet Kabeberi-Macharia “Reconstructing the Image of the Girl-Child” pp. 47-57 (48) in Ncube (ed.) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*.

⁴⁸³ See Chapter 2.3.1 *supra* on reservations to article 14, at the core of which is the right of parents to decide over their children.

⁴⁸⁴ see *tex* James, Jenks & Prout *Theorizing Childhood* p. 69 on the “folk devil”. For a perspective from Tanzania, see Rwezaura “The Duty to Hear the Child: A View from Tanzania”.

on the other hand who does not wish to live with, or even be in contact with a parent, can in many cases be forced to do so by law. Another example is paid parental leave which, in the states where it exists, could be argued in practice to be organised to more suit the needs and interests of parents and of the state rather than those of children.⁴⁸⁵ If the child's interests to be with his or her parents was *the* interest that society primarily wished to fulfil (instead of its being one of several), one could argue that it would be logical to make parental leave obligatory for both men and women who have become parents.⁴⁸⁶ This, however, is not the case in any state where paid parental leave is an option.

The point I am trying to make is that challenging the existing asymmetrical power relations within the family context brings a number of questions to the surface, not only concerning competence and capability but also regarding whose interests are being served by preserving current power relations. Empowering the child through increased participation rights inevitably entails that someone else's authority and power over the child is altered in the way that it can be exercised. That a child has a right to freedom of expression and information, to respect for his or her views, with those views being taken into account, are in many ways contradictory to traditional child-rearing attitudes of parents or other carers and go beyond what many families in most cultures would accept. Conflicts inevitably arise, especially as it cannot be presumed that the interests of children and parents always coincide. With this in mind, the controversial nature of these issues should come as no surprise – neither should the difficulties with effectively implementing participation rights in practice.

⁴⁸⁵ Parental leave is a concept that is designed and applied very differently in different countries. In Sweden, parents have the right to parental leave up to 480 days. How this time is divided between the parents is up to them, except for 60 days which cannot be "given away" to the other parent. These 60 days are in practice often referred to as "father months", as they are intended to encourage fathers to exercise their right to parental leave to a greater extent than is the current practice. See the Parental Leave Act (1995:584) and the National Insurance Act (1962:381). In contrast, in the UK a woman is entitled to 26 weeks of maternity leave and statutory maternity pay from her employer. A father is as of March 2003 entitled to two weeks of paid parental leave. See the 1996 Employments Rights Act, as supplemented by the 1999 Maternity and Parental Leave Regulations. *Oxford Dictionary of Law*, 5th ed. Oxford 2002.

⁴⁸⁶ My intention, as some conservative debater might think, is not to imply that it is harmful for children to be looked after and partly raised by others than their biological parents at, for example, day care, nursing schools etc. – far from it – but simply to point out that it is not the child's best interests that is the only concern in this equation, but rather socio-economic interests and the preservation of traditional gender roles.

4.3.4. Bodily Integrity – A Basic Human Right

4.3.4.1 Keyword: Control

Do parents have a right to decide over their children's bodies? If, so, to what extent? The imaginable conflict between what parents think is in their children's best interests and what the child wants can, when involving issues of bodily integrity, range from issues of whether a child can be stopped by the parents from, for example, cosmetic piercing to, forcing the child, against his or her will, to go through major surgery. The right to bodily integrity is a basic human right. So is the right to privacy. Not to have the right to control over what is done to one's own body signals one's low position in the hierarchy of power – as more of an object than an empowered participant. In a child context, it is generally accepted that children or other adults responsible for the child will make necessary the decisions on behalf of the child as the child is considered too young or immature to understand the impact of the decision that has to be made – especially if it is a decision with unpleasant aspects for the child. The right of adults (parents) to decide over children's bodies is thus in part based upon the presumption that children need the protection and experience of adults, but in part also on the (although not explicit) notion that children are, if not the property of parents, then at least not autonomous individuals that by definition have to be consulted in decision-making concerning them. Interests other than what are considered to be in "the best interests of the child" according to the Convention on the Rights of the Child or other legislation, can play an equally important part for the decision that is made by the parents or other adults responsible for the child. Economic concerns, tradition, custom and societal status of the parents are a few examples.

One area where children's right to decide over their own bodies and, not least, to privacy, has been debated is the field of medical treatment and counselling. The power relations between adults and children here are made visible in the possible conflict arising between children increasingly seeking privacy, in not wishing to allow their parents (or other adults) to have full knowledge of all aspects of their lives – or simply claiming the right to make life-altering decisions themselves – and the adult's wish to protect the child from making half-baked decisions, and/or safeguarding their own interests. In the following, a few examples will be discussed.

4.3.4.2 Medical Counselling and Medical Treatment

When imposing restrictions on the child's right to seek and receive independent medical counselling, the interests of protecting children – or perhaps the interests of their parents – must always be measured

against the child's right of access to information.⁴⁸⁷ The Convention on the Rights of the Child gives no support for setting a minimum age below which a child can seek and receive independent medical counselling. Article 24 requires state parties to pursue the full implementation of the highest attainable standard of health and

to ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents.⁴⁸⁸

The right of the child to receive medical counselling without parental consent is vital in cases where the interests and views of the child and the parents might be in conflict with one another. Cases of child abuse, situations where the child and the parents do not agree on issues of access to health services, and family planning matters are just a few examples. The matter is tackled differently in the state parties to the Convention. In Norway the main rule according to the 1999 Patients' Rights Act⁴⁸⁹ is that the patient has the right to participate when medical care is provided and to be given sufficient information to have an insight into his or her medical condition and the content of the medical care. If the patient is between the ages of 12 and 16, information must not be given to parents or others with parental responsibility if the patient, for reasons that *should be* respected, does not so wish. Information, however, that is *necessary in order to fulfil parental responsibility* must nevertheless be given to parents or others with parental responsibility when the patient concerned is under the age of 18. According to the Swedish Children and Parent Code,⁴⁹⁰ chapter 6, article 1, the child is entitled to care and respect and is not to be subjected to degrading treatment. In chapter 6, article 11 of the same law it is stated that the person who has custody of the child has the right and duty to decide in matters concerning the development of the child. This right, however, should be exercised while taking the evolving capacities of the child into account. In a patient's rights context, this would mean

⁴⁸⁷ See the Convention's article 16 (right to privacy), article 17 (right of access to information, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health) and the above mentioned article 24. See also Committee on the Rights of the Child General Comment 4 (2003) on Adolescent Health and Development in the context of the Convention on the Rights of the Child (CRC/GC/2003/4), para. 7-8 and 26-33 in particular.

⁴⁸⁸ CRC article 24(2)(e).

⁴⁸⁹ The 1999 Patients' Rights Act No.63 (entered into effect on 1 January 2001), Chapter 3. See also Norway's third periodic report to the Committee on the Rights of the Child (CRC/C/129/Add.1), para. 91-93.

⁴⁹⁰ SFS 1949:381.

that a minor, at least to an extent, has the right to decide, for example, whether or not to accept a specific course of medical treatment. It is, once again, a matter of evaluating the child's capacity of competent decision-making.⁴⁹¹ In Ghana on the other hand, parental consent is not needed for any form of medical (or legal) counselling of a child.⁴⁹² One reason for the Ghanaian approach could be that the child's capacity for deal with information is more relied upon than it is in the Norwegian case. It is also possible that the matter has simply not been made the subject of discussion.⁴⁹³

Consent or non-consent to medical treatment in relation to children can also involve opposition between parental rights to decide what they think is best for their children and the child's right to self-determination. Traditionally, parents have had the right to decide whether a child should or should not receive different kinds of medical treatment, or at least it has not been possible to keep parents uninformed about any treatment their children were undergoing. A classic example of the former concerns Jehovah's Witnesses. According to their beliefs, blood transfusions are prohibited even in life-threatening situations, and thus parents of this faith have not allowed their children to receive such treatment. The justification of the denial of necessary medical treatment to a child based upon the religious convictions of the parents has, however, been widely discussed because it conflicts with the responsibility of the state for the welfare of the child.⁴⁹⁴

4.3.4.3 Reproductive Freedom for Minors – Essential for the Empowerment of the Girl Child

The right of minors to seek and receive advice on sexual matters and contraceptives without parental consent or knowledge is interesting to discuss not least in the context of the child's right to participation. To control – or at least to try to control – the intimate lives of adolescents

⁴⁹¹ Elisabeth Rynning *Samtycke till medicinsk vård och behandling* Iustus, Uppsala, 1994 pp. 285-289. See also The Swedish Parliamentary Ombudsmen Report for the period 1 July 1997 to 30 June 1998 p 464.

⁴⁹² See Ghana's 2005 report to the Committee on the Rights of the Child (CRC/C/65/Add.34) para. 41.

⁴⁹³ Ghana ratified the African Charter on the Rights and Welfare of the Child in 1995. The country's 1998 Children's Act is a comprehensive law for children, which consolidated and revised existing law and filled in gaps. Among other things, it sets out the rights of the child and parental duties and provides for the care and protection of children. The Children's Act Section 11 (Children's Act, No. 560, § 11 [1998]) most clearly reflects the principles expressed in Article 12 of the Convention on the Rights of the Child and Articles 4 and 7 of the African Charter on the Rights and Welfare of the Child, echoing the language used in the treaties.

⁴⁹⁴ The practice of not allowing blood transfusions for children is contested also by members of Jehovah's Witnesses themselves. For a Swedish perspective, see e.g. Rynning *Samtycke till medicinsk vård och behandling* p. 289.

is one way of maintaining power over the child, regardless of the purpose in most cases being well-meaning: aiming at protecting the child from becoming an adult too fast, from getting hurt, from being exploited. The need for protection in this context must be seen as being extremely important, not least against the backdrop of sexual exploitation of children. There is, however, a fine line to be drawn between providing necessary, adequate protection and preventing the child from gaining independent experience. This is important not least in relation to the right to sexual and reproductive freedom, issues that are delicate in all ages but particular so for adolescents and children.

A discussion of rights relating to the body and to reproduction is perhaps particularly important in respect of the girl child. The life choices and opportunities of the girl child are in general circumscribed by the gender-based discriminatory structures that permeate all societies (although the manner of discrimination between societies and is much more severe in certain societies than others). The Committee on the Rights of the Child has made a point in recognising the importance of the gender issue and that gender-based differences should be thoroughly analysed. At its 1995 General Day of Discussion on the Girl Child the Committee emphasised that gender inequality in general is based upon discriminatory practices, prejudice, traditions and the cause of neglect, violence and exploitation – all of which, for that matter, are equally relevant for adult women.⁴⁹⁵ The importance to focus on the girl child in order to break down the cycle of prejudice and harmful practices against women was emphasised at the 1995 Day of Discussion, as was the necessity of focusing on the active involvement of girls to initiate a movement for change of the living conditions for all of female gender.⁴⁹⁶

The discriminating structures are in part based upon a notion that the female body and its reproductive capacities are not just the responsibility and “property” of the woman or girl herself – it is also still often seen as a matter of interest for the family, or even the community. The woman’s or girl’s body is simply not just her own concern. Such limitation of the right to control over one’s own body – of which the right to sexual and reproductive freedom is an essential part – paves the way for a lack of respect for the female person as an

⁴⁹⁵ See summary of the discussions at the 1995 General Day of Discussion on the girl child UN Doc. CRC/C/38 1995. For a discussion on the relationship between CEDAW and the CRC, see Savitri Goonesekere *Women’s Rights and Children’s Rights: The United Nations Conventions as Compatible and Complementary International Treaties*.

⁴⁹⁶ CRC/C/38 1995 para. 284-285. In relation to reproductive rights, see Eriksson *Reproductive Freedom* on adolescent pregnancy and abortion pp. 295-300 and the UNFPA *State of the World Population Report 2003: Investing in the adolescent’s health and rights* (UNFPA 2003), chapter 2 in particular.

autonomous individual, as a subject with rights. The result of a person's bodily integrity not being sufficiently respected, is that her right to participate in decision-making processes on any kind of matter is also likely not to be respected.⁴⁹⁷ The enduring tradition of placing female sexuality partly or entirely under the control of husbands, male family members, or, more subtly, socio-cultural traditions deciding what is considered acceptable behaviour, rather than with the women themselves, is one example of how women are at the losing end of power relations between the sexes, a tradition affecting women of all ages.⁴⁹⁸ The matter is further complicated by the fact that often, women themselves are part of upholding discriminatory structures, not least if they are based upon custom and tradition. Control can be exercised in many ways, from the extremes of female genital mutilation and child marriage to the refined code of conduct of "how good girls behave".⁴⁹⁹ The point is that these are all different expressions of the same power structures setting the limits for the life choices and opportunities open to girls and women.⁵⁰⁰ The situation can be described as one of girls fighting a two-front battle when claiming their right to participate in decision-making processes: against societal structures discriminatory towards females as well as against the reluctance of parents to allow girls to challenge traditional attitudes of how girls should behave. This description is applicable not only in the context of bodily freedom but

⁴⁹⁷ See in general Eriksson, *Reproductive Freedom*.

⁴⁹⁸ To be able to exercise birth control and safe sex, and to develop and explore one's sexuality on one's own terms – rights that historically have often been, and often still are, denied women – is as important for girls as it is for adult women. For many women and girls, however, this is far from being realised. Gage, in a study on how power and adolescent sexual relationships, asserts that in certain sub-Saharan African settings, adult women are treated no differently from adolescent girls in the lack of control afforded them over their sexual behaviour. Female sexuality is under the control of husbands or male family members throughout their reproductive life. Anastasia J. Gage "Female Empowerment and Adolescent Demographic Behaviour" in Presser & Sen (eds.) *Empowerment and Demographic Processes* pp. 186-204.

⁴⁹⁹ The traditional approach to female sexuality is of course not limited to so-called "traditional societies" but is equally prevalent in all parts of the world, although the ways in which it manifests itself vary. On societies' attitudes towards girls who are victims of rape in a Swedish perspective, see e.g. Katarina Wennstam *Flickan och skulden. En bok om samhällets syn på våldtäkt* Stockholm, Albert Bonniers förlag 2002. For a study of attitudes and structures restricting girls' behaviour in a Swedish upper secondary school, see Fanny Ambjörnsson *I en klass för sig: Genus, klass och sexualitet bland gymnasietjejer* Stockholm, Stockholm 2004.

⁵⁰⁰ (Just to clarify: I am well aware that in the individual case, the girl child might not be discriminated against or treated differently from the boy child at all. My aim here is to point at general tendencies.) The gender-biased focus exposed here is explained by the fact that more often than not, it is the sexual and reproductive rights of females that are the most circumscribed, irrespective of the socio-cultural context in which the woman/girl lives. This does not imply that men and boys are free to act exactly as they please or that they are never subjected to gender-related discrimination or violations.

to the right to participation in general, as girls in many societies are to an even lesser extent than boys expected to make their voices heard.

4.3.4.4 *Gillick*: Suggesting a Way Forward

In the 1986 *Gillick* case, a well-known and thoroughly discussed English House of Lords ruling, the House sitting as the final appeal court in the country, the key issue of the proper relationship between children's right to decide for themselves and the parents' right to decide for them, was addressed in the context of the reproductive freedom of minors.⁵⁰¹ Although *Gillick* was a case brought before the highest national court, the ruling thus only being applicable within that particular jurisdiction, the arguments presented in the ruling and the discussion it stimulated can be of interest in an international context as well, attempting as it did to define the limits of parental rights and linking them to the evolving capacities and competences of the child. This case is also referred to extensively in the children's rights literature.⁵⁰²

Gillick concerned the right of a child below the age of sixteen to seek advice on sexual matters and to be provided with contraceptives without parental consent. In the ruling, parental rights were concluded to exist only in so far as they were necessary to promote the interests and rights of the child: as soon as the child is capable of meeting those needs or independently exercising those rights, then the rights of the parents receded. The statement by Lord Scarman, one of the Lords of Appeal, has been frequently cited:

The underlying principle of the law [...] is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision [....] I would hold that as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him to understand fully what is proposed.⁵⁰³

⁵⁰¹ *Gillick v. West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112.

⁵⁰² Cf., e.g. Archard *Children, Family and the State* pp. 54-62, Hafen & Hafen "Abandoning Children to their Autonomy: The UN Convention on the Rights of the Child" p. 461, n. 60, Andrew Bainham "Growing up in Britain: Adolescence in the Post-Gillick Era" pp. 501-519 in Eekelaar & Sarcevic (eds.) *Parenthood in Modern Society: Legal and Social Issues for the Twenty-first Century* and Smith "Children, Parents and the European Human Rights Convention". Van Bueren, while discussing the legal capacity of the child to consent to medical treatment, emphasises that this is an area where a sufficiently uniform approach so far is not to be found and that one has to be careful with determining international law on the basis of national decisions. *The International Law on the Rights of the Child* pp. 310-312.

⁵⁰³ *Gillick* [1986] AC 112, 186, 188-189.

The ruling and Lord Scarman's statement correspond with the intentions of article 5 of the Convention on the Rights of the Child, in referring to the evolving capacities of the child, and with seeing the child not as an extension of the parents but as a person in his or her own right, with interests that might be in conflict with those of the parents. It also addresses the fundamental issue of the child's capacity and competence and sets the limit for parental rights on the point where the child has achieved competence to understand fully the consequences of a certain decision. This can actually be interpreted as being an extension of the right to participation, going beyond article 12 of the Convention, which does not talk of the right of the child to autonomous decisions but of the right to have the child's views listened to and respected. The next question to be considered must thus be who decides when the child is competent enough – an assessment which in practice, following Lord Scarman's line of argument, must be made in each individual case.

The *Gillick* judgment has been interpreted as allowing for a transformation of power relations between parent and child.⁵⁰⁴ However, the position taken by the court in *Gillick* was eventually undermined and redefined in 1992 by the case *Re W*, concerning an orphaned girl in a children's home who refused to eat.⁵⁰⁵ She was forcibly tube-fed until her sixteenth birthday, when she applied to the High Court to allow her the adult right to refuse treatment. Interestingly enough, though a lower court than that in the *Gillick* case, the High Court ruled that no one under the age of 18 years has an absolute right to make independent decisions on medical treatment, especially when that decision constitutes a refusal. The High Court in this way took a step back from the innovative interpretation of the child's right to participation presented in *Gillick*. Nevertheless, the *Gillick* judgment has been influential in the debate on children's autonomy. That judgment and its accompanying statements point towards a new view on the right of children to decide for themselves on matters concerning their own bodies – perhaps indicating a direction that we might be heading for in the future.

4.3.4.5 “My Body Is Mine to Decide Over”

A similar line of interpretation as that presented in *Gillick* is also to be found in a more recent example of children being empowered to take responsibility for their own bodies and lives: this is the Dutch 2002

⁵⁰⁴ Archard *Children, Family and the State* pp. 54-62.

⁵⁰⁵ *Re W* [1992] 3 WLR 758, referred to in e.g. J. P. H. Shield & J.D. Baum “Children's Consent to Treatment” *British Medical Journal* 7 May 1994, Vol. 308, pp. 1182-1183. On similar cases, see Gillian Douglas “The retreat from *Gillick*” *Modern Law Review*, Vol. 55, No. 4 (Jul., 1992), pp. 569-576.

legislation on euthanasia.⁵⁰⁶ The law allows for adults as well as minors between the ages of sixteen and eighteen, under certain particular circumstances, to decide whether to terminate their lives. Parental consent for persons between the ages of sixteen and eighteen is not required, since they are considered to be capable of making a reasonable assessment of their own interests.⁵⁰⁷ The Human Rights Committee in its 2001 Concluding Observations on the Dutch report to the ICCPR expressed its concern over this possibility (as well as on euthanasia in general), pointing to the controversial nature of the child's autonomy and its boundaries as well as that of euthanasia.⁵⁰⁸ The Committee on the Rights of the Child in its 2004 Concluding Observations to the Dutch report referred to the comments made by the Human Rights Committee in 2001, and expressed concern over

the monitoring of such requests because controls are exercised after the request has been fulfilled and because some cases are not reported by doctors.⁵⁰⁹

Euthanasia as such has been commented on by the European Court of Human Rights in a 2002 judgment, *Pretty v. the United Kingdom*, where the Court declared that euthanasia was not compatible with the European Convention of Human Rights.⁵¹⁰ At the time of writing, the Court has so far not considered any cases involving euthanasia in relation to children. However, as there are tendencies pointing towards the Dutch example being followed by other European countries – Belgium has since 2002 introduced legislation regulating situations where euthanasia might be allowed – it is not impossible that such cases eventually will reach the judges in Strasbourg.⁵¹¹

⁵⁰⁶ The Dutch Termination of Life on Request and Assisted Suicide (Review Procedures) Act entered into force on 1 April, 2002. See also the 2003 report of the Netherlands to the Committee on the Rights of the Child (CRC/C/117/Add.1) para. 25-26.

⁵⁰⁷ Dutch report *ibid.*

⁵⁰⁸ CCPR/CO/72/NET.

⁵⁰⁹ CRC/C/15/Add.227 para.33-34.

⁵¹⁰ *Pretty v United Kingdom* Judgment 29 April 2002 no. 2346/02, ECHR 2002-III. In the ruling, the Court concluded that refusing the spouse of a terminally ill woman the possibility of helping the woman to end her life (in a manner wished for and chosen by the woman) without being prosecuted for manslaughter or murder, was not a violation of articles 2, 3, 8, 9 or 14 of the ECHR. The Court stated quite clearly that the right to die as an additional interpretation of the right to life in article 2 did not fall within the scope of the Convention (para. 39). The fact that some state parties to the ECHR have adopted laws allowing euthanasia under certain restricted circumstances was not particularly commented on by the Court (see para.41).

⁵¹¹ The Belgian Act of Euthanasia of 28 May 2002. See also Torbjörn Tännsjö, "Förbättra vården med hjälp av aktiv dödshjälp" Dagens Nyheter 05/09/23. See also Rynning "Åldersgräns för mänskliga rättigheter? Om rätten till hälso- och sjukvård vid livets början" pp. 160-163.

Medical counselling, medical treatment and reproductive freedom are all areas where the power relations between adults and children become most visible. The interests that are to be protected are fundamental for both categories. The right to decide over one's own body and one's own life is a fundamental human right of which no human being should be denied. The right to privacy is also a basic human right. At the same time, parents have an interest in protecting their children from making decisions that may harm them or, at least, substantially affect their lives in ways that the child does not have the necessary experiences to foresee. The conclusions presented in the *Gillick* judgment, extending towards a limit of parental rights to the point where the child has achieved competence to understand fully the consequences of a certain decision, focus on the child's autonomy in a more radical way than that enacted in the Convention on the Rights of the Child. In the Convention, article 12 speaks not of autonomy but of having one's views being taken into account and given due consideration according to one's age and maturity, a right that must be seen – as the Convention is to be interpreted holistically – in the context of the rights of parents to provide appropriate direction and guidance when the child is exercising his or her rights (article 5). The crux of the matter is how to provide protection whilst not preventing the child from gaining experience or intruding on his or her privacy and right to private life.

4.4. Empowerment Enables Participation

In this chapter I have tried to shed some light on the implications of existing power structures in the adult-child relationship for the child's right to participation. A general remark is that the topic is somewhat controversial. The right to participate in decision-making processes includes a certain exercise of power. "Power" is a complex notion that can be exercised in many ways and on different levels: between the state and the individual, between individuals, between different groups in society. Adult power over children is considered as "the natural state of things" and is in general seldom contested (although the parents of rebellious teenagers might not agree on this point). Between adults and children, power is exercised both directly, as in when children are told what to do or how to behave, and indirectly, through the expectations of obedience based upon the higher status, experience and age of adults compared with children. The fact that children in many ways depend on adults for maintenance and survival is an essential element of the equation and something that in part justifies the subordination of children in relation to adults.

The right of parents to decide over their children was never really problematised in the context of children's rights until the adoption of the Convention on the Rights of the Child at the end of the twentieth century introduced the child's right to respect for his or her views and to have those views taken into account. The introduction of participation as a right for the child can be considered as to be in conflict with traditional attitudes and views on what children should and should not be permitted to do. Introducing "empowerment" as a concept that can also be relevant for the implementation and promotion of children's rights further challenges the hierarchy between adults and children as it advocates changes not perhaps primarily the outcome of decision making processes, but in the very process itself. If the right to participation for children is to be genuinely implemented, adults cannot make decisions affecting children without consulting them and taking their views into account – children have to be given the opportunity and means to exercise influence over any decisions made. It is, however, once again important to emphasise that this is not to be confused with the complete autonomy of the child. Nevertheless, as the aim was to show with the examples discussed in the chapter, this is still a new and radical way of seeing the relationship between adults and children. This because it means a restructuring, or at least an adjustment, of power structures that for centuries have been regarded as set in stone. This restructuring that is called for – and the restructuring of unequal power relations has at least in other contexts been described as an important objective for human rights – presupposes the willingness of adults to relinquish some of their power and to start seriously listening to children and taking into proper consideration what they say. It is thus important to emphasise that the empowerment of a group does not necessarily have to be perceived as being a zero-sum, or even a negative-sum game, inevitably leading to the disempowerment of another group. Instead, empowerment can be a positive experience for all those involved, leading to improved living conditions and a better society for all. In the following chapter, article 12 of the Convention will be analysed, taking the element of empowerment particularly into account along with the democracy aspects of the article. With that perspective as a starting point, the radical nature of the right to participation for children becomes very clear.

5 Article 12 – The Right to Participation the Convention Way

5.1. Introduction

Child participation in society, as such, is nothing new. Throughout history, children have always played active parts in some way or another: in the home, at work, within communities, in schools, and in times of war, sometimes voluntarily, other times forcibly. The difference today is that “childhood” has become conceptualised. Children are now increasingly being seen as social actors and individuals with their own rights and interests that should command respect.⁵¹² As a result, the right of children to participation has appeared on the political agenda, as well as its becoming a human rights issue through the adoption of the Convention on the Rights of the Child.

The concept of participation, as applied today, implies certain characteristics: inclusion, transparency, democracy, communication, equality and empowerment.⁵¹³ In previous chapters, the meaning of “empowerment” in relation to children’s participation has been analysed, as has the democracy aspects of the concept. A number of references in these chapters have been made to “participation” both in general and, more specifically, as it is expressed in the Convention on the Rights of the Child – article 12 in particular. In the present chapter, article 12 will be deconstructed and analysed in order to understand the meaning of the child’s right to participation within the specific context of the Convention.

⁵¹² As discussed in Chapter 3.

⁵¹³ CRIN Newsletter Nr 16/October 2002 “Children and young people’s participation”, editorial by Andrea Khan.

5.2 Framework of the Participation Rights in the Convention on the Rights of the Child

5.2.1 Participation Rights in General in the Convention

Article 12 is the article in the Convention on the Rights of the Child where the child's right to participation is most clearly expressed.⁵¹⁴ However, article 12 is not the only provision in the Convention involving the right to participation. Other articles that in one way or another include elements of this right are article 2 (prohibition of discrimination), article 9 (separation of family members), article 13 (freedom of expression), article 14 (freedom of thought, conscience and religion), article 15 (freedom of association and peaceful assembly), article 17 (access to information), article 21 (adoption), article 24 (right to health), article 28 (right to education), article 30 (minority rights), article 31 (right to play, leisure and participation in cultural and artistic life), article 37 (protection against torture, degrading treatment and deprivation of liberty), article 38 (children in armed conflict) and article 40 (administration of juvenile justice). These rights could all be described as empowerment rights, as they in some way all relate to the potential, or the possibility, of a person leading an autonomous life and for that person's voice to be heard, thus enabling the person to exercise influence over both his or her individual situation as well as in society.⁵¹⁵ The right to participation, one of the core principles of the Convention, is thus reflected in numerous ways in its articles.

Articles 12 to 17 emphasise the position and status of the child as a person possessing fundamental human rights and individual views. The rights protected by articles 13 to 17 are all classic civil rights that in different ways are connected to the child's right to respect for his or her views, as established in article 12. Article 13 protects the right to freedom of expression and the right to seek, receive and impart information. It restates and develops the rights expressed in article 12. Article 14 protects the right to freedom of thought, conscience and religion. The two first rights are prerequisites for the exercise of the latter. The right to freedom of religion is a fundamental human right and an area where it is of the utmost importance that the views of the individual are respected. Freedom of association and peaceful assembly (article 15) along with articles 12 and 13, promote the notion of the child

⁵¹⁴ See e.g. Santos Pais "The Convention on the Rights of the Child" p. 426.

⁵¹⁵ Lawrence J. Leblanc *The Convention on the Rights of the Child: United Nations lawmaking on human rights* Lincoln, University of Nebraska Press, 1995 pp. 157-182. Leblanc includes the right to education among the empowerment rights, thereby pointing to the difficulties of categorizing the rights and putting them into different set clusters: the right to education is, as pointed out earlier, one such example.

being an active participant in society in terms of collective participation. Finally, access to appropriate information and the role of the media (article 17) both play important parts in the exercise of the freedom of expression.

The fundamental human rights established in articles 13-17 of the Convention have their counterparts in the Universal Declaration of Human Rights, which in 1948 had established that these rights were for “everyone”. The rights established in these articles are to a large extent also identical with their corresponding articles in the International Covenant on Civil and Political Rights. Initially, it could be considered that articles 12 and 13 basically address the same reality. However, closely connected as the articles might be, their focus is different: while article 13 recognises in general terms the right to freedom of expression – thus corresponding with the ICCPR – article 12 prevails in all those cases where the matters at stake affect the child or a specified group of children, stressing the right of the child to be heard and for the views of children to be taken into account.⁵¹⁶ In what follows the emphasis will be on article 12 because of its fundamental importance for the Convention and children’s rights in general.

5.2.2 Background and Drafting of Article 12

Cited below is the final version of article 12 as adopted along with the Convention’s other articles by the General Assembly in 1989.⁵¹⁷

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Originally, however, freedom of expression and the right to have one’s views respected and considered were in general not associated with children.⁵¹⁸ Neither the 1924 and nor the 1959 Declarations on the

⁵¹⁶ Santos Pais “The Convention on the Rights of the Child” p. 426.

⁵¹⁷ On the drafting in general of the Convention, see Chapter 2.

⁵¹⁸ Polish paediatrician and educationist Janusz Korczak (1878-1942), one of the “intellectual fathers” of the Convention on the Rights of the Child through his advocacy work for children’s rights seems, however, to have seen children’s rights as, in many ways, a democracy issue. See Sven G. Hartman “Barnkonventionens föregångare.

Rights of the Child included any references to the child's right to freedom of expression or of participation in decision-making.⁵¹⁹ The original 1979 Polish draft proposal on a Convention on the Rights of the Child⁵²⁰ did not address the issues raised in what would become article 12 of the Convention, and neither did the commentaries on the draft submitted by different countries, NGOs, specialised agencies and various other organisations.⁵²¹ A revised Polish proposal⁵²² contained a draft article 7, obliging state parties to enable a child capable of forming personal views the rights to express them in matters concerning the child's own person, in particular with regard to marriage, choice of occupation, medical treatment, education and recreation.⁵²³ The article was debated at the 1981 Working Group session, where the discussion mainly concerned the scope of the article and whether or not there were to be any limitations on when the views of the child were to be considered.⁵²⁴ Most delegates argued that such matters should not be restricted to a list. The compromise draft article 7 as adopted by the Working Group reads as follows:

The State Parties to the present Convention shall assure to the child who is capable of forming his own views the rights to express his opinion freely in all matters, the wishes of the child being given due weight in accordance with his age and maturity.⁵²⁵

In 1988, the NGO Ad Hoc Group proposed an alternative article 7, in order to distinguish between freedom of expression and freedom of association, freedom of peaceful assembly and the protection of privacy.⁵²⁶ The NGO proposal included the right of the child to freely express opinions, that these views should be given due weight and the right to seek, receive and impart information from any source. UNICEF, in its commentaries to the draft convention submitted for the technical review, suggested a change from the word "wishes" to "views", since the intention of the article was to take account of all

Anteckningar om den polske barnläkaren och pedagogen Janusz Korczak" *Utbildning & Demokrati* Vol 10, No 2, 2001, pp. 9-24 with references.

⁵¹⁹ See Chapter 2.

⁵²⁰ E/CN.4/L.1366

⁵²¹ E/CN.4/1324 and Corr.1 and Add.1-5

⁵²² E/CN.4/1349.

⁵²³ *Ibid.*

⁵²⁴ See the 1981 report of the Working Group to the Commission on Human Rights E/CN.4/L.1575, reproduced in paragraph 289 of the 1981 report of the Commission on Human Rights E/CN.4/1475.

⁵²⁵ 1981 Report of the Working Group to the Commission on Human Rights E/CN.4/L.1575.

⁵²⁶ E/CN.4//1988/WG.1/WP.2 p 10.

views and not simply those manifesting themselves as wishes.⁵²⁷ UNICEF also commented on the importance of making the language of the Convention gender neutral, which the text, up until that late stage, had not been.⁵²⁸ In the previous draft Convention, the child was consistently referred to as “he”, as with all of the Convention’s predecessors on human rights treaties. Making the Convention gender neutral was an important indicator of its modern approach to human rights law – pointing to the inequalities embedded within the language of public international law.⁵²⁹

At the Second Reading of the draft Convention, a drafting group represented by Finland submitted a new proposal that introduced certain novelties. The article was to be made gender neutral. The new proposal also restricted the child’s right to freely express its views. The views were to be given due weight, but only apply to matters affecting the child. It also presented a second paragraph, relating to the right of the child to be heard in any judicial and administrative proceedings affecting that child.⁵³⁰ The delegates discussed the meaning of “in all matters affecting the child”, as Japan (among others) interpreted “affecting the child” as meaning “affecting the rights of the child”. It was pointed out (by Canada) that if the Japanese interpretation of the text was accepted, “the matters dealt with in the Convention not covering the rights (and still affecting the children) could be endangered”.⁵³¹ Article 7 was later renamed article 12 and adopted without the issue of interpretation being finally resolved.

One thing common to all of the civil rights articles in the Convention during the drafting process, and of overarching significance, was that the child’s right to participation was never made the subject of any major discussion.⁵³² The articles were simply included as being a necessary part of the draft Convention, and their potentially radical nature does not seem to have been made an issue by the drafters. The only exception to this silence was in relation to parental authority, the importance of which was acknowledged most visibly in articles 5 and 18.⁵³³ One can speculate on the reasons for this. One possibility is that

⁵²⁷ E/CN.4/1989/WG.1/CRP.1. This is an important distinction as “views” has a more mature ring to it, sounding as something being put forward by a subject with rights that should be taken into account. “Wishes”, on the other hand, has not the same authority.

⁵²⁸ E/CN.4/1989/WG.1/CRP.1 pp. 21-22.

⁵²⁹ See Charlesworth & Chinkin *The Boundaries of International Law* in which such inequalities are a main theme.

⁵³⁰ E/CN.4/1989/WP.35, draft article 7 as presented by Finland.

⁵³¹ E/CN.4/1989/48 para. 248.

⁵³² *Legislative History of the Convention on the Rights of the Child (1978-1989) Article 12 (Respect for the Views of the Child)* HR/1995/Ser.1/article. 12.

⁵³³ These articles together provide a framework for the relationship between the child, the family and the state.

all of the consequences of including the right to participation in decision-making processes in a treaty on children's rights simply were not clear to the drafters of the Convention. Another possible explanation could be that the state party delegates very well understood the radical nature of the article and the possible consequences of including in the Convention a right with such a clear focus on the child as being an autonomous individual. The drafters might not have wanted to emphasise that proper implementation of article 12 would require significant changes in attitudes and traditional views of children in most societies as this might have had a negative effect on the willingness of states to ratify the treaty. The *travaux préparatoires* of the Convention does not shed any light on this particular matter. The result, however, is that the intentions of the drafters concerning article 12 – for example, whether political rights in a wide sense would be included – are somewhat unclear.

5.3 Components of Article 12

5.3.1 Why an Analysis?

Despite its status as a general principle of the Convention on the Rights of the Child, article 12 is not – as article 3 has been asserted to be – a vague outline of a general position. On the contrary, it is a provision that could be argued to be sufficiently precise for direct implementation. Pursuant to the article, state parties have a clear and concise obligation to recognise and ensure the concrete right of expression of the child's views and to have them respected and taken into account.⁵³⁴ The following analysis of article 12 aims to create a deeper understanding of the different components of the article and its alternative interpretations. The results of that analysis is an important tool for understanding the way state parties have implemented article 12 on a domestic level and, also, how the state's implementation is explained and defended.

The Committee on the Rights of the Child, at the time of writing, had not presented any General Comment on article 12 providing an

⁵³⁴ Van Bueren describes article 12(1) as a way of persuading states to “adopt and adapt” decision-making processes so that they are accessible to the child, such adaptation including the dividing of the decision-making process thereby making it possible for the child to participate in parts of the decision, if not all. *The International Law on the Rights of the Child* p. 137. Concerning the status of the article, there are even those who argue that article 12 is of a self-executing character. See Marie-Francoise Lücker-Babel “The right of the child to express views and be heard: An attempt to interpret Article 12 of the UN Convention on the Rights of the Child”.

authoritative interpretation of the article's contents.⁵³⁵ The Committee has, however, in several Concluding Observations commented on how the article has been interpreted, thereby providing some guidance.⁵³⁶ The Committee's comments in the Concluding Observations cover many aspects of the respect to be accorded for the view of the child. One such observation expresses concern about fundamental obstacles for the implementation of article 12 in Angola when noting that

traditional norms in the State party do not encourage children to express their views in the family, in schools, in other institutions and in the community.⁵³⁷

On the other hand, another observation welcomes the efforts made by France to ensure the right to respect for the child's views, but nevertheless draws attention to

inconsistencies in legislation as well as the fact that in practice, the interpretation of the legislation, and determination of which child is 'capable of discernment', may leave possibilities of denying a child this right or make it subject to the child's own request and may give rise to discrimination.⁵³⁸

The review of how article 12 is to be implemented is an essential part of the monitoring of the Convention. The topic is never omitted from the Committee's Concluding Observations, although it is not always included by the state parties in their reports. The fundamental importance of thorough monitoring of the right of respect for the child's views is further underlined by the Committee's General Guidelines for periodic country reports, where the state party is requested to provide detailed information on legislative and other measures taken to ensure the exercise of the rights established in article 12.⁵³⁹

5.3.2 "...the child who is capable of forming his or her own views..."

Article 12 does not refer to any lower age limit on the right of the child to express views.⁵⁴⁰ Children from a very early age can form views and

⁵³⁵ See the discussion in Chapter 8.

⁵³⁶ See Chapters 6 and 7.

⁵³⁷ Concluding Observations to Angola's 2004 report CRC/C/15/Add.246, para.24.

⁵³⁸ The Committee's 2004 Concluding Observations to France's 2003 report CRC/C/15/Add.240, para.21.

⁵³⁹ N. 87 *supra*.

⁵⁴⁰ See Hodkin & Newell *UNICEF Implementation Handbook* p. 104, Santos Pais "The Convention on the Rights of the Child", p. 426, Lücker-Babel "The right of the child to express views and be heard: An attempt to interpret Article 12 of the UN

wishes, even though they might be communicated in ways other than through speech – for example, in play, art or other forms of oral expression. The Committee on the Rights of the Child, in its report from its General Day of Discussion on early childhood, recommended that

state parties must take all appropriate measures to ensure that the concept of child as rights-holders is anchored in the child's daily life from the earliest stage [...] in this regard, special attention must be given to the freedom of expression.⁵⁴¹

It is of particular importance for the exercise of their rights to find out which categories of children risk experiencing difficulties in making their voices heard. Young children, girl children in many societies, children with disabilities and indigenous children are all examples of such groups. Herein lies a connection with the general principle of non-discrimination as established in the Convention's article 2, which does not allow for any child to be denied rights on the basis of, for example, sex, race, colour, ethnic origin or disability.⁵⁴² Thus the Convention does not support depriving a child of the possibility of exercising this right on any grounds other than that the child is clearly unable to form views. At the core of the matter is the necessity of appreciating the child's presumed capacity and competence of making, to the extent to which it is possible, an autonomous choice.

However, the potentially negative aspects of participation must also form part of the equation – for example, making a child who has been the victim of a criminal offence appear in court to testify, thereby risking exposure of the child to unnecessary and severe mental pressure. One example of how the matter of child testimonies can be handled is to be found in Sweden, where the guiding principle is that the child has a right to make his or her voice heard in different situations and proceedings, but that some exceptions can be made in order to protect the child from harm.⁵⁴³ In Swedish trial proceedings, children below the age of fifteen are in general not heard in person but instead through video recordings made in the preliminary investigation. Proceedings are also conducted behind closed doors in order to protect the child. Furthermore, the child's identity may be concealed if it is considered

Convention on the Rights of the Child", Rebecca Stern "Tankar kring artikel 12. Rätten till deltagande" pp. 182-189 in *Barn och rätt* Anna Hollander, Rolf Nygren & Lena Olsen (eds.) Uppsala, Iustus, 2004.

⁵⁴¹ 2004 Day of General Discussion on Implementing child rights in early childhood (Committee on the Rights of the Child Report of the 37th session, 13 September – 1 October 2004, CRC/C/143) para. 10.

⁵⁴² Hodkin & Newell *UNICEF Implementation Handbook* p. 167.

⁵⁴³ Sweden's 2004 report CRC/C/125/Add.1 para. 216-251.

necessary. Once again, the aim is to strike a balance between the right both to participation and the right to protection.

5.3.3 “...right to express those views freely...”

The right to express freely one’s opinions, according to article 12, is not subject to limitations. The article emphasises that the child should not be subject to influence, constraint or pressure from parents, authorities or any other actors that might prevent expression of the child’s views. The right to be provided with the necessary information to make an informed decision is also included, as is the right to refrain from expressing a view or position: freedom of expression can also mean the right to choose to remain silent.⁵⁴⁴ The right to information is essential: a decision is not free if it is not an informed decision. This wording is the most obvious reference to the interconnectedness between articles 12 and 13 in the Convention.

5.3.4 “...in all matters affecting the child...”

The reference to “all matters” shows that the participatory rights in article 12 are not limited to matters dealt with specifically in the Convention. The scope of these rights is wider. Whenever a question arises that has a particular interest for a child, or which may affect his or her life, then article 12 applies. Marta Santos Pais points out that the wording is also intended

to stress that no implementation system may be carried out and be effective without the intervention of children in the decisions affecting their lives.⁵⁴⁵

The article applies to both the private and public spheres of society and thus creates duties for the state in relation to matters usually left for actors in the private sphere to decide – such as, for example, the family. Van Bueren asserts that the reference to “all matters” is one of the situations where articles 12 and 13, both on the subject of freedom of expression, should be read together.⁵⁴⁶ What actually the “all matters” criteria should be interpreted as covering depends upon what the aim

⁵⁴⁴ Santos Pais “The Convention on the Rights of the Child” p. 426. On questions children might not wish to answer, see Cecilia Modig *Frågor och svar om barns rätt till inflytande* Swedish Save the Children, Stockholm, 2003.

⁵⁴⁵ Santos Pais “The Convention on the Rights of the Child” p. 427.

⁵⁴⁶ Van Bueren also asserts that as a result of the connection between article 12 and article 13, the right to freedom of expression enshrined in the CRC is broader than in other similar treaty provisions. Van Bueren *The International Law on the Rights of the Child* p. 137.

of the article is considered to be, and on whether children as a group are covered as well as the individual child. It could be argued that if “children” as a category are seen as being equivalent to “human beings below a certain biological age” it would be illogical to categorise any issues that are relevant to human beings in general as being irrelevant to children – “what affects adults affects children”. Matters that are covered by using such arguments include, for example, environmental issues and infrastructure or social planning in general.

Marie-Francoise Lücker-Babel argues a more restrictive approach when suggesting that article 12 should be interpreted as being applicable to an individual child or an identifiable group of children for which the importance of the decision in question should exist concretely – thereby giving full effect to the article, since it establishes a link with the daily life of each child.⁵⁴⁷ She recognises that this interpretation might seem limiting but argues that it ensures that those matters in which children have the right to participate in decision-making will have “a real and specific bearing on the life of young citizens”.⁵⁴⁸ She supports her argument with comparisons with the best-interest principle in article 3(1), which also refers to matters beyond the scope of the Convention. Her conclusion is that even though the potential field of application for the two articles is equally wide, article 12 because of “its wording and the logic that animates it” appears to have a more limited effect than the best-interest principle in article 3, and is therefore reserved to those situations concretely affecting a specific child.⁵⁴⁹ Examples of areas referred to in the previously mentioned Guidelines for periodic reports as being within the scope of “all matters” are family life, school life, the administration of juvenile justice, the placement and life in institutional and other forms of care, and asylum-seeking procedures.⁵⁵⁰ A specific instance is the Concluding Observations of the Committee to Sweden’s 2004 report in which the Committee recommends Sweden to:

Ensure that administrative or other decisions relevant to children contain information on how the views of the children were solicited, on the degree to which the views of children were adopted and why.⁵⁵¹

This is in order to show to children that are directly affected, as well as others, how their views are properly being taken into account. Not

⁵⁴⁷ Lücker-Babel “The right of the child to express views and be heard: An attempt to interpret Article 12 of the UN Convention on the Rights of the Child” p. 396.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Ibid.*

⁵⁵⁰ See Guidelines for periodic reports para. III.D.

⁵⁵¹ CRC/C/15/Add.248, para. 24.

least in relation to asylum seeking procedures, a subject on which Sweden has received criticism from the Committee on how the state party deals with children, it is important for decisions to be very clear on the extent to which children have been made part of the process and whether their views and experiences have been given due weight.⁵⁵²

The matters suggested in the General Guidelines as included in the phrase “all matters” is not exhaustive. It could therefore be used as a support when arguing, in contrast to the interpretation promoted by Lückner-Babel, that “all matters” should be seen in a wider perspective than in direct relation to a specific child or group of children. The references in the Guidelines to such general categories as “family life” and “school life” indicate that such an interpretation might be preferred by the Committee on the Rights of the Child. In relation to family life, Van Bueren has pointed out that the reference to “all matters concerning the child” indicates that there are no longer areas of society that are the exclusive preserve of parental or family decision-making.⁵⁵³

5.3.5 “...the views of the child being given due weight in accordance with the age and maturity of the child...”

This section of article 12(1) emphasises that not only do children have the right to express their views but also to have those views taken seriously.⁵⁵⁴ The state party has an obligation to provide for the child’s views to be listened to with appropriate attention, with the genuine possibility of those views influencing any decisions taken. When deciding on the degree of influence and weight to be attached to the views of the child on a particular matter, the twin concepts of age and maturity must be considered. This makes the connection between the two main principles of interpretation in the Convention: the child’s best interests and the evolving capacities of the child. Age alone is not a sufficient criterion, since biological age is not a reliable indicator of an individual’s capability and capacity to seek and analyse information and to understand the consequences of decisions made. The social

⁵⁵² *Ibid* para. 22-23 and 39-40. Parallels can be drawn to the reports on the situation of fundamental rights (as stated in the EU Charter of Fundamental Rights) submitted by the EU Network of Independent Experts on Fundamental Rights. For 2004, see *Report on the situation of fundamental rights in Sweden 2004* (CFR-CDF/SE/2004, pp. 52-61 on the right to asylum, pp. 75-78 on the rights of the child) and *Report on the situation of fundamental rights in Sweden 2005* (CFR-CDF/SE/2005, pp. 52-58 (asylum), pp. 69-72 (the child), both prepared by professor Maja Eriksson of the Network. For a presentation of the Network, see n. 216 *supra*.

