

# Discrimination on the Basis of Chronological Age

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HUMAN RIGHTS PROGRAM  
HARVARD LAW SCHOOL

The *Human Rights Program at Harvard Law School* seeks to inspire and offer guidance to international human rights learning, scholarship, and research at Harvard Law School. Founded by Professor Emeritus Henry Steiner in 1984, the Program helps students, advocates, and scholars deepen and disseminate their knowledge of human rights. As a center for scholarship, the Human Rights Program plans events, directs international conferences and roundtables on human rights issues and publishes working papers, conference proceedings and books.

This workshop, which was held on November 18, 2022, is the fourth in a series about discrimination in different contexts. The three past workshops respectively handled the topics of discrimination on the basis of religion (April 2020); on the basis of sexual orientation and gender identity (October 2020); and impacts of the Covid-19 pandemic on discrimination (February 2021).

This workshop was organized in collaboration with the *Harvard Human Rights Journal*. The proceedings and working papers were published in April 2023.

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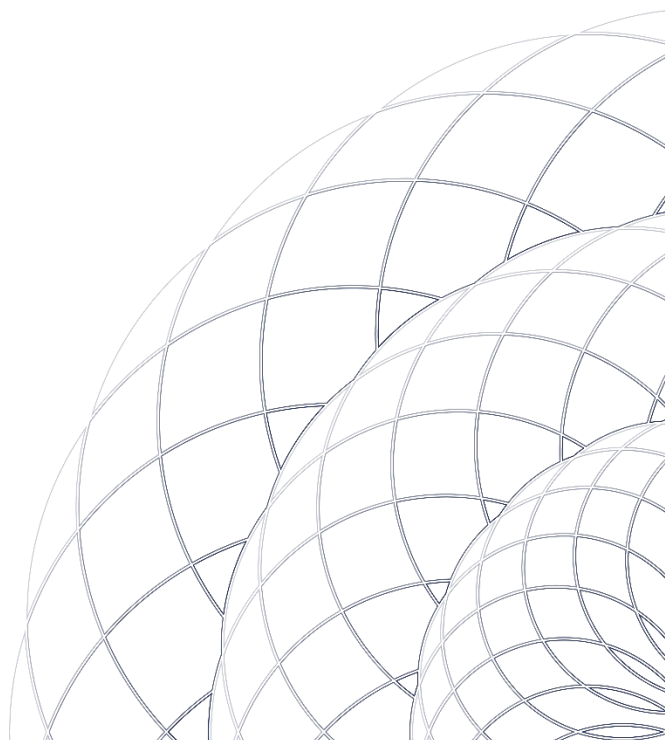
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## Introduction

The Harvard Law School Human Rights Program (HRP) convened a workshop on November 18, 2022, for the purpose of exploring in a comparative and cross-disciplinary manner the phenomenon of discrimination on the basis of chronological age, including discrimination against the young and against the old and against any ages in-between, and including both direct and indirect discrimination (both practices with discriminatory intention and those with discriminatory impact). This was the fourth in a series of workshops that HRP has convened on different types of discrimination since the spring of 2020.

This Report presents a summary of the discussion that took place (by remote technology) at the workshop, including divergent perspectives expressed. It does not attempt to synthesize the arguments offered into a commonly shared set of conclusions – the polyphonic character of the summary is intended as one of its virtues.

Legal norms prohibiting direct or indirect discrimination (the usual international phrasing) may be found in a variety of national laws, treaties, and other international instruments. The positive legal norms may differ in several dimensions, including the breadth of their scope, the types of discrimination they address, the public and/or private actors they regulate, the stringency of their prohibitions, and the methods by which violations may be demonstrated. Some antidiscrimination norms expressly include “age” or particular ranges of ages as designating a protected category, while others are interpreted as including some forms of age-based discrimination within a generally phrased prohibition of discrimination. In the context of international human rights norms, other questions relate to the nature of the international oversight of the application of nondiscrimination rules by national authorities.

Discussion at the workshop included examination of these questions, with regard to chronological age in general and with regard to specific age ranges, including older persons and children. Participants included current and former members of international and regional human rights institutions, judges, and academics from Harvard and other universities within and outside the United States. The conversation proceeded in seven segments with overlapping content, followed by a closing discussion of next steps to be taken:

1. Purposes of prohibiting direct and indirect discrimination
2. Is differentiation on the basis of chronological age relevantly different?
3. Discussion of hypotheticals from the Concept Note
4. Discrimination on the basis of chronological age, at the higher end of the range (older persons)
5. International oversight of national application of the prohibition of discrimination with respect to chronological age

6. Political rights of children as an issue of discrimination
7. Discrimination on the basis of chronological age, at the lower range – against children, or among children of different ages – including value added.

The Concept Note for the workshop is reproduced in Appendix I.

A partial list of participants may be found in Appendix II. The organizers of the workshop were HRP director Gerald L. Neuman and Professor Benyam Dawit Mezmur of the University of the Western Cape, South Africa, currently Eleanor Roosevelt Visiting Fellow at HRP, and a Member of the UN Committee on the Rights of the Child. The workshop was arranged in collaboration with the Harvard Human Rights Journal, which is publishing several articles derived from the Workshop. Kai Müller and Abadir M. Ibrahim provided essential logistical support.

Finally, Appendix III consists of working papers submitted for, or derived from, the workshop discussion. Several of these are explicitly mentioned in the summary of the discussion.

# I. Workshop Proceedings

## Segment 1: Purposes of prohibiting direct and indirect discrimination

**The segment moderator (Gerald Neuman)** suggested that the discussion be structured in two parts. It would deal first with the purposes of prohibiting direct discrimination, and then would discuss indirect discrimination (or discriminatory impact), both approaching discrimination in generality rather than with a specific class of persons in mind. To provide context for the discussion, the segment moderator laid out common arguments around the prohibition of direct and indirect discrimination.

Theorists have proposed various answers to why direct discrimination is wrong. For example, some have argued that it is wrong to disadvantage people arbitrarily or without good reason. Relatedly, it is wrong for governments to disadvantage people without a legitimate public purpose. Or that it is wrong to disadvantage individuals on the basis of inaccurate stereotypes about some group they are a member of, or that it is wrong to treat a person or group as having lower moral status or as not entitled to equal respect and concern. Others have argued that some forms of discrimination are not morally wrong, but rather prohibiting them nonetheless serves an instrumental public policy purpose, like in the equal representation of the states in the U.S. Senate.

Theorists also disagree on whether indirect discrimination is morally wrong for the same reasons why direct discrimination on the same ground is wrong, or whether indirect discrimination is wrong for different reasons, or whether indirect discrimination is not morally wrong at all. Some argue that indirect discrimination is morally wrong when it adds to the disadvantages of an existing pattern of social injustice. Others deny any duty of individuals not to discriminate indirectly, but recognize the duty of society as a whole, or the government, to prevent indirect discrimination. Even if indirect discrimination is not wrong, preventing a particular kind of indirect discrimination may be useful as a matter of social policy. Laws against indirect discrimination have also been defended instrumentally as a supplement to laws prohibiting intentional discrimination, in order to overcome the difficulty of proving hidden motives.

The **first speaker** questioned the utility of distinguishing between direct and indirect discrimination. There is a preoccupation, particularly in the United States, with categorizing all distinctions as discrimination. The U.S. debate on affirmative action is a good example of this phenomenon. If one starts with an almost esoteric distinction between direct and indirect discrimination, the conversation gets lost in definitions instead of substantive inquiry. Rather than age limits and distinctions, which will always be present, it is better to look at their arbitrariness and their impact, the systemic impact of the distinction that is alleged to be discriminatory.

A **second speaker** drew on the experience of the Inter-American Commission on Human Rights (IACHR) to highlight the importance of analyzing the contextual setting and taking into account the relationship between inequality and discrimination when scrutinizing direct and indirect discrimination. Disaggregated data takes up an important role in this analysis, while intersectionality matters for comprehending various levels of vulnerability better. The IACHR's robust legal framework on direct and indirect discrimination takes into account three dimensions: a negative dimension, that is, the prohibition of discrimination or the state's legal duty to prevent and eradicate discrimination; a positive dimension, meaning the promotion of equality based on affirmative action; and finally, the dimension of cultural change including the combat against cultural injustice, stigmatization and stereotypes. It is notable that the Inter-American system is the first and only system to have an international treaty dealing with elderly rights (the Inter-American Convention on Protecting the Human Rights of Older Persons).

A **third speaker** suggested that part of the issue of discrimination has to do with law itself, and part of it has to do with the impacts of law. In the case of children, to a large extent, discrimination against them also is the result of prior discrimination and normative, historical, and social attitudes. The law has a role to play in positively addressing these forms of discrimination. Law can be inclusive of children, but normative frameworks, including people's assumptions about childhood, get in the way of that.

A **fourth speaker** questioned the usefulness of shifting from a distinction between direct and indirect discrimination towards a more impact-based framework. As referenced in Reva Siegel's work on the "anti-balkanization principle", direct discrimination is distinct from indirect discrimination in that it more plausibly implicates a value that seems separable from material impact. This value is rooted in the thought that there might be something distinctively inappropriate about being stereotyped on the basis of a certain category of membership as suggested by the work of Sophia Moreau. The distinct nature of direct discrimination becomes particularly clear in the workshop's working papers about children, which appear to identify a specific wrong in stereotyping children separate from the fact that some of the classifications challenged might hurt their access to various social benefits or participations. Nonetheless, it bears mentioning that impact also is important and justifies consideration of the potential effects stemming from direct or indirect classifications.

## Segment 2: Is differentiation on the basis of chronological age relevantly different?

The **segment moderator (Benyam Dawit Mezmur)** started by presenting various arguments on the question of whether discrimination on the basis of chronological age is different relative to other forms of discrimination. Some argue that age is distinct because age limits and age-related measures are comparatively widespread in law. Another perspective holds that



different age groups are associated with varying advantages and disadvantages, and therefore age-differential treatment can be compatible with equality of opportunity, especially when viewed over a complete lifetime. Others advance a position contending that age discrimination is not analogous to invidious forms of discrimination, for example such as those based on race or sex, since age can be an efficient proxy for characteristics important to the functioning of economy or society. An example of this is an employer taking age into consideration in their evaluation of an applicant's job capability for the sake of cost-savings.

Central to this contested differentiation of age is the question of whether age should be treated as intrinsically less serious and suspect than more stigmatized forms of discrimination. If one subscribes to viewing age discrimination as less harmful, what would the implications be for courts applying various antidiscrimination provisions? Should they leave more scope to member states for justifying different positions on age discrimination?

**The first speaker** remarked that the difference between age-based discrimination and other forms of discrimination is less strong than commonly thought. However, some difference is still present. This line of thinking takes two directions.

First, the reasons that render age a good statistical proxy for certain features tend to be less morally problematic than the reasons that would render race or gender statistically reliable. For example, if a society excludes a certain race from education, then of course one may say that, statistically, the absence of certain skills may be predicted depending on race. However, it does not follow that the reliance on the proxy of race can be considered morally acceptable. Hence, age as a proxy is not only reliable for certain things, but the grounds which render it reliable are less morally problematic than the grounds of other identity markers used as proxies.

The second direction of thinking relates to the entire life equality idea. There are cases in which chronological age is used as a criterion; not only could that be mutual over entire lives, which is an often-used argument, but, more importantly, it could contribute to reducing inequalities over entire lives. Thus, whenever age is used for that purpose, it provides a ground for treating it more leniently than other suspect grounds.

A **second speaker** agreed with the distinction made in the working paper by Axel Gosseries between the defensive argument and the affirmative argument of entire lives equality. It shows that the entire life argument can work by saying "we are discriminating against everyone in the same way", meaning nobody is discriminated against. Whether this is a form of equality remains an open question of significant interest.

Reading Jonathan Herring's working paper on the topic, another point relates to the pragmatic and functional reasons for using age as opposed to, for example, race or gender. At first instance, it appeared compelling to consider age as a functional factor in situations with only

little decision-making time on how to treat a person. In this regard, Herring notes the distinction between a layman assessing the capacities of a child and a doctor doing the same.

But then this is basically the same argument given by police officers in favor of using race or other characteristics to stop-and-frisk teenagers on the street. They say, “we use race because, statistically, it is reliable to assume that people from certain races standing at certain corners of a street are more likely to be possible criminals than others.” If police officers are not justified in using race for reasons of pragmatism, efficiency, and security, then how is age acceptable as a pragmatic and functional reason to make distinctions?

The **third speaker** disagreed with the idea that exceptionalism, in terms of age discrimination, is something which we should tolerate, or that age should be treated any less strictly. There are problems with the whole life or the entire life idea, and research done in Manchester has identified some of these. Because of the way policies change over time, certain groups or certain cohorts of age groups can actually suffer more. For example, millennials are going to be paying more in terms of pension contributions but will actually end up with very little pension when they get to that particular point. So, there is doubt as to whether that equality of opportunity plays out the way it is imagined.

Secondly, in terms of proxies, they seem to be questionable as well. If, of course, there is reliable evidence for the use of the proxies which is up to date, then that can be justifiable within the strictures of our existing antidiscrimination legislation. Simply adhering to past practices is probably not the best way to deal with issues connected to equality. When we think about how women or migrants were treated on the labor market -- women were not wanted in the labor market because it was thought they were going to take jobs from men. Do we feel the same way about older people, for example, not being forced into retirement? There are also concerns about making the law more complex from a pragmatic point of view. Treating age as a less strictly regulated form of discrimination actually causes more problems for employers, who then have to deal with one level of scrutiny with respect to one part of discrimination law and a different level of scrutiny with respect to another.

A **fourth speaker** connected the discussion with their own personal experience during the Covid pandemic as someone who is aging. This is a group that faced the highest mortality rate as well as being the most discriminated against during the pandemic. In this regard, the consequences of the Convention on the Rights of Persons with Disabilities (CRPD) provides an important model as the first human rights convention of the United Nations in this century. A hundred and eighty-three states ratified this binding treaty on human rights, and they have assumed the obligation to implement it in their jurisdictions, and their actions in this regard are going to be monitored.

As mentioned by an earlier speaker, the Inter-American System has a specific treaty on elder persons. A UN convention on discrimination against the elderly is being proposed which

would amplify the universality of this right around the world. The practice of discrimination is also clear in reference to numbers. There are one billion people who are aging at the present moment. By the year 2050, there will be an aging population of two billion, of whom 800 million will be past 80 years old. If we add those indirectly affected, the impact of global legislation protecting the elderly would reach six billion people.

The age pyramid is now inversed, there are more elderly people than children being born. That requires a whole series of analyses on regulatory and administrative matters, practices, customs, or beliefs on the issue of aging in every activity in the world. For instance, in the banking sector there is a widespread upper age limit of 65 years concerning the ability to get loans, which originates from the Bismarck era. Due to increased longevity, this concept needs to be modified. Discrimination, whether direct or indirect, is part of the lives of people who are aging and who sometimes find they do not have insurance at age 65 because their policies lapse due to such practices. It is the responsibility of the state to correct that type of discrimination because it is both positive and also direct and indirect.

A **fifth speaker** voiced agreement with the view that accounting for effects over a lifetime can be an appropriate way of thinking about the fairness of a policy. Yet, a distinction should be drawn between policies which concentrate benefits earlier in life, and those that concentrate benefits later in life, such as, various tax credits or similar financial incentives existing in the United States and elsewhere. For example, the children's tax credit, which had been expanded briefly in the U.S. during the pandemic, seems to be something that, in principle, everyone is going to benefit from at some time, because most persons are going to live through the early years of their life. Therefore, policies benefiting stages of life everybody lives through could be fair from a complete lives perspective. In contrast, a tax credit that you are eligible for only at age 65 or older will not benefit those who do not live to that age. Given what we know about the factors which shorten life expectancy such as poverty, racism, and ableism, we would expect that people who do not receive the tax credit that has a minimum age cutoff will tend to be more disadvantaged in various ways.

Concerning a point raised by earlier, the fifth speaker observed that the differentiation between direct and indirect discrimination is important in relation to age discrimination. It may be very challenging to come up with policies which do not have differential impact by age. Furthermore, in reference to the observations of the previous speaker, the definition of the category of “people who are aging” may prove difficult given different life expectancies across different countries. A source of worry when defining the category would be the selection of a one-size-fits-all eligibility cutoff. This might tend unintentionally to advantage people who are in either intranational groups or in nations where advantages enable them to live longer and experience the protections of such a treaty. On the other hand, others who are dealing with the same underlying challenges of frailty or discrimination on the basis of

believed inability to do certain jobs would fall underneath that eligibility cutoff in certain countries, and so would not be able to benefit from the treaty.

**The sixth speaker** explained how a background in children's rights law had led the speaker to the assumption that discrimination of children was particular, and that it therefore required a particular legal approach to be addressed. The contributions by workshop participants in their working papers and in the discussion threw into question whether this assumption will prevail. The point to take from a legal perspective is whether there is a need to take different legal approaches when talking about age differentiation, and whether those different approaches are justifiable.

As argued in the speaker's working paper, there is no need for exceptionalism, so that age differentiation may be treated like other grounds of differentiation. The starting point of the reflection is that age differentiation is not more or less suspect as a matter of principle. The real challenge would then lie in the justification and, in particular, in proportionality. A lot of the elements mentioned by previous speakers actually feed into the analysis of the proportionality test, and even help to decide how strict the proportionality test is.

**The seventh speaker** highlighted that one main difference between race and age discrimination is that, with race discrimination, we can normally clearly identify who has benefited and lost from the provision. But with age, it can be much more complicated. If we take an example where we assume that at the age of sixteen, children have the maturity to make a particular decision, we might see that that clearly disadvantages children under the age of sixteen, who, in fact, have the capacity to make the decision but are treated as not having the capacity. However, the provision also disadvantages those over the age of sixteen who are, as a result of this provision, assumed to have the capacity, when in fact they do not. So, these age bars can disadvantage both groups below and above the age bar, making it much harder to identify who has lost out than is normally the case regarding, for example, race or sex discrimination.

The **eighth speaker** pointed out, with regard to measuring equality over the lifespan, that there is a unique quality to the early stages of life which is not dealt with very prominently in the working papers. There is something unique about the developmental nature of childhood such that being disadvantaged early and being advantaged later does not necessarily lead to a good outcome. That is worth keeping in mind.

The counterargument posits that if everyone is disadvantaged early, and then reaps some benefits later, they will be treated equally because everyone has missed out early. That argument raises broader questions about what the nondiscrimination principle is really doing or should be doing. Is the idea simply equality over the lifespan, where it turns out to be a less than optimal result, but a less than optimal result for everyone? That version of equality and fulfillment of nondiscrimination seems not very satisfying as an end goal. In the children's

rights context, we talk about what it takes for young people to develop to their full potential. If we are thinking about it from the perspective of potential rather than of a comparator – is somebody equally positioned, good or bad, compared to another – that means something very different for the types of differential treatment we would accept, at least in the early stages, but likely all throughout the lifespan.

**The ninth speaker** underscored the importance of giving consideration to the justification of discrimination, while being very cautious about concluding that an instance of discrimination is actually justified. There is an entire area of economics and economic policy where we fully admit that there are certain things that are inefficient and costly, but nevertheless, because of reasons of social policy, we do not want to strictly go by efficiency. A classic, and easy, example involves women and pensions. Women live longer, but they are supposed to receive the same amount, rather than being discounted in reference to their longer lifespan. The same would be true as far as accessing healthcare and the benefits that accrued afterwards. If you are white and privileged in the U.S., you will reap better benefits for every dollar that is put in, but that does not provide a good reason to exclude other individuals who do not fit those characteristics. We really need to pay attention to who is setting the idea of justification, and what is efficiency and what is not. In other words, it is necessary to look at baselines, and to also consider whether the targeted group has actually had input into thinking through some of those baselines. The assumption that older workers are more expensive is an example of an erroneous assumption as the correlation may not exist. Seniority may give older workers higher pay, but even then, it may also be more efficient to employ someone who actually knows how the workplace works, and who has institutional memory and will not be reinventing the wheel for two years before they jump in the water and start programming. We need to be a little bit skeptical about assumptions of efficiency and what is empirically proven.

**The tenth speaker** commented that if one were to ask young people, as some researchers have done, whether they experience discrimination, they would probably respond that they do. One example is through resource allocation. The speaker lives in proximity to a large number of major hospitals, yet infant mortality rates in the same area are off the chart when it comes to children of color. Therefore the question is how resource allocation works within the economy, and especially in light of the inability of children to have any influence on resource allocation due to their disenfranchisement. John Wall's work on childism would also be relevant here. In the end, if children had political power, maybe the picture would have been different.

**The eleventh speaker** presented a number of arguments against age exceptionalism. If one tries to think about what makes a class suspect, like gender and race, it has to do with whether there is systemic discrimination that has deep historical roots, and therefore needs to be addressed. One can argue that that is very much the case with children depending on the context and the society they are in. Globally speaking, children are the poorest group. They

have the least amount of voice in their communities. They are often viewed as being all the same.

There are lots of problems with developmental perspectives on children, as there are in all of childhood studies. They tend to look at children through the lens of the adults they are eventually going to become, instead of viewing them as diverse, agentic and socially constructed people in and of themselves. There would only be reason to not treat children as a suspect class if somehow it could be proven that the problems that children face are not systemic. But there is so much evidence to show that they are.

The idea of “childism” is an effort to respond to these kinds of systemic problems. Those problems could also be described as “adultism” or patriarchy – ways in which your age marginalizes you in one way or another. Currently, there is a lot of interesting work in childhood studies treating the question of how to deal with this category of childhood in a way that lifts it out of the historical position of discrimination. It has been put in this position since, pretty much forever, the same way as gender has been.

The other point relates to the entire life idea and is in agreement with the point made earlier about cohorts. Childhoods are all very different from each other, and a childhood fifty years ago is very different from a childhood today. It is unclear what this entire life perspective actually would mean in terms of policy. It could also be problematic at the other end of the age spectrum. Could that imply, for example, that the elderly have already used up enough resources, and we should, instead, spend them at the beginning of life instead of the end of life (which is where they are currently mostly spent)? In short, the argument would be that age is not different from other kinds of discrimination because it is systemic and deeply rooted.

**The twelfth speaker** remarked that much of this background policy framework is not terribly helpful when it comes to actually applying it on a case-by-case basis. Going down the road of deciding whether or not age discrimination merits more serious enforcement and attention than race or gender is a very American proposition that makes no sense when one is thinking about discrimination. Those participants who are not in law should look at the cases from the U.S. Supreme Court, where they try to apply “rational”, “strict”, or “intermediate” scrutiny. It is unclear what explains the outcome based on the application of these various principles. Discrimination is discrimination. There are different things that go into how you develop the policies to avoid it. But it is no less serious when you are a young person in need of protection, or an old person in need of protection, or a woman in need of protection, or somebody who is disabled and in need of protection. Every one of those is as serious as the other. Those levels of scrutiny are not helpful in the real world of actual application.

Regarding the use of the term “equality”, are we talking about formal equality the way the Americans do under the Fourteenth Amendment? Or are we looking at a bigger theory of



equality, such as the one used in Europe and in Canada, where it is substantive equality, not formal? Substantive equality appears much preferable to the Aristotelian conception of treating likes alike, which gets you nowhere.

One needs a tool to be able to help decide whether a particular distinction based on age is harmful to members of the group. However, you can examine policies designed to help people in those categories as to whether or not they reflect harmful arbitrary distinctions, that is discrimination or not. It is the synergy between discrimination and equality as protecting substantive rights rather than wallowing in formal distinctions because, otherwise, how do you think about seniority in a workplace? How do you think about mandatory retirement? How do you think about the voting age? How do you think about the fact that, if you are ten, you cannot drive? Does one need to get into a debate about whether that is formal equality or substantive, or whether it is systemic, or whether it is direct? Bigger picture categories are helpful to allow one to develop and encourage the development of programs designed to take into account the unique needs of different ages and different people in those ages. Otherwise, there will be people saying, “You can’t do that, that discriminates,” but it does not. If it is protective, it is not discrimination. One needs to take things into account in order to decide whether the policy ends up being fair, i.e., not a violation of discrimination or equality.

The formal distinctions get in the way of fair results. One needs to develop strong-anti discrimination policies which do not trip over invisible wires like, “Is this the same as somebody else? Is this formal or informal? Is this direct or indirect?” But the question should be, “Is it benefiting a group in need?” Anything that gets in the way of answering that question is not helpful.

### Segment 3: Discussion of hypotheticals from the Concept Note (particularly Nos. 2 and 4)

**The segment moderator (Gerald Neuman)** began the discussion of hypotheticals No. 2 and No. 4 from the Concept Note, having previously ascertained that participants did not want to add any of the other hypotheticals to the segment. Hypothetical two concerns the sentencing of a 34-year-old for burglary and hypothetical No. 4 concerns student discounts at a theater.

Hypothetical two is broken into two versions with direct discrimination and indirect discrimination, but the discussion does not have to be framed that way. It can be framed in terms of explicit use of age as a proxy versus use of some other form of sentencing methodology, which happens to correlate with age. Hypothetical two goes as follows: In country B, empirical evidence consistently supports the conclusion that recidivism rates after release from imprisonment are significantly correlated with age. Rates are highest for those who are ages 21 to 25 at the time of release, and then they decline gradually as age increases.

Risk of recidivism is regarded as an important factor in sentencing. Sentencing guidelines in country B recommend that current age be taken into account as a factor in sentencing with declining weights assigned for age in five-year age brackets from 25 upward. Individual Y is convicted of burglary at age 34, and the judge explicitly refers to Y's age in determining a prison sentence. Y challenges the decision as amounting to direct discrimination on the basis of age, arguing that the sentence would have been lower if Y had been 39 or 54. How should Y's claim of direct discrimination be analyzed?

The second version, with indirect discrimination, takes out the judge who refers to age and puts the sentencing decision in the hands of artificial intelligence software, a direction in which we are indeed moving. The software in the hypothetical has been forbidden to use age as a factor. However, it turns out that the model that it comes up with uses a number of factors that do correlate with age, and therefore the outcomes correlate with age. The question then is if, given that they correlate with age, there is discrimination, which might be labelled indirect discrimination or not, as one prefers.

The **first speaker** responded that, having had experience with a regime of young offenders, the speaker did not have any difficulty with the idea that one treats younger people differently based on age. But in sentencing for adults in Canada, the speaker did not recall witnessing any reference to age unless it was for someone much older. Making generalizations about 34-year-olds as a group is cutting such a fine distinction. Is it even discrimination to mention age at 34 versus one of the factors to consider? But sentencing taking into account an adult's age seems very odd.

After a clarification by the segment moderator that the hypothetical is based on an actual sentencing practice in some states in the United States, the first speaker responded that that was another reason why one has to be wary about using paradigms from the U.S. This practice is discriminatory because it is arbitrary and systemically irrelevant.

A **second speaker** said that while the practice might be specific to the United States, one could imagine similar practices developing in Europe. If you see this as an individual case with an individual where there is an individual complaint, whether it is direct or indirect discrimination, the key problem would then be with the absence of any individualization in the assessment. This is the case when you exclusively take age, or proxies which then also turn out to be age related in the case of indirect discrimination. But then you simply take the general evidence on recidivism which you have for that age group, without individualizing and without looking into the particular context, particular history of that individual. That is where the proportionality assessment would find a violation in the two hypotheses.

The **segment moderator** responded that, in hypothetical two, age is not the sole factor which determines the sentence. It is taken together with a variety of other factors, but it is included as a plus factor which increases the sentence. In the artificial intelligence example, it is



unknown which factors are taken into account. It is possible that those factors contain the number of past convictions, for example. Therefore, although age is not being used as a factor, nonetheless the sentences do use it because they are designed to predict recidivism and we know from external evidence that recidivism does correlate with age. So, whatever accurately predicts recidivism is going to end up correlating with age.

**The third speaker** offered the comment that hypothetical number two shows very well that the distinction between indirect and direct discrimination does bear importance, at least in this case. In the first example, where age is used explicitly as one of the morally relevant indicators to increase sentencing, the hypothetical appeared to have a discriminatory element. These proxy standards have to overcome certain objections. Maybe the most important of them is what Kasper Lippert-Rasmussen calls the spuriousness objection. The spuriousness objection asks if an indicator is just correlated with, and not causal to, a target that we are trying to track. This is an important question. There is also the matter of exclusivity. Is the indicator, in this case age, sufficiently accurate in avoiding as many false positives and false negatives (as Jonathan Herring mentions in his working paper) as possible? Are there other indicators or other thresholds that would be more accurate or more specific and that would generate less false negatives and false positives? Explicit use of age generates certain moral conflicts, with the use of the proxy to increase or lower sentencing.

In the case of the artificial intelligence, it seems that all these moral conflicts are avoided precisely because – assuming that the system works correctly and without biases and without other forms of discrimination in the coding – it appears to achieve perfect statistical reliability while avoiding all these issues of seriousness and inaccuracy. That is why these examples are so interesting on the topic of direct and indirect discrimination because they do show that there is a relevant moral difference between the two.

**The fourth speaker** offered to provide a very European perspective on these matters. Looking at the first case from a legal perspective, it would be a very clear case of potential direct discrimination, or certainly differential treatment. This differential treatment has a legitimate aim in reducing recidivism, but it is not proportionate because it uses a factor which is essentially a stereotype as you are treating all 34-year-olds as if they act in exactly the same way, which is not necessarily the case. Hence, using this proxy would potentially be disproportionate, and an individual assessment, as a previous speaker said, would be a better way of dealing with that particular scenario.

The other scenario is a little bit more complex. It is certainly more of an indirect type of discrimination. Again, it potentially does have the legitimate aim of reducing recidivism, social cohesion, or similar goals, but it potentially also may be disproportionate. You would have to look at what this algorithm is made of. How was it programmed? Are there any potential biases within that system that maybe are leading to this outcome? One of the things

the European model is based on – particularly the gender directive, which looks at gender discrimination and which has been pushed by the European Commission and its new proposals on expanding age discrimination to other fields – is using data which is accurate, reliable and up to date.

A **fifth speaker** opened up the question of whether the causes of recidivism matter in the assessment. One can make a rough distinction between an example of a biological cause and a social cause. Let us assume that recidivism is affected by hormonal factors, and that it is also affected by how we run the employment market so that there would be a lot of youth unemployment, hence contributing to recidivism. In these cases, should our moral intuitions diverge depending on whether the hormonal causal story is dominant or the social causal story is dominant? From the perspective of the particular burglar, both factors are out of their control. But from the perspective of society, unless we also have medicines against hormones or similar remedies, we can say that we maybe have more control over how we run the job market, and maybe that has an impact on how we should address recidivism based on age.

The **sixth speaker** agreed with the fourth speaker's direction of argumentation in the direct discrimination analysis, how you would go through the steps. Where you end up is probably where the rubber meets the road, in proportionality. The topic of debate is whether there is something about the sentencing context that requires, for example, greater individualization as compared to other contexts and concomitantly allows less leeway for proxies. It appears that in some contexts, for a variety of reasons mentioned previously, we are willing to allow proxies because they are good measures for the kinds of behavior that we want to encourage or deter, or because it is much more costly and expensive to engage in individualized determinations. Yet, the argument that costs and efficiency ought not be weighed in the equation or at least given very much weight is understandable and can be quite persuasive.

Despite this, the contextual background matters because it may be that in the sentencing context, we really do think that even having age as a factor in this context is going to be problematic. If we include it, we might include it as a kind of factor that can be rebutted or that we allow for various individualized determinations to counteract it, and that would then go to the question of proportionality and whether the proportionality standard has been met. That is where, on the topic of direct or indirect discrimination, the AI issue is a really challenging question since we do not know what is inside the black box. What goes into the black box is really critical.

The **segment moderator** commented that no speaker had said anything on the subject of whether 34-year-olds are subject to systematic discrimination in the society where this is taking place. This may be because the present speakers think this becomes relevant at a proportionality stage and proportionality has been pushed to a later stage of the discussion; or because speakers think that is not a relevant question; or because the answer is that people

over the age of 60 are subject to systematic discrimination and people under the age of 18 are subject to systematic discrimination on the basis of age, and therefore age is per se to be presumed to be a subject of systematic discrimination.

The **seventh speaker** agreed that the last point made by the segment moderator raised an important question. The ongoing discussion had been treating either end of the spectrum for young people or older people, and the speaker wondered whether this might reflect where participants think age discrimination lies. But if we swapped out age and put in some other characteristics, would we even be having this discussion? Some of this is about justifications, but there is another, less-desirable scenario where you would have some characteristics swapped in and it is said, “Well, because of that characteristic we’re going to give you a heavier sentence.” Approaching it from a legal perspective, there is that matter of justification and proportionality. When we think about justification, we think about it as an endpoint as in “this is the reason why”, but it seems plausible to think about it in terms of human rights law at the national level and the international level about the process that leads up to a certain outcome. Those aspects would imply thinking about what the law or policy is aimed at, whether there is a rational connection to it, whether it is proportional, and whether the differentiation is justifiable or not. It is the lead up to that outcome which is really important, rather than focusing on the actual outcome for “yes” or a “no”.

An **eighth speaker** stated that the algorithm case was particularly challenging and useful in that the threshold question is about the legitimacy of reducing recidivism in sentencing. If we think that aim is legitimate, what are the countervailing factors that could justify our accepting the expectation of increased recidivism compared to some other sentencing regime? What is the source of factors that might justify accepting this increased recidivism? These are the questions to reflect on. The countervailing factor is that it has something to do with the treatment of the individual being sentenced. But trying to identify this factor for differentiated treatment – one cannot just look at treatment on the basis of age in isolation. We have to consider whether any alternative sentencing regime might disadvantage the individual on some other basis.

The **segment moderator** then turned the discussion to hypothetical No. 4 about the student discount. In the hypothetical, a theater in country E sells tickets with a 50% student discount available only to full-time students with a student ID. This qualification for the discount has a disproportionate impact on different age cohorts with members of older age cohorts being less likely to be enrolled as full-time students. An individual aged 65 and retired challenges the practice as amounting to indirect discrimination against people over the age of 60. Questions could be raised on how the claim of indirect discrimination should be analyzed if it is a public theater owned and managed by the government, or if it is a privately owned theater. The segment moderator invited speakers to discuss this from the perspective of discrimination against people over 60.

The **ninth speaker** responded that in this case, there might be a question of whether or not there is in fact differential treatment of a person over a particular age who, for example, is not a student. It would be different if the preferential treatment had chosen a particular age grouping such as 18 to 24. In that case, it would be an obvious instance of discrimination. In this case, because the individual had no intention of ever becoming a student, and was not currently a student, the question is whether or not this is actually discrimination or whether it is discrimination against a class which is not suspect in any way. So, is it just discrimination against non-students? Because someone who is 30 and not a student is equally as affected by the rule as someone who is 60.

The **second speaker** explained that there is an advantage for those who are students, and so one could say this is perhaps a kind of affirmative action for students. But it does not affect this individual fee in a disproportionate way compared to all the others who also pay the standard fees. Some hesitancy perhaps is warranted to see this primarily as an issue of age discrimination because it is the status of student rather than the age that is the direct entry point. Although one could say that, typically, most full-time students will be along the earlier age ranges. Therefore, indirectly, age is at stake here.

The other point goes back to what was raised earlier about the damage that is done if you are charged as a person who is age 65 at the standard rate, while others are charged at a lower rate. Is that then also an issue of discrimination on the grounds of age or any other ground? From the second speaker's perspective, the case is puzzling in the sense that it is unclear whether the public-private distinction matters that much. At first sight, there does not seem to be any direct relevance for the discrimination assessment.

The **segment moderator** clarified the assumptions of hypothetical No. 4. The idea is that people are students at different ages. More people are students in their twenties, and come forward for student discounts. There are still students of older ages who come forward, but statistically, if you compare those in their twenties with those in their sixties, a far smaller percentage of people in their sixties are students. The question then is whether that disproportionate impact, even if it is small, even if it is the price of a 50% discount on a theater ticket, whether it is discrimination. How should that be analyzed?

Does it matter that it is a public policy, or whether it is one private theater which is doing it? At some point, as a human rights issue, this becomes a question of whether the state is obliged not merely to not discriminate in its own public theaters in an indirect way against older patrons, but also whether it is obliged to stamp out all discrimination of that kind by every private theater, which are places of public accommodation. It seems places of public accommodation are not subject to age discrimination norms under European Union law, although they are subject to other discrimination norms under European Union law.

The segment moderator stated, in response to a question by one of the workshop participants, that in the hypothetical there is no restriction on the age at which one can be a student and that children up to a certain age are required to attend school.

A **tenth speaker** observed that Lisbon recently implemented a policy where people over 65 do not pay for public transport and everybody else must pay public transport. This is a reverse case of what we could consider being the youth subsidy. In a hypothetical scenario, if one imagines that the key criterion is age, and that people in their twenties do not pay public transport or get cheaper tickets, what could an older person over 65 provide as a complaint about this youth subsidy? Could that person complain without taking into account other subsidies that person received from the state and that young people are excluded from such as pensions?

We are likely to need, all things considered from a normative perspective, an account of what we are receiving from the state. If it is the case that the young person receives less subsidies overall than the older person, how would that affect the legitimacy of the complaint of the older person? A further question is if we do indeed worry about these youth subsidies, then to be consistent are we also required to worry about age-based discrimination in old age pensions in favor of older people?

In response to a clarifying question by the segment moderator about whether the proper way of analyzing the discrimination was to analyze the subsidies individually, the tenth speaker noted that if we can have an isolated approach looking at the youth subsidies as such, and complain about their implementation, then perhaps this would open the avenue for young people to make isolated complaints about certain subsidies in favor of older people.

An **eleventh speaker** wondered if it would be allowed for the state to provide scholarships to students to cover their expenses while they are studying, then it seems plausible to allow the state to provide indirect forms of scholarship or subsidies to students through discounts in theater and similar items. Even if it is a private person, if we allow private persons to maybe fund scholarships as well, there seems to be no reason why this should not be allowed. Therefore, this should not be seen primarily as an age discrimination issue, even though some people may regard that to be the case indirectly.

But concern should be raised about the *a fortiori* argument saying that, if we allow the states to invest 10,000 euros in the case of Belgium, or several thousand euros per year per student, then why not allow the state through the way of subsidized theater to require that students also get a discount to allow them to have some cultural life, which is in the end part of what the normal expenses of some people are.

Responding to a question by the segment moderator on whether that defense is not present if it is a private theater which is not providing all of these scholarships to students, the eleventh

speaker answered that two questions arise: First, is this private theater not subsidized by the state and is it not part of the subsidy requirements that the state requires this discount? Second, why not allow also private donors to fund scholarships? Yet they do and we allow them to do so for students. So, this can be seen as a form of indirect scholarship if you want.

**The twelfth speaker** pointed out features that may be missing from the hypothetical. What is the aim? What is the purpose of having the discount, or not? Because that goes into any mix about a determination of whether it is discrimination or simply differential treatment.

The **thirteenth speaker** concurred with the previous speaker that the analysis of the legitimate aim is important. To support people who are economically inactive, for example, to allow them to socially and culturally enjoy integration within society. Is it proportionate, is it the most suitable measure of achieving that particular aim? On the question of other subsidies, certainly, the new proposed EU directive, which would expand age discrimination outside of the employment field, in its proposed draft form, brings one to the point that all subsidies really are open for an analysis as to whether they are or are not proportionate to meet the aim of equality on the grounds of age. The speaker opposed the idea of considering subsidies across a life course because subsidies can change – as we have seen with pension ages.

The **fourteenth speaker** agreed with the previous speakers and noted that it is unclear how this is a discrimination question. Regarding the hypothetical where somebody takes age and uses it to disadvantage somebody else, one should challenge the use of algorithms as discriminatory *prima facie* because they contradict the notion of the individualization that you need in sentencing by throwing in arbitrary factors, and because they exclude the rehabilitation that is equally important in sentencing.

But in something like making a distinction on the basis of age to allow students or older people to get advantages, one would have to show that it is harmful to somebody else for you to be making distinctions in order to be able to accommodate people who as a group have experienced different financial circumstances than most people. Those hypotheticals are so different. It is unclear how the fact of making a distinction on its own leads to anything like what we see as discrimination.

Following a comment by the segment moderator that, in the hypothetical, the reverse discrimination claim was brought by someone who is in a protected category of being over 60, the speaker continued that that leads to the conclusion that every single distinction that is made is going to hurt somebody and therefore is *prima facie* discriminatory. That means there is something wrong with our model if that is the result of getting entangled with every single distinction ever made. One has to be able to make distinctions and they can always lead to somebody claiming they have been left out. If the purpose is to assist somebody who is in a more disadvantaged position rather than the fact that not all people who feel disadvantaged are included, that does not mean it is discriminatory.



The **fifteenth speaker** asked, are we thinking about discrimination as a vehicle for examining differential treatment writ large, or are we thinking about discrimination in the context of international human rights law where, in the latter case, the question is then what right is being implicated? In the case of the theater ticket discount, or the lack thereof, is the argument that it is a discrimination and a deprivation of one's cultural rights or a failure on the state to respect and ensure the cultural rights of those who do not get a discount? The skepticism of the prior three contributors that this is discrimination is justified. But more broadly, it would help to clarify whether we are anchored to an international human rights law framework of non-discrimination. Is it discrimination in the implementation and enforcement of a particular right? Or is there some broader concept of discrimination that is really the lens through which we are analyzing these issues?

The **segment moderator** remarked that international human rights law does include Article 26 of the International Covenant on Civil and Political Rights (ICCPR), which is not tied to discrimination with regard to some preexisting right. It also includes Protocol No. 12 to the European Convention, which is not limited. Even if not all European states are parties to it, it can be used to make this point. International human rights law also includes an extremely broad concept of equal protection under the Inter-American human rights system. The Inter-American Court officially believes it is a *jus cogens* norm. We cannot limit ourselves to Article 14 of the European Convention.

