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RULE OF LAW IN A TRANSITIONAL SPECTRUM

EDITED BY
Rigmor Argren

Rule of Law in a Transitional Spectrum

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Strengthening the Rule of Law in Child Justice

Towards an Appropriate Minimum Age of Criminal Responsibility and Effective Procedural Rights Protection for Children in Conflict with the Law – Case Studies from Sweden, Norway and the Netherlands

Yannick van den Brink, Kerstin Nordlöf and Ingun Fornes

Abstract

The rule of law demands that States establish an appropriate minimum age of criminal responsibility (MACR) and guarantee effective procedural rights protection for children in conflict with the law. Based on case studies of the child justice systems of Sweden, Norway and the Netherlands, this chapter explores what an appropriate MACR requires in terms of procedural rights for children below and above the MACR. It is concluded that, even in supposedly progressive jurisdictions, there is still a world to win when it comes to safeguarding the rule of law and children's rights protection in child justice.

1. Introduction

The rule of law is a fundamental principle of governance which subjects the exercise of power by the State to agreed rules and laws, guaranteeing

the protection of human rights.¹ It requires that all institutions, legal processes and substantive norms are consistent with human rights, and is thereby essential for protecting people against State oppression, and unlawful and arbitrary State intervention.² This is particularly relevant in the context of State responses to crime, as the State traditionally has vast powers to deeply intervene in the lives of individuals who have allegedly committed a criminal offence. State authorities may impose far-reaching restrictions on the freedoms of suspects of a criminal offence and can even deprive them of their liberty, which underscores the need for effective human rights protection.³

The rule of law and its adherence to human rights protection becomes even more important when the State responds to *children* who have allegedly committed a criminal offence. Indeed, the UN Declaration of the High-Level Meeting on the Rule of Law highlights the importance of the rule of law for the protection of the rights of the child, guaranteeing the best interests of the child in all actions, and aspiring to the full implementation of the UN Convention on the Rights of the Child (UNCRC).⁴ Likewise, the UN Committee of the Rights of the Child (UN CRC Committee) specifically emphasizes the importance of safeguarding children's rights in State responses to children who have allegedly committed a criminal offence.⁵ Nevertheless, the reality is that in many jurisdictions the human rights of children who are subjected to such State responses are not sufficiently safeguarded.⁶

Under the almost universally ratified and legally binding UNCRC, States are obliged to establish a minimum age of criminal responsibility

¹ United Nations, 'What is the Rule of Law?' <www.un.org/ruleoflaw/what-is-the-rule-of-law/> accessed 15 August 2023.

² United Nations, 'Rule of Law and Human Rights' <www.un.org/ruleoflaw/rule-of-law-and-human-rights/> accessed 15 August 2023.

³ Stephan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2005).

⁴ UN General Assembly, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels* (A/67/L.1), 19 September 2012, para. 17.

⁵ UN Committee on the Rights of the Child, *General Comment No. 24 on Children's Rights in the Child Justice System* (CRC/C/GC/24), 18 September 2019.

⁶ See, e.g., Nessa Lynch, Yannick van den Brink and Louise Forde (Eds), *Responses to Serious Offending by Children: Principles, Practice and Global Perspectives* (Routledge 2022).

(MACR) below which children cannot be subject to criminal proceedings (Art. 40(3)(a) CRC). In its recent *General Comment No. 24 (2019) on children's rights in the child justice system*, the UN CRC Committee takes the position that the MACR should not be lower than 14, and should preferably be higher, such as 15 or 16.⁷ At the same time, the Committee emphasizes that an effective rights-based approach ultimately depends on how the State deals with children *above and below* that age.⁸ The UNCRC Committee thereby highlights that a high MACR is not in and of itself sufficient to protect the rights of children in conflict with the law.

Indeed, children below the MACR are not necessarily better off in terms of their rights protection, for example, in jurisdictions where these children – as opposed to children above the MACR – lack certain procedural due process rights, such as the presumption of innocence or the right to legal counsel.⁹ Moreover, the procedural rights of children above the MACR are also not always sufficiently guaranteed, for example, in jurisdictions where those children are subjected to criminal proceedings that are essentially designed for adults, whilst under the UNCRC they should be enabled to exercise their due process rights in a child-friendly manner, in accordance with their age and evolving capacities.¹⁰

This chapter explores what an appropriate MACR requires in terms of procedural rights for children below and above the MACR, to establish a child justice system which is in accordance with international children's rights standards. To achieve the aim of this chapter, the child justice systems of Sweden, Norway and the Netherlands will be presented and used as case studies. The child justice systems in Sweden and Norway are known for their relatively high MACR (15), but also for the absence of a specialized youth court for proceedings regarding children above

⁷ General Comment No. 24, above note 5, para 22.

⁸ General Comment No. 24, above note 5, para 23.

⁹ See: Yannick van den Brink and Jessica Valentine, 'The European Committee of Social Rights: International Commission of Jurists (ICJ) v. Czech Republic: Procedural rights for children below the age of criminal responsibility in the pretrial stage of proceedings' (*Leiden Children's Rights Observatory*, Case Note 2021-5) <www.childrensrightsobservatory.nl/case-notes/casenote2021-5> accessed on 15 August 2023; Kerstin Nordlöf, 'Oskuldspresumtionen – en utopi för minderåriga misstänkta för brott' in Kerstin Nordlöf (ed.), *Argumentation i nordisk straffrätt* (Norstedts Juridik 2013) 168–199.

¹⁰ See: Stephanie Rap and Ido Weijers, *The Effective Youth Court: Juvenile Justice Procedures in Europe* (Eleven Publishers 2014).

the MACR who are charged with a criminal offence.¹¹ The child justice system in the Netherlands, in contrast, has a relatively low MACR (12), but provides specialized youth courts with child-specific procedures for children above the MACR.¹² Deploying a cross-national comparison, this chapter ultimately aims to identify strengths and weaknesses in the different child justice systems and to provide insights into how human rights protection of children in conflict with the law can be improved in order to strengthen the rule of law in child justice.

The chapter is structured as follows. In the next section, the overarching international children's rights framework for State responses to offending by children will be provided, with a specific focus on the MACR and children's procedural rights (section 2). Subsequently, the relevant age limits in the child justice systems in Sweden, Norway and the Netherlands will be discussed (section 3), followed by an analysis of the procedural rights of children who are above and below the MACR in the respective jurisdictions (section 4). The chapter ends with a conclusion and discussion on the findings and their possible implications (section 5).

2. The Human Rights of Children in Conflict with the Law: the MACR and Procedural Rights

The UNCRC, which was adopted in 1989, contains several minimum standards for children's rights-compliant State responses to children who have allegedly committed a criminal offence. Article 40 UNCRC is the core provision when it comes to children's rights in the justice system.¹³ The first paragraph of this Article articulates the primary objective of

¹¹ See: Tapio Lappi-Seppälä & Anette Storgaard, 'Unge i det strafferetlige system' (2014) *Tidsskrift for strafferett* 14(4), 334; Kerstin Nordlöf, *Unga lagöverträdare i social-, straff- och processrätt* (Studentlitteratur 2012).

¹² Articles 486–509 Dutch Code of Criminal Procedure. See also: Mariëlle Bruning, Yannick van den Brink and Lies Punselie, *Jeugdrecht en jeugdhulp* (9th edition, Sdu 2020).

¹³ See: Geraldine van Bueren, *Article 40. Child Criminal Justice. A Commentary on the United Nations Convention on the Rights of the Child* (Marinus Nijhoff Publishers 2006); Ton Liefwaard, 'Juvenile justice from an international children's rights perspective' in

children's rights-compliant justice responses to offending by children, which essentially boils down to the successful reintegration of the child into society, making the child assume a constructive role in society and preventing the child from reoffending. The second paragraph further stipulates that all children alleged as or accused of having infringed the criminal law have the right to a fair trial and are entitled to various due process safeguards to ensure this. Moreover, Article 40 (3) UNCRC requires States to develop a specific child justice system, which, according to the UN CRC Committee, should preferably be separate from the adult criminal justice system,¹⁴ and should include an appropriate MACR (sub a) as well as mechanisms to divert children away from formal judicial proceedings (sub b). The fourth paragraph of Article 40 UNCRC provides that child justice interventions must ensure that children are dealt with in a manner appropriate to their well-being and proportionate to both the offence and the circumstances of the child.

