

# Children's Right to Equality

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The grounding principle of the United Nation's Universal Declaration of Human Rights is that all people are born 'free and equal in dignity and rights' (art. 1).<sup>1</sup> Today the principle of non-discrimination is probably the most widely-protected norm of international human rights law, and the idea of equal rights and the dignity of human beings can be found in the preambles of most human rights treaties.<sup>2</sup> However, many children face a wide range of inequalities early in life. Children are born with equal rights but in unequal contexts, creating hierarchies among children. Those hierarchies are not caused or voluntarily chosen by children or their parents, nor are they random, but fall into patterns based for example on race, gender and class. They are linked to the question of how the policies and structures of society produce and maintain inequality.<sup>3</sup>

Children also experience discrimination purely because they are children. For example, children are not listened to, and their views are not given the same weight as those of adults in matters affecting children's lives. Age-based discrimination of children, sometimes called adultism, is challenging to define and to address, yet it touches all children in some way. Indeed, age-based discrimination is considered one of the main causes of violations of children's rights and this finding also influenced the enactment of the UN Convention on the Rights of the Child (CRC or the Convention).<sup>4</sup>

This chapter examines *equality and non-discrimination towards children from the perspective of children's rights*. The term 'child' here refers to anyone under the age of 18. The focus is on age-based discrimination. A children's rights approach is holistic and deeply-rooted in the CRC. It emphasizes supporting the strengths and resources of children themselves and of all social systems that include children, such as family, school, community, institutional, religious and cultural systems. To this end, article 5 of the Convention plays an important role by defining the right of children to be directed and guided in the exercise of their rights by caregivers, parents and community members, in line with the child's developing capacity.<sup>5</sup>

The children's rights approach is guided by the four general principles of the CRC: the right to non-discrimination (art. 2), consideration of the best interests of the child (art. 3, para. 1), the right to life, survival and development (art. 6), and respect for the views of the child (art. 12). These principles are both independent rights and principles for interpreting the rights outlined in the CRC. All rights guaranteed in the Convention must be ensured without discrimination,

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<sup>1</sup> Dignity gives substance to or deepens equality. Dignity includes respect for the individual and a recognition of the inherent humanity and equal worth of all individuals. See for example Nancy E. Dowd, 'Children's Equality Rights: Every Child's Rights to Develop to Their Full Capacity' (2019) *Cardoza Law Review* 1367–1440, 1405–1406.

<sup>2</sup> Like many other constitutions, the Finnish Constitution (731/1999) guarantees the inviolability of human dignity (s. 1.2). It also requires that children be treated equally and as individuals, and guarantees their right to influence their own affairs according to their age and level of development (s. 6.3).

<sup>3</sup> Dowd, 'Children's Equality Rights' 1367, 1372.

<sup>4</sup> Samantha Besson and Eleonor Kleber, 'Article 2: The Right to Non-Discrimination' in John Tobin (ed.), *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) 42–43.

<sup>5</sup> GC No 13 (The Right of the Child to Freedom From All Forms of Violence, 2011) para 59.

considering the best interests of the child, and safeguarding the child's right to life, development and participation; the realization of these rights must also consider the inseparability and interdependence of all human rights.<sup>6</sup>

In accordance with the children's rights approach, this chapter aims to identify specific features of child discrimination and thus to make legislation on child discrimination more practical and easier to implement.<sup>7</sup> The chapter is structured as follows. Section 1 introduces the UN Convention on the Rights of the Child as a judicial tool for protecting children's rights. Section 2 examines equality and non-discrimination as fundamental principles of human rights law in general and of the CRC in particular. The review of article 2 CRC on non-discrimination is guided primarily by the General Comments (GCs) of the UN Committee on the Rights of the Child (later the CRC Committee), the monitoring body of the CRC. The section concludes with a review of the obligations of states to implement the non-discrimination principle in the CRC. Section 3 analyses the CRC Committee's views, and interpretations of non-discrimination based on the Committee's concluding observations concerning Nordic countries and on the Committee's jurisprudence. Section 4 examines who is responsible for protecting children from discrimination. This chapter ends with a discussion and some conclusions.

## 1 The UN Convention on the Rights of the Child

As all human rights treaties apply to every human being, children as well as adults, they also protect children's rights to equal treatment and non-discrimination. However, many existing treaties have been deemed to inadequately protect children from *child-specific discrimination*. This special protection for children is provided by the UN Convention on the Rights of the Child. Indeed, equality and non-discrimination were central to the draft of the CRC. Among other things, the CRC notes that children cannot exercise their rights the same ways adults can, and that child discrimination is particularly difficult to address, as it may be hidden in a desire to protect children. Furthermore, children, due to their age and lack of legal competence, are regularly excluded from actively taking part in judicial procedures through which they could fight to protect their right to freedom from discrimination.<sup>8</sup>

Drafting the CRC certainly took time,<sup>9</sup> but it was finally adopted on 20 November 1989 and entered into force internationally on 2 September 1990. All

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<sup>6</sup> GC No 5 (General Measures of Implementation of the Convention on the Rights of the Child, 2003) para 12.

<sup>7</sup> Kirsikka Linnanmäki, 'Lapsen etu huoltoriidan tuomioistuinsovittelessa: Lapsioikeutta, sovitteleteoriaa ja empiriaa yhdistävä tutkimus' [The Best Interests of the Child in Child Custody Disputes in Court-connected Mediation] (2019) Alma Talent 77.

<sup>8</sup> Besson and Kleber, 'Article 2' 42-48.

<sup>9</sup> The CRC was preceded by the Geneva Declaration of the Rights of the Child (1924) and the UN Declaration of the Rights of the Child (1959). These declarations were not legally binding. Poland proposed concluding the Convention in 1978. See the drafting history of the CRC: John Tobin, 'The Foundations of Children's Rights' in John Tobin (ed.), *The UN Convention on the Rights of the Child* 3-6.

Nordic countries have ratified and adopted the Convention,<sup>10</sup> and none of them have valid reservations. The Convention covers all aspects of individual rights (civil and political rights as well as economic, social and cultural rights) and it also addresses special categories of children such as refugees, immigrants and those with disabilities. Legally-binding, this allows the CRC to act as a powerful judicial tool for protecting children's overall well-being and development. The number of ratifications<sup>11</sup> as well as the pace at which the Convention entered into force, only a year after its adoption, reflect the States Parties' commitment to the protection of children's rights – at least at the level of international diplomacy.