The **fifteenth speaker** replied that the narrower way to construct this is using Article 2 of the ICCPR, Article 2 of the Convention on the Rights of the Child (CRC), and similar constructs of a non-discrimination principle. If we are looking at a broader construct that is not necessarily tied to the implementation and enforcement of rights, that presents more challenges because it is then harder to map a coherent strategy on whether something is a distinction, a difference or discrimination.

The **sixteenth speaker** added that this hypothetical posed challenges because it has led to follow-up questions. The question is what the legitimating reason is, especially if a distinction is made as to whether this is a state theater. That answer presumably has to do with ticket sales or encouraging students, which branches out to other questions. So, there is a differential treatment, then you have to decide whether it is discrimination or not. You have to look at what the reasons or goals are that legitimize it, and then ask whether there are less discriminatory means of achieving that goal. For example, how much are tickets? Would students be able to afford them without the discount, and if not, what proportion of them? So, there is a lot of empirical input that needs to come into this analysis. Are tickets sold out with or without this incentive to students? These questions come into the analysis. You also have to look at what the effects of different options are in terms of with or without this type of incentive to students. A combination of proportionality and what the legitimate interest is what it is going to boil down to.

The **seventeenth speaker** agreed with other speakers that it is hard to see what the discriminatory element here is. But if we assumed it was, there is also the factor that the allegedly aggrieved party has standing to bring this kind of challenge. Whereas somebody under 18, at least in most U.S. states, does not have standing, like a young person cannot sue the elderly for a similar practice if there is a theater that provides discounts to the elderly and not to the young. For example, climate activists have continually been dismissed in their suits because of being young. Thus, there is a power imbalance here, and it is unclear if that plays a role in determining whether a suit of this nature can be brought.

The **eighteenth speaker** commented that there seem to be different views on whether there is existence of discrimination in this specific hypothetical. Perhaps it would be helpful to look at it from a different contextual perspective. Not to look at the discount in relation to other preferential treatments, but rather to look at the application of the discount itself across those who would be benefiting from it and whether there is any kind of discrimination in application. For instance, someone joins a university, and he has the ability to open a bank account from the university itself. But then, the catch is that you should be below 22 to open the bank account and you are excluded just by the fact that you are a student who is 35. Thus, there is that aspect of discrimination in terms of applying the specific preferential treatment. It could be good to give context to the specific application of the student discounts. How have they been applied in the context of that application? Do we see any kind of discrimination in terms of persons who would benefit from it? So, we look at the concepts of discrimination from the application of the student discount itself, rather than relating it to other forms of differential treatments. We shall have more nuanced concepts going forward if you look at it from that rather closed perspective.

Segment 4: Discrimination on the basis of chronological age, at the higher end of the range (older persons) – direct and indirect discrimination, scope of the prohibition, standards for justification of differentiation

**The segment moderator (Gerald Neuman)** introduced the segment by saying that the usual international approach to discrimination is that a practice that treats people differentially can be justified if the practice serves a legitimate purpose and if there is proportionality between the benefit achieved by the practice and the differential harm that it causes. The evaluation of proportionality may depend on the grounds of the discrimination, on the nature of the harm and of other factors.

With regard to the prohibition of direct discrimination, should direct discrimination on the basis of age against older persons be more strictly regulated than discrimination against adults of intermediate age, like the 34-year-old in the preceding segment? If so, starting at what age? Is setting an age for this purpose itself discriminatory? The question has already been raised



whether it should be the same age in all societies. Should it be the same age in all categories of discrimination -- should it be the same age in employment discrimination, in housing discrimination, in discrimination in public accommodations and any other kind if we think that a stricter review of discrimination is required for some category of older persons than for people aged 34?

Should discrimination among older persons also be strictly regulated? For example, if older persons are defined as those over 65, but a policy favors those over 75, then should that be strictly reviewed as age discrimination? Should the regulation be equally strict in all fields of activity and equally strict for both public discrimination and private discrimination in all those fields? How strict should the standard of justification be? Should it be the same standard that we use for race or gender or are there reasons for not having it be the same standard that is used for race or gender? Many factors relevant to public policies correlate statistically with chronological age to the disadvantage of older persons. Should it be impermissible to use age as a proxy for these factors?

The **first speaker** said that, ironically, when you look at the program and the time allocations, discrimination on the basis of chronological age at the lower end was allotted half the amount of time compared to discrimination on the basis of age on the older end of life. Can we justify that difference of having 200% of the children's time allocated to those who are aging? What is our justification for that?

The **second speaker** responded in the negative regarding the question as to whether one should use uniform age in dealing with old age-related criteria. If one takes healthcare for example, and if one considers the accessibility of certain forms of healthcare or whether certain forms of healthcare are being funded or not by the state, one could assume that there must be medical reasons why age may be different for one pathology than for another pathology because some pathologies appear at an earlier or later age than others. This illustrates one of the reasons why, if one has good reasons to use age criteria in healthcare for example, one may also have good reasons not to use the same age for all pathologies, be it for access to healthcare or for reimbursement.

The **third speaker** highlighted that it appears to be quite clear that age should not be treated the same as race and gender and that it should not be the same standard necessarily across all contexts. There are very strong reasons not to think that the eligibility cutoff for this added discrimination protection should be cross-context. There are going to be real challenges, based on some things said before, about having a uniform standard for qualifying as a person on the older end of the age range across countries and maybe even within countries or across sub-national entities within a country.

The reasons are as follows. First, it seems that being at an older chronological age – unlike basically all of the other anti-discrimination categories that we worry about, or that we are

concerned about people being treated unfairly on the basis of – is a category that people want to attain. People want to live a substantial enough lifespan that they end up entering that category. That is quite different from many of the other categories. The other reason that seems very salient is that age is not only a category that people strive to enter. If one looks at it, either within nations or across nations, there tends to be a lot of overlap between the older end of the age range and other categories that are associated with advantages such as wealth and being less subject to various forms of structural racism and discrimination in particular.

This is put more provocatively than it perhaps needs to be. But what is certainly worrisome about having a uniform criterion is that incidentally, even though it may laudably protect against some unfair or arbitrary treatment, it will also disproportionately protect, say within the United States, white Americans. It will disproportionately protect, on a global level, people in wealthier countries who tend to live longer and people within any country who tend to be wealthier and more advantaged. Thus, it seems that these factors, an association between being at the older edge of the age range and advantage, are worth taking into account when thinking about when we should be concerned about this type of discrimination and how to weigh its prevention against other trade-offs in a policy-making context.

The **fourth speaker** commented that England's Equality Act offers the possibility of bringing a claim if either you are over the age of 65 or you are treated by others as if you were over the age of 65 or assumed by others to be over the age of 65. That creates a potentially interesting approach. It is not so much your age that matters, but the age others assume you to have and treat you as having that is at stake.

The **segment moderator** suggested that the fourth speaker's comment may point to the possibility that chronological age is not the right way to define the relevant category. In a way, the third speaker is also pointing to that. In this line of thinking, maybe a treaty for the protection of older persons should be for the protection of a sociologically defined category of persons and chronological age is not the right way to define older persons.

The **fifth speaker** said that in a recent project in Belgium, in which all the people involved decided themselves which topics to approach from a human rights perspective, one of the issues that came up is that age alone is not sufficient. Not just the sociological construct of who belongs to the category of older people, but also the strong link with socioeconomic status, which is very important. Although Belgium clearly is a social welfare state, it is clear that a disproportionate amount of older people are poor and have jobs in addition to the pension they receive in order to make ends meet.

In that sense, age alone certainly would not be sufficient and one would need to factor in elements of socioeconomic status. The other factor that seems to matter as much as chronological age and sociological categories is whether people still live in their own house, or whether they stay in a home for the elderly. During the Covid pandemic, that seemed to be

the key factor very often in terms of negative impact and possible issues of discrimination. This played a role even in the prioritization or deprioritization for emergency care. Though this is more intuition than the result of a study, these are very important factors to bring into the discussion.

The **sixth speaker** described the experience of the United Nations Committee on Economic, Social and Cultural Rights. General Comment No. 6, which was adopted in 1995 regarding the economic, social, and cultural rights of older persons, identified the age of 60 as the age of reference. There was a discussion during the last Committee session about whether or not the Committee should update that General Comment. Although the discussion occurred in a private session, the fact that it was being discussed was shared publicly and it was noted that it was considered as an option for the work on general comments. It is interesting that the discussion specifically addressed whether or not one should keep identifying 60 as the reference age or whether one should move towards another kind of criteria. There was a definite feeling that moving towards different sociological criteria would probably be better and more adequate.

The Committee on Economic, Social and Cultural Rights systematically considers the rights of older persons, including in its dialogues with states. So far, the Committee has kept the criterion of 60 as the age of reference, but of course that would depend on a lot of the different states and the different kinds of culture.

More and more voices are being raised regarding whether the age of 60 still is an age that makes sense. Age-related considerations depend on culture and context. The other thing which must be added is the fact that when we consider this question of non-discrimination – it also covers the discussion earlier about the hypothetical cases – we have to systematically relate that to the principle of equality. We also have to keep in mind the fact that the principle of equality and the right to non-discrimination are part of the same broad concept. Of course, with different applications, the principle of equality, when you include the issues of discrimination, is necessarily also related to theories of justice and political theories.

Why do you need to identify that specific category of persons as a group which would deserve that kind of positive discrimination, for instance, or that kind of different treatment? The answer to that would depend a lot on the theories of justice that you want to implement and the political philosophy that you agree with. The other aspect that seems to be important, especially in human rights law, is the concept of vulnerability. In all these political philosophies that would probably refer to age as a criterion to justify different kinds of treatment, one would probably have to take into account that aspect of vulnerability in order to better protect that category of persons. That concept of vulnerability deserves more reflection when we talk about age discrimination because it is part of the very hermeneutic exercise of human rights law when one discusses that sort of issue.

Subsequently, the speaker clarified that the CESCR Committee decided to not work on an update to the general comment for now, but to return to it later.

The **seventh speaker** reaffirmed the points made by the fifth speaker, about discrimination based on age and especially access to health, and the points made by the sixth speaker about vulnerability. One of the working papers references a very important judgment of the Inter-American Court of Human Rights, the case of *Poblete Vilches et al. v. Chile*, which is one of the first judgments on discrimination based on age and especially discrimination in access to healthcare. It is important because in its judgment, delivered in 2018, the Inter-American Court tried to explain the rationale of a special protection based on age. The Court explained that the purpose of this difference of treatment is dignity, autonomy, and independence.

But, like what the fifth speaker noted earlier, the position of the Inter-American Court is to say that age in itself is not a criterion. It cannot be used as an isolated criterion. The other intersectionality-related factors that would be considered when states elaborate public policy and access to health are physical limitations, limited mobility, economic situation, severity of illness, possibilities of recovery, family situation, and others. So, it is true that when we discuss a possible UN convention, this intersectionality element is very important because, indeed, age in itself cannot be the only factor when we talk about special measures and special protection which have to be provided by states. Vulnerability, which was mentioned by the sixth speaker is not in itself linked to an age limit. It is related to different factors that interplay and are interrelated.

The **eighth speaker** followed up and noted that a UN convention around older ages may take some lessons from the Convention on the Rights of the Child. The argument has been made that the Convention on the Rights of the Child in many ways actually separated children from the human rights community and was in part developed in order to allow for a differential treatment of younger people compared to everybody else. It has, therefore, been argued that it is in and of itself discriminatory. It constructs a child who is not political, needs help, or is only able to participate in terms of its maturity, for example.

It is not that there aren't many great things about the Convention on the Rights of the Child. It is just that there are risks one should be careful about regarding the possible creation of a convention on the rights of the elderly. In other words, there may be opposite effects that are not intended.

The speaker tended to agree with the argument that anti-discrimination rights are human rights, and so what should actually be changed are the human rights conventions that currently exist. The prohibition against discrimination should be universalized as opposed to divided into separate conventions.

**The segment moderator** commented that one way of doing that might be if the drafters of these treaties did not insist on creating separate enforcement mechanisms for all of the new treaties but were willing to confide the new treaties to some of the existing bodies. There would, for instance, likely be no need to worry that the Human Rights Committee or the Committee on Economic, Social and Cultural Rights would lack older persons who would be sympathetic to the rights that they were supposed to be enforcing.

The **ninth speaker** shared information stemming from the discussions about Covid in Switzerland and Germany. The speaker stated that age might be a legitimate factor of treating human beings differently. However, the propriety of the differential treatment would depend very much on the context. The more essential a service by the state is, the more problematic any differentiation will be. During Covid, when there weren't enough places in the hospital to treat people, with many cases of emergencies, the question arose as to what the criteria are to accept people in the hospitals. In Switzerland, one of the criteria was that a person over 80 did not have priority over a person around 50.

In Germany, there was even a discussion and a decision by the Federal Constitutional Court dealing with the question: "What about handicapped persons?" If you take intersectionality into account, if you are a handicapped person over 70, you catch Covid and need a respirator, you will probably not stand a chance of getting one of the already rare hospital spots.

The more essential the service is, the more problematic the differentiations are, and the more justification is needed if you want to regulate that in advance. Probably there is a legitimate aim in regulating it in advance because the personnel in the hospital have to act very quickly and make decisions over life and death. Context matters and to enter a theater at a lower price is something else than getting essential medical treatment.

The **tenth speaker (Benyam Dawit Mezmur)** echoed the segment moderator's observation that there might not be an appetite to establish new frameworks for older persons unless they do not have significant financial implications or do not require new monitoring mechanisms. Some of the suggestions mentioned in the discussion gravitate in the direction of what is happening at the regional level. On the African continent, there is a protocol on the rights of older persons, which is a protocol to the African Charter on Human and Peoples' Rights.

Two interesting observations about this are warranted. First, the African continent is a very young continent. By the year 2050, 42% of newborns will actually be in Africa. By the year 2030, a large proportion of the global child population is going to be in Africa, even though Africa currently accounts for only 18% of the global population. Life expectancy is still relatively low. It was not too long ago that countries like Swaziland and others had 41 or 42 years as life expectancies. From that, you might get the sense that issues about older persons are not going to be a priority from a policy point of view.

But there are also other considerations that come into play as one looks at the Protocol. The usual suspects such as employment, social protection, and so forth, are of course always there. But there are also other aspects that have motivated the regional instrument, for instance, the issue of harmful traditional practices that affect older persons. Older women in some jurisdictions are accused of witchcraft and other things that lead to some vulnerabilities. Thus, there is a need for protection that motivated a move towards the development of this regional instrument.

From a child rights point of view, and to an extent from an intergenerational point of view, one of the provisions actually talks about the need to provide support to older persons that are looking after vulnerable children. Although this was heightened by the HIV/AIDS context, there are many instances where older persons are looking after children or are primary caregivers. The considerations are not just life expectancy and fertility rates below or above replacement, but other social considerations that also come into view and have to be taken into account. A final point is that, sadly, even though the protocol was adopted in 2020, there are only six African countries that have actually ratified it. So, it has not yet entered into force, but it will hopefully happen in the foreseeable future.

The **eleventh speaker** seconded a previously made point about the stakes mattering. This point is applicable to other contexts as well. There might be disagreement on whether higher stakes in some ways count against a policy that differentiates by group membership more than against another policy. In the example of the Covid treatment allocation, you have to have some sort of policy when there is not enough of a vital resource such as hospital beds or respirators to go around. It is not clear that there should be a presumption for or against one sort of policy design as opposed to others. It seems that there are going to be certain principles that are relevant, but you do have to have some sort of policy.

Taking the example of someone with a disability and the worry about differentiation that would further disadvantage them, one principle is that people should not be further disadvantaged on the basis of some disadvantage or characteristic that has already subjected them to discrimination or unfair treatment. In the case of chronological age as such, as opposed to the case of disability or frailty, it seems like, when you are choosing between the 80-year-old and the individual that is younger, there is a plausible argument for thinking that differentiation in favor of the person who is at risk of the earlier death is justifiable. In this case, it does not seem like it is exacerbating a prior wrong. Rather, in some ways it is reducing the disparity that would otherwise exist. One overarching way to think about this should be that when the stakes are high, do not focus so much on, “Well, we should avoid policies that differentiate,” but in general, focus on how much weight should be put on avoiding the exacerbation of pre-existing disadvantage. This appears to have been a cross-cutting theme in considering these different discrimination rules. The question is always going to be, what is

the alternative policy that we think would have been preferable, say in the Covid allocation cases.

The **twelfth speaker** observed that the group seems to be slipping to a point where they are nervous about making policy decisions that are based on distinctions. This came up in the context of the Convention on the Rights of the Child, of making distinctions based on limited resources in the distribution of vaccines, or care for elderly people. There is the worry that we are getting into a world where we are tying the hands of the people who have to make these policy decisions and judgment calls. We may be creating different sets of arbitrary exclusions just because we are so focused on being careful about not being discriminatory when we make other sets of distinctions. Are we slipping into being afraid to make any distinctions at all?

Regarding the Covid discussion, the ninth speaker raised a very good point. However, in Canada, we made distinctions concerning people who were in long-term care facilities. We did not explicitly use age, but those who were affected happened to be people who were older because you do not get into a long-term care facility unless you are older in Canada. They were distinctions made based on people; if they were indigenous, they had priority. It is doubtful anybody really thought, given the limited resources, that the government was not able properly to make distinctions that excluded some people at particular times. We have to remember why we created this whole regime of human rights and anti-discrimination. It was to take into account differences between people so they would not be unfairly excluded. But that does not mean we cannot make distinctions to continue to assist those people who are the most vulnerable.

**The segment moderator** closed the segment with the question of whether the solution to all of this is to put everything into the stage of proportionality and not to have preexisting frameworks for analysis. If we put it all in the stage of proportionality, is that a comfort for those who end up engaging in the final review, that they can take everything into account? Does it fail to provide guidance to those who have to engage in the activities that are going to be reviewed later?

#### Segment 5: International oversight of national application of the prohibition of discrimination with respect to chronological age (all ages)

**The segment moderator (Gerald Neuman)** introduced the segment on the international oversight of national applications of the prohibition of discrimination with respect to chronological age, which concerns all ages. International human rights courts and similar bodies play a number of roles, sometimes making findings of violations and sometimes making softer recommendations regarding best practices. The segment moderator asked the speakers to focus on the adjudication of violations.



When a law or practice is challenged as amounting to discrimination on the basis of chronological age, and the national court upholds it as consistent with the state's human rights obligations. The question then arises as to whether the international body should give deference to the national actors and how much deference under which circumstances. The European Court of Human Rights applies a margin of appreciation doctrine, which varies the degree of deference depending on the ground of discrimination alleged, and on other contextual factors including the field of regulation involved, whether the discrimination is public or private, and whether there is a predominant European approach to the question at issue. Other international bodies do not apply a margin of appreciation doctrine, but the strictness of their review may still vary. How should the international review of these various discrimination claims based on chronological age of whatever age be conducted?

The **first speaker** started with a description of recent practice of the Human Rights Committee. Since the Human Rights Committee does not have strong jurisprudence on the rights of elderly persons, the speaker will focus on the rights of children. The recent way the Human Rights Committee has addressed the question of discrimination is through the special protection of children. The Covenant has different provisions prohibiting discrimination, such as Articles 2 and 3, and there are special provisions on the protection of children. Depending on the context, and depending on the situation, sometimes the Human Rights Committee may adopt or may use the discrimination provisions. But in other contexts, the Human Rights Committee does use Article 24 of the Covenant on the special protection needed by children and their specific situation.

Very recently, the Human Rights Committee has adopted this non-discrimination provision in cases dealing with intersected discrimination, and especially in the case of sexual violence inflicted on a child. There were actually three factors of discrimination that intersected. These were gender, age, and the victim of sexual violence was a member of an indigenous community in Nepal. In this case, there was no dominant factor used by the Committee. But the three elements were used as a form of intersected discrimination. The Committee may find this kind of intersected discrimination against children, based on age, although it is not that frequent.

But there are also a few very recent decisions on the special protection provision, Article 24. In this context, the Committee does not address the situation of children under the discrimination element, but more in a positive way under the special measures that are needed from the states and especially in situations, for instance, of statelessness and the special vulnerability of children in the context of statelessness. It was a case adopted in 2020.

Even more recently, a case was published about special protection needed by children in detention and especially in the context of migration. It was a situation of a two-year-old child detained with his parents. For a majority of members of the Committee, it was a clear violation



of Article 24, which concerns the special protection needed by a child because the position of the majority was to say that the child has an absolute right not to be detained. But there was dissent on the merits because a minority of members of the Committee did not appreciate the effect of detention on a two-year-old child. The case is very interesting because it became clear that general bodies need to adopt a more child-sensitive approach. That also echoes what has been said about specific treaties dealing with specific categories of persons versus the general conventions on human rights.

The **second speaker** inquired what the purpose of international oversight was in the context of the segment and what kinds of doctrines and methodologies would be used to determine the question of violation. The first speaker's point brings into play the situation when we are not talking about the CRC or one of the two regional conventions that have specific provisions for older persons. One can imagine that that kind of textual signaling could lead to a more robust oversight of national practices. That would be entirely appropriate and consistent with whatever the text of that provision is.

If it turns out that the Inter-American court, for example, eventually has the decision-making power over the rights of older persons convention, that again will then give it some specific license to develop common standards. But outside of that, there are a number of questions that get raised. Of course, doctrines of deference were already mentioned. How much do the practices of other jurisdictions within state parties subject to the authority of the court or treaty body matter? Do they matter? Is there some degree of permissible variation, or not? Do we have some of the other factors where we would be reluctant to accept proxies based on age as opposed to allowing governments to make determinations that use age as a particular proxy in certain contexts? We do not have a lot of case law across the different human rights mechanisms, global and regional. But those are the kinds of methodological questions that one wants to think about in deciding what kind of review by international mechanisms is appropriate.

The **third speaker (Benyam Dawit Mezmur)** raised one case at the UN Committee on the Rights of the Child and underlined that attention could also be given to the procedural aspects. There was a case involving a child who happened to be from Spain but was in Germany, and the case was on voting. The child was born in 1999, so at the time that the case was launched, the child was already 16 or so. The main contention was that the child and his parents resided in a municipality in the Saarland, and the child wanted to vote in the local mayoral election. He then approached the municipality, the municipality said no. He wanted to appeal further, they said no. He went to the administrative courts of Saarland and the case was dismissed because the court said that depriving children of the right to vote was duly justified by the absence of the political maturity and discernment required to exercise this right in children. Then, ultimately, he submitted an appeal to the higher administrative court of Saarland, and it was rejected.

It was after these domestic proceedings that the case came to the Committee on the Rights of the Child. The Committee ultimately declared the communication inadmissible for lack of exhaustion of local remedies because the members felt, and the Committee decided, that the complainant should have submitted a constitutional complaint. The avenue was available, and the complainant should not have just assumed that, given the lower courts' decisions and given the fact that there is no precedent at the constitutional court level, there was no prospect of success. The question that comes up then is: How should we deal with these cases from a procedural point of view? For instance, are these instances where an exception to the exhaustion of local remedies should actually be provided? Should we apply a higher threshold in the manner in which we scrutinize these cases for the purpose of saying whether exhaustion of local remedies can benefit from an exception?

The **fourth speaker** wondered if we should take into account the margin of appreciation not just for states, but for other, non-state actors, especially in the African context where you have legal systems and communities that coexist with the states and have semi-state functions but are not necessarily recognized in the human rights system. This pertains to indigenous and other traditional practices and structures specifically, and how much margin of appreciation we give to those institutions and not just the state. Because the state coexists with them and it, in some ways, is also an entity that is competing and coexisting in the same space with its own legal and administrative system. These indigenous and traditional groups also have an existence that is similar to the modern state, have their own governance and normative structures, and exercise some form of sovereignty. They may be smaller or weaker than the modern state, but they are also out there.

Part of the reason this needs to be raised is because when we are talking about age restrictions, either for positive or negative discrimination, when we are talking about age 65, when we are talking about age 18, these structures make sense in a certain cultural context in which we partake in, but may not necessarily capture other societies that coexist with modern urbanized society. But while living in a modern urban context, say in one African country, you would only have to travel maybe 20 minutes to find other societies in which the idea of age is radically different. Where people do not go to school, where individuals at age 13, 14, 15, start plowing their own lands, start owning camels, cattle and so on, and get married and start having children, and grow up to be adults, grow old and are taken care of by their societies.

Twenty minutes and you are back in the modern city where you have a different social structure and a different age-based structure that involves schools and that is almost like an assembly line that produces similar experiences comparable to other urban centers. Where you have schools, the number 18 is significant but only within that context. You also have pensions, social security, retirements and so on. It is sometimes an out-of-body experience for one to think about that society that lives 20 minutes away, to which these conversations are very alien.

It is hard to think about those two societies at the same time because the concepts and ideas we have just simply do not fit. The margin of appreciation, or a similar concept, can be applied to the modern state as the state makes and applies policies and laws in ways that have been described today. However, there are also state and non-state societies which do not operate the way we understand and one wonders if and how one can extend a level of margin of appreciation to such societies or if we simply operate as if they do not exist and afford a margin of appreciation only to the state that we, and the modern legal systems, recognize.

The **fifth speaker** posed the question of who would be bringing these cases around age discrimination at the national level. It is important to talk again about younger people and children as some of the discussion does not get very far where young people themselves cannot bring cases. Maybe there is no remedy available because they cannot bring a case in the first place. That then impacts that wider discussion about international oversight and maybe, to a certain degree, it then pivots back to this issue of margin of appreciation. How would you construct an argument or some sort of discussion about oversight of the state? A lot of states might still have 18 as the age at which you can bring a claim of age discrimination. This wider discussion does not go very far if every person under the age of 18 or 16 cannot bring a case. The whole discussion is colored or limited by the participants in this sort of discussion and case.

The **segment moderator** remarked that, next to the 16- or 17-year-old who cannot legally bring a case, there is also the issue about the two-year-old who could not bring the case, even if it was legally permissible for a two-year-old to bring the case. This is something else that we need to think about.

The **fifth speaker** responded that there is the aspect of legal permissibility. Under the age of 16, you cannot bring a case there. There are mechanisms, maybe there need to be more mechanisms to allow a case to be brought by a two-year-old. There is the legal and then the practical. The practical, however, does not go anywhere when you still have that legal barrier.

The **sixth speaker** referred to the experience of the African Committee of Experts on the Rights and Welfare of the Child. Once in a while, the Committee uses the margin of appreciation in engaging specific aspects. However, it also has leeway because there is a specific article that allows the committee to seek inspiration from other sources of international law, from the UN, from the African human rights system. There is one specific concept that has started gaining traction. It is not the margin of appreciation, but it adds to the conversation we are having.

The due diligence principle that has been widely used by the Committee on the Elimination of Discrimination Against Women (CEDAW), where in the African Committee's engagement with states, not only in the reports but also in communications, it looks out for the obligation of result. While the state is reporting on various steps that it has taken and it is reporting, there

is always that situation where it is caught with, “Yes, you have the beautiful policies, you have the beautiful laws, but what is the result?” It is interesting that usually, where there is that failure to show the obligation of result, it helps in coming to more concrete recommendations which would also add to the conversation.

The **seventh speaker** prompted by the comments about children’s ability to sue, noted that he is more familiar with some of the issues around the right to health. One challenge that comes up is when we are relying on individual enforcement. You can have various problems where, in that context, it is often people who have more economic means who are better able to bring these suits for individual enforcement. Analogously, it might be worth thinking about mechanisms for oversight that do not have to do so much with, “Can X person bring a case?”, but rather, “Is there some body that is empowered on its own initiative, that does not depend on someone who is represented and can bring a case, to be able to do some of the work with respect to the international or domestic provisions that we would want to do?” Could this happen without running into some of the same problems we see with the right to health and, it appears, maybe see with respect to age anti-discrimination rights?

#### Segment 6: Political rights of children as an issue of discrimination

**The segment moderator (Benyam Dawit Mezmur)** initiated segment six with a number of preliminary observations. One is that he and Gerald Neuman had actually discussed not just the time allocations for the different issues but even the sequence in which they appear. One option was to bring the children’s rights discussion first and then build our way to the older persons last. After a bit of a conversation, they were convinced that it made sense, partly because of the manner in which the jurisprudence has evolved, that there is much more within the older age part. That was one of the main substantive reasons it was decided to proceed to organize the workshop the way it is now.

The other point is that this morning the group touched on the conversations about the purpose of prohibiting direct and indirect discrimination. One of the points that have not been addressed in some detail was what the purpose of anti-discrimination law is. That is why, when the group was discussing some of the elements in the hypotheticals, some elements like, “What is the purpose? What was the intention? Is it, for instance, distributive justice that we are trying to achieve?” came a bit short. It will certainly be useful to hear about that issue from the point of view of children’s rights. The conversation on the hypotheticals was mostly focused on the in-betweens. So, not necessarily on children, not necessarily on older persons, but mostly on the in-betweens that also often tend to fall between the cracks.

Now, coming back to political rights, there are a couple of things that require attention. The political rights are often the orphans of the Committee on the Rights of the Child. Why?

Because it is usually when North Korea, Belarus, Russia, Eritrea or China are before the Committee that they are remembered. It is when those countries actually come before the Committee that it often remembers that we have these provisions in the Convention as the Committee wants to pay very close attention to and engage the state parties. But this should not necessarily be the case. That is one of the reasons why the jurisprudence around some of the issues that we want to raise here in the context of political rights of children is not well developed.

The second point, even though the title reads “Political Rights of Children as an Issue of Discrimination”, based on the working papers that were submitted, most were in relation to voting participation and there was one working paper on assembly and association. We are in a way lumping those. In relation to assembly and association, one of the differentiations is that if we are talking about voting, that is not a right that is explicitly provided for in the Convention. So maybe there are arguments as to why it is advantageous to look at it from an anti-discrimination point of view. But then, can we say the same thing about assembly and association?

There is quite a bit of an argument about how parents should be able to vote for children. What would that mean from an anti-discrimination benefit? What would be the advantage that we will be getting from that arrangement? The arguments on why, for instance, those that are five, six, ten, or eleven should vote can be debated. Electoral suffrage is a history of extension of the electorate and the only one that is missing now are the below-eighteens. That is worth reflecting upon, particularly with an anti-discrimination lens. Perhaps the last point is that both supporters and opponents of proxy votes for children hold strong beliefs about what parents would do if they had to cast a vote for their children. Unfortunately, in the literature there is very limited empirical data on how parents would actually vote if they were to use children’s proxies. What the implications of that would be for children’s voices and anti-discrimination legislation are issues that the group can touch on.

The **first speaker** observed that a number of the working papers focused on voting rights. This focus should be broadened. That is not to diminish in any way the importance of voting rights. Even beyond assembly and association, there are a host of political rights and civic engagement. Much of the legal structure in place in the United States is antagonistic toward youth civic engagement and youth participation. We see remarkable examples of youth civic engagement today but the vast majority of those happen outside of the state.

There is an interesting question to ask about the role of the state in this. If you ask young people, many of them today view the state, at best, as useless in this regard and, at worst, really harmful. There are interesting questions to ask about whether all youth really want to participate in the state as constructed currently. Their history of engagement has been with a state that has marginalized them, harmed them, and violated their rights.

One of the examples which is worth thinking about in broadening the conversation is status offenses. It is very clear that status offenses infringe on association and assembly rights, or at least they impose differential treatment on young people with respect to association and assembly. In fact, if one looks at the status offense language in state and local ordinances, they expressly say these would not be crimes if committed by adults. Children are caught up with these laws only because they are children. That needs to be discussed.

But there are hosts of other things that implicate political rights. Today, we live in a world where economic power plays such a role in the political arena. For often very well-intentioned and sensible reasons, the regulatory state deprives young people of essentially any economic power. They are either entirely restricted, or partially restricted depending on age, from engaging in any employment where they can earn money or can only do so in very limited contexts. Now this is not a call that we abandon all child labor laws of course. We have these different so-called protective structures in place, with respect to other aspects of children's lives, that in fact have indirect and often discriminatory or at least differential impacts on their political rights and their civic engagement. That is worth broadening the conversation for. Also, it is worth thinking about the role of the state and particularly the role of the state from the perspective of young people.

The **second speaker** made remarks about the practice of the Human Rights Committee. It is true that, in general, when it talks about children's rights and especially the special protection needed by children, the Human Rights Committee does not consider political rights. It is very important to also bring this into the conversation because when special protection is discussed, it is more special protection against violence or special protection against harmful practices. But it is very important to also see that young people may enjoy political rights.

The Human Rights Committee has received a lot of reports and a lot of input from civil society, especially from child rights NGOs, calling for a clear recognition of the enjoyment of the right to peaceful assembly by young people and by children. This happened during the discussion that went into drafting General Comment 37 on peaceful assembly. Doubtless there was resistance among Committee members to this notion.

In the General Comment that was adopted in 2020, Paragraph 5 includes a list of right holders for the right to peaceful assembly. But there is no mention of young people or children. Of course, it is a general paragraph, and it therefore automatically also applies to young people. But there was a debate on whether or not the General Comment should expressly recognize young people as holders of this right. The position of the majority was not to mention children. There is only one reference to children in the General Comment, but it is in one of the final paragraphs dealing with police officers and the training of police officers, especially with regards to needs of special groups.



It is really one of the blind spots of the approach to children's rights adopted by the Human Rights Committee. Again, they are really perceived – and it is an expression of the stereotypes we have about children – as victims of ill treatment, discrimination in education, and so on. But they are not perceived as political animals who can participate in bringing about solutions. It is very important to bring this into the conversation at the international level.

The **third speaker** noted that there is a challenge in children counting on their parents to represent their political interests. For example, children wanting better schools but parents not wanting to pay taxes. Young people's political rights and activities also seem to transcend national borders in some instances and cannot be ignored. In the working papers submitted to the workshop, Jonathan Todres referred to some examples, but some interesting points are raised in Brian Gran's working paper about what Greta Thunberg has done with some other young people. Furthermore, that paper discussed the children's rights ombudspersons, which opens another area of inquiry in this field.

The **fourth speaker** observed that Article 21 of the Universal Declaration of Human Rights and Article 25 of the ICCPR recognize the right to vote as universal and equal. They should support the idea of children having the right to vote unless the states can come up with a reason not to. The question then becomes why they are not doing that.

One answer, of course, would be deep historical prejudice. People have ideas about children that they used to also have about other groups such as women, minorities, the poor, and others. That is always very difficult to contend with, but it sounds like it is behind the thinking of the Human Rights Committee. Another reason may be the fact that the CRC does not protect children's political rights. This is very problematic because the Human Rights Committee is thinking that, since the CRC is dedicated to children's rights, the Committee does not have to worry about children's issues much. That is another group, they have their own committee, and they will do what needs to be done. The problem then also cascades to human rights NGOs, to fundraising and budgeting, to activism, and so on.

The issue of proportionality is not quite clear to non-lawyers, but it seems that voting rights could be subjected to an analysis where remedying the harm to children of not having the right to vote would be judged for whether it creates harms to others. There is a lot of literature on that and whether there would be benefits or harms to different groups. But historically, when people have first gained the right to vote, there has usually been a lot of conversation about who this will hurt. But then, once they get the right to vote, everybody realizes, "No, that is not how democracy works". It is actually fine. Everybody benefits from wider suffrage.

The **fifth speaker** expressed great interest in reading the workshop papers and noted that there are more papers that came out recently on the philosophical side on the right of children to vote. In principle, it is hard to be opposed to child suffrage and especially for teenagers. The challenge seems to be not only the right to vote, but real and substantive participation. We

know that, in so far as teenagers are concerned, the participation rate is quite low. So that is also part of the problem. Two further observations are warranted in this regard. First of all, the parental vote translation of that argument is not convincing. Second, if we rely on an argument that has to do with competence, it is very important to be clear on what kind of argument we want to put forward to defend the children's vote. The arguments being made may be mutually incompatible, there may be tension between these arguments.

Here are two examples of the tension. On one approach, what is central is that suffrage is not mostly about competence, it is about inclusion. In that case, it does not really matter whether young people are incompetent or not, politically speaking. A very different argument consists in saying, along the lines of the Goodin and Lau article that was referred to in John Wall's working paper, that this is about competence, it is about adding different competences than what we usually have, which implies different views about politics and social issues. So, there is a specific competence among young people, and this is why we want to include them, too. It is important that we are clear about what competence-related argument we want to rely upon, if any, when we justify the extension of suffrage to children.

The **sixth speaker**, responding to the segment moderator's earlier question about the relationship between freedom of association and age discrimination, remarked that the difference with the right to vote is that the problem with the freedom of association is a problem of practice. Children have the right, in theory. They should be allowed to exercise these freedoms exactly in the same way as adults do. In the Convention on the Rights of the Child, there are no extra caveats to the freedom in comparison to what adults would be allowed to exercise. The problem is that, in practice, there are so many other laws that are restricted. As mentioned earlier by other workshop participants, there are so many biases and assumptions about what is good for children, what is in their best interest, and all these justifications. It is the accumulation of these biases that leads to the limitation of this right in practice.

On the point on the right to vote, what was surprising to read in Claire Breen's working paper on the case in New Zealand was how the High Court and the Court of Appeals dealt with the issue of lowering the voting age. The banality of the arguments given to reject it was surprising. The claim is made that lowering the age for the right to vote requires general public support. It seems that the Court of Appeals explicitly took the position that it is a quintessentially political issue. It was surprising that a question of discrimination dealt with by a court could be solved by saying, "No, this is a matter of voting," people should vote on whether children should vote or not. But then, the circularity issue comes into question, which is that everyone but the people who we are dealing with are allowed to vote on whether children should be allowed to vote or not. It would be very interesting to look at this topic in greater depth because it seems to be a profoundly unjust situation.



The **segment moderator** recalled that the evidence from places where voting ages have been lowered to 16 is overwhelming, in that 16- and 17-year-olds vote at much higher rates than 18- to 24-year-olds. This evidence exists because there are a number of countries where the age has been lowered to 16 for national elections. Brazil, Austria, Cuba, Nicaragua, Bosnia-Herzegovina, and parts of Norway fall in this category. Those that lowered it to age 17 are East Timor, Indonesia, Seychelles, and Sudan. Perhaps Germany and Israel permit voting at 16 in local elections as well. States sometimes come to the Committee on the Rights of the Child during dialogue sessions and state that children do not vote because voting is omitted from the Convention on the Rights of the Child.

One of the reasons why we regard the best interest of the child to be a primary consideration is partly because children will not have the opportunity to vote, which means that they are not going to have the opportunity through the ballot box to actually rectify injustices despite their being overrepresented in poverty numbers and in a whole range of other things. As a matter of policy and as a matter of law, we have the best interest principle because they do not vote. That argument has been expressed on a few occasions and it does not seem convincing.

The **seventh speaker** explained that as someone who is not a child rights expert, they do not have philosophical reflections on the issue, but wanted to add some empirical evidence and throw in some personal reflections upon reading the articles submitted on the topic. The seventh speaker's first reaction to the notion of voting rights was extremely skeptical if not dismissive. If one were to go deeper and look behind that attitude, it would probably get to power relations and social standing connected with one's age. But the immediate reasons were because of the speaker's experiences from Ethiopia, where in practice no one really truly or fully exercises the right to vote and be elected anyway. Children's suffrage sounds like a privileged or even a luxurious conversation to have. The second reason is also practical since Ethiopian children do not have the right to participate in the administration of schools and to elect their representatives at school.

But then, the workshop papers evoked the role of teenagers in Ethiopian politics. One of the monumental moments in Ethiopian history, the student movement of the nineteen sixties, which was responsible for the overthrow of the monarchy and the establishment of the first republic, was carried mostly by teenagers – by urban youth who were in high school. There is also the 1970s when some 100,000 Ethiopians were killed in the Red Terror by the military regime. Most of the fatalities, one would assume, would have been teenagers. One can also imagine that a good number of combatants in the war that brought down the military regime would have been children.

More recently, in April 2018, Ethiopia had started a now squandered transition towards democracy. What brought down the regime was the Qerro movement which, translated from Afan Oromo, means the movement of the youth or of bachelors. The Qerro movement, too,

succeeded on the backs of high school and university students. What is ironic, however, is that, despite some 4,000 of these young people dying in the process of overthrowing the authoritarian regime, which one may add was assumed to be insurmountable up to that point, many of these teenagers would not have been able to vote if Ethiopia had democratized.

Even worse, as democracy and rule of law funds poured into the country in the ensuing months, Ethiopia hosted dozens and dozens of projects, meetings, and trainings on democracy and democratization. The teenagers and youth who overthrew the regime were, however, nowhere to be seen. The most interesting of these well-funded projects was a chain of events on the development of a national civic engagement policy which, by the way, explicitly aimed at raising a democracy-loving future generation. The youngsters whose civic engagement made those meetings possible were absent or, to be more accurate, they were excluded from the policy-making process that sought to target them as subjects who would be shaped into model democratic citizens of the future.

These experiences and facts can certainly go towards demystifying the notion that children should automatically be excluded from political life. If anything, at least as far as Ethiopia is concerned, children seem to be playing an indispensable role in the country's political history. It seems as if it is not that children are unable to do politics and play a role in democratic life. It is we, the adults, who are actively preventing them from doing so. These facts also demonstrate the deeply structural nature of the exclusion of children. Even if we hypothetically assumed that the student movement or the Qerro movement was exclusively responsible for the political changes, and if we assumed that those changes led to democratization, we might have still excluded them from being equal citizens once victory was secured.

The **eighth speaker** noted that John Wall had recently published a book titled “Give Children the Vote: On Democratizing Democracy” arguing for ageless democracy. There is also a children's voting colloquium, which has about a hundred scholars around the world who work on this issue. Political philosophers are trying to rethink the question of competence because of course that has been defined around adulthood when it comes to voting. But what is really the competence to vote? If a teenager can bring down a government, they probably also have the competence to vote. The only real competence necessary is the desire to vote. If you want to vote, then you understand politics and you understand what the issues are involved.

