Asgeir Falch-Eriksen

The Promise of Trust

- An inquiry into the legal design of coercive decision-making in Norway

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Sammendrag

I denne avhandlingen tas det sikte på å undersøke hvorvidt det rettslige designet av Fylkesnemnda for barnevern og sosiale saker innfrir et løfte om tillit. Den første delen utreder hva det vil si å innfri et løfte om tillit. Jeg vil redegjøre for de nødvendige premissene som må være på plass for at det skal være meningsfullt å sette opp et slikt løfte. Dette vil bli uttrykt i en modell som stipulerer at en forventningsorden er konstituerende for hva tillit er, og at man skal kunne evaluere hvorvidt en rettslig orden sammenfaller med forventningsordenen på et angitt tidspunkt. Sammenfall eller spenninger mellom disse to vil gi oss et inntrykk av hvordan det rettslige designet kan sies å holde sitt løfte om å skape tillit.

Den andre delen tar utgangspunkt i at forventningsordenen formes av hvilken tid man lever i. Den må derfor kvalifiseres gjennom historiske studier. Man må forsøke å spore hva det er som har skapt tillit og også hva som har endret oppfatninger om hva man kan ha tillit til. Den historiske analysen av forventningsordenen, og derfor hva som har skapt tillit tidligere, er nødvendig for å få et så klart innblikk som mulig i hva den nåværende forventningsordenen består av. Del to vil konkludere med at beslutninger om tvang innen barnevernet i dag skaper tillit dersom de innfrir et krav til et rettighetsbasert og et post-nasjonalt design.

Den tredje og siste delen vil gå inn i bestanddelene til hva et tillitsverdig rettighetsbasert og postnasjonalt barnevern består av. Dette vil si å ta tak i de dominerende forventningene i forventningsordenen, for deretter å etablere den normative selv-forståelsen av et tillitsverdig barnevern. Det vil bli argumentert for at barnets beste interesser og ikke-diskriminering skal betraktes som dominerende forventninger innad i et tillitsverdig barnevern. Den rettslige ordenen kan deretter evalueres opp imot den normative selvforståelsen som forventningsordenen inngir. Spørsmålet er derfor til slutt om beslutningsorganets design overholder disse to prinsippene i den forventningsordenen som utledes. Graden av overlapp mellom forventningsordenen og rettsorden vil derfor være avgjørende for hvorvidt beslutninger om tvang kan sies å innfri et løfte om tillit eller ikke.

Avhandlingens konklusjon er at fylkesnemnda innehar sentrale tillitsskapende trekk, spesielt gjennom en formalisering av prosedyreprinsipper og forhandlingsprinsippet. Allikevel har den også mange svakheter ved seg. Disse svakhetene ved designet vil bli argumentert for at er opprettelige.

Summary

In this thesis the aim is to examine whether the legal design of the County Board for Child Welfare and Social Affairs upholds a promise of trust. The first part investigates what it means to redeem a promise of trust. I will explain the necessary assumptions that must be in place for making it meaningful to set up such a promise. This will be expressed in a model that stipulates that an order of expectations is constitutive of what trust is, and to be able to evaluate whether a legal order complies with the order of expectations at a certain point in time. Convergence or tension between these two orders will give us an idea of whether or not the legal design keeps its promise of trust.

The second part is based on the idea that the order of expectations is shaped by what time you live in. It must therefore be qualified through historical studies. One must try to trace what it is that has induced trust and also what has changed perceptions about how you trust. The historical analysis of the order of expectations, i.e. what has induced trust in the past, is necessary to provide as clear an insight as possible into what the current order of expectations consists of. Part two will conclude that decisions about coercion in care today inspire trust if they meet the requirements of a rights-based and a post-national order of expectations.

The third and final part will dive into the constituents of what trust is, i.e. what rights-based and post-national child protection implies. This means to address the dominant expectations in the order of expectations, and then to establish the normative self-understanding of this particular type of trust. It will be argued that the child's best interests and non-discrimination should be considered dominant as expectations within trustworthy child protection. The legal order can then be evaluated against the normative self-understanding of the order of expectations. The question is how ultimately the design of the decision-making body complies with these two principles of the order of expectations. The degree of overlap between the order of expectations and the legal order will therefore be crucial to whether the decision-making complies with a promise of trust or not.

The thesis concludes that the design of the decision-making body holds key trust inducing components, especially through a formalization of principles of procedure and the meeting of negotiation. Yet it also has many weaknesses. These weaknesses of the design will be argued are repairable.

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Asgeir Falch-Eriksen

Oslo – August – 2012

Contents

Abbreviations

Bol	Barneombudsloven (Ombudsman for Children Act)
Bvl	Barnevernloven (Child Welfare Act - 1992)
BVL	Barnevernloven (Child Welfare Act - 1953)
BVN	Barnevernsnemnda (Child Protection Board)
CRC	UN. Convention on the Rights of the Child
CCPR	UN. Covenant on the Civil and Political Rights
ECHR	European Convention on Human Rights
FBSS	Fylkesnemnda for Barnevern og Sosiale Tjenester (Regional Board on Child Protection and Social Services)
Fvl	Forvaltningsloven (Public Administration Act)
Grl	Grunnloven (Constitution)
LBFB	Lov om behandling av forsømte børn (Treatment of Neglected Children Act)
Mrl	Menneskerettsloven (Human Rights Act)
Stl	Sosialtjenesteloven (Social Services Act)
Tvml	Tvistemålsloven (Civil Procedure Act)
Tl	Tvisteloven (Civil Procedure Act)

1. Introduction

In historic time, state-based protection of children stretches back to 1896 in Norway. Norway was among the first states to introduce legislation set to take care of children exposed to detrimental care. Currently, the most important decision-making body within this system is *Fylkesnemnda for barnevern og sosiale saker* (FBSS).[1] This decision-making body is set to reach decisions in the hardest, most complex and most intrusive cases of child protection—those involving the coercion of parents in the best interest of the child.

The public is prevented from access to what takes place behind closed doors, and for good reasons. The FBSS invade the private lives of families. It is to be expected that parents and children experience what happens in the FBSS with severe emotional distress. Families are on the line, and at the same time parents can lose custody of their children completely or for a limited period of time. The coercive nature of the FBSS can potentially ruin lives. The threshold should be set high when it comes to justifications of interventions; they should be thorough, and respect should be paid to those involved no matter what.

The case-work is subtle and very sensitive, but it is illegitimate to hold these cases transparent and open to public scrutiny. This leaves us with a very delicate problem. Everyone must be able to trust that which happens behind closed doors. We need to trust that the justifications provided are thorough, and that everyone involved are treated with respect, and that decisions are qualified. Hence, it is a need to design a decision-making body that is capable of ensuring trustworthy decisions. The public does not know the specifics of the matters at hand of each case, but should be able to trust the decision-making because of the quality of the procedure. The substantial input to the procedure, whatever it might be, must be

[1] This organization translates to the "county board of child protection and social affairs." However, the semi-official translation is "The County Social Welfare Board". Although the former is a more accurate translation, I will stick with the latter.

treated in a manner that makes the decision, the outcome, worthy of trust. Trust, in this way, is seen as the outcome of a 'correct' procedure. The procedure must be designed according to such principles that makes everyone trust the outcome, the decision. Said differently, everyone must be able to trust decisions without knowing what the decision is about. What is needed, then, are legal designs that can keep what I will refer to as a promise of trust.

Hence, this dissertation has been written with a firm belief that it is, in fact, possible to evaluate if decision-making bodies can induce trust due to the merits of the legal design alone. The idea is very appealing; but presently no such perspective on trust exist, let alone a research approach, which can be applied to actually evaluate if a legal design can be said to cash in on the promise of trust. Consequently, we need to develop the perspective and approach that can explain how it is possible to design decision-making procedures that comply with what is worthy of trust. When such an approach is established, we can evaluate if the FBSS keeps the promise of trust. The efforts involved are worth making, not only because nobody has done it before, but most importantly, I do believe it to be imperative that decision-making performed by the FBSS can induce trust on the merits of the procedure design alone simply because decisions reached behind closed doors must be worthy of trust.

In this dissertation, I will assume that an ideal constitutional democracy can craft a legal order that makes an implicit claim to be worthy of trust—this is its promise of trust.[2] Furthermore, it will be argued that what is worthy of trust is grounded in an order of expectations and constitutes the essence of what binds society together. Expectations constitute anticipations, normative or predictive, of events in the future. Although expectations are variable and fallible, individuals employ them in order to trust and keep their guard down during interaction.[3] On a general level, these expectations establish the order of expectations. Legal codes can be crafted that comply with the order of expectations, and hence regulate according to what is found worthy of trust. The consequence is that the legal order can be said to redeem the promise of trust. The order of expectations is a purely descriptive denomination of what is found worthy of trust. Turned around, we can argue that what is found worthy of trust is what we can expect others to do. Hence, expectations are what we act upon when we trust.

[2] Legal order implies not merely the legal code itself, but the entire system it establishes.
[3] See Grimen (2009): 39ff.

The promise of trust, as just expressed in a simple ideal form, implies that a legal order that uphold principles of constitutional democracy as a regulative ideal, has the potential and perhaps even the obligation to comply with the binding force of society, which is what I refer to as the order of expectations. When a legal order complies with the order of expectations, the legal order in principle expresses the will of *demos*. It seeks to accommodate the complete social order that the legal order regulates. Furthermore, to continue keeping such a promise, the legal order must be developed and maintained through an active law-making procedure that answers challenges and dynamics of the order of expectations, and all by observing procedural constraints that grants new legal codes potential acceptance of every member of society. Taking inspiration from the idea of reconciling the constitutional and democratic view of legitimate government, I will seek to study if the political will-formation that craft the legal order manage to express the order of expectations.[4] Cashing in on a promise of trust involve a legal order developed by self-legislation of citizens themselves through a representative assembly. Hence, those who are regulated and affected can also understand themselves as the authors of the law.

If tensions arise, and a legal order is no longer found worthy of trust, it means that the order of expectations of the political community in question no longer complies with the legal order that is enforced. The two orders, the order of expectations and the legal order, must again become aligned through political craftsmanship, where democratically elected representatives are provided a popular mandate to reach decisions for all that can again redeem the promise of trust. In such a way, the trustworthiness typical to any social community can become stabilized when it is transferred through law-making to the legal order. In many respects, ensuring that the legal order can redeem a promise of trust is a matter of democratic politics. This is how the legal order of a constitutional democracy can make an implicit promise to regulate in a manner that is found worthy of trust, and in that sense legitimate, by the subjects it regulates.

In this dissertation it will be acknowledged that such an ideal constitutional democracy is very difficult to obtain, let alone maintain. I will nevertheless hold it to be true that Norway belongs to those nation-states that do attempt to practice such an ideal, and as such has a constitutional democratic foundation. It is merely a matter of actively seeking to let popular sovereignty rule through a representative assembly that is sensitive to who they represent, and

[4] See Constant (2003). Hollis (1998):92.

constrained by constitutional rights that protects individual liberty for all. Although it is difficult to fully redeem the promise of trust, the goal is for government to try—the goal is to let the will of the people shape rule of law so that the promise of trust is redeemed. Hence, in this dissertation, I will for the sake of the argument treat the Norwegian legal order as if it were built upon principles of a constitutional democracy seeking to be in line with popular conceptions of rightness and correctness.

This means that I will hold it to be true that if the legal order that regulates Norwegian society maintains practices that depart from the trust that binds society together, reforms will be instituted to repair the legal order so that practices once again can redeem a promise of trust. Hence, the legal order will not redeem a promise of trust before the tension that the legal order has towards the existing order of expectations, has become corrected. The political craftsmanship within Norwegian parliament and government must be vigilant and competent enough in order to craft legal orders that continuously strive to keep its promise of trust. Constitutional democracy holds the necessary procedures needed to chisel out a legal order that can hold and keep a promise of trust. How the representative assembly conduct politics becomes imperative for striving to align the legal order to the order of expectations.

Child protection law is one branch within the legal order that has deep roots in Norway. The central node of decision-making within the current legal code regulating child protection is, as mentioned initially, *Fylkesnemnda for barnevern og sosiale saker* (FBSS).[5] It is a Norwegian court-like decision-making body set to reach decisions in cases in need of coercion, i.e. the hardest and most complex cases where children are suspected of being subjected to detrimental care. The design of this decision-making body figures in the legal order through *barnevernloven* (Child Welfare Act – *bvl*). On January 1st 2008, an amendment to the design of the FBSS was put into effect. With this last amendment, it was explicitly held that trust was induced by the principles the decision-making procedure was founded upon.[6]

It is not important for this study that the *bvl* has a legally entrenched claim that decision-making is supposed to induce trust, but what is important is the explicit focus upon establishing a decision-making procedure that is meant to induce trust. Said differently, the decision-making procedure of the FBSS invites itself to an evaluation. *The purpose of this*

[5] This organization translates to the "county board of child protection and social affairs." However, the semi-official translation is "The County Social Welfare Board". Although the former is a more accurate translation, I will stick with the latter.

[6] The opening sentence of first paragraph of *bvl* §7-3 states: "The decision-making procedure of the board shall be reassuring, expeditious, and induce trust."

dissertation is to find out whether or not decision-making of the FBSS redeems a promise of trust. To meet this aim, the dissertation will consist of three parts: First, I will develop the perspective of trust and the approach theoretically, of what it means for a legal order to redeem a promise of trust (chapter 2). Second, I will trace the order of expectations, i.e. what is worthy of trust, through history in order to establish what trustworthy decision-making constitute today (chapters 3, 4 and 5). Third, I will establish an evaluative standard based upon part II, and then evaluate the legal order of the FBSS (chapters 6 and 7). To what extent the legal order complies with the order of expectations will tell us to what degree the promise is redeemed. Thus, on a basic level, this dissertation is meant to be a critique of political craftsmanship by finding out if democratically elected officials are vigilant and competent to craft legislation that abides by the trust instilled in them by their office.

The FBSS reaches decisions involving coercion as the state removes parental rights temporarily or permanently and provides non-detrimental care to the child. Before reaching such a decision, the parents have a right to raise a counter-claim in order to argue that the care they provide is non-detrimental and that coercion is not necessary. Once the case is presented before the FBSS, the parties will argue their cases in a meeting of negotiation. The case is decided either by a regular board consisting of one judge, one professional and one lay-man, or by a large board that consists of one judge, two professionals and two lay-men. To delimit the discussions, this dissertation will make a clear distinction between child protection and child welfare, whereby the former involves coercion in order to protect a child, and the latter does not. Although both types of interventions figures in the *bvl,* this dissertation focus upon the child's need of protection. The dissertation contains three different parts:

1. Theoretical approach—"the promise of trust"
2. The historical development of the order of expectations
3. Evaluation of the legal order

1.1. Theoretical Approach—"the promise of trust"

In order to analyze if a legally entrenched decision-making procedure can redeem a promise of trust, or be trust-inducing, there is a need to develop an approach that allows for such a study. The study requires a theoretically substantial framework that can establish an analytically tangible approach to study how decision-making can induce trust by way of legal design only. The approach needs to tell us what trust is, and how it can be used to evaluate whether or not a decision-making process induces trust.

The first part involves an arrangement of theoretical nuts and bolts, or stepping-stones, drawn mainly from action-theory seeking to establish the theoretical approach that can explain how a promise of trust can be redeemed. Hence, I will argue that trust is best explained by employing an action-frame of reference. Trust will be treated as an action-theoretical base item with the individual actor's point of view as a point of departure.

The fundamental component of the order of expectations is in basic communication. Basic communication will be held to be the individual action-theoretical point of departure for trust.[7] Mutual understanding, and how it becomes established through basic communication, will be used as the spring-source for explaining trust. In order to understand why, we first need to provide a plausible solution to the problem of order. The problem of order is a theoretical construct that takes a world void of trust as its point of departure. I will argue that the solution to such a problem is the incremental development of an order consisting of expectations that individuals can direct towards generally applied action norms that are established through a mutual understanding. Hence, one can expect that others choose to act upon certain action norms.

Only by first explaining what trust entails on such a basic level, through an action-frame of reference, can trust be approximated to a promise of trust implicit to a legal order of a constitutional democracy. The basic theoretical level will argue that a specific spatially and temporally delimited legal code can express a specific type of legal order that can *stabilize* the order of expectations. The legal order, it will be argued, is supposed to comply with the ever present, yet changing, basic expectations that individuals carry.

The order of expectations itself express what is worthy of trust and constitutes the bond of society. To study the order of expectations is to study what is worthy of trust. Acting according to expectation is to act trustworthy, and to act trustworthy is to act according to expectations. Breaches in expectations constitute breaches of trust. Expectations constitute anticipations of events. Stability of expectations and their accuracy and quality can signal a level of trustworthiness. The more individuals constituting a social community act according to expectations, the higher this level becomes. The development and dynamics of expectations is dependent upon social integration, and will be clarified in part I.[8]

[7] See for instance Grimen (2009) and Baier (1986). We will return to this later.
[8] The role of expectation play a major role in trust-literature. See Grimen (2009):35ff.

Expectations come in two different categories: Normative and predictive. The latter are expectations based upon assumptions that events will occur in a foreseeable fashion as "they are supposed to". Normative expectations are independent from the event, and are aimed at social norms reached and maintained through mutual understanding. Both types of expectations might be rational or irrational to hold, and both are fallible. However, an irrational normative expectation can be kept although the expectation is not met regularly. Although the distinction between predictive and normative expectations is important, this dissertation will refer to both while it refers to expectations.

If the legal order is to become worthy of trust, it needs to comply with the basic expectations dominating the order of expectations. For instance, within child protection, there are always some expectations that are more fundamental. Consequently, they are basic to the order of expectation with regard to child protection. The legislator must attempt to insert the basic expectations into the legal order. When basic expectations become entrenched in the legal order, it becomes more able to redeem the promise of trust. If the legal order in child protection did not comply with basic expectations, it would not bestow trust either. Hence, the basic expectations constitute ideals that political craftsmanship should strive to implement in order for a legal order to redeem the promise of trust.

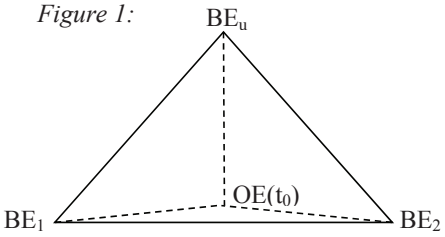
Since the order of expectations develops due to learning processes of different kinds, the order of expectations is in constant flux. The political craftsmanship must exert vigilance and continuous competence in order to redeem the promise of trust. Due to the flux within the order of expectations, it is a continuous problem in crafting a legal order that complies with it. Learning-processes of different kinds will produce tension towards the facticity of positive law. The lower the tension is, the more the current legal order complies with the order of expectations and harbor what is worthy of trust. Thus, the higher the tension between the basic expectations and the legal order, the less evidence it is of the presence of basic expectations within it, and hence the ability of the legal order to redeem the promise of trust is lacking. I will now present the approach in a more formal language in six steps.

The order of expectations (OE) at a certain point in time t can be illustrated within a 2-dimensional simplex when it is constituted by two known basic expectations (BE), BE_1 and BE_2, and one unknown amount of expectations that are not basic BE_u. A basic expectation can for instance be the principle of child's best interest or the principle of non-discrimination. If more known basic expectations are present, the simplex increases in complexity. Thus, BE_u

represents expectations that are universally present within an order of expectations at a certain point in time, but can potentially become more dominating as time goes by. Hence, expectations can become more specified and defined as time goes by. For the sake of simplicity, it can be assumed that BE_1 and BE_2 have an equal distribution within the order of expectations, and that the presence of BE_u is very low. Thus, the vector of the order of expectations at t_0 can be drawn, as shown in Figure 1.

1: The order of expectations in time t_0:

Figure 1:



2: It will be assumed that the current legal order (LO) can be plotted within the order of expectations at t_0. A legal order that is introduced as a new legal code, is *supposed* to comply with the OE *provided* certain principles of constitutional democracy are upheld. Some discrepancies are to be expected, but in general, a legal code is supposed to reflect the OE at a specific time to redeem the promise of trust. This assumption can be stated as:

$LO(t) \approx OE(t_0)$.

where the LO(t) can be reflected as a vector coordinate relating to the simplex. The coordinate illustrates to what extent the corresponding basic expectations of OE are operative within LO at time t.

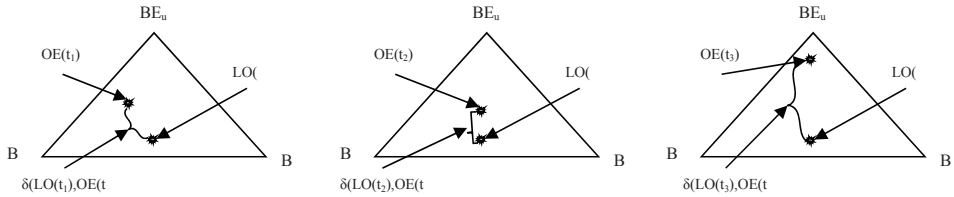
3: At different points in time $t_0, t_1, t_2, t_3, \ldots, t_n$, corresponding $OE(t_1)$, $OE(t_2)$, $OE(t_3)$,…, $OE(t_n)$ will be identified.

4: For each point in time, a potential discrepancy (δ) between the current legal order, LO(t), and the order of expectations, OE(t) can occur. This discrepancy constitutes a tension between the order of expectations and the current legal order. Formally, this can be represented as:

$\delta(LO(t), OE(t))$

Such discrepancy can be illustrated in three scenarios (Figure 2): $\delta(LO(t_1),OE(t_1))$, $\delta(LO(t_2),OE(t_2))$, and $\delta(LO(t_3),OE(t_3))$.

Figure 2:



5: As time goes by, the order of expectations develops, potentially introducing tensions to the legal order. For example, if, at a certain time, t_x, the tension $\delta(t_x)=\delta(LO(t_x),OE(t_x))$ is identified, it implies that the order of expectations has developed away from the current legal order so that the tension, $\delta(t_x)$, is too great for the current legal code to carry. In other words, the basic expectations held by OE, and which is found worthy of trust, are no longer operative within the current LO and hence the LO can no longer be said to redeem the promise of trust.

6: In the above scenario, at t_x, a need for legal reform emerges, as identified by the orientation of the order of expectations, $OE(t_x)$, which the current $LO(t_x)$ do not align with. The $\delta(t_x)$ consequently leads to the introduction of a new legal code that again reflects the order of expectations at a new time-interval $LO(t)\approx OE(t_0)$.

If the promise of trust is to be studied, it is a need to infer what the order of expectations is about with regard to the object of trust. In our case the object is decision-making involving coercion to protect children. The basic expectations need to be expounded from the order of expectations as the most dominant expectations. Once achieved, it is possible to evaluate whether or not the legal order is aligned with the basic expectations. If it is, the promise of trust is redeemed. If not, the legal order does no longer reflect a trustworthy practice. This is most probably always a matter of degree.

Only by establishing a stable tool by means of basic expectations, can the purpose of the dissertation be met. An evaluative standard must be developed which is a general expression of the basic expectations. This standard can be referred to as the normative self-understanding of current child protection. The decision-making design that is going to be evaluated according to the general expression made by the basic expectations is settled in Chapter 7 of the *bvl*. In the third part of this dissertation, the evaluation of how the current

legal order complies with the basic expectations, the child's best interest and non-discrimination, will be laid out. These two basic expectations, it will be argued, constitutes the two main pillars of the current order of expectations. The general expression reflected by these two basic expectations can be referred to as both rights-based and post-national.[9]

In order to establish the order of expectations and its components, a study of the legal discourse that led up to the establishment of the *bvl* in 1992 is required. The second part of the dissertation will focus upon the history of the order of expectations, and how it has been given different expressions in 1896, 1953, and 1992, and also how the order of expectations have continued to develop up till 2008.

1.2. The Historical Development of the Order of Expectations

This second part of the dissertation analyzes the history of child protection law and its adjacent discourses in Norway. It will specifically focus upon the decision-making bodies set to enforce coercive interventions and their designs. This implies a study of three legal orders. The first came in 1896, in 1953 the second, and the current one was introduced in 1992. It is a narrow approach to history in the sense that I will only locate the development of the order of expectations with regard to decision-making involving coercion to protect children. Hence, the purpose behind the historical study is to qualify the current order of expectations. I will use the legal orders, i.e. the different legal codes, as a lens to elaborate upon the political processes that made them.

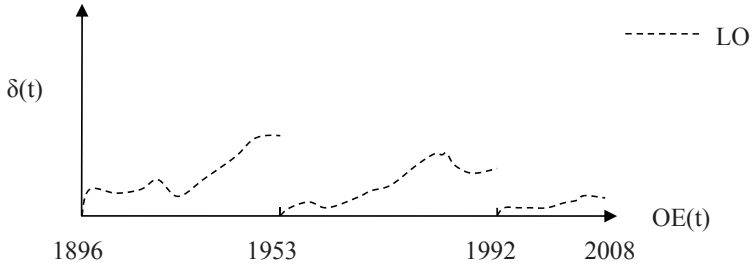
However, pragmatically treating the legal order as observing principles of the ideal constitutional democracy, the legal order can align with the order of expectations at the time of reforms or amendment-procedures are set in motion by parliament. At these moments, the representative assembly in principle reflects the entire demos; at this moment the assembly is most vigilant to the bond of society that it represents, and the data regarding the legal-political discourse on child protection abounds. Since we know the specific legal codes and how they came about, and hence how this alleged trustworthy child protection system became established, we can backtrack to the origin and reconstruct the basic expectations that become stabilized in the new legal code. The particular method deployed is process tracing.

[9] I will refer to fundamental political principles as rights. I borrow this idea from Ronald Dworkin who argues that rights are "political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them" (1977:xi).

The purpose of the historical investigation is twofold. *First,* I will provide a qualified description of the development of the order of expectations. Provided the presuppositions laid out in part I, it is assumed that, at the moment of the introduction of a new legal code (1896, 1953 and 1992) or large amendments (2008), we can expect the largest effort to make the legal orders redeem the promise of trust.

Second, it will be assumed that, throughout the legal history of child protection discourse, the tension between the order of expectations and the legal order of all three legal codes, increased with time, culminating in the establishment of a new legal code. The historical development can be illustrated, as in Figure 3.

Figure 3:



The line at the bottom of Figure 3 is the order of expectations of child protection. Although it is continuously in flux, it is still stable because it is the ever present order of expectations. Legal orders, on the other hand, come and go. A legal order constitutes stabilized expectations and departs from the order of expectations as time goes by and as new expectations become dominant within the order of expectations. The area between the departing legal order and the order of expectations illustrates the degree to which the promise of trust is redeemed. A high tension signifies that the promise is broken. In the end, for a legal order to comply with the order of expectations, it is most likely that a new legal order must be put in place.

The motivation for studying the entire history of child protection is that the current order of expectations is deeply rooted in the events that took place during the two prior legal codes on child protection. Based upon lessons from the past, trust in the decision-making body can only be rebuilt if the criticism that has been leveled against child protection, and that is agreed upon throughout its history, is acknowledged and the problems and criticisms met. Thus, the current order of expectations relating to the *bvl* of 1992 and 2008 can only be fully understood by first studying entire historical development.

The data material that has been made use of for the evaluation of the legal order and the promise of trust consists of documents. These documents have predominantly three origins: the legal codes, the legislative history, and important events and criticisms that have influenced the political craftsmanship. *First,* the legal codes constitute the legal orders, and will be used as past attempts to stabilize orders of expectations. Hence, the legal orders of 1896, 1953, 1992, and the amendment of 2008 are all attempts to stabilize orders of expectations. The different designs of decision-making boards that figure in these different legal orders are all products of the time they became established, and illustrate how the order of expectations have developed.

Second, I will make use of documents that lead up to new legislation as expressing the order of expectations. Methodologically, this can referred to as process tracing. A wide range of documents will be treated as constitutive of a law-making process that has the potential of making legal orders redeem a promise of trust. If a legal order has the potential of redeeming a promise of trust, it is because it has the necessary input to do so, namely the documents-material. It involves documents such as *Norges offentlige utredninger* (Green Papers–NOU), *Odelstingsproposisjoner* (Parliamentary Propositions – Ot.prp), *Stortingsproposisjoner* (Propositions to the Storting – St.Prp.), and *Stortingsmeldinger* (White Papers–St.meld). I will return to methodological considerations in the conclusion of part I.

Third, I will draw upon factors that have influenced the order of expectations throughout the history of child protection. They contribute in leading up to legal reforms and amendments. For the most parts, I will deal with these as primary sources embedded in documents. These are important events such as the criminalist movement of the late 19th century, the School-Asylum Inquiry in the beginning of the 20th century, the Labor-party's ideological domination after Second World War and the introduction of the UN Convention on the Rights of the Child. I will follow critiques or persons that have influenced the political craftsmanship of child protection, such as Bernhard Getz, Bjørn Evje, Johan Castberg and Inge Debes. It will also be a need to look at different types of public reports, legal proposals etc. that did not lead to the establishment of a new legal order. Finally, I will also use secondary sources, but most often as commentary. Most notably are Tove Stang Dahl, Rune Slagstad, Gerd Benneche, Erik Oddvar Eriksen, Marit Skivenes and Lucy Smith.

In the first part of the dissertation, the approach will be laid out. In part two, the expression of the order of expectations will be established through the study of child

protection history. This leads to the third and last part of the dissertation where the evaluative standard, the normative self-understanding of current trustworthy child protection, will be established first, and the evaluation of the FBSS as second.

1.3. Evaluation of the Legal Order: Is the Promise Redeemed?

The third and last part of this dissertation provides an in-depth evaluation of the current legal order with the design of the FBSS. The point of departure is the basic expectations of *bvl* 1992, and how they have developed towards 2008. It will be argued that what is worthy of trust in 2008 are the basic expectations introduced in 1992, child's best interest and non-discrimination, filtered through a post-national turn. In chapter 7 of part III, I will elaborate upon the type of normative expression provided by basic expectations, and thereby explain in detail what is worthy of trust, and thus establish an evaluative standard. In chapter 8 of part III, I will provide an evaluation of the legal order and its design of the FBSS.

It can be argued that currently, the order of expectations relates to legal developments aligning with human rights obligations. One of the articles of the United Nations Convention on the Rights of the Child (CRC), the principle of non-discrimination, is to be considered as one of the two basic expectations. It states that children are not to be discriminated against in any type of decision-making procedure. The most important basic expectation, besides non-discrimination, is to reach decisions that are in the child's best interest. In short, a decision-making procedure that promotes trust today must be in each child's best interest and with no discrimination.[10] If decision-making does not comply with basic expectations, decisions become unworthy of trust. Hence it is up to the political craftsmanship of parliament to chisel out a legal order that harbor the basic expectations that redeems the promise of trust.

The outline of the basic expectations is my interpretation and attempt to reconstruct and develop a systematic, consistent and rational expression of what is currently worthy of trust. The point of departure is the legally entrenched "statement of legislative purpose" of child protection.[11] It states that child protection is about securing and promoting the development and health of a child. This 'purpose' will be approximated to a human rights rationale. I will argue, from the point of view of the order of expectations, that childhood should be seen as a foundation of, and transition to adulthood, whereby the child's future as an adult should guide the decision-making regarding the protection of the child in particular

[10] See figure 1. The principle of non-discrimination can be seen as C_1 and the principle of the child's best interest can be seen as C_2.
[11] *Bvl* §1-1.

circumstances. The right to liberty that an adult has, and the need for opportunities this right entails, is central to the understanding of how the legal order should operate in order to redeem a promise of trust. All through the history of child protection, it has been a focus upon making sure that once adulthood ticks in it must be capable of living life on its own terms.

1.4. What This Study is Not About

Now that I have clarified the three different parts of the dissertation, I will pause to argue briefly regarding what this dissertation is not about. There are three other main routes to evaluate to what extent the decision-making procedure of the FBSS induces trust: Judicial, normative legitimacy and sociological. None of them, I will argue, can provide a satisfactory answer to whether or not the procedure is designed in a manner that induces trust. The *first* alternative approach is the judicial. Within the *bvl* §7-3, where it is stated that the FBSS-procedure itself induces trust, it is also stipulated what this would entail. Hence, from within the legal code itself, it is provided a practical answer on how to redeem a promise of trust. The promise is redeemed if the decision-making procedures observe certain principles of decision-making, such as hearing both sides and provide justification for decisions. These are principles that allegedly underpin a fair trial.

These principles are not necessarily the answer to the promise of trust emanating from the relation a constitutional democracy has to the social community it governs. For instance, in 1953 a new legal order was established that is significantly different from the current one, and efforts were made to make a trustworthy design of a decision-making body different from a legal trial. Hence, the claim that principles of fair-trial induce trust was wrong in 1953, whereas not necessarily today. Hence, it is not possible to argue that what is worthy of trust is located within the legal order decoupled from the bond of society. There is a need to reconstruct and qualify an analytical standard based what is held to be worthy of trust.

Trust is a consequence of interaction, irrespective of what is claimed from within the legal order itself. What is worthy of trust develops through discursive practices within the social system itself. These practices can produce mutual agreement regarding what to expect—these expectations has the potential of becoming embedded in a legal order provided constitutional and democratic law-making. Law can be codified with a claim to induce trust, and it can sum up principles that would achieve such an aim, but it would nevertheless only presume trust. For instance, what is assumed as worthy of trust according to *bvl* §7-3 today was not worthy of trust in 1953. This does not mean that the legal order of 1953 was not

found worthy of trust. In part I, I will lay out an approach to trust that suggests how the legal order can be crafted to redeem a promise of trust. It is a matter of political craftsmanship and not a matter of legal practice or jurisprudence. Once what is worthy of trust is stabilized within a legal order, the legal order will be worthy of trust. However, as time goes by, what was once stabilized can no longer be said to be worthy of trust because the order of expectations has developed away from the legal order. What is worthy of trust is continuously in flux, and unless law-makers are vigilant to their duties as elected officials, legal codes, or legal orders, will most likely become unworthy of trust in due time.

Underpinning such a notion is an idea that trust can become established by implementing a "right" type of design for decision-making. Although this is correct, what is found worthy of trust is first and foremost located in the social community and its order of expectations. Hence, the legal order and the legal design of the FBSS must still abide by what is found worthy of trust in the social community to maintain such a claim. It is also *not* important that the legally entrenched design explicitly argues that the FBSS-procedure induces trust, as is done in *bvl* §7-3. Even if such a claim were not provided, it would still be relevant to evaluate if the decision-making procedure would uphold the promise of trust.

Furthermore, the order of expectations is not to be confused with the general sense of justice (*allmen rettsfølelse*). The order of expectations is independent from law, and in a constitutional democracy it is always "ahead" of the law. Hence, I am not referring to a conception of the law when I refer to the order of expectations. The general sense of justice relates to how the subjects of the law believe the law is supposed to function. This is relevant from the point of view of jurisprudence, and not from a political point of view where the mandate is to craft the law in accordance with a popular will. This means that the general sense of law and the order of expectations are two different things in principle. On the other hand, the order of expectations and the general sense of justice might overlap in real life.

The *second* approach that is not chosen is to evaluate the legal design of the FBSS up against a normative standard of legitimacy. Although this is fruitful in itself, the standard we will attempt to evaluate FBSS up against is an empirical order of expectations within society itself, i.e. what is found worthy of trust. This standard can, hypothetically, be repulsive. For instance, corporal punishment of children was widely held to be acceptable in the late 1880s. A child protection system was suggested in 1892 that incorporated corporal punishment. This, we could argue, was a practice that was found worthy of trust by many, but it is indefensible

as a normative standard of legitimacy. The order of expectations, which is the standard employed here, is reconstructed empirically, and is not a normative standard of legitimacy.

A normative conception of legitimacy would also fall for the same argument as a judicial approach in the sense that it could only assume to maintain what is worthy of trust. For instance, it might be claimed that so-called knowledge-based decision-making, i.e. epistocracy, is one conception of trust/legitimacy, and that it is at odds with another conception of trust/legitimacy, namely democracy. Although both of these conceptions of legitimate decision-making can be worthy of trust, it is still only presumed. To illustrate: The legal design of decision-making established in 1953 reflected trust in democratic decision-making. In 1992, it reflected a desire for performing more knowledge-based decision-making.

Although legitimacy-approaches such as these are very fruitful within the framework of normative political theory, it is not the object of concern here. To find out if the legal order redeems the promise of trust, it needs to be evaluated up against the existing expression of the order of expectations. This *can* be referred to as an empirical type of legitimacy that changes over time. In that case, conceptions of what is held to be legitimate changes over time.

Hence, we could argue that what cashes in a promise of trust is also what is considered legitimate. In this case, it can be argued that what I am doing is a study of legitimacy, but then again the concept of legitimacy would become parasitic upon a conception of trust and thus redundant in itself. I will seek to reconstruct and qualify an empirical claim of what is found worthy of trust, and then evaluate the FBSS-procedure up against it.

The *third* alternative approach I will not choose is to investigate perceptions of the decisions being trusted, i.e. the sociological approach. Although this could be interesting, and can tell us something regarding how the FBSS is perceived, it will not answer the question of whether or not the procedure itself induces trust. With regard to the perception of trust, the promise of trust is made *ex ante.* If it leads to trust in the decision-making *ex post* is something else. If we would study the perception of decision-making, and seek to find out if different affected parties would trust it or not, we would not have any information regarding the procedure itself. It would not make sense to retroactively state that, since the perception of the outcome of the decision-making procedure, i.e. the decision, leads to trust, the procedure itself induces trust. Such a claim would be unfounded.

However prudent it is to empirically investigate the perception of decision-making, or the aggregate of perceptions of decisions and experiences, this study tries to address the issue of whether or not the promise of trust holds in and of itself, i.e. that the design of decision-making procedures can make a claim upon being worthy of trust regardless of what any other empirical investigation might conclude with regard to perceptions of decisions. Hence, the focus is on the procedure and its design, and that a design can comply with what is worthy of trust on a more fundamental level.[12] The claim raised stipulates that decisions made according to certain principles are conducive to trust, and trust can be seen as procedurally induced.

1.5. The Significance of Keeping the Promise

A formulation within *bvl* §7-3 stipulates that the FBSS-design observes certain principles that induces trust. Although it is the first legal code that explicitly expresses the need for trustworthy decision-making, claiming that only the current design has had such a goal is naïve. It can rather be argued that §7-3 could be a reflection of the transformation of the fair-trial principle into Norwegian law, and also that all decision-making bodies throughout history have had a goal of redeeming a promise of trust by abiding principles of constitutional democracy.

A problem in studying trust in relation to child protection is that the public does not know, are not legally entitled to know, and should not know, all the facts of a case that are in need of coercion. This sets restrictions on how we can study trust with respect to the FBSS. The benefit of the most common approach to the study of trust, namely through surveys, is limited.[13] The case-work is delicate and sensitive, and proceedings are not public. This means that this particular decision-making procedure is especially in need of being trusted on the merits of procedural design because it is illegitimate for these cases to be transparent and open for public scrutiny.[14] *Everyone must be able to trust that which happens behind closed doors, namely that everyone affected by the decision-making is treated according to proper standards worthy of trust.*

[12] See NOU 2005:9: 40 and NOU 2001:32: 650.
[13] Although it is common to perform such studies, there are at least three problems with trust-surveys: (1) Onora O'Neill argues that answers on direct questions phrased: "Do you trust...?" are in many cases not a matter of trust. Many say they distrust what is written in a newspaper, but their statement have seemingly no consequence for whether or not a newspaper is bought or not, see (2002): 8ff. (2) To trust means to transfer something into the hands of others and thereby become in one sense ignorant. As such, what happens to the transferred object is in most cases not something the person who trusts can have any informed idea about. (3) Trust is, as will become clear in part I, a complex topic, and it is hard to make any sensible question-battery that would genuinely reflect the state of trust. Examples of such studies can nevertheless be found in NOU 2000:12: 264.
[14] NOU 2005:9: 39.

Through the motivation to establish whether or not the promise of trust is redeemed or not, this study has been driven forth with a firm belief that it is, in fact, possible to discuss the promise of trust in an informed manner. However, no general theoretical framework has so far been developed or applied to approach this particular question—there are no pre-established theoretical frameworks to apply. Moreover, this issue has not been previously approached empirically in the same manner. Hence, the present study contributes to the extant body of knowledge in the field, through theory, the inquiry process itself and the outcome.

Within the Norwegian research-community the FBSS-procedure itself has not been previously studied with regard to a promise of trust. However, some authors have evaluated the FBSS and discussed how the FBSS came about. The most prominent example is the dissertation of Marit Skivenes, and her publications, some of which were co-authored by Erik Oddvar Eriksen.[15] In addition, numerous studies relevant to child protection are published, focusing on custody questions, coercive and non-coercive measures, principle of biology and principle of child's best interest, legal protection etc. The goal of the present study is to take a step back and evaluate the entire design of the FBSS and whether or not its decision-making process can be said to redeem a promise of trust.

Furthermore, most of the work of Skivenes was written prior to two important years in the development of the FBSS—2003, when children's rights became incorporated into the *mrl* and the *bvl* was amended to stand by the demands of the CRC, and 2008, when the design of the FBSS became reformed. Today, it is clear that neither politicians nor scholars have discussed the ability of decision-making to promote trust as will be done in the following.

The CRC is made statutory by its incorporation into *Menneskerettighetsloven* (Human Rights Act – mrl) in Norway, and has precedence to other regular legal codes. Through Ot.prp.nr.76 (2006-2007), the design of the FBSS was for the first time scrutinized in a real legal sense through the perspective of human rights. It was explicitly held that the FBSS was to abide by the CRC as part of the obligation towards the *mrl.* Did it stand the trial of such a post-national turn? If so, it might be that the FBSS also abides by the current order of expectations. Does the FBSS redeem the promise of trust? Let us now begin.

[15] Eriksen & Skivenes (1997), (1998); Skivenes (2002a).

Part I – The Promise of Trust

2. Order of Expectations and the Compliance of a Legal Order

John Locke argued in the spirit of the Enlightenment that by their reason alone, "…the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws."[16] Since everyone within the community were to stand behind those governing, certain unalienable rights had to be instituted to ensure the protection of all. Furthermore, no "edict of anybody else…have the force and obligation of a law which has not its sanction from that legislative which the public has chosen and appointed."[17] Law, according to Locke, has to have the consent of society, a consent that draws upon the bond of society, i.e. the trust that keeps society together—*vinculum societatis*. Locke argued that nothing could override the legislative that honored that trust. Hence, the legislator had to respect the trust of society when crafting a legal order, and thus redeem the promise of trust. This Lockean perspective is what this chapter will attempt to expound. I will lay out a perspective on trust and an approach to how trust can be examined that stipulate a legal form that can make a legal order comply with trust and hence redeem a promise of trust.

It will be argued that immanent to a conception of a constitutional democracy is a legal form that has a fundamental and a continuous relation to the order that binds society together. *The order of expectations is constitutive of the bond of society, and express what is found worthy of trust.* In this regard, an elected assembly is mandated as a representative legislator of the entire demos to craft legal orders that comply with the order of expectations.[18] I will in the first part of this chapter explain how the order of expectations originates and develops, and in the second half how a current legal order can be made to comply with the order of expectations. What is worthy of trust, expressed by the order of expectations, is purely descriptive.

[16] Locke (2000): §136.
[17] Locke (2000): §134.
[18] I will use the denomination "order of expectation" and "bond of society" interchangeably.

In order to develop the perspective of trust, based upon this basic Lockean insight, I need to utilize different fundamental theoretical contributions within sociology and political theory as stepping-stones to establish the perspective on trust and the research-approach. The first half of this chapter is dedicated this task, and I will begin by explaining order and explain myself down to the basic components that order consists of. The first part of this chapter involves taking a look at what order is. By explaining how order can become established from disorder, we can begin to grasp how trust actually works as a binding force of society. Hence, I will present a problem of order that provides such a challenge, and also how the order of expectations can emerge as its solution. By establishing how order can and must emerge from disorder, I will move on to the second effort of this chapter, namely to delve deeper into the specifics of the solution to the problem of order, to that of reducing contingencies. Action-norms can become established that interacting agents can act upon and that can leave a perception of reduction of contingencies. In the third part of this chapter, I will argue how action norms reached through mutual understanding can be utilized by individuals in the effort of expecting actions of others. For individuals to act upon action norms makes an individual act expectedly. Turned around, the same individual can expect actions of others. Hence, knowing that members of the same social system act upon settled action norms makes the members act expectedly. This, it will be argued, is how order works.

The next half of this chapter is devoted to explain the legal form that has the potential of establishing legal orders capable of redeeming a promise of trust—the constitutional democracy. In the fourth part, I will briefly explain how what is found worthy of trust is in constant flux due to processes of modernity. The fact of reasonable pluralism and how it is embedded in democratic institutions will be emphasized as especially important in explaining the flux within the order of expectations. This flux generate tension between the legal order that once stabilized the order of expectations and the order of expectations. The fifth part of the chapter explains the relationship between the order of expectations and principles of constitutional democracy. It will be explained how this legal form incorporates law-making having a potential of complying with the order of expectations and redeem a promise of trust.

Norwegian law-making will be treated, for the sake of the argument, as attempting to abide by principles underpinning a constitutional democracy. Hence, I will treat the Norwegian law-making assembly as having the potential and desire of redeeming a promise of trust. In this effort, the sixth part will examine the relationship between constitutionalism and democracy, which both must figure in such a law-making procedure, or legal form, in

order to redeem a promise of trust. In the seventh part, I will lay out how flux, caused especially by the dynamics of reasonable pluralism, generate new expectations in the order of expectations. Furthermore, that dominant expectations, referred to as basic expectations, will change as time goes by. A legal order that is supposed to redeem a promise of trust, must at a minimum comply with basic expectations. In part eight, I will lay out key characteristics of the political craftsmanship in question. I will explain that only by having political craftsmanship that is vigilant and competent, can the legal order comply with the order of expectations continously. In the conclusion, I will lay out methodological considerations for the research underpinning the dissertation.

The different stepping stones will be laid out without the resistance it might deserve. The focus here is to explain the perspective of trust, and establish it as an approach. The reason is to keep the focus upon the overall purpose of this dissertation, which cannot allow for too much theoretical outline of what constitutes trust. To reiterate, I only use fundamental insights from sociology and political theory in the effort to establish the approach needed to answer the research-question of this dissertation: Does the FBSS redeem a promise of trust?

2.1. The Problem of Order and the Inadequacy of Rational Self-Interest

In *Structure of Social Action,* Talcott Parsons presents the Hobbesian "problem of order."[19] This 'problem' will be used to explain how the order of expectations relies on multiple action-types in order to come about. The formulation *problem of order* captures a central topic in theoretical sociology and refers to the very nature of social organization. For Thomas Hobbes, the peaceful organization of society was assured through an absolute sovereign.[20] Today, within constitutional democracies, the standards of order are higher, and make the question of 'order' even more important to discuss. 'Order' can be understood not only as absence of war and conflict, but also as a type of social organization that is considered reasonable to its members—an organization they would, on some level accept and want to be a member of.

Order is absent in the Hobbesian state of nature. Due to the lack of order, each person will seek to arm themselves with whatever means, coercive if need be, to satisfy their interests for goods and security. Force and fraud are two such means. The search for satisfying each person's own self-interest, always with the potential of violent means, would hinder any establishment of order. Due to the absence of order in the state of nature, each individual's

[19] Parsons (1968): 90. It has also become referred to as the problem of collective action, or the problem of free-riding or the problem of voluntary provision of public goods, See Elster (1989): 17ff.
[20] Hobbes (1985): 81.

life is in danger. How can you trust anyone, if every person is potentially your enemy? It is the war of all against all – *bellum omnium contra omnes.*

The underlying thrust behind the "problem" is that each person "is essentially a servant of the passions."[21] In other words, each person is driven forth by their rational self-interest to acquire the objects of their passions, to become content and to be safe. Hobbes refers to the objects of a person's desires as a "good." Hence, the problem of order emerges when individuals strive for their own conceptions of good without being collectively restrained by order. Furthermore, Hobbes argues:

> *"...because the constitution of a man's body is in continual mutation, it is impossible that all the same things should always cause in him the same appetites and aversions."*[22]

This assumption of human psychology is equally valid today, and is hardly controversial. Conceptions of good will shift as the desires of each person 'mutate', or simply change. This can happen on a whim, through personal crisis, or revelations, changing workplace, taking an education, going through a divorce etc. This claim would entail each person to potentially always want what another man has, and make each individual a potential threat towards another. The unpredictability and uncertainty that arises constitutes the lubricant in maintaining the state of nature—needs and desires will bring individuals at odds with each other in a world characterized by scarcity of the desired objects.

To establish a social order would imply morphing motivation of actions based on rational self-interest with something not reducible to any one individual actor's self-interest. It would imply a binding force between individuals. It would require a mutual desire that all members of the social order could agree to on a basic level. Hobbes's suggestion is for all to enter a binding contract and subordinate themselves to a sovereign ruler. Parsons observes that this type of contract implicitly requires rationality that cannot be explained by mere individualistic self-interest. Hence, Parsons illuminates a weakness in Hobbes' argument—perhaps even the Achilles heel.

A contract that secures collective order is not reducible to every person's effort to purely satisfy their own conception of the good. Parsons argue that Hobbes needs to stretch the conception of rationality "beyond its scope in the rest of the theory" to raise order from

[21] Parsons (1968): 89.
[22] Hobbes (1985): 120.

disorder.[23] The idea of rational self-interest must be stretched to the extent that it includes the ability to have an intersubjective will-formation, ability for social coordination, a way of stabilizing expectations prior to the contract that establish order—it needs a type of mutual understanding. If a contract is to be agreed upon collectively, all the actors must…

> *"...come to realize the situation as a whole instead of pursuing their own ends in terms of their immediate situation and then take the action necessary to eliminate force and fraud, and, purchasing security at the sacrifice of the advantages to be gained by their future employment".*[24]

However, this type of action is hardly plausible since it depends upon abilities that, as Hobbes argued, individuals could not possess. The state of nature loses its analytical thrust for Hobbes by making individuals able to, "realize the situation as a whole," as a collective system.

To Hobbes, the solution to the problem of order lies in the recognition that constraints are needed in order for individuals to live without danger. Parsons claim that Hobbes' solves the problem of order by establishing a political order through a kind of collective and complete realization of the need for security. Survival and security, ironically, allegedly becomes safeguarded by the same faculties causing "force and fraud."

Furthermore, even if the Hobbesian order became established, there is another weakness in that it cannot be made to last. Securing "the observance of norms through external sanctions alone, [can] not be made to last and is, therefore, unsuitable as a model for explaining how social order is possible."[25] Without internalizing order on an individual level, disorder will always be a possibility. The Hobbesian order might hold for a while, but eventually it will collapse into the violence from where it once came from.

Parsons argued, that, "social relations cannot assume from the start the form of peaceful competition."[26] In a factual order, Hobbes holds as an ontological truth that individuals are utility-maximizers.[27] Since we know for a fact that order can be established, and that the "problem of order" shows us that it cannot be established by rational self-interest alone, other action-types needs to be invoked that can explain order. Consequently, the incompatibility that arise between the Hobbesian conception of the nature of man on the one hand, and the fact that social orders exist that carry mutual trust, needs to be remedied.

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[23] Parsons (1968): 93.
[24] Parsons (1968): 93.
[25] Habermas (1987): 212.
[26] Habermas (1987): 211.
[27] Hobbes (1985): 189ff.

The Parsonian "problem of order" is a theoretical problem that can reveal weaknesses of approaches to order that is based upon pure rational self-interest. Hence, to explain the order of expectations and how it arises, rational self-interest must be supplemented with a broader action-frame of reference—alternative action-types that explain how individuals can establish and sustain order from disorder. The presuppositions of pure rational self-interest theories are unable to recognize or do justice to the *fact* that the complex of actions involved in the pursuit of individual actors' self-interests takes place within social systems characterized by an order not reducible to rational self-interest alone. Such a social system is, it will be argued, "independent of the immediate motives of the contracting parties."[28]

2.2. Double Contingency, Mutual Understanding and Stable Expectations

Double contingency is the Parsonian denomination of the coordination problem.[29] The doubling of contingency is due to the interaction between *two* agents. If more agents were to interact, contingencies would increase exponentially.[30] It captures the essence of the problem of order, and will serve as a point of departure in arguing for its solution. It involves a situation where two individual actors engage with each other communicatively for the first time. The situation is characterized as uncertain, by disorder, and to establish order the two agents must learn to trust one another. Both individuals' actions are conditioned by how the other acts and no action is impossible or mandatory. How should they act, if they want to solve the problem of existing contingencies where insecurity is caused by uncertainty of action choices? How can they generate expectations towards each other that make interaction safe and predictable? Or, when actions are not guided by certain norms of expectancy, how do they proceed?

Knowing what to expect, it will be argued, is at the core of developing order. Developing workable expectations that they can act upon would incrementally establish order. General behavioral expectations, utilized to eliminate perception of contingencies, are depending upon a mutual understanding regarding action-norms.[31] Having reached a mutual understanding regarding what norm to act upon, provide the ability and potential for

[28] Habermas (1987): 213ff.
[29] Parsons (1951): 36ff.
[30] Luhmann (1976): 509.
[31] Mutual understanding is a neutral concept that does not lay any emphasis on how persons relate to understanding. As such, it does not necessarily denote any happy feelings or that everything becomes better as soon as mutual understanding emerge. It simply denotes that every actor who is a part of the understanding understands why it is so, and also accepts it.

expecting actions of others. You can expect others to act in a certain way, albeit knowing that the expectation is fallible.

One actor, in the situation of double contingency, can initiate interaction with very basic communication in the effort to minimize the danger of contingencies caused by being a stranger. A gesture, a smile, a simple handshake or "hello" will suffice. In this way, and by minimizing conceived danger and risk, order can become established incrementally. The contingencies will eventually be narrowed down as communication commence. A smile and a "hello" can for instance communicate that the person is not aggressive or have the desire to kill you right away. The interacting agents become familiarized to each other and develop a capacity to know what to expect and not to expect from each other. The reduction of contingency can help bring about expectations towards others specific to interaction. The interaction develops action norms that can successfully be acted upon, and which can be expected will be acted upon. The genesis of order can, by establishing action norms, be anticipated from a situation that was initially characterized as lacking order.[32]

Although order is established, the expectations that establish order are normative and fallible. Acting upon expectations towards others involves risk-taking. You risk that your expectations are not met. With regard to disorder it is not a matter of risk, but a matter of danger. When you apply expectations in a dangerous and unfamiliar environment, the expectations are not a product of mutual understanding, but rather personal contemplation. Hence, you have no way of knowing what to expect, and those you direct your expectations towards have no way of knowing what to expect of you. Hence, a social system emerge when a system of shared expectations begin to take shape. In order to build such a social system, which in this case involves order, it is a need to first reach mutual understanding regarding what norms we can expect others to act upon. Hence, it involves the development of action-norms that serves as references for individuals' choice of action.[33]

General behavioral expectations carried by interacting agents provide intersubjective stability as interacting agents can anticipate the behavior of others. Expectations are stable and intersubjective in that they are directed towards affirmed mutual behavioral-patterns among interacting agents, viz. that they are directed at action norms. Expectations are

[32] Luhmann (1995): 110-111.
[33] Hollis (1998):11.

therefore a basic component of action norms.[34] Expectations harbor shared and stable set of norms that are maintained and acted upon through mutual understanding among interacting agents. On the greater scale of a social system, valid norms consists of those action norms that has been passed down through history, and that have been found acceptable and continuously acted upon.[35]

To illustrate, it is possible to establish an expression of the normative self-understanding of a particular community or a particular practice within a community,[36] for instance child protection, by elaborating upon those action norms that have come to dominate. These action norms, constitutive of the normative self-understanding, are what basic expectations are directed towards. For instance, the action norm of protecting the child's best interest is dominant in current child protection, and child protection is expected to enforce this action norm. If it enforces this action norm, and act expectedly, it is increasing the likelihood that the child protection system redeems a promise of trust. Hence, it is a basic expectation towards the system of child protection that they enforce such a principle. If we combine this expectation with other, equally dominant expectations, we can configure the order of expectations, i.e. what constitute trustworthy protection of children. Once we have located the different basic expectations, it is possible to configure the order of expectations by establishing the normative self-understanding of child protection. Once the normative self-understanding is settled, and is an expression of what is found worthy of trust, it serves the function of being an evaluative standard.

Embedded in a system of norms is a conjunction of shared and stable set of expectations that is parasitic upon the mutual understanding upheld by the stable action norms. Expectations emerge with action norms and are verified by all as acceptable to act upon. Such expectations can be applied with acceptable risk. If expectations are not relating to action norms reached upon mutual understanding, they cannot become part of trustworthy interaction. The order of expectations, which harbor what is worthy of trust, is a platform of shared expectations that originates and develops according to efforts of forming mutual understanding upon what action norms to choose from among interacting agents. If this

[34] See Habermas (1998a): 107: "I understand "action norms" as temporally, socially, and substantively generalized behavioral expectations."

[35] This is meant to be a purely descriptive approach to the concept of norms and expectations. This means that it does not matter if they are valid in any moral sense, but that action norms have become validated by the fact that the general public have acted upon certain expectations. Clearly, some action norms have been found worthy of trust although they are morally repulsive. For instance is the disciplining of children that was broadly seen as legitimate until the late 19th century. Disciplining children is a euphemism for causing bodily harm to children.

[36] This is the purpose of chapter 6.

platform shakes, i.e. that we no longer can expect others to act upon shared action norms, one becomes...

> *"...confronted by the alternatives of switching to strategic action, breaking off communication altogether, or recommencing action oriented towards reaching understanding at a different level, the level of argumentative speech."*[37]

If expectations towards others break down, we are again left with our rational self-interest, and motivation towards mutual understanding regarding expectations must develop anew.

In short, for a person who enters a situation in which one depends upon one another for the first time it is a situation of double contingency. Initially it is uncertainty of outcome, and both actors know that they relate in this manner. Nevertheless, upon interaction, they both have expectations towards probable reactions from the other.[38] This situation is uncertain and, in its purest form, serves as the point of departure for describing how agents anticipate probable behavior of others, or simply learn what to expect.[39] Both agents involved know they can expect a great variety of actions, and that choosing differently among them would produce different outcomes and generate different cues for the other agent to act upon.

Trust develops as you can act upon the expectations towards the other, knowing that they can and will do the same with you. By establishing action norms that both act upon, based in mutual understanding, the uncertainty caused by contingency can be ignored. The cost of not conferring trust will be to exit order, and live in distrust. Contingencies will always be there, but positive expectations towards the other will make you commence upon risky behavior in order to get by. Basic communicative interaction and shaping action norms that are agreed upon through mutual understanding, is an important part of generating and maintaining the order of expectations.

In a complex world, it has become a truism that each individual actor become interdependent in order to get by, thus, the number of situations characterized by contingency has increased.[40] A modern society even presents hidden contingency, in that there are many aspects of an agent's life that the agent is unaware that it is depending upon. The potential of success or failures of others, known as unknown, whom we interact with and that affect us are crucial for many outcomes in our daily lives. Getting by in a complex environment would

[37] Habermas (1998b): 24.
[38] Parsons (1951): 5.
[39] Günther (1993): 256.
[40] This is essentially the whole purpose for Luhmann (1979) to write his book on trust.

become even harder if we were unable to act upon expectations, i.e. to trust. In a modern society, not being able to trust those who we interact with, knowingly or not, would make our lives hard or even impossible.[41] Distrust in others can lead to two outcomes—we either cease to act in situations that would require cooperation of others, or we would acquire necessary skill that would make us more self-sustained, thus avoiding the issue of trust. The latter is in many respects practically impossible and sometimes even illegal (self-surgery comes to mind) in a modern complex society. Choosing to be a part of order implies trust, and pathologically distrustful behavior would involve exiting order.

In a complex world, we must interact willingly or not in many areas and on many levels, and we become dependent upon those we are interacting with. It is in situations where interaction takes place that expectations incrementally develop as you gradually become able to expect what others will do. These expectations can become mutually confirmed and thus become generalized behavioral patterns. It means that certain types of behavior become expected in general. Thus, at a later stage, we can trust others to act according to stabilized behavioral patterns because it is what is expected—they act upon norms. It also works the other way around, namely that general expectations become mutually invalidated, and thus weaken its standing as anticipating the actions of others upon formerly generalized behavioral pattern. In this manner, you can no longer expect others to act in a certain manner.

An individual's ability to act upon general behavioral expectations has been acquired either by experience, observation or by being told by others. Interaction is thus dependent upon the ability to learn and recall past experiences. By having access to the order of expectations, it is possible to trust that someone is acting upon action norms that have been established through mutual understanding. For instance, the beams holding your ceiling up – who made them? The person paying your salary – is she complying with your contract? Your toothpaste – who made it? The bus-driver – who is he? The water you drink – is it water? Each day is filled with small acts of trust, where you expect things to happen the way it is supposed to. Most of the time, these expectations are only reconfirmed. Sometimes however, they become invalidated.

Since it is a lack of certainty regarding what action norms are chosen as a response in a situation of double contingency, we can only assume that others act according to general action norms. If, however, the interacting partner does not have access to general action

[41] Baier (1986); Barber (1983); Hardin (2002); Luhmann (1979).

norms, it would imply that the interacting partner have not participated in mutual understanding regarding how to act. Hence, it cannot be presupposed that it can act according to expectations. The situation is thus characterized by a lack of mutuality of expectations, and the problem of contingency is not solved and order is not established. For order to be established, an agent must be able to expect that interacting partners act upon certain action norms.

On the other hand, the person who responds by applying generalized action norms to guide actions must know what such an action norm involves. Hence, an important part of general expectations is that they are generated on an intersubjective platform of mutual understanding, which must be accessible to all agents who interact. Although action norms give birth to expectations, it eventually becomes a dialectic relationship where action norms feed into expectations and vice versa. General action norms and general expectations are, therefore, inferred and applied by individual agents who interact in specific scenarios.

Communication becomes a matter of complementary expectations; namely that the internalized expectations that are applied overlap among interacting agents. If a person does not know what to expect in a given situation, it is probable that they have not ever communicated before in similar situations. In such cases, the actors must probably initiate the communication with a gesture that can be interpreted as a friendly "hello".[42] It can be illustrated with two laymen A and B. The condition for B, being dependent upon the actions of A, is that he acts responsive to A's expectations when he reacts, and also that he acts with expectations towards the future response of A. If B did not do this, B would not respond to A in a relevant manner, and hence A would not understand B's response as adequate.

The stability within order is provided by complementary expectations, and is based upon the ability to expect others to act upon mutually recognized action norms. Hence, the order of expectations depends upon a concurrent system of norms that develop through history. A system of norms is a result of mutual adaption among interacting agents in combination with the recognition of norms in their application. A precondition towards finding something worthy of trust is that those involved must be able to understand or accept the risk involved in trusting others. This means that it is a need for accurate expectations, and that these expectations can be directed towards generally recognized action norms that one

[42] Showing your hands usually works. You can also show them in a manner that you do not carry anything suspicious – like a knife, gun or water balloon.

can expect are followed. Hence, if individual actors are not able to trust the action of others, it is because expectations towards them do not exist, or that they are too fragile. Where there are no solid expectations, there are no action norms one can expect others to abide by. Not knowing what to expect makes it impossible to find something worthy of trust. On the other hand, mutual understanding regarding what action norms to abide by would also mean a consensus with the interacting agent regarding what to expect of the other. For those who do not share in the mutuality of action norms, or even does not accept the norm, the social system has become unstable and cannot foster social interaction. A social system, at a basic level, depends upon an order of expectations for the possibility to thrive and to develop.