However, the reservations<sup>12</sup> expressed by States Parties and the initially weak control mechanism, which uses periodic reports from States Parties and the Committee's observations of States Parties, can be seen as undermining the legal weight of the Convention to some degree. Article 2 on discrimination is not the most common object of expressed reservations, but a few State Parties have referred to it in the context of immigration or foreigners' rights, so that the Convention does not automatically guarantee foreigners the same rights as nationals. In addition, several Islamic countries have expressed general reservations to all provisions of the Convention that are incompatible with Islamic Sharia law and local legislation.

Despite these shortcomings, the Convention has nevertheless initiated a 'seismic shift in the legal status of children,' transforming children from mere objects of protection and care to active subjects in their own lives. The Convention underlines the fact that children hold all human rights from birth. They are individuals (art. 5) with their own identities (arts. 7 and 8) and civil rights and freedoms (arts. 13–16), as well as economic, social and cultural rights (arts. 24, 26 and 28). This also applies outside the context of families, which is where children are traditionally and most often positioned.<sup>13</sup> Furthermore, the

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<sup>10</sup> Sweden 1990; Finland, Norway and Denmark 1991; and Iceland 1992. It seems that, during ratification, many Nordic countries assumed that their own national laws fulfilled the requirements of the CRC or even provided better protection for children. However, since ratification, it has become clear that this is not the case; on the contrary, some national laws have been shown to have significant shortcomings. See Suvianna Hakalehto-Wainio, 'Uusi lapsioikeus' [Modern Child Law] in Jaakko Husa, Petri Keskitalo, Tuula Linna and Eva Tammi-Salminen (eds.), *Oikeuden avantgarde. Juhlakirja Juha Karhu* (Talentum, Helsinki 2013) 59–76. See also Trude Haugli, 'Constitutional Rights for Children in Norway' in Trude Haugli, Anna Nylund, Randi Sigurdson and Lena R.L. Bendiksen (eds), *Children's Constitutional Rights in the Nordic Countries* (Stockholm Studies in Child Law and Children's Rights, Brill Nijhoff 2020) 42.

<sup>11</sup> Only the United States has not yet ratified the treaty, see United Nations Human Rights Office of the High Commissioner, 'Ratification of 18 Human Rights Treaties' (2014) <<https://indicators.ohchr.org/>> accessed 5 October 2021.

<sup>12</sup> See United Nations Treaty Collection, 'Status of Treaties' <<https://treaties.un.org/>> accessed 6 October 2021.

<sup>13</sup> For centuries, children were not considered to have legal rights at all. The debate on children's rights began in the late 19th century but did not become widespread until the mid-20th century. Juridically, children were understood mainly as members of their families, not as members of society or active actors in other contexts. The family is still one of the primary communities in which children operate, so children's rights cannot be exercised in isolation from their parents and families. However, the Convention has also changed the way children are – or should be – treated within their families or in other private spheres, where children

Convention applies to all children, that is, to all human beings under the age of 18, within states' jurisdictions. This includes adolescents and migrant children. It was a conscious choice to extend the protection provided by the Convention to any children entering the territory of a state.<sup>14</sup>

Although children hold all human rights, the CRC also acknowledges that children's needs differ from those of adults. Because children are vulnerable, and especially because young children depend on adults in many ways, children need special protection and support from adults to fully develop their potential.<sup>15</sup> As children's vulnerability is not absolute but changes over time, this protection must therefore be balanced with children's evolving capacities (art. 5). Accounting for both of these characteristics of children (rights holders who are also vulnerable dependents), the CRC aims to strengthen the protection and implementation of children's human rights, both by clarifying existing human rights from the perspective of children's rights and by identifying the unique rights of children. The latter are rights that children have but adults do not; these rights include children's right to have their best interest taken as a primary consideration (art. 3.1), the right to development (art. 6), the right to rest and play (art. 31), and, probably the most important, the right to special protection.<sup>16</sup> This right to special protection arises from children's vulnerability and dependency, which mean that children are not only particularly vulnerable to violations of their rights but also that they often need help or support from adults to recognize and respond to violations of those rights. Children's right to special protection corresponds to society's obligation to pay special attention to realizing and protecting children's rights.

## 2 Equality and Non-discrimination

Equality and non-discrimination are both fundamental moral principles as well as essential assumptions of democratic societies; they are named in most

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must also be recognized as active and equal holders of rights. See, e.g., GC No 7 (Implementing Child Rights in Early Childhood, 2005) para 5; GC No 4 (Adolescent Health and Development in the Context of the Convention on the Rights of the Child, 2003) paras 7, 8. See also John Tobin and Sheila Varadan, 'Article 5: The Right to Parental Direction and Guidance Consistent with the Child's Evolving Capacities' in John Tobin (ed.), *The UN Convention on the Rights of the Child* (OUP 2019) 159–165.

<sup>14</sup> E/CN.4/L.1575 17.2.1981 (Report of the Working Group on a Draft Convention on the Rights of the Child) paras 40, 44, 47. See also GC No 4 (2003) para 6; GC No 6 (Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, 2005) para 12; GC No 5 (2003) para 30.

<sup>15</sup> See the Preamble to the CRC: Bearing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.' Dowd calls the right of every child to maximize their developmental potential the child's right to developmental equality. Dowd, 'Children's Equality Rights' 1368.

