

## Bergen Exchanges on Law & Social Transformation

20 - 24 AUGUST 2018

[DRAFT]

# PROGRAM

Focus areas:

**HEALTH & the LAW** Keynote Address:

**“Human Rights and Fair Priorities in Health”**

by **Norman Daniels** (tbc\*) Harvard University, USA

**RIGHTS of the CHILD** Keynote Address:

**“Participation for Unaccompanied Children”**

by **Helen Stalford** University of Liverpool, UK

*Annual lecture on Law & Social Transformation*

**Sally Engle Merry**

Silver Professor of Anthropology, New York University College of Arts and Sciences

**On translating human rights into local justice  
& the quiet power of indicators**

Tentative title (tbc\*)

**“those who create indicators aspire to measure the world  
but, in practice, create the world they are measuring”**

**Bergen University Aula**

**Wednesday 22 August 15:30**

**Followed by reception hosted by the Mayor of Bergen (by invitation)**

\*\*\*\*\*

## Topics to be discussed at the 2018 Bergen Exchanges:

### Human Rights and Fair Priorities to Children in Health

The keynote lecture by Norman Daniels, will be followed by a roundtable on how to set fair priorities to children when allocating resources in health. The right to health aims to secure for all the highest attainable standard of physical and mental health, but what when resource scarcity makes it impossible to provide optimal health care for the entire population? Can the right to health be useful in the pursuit of fair priorities in health, or does maximalist conception of health rights undermine efforts to advance justice in health? Should we, when prioritising health resources, use other standards for effectiveness and costs of treatment with regard to the medical needs of children? What does the obligation to ensure the highest attainable standard of physical and mental health mean for disabled children? And when should children have autonomy over decisions regarding their own health – for example regarding gender-affirming treatment, male circumcision or blood-transfusion?

### The Role of Law in Global (and National) Health Governance

#### - and the report of the Lancet Commission on “Health and the Law”

Agenda 2030, and the Sustainable Development Goals, which followed the Millennium Development Goals, sets out an ambitious agenda on an array of issues of global health. The SDGs, as opposed to the MDGs, set out a universal framework that is applicable to high-income and low-income countries alike, and concentrates in inequalities. Achieving goals, such as in health, are explicitly acknowledged to be connected to other goals, such as sustainable production, gender equality, and effective and transparent institutions. **The Lancet-Georgetown/O'Neill Commission on Global Health and the Law** (to be released before the Exchanges) sets out the concept of legal determinants of health - akin to political and social determinants - and examines how law can be used to translate vision into action on sustainable development. Among other things, it is clear that law reform will be necessary to strengthen the governance of national and global health institutions, as well as to implement fair, evidence-based priority-setting on the path to Universal Health Coverage. A number of UN groups are also examining how legal reform and enforcement can be used to strengthen accountability in global health, and in particular the Un Secretary General's Independent Accountability Panel for the Global Strategy on Women's Children's and Adolescent Health (IAP) will be exploring the multiple layers of laws and institutions required to private sector accountability for their role in global health. This role goes beyond provision of services or medicines and commodities to influencing health, through direct consumption patterns, as well as creating social norms, and influencing political processes, as well as financing development. This brings into focus the tremendous array of legal forms and spaces, from regulatory frameworks to judicial enforcement to securities, tax and trade legislation in other countries. But there are many challenges to harnessing laws to effectively regulate the asymmetries of power and lack of accountability that pervades national health systems as well as global health architectures, due among other things to public incapacity and sometimes capture. Moreover, of course, often laws are punitive and discriminatory and have negative effects on both health of certain populations, as well as on inclusive democracy. This panel will explore the potential and challenges of harnessing law, including international human rights law,

to promote equity and accountability in health systems and global health governance. Discussion will include concrete experiences from different regions that offer lessons (positive and negative), as well as analysis of the global stage.

