

Children's Constitutional Rights in the Nordic Countries: Do Constitutional Rights Matter?

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1 Introduction

This study demonstrates tangible variations in how children's rights are protected in the Nordic Constitutions, even given that the countries, in many ways, have similar cultures, traditions and legal systems. Thus, a central undertaking for this chapter is to analyse the interlinkages and discrepancies between the formal level of protection of children's rights in the Constitution with the level of protection in statutory law and court practice. We also analyse whether and how constitutional protection is reflected in legislation, court rulings, and government policies and practices. A central question is whether constitutional protection matters for implementation of children's rights and whether it provides advocacy tools. A key observation is that the protection of children's rights varies within each country: In some areas of law, children's rights are outlined in detail, in other areas, obvious lacunae remain. Some domains of law are more 'child-including', others remain 'adult-centred'. The question is whether some domains are more prone or resistant towards acknowledging children as agents and right's holders.

In this chapter, we compare the findings from the contributions in this volume to attempt to uncover whether and how including children's rights in the Constitution matters.

Firstly, we analyse children's constitutional rights in general in the Nordic countries, building on a typology developed by Conor O'Mahony, which builds on children's rights as envisaged in the Convention on the Rights of the Child (CRC).¹ The model measures the protection of children's rights on three spectrums: visibility, agency and enforceability. However, since we study the Nordic countries in specific, our analyses allow us a more detailed analysis than what could be done in his study, analysing 47 European countries. In addition, we

¹ Conor O'Mahony, 'Constitutional Protection of Children's Rights: Visibility, Agency and Enforceability' (2019) 19(3) *Human Rights Law Review* (forthcoming).

analyse implementation of children's rights in general and the interrelation between the wording of the Constitution and implementation.

Secondly, we discuss how international instruments work as supplement to constitutional law in the Nordic countries. The rationale is to illustrate how international instruments supply protection offered by national constitutions and how case law from international bodies serves as an impetus for change.

Thirdly, we compare implementation and enforcement of children's rights in each of the three domains included in this volume: the principle of the best interests of the child, participatory rights and the right to family life.

Finally, we address the question of whether enshrining children's rights explicitly in the constitution really matters.

2 Protection of Constitutional Rights in the Nordic Countries

2.1 *A Spectrum Analysis of Children's Rights*

As mentioned above, this general analysis of protection of children's constitutional rights in the Nordic countries utilises a typology consisting of three indicators – visibility, agency and enforcement – each of which consists of a spectrum of classifications developed by Conor O'Mahony.² His typology matches our approach. The multiple dimensions allow a nuanced analysis to a far greater extent than binary categories do. The visibility spectrum measures the extent to which children's rights are expressly protected in the Constitution. The agency spectrum assesses whether children are considered independent, autonomous rights-holder or merely objects in need of protection. The enforcement spectrum determines the extent to which children's rights are enforceable through a variety of remedies. A Constitution

2 Conor O'Mahony (n 1). For other typologies of children's constitutional rights, see John Tobin, 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights' (2005) 21 *South African Journal on Human Rights* 86–126 and Janette Habashi and others, 'Constitutional Analysis: A Proclamation of Children's Right to Protection, Provision, and Participation' (2010) 18 *International Journal of Children's Rights* 267–290. Tobin employs the categories of 'invisible child', 'special protection' and 'child rights' constitutions, which is a more rudimentary typology than measuring the spectrums of visibility and agency. Furthermore, although Tobin discusses enforcement by mentioning justiciability, access to justice, judicial conservatism and social legitimacy, the aspect of enforcement remains underdeveloped in his typology. Habashi and others utilise a linguistic content analysis to provide quantitative data on the prevalence of protection, provision and participation rights in constitutions of countries with a high, medium and low Human Development Index. This methodology is too rudimentary for our purposes.

might score high on one of the spectrums, but, at the same time, low on the other spectrums. O'Mahony's classification captures the recognition that mentioning children in the Constitution does not suffice if children are treated as 'objects' of protection rather than individuals who can exercise agency and when rights are mere symbols without sufficient remedies attached to them.³

In addition to discussing the wording, interpretation and enforcement of Nordic Constitutions, this study encompasses implementation of children's constitutional rights in legislation and government practice. Thus, we add the component of implementation to the aspects of the analysis.

2.2 *Visibility Spectrum of Children's Constitutional Rights in the Nordics*

O'Mahony applies a four-tier scale for the visibility spectrum of children's rights: invisible, education, education+ and detailed children's rights provisions. Despite their cultural, historical, legal and societal similarities, in our study, the Nordic countries receive dissimilar ratings on the visibility spectrum.

Norway receives the highest score, since section 104 of the Constitution is devoted to children's rights vesting several different rights with children and stressing children's dignity as a basic legal principle. In addition, section 109 of the Constitution on the right to education mentions children explicitly. Denmark, on the other hand, lands in the second-lowest category of education, since children are only mentioned explicitly in section 76 of the Danish Constitution, which regulates the right to free primary education.

The Finnish Constitution mentions children explicitly and give the right to equality and the right to participation in decisions concerning themselves. The principle of non-discrimination, freedom, education and social benefits are also enshrined in the Constitution, but these sections do not mention children.⁴

Section 65 of the Icelandic Constitution contains the principles of equality and non-discrimination, but the article does not mention children. Section 76, subsection 3, however, gives the state the duty to provide children with protection and care. Subsection 2 enshrines the right to education but does not mention children. Thus, children are assigned some visibility. The proposed

3 Michael Freeman, 'Why it remains important to take children's rights seriously' (2007) 15 *International Journal of Children's Rights* 5–23, 8.

4 Suvianna Hakalehto, 'Constitutional Protection of Children's Rights in Finland' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 4, section 2.

amendments to the Icelandic Constitution would, nevertheless, improve children's agency by giving children the right to be heard.⁵

The Swedish Constitution only mentions children in chapter 1, section 2 of the Instrument of Government (one of the four Constitutional Acts). Children's right to education is also specifically included in the Instrument of Government. Other provisions safeguard non-discrimination and citizenship, but do not render visibility to children, as children are not explicitly mentioned.⁶

The Swedish and Norwegian Constitutions have provisions of a declaratory, symbolic nature that highlight children's rights. The Swedish Constitution mentions children in the general introduction to human rights. Section 104 of the Norwegian Constitution acknowledges specifically the human dignity of children as a rationale for why children's rights must be taken seriously. Sigurdson argues that vesting children with crucial rights is a prerequisite for recognising and honouring their human dignity.⁷ The declaratory nature of the Swedish provision lessens, however, its value as a legal tool with a clear potential to create a shift in the recognition and enforcement of children's rights.

The Finnish, Icelandic and Swedish Constitutions fall somewhere between the second highest and the highest category, with provisions explicitly mentioning children's rights, albeit not in a section dedicated to children, in addition to provisions on education where children are either the implicit primary beneficiary or the outspoken holders of the right. Pigeon-holing the Nordic Constitutions is difficult. Although the Finnish, Icelandic and Swedish Constitutions assign particular rights to children, their provisions render less visibility both in terms of structure and the rights recognised explicitly as children's rights, than the Norwegian Constitution does. This is in accordance with O'Mahony's rating of Norway at the highest level of the visibility spectrum, Finland and Iceland at the second highest level and Denmark at the third level.⁸

Naturally, all constitutional rights apply to everyone, also children, but as many of the authors note, the focus has traditionally been on adults' rights and an adult perspective on rights. For instance, mandatory measures in child welfare have been considered primarily a possible infringement of parents' rights

5 Hrefna Friðriksdóttir, 'Protection of Children's Rights in the Icelandic Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 5, section 5.

6 Titti Mattsson, 'Constitutional Rights for Children in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 6, section 3.

7 Randi Sigurdson, 'Children's Right to Respect for their Human Dignity' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 2, sections 2 and 3.

8 O'Mahony (n1).

rather than children's rights in Danish law.⁹ However, children are increasingly seen as autonomous holders of rights across the Nordic countries, particularly in certain areas, such as child welfare law.