2.3. Expecting Actions and Act Expectedly—the Role of Norms

Expectations are directed at action norms that can be chosen in interaction. These action norms must imply the same thing for the interacting agents in order to correspond to expectations. It is a need to establish mutual understanding regarding action norms. Since we have plausible theories that can explain what it takes to establish mutual understanding, we can acquire a grip of what is implied by having a mutual understanding regarding the relation between expectations and action norms. I will argue that implicit to the process of establishing mutual understanding are discursive rules. Hence, one way of interpreting how mutual understanding is reached is thereby through the study of rules of discourse. Mutual understanding on what constitute action norms can be said to be in reach if rules of discourse are observed. By establishing action norms that have general recognition, it also makes it possible to expect what others will do.

It should be noted that rules of discourse are referred to as an evaluative tool for analytical purposes and not assumed as an integral part of factual communication. Adults can proceed as competent speakers, and be conscious of the rules implicit to communication, but it is no guarantee that this will bring about mutual understanding. I am more preoccupied with analyzing what makes mutual understanding possible with regard to establishing general action norms. Rules reflect ideal preconditions for reaching mutual understanding. An ideal speech-situation is practically unattainable, and should not be seen as attainable either, but it describes a procedure for testing the validity of action norms and the quality of mutual understanding and a test upon the 'mutuality' of the shared action norm.[43]

[43] Habermas applies the denomination 'ideal speech situation' as an analogue to Kant's 'kingdom of ends', and is merely supposed to be a regulative ideal – see Heath (2003): 213.

Discourse rules can be formulated as formal and pragmatic preconditions for reaching mutual understanding.[44] Formal pragmatism involves the investigation of argumentation in search of reconstructing the communicative competence involved when interaction occur with the aim of establishing mutual understanding. Argumentation involves the employment of meaningful sentences observing an intuitive and implicit rule consciousness among communicatively competent agents. There are at least four different rules: That the utterance is understandable, that its propositional content is true, that the speaker is sincere and normative rightness, i.e. that it is appropriate for the speaker to put forth such an assertion.[45]

Here we are preoccupied with situations of double contingency, and how contingency compel us to establish mutual understanding concerning action norms to create order. If some of these four rules become violated, mutual understanding regarding action norms will not be established, contingencies will again be visible and action-coordination becomes hard. Intersubjective and stable action norms are not maintained if what is correspondingly expected, i.e. that others abide by and act upon the formerly agreed upon action norms, do no longer apply. Then the order of expectations, as a binding force of society, must become revised. In other words, the particular order, or aspects of a particular order that was once established, must become revised if expectations fail to work. The only way to re-establish order is to discursively involve anyone who must abide by the action norms that is to be agreed upon—those who collectively constitute the order. If not, action-norms would not be established upon an understanding that was *mutual*, and the action-norm would probably not acquire the stability needed for general application; coincidentally nobody would know what to expect and order would not be established.

Including everyone affected by the action norm into the process of argumentation, is equivalent to instilling accountability of outcome of that particular communication upon all participants. Each participant must expect that everyone affected by the action norm could raise an claim to test its validity, all in the effort to secure that an action norm is reached by a mutual understanding. If action-norms are to establish order, false and weak expectations must be eradicated and replaced by general expectations. The aim of action norms is to generate stability and have a coordinating effect through mutual understanding upon what interacting agents will be likely to do. This is achievable through subjecting counterfactual expectations to a discursive test that would prove them no longer applicable upon a general

[44] Alexy (1989): 93 and See McCarthy in Habermas (1984): X.
[45] Habermas (1998a): 4ff.

level, namely that they do not originate from mutual understanding. Unknown expectations can erupt and challenged generalized and stabilizing expectations as what individuals want others to do might change. New types of expectations can replace dominant, or basic expectations within the order of expectations as action norms become revised.

If the goal of individual actors is to coordinate their action in a complex world, they must reach mutual understanding on what action norms are currently in place and worthy of respect. Mutual understanding provides the necessary stability for living with complexity where many circumstances affecting life are beyond an individual agent's control. If an individual actor chooses force and fraud instead of abiding by general action norms that have been validated, living in a complex world would become impossible. Such actions are not expected in a system based upon mutual understanding and could perhaps not be made to belong to such a system, nor be deemed valid. Such behavior would be an incremental step towards disorder. Hence, mutual understanding, and the process of reaching it, constitutes the core of trustworthiness in that mutual understanding is a precondition for developing a system of norms that stand in conjunction to the order of expectations.

The rules of discourse can only be inferred as preconditions for reaching mutual understanding. In this regard, Habermas argues for an impartial justification of action norms through the discourse-principle, "D: Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourse."[46] This principle requires that every action-norm pass a validity-test if it is to be lifted onto a general level. Nobody can alone decide whether or not an action norm is valid, they can only make a claim towards such an end.[47] Action norms must be agreed upon by all affected parties through mutual understanding, in order to be able to expect the action norm to guide actions of one's peers.

It can be argued that rational discourse involves a commitment upon participants to reach mutual understanding, which is above and beyond rule-abiding behavior (e.g. not to resort to coercion) or logical and semantic rules (e.g. demand for consistency and non-contradiction).[48] The commitment also involves discourse-internal norms that govern the procedure itself, such as sincerity, accountability, and truthfulness. Although mutual understanding is beyond any single individual agent's control, since it must be confirmed by interacting partners, mutual understanding depends upon the efforts of each interacting agent.

[46] Habermas (1998a): 107.
[47] The principle of discourse renounces the Kantian first categorical imperative which is monological.
[48] Habermas (1990): 86.

If the single individual agent did not commit to such an effort, it would risk not coping in a world of increasing complexity, where an individual is dependent upon trusting others to act upon generally recognized action norms.[49]

In order to reach mutual understanding, individuals must on some level provide justifications by way of assertions, or speech-acts. The driving thrust behind a justification is how speech in itself is performative, in that "the uttering of the words, indeed, usually a, or even *the,* leading incident in the performance of the act."[50] Examples of performative utterances are: "I am taking the train", "I accept your apology", "I promise you", and "I will stop giving examples." Hence, it is a matter of commitment by the speaker to certain action norms. The performative aspect of speech is at the centre of attention in action coordination and how individual actors can interact—it is in the performance of speech-acts that each agent can be held accountable for, because that is what we can 'hear' and thus react to. It is also the performative aspect of the action that is chosen that can or cannot become expected.

The demand to observe rules of discourse, and being committed to them, means that any individual actor can, being communicatively competent, provide justification for the performance of an action when this has been requested. Demanding justifications and producing justifications for actions is a built in feature of discourse because each individual actor can potentially be held accountable for their own actions and also hold others accountable for theirs.[51]

Mutual understanding concerning action norms is a coordinating mechanism in interaction, and basic to this coordinating effect are the birth of expectations one can have that the action norm will be acted upon. Hence, the expectation rely parasitically upon the general action norms that are agreed upon. Mutual understanding that validates action norms let interacting agents know what to expect from one another. Order can thus be established by way of the coordinating effect that expectations provide in interaction. Hence, we need to stretch Habermas' theory further to establish order.

> *"The aim of reaching understanding (Verständigung) is to bring about an agreement (Einverständnis) that terminates in the intersubjective mutuality of reciprocal comprehension, shared knowledge, mutual trust, and accord with one another."*[52]

[49] I will return to this later.
[50] Austin (1962): 8.
[51] Regh in Habermas (1998a): XIV.
[52] Habermas (1999): 23 - my emphasis.

Order is not established by mutual understanding itself, but *from the expectations that become established towards the action norms that have been reached upon mutual understanding*.

The type of speech-acts that have the potential of reaching mutual understanding are so-called illocutionary; these speech-acts constitute the infrastructure of a process that can reach mutual understanding. It involves the illocutionary obligation to the exchange of speech acts due to its particular properties, and which separate illocutionary speech acts from other types of speech acts.[53] It is not only a matter of providing reasons for a claim to be valid, or providing reasons for why others are wrong, it is the obligation to adhere to the outcome of the discursive procedure even if the reasons of an agent have been proved wrong.

By entering this discursive environment, knowing it involves raising criticizable validity-claims, each participant becomes obligated to follow the outcome due to the illocutionary force carried by the mutual understanding—everyone involved should accept the outcome as participants in discourse. The participants in discourse bind themselves in the presence of all to take the propositional content of the accepted action norm into account in how they subsequently interact. This illocutionary obligation is a consequence of participating in validating action norms, and is an "obligation relevant to the sequel of interaction…inasmuch as it establishes between speaker and hearer an interpersonal relation that is effective for coordination."[54] Hence, validating action-norms, needed for action-coordination, depends upon the illocutionary force of speech-acts. By reaching mutual understanding regarding action norms, expectations can be shaped towards them, and thus deployed to create order—you can act expectedly and expect action.

To sum up, in search of mutual understanding, each individual actor must assume that each participant in discourse will argue their own aims. The resulting agreement will stand as the valid action norm for further interaction until a conflicting but reasonable valid claim is raised. Social integration of this kind is driven forth by the "illocutionary binding energies…to reach understanding", and makes trust possible because actions of others can become expected.[55]

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[53] John Austin differentiates speech-acts between locutions, which simply is the semantic utterance of words, illocutions and last perlocutions, which is separated from illocutions because they have consequences external to the utterance itself. A perlocutionary act can for instance involve persuading, convincing, scaring, enlightening, or inspiring the listener.
[54] Habermas (1984):296.
[55] Habermas (1998a): 8.

If new assertions enter public discourse, its claim can shake and replace former agreements and establish new types of action norms that again feed into the order of expectations. In this manner, unknown expectations can develop to become dominating, or basic, within the order of expectations. This dynamic is not necessarily ensuring a being "better" direction. The order of expectations, no matter what it might look like, is purely descriptive of what is found worthy of trust. The flux within the order of expectations stresses the descriptive notion of trust and of order.

2.4. Two Circumstances that Cause Flux in the Order of Expectations

There are two main circumstances that cause flux within the order of expectations: Reasonable pluralism, and the increasing complexity of modern societies. Flux influence how mutual understanding is shaped, it challenge action norms and cause questioning of whether or not expectations can be applied accurately. If a legal order has managed to stabilize the order of expectations, and thus redeemed the promise of trust, the flux within the order of expectations is what causes a legal order once worthy of trust to become unworthy of trust. The reason is that what was once found worthy of trust and thus stabilized into a legal order, will be pushed further by flux and tension will develop towards the legal order. These circumstances represent facts that make the tension between the legal order and the order of expectations more important as a focus-point. The order of expectations is placed under tremendous stress by these different and intertwining traits of modernity. These circumstances, as facts, constitutes a perpetual challenge towards modern political craftsmanship, and are what pressures those accountable for the legal order to stay vigilant and perform competently towards the order of expectations.

The *first* circumstance is the magnitude of reasonable choices on how to live life, i.e. the fact of reasonable pluralism. The gradual realization of, and implementation of the fact of reasonable pluralism has fragmented earlier common religious or sacred worldviews, it has in Weberian terms disenchanted the world and left it open for individuals to strive for whatever reasonable conception of good they might choose. This empirical fact must be seen in combination with the incremental introduction of the constitutional right to choose how to live your life in a modern society.[56] By this I only imply that a principle of equality must be enforced on a fundamental level to secure the right to choose how to live life for everyone as long as that choice is reasonable. Hence, the freedom to choose how to live life has taken a

[56] Rawls (1993): 36 and xxiv*ff*.

constitutive role within modern constitutional democracies. Thus, the fact of reasonable pluralism can be deemed as a basic feature of democracy, and "…is the normal result of its culture of free institutions."[57] The establishment of constitutional protection of individual liberty thus becomes a hallmark of 'free institutions'.

Securing the right to freely choose how to live life involves instituting constraints upon government and others from interfering into the everyday lives of citizens. A right to individual liberty must be constitutionally settled so that it can apply to everyone equally. John Rawls further states that pluralism is a, "permanent feature of the public culture of modern democracies."[58] Pluralism stresses that a legal order must be recognized by very different individuals at all times. The constitutional constraints will guarantee that different reasonable opinions can intersect, and that collective problem-solving occur in a manner that can be acceptable to all even if they are not agreed upon.[59] As a legal order becomes established, it might have elements that some disagree to, but if the constitutional rules of the game have been observed, and even if these elements strive for the fulfillment of diverging or even irreconcilable conceptions on how to live life, the legal order is nevertheless reasonable.

Since individuals can be said to be free to choose how to live life, the configuration of how different possible choices will vary continuously according to what individuals want out of life. It will lend pressure to those action norms that has previously been agreed upon. Certain action norms will diminish, contested and reconsidered, while new norms can begin to take shape that one day could receive general recognition. In such a manner, reasonable pluralism will always challenge existing set of action norms, and thus also the behavioral expectations that are associated with the action norms. The fact of reasonable pluralism keeps the order of expectations in constant flux.

The *second* circumstance is the steady growth of complexity. Processes of modernization ensure differentiation of functional spheres that organize social reproduction. Examples of such spheres are the economy, educational systems and politics.[60] What the increase in complexity shares with the fact of reasonable pluralism is that it increases with the growth of number and variety of action norms that individuals can choose from. In this respect it is a steady growth in the amount of general expectations within the order. Hence,

[57] Rawls (1997): 765-766.
[58] Rawls (1987): 4.
[59] Habermas (1998a): 37.
[60] Coping in a world of increasing complexity is at the center of Luhmann's theory of trust (1979):14-15.

what binds society together becomes increasingly complex. What is implied is that having entrenched stable general expectations as legal rules has become a precondition to cope in a world of great and increasing complexity. The legal order, and how it is enforced, work as a library of reference upon what to expect, and can thus function as to organize complexity. Hence, the legal order has the potential to stabilize the complete order of expectations. Knowing that this order of expectations is in constant flux, it sets demands to political craftsmanship, and that it needs to perform with competence and in a vigilant manner.

2.5. Establishing a Legal Order from the Order of Expectations

The need to achieve and make claims that are valid across many types of value spheres facilitate the logic of communicative rationality and the need to reach mutual understanding that can lead to, and become, crafted into a legal order.

> *"Modern law can stabilize behavioral expectations in a complex society with structurally differentiated lifeworlds and functionally independent subsystems only if law, as regent for a "societal community" that has transformed itself into civil society, can maintain the inherited claim to solidarity in the abstract form of an acceptable claim to legitimacy. Modern legal systems redeem this promise through the universalization and specification of citizenship."*[61]

Holding for a moment this quotation to be true, it can be argued that by establishing a modern law-making system that abides by principles of ideal constitutional democracy, a nation-state has the potential of redeeming a promise of trust by stabilizing general behavioral expectations into rule of law. Expectations can become stabilized by embedding them as rules in a legal order—they become reference-points on what to expect of others that abides by the same rules. Each citizen becomes able to hold the legal order as a reference-point for what is worthy of trust—of what to expect from others. Hence, rule of law can be referred to as having the ability to stabilize general expectations, and back the enforcement of law with threat of sanctions if you do not act upon what is expected.

By legal order, I simply mean a code of law and the type expectations that are stabilized within it. The legal order has the potential of complying with the order of expectations. For the legal order to have this potential, it must be established through a law-making procedure that includes the vindication of claims raised through legal-political discourses that include all those constitutive of the order of expectations. If a legal order is crafted that manage to redeem the promise of trust, it can be argued that the legal order is stable and express concurrent democratic agreements of what action norms one can expect

[61] Habermas (1998a): 76. Note that this concept of legitimacy is empirical – see discussion in section 1.4.

others to abide by. In this way, these agreements can uphold the effect of expectations, and stabilize them indefinitely or until the legal order is changed.[62]

Redeeming the promise of trust can be a regulative ideal of nation-states that can be claimed to be constitutional democracies. Hence, for the sake of the argument, in order to evaluate whether or not the decision-making of the FBSS can redeem a promise of trust, I will treat the legal construct as if it actually can do so. This implies that the system of political craftsmanship that creates the legal order must be assessed according to an ideal form. The goal is to proceed beyond the obvious empirical imperfections of government, and focus upon the relationship between the order of expectations and the competence and vigilance of the political craftsmanship to craft legal orders that comply with the order of expectations.

As a result of the increase in pluralism and increasing complexity, the variety of action-norms within a social system has become enormous. It can be argued that many action-norms are upheld that affect individuals without them knowing it. That the tap-water is healthy, that food is of a certain quality, that education has certain merits etc. The variety of norms all needs to be regulated in some way by a legal order simply because they affect everyone. By not establishing rules that uphold the action norms that are expected, each individual must learn for themselves what to expect; such an undertaking is daunting in an increasingly complex social order. Immense diversity has a corresponding consequence of a massive increase in the need to have sound expectations towards actions. It is practically impossible for individual agents to carry the knowledge of all these expectations alone. The legal order can stabilize expectations and become a reference-point, or library regarding what to expect.

As already argued, the potential for a legal order to become a stabilized order of expectations is depending upon maintaining constitutional constraints upon political craftsmanship. If it did not, a legal order would not have the potential of reflecting what is worthy of trust by the complete demos. The genesis of law, its enforcement and threat of sanction are all constrained by constitutional provisions. In this manner, what can be expected of anyone is bound by the constitution on one side, and stabilized into a legal order by a democratically appointed assembly exercising political craftsmanship on the other.

[62] This does not mean that law is what binds society together. Trustworthiness is what binds society together, and a particular type of law can work to entrench and safeguard trustworthy behavior. This is the point originally made by Locke (2000).

Pluralism and increasing complexity all contribute to differentiate between ways of life, the increase of potential norm-conflicts and system differentiation. However, legitimate practices can only be achieved across the total sum of reasonable ways of life, whereby legitimate practices become increasingly difficult to ensure. Political craftsmanship becomes increasingly complex as it must deal with all the circumstances of a legal order. These circumstances push the legal order further. For the promise of trust to be redeemed and the entire order of expectations infused into the legal order, political craftsmanship must be constrained by the constitution, letting all different types of individuals be represented equally.

2.6. Reconciling Constitutionalism and Democracy

The legal order can be perceived of as worthy of trust if it can make two promises simultaneously. *First,* it must demarcate an area where private individuals can act autonomously, according to their own rational self-interest, as a matter of individual right. *Second*, reasonable individuals can always agree to the constraints of law in a rational fashion because disagreements would be resolved through civic deliberation. Combining these two, it can be argued that a legal order is a product of civic democratic engagement and simultaneously that its genesis maintain and secure the private autonomy of all. Only by combining these two types of liberty can the desirable purpose of a legal order be issued from democratic rational self-legislation and the promise of trust redeemed.

The legal form that Jürgen Habermas prescribes incorporates these two conceptions of liberty.[63] His legal form is located between the constitutionalism of Immanuel Kant and the civic republicanism of Jean Jacques Rousseau.[64] Constitutionalism can have the goal of establishing basic institutions that can secure the autonomy of every single individual as a matter of right. A precondition for the latter to unfold is that each individual agent has a constitutional right to liberty.

Civic republicanism, i.e. democratic political autonomy as a matter of right, emphasizes democratic processes of self-government through collective deliberation. The goal is to ensure that a common good becomes established through the "expression of ethical

[63] I borrow substantially from his legal theory. My contribution is how I use it to argue that the legal form can comply with an order of expectations.
[64] Habermas (1998a): 99. The importance of the distinction of liberty was first illuminated clearly by Constant (2003). It is also maintained by John Rawls (2001): 2, Rawls (1993): 396.

self-realization."[65] Constitutional liberalism is in opposition to democracy mainly because of the restrictions individual rights to liberty impose on reaching collective self-realization. Collective self-realization should never violate individual rights. If violations were to occur, it would be in breach with reasonable pluralism and hence each individual's right to equal influence upon collective problem-solving. All individuals are bound by law, and if one person, or a group of persons, are violated, the order of expectations has not become embedded into the legal order. Those violated are a part of the social order and violations imply that the promise of trust has not been kept.

Civic republicanism, furthermore, separates itself from constitutional rights in that it demands participation in collective self-rule and problem-solving. It is not merely about electing representatives, but also engaging in public deliberation. Therefore, civic republicanism has popular sovereignty built into it as a fundamental principle of legitimate rule of law. On the other side is the constitutional view that holds legitimate rule of law as the mere protection of individual rights and the freedom from interference.

A modern liberal legal order is only in need of external obedience, rather than internal. External obedience means that individual agents are motivated to comply with the legal order because it applies to everyone equally. It means that the legal order does not demand that individual agents must ethically comply with it. Reasonable pluralism would be strangled if that was not the case. It would imply that many would potentially have to ethically reorient themselves against their will, resulting in a violation of their rights to personal liberty.

Anyone can disagree ethically to a legal order, and the legal order is pervaded by ethics, but most individuals will comply with it because it is reasonable and because it has come about in a manner that is legitimate. If a socialist-party had a majority, and hence constituted the government, political craftsmanship would have a socialist imprint. A conservative would not ethically comply with their policies, but the conservative would—as long as law-making is constitutionally constrained—recognize the legal order as legitimate and the promise of trust is still kept. Consequently, law must be rationally accessible so that individual agents are able to understand and accept it, albeit be able to disagree with it.[66] It can be referred to as rule compliance, rather than ethical compliance.

[65] Habermas (1998a): 99. Immanent to the idea of political liberty is also the notion of deliberative democracy or public reason, see Habermas (1997): 44.
[66] Habermas (1998a): 37.

Legal codes and procedures are found worthy of trust without any need for a higher source of justification than being crafted in a way that upholds a standard that makes it comply with the order of expectations. Hence, once legal codes and procedures have become a part of a democratic constitutional legal corpus, it has been crafted according to a procedure that has the potential of making it redeem the promise of trust. It all depends upon the competence and vigilance of political craftsmanship to craft legal orders that complies with the order of expectations. By this, it is meant that the legal order complies with the action norms that it is expected to, and thus stabilize what is expected on the basis of the order of expectations. Hence, the legal order must 'communicate' with the basic expectations within an order of expectations. A legal code becomes respected because it is "possible to follow the norm out of respect for the law."[67] Citizens are able to abide by the law as co-authors in democratic political opinion- and will-formation, i.e. through their own self-government.

The respect for the law is upheld because those action norms that are stabilized into the legal order, and thus enforced with a threat of sanction, uphold the two types of liberty simultaneously due to the legal form of constitutional democracy. It means that what actions can become expected of others is crafted in a manner that deserves general recognition because everyone has been allowed to influence it. Democratic law-making with constitutional constraints reaffirms both types of liberties in the genesis of law. Hence, within law-making of a constitutional democracy is a potential for trust-repair because the legal order can be amended or reformed to comply with those action norms that at any time is expected. If a legal order complies with the order of expectations all depend upon how vigilant and competent those responsible for political craftsmanship are.

A trustworthy legal order is challenged on both types of liberty. The *first* challenge is to locate what is worthy of trust at the correct level. This means not to consider the legal order to be universalistic, or moral. What is worthy of trust, i.e. the order of expectations, depends upon the composition of expectations binding society together. Hence, what is found worthy of trust is conditioned by a temporally delimited context. Furthermore, these contexts are in constant flux. The *second* challenge is that a trustworthy legal order consists not of law bent in direction of conforming to one group's claim upon ethical convictions. The latter could be the outcome of pure democracy and majority rule, where certain types of civic standpoints colonize rule of law and effectively establishing minorities who might have different

[67] Habermas (1998a): 31.

expectations. This leads us to a conclusion that moral and ethical components can be traced in the legal order and pervades positive law on every level. Democratic law is shaped according to the concrete legal-community's particular history and its obedience to constitutional constraints. Hence, redeeming the promise of trust depends upon the context of the social system and the order of expectations that binds it together at a specific time.

The point is that neither a universalistic moral defense through constitutional human rights nor ethical self-government can by themselves provide the account of a legal form that can redeem the promise of trust. They must be combined in having constitutionally protected reasonable pluralism on one hand and allowing for the democratic establishment of legal orders that comply with the order of expectations on the other. Provided that the order of expectations is in constant flux, the legal form must be considered conceptually prior to the distinction between constitutionalism and democratic conception of law because it needs the capability of encompassing both simultaneously to redeem the promise of trust.

In order to establish a legal form that can encompass both types of liberty and thus comply with an order of expectations, a system of rights must be incorporated into the legal form that guarantee constitutional democracy. Only by having a legal order that can comply with the order of expectations, can a legal code be established with the potential of redeeming a promise of trust. According to Habermas, who I will align with here, such a system of rights consists of five broad categories. The first three are basic negative rights, membership rights, and the right to legal remedies. These three, and the way in which they are interdependent and interconnected, is a constitutional guarantee of personal autonomy/freedom and, "in a word, there is no legitimate law without these three."[68] These three types of rights is a necessary condition for embedding the fact of reasonable pluralism into a legal form. The fourth category, which can only work given the former three categories of rights, consists of political rights to participate in public discourse—it guarantees public autonomy.[69] This is the democratic component that incorporates the principle of popular sovereignty, i.e. the liberty to engage in collective self-government, which can only become legitimately enforced if the personal right to liberty is introduced first.

Neither of these two types of liberties, constitutionalism and civic republicanism, can be reduced to the other. Without the first three rights, there will not be any freedom or

[68] Habermas (1998a): 125.
[69] Habermas (1998a): 127.

equality before the law to speak of. These rights neutralize law so that it does not infringe upon reasonable doctrines of a pluralistic society. Without the fourth category, collective coordination and problem-solving would potentially not be anything but paternalistically imposed on its subjects without them having any influence. With rights to political participation, citizens themselves shape and specify what types of action norms they want to expect others to follow.

The last type of rights are social-welfare rights. They are necessary insofar as the effective exercise of civil and political rights depends upon certain social and material conditions that can only be achieved through redistribution and the establishment of some level of justice. These rights can secure the level of welfare necessary for providing a fair opportunity-set for individuals to make use of their personal liberty.[70]

The system of rights is a necessary component for establishing a legal form capable of stabilizing expectations. Put differently, the system of rights is a precondition for a constitutional democracy, which again is a precondition for the potential of crafting legislation that can redeem the promise of trust.

> *"From a reconstructive standpoint, we have seen that constitutional rights and principles merely explicate the performative character of the self-constitution of a society of free and equal citizens. The organizational forms of the constitutional state make this practice permanent."*[71]

The "system of rights" is something that each modern democratic state-system must appropriately elaborate and specify as constitutional to enable a law-making procedure that can establish legal orders redeeming the promise of trust. Accordingly, it can be argued that such a system "states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law can be legally institutionalized."[72] A system of rights, constitutionally embedded as a type of legal form, provides the necessary ingredients and backdrop for designing decision-making bodies reflecting the order of expectations, and which has the potential of redeeming a promise of trust.

2.7. Flux Generating Basic Expectations and Tension to the Legal Order

A constitutionally entrenched system of rights bring to the fore an internal and necessary tension between the legal order and the order of expectations.[73] The tension alludes to the

[70] Habermas (1998a): 41.
[71] Habermas (1998a): 384.
[72] Habermas (1998a): 103. This conception of legitimacy is empirical – see section 1.4.
[73] See Habermas (1998a): 32.

dynamics of democratic rule of law, and the potential disintegration between the positivity of the legal order on one side and what is perceived of as worthy of trust on the other, or the opposite, of the move towards reconciliation, viz. that the legal order becomes more and more close to what is perceived of as worthy of trust. The flux within the order of expectations is what causes the tension to the legal order—the legal order consists of stabilized expectations, and is thereby not in flux. When it is no tension, it can be argued that the order of expectations is embedded in the legal order. This is very hard to achieve perfectly due to flux, but constitutional democracy as a legal form carries a potential for, and a driving thrust to stabilize generalized behavioral expectations into the legal order through political craftsmanship. The most important general expectations within the order of expectations dominate the orientation individuals have towards the practice of the legal order. These expectations are basic to the order of expectations, viz. they dominate the order of any given area. If basic expectations are not embedded in the legal order, the legal order cannot be said to be worthy of trust at all. However, this is most likely always a matter of degree, i.e. that the basic expectations are expected to be embedded in the legal order to a certain extent.

Consequently, a tension arise by the fact that an order of expectations always has the potential of becoming embedded in a legal order, but as the legal order stabilize expectations at one moment in time, the order of expectations develop away from what was once stabilized. Being politically vigilant and competent towards the order of expectations requires commitment to engage in political craftsmanship that incorporates basic expectations continuously and correctly, or dissolves the wrongfully incorporated basic expectations when needed in order to craft legislation that redeems the promise of trust. Accordingly, it is a matter of political craftsmanship whether or not a promise of trust can be redeemed or not. In order to study whether or not the promise is redeemed, an evaluation of whether or not the political craftsmanship has been competent and vigilant is in place.

Democratic law-making is passed, enforced and developed by an assembly representing the popular will. Law can, thus, replace each individual agent's need to become acquainted with all matters in life in the sense of knowing what to expect. Due to a massive increase in complexity, an individual agent does not have the time nor competence to go through such a massive learning process. It is a constant increase in complexity provided by different processes of differentiation and social reproduction. However, the different subsystems and divisions of labor belonging to a complex system still belong to the same

order of expectations and can be kept together by, among other factors, a legal order that comply with the order of expectations.

Each individual agent can draw upon legal rules as reference-points on what to expect. Breaching the law is thus a breach of what is expected, and can be met with a threat of sanctions. Stabilized expectations within the legal order can direct the individual when interacting with others who must abide by the same legal order. They are both expected to act in a certain way because the legal order prescribes it, and because the legal order is an expression of the order of expectations. The legal order creates a safe environment for action-choices and can become expressions of a behavior worthy of trust: "Modern law displaces normative expectations from morally unburdened individuals onto the laws that secure the compatibility of liberties."[74]

When an order of expectations becomes embedded in a legal order, it is what is worthy of trust at the moment in time that legal order was crafted, rather than the order of expectations in itself. Since the latter is continuously in flux, a legal order can only replicate it at one moment in time and stabilize that particular version of the order of expectations. By this, I simply imply that as the order of expectations is in flux, the legal order becomes less worthy of trust if not amended or replaced by competent political craftsmen.

The study of the order of expectations involves locating the constituents of the order of expectations—namely the basic expectations of the legal order. To a certain extent, it can be argued that a number of basic expectations form the complex that is the order of expectations.[75] This means that some expectations dominate and are decisive for redeeming a promise of trust. Basic expectations allude to those action norms that have gained massive support, and which individuals want to expect others to act upon by enforcing it through a legal order. If the legal order regulate the social system without adhering to basic expectations, the legal order is not worthy of trust.

Unknown expectations, which can also be dubbed as latent, are the last piece of the puzzle. The "unknowns" constitute the driving thrust that any expectation, no matter how insignificant it is to a current order of expectations, can become basic within a future order of expectations. Hence, it can develop from being something that is borderline to unexpected to an expectation that dominates within the order of expectations. When, for instance, an order

[74] Habermas (1998a): 83.
[75] This was captured in the simplex-figure in the introduction.

of expectations profoundly changes, e.g. due to different types of significant events, it is due to an articulation and gradual incorporation of an unknown expectation into a known and, perhaps, basic expectation. The new basic expectation makes some kind of imprint on the order of expectations that influences significantly what is worthy of trust.

Once it becomes a basic expectation, the order of expectations has fully developed into something different from what it was prior to the articulation of this new basic expectation. For a legal order to become worthy of trust, the new basic expectation must become incorporated in a manner that once again complies with the order of expectations. It becomes a matter of political craftsmanship. For instance, if a basic expectation, such as the principle of the child's best interest, is embedded in a legal order at one point in time, it does not imply that the principle of the child's best interest remains as basic when the order of expectations continue to develop.

This leaves a tension between what a current legal order factual enforce on one side and what is worthy of trust within the order of expectations on the other. It sets a demand towards the legal order to be worthy of trust. The tension is embedded in the legal form in general and also within each particular legal code. Observing this tension reveals the flux of the order of expectations and how it becomes bent away from the stability of the legal order. The tension reveals how the dynamics within basic expectations evolve and alter what is worthy of trust within the order of expectations. Thus new basic expectations can stand in potential contrast to those basic expectations once stabilized into the legal order. Incorporating new basic expectations into the legal order can push the legal order once again in direction of being worthy of trust. However, an unavoidable consequence of having ruling majorities is that the order of expectations of the complete social system will never become embedded at once into a legal order. Hence, it will always be imperfections and tension.

A constitutional democracy owes its stability to agreements molded through decades of practices and legal-political discourses that incorporate new experiences. This is the procedure that can transform an unknown expectation into a specific basic expectation that must be embedded in a legal order to redeem the promise of trust. Again, it can be argued that mending the tension is the driving force of vigilant and competent political craftsmanship.

2.8. The Dynamics of Political Craftsmanship

Democratic rule of law implies self-government. Tension can arise between the legal order on one hand, and the order of expectations, constitutive of the social system, on the other. Since

the order of expectations can become stabilized by embedding it in the legal order, it is possible to study the order of expectations by studying the political-legal discursive development towards the introduction of a legal order.[76]

The order of expectations at any point in time in history can be studied. A legal code from 1953 can be said to be the attempt to stabilize an order of expectations pro anno 1953. However, unknown expectations of the past can become dominant in a future order of expectations – erupting from the facticity of the social system itself, and that can, as already argued, penetrate, develop and put legitimate pressure on the legal order from the outside. Thus, tension arises between what is found worthy of trust on one hand and what is settled within the legal order on the other. This pressure alludes to the promise of trust, and that a legal order that has stabilized past expectations, no longer comply with the order of expectations due to flux. Consequently, an order of expectations will develop and be different in 1963 from what it was in 1953. If the legal order has not changed with it, it does no longer redeem the promise of trust.[77] The legal order can stabilize the order of expectations at the time legislation is passed, not necessarily in its aftermath. It is a matter of how competent and vigilant political craftsmanship of parliament is. Hence, the study of the promise of trust is a study of political craftsmanship.

Furthermore, a legal order that complies with the order of expectations is crafted according to democratic procedures that are constitutionally constrained. The legal order can thus reflect the self-rule of the entire demos, and not merely a majority. Hence, political craftsmanship is procedurally constrained. In a system regulated by an ideal constitutional democracy, the compliance of the legal order with the order of expectations is, thus, implied. Mending tensions between these orders is the driving force of responsive and responsible law-making and a matter of political craftsmanship. A high amount of tension equals a less trustworthy legal order as it departs from the order of expectations, a legal order is thus no longer an expression of popular will. High amounts of tension equals that a political craftsmanship that is not competent and vigilant.

On a more fundamental level, and with regard to how constitutional democracy works, it can be argued that rules, principles and procedures are applied to treat "equal cases equally and unequal cases unequally." This is referred to as the formal principle of justice, or as the

[76] I will return to methodological considerations at the end of this chapter.
[77] In the introduction to this dissertation, the expectations that drove an order of expectation away from what was legally entrenched were referred to as unknown expectations.

principle of equality, principle of law, equal treatment, or as I will refer to it as non-discrimination.[78] Its application has ramifications for legal designs of decision-making bodies' ability to evaluate equality and inequality.[79] Therefore, cases that are evaluated as being equal are treated in an equal manner, whereby different treatment must be justified by giving valid reasons for differences in treatment. Equally, persons evaluated as being equal before the law will receive equal treatment.

The consequence of constitutional rights is the limitation of government and especially democratic rule of law. It implies that every individual agent can act freely with no other limitation on actions other than what is necessary to safeguard every other individual agent's similar range of freedoms. Constitutional rights and the constraints they place upon government, implies a fundamental application of the principle of equal treatment or non-discrimination.[80] It states that all citizens that carry rights, and carry them equally are thus treated equally, and also opposite—that relevant inequalities justify unequal treatment. Since everyone becomes equal before the law in such a manner, each rule applies equally to all.

However, the *rule* in rule of law has a twofold meaning. The *first* is rather obvious, whereby "rule" means the enforcement of law, and the credible threat of sanctions if rules are broken. *Second*, and a more substantial meaning, is that the rule of law is a constitutional constraint on government and majority rule, and how it can only sanction actions that do not abide by law. A democratic constitution ensures that rule of law is on accord with the standards prescribed by rights and popular sovereignty. This means that law is substantial and instrumental and must be applied equally to equal cases. A right to property and the right to free-speech means that a person can own the fruits of their labor and speak without interference against his or her will. However, a person or group that hinder others from owning property, or speaking their mind, are *de facto* and *de jure* violating that person's constitutional right to speak and own property. This is an important restriction that rule of law set upon democratic majority and government. The constitutional constraints upon rule of law are set in place to bind majority rule, and hinder groups attempting to curb individual liberty of others. Hence, if the promise of trust is to be redeemed, a legal order needs to comply with expectations that everyone can accept.

[78] See Dworkin (1977): 66ff.
[79] Alexy (2002): 264-265.
[80] It can also be referred to as a formal principle of justice, a principle of non-discrimination and a principle of consistency.

The last parameter laid out to configure an ideal constitutional democracy is the republican insight of democratic representation. Modern democratic rule of law means electing an assembly that, on a basic level, is intended to represent and reflect the entire population that is governed. For instance, the legal form presented here can be achieved through a parliamentary or a presidential system; it can also vary with regard to who constitutes the electorate etc. Electing representatives has become a practical precondition for democratic rule of law due to the need for making competent decisions in a great variety of cases. This does not eliminate elements of direct democracy, but direct democracy cannot perform legislation in any informed manner on a daily basis in a modern complex world. If political craftsmanship is to perform with certain skill, it needs to be competent and vigilant all the time. Hence, rule of law needs to be representative if it is to appear as informed and effective and reflect popular will.

2.9. Conclusion and Methodological Considerations

This chapter has laid out how the order of expectations can become operative through a legal order that is crafted by a legislative procedure that abides by principles of an ideal constitutional democracy. Such a legal order carry the potential of stabilizing what is worthy of trust. Due to the flux within the order of expectations, the stabilized legal order can move away from the order of expectations as time goes by. Consequently, an operative legal order can become unworthy of trust. Basic expectations, which are dominant within the order of expectations, can in due time become less dominant and also be replaced altogether by new basic expectations. New basic expectations are not a part of the legal order, and hence a legal order that has stabilized past basic expectations cannot be expected to redeem the promise of trust any longer. Consequently, the legal order might become unworthy of trust if political craftsmanship is not competent or vigilant towards the flux of the order of expectations. In order to rebuild trust towards a particular legal code, it is up to political craftsmanship to amend or reform the legal code to once again comply with the order of expectations.

Although the potential of redeeming a promise of trust is purely theoretically established I hold Norwegian politics to abide by principles of constitutional democracy as a regulative ideal. Hence, the Norwegian political system will in the remainder of the dissertation pragmatically be treated as an ideal constitutional democracy with the potential of redeeming a promise of trust. Child protection law has been subjected to two reforms and numerous of amendments throughout history. In what has been laid out in theory, such a legal development can be seen as a way to reestablish trust in child protection.

As already defined, expectations are anticipations, normative or descriptive, of events in the future. They are variable and fallible, but they are nevertheless employed in order to get by in a world characterized by increasing complexity. On an aggregative level, these expectations constitute the binding force of society in that individuals know what to expect and what not to expect of others. Now that the basic theoretical terms of the approach have been established and how they relate, i.e. "order of expectations", "basic expectations" and the "legal order" which can be crafted to redeem the promise of trust, and we thereby know what is going to be studied, it is prudent to say something about how it is studied methodologically. How do we study if decision-making of the FBSS redeems the promise of trust or not?

Whether or not legal orders can redeem a promise of trust and express the order of expectations is not something that we can get access to through 'objective' method; that is through ordinary empirical or statistical methodology. However, it is this order that needs to be located, because this is what express what is worthy of trust. Even though we know that order has prevailed simply due to the fact of relative consensus and absence of contestation, it cannot be objectively observed; seen or heard. Furthermore, the development with regard to what is trustworthy child protection is often not something that the different actors involved are conscious about. However if it is a fundamental development in the conceptions of trust, it must be possible to establish and articulate its meaning. Hence, it is a need to uncover the type of child protection that the bond of society express and want—namely a child protection system that is found worthy of trust and that as such can be the object of the legal order. What must be identified is how the order of expectations is structured and made meaningful on one side, and made into an object of political craftsmanship on the other.

The parliament can ideally be treated as a representative assembly of the complete social system it is set to govern. Consequently, it is also a representation of the order of expectations, and has the potential of crafting legal orders that complies with it and can be worthy of trust. This presupposition is made for the sake of the argument. If the political system is treated as having the capability of redeeming a promise of trust, it implies that the political system must be able to access the order of expectations. Hence, the inputs to the system are the documents that establish the premises for politics and political craftsmanship. These consists of documents such as legal propositions, public reports, white- and green papers, in combination with relevant contributions to the public discourse such as books, academic articles, speeches, newspaper articles etc, that influence the process of crafting new

legislation and are the objects of political craftsmanship. By studying such documents, it can be possible to establish expressions of the order of expectations.

Consequently, in order to answer my research questions, I will make use of documents that underpin the political craftsmanship and that can be used to establish legal orders that can comply with the order of expectations and hence redeem a promise of trust. The question is therefore if the politicians responsible have been vigilant and competent enough to meet such a challenge. These documents will be treated as input to the political process and constitute expressions of expectations at different times. The documents have this quality because they relate to the political craftsmanship as background documents.

We know what documents are most relevant because we can backtrack from the legal order itself, to propositions and different reports, to academia, books and speeches, and to important persons. From these background documents, we can trace how the decisions came about, how the legal-political discourse on child protection developed, what actors were important and which events triggered the effort towards political change. In tracing this empirical data, the background documents to a legal order and different discourses that relate to these documents, I will unveil patterns of a general nature, and a continuous development of the order of expectations can be discerned.

The particular method that will be used to empirically establish what the order of expectations consists of is called process tracing.[81] It serves the heuristic function of generating new variables inductively on the basis of an historical narrative unveiling sequences of events traceable in the document corpus that constitute the legal-political discourse in child protection history. In this dissertation, these variables I seek out are the temporally specified types of expressions of the order of expectations, i.e. what is worthy of trust at a certain point in time. Hence, the goal of the second part is to establish empirically what constitutes the development of trustworthy child protection. The first chapter in the third part will attempt to provide an interpretation of what the current expression of the order of expectations is like, by establishing a theory of what constitute current trustworthy child protection, by drawing upon the development of the order of expectations of the second part.

Hence, the aim is to establish, refine and reach an expression of what constitutes the current order of expectations, i.e. what is currently held to be worthy of trust, through studying hypothesized causal connections that leads to the current expression, or standard.

[81] See e.g. Brady and Collier (2010).

Only by having such a standard expression of what is worthy of trust, can we proceed to evaluate the 2008-design of the FBSS. This implies that part II will figure a parsimonious account of the historical development with a deliberate focus upon only unveiling the causal connections and sequence that is necessary to establish the different expressions of the order of expectations throughout history. Hence, document data of different types are selected because of its importance as part of establishing an adequate theoretical explanation.

In this way the historical narrative becomes transformed from being an account that implies causal connections, into an analytical causal explanation of the order of expectations embedded in different theoretical variables. Turning an historical narrative into an account of causal connections and sequences leading to theoretical variables will undoubtedly lead to a loss of information from that of a rich historical narrative. This shortcoming notwithstanding, the purpose of the empirical undertaking is to develop theoretical variables that can establish a standard of child protection that is worthy of trust—all in the effort to evaluate the FBSS.

In order to establish this historical development, the empirical research has undergone four steps. This procedure can be illustrated with a line of 40 dominos whereby I drop ten dominos backwards at the time. It leaves four interconnected causal sequences that make up one row of dominos. The complete line of dominos is the order of expectations, while the years 1896, 1953, 1992 and 2008 are the different markers where the data-access abounds due to significant reforms. I use the legal order of 1896 as a point of departure and ask what made this type of legal order come about. This implies that I trace the causal sequence backwards, i.e. I begin with the domino I pushed and see how it is connected with the next domino, and then the next etc. In doing so, I unveil the legal-political discourse that became the backdrop that led to the legal order. Unveiling this historical narrative is the first step, and the second is to establish theoretical propositions that can express the development of the order of expectations.

As stated, for the sake of the argument, I treat the Norwegian legal system as if it has the potential of crafting legislation that redeems the promise of trust, what can redeem such a promise must be located within the background documents to the legal-political discourse. The procedure applied for locating the order of expectations that led up to 1896 is repeated in 1953, in 1992 and 2008. By establishing the complete historical development of the order of expectations, we can acquire a deeper understanding of what is currently held to be worthy of trust. Once I have established what can redeem a promise of trust in 2008, I will elaborate

upon what the order of expectations implies as an analytical standard for the purpose of evaluation in the first chapter of part III.

In the daily run of empirical research, the processing of the document-data has undergone evaluation: Is the document data sufficient for establishing a causal connection, or is it necessary for a causal connection, is it both or is it neither?[82] Hence, not all data has been treated as if it was of equal importance: "not all information is of equal probative value in discriminating between alternative explanations, and a researcher does not need to examine every line of evidence in equal detail. It is possible for one piece of evidence to strongly affirm one explanation and/or disconfirm others."[83] For instance, most data are, on default, straws in the wind. Others can be both necessary and sufficient to establish a causal connection with the type of order of expectations that becomes diagnosed. Hence, part II is to be read as an extrapolation of the development of the order of expectations.

The final expression of the order of expectations, located in part II, will be utilized to establish the normative self-understanding of child protection. This is the evaluative standard. This self-understanding, based upon basic expectations, is what the legal order must comply with in order to redeem the promise of trust. Since what is worthy of trust changes slowly and on a basic level of the social system, it is important to identify its sources in a broader, more long-term context. Thus, in order to understand how decision-making that authorizes coercion can be worthy of trust today, it is necessary to lay out the complete historical development of the order of expectations.[84] This is why I will establish and trace the development of the order of expectations that led to the current configuration of basic expectations in child protection—all in the effort to understand how the nature of our current order of expectations work.

By treating the system of law-making as if it can develop legal orders that comply with the order of expectations, the system itself becomes the spectacles/lenses through which the order of expectations can be identified. This implies analyzing the input to a law-making process *as if* it was expressions of the order of expectations. These expectations are inferred from the document corpus that constitutes the political-legal discourse on child protection, and which seem to drive the law-making process. These expectations are not necessarily an explicit part of the legal order itself.

[82] For a more elaborate version, see Collier (2011): 825. Mahoney 2012: 5ff.
[83] Brady, H. E., & Collier, D. (2010): 209.
[84] This will be the focus in part II of this dissertation.

The approach relates to a document-analysis with two hermeneutical levels. On the first level, it is a need to establish the order of expectations, and the basic expectations, through the analysis of documents. On the second level, it is a need to interpret what the order of expectations and the basic expectations express regarding a normative self-understanding. The second step involves introducing a theory of child protection *currently* held to be worthy of trust. It is a search for, and a qualification of a normative self-understanding that constitute trustworthy protection of children. Hence, the hermeneutical exercise is an effort of making implicit knowledge explicit. It is a need to make the order of expectations, which is implicit wherever order resides, explicit, and turn it into an evaluative standard.

The current legal order will not merely be studied as to what type of child protection was found worthy of trust at the inception of the legal code in 1992, but also what is found worthy of trust as of 2008 when the FBSS was last subjected to a large amended and could once again be crafted to comply with the order of expectations. Only through an historical approach can the development within the order of expectations be credibly reconstructed and, hence, help understand how the basic expectations dominant to the current order of expectations be justified.

To illustrate, the order of expectations of 1896 will be referred to as a defense of a conception of good, i.e. of what was deemed as "normal" or "moral" at the time. This general description, it can be argued, is configured by different basic expectations that describe more specifically how the order of expectations works. One basic expectation could for instance be the criminalist ideology, and another the need for correctional education. I have come to such a conclusion by analyzing the different documents that led up to the legal order of 1896. In 1953 the child protection worthy of trust was a system set to protect the family. Here, the basic expectations constitutive of the order of expectations could be the principle of democracy in combination with a principle of subsidiarity and insights from developmental psychology that stressed the importance of the family. Again, in order to acquire this knowledge, I made use of the background history of the legal order of 1953 as a point of departure, and studied different documents that unveiled how the order of expectations developed from one standpoint in 1896 to a completely different one in 1953. This effort can be repeated again and again depending upon what type of legal order we are interested in evaluating. In this dissertation, it is the legal order of 2008.

In part III, I will explore the order of expectations of 2008, located in the second part. I will explore the configuration of basic expectations, and develop a normative self-understanding of the current child protection system. This self-understanding is what the legal order must comply with in order to become worthy of trust. I need to explain how the basic expectations work in order to understand what is currently held to be worthy of trust. Once I have established the normative self-understanding, I will move forth to analyze to what extent the current legal order, with its design of the FBSS' decision-making procedure, abides by the normative self-understanding constitutive of the current order of expectations. The extent to which the legal order complies with the order of expectations will tell us to what degree the promise of trust is redeemed.

Knowing that this involves interpretations of events that can explain this development, as well as knowing that the explanation of the normative self-understanding of current trustworthy child protection is also an interpretation of a document corpus, the entire study is of a fallible nature. The different interpretations are open for affirmations or even falsification. What constitutes the order of expectations is entirely descriptive, viz. an interpretation of what constitute a factual order. The evaluation of the legal order up against this empirically construed notion of trust, makes this dissertation an empirical investigation of political competence and a critique of political craftsmanship. The analysis that is presented is confined to an historical context, and this type of context is complex, unstable and in constant flux. In this regard I recognize that the analysis in the following can become challenged and disproved. Furthermore, what I hold to be well-founded and true is in this regard open for revision and can be proved to the contrary through new arguments, better analysis and more solid conclusions.

Part II –The Historical Development of the Order of Expectations

3. 1896: Expecting Children to become Moral

The Norwegian legal-political discourse on coercion in child protection circles three specific legal orders. These were introduced in 1896, 1953 and 1992 respectively. These three different legal orders constitute the history of child protection law. The goal of the three following chapters is to unveil the history of the order of expectations that circles these three legal orders. The point in time when a new legal code passes through parliament will be used as a main entry-point to the study of the order of expectations. Hence, this part of the dissertation should not be read as a regular historical-empirical account, but rather as an historical investigation to unveil how child protection has been found worthy of trust, i.e. how the order of expectations has developed. This effort is undertaken as a necessary step in learning what trustworthy child protection contains by 2008.

Since I am preoccupied with finding out if the legal design of the FBSS of 2008 redeems the promise of trust, it is prudent to investigate the current order of expectations more extensively in the third chapter in this part of the dissertation (chp 5). I will not only say something about the order of expectation in 1992, whereby we can observe the important reaction to the legal order introduced in 1953, but also how the order of expectations have continued to develop until 2008. Finally, I will identify the different basic expectations within the current order of expectations, i.e. find out what type of expectations that dominate the current order of expectations. The reason for this extended focus upon the current legal order is that it is this legal order that will become scrutinized in part III. In order to acquire knowledge regarding what the order of expectations is in 2008, which we need in to move on to part III, we need to study the historical development within the order of expectations. Only then can we know in what way, and why we trust child protection in a certain manner today.

The three legal orders throughout history of child protection have become established due to different motives and have had different aims. This implies that although the three

legal codes specifically can reflect similar design-criteria on how operative decision-making is taking place, the legislative histories and different justifications that have promoted each of the legal orders have been remarkably different, and reflects the ever present flux within the order of expectations.[85]

Bernhard Getz was the engine behind introducing the first legal code on child protection. He argued that the way children became treated by the Criminal Code was wrong, and especially the criminal prosecution and imprisonment of children beneath the age of 16:

> *"This admission has grown in giant strides in recent years. The steady increase of attention, which all over the civilized world has been directed towards circumstances of criminal law, and which has not only made an imprint within an overflow of literature, but also in the series of the more or less international meetings and congresses, have fixedly directed itself at this point; and time and again in recent years it has been emphasized by experts as well as by convention resolutions, that society, if it is to accomplish anything effectively against the world of crime, must pull the evil up by the root, must energetically and systematically proceed to protect the children from corruption that is often caused by the vices of parents or by their more or less undeserved misery."*[86]

The experts and meetings and congresses he is referring to are the international criminalist and penitentiary movement of which he too was a member. The spring-source of the discourse regarding Norwegian child-protection is rooted here, and many European nation-states were at the brink of introducing legislation of the type that Norway received in 1896. Hence, Norway was among the first nation-states in the world to introduce such a system.[87]

3.1. The Path towards Reform

The practice of dealing with problematic children prior to 1896 was to send them to prisons or asylums. The punishment could be quite harsh from the age of 10. Francis Hagerup argued in the first meeting in *Den norske kriminalistforening* (The Norwegian Criminalist Association) on 1st October 1892 that this way of punishing children did no longer make sense, and it seemed like everyone agreed to such a statement. It was no empirical evidence that this way

[85] The legal-political development has been presented two places: Kjønstad (2002) and Larsen (2002).
[86] Getz, 1892:2.
[87] Tove Stang Dahl (1978), has written the most important academic contribution regarding the system of child protection introduced in 1896, but she has arguably got one small thing wrong. Her opening sentence claims that Norway had the first system of child protection in the world. This claim is contestable. *First,* Bernhard Getz, the author of the first legal code, claimed that France had the first legal code already in 1889—Getz (1892):12. *Second,* international literature confirms such a claim—see e.g. Friedlander (1962): 106 or Heywood (2007): 144. *Third,* the legal code of France itself: *Loi Du 24 Juillet 1889 Sur La Protection Des Enfants Maltraites Ou Moralement Abandonnes* (Act of July 24th 1889 on the protection of abused and morally corrupted children)—Lallemand (2009). See also http://oned.gouv.fr/documents/ressources_juridiques/L3.pdf. It is unfortunate that this small sentence has become used to argue that Norway was a pioneer in child protection, for instance in NOU 2000:12: 21, St.meld.nr.40 (2001-2002): 18 and 20 or Wikipedia, especially since Dahl herself stressed the fact that the Norwegian legal development in child protection was an invariable part of an international criminalist discourse.

of punishing children actually helped the children back on track.[88] Punishment through imprisonment was in fact counter-productive.

In particular, it was argued that *kriminalloven* (the Criminal Code) of 1842 was a failure with regard to convicting children. *First*, it was argued that the prisons rather worked as an arena for recruiting children to join the ranks of criminals. *Second*, they questioned the manner in which children between 10 and 16 were prosecuted through the so-called rule of relative criminal responsibility.[89] This meant that children were sent to prisons for committing crimes, not legally as adults, but to their individual degree of adulthood.

The time had come to argue that the consequence of sending children to prisons, in combination with a perceived increase in youth crime, had made it prudent to establish a separate legal code to counter what was called moral decay.[90] Bernhard Getz diagnosed the problem and prescribed the cure: Increasing crime among children, caused by parental neglect was the main cause, and this had to become compensated for through state-driven correction of the corrupted child.[91]

In 1885, professor Bernhard Getz, was appointed chairman of a government commission that was to arrive at a proposal on reforming the Criminal Code of 1842 – *Straffelovkommisjonen* (Criminal Code-Commission). This commission was not mandated to develop any legal code on child protection on its appointment. The commission's work lasted until 1886, resulting in a draft-proposal in the following year. In the proposal of 1887, *Almindelig borgerlig straffelov* (General Civil Penal Code), Getz argued that the legal age should be raised as high as 15, compared to 10 at the time. Furthermore, imprisonment was suggested to become limited of children up to the age of 18.[92]

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[88] Hagerup (1893a): 11. The Norwegian Criminalist Association was established by Bernhard Getz and Francis Hagerup, Andenæs (1973a): 42. Their first meeting ever was about neglected children, and what the state should do about them. They discussed the legal-proposal written by Getz on this issue and how the contemporary criminalists movement would answer to such a problem.

[89] See quotation of Professor Stoos in Getz (1892):4. Here it is commented that relative criminal responsibility, where a child is to be punished according to "criminalist intent" of an adult.

[90] Some, as e.g. Slagstad (2001), argue that it in fact was not any drastic rise in youth-crime in Norway. This is why we can refer to it as *perceived* increase in youth crime since Getz firmly believed this increase to be true. It is really not the issue here to dispute Slagstad's claim. What we know is that Bernhard Getz was of the opinion that youth crime had tripled in three decades, and was on a rising trend – see Getz (1885): 175, and especially the footnote on page 176, and that such a trend constituted a grave threat to the nation. He set the diagnosis and gave the cure to what he believed to be a nation-state fallen ill.

[91] Getz (1892): 2.

[92] See Hagerup (1903): 117. This article is the same as the first 23 pages regarding "motives" given in Getz (1892).

The first time Getz argued the case that children were in need of more specialized measures than imprisonments, he argued that child protection should be included as a §56 in the Criminal Code. He later retracted and proposed that this type of "arrangement should be transferred to a special legal code."[93] The very fact that Getz changed his mind on this matter is the primary reason for why the first legal code on child protection became established.

Getz argued his desire to implement arrangements that took care of children who had shown traces of criminal behavior or were showing other types of "moral decay" or "neglect." He wanted to implement a system that accommodated these children, and that could treat them in a systematic manner in correctional facilities, i.e. school-asylums. Children who were in need of better care, and did not show any traces of "moral decay" or other types of "neglect," could be re-located to healthy families. However, the important focus of this inquiry was the treatment of children who were showing the potential to do more harm than good to society, and who were thought could, in the extreme cases, develop into criminals. These children were the focus of attention for Getz' work. As chair of the commission, Getz argued that the §56 should be omitted from the initial proposal so that organizational arrangements, with a specific decision-making body, could be established to include all children in need of protection.

Five years after Getz had written a first draft on a new Criminal Code, his legal proposal on child protection was complete. In 1892, the new type of legal arrangements that he had argued was needed was in place. This was the beginning of the path towards a legal code specifically dedicated to child protection. The initial draft proposal was dubbed *Om sædelig forkomne og vanvyrdede Børns Behandling* (On the Treatment of Morally Corrupted and Scorn Children). Getz argued that the new Criminal Code assumed, without having it already incorporated in its draft, the need for establishing a system of correction/forced upbringing of children that earlier would be affected by the Criminal Code. The asylum was to ensure that children were given the opportunity to get their lives back on the right track; i.e. correct what was wrong into what was deemed as "moral" or "normal".

This idea, namely to correct corrupted children that could develop a personality that was allegedly immoral or abnormal, or thought to have potential to develop into something abnormal in due time, was to become the justification for the use of authorized coercion by a decision-making body to remove children from families. At the time, the increasing number

[93] Getz & Hagerup (1903): 118.

of individuals behaving abnormally was perceived to be a threat towards established and desirable behavioral pattern, i.e. what was "moral" or "normal" behavior.[94] Hence, the defense of morality, as a specific type of normality, it can be argued, was the justification for implementing measures that corrected abnormality.[95] It was claimed that the increasing number of imprisoned criminals was endangering a healthy of society.

This was not a Norwegian problem *per se*, but rather something that challenged the so-called "cultural nations" of the world.[96] Abnormal behavior had to be "corrected" into becoming acceptable behavior. This did not imply that children placed into asylums were taught to behave in a desirable manner, acceptable and useful to the rest of society. The goal was to ensure that children did not grow up to become a burden to the rest of society, or a liability. The defense of "morality", or "normality" as they also referred to it, can be argued is a good denomination of the first order of expectation. A child protection system worthy of trust had to defend what was perceived of as "moral" or "normal" against corrupting forces.

The commission that Getz directed, was set to reform the Criminal Code according to the new jury-arrangements in the Criminal Procedure Act. On appointment, the mandate was not about erasing the old legal arrangement, but Getz had other and grander plans. He wanted to introduce a new type of law and argued that it's establishment was a logical consequence of his original mandate from the Criminal Code-Commission. Within the new legal proposal for *Almindelig Borgerlig Straffelov* (General Civil Penal Code), the age of criminal responsibility was raised from 10 to 15, and this established an age-gap where a new legal code could enter to deal with the problem of corrupted children earlier affected by the Criminal Code.[97]

Professor Johs. Andenæs argues in his book on great Norwegian legal scholars that Getz had immense prestige. Getz was known as the almost brilliant genius.[98] His only flaw, as Andenæs reports, was that he lacked some abilities as a public speaker. The prestige that Getz carried made people hesitant to question his judgment on matters of the law. The fact that criminal law was reinvented, for better or worse, was probably due to his merits alone.[99] His

[94] The use of the denominations such as «moral», «normal» or «social» was normal in the legal discourse. They were not specified in any defiantly manner, but applied as synonyms in the legal discourse. In the following I will refer to the denominations as "normality" or "morality" interchangeably.
[95] See Slagstad (2001). He also claims that the introduction of the LBFB was motivated by a need to defend "normality" (2001): 145.
[96] See e.g. Getz (1892).
[97] Getz (1892): 1
[98] "Hagerup was a brilliant talent and Getz the not so brilliant genius", Andenæs (1973b): 34-35.
[99] Andenæs (1973b): 35.

work can be argued is the introduction of a new criminalist legal system in Norway, and child protection was a part of it this effort.

3.3. Outdated Criminal Code and Statistical Evidence

There were two main reasons why Getz argued for the need to write a new legal code that was to protect children. The *first* was that the minimum age of criminal responsibility was too low for seemingly no good reason. Age of criminal responsibility was the initial academic field of interest that drove Getz to submit the first legal-proposal of 1892.[100] The age of 10 could no longer be maintained, and argued that children had nothing to do with being labeled as criminals. They did not have proper will, or self-determination to resist criminal inclinations—they did not have sufficient moral power to resist.[101]

The criticism against the French Penal-invention that the criminal court should punish children according to their discernment to the criminal act, had gained momentum. In particular, Getz quoted the Suisse professor C. Stoos, who argued in the Suisse Criminalist Convention of 1891 that criminal children were nothing more than "neglected and morally corrupted."[102] Getz later argued that children were in need of protection, correction and care—not punishment.

The *second* reason was the continent-wide problem of increasing criminal activity. Not only among the "criminal proletariat that constituted the permanent flocks of the penal asylums," but more importantly, it was claimed, among children.[103] This problem was especially coupled with increasing urbanism and the fact that children in major cities allegedly did not have anything better to do. Enrico Ferri, regarded as one of the most important pioneers in criminology, argued that the origin of such a problem was that the industrious society had left the child at home while both mother and father had gone to work. This line of thinking gained support in Norway.[104] The problem would never end, it was argued, since the steam-engine that drove industry forth did not stop at night-fall. The child was then "left to its own resources, in the filth of life, and that its history will be inscribed in criminal statistics, which are the shame of our so-called civilization."[105] The potential for introducing a legal-reform such as the one Getz would present was in part due to his ability to

[100] Getz (1892).
[101] Stoos in Getz (1892): 4 and Hagerup (1893b): 46.
[102] Getz (1892): 4f.
[103] Getz (1892): 45. Bilag I.
[104] See for instance Hagerup (1893b).
[105] Ferri (1913): 32.

portray a crisis for the Norwegian society. People would want to trust others, but as Getz argued, this ability was under severe threat by the corrupting forces of crime.