Article 37 UNCRC is also of particular relevance to children in the justice system.¹⁵ Article 37(a) UNCRC protects children from inhuman and degrading punishment, including life imprisonment without the possibility of release. Furthermore, Article 37(b) UNCRC provides that the deprivation of liberty of children may be used only as a measure of last resort and for the shortest appropriate period of time. When children are nevertheless deprived of their liberty, they are – under Article 37(c) UNCRC – entitled to stay separate from adult detainees and to be treated with humanity and respect for their inherent dignity, in a manner appropriate to their age. In addition, children whose liberty has been deprived have the right to prompt access to legal and other appropriate assistance and to challenge the legality of the deprivation of liberty before a court or other competent authority (Art. 37(d) CRC).

Wouter Vandenhole et al. (ed.), *Routledge International Handbook of Children's Rights Studies* (Routledge 2015) 234–256.

¹⁴ General Comment No. 24, above note 5, para. 2.

¹⁵ See: Ton Liefwaard, *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (Intersentia 2008); Yannick van den Brink and Nessa Lynch, 'Beyond the Life Sentence – A Children's Rights Lens on Sentencing for Murder' (2021) *International Journal of Children's Rights* 29(4), 972–1005.

In 2019, the UN CRC Committee, issued *General Comment No. 24 on children's rights in the child justice system*,¹⁶ which provides an authoritative and up-to-date interpretation of and specific guidelines for the effective implementation of the afore-mentioned UNCRC standards into domestic child justice systems.¹⁷ General Comment No. 24, which replaced *General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, also provides States concrete guidance as to the establishment of an appropriate MACR and the safeguarding of procedural rights for children in conflict with the law – the issues central to this contribution.

2.1 The MACR

Under Article 40(3)(a) UNCRC, all States are required to establish a MACR in their national legislation. The treaty text itself, however, gives no indication of what that MACR should be. Yet, the UN CRC Committee, does provide guidance on this issue. In its former *General Comment No. 10 (2007)*, the Committee took the position that a MACR of 12 is the absolute minimum and that a higher MACR of 14 or 16 is encouraged.¹⁸ In its more recent *General Comment No. 24 (2019)*, the Committee has shifted its position and is now calling on States to raise the MACR to at least the age of 14, whilst encouraging a higher MACR of 15 or 16.¹⁹ To substantiate its new position, the Committee points out that a MACR of 14 is the global average (i.e. the most common MACR worldwide).²⁰ The Committee also states that recent developmental psychological research and brain research show that children under the age of 14 are not capable of overseeing the consequences of their actions and not equipped to sufficiently understand the justice proceedings.²¹

Yet, notwithstanding their call to raise the MACR to at least 14, the UN CRC Committee also makes clear that a high MACR is, as such,

¹⁶ General Comment No. 24, above note 5.

¹⁷ Yannick van den Brink and Isabeth Mijnaerends, 'General Comment No. 24 – nieuw elan voor het jeugdstrafrecht? Over leeftijdsgrenzen, 'diversion' en de bredere implicaties voor het jeugdstrafrecht' (2020) Boom Strafbblad 1(1), 7–15.

¹⁸ UN Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice* (CRC/C/GC/10), 25 April 2007, paras 32–33.

¹⁹ General Comment No. 24, above note 5, para. 22.

²⁰ General Comment No. 24, above note 5, para. 21.

²¹ General Comment No. 24, above note 5, para. 22.

not sufficient to protect the rights of children in conflict with the law: an effective rights-based approach depends on how the State deals with children *above and below* that age.²² In doing so, the Committee seems to acknowledge that children below the MACR are not necessarily better off in terms of their rights protection.

This has also been observed by other human rights bodies. The European Committee of Social Rights ('ESR Committee'), for example, condemned the Czech Republic for not providing sufficient procedural rights to children who are subjected to pre-trial and trial proceedings but who are below the MACR (which is 15 in the Czech Republic). In the case *International Commission of Jurists v. Czech Republic*, the ESR Committee considered that, even though children below the MACR cannot be held criminally responsible, they must be afforded adequate legal procedural protections if they are involved in pre-trial and trial proceedings as a result of allegedly committing an unlawful act.²³ According to the ESR Committee, this is because those proceedings may have important consequences for a child's social and economic protection, especially when – such as in the Czech Republic – those proceedings can result in 'protective measures' that deprive children of their liberty.²⁴

Against this background, even though the UN CRC Committee does not make this explicit in General Comment No. 24, it could be argued that the procedural rights for children laid down in Article 40 (2) CRC should be equally granted and upheld when children are subjected to – potentially – intrusive proceedings or interventions in response to an alleged criminal or unlawful act, regardless of whether these children are above or below the MACR.

2.2 Procedural Rights of Children in Conflict with the Law

Article 40 (2) (b) UNCRC prescribes that "every child alleged as or accused of having infringed the penal law" is entitled to certain procedural rights, aimed at ensuring fair treatment and a trial. This provision

²² General Comment No. 24, above note 5, para. 23.

²³ *International Commission of Jurists (ICJ) v. Czech Republic* Complaint no. 148/2017 (ECSR, 21 March 2021); See also: Yannick van den Brink and Jessica Valentine, above note 9.

²⁴ *International Commission of Jurists (ICJ) v. Czech Republic*, above note 23.

demands, first of all, that children in conflict with the law are to be presumed innocent until proven guilty according to the law, given that the burden of proof lies with the authorities.²⁵ In this regard, children have the right to remain free from compulsory self-incrimination, meaning that a child should not be compelled to give testimony or to confess or acknowledge guilt.²⁶

Moreover, children in conflict with the law have the right to be informed promptly and directly of the charges brought against them, as well as the right to legal or other appropriate assistance from the outset of the proceedings.²⁷ According to the UN CRC Committee, States are required to grant all children who face criminal charges and/or are deprived of their liberty effective legal representation.²⁸ If children in conflict with the law are dealt with in an alternative system that does not result in a conviction, criminal record or the deprivation of liberty, 'other appropriate assistance' by well-trained officers may be acceptable, although States that have the means to provide legal representation for children during all processes should do so.²⁹ In addition, the UN CRC Committee recommends the maximum possible involvement of parents or legal guardians in the proceedings because they can provide general psychological and emotional assistance to the child.³⁰

Moreover, children in conflict with the law have the right to have their case determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to the law, as well as the right to exercise other due process rights, including the right to examine witnesses and the right to appeal.³¹ Children who cannot understand or speak the language used, are entitled to the assistance of an interpreter free of charge throughout the procedure.³²

²⁵ Art. 40 (2) (b) (i) UNCRC. See also: General Comment No. 24, above note 5, para. 43.

²⁶ Art. 40 (2) (b) (iv) UNCRC. See also: General Comment No. 24, above note 5, para. 58.

²⁷ Art. 40 (2) (b) (ii) and (iii) UNCRC.

²⁸ General Comment No. 24, above note 5, para. 51. See also: Art. 37(d) UNCRC.

²⁹ General Comment No. 24, above note 5, para. 52.

³⁰ General Comment No. 24, above note 5, para. 57. Cf. Art. 40 (2) (b) (iii) UNCRC.

³¹ Art. 40 (2) (b) (iii), (iv) and (v) UNCRC.

³² Art. 40 (2) (b) (vi) UNCRC.

All children in conflict with the law have the right to effectively participate in their proceedings, from the first contact with the police to the final verdict in court. Indeed, the UN CRC Committee, like other human rights bodies, recognizes the effective participation of the child as an essential requirement for a fair trial.³³ This implies that children are entitled to appropriate support and adapted procedures which enable them to understand the charges against them, their rights, the procedures and possible consequences of decisions, and allows them to effectively prepare and present their defence.³⁴ According to the UN CRC Committee, this calls for child-friendly procedures at all stages, including the use of child-friendly language, child-friendly layouts of interviewing spaces and courts, the support of appropriate adults, the removal of intimidating legal apparel and adapting proceedings to accommodate the specific needs and capacities of children.³⁵ In this regard, the UN CRC Committee recommends States to respect the rule that child justice hearings are to be conducted behind closed doors, in order to provide a less intimidating setting and to safeguard that the child's privacy is fully respected.³⁶

According to the UN CRC Committee, children who are above the MACR should be considered competent to participate throughout the child justice process and have the right to do so.³⁷ The Committee is not explicit about whether this right under Article 40 (2) UNCRC is also applicable to children below the MACR. Yet, the Committee does make clear that the child's right to be heard under Article 12 UNCRC – one of the general principles of the Convention, applicable to all children – equally applies to child justice and other procedures in response to children allegedly committing an offence.³⁸ This means that children, regardless of whether they are above or below the MACR, have the right

³³ General Comment No. 24, above note 5, para. 22. See also: Art. 6 (1) European Convention on Human Rights and Fundamental Freedoms (ECtHR) E.g.: *V. v. The United Kingdom* App. no. 24888/94 (ECHR, 16 December 1999); *Salduz v Turkey* App. no. 36391/02 (ECtHR, 27 November 2008).