On the question of best interests and the CRC, it is notable that other groups do not get subjected to this regime of best interests. The reason is that it would be patronizing for anyone else to have the international community decide what is in their best interests. Unfortunately, that term, which in childhood studies is subject to a great deal of criticism, is often used in this way to trump basic human rights. We are not going to give you the right to vote because we think it is in your best interests. That would be problematic for any other group. Regarding

the thought “No one wants to vote anyway”, it is not a luxury to vote. It is part of being a member of a democratic society. If you really thought it was a luxury, then you would be happy not to vote, you would give up your own right to vote, you would not care that you had the right to vote. But people who have the right to vote do care that they have the right to vote.

Then there is the often-cited argument that makes claims about manipulation. The assumption here is an adultistic one – that adults are free of manipulation and children are not. Purportedly, at age 18 is when you magically move from being manipulated to being manipulative. As a resident of the U.S., the level of manipulation of adults is remarkable. One can hardly say adults themselves vote on a purely independent basis. No one is really free from manipulation. Thus, this argument stands on a false dichotomy.

The **ninth speaker** pondered whether part of the problem around the voting age is that it is either at the head or the tail of the wider discussion about children and their political rights. Some of the speakers were saying a while ago, there is a kind of blank space in some ways when it comes to children’s political rights. Adults do not necessarily perceive them as being effective political actors. Young people, if we want to talk about manipulation, may end up internalizing that this is not for you. So, whether it is at voting or whether it is participation in school or protest movements or whatever, even before we get to a discussion about whether they have the right to vote or not, if children are continually hearing this message from adults that they cannot fully participate or their participation is not worthwhile or equally worthy, then it is going to feed into wider discussions about voting.

The speaker agreed with the comment about how dreadfully banal the Court of Appeals and the High Court decision in Aotearoa, New Zealand, was. But the same sorts of discussions had been raised. It is interesting that the Children’s Commissioner – New Zealand has a Children’s Commissioner as opposed to an Ombudsperson – provided a report to the High Court in which he drew a distinction between cognitive development in terms of decision-making under stress and decision-making in less stressful environments. That research showed that young people were very much able to make informed decisions when it came to less stressful environments like voting. Thus, the issue of capacity really did not run there.

Two other interesting points are worth noting. One went back to 1986 when there was a Royal Commission on the Electoral System. Back in 1986, that Commission concluded that 16- and 17-year-olds should be entitled to vote for all the same reasons that we are talking about today, or it dismissed the arguments against them. If we want to go farther back into history, one of the arguments back in 1893 for denying women the right to vote was they would be manipulated by their husbands and fathers, which never came to pass. Women went out and voted. The prime minister at the time worked out that actually a whole bunch of new people would come into the voting arena and that maybe his party and other parties would do quite well out of it.

We keep coming back to the same old arguments back and forth in 2022. Are we ever going to change away from any of that, if at some level we do not address the wider issue that sits behind voting, which is a wider political participation of children? That does not seem to be terribly well encouraged in many countries, but children in their own right, with the climate change strikes, amongst other things, and we see it coming through in the latest COP, they are there and well able to articulate their views.

The **tenth speaker** observed out that some of this discussion brings the group back to the central theme of the whole day, which is differential treatment and discrimination. Many of the points that others beyond this group have raised relate to holding young people to a higher standard than we hold adults. It is said that young people will not vote, and therefore they do not really need the right to vote. If you look at the U.S. as one example, not only do people not vote, but there are also so many adults who do not even register to vote. The number of people who actually are eligible to vote and actually vote is really low. We hold children to a higher standard than adults.

Also, we treat this somehow as a different right than other rights. We also do not say that if you do not express your views over a six month or one year period, you no longer need the right to freedom of expression. We would never entertain that sort of argument about any other right. Yet, we are having these conversations or others are having the conversations that if young people are not going to vote, they do not really need it.

It is the same with the competence issue. We are holding young people to a higher standard. There is a differential treatment here and some might argue a discriminatory treatment that you have to demonstrate competence, which we have seen in other contexts with other historically underrepresented populations. Imposing these kinds of tests on the ability to have the right to vote is deeply problematic.

These positions do not even reflect reality. Young people have a lived experience that is rich and that can bring to the table real expertise on many topics such as on education, for example. Young people are the only ones alive today who have gone to school in a pandemic. That is some expertise as to what schooling is like in a pandemic. The competence arguments do not even hold up to reality. The bigger question is why we are imposing a higher standard. It really brings us back to this theme throughout the day, which is, does this amount to discrimination? That young people are held to this higher standard to be able to participate through the right to vote or other political participation.

The **eleventh speaker (Gerald Neuman)** appreciated the fact that the previous speaker had brought the testing for competence issue into focus because it seems that there is a trilemma of which the solution is unclear.

Much has been said in support of the idea that 16-year-olds should vote. However, if you say that as a matter of discrimination law, 16-year-olds should be allowed to vote, then an immediate question is, “Okay, and what about 15-year-olds and what about 14-year-olds and what about 13-year-olds?” How far do we go back to not find that it is discrimination if we are going to have an age limit? Do three-year-olds have the right to vote? Even by the test of desire to vote? Parents could probably instill in three-year-olds the desire to vote even if they just thought they were coloring in a coloring book. The problem is, do we have an age which is the designated age below which people are viewed as not competent to vote, and above which people are viewed as competent to vote?

Or do we have tests, and is everybody in some transitional age group going to be tested on their competence? Political officials questioning people to find out whether they understand voting well enough to vote is very problematic. We cannot keep them from finding out what the opinions of the children are as part of the exercise.

Or as Warren Binford explicitly proposes in her working paper, do we give the right to vote to the parents for children who were too young to be able to exercise the right on their own? But if the parents are exercising the right to vote, then in what sense are we giving the children the right to vote as opposed to giving them the right to be counted according to the opinions of their parents? It is at this point unclear how to solve that trilemma.

**The segment moderator** commented that the observation just made was also the source of a bit of a doubt for the UN Committee on the Rights of the Child when it was dealing with that case from Germany. It was a blessing in disguise that the Committee could quickly dismiss it saying non-exhaustion of local remedies. Because the Committee did not have a solution at hand to actually resolve it. It was a case involving a 16-year-old and the argument was, how about 15? How about 14? If we look a little bit into a state practice, quite a lot of what is being done is very much focused on 15- and 16-year-olds, for instance, the UK case from 2004. It was a 16 to vote campaign that they were running. That threshold issue is definitely worth having a conversation about and it is something that was doubted by the Committee.

The **twelfth speaker** expressed doubt about why the group was talking about age at all with regard to voting. There is a presumption that all of us are humans; that all of us are participants in our society and have a right to participation in our society; and that when our abilities prevent us from being able to exercise our rights as humans, that our social structures, our families, our neighbors, our political leaders have an obligation to support us in being able to exercise our rights, including the right to vote. If we start by moving away from an age discrimination structural analysis, which in itself places children at a disadvantage, and instead recognize the core element that children are human beings and as human beings have rights of participation just like adults, then we start to get to some of the discussion earlier in the day, which is that we should be focused on what is fair.

We should be focused on justice, we should be focused on what do these individuals need, whether we are talking about a disabled young person or a BIPOC elderly person who has a shorter lifespan because of the structural inequities that they face their entire life. We can instead be focused on solutions and support to empower people to enjoy the rights of their inherent humanity. So that was part of the reflection the same speaker had made earlier, which is that structuring this in terms of age discrimination, we place children at a disadvantage. Even within the body of age discrimination, most of it is focused on older groups.

A lot of the conversation in this segment is not really about age discrimination, it is about children's rights, and it should be based on their rights and not based on their age. It then really comes down to what support does this group of humans need in order to exercise those rights? It is horrifying to hear about the Human Rights Committee's deliberations and their difficulty in recognizing the inherent rights of children to political participation. One only needs to consider the impact that children are having on climate change, the impact that children are having on gun safety here in the United States, the dispositive impact that young voters had in changing the course of our recent federal elections and the state elections here in the United States, the role that children and youth are having in Iran right now. When you look at movements all around the world, they are often being led by young people. Some of them are technically children, some of them are technically young adults, but they have a certain type of wisdom and lived experiences that give them a perspective that many adults who lack those perspectives do not have. In any case, the age discrimination construct is not necessarily the point of departure because it is inherently disadvantageous to children.

The **thirteenth speaker** remarked that on the question of age, people raise the objection that 16-year-olds voting would then lead to a lowering to 15, 14, 13, so on. But the issue around discrimination, at least as far human rights are concerned, is similar to issues around gender, class, and race. When there were suffrage movements for women, for ethnic minorities, or for the poor, none of which could vote 150 years ago, there were always these discussions about, "Well, maybe some women can vote – the ones who have property or the ones who are married or the ones who are over 30", and so on. But ultimately, it always comes back to discrimination and age is a discriminatory factor here. Whatever number you put on it is going to be over-determinative and under-determinative. It should just be whoever wants to vote can vote.

Voting is a complex process. Adults are manipulated. People with dementia who have no idea what they are doing can vote. Those are secondary concerns to this problem of age discrimination. Democracy should mean those affected by laws get to have a say in how they are made. It has gradually gotten more like that over history. But there is this vast group of people who make up a third of humanity who have not been included in that. They have been excluded from the vote even though they are actually affected more than anybody else because they are young. Secondly, they are going to live longer under the laws. Then, of course, with



climate issues, they are going to be affected in many different ways in the future as well. Age as a number is a stumbling block to thinking clearly about the issue.

Segment 7: Discrimination on the basis of chronological age, at the lower end of the range – against children, or among children of different ages – direct and indirect discrimination, scope of the prohibition, standards for justification of differentiation, and value added

The **segment moderator (Benyam Dawit Mezmur)** opened the conversation by explaining that many of the topics in age discrimination at the lower end of the age range link to, and present specific iterations of, overlapping topics discussed throughout the conference. The questions in this segment relate to whether there are reasons as to why the same, competing, or complementary policy considerations should lead to more, comparable, or less stringent thresholds against discrimination at the lower end of the threshold. Specific topics that are to be covered in this segment can include:

Whether the significant role of early childhood development justifies the application of different standards to children in their early years of development.

Whether policy considerations or standards of justification warrant the application of distinctive thresholds to different societies or substantive rights. Policy considerations or standards of justification used may also imply differences in the types or scale of remedies. One can also ask whether these apply differently in the case of direct or indirect discrimination.

Whether jurisprudence on age-based discrimination against children is underdeveloped, and whether it is so because of the pervasiveness of intersectionality in the field. Since intersectionality brings into focus discrimination based on disability, gender, or other markers such as religion or minority status, and not age, it raises questions as to whether it is causing attention to drift from age-based discrimination. In a way, this is asking if intersectionality is an ally or an adversary when it comes to the development of the jurisprudence on age discrimination in a more nuanced way.

Whether there is conflict or competition between the principle of the best interest of the child and age discrimination as conceptual tools for protecting children. The concept of the best interest of the child is often invoked by states to argue that they do not want to grant children voting rights, or at least the possibility of opening up the political space in certain issue areas or in local elections. Since the best interest standard is considered in a broad array of legal and policy considerations, or since a higher standard of the principle is applied, it is argued that it renders the granting of political rights to children superfluous. From a broader



perspective, one can also look at this topic as to what the added value of looking at things from an age-based discrimination lens is when the best interest principle already exists.

Whether there should be higher or lower thresholds for justifying distinction based on age within sub-categories of children. For example, one can make a case for distinctions arguing that there should be a higher threshold for limiting the health rights of children under the age of two, because they have a greater need for it.

The **first speaker** observed that scholars and advocates in the children's rights space recognize a need to admit some inherent conflicts between competing interests and rights. On the one hand, you have children's full and unlimited political participation rights. On the other hand, you have the need for strong measures of protection of children with regard to their sexuality with regard to exposure, to harmful content online with regard to economic exploitation, and so on. Children's rights scholars and advocates have been trying, relying on children's rights as both the sword and the shield as it were, to figure out ways of logically integrating these two seemingly contradictory positions.

Another conflict lies in conversations about studies, including recent ones that incorporate input from the examination of functional brain scans of children, that show that males and females have different rates of maturation, and that young people do not have fully developed brains compared to adult ones. However, one should also approach these studies with much skepticism, lest one should go down a slippery slope of relying too heavily on science to determine at which point in their age what rights people should be able to exercise. After all, it was not too long ago that arguments were being made that because women have smaller brains than men, they were clearly less intelligent and less capable of being full political participants.

A **second speaker** offered some comments aimed at showing that many of the problems with the discrimination model stem from the fact that they tend to take the law of adults, and the assumptions the law of adults are based on, for granted. It is a mistake to assume that the laws for adults are appropriate and then proceed to measure the propriety of the laws applicable to children based on them. For example, the laws on sexual relations applicable to adults are highly problematic. They misconceive adulthood and fail to protect the sexual autonomy of adults. We may have to reimagine the laws of adults based on an understanding that adults are profoundly vulnerable, and that adults are all profoundly lacking capacity and agency, before we begin thinking about their pertinence to children.

The **third speaker** added that, in its attempt to mediate the tension between children's agency and their protection, the law acts against children's autonomy, behaving in a way that is akin to a "one-way ratchet." A child, no matter how responsible and mature they may be, will not be able to exercise their rights, such as to vote or enter into contracts, earlier than is set in the law. However, if a child makes a mistake, for example by breaking the law, they can relatively easily find themselves treated as an adult. The arbitrary assignment of legal significance is

not limited to the age of eighteen. There are arbitrary numbers in many parts of the law. Therefore, it is not only children's rights scholars and advocates who are struggling with this challenge, but also the legal system and society as a whole.

Another distinction is one made between exercising rights and the determination as to whether one has rights. If it is posited that young people have rights, rights that are inherent in them as human beings, it should then be recognized these are not privileges granted by governments. One can start from the assumption that individuals have rights and discuss what kinds of individual protections they need to realize their rights. It is in this sense that it would be proper to begin discussing the balance between the rights and protections of individuals, and in this case, that of children.

A **fourth speaker** noted that it may be useful to distinguish between children's participation in political choice on matters that directly affect them and those that do not. The speaker posed the question as to whether it would be easier to reconcile the conflict between rights and protection if one were to focus on laws that have direct impact on children, such as those dealing with the sexual activities of children, rather than advocating for more extensive political rights.

A **fifth speaker** observed that the notion that everyone should have a claim to arrangements that will fairly serve their interests is compelling. There is, however, room for reasonable disagreement on the kinds of arrangements or legal regimes that will better serve the interests of any given individual. Voting rights and self-advocacy best represent children's interests as opposed to being represented by third parties who are authorized to do so, including parents or other fiduciaries. However, especially when you are dealing with much younger children, you can imagine fiduciaries helping them with the exercise of their rights, as in helping them vote or voting on their behalf, rather than them not getting a vote at all. Moving the age limit for self-advocacy and voting could also be one factor to consider. We should also consider age to be a good proxy for where you draw the line for self-advocacy as an individualized approach where you decide on a case-by-case basis is unlikely to be fair or workable.

The **sixth speaker** responded to the segment moderator's opening question on intersectionality. The speaker noted that children can get exposed to extreme content that includes brutal, torturous, and degrading acts, sometimes against children. While it is not difficult to argue for the protection of children in these contexts, one also has to take into account that adult content is critical to queer youth who would otherwise not have access to information about same-sex intimate relationships as straight youth do. Thus, protecting children from this content can, thus, disadvantage a category that has the intersectionality of being children at particular age in the development of their sexuality. One has to do a weighing of harms versus benefits that compares the risks created by access to such content and their ability to exercise agency, to exercise their right to have access to certain experiences.

A **sixth speaker**, citing the work of Neena Modi in the United Kingdom, explained that very young children or toddlers who may not have the ability to self-advocate politically face the consequences of their inability to vote in the form of a public health system that is failing them. The moment they walk into a pediatric facility they face a top-down approach to their wellbeing where it is their parents and other adults doing all the talking and making decisions. The whole notion of self-advocacy, confidence, independence, and autonomy fall apart. The exclusion of any group from rights can be seen as a harm in and of itself. Even if a toddler cannot exercise the right to vote, speech or assembly, the fact of having that right gives them political dignity and puts them on the map. Even if it is their parents who take the children to the polling station, it will not matter what they vote for in particular instances, what will matter is that politicians will be forced to take their interests and needs into consideration.

A **seventh speaker** expressed uncertainty about how to distinguish between practices that should be characterized as discrimination and those that are merely just differentiations based on chronological age. Using chronological age to differentiate children can sometimes have beneficial effects for the protection of their rights because it allows us to accommodate certain issues. However, use of age-ranges can also be challenging, for example, when going through ethical clearance committees. The escalating age limits of European Union level data protection and privacy directives increasingly exclude certain age ranges from participatory research such as interviews and focus group discussions and, therefore, from gaining from the benefits of research. This threshold question is also significant because it is a matter of differentiation within the category of children.

An **eighth speaker** agreed that it is best to start with the perspective that individuals have certain fundamental rights and to subsequently evaluate their capability to exercise these rights as well as the level of support required for the effective exercise of those rights. The speaker also added that bright line rules may be especially problematic for delineating early stages of life. However, they are also necessary as no legal system can handle everything on a case-by-case basis.

The challenge of bright line rules may go even deeper in that the liberal tradition of autonomy-based rights may not be entirely appropriate for the very young. In fact, it is worth noting that the autonomy-based model may not be suitable for many adults or may not be appropriate across the lifespan. It is, therefore, necessary to consider alternative ways of constructing and conceptualizing the rights of young people. A study conducted over a decade ago examined the legal and cultural constructs of childhood and revealed that in many non-Western traditions, there are established duties to support and develop young individuals to reach a point where they can assume responsibilities. This highlights the importance of considering cultural and societal influences when evaluating the rights of young individuals. Setting aside the complications that may arise from the patriarchal nature of some of these social norms, the point here is that a child is prepared to enter from one stage to another rather than simply becoming an adult after an arbitrarily set birthday.

The **ninth speaker**, also expanding upon the conflict between children's autonomy and the need to protect them, used the example of the right of children to be free from violent discrimination based on sexual orientation and gender identity and concerns over the protection of the physical integrity of children in the context of gender reassignment therapies and procedures. This conversation seems to have been focusing increasingly on reversibility. The ability to reverse reassignment, with the effects of hormone therapy being seen as more reversible than surgical interventions. Long-term effects and potential seriousness of consequences of these treatments are considered as factors. The problem, however, is that the science is inexact. Recently, research surfaced showing that gender-affirming hormone therapy may negatively affect bone density and development. This may once again bring this issue of conflict to the forefront. Whereas these types of conflicts and dilemmas are by no means easy to resolve, a layer of complexity is added by a conflict between physical and psychological harm. These dilemmas are worrying because there is no clear pathway to their resolution.

The other thing that is relevant to the idea of the exercise of rights is the deployment of deeply discriminatory and stigmatizing views of sexuality in order to galvanize political campaigns. This is worrisome due to limitations to access to comprehensive sex and gender education as some actors are increasingly making discriminatory discourse a significant part of their political platform. One of the elements of this platform is a powerful imagery and invocation of the protection of children. The adverse effects can also extend to practices such as conversion therapy which are typically decided and enforced by adults, thus both depriving children of agency and exposing them to extreme, possibly life threatening and lifelong, psychological harm.

The **tenth speaker** supplemented the preceding comments by further developing a previous example on the connection between hormone suppression therapy and bone density. Albeit based on observations over a limited number of years, what the new research on the topic is showing is not just that hormone suppression may negatively affect bone density, but that its adverse effects may be irreversible. Thus, although it is appropriate for a society to empower children to exercise agency over their health and wellbeing, the risk involved in hormone therapy is an example where a need to limit children's ability to consent may be justified on the grounds of the need to protect children. In this context, the individualized risks and benefits analysis could be between mental anguish or possible suicide on the one hand, and brittle bones on the other. Since we can add different factors and permutations as to chronological age and individualized vulnerability to this basic analysis, it is a perfect example of the difficulty of dealing with the conflict between children's autonomy and their protection.

The **segment moderator** noted that if there is one thing that is the most arbitrary standard in the Convention on the Rights of the Child, it is in Article 1, the line that is drawn at age eighteen to delineate between childhood and adulthood. New research, especially research

relying on previously unavailable technology, can yield more refined ways of demarcating age categories. Neuroscientific literature was for example extensively used in setting age limits, such as the minimum age of criminal responsibility, in the general comment on children's rights in the child justice system. These science-based demarcations are not going to be free of arbitrariness, but they will be less arbitrary.

The segment moderator then invited participants to comment on two topics. First, whether there should be different standards of justification for age-based distinction and other categories such as race or gender, and whether different standards should apply to different chronological age based sub-categories of children. Second, the best interest of the child: age-based distinctions did not get as much attention as they could have because the distinctions are also not in the best interest of the child. For example, status offenses that apply only to minors, such as the unlawful flight from parental custody, are deemed to be against the interest of the child. But would there be utility in characterizing it as discrimination based on chronological age?

An **eleventh speaker** asked whether the best interest of the child standard can be applied to the claims of the childhood community as opposed to particular children. It appears that the best interest of the child has been applied to the latter and not the former. For example, for status offenses, the best interest of the child has to apply to the childhood community and not the child unless the consideration of a particular child helps in setting the law which would then be applied to all children. But the risk of this outcome is that it is not universalizable in that another judge can say the rule applies to the first child but not the next one.

The **segment moderator** replied that the Committee on the Rights of the Child applies the best interest of the child to both particular children and to the childhood community as a whole.

The **twelfth speaker** noted that there is a tendency in which distinctions based on age are seen as more acceptable than those based on gender or race. It does not follow from this that the standard of justification has to, by necessary implication, also be different. It is just that the standard is satisfied in more contexts of distinctions based on gender and race, but not age.

The **thirteenth speaker** agreed, and added that law should be flexible enough to accommodate sufficiently nuanced discussions in individualized circumstances but also has to be pragmatic in terms of general applicability. Therefore, laws need to meet both universality and legal certainty, while also allowing flexibility in individualized applications.

The **fourteenth speaker**, agreed with the notion that best interest and discrimination considerations should go hand in hand and not be conflicting interests in need of resolution. However, best interest determinations are also problematic when they do not take the opinions of children into consideration. Since there is no harm in learning about the opinions of children regarding their interests, there is at least no harm in making them part of the conversation.



## II. Appendices

### Appendix I. Concept Note for the Workshop on Discrimination on the Basis of Chronological Age

Gerald L. Neuman and Benyam Dawit Mezmur

The Harvard Law School Human Rights Program (HRP) is convening a workshop on November 18, 2022, for the purpose of exploring in a comparative and cross-disciplinary manner the phenomenon of discrimination on the basis of chronological age, including discrimination against the young and against the old and against any ages in-between, and including both direct and indirect discrimination (both practices with discriminatory intention and those with discriminatory impact). This will be the fourth in a series of workshops that HRP has convened on different types of discrimination since the spring of 2020.

This note is not intended to limit the scope of discussion at the workshop, but to describe and illustrate some of the range of issues that may shed light on the concepts of direct and indirect discrimination based on age. The hypotheticals given below are stylized in order to isolate certain issues that may arise in the analysis of discrimination, but they involve realistic situations. We may discuss some of them explicitly at the workshop, but we will also discuss relevant problems raised by the participants, including in the short papers that will be distributed in advance of the workshop.

Legal norms prohibiting direct or indirect discrimination (the usual international phrasing) may be found in a variety of national laws, treaties, and other international instruments. The positive legal norms may differ in several dimensions, including the breadth of their scope, the types of discrimination they address, the public and/or private actors they regulate, the stringency of their prohibitions, and the methods by which violations may be

demonstrated. Some antidiscrimination norms expressly include “age” or particular ranges of ages as designating a protected category. Other antidiscrimination norms can be interpreted as covering categories defined by chronological age; for example, article 26 of the International Covenant on Civil and Political Rights (ICCPR) broadly requires states to protect against

discrimination on a variety of grounds including “other status.” Some treaties protect only children, and some treaties protect only older persons, e.g., those over age 60. Some laws prohibiting “age discrimination” define it so as to protect only persons over a particular age. Some norms do not contain a numerical specification of the protected age group but describe it in other ways.

The usual international definition of discrimination includes an element of (non-)justification that separates permissible differential treatment or effect from prohibited direct or indirect discrimination. The standard for justification often involves a requirement of proportionality,



which then raises the question how proportionality is to be evaluated. Other legal norms may prohibit differential treatment absolutely, while enumerating a list of permitted exceptions. Where standards of justification apply, one may ask how the level of justification compares with the level used in other areas of anti-discrimination law, such as race discrimination or gender discrimination, or differential regulation of different occupations. One may also ask whether all age categories should be subject to the same level of justification.

Specifically with regard to children, antidiscrimination norms may also coexist with the norm requiring consideration of the best interests of the child. For example, the Convention on the Rights of the Child (which has been ratified by all UN member states except the United States) includes in Article 2(1) a requirement that the rights set forth in the Convention be respected and ensured without discrimination of any kind, on grounds including “other status.” Understanding age as involving another “status,” one might then ask what this requirement adds to the requirement in Article 3(1) that the best interests of the child shall be a primary consideration in all actions concerning children.

International law and some national law norms also address intersectional discrimination on combined grounds such as race and age, gender and age, etc. Without meaning to distract from the importance of intersectionality, the hypothetical examples that follow below are more abstractly described in order to focus attention on the issue of discrimination on the basis of age, which may be considered as raising enough complexity without more.

Differentiation by age has certain unusual characteristics. One’s age is not subject to one’s control, but changes continually as long as one lives, so that people pass from one age group into another by the mere passage of time (in one direction only). Should this affect the design of norms regarding discrimination on the basis of age?

In the context of international human rights norms, other questions relate to the nature of the international oversight of the application of nondiscrimination rules by national authorities.

### **Hypothetical No. 1: Conscription**

In country A, the members of the military defense force include volunteers and conscripts. Men between 18 and 27 are subject to conscription, with selection by lottery. The level of conscription varies depending on the assessed need in that year. Individual Z is chosen for conscription at age 23, and objects that the system discriminates by age, against his age group and against him personally. He points out that if the age range for conscription were extended up to 30, or 35, or 45, as it is in some other countries, the odds of his being selected that year would have been lower.

The state argues that men between 18 and 27 make better soldiers, and also that although Z may feel disadvantaged now, he would have faced a risk of conscription in more years if the maximum age were higher.

How should Z's claim of discrimination on the basis of age be analyzed?

## Hypothetical No. 2: Sentencing

In country B, empirical evidence consistently supports the conclusion that recidivism rates after release from imprisonment are significantly correlated with age. Rates are highest for those who are 21-25 at the time of release, and then decline gradually as age increases. The risk of recidivism is regarded as an important factor in sentencing.

Sentencing guidelines in country B recommend that current age be taken into account as a factor in sentencing, with declining weights assigned for the age brackets 21-25, 26-30, 31-35, 36-40, 41-45, 46-50, and over 50. Individual Y is convicted of burglary at age 34, and the judge explicitly refers to Y's age in determining a prison sentence. Y challenges the decision as amounting to direct discrimination on the basis of age, arguing that the sentence would have been lower if Y had been 39, or 54.

How should Y's claim of direct discrimination be analyzed?

Now suppose instead that country B has prohibited the use of age as a sentencing factor, and instead uses a computer-generated algorithm that excludes age as an eligible variable, but models the relationship between other characteristics of the offender and the offense with risk of recidivism. Some of the characteristics that the model identifies are significantly correlated with age, and as a result, recommended sentences for any given crime still decline with age. The average recommended sentence for burglary, for which Y was convicted, is substantially higher at age 34 than the average for the same crime if the defendant is convicted at age 39 or age 54. Y challenges the sentence, arguing that the algorithm overestimates Y's individual risk of reoffending, and that the use of the algorithm amounts to indirect discrimination on the basis of age.

How should Y's claim of indirect discrimination be analyzed?

## Hypothetical No. 3: Candidacy

In numerous countries (but not all), candidates for the national legislature – either the upper house or the lower house – must be older than the age required for voting. Usually, the age for the lower house is at least 21; often it is 25; sometimes the age for the upper house is even older, such as 30 in a dozen countries. In its 1995 General Comment No. 25 on the right to political participation under the ICCPR, the UN Human Rights Committee accepted that “it may be reasonable to require a higher age for election or appointment to particular offices

than for exercising the right to vote, which should be available to every adult citizen.” (Para. 4.)

In country C, the minimum age for election to the national legislature is 25. Individual W is 22 years old, and wants to stand for election to the national legislature, and challenges the minimum age rule as amounting to direct discrimination against adults under 25.

How should W’s claim of direct discrimination be analyzed?

In considering W’s claim, does it matter what the current demographic structure of country C’s population is – for example, whether there is an “expansive pyramid” with a “youth bulge,” or a “constrictive pyramid” with an increasing median age and a low birth rate?

Lowering the age of eligibility may not suffice to overcome barriers to the successful candidacy of young adults, such as popular opinion about their inexperience, or power structures within political parties. Various proposals have been made for “youth quotas” in response to these problems. A few countries set aside seats in the national legislature for young adults, or set required quotas on party lists in systems of proportional representation.

In country D, the minimum age for all elected offices is 18. Nonetheless, candidates under the age of 25 are rarely elected. Legislator L argues that a youth quota in favor of candidates under the age of 25 is required to address structural discrimination.

Legislator M argues that a youth quota would amount to discrimination against candidates over the age of 25, and in particular against candidates over the age of 60.

How should these contrasting claims be analyzed?

#### **Hypothetical No. 4: Student discount**

A theater in country E sells tickets with a 50% student discount, available only to full-time students with a student ID. The qualification for the discount has a disproportionate impact on different age cohorts, with members of older age cohorts being less likely to be enrolled as full-time students. Individual V, aged 65 and retired, challenges the practice as amounting to indirect discrimination against people over the age of 60. (V is not a full-time student and has no plans to be.)

Assume that the theater is a public theater, owned and managed by the government of country E. How should V’s indirect discrimination claim be analyzed?

Assume instead that the theater is privately owned and managed, and that country E has legislation prohibiting both direct and indirect discrimination on the basis of age in places of public accommodation, including private theaters. How should V’s indirect

discrimination claim be analyzed?

Continuing the assumptions of (b), assume that the national court finds that the student discount does not violate V's rights under country E's legislation, because the reasons for the student discount meet the standard for justification applicable to indirect discrimination on the basis of age by private theaters. Assume that V then brings a complaint to an international body, and claims that V's human rights have been violated by the failure of the government of country E to correct and remediate indirect discrimination on the basis of age by private parties. How should the international body review the case?

### **Hypothetical No. 5: Status Offences**

Country F is one of the countries in the world that inherited most of the elements of its juvenile justice law from the colonial era. As a result, its law books still contain provisions that criminalize status offences – by definition an “act that is considered illegal when committed by a child, but not when committed by an adult”. The list of status offences that are still part of its law include running away, school truancy, curfews and disobeying parents.

Child Q, who is 16, has been charged for disobeying his parent. The complaint was lodged by his single mother, who maintains that her son has increasingly been engaging in what she considers to be “disrespectful behavior”. Child Q contends that a status offence is discriminatory against children on the basis of their age. He maintains that if country F is serious about the prevention of children coming in conflict with the law and strengthening its child justice system, it needs to close all unnecessary pathways into the child justice system especially through the decriminalization of status offences that discriminate against children on the basis of their age. How should Child Q's claim of discrimination on the basis of age be analyzed?

### **Hypothetical No. 6: Euthanasia**

Country G is one of a small number of jurisdictions in the world that allows euthanasia for children – specifically for those above the age of twelve. As a result, according to the law, a child who is 12 years of age or older who is in a hopeless medical situation of constant and unbearable suffering that cannot be eased and which will cause death in the short term can be eligible for euthanasia.

Multiple stakeholders in country G have argued that while they appreciate that the decision to proceed with euthanasia is by no means an easy one, respecting the evolving capacities of children requires that there is a need to legalize the practice for children below the age of 12 too. Nonetheless, country G has been unwilling to legalize it for those under 12 years of age, because the state believes that the margin of error in determining the patient's ability to

understand the consequences is too great, and the likelihood of a child under 12 truly understanding the consequences is too low, so that a categorical rule is safer for children under 12.

Child T is 11 years of age and suffers from an incurable and fatal disease. She contends that allowing her to continue to suffer from this incurable and fatal disease while other individuals that are 12 years and above are able to stop their suffering constitutes an age-based discrimination against her and other children in a comparable situation. She further underscores that given the rigorous individualized assessment that the law mandates for the purpose of determining the mental capacity of a person who is considering to make a decision about euthanasia, which looks in depth into the patient's ability to fully understand the consequences of his/her decisions, it is difficult to justify the age criterion as being relevant. Child T wants to challenge the exclusion of those below the age of 12 from euthanasia as constituting age-based discrimination before a court of law.

How should such a challenge be analyzed?

How would analysis of child T's discrimination claim differ from analysis of whether denying child T the option of euthanasia is consistent with the best interests of the child?

Assume that a national court of country G finds that the categorical exclusion of those below 12 years of age from euthanasia does not violate child T's rights under country G's legislation. Assume that child T then brings a complaint to an international body, and claims that the exclusion constitutes a violation of her right not to be discriminated against on the basis of age. How should the international body review the case?

## General questions

The above hypothetical cases involve public or private action in a variety of fields of activity – military service, criminal sentencing, candidacy for legislative office, the sale of theater tickets, regulation of children by means of status offenses, and medical practice including euthanasia.

Should the standards used to evaluate the claims of discrimination based on age vary depending on the field(s) of activity to which the norm applies?

Should the standards used to evaluate the claims of discrimination based on age vary depending on the public or private character of the person or entity that is arguably discriminating?

Regarding direct discrimination, should the standards for evaluating differential treatment be the same for all age ranges? Or should higher levels of justification be required for differential treatment of certain age ranges, and if so which? And if higher for certain age ranges, should

the relevant age ranges be the same for all countries in the world, or should the relevant age ranges be identified within each particular society?

As a specific example, should discrimination on the basis of age among children be evaluated by the same standard as discrimination on the basis of age against children?

Regarding indirect discrimination, should the standards for evaluating disproportionate effects be the same for all age ranges? Or should higher levels of justification be required for differential effects on certain age ranges, and if so, which? And if higher for certain age ranges, should they be the same worldwide, or identified within each society?

Are there some age ranges that should not be considered specially protected groups for purposes of a direct discrimination norm, or an indirect discrimination norm, at all?

How should international human rights tribunals, such as regional human rights courts and commissions and global treaty bodies, review the decisions of national courts that find that a practice does not amount to direct (or indirect) discrimination on the basis of age?

## Appendix II. Partial List of Participants in the Workshop

### *Rosalie Silberman Abella*

Samuel and Judith Pizar Visiting professor of Law, former Justice of the Supreme Court of Canada; sole Commissioner and author of the 1984 federal Royal Commission on Equality in Employment examining barriers to employment for women, indigenous people, visible minorities and persons with disabilities; former Chair of the Ontario Labour Relations Board and of the Ontario Law Reform Commission

### *Warren Binford*

W.H. Lea for Justice Endowed Chair in Pediatric Law, Ethics & Policy, University of Colorado

### *Alexander Boni-Saenz*

Visiting Professor of Law, University of Iowa Law School; Associate Dean for Scholarship & Faculty Development, Professor of Law, and Norman & Edna Freehling Scholar, Chicago-Kent College of Law

### *Nicolas Brando*

Newton International Fellow / Derby Fellow, University of Liverpool Law School

### *Claire Breen*

Professor of Law at the Te Piringa Faculty of Law, at the University of Waikato in Aotearoa New Zealand.

### *Elaine Dewhurst*

Associate Professor (Senior Lecturer) in Law at the University of Manchester; the Ground Expert on Age for the European Equality Law Network

### *Luis Gallegos*

Fellow, Harvard Advanced Leadership Initiative; formerly Minister of Foreign Affairs of Ecuador, Ambassador of Ecuador to the United Nations, Member of the UN Committee Against Torture, President of the committee that drafted the Convention on the Rights of Persons with Disabilities

### *Axel Gosseries*

FNRS Research Professor (Maitre de recherches) and Professeur extraordinaire at the University of Louvain, where he heads the Hoover Chair in economic and social ethics

### *Brian Gran*

Professor of Sociology, Law, and Applied Social Sciences, Case Western Reserve University; Jefferson Science Fellow, U.S. National Academies of Sciences, Engineering, and Medicine (2020-2021)



*Laurence Helfer*

Harry R. Chadwick, Sr. Professor of Law, Duke University Law School; Permanent Visiting Professor at iCourts, University of Copenhagen; Member-elect, [UN] Human Rights Committee

*Ludovic Hennebel*

Professor of International Law and Human Rights at Aix-Marseille University; Director of the Institute of International Humanitarian Studies; Member of the [UN] Committee on Economic, Social and Cultural Rights

*Jonathan Herring*

Professor of Law, Exeter College, University of Oxford

*Abadir M. Ibrahim*

Associate Director, HRP; formerly Head of Secretariat for the Legal and Justice Affairs Advisory Council of Ethiopia

*Helen Keller*

Professor of International and European Law at the University of Zurich, Judge at the Constitutional Court of Bosnia and Herzegovina, Former Judge of the European Court of Human Rights (2011-2020)

*Laura Lundy*

Professor of Children's Rights at Queen's University, Belfast, and Professor of Law at University College Cork

*Victor Madrigal-Borloz*

Eleanor Roosevelt Visiting Senior Researcher, HRP; UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

*Benyam Dawit Mezmur*

Professor of Law, University of the Western Cape; Eleanor Roosevelt Visiting Fellow, HRP; Member and former Chair, [UN] Committee on the Rights of the Child

*Robert Doya Nanimba*

Associate Professor of Law, University of the Western Cape; Member, African Committee of Experts on the Rights and Welfare of the Child

*Gerald Neuman*

J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law, Director of Human Rights Program at HLS

*Govind Persad*

Assistant Professor of Law, Sturm College of Law, University of Denver

*Flávia Piovesan*

Professor of Constitutional Law and Human Rights at the Catholic University of São Paulo; former Commissioner, Inter-American Commission on Human Rights

*Silvia Serrano-Guzmán*

Adjunct Professor of Law, Georgetown University, and Associate Director of the Health and Human Rights Initiative at its O'Neill Institute; formerly attorney at the Executive Secretariat of the Inter-American Commission of Human Rights

*Michael Stein*

Executive Director and Co-founder, Harvard Law School Project on Disability and a visiting professor at HLS since 2005

*Jonathan Todres*

Distinguished University Professor and Professor of Law, Georgia State University College of Law

*Manuel Sá Valente*

Researcher at the Hoover Chair of Economic and Social Ethics (UCLouvain); Lecturer at Leiden University

*Wouter Vandenhole*

Full Professor of Human rights and children's rights, Faculty of Law, University of Antwerp (Belgium); Vice-dean of research; coordinator sustainable development and human rights module; formerly holder of UNICEF Chair in children's rights [2007-2018]

*John Wall*

Professor of Philosophy, Religion, and Childhood Studies, Director of the Childism Institute, Rutgers University, Camden

## Appendix III. Working Papers

## Instituting Children's Full Political Participation and Representation in the 21st Century United States

Warren Binford\*

As we approach the 100<sup>th</sup> anniversary of children's rights in 2024,<sup>1</sup> it is easy to marvel at the apparent strides that have been made this past century in recognizing children as their own persons near-fully endowed with all the same human rights as adults, as well as additional rights based on their unique status as children. Many of these rights are exercised based upon an individual child's "evolving capacity,"<sup>2</sup> which, unfortunately, has been used to disenfranchise en masse approximately one-third of the world's population from exercising their full political power based not on an individual child's capacity to exercise her enfranchisement rights, but rather simple chronological age.

### The Right to Vote in the U.S.

The most obvious example of the disenfranchisement of children's political power as an act of blatant age discrimination is the near universal denial of children's right to vote.<sup>3</sup> Take the United States, for example. Founded as a federal democratic republic in 1776, Article 1 of the country's second constitution, which was adopted in 1789, gave states the right to control elections.<sup>4</sup> This resulted in the right to vote being given to only six percent of the U.S. population (primarily land-owning white males).<sup>5</sup> Suffrage was not extended to Black men, women, and Native Americans until, respectively, the ratification of the 15th Amendment in 1870,<sup>6</sup> the ratification of the 19<sup>th</sup> Amendment in 1920,<sup>7</sup> and the passage of the Indian Citizenship Act of 1924.<sup>8</sup> Sadly, although the latter recognized the right of Native Americans to U.S. citizenship, it took another 40 years before all 50 states recognized their right to vote.<sup>9</sup> Shortly after Native Americans finally received

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<sup>1</sup> Geneva Declaration of the Rights of the Child, Sept. 26, 1924, League of Nations, O.J. Spec. Supp. 21 at 43 [hereinafter 1924 Geneva Declaration]. The United States was not a member of the League of Nations. However, the 1924 Geneva Declaration laid the foundation for the United Nations Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), GAOR 14<sup>th</sup> Sess., Supp. No. 16, U.N. Doc. A/4249 (Nov. 20, 1959) [hereinafter 1959 U.N. Declaration], as well as the United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter UNCRC].

<sup>2</sup> *Id.* at arts. 5 and 14(2).

<sup>3</sup> Certain governments do allow persons under 18 years of age to vote including Austria and certain areas in Germany, Switzerland, and the Isle of Man, for example. Also, some U.S. states allow 17-year-olds to vote in a primary if they will be 18 years of age by the next general election. Sonja C. Grover, Chapter 8 *Unconstitutional Age-Based Discrimination in the Vote Applied on Account of Young Age*, 6 IUS GENTIUM 167, 196 (2011). Additionally, several municipalities in the U.S. have lowered the voting age to 16. Katharine Silbaugh, *Developmental Justice and the Voting Age*, 47 FORDHAM URB. L.J. 253, 256 (2020).