The problem of crime among children was furthermore narrowed down to how law could be designed to stop the growth of habitual criminal behavior as they approached adulthood. The solution was to introduce child protection law in Norway. Hence, the motivation was to prevent that more children became recruited to destructive criminal behavior. The statistics that showed increasing child-criminality, Getz argued, were what made the criminalists and the law-makers stand together in a continent-wide mobilization.[106]

The perception regarding the increase in child criminality became reflected in Getz' preparatory works:[107]

> *"While the rest of our penological results can be referred to as satisfying, the number of criminal children has been in a rapid growth, in which nothing else can compete"*[108]

Within the legal discourse it was stressed that child delinquency and criminal behavior was an urban problem. However, Getz did not care. He had broader plans. The new legal code was not made entirely for those affected by urbanism. Now, the entire population of Norway was to correct the behavioral types that threatened general morality. Johs. Andenæs argued that Getz had his will.[109] The destructive forces of criminal behavior was believed to become prevented by a new legal code, and the society could once again get "back to more normal conditions."[110] Correctional ideology backed by state-coercion could restore moral behavior.

Getz argued that the fast-track development that the Norwegian society was in, the lives of people was "bereft of their former basis without having a new one."[111] Due to this alleged threat, the parliament aimed at implementing means to reduce crime. However, crime was actually not a big problem. The criminalist movements of Italy, France and Germany had all real numbers to show for, with real problems, and this gave rise to the criminalists' and

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[106] Getz quotes Franz von Liszt in Hagerup (1903): 97.
[107] I use the dubious word "perception" because there are reasons to believe that the problem in growth in criminal behavior among children in Norway actually was wrong, see Slagstad (2001): 146 and SSB (1978): 605. If we examine the place where Getz refer to the increase in crime and statistics, he does not show where the data is from and how he constructed it, Getz (1885): 175. This leads to a suspicion that it is not an accurate assessment. In Getz (1892): 53, the lack of convincing statistical evidence for the claim of increasing crime is attempted to be strengthened by arguing that the rules that earlier convicted children no longer were operative.
[108] Getz (1892): 4.
[109] Andenæs (1973b): 29.
[110] Getz (1892): 5.
[111] Getz (1892): 47. Bilag I. Although this quoatation is bereft of logic, it can illustrate how he argued for instituting a system that defended the idea of normality.

penologists' recommendations for law-making.[112] However, the numbers that were to prove the great growth of criminal behavior among children in Norway did not justify the huge reform that was to come in Norway. Nonetheless, those who debated the new legal code were convinced that the problem was real, or would become real. Getz was convinced that something had to be done because the development in Norway clearly showed that the nation was heading in the direction of a rise in criminal behavior that was already evident in other "cultural nations." Getz argued that the evidence was sufficient, and if nothing was done to counter this development, increasing crime and child delinquency would be inevitable.[113]

To illustrate the point of an increase in crime among children, which was an indicator for the destructive force that urbanism brought along was, for Getz, that Bergen had an increase in convictions for children under 18 in the year 1867 from 21 to 71 cases in 1889. In Trondheim, it rose from 27 to 44 cases. In Christiania (Oslo), the numbers were higher, from 118 to 307 cases. Although presented as evidence of an increase in criminality, it can easily be argued that the increase in crime was rather only an epi-phenomenon. The cities had grown at a higher rate than the crime. Relatively to the growth in city-size, crime had decreased.[114] However, the increasing amount of convictions seemed sufficient to warrant drastic reforms.

With the Criminal Code of 1842 rendered outdated, combined with a firm belief in the statistical evidence to support the claim of an increase in criminal behavior—children were now to receive their own specialized code of law that allegedly was for the good of all. Getz' reform would remove the state's treatment of children from the Criminal Code and penal thinking altogether, and transfer them to another and new body of law; a system that "saved" children from becoming "criminals" or "low-lives" through correction. Ole Anton Qvam, one of the lead voices on the political left and leader of Left in 1896, argued that the new system had the function of ensuring that a child did not "become a recruit to the ranks of the penal asylum", and that such a decision "is a legal decision...[by] a court of law."[115] Qvam captured

[112] See e.g. Ferri (1917): 5.
[113] Getz (1892): 47.
[114] This conclusion is made plausible from analyzing two separate tables. One indicates the general growth in cities, which stipulate a population of 206338 in 1845, with an increase to 625417 in 1890. The second table shows the amount of average prison-convictions between the years 1846 to 1855 being 2020, with an increase to 2467 in the period 1886-1895. As city-areas tripled its population, crime in general had only gone up with a small amount, at least far from being tripled, see table 3 in SSB (1978): 33 regarding the growth in population, and see tabel 37 *Statistiske oversigter 1914* (1914): 42 regarding the growth in crime. However, these numbers do not differentiate the adult criminal from the young criminal, but it illustrates that the panic that Getz attempt to establish was in fact highly disputable since the population-dense areas actually grew relatively more than the crime itself. He does not provide sources from where he received his statistical evidence.
[115] Forhandlinger i Odelsthinget (No. 25): 193.

the core idea behind the legal proposal. In this way the political left aligned with Getz and the criminalists on the right.

However, the new decision-making body, and the institutionalization of child protection, could be described as an intrusive institutional innovation in the making. Francis Hagerup argued that the state could from now on deprive parents of their children if the state saw any threat towards the child's moral upbringing.[116] Both Qvam and Hagerup stressed the fear of moral decay among children who grew up, i.e. they were both convinced that undesirable behavior could become corrected by subjecting children to corrective measures. Together, Qvam and Hagerup represent the two wings of parliament, and they both supported a system that would ensure that children became "moral" and "normal" adults.[117]

From now on, it would not be about punishment by imprisonment but correction in asylums. It would rather become a matter of disciplining a child into becoming a "normal" person, or as they argued, a "moral" person.[118] The meaning of "normal" or "moral" is simply the goal they set for the correction of any child. The purpose was to cut off the recruitment to crime and behavior that was a burden for society.

In 1887, Frantz von Lizst, a leading scholar of criminology in Germany, commented positively on the draft of the new New Norwegian Criminal Code written by Getz. It was not a small polite recognition, but rather a cheer to Getz' ambition and talent by one of the leading criminalists in Germany and Europe. Lizst argued that, as an author, Getz belonged eternally in the history of criminology.[119] In this respect, Getz' legal proposal to a new Criminal Code, whereby child protection was deemed by him to be an appendix, was a testimony of modern criminology. Getz was a representative of the so-called positivist movement of criminology in the second half of the 19th century—a lawmaker trapped between the jurist and the sociologist.

The legal reforms that Getz was in charge of writing can be traced directly to the research of both the German and Italian schools of criminology. This connection is

[116] Hagerup (1893a): 113.
[117] I am not going to discuss what they meant by "moral" in depth. I will plainly hold their use of the word to mean something equivalent to "normal". The reason is that the term "moral", at the time, did not mean anything distinct. Getz refer to morality as a type of will-power that children did not possess - (1892): 4, "morality" could also mean something they did possess, but which was very fragile, corrupted or could become corrupted - (1892): 13, Getz also refer to "morality" as a feeling - (1892): 48, and that a prison-conviction could have a "moral" effect - (1892): 49.
[118] This type of terminology pervades the preparatory works of the LBFB. See. e.g. Getz (1892)or Hagerup (1893b).
[119] Vogt (1950): 86. Von Liszt, F. (1905).

illuminated in the Getz's biography written by Adler Vogt.[120] Getz's knowledge of the currents of criminology can be traced through references in his legal texts, and can be evidence that he paid close attention to the continental-wide positivist currents in criminology. As such, the work of Getz can be linked to prominent criminologists, such as Enrico Ferri in Italy and Franz von Liszt in Germany.[121]

This link to positivist thinking is also a reference to a legal technique, i.e. the manner in which legal drafts were justified with reference to allegedly solid empirical investigations. It is not accidental that very different states, such as Germany and Norway, started to develop in a very similar manner with respect to, for instance, child protection law. For instance, Getz's legal proposal makes a reference to the German proposal on *Erziehungsamt* (Office for Public Rearing), which is almost identical to Getz' own proposal of 1892.[122] However, similarities were especially true for Scandinavian countries due to access to the same type of knowledge, allegedly based upon the solidity that empirical science provided.[123]

3.4. The Criminalist Backdrop for Establishing Law

The first equivalent of a modern legal code on child protection in Norway was dubbed *Lov om behandling av forsømte børn* (The Treatment of Neglected Children Act – LBFB) of 1896.[124] Although it was passed by parliament in 1896, the LBFB was not fully introduced until 1900. It replaced the treatment of neglected children by the Criminal Code and *Fattigloven* (Poor Relief Act), and removed the need for the provisions within *Folkeskoleloven* (Public School Act) regarding the protection and correction of children. However, school-commissions and the police would still play a major role in locating and providing reports on children that were to be taken care of by the new decision-making body established by the LBFB – *Vergeraadet* (the Trustee-board).[125] Thus, as of 1896 Norway no longer legally punish children as criminals.

Although children were no longer to be sentenced as criminals, they were still held blameworthy for their actions, in particular from the age of 12.[126] Older children who had so-

[120] Vogt (1950): 85 and Hagerup (1903): 93ff. The motives that explains Getz' thinking regarding the legal-proposal of 1892 also have substantive references to the criminalist movement in Europe.
[121] Vogt (1950): 39. Furthermore, Jerome Hall argues: "the positivism of the last century…found its warmest advocates among German and Italian criminalists" Hall (1947): 287.
[122] Getz (1892): 3.
[123] Andenæs (1968).
[124] This legal code is translated directly to English in order to maintain what it stands for in Norwegian. Sometimes it is simply translated to the Child Welfare Act. This takes away its meaning - see e.g. Dahl (1985).
[125] LBFB §6.
[126] LBFB §20 – fourth sentence, and §28.

called criminal inclinations were to receive strict correction. The treatment of these children, as will be shown in the next chapter, was harsh. As the new legal practice was set in motion, it became gradually referred to as a type of punishment when a child was sent to an asylum.[127] The legal code even became referred to as a deterrent—something that would hold undesirable behavior among children at bay due to the fear of being sent to an asylum.[128]

The interventions into family-lives became regulated by the LBFB. Children aged six or older could be sent to regular asylums, and from the age of 12 to stricter asylums. The stricter asylums were practically an equivalent to the earlier correctional work-houses, albeit from now on solely occupied by children.[129]

The establishment of the asylum-system, which allowed for harsh environments on asylums such as Bastøy and Toftes Gave, did not address the former treatment of children in prisons as cruel. The LBFB was simply a reaction to the Criminal Code of 1842, as the bad treatment of children was implemented for the wrong reasons, and that sending children to prisons had a bad effect.[130] Within the framework of the LBFB, the asylums could be harsh, as long as it disciplined and corrected the children into becoming "moral" or "normal."

The criminalist movement had gained momentum in Norway in the 1880s. Bernhard Getz and Francis Hagerup—both very much involved in the Norwegian legal development at the time—founded *Den Norske Kriminalistforening* (The Norwegian Criminalist Association). This association was established on assignment for the International Criminalist Association, and would become the Norwegian branch. The goal, according to Hagerup, was to "spread the knowledge towards, and increase the interest for crime-politics."[131] Amongst the numerous aspects of criminology, the child was receiving increasing interest, and the first meeting ever of the Norwegian Criminalist Association revolved around matters of child neglect and youth crime and had the forthcoming legal development as focus.

Deciding upon the minimum age of criminal prosecution was one of the most important topics at the time. The problem triggered continent-wide debate on the need to

[127] Dahl (1985). This is the English translation of Dahl (1978). This can also be traced in media and public debates. We will return to this later.
[128] Dahl (1985).
[129] See Befring (1963). For a good overview of the treatment of children, see Bugge (2001); Dahl (1985); Ustvedt (2000).
[130] At the Pentientary Congress in St.Petersbourg in 1890, it was argued that "it is assumed, for the sake of the child, i.e. persons below the age of 16, to give up the question regarding guilt and the understanding of punishable actions, and rather ask, if it is necessary that the state assume custody of children and ensure their upbringing or re-locate the child in a correctional asylum", Getz (1892): 2.
[131] Hagerup (1893b): 17.

invent state-driven child protection of those beneath this age and who showed undesirable behavior. The different congressional meetings prior to 1890, both in the criminalist and penitentiary associations, provided an arena for spreading knowledge of what type of systems could potentially be implemented. For instance, Frantz v. Liszt, who at the time sat in the German Criminalist Association, and one who Getz refers to,[132] argued that the inclination to commit a crime grew for every punishment a child was subjected to. Punishing children and juveniles was, according to him, "the complete failure of our penal system."[133] Scholars in criminology thus began to see the treatment and development of children as the fight against corrupting forces. As neglected children and dissipated juveniles were seen as the roots to the criminal society, in order to save society, these children had to be corrected.

The International Penitentiary Congresses in Rome (1885), Paris (1889) and St. Petersburg (1890), the meetings of International Criminalist Association in Brussels (1889) and Bern (1890), all contributed to heightening the focus on finding a solution to the bad treatment children had received from traditional criminal- and penal law. As such, Getz was on par with the currents in contemporary criminology. Juvenile delinquency was set on the agenda, and something had to be done about the deteriorating forces that pulled children into the ranks of criminals and low-lives.

The International Criminalist Association's German branch met in Halle in 1891 and appointed a committee to investigate how to treat juvenile delinquents. Getz referred to its members—Krohne, Appelius, Kessler, and Liszt—as renowned criminalist scholars. The German branch concluded in their report that the age of criminal responsibility should be 16. If a need to do something about a child prior to this age arose. whether due to the child's bad behavior, parental treatment or assumed future bad behavior. the child should be sent to an asylum that could provide care and correction, or to a private family. For the German branch, the decision-making body empowered to decide in such matters was the *Erziehungsamt* (Office for Public Rearing).[134] This organization was to consist of representatives of the state, the local government administration, the school and the church. The *Erziehungsamt* was to decide upon cases that involved criminal behavior, as well as potential criminal behavior, namely what was dubbed morally corrupt or potentially corrupt behavior. These measures were not implemented in German law at the point when Getz referred to them, but was a

[132] Getz (1892): 3,46.
[133] Von Liszt (1905): 338-339.
[134] The decision-making procedure on dealing with children that was shaped here is, according to Getz, very similar to how Getz argued, see Getz (1892): 3 - footnote.

draft-proposal. This decision-making body was strikingly similar to the system that was to become implemented in Norway. It clearly illustrates the influence of international currents in criminology upon the Norwegian legal discourse.

3.5. The Organization of Authorized Coercion: The Trustee-board

The introduction of the new child protection system in 1896 could affect the children and young adults up to the age of 21, and the state could implement coercive measures onto children under the age of 16.[135] Getz argued in the draft-proposal of 1892 that the suggested arrangement was not only a duty imposed on society by the children's own desire to grow up to become decent future adults, but also that the future adult would welcome the intrusion in their childhood to get back on the right track. [136] It was also a duty imposed on society itself in the sense that the new legal code was to ensure the future comfort and healthy development of society.[137] These goals, in Getz's view, justified the means. If the state came across a child that showed inappropriate, undesirable, or *potentially* undesirable behavior, it would be in need of appropriate correction.

Children that was thought to become morally corrupted were feared to develop inclinations that were incompatible with the duties imposed upon everyone to act according to what was expected, or what was argued as "moral" or "normal." [138] It was argued that the situation was out of control and that normal conditions had to be re-established.[139]

Each child was to be corrected and disciplined to the extent that they acquired a preference-structure that made them act according to what was morally acceptable. The building-blocks of this preference-structure could be said to be a well-ordered set of utilities that supposedly became carried by everyone discharged from the custody of the Trustee-board and the asylums. As the Super-Intendent of Education, Karl Aas, explicitly states: "*...teaching material, should be used for ethical influence, for developing the character of the kin to a*

[135] As become clear of §1 of the LBFB, it could only intervene with children younger than the age of 16. However, once caught in the system, a child could stay until it had become a young adult at the age of 21 - LBFB §39.
[136] Getz (1892): 35.
[137] Getz (1892): 16.
[138] The legal code is actually about morally *neglected* children. However, the original draft put forth by Getz, referred to morally *corrupted* children, pervades the entire LBFB. Neglect is even inaccurate for what the legal code did – it was to police the potentially misbehaving children. This has nothing to do with neglect – it has rather to do with moral corruption. This is why we refer to corruption rather than neglect.
[139] Getz (1892): 5 – my emphasis.

moral level."[140] It was argued that the society's chance of survival was depending upon the moral character of the future generation and hence the success of the correctional facilities.

Childhood, it was argued, should prepare "moral" or "normal" persons. There were no room for abnormal behavior that would contest the conception of what was deemed as "normal" or "moral". Getz argued that the cost of creating the defense of morality should be as high as necessary for it to succeed, stating that "a bad arrangement…will deprive society of the fruits of their sacrifices."[141] Indeed, the evidence suggests that the system was costly and that the government made every effort in order to make it work.

Hence, Getz implied that a child was not once and for all abnormal or immoral, but could be taught to become "normal" or "moral." This manner of arguing against the use of traditional courts with regard to solving cases of failed care has received resonance throughout the legislative history of coercion-cases. The legal system recognized that neither children nor their parents did something that a regular criminal court could solve through its binary system of guilty or not guilty. For Getz, it was a matter of combining the safeguards of a judicial procedure with professionalism and local representation in a decision-making procedure with exclusive discretionary competence.

The cases within child protection were in need of special attention as the character of the parents and of the child needed to be evaluated and ruled upon. To this extent, Getz argued that it was of central importance to let a principle of subsidiarity be applied. This meant that decisions were supposed to be made as close to the child as practically possible, but without losing the necessary legal protection that such decision-making was in need of carrying.[142] The legal protection could only be instilled by the state, he argued.

The decision-making body that was set in charge of child protection became *Vergeraadet* (Henceforth Trustee-board). Two of Getz' important points argued in his draft of 1892 did not become a part of the LFBF of 1896. *First*, that local representation was to be kept at a minimum because the decision-making of the Trustee-board needed to draw upon legitimating factors for the implementation of coercive *state-level* intrusion.

Second, Getz argued that the Trustee-board was to be designed as a *Koorporation* (a corporation) where both the local personal knowledge and unbiased professional knowledge

[140] Hagerup (1893b): 106.
[141] Getz (1892): 16.
[142] Getz (1892): 25.

were represented. The corporation were sought to have representatives both from the local area and the general society, with the lay-element and the state represented. Getz was heavily in debt to the German *Erziehungsamt*, when he advocated for having members from the school-council and the poor-relief commission in the Trustee-board, as he believed that they had particular types of knowledge. However, he did not have his way on these two points.

Nevertheless, the three first legal proposals that was drafted all suggested such arrangements. However, the debates in parliament became increasingly polarized, and the treatment it received in March 1895 was that state-representation, and the focus on state-level intrusion, was too much at odds with the political order of parliament. It turned the draft down with 48 against 37 votes in the Odelsting-chamber.[143] Contrary to Getz' desires, the parliament demanded it was to be reshaped so that local knowledge and local representation would become more prominent. The strongest antagonists even argued against having a Trustee-board altogether. They rather suggested that the School-commission could work just as effectively. However, Qvam, who was a dominant figure on the political left, argued that the draft proposal written by Getz could just as much be referred to as an appendix to the Public School Act, as much as Getz claimed it to be an appendix to the Criminal Code. He thereby argued that the school movement on the left was supposed to feel accommodated. Qvam argued that it was a need for a legal code that guaranteed a functional public school system. Hence, members of parliament across the political spectrum could agree that the asylum-system was needed.[144]

Qvam clearly illustrates how the legal code on child protection finally received broad support, and that the educationalists on the left could agree to it. This point, however, would not undermine the grand architecture of the legal code or its timing inspired in general by European criminalist thinking. Although Getz' recommendations on the design of the decision-making body were rejected in favor of less prominent state-representation, the legal code would serve the intended function, albeit as a more democratic decision-making body.

The final composition of the Trustee-board of 1896 had five laymen as members in addition to a medical practitioner, the priest and the local judge.[145] Hence, the so-called democratic element was in majority. The five laymen, of whom at least one had to be a woman, were appointed by *formannskapet* (the executive committee) in each municipality.

[143] Dahl (1985).
[144] Qvam in Oth.Prp.No.33 (1893): 3.
[145] LBFB §6.

The chairman of the board was to be elected by the board, which was in contrast to the proposal put forth by Hagerup where the local judge had the role as the chairman of the board. The educationalists on the left thought that this would make the Trustee-board just another type of criminal court, which would be superfluous, since courts already existed and functioned well. The judge was, nevertheless, a permanent member of the board, and hence served the same intended function for Hagerup.[146]

The aim of this arrangement was to ensure that the board acted through local and personal knowledge, as well as unbiased knowledge represented by the priest and the medical practitioner. These two different knowledge bases were to inform the decision-making, whereas the judge was to ensure an adequate level of legal protection of all throughout the entire case-proceeding. Those who represented local knowledge could be rendered as knowledgeable regarding local circumstances, and knew where the shoe pinched in the local area that a specific Trustee-board governed. The unbiased knowledge the professionals possessed provided procedural constraints upon the laymen. The decision-making within the board was achieved on simple majority and ensured that the judge, the priest and the doctor could be outvoted if necessary.

The Trustee-board were legally equipped to call on witnesses, investigate and even search the home of the child, all in an effort to inform the decisions that was about to be made.[147] Before the Trustee-board was to reach a decision, they gave parents, or representatives of the child, a chance to express their views, as a way for those affected to be heard and contradict claims made by others.[148] This opportunity was deemed as beneficial, as the board could evaluate both sides before reaching a decision. The process allowed both the child and the parents to voice their views (although written testimony could also be submitted). In the final legal proposal, it was stressed that the board was not in any way to resemble a court, and it was not bound by any distinct procedural design.[149]

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[146] That the legal code was administered by the Ministry of Church and Education have led some to believe that the LBFB became a victory for the educationalists on the political left. However, the driving force behind the whole proposal is well documented as being the positivist criminalist thought at the time. The reason for adhering to the minor changes of the educationalists is better understood as something purely pragmatic in order to get the draft proposal through parliament so that a legal could be established. Furthermore, as Super-Intendent of Education, Karl Aas, argued, it was more a point not to have this new type of legislation as being a part of the Criminal Code—Hagerup (1893b): 108.
[147] LBFB §14.
[148] LBFB §13.
[149] Oth.Prp.No.6 (1896): 22. LBFB §41, Hagerup (1893a): 54-55.

The decisions the Trustee-board made could vary between five different measures (§§1 and 4): Disciplinary action of the child, place orphans in homes that ensured their care (most often private), coercively remove children and place them in families, or confine them to mild or strict school-asylums. Although every measure was to ensure some sort of correction, the last options, being the most drastic, were least used, but obviously caused the most debate. A grid of asylums was established all over Norway, and these asylums, and the children that they housed, were the most striking feature of this new child protection system.

The Trustee-board was preoccupied predominantly with children up to the age of fifteen.[150] They could, in special circumstances, keep a child that was placed into an asylum before the age of 18 up until the age of 21.[151] The reason for raising the age-limit can be traced to a comment in the Norwegian Criminalist Association of 1892, as Getz argued that some needed to be kept because they were morally "backwarded" pupils. They did not deserve to be imprisoned for their antisocial behavior, but were still in need of correction.[152]

3.6. "Moral" or "Normal" Behavior is Preferred

The most appropriate point of departure to describe the order of expectations that the new legal order attempted to comply with, was the desire to protect an idea of what was desirable behavior, i.e. what was perceived of as "moral" or "normal." All municipalities in Norway had established a decision-making body set to enforce correct child-rearing and thereby indirectly correct adulthood. The title of the legal code includes the word "neglect," and it clearly points towards parents who have not done their duty to raise the child. Indirectly, the parents were charged with a duty to educate the child to become moral, i.e. that the child would develop into choosing a way to live life that was considered moral. Neglect had to be remedied through correction, which would 'heal' the child to no longer be undesirable for society.

Thus, the system implied that lack of morality or the existence of neglect within a family would justify the coercive intrusion into family life and into the lives of children. The goal of such intrusion was to cure abnormality or rescue a child from the path towards abnormality. This line of arguing, where the problems were considered anti-social and thereby

[150] Arctander & Dahlstrøm (1932): 23.
[151] LBFB §39 cf. §28. Children that were not sufficiently corrected were argued to be in need of further correction. All until they became 21.
[152] Getz (1892): 36.

an object of correction is clearly influenced by the French criminalist Alexandre Lacassagne, who famously expressed:

> *"The criminal is a microbe that proliferates only in a certain environment. It is probably the environment that produces the criminal, but like a medium that has no microbes, it cannot make crime germinate on its own. Microbe and medium, the biological and the social, are hence the two fundamental aspects of criminality and constitute the essential data of criminal anthropology."*[153]

Lacassagne concluded that a society had the criminals it deserved, most significantly because the corrupted society allowed for the increase in corrupted and socially-degenerative behavior. This is why children stand in a significant position. If the children that were showing signs of neglect were treated adequately, they would develop into decent adults, or as Getz eloquently put it, "rip the evil up by its root."[154]

Correction and crime were thus both seen as *prima facie* evils. However, correction was thought to be justified wherever it counterbalanced the evil threat of criminal behavior.[155] The focus, it can be argued, was to diminish the threat of evil that morally neglected children constituted, namely that they would grow up to become members of the "criminal proletariat."[156] The costs of the correctional system would be outweighed by the positive consequences in course of time, due to the reduction in costs to maintain an expensive penal system. The society would, as Getz argued, in time harvest its fruits, as the "rawness" of criminality diminished.[157] Thus, he continued, the society had to pay whatever the costs, and he painted a picture of a grave escalation of crime-rates if nothing was done.

Tove Stang Dahl argues that a primary role for the new legal code was to develop a defense of society from its future criminals.[158] However, this interpretation can be contested. For instance, Bernard Getz stresses the opposite in particular. When it comes to defending society against children that showed criminal inclinations, it was only argued that society needed protection against the most severe cases—*not* in general.[159] Most children did not become relocated to asylums, but rather to other families. Hence, the total system of child protection that was established by the LBFB cannot support parts of Dahl's conclusion.

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[153] Lacassagne quoted in Dedichen (1893): 23. The French Lyonne-School would hold that even though the criminal was a weakened organism it could be corrected, or "determine him in positive direction" – Dedichen (1893): 24. The French school held education through punishment as a way of correcting the criminal to become a normal person, See Kaluszynski (2006) for more.
[154] Getz (1892): 2.
[155] Getz (1892): 5.
[156] Getz (1892): 45.
[157] Getz (1892): 47.
[158] Dahl (1985).
[159] Getz (1892): 29.

Furthremore, the legal code introduced a system of correctional facilities because it wanted to *re-introduce* these children as normal adult individuals who would be able to contribute to the benefit of all, or at least not become a burden. They were not given correctional treatment because society needed protection from them, but rather that the children themselves needed protection from what they could become. In Getz' terms, this was about distinctive *means* for pursuing a social or general good.[160] The success of the new system would be entirely dependent upon the contribution that the correction of children was, to the effectiveness of fortifying a public good, i.e. strengthening what was perceived of as moral.

3.7. The Order of Expectations: Restoring Morality

The order of expectation that can be argued has manifested itself can be explained by reference to especially two basic expectations. Although distinct, both basic expectations support the claim that a trustworthy child protection authority would be established if that system helped fortifying what was generally perceived of as "normal" or "moral." The *first* can be dubbed correctional ideology. It can be illustrated through the fact that Getz did not have sufficient support to pass the legal code through parliament—namely by those on the political left. It basically consisted of a group of parliamentarians who saw the legal proposal as a means to a different end—namely to ensure a better public school for the rest of society. In order to reach this end, they would easily accept a legal code that would send troublemakers to asylums instead of public schools. The outcome would be a better school. This would mean that the school-system could ensure that pupils became familiarized into the established conception of morality, whereas children that stood in need of correction could hope to achieve it through increased discipline and correction.

Second, basic expectation is shaped by criminalist thought. Bernhard Getz wrote a legal code on child protection in accordance with the currents of criminology at the time—it was dubbed positivist. It was accepted in Norway, not because of the wide-ranging knowledge of continental criminalist thought among those who participated in the public discourse, but because it applied reasons and evidence that were convincing.[161] In combination with the support of the school movement on the Norwegian political left, the legal code was passed.[162] Both of these reasons underpin the order of expectations, which can

[160] Getz (1892): 15.
[161] Andenæs (1973b): 34.
[162] Many have argued that since Aas got his will of transferring the legal code from the Ministry of Justice to Ministry of Education, somehow the school-movement hijacked the entire legal-process and the new LBFB became not an appendix to the Criminal Code, but rather an appendix to the Elementary School Act. This is

be described as a desire to mend the problem of a growing threat towards what was deemed as "normal" or "moral." Hence, child protection worthy of trust would secure "normality" or "morality." This could be achieved through complying with basic expectations of the correctional ideology and criminalist thought.

It was no longer maintained that criminal procedure could work preventively on the increase of crime among children. Imprisonment did not work as a deterrent on children, and a truism had developed in that children did not know the consequences of their own actions, or even that their actions could be ruled as illegal. In line with criminalist thought, Getz argued that children not fit for family-life, had to be cared for and corrected in asylums to become moral adults.

Furthermore, at the asylum, each child had to be educated, through labor or school, to become "moral". This would mean that a child received the status as "moral" after correction. While the Trustee-board provided the input to the correctional system, and consequently ensured that children within the jurisdiction of the board could remain normal, the asylum-system ensured that once the child was corrected, it could be returned. As a result, one third of all children affected by the Trustee-board were sent away from their custodians. Was it to be expected that they would become moral persons?[163] This will be elaborated upon in the next chapter.

The defense of what was held to be "normal" or "moral" was what could devise a system of child protection that was worthy of trust in the period of its introduction. With increasing number of individuals exhibiting undesirable behavior, what was found "moral" became gradually corrupted. In order to re-establish trust towards the system of criminal law and the public educational system, the legal order of the LBFB had to operate according to expectations that could mend a downward spiral of criminal and abnormal behavior and rescue "morality." The educationalist-left feared that the newly introduced public educational system would be destroyed by delinquents, whereas the criminalists on the right feared that crime would corrupt society. They were both united in the common effort of rescuing a general good.

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strange since the entire infrastructure that the legal code rests upon, is based in Bernard Getz initial draft of 1892, which is a tribute to criminalist thought.

[163] Arctander & Dahlstrøm (1932): 22-23.

The very motivation for sending children to asylums was to correct them so that they would not become abnormal adults. Thus, it can be argued that the fear that they would develop into distrustful members of society was the driving thrust for instituting the LBFB. A downward spiral of abnormality would create an increase of distrust that could destroy society, and in order to remedy the origin of such a problem, children had to be taught how to behave. Their behavior would become, if the reform worked, acceptable by the greater society. Thus, if this legal code was implemented, the greater society would not only abolish crime, but also have a workable school-system. After correction, the children would have become "moral" persons that could be trusted. Both the educationalists on the left and the criminalists on the right agreed that children should be brought up to become moral persons.

4. 1953: Protecting the Family to Protect the Child

The legislative process moving to reform the LBFB was put to a halt during the Second World War. The plan to reform the entire system had begun in the 1930s. The reform of 1953 was a result of an initiative made by the majority-government of Einar Gerhardsen's *Arbeiderparti* (Labour-party) on November 21st 1947. The exploratory committee was established same year, and was a continuation of the work of *Sosiallovkomiteen* (Social Act Committee) already established in 1935. The Social Act Committee was led by municipal court judge Inge Debes. This commission was mandated to propose a legal reform governing social welfare in its entirety.[164] The influence and domination of Debes' work within the Social Act Committee of 1935 was so great that after he passed away in 1945, the work seized. As a consequence, Debes did not become the main author of the second legal code on child protection. However, the work Debes did manage on child protection was not in vain.[165]

Child protection was no longer seen as the project of the educationalist-left or the criminalist-right. It had moved into an entirely new category of social legislation. This development is an implication of how the order expectations had developed. The legal order of the LBFB no longer complied with the order of expectations at the time of Debes. Since what was deemed as worthy of trust had changed considerably, the time had come to establish a new legal order that could again comply with the order of expectations. Once the order of expectations again could be embedded in the legal order, child protection would again become worthy of trust.

In November 1947, Sven Oftedal, minister of *Sosialdepartementet* (Ministry of Social Affairs) in the Gerhardsen-government appointed *barnevernskomiteen* (the Child Welfare

[164] Debes (1939): 1.
[165] In Innst. I (1951): 5. His work is credited as being a part of the investigatory efforts made to the report that led to the reform in 1953. In this vein, we can argue that he in fact can be credited for instigating the reform of 1953 by the work he undertook as the chairmen of the Social Act Committee of 1935.

Committee).[166] It was mandated to "*consider questions regarding the revision and further development of child protection and the rest of child law.*"[167] The new committee was mandated to continue the work of Debes, but only to the extent of examining legal codes relevant to children's issues apart from the remainder of the social welfare legislation.

The chairman of the new committee was initially Aaslaug Aasland, but when she replaced Oftedal as minister at the Ministry of Social Affairs in 1948, it became apparent that she would not perform adequately as both minister and chairman of this committee. Undersecretary to Aasland, K. J. Øksnes, replaced her as new chairman. The committee submitted its draft-proposal in 1951, which marked the birth of a parliamentary process that would result in a new legal code from 1953 that replaced the LBFB. However, intentions to reform the LBFB had already been called upon a decade after its introduction.[168] This was especially true with regard to correctional ideology. Within the draft-proposal it was admitted that many years had gone by without any attempts to correct the shortcomings and mistakes of the LBFB. The shortcomings were many.

On July 17th 1953, more than half a century after the introduction of the LBFB, a new legal code was adopted by parliament. It was argued that it would alter the way in which child protection would work.[169] From this time on, child protection in Norway would become far more proactive and solve problems within families before the need to intervene coercively. The time was ripe to introduce a much more elaborate system of proactive child welfare. The order of expectations that underpinned child protection had shifted, and a focus upon non-coercive and family-based measures had gained momentum. I will refer to the system of non-coercive proactive efforts as child welfare.

4.1. The Path toward Reform

The LBFB of 1896 was criticized immensely during its reign, but in one way or the other, all former attempts to reform had failed to correct its shortcomings.[170] Prior to the reform of 1953, it was argued that the LBFB practically ran counter to its original intent. Getz' ideas had now become a correctional utopia, and the reality at the asylums was void of its original promises. It was established that the LBFB-system was a problem—a problem that backfired

[166] Since the Norwegian norm is to translate *barnevern* to child welfare, I will do so here. However, *barnevern* directly translates to child protection and not child welfare.
[167] Royal Decree of 7th of November 1947 cited in Innst. I (1951): 5.
[168] See Innst. O. XVII (1953).
[169] See e.g. Innst. I (1951): 10-11.
[170] Innst. I (1951): 11.

by letting immoral and abnormal children back into society because correction failed. The LBFB was thought to no longer be able to ensure that children were saved from moral corruption. It was argued that the LBFB and the Trustee-board had, in fact, despite intents and purpose was conceived of as a part of the penal-system in Norway. The new reform of 1953 was to turn away from the system established by the LBFB, or at least so it was argued, and re-establishing a modern system of child protection.[171]

The immediate years after the Second World War were pervaded by reform-starved participants in the debate revolving child protection.[172] The path towards reform had begun long before the committee of 1947 had started their work. In order to delineate this process, four different elements will be presented that pushed the order of expectations and hence became significant to the reform: *First* is the publication of the book "*Under loven*" (Beneath the Code) of 1907. *Second* is the Statutes of Castberg of 1915. *Third* is the initial reform effort by *Sosialkomiteen* (Social Committee) of 1935. *Fourth* and last is the shift in correctional ideology.

4.1.1. "Under loven"

"*Under loven*" ("Beneath the Code") was a novel written by Bjørn Evje in 1907 under the pseudonym of Mikael Stolpe.[173] It is a short novel portraying the lives of children at the strict school-asylum at Bastøy, an island in the Oslo fjord. Bjørn Evje had worked at Bastøy and at Toftes Gave, which was another school-asylum. At Bastøy, he worked as both a teacher and acting director. Thus, given his first-hand experience, Evje knew much about what the children experienced who were placed in this asylum. His book describes, in an allegedly fictional manner, the system established by LBFB; it provides descriptions of cruel and often arbitrary punishments, and it describes harsh discipline, and lack of professional knowledge among those working in the system.[174] A description of cruel punishment is given as follows:

> *"Jan saw the director raise his huge birch rod above his head and how his face became hard and strong, he heard the sound of the birch shriek in the air – and it was as if his hole lower body died and became ice cold for only to feel thousands of glowing pieces of iron be drilled into his body and burned into him. But he did not have the time to sense this for long, only to hear again the*

[171] Innst. O. XVII (1953): 9.
[172] Ot.prp.nr.56 (1952): 2.
[173] Stolpe (1907).
[174] This exact problem was something Getz was fully aware of could happen. Namely that if the school-asylums were not properly run, then the entire system would collapse, see Getz (1892): 20. According to Getz, the school-asylums should have been professionalized.

shriek in the air and a slap against his own body. This time he felt that the birch sucked itself into his flesh."[175]

What made portrayals like this shocking for the general public was the fact that it was written by Evje, who was, due to his background as acting director and a teacher at a school asylum, capable of providing accurate descriptions of what actually took place at Bastøy school-asylum. Although the book was fiction, it had an impact as if it was real documentation on the everyday life of children at the school-asylums.

Evje's motive for writing this book could have been, according to Ustvedt, a desire to give a critique of the use of large correctional asylums instead of smaller ones. Evje argued the case that smaller and more homogenous entities should be considered as best practice, and hence replace the larger asylums that allegedly did not work.[176] Hence, it was a critique of the correctional ideology that had dominated the order of expectations at the inception of the LBFB. The publication of the book sparked a huge parliamentary inquiry, shedding light on the dark side of school-asylum practice.

At first, the protagonists of the LBFB, who predominantly represented the asylum-system, were seemingly able to put out the flames that Evje had lit. However, due to their eagerness to silence Evje, and their efforts to criminalize him in media, the government had to intervene. As a result, a parliamentary-led investigation that was meant to examine the credibility of Evje, boomeranged on the directors and personnel of the large school-asylums. Ustvedt argues that in the end, it was the protests against Evje – not only from the managers at Bastøy and Falstad school asylums, but from the management at Toftes Gave, an alleged "mild" school asylum – that led *Kirke- og undervisningsdepartementet* (Ministry of Church and Education) to proceed with a public investigation that, in the end, resulted in providing support for Evje's novel. Hence, the so-called "*skolehjemssaken*" (the School-Asylum Inquiry) was established.[177] The inquiry was initiated early in 1908 and resulted in the establishment of *Skolehjemskomiteen* (School-Asylum Committee) in parliament. The committee delivered its report the year after, which was devastating to the asylum-system.[178]

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[175] Stolpe (1907): 42-43. Although the wording here provides a kind of drama to the story, the punishment by rods were normal, and the wounds of the boys was sometimes severe, see Ustvedt (2000).
[176] "Central to the novel was the critique of the *large* school asylums and a corresponding defense of the smaller asylums…The system was flawed, yes, even condemned to failure beforehand" Ustvedt (2000): 98.
[177] Ustvedt (2000): 95ff and 110-119.
[178] Om skolehjemmenes ordning (1909). The report consists of, among other things, testimonies given by various personnel, pupils and other parties at the school-asylums at Bastøy, Toftes Gave and Falstad. Although the personnel denies most of the allegations made by the pupils, too many of the personnel, who in this case are credible, do argue that corporal punishment was used extensively in the asylums. The worst case is the dairymaid

Now the focus was on what was viewed by many as obviously bad circumstances for the children at the large school-asylums and the strict asylum at Bastøy. The inquiry concluded that the strict and the large school-asylums should be divided internally into smaller asylums within one large organization.[179] Most important for the general public was the need to abolish all corporal punishment.

"Toftes Gave," a large school-asylum established long before the introduction of the LBFB, was devoted special attention by the inquiry-committee.[180] Its historically harsh treatment of children was upheld by Director Nils Navelsaker. He was a close friend of Bernhard Getz and had taken office already in 1890. He had maintained a belief in firm discipline and corporal punishment of children (as did Getz), and he had ignored that the LBFB did not mandate corporal punishment.[181] It was significant for the committee's work that the author of the LBFB had direct knowledge regarding the harsh discipline at "Toftes gave,"[182] where discipline was established through a military organization. The committee concluded that the military organization had been proved flawed not only in Norway, but also in Sweden and Denmark. Although the model had some success in other and larger nation-states, with larger populations, it did not fit well in Norway.[183] For instance, the argument against the organization of "Toftes Gave" was that it did not open up for a family-design within the asylum. It had an old military organization and could, according to the inquiry, no longer maintain the status as a school-asylum in Norway, and should rather be disbanded.[184] The report from the School Commission even revealed that the toughness at the school-asylums at Bastøy and "Toftes Gave" often involved grave corporal punishment and lack of understanding for the situation that the children in fact were in. Something had to be done.

Eline Nyhus at Toftes Gave that in 1904 had a corpse of a young boy made ready for burial. She insinuated that the death was caused by three beatings of the cane from the renowned director at the time – Navelsaker, See Om skolehjemmenes ordning (1909): 169. The child suffered from a weak heart, and Navelsaker, who did not deny he did beat the child with a cane, argued that he was a weakling, and that was the cause of death. Even though we argue that Nyhus was wrong to insinuate that the cause of death was the beating, which might be wrong of us to do, it nevertheless portray a director who knew about the child's weaknesses but nevertheless chose to beat him.

[179] Om skolehjemmenes ordning (1909): 83.

[180] See e.g. Asbjørnsen (1908) for an elaboration on this place.

[181] Vogt (1950): 96.

[182] Getz himself argued that corporal punishment should be an option, and that it should be up to the discretion of the Director of any school-asylum whether or not corporal punishment should be used - Getz (1892): 95. It might also be added that what was corporal punishment earlier was when the pain was inflicted on the body of the child. However, many of the punishments would be referred to as corporal today. Solitary confinement, withholding meals and hard labor would by many also be rendered corporal punishment. Although consistent at the time, Getz' argued for a type of punishment of children that were particularly brutal, and especially because these were children that would push the limits and temper of the asylum personnel to the limit (ibid.).

[183] Om skolehjemmenes ordning (1909): 82-83.

[184] Om skolehjemmenes ordning (1909): 112.

Matias Kluge, a school asylum director, articulates some of the main problems in his evaluation of the School-asylum inquiry, which is annexed to the report on the school-asylum.[185] The most significant weakness that was unveiled with regard to the Trustee-board was how the placement of children was decided upon. The investigation into the life of the particular child was often absent. Furthermore, in his view, it had also become established that the strict and the large school-asylums did not correct the child; instead, the asylums punished children for their bad behavior. For Kluge, in order to mend the problems with the LBFB, the law-makers would need to focus more on the family. Parents had to become more involved in the rehabilitation procedure of the child, and the child should be subjected to family-like circumstances at the asylums. In this sense he agreed with Evje that the problem was the correctional ideology.

Kluge points towards a shift in the order of expectations regarding child protection. The criticism captures a move away from the correctional ideology of the school-asylums, and towards family-based protection of children. The LBFB was a top-driven legal development that did not take into account the public reaction towards the LBFB. As a result, the cry for reform came from the grassroots of the asylum-system, media, and ordinary citizens. An argument had begun to take shape stipulating that children were not to be subjected to correction at asylums.

The view that the solution to the problem of failed care was essentially located somewhere else than in the child alone, namely within family and the child's place within it, started to emerge. Every child, Kluge argues, should be seen as in need of a family and family-like surroundings. Children need the safe environment that the family provides, allowing it to grow up. This is the new direction that the reform-movement had begun to point out—a direction that would point towards a shift within the order of expectations. What was deemed as worthy of trust had shifted from correction towards a focus upon protecting the child in its natural surroundings, i.e. in the child's symbiotic relationship to the family.

Although the inquiry explicitly investigated the large asylums in the asylum-system, it was also the spark of a nation-wide critique of the LBFB as the root cause of the mistakes of the asylum-system. The solidity of the LBFB had begun to crack, and for the next decade, the stage was set for these issues to be debated in parliament. However, as will be shown, no solid amendments cleared the way for dealing with the problems that had surfaced.

[185] Om skolehjemmenes ordning (1909): 263ff.

4.1.2. The Statutes of Castberg – the New Welfare Dimension

Until 1935, when the social-committee in parliament, with Inge Debes as the chairman, was mandated to investigate the legislation on social welfare in Norway, no reform efforts had been successful in dealing with the problems facing the system of the LBFB. The only significant *legal* development was the introduction of welfare-measures improving conditions for children at home, also known as the Statutes of Castberg, after its strongest protagonist Johan Castberg.

Castberg became the minister in the recently established Ministry of Social Affairs in 1913. In 1915, many legal codes were drafted from his office, including *Lov om foreldre og ektebarn* (Parents and Legitimate Children Act), *Lov om barn utenfor ekteskap* (Illegitimate Children Act) and *Lov om forsorg for barn* (Child Relief Act). These legal codes were directed towards the welfare of children at home, implying that the state should take responsibility for ensuring that parents in need received relief to cope with child rearing.

In 1909, Nicolai Rygg published a statistical account showing that Norway ranked second amongst European states, after Denmark, in mortality rates between legitimate and illegitimate children.[186] The alleged reason was that illegitimate children were often relocated and not fed and cared for adequately. Castberg had promoted the social state and especially welfare relief for children from the end of the 1880s, but not until he was offered the job as minister in the Gunnar Knutsen Government in 1913, did his goals become attainable.[187] In his view, legal codes could be crafted and enacted upon that could remedy the problems of the high mortality rate among illegitimate children.

The driving thrust for Castberg's engagement was a social justice-ideology influenced by three different traditions—British rights-based liberalism, an idea of solidarity and the German socialist Lassalle.[188] *First*, to him, a nation-state's ranking was entirely dependent upon the rights it gave to women and children. The only time that individual rights did not automatically receive his support, was when such rights stood against the solidity of the national community. In other words, he did not support measures that could ruin the solidarity among Norwegians.

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[186] In Seip (1984): 196.
[187] Seip (1984): 193.
[188] Slagstad (2001): 168. Reading Slagstad's account of Castberg is completely different from Anne-Lise Seip's account - Seip (1984): 194. She portrays Castberg as a national-socialist, something that is not reflected in Slagstad's depiction of Castberg as a person. This is very important, because Seip gives the impression that child welfare law was rooted in a fascist mindset. This is inaccurate to say the least.

Secondly, the establishment of solidarity was very important for the wellbeing of the state system. As he argued, the strong should not be allowed to crush the weak. The solidarity between the different social strata of a nation-state would ensure that those at the lower levels were taken care of by the stronger. To him, rights were to be provided to strengthen the solidity of popular sovereignty with the aim of always lending priority to those who had the least. Only then, according to Castberg, would everyone truly become liberated.

Third, the German socialist philosopher, Ferdinand Lassalle, inspired Castberg to believe in a nation-state that could rise above class conflicts. The state was to be the tool that emancipated people by helping those in need first. The state could, for example, ensure that people became more self-relied. Castberg's study of Lassalle was thought to be his inspiration for becoming a "practical reform politician."[189] His work as a social-engineer was not merely focusing upon child welfare and child protection, but had a much broader aim for introducing a general conception of social justice upon the nation state itself.

However, the important aspects of his work for the present study are not the statutes *per se*, as they had no influence over the coercive measures in child protection. However, it is the very articulation of the new mindset that had begun to gain support in Norway, namely an increasing focus upon the home and the ability for children to grow up and become decent members of society through the natural environment that was provided by the family. A new type of public responsibility is reflected through the work of Castberg. He represents the dawn of a new type of reflection—the collective responsibility for the general welfare of the child and the family.

4.1.3. The Social Act Committee

As already mentioned, *Sosiallovkomiteen* (the Social Act Committee) was established in 1935 and was led by Inge Debes. He was a Labour-party protagonist. Debes had great influence on how the social policy within the Labour-party became articulated. The Social Act Committee was set to solve two problems. The *first* was to gather and rationalize social welfare legislation. The committee was tasked with dissecting the entire Norwegian legal corpus on social welfare in order to establish more rational and coherent social welfare legislation. The *second* was to provide plans for simplifying administration. This was particularly relevant for the legal codes on child relief/welfare and child protection.[190]

[189] Keilhau (1913): 447.
[190] Seip (1994): 151.

The Social Act Committee did not have sufficient time to finish a draft-proposal for amending the child protection system. As the Second World War broke out, their work was put to an effective halt. Their work was, however, impressive in other areas of social welfare and, as such, it was a success for the first committee established by the Labour-party.[191]

When Inge Debes argued for social welfare that primarily focused on children, advocating for both child welfare and child protection policies, he did not only refer to the LBFB, but also to the Statutes of Castberg.[192] He saw that the entire system of legislation that had developed concerning children was in need of being gathered into one legal code with one decision-making body and one administration. This decision-making body had to be the central node of the system and have the ability to work with the families to make sure that the problems could be solved within the families, as well as having the right to implement coercive measures. In this sense, Debes had argued the case of proactive child welfare in combination with coercion-based child protection in one and the same decision-making body.

As Castberg belonged to the political left, so did Debes. He was a social-democrat all through the 1920s and was also actively involved in the journal dubbed *Sosialt arbeid* (Social work). As Rune Slagstad argues, "Debes belonged to Castberg's legal-reformist tradition. Castberg and Debes signaled different stages in socialism's transformation to a social-ethically welfare ideology in harmony with the economic growth of society."[193] This illuminates also the general shift in the order of expectations. From the school asylum inquiry that initiated a wide-ranging criticism of the correctional system and the criminalist correctional ideology, to family-based pro-active child welfare.

4.1.4. The New Correctional Ideology: Protecting Children within the Family

The legal code of 1953 was referred to as *Lov om barnevern* (Child Welfare Act - BVL).[194] The LBFB had a name that did not signal that the child was to be protected; rather, it was the legal code established for the *treatment* of neglected children. Children were thought to be in need of a trustee that could lead the child back on right track. However, from now on, the correctional ideology was challenged, and the child was no longer to blame—raising a child had become a social problem in need of social solutions.

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[191] Seip (1994).
[192] Debes (1939): 2.
[193] Slagstad (2001): 244.
[194] The abbreviation is capitalized letters, BVL. The next legal code introduced in 1992 has the same name. However, its abbreviation is *bvl.* The Norwegian word *barnevern* does not translate to *child welfare* but rather to child protection. However, the legal code is translated as a child welfare act as a standard–I will use the standard.

The new legal code of 1953 was to establish a new decision-making body to replace the Trustee-board. It was dubbed *barnevernsnemnda* (The Child Welfare Board – BVN). In comparison to the former body of law, and its decision-making within the Trustee-board, the idea had now developed towards the child being in need of a healthy developmental environment.

Knut Sveri suggests that an important reason for this change in motives from correction to protection was a result of new discoveries in psychology, and especially the influence of Sigmund Freud's developmental psychology.[195] Sveri argued that, conforming to the influence from psychology, it had become apparent that children were vulnerable and dependent upon their parents for developing into decent persons.[196] The new system of child welfare would ensure that families raised their children in a decent fashion; thus, the goal was to both ensure the welfare of the child within the family and to protect the child through coercive means if needed. According to the report delivered by the Øksnes-committee, submitted in 1951, proactive measures were to be put into effect in order to avoid removing the child from the parents. According to the report, a mother, father and children developed in a symbiotic relationship that provided the children with important psychological ties to the parents. These ties should no longer be so easily cut through coercive measures. On the contrary, child welfare was from now on to implement non-coercive in-house measures as long as it did not threaten the child or the family to not coercively intervene.[197]

One of the most important contributions that led to legally entrenching the new focus was provided by the sixth attachment to the report of the Child Welfare Committee, given by the very influential *helsedirektør* (the Secretary of Health and Human Services) Karl Evang. To Evang, it was very important to maintain the state's responsibility for social hygiene, and which involved ensuring that children grew up in a decent manner.[198] He had, as Secretary of Health and Human Services, direct influence upon how the new legal code was to be shaped. He argued for the introduction of professional expertise to assist in curing the ills in child rearing, i.e. to assist families that were in need of assistance. In his view, the child protection

[195] A good account on the psychoanalytic discourse in the interwar period is given in Hagen (2001): 38ff
[196] Sveri (1957): 29. The incorporation of psychology and psychiatry into the treatment of children are described in Innst. I (1951): 42ff. It was incorporated as the BVL §6. §6 demand that any child that the BVN is to decide upon is to have an examination of professional personnel. §6 refers to §23, which states that a medical practitioner always should examine any child, but if it was a need, which it most often was, the medical practitioner had to refer the child to either a psychiatrist or psychologist.
[197] Innst. I (1951): 37-38.
[198] Slagstad (2001): 362-371.

system could become more systematically assisted by professionals. He especially emphasized three areas where "preventive psychiatric health-services" would be important:

> *"1: Education among parents, and for the schools also the teachers, about basic principles in mental-hygiene for the treatment and rearing of children, as well as how one should relate to ordinary occurring behavior problems.*
>
> *2: Correction of lighter behavioral problems of adjustment for the individual child, mainly by advice to parents and to the school.*
>
> *3: Examination, with a goal to ascertain graver psychological disturbances among the children, mentally disabled, grave behavioral disorders and neurotic conditions, for referrals to specialists"*[199]

The goal was to counter developments of what he referred to as "insufficiency-conditions" and create "*socially well adjusted persons, and hence useful, and happy citizens.*"[200]

The proposals signed by Evang, and which aimed at furnishing child protection law with the possibility for professionals to implement preventive measures to curb parental neglect in child rearing, received immediate attention. The reaction was the call for something to be done immediately to see that child law were designed with such potential—namely to introduce a proactive child welfare system and a child protection system at the same time.[201]

The explicit correction of abnormal behavior was no longer at centre. It had become acknowledged that it was not one way to correct a child into becoming moral, but that families would provide different, but decent care of the child. How children were brought up would from now on be allowed to vary among families, as opposed to the old LBFB-system.

4.2. The Child Welfare Act: The Effort to Change

The reports portraying shortcomings in the LBFB-system were many.[202] Some leaders of the Trustee-boards would, for instance, use their privilege to temporarily remove a child from the custody of the parents, and then attempt to convince the rest of the members of the Trustee-board that removal of the child was the only right course of action. Another, and even worse, practice was that the chairman would make a decision on a certain case, and then circulate the proposal by mail—effectively undermining the process of co-decision. Both of these practices were illegal, but the chairs of the Trustee-boards, and especially in rural areas, did not have enough knowledge or practice to actually understand the implications of such actions. In the Øksnes-report, these practices were not only commented upon as illegal, but also disgraceful.

[199] Karl Evang's answer to the Child Protection Committee in Innst. I (1951): 112.
[200] Innst. I (1951): 115.
[201] Innst. I (1951): 46.
[202] See Innst. I (1951).

The Child Protection Committee's mandate was very broad. Everything was set for a large revision of the system that the LBFB had established. The reform efforts were made by the Ministry of Social Affairs and not the Ministry of Church and Education, and can illustrate a shift in the treatment of children. They were mandated to answer three main problems:

1. Foster a greater unity within the administration of child protection.
2. Evaluate the need to produce one body of law dealing with relocated children.
3. Propose measures that the public can attempt to institute to care for children in need.

With such a mandate, the new legal order would also become very different compared to the old one. The new legal order was to apply professional competence to a much wider degree, and especially to inform decision-making. The new decision-making body was once again to receive public support, and especially because it had a primary focus upon non-coercive child welfare. The mandate provided the ability to replace the entire LBFB-system—to once again make the order of expectations be thoroughly embedded in the legal order.

The way to ensure that the new child welfare system was become worthy of trust, was to ensure that the decision-making body reflected the will of those living in each local community in combination with the relevant expertise in the field.[203] Knowledge of the specific family and professional knowledge would effectively cure the ills in child rearing through in-house measures. Allegedly, the standard of care that a family was supposed to provide was best known among those living in the same community as the child. This idea was, at the time, in great contrast to the practice of the Trustee-board, which was perceived of as a state-driven deterrent against bad behavior amongst children. Furthermore, the professionalism was no longer dominated by correction, but rather non-coercive socially based family-assistance. The new decision-making body was to provide democratic legitimacy in combination with professional expertise; and, the legal order would establish child welfare. Child protection, on the other hand, with its need to intervene coercively, would from now on only become used in the worst cases, but through the same decision-making body as the one implementing non-coercive measures.

The mandate provided to the Øksnes-committee could ensure the establishment of a system incorporating new currents of professional knowledge in child protection, in particular

[203] Ot.prp.nr.56 (1952).

with respect to a child's psychological development and behavior.[204] The subsequent legal proposition suggested that the new decision-making board, rather than being populated by professionals, was to be populated by laymen who sought professional guidance in attempting to avoid the need for coercive measures and also reach decisions that incorporated best available knowledge.

Safeguarding democratic legitimacy was held to be imperative for decisions involving coercion. Only by ensuring democratic legitimacy would decisions receive acceptance. Each municipality became authorized to make sure that children received the necessary level welfare it needed to develop in that particular municipality. Thus, for the board to be perceived as representative, the decision-making itself had to be representative for the local population. In 1967, the local representatives within the BVN were predominantly housewives, followed by teachers.[205] These were predominantly women, and it was firmly believed that housewives carried knowledge regarding the needs of children, and knew how to deal with difficult cases of child rearing.

4.3. Greater Unity in Law

The mandate Øksnes received provided the potential of uniting all types of legislation involving children into one legal code. The LBFB focused only on coercive measures. However, there were many other different legal codes that affected children, such as the Statutes of Castberg. The unification within law affecting children also led to the establishment of the new local BVN. This board would effectively take over the work of the Trustee-board. Every municipality in Norway was to have one, and it consisted of five members appointed by *kommunestyret* (the Municipal council) for a period of four years.[206]

The different arrangements that dealt with children were located in five different legal codes prior to the reform of 1953. This broad spectrum made it hard to build any coherent and legally just system within child welfare and child protection. The *first* and the most important one was the LBFB that included the design of the Trustee-board. The *second* was *Lov om offentlig forsorg* (Public Poor-relief Act) of May 19th 1900. It dealt with children that could not be supported by their parents but who were still not relocated by the Trustee-boards. The Poor-Relief Commission was not authorized to implement coercive measures. The *third* was *Lov om tilsyn av pleiebarn* (the Oversight of Foster Children Act) of April 29th 1905, which

[204] Ot.prp.nr.56 (1952): 3.
[205] Benneche (1974).
[206] BVL §1.

dealt with the oversight of relocated children. The *fourth* legal code was *Lov om forsorg for barn* (Poor-relief Act for Children) of April 10th 1915 with similar provisions for oversight as the previous. The *fifth* and last legal code was a recent amendment to the two former childcare provisions of August 22nd 1947, that relied upon the public to control and approve private institutions were children were kept. With the reform, the LBFB and parts of the Poor-relief Act were abolished (the board of public health lost some provisions regarding foster-children as well) and the decision-making was centralized under the BVN. Ot.prp.nr.56 (1952) made it clear that gathering all the legal codes affecting children into one was of highest priority. Hence, it established *one* institution to replace all the others. The BVN became the highest-ranking unit in charge of all cases in child welfare and child protection within the local municipal administration.

The composition of *barnevernsnemnda* (the Child Welfare Board – BVN) caused a stir in parliament when the bill was put forth. The minority supported the logic behind the Trustee-board, although agreed that the Trustee-boards could not continue on the same track. They advocated for permanent members, such as the priest, the medical practitioner, an educational specialist, the representative from the system of poor relief etc. to become members of the board. However, the left-wing in parliament, and especially the Labour-party, had not only a majority government, but also a huge grasp on the public, and it went their way. Hence, the second design of decision-making board could reflect a pure Labour-party ideology. They argued the case that the board was to represent the public, so that that the governed were given the chance to govern.[207] The central node of the BVL was to have a decision-making body that was to reflect the general, albeit local, democratic point of view. This popular appointed board would reflect local self-government regarding child rearing.

The point of departure for the new BVL was that the parents was to be responsible for child rearing, and if they were inadequate, they were to be empowered to manage the care situation.[208] Children were no longer seen as accountable for themselves, as individual agents that had to be corrected and reintegrated by the state if it was deemed as necessary. Children were the responsibility of the parents, and of the family, and hence the child belonged therein. A child was not capable of functioning alone—it was in need of a healthy family. Child protection thus focused on non-coercive child welfare, and determined to conserve the family

[207] Slagstad (2001): 421ff.
[208] NOU 2000:12.

as the most important safeguard for any child's needs. If the family functioned correctly, the child would be happy and become a well-adjusted adult. This, at least, was the idea.

4.4. The Organization of Authorized Coercion: The Child Welfare Board (BVN)

The body of law of 1953 was a result of Ot.prp.nr.56 (1952) and the subsequent parliamentary debates. It included, just as LBFB did previously, a design of a new decision-making body that would stand as a central node in the work on child protection but now also child welfare.

Each municipality was set up with one BVN (BVL §1) consisting of five members, both women and men, with particular knowledge and interests relevant for child rearing and child protection (§2 – first sentence). The Municipal Council appointed the members and the chairman for a four-year period. The board, if the chairman attended and whose vote counted as two (§4), could make decisions with only three members. In cases involving coercion, the vote needed a qualified majority on four members to support the decision (§4 – first sentence). However, if the case at hand was in need of implementing coercive measures, the decision-making body had to convene with the local judge (§5). According to §6, it was demanded that a comprehensive investigation into each case was the responsibility of the chairman of the board. Professional expertise was to be called upon whenever it was needed in order to ensure that each decision became informed and based upon best available knowledge. The Ministry of Social Affairs was to provide instructions with regard to practice of calling upon professional knowledge.

BVL §8 stated that the child´s parents could present their case to the board. However, their lack of understanding for such a process prevented them from effectively presenting their cases and mount proper defense. In fact, the lack of a coherent way of arguing in cases established an unsteady process, and equal treatment would be hard to accomplish. Furthermore, §10 argued that the board itself was to make sure that the measures decided upon actually were carried out. If a case needed it, the leader of the board could temporarily take over the care of a child (§11), whereby the board had to convene as fast as possible.

The board was to engage with coercive means in all cases were they deemed it appropriate (§16). They could intervene if the child was badly treated or were raised in unacceptable conditions that set the child´s health at risk (both physical and psychological), or that its development in itself was at risk. Such interventions called for evaluations regarding the treatment of the child (§6 – first sentence). The board could also intervene if the child did not receive the proper treatment due to inadequate care provided by the parents.

BVL's §17 emphasized the democratic aspect of BVN's design. It stated that every public official had to report to the BVN if they encountered anything suspicious that would be of interest to the board (§12). The board had the potential of drawing upon a huge network of public officials, as it had the assistance of every public official working with children. The second paragraph of §17 argued that the decision-making should be guided by a so-called child´s best principle.[209] However, it also argued in the same paragraph that it could be better for other children if a troublesome child was removed from the family. This stressed the fact that the unity of the family was very central, and could trump the child's best. It meant that it was better for difficult children to be removed from families if the family itself was threatened. This marks a clear focus upon the family, and that the family itself was to be protected.

The board was set with the task to always react whenever someone had reported alleged failed care. The board was set to investigate by deploying social curators. These services were also to work as assistance to get parents and children back on track as a part of the new proactive child welfare-system. New measures had the aim of saving the family as an entity first, and the child second. The idea of exhausting every possible means of in-house measures before intervening coercively became the manner in which pro-active measures were developed. The LBFB did not have pro-active measures in any equivalent manner.