³⁴ General Comment No. 24, above note 5, para 44–71.

³⁵ General Comment No. 24, above note 5, para. 46.

³⁶ Art. 40 (2) (b) (vii) UNCRC. See also: General Comment No. 24, above note 5, para. 67.

³⁷ General Comment No. 24, above note 5, para. 46.

³⁸ General Comment No. 24, above note 5, para. 44.

to be heard directly, and not only through a representative, at all stages of the process, starting from the moment of contact. In this regard, the Committee emphasizes that the right to be heard in the context of child justice does not mean that children are obliged to speak: children in conflict with the law have the right to remain silent and no adverse inference should be drawn when children elect not to make statements.³⁹

3. The MACR in Sweden, Norway and the Netherlands

The justice systems in Sweden, Norway and the Netherlands have had a MACR since long before the UNCRC came into force in 1989. What were – historically – the underlying considerations of the MACR in these jurisdictions? And how do these considerations relate to the current views of the UN CRC Committee?

Sweden

As early as the 13th and 14th century, different laws of Swedish counties had rules concerning impunity or reduced criminal responsibility based on a person's young age.⁴⁰ The MACR was set at 15, but children as young as 7 could still be held criminally responsible in certain cases. This remained unchanged when Sweden introduced its first common and larger legislation including criminal law in 1734.⁴¹ In the Penal Code of 1864, the MACR was kept at the age of 15, but with the exception that 14-year-olds could be held criminally responsible for serious offences. Why a younger person, under the age of 15 or 14, could not be held

³⁹ Art. 40 (2) (b) (iv) UNCRC. See also: General Comment No. 24, above note 5, para. 45.

⁴⁰ For example: Västgötagen, Östgötagen, Upplandslagen and Hälsningelagen.

⁴¹ See, e.g., Alfred Petrén, 'Om behandling av minderåriga lagöverträdare' in *Festskrift tillägnad Axel Herlin* (Lund, 1935), 117–135; Erik Fahlbeck, *Förvaltningsrättsliga studier I* (1938) 86–87; Ola Nyqvist, *Juvenile Justice* (1960), 113–127.

criminally responsible was motivated by the idea that they were not yet fully developed.⁴²

Nevertheless, until the end of the 19th century, childhood as a part of the human lifespan was still largely ignored and children were in many ways treated in the same way as adults. This shifted at the beginning of 20th century, when ideas such as society's duty and the child's right to care and an upbringing gained political ground in Sweden.⁴³ In 1902, the exception to the MACR of 15 for serious crimes committed by children aged 14 was removed from the Penal Code. The age of 15 thus became the absolute MACR in Sweden. This MACR was motivated by both practical and humanitarian reasons related to reforms of social laws and more specifically the responsibility of the (local) government to offer children both under and above the MACR appropriate care and a safe and healthy upbringing.⁴⁴

In 1965, a new Criminal Code (1962:700) entered into force, which maintained the MACR at 15 and which is still in force today. Indeed, under the Criminal Code, a child can be held criminally responsible if he or she commits a criminal offence at the age of 15 or older.⁴⁵ The rationale behind this MACR lies in the notion that children under 15 are not psychologically mature enough and have not yet developed enough of an understanding of what is right or wrong to be held criminally responsible for their acts.⁴⁶ Moreover, criminal sanctions do not have the same preventive effect on a child compared to an adult. A sanction which includes the deprivation of liberty, for example, may do more harm to a child than it does to an adult.⁴⁷ Furthermore, the MACR aims to reflect that offences committed by children are often the result of unfavourable circumstances in which these children grow up, which

⁴² The Penal Code Chapter 5 §§ 3–5; Ivar Agge et al. *Samhällets åtgärder mot lagöverträdare* (Karlshamn, 1949), 99; Brå, Rapport 1977:7, 354.

⁴³ Gunnar Bramsträng, *Föresättningsnämndarna för barnavårdsnämnds ingripande mot asocial ungdom* (Lund, 1964), 1 ff.

⁴⁴ Göran Elwin m.fl., *Den första stenen*, (Stockholm, 1974), 71.

⁴⁵ The Criminal Code (1962:700) Chapter 1 Article 6.

⁴⁶ The Criminal Code (1962:700) Chapter 1 Article 6; Olof Kinberg, *Om den s.k. tillräkneligheten* (Stockholm, 1917), 102; Ivar Agge, above note 42; Göran Elwin, above note 44; Knut Sveri, *Fri från påföljd, Festskrift till Hans Thornstedt* (Stockholm, 1983), 679 ff; Nils Jareborg, *Handling och uppsåt* (Stockholm, 1969), 161, 342 f.

⁴⁷ See, e.g., Act (1990:52) with special regulations on the care of young people Article 1.

calls for the protection of the child rather than condemning the act and treating the child as guilty of a criminal offence.⁴⁸ Therefore, child protection measures by the social services, with consent or by compulsory means, are deemed to be a more appropriate response to unlawful acts committed by children.⁴⁹

Over the past decade, however, the political climate in Sweden has shifted towards a tougher stance regarding crime committed by children,⁵⁰ despite the fact that official data show no significant increase in child crime rates.⁵¹ Fuelled by public outcry over incidents of serious crime committed by children, there is a political push towards lowering the MACR. This has led to criticism by the UN CRC Committee which, in its latest 2023 report on Sweden, expressed its deep concern “about current moves to lower the minimum age of criminal responsibility”.⁵² Nevertheless, in May 2023, the Swedish Minister of Justice announced that he had commissioned an official investigation into the matter with the aim of lowering the MACR to somewhere between 12 and 15.⁵³

Norway

In Norwegian law, rules regarding the MACR can be found in the earliest laws, which were in effect until 1274, encompassing both absolute and relative minimum ages, ranging between 12 and 15 in Gulatingloven and 8 and 15 in Frostatingloven. In later legislation, until the Criminal Code was enacted in 1842 (*Kriminalloven*), the extent the minimum

⁴⁸ See, e.g., Knut Sveri, *Kriminalitet og alder* (Uppsala, 1960).

⁴⁹ Kerstin Nordlöf (2012), above note 11, 253–257; The Social Services Act (2001:453); Act (1990:52) with special regulations on the care of young people.

⁵⁰ This political climate has resulted in, for example, legislation which entered into force in January 2022 and allows young adults (aged 18–21) to be treated in the same way as adults in criminal sentencing. Recently, the first two life imprisonment sentences were imposed on young adults, while previously, young adults could only be sentenced to a maximum of 14 years of imprisonment. HRSB mål nr B 3455-22. An inquiry requested by the government suggests a re-introduction of youth imprisonment for children aged between 15–17 to enable sufficiently interventionist reactions to serious crime including adequate relapse prevention measures and to ensure a safe and secure environment. SOU 2023:44.

⁵¹ *Ungdomsbrottslighet* – Brottsförebyggande rådet (bra.se) 2023-06-09.

⁵² CRC/C/SWE/CO/6-7, para 44.

⁵³ Dir 2023:112 Skärpta regler för unga lagöverträdare.

age of criminal responsibility was specifically regulated varied slightly.⁵⁴ The Criminal Code of 1842 established an absolute minimum age of criminal responsibility of 10 years of age and a relative minimum age of criminal responsibility of 15.⁵⁵ For children aged between 10–14, the law allowed for a discretionary assessment of whether the child was sufficiently developed to understand the nature of the crime, while at the same time there was a presumption that the child understood this for the most serious offences.⁵⁶

When the 1902 Criminal Code was introduced into Norwegian law, the MACR was set at 14.⁵⁷ This was an absolute minimum age, and the system of using a relative minimum age was thereby abolished. The primary rationale for establishing a MACR is the child's reduced culpability. In determining the MACR, however, the prominent factor has been the potential harm of punishment, particularly that associated with imprisonment.⁵⁸ The change in the MACR must thus be seen in the context of the establishment of correctional institutions in what would later become a separate child protection system.⁵⁹ The transfer of children's cases to this system was in all cases considered a better solution than punishing the child.⁶⁰ The change in the MACR in Norwegian law was at least partially inspired by developments in the other Nordic countries: the regulations of the MACR in Sweden and Finland were, in fact, used as models for the amendment in Norwegian law.⁶¹

In 1990, Norway raised the MACR from 14 to 15, bringing Norwegian law fully in line with the law in the other Nordic countries in this

⁵⁴ See Ingun Fornes, *Straff av barn: Frihetsstraffene og alternativene* (Gyldendal 2021) 81.