⁵⁵³ Van Bueren *The International Law on the Rights of the Child* p. 137.

⁵⁵⁴ Hodkin & Newell *UNICEF Implementation Handbook* p. 165, Santos Pais “The Convention on the Rights of the Child” pp. 427-428, Stern “Tankar kring artikel 12. Rätten till deltagande” p. 185.

context, the particular issue itself, the child's individual experiences and capabilities and the support available from adults present in the child's life, all represent components that have to be taken into account in any specific assessment.⁵⁵⁵ Additionally, the rights and duties of parents as expressed in article 5 to provide the child with appropriate direction and guidance must be taken into account – factors that can somewhat limit the extent to which children's voices are appreciated. It can therefore be presumed that the application of specific age limits to restrict participation of children in decision-making procedures should not be considered to be a notion supported by the Convention. The aim of the article is not for children's views to constitute the decisive element in a decision-making process, but to be one important factor among others. In the Manual on Human Rights Reporting, the importance of dialogue and exchange between children and adults is emphasised as a way to “prepare the child for a responsible life in a spirit of tolerance and understanding, and support him or her in the process of becoming active, tolerant and democratic.”⁵⁵⁶

In decisions that carry serious consequences for the individual child, such as adoption, asylum processes or placement in institutional care, it would seem obvious that the views of the child should have significance.⁵⁵⁷ The key to empowerment of the child lies very much in paying the same respect to the child's views as one would to any person's views – regardless of whether these views are supported or not. To listen in a serious way to what children have to say, and to be prepared to change one's ideas and actions based upon the child's contributions, can improve adult understanding of how to properly respect and achieve the objective of the best interests of the child. This however presupposes that the adult (or the adult collective) is willing to share with children some of the power that comes with exercising a certain influence over decision-making processes. This is more easily argued in theory than achieved in practice. Changing existing power structures is, as discussed earlier, a slow process – in particular those that have traditionally been regarded as “the natural state of things”, as has often been the case with the complete subordination of children in relation to adults.

⁵⁵⁵ Lansdown *Promoting Children's Participation in Democratic Decision-making* p. 3.

⁵⁵⁶ Santos Pais “The Convention on the Rights of the Child” p. 427 – a typical example of the dominant development-oriented paradigm.

⁵⁵⁷ On the asylum process in Sweden and the difficulties of allowing the views of the child be heard, see e.g. Eva Rimsten *Ensamkommande barn i Sverige ur ett rättighetsperspektiv* Stockholm, Rådgivningsbyrå för asylsökande och flyktingar, 2006.

5.3.6 “For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child...”

The second paragraph of article 12 illustrates the general provisions of the first paragraph by referring, in particular, to children involved in judicial and administrative proceedings.⁵⁵⁸ The second paragraph thus poses an obligation upon the state party to provide an active opportunity for the child to express views in these kinds of proceedings. “Proceedings” should be interpreted in a broad manner, including situations both where the child has initiated the process (by, for example, filing a complaint as a victim) and when the child becomes affected by proceedings through the actions of others. Custody issues are an obvious example. Judicial proceedings affecting the child can range widely from civil or criminal proceedings to judicial decision-making on refugee status and asylum. The reference to administrative proceedings widens the scope even further by including, for example, formal decision-making in health care, social security and juvenile justice. Certain proceedings are also mentioned in particular in other articles of the Convention, such as article 9 on the subject of separation of children from their parents, article 21 on adoption and article 28 on education.⁵⁵⁹ It should also be noted that in order to fulfil the obligation to provide for the child’s participation in different kinds of proceedings, the process itself in courts and other decision-making bodies must be adapted to suit children when necessary, as well as adults. Such measures could include everything from changing the layout of the court in order to make it more child-friendly, to educating judges, lawyers, social secretaries and others involved in the process of meeting the specific needs of children in such situations.⁵⁶⁰

The same criterion applies as in the article’s first paragraph: the only requirement is that the child has to be capable of expressing a view in some way, again emphasising that very young children also have the formal right to be heard.⁵⁶¹ Thus references to setting minimum age limits for the right to be heard, as noted above, are not supported by the Convention. In its Guidelines for Periodic Reports, the Committee asks specifically for information on minimum ages set

⁵⁵⁸ See Santos Pais “The Convention on the Rights of the Child” p. 428, Handbook pp. 165-166.

⁵⁵⁹ *Ibid.*

⁵⁶⁰ See Hodkin & Newell *UNICEF Implementation Handbook* p. 165 p 166, with ref to article 19.

⁵⁶¹ 2004 Day of General Discussion on implementing child rights in early childhood (n. 541 *supra*). The Committee in the report emphasises the importance of that “States parties must take all appropriate measures to ensure that the concept of the child as rights-holders is anchored in the child’s daily life from the earliest stage” (para.10).

down in legislation, thereby emphasising that such age limits cannot be accepted when implementing article 12.⁵⁶² One state party where respect for the views of the child and the right to participation seems to have been taken very seriously is Norway, where much work has been put into properly implementing and realising the provisions of article 12. Newly proposed amendments to the Children Act, the Adoption Act, the Child Welfare Act, the Public Administration Act and the Civil Procedure Act aiming to improve the child's opportunities of expressing views, taking account not of age but maturity, is a good illustration of this. So, of course, is the fact that the Convention since 2003 has been a part of Norwegian law.⁵⁶³ Though age limits have not been removed totally in Norway, the emphasis of its legislation in this particular matter seems to be on ensuring that the views of the child are taken into consideration to the widest extent possible at all levels of society. It is stressed – very much in the spirit of the core of article 12 – that:

Children and young people must take part in determining the basis on which decisions are made. They must be taken seriously [but at the same time] not be given greater responsibility than they are able to cope with.⁵⁶⁴

The citation is an example of the balance between participation and protection that is always sought to be upheld.

5.3.7 “...either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

The state parties are left with discretion to fulfil the obligation in accordance with their national laws – this, however, does not allow for a diminishment of the scope of the obligation to respect the views of the child and to take them into consideration. The reference to “procedural rules of national law” is intended to emphasise the importance of adopting domestic legislation that ensures the realisation of article 12, not to allow for divergences from the provision's core obligation.

As pointed out in the Manual on Human Rights Reporting, the child may be heard in a number of ways: directly, or through a representa-

⁵⁶² Guidelines for Periodic Reports, para. 24. See also Hodkin & Newell *UNICEF Implementation Handbook* p. 165 p 165-166.

⁵⁶³ As regards the proposed amendments, see Norway's 2004 report CRC/C/129/Add.1, para.81-86. On the incorporation of the CRC into Norwegian law, see chapters 2.4.1 - 2.4.2.

⁵⁶⁴ CRC/C/129/Add.1, para. 181-213.

tive or an appropriate body.⁵⁶⁵ The method chosen should be determined with reference to the particular situation and to the child itself, using the evolving capacities of the child and the ‘best interest’ principle as guidelines in each individual case. A representative could be the parent or legal guardian of the child. It could also be someone specifically appointed to safeguard the child’s interests in a particular matter. In some countries the appointment of an Ombudsman for children – which would fall within the category of “appropriate body” in the second paragraph – has been established as a body that can intervene and act in the child’s best interests.⁵⁶⁶ Another example of the search for solutions on how best a child should be represented in judicial or other proceedings is set out in the previously mentioned 1996 European Convention on the Exercise of Children’s Rights.⁵⁶⁷

5.3.8 Summing Up the Analysis So Far

Article 12 establishes certain limitations of the child’s right to participation. The child must be capable of forming a view, the matter in question must affect the child and the child’s age and maturity must be assessed when taking the child’s views into consideration. Precisely how these limitations should be interpreted, as with all matters of interpretation, is subject to discussion. One important question is whether the article is to be considered as applicable to matters concerning children in general – children as a social group – or if the matter concerned has to be connected to an individual child or an identifiable group of children to be applicable. Regardless of whether one chooses the latter, wide interpretation or opts for a more restricted scope of article 12, it should not be forgotten that the article, as with the Convention as a whole, was adopted with consensus. Its wording could therefore be argued to express values and intentions that a vast majority of the state parties concerned (only three countries have made statements concerning article 12) have agreed upon as being acceptable.⁵⁶⁸ The main difficulty with article 12 has never been agreeing in theory on that it is important that children’s views are heard – it is the implementation in practice that has been problematic.

⁵⁶⁵ Santos Pais “The Convention on the Rights of the Child” p. 429.

⁵⁶⁶ One example is the Swedish Children’s Ombudsman. The Ombudsman’s main duty is to promote the rights and interests of children and young people as set forth in the United Nations Convention on the Rights of the Child. The agency however does not have the possibility to interfere in individual cases.

⁵⁶⁷ Chapter 2.6.5.2 *supra*.

⁵⁶⁸ Chapter 6.3.2.

5.4 The Ladder of Participation

The right to participation according to article 12 of the Convention on the Rights of the Child and how it can be exercised can thus, as has been discussed above, be interpreted in different ways. One way of practically assessing participation in relation to children is the “ladder of participation” as developed by psychologist Roger A. Hart.⁵⁶⁹

Hart presents eight levels in his model which are, starting from the bottom of the ladder: manipulation, decoration, tokenism, “assigned but informed”, “consulted and informed”, “adult-initiated, shared decisions with children”, “child-initiated and directed” and, finally, “child-initiated, shared decisions with adults”. The first three steps are in fact not about participation in any real sense at all, but are merely cosmetic measures. Children in these first steps are treated by adults as objects, not as independent actors with capacities of their own, and without being given information or having their views treated with respect.⁵⁷⁰ An example of what Hart means by tokenism is the description of the only role for children at the 1990 World Summit for Children was as “nicely dressed in national costume, they ushered [adult] delegates to their seats”,⁵⁷¹ as opposed to the role played at the 2002 UNGASS, where children held their own forum as well as participated throughout the full event as delegates.⁵⁷² The evolution of the concept and the progress made concerning children’s rights to participation during the decade separating the two events is impressive.

The remaining steps, however, are described by Hart as models of genuine participation of varying degrees of involvement and responsibility. It is also in these steps that the concept of empowerment becomes relevant as involving children also gives them influence. “*Assigned but informed*”, the fourth rung of the ladder, describes projects where children understand the intentions of the project, know who decided on their participation and why, where they have a meaningful

⁵⁶⁹ Hart *Children’s Participation: From Tokenism to Citizenship*.

⁵⁷⁰ Flekkoy & Hevener Kaufman *The Participation Rights of the Child. Rights and Responsibilities in Family and Society* pp. 85-86.

⁵⁷¹ See Roger Hart & Gerison Lansdown in “Changing world opens door to children” in CRIN Newsletter Nr 16/October 2002, pp. 9-11.

⁵⁷² See, also, the description of a children’s parliament in Zimbabwe, where the children participating raised serious doubt about the seriousness of the commitment of the adult initiators to child participation. Chris McIvor, “*Hard lessons from Zimbabwe’s children’s parliament*” in CRIN Newsletter *Children and young people’s participation* no.16/October 2002, pp 28-29. The failure of the children’s parliament should not be attributed solely to the present flaws of Zimbabwean democracy as a whole, but could also be seen as an example of tokenism in general. Furthermore, it is interesting to reflect on how the children who participate in e.g. children’s parliaments are selected: are they representative of their peers, or are they part of an elite because of who their parents are and their social position? Representation is as tricky a question for children as it is in relation to adults.

role and have volunteered for the particular project after it has been explained to them. “*Consulted and informed*”, the next rung, requires that children “work as consultants” to adult-designed and adult-run projects, in which children’s views are taken seriously and where they understand the aims of the project in question. “*Adult-initiated, shared decisions with children*”, the sixth rung of the ladder, speaks for itself. The seventh rung concerns projects that are “*Child-initiated and directed*” with the support of adults. The eighth and last rung is concerned with “*Child-initiated, shared decisions with adults*”. Hart thus places participation and decision-making alongside adults on a higher level than decisions made solely by children. He explains this by saying that he did not want to limit the application of the ladder to issues where it was possible for children to make autonomous decisions, but to extend it to areas where adults wished to remain participants in the decision-making.

Harry Shier has built on Hart’s model and proposes his own variation for the evaluation of child participation.⁵⁷³ Shier has no equivalent to the three lower rungs of Hart’s ladder, but provides a series of questions for adults to answer in order to determine on which of the five levels proposed by Shier they operate when supporting children’s participation. The five levels in Shier’s model are 1) children are listened to, 2) children are supported in expressing their views, 3) children’s views are taken into account, 4) children are involved in decision-making processes and 5) children share power and responsibility for decision-making. At each level, there are three stages of commitment – openings, opportunities and obligations. Having determined on which stage the individual or organisation operating is positioned, the next step in increasing the levels of participation can be identified.⁵⁷⁴ Shier did not intend that his model should replace Hart’s, but rather to complement it as an additional tool for practitioners when exploring different parts of the participation process.⁵⁷⁵

Hart and Shier both speak of different “levels” in their respective models. This can be seen as representing a rather traditional and hierarchical approach to development and participation. Though Hart points out that the important thing is not at which level the child participates, he emphasises:

⁵⁷³ Harry Shier “Pathways to Participation: Openings, Opportunities and Obligations” in *Children and Society* 2001 (10) pp. 107-117. On Shier’s model, *c.f.*, *e.g.* Anne B Smith “Interpreting and supporting participation rights: Contributions from socio-cultural theory” *The International Journal of Children’s Rights* vol 10 No 1 2002 pp.73-88 and B. Rasmussen, U. Hyvönen & L. Mellberg *Utvärderingsmöten i BBIC. En studie i barns delaktighet och medbestämmande* Delrapport från utvärderingen av projektet Barns behov i centrum/Socialstyrelsen, Stockholm, oktober 2004.

⁵⁷⁴ Shier “Pathways to Participation: Openings, Opportunities and Obligations” p. 110.

⁵⁷⁵ Shier “Pathways to Participation: Openings, Opportunities and Obligations” p. 109.

The important principle again is one of choice: programmes should be designed which maximise the opportunity for any child to choose to participate at the highest level of his ability.⁵⁷⁶

A core word in this quote seems to be “ability” – thereby focusing primarily on the child’s competence and capacity. Shier’s model appears to have a similar starting-point. It would thus seem appropriate to place Shier and Hart within the development-psychology paradigm that has dominated childhood research: at least, that kind of future-oriented perspective on childhood has influenced them both in constructing their respective models of analysis. The intrinsic value of “childhood” in itself does not seem to be a core element in the evaluation models. This said, the models proposed by Hart and Shier are useful tools for the analysis of how children in practice are allowed to participate in society’s decision-making processes. Hart also makes an important point when emphasising the need for awareness of how children and adults interact, and that adults must be able to tell the difference between those activities initiated and directed by children and those where children are merely used by adults for promoting their own causes.⁵⁷⁷ Hart’s model was originally intended to be used when analysing children’s involvement in projects and activities, but is also applicable for conceptualising their participation or when analysing adult approaches to children’s participation in decision-making.⁵⁷⁸ The ladder can be useful for deconstructing methods of children’s alleged participation into smaller components in order to improve and develop them.⁵⁷⁹ The model is widely known and often referred to in research and reports on children’s participation.⁵⁸⁰

5.5 *Pro and Contra* Child Participation

Article 12 builds on the presumption that participation is good for children *per se*. So does the models presented by Hart and Shier. But the benefits of participation rights for children have not been left uncontested. A number of arguments have been used over the years to

⁵⁷⁶ Hart *Children’s Participation: From Tokenism to Citizenship* pp. 8-16.

⁵⁷⁷ See Flekkoy & Hevener Kaufman *The Participation Rights of the Child. Rights and Responsibilities in Family and Society* p. 87.

⁵⁷⁸ Cf. Gerison Lansdown *Taking Part: Children’s Participation in Decision Making*, London, Institute for Public Policy Research. 1995 pp. 17-19.

⁵⁷⁹ Näsman “Barn, barndom och barns rätt” pp. 66-72.

⁵⁸⁰ Shier refers to Harts ladder of participation as uniquely influential. Shier “Pathways to Participation: Openings, Opportunities and Obligations”. In official documents, Hart is e.g. referred to in SOU 1997:116 *Barnets bästa i främsta rummet. FN:s konvention om barnets rättigheter förverkligas i Sverige* pp. 196-198.

challenge these rights.⁵⁸¹ One argument, building on the perception of the child not as an individual with rights but as a “person in development”,⁵⁸² has been that children lack the competence and experience required for their participation in decision-making to be fruitful and worthwhile. Children are thus presumed unable to properly understand the far-reaching consequences of their actions and of decisions made, making it pointless and unjust to include them in the process. Another argument presented was that children must learn to take responsibility before they could be granted rights – that is, that the possession of rights was to be connected to the fulfilment of certain standards, normally attained when a person becomes an adult. Other objections to granting children participation rights were that it would lead to a lack of respect for parents and their authority, affirming them in opposition to the rights of adults or as alternatives to the rights of parents. This would threaten the stability of the family, and in the long run, society as a whole. This fear was one of the reasons behind the introduction of article 5, which emphasises the responsibilities, rights and duties of parents, in the Convention on the Rights of the Child.⁵⁸³ Then there is the argument that “we should let children be children”, referring to the perception of childhood as being a golden age of innocence and carelessness. This state of being should not be interfered with by the duties and demands of the adult world, meaning that giving children the right to be heard and exercising the possibility of influencing decisions concerning them would deprive them of their childhood and force them to take on too much responsibility too soon.

These arguments challenging the child’s right to participation mainly reflect the traditional view of the child as being first of all in need of protection, and not as a rights holder. Though these intentions might be well-meaning and directed towards protecting children from the sometimes stressful and hard circumstances of adult life, they nevertheless reinforce the child’s subordinated position within the family and present an image of the child as being unable to make any significant contribution to society in general through a lack of both competence and capability.

Those arguing an opposing standpoint see the child as someone possessing individual rights based upon the status of being a human being.⁵⁸⁴ A number of specific reasons building upon this view favour-

⁵⁸¹ These examples are presented in Lansdown *Promoting Children’s Participation in Democratic Decision-making* and in Gerison Lansdown *Can you hear me? The right of young children to participate in decisions affecting them* Working Papers 36. Bernard van Leer Foundation, The Hague, The Netherlands (2005) pp. 17-18.

⁵⁸² See the discussion in Chapter 3.

⁵⁸³ Van Bueren *The International Law on the Rights of the Child* pp. 72-77.

⁵⁸⁴ See Chapter 3.1.

ing child participation have been presented. Many of the reasons have a bearing on the democracy aspects of child participation, as discussed earlier. It is stated that when children's views are respected and they take part in decision-making processes it strengthens an understanding of democracy, helps in the gaining of democratic skills and creates a commitment to democratic values and ideas. Also, involving children and listening to their views, will result in better decisions. This is because children are possessed of a body of experience and knowledge unique to them, and in transmitting such valuable information they can make an informed contribution to the decision-making process. When their views and ideas are included and respected, it is more likely that the environment in which decisions are applied will be more harmonious, since the children themselves have been involved in shaping the particular situation. Such results, for example, are noticeable in schools,⁵⁸⁵ and where applicable, in relation to child labour.⁵⁸⁶ The measures taken to include children in decision-making in such contexts can successfully be measured and evaluated by using, for example, Hart's ladder. The essential thing is that such participation much have meaning and a certain quality – otherwise, it can even be counterproductive, giving children a negative experience of what participating in a democratic process can be like. Being refused the possibilities of influencing one's own life situation will create frustration and sometimes apathy, neither of which is beneficial for growth, nor for taking part as an individual and in society.

Furthermore, constructive participation in decision-making processes is a skill acquired through practice and experience, as in all kinds of interaction. As well as learning how to exercise the right as such, understanding how to participate responsibly also means learning to accept with tolerance when one's opinions are rejected as well as when they are followed. Promoting participation can also help improve protection. When children are encouraged to articulate their concerns and experiences, then rights violations are more easily exposed and corrected. It is argued that the process of empowerment can help children to challenge abuses of their rights themselves, whether collectively or individually, and without relying exclusively on adults to protect them.⁵⁸⁷ This does not imply that children should take full responsibility for their own protection, thereby freeing adults from their duties,

⁵⁸⁵ See Anna Gustafsson *Skola – plikt eller rättighet?* Doctoral thesis (working title), Faculty of Law, Uppsala University – *forthcoming*.

⁵⁸⁶ Campaigns against child labour are likely to fail if they do not address the reality of working children's lives: the best solution might not always be to stigmatise child labour without exception. See e.g. Dahlén *The Negotiable Child. The ILO Child Labour Campaign 1919-1973*.

⁵⁸⁷ See Lansdown *Promoting Children's Participation in Decision-Making* p. 7

but rather that children can contribute actively to the improvement of their own situations by providing information to those holding the authority to take appropriate actions. That child participation is intended to be a joint project for both adults and children was emphasised in the 2002 UNGASS final document “A World Fit for Children” where world leaders were committed to changing the world not only *for* children, but in participation with them.⁵⁸⁸

For a person to be able to participate with true meaning in decision-making, it is essential for that person to be perceived as being an autonomous individual and not primarily as part of a collective – for example, the family, a social class, an ethnic group, or as someone’s property. Allowing children to participate in decision-making and to exercise influence emphasises their position as individuals in their own right and prevents them from being seen first and foremost as objects. Objectification, to not see a person as being an individual possessing dignity and rights simply by virtue of being human, is a first step towards legitimising and justifying violations of human rights. Objectify or even dehumanise a certain group of people, and they are suddenly much easier to exploit, discriminate against, maltreat or even kill. History is full of examples.⁵⁸⁹ The disempowerment of a person or a group of people, when excluding them from the opportunity to exercise influence over themselves and the society they live in, is a manifestation of the loss of the “thou” feeling towards life, and is an important step towards ignoring all of their rights, of turning people into “its”. Seeing children as “its”, as objects with which one can do as one pleases, are at the root of child exploitation and trafficking. The connection between the concepts of participation, empowerment and, also, protection against harm, is here made obvious. Objectification is thus the greatest threat against the possibilities of the individual to exercise rights and to be in control of one’s own destiny. If emphasising and enforcing a person’s right to participation can contribute to that person maintaining his or her human dignity, then a fundamental goal has been achieved. This is one of the most important reasons for the absolute necessity of including an article such as article 12 in any treaty on the rights of the child.

⁵⁸⁸ A/RES/S-27/2, adopted on 10 May 2002.

⁵⁸⁹ Examples: The justification of, for instance, the slave trade by arguing that Africans were more animal than human; the discrimination and persecution of the Romany people that has taken place in Europe for many centuries, and still is; the Nazi propaganda against Jews; and the propaganda spread by the Hutu militia in Rwanda in 1994, comparing the Tutsi with cockroaches.

5.6 Article 12 – “the Democracy Article”

Article 12 has been described as “the democracy article” of the Convention in the Rights of the Child.⁵⁹⁰ The participation of children and young people in society is, at the end of the day, a question of democracy and of putting democratic values into practice. As discussed in a previous chapter, the level of democracy achieved in a society can be measured by the extent to which its citizens take active parts in societal processes. The article’s reference to the state party’s obligation to ensure that all children capable of expressing their views have the right to do so in *all matters* affecting the child emphasises that it is a fundamental right of children to be able to take active parts in decision-making processes in society without those possibilities being restricted to specific areas. “All matters affecting the child”, as I see it, could very well be read as “all matters affecting the citizens of a society” because what affects the citizens of a society in general is of interest for *all* citizens, not only those over a certain age. Article 12 establishes the child not merely as a human being in a state of development, but as an individual who can make valuable contributions to society today and who, not least, has the *right* to exercise a certain amount of influence. This view of child participation corresponds with what Susan Marks has argued about regarding the fundamental importance of democratic inclusion and to level out inequalities between citizens.⁵⁹¹

How this right can be exercised varies with the context. Mischa de Winter, for example, has suggested that a distinction should be drawn between social and political participation. She contends that political participation is to be defined as the behaviour of citizens aimed at influencing the political decision-making process directly or indirectly – a definition embracing activities, for example, from voting to non-parliamentary political activism. Social participation, on the other hand, is a wider definition not so much concerned with formal political processes but with influencing policy affecting daily life at different levels, such as the working life or in schools. Both forms of participation are relevant in relation to children. What is important is that all levels of society can be involved, from family to national government, and may include a number of activities differing in form, style and exercise depending on the child’s age: seeking information, forming views and expressing ideas, being informed and consulted in decision-

⁵⁹⁰ See, for example, SOU 1997:116 *Barnets bästa i främsta rummet. FN:s konvention om barnets rättigheter föreverkligas i Sverige* p. 192.

⁵⁹¹ Chapter 3.3.2 *supra*.

making, analysing ideas and making choices, as well as respecting others and expecting to be treated with dignity.⁵⁹²

As is often the case, however, not least in a human rights context, things are more easily said than done. In their periodic reports to the Committee on the Rights of the Child, state parties have expressed their difficulties with implementing article 12, referring to it as one of the biggest challenges of the Convention.⁵⁹³ The fact that the full scope of the child's right to participation does not appear to have been discussed in depth during the drafting process, and, more importantly, that the Committee has so far not presented a general comment to article 12, does not make the task set out for the state parties any easier. It also leaves room for the standard of implementation of children's participation rights on a domestic level to vary considerably. All challenges are not considered as positive, at least not when being as radical as those set out by article 12 if all the possibilities that the article offers are considered. A severe change in attitude towards the relationship between adults and children, power structures in particular, is without doubt required if article 12 is to be fully implemented.

In the following, how state parties implement article 12 in practice will be examined, with particular focus on how culture and tradition are referred to as possible obstacles. One could, however, ask oneself why this should really be so problematic. The right to express one's views and to participate in those decisions affecting one's life is the fundamental human right of every individual, regardless of age, sex, ethnicity or any other matter. In a better world, this argument would be the only one needed for the child's right to participation to be respected. On the other hand, in a better world human rights for all would not be an issue, but merely an uncontested reality.

⁵⁹² UNICEF Working Paper Series Program Division *The Participation Rights of Adolescents: A Strategic Approach* New York, August 2001, p. 11.

⁵⁹³ See Chapter 6.

6 Article 12 and the Culture Argument

6.1 Why Address “Culture” and “Traditional Attitudes”?

The United Nations human rights instruments, not least the Convention on the Rights of the Child, rest on the idea of the universality of human rights as expressed in the Universal Declaration on Human Rights and on the universal applicability of the treaties that have been developed to safeguard those rights.⁵⁹⁴ The very existence of a Convention on child rights is in itself a tacit understanding and a universal acceptance of the fact that children as well as adults do have rights. The 1993 Vienna Declaration and Plan of Action established the universality, indivisibility and interdependence of human rights as a norm, affirming that “the universal nature of these rights and freedoms is beyond question”.⁵⁹⁵ The importance of the effective implementation of the Convention in relation to the rights of the child and its taking priority in all UN human rights work, is particularly mentioned in the final document of the 1993 World Conference.⁵⁹⁶ This is also the message sent by the 2001 Secretary General report *We the Children* and by *A World Fit for Children* – the Declaration and Plan of Action adopted at the 2002 UNGASS.⁵⁹⁷ Presupposing that a majority of the world’s states agrees on these principles and on the universal applicability of human rights norms – the Vienna Declaration and Plan of Action was adopted by consensus by 171 nations – the ways of a particular culture (however it is to be defined) or traditional attitudes ought not to constitute valid objections to the implementation of such norms. However, as T.S. Eliot said, “between the idea and the reality, falls the shadow”. Irrespective of the inconsistency of such arguments with the overarching principles of the Vienna Declaration, a supposed incompatibility between the universal standard expressed in the Convention and different culturally-based views of the child and his or her rights and capabili-

⁵⁹⁴ See Chapter 1.

⁵⁹⁵ Vienna Declaration and Plan of Action para. 1. The interdependence of human rights is established in para. 5.

⁵⁹⁶ Vienna Declaration and Plan of Action para. 21.

⁵⁹⁷ On *We the Children*, see n. 178 *supra*. On *A World Fit for Children*, see n. 396 *supra*.

ties is often cited to explain and excuse a particular country's poor implementation of the Convention. This not only undermines the normative value of international human rights law, but also its practical utility.

It was emphasised during the Convention's drafting process that its aim should be one of inclusiveness, rather than merely producing a document that could easily be dismissed as a creation of the industrialised West.⁵⁹⁸ The intention was to promote what Geraldine Van Bueren calls "an ethos both of cultural plurality and universalism".⁵⁹⁹ However, to what extent this has succeeded is open to discussion. The Convention does not strive to present a universal definition or description of the concept of childhood. What it does attempt to do is to set a universal standard as to how children should be treated and what rights they possess, irrespective of their socio-cultural environment. The fact that the Convention to date has been ratified by every country of the world, except two, would imply that this universal standard has been agreed upon by all of those state parties and is therefore not fundamentally controversial within those societies. This universal standard, however, has been criticised as being incompatible with the different views of the child that exist in various societies and cultures. This argument is used not least in relation to the implementation of the child's right to respect for his or her views and to participation, rights which are often described as controversial and therefore difficult to combine with traditional views and attitudes towards children and what they should and should not be allowed to do. The gap between law and practice, the existence of which effectively undermines the realisation of children's rights, in this way can be blamed on differences in culture. The main purpose of this chapter is therefore to examine if and how the "culture argument" is used by state parties and the Convention's monitoring body in relation to the child's right to participation according to the Convention, and subsequently, whether or not such an argument is relevant or valid.

The impact of traditional attitudes and cultural diversity on the implementation of human rights norms as well as on the legitimacy of these norms is undeniable – as A. A. An-Na'im observes:

⁵⁹⁸ See Chapter 3.

⁵⁹⁹ Geraldine van Bueren "Balancing Traditional Values and Cultural Plurality" pp. 15-31 (19) in Gillian Douglas & Leslie Sebba (eds.) *Children's Rights and Traditional Values* Aldershot, Ashgate Dartmouth, 1998.

whilst cultural legitimacy may not be the sole or even primary determinant of compliance with human rights standards, it is [...] an extremely significant one.⁶⁰⁰

Not least when state parties to the Convention present the way they have – or, have not – implemented article 12, culture and traditional attitudes are often referred to as being obstacles to effective implementation. In this chapter the ways will be examined in which the concepts of culture and traditional attitudes are used by certain state parties to explain and perhaps excuse their unsatisfactory results of implementation regarding article 12, and how this is commented upon by the Committee on the Rights of the Child.⁶⁰¹ The intention is to investigate to what extent factors related to culture and traditional practices actually are at the root of the problems arising in the attempt at implementing article 12 of the Convention, and to discuss whether there are other elements that need to be considered within this context. For this purpose, state party reports, comments by Committee members and state party representatives, additional information submitted by state parties and the Committee's Concluding Observations have been examined. An introduction to the discussion on the concepts of culture and universalism is also included as a backdrop to the final section's analysis of the findings of the investigation and the effect of the "culture argument".

6.2 The Concept of Culture

6.2.1 What is Meant by "Culture"?

"Culture" and "traditional attitudes" are referred to as having an impact on the implementation of human rights norms on a domestic level. Traditional attitudes can be regarded as being a component of what constitutes a culture. The term "culture" is, and has been, deployed in various ways in the human rights discourse. Sometimes culture is seen as something that should be protected by international human rights law. At other times, it is seen as being in stark opposition to it. However, before beginning the analysis of how "culture" and "traditional attitudes" are used in a children's rights context, a few remarks should be made on the difficulties of defining what is actually meant by culture.

⁶⁰⁰ A. A. An-Na'im "Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives – A Preliminary Inquiry" (1990) 3 *Harvard Human Rights Journal* 3, 1990, pp. 13-53 (15).

⁶⁰¹ The Convention's monitoring system is described in Chapter 2.

The concept of culture is obviously referred to when discussing cultural rights in the context of human rights protection. Cultural rights include group rights as well as individual rights.⁶⁰² The right to culture or to cultural rights – the concepts are not synonymous – is referred to in a number of human rights instruments and texts, some of the most prominent being the Universal Declaration on Human Rights (article 22), the International Covenant on Economic, Social and Cultural Rights (article 15), the International Covenant on Civil and Political Rights (article 27), the UN Convention on the Elimination of Racial Discrimination (article 7), the UN Convention on the Rights of the Child (article 30) and the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities.⁶⁰³ There also exist a number of regional instruments and texts referring in some way to culture and to cultural rights. The African Charter on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child could be particularly mentioned here for their references expressing the importance of culture.⁶⁰⁴

A look at how “culture” has been dealt with in the aforementioned human rights instruments shows a variety of usages: there does not seem to be one general definition of culture generally agreed upon in these texts.⁶⁰⁵ The Committee on Economic, Social and Cultural Rights, taking its starting point in article 15 of the ICESCR on cultural rights, has indicated that the term culture should be interpreted

⁶⁰² The right to culture of the individual has been referred to by Asbjorn Eide as receiving little attention compared with group rights to culture. See Asbjorn Eide “Cultural Rights as Individual Human Rights” pp. 289-301 (289) in Asbjorn Eide, Catarina Krause & Allan Rosas (eds.) *Economic, Social and Cultural Rights. A Textbook* 2nd ed. Dordrecht, Martinus Nijhoff, 2001.

⁶⁰³ The Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities General Assembly Res. 47/135, annex 47, U.N. GAOR Suppl. (No.49) at 210, U.N. Doc. A/47/49 (1993).

⁶⁰⁴ Elsa Stamatopoulou “Why Cultural Rights Now?” edited transcript of remarks at “The Case for Cultural Rights Workshop” at the Carnegie Council, New York, 23/9/2004. The African Charter on Human and Peoples' Rights protects cultural rights (articles 17 and 22) and refers particularly to “African cultural values” in article 29 (on duties). The African Charter on the Rights and Welfare of the Child refers to culture or cultural values in articles 1 (obligation of state parties), 12 (cultural activities), 12 (handicapped children), 21 (protection against harmful social and cultural practices) and 31 (responsibilities of the child). See also the article 14 (right to the benefits of culture) of the Protocol of San Salvador (Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, OAS Treaty Series No. 69 (1988), entered into force 16 November 1999, OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992).

⁶⁰⁵ Rodolfo Stavenhagen “Cultural Rights: A Social Science Perspective” pp. 85-109 (86) in Eide, Krause & Rosas *Economic, Social and Cultural Rights. A Textbook* 2nd ed.

widely.⁶⁰⁶ The Human Rights Committee when commenting on the topic of culture and minority rights in the Covenant's article 27 seems inclined towards a wide definition of the concept, observing that "culture manifests itself in many forms", which can be seen as emphasising the diversity of the concept.⁶⁰⁷ In the jurisprudence on article 27, the Human Rights Committee has confirmed that a wide and flexible interpretation of the term "culture" lies within the scope of the article.⁶⁰⁸ The HRC, however, has not indicated how it actually defines culture as such. Other monitoring committees within the UN human rights system all refer to culture and traditional practices in various contexts but do not account for what they mean by the concept.⁶⁰⁹

Other branches on the UN tree (for example UNESCO) have introduced more elaborated definitions of culture. The preamble to the 2001 Universal Declaration of Cultural Diversity suggests the following definition of culture:

culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.⁶¹⁰

⁶⁰⁶ UN Fact Sheet No.16 (Rev.1) The Committee on Economic, Social and Cultural Rights.

⁶⁰⁷ Human Rights Committee General Comment No. 23 *The Rights of Minorities* (art.27) CCPR/C/21/Rev.1/Add.5, para. 7. See, also, Joseph, Schultz & Castan *The International Covenant on Civil and Political Right* para. 24.22 – 24.27.

⁶⁰⁸ The following are a few examples of the Human Rights Committee jurisprudence in some way addressing culture: *Lubicon Lake Band v. Canada* Communication No. 167/1984, CCPR/C/33/D/197/1985, *Ivan Kitok v. Sweden* Communication No. 197/1985, CCPR/C/33/D/197/1985, *Länsman et al. v. Finland* Communication No. 511/1992, CCPR/C/52/D/511/1992, *Mahuika et al. v. New Zealand* Communication No. 547/1993, CCPR/C/70/D/547/1993, *Buckle v New Zealand* Communication No. 858/1999, CCPR/C/70/D/858/1999, *Winata and Li v. Australia* Communication No. 930/2000, CCPR/C/72/D/930/2000, *Brough v. Australia* Communication No. 1184/2003, CCPR/C/86/D/1184/2003.

⁶⁰⁹ A few examples: CERD General Recommendation 27 *Discrimination against Roma*, CESCR General Comment 6 *The economic, social and cultural rights of older persons*, CESCR General Comment No. 16 (E/C.12/2005/4) The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights), CEDAW: Reports of the Special Rapporteur on violence against women: *International, regional and national developments in the area of violence against women 1994-2003* (E/CN.4/2003/75 para. 61-70) on religious extremism, harmful traditional practices and the impact of the doctrine of cultural relativism, *Violence in the Community* (E/CN.4/1997/47) and *Violence Against Women in the Family* (E/CN.4/68).

⁶¹⁰ Universal Declaration of Cultural Diversity (UNESCO Doc. 31C/Res 25, Annex 1 (2001)) adopted unanimously by the organisation's General Conference at its 31st session, 2 November 2001. The Declaration is a legal document in the same sense as the United Nations Universal Declaration on Human Rights and it is the hope of Director-General Koïchiro Matsuura "that one day it may acquire the same force as the Universal Declaration on Human Rights" (see the foreword to the Universal Declara-

Furthermore, the Declaration includes a clear statement of the connection between human rights and cultural diversity, as its article 4 proclaims that human rights are guarantees of cultural diversity, that the defence of the latter is inseparable from respect for human dignity and that it implies a commitment to human rights and fundamental freedoms. Article 4 continues by stating that “no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.” As regards the UNESCO definition of culture, it is clear that it explicitly refers to value systems, lifestyles, traditions and not least, beliefs – presumably religious as well as others. The Universal Declaration of Cultural Diversity thereby provides a wider interpretation of what can be included in the concept of culture than what is explicitly stated in, for example, the ICCPR or the ICESCR. This, however, does not mean to imply that values, traditions, beliefs and other similar elements are excluded from interpretations of the meaning of “culture” made by the aforementioned monitoring committees.

Regarding religion and beliefs in particular, it is difficult to draw a sharp distinction between what can be defined as culture and what is religion. Cultural practices might be firmly rooted in religious considerations, or at least be presumed to be. Religion and beliefs can be so intertwined with the socio-cultural fabric of a particular society or community that it becomes difficult or even pointless to distinguish between what is culture and tradition and what is religion. Indian society, where religion – perhaps in particular, Hinduism – affects practically every aspect of society is one such example. Muslim societies are another.⁶¹¹ The far-reaching reservations and declarations made by Islamic states to, for example, the Convention on the Rights of the Child, illustrate the impact that religious considerations can have on the implementation of human rights provisions.⁶¹² Furthermore, it should not be forgotten that Western societies, not least in their human rights legislation, to a large extent are also based upon religion and what can be referred to as “fundamental Christian values”, even though these religious origins might not be emphasised in, for exam-

tion of Cultural Diversity). See also the UNESCO Convention on the Protection and Promotion of Cultural Expressions (CLT-2005/CONVENTION-DIVERSITE-CULT REV.) adopted by the UNESCO General Conference in October 2005. The Convention is yet to enter into effect. See also “Cultural diversity belongs to us all”, article by Armand Mattelart in *Le Monde Diplomatique* November issue, 2005.

⁶¹¹ For a survey of Islam and human rights views, see Eva Brems *Human Rights: Universality and Diversity* The Hague; London, Martinus Nijhoff, 2001 pp. 183-290. An author who has published extensively on the topic of Islam and human rights is A.

A. An-Na'im, see the list of selected publications in n.746 *infra*.

⁶¹² See Chapter 2.3.1.

ple, today's modern European societies.⁶¹³ In the United States, on the other hand, this connection is much more visible in political rhetoric as well as in American society in general.⁶¹⁴ This intertwining of culture and religion is one of the components that make the concept of culture ever more complex and its precise content difficult to pinpoint, leading to uncertainty over what is actually meant in referring to "culture".

Finding a working definition of culture thus seems to be a very difficult task, but one that is necessary to give some attention to if one intends to use the concept.⁶¹⁵ Rodolfo Stavenhagen has made an attempt and has identified three different levels.⁶¹⁶ On one level, culture can be defined as the accumulated material heritage of mankind in its entirety or of particular groups including, but not being limited to, monuments and artefacts.⁶¹⁷ The second level is to see "culture as creativity" – that is, the process of artistic and scientific creation.⁶¹⁸ On the third level, culture is viewed as "a total way of life", which Stavenhagen links to anthropology. Culture perceived in this way identifies the concept as

the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups. Thus understood, culture is also seen as a coherent self-contained system of values and symbols as well as a set of practices that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behaviour and social relationships in everyday life.⁶¹⁹

Attempts at finding a working "all-embracing" definition of culture such as Stavenhagen's third proposed level are common in the field of anthropology. A definition agreed upon by many anthropologists is that culture can be seen as the sum of the capabilities, ideas and behaviours that people/actors have adopted as members of a society.⁶²⁰ Ann-Belinda Preis in an often-cited 1996 article discussing the relationship between human rights and anthropology, notes that in contemporary anthropology there is a tendency to regard culture not so much as a

⁶¹³ For a discussion, see Chapter 6.4.1 below.

⁶¹⁴ See e.g. Steve Bruce "Religion" pp. 410-427 in Robert Singh (ed.) *Governing America: the politics of a divided democracy* Oxford; New York, Oxford University Press, 2003.

⁶¹⁵ The word "culture" has been described as one of the most complex words of the English language. Raymond Williams 1981, cited in Hylland Eriksen *Små platser – stora frågor* p. 20.

⁶¹⁶ Stavenhagen "Cultural Rights: A Social Science Perspective" pp. 87-88. Also, see Elsa Stamatopoulou *Why Cultural Rights Now?*.

⁶¹⁷ Stavenhagen "Cultural Rights: A Social Science Perspective" p. 87.

⁶¹⁸ Stavenhagen "Cultural Rights: A Social Science Perspective" p. 88.

⁶¹⁹ Stavenhagen "Cultural Rights: A Social Science Perspective" p. 89.

⁶²⁰ Hylland Eriksen *Små platser – stora frågor* p. 98.

static unity (as perhaps was the case earlier) but instead as something rather more “fluid in character”, undergoing constant change.⁶²¹ She contends that anthropology seems to be moving away from understanding culture as “a homogenous, bounded unit”, an interpretation she sees as underpinning much of the literature on how human rights are defined and perceived in non-Western contexts.⁶²² Her point is that this way of defining concepts offers no solution to questions pertaining to human rights and culture but at best reproduces already existing definitions under a more sophisticated name.⁶²³ Instead, Preis calls for a more dynamic and radical approach to culture, acknowledging and accommodating the reality of cultural diversity.

What is interesting to note is that regardless of the lack of definitions or existing definitions, having a varying content, “culture”, “cultural diversity” and to a similar extent, “tradition”, are referred to as important factors – often as obstacles – in the process of implementing a human rights treaty; not least the Convention on the Rights of the Child. Thus the fact that the content of the concept is not clear does not seem to prevent it from being applied.

⁶²¹ Ann-Belinda Preis “Human Rights as Cultural Practice: An Anthropological Critique” *Human Rights Quarterly* 18.2 (1996) pp. 286-315 (p. 289 with references). Preis’ critique of cultural relativism is addressed in Chapter 6.4.1. See also Jane K. Cowan, Marie-Bénédicte Dembour & Richard A. Wilson “Introduction” pp. 1-26 in Jane K. Cowan, Marie-Bénédicte Dembour & Richard A. Wilson (eds.) *Culture and Rights. Anthropological Perspectives* Cambridge, Cambridge University Press, 2001. Preis’ statement can be compared with the UNESCO 2000 World Report, in which it is stated that the cultures of today are “...no longer the fixed, bounded, crystallized containers they were formerly reputed to be. Instead they are trans-boundary creations exchanged throughout the world [...] We must now regard culture as a process rather than a finished product.” UNESCO World Culture Report 2000 *Cultural Diversity, Conflict and pluralism* p 25. For an introduction to the critique of UNESCO’s view on culture, see e.g. Thomas Hylland Eriksen “Between universalism and relativism: a critique of the UNESCO concept of culture” pp. 127-149 in Cowan, Dembour & Wilson (eds.) *Culture and Rights. Anthropological Perspectives*.

⁶²² Preis “Human Rights as Cultural Practice: An Anthropological Critique” pp. 293-294. Preis takes this more complex perception of culture as a starting point for criticising different responses to cultural relativism in a human rights context presented by e.g. Jack Donnelly, Rhoda Howard, A.A. An-Na’im and Alison Dundes Renteln. Preis argues that the questions pertaining to human rights and culture cannot be escaped by for example distinguishing between different kinds of relativism or arguing for increased cross-cultural dialogue as one then risks engaging in “fallacious reductionism”. Donnelly in a response to Preis’ critique argues that even though Preis has a point it still is fruitful to use the understanding of culture as advanced in human rights literature but with the intention to show “that the conclusions typically drawn from it simply do not follow”. Jack Donnelly *Universal Human Rights in Theory and Practice* pp. 86-87.

⁶²³ Preis “Human Rights as Cultural Practice: An Anthropological Critique” pp. 291-297.

6.2.2 Whose Culture and Traditional Attitudes?

It is not only difficult to define “culture” – it is also difficult to know *whose* culture one is referring to in the first place. A few words should therefore be said in this context about who has the preferential rights of interpretation when it comes to defining the fundamental features of a particular culture. “Culture”, when speaking of the culture of a specific society, is often referred to in very general terms. We speak of “Swedish culture (or tradition)”, “European culture (tradition)” or “Indian culture (tradition)” as if such things exist as single entities, agreed upon by all members of a community without derogation, contestation or variation. People who live, work and communicate with one another form a cultural community. The community shares certain ideals and norms: however, it would be naïve to assume that all individuals or groups within a certain society held identical views on the content and implications of cultural norms and values. The views that are in fact shared depend upon a number of aspects – for example, the gender, ethnicity, classes and ages of the interacting persons.⁶²⁴ Ann-Belinda Preis in her aforementioned article suggests that recognising the complexities of culture, the differences within societies and groups, and the fluidity of the concept, entails the acknowledgement that

culture, the shared meanings, practices, and symbols that constitute the human world, does not present itself neutrally or with one voice. It is always multi-vocal and over-determined, and both the observer and the observed are always enmeshed in it [...] There is no privileged position, no absolute perspective, no final recounting.⁶²⁵

The features presumed to define the culture of a society or community are in general identified by the dominant elites of that group. A country’s population can in one way be identified as “a group” but it is unlikely that a society is homogenous to the point of such a definition being applicable. Instead, societies consist of a number of subcultures, depending on geography, gender, ethnicity, religion and other similar factors. The dominant elite of a society, however, comprises those individuals or groups who have the power to claim their preferential right of interpretation of what is to be considered a cultural tradition fundamental in a particular socio-cultural context, irrespective of the fact that these norms could have a negative effect on certain individuals within the community concerned. A. A. An-Na’im asserts that “dominant groups or classes within a society normally maintain per-

⁶²⁴ On the importance of identifying and analysing how these concepts are perceived, see Poluha, Norman & Einarsdóttir *Children Across Time and Space* pp. 6-8.