The emphasis on keeping the child in the custody of the parents by empowering the parents to become capable of providing care can be argued is the introduction of the principle of biological presumption. This principle is fundamental for a system of child welfare (as opposed to child protection).[210] It implies that parents in need were to receive in-house measures that would make them capable of caring appropriately for their child, and hence empowering them to keep the child in their custody. If that did not work, the state would seek to solve the problem of child-rearing by intervening coercively.

The in-house measures were not based on any systematic body of knowledge when the legal code came into effect. Any professionalization within child protection and child welfare were absent.[211] This meant that in-house measures were guided by the common-sense of those

[209] The principle of the child's best (in mind) is not to be confused with the more modern version that stipulates the child's best interest as a guiding principle. The latter is situated in the United Nations Convention on the Rights of the Child.
[210] For an elaboration and discussion of the biological presumption, see Skivenes 2003.
[211] This was even the case when the discourse on child protection and professionalism entered the 1990s – see Eriksen & Skivenes (1997).

working within the child welfare system. This, combined with the fact that the BVN were democratically constituted, left the entire new system of child protection at the hands of locals. Even though professionals were involved in the decision-making in its preparatory stages, they did not make the decisions.

4.5. The Order of expectations: Local Protection of Families

In contrast to the new legally entrenched order of expectations stood the former one of 1896. The LBFB had the correctional ideology with the Trustee-boards as its core engine. Its goal was to correct children to become "normal" or "moral". The Trustee-board intervened only when the corruption was deemed incessant – not before. It intervened to fix the consequences of failed care, and not becoming interventionist and prevent failed care from occurring.

The decision-making body set in charge of child-protection cases changed in 1953 to the BVN. It changed from what was viewed as a fixed board of trustees to become a purely democratic local board. The principle of subsidiarity was further extended—the type of decision-making that was worthy of trust was reached by persons in proximity to the problem. The process moved from decision-making bodies that strived to ensure the legal security of children by enforcing "morality" and "normality" equally across Norway, to a decision-making body that reached decisions according to what reasonable people would want to do in cases of inappropriate childcare. Any formal guidelines were omitted, no principles or rules of procedure on how to reach decisions. It had become important that each member was a layman that could perform decision-making that reflected the local solution to the local problem. The new legal code was devised to promote the harmonious nuclear family as a core value and as inherently good for each child to grow up in. In short, the order of expectations reflected in the LBFB had changed dramatically. The type of child protection that was deemed worthy of trust in 1953, viz. local family protection, was something completely different than the 1896 and its focus upon defending "normality" and "morality."

The lack of trust in the child protection system was to be repaired by removing the state driven supervision of the Trustee-board, and replace it with municipal decision-making. The Trustee-board had an inherent "coercive and condemning nature."[212] By way of promoting a proactive child welfare system, in addition to the coercive nature of child protection, Rakel Seweriin, a member of the Child Protection Committee in charge of delivering the initial draft proposal in 1951, argued that the new system would be "an

[212] Nissen (1917).

advisory and helping authority that everyone naturally would approach."[213] It was emphasized that the proactive child welfare system was to support the home environment and nuclear family, so that each child would grow up with the love and care of the parents. Coercion, it was argued, should only be used when the child's health and development or the family was in evident danger. The emphasis on "morality", that the LBFB had strived for, was no longer explicitly a part of the law.

From now on, local variations were cultivated by leaving it to the community in question to find answers to what type of measures should be implemented. Each municipality would decide in a manner that was appropriate for the specific municipality. This also implies that decision-making did not correspond necessarily to what other communities in Norway would do. The entire system of a pro-active child welfare established a preventive-therapeutic ideology, that would, albeit in a different manner to that of the LBFB, strive for defending what was now thought to be worthy of trust—namely the well-being of the nuclear family. It involved the defense of the family organization for the sake of a healthy local community. The time had come to implement a popular-democratic decision-making form that would draw upon the people's desire to govern themselves and how they saw fit.[214] The idea of a democratic design would entail a relationship between those governing to be on an equal level with the governed.

Here, we can see that the order of expectations clearly had changed, and that especially two basic expectations had developed to dominate. The first basic expectation was that the decision-making had to abide by a principle of democracy and subsidiarity to become worthy of trust. The second basic expectation dominant to the order of expectations was the new insights from developmental psychology that stressed the importance of the family. Decision-making worthy of trust had to respect the family-institution as the basic building-block of any community.

One main problem of the LBFB and the Trustee-board was its lack of local know-how regarding the situations of the families it affected, i.e. the lack of investigation. Moreover, the decision-making within the Trustee-board had an excruciating effect upon local communities.[215] The time had come to implement decisions that did not need coercion, but would assist proactively the families in need—investigation was demanded to qualify

[213] Innst. I (1951).
[214] See Slagstad (2001): 421.
[215] Sveri 1957.

practice. If the public could assist the family, e.g. financially, to ensure that a child remained at home, the BVN was supposed to support it. From now on, the time had come to focus on the implementation of non-coercive in-house measures that could rescue the families so that the children did not need to be removed from the custody of the parents and from the community. Hence, it can be argued that the shifts in the order of expectations, and with the increased focus upon the family, ensured that a proactive child welfare service became established.

The best way of making sure that families would cope was to let the locals decide for themselves how to ensure that children grew up with their families—it was "in accordance with the democratic attitude in the people."[216] This line of argument pervaded the new reform of child welfare, a reform that through the democratic motivation became somewhat in opposition to the LBFB and the spirit of Bernhard Getz. In Getz' first draft proposal to the LBFB in 1892 (which did not become a part of the LBFB), he underlined that it had to be the central state authority that intruded locally into the lives of the families. Local representatives, he argued, would constitute a grave threat to the legal protection of both the child and the parents. Furthermore, Getz argued that the board was in need of expertise that would safeguard both the legal protection of the family and the child and who also carried an understanding of best practice. The Trustee-board that he advocated for had only a partial representation of locals.[217] Francis Hagerup furthermore stressed in the meeting of October 20th 1892 in the Norwegian Criminalist Association that...

> *"This legal code introduces, as we will see, the authority of the state and its agencies, to simply deprive parents of their children, not only when they have committed criminal acts, but merely in every case where the conditions in the home does not provide a guarantee for a moral upbringing."*[218]

This way of thinking, represented by both Getz, who was arguably the architect of LBFB of 1896, and Hagerup, who was the Prime Minister that pushed the legislation through parliament in 1896, was highly influential upon the order of expectations at the time. This line of reasoning, however, received massive opposition in due time, and the BVL clearly opposed the idea of a centralized state-authority and the court-like design of the Trustee-board. From the point of view of the BVL of 1953, dissolving families should be avoided whenever possible. The way to achieve this aim was to introduce democratic decision-making and a

[216] Innst. I (1951).
[217] Getz (1892): 25.
[218] Hagerup (1893a): 113.

proactive child welfare system that would know what to do. Hence, a shift in the order of expectations occurred in the time between two very different legal orders.

Children were, by the 1920s and onwards, increasingly referred to in a manner that reflected a need to provide correct care rather than correctional education. The child in need was increasingly perceived as being in need of a harmonious and a natural environment such as the family, and that different measures could ensure that a child received it. What was best for a child in general was to grow up in a natural family environment together with its parents and siblings.[219] The introduction of in-house therapeutic measures of different kinds to correct the child within the family challenged the former view of segregating parents and child.[220]

Each person was to be seen as embedded in the social practices and relationships locally. The new legal order had to focus on, and reflect harmonious local bonds as a part of each child's upbringing. If there were no hope in ensuring that a child could grow up in healthy and natural circumstances, it had to be removed through coercion. In this respect, the new BVN could draw upon the same authority as the Trustee-board, but for a different purpose. If, however, the child was to be removed due to problems caused by the parents, then a more significant effort would be made by the Trustee-board to relocate the child to different private foster families instead of public homes:

> *"...a child that grows up in a good, private home receives a far more natural childhood environment than what can be expected from an institution. If it is a choice between a good foster-home that is fitting for the respective child, and a home for children, then the choice should be the foster home."*[221]

Although the legal code of 1953 was the introduction of a new decision-making design, there were not that many local changes with respect to who sat in each BVN. The Municipal Council simply appointed members that had been working within the previous Trustee-board. Moreover, although the legislative history and the new legal order both argued that coercion should be limited to an absolute minimum, the Child Statistics illuminate that coercive measures remained unchanged by the BVL, all until the end of the 1970s.[222] Statistical data reveal a child protection and child welfare organization that did not achieve any differences in the life quality and outcomes of the affected children. Did this mean that the BVL had failed on departure? The next chapter will discuss it.

[219] Innst. O. XVII (1953): 37.
[220] Ludvigsen & Seip (2009): 7ff.
[221] Innst. I (1951).
[222] Benneche (1986): 24.

5. 1992: Expecting Right's-based and Post-National Protection

Barnevernloven (Child Welfare Act – *bvl*) was passed by parliament in 1992. It is the third and it is the current legal order regulating and mandates the use of authorized coercion to protect children. At present, state officials intervene coercively in the daily lives of private families in a different manner, compared to earlier.[223] The new legal code constituted in many respects an opposition towards the former legal order of the BVL. Hence, the new legal order, is a reaction to the two former legal orders, and can thus reflect a result of developments in the order of expectations.

This chapter will differ from the previous two in that it will explain the order of expectations at two different points in time. The first is when the new legal order became established in 1992, and the other is in the aftermath of the largest reform of the design of decision-making involving coercion of 2008. When the new legal order became established, it reflected what will be referred to as rights-based because the individuality of the child had now become the object of protection—it was no longer a family-focus as in the former BVL.[224] The development in the order of expectations from 1992 towards 2008 will show that trustworthy use of coercion in child protection, involving basic expectations such as the child's best interest and non-discrimination, shifted to also become post-national as well as rights-based.

5.1. The Path towards Reform

One of the main reasons for reforming the LBFB in 1953 was to reduce the number of cases that involved coercively removing children from their families. They established a democratic

[223] It is worth stressing again that I operate with a distinction between child welfare and child protection, where the latter includes coercion to protect the child and the former is a pro-active family-centered child welfare. The new legal code of 1992 separates clearly the different decision-making bodies dealing with child protection and child welfare.

[224] Hence, the use of rights alludes to constitutional liberalism, and thus the protection of the autonomy of the child against illegitimate infringements. I will return in detail to what is meant by rights-based in the next chapter. It is not a matter of formal legal rights.

decision-making body to replace the Trustee-board. The latter had become labeled a police-authority. The Trustee-board implemented *only* coercive means. The Child Welfare Board (BVN) of 1953 aimed at raising the conditions of care within the family and make it bearable for the child to remain, viz. it introduced in-house measures as a part of decision-making. Coercion, it was argued, was to be last resort, and only implemented when all other efforts were futile. Hence, parents were to be assisted as far as possible, which made the slogan "parent protection" more accurate of most decision-making rather than child protection.

The primary task of the BVN was, according to the authors of the legal code of 1953, to "inform the child's parents regarding what could be done" to solve the issue at hand.[225] The entire legal reform was directed at changing the way in which child protection functioned with the intention of making coercion an exception rather than the rule. Saving the families was the new object of concern. "The entire system is founded upon that relocating children [through coercion] is the last resort, and should only be applied if no other measures are adequate."[226] Children were saved, it was argued, by saving the families.

Contrary to the intentions behind the reform of 1953, namely to reduce the number of cases involving coercion by use of in-house measures, decision-making involving coercion increased. The idea had been to reform the system of child protection entirely and make it on par with the modern demands, which did not involve a correctional ideology. The lack of trust towards child protection was to be repaired by implementing a democratic approach that focused on the family. Within the know-how of the local community was the alleged medicine for detrimental care of children. The needs of a child were seen as a social problem with social solutions.

In 1952, there were 2238 decisions made to coercively intervene. In 1954, when the new legal code had settled, and the BVNs around Norway had begun to work, the decisions to apply coercive measures in response to a child's situation reached 4159.[227] Although the Trustee-boards decided to implement around 3400 coercive measures yearly in the period from 1920 to 1939, which is a number closer to the year of 1954, the intention to reduce decision-making involving coercion had failed for the BVL. Hence, it can be argued that the legal order of 1953 had a high amount of tension to the order of expectations just after its introduction. This failure of the legal order to comply with the order of expectations, i.e.

[225] Innst. I (1951): 35.
[226] Ot.prp.nr.56 (1952): 8.
[227] SSB (1978): 594.

family protection, is one of the reasons for taking criticism towards the legal order of 1953 less lightly. The number of cases that involved coercion grew after 1953, and problems with the institutional design of the new decision-making body made new reform all the more pertinent. However, 40 years would go by until it happened.

There were predominantly two main problems that drove the reform of 1992 forth. *First*, it was especially the lack of legal protection of the child and focus upon the individuality of the child and the interests of families and *second*, and relating to the first, the decision-making body was often perceived as being discriminatory. It has been argued that these shortcomings came about as a consequence of the poor design of the BVN in 1953.

The most important report that informed the legislation of 1992 regarding coercive decision-making, which was a Green Paper submitted in 1985, holds this criticism to be common throughout the reform-period that started in 1969. The consequence of these two shortcomings led to the following argument:

> *"It is therefore a common opinion that decision-making in these cases should be placed in a court of law or another independent decision-making body, and that the form of procedure is designed in a manner where all affected interests are comprehensively illuminated."*[228]

This argument is in contrast to the core reason for reforms behind the BVL of 1953, and its emphasis on having a democratic decision-making body; only then would anyone know what was wrong in families and what to do about it. In NOU 1985:18, it is stated that it had become "a common opinion" that decisions should not be made by a decision-making body such as the BVN, because it could hardly be referred to as independent and professional. Instead, the very point of establishing the BVN was that it was a community-rooted decision-making body and consequently not independent nor professional. Hence, we can observe a development in the order of expectations, and that what is found worthy of trust has shifted.

One of the greatest critics of the BVN and the child protection system established by the BVL was Gerd Benneche. She argued that that the legal protection of both the child and the parents, offered by the BVL, was inadequate, and more importantly, that the slim amount of legal protection it did provide was seldom effectuated and upheld.[229] Benneche concluded that it was a need to reform the democratically appointed BVN into a court-like procedure with professional expertise.

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[228] NOU 1985:18: 27.

[229] See e.g. last chapter in Benneche (1967). Benneche's analysis and critique of the BVL, given in Benneche's book "*Barnevernet i Norge"* (1986) was explicitly quoted in the NOU 1985:18 as a credible critique (p.292).

According to Benneche, child protection was no longer an area left open for people who were only democratically qualified simply by their good intentions—this could not guarantee the legal protection of the private and family life. To Benneche, it was a need to professionalize the area of child protection, and also to have stricter criteria for how people became appointed.[230] She highlighted the arbitrariness pervading the BVN due to the manner in which appointments were made to it. The procedure of appointment could establish very different decision-making bodies across municipalities.

Benneche argued that an amendment to the BVN in 1967 made the arbitrary imprint in the design even more problematic. The cases perceived as more of a general social problem, involving other areas than mere child protection and child welfare, had become the responsibility of a new decision-making body dubbed *Sosialstyret* (Social Committee).[231] The Social Committee was still appointed by the Municipality Council. However, within the Social Committee, it was not a demand towards the appointment that you had any knowledge regarding children in particular. However, decision-making regarding coercion was not transferred to the Social Committee, but whenever a problem arose that could be deemed as a social issue the case was to be handled by the Social Committee and not the BVN.[232] In many cases involving protection of a child, and that was not in need of coercion, the decisions were made by unsuitably qualified individuals. To Benneche, this was an amendment that pushed decision-making within state protection of children further into the hands of unqualified personnel, and it removed the legal protection of children.[233]

Arguably, to Benneche, the lack of professionalism had become the main argument against the BVN. Moreover, the well-intended reform of 1953 had led to gross violations of the legal protection of children. It had become apparent that the intention of the law of 1953 was in strong contrast to how it actually worked.[234] According to Benneche, the Trustee-board of 1896 had better legal protection than the BVN because its decisions was not as arbitrary.

Nils Christie argued that the two-folded task of the BVN, to both implement "therapeutic" in-house measures as well as coerce in cases in need thereof, was the single biggest obstacle for acquiring the necessary trustworthiness that authorized coercion should

[230] Benneche (1967): 283.
[231] BVL §12-A, 1. The amendment to the BVL came as a consequence of an amendment of *Lov om sosial omsorg* (Act of Social Affairs) in 1964, effectuated from January 1965.
[232] BVN §12-A-1.
[233] Benneche (1967): 82.
[234] Benneche (1967): 269.

have.[235] He suggested that the BVN should only be focusing on the "therapeutic" measures, or in-house measures and voluntary placements of children, whilst removing its ability to implement coercive measures. By doing so, it would make the child perceive the BVN as a "helper." Only by relieving them of "all rights to apply coercion," would they be able to "provide a maximum of variety in offering help."[236] He furthermore argued that coercion should be applied by another decision-making body. It was imperative that the encounter with the BVN should not be perceived as a punishment.

According to Benneche, it was not just cases were it was a need to coerce that was negatively affected. It was, at a basic level, too much arbitrary decision-making—even in areas that did not include coercion. The BVN had a design that made it possible to implement different decisions in almost equal cases, hence breaching the legal demand towards equal treatment. She argued that, "children subjected to the BVL are also subjected to the Law of Chance."[237]

5.1.1. The Point of Departure – Social Reform Committee and Non-Discrimination

Although there are many documents that constitute the legislative process that led to the reform of 1992, the Green Paper mentioned above, NOU 1985:18, stand out as the central one. It includes the discussions necessary for understanding coercive interventions to protect children pf the *bvl* from 1992. However, this Green Paper was not written in a vacuum, but should rather be seen as a result of decades of child protection discourse. The shortcomings of the legislation of 1953 were all too apparent within the legal-political discourse on child protection. There were predominantly two camps that disagreed—one that argued for a decision-making body outside the regular civil courts, and the other that supported the idea for the civil court to make decisions that involved coercion. Although they disagreed, they were both united in the effort to ensure that children were not discriminated against.

The mandate that laid the ground for NOU 1985:18 was given in 1980 and was, in many respects similar to the mandate given *Sosialreformkomiteen* (Social Reform Committee) of 1969. The work that started in 1969 initiated a decade of debate. In the mandate to the committee that wrote the NOU 1985:18 in September 26th 1980, it was clearly stated that the suggestions for reform that they should provide, should be constructed upon the foundation of

[235] Christie (1961).
[236] Ot.prp.nr.31 (1977-78): 94-96.
[237] Beer (2009): 202.

the work of the Social Reform Committee.[238] It can, therefore, be claimed, at least in retrospect, that the discontent with the BVL of 1953 had peaked already in the late 60s.

It is also important to stress that the reaction in 1969 was a result of a longer academic and media-driven critique of the legal organization of child protection from 1953.[239] Both Gerd Benneche and Niels Christie, mentioned above, can serve as examples of antagonists in the critique of the BVL. The work of the Social Reform Committee was initiated in 1969 and was the first major attempt to address shortcomings of the BVL. Their work lasted until June 29th 1972 with a concluding Green Paper, NOU 1972:30—*Sosiale tjenester* (Social Services).

The Social Reform Committee was mandated to evaluate the entire public system of social assistance and benefits. Its main goal, proclaimed in the mandate of 1969, was to arrive at a legal proposal that would be a rationalized, coordinated and effective public distribution of social assistance and benefits by building an adequate organizational response to social affairs.[240] The backdrop for the mandate was that social services were spread across many different arenas, in many different legal codes, different offices, and enforced by differently qualified personnel. The system was confusing and had shortcomings for the client-groups it was supposed to serve. The BVL was considered as part of this system, and hence fell victim to the same criticism. It too did not serve the intention that it was designed to fulfill.

The critique had culminated in an effort to change the totality of the system, and reach the goal on designing institutions that would deliver social services and welfare benefits according to their intent, namely without any discrimination in how public assistance were distributed and received across all the municipalities in Norway.[241] At the time, there were variations between the municipalities in terms of financing social services, which also included the financing of child protection, and with significant discrepancies. The system was completely inadequate with respect to legal protection and thus non-discrimination, and had the unfortunate consequence that some municipalities could protect children better than others.[242]

Because child protection was a part of this criticism, a new decision-making design had to correct shortcomings. This would mean that it too had to treat its client-group—the

[238] See Ot.prp.nr.29 (1990-1991): 10 for an account of the mandate given.
[239] It actually figure as a reason for reforming the child protection system in the mandate. NOU 1972:30: 7.
[240] NOU 1972:30.
[241] See NOU 1972:30: 9.
[242] Innst. I (1970): 7.

parents and the children—in a manner that did not discriminate across all municipalities. This is in opposition to the normative principles embedded the BVL, namely purposefully letting child protection vary across Norway according to a principle of democratic subsidiarity. Within this line of criticism, it can be argued that the principle of non-discrimination was acknowledged in parliament in 1971, "The ministry sees it as an important task to implement measures that ensures equal treatment in social care and assistance in all of the municipalities across the state, and agrees that this cannot be solved without a reform."[243] Equality of treatment, legal equality or non-discrimination as I will refer to it, had become in opposition to the legal order of the BVL.[244] This illuminates a development in the order of expectations, namely that trustworthy child protection now had to comply with the basic expectation of non-discrimination.

With the work of the committee of 1969 it had become evident that equality of welfare, and hence protection of children according to a principle of non-discrimination, was dependent upon a universal welfare state.[245] To avoid discrimination between each case, coercion had to be implemented with a minimum of elements that could cause unequal treatment of equal cases. This demand would evidently lead to a stricter legal design of decision-making, one that had to be uniform across Norway, and not open for local variations. The BVN was a democratically constituted board consisting of people living within the municipality, and who were conveniently interested in child protection. This board was also not subjected to a any great amount of rules of procedure. The lack of specifications on how the BVN conducted its decision-making, and also who conducted it, was a threat to non-discrimination. It can thus be concluded that in the late 60s, the priority of principles was reversed, and thus also what to expect, whereby non-discrimination, or equality of treatment, taking precedence over the principle of democratic representation.

The central feature of the Green Paper that was delivered by the committee convened in 1969 was most notably that authorized coercion was recommended to be handled only by the courts. It considered courts as the entity that ensured the best legal protection possible, and hence could ensure non-discrimination. Second, it also suggested an opportunity to appeal

[243] Zwarenstein, Goldman, & Reeves (2009).
[244] Non-discrimination is one of two basic expectations within the current order of expectations, and is also embedded in the legal order of *bvl.* This will be discussed in depth in part III.
[245] Seip (1994): 241.

cases involving authorized coercion.[246] This suggestion stands in clear opposition to the democratic design of the decision-making body of 1953.

Decision-making by the courts would, according to the committee, re-establish trust in child protection.[247] However, even Bernard Getz had argued, in 1892, that the courts were unfit for the type of case-work that child protection would involve. His arguments were becoming only more valid, since it stipulated that the type of case-work was too normatively complex for the courts to handle.[248] However, ignoring this argument, the committee laid weight on the dilemma that the BVN was both an institution that provided services for their client *and* was supposed to coerce, and suggested that a bill should be passed to remove coercive decision-making from the BVN.[249]

The Green Paper of the Social Reform Committee suggested a child protection system that would dispose of the democratic component for decision-making design altogether. No democratically elected board was to be involved in coercive interventions in any capacity. According to the Green Paper, the responsible way to do it was to transfer this type of decision-making to a professionalized system of Social Centers that dealt with case-work and to the courts for reaching decisions. The goal was to have equally qualified personnel providing equal treatment all over Norway.[250] Hence, the report responded to the criticism that the BVN was in need of a higher level of professionalism when preparing cases and reaching decisions.[251] The goal was to establish a decision-making process that was less arbitrary. Another element regarding professional decision-making was the need to avoid prejudiced decisions where members of the board had some type of local relation to the parents being scrutinized. The client-work was from now on to become a professional work-jurisdiction.[252]

However, the suggestions for reform never passed parliament. A *Stortingsmelding* (White Paper) presented in June 1975 by Brattli's Labour-government, did not agree to the suggestions made by the Social Reform Committee.[253] Labour could never approve the

[246] NOU 1972:30: 69-71.
[247] NOU 1972:30.
[248] Getz (1892).
[249] These suggestions are in line with what Nils Christie had argued for. See above.
[250] See also Seip (1994): 241.
[251] These suggestions are in line with what Gerd Benneche had argued for. See above.
[252] NOU 1972:30: 66.
[253] The Royal Decree that appointed the Social Reform Committee was given by the government of Per Borten. It was a coalition of centre-right parties and therefore in opposition to the Labour-party. Odd With, who was the chairman of the Social Reform Committee, was a high profiled politician from the *Kristelig folkeparti* (Christian

transfer of the authorized coercion within child protection to the courts, as suggested by the earlier Green paper.[254] For Labour, it was important to accommodate the criticism, but at the same time not reform the system completely. The BVL was after all forged according to a social-democratic Labour-ideology. The White Paper focused upon strengthening the social services within each municipality; however, since the Social Reform Committee's Green Paper was so clear that the very source of the weaknesses in child protection was the BVN, Labour had to answer some of the criticism by reform.

To this end, the Brattli government put forth the idea that authorized coercion in child protection should be elevated to a regional level, between the state and the municipality. It would constitute a political compromise. Furthermore, it was supposed to be an administrative decision-making body, rather than a court. Their insistence on not having a court reflects the same argument applied when implementing the reform in 1953. A court of law, it was argued, would send wrong signals with regard to the type of decision-making that was supposed to take place, and non-discrimination could be ensured in other ways. It would only re-establish a type of decision-making that the LBFB represented the last decades prior to 1953—something equivalent to a police-organization. Only the Labour-party went against using the court as a decision-making body in child protection cases. The non-socialist parties in parliament, as well as *Sosialistisk venstreparti* (Socialist Left), preferred having decision-making involving coercion done by the courts. In sum, the need for change was motivated by a political consensus on ensuring non-discrimination. The problem with discrimination and thereby lack of legal protection for children was acknowledged across all the different party-platforms. At this point, it had become acknowledge that trustworthy child protection had to involve a decision-making body that did not discrimination.

In addition to agreeing to the need for more professionalism, the Labour-government now argued that the leader of the regional decision-making body that would be in charge of decision-making ought to have competence as a judge. The decision-making would furthermore be subordinated to a regional Social Committee. By raising the decision-making body onto a regional level, it would receive all the cases in need of coercion from all of the municipalities within that region. This would concentrate decision-making on a narrow area

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Democratic Party), and would possibly be suspected for partisan advice. This might explain why the Labour-government did not follow the advice given by the committee. The fact that The Labour Party also was responsible for the BVL of 1953, and hence had to save face by not instigating massive reforms, and hence admitting their passed mistakes, can also be seen as contributing.

[254] St.meld.nr.9 (1975-76).

of competence, and thus achieve a higher degree of formal equality of treatment, i.e. non-discrimination. It was also argued that the decision-making body, i.e. those who were members of it, would become increasingly professional by focusing on a narrow case-type and hence be more aware of appropriate procedures. It was argued that this would enhance the legal protection of its client-group.

Ministry of Social Affairs, that prepared the legal proposal for designing the FBSS, argued that they could not understand that the problems with the BVL of 1953 were solved by transferring it to the courts as the Social Reform Committee had suggested. Even *Justisdepartementet* (Ministry of Justice) and *Den norske dommerforening* (The Norwegian Union of Justices) agreed to this conclusion.[255] Furthermore, new problems emerged, as the court was argued to not have competence to deal with matters of child protection, and could not make decisions in any professional manner and provide good enough reasons for the decisions that were being made.

In fact, the arguments presented by the Ministry of Social Affairs were very similar to the assessment by Berhard Getz regarding the design of a decision-making body presented in 1892, namely that it should include a democratic as well as a professional component, and situated neither too centrally nor too locally. It seems, at first, that a renewal of this old arguments emerged. This is only partly true. The main difference was the development of a more solid competence-base for child welfare and child protection in the 70s.[256]

During the 1890s, the legislation was informed by positivist criminology, rather than by knowledge on child welfare (this knowledge-base was practically non-existent at the time). In the 1970s, the child welfare movement had grown in Norway—and had the child itself more at the centre. Although knowledge on child welfare and child protection was fragmented and spread, it had become accepted as a more credible area of competence.[257] This meant that politicians now could provide a mandate to populate the child protection organization with a certain type of personnel equipped with certain type of knowledge.[258] It could be argued that this sparked an incentive to initiate a more systematic professionalization within child protection (and child welfare). Indirectly, only by subjecting the case-work of child protection

[255] Ot.prp.nr.29 (1990-1991): 130.
[256] This was a part of the initial criticism towards the LBFB. The only child protection that was possible was the one that involved coercive measures. The nation-states that Getz had compared Norway to had a widespread and active debate on child welfare, and could develop an institution like the Trustee-board on top of it – Norway only developed the top with no bottom.
[257] See St.meld.nr.9 (1975-76): 85-86.
[258] See St.meld.nr.9 (1975-76): 109-110.

and child welfare to a coherent body of knowledge that was generally applied, could parents and children receive non-discriminatory treatment.

5.1.2. Social Act Committee – the Reform

The Green Paper that led directly to the reform of the BVL to the new *bvl*, was submitted in 1985 and written by *Sosiallovutvalget* (Social Act Committee).[259] The committee was appointed by the Labour-minority government of Oddvar Nordli on September 26th 1980. The Social Act Committee was mandated to carry out a critical review regarding the totality of statutory law that could be referred to as social services within the welfare state system. The purpose of this committee was to chisel out one unified body of law for social welfare that included all the former legal codes in one single package. Child protection, with authorized coercion of children, was considered to be a part of social services. The goal was to write *sosialtjenesteloven* (Social Services Act), a body of law that would "promote economic and social security," "improve the living conditions for those in difficulties," which would "prevent social problems."[260]

The Green Paper contains the initial reasons and reasoning for why the FBSS ended up with its particular design. The purpose and goal of the Green Paper was to reform the whole legal corpus of social services and establish one legal code. Although this effort failed with respect to child protection, which would not become a part of the Social Service Act, the design of the decision-making body involving coercion would. Hence, when it comes to the FBSS, the justification of design is predominantly located within this specific Green Paper.[261] The Green Paper helped shape a proposition that was presented to parliament in late March 1989 by Gro H. Brundtland's *Arbeiderpartiregjering* (Labour-government). This proposition was a direct result of the combination of advice provided by the Green Paper NOU 1985:18, consultative statements to this report, and the final draft-proposal made by *Sosialdepartementet* (Ministry of Social Affairs).[262] However, Brundtland's government fell, and Jan P. Syse's *Høyre-koalisjon regjering* (Right-coalition government) that came into power in the spring of 1989 withdrew the proposition. When the proposition was withdrawn,

[259] NOU 1985:18.
[260] NOU 1985:18: 15. It should be stressed that the NOU 1985:18 is important with respect to the decision-making in coercive cases, and not child welfare. The design of the decision-making body in charge of coercion cases was not entrenched in the *bvl*, but the *stl*.
[261] I refer to it in abbreviated form only as the FBSS and not FSS. The decision-making body changed name in 2007, with the reform following the arguments put forth in Ot.prp.nr.76 (2005-2006) to *Fylkesnemnda for barnevern og sosiale saker* (County Board of Child Protection and Social Affairs). Originally, in 1992, it was only *Fylkesnemnda for sosiale saker* (County Board of Social Affairs).
[262] Ot.prp.nr.60 (1988-1989).

it did not imply that Syse's party, *Høyre* (Right), wanted to depart from the track towards establishing one unified Social Services Act, but rather to put forth a legal proposal with the imprint of the coalition government.[263]

When Brundtland again came to power in 1990, the earlier proposition was again put on the table, but it would now become split into two different codes of law—Social Services Act and the Child Welfare Act—and significantly revised. The revision, however, had little impact on the design of the FBSS which would remain a part of the Social Services Act. One of the important changes that had occurred with Brundtland was that child protection was to remain as an independent area of commitment apart from social services.[264] The idea of forming one unified legal code regarding social services was therefore abolished—child protection and child welfare became embedded in a legal code apart from social services.

Brundtland also established a new ministry to replace the Ministry of Family and Consumer Affairs, and renamed it *Barne- og familiedepartementet* (Ministry of Children and Family Affairs). The new ministry was established on January 1st 1991. The fact that Labour accepted this development can be argued is a result of a generally escalating focus upon the public responsibility for each individual child.

Most members of the committee that wrote NOU 1985:17 agreed that the new board could be neither a regular court *nor* a democratically elected decision-making body.[265] Something had to be done, and they would have to take into account the decade-long criticism against the BVL—a criticism that had mainly been dominated by a discussion with two alternatives. One camp would improve the way in which the BVN worked, while the other would authorize the courts to deal with decision-making in coercion-cases. Although the committee was split on writing its proposal, all agreed upon dispensing the BVN. The majority, however, were not in favor of the courts to decide in coercion-cases.[266]

The BVN was recognized by all as obsolete. It was no longer maintained that child protection could be effectively implemented through the BVN according to modern demands for legal protection. The majority preferred to entrust coercion-cases to a designated decision-making body. This decision-making body was also in need of being independent from those

[263] Larsen (2002): 155.
[264] Ot.prp.nr.44 (1991-1992): 10.
[265] NOU 1985:18: 27-28.
[266] The majority consisted in Jan Skåre, the leader, Knut Brofoss, Aksel Hatland, Aage Müller-Nilssen, Dorthea Skeide, Karin Stoltenberg and Wenche Ørstavik. The minority consisted of two: Ebba Lodden and Frank Sundkvist.

initiating the cases from below in each municipality as well as from being directed from above from directorates and the ministry. In this way, the social services could better and in a more independent manner be a representative of the "child's interests."[267]

The goal of the BVL was to ensure best practice by appointing people that had special interest or had particular knowledge that qualified them, and also that those preparing the case-work were professionals. This was thought to be sufficient to secure the best interests of the child. The problem was that this was not always the case. The BVN in 1960, 1963, 1967 and 1969 were dominated by housewives, followed by teachers; neither group had any professional knowledge about what should trigger coercive measures.[268] According to Gerd Benneche, the overrepresentation of these groups was probably due to the view of the Municipal Councils that their daily involvement with children was a sufficient criterion for making sound judgments to protect children and ensure their welfare.

The lack of professionalism, in the sense of coherently applying knowledge of a certain type and quality in practice and also by being able to explain why a type of practice had been chosen, had become a major problem with the BVN. Without the stabilizing force of knowledge, the practice of child protection would vary across cases or lacking any valid justification for why a choice on practice was commenced upon. Having no way of knowing whether or not a child was treated according to a best-practice standard became interlinked with the lack of any prospects of establishing solid protection of the child as an individual.

On the other hand, the need for coercive intervention had proved to be overwhelming. Despite efforts to minimize decision-making involving coercion, the use of coercion to remove children had increased after the implementation of the BVL. Additionally, in-house measures were implemented on a steadily increase from 1953 to 1975.[269] Thus, the criticism of the BVN lacking professionalism, which leads to arbitrary outcomes, combined with an increasingly active decision-making body, made the need for a reform all the more relevant.

5.1.3. Four Demands to Ensure Non-Discrimination

In NOU 1985:18, it was argued that the design of casework and decision-making procedures was to satisfy four distinct demands.[270] These criteria would ensure that the procedure for decision-making would no longer discriminate across different cases. The lack of an operative

[267] NOU 1985:18: 292.
[268] Benneche (1967): 81 and Benneche (1974): 20.
[269] SSB (1978): 594.
[270] These demands are articulated in NOU 1985:18: 293-296.

principle of non-discrimination was at the core of the criticism raised towards the BVN, and behind it was the idea that the child's individuality alone had to be subjected to a procedure that would respect its need for legal protection.

The *first* addressed the criticism that was directed at the BVN for being an organization that was too interconnected with other decision-making bodies locally. Other public organizations could influence decisions to coerce in a manner that weakened the legal protection of both parents and children. It was recommended that the decision-making body had to be independent from other municipals, regional or state-level decision-making bodies. In this way, it could be autonomous with respect to other state-parties (regional governors, social services in the municipalities, Ministry of Children and Family Affairs). Thus, decisions were going to be reached only in this one particular decision-making body, without any external interference.

The *second* demand set to the new design was that the parties to the procedure were to be represented by a lawyer. This was an answer to the criticism that the BVN was both in charge of investigation and performing decision-making. Both the parents (accused of providing detrimental care) and those authorized to protect the child, needed to argue their cases prior to any decision. In addition, in order to provide equal treatment of both the accuser and the accused, the committee planned to implement specific legal principles and rules of procedure into the design. Rules of procedure would subject child protection cases to the same type of treatment. The rules that were to be applied existed within the civil courts already, in particular in chapter 33 of *Tvistemålsloven* (Civil Procedure Act – *tvml*).[271] Within this chapter, there were several rules of procedure that the committee regarded as easily adjustable to fit a new decision-making body for coercion-cases.

The *third* demand placed upon the new design was that it had to facilitate best practice within the area of child protection. In other words, it was required to equip the procedure with professionals that were trained to assess the needs of the child in as neutral manner possible. Introducing professionals, mainly psychologists and social workers, would answer the criticism that lay-men only had unspecified knowledge in the protection of children. Adding professionals to the decision-making procedure would allegedly make decisions more systematic and coherent.

[271] NOU 1985:18: 285.

Furthermore, if the second demand listed above would have any significance, a professional jurist would have to be included in the decision-making procedure at all times. Not only would it be a need for upholding the rules of engagement in litigation, but also to uphold rules of procedure. In contrast, the legal scholar would be able to ensure that arguments were asserted properly, and that each case became illuminated in an exhaustive manner. Thus, having professionals represented in the board would optimize both the best insights in law and knowledge of best practice in child protection.

It was also argued that laymen were to be included to represent common-sense morality. Including lay-men, it was argued, was imperative in this way since decision-making had a normative component. It reflected the idea that no professional could reach any final decision on what would be best for the child.[272] The lay-men represent what can be dubbed as common-sense values and become a corrective on the professionals' epistemic approach. The professionals, on the other hand, constitute a corrective on the lay-men's subjective evaluations.

The *fourth*, and last, demand is again directed at the lack of legal protection. Each case that was allegedly in need of coercion was to be treated and decided upon swiftly. Such a demand reflects that coercion is a matter that was to be settled fast because it was a need for protection against detrimental care. This argument was directed to the use of professionals, and the need to have them as permanent members and not call upon them as expert-witnesses. The swiftness that this type of decision-making needed was an important argument for establishing a new and specialized decision-making body.

These four demands were the answer to the critique that had been directed at the design of the BVN of 1953. The BVN was both responsible for preparing the case, making decisions and implementing the measures that it decided upon.[273] It was also argued that the BVN was unprofessional and too local, thus also frequently legally prejudiced. It was argued that these four demands towards design would, if accommodated, effectively dissolve many of the problems facing the BVN and restore legal protection of the affected parties.

[272] See e.g. Eriksen (2001).
[273] This criticism was not new, as already mentioned above. However, the criticism made in this Green Paper became more important since its thorough assessment of social services in general, and child protection in particular, was directly linked to the introduction of the new body of law that was to come.

5.1.4. Design of Decision-Making with the Child's Best in Mind

In addition to these four criteria aimed at instituting non-discrimination into the design of decision-making, another principal innovation that would pervade the legislation on child protection was introduced—namely to seek out what was best for the child. In Norway, it was not an entirely new idea, but the manner in which it was to be implemented was new. In BVL of 1953 §17 second paragraph it is stated that, "when the board argues to implement a type of measure, it should have the child's best in mind." The legislative history to the BVL explains what is meant by the "child's best in mind"-formulation. *If* it comes to it, and the child must be coercively removed from the parents, it should only be because it is imperative for the concern of the child. It was also argued that, "Contrary to the view that constructed the LBFB, it ought, according to the committee, as far as possible through those means available seek to hinder that the child is separated from its home."[274] As such, what was thought to be best for the child, during the BVL, was to defend parents, and thereby the child. This has been referred to as letting a biological principle drive decision-making.

Seeking out what was *best* for a child was not in any way the first and foremost priority for the BVN, along with the driving motivation for introducing it, what was best for a child was rather held to be concurrent to those of the parents. It can be argued that the child's interest was seen as equivalent with the best interest of the family until the point was reached whereby the family could no longer improve the situation of the child. Consequently, a long time would pass until a child's individuality would become protected, and not until the BVN had exhausted all non-coercive remedies. Hence, in combination with the motivation to decrease the amount of cases in need of coercively relocating children, the parents' right to keep their child in their custody was, according to the BVL, more important than the child's need to be protected. For instance, the board could implement coercive measures if it had to protect the child from its parents, but also to protect other children in the family from the child in question. This would mean that when coercion was to be applied, it did not need to be in the interest of the child, but rather the family.

With NOU 1985:18 came also a final shift towards the focus on the child first and the family second. Emphasizing that measures were to be in the child's interest would not do away with lending priority to the family, but resorting to a biological presumption had to have the child's best in mind.[275] According to this Green Paper, it would be preferable if the

[274] See also Innst. I (1951): 38 and 80.
[275] NOU 1985:18: 145.

principle of the 'child's best' was pervading the entire child protection system, irrespective of the type of measures—non-coercive or coercive.[276] Hence, it was maintained that what was best for a chidl was upheld by ensuring stabile and lasting relationships with adults. Thus, in order to, "consider what would be best for a child," the bonds a child had developed, i.e. what was familiar to the child, was to be focused upon.[277] This way of interpreting what was meant by having the child's best in mind would include the parents.

According to §16 of the BVL, when the biological parents proved fit to care for their child, the child would return from foster care. Hence, the child was stuck with its parents. The BVN always had the child in their custody. In this way, any coercive means implemented would predominantly be temporary. The parents could always get their child back. This approach always allowed the principle of biology to trump that of the child's best interest.

Another Green Paper, NOU 1982:26, which focused upon child abuse and failed care, argued for strengthening child protection. It was stipulated that in order to protect the child, it needed to be implemented a principle of custody instead of a principle of biology. If children had developed new bonds to their custodians, the new bonds had to be taken into account when deciding what was best for a child. The Green Paper did not refer to these terms explicitly, but their critique of the application of the best interest-principle in BVL §16, and how children are sent back to their biological parents when home environment improved, makes for such an interpretation.[278] This was one of the main reasons for NOU 1985:18 to include guarantees for those who had the child in custody, i.e. foster parents. This would provide an avenue for the biological parents to lose their rights to get the child back if the child was in foster care for a long period.[279] Once it has been decided that a child is in need of protection and received other custodians than the biological parents, the principle of biology gradually decrase in importance and parents risk losing their child.

In NOU 1982:26, it was argued that the biological principle was taken too much for granted, and that the state authorities had to show more willingness to infringe upon the biological principle due to the increase in the number of cases that showed a severe lack of

[276] NOU 1985:18: 27.
[277] NOU 1985:18: 146.
[278] *Barnemishandlingsutvalget* (The Committee on Child-Abuse) was appointed in 1979 by the Ministry of Social Affairs. It argued that strengthening child protection was the only remedy for the escalating instances of child-abuse – NOU 1982:26: 153.
[279] This was later more differentiated in the Ot.prp.nr.60, but remained the lead argument for how the child's best interest should be read with respect to the paragraph that argues that stabile and lasting bonds should not be broken, Ot.prp.nr.60 (1988-1989): 116-117.

care. This very same Green Paper argued that only 10% of abused children were caught by the system, and thus made it clear that child protection needed strengthening and reform fast.[280]

Having the four different demands placed upon the design of the new decision-making body to ensure non-discrimination, and in combination with the principle of having the child's best in mind, child protection would now become guided by two strong principles for the entire process of both non-coercive child welfare and coercive child protection. Both of these principles are upheld as important from within NOU 1985:18. They constitute the main influence regarding how the FBSS was supposed to work from the introduction of the *bvl*. In the next chapter, this will be referred to as the two basic expectations of the current order of expectations.

5.1.5. Becoming a new Legal order

The design of the FBSS figured in the *stl* until it became a part of the *bvl* until 2008. The reform of the BVL with regard to establishing a new decision-making body was situated in *Lov om sosiale tjenester* (Social Services Act - *stl*), and with a design based directly upon NOU 1985:17. However, the reform of the BVL led to another legal code, namely the new *bvl*. Hence, those who enforced child protection had to relate to two legal codes. FBSS was not merely designed to be a decision-making body that would decide upon whether or not to implement coercive measures in child-protection cases, but also in other cases. At first, this included only cases of drug-abuse, but the Ministry of Social Affairs planned for it to be left open to case-types involving social issues in need of coercion. It was thought as relevant to settle the institutional design within a legal order dedicated to social services in general, rather than child protection specifically.[281]

The proposition emanating from NOU 1985:18, Ot.prp.nr.29 (1990-1991), to reform social services was assigned *Sosialkomiteen* (Social Committee) in parliament. Their work started on April 11th 1991, and they put forth their proposal on October 29th. This would mean that the members would have more than enough time to contemplate on the political craftsmanship thus far of the design of the FBSS. They remarked that:

> *"The Committee endorse that the treatment of cases involving coercion is placed to an independent regional board with a composition as suggested by the Social Act Committee.*

[280] NOU 1982:26: 142-143. <2
[281] Ot.prp.nr.29 (1990-1991): 135.

According to the Committee, such a board would comply with the needs for a reassuring procedure, professional insight, independence and quick procedure."[282]

It was only one minor change to the legal proposal, namely that the proposal from the Ministry of Social Affairs included a paragraph that stipulated that the Ministry of Social Affairs itself could instruct the FBSS to include additional case-types than the original cases of drug-abusers and child-protection cases. The Social Committee wanted it rather to be the parliament that decided if the board should be authorized to decide in a broader variety of cases. As such, the only change made by the Committee was to increase its independence further. The consequence was that the FBSS was not subjected to the government's right to instruct lower-level decision-making bodies—making it completely independent.

The new legal code on child protection, the *bvl*, was presented in Council of State on March 27th 1992, and was assigned *Forbruker- og administrasjonskomiteen* (Standing Committee for Consumer Affairs and Government Administration). The committee embraced the new manner in which coercion-cases were to be decided upon by the *stl*.[283] This committee, dominated by centre-right parties, was satisfied that the design had become a court-like procedure. Hence, they could agree to its basic tenets. Hence, the Labour-government's proposal met little resistance. The wide-spread agreement within parliament to adopt the legal code on child protection is best summed up in the attitudes towards the proposal presented to parliament, coming from the Standing Committee for Consumer Affairs and Government Administration on the *bvl*:

"The committee emphasized that those measures implemented by the Child Welfare Office should be the best for the child, and as far as possible be conceived of as reasonable among the affected parties. Emphasis should be laid upon cooperation between the affected parties and the local Child Welfare Office, and that the parties' "legal protection" is strengthened."[284]

The quotation underlines both the principle of child's best interest and non-discrimination as central tenets within the design of decision-making procedure. These two tenets will later be argued constitute the basic expectations within the current order of expectations.

The following sections will present the layout of the design of the FBSS after the significant amendment to the *bvl* and the design of the FBSS made by Ot.prp.nr.76 (2006-2007), which was put into effect January 1st 2008. This amendment transferred the design of

[282] Innst.O.nr. 9 (1991-92): In "Comments" on Chapter 9. I will return to how the composition of the FBSS is today later. I will not enter specifics on composition of the FBSS in this proposal since it has changed through amendments. For now it is merely sufficient to note that it received support from the committee.
[283] Innst.O.nr. 80 (1991-92) Section 3.8
[284] Innst.O.nr. 80 (1991-92).

the FBSS from the *stl* to *bvl* and, as already mentioned in the introduction, also changed the original name from *Fylkesnemnda for sosiale saker* (Regional Board for Social Cases – FSS) to *Fylkesnemnda for barnevern og sosiale saker* (Regional Board for Child Protection and Social Cases – FBSS). The main reason for transferring the board from one body of law to the other was simply that the vast majority of cases were directly related to child protection, rather than social services.[285] This was also the reason for changing its name.

5.2. The Organization of Authorized Coercion: The FBSS

There are three important aspects from the historical discourse on the legal design of the FBSS. These constitute *first* the discussion of whether or not the decision-making should be reached by a court or a separate board. *Second*, it is the discussion on the composition of the board with respect to professionalism. *Third*, what rules of procedure should guide the process of decision-making to ensure non-discrimination. All of these discussions had a focus upon increasing legal-protection of the child itself, and that coercion-cases had the child alone as a first and foremost consideration.

5.2.1. Would it be a Court or a Board?

One of the rather large debates was whether or not the courts should decide in cases of detrimental care, or if another type of decision-making body should be established with such a particular mandate. Both of the two earlier legal codes had their reasons for not arguing that the court should deal with such cases. To Getz, the entire purpose of establishing the Trustee-board was not to put child protection cases into the court system. To him, decisions regarding childcare were not appropriate to be handled by a court of law.[286] The thrust behind the reform of 1953 was to let the democratic spirit of post-war Norway pervade the new legal code on child protection; a consequence of which would mean to omit court-like elements from the design of the decision-making body as much as possible, e.g. by not having a judge as a permanent member of the BVN.[287]

The majority behind the NOU 1985:18 maintained that the court was not a suitable alternative. Many of their arguments related to the fact that it was a need to implement a reform of the child protection system that included professional expertise on a permanent basis. They argued against the courts, which they claimed had a lack of professional

[285] Ot.prp.nr.76 (2005-2006): 5.
[286] Getz (1892): 24.
[287] Ot.prp.nr.56 (1952): 5 and 6.

knowledge related to many different issues.[288] The most explicit argument was that a court's decision was dependent upon expert witnesses, but where the decision-making had to rely upon the expert-witness as true because of the inability to understand what the expert-statements implied. This was seen as problematic, since decisions would become influenced by what the expert witness in fact argued.[289] The use of expert witnesses makes a court accountable for verdicts it cannot vouch for without the expert. In a child protection case, there would be many different expert arenas that would confront the board, both internally and externally. Knowing that it is a minefield of esoteric approaches to best practice, a claim raised regarding the need to incorporate professional know-how can be problematic without permanent expert-representation.

> *"The one who does not have an understanding regarding these matters, will have great difficulties analyzing the meaning and quality of the different professionals' points of view, and when it comes to pass on these points of view to others who is co-deciding."*[290]

This argument lays impetus to increasingly professionalizing the decision-making body in order to make independent and qualified decisions.

Another reason provided for not transferring the decision-making to the courts was that children in need of protection constituted special and complex cases, and a regular court judge would not have proper experience in dealing with such cases. Child protection cases would only be a small portion of the court's work, and hence it would not develop proper knowledge in dealing with them.[291] The last argument was that they argued that the courts did not have an adequate secretariat to prepare the cases to them, consequently leaving the courts ill-prepared and ill-equipped.[292] It was rather a need to establish a professional decision-making body as a "neighboring alternative" to the courts.[293]

A minority in the committee writing NOU-1985:18, constituted by Ebba Lodden and Frank Sundkvist, expressed their thoughts that it was imprudent to establish a new type of decision-making body for cases involving coercion.[294] Their arguments had the same tone as those presented in NOU 1972:30 that argued in favor of transferring decision-making of the

[288] NOU 1985:18: 293
[289] NOU 1985:18.
[290] NOU 1985:18.
[291] NOU 1985:18: 293.
[292] NOU 1985:18: 294.
[293] NOU 1985:18: 294.
[294] NOU 1985:18: 268ff. It has never been a question of using the courts as long as we have had a separate legislation on child protection in Norway.

BVN to the courts.[295] The courts were, according to Lodden and Sundkvist, best equipped to deal with cases involving authorized coercion because the courts were best equipped to uphold the legal protection. Lodden and Sundkvist argued that the courts possessed the necessary trustworthiness to provide legal protection.[296] Their arguments stressed that child protection cases would not induce trust if decision-making were given to a new administrative decision-making body outside the court system. This would, according to them, become an object of the same kind of criticism as the design it was intended to replace.

Their objection was not very well explained or thought out. The committee responsible for the NOU 1985:18 was mandated to find a replacement for the decision-making body of the BVN. Lodden and Sundkvist argued that replacing such a weak decision-making body with another similar and weak decision-making body would counter-productive. They argued that, "no administrative body, no matter how it is composed, or how it is organized, will accomplish the same kind of prestige in our society as the courts have."[297] This is also where the majority in the committee disagreed, as in their view, it was more important to design a decision-making body that reached decisions worthy of trust, rather than believing that the decision-making became trustworthy simply because the courts were worthy of trust.

The majority opinion portrayed in NOU 1985:17 can be summed up with a quotation from Bernhard Getz. He had also argued against leaving it to the courts to decide in child protection cases. According to Getz, these cases were far too complex for the regular criminal courts, and normal efforts to subsume actions under a legal rule would be extremely hard, if not impossible:

> *"In my opinion, it would not be satisfactory to transfer this type of decision-making to the courts, whether it would imply a judge alone or a court of appeal. Both of these arrangements would in cases where it was not a matter of subsuming or proving the occurrence of single actions, but rather revolve around conditions in life as well as understanding the whole character of the parents and the child, not be recommendable. Such cases are not suitable for subsumption in a court, but must rather be known personally, which judges or random lay-judges cannot be assumed to be doing. Judges or courts of appeal would, in these matters of discretion, easily become staggering and internally inconsistent and cannot provide guarantees for accuracy in so important matters."*[298]

[295] NOU 1972:30.
[296] The minority, Lodden and Sundkvist, did not put forth evidence to support this claim. The majority-proposal even charged Lodden and Sundkvist with it and wrote: "It is doubtful if the prestige of the courts is as high in coercion-cases according to *tvl* §33, because these cases obviously revolves around priorities of values more than other normal cases", NOU 1985:18: 294.
[297] NOU 1985:18: 297
[298] Getz (1892): 24.

The idea behind the FBSS was to introduce a decision-making body that was not only professional, but could also become increasingly better as time went by. Improvements would be achieved by demanding that decision-making was to comply with certain principles and rules of procedures that could ensure a type of training for those in the court to approach these cases in a much more adequate and coherent manner.

The majority argued that transferring child protection cases to the courts from the BVN was to stretch the criticism towards the BVN too far in the opposite direction. It was not a matter of simply moving the case-work to another decision-making body; such a move would have to be justified by showing that it would improve the problems facing case-work within child protection.[299] Thus, it could be argued that the opinion of the majority was that simply moving the type of decision-making that involved coercion to the court, only to guess that the decision-making could be parasitic upon the legal protection that the courts provided, would be a gamble on reaching decisions that adequately would upheld what was best for a child. Reforming the BVL in such a manner would mean that the complexities of child protection cases would be dealt with in an adequate and respectful manner, and hence, it could be argued that the board was the reasonable outcome.

5.2.2. The Composition of the Board

The composition of the board has always been a great topic of concern. In 1892, Getz presented a composition of a so-called corporation of professionals that possessed special knowledge about children. He advocated for the inclusion of permanent members from the school-commission, from the poor-commission, one priest, one medical practitioner, two lay-women, and a judge to be the leader of the board. [300] Although the composition of the permanent members did not adhere to Getz's proposal as the LBFB was passed in 1896, a judge, a priest, and a medical doctor still became permanent members.[301] In the BVL of 1953, it was explicitly argued that a permanent member—the local judge—was only assigned when cases were in need of coercion. The composition of the decision-making board was, apart from the judge, supposed to be democratically appointed.[302]

The composition was transferred to from the *stl* §9-2 of 1992 to *bvl* §7-2 in 2008. The amendment that moved the design-principles over to the *bvl* did not make any significant

[299] NOU 1985:18: 294.
[300] Getz (1892): 25
[301] LBFB §6.
[302] BVL §2 and 5.

changes to the original design. The *bvl* stipulates that each board is supposed to be composed by a leader who satisfies demands to be a judge. *Barne- og likestillingsdepartementet* (Ministry of Children and Equality), thus, appoint a panel of professionals and a panel of lay-men, who are represented in the FBSS proportionally in a 1:1-relationship, with a four-year mandate. When the design of the FBSS was entrenched in the *stl*, it was stressed that, "the decision-making body was to be composed so that it best could combine judicial, professional knowledge and lay-man discretion."[303] This would establish a professional and court-like decision-making body that, according to the consultative statement of *Den norske dommerforening* (Norwegian Judge Union), included in the proposition leading to the *stl*, would increase the legal protection of each case.[304]

This legal development is a turning-point with regard to the BVN. By suggesting a design that had permanent members, and also that lay-men was no longer appointed locally, but centrally by the ministry, it became obvious that the new FBSS was not to resemble anything that the BVL once stood for. A child's need for protection was no longer seen as a local problem with the need for local solutions. The child's need for protection had no longer anything to do with the place where the child grew up.

5.2.3. Rules of Procedure

NOU 2000:12 was the first thorough investigation of the child protection and child welfare system in Norway. It was pointed out that, "lacking general rules of procedure creates a lack of expectation and a development of different types of practices between the different FBSS' and also within each board."[305] NOU 2000:12 had pointed out that one of the main purposes behind the design of the FBSS, namely embedding a principle of non-discrimination, was falling short. Both former decision-making boards, but especially the BVN lacked predictability in decision-making due to a lack of rules of procedure. The lack of procedural constraints such as these was arguably a great threat towards the principle of non-discrimination. The *bvl* had rules of procedure implemented already in 1992, but the problem was that they were not a formal part of the legal code.

This line of thought, namely the lack of formal rules of procedure to secure non-discrimination, helped bring about the mandate given to *fylkesnemndsutvalget* (FBSS-committee) responsible for the Green Paper that would later reform the FBSS from 2008:

[303] Ot.prp.nr.29 (1990-1991): 131.
[304] Ot.prp.nr.29 (1990-1991): 133.
[305] NOU 2000:12: 257.

> *"The FBSS operate according to the basic rules for decent casework that are enforced by the courts. Both forvaltningsloven [Public Administration Act], tvistemålsloven [Civil Procedure Act], domstolsloven [Courts of Justice Act] and barnevernloven [Child Welfare Act] are applied in addition to the special rules in sosialtjenesteloven [Social Services Act]…there are many different sets of rules that becomes applied in decision-making, the different boards have somewhat different practice of what rules are valid in different areas…On this background, the Child- and Family Ministry should appoint a committee to give a general and unified evaluation of the decision-making procedure."*[306]

This prompted the FBSS-committee to propose the adoption of the rules of procedure found in the legal proposal to the new *Tvisteloven* (Dispute Act – *tl*) §1-1—it was stated that "the legal code is going to make arrangements that will ensure a fair, quick, effective and trust-inducive treatment of civil court disputes."[307] This proposal gives an account of rules of procedure that has its point of origin in the European Convention on Human Rights Art. 6 (1), better known as the fair-trial-principle.[308] The FBSS-committee followed the same pattern of arguments as the one that changed *tl,* and held this article to be the normative foundation for any trial.[309] Hence, the *bvl* §7-3, where the current rules of procedure are situated, can be referred to as a Norwegian interpretation of the fair-trial-principle of the ECHR—a transformation of international law to become regular national law. This is a significant element with respect to the post-national turn within the order of expectations towards decisions involving coercion to protect children.

The Green Paper refers to Art. 6 of the ECHR, which argues the relevance of establishing institutions that can guarantee "fair trial":

> *"…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*[310]

Although Art. 6 cannot become directly applicable to the FBSS, due to obvious restrictions on publicity of the trials within the FBSS, it is argued that it is a, "highly natural point of departure for the [committee's] considerations, especially because the [FBSS] is expected to work according to basic rules of fair decision-making as the courts."[311] The *bvl* §7-3 has a direct link to the rules of procedure and standards provided by the *tl* §1.

The rules of procedure became explicated through an amendment that provided a new *bvl* §7-3 from January 2008. The new "rules of procedure" section was aimed at ensuring that

[306] NOU 2005:9: 7 and 38.
[307] Ot.prp.nr.51 (2004-2005).
[308] Ot.prp.nr.51 (2004-2005): 39 and also NOU 2005:9: 31.
[309] NOU 2005:9: 38.
[310] ECHR Art. 6.
[311] NOU 2005:9: 31.

each decision-making process to the FBSS would be made fast, be reassuring and induce trust (which is almost a direct quotation of *tl* §1-1). The §7-3 became the "main principles of procedure" and when applied to all cases, it would secure non-discrimination by enforcing the same set of rules. This ensured that the leader could assess the seriousness of the case, and enforce the principles provided to ensure fair decision-making in each process.[312]

The next important aspect of the design related to the rules of procedure is the forum where the deliberations within each case would take place, namely *forhandlingsmøte* (meeting of negotiation).[313] The rules stipulate that, prior to any decision reached by the FBSS, a meeting of negotiation must be held. According to *bvl* §7-15, this meeting is going to be based on guidelines on how *hovedforhandlinger* (main meeting of negotiation) is supposed to work according to *tl* §9-15, but, "*according to their appropriateness*".[314] To this extent, the leader of the FBSS is at the helm of the procedure when maneuvering between principles and guidelines for how a civil trial is supposed to work within child protection cases. Hence, the level of legal protection within the FBSS is allegedly paracitic upon civil trials.

The BVL of 1953 did not explicate any principles or rules that would guide the procedure, and even though the *bvl* at its introduction in 1992 did not have them incorporated into its legal design, they did however exist as a part of its legislative history.[315] The FBSS was to observe the same rules of procedure as in civil trials and consequently be parasitic upon the legal protection provided by these rules. Such rules of procedure, as they have been a part of the FBSS from the start, is in opposition towards the open-ended design of the BVN, which lacked reference to any rules of procedure.

Thus, an open-ended decision-making procedure was integral to the way the BVN was designed. However, the decision-making procedure was not stabilized on a national level—the procedure would vary by default. In many respects, having no rules of procedure would greatly narrow down the ability of those deciding within the board to claim that a decision could have any statutory authority. The lack of rules diminishes the chance of the decision-

[312] Ot.prp.nr.76 (2005-2006): 18.
[313] The translation of the word "forhandlingsmøte" is tricky. "Forhandling" needs to be translated relative to its meaning, which means that negotiation might not be the best word. Deliberation and argumentation are words that hold equivalent merit as translations.
[314] See Ot.prp.nr.51 (2004-2005): 188f.
[315] This is claimed e.g. in Ot.prp.nr.76 (2005-2006).

making being based upon a principle of legality.[316] Without any rules of procedure, the BVN ensured discriminating decision-making from the start.