⁵⁵ See Ingun Fornes (2021), above note 54, 82.

⁵⁶ See A. Schweigaard, *Commentar over Den norske Criminallov*: vol 1 (3rd edn. Aschehoug & Co. 1882) 292–299.

⁵⁷ Straffeloven 1902 § 20.

⁵⁸ Linda Grønning, 'Kriminell lavalder – noen utgangspunkter' (2014) *Tidsskrift for strafferett*, 314.

⁵⁹ Foreløbigt Udkast til Almindelig borgerlig Straffelov 1887 87-93 and B. Getz, *Udkast til Lov om sædelig forkomne og vanvyrkede Børns Behandling med Motiver* (Det Steenske Bogtrykkeri, 1892).

⁶⁰ B. Getz (1892) p. 4.

⁶¹ See B. Getz, above note 60, 2.

regard.⁶² The primary objective of this legislative amendment was to avoid the imposition of prison sentences on the youngest children.⁶³ The proposal to raise the MACR was issued for the first time in the 1950s, and it had been reiterated and debated on multiple occasions thereafter.⁶⁴ The primary reason why the MACR was not raised earlier was due to the perceived inadequacy of the social welfare system in handling children who might otherwise have been subject to criminal sanctions.⁶⁵

Since establishing 15 as the MACR in 1990, the issue has been the subject of political debate in Norway only to a small extent. In the process of drafting the new criminal code, adopted in 2005, there was consensus to retain the age of 15 as the MACR.⁶⁶ A proposal urging the government to investigate the possibility of lowering the MACR from 15 to 14 was nevertheless submitted to the Norwegian Parliament in 2020 by representatives of the right-wing political party called “The Progress Party” (*Fremskrittspartiet*).⁶⁷ This party has positioned itself as tough on crime, and the proposal was justified by increased child and youth crime, while asserting that the current responses towards children are inadequate and lenient.⁶⁸ The proposal, however, was not adopted as it failed to garner support from the Standing Committee on Justice of the Parliament.⁶⁹ In this regard, it should be noted that the proposal also contravenes the UNCRC and General Comment No. 24: even though the UN CRC Committee finds 14 to be an acceptable MACR, the UN CRC Committee urges States that have a higher MACR not to reduce

⁶² In Denmark, the MACR was initially set at 14 in 1905, but was raised to 15 in 1930. See: See Tapio Lappi-Seppälä and Anette Storgaard, ‘Unge I det strafferetlige system’ (2014) *Tidsskrift for strafferett* 333. See also: Ingun Fornes (2021) above note 54, 113.

⁶³ See Ot.prp. nr. 26 (1986–1987) 9–10.

⁶⁴ See Barnevernkomiteens innstilling 1951, 69, Ingun Fornes, (2021), above note 54, 113.

⁶⁵ See Ot.prp. nr. 26 (1986–1987), 10.

⁶⁶ See Ot.prp. nr. 90 (2003–2004), 216 and Innst. O. nr. 72 (2004–2005), 48.

⁶⁷ Dok. 8: 115 S (2019–2020). See also: Fremskrittspartiet, ‘Fremskrittspartiets parti-program 2021–2025’, <<https://www.frp.no/files/Partiprogram/2021-2025/Partiprogram-2021-2025-web.pdf>>, 28, accessed 18 august 2023.

⁶⁸ Dok. 8: 115 S (2019–2020), 1.

⁶⁹ Innst. 147 S (2020–2021), 9.

the MACR under any circumstances, in accordance with Article 40 (3) (a) UNCRC.⁷⁰

The Netherlands

Under the 'old-Dutch law' (*oud-vaderlands recht*), which refers to laws that applied in the territories of the Netherlands between the 12th and 19th centuries, a MACR existed and ranged between 10 and 14.⁷¹ From 1810 to 1886, the French Code Pénal was the applicable law in the Netherlands. This law had no MACR. However, when it came to persons below the age of 16, a distinction was made between those who had committed a criminal offence without a 'judgment of distinction' (between 'right' and 'wrong') and those who were deemed to possess this judgment. Only if the judge considered the young person to have committed the offence with 'judgment of distinction', could criminal sanctions be imposed.⁷² In 1886, the MACR returned to the Netherlands when the Dutch Criminal Code came into force. Under this Criminal Code, the MACR was set at 10 years of age. For young persons aged 10 to 16, the Criminal Code adopted the rules from the old French Code Pénal: the presence of 'judgment of distinction' continued to determine the application of criminal law.⁷³

In 1905, the Child Acts came into force, which revolutionized the way the Dutch justice system dealt with children who committed criminal offences.⁷⁴ The Child Acts introduced, for the first time, a separate child justice system in the Netherlands, apart from the adult criminal justice system. The Child Acts provided a separate set of sentences and measures specifically designed for children (under the age of 18), which had the character of both disciplinary and educational remedies and were aimed at 'moral improvement' and the rehabilitation of the child. The legislator's

⁷⁰ General Comment No. 24, above note 5, para. 22.

⁷¹ See: P.A. van Toorenburg, *Kinderrecht en kinderopvoeding in de laatste honderd jaren* (Sijthoff 1918).

⁷² See: Chris Leonards, *De ontdekking van het onschuldige criminele kind. Bestrafing en opvoeding van criminele kinderen in jeugdgevangenissen en opvoedingsgestichten 1833–1886* (Verloren 1995).

⁷³ See: Mariëlle Bruning, Yannick van den Brink and Lies Punselie, above note 12, 454–455.

⁷⁴ Dutch Child Act of 12 February 1901, *Srb.* 1901, 63.

confidence in the socio-pedagogical importance of these interventions was so high that the legislator saw no need to categorically exclude children below a certain age from these interventions. Besides, the legislator considered judges fully capable of making sure that the ‘no punishment without guilt’ principle was upheld on a case-by-case basis. Consequently, the MACR was removed from the Dutch Criminal Code.⁷⁵

Six decades later, in 1965, the MACR was re-introduced into the Dutch Criminal Code.⁷⁶ It was observed that, in practice, the ‘no punishment without guilt’ principle in itself was insufficient to prevent very young children from being prosecuted and sentenced. This was deemed inappropriate and undesirable and called for the re-establishment of a MACR, which was set at 12. The rationale behind the re-introduction of the MACR was the notion that young children should be categorically excluded from criminal prosecution, because they are not mature enough to be held criminally accountable for their actions. Moreover, criminal prosecution was considered to be too onerous for children and well beyond the scope of their comprehension. The legislative choice of the age of 12 was essentially a compromise resulting from heated debates involving experts and politicians, and was ultimately considered a ‘principally defensible’ and ‘practically feasible’ MACR.⁷⁷

The MACR of 12 is still applicable today.⁷⁸ Nevertheless, debates about the MACR are still ongoing and topical. In 2017, for example, the Advisory Council for the Administration of Criminal Justice and Protection of Youth recommended raising the MACR to 14 years, based on – inter alia – developments in brain science that show that children below 14 are not yet capable of overseeing the consequences of their actions and to effectively participate in criminal proceedings.⁷⁹ The

⁷⁵ Explanatory Memorandum to Dutch Child Act 1897/98, 219, 3. See also: Mariëlle Bruning, Yannick van den Brink and Lies Punselie, above note 12, 455–456.

⁷⁶ Act of November 1961, *Stb.* 402 and 402.

⁷⁷ Cf. Commissie Overwater, *Rapport van de commissie ingesteld met het doel van advies te dienen over de vraag in welke richting het rijkstucht- en opvoedingswezen en in verband daarmee het kinderstrafrecht zich zullen moeten ontwikkelen* (Staatsuitgeverij 1951). See also: Mariëlle Bruning, Yannick van den Brink and Lies Punselie, above note 12, 457–458.

⁷⁸ Article 486 Code of Criminal Procedure; Article 77a Criminal Code.

⁷⁹ Raad voor Strafrechtstoepassing en Jeugdbescherming, *Verhoging strafrechtelijke minimumleeftijd in context* (20 December 2017).