<sup>4</sup> U.S. Const. art. I.

<sup>5</sup> Archive of The Charters of Freedom: A New World is at Hand, [https://web.archive.org/web/20160706144856/http://www.archives.gov/exhibits/charters/charters\\_of\\_freedom\\_13.html](https://web.archive.org/web/20160706144856/http://www.archives.gov/exhibits/charters/charters_of_freedom_13.html) (last visited Oct. 18, 2022).

<sup>6</sup> U.S. Const. amend. XV.

<sup>7</sup> U.S. Const. amend. XIX.

<sup>8</sup> Act of June 2, 1924, Public Law 68-175, 43 STAT 253. [Update Cite]

<sup>9</sup> Library of Congress, Voting Rights for Native Americans, <https://www.loc.gov/classroom-materials/elections/right-to-vote/voting-rights-for-native-americans/> (last visited Oct. 18, 2022).

nationwide suffrage, 18-20-year-olds were also given the right to vote in 1970 with the passage of the 26<sup>th</sup> Amendment.<sup>10</sup>

What demographic group is still denied the right to vote half a century later in the United States? Children. Children comprised 22.1 percent of the U.S. population in 2020<sup>11</sup> and yet just 7.4 percent of the federal budget was allocated for their needs.<sup>12</sup> By contrast, seniors received nearly 40 percent<sup>13</sup> of the federal budget even though they comprise just 16.9 percent of the U.S. population that same year.<sup>14</sup>

What explains this remarkable gap between spending on seniors versus children? Political enfranchisement. Seniors are fully endowed with the right to vote and enjoy robust representation in Washington, D.C., both with elected individuals, executive agencies, a Cabinet position, and, of course, lobbyists.<sup>15</sup> Children deserve the same.

### **Children’s Lesser “Becomings” Status Under International Human Rights Framework**

Equality is a foundational principle to the human rights framework.<sup>16</sup> As fully human beings, children should enjoy all the rights inherent to being human with additional rights and protections due to their unique status as children. When the League of Nations first created the children’s rights framework with the 1924 Geneva Declaration, children were viewed largely as objects—to be protected, assisted, and nurtured into responsible adulthood. Indeed, its preamble declared that “mankind owes to the Child the best that it has to give.”<sup>17</sup> When the 1959 United Nations Declaration was adopted 25 years later, children were portrayed not as objects, but as subjects—capable of acting, forming their opinions, and possessing their own individuality.<sup>18</sup>

The portrayal of children as subjects was further developed in 1989, when the United Nations Convention on the Rights of the Child was introduced to the General Assembly. The world’s first children’s rights treaty went on to become the most widely ratified human rights treaty in the world.<sup>19</sup> Indeed, every recognized nation has ratified it except the U.S.<sup>20</sup> Nonetheless, the U.S.

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<sup>10</sup> U.S. Const. amend. XXVI.

<sup>11</sup> Statista, Share of Child Population in Total U.S. Population 1950 to 2020, <https://www.statista.com/statistics/457796/share-of-child-population-in-the-total-us-population/> (last visited Oct. 18, 2022).

<sup>12</sup> HEATHER HAHN, ET AL., KIDS’ SHARE 2021: REPORT ON FEDERAL EXPENDITURES ON CHILDREN THROUGH 2020 AND FUTURE PROJECTIONS 1, 3, 32-33 (Urban Institute 2021).

<sup>13</sup> Howard Gleckman, *The Federal Budget Will Spend Half Its Budget on Older Adults in Ten Years*, FORBES (Feb. 1, 2019).

<sup>14</sup> Statista, Share of Old Age Population (65 Years and Older) in Total U.S. Population from 1950 to 2050 <https://www.statista.com/statistics/457822/share-of-old-age-population-in-the-total-us-population/#:~:text=In%202020%2C%20about%2016.9%20percent,reach%2022%20percent%20by%202050> (last visited Oct. 18, 2022).

<sup>15</sup> Previously, seniors also were trapped in a state of poverty. However, social programs were created after the Depression to help provide for children and seniors. When those same programs later came under attack, seniors were able to unleash their political power to defend their programs targeting them, whereas children’s programs were decimated despite the fact that children comprise a larger share of the population]. Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463, 1465 (1998).

<sup>16</sup> Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, art. 7.

<sup>17</sup> 1924 Geneva Declaration, *supra* note 1.

<sup>18</sup> 1959 U.N. Declaration, *supra* note 1.

<sup>19</sup> Congressional Research Service, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 1 (Updated July 27, 2015).

<sup>20</sup> *Convention on the Rights of the Child Ratification Status*, U.N. TREATY COLLECTION DATABASE, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en) (last visited Oct. 18, 2022).

has signed the treaty.<sup>21</sup> Additionally, the U.S. submitted more content to the treaty and made more revisions to the content submitted by other countries than any other drafting country,<sup>22</sup> which suggests that the U.S. was heavily invested in the tenets of the treaty (and, arguably, has at least a moral duty to uphold the Convention).

One of the main tenets of human rights as embodied in the Convention on the Rights of the Child is that they should be exercised within the child's "evolving capacity."<sup>23</sup> It is this framing of children's capacity as evolving that has been used to disenfranchise children in the U.S. and elsewhere and has legitimized widespread age discrimination. Michael Freeman criticizes the concept as allowing us to view children not as human "beings," but as "becomings"<sup>24</sup> who are less than fully human. In other words, because children are not adults, they are not entitled to equality, including full political participation, within the human rights framework.

Such an arrangement might be acceptable if humanity truly gave children "the best that it has to give,"<sup>25</sup> as was promised 100 years ago when children were still being treated as objects, but with the climate crisis bearing fully upon us, child abuse and exploitation visible worldwide, child poverty entrenched in both the North and the South, in adequate educational opportunities around the globe, and many other ills disproportionately affecting children, one has to wonder if, on balance, being a disenfranchised subject is worse than being a well-cared-for object.

But this is not the dichotomous choice we are faced with. As witnessed both in the U.S. *vis-à-vis* voting rights and in the international community *vis-à-vis* human rights, rights evolve, and children's rights are necessarily destined to evolve as well. For example, the Convention on the Rights of the Child recognized that children have "participation rights" in Article 12, *et seq.* Indeed, the United States proposed Article 13, which articulated children's rights to freedom of expression, a foundational principle of democracy in the U.S., which has been recognized by the United States Supreme Court as being held by children (once again, subject to limitations).<sup>26</sup> And of course, the Convention recognizes the rights of children to freedom of thought, conscience, religion, assembly, and more.<sup>27</sup>

What does the Convention not recognize? Children's rights to direct political participation. Take Article 12 (2), for example. While it recognizes the child's right "to be heard in any judicial and

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<sup>21</sup> *Id.* The Vienna Convention on the Law of Treaties mandates that a treaty signatory shall not defeat the treaty's purpose. Vienna Convention on the Law of Treaties, Article 18, 1155 U.M.T.S. 331 (1969). Unfortunately, the United States has also signed, but failed to ratify the Vienna Convention. However, many of the provisions of the Vienna Convention have been recognized as customary international law by the U.S. Department of State. M. Frankowski, *The Vienna Convention on the Law of Treaties before United States Courts*, 28 VIRGINIA JOURNAL OF INTERNATIONAL LAW 281, 307 (1988).

<sup>22</sup> See generally Office of the United Nations High Commissioner for Human Rights, *The Legislative History of the Convention on the Rights of the Child* (2007); Cynthia P. Cohen, *Role of the United States in Drafting the Convention on the Rights of the Child: Creating a New World for Children*, 4 LOY. POVERTY L.J. 38 (1998). The United States participated in drafting or proposing language to thirty-eighty of the Convention's forty substantive articles, including Article 13 on freedom of expression.

<sup>23</sup> UNCRC, *supra* note 1, arts. 5 and 14(2).

<sup>24</sup> MICHAEL FREEMAN, A MAGNA CARTA FOR CHILDREN? RETHINKING CHILDREN'S RIGHTS, *passim* (2020).

<sup>25</sup> 1924 Geneva Decl., *supra* note 1, Preamble.

<sup>26</sup> See generally *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) and *Mahoney Area School Dist. v. B.L.*, 141 S. Ct. 2038 (2021).

<sup>27</sup> U.N. Convention, *supra* note 1, arts. 14 and 15.

administrative hearing affecting the child,” it does not recognize a similar right to participate in legislative hearings affecting the child.<sup>28</sup> Our failure to recognize children’s political rights has relegated them to a powerless childhood without security and a future without promise. Maybe this is why children feel so anxious and depressed these days<sup>29</sup> and youth suicide is so prevalent.<sup>30</sup>

### **Instituting Children’s Full Political Participation in the 21<sup>st</sup> Century United States**

The elegant solution to resolving children’s right to full political participation with current systems is to recognize that equal rights does not necessarily require the same treatment. For example, some argue that young children physically could not vote, and that could be used as an argument to deny their right to vote.<sup>31</sup> However, many disabled adults are physically or mentally unable to vote but are given accommodations (including companion assistance) that allow them to overcome this hindrance.<sup>32</sup> So, too, could children. But it isn’t really children’s size or physical abilities that prevents them from being entrusted with the right to vote, is it?

Some say that it is children’s lack of capacity,<sup>33</sup> yet, we don’t test their capacity do we? Indeed, because of the well-documented abuses in testing capacity to vote,<sup>34</sup> we have ended capacity tests in the U.S. and made enfranchisement nearly universal for citizens—that is, except for children. But is a person any more capable of voting on her 18<sup>th</sup> birthday than she was the day prior? Of course not.

Although we argue that a child is incapable of exercising her right to vote, in the U.S., we recognize her right to express her political views, volunteer in political campaigns, organize rallies, canvas, and donate her money to politicians.<sup>35</sup> But we will not recognize her right to vote for the same politicians, even if the political issues affect her.

Should a court emancipate a person under 18 years of age after she proves that she is capable of functioning as an adult, the emancipation order would not entitle her to cast a vote. A person under 18 years of age can get pregnant, consent to confidential medical care, marry, end her education, work, leave home, support herself, and become a parent, but there are no circumstances in which she can vote, except in those handful of municipalities that have recently allowed 16- and 17-year-olds to cast votes in local elections.<sup>36</sup>

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<sup>28</sup> *Id.*, at art. 12(1).

<sup>29</sup> Lydie A. Lebrun-Harris, et al. *Five-Year Trends in Children’s Health and Well-Being 2016-2020*, JAMA PEDIATRICS (March 14, 2022).

<sup>30</sup> Sandy Cohen, *Suicide Rate is Highest Among Teens and Young Adults*, UCLA Health (March 15, 2022), available at <https://connect.uclahealth.org/2022/03/15/suicide-rate-highest-among-teens-and-young-adults/#:~:text=Suicide%20is%20the%20second%2Dleading,National%20Alliance%20on%20Mental%20Illness> (last visited Oct. 18, 2022).

<sup>31</sup> Freeman, *supra* note 24 at 309 *et seq.*

<sup>32</sup> Jennifer A. Okwerekwu, et al., *Voting by People with Mental Illness*, 46(4) THE JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW 1 (2018).

<sup>33</sup> Nico Brando, *Is Child Disenfranchisement Justified?* CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY 1, 4 (2022).

<sup>34</sup> Thus, the practice was banned by the 1965 Voting Rights Act and upheld by the U.S. Supreme Court in *Oregon v. Mitchell*, 400 U.S. 112 (1970).

<sup>35</sup> See generally *id.* and Grover, *supra* note 3.

<sup>36</sup> Joshua Douglas, *The Case for the 16-Year-Old Vote*, WASHINGTON MONTHLY (Aug. 25, 2022). Some colonies in early America also allowed 16- and 17-year-old males to vote so arguably youth voting is part of our national political tradition. Wendell W. Cultice, *Youth’s Battle for the Ballot: A History of Voting Age in America* 3 (1992).



So let's stop pretending that denying children the right to vote is anything other than pure and simple age discrimination and instead, recognize that children have the right to full political participation, including enfranchisement, and figure out how to facilitate the fulfillment of their full political rights in light of their "evolving capacity."

We should start by giving every child citizen the right to vote in all elections (local, state, and federal) and both presume and bolster their capacity, by, for example, family-facilitated accommodations and universal, robust age-appropriate civics education at all levels. For example, young children could have their votes cast by their parents or guardians as has been proposed by others for decades.<sup>37</sup> The child's representatives could be educated to help ensure that they are not just doubling or tripling their own voting in accordance with their own political interests, but should instead, honor their children's stated interests. If the child is not able to express herself, such as in the instance of an infant, the child's representative could follow the substituted judgment model of representation used by some children's attorneys that require the adult to put themselves in the children's shoes.<sup>38</sup> Alternatively, one could cast the child's vote in accordance with the child's best interests standard, which was created in the U.S. and was fully embedded throughout the Convention on the Rights of the Child.<sup>39</sup> Presumably, by the time the child is an adolescent, they will be able to cast their own vote with minimal assistance from their parents or guardians.

But universal enfranchisement of children is not enough to ensure children's full political participation in the United States. We also need to create child-centered systems, positions, and institutions that effectively advance children's interests and facilitate their participation. For example, children's advocates and ombuds offices have been established in numerous states.<sup>40</sup> The nature and authority of individual state offices vary, but essentially, they are charged with responding to the problems children in their state are experiencing and helping to create solutions to those problems.<sup>41</sup> An independent Children's Advocate Office should be established at the federal level, charged with creating age-appropriate communication systems, that ensures access for children of all ages nationwide.

Additionally, a Department of Children should be founded with a Children's Secretary serving in the President's cabinet. The U.S. Children's Department will be charged with institutionalizing child impact statements for all legislation, representing children's interests in all federal deliberations (including the budget), and facilitating child participation in public policy planning and implementation. Effectively, the Children's Department will help ensure that children are no longer an afterthought in Washington, D.C.

This system--universal suffrage for children, an independent federal Child Advocate's Office, and an executive branch department focused solely on children's needs--should be instituted, and

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<sup>37</sup> See, e.g., Rutherford, *supra* note 15.

<sup>38</sup> Andrea Khory, *ABA Adopts Model Act on Child Representation*, American Bar Association (Sept. 1, 2011) available at [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol30/september\\_2011/aba\\_adopts\\_modelactonchildrepresentation/#:~:text=Substituted%20judgment%20means%20the%20lawyer,making%20an%20adequately%20considered%20decision](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol30/september_2011/aba_adopts_modelactonchildrepresentation/#:~:text=Substituted%20judgment%20means%20the%20lawyer,making%20an%20adequately%20considered%20decision) (last visited Oct. 18, 2022).

<sup>39</sup> Cf Erica Salter, *Deciding for a Child: A Comprehensive Analysis of the Best Interests Standard*, 33(3) THEORETICAL MEDICINE AND BIOETHICS 139 (April 2012).

<sup>40</sup> Children's Ombudsman Offices/Office of the Child Advocate, available at <https://www.ncsl.org/research/human-services/childrens-ombudsman-offices.aspx> (last visited Oct. 18, 2022).

<sup>41</sup> *Id.*

then replicated at all levels of the U.S. political system (local, state, and federal), so that children have both representation, as well as points of access to help facilitate their participation so that they can realize their full political rights in accordance with their evolving capacity.

## **Conclusion**

In the same way that children's rights has been evolving in its first 100 years—from framing children as objects in 1924 and then subjects in 1959 and then “becomings” in 1989—it is critical that children's rights continue to evolve in the next 100 years. Children should be viewed and treated as fully human *beings*, with a right to exercise their full array of both human and political rights, including the right to vote. All age-based discrimination that is not based on individual capacity and is not known to be harmful to the child should end. Instead of defining “evolving capacity” as what the child is capable of on her own measured against adults, a child's evolving capacity should be viewed within the systems of support available to her as accommodations and in the context of the unique stage of childhood. It is only when children are able to fully exercise their political rights that their needs will start to be addressed by a system that too often has dismissed them as merely children, and as a result, under-resourced them and their future.

# Discrimination, and Children's Right to Freedom of Association and Assembly

Nico Brando (University of Liverpool)

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"I started striking from school every Friday. I did this because I was under 18 and being under 18 meant I had no vote, no say in the decision-making process of my Government."

Anna Warren, 2019 <sup>1</sup>

## 1. Introduction

Children<sup>2</sup> are treated differently from adults in almost every aspect of their lives. This is sometimes necessary (e.g. for their survival) or desirable (e.g. for their development). However, so widespread is the practice of treating them differently based on their age that it appears to be implemented without need to justify the differential treatment. Of particular concern, in this respect, is the differential treatment encountered by children in the realm of political participation. Not only are they the sole social group systematically excluded from formally exercising core political entitlements (e.g. the right to vote, or to run for office), but, moreover, their participation as political actors in informal spheres, their freedoms, and the spaces available for them to associate and express their political claims are also highly restricted. Here we focus on the potential discrimination of children when attempting to exercise their right to freedom of association and peaceful assembly (FAPA). We wish to draw attention to the potential injustice of children facing unjustified differential treatment in the exercise of one of the very rights needed for them to argue against discrimination in the first place.

This issue is timely since many children and young people across the world wish to form or join groups to campaign for social change, and to protest on issues that are important to them, including discrimination itself (e.g. climate change, BLM, gun law reform, and gender equality). Children have the right to FAPA in Art. 15 of the UNCRC, a provision which replicates the right of both adults and children in the International Covenant on Civil and Political Rights (ICCPR, Art. 11). However, in many contexts, children are prohibited or restricted from exercising this fundamental human right by the state (e.g., through laws which prohibit 'minors' from forming associations), schools (who punish children who attend protests), or parents/guardians (who stop children from taking part in associations or protests). Can the restriction of children's right to FAPA be justified based on their age? Can their right to an education, or to be protected from harm, trump their right to FAPA?

## 2. Discrimination and Differential Treatment of Children

To assess whether restrictions of children's rights to FAPA can be justified or not, we must clarify what we mean by 'discrimination'. In this respect, it is useful to distinguish discrimination from

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<sup>1</sup> <https://www.amnesty.org.uk/childrens-right-protest>

<sup>2</sup> We follow the UN Convention on the Rights of the Child (UNCRC) Art.1 which defines a child as every person under the age of 18.

justified differential treatment. We understand ‘discrimination’, simply, as a form of differential treatment which is unjustifiable. Justified differential treatment entails all forms of law, policy, and social practice that, for legitimate and necessary reasons, treat a section of the population in a way that is different from others. This is often the case with children. For example, it is considered that children are especially vulnerable to certain forms of harm and exploitation if allowed to engage in work, thus, their rights and best interests are better protected by restricting their right to engage in most forms of economic activity.

Age-based differential treatment is not necessarily wrong; what we are concerned about, and claim, is that, particularly in the case of age-based differential treatment of children, there tends to be a lack of accountability for the reasons given to restrict rights, and a generalised lack of justification as to why certain forms of differential treatment are required and directed specifically towards children. It is often taken as a given both in law, and in social life, that children can have many of their political and civil freedoms justifiably restricted due to their assumed vulnerability (they should be protected from harm that can be caused by these freedoms), or because of their assumed incapacity (they should be protected from harm that they may cause themselves).

However, this belies the fact that civil and political rights can only be restricted in a number of specific ways. Children can be justifiably treated differently from others based on their age, as long as the differentiation is proven to have a legitimate aim, to be a necessary solution to achieve that aim, and to be proportional (i.e. there aren’t less restrictive alternatives that would achieve the same result). Leaving aside inherent limitations within the text of legal provisions, justified differential treatment that is necessary and proportional can occur when there is a conflict between the boundaries of the rights of different individuals. However, when children are denied their civil and political rights (e.g. FAPA), it is usually not because this interferes with the rights of others but because it is seen to be harmful to the child or children themselves. Sometimes this is presented in the language of children’s rights – it is not in their ‘best interests’ or it will interfere with their right to be protected from harm. This is an argument seldom used to justify the restriction of rights to adult citizens, and determining whether this can be justified for children is necessary to understand if it amounts discrimination.

### **3. Political Participation and the Right to Association and Assembly**

Children are systematically excluded from exercising certain (basic) forms of political participation. Most States limit the right to vote to adults, and none (as far as we are aware) allow individuals under the age of 18 to run for office at any level of government. These are already two restrictions which raise important questions about children’s potential discrimination in the exercise of their political rights, and their recognition as political actors. It has been claimed that this is not only a source of direct discrimination (by explicitly excluding them from exercising certain rights due to their age), but also of indirect discrimination, as their exclusion from formal spheres of authority (as voters or as members of parties or government) affect the attention that is given by government to their claims and interests (e.g. the examples of climate change action or gun law legislation are very clear in this respect).

Article 25 of the ICCPR gives every citizen ‘the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be

held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country'. This was not transcribed into the UNCRC, the restrictions on the right presumably considered not 'unreasonable' in the case of children. That omission in itself calls out for justification, yet no such justification was proffered.

However, children are included amongst the individuals endowed with other basic civil and political rights (UNCRC Art.12-17), FAPA among them.<sup>3</sup> This is important precisely because of children's systematic exclusion from the formal spheres of influence and political participation. Children have a special stake in having these rights respected, protected and fulfilled as they do not have other avenues, open to adults, through which to be heard, and recognised as political actors. Children, however, suffer from restrictions on their FAPA that go beyond those included in the wording of Article 15 (i.e. 'those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others').

In law, the right to FAPA in the UNCRC (Art.15) is in all key respects the same as that afforded to adults and does not include any additional inherent restrictions on the scope of the right. A key difference, in the case of children, is that Article 15 needs to be read in the context of children's other human rights in the UNCRC and, in particular, Article 5 (parents' right to advise and guide in line with children's evolving capacities), Article 3(1) (best interests as a primary consideration), and Article 19 (protection from all forms of harm)." (Lundy 2020 p.67). Even so, any restrictions that are imposed, even in what is perceived as in children's own interests or for the enjoyment of their other rights, must be legitimate, necessary, and proportionate.

## **5. The Reality of Children's Right to Association and Peaceful Assembly**

In practice, many countries, legislation, and other regulations have introduced barriers to children's enjoyment of Article 15. Minimum age restrictions are among the most significant barriers, since practically all laws and regulations around the world ask for a legal personality to form associations, and the age for legal personality usually coincides with the age for legal capacity/maturity which is often 18. Many, moreover, establish minimum age requirements to join certain forms of associations freely.

Age-based restrictions can limit children's right to FAPA in various ways. Lebanon for example, limits association membership to individuals over the age of 20.<sup>4</sup> Japan does not allow minors to join associations without parental consent.<sup>5</sup> In Costa Rica, children are allowed to join associations, as long as they don't have a political or lucrative intent.<sup>6</sup> This is challenged rarely. An exception is a recent case from the Supreme Court of Estonia in which it was decided that a

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<sup>3</sup> Article 15 (UNCRC) states that "1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly. 2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law, and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others."

<sup>4</sup> <https://archive.crin.org/en/library/news-archive/lebanon-finalisation-new-draft-legislation-child-protection-and-freedom.html#2>

<sup>5</sup> <https://archive.crin.org/en/docs/Japan%20COs.html>

<sup>6</sup> <https://digitallibrary.un.org/record/570468?ln=en>

restriction on the right to form and lead associations to persons over 18 was discriminatory and violated Art. 15 of the UNCRC.

There is, moreover, a trend to make use of the limits to FAPA in Art.15(2) to justify the restriction of children's peaceful assembly. While, in theory, age is not a justification for limiting Article 15, many states have appealed to public order, safety and morals to restrict children's association and assembly. Curfew laws in the UK, loitering laws, and other decrees aimed at targeting 'antisocial behaviour', threaten children's access to peaceful protest and manifestations. In the ongoing protests led by girls and women in Iran, it was reported that the average age of those arrested during the protest is 15 years-old. The Deputy Commander-in-Chief of the Islamic Military claimed that the arrest of children was justified as they were affecting public order by inciting violence. It has been claimed that security forces are going into schools to arrest children who protest.<sup>7</sup> While in certain instances, particular adult collectives are targeted and harassed by public forces when protesting, the existence of specific laws that limit children's (but not adults) use of public spaces is questionable.

Beyond public order, there also appears to be a default and indeed tacit assumption that it is appropriate to limit children's enjoyment of their FAPA for their own best interests. Police and government officials in New Zealand, for example, have regularly appealed to threats to children's safety in order to limit their access to public protests.<sup>8</sup> The 'best interests' principle (Art. 3(1), UNCRC) is appealed to regularly as justifying trumping children's civil and political freedoms to protect them from harm. Moreover, even when law allows children's participation in peaceful protest, children can suffer from restrictions imposed by both parents and schools. In the USA, many school districts threatened repercussions for children who intended to join the gun law reform protests, after the Parkland shooting.<sup>9</sup> The UK Department of Education, moreover, highly encouraged schools and parents not to allow children to manifest in Friday's for the Future protests, as this would greatly affect children's education.<sup>10</sup> All this begs the question whether parents, guardians, or public institutions should have the authority to decide whether, when, and how should children be allowed to exercise their right to FAPA. While Article 5 of the UNCRC allows parents or guardians to provide "appropriate direction and guidance" in children's exercise of their rights, it seems difficult to claim that this would entitle them to unilaterally restrict their children's FAPA.

## 6. Discussion

Children and adults have the same right to freedom of association and peaceful assembly. However, children, unlike adults, are often denied the opportunity to exercise this right, with their protection/ education/ 'best interests' employed to justify restrictions on the exercise of the right that would not be applied to adults. We suggest that the application of such restrictions can

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<sup>7</sup><https://www.barkhat.news/political/166496860259/sardar-fadavi-the-average-age-of-many-of-those-arrested-is-15-years-old>; <https://www.theguardian.com/world/2022/oct/09/iranian-security-forces-arresting-children-in-school-reports-claim-state-tv-hackers>

<sup>8</sup> <https://theconversation.com/what-are-the-rights-of-children-at-the-parliament-protest-and-who-protects-them-177356>

<sup>9</sup> <https://time.com/5171160/gun-control-student-protest-history/>

<sup>10</sup> <https://www.theguardian.com/education/2021/nov/05/do-not-encourage-pupils-to-join-climate-protests-says-draft-dfe-strategy>

constitute unjustified and unjustifiable differential treatment and therefore amount to discrimination.

We note that addressing the issue of whether there are varying ‘levels’ in the standards used to justify differential treatment is problematic when the objects of discrimination are children. In particular, we do not consider that it is higher or lower standards what affect the issue of discrimination. Rather a different set of standards are used, because there is an extra set of bespoke children’s rights at play. Even so, while the elements to be assessed are different, the process should be the same – if you are restricting a right, you have to make sure that the restriction is necessary and proportionate. In practice, that means that all other possible avenues that could achieve the same result are not accessible. So, for example, when we look at concerns about children’s safety when taking part in protests, a default response is often to prohibit children from taking part. These decisions are often made without any apparent consideration that this is a human right and that any interference with it should be necessary and proportionate (as would be the case with adults). A rights-based response would be to see what could be done to make sure that children are safe when they do so. For example, when children are taking part, the police response should refrain from the use of methods of dispersal or containment that might endanger or have a disproportionately adverse impact on children (high frequency ultrasound devices, plastic bullets, teargas, tasers, etc.). (Lundy 2020, p.67).

To conclude, we have chosen to focus on this form of unjustified differential treatment of children as it provides a timely and real-life example not just of the ways in which we treat children that we would not treat adults, but the way in which we interfere with their human rights without recourse to conventional processes and standards that are needed to justify such restrictions. It also raises some wider issues in the context of age discrimination. For example, one could argue that the fundamentality of a certain entitlement or claim could tweak the standard used to evaluate discrimination: it is not necessarily the field of activity, but the importance on the restriction which may be incurred. In basic civil and political rights, we suggest that standard should be definitely high especially given that enjoyment of these rights is foundational to challenging discrimination against any group, including children.



# Voter Eligibility and Age Discrimination: The View of the Aotearoa New Zealand Court

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## Introduction

At the time of writing, the Supreme Court of New Zealand is currently considering the question of whether a formal statement is required that Aotearoa New Zealand's electoral laws are in breach of the right to be free from age discrimination. This case follows on from a 2021 decision of the Court of Appeal, Aotearoa New Zealand's statutory provisions setting the minimum voting age at 18 years were an unjustifiable breach of the right to be free from age discrimination. In so doing, it overturned a High Court decision from 2020 which considered that while the statutory provisions regarding the voting age were inconsistent with the right to be free from age discrimination, such inconsistency was justifiable.

The judiciary's consideration of age discrimination provides a snapshot of if, and how, two seemingly conflicting rights can be reconciled, and what this tells us about the importance that is attached to age discrimination in Aotearoa New Zealand, and how change might occur.

## Electoral Legislation in Aotearoa New Zealand.

In Aotearoa New Zealand, the Constitution Act 1852 stated that males over the age of 21, who owned, leased or rented property of a certain value could vote.<sup>1</sup> The communal ownership of land by Māori (the Indigenous People of Aotearoa) meant that they were prevented from voting until 1867,<sup>2</sup> and then the franchise was extended to all males in 1879. The passing of the Electoral Act 1893 saw universal suffrage for all New Zealand women aged over 21, although women had voted in, and stood for, local body elections prior to that.

In 1969, the voting age was reduced to 20 years;<sup>3</sup> and then, as with most Western democracies during the late 1960s and 1970s, to the current age of 18 in 1974. The 1974 Act does not specify 18 years directly, however.<sup>4</sup> The first time 18 year olds could vote was in a by-election in late 1974, prompted by the death of the then Prime Minister, Norman Kirk; Kirk had supported lowering the voting age while leader of the Opposition in the 1960s.

In 1986, the Report of the Royal Commission on the Electoral System favoured lowering the voting age. The Report observed that although public opinion might not have been ready for

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<sup>1</sup> Constitution Act 1852, s.

<sup>2</sup> Maori Representation Act 1867.

<sup>3</sup> Electoral Amendment Act 1969.

<sup>4</sup> Electoral Amendment Act 1974. Section 60 sets out who may vote and references those who are "qualified to be registered as an elector of the district", whilst s 74 states that every "adult person" is qualified to be registered as an elector of an electoral district if certain criteria are met. Section 3 of the Electoral Act as meaning "a person of or over the age of 18 years". Sections 3, 60 and 74 are what are called reserved provisions under s 268(1)(e) of the Electoral Act. This means that they can only be amended or repealed by a special majority of 75 per cent of all members of the House of Representatives or by a majority vote in a public referendum.

change, the Royal Commission was ‘conscious that children’s rights are not often the subject of public attention and must therefore be a particular concern of Governments and the law.’<sup>1</sup>

Section 12(a) of the New Zealand Bill of Rights Act 1990 (NZBORA) states that every New Zealand citizen who is of or over the age of 18 years has the right to vote. In 1993, New Zealand’s electoral system underwent a major overhaul aimed at increasing electoral diversity in Parliament,<sup>2</sup> but the voting age remained at 18 years.

The domestic legal framework also reflects those provisions of international human rights law regarding the right to vote,<sup>3</sup> which have been incorporated into New Zealand domestic law by virtue of the NZBORA 1990<sup>4</sup> and the Human Rights Act 1993.<sup>5</sup>

There have been a few unsuccessful – and sometimes – contentious attempts to lower the age in the twenty-first century. But, the (previous) Children’s Commissioner (himself a former Youth Court Judge) has called for a ‘genuine discussion’ in favour of reducing the age to 16 years as he believed 16- and 17-year olds were ‘up for the responsibility’.<sup>6</sup> In 2019, at the launch of At Make it 16’s campaign, the Commissioner reiterated his belief that ‘children and young people have the right to have their voices heard and taken into account.’<sup>7</sup>

## **Children, Age, and the Law in Aotearoa New Zealand – The Current State of Play**

When it comes to children and young people, Aotearoa New Zealand law draws the line at a number of different ages for a range of, what seem to be, largely protective purposes. For example: subject to certain exceptions, young people under the age of 18 are referred to the youth justice system rather than the adult criminal jurisdiction.<sup>8</sup> At 16 years old a person is: able to leave school;<sup>9</sup> entitled to adult minimum wage rates;<sup>10</sup> able to provide consent to, or refuse, medical treatment as if they were an adult<sup>11</sup> (although this does not mean that those aged under 16 years cannot consent to or refuse medical treatment). With the permission of the Family Courts, 16 year olds can marry or enter into a civil union.<sup>12</sup> At 17 years, a person is able to enlist in the armed forces.<sup>13</sup> The Age of Majority Act 1970 sets that age at 20 years.

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<sup>1</sup> Royal Commission on the Electoral System, *Report of the Royal Commission on the Electoral System 1986: Towards a Better Democracy* (December 1986) 235–236, <https://elections.nz/assets/Report-of-the-Royal-Commission-on-the-Electoral-System-1986/Chapter-9-administration-of-the-system.pdf>

<sup>2</sup> Electoral Act 1993.

<sup>3</sup> Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Art 21; International Covenant on Civil and Political Rights, 999 UNTS 171, Art 25, which affirms the right of every citizen to take part in the conduct of public affairs and to vote “without unreasonable restrictions”.

<sup>4</sup> New Zealand Bill of Rights Act 1990, Title.

<sup>5</sup> Human Rights Act 1993, Title.

<sup>6</sup> S Kirk, ‘Children’s Commissioner Calls for Discussion on Lowering Voting Age to 16, *Stuff News* (28 February 2018) <https://www.stuff.co.nz/national/politics/101837308/childrens-commissioner-calls-for-discussion-on-lowering-voting-age-to-16>

<sup>7</sup> F Desmarais, ‘Make it 16’ Campaign Launches, Taking Case of Voting Rights of 16-year-olds to Court’ *Stuff News* (19 September 2019) <https://www.stuff.co.nz/national/politics/115858495/make-it-16-campaign-launches-taking-case-of-voting-rights-of-16-year-olds-to-court>

<sup>8</sup> Oranga Tamariki Act 1989, s 272.

<sup>9</sup> Education and Training Act 2020, s 35

<sup>10</sup> Minimum Wage Act 1983, s 4.

<sup>11</sup> Care of Children Act, s 36

<sup>12</sup> Minors (Court Consent to Relationships) Legislation Act 2018.

<sup>13</sup> Defence Act 1990, s 33.

Meanwhile, the Committee on the Rights of the Child has expressed concern regarding the lack of consistent age limits across New Zealand statutes.

The NZBORA is also the starting point for the statutory framework for the prohibition of age discrimination. Section 19 of the NZBORA stipulates that everyone has the right to be free from discrimination on the grounds set out in a further key piece of human rights legislation, namely the Human Rights Act 1993 (HRA). Section 21(1)(i) of the HRA prohibits discrimination on the basis of age but, somewhat paradoxically, this prohibition does not extend to those under the age of 16 years.<sup>1</sup> Where discrimination is found to exist, the next question that is to be asked is whether it is “demonstrably justified in a free and democratic society”, as per s 5 of the NZBORA.

Section 19 of the NZBORA forms the basis for claim that the current voting age of 18 years – as set by s 12 of the NZBORA – is a violation of the right of 16 and 17 year New Zealand to be free from age discrimination.

### **Is Aotearoa New Zealand’s Voting Age Discriminatory? *Make It 16 v The Attorney General***

Make It 16 is a non-partisan youth-led campaign that was formed out of Aotearoa New Zealand’s Youth Parliament in 2019. In advocating for the vote to be extended to 16 and 17-year-olds, Make It 16 also sought a declaration of inconsistency that those parts of the Electoral Act 1993 and Local Government Electoral Act 2001 that prevent 16 and 17 year-olds from voting are in breach of the right to be free from age discrimination as set out in the NZBORA.

#### The High Court

A two-step process to determining whether the voting age was discriminatory was adopted in the High Court;<sup>2</sup> (i) was there differential treatment as between persons or groups in analogous or comparable situations on the basis of the prohibited ground of discrimination; and (ii) did that treatment have a discriminatory impact?<sup>3</sup>

The Court identified the appropriate comparator group, namely those aged 18 and above, and found that there was differential treatment, on the basis of age, between that group and citizens aged 16 and 17.<sup>4</sup> This differential treatment was inconsistent with the right free from age discrimination.<sup>5</sup> But, in the High Court’s view, this inconsistency was a justified limit, because it was no more than was reasonably necessary for sufficient achievement of the purpose of granting adults the right to vote; and, to draw a line at the age of 18 was reasonable in that regard given that this was the age set by Parliament in s 12 of the NZBORA.<sup>6</sup> Setting the age at 18 would also be in line with other legislative lines drawn on the basis of age,

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<sup>1</sup> M Bedggood and C Breen, ‘The Rights to Equality and Non-Discrimination’, in M Bedggood, K Gledhill and I McIntosh, *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, 2017), pp7

<sup>2</sup> *Make It 16 Inc v Attorney-General* [2020] NZHC 2630, para 6, <https://forms.justice.govt.nz/search/Documents/pdf/jdo/a6/alfresco/service/api/node/content/workspace/SpacesStore/9952af32-455e-4469-bcb5-00fc19de79be/9952af32-455e-4469-bcb5-00fc19de79be.pdf>

<sup>3</sup> *Ibid*, para 79 citing *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456, at para 66.

<sup>4</sup> *Ibid*, para 85

<sup>5</sup> *Ibid*, para 88.

<sup>6</sup> *Ibid*, para 105.

determinations where, according to the Court, complex issues of morality, social justice, individual responsibility, and public welfare were at play. If any change were proposed there would be a substantial policy process involved.<sup>1</sup>

The High Court also noted that although there had previously been some discussion of lowering the voting age, any change would require “broad political and public support” and public discussion would be needed “with a view to enabling Parliament to judge when and if the public is ready to accept a change.”<sup>2</sup> It was the view of the High Court that (in 2020) such support was lacking, given that a 2019 petition requesting Parliament lower the voting age to 16 had 43 signatures, and a 2020 petition had 68 signatures.<sup>3</sup> A final justification was that the voting age provisions were consistent with the ‘reasonable’ restrictions permitted under the ICCPR, states’ freedom to establish their own voting age, and the definition of a child under the Convention on the Rights of the Child.<sup>4</sup>

### Court of Appeal

Make it 16 appealed the finding that there was no age discrimination; it sought a declaration of inconsistency once again.

In upholding the first ground of appeal, the Court held that the High Court was unduly deferential to Parliament and that it had failed to inquire whether the Attorney-General had discharged the burden of proof to justify the limit on the right to be free from age discrimination. The Court found that examination of the justification for limiting the rights of 16 and 17 year olds was required.<sup>5</sup> In its examination of the justifications that had been advanced, the Court concluded that general consistency with the law could not be a justification because the age of responsibility varies greatly under New Zealand law.<sup>6</sup>

In its view, the most obvious and cogent justification was competency, but that the Attorney-General provided no evidence to suggest 16 year olds lacked the necessary competence to vote. Rather, it noted, the evidence provided to the High Court suggested 16 and 17 year olds are competent. The evidence in question was a report of the Children’s Commissioner, in which he referred to a 2019 study that drew a distinction between the cognitive abilities of young people in different situations. According to that study, in emotionally charged situations (hot cognition), the adolescent brain does not have full capacity to over-ride impulses but, in situations where there is time to deliberate (cold cognition), 16 year olds showed competence levels similar to older people, indicating cognitive maturity.<sup>7</sup>

As for the justification that 16 and 17 year olds are more dependent on their family and do not have the necessary independence of thought, it was not one advanced by the Attorney-General. Nor were issues of knowledge and world experience. As regards the High Court’s identification

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<sup>1</sup> Ibid, para 112.

<sup>2</sup> Ibid, para 106 citing the *Report of Royal Commission on the Electoral System*, ibid at [9.14].

<sup>3</sup> Ibid, para 107.

<sup>4</sup> Ibid, para 108.

<sup>5</sup> *Make It 16 Inc v Attorney-General* [2021] NZCA 681, paras 53–54. <https://forms.justice.govt.nz/search/Documents/pdf/jdo/86/alfresco/service/api/node/content/workspace/SpacesStore/06fdd8db-baec-4163-a548-8014db3c4407/06fdd8db-baec-4163-a548-8014db3c4407.pdf>

<sup>6</sup> Ibid, para 55.

<sup>7</sup> Ibid, para 56, citing Grace Icenogle and others, ‘Adolescents’ Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a ‘Maturity Gap’ in a Multinational, Cross-Sectional Sample’ (2019) 43 *Law Human Behav* 69.

of international practice as a justification, the Court of Appeal was of the view that it was an insufficient justification, especially in the context of a process of incremental change.<sup>8</sup>

Finally, the Court of Appeal was not persuaded that setting the age at 18 fell within the range of reasonable alternatives that would discharge the burden of proof to show that the limitation was justified because the right to vote was a core democratic right. The Attorney-General needed to do more.<sup>9</sup>

In sum, the Attorney-General had not established that the limits on the right of 16 and 17 year olds to be free from the age discrimination caused by voting age provisions were reasonable limits that could be demonstrably justified in a free and democratic society. The application for the declaration of inconsistency was declined, however, because, in the Court's view, the question of the voting age was an "intensely and quintessentially political issue involving the democratic process itself and on which there are a range of reasonable views"; it was not the role of the Courts to make such a determination on this matter.<sup>10</sup>

### **What is a Declaration of Inconsistency and Why is it Important to Age Discrimination and Voter Eligibility?**

A finding of justifiable (age) discrimination is only part of the issue, given Aotearoa New Zealand's constitutional arrangements; the Constitution itself is unwritten and largely unentrenched. Normally, the NZBORA is used by the judiciary to determine whether a statute is consistent with the NZBORA; there is a presumption that all legislation is consistent, or that it should be interpreted, where possible, in a manner consistent with the NZBORA.<sup>11</sup> And, as noted above, the Supreme Court is currently deciding whether a declaration of inconsistency should be granted.