⁶²⁵ Preis “Human Rights as Cultural Practice: An Anthropological Critique” p. 299 with references.

ceptions and interpretations of cultural values and norms that are supportive of their own interests, proclaiming them to be the only valid view of that culture”.⁶²⁶

Being in a position where one has the preferential right of interpretation of concepts such as, for example, culture and tradition, is to be able to consolidate one’s place in a societal structure. It is thus a way through which the dominant groups or classes of a society seek to preserve their power, whether political, economic and/or cultural.⁶²⁷ The potential conflict between the concerns of the culturally defined group and the rights and concerns of the individual is therefore omnipresent.⁶²⁸ Individuals or groups that are “weak” and subordinated in relation to other groups in the power hierarchy of a society – such as, for example, children – are, if such a conflict occurs, those most often at risk of having their voices silenced. Furthermore, elements seen from the outside as “typical” and incontestably part of a specific culture, defined as they are by the dominating groups, might very well be strongly contested from inside the community both in terms of validity and *raison d’être*. An obvious example of this are women who disagree with the understanding of women’s (subordinated) position in their particular community and who combat it from within that culture, thereby challenging the power of the dominant groups.⁶²⁹

The UN Special Rapporteur on Violence Against Women has in the context of female genital mutilation (FGM) emphasised the impact of patriarchal attitudes and traditions – the voice of the dominating group – in pointing out that:

This universal phenomenon [violence against women] is embedded in a patriarchal legacy, at the core of which lies the interest of a social group in sustaining and controlling socially acceptable lines of reproduction of the species.⁶³⁰

As pointed out above, the dominated groups in any community are those that are at risk of suffering the most when repressive practices are upheld in the name of cultural rights and tradition. It is primarily these dominated groups in holding alternative interpretations, or at

⁶²⁶ A. A. An-Na’im “Toward a Cross-Cultural Approach to Defining International Standards of Human Rights. The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment” pp. 19-44 in A.A. An-Na’im (ed.) *Human Rights in Cross-Cultural Perspectives. A Quest for Consensus* Philadelphia, University of Pennsylvania Press, 1992.

⁶²⁷ Stavenhagen “Cultural Rights: A Social Science Perspective” pp. 96-97.

⁶²⁸ Eide “Cultural Rights as Individual Human Rights”, pp. 238-240.

⁶²⁹ See, for example, Philips “Multiculturalism, Universalism, and the Claims of Democracy” p. 121.

⁶³⁰ *Towards an effective implementation of international norms to end violence against women* E/CN.4/2004/66 para.35.

least being open to such interpretations, that can be empowered, for the holding of such views can help them in the struggle for justice.⁶³¹ The dominated groups often, but not always, consist of women and children who are at risk of being subjected to practices and norms with which they do not agree, and which might be harmful to them. In international human rights law, for example, harmful traditional practices are addressed in article 7 of the CERD, article 5 of the CEDAW and article 24(3) of the CRC, all binding state parties to take appropriate measures to combat discriminatory prejudices and practices. Oppression of a person's right to express views and to have those views respected is not specifically included in what is referred to as harmful practices. A denial of this right – as women and children in many societies traditionally are not considered to have the right to make their voices heard – is, however, as harmful a traditional practice as any. This is because being able to express one's views is fundamental to the exercise of so many other rights. The UN Special Rapporteur on Violence Against Women in several reports has pointed to the prevalence of cultural practices in families, and elsewhere in society, constituting violations of women's human rights that have “avoided national and international scrutiny because they are seen as cultural practices that deserve tolerance and respect.”⁶³² The Special Rapporteur in the reports and statements strongly emphasised the importance of eliminating cultural practices that were violent against women and girls and stressed that culture could not be seen as a valid excuse or justification for the serious human rights violations that women of all ages have been, and are, subjected to behind the covering veil of tradition.

6.2.3 Remarks on the Use of “Culture” and “Traditional Attitudes”

To sum up, to see culture as something constantly evolving and changing is indeed challenging but also valuable for a human rights law analysis. It contributes to an understanding of how human rights are defined and interpreted in different contexts, not least by different groups in the same society. The legitimacy and subsequent implemen-

⁶³¹ See the discussion in Susan Moller Okin (ed.) *Is Multiculturalism Bad For Women?* Princeton, Princeton University Press, 1999, articles by Susan Muller Okin “Is Multiculturalism Bad for Women?” pp. 7-27 and “Reply” pp. 115-133 and Yael Tamir “Siding With the Underdogs” pp. 47-53 in particular. On the myth of the “happy, harmonious culture” versus seeing cultures as scenes of debate and contestation, see e.g. Martha C. Nussbaum “Women's Capabilities and Social Justice” pp. 45-77 in Molyneux & Razavi. On empowerment, see, also, the discussion in Chapter 4 *supra*.

⁶³² See E/CN.4/2002/83 *Integration of the human rights of women and the gender perspective. Violence against women* p. 3.

tation of human rights norms is tied to how those norms are perceived in a particular society. In the context of the implementation of children's rights, not least the right to participation, the perceptions of what children can (or should) do, or not do, depends upon the socio-cultural context of that society.⁶³³ In the following, the use of "culture" and "traditional attitudes" by state parties and the Committee on the Rights of the Child respectively in relation to article 12 will be analysed. The purpose is to clarify the prevalence of such arguments in the context of implementing the child's right to participation, and to discuss whether such arguments are valid explanations and/or justifications of what the states have accomplished so far in this respect.

6.3 "The Problem With Article 12 is...". On Obstacles for Implementing Article 12

6.3.1 Article 12 – Too Good to be Disputed

UN Secretary-General Kofi Annan, in the 2001 report *We the Children*, stated that the recognition of the right of children to participate in decision-making on different levels was "one of the most significant advances of the previous decade" and that those processes needed to be further followed up and promoted.⁶³⁴ That the child's right to participation is of the utmost importance has been emphasised on numerous occasions by the Committee on the Rights of the Child as well as by other agents in the field. Following the 1999 workshop *Tenth Anniversary of the Convention on the Rights of the Child: Achievements and Challenges*, the Committee made certain recommendations *a)* underlining the importance of considering children's rights as the human rights of children, *b)* emphasising that "participation includes, but is not limited to, consultation and proactive initiatives by children themselves" and *c)* reminding state parties of the need to pay adequate attention to the requirements of the provisions on participation.⁶³⁵ At the Committee's Days of General Discussion the particular importance of promoting the participation rights of so-called vulnerable groups such as girls, indigenous children and children with disabilities was a reoccurring theme.⁶³⁶ The importance of respecting children's views

⁶³³ As discussed in Chapter 3.

⁶³⁴ *We the Children* para. 415-417.

⁶³⁵ Report on the twenty-second session, September/October 1999 CRC/C/90. Name of workshop: Tenth Anniversary of the Convention on the Rights of the Child: Achievements and Challenges" held on 30 September-1 October 1999 in cooperation with the Office of the High Commissioner for Human Rights.

⁶³⁶ See e.g. the 1995 Day of Discussion on the girl child (8th session, 21 January 1995), the 1997 Day of Discussion on children with disabilities (16th session, 6 October

and taking them into account was also, as previously mentioned, addressed by the 1993 Vienna Declaration and Programme of Action⁶³⁷ and in *A World Fit for Children* – the Declaration and Plan of Action adopted at the 2002 UNGASS.⁶³⁸ One of the objectives of *A World Fit for Children* was that the state parties should:

Listen to children and ensure their participation. Children and adolescents are resourceful citizens capable of helping to build a better future for all. We must respect their right to express themselves and to participate in all matters affecting them, in accordance with their age and maturity.⁶³⁹

The examples above of references to the child's right to participation and the positive influence it is supposed to have are just a few of those that have emerged from the international community. Based upon statements like these it would be logical to draw the conclusion that consensus prevails in the international community on the "undisputed good" of child participation. Any shortcomings in the implementation of article 12 of the Convention on the Rights of the Child could be seen as purely temporary, mostly because the proper channels and procedures required have yet to be put in place. In reality, the position is rather more complicated.

The implementation of article 12, some fifteen years after the Convention entered into effect, is still considered to be difficult and problematic in the majority of the state parties concerned. State parties all over the world have referred to the article as being one of the most controversial provisions in the Convention, and one of the most difficult to implement properly.⁶⁴⁰ This does not mean that the article is directly questioned by a large majority of the state parties to the Convention – only three states (Poland, Singapore and Kiribati) have taken the trouble of making declarations concerning its interpretation.⁶⁴¹ It stands clear, however, that many of the states concerned have experienced serious difficulties in relation to its practical implementation.

It should be noted here that often the state parties in question do not, contrary to their obligations under article 44(3) of the Convention, indicate any particular difficulties affecting the implementation of the

1997), the 2003 Day of Discussion on indigenous children (34th session, 19 September 2003) and the 2004 Day of General Discussion on Implementing child rights in early childhood (37th session 17 September 2004). The recommendations from the Days of Discussion are available at <http://www.ohchr.org/english/bodies/crc/discussion.htm>.

⁶³⁷ Para. 21 of the Programme of Action.

⁶³⁸ See n. 396 *supra*.

⁶³⁹ *A World Fit for Children* para. 7(9).

⁶⁴⁰ Hodkin & Newell *UNICEF Implementation Handbook* p. 163.

⁶⁴¹ Section 6.3.2 *infra*.

Convention in their respective countries.⁶⁴² Many states simply refer to existing legislation and policies, and refrain from providing any substantial analysis of any problems that might exist.⁶⁴³ This makes it difficult – in relying on that information alone submitted by the state parties themselves – to assess what implementation actually has been accomplished. To gain a more complete picture of the state of implementation (or of any other human rights treaty for that matter) it therefore becomes necessary to procure additional information from, for example, non-state actors, information that is often submitted to the monitoring committee in so-called shadow reports.⁶⁴⁴

In the following, the obstacles to the effective implementation of article 12 will be examined that are presented by state parties as related to culture and traditional attitudes. State party reports, written follow-up information submitted by state parties, the discussions that take place at the sessions of the Committee on the Rights of the Child as well as the Committee's Concluding Observations will be examined in order to analyse if and, in such case, in what way "the culture argument" has been applied and responded to. The declarations on article 12 and the following responses will also be discussed. The material that is presented is selected with the aim to secure the greatest possible geographical diversity.⁶⁴⁵ The analysis is based upon an examination of jurisprudence of the Committee on the Rights of the Child up until April 2006.

⁶⁴² See Chapter 4, section 4.4.2.3.

⁶⁴³ This is not a phenomenon limited to the right to participation: the Committee has frequently commented on the state parties neglect of analysis and the inadequate information provided on the actual impact of the Convention and related domestic legislation. Therefore, questions are posed both before the examination of reports and during the actual session. (Examples from NGO reports and other such documents will be referred to when relevant.) Furthermore, the problem of insufficient information being submitted by state parties is not exclusive to the Committee on the Rights of the Child. This is a serious problem for all treaty monitoring bodies, negatively affecting the quality of monitoring as well as the credibility of the comments and observations issued by the monitoring bodies.

⁶⁴⁴ Article 45(a) provides the Committee with the possibility of gathering information and expert advice" from "the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate".

⁶⁴⁵ The UNHCHR treaty bodies data base (www.unhchr.ch) was searched to find reports where culture and traditional attitudes are referred to. The jurisprudence that has been examined dates from the beginning of the work of the Committee on the Rights of the Child following the adoption of the Convention in 1989, with a certain emphasis on more recent documents in order to illustrate the current situation in the state parties. The countries examined are enumerated in n. 677 *infra* and in the list of references. On the use of sources, see, also, Chapter 1.3.3 *supra*.

6.3.2 Declarations by State Parties to Article 12

Article 12, despite being one of the more radical articles in the Convention on the Rights of the Child, has, contrary to articles on, for example, the right to freedom of religion (article 14) and children in armed conflict (article 38), not given rise to large numbers of reservations or declarations.⁶⁴⁶ Furthermore, as indicated earlier, article 12 and its predecessors were not subject to any major debate during the drafting process.⁶⁴⁷ The fact that few formal protests or objections have been made to the article, however, should not necessarily lead to the conclusion that state parties do not consider it difficult and complicated to interpret and implement on a national level.

Three state parties have made declarations relating to article 12: Kiribati, Poland and Singapore. No state has made a reservation to the article. The Kiribati and Polish declarations are practically identical, proclaiming that:

The Republic of Kiribati [Poland] considers that a child's rights as defined in article 12-16 shall be exercised with respect for parental authority, in accordance with the Kiribati [Polish] customs and traditions regarding the place of the child within and outside the family.⁶⁴⁸ [*author's inserts*]

The Singaporean declaration proclaims that:

The Republic of Singapore considers that a child's rights as defined in the Convention, in particular the rights defined in articles 12-17, shall in accordance with articles 3 and 5 be exercised with respect for the authority of parents, schools and other persons who are entrusted with the care of the child and in the best interests of the child and in accordance with the customs, values and religions of Singapore's multi-racial and multi-religious society regarding the place of the child within and outside the family.⁶⁴⁹

The aim of these declarations seems to be – as is the case with certain reservations made to article 13 on the right to freedom of expression – to preserve adult, in particular parental, rights to authority and influence and to avoid challenging prevailing customs and traditions regarding the position in general of children in society.⁶⁵⁰ Considering

⁶⁴⁶ See Chapter 2.3.1.

⁶⁴⁷ See Chapter 5.

⁶⁴⁸ See <http://www.ohchr.org/english/countries/ratification/11.htm#reservations> (as visited 3/8/2006).

⁶⁴⁹ *Ibid.*

⁶⁵⁰ One example is the reservation made by the Holy See, which states "...b) [The Holy See] interprets the articles of the Convention in a way which safeguards the primary and inalienable rights of parents, in particular insofar as these rights concern

the manner in which the declarations are expressed, one could question the validity of interpretative declarations as generally formulated as those submitted by Kiribati, Poland and Singapore – in particular when referring to one of the Convention’s core principles. According to article 51(2) of the Convention, reservations incompatible with the object and purpose of the treaty are prohibited. The Convention thus restates the general rule of treaty reservations found in article 19(c) of the Vienna Convention on the Law of Treaties (VCLT).⁶⁵¹ Neither of the articles mentions declarations. However, article 2(1)(d) VCLT defines reservations as

a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

Judging by the wording of article 2(1)(d), the declarations concerning article 12 of the Convention on the Rights of the Child submitted by Poland, Kiribati and Singapore are formulated in a manner which implies that they could fall within the scope of what constitutes a reservation. It can be noted that the states themselves refer to these statements as “declarations” to distinguish them from the reservations they also have submitted.⁶⁵²

Regardless of this attempted distinction, this leads to the question of the incompatibility of these statements with the object and purpose of the Convention, and the following possible consequences. The Committee has expressed concern that some state parties have made reservations which plainly breach article 51(2) but has, so far, remained silent on the legal effect of reservations.⁶⁵³

What the Committee has done, however, is to express concern regarding declarations such as these and has recommended that state parties should withdraw them, referring to what was agreed upon in the

education (articles 13 and 28), religion (article 14), association with others (article 15) and privacy (article 16).” See <http://www.ohchr.org/english/countries/ratification/11.htm> (as visited 20/07/2006).

⁶⁵¹ The general applicability of the VCLT is endorsed by the International Law Commission in its Preliminary Conclusions on *Reservations to Normative Multilateral Treaties Including Human Rights Treaties (Preliminary Conclusions)*. I.L.C. Report (1997) para.157 (5).

⁶⁵² See http://untreaty.un.org/humanrightsconvs/Chapt_IV_11/RightsOfTheChild.pdf.

⁶⁵³ General Comment 5 CRC/GC/2003/5, paras. 13-16. See, also, Gras *Monitoring the Convention on the Rights of the Child* p. 36 and William A. Schabas “Reservations to the Convention on the Rights of the Child” *Human Rights Quarterly* 18.2, 1996, pp. 472-491.

Vienna Declaration and Programme of Action.⁶⁵⁴ Several other state parties, among them Sweden, have submitted comments to the Committee expressing their concern over the reservations made by Kiribati and Singapore (not Poland, interestingly enough), questioning their compatibility with the object and purpose of the Convention.⁶⁵⁵ The objecting states have a point – but it is however not possible to determine the possible legal impact of these comments on the declarations as their status as objections in the legal sense is not clearly established.⁶⁵⁶

The validity of these declarations can also be questioned with reference to the Human Rights Committee General Comment 24, a comment also applicable in contexts other than those relating directly to the ICCPR.⁶⁵⁷ The HRC asserts that:

Reservations often reveal a tendency of States not to want to change a particular law. And sometimes that tendency is elevated to a general policy. Of particular concern are widely worded reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted.⁶⁵⁸

The Human Rights Committee continues by saying that:

Nor should interpretative declarations or reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or be accepted only in so far as they are identical, with existing provisions of domestic law.⁶⁵⁹

The declarations by Kiribati, Poland and Singapore all emphasise the fundamental importance of prevailing customs, traditions and values, elements that are reflected in the legislation of the three states. The content of such declarations challenges the fundamental purpose of the

⁶⁵⁴ See the Concluding Observations on Singapore's second Periodic Report CRC/C/15/Add. 220, para. 10, Kiribati's Initial Report CRC/C/61/Add. 6 section 3.3.3. and Poland's third Periodic Report CRC/C/15/Add.194, para. 9-10. Poland, in the Concluding Observations, is commended for having begun revising its reservations and declarations to the CRC, a revision that might lead to their withdrawal. However, at the time of writing, the declaration appears not to have been withdrawn. <http://www.ohchr.org/english/countries/ratification/11.htm#reservations> 8/2/2006

⁶⁵⁵ See <http://www.ohchr.org/english/countries/ratification/11.htm#N17>.

⁶⁵⁶ Schabas "Reservations to the Convention on the Rights of the Child".

⁶⁵⁷ General Comment No. 24: *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant* CCPR/C/21/Rev.1/Add.6.

⁶⁵⁸ HRC General Comment 24 para. 12.

⁶⁵⁹ *Ibid* para. 19.

Convention as an international human rights law instrument promoting the rights of the child and the idea of the child as being first and foremost a rights-holder. The underlying message of those declarations seems to be that protecting and preserving traditions and attitudes regarding children and their rights are, and will continue to be, considered more important than implementing to their full extent the rights of the child as stated in article 12. The authority of parents and others with authority over the child still take precedence over the child as a rights-holder. The same wish to preserve traditional values on children's rights in general is also detectable in the reports submitted by these state parties.

6.3.3 What the State Parties Say...Arguments Related to Culture and Tradition

6.3.3.1 State Parties on Article 12 and the Child's Right to Participation

Singapore, Kiribati and Poland are, of course, not the only state parties to the Convention where custom and tradition affect the implementation of article 12. Prevailing customary and traditional practices, attitudes and norms are referred to in state party reports and other information submitted to the Committee on the Rights of the Child as constituting important obstacles to the full implementation of article 12. "The culture argument" is often espoused by states in relation to harmful traditional practices such as female genital mutilation (FGM)⁶⁶⁰ as well as regarding difficulties of dealing with gender-based discrimination.⁶⁶¹ Similar arguments are also often employed, explicitly or indi-

⁶⁶⁰ The Convention on the Rights of the Child, article 24(3) in particular, is by those arguing for the abolition of female genital mutilation referred to as the key instrument in the work towards total prohibition of FGM. Of the rich literature on FGM, cf., e.g. Brems *Human Rights: Universality and Diversity* pp. 168-177, Sonia Harris-Short "International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child" *Human Rights Quarterly* Vol. 25, 2003 pp. 130-181, Wheeler "Eliminating FGM: The Role of the Law" p. 260 with references, *Female Genital Mutilation/Cutting: A Statistical Exploration* UNICEF. Nov. 2005, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting* UNICEF, Innocenti Digest 12, 2005.

⁶⁶¹ In the CEDAW, article 5 particularly refers to the modification of social and cultural patterns of conduct of men and women. As a result, the matter of culture as a factor influencing the status of women and girls is referred to in state party reports to the CEDAW Committee (e.g. Yemen 2002 report CEDAW/C/YEM/5, Benin 2002 Report CEDAW/C/BEV/1-3 and the comprehensive Brazilian 2002 report CEDAW/C/BRA/1-5). In the reporting to the Committee on the Rights of the Child, references to gender inequalities based on culture in relation to, e.g. article 2 on discrimination but also in the context of other articles. The two reports submitted by India in 1997 and 2003 are illustrating examples. On India's reporting to the Committee on the Rights of the Child, see Chapter 7.

rectly, when explaining the problems associated with fulfilling the obligations set out in article 12 and in additional articles on children's civil and political rights.

The information submitted in the state party reports to the Committee on the Rights of the Child provides the basis for the monitoring procedure. State parties can also be asked to submit a list of written replies to additional questions posed by the Committee on the Rights of the Child. These questions are based upon the information in the state party report, additional information submitted to the Committee in shadow reports, (that is, NGO reports) and on the knowledge and experience possessed by Committee members themselves. State delegates are usually asked for further comments during the public session at which the report is examined, which means that issues not thoroughly discussed in (or completely omitted from) the state party report can still be investigated. The following citations are examples of how article 12 has been addressed in the reports and in additional information provided at the Committee sessions.

In its 1998 initial report to the Committee on the Rights of the Child, the Central African Republic commented upon how child participation in general was viewed in that country:

Outside this legal framework, national customs all reflect the conviction that the child has no views, so that a child who contradicts an adult commits a sacrilege, regardless how justified his or her opinion may be. This was confirmed in the course of our inquiries and research aimed at determining the views of the population on the problem of respect for the views of the child. Large numbers of parents consider that the child has no views and should simply obey. Yet in some families the idea of respect for the views of the child is gaining ground. In short, despite the existence of a wide variety of provisions intended to protect the child, there is evidently a gap in the law on respect for the views of the child on the one hand and a problem of cultural re-adaptation on the other.⁶⁶²

At the 2000 examination of Grenada's initial report the state representative, when asked

whether progress had been made in changing the traditional views of adults that "children should be seen and not heard" [and of] children were [considered] the property of adults and that children's rights and parents' rights were incompatible⁶⁶³

answered that

⁶⁶² CRC/C/11/Add.18, para.87-88.

⁶⁶³ Summary Record CRC/C/SR.607, para.20, question by Mrs. Mokhuane.

while recognizing the importance of children expressing their views [...] it would require time to achieve acceptance of that idea in Caribbean culture.⁶⁶⁴

In the Cambodian 1998 initial report it was stated that there were certain channels through which children can express their views, but that

children cannot exercise this right fully because custom does not allow them to challenge decisions taken by adults or to be present at discussions between adults.⁶⁶⁵

However, there are signs of Cambodian attitudes changing. At the 2002 session where Cambodia's latest report to the Committee was examined, the Cambodian delegate stated that:

according to tradition, children were really supposed to listen to adults but the situation was changing and most Cambodians were aware that they needed to listen to children as well.⁶⁶⁶

The 2003 periodic report submitted by Bangladesh presents a grim picture of how the child's right to participation is regarded in that society:

The principle of child participation, especially the obligation on the part of adults to listen to children's views on matters affecting them and to give those views due weight in accordance with the child's age and maturity, runs counter to many established norms in Bangladeshi society [...] As children get older, increasing account is taken of their views, although adults display striking inconsistencies in their attitudes to the participation of adolescents in different aspects of life. On the one hand, the family and community expect them to act like adults - arguably overestimating their capacity - on matters such as work and responsibilities towards parents and other family members. On the other, their potential is underestimated and they are insufficiently consulted on issues on which they have a right to express an opinion, such as the course of their future studies or career, decisions regarding their marriage and other future plans.⁶⁶⁷

In Botswana's 2004 initial report it is made clear that

...in terms of Setswana culture respect for the views of the child is not regarded as a right. Children do not generally attend or speak at the *kgotla* where issues of significance in a community have traditionally been and continue to be discussed. There is therefore a culture of be-

⁶⁶⁴ *Ibid*, para 34.

⁶⁶⁵ CRC/C/11/Add.16, para. 36-37.

⁶⁶⁶ CRC/C/SR.629, para. 58.

⁶⁶⁷ CRC/C/65/Add.22, para. 63, 65.

lieving that adults know what is best for children and that they are in a position to articulate the views of their children.⁶⁶⁸

Similar references to the non-existence of recognition of the right of the child to respect for its views are found in Madagascar's reports and replies to the Committee:

In the spirit of tradition, the child cannot express his opinions, but must rely on the wisdom of his natural protectors, namely, his family, his mother and father and his legal guardians.⁶⁶⁹

It can here be noted that in the Malagasy report, children are in general referred to in the male pronoun. Obstacles standing in the way of the implementation of article 12 in Madagascar, according to the state include

the indifference and even mistrust of social groups deeply wedded to tradition when confronted with new ways of thought and the restructuring of values in connection with the status of children.⁶⁷⁰

Furthermore, in traditional Malagasy society women and children do not often have the right to express their views on decisions taken within the community, even if those decisions have consequences for them in particular. According to tradition, children are ranked third after women and it is still the men who are the decision-makers in the villages. Children do not have rights, only duties, meaning that they are to do only what they are told.⁶⁷¹

In the reports cited above references to tradition and cultural and societal norms are, as seen, quite common. When examining state party reports to the Committee on the Rights of the Child and the additional information submitted to the Committee orally or in writing, it becomes apparent that references to culture and traditional practices are predominantly made by non-Western states – even though it cannot be presumed that appeals to cultural differences would be alien to Western states. In the universalism debate in general, a common view among commentators has been that an argumentation based upon references to cultural relativism and the incompatibility of universal human rights norms with the socio-cultural context of a particular country is often exploited by states attempting to conceal their unwillingness to comply with their treaty obligations and to justify repressive

⁶⁶⁸ CRC/C/51/Add.9, para.135.

⁶⁶⁹ Madagascar 1993 report, CRC/C/8/Add.5, para. 32.

⁶⁷⁰ Reply to Question 3; Written Replies to List of Issues 31/08/94.

⁶⁷¹ CRC/C/70/Add.18, para.324 -325.

internal practices and their exposure to unwelcome criticism.⁶⁷² (Whether the states to which such intentions are attributed are more often non-Western rather than Western depends on whether non-Western states do in fact experience more culture-related problems when implementing treaty provisions or, instead, that in the Western context, the culture argument is not used, is a topic seldom discussed.) However, further examination reveals that this conclusion is not completely accurate, at least not with regard to the implementation of article 12. Most countries have expressed a clear commitment to the principle of child participation. At the same time, they also claimed that the principle ran counter to established social norms in their societies. The main challenge for the future was for the principle of the child's right to be heard to be accepted in those societies at every level. An important question when addressing this challenge is what the obstacles to the fulfilment of these rights actually consist of – whether or not there are factors additional to those presented by the state parties.

In a 2003 study of the sessions of the Committee on the Rights of the Child, Sonia Harris-Short, has analysed how state delegates before the Committee referred to culture and traditional attitudes as being obstacles in the way of implementing the provisions contained in the Convention within their own countries.⁶⁷³ Her analysis is based upon a selection of state party reports and the appearances of delegates from fifty-six states that up until June 2001 had identified prevailing cultural practices and traditions as reasons for poor implementation of the Convention in their respective countries.⁶⁷⁴ Harris-Short does not refer to article 12 and the right to participation in particular – she has used the practice of female genital mutilation to exemplify her thesis as it is “often presented as a classic example of the conflict between ‘universal’ human rights and valued cultural practices”.⁶⁷⁵ She, however, argues that her conclusions are applicable to the Convention in general

⁶⁷² A few examples from the rich literature: Adamantia Pollis “Cultural Relativism Revisited: Through a State Prism” *Human Rights Quarterly* 18.2, 1996, 316-344 (320-324), Tatsuo Inoue “Human Rights and Asian Values” pp. 116-133 in *The Globalization of Human Rights* Jean-Marc Coicaud, Michael W. Doyle & Anne-Marie Gardner (eds.) United Nations University Press, Hongkong, 2003, Jack Donnelly *Universal Human Rights in Theory and Practice* 2nd ed. Cornell UP, Ithaca, 2003, Bonny Ibhawoh “Cultural Relativism and Human Rights: Reconsidering the Africanist Discourse” *Netherlands Quarterly of Human Rights* Vol. 43, 2001, pp. 43-67.

⁶⁷³ Harris-Short “International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child” (n.665 *supra*).

⁶⁷⁴ Harris-Short “International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child” p. 146, footnote 73.

⁶⁷⁵ Harris-Short “International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child” p. 136.

as well.⁶⁷⁶ Judging from Harris-Short's analysis of the state reports and the summary records from the sessions, combined with an additional analysis of both the material she has used as well as those of a later date concerning the same countries suggests that her analysis at least in part also has relevance with regard to article 12, as there are conclusions of a general nature to be drawn.⁶⁷⁷ This, however, does not mean to say that her conclusions cannot be questioned.

⁶⁷⁶ Harris-Short contends that "the apparent reluctance of state delegates to defend traditional attitudes and practices on the basis of cultural difference is not restricted to FGM or, indeed, to delegates from any particular geographical region. Harris-Short "International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child" p. 146.

⁶⁷⁷ I have revisited the material to which Harris-Short refers in her analysis, *i.e.* reports and summary records up to June 2001 concerning Burkina Faso (1993 report CRC/C/3/Add.19, CRC/C/SR.136), Indonesia (CRC/C/SR.80, 1994 report CRC/C/3/Add.26, CRC/C/SR.79, CRC/C/SR.162, CRC/C/SR.81) Jamaica (1994 report CRC/C/8/Add.12, CRC/C/SR.197), Jordan (CRC/C/8/Add.4, CRC/C/SR.144, CRC/C/70/Add.4, CRC/C/SR.621), Pakistan (1993 Report CRC/C/3/Add.13, CRC/C/SR.132-34), Senegal (1994 Report CRC/C/3/Add.31, CRC/C/SR.248), Sudan (1992 report CRC/C/3/Add.3, CRC/C/SR.69-71, CRC/C/SR.89-90) Vietnam (1992 report CRC/C/3/Add.4, CRC/C/SR.60-61, 1993 report CRC/C/3/Add.21) Yemen (1995 report CRC/C/8/Add.20, CRC/C/SR.261-63, 1998 report CRC/C/70/Add.1, CRC/C/SR.523-24), China (1995 report CRC/C/11/Add.7, CRC/C/SR.298, CRC/C/SR.299-300), Nepal (1995 report CRC/C/3/Add.34, CRC/C/SR.301-303), Guatemala (1995 report CRC/C/3/Add.33, CRC/C/SR.306-308, 2000 report CRC/C/65/Add.10) Morocco (1995 report CRC/C/28/Add.1, CRC/C/SR.317-319), Nigeria (1995 report CRC/C/8/Add.26, CRC/C/SR.321-323), Uruguay (1995 report CRC/C/3/Add.37, CRC/C/SR.325-327) Ethiopia (1995 report CRC/C/8/Add.27, CRC/C/SR.349-351), Ghana (1995 report CRC/C/3/Add.39, CRC/C/SR.377-379), Bangladesh (1995 report CRC/C/3/Add.38, CRC/C/SR.380-382), Uganda (1996 report, CRC/C/3/Add.40, CRC/C/SR.409-410) Togo (1996 report CRC/C/3/Add.42, CRC/C/SR.421), Guinea (1997 report CRC/C/3/Add.48, CRC/C/SR.515-517), Barbados (1997 report CRC/C/3/Add.45, CRC/C/SR.533-536), Benin (1997 report CRC/C/3/Add.52, CRC/C/SR.543-545), Chad (1997 report CRC/C/3/Add.50, CRC/C/SR.547-549), Vanuatu (1997 report CRC/C/28/Add.8, CRC/C/SR.566-567), Mali (1997 report CRC/C/3/Add.53, CRC/C/SR.570-572), India (see Chapter 7 *infra*), Sierra Leone (1995 report CRC/C/3/Add.43, CRC/C/SR.593-594), South Africa (1999 report CRC/C/51/Add.2, CRC/C/SR.609-611), Djibouti (1998 report CRC/C/8/Add.39, CRC/C/SR.638) Central African Republic (1998 report CRC/C/11/Add.18, CRC/C/SR.657-58), Lesotho (1998 report CRC/C/11/Add.20, CRC/C/SR.685-86), Egypt (CRC/C/SR.66, 1999 report CRC/C/65/Add.9, CRC/C/SR.680), Côte d'Ivoire (2000 report CRC/C/8/Add.41) and Tanzania (report 2000 CRC/C/8/Add.14) see Harris-Short "International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child" p. 147, footnote 73. Additionally, available Summary Records concerning these countries after June 2001 (if any) have been examined: see Burkina Faso CRC/C/SR.825, Indonesia CRC/C/SR.920, Jamaica CRC/C/SR.880, Jordan CRC/C/CSR.621-622, Pakistan CRC/C/SR.132-134, Sudan CRC/C/SR.817, Vietnam CRC/C/SR.848, Yemen CRC/C/SR.1049, China CRC/C/SR.1062, Nepal CRC/C/SR.1033, Morocco CRC/C/SR.882, Nigeria CRC/C/SR.1022, Uganda CRC/C/SR.1058, Togo CRC/C/SR.1018, Egypt CRC/C/SR.679 and Tanzania CRC/C/SR.713. Furthermore, Summary Records concerning the reports by Armenia (CRC/C/SR.924), Cambodia (CRC/C/SR.629), North Korea (CRC/C/SR.965), Iran

One of the results found by Harris-Short is that while many state delegates did in fact refer to culture and tradition as being major obstacles in the way of proper implementation of the Convention, nevertheless they did not defend poor implementation with cultural relativist arguments. Instead, they often conveyed rather negative opinions on the attitudes and customs of their own populations.⁶⁷⁸ She suggest that the reason for such criticism

lies in the apparent belief that culturally entrenched attitudes and practices impede the government's struggle to create a modern developed state.⁶⁷⁹

An additional dimension is thus added to the arguments presented by the state parties as it poses questions on why state delegates express themselves as they do – whether it is a reflection of what has been referred to as “Western thinking” on state elites, or if it amounts to cynically paying lip service to human rights norms out of political expediency.⁶⁸⁰

6.3.3.2 Remarks: State Party Reports and Statements at the Committee Sessions

It is interesting to note that the various state parties seem to identify traditional attitudes and culture as something that indeed prevails in their societies, while at the same time indicating that these views do not conform either with what might be called the “official view” of the country as a party to the Convention on the Rights of the Child, nor with a particular government's struggle to create a modern and progressive developed state. By using expressions such as “traditional attitudes” “culture” and “custom” the various state parties in their reports seem to imply that “tradition” is considered by the state to be a thing of the past and in conflict with the views and aims of what are described as progressive governments striving towards the full imple-

(CRC/C/SR.1016), Mongolia (CRC/C/SR.1041), Norway (CRC/C/SR.1037) and Mozambique (CRC/C/SR.762) have been examined in order to widen the scope of the study. On the method of selection, see Chapter 1.3.3 *supra* and n. 645 *supra*.

⁶⁷⁸ Harris-Short “International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child” p. 148-150, 149.

⁶⁷⁹ Harris-Short “International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child” p. 149.

⁶⁸⁰ Harris-Short “International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child” p. 170. A. A. An-Na'im "Conclusion" pp. 427-428 in A. A. An-Na'im (ed.) *Cross-Cultural Perspectives: A Quest for Consensus* has discussed the Westernisation of state elites. For a historical perspective, see Johnson & Symonides *The Universal Declaration of Human Rights: a history of its creation and implementation, 1948-1998*.

mentation of their particular state's obligations under the Convention. The reports cited above in section 6.3.2.1 exemplify this reasoning. The state parties seem to argue in their reports – both through what they say and in what kind of language this is expressed – that the circumstances that negatively affect the implementation of the treaty provisions are rooted not in the position of the state, “enlightened” as it is, but in what is referred to as the backward ideals and ideas of the population in question. In her above mentioned study, Sonia Harris-Short paints a different picture from that of the manipulating, cynical state presented by many other commentators. The conclusion she draws from her analysis is rather that

cultural relativism remains a formidable argument which continues to be raised by state delegates to justify the ineffective implementation of international human rights standards. The dynamics of the argument are, however, more subtle and thereby more difficult to counter than some of the academic literature would suggest [...] it is [by Harris-Short] argued that rather than state delegates cynically manipulating “culture arguments” to challenge and undermine human rights norms, the commitment given by states to securing the effective implementation is often genuine.⁶⁸¹

Arguments based upon culture and traditional attitudes are thus, she argues, not primarily used by state parties in a cynical attempt to justify a poor implementation by taking a relativist standpoint, but instead as recognition of the cultural context of a particular state and the problems that derive when traditional values meet modern human rights legislation. Harris-Short suggests that even though the states concerned might have a sincere commitment to fulfilling their obligations in accordance with human rights norms, this is made difficult because of an absence of a human rights culture at local level.⁶⁸² This is “particularly a problem when the rights in question impinge upon traditions and practice relating to children and the family”.⁶⁸³ Her point (which, it should be once more emphasised, is based only upon the practice of the state delegates) is that delegates do not primarily use the culture argument in order to object to a foreign cultural tradition – that is, the Western liberal human rights tradition – being imposed upon their countries but that they instead argue that what really makes implementation difficult are the views and attitudes of their own populations.⁶⁸⁴

⁶⁸¹ Harris-Short “International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child” p. 134.

⁶⁸² *Ibid.*

⁶⁸³ *Ibid.*

⁶⁸⁴ Harris-Short “International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child” p. 164-165 on the modern state in opposition to the population.

The states – or rather their governments – in this way distinguish themselves as being something other than simply representatives of their citizens.⁶⁸⁵

Harris-Short concludes that state delegates by alienating themselves from their cultural roots will add to silencing the voices of the grass-roots and that, in order for human rights norms embracing cultural practices to be also culturally legitimate, the consent of people themselves, those on whom the obligations are imposed in practice must be sought – otherwise, human rights will remain “a tool of the imperialist”.⁶⁸⁶ As an example she refers to female genital mutilation (FGM), a practice the abolition of which is supported by most states. Regardless of the position taken by the states, Harris-Short argues that there is evidence that FGM is in fact – in African states in particular – not only practised but also embraced by a majority of the population, not least women. That is, those who are supposed to be the victims of a harmful practice do not seem to consider themselves to be victims.⁶⁸⁷ This, she contends, illustrates the need to acquire genuine cross-cultural acceptance of human rights norms if the norms at the local level are not to be considered as imperialist and irrelevant. By taking this position, Harris-Short adopts a similar stance to that of Makau wa Mutua, an ardent advocate both of the particularism of the human rights paradigm and of the view that cultural legitimacy of human rights norms can only be achieved through the reinterpretation and revision of all existing such norms.⁶⁸⁸ What Harris-Short, however, does not seem to take into account – at least not to any great extent – is the variation of values existing within a culture and that the “cultural world view”, as she calls it, can be very different between one group and another or even between individuals within the same country.⁶⁸⁹ It really depends on

⁶⁸⁵ Harris-Short refers to statements by the delegates from the Central African Republic, China and Benin as examples of this line of reasoning; all referring in various manners to the social and cultural backwardness prevailing in their respective societies. See Harris-Short “International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child” p.149 with references.

⁶⁸⁶ Harris-Short “International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child” p. 179-181.

⁶⁸⁷ Harris-Short “International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child” p. 136-146 with references.

⁶⁸⁸ For examples of Mutua’s writings see n. 718 *infra*.

⁶⁸⁹ Harris-Short argues that “The crucial difference between imposing obligations on ‘the state’ and seeking to persuade private individuals to comply with international standards and obligations is that the latter are being asked to comply with an obligation to which they have never agreed and into creation of which they have played no part. Moreover, it may be a standard that is fundamentally inconsistent with their cultural ‘world view’”. Harris-Short “International Human Rights Law: Imperialist, Inept and

who you ask, how the question is posed and, not least, within what context it is asked – can the respondent answer freely? In my view, although the point she makes of taking the creation of cultural legitimacy is very important, she still fails to recognise that there can be large groups within a community that do not agree with the “cultural world view” of the majority or of the dominant elites of that community, groups that might very well both benefit and welcome the imposition of human rights obligations on individuals. In the context of FGM, it is difficult to imagine the young girl child at risk of being subjected to the practice being asked whether she thinks it is a practice worth preserving for cultural reasons, and if it is something to which she wishes to subject herself. As Martha Nussbaum puts it, tradition can look beautiful from the outside if you do not have to live with its consequences.⁶⁹⁰

In the context of child participation and the implementation of article 12, there are additional aspects to be considered alongside what can perhaps be described as the more “clear-cut” culture-related arguments referring to practices such as FGM, practices that are generally regarded by the states parties as being harmful. Not abolishing and actively working against FGM is agreed to constitute a violation of the Convention on the Rights of the Child.⁶⁹¹ As regards child participation and the right of the child to have views respected and taken into account, the commitment expressed by state parties is not as clear – especially not as regards the democracy aspects of participation. Creating and implementing rights for children that in practice challenge deeply entrenched cultural norms of what children do and do not do are in many ways more challenging and progressive than enforcing the eradication of a traditional practice that is obviously harmful to women and girls both physically and psychologically to women and girls.

A conclusion to be drawn from Harris-Short’s study and the additional follow-up examination presented here of how state delegates have acted before the Committee on the Rights of the Child, however, does not necessarily need to be that state delegates have deliberately alienated themselves from the grassroots and that these governments in

Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child” p. 180).

⁶⁹⁰ Martha Nussbaum points out that even though it is of course not precluded that a woman chooses to lead a traditional life, with all that entails, this does not justify that such a lifestyle is the only one available to her. What is fundamental is her capability to choose. The choice she makes has to be an actual choice between existing possibilities and not be narrowed down to nothing by restrictions imposed by traditional ideas of what women can and cannot do. Nussbaum *Women and Human Development. The Capabilities Approach* pp. 34-49 in which she argues for a universalist approach to rights based on her discussion on women, in the Indian context in particular.

⁶⁹¹ See General Comment 4 on adolescent health (CRC/GC/2003/4), para. 39(g).

reality have as their prime objective the implementation of the Convention, hindered only by the backwardness of their citizens. The explanations as to why state parties argue as they do in their reports and at the subsequent Committee sessions is more likely to lie somewhere between Harris-Short's faith in the genuine commitment of governments to the objectives of the Convention, and a complete dismissal of any good intentions on the part of states. Indeed, the majority of the state parties to the Convention probably intend to implement its provisions as far as possible. The difficulty is that "as far as possible" can be interpreted very differently depending on, for example, which rights are concerned, the resources considered to be available and the degree of effort an effective implementation demands of the individual state. Symbolic gestures can sometimes be passed off as a genuine commitment to international human rights norms, gestures that, however, have little value in practice. Once again: to implement human rights norms in order to improve the living conditions of the population is above all a matter of whether there exists an actual political will of the state or if the intentions expressed by a government to implement human rights in the state in question is mostly an attempt to collect political and diplomatic points on the international arena. At the end of the day, it is not what is said, but what is done, that counts.

6.3.4 What the Committee Says... Arguments Related to Culture and Tradition

The Committee on the Rights of the Child, in its Concluding Observations to state party reports (as well as in additional questions and commentaries) comments on how the state parties have succeeded in implementing the Convention. The pronounced aim of the Committee is for the monitoring process to be conducted in a spirit of co-operation and constructive dialogue.⁶⁹² Neither the Concluding Observations, nor the questions and remarks made when the reports are examined in the public Committee sessions, refer directly to *violations* of the Convention on the Rights of the Child by a state party. Instead the Committee simply *expresses its concerns* over the insufficient or lack of imple-

⁶⁹² See Gras *Monitoring the Convention on the Rights of the Child* pp. 123-125 on what is meant by "constructive dialogue". Gras calls it "a flexible umbrella concept which may include several elements", and suggests that constructive criticism should be presented by the Committee members, that state party representatives should make real commitments to change before the Committee, that both positive and negative aspects are addressed as well as the need for international assistance, and, not least, appreciation of the progress that has been made by a state party. She then continues to evaluate the work of the Committee and the status and impact of the Concluding Observations that are issued (pp. 125-141).

mentation of treaty provisions. This, however, does not mean that no criticism flows from the Committee or its individual members.

The main section of the Committee's Concluding Observations is called "Principal areas of concern and recommendations". This is where the Committee, taking its starting point in the state party report, first describes its specific concerns regarding the implementation of the Convention in the state concerned and then makes recommendations on measures to be taken for a particular situation to be improved or resolved. Issues dealt with in this section usually concern one or several of the following: war and violence, the economic situation in a country, political stability, population, nature and geography and, most interesting for the purpose of this investigation, culture and/or tradition.⁶⁹³

Traditional practices and attitudes, customs or culture are systematically referred to in the Concluding Observations as obstacles in the way of implementation of children's rights. Female genital mutilation, traditional birth practices and preferential feeding for males are frequently referred to as examples of harmful traditional practices that should be resisted by state parties.⁶⁹⁴ A low level of tolerance for obstacles to the implementation related to culture and tradition, however, is also noticeable in the context of children's right to participation and article 12. The Committee in a number of Concluding Observations, has expressed concern over the negative impact of traditional attitudes and culture and related conservative attitudes on the right of children to express their views and have them respected. Illustrative examples are the following:

In the 2003 Concluding Observations to the report of Eritrea, the Committee

notes with concern that [...] traditional practices and attitudes still limit the full implementation of article 12 of the Convention, in particular for girls.⁶⁹⁵

In the 2005 comment on Bolivia the Committee welcomed

the efforts of the State party to promote and implement the right of children to express their views and actively participate at various levels of society. However, it remains concerned at the persistence of traditional attitudes in the State party which, among other things, limit children's right to participation and to express their views. It notes with concern the limited possibilities available to children to participate in

⁶⁹³ See Brems *Human Rights: Universality and Diversity* pp. 346-349 for an introduction to what is addressed under these headings.

⁶⁹⁴ Van Bueren *The International Law on the Rights of the Child* p. 307, n. 85.