<sup>16</sup> Jaap E. Doek, 'Child Well-Being: Children's Rights Perspective' in Asher Ben-Arieh, Ferran Casas, Ivar Frønes and Jill E. Korbin (eds.), *Handbook of Child Well-Being: Theories, Methods and Policies in Global Perspective* (Springer Link 2014) 187–217. The case law of the European Court of Human Rights also underlines children's need and right to special protection, see, e.g., *Popov v France* [19.1.2012] (103 §).

international and regional human rights instruments and in many national regulations.<sup>17</sup> Due to their prevalence, references are sometimes made to their customary nature, and some argue that they meet the criteria of *jus cogens*.<sup>18</sup>

## 2.1 Scope and Content

The prevalence and the significance of these values suggest that it is possible to develop a universal, intuitive definition for equality and non-discrimination, as well as a universal understanding of how to achieve them. However, a closer look at these concepts reveals that their meanings are relative and shift according to the circumstances or the group under consideration.<sup>19</sup> Neither the CRC nor the CRC Committee defines discrimination. However, it is generally accepted that equality and non-discrimination are related. This is often described in the following way: The principle of equality requires that similar situations be treated in the same way and different situations in different ways. Deviation from this may constitute discrimination, unless there is an objective and reasonable justification for the difference in treatment.<sup>20</sup> This *formal approach to equality* supports the argument that a person's individual physical or personal characteristics should be viewed as irrelevant to that person's rights and obligations; in other words, justice should be blind to factors such as gender, age, country of origin, language, religion, convictions, opinions, health and disability.<sup>21</sup> Above all, eliminating direct discrimination described above

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<sup>17</sup> Manfred Liebel, Katre Luhamaa and Kiira Gornischef, 'Introduction' in Dagmar Kutsar and Hanne Warming (eds.), *Children and Non-Discrimination: Interdisciplinary Textbook* (Children's Rights Erasmus Academic Network [CREAN] 2014) 14. International and regional guarantees of equality and non-discrimination vary in nature. They may be *general*, prohibiting discrimination on all grounds based on the protection of human rights guaranteed by the relevant instrument (e.g., the Universal Declaration of Human Rights [UDHR], the International Covenant on Civil and Political Rights [ICCPR, art. 3], the International Covenant on Economic, Social and Cultural Rights [ICESCR, art. 2.2, 3], the European Convention on Human Rights [ECHR], art. 14, Protocol 12, art. 1.1-2). They may also be *ground-specific*, prohibiting discrimination only on specific grounds (e.g., the Convention on Elimination of All Forms of Discrimination Against Women [CEDAW], the International Convention on the Elimination of All Forms of Racial Discrimination [ICERD], the Convention on the Rights of Persons with Disabilities [CRPD]). Occasionally, they may be *context-specific* (e.g., the UNESCO Convention Against Discrimination in Education).

<sup>18</sup> Paraskevi (Paroula) Naskou-Perraki, 'An Introduction to the International Protection of Human Rights' in Kutsar and Warming (eds), *Children and Non-Discrimination* (Children's Rights Erasmus Academic Network [CREAN] 2014), 39. See also the Inter-American Court of Human Rights, Advisory Opinion OC 18/03 of 17 September 2003, Juridical Condition and Rights of Undocumented Migrants, para 101: 'The principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.'

<sup>19</sup> Liebel et al., 'Introduction'.

<sup>20</sup> Besson and Kleber, 'Article 2' 57–58.

<sup>21</sup> See Liebel et al.'s ('Introduction' 26–27) ideas on ontology: In the context of discrimination, the problem may indeed arise from 'ontologizing' the categorization of language which is originally meant to solve it.

requires ensuring that a state's constitution, laws, and policy documents do not discriminate on prohibited grounds.<sup>22</sup>

Formal equality can, however, lead to unfair outcomes; therefore, justice's blindfold must at times be removed. *Substantive equality* may require a departure from formal equality, but only in order to achieve an acceptable purpose: equality of outcomes. The aims of the concept of *indirect discrimination* are ambiguous as this approach often seeks to go beyond equal treatment (i.e., the same treatment) to attain equality of opportunities and of results. This aim may often require positive action, which is called reverse discrimination, positive discrimination or affirmative action.<sup>23</sup>

Article 2 of the CRC states that:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parents' or legal guardians' race, colour, sex, language, religion, political or other opinion, national, ethnic, or social origin, property, disability, birth or other status.<sup>24</sup>

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

While the wording of the non-discrimination article in the CRC does not guarantee equality (positive statement) but simply forbids discrimination (negative statement), the Convention nevertheless aims to protect, not only formal, but also substantive equality. Hence, equality in the CRC does not mean identical treatment. On the contrary, the Committee has underlined the importance of taking special measures to diminish or eliminate conditions that cause discrimination. Therefore, the principle of non-discrimination does not prevent, but may indeed call for, differentiation based on individuals' different needs for protection, including also age.<sup>25</sup> The right to non-discrimination is thus not a passive obligation; states must take appropriate proactive measures to ensure that all children have effectively equal opportunities to enjoy their rights under the Convention.

Article 2 protects children from discrimination based on all the factors mentioned therein. As in many other non-discrimination principles, the scope of article 2 is open-ended (expressed by the phrase 'or other grounds'). It follows that the scope of the article can be extended to other similar potential grounds for discrimination and is not limited to those specifically mentioned.

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<sup>22</sup> Liebel et. al., 'Introduction' 17.

<sup>23</sup> Liebel et. al., 'Introduction' 8–19; Besson and Kleber, 'Article 2', 64.

<sup>24</sup> The CRC's list of protected grounds is the same as those in most international and regional human rights instruments. As such, article 2 can be defined as a general non-discrimination principle in a ground-specific (children) human rights treaty. Besson and Kleber, 'Article 2' 48.

<sup>25</sup> GC No 5 (2003) paras 12 and 30; GC No 6 (2005) para 18; GC No 14 (The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, 2013) para 41.