The committee in charge of writing the report NOU 2005:9, which was the background report to the latest amendment of the FBSS in 2008, were mandated to suggest explicit rules of procedure that would develop a more unified practice within the different boards across Norway. The idea was that it would secure the legal protection of those affected more than leaving it to the leader of the board to interpret how a civil trial ought to be applied during procedures, which was the arrangement settled in 1992.[317] Although the committee did not reinvent what was meant by rules of procedure, they argued that something needed to be explicated formally to guide the procedure itself, as there were no provisions within the *bvl* or *stl* that explicitly put forth the guiding principles for decision-making. The solution manifested itself with the amendment of 2008 and the introduction of a section called "main principles of procedure."[318]

The mandate of the FBSS-committee stated furthermore that it needed to consider and explore the human-rights standard of the FBSS. By their mandate, it was indirectly admitted that the ability to enforce human rights by the FBSS in the past was insufficient, and that something had to be done. The need for transforming the *bvl* into a body of law that complied with human-rights standards, and especially the standards of the United Nations Convention on the Rights of the Child (CRC), was a consequence of the process of incorporating the CRC into *Menneskerettighetsloven* (Human Rights Act - *mrl*) in 2003.[319] This increasing focus upon making the FBSS and child protection, i.e. decision-making involving coercion, be subjected to a post-national turn, has become increasingly apparent.[320] When the CRC was incorporated to Norwegian law, it was also stressed that it implied passive and active transformation of the *bvl.* For the most parts, it was a matter of passive transformation in that it was claimed that Norwegian law was to be considered as already reflecting a post-national turn, and that the CRC-standards was already maintained and enforced through Norwegian law.[321] Some minor changes were made to the *bvl,* with respect to active transformation. I will return to them later. If we compare the effort to incorporate CRC to become part of Norwegian regular law in 2003, to the statement in the mandate of the FBSS-committee that

[316] The principle stipulates that any verdict, or decision-making, should have statutory authority.
[317] NOU 2005:9: 38.
[318] Ot.prp.nr.76 (2005-2006): 28.
[319] NOU 2005:9: 12.
[320] I will return to this in section 5.4.
[321] Ot.prp.nr. 45 (2002-2003): 24.

argued an insufficient focus upon human rights in 2005, it can be argued that the efforts of 2003 was inadequate. Especially with the explicit focus upon making the FBSS abide by human rights standards from 2005 till present. This development can be summed up as the post-national turn in Norwegian child protection.

The FBSS-committee's Green Paper of 2005 argued that human rights always needed to be taken into consideration so that they would not be broken. Hence, the committee admitted that FBSS-design had to have a design that complied with human rights. They stressed the important position that human rights had come to play, and that the FBSS was to abide by and maintain such a post-national standard. Human rights can thus be seen as a primary focus in NOU 2005:9, as to measure the quality and legitimacy of the decision-making. This focus upon fair-trial and human rights was upheld in Ot.prp.nr. 76 (2006-2007), which was the legal proposal that amended the design of the FBSS to its current state.[322] Implicitly, then, there is a claim that the FBSS currently upholds a post-national standard.

5.3. The Order of Expectation of 1992: The Rights of the Child

The CRC was open for ratification in 1989, and Norway did so in 1991. Consequently, it did not influence Ot.prp.nr.44 (1991-1992) that led to the *bvl,* or Ot.prp.nr.29 (1990-1991) that led to the *stl* and the design of the FBSS.[323] The CRC did not become a dedicated part of the legislative history at the introduction of the *bvl*. However, this does not imply that the *bvl* was not underpinned by basic principles that focused upon the protection of the individuality of the child as right. The introduction of the *bvl* was the introduction of a system of protection set to secure the individual utility of each child. The aim was, and still is, to secure that each child can live a life on its own terms as adulthood and self-determination begins. In this sense, child protection is a matter of positively ensuring the negative rights of the future adult.

The panel responsible for NOU 1985:18 ended up arguing against moving protection cases to the court-system. The civil court did not have the competence to uphold modern demands towards legal protection of parents and child—the case-work was argued to be too complex. The mandate behind NOU 1985:18 required that they specified more clearly the terms that led to a more coherent decision-making. The emphasis upon legal-protection is so strong that it constitutes the origin of the basic expectation of non-discrimination. It is basic to

[322] Ot.prp.nr. 76 (2006-2007): 19-20, but especially 31-32.
[323] Ot.prp.nr.44 (1991-1992): 12 and notably 17.

the extent that the FBSS-design had to abide by it already in 1992 in order to redeem a promise of trust.

On the other hand was the need to have enough discretionary competence to plunge deeply, and in an informed manner, into the complexity of each case in order to make the best type of decision for the individual child.[324] Decisions that affected a child had to be in the best one for the particular child. Its individuality had now become the object of protection, and ensuring what was best for a child had become another basic expectation. It was explicitly pointed out that "solutions are not to be found that serve the parents or local community at the cost of the child."[325] This is clearly departing from the order of expectations that was reflected by the BVL, and points towards establishing a new legal order that attempt to comply with an order of expectations where basic expectations of 'child's best' and non-discrimination.

The *bvl* of 1992 was set to focus on the child itself, as an individual in need of protection. When it had been decided that the parents had forfeit their duty to provide non-detrimental care to the child, the child would become the only focus of attention. The new *bvl*, can be considered as a profound change in how child welfare and protection became enforced. Child welfare would still be considered as the attempt to solve problems in how parents provided care, but once it had become established that the child was in need of protection, the child alone would stand at the centre of attention. Cases involving coercion to protect the child went from being a family-oriented social protection to a child-centered focus by the introduction of the *bvl*.

The combination of foci, i.e. upon each individual child and ensuring non-discrimination, is what I will refer to as the basic expectations of a right's based order of expectations. It is the principle right of the child, and only the child, to receive protection in its own best interest. It is a right in the sense of a principled entitlement the child has to public protection. This is how we can argue that the order of expectations is constituted in 1992, if the legal order complies with it is another thing. As time has gone by, how to interpret these two basic expectations has changed. Eventually, a post-national turn has changed the order of expectation and thus the face of child protection from within the same basic expectations. This means that the focus upon what was best for a child and non-discrimination was first introduced in a nation-based context, but eventually became subjected to a post-national turn

[324] NOU 1985:18: 156.
[325] NOU 1985:18: 145.

which means that child protection in Norway currently needs to comply with the principle of the child's best interest and non-discrimination with a cosmopolitan imprint.

5.4. The Order of Expectation of 2008: The Post-National Turn

It is argued in NOU 1985:18 that human rights set fundamental demands to the design of the decision-making procedure for the FBSS.[326] At the time, the European Convention on Human Rights (ECHR) had already developed strong historical roots in Norwegian rule of law, together with the United Nations International Covenant on Civil and Political Rights (CCPR). However, according to NOU 1985:18, other conventions had not.[327]

In 2003, the parliament incorporated the CRC into the *mrl*. This meant that the authentic text of the CRC became part of Norwegian regular law. In this effort, the *bvl* was also transformed to abide by the CRC.[328] For the most parts of the *bvl,* it was rather confirmed legal harmony between the *bvl* and the CRC.[329] The intention behind amending the *bvl* was to give it the cosmopolitan and post-national imprint bestowed by the origin of the CRC as a global legal document.

Currently the CRC has precedence to the *bvl* due to a rule-of-precedence within the *mrl*. It implies that when a conflict occurs between the CRC and the *bvl*, the CRC has precedence.[330] Prior to 2003, the CRC did not have this explicit legal precedence. By having the CRC as part of the *mrl,* it indirectly makes the *bvl* a rights-law because the *bvl* cannot be in conflict with the CRC. In the effort to maintain the rule-of-precedence, the amendment of the *bvl* in 2003 was argued would ensure that the *bvl* would uphold standard of the CRC.

The demands set towards the FBSS-design by the CRC was reconfirmed in the Green Paper NOU 2005:9. This Green Paper, in combination with the legal proposal Ot.prp.nr.76 (2006-2007) held the reference of *bvl* to the principle of the child's best in *bvl* §4-1 to be on par with the child's best interest standard according to CRC Art. 3-1. As such, every decision

[326] NOU 1985:18: 322.
[327] NOU 1985:18: 322.
[328] This was predominantly passive transformation by affirming legal harmony, but also active transformation. I will return to this in the next chapter.
[329] Confirmed legal harmony is equivalent to passive transformation. This is particularly important with regard to CRC Art. 3.1. that includes the child's best interest. By confirming legal harmony, it implicitly stated that the way in which the child's best interest-principle *bvl* is to be interpreted as equal to Art. 3.1. in the CRC.
[330] *Mrl* §3.

reached by the FBSS, which would uphold *bvl* §4-1, could from now on be interpreted as also the enforcement of the human rights standard of the CRC.[331]

In order to have a child protection system that is worthy of trust, it is imperative for the political craftsmanship of parliament to design a decision-making body that complies with the current order of expectations. The increasing focus upon human rights within the order of expectations set constraints upon the design of the FBSS, and the current child protection system must accommodate a human rights rational in order to redeem the promise of trust.

With regard to the post-national turn, it is important to stress that we are talking about a transformation of the content of the basic expectations that was introduced in *bvl*, and which we can see has increasingly an effort in politics. The basic expectations of child's best interest and non-discrimination, developed from being founded in national child protection discourse in 1992 towards becoming based in a post-national line of thought in 2008. The latter implies a non-nationalist understanding of child protection. A post-national turn implicitly states that there are key-demands to the legal architecture that are not nation-based, but originates rather from a universalistic legal order. Although 2003, and the incorporation of the CRC into the *mrl,* constitute the most important formal expression of this development, the post-national turn is the result of a development that started prior to the introduction of the *bvl,* and refers to the gradual increase in reference to the protection of the individual child as a matter of right.[332]

There are several things that points towards this development, and I will briefly state some of the most important factors that underpin the post-national turn in Norwegian child protection and that has not been mentioned earlier. They all relate to the argument that the legal order, in order for it to become worthy of trust, must comply with a post-national turn:

1. In the introduction of the design of the FBSS, it was a focus upon maintaining general human rights (not child-specific rights). It was argued that the design had to uphold the standards of a fair trial set by the ECHR.[333] They focused upon decision-making in coercive-cases, and how demands towards were supposed to be measured according to human rights standards. It was emphasized especially a need for independent and

[331] Lucy Smith wrote as early as in 1999 that the CRC was an active reference-point for the court and the administration, and that the CRC was to be enforced as far as possible due to the Norwegian obligation towards international law (1999:357).
[332] It is again worth pointing out that I am alluding to constitutional liberalism when I refer to rights-based child protection, and not formal rights.
[333] Ot.prp.nr.29 (1990-1991): 134. It is also recited in Ot.prp.nr.44 (1991-1992):89.

neutral decision-making, and the inclusion of professionals and lay-men in a court-like proceeding in order to reach the aim of a fair-trial. Hence, central design-traits have their justification based in a human rights-rational. The meeting of negotiation, which is the decision-making node within the FBSS, is currently one example of what is supposed to adhere to the principle of fair-trial. The principle is formulated in Art. 6 (1) of the ECHR, and "constitute the bedrock of civil procedure" in Norway.[334] The rules of procedure that the FBSS must adhere to are deduced from this principle. Hence, the decision-making body within child protection is claimed to adhere to a human rights standard.

2. By ratifying the CRC, Norwegian authorities acknowledged that the CRC constituted an important part of international law, and Norwegian authorities committed itself to uphold the human rights-standards expressed by this rights-catalogue. This effort have been reported upon to the UN Committee on the Rights of the Child.[335] Although their comments are not legally binding, they have become significant as legal source.[336]
3. In a White Paper submitted in 2001, it is a section devoted to the increasing focus upon the CRC. It states that the CRC have had a decisive impact regarding how the public is to protect children, and that children was to be treated according to their particular context and interest. It supports the notion that the order of expectations was changing from within through an increasing focus upon the human rights catalogue of the CRC as a point of reference.[337]
4. This White Paper was again based upon the Green Paper submitted by the Befring-committee—NOU 2000:9. This major Green Paper states that children in need of public protection were to receive protection according to what was best for them. It even states that this principle was the "incontestable value and fundamental principle within the law."[338] The Green Paper concluded also that this fundamental principle was embedded in the *bvl* and was *de jure* in harmony with the CRC's principle of the child's best interest.[339] Hence, long before the CRC was incorporated into Norwegian law, we can see a change in how the basic expectations become evaluated.
5. Within the amendment of *Barneombudsloven* (Ombudsman for Children Act – *bol*) of 1998, it became explicated in *bol* §3-b that the Ombud is supposed to ensure that the

[334] NOU 2005:9: 31.
[335] Cf. CRC Art. 43 and 44.
[336] Søvig (2008):112. NOU 2008:9.
[337] St.mld.nr.40 (2001-2002): 97ff
[338] NOU 2000:12: 89
[339] NOU 2000:12.

rights of the child became secured. Hence, already in 1998 was a watchdog established to ensure oversight and review of the practices that affected children, and to ensure that these practices upheld the self-inserted commitment of Norwegian government to uphold the CRC. Over 70 hearing-instances underlined the importance of the *Ombud* with regard to promoting the rights of the child.[340]

6. In 1999, the Human Rights Act (*mrl*) was introduced. It is explicitly stated that the child-convention was to be incorporated at a later stage.[341] In the Green Paper behind the legal proposal to the *mrl,* NOU 1993:18, the CRC was not provided any evaluation.[342] Hence, it would be premature to incorporate it at that point. This had to do with the short amount of time that the CRC had been around. The CRC became incorporated in the *mrl* in 2003, and a consequence of that incorporation was the amendment of the *bvl* to abide by it.
7. It was reaffirmed by parliament, Innst. O. nr. 51 (1998-99):5, that the CRC had to become a part of the *mrl.* The CRC, it was argued, belonged to the fundamental human rights conventions. The broad parliamentary agreement on this issue marks a lack of opposition towards the CRC and the consequences it would have on regular law.
8. A White Paper submitted in 1999, St.meld.nr. 21 (1999-2000), present an action-plan on incorporating human rights into the Norwegian law and legal practice. Here, already in 1999, it was pointed out that the CRC was to be incorporated into the *mrl.* The parliament asked the same year, 4th of May, the government to begin the process of incorporating the CRC into the *mrl*. This led to Ot.prp.nr. 45 (2002-2003) that amended the *bvl* by affirming legal harmony with the CRC. Hence, the claim that human rights for children was a focus, was backed up by action to craft legislation.
9. The Green Paper of 2005, leading to the large amendment of the FBSS in 2008, NOU 2005:9, was mandated to ensure that the decision-making procedure was observing standards of human rights. The subsequent legal proposal, Ot.prp.nr. 76 (2006-2007), refer to the NOU 2005:9, and argues that since the CRC was incorporated into the *mrl,* and thus had precedence, any amendment had to abide by the CRC.[343] Hence, the recent design of the FBSS is indirectly argued to uphold human rights. Among them

[340] Ot.prp.nr.40 (1996-1997): 7.
[341] Ot.prp.nr.3 (1998-1999): 5.
[342] Ot.prp.nr.3 (1998-1999): 31.
[343] Ot.prp.nr. 76 (2006-2007): 19. It should be noted that this section of the legal proposition does not have any comment made by the Ministry, and how the Ministry includes these thoughts into the amendment.

are most notably the principle of child's best interest, non-discrimination, and fair-trial.

10. The last point I will make is that if we pragmatically hold the Norwegian legal order to abide by principles of an ideal constitutional democracy, it would be sufficient for the *bvl* to be subjected to a post-national turn if the legal order was amended to be in harmony with a human rights convention of global reach designated children only.

It is argued that the *bvl* is not in conflict with human rights.[344] However, in the next part, it will be argued that the order of expectations, that can be dubbed as post-national and rights-based is not embedded in the legal order adequately. Both of the basic expectations, the child's best interest and non-discrimination, must be embedded in the legal order if the promise of trust is to be redeemed. The post-national rights-based order of expectations and its dominant basic expectations, set demands upon the legal order. The specifics of such a demand, and whether or not the FBSS complies with them, is what we will discuss in part III.

[344] See e.g. Smith (1999).

Part III – Does the FBSS Redeem the Promise of Trust

6. How Basic Expectations Redeem a Promise of Trust

What does the order of expectations currently entail? What can be argued is the normative self-understanding expressed by its basic expectations? Asked differently, what is trustworthy child protection today? These are questions that still need an answer in order to evaluate the FBSS and find out if it can redeem the promise of trust. So far, the historical development of the order of expectations, with two basic expectations, has been laid out: The child's best interest and non-discrimination. This effort has been made to unveil what is claimed to be the current order of expectations. Now, I will seek to lay out the expression of the normative self-understanding of the order of expectations, viz. elaborate on the rationale that underpins current trustworthy child protection. Arguing the complexity of the current order of expectations will allow us to perform an illuminating critique of political craftsmanship, and answer, in the next chapter, if the legal design of the FBSS was crafted in 2008 to comply with the order of expectations.

In part II, it was argued that the development within the order of expectations in child protection has entered what can be dubbed rights-based and post-national, where the two basic expectations dominating are non-discrimination and the child's best interest. Since 1992, it was supposed to be a "new child protection code with increased legal protection for children, more in line with a current and future child protection and the reality that children live in."[345] The 2008-amendment that focused upon the FBSS was the latest grand effort for the lawmakers to craft legislation that complied with such an aim—does the legal design redeem the promise of trust?

In order to lay out the normative self-understanding of child protection, I will begin by explaining the purpose of child protection by drawing upon the legal purpose of child protection that stipulates that a child's development and health needs protection if it is

[345] Ot.prp.no.44 (1991-1992): 12.

subjected to detrimental care.[346] I will also explain how we need to understand this purpose with respect to the post-national turn. Secondly, I will lay out thresholds of intervention that uphold the demand of non-discrimination. Third, I will argue that reasonable pluralism of parental care and within the interests of children, leads to a conflict of claims on what is in a child's best interest. This sets demands towards decision-making in that it needs to be argumentative. Fourth, I will elaborate upon the two basic expectations, and argue how they set constraints upon decision-making designs. I will draw upon the discourse on child protection, the legal order itself and the legislative history in the attempt to present a more detailed argument for what is worthy of trust in child protection.

Once the aim of child protection no longer applies to the child, i.e. that the child becomes an adult, the child receives self-determination, which is what I will refer to as autonomy or personal liberty. At this point, the person is no longer held to be in need of protection as a child. The transition from dependency of parents to autonomy is when the child receives the right to personal liberty as an adult. The importance of this transition has been upheld throughout the history of child protection, and it has been used as a reference point for what type of protection has been needed. Furthermore, I will claim that this *prospective* right to personal liberty, carried by a child, is linked to the development of the interests of the child—it is the interests developed during childhood that directs the choices of a young adult. Hence, how interests develop during childhood becomes significant for the prospective right to personal liberty and what constitute the best interest of the adult person.

6.1. Extrapolating the Purpose of Protection After the Post-National Turn

Throughout child protection history, the *bvl* is the first legal code with a so-called statement of legislative purpose. It states:

> *"§1:The purpose of this Act is (1) to ensure that children and young persons who live in conditions that may be detrimental to their health and development receive necessary assistance and care at the right time. (2) to help ensure that children and young persons grow up in a secure environment"*[347]

This legislative purpose is set to direct all actions authorized by the legal order of the *bvl*. Hence, this purpose also encompasses the FBSS-design. As this legal code applies to all

[346] This formulation was also part of the legislative history of the BVL §16-a of 1953. However, in 1953 it was not referred to as a specific statement of legislative purpose. Although we can trace the focus upon protecting development and health far back in time, it became clearer with the establishment of *bvl* §1– Ot.prp.nr. 44 (1991-1992):16.

[347] *Bvl* §1-1. The second sentence to this purpose, "…to help ensure that children and young persons grow up in a secure environment", can be argued relates more to child welfare in general, rather than to coercion of the parents. In this second sentence, the child's development is not threatened.

children, it can be argued that the purpose of child protection is to safeguard each child's development until they are no longer subjects of the legal code, i.e. until adulthood and self-determinate is reached.[348]

Hence, at a general level, current protection is set to ensure that children do not become harmed by their childhood as they develop into adults. This legislative purpose serves the function of being a general formulation of child protection itself, and should not be seen as uncontroversial. I will apply this regulation as a basic ingredient to the normative self-understanding of trustworthy child protection.

This purpose of child protection implies that when the child receives autonomy as an adult, and must take care of oneself, its development and health is supposed to have been above a certain threshold. The new adult, who has not had a detrimental childhood, can then choose to act upon its own interests. A childhood without detrimental care leaves a new adult with the liberty to choose among a certain amount of opportunities.[349] A child affected by detrimental care, on the other hand, will not acquire the sufficient amount of opportunities to make use of autonomy. Hence, such a child must be protected. Due to the principle of non-discrimination, every child is supposed to receive equal protection of their development. If the meaning of "development" is inadequately understood, and a coherent threshold of intervention is not enforced, it opens up for a variety of interpretations of what "development" entail, and risk discriminatory protection of children. Hence, we can argue that each child, in a non-discriminatory fashion, must receive a sufficient amount of opportunities when they become adults.

However, the problem in finding out what is in the child's best interest is that children cannot advocate their own interests because they are children. Thus, the local Child Welfare Office must raise a claim to protect the child's interests on its behalf if threats towards their development are suspected. This doctrine can be dubbed *in loco parentis*, which means that the local Child Welfare Office claim "the place of a parent." When the state wants to protect, it must raise a claim against the parents, and hence a conflict of claims must become resolved.

[348] In special cases, this age-limit can be exceeded from 18, which is normal, to the age of 23 – cf. *bvl* §1-3.
[349] This does not mean that the quality of the childhood itself is disregarded. This is embedded within the demand to a decent development. If you have a miserable childhood, it is equivalent to detrimental treatment and hence a threat towards the development of the child. Across Norway there has been implemented arrangements that ensure economic compensation for "lost childhood" for children who lived in some type of institution prior to the implementation of the *bvl* – cf. St.meld. 45 (2004-2005).

When the FBSS was introduced in 1992, it did not include today's interpretation of the principle of the child's best interest. Currently, the fundamental consideration during the decision-making procedure is a principle of the child's best interest that is in harmony with human rights; this principled shift constitutes the essence of the post-national turn in child protection. With respect to the child's best interest, this turn was affirmed through the passive transformation of the child's best-principle of the *bvl* §4-1 to that of CRC Art. 3.1. in 2003, which meant that the CRC-principle of the child's best interest was confirmed as already embedded in the *bvl.* Hence, the current version of the principle embedded in the legal order is supposed to be rights-based and post-national, while it initially was merely rights-based and a reaction to the BVL.[350]

In NOU 1985:18 and in Ot.prp.nr.45 (1991-1992), the fundamental consideration of the legal code was dubbed "*barnets beste for øye,*" which is an expression that translates to "having the child's best in mind."[351] This is not the same as having a particular child's best interest as a primary concern, as it is stated by the CRC. Hence, it is debatable if the original principle of 1992 is alluding to interests of the particular child at all, or what is meant by having the "child's best in mind."[352]

This difference in principle has not been noted in the more recent legislative history regarding the principle of the child's best interest. It can rather be argued that the difference is ignored in that it is taken for granted that they are in harmony and imply the same thing.[353] The original consideration of "child's best in mind" was nation-based and could involve a simple way of reasoning. The denomination was also provided long before the CRC was even finished, let alone ratified. I will argue that the turn towards having a primary consideration in a particular child's best interest from 2003, makes child protection much more complicated that it was in 1992.

Arguing that the child's best interest principle was already rights-based and in harmony to the CRC Art. 3-1 in a post-national sense in 1992 disregards the legislative history that established the *bvl* §4-1 where the child's best-principle is embedded.[354] If the

[350] Ot.prp.nr. 76 (2006-2007):127, NOU 2005:9: 38-39 and Ot.prp.nr.45 (2002-2003):25.
[351] This is a typical Norwegian expression and it does not work in English. It means that those who are to decide is supposed to think about what would be the best for the child when they reason on what to do. This does not mean that they are supposed to approach the child's own interest.
[352] NOU 1985:18: 145 and Ot.prp.nr.45 (1991-1992):6.
[353] Ot.prp.nr.45 (2002-2003):23.
[354] Ot.prp.nr.45 (2002-2003):25. This interpretation is reaffirmed later in both Ot.prp.nr. 76 (2006-2007) and NOU 2005:9.

amendment of the *bvl* in 2003, which incorporated the CRC, had taken the differences into account, it would have noticed that the §4-1 advocates for the child's best *in mind*, rather than *a guarantee* that decisions are in a particular child's best interest. Currently, the *bvl* §4-1 does not have the word "interest" built into it at all. This omission is, as will become clear later, significant. Since the child's best interest of the CRC is *claimed* to be in harmony with the *bvl,* and hence *claimed* to guide the decision-making process of the FBSS*,* it is a matter of political craftsmanship to ensure that the FBSS operates according to a post-national turn. However, this craftsmanship has yet to occur.

Through the FBSS, both the parents and child are protected by rights. This does not imply formal legal rights, but alludes to the fundamental principle purpose of the system of child protection in Norway—namely to protect the individual parent as long as the child is subjected to non-detrimental care, but protect the child once the type of care becomes detrimental. The defense of parental rights, or what has been referred to as the biological presumption, is the task of the local Child Welfare Office and the non-coercive measures at its disposal. On the other hand, FBSS must potentially be prepared to revoke this right. Hence, parents are coerced only as a last resort, namely when it has been established that it is in the best interest of the child to intervene coercively.

Once childhood crosses over to adulthood, the child is granted the right to personal liberty as a regular adult, and it must continue further alone, and choose what to do in life, according to his or her own best interest. In this manner, it can be argued that the child's best interest, being a fundamental principle of child protection, is internally linked to the right to personal liberty of adults.[355] The protection of a child's development is directed towards ensuring that a child can choose for itself the way it wants to live life once it becomes an adult.

As the *bvl* has a statement of legislative purpose that focus upon the protection of the development of the child, it can be seen as a protection of the development until adulthood when a right to personal liberty is obtained—this is a way to provide a post-national rights-based rationale to the purpose of child protection. This type of rationale is not feasible if you simply interpret that protection of a child is to have the "child's best in mind", which does not

[355] It can be argued that the right to liberty is explicitly entrenched many places in Norwegian law. The most obvious formulation is Art 1 of the United Nations International Covenant on Civil and Political Rights (*spr*). It states that all people have the right to self-determination, which entail the right to choose for themselves what type of conception of good they want to live by. It is also covered in Art. 5 of European Convention for the Protection of Human Rights and Fundamental Freedoms (*emk*): *The right to liberty*.

imply the protection of the interests of the child until it reaches adulthood. The rationale presented here is deduced from the CRC-principle focusing on the interests of the child.

Linking an adult's personal liberty to the purpose of child protection set demands towards how the design of the FBSS should function. If a child did not have an opportunity-set that matched reasonable interests, the development of the child has not been protected in its best interest. If opportunities do not cover a reasonable amount of interests of the child, the care that the child has been subjected to has been detrimental to the child and to the life that child could reasonably want. At this point, coercion against the parents is necessary, I would argue, because the parents have violated the child's *prospective right to personal liberty*.

That the purpose of the *bvl* is to protect the child's prospective right to personal liberty is *not* a normative claim in the sense of arguing for a child protection system we *ought* to have, but is a way of providing a normative language to an interpretation of child protection that the current order of expectations reflect provided its basic expectations. By protecting the best interests of the child as long as it develops, the adult will be able to act upon its interests when it becomes free to do so as an adult. The focus upon protecting the development of the child until it receives the right to personal liberty is the key to understand when to intervene and what to protect.

6.2. The Post-National Threshold of Intervention

The principle of non-discrimination is the key to understand how institutional design provides procedural equality when enforcing a principle of child's best interest. Enforcing the latter principle imply a protection of the individual interest of the child—it is the prospective right to personal liberty of one particular child that is at stake here. In this regard, we can draw lessons from John Stuart Mill, about the state's duty to educate children.[356] I am preoccupied with the protection of the child's prospective right to liberty, and Mill's reasoning regarding the need for state run "education" is equally valid for child care. According to Mill:

> *"...to bring a child into existence without a fair prospect of being able, not only to provide food for its body, but instruction and training for its mind, is a moral crime, both against the unfortunate offspring and against society; and that if the parent does not fulfil this obligation, the State ought to see it fulfilled, at the charge, as far as possible, of the parent."*[357]

If a child is subjected to detrimental care, the child's ability to fulfill its potential in life would become impaired, hence the "State ought to see it fulfilled." Mill's argument, if applied to

[356] See Palmer, Bresler, & Cooper (2001): 116.
[357] Mill (1867). See also Eriksen and Skivenes (1998).

child protection, stands as a crude description of the order of expectations of child protection. If parents fail to provide non-detrimental care, it is the duty of the state to intervene and protect the child.[358] The state must ensure that the child is cared for so that it receives its prospective right to liberty, and hence take over as "the parent does not fulfill this obligation."

Since 1896, it can be argued that a certain type of protection doctrine has been enforced by the state to ensure that a child develops with the ability "not only to provide food for its body," but also with an adequate "instruction and training for its mind." All adults would become "prepared" for a life of their own, for self-determination or autonomy. However, protection must be conditioned by a threshold of intervention that relates to the transition to adulthood and autonomy, namely what this newly acquired autonomy is there to provide—the opportunities needed to choose how one wants to live life. Hence, protection of children is directed towards ensuring that once adulthood is reached, the ability to live an autonomous life according to the child's own choice, is not impaired.

The threshold of intervention is set to ensure that each child receives a sufficient amount of opportunities once they become adults. Those who receive protection cannot expect to receive a type of treatment that would make them better off than those who did not receive any protection but nevertheless received a smaller amount of opportunities than others. In other words, those who receive the worst non-detrimental care, and who are consequently not deemed in need of protection, set the threshold of intervention. As such, it is the children subjected to "almost" detrimental care that has set the threshold to be one of sufficiency. *In sum, decision-making of the FBSS, which is supposed to be in the child's best interest, must ensure that the child receives a sufficient amount of opportunities once adulthood ticks in*.

6.2.1. A Right to a Sufficient Amount of Opportunities as New Adult

As of 1953, by admitting that the parents were best suited to provide care for their children, parents were also guaranteed a right to provide care of their choice. In this way, reasonable pluralism was embedded in the way child protection and child welfare worked. A pluralism of conceptions of childcare and levels of quality of care provided for by parents was the new hallmark. It could no longer be maintained by the LBFB-doctrine that children were to develop to become a part of a monolithic "normality" or "morality"; rather, their upbringing was from then on the result of a reasonable choice of care provided for by parents.

[358] *Bvl* §1-1.

Based on this logic, children could be subjected to an acceptable, albeit less than perfect type of care, which could not be deemed detrimental. However, although "almost" detrimental care would not trigger coercive intervention, the care-type could be subjected to non-coercive child welfare measures. This established a first threshold for non-coercive state interference of child welfare, as child-care was non-detrimental and tolerated. Once a type of care could no longer be tolerated it would be because the parents allegedly had crossed the second threshold of child-care and provided detrimental care. The latter threshold is the focus here, namely when the need for coercive intervention is necessary.

If it was established that care was detrimental to the child, it would be a threat towards the child's development and health, and the care of the child needed to be re-established to once again become non-detrimental. The mandate of child protection has never been to safeguard a happy childhood, but rather to guarantee that the child's life as an independent adult is not ruined because of childhood. It can be argued that, if a child's future right to a sufficient amount of opportunities becomes threatened, it is the state's duty to intervene so that the child is unable to freely choose how to live life once self-determination is acquired.

The principle of sufficiency of opportunity can describe what guides child protection. It stipulates that state-run child protection should ensure that each recent adult is granted the ability to live a life that is worth having for the particular person in question.[359] Hence, it is a focus upon protecting the individuality of each child. The point of divergence from the former legal codes (even the *bvl* of 1992) on child protection of 2008 is, thus, that the type of development of the child that is the object of current child protection is the *particular* child's *best* interest.

6.2.2. Opportunities from Civic Republicanism to Constitutionalism

Although it can be argued that the principle of sufficiency of opportunity, i.e. a certain minimum standard threshold for care, has sufficed throughout the history of child protection, what these opportunities have entailed has varied according to what the purpose of protection entailed.

In 1896 and partially in 1953, child protection aimed to safeguard the development of children so that they, at least ideally, became citizens of a kind that the lawmakers wanted. In 1896 they established corrective education, whereas in 1953 the interests of the child was

[359] This means that the child's best interest is a demand towards the principle of sufficiency of opportunity that is agent-relative. Such a principle is also presented in NOU 2000:12.

either that of the parents or that of the local community—it was never about developing the particular child's best interest. Liberty, in such a civic republican view, implied the obligation to participate freely in civic duties and self-government.[360] In both of these legal codes, but 1896 in particular, it was a desire to make children develop into becoming "normal" individuals in the sense of complying with a general good. Thus, child protection had an element of social hygiene. It was a belief that the success of the recruitment of a civic culture adhering to a general good was a condition for this culture to remain thriving. This is why the two first legal codes can be referred to as dominated by a civic republican imprint.

The *bvl* introduced the child's individuality as a primary focus, and hence liberal constitutionalism. The fact of reasonable pluralism had led the state in 1953 to accept that the aims of parents are not necessarily the same as the state. Child protection incorporated a wider principle of toleration that accepted reasonable and different ways of parenting, making a thicker conception of general good to be disbanded. In due time the focus had become directed towards the child itself, and that they too had to be allowed to vary according to their individuality. From within the new legal order of 1992, the child's individuality was to direct decision-making. Currently, in 2008 and after the post-national turn, the state must find out what is in the particular child's best interest in each child's case. From now on, the child was to develop into an adult on his or her own terms. Trustworthy decision-making is no longer a matter of deciding what type of interest this child is supposed to have, which was upheld in 1896 and partly in 1953, nor is it an effort to have these best interest "in mind", which was instituted in 1992. Current child protection is trustworthy when each child's individuality is upheld.

The threshold of sufficiency of opportunity, which is the object goal of child protection, is relates in a non-discriminatory fashion to the particular child's individuality. The development of the particular child must become elevated above the threshold in order to safeguard his or her right to receive a sufficient amount of opportunities once it becomes an adult. Only then can the child make use of the right to personal liberty.

To a certain extent, the entire history of coercion in child protection has been a matter of developing the normative self-understanding away from the dominance of civic republicanism and towards a dominance of constitutionalism, i.e. the individual right to liberty. It is as if political liberty instilled in civic republicanism can no longer trump the

[360] Civic republicanism is equivalent to "liberty of the ancients" proposed in Constant (1988).

overarching goal of child protection—namely to ensure that the development of the individual child is not detrimental to that particular child's interests, and that what is done to mend the situation is in that particular child's best interest.

6.2.3. Summing Up So Far: A Prospective Right to Personal Liberty

What does the liberty-principle entail in terms of state-driven protection of children? It is not, for instance, an idea of protecting a child's right to personal liberty when it is a child.

> *"To turn [a child] loose to an unrestrained liberty, before he has reason to guide him, is not the allowing him the privilege of his nature to be free, but to thrust him out amongst brutes, and abandon him to a state as wretched and as much beneath that of a man as theirs. This is that which puts the authority into the parents' hands to govern the minority of their children."*[361]

Children do not have a right to liberty when they are children; this is a right that they receive once they become adults. Hence, the child has a prospective right to liberty. This sudden shift into adulthood is outlined in the legal history of the FBSS, dating back to Ot.prp.nr. 44 (1991-1992).[362] Children are today granted full self-determination once they become adults at the age of eighteen. The right to personal liberty that the child receives as an adult must be something the child is prepared for and can make use of. This preparedness is developed in childhood, and is the underlying meaning behind the purpose of child protection—namely to protect the *development* of the child.

Presently, as a child reaches adulthood, that particular person is equipped to strive for whatever that person choose to do, as long as it is reasonable.[363] This person-relative view must be, in a non-discriminatory fashion, compatible with all others having the same chance of choosing among a sufficient amount of opportunities on how to live their own lives.[364] Once the child reaches adulthood, the child has a level of opportunities sufficient for that child. To illustrate, measures that are to be implemented are *always* going to be in the affected child's best interest, rather than that of *a* child's best interest. This is completely different from merely having the child's best *in mind*. Thus, if detrimental care provides an insufficient amount of opportunities, child protection has not served its purpose.

6.3. Reasonable Pluralism and Procedurally Resolving a Conflict of Claims

The order of expectations that maintain post-national child protection standards is embedded in a social system characterized by the fact of reasonable pluralism. Basic expectations within

[361] Locke (2000): §63.
[362] Ot.prp.nr.44 (1991-1992): 5ff.
[363] Cf. reasonable pluralism in part I.
[364] See Nagel (1986): 153.

child protection must also be understood within such parameters. Every parent has the right to choose how to provide care, and each child can choose, according to its interests, how it wants to live life once it becomes an adult. In order to reach such an end, the decision-making design must incorporate reasonable pluralism.

The FBSS must have the ability to reflect upon a multitude of moral and ethical reasons for providing care, ethical and reasonable disagreement etc. The design of the FBSS must assume that parties that confront the board have, or can potentially have, a multitude of views on what non-detrimental care entails. To understand what counts as trustworthy decision-making, it must be presupposed that any procedure must accommodate a multitude of views on how to provide decent care, where all of these views, or claims, can become potentially challenged. Consequently, the decision-making body that needs to solve the norm-conflict must have a design that can deliberate upon every possible choice of care, i.e. whatever conception that is conceivable and contestable. If not, it would be a danger in that even reasonable choices of care could potentially be deemed as detrimental. This means that the decision-making must be designed so that it can justify a final claim upon the best interest of the child.

If the decision-making body becomes confronted by a norm-conflict, the case cannot be resolved according to any pre-conceived notion on what constitute non-detrimental care, in a combination with enforceable norms regarding best types of care, or even a kind of strict non-discretionary rule-governed procedure that stipulates how to reach a decision. None of these approaches would be able to abide by a fact of reasonable pluralism without running counter to such a principle.

The type of norm-conflict we are dealing with here must have a design of the FBSS with the potential to decide in every type of case, in an independent fashion and according to its own authority and discretion. The latter demands towards independence and according to its own authority are a consequence of the need to deliberate upon any type of care-situation in a non-discriminatory fashion.

The need to have an open board that can decide according to its own discretion does not imply that the decision-making does not need to abide by rules. In order to uphold a principle of non-discrimination, the argumentative procedure must become stabilized, and apply equally in all cases. Thus, the decision-making procedure must be neutral, and serve as a device that can reach decisions according to every conceivable input after careful

deliberation. Consequently, the decision-making needs to abide by formal procedural constraints.

It is a predicament in embedding reasonable pluralism into decision-making designs that also needs to ensure stable non-discriminating decision-making. Decisions must reach rational acceptability through procedurally stabilized decision-making. Because of pluralism, in order for a promise of trust to be redeemed, any type of decision must be able to reach the standard of rational acceptability. Is the type of care provided to this particular child detrimental? Should this type of care of this child be tolerated? Searching for answers to such questions, and which only relates to a particular child every time, can only be done through a process of argumentation. The reason is that identifying cases of detrimental care can only be possible if the underlying justification of a type of care, either provided by parents or allegedly desired by the child, pass an argumentative test that answers the questions above. Hence, to find out if a child is cared for in a detrimental fashion, its care-situation must be laid out and justified. If it cannot be justified, it is detrimental. Thus, the FBSS must have a procedural design with an ability to identify, define and test if a care-type is detrimental or non-detrimental.

In the need for locating the threshold of care that determines when the child needs to become protected, it becomes apparent that the threshold of care will take different shapes due to the pluralism of care-types. Nevertheless, all forms of child rearing below the threshold have the common trait of being detrimental. Since the local Child Welfare Office most often does not know if the threshold is crossed—a claim must be raised by them and qualified. They must test their argument. In this effort, parents are likely to raise a counter-claim arguing they are providing non-detrimental care, and that they do not want their parental rights revoked. As such, a conflict of claims arises in every case raised. The FBSS must therefore be able to reach, through processing different claims, an ultimate claim to correctness, reached by procedural constraints guaranteeing rational acceptability.

The parties on either side of the conflict of claims must relate to two different principles—the principle of tolerance of the choices that the parents make on how to provide care, and the principle of the child's right to receive the care that safeguards its prospective right to personal liberty, i.e. its alleged best interests.[365] The claims are either parent-centered

[365] Cf. Art. 8-1 of the ECHR, Art.17 of UNCPR, Art.18-4 of UNESCR for the negative right of freedom from interference into the privacy of family-life. Cf. Art. 8-2 of the ECHR, Art.24 UNCPR, Art.10-3 of UNESCR—all are incorporated into the *mrl* in Norway.

or child-centered, but each claim must relate to the best interests of the child. [366] Just because public officials raise a claim regarding the child's best interest does not mean that the parents have their own interests as a primary concern. Instead, they would claim that the best interest of the child is to remain in their custody. Again, since this is a norm-conflict on how to provide care, there are several right and wrong answers. The decision-making body in charge must consequently be able to qualify and justify its final decision.

According to *bvl* §4-1, which is the *bvl's* equivalent to the best interest of the child of CRC Art. 3-1, it is a demand to both parties to uphold the child's interests. For instance, it might be decided that the claim of the local Child Welfare Office is wrong to some degree, and that the prospective right to personal liberty is not under threat. In this case, the FBSS is supposed to decide not to coercively intervene because non-interference is in the child's best interest. Alternatively, if the best interest of the child is to be protected due to detrimental care, it is to receive compensation for detrimental care in order to increase the likelihood for the child to receive a sufficient amount of opportunities at the dawn of adulthood.

However, the child's best interest can only be approximated because the principle is indeterminate.[367] The best interest of any child can only be assumed—it is a matter of simulating the child's own rational choice when the child is an adult. No one knows what is in a child's best interest, but claims can be made to qualify an assumption. As such, a final decision can only reach rational acceptability through a procedure of claims that culminate in a final and ultimate claim acceptable to all participants as the rational thing to do. In order to qualify such a decision, the process of argumentatively approximating the best interest of the child must open up for all relevant types of arguments, i.e. a multitude of knowledge-bases in order to have an exhaustive and fully ventilated argumentative procedure that tests all types of potential best interests of the child.

6.4. The Child's Best Interest and Non-Discrimination

What is in the best interest of a child? Specifically, what is in a particular child's best interest? More generally, what can be the best interest of any child? Nobody knows the answer—the principle is indeterminate. This means that a decision that claim to be in a child's best interest

[366] This line of thinking can also be traced within the CRC as the principle of toleration and can be argued as entrenched in Art. 5: "States Parties shall respect the responsibilities, rights and duties of parents…to provide…appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention." Hence, this explicates the need for the state not to intervene unless it is a matter of parents not upholding their "responsibilities, rights and duties."
[367] See e.g. Mnookin (1975).

can never become equal to the best interest of the child—such knowledge is inaccessible. Hence, a principle of the child's best interest must be answered by admitting the need for approximation. Decision-making within child protection must observe such an indeterminate principle, and have the child's best interest as a primary consideration in order to be worthy of trust. Some have argued that the indeterminacy of this principle makes it unattainable and hence virtually useless.[368] The purpose here is nevertheless to try to make sense of this principle because it is a basic expectation within child protection.

Many of the critiques of the principle of the child's best interest do not focus upon child protection, but rather upon the application of the principle in general.[369] Here, I will interpret the principle as it figures within the order of expectations, viz. provide it with a post-national human rights rationale. Hence, the approach that will be embarked upon here has a different type of motivation. When a child is in need of protection, it can be argued that any alternative guiding norm besides the child's best interests would be deemed as highly illegitimate, provided the current order of expectations.

In order to uphold the prospective right to personal liberty, the principle of the child's best interest must be pursuant to it. The child must receive measures that would make it capable of making use of autonomy, i.e. to have a sufficient amount of opportunities as an adult. This is the purpose and aim of protecting the development of a child. To deny the child measures that will remedy its detrimental situation in favor of its best interest, is to deny the same child a sufficient amount of opportunities and indirectly deny the right to liberty of that child in adulthood.[370] Such practice would be in conflict with the order of expectations.

The state can only elevate the care-situation of the child up to the level where the child again is subjected to non-detrimental care, and not further. It is illegitimate, according to the current order of expectations, to leave the children that are subjected to inadequate, but non-

[368] The two who has argued the most prominently about the principle of child's best interest being indeterminate and therefore useless as a guiding norm are Mnookin (1975): 229 and Elster (1987): 7. The latter is in debt to the former. They are obviously correct in dubbing the principle indeterminate, but they do not argue the case of the need for it to be indeterminate, or open-textured. Furthermore, it is quite obvious that the principle is more indeterminate in divorce cases where both parents are good parents, and the child is in good mental and physical health, than in a case where parents provide detrimental care, and the mental and/or physical state of the child is threatened. Elster implies that he will provide a publication that argues that the divorce-case is equal to the conflict between parents and the Child Welfare Office, ibid.:1f. He has not published such an argument yet.

[369] In their defence, both Mnookin and Elster published their critique prior to the establishment of the CRC, and their arguments were, at the time, correct. However, the most important points are still relevant, i.e. that it is, in general, an indeterminate principle.

[370] Implicit to this is the obvious argument that the failure to ensure that the principle of opportunity is not secured in manner that makes liberty feasible.

detrimental care, worse off than those captured by the state apparatus. It would be discrimination against those children that were subjected to, and the parents who provided, the worst kind of non-detrimental care. Enforcing a principle of sufficient amount of opportunities must be applied equally to all children—also those directly above the threshold.

More importantly, it would violate parents' right to provide care. Parents have the right to provide less decent care, as long as it is not detrimental to the child's health and development. Arguing in such a way allows for development of rational principles to the interpretation of the principle of child's best interest itself. As Philip Alston argues about the principle of the CRC:

> *"The convention as a whole goes at least some of the way towards providing the broad ethical or value framework that is often claimed to be the missing ingredient which could give greater degree of certainty to the content of the best interest principle."*[371]

In order to make sense of it all, we need to attempt, although knowing that the guiding principle of the child's best interest is indeterminate, to establish a design of a procedure that optimizes the search for what is in a child's best interest without believing that such a goal is attainable. The general stipulation made in the purpose of *bvl*, i.e. §1-1, is one example of an indicator on what direction we need to go to ascertain a child's best interest—namely to focus upon development.

An individual child cannot know what is in its future best interest. We might know something regarding the immediate best interests, but in the long run and with a regard to the development of the particular child, nobody knows what constitutes the best interest. We can never be sure that a decision in a child's best interest was reached and whether or not his or her subsequent development benefits the child in a way it would rationally consent to. Although reaching this goal is the legal claim of the *bvl*, it is nevertheless unattainable.

Even though the principle of the child's best interest is indeterminate, it is important to stress that the indeterminacy of the principle of the child's best interest, within the realm of child protection, is smaller than in, for instance, divorce-cases. The point is that it is always better for the child not to remain in the custody of persons that provide detrimental care. This means that the measures that are implemented to help the child will always improve its situation since the child is removed from detrimental care to non-detrimental care. Hence, this action is always something the child would want, presently and as a future adult. The problem

[371] Alston (1994): 19.

still remains though. Although the situation of the child has improved, it might not mean that the decision fulfills the promise of serving the child's *best* interest.

6.4.1. The Child's Best Interest and the Claim to Correctness

There are no scientific proof that supports any claim of *the* best interest of any child. Moreover, it is no hierarchy of ultimate values guiding the decision that would ensure that a child's best interest is attained. It is no clear-cut consensus on what would be the best type of child-rearing strategy. It is absolutely nothing that can guarantee the child's best interest.[372] Why, then, have such a principle at all?

To argue that the *bvl* is in harmony with the CRC, which was done in 2003, and thereby also argue that the principle of the child's best interest was a part of the *bvl*, did not take into account the moral problems of the principle as it figures in the CRC. In NOU 1985:18, it was argued that the principle of the child's best interest had to be seen in relation to the weight that the developmental psychology puts on the bond between the child and the parents.[373] Hence, the Green Paper argued that decision-making should have the relationship to parents as an indicator on what was best for the child.[374] The principle, as it stands today within *bvl* §4-1, after 2003, has an entirely different purpose, namely to argue that measures implemented according to the *bvl* are aimed at always serving the best interests of the child and nobody else.

For a child that is subjected to detrimental care, any non-detrimental care is better than its current situation. In such cases, something needs to be done, and the interest of the child is the only interest of concern; it is about raising the child's care situation above the threshold and out of detrimental care into non-detrimental care. This does not mean perfect care, but it is a decision on how the child's best interest is served above the threshold so that its prospective right to liberty becomes secured. Hence, the present discussion is not about the principle's application in general, nor is it aimed at how it works in child welfare, but how it works in child protection specifically.

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[372] Mnookin (1985): 18.
[373] NOU 1985:18: 27.
[374] This type of debate illustrates the need to differentiate state involvement between the protection of children and the welfare of children. When the care of a child can be guaranteed by assisting parents voluntary, the rights of parents, as well as the interest of the child, are served. However, when the child is in need of protection because it is subjected to detrimental treatment, the rights of parents are removed prior to the implementation of measures that should be in the child's best interest. Furthermore, non-coercive measures are always to be attempted prior to coercion, which gives the parents ample opportunity to correct their path away from state-interference.

In child welfare, the rights of parents are not revoked or disputed, and hence they still constitute a primary consideration on par with the child's best interest. This implies that the child's best interests constitute different types of consideration as to where that principle is applied. Hence, the best-interest principle must be specified so that it becomes applicable to child protection. It could for instance be argued that the more a situation is deemed as detrimental for the child, the less difficult it becomes to reach a decision that is better for the child, albeit not the best.

In order for the child to receive measures that are in his or her own best interest involves a demand towards decision-making that stipulates that a decision can claim to be the right one, i.e. what Robert Alexy refers to as "the claim to correctness." Due to indeterminacy, we can never do anything else than raise claims to what we argue is in a child's best interest. Hence, the procedure of decision-making must enforce a rule of approximation in the attempt to reach the best possible solution. A claim to correctness involves a claim that is rationally acceptable but nevertheless not valid in a strict sense.[375] By approximating the best interest of the child, an agreement can be established that does not claim to be in the *best* interests of the child. In a process where many claims can be raised, it becomes a matter of finding out how an ultimate claim to correctness can be reached, i.e. the claim that all affected parties can rationally accept.

The process of rational justification must also observe a principle of non-discrimination, as this is the other basic expectation—the demand that children was to receive an equal type of protection and subjected to an equal type of decision-making procedure. This means that the procedure of decision-making must become rule-governed so that each case, although being unique, can be trialed in the same manner. The design of the decision-making body must therefore follow a rule-driven procedure where argumentation consists of raising and testing different claims to correctness, and where the goal is to reach an ultimate claim to correctness that is rational acceptable.

6.4.2. The Need for Indeterminacy and the Ultimate Claim to Correctness

The child's best interest needs to be decided upon in a way that simultaneously upholds the principle of non-discrimination. This can be achieved by designing a decision-making procedure as a legal procedure that can ensure a legitimate outcome based upon principles of

[375] Alexy (1989): 16. Alexy relates to indeterminacy of rules in itself. However, we are not preoccupied with legal argumentation *per se*, but rather a procedure involving legal-normative argumentation. His theoretical propositions are nevertheless relevant to this arena as well.

a general practical discourse—namely rational acceptability. By embedding such an aim into a decision-making design, that also have the capability of reaching it, each decision can be supported by a rational justification in the sense that any moral person can rationally accept the outcome. Such a justification is dependent upon a process of fair argumentation.

A design that meets the procedural demands of a legal discourse must be activated by a problem that must be argued for in the sense that it is a practical problem that needs a solution. Hence, the problems raised by the indeterminacy of the child's best interest principle, i.e. the need for exhaustive procedure of argumentation, can be argued is a precondition for reaching rational acceptability in that it sets demands towards such a procedure. Indeterminacy is rather about the practice of the right in itself—that it is not possible to enforce with certainty. In order for the principle of the child's best interest to be applied in a sensible manner, provided its indeterminacy, we need to approximate certainty each time knowing certainty is unattainable. Since the best interest of the child is contingent upon others making a judgment on behalf of the child, efforts should be made in order to safeguard highest possible certainty that the best interest of the child become served.

The prospective right to personal liberty provided to each child is internally linked to the child's best interest. Decision-making enforcing the prospective right to personal liberty implies decision-making with a current focus upon the future interests of the child. This is an interpretation of the meaning behind protecting the development of the child, provided the backdrop of a post-national human rights rationale that is reflected by the current order of expectations. What justifies such a guiding norm is the importance of the right to personal liberty for adults, and how this type of autonomy is embedded in a constitutional state.[376]

Attempting to solve the ethical problem in question is a matter of practical reason, i.e. a question of drawing upon the faculties of reason in order to decide on how to act in the best interests of a child. As such, a decision becomes forged on the correct course of action for a particular child through a process of argumentation; it is a matter of expressing a final ethical position by way of constructing an argument. Since nobody knows, or can know, with any certainty what the correct answer is, all relevant arguments must be put on the table. One argument alone can claim to be correct, and claim the just course of action to ensure the best interest of the child. One such argument reflects a type of reason from the person or entity that

[376] Any moral discussion on whether or not this is good or bad thing in itself is unnecessary at this point; this is merely stated as a characteristic for a nation-state that claims to uphold human rights. Norwegian government claim to uphold human rights.

utters it alone. Such a claim is not universally held to be correct, as it is the opinion of one person or one entity alone—others have competing and potentially equally good justifications for why a particular action should be commenced upon.

The ethical point of view of one person or entity that claims to be the right one constitutes *one* claim to correctness. If others make claims to correctness, they must also be heard in order to establish the validity of their claims. All claims that can inform the process of reaching an ultimate claim to correctness must be allowed to enter the procedure of argumentation—if not, the final decision might lose valid insights and thus lack the quality of rational acceptability towards the guiding principle of being in the child's best interest.

The claim that can be argued is legitimate is the one that all affected parties can accept through a procedure of scrutiny and deliberation, where rational acceptability of a decision in the child's best interests is reached by the decision closest to being the objectively justified action norm of the particular case at hand. This claim is most often not carried by one speaker, but is a result of argumentation. It could be carried by one speaker, but then it would need to address other arguments in order to reach rational acceptability among all affected parties by way of the argumentative test. Hence, the design of the decision-making procedure itself is imperative.

By confronting a distinct problem to practical reason, a distinct normative question becomes raised at the point of departure. In this case, the question is: "What is in a child's best interest, given this particular child's circumstances?" The solution is sought in a decision stipulating an action regarding what *ought* to be done. At this point, securing the interests of the child is not a matter of facts and how such facts become established. Such matters have been settled, and then it is a need to decide on the issue of what ought to be done in order to ensure that the child's best interest is fulfilled.

The solution to the problem should be within the realm of what Kant referred to as objective practical reason—namely "valid for the will of every rational being."[377] This is what is meant by rational acceptability. As noted above, each carrier of an argument can only make a claim upon representing something that is subjectively valid until such an argument has been confronted, confirmed or dismissed in a process of argumentation that includes all parties that are relevant. Only by subjecting an argument to an argumentative procedure

[377] Kant (2002): 29. Many modern theorists have argued around this type of thinking. However, we will discuss or present them here.

would it be possible to make it valid to the will of every rational being and reach rational acceptability. Hence, it is not a matter of claiming what is in a child's best interest, which is indeterminate, but to reach a conclusion that all can agree to is the optimal one. However, in the case discussed here, it is not necessary to include every rational being directly, but rather those who are affected by the decision and who thereby posit relevant arguments.

Important parties to the procedure is the child, the parents, the accusers, the mediators, medical practitioners, psychologists, neighbors, and friends, but this list is by no means exhaustive. A relevant argument raised by a parent is to be treated as one subjective practical argument on par with, for instance, the medical practitioner or social worker. Since the goal is to achieve an outcome that satisfies "every rational being," it becomes mandatory that every relevant argument must be heard and scrutinized.

Due to reasonable pluralism of modern societies, of continuous differentiation and increasing normative and epistemic complexity, the amount of relevant arguments can be many. Due to indeterminacy, none of them can claim certainty in knowing what is in a child's best interest. This rather makes it more important to establish procedural decision-making that can include all relevant arguments relating to the child in question.

Three important issues must be accommodated in the attempt to approximate a decision that is in a child's best interest. *First*, nobody alone can make decisions in the child's best interests that have the quality of rational acceptability. *Second*, every argument that can be relevant must be included; hence the need to include every affected party. *Third*, such a procedure must be able to extrapolate the relevant arguments in a fair manner. Due to these three circumstances, which can accommodate variations of input between cases, the design of the decision-making procedure must become rule-based to ensure a fair procedure of argumentation that do not discriminate between cases. This also sets demands towards the leader of the decision-making board, who must be able to understand what arguments are permissible or not.

On this note, we must resort to the central background principles of a fair process of argumentation that can solve the practical problem we are confronted by. Reaching a legitimate decision can only be achieved if "every rational being" becomes included in argumentation. This demand is limited by the fact that in order to be regarded as a "rational being," one must present rational arguments, which implies being, at some level, affected by

the purpose and aim of decision-making. Each argument presented must have the particular child's best interest at heart, and on some level relate to this aim.[378]

Habermas formulates a discourse-principle that incorporates the Kantian precept: "valid for the will of every rational being." Here, I will apply such a discourse-principle as a design principle for establishing an ideal standard for a decision-making body that can be said to harbor the ability of reaching legitimate consensus through argumentation that merits rational acceptability. The principle underpins objective justification of norms in general:

> *"Only those norms are valid to which all affected persons could agree as participants in rational discourses."*[379]

According to such a principle, a decision can only be reached through a discursive test that includes *all those affected*. This line of thinking is what has to pervade the design of the decision-making body and its procedure of decision-making.

It is simple to narrow down most of the affected parties. Since most people have no sensible arguments, then "most people" have no place in the general practical discourse concerned with one particular child's best interest. As such, everyone can, at least theoretically, be represented in the fact that most parties external to the case have no convincing arguments to present, or so we can at least assume for practical purposes.

By demanding that every conceivable relevant argument is to be raised and argued for before reaching a decision, the discourse-principle approaches the aim of decision-making from an angle that makes the indeterminacy of the child's best interest less important. It is a matter of treating the problem at hand as a practical problem that has many solutions, and makes it rather into an effort to approximating the child's best interest exhaustively. Reaching an ultimate claim to correctness is the goal, since a valid or factually correct decision is still impossible. If the design of the procedures observes the discourse principle, it could be assumed that an ultimate claim to correctness would arise at the intersections of arguments, where many different claims to correctness are raised and are potentially of equal strength.

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[378] Professionals are representatives of knowledge-regimes that are qualified on their own terms. An argument made by medical practitioner that stipulates a particular treatment of a child in order to develop affects the decision in a reasonable manner. Professionals make claims upon best practice and must be included into the procedure discursively. Their claims are equally scrutinizable. This point will not be argued further in this dissertation.

[379] Habermas (1998a): 107.

6.4.3. Upholding the Principle of Non-discrimination through Rules of Discourse

The fact of reasonable pluralism is a consequence of the free exercise of reason under conditions of personal liberty for all.[380] Interests of children are embedded in such a highly normative complex landscape in a distinct fashion, namely by their prospective right to personal liberty. In order to incorporate the fact of reasonable pluralism, how protection becomes enforced operatively must be allowed to vary according to the differences between children that are rooted in their individuality. For instance, two children who are subjected to the same detrimental care can receive different treatment because children, it can be argued, have different interests. This means that different treatment, on one level, is called upon in order to enforce a more fundamental principle, namely non-discrimination. To reach such a goal, some basic rules of discourse must be accommodated that can safeguard that the conclusion that claim to be in the particular child's best interest is also applied as a general right of the child, i.e. that it does not discriminate. Hence, rules of discourse can secure a principle of non-discrimination embedded in decision-making and thus safeguard an equality of treatment although each child is to be treated according to their individuality.

The principle of non-discrimination is, perhaps, the most basic principle in rule of law. Here, it could be argued that the principle of non-discrimination is what makes democratic law legitimate, namely that law applies to all equally. In the CRC, non-discrimination is the first article to be mentioned after the definition of the child, and it is a principle definition of demands set towards enforcing post-national standards of non-discrimination: "State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind."[381]

Hence, each time a decision in a child's best interest is reached, or claimed to be reached, it must be reached in a manner that does not discriminate between children's positive right to receive measures in their own best interest.[382] Frøydis Heyerdahl argues that "[t]he protection of non-discrimination in the CRC, imply that children is to have equal access to the rights of the convention."[383] Since the outcome of such a demand, i.e. namely that the decision is in a child's best interest can vary from one child to the next, according to the interests of the particular child, as is one of the central features of the normative self-understanding of current child protection presented here, the design of decision-making

[380] Rawls (1993): XXIVFF.
[381] CRC Art. 2.1.
[382] This is a social right equivalent to an allocation-rule – Goodin (1986):186. I will return to this later.
[383] Heyerdahl (2008): 32.

procedure itself is the equalizer in being stable from case to case whereas the input to the procedure can vary. Said differently, whereas each child is treated according to their individuality, the procedure remains the same.

Any infringement upon the principle of non-discrimination, which would mean that equal cases were treated unequally, or unequal cases were treated equally, would mean that some or all children lack legal protection. Both cases could threaten the potential for decision-making in child protection to redeem a promise of trust—namely, different children would be treated as if they had the same interest or that equal children (however unlikely there is such an event) were treated different. Consequently, it can be argued that the manner in which the principle of non-discrimination becomes enforced, influence the way the child's best interest is reached.

So far, it has been established that since the child's best interest is an indeterminate principle, it needs to be approximated through a process of argumentation. This involves opening up for all types of arguments that can lay claim upon being in the particular child's best interest. Hence, the discourse-principle, with its ability to shape mutual understanding and rational acceptability, is a strong contender to become the fundamental design-principle. The stability provided by the discourse-principle is the need for abiding rules of discourse that originate in practical discourse. In this way, each decision can make use of the ideal standard of reaching decisions that are "valid for the will of every rational being" as a regulative ideal. This sets yet more demands towards how the procedure, namely that rules of discourse must be enforced.[384] These rules are different from formal rules of procedure in that they are embedded in the logic of discourse itself.

In order to solve the problem of indeterminacy, a legitimate consensus can become established that all parties can be made to accept a decision as an ultimate claim. Hence, the fact of indeterminacy becomes also a resource in that reasonable pluralism is allowed to pervade the procedure through different claims upon what is in a child's best interests. Hence, a general practical discourse, which upholds rules of discourse, should become incorporated into the decision-making design in combination with formal rules of procedure that mimic a legal practical discourse. The design-principles that stipulate a rule-governed procedure will ensure non-discrimination, and a general practical discourse within such a framework can ensure that the best interest of the child is approximated through exhaustive argumentation.

[384] I will return to this briefly.

By applying a discourse-principle to a legal design, which is needed in order to approximate the child's best interest, both basic expectations can become incorporated simultaneously. In such a way, it can be argued, a legal order can comply with the current order of expectations to become worthy of trust. Hence, by extrapolating design-criteria, empirical assessments can be made on whether or not the design of decision-making body complies with basic expectations.

A design must *first* be confronted by a problem that requires practical reason, i.e. an ethical problem.[385] The solution to such a problem cannot be settled in any other way, either by for instance scientific methods or by aggregating preferences on this particular issue. It is a problem where the solution is essentially contested. Although the indeterminacy of the child's best interests sets constraints on design, indeterminacy does not become a problem once reasonable pluralism is embedded in the design. The reason is that the constraint of reasonable pluralism admits that any outcome is contestable, and that the best interest cannot be reached in any absolute terms. Due to the contested nature of the decision, it is not an exercise in rhetoric skills and theoretical considerations, but rather one of practical reason. The process of reaching a decision that is in the best interest of the child constitutes such a practical problem.

Second, the practical problem must be recognized by those involved, and that would motivate them to participate and present arguments that are relevant. The participants must be affected in a manner that makes them want to argue their case. The solution to the ethical conflict is something that those affected must live by, and it is in their interest to be a participant. If those affected did not join the discussion, their arguments would not be aired and the outcome of the process could become illegitimate because relevant actors did not partake in the process of reaching the final decision. Hence, rational acceptability would not be established.