A declaration of inconsistency<sup>12</sup> is a way for the Courts to confirm formally to Parliament that legislation has infringed the fundamental human rights set out in the NZBORA.<sup>13</sup> It can be a "means of vindicating the right in the sense of marking and upholding the value and importance of the right" that is owed by Parliament,<sup>14</sup> "while observing parliamentary supremacy in law-making."<sup>15</sup> The purpose of a formal declaration is not to make a political statement to endeavour to persuade Parliament to change its mind.<sup>16</sup> A declaration does not affect the validity of an Act, or anything done lawfully under that Act. Legislation that is inconsistent with the NZBORA will prevail, unless and until Parliament, as the supreme law-maker, makes any change. But, a declaration of inconsistency is a means by which the Courts can draw to the attention of the New Zealand public that Parliament has enacted legislation that is inconsistent with a fundamental right.<sup>17</sup>

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<sup>8</sup> Ibid, para 57.

<sup>9</sup> Ibid, para 58.

<sup>10</sup> Ibid, para 62.

<sup>11</sup> C Breen, 'Recent COVID-19 Court Cases Show New Zealand's Bill of Rights Act is Not as Strong as Some Might Wish', *The Conversation* (May 2022), <https://theconversation.com/recent-covid-19-court-cases-show-new-zealands-bill-of-rights-act-is-not-as-strong-as-some-might-wish-182232>

<sup>12</sup> New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022.

<sup>13</sup> *Make It 16 v Attorney-General* [2020], supra note 20, paras 9, 53.

<sup>14</sup> Ibid, para 10 citing *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213, at para 56.

<sup>15</sup> Ibid, para 100.

<sup>16</sup> Ibid, para 70.

<sup>17</sup> Ibid, para 10 citing *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213, para 77.

## Conclusion and Where to From Here?

Much of the High Court's reasoning turned on the level of public support (or lack thereof), whilst Court of Appeal noted that none of the usual arguments around lack of competency, or parental influence had been advanced by the Attorney-General. Both Courts noted the importance of wider public opinion as regards a core democratic right.

Very recent events suggest that there may a change in attitude. In September 2022, a petition calling for the lowering of the voting age – which had over 7,000 signatures – was handed over to Parliament. However, a private member's Bill calling for wider change, and which containing a provision to make the voting age 16, failed to be considered by Select Committee,<sup>1</sup> on the basis that such matters would be best dealt with by the Independent Electoral Law Review, which the Government had established with a view to making any changes by the 2026 general election.

The Independent Electoral Law Review issued its Consultation Document in September 2022. The voting age is one of the considerations identified therein. The Consultation Document also notes that changes to voter enrolment may also impact candidate eligibility.<sup>2</sup> In October 2022, a draft report on reforming local government was published.<sup>3</sup> The matter of lowering the voting age was raised there too. Arguments that lowering the voting age included the potential for parental coercion, and that 16- and 17-year-olds could already participate in our democracy by way of protesting, lobbying, petitioning, and presenting to Parliamentary select committees did not sway the Review body from recommending that the voting age for local government elections should be 16 years.<sup>4</sup>

Should the Supreme Court issue a declaration of inconsistency it will not overturn the discriminatory law but it will send a strong moral message to Parliament that the voting age is discriminatory and has to change. Any law change will be a matter for Parliament. However, those sections of the Electoral Act regarding the voting age are some of the very few entrenched provisions in New Zealand's unwritten and largely unentrenched constitution, meaning that any change would need to be supported by 75% of MPs or endorsed in a national referendum.<sup>5</sup> So, change may not be easy without clear support from the New Zealand public.

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[NOTE by HRP: Shortly after the Workshop, the New Zealand Supreme Court set aside the decision of the Court of Appeal, and made a declaration that the minimum voting age of 18 years was inconsistent with the New Zealand Bill of Rights Act, and that the inconsistency had not been justified. *Make It 16*

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<sup>1</sup> Electoral Strengthening Democracy Electoral Bill 2022.

<sup>2</sup> Independent Electoral Review, *Consultation Document, An Invitation to Tell Us What You Think About Our Electoral System* (September 2022) 18–19, <https://electoralreview.govt.nz/assets/pdf/independent-electoral-review-consultation-document.pdf>

<sup>3</sup> Review into the Future of Local Government, *He Mata Whāriki, He Matawhānui Future of Local Government Review Draft Report* (October 2022) 171–172, <https://www.futureforlocalgovernment.govt.nz/assets/Review-into-the-Future-for-Local-Govt-Draft-Report.pdf>

<sup>4</sup> Ibid, 21.

<sup>5</sup> Electoral Act 1993, s 268.

*Incorporated v. Attorney-General*, [2022] NZSC 134 (Nov. 21, 2022).]



## Student Discounts and other preferential treatment on grounds of age: untangling scope, legitimate objectives and proportionate responses

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### Introduction

Providing student discount or other forms of preferential treatments which essentially amount to free access, reduced tariffs or preferential access to certain groups based on age have become a social norm from which it is difficult to imagine any particular moral or even legal outrage emerging. Indeed, it is often the case that ‘age’ as a ground of discrimination has been treated differently (that is, more leniently) for many years due to a combination of factors arising from a lack of perceived political and historic disadvantage, immutability, legal certainty and a general understanding that such treatments are, in the round, socially acceptable. Yet when preferential treatments are examined more closely it becomes possible to identify potentially direct or indirect discrimination arising and arguments about legitimate objectives and proportionality ensuing.

This then opens up a variety of questions regarding the scope of existing discrimination laws (both personal and material), the extent to which such differential treatment could be justified and considered proportionate and what factors should influence an international court and tribunal where such cases end up before them. As preferential treatment necessarily entails a beneficiary, the task of establishing who these beneficiaries should be arises. In the context of age, this requires the setting of age limits or groupings which benefit a certain group of persons. Additionally, the question of whether public or private bodies should be responsible in the case of potential discrimination, and in what fields of activity protection against discrimination should arise, need to be addressed. Another natural consequence is that the preferential treatment is, with respect to other age groupings, potentially disadvantageous. At this point, it then becomes necessary to consider the legitimacy of the objectives sought to be achieved and whether the measure is proportionate to meet these objectives. Where these cases stray outside the national boundaries, the question then arises as to how international courts and tribunals should assess these challenging issues. The European Union (EU) protections will be used as a case study throughout to examine how these issues could or should be dealt with in practice, with the European Court of Human Rights (ECtHR) providing an interesting example of how international courts or tribunals currently deal with such issues.

This paper addresses three main issues. Part I of the paper focuses on the scope of protection of existing EU law both personal and material. With respect to personal scope, the paper looks at age limits/groupings and the public/private debate with respect to the level of protection to be afforded. With respect to material scope, existing protected fields of activity are analysed, and proposed extensions discussed. Part II of the paper focuses on legitimate objectives and proportionality. Naturally any assessment of where differential treatment might cross the line into discrimination will involve an assessment of the legitimacy and proportionality of any measures imposed.

Drawing on EU case law, this section of the paper examines which objectives may be considered legitimate and what factors might be relevant in determining proportionality in the context of preferential treatment. Finally, Part III of the paper moves to the international realm and, using the case law of the ECtHR as a case study, provides some insight into how such decisions are made. This should provide a useful basis upon which to examine how decisions should or could be assessed in international fora. Particular attention is focused on the use of comparative interpretation and the use of the margin of appreciation doctrine.

This short paper concludes that preferential treatment is invariably considered a social norm at the present time but there are movements, certainly at an EU level, to subject these to more scrutiny in their construction and application. This will also have a consequential impact on the determinations of international courts and tribunals in these matters.

## **Part I: Scope of protection**

In examining whether such cases fall within the scope of protection of existing anti-discrimination laws, both personal and material scope must be examined. With respect to personal scope, two primary issues arise (a) the choice of age limit or age group who will become the beneficiaries of the treatment, and (b) whether both public and private individuals and entities should be responsible for any potential discrimination claims. With respect to material scope, the main consideration is the fields of activity in which preferential treatment might fall foul of anti-discrimination law.

### *i. Personal scope*

While anti-discrimination laws in the EU context apply to all ages (and there are therefore no limits on the protection from age discrimination), the question then arises as to whether the selection of age limits or groupings for the purposes of preferential treatment might fall foul of age discrimination protections. This is something which might also be considered as part of the proportionality assessment but is dealt with here to indicate the relationship to the personal scope of anti-discrimination laws and the impact of their breadth. In the EU context, this ‘*collective approach*’<sup>1</sup> to non-discrimination would be considered as an exception to the non-discrimination rules and should therefore be strictly defined according to sound principles. The EU Fundamental Rights Agency identifies preferential treatment as ‘*a short-term and exceptional means of challenging prejudices against individuals who would normally suffer discrimination, by favouring members of a disadvantaged group*’<sup>2</sup>. This then indicates that in determining the potential appropriateness of an age grouping or limit, certain factors should be considered, namely:

- (a) The temporal nature of the measure: this would require a consideration of whether the measure is short-term in nature or has a more longer-term impact, a review mechanism to

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<sup>1</sup> Europäische Union, Europarat, and Europäischer Gerichtshof für Menschenrechte, eds., *Handbook on European Non-Discrimination Law*, 2018 edition, Handbook / FRA, European Union Agency for Fundamental Rights (Luxembourg: Publications Office of the European Union, 2018), 70, <https://doi.org/10.2811/58933>.

<sup>2</sup> Europäische Union, Europarat, and Europäischer Gerichtshof für Menschenrechte, 71.

allow for re-consideration of the age limits/groupings over time and a clear avoidance of a reliance on social norms.

- (b) The exceptional nature of the measure: this overlaps to an extent with the temporal considerations and would require a review mechanism to be in place to determine the exceptional nature of the measure to achieve a particular purpose.
- (c) The justification of the measure: the treatment should favour a disadvantaged group. This should be an essential part of the assessment of an age grouping. In the case of a student discount for example, students could arguably be a disadvantaged group because they are often perceived to be poorer due to their commitment to education and their lack of economic activity. Older persons, who may not be economically active, or having reached certain age profiles e.g. over state pension age may also be considered to be a disadvantaged group. This would, however, call into question whether setting an age limit of, for example, 18-24 would be justifiable given that students may also be in older age categories.

Another important aspect of person scope is the extent to which both public and private entities may be liable for anti-discrimination claims. In this respect, EU law is fairly clear, albeit materially limited in scope (this will be discussed further below). The right to protection against age discrimination in the EU context personally extends to ‘*all persons, as regards both the public and private sectors, including public bodies*’<sup>3</sup>. Additionally, the European Court of Justice has held that the protection against age discrimination is a general principle of EU law<sup>4</sup> bolstered by the EU Charter of Fundamental Rights, Article 21. This is sufficient in itself to confer on individuals a right which they may rely on in disputes between them in a field covered by EU law.<sup>5</sup> It is conclusive then that in EU law private entities may be the subjects of a non-discrimination claim. This ensures that within the scope of EU law (personal and material) there are no gaps in protection. This right to non-discrimination takes precedence over any conflicting national law and may even create a positive duty on the state to ensure equal rights. The European Convention on Human Rights (ECHR) also provides protection against non-discrimination<sup>6</sup>, but claims can only be made against States and only in respect of a breach for which the State is in some way responsible. However, as the State may be liable for the acts of the legislature, executive or judiciary or other public authorities, a failure to effectively deal with a particular non-discrimination issue between private parties (either a negative or positive obligation violation) may find its way to the European Court of Human Rights. A number of rationales have been put forward to support this expansion of responsibility from public entities to private entities. These include:

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<sup>3</sup> ‘Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation OJ L 303, 2.12.2000, p. 16–22’, n.d., art. 3(1).

<sup>4</sup> Case C-144/04 Werner Mangold v Rüdiger Helm ECLI:EU:C:2005:709 (n.d.).

<sup>5</sup> Case C-414/16, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. ECLI:EU:C:2018:257. (n.d.).

<sup>6</sup> ‘European Convention on Human Rights’ (n.d.), arts. 14, and Protocol 12.

- (a) essentialism (the fact that the right or value is so essential and fundamental to the EU legal order that they must be protected)<sup>7</sup>,
- (b) integrationalism and functionalism (the fact that the protection of these rights is central to ensuring integration and, additionally ensuring the proper functioning of the EU legal order)
- (c) practical (considering the very obvious shift in power from the public to the private sector in recent years, ‘the need for an adequate and different protection of fundamental rights has changed too’.<sup>8</sup>)

Naturally, there are some negatives associated with expansion of the application of law in this horizontal manner including lack of legal certainty and potential conflicts of freedom of contract but these appear to be generally outweighed in the case of anti-discrimination law, at least.

## *ii. Material Scope*

As mentioned previously, EU law has a very limited material scope of protection in the age discrimination context. The fields of activity which are protected by EU law are limited to the employment context which includes self-employment<sup>9</sup>. The issue is slightly more complicated than at first sight, however. This is due to the wider scope of protection available under national laws within the EU<sup>10</sup> and under the ECHR. The EU currently has proposals under way for the extension of anti-discrimination protections on grounds of age to other fields of activity outside of the employment context including healthcare, social protection, education, housing, and access to, and provision of, goods and services.<sup>11</sup> The rationale for expansion of the fields of activity arise from central EU law concerns related to uniformity and integration but also include more general concerns relating to the need to combat discrimination which can have detrimental impacts on individuals but also on economic efficiency (ensuring healthy competition within the EU internal market). However, the proposal has been met by concerns from Member States relating to legal certainty and contractual freedom particularly in the financial and insurance sectors.

## **Part II: Legitimate objectives and proportionality**

In any differential treatment determination, the assessment of legitimate justifications/objectives and proportionality will emerge. One of the first tasks in any such assessment is to identify what

<sup>7</sup> Sacha Prechal, ‘Horizontal Direct Effect of the Charter of Fundamental Rights of the EU’, *Revista de Derecho Comunitario Europeo* 66 (15 August 2020): 419, <https://doi.org/10.18042/cepc/rdce.66.04>.

<sup>8</sup> Prechal, 418.

<sup>9</sup> ‘Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation OJ L 303, 2.12.2000, p. 16–22’.

<sup>10</sup> European Commission. Directorate General for Justice and Consumers. and European network of legal experts in gender equality and non discrimination., *Age Discrimination Law Outside the Employment Field: 2020*. (LU: Publications Office, 2020), <https://data.europa.eu/doi/10.2838/214317>.

<sup>11</sup> ‘Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation, {SEC(2008) 2180} {SEC(2008) 2181} /\* COM/2008/0426 Final - CNS 2008/0140 \*/’, n.d.

may constitute a legitimate objective/aim for differential treatment. At an EU level, the type of justifications which have been accepted as legitimate within the employment field are generally broadly defined. Member States have been given a wide discretion to determine such aims/objectives as long as the aim falls within some political, social, economic, demographic or budgetary consideration.<sup>12</sup> Outside of the employment context, the EU has indicated in its most recent proposals that preferential treatment on the grounds of age may be permitted if it promotes economic, cultural or social integration. So what might fall within these broadly defined grounds? An assessment of the case law of the Court of Justice of the EU (CJEU) in the employment context indicates a very broad scope including the measures which encourage the recruitment and promotion of older workers, improve personnel management, prevent disputes and protect the dignity of workers and measures which ensure the continuance of high-quality services. They have been keen to impress upon Member States that there is a distinction between public and private interests and that only the former is sufficient to justify a difference in treatment based on age. Although in practice this has often been difficult to discern because what might be needed in a business setting can often be framed as a public policy. Outside of the employment field, the possibilities of what promotes cultural, social and economic integration are potentially open-ended.

As a result of this wide interpretation, proportionality assessments have become the space in which more scrutiny can be placed on potential justifications. Proportionality assessments in the EU centre on determinations of appropriateness and necessity (which can often overlap or intertwine) and include assessments also of arbitrariness and alternative or more suitable means of achieving similar aims. Manifest unsuitability would render a measure disproportionate. As discussed above, it is in this context that the age groupings/limits might come into question as to their appropriateness and necessity to achieve certain objectives. Other factors to be considered might be the characteristics of the economic, social or cultural sector involved, the availability of other options which could achieve similar objectives and, the impact of the measure on the rights of others.

### **Part III: International adjudication**

If a preferential treatment case found its way to an international forum, one important question which might arise is whether there are any additional considerations, apart from the ones discussed at a national or regional level and articulated above, which might be relevant to their determination. The practice of the ECtHR is instructive in this regard as they have developed some useful interpretative and determinative tools to assist them in this process. One such interpretative tool is the use of comparative interpretation which tends to avoid suggestions of law-making or judicial activism. Jacobs, White and Overy have defined this concept as the '*resort to the search for a*

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<sup>12</sup> 'Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation OJ L 303, 2.12.2000, p. 16–22', art. 6.

*common European standard*<sup>13</sup> and decisions can be made based on common constitutional or national law traditions. Where common standards are found, the Court is more likely to decide in this direction. Where there is a wide diversity of opinion, the Court tends to take a more conservative approach with the case being resolved in favour of the State rather than the individual.<sup>14</sup> This could have a particular impact in the context of preferential treatment which may be a social norm and therefore may struggle to pass this comparative test.

The ECtHR may also rely on their margin of appreciation, a concept which essentially amounts to a level of deference given by the court to the judgment of national authorities in view of the international nature of the ECHR. The scope of the margin of appreciation tends to alter depending an assessment of certain factors including (a) the circumstances and background of the case and, (b) the subject matter of the case (particularly which human right is being affected). In the age context to date, certain statements have been made which may indicate how such a margin might be applied in the case of preferential treatments. The ECtHR has indicated that age is not considered to be a ‘*suspect*’ ground under the Convention so would engender a wider margin of appreciation.<sup>15</sup> In addition, general measures of economic or social policy or criminal matters would also engender a wider margin of appreciation, although it is questionable whether private objectives might fall into these categories. It has also stated that ‘*traditions, general assumptions or prevailing social attitudes*’<sup>16</sup> would not in themselves be sufficient to justify a difference in treatment, a fact which might be particularly relevant in the context of preferential treatment.

## **General Conclusions**

All of us could probably point, if asked, to a preferential treatment which we have stumbled upon in our day to day lives. Whether it is a gym discount, or state subsidy for certain groups of people, these types of treatment are ubiquitous in our everyday lives and have become societal norms. However, they are not necessarily benign and in every one of these treatments there is possibly a winner and a loser. In many cases, preferential treatment serves a justifiable purpose, for example, the entitlement to a state pension at a certain age. However, there are cases where the means sought to achieve these aims are inappropriate or where the aims themselves are not legitimate. This short excursion into this thorny question indicates that there are movements afoot, certainly at an EU level, to subject these measures to more scrutiny in both their construction and application. This will also have a consequential impact on the determinations of international courts and tribunals in these matters and on society’s normalisation of such treatments.

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<sup>13</sup> Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, Eighth edition (Oxford, United Kingdom: Oxford University Press, 2020).

<sup>14</sup> Rainey, Wicks, and Ovey.

<sup>15</sup> *Khamtokhu and Aksenchik v Russia* (Applications nos 60367/08 and 961/11) (n.d.).

<sup>16</sup> *Stec and Others v United Kingdom* (Application nos 65731/01 and 65900/01) (n.d.).



## Are early-age limits morally worse than late-age ones?

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1. Consider, to begin with, the following (realistic) list of age-based practices:

- Before 14 and after 67, you are being denied access to (some) jobs
- Before 18 and after 42, you are not being offered IVF treatment
- Before 18 and after 70, your right to drive is subject to specific restrictions
- Between 5 and 18, you are subject to compulsory education
- Before 18, you are not entitled to vote
- Before 65, you are not entitled to full pension rights

Some will want to defend the view that we should get rid of *all* age criteria, systematically seeking substitute criteria or simply dropping the restrictions at stake. Others may rather want to double-check, with an open mind, whether we do not have reasons to stick to age criteria in some cases. The point of this short note is to explore the implications of *combining* what I consider to be two of the best possible justifications for using at least some age criteria in social life. To my mind, two of the best justifications (if any) for still using age criteria consist of (1) relying on the value of chronological age as a proxy indicator of *current and future abilities* and (2) its value as a proxy indicator of *past opportunities*, in connection with *equality over entire lives*.<sup>2</sup>

I will state a set of claims and conjectures and explore what they entail, in a necessarily sketchy way. I will explore their implications for the use of lower or upper ages. My general question is whether using upper ages tends to be less problematic than using lower ages? I will check whether there is a convergence between the two justificatory strategies that I will now present in more detail.

2. I begin with the use of age as a proxy indicator for *abilities*. It can be used to indicate some physical, affective or cognitive abilities, the passage of (life) time being important for development and deterioration processes. Note that when it is used in the spirit of entire life egalitarianism – see below –, chronological age is *also* in some sense used as a proxy, taking the chronological age reached so far as signaling the degree to which one has already enjoyed access to certain valuable

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<sup>1</sup> This is a revised version of a note prepared for a workshop organized by Harvard's Human Rights Program on Nov. 18, 2022. I wish to thank G. Bognar, T. Meijers, G. Neuman, M. Sa Valente, V. Vandenberghe, J. Rennes and C. Wareham for comments on an earlier version. E-mail: [axel.gosseries@uclouvain.be](mailto:axel.gosseries@uclouvain.be)

<sup>2</sup> I discuss other ones elsewhere, including the one of "sequence efficiency" See Gosseries (2014)



things in one's life. While longevity is admittedly an imperfect predictor of the range of opportunities that one has benefitted from, it may still remain a relevant one.

Let me make three claims on age as a proxy indicator of abilities. First, using age as a proxy makes special sense when we are dealing with large numbers of people (e.g. massive elections, flows of travelers in airports, waves of COVID patients, etc.). Yet, there are also cases where even if numbers were not large, it might remain preferable to use a proxy indicator – age being one of the options - rather than relying on an individualized assessment. These reasons include avoiding test manipulability (chronological age is often easily observable on ID cards), protecting privacy (e.g. when assessing sexual or political maturity) or restricting the range for human error (e.g. when combining an age criterion with in-depth individualized assessment). Second, the stronger the correlation between a given chronological age and the target variable, the more justifiable it is to rely on such a proxy indicator. This is not self-evident, as gaining precision may lead to further group segmentation on grounds that are not necessarily within people's control, which does not necessarily promote fairness.

Third, statistical significance does not merely result from natural facts. It is also generated by background practices that could themselves be morally problematic. In such a case, we could have a reason (the nature of which ought to be clarified) not to rely on the proxy indicator, even if it were to make sense statistically speaking. For instance, using a gender criterion as a proxy may be problematic even if the correlation is strong, not only because it reinforces gender divisions that may be deemed undesirable, but also because what renders it statistically significant may in fact *result from* the very gender divisions that we deem undesirable. For instance, in a society in which girls are denied access to formal education, gender-based predictors of some skills acquired at school will be very reliable. This may not suffice to render their use morally acceptable. The same may hold for age.

On statistical significance, a first conjecture is that it tends to be stronger at “extreme” ages (very young and very old) than at mid ages (e.g. 30 or 50). This assumes that physical, affective and cognitive change is not linear in life. It is not so much about the magnitude of the age gap between the two individuals that we compare. It has more to do with the idea that there are steep developments at the beginning of people's lives and also that there tends to be quite systematic deterioration processes beyond an advanced age (e.g. after 80). This connects to a second - and more tentative - conjecture: statistical reliability is higher at young ages than at later ages. This is because, as our lives develop, a lot of other intervening factors have an impact on who we become. How we start our life may be more uniform than how we end it.

The implications of this twofold conjecture are that the use of *early age* criteria may be *statistically* more justifiable than the use of late age criteria. In addition, there could be a *pro tanto* argument for its superior moral acceptability in reference to background practices that render the age

criterion statistically reliable. Early age practices (e.g. age-based compulsory education or the paternalistic use of age) that increase the statistical reliability of early age as a proxy indicator may be morally less problematic than practices that rely on old ages.<sup>3</sup> At this stage, the provisional conclusion is that if the only reason to use age criteria were their value as a proxy indicator for physical, affective or cognitive features, relying on early ages would be slightly more acceptable than relying on late ages.

3. I have just presented a few ideas about age as a proxy indicator for physical, affective or cognitive abilities. How do the implications of the *entire life equality* view combine with its use as a proxy for past opportunities?

Two points about complete life egalitarianism. First, I understand *egalitarianism* in broad terms here. Philosophers and economists have long stressed that reducing inequalities and improving the situation of the least well-off are two goals that do not always coincide. Hence, within the broad egalitarian family, one of the dividing lines is between those who advocate reducing inequalities as such and those who stress that our core concern should be with improving the situation of the least well-off, even at the cost of letting inequalities increase. The divergence between classical egalitarianism on the one hand and leximin egalitarianism or Gini prioritarianism on the other hand typically leads to different practical guidance when our choices take place in a game that is not a zero-sum one.

The second point is about the *complete life* intuition. Here, the idea is that if we care about inequalities or about the situation of the least well-off, this should be assessed over people's entire lives rather than at specific moments in time taken in isolation. The view comes in various versions. One way of putting it is that we should give priority as a matter of distributive justice to how people fare over their entire lives, even if some spot inequalities may also matter on top. This does not render spot inequalities irrelevant. It simply means that we should mostly worry about spot inequalities if we anticipate that they contribute to inequalities over our entire lives. Incidentally, this also suggests, not only one way of interpreting inequalities between birth cohorts, but also that we should be more centrally concerned about cohortal inequalities than about age group inequalities. This is not necessarily reflected in anti-discrimination law regimes that do not allow for a cohortal reading of their anti-age discrimination provisions. Age discrimination laws that only ban discrimination above or below a certain age (e.g. above 40) typically do not allow for such a cohortal reading.<sup>4</sup>

How do we connect the complete life intuition with our concern for age limits? Here, we can distinguish a *defensive* use from an *affirmative* use of the entire life egalitarian idea.<sup>5</sup> The former

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<sup>3</sup> See Møller Lyngby Pedersen (in press) (on paternalism and the twofold role of age)

<sup>4</sup> See Gosseries (2015) (on the difference between an age group and a birth cohort reading of age discrimination)

<sup>5</sup> See Gosseries (2023)

states that relying on age-based differential treatment is *acceptable* to the extent that it *does not generate further* inequalities over people's entire lives. This is typically relied upon when defending e.g. a minimum voting age, in conjunction with stressing the function of age as a proxy for political maturity.

In contrast, the *affirmative* argument states that relying on age-based differential treatment is *desirable* to the extent that it *contributes to reducing* entire life inequalities. For example, the affirmative argument could feed a *pro tanto* case supporting age-based compulsory retirement in some professions. Of course, moving to an all-things-considered argument for age-based compulsory retirement requires more than that. One needs to check the relationship between the age reached and the extent of access to employment that one has effectively enjoyed. An account of the relative importance of access to employment compared with other opportunities in people's lives would be necessary too. In addition, account would have to be taken of the efficiency impact of retirement. While freeing some jobs, retirees do not simply leave the game. They entail extra costs to the active population. Some versions of complete-life egalitarianism, i.e. those that – like Gini prioritarianism or leximin egalitarianism – care about improving the situation of the least well-off rather than reducing inequalities as such, may be especially sensitive to such efficiency concerns while remaining complete-life egalitarians in broad terms.<sup>6</sup> Costs might be such that age-based compulsory retirement, while possibly reducing inequality in lifetime access to employment, would in the end worsen the general situation of the least well-off over their entire life. Yet, age-based compulsory retirement is not the only possible illustration of an affirmative use of age-based differential treatment. The use of relative ages in access to life-prolonging health care provides another illustration.

Now, the problem with the *defensive* version of the complete-life view is twofold. First, it is insufficient because we still lack a *positive* reason to support the age-based differential treatment at hand. In other words, even if an age-based exclusion were not to generate any inequality over complete lives between two individuals, it would still amount to a restriction of people's opportunities or freedom that requires justification. Second, in many contexts, age-based differential treatment *is not* neutral – as a matter of fact – in terms of its impact on inequalities over entire lives. In other words, there are many types of age-based rules that do increase inequalities over entire lives. Often, if you are only entitled to something beyond the age of 45, it means that all those who happened to have died before 45 and who may have needed it before then will end up having never benefitted from it, adding insult to injury.

Hence, the scope of the defensive argument is more limited than we think and is not fully complemented, I submit, by the scope of the affirmative argument. For the problem with the *affirmative* argument is also that the ability of age criteria to promote equality over entire lives may be *more limited* than we anticipate, even if we give importance to longevity in how well

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<sup>6</sup> On compulsory retirement: Lippert-Rasmussen (2019), Halliday and Parr (2022).

people's lives fare.<sup>7</sup> Many ways in which we use age criteria *do not* reduce inequalities over entire lives at all. The use of age for enfranchisement purposes or of age gaps in criminal law are cases in point. In other words, if the affirmative argument is the most solid of the two, its scope may be equally limited if we consider the whole range of uses of age criteria that we typically rely upon.

The conjecture here is that, based on the entire life equality idea and more specifically on the affirmative argument, there is a limited range of cases in which using age criteria *against the elderly* is less problematic (and even desirable in some cases when we are dealing with scarce resources) than using age criteria *against the young*. This is due to the role of longevity as an indicator of the *past opportunities* that a person has had so far - rather than as an indicator of the person's *current and future abilities*, be they physical, affective or cognitive. Of course, there remains a vast range of cases in which differential treatment against the elderly will *not* contribute to reducing lifetime inequalities, nor be neutral from the perspective of entire life inequalities.

Note as well that when looking into the use of age as a proxy indicator for present and future abilities— as opposed to an indicator for past opportunities -, the *direction* of differential treatment (for or against) is not necessarily central. What matters from that perspective is the proxy's statistical reliability. In contrast, when we look at age from the angle of entire life equality concerns, it is the *direction* of differential treatment (for or against) rather than the age location (early or late) that is crucial. Admittedly, the notion of direction of discrimination (for or against) is not always straightforward to use, as the case of paternalism illustrates.

4. Can we derive any general conclusions from combining these two possible grounds for age-based differential treatment? When it comes to age as a *proxy indicator for abilities*, there might be a slight presumption that relying on advanced ages is more problematic than relying on early age, whatever the direction of discrimination. Yet, it is only a very slight presumption premised on the second – and quite tentative - conjecture formulated in section 2. When it comes to age as a *proxy indicator of past opportunities*, there is a clear presumption that relying on early ages to deny entitlements to the young is more problematic than relying on advanced ages to deny entitlements to the elderly. Yet, this depends on the ability of the age practice at hand to effectively contribute to entire life equality and/or to generate significant efficiency gains, which is not the case in a significant range of practices in which relying on age pursues other goals.

Hence, we are far from a clearcut argument to support a general presumption that differential treatment based on late ages is less problematic than differential treatment based on early ages. While the exclusive focus of the 1967 Age Discrimination in Employment Act on 40-plussers is puzzling, we should also not go all the way down in the other direction to care exclusively about age-based practices that exclude teenagers or young adults.<sup>8</sup>

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<sup>7</sup> Gosseries (2023)

<sup>8</sup> For a great piece of work putting the emphasis on young adults: Bidadanure (2021)

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# The International Framework of Children's Rights Fosters Discrimination against Young People

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October 22, 2022

“The right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself. It is by no means certain whether this is possible.”<sup>2</sup>

Hannah Arendt

**Introduction:** The purposes of this paper are to explore in a comparative manner how discrimination is built into the international framework of children's rights and examine consequences of these problems for children in vulnerable situations, people human rights are supposed to protect.

**Inherent Discrimination in International Framework of Children's Rights:** From its inception, the international framework of children's rights was understood as inclusive, a framework through which young people are supposed to be able to call on their governments to implement rights. Nevertheless, a closer look reveals that discrimination is built into the framework.<sup>3</sup> The international framework of children's rights consists of the UN Convention on the Rights of the Child and its Optional Protocols, the UN Committee on the Rights of the Child, and the policies and procedures the UN Committee uses to enforce the Convention.<sup>4</sup> National governments subscribe to this framework through ratification of the UN Convention, which commits member parties to adhere to UN Committee procedures. Famously, the UN Convention is the most widely-ratified of the UN treaties.<sup>5</sup> Accompanying the UN Convention are three Optional Protocols: Optional Protocol to the Convention on the Rights of the Child on the sale of

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<sup>2</sup> Hannah Arendt. 1951. *The Origins of Totalitarianism*. Page 298. Harcourt, Brace.

<sup>3</sup> Brian Gran. 2017. “An International Framework of Children's Rights.” *Annual Review of Law and Social Science*. 13:79-100. <https://doi.org/10.1146/annurev-lawsocsci-110615-084638>. Breen, C., 2019. The ageing of Article 2 (1): The child's right to be free from age-based discrimination. In *Child Rights and International Discrimination Law* (pp. 55-69). Routledge. Madrigal-Borloz, V., 2021. The Theory of Indirect Discrimination: Application to the Lived Realities of Lesbian, Gay, Bisexual, Trans, and Other Gender Diverse (LGBT) Persons. *Harv. Hum. Rts. J.*, 34, p.295. Todres, J. and King, S. 2020. “Introduction.” Todres, J. and King, S.M. eds., 2020. *The Oxford handbook of children's rights law*. Oxford University Press.

<sup>4</sup> Brian Gran. 2021. *The Sociology of Children's Rights*. Polity. Vandenhoe, W., 2022. The Committee on the Rights of the Child—Size Matters Sometimes, Somewhat: A Comment. *Journal of Human Rights Practice*, 14(1), pp.101-107.

<sup>5</sup> UNICEF. Nd. “Convention on the Rights of the Child.” Accessed October 16, 2022: <https://www.unicef.org/child-rights-convention>.

children, child prostitution and child pornography, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, and Optional Protocol to the Convention on the Rights of the Child on a communications procedure.<sup>6</sup> These Optional Protocols are distinct treaties that the UN Committee urges member parties to ratify.<sup>7</sup> As of October 7, 2022, 172 member parties have ratified the Optional Protocol on armed conflict, 178 member parties have ratified the Optional Protocol on child trafficking, and 50 member parties have ratified the Optional Protocol on the communication procedure.<sup>8</sup> Because the U.S. Government has ratified the Optional Protocols on armed conflict and child trafficking, it can ratify the Optional Protocol on the communication procedure.<sup>9</sup> Ratifying the third protocol indicates a member party is willing to be subject of an individual complaint about the member party's implementation of the Convention and Optional Protocols on armed conflict and child trafficking.<sup>10</sup> The individual complaint procedure seems available only to individuals, not a group of individuals. Greta Thunberg and sixteen young people, ages 8 to 17, used the individual complaint procedure to complain that national governments that have ratified the UNCRC have failed to protect young people's rights and interests around climate change.<sup>11, 12, 13</sup> It is this author's impression that Thunberg and colleagues are the first to attempt to use the individual complaint procedure to file

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<sup>6</sup> UN Office of the High Commissioner for Human Rights. Nd. Committee on the Rights of the Child. Nd. Accessed October 16, 2022: <https://www.ohchr.org/en/treaty-bodies/crc>.

<sup>7</sup> UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, Annex I, 27 November 2003, CRC/GC/2003/5. UN Entity for Gender Equality and the Empowerment of Women. Nd. "Convention on the Elimination of All Forms of Discrimination against Women: What is an Optional Protocol?" Accessed October 16, 2022: <https://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm>.

<sup>8</sup> UN Office of the High Commissioner for Human Rights. 2022. "Status of Ratification Interactive Dashboard." Accessed October 16, 2022: <https://indicators.ohchr.org/>.

<sup>9</sup> UN Office of the High Commissioner for Human Rights. 2011. "Optional Protocol to the Convention on the Rights of the Child on a communications procedure." Article 18. Accessed October 16, 2022: <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-communications>.

<sup>10</sup> UN Office of the High Commissioner for Human Rights. 2011. "Optional Protocol to the Convention on the Rights of the Child on a communications procedure." Accessed October 16, 2022: <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-communications>.

<sup>11</sup> Committee on the Rights of the Child. 2019. "Communication to the Committee on the Rights of the Child. In the Case of Chiara Sacchi, Catarina Lorenzo, Iris Duquesne, Raina Ivanova, Ridhima Pandey, David Ackley, III, Ranton Anjain, Litokne Kabua, Deborah Adegbile, Carlos Manuel, Ayakha Melithafa, Greta Thunberg, Raslen Jbeili, Carl Smith, and Alexandria Villasenor v. Argentina, Brazil, France, Germany, and Turkey."

<sup>12</sup> UNICEF. 2019. "16 children, including Greta Thunberg, file landmark complaint to the United Nations Committee on the Rights of the Child." Accessed October 16, 2022: <https://www.unicef.org/press-releases/16-children-including-greta-thunberg-file-landmark-complaint-united-nations>.

<sup>13</sup> Josefsson, J. and Wall, J., 2020. Empowered inclusion: Theorizing global justice for children and youth. *Globalizations*, 17(6), pp.1043-1060.



a complaint as a group.<sup>14</sup> Nearly two years later, the UN Committee sidestepped the group's concerns and concluded that the group should take their complaint to national courts.<sup>15</sup>

The International Bill of Human Rights (IHBR) consists of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>16</sup> The UDHR, ICCPR, and ICESCR are distinct instruments. When a UN member party voted for the UDHR, they indicated their agreement with the Declaration's principles. When a UN member party ratifies the ICCPR and the ICESCR, they indicate their promises to implement the Covenant's contents domestically.<sup>17</sup> As of October 7, 2022, 173 UN member parties have ratified the ICCPR and 171 UN member parties have ratified the ICESCR.<sup>18</sup> As their names indicate, the ICCPR articulates civil and political rights, and the ICESCR articulates economic, social, and cultural rights. The IHBR articulates rights belonging to every person; no exceptions.

Despite application of the IBHR to every human, including children, the UN adopted the Convention on the Rights of the Child (UNCRC) in 1989 and then initiated the steps needed to establish the UN Committee and its procedures.<sup>19</sup> As is well known, all but one UN member party, the United States, have ratified the UNCRC.<sup>20</sup> This near universal ratification does demonstrate widespread commitment to the rights and interests of children.<sup>21</sup> Nevertheless, why establish a separate international framework of children's rights given the IBHR applies to young people? If the IBHR was adopted, why is the UNCRC needed? The UNCRC acknowledges that "particular care" should be extended to young people and young people need "special safeguards."<sup>22</sup> Yet the ICCPR and ICESCR also acknowledge and incorporate these concerns. ICCPR's Article 24 states: "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required

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<sup>14</sup> Brian Gran and Colette Ngana. Forthcoming. "Researching Children's Rights in Pursuit of Social Change." Chapter in *Research Handbook on Intersectionality*. Edited by Mary Romero. Edward Elgar Publishing.

<sup>15</sup> Committee on the Rights of the Child. 2021. "Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 104/2019," as well as Numbers 105/2019, 106/2019, 107/2019, and 108/2019.

<sup>16</sup> UN. Nd. "The Foundation of International Human Rights Law." Accessed October 16, 2022: <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law>.

<sup>17</sup> UN Treaty Collection. Nd. "Definitions." Accessed October 16, 2022: [https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1\\_en.xml](https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml)

<sup>18</sup> UN Office of the High Commissioner for Human Rights. 2022. "Status of Ratification Interactive Dashboard." Accessed October 16, 2022: <https://indicators.ohchr.org/>.

<sup>19</sup> UN Office of the High Commissioner for Human Rights. 1989. Convention on the Rights of the Child, Article 43. Accessed October 16, 2022: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.

<sup>20</sup> UN Office of the High Commissioner for Human Rights. 2022. "Status of Ratification Interactive Dashboard." Accessed October 16, 2022: <https://indicators.ohchr.org/>.

<sup>21</sup> Blanchfield, L. 2015. "The United Nations Convention on the Rights of the Child." Congressional Research Service R40484.

<sup>22</sup> UN Office of the High Commissioner for Human Rights. 1989. Convention on the Rights of the Child. Accessed October 16, 2022: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.

by his status as a minor, on the part of his family, society and the State.”<sup>23</sup> ICESCR’s Article 11 states: “Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.”<sup>24</sup> Rather than insist that children, like every person, are able to exercise their rights through the ICCPR and the ICESCR, the UN and its member parties established an international framework for children’s rights.<sup>25</sup> This child’s rights framework not only may be unnecessary, the international framework may be used to discriminate against young people. Although the IBHR declares that human rights should prevent discrimination,<sup>26</sup> establishing the international framework of children’s rights indicates that children and their rights are different from other people.

While the framework aspires to assure dignity of every young person and reduce discrimination among young people,<sup>27, 28</sup> this framework allows adults to discriminate against young people and young people’s interests, including exercise of their rights. Through this paper, I intend to demonstrate that the international framework of children’s rights is built on discrimination and that the international framework fails young people when they most need what their rights can do.<sup>29</sup> Current practices treat young people as neither full members of the societies in which they live nor entitled to exercise rights as societal members.<sup>30, 31</sup> Adults are expected to serve as young

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<sup>23</sup> UN. 1966. International Covenant on Civil and Political Rights. Accessed October 16, 2022: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

<sup>24</sup> UN. 1966. International Covenant on Economic, Social and Cultural Rights. Accessed October 16, 2022: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>.

<sup>25</sup> Freeman, M., 2009. Children’s rights as human rights: Reading the UNCRC. In *The Palgrave handbook of childhood studies* (pp. 377-393). Palgrave Macmillan, London. Mezmur, B.D., 2019. The Convention on the Rights of the Child, migration, and Australia: repositioning the convention from being a ‘wish list’ to a ‘to do list’ The 2018 Australian Human Rights Institute Annual Lecture. *Australian Journal of Human Rights*, 25(2), pp.177-199. Wall, J., 2019. Theorizing children’s global citizenship: Reconstructionism and the politics of deep interdependence. *Global Studies of Childhood*, 9(1), pp.5-17.

<sup>26</sup> UDHR Article 37, ICCPR Article 26, and ICESCR Article 2. But see: Silberman Abella, R. (2019) “The Arc of the Moral Universe Is Long, But . . .,” *Canadian Journal of Law and Society / Revue Canadienne Droit et Société*. Cambridge University Press, 34(1), pp. 1–11. doi: 10.1017/cls.2019.10.