Furthermore, due to children's dependency on their caregivers, the CRC is the only human rights instrument that forbids discrimination not only based on a person's own status but also based on the status of another person close to the child (family members and guardians).<sup>26</sup>

Like the grounds for discrimination, the perpetrators of discrimination vary: Inequality may appear due to legislation and other actions by the public authorities, but it may also be perpetrated by private actors. As the CRC protects children's equality in all relationships and systems (see further section 2.3), the appropriate protective measures are also diverse. They may include changes to legislation, administration and resource allocation, as well as educational measures to change people's attitudes.<sup>27</sup> Furthermore, states may need to take selective action to protect vulnerable children. Articles 22, 23 and 30 of the CRC are examples of special provisions regarding child discrimination. These articles address special needs, and they should therefore take priority over article 2 when applicable.<sup>28</sup>

## 2.2 *Child-specific Discrimination*

As stated above, children may face discrimination on many grounds, including gender, disability or sexual orientation and sometimes for a combination of reasons.<sup>29</sup> In addition to facing discrimination due to their own characteristics, children may also face it due to the status of a parent, guardian or other caregiver. Furthermore, children are easily discriminated against as a group and as individuals purely on the grounds of age (age-based discrimination). Children face discrimination in most societies *compared to adults* because they depend on adults and because adults are often reluctant to increase children's decision-making power as children develop and mature. Many societies exclude minors from participating in society and from influencing their own affairs based on age, without considering individual capacities and ignoring article 5 of the CRC and the idea that children become able to fully exercise their rights as they acquire competence, rather than when they reach a certain age.<sup>30</sup>

Indeed, participation rights (arts. 12 and 13 CRC) underpin all the rights mentioned in the Convention. Participation rights are key to children's right to an individual identity and to equal treatment and are thus a strong tool for

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<sup>26</sup> GC No 3 (HIV/AIDS and the Rights of the Children, 2003) illustrates that children may experience discrimination for reasons related to their parents.

<sup>27</sup> GC No 5 (2003) paras 4, 12, 30.

<sup>28</sup> Special measures are sometimes considered controversial, as they may lead to indirect discrimination. See, e.g., *Horvath and Kiss v Hungary* [29.1.2013].

<sup>29</sup> For more detailed definitions, see Timo Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore* (Abo Akademi University 2002) 12.

<sup>30</sup> Tobin and Varadan, 'Article 5', 173–174. See also Manfred Liebel, 'Adulthood and Age-Based Discrimination Against Children,' in Kutsar and Warming (eds), *Children and Non-Discrimination*, 125, 133–134.



challenging age-based discrimination.<sup>31</sup> In violation of article 12 CRC (the right to be heard), children are largely discriminated against because they are not listened to and because less weight is attached to the views that they are able to express. In the courts, in families, in schools and in other spheres, adults make decisions that significantly impact children's lives without consulting the children the way adults would be consulted regarding decisions that would impact them in similar ways.<sup>32</sup> This exclusion is often based on categorical age limits established through legislation, which are seldom consistent or thoroughly justified. For example, in Finland, a 15-year-old can be judged to have committed a murder in sound mind (*fullt förstånd*)<sup>33</sup> and be held fully liable for any damage.<sup>34</sup> At the same time, children under 18 cannot independently join or resign from a religious group, nor can they vote in municipal or state elections.<sup>35</sup>

Age-based discrimination does not always spring from an intention to harm children, but it can be an unintended consequence of the need to protect children. This renders it invisible and difficult to identify, albeit it is just as reprehensible as any other form of discrimination.<sup>36</sup> Indeed, the act of defining a child as a person under 18 is protective per se. Some differential treatment based on age is often necessary to guarantee children's safety and well-being. In many cases, however, children's age and relative lack of experience are used to justify denying them rights to which they are entitled and as a result, children face exclusion and unfair treatment.

The CRC does not explicitly consider age-based discrimination. However, in some of its concluding observations, the CRC Committee mentions age-based discrimination against children and urges its abolition.<sup>37</sup> More specifically, it calls on States Parties to regularly review existing age limits. Here the Committee is guided by two principles. First, age limits should be set higher when they relate to protecting children and allowing them to develop (for instance, in the area of juvenile criminal law). Second, age limits that impact

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<sup>31</sup> GC No 13 (2011) para 59. As the Committee has stated, this requires a paradigm shift away from child protection approaches in which children are perceived and treated as 'objects' in need of assistance rather than as rights holders entitled to non-negotiable rights to protection.

<sup>32</sup> For a summary, see Christina McMellon and E. Kay M. Tisdall, 'Children and Young People's Participation Rights: Looking Backwards and Moving Forwards' (2020) 28 *The International Journal of Children's Rights* 1, 157–182.

<sup>33</sup> Minority is considered only during sentencing, which is determined according to a reduced scale (Criminal Code 39/1889, 6:8 §). The criminal justice system may also ignore the root causes of criminal action, which often result from psychological or socio-economic problems. Thus, these problems may not be addressed; instead, the children themselves are regarded as the problem. GC No 24 (Children's Rights in the Child Justice System, 2019) para 12. See also Liebel, 'Adulthood and Age-Based Discrimination Against Children' 129.

<sup>34</sup> Minority can be considered when assessing the amount of damages (Tort Act 412/1974, 2:2 §).

<sup>35</sup> Interestingly, children over the age of 16 may vote in parish elections. The voting age was lowered in the early 2000s in response to declining church membership and the age structure of the church's governing bodies. PeVM 10/2002 vp, [Report of the Constitutional Committee on the Government's Proposal for a Religious Freedom Act and Certain Related Acts] 5.

<sup>36</sup> GC No 1 (The Aims of Education, 2001) para 10.

<sup>37</sup> Liebel, 'Adulthood and Age-Based Discrimination Against Children' 121–123.

children's degree of independence (such as participation rights) should be reviewed to determine whether and how much they could be lowered or whether age limits are necessary at all.<sup>38</sup>

All forms of child discrimination are exacerbated by children's dependence, vulnerability and lack of legal capacity, which means that children do not have the same access to courts and complaint mechanisms that adults do. Indeed, the CRC Committee describes discrimination as an offense to children's human dignity and highlights the profound consequences of discrimination. The consequences can be serious and long-lasting for all children, but particularly for marginalized and disadvantaged children. Vulnerable children are often doubly victimized (as children and as members of a minority group) and are therefore entitled to special attention and protection in all segments of society.<sup>39</sup>

### **2.3 Implementation of Article 2 CRC on Non-discrimination**

To more precisely understand the nature of the obligations the CRC imposes on States Parties, article 2 must be read in conjunction with articles 4 and 42. Article 4 obliges States Parties to undertake all appropriate legislative, administrative and other measures to implement the rights recognized in the Convention. Article 42 commits States Parties to use active and appropriate means to make the principles and provisions of the Convention widely known to adults and children alike. The wording of article 4 imposes an immediate and mandatory obligation on state parties.<sup>40</sup> States Parties do have some discretion about which measures are appropriate, but this discretion is not unlimited: Any actions taken must help realize children's rights, and implementation must be consistent with all the articles of the Convention. Furthermore, states have the burden of proof in demonstrating that their actions align with the CRC. Ultimately, the Committee may determine whether all appropriate measures have been taken.<sup>41</sup>