Including parties that have nothing to lose or gain, or are equally motivated to disinterest as to interest towards the matter at hand, can unnecessarily disturb the procedure. They are not qualified as affected or relevant. Consequently, the number of parties that are affected must be kept to what is constructive for the decision in question. Child protection cases where parents potentially become coerced and might lose their child are cases that

[385] See Eriksen & Weigård (2003): 199ff.

constitute situations where those affected, either because their life-situation is at stake, or can make qualified professional opinions on the matters at hand, are easy to identify.

Third, it must be a competent mediator, whom all parties to the procedure can trust to be fair. This person must ensure that the parties to the procedure abide by certain rules that an argumentative procedure must adhere to in order to reach rational acceptability of the outcome—that decision-making adhere to a principle of non-discrimination. The role of the mediator is to ensure that the argumentative procedure navigates according to a rule-driven procedure towards the aim of decision-making, namely that decisions are in the best interest of the child. This involves formal rules of procedures and rules of discourse. Any attempt to cheat, to pressure, or to selfishly argue contrary to the aim of decision-making, the child's best interest, would be in need of correction by such a mediator. The purpose is to construct a platform from which a solid decision can arise. In order for this role to be fulfilled in a fair manner, the mediator must also be the judge, i.e. the decision-maker. The mediator is in need of having a full understanding of the case-matter and must safeguard a procedure that convinces all those involved the rational acceptability of the decision.

Fourth, those who participate must have equal capacities. Since rational acceptability requires mutual understanding, discursive asymmetries must be compensated for. In this context, discursive asymmetries refer predominantly to competence and authority. Hence, having extensive competence or having authority should not push the discourse in any particular direction. Either a party must become empowered to participate, for instance by having legal representatives, or the other party must be controlled for not using illegitimate coercive means. If parties are not set to be equally represented, it would not be possible to reach legitimate consensus. In the case under consideration in this study, the party who is most likely to feel like the "smaller part" is the parents. They become subjected to a decision-making procedure that every other party, except their family, has experienced before. Hence, the parents and the child must receive some kind of support.

6.5. Conclusion

Since 1992 it has been a significant development within the legal order of child protection. This development's strongest manifestation was the amendment of the *mrl* that incorporated the rights-catalogue of the CRC into Norwegian law in 2003. This amendment supported the development of making the legal order more in line with a post-national order of expectations. However, in order to redeem the promise of trust, the entire *bvl* must be pervaded by a proper

human rights rationale so that it too complies with the order of expectations. The problem is that no significant attempt has been made to reach such a goal. The legal proposal that sought to break this ground merely changed two rules within the *bvl*. It is safe to say that efforts have not been made to lift the *bvl* onto a human rights-rationale it needs to be in order to redeem the promise of trust.[386]

The principle of non-discrimination and the principle of the child's best interest are the most important components of the order of expectations in child protection. These basic expectations were both introduced by the *bvl* in 1992, but have been through a post-national turn. However, the design of the FBSS has not become altered specifically to comply with the order of expectations after a post-national turn. Due to the lack of any legislative history concerned with the application of a post-national principle of child's best interest, we can guess that the *bvl* has yet to comply with the order of expectations fully. Consequently, the FBSS does not necessarily abide by the current order of expectations. We will seek to evaluate the FBSS in the next chapter.

In an attempt to construct an expression of how a human rights-rationale for the child's best interest can be approximated to child protection, a principle of sufficiency of opportunity has been applied. This principle is an interpretation of what a prospective right to personal liberty must entail with regard to child protection. The aim of protecting the child's prospective right to liberty is directed at the development of the child and the child's health. This protection principle is empirically construed in the sense that I have drawn upon the rights-based post-national turn in combination with the purpose of the *bvl* to lay out a normative self-understanding that can be argued is worthy of trust. The discussion has not, and will not, lead to any claim upon its moral validity or truthfulness. The point has been to infer the current order of expectations empirically and its basic expectations and thus explain what they could imply.

Protection must safeguard personal liberty in that the child has a sufficient amount of opportunities to choose from. The threshold of sufficiency is set because children in state-custody cannot be given an advantage compared to those who receive non-detrimental care, but who have a smaller amount of opportunities. Decisions that involve coercion must ensure that the child receives non-detrimental care, and also that this type of care is in the best interest of the child. If the state did not protect children and failed to ensure that they received

[386] Ot.prp.nr.45 (2002-2003).

measures that would re-establish non-detrimental development towards adulthood, the freedom to choose for one self how to live life would not become realized for that child.

Hence, the threshold of coercive intervention is conditioned by the worst type of non-detrimental care provided by parents. Every kind of care is detrimental to the development of a child if it ends below this threshold. Detrimental care threatens the child's right to personal liberty and narrows down the child's future autonomy as an adult. The larger the gap becomes between the worst type of non-detrimental care and the detrimental care a child is demonstrably subjected to, the more likely it is that the parents would lose custody.

Since the goal of the decision-making process is embedded with normative complexity by the indeterminacy of the child's best interest, the attention towards the principle of non-discrimination becomes all the more important. As such, in order to establish non-discrimination, each case must be subjected to procedural equality. Discrimination occurs if children would become subjected to different types of decision-making procedures, or rules of procedures, as was the case with the BVL of 1953. The lack of upholding the principle of non-discrimination was one of the main criticisms that led to the downfall of the BVL. By establishing rules of procedure that does not restrict argumentation, but secure the discursive space needed, procedural equality that ensures non-discrimination can become established. In the present case, the rules of procedure must encapsulate the discursive space in order for a decision to approximate the best interest of the child. Rules can construct the necessary procedural conditions to optimize the goal of reaching the child's best interest.

No matter what the nature of the case is, or how apparent the lack of care is perceived to be, the implementation of measures in a child's best interest is never a rock-solid verdict. The child's best interest is not a science. It is also hard to imagine that it can become a part of any one profession's epistemic platform, although some claim to have a way of calculating what is in the child's best interest.[387] There are numerous perils when making decisions upon a principle that is indeterminate: the empirical evidence is complex and confusing, weighting arguments can differ, concepts are vague, disparate life experience makes judgments diverge,

[387] Here, I refer to the development of evidence-based practice within child welfare. This type of practice can be a threat towards the need to particularize the decision-making within child protection. Hence, if evidence-based practice became introduced into coercion cases, where the particular child in question needed its best interest maintained, evidence-based practice would be an unwarranted practice.

different normative considerations makes overall assessments different, and some type of selection must be made that unintentionally exclude others.[388]

It can be argued that, theoretically, those who claim to set forth design principles, such as those that have been produced here, also carry shortcomings and inadequacies, such as cognitive biases and misconstruing morality, overtaxing their own rationality or misdiagnosing reason. In sum, the pitfalls of deliberation in practical problem-solving are apparent and out in the open. The pitfalls aside, the alternative to producing design principles, i.e. not doing so, is leaving design to chance and discrimination. Let us now turn to the evaluation of the FBSS, and discuss if it can redeem the promise of trust.

[388] See Rawls (1993): 56-57.

7. How the Design of the FBSS Comply with Basic Expectations

This chapter will discuss the important strengths and weaknesses of the FBSS-design with respect to the promise of trust. This means that I will provide an evaluation of the congruence between the current legal order and the basic expectations of child protection. Hence, we have finally reached the point where we can focus upon answering the main research-question of this dissertation: Does the FBSS redeem the promise of trust?

In the former chapter, an expression of a normative self-understanding was reconstructed from basic expectations. It established a special interpretation of the principle of sufficiency of opportunity and the child's right to personal liberty once it becomes an adult. In order for child protection to safeguard a sufficient amount of opportunities for each child, decisions must be reached that are in the particular child's best interest and at the same time uphold the principle of non-discrimination. These two expectations and how they are embedded in a particular type of design will be the underlying critical framework throughout this chapter.

The strengths of the design will imply that the promise is kept. The weakness, on the other hand, will imply a weakening or breaking of the promise of trust. Hence, the weaknesses can overshadow the strengths, so that—although there is solidity with respect to trust—the promise of trust can nevertheless no longer be argued is redeemed. Thus the argument emerges whereby the greater the tension between current legal order and the order of expectations, the less worthy of trust the FBSS' decision-making becomes.[389]

In the following section, the focus will be upon the design of the FBSS in January 2008, when the last great reform of the FBSS became implemented. There are important changes to the design from 2008; for instance, the FBSS became transferred to the *bvl* from

[389] See the model of the approach in the introduction.

the Social Services Act – *stl*, and the design of the FBSS has now explicit formal main principles of procedure, including absolute demands. These changes are all put forth by Ot.prp.nr.76 (2006-2007). The transfer from *stl* to the *bvl* was done because the original FBSS, which was set to perform decisions within social affairs that involved coercion in general, was predominantly making decisions in child protection cases. With reference to the formalization of rules procedure, the committee set in charge for proposing these measures, first put forth in NOU 2005:9, proposed to copy the rules and principles that were to guide the civil courts. They argued that the fundamental principles guiding a civil procedure, formally expressed by *tl* §1-1, contained fundamental demands to the quality of the decision-making needed for the FBSS. This effectively made it quite explicit that the decision-making of the FBSS were to observe principles guiding a legal discourse within a court of law.[390]

However, the greatest change from the implementation of *bvl* in 1993 until 2008, is not within the legal order itself, but in the transformation of the basic expectations, and how the legal order must abide by them in order for it to become trustworthy. As shown in the previous two chapters, it can be argued that the basic expectations have developed in a post-national direction, and that the political craftsmanship has not been competent enough to incorporate the type of rationale that is involved in such a turn of events. This means that what we can expect is tension between the legal order and the order of expectation, a tension that indicate that the promise of trust is not redeemed.

The forthcoming discussion will be divided into five parts. They represent the main building blocks of a design of any decision-making body. The *first* will focus on how a case is *initiated* and the *localization* of the board. The *second* will discuss the *composition of the board* and how it is convened. The *third* will discuss in what way the *parties to the procedure* is included. The *fourth* will discuss the main *principles of procedure* as they are formulated in the *bvl*. Finally, the *fifth* will focus on the *procedure of negotiation*. In this last part, the four prior sections will intersect, as the procedure of negotiation constitutes the core of the decision-making procedure.

7.1. Localization of the FBSS and Initiating its Authority

With regard to localization and the initiation of the authority of the FBSS, there are three key aspects that will be discussed. The first is how the private party is drawn into the procedure,

[390] NOU 2005:9: 31ff and 38. To mention some: Parties to the procedure have a right to be heard, case-proceedings is based upon equal treatment, contradiction/adverserial principle, decisions are to be justified. The subsequent proposition upheld this demand, and these rules of procedure are today a part of *bvl* §7-3,

focusing on the parents rather than the child. The second is to argue that the authority of the FBSS is independent from geographic distance to those affected. The third is to argue that the principle of child's best interest calls for a separation of child protection from child welfare.

7.1.1. Initiating Authority and the Private Party

The FBSS is set to respond to petitions put forth by the local municipal Child Welfare Office in combination with a counter-claim to the petition made by the private party (if such exists).[391] It is submitted to the FBSS because non-coercive means have not worked, implying the need to coerce in order to elevate the care of the child from detrimental care to non-detrimental. This petition corresponds to a regular court subpoena.[392] Within the petition, there are two particularly important elements: The first is the claim from the local Child Welfare Office on the need to intervene, namely a justification of what constitute the detrimental nature of the care. Second, is what measures to implement to improve the life of the child supposedly in that child's best interest.[393]

These two steps are intertwined but they do constitute two very different parts of the overall decision-making procedure. The first is a claim upon the need for coercion of parents and revoking their parental rights temporarily or permanently. The second is to find out what to do with the situation of the child that would help bring his or her development back on track. The petition is to include claims from the Child Welfare Office on why coercive measures should be taken, the case matter, propose measures, who the parties to the procedure are, what type of the FBSS to convene.[394]

The private party does not need to put forth a counter-claim, or stay in the meeting of negotiation, and if they do not present a counter-claim in ten days, the case is presented to the board with only the claims put forth by the Child Welfare Office.[395] This can obviously weaken the case of the private party, since the leader of the board would have no way of knowing how the claims raised by the local Child Welfare Office can disputed by the parents.

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[391] *Bvl* 8-4, 2-1 c, 7-11.

[392] Cf. *tl*§9-2. The difference between the *bvl* Norwegian denomination *begjæring* (petition) and the *tl* denomination *stevning* (subpoena) can be incidental. Nevertheless, the difference underlines the fact that the FBSS and civil court are different systems (although this is a copy-paste rule from *tl* to *bvl*), and that a civil court is not to act in the way the FBSS must—namely implementing measures as well as reaching a decision on whether or not the parents have, in fact, delivered detrimental care.

[393] How these petitions are written is not an object of the present study. I do not know if the child welfare office have obeyed by a post-national turn or not, but the petition should include, if it is to redeem a promise of trust, a justification of action that is directed upon restoring the child's development so that it receives a sufficient amount of opportunities as adulthood ticks in.

[394] Cf. *bvl* §7-11.

[395] *Bvl* §7-7, 7-11 – fourth paragraph.

Another problem is that the complexity of the case is underestimated, and hence the board can be convened in a manner not fit for the case.

Another problem with the fact that there are no formal requirements to the private party presenting a counter-claim is that the private party does not become included in the procedure appropriately on par with the public prosecutors. Parents can thereby loose their rights to parent their children *in absentia.* Thus, an important demand set to a decision-making procedure that is supposed to reach a legitimate consensus is compromised, as the parents have not become sufficiently empowered to participate in the procedure. They loose their rights due to the asymmetric relationship between those involved. By not forcing them to attend, the ability to reach a legitimate consensus on the child's best interest is weakened. Knowing what the weaknesses of the particular parents are can for instance qualify the needs of the child. Hence, forcing parents to attend would help reaching decisions that are more relevant to the need for compensating for the detrimental treatment of the child.

If a counter-claim is not produced, the leader of the FBSS has no way of knowing the circumstances of the private party. The parents are the closest relatives to a child, and the possibility of not including them at all will affect not only the relevancy of measures, but also the solidity of the decision-making. The board has to establish how bad, and in what way the parents have been bad, and not only if they have provided detrimental care or not. Detrimental care is also a matter of degree, and this has to be established together with the parents. If the parents choose not to, or are unable to submit a counter-claim to the petition, or fail to attend the meeting of negotiation, this might lead to a decision that is too harsh with respect to the rights of the parents, decisions can become less relevant, and they are less solid. Not hearing the voice of parents will affect the procedure one way or the other and make the decision shakier. If a decision is to be worthy of trust, it must approximate the child's best interest from all sides. Excluding one side harms this aim.

If the parents of the child are allowed not to attend, then the mindset behind the design also accepts that the parents do not need to be there in such decision-making. This can be interpreted as a lack of understanding for one important role that the FBSS is set to play, namely to protect the rights of the parents from an obtrusive state interference and ensure that the child's best interest is upheld with or without the implementation of coercion.

7.1.2. The Regional Level – Geographic Distance or Court of First Instance

One of the most significant design changes made when the FBSS replaced the old BVN-regime from 1993, was that the protection of the child from then on was to be entrusted to a separate decision-making body from those implementing non-coercive measures, i.e. those responsible for relief and welfare-measures at the municipality level. The reform of 1953 was motivated by including parents, or family, into the equation when securing the welfare of the child. This system attempted to rescue a family without resorting to coercion, and consequently introduced the biological presumption. It stipulates that the child is to remain with its parents as far as it is possible without the child receiving detrimental care.

The development of 1992 was to separate distinctly between the welfare of a child and its family from the need for protection of a child subjected to detrimental care. The separation between coercive and non-coercive measures was made partially to ensure the legal protection of the parents, and that decisions involving coercion was to be raised to a higher level. The biological presumption remains in the sense that when the parents can no longer be empowered by public officials and their relief-efforts to deliver non-detrimental care, they also lose their rights of parenting the child.

The *bvl* of 1992 lifted the decision-making body responsible for such decisions out of the local bonds, where it was settled by the legal code of 1953. The BVN had predominantly locally appointed members, and the new FBSS was not to follow on such track. However, non-coercive measures remain the task of each municipality. If the local Child Welfare Office claim it to be necessary to coercively intervene in the care-situation of a child, they must put forth their case on a regional level.

> *"The committee on the Social Services Act has unanimously suggested that the treatment of coercion-cases is to be moved out of local administration and over to an independent body, and about 80% of the hearing-respondents supports this proposal…The proposal has its background in the criticism directed towards the case-work in the boards within the municipality. The rules of procedure are to contribute to a result that is correct and just, and the criticism towards weaknesses regarding the case-work must be taken serious."*[396]

Elevating the board to a regional level made it possible to perform coercive decision-making by members of the board that did not run the risk of making decisions that set a stigma upon familiar faces within the local community.[397] Hence, the first article of the design of the FBSS in chapter 7 of the *bvl* states that each *fylke* (region) is to have one board that would make

[396] Ot.prp.nr.29 (1990-1991): 134.
[397] It can be argued that the problem of legal protection and being legally prejudiced became greater in the local communities with a low population density.

decisions in child protection cases, whereby each municipality within one region is subordinated to one board.[398]

The geographic jurisdiction of an FBSS is simply meant to be practical. The purpose of the 1992-reform was to have a state-driven board with a professional imprint that could ensure the legal protection of all those affected. It was not a point any longer, as pointed out within the NOU 1985:18, that led to this design of the FBSS, for the geographic localization to have substantial meaning, as was the case with the former BVL.[399] Within the former BVL, the entire point was to establish a local decision-making board, symbiotically linked to the local community.

That the FBSS became independent or separated from the logic of geography can be illustrated through the arrangement that ensures that each municipality is linked to one regional FBSS. If an FBSS could not handle a case, or had other problems with capacity to handle a case, the neighboring regional board, it was argued, was just as fit to perform decision-making.[400] This made the former logic of geography, or locality, redundant. Moreover, the local representation was no longer an issue. Decision-making within the FBSS was no longer seen as best accomplished through having democratically appointed members of the board. It is rather a point that the decision-making body was to be of a professional and independent nature.[401] This underpins the post-national turn of the basic expectations of child protection, since children within the FBSS are treated as equals, independent from their local background. Although on par with the basic expectation of non-discrimination, this is contrary to the BVL arrangement where children was seen as intimately linked to their families and local communities.

Even though the board is only meant to be regional of practical reasons, it still has a geographic denomination. The geographic denomination, which the word *fylke* (region) suggests, clouds the very essence of what the FBSS is set to do, namely to protect the interests of the particular child no matter where that child came from. Any board, in any region, is supposed to do the same job and thereby uphold the basic expectation of non-discrimination. This expectation stipulates that it cannot be any variations in the protection of children

[398] Region is more accurate than the administrative areas referred to as *fylke.* There are fewer FBSS that there are *fylke.* The regional level is also not administratively entrenched, but rather geographically – the FBSS is state-driven from 2004 and not on a *fylke* level or *kommunalt* level (i.e. local, or municipality).
[399] Ot.prp.nr.29 (1990-1991): 131.
[400] Ot.prp.nr.76 (2005-2006): 24.
[401] Ot.prp.nr.29 (1990-1991): 134.

depending upon where they reside, it harbors the principle of non-discrimination fundamental to rule of law. Hence, it helps to redeem the promise of trust.

The basic expectation of non-discrimination can become embedded in the legal order by equalizing the ability of the boards to decide on what to do in any potential case. Geography had lost its value as a legitimizing factor in child protection—it had, in fact, brought about discrimination. New basic expectations had emerged, and the principle of subsidiarity within decision-making could no longer redeem the promise of trust. When non-discrimination is embedded in the design, decisions are supposed to receive equal treatment across the different boards. The word *court* is in this respect neutral, and could replace the obsolete geographic connotations such as municipality or region. Since *fylke,* region, is of no meaning, it should also bring about a change of the denomination to become 'court'. As we will see in this chapter, the FBSS can rather be referred to as a type of court of first instance for cases involving protection of children, albeit still an administrative court.

If any board's practice varies, i.e. by treating equal cases unequal, or unequal cases equally, the decision-making discriminates between children. This is a breach with the basic expectations and a threat towards the promise of trust. Although the regional denomination of the decision-making board does not lead to a weaker decision-making in and of itself, it suggests that the system is somehow dependent upon being regional. This is hardly any demand today, which is underlined also by the post-national turn within child protection. As it stands now, the name of the board is part of a reasoning regarding administrative decision-making belonging to the past logic of geographic denominations.

The FBSS is to decide in cases that are raised by the Child Welfare Office in each municipality.[402] This is what activates its authority. The Child Welfare Office in each municipality is responsible for seeing the case through, from raising a claim to the follow-ups and implementations of the decisions of the FBSS. This implies that both initiating and implementing the decisions of the FBSS still depends upon the personnel of the local child welfare office.[403]

This office can only do as much as its capacity allows. Hence, variations between the local Child Welfare Offices can occur with respect to differences in capacity. If a situation arises and the capacity is blown, the office cannot take care of children in need of protection,

[402] *Bvl* §8-4.
[403] *Bvl* §2-1.

and it can be argued that problems arise both with respect to the basic expectations of child's best interest and non-discrimination. For instance, some children might not receive equal priority because the detrimental treatment of a child is less severe than other more deserving children. Hence, a petition to the FBSS is not submitted. The threat is nevertheless still there, albeit less prominent. Hence, the entire purpose of child protection, i.e. *bvl* §1, can become unattainable still because of variations between municipalities, and how their offices have capacity to deliver petitions and also that what is deemed as detrimental care is dependent upon those working at these local offices. The way of correcting such a weakness is to leave child protection entirely to a state-level that perform practice that does not discriminate according to municipal borders.[404]

The FBSS must ensure that decisions that are to be in the best interest of the child are enforced when the Child Welfare Office in the municipality takes over the process of implementation. If the municipality interprets and implement decisions wrong, the intention behind a decision within the FBSS becomes compromised.[405] This can have the consequence of lowering the threshold of what constitutes non-detrimental care, as argued in the former chapter. If the Child Welfare Office implement a decision inadequate, it becomes a breach with the child's right not to be discriminated against and the child's best interest might not be served. The lack of a mechanism to ensure that decisions actually become implemented makes for another argument, namely that the decision-making design of the FBSS should not be dependent upon other agencies that are driven forth by other types of logics, as for instance that of child welfare. The decision-making of the FBSS should, therefore, also include the implementation of decisions.

7.1.3. Child Welfare set Apart from Child Protection

According to the former chapter, there are two thresholds that the current *bvl* aims to determine. The first is where the child is subjected to non-detrimental care and is only in need of non-coercive child welfare measures. The other is when the child is subjected to detrimental care and where the parents must be coerced. The focus of this study has been on the latter. However, both of these measures aim to ensure a level of welfare for the care of children, i.e. both relate to thresholds, whereby one refer to tolerable non-detrimental care and the other to detrimental care. The part of the legal code that is preoccupied with child welfare is mainly delegated to the Child Welfare Office in each municipality. The first threshold that

[404] The practical implication is to remove *bvl* §2-1 in its current version.
[405] Cf. *bvl* §2-1 d.

relate to child welfare, is when a child in some sense is not receiving the care that is required to satisfy his or her need to develop normally. However, the lack of proper care is deemed not detrimental to the child. The second threshold comes into force when the child welfare officers have failed to improve the care situation for the child, and they need to step in to protect it from the parents, since the care has become detrimental. This latter intrusion includes the use of coercion, and how coercion is implemented depends upon the reasons for why the parents are not able to provide reasonable care.

When the care of a child has crossed the lowest threshold, the responsibility for raising the case to the FBSS is with the Child Welfare Office. As it has been shown earlier, this office is also responsible for seeing the cases through once the FBSS has reached a decision. Therefore, the same office is responsible for enforcing the decisions of both child protection and child welfare. This can become problematic because the logic of child welfare and that of child protection can conflate, given that these two logics are different on a principle level in that the former is based upon the biological presumption, whereas the latter is not. The parents' ability to care is the entity that is interfered with in a non-coercive way within child welfare. This means that the rights of the parents are not set aside—the child is still in their care. This means that the logic established by the biological presumption can taint the considerations for what is deemed as detrimental care, viz. that the child's prospective right to personal liberty has become violated. If the practice of the *bvl* within a municipality is driven forth by a biological presumption, a child risk staying at home when it actually needs protective measures.

If it is no separation between protection and welfare, it is a risk that the enforcement of protective measures in the child's best interest becomes driven forth tainted by how such a principle is operative in child welfare. When the FBSS receives a case, the entire case is removed out of the control of the local Child Welfare Office, thus dispensing with the logic that drives child welfare. However, the amount of cases that do reach the FBSS can be fewer because the municipal Child Welfare Office is working to keep children at home. By transferring the entire decision-making procedure of the FBSS, including petitions as well as the implementation of the decision, to an institution dedicated to child protection, it can maintain the focus upon the basic expectations needed to promote trust. A practical way of achieving this aim is to have an FBSS-review of the casework within each municipality.

If the *bvl* continues to be one legal code that includes both child welfare and child protection, it can continue to fail to differentiate the principle of the child's best interest to these two different state-driven measures. Decisions involving coercion to protect the child is different than decisions made to empower the parents to take care of their children. Both types of decisions are to be in the child's best interest, but the care-situation is different between them, and currently this has very little consequence. It is the same interpretation of the principle of child's best interest, whereas parents have not lost their right to provide care in non-coercive cases.[406] For instance, in child welfare, the best interest of the child is not the only primary consideration. The parental rights are still strong rights that clearly constitute a primary consideration. With regard to child protection, the principle of the child's best interest is the *only* primary consideration.

Thus, it is the task of legislators to explicate the meaning of the principle of the child's best interest in the different areas that affect children.[407] The best interest of the child is always a primary consideration, but it must be up to the signatories to find out if there are other primary considerations. With respect to child welfare, there can be a multitude of other primary considerations. For instance, it can be argued that parents have a fundamental right to care for the child, in a manner that is not in the child's, but rather in the parents' best interest.[408]

It should be stressed that the FBSS is not, and cannot be, regarded as a regular civil court.[409] However, if child protection where to be separated from child welfare completely, it would for all intends and purposes become a new and specialized administrative court. This would clearly institute state-enforcement of the principle of the child's best interest in a much more accurate manner, and clearly in line with the basic expectations of child's best interest and non-discrimination. In this respect, child protection can become more worthy of trust if the bond with child welfare becomes broken off.

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[406] *Bvl* §4-1 explain that the implementation of measures according to this chapter shall be to the "child's best." Since this chapter lays out both coercive and non-coercive measures, it does not separate between child welfare and child protection. The principle is applied in the same manner in both instances. See also footnote 11.

[407] Art. 4 of the CRC is referred to as "general measures of implementation." It is an obligation-clause that orders the state-signatories to implement rights to all children so that they do no longer receive discriminatory treatment. See UNHCHR (2007).

[408] Brighouse & Swift (2006).

[409] Although it was argued in NOU 1985:18:23 that the FBSS was to be regarded as a court of law, or a court-like decision-making body that satisfied all the demands set to a regular court, it is not a part of the court system of Norway. The FBSS is an administrative tribunal. I will return to this later.

7.2. Composition of the Board and What Board to Convene

During the history of design of decision-making bodies within child protection, the focus upon composition has been both controversial and important each time. It has been realized from the beginning that those types of members who receive a formal delegated authority to reach decisions significantly affect the outcome of the procedure. Consequently, the composition of the board is a dimension of the design that helps shape the quality of the decision. The aim of the current composition is to ensure that those who contribute in the decision-making procedure are able to optimally approximate the child's best interest each time. They must possess the necessary competencies that in total can determine what type of decision and what type of measures can claim to be in the best interest of the child.

7.2.1. The Members of the Board

Optimizing the board's ability to reach decisions without discrimination that are in the child's best interest was the purpose of the composition of the board.[410] As such, the FBSS of 1992 have a design that has the potential of corresponding to the current basic expectations in that it incorporates both child's best interest and non-discrimination. The question is whether or not it can comply with the post-national turn and comply with the order of expectations. The *bvl* §7-2, which stipulates the composition of the board, is a continuation of the original *stl* §9-2. Decisions were to be reached after deliberation among the members of the board where arguments could be put forth and grind against each other.[411] Thus, the idea was to have representatives within the board that were the best fit for a process of argumentation leading to decisions in the child's best interest.

7.2.1.1. The leader

According to the *bvl*, each FBSS is to consist of a leader who is qualified to the competence-level of a judge.[412] This demand has been one of the most controversial in each of the earlier decision-making bodies. According to Bernhard Getz, the legal-proposal of 1892 was in need of a judge as a leader in order to ensure that the *legal* protection of a child was maintained. Later Getz' hopes were left behind with the final LBFB in 1896, and the judge became a regular but permanent member of the Trustee-board, rather than its leader. Although, formally, the leader was not necessarily the judge, it was still important to have legal

[410] NOU 1985:18: 298-299.
[411] It is the board that is supposed to deliberate and reach a decision. As such, it is the board that is to reach an agreement on what to do. This does for instance mean that everyone must agree to the decision, including the parties to the procedure.
[412] *Bvl* §7-2.

competence represented in the Trustee-board that involved something as grave as coercive intrusion into family-life. In the BVN of 1953, the judge was no longer a permanent member of the decision-making body, but called upon when a case was in need of coercion.

Currently, within the legal code established in 1992, this line of thinking is still maintained as a judge is called upon only when it is a matter of coercion, and not in regular child welfare cases. However, the differentiation between child welfare and child protection *within* the *bvl* established a single institution in charge of coercion, namely the FBSS. This is a result of the criticism towards how coercion-cases were lacking legal protection during the BVN, and the need to separate decision-making within child welfare from that of child protection.

This line of reasoning would suggest that all the three different legal codes actually have been in line on the issue of legal representation in child protection cases that involve coercion. This can be interpreted as if the child protection discourse, throughout the history of child protection, agrees upon the issue of the need for legal control of the state's coercive intrusion into the private lives of families in order to protect a child. Hence, it is a matter of finding a threshold for intrusion, which should be legally established, and can only be legitimized through filtering it through the legal principles carried by the competence of the judge.

According to the post-national turn, the *bvl* is now supposed to be in legal harmony with the rights of the child stipulated by the CRC.[413] Provided the importance in observing demands of human rights to redeem the promise of trust, it is essential to establish a legal procedure that is fit to reach a decision that can enforce the aim of making decisions in the child's best interest. Approximating the child's best interest is a practical problem in need of a procedure both adhering to certain rules and allow for a flow of relevant arguments. This demand has been obtained by the design. Regular legal adjudication has become established by embedding the principle of fair trial into the FBSS-design.[414] Hence, the leader must be competent in matters of legal adjudication, and ensure that the decision-making procedure is heading in the right direction, which is to be in the child's best interest. This is also answered

[413] This was at least one of the intentions behind Ot.prp.nr.45 (2002-2003), which amended the *bvl*: "Considering the child's best is established in law that directly affects children, cf. i.a. Child Welfare Act §4-1, but this is not a general principle of law. By incorporating the Convention on the Rights of the Child it will become established in law that the child's best is to be a primary concern regarding all decisions concerning children."
[414] The principle of fair trial is embedded in *bvl* §7-3 – see Ot.prp.nr.76 (2007-2008): 32, cf. NOU 2005:9: 31. I will return to the fair trial-principle later.

by the design, by demanding that the leader of the board has a degree in law. This strengthens the likelihood that the procedure of argumentation abides by the principle of fair trial, which again strengthens the likelihood of approximating the child's best interest in an adequate manner.

The leader is required to ensure that decision-making abides by the principle of fair trial. By enforcing a fair trial principle, and having a judge is the same as admits that the decision-making attempt to establish a court-like procedure in order to enforce protection in the child's best interest. In the former chapter, this was a central point for approximating the principle of the child's best interest without discrimination. A leader, with legal competence, has the ability to enforce a court-like proceeding that ensures a coherent process of argumentation each time. This helps redeem the promise of trust by strengthening the basic expectation of non-discrimination.

The leader of the board is according to the legislative history to the *bvl* to posit specific experiences or training that qualifies to work within areas of law relating to children.[415] The judge is the one that ensures that the procedure of each case observes certain demands to how a case is processed up until the decision-making itself. Does a judge posit these qualifications? The answer to that question is both yes and no.

The demands set towards the judge is in the third chapter of *Domstolloven* (Courts of Justice Act – *dl*). Such a reference is simply not suited in its current configuration for the purpose of describing the qualifications needed to perform as a judge within the FBSS. The reason is that the legal protection of children falls outside traditional Norwegian jurisprudence, and hence has not been incorporated into formal procedures of qualifications entrenched in the *dl*. For instance, the rights that children have to legal protection today are very comprehensive, cf. CRC Art 3, that the demands towards an FBSS-leader are likely to be higher than in other circumstances. The child's best interest is supposed to be a mindset guiding every decision that affects a child. For the purpose of the FBSS, it involves a need for a legal understanding of what constitutes the threat towards any child's development and health.

The principle of the child's best interest relating to issues of care, is a specialized field of competence in itself due to the wide range of applications of children's interests, and also the need to approximate the *best* interest for each child without discrimination. It can be

[415] NOU 2005:9: 15 and Ot.prp.nr.76 (2005-2006): 126.

argued that specific training is needed in order to abide by the demands set towards decision-making that is supposed to uphold the child's best interest. How, then, can a judge be said to process a case when the judge has no professional training in advance? The *bvl* has no answer to this question.

There are no demands except that the leader of the board shall have the competence of a judge. If the court-system depends upon training through experience, a type of situated learning, then bad local practices at one FBSS can prevail. Bad interpretations of the *bvl* can cement into the decision-making body. Hence, there is a continuing threat towards the principle of non-discrimination since some boards can develop practices that depart from other boards. This type of learning—i.e. situated learning—is emphasized as the route to becoming qualified in the current FBSS.[416] Thus the question must be asked—is this adequate to redeem the promise of trust?

By comparison, a medical practitioner, once educated as a general practitioner, admittedly has no knowledge necessary to perform advanced surgery. Specialist-education is necessary in order to qualify to such positions. Qualifying for advanced surgery is not something that can be done purely through "cutting meat." Objective knowledge that has been found reliable and valid must become a part of qualification to practice in order to avoid the threat towards the principle of non-discrimination when practicing advanced surgery. It is not difficult to see that this can be equally relevant for judges. Having a traditional legal education in Norway today does not necessarily make a person fit for specific jobs. The demands set towards being the leader of a board, where the board is the final protective measure for a child, needs specific and general training prior to the appointment if the threat towards the principle of non-discrimination is to be avoided.

These skills can, for instance, include training in the rights of the child, the breadth of its application, of the moral responsibility of child protection, etc. This is not a demand set to the legal order of the *bvl* today. Hence, it is no guarantee that leaders of different boards practice equally. Equal practice is a formal criterion for the decision-making in the FBSS according to the principle of law. If this is threatened, we can also argue that discrimination can occur, and that the promise of trust would become harder to cash in.

The problems are augmented by indeterminacy of the principle of the child's best interest. Since the child has a right to whatever is in his or her best interest, the judge must, in

[416] NOU 2005:9: 15.

fact, know a way of ensuring that the procedure establishes a solid foundation for making a decision that can approximate this principle in a legitimate manner.[417] If not, the child's best interest might not have been approximated at all. This responsibility currently rests solely on the shoulders of the leader.[418]

When the FBSS was introduced from 1993, decision-making within child protection was merely one part of the job of being a judge. It was argued in NOU 1985:18 that being a leader of the FBSS was to be considered as a part-time job.[419] The idea was that a judge also had other responsibilities outside the FBSS. However, when the FBSS became a reality, this was a type of practice that was soon abolished. The workload was higher than expected; thus, full-time leaders of the board were required.[420] As a consequence, the leader of the board can today be compared to a full-time judge in a regular court of law.

In NOU 2005:9, it was held that the leader of the FBSS ought to have contact with other judges within the court-system, i.e. belong to a judge-culture. This presupposes a view that, within such a culture, "being a judge" could be taught.[421] According to this Green Paper, the leader of the FBSS should attempt to maintain being a judge in the regular sense and not in a sense that is specific to that which affects children.[422] Although it is an obvious need for a judge within the FBSS to maintain the competence regarding the basic rules of procedure constitutive of a fair trial, which is equally valid for the FBSS as the civil court, there are insufficient demands for ensuring the legal protection of children by not seeking specific requirements for judges in the FBSS. The rights of the child according to a post-national turn, and consequently the child's special place within law—as a person who cannot decide for itself, i.e. having self-determination, with regard to perhaps the most important decisions of their lives—needs more qualification than merely knowledge regarding how a court works.[423]

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[417] It is the leader of the board who is responsible for ensuring that the principles of procedure, *bvl* §7-3, is enforced, and that a solid foundation is established.
[418] *Bvl* §7-3 third paragraph.
[419] NOU 1985:18: 297.
[420] Forhandlinger i Odelsthinget (No. 25): 58.
[421] NOU 2005:9.
[422] NOU 2005:9: 15.
[423] NOU 2005:9, being the Green Paper that led to the bill that later where to alter the design of the FBSS from 2008, became criticized for having too much belief in the court-system. The Green Paper was ruled as waiving too much in direction of applying regular court-principles to decision-making within child protection. The NOU 2005:9 was written during Christian-Conservative coalition government of Kjell Magne Bondevik, while the Ot.prp.nr. 76 (2005-2006), that put forth this criticism, was a bill presented by Jens Stoltenberg – See for instance Ot.prp.nr.76 (2005-2006): 83.

Enforcing the rights of the child, and especially an indeterminate principle, is currently considered a learning-by-doing process for each judge respectively. There are no formalized qualifications besides the demands set to be a regular judge, whereby any additional education is optional and left to the judge's own discretion. This means that the level of competence is allowed to vary between the board leaders, and constitutes a threat of discrimination.

If it is any point in acquiring new knowledge, it must be that it leads somewhere or anywhere. The lack of coherence in what constitute a judge's formal competence outside being a judge can lead to a discriminatory treatment between children and between boards. Currently, it is no systematic training of those that should populate this particular office. If the interpretation of the practice of the principle of the child's best interest is founded in very different knowledge regimes and learning-arenas, then the different boards throughout Norway will have decision-making procedures that potentially discriminate.

The solution to this problem is to have a more carefully considered plan on how a judge to the FBSS actually can be said to become qualified in such a manner that it is not a threat towards the principle of non-discrimination. Although it is no shortage on ideas on how to think and apply the principle of the child's best interest, there is a lack of debate as to what type of best practice a judge should posit today within the FBSS in order to ensure a principle of non-discrimination when enforcing the principle of the child's best interest. If a judge leads one FBSS to provide better practice objectively, then this is unfair from a legal point of view on behalf of children who have their cases trialed at a different, and not as competent, FBSS. This weakness ultimately leaves the child in the hands of a board-leader that may or may not have a well thought-out idea of what the principle of the child's best interest means.

7.2.1.2. The Professionals

In addition to the leader of the board, a regular board is to be convened with a professional. The professionals are presumably representing the necessary knowledge regarding best practice relating to both evaluating if the child receives detrimental treatment as well as knowing what measures the child is in need of. The original idea, posed in NOU 1985:18, was that there should always be two professionals participating in decision-making. If they concurred, there would not be any need to call upon further professional expertise.[424] The introduction of professionals into the board, which at the time of the introduction of the *bvl*

[424] NOU 1985:18: 293.

was an innovative idea, was aimed at remedying the problem with the lack of professional expertise that crippled the design of the BVN of 1953.[425]

By incorporating permanent professional members into the FBSS, two problems were thought to be solved. The *first* was that by replacing members that were politically appointed, they could establish a distance between those who decided and those who had to live by the decisions. It was no longer any point in having a panel of local laymen. Due to the political appointment of the BVN, the legal protection of both the child and the parents had become fragile and incoherent. By introducing professionals and removing democratically appointed members, the legal protection would become more solid due to less discrimination between decision-making.

Through NOU 1985:18, another idea was presented in that decision-making could become more coherent through basing decision-making upon knowledge. By including professionals into the decision-making procedure, the practice of their esoteric expertise would qualify them to board membership. This line of thinking bring back the argument of Bernhard Getz in 1982 that the leader of the board should be a legal professional, and that leaders from both the poor-commission and the school-commission were to be represented because they knew about best practice—they had the expertise.[426] The Trustee-board, as Getz saw it first, was not only having representation of locals, but also the type of expertise that would balance the laymen's common sense approach. Getz' proposal regarding this part of the composition was not met in 1896. Today, the professionals are included in the process much in the same manner as Getz intended, namely in order to safeguard that decisions rests within the boundaries of what is known to be best practice. At least, that is the idea.

The *second* problem that could be solved by bringing in professionals was that knowledge-based practice would replace the randomness of the decision-making of a board purely consisting of democratically appointed laymen. Professionals that must appeal to best knowledge, or best practice, must resort to arguments that must be valid and reliable, viz. intersubjective and neutral. If not, it would not be referred to as credible knowledge, and therefore not applicable to practice in the sense of being professional.

Compared to the potential for discrimination caused by judges as leaders, as mentioned above, the professional representatives of the board represent a more significant

[425] NOU 1985:18: 293.
[426] Cf. Getz' (1892:25) desire to include "unbiased knowledge" ("*den saglige kundskab"*).

threat towards the principle of non-discrimination. No profession have a solid guide of reasoning in cases that are normatively complex and indeterminate—they cannot have. The variations between concepts, approaches, empirical data etc. are enormous; professional knowledge cannot reach the aim of the decision-making, namely to say bluntly what is in a child's best interest. No knowledge-base can argue about the prospective right to personal liberty, and what a sufficient amount of opportunities of a particular child entail. If a social worker was chosen as the professional within the FBSS, it will be a different professional than if a psychologist was selected. A psychologist and a social worker have different approaches to the decision-making of the FBSS. However, these are the two major professions that occupy positions as professional members of the FBSS.[427]

Having no explicit criteria that set demands to the professionals that occupy the positions within the board, or any review of professional decision-making within the design of the FBSS, clearly constitutes a threat to the practice and enforcement of the child's best interest and the principle of non-discrimination. Since the professionals within the board can vary between different professions, equal cases can receive unequal treatment. Although this threat towards the principle of non-discrimination is clear, a solution to it is hard to find. However, as there is no explicit thinking regarding what could be argued constitute the desirable professional within the board, the threat towards unfair treatment remains.

Another controversial debate that has been ignored is what type of profession, or combination of professionals, can best argue the case of best practice with regard to finding out what is in a child's best interest in decision-making of the FBSS. Best practice does not mean that they know what the best interests of the child entail, but rather that they have an approach that approximates this aim in a coherent and agreed upon manner. Why e.g. are psychologists the dominant profession? Why not social workers? Why are not both represented in every board? Are there others that have professional knowledge that would benefit the decision-making process? What about the medical practitioner? The point to be made here is that there is a complete lack of debate on what it means to have professional representatives within the FBSS.

Currently, any expert that has knowledge regarding children—a psychologist, psychiatrist, child welfare officer, social worker, or a special-educator—can be recruited to

[427] BLD (2008): 5.

the FBSS as a professional.[428] A critical argument here is that educations such as psychology and social work are meant to serve different purposes—they are very different professions. Hence, the educated psychologist and the educated social worker have very different ways of arguing the case of the child's best interest.

However, what can be stated with certainty is that there are no professions with monopoly on best practice knowing what to decide is in a child's best interest.[429] Many different professionals have many different types of good reasons for wanting to put forth claims in a child's best interest. However, it is a normative and indeterminate aim, and cannot be determined by any one type of professional's technical knowledge. Claims of protecting a child can only serve to approximate the prospective right to personal liberty, and hence, all relevant claims must be put forth.

A different perspective can also be presented, namely that professionals control and evaluate the arguments that are presented in the process of argumentation within the meeting of negotiation.[430] According to this argument, the professional must be able to comprehend different claims that are provided in this meeting and, as such, help the FBSS retain its independent decision-making status. What is then lacking is the insurance that professionals would always contribute to this process in a way that other professionals would not dispute. This would mean that the professional that holds the office within the FBSS actually must be able to judge and evaluate the expert-opinions that are presented to the board as evidence by the state and private parties as well as those the board itself calls upon. The professionals must be able to comprehend and evaluate the different types of expertise that make claims upon what is in a child's best interest and make sure that the other members of the board understand the fundamentals of these claims. If this is not the case, the FBSS cannot be said to be an independent decision-making board. There is much evidence suggesting that the differences exist in practice, whereby the lack of coherent recruitment becomes a threat towards the basic expectations of both child's best interest and non-discrimination.

7.2.1.3. Laymen

The final type of permanent member of the board is the layman. This member-type has endured all the different boards throughout the history of child protection. They represent common sense, and they have had a prominent place within the boards and especially in the

[428] BLD (2008): 5.
[429] Eriksen (2001).
[430] I will discuss the meeting of negotiation later.

period of 1953 to 1992. However, both in 1896 and in 1953, their inclusion was conditioned upon the need for local representation. In the *bvl*, this reason no longer applies. The main idea in 1953 was that representatives that have experiences with the local area where the child resides were needed. From 1993 and onwards, the idea was to have common sense represented in dealing with normative matters, which were recognized as rather complex and thus needed a broader perspective.[431]

However, it is one problem with respect to current child protection. It has to do with the duality of the decision-making procedure. *First*, the decision of whether parents need to be coerced—i.e. that the child needs protection. *Second*, the type of measures to be implemented to remedy the wrongs concerning the child's development must be identified in order to remedy the wrongs the child has been subjected to. Under no circumstances can it be maintained that laymen are peers of the child, which is something that the denomination 'layman' alludes to. Relying on laymen in the process of deciding what to do for the child can be questioned. The child is the primary focus of attention throughout the proceedings, but if the child's parents lose their custody, it is only the child's best interests that count.

On the other hand, although laymen cannot be seen as peers of the child, they could be argued as being peers, or equals, to the parents. Should not this division have consequences for how laymen contribute in the FBSS-proceedings? The decision-making, if the parents have lost their custody, is only going to find out what is in the child's best interest and not that of the parents. Thus, given that laymen cannot be referred to as peers to the child, their ability to contemplate on what is in a child's best interest becomes random. Are laymen fit for the task of understanding if a child receives detrimental care, or what type of measures should be decided upon? Is this line of thinking still valid? Can they be included without threatening the basic expectation of non-discrimination?

In NOU 1985:18 the following is stated:

> *"Also the use of non-professionals is important because we have to do with conflicts that raise difficult value questions with a common sense character. It is in the opinion of the committee that...it should be a layman element."*[432]

[431] Bernt (2001): 35 argues that laymen were included into the FBSS to balance the professionals' "conception of reality." However, laymen did not serve such a corrective purpose in the design of the FBSS. This will be discussed in more detail below.
[432] NOU 1985:18: 298.

This line of reasoning explains why there are laymen in the FBSS today.[433] Hence, it is a widely different reason from what was provided in the BVL of 1953, where the logic was rather that laymen represented the local community and the families living there.

The NOU 1985:18 was written during the reign of the BVL, and long before any ratification of the CRC. At the time that these ideas were committed to paper, prior to 1985, the coercive measures within child protection were decided upon almost entirely by laymen. However, with the development in the beginning of the 21st century, there has been a turn of events. Children have a prospective right to personal liberty, and this type of thinking provides parameters on how to reason on child protection and the implementation of measures.[434] Is laymen representation desirable any longer? Upholding a child's prospective right to liberty, which is a normative self-understanding of the current order of expectations, which incorporates the basic expectations of the child's best interest and non-discrimination, must be strengthened through the use of laymen. Thus, whether or not laymen pass this test will help to answer if they contribute or not in redeeming the promise of trust.

In the first legal code on child protection, it was a need to have laymen to contribute in arguing what constituted a "moral" or "normal" child when finding out whether or not correctional measures were to be implemented. Once they reached the decision, they could implement measures that would remedy the lack of "normality" or "morality." In the second legal code, the point was that healthy *local* common sense, carried by locals who were appointed, would lead to decisions that were to the best for the family and the child. The BVN consisted of members appointed from the municipality, and included individuals who knew a great deal about children. Both of the former legal codes have been dependent upon this common sense element in its justification for pushing the legal codes through parliament. None of these earlier codes has argued that the best interest of the child should be the primary consideration of child protection.

Currently, a child is a rights-holder due to the ratification and incorporation of the CRC into the *mrl*. If the rights of a child are breached, then the state has a duty to intervene and protect the rights of that child.[435] The rights of children are supposed to be defended by others because children *de facto* and *de jure* are unable to put forth claims themselves. This is a modern version of the doctrine *in loco parentis*. In this situation, laymen are confronted by a

[433] This idea is reaffirmed in Ot.prp.nr.76 (2005-2006).
[434] This duty is entrenched in the CRC Art. 4.
[435] The state is obligated by the CRC to secure legal harmony – Art. 7-2.

new situation. How can common sense be fit to guide what is in one particular child's best interest, given the fact that the child's right to receive measures are not to be guided by anything else than the child's best interest, viz. its prospective right to personal liberty? Is it so that "difficult value questions" are best answered by those who have no training in thinking about values, i.e. to resonate regarding practical problems?

The goal is to approximate the particular interest of a child that no other interest can trump. This can hardly be referred to as a common-sense issue. It is a question that can be answered best through qualified personnel. Hence, in using laymen, the lack of a methodological approach to normative questions can become a threat to the legal protection of the child. A methodological approach to normative questions can help to establish a way of influencing this issue that ensures non-discrimination.

There is nothing that can ensure that the layman's common sense does not simply ensure discrimination between cases, and thus represent a threat towards the basic expectations. The manner in which common sense has been entrenched today is more motivated by the political ideology of Labor rather than an optimizing design. It is ideological in the sense that it is a continuation of the BVN-practice, rather than being any well thought-out implementation of common sense. If common sense moral evaluation were to be introduced in a coherent manner, the FBSS could recruit philosophers, rather than laymen. Philosophers can, in many respects, be said to have more training in how to reason with regard to normative questions and in a coherent manner, which is also a demand if decision-making is not to discriminate between cases.

As early as in 1953, the concept of reasonable pluralism was introduced as a baseline in Norwegian legal thought on child protection.[436] It implied that "the society in question is one in which there is diversity of comprehensive doctrines, all perfectly reasonable."[437] However, with the current legal code, each child is to have its health and development protected, so that it can claim personal liberty as an adult. It implies that the child must be able to make choose among a sufficient amount of opportunities regarding how to live life. When the child reach adulthood, it must have the capabilities to actually perform such a

[436] Here, the reference is made to the toleration of different, yet reasonable, ways of providing care for children, and that being a parent could have a variety of meanings for children. Hence, what type of protection a child needed was determined locally and variations across Norway were allowed to emerge. The idea of defending an idea of "normality" or "morality" was no longer permissible.

[437] Rawls (1993): 24 and 36. This illustrates that, for instance, parent's rights are strong rights. Namely, the boundaries of reasonableness also include types of care that are not beneficial.

choice freely. This is where the need for competence on values becomes relevant. The goal of protection of a child should be, if it is to adhere to the normative self-understanding worthy of trust, to attempt to reach a decision that would best ensure that the child's development and health steadily develop as he or she approaches adulthood without the disturbance of detrimental care.

Such a task requires methodological competence in resonating on ethical issues. Laymen are defined as such because they do not posses such methodological competence. If the person acquired professional knowledge on how to reason in child protection cases, this person would cease to be a layman. The need for competence in ethics is high, since the fact of reasonable pluralism demands that any type of life-prospect entail potentially different measures for a child. Laymen, in their search for best answer to the decision on what constitutes the child's best interest, are poorly equipped to provide well thought out answers.

However, the issue of laymen can be approached from another direction. Do laymen act indiscriminately between the different boards and different cases? The answer to this question is "no." The most obvious reason is that there is no consistency in what constitutes a respective common-sense layman-answer. To use Toulmin's terminology: Laymen across the different boards lack consistency of "warrants" for what action to proceed with. Warrants are propositions of a certain kind, such as rules and principles. To illustrate, a case that enters one FBSS will have all the necessary inquiries, empirical evidence to settle upon in this decision-making body. The board has an adequately lucid picture of the situation of the child and it is thus time for the layman to consider the course of action, and present the arguments to this particular FBSS. The goal for that particular layman is to take under consideration the situation of the child as a point of departure, and take the next step to decide upon what to do. At this point, and this is where it becomes crucial, what is called upon are general propositions for action. These are the warrants. They act as "bridges, and authorize the sort of step to which our particular argument commits us."[438] The particular layman therefore resonates "if the situation is A then do B," and the warrants constitute the authorization that binds A to B. The problem is that these warrants are not shared knowledge across the different boards—the warrants laymen uses are random. Hence, the common sense of the layman can easily be argued as being a threat towards the principle of non-discrimination and thus a threat towards the promise of trust.

[438] Toulmin (2003): 91.

Although there are certain qualifications that safeguard that certain laymen are not represented, for instance, through the demand to an unblemished record, there is nothing that suggests that these individuals are capable of defending the rights of the child. Their representation is on the contrary a threat towards the rights of the child, since rights should be employed and safeguarded in a non-discriminatory fashion.

The question that needs answering is: Do laymen benefit the enforcement of the rights of the particular child, or do they not? Laymen have no way of knowing, or should not know, how the rights of the child work, from what their rights entail, and why this is so. With regard to their role as taking a part of defending children's rights, and their lack of competence in doing so, they risk treating an indeterminate principle in a manner that is a threat to the principle of non-discrimination. The likelihood of laymen actually benefitting the legal protection of the child is minimal.

The use of peers within the BVN of 1953 was justified because a child was seen in a symbiotic relationship with its biological parents and the local community they resided in. Hence, their representation was a direct result of the order of expectations of 1953. The democratic aspect to the legal order of 1953 was an important step to reform the Trustee-board of 1896. The Trustee-board was, at that time, seen as a state-driven extension of the prison-system with a focus upon correction of the child. When the BVL was introduced in 1953, and child welfare was recognized as the primary state involvement in child-rearing, the democratic aspect of it, and the need for a local foundation for decision-making, provided the peer-system with a primus motor function of bestowing legitimacy to the BVN at the time. The use of democratically appointed peers was justified as parents were the ones put on trial. It was their child rearing competence that was disputed, which had nothing to do with the particular needs of the child. Hence, the child was, in one sense, subordinated to his or her custodians. This view upon children and their belonging has become far more elaborated as time went by, and legitimate decision-making is today dependent upon taking all parties into consideration. As the *bvl* is supposed to be in harmony with the rights of the child, the laymen arrangement can no longer be maintained as an argument for increasing the legitimacy of the decision-making procedure. Today, the enforcement of the rights of the child must be applied equally without any local variations, or else it would be a breach with non-discrimination.

The natural question is, are there any good reasons for having laymen at all? There is one reason, but only in the part of the decision-making process that deals with the rights of

parents and the question of revoking them. For reasons mentioned above, there are no seemingly good arguments in favor of involving laymen in decisions that affects children. However, laymen can contribute in the same sense as jurors in deliberations upon whether or not parents should be coerced or not.[439] Laymen can be peers of parents, but not the child. However, this is not how they are included into the FBSS, and laymen consequently stand as a threat to the basic expectations of non-discrimination.

7.2.2. Different Boards to Convene

In this section, the discussion focus on the two main types of boards that can be convened in order to perform decision-making. The first paragraph of *bvl* §7-5 stipulates that the general rule is to convene a regular board. This board is to consist of the leader of the board, one layman and one professional representative. However, there are two other types of FBSS-boards. If a case is complex, the leader can determine to convene a large board that consists of two professionals, two laymen and the leader. Convening a board in this latter way was how the original board was designed upon the introduction of the *bvl* from 1993. However, due to economic and efficiency reasons, the current regular board is smaller. The final type is a single board, consisting of the leader alone. This last board can be established instead of a regular board if adequate regard to legal protection is taken, or if the type of case involves minor changes to earlier decisions.

When the petition is delivered by the local child welfare office, the leader of the board is to decide upon what board to convene. Within the petition, the child welfare office suggests what type of board the leader is to convene. This arrangement, perhaps, ensures perfectly reasonable claims by the child welfare offices responsible for raising the case and appurtenant casework. This makes the casework for the leader of the FBSS simpler, but the threat towards allowing cases that in fact are complex to be labeled as regular still remains. The private party can answer the petition, and hence comment upon what board to convene.[440]

The main reason for having three different types of boards is that cases can allegedly be differentiated without being a threat towards the legal protection of the child.[441] Prior to the amendment of the *bvl* and the design of the FBSS in 2007, its design generally had the shape

[439]This does not mean that the use of jury is necessarily normatively defendable, but since the use of jury-peers is widespread in Norway, it is an accepted way of involving laymen. The role of the jury is, however, outside the scope of this discussion.
[440] *Bvl* §7-11.
[441] Ot.prp.nr.76 (2005-2006).

of a large board.[442] Simpler casework could still be decided by the judge alone. This meant that, prior to 2007, the board could not be differentiated into two different boards designated to either complex or non-complex cases. The argument the amendment introduced in 2007 was that it was more cost-efficient not to always have a large board, especially since in some simpler cases this decision allegedly did not reduce the legal protection for those involved. However, one of the reasons for establishing the original design was that there was always a need for this composition in order to establish sufficient legal protection. This would mean that if the parties to the procedure disagreed, there would be a need to ensure that the decision of the board was reached upon a solid foundation.

To illustrate, we can turn to the original design, especially how it is laid out in the legislative history leading to the 1991 *stl* §9-6, where the original design of the FBSS regarding the composition of the board in each case proceeding is situated.[443] The background for this rule was that an agreement could be reached within the board without relying upon external expert witnesses. Hence, having the original type of board was seen as a precondition for independent decision-making. If discord erupted between two professionals *within* the board, additional evidence could be called upon in the form of additional expert witnesses.[444] Only by ridding the board of discord could a decision be reached with no reasonabe rejections.

By including two professionals into the board, the NOU 1985.18 presented the argument that professional expertise could help to make the board independent. If decision-making could be professionally guaranteed through professional representatives in the board, the FBSS would become more independent as well as fully accountable for decisions. This motivation was a result of the criticism of the former arrangements in the BVN—that it was dependent upon expertise and could not make decisions on its own.

Having professional members could ensure that any case was illuminated in a professionally sound manner, which would ensure that the board itself shaped the platform for decision-making and also reached the decision. The role of the professionals would either imply that each petition to the board is settled by the board alone, rather than through external

[442] *Stl* of 1991 nr.81 §9-6. The leader of the board could decide not to have professionals participating in the board if both parties to the case agreed to it, cf. §9-6. It was not allowed to disregard the laymen-members to the board, cf. Ot.prp.nr.29 (1990-1991): 168. However, the general rule was to have two professionals and two laymen, together with the leader.
[443] NOU 1985:18 and Ot.prp.nr.29 (1990-1991): 136.
[444] NOU 1985:18.

professional witnesses, or that the board itself became able to understand the arguments of the witnesses that were called upon. Either way, the FBSS was enabled to reach independent decision. The extra effort in making this work for the FBSS was to make the professionals accountable by making them a part of the entire decision-making process as permanent members of the board.[445] Professionals are not included to argue on certain dimensions of the decision, but are accountable as board members in the entire decision-making procedure on par with the other members.

The idea of putting the professionals' "feet to the fire" is somewhat disregarded in the current design where regular boards consist of one professional instead of two, thus avoiding potential for professional friction. However, having only one professional implies the lack of ability for qualifying the board with professional knowledge through arguing what is best practice. Furthermore, it is no way for the leader to know if the professional within the regular board represent "best practice." Having a social worker or a psychologist as the professional members would most likely lead to two different evaluations. Hence, it is a threat towards the principle of non-discrimination by having only one professional.

There are no convincing arguments that address the current design of the FBSS and that can explain in what manner professionals should be involved, and why laymen are members at all. Furthermore, the use of regular boards and single boards has significant shortcomings because their introduction in 2008 was based solely on cost-efficiency. This bodes ill for the promise of trust. There are especially three reasons for why the large board is best suited to answer the purpose of the FBSS:

1: Having two professionals is always better than one, as no professional's best-practice solution can guarantee best type of decision.

2: Having two professionals, or even two different professions, can help qualify the arguments presented and yield a more solid decision.

3: The responsibility of the leader, and how large role the leader takes, is smaller in a large board. In a large board, greater number of members must carry the responsibility for decision-making.

The purpose of convening a board such as the large board, which was the only type of board in the original FBSS-design of 1992, was to find out what type of care is detrimental

[445] NOU 1985:18: 298.

and would trigger the removal of parental rights, and what measures are in a child's best interest. The protection of these two rights is less strong if the board is reduced to the regular board. Hence, the differentiation of the board, and with a regular board consisting of only one professional, is a threat towards the basic expectation that stipulate decisions to become in the child's best interest.

7.2.3. Arbitrary Design Features: Members and Boards

The shortcomings of each of the member-types, and each of the boards, have not been addressed in the legislative history to the current decision-making design. Discussions on what constitutes professional knowledge are absent, and it is no good reason for why laymen are participants other than their ability to discuss complex normative issues, which arguably is disputable.

The judge is the professional member that has received a role in each board throughout the history of child protection, and the reason for including judges has been the same. They have been the, and for good reasons, the alibi of legal protection. However, in the current child protection regime, the demands are higher to legal protection than ever before. The current demand towards legal protection is a result of criticism raised against the first two legal orders and their inadequacies when it came to the protection of those affected. The LBFB had inadequate legal protection for parents and for children, whilst the BVL had inadequate legal protection for the child. With the introduction of *bvl,* demands are not only set to respect both parents and child, but also to ensure that anything that happens to the child would be in its best interest. This means that there are higher demands to the judge as a legal scholar. If a leader lacks the professional ability to understand the complexities of the indeterminacy of the principle of the child's best interest, it might lead to discrimination in practice, especially if cases become treated as if they were similar. The indeterminacy of the child's best interest makes it necessary to make new evaluations for each case, because each case is unique to the particular interests of each child.

If decision-making is to redeem a promise of trust, for the ability of some members to contribute to the decision-making process must be elaborated further. If, for instance, the professionals within the FBSS were replaced with Volvo-drivers, then the decision-making would not be said to be equally qualified. Hence, representation of certain types of members must be made for a reason. There are two ways of discussing the composition of the board with respect to trust. First, do the respective representatives contribute towards redeeming the

promise of trust? Second, does the entire composition contribute towards redeeming the promise of trust? These questions must focus upon how representatives contribute to the decision-making being in the child's best interest and that the composition of the board ensures it in a non-discriminatory way. These questions have been answered in the negative. There are shortcomings in including representatives of the board; moreover, the regular board and the single board are both established with inadequate attention towards the purpose of child protection. Hence, the promise of trust becomes threatened and cannot be cashed in.

7.3. Parties to the Procedure and Their Possibilities

When the child welfare office submits a petition to the FBSS, the FBSS is authorized through the *bvl* to claim jurisdiction of the case-matter.[446] In this respect, it distinguishes itself from most types of civil courts where the parties generally have disposal of the case-matter.[447] Decision-making, in this respect, makes the FBSS inquisitorial because the board is responsible for both clarifications of matters of fact and decisions once the petition is delivered.[448] This means that the FBSS is the entity that has decision autonomy in settling the issue once the petition has set things in motion. It is also further independent in that the board itself must reach a decision where they are not in need of any outsiders to deliberate or understand the ramifications of the decision.[449] This type of independency is equalizing the boards across Norway in the sense that the boards have equal competence to reach a decision. This help securing non-discrimination.