## Political & legal determinants of sexual health: evidence of impact

## Political & legal determinants of reproductive health: evidence of impact

The roundtables present findings from the *LawTransform* research projects on “Political Determinants of sexual and reproductive health in Africa” and “Sexual and Reproductive rights Lawfare: Global Battles”. They will discuss dynamics of politicisation and legal change regarding sexual and reproductive rights, the effects of this on health service delivery as well as on sexual and reproductive health.

## Researching intersectionality

Human rights violations are closely related to structural inequalities in society – when we look at barriers to the implementation of the right to health we need to take as a starting point how overlapping structures of discrimination – age, sex, race, class, religion, cast, sexual orientation and gender identity ... - intersect to form barriers to rights realization, including of the right to health. This poses challenges for research as well as for policy.

## Corruption and health

Corruption is a major health risk. It takes different forms – from bribes and charging of unofficial fees, via sale of fake or substandard drugs, to corruption in public procurement of drugs and infrastructure, and diversion of public health funds. Corruption is one of the biggest threats to universal health coverage and estimates indicate that in some countries, as much as 80 per cent of non-salary health funds disappear before reaching local health facilities. This round-table discusses how the scale and form of corruption vary between health systems, and some of the efforts taken to address it.

## Criminal justice and mental health

This roundtable discusses challenges arising from the way in which criminal justice systems and criminal law deals with issues concerning mental health.

## Abortion Lawfare: battling criminalization

The past year has seen surprising changes towards legalization of abortion in countries known for their strict abortion laws. Chile liberalized their ‘under-no-circumstances’ stance in August 2017; Ireland goes to the polls on Friday 25 May to vote in a referendum that could end the country's ban on abortion; and on 11 April, the Argentinian Congress started the debate on a bill proposing allowing abortion in the first 14 weeks. Why do we see these moves, and why now? In this roundtable we meet some of the key ‘movers’ behind these reforms.

## Migrants health rights

While international human rights instruments recognize the right to health as a basic human right, access to health services is often precarious for migrants, and particularly for those who do not have legal residency. They are regularly denied access to services, even in countries with universal health care systems – who have ratified all the relevant international human rights treaties - such as Norway. And with increasingly strict policies of migration and asylum, the situation is growing progressively worse. In this roundtable, health practitioners and researchers discuss the health rights of migrants in Norway and other countries, and whether the situation constitutes a human rights violation.

## Law & Technology

Technology is changing the law and the legal profession innumerable ways. This roundtable discusses some of the most pertinent issues – from challenges of developing legal regulations that can adequately handle the threats that new technologies are posing to our privacy, to computer judging that look set to change the way in which judicial institutions operate and the work of the legal profession.

## Children's Right to Health:

discussions on vaccinating children; childhood obesity; adolescent sexual and reproductive rights and health; and the rights of transgender children

This evening session, will discuss the multifaceted issue of children's right to health:

Skepticism towards **childhood immunization** remain widespread. 20 years after Andrew Wakefield published his now-retracted paper on a supposed link between the MMR vaccine and autism, the European Centre for Disease Prevention and Control report a spike in diseases such as measles, chicken pox and mumps, and the WHO strategic goal to eradicate polio, rubella and measles by 2020 is now unlikely to be met. Other disease have made a reappearance in Europe, such as the incidence of diphtheria in Spain in 2015. Consequently, several European governments have decided to tighten their vaccination laws, including Italy and France who have introduced compulsory childhood vaccinations this year. Vaccine-preventable diseases are a public health priority, yet despite the empirical evidence in favour of vaccinations, many parents defend their right to parental autonomy and refuse. Their reasons range from religious and anthroposophical beliefs, a distrust in the medical system and the pharmaceutical industry, to an insistence that parents should be the final *arbiter* in all child-related matters. How can parental rights be reconciled with paternalistic regulations to promote public health? Given that compulsory vaccination schemes do not yield better results than voluntary programmes, should the state do more to educate parents about the risks and benefits of vaccines?