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<sup>38</sup> For example, the Committee has urged Sweden to raise the minimum age for participation in firearms training provided by voluntary defence organizations from 16 to 18 years. This change would fully respect the spirit of the Optional Protocol on children in armed conflict and provide full protection for children in all circumstances. CRC/C/SWE/CO/5, para 54. See also CRC/C/OPAC/SWE/CO/1, para 15. The Committee has advised Finland to abolish the age limitations established under domestic laws and ensure that all children under the age of 18 are duly heard in judicial and administrative proceedings affecting them. CRC/C/FIN/CO/4, para 30.

<sup>39</sup> See, e.g., GC No 1 (2001) para 11; GC No 3 (2003) paras 7–9; GC No 5 (2003) para 30; GC No 7 (2005) paras 11–12; GC No 11 (Indigenous Children and Their Rights Under the Convention, 2009) paras 5–6. See also the European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to the Rights of the Child* (2015) 51–59.

<sup>40</sup> Art. 4: 'States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. Regarding economic, social, and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.'

<sup>41</sup> In this assessment, children's views are an additional criterion. GC No 19 (Public Budgeting for the Realization of Children's Rights, 2016) para 18; John Tobin, 'Article 4: State's General Obligation of Implementation' in John Tobin (ed.), *The UN Convention on the Rights of the Child* 109–122.

States Parties have an absolute obligation to enforce the general principles and civil and political rights guaranteed by the CRC whereas they should strive to implement economic, social and cultural rights 'to the fullest extent of available resources.'<sup>42</sup> Since it is one of the Convention's general principles, under no circumstances is article 2 subject to progressive realization.<sup>43</sup>

The wording of article 4 requires national laws to be 'fully compatible with the contract as a whole.' To ensure full compliance with the Convention, States Parties must take a comprehensive review of domestic legislation and related administrative guidance to ensure that contractual obligations are applied to all areas of substantive law, including the private sphere, such as home (family) and business environments.<sup>44</sup> Furthermore, States Parties must ensure that laws and regulations are adequately implemented and that those who work with and for children have sufficient resources and capacities to apply the law. In the fight against discrimination, this means preventing, identifying and reacting to discrimination against children. To this end, the Committee highlights, for example, the need for data collection to be disaggregated so that discrimination or potential discrimination can be identified. Article 2 must also be disseminated widely, and information on discrimination must be effectively incorporated into the training of all professionals working for and with children. Children should also be informed about what constitutes discrimination and how they should respond to violations of their right to non-discrimination. In addition, States Parties should establish measures and programmes that are equipped to assess, monitor and evaluate the progress or shortcomings of activities to end discrimination against children.<sup>45</sup>

In addition, effective, child-friendly remedies must be in place when and if discrimination occurs. The CRC does not contain a specific article on legal protection, but the requirement is implicit in the Convention, since for 'rights to

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<sup>42</sup> Progressive realization of ESC rights does not apply to economically prosperous states that are governed by the rule of law. In all States Parties, the enforcement of ESC rights must be effective and in line with the rights outlined in the CRC as well as other human rights treaties. GC No 5 (2003) paras 6–8; GC No 15 (The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health, 2013) paras 112–116. See also John Tobin, 'Article 24: A Right to Health' in John Tobin (ed.), *The UN Convention on the Rights of the Child* 907.

<sup>43</sup> GC No 13 (The Right of the Child to Freedom from All Forms of Violence, 2011) para 37. See also the Committees' concluding observations on France CRC/C/15/Add.20, para 19. This so-called budgetary exception does not under any circumstances apply to economically prosperous states governed by the rule of law, such as the Nordic countries.

<sup>44</sup> GC No 5 (2003) and GC No 16 (State Obligations Regarding the Impact of the Business Sector on Children's Rights, 2013) paras 13–14. The latter refers to the *indirect horizontal effect* of human rights treaties: Domestic judges and other institutions are expected to refer to the non-discrimination principle when interpreting domestic private law and the law regulating inter-individual relationships in a way that prohibits discrimination between private parties. The direct horizontal effect, under which the non-discrimination principle would directly apply to individuals, has not been granted in international law. See also Besson and Kleber, 'Article 2' 55–56.

<sup>45</sup> GC No 13, paras 5, 8, 32; GC No 17, paras 57c, 57g; GC No 2 (The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child, 2002). See also John Tobin and Judit Cashmore, 'Article 19: A Right to Protection Against All Forms of Violence' in John Tobin (ed.), *The UN Convention on the Rights of the Child* 689.

have meaning, effective remedies must be available to redress violations.<sup>46</sup> It is particularly important to seek to prevent violations against children's rights because it is often challenging for children to identify and react to them.<sup>47</sup> However, there is also a need to invest in ex-post legal protection, that is, in effective legal remedies that are appropriate for children. Effective remedies include ensuring that child-sensitive procedures are available to children and their representatives. Those procedures should consider children's perception of time and should include providing child-friendly information, advice, advocacy, and, if needed, access to independent complaints, procedures and the courts for legal and other types of assistance. Child-friendly remedies should be adapted to and focused on children's needs. When rights have been violated, there should be appropriate reparation as well as appropriate measures to promote children's physical and psychological recovery, rehabilitation and reintegration, as required by article 39.

### **3 Equality and Non-discrimination as Monitored by the CRC Committee**

The implementation of the CRC is monitored by the UN Committee of the Rights of the Child. Initially, States Parties were monitored via periodic reports they made to the Committee.

#### ***3.1 Monitoring Mechanism of the Convention***

Under article 44 CRC, States Parties must submit reports on measures taken to implement the rights recognized in the CRC and on progress in the enjoyment of those rights. The first report was to be submitted within two years after the Convention entered into force; thereafter, reports must be submitted every five years.<sup>48</sup> The Committee replies to reports with concluding observations, which also include recommendations for States Parties. The concluding observations are not legally binding but aim to establish a constructive dialogue and to guide States Parties' interpretation and application of the CRC.