This section will draw the attention towards how the parties to the procedure becomes involved in the decision-making procedure once the petition is submitted and the procedure is set in motion, and what the possibilities are with respect to preceding and appealing their case. Said differently, the discussion will focus on how the different parties become included into the decision-making procedure.

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[446] *Bvl* §8-4. This point is made very clear in both NOU 2005 and Ot.prp.76 (2005-2006).
[447] Cf. *tl*§11-2, 11-4.
[448] Robberstad (2009): 14. Administrative decision-making with respect to coercion is a type of decision-making that is omitted from the ordinary civil trial-proceedings where each party has control of the case matter, see Ot.prp.nr.51 (2004-2005): 177. Within administrative decision-making of the sort that the FBSS is responsible for, the board becomes inquisatory because (1) the parties do not have control with the outcome/decision, (2) no parties to the procedure can determine sentence and (3) the parties are not to decide upon the sufficiency of evidence. As such, the parties to the procedure cannot plead the case, and the FBSS can exceed the limits set by either of the parties' claims, see Robberstad (1999): 129.
[449] This is what is meant by *bvl* §7-3-e. It states that the FBSS is supposed to make decisions independently and through a real examination of the foundation for the decision – see Ot.prp.nr.76 (2006-2007):32. It is also important to combine the need for independency to the fact that it is an inquisitorial trial, namely that the FBSS has a sole responsibility for establishing the foundation for making the decision.

7.3.1. Parties to the Procedure

If the FBSS did not have full disposal of the case, but rather the parties to the procedure "owned" the procedure, the FBSS could never be said to be able to reach decisions that were in the child's best interest. If the decision-making was a matter of settling a dispute between two parties, which would be typical for a general civil procedure, there would only be two claims upon what would be seen as the child's best interest, and neither of them needed to even be close to being in the child's best interest. As such, a general civil procedure is not any guarantee for a decision being qualified as the best approximation to the principle of the child's best interest. Hence, arranging the decision-making procedure in a manner where the board settles the issue independently is clearly strengthening the potential of approximating the child's best interest. Neither of the parties to the procedure need to be correct on their claim, and by instituting an inquisitorial decision-making board, there is an ability to take in the complexity that the principle of child's best interest entails. This would not be possible if the parties to the procedure had disposal of the case-matter.

The parties to the procedure will, however, direct the course of deliberation by being the most important supplier of arguments to the decision-making procedure and, in this manner, they have certain control of the procedure. This does not mean that the FBSS is bound by either of the claims put forth by either of the parties. The decision claimed to be in the child's best interest includes both the removal of the rights of parents and implementing measures. Agreement on these two issues is to be reached within the board rather than among the private parties or the child welfare office.[450] Hence, it is the board itself that is accountable for the decision that can reach rational acceptability for all.

The definition of party to the procedure is a "person that a decision is directed toward or who the case directly concerns."[451] The right to be included in a decision-making procedure is claimed by a person that carries the status as a party.[452] Furthermore, contrary to the traditional Public Administration Act (*fvl*), a party to the FBSS receives full access to all types of information that the decision is based upon—a right to conditional transparency.

[450] Agreement means that there are no claims that can be deemed as more convincing or better. This means that parents might not like the outcome of the decision, they might disprove it, but if they do not produce arguments that are more forceful than the decision of the FBSS, then their feelings become irrelevant with respect to what is in a child's best interest.
[451] *Bvl* §6-1.Definition in *fvl* §2-e. See Ot.prp.44 (1991-1992):78.
[452] In most cases the local child welfare office claims the right to a proceeding, cf. *bvl* §8-4, but the private party can also, in some cases, claim such a right, cf. *bvl* §7-10, second paragraph.

Conditional transparency is a special exception to the *fvl* §19 for the casework in the FBSS that involves sensitive cases, such as the future of a child.

Only the board itself makes the decision. Hence, no parties participate in decision-making. Rather, they are parties to the decision-making procedure of the FBSS, whereby they contribute and influence the argumentative procedure in the *meeting of negotiation* (discussed in more detail later). In this context, the term 'parties' refers first of all to the private parties, i.e. parents and, in some cases, the child.[453] Furthermore, parties are also the public officials from the child welfare office. Although they also submit the petition to the FBSS, they are not accountable for the process itself. Anything they submit to the FBSS can be disputed in a counter-petition, if necessary, from the private parties, as well as from the board.[454]

The question regarding who is a party to the board and procedure is important in regard to many of the rules that are activated as a result. In such cases, a party to the decision-making procedure has access to all relevant documents (§7-4), they are warned regarding the petition (§7-11 – fourth paragraph), they have the right to participate in the meeting of negotiation (§7-7 and also §6-3), as well as the right to legal representation (§7-8), the right to influence the preparation for procedure (§7-12 – third paragraph), they influence how the meeting of negotiation is constituted (§7-5 – second paragraph and §7-12 – third paragraph), and finally they hold the right to appeal (§7-24).

How parents and children, viz. those directly affected by the decision, are incorporated into the process of decision-making is imperative with regard to the promise of trust. It is their lives that are about to change and, if their inclusion is made in a manner where their arguments are not taken into account, the post-national rights-based aim of child protection is hard to obtain. If their arguments were not taken into account, it would not be possible to reach rational acceptability of the decision. If their treatment is not on par with the basic expectations towards child protection, it is nothing that can provide reasons for anyone to have trust in the decisions.

To illustrate how a practice could not redeem a modern promise of trust, the BVL of 1953 should be revisited. Here, the parents did not have the right to see the relevant documents to the case they were involved in.[455] This meant that they could not defend

[453] Children are parties to the procedure in both a special sense and in a directly judicial sense – as discussed later.
[454] What I refer to as a counter-petition is the *bvl* §7-11 - fourth paragraph.
[455] Benneche (1986): 113.

themselves properly because they were not included as a legal party to their own cases in any proper manner. Thus, the report of the child welfare office was not something that the parents could contribute or influence, criticize or answer to in a manner that could help the decision in becoming in the best interest of the child. The child welfare officers conducted investigations and interrogations that would lead to writing a so-called social report. Most often, the BVN reached their decisions according to these reports, which effectively made the BVN into a dependent decision-making body.[456] These documents were withheld due to restrictions imposed on private parties, preventing them from accessing public documents. This type of exclusion of the private parties did not enable the BVN to establish an exhaustive argumentative process that could help finding out what was in a child's best interest. This was remedied with the introduction of the FBSS.

7.3.2. An Inquisitorial Party Procedure

With the introduction of the *bvl,* the decision-making procedure became based upon a traditional civil trial and party-procedure, or at least a special version of it. This was not the case with the BVL or the LBFB. However, the introduction of the party procedure principle can be seen as a reaction to both the BVL and the BVN. By establishing a party procedure, the local child welfare office in each municipality became a party to the procedure on par with the parents. In this type of procedure, the two parties present claims upon what is in a child's best interest, which are considered equally in front of the FBSS.

Establishing a party process, where the meeting of negotiation is one of the most important characteristics, can be considered as the most important step in re-embedding the order of expectations into the legal order. This idea is reflected in NOU 1985:18:

> *"It must be added up to a party procedure in which the municipal social services, or Ministry of Social Affairs, promote well-founded proposals for specific measures…The other party is that which the action is directed towards…The private party should always be represented by a lawyer."*[457]

The most important difference between the traditional party procedure of the civil court and the FBSS is that the board must itself determine the solidity of the decision-making platform. In order to achieve such an aim, which is reaching a decision in the child's best interest on a solid platform and in an informed manner, the FBSS had to become equipped with a design that was independent. It can be argued that the FBSS is independent from those below and those above, through two design-mechanisms—(1) the FBSS is an administrative court. It

[456]Kjønstad (2002): 70.
[457] NOU 1985:18: 299.

means that it is separate from the regular court system.[458] As such, the FBSS is only similar to a court, but a part of public administration and pursuant to *forvaltningsloven* (Public Administration Act – *fvl*) §1.

(2) The leader of the FBSS has a responsibility to remain independent and ensure that cases reach a decision according to the main principles of procedure and in accordance with the purpose of the legal code, rather than resting on either of the parties' claims. The FBSS is independent in that the decision-making does not risk being influenced by political tampering or different administrative directives. The FBSS is exempted from these types of instructions. This allows the FBSS to work independently as if it was a court, something that has been stressed in most of the reports regarding the decision-making board.[459]

The leader plays an active role in establishing a solid foundation for decision-making by, for instance, deciding to add more evidence to the procedure.[460] The active leadership entrenched in *bvl* §7-12 has no parallel in current law.[461] The active leadership is set to ensure that the main principles of procedure of *bvl* §7-3 is enforced. The idea of active leadership was first launched in NOU 1985:18 as a way to establish legal protection for those affected by the child protection system.[462] The lack of legal protection was the largest problem with the BVL, and a way to remedy such a problem was to introduce a jurist that could enforce civil court-principles as well as principles underpinning a legal practical discourse. The jurist could draw upon esoteric know-how in order to secure a fair trial proceeding.

A child protection case involves a child who cannot automatically be a party to the procedure on par with others. The decision-making procedure is to decide what is best for this child, and nobody else. The board is not only going to establish facts, but they also must decide upon the treatment of the child in order for its best interests to be met. The party-procedure is not about two adverse parties who must settle a disagreement; it is a matter of locating what is in the child's best interest, irrespective of the two parties. Hence, having an inquisitorial trial procedure becomes a precondition for reaching such a principled aim. It renders it possible to approximate the child's best interest in an argumentative fashion where the best argument that serves such an aim can be made acceptable to all. This helps to redeem

[458] *Bvl* §6-1.
[459] The reference to the FBSS as a court-like decision-making body is found practically everywhere, e.g. Ot.prp.nr.44 (1991-1992): 13, NOU 2000:12: 267, NOU 2001:32: 234, NOU 2005:9: 50 and Ot.prp.nr.76 (2005-2006): 119.
[460] *Bvl* §7-12b, d, e, f.
[461] See Ot.prp.nr.76 (2005-2006): 129-130.
[462] NOU 1985:18: 293.

the promise of trust, while it opens up the possibility for reaching the aim of upholding the child's best interest.

7.3.3. The Public Party: The Role of the Local Child Welfare Office

The local Child Welfare Office is the key actor in Norwegian child protection and child welfare. However, this dissertation will not evaluate its role with regard to ensuring the welfare of children within families, but on the protection of children. The local child welfare office is in charge of the child's welfare and attempts to remedy his or her situation through non-coercive means. If these measures fail, or the situation is acute, they can move to prepare a petition before the FBSS on a request to use coercive measures.

When a petition is submitted by the local child welfare office, the situation of the child has become labeled detrimental, and it is a threat to the child's health and development. The claim raised by the child welfare office is allegedly in the child's best interest. The office is thus attempting to advocate for the interest of the child, irrespective of the parents' views. Even if the child is entitled to be a party on its own, this still does not remove the right of the child welfare office to stand by their claim that they know and will protect the child's best interest. Onora O'Neill argues this very point:

> *"Children easily become victims. If they had rights, redress would be possible…Although they … cannot claim their rights for themselves, this is no reason for denying them rights. Rather it is a reason for setting up institutions that can monitor those who have children in their charge and intervene to enforce rights."*[463]

This has the practical consequence in that the local child welfare office can claim to represent the child's best interest on behalf of the child, against the parents' claims. This is the local child welfare office' role called *in loco parentis*—"being in the place of the parent."

In loco parentis is a positive right, carried by the child. It stipulates that the child has a right to protection. This social right can be given the following formulation:

> *"If some individual I, who satisfies certain background conditions B, displays characteristics K in circumstances C, then an individual O, who occupies official position P, should do T to or for individual I."*[464]

Using this description, we get the following scenario. An individual (I), who is a child according to law (B), is receiving detrimental care (K) within its current family or care-

[463] O'Neill (1988): 445.
[464] Goodin (1986): 186.

situation (C), then the individual (O), who occupies the position as a child welfare officer (P), should raise a claim to protect (T) the child (I) from the family or care-situation (C).

That the local Child Welfare Office is supposed to raise such a claim upon what is in a child's best interest opens up for variations across municipalities according to the quality of the personnel at the particular local office. Do all the local offices act upon the same knowledge-base regarding when to file a petition? Do they act upon the same notion of detrimental care? Is the threshold of intervention coherent across municipalities? The answers to these question are "no". This implies that the FBSS might not be activated coherently, and some municipalities can be more active than others. This discriminates between cases.

During the time of the BVL, these variations provided a breeding ground for critique of the lack of non-discrimination. The criticism was directed at the system's acceptance of variations in decision-making. The purpose behind the BVL was to safeguard the distinctive character of the municipalities. Healthy families in healthy communities were the goal of child protection. This idea instituted discrimination across municipalities. Hence, the BVN discriminated by design.

Lifting the decisions on coercion out from the municipality could remedy the problem of discrimination between municipalities. Thus, making decisions on a regional level and with a professionalized board could ensure less discrimination between cases. However, it is still a threat that there would be variation amongst those who activate the FBSS.[465] Local variations, as e.g. lack of competence, lack of personnel, lack of budget, lack of time etc. will inevitable occur.

The child itself cannot raise a rights-claim effectively since it is a child; thus, it can be argued that the local child welfare office is given the task to enforce the rights of the child as stipulated by CRC Art. 3.2: "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being." The Child Welfare Office takes the view, as they move forth to formulate a petition to the FBSS, that the child would want their parents to be coerced and that the care of the child potentially transferred to someone else. Conceptualizing the purpose of the local child welfare office in this manner is somewhat new, and cannot be found explicitly in the legislative history of child protection. However, as

[465] This relates to the professionalization of the local Child Welfare Office and the operative street-level child welfare. The manner in which the different local Child Welfare Offices can avoid discriminating children is to equalize practice through the application of the same knowledge-base and equal procedures.

argued in the former chapter, it is a consequence of a rights-based post-national turn in child protection where the protection of the child's best interest is the primary consideration. Although variations occur between municipalities, the possibility for raising petitions on behalf of the child, because it is in that child's interest, is embedded in the FBSS-design. This helps redeem the promise of trust.

One of the ways in which cases become equalized, and thus contribute to ensure that decision-making does not discriminate by design, is that the local child welfare office is represented by a lawyer when pleading the case at the FBSS. This is also the case with the private parties. Hence, the way parties to the procedure raise their claims is equalized in that respect. This clearly strengthens the likelihood that the FBSS can treat cases in a non-discriminatory manner, and that everyone involved can be shown equal respect.[466]

7.3.4. Parental Rights and Their Legal Representative

The private party's procedural rights are activated when the local Child Welfare Office commences its investigation into a care-situation. The parents of the child are entitled to legal representation as well as access to all case-documents from this point on.[467] This type of relative transparency can be seen as a reaction to the lack thereof during the BVL-period when parents did not receive access to all documents, and their ability to argue their case became difficult. In many respects, the role of the local child welfare officers were too integrated with the BVN in reaching decisions on matters that needed coercion.

By providing parents status as a party, corresponds with the demands set to maintain the rights of parents. Since parental rights are seen as a general precondition for ensuring the best interest of the child, securing and respecting these rights in a decision-making procedure is imperative. Respecting the rights of parents and keeping them operative in including them as parties to the procedure is a way of ensuring that the interests of the child is enforced as far as possible.

What is at stake when the FBSS receives a petition from the local child welfare office is a claim that the rights of parents to provide care for their child should become limited or revoked. According to the principle of least intervention (*minste inngreps prinsipp*), the rights of parents are respected until the point where coercion is deemed as the only viable action. At this point, it is claimed that the child receives care that is detrimental because it has become a

[466] This argument is also put forth in Eriksen & Skivenes (1998).
[467] Cf. *bvl* §4-3.

threat to his or her health and development. This implies that parental rights are presumed until coercive intervention is deemed necessary—it is referred to as the biological presumption.[468]

The biological presumption is maintained by the state to safeguard parental rights as long as it does not threaten the child's development and health. This is so because it is in the child's best interest to remain within the family until a certain point, i.e. when care falls beneth a certain threshold and becomes detrimental. In order to legitimize the removal of parental rights, the parents must be allowed to put forth a counter-claim to the local Child Welfare Office in an effective manner. This will illuminate the care-situation of the child, and will contribute in the process of approximating the child's best interest.

On the other side, the local Child Welfare Office must communicate on an equal footing with the private parties in order for their arguments to understand each other. To reach such an end, the parties to the procedure in the FBSS have legal representatives—lawyers. These representatives function as an equalizer that levels the playing field. This will help to establish discursive symmetry between those involved. As with the local child welfare office, the legal representation of parents is a way to ensure that the argumentative level of the claims put forth in front of the FBSS is provided on an equal level and according to similar type of specialized adjudication. This makes the FBSS more likely to understand each case on equal terms—implicitly enforcing the basic expectation of non-discrimination. By providing legal representation of the parties to the procedure, the promise of trust becomes increasingly cashed in.

7.3.5. The Child's Co-Determination and Self-Determination

The *bvl* §6-3 stipulates the most important inclusion of children into FBSS proceedings. According to the legislative history, the reason for its inclusion was to empower children and make them able to participate in their own lives.[469] The right of the child to be heard is now a part of *bvl* §6-3. It is directly derived from a specification of the principle of the child's best interest in Art. 12 of the CRC, and was one of the few efforts made to harmonize the *bvl* to the CRC through active transformation.[470] Hence, the *bvl* §6-3 is a result of incorporating the CRC into Norwegian law. Children from the age of 7, or younger, if they are capable, are given the right to express themselves on matters affecting them. The FBSS should weigh their

[468] See e.g. Skivenes (2002b): 113.
[469] Ot.prp.nr.45 (2002-2003).
[470] Detrick (1999): 89.

opinions according to the age of the child and its maturity. According to *Barneloven* (The Children's Act – *bl*) §31, opinions of children aged 12 or older are to be given great weight in the decision-making procedure.[471] Finally, a child at the age of 15, and sometimes younger, can be provided the status as a party to the procedure.

By gradually increasing a child's involvement as the child matures, the law has formalized a type of relative autonomy of the child. While an adult at the age of 18 can be said to be autonomous in deciding in all matters, a child does not receive any type of formal self-determination until the age of 15. Even at that age, the type of self-determination is very limited. A child's relative autonomy prior to 15 is not as if it alone can shift the decision-making in its favor and towards its claim. The age-limits of 7, 12 and 15 reflect an operationalization of the development of a child. Furthermore, the FBSS is given leeway to argue that children under the age of 7 can be heard, as well as that some children younger than fifteen can have status as a party to the procedure. The important question is then if this operationalization of a child's relative autonomy in the legal order complies with basic expectations.

In *bvl* §6-3, it is stipulated how a child can become a participant in its own trial. Arguably, the older a child becomes, it becomes correspondingly likely that opinions become indicators on what is in its best interest. The reason is that the child's best interest is increasingly argued coherently by the child itself.

There are two problems regarding how the child becomes included into the process. The first is the arbitrary age factor, and the other is what I refer to as the party paradox. The age-limits 7, 12 and 15 cannot be said to have any scientific support. Similar arguments can be made for the configuration 5, 10 and 13 instead. Moreover, as the CRC does not operate with any age-limits, the question regarding what the particular reasons are that stipulate the particular age-limit configuration of 7, 12 and 15 arises. These age-limits, in its general application, are redundant. Why cannot the child's relative autonomy be sought out in each case?

The FBSS can argue that a child can follow a different and more liberal age-limit configuration than what is formalized by the *bvl*. Hence, hearing a five-year old may be

[471] The rule within the *bl* §31 is referred to from Ot.prp.45 (2002-2003), which was the legal proposal on the incorporation of the CRC into Norwegian law. This rule becomes as such a part of how to interpret Art. 12 of the CRC into Norwegian law and child protection.

equally valid. To avoid such arbitrariness, the *bvl* should not operate with age-limits with respect to hearing the opinion of the child, especially since the interpretation of the age-limits can differ between boards and discriminate between children that should otherwise be considered as equals. There are no reason to avoid hearing the child, as it cannot be known if it "is capable of forming his or her own views" before given the chance to talk.[472]

The second point is the party paradox. It revolves around the paradox of having an entire decision-making body's purpose of ensuring that a decision is in a child's best interest on the one side, and a claim from the child that allegedly is its best interest on the other. Can the FBSS decide upon anything else than the claim of the child if that claim is considered as reasonable? The answer is yes. The board, through an exhaustive argumentative procedure is the entity that is to settle on the issue of what is in a child's best interest. The problem, nevertheless, remains that the child is authorized to raise its own claim on its own best interest. As every child that has turned 15 is to receive the status as a party to the procedure, he or she can raise a claim regarding what is in their own best interest.

Arguments that go against the claim of the child must be particularly strong. Once the child has become empowered to become on par with adults, its relative autonomy suggests that it must understand the perils of its own situation and raise a claim similar to that of an adult.[473] This would mean that the child took control of the situation. This is not the case. By empowering the child to become a party to the proceedings, the FBSS provides the child with a confusing role with regard to its relative autonomy. This autonomy has ceased to be relative and rather became on par with self-determination, placing too much responsibility on the child. Although the formal responsibility for any decision is on the shoulders of the FBSS, the very idea that the FBSS can relax itself whenever a child at the age of 15 or older puts forth a reasonable claim, is to set aside the purpose of child protection to ensure that the development of the child continues in a non-detrimental fashion until adulthood.

Consequently, the type of empowerment that enables a child to become pseudo-autonomous can threaten the entire purpose of the decision-making procedure. The reasoning behind having a carefully designed decision-making procedure is that the child cannot know what is in his or her best interest as long as it is a child, and *because* it is a child. This is not an argument against including a child into an argumentative procedure according to its

[472] CRC Art. 12-1.
[473] See NOU 2005:9: 54ff.

relative autonomy, listening to its arguments and taking them very seriously, but rather a criticism towards setting a child's relative autonomy aside in order to include them as if they no longer were children, i.e. as a party to the procedure represented by lawyer. Including the child as a party to the procedure becomes questionable since the child still is only a child who is not to be held accountable for the measures that should ensure that its development and health gets back on track.[474]

The aim of any decision is the child's best interest, and the interests of the child is the only issue worth considering once parental rights are set aside due to detrimental care. However, the child is not an adult, and should not be treated as one. Granting the child status as a party to the procedure is counterproductive to the work of the FBSS. It becomes a threat both towards the promise of trust if or when the child makes a claim towards its best interest that becomes set aside by the FBSS or when the FBSS accommodates such a claim.

Given that the child's age is an arbitrary factor, the party paradox can be solved by simply deciding that any child is to be allowed to put forth its arguments no matter how old that child is. This means that the FBSS should always hear the child's point of view without it being considered as a claim put forth on par with that of the parents or local Child Welfare Office or any other actor. In this way the treatment of a child becomes similar across boards, and the child itself contribute on an equal footing.

One further way of including a child, and irrespective of age, is to make use of the already established arrangement of appointing a spokesperson to the child.[475] This arrangement was pushed through by the parliamentary committee responsible for the final formulation of the legal order of *bvl*.[476] It introduced the ability for the FBSS to appoint a spokesperson for the child. The Labor-government responsible for the *bvl* was not in favor of such a spokesperson, since it complicated the decision-making procedure and risked confusing the child. Since the *bvl* was dependent upon reaching a majority in parliament, the spokesperson became a part of the legal arrangement. It was argued that:

> *"In these cases, the interests of children do not need to be identical with the interests of the other parties to the procedure. According to the understanding of the majority it would be a strengthening of the child's legal security and their position in relation to such decisions that it has its own "representative" that can speak the case of the child and present the case from the*

[474] Brighouse (2003).
[475] *Bvl* §7-9.
[476] Innst.O.nr. 80 (1991-92).

child's perspective. Such a representative must be trained to speak with children and be independent of the local child welfare office"[477]

The current arrangement makes it voluntary to appoint such a spokesperson, and it is a qualified guess that such a person not always becomes appointed. This is obviously a threat towards the ability to raise valuable and qualified arguments in the process of finding out what is in a child's best interest.

Participants to the discourse on child protection emphasize that empowering the child is a step in the right direction of securing correct decisions.[478] This can be true, but the way they are included should be more thoroughly considered. If the decision-making is to redeem the promise of trust, the basic expectation of the child's best interest must become reflected in the way children are included. Having age-limits that are arbitrary, including children as parties to the procedure and having a voluntary appointment of a spokesperson does not necessarily constitute empowerment that safeguards the child's best interest. Currently, it is rather a risk for discrimination to occur between children and how they are included—this threatens the promise of trust.

7.3.6. Fixed or Free Measures

As we have seen, according to the *bvl,* the FBSS is to decide to coercively intervene and remove the rights of the parents, and then to implement measures that are in the child's best interest.[479] This does not mean that the FBSS can formally do whatever it desires in order to achieve its aim of finding out what is in a child's best interest. The types of measures that are available to choose among are specified in the legal order, and as such, what is in a child's best interest is claimed to be one of the measures settled within the legal order. Hence, the legal order assumes the capacity for determining the indeterminate—that care-measures decided upon are in fact the child's best interest.

This means that from within the legal order itself, it is a claim that every conceivable child that the FBSS can be confronted by will receive measures in its best interest through the

[477] Innst.O.nr. 80 (1991-92).
[478] Smith (1999) and Archard & Skivenes (2009).
[479] Cases are supposed to be raised, cf. *bvl* §7-1, according to *bvl* §8-4. In §8-4, there is a reference to one rule, namely §4-8. This means that the §4-8 serves as the premise for the casework in the FBSS. However, §4-8 refers further to many different rules in chapter 4 of the *bvl*, and makes the decision entangled into a web of rules. However, the most important decisions that the FBSS can make is to temporarily take care of the child (by simply deciding that the parents cannot decide whether to send a child to kindergarten, §4-4-fourth paragraph, or send the child to a foster-home, §4-14a). It can also decide on adopting the child to new parents, according to *bvl* §4-20. Furthermore, special provisions are activated in acute cases where the leader of the local child welfare office can coercively intervene without a prior decision of the FBSS, cf. *bvl* §4-6- second paragraph. However, in order to maintain such a decision, it needs to be resolved in the FBSS.

fixed measures within the legal order. The problem is that the local child welfare office activates the FBSS with a claim to implement certain types of coercive measures that are entrenched in chapter four of the *bvl.* However, the FBSS is, in fact, not restricted to follow the claim raised by the local Child Welfare Office. The FBSS can do whatever is in the best interest of the child. For instance, if what is in a child's best interest is a more complex matter than first suggested by the local Child Welfare Office, the FBSS can decide to proceed differently.

The question of finding measures that is in the child's best interest, and coincidentally attempting to uphold a basic expectation towards child protection, is loaded with normative complexity. What ought to be done to qualify what is in a child's best interests can entail a multitude of measures. Competing claims can easily be made, and all of them claim to be correct. These claims can all involve different measures. Different arguments are raised by e.g. a social workers or medical practitioners, the judge, or even the child or the parents, but they all emanate from an idea of what constitutes the best type of interest of the child. This type of normative complexity is at the core of the enforcement of the child's best interest principle, and hence the procedure must be able to include, confront, and settle all the arguments in order to dismiss or confirm aspects that can lead to a decision that can be said to be in a child's best interest.

The input that one child's case provides to a decision-making process must have consequences for the outcome of the decision-making. The answer to the question of what is in that child's best interest should be treated as potentially varying from child to child. In order to achieve such an aim, which is founded upon a child's right to receive a trial that treats them uniquely, there is a need to address every case with an open mind regarding what measures ought to be settled upon. The FBSS is not supposed to 'know' about any measures prior to hearing the child's case, i.e. hearing what the interests of the child are. If the different types of measures that the FBSS can decide upon are fixed prior to any argumentative procedure, arguments can become prejudiced and blind towards the fact that the best interests of a child could only be settled unrestrained by such measures. By having fixed measures, the argumentative procedure within the FBSS can become fixated by the *bvl* and can run counter to a child's best interest. Indirectly, it can even be argued that the legal code attempt to determine the indeterminable principle of the child's best interest as measures that are open for the FBSS to pursue are fixed. This is clearly a threat towards the basic expectation of the child's best interest, and the potential of redeeming a promise of trust.

In order to ensure that a decision approximates the best interests of the child in an as satisfactory manner as possible, the different fixed measures within the *bvl* might distort this goal and simply not be enough. Having deliberations in the FBSS regarding measures must be open to accommodate any eventuality within argumentation on a principled level. If not, a child's best interest might not become approximated in an optimal fashion because the child's interest is settled through a few fixed measures. The latter goes against, and threatens the basic expectations of the child's best interest, and could easily be removed by not dictating what type of decisions that can be made by the FBSS.

There is no way of knowing how the board reasons with fixed measures, at least not without empirically studying the deliberations themselves. Since this type of examination is not conducted here, only illuminating this potential problem area of the design will have to suffice. By explicitly formalizing what measures to decide upon, the *bvl* functions as a type of limitation on what and why specific measures and hence specific interests can be in a child's best interest. Furthermore, if a board thinks in terms of fixed measures, then they might view any case with prejudice in the sense that it is not the child's interests that are being deliberated upon at all, but rather what type of measures should a particular child fit into. The latter is an obvious threat towards the basic expectations of the child's best interest. In this sense, the fixed measures are procedural constraints on what type of interests can be considered, and can obstruct the flow of arguments leading to a particular child's best interest.

7.4.7. Appealing Decision of the FBSS

When a decision of the FBSS is not accepted by any of the parties to the procedure, they can appeal this decision to *tingretten* (court of first instance/district court), according to chapter 36 of the Civil Procedure Act.[480] This court is a special type of civil procedure that deals with appeals from administrative decision-making involving coercion. When appeals arise from the FBSS, it is because either the local child welfare office or one of the private parties—the child or the parents—do not believe that their claims are met in any reasonable manner. Said differently, the decision of the FBSS becomes contested.

Once the case is raised to a civil court of law, it becomes subjected to a different type of scrutiny to the one within the FBSS. When a case is appealed, it enters a different system of norms, and with an entirely different background history. Said differently, once the child

[480] *Bvl* §7-24.

protection case leaves the FBSS, it also leaves a decision-making body that has gone through decades of discourse on how to perform decisions in a trustworthy fashion.

The case enters a civil court system that has notoriously been proclaimed, throughout the history of child protection discourse, as unfit for making decisions in child protection cases.[481] Even in the Green Paper that contained the groundwork to the FBSS design, the traditional court system is argued as inappropriate for the purposes of reaching decisions regarding coercion cases in a legitimate manner. The FBSS has a design made more or less in opposition to the court system. Thus, it can be argued that, according to NOU 1985:18, the goal of ensuring the child's best interest could not be achieved within the regular court system. The decision-making body set in charge, which became the board, had to combine independency with a procedure of argumentation. A court, it was argued, could not. When the civil court reaches a decision, claims become assessed according to principles underpinning a civil court instead.

If the court of appeal cannot safeguard the principle of non-discrimination and the principle of the child's best interest, the criticism that child protection cases lack any proper legal protection with regard to a court of appeal—i.e. a lack of any proper way of testing the ultimate claim to correctness that is the final decision of the FBSS—is valid. If the design of the FBSS is an answer to what is promoting trust the most, then a design of the type of appellant court procedure that differs, would not induce trust in the same manner. Hence, the promise of trust becomes threatened. If the FBSS has become the most optimal decision-making body to answer such a question, then the appellant body should essentially be built upon the same design principles.[482] This is presently not the case.

This means that the promise of trust, even though it might be redeemed in the decision-making of the FBSS, would not automatically be true for the appellant body. Two entirely different institutions cannot induce trust in the same manner when certain principles are to be upheld in order to do so. In this regard, it can be argued that there is a principled shift in how casework is processed when a case leaves the FBSS and enters the civil courts. I will not discuss this further as it falls outside the reach of this dissertation.

[481] This is laid out in chapter 5.
[482] This argument is also traceable in Skivenes (2010), who argues that Supreme Court decisions are arbitrary in enforcing the purpose of child protection.

7.4. Main Principles of Procedure in the FBSS

In comparison to the predecessor of the FBSS, the BVN of 1953, the FBSS has had an elaborate set of rules that are supposed to guide each decision-making procedure. These constraints upon argumentation were introduced to reestablish legal protection. Initially the rules of procedure were not a formal part of the *bvl* or the *stl*. Rules were to be enforced, and the legislative history referred to the rules specific to the Civil Procedure Act.[483] Today, rules of procedure have become an explicit part of the *bvl* and are dubbed as "main principles of procedure" located in *bvl* §7-3. Having rules of procedure, as I will refer to it, is a result of transforming the principle of fair trial from the ECHR into Norwegian regular rule of law and to child protection. It will be argued that the rules of procedure are, to a certain extent, the main design-features that comply with the basic expectation of non-discrimination. Observing such principles can be equivalent to having a rule-guided decision-making procedure that can ensure the formal principle of equality and hence the basic expectation of non-discrimination.

7.4.1. The Criticism of the BVL Gave Rules of Procedure

One of the main shortcomings of the BVL of 1953 and its decision-making board was that it had no formal rules of procedure. Nevertheless, the legal code contained a potential to put forth demands to the procedure, since decision-making in coercion-cases needed the local judge to ensure legal protection. A judge could thus enforce rules as if it was a court-like procedure, but all according to the will of the judge. No rules were explicitly formalized that the judge had to enforce. The lack of rules of procedure in the BVL would potentially, but most likely, lead to arbitrary enforcement of coercion. Consequently, decision-making would have an imprint of arbitrariness, rather than being an explicit and formal legal discourse with rules of procedure that would maintain a coherent decision-making procedure. By demanding that rules are to be enforced, the FBSS have definite constraints on discretionary decision-making, compared to the BVL. The implementation of rules of procedure can be referred to as the answer to the criticism towards the BVL and its lack of legal protection.

To Gerd Benneche, the lack of rules of procedure was one of the elements that contributed to the BVL becoming a threat towards the legal protection of the child. She referred to the BVN, quite accurately, as a democratically appointed committee with no

[483] Ot.prp.nr.29 (1990-1991): 180.

guarantees for having qualified personnel sitting there.[484] The subtext for such criticism was that the personnel occupying the BVN had no particular good reasons for making decisions.

The original design of the FBSS did not contain any explicit main rules of procedure as is the case with the current *bvl* §7-3. It was argued, in the amendment of the *bvl* in 2006, that the rules of procedure, known from a civil court-procedure, were already expressed in the legislative history of the original FBSS introduced in 1992.[485] They can be found in both NOU 1985:18 and Ot.prp.29 (1990-1991).[486] The design was from the beginning supposed to adhere to certain principles of procedure. Although these principles were operative but not codified, it could lead to confusion as to how they would be enforced.

The confusion was even greater since the FBSS was originally a part of the *stl* and not the *bvl.* One potential consequence of not explicitly codifying the principles within the *bvl* itself, but having two different legal codes designing the decision-making body, the *stl* and *bvl*, was that it could lead to confusion regarding what type of main principles should in fact be guiding the decision-making procedure and also for what purpose. Hence, the introduction of *bvl* §7-3 as well as moving the FBSS from the *stl* to the *bvl* from 2008*,* can be said to equalize how procedures of the FBSS are accomplished. Therefore, the new rules of procedure is a positive development in ensuring that decision-making does not discriminate.

Although the list within §7-3 is incomplete, it can be argued that it formalizes the most important demands set to a civil trial.[487] These are the immediacy of evidence – §7-3-a, that those affected are heard §7-3-b, the need for thorough and sufficient contradiction §7-3-c, equal treatment §7-3-d, that the FBSS performs independent decision-making §7-3-e, and that the decision is rationally justified §7-3-f. All these principles are supposed to be operative in the decision-making procedure; moreover, they intersect and are mutually dependent. For instance, it is possible not to have thorough contradiction without the immediacy of evidence; moreover, rational justification cannot be made without including affected parties; equal treatment is not ensured if the decision-making body is not independent etc. As such, civil court principles become imported into an administrative decision-making body.

When the rules of procedure finally became formal constraints upon decision-making, it simultaneously settled formally that case-work involving coercion is supposed to proceed as

[484] Benneche (1967): 82-83
[485]Ot.prp.nr.76 (2005-2006): 27.
[486] NOU 1985:18:293, Ot.prp.nr.29 (1990-1991):168.
[487] Ot.prp.nr.76 (2005-2006): 27.

a legal discourse adhering to formal rules of procedure. The implementation of these rules, that simulates a civil court-procedure, was argued setting the most optimal boundaries of an argumentative procedure equipped with finding out what is in a child's best interest.[488] Admitting that the above-mentioned principles serve the purpose of optimizing the accuracy of the decision-making procedure is not to say that such principles belong only within a traditional civil court-procedure. Applying rules of procedure known from civil procedures onto coercion cases will enable the leader, who is supposed to enforce these rules, to structure the procedure of argumentation to reach the predetermined aim of the child's best interest. It has the potential of ensuring that each case is deliberated upon equally. Not only does the rules of procedure structure the flow of argumentation, and hence makes decision-making more lucid, it also implies that the procedure in one FBSS becomes more similar to the next, hence strengthening the principle of non-discrimination.

7.4.2. Approximating the Child's Best Interest

As established in the former chapter, in order for the child's best interest to become optimally approximated, it is a need to establish a procedure that can settle a conflict of claims on normative matters as accurate as possible. Since the principle of the child's best interest is indeterminate, the problem to be solved is the matter of reaching a decision that reflects a qualified agreement upon what is the child's best interest. In order to get there, arguments must be laid out, and consequently, the decision-making procedure must be designed as a deliberative forum that can incorporate an open exchange of arguments.

In the search for identifying the child's best interest, which is a search for finding an answer to a practical problem, all arguments that make a claim upon what this entails must be aired and scrutinized. If not, valid arguments might be overlooked, or arguments that lead to the decision could be overrated. How, then, has the FBSS met such a challenge?

Formalizing rules of procedure and making them operative within the *bvl* underlines their perceived importance in guiding the entire decision-making procedure. By doing so, a legal discourse was established that could abide by the purpose of the *bvl*. Once established, it was thought that the board was enabled to approximate the principle of the child's best interest in a coherent fashion without discriminating between cases. This is the reason why the leader of the board needs to be a competent legal scholar, and why it is provided legal representatives for the parties to the procedures—namely to equip the procedure with

[488] Ot.prp.nr.76 (2005-2006):127.

necessary legal components for coherent argumentation. The rules of procedure institute the principle of non-discrimination by establishing a stable structure of argumentation that the FBSS must relate to in each case. The rules of procedure embed a practical legal discourse into the overall design of the FBSS and instruct a judge to ensure that they become enforced.

Moreover, the rules of procedure must be able to ensure that, once the procedure has commenced, a case-proceeding move in the right direction, implying the direction of the child's best interest of any child. In order to ensure that each case has a legitimate outcome, one that is upholds the order of expectations, it can be argued that enforcing structural design criteria such as this safeguards non-discrimination within the procedure and cash in on the promise of trust.

7.4.3. Expressing Principles of Fair Trial

The first paragraph of *bvl* §7-3 is allegedly the transformation of the fair-trial principle of ECHR Art. 6.1.[489] ECHR Art. 6.1, which states the fair trial principle, is, therefore, also claimed to be incorporated into the legal order of child protection. *Bvl* §7-3 reads as follow:

> *"The procedure of each case within the FBSS should be reassuring, fast and promote trust. It should be adjusted to the measure and the nature of the case, its size and degree of difficulty, and support the fundamental consideration of the Act."*[490]

The "*fundamental consideration"* that this paragraph refers to is the purpose of the *bvl*—which is to protect the child's prospective right to liberty and thereby the interests of the child.[491] Furthermore, it is a clear reference to the CRC and human rights in the legislative history of §7-3, which underlines the post-national rights-based enforcement of the child's own best interest. It is this fundamental consideration that must be upheld every time. In other words, a fair trial implies that the procedure must ensure each child's *best* interest every time a decision is reached. Implicit to a fair trial principle that implies equal formal treatment of children, is the basic expectation of non-discrimination.

By applying this ECHR's fair trial-principle to the *bvl* and specifically to the design of the FBSS, it contributes to shift the design of the FBSS in direction of becoming a regular

[489] *Bvl* §7-3 is primarily a copy-paste legislation first written as the rule of legislative purpose in *tl* §1. It is in the preparatory-works to the *tl* where the argument is laid out that stipulate that this is a Norwegian adaption of ECHR Art. 6.1. – see NOU 2001:32: 564ff and Ot.prp.nr.51 (2004-2005): 36ff.
[490] *Bvl* §7-3 first paragraph. This is my translation. The semi-official translation that the Ministry of Children, Equality and Social Inclusion is not satisfactory. Their translation use "tillitsskapende" as "confidence-inspiring" and "betryggende" as "satisfactory". These translations are not good and convey a legal practice that is not Norwegian law.
[491] Ot.prp.nr.76 (2005-2006): 127.

trial-proceeding. Many of the rules of procedure also count in civil trials and *bvl* §7-3 is nearly a replica of §1-1 in *tvisteloven* (Civil Procedure Act– *tl*). A potential problem with replicating a fair-trial principle from *tl* is that the cases presented to a civil trial are very different from those cases that are presented to the FBSS. Furthermore, the implementation of §7-3 became accepted by parliament without any real arguments as to how they were to operate within the FBSS as opposed to a civil procedure. Consequently, the design stipulates that *bvl* §7-3 is supposed to be enforced as if it was a regular civil trial. This can be unfortunate. The main problem is that the FBSS is independently responsible for establishing a sound platform for reaching a decision, which implies that the parties to the procedure are not in control of case-proceeding. Furthermore, the decision of the FBSS should always be in the child's best interest—and nothing else.[492] These two points will be revisited later, but they serve to illustrate the difference between a regular court and the FBSS.

It could be argued that this line of reasoning, namely to incorporate the fair trial-principle into the *bvl* and the design of the FBSS, ensures that the *bvl* develops in the direction to be on par with modern standards of legal-protection through the use of the court-design and legal adjudication.[493] This development, although helpful to strengthen the rights-protection for children, is an historical paradox. The discourse on child protection, since the late 1960s, has been about introducing a court-system or maintaining a democratic decision-making process. The introduction of the current design, and its most important amendments, has been dominated by Labor governments. Hence, the party that introduced the BVL of 1953, and that defends it all the way through the 1960s and until late 1980s, contributed to re-design the system of child protection by stealth into a decision-making procedure that is close to being a design of a regular civil court—something Labor governments have had historical reasons for opposing the court-design. This is, nevertheless, also a compromise in that it is neither a democratically appointed decision-making body nor a court—it is a special type of professional board with a court-like procedure including laymen. This can, provided how the fair trial-principle is embedded in the FBSS-design, currently be labeled a special court for children.

This type of pseudo-court position, it can be argued, is needed to uphold both the basic expectation of the child's best interest, which its normative complexity is not easily observed

[492] Once a process of decision-making is initiated by the FBSS, the parties to the board have no longer the jurisdiction of the case-matter. This has been transferred to the board.
[493] Ot.prp.nr.76 (2005-2006): 127.

within a regular court, and non-discrimination, which is fundamental to a court. Ensuring that any coercion case meets a board that is supposed to have a coherent decision-making procedure, combined with the ability to draw upon a variety of competencies and reach independent decisions, bridge the two basic expectations within the design.

Although this development points towards having a special court of law, the debate has never been raised whether or not it is actually desirable. Historically, the Labor party has fronted a democratic decision-making body and, without any explicit rationale or justification that explains the development, Labor has met the criticism raised towards the former BVN, and has incrementally introduced a type of design that is supposed to be comparable with the civil court-system. Although this is a Labor-paradox, it has nevertheless strengthen the likelihood of redeeming the promise of trust. Securing a coherent argumentative procedure is a way of securing both non-discrimination, and the best interest of the child.

7.4.4. Variations of Claims and the Stability of Procedure

The caseload that meets the FBSS includes a wide range of care-types provided by parents. This implies also a variety of ways to cross the thresholds from non-detrimental care to detrimental care. In order to meet the challenge of such a caseload, the procedure of decision-making must become stabilized in a manner that treats all these different cases in a non-discriminatory manner. Although each case is potentially unique, or is supposed to be treated as such, the FBSS can be argued is equipped with rules of procedure, i.e. §7-3, that are able to accommodate pluralism by way of having a stable rule-driven procedure that could ensure non-discrimination. The basic expectation of non-discrimination, thus, can be seen as procedurally entrenched.[494] Due to rules of procedure, the input to the procedure can vary, while the procedure remains stable.

Even though there are no way of reaching valid decisions when the goal is indeterminate, a rule-driven procedure can ensure that decisions reach an agreement worthy of trust because it is the best answer to the practical problem that is to find out what is in the child's best interest. Because of rules, an understanding can be built through a process of rational argumentation that all affected parties can accept mutually. Having formal rules of procedure that abides by the demand for rational justification is therefore a strength towards the ability of the legal discourse to shape legitimate decisions, i.e. be worthy of trust. The three most important rules embedded in the *bvl,* and that can ensure that a legitimate

[494] Cf. CRC Art. 2.

agreement emerge through rational argumentation, are including the affected parties (*bvl* §7-3-b), the principle of contradiction/adversarial principle (*bvl* §7-3-d) and the immediacy of evidence (*bvl* §7-3-a). These principles ensures that the procedure establish a platform from which a rationally justified decision can erupt.

However, what do the rules of procedure entail? Contradiction, for instance, is an abstract legal denomination for confronting arguments with arguments. If the parties to the procedure are to understand each claim's implication, they must also know what each claim means. How arguments are presented and how they are understood in an equal fashion therefore becomes imperative. If, for instance, parents do not understand the situation, they must be given adequate explanation in order for them to contradict arguments they disagree with or even know to be wrong. If they do not understand the counter-arguments, the board has a duty to provide an explanation so that contradiction can continue. Moreover, it is a duty of the legal representative presenting the counter-claim to talk to the parents without losing the accuracy and consistency that legal argumentation demands. Hence, by formally demanding that contradiction is to take place, the argumentative procedure can become thoroughly ventilated and a solid base from where to reach a decision in the child's best interest can be established.

7.4.5. Raising Claims to Correctness in a Process of Argumentation

Each claim put forth by either parties to the procedure are normative claims upon what ought to be done to remedy the threat towards the child's development and health. Each claim is, irrespective of what the intention of either of the parties is, a claim to correctness. In order to ensure that the arguments put forth in the meeting of negotiation can convince others, as well as to move the procedure in the direction of an agreement on what is in the child's best interest, it has to be such a claim to correctness. In order to reach agreement when such claims are the input to the argumentative procedure, the argument must observe certain ideal rules of discourse. The basic rules of discourse proposed by Robert Alexy will suffice:

1. No speaker may contradict him or herself.
2. Every speaker may only assert what he or she actually believes.
3. Every speaker who applies a predicate F to an object A must be prepared to apply F to every other object which is like A in all relevant respects.

4. Different speakers may not use the same expression with different meanings.[495]

It can be argued that these abstract rules are implicitly operative within any legal discourse in search of rational acceptability of the outcome. Nevertheless, these rules describe the ideal speech situation, a situation that underlines both equality of participation and freedom to conduct argumentation without coercion or unfair asymmetries. By adhering to these rules, the parties to any legal procedure makes arguments that implicitly also constitute a claim to correctness, and each other claim to the procedure will contribute to unveil the ultimate claim to correctness. The latter is simply the denomination of the decision.

Although the basic rules of discourse are ideal, they can become formalized into becoming enforceable rules of procedure that can assist in establishing decision-making that do not discriminate, which also means trustworthy agreement. Said differently, if rules are broken or not enforced, agreement is unattainable. Enforcing rules of discourse when the aim is the child's best interest can lead to rational acceptability of the decision because the strengths of any argument have been allowed to be contested.[496]

By formally entrenching the principle of contradiction into the decision-making procedure of the FBSS, which imply a procedure of argumentation, decision-making will entail a specific type of justification. This type of justification is only accessible if there are no relevant arguments against the conclusion. The reason is that every argument can be heard and deemed as relevant or irrelevant. Moreover, everyone relevant has been given the opportunity to present their views, either as a party to the procedure or called in as a witness. This makes it more plausible for all relevant arguments to be asserted. Thorough contradiction implicitly upholds basic rules of discourse because the principle is set to remove any inconsistencies and wrongful or objectionable arguments, and ensure an exhaustive argumentation that establish a solid platform from where a decision can be based. The final and ultimate claim to correctness deserves agreement because it is the closest claim to the child's best interest by an agreement among all those affected.

No legal representative of the parents, child or state parties could lay out arguments effectively if they contradicted themselves. Moreover, the representative must also be consistent in its argumentation. Also, in argumentation, the parties involved must reach common understanding of the presented facts and arguments. The latter is important for all

[495] Alexy (1989): 188.
[496] Alexy (1989): 294.

types of communication, and alludes to the attitude of the speaker. In sum, it can be argued that the formal legal boundaries of the FBSS are there to establish the rational exchange of arguments that observes rules of discourse, and which also will lead the participants within the procedure to move in concert towards an ultimate claim to correctness that is the decision in the child's best interest. By having such design-traits, it helps to redeem the promise of trust.

In designing the FBSS, it was stressed that, in order to reach a decision that is in a child's best interest, the decision-making needs to be independent, allow for contradiction, include ethical, judicial and scientific representation and reach an expedient decision.[497] Apart from the last factor relating to speed, which will be discussed later, the three former factors, independence, contradiction and representation, are all put forth as necessary components for establishing a qualifying discourse that will optimize the final decision.[498] Hence, it has been a need to optimize the argumentative procedure and establish a rational justification of each decision. When announcing the decision, the FBSS is supposed to explain and justify how the decision is reached, thus rooting the decision in an argumentative process become upheld as essential.[499] Regarding these design aspect of the FBSS, it optimizes the very essence of the goal of the basic expectation of the child's best interest and non-discrimination. Every child in need of protection is to be acted upon according to decisions settled by a rule-driven argumentative procedure that solves the particular practical problem of finding the child's best interest in an optimal fashion. It clearly contributes towards redeeming a promise of trust.

7.4.6. Rules of Procedure Establish a Legal Procedure

By establishing formal rules of procedure within the FBSS-design, it can become dubbed as a legal discourse that also must abide by rules of discourse, it can be argued that the FBSS draws upon the general human capacity to pragmatically solve practical problems through a process of argumentation. The justification of arguments that are presented in a rule-governed procedure, as the one governed by e.g. a principle of contradiction, are also implicitly "claiming that the justification is sound and the assertion therefore correct."[500] Each participant to the discourse is, therefore, presenting a claim to correctness.

[497] Ot.prp.nr.29 (1990-1991): 131.
[498] Ot.prp.nr.76 (2006-2007).
[499] *Bvl* §7-3-f. Cf. NOU 2005:9: 79.
[500] Alexy (1989): 214.

The goal of the FBSS is to reach a claim that can be rationally justifiable, rather as determined to be correct or valid. The goal is to make a decision that is agreed upon and that approximates the best interest of the child by acceptance, and without claiming the impossible, namely that the best interest of the child has become determined. Such a legal discourse, having to do with something indeterminate, has such a rule of approximation built into it in the sense that it has the ability to approximate the best interest of the child and reach rational acceptability.

Due to the indeterminacy of the principle of the child's best interest, it is no need for a procedure that does anything else than to raise claims to correctness and work steadily towards agreement on an ultimate claim to correctness that everyone involved can accept. Having different claims to correctness as the input to the process of decision-making in the FBSS simply translates to being one claim on what ought to be done with the child at hand. Each claim put forth must be held to be valid by the person who represents it. If that person's claim is deemed as wrong by others, the opposing argument must gain the necessary acceptance to either adjust the other claim, or falsify it altogether.

In order to present an argument claiming to be correct during a proceeding, those included into the procedure must know what reasons are permissible as claims to such an end. For instance, the child's best interest is a primary consideration for every argument. Consequently, all those involved must have some sense of why their argument is in the child's best interest in relation to other arguments during argumentation. Arguments can thereby be used to reinforce one side's claim or stipulate the reasons for it being more legitimate than that of others. This means also that either party must not only put forth claims, but also have a rational commitment to the rightness of the claim in the potential opposition of others. Having this dynamics built into the principle of contradiction, it enables the FBSS to reach decisions that approximate the child's best interest without discriminating between cases. On this design trait, we can argue that the promise of trust is redeemed.

7.4.7. A Civil Court for Children?

There are many aspects of the decision-making process that makes it a suspect of being a civil trial in disguise. The leader is a judge and the main principles of procedure are replicated from the Civil Procedure Act. At first glance, it is in fact very little that suggests that this is not a type of civil court. The development from being a board-procedure towards becoming a court of law specified to the needs in child protection cases has been incremental. In fact, from

NOU 1985:17 to Ot.prp.nr.76 (2006-2007), it has been referred to as a court and not only a court-like procedure.[501] The background report for Ot.prp.nr.76 (2006-2007) even advocated for going further in establishing the FBSS to be on par with a civil court.[502] However, there are two important differences between FBSS and a *regular* civil court, which is relevant to discuss with reference to the promise of trust.

The first difference between a civil court and the FBSS is that the members of the board are always going to reach a decision that is in the child's best interest. The civil court does not have an equivalent to such a principle. In order for the FBSS to uphold such a principle, the parties to the procedure cannot, as already mentioned, have the case-matter at their disposal. None of the parties to the procedure 'own' the right answer to such a question; it needs to be deliberated upon, argued for, and it is acknowledged that the child's best interest can only be reached after all relevant arguments have been heard. Hence, the board has full control of the decision-making procedure.

The second important difference is that the decision-making within the FBSS is meant to be independent.[503] This is broadly held to be an important precondition for establishing a legitimate and fair trial in child protection. First, it means that any decision made within the FBSS is supposed to be a result of the procedure of negotiation and the deliberation among the board members within the FBSS alone. Secondly, it implies that the board itself should be capable of reaching decisions that are in the child's best interest by themselves. Although the latter is a strict demand towards decision-making, lending decisive weight upon an expert witness, for instance, will make the FBSS dependent upon that witness when it performs decision-making. Hence, the board must consist of professionals capable of making informed decisions. Since the FBSS have professional representatives, this problem is sought solved. If the board was not independent, it would be incapable of approximating the child's best interest because the board would simply not know if the arguments put forth were valid.

If the FBSS is to perform decision-making worthy of trust, it must have a permanent delegated authority that blocks anyone from instructing or interfering with it. This means that changes or instructions to the procedure can only be introduced by the entity that established the authority to coerce in the first place, namely parliament. This type of independency is the

[501] For instance: NOU 1985:17: 23ff, Ot.prp.nr. 76 (2006-2007): 12.
[502] See Ot.prp.nr. 76 (2006-2007):69-74. One reason for having such a focus and viewing such a development is that the members of the panel that were responsible for NOU 2005:9 were all, except one, of the jurist profession.
[503] *Bvl* §7-3-e and the ECHR Art 6-1, first sentence.

case for the FBSS—nobody can instruct the FBSS on how to perform decision-making. As such, the board is equally independent as the courts. This does not make it a court. The FBSS is still not a part of the court-system, but a part of public administration of child protection. However, the FBSS secures the principle of non-discrimination by embedding important design-principles known from the court system into its own design. We can argue that being parasitic upon important court-principles have made the design more capable of complying with basic expectations.

7.4.8. Conclusion

By having rules of procedure, it can be argued that the FBSS, although with some shortcomings, has been capable of optimizing the procedure for reaching a decision in the child's best interest. This clearly helps to redeem a promise of trust. By formally introducing an argumentative procedure, the parties to the procedure are given the right to put forth their claims.[504] Although the ultimate claim to correctness is settled by the board itself, the argumentative procedure, borrowed from the civil court system, ensures that all the parties to the procedure can affect the outcome and thus inform the decision-making. It makes the decision more solid, and more likely to reach rational acceptability.

7.5. The Process of Negotiation

The main goal of the design of the FBSS is to lead the decision-making process up to an argumentative procedure that has been dubbed *forhandlingsmøte* (meeting of negotiation). The design of the FBSS stipulates that once the petition has been submitted by the local Child Welfare Office, the wheels are set in motion towards this meeting.[505] The foundation for making the final decision is molded during these negotiations, and the solidity of the decisions is depending upon the arguments presented here.[506] This is where the FBSS can receive a *coup de grace* or not with regard to the promise of trust. This is the reason why this is the final part of the discussion of the FBSS and whether it redeems the promise of trust or not.

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[504] *Bvl* §7-3-c.

[505] There are two exceptions to this case. First, when the parties to the procedure accept it and the judge finds it acceptable, then a meeting of negotiation does not need to be arranged. Second, when a prior decision needs to be altered and it is acceptable to not have a meeting of negotiation, cf. *bvl* §7-14. However, for all intents and purposes, the central node of decision-making in the FBSS is the meeting of negotiation.

[506] Ot.prp.nr. 76 (2007-2008):79: "In practice, the reasons applied when making a decision, in cases that is decided by a meeting of negotiation, is settled in this meeting."

7.5.1. Court-Room Discretion

So far, we have seen that there are problems with how the board is convened and how parties to the procedure are included and treated. This means that the preparation for the negotiating procedure and its framework have partly substantial shortcomings that threaten the promise of trust. Now, the focus will be predominantly upon what is not entrenched in the *bvl*, but rather left open as the area where FBSS is free to reach decisions—namely its delegated authority. The framework of the decision-making procedure that has already been illuminated can be referred to as a "surrounding belt of restrictions," where the negative void in the middle of the belt is the area left open for free exercise of the authority of the FBSS to protect children. This is the discretion that the FBSS is authorized to act upon.[507] It is what happens in the meeting of negotiation that constitutes the main input to this authority.

It can be argued that a general practical discourse has become inserted into a legal design whereby it is provided with practical restrictions that focus the decision-making to reach its predetermined aim.[508] The child's best interest is this aim, and an argumentative procedure is thought best equipped to reach such an aim. This corresponds with the demands set upon how you reach decisions upon indeterminate issues that constitute practical problems, i.e. the child's best interest. Establishing such an argumentative procedure cash in on the promise of trust.

The legally established constraints make the decision-making procedure into a legal discourse. As argued in the former chapter, the "need for legal discourse arises out of the weaknesses of the rules and forms of general practical discourse."[509] By establishing a legal discourse, a decision can be reached that maintain the quality of rational acceptability without claiming to determine what is indeterminable. This is particularly important when the goal is to decide on the child's best interest, which is indeterminate. The belt of restrictions is a pragmatic tool to guide the procedure towards making a practical decision.

> *"Law must once again be applied to itself in the form of organizational norms, not just to create official powers of adjudication but to set up legal discourses as components of court-room proceedings. Rules of court procedure institutionalize judicial decision-making in such a way that the judgment and its justification can be considered the outcome of an argumentation game governed by a special program. Once again, legal procedures intertwine with processes of*

[507] Here, I use "discretion" differently than what is intended by Dworkin (1977): 31. However, I do believe his concept of discretion can be applied also to the context prescribed here. See also Goodin (1986): 233.
[508] This is similar to the third interpretation of the special-case thesis (die sonderfallthese) of Robert Alexy (1989), dubbed as the integration thesis.
[509] Alexy (1989): 287.

argumentation, and in such a way that the court procedures instituting legal discourses must not interfere with the logic of argumentation internal to such discourses."[510]

On this note, it can be argued that the stability that a decision-making body adhering to formal rules of procedure provides, is a precondition for reaching decisions upholding the basic expectation of non-discrimination. Whereas the limitation of a legal procedure forces through a decision that can uphold rational acceptability in that all those included into the discourse can accept that the decision is the most optimal one in the child's best interest.

The meeting of negotiation is a denomination borrowed to the *bvl* from the court of civil procedure. It is entrenched in *bvl* §7-15 and reads as follows:

"The leader of the board directs the negotiation and ensures that it proceeds according to the framework that is set. Furthermore, the Civil Procedure Act §9-15, applies correspondingly as far as it is compatible."

This means that principles underpinning a civil trial are to be applied "as far as compatible," whereby the most important principle is that of contradiction, which is the legal doctrine of *audi alterem partem*, and implies hearing both sides of a case.

With respect to child protection and the design of the FBSS, the core process has been dubbed as a meeting of *negotiation* all the way back to NOU 1985:18.[511] However, referring to it as a negotiation without substantiating what is implied can cloud the very purpose of the *bvl.* If the word "negotiation" is not elaborated upon as an argumentative procedure, which is what has been intended according to legislative history, and, furthermore applied to child protection specifically it can lead to interpretations that are unfounded. It is, for instance, not a matter of negotiating between parties, such as the parents and the child, or the parents and the Child Welfare Office. The parties to the procedure have lost their right to control the outcome, and the board can question anything they believe to be relevant. Hence, the term "negotiation" is not accurate. It is rather a matter of internal deliberation within the board, based upon what is presented in the meeting of negotiation by way of contradiction between the parties to the procedure.

Although this is not something that actually threatens the decision-making procedure, the difference between a regular civil court and the FBSS is important to stress. The FBSS does not negotiate with or between the parties that are involved. The FBSS, i.e. the board alone, reach decisions independently from the parties on what action to take. Hence, the FBSS

[510] Habermas (1998a): 234-235.
[511] NOU 1985:18: 357.

can be said to have the potential of reaching the best type of answer available each time—the final decision is thereby an ultimate claim to correctness.[512] Treating the practical problem of finding out what is in a child's best interest in such a manner is a very important contender in complying with basic expectations.

7.5.2. Building a Solid Foundation for Decision-Making

Claiming to make decisions that are supposed to adhere to a principle of a child's best interest in a non-discriminatory fashion is equivalent to raising a claim to correctness. This means that it is "reflective of the *impartiality norm* of general practical reason."[513] A claim to correctness presuppose that members to the legal discourse are capable of, and argue to justify what is in a child's best interest according to the 'impartiality norm' implicit to the rules of discourse. This means also that the members of the discourse must be capable of practical reasoning with respect to finding out what is in a child's best interest. They must be prepared to be challenged, and potentially proven wrong. This means that any claim that has been put forth must be argued as being correct, valid, or just, by the person who carries it. This is made possible through the establishment of the meeting of negotiation.

If a claim has weaknesses or is deemed to be wrong, the negotiation process of the FBSS has the design capability to ensure deliberative quality that can argue that a claim is not a claim to correctness. Weaknesses or arguments that are plainly wrong can become corrected through counter-arguments. In this process the ultimate claim to correctness, the final decision, carry the impartiality norm that stipulates the correct action in universal terms. Everyone involved can accept the argument made because of the rational acceptability of the decision. The final decision becomes the right course of action in each case, even if the aim of protection, viz. the child's best interest, is indeterminate.

The ultimate claim to correctness, which is reflected by the final decision, is not qualified unless every type of relevant argument has been aired. Hence, since all who have relevant arguments can be included into the FBSS and provide their claims, either as parties to the procedure or as witnesses, the FBSS has the ability to perform an exhaustive argumentative process. Each participant believes the claim constitutes a claim to correctness, but a claim is not qualified as a decision that is ultimately a claim to correctness. The ultimate claim to correctness can only be qualified through a process of argumentation. This process,

[512] Alexy (1989): 219-220.
[513] Eriksen (2004): 118

enabled by the meeting of negotiation, makes it possible for decision-making to rest on a solid foundation.