⁶⁹⁵ CRC/C/15/Add.204 para. 25.

and express their views in decision-making procedures affecting them, particularly in schools and communities.⁶⁹⁶

The 2003 Concluding Observations to Singapore's report expressed concern about

...traditional attitudes towards children in society limit respect for their views within the family, schools, other institutions and society at large.⁶⁹⁷

This is a wording very similar to the comment made in the Committee's 2003 Concluding Observations to Syria's report:

it [the Committee] is concerned that traditional attitudes towards children in society may limit the respect for their views, especially within the family and schools, and that children are not systematically heard in court and administrative proceedings in matters that affect them.⁶⁹⁸

The Committee also in 2003 expressed its concern regarding the implementation of the child's right to participation in Vietnam, observing that:

traditional attitudes towards children in society still limit the respect for their views, within the family, schools and society at large. In addition, administrative and judicial proceedings are not always required to take the views of the child into account.⁶⁹⁹

In Croatia (2004)

The Committee welcomes the efforts made by the State party to promote respect for the views of the child. The Committee remains concerned that the general principle laid down in article 12 of the Convention is insufficiently respected in families, schools and other institutions and not fully applied and duly integrated in practice in judicial and administrative decisions and in the implementation of the laws, policies and programmes of the State party.⁷⁰⁰

Burkina Faso (2002)

...owing to traditional attitudes, respect for the views of the child remains limited within the family, on schools, in the courts before administrative authorities and in society at large.⁷⁰¹

⁶⁹⁶ CRC/C/15/Add.256 para. 25

⁶⁹⁷ CRC/C/15/Add.220 para. 28.

⁶⁹⁸ CRC/C/15/Add.212 para. 30.

⁶⁹⁹ CRC/C/15/Add.200 para. 29.

⁷⁰⁰ CRC/C/15/Add.243 para.29

⁷⁰¹ CRC/C/15Add.193 para. 16.

Italy (2003)

The Committee is concerned that the general principle, as laid down in article 12 of the Convention, is not fully applied in practice. In this regard, the Committee is concerned that the right of children to be heard is insufficiently guaranteed in proceedings affecting them, in particular in cases of the separation of parents, divorce, adoption or foster care, or within education.⁷⁰²

Romania (2003)

The Committee notes the State party's efforts to ensure that administrative and judicial proceedings take into account the views of the child, but remains concerned that traditional attitudes towards children in society still limit the respect for their views within the family, at schools, in institutions and at the community government level.⁷⁰³

Uganda (2005)

While noting with appreciation the efforts made by the State party in order to implement the principle of respect for the views of the child such as the child forum, the Committee remains concerned that traditional societal attitudes appear to limit children in freely expressing their views in schools, courts or within the family.⁷⁰⁴

Ireland (1998)

Regarding the implementation of article 12 of the Convention, the Committee is concerned that the views of the child are not generally taken into account, including within the family, at schools and in society.⁷⁰⁵

And El Salvador (2004)

While appreciating that some measures have been taken to give children's views more weight in schools, communities, and in decision-making procedures, the Committee is concerned at the persistence of traditional and authoritarian attitudes in the State party, which, among other things, limit their right to participation and to express their views.⁷⁰⁶

⁷⁰² CRC/C/15/Add.198 para. 25.

⁷⁰³ CRC/C/15/Add.199 para.30.

⁷⁰⁴ CRC/C/UGA/CO/2, para.35.

⁷⁰⁵ CRC/C/15/Add.85, para.15, 35. It can be noted that Ireland's second periodic report, due in 1999, was submitted to the Committee in August 2005. At the time of writing, no Concluding Observations had been issued concerning this report.

⁷⁰⁶ CRC/C/15/Add.232 para.27.

In many of its Concluding Observations the Committee on the Rights of the Child uses standard formulations when expressing its concerns on how a state party fulfils its obligations under the treaty, not least with regard to article 12. Nevertheless, the concerns expressed are serious. The Committee has established that traditional practices and attitudes form serious obstacles to the full implementation of article 12 and other civil rights for children, and that the child in some countries seems neither to be considered a subject of rights nor as an active participant in society. It is interesting to note that, as seen in the examples presented above, direct references to culture and traditional attitudes are much more frequent when the Committee comments upon non-Western states than when referring to Western countries. Whether this depends upon the fact that state parties in “the West” seldom employ “the culture argument” in their reports when seeking to explain inadequate implementation of the Convention, or simply that the Committee does not find that arguments referring to cultural particularities are relevant in a Western context, is difficult to say. Either way, in not recognising that culture and attitudes have as much impact on treaty implementation in the Western hemisphere as in other parts of the world, is to take a somewhat naïve stance, even though the cultural element might not appear as obvious in a socio-cultural context where the human rights discourse in its present shape at least in theory is an integrated part of state policy and practice.⁷⁰⁷

The Committee has complimented and encouraged states that have made progress in this field, but at the same time it has been persistent in its critical comments on ineffective or even lack of implementation – though criticism is always expressed in a diplomatic, consensus-seeking manner. The manner in which the Committee now expresses its concerns and asks follow-up questions at the examination sessions, however, appears to have sharpened somewhat more recently. Not only does the Committee give positive and negative feedback in its Concluding Observations, it also provides suggestions as to how a state party can improve its implementation of the Convention. Such suggestions often recommend a strengthening of efforts to promote respect for the views of children by initiating awareness campaigns, by reviewing and adopting appropriate legislation and policies and ensuring that civil servants receive appropriate training.⁷⁰⁸ Suggestions like these are revisited by the Committee when examining a particular

⁷⁰⁷ See Chapter 3.4.

⁷⁰⁸ See e.g. Concluding Observations to the reports of France 2004 (CRC/C/15/Add.240 para. 22), Brazil 2004 (CRC/C/15/Add.241 para. 37), Angola 2004 (CRC/C/15/Add.246), Costa Rica 2005 (CRC/C/15/Add.266 para. 22), Guyana 2004 (CRC/C/15/Add.224 para. 28), Iran 2005 (CRC/C/15/Add.254 para. 34), Kazakhstan 2003 (CRC/C/15/Add.213 para. 31).

state's subsequent report to see to what extent its recommendations have been followed.

As seen in the documentation presented above, when the implementation of children's right to participation is discussed, the culture argument is commonly referred to. In the following section, we explore the theoretical underpinnings of the universalism debate in order to provide a backdrop for an analysis of the applicability and validity of this argument.

6.4 Cultural Diversity and Human Rights

6.4.1 Questioning Universality

Cultural relativity is an undeniable fact; moral views and social institutions evidence astonishing cultural and historical variability.⁷⁰⁹

Those are the words of Jack Donnelly, an influential writer on universalism and cultural diversity and a strong defender of the universal legitimacy of human rights. How culture, in particular cultural diversity, should be addressed and reconciled with the dominant paradigm of universal human rights standards is one of the most discussed issues in the human rights discourse, not least in relation to the effective implementation of human rights provisions. As seen in the study above, arguments one way or another relating to cultural diversity are frequently applied not least in the context of children's right to participation.

The universality of human rights is a concept that, despite its strong position, has not been left uncontested. The relationship between culture and human rights law has been discussed since the adoption of the Universal Declaration on Human Rights in 1948. During the 1990s, an increasingly assertive non-Western discourse on human rights emerged, inspired by a general discussion on cultural diversity and universal values within the social sciences – not least in anthropology and philosophy.⁷¹⁰ This discourse is generally known as “cultural relativism”, a concept that (in a human rights context) has been defined as

⁷⁰⁹ Donnelly *Universal Human Rights in Theory and Practice* p. 89.

⁷¹⁰ The theory of cultural relativism was for many years very influential not least in the field of anthropology. One well-known example is the 1947 statement on human rights submitted by the American Anthropology Association (the AAA) submitted to the United Nations (Executive Board, American Anthropology Association, Statement on Human Rights, 49 *American Anthropologist* 539 [1947]) in which the notion of universal human rights was rejected and the idea of a universal human rights legal network was criticised as ethnocentrically Western. The Statement has since then often

the view that norms of justice are always relative to the society in which they are formed, reflecting values and practices that vary enormously from one society to another; that there is no “truth” outside these various local standpoints; and that it is therefore inappropriate to take the norms that emerge in one society as the measure against which to assess the practices of another.⁷¹¹

Eva Brems has argued that it is, however, somewhat misleading to refer to what she instead calls “a non-Western particularist human rights discourse” as ‘cultural relativism’.⁷¹² This is because culture is not the only particularist element that this discourse is based upon and, also, because the school of cultural relativism in Western social sciences opposes the idea of universal human rights as such.⁷¹³ In the present study, the more specific definition argued by Brems is applied unless otherwise stated.⁷¹⁴ The non-Western particularist discourse referred to in the present study is not incompatible with the idea of universal human rights – what it does is question how universal norms of human rights can and should be implemented in different cultural contexts.

The debate on universalism as it has been led in the human rights context has often crudely been described as the dichotomy between “the West and the rest”. “Human rights” was, in the early 1990s, referred to by those questioning the applicability of universal human rights norms as being a fundamentally Western, liberal concept and therefore not really applicable in other cultures and societies. Human rights were also widely perceived as being an attempt by the West to ensure its hegemony over the rest of the world through emphasising western oriented rights.⁷¹⁵ The argument has since developed and wid-

been referred to as ‘an embarrassment’ and in the 1990s, the A.A.A. made quite clear that its current position on human rights was very far away from the views expressed in the 1947 Statement. (See Karen Engle “From Scepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999” *Human Rights Quarterly* Vol. 23, 2001, pp. 536-559). Today, as noted by Preis in her aforementioned article, cultural relativism is no longer high on the anthropologist agenda (Preis “Human Rights as Cultural Practice: An Anthropological Critique” pp. 288-289). See, also Brems *Human Rights: Universality and Diversity* pp. 24-25, Cowan, Dembour & Wilson “Introduction” pp. 1-26, Hylland Eriksen *Små platser - stora frågor*.

⁷¹¹ Philips “Multiculturalism, Universalism, and the Claims of Democracy” pp. 115-138 (115).

⁷¹² Brems *Universality and Diversity* pp. 23-25.

⁷¹³ *Ibid.*

⁷¹⁴ Where other authors have used the term, it is however left unchanged.

⁷¹⁵ The literature on the topic is comprehensive. Brems in *Human Rights: Universality and Diversity* provides an analysis of non-Western human rights claims and therein refers to how universality is questioned in the Asian, African and Islamic human rights contexts (pp. 27-290). The essays included in András Sajó (ed.) *Human Rights with Modesty. The Problem of Universalism* Leiden, Martinus Nijhoff, 2004 considers

ened into including elements of postcolonial discourse and globalisation issues.⁷¹⁶ The non-Western particularist human rights discourse proposes alternative frameworks for human rights founded on the cultural context in which the concepts are to be applied. Its focus is on emphasising cultural diversity and difference.

Criticism of the idea of universally applicable human rights was particularly strong during the 1990s in South-East Asia, parts of Africa and the Islamic world. In the African context, it has in contemporary African statements and academic writings been emphasised that even though human rights norms as such can be universal, their implementation in the African context demands taking into account the particularities of the region – if one can refer to Africa as one single region – not least customary law and tradition.⁷¹⁷ Family law and the relationship between the individual and the family are areas where customary law and tradition is of particular interest in the African context.⁷¹⁸

In South East Asia, a number of states adopted the Bangkok Declaration, a preparatory statement to the 1993 Vienna World Conference on Human Rights.⁷¹⁹ The Bangkok Declaration is a good example of the particularist discourse as seen from a state perspective and is re-

universalism in a critical perspective. One insistent advocate of the position that human rights are a Western construct and that today's dominant human rights discourse rejects the cross-fertilisation of cultures and instead seeks to transform non-Western cultures into bleak copies of the West is Makau wa Mutua. See e.g. Makau wa Mutua "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties" 35 *Virginia Journal of International Law* (1994-95) pp. 339-380, "The Ideology of Human Rights" 36 *Virginia Journal of International Law* (1996) pp. 589-657, "The African Human Rights Court: A Two-Legged Stool?" *Human Rights Quarterly* 21 (May) 1999, pp. 342-363, *The Complexity of Universalism in Human Rights*, conference paper delivered at the 10th Annual Conference on "The Individual vs. the State" Central European University, Budapest, 14-16 June 2002, Mutua "Politics and Human Rights: An Essential Symbiosis". *Human Rights: A Political and Cultural Critique* Philadelphia, University of Pennsylvania Press, 2002.

⁷¹⁶ Some examples (of many): Karen Engle "Culture and Human Rights: The Asian Values Debate in Context" *International Law and Politics* Vol.32, pp. 291-333, 2000, Ibhawoh "Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State", Yash Ghai "Human Rights and Governance: The Asia Debate" *Asia-Pacific Journal on Human Rights and the Law* 1:9-52, 2000. Preis "Human Rights as Cultural Practice: An Anthropological Critique".

⁷¹⁷ Brems' conclusion after her examination of African human rights views (pp. 91-181) that "the rejection of human rights, which was sometimes part of the ant-European rhetoric of early independence, is extremely rare in contemporary African statements". *Brems Human Rights: Universality and Diversity* p. 180. See, also, The Tunis Declaration (A/CONF.157/AFRM/14, A/CONF.157/PC/57, 24 November 1992), "the African version" of the Bangkok Declaration. The Declaration stresses the African view of human rights.

⁷¹⁸ See Chapter 2.6.7.

⁷¹⁹ See *Report of the Regional Meeting for Asia of the World Conference on Human Rights* UN Doc. A/Conf.157/PC/59 (1993).

garded as being a main document in the so-called Asian values-debate.⁷²⁰ In the Declaration the following statement is made:

...while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.⁷²¹

Critique of the Bangkok Declaration has concentrated on the fact that the signatories of the Declaration considered national and historical particularities and cultural heritage as being valid objections to the paradigm of a universalistic human rights discourse.⁷²² At the core of the Declaration lies the presumption that in the socio-cultural context of a particular state, values other than those fundamental to a Western liberal context can prevail. This poses a problem of legitimacy for international human rights law affecting the implementation of human rights treaties. Proponents of Asian values argued that the concept of human rights is founded upon Western liberal ideas based upon individualism that does not conform to Asian culture based upon the primacy of the community and including strong elements of Confucianism.⁷²³ Implementing international human rights instruments without

⁷²⁰ Of the rich literature, cf., eg. Brems *Human Rights: Universality and Diversity* pp. 33-91 in which is provided a thorough survey of Asian human rights claims, Christina M. Cerna "East Asian Approaches to Human Rights" 2 *Buffalo Journal of International Law* (1995-1996) pp. 201-214, Engle "Culture and Human Rights: The Asian Values Debate in Context", Neil A. Englehardt "Rights and Culture in the Asian Values Argument: The Rise and Fall of Confucian Ethics in Singapore" *Human Rights Quarterly* 22 (2000) pp. 548-568, Ghai "Human Rights and Governance: The Asia Debate", Bilahari Kim Hee P. S. Kausikan "An East Asian Approach to Human Rights" 2 *Buffalo Journal of International Law* (1995-1996) pp. 263-283, Pollis "Cultural Relativism Revisited: Through a State Prism", Inoue "Human Rights and Asian Values", Amartya Sen "Human Rights and Asian Values" *The New Republic* 14/21 July, 1997, pp. 33-41, Sen *Utveckling som frihet* pp. 325-336. The debate on the universalism of human rights reached a peak in the 1990s with the so-called Asian values-debate. The Asian values-debate concerned the bases or obstacles to human rights in Asian cultures and traditions, taking its starting point in the presumption that in these societies other. The so-called Asian values were mainly argued by a circle of East and South-East Asian states which stated their view on the issue of universality in relation to their distinctive cultural heritage.

⁷²¹ Bangkok Declaration, para. 8.

⁷²² Brems *Human Rights: Universality and Diversity* pp. 55-69.

⁷²³ Brems argues that even though the individual is central to human rights protection in Europe as well as in the United States, the emphasis on the rights of the individual is in Europe complemented with a "rhetoric of solidarity". This, she asserts, together with the acknowledgement by European states of economic, social and cultural rights as valid human rights and a tendency in this region to take communal interests into account, makes the European approach to human rights – as compared to the U.S. approach – more suitable for rapprochement to non-Western human rights claims. Brems *Human Rights: Universality and Diversity* pp. 357-358.

thoroughly considering and adjusting the interpretation of the obligations enshrined within them, were therefore argued to be problematic within an Asian context.

One of the main arguments of the non-Western particularist human rights discourse is that universal human rights norms are firmly rooted in a Western context and therefore not easily applicable in other parts of the world where other values, such as “the good of the community” are argued to be ranked higher than what is referred to as Western ideals of liberalism and individualism.⁷²⁴ This could lead to the assumption that arguments based upon culture and traditional practices are not referred to in the West regarding human rights since “the West is the norm”.⁷²⁵ Such a conclusion, however, is naïve and simplistic. Deliberations based upon the socio-cultural context are made in every society and important differences exist within the Western context as well as elsewhere. One example is the European recognition of economic, social and cultural rights as being equally important to civil and political rights (by ratification of the European Social Charter and by the inclusion, in some countries, of these rights in their constitutions) which is a view not shared by the United States which tends to emphasise civil and political rights.⁷²⁶

In the context of the European Convention on Human Rights, the differences existing between the contracting states are accommodated for through the doctrine of the margin of appreciation.⁷²⁷ The margin of appreciation doctrine is a fundamental principle of interpretation in the regional human rights system in Europe – which could be argued to be based upon the same wish to satisfy “national and regional particularities and various historical, cultural and religious backgrounds” as referred to in the Bangkok Declaration. The doctrine is developed in the case law of the European Court of Human Rights (ECtHR) and must be understood in the light of the subsidiary nature of the European Convention on Human Rights (ECHR) in relation to the legal systems of the state parties. The doctrine allows for a state party to the ECHR a certain measure of discretion when taking legislative, administrative or

⁷²⁴ See the discussion on liberalism and culture in Barry *Culture and Equality*.

⁷²⁵ Thomas M. Franck discusses the idea of “Western values” in *The Empowered Self. Law and Society in the Age of Individualism* Oxford, Oxford University Press, 1999. pp. 101-150.

⁷²⁶ See n. 723 *supra*.

⁷²⁷ For a discussion on how a margin of appreciation-doctrine could be used as a tool to balance uniformity and diversity within a universal human rights law context, see Brems *Human Rights: Universality and Diversity* pp. 357-422 and Eva Brems “The Margin of Appreciation Doctrine of the European Court of Human Rights. Accommodating Diversity within Europe” pp. 81-110 in *Human Rights and Diversity. Area Studies Revisited* David P. Forsythe & Patrice C. McMahon (eds.) *Human Rights and Diversity. Area Studies Revisited* Lincoln, Neb., University of Nebraska Press, 2003.

judicial action in the area of a right covered by the Convention as the state party is presumed to be best qualified to appreciate the necessary measures to be taken in matters affecting its own jurisdiction.⁷²⁸ The degree of discretion allowed for a state party to the Convention varies depending upon the particular situation, being at its most generous in cases of public emergency, certain cases of national security and when the contracting parties share little common ground.

An important difference between the European margin of appreciation and the non-Western particularist views expressed in the Bangkok Declaration, is that the margin of appreciation is subject to supervision by for, example, the ECtHR. The ECtHR has clearly stated that the doctrine should by no means be regarded as a *carte blanche* for state parties to justify breaches of the Convention.⁷²⁹ The Bangkok Declaration – which contrary to the ECHR is not a legally binding document – is not subject to monitoring by any such watchdogs or to any formal restrictions. The recommendations issued by treaty monitoring bodies such as, for example, the Human Rights Committee or the Committee on Economic, Social and Cultural Rights are not legally binding in the same way as a judgment by the ECtHR and therefore, in practice, does not have the same deterrent effect. Therefore, presumably, the Declaration can more easily be exploited by, for example, governments trying to justify and cover up human rights violations. What is interesting to note, however, is that the starting point of the argument for a certain measure of discretion to be allowed for a state based upon cultural particularities is very similar for the Bangkok Declaration and for the European Convention on Human Rights. The concerns expressed regarding the values that underpin the Bangkok Declaration are, however, seldom heard in relation to the doctrine of the margin of appreciation in the European context.⁷³⁰ Whether this depends upon Western

⁷²⁸ D. J. Harris, M. O'Boyle & C. Warbrick *Law of the European Convention on Human Rights* Butterworths, London, 1995 p 12. See also Ian Brownlie *Principles of Public International Law* 6th ed. Oxford University Press, Oxford, 2003 p. 549.

⁷²⁹ Harris, O'Boyle & Warbrick p 12-15. See also the reasoning by the ECtHR in e.g. *Handyside v. the United Kingdom* Judgment 7 December 1976, Series A no. 24, paras. 47-50, *Dudgeon v. the United Kingdom*, Judgment of 22 October 1981, Series A no. 45 and *Case of Open Door and Dublin Well Woman v. Ireland* Judgment 29 December 1992, Series A no. 246-A, para.68.

⁷³⁰ *Tyrer v. the United Kingdom* (n. 166 *supra*) is one of the few examples of where the Court refers to matters of tradition. In the case, an adolescent boy resident at the Isle of Man was caned as punishment for an offence he was convicted of. The applicant argued that the sentence amounted to degrading treatment and, therefore, constituted a violation of article 3 of the ECHR. One of the arguments presented by the Manx Attorney General was that that the judicial corporal punishment at issue in this case was not in breach of the Convention since it did not outrage public opinion in the Island – implying it was accepted in society (para.31). The Court, however, concluded that no local requirement relative to the maintenance of law and order would entitle

values being regarded as norms that need not be questioned, as opposed to the values underlying non-Western documents and deliberations, is a question worthy of much consideration. It can, for example, be noted that in the case law of the ECtHR on children in custody the approaches of the European countries to parental rights vary considerably, showing also that within the European context there are significant variations in relation to values that are considered to be most important to protect.⁷³¹ It is also obvious that within a relatively homogeneous context such as that of Europe, the differences are thus in many cases too significant for a uniform conception of human rights to be conceived.⁷³² Culture and tradition, regardless of what it is called, has as great an impact on the implementation of treaty provisions in the European context as it has elsewhere in the world. The difference is that they are often not called by this name.⁷³³

6.4.2 Accommodating Claims of Cultural Diversity and Particularity – Different Approaches

The fact that culture and traditional attitudes are elements having an impact on the interpretation and implementation of human rights norms is both pointless and impossible to completely ignore. The problem lies rather in which way arguments based upon culture and tradition are deployed by states. A typical critique of states defending the way in which human rights treaties are implemented on the national

any state, under article 63, to make use of a punishment contrary to article 3 as the prohibition contained in the article is absolute. The Court concluded that there were no local requirements affecting the application of article 3 in the Isle of Man and, accordingly, that the applicant's judicial corporal punishment constituted a violation of that article. In the judgment, references are made to the possibility of significant social or cultural differences justifying different application of article 3 on the Isle of Man and the United Kingdom respectively which could be relevant to the application of article 3, an argument however dismissed by the Court. (para.37).

⁷³¹ In the case of Sweden, where the authorities seem inclined to take children into custody more than in many other European countries, see e.g. *Olsson v. Sweden* (No.1) (see n. 195 *supra*), *Olsson v. Sweden* (No.2) (*ibid*) and *Eriksson v. Sweden* Judgment 22 June 1989, Series A no. 156.

⁷³² For a discussion of universality in the European context, see for example, Päivi Leino. Päivi Leino "A European Approach to Human Rights? Universality Explored" *Nordic Journal of International Law* 71, 2002, pp. 455-495.

⁷³³ The first Protocol to the European Convention on Human Rights (ETS No.009) protects the right to education (article 2) which states that "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions", this way accommodating cultural diversity in the context of education, besides ensuring the right of parent to decide what is best for their children.

level by referring to the country's culture and tradition, is that the particular state, when playing "the culture card", is merely seeking to escape criticism and to justify repressive practice. By deploying the language of cultural relativism the dominant elite of a state can consolidate its grasp of power in the name of protecting a country's particular culture. That states when cynically referring to cultural distinctiveness and fundamental values undermine the normative value and practical applicability of international human rights law, as was discussed previously in the analysis of state party reports and statements of country delegates on the topic of implementing article 12, is a position taken up by academics as well as non-state actors. Other states, however, do not seem to comment on this subject to any particular extent.

To dismiss completely arguments of cultural diversity is neither possible nor advisable. Societal norms, tradition, attitudes and practices vary considerably depending upon the socio-cultural context of a country. This is a fact, not a made-up argument. It is also a fact that in one way or another, this has to be addressed in order for human rights norms to assume credibility. This is important, especially in a treaty such as the Convention on the Rights of the Child, whose provisions and the values that they represent might well be presumed to be universally accepted and uncontested, since the Convention has been ratified by almost every country in the world.⁷³⁴ The reality, however, is somewhat different. Though the Convention has been overwhelmingly ratified by no means has this led to its being effectively implemented by all the state parties concerned. On the contrary, no state has escaped criticism in relation to inadequate implementation.⁷³⁵

In order to try to find ways of accommodating or countering claims of cultural diversity, different approaches have been presented – not least in the academic debate. One well-known voice is the aforementioned Jack Donnelly, whose principal aim has been to "explicate and defend an account of human rights as universal rights" on both a moral and normative level.⁷³⁶ He defines human rights as being something universally applicable, but at the same time does not contest the idea that the origin of modern human rights thinking lies in a Western liberal tradition.⁷³⁷ To Donnelly, the case for universality is not affected

⁷³⁴ On reservations and declarations to the CRC, see section 6.4.2.

⁷³⁵ Even Norway, which has a very good general record in implementing the Convention, has been criticised by the Committee on the Rights of the Child on certain points. See Concluding Observations CRC/C/15/Add.263.

⁷³⁶ Donnelly *Universal Human Rights in Theory and Practice* p. 1.

⁷³⁷ Jack Donnelly "Human Rights and Western Liberalism" pp. 31-58 in A.A. An-Na'im & Francis Deng (eds.) *Human Rights in Africa. Cross-Cultural Perspectives* Washington D.C., Brookings Institution, 1990.

by the origins or composition of human rights. He argues that today human rights form part of mankind's global cultural heritage, and that the Universal Declaration on Human Rights is a sort of lowest common denominator for human rights that is recognised by all, irrespective of the socio-cultural context in which they live.⁷³⁸ Without denying the existence of cultural relativity and diversity, Donnelly argues that culture poses only a modest challenge to the contemporary normative universality of human rights norms.⁷³⁹ He proposes what he calls a *weak cultural relativism* that "considers culture a secondary source of the validity of a right or rule".⁷⁴⁰ Weak cultural relativism presumes universality, but can simultaneously allow for limited local variations in order to check what Donnelly refers to as "potential excesses of universalism".⁷⁴¹ These legitimate "variations on a theme" of international human rights norms can concern the *substance* of lists of human rights, the *interpretation* of certain rights and the *form* in which these rights are implemented.⁷⁴² By *substance* or *concept*, Donnelly refers to "an abstract, general statement of an orienting value", by *interpretations*, he means variations that are plausible and the scope of which are relatively modest, and by *form*, he refers to the implementation of a norm.⁷⁴³ The only level on which he argues for universality is at the level of the concept – which, as he points out, corresponds with the reference to "a common standard of achievement for all peoples and all nations" in the Universal Declaration on Human Rights.⁷⁴⁴

Abdullahi Ahmed An-Na'im, also a strong voice on cultural diversity, adopts a less strict position. An-Na'im presents himself as being committed to 'the moral superiority of the Western doctrine of human rights', but simultaneously argues in favour of the fundamental importance of both an *internal* cultural discourse, recognising that a culture is not so much a static entity as a multi-vocal process, and a *cross-cultural dialogue* in order that a truly universal doctrine may de-

⁷³⁸ Donnelly proposes a substantial theory of human rights that he has called the Universal Declaration model which recognizes the central role of the UDHR "in establishing the contours of the contemporary consensus on internationally recognized human rights." See Donnelly *Universal Human Rights in Theory and Practice* p. 22.

⁷³⁹ Donnelly *Universal Human Rights in Theory and Practice* p. 89. Donnelly, contrary to Brems (see Chapter 6.4.1 *supra*) does not distinguish between the cultural critique of the present human rights system presented by non-Western actors (the particularist human rights discourse argued by Brems) and the cultural relativist critique of the universality of human rights as such. He uses 'cultural relativism' as a general term covering both these aspects, something that is commented upon by Brems. Brems *Human Rights: Universality and Diversity* pp. 335-338.

⁷⁴⁰ Donnelly *Universal Human Rights in Theory and Practice* p. 90.

⁷⁴¹ *Ibid.*

⁷⁴² *Ibid.*

⁷⁴³ *Ibid* pp. 93-98.

⁷⁴⁴ *Ibid* p. 97.

velop.⁷⁴⁵ An-Na'im declares that since it is not realistic to deny that some human rights standards are lacking in cultural legitimacy, it is

preferable to adopt a constructive approach that recognizes the problems and addresses them in the context of each cultural tradition, as well as across cultural boundaries.⁷⁴⁶

The principal aim of this approach is to enhance the credibility of national as well as international human rights standards by developing effective ways of promoting and implementing those rights.⁷⁴⁷ An-Na'im, in his proposed cross-cultural approach, discusses the possibilities of cultural reinterpretation and reconstruction and concludes that a cross-cultural analysis can lead to revisions and/or reformulations of already existing human rights standards, while at the same time emphasising that such measures should not be recommended lightly.⁷⁴⁸ He also admits that in seeking to retroactively legitimise existing international human rights standards there is a possibility that reformulation and revision of these standards will become necessary. Thereby, he exhibits his openness to alternative interpretations and even a renegotiation of human rights in a way that could be difficult to accept with reference to the risk of such adjustments in the long run threatening the impact of human rights norms. A problem, however, with the cross-cultural approach that An-Na'im proposes is that it is not quite clear on how to deal with practices that are in direct conflict with universal human rights standards. A typical example is seen in the dichotomy

⁷⁴⁵ Cf., e.g. A. A. An-Na'im "Problems of Universal Cultural Legitimacy for Human Rights" pp. 331-368 in A. A. An-Na'im & Francis Deng (eds.) *Human Rights in Africa: Cross-Cultural Perspectives* (1990), "Introduction" and "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment," in A. A. An-Na'im (ed.) *Human Rights in Cross-Cultural Perspectives. A Quest for Consensus* Philadelphia, University of Pennsylvania Press, 1992, "Cultural Transformation and Normative Consensus on the Best Interest of the Child," *International Journal of Law and the Family*, vol. 8 (1994), pp. 62-81, "Human Rights in the Arab World: A regional perspective" *Human Rights Quarterly* Vol. 23, No.3 2001, pp. 701-732, "'Area Expressions' and the Universality of Human Rights" pp. 1-21 in David P. Forsythe & Patrice C. McMahon (eds.) *Human Rights and Diversity. Area Studies Revisited*, "The Interdependence of religion, secularism, and human rights" *Common Knowledge* 11:1 2005 pp. 56-80.

⁷⁴⁶ A. A. An-Na'im "Introduction" p. 3.

⁷⁴⁷ An-Na'im has illustrated his proposed approach by applying it to the concept of cruel, inhuman or degrading treatment or punishment as it is perceived and interpreted in Shari'a law and international human rights law respectively. A. A. An-Na'im "Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment".

⁷⁴⁸ An-Na'im "Introduction" pp. 5-6. See also A. A. An-Na'im "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights. The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment" pp. 19-43.

existing between the prohibition on torture – which has the status of *ius cogens* in international law – and the punishments prescribed in Shari’a law for certain offences such as *zina* (fornication) which is punishable by whipping or stoning.⁷⁴⁹ These sentences are likely to, in a non-Shari’a context, to be considered as constituting torture or at least inhuman or degrading treatment or punishment. One danger of the cross-cultural approach might be that in the interests of accommodating many different cultures and traditions, the protection of human rights becomes diminished and core rights compromised which will endanger not least those groups that cannot protest loudly enough against their rights being circumscribed.

Yet another approach to justifying the universality of human rights as a concept is to attempt to identify universal features of human beings as grounds for these rights. Amartya Sen and Martha Nussbaum have argued in favour of the idea of *human capabilities* for which human rights are the measure of protection. A capability is an opportunity to achieve certain valuable human functionings, be it to be adequately nourished or a certain standard of living. The point is that these capabilities are not dependent on which societal context or country a person lives in, but are connected to the dignity of the human person as such. Hence the concept’s universal applicability. The concept of capabilities was first introduced in Sen’s work with the Human Development Index and has since then been developed by Sen and Nussbaum respectively.⁷⁵⁰

One important difference between the approaches of Sen and Nussbaum is that Sen does not offer a clear distinction between essential and non-essential capabilities, a fact creating certain difficulties. Neither does he present any ranking of which capabilities are more important to protect. Instead, he argues that such a ranking must emerge from public discussion in the context in which the capabilities measure is to be applied. Parallels can here be drawn to Donnelly’s argument on the importance of universality first and foremost on the concept level, as well as with An-Na’im’s proposed cross-cultural approach. The fact, however, that Sen is silent on which capabilities are to form a basis for human rights makes it somewhat problematic to decide which capabilities have “moral ground” to create rights. Nussbaum, on the other hand, presents an extensive list of human capabilities which she describes as commanding cross-cultural consensus.⁷⁵¹ Nussbaum argues that there is a close connection between the concepts of human

⁷⁴⁹ An-Na’im “Toward a Cross-Cultural Approach to Defining International Standards of Human Rights. The meaning of Cruel, Inhuman, or Degrading Treatment or Punishment” pp. 33-37.

⁷⁵⁰ N. 9 *supra*.

⁷⁵¹ Nussbaum *Women and Human Development. The Capabilities Approach*.

rights and capabilities, and that there are many reasons to see capabilities *as* rights.⁷⁵²

Both Sen and Nussbaum, irrespective of their somewhat different applications of the capabilities approach, are strong proponents of a universal view of human rights, and dismiss arguments against universality based on an idea of culture and values being very different depending on which society is concerned. This is done both by emphasising that ideas of freedom and personal autonomy exist in all cultures, not only the Western liberal context, and that the idea of human dignity is present in some fashion in every culture. Sen points out, when discussing the concept of Asian values, that too much weight is attached to what the dominant elites present as societal norms and attitudes – the views of other actors must also be taken into account for the diverse ideas making up every society to be properly taken into account.⁷⁵³ The same argument is advanced by Nussbaum in the context of women's rights in India.⁷⁵⁴

Jack Donnelly, Abdullahi Ahmed An-Na'im, Amartya Sen and Martha Nussbaum represent three approaches as to how the challenge of cultural diversity and how it is to be accommodated can be met. One sees the universality of human rights as being an incontestable norm the credibility of which cannot be seriously questioned by arguments based upon cultural diversity. The second is a more flexible – or perhaps compliant – reply that attempts to accommodate alternative perceptions of rights and duties by reinterpreting or even changing existing norms, thereby seeking to ensure the continued applicability of at least the core of human rights standards. The third response, represented by Sen and Nussbaum, is perhaps a more philosophical approach focusing less on the actual norms than on the idea of the capabilities and wishes that people have in common, irrespective of where they live. All three alternatives, however, acknowledge as a fact the impossibility of denying the impact of cultural diversity on the implementation of international human rights standards.

It is also considered as a fact in these three alternatives that culture and traditional attitudes as concepts must in some way be addressed in the human rights discourse for that discourse to be realistic and not lose its legitimacy. The extent, however, to which relativist considerations shall be allowed is a fundamental question – a question to which the solution can only be found if acting in a spirit of respect both for individual human rights and dignity and for the diversity of values and practices that our world consists of. Donnelly's model of a weak cul-

⁷⁵² *Ibid.*

⁷⁵³ Sen *Utveckling som frihet*, Chapter 10.

⁷⁵⁴ Nussbaum *Women and Human Development. The Capabilities Approach*.

tural relativism might be the way to go, focusing on the universality of concepts and not, primarily, on implementation in detail. The acknowledgement that cultural diversity is a necessary part of the puzzle named human rights implementation, but one that should not be allowed to completely dominate it, is perhaps the most important conclusion to be drawn from the debate of cultural relativism versus universalism. It is also one of the most important things to bear in mind when applying the theoretical arguments to problems in practice.

6.5 Is Culture a Valid Argument?

References to culture and traditional attitudes are, as previously indicated, used by state parties to the Convention on the Rights of the Child to explain and excuse their difficulties with implementing article 12. Those referring to culture and traditional attitudes as being obstacles are in almost all cases non-Western states. What needs to be considered is how “the culture argument” is adduced by some countries, why it is applied by some but not by others and, finally, whether or not using culture and traditional attitudes as an excuse or justification for poor implementation is valid in the context of the child’s right to participation.

From those arguing in favour of a “particularist” standpoint, references to the socio-cultural context of a particular society are valid justifications for countries when they do not interpret or implement human rights norms in a prescribed way. As presented above, explanations and justifications drawing on cultural diversity generally refer to the incompatibility and inapplicability of Western-based norms in non-Western societies. Such arguments can be found not least in relation to those human rights obligations regarded as being controversial and progressive. The child’s right to participation in decision-making processes, as established in article 12 of the Convention, is considered to be radical and progressive – not least because it clearly presents the view of the child as an individual and a rights holder, elements that are central to a Western liberal tradition. This is thus the kind of obligation where relativist arguments might be expected to be applied. However, as shown in the examination of state reporting presented in this chapter, this does not seem to be the case. State parties do often state that traditional attitudes and culture produce obstacles for effective implementation of article 12. States, however, do not invariably try to justify poor results by claiming that the right of the child to have his or her views respected and taken into account is incompatible with the traditions and culture of their communities. Instead, state parties in their reporting seem to draw a distinction between the modern, enlightened

state, striving to implement human rights standards, and the “backward” traditional attitudes prevailing among their populations on a fundamental level.⁷⁵⁵ The Committee on the Rights of the Child on its part, however, refers to traditional attitudes and culture as being important reasons as to why the implementation of article 12 in a particular country is unsatisfactory and urges the states to address these problems and to deal with them in a serious manner. The Committee thus seems to consider culture and traditional practices as more of a problem than what seems to be the case with state parties themselves. The Committee’s comments to Syria and Bolivia above illustrate their concern. Regarding Syria:

it [the Committee] is concerned that traditional attitudes towards children in society may limit the respect for their views,⁷⁵⁶

and regarding Bolivia

it [the Committee] remains concerned at the persistence of traditional attitudes in the State party which, among other things, limit children’s right to participation and to express their views. It notes with concern the limited possibilities available to children to participate in and express their views in decision-making procedures affecting them, particularly in schools and communities.⁷⁵⁷

In this context it can be noted that what is actually meant when referring to culture and traditional attitudes is not specifically identified. “Culture” as a concept is not properly examined either by the state parties or as might have been expected, by the Committee on the Rights of the Child. Neither did the Committee seem to have wished to engage in any discussion on the impact of cultural diversity and of the use of arguments based upon culture and traditional attitudes as justifications for poor implementation. It is not implied here that the Committee on the Rights of the Child is not familiar with the debate on cultural relativism – far from it – but to point out that the lack of definitive or interpretative meanings for the concepts of culture and traditional values, as presented by state parties, seems to be taken for granted by the Committee in its comments. There are many different interpretations of “culture” and the notion, for example, that it is the dominant elite, with an interest in preserving existing power structures in a society, that hold the preferential right of interpretation of what constitutes the particular culture of a society, could have also been the

⁷⁵⁵ See Chapter 6.3.3 *supra*.

⁷⁵⁶ CRC/C/15/Add.212 para. 30.

⁷⁵⁷ CRC/C/15/Add.256 para. 25.

subject of a valuable discussion in this context.⁷⁵⁸ This not least as the more vulnerable groups in any society – in which children must be counted – seldom benefit from a position where traditional values are seen as an unchangeable fact. This is particularly relevant within the context of progressive rights such as the child’s right to participation.

Looking further at how the “culture argument” is used, it can be questioned whether a sharp distinction can actually be drawn between the “traditional attitudes of the people” and the “modern position of the state”. This distinction seems to be attempted by many state parties – while at the same time pointing out the importance of considering their particular cultural and societal context when analysing the state’s implementation of treaty obligations. The traditional emphasis on child protection rather than on child participation is not limited to conservative groups in society. This is evidenced by the fact that child protection is a prominent feature in the domestic legislation of many states.⁷⁵⁹ The legal system of a particular country is always part of its social system and therefore reflects the social, political, economic, and cultural characteristics of that society. Without doubt, the cultural context of a country, including its traditions, customs, norms and ideals therefore exerts a strong influence on how international human rights instruments are interpreted and implemented. The socio-cultural context of a country *de facto* determines how legislation is interpreted and implemented. Prevailing cultural and traditional attitudes that allegedly go against “modern” concepts such as child participation thus most likely permeate society at all levels in one way or another, not only at the “grassroots”. Drawing a sharp line between the position of the state and the position of the population (if, as discussed earlier, it is even possible to talk about one single position being acceptable to the whole of a population on any matter) thereby becomes an uninteresting enterprise, which does not contribute to solving any problems in practice as regards the implementation of treaty provisions.

However, as indicated initially in this section, not all state parties experiencing difficulties with implementing article 12 refer to culture and traditional attitudes as an explanation. Western states hardly ever employ the culture argument. Is this because culture and tradition – however they may be identified – are simply more prominent obstacles in non-Western states than in Western countries, or is it because such arguments are more accepted, and perhaps also more expected, when advanced by a non-Western state? Whatever the reason, the fact that culture and traditional attitudes are advances as explanations by some

⁷⁵⁸ See section 6.2.1 - 6.2.2 *supra*.

⁷⁵⁹ Van Bueren *The International Law on the Rights of the Child* p. 19.

states but not by others could lead to the presumption that culture and tradition in this context are not issues in a modern Western country.

Such a presumption, however, would be too simplistic. It would be naive to think that traditional attitudes towards human rights do not exist in states in the West just because the roots of the contemporary human rights discourse are claimed to be found in Western liberalism from the eighteenth century onwards. What is interesting is that “the cultural argument” does not seem to form part of the vocabulary adopted by Western states reporting on the implementation of article 12 to the Committee on the Rights of the Child. One reason could be that by referring to culture and traditional attitudes it would not correspond with the desired image of the progressive, developed, modern democratic state where the universal applicability of human rights is the norm, a category of states in which Western states are likely to include themselves.⁷⁶⁰ Accordingly, conclusions based upon culture are not made, since the impact of culture does not seem to be considered a relevant issue in the context of a modern Western – or Westernised – state. However, in as discussed in section 6.4.1, the principle of margin of appreciation as applied by the European Court of Human Rights can very well be seen to be an instrument for dealing with local differences within the European context, differences that in many cases can be defined as being rooted in the particular culture of a community. The impact of cultural diversity and traditional attitudes thus in a way is also recognised in this part of the world, although the vocabulary used is not the same.

But the problem of citing culture and traditional attitudes to explain poor implementation of article 12 does not stop here. From the human rights law point of view, arguments referring to culture and traditional attitudes do not relieve states from their obligations to implement a human rights treaty by which they are bound. Traditional, historical, religious or cultural attitudes cannot be used as justifications for human rights violations. Cultural relativist-tainted arguments questioning not only a certain mode of implementation but the right as such – or the concept of the right, as Donnelly might well put it – are not accepted in the mainstream human rights discourse nor in treaty body jurisprudence. Furthermore, it is a fact that regardless of whether or not a state party acknowledges the impact of culture and traditional attitudes, cultural diversity and the socio-cultural context of a society – irrespective of how modern, progressive and democratic a country might be – do in fact have a very substantial impact on how the articles

⁷⁶⁰ Of course, all so-called “modern” states are not progressive: many would argue that the United States is one of the more conservative countries in the world – but that it is a modern democratic state is perhaps not as often questioned.

of a treaty are implemented. No interpretation is ever made in a cultural vacuum.

Nevertheless, on implementing the right to participation, the similarities, judging from the obstacles for implementation described by state parties, by far outnumber the differences. This is particularly striking regarding the democracy aspects of article 12, on which most countries – and also the Committee – are noticeably silent. All state parties to the Convention seem to experience the same difficulties in implementing this right. The obstacles of an effective implementation of article 12 seem more difficult to overcome and of a different nature than what is the case regarding many other articles of the Convention. This is perhaps because the matter of power and the exercise of power becomes very real when an individual is seen as being an active participant in decision-making processes. That children would be able to exercise real influence over their lives and in those matters related to their lives can, as we have seen in the reports, be difficult to accept, especially in conservative communities. It seems that looking at the way in which “childhood” is understood in societies around the world, the way the child and his or her abilities are looked upon is not fundamentally different between one society and another.⁷⁶¹ There are, of course, variations – sometimes significant ones – but it still seems as if hesitation to implement article 12 in all its aspects, including the most controversial ones, is present in almost all countries. Above all, it seems to be a question of attitudes and the position of the child – in particular children’s participation and the right to have their views respected and taken into account. If it is a question of culture, one could perhaps see it as a culture permeating all countries. This perhaps disqualifies “culture” as a valid argument. As I see it, the answer to what is at the root of the difficulties of implementing article 12 and the child’s right to participation must therefore lie beyond the culture argument and address the fact that a thorough implementation of all aspects of article 12, including the democratic aspects of the right to participation, would entail a redefinition of existing societal and power structures and re-allocating power to a previously marginalised group. This is undoubtedly a difficult task with far-reaching consequences, and it is not surprising that it is not at the top of every state party’s political agenda.

⁷⁶¹ See the discussion in Chapter 2.

7 The Example of India

7.1 The Universe that is India

The following section on India is included in this study as an example of how a state party describes its implementation of the child's right to participation and the responses this description evokes from the monitoring body of the Convention on the Rights of the Child. The purpose is to show how the state party itself describes its accomplishments, how the Committee on the Rights of the Child comments upon them and if, and in such case how, arguments referring to culture and traditional attitudes are adduced in a society as culturally diverse as India. The diversity of Indian society and the complexity of the task of implementing legislation of any kind in such a context is one important reason for choosing India as an example. An equally important reason is that it is a country with a population of more than one billion people, which means that the implementation of the Convention affects a very large number of individuals in this one single country.⁷⁶² This makes it interesting to study how the performance of this obligation is exercised and described. Furthermore, India is a federal, secular democratic republic – often described as the world's largest democracy.⁷⁶³ Although democracy as a political system in India has had to struggle with the undemocratic social structures of the past that still prevail, compromising democratic practice – the caste system, poverty and widespread corruption are just a few examples – it is nonetheless a functioning democracy.⁷⁶⁴ The right to participation in decision-making processes

⁷⁶² See http://www.censusindia.net/t_00_003.html (visited 12/10/2005).

⁷⁶³ On the Indian democratic structure in general, see, for example, Shalendra D. Sharma *Indian Politics* pp. 63-92 in Sumit Ganguly & Neil DeVotta (eds.) *Understanding Contemporary India* New Delhi, Viva Books, 2003.