Is **childhood obesity** a case of medical neglect? Does it warrant state intervention? What is the state's responsibility in creating a regulatory framework that supports parents in making healthy choices for their children's nutrition, e.g. prohibition of obesogenic marketing for children, hidden sugars, etc. Do children have a right to not just food, but to healthy and safe food? How is the issue of

malnutrition / obesity addressed in the child welfare system? Have there been any cases heard in the national or international courts? The ECJ ruled in 2014 that obesity can be a disability, at least in the work context - are parents and/or the state guilty of disabling children by not doing more to prevent childhood obesity?

Issues of **adolescent sexuality** are highly politicised in many parts of the world, with consequences for the sexual and reproductive right and health of young people. In Latin America (and elsewhere) comprehensive sexual education in schools and access to emergency contraception are highly politicised with significant consequences for teen pregnancy rates.

Laws relating to the **change of legal and physical gender** vary radically between countries. Some countries have total bans on any change of gender, whether physical or legal. In other cases there are strict conditions, sometimes tying the change of legal gender to physical sex-change. And, and even where conditions are less severe, age limits often prevent children from changing their gender.

## Litigating health rights – what happened with the mega-judgments?

The first decade of the millennium has witnessed a surge in structural cases decided by courts of the Global South regarding health rights and their social determinants. In widely discussed mega decisions adopted in India, Colombia or Argentina courts have experimented with a variety of procedural and remedial tools in environmental health, food or health systems design matters. A first generation of pioneer socio-legal studies have scrutinized the context of the cases, the weak and strong remedial approaches deployed by courts, and the cases' early direct and indirect effects. As the cases enter their second decade of life, time is ripe to reopen the conversation to comparatively assess courts strategies and performance. What are the challenges faced by courts and other actors dealing with protracted implementation processes? How have courts internal organizational capacities and resources evolved? Has the execution of the decision involved other courts or administrative bodies? How have participation, information and transparency mechanisms been shaped? What about communication strategies? How have the impacts of the mega cases evolved? The panel will invite participants and researchers involved in the mega cases to discuss from a comparative perspective the transformations observed in the courts, governments and civil society after a decade of experimentation.

## Children's Climate Litigation -

### Future Generations' rights to a healthy environment

We see a growing number of court cases where children challenge the state for not acting responsibly to secure their (and future generations') rights to a healthy environment. Most of the cases have been lodged before courts in the USA but we also see in other parts of the world, including in Colombia, where a landmark judgment was handed down by the Supreme Court in April 2018. Are children lodging these cases really active participants or mere symbols? And what is the likelihood of winning these cases- and of having real world effects?

## Judging democratic backlash

Many countries are currently experiencing a narrowing of democratic space. This frequently affects the court, both directly and indirectly. It often affects who are appointed (and not appointed) to the bench as well as the terms of their operation. Courts in some cases continue to serve a pro-democratic role, upholding rights and sanctioning violations – but they are also used by governments as part of their strategies to silence the opposition and ensure electoral victories. This roundtable forms part of a *LawTransform* project on *Breaking BAD: Backlash against democracy in Africa* and discusses the experiences of African courts in comparative perspective

## Women on the Bench

How is it to be a woman judge? What are the incentives and obstacles that women face on the road to judgeship in different societies? And does it make a difference - to the operation of the court, its legitimacy or its judgments - whether there are women judges on a court – and how many they are? In this session **Ruth Rubio Marin** will interview women who have made it to the bench in different countries about their experiences. This is part of a new *LawTransform* project on “Women on the Bench”