The Committee's GCs share the same guiding objective as the concluding observations. They address the Committee's interpretations of the articles of the Convention and other important topics. Like the concluding observations, the GCs are not legally binding, but their interpretive impact is strong.<sup>49</sup> To date, the

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<sup>46</sup> GC No 5, para 24. The right to a fair trial (art. 6) under the ECHR protects children as well as adults. Children's right to legal protection is further supported by art. 13 of the ECHR, which addresses the right to an effective remedy before a national authority.

<sup>47</sup> GC No 13, paras 5, 8, 32; GC No 17 (The Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts, 2013) paras 57c, 57g; GC No 2 (2002).

<sup>48</sup> Finland, for example, submitted its combined fifth and sixth periodic report in 2019 (over two years overdue); the Committee has not yet responded to this report.

<sup>49</sup> International Law Association, *Committee on International Human Rights Law and Practise: Final Report on the Impact of Finding of the United Nations Human Rights Treaty Bodies* (London 2003) paras 16, 18; Helen Keller and Leena Grover, 'GC of the Human Rights Committee and Their Legitimacy' in Helen Keller, Geir Ulfstein and Leena Grover (eds),

CRC Committee has issued 25 GCs, two of which were written with the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. One joint comment/recommendation was written with the Committee on the Elimination of Discrimination Against Women. Article 2 does not have its own GC, but as one of the general principles of the Convention, non-discrimination is featured in some way in all the GCs,<sup>50</sup> and some GCs, such as GC No 21 (Children in Street Situations, 2017), are almost entirely written from the point of view of non-discrimination.

Until 2014, the GCs and concluding observations were the most important tools for interpreting the CRC. When the third optional protocol<sup>51</sup> on a communications procedure entered into force, the Committee gained the competence to investigate complaints of violations of children's rights made by individuals or States Parties. Through its decisions, the Committee will gradually establish case law on the Convention on the Rights of the Child.<sup>52</sup> So far, 52 states have signed the Optional Protocol on Communications Procedures, and it is currently valid in 42 countries. Those countries recognize the Committee's competence to investigate complaints made against them, and they have committed to give due consideration to the views of the Committee (arts 1 and 11 of OP 3). Finland is the only Nordic country where the third optional protocol is currently valid.

### 3.2 *Committee's Concluding Observations on Discrimination in the Nordic Countries*

The Committee's concluding observations and recommendations to the Nordic countries on discrimination are quite similar in content. On the one hand, the Committee is pleased by Nordic countries' non-discrimination laws and by the Nordic states' efforts to address various forms of discrimination. However, problems in the implementation of these laws highlight the need for additional practical measures to combat discrimination and to mainstream children's right to equality. The Committee expresses particular concern about discrimination against children from disadvantaged, marginalized or migrant families. Therefore, more work is needed to effectively combat child discrimination in the

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*UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) 131. For more general rules of interpretation, see Tobin, 'The Foundation for Children's Rights' 9–19.

<sup>50</sup> See, e.g., GC No 1 (2001) paras 10–11; GC No 2 (2002) para 12; GC No 3 (2003) paras 7–9; GC No 4 (2003) para 6; GC No 5 (2003) paras 12, 30, 4; GC No 6 (2005) para 18; GC No 7 (2005) paras 11–12; GC No 9 (2006) paras 2, 8; GC No 11 (2009) paras 5–6; GC No 12 (2009) paras 75, 77–78; GC No 13 (2011) para 60; GC No 14 (2013) para 41; GC No 15 (2013) paras 8–11; GC No 16 (2013) paras 13–14; GC No 17 (2013) para 16; GC No 18 (2014) paras 4, 6; GC No 19 (2016) paras 41–44; GC No 20 (2016) para 21; GC No 21 (2017) para 25; GC No 22 (2017) paras 21–26; GC No 23 (2017) paras 21, 27, 31; GC No 24 (2019) paras 30, 40; GC No 25 (2021) paras 9–11.

<sup>51</sup> Optional Protocols to a treaty are international acts which either add new human rights or amend certain provisions of the treaty or the mechanism of implementation.

<sup>52</sup> See Agnes Lux, 'Non-Discrimination, Complaints Mechanism and Equality Bodies' in Kutsar and Warming (eds.), *Children and Non-Discrimination: Interdisciplinary Textbook* 73–75.

Nordic countries. The focus should be on preventive activities, such as those implemented through the media and education. Where necessary, affirmative action should be taken to protect vulnerable children. Programmes to raise awareness and foster tolerance should target the public at large as well especially targeting children. Finally, resources should be allocated for research to explore the root causes of discrimination.<sup>53</sup>

In these concluding observations, age-based discrimination is addressed indirectly, largely in terms of child participation. Again, the Committee notes with appreciation that the States Parties' legal frameworks are, to a large extent, in line with the principles of article 12 of the Convention. Yet the Committee also expresses concern about the insufficient implementation of participation rights in practice. Therefore, Nordic countries should increase their efforts to strengthen child participation in practice; particular attention should be paid to children who are more vulnerable to exclusion from participation, such as children with disabilities, young children, and migrant, asylum-seeking and refugee children.<sup>54</sup>

### 3.3 *Jurisprudence of the Committee*

The CRC Committee has heard complaints about violations of children's rights since 2014. Thus far, the Committee has dealt with 53 cases, but most of the Committee's decisions have been decisions of discontinuance or inadmissibility. Of the Nordic countries, only Denmark (8 cases) and Finland (5 cases) have been subjects of Committee decisions, and both countries have received one condemnatory decision each.