The age of the Constitution and the timing of the reform cycle seems to be the primary explanation for these differences. Though the Norwegian Constitution was formally enacted in 1814, the Bill of Rights was completely overhauled in the 2010s. The Finnish Constitution reflects state-of-the-art of the 1990s, and the Danish Constitution the legal thinking of the early post-war years with mainly classic liberty rights, many of which are not specifically relevant for children. The Finnish and Icelandic Constitutions enshrine rights for children in specific contexts related to non-discrimination and social rights. The Swedish Constitution has only educational rights, in addition to a declaratory provision mentioning children's rights. Since the Swedish constitutional acts were partly amended in the early 2000s, this age-explanation is not accurate for all countries. Nonetheless, it explains the differences among the Nordic countries, in general.

Another explanation is the stance towards constitutional reforms. Danes appear to consider their Constitution to a larger extent than their Nordic neighbours to be a static document that the legislator should not 'meddle' with it by amending it.¹⁰ In contrast, the Icelandic Constitution appears to be amenable to periodic review.¹¹

A third aspect consists of constitutional interpretation, in particular, the interpretation of vague provisions. The Finnish and Icelandic Constitutions have vague, open-ended provisions on children's rights. According to Friðriksdóttir, it is 'widely recognised that the written text of the Constitution does not fully represent the extent and depth of constitutional law'.¹² Therefore, section 76 of the Icelandic Constitution could – and should – be interpreted broadly to encompass participatory rights, either because it is presumed to reflect the CRC or as a result of dynamic interpretation, as Gísladóttir.¹³ Finland, in contrast, has a tradition for literal interpretation. Consequently, the wording of the

9 Caroline Adolphsen, 'Constitutional Rights for Danish Children' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 7, sections 2 and 4.2.1.

10 Adolphsen, 'Constitutional Rights' (n 9) sections 1 and 2.

11 Friðriksdóttir (n 5) sections 2.1 and 5..

12 Friðriksdóttir (n 5) section 2.3.

13 Elisabet Gísladóttir, 'Children's Right to Participation in Iceland' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 13, section 2.

Constitution alone may not be decisive for establishing the level of constitutional protection.

Interestingly, only a small range of children's rights are explicitly included in the Nordic Constitutions. Protection from economic exploitation, child labour, harm and sexual abuse are not explicitly included in any of the Nordic Constitutions. Specific rights for children representing ethnic, religious, and sexual minorities, and children with disabilities are not explicitly included in any of the Constitutions, unlike several other European Constitutions.¹⁴ The reason could be that children are considered included regardless of whether they are explicitly mentioned or not. Thus, mentioning children explicitly could be considered redundant. This appears to be in harmony with the prevailing Nordic ideology of equality, where mentioning one group would be at odds with egalitarianism.¹⁵ Swedish constitutional law reflects this view because it seems to expect that a general declaration that children are equal suffices to ensure equal rights.¹⁶ Another explanation is the perceived absence of child labour and gross exploitation of children in the Nordic countries. Hence, there would be no direct need to include these issues in the Constitution, because criminalisation of such acts would suffice.¹⁷ Furthermore, one could argue that the protection of the right to respect for dignity and integrity encompasses these aspects, as well.

The inherent weakness of the Nordic approach is that a narrow catalogue of rights may result in children having rights in some areas of law, but not in others. As Sigurdson emphasises, dignity is entangled with equality and autonomy; dignity is honoured when we respect children's autonomy and capabilities rather by giving them rights than accentuating their vulnerability and need for protection.¹⁸ Furthermore, the approach may both reflect and result in adult decision-makers overlooking or disregarding the specific problems disabled and minority children face as a combination of being simultaneously part of at least two vulnerable groups.¹⁹ Exploitation of children may fall under the radar because it takes a different, less visible form in highly developed societies, such

14 O'Mahony (n 1).

15 Anna Nylund, 'Introduction' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 1, section 2.1.

16 Mattsson (n 6) section 4.

17 Trude Haugli, 'Constitutional Rights for Children in Norway' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 3, sections 3.2, 5.3 and 5.4.

18 Sigurdson (n 7) sections 4 and 6.

19 Sigurdson (n 7) section 6.

as the Nordic countries, than it does in less developed, less affluent places.²⁰ The question is whether the result is that children are not afforded adequate constitutional protection against exploitation. Failing to provide specific protection of violence against children may result from lack of recognition of the particular vulnerability of children vis-à-vis their parents and other caretakers.

Enumerating a right in the Constitution serves as a tool for advocacy and a beacon guiding implementation and for developing policies. For instance, in the case of protecting children from abuse, penalisation of child abuse does not suffice; protection requires other measures as well, such as preventive measures offered by health care professional and social services, and equipping police investigators with sufficient resources. Provisions recognising the specific vulnerabilities of children and particular groups of vulnerable children (e.g. disabled and minority children) are likely to be more powerful tools than general provisions on children's rights or on equality.

2.3 *Agency Spectrum of Children's Constitutional Rights*

Agency is a measure of the extent to which children are treated as autonomous, independent rights-holders rather than objects in need of protection. O'Mahony applies a four-tier typology here, too: paternalistic, predominantly paternalistic, predominantly child-centred and child-centred.²¹ The Nordic Constitutions assign agency to children to various degrees. The Danish Constitution only assigns children the right to primary education, which leaves little room for agency.

The only provision in the Icelandic Constitution devoted to children does not convey agency. It only obliges the state to protect children and provide care. The question is whether it is merely an expression of a social policy goal or whether and to which extent it entails rights.²² The Icelandic Constitution could be characterised as primarily paternalistic.

The Finnish Constitution contains a general duty to treat children equally and with respect, which is an expression of a child-centric mentality. Additionally, children are given the right to be heard, which clearly assigns children a right and thus agency.²³ The Finnish Constitution underlines agency since the

20 See eg the recent report on trafficking in children and juveniles in Finland uncovered more extensive problems than expected and how authorities often do not recognise trafficking. See Elina Kervinen and Natalia Ollus, *Lapsiin ja nuoriin kohdistuva ihmiskauppa Suomessa* (European Institute for Crime Prevention and Control 2019). Affiliated with the United Nations (HEUNI) Publication Series No. 89.

21 O'Mahony (n 1).

22 Friðriksdóttir (n 5) section 4.

23 Hakalehto (n 4) section 2.

single right vested with children is participation. Hence, the Finnish Constitution could be classified as predominantly child-centred.

Chapter 1, section 2 of the Swedish Instrument of Government obliges public organs and institutions to safeguard children's rights. In doing so, the provision recognises explicitly that children have rights, although it does not specify these rights.²⁴ Hence, the provisions assign children agency and could be labelled (primarily) child-centred.

The Norwegian Constitution scores highest on agency, since it explicitly bestows children the right to participation.²⁵ The right to respect for human dignity assigns agency in the sense that it requires adults to enhance children's capacities, which in turn requires agency.²⁶ The duty to provide for social and economic rights is framed as an obligation for the state to protect children rather than providing children agency. Consequently, the Norwegian Constitution scores highly on agency.

The Nordic Constitutions vary considerably in the degree to which agency is assigned to children, from no explicit mention of children to a powerful statement recognising children as autonomous, independent persons. The level of agency reflects primarily the age of the Constitution and its provisions and follows the same pattern as visibility. However, the Swedish constitution receives a higher score on agency than on visibility.

2.4 *Enforceability of Children's Constitutional Rights in the Nordic Countries*

The enforceability spectrum of children's constitutional rights measures whether and how children's rights are enforceable through a variety of remedial avenues. Are rights unenforceable or enforceable through administrative, weak judicial or strong judicial remedies? Unless children are able to obtain a timely and just remedy, their rights are reduced to 'mere symbols that miss out on much of the added value that constitutional status can bring', O'Mahony asserts, referring to Freeman.²⁷

The Nordic Constitutions enshrine rights that are at least *prima facie* enforceable, such as the rights to participate in decision-making, education, physical freedom, and private and family life.²⁸ However, some of them also include rights of a more declaratory nature, as discussed above. The introductory

24 Mattsson (n 6) section 3.

25 Haugli (n 17) section 4.2.

26 For a more detailed discussion on the implications of human dignity, see Sigurdson (n 7).

27 O'Mahony (n 1).

28 See e.g. Hakalehto (n 4) section 2.

chapter in the Swedish Instrument of Government includes a reference to children, but the reference has a mere symbolic character.²⁹ The question is whether the same applies to the duty to guarantee children care and provision in the Icelandic constitution.³⁰ Furthermore, the right to equal treatment in the Finnish Constitution appears to be of a declaratory character. The right to non-discrimination and the right to respect of human dignity fall somewhere in-between justiciable and expression of a general principle.³¹ Particularly, the latter is likely to be non-justiciable, unless it is combined with other rights. As an expression of a general principle these kinds of provisions—in particular, the Norwegian provision accentuating the human dignity of children—have the potential of becoming a strong tool for advocacy of children's rights; especially, rights that do not assigned agency to children explicitly.