## Children's Right to child friendly Justice

Courts, traditionally being oriented towards parental rights and presumptive autonomous individuals, are criticized for not being focused on children's interests, rights and competencies. Children who are at the centre of cases concerning them, child custody, child protection, criminal charges, are often not engaged as agents in the decision-making process. Reports from children and young people regarding their experiences of the justice system (covering criminal, family and child protection courts), found a high degree of mistrust (Kilkelly, 2010). Shortcomings such as “intimidating settings, lack of age-appropriate information and explanations, a weak approach to the family as well as proceedings that are either too long or, on the contrary, too expeditious” were just some of the deficits highlighted by the Council of Europe (2010: 7). The Convention on the Rights of the Child, article 12, states that “Children shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body.” **But what does it mean to be heard, are courts considered child-friendly, and how do courts vary as child-responsive settings across varying systems? Guidelines on Child Friendly Justice (Council of Europe, 2010) underscore the necessity of skills and competencies of judiciary staff. Can children's Rights Capacity be improved through empowerment and advocacy?** In this session we will hear results from several action projects on child friendly courts. “Improving Decisions through Empowerment and Advocacy (IDEA)”, includes five countries, Estonia, Finland, Ireland, Hungary, and Sweden. The researchers have provided interdisciplinary training on legal developments, child participation, child development and welfare and staff welfare to lawyers representing children or children's interests. The Change Factory (Norway) has a training program for district courts and country boards to improve the dialog and inclusion of children. What have we learnt from these interventions? Are courts becoming more child friendly?

## Changing the system from within: influencing front level practice and politicians mindset

Societies and states are at a crossroad in how children are treated and how their rights are respected and protected. Children's new position and their strong rights create tensions and challenge the traditional relationships between family and the state, and the state's and court's role towards its citizens. The individuals receiving services are raising their voices and demands a place at the table where decisions are made. These expert by experience attempts to change the system and the decision-making processes, and the Child protection Professionals – Proffene – have made quite a splash in the Norwegian political administrative system, bringing in their perspectives of children in the child protection service, into the public debates and on the political agenda. They are targeting the government from all angles. Ground breaking in a Norwegian context, Proffene made an alternative child protection law in 2016, parallel to the government's expert committee's suggestion. How did they do it, and had it any effect? What can the role of "experts by experience" be in such processes? How can children take action and lobby for change? Proffene have also implemented several programs at the frontline of our public administration, and one of these is "My life – child protection" in which over 200 child protection agencies across Norway have signed up for making changes according to a child centric work practice. The program is impressive in its design and its comprehensiveness, but does it work? How can child protection workers, with a constant time pressure and scarce resources, change their way of working with children at risk? The Pro Bono group at the University of Bergen, has studied the effects of My Life Child Protection, and together with Proffene and child welfare workers, this session will discuss how to make changes, and how to make them last.

## Making professional decisions and judgements

Convention on the Rights of the Child (CRC) is a global and European standard. The CRC is a legal document with global reach and thus a cosmopolitan imprint. The CRC is the most far-reaching document explicitly stating the rights of children. Child protection viewed through a prism of children's rights should concern how the rights of children can and should influence and shape decisions that are made in different parts of the child protection system. This involves how assessments are made, decisions about preventive services including children with disabilities, about out-of-home placement, emergency placements, adoption and aftercare. It will be important to discuss whether and how the CRC should lead to different ways of working professionally. Today, we have most prominently seen the influence of the CRC in shaping demands towards the involvement of children in decision-making. Guidelines from the UN Committee on the Rights of the Child (General Comment 12, 2009) suggest nine conditions that are necessary to fulfil participation rights for children: (1) transparent and informative; (2) voluntary; (3) respectful; (4) relevant; (5) inclusive; (6) supported by training; (7) safe and sensitive to risk; (8) accountable; and (9) child-friendly. Are these standards relevant for jurisdiction across the world or are there other more pressing problems that are overshadowing children's rights. The general question is, **how the CRC can be an instrument in shaping decision-making systems and courts in becoming professional in line with the CRC.**

## The Media - is 'sharenting' a violation of children's rights?

The use of media, including the internet and social media, to share personal information is on the rise across all sections of society. This includes parents, who increasingly engage in "sharenting": the online sharing about parenting experience and their children's lives, thereby creating a digital identity for children before they themselves can participate in online life (Steinberg 2017). This is not merely



an issue of privacy rights, as it also has significant impact on the healthy development of the child, affecting her sense of identity and her mental health as she matures. In that sense, oversharing of information online may pose a threat to a child's sense of autonomy over her developing identity, since the "internet does not forget". For example, photographs of children have been used for cyberbullying and general mockery, as in a Facebook group sharing "ugly babies" pictures taken without permission from mothers' profiles. Other examples include the divulgence of medical information, such as children's and teenagers' mental health condition, or disabilities. It has been argued that children's rights are largely absent from internet governance (Livingstone et al, 2015), affecting children in many ways and requiring urgent regulatory attention. Should the state limit or prevent certain types of "sharenting"? Should parents be educated in sensible sharing practices with regard to their children?