Article 2 has been pled in a total of 28 cases. Of these, the Committee ruled on 16 cases; all but one involved refugees and/or matters of asylum. In seven cases, the Committee cited article 2 in its decision. Unfortunately, the decisions do not deal with the substance of article 2. In four decisions,<sup>55</sup> the Committee noted that the authors set out their grievances in a very general manner, without explaining the basis of the alleged discrimination. Therefore, the Committee declared these claims manifestly ill-founded and inadmissible under article 7 (f) of the Optional Protocol. In the other three cases,<sup>56</sup> the Committee found

<sup>53</sup> See Sweden CRC/C/SWE/CO/5; Norway CRC/C/NOR/CO/5-6, paras 11–12; Denmark CRC/C/DNK/CO/5, paras 12–13; Finland CRC/C/FIN/CO/4, paras 25–26. In Iceland, the Committee has brought up the growing number of people of foreign origin and the need for efforts to proactively address issues of racism that may arise. The Committee has therefore stressed that Iceland guarantees all children within its jurisdiction all the rights contained in the Convention in accordance with art. 2. Iceland CRC/C/15/Add.203, paras 22–23.

<sup>54</sup> CRC/C/SWE/CO/5, paras 19–20; CRC/C/NOR/CO/5-6, para 14; CRC/C/FIN/CO/4, paras 29–30, CRC/C/DNK/CO/5, paras 13–14; CRC/C/ISL/CO/3-4, paras 28–29.

<sup>55</sup> *V.A v Switzerland* (28.9.2020) (deportation to Italy); *W.M.C v Denmark* (28.9.202) (deportation to China); *M.B.S v Spain* (28.9.2020) (determination of the age of an alleged unaccompanied minor asylum seeker); *I.A.M v Denmark* (25.1.2018) (deportation to Somalia).

<sup>56</sup> *M.T v Spain* (18.9.2019) (age determination of an alleged unaccompanied minor asylum seeker); *J.A.B v Spain* (31.5.2019) (age determination of an alleged unaccompanied minor asylum seeker); *Y.B and N.S v Belgium* (27.9.2018) (denial of humanitarian visa to a child taken in under *kafalah* [a fostering arrangement] by a Belgian–Moroccan couple).

violations of various articles of the Convention and therefore did not consider it necessary to examine whether the same actions constituted a separate violation of article 2 of the Convention. Although the decisions do not address discrimination directly, they nevertheless illustrate how discrimination affects the fulfilment of all children's rights.

For example, in the case *M.T. v Spain* (18.9.2019), the author claimed to have suffered a violation of article 2 because he experienced discrimination due to his status as an unaccompanied foreign minor. He would not have been so vulnerable or unable to apply for asylum if he had been accompanied by his family. The author claimed that the best interests of the child were not considered during the process, since he was not duly informed of the steps taken to determine his age and his legal representative was not allowed to accompany him during the age determination process. The author also provided various identity documents to demonstrate his age (a birth certificate, certificate of nationality, identity certificate and later a passport), but these documents were rejected by the authorities (para. 3.1).

The Committee ruled that the fact that the author was not accompanied by a representative during the procedure and the fact that the state party rejected the author's documents constituted violations of articles 3 (best interests of the child) and 12 (participation rights). The fact that the author was not assigned a guardian to help him apply for asylum as a minor deprived him of the special protection that should be afforded to unaccompanied minor asylum seekers and put him at risk of irreparable harm if he were forced to return to his country of origin; this constituted a violation of articles 20(1) and 22 of the Convention. The Committee further noted that the State Party violated the author's rights in that it altered elements of his identity by attributing an age and a date of birth to him that did not match the information on the documents submitted to national authorities. Consequently, the Committee found that the state party also violated article 8 (the right to identity) of the Convention (paras. 13.6-13.9). Having found violations of articles 3, 8, 12, 20 (1) and 22 of the Convention, the Committee did not consider it necessary to examine whether the same actions constituted a separate violation of article 2 of the Convention (para. 13.10). In two other cases (*J.A.B. v Spain* [31.5.2019] and *Y.B. and N.S. v Belgium* [27.9.2018]), the Committee's reasoning proceeded in the same way.

#### **4 Children's Right to Non-discrimination: Who is Responsible?**

The question of who is responsible for realizing children's rights can be considered at three levels: international, national and parental. The ultimate objective of the CRC is to protect children's well-being and development by protecting children's rights: A child's well-being and development are safeguarded when the child's rights are realized. As parents have the primary right and responsibility to protect their children's well-being and development (CRC arts. 7 and 18), they can also be held primarily responsible for the realization of their children's rights. This long-standing tradition of 'parental rights' is based on the presumption that parents know what is best for their child and that they act accordingly, which is, of course, most often the case. However, privatizing responsibility for children to the parents may also limit society's

responsibility to children.<sup>57</sup> Furthermore, children's rights may sometimes conflict with parental or familial rights, which is not conducive to the realization of children's rights. Therefore, the CRC places the ultimate responsibility for realizing children's rights on the public authorities.

This public responsibility is national in nature, since protecting human rights is fundamentally a national obligation. All states have the primary responsibility to protect individuals under their jurisdiction, as foreseen in national constitutions, national laws and laws ratifying international treaties.<sup>58</sup> International protection is subsidiary and applies only when national protection fails. As described above, this protection materializes in the Committee's concluding observations and in the future, it may also manifest in the Committee's decisions on appeals. From a child's perspective, both mechanisms are distant and slow. It is therefore important that children's rights and legal protections for these rights are secured at the grassroots level, which is where children spend most of their time and where most violations of their rights take place.

In practice, States Parties implement the Convention in very different ways. This is also true of the Nordic countries, despite their similar cultures, traditions and legal systems.<sup>59</sup> National implementation is often impacted by whether the Convention has only been ratified or also incorporated into national law. The latter has been proven to have positive outcomes, as it enables individuals to refer directly to the Convention and allows courts and officials to directly cite the CRC as a basis for their decisions.<sup>60</sup>

Of the Nordic countries, Finland (in 1991), Norway (in 2003), Iceland (in 2013)<sup>61</sup> and Sweden (in 2020) have incorporated the Convention.<sup>62</sup> In Finland, Iceland and Sweden, the CRC has the same status as other acts of parliament; the Norwegian Human Rights Act explicitly gives the CRC a semi-constitutional character. Since the Finnish Constitution obliges governmental bodies to guarantee human rights (including all ratified human rights treaties), the CRC can be considered to be incorporated into national law at a semi-constitutional

<sup>57</sup> Dowd, 'Children's Equality Rights' 1373.

<sup>58</sup> Naskou-Perraki, 'An Introduction to the International Protection of Human Rights' 37–38.