However, the question is whether children are able to invoke their rights in practice. The constitutional practice of limited judicial review could pose a hindrance to enforcing children's rights. Apart from Norwegian courts, Nordic courts have been hesitant in exercising their powers and have limited open judicial review to instances where legislation is clearly and manifestly contrary to constitutional law. However, this restrained approach to judicial review is attributable to differences in the role of courts as guardians of the Constitution and human rights, rather than protection of children's rights.³²

Interestingly, the willingness of courts to use the Constitution actively in their argumentation varies within the countries studied. The differences are most tangible in Finland, which has both general and administrative courts. The Supreme Administrative Court seems to be more willing to refer to the Constitution when ruling on children's rights.³³ What could explain the differences among the Finnish Supreme Court and the Supreme Administrative Court? One answer could be differences in legal constellations in these cases. Administrative courts adjudicate cases where the government infringes on individual rights, whereas general courts adjudicate matters between private individuals. Perhaps the threshold to protect children's constitutional rights vis-à-vis the state is lower than forcefully applying children's rights when the

29 Mattsson (n 6) section 3.

30 Friðriksdóttir (n 5) section 4.

31 Sigurdsen (n 7) section 5.

32 Nylund, 'Introduction' (n 15) section 2.2.

33 Hakalehto (n 4) section 2.2; Hannele Tolonen, Sanna Koulu and Suvianna Hakalehto, 'Best Interests of the Child in Finnish Legislation and Doctrine: What Has Changed and What Remains the Same?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 12, section 3.2.

counterpart is an adult care-taker. A further question is whether the same difference exists in Sweden, which also has a two-tier court structure with general and administrative courts. Similarly, courts appear to be prone to resort to the Constitution in their argumentation in some areas of law, but not in others, following at least partly the distinction between private law and public law.

Legal standing influences enforceability. Giving children, rather than their guardian, legal standing improves enforceability, since the absence of independent legal standing is likely to inhibit children from invoking their rights.³⁴ In the Nordic countries, guardians have legal standing on behalf of their children until the children reach the age of maturity. Parents are assumed to make decisions that are in the best interests of the child.³⁵ In child welfare cases, the conflicts of interests between the child and parents are immanent and palpable. Thus, children are given independent rights earlier than in most other cases. In contrast, in cases on parental responsibility, children are in practice prevented from invoking their rights even if there could be significant conflicts of interests between the child and the parents. The lack of recognition of the manifold situations where the child's interests and rights are in dissonance with parents' interests and rights impedes children from enforcing their rights.³⁶

Furthermore, much of the decision-making involving children's rights takes place in municipal organs. Consequently, the road to courts is oftentimes long and winding. In the majority of cases, the question of enforcement is therefore a matter of whether teachers, social workers, nurses and other civil servants value children's rights and implement children's rights in their daily activities. The design of administrative complaints is decisive for enforcement of children's rights.

Finally, ombudsmen are key actors in enforcing children's rights in the Nordic countries. Parliamentary Ombudsmen have a paramount role in all Nordic countries in handling individual complaints against state organs. The Parliamentary Ombudsmen also hear complaints filed by children. The ombudsmen do not have the power to overturn or remand administrative decisions, however, their reproofs are taken seriously and are often consequential.

All Nordic Countries, except for Denmark, have ombudsmen for children. None of the ombudsmen has the authority to handle individual complaints from children.³⁷ Denmark has, however, a Children's Office³⁸ at the

34 Adolphsen, 'Constitutional Rights' (n 9) section 3.

35 Sigurdson (n 7) section 6.

36 For a discussion of this topic, see sections 5.1 and 5.2 below.

37 See Friðriksdóttir (n 5) section 2.3; Hakalehto (n 4) sections 2.2, 3.3 and 5.2; Haugli (n 17) section 7; and Barnombudsmannen in Sweden www.barnombudsmannen.se (accessed 29 April 2019).

38 <http://boernekontoret.ombudsmanden.dk/> (accessed 29 April 2019).

Parliamentary Ombudsman's Office and also a Children's Council.³⁹ The advantage of the Danish system, where children have a dedicated unit under the auspices of the Parliamentary Ombudsman rather than a separate unit, is that the children's unit has the power to hear individual complaints and is, hence, a more efficient mechanism. In its Concluding observations on the Nordic countries, except Denmark, the Committee on the Rights of the Child reiterates its recommendation to consider giving the ombudsmen such competence and ensure that this mechanism is effective and accessible to all children.⁴⁰

2.5 *Implementation of Children's Constitutional Rights*

Assessing implementation of children's constitutional rights in the Nordic countries is arduous for several reasons. One reason is that the Nordic countries, as many other countries, recognise children's rights in general terms, if not overtly as a legal principle. Attributing the existence of children's rights to constitutional law is consequently not easy. Furthermore, variations in children's rights among the Nordic countries at the legislative, policy and practice levels are fairly small. Another question is whether one should limit the study to provisions explicitly mentioning children or to rights enshrined in the respective Constitution in general. A further question is whether implementation should be assessed individually for each country or whether one should compare children's rights within specific areas of law across the Nordic countries. Moreover, the chapters discussing children's constitutional rights in general in this volume (chapters 3–7) have a limited scope. Further, the areas studied reflect the scope of constitutional protection of children's rights, current debates and topics in each country and perhaps also the research interests of each author. They are thus not amenable to direct comparison.

Nevertheless, there are indications that visibility in the Constitution translates into implementation in legislation, court practice and policies.

The findings on the Norwegian Constitution illustrates the potential symbolic value of a specific section on children's rights as a primary source of law and guideline for lawmakers and policymakers. In contrast to the Icelandic Constitution, the Norwegian preparatory works give ample guidance on why

39 <https://www.boerneraadet.dk/> (accessed 29 April 2019).

40 Concluding observations of the CRC Committee on consideration of reports submitted by State parties under Article 44 of the Convention. Norway CRC/C/NOR/CO/5–6 (1 June 2018) chapter A, para 8; Sweden CRC/C/SWE/CO/5 (6 March 2015) chapter A para 14; Iceland CRC/C/ISL/CO/3–4 (23 January 2012) chapter IV, para 17; Finland CRC/C/FIN/C/4 (3 August 2011) chapter A para 15.

specific rights were included, and the section 104 subsection 1 emphasising human dignity of children imposes a general duty to respect children as autonomous rights-holders. Although the duty to facilitate children's development is of a declaratory nature, economic and social rights are justiciable according to the preparatory works.⁴¹ Considering the paramount role of preparatory works in Norway, and the Nordic countries in general,⁴² these comments remove many of the potential ambiguities associated with economic and social rights. In spite of a specific provision in the Constitution, children's rights are still sometimes overlooked in the legislative process,⁴³ and there are numerous examples of policies and practices that are contrary to the wording and spirit of section 104.⁴⁴ The impact on court rulings is unclear, because although Norwegian courts refer to section 104, they have so far refrained from interpreting it independently and from explaining whether and how it influences the outcome, notes Haugli.⁴⁵ However, since section 104 is relatively new, our conclusions are only provisional. To the extent that children's rights are well protected in Norway, much of the work that caused this pre-dates section 104 and may stem from a child-centric turn in general rather than from constitutionalisation of children's rights.

In Finland, children's constitutional rights are employed as an argument in the legislative process. Hakalehto notes a shift in the use of children's rights as a key argument and explicit references to both section 6 of the Constitution and relevant provisions in the CRC in preparatory works.⁴⁶ The changes have been gradual and is probably linked to the increasing role of human rights in general. As Hakalehto notes, embedding children's rights in statutory law is imperative since practitioners rely primarily on statutory law, not the Constitution, when they develop and monitor practices. For rights that are

41 Haugli (n 17) section 4.6.

42 Nylund, 'Introduction' (n 15) section 2.1.

43 Haugli (n 17) section 7.

44 For examples, see Lena R L Bendiksen, 'Children's Constitutional Right to Respect for Family Life in Norway: Words or Real Effect?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 16, section 6; Anna Nylund, 'Children's Right to Participate in Decision-Making in Norway: Paternalism and Autonomy' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 11, sections 5.1.2, 5.2 and 5.3; Kirsten Sandberg, 'Best Interests of the Child in the Norwegian Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 8, sections 3.2 and 5.2.