⁷⁶⁴ For a discussion of Indian democracy, see, for example, Ian Buruma "India: The Perils of Democracy" pp. 3-33 in Robert B. Silvers & Barbara Epstein *India: A Mosaic* New York, New York Review Books, 2001, Jean Drèze & Amartya Sen *India. Development and Participation* 2nd ed. New York, Oxford University Press, 2002 pp. 349-350, Pratap Bhanu Metha "Hinduism and Self-Rule" in *Journal of Democracy* Volume 15, Number 3 July, 2004 pp. 108-121, Pratap Bhanu Metha "India: Fragmentation Amid Consensus" *Journal of Democracy* 8.1, 1997, pp. 56-69, Arundhati Roy *The Algebra of Infinite Justice* pp. 263-295 New Delhi, Penguin Books India, 2002 and Pavan K. Varma *Being Indian. Inside the Real India* London, William Heineman, 2005 pp. 16-56.

is thus presumably a principle carrying a certain amount of weight in Indian society and politics and therefore something that should not easily be ignored – not least in relation to children. It is therefore interesting to analyse how India presents its implementation of the child's right to participation as established in article 12, and how it has chosen to argue regarding problems in its implementation.

7.2 Basic Facts

India is the seventh largest country in the world. It is a union of 28 states and seven Union Territories, reflecting not only a geographical but also a rich cultural diversity. According to the 2001 census, some 350 million (34%) of India's citizens are children.⁷⁶⁵ The census, however, defines children as persons between 0-14 years, which means that there are a number of children in the 15-18 age group not identified as children in the statistics.⁷⁶⁶ The total number of children in India is therefore presumably closer to 400 million.⁷⁶⁷ In the age group 0-6 years the sex ratio according to the census is 927 – that is, there are 927 girls to every 1,000 boys – indicating a decline in the last decade of the number of girls born (or at least registered).⁷⁶⁸

⁷⁶⁵ Government of India – Ministry of Women and Child Development: Department of Women and Child Development Annual Report 2005-2006, Chapter 1.1.

⁷⁶⁶ In India there are several different definitions of the child – see Chapter 7.4.2.1 *infra*. The definition of who is a child (0-14 years) chosen for the purpose of the census corresponds with the age limit for compulsory education (see Chapter 7.3.2 *infra*) which might be an explanation.

⁷⁶⁷ See India's 2003 report to the Committee on the Rights of the Child (CRC/C/93/Add.5) para.2. and A. B. Bose *The State of Children in India. Promises to Keep* New Delhi, Manohar, 2003 pp. 20-44. Of these 400 million children, around 164 million are aged between 0 and 6 years. http://www.censusindia.net/t_00_004.html (as visited 12/10/2005).

⁷⁶⁸ On the sex ratio for 0-6 year olds, see http://www.censusindia.net/t_00_003.html (as visited 12/10/2005) and Bose *The State of Children in India. Promises to Keep* pp. 28-32. The sex ratio of the country as a whole according to the 2001 census was 933 – that is, there were 933 women to every 1,000 men, see http://www.censusindia.net/t_00_004.html (as visited 12/10/2005). See also there contained references to the 1991 census. According to more recent statistics published by the United Nations Department of Economic and Social Affairs (Populations Division) the male to female ration in India in 2005 was 105 males to 100 females. As a comparison, many countries in sub-Saharan Africa, as well as in Europe, have higher female-male ratios, implying that economic development does not have to be the deciding factor for the possibilities of survival for men and women respectively. For statistics, see the World Population Prospects (The 2004 Revision) Highlights (ESA/WP.193), 24 February 2005, issued by the United Nations Department of economic and Social Affairs, Population Division. For a discussion on female-male ratios and their causes, see Drèze & Sen *India. Development and Participation* pp. 229-245.

India is governed by a central government, seated in New Delhi, and state governments, one for each state or Union Territory.⁷⁶⁹ Below the state governments there are a number of formal and informal structures known as local self-government that should be understood as constituting the administration of a locality of any kind smaller than a state (a village, town, city and so on) by a body representing the local inhabitants.⁷⁷⁰ An important component in the governmental structure is the *panchayati raj* – traditional village councils. Their revitalisation and empowerment was intended to widen the democratic base for Indian polity and to open up new possibilities, not least for women's participation.⁷⁷¹

The federal states of India vary greatly in terms of language, culture and human and economic development. Religion is a feature central to Indian culture affecting people's lives in a multitude of ways. Hinduism is the dominant religion and its values and practices therefore influence not only Hindus but Indian society as a whole. Other faiths, however, have had (and still have) an impact.⁷⁷² In later years Indian society has gone through great changes and is increasingly taking up an important position on the global arena economically as well as politically.⁷⁷³ The Indian economy is booming and the middle-class is growing rapidly.⁷⁷⁴ Simultaneously, India still has to continue to wage its battle against poverty and its attendant negative ramifications such

⁷⁶⁹ The key institutions of national governance in India are the executive, composed of the President and the Council of Ministers, headed by the Prime Minister; legislature, the Parliament (the Lok Sabha [lower house] and the Rajya Sabha [the upper house]); and the judiciary, the Supreme Court of India.

⁷⁷⁰ Sharma *Indian Politics* p. 69.

⁷⁷¹ The *panchayati raj* are by all levels of government endowed with such powers and authority so that they can function as units of self-government. The self-governing system of the villages was not originally recognised in the main body of the Indian Constitution, but through the 73rd and 74th Constitution Amendments which entered into effect in 1993, the importance of the local bodies was recognised. See Drèze & Sen *India. Development and Participation* pp. 358-363, Sharma *Indian Politics* p. 69 and Mathew "Panchayati Raj Institutions and Human Rights in India" p. 155 with references.

⁷⁷² The principal religious groups are Hindu, Muslim, Christian, Sikh, Buddhist and Jain. Around 82 per cent of the population is Hindu (see India's first periodic report to the Committee on the Rights of the Child, CRC/C/28/Add.10, para.1). See also Ainslie T. Embree "Religion" pp. 191-231 in Ganguly & DeVolta (note 830 *supra*), Amartya Sen *The Argumentative Indian. Writings on Indian History, Culture and Identity* London, Allen Lane/Penguin 2005 pp. 352-356, Varma *Being Indian. Inside the Real India* pp. 89-95 on "the pragmatic Hindu".

⁷⁷³ See, for example, Drèze & Sen *India. Development and Participation*, Varma *Being Indian. Inside the Real India* pp. 1-15. International Monetary Fund *World Economic Outlook September 2005 Building Institutions* IMF Washington, D.C., 2005 pp. 32-37. See also Sen *The Argumentative Indian*.

⁷⁷⁴ World Bank *India Country Fact Sheet* (updated July 2005), *India Development Policy Review: Inclusive Growth and Service Delivery: Building on India's Success. Overview* The World Bank 2006.

as high mortality rates, malnutrition and illiteracy – the greatest victims of which are women and children.⁷⁷⁵ Other problems needing to be continually addressed are caste and gender related discrimination, the increasing urban/rural divide and the human rights violations that are sadly far too common.⁷⁷⁶ Because of its size and enormous diversity, only one thing can be said for certain about Indian society – it is not just one single society or culture but a multitude of such within the boundaries, physical and spiritual, of a nation.

7.3 The Indian Constitution

7.3.1 The Constitution in General

India has one of the oldest legal systems in the world, bringing together laws and jurisprudence from many periods and from different rulers of the country. Rights discourses in ancient India were essentially duty-oriented and coupled with privileges. They were also closely connected to the caste system and its inherent system of inequality.⁷⁷⁷ This does not exclude the fact that a human rights perspective based upon Hindu conceptions of dignity, human rights and human responsibility is claimed to have existed since ancient times.⁷⁷⁸ The Indian legal system of today is a mixture of influences from cus-

⁷⁷⁵ *Ibid.* UNDP Country Programme Outline for India (2003-2007) 15 April 2002 DP/CPO/IND/1 and *Attaining the Millennium Development Goals in India: Role of Public Policy and Service Delivery* The World Bank, June, 2004.

⁷⁷⁶ For an overview of the human rights situation in India in general, see for example the Human Rights Watch World Report 2006 Country Summary: India, the US State Department Country Reports on Human Rights Practices 2005: India, released 8 March, 2006 (see <http://www.state.gov/g/drl/rls/hrrpt/2005/61707.htm>, visited 12/07/2006) and Amnesty International's Report 2006 Country Overview: India (<http://web.amnesty.org/report2006/ind-summary-eng>, visited 12/7/2006). The website of the National Human Rights Commission is also quite informative and contains links to the state human rights commissions in India (<http://nhrc.nic.in>).

⁷⁷⁷ See e.g. Furqan Ahmad "Protective Judiciary in Aid of Human Rights in India" *Indian Journal of International Law* Vol 43, 2003 pp. 349-359, Sujata V Manohar "The Indian Judiciary and Human Rights" pp. 137-153 in Venkat Iyer (ed.) *Democracy, Human Rights and the Rule of Law. Essays in Honour of Nani Palkhivala* New Delhi, Butterworths India, 2003, Vibha Pingle "Caste" pp. 231-255 in Ganguly & DeVolta and Mahendra Pratap Rana "Protection of Human Rights or Protection of Rights of Caste in India?" pp. 139-147 in *Protection of Human Rights – A Critique* R.M. Pal (ed.) New Delhi, Indian Social Institute, 1999. See, also Varma *Being Indian. Inside the Real India* pp. 16-56 on "power".

⁷⁷⁸ See, for example, B C Nirmal "An Ancient Indian Perspective of Human Rights and its Relevance" in *Indian Journal of International Law* Vol 43 2003 pp. 445-478, Manohar "The Indian Judiciary and Human Rights" pp. 137-138.

tomary law, Hindu law, Muslim law, British law and modern jurisprudence.⁷⁷⁹

The Constitution of India was adopted in 1949, two years after independence.⁷⁸⁰ The preamble identifies democracy, secularism, liberty, equality and dignity of the individual as values fundamental to the Constitution that cannot be removed, even by constitutional amendment.⁷⁸¹ Part III on Fundamental Rights and Part IV on Directive Principles of State Policy contain objectives fundamental to the governance of the nation and for the protection of human rights. The Fundamental Rights, mainly civil and political rights, are directly enforceable in Indian courts.⁷⁸² The Directive Principles of State Policy mainly provide for the protection of economic and social rights.⁷⁸³ These two

⁷⁷⁹ The demands for equal and fundamental rights for all were at the forefront of the struggle for independence from colonial rule and were also central to the drafters of the Constitution of India. See, for example, Parmanand Parashar *Enforcement of Human Rights*, Jaipur, Book Enclave, 2001, p. 11.

⁷⁸⁰ The Constitution of India entered into force on 26 January 1950. It consists of 395 articles and is divided into a Preamble and Parts I–XXII. To date, 93 Acts of Amendment have been passed by Parliament. See <http://indiacode.nic.in/coiweb/welcome.html> (as visited 16/2/2006).

⁷⁸¹ See Leela Simon & Chiranjivi J. Nirmal “Fundamental Rights: The Constitutional Context of Human Rights” pp. 40–53 (43) with references to case law in Chiranjivi J. Nirmal (ed.) *Human Rights in India. Historical, Social and Political Perspectives* New Delhi, Oxford University Press, 1999.

⁷⁸² Part III – articles 14–35 – includes rights such as the right to equality before the law, the prohibition of discrimination, the abolition of untouchability, freedom of expression, protection of life and personal liberty, prohibition of trafficking and forced labour and the right to freedom of conscience and religion. The enumerated Fundamental Rights are not absolute but can be subject to limitations. The enforcement of fundamental rights can also be suspended or prevented under special circumstances. (See article 34 of the Constitution.). Following the 44th Amendment, however, the possibilities of suspending fundamental rights has been severely limited: the protection of life and liberty and the right to information on reasons for arrest and detention and the right to legal counsel as stated in articles 21 and 22 cannot be suspended even in times of emergency (the Constitution (Forty-fourth Amendment) Act, 1978). The right to life and personal dignity as protected in article 21 has been an important focus of Indian human rights jurisprudence as “personal liberty” has been interpreted as covering a wide array of rights necessary to live a life in freedom and with dignity, examples of which are the release of bonded labour, the right to receive medical help in various situations and the right to free education See Manohar “The Indian Judiciary and Human Rights” pp. 147–150, with references to case law.

⁷⁸³ Rights included in the Directive Principles (articles 36 to 51) include the right to adequate means of livelihood, equal pay for equal work, the right to equal justice and free legal aid and the responsibility on the part of the state to endeavour to provide early childhood care and education for all children until completing the age of six. Article 51 A (k) placed in Part IV A states that the person who is the parent or guardian of a child has a duty to provide opportunities for education to the child, or as the case may be, a ward aged between 6–14 years. The Directive Principles of State Policy are not enforceable in a court of law, but are “nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws” (Article 37). However, the rights provided for in the Directive Principles can and have been read into the Fundamental Rights of Part III and hence be enforce-

sections lay the foundation for the human rights-related case law of India, a case law also influenced by the principles identified in the Universal Declaration of Human Rights and by subsequent international human rights standards.⁷⁸⁴

7.3.2 The Constitution and Children

The chapters on Fundamental Rights and on Directive Principles for State Policy both contain particular references to children. Article 15,

able in the courts (See Bajpai *Child Rights in India. Law, Policy, and Practice* pp. 6-7. See also India's 1997 initial report, CRC/C/28/Add.10 para. 75.) Many of the Directive Principles have, due to judicial interpretation, also become enforceable through legal actions brought before the courts. One example is the right to education.

⁷⁸⁴ Manohar "The Indian Judiciary and Human Rights" pp. 138-139. The Supreme Court is the highest court and has original, appellate and advisory jurisdiction. See articles 124 - 147 of the Constitution. Article 32 of the Constitution gives an extensive original jurisdiction to the Supreme Court with regard to the enforcement of fundamental rights. The appellate jurisdiction of the Supreme Court can be invoked in both civil and criminal cases, involving substantial questions of law as to the interpretation of the Constitution. (See website of the Indian Judiciary http://www.indiancourts.nic.in/indian_jud.htm, as visited 20/10/2005.) The Supreme Court has been very influential in India as regards the protection of fundamental rights and in many cases is seen as taking a proactive and progressive approach, expanding the meaning of rights already accepted under the Constitution (as argued by e.g. Ahmad "Protective Judiciary in Aid of Human Rights in India", Manohar "The Indian Judiciary and Human Rights" and George Mathew, Director of the Institute for Social Sciences in New Delhi) (interviewed 31/10/2003). This progressive approach has had some impact in relation to children's rights, where the Supreme Court (and the High Courts) has taken affirmative action in order to protect children's rights, to widen the scope of already existing provisions and to promote the implementation of the Convention on the Rights of the Child. Asha Bajpai observes: "The Courts in India have ensured the implementation of progressive laws and the interpretation of restrictive laws in the best interest of the child." Bajpai *Child Rights in India. Law, Policy, and Practice* p. 27.

The concept of Public Interest Litigation (PIL) is another very important component in the protection of fundamental rights in India which has been made possible largely through a generous interpretation of article 21 of the Constitution by the Supreme Court. See R S. Pathak "Public Interest Litigation in India" pp. 125-135 in Venkat Iyer (ed.) *Democracy, Human Rights and the Rule of Law*. Public Interest Litigation in the Indian context means that the traditional scope of *locus standi* is relaxed and that any citizen or group can approach the Supreme Court or the High Courts on behalf of those who, because of poverty, illiteracy, disability or other economic or social impediment are unable to claim and enforce their rights themselves. See, for example, Pathak "Public Interest Litigation in India" p. 131 and Ahmad "Protective Judiciary in Aid of Human Rights in India" pp. 352-353. Not least in relation to children the liberalised view of *locus standi* has been useful, as children otherwise are by definition unable to file petitions to a court but have to depend on their parents or the State arguing their case. A case under PIL is easily initialised. It can be done either by filing a petition to the Court or by addressing a letter to the Chief Justice highlighting the question of public importance for invoking this jurisdiction. Public Interest Litigation has been quite successful and several matters of public importance have become landmark cases. The concept is often used by non-governmental organisations in their human rights advocacy work.

which prohibits discrimination in its subsection 3 establishes that “nothing in this article shall prevent the State from making any special provision for women and children” – which means that laws providing children with special protection can be adopted. Article 15 – as well as articles 16 and 17 (on equal opportunity and untouchability) – has a direct nexus with the customs, traditions and social norms of India, elements laying the ground for a prevailing gender bias forcing women to occupy an inferior position in society and for preserving discriminatory practices aimed at the scheduled castes, scheduled tribes and socially backward classes.⁷⁸⁵ An important step forward for children’s rights in India was the 2002 introduction of article 21(a) through the 93rd Amendment making free and compulsory education a fundamental right for all children aged between six and fourteen.⁷⁸⁶ Article 24 prohibits the employment of children below the age of fourteen in factories, mines or in any other hazardous environment. Article 28 on freedom regarding attendance at religious instruction or religious worship in certain educational institutions is also applicable to minors, but as regards children is made dependent upon whether “his guardian has given his consent thereto” – thereby, at least in part, effectively restricting the child’s freedom in relation to religion.⁷⁸⁷ Article 39 on special policies to be followed by the state includes references to health and protection from exploitation.⁷⁸⁸ Article 45 establishes that the state shall endeavour to provide early childhood care and education for all children until they complete the age of six years, thereby complementing the provisions set down on education in article 21(a).⁷⁸⁹ It is noticeable that the focus of these provisions is on the protection of children based upon their vulnerability, not on their status as autonomous rights holders.

⁷⁸⁵ See Manohar “The Indian Judiciary and Human Rights” pp. 144-145 and Asha Bajpai *Child Rights in India. Law, Policy, and Practice* New Delhi, Oxford University Press, 2003 p. 6.

⁷⁸⁶ The Constitution (93rd Amendment) Act (No. 93 of 2005) was passed by Parliament as on 20 January 2006.

⁷⁸⁷ See article 28, subsection 3. As seen, the article is not gender neutral as it refers to the child as “he”.

⁷⁸⁸ Article 39(e): “...that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength”. (Article 39(f): “...that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment”).

⁷⁸⁹ See India’s 2003 report CRC/C/93/Add.5 paras. 9-27 on the new articles of the Constitution inserted through the 93rd Amendment and the consequent measures taken.

7.4 Human Rights Legislation

7.4.1 Legislation in General

A number of Acts relate to human rights issues in the Indian legislative system. A central provision is the 1993 Protection of Human Rights Act, providing for the constitution of the National Human Rights Commission, various state human rights commissions and human rights courts.⁷⁹⁰ The National Human Rights Commission (NHRC) has been granted somewhat limited powers, to inquire in various ways into complaints of human rights violations.⁷⁹¹ However, it has limited possibilities of working with individual cases.

Human rights treaties in consonance with the fundamental rights laid down in the Constitution can be enforced in Indian courts without a statute codifying the treaty provisions in domestic law.⁷⁹² Following

⁷⁹⁰ The Protection of Human Rights Act, 1993 (10 of 1994), entered into effect on 28 September 1993. The Act was amended in 2000 by The Protection of Human Rights (Amendment) Act. Other examples of legislation protecting human rights are the 1961 Dowry Prohibition Act, the 1976 Bonded Labour System (Abolition) Act, the 1986 Immoral Traffic (Prevention) Act, the 1987 Commission on Sati (Prevention) Act and the 1989 Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act.

⁷⁹¹ The National Human Rights Commission has the power “to intervene in court proceedings involving allegations of human rights violations or otherwise dealing with human rights issues, to review constitutional and legal norms and the conformity of laws with international human rights instruments, to make specific recommendations to the Parliament and other authorities and to undertake activities in the field of human rights education.” The Protection of Human Rights Act, Chapter III. Other Commissions: the National Commission for Scheduled Castes and Scheduled Tribes, the National Commission for Women and the National Commission for Minorities.

⁷⁹² India at the time of writing had ratified the International Covenant on Civil and Political Rights (but not its Optional Protocols), the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women (but not its Optional Protocol), the Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (See <http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet>, as visited 17/10/2005). At the time of ratification of the Convention on the Rights of the Child India made a declaration referring to its interpretation of article 32, a declaration which at the time of writing still remains in force. Furthermore, India has signed the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. India has not ratified the Statute of the International Criminal Court or the Geneva Convention relating to the Status of Refugees; neither has it particular legislation referring to refugees. As regards the International Labour Organization (ILO) India has ratified a number of conventions, but not the important 1973 Minimum Ages Convention (C 138) nor the 1999 Worst Forms of Child Labour Convention (C 182) (<http://www.ilo.org/ilolex/english/convdisp2.htm>, as visited 20/10/2005). On the regional level, India in 2002 signed the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (<http://www.saarc-sec.org/old/freepubs/conv-trafficking.pdf>, as visited 20/10/2005) and the SAARC Convention on Regional Arrangements for the Promotion of Child Wel-

articles 73 and 253, any international treaty consistent with the fundamental rights established by the Constitution and in harmony with its spirit must be read into the provisions of the Constitution.⁷⁹³ The principle of direct applicability of these treaties is established by the Supreme Court, which has ruled that in the absence of a domestic law international treaties and norms are applicable for the purpose of interpretation of fundamental rights.⁷⁹⁴ Thus the Convention on the Rights of the Child, at least in part – depending on to what extent it is interpreted as being in consonance with the fundamental rights laid down in the Constitution – is enforceable without a statute supporting it.

7.4.2 The Child in Indian Legislation

7.4.2.1 Legislation on Children

In India, the age at which a person ceases to be a child is set at different ages in different pieces of legislation depending upon the purpose served by the law. Under the Indian Majority Act 1875, every person domiciled in India attains majority upon completion of eighteen years of age unless a particular personal law specifies otherwise.⁷⁹⁵ Eighteen is also the age at which a minor becomes an adult in accordance with the Hindu Minority and Guardianship Act 1956, the Dissolution of Muslim Marriages Act 1939, the Indian Divorce Act 1860 and the Parsi Marriage and Divorce Act 1936.⁷⁹⁶ These definitions should be

fare in South Asia (<http://www.saarc-sec.org/old/freepubs/conv-children.pdf>, as visited 20/10/2005).

⁷⁹³ Bajpai *Child Rights in India. Law, Policy, and Practice* pp. 23-24, 471. This follows from article 73(1)(a-b) stating that “Subject to the provisions of this Constitution, the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws; and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement” and article 253 which states that “...Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement to Convention with any other country or countries or any decision made at any international conference, association or other body.”

⁷⁹⁴ See references to *Mayanbhai Ishwarlal Patel v Union of India* (AIR 1969 SC 783) and to *Vishaka v State of Rajasthan* (1997) (6 SCC 241) in Bajpai *Child Rights in India. Law, Policy, and Practice* p. 24.

⁷⁹⁵ According to the same Act however, the age of majority is raised to twenty-one years in case of a minor for whose person, property or both a guardian has been appointed before the minor has turned eighteen. For both provisions, see the Indian Majority Act 1875, Section 3.

⁷⁹⁶ See Bajpai *Child Rights in India. Law, Policy, and Practice* p. 3. Other minimum ages, however, are defined in relation to a number of different issues such as marriage, sexual consent for girls, voluntary enlistment in the armed forces, admission to employment or work, criminal responsibility, juvenile crime, capital punishment and life imprisonment. See CRC/C/93/Add.5 para. 67. The Committee in its 2000 Concluding Observations expressed concern over the fact that various age limits were not in accordance with the general principles and other provisions of the CRC and recommended

compared with the definition used in the 2001 census, which for its own purposes set the end of childhood at completing the age of fourteen.⁷⁹⁷

It is estimated that in India there are more than 250 federal and state statutes that in some way or another relate to children.⁷⁹⁸ Apart from the articles in the Constitution relating to children there are a number of provisions in general statutes that are relevant to the child in criminal law, employment law, laws covering different aspects of childcare and welfare and family law. Examples of this are the Indian Penal Code 1860, the Evidence Act 1872 and the Code of Criminal Procedure 1973, all of which include provisions that particularly provide for the protection of children.⁷⁹⁹ On family law, it should be noted that the personal laws of India are based upon religious affiliation.⁸⁰⁰ This means that the customary practices of each religion have been codified and incorporated into the legislative system.⁸⁰¹ As a result, children are

that India reviewed its legislation “with a view to ensuring that age limits conform to the principles and provisions of the Convention, and that it take greater efforts to enforce those minimum-age requirements.” CRC/C/15/Add.115 para. 26-27.

⁷⁹⁷ See n. 766.

⁷⁹⁸ Bajpai *Child Rights in India. Law, Policy, and Practice* p. 7. Of these statutes, some of the most important are the following: the Children (Pledging of Labour) Act 1933, the Probation of Offenders Act 1958, the Orphanages and Other Charitable Homes (Supervision and Control) Act 1960, the Medical Termination of Pregnancy Act 1971, the Child Labour (Prohibition and Regulation) Act 1986, the Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act 1992, the Pre-Natal Diagnostic Technique (Regulation and Probation) Act 1994 and the above mentioned Juvenile Justice (Care and Protection of Children) Act 2000. For these and additional examples, see India’s 2003 report to the CRC/C/93/Add.5, para. 110.

⁷⁹⁹ The Penal Code has e.g. special provisions relating to the causing of miscarriages and injuries to foetuses (Indian Penal Code Secs. 312-318), child rape (Indian Penal Code Secs. 375-376) and the kidnapping, abduction or trafficking of minors for the purposes of prostitution, slavery and forced labour (Indian Penal Code Secs. 358-374). As regards children and employment there are provisions relating to children in e.g. the Factories Act 1948, the Minimum Wages Act 1948, the Mines Act 1952, the Bonded Labour System (Abolition) Act 1976 and the various state Shop and Establishment Acts. See Bajpai *Child Rights in India. Law, Policy, and Practice* p. 10. See also e.g. Bose *The State of Children in India. Promises to Keep* pp. 220-266 for an overview of child labour in India.

⁸⁰⁰ After Independence in 1947 it was decided that all matters pertaining to family life would continue to be governed by the personal laws of each religion, as had been the case under British colonial rule. India’s 1997 report to the CRC CRC/C/28/Add.10, para. 144.

⁸⁰¹ Therefore, the rights of children born to Hindus are in these matters governed by the Hindu Marriage Act 1955 and the Hindu Succession Act 1956, Christian children are governed by the Indian Divorce Act 1860 and the Indian Succession Act 1925, Muslim children are in matters of marriage, maintenance, guardianship, custody, adoption, inheritance and succession governed by Muslim personal law and Parsi children are governed by the Parsi Marriage and Divorce Act 1936 and the Indian Succession Act 1925. As regards the qualifications, appointment and removal of guardians of children by the courts the Guardian and Wards Act 1890 is, however,

treated differently based upon their religion with regard to adoption, custody, guardianship and succession, to mention a few examples.⁸⁰² The fact that the religious faith of a person (or that of the parent) decides which legislation is applicable, and whether the different treatment that this results in is consistent with the prohibition of discrimination laid down in article 15 of the Constitution can, and has been, discussed in Indian jurisprudence and has been the subject of legal debate.⁸⁰³ The inconsistency in this kind of legislation with the principle of non-discrimination laid down in article 2 of the Convention on the Rights of the Child is all too evident.

The Indian Government has drafted a Children's Code Bill 2000 (Draft) which draws heavily on the provisions and not least the spirit of the Convention on the Rights of the Child.⁸⁰⁴ The Children's Code Bill 2000, however, has at the time of writing not been adopted. Instead, the Commissions for Protection of Child Rights Act 2005 was adopted by the Lok Sabha in May 2005 and entered into force in January 2006.⁸⁰⁵ The Commissions for Protection of Child Rights Act provides for the constitution of national and state commissions for the protection of child rights and for the constitution of child courts. The Commissions for Protection of Child Rights Act has been criticised by non-governmental organisations, activists and human rights scholars for being structured along similar lines as other human rights commissions in India – for example, the National Human Rights Commission and the National Commission for Women, both of which have been accused of being ineffective and impotent.⁸⁰⁶

applicable to all children irrespective of religion. The same applies to the above mentioned Child Marriage Restraint Act 1929.

⁸⁰² See Bajpai *Child Rights in India. Law, Policy, and Practice*. Chapters 2 & 3. In the case of adoption, for example, the possibility of benefiting from a family environment is open only to Hindu children for the Hindu Adoptions and Maintenance Act 1956 applies only to Hindus. There are no laws establishing similar rights for Muslim, Parsi or Christian children. See Bajpai *Child Rights in India. Law, Policy, and Practice* p 87.

⁸⁰³ Bajpai *Child Rights in India. Law, Policy, and Practice* pp. 87-91.

⁸⁰⁴ See The Children's Code Bill 2000 (Draft), prepared by the Special Expert Committee chaired by Justice V. R. Krishna Iyer, facilitated by UNICEF India Country Office.

⁸⁰⁵ The Commissions for Protection of Child Rights Act 2005 (No.4 of 2006).

⁸⁰⁶ See e.g. Bajpai *Child Rights in India. Law, Policy, and Practice* pp. 439-461. The directives that can be issued by these bodies are in practice quite toothless as the directives are only recommendatory, thus leaving the bodies without any real powers of enforcement. The same is feared will happen with the recommendations with regard to the National Commission for Protection of Child Rights if there are no provisions in the Act providing for mandatory enforcement of the recommendations: the Commission can issue recommendations to the concerned Government or authority or to the Supreme Court, but if these recommendations are left unattended there is no obvious follow-up (The Commissions for Protection of Child Rights Act Section 15 (i-iii)). The impact of the annual and special reports to be submitted by the Commission to the

7.4.2.2 Policies on Children

An impressive number of policies, plans of action and programmes relating to children have been created in India in addition to the goals set out in the Constitution and in other legislation. These documents are intended to set out the framework and function as points of reference for actions taken affecting children.⁸⁰⁷ In 2003, the National Charter for Children⁸⁰⁸ was presented, a text replacing the long-since outdated 1974 National Policy for Children.⁸⁰⁹ The 2003 National Charter for Children enumerates a number of rights for children, including the right to survival, good health and adequate nutrition, a standard of living to enable full development of the child's faculties, proper protection with particular reference to the rights of girl children, equality, freedom of expression and the right to a family.⁸¹⁰ The list of rights is comprehensive and detailed and the preamble states:

Whereas we affirm that the best interest of children must be protected through combined action of the State, civil society, communities and families in their obligations in fulfilling children's basic needs... Underlying this Charter is our intent to secure for every child its inherent right to be a child and enjoy a healthy and happy childhood, to address the root causes that negate the healthy growth and development of children, and to awaken the conscience of the community in the wider societal context to protect children from all forms of abuse, while strengthening the family, society and the Nation.⁸¹¹

A brief look at the 2003 Charter would thus imply that children's rights in India are well protected by this text. The Charter, however, does not include any references to the Convention on the Rights of the Child and does not appear to have been drafted with a child rights-perspective in mind. Instead, its focus is primarily on the protection of

Government, which in turn shall present the reports and an accompanying memorandum of action to Parliament, is also made dependent on how the Government acts (The Commissions for Protection of Child Rights Act Section 16 1-3.).

⁸⁰⁷ Some of the most important have been the 1974 National Policy for Children, the 1976 National Policy on Education, the 1987 National Policy on Child Labour, The 1991-2000 National Plan for the SAARC Decade of the Girl Child, the 1992 National Plan of Action for Children, the 1993 Nutrition Policy, the 2000 National Population Policy, the 2000 CHILDLINE Service and Childline India Foundation and the 2001 Health Policy. See e.g. Bajpai *Child Rights in India. Law, Policy, and Practice* p. 10, 2003 report CRC/C/93/Add.5, para.109.

⁸⁰⁸ National Charter for Children, 2003. NO.F.6-15/98-CW Government of India, Ministry of Human Resource Development, Department of Women and Child Development, New Delhi, adopted on 9 February 2004 resolution, published in the Extraordinary Gazette of India, Part-I, Section-I.

⁸⁰⁹ Bajpai *Child Rights in India. Law, Policy, and Practice* pp. 10-11, 14.

⁸¹⁰ See Bajpai *Child Rights in India. Law, Policy, and Practice* pp. 444-449 for comments on the Charter.

⁸¹¹ Preamble National Charter for Children, 2003.

the child and not on the child as a rights-holder. The Committee on the Rights of the Child in its 2004 concluding observations commented on the draft 2003 National Charter in the following way:

The Committee is nevertheless concerned that the National Charter for Children does not adopt a child-rights-based approach and does not explicitly include all rights and principles of the Convention... the Committee recommends that the State party expedite the adoption of the National Charter for Children and make sure that the Charter adopts a child-rights-based approach and covers all the rights and principles of the Convention.⁸¹²

The critique on the National Charter seems to have been taken into consideration. In 2005 a new Plan of Action for Children was introduced. This established that the Convention on the Rights of the Child should be the guiding light for implementing all rights for children and that

the rights of the child as articulated in the Constitution of India and the Convention on the Rights of the Child should work in synchrony to ensure all rights to all children. Building on these provisions and in recognition to India's commitment to the Millennium Development Goals and the World Fit for Children, the State shall work to progressively extend these guarantees and protections to all children up to the age of 18 years.⁸¹³

The main responsibility for implementing the National Plan of Action for Children rests on both central and local government.⁸¹⁴ Four guiding principles are identified in the Plan: to regard the child as being an asset and as a person with human rights, to address the issue of discrimination, to accord the utmost priority to the most disadvantaged, poor and least served children and to recognise the different stages of childhood, meeting the rights and needs of each stage.⁸¹⁵ The Plan identified twelve key areas on which measures would be concentrated.

⁸¹² Concluding Observations CRC/C/15/Add.228 para.15-16.

⁸¹³ National Plan of Action for Children 2005 Introduction para. 4. See also the 2004 comment by the Committee on the Rights of the Child on a future National Plan of Action for Children: "The Committee recommends that the State party take all necessary measures to adopt, in consultation with all relevant partners, including the civil society, a new Plan of Action for Children that covers all areas of the Convention, includes the Millennium Development Goals, and fully reflects 'A world fit for children'; to allocate the necessary human and financial resources for its full implementation; and provide for a coordination and monitoring mechanism." CRC/C/15/Add.228 para. 16.

⁸¹⁴ The guiding principle should be that of subsidiarity; *i.e.* that which can be most effectively done at the lowest hierarchical level should be done at that level. See the 2005 National Plan of Action for Children, sections 19.1 and 19.11.

⁸¹⁵ National Plan of Action for Children 2005 Introduction para. 12.

Of these, “ensuring child participation and choice in matters and decisions affecting their lives” is one.⁸¹⁶ The Plan also includes a section on “Child participation” in which the aims, objectives and strategies for promoting and implementing child participation are enumerated. The goals are on all levels of society and seek to promote respect for the views of all children, to make all children aware of their rights and to empower them as citizens.⁸¹⁷ The objectives and strategies identified to attain these goals focus on awareness-raising, advocacy, promoting respect, dissemination of information and training of key actors.⁸¹⁸ Clearly, for the strategies to be effective they will have to be further elaborated on and adjusted with regard to each specific context, taking into account the substantial obstacles existing in Indian society. At the time of writing it remained to be seen how the idealistic goals of the 2005 Plan of Action for Children would be implemented.⁸¹⁹

7.4.3 Monitoring India’s Implementation of Article 12

7.4.3.1 India’s State Party Reports

India has submitted two extensive reports to the Committee on the Rights of the Child. The right to participation and respect for the child’s views is by no means the most prominent feature in them but the issue is nevertheless referred to. The general impression gained from the reports is that the focus in general is predominantly on the protection and welfare of the child, not on the child as an individual rights-holder. In both reports, India particularly acknowledges the difficult situation of the most vulnerable children – as for example girls, Dalit children, children of ethnic minorities and working children.

In its 1997 *initial report* India underlines the progress that has been made since independence within the fields of child welfare and child development. For example, it enumerates the child-related legislation that has been enacted and the policies it has adopted. These include child-sensitised five-year plans, national plans of action and campaigns of co-operation with non-governmental organisations. These are all cited as examples of successful measures of implementation.⁸²⁰ The initiatives taken to promote child participation in implementing the

⁸¹⁶ National Plan of Action for Children 2005 Introduction para. 13

⁸¹⁷ National Plan of Action for Children 2005 section 17.1.1-3.

⁸¹⁸ See section 17.3.1-19.

⁸¹⁹ The National Plan of Action for Children will be monitored by the National Coordination Group created for the implementation and monitoring of the Convention on the Rights of the Child and will be supported by the Department of Women and Child Development, which assumes overall responsibility for the coordination of the implementation of child rights. Periodical and annual reviews will be made; see section 20.1-2.

⁸²⁰ CRC/C/28/Add.10 para. 1-64.

Convention are particularly referred to. These include essay competitions on children's rights in newspapers, school campaigns, children's rallies, activity weeks around the theme of the Convention and the joint government and UNICEF campaign "Voices of Children".⁸²¹ On article 12 and respect for the views of the child the report refers to the traditional importance of age hierarchies and obedience to adults in the growing up process of Indian children, a relationship that continues throughout life, albeit in different forms.⁸²² The report continues:

The child often does not get to express his or her views freely. However, the sensitivity of families towards children's needs has increased in recent years as a result of advocacy and education.⁸²³

On the topic of the right to participate, freedom of expression and access to information, the report further states:

Freedom of expression is a fundamental right which is available to all persons in India, including children. The fact that this freedom, especially in the case of children, may be circumscribed by the cultural ethos of a society needs to be acknowledged. The child's right to information is sometimes determined by parents or teachers, which may sometimes be seen as limiting their rights. However such action is taken predominantly in the best interest of the child and should not be seen as preventing free access to information or freedom of expression. The child's view is taken into account in a number of situations involving custody, fixing criminal liability, and giving evidence in court.⁸²⁴

In the report, it is stated⁸²⁵ that most of the rights of the child that are articulated in the Convention find prominence in the chapter on Fundamental Rights in the Indian Constitution, that

all the seven sets of Fundamental Rights in the Constitution are available to children with as much authority and accessibility as to adult citizens⁸²⁶

and that

there is a large body of case law which has not only developed the application of these rights to children but has also expanded their scope in order to make them meaningful. This was accomplished by the judiciary through harmonious construction of Part III (Fundamental

⁸²¹ CRC/C/28/Add.10 para. 61-62.

⁸²² CRC/C/28/Add.10 para.95.

⁸²³ *Ibid.*

⁸²⁴ CRC/C/28/Add.10, para. 109.

⁸²⁵ CRC/C/28/Add.10, para. 71.

⁸²⁶ CRC/C/28/Add.10, para. 99.

Rights) and Part IV (Directive Principles of State Policy) of the Constitution side by side with India's treaty obligations and obligations under the Convention on the Rights of the Child. Thereby, the Indian judiciary has made a singular contribution for the universal development of human rights generally, and of child rights in particular.⁸²⁷

Following these confident statements is another ascertaining the successful progress of implementation of child rights in India:

it may be concluded that in the matter of civil rights and freedoms, the laws of the country stand very much in line with the global human rights movement and the Convention on the Rights of the Child.⁸²⁸

Judging by these citations, the participation rights of children could be considered to be sufficiently protected in India. Whether these safeguards are adequate and children *in practice* can exercise their right to participation in decision-making processes and make their voices heard, is, however, not a subject into which the initial report delves in any depth. What are presented are the measures of implementation *de jure*, not *de facto*.

There is a tone and focus in India's 2003 *second report* that is similar to those of its predecessor, although the analysis included in the second report is somewhat more extensive. What is said above about a discussion on *de facto* implementation applies also to the second report. On the topic of respect for the views of the child, India initially comments that

it is indeed welcome that there is a gradual increase in the initiatives to promote child participation in many parts of the country. The initiatives vary in content and comprehensiveness from participation in activities, to expression of views in matters that affect their lives as well as that of others in many parts of the country [...] it is evident that progress has been made in this area through the active intervention of NGOs.⁸²⁹

In the report it is stated that although there is no legislation that specifically mentions the child's right to freedom of expression, this is a fundamental right available to all citizens including children.⁸³⁰ The right of children to express their views freely is also said to be covered by the then (2004) not yet adopted National Charter for Children.⁸³¹ The report describes the right to participation as the right covered in

⁸²⁷ CRC/C/28/Add.10, para.100.

⁸²⁸ CRC/C/28/Add.10, para.101.

⁸²⁹ CRC/C/93/Add.5, para.72.

⁸³⁰ CRC/C/93/Add.5 para.268.

⁸³¹ *Ibid.*

the Convention on the Rights of the Child as the one being “least understood and appreciated by adults”.⁸³² The importance of applying a child-oriented perspective is, however, underlined and it is stated that:

The rights of the child under the CRC to have his/her views respected are intrinsically linked to the opportunities available to the child to participate in a wide spectrum of activities, ranging from the home to school life. It is indeed welcome that there is a gradual increase in initiatives to promote child participation in many parts of the country. The initiatives vary in content and comprehensiveness, from participation in activities to expression of views on matters that affect their lives or those of other children or their communities. In some cases, efforts have been made to link hearing children’s views to decision making and implementation processes of programmes for children and local community initiatives. As child participation seemingly gains acceptance in more parts of the country [...] there is a need to fully understand the spirit and principles of child participation within the framework of the Convention and the evolving capabilities of children, and to develop a framework for action which will contribute to creating the institutional spaces for promoting meaningful participation and raising the profile of children as actors in their own development and the development of their communities. At the same time, adults will need to change the way they currently perceive children and their potential, so that children can interact in an environment where adults with the authority to make decisions provide them relevant information, actively seek their opinions and value and respect their comments and proposals. This will also lead to the development of their potential and evolving capabilities, thus enhancing their role as citizens and making them actors in the realisation of their own rights.⁸³³

The report on this topic speaks in terms of what should be done in the future and not what has been accomplished so far – references are made to a “gradual increase” of recognition of the value of child participation, a growing acceptance of the concept and the need for a change in how adults perceive children and their capacities. (This said, it can be noted that as regards freedom of expression and the right to information, more or less the same phrases are used as in the initial report.)⁸³⁴ It is then recognised that the progress made so far concerning the respect of the views of children is made mainly not through measures taken by the state – the responsibility of which it is to fulfil its obligations according to the international treaty it has ratified – but through the intervention of NGOs. This acknowledgement is followed by an enumeration of projects with innovative approaches initiated by

⁸³² CRC/C/93/Add.5 para.269.

⁸³³ CRC/C/93/Add.5 para.270.

⁸³⁴ CRC/C/93/Add.5, para. 296.

non-governmental organisations.⁸³⁵ The impression gained by the section on article 12 in this report is that the Indian government recognises the importance of its proper implementation, and the measures that need to be taken for this to be effective. However, any such measures actually undertaken by the Indian state itself are not reported – with the exception of the International Children’s Day of Broadcasting, allowing children to participate in the media.⁸³⁶

Neither the initial nor the second report submitted by India included any particular discussion on the reasons why the Indian state – at the time – had up until then been fairly passive in terms of implementing article 12, or indicated what the major obstacles had been. Traditional attitudes towards children which one might expect to be one important element making the implementation of article 12 problematic are, as seen in the citations, only briefly mentioned. When references to culture and traditional attitudes are made in the reports, this is generally either in relation to the right to culture or in general terms in the context of discrimination shown towards girls and with reference to the family environment.⁸³⁷ The reports submitted by India are different from many other state parties to the Convention whose societies resemble India in terms of cultural diversity, the importance of tradition, and differences in living conditions between different groups of population, and where culture and traditional practices are directly referred to as obstacles for the effective implementation of article 12.⁸³⁸

The aforementioned references in this report made to the work of NGOs raises the question of whether the Indian state, by acknowledging their work in practice, has itself partially renounced its responsibility to be at the forefront of implementing the Convention’s provisions in practice, as well as the monitoring of how those obligations are to be implemented. The same question could be posed regarding India’s first

⁸³⁵ CRC/C/93/Add.5 para. 271-278. The previously referred to *makkala panchayats* supported by the NGO Concerned for Working Children in the state of Karnataka is one of the examples mentioned in the report. CRC/C/93/Add.5 para. 268-278, which is the entire section covering article 12. See also how the NGO CWC comments on how the Indian state has not acted to facilitate child participation at local, national or international levels and on whether the right to freedom of expression is available to all people in India, including children. *A Critical Review of the Government of India’s report submitted to the Committee on the Rights of the Child* The Concerned for Working Children India 1999 and the July 2003 Alternate Report submitted by the National Movement of Working Children pp. 14-15.

⁸³⁶ CRC/C/93/Add.5 para. 271-278.

⁸³⁷ On cultural rights, see e.g. the 1997 report CRC/C/28/Add.10, para.257 and 2003 report CRC/C/93/Add.5, para. 1010-1027. Additional examples include CRC/C/28/Add.10, para. 21 and CRC/C/28/Add.10, para. 295 on the traditional Indian family, CRC/C/28/Add.10, on son preference and CRC/C/93/Add.5, para. 965, on the discrimination of girls in general.

⁸³⁸ Cf. Chapter 6.3.3 *supra*.

report. True or not, many of the NGOs active in India, on national as well as international levels, claim that children's participation rights are not prioritised by the state, even though a commitment to the implementation of these rights has been expressed. One example is related to the report itself. As pointed out by the National Movement of Working Children, the report does not seem to have been drafted in consultation with children and no opinions of children are included in it.⁸³⁹

The democracy aspect of child participation is not included in either of India's submitted reports. It is not referred to in the state reports, neither in the context of general measures of implementation nor concerning article 12 and the civil rights of the child. Several child-rights organisations, however, which have a focus on child participation, are in several of India's states the facilitators of the children's (*makkala* or *bal*) *panchayats*, initiatives that have been referred to with pride by central government in its reporting to the Committee on the Rights of the Child.⁸⁴⁰ The children's *panchayats* work alongside the adult *panchayati raj*, providing a child perspective as well as contributing with important information. The children's *panchayats* provide opportunities for exerting influence over things affecting their lives, and cause adults to realise the benefits of respecting the child's views and contributions. They also introduce children to the democratic mechanisms of society and how they work and can be applied. Nevertheless, although the positive effects for children of being involved in the work of children's *panchayats* and other NGO-initiated or facilitated initiatives are recognised by the state in the report, it is perfectly clear that the democracy aspects of children's rights are not among the state's highest priorities.

7.4.3.2 Comments and Concluding Observations

At the *Committee session* in 2000 when India's initial report was examined by the Committee on the Rights of the Child, members sought information on issues on which the report was silent. They asked about the obstacles that had been encountered during the transition from a welfare-based to a rights-based approach to issues affecting children that were taking place in India. They inquired into the progress made in this field,⁸⁴¹ and asked why no legislation had been adopted so far to

⁸³⁹ July 2003 Alternate Report, submitted by the National Movement of Working Children, p. 16.

⁸⁴⁰ The Concerned for Working Children, working with Bhima Sangha in Karnataka, UNICEF and *Bharat Gyan Vigyan Samiti* in Rajasthan – for more examples, see CRC/C/93/Add.5 para. 273-277 and boxed information 3.8 and 3.9. See also Chapter 3.6.2.2 *supra*.