<sup>59</sup> The issue is thoroughly addressed in Trude Haugli and Anna Nylund, 'Rights in the Nordic Countries: Do Constitutional Rights Matter?' in Haugli et al. (eds.), *Children's Constitutional Rights in the Nordic Countries* 391–422.

<sup>60</sup> GC No 5 (2003) para 20. See also Simon Hoffman and Rebecca Thorburn Stern, 'Incorporation of the UN Convention on the Rights of the Child in National Law' (2020) 28 *The International Journal of Children's Rights* 1, 133–156; Ursula Kilkelly, Laura Lundy and Bronagh Byrne, 'Introduction' in Ursula Kilkelly, Laura Lundy and Bronagh Byrne (eds.), *Incorporating the UN Convention on the Rights of the Child into National Law* (Intersentia 2021) 1–10; Conor O'Mahony, 'Constitutional Protection of Children's Rights: Visibility, Agency and Enforceability' (2019) *Human Rights Law Review* 401–434.

<sup>61</sup> Hrefna Friðriksdóttir, 'Protection of Children's Rights in the Icelandic Constitution' in Haugli et al., *Children's Constitutional Rights in the Nordic Countries* 83–102.

<sup>62</sup> On Sweden's recent incorporation, see Regeringens Proposition 2017/18:186, *Incorporering av FN:s konvention om barnets rättigheter*. Some of the Convention's articles (particularly arts 3 and 12) were incorporated into national legislation earlier. Titti Mattson, 'Constitutional Rights for Children in Sweden' in Haugli et al., *Children's Constitutional Rights in Nordic Countries* 103–119.



level in Finland as well.<sup>63</sup> The actual significance of the rights guaranteed by the Convention is determined by the way authorities, courts and other social actors, public as well as private, apply the Convention.<sup>64</sup> The journey from incorporation to application in practice is often long. However, in Finland, for example, both Supreme Courts<sup>65</sup> in recent jurisprudence have begun to refer, not only to the CRC, but also to the GCs of the CRC Committee and even to the Committee's concluding observations on Finland.<sup>66</sup> It is anticipated, that the case law of Supreme Courts will eventually encourage other actors of society to apply the Convention on more regular basis.

Unlike other Nordic Countries, Denmark has only ratified the CRC and is only bound by the *principles* of the convention. Thus, legislators take the Convention into consideration when making child-related legislation, but individuals cannot make a claim against an authority based solely on the Convention.<sup>67</sup>

## 5 Discussion and Conclusion

Equality and non-discrimination are undeniably among the most fundamental human rights, and they are closely intertwined with the realization of many other rights. Equally indisputable is that children's equality and non-discrimination require special attention. First, children's rights are violated or left unfulfilled in ways that those of adults are not (age-based discrimination). Second, how a child

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<sup>63</sup> Haugli, 'Constitutional Rights for Children in Norway 39–57; Suviana Hakalehto, 'Constitutional Protection of Children's Rights in Finland' in Haugli et. al. (eds.), *Children's Constitutional Rights in the Nordic Countries* 58–82. Finland has formally incorporated all major human rights treaties into its national law (Constitution, s. 95). Most human rights treaties, such as the CRC, have been incorporated with the hierarchical rank of an Act of Parliament (ordinary law).

<sup>64</sup> In fact, private actors have an enormous capacity to positively or negatively impact the implementation of children's rights. To this end, States Parties are responsible for regulating, informing and educating the private sector on children's rights and also for engaging and supporting private actors in this task. See, e.g., GC No 14 (2013) paras 13–14 and GC No 16 (2013) para 56.

<sup>65</sup> Finland has two lines of courts: general and administrative. General courts deal with civil and criminal cases, and administrative courts with administrative matters (such as social welfare, education and tax-related issues).

<sup>66</sup> See, e.g., the Supreme Administrative Court decision KHO 2017:81 (right to asylum) and the Supreme Court decision 2021:41 (annulment of paternity). Both concerned children's participation. The Supreme Administrative court referred to GCs No 14 (the right of the child to have his or her best interests taken as a primary consideration) and 12 (the right of the child to be heard). The Supreme Court referred to GC No 14 and to the Committee's recommendations to Finland (CRC/C/FIN/CO/4). According to the latter, Finland should ensure that all children are properly consulted in judicial and administrative proceedings, with consideration for their level of development. This should be done in a child-friendly manner considering the principle of the best interests of the child. Danish courts are more reluctant to use international instruments in their argumentation; this stems from a tradition of emphasizing sovereignty in combination with a restrained approach to judicial review. Adolphsen, 'Constitutional Rights for Danish Children' in Haugli et. al. (eds), *Children's Constitutional Rights in the Nordic Countries* 120–130.

<sup>67</sup> Caroline Adolphsen, 'Constitutional Rights for Danish Children' 120–130.

is treated today impacts the kind of adult that child will become. This impacts not only the individual but also society. Ultimately, children's right to equality, like any other human right, rests on their common value as human beings. However, children's unique characteristics as growing and developing human beings mean that adults and society must pay more attention to protecting children's right to equality. Children are after all our future; they will join society and its macro and micro communities when they reach adulthood. It is this future role of children that makes their development and their equality essential to society.<sup>68</sup>

Since children are dependent and lack legal competence, safeguarding children's equality requires positive action by states. Because children are dependent, they can choose neither their families nor their circumstances, and adults can easily think, speak and act on children's behalf and exclude children from matters that significantly impact their lives. Furthermore, children might not notice when they are treated unequally, and because they lack legal competence, they are often unable to defend themselves against discrimination. Therefore, in addition to legislation, the issue of children's equality should be also addressed via information, education and research. This is also true in Nordic countries, despite their reputation as models of equality. Despite the Nordic states' broad efforts to address various forms of discrimination, non-discrimination laws, especially those that impact vulnerable children, are imperfectly implemented in the Nordic countries. Thus, the Nordic countries must continue their work to end child discrimination. Indeed, as economically prosperous, democratic states that are governed by the rule of law, Nordic countries should lead the way in protecting children's rights.

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<sup>68</sup> See also Dowd, 'Children's Equality Rights' 1370, 1416.