45 Haugli (n 17) section 7.

46 Hakalehto (n 4) section 3.

not explicitly recognised in the Constitution, implementation in statutory law both directly and through preparatory works is vital.⁴⁷

The limited context in which children are explicitly enshrined in the Icelandic Constitution and the brief discussions in the preparatory works hinder a broader analysis of children's rights and may lead to the false conclusion that both children's rights and economic and social rights are policy statements rather than rights and that they are only weakly enforceable. Furthermore, 'protection and care' is ambiguous: it could be interpreted narrowly or broadly, and even interpreted to encompass participatory rights. As Friðriksdóttir explains, Icelandic courts have been hesitant to add to the analysis of the provision.⁴⁸

Despite the fact that children's rights are protected only in a declaratory provision in the Swedish Instrument of Government and that it is hence not justiciable and does not entail any specific rights, children's rights are increasingly recognised and implemented in Swedish legislation and legal practices. However, the child-centric turn emanates more from general shifts in the view of children and from international instruments such as the CRC, European Court of Human Rights (ECHR) and EU instruments, explains Mattsson. In her opinion, the forthcoming implementation of the CRC ought to result in a review of Swedish law, both on the constitutional level and the level of statutory law.⁴⁹

Although the Danish Constitution does not mention children specifically, it nevertheless endows children's rights. Children have a constitutional right to physical integrity; hence, it must be respected. In this respect, Denmark is similar to the other Nordic countries. Nonetheless, the protection is weaker because the Constitution does not mandate treating children as autonomous rights holders. This, in turn, influences arguments available in a discussion on *inter alia* appropriate age-limits for assigning children autonomy, and whether age-limits should be combined with individual assessments on the maturity of the child, notes Adolphsen.⁵⁰

The contributions in this volume hint at a specific problem in implementing children's rights: providing equal rights for all children. Friðriksdóttir discusses how children in rural areas may be deprived of social services and special education due to the fact that access to services is more limited in these places than in urban areas and how the needs of particularly vulnerable children, for instance, disabled children, may be disregarded.⁵¹ Hakalehto notes how the

47 Hakalehto (n 4) section 7.

48 Friðriksdóttir (n 5) section 4.

49 Mattsson (n 6) section 6.

50 Adolphsen, 'Constitutional Rights' (n 9) section 4.2.

51 Friðriksdóttir (n 5) section 4.3.

fact that the right to early childhood education is limited to 20 hours a week unless both parents work full-time, amounts to discrimination of children based on their needs.

Based on the perspectives and examples in the five contributions on children's constitutional rights in general, the visibility, agency and enforceability of children's rights at the constitutional level has at least some impact on implementation of those rights. The Constitutions provide powerful tools for advocacy, both in terms of general principles mandating the government and government officials at all levels to treat children as autonomous subjects and by specifying rights. Therefore, it comes as no surprise that the Norwegian Constitution appears to offer the best tools for implementing children's rights. Even so, implementation is slow and sometimes cumbersome or unsuccessful.

One important caveat remains in our study. All contributions in this volume discuss children's rights in general. Consequently, issues related to children in particularly vulnerable situations are mentioned haphazardly, but the issues are not explored in-depth. The contributions indicate that such children are at risk of having deprived of their rights in practice. A few authors mention children in immigration cases and how these children are given less voice than children in child welfare and parental responsibility cases. Disabled and seriously ill children receive only limited attention as do minority children. Our study is an initial study that lays ground for further exploration of specific children's rights in specific contexts. Vulnerable children and their rights are an area calling for more research.

3 International Instruments as Supplements to Constitutional Law

In all the Nordic countries children's rights are also protected through international instruments, many of which have a semi-constitutional character.

The Fundamental Rights Charter of the European Union is directly applicable in Denmark, Finland and Sweden in the power of their EU membership. The EFTA Court has repeatedly stated that although the Charter is not formally European Free Trade Association (EFTA) law, the rights enshrined in it are applicable as general principles of EFTA law.⁵²

The ECHR and the CRC have a semi-constitutional character in Finnish and Norwegian law since the Constitution obliges government organs to ensure

52 Eg Case E-14/15 *Holship v Norsk Transportarbeiderforbund* [2016] EFTA Ct. Rep. 240, section 123.

human rights, which includes all ratified human right's treaties. Finnish and Norwegian courts tend to interpret their Constitutions in the light of the ECHR.⁵³ The Norwegian Human Rights Act explicitly gives the ECHR and CRC a semi-constitutional character. Their rank is below the Constitution but above other statutory law. The ECHR has a similar status in Swedish law, however, the CRC has not been incorporated into Swedish law yet, but from 2020 onwards it will.⁵⁴ In Finland and Iceland, the ECHR and the CRC have the same status as other acts of parliament.⁵⁵ In Denmark, only the ECHR is incorporated into Danish law, while Denmark has only ratified the CRC. Danish courts are reluctant to use international instruments in their argumentation.⁵⁶ As explained in the introductory chapter, the disinclination of Danish courts to use the CRC and other international instruments, stems from a tradition of emphasising sovereignty in combination with a restrained approach to judicial review.⁵⁷

The extent to which children's rights are enshrined under the panoply of international instrument varies to some extent among the Nordic countries, particularly, as to the CRC and to the extent to which the legislature explicitly bases their argumentation on these instruments and the courts are willing to enforce the rights enshrined and to interpret national legislation in light of international instruments. Based on the contributions in this volume, European Court of Human Rights (ECtHR) case law comes across as having particularly strong persuasive force in Finland. One reason may be that Finnish courts had no right to perform judicial review until the ECHR was ratified and implemented in Finnish law in the mid-1990s.⁵⁸

However, as for constitutional protection of children's rights, differences seem to derive mainly from the general approach to human rights and international law rather than children's rights, in particular. The ECHR and the EU Charter may be considered to have a higher status than the CRC due to the high status of the ECtHR and the Court of Justice of the European Union (CJEU). For instance, the majority in a plenary judgement of the Norwegian Supreme Court refused to assign significant weight to the general comments from the CRC Committee.⁵⁹

53 Hakalehto (n 4) section 2; Haugli (n 17) sections 2 and 3.3, Tolonen et al. (n 33) sections 3.1 and 3.2.

54 Mattsson (n 6) sections 2.3, 2.4. and 4.

55 Friðriksdóttir (n 5) section 2.2.

56 Adolphsen, 'Constitutional Rights' (n 9) section 1.2.

57 Nylund, 'Introduction' (n 15) section 2.2.

58 Nylund, 'Introduction' (n 15) section 2.2.

59 HR-2015-2524-P (Rt. 2015 p 1388) para 153–154. See also Sandberg (n 44) section 3.3.1.

4 The Best Interests of the Child

The implementation of the principle of the right of the child to have his or her best interests taken as a primary consideration differs between the Nordic countries and also within different domains within each country. This analysis is based on Norwegian, Finish and Swedish law. The principle has been well known and applied in practise for several decades, especially in family law, child protection and adoption law. Regarding the formal status, only the Norwegian Constitution explicitly recognises this principle. Because the best interest of the child is one of the general principles of the CRC, the variation in the status of the CRC (Norway and Finland – semi constitutional character, Iceland – incorporated, status as national law, Sweden – partly incorporated, will become national law in 2020; Denmark – only ratified, not incorporated) may also influence the status of the principle in national law.

All the Nordic countries have statutory provisions in different areas of law where the principle is stated, primarily in the field of family law, child protection, adoption and immigration. In Norway and Sweden, the principle is in addition stated in a wide range of areas of law, for example, in health law, education law, and even in criminal law. In Finland, the best interests-principles is stated in the Act on Early Childhood Education and Care, but not in the Basic Education Act. Although the principle is seemingly coherent, as Schiratzki notes, the principle may presumably be given divergent interpretations in the various field of law.⁶⁰ A common observation is that the more politically loaded an area is, with immigration law as the paramount example, the weaker the position of the principle is, both in legislative work and in individual cases.⁶¹ Court cases are considerably influenced by CRC and case law from the ECtHR. Further, one could argue that a ‘constitutionalisation’ of the concept is taking place both in Sweden and Finland.⁶²

An interesting issue before Norwegian courts has been whether CRC article 3 is justiciable in and of itself, without being connected to other claims. This is discussed by Sandberg, who notes that the new section 104 of the Norwegian Constitution may shed new light on this issue, after the Supreme Court in 2012 decided that article 3 is not justiciable.⁶³

60 Johanna Schiratzki, ‘The Elusive Best Interest of the Child and the Swedish Constitution’ in Trude Haugli and others (eds), *Children’s Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 10, section 4.