⁸⁴¹ CRC/C/SR.589 para. 40, question posed by Mrs. Mokhuane.

affirm the right of children to be heard.⁸⁴² The Committee also wanted to know how the rights-based strategy that the Convention required was to be put into practice.⁸⁴³ Members made clear that the initial report did not refer to the four general principles of the Convention, and that “a holistic and integrated approach to the problems existing was clearly lacking”.⁸⁴⁴ It was also pointed out that a public education campaign designed to change people’s attitudes was essential to achieve children’s rights.⁸⁴⁵ Furthermore, the Committee emphasised that the government had to take the lead in invoking the provisions of the national Constitution and additional national agreements. It urged that greater attention must be paid to changing attitudes among the population in order for the Convention to be implemented more effectively and to allow for “the principles of democracy to be more fully extended to children’s rights”.⁸⁴⁶

The 2000 Concluding Observations follow a similar line of thought to that expressed in the questions, comments and discussions at the session held a few months earlier. The Committee identified the existence of traditional customs – the caste system in particular – and societal attitudes as constituting obstacles to efforts to combat discrimination of different kind.⁸⁴⁷ It expressed concern over a lack of action to bring existing federal, state and personal law status into full conformity with the Convention and

notes that insufficient efforts have been made to implement legislation and the decisions of the courts and commissions [...] and to facilitate the work of such institutions with respect to children’s rights.⁸⁴⁸

On article 12,

the Committee notes that the views of the child are accorded insufficient importance, especially within the family, the school, care institutions, the courts and the juvenile justice system.⁸⁴⁹

The Committee was of the opinion that respect for the views of children and their participation in all matters affecting them should be promoted and facilitated by the state, and that skill-training programmes for key functionaries should be developed.⁸⁵⁰ The Concluding

⁸⁴² CRC/C/SR.590 para. 28, question posed by Mr. Doek.

⁸⁴³ CRC/C/SR.590 para. 31, question posed by Mrs. Karp.

⁸⁴⁴ CRC/C/SR.590 para. 60, comment by Mrs. Karp.

⁸⁴⁵ Ibid.

⁸⁴⁶ CRC/C/SR.590 para. 64.

⁸⁴⁷ CRC/C/15/Add.115 para 9.

⁸⁴⁸ CRC/C/15/Add.115 para. 10.

⁸⁴⁹ CRC/C/15/Add.115 para. 34.

⁸⁵⁰ CRC/C/15/Add.115 para. 35.

Observations pointed to some positive aspects, such as the existence of a wide range of legislation and constitutional provisions for the protection of children's rights, as well as for human rights in general and also welcomed the progressive attitudes of the Indian courts (the Supreme Court in particular). However, the final judgement on India's accomplishments, as presented in the initial report, was that they were unsatisfactory on the level of implementation and that further effort was required.

An effect of the critique presented by the Committee in 2000 was that India's first periodical report was very comprehensive and provided information on a number of questions not previously referred to. However, Committee members at the 2004 *examination session* still felt obliged to comment on the slow progress of children's rights implementation in India. Members emphasised that although the intention of the Indian government might well be to proceed from a welfare-based to a rights-based approach to children, nevertheless in too many situations children were still categorised and treated according to the status connected to their gender and social status, and were not perceived as being individuals with rights.⁸⁵¹ The Indian delegates responded to the questions, emphasising their country's commitment to ameliorating the living conditions of children in India, while at the same time reminding the Committee of the stark economic realities affecting how the Convention could be implemented.⁸⁵² As regards article 12, the Indian delegate said that India was truly committed to child participation and that the concept was increasingly gaining ground, in particular within the education system.⁸⁵³ The important role played by NGOs was also acknowledged.⁸⁵⁴

The 2004 Concluding Observations also pointed to a lack of conformity, for example, between domestic legislation, particularly on family law, and the provisions and principles of the Convention on the Rights of the Child and, as mentioned earlier, on the lack of a child-rights-based approach in the National Charter for Children to include all the rights and principles of the Convention.⁸⁵⁵ The Committee also expressed specific concern over the persistence of discriminatory social attitudes and harmful traditional practices shown towards girls and encouraged "the state party to continue its efforts to [...] carry out comprehensive public education campaigns to prevent and combat gender discrimination, particularly within the family".⁸⁵⁶ The Commit-

⁸⁵¹ CRC/C/SR.932 para. 9-10, comments by Mr. Krappman, Country Rapporteur.

⁸⁵² CRC/C/SR.932 and CRC/C/SR.933, para. 24.

⁸⁵³ CRC/C/SR.933, para. 24.

⁸⁵⁴ CRC/C/SR.933, para. 24-25.

⁸⁵⁵ CRC/C/15/Add.228 para. 9, 15.

⁸⁵⁶ CRC/C/15/Add.228, para. 30.

tee also observed that the Indian state should mobilise the support of political, religious and community leaders to eradicate harmful traditional practices and attitudes which still discriminate against girls.⁸⁵⁷ On article 12 and respect for the views of the child, the Committee declared that it

welcomes initiatives to increase child participation by the establishment of children's councils, associations and projects in several states and districts, but remains concerned that traditional attitudes towards children in society, especially girls, still limit the respect for their views within the family, at school, in institutions and at the community government level. The Committee further notes with regret that there are virtually no legal provisions guaranteeing children's participation in civil proceedings affecting their rights and well-being.⁸⁵⁸

From the Committee member's comments and the formulations in the concluding observations – a conclusion applicable to both reports submitted by India so far – it is clear that the Committee considered traditional attitudes and what can be referred to as “culture”, to be important factors affecting the implementation of the Convention in India, not least the implementation of participation rights. Achieving effective implementation is very much a question of changing attitudes on different levels and in various contexts. The Committee's overarching recommendation was that existing legislative and other measures concerning the rights of the child had to be more effectively implemented and disseminated throughout India. The mechanisms for coordinating implementation at federal and state level should be strengthened in order to improve efficiency.⁸⁵⁹ It also recommended that all existing and future special temporary programs should have specified goals and timetables so that they can be evaluated in order to justify their continuation, expansion and dissemination.⁸⁶⁰ On article 12, the Committee recommended that respect for the views of children, girls in particular, must be further promoted and facilitated. Educational information to all groups concerned – in practice meaning all groups in society – must be provided and the extent to which children's views were to be taken into consideration must be regularly reviewed.⁸⁶¹ Thus the important message of the 2004 recommendations does not relate primarily to a requirement for the drafting and adoption of legislation

⁸⁵⁷ CRC/C/15/Add.228 para. 29.

⁸⁵⁸ CRC/C/15/Add.228 para. 36. It is not clear in the concluding observations if the Committee in this citation refers to initiatives taken by the Indian state or to initiatives in general (most likely NGO-initiated).

⁸⁵⁹ CRC/C/15/Add.228 paras. 10, 14.

⁸⁶⁰ CRC/C/15/Add.228 para. 32.

⁸⁶¹ CRC/C/15/Add.228 para. 37.

and norms, but rather for the effective implementation of the rules already in place and for the careful monitoring of that implementation. The Committee wished to see evidence of *de facto* implementation, not only *de jure*.

7.5 India and “the Culture Argument”

As indicated earlier, the Indian government in its reports and additional information submitted to the Committee on the Rights of the Child in general paints a predominantly positive picture of how children’s rights are implemented in India. Progress and accomplishments are emphasised by the government and developments in the field of child protection and children’s rights are described as being part of India’s “considerable post-independence achievements”.⁸⁶² For a government to stress positive results regarding the implementation of a treaty while minimising its shortcomings is neither uncommon nor surprising in human rights reporting. Any country, regardless of its political system, seeks to present itself in the best light possible: to appear as a forward-looking state placing human rights issues high on the political agenda, irrespective of whether those rights are actually respected or made effective to any significant extent.⁸⁶³

In the case of India and children’s rights, the focus of the reports has been more on enumerating and describing in detail the measures, legislative and others, that have been taken rather than to provide a critical self-examination and analysis of the results of implementation so far. This has provoked strong objections from non-governmental organisations working in India who accuse the government of describing the situation on children’s rights in self-flattering and inaccurate terms and (regarding the 2003 report) of submitting a report that is “entirely uninformative about the actual status of children in India”.⁸⁶⁴

⁸⁶² CRC/C/SR.589 para. 34.

⁸⁶³ State party reports from countries such as North Korea, Burma and Belarus are only a few examples of that what the governments present to the Committees regarding *e.g.* the right to freedom of expression can be far from the actual state of affairs.

⁸⁶⁴ The citation is taken from the alternative report by the NGO Asian Centre for Human Rights *The Status of Children in India* 2003, where also the lack of information submitted on children’s political and civil rights is pointed out (p. 5). Other critical NGO reports include *Children of Manipur: A Supplementary Report on the Rights of the Child* by the Centre for Organization, Research and Education (CORE) (Manipur) 1998, *An Alternate report on the Status of Child Labour in India* by the Campaign Against Child Labour (India) 1998, *A Critical Review of India’s Report Submitted to the Committee on the Rights of the Child* by The Concerned for Working Children 1999. Critique was also aired in interviews with Ashley Varghese of the International Justice Mission in Mumbai, 06/11/2003, Kavita Ratna of the Concerned for Working Children in Bangalore 17/11/2003, Dr. Rao at the Global March Against Child Labour,

A comparison can be made with Vietnam's 2002 report.⁸⁶⁵ The Vietnamese report displays a clear aim to describe accurately – for the lion's share of the articles – the results of implementation in the country, limitations and future plans as well as already existing legal frameworks and policies. In contrast, the weaknesses in India's reporting to date become obvious. It is perhaps particularly noteworthy that the democracy aspects of the right to participation, fundamental in a democratic state – and India being the world's largest democracy – are not mentioned in the reporting. On the other hand, this is, as shown in section 6.3.4, rather a rule than an exception in a majority of the reports submitted to the Committee by state parties.

A general conclusion to be drawn from the chosen disposition of the Indian reports – information rather than self-examination – is that India's government has not felt itself obliged to go into extensive detail on whether or not the implementation of the Convention on the Rights of the Child in that country has been successful, nor on the actual results attained. The focus is predominantly on implementation *de jure*, not *de facto*. No extensive argumentation is presented to explain obstacles to effective implementation of the Convention. It is not suggested here that the Indian government has attempted to hide or ignore the enormous and complex challenges it has faced in the past – and will face in the future – nor that it has ignored or minimised the impact on effective implementation created by extreme poverty, illiteracy, the caste system and gender and ethnic-based discrimination. These factors are all mentioned in the reports as being important obstacles in general to the implementation of human rights and to human development.⁸⁶⁶ In the reports mention is also made of the influence of age hierarchies, that children often have a limited say in the decisions that are made concerning them, that the understanding of the spirit and principles of child participation must be further developed and, not least, that adults need to change the way that they currently see children and their potential. These underlying reasons for the current situation are, however, not further analysed, nor are the measures of dealing with them envisaged.⁸⁶⁷ The Committee on the Rights of the Child, on the other hand, refers frequently in its comments to traditional customs

New Delhi, 04/11/2003, Pratibha Menon at the Indian Centre for Human Rights and the Law, Mumbai, 06/11/2003 and Aparna Bhat at the Human Rights Law Network/SLIC, New Delhi 31/10/2003. Academics at the Centre for Child and the Law at the National Law School of India in Bangalore expressed similar views (interview with Arlene Manoharan at the Centre for Child and the Law 14/11/2003).

⁸⁶⁵ Vietnam's second report CRC/C/65/Add.20.

⁸⁶⁶ See India's 1997 report (CRC/C/28/Add.10), summary records from the 2000 meeting (CRC/C/SR.589-591), India's 2003 report (CRC/C/93/Add.5) and summary records from the 2004 meeting (CRC/C/SR.932-933).

⁸⁶⁷ See Chapter 7.4.3.1 *supra*.

and discriminatory societal attitudes as forming major obstacles to the effective implementation in India of the Convention both in general, and as regards article 12, in particular – as do a number of non-governmental organisations and other commentators when discussing its implementation in that country.⁸⁶⁸

As discussed in Chapter 6, many state parties to the Convention tend to use arguments referring to culture and traditional attitudes as explanations and, in some cases, justifications for their lack of implementation of the child's participation rights.⁸⁶⁹ It would thus, judging from how similar state parties have dealt with the matter, not have been surprising if India – being a society of enormous cultural diversity where tradition, religion and societal attitudes affect people's everyday lives, not least concerning family relations and the relationship existing between adults and children – would have used the same kind of argumentation.⁸⁷⁰ Cultural diversity and traditional attitudes in India, as in all countries, inevitably has a significant influence not least on how a progressive and somewhat controversial right such as the right for children to participate in decision-making processes can be implemented. Contrary to many other state parties to the Convention, however, India does not particularly refer to traditional attitudes, customs or "culture" when accounting for the difficulties and obstacles encountered when attempting to implement the right of respect for the child's views. In the Indian reporting, there is no assertion that cultural diver-

⁸⁶⁸ On the Committee, see Chapter 7.4.3.2; on the NGOs, see the reports enumerated in n. 864 *supra*.

⁸⁶⁹ For countries that refer to the backwardness of their population as a reason why implementation of the Convention is slow and difficult, see Chapter 6.

⁸⁷⁰ In the most recent (1999-2004) World Values Survey, it is established that India shows little evidence of intergenerational value change – that is, the same values are seen as important regardless of the age of people who are asked. Intergenerational value changes reflect changes in a society's existential conditions and are, according to the study, found only in societies where the younger generations experience better conditions than their parents. According to the World Values Survey, socioeconomic development is an important factor in the transformation of people's basic values and beliefs. It is also concluded in the analysis following the survey that a society's prevailing value orientations reflect the relationship between modernisation and traditional influences. On the Inglehart Values Map (visualising the strong correlation of values in different cultures), India is placed somewhat closer to the traditional and survival poles than to the rational-secular and self-expression poles (although traditional values do not hold as strong a position as in, for example, many sub-Saharan countries). Significant for societies where traditional values are dominant are an emphasis on "family values" and a conservative approach to behaviour that appear to threaten the family as the basic unit of society. In postindustrial societies with well developed welfare systems, a strong family is no longer necessary for survival and thus more room is left for alternative views and life choices. See Ronald Inglehart & Christian Welzel *Modernization, Cultural Change, and Democracy* New York, Cambridge University Press, 2005, pp. 4-7, 111-113, and the values map as published on the project's official website, <http://www.worldvaluessurvey.com> (as visited 11/7/2006).

sity and traditional values contradict the values underpinning the Convention and that they are therefore unsuitable to implement in Indian society. Nor is there any attempt to try to free the state from responsibility by blaming the population's backwardness. Nor is it objectively presented as a major obstacle of implementation. Traditional values and societal attitudes are indeed referred to in general terms in the reports as being part of what shapes the living conditions of the Indian child, but arguments referring to culture are not referred to as specific explanations as to why the country's implementation of child participation rights is as bleak as it still is. It can thus be concluded that India has not chosen the same approach as many other countries faced with similar problems of poverty, lack of education, discriminatory practices and the unequal distribution of resources – countries that have exploited the possibilities of “the culture argument” to the full (as discussed earlier). The question arises: why has India chosen a different approach?

One explanation suggested as to why India has not particularly employed “the culture argument” is that it is not in its best interests to present itself as a country where traditional attitudes and customs – concepts often perceived as having a negative ring to them – have a major influence on how the state fulfils its obligations according to international treaties, and on how it implements domestic legislation. This, as discussed in Chapter 6, does not seem to be the hallmark of a modern state. In their analysis of the results of the most recent World Values Survey, a worldwide investigation of sociocultural and political change, Roger Inglehart and Christian Welzer argue that “modernisation is evolving into a process of human development, in which socioeconomic development brings cultural changes that make individual autonomy, gender equality, and democracy increasingly likely, giving rise to a new type of society that promotes human emancipation on many fronts.”⁸⁷¹ Socioeconomic modernisation, according to Inglehart and Welzer, is linked to a mass emphasis on self-expression values which in turn leads to growing public demands for democracy and, also, human liberties.⁸⁷² According to their analysis, “a modern, developed state” is, crudely expressed, very likely to be an effective liberal democracy where values of self-expression and human rights are respected and where traditional values and attitudes become less influential.

⁸⁷¹ The World Values Survey is based upon interviews with a representative national sample of at least 1,000 people in a society. Inglehart & Welzer *Modernization, Cultural Change, and Democracy* p. 2.

⁸⁷² Inglehart & Welzer *Modernization, Cultural Change, and Democracy* pp. 1-5 and 285-300.

So how does this relate to India? India considers itself to be a secular democracy and a modern state. It is also an emerging world power – economically as well as politically.⁸⁷³ Its cultural and historical heritage form an important backdrop to its ancient civilisation, but it is the India of today that is truly important. References to backwardness, traditional attitudes and “culture” as constituting obstacles to progress have no place in this ‘brave new world’ of development. The writer Arundhati Roy has reflected upon the paradox of how “India lives in several centuries at the same time” and on how development affects and benefits different groups in society in very different ways.⁸⁷⁴ Her description of the political development in India today is vivid:

It’s as though the people of India have been rounded up and loaded onto two convoys of trucks (a huge big one and a tiny little one) that has set off resolutely in opposite directions. The tiny convoy is on its way to a glittering destination somewhere near the top of the world. The other convoy just melts into the darkness and disappears.⁸⁷⁵

One could argue that the preferred image of modern India, presented by the state in its human rights reporting, often appears to concentrate on the tiny convoy Roy refers to – without, it should be noted, denying the situation of the passengers on the larger convoy. What seems to be promoted is the picture of an increasingly modern state, not least as regards the effective implementation of human rights, playing on equal terms with its competitors in the West and elsewhere.⁸⁷⁶ Following this line of argument, it would appear logical for India not to use argu-

⁸⁷³ *Ibid.* India’s Human Development Index (HDI) 2005 rank is at 127 of 177 states, placing India among the medium developed countries, and a GDP per capita annual growth rate (1990-2003) of 4 per cent. For statistics, see UNDP Human Development Report 2005 as published on <http://hdr.undp.org/reports/global/2005> (visited 11/7/2006). India’s HDI has since 1975 increased from 0,412 to 0,602 in 2003 (see http://hdr.undp.org/statistics/data/hdi_rank_map.cfm). Sweden, as a comparison, is ranked 6 on the 2005 HDI index and has from 1975 to 2003 increased its HDI from 0,864 to 0,949. Sweden’s GDP annual growth rate (1990-2003) is 2 per cent (http://hdr.undp.org/statistics/data/hdi_rank_map.cfm, as visited 11/7/2006). China is generally referred to as India’s most important rival as “the next economic superpower” – there is, however, no doubt about India being more at the forefront in terms of human rights.

⁸⁷⁴ Roy *The Algebra of Infinite Justice*, pp. 187-215.

⁸⁷⁵ Roy *The Algebra of Infinite Justice* pp. 188-189.

⁸⁷⁶ See e.g. interview with Yasmine Zaveri-Roy, SIDA Programme Officer, Embassy of Sweden, New Delhi 31/10/2003, APJ Abdul Kalam *Ignited Minds: Unleashing the Power within India* New Delhi, Penguin Books, 2003, Sumit Ganguly “International Relations” pp. 93-111 in Ganguly & DeVolta, Varma *Being Indian. Inside the Real India* pp. 174-194, Sen *The Argumentative Indian. Writings on Indian History, Culture and Identity* London, Allen Lane, 2005, pp. 193-173, India’s Prime Minister Dr. Manmohan Singh’s Address at the 59th Session of the United Nations General Assembly 23/09/2004, Statement by Prime Minister Dr. Manmohan Singh at the 13th SAARC Summit 12/11/2005.

ments based upon cultural diversity in its reporting to human rights monitoring bodies such as the Committee on the Rights of the Child – as part of the effort to avoid placing itself in that category of country where the concept of “modernity” could be at risk of being questioned.⁸⁷⁷

Inglehart and Welzer make, as described above, a connection between modernisation and mass demands for effective democracy. If a state wishes to present an image of itself as modern, it is not too far-fetched to think that fulfilling – or at least, attempting to implement – democratic rights for all citizens would be part of this effort, since democracy as such, including the democracy aspects of the child’s right to participation, has attracted mounting attention worldwide over the past decade. This increased interest in democratic values could thus have been expected to show, one way or another, in how states implement the Convention on the Rights of the Child – children’s participation rights in particular. The connection between being a modern, democratic state and not advancing the culture argument does not, however, seem to affect the way in which the state parties to the Convention value implementing article 12. As shown in Chapter 6, references to the child’s right to participation from a democracy point of view are presently exceptions to the rule in all types of country, as evidenced in the reports submitted by state parties to the Committee on the Rights of the Child. The system of government or level of development or “modernity” of a state appears irrelevant in relation to how states address the matter of child participation. In the examination of state party reports presented earlier, a discussion concerning the possibility of children, as well as adults, *a)* actually having democratic rights and *b)* that it would benefit the individual to be able to exercise these participation rights is conspicuous by its absence in a majority of the reports, regardless of whether the reporting country concerned is a post-industrial, Western-style functioning liberal democracy or a low developed country where democratic practice is limited or even absent.⁸⁷⁸ This is true not least in the case of India, where the democracy aspects of article 12 are not mentioned in the reporting – regardless of the fact

⁸⁷⁷ In India’s reports to, for example, the ICCPR and the CEDAW culture and tradition is occasionally referred to – particularly in relation to family matters – but the impact of these factors are not emphasised more than what is done in the reporting to the CRC. See India’s 1983 report to the ICCPR (CCPR/C/10/Add.8), the 1989 report (CCPR/C/37/Add.13), the 1995 report (CCPR/C/76/Add.6) – India’s fourth report to the ICCPR is at the time of writing yet to be submitted. See also the 1999 report to the CEDAW (CEDAW/C/IND/1) which at the time of writing is the only one India so far had submitted to the CEDAW.

⁸⁷⁸ See examination of state reports in Chapter 6.3.

that the Committee has explicitly expressed its wish to see the principles of democracy to be also extended to children's rights.⁸⁷⁹

On the other hand, the causes of India's omitting of references to tradition and culture are perhaps not to be sought in arguments referring to the country's aspirations for it to be conceived as a modern state. It might be simpler than that. India does not seem (at least in the context of reporting to the Committee on the Rights of the Child), in contrast to the attempts of many other countries, to try to make a distinction between the "progressive state" and what often is referred to as a "backward population", thereby attempting to justify its less than satisfactory implementation of article 12. The topic is simply more or less ignored. Whether this depends on whether India – regardless of its statements to the contrary in reports and additional information to the Committee – still applies a welfare-based approach rather than a rights-based approach to children and that child participation rights are therefore considered too radical to implement or, whether it is because there are so many other rights (the right to life, development, education are just a few examples) that are considered more pressing to implement in present-day India is difficult to say. The conclusion to be drawn from the fact that India does not refer to cultural diversity when explaining its unsatisfactory implementation of article 12 might be very simple. It is perhaps not because the country wishes to project the image of itself as a modern, progressive state but, instead, because the child's right to participation is considered to be more or less Utopian – not least in a society where so many adults have little chance of exercising political influence in practice – and therefore extremely difficult to implement.⁸⁸⁰ The implementation of the democracy aspects of the child's right to participation by many, especially NGOs, simply is considered to be far ahead of its time – whether it is even conceived to be possible at all in India.⁸⁸¹ Not discussing these aspects in the state party reporting might thus be a quite honest indication of the actual priorities made by the implementing state – regardless of its being contrary to the holistic approach to the rights included in the Convention that is preferred by its monitoring body.

⁸⁷⁹ See 7.4.3.2 *supra*.

⁸⁸⁰ Drèze & Sen *India. Development and Participation* pp. 346-379.

⁸⁸¹ See n. 864.

8 Turning Rhetoric into Reality: Conclusions and Suggestions

8.1 Conclusions – It's all a Question of Power

This dissertation builds on the essential idea of the interconnectedness between participation in decision-making, the possibility of exercising influence over one's own life, human dignity and last, but not least, the human rights of the individual. This study is intended to illustrate and analyse different aspects of this interconnectedness within a child rights context. The overarching topic of the work is an analysis of the child's right to participation as expressed in article 12 of the UN Convention on the Rights of the Child, and the gap between theory and practice with regard to its implementation. For the purpose of this analysis, four aims have been established. The first three are to clarify the importance of child participation in a democratic society, to contribute to a better understanding of the meaning of child participation and to investigate certain obstacles in the way of implementation of the article. These aims have been discussed in previous chapters. The fourth aim, to discuss possible changes to be made in order for implementation to function more effectively than is the case today, builds on the conclusions drawn from the analysis above and is addressed in the following.

In theory, the implementation of human rights treaties should not be unduly complicated. Countries consent to be bound by a treaty and thereby become state parties to it. They are thereafter bound to implement the treaty in good faith and not to interpret its provisions in contradiction to its aim and purpose.⁸⁸² Human rights treaties in general contain provisions on how a particular treaty is to be implemented, stating specifically whether or not it is possible to put into effect the rights protected by the treaty gradually, depending on the availability of resources. If a treaty allows for successive implementation – as does, for example, the International Covenant on Economic, Social and Cultural Rights – then, but only then, gradual progress is acceptable. Otherwise, slow implementation cannot be justified by lack of resources. Neither can a state justify its failure to carry out its obligations

⁸⁸² Vienna Convention on the Law of Treaties (VCLT) articles 26 and 31.

under a treaty by invoking its internal legislation.⁸⁸³ The procedures established for monitoring treaties provide tools for the monitoring bodies to oversee how state parties fulfil their treaty obligations. The framework for an effective implementation of a treaty is thus established and should therefore, along with the treaty provisions and additional jurisprudence, provide sufficient guidance for effective implementation to be attained.

In practice, of course, it is not so simple. Reality and rhetoric are very far apart when it comes to respect for human rights in so many countries. The essential element for the implementation of human rights treaties – *political will* – is far too often a lacking ingredient outside of the diplomatic context. In the case of the Convention on the Rights of the Child, international political and diplomatic consensus prevails on the issue that the rights of the child must be protected. All countries in the world, but two, are parties to the Convention, making the rights defined in it into something of a global checklist of which rights are considered to be important for children. Advocating children's rights and accentuating the progress that has been made in the field creates political goodwill for states. Simultaneously, reservations have been made to the Convention that in some cases, as for example those made by several Muslim states to article 14 on the right to freedom of religion, are so extensive that they are on the verge of being unacceptable.⁸⁸⁴ Equally problematic is the fact that these reservations weaken the Convention on both a universal and national level, and challenge the competence of the Committee. Nevertheless, the fact remains that the Convention has put the rights of the child on the international agenda as never before.

However, as discussed in the present study, all rights are not considered to be as equally important to fulfil when push comes to shove. The right of children to have their views respected and taken into account, despite its being one of the Convention's core principles, is not a top priority among the Convention states. The way in which child participation and the progress made in this field on a domestic level are referred to in the state party reports is evidence of this. Considering its status, article 12 is seldom accorded the attention in the reports that one might expect. Although state party reports are only one element of the monitoring process, the attitude visible in many reports – although not all – tells of the difficulties experienced by state parties, not least in relation to article 12, and the lack of political will to overcome them.

A few particularly important strands can be identified in the complicated web of reasons as to why participation rights for children,

⁸⁸³ VCLT article 27.

⁸⁸⁴ See Chapter 2.3.1 *supra*.

although considered to be such a good idea in theory, are so difficult to implement effectively in practice. One such strand is that certain aspects of the Convention – for example, children’s participation rights – often seems to be regarded as something of a policy document, rather than as being the binding international law treaty and core international human rights instrument that it is. *These aspects of children’s rights are simply not taken seriously.* Yes, the Convention has been almost universally ratified, and yes, the state parties are eager to show their commitment to children’s rights when reporting to the Committee on the Rights of the Child as well as in other contexts. It is also true that the Convention has had a visible impact on the jurisprudence of other international human rights instruments, on regional human rights systems, on a constitutional level in some countries as well as on domestic legislation.⁸⁸⁵ However, the fact that many countries have had no difficulty in ratifying the Convention on the Rights of the Child – protecting, among other rights, the right to freedom of thought, expression, information and assembly – while at the same time refraining from ratifying the Covenant on Civil and Political Rights (which establishes the right to exercise these very freedoms for “all individuals”) indicates that the rights of children and adults are not accorded similar weight. It is hardly the intention of states such as, for example, China and Myanmar – both of which have ratified the Convention but not the Covenant – to ensure that children should have more rights than adults.⁸⁸⁶ The conclusion to be drawn is that governments such as these simply do not consider children’s civil and political rights as being as important as those of adults. This makes it possible for states to ratify the Convention even though it is clear that the right, for example, to freedom of expression in general is severely limited in a number of the Convention’s state parties.⁸⁸⁷ Children’s rights are not accorded the same respect as the human rights of other groups – if they are considered to be human rights at all.

This hesitation, or perhaps unwillingness, among states to see children’s rights as being as important as adult rights is without doubt a tendency permeating the whole process of implementation of the Convention. In the context of participation, one example is the democracy aspects of article 12 which are seldom referred to in the reporting

⁸⁸⁵ A recent study from the UNICEF Innocenti Research Centre presents a useful inventory of this impact. Philip Alston & John Tobin *Laying the Foundations for Children’s Rights. An Independent Study of some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child* Sienna, UNICEF, 2005.

⁸⁸⁶ China signed the ICCPR on 5 October, 1998 and ratified the CRC 2 March, 1992. Myanmar had, at the time of writing, neither signed nor ratified the Covenant. It acceded to the CRC on 15 July, 1991.

⁸⁸⁷ See 3.4.2 *supra* for statistics from Freedom House.

process, either by state parties or by the Committee.⁸⁸⁸ There are a few exceptions where state parties have addressed the matter – Germany is one example – but in general, references to democracy issues are rare in the reports.⁸⁸⁹ Neither does the Committee, in its Concluding Observations, tend to comment in particular on this aspect of article 12. This is, however, not surprising as no society considers the child to be a full member of the *demos*. As a result, the exclusion of children from many levels and procedures of political decision-making can easily be justified.

The exclusion of children from the *demos* in general is not seen as being problematic (it is, as discussed in Chapter 3, not high on the agenda in the democracy discourse). Neither the majority of state parties nor the Committee seem to consider it necessary for countries to account for how children, as a social group or as individuals, can participate in and exercise influence on society's decision-making processes. The fact that the Committee seldom comments on the democracy aspects of article 12 does not necessarily mean that it considers these aspects to be unimportant – it is, however, interesting to note that they so often remain unaddressed. The conclusion, once again, is that *the right to participation as an issue of democracy* is apparently not considered to be as important for children as it is for adults. The possibilities for children to exercise influence on a national level are seldom referred to, either in state reports or in the Committee's concluding observations.⁸⁹⁰ The right to have a say in decision-making affecting the child on an individual level, or in contexts closely connected to children – medical treatment is an example of the first, school matters of the second – is on the other hand addressed in many state reports and commented on by the Committee.

The lack of references to the democratic dimension of article 12 by the Convention's state parties as well as by its monitoring body could, of course, be taken as an indication that the scope of article 12 does not include the democratic participation of children in situations other than those directly affecting the individual child. Such an interpretation, however, is contradicted by the number of references made to the im-

⁸⁸⁸ See 6.4.4 *supra*.

⁸⁸⁹ Germany's 2003 report CRC/C/83/Add.7 para. 254: "This approach [the approach of article 12] is consistent with the fundamental principle of a democratic society, according to which those affected must have an opportunity to represent their own interests. [...] The fundamental acceptance of the idea of participation is not the least of the manifestation of a course of development which sees children more and more as subjects rather than objects of decisions by parents and society." See, also, para. 264-316, on different forms of child participation on the level of local communities.

⁸⁹⁰ Norway is as discussed in previous chapters, an exception as regards state parties – see Norway's reports to the Committee of the Rights of the Child: CRC/C/8/Add.7, CRC/C/70/Add.2 and CRC/C/129/Add.1.

portance of child participation by the Committee in various contexts. Two examples are the final recommendations following several of the Committee's Days of General Discussion⁸⁹¹ and the workshop celebrating the 1999 tenth anniversary of the Convention.⁸⁹² In the recommendations following the workshop, the importance of considering children's rights as the human rights of children is emphasised, as is the notion that "participation includes, but is not limited to, consultation and proactive initiatives by children themselves".⁸⁹³ The recommendations also remind state parties of the need to pay adequate attention to the requirements of the provisions on participation, articles 12 through 17 in particular.

The categories of individuals that can participate in democratic decision-making processes have traditionally not included children. *Democracy is, in this way, for some but not for all*. Although it is not a legitimate justification, it should be pointed out that exclusion – whether complete or partial – from the possibility of actually exercising influence over matters affecting one's life is a destiny shared by all so-called weaker groups in any society. Women, immigrants, ethnic minorities, people of colour, poor people – depending on the society in question, such groups all too often have limited possibilities of exercising influence. Even though their citizenship status is equal to everyone else's in a legal sense, it is not in the way it is interpreted and put into practice.⁸⁹⁴

In a world where so many categories of people are *de facto* excluded from decision-making processes and thus have limited possibilities to influence their individual destinies, it is not surprising that

⁸⁹¹ See, for example, 2004 Day of General Discussion on Implementing child rights in early childhood (Committee on the Rights of the Child Report of the 37th session, 13 September – 1 October 2004, CRC/C/143) the 2003 Day of Discussion on indigenous children (Committee on the Rights of the Child Report of the 34th session, 15 September – 30 October 2003, CRC/C/132) the 1997 Day of Discussion on children with disabilities (Committee on the Rights of the Child Report of the 16th session 22 September – 10 October 1997, CRC/C/69) and the 1995 Day of Discussion on the girl child (Committee on the Rights of the Child Report of the 8th session, 9-27 January 1995, CRC/C/38).

⁸⁹² The recommendations were issued by the Committee as a result of the workshop "Tenth Anniversary of the Convention on the Rights of the Child: Achievements and Challenges" held 30 September – 1 October 1999 at the tenth anniversary of the CRC commemorative meeting. See Report on the twenty-second session, September/October 1999 CRC/C/90.

⁸⁹³ Report on the twenty-second session, September/October 1999 CRC/C/90, para. 291(w).

⁸⁹⁴ There are numerous examples, from the blatant discrimination of South Africa's previous political system of apartheid, to more disguised forms of limitations where a group, such as, for example, immigrants, have the right to vote formally speaking but in practice are restrained from doing so freely by the fact that information about the political parties and about the national political process is not available in their language.

the child's right to participation is not a priority. Children have few possibilities to make their voices heard in public debate and to demand that they are listened to. It is against this backdrop that the proud statements and promises made when referring to children and their rights in various contexts, not least on a high political and diplomatic level, have to be measured. A positive sign on the international level is that child representatives have been present at several General Assembly sessions in the past decade and that these representatives have been able to participate actively in the proceedings, at least at the 2002 UNGASS.⁸⁹⁵ At the end of the day, children depend on the condescension and benevolence of adult society, a society that traditionally prioritises protection of children over participation, not seeing the two as being interconnected but rather in terms of protection first, participation later.⁸⁹⁶ This thinking, however, does not correspond with the holistic approach of the Convention on the Rights of the Child, or with the 1993 Vienna World Conference Plan of Action, in which the interdependent and interrelated nature of human rights is clearly emphasised.

One important question arises when considering the legitimacy of such exclusion in the context of the child's right to participation. If children can be justifiably excluded from democratic decision-making processes, how is genuine implementation and realisation of article 12 – “the democracy article” – to be made possible in anything other than a very limited way? This question in itself is enough reason to consider the content of the concept of democratic inclusion.

One explanation offered as to why implementation of article 12 has proved to be difficult is that the concept of child participation is in conflict with the *traditional attitudes and values of many societies and their cultures*. “Culture” in this context has acquired a somewhat negative ring, positioning it as being in opposition with the modern framework of human rights. This “justification” has been discussed in Chapters 6 and 7. The point in the analysis made, however, is that the problem lies not in certain societies/cultures (often labelled traditional) being less inclined to allow and facilitate matters for children to participate in decision-making than in other more “modern” societies (also known as Western style democracies). Instead, the same view of the child prevails, regardless of the society in question. It can be expressed in different ways and be of varying degrees, but the image that

⁸⁹⁵ The 2002 General Assembly Special Session was a landmark as it was the first such session devoted exclusively to children, and the first to include them as official delegates. Four governments had youth representatives address the General Assembly on behalf of their respective countries: the Netherlands, Norway, Sweden and Togo. Furthermore, a number of children and adolescents were included in NGO delegations.

⁸⁹⁶ See Chapter 7 for a discussion on the views of the child in the Indian context.

emerges is that children in general are often not seen as being capable or competent enough to effectively take part in decision-making processes on the grounds of their not being able to make a valuable contribution. When children are involved in decision-making processes in society the emphasis is more likely to be on the grounds of their participation being seen as part of a learning process – to foster them into responsible citizens for the future – than for their views to be worthy of independent and proper consideration. It is not the intention to be overtly pessimistic – there are, of course, examples of children’s views being taken into account and given real and measurable force. Norway, for example, has a very good record of implementing the democracy aspects of article 12 as is shown in their reports to the Committee on the Rights of the Child.⁸⁹⁷ Examples include Acts concerning local planning, decision-making in municipalities, in schools and on a central government level. However, the tendency on a universal perspective is that children’s views are *per se* accorded less attention and respect than is the case with the average adult. This applies to all children irrespective of age, although there is naturally a difference in the approach to very young children compared with how adolescents are treated. Examples of this overarching attitude can be found, for example, in Costa Rica’s 2004 report to the Committee on the Rights of the Child where it is recognised that:

In spite of the country’s systematic efforts to disseminate a rights approach, the adult population continues to put a construction on rights that is directly bound up with day-to-day life [...] However, other rights associated with the building of the personality, the development of autonomy and subjective experience have been related to a secondary position.⁸⁹⁸

Germany, in its 2003 report, made a similar statement:

the participation of children in society requires further development - and not only in Germany. The idea that adults know best what is good for children is too firmly entrenched in many people. Children are still frequently not taken seriously and not even consulted or listened to. This is particularly true in the *political* [author’s italics] sphere, which is considered to be beyond the faculties of children from the outset. It remains a central task and challenge to induce a change of attitude among adults, as participation is unfeasible without adults who are willing to listen to children.⁸⁹⁹

⁸⁹⁷ See references to Norway’s reports to the Committee on the Rights of the Child in n. 890 *supra*.

⁸⁹⁸ CRC/C/125/Add.4 para. 279.

⁸⁹⁹ CRC/C/83/Add.7, para. 279.

The citations above illustrate that problems also exist in so-called “forward-looking states”, where child participation has made it on to the political agenda. The element that all states (societies) have in common (as exemplified by the citations above) is the difficult process of *changing adult attitudes towards children and child participation in decision-making processes* – a change the importance of which is emphasised in the Committee’s comments as well as in certain state reports. The conclusion to be drawn, therefore, is that the problem is not in traditional attitudes towards children which are particular to a specific culture. State parties experience the same difficulties regardless of cultural context. Rather, the difficulties are related to the fact that real participation means exercising influence. Being able to exercise influence is to be empowered. Participation equals power. This epitomises the core of article 12 of the Convention on the Rights of the Child, although it is not expressed in terms of power and influence in the article itself. Fundamentally, it is also the element of power – or, more specifically, of child empowerment – that makes the article so radical.

The empowerment of children is a result of their effective participation in decision-making processes, not least on a political level, which challenges the very foundations of the existing hierarchy between children and adults. The full extent of the radical nature of article 12, judging by the *travaux préparatoires*, was not fully appreciated by the Convention’s drafters – at least it does not show in the documentation available from the process. Parallels regarding power hierarchies can be drawn with other groups and processes – for example, the struggle for gender equality. The element of power, and of power structures being altered, is perhaps even more difficult to accept in the case of children, where aspects of protection have to be taken into the equation. Children are *per se* more vulnerable than adults and need their support – it is an undeniable fact and something that always needs to be weighed in the balance.

The challenge lies in acknowledging in words and deeds that children, according to the Convention, have the right *both* to be a part of decision-making – thereby increasing their potential to decide their own destinies – and to protection from harm and exploitation. Presuming that the aim and intention of the international community is for article 12 of the Convention on the Rights of the Child – and, indeed, the Convention as a whole – to be implemented on a national level more effectively than is the case today, participation and protection must be considered as being equally important prerequisites for children’s rights to be seen as something more than merely good intentions. This presupposes that the interrelatedness between the concepts as well as the need to change existing power structures has to be recognised and, not least, addressed to a much further extent than what

has been accomplished so far by state parties, the Committee on the Rights of the Child and other actors in the global community.

8.2 Which Way to Go?

In the conclusions above, it is argued that at the root of the problems in relation to implementing article 12 there is a reluctance to deconstruct and alter existing power hierarchies and relationships between adults and children. Participation equals power, and power is seldom willingly shared. A thorough implementation of all aspects of article 12, including the democratic aspects of the right to participation, would entail a redefinition of existing societal structures and reallocating power to a previously marginalised group. This is undoubtedly a difficult task with far-reaching consequences. Furthermore, it is argued that for article 12 to be implemented to its full extent, including those aspects that have an impact on democracy and decision-making in a democratic society, it is of fundamental importance that the prevailing attitudes of state parties to the Convention and their national institutions, as well as of people in general, change significantly.

There are, perhaps, two ways of dealing with the problems of implementing article 12. This, of course, presupposes that it is considered a problem worth solving. This should not be taken for granted in a world where human rights are challenged and restricted in numerous ways – whether in the name of security and stability or simply as a result of a country's political system and form of governance. “Democracy” might well have been a buzzword for decades – but that does not mean that it has been correspondingly popular in practice. It is to be hoped that the current reform process of the United Nations and the establishment of a new Human Rights Council with extended powers as compared with its predecessor, the politicised Commission of Human Rights, is an indication that human rights issues are not being completely put on hold by the international community.⁹⁰⁰

The *first* approach is the easy one – it more or less means accepting the current state of affairs with a few, but not fundamental, changes. This means accepting a narrow interpretation of the scope of article 12 – as, for example, the one suggested by Marie-Francoise Lücker-Babel – who argues that the article is applicable to an individual child or an identifiable group of children for which the importance of the decision in question should exist specifically and not on matters affecting chil-

⁹⁰⁰ Report of the Secretary-General *In Larger Freedom* n. 342 *supra*. See also the Plan of Action submitted by the High Commissioner for Human Rights to the General Assembly, A/59/2005/Add.3.

dren in general.⁹⁰¹ Such an interpretation of the right to have one's views taken into account does not leave much room for issues on a national level such as, for example, environmental matters, guidelines for education and social planning.

That the child should be accorded more influence in matters important for the individual will require changes in national legislation – family law is one example, medical law another, not least as regards consent to treatment. It also challenges traditional power structures within the family. Patriarchal notions of the male breadwinner – the father/husband as the unquestionable head of the household – have resulted in a traditional paternalistic approach towards children and women in most of the world's legal systems as well as within the individual family.⁹⁰² The private sphere of the family is also a context in which the state traditionally has refrained from interfering. This reluctance has added to the conservation of the present distribution of powers, something that has effects not only for the particular family but also reflects itself in society in general. For both women and children, power relations within the family is of particular interest as this is a context where traditional views of "how things should be" are often preserved, thereby maintaining prejudice and patterns of subordination disadvantageous to certain categories. Changes in attitude must also be acknowledged in relations between individuals, in the family or elsewhere, for society to change other than merely on the surface. Changed attitudes on every level towards child participation in decision-making processes are, as argued above, a necessary prerequisite for an effective implementation of article 12 to be possible.

A result of accepting things roughly the way they are as regards the implementation of article 12 is that it opens the door for challenges to the Convention's credibility. If no real interest exists among state parties to effectively implement one of the Convention's general principles, the status and weight accorded not only to article 12 but to the treaty as such must be seriously questioned. If the state parties do not consider it important to put one of the Convention's core articles into practice, why should their position be any different in relation to other rights included in the treaty? The lack of effective implementation of the Convention thus implies that the commitment of state parties to children's rights can be regarded as nothing but lip service and political tactics, instead of a genuine wish to improve children's lives.

⁹⁰¹ See Chapter 5.

⁹⁰² See for example Goonesekere *Women's rights and children's rights: The United Nations conventions as compatible and complementary* and Goonesekere "Human Rights as a Foundation for Family Law Reform". See also the report from the 1994 Day of General Discussion on the Role of the Family in the Promotion of the Rights of the Child (n. 157 *supra*).

The second option puts more emphasis on the democracy aspects of article 12, interpreting the “all matters affecting the child” criteria in the article as “all matters affecting human beings”. Such an interpretation not only aims at providing the individual child with increased possibilities to influence his or her own life conditions – it also positions the child within the democratic process. This is both because it is considered positive that children learn the rules of the democratic process for the future – that they are educated into becoming future, responsible citizens – and because a child perspective can actually be of relevance to a decision-making process. A prerequisite for this interpretation of article 12 to be made possible to implement in practice, is that child participation is not considered to be a threat to adult society but a valuable complement that can benefit society as a whole. Child participation, as pointed out before, does not mean that children will make autonomous decisions; but that they will act alongside adults and that their views are accorded respect.⁹⁰³ Furthermore, as observed by Amartya Sen, democracy benefits development, economic as well as on other levels. Widening the scope of the *demos* to include children – in relation to their age and maturity – could thus be argued to have positive effects not only for the individual child, but also for a society’s prosperity.

Acknowledging aspects of child participation in relation to democratic processes leads to questions about what democracy actually is, what we want with it and who it is for. To see democracy as a process, rather than as a set of institutions, is an attitude of mind that leans towards the principle of democratic inclusion. Susan Marks, who argues the benefits of this principle, has proposed that a new, democracy-focused approach to international law has emerged over the past decade.⁹⁰⁴ This approach could perhaps be employed as an argument for the need to emphasise and strengthen the democracy aspects of the child’s right to participation in international law and for the necessity of effective implementation of article 12, not only in relation to a particular child but to children as citizens with rights. At the core of such an interpretation of “participation” and “democracy” lies the belief that the right to express one’s views, have them respected and to be able to participate in decision-making processes affecting one’s life are fun-

⁹⁰³ This was also the point where Roger Hart in his ladder of participation placed “child-initiated, shared decisions with adults” on the last rung. Hart did not want to limit the application of the ladder to situations where it was possible for children to act independently, but to make it applicable also to matters in which adults still wanted to take an active part in the decision-making. The key word, if one so wishes, is co-operation. On Hart’s ladder of participation, see Chapter 5.4 *supra*.

⁹⁰⁴ See section 3.4.3 *supra*.

damental human rights, rights which should not be dependent on the number of one's years.