<sup>27</sup> UN Office of the High Commissioner for Human Rights. 1989. Convention on the Rights of the Child. Preamble, Articles 2, 23, 28, 37, 39, and 40.

<sup>28</sup> Herring, J., 2019. *Law and the relational self*. Cambridge University Press.

<sup>29</sup> Haydon, D. 2012. “Children’s Rights: The Effective Implementation of Rights-based Standards.” Pages 23-40 in *Vulnerable Children and the Law: International Evidence for Improving Child Welfare, Child Protection and Children’s Rights*. Edited by Young, L., O’Leary, P., Foster, H.R., Moore, L., Convery, U., Beddoe, C., Turton, J., Oliver, S., Cardol, G., Das, C. and Molina, G. Jessica Kingsley Publishers.

<sup>30</sup> Karl Hanson and Olga Nieuwenhuys (editors). 2013. *Reconceptualizing Children’s Rights in International Development*. Cambridge University Press.

<sup>31</sup> Cohen, C.P., 1997. The United Nations convention on the rights of the child: A feminist landmark. *Wm. & Mary J. Women & L.*, 3, p.29. Boni-Saenz, A. (2020) Age, Equality, and Vulnerability. *Theoretical Inquiries in Law*, Vol. 21 (Issue 1),

people's representatives to their societies and build and maintain institutional mechanisms that ensure young people can exercise rights.<sup>32</sup> Given the international frameworks of children's rights does not extend all human rights to young people,<sup>33</sup> young people face barriers to changing this framework.<sup>34</sup>

**Reliance on Adults:** Discrimination against young people arises from a dilemma built into the children's rights framework: young people rely on adults to implement their rights.<sup>35</sup> Young people's reliance on adults is a feature of Aristotle's notion of the state.<sup>36</sup> In *Politics* Aristotle describes the state, its components, and how it works. The state consists of communities, and communities consist of households. The household consists of male citizens who are husbands and their wives, fathers (and mothers) and their children, and owners and slaves. Fathers, according to Aristotle, are expected to protect their children as royal rulers protect their subjects. If the male citizen fails to protect his children, the state, composed of male citizens, will intercede on behalf of young people so they can live as they should under their father's royal rule.<sup>37</sup> Of course, while Aristotle's notion of the state continues to shape contemporary approaches to governance, we recognize that the state often does not intervene to assure young people can exercise their rights.<sup>38</sup> Aristotle's conception has led to state structures organized around false expectations on utilities of rights for some social groups, such as children.<sup>39</sup>

This dilemma of young people's reliance on adults to exercise their rights is built into the international framework of children's rights. This reliance can range from (1) a parent or caretaker who ensures their child can exercise their rights (2) to adults who establish institutional mechanisms necessary to a young person exercising their rights (3) to adults responsible for maintenance and managing institutional mechanisms central to the international framework of children's rights. This reliance dilemma reveals structural discrimination shaping exercise of young people's rights, which can place children in harm's way. This reliance dilemma exposes young people to failures of parents and caretakers, national governments, and community and society.

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pp. 161-185. <https://doi.org/10.1515/til-2020-0008>. Herring, J., 2018. Are Children More Vulnerable Than Adults?. In *Vulnerability, Childhood and the Law* (pp. 27-46). Springer, Cham.

<sup>32</sup> Minow, M., 1986. "Rights for the next generation: A feminist approach to children's rights." *Harv. Women's LJ*, 9, p.1.

<sup>33</sup> Gran, B. 2021. *The Sociology of Children's Rights*. Polity.

<sup>34</sup> Gran, B. 2021. *The Sociology of Children's Rights*. Polity.

<sup>35</sup> Byrne, B. and Lundy, L., 2019. Children's rights-based childhood policy: A six-P framework. *The International Journal of Human Rights*, 23(3), pp.357-373.

<sup>36</sup> Aristotle. 1905. *Aristotle's Politics*. Oxford University Press.

<sup>37</sup> Aristotle. 1905. *Aristotle's Politics*. Oxford University Press.

<sup>38</sup> Minow, M. 1991. *Making All the Difference*. Cornell University Press.

<sup>39</sup> Gobetti D. 1997. Humankind as a system: private and public agency at the origins of modern liberalism. In *Public and Private Thought and Practice*, ed. J Weintraub, K Kumar, pp. 103-32. Chicago: Univ. Chicago Press.

We witness this reliance dilemma and its consequences every day; it affects nearly all rights to which children are entitled.<sup>40</sup> Problems resulting from this circumstance are revealed when a young person's interests seem in opposition to adults' interests, when young people face danger and great hardship, and when institutional mechanisms purportedly designed to enable young people to exercise their rights instead fail to facilitate those rights. Currently, these problems are part and parcel of everyday life in two camps and a center in North East Syria where young people live: Al-Hol, Al-Roj, and the Houri Center. An examination of these camps/center reveals how discrimination inherent to the children's rights framework leads to problems for young people, as well as potential solutions.

**Discrimination against Vulnerable Children:** The Al-Hol and Al-Roj camps are located in the Al-Hasakeh protectorate in Syria.<sup>41</sup> The Houri Center is based in Tal Marouf, Syria.<sup>42</sup> People living in these camps/center are neither prisoners nor internally displaced. Their statuses are undetermined and unclear. Residents come from over sixty countries, according to Save the Children.<sup>43</sup>

Living in the camps/center presents two problems afflicting young people and their rights as well as a potential challenge. Simply put, the first problem for children's rights is living in the camps. Every day in the camps, children face desperate circumstances and concerns for their futures.<sup>44</sup> The second problem for children's rights is trying to exit the camps. An anticipated challenge facing young people and their rights is what will happen if and when they return to their home societies.

Living in the camps/center exposes a problem for children's rights and the obstacle embedded in the children's rights framework. The young people did not choose to live there. Living in the camps/center, young people encounter the nonexistence or failure of institutional rights mechanisms operating to assure their rights. While the country of citizenship of every young person living in the camp has ratified the UNCRC (the U.S. Government has attempted to repatriate all U.S. residents), the UNCRC framework has limited utilities to young people living in Al-Hol, Al-Roj, and the Houri Center.<sup>45</sup> Young people struggle to turn to organizations through

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<sup>40</sup> Hellman, D., 2018. Indirect discrimination and the duty to avoid compounding injustice. *Foundations of Indirect Discrimination Law*, Hart Publishing Company, pp.2017-53.

<sup>41</sup> Al Hol: <https://reliefweb.int/report/syrian-arab-republic/camp-profile-al-hol-al-hasakeh-governorate-syria-september-2021>. Al-Roj: <https://reliefweb.int/report/syrian-arab-republic/camp-profile-roj-al-hasakeh-governorate-syria-may-2022>.

<sup>42</sup> Trew, Bel. 2022. "Trapped and Traumatized." The Independent. Accessed on October 16, 2022: <https://www.independent.co.uk/independentpremium/world/syria-camps-foreign-children-isis-b1988200.html>.

<sup>43</sup> Reliefweb. 2022. "North east Syria: Rise in killings 'terrifying' children in Al Hol camp, says Save the Children." Accessed October 16, 2022: <https://reliefweb.int/report/syrian-arab-republic/north-east-syria-rise-killings-terrifying-children-al-hol-camp-says-save-children>

<sup>44</sup> Gorevan, D. and Achilles, K. 2021. "When am I Going to Start to Live?" Save the Children.

<sup>45</sup> UN News. 2022. "Finland: Rights of Finnish children detained in Syria camps violated." <https://news.un.org/en/story/2022/10/1129462>.

which they can exercise their rights to health (UNCRC Article 24), education (Article 28), and nutrition (Article 24). Instead, camp residents experience poor health care, little education, and malnutrition. They experience violations of freedoms from economic exploitation (Article 32). Dangers due to fires and flooding are common; violence, including shootings, is frequent. Of course, these young people are socially isolated.

The failure of the international framework of children's rights is evident in assuming adults serve as young people's representatives and have their best interests in mind. Boys living in the Houri Center are separated from their parents, caretakers, and families living in the Al-Hol camp and sent to the Center to undergo programs to prevent their radicalization, violating their rights to be with parents and family.<sup>46</sup> Some young people who live in Al-Hol and Al-Roj do not have parents in the camps. In these camps and the Houri Center, adults have failed to establish institutional mechanisms needed for a young resident to exercise their rights. While leaders of some national governments have welcomed orphans to their home societies, some national governments have not. In their home societies, leaders of governments who are responsible for maintenance and managing institutional mechanism central to the international framework of children's rights fail to do their jobs and ignore promises they have made to ensure that young people can exercise their rights.

Young people struggle to exercise their rights for purposes of exiting the camps and the Houri Center. The UN Committee on the Rights of the Child has called on the national governments of France and Finland to repatriate their children,<sup>47</sup> and for the children they do not repatriate, instructed the national governments of France and Finland "to take additional measures to mitigate the risks to life, survival and development of the children while they remain in Syria."<sup>48</sup> For most children living in the camps, governments of their home societies ignore their children's rights and interests. Instead, these governments allow their young people to live in desperate situations, despite making commitments to repatriate, rehabilitate, and reintegrate their children through the

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<sup>46</sup> Please note that I am trying to determine whether brothers are detained in the Houri Center.

<sup>47</sup> Committee on the Rights of the Child. "Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 100/2019." CRC/C/91/D/100/2019. Committee on the Rights of the Child. "Constatations adoptées par le Comité au titre du Protocole facultatif à la Convention relative aux droits de l'enfant établissant une procédure de présentation de communications, concernant les communications nos 77/2019, 79/2019 et 109/2019." CRC/C/89/D/77/2019 CRC/C/89/D/79/2019 CRC/C/89/D/109/2019. UN News. 2022. France violated rights of French children detained in Syrian camps." Accessed October 16, 2022: <https://news.un.org/en/story/2022/02/1112682>. UN News. 2022. "Finland: Rights of Finnish children detained in Syria camps violated." <https://news.un.org/en/story/2022/10/1129462>.

<sup>48</sup> Committee on the Rights of the Child. "Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 100/2019." CRC/C/91/D/100/2019. Committee on the Rights of the Child. "Constatations adoptées par le Comité au titre du Protocole facultatif à la Convention relative aux droits de l'enfant établissant une procédure de présentation de communications, concernant les communications nos 77/2019, 79/2019 et 109/2019." CRC/C/89/D/77/2019 CRC/C/89/D/79/2019 CRC/C/89/D/109/2019. UN News. 2022. France violated rights of French children detained in Syrian camps." Accessed October 16, 2022: <https://news.un.org/en/story/2022/02/1112682>. UN News. 2022. "Finland: Rights of Finnish children detained in Syria camps violated." <https://news.un.org/en/story/2022/10/1129462>.

IBHR and UNCRC.<sup>49</sup> Through UNCRC ratification, governments have promised to make detention a last resort and, if detention happens, for the shortest time.<sup>50</sup> The governments of young people living in Al-Hol, Al-Roj, and the Hour Center are failing to implement these treaties and ensure young people can exercise their rights.

Governments are unwilling to take seriously young people's citizenship and the rights that come with citizenship. Hannah Arendt criticized human rights for their dependence on national citizenship.<sup>51</sup> The international framework of children's rights is based on the notion that young people can call on their national governments to enforce their rights. Many governments, however, ignore their children who reside in the Al-Hol and Al-Roj camps and the Hour Center.

**What can be done?** Across many countries, national governments have established independent children's rights institutions (ICRIs), often called children's ombudspersons and children's commissioners.<sup>52</sup> These ICRIs typically are independent of their governments yet endowed with legal powers to monitor and advocate for children's rights. Their focus is on their national governments and their efforts to advance children's rights through the UNCRC framework.<sup>53</sup>

A global ICRI established to monitor the international framework of children's rights would concentrate on all young people and exercise of their rights. A global ICRI would be independent not only of national governments, but the UN Committee on the Rights of the Child. If endowed with appropriate powers, this global ICRI could use its independence and powers to monitor national governments and the UN Committee and components of the international framework of children's rights, including the individual communications procedure. Young people could call on the global ICRI to advocate, protect, promote, and enforce their rights wherever they live.

Societal leaders, especially political leaders, must think long term. If current arrangements encourage short-term thinking, then those arrangements must be corrected. Societal leaders must

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<sup>49</sup> Loveluck, L., and Salim, M. 2022. "After years in ISIS prison camp, they now face an uncertain welcome home." *The Washington Post*. Accessed October 16, 2022: <https://www.washingtonpost.com/world/2022/07/05/iraq-syria-al-hol-return/>.

<sup>50</sup> UN Office of the High Commissioner for Human Rights. 1989. Convention on the Rights of the Child, Article 37. Accessed October 16, 2022: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>. Neuman, G.L., 2018. Detention as a last resort: the implications of the Human Rights Committee's General Comment No. 35. In *Protecting Migrant Children* (pp. 381-395). Edward Elgar Publishing.

<sup>51</sup> Arendt, H. 1951. *The Origins of Totalitarianism*. P. 230. Harcourt, Brace.

<sup>52</sup> Gran, B. 2022. "Why the United States Needs a National Children's Rights Ombudsperson." Lux, A. and Gran, B. (Ed.) *The Roles of Independent Children's Rights Institutions in Advancing Human Rights of Children (Sociological Studies of Children and Youth, Vol. 28)*, Emerald Publishing Limited, Bingley, pp. 115-130. <https://doi.org/10.1108/S1537-466120220000028008>. Bochenek, M.C. and Binford, W. 2022. "Children Arriving in the United States Need Strong Safeguards." <http://dx.doi.org/10.2139/ssrn.4130815>.

<sup>53</sup> Lux, A., and Gran, B. (eds). 2022. *The Roles of Independent Children's Rights Institutions in Advancing Human Rights of Children*. Emerald Publishing.

conceptualize children's rights as human rights and keep in mind why an international framework of human rights was established for all people. Assuring young people can exercise their rights as humans can foster commitments to non-discrimination, dignity, and participation in communities as citizens, workers, leaders, and parents.<sup>54</sup> Young people can then grow up to make powerful contributions and hold responsibilities as societal leaders who advance "peace, dignity, tolerance, freedom, equality and solidarity..."<sup>55, 56</sup>

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<sup>54</sup> Hart, C.S. and Brando, N., 2018. A capability approach to children's well-being, agency and participatory rights in education. *European Journal of Education*, 53(3), pp.293-309.

<sup>55</sup> Gosseries, A., 2022. 15 Ageing, Unequal Longevities and Intergenerational Justice. *The Cambridge Handbook of the Ethics of Ageing*, p.212.

<sup>56</sup> UN Office of the High Commissioner for Human Rights. 1989. Convention on the Rights of the Child, Preamble. Accessed October 16, 2022: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.



## Should the standards used to evaluate the claims of discrimination based on age vary depending on the field(s) of activity to which the norm applies? When to use age and when to use capacity based approaches.

### Jonathan Herring

As is well known in response to the varying capabilities of children and adults lawyers tend to turn to two alternative approaches.

“Aged based approach”. This takes the view that children under a particular age cannot engage in certain activities or have legal rights or responsibilities imposed upon them.

“Capacity assessment approach”. An assessment is made of the child to determine whether they have sufficient maturity and capacity to make the decision in question. In English law a child, of any age, can give effective consent to receive medical treatment, if a doctor that they have sufficient maturity to understand the issues raised

This paper will explore two issues where it might be claimed that this produces an illogical outcome.

Cases where in relation to the same or a similar issue capacity is sometimes used and sometimes age

Here is an example from English law:

Lucy, aged 14, may have sufficient maturity to consent to be given medication (using a capacity based test), but not old enough to be able to buy alcohol (using an age based test).

If we assume that the medication in question has similar risks to alcohol (or indeed greater) at first this seems odd. There are, however, I suggest two good reasons why the law might use an age based test for alcohol but a capacity based test for medication.

### Clarity

The rule of law requires that the boundaries of criminal law are defined reasonably precisely, so that people can predict with a degree of certainty whether their conduct will be criminal or not. Clear definitions also bring the benefit of efficiency enabling those who administer the law to know whether or not a person should be prosecuted or convicted. Sometimes clarity in the law comes at the cost of nuance. A good example is a speed limit. If the speed limit is set at 30 mph then the driver knows precisely what speed they need to drive at to avoid breaking the law and

the case can be easily dealt with at court. With modern technology the speed of the driver is readily proved and a conviction or acquittal follow with the upmost efficiency. Contrast the alternative, an offence of “travelling at a dangerous speed”. A driver would not know for sure if the speed they thought safe would be accepted as safe by a court. A police officer would have considerable discretion in deciding whom to arrest and court hearings would get bogged down with lengthy disputes over whether or not the speed was dangerous. In the same way in relation to criminal offences using the aged based approach, as compared to capacity assessment approach, offers a clear benefit for potential defendants and to prosecutors.

A particularly important aspect of the ease of prosecution arises in child sex offence. As Baroness Hale in *R v G*<sup>1</sup> explains a fixed age of consent means a child victim is not required to attend court. They can avoid distressing cross-examination as to whether or not they consented. Such advantages may be seen as outweighing any countervailing concerns around the crudeness of the regulation.

Applying this to our scenario, the aged based restriction has a clear advantage for those selling alcohol. In a busy bar or supermarket, they cannot be expected to do more than check the age of the person concerned. Similarly prosecutors have a straightforward task if it is clear alcohol was sold to a person below a certain age.

However, there are much less apparent in the field of a doctor prescribing medication. They do have the time to assess the capacity. The need for a speedy assessment is much weaker, given the nature of a doctor-patient interaction. Further, in a borderline case, we do not want doctors to feel deterred from prescribing medication for fear of a criminal conviction, while we might in the case of a driver unsure of whether they are driving at a safe speed or the bar tender dealing with an apparently underage customer. While it is true this will make prosecutions harder, there may even be some merit in that. We might think it very rare that a doctor giving medication is doing anything wrong and even if they the capacity assessment is wrong that the child will be greatly harmed.

## Consent and the status of the other party

The status of the person interacting with the child can be important in determining whether an age or capacity approach is beneficial. In the context of medical treatment, we have a doctor who is in a good position to determine whether the child has sufficient maturity and understanding can give consent to legal treatment just like an adult. But, the same approach cannot be taken in relation to the bar tender. While a medical professional has the expertise to

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<sup>1</sup> *R v G* [2008] UKHL 37 (HL), para 44.

make the kind of nuanced assessment of the capacity of the person we would want, a bartender does not. Similarly, in relation to sexual encounters, an ordinary person who wants to have sex with a minor has no skills or expertise to make an assessment of their minor partner's capacity. Further, unlike a medical professional, they will be obviously biased in their assessment of capacity. The person at the start of a sexual encounter is unlikely to have the kind of cool detachment necessary to make an full assessment of capacity. While a doctor will have a set of professional guidelines to follow to ensure she has made an appropriate assessment the person wishing to have sex with an underage child has little to go on. The law is, therefore, entitled say to a person who wishes to have sex with an under age person: even if you think your partner is sufficiently mature, you should not go ahead. You are not in a position to make that kind of assessment. But to a doctor: if you wish to give medical treatment to a child and have determined in line with the appropriate guidance the child has capacity to consent: you can go ahead.

So we have then two reasons why it might be appropriate for the state to use a capacity based test for some kinds of cases and an age based test for others: the importance of clarity and the status of the person dealing with the child.

Cases where in relation to the same issue an age based criteria is used for some aspects but not others.

Here is an example from English Law

Rohan and Michael, both aged 12, have a quick consensual kiss behind the school bike sheds during lunchbreak. Both can be convicted of a sexual assault. At age 12 they both are old enough to be held criminally responsible for their act; but too young to be able to give legally effective consent.

If you are old enough to held to account for your actions as a defendant at a criminal trial should you not be old enough to give effective consent if you appear as a victim? Surely once we select an age at which a person is mature enough to be responsible for their acts under criminal law consistency requires that it makes no different whether the person is a defendant or a victim? I suggest two reasons why that is not as illogical as it might at first appear.

### The Challenge of Errors

In deciding what age to select age or capacity four factors are important ones to consider:

What are the percentages of “false positive” errors? In other words, how many people are incorrectly found to capacity when they do not.

What are the percentages of “false negative” errors? In other words, how many people are incorrectly found to lack capacity when they in fact have it.

What are the consequences for the “false positive” group?

What are the consequences for the “false negative” group?

The assessment requires a consideration of the likelihood of these errors and the severity of the consequences. For example, if there are disastrous consequences for the “false positive” group, but the impact on the “false negative” group are not too bad, then we should select an age which has a low number of false positives, even if it has a higher number of false negatives. For example, using age of consent to sex, the harm done to a group assessed as having capacity when in fact they do not is far greater than the group assessed as lacking capacity when in fact they do. The former are put at risk of rape, the latter at risk having to put off lawful sexual experiences for a short time. We should be far happier to err on the side of deeming the competent incompetent than of deeming the incompetent competent. If we were to change the scenario, the balance may come out differently. Supporters of vaccination might, for example, be relatively unconcerned if some children are treated as having capacity due to an age based assessment and given the vaccination (even though they lack capacity in truth). But would be more concerned at children being denied the vaccine because they refuse, and are deemed (wrongly) to have capacity due to the low age used. Similarly, in relation to the example above, we would need to consider the impact of being correctly assessed as criminally responsible on the basis of an age and the impact of being incorrectly assessed. I accept it would be possible to determine that such an assessment would lead to the same age being used for both, but it certainly need not.<sup>2</sup>

### The difference in the moral roles played by consent

In this section I will explore the moral work of a finding that a person gave effective consent and that a person was criminally responsible. The model of consent I will adopt is that propounded by Michelle Madden Dempsey.<sup>3</sup> In outline the approach is as follows: consent is only needed when D’s act would otherwise be wrongfully harming another person’s well-being. You do not need consent if an act causes no harm. So looking at a person’s car, does not require their consent. Consent, therefore, changes an act from a *prima facie* wrong to one that can be justified.

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<sup>2</sup> I certainly should not be taken to agree to the approach taken by English law in these cases.

<sup>3</sup> Michelle Madden Dempsey, ‘Victimless Conduct and the *Volenti* Maxim: How Consent Works’ (2013) 7 Criminal Law and Philosophy 11

Consent provides that justifying reason. It does this by allowing D (if they wish) to assume that if V consents that the act is not all things considered contrary to V's well-being. That is because D is permitted to rely on V's assessment of their own best interests. This is particularly true in the area of sexual relations because D has no reason to think a sexual act will be in V's welfare, except for V's own assessment. We would not think much of D if they said "I think you will greatly benefit from having sex with me and I know better than you about that!" In effect where consent is effective Madden Dempsey claims that D is entitled to say:

This is [V]'s decision. He's an adult and can decide for himself whether he thinks the risk is worth it. In considering what to do, I will assume that his decision is the right one for him. After all, he is in a better position than I to judge his own well-being. And so, I will not take it upon myself to reconsider those reasons. Instead, I will base my decision of whether to [harm] him on the other relevant reasons.<sup>4</sup>

This model provides a helpful explanation of what we are looking for with consent: that it gives D sufficient reason to rely on V's assessment of V's well-being. Where D knows that V's apparent consent is flawed, for example, it is based on a mistake, or is a result of significant pressure, then D cannot rely on it because they cannot take it as an assessment by V of their own wellbeing. Indeed, given that D is due to perform a *prima facie* wrongful act on V, D has a responsibility to ensure that V is in the position to make a proper assessment of their own well-being.

This reveals why the age of consent issue is different from a capacity assessment other contexts, such as age of criminal responsibility. Consent is about whether the child's understanding is sufficient to justify a defendant performing an act which would be otherwise wrongful and criminal. Where the consent is to an act which is beneficial to the child (such as medical treatment) or where the question is around whether a child is responsible for their behaviour (such as cases of criminal responsibility) different issues arise. These are profoundly different and there may be good reasons why they would lead to different assessment of ages and tests for capacity in the area of age of consent and age of criminal responsibility.

So we have, then two good reasons why in relation to the same issue a child may have capacity for some legal purposes, but not others. First, because the consequences of a capacity assessment vary depending on the legal question asked and second because capacity to consent in relation to a harmful act raises very different question to consent in a different context.

## Conclusion

This paper has highlighted some reasons that be used to explain why sometimes the law might use an age based assessment and sometimes a capacity based assessment, even in relation to

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<sup>4</sup> Ibid.

the same kind of decision. It has also sought to explain why even in relation to the same issue a different age might be used in different legal contexts.

This all said, in fact, I am highly sceptical of the claim anyone has capacity, be they child or adult, for the kind of purposes that capacity is used for in the law. Indeed the fact that for children we need to reach for age based claims demonstrates the failures of capacity as a governing concept. I would prefer a legal system based on the fact that no one, of any age, is capacitous or autonomous. One that elevates values of care, dignity and respect, over and above autonomy and consent.<sup>5</sup> However, we are nowhere such a legal system.

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<sup>5</sup> J. Herring, *Vulnerable Adults and the Law* (OUP, 2016); J. Herring, *Law Through the Life Course* (CUP, 2021).

## I've a Feeling We're Not in Addis Anymore: Age Discrimination in Age-Set and Generation-Set Societies\*

Abadir M. Ibrahim

### Introduction

Imagine an expert meeting of human rights specialists drafting what are now the African conventions on the rights of children and that of older persons. Assume that the meeting is taking place in Addis Ababa, although the imagery could have worked as well if it were in Arusha or Nairobi. Then imagine that a couple of indigenous Oromo *Ayyantu* of the Gada system, time reckoning experts and ritual leaders who specialize all things time related, are in attendance. Now presume that the two kinds of experts speak the same language. Then, wait and see what happens.

In all likelihood, not much will happen in terms of conversations between the two groups, even though they both specialize in partially overlapping topics such as defining who is a child or an elder, and the values and norms attached to these categories. It would be nigh impossible for *Ayyantu* not to feel like Dorothy from “The Wizard of Oz” after realizing she was no longer at home. Dorothy describes this strange feeling as being “over the rainbow,” “behind the moon,” and “beyond the rain” to her dog Toto. Trying to follow human rights talk in all its technical glamour must surely feel strange to them. Although the meeting is on topics that are intimately familiar to them, they are also about to embark upon a journey to an alien discursive universe.

Coming from an age and generation set society, the *Ayyantu* would be hard pressed to understand many of the concepts and underlaying assumptions behind the words would end in constituting the treaties on the rights of children or older persons. The underpinning conceptual frameworks behind this language, similar to the human rights experts themselves, come from social settings that are chronological-age-oriented, industrialized, and that are either Western, or globalized and urban. The *Ayyantu* will likely be perplexed by the age-structured polity and particularly by its assignment of chronological numbers to individuals based on when they were born, and then assigning cultural and legal significance to these numbers.

The same scenario would play out if the human rights experts were to join a ritual led by the *Ayyantu* just a kilometer or so outside their meeting hall. Despite their global credentials, the human rights experts are unlikely to understand how his society conceptualizes seemingly universal phenomena such as childhood or aging. The experts, momentarily rendered a little less

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\* A word of thanks you goes to Gerald L. Neuman without whose encouragement, and post facto support I would not have embarked upon or completed this paper. A special thanks also goes to Pierre Lienard for his support in an exercise of wordsmithing and for fashioning the phrase “age-structured polity”.



international by this encounter, will be challenged by the notion of a society in which chronological age is nonexistent or is at least inconsequential. In contrast to their own comparatively hierarchical societies that may be organized based primarily on economic, class, ideological, religious, or ethnolinguistic grounds, the egalitarian system in front of them organizes society primarily along the lines of age groups and generation groups. In the international experts' respective age-structured or chronological-age-oriented societies, one's age group or generation, or for that matter one's chronological age, on the whole, play a minor role. In the society in front of them age and generation principles form the essence of the society.

Something of a mutual unintelligibility between the two types of experts is what this paper uses as starting point to building the contours of a yellow brick road that winds up to a broader argument. A case will be made for a process of reverse-vernacularization<sup>1</sup> which, by centering indigenous African normative constructs at regional and global human rights regimes, aims to protect indigenous groups from structural violence at and through human rights regimes, while also making the African human rights regime more African, and the universal system more universal. The argument in favor of reverse-vernacularization may be infrequent, but it is not new.<sup>2</sup> This and subsequent studies will explore novel paths to that conclusion and hope to provide clarity on the possibility of a reverse-vernacularized human rights system and its potential alternative (non-authoritarian) iterations.

This paper will outline parts of this argument in relation to discrimination on the basis of chronological age in age-set and generation-set societies. It will contend that international and domestic legal norms dealing with age differentiation and discrimination are designed to strive for justice in age-structured polities and may not, therefore, be well suited to age and generation set ones. In addition, at least a preliminary case will be made against the wanton imposition of human rights norms against age and generation set societies.

It is important to note that these arguments assume and will be placed in legally plural setting where international human rights law, Western inspired, and many a time colonially imposed, legal systems, and non-state legal systems share the same social field.<sup>3</sup> The arguments made in this paper, in order to be developed fully, would need to take into account a broader spectrum of

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<sup>1</sup> The word-use was partly inspired by Daniel Huizenga, *The Right to Say No to Imposed Development: Human Rights Vernacularization in Reverse in South Africa*, 13:2 J. Hum. Rts. Prac. 205 (2022).

<sup>2</sup> This notion has been advanced previously as "cross-cultural dialogue", "inter-civilizational norm making", "inclusive universality", "pluralistic process of cultural integration". See respectively Abdullahi Ahmed An-Na'im ed., *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES passim*, esp. 2-29 (University of Pennsylvania Press 1995); James Thou Gathii, *A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias*, 21 Leiden J. Int'l L. 317, 319 (2008); Eva Brems, *HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY* 309-314 (Martinus Nijhoff Pub., 2001); Federico Lenzerini, *THE CULTURALIZATION OF HUMAN RIGHTS LAW* 246 (Oxford University Press, 2014). Also see Makau Mutua, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE* 73 (University of Pennsylvania Press, 2002).

<sup>3</sup> Generally, Sally Engle Merry, *Legal Pluralism*, 22 L. & Soc'y Rev. 869 (1988); relying on notions of legal pluralism and semiautonomous social orders developed by Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 L. & Soc'y Rev. 719 (1973).

factors such as ecological, geographic, political, and economic settings in which international, state, and indigenous normative systems interact. Although these broader factors are not disregarded, they are held *ceteris paribus*, in order to focus on age discrimination and how it may interact with age and generation set societies. While the focus on age and generation set societies has an independent value in highlighting unique or additional aspects that may not apply to age-structured indigenous polities, future iterations or expansions of this study will involve a complication of the setting including by problematizing the brief archetypal representations of the relevant societies, opening up the analysis to take account of concrete lived experiences in contemporary indigenous spaces, and introducing other factors including by going beyond the confines of age discrimination.

### **Age and Generation Set Societies: An Initial Encounter**

Assuming a readership that is from, and that is familiar with age-structured or chronological-age-oriented societies, the paper will first provide a brief overview of age-set and generation-set societies.

### **Age-Set Societies – Three Examples**

Age-set societies, broadly speaking, organize society by grouping members, usually male members, of society together as sets of contiguous age groups and stratify them in accordance with these groups so that the political, social, economic position of each individual member is defined primarily or significantly by their membership to this age group. In age-set societies, such as indigenous Mursi, Nuer and Oromo communities inhabiting Ethiopia, Northern Kenya and South Sudan, chronological age, or mental or physical maturity, are not paramount in determining age-related social identity, status, or role.<sup>4</sup> Individuals join into an age-set through extensive collective initiation. For the Mursi these take place roughly every 15 years with some age-grade changes taking place in shorter intervals. The Nuer, on the other hand, have periods of about 6 years that are open for initiation into one age-set, followed by 4 “closed” years which separate both initiation periods and age-sets. For the Oromo initiations take place every 8 years.

Once an age-set is formed, it will constitute a cohort or an incorporated-set of individuals whose social identity, status, and role are determined by the age-grade into which the group is initiated. This means that individuals are bound together and will remain members of an age-set for life, while the cohort of individuals that belong to that age-set will, in a manner of speaking, “graduate” together from one age-grade to another. For the Mursi and Nuer, the age-grade the cohort happens to be at any one time determines the group’s legal capacity (for ex. to own cattle, to marry, to vote, to speak in public assemblies), socioeconomic roles (nursing sheep and goats,

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<sup>4</sup> David Turton, ‘Territorial Organisation and Age among the Mursi’ in P.T.W. Baxter & Uri Almagor eds., **‘AGE, GENERATION AND TIME: SOME FEATURES OF EAST AFRICAN AGE ORGANISATIONS** 95, 103-109 (Hurst, London 1978); E. E. Evans-Pritchard, *The Nuer: Age-Sets*, 19 Sudan Notes and Records 233 *passim* (1936); Asmarom Legesse, **GADA: THREE APPROACHES TO THE STUDY OF AFRICAN SOCIETY** 50, *passim* (New York, Macmillan Pub. Co, Inc. 1973).

herding adult cattle, fighting wars), and even the part of the village or homestead they are allowed to reside in.

Although individuals initiated into the same age-set fall within a contiguous chronological age range, it is the age-grade to which a cohort belongs that is the most important determinant of the social identity, status, and role. This means, first of all, that there is always going to be a chronological age difference between individuals who are initiated into an age-set with up to about either 3 to 4 or 15, 10 and 8 years, for the Mursi, Nuer and Oromo respectively.<sup>5</sup> Second, the period for a cohort's initiation into an age-grade, and therefore its ability to enter the next stages of individual and social life, can be extended where initiations are disrupted by disagreements within that society, war, natural disasters, etc. Third, the age gap can also be multiplied in situations where, for example, an individual misses an initiation ceremony and has to wait for the next round of initiations. These underscore how the whole notion of counting the age of individuals in years and ascribing social values to the number of years an individual has lived, can be strange to some societies.

Despite substantial differences between age-set and chronological-age-oriented systems, the two also share broad affinities in that both correlate with and define shifts in physiological, social, and economic roles and relationships. For instance, for both the Nuer and Mursi, initiation from childhood to adulthood begins when age-set members are roughly around their mid-to-late teens at which point they would be launched from homestead roles to independently herding cattle or joining war efforts. Although marriageability is also attained at this time, Mursi and Nuer do not marry until they are able to accumulate enough bridewealth and find willing mates and in-laws. One could also see<sup>6</sup> some similarity between chronological-age-oriented and age-set societies in the starkness of the passage from childhood to adulthood. Although the transformations are loosely linked in time with physiological development, just as one suddenly becomes an adult at midnight at age 18, one comes out of initiation rituals with radically transformed social and legal roles.

### **Generation-Set Societies – The Gada System**

The picture gets more complicated with generation-set systems that organize their societies on the basis of genealogical, but not necessarily genetic, relationships along the paternal line.<sup>7</sup> The

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<sup>5</sup> See *supra* note 4, Turton, at 107, Evans-Pritchard, at 237, and Legesse, at 60 (however note that, although Legesse reports an eight-year gap between age-sets, this could be partially accidental since entry into the age-set structures of the Borana is not strictly tied to initiation ceremonies, see *id.*, at 57, 59). Generally, also see Anne Foner and David Kertzer, *Transitions Over the Life Course: Lessons from Age-Set Societies*, 83 *Ame. J. Soc.* 1081, 1090-92 (1978).

<sup>6</sup> Note that the Mursi also enter an age-grade which will require them to reside in an age-grade encampment for at least the duration of the age-grade. After they transition to the next age-grade they will remain in the encampment until they marry which will depend on their ability to collect enough wealthy in a process which would start upon entering the previous grade.

<sup>7</sup> It has to be noted here that the notions of genealogy, heredity, paternity, etc. do not necessarily assume that there are genetic or biological relationships between family-members as these societies formalize polygynous, polyamorous, and ciscisbean relationships in addition to adoptive parenting.

*Gada* system of the Oromo, on top of the age-set *Hariyya* system, incorporates eleven generation-grades and corresponding rites of passage which determine the social roles of the members of generation-sets.<sup>8</sup> It is important to note that although the age and generation systems intertwine, these are two separate institutions with distinct logics and ceremonies, and which define different aspects of an individual's social roles and levy separate demands for the time and loyalty of one individual.

As is the case with the Mursi and Nuer, individuals in Oromo communities are initiated into an age-set in their mid-to-late teens together with their near age peers of about 8 years, and they remain in and identify with that age-set for the remainder of their lives. Since age-set initiations are not cyclical, there is no upper limit on the number of age-sets. Thus, if a group of individuals is initiated at age 16 and members of that age-set are the oldest individuals in the community at age 96, there will be 11 age sets at one time. The number of age-sets will be 12 when that group lives past 104.

Unlike for the Mursi and Nuer, however, the Oromo age-set system is not as prominent in defining social roles. It is the generation-set system, and more specifically the generation-grade to which a generation-set belongs, that determines the most important social roles.

With a great degree of oversimplification, and assuming that a child is born into the first or “youngest” generation-grade, the age-set that falls in the first generation-grade will spend 8 years inside their mothers' huts. In part because only women are allowed to build and live in the home, with their husbands or other male partners only residing in their partners' huts, all children in the “youngest” generation-grade are assigned a female gender identity and to perform feminine identities and social roles.<sup>9</sup> In the second generation-grade the set moves out of the hut to reside in the general vicinity of the kraal, starts herding small livestock, and its gender role also shifts to a male one. As the cohort progresses through more generation-grades, members of the group live farther and farther from their hut, eventually leaving their family's compound, and then village. The generation-set members also assume more and more strenuous economic roles, fight wars, and would eventually establish their own households and their own legislative council by the time they have reached the fifth generation-grade. When the set reaches the sixth generation-grade, the set's legislative council takes on the most important legislative roles and elects individuals who will wield executive power. Over the next grades the generation-set's council takes advisory roles, becoming less and less actively involved in politics. When the set reaches

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<sup>8</sup> Note that the Oromo are the largest ethno-linguistic group in Ethiopia and the indigenous system described here is both temporally and geographically spread. One should thus expect both variance and continuity in terms of the number of generation grades, their subdivisions, their naming, etc. This study relies primarily on Asmarom Legesse's account of the Borana society. Future iterations of this work will either account for these variances or simply focus on the Borana or one specific locale and time. For an account of some of these differences see Legesse, *supra* note 4, at 124-25, 254-58.

<sup>9</sup> For gender identity and role changes effected by membership to the *daballe* generation-grade see Legesse, *supra* note 4, at 52-54.

the eleventh grade, the grade of political retirement, the set ceases to meet as an institutionalized council and its members assume ritual spiritual and ceremonial roles.

The complexity of generation-set system is amplified by the fact that it is also what Asmarom Legesse describes as a “theoretical life cycle”.<sup>10</sup> Whereas we assumed above that the cycle began at birth, this is not always the case. Contrary to the age-set system to which one enters at a young age, individuals are born into a generation-grade that is 5 generations removed from that of their fathers’. This means that children who are born at the same time are almost invariably going to be born into different grades and a significant chronological age diversity will exist within generation-sets.

The operation of the generation-set system can thus lead to situations that seem paradoxical to outsiders.<sup>11</sup> For example, a 60-year-old man who belongs to a “younger” generation-grade could refer to himself as a child and show reverence to his elder who is only 10 years old if the former than the later.<sup>12</sup> It is also not uncommon for one to be able to marry (but not consummate) at infancy, vote in legislative councils before puberty, and face political retirement at puberty. Whereas the intricacies of the system as a whole and how it manages such paradoxes is beyond the scope of this study, it is apt to note that part of the explanation lays in its interactions between the age and generation systems. For example, although a prepubescent can vote in legislative councils, sometimes while too young to do so without the help of an adult, political office is reserved for members of the oldest age-set within the same bodies.<sup>13</sup> In addition to forming coalitions within and among age-sets to influence the decisions generation-set institutions, age-set groups that are composed of members who are of fighting age also elect leaders who direct the operation of wars.

The possibility of having two distinct loyalties, identities and social roles based on one’s belonging to different age and generation sets, in addition to having additional roles connected with the physiological-developmental aspects of chronological age,<sup>14</sup> are unintelligible to legal and normative systems on which the modern human rights system is based. In addition to these distinct features, each age and/or generation-set society is also built on unique sets of local ecological, geographical, and economic settings; relationships of affinity; lineage groups (for ex. clan, moity, nuclear/extended family), hereditary institutions (ex. chiefs, leaders of rites or initiations), religious-spiritual and ritual groupings, and other formal and informal or *ad hoc*

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<sup>10</sup> Legesse, *supra* note 4, at 52; also generally David I. Kertzer, *Theoretical Developments in the Study of Age-Group Systems*, 5 *Ame. Ethnologist* 368, 372-73 (1978).

<sup>11</sup> Alternatively, one can be unable to marry as an adult, though maintaining extramarital and *cicisbean* relations. Legesse, *id.*, at 51-52, 132-34; Also see, Foner and Kertzer, *supra* note 5, at 1090.

<sup>12</sup> Tadesse Jaleta Jirata, *Intergenerational Continuity and Change in Conceptualization of the "Child" Among Guji People of Ethiopia*, 13 *J. Intergenerational Rel.* 104, *passim* (2015).

<sup>13</sup> Legesse, *id.*, at 76-77.

<sup>14</sup> For ex., the consummation of marriage, engagement in extramarital and *cicisbean* relationships, the ability to hunt or engage in war.

relationships such as friendships, alliances, or professional and trade networks that sometimes cross ethnic and kin lines.<sup>15</sup> Although the age and generation set institutions discussed in this section are almost exclusively male institutions, women's roles, and in some situations the roles of women-specific institutions, add another layer to the complexity.

### **Disturbing the other side of the Moon: Incompatibility and Mutual Unintelligibility**

The social norms that come out of the complex social structures of the age and generation systems raise quite a number of human rights issues and challenges.<sup>16</sup> Putting aside this long list of issues and focusing only on chronological age discrimination, one can conclude that the age-set systems of the Mursi, Nuer and Oromo, and the generation-set system of the Oromo when in alignment with the age-set system, can be seen as inherently discriminatory. One could contend that the formalized, and in theory inflexible, stratification of society based on the age principle is discriminatory on the basis of age.