61 Sandberg (n 44) section 4.

62 Tolonen, Koulu and Hakalehto (n 33) section 4; and Schiratzki, ‘The Elusive Best Interests’ (n 60) section 4.

63 Sandberg (n 44) section 2.5.

In this volume, the authors mainly focus on the best interests of the child in case law and in preparation of legislation. However, the best interests-principle has a much wider scope. For all the Nordic countries, one may see from the concluding observations of the Committee on the Rights of the Child, referring to its general comment No 14 (2013), that it recommends in slightly differing wording that states

- strengthen their efforts to establish clear criteria regarding the best interests of the child for all those authorities that have to take decisions affecting children;
- provide sufficient training for relevant professionals on best interests-determinations, and
- ensure that this right is appropriately integrated and consistently interpreted and applied in all legislative, administrative and judicial proceedings and decisions as well as in all policies, programmes, projects and international cooperation relevant to and having an impact on children.⁶⁴

Constitutionally protected or not, it seems like all the Nordic countries still have a long way to go in order to fulfil the requirements of the CRC committee on how to really take the best interests-principle into account.

5 The Right to Participation in Decision-Making

5.1 *Defining Participatory Rights*

All Nordic countries recognise children's right to participation, although only the Finnish and Norwegian Constitutions provide explicitly protection. Rules providing for participation emerged already decades ago, far earlier than the constitutional right.

A question raised in all five chapters on participatory rights is what participation entails. Is it a question of hearing children to gain information to improve the quality of the decisions that adults make on behalf of children? Is it a matter of giving children voice to enable child-focused or child-friendly decisions? Or, does it entail a duty to let children participate directly or through a representative and to let them form the decision-making process, the agenda and the outcomes? Is it primarily a question of hearing the child – a procedural

64 Concluding observations of the CRC Committee on consideration of reports submitted by State parties under Article 44 of the Convention. Norway (n 40) Part B para 13; Sweden (n 40) Part B paras 17–18; Iceland (n 40) Part IV paras 26 and 27; Finland (n 40) Part B paras 27–28. The topic is not mentioned in the concluding observation to the Danish report, CRC/C/DNK/CO/5 (26 October 2017).

matter or also an obligation to give children influence on the outcome – a substantive matter in addition to a procedural matter? When children are assigned a representative, should the representative primarily advocate the views of the child, the individual perspective of the child concerned, or the child's best interests, a child perspective but not so much from the point of view of the specific child concerned?⁶⁵ Although the CRC and the Committee on the Rights of the Child clearly support to the broadest notion of participation and focusing on each child's individual views,⁶⁶ on a national level the issue still appears to be unclear.

Despite progress, the belief that participation is harmful for children is still common, as is the belief that younger children (i.e. children age 8–9 or younger) are too immature to participate.⁶⁷ Current practices and processes are seldom designed to enable meaningful participation and the views of the child are construed narrowly, which presupposes fairly advanced cognitive and verbal capabilities. Additionally, exceptions for children's participation are sometimes interpreted quite broadly, such as in the Finnish Aliens Act which makes an exception for situations when hearing the child is manifestly unnecessary. The Finnish Supreme Administrative Court, however, ruled that the exception must be interpreted narrowly.⁶⁸

Furthermore, parents are generally considered to have the power to make decisions on behalf of their children and have the primary obligation to hear the child⁶⁹: authorities have traditionally entrusted hearing the child to the

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- 65 Pernilla Leviner, 'Voice but no Choice – Children's Right to Participation in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 14, section 3.2.1; Nylund, 'Children's Right to Participate' (n 44) section 2.
- 66 *General comment no. 20* (2016) *on the implementation of the rights of the child during adolescence* (6 December 2016) CRC/C/GC/20 paras 7–8; *General comment no. 12* (2009) *The Right of the child to be heard* (20 July 2009) CRC/C/GC/12; *General comment No. 7* (2005) *Implementing child rights in early childhood* (20 September 2006) CRC/C/GC/7/Rev.1 paras 6–7; *General comment no. 4* (2003) *Adolescent health and development in the context of the Convention on the Rights of the Child* (1 July 2003) CRC/GC/2003/4 paras 7, 9–10.
- 67 Gísladóttir (n 13) sections 5.3–5.4; Tolonen, 'Children's Right to Participate and Their Developing Role in Finnish Proceedings' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 12, section 2.
- 68 Tolonen (n 67) section 2.3. Gísladóttir (n 13) section 5.4, mentions a comparable example where the Icelandic Supreme Court overruled a ruling where a 10-year-old had not been heard in a case concerning residence and contact.
- 69 Gísladóttir (n 13) section 4; Hanne Hartoft, 'Children's Right to Participation in Denmark: What is the Difference Between Hearing, Co-Determination and Self-Determination?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 15, section 5; Leviner (n 65) section 3.1.

parents and trusted that the parents' give a sufficient and exact account of the child's views. Authorities do not control whether and how parents have involved their child in decision-making. Moreover, these methods of participation disregard potential conflicts of interests between the parents and the child, and that, in some situations, children have a legitimate wish of privacy from their parents. Consequently, these practices are not compatible with the spirit of the CRC as expressed in the general comments,⁷⁰ since they deprive children of effective participation and hinder children from receiving information directly.

There are signs of change, such as reforms giving children the right to act without involvement of their parents in health care settings and even to keep information secret from their parents.⁷¹ Another example is the Danish family-law house where children have an independent right to schedule a meeting at the house to discuss custody, residence and contact arrangements.⁷²

5.2 *Participatory Rights – Voice and Choice*

Children's right to participation varies across different domains. Children have very limited opportunities to collective, civic participation and active citizenship in the Nordic countries. Although extending voting rights to 16- and 17-year-olds has been discussed, the arguments of the opponents, mainly that children are immature and inexperienced, have – at least until now – prevailed.⁷³ Leviner remarks how children are automatically considered to lack the capacity and competence to assess information and make 'rational' choices in elections, and that the capacity will magically surface at the moment they turn 18.⁷⁴ The youth demonstrations for climate are a direct consequence of the disenfranchisement of children: since children are barred from participating in political processes, they must avail themselves of other opportunities for making their voices heard.

Youth councils and school councils are the exceptions to lack of participation at the collective level. Nonetheless, since the decision-making authority of these organs is very limited, in the case of youth councils sometimes even virtually non-existent, these organs pay, in effect, lip service to children's

70 Gísladóttir (n 13) sections 5.3–5.4; Tolonen (n 67) section 2.

71 See Gísladóttir (n 13) section 4; Hartoft (n 69) section 7; Nylund, 'Children's Right to Participate' (n 44) section 5.3; Tolonen (n 67) section 2.3.

72 Hartoft (n 69) section 5.

73 Gísladóttir (n 13) section 3.3; Leviner (n 65) section 2.1.

74 Leviner (n 65) section 2.1.

participatory rights.⁷⁵ Denmark and Norway serve as examples: the youngest children in primary schools are excluded from participation in the student council and have therefore a limited say on how the physical and social school environment is shaped.⁷⁶ This is true even though one would expect most children age 6–10 to be far more interested in, for example, the design of the playground, than children age 11–13 would be. Although town planning has significant impact on children's lives, in particular, for making public spaces appealing and accessible and for enabling children to move independently in their surroundings, children are not regularly given an opportunity to participate in decision-making processes or even rendered an opportunity to be heard. Consequently, children's opportunities to advocate for their views and to invoke their rights is limited. This is also an example of the principle of 'integration through separation' of children and young people, where participation is confined to a narrow area that serves primarily children and young people.⁷⁷

On the level of decision-making concerning individual children or siblings, the view of children's participatory rights is in a process of transformation. Children's participation is increasingly enshrined, not just in a tokenistic perspective as a source of information, but also as an intrinsic value. Progress is, nonetheless, fairly slow and proceeds unevenly across different domains. Participation in child welfare services has been improved significantly; nonetheless, problematic regulation and practices are still abundant. For instance, in Sweden, hearing the child regardless of whether the parents cooperate is still considered an exception designed only for serious cases.⁷⁸

In cases on parental responsibility, which belong to the core domain of private life, participation rights for children are still limited. In particular, children lack legal standing in courts. However, courts increasingly hear children either directly during or before the main hearing or request social services or

75 See Gísladóttir (n 13) section 3.2; Hartoft (n 69) section 4; Leviner (n 65) sections 2.2–2.3; Nylund, 'Children's Right to Participate' (n 44) section 4; Tolonen (n 67) section 2.3. See also the concluding observations of the CRC Committee on Norway (n 40) Part III para 14; Iceland (n 40) Part IV paras 28–29; and Denmark (n 64) Part III para 13.