It is the task of the leader, or mediator, which is the jurist of the board, to ensure that no relevant question is unanswered, and must ensure that the board-members provide every claim put forth with exhaustive scrutiny. Embedded in the design of the FBSS, the leader enforces the pragmatic conditions of rational discourse to ensure that the compelling force of the better argument is continuously in the child's best interest.[514] By institutionalizing the possibility of achieving a rational outcome for each child in a non-discriminatory manner, both of the basic expectations are upheld during the meeting of negotiation.

It can be argued that what redeems the promise of trust the most during decision-making is that the design is meant to be an argumentative procedure. The FBSS borrows principles of a legal discourse, combining it with being independent and professionalized. This means that a decision can reach *rational acceptability*, where all affected parties are able to accept the decision based on what they themselves believe to be valid reasons.[515]

By embedding an argumentative procedure that upholds rules of discourse into the institutional design of the FBSS, decision-making can become capable of establishing an ultimate claim to correctness. All parties can become able to accept the outcome. It is the rational acceptability that the procedural design establish that can accommodate both the indeterminate principle of the particular child's best interest coincidentally with maintaining the principle of non-discrimination. Reaching decisions in the best interest of the child is a practical moral problem that is indeterminate, and is best accommodated as an object of argumentation. By having an argumentative process that can be claimed to be exhaustive, independent and neutral, the child's situation can be given the chance to be investigated in an exhaustive fashion. This increases the probability for reaching a decision that is best qualified to be in the best interest of the child, and thereby contribute in redeeming a promise of trust.

7.5.3. Enforcing the Purpose of the bvl

The FBSS must uphold the legislative purpose of *bvl* §1, and find out if the child's development or health is threatened to the extent that coercion must be applied to protect it. The decision is, irrespective of the parties to the board, to be in the child's best interest.[516]

[514] Habermas (1998a): 166. See also Elster (1998).
[515] Habermas (1998a): 103.
[516] This function of independency is stated among other places in *bvl* §7-3-e.

So far, the main characteristics of the board have been discussed, i.e. who sits in the board, who participates and what the main rules of procedure consists of. These elements constitute the framework for the negotiations. According to *bvl* §7-15, the leader of the board must ensure that the meeting of negotiation proceed according to this framework. Now, the discussion will focus on this role and what the denomination "according to framework" entails with respect to basic expectations. The principle of the child's best interest and non-discrimination will be discussed according to the design principles launched at the end of the previous chapter that could incorporate both of the basic expectations through rational argumentation.

1. The problem required practical reason.
2. The problem included affected parties.
3. There must be a competent mediator.
4. Equal possibilities among participants.

It can be argued that all of these demands are upheld by the design of the FBSS. Effectively, this means that, with respect to the meeting of negotiation, it encompasses both rational argumentation and decision-making.

7.5.3.1. A Problem That Requires Practical Reason

As stated earlier, the location of the board, the composition of the board, and the parties to the procedure all have certain shortcomings with regard to redeeming the promise of trust. Nonetheless, the intention behind the design—reaching decisions on matters that are normatively complex and that involve a multitude of legitimate claims—must be appreciated.[517] The idea was, and still is, to have a decision-making body with the ability to solve a practical problem in a way that is in the best interest of the child. Nobody knows or owns the right answer, and it is no solid way out of such a predicament due to the indeterminacy of the child's best interest. As long as this is a basic expectation, it can be argued that nobody in isolation can know with any certainty the right course of action or what the right decision is. Hence, the solution must become qualified through argumentation as the indeterminacy of the problem has a built in need for practical reason. The design of the FBSS is equipped with a procedure that has the ability to solve practical problems.

[517] NOU 1985:18.

An initial demand towards finding a solution to such a problem is that the FBSS must put forth an expedient solution. This means that a solution must be presented since there is a claim that the child is in detrimental care. A quick response time is a condition for upholding the child's best interest. The opposite would be to admit that it is acceptable for children to remain in care that threatens to harm its development or have already harmed its development. By subjecting the decision-making to a judicial procedure, which is what the FBSS is doing, a decision can be reached fast.[518] Hence, having the potential of reaching a decision fast can also help to secure what is in the child's best interest.

The FBSS makes decisions involving the need for a justification that rests within the argumentative input of the procedure and nothing else.[519] The correctness of the decision is therefore confined to the options available to the FBSS in each case. Hence, it is a need to base the decision in the arguments presented in each case. Only by accepting arguments that abide by rules of discourse, and which has the child's best interest as a regulative ideal can the child's best interest be approximated optimally in each case. This, it can be argued, has become accommodated by the FBSS-design's incorporation of a legal discourse, and helps redeem the promise of trust. The legitimacy of the ultimate claim to correctness, the decision, depends upon upholding the formal rules of procedure that underpin the meeting of negotiation as well as rules of discourse, and establishes an intersubjective standard of decision-making that safeguards non-discrimination between cases.

A legal discourse is in need of adhering to certain formal rules of procedure that control the exchange of arguments. This is what separates it the most from a general practical discourse that does not have formal rules of procedure. These rules can for instance be the immediacy of evidence and contradiction. Without formal rules of procedure, it would not become a legal procedure per se. It is not enough to appeal to a type of legal culture that is allegedly self-enforcing. This was the case in 1992 when the *bvl* was introduced. If rules of procedure are not formalized, variations could occur that would not become visible to those affected by the process. This would, again, present a clear threat towards the basic expectation of non-discrimination. Hence, as the rules of procedure became explicitly formalized in the *bvl* from 2008, the procedure became also more stable.

[518] There are many places where time is stressed as an essential component. See e.g. Ot.prp.nr.76 (2005-2006), Ot.prp.nr.29 (1990-1991).
[519] Cf. *bvl* §7-3 e, f and §7-14.

In the present case, a solid platform that optimizes decision-making has become established through an argumentative procedure that can qualify rational acceptability regarding the child's best interest. It is the combination of strengths of a general practical discourse to deal with practical problems—namely that its rules of discourse can become enforced in a manner that makes argumentation fair, and within a legal framework provided by the formal rules of procedure which ensures that decisions are made. In this way arguments become charged with relevant and exhaustive criticism from all necessary angles. Integrating the rules of discourse into a legal framework helps to deal with the practical problem in a relevant and timely manner, leading to a decision-making process that does not discriminate even though the input to the procedures vary.

7.5.3.2. A Problem that Activates Affected Parties

Along each petition to the FBSS, there are claims put forth by the parties to the procedure.[520] The local Child Welfare Office raise what can be dubbed as a claim to correctness, and the private parties have a deadline of ten days to submit a counter-claim. Hence, once deliberations has commenced during the meeting of negotiation, there are two or three main claims that have been raised. These are the central claims of those who are directly affected by the decision: The local Child Welfare Office, the parents and perhaps also the child. Other claims that will inform the discussion come from either the board or different types of witnesses.

The local Child welfare office enforces child welfare and child protection operatively on street-level. They are the ones the FBSS is dependent upon to seek out children subjected to detrimental care.[521] The casework within the FBSS is dependent upon the child welfare office finding every child subjected to detrimental care and put forth a claim on behalf of the child. Thus, the local Child Welfare Office represents and implements the will of the law, and become the last link in the democratic chain of command as street-level bureaucrats in child protection.[522] When they put forth a claim, they take on the role as a pseudo-parent and raise a claim on behalf of the public with respect to what constitutes detrimental care.

The other claims that are made initially come from the private parties—they are supposed to respond to the claim made by the local Child Welfare Office. These claims

[520] *Bvl* §7-11.
[521] I will not focus upon how they do this job, or if this job is done well. I only discuss what they represent in relation to the FBSS.
[522] Lipsky (1980).

constitute individual claims, including the child's own, upon the correct care of the child, i.e. on what they argue is in the child's best interest. The child and the parents must be able to put forth counter-claims and justify them, and advocate for the type of care being provided.

In addition to these main claims to correctness, the parties themselves can front other types of affected parties as evidence into the procedure. This type of evidence, although most likely backing the claims that are put forth by the party who presented them as evidence, is only considered if they have relevant arguments that can support, dismiss or come up with claims upon what would be the child's best interest. These can e.g. be psychologists, medical practitioners, as well as extended family. If the parties to the procedure fail to present a sufficient amount of evidence to the procedure, the FBSS itself can introduce it. In this sense, the child's best interest serves as the focal point for arguments, and any argument that can make the foundation for a decision more solid, can become introduced. This focus upon the child's best interest, in the combination with the process of argumentation, qualifies the outcome with respect to rational acceptability. All of the affected can argue their case, and an outcome can be reached that accommodate all arguments, dismissing those that are wrong and granting emphasis upon those arguments that are deemed as important or correct. This potential for reaching rational acceptability upon what is in a child's best interest clearly cash in on the promise of trust.

Finally, the board itself can call upon others as witnesses or evidence, as well as appoint a spokesperson for the child. It is no restriction upon whom the FBSS can call upon and, consequently, all relevant arguments can become heard.[523] The leader of the board can formally call upon expert witnesses and also decide how the submission of evidence precedes. The spokesperson for the child will attempt to produce the voice of the child by claiming what the child's point of view *might* be.[524] The abilities of the FBSS and its leader to perform *ad hoc* adjustments to the procedure in order to establish a solid platform for the decision is not restricted in any way. Hence, the procedure within the FBSS can involve all affected parties in order to establish what is in a child's best interest.

7.5.3.3. There must be a competent mediator

In order for the rules of procedure to be upheld, it must be a mediator that ensures that the procedure observes the principles underpinning a legal discourse. The rules of discourse have

[523] Cf. *bvl* §7-12-d.
[524] Cf. *bvl* §7-12-f.

become formalized in the main principles of procedure and, consequently, must be enforced by a mediator. Moreover, the mediator is supposed to be neutral to the goal of the decision-making. The FBSS has two such mediators.

The *first* is the leader itself, who is, as already pointed out, authorized to decide on what board to convene and secure that the rules of procedure are upheld. The *second* role is played out by the entire board itself. The board is the main mediator in the sense that all parties to the procedure must argue their case in front of it. The board constitutes a professional and a layman component that can understand and take in all potential arguments presented to them, and mediate in order to find the ultimate claim to correctness.

Although the idea behind the design was to perform decision-making in the child's best interest in an independent manner, the type and consistency of professional representatives and the idea of laymen as members of the board can easily contest the attainability of the purpose of the FBSS. A further demand towards the mediator is that he or she must be qualified with the ability to differentiate between the interests that different children can have. The interests of the particular child must become localized within the process of negotiation. The motivation behind the design was to establish a board that could mediate in a sea of arguments in order to make a solid decision regarding the particular child. The idea behind such a design-characteristic, namely to ensure that the board could be independent, complies with the order of expectations, but the way it is sought obtained have certain drawbacks with respect to non-discrimination and therefore also the child's best interest. These drawbacks were laid out above.

There is no knowledge-base, and no legal precedence that can help to overcome the predicament of finding a particular child's best interest due to indeterminacy. The need for a mediator is a need for ensuring that the procedure of argumentation abides by rules of discourse within a legal discourse.[525] Establishing a legal discourse that observes principles of general practical discourse and formal rules of procedure means to ensure that a process of negotiation approximates the best interest of the child exhaustively and in a non-discriminatory fashion.

During the BVL regime, with the design of the decision-making board at the introduction in 1953, the BVN was neither neutral nor a mediator of arguments. The BVN was to perform decision-making that was *not* neutral, conducted by members appointed by the

[525] Eriksen & Weigård (1999): 286.

local council by their reputation on knowing what to do regarding children. The members were local trustees that had an interest in the welfare of children and their families. This decision-making body was meant not to be a neutral mediator in the dual sense of the FBSS.[526] Introducing a jurist into a democratically appointed BVN assembly was not sufficient to establish a solid foundation for making a decision. The effort to establish a neutral mediator within the FBSS answered much of the criticism towards the former BVN, and contributed in making the legal order comply with the order of expectations.

The neutral mediator is supposed to lead the process of argumentation and ensure that every type of relevant argument is presented in a manner that can aid raising a final and ultimate claim to correctness. This ultimate claim is forged through an agreement within the board itself, and has the standard of rational acceptability for all. The lack of neutrality in the BVL was one of the main reasons for elevating decision-making of the FBSS up onto a regional level, as well as having members that were not appointed by the local municipality council. Consequently, it can be argued that the FBSS is an attempt at establishing a neutral ground to decide upon what is in the child's best interest, which consequently becomes neutral for all those affected by the FBSS.

7.5.3.4. Equal possibilities among participants

Within a process of argumentation, it is vital that all parties involved are on an equal footing. As such, arguments presented in an open procedure are deemed to be the only way to influence the decision-making in a legitimate manner. This is also what happens in the meeting of negotiation. If different parties can use illegitimate pressure, such as coercion or propaganda, it would distort the ability to reach decisions abiding the demand for rational justification and thorough contradiction demanded by *bvl* §7-3. The demand towards equalizing the ability to put forth arguments has been met by making both parties be represented by lawyers. This effort integrated a principle of non-discrimination between and within cases by ridding the procedure of illegitimate asymmetries, and coincidentally made the process of argumentation more coherent by leaning towards regular court-room adjudication.

By making the form of argumentation become courtroom adjudication, the leader of the board, who is a jurist, would interact with other legal professionals that know what rules to follow during argumentation. Since the procedure is driven forth as a legal discourse, and

[526] See chapter 5.

where lawyers argue their cases, the leader of the board ensures that rules are followed. This is equalizing the possibilities of the parties to influence the case. This is clearly a strength with regard to the principle of non-discrimination and contribute in establishing a solid foundation for the ultimate claim upon what is the best interest of the child.

None of the two earlier legal codes had any safeguards against public bias, thus the public became often criticized for unqualified use of coercion. It threatened the legal protection of those involved. None of the former designs had the public claim to be on par with the private. It was not demanded in either of the two former legal codes that the public claim could become contested and justified through argumentative procedures. Obviously, the parents could state their claims in both of the two prior decision-making bodies, but it was no obligation to discuss and provide reasons against their claims.

The FBSS is a decision-making body that is not supposed to be influenced in the same manner as the two former decision-making bodies. The FBSS can establish a neutral and solid ground for decision-making, and reach decisions that uphold the standard of rational acceptability. The latter, i.e. rational acceptability, was not possible to establish given the two former decision-making bodies. Whoever put forth a claim will become measured on the claim itself, and nothing else. However, some challenges are confronting the FBSS. The problem can, for instance, arise if the public have an ability to prepare arguments better than the private party, provided that the private party have very little time, as well as having substantially more experience with case-proceedings. Such discrepancies could violate the principle of non-discrimination since some members of the argumentative process would not become able to put forth their case convincingly or exhaustively. However, with regard to coercion and propaganda, the leader of the board has a duty to eliminate its potential to influence the case.

The conclusion to these four design-principles, the need to incorporate practical reason, the inclusion of those affected, the competent mediator and equality of possibility, is that it can be argued that the FBSS carries design characteristics of a legal discourse. It makes it possible for the decision to be guided by rational argumentation towards decision-making. The design of the FBSS, when it comes to both rules of procedure and the meeting of negotiation, is resting upon many important design-principles that contribute in qualifying decisions in the child's best interest. Although some of the other design-traits mentioned

earlier in this chapter collide with the promise of trust, the rules of procedure and the process of negotiation are both contributing strongly to cash in on the promise of trust.[527]

7.5.4. To Sum Up the Post-National Turn

During the two prior legal codes, the LBFB and the BVL, the order of expectations expressed the contemporary respective basic expectations that were, at the time, what induced trustworthy authorized coercion. During the third legal code, the *bvl*, it is again different, as the current order of expectations can be described as rights-based and post-national.

Trustworthy practice must treat each child in a non-discriminatory fashion and thus transgress the design of the former nation-based and community-based legal code of the BVL. The first step that the *bvl* took was to establish a decision-making procedure that no longer was to discriminate between children in the way that the BVL did, and secondly it needed to treat each child in their individuality and not as part of the family. These reform-efforts made the *bvl*, in 1992, into a rights-based protection in the sense that the child's individuality was the object of protection. In due time, the order of expectations pushed the legal order further. The order of expectations went from merely rights-based to also become post-national in the sense that protection of children needed a legal order respecting universal rights-based standards with a cosmopolitan imprint in order to become worthy of trust. To a large extent, the legal order has conformed to this order of expectations—especially with regard to the rules of procedure and the meeting of negotiation.

Within the current legal order, it can be argued that the order of expectations is complied with through the establishment of a decision-making procedure that is argumentative, where arguments construct a solid foundation for decision-making that is in a child's best interest in a non-discriminatory fashion. Although there are elements that do not cash in on the promise of trust, the design of the FBSS nevertheless have these strong contenders that comply with tht order of expectations.

7.5.4.1. Adhering to Rules of Discourse

By dubbing the FBSS into an argumentative and deliberative decision-making body, as e.g. Erik Oddvar Eriksen and Marit Skivenes have done, it is implied that the FBSS adheres to traits of an argumentative process.[528] Adhering to rules of discourse and formal rules of procedure establish the potential of resolving conflicting claims through argumentation.

[527] For a similar argument see Eriksen & Skivenes (1998).
[528] Eriksen and Skivenes (1997).

Hence, their claim is that the FBSS adheres to a procedural conception of legitimacy. It can now be confirmed that this conception of legitimacy is also what is found worthy of trust. The FBSS is enabled through procedural constraints to normatively justify an ultimate claim that is in the child's best interest.

Since the FBSS subscribes to certain rules and principles of discourse that can accommodate any type of claim in child protection, the FBSS has incorporated the fact of reasonable pluralism.[529] Interests can thereby be discussed exhaustively, and it can be argued that the child protection system, through its historical development, has come to a point where it incorporates current basic expectations fairly well. The FBSS is a decision-making body that can confront any type of conflict of claims emanating from the social realm it is set to govern. The fact that Norwegian society is characterized by social conflicts and profound ethical disagreements regarding the conception of what is a child's best interest is a challenge that the FBSS can answer.

The rule-driven procedure that encapsulates the deliberations within the meeting of negotiation is a hallmark of the FBSS. It depicts a manner in which justifications can only be provided for decisions that adhere to a process of argumentation alluding to rational acceptability among all affected parties. Hence, the imprint of rationality onto decision-making is determined by the decision-making procedure upholding the formal constraints provided by rules of procedure. The leader plays an imperative role in enforcing such rules.

Within the FBSS-design, any argument put forth must be backed up by reasons that are acceptable, and all types of arguments and counter-arguments that are relevant for the case is supposed to be asserted. Reasons for these arguments can only become accepted by others if they understand reasons equally. Hence, it can be argued that the rules of discourse mentioned in the former chapter have been incorporated. To illustrate: A medical practitioner should, when confronted, be able to explain why he or she is of a certain opinion without resorting to purely esoteric and exclusive argumentation. Such arguments, when communicated to the board, must express esoteric knowledge through language that is comprehendible to all. Only then, can all parties to the procedure relate to it, respond and accept it. In this sense, the rules of procedure set restraints on the arguments and reasons that can be given. Reasons that are provided must claim to be and prove to be intersubjectively acceptable within the particular legal discourse, i.e. ensure the demand for an argument to

[529] See also Eriksen (2001).

carry an inherent claim to correctness. If a claim did not abide by standards that were intersubjectively valid, it would not be shared by all affected parties and thus lacks the necessary legitimacy needed for this type of decision-making to reach a level of rational acceptability. However, the leader of the FBSS have the capability to ensure that claims abides by such standards, and that consequently can craft decisions that are rationally acceptable.

Within the principle of contradiction is also a right for, where possible, comprehension.[530] This means that no decisions are made before a case is exhaustively investigated and made comprehensible to all affected parties, so that potential counterclaims can be asserted.[531] This can be ensured by the leader and help build a solid platform where a decision can reach rational acceptability. The goal is to provide each case an exhaustive contradictory treatment, and hence an illumination of all aspects concerning each case, and as already argued, this aim is embedded as a potential within the design of the FBSS.

7.5.4.2. Not a Civil Court

The major difference between a regular civil proceeding and the one within the FBSS is that any decision made should be in the interest of the third party, namely the child. It should not only be in his or her interest, but also the *best* interest.[532] It is the fate of a third party, the child, that is the focus of attention, which is not the case in a regular civil court procedure. If the rights of the parents are revoked, the FBSS must implement protective measures that would reestablish the healthy development of the child.[533]

As a professional decision-making body, the FBSS is adaptive or capable of becoming adapted to everything that can inform the case at hand. What can be argued as being best practice among lawyers, social workers, medical practitioners, psychologists etc. can all be incorporated to influence the case, as long as their arguments are relevant to the procedure. Those who provide arguments for any claim will be held accountable in the process of deliberation. This security is an integrated part of the design of the FBSS.

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[530] The principle of contradiction is usually referred to as hearing both sides of a case. However, it follows that if it is a point in being heard, it is due to a relevant argument. Moreover, a relevant argument can only be made if all aspects of any given case are made comprehensible.

[531] *Bvl* §7-3-c refer to *tl* §11-1-3 first paragraph. However, more importantly, *bvl.*§7-3 is, in many respects, the same as the formulation of the purpose of the Civil Procedure Act (tvml. §1). These specifications came with the amendment of Ot.prp.nr.76 (2005-2006): 127, and were a direct influence from how the principle of contradiction is utterly significant for civil proceedings (*tvml.*), see NOU 2005:9: 38, or see the proposition that amended the Civil Procedure Act, Ot.prp.nr.51 (2004-2005).

[532] *Bvl* §4-1.

[533] cf. NOU 1985:18: 298.

Although it is the duty of the leader of the FBSS to ensure a solid foundation for each decision, the other members of the board must also participate in the deliberative process through the process of argumentation.[534] Those who provide the most important claims are "as a general rule" lawyers that represent the local Child Welfare Office, lawyers representing the parents and, in some cases, the child.[535] These claims set the premises and parameters for the initial deliberation, but the board is alone responsible for the decision-making procedure.

In order for the FBSS to build a solid foundation on which to base its decision, the board cannot rely completely on the parties to the procedure, and their claims. The reason for why the parties stand before the board is due to a conflict that could not be resolved by non-coercive means. Hence, the design assumes that the parties to the procedure will defend themselves. The evidence presented by each party provides the basis for the reasons that are given for each decision, whereby, if the parties do not put forth sufficient evidence, the FBSS can by itself acquire such evidence independently to establish solid decision-making.[536]

The ability to process all types of relevant information makes the FBSS a professional decision-making body. It means that lawyers, child psychiatrist, medical practitioners, social workers, child protection officers, psychologists etc. can collectively challenge each other's arguments in order to qualify decision-making. The professional design has the potential of providing the decision-making with the imprint of an interprofessional "best practice" solution in each case. This type of design ensures procedural equality with a high level of complexity in a non-discriminatory fashion and helps redeem the promise of trust.

7.5.4.3. Laymen and Professionals

The inclusion of the laymen as a valuable contribution in reaching a best possible decision is stressed as a very important component in the preparatory works of the *bvl*, namely "because it has to do with conflicts that raise difficult value question common to all mankind."[537] Some would argue that this becomes a corrective mechanism to the professionals' esoteric expertise and provides the platform for reasonable disagreements to occur by instituting common sense as a field of "expertise" of the laymen. There are no professional competences able to conquer the ethical and political minefield that the FBSS can be confronted by. Laymen are in this respect thought to be a supplementary necessity to best-practice know-how of professionals.

[534] Ot.prp.nr.76 (2005-2006): 73.
[535] *Bvl* §7-8.
[536] *Bvl* §7-17 cf. *tvl* §21-1. and*bvl* §7-17 (d) cf. *tvl* §25-2 (2).
[537] Om skolehjemmenes ordning (1909): 298.

However, the quality of the layman varies, and it is absolutely no guarantee that their inclusion will support the principle of non-discrimination across the different boards that exist in Norway. Hence, the inclusion of the layman threatens to discriminate between children. It can, nevertheless, be argued that it is a need for a corrective force to counter the professional expertise, whereby philosophers could be included instead, or a more coherent recruitment of different types of professionals as members.

Professionals have the capacity of having a role as laymen.[538] The decision-making realm of the FBSS is typically characterized by a multitude of "right answers." The different competencies populating the FBSS, where no one is given monopoly on the right answer, correct one another. As such, the decision that is reached has the potential of being the best "right answer" each time. Thus, the key is to equip the FBSS with a sufficiently wide range of competencies so that the argumentative procedure can become truly exhaustive. Competence-hierarchies are built down, and knowledge-spheres are combined for the purpose of reaching a decision that ultimately satisfies the child's right to receive measures in its own best interest.

7.5.4.4. What Profession?

As argued previously, there are many professional opinions as well as common-sense opinions on what constitutes decent childcare and need for protection of children subjected to detrimental treatment. When arguments are presented on what action to proceed with, they are directed by the abilities of participants in decision-making. This means that those who are supposed to find and implement the type of measures that is in the best interest of the child would present arguments that are accessible to them. A psychologist, a jurist, a social worker, the child welfare office and a layperson might all have good but different reasons for prescribing certain treatment of a child and parents. However, this might not be enough.

The most optimal decision can only be established in an environment where all the different types of arguments, that claim to hold a relevant and right course of action for the particular child, becomes sharpened through the resistance of open criticism from other arguments. On the other hand, we need to be realistic. It is not possible to recruit every type of profession or everyone affected that has something sensible to say regarding the best

[538] A professional must resort to different type of reasoning when he or she deploys professional knowledge in argumentation. Moreover, professional "warrants" for actions must be presented, rather than those of a laymen. However, the layman warrants are still accessible. Putting on a uniform might provide an impression of professionalism, but it remains a cloth and does not do away with the layman.

interest of a child. Certain professions are, more than others, better equipped to provide valid contribution to such cases.

In today's boards, two professions dominate—psychology and social work. They are not both represented in each board, but constitute the two main bases of recruitment to staff the positions as professional members. For a child that becomes confronted by a board of social workers, how can the lack of psychologists be of no concern? Is the equal treatment of each child that is subjected to the FBSS guaranteed when the expertise can diverge between psychologist in one board and a social worker in the other? The answer is most certainly no. If it was no difference between these professions, why have two different professions at all? The professions have different knowledge-base, knowledge-production as well as knowledge-practice. In sum, being treated by a psychologist is most likely very different from that of a social worker.

By not elaborating upon who is best qualified to evaluate the arguments on what the best decision is, or how to reach it, reflects a way of dealing with professional personnel as if it did not matter who sat as professional members. The composition of each board, as described in *bvl* §7-2, does not stipulate any specification regarding what type of profession to recruit from. It is hardly a strength when the professional competence is allowed to vary across boards. This directly threatens the basic expectation of non-discrimination. Indirectly, it also threatens the child's best interest, since perhaps not all types of arguments have become accommodated or evaluated.

7.6. Conclusion:

It is important to stress that, although this chapter revealed shortcomings within the design of the FBSS, it is not a matter of trust-crisis. On the contrary, the historical perspective reveals a development towards two basic expectations that on a general level still can be argued is complied with by the legal order. Historically, the FBSS can be stated to be a legal innovation that is on the right track if protection of each child's interest on the child's premises is a goal. This is true due to the manner in which children are introduced into the decision-making as the main focal point, as well as in how the affected parties have been extended to gradually include the child. Nevertheless, having an historical development that increasingly includes those affected, and perhaps especially the child, does not excuse the shortcomings to the promise of trust.

As was shown through closer scrutiny, the FBSS has shortcomings with respect to the decision-making procedure with regard to basic expectations. Hence, it is a gap between what the basic expectations state can redeem a promise of trust and what the operative design within the legal order stipulates and can actually answer. Said differently, it is a gap between what expected protection of children is, and the legal protection of children. Thus, it can be argued that problems with the FBSS-design are uncovered, whereby a promise of trust is not being redeemed fully, i.e. the types of expectations that constitute trustworthy child protection today are not fully operative in the FBSS design.

8. Is the Promise of Trust Redeemed?

As shown in the two previous chapters, the FBSS fails to comply fully with the order of expectations in many areas with respect to the promise of trust. This does not imply that the FBSS has no important design features that redeem the promise of trust. It does, and the most prominent are the rules of procedure and the process of negotiation. These two features of the design express that the legal order complies with the basic expectations of the order of expectations of child protection.

This dissertation has analyzed the development within the order of expectations throughout history, and evaluated the current legal order and how it complies with the current order of expectations. Through the historical approach I have established how current child protection has become worthy of trust, and also the normative self-understanding of such a trustworthy system. The last part evaluated if the FBSS can be said to observe basic expectations currently held to be worthy of trust. Clearly, child protection is heading in a direction where those involved increasingly become protected according to standards that are both post-national and rights-based. Although the basic expectations of 1992 originated within a Norwegian discourse on child protection, the same basic expectations have currently been subjected to a post-national turn.

Parents and child have both received protection with respect to child welfare and child protection. Parents are protected by the biological presumption, and the child must receive protection against detrimental care that threatens its health and development. The focus upon securing the legal protection of those involved reflects how the liberal ideal of constitutionalism has settled in the legal order of child protection in the sense that state-interventions upon the liberty of parents and child must become thoroughly qualified. On the other hand, there are still several shortcomings to the FBSS design. This is especially true with regard to the board composition, the type of board convened, and the inclusion of the

parties to the procedure. In this conclusion, I will first present the evaluation of the promise of trust with regard to the FBSS, followed by the discussion of the historical development.

8.1. Does the Decision-Making of the FBSS Warrant a Promise of Trust?

Although some of the most important aspects of the FBSS design, i.e. the rules of procedure and the meeting of negotiation, contribute to redeem to the promise of trust, the decision-making process is dependent upon all of the design-traits adhering to the basic expectations. Consequently, the only conclusion that can be reached is that the promise of trust is not kept. This was not to be expected either. It will always be a matter of degree of compliance, while the order of expectations is in constant flux.

8.1.1. Political Incompetence

In chapter 6, it was illuminated that the incorporation of the CRC into the *mrl* had very little consequence for the legal order on child protection. During the review of the *bvl* at the time, it was for the most parts an assumed harmony with international human rights. The process of integrating the CRC into Norwegian legal order went by without laying out any rational principles as to what it would mean for child protection to adhere to international human rights, viz. to take a post-national turn. The problem that arises is a lack of ability to enforce the CRC within child protection. Hence, it is implied that the *bvl* has a huge potential in becoming more rights-based and post-national. This flaw makes the entire legal code less likely to redeem a promise of trust. However, we will only focus upon the FBSS-design.

For child protection to become trustworthy, I laid out in chapter 6 an interpretation of the normative self-understanding of a post-national rights-based child protection system. It was argued that a post-national and rights-based child protection had to adhere to a combination between a principle of the child's best interest and the principle of non-discrimination in a manner consistent with a system of rights. If a child has been subjected to detrimental care, it was argued that the state had a duty to protect and ensure that the child's development settled upon a track that compensated for the former detrimental care, and ensured that the child received its right to liberty that accommodated a sufficient amount of opportunities in adulthood.

This is one way of arguing what the order of expectations currently embodies. Referring to the order of expectations as post-national and rights-based sets certain constraints upon how the decision-making procedure is to be designed if it is to redeem a promise of trust. In the following sections, the most important findings of the former chapter—i.e.

findings that relate to whether or not the design of the FBSS observes the basic expectations of the order of expectations—will be laid out.

8.1.2. Localization of the FBSS and Initiating its Authority

The first apparent issue with the current design is that it allows for parents to become completely left out of the process of negotiation. It is argued that the FBSS is not dependent upon having the parents present during the process of decision-making. Not hearing the parents, and confronting them with arguments, can result in omitting the information that would enrich the platform for reaching a decision that would be in the child's best interest. Even horrible parents can provide important information that can help to understand what type of measures the child needs. This arrangement can therefore be said to threaten the solidity of the foundation from which a decision should erupt in the best interest of the child.

By not having a demand towards the parents for providing counter-claims, the procedure is designed as if it did not need the parents in order to revoke their parental rights and reach a decision in the best interest of the child. This is a misperception of the need for information on what constitutes the interests of the child, and the procedure fails to uphold the process of contradiction—arguably dependent upon the presence of the parents. By not including parents into the procedure, i.e. omitting affected parties, it risks becoming less solid.

With the introduction of the *bvl*, the protection of children through coercive means became the responsibility of a separate decision-making body apart from those cases that had a need to intervene non-coercively. Child protection became separated from child welfare. Although these are two very different types of intervention, and performed by two very different decision-making bodies, they are still legally entrenched in one and the same legal code. This is a confusing element since the use of coercion is such a drastic step compared to relief efforts and council. The separation of the *bvl* could avoid the confusion that arises if child protection is misunderstood as governed by the same principles as child welfare—they are not. This would clarify that coercive intervention is an effort of last resort, and that child welfare is a service that is set to make parents that provide borderline detrimental care fit to maintain custody of their child.

Moreover, in Norway, child welfare and child protection is gathered in one term, namely *barnevern* (child protection). A child does not need to be protected, *de facto* and *de jure*, when it is subjected to non-detrimental care and the parents are receiving non-coercive measures. At that point, the parents still hold the right to provide care for their child.

By lifting the localization of the board onto a regional level, as was done with the *bvl,* and thereby argue that any board is set to handle any case, thus excluding the prerogative of geography that was significant to the BVL of 1953, grounded the basic expectation of non-discrimination into the design efforts. The reason for doing so was to establish a more legally competent decision-making body that did not have any ties to the area where the child resided, and underlined the principled difference between local non-coercive measures and regional coercive measures. These design efforts made it comply with the order of expectations.

Since the local Child Welfare Office is set to implement the decisions of the FBSS, the decisions are dependent upon funding and personnel locally. Thus, if decisions that the FBSS has reached are not implemented due to suboptimal funding or personnel, the purpose of child protection is threatened. A solution to such a problem could be to situate the apparatus needed to take care of such cases in a separate administration under the FBSS.

8.1.3. Composition of the Board and What Type of Board to Convene

The composition of the FBSS includes three different role-types—the leader of the board, the professionals and the laymen. Whilst the leader has extended roles, the rest of the members play a substantial role regarding decision-making. The leader also administrates case-proceedings of the process of negotiation. The most important role that the leader upholds is to ensure that rules of procedure are enforced. The entire board, on the other hand, must be able to evaluate any type of argument presented, whether such arguments originate from laymen or professionals.

The original motivation for providing the specific design of the original board of 1992 was based upon ensuring that the board became independent and neutral. Its independent status can easily become dismantled by making the board become dependent upon others. It is, nevertheless, important to point out that the FBSS' independence still needs revision. Independency as a design-principle is a strong contender in redeeming the promise of trust. If the board became dependent, for instance upon former decisions or external expertise in order to make a decision in a particular case, it would be no way of establishing a solid foundation from where a decision can erupt as an ultimate claim to correctness. The board would not know if decision had reached rational acceptability or on what terms it would become an ultimate claim to correctness. Hence, the FBSS would not know if a decision is the child's best interest. Hence, doing away with independency as a design-principle that, for instance, is

suggested in NOU 2005:9, set the basic expectations in peril and leads decision-making to not redeem the promise of trust.[539]

However, there are certain problems that emerge with the composition, of which four will be illuminated here. *First,* how does the leader become qualified today? There are no demands set to the leader of the board regarding the aptitude for reaching decisions that are in the child's best interest. It is implicitly accepted that if the leader of the board upholds principles of a regular civil trial, the decision-making procedure will be 'good enough'. This is not the case. Reaching decisions in the child's best interest is a specific aim. Having claimed that the child's best interest principle of the *bvl* is in harmony with the CRC makes the principle fundamentally post-national and requires knowledge on how to reason on the topic. Thus, the decision-making of the FBSS is driven forth by a person that does not necessarily know how to obtain the necessary quality to abide by the post-national turn in decision-making. This is a threat towards how the decision-making procedures are handled, and case-proceedings can become discriminated against across the different boards.

Second, does the professional representative secure independency? Since there are no coherent practices regarding the recruitment of professionals—moreover, what is meant by a professional is not discussed in the legislative history of child protection—it can be argued that it is a general uncertainty towards what the role of the professional is. With regard to independency, it is hard to argue that the professional can *de facto* ensure independency. If the professional is a social worker, he or she will simply not have any *professional* idea as to what the medical practitioner argues, or the psychologist or any other professional that is not a social worker. This threatens the professionalism of the board and raises doubt towards whether or not a relevant or correct type of best professional practice is applied to the process of decision-making, and if the decision-making actually can be deemed as independent at all.

Third, there is no discussion leading to the design of the FBSS about what type of professional role is needed. This introduces an unresolved conflict as to what type of professional competence is called for. Clearly, choosing one profession over another might have its advantages, but at what cost? There are mainly social workers and psychologists occupying the FBSS. Although these are two different professions, it is no guarantee that these are even the right types of professions. If the purpose of the *bvl* is to be upheld, namely to protect a child when its health and development is threatened, should it not be a medical

[539] See NOU 2005:9.

practitioner and a psychologist that are represented? One that could evaluate the health of the child, and another that could evaluate the psychological development. Why a social worker at all? Having these questions unanswered underlines an uncertainty relating to the professional that threatens the role that he or she is supposed to play.

The *fourth* and the last point is the lack of any good arguments for including laymen, which are currently included based on the premise that the FBSS makes decisions with a high amount of normative complexity. However, their involvement is rather some type of continuation of the BVN and its democratic component. This, nevertheless, does not contribute to the qualified search for decisions that would be in the child's best interest. What are needed are representatives that can argue on normatively complex cases, which does not automatically imply laymen.

8.1.4. Parties to the Procedure and Their Possibilities

Having a party procedure enables affected parties to put forth their claims in an exhaustive manner. Furthermore, anyone who has relevant arguments that can illuminate the case can be included as witnesses. By enabling everyone that has a relevant argument to put them forth, the process of decision-making can become truly argumentative. However, their inclusion is not a matter of reaching a decision that accommodates the views of all the parties to the procedure. Although the parties to the procedure contribute to establish the platform from where a decision is to emerge, the board alone is accountable for the decision.

The local Child Welfare Office has the role of protecting the child who receives non-detrimental care. This is how they must argue, provided that the child's best interest is always a primary consideration. Thus, the local Child Welfare Office can be seen as a representative of the child's interests, *in loco parentis*, since it cannot protect itself. However, the *bvl* gradually include the child, and until it also can become a party to the procedure.

Although having the local Child Welfare Office to advocate the interests of the child is a positive step, it might not be an advantage that the child can represent itself. This can lead to either of two problems. First, the FBSS may choose to listens to the child and make a decision that is on par with his or her desires. This would make the child accountable for its own best interests as a child. Second, not listening to the child would be to admit that a child's opinion is not taken seriously. Either of the outcomes can be solved by not including the child into the procedure as a party to the procedure. This does not mean that the child's opinion is not taken

seriously, or that the child is not a central part of the deliberation, but to argue that including the child as a party to the procedure leads to counterintuitive consequences.

The court of appeal for the parties to the procedure is the civil court. When a case leaves the FBSS and enters the court system, the type of decision-making body that the FBSS is set to be is replaced by a different one. The civil court is mostly not preoccupied with reaching decisions in child-protection. Its staff lacks training and the necessary ability to be independent in a correct manner, which means to reach decisions in the child's best interest through an independent and fully ventilated argumentative provedure. Furthermore, since the CRC did not establish a court, and its incorporation was unsatisfactory with regard to what the principle of the child's best interest would mean, the Supreme Court has no ability or incentive to enforce a post-national rights-based child protection system. Such a system is, nevertheless, a necessary consequence of the incorporation of a rights-catalogue for children. The absence of a coherent system of appeal, one that can base decisions in a rights-based and post-national manner, can threaten the basic expectation of the child's best interest.

The board is supposed to reach decisions upon measures according to certain paragraphs of chapter four of the *bvl.* This confuses the decision-making process and the procedure of negotiation in that these measures constitute pegs that any decision must hang on to, which—if removed—would not direct decision-making at a too early stage. The local Child Welfare Office is supposed to suggest measures when raising a case to the board, and by doing so, it can influence the procedure of decision-making in a direction that is unfortunate and threaten to destroy the dynamic that a completely open process could provide. This could be solved by either removing the types of measures that a decision must adhere to, or remove the demand of the *bvl* towards the local Child Welfare Office to suggest measures.

Furthermore, by having fixed measures in chapter four of the *bvl,* it implicitly argues the impossible—namely that any child's best interest is served through these measures. Somehow, the indeterminacy of the principle of the child's best interest becomes determinate. This is unfortunate. Although it is a need to have a legal discourse that pragmatically argues that something is in a child's best interest, as if it is determinate, to legally entrench these measures in the chapter four of the *bvl* is too far in the opposite direction. The different measures can direct or influence the deliberations in an unfortunately manner. The child's best interest is indeterminate; and, should be embedded in a legal discourse on those terms.

8.1.5. Main Principles of Procedure in the FBSS

The FBSS is an independent administrative decision-making body shaped like a court-procedure. It is a special court for set in charge of reaching decisions involving coercion to protect children, and it has the potential of testing the correctness of the claims held by the parties to the procedure. In many respects, the casework that enters the FBSS belongs to a path that goes through the FBSS to the civil courts and up to the Supreme Court. Thus, it can be referred to as a special court of first instance, with a procedure controlled and driven forth by a judge that enforces principles of procedure belonging to the civil courts. The FBSS is designed to encompass a legal discourse in order to uphold the basic expectation of non-discrimination and have the ability to reach decisions in the child's best interest.

Having formal principles of procedure contribute in upholding the basic expectation of non-discrimination. As such, formal rules that encapsulate the decision-making procedure constitute a clear contender in redeeming the promise of trust. Prior to introducing *bvl* §7-3 from 2008, the rules were entrenched in the legislative history to the *stl* and *bvl.* Providing a formal expression of these rules from clarifies priorities, and makes decision-making across different boards more coherent. The formal rules of procedure is what ensures the potential of having a general practical discourse inserted into the judicial precept of reaching a resolute decision that can be said to be the ultimate claim to correctness.

Having a formal rule-based procedure subjects every case to the same type of procedure. This will remove discrimination as well as establish what can be called a individual-oriented child protection system. As this type of decision-making would be in line with the basic expectations of the current child protection regime, it promotes trust.

8.1.6. The Process of Negotiation

The process of negotiation can be referred to as a legally confined practical discourse, i.e. a legal discourse. Thus, the procedure of *negotiation* between different parties does not serve to reach an agreement among parties; instead, it is an argumentative process aimed at reaching decisions according to the child's best interest. Hence, the denomination *forhandling* (negotiation) is misleading when it comes to the FBSS. By entrenching the principle of the child's best interest as the aim of every legal discourse, it is possible to pragmatically draw the line and choose that which seem optimally in the child's best interest without disregarding the fact that such a principle is indeterminate. Replacing such a principle with another is not a solution, since no principle would neither conflate with the basic expectation of the best

interest of the child nor do away with indeterminacy in matters that are wedged into a sphere of high normative complexity.

The decision-making procedure, by itself, becomes optimal if the child's best interest is to be treated as a principle right prescribed by the CRC. However, it is nothing that suggests that the CRC is incorporated in a real sense. Confirming legal harmony without providing the argument for why it is in harmony, as was done by Ot.prp.nr. 45 (2002-2003), is a weakness with respect to this amendment. As was shown earlier, having the "child's best in mind," which is how this principle has been argued for when establishing the *bvl* in 1992*,* is not the same as ensuring the child's best interest when it is supposed to be in harmony with the CRC from 2003.

Leaving this important shortcoming aside, the decision-making of the FBSS encompasses a design for rational argumentation and decision-making. By applying an argumentative process that includes all affected parties in a mediated fashion, and having the principle of the child's best interest as a regulative ideal, the decision will accommodate both basic expectations constitutive of the current order of expectations. The argumentative procedure is needed in order to flesh out every relevant and conceivable argument that can assist in building a solid platform from which to base a decision. An argumentative procedure is simply a precondition for qualifying the child's best interest. Such a procedure, which aside from adhering to formal rules of procedure also abides by rules of discourse, clearly cashes in on the promise of trust.

Applying such an argumentative procedure, where rules of discourse are upheld, is necessary as the problem at hand is a practical one. In order to make an optimal decision, given the indeterminacy of such a principle, all affected parties must be included. This includes not only those who are directly affected, such as the parents and the child, but also competent professionals that can make claims that affect the particular child's best interest as well as family and friends of the child or parents.

By having a decision-making body that is enabled to include all relevant parties, it can be argued it is qualified with the ability to reach a decision that is optimal with regard to the best interest of the child. At the point of departure, it is the public claim versus that of the private parties. Furthermore, the private and the public parties can call upon additional affected parties, or simply individuals that can put forth relevant arguments. If this is not satisfactory, the board itself can call upon whoever can illuminate what is in the child's best

interest further. Consequently, the decision can become as illuminated as is needed. This is an important component that prepares the ground for a solid decision due to the potential of exhaustive argumentation. At this point the legal order complies with both of the basic expectations, and consequently helps fulfilling the promise of trust.

8.2. Constitutional Liberty and the History of Child Protection Law

During the discourse on child protection from late 1880s until today, it has always been maintained that each individual was to be provided the right to liberty upon adulthood.[540] What has differed is the conception of liberty that each legal code has been justified under, i.e. the meaning of liberty. As argued earlier, the order of expectations have produced three very different legal orders as products of different representative law-making assemblies. Each of the legal codes is a part of the process of democratic self-government at three very different points in time.

During the LBFB, the aim was to ensure that the child became "normal" or "moral." During the BVL, the child was to be raised within a healthy family as a part of its local community. The *bvl* is to ensure that the child's best own interests become protected. These are all three different ways to establish child protection worthy of trust. Consequently, it can be argued that each type of historical child protection system relate to a specific conception of liberty, whereby a stylized continuum can be established where the legal codes can become placed regarding what type of conception of liberty was applied to justify the legal code.[541]

As was argued in part I, we can differentiate between two main types of liberties. On the one hand are constitutional rights carried by one citizen that enables personal autonomy through individual freedom. Benjamin Constant referred to these liberties as "liberties of the moderns." On the other hand are political liberties and the values of civic life referred to as "liberties of the ancients." On one side of the stylized continuum are guarantees of personal liberty, or autonomy, and can be referred to as rights. The other side grants equal political liberty and can be referred to as civic republicanism.[542] The latter version grants collective freedom—"admitted as compatible with this collective freedom the complete subjection of the individual to the authority of the community."[543] The Norwegian history of decision-making in child protection has weighted the different types of liberties differently when

[540] To illustrate, see e.g. Andenæs (1965); Smith (1994), (1996).
[541] Rawls (1993), Calhoun (1992): 193 and Berlin (1958).
[542] See Constant (2003). Here, we will merely use these two types of liberties to frame the historical discourse on child protection, and not pose any argument that involves Constant.
[543] Constant (1988).

justifying the legal order. In general, child protection law can be said to have drifted on the continuum from a principle of liberty dominated by "liberty of the ancients" and gradually closer to the "liberty of moderns." Today, the best interests of the individual child and its ability to choose for itself how to live life is at the centre. In 1896, it was rather a matter of constructing "normal" or "moral" individuals that would freely choose to contribute and maintain collective self-government, hence an emphasis upon the "liberty of ancients."

The continuous reflexivity in the progress of the child protection discourse has had a similar overall motivation—namely that the law on child protection has incrementally incorporated the affected parties into the decision-making itself. The different legal codes reflect different solutions to such an end, and has gradually lent higher priority the constitutional liberalism of the "liberty of the moderns."

As can be argued here, the legal development in child protection begins with the LBFB—through a justification that is lending priority to the "liberty of the ancients," i.e. the republican virtue of civic participation—and ends in the current *bvl* that lends priority to the "liberty of the moderns," defending the child's constitutional rights to choose how to live life.

8.2.1. Type of Trust Promoted by the LBFB and why it became Abandoned

The first legal code, the LBFB, had the objective of rescuing neglected and abused children from failed care. The idea was that failed care of children lead to adult loafers, beggars and criminals, i.e. abnormal and undesirable conceptions on how to live life.[544] According to the motives behind the legal code, the criminal career posed the single biggest threat towards the civilized world, and no one would want to be a part of such a world.[545] It had to be the state's duty to intervene so that the child was not recruited to such a life. The solution was to develop a way to correct and develop children into not becoming criminals once it had been discovered that the parents, indeed, provided care that would lead them onto such a path.

The initial motives developing the LBFB focused upon the protection of a child from developing into a so-called low-life or criminal adult. As such, the correction of a child was not only for the sake of the child acquiring a "normal" or "moral" adulthood, but also that society itself remained healthy by developing healthy recruits to its citizenry. This was a point that Bernhard Getz pointed out explicitly, namely that the LBFB was to serve a twofold purpose. On the one side, it was to correct the child so that it became a person that itself

[544] Getz (1892): 1ff.
[545] Getz (1892): 2.

would want to be, namely "moral" and "normal." On the other was that the citizenry itself remained healthy and normal, and the number of recruits to the criminal ranks would be on a decline.[546]

This dual purpose illustrates that, within the legislative history of the LBFB, the conflict of priority of liberal justification resides. If the legal code shifted in the direction of the "liberties of the moderns" or the "liberties of the ancients"—given that parental rights could easily be revoked and that the child was not to develop in any manner according to individual utility, but instead become "corrected" at the whim of others—neither the parents nor the child would receive constitutional protection that superseded the need to develop healthy citizens for the sake of the citizenry. Both the parents and the child had to obey some ethical life-choices, or conceptions regarding how to live life.

Consequently, the LBFB was set to correct children to become a specific type of person—a type of minimum personal standard at the time. They had to become "normal" and "moral" enough to both take care of themselves as adults as well as not become a corrupting influence on the civilized population. The consequence is that the personal right to liberty is narrowed down to a minimum, and in the foreground stands the republican ethos of ensuring that society is working with a healthy *demos*.

The focus upon a type of civic "normality" won ground. Rune Slagstad has referred to this development as the establishment of the Norwegian demos.[547] His argument has become further documented and affirmed in chapter 3 as relevant also for the child protection institution. With respect to the development of demos, the primary role of the LBFB was to ensure that the corrupted children did not threaten this development. Moreover, they were hopefully enabled to become a part of such demos as an active citizen. This leads to the conclusion that the LBFB was a legal code that leaned towards the "liberties of the ancients," with a justification in ensuring the political rights for equal participation in public life. It could be argued that the underlying assumption for such a justification was that a thriving democracy needed a thriving demos.

What stands out in the LBFB as the most important characteristic is the treatment of children who were deemed a threat towards the development of the Norwegian demos. The emphasis was clearly on social hygiene rather than the safeguards of each child's prospective

[546] Getz (1892).
[547] Slagstad (2001): 107ff.

right to liberty. It was not the established decision-making body, the Trustee-board, that would lead to the reform in 1953—as this decision-making body did not constitute the great problem with the LBFB—it was rather the failure of the system that took care of the children ruled as morally corrupted by the LBFB.

To illustrate, once the parental rights were set aside, most children were sent to so-called decent families who could take care of them.[548] As such, the children received close to a normal childhood at the time. However, the reference-point in the public debate, one that was ultimately the reason for reform in 1953, was the children of the asylums. These children were the ones subjected to the double strike of coercion—first removed from the parents and then sent to coercive correction. As shown in part II, it was the very idea of correction that was argued to be wrong or even unnatural.

The idea behind correction was that the effect of the system of child protection also defined what type of opportunities a child should and should not have later in adulthood. The focus here was not merely on preparing the child to become a part of society from the standpoint of justice, but also on shaping the child's future conception on how to live life beyond such a standpoint. The asylum children, as such, were corrected beyond what could be referred to as the necessary character traits to abide by civic duties. They were corrected beyond what was needed to participate in social cooperation on fair terms, based upon an idea of reciprocity and mutuality. Their ethical choice on how to live life was supposed to be made for them through correction.

The plan was that correction of the child involved making a choices for the child because it had no one else that could do so with regard to its way of life. Life was in this respect already determined through the state's correctional efforts. At least, that was the plan—namely to reestablish "normality" and "morality." Because of this type of paternalism, the "liberty of the moderns" was not facilitated as a source of justifying what to do in child protection. The republican ideal of democratic self-rule, the development of a healthy demos, an active and healthy popular sovereignty, trumped the constitutional defense of the child's right to personal liberty as an adult.

It can nevertheless be argued that the system of child protection presupposes a certain amount of constitutional right to liberty. If there is no free choice or a constitutional protection of the liberty to choose how to live life, there would be no need for any Trustee-

[548] SSB (1978): 594.

board to evaluate each case. There would be no need for an elaborate system of state-intervention. It could rather be a matter of a legal or illegal type of care. Getz, as well as Hagerup, argued that the state had to protect the privacy of family life as well as the child's future development.

The free choice of the parents and the natural development of a child, both are "liberties of the moderns," was narrowly enforced by the LBFB. The subsequent historical development in the discourse on child protection, leading towards the new legal order of 1953, turned in direction of opening up the "liberty of the moderns" as personal right to liberty. Parents were, as time passed towards the introduction of the BVL, increasingly perceived to be the natural provider of care for children, and were in need of relief-measures that could empowered them to cope. The new idea would lead children to have the opportunities in life that was prescribed through their parents' care, and no longer the state. Hence, the personal liberty of parents was provided, albeit the situation for the child's prospective right to personal liberty was still missing.

As has been shown through the massive protests against this system of child protection set up by the LBFB, the idea of correction through discipline, isolation, hard labor, education etc. did not produce the desired outcome. Children did not become "moral" or "normal," and crime did not recede.[549] Furthermore, new knowledge had entered the arena, placing the idea of "correction" under scrutiny. The time had come to reform child protection to deal with respecting the rights of parents through pro-active child welfare, where the child should be enabled to remain in its natural environment with its biological parents. The family itself was now sought to be the best suited place to 'correct' children.

8.2.2. Type of Trust Promoted by the BVL and Why it became Abandoned

The reform of the LBFB in 1953 was a long awaited one. Even forty years prior, the legal code already had a substantial opposition. Explicit plans for reform began in the 1930s. In the 1930s, arguments that the child protection system created by the LBFB worked counter to its intent were brought to the parliament, implying that child protection was a legal code that needed to be incorporated into a bigger picture of social regulation. Furthermore, children in need were not corrected into becoming "moral" or "normal"; they rather ended up becoming

[549] This figures as central part of Benneche's (1967) critique of the BVL.

the "liability" once feared—criminals and adults who did not cope well in society.[550] Assessed on its own intents, the LBFB had developed into a complete failure.

Although the LBFB had failed its purpose, it did establish an infrastructure that was set to protect children. It was never any discussion of simply getting rid of the state-driven effort to protect children. It was only a matter of changing it to what was assumed to be better. Its development had settled the idea of the state having an apparatus that would take care of children subjected to detrimental care. The Getz had established, through the LBFB, that children who had become in need of care in order to develop into an adult had a legitimate claim, and that the state had to make sure such a claim became answered in some way.

The use of correctional asylums became criticized to the extent that something had to be done. The children was to develop the ability to acquire knowledge on how to live life as emanating from psychological bonds within family and local communities. Psychological strains such as these had particular causes that were seen as roots of the child's developmental problems. Hence, psychological causes could not be defeated by disciplinary and coercive methods, but rather through relevant treatment of each child. As such, the correctional ideology was abandoned, at least in denomination.[551] Coercion was no longer to be implemented if it was not absolutely necessary. The family had become the new correctional facility, and parents were to be empowered to solve the problems of care.

The difference to the LBFB was that child protection was from now on to lend support to the natural development of the child within the family. The new legal code established pro-active state-driven child welfare to ensure that parents became capable of providing care for the child in its natural environment.

However, with the BVL, the individuality of the child was still mainly left out of the decision-making equation. The interests of the parents and their responsibility as the prime-caretakers were the focus of the entire establishment of child welfare. From 1953, the interference from the state was always supposed to be non-coercive wherever possible and coercive only as the last resort. This has been dubbed the biological-presumption.[552] This

[550] Arctander & Dahlstrøm (1932): 64.
[551] The correctional school system was huge, and could not be abandoned overnight. Although the BVL had an explicit goal of decreasing the coercive removal of children from parental care, this did not happen in practice SSB (1978): 594.
[552] Skivenes (2002b).

meant that from 1953 and onwards, the child could be subjected to care that was questionable, but held to be non-detrimental because the child's natural place was with its biological family.

The BVL went only half way onto applying the "liberties of the moderns" to child protection. It was only the parents who were admitted a right to personal liberty. Their right to provide care was to be enforced as far as possible according to a principle of toleration. The way children were ensured a natural development and good health was to ensure that parents could provide adequate care. Child protection went from being predominantly engraved with "liberties of the ancient" within the era of LBFB, into becoming gradually a rights-based child protection system through by granting parents their rights. It can be argued that parental rights had become the first line of defense against the will of the people. Hence, child protection illustrates a gradual development towards the regulative ideal of the constitutional democracy where the focus upon securing individual liberty of those affected has been given increasing priority. Today, it can be argued that child protection has taken a post-national turn where the order of expectations lends priority to the individual rights of all involved. Hence, emphasizing "liberty of the moderns."

As discussed earlier, the decision-making of the FBSS is yet to deliver fully on the promise of trust. The promise is in many respects not kept if the argument regarding the basic expectations is accepted. As summarized earlier in this chapter, it is a tension that makes the promise of trust hard to fulfill. However, the most important aspects of the design, i.e. the rules of procedure and the process of negotiation, comply with the basic expectations of child protection and by themselves contribute a long way to redeem the promise. In total, even though the promise in itself is not kept, the wrongs of the design can be seen as bearable and repairable.

Prior to a reform, as the one in 1953 and 1993, the past legal codes deviated away from what was child protection worthy of trust to the extent that the construct of the legal order itself no longer could become adjusted to comply with the order of expectations. In due course of time, the legal design that once passed through parliament and that had a minimum of tension to basic expectations would no longer be worthy of trust because new basic expectations have entered and thus the nature of the order of expectations changed. In the end, the legal order is simply no longer repairable. The new legal order removed the tension between the former legal order and the order of expectations by again crafting the legal order to comply better with the order of expectations. The way in which a legal order can be made

to redeem a promise of trust, is the result of political craftsmanship to repair distrust or reestablishing trust by removing the tension between legal order on one side and order of expectations on the other.[553]

8.3. Conclusion

Despite the weaknesses within all the legal codes throughout history, it can be concluded that all law-making in Norway have upheld the respect and importance of implementing a state-doctrine to protect children. It has been argued affirmatively since 1896 to have strong decision-making bodies in child protection. It is the shape of this doctrine that has been a source of disagreement, i.e. the point of discord has always been on when and how to coercively intervene. These variations will probably continue to emerge as time progresses, new knowledge emerges, and society is confronted by new problems that push the order of expectations in new directions.

In order to establish a fair start in life, which in chapter 6 was argued is implicit to *bvl* §1-1, any child's development must be protected so that it comes on par with what is acceptable. In other words, child protection needs to only mend the failed development of the child up to the point where the child's chances in life are on par with children who are marginally above the threshold that trigger a need for protection. This means that once the care of a child falls below a certain threshold, the state must intervene to ensure that the child receives a sufficient amount of opportunities needed for personal liberty to make sense.

Norwegian child protection rests upon the premise that it upholds the individual right to liberty more effectively. Today, the affected parties are included to a much greater extent than ever before. The gradual introduction of such a rights-based protection of parents and children can potentially only allow for the design of decision-making bodies that take into account these two main affected parties. Constitutional liberties, such as these, cannot be overthrown easily, and have incrementally become qualified throughout Norwegian history. We can argue that…

> *"…the constitutional state does not represent a finished structure but a delicate and sensitive – above all fallible and revisable – enterprise, whose purpose is to realize the system of rights anew in changing circumstances that is, to interpret the system of rights better, to institutionalize it more appropriately, and to draw out its contents more radically."*[554]

[553] This is a different use of the denomination "trust-repair" from what figures in Eriksen (2001).
[554] Habermas (1998a): 984.

The priority of the "liberties of the moderns" above the "liberties of the ancient" has introduced the respect for the individuality of each citizen, it be a parent or a child. At the same time, the manner in which we answer a rights-based development "anew in changing circumstances," will determine whether or not a decision-making body is able to redeem a promise of trust.

The design of the FBSS favors constitutionalism over civic republicanism. Rights principles restrict what can be done to individuals, i.e. they restrict popular will. Both conceptions of liberty are preoccupied with safeguarding the prospective right to liberty of the child. However, they differ in ideas on how to get there. Civic republicanism aims to develop children into individuals that engage in civic life on equal terms, in a shared civic tradition and in establishing an agreement on a common good. Constitutionalism, on the other hand, will safeguard the freedom of the individual against unreasonable interference—either it is the parents or the child. It is a protection of the interests of the child. The development towards lending increasing weight on rights can be argued is a type of maturation of child protection in Norway and reflect a constitutional democracy in the making.

The prospective right to personal liberty for the child is where the historical development of the order of expectations has brought us. The rights-based child protection system have included the child into the equation as affected party in child protection cases. As such, children, ironically, were the last piece of the puzzle for ensuring that decision-making includes all affected. They are included, not as participants in the discourse of child protection itself, but as a group that everyone else is demanded to accommodate according best interest.

The historical development has left the Norwegian discourse on child protection in a predicament. To deny a child the right to develop in a manner that makes it prone to act upon a principle of personal liberty has become normatively and politically impossible. To paraphrase Kant, Norwegian child protection has reached the point where any child is granted, "by virtue of his humanity," its "birthright of freedom."[555] To Kant, every other right is externally acquired, and cannot be in conflict with the birthright. As presented in chapter 6, it is plausible to argue that children in Norway are entitled to a prospective right to personal liberty. In order for such a right to be indiscriminately applied, children must become adults with a sufficient amount of opportunities so that their life can fully make use of liberty.

[555] Kant (2006): 8.

If a child is not provided for in a non-detrimental fashion, the state needs to intervene to protect it so that the child can have opportunities sufficient to live the life that it can reasonably want as an adult. In doing so, the state must see the right to personal liberty, as a primary guiding norm for entrenching the basic expectations of a post-national rights-based child protection system. This effort must be made by the state because children cannot be said to be free, or have liberty-rights as children.[556] They have a prospective right to liberty. Once they receive personal liberty, they do, in certain respect, cease to be children.

Throughout history of child protection, decisions have been made on what to do in order to protect a child with no regard for the particular child's best interest—at least not as a prospective right to liberty of the child. What has now become a part of trustworthy child protection has developed to this point through incrementally establishing the child's best interest as a basic expectation. The legal protection of the child itself is now at the center. The FBSS-design incorporates these important developmental traits, and in this regard cash in on the promise of trust.

The challenges today is rather about perfecting the design of the FBSS to better accommodate the principle of the child's best interest and make it adhere better to the logic of human rights. Doing this will better ensure that the legal order conflate with the order of expectations and that once again restore a trustworthy decision-making body. Even though this decision-making body is a strong one in upholding the underlying principles of the current order of expectations, and hence redeems a promise of trust, there are many aspects of the design worth further assessment. This is where political craftsmanship comes to play.

To redeem a promise of trust completely is perhaps impossible because of the normative complexity of the task. Moreover, it is also the matter of having a order of expectations in constant flux. However, the small, but important, efforts that are made to the attempt of optimizing the enforcement of the rights of the child is an important step in safeguarding a decision-making practice worthy of trust. As such, child protection discourse has settled in a realm where it is a discussion on how to protect children's prospective right to liberty.

[556] This is also a duty entrenched in CRC Art. 4: "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention."

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