Short of rejecting the entire social structure as discriminatory, one could enumerate examples of how the operation of important aspects of the age-grade system can lead to age discrimination. One can, for example, ask whether a prohibition excluding members of an age group from farming, nursing minor livestock, milking cows, or even drinking milk, passes tests related to legitimacy, effectiveness, necessity, or proportionality. Furthermore, what legitimate interest would be served by forcing male children (alongside some adults) to assume a female gender? How about expelling entire age groups out of their villages and homes and forcing them to reside in the wilderness or in a separate village for a couple of years at a time? What about prohibiting certain age groups from being able to marry, to have female children, or have any children going as far as forcing them to give up their children or committing infanticide if they violate the prohibition? Even if one can propose legitimate reasons for these practices, would there be less drastic ways of achieving those legitimate goals? Can exclusions of the majority or a significantly large proportion of a society from speaking or voting in political assemblies, or running for non-hereditary leadership positions, or the forced retirement of people in their 50s, based on "reasonable and objective"<sup>17</sup> criteria? Would the non-existence of merits-based exceptions to the age principle, or of social policy principles such that that of equality, non-discrimination, the best interests of the child, or prioritization of disadvantaged groups be

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<sup>15</sup> While these relationships are covered by Legesse, *supra* note 4, at *passim*, in relation to Borana society, see Wolde Gossa Tadesse, *Entering Cattle Gates: Trade, Bond Friendship, and Group Interdependence*, 7 Ne. Afr. Stud. 119, *passim* (2000) for a discussion of stable trading networks that cross international borders and (Borana and other) ethnic lines.

<sup>16</sup> These can range from whether the indigenous legal systems violate a plethora of due process rights and the rights of women (for ex., bridal abduction, female infanticide) or children (for ex., bodily scarring, circumcision and infanticide). Another example that can raise structural issues is that both age and generation systems are exclusively male institutions wherein women's secondary roles are defined around or in relation to men.

<sup>17</sup> For ex., *John K. Love et al. v. Australia*, Comm' No. 983/2001, Pars. 8.2-8.3 (2003); *Canessa Albareda et al. v. Uruguay*, Comm's Nos. 1637/2007, 1757/2008 and 1765/2008, Pars. 9.2 - 9.3 (2011).



overlying factors that prevent these societies from ensuring that their norms are interpreted in a way that is likely to discriminate based on age-equivalent criteria?

If the answer to these questions, and other questions related to other rights, leads to the conclusion that age-set norms violate human rights law, does that mean that states then have duty to protect and enforce rights? This is not a question that can, due to its breadth, be answered here (if at all). ... I will make a case for caution against unhindered imposition of international human rights and state law on age and generation set societies.

The problem with the questions raised above is that they are discussions about what is behind the moon as far as age and generation set societies are concerned. For instance, if not for much hypothesizing, one quickly hits a wall of non-applicability and partial unintelligibility when trying to apply human rights norms to age-set societies. The historical development, application and overall understanding of the human rights rules typically assume modern school systems, public education, a civil service, juvenile justice systems, brightline rules, sentencing guidelines, industrial job markets, public housing, social security and pensions, retirement homes, etc., and are exclusively understood on the basis of chronological age.<sup>18</sup> The generation-set system of the Oromo is, simply put, unintelligible to the human rights system where the generational principle's "theoretical life cycle" does not correspond with the physiological development of generation-set members.

Knowledge of the complex social relationships, cognitive structures, and economic relationships that are built on age and generation principles makes at least a partial or preliminary case for the non-applicability of international human rights and state law norms, especially to the extent that they address social issues peculiar to age-structured polities. Fortes and Evans-Pritchard,<sup>19</sup> and others who came after them,<sup>20</sup> have demonstrated age-set societies, employing "segmentary principles", institutions, norms and mythologies, achieve a balance of forces or an equilibrium between rights, duties, responsibilities, privileges, and allegiances, Asmarom Legesse describes how "sectional principles" operate in the generation-set system which disburses political, procedural, executive and ritual power among different generations, therefore, creating a balance

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<sup>18</sup> For ex. see the Committee on Economic, Social and Cultural Rights' General Comment No. 6, par. 22; General Comment No. 18, par. 16; General Comment No. 20, par. 29. See also Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari, Basic Principles and Guidelines on Development-Based Evictions and Displacement, A/HRC/4/18, Annex I, pars. 31-33 (2007).

<sup>19</sup> M. Fortes and E. E. Evans-Pritchard, "Introduction" in M. Fortes and E. E. Evans-Pritchard eds., **AFRICAN POLITICAL SYSTEMS** 11-14, 19-20, and accompanying chapters (Oxford Univ. Press 1940).

<sup>20</sup> Aidan William Southall, **ALUR SOCIETY: A STUDY IN PROCESSES AND TYPES OF DOMINATION** 249-254 (Lit Verlag Muster, 2004) (describing how different age set and segmental societies can be organized in diverse ways including ways that merge the horizons of Group A and B political arrangements of Fortes and Evans-Pritchard thus for example showing how monarchical/hierarchical structures can merge with segmentary ones); Pierre Lienard, *Age Grouping and Social Complexity*, 57 *Current Anthropology* 105 (2016) (showing how age-set systems neutralize nepotistic tendencies in order to achieve broader social collaboration but without establishing formal institutions). For an overview of theories explaining why or how age-set societies evolved, see Madeline Lattman Ritter, *The Conditions Favoring Age-Set Organization*, 36 *J. Anthropol. Res.* 143 (1980).



through competition, functional differentiation and interdependence.<sup>21</sup> Age and generation systems can thus be seen as alternative forms of political integration that evolved in specific social, demographic, economic, and ecological contexts, and that have developed unique systems of “checks and balances” responding to patterns of power relations within these systems.

The imposition of human rights without an understanding of, or concern for, whether or how such action will disrupt pre-existing political and social equilibria is in the least irresponsible. There is, for example, no reason to believe that such disruptions, especially when done in the name of individual rights, will have a net short- or long-term positive effect on individual rights. Given that there is little evidence for the effectiveness of both older and contemporary law reform efforts,<sup>22</sup> even if one were to accept the argument that disruptions of indigenous societies can be justified on the grounds of protecting individual rights – the burden of production and proof that such interventions can have a net positive effect on individual rights lies with the proponents of disruption.

In addition, coming from the other side of the moon to disrupt a social order, for the presumed benefit of the mostly unwillingly disrupted, is not only a violation of non-discrimination on the basis of cultural origin and the right to self-determination, but sounds and feels a lot like the institution of colonialism that led to the development of this right in the first place. Putting aside the impact of colonialism on the abysmal human rights conditions in contemporary postcolonial polities, wishing a condition of coloniality on indigenous communities in today’s decolonial moment is simply in bad taste. This is especially relevant to Africa where the societies discussed in the paper reside and whose regional system of rights recognizes an extensive list of peoples’ rights and prides itself for being an anti-colonial document and a receptacle of Africa’s traditional legacies.

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<sup>21</sup> Legesse, *supra* note 4, at 40-43, 116-17, 229-31.

<sup>22</sup> Julio Faundez, *The Rule of Law Enterprise: Promoting a Dialogue between Practitioners and Academics*, 12 *Democratization* 567, 569-72 (2005); Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge*, Working Papers No. 34 (Carnegie Endowment for International Peace 2003); Livingston Armytage, *REFORMING JUSTICE: A JOURNEY TO FAIRNESS IN ASIA 2* (Cambridge Univ. Press 2012); Roger Cotterrell, ‘Is There a Logic of Legal Transplants?’ in David Nelken & Johannes Feest (eds.), *ADAPTING LEGAL CULTURES* (Hart Pub. 2001); Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 *Mod. L. Rev.* 11, 12 (1998); Bryant G. Garth, *Building Strong and Independent Judiciaries through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results*, 52 *DePaul L. Rev.* 383 (2002); Stephen Holmes, *Can Foreign Aid Promote the Rule of Law?* 8 *E. Eur. Const. Rev.* 68 (1999). See also Linn Hammergren, *Envisioning Reform: Conceptual and Practical Obstacles to Improving Judicial Performance in Latin America* 2-22 (Penn. State Univ. Press 2007). For the effectiveness of legal transplantation among Western states see Pierre Legrand, *The Impossibility of Legal Transplants*, 4 *Maastricht J. Eur. & Comp. L.* 111, 115 (1997).

## More questions than answers? Some thoughts on age-based discrimination among and against children

*Benyam Dawit Mezmur (October 2022 draft v1)*

This short essay explores three intertwined aspects of article 2 of the Convention on the Rights of the Child (CRC) in so far as it relates to age discrimination both among and against children. The essay begins by offering some preliminary observations on article 2 and age discrimination. This is followed by a discussion of what the role of the principle of the best interests of the child should be in instances of age-based discrimination against children. The third part examines the question of whether there are certain fields of activity where a higher standard of justification should be required in case of discrimination based on a child's age. This essay relies in particular on the work of the UN Committee on the Rights of the Child (CRC Committee), the body that monitors the implementation of the Convention and its Optional Protocols.<sup>1</sup> For present purposes, a child is any person under the age of 18 years.

I. Let me begin with some brief observations about article 2 of the CRC and age-based discrimination. Age is central to the CRC: the very scope of its application is determined on the basis of age.<sup>2</sup> However, article 2 does not explicitly mention 'age' as a prohibited ground for discrimination. This should come as no surprise, and for a number of reasons. I will limit myself to three such reasons.

First, the instruments that predate the CRC and from which article 2 draws its inspiration and wording<sup>3</sup> do not mention age. Similarly, among the core post-CRC UN human rights instruments,<sup>4</sup> it is only the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families that does so.<sup>5</sup>

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<sup>1</sup> Optional Protocol on the Involvement of Children in Armed Conflict; the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornograph; and the Optional Protocol on a Communications Procedure.

<sup>2</sup> Article 1 of the Convention.

<sup>3</sup> In this regard, the Universal Declaration of Human Rights (UDHR) is primary. The 1924 Geneva Declaration of the Rights of the Child and 1959 Declaration of the Rights of the Child are also critical; neither do instruments such as the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) contain an explicit reference to age in their anti-discrimination provisions.

<sup>4</sup> It is worth mentioning that article 11(e) of the Convention on the Elimination of Discrimination against Women makes reference to 'old age' and prohibits discrimination against women in the field of social security.

<sup>5</sup> Adopted in 1990 and coming into force in 2003. Article 7 provides that 'States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status'.

Secondly, the core argument that was used to justify the need to hold a discussion on the ‘Question of a Convention on the Rights of the Child’ (as the agenda item was referred to at the time)<sup>6</sup> was children’s ‘immaturity’ and their need for ‘special care’. Therefore, it is perhaps not off mark to argue that the Convention draws most of its moral and legal standing on the basis of a paragraph in its Preamble which indicates that ‘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’. This probably also explains why the *travaux préparatoires* show that while there were a few attempts to delete from, and add to, the prohibited grounds in article 2, the question of ‘age’ was not directly part of those discussions. The main points of debate on article 2 concerned discrimination against non-marital children and on the basis of ‘immigration status’.<sup>7</sup>

Thirdly, such an explicit inclusion could have held negative practical consequences for the future of the Convention. While this is perhaps speculative, it could be argued that, had the Convention explicitly included ‘age’ as a prohibited ground and such an inclusion were interpreted as somehow disallowing discriminatory treatment of children as compared to adults (very little chance of such an interpretation), article 2 would have been exposed to numerous reservations and, indeed, the prospect of the Convention’s coming into force, let alone achieving universal reach, would have been undermined. These considerations appear to have been a major influence on the trajectory of the CRC Committee’s work on the topic. For example, while the Committee asks states to include ‘specific data and statistics, disaggregated by age’<sup>8</sup> in their reports, states (as well as the CRC Committee) have interpreted this almost exclusively to mean disaggregated data on different age groups of children<sup>9</sup> rather as including comparative data on children versus adults. Though it is true that children are disproportionately represented in data showing the number of persons living in poverty or affected by violence, and the like, the work of the CRC Committee has hardly catered for such eventualities. Moreover, with the exception of few outliers, such as Australia, Finland, South Africa and Sweden, there is very little state practice in which children are protected from age-based discrimination by equality or anti-age discrimination legislation.

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<sup>6</sup> The 1979 draft resolution proposed by Poland on the ‘question of a Convention on the Rights of the Child’ underscored the need to ‘strengthen the comprehensive care and well-being of children all over the world’. See United Nations Economic and Social Council E/CIM.4/L.1471 (12 March 1979).

<sup>7</sup> E Sutherland ‘Article 2 of the Convention on the Rights of the Child: Non-discrimination and children’s rights’ (2019) 24-25 in M. Skivenes and K. H. Søvig (eds.), *Child Rights and International Discrimination Law: Implementing Article 2 of the United Nations Convention on the Rights of the Child* 24-25.

<sup>8</sup> CRC Committee, Guidelines on Periodic State Party Reports (3 March 2015), 9CRC/C/58/Rev.3), para 14.

<sup>9</sup> This included the number of children in domestic, intercountry and *kafala* adoption programmes disaggregated by age; data disaggregated by age on the number of children who entered or left the country for the purpose of family reunification; incarcerated parents and children living in prison with their mothers and the average age of those children; the number of persons under 18 years of age who have been arrested by the police due to an alleged conflict with the law; the number of persons under 18 held in police stations or pretrial detention; the number of reported cases of abuse and maltreatment of persons under 18 during their arrest and detention/imprisonment; and the number of students attending military schools and the minimum age of admission.

II. This raises the question what the role of the principle of the best interests of the child should play in instances of age-based discrimination *against* children. A sub-question that could be added is this: Given that article 2 does not explicitly mention age, does this create a protection gap that the best-interests principle is not well suited to addressing in instances of age-based discrimination against children?

Alston identifies two roles that the best-interests principle plays in the CRC. First, it has been credited as a tool that can ‘support, justify or clarify a particular approach to issues arising under the Convention’.<sup>10</sup> Secondly, it is said to be a ‘mediating principle which can assist in resolving conflicts between different rights where these arise within the overall framework of the Convention’.<sup>11</sup> A third role, it may be added, is to serve as a ‘gap-filling’ provision when lacunae are identified.<sup>12</sup> Similarly, the CRC Committee has underscored that ‘the best interests of the child’ has three aspects: it is a substantive right; an interpretative legal principle; and a rule of procedure which subjects decision-making that affects children to an evaluation in regard to their best interests.<sup>13</sup> Paragraph (1) of article 3 of the CRC enjoins that the best-interests principle be applied ‘in all actions concerning children’. This oft-quoted phrase is intended to be interpreted broadly so as to encompass any action that directly or indirectly affects children.<sup>14</sup> As Freeman observes, ‘[t]he decision to build a new major road concerns children’.<sup>15</sup> The decision to go to war, decisions taken in relation to global warming, and the passing of laws about cloning, too, are material to children’s interests.<sup>16</sup> Moreover, surely, the obligation to make the child’s best interests a primary consideration is a high enough threshold for protection from various forms of rights violations.<sup>17</sup>

This broad approach to the best-interests principle – which can be contrasted with the scope of application of article 2, which has an in-built limitation – should make it appealing in addressing discrimination

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<sup>10</sup> P Alston, (1994) “The best interests principle: Towards a reconciliation of culture and human rights” 8 *The International Journal of Law, Policy and the Family* 15-16.

<sup>11</sup> *Ibid.*, 16.

<sup>12</sup> M Freeman, (2007) “Article 3: The best interests of the child” in A Alen, *et al.* (eds.) *A commentary on the United Nations Convention on the Rights of the Child* (Leiden/Boston: Martinus Nijhoff Publishers) 32 citing S Parker, (1994) “The best interests of the child: Principles and problems” 8 *International Journal of Law and the Family* 26.

<sup>13</sup> CRC Committee, 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, para. 1) (CRC/C/GC/14), para 6.

<sup>14</sup> During the drafting of the CRC, an early draft of article 3 read ‘[i]n all official actions concerning children’, but the word ‘official’ was dropped to broaden the scope of the provision.

<sup>15</sup> Freeman, (2007), 46.

<sup>16</sup> *Ibid.*

<sup>17</sup> The prominent role of the best interests of the child plays in the Optional Protocol on a Communications Procedure is also apparent. The table of lists of pending cases which is publicly shared by the CRC Committee shows that no less than 75% of cases invoke the best-interests-of-the-child principle, along with other provisions of the Convention. In fact, even in rare instances where discrimination is invoked (and no case to date invokes age-based discrimination) – for example, in *Y.B. and N.S. v Belgium*, involving the denial of humanitarian visa to child C.E. taken in under *kafala* (a fostering arrangement) by a Belgian-Moroccan couple and underscoring discrimination on the basis of ethnicity – the submission by the complainants, as well as the reasoning for the CRC Committee’s decision, relies predominantly on ‘best interests’.

against children on the basis of age. It is also worth recalling that the obligation of states under article 2 is to not discriminate in respect of the ‘the rights recognized in the present Convention’. There are multiple rights that are not recognised in the Convention – especially political rights, including voting – and to which article 2 is not applicable. While the ICCPR in article 26 states that ‘the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination ...’ and indicates that this does not apply only to the rights recognised in the Covenant, a similar provision is not present in the CRC. It should also be underscored that ‘of any kind’ in article 2 is not to be read in isolation to mean ‘every possible’ ground of differentiation, and that it should be read with the other specified characteristics, such as ‘religion’ or ‘other status’.<sup>18</sup> In addition, since a good deal of age-based discrimination against children takes place through the actions of parents or caregivers, it is very useful that the requirement exists that parents, when exercising their responsibilities, should act in the best interests of the child, which, under article 18(1) of the CRC, ‘will be their basic concern’.

The jurisprudence of the CRC Committee contains multiple examples of discrimination against children on the basis of age. These relate, inter alia, to unequal access to courts; not being able to undergo any medical treatment without parental consent; children who are parents and unmarried not being able to acknowledge their own child or apply for documents such as a birth certificate; having one’s behaviour criminalised through status offences; and being subjected to corporal punishment. The best-interests principle can be, and has been, used to address these and other forms of age-based discrimination against children.

Let me dwell on corporal punishment for a moment. The widespread and traditional acceptance of corporal punishment is in part an indication of its nature as structural discrimination – which by definition is discrimination which ‘is woven into the ways our societies function, and [that] operates through norms, routines, patterns of attitudes and behaviour that create obstacles in achieving equal opportunities and real equality’.<sup>19</sup> To date, the number of countries to have banned corporal punishment in all settings remains below 60. The practice is so systemic and structural that there still are a number of countries that, in law, policy, or practice, maintain that some level of ‘moderate or reasonable’ corporal punishment could be in the best interests of the child.<sup>20</sup> It can be argued that whether it is in rejecting this self-contradictory argument in respect of ‘moderate/reasonable’ chastisement, differentiating between the use of force to protect a child from deliberate and punitive use of force to cause some degree of pain and humiliation, and ensuring that the upholding of the principle of equal protection of children and adults from assault does not lead to unnecessary prosecution of parents/care givers, the best interests of the child offers enough flexibility and force to identify violations and call for reform.

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<sup>18</sup> B Abramson, (2008) “Article 2: The right of non-discrimination” in A Alen, *et al.* (eds.) *A commentary on the United Nations Convention on the Rights of the Child* (Leiden/ Boston: Martinus Nijhoff Publishers) 28.

<sup>19</sup> <https://www.coe.int/en/web/gender-matters/intersectionality-and-multiple-discrimination>.

<sup>20</sup> See CRC Committee, General Comment No. 8 ‘The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment’ (inter alia, arts. 19; 28, para 2 and 37) (2006) para 26.

The work of the CRC Committee has shown that age discrimination against children (group-based discrimination) is often compounded with other grounds of discrimination, such as disability and gender, in what is known as ‘intersectional discrimination’. So the issue of intersectionality is only too prevalent in the context of children and discrimination. As Zermatten puts it, ‘children suffer a double violation of their rights: their rights are violated because they are children, and again because they are black, or migrants, Roma, disabled, girls, soldiers, and the list goes on and on’.<sup>21</sup>

As such, given the relatively wide scope offered by article 3 on best interests, and because of states’ general receptiveness to this principle, it is worth considering if multiple discrimination that involves age is better addressed through the concept of discrimination or through that of best interests. For example, are there examples which show that remedies are more accessible and, when provided, more comprehensive, if age-based discrimination against children is addressed through the best-interests principle? Does the requirement, within the framework of the best interests of the child, that states undertake child-rights impact assessments (CRIAs) help to better predict the impact of any proposed policy, legislation, regulation, budget or other administrative decision which constitutes age-based discrimination against children?

III. It is not clear if there are certain fields of activity where a higher standard of justification should be required to evaluate claims of discrimination based on a child’s age.

Let me start with ‘protection rights’. For the sake of convenience, some child-rights commentators describe the rights in the CRC as consisting of the ‘three P’s’: ‘protection,’ ‘provision,’ and ‘participation’.<sup>22</sup> Protection rights relate to violence against children, exploitation, abuse, and so on. Participation rights include the right to freedom of expression, freedom of association, and the right to information.<sup>23</sup> Provision rights include the right to education and the right to health.

While classifying rights along the lines of these categories has its own limitations (for example, overlaps can and do occur), some basis for the classification can be found in the text of the Convention itself. For example, under article 19(1), states have the obligation ‘to protect the child from all forms of physical or mental violence, injury or abuse’; under article 32, ‘the right of the child to be protected from

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<sup>21</sup> Abramson (2008), x.

<sup>22</sup> See N Cantwell, (1992) “The origins, development and significance of the United Nations Convention on the Rights of the Child” in Detrick, S. (ed.) *The United Nations Convention on the Rights of the Child: A guide to the “Travaux Préparatoires”* (Dordrecht: Martinus Nijhoff Publishers) 27.

<sup>23</sup> The following are some examples in this category: lodging complaints and seeking redress before a court without parental consent; participating in administrative and judicial proceedings affecting the child; giving consent to change of identity including change of name; having access to information concerning the child’s biological family; legal capacity to inherit, conduct property transactions, and create and join associations; and choosing a religion or attending religious school teaching.

economic exploitation’ is recognised; article 33 requires states ‘to protect children from the illicit use of narcotic drugs and psychotropic substances’. Articles 34 on sexual exploitation, 35 on abduction, and 36 on other forms of exploitation have similar connotations. In respect to the right to privacy, in terms of article 16(2), the ‘child has the right to the protection of the law against ... interference or attacks...’.

It could be argued that the jurisprudence of the CRC Committee has established that, in general, minimum ages that are protective should be set as high as possible.<sup>24</sup> On the other hand, those ages that pertain to the child’s autonomy demand a more flexible system, one sensitive to the needs of the individual child.<sup>25</sup> Sensitivity to the individual child’s needs bodes well for the principle of ‘the evolving capacities of the child’ in the CRC.<sup>26</sup>

The majority of the provisions in the CRC that explicitly provide a specific minimum age or refer explicitly to the need for such an age threshold relate to protection rights. Two good examples are the non-applicability to persons below the age of 18 years of the death penalty and life imprisonment without the possibility of release. The infamous article 38(2) and (3) put the minimum age for taking direct part in hostilities and military recruitment at 15 years, respectively. The latter further provides that in recruiting those aged 15 to 18 years, states ‘shall endeavour to give priority to those who are the oldest’. Moreover, apart from well-known instances such as the obligation to provide for a minimum age of employment (article 32) and the need for a minimum age of criminal responsibility (article 40), treatment in the context of deprivation of liberty has to take into account ‘the needs of persons of his or her age’ (article 37(c)). Even in article 31(1), which seems to combine protection and participation rights, the right to engage in play and recreational activities has to be ‘appropriate to the age of the child’.

As regards minimum ages that are set at 18 (non-application of the death penalty or non-involvement in hazardous work, for example), there appears to be no room whatsoever to justify discrimination and lower such a minimum age limit. In other contexts, most of the standards seem to permit no flexibility to take into account the maturity of the child to justify operating below a minimum age. For example, a 14-year-old’s high maturity and evolving capacity (article 5) should not be grounds on which a state can justify recruiting him or her into the military. The same is true in complying with the minimum age of criminal responsibility, which the CRC Committee has recommended should be at least 14 years. Consideration of age along with maturity and evolving capacity on a case-by-case basis could allow for a little flexibility, for example in the context of deprivation of liberty. Even then, a state should utilise such leeway in a restrictive manner.

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<sup>24</sup> R Hodgkin, and P Newell, (2007) *Implementation handbook for the Convention on the Rights of the Child* (New York: UNICEF) 5. These include ages for protecting children from criminalisation and involvement in armed conflict, child labour and similar situations.

<sup>25</sup> Hodgkin and Newell (2007), 5. Importantly, some issues, such as the minimum age for filing a complaint in court or of sexual consent, could be cross-cutting issues falling in both protective and autonomy-related minimum ages.

<sup>26</sup> Article 5 of the CRC.



So, it is worth going on to determine whether, as far as the majority of protection rights of children are concerned, the response to the question ‘Should the standards used to evaluate the claims of discrimination based on age vary depending on the field(s) of activity to which the norm applies?’ could be answered in the affirmative.

In a similar vein, one may consider whether certain fields of activity that discriminate on the basis of age among a group of children and which have significant lifelong impacts could warrant requiring a higher standard of justification. Take the case of very young children, in particular those in their first 1,000 days (that is, the period from pregnancy until the second birthday). Over the years, research in fields such as early childhood development, paediatrics and neuroscience have shown, increasingly and conclusively, that factors like nutrition, stimulation, and the environment of the mother and child have a major impact on future outcomes in a child’s life.<sup>27</sup>

The CRC Committee acknowledges that ‘a number of determinants need to be considered for the realization of children’s right to health’ and that these include ‘individual factors such as age’.<sup>28</sup> The Committee also highlights, for example, that ‘a significant number of infant deaths occur during the neonatal period, related to the poor health of the mother prior to, and during, the pregnancy and the immediate post-partum period, and to suboptimal breastfeeding practices’.<sup>29</sup> As a result, laws, policies, and practices – for example, ‘discriminatory infant and young child feeding practices’,<sup>30</sup> or discriminatory practices pertaining to vaccination rollouts – would have a lifelong effect. Similar reasoning serves as justification for why states should take legislative and other measures to avoid, as far as possible, the early and prolonged placement of children below the age of 3 years in institutional care.<sup>31</sup> The first 1,000 days of a child’s life – especially in respect of the right to the highest attainable standard of health (article 24) and the prohibition of violence (article 19) – could be considered, arguably, as fields of activity that require a higher standard of justification for differential treatment.

To conclude, age-based discrimination among and against children in the context of article 2 of the CRC has not yet benefitted from adequate research, widespread state practice, or focused attention in the CRC Committee’s jurisprudence. This short essay no doubts raises more questions than it answers, and I look forward to the discussions that will be held in November.

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<sup>27</sup> See <https://thousanddays.org/why-1000-days/> for more detail in respect of, for example, how ‘nutrition in the first 1000 days provides the building blocks for brain development’.

<sup>28</sup> CRC Committee, General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), para 17.

<sup>29</sup> Ibid, para 18.

<sup>30</sup> Ibid, para 9.

<sup>31</sup> Such placements have irreversible negative consequences for physical, cognitive and other development; a ‘general rule is that for every three months that a young child resides in an institution, one month of development is lost’. See, generally, UNICEF, ‘End the placement of children under three years’ (2012), available at <https://bit.ly/3DaXIa3>.

## Interrogating “Discrimination” on the Basis of Chronological Age

Gerald L. Neuman

This essay addresses legal regulation of discrimination on the basis of chronological age, or “age discrimination” for short,<sup>1</sup> from the perspective of human rights law as a complex system of positive law serving normative ends. It first describes some of the positive law of age discrimination, including differential treatment of older persons, differential treatment of young persons, and differential treatment of persons in-between. It then deals with some factors relevant to evaluating claims that differential treatment on the basis of chronological age amounts to wrongful direct discrimination. Finally, it turns to the consideration of claims that differential effects according to chronological age amount to wrongful indirect discrimination.

The essay does not attempt to analyze any of the hypothetical situations proposed for discussion at the workshop, in order to facilitate the contributions of the other participants.

I. Chronological age is a social construct that reflects physical and biological regularities as well as interactions with social structures. Human beings are born, grow and develop, and they eventually die, sometimes abruptly and often with a preceding decline. Individuals age differently, but ages correlate with certain statistically likely generalizations, either worldwide or within particular populations. While genetic engineering or technological hybridization may lead to different generalizations at some future date, for now we live in the present.

Age discrimination law apparently originates in employment law, primarily for the protection of middle-aged and older workers, before expanding unevenly in three dimensions: from employment to other fields of private and public action, from older workers to age in general, and from direct to indirect discrimination (roughly speaking, from intentional discrimination to actions with discriminatory effect). Some of these expansions have been incomplete, leaving sectors or ages or types of discrimination uncovered, for good or bad reasons. Some of these expansions have been inadvertent or unconsidered.

Consistent with their origin, some “age discrimination” statutes, like the U.S. Age Discrimination in Employment Act, protect only individuals within a specified range of ages, such as those over 40 years old. Other statutes, like those in some U.S. states, do not define a restricted

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<sup>1</sup> In this essay, I will consider as “age discrimination” actions or policies that unjustifiably favor or disfavor persons of any age, or persons within a restricted range of ages ( $x > A$ ,  $x < B$ , or  $C < x < D$ ), in comparison with people substantially younger than themselves, in comparison with people substantially older than themselves, or in comparison with both. I will not consider other conceivable forms of “age discrimination,” such as discrimination against people born in odd-numbered years, or people born in a disfavored zodiacal year, or relative age effects within a cohort.

range, but are interpreted as if they did.<sup>2</sup> The statutes may also provide asymmetric protection for individuals, only against discrimination that favors persons younger than themselves, or (if the protected group is young) only against discrimination that favors persons older than themselves. Limitations of this kind presume a particular pattern of systematic discrimination, either within a sector or in society generally, and aim to prevent it, rather than aiming to prevent “age discrimination” in the abstract. Instead, an age-discrimination norm may be written generally and interpreted literally. Or it may not mention age at all, but may be written broadly – for example, by referring to “status” discrimination<sup>3</sup> -- and interpreted as including age without limitation.

Some differential treatment by age may be required by human rights law. The Convention on the Rights of the Child (CRC) has some distinctions based on chronological age built into its text, and the Committee on the Rights of the Child, the treaty body that monitors compliance has adopted others by interpretation. For example, the Convention’s definition of “child” refers presumptively to the chronological age of 18 years (article 1), and refers both to age and maturity as criteria for the increasing weight that should be given to a child’s views (article 12). CRC article 32 requires states to adopt “a minimum age or minimum ages” for employment, which the CRC Committee aligns with the International Labour Organization’s standard of 15 years generally for nonhazardous work, and 13 years for light work.<sup>4</sup> CRC article 40 calls for a minimum age of criminal responsibility; the CRC Committee currently urges 14 years or higher.<sup>5</sup> The CRC Committee also promotes a minimum age of legal consent to sexual activity,<sup>6</sup> and insists on an absolute and exceptionless minimum age of 18 for marriage, although marriage is protected as a human right for adults.<sup>7</sup> The Committee also favors a minimum age of 18 for purchase and consumption of alcohol and tobacco.<sup>8</sup> Thus, the CRC regime does not consistently rely on individualized determinations of a child’s maturity, but sometimes encourages the use of minimum chronological ages as a mechanism to protect children by limiting their options.

In international and national law, prohibited discrimination is often distinguished from permissible differential treatment by means of a standard of justification. In U.S. constitutional law, the Supreme Court evaluates age discrimination of all kinds under a highly deferential standard of arbitrariness, known as rational basis review. The court considered that “the aged” had not been subjected to a history of discrimination comparable to groups that needed stronger judicial protection, and that “old age ... marks a stage that each of us will reach if we live out our

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<sup>2</sup> For a U.S. state, this may be justified as interpretation in light of the federal law.

<sup>3</sup> See ICCPR, ICESCR, ECHR, ACHPR; cf. ACHR (“social condition”).

<sup>4</sup> See CRC Committee, General Comment 20, para. 84 (2016); ILO Minimum Age Convention (no. 138) (1973).

<sup>5</sup> See CRC Committee, General Comment 24, para. 22 (2019).

<sup>6</sup> See, e.g., CRC Committee, General Comment 20, para. 40 (2016); Concluding observations on Iran, para. 58, UN Doc. CRC/C/IRN/CO/3-4 (2016) (recommending increase to 16 years).

<sup>7</sup> See CEDAW/CRC Joint General comment 31/18, para. 20 (2019) (revising a prior joint general comment from 2014, to eliminate the option for judicial approval of a mature adolescent’s decision to marry).

<sup>8</sup> See CRC General Comment 20, para. 40.

normal span.”<sup>9</sup> U.S. statutory prohibitions of age discrimination apply more substantial standards, but their scope of application is more selective, regulating particular sectors of activity, often protecting specific age categories and accompanied by explicit exceptions. The European Court of Human Rights considers that “age,” in general, may amount to an “other status” on which discrimination is prohibited, but that justifying differential treatment need not require as weighty reasons as for ethnic origin, gender, or sexual orientation;<sup>10</sup> under the margin of appreciation doctrine the closeness of review can also vary depending on the subject matter involved and the degree of consensus among European states on the policy at issue.

At the global level, the treatment of age discrimination by the Human Rights Committee (which monitors compliance with the Covenant on Civil and Political Rights) is opaque and unelaborated, aside from the general phrasing that differential treatment must be based on “reasonable and objective criteria,”<sup>11</sup> which presumably includes some form of proportionality. Nonetheless, the Human Rights Committee has insisted in its concluding observations on state reports that states should adopt “comprehensive anti-discrimination legislation that prohibits all forms of direct, indirect and multiple discrimination, based on all prohibited grounds of discrimination, including age, . . . , in all public and private spheres.”<sup>12</sup>

II. For purposes of discrimination law, chronological age has certain unusual characteristics. One’s age is not subject to one’s control, but changes continually as long as one lives, so that people pass from one age group into another by the mere passage of time, in one direction only.

Measuring age by whole numbers of years breaks this continuous process into conventional segments familiar in most cultures. This practical approximation should not be considered problematic per se. Fred Schauer’s analysis of line-drawing on the basis of age cogently refutes the idea that a chronological age limit is arbitrary -- in the sense of being irrational – merely because situations slightly above and slightly below the limit are assigned different outcomes that would not be empirically justified by direct comparison of the two situations in isolation from the broader scheme of regulation.<sup>13</sup> If accurate statistical generalizations support the relationship between age and performance on a larger scale, then the justification of an age limit depends on a comparison with other regulatory options, in which the factors may include the cost, accuracy and intrusiveness of individualized assessments, and the need for informing third parties. In a human rights perspective, the framework for evaluating these comparisons may be different from that of a cost/benefit analysis, but these factors remain relevant.

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<sup>9</sup> *Massachusetts Retirement Board v. Murgia*, 427 U.S. 305 (1976) (upholding mandatory retirement age for state police officers).

<sup>10</sup> See *Šalinyté v. Lithuania*, App. No. 32934/19 (ECHR 2021); *P.C. v. Ireland*, App. No. 26922/19 (ECHR 2022).

<sup>11</sup> See *Love v. Australia*, Comm. No. 983/2001 (2003); *Canessa Albareda v. Uruguay*, Comms. No. 1637/2007 et al. (2011).

<sup>12</sup> E.g., Concluding Observations on Hong Kong, China, UN Doc. CCPR/C/CHN-HKG/CO/4 (July 2022), para. 9.

<sup>13</sup> Frederick F. Schauer, *Profiles, Probabilities and Stereotypes* (2003), at 115-117.

Judicial suggestions that age discrimination is different from race or sex discrimination because people's ages continually change would appear to have some merit. First, policymakers have been young, and can foresee being older, and so may be better able to identify with individuals of other ages than with individuals of a different race or sex. This is a contingent proposition, which may not apply in some societies or at some historical periods. Second, a person who is burdened by a rule at one age may benefit from the rule at another age.

The academic literature on age discrimination highlights a contrast between two approaches to measuring equality, one that compares the situation at the particular moment of individuals of different ages, and one that compares individual lives taken over their whole duration.<sup>14</sup> Under the "complete lives" approach, contemporaneous differences may not indicate injustice because the disadvantage to a person at one age may be compensated by the advantage to the same person at another age, and sometimes the temporary disadvantage is the cause of the (later or earlier) advantage. The implications of the complete lives perspective for the evaluation of alleged discrimination are debated.

From a human rights perspective, the insight of the complete lives perspective should not be overstated. The complete lives approach bears some analogy to utilitarian analysis, in that it aggregates advantages and disadvantages over the course of a person's life, and may neglect intense disadvantage at one stage in light of advantages at others. Nonetheless, the insight may have value in combination with other human rights perspectives.

In particular, I would suggest that human rights law should not view isolated instances of disadvantageous treatment based on chronological age, affecting age ranges that do not suffer systematic disadvantage, as necessitating substantial legal protection. They do not require the same level of justification as differential treatment of age groups that do suffer systematic disadvantage. Laws that apply a uniform prohibition of discrimination at all ages may be acceptable, as a useful approximation to the more appropriate norm, or as a means of ensuring public support for the policy. But human rights reasoning should not require such uniformity. Undifferentiated laws should also leave room for affirmative action (or "special measures") for more disadvantaged groups.

III. Additional questions arise concerning the extension of indirect discrimination analysis to chronological age. In various portions of the age spectrum, many policy-relevant characteristics correlate with chronological age. Some of these correlations have physiological bases. Others reflect longevity -- within appropriate age ranges, chronological age often correlates with experience and cumulative accomplishment, and also with cumulative records of misconduct, because the passage of time increases the opportunity for their accrual. If antidiscrimination norms

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<sup>14</sup> See Juliana Uhuru Bidadanure, *Justice Across Ages: Treating Young and Old as Equals* (2021), chapter 1.

restrict use of chronological age as a proxy for such characteristics, should these characteristics also be challenged as permissible criteria because they correlate with chronological age?

Although theorists disagree about why – or whether – indirect discrimination on various grounds is morally wrong, I will assume here that the arguments for regulating indirect discrimination are most persuasive when the category of persons affected is subject to widespread disadvantage in the particular society. Human rights law should not require states to eliminate every practice that has “disproportionate” effect on any conceivable social grouping. Even more than for direct discrimination, application of indirect discrimination norms to effects on every age range appears excessive.

To the extent that indirect discrimination on the basis of chronological age is adjudged in terms of proportionality, the outcome would depend on factors including the “weight” attributed to the age-related disadvantage and the normative importance of avoiding it. If there is a category of “older persons” who suffer systematic discrimination, then that discrimination may be likely to continue for the rest of their lives. Age-related disadvantages for other age groups may be temporary. Some of these may be mild, and may be compensated by later advantage. Yet other disadvantages correlated with age may be isolated exceptions to a generally favorable situation. These variations suggest that a uniformly restrictive standard of justification for indirect discrimination with regard to all age ranges may not be appropriate. And if practical considerations make a simple, uniform standard necessary for all instances of indirect discrimination, more questions arise about what it should be. These observations are general, but I hope that discussion at the workshop from more specialized perspectives will shed further light on them.

## Minimum Age Cutoffs and the Fair Allocation of Benefits

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The COVID-19 pandemic brought debates over the use of age in scarce resource allocation to the fore once again. Initially, particularly in developed countries, debates surrounded the use of older age as an exclusion or lower-priority criterion for receipt of scarce medical interventions such as ICU beds and ventilator therapy. Many advocacy groups for older adults argued that age should not be used as a criterion for access to such interventions.<sup>1</sup> In developed countries and in particular the United States, they were largely successful at least with respect to formal policy, ensuring that resource allocation policies excluded or minimized the role of age-based prioritization that might work to the disadvantage of older adults. Some of these groups argued that the use of age would constitute “unlawful age discrimination.”<sup>2</sup>

In stark contrast, during the later allocation of vaccines and scarce therapies, age was frequently proposed as a minimum criterion rather than a maximum one: that is, only people over a given age (e.g. 65) could receive a vaccine or scarce therapies such as antivirals, or older age was a priority criterion for access to these interventions. The same advocacy groups who previously rejected the use of age as a criterion now often welcomed their use,<sup>3</sup> even as a sole basis for allocation to the exclusion of others. Concerns about age discrimination were downplayed or ignored.

The second development, the use of age as a minimum criterion, has the tendency to worsen disparities in several respects. In this discussion note, I identify four factors that tend to make minimum age cutoffs for access to benefits inequity-exacerbating rather than inequity-mitigating. I then discuss a better alternative to such minimum cutoffs.

### **Four ways that minimum age cutoffs for health and other benefits can worsen inequity**

First, individuals and communities that face serious forms of social prejudice or resource disadvantage tend to live less long, and so are on average less likely to attain a minimum age cutoff. Such life-shortening disadvantages include poverty and structural discrimination. In the

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<sup>1</sup> Farrell TW, Francis L, Brown T, Ferrante LE, Widera E, Rhodes R, Rosen T, Hwang U, Witt LJ, Thothala N, Liu SW. Rationing limited healthcare resources in the COVID-19 era and beyond: ethical considerations regarding older adults. *Journal of the American Geriatrics Society*. 2020 Jun;68(6):1143-9.

<sup>2</sup> Liddell K, Martin S. Allocating medical resources in the time of Covid-19. *N Engl J Med*. 2020 May 28;382(22):e79.

<sup>3</sup> <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/WrittenCommentsCVAC2.1.21.pdf> (comments of AARP)



United States, Black Americans, Native Americans, and people in poverty all have shorter lifespans than average.<sup>4</sup> Globally, the use of a minimum age cutoff for vaccine distribution would've favored the residents of wealthier nations (such as Japan or the United Kingdom) that have longer average life expectancies.