## The Refugee Convention and Children's Rights

### - does ratification matter?

Maja Janmyr was awarded the Chr. Michelsen Prize for 2018 for her article "*No Country of Asylum: 'Legitimizing' Lebanon's Rejection of the 1951 Refugee Convention*" (*International Journal of Refugee Law* 2017). To introduce this roundtable she will talk about the rights of children under the refugee convention and to what extent children's legal and actual situation is affected by non-ratification.

### Children on the run.

## Keynote by Prof Helen Stalford, followed by a panel debate

### Prof. Helen Stalford: *'David and Goliath: Children's Participation in Immigration Proceedings'*

This presentation considers what it means to adopt a children's rights-based approach to immigration and asylum law. It focuses, in particular, on children's right to be heard as expressed in Article 12 of the UN Convention on the Rights of the Child (UNCRC). Notwithstanding the vast literature on children's participation on the one hand, and on child migration on the other, there has been virtually no attempt to bring these fields of inquiry together to interrogate the currency of participation for immigrant children. This is perhaps not surprising: one might query the relevance of participation, conceptually or practically, in proceedings that are arguably inimical to individual autonomy (there is no specific human right to choose the country in which you want to live) and that permit only narrow, welfare-related concessions to an otherwise rigid regime primarily designed to protect state borders and public resources. And yet it is argued that participation and, specifically, the weight to be attached to children's views, is a crucial dimension of migration proceedings, particularly in relation to unaccompanied children, not least because, in the absence of any other documentation or supporting evidence, the outcome of the case rests heavily on the child's own testimony.

Applying children's rights-based conceptualisations of participation to this area are contested and complex. The coherence and credibility of children's direct accounts, the influence of anecdotes on what should be told or not told to authorities, children's motivation for migrating, are factors playing into the proceedings of applying for asylum or residence permits. The obligations of the States are

clear: Migrant children have the same rights as domestic children, and unaccompanied migrating children are an exceptionally vulnerable group. States still have to uphold a threshold for immigration, and thus migrating children will meet a system that also are operating under a rather more hostile agenda of exclusion and expulsion. What does compliance with Article 12 UNCRC actually mean in asylum proceedings?

## Gypsy Kids Taken From Home (BBC documentary, 2018)

Hungary has more Roma gypsy kids in institutional care than any other EU country and is facing a potential crisis. Stacey Dooley meets some of the parents, kids and social workers on the frontline of Hungary's child protection system, as she investigates accusations by Roma families of widespread institutional racism in the Hungarian care system. Against a backdrop of growing support for nationalist and far right politicians amongst Hungarians, Stacey questions if there is a genuine need for Roma children to be protected or if prejudice is driving the growing trend to take Roma kids from their families. Visiting some of Hungary's poorest communities, Stacey meets Roma gypsy families who are threatened with child removal and mothers who have recently lost their children, as well as spending time with the social workers charged with making the life changing decision to remove children deemed at risk. Stacey meets staff and teenage residents in Hungary's children's homes where often over 70% of the residents are Roma gypsy kids. Stacey discovers that many of these homes are far from a refuge from the chaotic families the children were taken from, but instead many are said to be rife with drug use, prostitution, physical and sexual violence, with care workers feeling powerless to intervene. Outside the homes she confronts the pimps who are exploiting Hungary's most vulnerable children, only to discover many of them are Roma themselves. Caught between anti-gypsy hostility in their communities, the demands of child protection services, and growing up in struggling families who often have social problems, Stacey explores if there's any hope for Hungary's Roma gypsy kids in care.