Minister of Legal Protection, however, decided in 2019 to maintain the MACR of 12, pointing out that 12- and 13-year-olds sometimes committed serious offences for which – in his view – child (criminal) justice interventions are necessary. The Minister also stated that a MACR of 12 was in line with the UN CRC Committee’s recommendations in General Comment No. 10, which was still applicable at that time.⁸⁰ The latter argument, however, is no longer valid today, as the UN CRC Committee adopted General Comment No. 24 in which it recommends a MACR of at least 14. Indeed, in its most recent Concluding Observations on the Netherlands in 2022, the UN CRC Committee expressed its concerns about the MACR of 12 and urged the Dutch government to raise the MACR to at least 14.⁸¹ Yet, so far the UN CRC Committee’s calls have remained unheard.

4. The Procedural Rights of Children Above and Below the MACR: Sweden, Norway and the Netherlands

As the CRC Committee emphasizes in its General Comment No. 24, a high MACR is not in and of itself sufficient to protect the rights of children in conflict with the law. Indeed, an effective children’s rights-based approach to responding to children who allegedly committed a criminal offence boils down to how these rights are safeguarded for children above *and* below the MACR. To what extent are the procedural rights, laid down in Articles 40 and 37 UNCRC, safeguarded for children above and below the MACR in Sweden, Norway and the Netherlands? And what does that tell us about the effectiveness of the MACR for safeguarding the rights of children in conflict with the law in these respective jurisdictions?

⁸⁰ *Kamerstukken II* 2018/19, 28741, 53.

⁸¹ UN Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of the Kingdom of the Netherlands* (9 March 2022) para 41.

Sweden

In Sweden, child justice is integrated into the ordinary criminal justice system, with a close link to the social welfare system. As the social services, for example, take part in the interrogation of child suspects, they are responsible for mediation and youth services.⁸² Concerning the main procedural rights for children in conflict with the law, they are stipulated in the Code of Judicial Procedure (1942:740), the Criminal Code (1962:700) and the Act with Special Regulations for Young Offenders (1964:167). Since the UNCRC was ratified in 1990 and was given the status of Swedish legislation in 2020, several improvements relating to procedural rights for children have been enforced to fulfil the requirements of child-friendly justice. Still, due to the present criminal policies favouring repressive measures there is an imminent risk of not improving or even dismantling what has so far been accomplished.

Key child-specific procedural rights for children above the MACR include the requirement of specialized police officers and prosecutors, the speediness of the investigation into the crime and the trial, pre-trial custody time limits, the possibility to exclude the public from the trial, to deliver the sanction orally at the trial as well as to summon and hear the parents, other appropriate adults, and the social services during the interrogation of the child and at the trial or when a warning is issued instead of bringing a case to prosecution.⁸³ Furthermore, the use of coercive measures – such as arrest and pre-trial detention – must be avoided and replaced with other measures where possible.⁸⁴

⁸² Kerstin Nordlöf, (2012), above note 11, 18–19, 160–161; the Act of Special Regulations for Young Offenders (1964:167) Article 7; The Act of Social Services (2001:453) Chapter 5 Articles 1b–1c.

⁸³ Kerstin Nordlöf (2012), 343–350, 356–357; the Act with Special Regulations for Young Offenders (1964:167) Articles 2, 5–6 11, 15, 17–22, 25–30, 32–35; Prop. 2001/02:111; prop. 2021/22:227; prop. 2022/23:78, 26–32. The Code of Judicial Procedure (1942:740) Chapter 23 Articles 3 and 9; Förundersökningskungörelsen (1947:948) Article 2; The Social Services Act (2001:453) Chapter 5 Article 1c.

⁸⁴ Prop. 2005/06:165, 110 ff. Kerstin Nordlöf (2012), above note 11, 263; Andreas Anderberg & Linnéa Lindström, Häktning eller annan betryggande övervakning? Omhändertagande av omyndiga misstänkta lagöverträdare in *Med unga i fokus, Festskrift till Kerstin Nordlöf*, Andreas Anderberg, Ervo, Laura, Kristoffersson, Eleonor, (eds.) (Iustus, 2023) 11–36; The Code of Juridical Procedure Chapter 24 Articles 1 and 5; the Act of Special Regulations for Young Offenders (1964:167) Articles 23 and 23a.

Yet, despite these child-specific procedural provisions, Sweden does not have specialized youth courts. This means that, in court, children above the MACR are treated in largely the same way as adult defendants. This is not in accordance with the UNCRC, Articles 40 (2) and (3). Indeed, in its Concluding Observations on Sweden, the UNCRC Committee explicitly criticized the absence of specialized courts or specially trained judges for children.⁸⁵ The UN CRC Committee also urged the Swedish government, with regard to the procedural treatment of children above the MACR, to prevent and limit the use of coercive measures, to ensure that information of their rights and the charges is presented promptly and directly in a child-friendly manner and to broaden the conditions under which a public defence counsel may be appointed.⁸⁶

Children below the age of 15 cannot be held criminally liable in Sweden but can still be subject to a police investigation. These investigations by the police can take place on the request of the social services. Even without a request from the social services, the police have the authority to initiate an investigation concerning a child under 15 based on a suspicion of a crime which had the crime been committed by an adult, would have carried a prison sentence of one year or more. Other lawful reasons for the police to initiate an investigation are to find out whether a person over the age of 15 has taken part in committing a crime, to find stolen property or for other reasons of special importance with reference to a general or individual interest. If the child is under the age of 12, special reasons are required before an investigation can be initiated unless the crime in question carries the sanction of imprisonment.⁸⁷ It can be argued, however, that police investigations of children below the MACR contravene Article 40 (3) (a) and (b) UNCRC which aims at preventing children from being involved in criminal procedures. Still, fundamental for all police investigations where a child under the age of 15 is under suspicion is that the main interest is to understand whether the child

⁸⁵ CRC/C/SWE/CO/6-7, para 44.

⁸⁶ CRC/C/SWE/CO/6-7, para 45 (e–h).

⁸⁷ The Act of Special Regulations for Young Offenders (1964:167) Article 31.

needs any measures of care, voluntary or compulsory, as children are under the responsibility of the social services.⁸⁸

Moreover, contrary to the UNCRC's aspiration to keep (young) children out of the criminal justice system, several coercive measures can be enforced against children below the MACR in Sweden. Similar to children above the MACR, children below the age of 15 can be subjected to arrest, seizure, house searches, measures for biometric authentication, remote scanning and body searches as well as the taking of photographs and fingerprints of the child and body inspections.⁸⁹

Children above the MACR who are suspects in a criminal investigation have a conditional right to legal assistance/aid, which is funded by the state, before the prosecutor has decided whether to prosecute or not. If it is evident that the child does not need a lawyer, the court is not obliged to appoint one. The need for legal representation is, for example, dependent on the severity of the crime or whether a warning or a penalty order will be issued instead of prosecution. Children below the MACR who are involved in criminal investigations are sometimes, but not always, entitled to legal assistance. The possibility for a child below the MACR to have a lawyer applies when the police are authorized to initiate an investigation due to a suspicion of a serious offence, unless it is evident that the child is not in need of legal representation. If children below the MACR are involved in a police investigation because there is a person over the age of 15 who might have taken part in committing the crime (i.e. a co-offender above the MACR), or in order to find stolen property or for other reasons of special importance with reference to a general or individual interest, a lawyer can only be appointed to assist the child if there are special reasons to do so. This limited access to legal representation for children below the MACR also applies when the social services ask the police to initiate an investigation for the purpose of assessing the child's need for care. As children below the MACR are generally more vulnerable than those above the MACR and arguably in a similar position (i.e. subject to a police investigation), it can be argued that they ought to have an unconditional right to legal assistance in accordance with Article 40 (2)

⁸⁸ Kerstin Nordlöf, (2012), above note 11, 264–275; The Act of Social Services (2001:453) Chapter 5 Article 1.

⁸⁹ The Act of Special Regulations for Young Offenders (1964:167) Articles 36 and 36a.

(ii) UNCRC. Evidently, also children above the MACR should have legal representation appointed without exception.⁹⁰

In this regard, it is relevant to note that there is a well-known case in Sweden from 1998 in which two brothers, at the ages of 5 and 7, were accused by the police and the prosecutor of having murdered a 4-year-old child, without them being represented by a lawyer and without a court trying the evidence. The case was reopened in 2017, which revealed that the brothers had been exposed to many long as well as wrongful interrogations without legal representation. The police and the prosecutor claimed that the brothers had confessed although this was not documented. In 2018, it was established that the toddler's death was accidental.⁹¹

In Sweden, children below the MACR can also appear as suspects in a criminal court, as they can be subjected to a so-called evidentiary trial ('bevistalan') to have the evidence assessed by an independent and impartial court in cases where the criminal offence – if committed by an adult – would carry a prison sentence of five years or more or if there are extraordinary reasons.⁹² This evidentiary trial, however, cannot result in a criminal conviction or sentence, as children below the age of 15 are not criminally responsible. Therefore, the rationale behind this evidentiary trial lies in the importance of the circumstances in relation to a serious crime being thoroughly investigated and assessed, which is deemed to serve the interests of the child under suspicion, the victims and society at large. The evidentiary trial also leads to social welfare measures, which aim to prevent the child from reoffending.⁹³ Yet, it is seriously questionable whether subjecting children below the MACR to proceedings in a criminal court is acceptable under the UNCRC. Indeed, underpinning the UNCRC provisions which require the establishment of a MACR (Art. 40 (3) (a)) and of mechanisms to divert children away from the formal justice system (Art. 40 (3) (b)), the UN CRC Committee emphasizes that

⁹⁰ Kerstin Nordlöf, (2012), above note 11, 355–356; CRC/C/SWE/CO/6-7, para 45.