8.3 Some Suggestions

If the latter approach is the one preferred – which is the position argued in this analysis – the next question is this: what measures should be taken to ensure that this interpretation becomes more than rhetoric. How does one change attitudes? In the 2005 OHCHR Plan of Action, the High Commissioner identified four “gaps” standing in the way of an effective implementation of human rights treaties on a national level.⁹⁰⁵ These are the *knowledge gap* (respect, protection and fulfilment of human rights requires an understanding of the best way to do so), the *capacity gap* (lack of human, financial or other resources), the *commitment gap* (governments must be committed to reform or redress a pattern of human rights abuse – that is, political will is crucial) and, finally, the *security gap* (where human rights violations are linked to policies directly threatening personal security).⁹⁰⁶ The obstacles to implementation combine elements of several of the gaps, which all need to be addressed in order for the obligations laid down in the treaties to be translated into reality. On a domestic level, this can be done, for example, by adopting new laws, policy making, influencing public opinion, disseminating information and through education. The Swedish Child Ombudsman, *Barnombudsmannen*, is one example of a state institution that has been very successful in its lobbying in child rights issues. Even though legislation is obviously not the only way in which attitudes can be changed – far from it – progressive legislation is a strong signal indicating in which direction the state aims to proceed, and suggesting which forms of behaviour are to be promoted and encouraged. The impact on the national level, however, is determined by the state's commitment, the effort that is made and the resources allocated to the effective implementation of any legislation. Without these elements, legislation is little more than a paper tiger. India, whose legislation on child rights was discussed in Chapter 7, can be mentioned as one (of several) examples of countries where the legislation is substantial and progressive but not corresponding with what is actually

⁹⁰⁵ See OHCHR Plan of Action (n. 900) paras. 22-32. For a discussion on UN treaty body reform, see the essays in Philip Alston & James Crawford (eds.) *The Future of UN Human Rights Treaty Monitoring* Cambridge, Cambridge University Press, 2000. Philip Alston in his contribution to the book “Beyond ‘them’ and ‘us’: Putting treaty body reform into perspective”, pp. 501-525, discusses possible measures to be taken to improve the effectiveness of the UN monitoring system.

⁹⁰⁶ *Ibid.*

implemented in practice. Not enforcing legislation protecting children's rights sends the message that these rights do not necessarily need to be taken seriously – a message that does not contribute to a solution to the problems of implementing the Convention.

On the international level, where states are the prime targets, there are a number of alternatives. A few are suggested here. As regards the work of the Committee on the Rights of the Child, several measures could be taken by the Committee to further emphasise the fundamental importance of an effective implementation of article 12. The effectiveness of the monitoring process can, and has been, questioned – it is marred by political, jurisdictional, technical and procedural problems.⁹⁰⁷ Jutta Gras has identified three main reasons for the Committee's lack of ability to respond to the – sometimes exaggerated – expectations that have been addressed to it. First, Gras argues that the provisions of the Convention are very vague and that their implementation is made even more difficult because of the many reservations of a general nature that have been submitted by state parties. The second reason is the inadequate resources of the Committee, both as regards time and funding. After the 2002 reform increasing the number of Committee members from ten to eighteen – in an attempt to reduce its workload – a more effective monitoring process could perhaps be expected.⁹⁰⁸ Gras finally identifies a lack of political will and interest among many of the state parties toward the reporting process, combined with a lack of interest in increasing its effectiveness, as being one of the fundamental obstacles for the monitoring system of the Convention to function in the way that it was intended. As Gras observes, those reasons are mostly beyond the reach of the Committee's influence.

However, the Committee's hands are in no way tied. It is still the master of its own working methods, and it has also interpreted its mandate quite widely. One example is the drafting of General Comments which was introduced as part of the Committee's work at the beginning of the millennium. The General Comments provide an authoritative interpretation of the Convention's articles and are an important tool in the implementation process. The drafting of a General Comment on article 12 would be a strong indication of the fundamental importance of the child's participation rights and the article's position as one of the Convention's core principles. A main feature of such

⁹⁰⁷ Jutta Gras in her 2001 study thoroughly discussed these aspects of the work of the Committee on the Rights of the Child. Jutta Gras *Monitoring the Convention on the Rights of the Child*.

⁹⁰⁸ The increased number of Committee members is a result of an amendment to article 43(2), approved by General Assembly Res. 50/155 of 21 December, 1995, which entered into force 18 November 2002.

a General Comment should undoubtedly be to make clear which aspects of society are to be included in the article's wording "all matters affecting the child". Furthermore, the General Comment could perhaps include specific guidelines on how participation rights can be satisfactorily implemented in different ages, thus providing state parties with more detailed assistance on how to address the evolving capacities and competences of the child. As evidence of the importance of these issues, the 2006 Day of General Discussion of the Committee on the Rights of the Child will be on the subject of article 12 and the right of the child to be heard. One purpose of this Day of Discussion – in which children will be encouraged to participate – is stated to be to provide input in the drafting process of a General Comment on article 12, which is a most positive development.⁹⁰⁹

The process of examining state party reports and drafting Concluding Observations on them is the Committee's most important task. In this work, it could show a little more teeth. True, the Committee and the state representatives are expected to enter into a constructive dialogue, and there are a multitude of issues to be covered if every article of the Convention is to be discussed. This means that there is seldom enough time at the sessions to discuss a particular aspect of implementation in depth. One solution could therefore be to dedicate more time to discussing the implementation of the Convention's general principles – as presented in articles 2, 3, 6 and 12 – and to focus more specifically on the controversial aspects of these articles, such as, for example, which decision-making processes should include children, or the gender-based discrimination of girls that is still far too common a practice in many countries.

A more critical approach than the present could also be adopted in the Concluding Observations. The Concluding Observations, even though they do include a section on "Principal Subjects of Concern", are today very diplomatic when expressing critique of how a state party implements the Convention. The democracy aspects of article 12 are, as shown in this analysis, seldom directly referred to or discussed in the Concluding Observations drafted so far. Gras has suggested that the Committee should either introduce a new category called "Violation of the CRC" or let such a category replace the previously mentioned "Principal Objects of Concern" as a way of taking the discussion to another level.⁹¹⁰ Gras correctly argues that the Committee, in-

⁹⁰⁹ Outline for the Day of Discussion, accessed at <http://www.ohchr.org/english/bodies/crc/docs/discussion/outline-E2006.pdf>, (as visited 26/06/2006). As the date for the day of Discussion was set for 15 September 2006, there was at the time of writing (July 2006) for obvious reasons no possibility of discussing the conclusions arrived at by the participants.

⁹¹⁰ Gras *Monitoring the Convention on the Rights of the Child* p. 169.

stead of expressing its concern on “almost anything”, should focus on identifying those areas where the state party is actually in breach of the Convention. Identifying a state party as violating the Convention would, considering the ill will this would bring, hopefully have a measurable influence on the behaviour of state parties – not least on the political will to effectively implement the Convention.

Other measures that could be taken by the Committee would, for example, be to promote the inclusion of children in the monitoring process, both in the Committee’s own work – for example, creating a child reference group to the Committee – and in the drafting of state party reports, where the participation of children could be referred to as a requirement in the Guidelines. The Committee could also, even more strongly than what is done today, emphasise the importance of state parties incorporating the Convention into their domestic legislation – that is, to make it directly applicable in national courts. As regards the Guidelines for reporting, they could be revised or perhaps amended, to include instructions for state parties to state clearly how the democracy aspects of child participation are regarded and dealt with in each country.

One of the most important developments of the monitoring procedure would, however, be the establishment of an individual complaints mechanism by which the Convention could be supplemented. Such a protocol would be similar to those established by the optional protocols to other UN human rights treaties such as the ICCPR, CEDAW and CAT. The possibility of filing individual complaints would be an effective tool for the monitoring of how state parties implement the treaty by which they are bound, even though the recommendations issued after the Committee had examined the alleged violation would not be binding on state parties in the same way as are, for example, the decisions of the European Court of Human Rights. However, since the treaty committees are the bodies providing an authoritative implementation of their respective treaty, the recommendations often have an important impact on how states behave in future. A key element for an individual complaints procedure to have an actual impact would be to create publicity, to make the reports and decisions and their content widely known. No state enjoys bad publicity and to being pointed out as a human rights abuser, so disseminating information could therefore have an effect on how a state party behaves in the future.

The establishment of an individual complaints procedure means emphasising the importance of the situation of the individual. In the context of child participation in particular, this is an important point to make for at the core of participation in decision-making processes lies the right of the individual to be heard and to be able to exercise influence over his or her own life. An individual complaints procedure

would also be a way of increasing the possibilities for state parties to effectively implement their own domestic legislation, and not allowing it to remain as vague objectives that are never put to the test.

Creating a procedure of individual communications in a child rights context, however, once again brings to the fore questions of competence and capacity. A communication to a UN treaty monitoring body usually cannot be considered until all available domestic remedies have been exhausted. In general, children cannot represent themselves in domestic court proceedings but must be represented by an adult. The same applies in relation to international instruments. This could be problematic in the context of the Convention on the Rights of the Child – it cannot be presumed that the interests of the child and those of his or her legal guardians are identical. It should not be forgotten that sadly enough, many of the worst violations of children's rights are committed within the family or by adults responsible for the child. For an individual complaints procedure in this particular context to be effective for those whose rights it is intended to protect, children themselves must be allowed to submit complaints even though they, for judicial-technical reasons, have not been able to go through the whole judicial process on a domestic level. This approach is adopted in the African Charter on the Rights and Welfare of the Child, whose article 44(1) does not limit the scope of actors that can submit communications to the African Committee of Experts on the Rights and Welfare of the Child. Allowing children to submit applications – on which of course certain demands of clarity and accuracy can be made – is also in itself a way of acknowledging the child's right to participation and the importance of listening to and respecting the views of the child.

An Optional Protocol on individual communications or complaints would be one of the more effective measures that can be taken within the monitoring process to increase the pressure on state parties to ensure that the treaty to which they are parties is implemented effectively. However, there are other alternatives that could be introduced simultaneously. The current reform process that is taking place within the United Nations – in which the establishment of a new Human Rights Council is one of its more prominent features in the field of human rights protection – hopefully will also have an effect on the implementation of the child's right to participation, as a result of the increasing emphasis put on the interconnectedness between human rights and democratic values and processes. This could lead, for example, to children's rights taking an equal focus on participation and protection and becoming a permanent item on the agenda of the new Council. Other measures to be taken could include the establishment of a Special Rapporteur on child participation, a United Nations Child Rights Commissioner or, at least, that the mandate of the High Com-

missioner for Human Rights be strengthened in relation to children in general, without focusing on children primarily as objects of protection but rather as autonomous individuals. It should also be mentioned that as a way of reforming and strengthening the monitoring procedure as a whole, the idea of a unified standing treaty body – or even a Human Rights Court – replacing the existing global human rights treaty monitoring bodies, has been discussed.⁹¹¹ Such a unified standing treaty body would, presumably, increase the impact of the decisions or recommendations of the monitoring bodies as well as ensuring their consistency and promote a holistic and comprehensive interpretation of human rights provisions.⁹¹² The creation of a proper Human Rights Court would make the monitoring system more judicial, resembling the regional systems such as, for example, the work of the European Court of Human Rights in Strasbourg as well as its American and African counterparts. However, bearing in mind the slow procedure of launching the International Criminal Court, a universal Human Rights Court is likely to be a long-term project. Nevertheless, the creation of a unified standing treaty body, replacing the present treaty bodies, is referred to by the High Commissioner for Human Rights as being the obvious way forward.⁹¹³

8.4 Final Words

So, why bother about child participation? Why is it a good thing? For several reasons: it benefits society of today – the more perspectives included in a decision-making process, the better the decisions. It benefits democracy as such. Involving young people in democratic processes, making them understand and embrace democratic values will help preserve peace and security in the world, since democratic states very seldom start wars. Child participation can also make democracy more inclusive, which in turn can benefit other groups in society. Furthermore, it has positive effects for the individual in terms of feeling empowered (which is good for development, as argued by Sen and Nussbaum, among others). The protection of children's rights will also improve if they are allowed to participate in this work them-

⁹¹¹ See, for example, Heli Niemi & Martin Scheinin *Reform of the United Nations Human Rights Treaty Body System Seen from the Developing Country Perspective* Institute for Human Rights, Åbo Akademi University, June 2002, p 4.

⁹¹² OHCHR Plan of Action, paras. 99-100, and *Concept paper on the High Commissioner's proposal for a unified standing monitoring body – report by the Secretariat* HRI/MC/2006/2, 22 March 2006.

⁹¹³ *Ibid.*

selves. Finally, to be heard and respected is a fundamental human right. This, really, is the only reason needed.

References

Books and Articles

- Aguilar, Luisa Maria, "The Role of the NGOs in Monitoring Children's Rights" pp. 503-509 in Eugen Verhellen (ed.) *Monitoring Children's Rights* The Hague, Martinus Nijhoff Publishers, 1996.
- Ahmad, Furqan, "Protective Judiciary in Aid of Human Rights in India" *Indian Journal of International Law* Vol 43, 2003 pp. 349-359.
- Ahmad, Imtiaz, "Between the Ideal and the Real: Gender Relations within the Indian Joint Family" pp. 36-63 in Margit Pernau, Imtiaz Ahmed & Herlmut Reifeld *Family & Gender: Changing Values in Germany and India* New Delhi, Sage 2003.
- Alston, Philip, "Children's Rights in International Law" *Cultural Survival Quarterly* 10.4, 1986, pp. 59-61.
- Alston, Philip, Parker, Stephen & Seymour, John (eds.), *Children, Rights and the Law* Oxford, Clarendon Press, 1992.
- Alston, Philip (ed.), *The best interests of the child: reconciling culture and human rights* Oxford, Clarendon Press, 1994.
- Alston, Philip, "Beyond 'them' and 'us': Putting treaty body reform into perspective" pp.501-525 in Philip Alston & James Crawford (eds.) *The Future of UN Human Rights Treaty Monitoring* Cambridge, Cambridge University Press, 2000.
- Alston, Philip & Crawford, James (eds.), *The Future of UN Human Rights Treaty Monitoring* Cambridge, Cambridge University Press, 2000.
- Alston, Philip & de Schutter, Olivier, "Introduction: Addressing the Challenges Confronting the EU Fundamental Rights Agency" pp. 1-25 in Philip Alston & Olivier de Schutter (eds.) *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency* Oxford and Portland, Oregon, Hart Publishing, 2005.
- Alston, Philip & Tobin, John, *Laying the Foundations for Children's Rights. An Independent Study of some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child* Sienna, UNICEF, 2005.
- Alvesson, Mats & Sköldböck, Kaj, *Tolkning och reflektion. Vetenskapsfilosofi och kvantitativ metod* Studentlitteratur, Lund, 1994.
- Ambjörnsson, Fanny, *I en klass för sig: Genus, klass och sexualitet bland gymnasietjejer* Stockholm, Ordfront 2004.
- Amoah, Philip, "The African Charter on Human and Peoples' Rights – An Effective Weapon for Human Rights?" *African Journal of International and Comparative Law* 1992 pp. 226-240.
- Ankumah, Evelyn A., *The African Commission on Human and Peoples' Rights: practices and procedures* Dordrecht, Martinus Nijhoff, 1996.

- An-Na'im, A. A., "Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives – A Preliminary Inquiry" *Harvard Human Rights Journal* 3 (1990) pp. 13-53.
- An-Na'im, A. A., "Problems of Universal Cultural Legitimacy for Human Rights" pp. 331-368 in A. A. An-Na'im & Francis Deng (eds.) *Human Rights in Africa: Cross-Cultural Perspectives* Washington D.C., Brookings Institution, 1990.
- An-Na'im, A. A., "Introduction" pp. 1-15 in A.A. An-Na'im (ed.) *Human Rights in Cross-Cultural Perspectives. A Quest for Consensus* Philadelphia, University of Pennsylvania Press, 1992.
- An-Na'im, A. A., "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights. The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment" pp. 19-44 in A.A. An-Na'im, (ed.) *Human Rights in Cross-Cultural Perspectives. A Quest for Consensus* Philadelphia, University of Pennsylvania Press, 1992.
- An-Na'im, A. A., "Conclusion" pp. 427-428 in A. A. An-Na'im (ed.) *Cross-Cultural Perspectives: A Quest for Consensus* Philadelphia, University of Pennsylvania Press, 1992.
- An-Na'im, A. A., "Cultural Transformation and Normative Consensus on the Best Interest of the Child," *International Journal of Law and the Family*, vol. 8 (1994), pp. 62-81.
- An-Na'im, A. A., "Human Rights in the Arab World: A Regional Perspective" *Human Rights Quarterly* Vol. 23, No.3, 2001, pp. 701-732.
- An-Na'im, A. A., "'Area Expressions' and the Universality of Human Rights" pp. 1-21 in David P. Forsythe & Patrice C. McMahon (eds.) *Human Rights and Diversity. Area Studies Revisited* Lincoln, Neb., University of Nebraska Press, 2003.
- An-Na'im, A. A., "The Interdependence of Religion, Secularism, and Human Rights" *Common Knowledge* 11:1 2005 pp. 56-80.
- Archard, David, *Children, Family and the State* Aldershot, Ashgate, 2003
- Ariès, Philippe, *Centuries of Childhood* London, Cape 1962.
- Arts, Karin C. J. M., "The International protection of Children's Rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child" in 5 RADIC 1992 pp. 139.
- Bainham, Andrew, "Growing up in Britain: Adolescence in the Post-Gillick Era" pp. 501-519 in John Eekelaar & Petar Sarcevic *Parenthood in Modern Society: Legal and Social Issues for the Twenty-first Century* Dordrecht, Martinus Nijhoff, 1993.
- Bajpai, Asha, *Child Rights in India. Law, Policy, and Practice* New Delhi, Oxford University Press, 2003.
- Barnett, Clive & Lowe, Murray, "Geography and Democracy: An Introduction" pp. 1-22 with references in Clive Barnett & Murray Lowe (eds.) *Spaces of Democracy: Geographical Perspectives on Citizenship, Participation and Representation*. Sage, London, 2004.
- Beckman, Ludvig. "Demokrati och kompetenskrav. Barn ungdomar och rätten till politiskt inflytande" in Britta Jonsson & Klas Roth (eds.) *Demokrati och lärande. Om valfrihet, gemenskap och övervägande i skola och samhälle* Studentlitteratur, Lund, 2003.
- Beetham, David, "Democracy and human rights: contrast and convergence", introductory paper presented at the Office of the High Commissioner for Human Rights Seminar on the Interdependence Between Democracy and Human Rights in Geneva 25-26 November 2002.

- Beetham, David, *Democracy and Human Rights* Cambridge, Polity Press/Blackwell 1999.
- Bergman, Laura Theytaz, "NGO Group for the Convention on the Rights of the Child" pp. 537-541 in Eugen Verhellen (ed.) *Understanding Children's Rights. Collected Papers Presented at the First International Interdisciplinary Course on Children's Rights*, Gent, University of Gent, Children's Rights Centre, 1996.
- Bernhardt, R., "Thoughts on the interpretation of human rights treaties" pp. 65-71, in Franz Matscher & Herbert Petzold *Protecting human rights: The European Dimension. Studies in Honour of Gerard J Wiarda* Köln, Heymann, 1988.
- Bernitz, Hedvig Lokrantz, *Medborgarskapet i Sverige och Europa: räckvidd och rättigheter* Uppsala, Iustus, 2004.
- Bhabha, Jacqueline, "The Citizenship Deficit: On being a citizen child" in *Development* Vol.46, No.3, September 2003, pp. 53-60.
- Bhagat, Rasheeda, "Empowering Children" in *Frontline* Vol. 18, Issue 20, September 29 – October 12, 2001.
- Bose, A.B., *The State of Children in India. Promises to Keep* New Delhi, Manohar, 2003.
- de Beauvoir, Simone, *Det andra könet* Norstedts, 2002.
- Boyden, Jo, Ling, Birgitta & Myers, William, *What works for working children* Stockholm, Rädda barnen, Florence, UNICEF, 1998.
- Brems, Eva, "Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse" *Human Rights Quarterly* 19.1 (1997), pp.136-164.
- Brems, Eva, *Human Rights: Universality and Diversity* The Hague, London, Martinus Nijhoff, 2001.
- Brems, Eva, "The Margin of Appreciation Doctrine of the European Court of Human Rights. Accommodating Diversity within Europe" pp. 81-110 in *Human Rights and Diversity. Area Studies Revisited* David P. Forsythe & Patrice C. McMahon (eds.) *Human Rights and Diversity. Area Studies Revisited* Lincoln, Neb., University of Nebraska Press, 2003.
- Barry, Brian *Culture and Equality* Cambridge, Mass., Harvard University Press, 2002.
- Bridgeman, Jo & Millns, Susan, *Feminist Perspectives on Law. Law's Engagement With the Female Body* London, Sweet & Maxwell, 1998.
- Brownlie, Ian, *Principles of Public International Law* 6th ed. Oxford, Oxford University Press, 2003.
- Bruce, Steve, "Religion" pp. 410-427 in Robert Singh (ed.) *Governing America: the politics of a divided democracy* Oxford; New York, Oxford University Press, 2003.
- Buerghenthal, Thomas, "The Inter-American System for the Protection of Human Rights" pp. 435-493 in Theodore Meron (ed.) *Human Rights in International Law: Legal and Policy Issues Vol. II* Oxford, Clarendon Press, 1984.
- Buruma, Ian, "India: The Perils of Democracy" pp. 3-33 in Robert B. Silvers, & Barbara Epstein *India: A Mosaic* New York, New York Review Books, 2001.
- Buss, Doris & Manji, Ambreena (eds.), *International Law. More Feminist Approaches*, Oxford and Portland, Hart Publishing, 2005.
- Cantwell, Nigel, "The Origins, Development and Significance of the United Nations Convention on the Rights of the Child" pp. 19-31 in Sharon

- Detrick (ed.) *The United Nations Convention on the Rights of the Child. A Guide to the Travaux Préparatoires* Dordrecht, Martinus Nijhoff, 1992.
- Cerna, Christina M., "East Asian Approaches to Human Rights" 2 *Buffalo Journal of International Law* (1995-1996) pp. 201-214.
- Charlesworth, Hilary & Chinkin, Christine, *The Boundaries of International Law. A Feminist Analysis* Manchester University Press, Manchester, 2000.
- Charlesworth, Hilary, "Feminist Methods in International Law" *The American Journal of International Law*, Vol. 93, No. 2. (April 1999), pp. 379-394.
- Charlesworth, Hilary, Chinkin, Christine & Wright, Shelley, "Feminist Approaches to International Law" *The American Journal of International Law* Vol. 85, No. 4. (October 1991), pp. 613-645.
- Charmes, J. & Wieringa, S., "Measuring Women's Empowerment: an assessment of the Gender-related Development Index and the Gender Empowerment Measure" *Journal of Human Development*, Volume 4, Number 3, November 2003, pp. 419-435.
- Chriwa, Danwood Mzikenge, "The merits and demerits of the African Charter on the Rights of the Child" *The International Journal of Children's Rights* Vol. 10, No.2, 2002, 157-177.
- Clapham, Andrew, *Human rights in the private sphere* Oxford, Clarendon Press, 1998 (New print 2002).
- Cohen, Cynthia Price, "The Relevance of Theories of Natural Law and Legal Positivism" pp. 53-70 in Michael Freeman & Philip Veerman (eds.) *The Ideologies of Children's Rights*, Dordrecht; London, Martinus Nijhoff, 1992.
- Cohen, Cynthia Price, "Drafting the United Nations Convention on the Rights of the Child" pp. 323-353 (344) in Eugen Verhellen (ed.) *Understanding Children's Rights: Collected Papers Presented at the First International Interdisciplinary Course on Children's Rights*, Gent, University of Gent, Children's Rights Centre, 1996.
- Cohen, Cynthia Price, "The United Nations Convention on the Rights of the Child: A Feminist Landmark" *William and Mary Journal of Women and Law* Vol. 3, 1997, pp. 29-78.
- Cohen, Elizabeth F., "Neither Seen Nor Heard: Children's Citizenship in Contemporary Democracies" in *Citizenship Studies* Vol. 9; No.2, May 2005, pp. 221-240.
- Conforti, Benedetto, "National courts and the international law of human rights" pp. 3-14 in Benedetto Conforti & Francesco Francioni (eds.) *Enforcing International Human Rights in Domestic Courts* The Hague & London, Martinus Nijhoff, 1997.
- Cowan, Jane K., Dembour, Marie-Bénédicte & Wilson, Richard A., "Introduction" pp. 1-26 in Jane K. Cowan, Marie-Bénédicte Dembour & Richard A. Wilson (eds.) *Culture and Rights. Anthropological Perspectives* Cambridge, Cambridge University Press, 2001.
- Cruft, Rowan, "Rights: Beyond Interest Theory and Will Theory?" in *Law and Philosophy* 23, pp. 347-397, 2004.
- Cunningham, Hugh, *Children and childhood in western society since 1500* London, Longman, 1995.
- Dahl, Robert A., *Polyarchy. Participation and Opposition* New Haven University Press, 1971.

- Dahl, Robert A., *Dilemmas of Pluralist Democracy. Autonomy vs. Control* Yale Studies in Political Science 31, New Haven, Yale University Press, 1982.
- Dahl, Robert A., *Democracy and its Critics* New Haven, London, Yale University Press, 1989.
- Dahlén, Marianne, *The Negotiable Child. The ILO Child Labour Campaign 1919-1973* Doctoral thesis (working title), Faculty of Law, Uppsala University – *forthcoming*.
- Danelius, Hans, *Mänskliga rättigheter i europeisk praxis. En kommentar till Europakonventionen om de mänskliga rättigheterna* Stockholm, Norstedts Juridik, 2000.
- Davidson, Scott, *The Inter-American Human Rights System* Aldershot, Dartmouth, 1997.
- Davis, Roy W., "Citizenship of the Union...rights for all?" *European Law Review* 27. Apr. 2002 pp. 121-137.
- Dekker, Jeroen J. J. H., "The Century of the Child Revisited" *International Journal of Children's Rights* Vol. 8, 2000, pp. 133-150.
- Delanty, Gerald, *Citizenship in a global age. Society, culture, politics*. Buckingham, Open University Press, 2000.
- Detrick, Sharon (ed.), *The United Nations Convention on the Rights of the Child. A Guide to the Travaux Préparatoires* Dordrecht, Martinus Nijhoff, 1992.
- Detrick, Sharon, *A Commentary on the United Nations Convention on the Rights of the Child* The Hague, Martinus Nijhoff, 1999.
- Donnelly, Jack, "Human Rights and Western Liberalism" pp. 31-58 in A.A. An-Na'im & Francis Deng (eds.) *Human Rights in Africa. Cross-Cultural Perspectives* Washington D.C., Brookings Institution, 1990.
- Donnelly, Jack, *Universal Human Rights in Theory and Practice* 2nd ed. Ithaca & London, Cornell University Press, 2003.
- Douglas, Gillian, "The retreat from Gillick" *Modern Law Review*, Vol. 55, No. 4 (Jul., 1992), pp. 569-576.
- Douglas, Gillian & Sebba, Leslie, *Children's Rights and Traditional Values* Aldershot, Ashgate, 1998.
- Drèze, Jean & Sen, Amartya, *India. Development and Participation* 2nd ed. New York, Oxford University Press, 2002.
- Eekelaar, John, "The Importance of Thinking That Children Have Rights" in *International Journal of Law and the Family* (1992) Vol. 6 No.1 pp. 221-235.
- Eekelaar, John, "Are Parents Morally Obligated to Care their Children?" pp. 51-64, in John Eekelaar & Petar Sarcevic *Parenthood in Modern Society: Legal and Social Issues for the Twenty-first Century* Dordrecht, Martinus Nijhoff, 1993.
- Eekelaar, John & Sarcevic, Petar, *Parenthood in Modern Society: Legal and Social Issues for the Twenty-first Century* Dordrecht, Martinus Nijhoff, 1993.
- Eide, Asbjørn, "Economic, Social and Cultural Rights as Human Rights" pp. 21-41 in Asbjørn Eide, Catarina Krause & Allan Rosas (eds.) *Economic, Social and Cultural Rights. A textbook* 1st ed. Dordrecht, Martinus Nijhoff, 1995.
- Eide, Asbjørn, "Cultural Rights as Individual Human Rights" pp. 289-301 in Asbjørn Eide, Catarina Krause & Allan Rosas (eds.) *Economic, Social*

- and Cultural Rights. A Textbook* 2nd revised ed. Dordrecht, Martinus Nijhoff, 2001.
- Embree, Ainslie T., "Religion" pp. 191-231 in Sumit Ganguly & Neil De-Volta *Understanding Contemporary India* New Delhi, Viva Books, 2003.
- England, Paula "Conceptualizing Women's Empowerment in Countries of the North" pp. 37-69 in Harriet B. Presser & Gita Sen (eds.) *Women's Empowerment and Demographic Processes* New York, Oxford University Press, 2000.
- Engle, Karen, "Culture and Human Rights: The Asian Values Debate in Context" *International Law and Politics* Vol. 32, 2000, pp. 291-333.
- Engle, Karen, "From Scepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999" *Human Rights Quarterly* Vol. 23, 2001, pp. 536-559.
- Englehardt, Neil A., "Rights and Culture in the Asian Values Argument: The Rise and Fall of Confucian Ethics in Singapore" *Human Rights Quarterly* 22 (2000) pp. 548-568.
- Eriksen, Thomas Hylland, *Små platser – stora frågor. En introduktion till socialantropologi* Falun, Nya Doxa, 2000.
- Eriksen, Thomas Hylland, "Between universalism and relativism: a critique of the UNESCO concept of culture" pp. 127-149 in Cowan, Jane K., Dembour, Marie-Bénédicte & Wilson, Richard A. (eds.) *Culture and Rights. Anthropological Perspectives* Cambridge, Cambridge University Press, 2001.
- Eriksson Maja Kirilova, "Att gå på två ben eller ett. Beträktningsätt på mänskliga rättigheter" *Feministiskt perspektiv* 1/2000 pp. 5-12.
- Eriksson, Maja Kirilova, *Reproductive Freedom: In the Context of International Human Rights and Humanitarian Law* The Hague, Martinus Nijhoff, 2000.
- Eriksson, Maja Kirilova, *Skydd av mänskliga rättigheter. Det interamerikanska systemet* 3rd ed. Uppsala, Iustus, 2002.
- Evans, Malcom D. & Murray, Rachel (eds.) *The African Charter on Human and Peoples' Rights: the system in practice, 1986-2000* New York, Cambridge University Press, 2002.
- Federle, Katherine Hunt, "Rights Flow Downhill" *International Journal of Children's Rights* Vol. 2, 1994, pp. 343-368.
- Flekkoy, Målfrid G. & Hevener Kaufman, Natalie, *The Participation Rights of the Child. Rights and Responsibilities in Family and Society* London, Jessica Kingsley, 1997.
- Fottrell, Deidre, *Revisiting children's rights: 10 years of the UN Convention on the Rights of the Child* The Hague; Boston, Kluwer Law, 2000.
- Franck, Thomas M., "The Emerging Right to Democratic Governance" 86 *American Journal of International Law* (1992) pp. 46-91.
- Franck, Thomas M., *The Empowered Self. Law and Society in the Age of Individualism* Oxford, Oxford University Press, 1999.
- Franklin, Bob "The case for children's rights: a progress report" pp. 3-22 in Bob Franklin (ed.) *The Handbook of Children's Rights* 1995 London, Routledge.
- Franklin, Bob, *The Rights of Children* Oxford, Blackwell, 1986.
- Fraser, Arvonne S., "Becoming Human: The Origins and Development of Women's Human Rights" *Human Rights Quarterly* 21 (1999) pp. 853-906.

- Freeman, Michael D. A., "Taking Rights More Seriously" *International Journal of Law and the Family* (1992) Vol. 6 pp. 52-71.
- Freeman, Michael D. A. & Veerman, Philip (eds.), *The Ideologies of Children's Rights* Dordrecht, Martinus Nijhoff, 1992.
- Freeman, Michael D. A., "The sociology of childhood and children's rights" *The International Journal of Children's Rights* 6 (1998) pp. 433-444.
- Freeman, Michael D. A., "The Future of Children's Rights" *Children & Society* vol. 14 (2000) pp. 277-293.
- Freeman, Michael D. A., "Introduction" p xi-xlii (xi-xii) in Michael D. A. Freeman. (ed.) *Children's Rights Volume 1* Ashgate Dartmouth, Aldershot, 2004.
- Freeman, Michael D. A., (ed.) *Children's Rights Volume 1-II* Ashgate Dartmouth, Aldershot, 2004.
- Gage, Anastasia J., "Female Empowerment and Adolescent Demographic Behaviour" in Presser, Harriet B. & Sen, Gita (eds.) *Women's Empowerment and Demographic Processes* New York, Oxford University Press, 2000.
- Ganguly, Sumit, "International Relations" pp. 93-111 in Sumit Ganguly & Neil DeVolta *Understanding Contemporary India* New Delhi, Viva Books, 2003.
- Ghai, Yash, "Human Rights and Governance: The Asia Debate" *Asia-Pacific Journal on Human Rights and the Law* 1, pp. 9-52, 2000.
- Goonsekere, Savitri, *Women's rights and children's rights: The United Nations conventions as compatible and complementary treaties* Innocenti Occasional Papers Child Rights Series, Number 1, UNICEF, September 1992.
- Goonsekere, Savitri, "The Best Interests of the Child: A South Asian Perspective" *International Journal of Law, Policy and the Family* 1994 8(1), pp. 117-149.
- Goonsekere, Savitri, "Human Rights as a Foundation for Family Law Reform" *International Journal of Children's Rights* 8, pp. 83-99, 2000.
- Gras, Jutta, *Monitoring the Convention on the Rights of the Child* Helsinki, Publications of the Faculty of Law, University of Helsinki, 2001.
- Gustafsson, Anna, *Skola – plikt eller rättighet?* Doctoral thesis (working title), Faculty of Law, Uppsala University – *forthcoming*.
- Gyekye, Kwame, *African cultural values: an introduction* Philadelphia, PA, Sankofa Pub. Co, 1996.
- Hafen, Bruce C. & Hafen, Jonathan O., "Abandoning Children to their Autonomy: The UN Convention on the Rights of the Child" 37 *Harvard International Law Journal* (1996) pp. 449-492.
- Harris, D. J., O'Boyle, M. & Warbrick, C., *Law of the European Convention on Human Rights* Butterworths, London, 1995.
- Harris-Short, Sonia, "International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child" *Human Rights Quarterly* 25 (2003), pp. 130-181.
- Hart, Roger A., *Children's participation. From tokenism to citizenship*. Innocenti essays No. 4, Florence, UNICEF, 1992.
- Hart, Roger & Lansdown, Gerison, in "Changing world opens door to children" CRIN Newsletter Nr 16/October 2002.
- Hartman, Sven G., "Barnkonventionens föregångare. Anteckningar om den polske barnläkaren och pedagogen Janusz Korczak" *Utbildning & Demokrati* 2001, Vol 10, No 2, pp. 9-24.

- Heater, Derek, *What is Citizenship?* Cambridge, Polity Press/ Blackwell, 1999.
- Held David, *Democracy and the global order: from the modern state to cosmopolitan governance* Stanford, Stanford University Press, 1995.
- Held, David *Models of Democracy* 2nd ed. Cambridge, Polity Press/Blackwell, 1996.
- Hellner, Jan, *Metodproblem i rättsvetenskapen. Studier i förmögenhetsrätt* Stockholm, Jure, 2001.
- Henderson, Conway W., "The Political Repression of Women" *Human Rights Quarterly* 26 (2004) pp. 1028-1049.
- Himes, James R., "Monitoring Children's Rights: Cutting Through the Confusion and Planning for Effective Action" pp. 113-129 in Eugen Verhellen (ed.) *Monitoring Children's Rights. Collected Papers Presented at the First International Interdisciplinary Course on Children's Rights*, The Hague, Martinus Nijhoff, 1996.
- Himonga, Chuma, "Implementing the rights of the child in the African legal systems: The Mthembu journey in search of justice" *The International Journal of Children's Rights* 9, 2001, pp. 89-122.
- Hodkin, Rachel & Newell, Peter, *UNICEF Implementation Handbook for the Convention on the Rights of the Child* 2nd ed. New York, UNICEF 2002.
- Holmström, Ola, "Funktionshindrade och folkhögskolan: Perspektiv på empowerment genom folkbildning" in *Folkbildningsinstitutet Utvärderar* no 1 2002, pp 15-20.
- Höglund, Anna T., "Feminismens paradox – Kampen för gruppen kvinnors rättigheter och för varje kvinnas rätt att vara en individ" in Göran Gunner & Diana Amnéus (eds.) *Mänskliga rättigheter – från forskningens frontlinjer/Human Rights – from the Frontiers of Research* Studia Theologica Holmiensia No. 7, Uppsala, Iustus, 2003.
- Ibhawoh, Bonny, "Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State" *Human Rights Quarterly* 22 (2000) pp. 838-860.
- Ibhawoh, Bonny, "Cultural Relativism and Human rights: Reconsidering the Africanist Discourse" *Netherlands Quarterly of Human Rights* 43 2001, pp.43-62.
- Inger, Göran, *Svensk rättshistoria* 4th ed. Malmö, Liber Ekonomi, 1997.
- Inglehart, Ronald & Welzel, Christian, *Modernization, Cultural Change, and Democracy* New York, Cambridge University Press, 2005.
- Inoue, Tatsuo, "Human Rights and Asian Values" pp. 116-133 in *The Globalization of Human Rights* Jean-Marc Coicaud, Michael W. Doyle & Anne-Marie Gardner (eds.) United Nations University Press, Hongkong, 2003.
- James, Alison, Jenks, Chris & Prout, Alan, *Theorizing Childhood* Cambridge, Polity Press, 1998.
- Janis, Mark W., Kay, Richard S. & Bradley, Anthony W., *European human rights law: text and materials* 2nd ed. Oxford, Oxford University Press, 2000.
- Johnson, M. Glen & Symonides, Janusz, *The Universal Declaration of Human Rights: a history of its creation and implementation, 1948-1998* Paris, Unesco Publ., 1998.
- Johnsson, Christina, *Nation states and minority rights: a constitutional law analysis* Uppsala, Faculty of Law, Univ., 2002.

- Joseph, Sarah, Schultz, Jenny & Castan, Melissa, *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary* 2nd ed. Oxford, Oxford University Press, 2004.
- Kabeberi-Macharia, Janet, "Reconstructing the Image of the Girl-Child" pp. 47-57 in Welshman Ncube (ed.) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* Aldershot, Ashgate Dartmouth 1998.
- Kalam, Abdul A. P. J., *Ignited Minds: Unleashing the Power within India* New Delhi, Penguin Books, 2003.
- Kausikan, Bilahari Kim Hee P. S., "An East Asian Approach to Human Rights" 2 *Buffalo Journal of International Law* (1995-1996) pp. 263-283.
- Key, Ellen, *The Century of the Child* Stockholm, Albert Bonniers förlag, 1900.
- Khan, Andrea, CRIN Newsletter Nr 16/October 2002, "Children and young people's participation" (editorial).
- Kilkelly, Ursula, "The Best of Both Worlds for Children's Rights: Interpreting the European Convention on Human Rights in the Light of The UN Convention on the Rights of the Child" 23(2) *Human Rights Quarterly* (2001) pp. 308-326.
- Kilkelly, Ursula, *The child and the European Convention on Human Rights* Aldershot, Ashgate, 1999.
- Kishor, Sunita, "Empowerment of Women in Egypt and Links to the Survival and Health of Their Infants" pp. 119-159 in Harriet B. Presser & Gita Sen (eds.) *Women's Empowerment and Demographic Processes* New York, Oxford University Press, 2000.
- Kjorholt, Anne Trine, "The Participating Child – A Vital Pillar in this Century?" Keynote paper at the congress "Science of education in new relations. Time. Space. Thought" Nordic Association for Educational Research 28th Congress 2000. (Nordbarn)
- Kouvo, Sari, *Making just rights? Mainstreaming women's human rights and a gender perspective* Uppsala, Iustus, 2004.
- Kulynych, Jessica, "No Playing in the Public Sphere: Democratic Theory and the Exclusion of Children" *Social Theory and Practice* Vol. 27, No.2 (April 2001) pp. 231-264.
- Kymlicka, Will & Norman, Wayne, "Return of the Citizen: A Survey of Recent Work on Citizenship Theory" pp. 283-322 in Ronald Beiner *Theorizing Citizenship*, State University of New York Press, 1995.
- Kymlicka, Will, *Multicultural Citizenship* Oxford, Clarendon Press, 1995.
- Kymlicka, Will & Norman, Wayne, "Introduction" pp. 1-41 in Will Kymlicka & Wayne Norman (eds.) *Citizenship in Culturally Diverse Societies* Oxford, Oxford University Press, 2000.
- Langlois, Anthony J., "Human Rights without Democracy? A Critique of the Separationist Thesis" in *Human Rights Quarterly* 25 (2003) pp. 990-1019.
- Lanotte, J. Vande & Goedertier, G., "Monitoring Human Rights. Formal and Procedural Aspects" pp. 73-113 in Verhellen (ed.) *Monitoring Children's Rights Collected Papers Presented at the First International Interdisciplinary Course on Children's Rights*, Gent, University of Gent, Children's Rights Centre, 1996.
- Lansdown, Gerison, *Taking Part: Children's Participation in Decision Making*, London, Institute for Public Policy Research. 1995.

- Lansdown, Gerison, *Promoting children's participation in democratic decision-making* UNICEF Innocenti Research Centre, Florence, 2001.
- Lansdown, Gerison, *Can you hear me? The right of young children to participate in decisions affecting them* Working Papers 36. Bernard van Leer Foundation, The Hague, The Netherlands, 2005.
- Leblanc, Lawrence J., *The Convention on the Rights of the Child: United Nations lawmaking on human rights* Lincoln, University of Nebraska Press, 1995.
- Leino, Päivi, "A European Approach to Human Rights? Universality Explored" *Nordic Journal of International Law* 71, 2002, pp. 455-495.
- Lindgren, Anne-Li & Halldén, Gunilla, "Individuella rättigheter; autonomi och beroende. Olika synsätt på barn i relation till FN:s barnkonvention" *Utbildning & Demokrati* 2001, Vol 10, Nr 2, pp. 65-79.
- Lindblom, Anna-Karin, *The Legal Status of Non-Governmental Organisations in International Law* Faculty of Law, Uppsala University, Uppsala 2001.
- Linfelt, Mats, "Europeiska Unionens grundrättsstadga: Fågel, fisk eller mitemellan?" *Mennesker & Rettigheter* 4/2002.
- Lister, Ruth, *Feminist Theory & Practice of Citizenship* Paper presented at the annual conference of the German Political Science Association (DVPW) in Mainz, September 2003.
- Lister, Ruth, *Citizenship: Feminist Perspectives* 2nd ed. Basingstoke & New York, Palgrave, 2003.
- Lister, Ruth, *Children and Citizenship* Paper presented at a Glasgow Centre for the Child & Society seminar, 3 November 2005.
- Lloyd, Amanda, "Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: *Raising the gauntlet*" *The International Journal of Children's Rights* Vol. 10, No.2, 2002, pp. 179-198.
- Lücker-Babel, Marie-Francoise, "The right of the child to express views and be heard: An attempt to interpret Article 12 of the UN Convention on the Rights of the Child" *International Journal of Children's Rights* 3 1995 pp. 391-404.
- Manohar, Sujata V., "The Indian Judiciary and Human Rights" pp. 137-153 in Venkat Iyer (ed.) *Democracy, Human Rights and the Rule of Law. Essays in Honour of Nani Palkhivala* New Delhi, Butterworths India, 2003.
- Marks, Susan, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* Oxford, Oxford University Press, 2000.
- Marshall, T. H., *Citizenship and Social Class* Cambridge, 1950.
- Marsten, Sallie A. & Mitchell, Katharyne, "Citizens and the State: Citizenship Formations in Space and Time" pp. 93-112 with references in Clive Barnett & Murray Low (eds.) *Spaces of Democracy. Geographical Perspectives on Citizenship, Participation and Representation* Sage, 2004.
- Mattelart, Armand, "Cultural diversity belongs to us all", article by in *Le Monde Diplomatique* November issue, 2005.
- Mathew, George, "Panchayati Raj Institutions and Human Rights in India" in *Economic and Political Weekly*, Vol XXXVIII, No 2, January 11, 2003 pp. 155-162.
- Mayall, Berry, "The sociology of childhood in relation to children's rights", *International Journal of Children's Rights* Vol 8 pp. 243-259, 2000.
- McCormick, Neil, "Children's Rights: A Test-Case for Theories of Rights" *Archiv für Rechts- und Sozialphilosophie*, 62, pp. 305-316.