<http://www.bbc.co.uk/programmes/p05x5rh4>

## Child's best interest – a principle without substance?

In 2015, the Norwegian Supreme Court issued two contrasting judgments on child welfare. Both cases were issued by the same presiding judge. What does this tell us about child welfare in the legal sphere – and what are the implications of this on child welfare practice? If our highest ranking judicial officers can't apply the law in this field consistently – what does this tell us about the rights of children?

Legislation

## The European Court of Human Rights and Child's Rights

How does the ECtHR handle cases that concern child care proceedings/adoption without consent/care orders of newborn babies? How does the ECtHR understand the margin of appreciation, subsidiarity principle and what is "necessary in a democratic society" in these cases? Is the case law uniform on this? And is there European consensus to speak of on these issues? Norway has 9 cases communicated by the ECtHR to the Norwegian government within the field of child protection. 4 of these 9 cases concern adoption as child protection measure with the applicants claiming a violation

of Article 8. How does and should the court weigh biological ties and legal ties and best interest assessments in light of Article 8.,

## Rights of the Child:

### International norms & State obligations – the issue of poverty

The United Nations' Convention on the Rights of the Child (UNCRC) places extensive obligations on governments to provide for the needs of children. This poses challenges for rich as well as for poor countries. The committee on the Rights of the Child is tasked with overseeing the implementation of the Rights of the Child, and professor Kirsten Sandberg chaired the committee (xx-xx) and we ask her to reflect on areas where states must improve, but also on the standards of what is good enough. Specifically, it is interesting to discuss [Child Poverty as a Human Rights Violation](#). Article 27 of the UNCRC recognizes "the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development." What does this mean in practice for countries with highly different economic conditions, and states with different welfare state models? For example, a country like Norway is it a human rights violation when one in ten Norwegian children live in (relative) poverty? According to figures from The Norwegian Directorate for Children, Youth and Family Affairs, there are major geographic and group differences, and migrant children are hugely overrepresented on this statistic. Is this in violation of [children's protection against discrimination](#) (UNCRC §2)?

## The right to water, urban governance & children's right to health

Water is an increasingly scarce resource with pressures from growing populations and industrial developments depleting and polluting water resources, and with changes in the climate exacerbating the situation. Some of the world's largest cities – including Sao Paulo, Cape Town, Bangalore, Mexico City, London and Miami - are facing severe scarcity of drinking water, posing severe risks to human life and health - and to the rights for children and future generations in particular . This roundtable discusses the challenges and to what extent the adoption of the right to water as a human right, can contribute towards better and more just water governance. This panel is linked to the *LawTransform* project on "Water Rights"

## Innovative Teaching on Law & Social Change

LawTransform and partner institutions in Brazil, the USA, South Africa and India won an INTPART grant (2018-21) to collaborate on strengthening their teaching in the field of Law & Social Change. The ambition is to improve and develop new models for research-integrated teaching, starting with the Bergen Exchanges PhD course on "Effects of Lawfare". In this session, which launches the project, presents the core ideas of the program and challenges students of this year's Bergen Exchanges PhD course to point to new directions.

## Understanding Discretion & Paternalism: autonomy, paternalism, justice

**Moderator:** Marit Skivenes

In the majority of jurisdictions and countries children are not allowed to vote, to buy alcohol, to have sex, to marry, or to have paid employment. What are children's rights? How do children's rights challenge parents', and how should they be balanced when they are in conflict?

Paternalism project will conduct the first ever experiments to systematically examine how people make choices in situations where there is a trade-off between a person's freedom and autonomy and other moral values. The project takes a broader approach to paternalism than the existing literature, by moving beyond the focus of paternalism as being a feature of a hierarchical relationship, between the state and the citizen or between the parent and the child, to also study the nature of paternalistic behavior in non hierarchical relationships. The project also introduces the concept of extended paternalism, which takes place when the paternalistic intervention is justified by being in the interest of some other moral value.