⁹¹ Två små barn pekades ut som mördare – nu ifrågasätts utredningen av mordet på Kevin, *Dagens Nyheter*, 2017-04-26; Andreas Slätt, familjen Karlsson-Dahlén, *Berättelsen om Kevinfallen: familjens egna ord om den stora rättskandalen* (Stockholm Forum, 2021).

⁹² The Act of Special Regulations for Young Offenders (1964:167) Articles 38 and 38a–c; Prop. 2022/23:78, 33–51.

⁹³ Prop. 2022/23:78, 34–35.

“exposure to the criminal justice system has been demonstrated to cause harm to children” and should be avoided where possible.⁹⁴

Norway

Similar to the Swedish system, child justice in Norway is integrated into the ordinary criminal justice system, with a close link to the social welfare system.⁹⁵ The fundamental procedural rights of children in conflict with the law are enshrined in the Criminal Procedure Act. At the same time, the Police Act also allows for interventions in the rights of the child, which are relevant in this context. For children above the MACR, this means that in criminal proceedings, children are initially afforded the same procedural protection as adults. General due process rights and criminal procedural principles, such as the presumption of innocence and the prohibition against self-incrimination, therefore, apply equally to both children and adults. The challenge lies in the extent to which this integrated system allows for the necessary adaptations to ensure that these rights are realized for children as well.

There are relatively few legal provisions that specifically regulate the handling of children above the MACR, neither in the Criminal Procedure Act nor in the Police Act. Since 2003, the UNCRC has been incorporated into Norwegian law with primacy over domestic legislation, thereby ensuring the procedural rights of children.⁹⁶ This highlights the need to consider the fact that the accused, suspect, or defendant is a child when interpreting general legal provisions. However, the absence of specific legal provisions that provide guidance on how to safeguard these rights, may result in an inadequate protection of the particular needs of children in the criminal justice process.

Children above the MACR have an enhanced right to state-funded legal representation. This involves a faster appointment of a public defender for minors compared to adults, along with the mandatory

⁹⁴ CRC/C/GC/24 General Comment No. 24 (2019) on children's rights in the child justice system I (2), p. 2.

⁹⁵ Ingun Fornes and Anette Storgaard, 'Varetekstfengsling av personer under 18 år – Norge og Danmark', in Andreas Anderberg, Laura Ervo, Eleonor Kristoffersson, *Med unga i fokus, Festschrift till Kerstin Nordlöf*, (Iustus 2023) 133, 134.

⁹⁶ The Human Rights Act § 2 and § 3.

assignment of such legal representation in cases of a specific level of seriousness.⁹⁷ Furthermore, the Criminal Procedure Act contains special time limits in criminal cases involving suspects under 18 at the time of the offence. Moreover, the Court Act stipulates that a case can be held behind closed doors where the accused is under 18 years of age.⁹⁸ This access seems to be used to an increasing extent, in line with General Comment no. 24.⁹⁹

There are also several specific rules regarding the pretrial detention of children. The threshold for using pretrial detention is higher than for adults and shorter timeframes are in effect here compared to cases involving adults.¹⁰⁰ The duration minors can be held in custody is also shorter than for adults.¹⁰¹ Furthermore, if the accused is under 18, isolation may not be ordered during pretrial detention.¹⁰²

An area where the lack of specific regulation is particularly noticeable is the area of police interrogations of children under suspicion. Despite the requirement to interpret these rules in accordance with the UNCRC, specifically Article 40 (1) in this context, the precise implications remain ambiguous.¹⁰³

As the question of criminal sanctions for children is part of the regular criminal justice system, there are no separate investigative units, prosecution departments, or youth courts in Norwegian law that handle criminal cases against children. This entails, among other aspects, the absence of specialized judges dedicated to adjudicating criminal cases involving children within the Norwegian legal system. Furthermore, there are no special provisions that regulate the conduct of court proceedings in these cases.¹⁰⁴ The UN CRC Committee has recommended ensuring that those working with children in the justice system, receive appropriate train-

⁹⁷ The Criminal Procedure Act § 96 and § 98.

⁹⁸ The Court Act § 125 (1) (c).

⁹⁹ General Comment No. 24, above note 5, para. 67.

¹⁰⁰ The Criminal Procedure Act § 184 and 183.

¹⁰¹ The Criminal Procedure Act § 185.

¹⁰² The Criminal Procedure Act § 186a.

¹⁰³ See Gert Johan Kjelby and Ørnulf Øyen, 'Barnekonvensjonen og norsk straffeprosess gjennom 20 år' in Ingun Fornes, Anna Nylund and Anneken Sperr (eds.) *Barnekonvensjonen i norsk rett. Prinsipper og praksis* (Gyldendal 2023) (forthcoming).

¹⁰⁴ See Ingun Fornes, 'Gjennomføring av rettsmøter i straffesaker mot barn' (2014) *Tidsskrift for strafferett* 378.

ing.¹⁰⁵ However, unlike the reports concerning Sweden, the Committee has (for now) not criticized Norway for the absence of specialized courts or specially trained judges for children.

In contrast, most police districts in Norway now have specialized youth teams that investigate cases where the suspect is a minor, and specialized prosecutors who work specifically with criminal cases against children.

Although children *below the* MACR cannot face criminal justice reactions, there are certain procedural rules that apply to this group of offenders as well. To a certain degree, these rules reflect that this group of offenders primarily face measures in the child protection system.

The Criminal Procedure Act establishes an obligation to investigate by the prosecution and police in cases where there exists reasonable cause to believe that a possible criminal act has occurred, although this obligation is not absolute in nature.¹⁰⁶ This duty to investigate also applies where a possible offender cannot be punished because they were between 12 and 15 at the time of the offence. Where the potential offender is under 12, an investigation *may* be conducted.

As the duty to investigate is limited to cases where the potential offender is over the age of 12, this aligns with the age limit applied for behavioural measures in the child protection system.¹⁰⁷ The Child Protection Act allows child protection services to implement various measures to help children who, due to their behaviour, require such help. The most intrusive measure is the involuntary placement of a child in a child protection institution.¹⁰⁸ Where such placement occurs based on the criminal act, it is considered to constitute a ‘criminal charge’ within the scope of the European Convention on Human Rights.¹⁰⁹ The duty of the police to investigate in these cases facilitates the child protection service’s assessment of whether the conditions for implementing measures

¹⁰⁵ CRC/C/NOR/CO/4 para 58 (d).

¹⁰⁶ The Criminal Procedure Act § 224. See Gert Johan Kjelby, *Påtalerett* (3rd. edn., Cappelen Damm Akademisk 2023) 21. In Norway, prosecution is integrated in the police. The prosecution leads the investigation, but it is carried out by the police.

¹⁰⁷ Ot.prp. nr. 44 (1991–1992), 59, Prop. 133 L (2020–2021), 233.

¹⁰⁸ The Child Protection Act § 6-2. Children under the age of 12 can also be placed in an institution, but child protection measures will in these situations in practice be aimed at the parents’ care situation, rather than being based on the behaviour itself.