- McIvor, Chris, "Hard lessons from Zimbabwe's children's parliament" in CRIN Newsletter *Children and young people's participation* no.16/October 2002.
- Modig, Cecilia, *Frågor och svar om barns rätt till inflytande* Stockholm, Rädda Barnen, Stockholm, 2003.
- Mohamad, Maznah, "The Politics of Gender, Ethnicity, and Democratization in Malaysia: Shifting Interests and Identities" pp. 347-384 in Maxine Molyneux & Shahra Razavi (eds.) *Gender Justice, Development, and Rights* Oxford University Press, New York, 2002.
- Molokomme, Athaliah & Mokobi, Keletso, "Custody and Guardianship of Children in Botswana. Customary Laws and Judicial Practice within the Framework of the Children's Convention" pp. 182-203 in Welshman Ncube (ed.) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* Aldershot, Ashgate Dartmouth 1998.
- Morss, John R., "The several social constructions of James, Jenks and Prout: A contribution to the sociological theorization of childhood" in *The International Journal of Children's Rights* 10, 2002, pp. 39-54.
- Mower, Glenn A., *The Convention on the Rights of the Child: international law support for children* Westport, Conn., Greenwood Press, 1997.
- Murray, Rachel, *The African Commission on Human and People's Rights and international law* Oxford, Hart, 2000.
- Murray, Rachel, *Human rights in Africa: from the OAU to the African Union* New York, Cambridge University Press, 2004.
- Mutua, Makau wa, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties" 35 *Virginia Journal of International Law* (1994-95) pp. 339-380.
- Mutua, Makau wa, "The Ideology of Human Rights" 36 *Virginia Journal of International Law* (1996) pp. 589-657.
- Mutua, Makau wa, "The African Human Rights Court: A Two-Legged Stool?" *Human Rights Quarterly* 21 (May) 1999, pp. 342-363.
- Mutua, Makau wa, "Politics and Human Rights: An Essential Symbiosis" pp. 149-177 in Michael Byers (ed.) *The Role of Law in International Politics. Essays in International Relations and International Law* Oxford, Oxford University Press, 2000.
- Mutua, Makau wa, *The Complexity of Universalism in Human Rights*, conference paper delivered at the 10th Annual Conference on "The Individual vs. the State" Central European University, Budapest, 14-16 June 2002.
- Mutua, Makau wa, *Human Rights: A Political and Cultural Critique* Philadelphia, University of Pennsylvania Press, 2002.
- Mårsäter, Olle, *Folkrättsligt skydd av rätten till domstolsprövning* Juridiska fakulteten, Uppsala, Uppsala Universitet, 2005.
- Ncube, Welshman, "Prospects and Challenges in Eastern and Southern Africa" pp. 1-10 in Welshman Ncube (ed.) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*, Ashgate, Dartmouth, 1998.
- Ncube, Welshman, "The African Cultural Fingerprint? The Changing Concept of Childhood" pp. 13-27 in Welshman Ncube (ed.) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* Aldershot, Ashgate, Dartmouth, 1998.
- Ncube, Welshman, "Re-evaluating Law, Tradition, Custom and Practice. Custody and Access to Non-marital Children in Zimbabwe" pp. 150-181

- in Welshman Ncube (ed.) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* Aldershot, Ashgate Dartmouth 1998.
- Niemi, Heli & Scheinin, Martin, *Reform of the United Nations Human Rights Treaty Body System Seen from the Developing Country Perspective* Institute for Human Rights, Åbo Akademi University, June 2002.
- Nilsson, Eva, "Children Crossing Borders: On Child Perspectives in the Swedish Aliens Act and the Limits of Law", article, *forthcoming*.
- Nirmal, B.C., "An Ancient Indian Perspective of Human Rights and its Relevance" *Indian Journal of International Law* Vol 43 2003 pp. 445-478.
- Nmehielle, Vincent O. Orlu, *The African human rights system: its laws, practice and institutions* The Hague, Kluwer Law International, 2001.
- Norman, Karin, *Kulturella föreställningar om barn: ett socialantropologiskt perspektiv* Stockholm, Rädda Barnen, 1996.
- Nowak, Manfred, *U.N. Covenant on Civil and Political Rights. CCPR Commentary* 2nd rev. ed. Kehl, N.P. Engel Verlag, 2005
- Nussbaum, Martha C., *Women and Human Development. The Capabilities Approach* Cambridge, Cambridge University Press, 2000.
- Näsman, Elisabeth, "Barn, barndom och barns rätt" pp. 53-77 in Lena Olsen (ed.) *Barns makt* Uppsala, Iustus 2004.
- O'Hare, Ursula, "Realizing Human Rights for Women" *Human Rights Quarterly* 21 (1999) pp. 364-402.
- Okin, Susan Muller, "Is Multiculturalism bad for Women?" pp. 7-27 in Susan Moller Okin (ed.) *Is Multiculturalism Bad For Women?* Princeton, Princeton University Press, 1999.
- Okin, Susan Muller, "Reply" pp. 115-133 in Susan Moller Okin (ed.) *Is Multiculturalism Bad For Women?* Princeton, Princeton University Press, 1999.
- Olsen, Frances, "Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child" pp. 192-220 in Philip Alston, Stephen Parker & John Seymour (eds.) *Children, Rights and the Law* Oxford, Clarendon Press, 1992.
- Oluwo, Dejo, "Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child" *The International Journal of Children's Rights* Vol. 10, No.2, 2002, pp. 126-136.
- Opromolla, Adriana, "Children's rights under articles 3 and 8 of the European Convention: recent case law" *European Law Review Human Rights Survey* (2001) pp. 42-57.
- Orford, Anne, "Feminism, Imperialism and the Mission of International Law" *Nordic Journal of International Law* 71, 2002, pp. 275-296.
- Ouguergouz, Fatsah, *The African Charter on Human and Peoples Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* The Hague, Martinus Nijhoff, 2003.
- Pais, Marta Santos, "The Convention on the Rights of the Child" pp. 393-504 in *The Manual on Human Rights Reporting Under six major international human rights instruments* Geneva, United Nations, 1997.
- Pateman, Carole, *The Sexual Contract* Stanford, Stanford University Press, 1988.
- Pathak, R S., "Public Interest Litigation in India" pp. 125-135 in Venkat Iyer (ed.) *Democracy, Human Rights and the Rule of Law. Essays in Honour of Nani Palkhivala* New Delhi, Butterworths India, 2003.

- Pernau, Margit, "Family: A Gendering and Gendered Space" pp. 9-33 Margit Pernau, Imtiaz Ahmed & Herlmut Reifeld *Family & Gender: Changing Values in Germany and India* New Delhi, Sage 2003.
- Peters, Julie & Wolper, Andrea (eds.), *Women's Rights, Human Rights – International Feminist Perspectives* New York, Routledge, 1995.
- Pettman, Jan Jindy, *Worlding Women. A Feminist International Politics* Routledge, London & New York, 1996.
- Philips, Anne, "Multiculturalism, Universalism, and the Claims of Democracy" pp. 115-141 in Maxine Molyneux & Shahra Razavi (eds.) *Gender Justice, Development, and Rights* Oxford University Press, New York, 2002.
- Pinglé, Vibha, "Caste" pp. 231-255 in Sumit Ganguly & Neil DeVolta *Understanding Contemporary India* New Delhi, Viva Books, 2003.
- Pollis, Adamantia, "Cultural Relativism Revisited: Through a State Prism" *Human Rights Quarterly* 18.2, 1996, pp. 316-344.
- Poluha, Eva, Norman, Karin & Einarsdóttir, Jónína, *Children Across Time and Space* Stockholm, Rádda Barnen, 2000.
- Pradhan, Bina, "Measuring Empowerment: A methodological approach" in *Development*, Vol.46, No.2 June 2003, pp. 51-58.
- Pratap, Bhanu Metha, "India: Fragmentation Amid Consensus" *Journal of Democracy* 8.1 (1997) pp. 56-69.
- Pratap, Bhanu Metha, "Hinduism and Self-Rule" in *Journal of Democracy* Volume 15, Number 3 July, 2004 pp. 108-121.
- Pratchett, Lawrence & Lowndes, Vivien, *Developing Democracy in Europe. An analytical summary of the Council of Europe's acquis* Council of Europe, Strasbourg, 2004.
- Preis, Ann-Belinda, "Human Rights as Cultural Practice: An Anthropological Critique" *Human Rights Quarterly* 18.2 (1996) pp. 286-315.
- Pupavac, Vanessa, "The International Children's Rights Regime" pp. 57-75 in David Chandler (ed.) *Rethinking Human Rights: Critical Approaches to International Politics* Basingstoke; New York, Palgrave Macmillan, 2002.
- Purdy, Laura M., *In Their Best Interest?* Ithaca, NY, Cornell University Press, 1992.
- Putnam Tong, Rosemarie, *Feminist Thought. A More Comprehensive Introduction*, 2nd ed., Boulder and Oxford, Westview Press, 1998.
- Qvortrup, Jens (ed.), *Childhood matters: social theory, practice and politics* Aldershot: Avebury, 1994.
- Qvortrup, Jens, *Studies in modern childhood: society, agency, culture* Basingstoke: Palgrave Macmillan, 2005.
- Rana, Mahendra Pratap, "Protection of Human Rights or Protection of Rights of Caste in India?" pp. 139-147 in R.M. Pal (ed.) *Protection of Human Rights – A Critique* New Delhi, Indian Social Institute, 1999.
- Rasmusson, B., Hyvönen, U., & Mellberg, L., *Utvärderingsmöten i BBIC. En studie i barns delaktighet och medbestämmande* Delrapport från utvärderingen av projektet Barns behov i centrum/Socialstyrelsen, Stockholm, oktober 2004.
- Rawls, John, *En teori om rättvisa* Uddevalla, Daidalos, 1996.
- Reddy, Nandana & Ratna, Kavita, *A journey in children's participation* courtesy of The Concerned for Working Children, (available at www.workingchildren.org).

- Reddy, Nandana & Ratna, Kavita, *Working children as protagonists* courtesy of The Concerned for Working Children, available at www.workingchildren.org).
- Rimsten, Eva, *Ensamkommande barn i Sverige ur ett rättighetsperspektiv* Stockholm, Rådgivningsbyrån för asylsökande och flyktingar, 2006.
- Roche, Jeremy, "Children: Rights, Participation and Citizenship" *Childhood* Vol. 6(4) pp. 475-493, 1999.
- Roy, Arundhati, *The Algebra of Infinite Justice* New Delhi, Penguin Books India, 2002
- Ruxton, Sandy *What about us? Children's Rights in the European Union. Next steps* Brussels, The European Children's Network, 2005
- Rynning, Elisabeth, "Åldersgräns för mänskliga rättigheter? Om rätten till hälso- och sjukvård vid livets början" pp. 149-181 in Anna Hollander, Rolf Nygren & Lena Olsen (eds.) *Barn och rätt* Iustus, Uppsala, 2004.
- Rynning, Elisabeth, *Samtycke till medicinsk vård och behandling* Iustus, Uppsala, 1994.
- Sacerdoti, Giorgio, "The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens' Europe" 8 *Columbia Journal of European Law* 37 (2002) pp. 37-52.
- Schabas, William A., "Reservations to the Convention on the Rights of the Child" *Human Rights Quarterly* 18.2 (1996) pp. 472-491.
- Schiratzki, Johanna *Barnets bästa i ett mångkulturellt Sverige – en rättsvetenskaplig undersökning* 2 ed. Uppsala, Iustus, 2005.
- Schmitter, Philippe C. & Trechsel, Alexander H., *The Future of Democracy in Europe: Trends, Analyses and Reforms*. A Green Paper for the Council of Europe co-ordinated by Philippe C. Schmitter and Alexander H. Trechsel, commissioned by the Secretary General of the Council of Europe, Integrated project "Making democratic institutions work" Council of Europe Publishing, 2004.
- Sen, Amartya, "Human Rights and Asian Values" *The New Republic* 14/21 July, 1997, pp. 33-41.
- Sen, Amartya, "Democracy as a Universal Value" in *Journal of Democracy* 10.3 (1999) pp. 3-17.
- Sen, Amartya, *Utveckling som frihet* Göteborg, Daidalos 2000.
- Sen, Amartya, *The Argumentative Indian. Writings on Indian History, Culture and Identity* London, Allen Lane 2005.
- Sen, Gita & Batliwala, S., "Empowering Women for Reproductive Rights" in Presser, Harriet B. & Sen, Gita (eds.) *Women's Empowerment and Demographic Processes* New York, Oxford University Press, 2000.
- Sharma, Shalendra D., *Indian Politics* pp. 63-92 in Sumit Ganguly & Neil DeVotta (eds.) *Understanding Contemporary India* New Delhi, Viva Books, 2003.
- Shaw, Jo, "The Interpretation of European Union Citizenship" *The Modern Law Review* Vol. 61, No.3 (May, 1998) pp. 293-317.
- Shield, J. P. H. & Baum, J. D., "Children's Consent to Treatment" *British Medical Journal* 7 May 1994, Vol. 308, pp. 1182-1183.
- Shier, Harry, "Pathways to Participation: Openings, Opportunities and Obligations" in *Children and Society* 2001 (10) pp. 107-117.
- Simon, Leela & Nirmal, Chiranjivi J., "Fundamental Rights: The Constitutional Context of Human Rights" pp. 40-53 in Chiranjivi J. Nirmal (ed.) *Human Rights in India. Historical, Social and Political Perspectives* New Delhi, Oxford University Press, 1999.

- Singer, Anna, *Föräldraskap i rättslig belysning* Uppsala, Iustus, 2000.
- Slaughter, Anne-Marie & Ratner, Steven R., "The Method Is the Message" in *American Journal of International Law* Vol. 93, 1999, pp. 410-423.
- Sloth-Nielsen, Julia, "Children's Rights in the South-African Courts: An overview since ratification of the UN Convention on the Rights of the Child" *The International Journal of Children's Rights* Vol. 10, No.2, 2002, pp. 137-156.
- Smith, Anne B., "Interpreting and supporting participation rights: Contributions from socio-cultural theory" *The International Journal of Children's Rights* vol. 10 No 1 2002 pp.73-88.
- Smith, Lucy, "Children, Parents and the European Human Rights Convention" pp. 447-463 in John Eekelaar & Petar Sarcevic *Parenthood in Modern Society: Legal and Social Issues for the Twenty-first Century* Dordrecht, Martinus Nijhoff, 1993.
- Smith, Lucy, "Om barn og menneskerettigheter" *Juridisk Tidskrift* no. 3 (2005-06) pp. 503-513.
- Stalford, Helen, "The Citizenship status of children in the European Union" *The International Journal of Children's Rights* 8 pp. 101-131, 2000.
- Stamatopoulou, Elsa, "Why Cultural Rights Now?" edited transcript of remarks at "The Case for Cultural Rights Workshop" at the Carnegie Council, New York, 23/9/2004.
- Stasiulis, Daiva, "The Active Child Citizen: Lessons from Canadian Policy and the Children's Movement" *Citizenship Studies* Vol.6, No.4, 507-538, 2002.
- Stavenhagen, Rodolfo "Cultural Rights: A Social Science Perspective" pp. 85-109 in Eide, Asbjorn, Krause, Catarina & Rosas, Allan (eds.) *Economic, Social and Cultural Rights. A Textbook* 2nd revised ed. Dordrecht, Martinus Nijhoff, 2001.
- Stern, Rebecca, "Tankar kring artikel 12. Rätten till deltagande" pp. 182-189 in *Barn och rätt* Anna Hollander, Rolf Nygren & Lena Olsen (eds.) Uppsala, Iustus, 2004.
- Subrahmanian, Ramya, "Engendering Education: Prospects for a Rights-Based Approach to Female Education Deprivation in India" pp. 204-239 in Maxine Molyneux & Shahra Razavi (eds.) *Gender Justice, Development, and Rights* Oxford University Press, New York, 2002.
- Svensson, Eva-Maria, *Genus och rätt: en problematisering av föreställningen om rätten* Uppsala, Iustus, 1997.
- Svensson, Eva-Maria, *Genusforskning inom jurridiken* 2 ed. Höskoleverket, Kalmar, 2001.
- Symposium on Method in International Law, *American Journal of International Law* Vol 93, (1999), pp. 291-423.
- Tamir, Yael, "Siding With the Underdogs" pp. 47-53 Susan Moller Okin (ed.) *Is Multiculturalism Bad For Women?* Princeton, Princeton University Press, 1999.
- Thompson, Bankole, "Africa's Charter on Children's Rights: A Normative Break With Traditionalism" *International and Comparative Law Quarterly* Vol. 4, April 1992, pp. 432-444.
- Tripp, Aili Mari, "The Politics of Women's Rights and Cultural Diversity in Uganda" pp. 413-441, in Maxine Molyneux & Shahra Razavi (eds.) *Gender Justice, Development, and Rights* Oxford University Press, New York, 2002.

- Tännsjö, Torbjörn, "Förbättra vården med hjälp av aktiv dödshjälp" Dagens Nyheter 23 September 2003.
- Umozurike, U. Oji, *The African Charter on Human and Peoples' Rights* The Hague, Martinus Nijhoff, 1997.
- Van Bueren, Geraldine, *The International Law on the Rights of the Child* The Hague, Kluwer, 1995.
- Van Bueren, Geraldine, "Balancing Traditional Values and Cultural Plurality" pp. 15-31 in Gillian Douglas & Leslie Sebba (eds.) *Children's Rights and Traditional Values* Aldershot, Ashgate Dartmouth, 1998.
- Van Dijk, P. & van Hoof, G.J.H., *Theory and practice of the European Convention on Human Rights* 3rd ed. The Hague, Kluwer, 1998.
- Varma, Pavan K., *Being Indian. Inside the Real India* London, William Heineman, 2005.
- Wennstam, Katarina, *Flickan och skulden. En bok om samhällets syn på våldtäkt* Stockholm, Albert Bonniers förlag 2002.
- Verhellen, Eugen, *Convention on the rights of the child. Background, motivation, strategies, main themes* 3rd ed. Leuven/Apeldoorn, Garant, 2000.
- Veerman, Philip & Levine, Hephzibah, "Implementing children's rights on a local level: Narrowing the gap between Geneva and the grassroots" *The International Journal of Children's Rights*, Volume 8, Number 4, 2000, pp. 373-384.
- Verschraegen, Bea, "The Right to Private Life and Family Life, the Right to Marry and to Found a Family, and the Prohibition of Discrimination" pp. 194-211 in Katharina Boele-Woelki & Angelika Fuchs (eds.) *Legal Recognition of Same-sex Couples in Europe* Antwerp, Intersentia, 2003.
- Westberg, Peter, "Avhandlingsskrivande och val av forskningsansats – en idé om rättsvetenskaplig öppenhet" in *Festskrift till Per Olof Bolding*, Stockholm, Juristförlaget, 1992.
- Wheeler, Patricia, "Eliminating FGM: The Role of the Law" *International Journal of Children's Rights* 11 pp. 257-271, 2004.
- Wijma, Barbro & Siwe, Karin, "Empowerment i gynstolen. Teori, empiri och möjligheter" in *Kvinnovetenskaplig tidskrift* 2-3/2002 pp 61-73.
- Viljoen, Frans, "State Reporting Under the African Charter on Human and Peoples' Rights: A Boost From the South" *Journal of African Law* J50 44, 2000, pp. 110-118.
- Viljoen, Frans, "Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" *Comparative and International Law Journal of Southern Africa* C36, 31, (1998) pp. 199-212.
- de Winter, Micha, *Children as Fellow Citizens. Participation and Commitment* Oxford, Radcliffe Medical Press, 1997.
- Wolf, Joakim, "The Concept of the Best Interest in Terms of the UN Convention on the Rights of the Child" pp. 125-135 in Michael Freeman & Philip Veerman (eds.) *The Ideologies of Children's Rights*, Dordrecht; London, Martinus Nijhoff, 1992.
- Wyness, Michael, "Children, childhood and political participation: Case studies of young people's councils" *International Journal of Children's Rights* Vol. 9 2001, pp. 193-212.
- Young, Iris Marion, *Inclusion and Democracy* Oxford, Oxford University Press, 2000.

- Zion, James W., "North American Indian Perspectives" pp. 191-221 in Anna'im, A. A. (ed.) *Human Rights in Cross-Cultural Perspectives. A Quest for Consensus* Philadelphia, University of Pennsylvania Press, 1991.
- Österdahl, Inger, *Implementing human rights in Africa: the African Commission on Human and Peoples' Rights and individual communications* Uppsala, Iustus, 2002.

Reports

- Bhima Sangha and the Makkala Panchayats – Chroniclers of Our Own Histories*. Report authored by Bhima Sangha and Makkala Panchayats with assistance from the Concerned for Working Children. India, 2004.
- Campaign Against Child Labour *An Alternate report on the Status of Child Labour in India 1998*.
- Centre for Organization, Research and Education (CORE) Children of Manipur: *A Supplementary Report on the Rights of the Child (Manipur) 1998*
- National Movement of Working Children *Alternate Report July 2003*.
- NGO Asian Centre for Human Rights *The Status of Children in India 2003*.
- The Concerned for Working Children India *A Critical Review of the Government of India's report submitted to the Committee on the Rights of the Child 1999*.
- UNDP World Development Report 2000 *Human Rights and Human Development* New York, Oxford, UNICEF, Oxford University Press 2000.
- UNDP World Development Report 2002 *Deepening Democracy in a Fragmented World* New York, Oxford, UNICEF Oxford University Press 2002.
- UNDP Country Programme Outline for India (2003-2007) 15 April 2002 DP/CPO/IND/1.
- UNESCO World Culture Report 2000 *Cultural Diversity, Conflict and Pluralism* UNESCO 2000.
- UNFPA State of the World Population Report 2003 *Investing in the adolescent's health and rights* UNFPA, 2003.
- UNICEF Working Paper Series Program Division *The Participation Rights of Adolescents: A Strategic Approach* New York, August 2001.
- UNICEF The State of the World's Children 2003 *Child participation* UNICEF 2003.
- UNICEF The State of the World's Children 2005 *Childhood under threat* UNICEF 2005.
- UNICEF Summary Report *Study on the Impact of the Implementation of the Convention on the Rights of the Child* Innocenti Publications 2004.
- UNICEF *Female Genital Mutilation/Cutting: A Statistical Exploration* November 2005.
- UNICEF *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting* Innocenti Digest 12, 2005.
- EU Network of Independent Experts on Fundamental Rights *Report on the situation of fundamental rights in Sweden 2004* (CFR-CDF/SE/2004).
- EU Network of Independent Experts on Fundamental Rights *Report on the situation of fundamental rights in Sweden 2005* (CFR-CDF/SE/2005).
- International Monetary Fund World Economic Outlook September 2005 Building Institutions IMF Washington, D.C., 2005.

International Law Commission, Preliminary Conclusions on Reservations to Normative Multilateral Treaties Including Human Rights Treaties (Preliminary Conclusions). I.L.C. Report 1997.

World Bank *Attaining the Millennium Development Goals in India: Role of Public Policy and Service Delivery* June, 2004.

World Bank India Country Fact Sheet (updated July 2005).

World Bank India Development Policy Review: Inclusive Growth and Service Delivery: Building on India's Success. Overview 2006.

The role of good governance in the Promotion of Human Rights: Note by the High Commissioner for Human Rights, E/CN.4/2005/97.

Report of the Office of the High Commissioner for Human Rights "Interdependence between democracy and human rights", E/CN.4/2004/54.

Report of the second expert seminar "Democracy and the rule of law" Geneva 28 February – 2 March 2005, E/CN.4/2005/58.

Other

United Nations Centre for Human Rights & Save the Children Sweden Legislative History of the Convention on the Rights of the Child (1978-1989) Title and Preamble HR/1995/Ser.1/titleandpreamble.

United Nations Centre for Human Rights & Save the Children Sweden Legislative History of the Convention on the Rights of the Child (1978-1989) Article 1(Definition of a Child) HR/1995/Ser.1/article.1.

United Nations Centre for Human Rights & Save the Children Sweden Legislative History of the Convention on the Rights of the Child (1978-1989) Article 4 (Implementation of Rights) HR/1995/Ser.1/article 4.

United Nations Centre for Human Rights & Save the Children Legislative History of the Convention on the Rights of the Child (1978-1989) Article 12 (Respect for the Views of the Child) HR/1995/Ser.1/article.12.

United Nations Centre for Human Rights & Save the Children Sweden Legislative History of the Convention on the Rights of the Child (1978-1989) Article 14 (Right to freedom of thought, conscience and religion) HR/1995/Ser.1/article. 14.

United Nations Centre for Human Rights & Save the Children Sweden Legislative History of the Convention on the Rights of the Child (1978-1989) Article 38 (Children in armed conflicts) HR/1995/Ser.1/article.38.

Address by India's Prime Minister Dr. Manmohan Singh at the 59th Session of the United Nations General Assembly 23 September 2004.

Statement by Prime Minister Dr. Manmohan Singh at the 13th SAARC Summit 12 November 2005.

Interviews

Göran Håkansson, Swedish delegate to the drafting process Stockholm, 18/5/2001.

Yasmine Zaveri-Roy, SIDA Programme Officer, Embassy of Sweden, New Delhi 31/10/2003.

Aparna Bhat, Human Rights Law Network/SLIC, New Delhi 31/10/2003.

Dr. Rao, Global March Against Child Labour, New Delhi, 04/11/2003.

Pratibha Menon, Indian Centre for Human Rights and the Law, Mumbai, 06/11/2003.
 Ashley Varghese, International Justice Mission in Mumbai, 06/11/2003.
 Arlene Manoharan, Centre for Child and the Law, National Law School of India, Bangalore, 14/11/2003.
 Kavita Ratna, Concerned for Working Children in Bangalore, 17/11/2003.

Official Documents

Main Treaties and Declarations

International Covenant on Civil and Political Rights 16 December 1966, 999 UNTS 171.
 Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 302.
 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989).
 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3.
 Convention on the Rights of the Child 1577 UNTS 3.
 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography G.A. res. 54/263, annex II, 54 U.N. GAOR Supp. (No. 49), U.N. Doc. A/54/49 (2000).
 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict G.A. Res. 54/623, annex I, 54 UN GAOR Supp. (No. 49), UN Doc. A/54/49 (2000).
 Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13.
 Optional Protocol to the Convention on the Elimination of Discrimination against Women G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49.
 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Doc. A/RES/45/158.
 Universal Declaration of Human Rights, 1948, GA Resolution 217A(III).
 Declaration of the Rights of the Child League of Nations O.J. Spec. Supp. 21, at 43 (1924).
 Declaration of the Rights of the Child G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).
 Vienna Convention on the Law of Treaties 1155 UNTS 331.
 The European Convention for the Protection of Human Rights and Fundamental Freedoms 87 UNTS 103, ETS No. 005.
 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms ETS No. 009.
 Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms ETS No. 117.
 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms ETS No. 177.

European Social Charter ETS. No. 035.
 European Social Charter (revised) ETS No. 163.
 Protocol amending the European Social Charter ETS. No. 142.
 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints ETS. No. 158.
 The European Convention on the Exercise of Children's Rights ETS No. 160.
 The Charter of Fundamental Rights of the European Union Official Journal C 364, 18/12/2000 P. 0001 – 0022.

American Declaration on the Rights and Duties of Man Res. XXX, Final Act of the Ninth International Conference of American States, Bogotá, Colombia 30 March – 2 May 1948.
 American Convention on Human Rights OAS Treaty Series No. 36, 1144 UNTS 123.
 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights OAS Treaty Series No. 69 (1988), OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992).

African Charter on Human and People's Rights OAU Doc. CAB/LEG/67/3 rev. 5 1520 UNTS 217.
 African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49.

Arabic 2004 Sa'na Declaration on Democracy, Human Rights and the Role of the International Criminal Court Issued at the Inter-Governmental Regional Conference on Democracy, Human Rights and the Role of the International Criminal Court held in Sa'na, Yemen, 10-12 January 2004.
 The Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities GA Res. 47/135 annex 47, U.N. GAOR Suppl. (No.49) at 210, U.N. Doc. A/47/49 (1993).
 The Tunis Declaration (A/CONF.157/AFRM/14, A/CONF.157/PC/57, 24 November 1992).
 The Bangkok Declaration UN Doc. A/Conf.157/PC/59 (1993).
 Universal Declaration of Cultural Diversity (UNESCO Doc. 31C/Res 25, Annex 1 (2001)) adopted unanimously by the organisation's Conference at its 31st session, 2 November 2001.
 UNESCO Convention on the Protection and Promotion of Cultural Expressions (CLT-2005/CONVENTION-DIVERSITE-CULT REV.).

Programmes of Action and Main Resolutions

World Conference on Human Rights, Vienna Declaration and Programme of Action, adopted 25 June 1993, UN Doc. A/CONF. 157/23.
 Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41.
 Beijing Declaration and Platform for Action, Fourth World Conference of Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).

Programme of Action of the 1994 United Nations International Conference on Population and Development (the Cairo Conference) A/Conf.171/13 (1994).

Report of the International Conference on Population and Development A/Conf.171/13/Add. 13 Report annexes I – IV.

Plan of Action submitted by the High Commissioner for Human Rights to the General Assembly, A/59/2005/Add.3.

Millennium Declaration UN General Assembly Res. A/RES/55/2, 18 September 2000.

Report of the Secretary-General *We the Children: End-decade review of the follow-up to the World Summit for Children* 2001 A/S-27/3.

A World Fit for Children UN General Assembly Res. A/RES/S-27/2, 10 May 2002.

Report of UN Secretary-General *In larger freedom: towards development, security and human rights for all* 21 March 2005 A/59/2005.

Other UN Documents

E/1978/34.

E/1979/36.

E/CN.4 /L.1575.

E/CN.4//1988/WG.1/WP.2.

E/CN.4//780/Add.1.

E/CN.4/1324 and Corr.1 and Add.1-5

E/CN.4/1324.

E/CN.4/1324/Add.5.

E/CN.4/1349.

E/CN.4/1475.

E/CN.4/1989/48.

E/CN.4/1989/WG.1/CRP.1.

E/CN.4/1989/WG.1/WP.6.

E/CN.4/1989/WG.1/WP.8.

E/CN.4/1989/WG.1/WP.9.

E/CN.4/1989/WP.35.

E/CN.4/L.1366.

E/CN.4/L.1366/Rev.1.

E/CN.4/L.1542.

E/CN.4/L.1575.

E/CN.4/WG1/L.4.

The UN Human Rights Treaties Monitoring Bodies

Committee on the Rights of the Child

CRC/C/5 General guidelines regarding the form and content of initial reports.

CRC/C/58 General Guidelines for periodic reports.

CRC/C/33 Overview of the reporting procedures.

CRC/GC/2001/1 2001 General Comment 1 *The aims of education.*
 CRC/GC/2002/2 2002 General Comment 2 *The role of independent human rights institutions.*
 CRC/GC/2003/3 2003 General Comment 3 *HIV/AIDS and the rights of the child.*
 CRC/GC/2003/4 2003 General Comment 4 *Adolescent health.*
 CRC/GC/2003/5 2003 General Comment 5 *General measures of implementation for the Convention on the Rights of the Child.*
 CRC/GC/2005/6 2005 General Comment 6 *Treatment of unaccompanied and separated children outside their country of origin.*
 CRC/GC/2005/7 2005 General Comment 7 *Implementing child rights in early childhood.*
 CRC/GC/8 General Comment 8 (2006) *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (articles 19, 28(2) and 37, inter alia).*

State Party Reports

CRC/C/104/Add.2 Japan
 CRC/C/11/Add.12 Ireland
 CRC/C/11/Add.16 Cambodia
 CRC/C/11/Add.18 Central African Republic
 CRC/C/11/Add.20 Lesotho
 CRC/C/11/Add.7 China
 CRC/C/117/Add.1 the Netherlands
 CRC/C/125/Add.1 Sweden
 CRC/C/125/Add.4 Costa Rica
 CRC/C/129/Add.1 Norway
 CRC/C/15/Add.194 Poland
 CRC/C/28/Add.1 Morocco
 CRC/C/28/Add.10 India
 CRC/C/28/Add.8 Vanuatu
 CRC/C/3/Add.1 Sweden
 CRC/C/3/Add.13 Pakistan
 CRC/C/3/Add.19 Burkina Faso
 CRC/C/3/Add.21 Vietnam
 CRC/C/3/Add.26 Indonesia
 CRC/C/3/Add.27 Holy See
 CRC/C/3/Add.3 Sudan
 CRC/C/3/Add.31 Senegal
 CRC/C/3/Add.33 Guatemala
 CRC/C/3/Add.34 Nepal
 CRC/C/3/Add.37 Uruguay
 CRC/C/3/Add.38 Bangladesh
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 CRC/C/3/Add.40 Uganda
 CRC/C/3/Add.42 Togo
 CRC/C/3/Add.43 Sierra Leone
 CRC/C/3/Add.45 Barbados
 CRC/C/3/Add.48 Guinea
 CRC/C/3/Add.50 Chad
 CRC/C/3/Add.52 Benin

CRC/C/3/Add.53 Mali
CRC/C/3/Add.65 Brazil
CRC/C/51/Add.2 South Africa
CRC/C/51/Add.9 Botswana
CRC/C/61/Add. 6 Kiribati
CRC/C/65/Add.10 Nepal
CRC/C/65/Add.20 Viet Nam
CRC/C/65/Add.22 Bangladesh
CRC/C/65/Add.3 Sweden
CRC/C/65/Add.34 Ghana
CRC/C/65/Add.9 Egypt
CRC/C/70/Add.1 Yemen
CRC/C/70/Add.18 Madagascar
CRC/C/70/Add.2 Norway
CRC/C/70/Add.4 Jordan
CRC/C/8/Add.12 Jamaica
CRC/C/8/Add.14 Tanzania
CRC/C/8/Add.20 Yemen
CRC/C/8/Add.26 Nigeria
CRC/C/8/Add.27 Ethiopia
CRC/C/8/Add.39 Djibouti
CRC/C/8/Add.4 Jordan
CRC/C/8/Add.41 Côte d'Ivoire
CRC/C/8/Add.5 Madagascar
CRC/C/8/Add.7 Norway
CRC/C/83/Add.14 Lithuania
CRC/C/83/Add.7 Germany
CRC/C/93/Add.5 India

Concluding Observations

CRC/C/15/Add. 23 Norway
CRC/C/15/Add.101 Sweden
CRC/C/15/Add.115 India
CRC/C/15/Add. 126 Norway
CRC/C/15/Add.198 Italy
CRC/C/15/Add.199 Romania
CRC/C/15/Add.2 Sweden
CRC/C/15/Add.200 Vietnam
CRC/C/15/Add.204 Eritrea
CRC/C/15/Add.212 Syria
CRC/C/15/Add.213 Kazakhstan
CRC/C/15/Add.220 Singapore
CRC/C/15/Add.224 Guyana
CRC/C/15/Add.227 the Netherlands
CRC/C/15/Add.232 El Salvador
CRC/C/15/Add.240 France
CRC/C/15/Add.241 Brazil
CRC/C/15/Add.243 Croatia
CRC/C/15/Add.246 Angola
CRC/C/15/Add.248 Sweden
CRC/C/15/Add.254 Iran

CRC/C/15/Add.256 Bolivia
CRC/C/15/Add.257 Nigeria
CRC/C/15/Add.263 Mongolia
CRC/C/15/Add.263 Norway
CRC/C/15/Add.266 Costa Rica
CRC/C/15/Add.85 Ireland
CRC/C/15/Add.193 Burkina Faso
CRC/C/93/Add.5 India
CRC/C/UGA/CO/2 Uganda

Summary Records

CRC/C/11/Add.18 Central African Republic
CRC/C/11/Add.20 Lesotho
CRC/C/11/Add.7 China
CRC/C/28/Add.1 Morocco
CRC/C/28/Add.8 Vanuatu
CRC/C/3/Add.13 Pakistan
CRC/C/3/Add.19 Burkina Faso
CRC/C/3/Add.21 Vietnam
CRC/C/3/Add.26 Indonesia
CRC/C/3/Add.3 Sudan
CRC/C/3/Add.31 Senegal
CRC/C/3/Add.33 Guatemala
CRC/C/3/Add.34 Nepal
CRC/C/3/Add.37 Uruguay
CRC/C/3/Add.38 Bangladesh
CRC/C/3/Add.39 Ghana
CRC/C/3/Add.4 Vietnam
CRC/C/3/Add.40 Uganda
CRC/C/3/Add.42 Togo
CRC/C/3/Add.43 Sierra Leone
CRC/C/3/Add.45 Barbados
CRC/C/3/Add.48 Guinea
CRC/C/3/Add.50 Chad
CRC/C/3/Add.52 Benin
CRC/C/3/Add.53 Mali
CRC/C/51/Add.2 South Africa
CRC/C/65/Add.10 Nepal
CRC/C/65/Add.9 Egypt
CRC/C/70/Add.1 Yemen
CRC/C/70/Add.4 Jordan
CRC/C/8/Add.12 Jamaica
CRC/C/8/Add.14 Tanzania
CRC/C/8/Add.20 Yemen
CRC/C/8/Add.26 Nigeria
CRC/C/8/Add.27 Ethiopia
CRC/C/8/Add.39 Djibouti
CRC/C/8/Add.4 Jordan
CRC/C/8/Add.41 Côte d'Ivoire
CRC/C/SR.1016 Iran
CRC/C/SR.1018 Togo

CRC/C/SR.1022 Nigeria
CRC/C/SR.1033 Nepal
CRC/C/SR.1037 Norway
CRC/C/SR.1041 Mongolia
CRC/C/SR.1049 Yemen
CRC/C/SR.1058 Uganda
CRC/C/SR.1062 China
CRC/C/SR.132-134 Pakistan
CRC/C/SR.136 Burkina Faso
CRC/C/SR.144 Jordan
CRC/C/SR.162 Indonesia
CRC/C/SR.197 Jamaica
CRC/C/SR.248 Senegal
CRC/C/SR.261-63 Yemen
CRC/C/SR.298-300 China
CRC/C/SR.301-303 Nepal
CRC/C/SR.306-308 Guatemala
CRC/C/SR.317-319 Morocco
CRC/C/SR.321-323 Nigeria
CRC/C/SR.325-327 Uruguay
CRC/C/SR.349-351 Ethiopia
CRC/C/SR.374-276 Cuba
CRC/C/SR.377-379 Ghana
CRC/C/SR.380-382 Bangladesh
CRC/C/SR.409-410 Uganda
CRC/C/SR.421 Togo
CRC/C/SR.515-517 Guinea
CRC/C/SR.523-24 Yemen
CRC/C/SR.533-536 Barbados
CRC/C/SR.543-545 Benin
CRC/C/SR.547-549 Chad
CRC/C/SR.566-567 Vanuatu
CRC/C/SR.570-572 Mali
CRC/C/SR.589-591 India
CRC/C/SR.593-594 Sierra Leone
CRC/C/SR.60-61 Vietnam
CRC/C/SR.607 Grenada
CRC/C/SR.609-611 South Africa
CRC/C/SR.618 Iran
CRC/C/SR.621-622 Jordan
CRC/C/SR.629 Cambodia
CRC/C/SR.638 Djibouti
CRC/C/SR.657-58 Central African Republic
CRC/C/SR.66 Egypt
CRC/C/SR.679-680 Egypt
CRC/C/SR.685-86 Lesotho
CRC/C/SR.69-71 Sudan
CRC/C/SR.713 Tanzania
CRC/C/SR.762 Mozambique
CRC/C/SR.79-81 Indonesia
CRC/C/SR.817 Sudan
CRC/C/SR.825 Burkina Faso

CRC/C/SR.848 Vietnam
CRC/C/SR.880 Jamaica
CRC/C/SR.882 Morocco
CRC/C/SR.89-90 Sudan
CRC/C/SR.920 Indonesia
CRC/C/SR.924 Armenia
CRC/C/SR.932-933 India
CRC/C/SR.965 North Korea

Other CRC Documents

CRC/C/24 7th session, 10 October 1994 report from the 1994 Day of General Discussion on the Role of the Family in the Promotion of the Rights of the Child.
CRC/C/38 summary of the discussions at the 1995 General Day of Discussion on the Girl Child, 1995.
CRC/C/90 Report on the twenty-second session, September/October 1999 Workshop held at the Tenth Anniversary of the Convention on the Rights of the Child: Achievements and Challenges” held on 30 September - 1 October 1999 in cooperation with the Office of the High Commissioner for Human Rights.

Human Rights Committee

CCPR General Comment No.3 Implementation at the national level (art.2). (29/0781).
CCPR General Comment No. 17 Rights of the child (Art. 24) (07/04/89).
CCPR General Comment No. 23 The Rights of Minorities (art.27) CCPR/C/21/Rev.1/Add.5.
CCPR General Comment No. 24 Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant CCPR/C/21/Rev.1/Add.6.

State Party Reports

CCPR/C/10/Add.8 India.
CCPR/C/37/Add.13 India.
CCPR/C/NET/ 99/3 the Netherlands.
CCPR/CO/71/VEN Venezuela.
CCPR/CO/72/CZE Czech Republic.
CCPR/C/76/Add.6 India.

Concluding Observations

CCPR/C/79/Add.39 Cyprus.
CCPR/C/79/Add.56 Sri Lanka.
CCPR/C/79/add.102 Japan.
CCPR/C/79/Add.62 Zambia.
CCPR/CO/72/NET the Netherlands.

Jurisprudence

Lubicon Lake Band v. Canada Communication No. 167/1984
CCPR/C/33/D/197/1985.

Ivan Kitok v. Sweden Communication No. 197/1985
CCPR/C/33/D/197/1985.
Länsman et al. v. Finland Communication No. 511/1992
CCPR/C/52/D/511/1992.
Mahuika et al. v. New Zealand Communication No. 547/1993
CCPR/C/70/D/547/1993.
Buckle v New Zealand Communication No. 858/1999
CCPR/C/70/D/858/1999.
Winata and Li v. Australia Communication No. 930/2000
CCPR/C/72/D/930/2000.
Brough v. Australia Communication No. 1184/2003
CCPR/C/86/D/1184/2003.

Committee on Economic, Social and Cultural Rights
CESCR General Comment No. 3 The nature of State parties' obligations
(14/12/90).
CESCR General Comment No. 6 The economic, social and cultural rights of
older persons (08/12/95).
CESCR General Comment No. 9 The domestic application of the Covenant
(03/12/98).
CESCR General Comment No. 16 The equal right of men and women to the
enjoyment of all economic, social and cultural rights E/C.12/2005/4.
UN Fact Sheet No.16 (Rev.1) The Committee on Economic, Social and Cul-
tural Rights.

Committee on the Elimination of Discrimination Against Women
Reports of the Special Rapporteur on violence against women:
E/CN.4/2003/75 *International, regional and national developments in the
area of violence against women 1994-2003*.
E/CN.4/1997/47 *Violence in the Community*.
E/CN.4/68 *Violence Against Women in the Family*.

State Party Reports
CEDAW/C/BEV/1-3 Benin.
CEDAW/C/BRA/1-5 Brazil.
CEDAW/C/IND/1 India.
CEDAW/C/YEM/5 Yemen.

Committee on the Elimination of Racial Discrimination
CERD General Recommendation 27 *Discrimination against Roma*.

Regional Systems

European System

European Court of Human Rights
Tyrer v. the United Kingdom Judgment 25 April 1978, Series A no. 26.
Marckx v. Belgium Judgment 13 June 1979, Series A no. 31.

Handyside v. the United Kingdom Judgment 7 December 1976, Series A no. 24.
Dudgeon v. the United Kingdom, Judgment of 22 October 1981, Series A no. 45.
Johnston and Others v. Ireland Judgment 18 December 1986, Series A no. 112.
Olsson v. Sweden (No. 1) Judgment 24 March 1988, Series A no. 130.
Berrehab v. The Netherlands Judgment 21 June 1988, Series A no. 138.
Eriksson v. Sweden Judgment 22 June 1989, Series A no. 156.
Moustaquim v. Belgium Judgment 18 February 1991, Series A no. 193.
Y v. the United Kingdom Judgment of 29 October 1992, Series A no. 247-A.
Olsson v. Sweden (No. 2) Judgment 27 November 1992, Series A no. 250.
Case of Open Door and Dublin Well Woman v. Ireland Judgment 29 December 1992, Series A no. 246-A.
Hokkanen v. Finland Judgment 23 September 1994, Series A no. 299-A.
Kroon and Others v. the Netherlands, judgment of 27 October 1994, Series A no. 297-C.
Boughanemi v. France Judgment 24 April 1996, *Reports of Judgments and Decisions* 1996-II.
Söderbäck v. Sweden Judgment 28 October 1998, *Reports of Judgments and Decisions* 1998-VII.
T v. the United Kingdom [GC], no. 24724/94, 16 December 1999.
V v. the United Kingdom [GC], no. 24888/94, ECHR 1999-IX, 16 December 1999.
Fretté v. France Judgment 26 February 2002, no. 36515/97, ECHR 2002-I.
Pretty v. the United Kingdom, no. 2346/02, ECHR 2002-III.
Sahin v. Germany, no. 30943/96, 11 October 2001.
Sommerfeld v. Germany [GC], no. 31871/96, ECHR 2003-VIII (extracts).
Vo v. France [GC], no. 53924/00, ECHR 2004-VIII.

Council of Europe Official Documents

Council of Europe Recommendation 1121 (1990) on the Rights of Children by the Council of Europe Parliamentary Assembly.
 Council of Europe Recommendation No R (98) 8 by the Committee of Ministers to Member States on Children's Participation in Family and Social Life, 18 September 1998.
 The Explanatory Report to the European Convention on the Exercise of Children's Rights (ETS 160).

European Union Official Documents

Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, OJ L 251, 03/10/2003 pp. 0012 – 0018.
 Amended Proposal for a Council Directive on the Right to Family Reunification, OJ C 203 E, 27/08/2002 pp. 0136 – 0141.

Inter-American System

Inter-American Court of Human Rights

Villagran Morales et al v. Guatemala I/A Court H.R. Series C, No. 63, Judgment 19 November 1999.

Inter-American Court of Human Rights *Advisory Opinion* OC 10/89 July 14, 1989 Interpretation of the American Declaration of the Rights and Duties of Man within the framework of the American Convention on Human Rights IACourtHR, Ser. A: Judgments and Opinions, No.10.

Inter-American Court of Human Rights *Advisory Opinion* OC 17/2002 August 28, 2002 Juridical Condition and Rights of the Child, IACourtHR, Ser.A: Judgments and Opinions, No. 17.

Inter-American Commission on Human Rights

White and Potter v. USA Case 2141 (United States) Annual Report of the Inter-American Commission on Human Rights 1980-1981, OEA/Ser.L/V/II.54 Doc. 9 rev. 1. 1981.

Perez v. Mexico (Case 11.565, Report N° 129/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 232 [1999]).

Theissen v. Guatemala (Case 12.101, Report No. 79/01, OEA/Ser.L/V/II.114 Doc. 5 rev. at 182 [2001]).

1991 Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.81 Doc. 6 rev. 1, 1992.

Report on the Situation on the Situation of Human Rights in Brazil OEA/Ser.L/V/II.97 Doc. 29 rev.1, 1997.

Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 1999.

Report on the Situation of Human Rights in the Dominican Republic, OEA/Ser.L/V/II.104 Doc. 49 rev. 1, 1999.

Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev., 2000.

Third Report on the Human Rights Situation in Paraguay OEA/Ser.L/V/II.110, Doc.52, 2001.

Fifth Report on the Situation of Human Rights in Guatemala OEA/Ser.L/V/II.111 doc. 21 rev., 2001.

African System

Rules of Procedure of the Committee of Expert on the Rights and Welfare of the Child Cmttee/ACRWC/11.Rev. 2.

Swedish Official Documents

SOU 1997:116 *Barnets bästa i främsta rummet. FN:s konvention om barnets rättigheter föreverkligas i Sverige.*

SOU 1998:97 *Gör barn till medborgare! Om barn och demokrati under 1900-talet* Kristina Engwall. Demokratiutredningens skrift nr 4.

SOU 1999:13 *Etik och demokratisk statskonst* Hans L. Zetterberg. Demokratiutredningens skrift Nr. 15.

Prop. 1989/90:107 Om godkännande av FN-konventionen om barnets rättigheter.

Prop. 2001/02:80 Demokrati för det nya seklet.

SKR 2003/04: 20 Mänskliga rättigheter i svensk utrikespolitik.

Norwegian Official Documents

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

Other

Gillick v. West Norfolk and Wisbech Area Health Authority [1986] 1 AC 112.

Websites

<http://www.amnesty.org>
<http://www.censusindia.net>
<http://www.coe.int>
<http://www.freedomhouse.org>
<http://www.freethechildren.com>
<http://www.hrw.org>
<http://www.idea.int>
<http://www.indiancourts.nic.in>
<http://www.ilo.org>
<http://www.ohchr.org>
<http://www.saarc-sec.org>
<http://www.state.gov>
<http://www.un.org>
<http://www.untreaty.un.org>
<http://www.worldvaluessurvey.com>
<http://www.workingchildren.org>