76 Hartoft (n 69) section 4.1; Nylund, 'Children's Right to Participate' (n 44) section 4. See also the concluding observations of the CRC Committee on Denmark (n 64) Part III, para 13.

77 Michael-Sebastian Honig, 'Work and Care: Reconstructing Childhood through Childcare Policy in Germany' In Allison James and Adrian L James (eds), *European Childhoods: Cultures, Politics and Childhoods in Europe* (Palgrave Macmillan 2008) 198–215, 202.

78 Leviner (n 65) section 3.2.1 and the concluding observations of the CRC Committee on Sweden (n 40) Part III, paras 19–20.

an expert to do so.⁷⁹ The former method is preferable, as it ensures children superior voice.⁸⁰ In recent years, systems have been put in place for child-inclusive decision-making processes on parental responsibility in mandatory out-of-court mediation.⁸¹ However, even when child-inclusive processes have been developed, they do not necessarily become the standard, as the Norwegian BIM model illustrates.⁸² When parents agree on residence and contact, children's voices become muted unless the parents are willing to hear the views of the child and to incorporate those views in decision-making.⁸³

The Nordic countries operate with numerous age-limits for participation in different areas of law, where 15 and 12 are very common. The approach appears to be haphazard because age-limits vary across different domains. While age limits ensure participation for children above the limit, they tend to hinder participation for younger children even when the provision states that sufficiently mature children have participatory rights. Thus, age limits are a double-edged sword. Denmark, Finland and Sweden have high age limits, putting the limit mostly at 12 or 15 years of age.⁸⁴ The Norwegian strategy is using two age limits, a lower limit ensuring the right to express views and a higher limit ensuring that proper weight is assigned to those views. This approach is preferable, because it forces authorities to hear children already at an earlier age.⁸⁵ Based on the contributions in this volume, time is not ripe for abolishing age limits; rather, the primary focus should be to lower them significantly. To avoid 'infantilisation' of adolescents, we should simultaneously mind their capacities by endowing young people with stronger participatory rights than younger children.⁸⁶

Children's participatory rights depend to a large extent on practices: on whether professionals involved in decision-making processes develop

79 Leviner (n 65) section 3.2.1; Nylund, 'Children's Right to Participate' (n 44) sections 5.1.2 and 5.2; Tolonen (n 67) section 3.

80 CRC Committee on Sweden (n 40) Part III D.

81 Gísladóttir (n 13) section 5.3; Hartoft (n 69) section 5; Nylund, 'Children's Right to Participate' (n 44) section 5.1.1. For criticism on the practice in Denmark in place until March 2019, see the concluding observations of the CRC Committee on Denmark (n 64) Part III, para 14.

82 Nylund, 'Children's Right to Participate' (n 44) section 5.1.1. See also the concluding observations of the CRC Committee on Norway (n 40) Part III para 14.

83 Gísladóttir (n 13), section 5.2.

84 Hartoft (n 69) section 5; Leviner (n 65) section 3.2.1; Tolonen (n 67) section 3.

85 Nylund, 'Children's Right to Participate' (n 44) section 6.

86 Bruce Abramson, 'The Invisibility of Children and Adolescents: The Need to Monitor our Rhetoric and our Attitudes' in Eugeen Verhellen (ed), *Monitoring Children's Rights* (Martinus Nijhoff 1996) 393–402, 397400.

processes for involving children and hearing the voice of the child. Professionals need skills to engage children in age-appropriate ways. The contributions unanimously emphasise that formal participation does not guarantee voice and choice for children. It must be accompanied by appropriate child-friendly and child-centred practices and proper training of the professionals involved.⁸⁷

Several authors address the difference between enabling children to express their views and giving due weight to those views. The two concepts do not appear to be highly problematized nationally, even though hearing the child does not automatically translate into giving weight to the views of the child.⁸⁸ Perhaps the two are largely thought to coincide – only children who are capable of ‘rational’ thinking are considered to be capable of forming their own views or perhaps the main problem is that children do not have access to meaningful participation, and consequently, the issue of assigning weight to those view does not arise. Icelandic and Norwegian law are the exception, operating with different age limits for the right to be heard, the right to participate in decision-making and the right to self-determination.⁸⁹

5.3 *The Role of Constitutional Protection*

The question remains whether including children’s participatory rights in the Constitution matters. Despite the differences in the formal constitutional protection, the issues addressed in the five chapters on participation in this volume are similar. Divergences among the contributions seem to ensue primarily from each author’s research interest and is to some extent contingent on incidental factors such as recent cases. As Hartoft notes, lack of constitutional protection (and lack of implementation of the CRC at a semi-constitutional level) impedes reforms to some extent.⁹⁰ Although the right to voice and choice is enshrined in the Finnish Constitution, case law from the ECtHR appear to be highly influential, perhaps much more so than case law from national courts, at least based on Tolonen’s contribution.⁹¹ The question is whether incorporating children’s rights into the Finnish Constitution has propelled the development of the right to participation or whether the shift emanates from the evolution in the role of human rights and changing attitudes to children.

87 Gísladóttir (n 13) sections 4 and 5; Hartoft (n 69) section 6; Leviner (n 65) section 3.2; Nylund, ‘Children’s Right to Participate’ (n 44) sections 5 and 7; Tolonen (n 67) section 4.

88 Hartoft (n 69) section 6; Leviner (n 65) sections 3.2.2–3.2.3 and 4.

89 Gísladóttir (n 13) section 4.

90 Hartoft (n 69) section 2.

91 Tolonen (n 67).

Although the value of explicitly including the right to participation as a constitutional right is limited, Norwegian law has several examples of a burgeoning shift in the patterns of argumentation.⁹² Children's constitutional right to participation serves perhaps not by itself as a sufficient impetus for change of legislation and practices, but it adds significant weight to arguments for improving participatory rights and to extend the reach of those rights. The combined effect of the shift in our view of children and constitutional law could prove to be forceful.

6 The Right to Family Life

6.1 *'Family' as a Legal Concept*

The family is almost universally considered as the natural environment for the child to live and grow. Although the right to family life has a bearing on virtually all areas of child law, as Schiratzki notes,⁹³ and 'family' is a legal concept used in numerous international and national legal instruments, there is no common definition of 'family'. If the concept is defined at all, it is presumably given divergent definitions in the various domains of law, e.g. in family law, child protection law and immigration law. Some guidance may be found by analysing ECHR article 8, which is incorporated into national law in all the Nordic countries.⁹⁴ The ECtHR has developed the concept of and the right to family life over the years in its extensive practice, with increasing attention to the rights of the child and the CRC. According to the ECtHR, family life may depend on biological, legal or social (*de facto*) ties between a child and another person.⁹⁵ The right to family life is understood both as a negative right that imposes a duty on the state not to interfere in family life and as a positive duty for the state to promote family life and to protect the family from violations from third parties. The Committee on the Rights of the Children interprets the concept of 'family' concordantly with the ECtHR when stating the following:

[t]he family is the fundamental unit of society and the natural environment for the growth and well-being of its members, particularly children

92 Nylund, 'Children's Right to Participate' (n 44) sections 5.1.2, 5.2 and 5.3.

93 Johanna Schiratzki, 'Children's Right to Family Life and the Swedish Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 18, section 1.

94 See this chapter, section 3.

95 See *K. and T. v Finland* (Application no. 25702/94) ECtHR Grand Chamber 12 July 2001.

(preamble of the Convention). The right of the child to family life is protected under the Convention (art 16). The term “family” must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom (art 5).⁹⁶

According to the Norwegian Constitution, section 102, everyone has a right to respect for private and family life. ‘Everyone’ includes children, of course, and the provision should be read in conjunction with section 104. Section 71 of the Icelandic Constitution ensures the right to respect for private and family life. Family is not mentioned in the Finnish Constitution, however, the right to privacy as stated in section 10 is meant to cover family life as well. According to chapter 1, section 2 of the Swedish Instrument of Government, the State has a duty to protect the private and family life of the individual. Family is not mentioned in the Danish Constitution, however, the right to personal liberty is protected under section 71, and interference with family life may be considered as an intervention in the right to personal liberty.