¹⁰⁹ Rt. 2003 s. 1827 and Rt. 2012 s. 1051. See also Fornes 2021, above note 54, 320–324.

have been met.¹¹⁰ For this reason, the duty of confidentiality of the police does not prevent the investigation material from being handed over to child protection services.¹¹¹

As part of the investigative process, suspects may be subject to interrogation. Just as with children above the MACR, there are no specific provisions regarding age-appropriate questioning of children below 15 during an interrogation. Thus, police question children in largely the same way as during regular police interrogations. It is stipulated by law that the guardian of a suspect who is under the age of 18 should usually be given the opportunity to be present during the interrogation.¹¹² Additionally, in such cases, the child protection services should be notified of the interrogation and given the opportunity to be present.¹¹³

The Criminal Procedure Act does not explicitly mandate legal representation for children who are below the MACR and are suspected of committing an offence. However, it appears that in practice, in such cases public defenders are appointed for the children through expansive interpretations and recognitions of the special needs children have for such assistance.¹¹⁴ In cases where the suspect is under 18, it is the responsibility of the child's guardian to choose the defence counsel.¹¹⁵

The condition for using coercive measures is normally not met where the child suspect is below the MACR. As a result, children under the age of 15 cannot, for example, be subject to arrest or pretrial detention. However, the police are still authorized to bring individuals to the police station for various reasons and detain them there for up to four hours, including children under the age of 15.¹¹⁶ Additionally, there are certain coercive measures that can be applied to children below the MACR. For instance, searches are permitted to be conducted on children under 15

¹¹⁰ Ot.prp. nr. 106 (2001–2002), 15.

¹¹¹ The Child Protection Act § 13-2 and The Police Register Act § 26 and § 30. See Ot.prp. nr. 106 (2001–2002), 19, and Thomas Frøberg et al. (2023) 'Straffeprosessloven § 71b' Karnov <<https://lovdata.no/pro/#document/NL/lov/1981-05-22-25/%C2%A771b?searchResultContext=3212&rowNumber=1&totalHits=17>> accessed 18 august 2023.

¹¹² The Criminal Procedure Act § 232.

¹¹³ The Criminal Procedure Act § 232a. See Ot.prp. nr. 44 p. 122.

¹¹⁴ The Criminal Procedure Act § 100, Påtaleinstruksen § 8-1a and Oslo District Court's Guidelines for the Appointment of Defence Counsel, section 2.1 and 2.2.2.3.

¹¹⁵ The Criminal Procedure Act § 94.

¹¹⁶ The Police Act § 8.

and a separate form of restraining order has been devised for children under 15.¹¹⁷

When the investigation has been completed, the prosecution may decide to transfer the case to the child protection services.¹¹⁸ When the case is transferred to child protection services, the child may, as mentioned, be subject to intrusive measures, such as involuntary placement. This means that the failure to safeguard the child's procedural rights in the criminal justice system may permeate and adversely affect the process that will be carried out in the child protection system later.

Finally, similar to the situation in Sweden, a Norwegian incident revealed significant deficiencies in the investigation of a case concerning very young children below the MACR. In 1994, the police concluded that three young boys, aged 4, 5 and 6, were responsible for the death of a six-year-old girl, after a very short investigation.¹¹⁹ When the case was further examined upon media initiative in 2021, the police were criticized for having used manipulative and confession-focused interrogations with these three boys.¹²⁰ Eventually, in 2023, the prosecutor reached the conclusion that the three young boys were not responsible for the death of the six-year-old girl.

The Netherlands

The Netherlands has a separate child justice system for children between 12 and 18. The rules governing this system are to be found in the Code of Criminal Procedure (CCP) and the Criminal Code (CC).¹²¹ The Dutch child justice system has a dual character. On the one hand, the child justice system strongly corresponds to the adult criminal justice system, including its substantive notions, such as culpability, and procedural fair trial rights. On the other, the child justice system is also defined by its pedagogical and child-specific approach, which is reflected in its separate

¹¹⁷ The Criminal Procedure Act § 196 and § 222c.

¹¹⁸ The Criminal Procedure Act § 71b.

¹¹⁹ The case is internationally known through David A. Green, *When Children Kill. Penal Populism and Political Culture* (Oxford University Press 2012).

¹²⁰ Asbjørn Rachlew, 'Avhør av mistenkte barn. Silje-saken – en kritisk analyse' Politihøgskolen 2023 <https://phs.brage.unit.no/phs-xmlui/bitstream/handle/11250/2833034/avhor_av_mistenkte_barn.pdf?sequence=1&isAllowed=y> accessed 18 august 2023.

¹²¹ Article 486 ff CCP; Article 77a ff CC.

sentencing framework which consists of punishments and measures that are specifically designed for children. These sentences, which include, *inter alia*, youth detention, the closed treatment measure, community service and the behaviour modification measure, are generally less severe than adult sentences and have a primary focus on education, behaviour modification and the reintegration of the child.¹²²

The dual character of the child justice system is also reflected in the procedural rights position of children (above the MACR) who are accused or charged with a criminal offence. General due process rights and principles from the criminal justice system, such as the right to remain silent and the presumption of innocence, are equally applicable to both adults and children (above the MACR) who are accused or charged with a criminal offence. Additionally, the Code of Criminal Procedure contains a section with specific procedural rights for children (above the MACR).¹²³ When children aged 12 or above are accused or charged with a criminal offence, they generally have the right to free and mandatory legal assistance from the first police interrogation onwards.¹²⁴ Moreover, they have the right to be accompanied by their parents during interviews and hearings throughout the procedure.¹²⁵ The pre-trial detention of child suspects may only be used after the judge has explored the possibility of using community-based alternatives (i.e. by suspending the pre-trial detention order under certain conditions) and only for the shortest appropriate period of time.¹²⁶

Furthermore, specialized agencies, particularly the Child Protection Service and Youth Probation, inform the prosecutor and judges orally and in writing about the child's personal circumstances and advise them about appropriate interventions at the pre-trial stage and trial and sentencing stages.¹²⁷ If a child suspect is charged and brought before a court, (s)he will appear before a specialized youth chamber of the court, consisting

¹²² See: Yannick van den Brink, 'Tussen strafrecht en hulpverlening. Grondslagen, praktijk en schurende paradigma's in het Nederlandse jeugdstrafrecht' (2019) TJK 2, 144–162.

¹²³ See: Mariëlle Bruning, Yannick van den Brink and Lies Punselie, above note 12, chapter 9.

¹²⁴ Art. 489 and 491 CCP.

¹²⁵ Art. 488ab, 491a, 493a and 496 CCP.

¹²⁶ Art. 493 CCP.

¹²⁷ Art. 490, 494 and 494a CCP.

of either one or three child judges, for adjudication and sentencing.¹²⁸ In the youth chamber, there is more attention on safeguarding the effective participation of the child suspect, which requires a different, child-appropriate approach, and significantly more time and attention for discussing the personal circumstances of the child suspect, compared to adult criminal court hearings. Moreover, hearings in the youth chamber of the court are held behind closed doors.¹²⁹ Apart from the child judge(s), clerk, prosecutor, defence lawyer, possible victims and their lawyers, representatives from the Child Protection Service and Youth Probation and the child and his/her parents, in principle, no one is allowed to be present at the hearing. As long as the child is still under 18 at the time of the hearing, the child suspect and his/her parents are obliged to appear in person in court.¹³⁰

From a procedural rights perspective, it can be argued that – at least on paper – the Dutch child justice procedure for children above the MACR is largely in compliance with the UNCRC. In practice, however, there are concerns, for example, about the high reliance on pre-trial detention¹³¹ (which contravenes Article 37 (b) UNCRC) and the lengthy case processing times¹³² (which contradicts Article 40 (2) (b) (iii) UNCRC). Nevertheless, the procedural rights position of child suspects aged 12 and older is generally well-safeguarded in the Dutch Code of Criminal Procedure. This, however, is very different for children below the MACR who are involved in the justice system when they have allegedly committed a criminal offence.¹³³

In the Dutch child justice system, children below the age of 12 cannot be formally qualified as a suspect, be criminally charged, convicted or sentenced.¹³⁴ Nevertheless, when children below the age of 12 have allegedly committed a criminal offence, they can be arrested, searched,

¹²⁸ Art. 495 CCP.

¹²⁹ Art. 495b CCP.

¹³⁰ Art. 495a CCP.

¹³¹ Yannick van den Brink, *Voorlopige hechtenis in het Nederlandse jeugdstrafrecht. Wet en praktijk in het licht van internationale en Europese kinder- en mensenrechten* (Kluwer 2018).

¹³² Mariëlle Bruning, Yannick van den Brink and Lies Punselie, above note 12, 534–536.

¹³³ Yannick van den Brink, ‘12-minners in het strafrecht’ (2021) *Tijdschrift voor familie- en jeugdrecht* 43(9), 203.