To identify how children’s right to family life has been implemented, one must turn to statutory law and court cases. In analysing children’s right to family life, the authors in this volume have mainly discussed children’s rights to know and to be cared for by their parents, which includes registration of paternity, parental responsibility and the post-divorce family; adoption; out of home care; and forming and maintaining relationships with the extended family. Based on the four chapters on family life in this volume, the variations among the Nordic countries regarding children’s rights to family life are fairly small. Therefore, the areas with the most pronounced differences will be subject to further analysis.

6.2 *Defining and Establishing Parenthood*

The idea of parenthood in Nordic legislation appears to stem tacitly from the idea of the nuclear family with two parents of opposite sexes, even when the parents are separated, divorced or have never lived together. However, the regulation of parenthood is far from consistent. Despite recurrent debates of extending parenthood to more than two persons when more than two persons are the *de facto* parents of the child, no legislative changes have been made.

96 Committee on the Rights of the Child, *General comment no. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3.1)* (29 May 2013) para 59.

There are naturally many children with only one parent, and in Norway and Sweden single persons are allowed to adopt children. In Sweden, assisted reproduction is legal for single women, in Norway they are limited to married and co-habiting couples.

Regarding the right to contest and change legal paternity, the views differ – and evolve – in the Nordic countries. The main concern is balancing ‘the right to know’ and the protection of the family that has been established *de facto*. The right to know one’s identity is an integral part of the right to privacy and family life, stated the Supreme Court of Iceland in a paternity suit.⁹⁷ In Norway, the Children Act has been amended several times in this respect. Currently the child, either of the parents and any person who believes he is the father of a child, may at any time bring an action before the courts regarding paternity, even when paternity has already been established through marriage or declaration. Denmark, on the other hand, has very strict reopening rules. The ECtHR has accepted these rules under the condition that there is still room for some discretion.⁹⁸ Thus, Norway protects the right to know and biological factors, whereas Denmark protects the family as an established social unit. Finland is in a middle position: Since 2015, the time limits for the child to bring a paternity case to court have been abolished as a consequence of a ruling of the Supreme Court from 2012 finding such time limits unconstitutional.⁹⁹ However, a time limit still restricts the right of the legal mother and father to bring an action on paternity.¹⁰⁰

Legislation reflects how particularly assisted reproductive treatments result in the increasing importance of intent as a factor for establishing parenthood, observes Koulu.¹⁰¹ Still, the Icelandic Supreme Court found that the refusal to acknowledge non-biological intended parents as legal parents pursuant to a surrogacy arrangement did not amount to a violation of the right to family life.¹⁰²

97 Friðriksdóttir (n 5) section 3.

98 Caroline Adolphsen, ‘Children’s Right to Family Life in Denmark’ in Trude Haugli and others (eds), *Children’s Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 19, section 2.2.

99 Sanna Koulu, ‘Children’s Right to Family Life in Finland: A Constitutional Right or a Side Effect of the “Normal Family”?’ in Trude Haugli and others (eds), *Children’s Constitutional Rights in the Nordic Countries* (Brill 2019) chapter 17, section 4.1.

100 Koulu (n 99) section 4.1.

101 Koulu (n 99) section 4.1.

102 Friðriksdóttir (n 5) section 3.

6.3 *The Right to Family Life for Children in Out-of-Home Care and in Post-Divorce Families*

The ECtHR has repeatedly stated that ‘the mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of family life and that domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8’.¹⁰³

A fundamental part of this ‘mutual enjoyment’ is the right to live together, enable ‘normal’ development of family relationships, or at least to enable regular contact between the child and parent(s). As Koulu notes, ‘the child’s right to family life does not suddenly disappear just because her right to protection and her best interest need to take precedence at a given moment’.¹⁰⁴

The right of the child to maintain contact with the biological family other than the parents (i.e. siblings and grandparents), or the *de facto* family, or both (i.e. step- or social-siblings or parents), is very limited in post-divorce cases in the Nordic countries, which reflects the dominance of the two-parent norm in all the Nordic countries, and how family is construed narrowly to encompass child-parent relations only. However, the 2018 reform of the Finnish Child Custody Act constitutes a shift in extending family life to include for example step-parents and grand-parents as persons with whom an enforceable right to contact can be established.¹⁰⁵

For children in out-of-home care, the general picture is slightly different. In Norway and Finland, the social welfare authorities have a duty to investigate whether children can live with their non-residential parent or be placed in foster care within the extended family. In Finland, the variations in social family constellations are recognised by giving children placed in care the right to meet their parents, siblings and ‘other people close to them’.¹⁰⁶ Similarly, in Denmark, children in care have the right to stay in contact with their social network.¹⁰⁷ In Sweden and Norway, the child’s right to contact with the extended family is more restricted. This might amount to a violation of children’s right to respect for their family life, according to ECHR article 8, and, in Norway, in conflict with the Constitution sections 102 and 104. For children living in a foster home, the foster-family may over time turn into the child’s *de facto* family, especially in cases where contact between the child and the biological family has been very limited.

103 *Johansen v Norway* App no 7383/90 (ECtHR, 7 August 1996).

104 Koulu (n 99) section 1.

105 Koulu (n 99) section 4.2.

106 Koulu (n 99) section 4.3.

107 Adolphsen ‘Children’s Right to Family Life’ (n 98) section 3.4.

During the last few years Norwegian child protection cases have been heavily criticized by an international audience, mainly for not paying sufficient respect to family life. Since 2016, the ECtHR has received 13 complaints against Norway in such cases.¹⁰⁸ The main questions concern care orders, contact and adoption. Norwegian courts should give proper attention and weight to children's rights to respect for their family life, balancing the principle of the best interests of the child, as Bendiksen notes.¹⁰⁹

In Norway, Denmark and Finland children placed in care may in extraordinary circumstances be adopted without the consent of the parents.¹¹⁰ In Sweden, custody may be transferred to the child's foster parents, and this is regarded as the Swedish version of adoption of a child without consent from the birth parents.¹¹¹ Adoption transfers the child's right to family life to concern the adoptive family and terminates the legal ties to the birth family.

6.4 *An Emerging Shift in the Nordic Definition of Family Life?*

Nordic family life has changed significantly over the past decades, but these changes are not sufficiently reflected in the legal regulation of family life and parenthood. Cohabitation is legally largely equated marriage and same sex relations are legally recognized. Many children live in post-divorce families and experience that their parents establish new relationships. Children's family relationships have become more diverse, complex and fluid. Regulating the right of the child to family life with the extended or *de facto* family in different areas is one challenge.

If family is defined in a too narrow way, law may put restrictions on a child's right to contact with people close to them. This may represent a violation of the right to respect for family life and the best interest of the child. There must

108 Ten cases have been communicated from the EMD since 2016. *K.O. and V.M. v Norway* App no 64808/16; *Hernehult v Norway* App no 14652/16; *Ibrahim v Norway* App no 15379/16; *Pedersen and others v Norway* App no 39710/15; *Hasan v Norway* App no 27496/15; *M.L. v Norway* App no 43701/14; *A.S v Norway* App no 60371/15; *Strand Lobben and others v Norway* App no 37283/13; *Jansen v Norway* App no 2822/16 *Bodnariu and others v Norway* App no 73890/16. Three cases have been lawfully settled; there was a violation in one of the cases (*Jansen v Norway*) and Norway was acquitted in the other two (*M.L v Norway*, *M.H. v Norway*). In addition, the case of *Strand Lobben and Others v Norway*, where Norway was acquitted—however, with a dissenting opinion—was brought before the EMD's Grand Chamber in 2018. The decision is not yet final. Another three complaints against Norway have been rejected with justification, without being communicated.

109 Bendiksen (n 44) section 6.

110 Bendiksen (n 44) section 6; Koulu (n 99) section 4.1; Adolphsen, 'Children's Right to Family Life' (n 98) section 4.2.

111 Schiratzki, 'Children's Right to Family Life' (n 93) sections 4 and 7.

be room for discretion, as a child may have lived with a person for a long time without establishing any emotional connection with the person or contrary, have developed a close emotional connection during a short period of time.

Fathers spend much more time with their children and in many families the parents participate in taking care of children equally. This is a consequence of Nordic women's high participation in working life outside of home. For separated or divorced parents, shared parental responsibility has, in practice, become the main rule. One sees a clear trend towards increased shared residence for children.

How parenthood can be established has also changed considerably, with genetics and intention as new factors in the context of increased possibilities for various forms of assisted reproduction. Co-motherhood is a new legal concept, linked to the fact that the mother's female partner establishes parenthood through consent to assisted reproduction. Children can be created through surrogacy schemes, which in themselves raise a number of unresolved legal challenges both nationally and internationally, including the issues of how the intention to become a parent should be protected legally, and which obligations towards the future child the intention should entail.

One challenge is the balancing of children's right to know about their genetic origin, with the child's right to be cared for by the persons legally recognised as a child's parents.

The Nordic countries are trying to cope with these challenges, often by frequently changing statutory law, piece by piece. Children's rights to respect for their family life are heavily protected by constitutional law and human rights conventions, but this does not suffice. Those rights must be comprehensively implemented in national law. However, the task is far from easy: 'It takes careful legal craftsmanship to create a comprehensive legal system that meets the demands of protecting and promoting those relationships that make up contemporary family life', comments Schiratzki.¹¹²

7 The Value of Specific Constitutional Protection of Children's Rights

The initial assessment done in section 2.5 above suggests that constitutional protection could render tools for advocating that courts, policy makers and practitioners must take children's rights seriously. According to Conor O'Mahony, making children visible in constitutional matters 'requires child-specific

¹¹² Schiratzki, 'Children's Right to Family Life' (n 93) section 7.

provisions rather than leaving children to rely on general rights guarantees'.¹¹³ The question is whether the varying level of constitutional protection is reflected in legislation, court cases and (legal) practices. Another question is whether codifying children's rights in the Constitution represents the culmination of the development of recognition of children's rights and or the genesis of a new era?

Answering these questions is far from easy, as this study demonstrates. At first glance, the differences among the Nordic countries in terms of recognition and implementation of children's rights are practically non-existent and stem from differences in reform cycles, structural and organisational differences and so forth, rather than from divergent views on children's capabilities and rights. However, this observation would support the view that children's constitutional rights are of little consequence and that constitutionalisation is the apex of the shift in our image of children.

However, a more detailed analysis defeats, at least partly, this line of argumentation. Constitutional rights are an advocacy tool in several respects, as numerous examples from primarily Norway and Finland. These two countries afford a stronger – more comprehensive and obliging – constitutional protection of children's rights. The Constitution demands that children's rights are taken seriously in the legislative process, especially when the act of parliament or decree is of vital importance for children. The legislator must assess whether and how each provision impacts children's rights. There are indications that when a right is explicitly enshrined in the Constitution, the legislator will make a more thorough assessment of that right when drafting new laws. Constitutional rights influence interpretation of statutory law, as well. Again, the more clearly a right is protected in the Constitution, the stronger the persuasive force of it will be, and courts and administrative organs will be more likely to interpret law in light of it and, thus, enforce it. In light of these observations, constitutional rights matter, even in countries where children's rights are widely recognised and even treated as principles of law.

Norway and Finland, by recognising children as rights-holders in their Constitutions, also illustrate the innate transformative power of constitutionalisation of children's rights. Constitutionalisation propels implementation and enforcement of children's rights by mandating policy-makers, legislators, courts and practitioners working with children and children's rights to take those rights seriously. The more unequivocal and comprehensively children's rights are enshrined, and the more children's human dignity is advocated, the

113 O'Mahony (n 1).

more efficient advocacy tools the Constitution offers. Based on our study, a dedicated provision for children's rights, recognising children as agents and containing at least all the general principles of the CRC, is superior to other alternatives.

Despite the value of constitutional law, constitutionalisation is not a magic trick transforming law overnight. On the contrary, implementation is a slow and arduous process, requiring continuous effort. Firstly, constitutions are inherently general, requiring interpretation and in need of implementation through more detailed provisions in legislation, practice guidelines, policy documents and other documents. Courts must be willing to interpret and enforce the Constitution in a manner that empowers children, balancing considerations of agency and vulnerability. This volume contains abundant examples of how children's rights are implemented, interpreted and enforced unevenly in different realms, and how current legislation and practices are oftentimes unsatisfactory. Adult-centric notions produce resistance towards development of child-centred practices and regulation. In many areas, policies, practices and the mind-set of individuals working with children are pivotal for implementing children's rights in practice. Allocation of adequate resources to develop and implement new practices and to provide necessary training and monitoring is required if we want to take children's rights seriously.

References

- Abramson B, 'The Invisibility of Children and Adolescents: The Need to Monitor our Rhetoric and our Attitudes' in Eugeen Verhellen (ed), *Monitoring Children's Rights* (Martinus Nijhoff 1996) 393–402.
- Adolphsen C, 'Constitutional Rights for Danish Children' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries*, (Brill 2019).
- Adolphsen C, 'Children's Right to Family Life in Denmark' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries*, (Brill 2019).
- Bendiksen LRL, 'Children's Constitutional Right to Respect for Family Life in Norway: Words or Real Effect?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).
- Freeman M, 'Why it remains important to take children's rights seriously' (2007) 15 *International Journal of Children's Rights* 5–23.
- Friðriksdóttir H, 'Protection of Children's Rights in the Icelandic Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

- Gísladóttir E, 'Children's Right to Participation in Iceland' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).
- Habashi J and others 'Constitutional Analysis: A Proclamation of Children's Right to Protection, Provision, and Participation' (2010) 18 *International Journal of Children's Rights* 267–290.
- Hakalehto S, 'Constitutional Protection of Children's Rights in Finland' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).
- Hartoft H, 'Children's Right to Participation in Denmark: What is the Difference Between Hearing, Co-Determination and Self-Determination?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).
- Haugli T, 'Constitutional Rights for Children in Norway' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).
- Honig M-S, 'Work and Care: Reconstructing Childhood through Childcare Policy in Germany' in Allison James and Adrian L. James (eds), *European Childhoods: Cultures, Politics and Childhoods in Europe* (Palgrave Macmillan 2008) 198–215.
- Kervinen E and Ollus N, 'Lapsiin ja nuoriin kohdistuva ihmiskauppa Suomessa' (European Institute for Crime Prevention and Control 2019). Affiliated with the United Nations (HEUNI) Publication Series No. 89.
- Koulu S, 'Children's Right to Family Life in Finland: A Constitutional Right or a Side Effect of the "Normal Family"?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).
- Leviner P, 'Voice but no Choice – Children's Right to Participation in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).
- Mattsson T, 'Constitutional Rights for Children in Sweden' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).
- Nylund A, 'Introduction' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).
- Nylund A, 'Children's Right to Participate in Decision-Making in Norway: Paternalism and Autonomy' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).
- O'Mahony C, 'Constitutional Protection of Children's Rights: Visibility, Agency and Enforceability' (forthcoming) *Human Rights Law Review*.
- Sandberg K, 'Best Interests of the Child in the Norwegian Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).
- Schiratzki J, 'The Elusive Best Interest of the Child and the Swedish Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).
- Schiratzki J, 'Children's Right to Family Life and the Swedish Constitution' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).

- Sigurdson R, 'Children's Right to Respect for their Human Dignity' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).
- Tobin J, 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights' (2005) 21 *South African Journal on Human Rights* 86–126.
- Tolonen H, 'Children's Right to Participate and Their Developing Role in Finnish Proceedings' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).
- Tolonen H, Koulu S and Hakalehto S, 'Best Interests of the Child in Finnish Legislation and Doctrine: What Has Changed and What Remains the Same?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill 2019).
- UN Committee on the Rights of the Child, *Concluding Observations: Finland* CRC/C/FIN/C/4 (3 August 2011).
- UN Committee on the Rights of the Child, *Concluding Observations: Iceland* CRC/C/ISL/CO/3–4 (23 January 2012).
- UN Committee on the Rights of the Child, *Concluding Observations: Sweden* CRC/C/SWE/CO/5 (6 March 2015).
- UN Committee on the Rights of the Child, *Concluding Observations: Denmark* CRC/C/DNK/CO/5 (26 October 2017).
- UN Committee on the Rights of the Child, *Concluding Observations: Norway* CRC/C/NOR/CO/5–6 (1 June 2018).