¹³⁴ Art. 486 CCP; Art. 77a CCP.

interviewed by the police and kept in a police cell for up to six hours.¹³⁵ Whilst the Code of Criminal Procedure explicitly allows the authorities to deploy these intrusive interventions concerning young children, procedural rights for these children are strikingly absent.¹³⁶ As opposed to children above the MACR, these children are not formally granted the right to legal assistance prior to and during police interviews, the right to remain silent or even the right to be accompanied by their parents during the police interview under the Code of Criminal Procedure.¹³⁷ Yet, statements made by the child during a police interview can be used in civil child protection procedures, which do not have the same due process safeguards as child justice proceedings, but which can nevertheless result in intrusive child protection measures, including the deprivation of liberty.¹³⁸

Overall, in the Netherlands, the procedural rights position of children below the MACR is strikingly weaker than the position of children above the MACR, which – as the ESR Committee has made clear¹³⁹ – cannot be justified by the single fact that children below the MACR cannot be criminally charged, convicted or sentenced. Recently, legislative proposals have been submitted to Parliament which include proposals to strengthen the procedural rights position for children below the MACR. However, as regards their current procedural position, it could be argued that in the Netherlands, children below the MACR are not necessarily better off than children above the MACR when they have allegedly committed a criminal offence, which – as the UN CRC Committee warns¹⁴⁰ – may undermine the essence and effectiveness of the MACR under the UNCRC.

¹³⁵ Art. 487 (1) and (2) CCP.

¹³⁶ Marije Jeldes, 'De rechtspositie van aangehouden minderjarige verdachten in de eerste fase van het strafrechtelijk onderzoek' (2020) *Boom Strafbblad* 1, 20–26. See also: Yannick van den Brink, above note 133.

¹³⁷ Although the presence of parents is common practice.

¹³⁸ Marije Jeldes, above note 136; Yannick van den Brink, above note 133.

¹³⁹ *International Commission of Jurists (ICJ) v. Czech Republic*, above note 23; Yannick van den Brink and Jessica Valentine, above note 9.

¹⁴⁰ General Comment No. 24, above note 5, paras. 22–23.

5. Conclusion and Discussion

This chapter explored what an appropriate MACR looks like and what is required, in terms of procedural rights for children below and above the MACR, to establish a child justice system which is in accordance with international children's rights standards. According to the UN CRC Committee, the MACR should be at least 14, preferably 15 or 16. This position finds support in evidence from neuroscience and child development research. Indeed, research suggests that the still ongoing development of the adolescent brain affects certain kinds of decision-making during adolescence. The fact is that the prefrontal cortex is still developing and the capacity for abstract reasoning is still evolving in children aged 12 and 13 and in general until the age of 25. Based on this, one cannot assume that children below the age of 14 are sufficiently capable of understanding the impact of their actions or comprehending criminal proceedings.¹⁴¹

On the surface, it seems that Sweden and Norway – which both implemented a MACR of 15 decades ago – are in full compliance with the UN CRC Committee's recommendation to establish an appropriate MACR, whilst the Netherlands falls short with its MACR of 12. However, informed by the case studies of the child justice systems of Sweden, Norway and the Netherlands, this chapter illustrates that the effective implementation of an appropriate, children's rights compliant MACR in domestic child justice systems proves to be challenging and requires more than just setting an age limit. Overall, the case study analyses reveal three key issues in this regard.

Firstly, the case studies show that the MACR can be a highly controversial and politically sensitive topic, especially when young children commit serious offences that spark public outcry. Indeed, in the Netherlands, the main reason why the Minister of Legal Protection refused to raise the MACR from 12 to 14 was his claim that 12- and 13-year-olds can also be involved in serious offences, as to which he deemed the possibility

¹⁴¹ General Comment No. 24, above note 5, para. 22. See e.g.,: Martina Knežević and Ksenija Marinković, 'Neurodynamic correlates of response inhibition from emerging to mid adulthood' (2019) *Developmental Cognitive Neuroscience* 36, 100626; Laurence Steinberg, 'Adolescent brain science and juvenile justice policymaking' (2017) *Psychology, Public Policy, and Law*, 23(4), 410–420.

of a justice system response necessary. Recently, in Sweden, politicians have used public outcry over incidents of serious crimes committed by children to call for a lowering of the MACR. This highlights that raising or maintaining a MACR to/at an appropriate level requires a principled approach that withstands populist, punitive pressures,¹⁴² recalling that young children can admittedly commit an act that breaks the law, but they cannot be held criminally responsible for it, as they lack the capacity to effectively participate in criminal proceedings and to be considered criminally culpable. Effective and appropriate responses to young children who commit serious offences should therefore be sought outside the justice system.

Secondly, the case studies show that children who are below the MACR can still be involved in criminal justice proceedings in response to them allegedly committing a criminal offence. In Norway, children below the MACR can be subjected to police investigations, including searches, police interviews and police custody (up to four hours). In the Netherlands, children below the MACR can be arrested, searched, interviewed by the police and kept in a police cell for up to six hours. In Sweden, children below the MACR can even be subjected to an evidentiary trial ('bevistalan') in a criminal court, without specialized child judges, and exposed to several coercive measures. Consequently, even though children below the MACR cannot be criminally convicted and sentenced, they can still be harmed by exposure to the justice system, which is contrary to the views of the UN CRC Committee. Indeed, where possible, children below the MACR should be kept out of the justice system entirely.

Thirdly, the case studies make clear that the protection of procedural rights of children in conflict with the law requires particular attention, when it comes to children above and below the MACR. Indeed, Sweden, Norway and the Netherlands all have some flaws in their procedural rights protection for children above the MACR who are involved in justice system proceedings. Most strikingly, Sweden and Norway do not have specialized youth courts or judges, which is not in accordance with the UNCRC. However, the case studies also reveal that, when it comes

¹⁴² Cf. Wendy O'Brien and Kate Fitz-Gibbon, 'Can Human Rights Standards Counter Australia's Punitive Youth Justice Practices?' (2018) *International Journal of Children's Rights* 26(2), 197–227.

to procedural rights protection, children who are below the MACR and involved in justice system proceedings seem to be even worse off. In the Netherlands, children below the MACR who have allegedly committed an offence can be arrested, interviewed and kept in police custody, but – since they cannot be formally qualified as a ‘suspect’ – they are not entitled to the key procedural rights that child suspects above the MACR have, such as the right to legal assistance, the right to be presumed innocent and the right to remain silent. Likewise, Norwegian law does not explicitly mandate legal representation for children below the MACR when they are arrested, interviewed or kept in custody by the police. Children below the MACR are thus dependent on the police and the court recognizing and emphasizing the special needs of children in these situations, when interpreting general provisions. Also, in Sweden, children below the MACR can be kept at a police station for interrogation whilst legal assistance is not guaranteed.

Even though children below the MACR cannot be criminally convicted or sentenced, the lack of procedural protections for these children when they are involved in criminal justice proceedings is highly problematic. This is not just a matter of principle, as flaws in procedural rights protection can have far-reaching consequences for the child. Indeed, incriminating statements made by the child during police interviews or – in Sweden – court hearings can later be used in child protection proceedings that may result in intrusive measures, including out-of-home placements in closed care institutions. Moreover, the negative impact of the police incorrectly determining that a young child has committed a serious criminal offence can be significant and harmful. As discussed in this chapter, both the Swedish and Norwegian criminal justice systems have been shocked by cases where very young children have been mistakenly considered by the police to have killed another child. Failure to ensure procedural guarantees increases the risk of such erroneous conclusions. Consequently, it is important that, when children below the MACR are involved in criminal justice procedures, they are equally entitled to the due process rights and principles laid down in Article 40 (2) UN CRC. Nevertheless, the point of departure should still be that children below the MACR are kept out the justice system altogether.

This might be challenging, however, when a child below the MACR has allegedly committed a serious offence, especially when the inter-

ests of victims, society and/or the child him/herself call for a thorough investigation into the case and potentially intervention. For those cases, alternative, child-appropriate, rights-based procedures outside the formal criminal justice system – different to the court-based Swedish ‘bevistalan’ in the way it was formalized in 2023 – should be developed to investigate and assess the evidence and to identify the child’s needs and risks which may require child protection interventions.

Overall, returning to the overarching theme of the book, it is clear that the rule of law demands State authorities to respect the human rights of children, also when they have allegedly committed a criminal offence. Under the rule of law, States are obliged to establish an appropriate MACR – which is recommended to be at least 14 and preferably 15 or 16 – below which children should ideally be kept out of the justice system entirely. The rule of law also requires that children above and below the MACR are entitled to sufficient procedural rights that effectively protect them against unlawful and arbitrary State intervention. In this chapter, it has become clear that, even in supposedly progressive jurisdictions such as Sweden, Norway and the Netherlands, there is still a world to win when it comes to safeguarding the rule of law and human rights protection in child justice.