Second, in most countries, the age structures of populations differ such that populations that are ethnic minorities or more disadvantaged are also younger on average. This factor played out in the COVID-19 pandemic both domestically in the United States and internationally. Within the United States, the median age of minority Americans is 31 whereas the median age of White Americans is 44. Globally, the median age in many lower and middle-income countries is under 30, while the median ages are much higher - sometimes over 40 - in high-income countries.

Third, people who are disadvantaged also experience a shift in risk from illness earlier in their lives. While the risk of serious harms from illness in general, and from certain conditions such as COVID-19 in particular, increases as one moves through one's life, people from disadvantaged communities often face greater risk earlier in their lives than others do later in their lives. This played out both domestically and internationally during the COVID-19 pandemic. Domestically, Black, Hispanic, and Native Americans have faced higher risk earlier in life.<sup>5</sup> Internationally, COVID-19 deaths have happened earlier in less developed nations.<sup>6</sup> These differences mean that one-size-fits-all cutoffs for access to vaccines (such as the age-65 standard promulgated by the CDC, WHO, and others) will often prioritize older adults who are nevertheless at lower risk over younger adults who are at higher risk despite their age.

A final factor is a straightforwardly normative one. It is worse to die earlier in one's life, and similarly more important to prevent deaths that happen early in life. The COVID-19 pandemic's disproportionate impact on older adults has led some to argue that we should recognize the deaths of older adults as no less important to prevent than the deaths of anyone else. This would be a mistake. While the COVID-19 pandemic may have taught us that we should regard preventing the deaths of older adults as *more important* in absolute terms, the *relative* importance of preventing deaths plainly differs by age. To see why, consider a potential alternative course the pandemic could have taken. In this alternative, rather than older adults being highly overrepresented among

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<sup>4</sup> Olshansky SJ, Antonucci T, Berkman L, Binstock RH, Boersch-Supan A, Cacioppo JT, Carnes BA, Carstensen LL, Fried LP, Goldman DP, Jackson J. Differences in life expectancy due to race and educational differences are widening, and many may not catch up. *Health affairs*. 2012 Aug 1;31(8):1803-13; Chetty R, Stepner M, Abraham S, Lin S, Scuderi B, Turner N, Bergeron A, Cutler D. The association between income and life expectancy in the United States, 2001-2014. *Jama*. 2016 Apr 26;315(16):1750-66.

<sup>5</sup> Bassett MT, Chen JT, Krieger N. Variation in racial/ethnic disparities in COVID-19 mortality by age in the United States: A cross-sectional study. *PLoS medicine*. 2020 Oct 20;17(10):e1003402; Wortham JM, Lee JT, Althomsons S, Latash J, Davidson A, Guerra K, Murray K, McGibbon E, Pichardo C, Toro B, Li L. Characteristics of Persons Who Died with COVID-19-United States, February 12-May 18, 2020. *MMWR. Morbidity and mortality weekly report*. 2020 Jul 17;69(28):923-9.

<sup>6</sup> <https://blogs.worldbank.org/developmenttalk/too-young-die-age-and-death-covid-19-around-globe>

COVID-19 deaths, the number of deaths in each age group would be proportionate to that group's share of population--there would be no age disparity in deaths. In this scenario, over 1 million Americans would still have been lost to COVID-19, but now over 200,000 of them would have been children under 18, instead of the 1,310 children who have actually died, and over 800,000 would have been under 65. Similarly, the COVID-19 pandemic would still have killed 6.5 million people worldwide, but 25% of them - 1.65 million - would now be children, and over 80% of them, more than 5 million, would've been people under age 64. While the COVID-19 pandemic's absolute impact on older adults has been tragic, relieving this disparity by reallocating deaths proportionally across age groups would be far worse.

We can see a similar phenomenon at the individual rather than community level. In our own lives, we clearly regard death earlier in life as a worse outcome than death later in life. Medical breakthroughs, like antiretrovirals for diseases like HIV, do not "save lives": no medicine truly can. What they do is convert deaths that would've come disproportionately early in life, as was true of HIV deaths before the advent of antiretrovirals, into deaths that come later in life instead. While a death late in life is still important to prevent, a death earlier in life is far worse.

All these factors can intersect. For instance, sending COVID-19 vaccines to countries proportional to their over-65 population will tend to favor wealthier countries, where people are more likely to live to 65 and where age structures tend to skew older. In addition, it will prioritize some lower-risk people over higher-risk ones, since middle-aged adults in low-income countries may be at higher risk than some adults over 65 in high-income countries.

While the inequity-exacerbating potential of minimum age cutoffs is particularly visible in the context of scarce interventions such as vaccines, therapies, and ICU beds, this potential also exists for other types of policy interventions such as social insurance programs. For instance, restricting universal access to high-quality health insurance to people over 65, as the United States' Medicare program does, will tend to exacerbate inequity, because it is easier to live to retirement age if one is more advantaged.<sup>7</sup>

## **Potential solutions**

What is the right approach to minimum age cutoffs? One possibility is to adopt an 'anticlassificationist' approach akin to those advocated at the start of the pandemic by organizations representing older adults. On this approach, age should simply not be considered when defining access to benefits. Age cutoffs, whether they establish a minimum or maximum age, should be considered unacceptable in the same way as program eligibility criteria based on religion or nationality.

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<sup>7</sup> Persad G. Reforming Age Cutoffs. *U. Rich. L. Rev.* 2021;56:1007.

While tempting, this approach would be mistaken. A better approach would be to replace one-size-fits-all age cutoffs with cutoffs that recognize the rule of age in eligibility. For instance, the use of minimum age cutoffs in health programs like Medicare responds to a genuine fact, which is that health expenses and need for healthcare does tend to rise with age. Similarly, the use of age cutoffs in vaccine allocation responds to the genuine fact that, *all other factors being equal*, risk of serious complications or death from COVID-19 infection does rise with age. Even though it is much worse to die at 40 than at 80 (above the average US life expectancy at birth), vaccinating an 80 year old is much more likely to prevent a death than vaccinating a 40 year old. This difference is substantial enough that it can outweigh the greater badness of death earlier in life.

But using age as the only basis for a cutoff is both inaccurate and unnecessarily exacerbates inequities, because it ignores the other factors that drive outcomes such as poor health. A better approach would incorporate age alongside these other factors. For instance, eligibility for health programs designed to reach older adults could be adjusted based on local life expectancy, so eligibility comes earlier in localities where people live less long and are likely to encounter health problems earlier in life. Someone who has been dealing with challenges of poverty, chronic illness, or systemic marginalization over their entire lifespan is likely to experience the same health problems at 60 that more advantaged adults do at 65. Access to health and other benefit programs should reflect this.

## Age discrimination in the Inter-American System: Initial steps and a path forward

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The Inter-American Human Rights System (I-A System) has a strong legal framework when it comes to equality and non-discrimination. However, specifically on age discrimination, only a few cases have made their way to the I-A Court and the topic has been considered in one Advisory Opinion. In this article we intend to describe these initial steps and to propose a path towards a comprehensive understanding and combat of a type of discrimination that has some distinctive features. The article is divided in two parts: **I.** The approach of the I-A System to equality and non-discrimination; and **II.** Initial steps regarding age discrimination and a path forward.

### **I. The approach of the I-A System to equality and non-discrimination**

The I-A System's legal framework regarding equality and non-discrimination comprises both the provisions of the instruments and treaties as well as their interpretations by the I-A Commission on Human Rights (I-A Commission) and the I-A Court of Human Rights (I-A Court).

Regarding the provisions of the instruments and treaties, Article II of the American Declaration of the Rights and Duties of Man (American Declaration)<sup>1</sup>, adopted in 1948, established a right to equality before the law and a prohibition of "distinction" based on a non-exhaustive list of specific grounds in the exercise of the rights protected by the instrument. The American Convention on Human Rights (American Convention or ACHR), adopted in 1969, included two main cross-cutting provisions regarding equality and non-discrimination. Article 24 provides for a right to equality before the law and to the entitlement "without discrimination" to the equal protection of the law, while Article 1.1 is the antidiscrimination provision, applicable to the rights protected in the treaty. This antidiscrimination provision also includes a non-exhaustive list of grounds that is more comprehensive than Article II of the American Declaration<sup>2</sup>.

Additionally, in the past decades, the American States have adopted a number of specific human rights treaties that range from a moderate to a very strong connection with equality and non-discrimination: the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights; the Inter-American Convention Against Racism, Racial

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<sup>1</sup> This is the instrument used by the I-A Commission to monitor the general situation and to adjudicate individual cases concerning the States that are not parties to the American Convention, such as the United States, Canada and a number of English-speaking Caribbean countries.

<sup>2</sup> There are other provisions in the ACHR that refer to equality and non-discrimination with respect to specific rights.

Discrimination, and Related Forms of Intolerance; the Inter-American Convention Against All Forms of Discrimination and Intolerance; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Pará); the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities; and the Inter-American Convention on Protecting the Human Rights of Older Persons. The latter convention will be discussed in section II. Despite the multiple provisions in the I-A instruments and treaties, most of the case-law and standard setting regarding equality and non-discrimination is based on the American Convention and, to a lesser extent, in the American Declaration and the Convention of Belem do Pará<sup>3</sup>.

The long-standing interpretation of the equality and non-discrimination provisions by the I-A Commission and the Court is clear in recognizing two main dimensions: “(...) a negative concept related to the prohibition of arbitrary differentiation of treatment, and an affirmative concept related to the obligation of States Party to create real equal conditions towards groups who have been historically excluded or who are exposed to a greater risk of being discriminated”<sup>4</sup>.

According to the “**negative conception**”, States have the obligation to abstain from arbitrary or non-justified differential treatment. If such treatment is based on one of the grounds established in the antidiscrimination provisions, the scrutiny is more intense<sup>5</sup>. The I-A Court has developed a robust case-law regarding the negative conception. It has adjudicated i) cases of differential treatment that was considered arbitrary but where no specific protected ground was alleged<sup>6</sup>; and ii) cases of differential treatment based on one or more grounds protected by Article 1.1 of the ACHR. In the second group of cases, the I-A Court clarified that the non-discrimination provisions allow for the inclusion of additional grounds<sup>7</sup> such as sexual orientation and gender identity<sup>8</sup>, health status including living with HIV<sup>9</sup>, age<sup>10</sup> and refugee status<sup>11</sup>, among others. The I-A Court has also established that the prohibition of discrimination includes unjustified differential treatment not only explicitly based on prohibited grounds, but also when such grounds are

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<sup>3</sup> This is due to a number of reasons that fall outside the scope of this brief paper.

<sup>4</sup> I/A Court H.R., Case of Furlan and family v. Argentina. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246. Para. 267.

<sup>5</sup> I/A Court H.R., Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293. Para. 228.

<sup>6</sup> For example, Barbani and others v. Uruguay, Reverón Trujillo v. Venezuela, Jenkins v. Argentina.

<sup>7</sup> I/A Court H.R., Case of Atala Riffo and daughters v. Chile. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239. Para. 85.

<sup>8</sup> I/A Court H.R., Case of Atala Riffo and daughters v. Chile. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239. Para. 91.

<sup>9</sup> I/A Court H.R., Case of Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 1, 2015. Series C No. 298. Para. 255.

<sup>10</sup> With respect to older persons: I/A Court H.R., Case of Poblete Vilches et al. v. Chile. Merits, Reparations and Costs. Judgment of March 8, 2018. Series C No. 349. Para. 122. With respect to young persons: I/A Court H. R., Case of Guerrero, Molina et al. v. Venezuela. Merits, Reparations and Costs. Judgment of June 3, 2021. Series C No. 424. Para. 93.

<sup>11</sup> I/A Court H.R., Case of I.V. v. Bolivia. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 30, 2016. Series C No. 329. Para. 240.

implicitly considered to a relevant extent<sup>12</sup>, when the ground is covert behind an appearance of legality<sup>13</sup> or when there is a perception that the victim is related to a prohibited ground and such perception is the basis for the differential treatment<sup>14</sup>.

In turn, the **positive conception** has been defined by the I-A Court as the one that requires from the States the adoption of positive measures in order to revert or change existing discriminatory situations<sup>15</sup>. This positive conception is also referred to as “substantive equality”. The actual enforcement of the positive conception by the I-A Court in specific cases is less prolific and still evolving. However, there are already some relevant references in the existing case-law. For example, referring to the positive conception with respect to persons with disabilities, the I-A Court indicated that States must adopt measures to achieve equal opportunities and participation in all spheres of social life, including social inclusion policies and affirmative action<sup>16</sup>. The I-A Court also declared the international responsibility of States<sup>17</sup> due to their failure in adopting positive measures in a context of *de facto* inequality due to individual circumstances of vulnerability<sup>18</sup>, as well as in a context of structural disadvantage and exclusion of a group of persons<sup>19</sup>. Also related to substantive equality, the I-A Court has interpreted the equality and non-discrimination provisions as prohibiting not only direct or intentional discrimination but also indirect or disparate impact discrimination<sup>20</sup>. Recently, the I-A Court issued an Advisory Opinion on differential approaches to specific groups – protected by the antidiscrimination provisions – of persons deprived of liberty<sup>21</sup>.

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<sup>12</sup> I/A Court H.R., Case of Atala Rifo and daughters v. Chile. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239. Para. 94.

<sup>13</sup> I/A Court H.R., Case of San Miguel Sosa et al. v. Venezuela. Merits, Reparations and Costs. Judgment of February 8, 2018. Series C No. 348. Para. 121.

<sup>14</sup> I/A Court H.R., Case of Flor Freire v. Ecuador. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2016. Series C No. 315. Para. 120.

<sup>15</sup> I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18. Para. 104.

<sup>16</sup> I/A Court H.R., Case of Furlan and family v. Argentina. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246. Para. 134.

<sup>17</sup> Serrano Guzmán, Silvia. *Dos avances de la Corte IDH en 2020 sobre igualdad y no discriminación*. Article published in: Agenda Estado de Derecho. Fundación Konrad Adenauer Foundation. 2021.

<sup>18</sup> I/A Court H. R., Case of Roche Azaña et al. v. Nicaragua. Preliminary Objection, Merits and Reparations. Judgment of June 3, 2020. Serie C No. 403. Para. 93.

<sup>19</sup> I/A Court H.R., Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 15, 2020. Series C No. 407. Paras. 198-200.

<sup>20</sup> I/A Court H.R., Case of the Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala. Merits, Reparations and Costs. Judgment of October 6, 2021. Series C No. 440. Para. 136.

<sup>21</sup> I/A Court H.R., Differentiated approaches with respect to certain groups of persons in detention (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments). Advisory Opinion OC-29/22 of May 30, 2022. Series A No 29.

Finally, the notion of **intersectionality** is a key component of the evolution of the relevant case-law. As defined by the I-A Court, intersectional discrimination is the one that takes place not only as a result of one or more prohibited grounds but by the intersection of such grounds: if one of such grounds is not present, the discrimination would have a different nature<sup>22</sup>.

This general overview of the negative/formal and the positive/substantive dimensions, the nature of the State's obligations, as well as the more specific types of cases that fall within both dimensions, shows that the I-A System has adequately embraced the complex and multidimensional nature of inequality and discrimination and has made a significant effort to strengthen the legal tools to combat them.

## **II. Initial steps regarding age discrimination**

However, the development of age discrimination is still incipient in the I-A System. In this section we will describe the initial steps on this type of discrimination and propose a path forward.

### *Age as a prohibited ground of discrimination in the conventional sources*

As mentioned before, the non-discrimination provisions of the American Declaration and the American Convention are non-exhaustive. Therefore, although there is no explicit mention in the relevant provisions, age has been considered by the I-A Court as a prohibited ground of discrimination. This determination has not been particularly consistent. In Advisory Opinion 18/2003<sup>23</sup>, the I-A Court decided to expand the list of grounds protected – including age – but without reasoning the inclusion of each ground<sup>24</sup>. Years later this determination was confirmed in the two cases that we discuss below. However, the framing of age as a prohibited ground of discrimination showed some inconsistency when comparing both cases.

In *Poblete Vilches v. Chile*, the I-A Court created some confusion when stating that the prohibition of discrimination based on age is included in the American Convention “when it comes to older persons”<sup>25</sup>. One reading of such a statement is that the I-A Court took an asymmetric approach to this specific ground<sup>26</sup>, as happens, for example, with respect to disability. However, in *Guerrero Molina v. Venezuela*, the I-A Court considered that a poor young man (a victim of an extrajudicial

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<sup>22</sup> I/A Court H.R., Case of Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 1, 2015. Series C No. 298. Para. 290.

<sup>23</sup> I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18. Para. 101.

<sup>24</sup> In other cases, for example, IV v. Bolivia, the I-A Court provided for a list of criteria to take into account when considering the expansion of the protected grounds. Para. 240.

<sup>25</sup> I/A Court H.R., Case of Poblete Vilches et al. v. Chile. Merits, Reparations and Costs. Judgment of March 8, 2018. Series C No. 349. Para. 122.

<sup>26</sup> For a detailed discussion on the symmetric and asymmetric nature of the grounds in the anti-discrimination provisions see: Saba, Roberto. *¿Qué es lo sospechoso de las categorías sospechosas?*.



killing) was discriminated against based on socio-economic status and age. In this case, the Court clarified that age is protected symmetrically in the anti-discrimination provision. In its words, the “American Convention [also] prohibits discrimination against young people”<sup>27</sup>.

But beyond the general anti-discrimination provisions of the American Declaration and the American Convention, age as a prohibited ground of discrimination is also present in the Inter-American Convention Against All Forms of Discrimination and Intolerance, adopted in 2013. Article 1 of said treaty explicitly includes age in a long list of prohibited grounds<sup>28</sup>. Unfortunately, after almost 10 years of its adoption, this treaty was signed by 12 States and has only been ratified by two of them<sup>29</sup>. This shows the lesser political and legal authority of this Convention in the region.

In 2015, the Inter-American Convention on Protecting the Rights of Older Persons was adopted. The scope and content of this convention is intended to address not only discrimination against older persons, but all their human rights. However, the fight against ageism is clearly one of its main inspirations and is transversally reflected in all its provisions<sup>30</sup>. It also provides for an individual petition system. This is one of the international treaties dealing with the situation of specific groups – in this case, older persons. Its approach is inherently asymmetric in comparison to the non-discrimination provisions of more general human rights treaties. This Convention does not protect any person from discrimination on the basis of age. It protects the specific group of older persons. One of the many expressions of this approach<sup>31</sup> in this convention is reflected in Article 4 b), which explicitly requires States to adopt positive and affirmative measures in order to achieve substantive and real equality. Another remarkable feature of this Convention is its strong commitment to the notion of intersectionality. Clear expressions of such commitment are the repeated references to gender perspective and to the specific situation of older women. Unfortunately, up to now, only nine States have ratified/adhered to this Convention. Hopefully, after the wide variety of expressions of ageism during the pandemic<sup>32</sup>, more States will become a party of this Convention in the near future.

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<sup>27</sup> I/A Court H. R., Case of Guerrero, Molina et al. v. Venezuela. Merits, Reparations and Costs. Judgment of June 3, 2021. Series C No. 424.

<sup>28</sup> Many of which have been included in the I-A Court’s case-law when interpreting the phrase “any other social condition” of Article 1.1 of the American Convention.

<sup>29</sup> Mexico and Uruguay.

<sup>30</sup> For more details regarding the principles inspiring the convention, see: Piovesan, Flávia. Protection of the rights of the elderly. The impact of the Inter-American System. *ReVista. Harvard Review of Latin America* (2019).

<sup>31</sup> Other international human rights treaties that adopt this asymmetric approach and explicitly provide for positive and affirmative measures are the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention on the Elimination of All forms of Racial Discrimination; and the Convention on the Rights of Persons with Disabilities.

<sup>32</sup> For some examples, see this global platform: <https://corona-older.com/>.

Poblete Vilches v. Chile - discrimination of an older person in the context of health care<sup>33</sup>

In the context of specific cases, this was the first time in which the I-A Court established the international responsibility of a State for discrimination on the basis of age.

The case concerns the death of an older person due to the failure of a public hospital to provide the healthcare that he needed. Mr. Poblete was first hospitalized with a respiratory deficiency on January 2001. A lung intervention was performed while he was unconscious and without the informed consent of his relatives. Mr. Poblete was prematurely discharged from the hospital. A few days after the discharge he had to be hospitalized again with a number of complications. During the second hospitalization, he needed intensive care and a ventilator, but he only received intermediate care. Mr. Poblete's intensive care was deprioritized in part because of his age.

The I-A Court analyzed two specific aspects of the healthcare received by Mr. Poblete that were framed under the immediate obligations of the State of Chile with respect to the right to health: i) emergency healthcare; and ii) reinforced obligations stemming from the right to health of older persons, taking into account their particular situation of vulnerability. The Court concluded that both hospitalizations failed to comply with the standards of quality, availability, accessibility and acceptability; and that Mr. Poblete was discriminated against as an older person in the access to the intensive medical attention that he needed. It is worth mentioning that, beyond the standards on the healthcare of older persons and on emergency treatment, the case is particularly relevant because it is the first judgment referring in general to the rights of older people, a group subject to special protection that was absent in the case law of the I-A Court.

Guerrero Molina v. Venezuela – discrimination of a young person by the police<sup>34</sup>

More recently, the I-A Court decided a case of two arbitrary deprivations of liberty, torture and cruel, inhumane and degrading treatment and extrajudicial killings on the part of the police. This case, as many others decided by the Commission and the Court, was one example of a more general context of police abuse in Venezuela that followed a specific pattern and *modus operandi*. A part of such pattern was the targeting of young poor men as suspicious, dangerous or criminals. The Court stated that “police conduct against Jimmy Guerrero, which was detrimental to his rights, as specified below, was based on stereotypes resulting from assuming young men living in poverty were dangerous or likely to engage in illegal activity”.

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<sup>33</sup> I/A Court H.R., Case of Poblete Vilches et al. v. Chile. Merits, Reparations and Costs. Judgment of March 8, 2018. Series C No. 349.

<sup>34</sup> I/A Court H. R., Case of Guerrero, Molina et al. v. Venezuela. Merits, Reparations and Costs. Judgment of June 3, 2021. Series C No. 424.

Therefore, in addition to establishing the international responsibility of the State for the violations of the rights to life, personal integrity and personal liberty, the I-A Court concluded that the acts of the police also amounted to discrimination on the bases of socio-economic status and age. This means that up to now, the I-A Court has decided two cases of discrimination on the basis of age, one concerning an older person and another one concerning a young person.

### *The differential approaches with respect to children and older persons*

In addition to the previous cases that were clearly framed as discrimination on the basis of age, the I-A system is mindful of the needs for differential approaches with respect to specific groups. In the context of age, there is a clear understanding that States are under the obligation to provide for a special and differentiated treatment to both children and older persons. With respect to children, the principles of special protection and best interest of the child, that inspire the case-law of the I-A Court in cases of children and adolescents<sup>35</sup>, directly encompass the idea of not only differential approaches but also of heightened or reinforced obligations. Regarding older persons, the need for a differential approach and also reinforced obligations on the part of the States, inspired the adoption of a specific convention and has been considered by the I-A Court, in addition to the Poblete case, in other cases related to social security<sup>36</sup> as well as recently on its Advisory Opinion related to differential approaches in the context of deprivation of liberty<sup>37</sup>.

### **Conclusion**

The I-A System has developed a strong legal frame-work and case-law with respect to equality and non-discrimination. But the prohibition of age discrimination in the I-A System is still evolving and poses important challenges – some substantive and others institutional.

With respect to the protection of the ground itself, one can find an initial ambivalent position regarding the symmetric or asymmetric approach to this ground. However, now it is clear that the I-A Court leans towards a more symmetric understanding of the ground “age” that is not limited to specific groups that due to their age require special protection or differentiated approaches (children, adolescents and older persons), but includes the chronological age in general. Considering that in the opinion of the I-A Court, all grounds protected by Article 1.1 of the American Convention trigger a strict scrutiny, this means that any differential treatment based on chronological age would be presumed unconventional, the burden of persuasion and proof shifts

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<sup>35</sup> See for example cases: Atala Riffo and daughters v. Chile, Forneron and daughter v. Argentina, Mendoza and others v. Argentina, VRP and VPC v. Nicaragua; Ramírez Escobar and others v. Guatemala, to name a few

<sup>36</sup> See for example cases: Muelle Flores v. Peru and National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru.

<sup>37</sup> I/A Court H.R., Differentiated approaches with respect to certain groups of persons in detention (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments). Advisory Opinion OC-29/22 of May 30, 2022. Series A No 29. Para 337 – 386.

to the State and each step of the proportionality test would have to be considered with the stricter scrutiny. But this does not sound quite right. A legal framework should not reprove with the same vehemency the deprioritization of an older person by the health system and the constitutional requirement of having a minimum age to run for President. It is easier to claim a strict scrutiny for the former than for the latter. The ground ‘age’ is precisely one of those that challenge the idea that symmetrically defined prohibited grounds must always trigger the same level of scrutiny.

Another complexity of the prohibition of age discrimination is whether the idea of a heightened level of scrutiny of any differential treatment based on age, conspires against the fulfillment of the special protection obligation or the need for a differentiated approach that are particularly stronger with respect both to children and adolescents and to older persons. The jurisprudential development of this topic will need to reconcile the apparent tension between consistently requiring States to adopt special and differentiated measures with respect to both groups and the idea that any differential treatment based on age triggers a strict scrutiny.

More on the institutional side, unfortunately the I-A System has not received a particularly relevant number of cases related to discrimination on the basis of age. This is a limitation for a jurisprudential development of the issue that takes into consideration its special challenges and very varied nature. To overcome this limitation of the case system, particularly the I-A Commission is in a better position to include this issue more deliberately in its agenda. Just to mention some examples and considering the very limited jurisprudential development, the Commission could adopt a policy of prioritization of cases with allegations of age discrimination as happened in the past with respect to other forms of discrimination that were absent for the case-law. Also, the Commission could strengthen the steps taken with the creation of the Rapporteurship on the Rights of Older Persons by drafting and adopting a regional thematic report, producing an integral diagnosis of the human rights violations, including discrimination, that older persons face, as well as recommendations to overcome such violations. The Commission should also be deliberate in including the situation of older persons (as it has done historically with respect to children) in all its monitoring activities, including *in situ* and working visits as well as in country reports.

## Age Discrimination and the Personhood of Children and Youth

Jonathan Todres\*

A significant percentage of the population of the United States, or any other country, lives without voting rights, is prohibited from holding public office, has restricted access to employment opportunities, and is subjected to greater restrictions on their participation rights such as freedom of expression, association, and assembly.<sup>1</sup> Children (individuals under 18 years of age<sup>2</sup>) constitute more than twenty percent of the U.S. population.<sup>3</sup> In other countries, they represent close to half the population.<sup>4</sup> If this were another group, there would likely be uproar and accusations of discrimination. But because the group is children, such differential treatment is rarely questioned.

The construct of a bright-line rule dividing childhood and adulthood, while advantageous for administrative reasons, fails both to recognize the full personhood of young people and account for developing nature of childhood. It also deprives communities and countries of valuable contributions from its youngest members. Moreover, it does not even accurately reflect the state of the law, as various areas of law draw the line at different ages.<sup>5</sup>

The essay questions this bright-line distinction, which has most commonly been drawn at 18 years old. It focuses in particular on young people's participation rights. Evolving understandings of both children's rights and child and adolescent development necessitate a rethinking of the legal regulation of childhood and emerging adulthood.<sup>6</sup>

### The Legal Regulation of Children and Adolescents

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<sup>1</sup> See Jonathan Todres, Charlene Choi, & Joseph Wright, *A Rights-based Assessment of Youth Participation in the United States*, 95 TEMPLE L. REV. \_\_\_\_ (forthcoming Spring 2023).

<sup>2</sup> See Convention on the Rights of the Child, art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3 (defining a child as any individual under 18 years of age) [hereinafter "CRC"].

<sup>3</sup> Stella U. Ogunwole et al., *Population Under Age 18 Declined Last Decade*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html#:~:text=By%20comparison%2C%20the%20younger%20population,from%2074.2%20million%20in%202010,https://perma.cc/7LET-DDEH> (approximately twenty-two percent of the US population is under 18 years of age).

<sup>4</sup> Canela López, *The Countries with the Youngest Populations in the World*, BUSINESS INSIDER (Sept. 6, 2019, 2:32 PM), <https://www.businessinsider.com/countries-youngest-populations-most-children-2019-9> [https://perma.cc/7QBS-7F5N].

<sup>5</sup> For example, in the U.S., minimum ages for voting, work, and criminal responsibility vary considerably. See Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107 (2012).

<sup>6</sup> In this essay, I use "child" as defined in the CRC (any individual under 18 years of age), and emerging adulthood to cover the span from eighteen years of age to mid-20s. Adolescence, which is often described as covering ages 10-25, spans across both categories.

The legal regulation of childhood is an inconsistent blend of rules and standards. Legal scholars have long debated the relative merits of framing legal mandates as rules versus standards.<sup>7</sup> Rules—such as minimum age laws—offer greater clarity *ex ante*, but they can be both over- and under-inclusive.<sup>8</sup> In contrast, standards—which “employ more ‘evaluative’ criteria, such as reasonableness, ... or use multi factor or ‘totality of the circumstances’ tests that do not specify the weight to be given to individual factors”<sup>9</sup>—offer greater flexibility but less *ex ante* certainty.

The law in the United States tends to rely heavily on rules with respect to rights and opportunities for young people but often turns to standards when imposing responsibility on children.<sup>10</sup> That is, for voting rights and economic opportunities (e.g., work, entering into contracts), the law relies on minimum age rules that exclude young people regardless of their individual capacity. However, when it comes to punishment of young people, the law often relies on standards to evaluate individuals to determine whether they are mature enough to be held accountable for their actions.<sup>11</sup>

From a human rights perspective, a default stance that categorically denies participation rights and other rights but allows flexibility to hold individuals accountable for missteps is inherently problematic. Each side of this equation merits further examination, but I focus the remainder of this essay on the use of rules to categorically deny young people’s participation rights.<sup>12</sup> Every rule has a justification—that is, a “purpose or goal that the rule is thought to advance”<sup>13</sup>—and the anti-discrimination framework of human rights law offers a vehicle for reexamining justifications for rules that deny young people their participation rights.

## Justifications for Differential Treatment

Under international law, differential treatment must advance a legitimate aim and be proportionate.<sup>14</sup> As the European Court of Human Rights has held, “the principle of equality of treatment is violated if the distinction has no objective and reasonable justification ... and there is no reasonable relationship of proportionality between the means employed and the aim sought to

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<sup>7</sup> For a concise explanation of the “rules” versus “standards” debate, see Russell D. Covey, *Rules, Standards, Sentencing, and the Nature of Law*, 104 CALIF. L. REV. 447, 458-63 (2016). *But see* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) (critiquing the debate).

<sup>8</sup> FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 31-32 (1991).

<sup>9</sup> Covey, *supra* note 7, at 461.

<sup>10</sup> Todres, *supra* note 5, at 1111.

<sup>11</sup> In this essay, I focus on the regulation of young people’s agency. So, for example, the best interests of the child is a standard that allows decision-makers to make case-specific decisions, but it is most often used in cases, such as child custody, in which the child is primarily a passive agent subject to adult decision-making.

<sup>12</sup> In theory, the flexibility of a standards approach to juvenile justice could account for the developmental nature of childhood in a way that is supportive of young people’s healthy development, rather than taking a punitive approach to what is often typical adolescent behavior. See KRISTIN HENNING, *THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH* 228 (2021) (“Black youth who act out as a symptom of their mental health challenges are often punished, excluded from school, or arrested.”).

<sup>13</sup> Covey, *supra* note 7, at 459.

<sup>14</sup> Daniel Moeckli, *Equality and Non-Discrimination*, in *INTERNATIONAL HUMAN RIGHTS LAW*, 148, 157 (3<sup>rd</sup> ed. 2018).



be realised.”<sup>15</sup> With respect to young people, the state has two important functions: protecting young people from harm and supporting their healthy development. Differential treatment of young people has long been justified by the need to protect children. For example, child labor laws seek to protect children from work that would interfere with their education or healthy development.<sup>16</sup> Similarly, the law limits children’s right to enter into enforceable contracts because minors are “perceived as having far less capability to engage in fair exchange over the long term.”<sup>17</sup> Both of these constraints are justified as protective measures, even though they limit young people’s autonomy and could adversely affect the economic well-being of the child and their family.

But while the state has a legitimate interest in protecting children from harm,<sup>18</sup> the legal regulation of childhood extends well beyond protective measures. On many issues—particularly ones implicating children’s agency—the law opts for rules that treat children as lacking capacity, as “becomings” not “beings.”<sup>19</sup> Such restrictions do not appear to serve either the purpose of protecting children from harm or ensuring their healthy development. Instead, minimum age rules on young people’s agency—e.g., voting and holding public office—are typically not justified on protective or supportive grounds. Rather, young people are denied access to these spaces because they are deemed incompetent or lacking maturity.

Not only does the law deny individuals under 18 years of age the right to vote—that is, to have a say in who represents them—but young people must wait even longer to be eligible to hold public office. The U.S. Constitution requires that individuals be at least 25 years old to serve in the House of Representatives and at least 30 years old to serve in the Senate.<sup>20</sup> In *The Federalist*, No. 62, James Madison offered a justification for a higher minimum age of Senators by saying that serving

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<sup>15</sup> Case relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Belgium Linguistics Case) (No 2) (1968) 1 EHRR 252, para 10.

<sup>16</sup> See Wage & Hour Div., U.S. Dep’t of Labor, Child Labor Bull. 101, Child Labor Provisions for Nonagricultural Occupations Under the Fair Labor Standards Act 1 (2010), <http://www.dol.gov/whd/regs/compliance/childlabor101.pdf> [https://perma.cc/47LF-ZKFE] (stating that the federal youth employment provisions “were enacted to ensure that when young people work, the work is safe and does not jeopardize their health, well-being or educational opportunities”).

<sup>17</sup> Michael Glassman & Donna Karno, *On Establishing a Housing Right of Contract for Homeless Youth in America*, 7 SEATTLE J. FOR SOC. JUST. 437, 438 (2008); Todres, *supra* note 5, at 1125.

<sup>18</sup> Meredith Johnson Harbach, *Childcare, Vulnerability, and Resilience*, 37 YALE L. & POL’Y REV. 459, 516 n.274 (2019) (“The notion that the state is empowered and indeed required to step in to protect children in certain circumstances has a long history in our legal tradition. Broadly speaking, the *parens patriae* principle recognizes that the state has a right and responsibility to protect those who cannot protect themselves.”).

<sup>19</sup> See Michael Freeman, *Taking Children’s Human Rights Seriously*, in THE OXFORD HANDBOOK OF CHILDREN’S RIGHTS LAW 49, 57 (Jonathan Todres & Shani M. King eds., 2020); Anne C. Dailey, *Children’s Constitutional Rights*, 95 MINN. L. REV. 2099, 2104 (2011); Jens David Ohlin, *Is the Concept of the Person Necessary for Human Rights?*, 105 COLUM. L. REV. 209, 215 (2005) (“Depending on [ ] age, a child may not yet have fully developed the hallmarks of rational agency such as means-end reasoning, accepting the logical consequences of beliefs and desires, and the transitive ordering of preferences. Such capacities develop with time and it is these deeper properties, and their fluctuations, that are the source of our intuition that children are persons to some lesser degree than adults.”)

<sup>20</sup> *Constitutional Qualifications for Senators*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/common/briefing/Constitutional\\_Qualifications\\_Senators.htm](https://www.senate.gov/artandhistory/history/common/briefing/Constitutional_Qualifications_Senators.htm) [https://perma.cc/4CLN-5Q7A] (last visited Nov. 1, 2022).



in the Senate necessarily required a “greater extent of information and stability of character.”<sup>21</sup> Said another way, the founders believed that elected government leaders should have experience and maturity.

Age, however, is a poor proxy for experience.<sup>22</sup> A 16- or 17-year-old may in fact have more relevant lived experience with respect to particular social issues than a 25-year-old or 30-year-old. To take just one example, children today are the only ones alive who know what it is like to go to school during a global pandemic.<sup>23</sup> That lived experience imbues them with experience and insights that many adults will not have when evaluating education policy options.<sup>24</sup>

Moreover, in recent years, individuals in the United States have been elected to office with little to no relevant policymaking experience. Indeed, their campaigns often tout their lack of political experience as one of their primary strengths.<sup>25</sup> Conversely, many young people serve in Youth Councils and Congresses and arguably have a greater understanding of the legislative process than many adults.<sup>26</sup>

Beyond questions about whether the state advances a legitimate aim by categorically excluding young people from the political arena, under human rights law differential treatment must be proportionate to be sustained. Unlike standards, rules are blunter instruments that make proportionality harder to achieve. Categorical denials of individual rights—such as barring under-25-year-olds from holding office or under-18s from voting—should be considered inherently suspect. Can we say categorically that 22-year-olds are more akin to 12-year-olds than they are to 32-year-olds when it comes to serving in public office? Are 16-year-olds more akin to 6-year-olds than 26-year-olds in terms of capacity to choose which candidates for office to support? Although age may be a better proxy for maturity than it is for experience, it is still imperfect. Minimum age rules are inevitably overinclusive in that they deny participation rights to many young people who are fully capable of responsibly exercising those rights. Moreover, such categorical denial of civil and political rights seems to ignore what development science has shown: First, with respect to

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<sup>21</sup> *Id.* When the drafters of the Constitution decided on these requirements, they were aware that members of parliament in the U.K. at that time needed to be only 21 years old, yet they opted for a higher minimum. *Id.*

<sup>22</sup> That is, while additional years provide the possibility of gaining experience, it offers no guarantee that an individual will gain the experience needed to successfully do a particular job.

<sup>23</sup> Tammy Chang & Jonathan Todres, *Listening to Young People Could Help Reduce Pandemic-related Harms to Children*, THE CONVERSATION (June 2, 2022, 8:14 AM), <https://theconversation.com/listening-to-young-people-could-help-reduce-pandemic-related-harms-to-children-179745> [https://perma.cc/42ZD-B66Y].

<sup>24</sup> Erin G. Fox, Nicole F. Kahn, and Gabrielle Battle, *When Youth Are Experts in the Field*, ISSUES IN SCI. & TECH. (May 3, 2022), <https://issues.org/youth-experts-bcyf-nasem-fox-kahn-battle/> [https://perma.cc/T6T2-Y28B].

<sup>25</sup> Britt Peterson, *A Brief History of Washington Insiders Claiming to be Outsiders*, WASHINGTONIAN (Apr. 8, 2016), <https://www.washingtonian.com/2016/04/08/a-brief-history-of-washington-insiders-claiming-to-be-outsiders/> [https://perma.cc/QC7A-S83R].

<sup>26</sup> See, e.g., THIRTY-THIRD GUAM YOUTH CONGRESS, <https://guamyouthcongress.wixsite.com/33rdgyc> [https://perma.cc/2G85-PE57]; YOUTH COMMISSION, CITY AND COUNTY OF SAN FRANCISCO, <https://sfgov.org/youthcommission/> [https://perma.cc/WR4A-69TU]; YOUTH COMMISSION, CITY OF BALTIMORE, <https://youth.baltimorecity.gov/about-0> [https://perma.cc/BP9A-MHTS]; YOUTH COUNCIL, CITY OF FRAMINGHAM MA, <https://www.framinghamma.gov/2789/Youth-Council> [https://perma.cc/B6U5-WKXW].

some tasks, adolescents' capacity is not significantly less than that of adults.<sup>27</sup> And, second, lumping all young people into a single category of "children" fails to account for the dramatic differences in capacities across the span of childhood.

## **The Impact of Categorical Exclusions of Young People**

In recent years, we have seen young people come to the forefront of human rights and social justice movements. At age 17, Malala Yousafzai became the first child to receive the Nobel Peace Prize for her work on girls' education. Greta Thunberg has become a global leader on climate change mitigation. And many other young people have assumed leadership roles on issues including gun violence, immigration, racial justice, climate change, and other pressing challenges.<sup>28</sup> These actions have been significant, yet most of them occur outside of, and often in spite of, the state.<sup>29</sup> Categorical exclusions of young people have left them few official pathways to contribute to and shape the direction of their communities and nations.

Overall, this default rule of disqualification of young people conflicts with the notion that rights are inherent. If rights are inherent to all human beings, they exist from birth. Children's rights law, for example, holds that every child "capable of forming a view" has the right to express that view on matters affecting the child.<sup>30</sup> Not accepting that children have rights equates to saying rights are not inherent but are granted by governments when individuals reach adulthood. Dependent on government largesse is precisely what rights are *not* in theory and should *never* be in practice.

This does not mean all minimum age rules are invalid. However, it does mean that the default position must be recognition that individuals are rights holders and, therefore, any differential treatment must reflect a more nuanced understanding of children's capacities than categorical exclusions do.

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<sup>27</sup> See, e.g., Megan E. Hay, *Incremental Independence: Conforming the Law to the Process of Adolescence*, 15 WM. & MARY J. WOMEN & L. 663, 679 (2009) ("Using a conservative reading of the research, the general framework presumes that by age fifteen, adolescents have the requisite cognitive maturity to understand each of these activities and articulate reasonable decisions."); see generally Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1061 (2017) ("Voting, after all, is a fundamental right. It provides the foundation of our democracy. Children are part of and affected by that democracy .... Allowing youth to vote is preservative of youth rights in our democracy.").

<sup>28</sup> See, e.g., SUNRISE MOVEMENT, <https://www.sunrisemovement.org/> [https://perma.cc/JN9M-U3SD]; FRIDAYS FOR FUTURE, <https://fridaysforfuture.org/> [https://perma.cc/J8V3-BBC6]; MARCH FOR OUR LIVES, <https://marchforourlives.com/> [https://perma.cc/EK7T-7N27]; YOUTH JUSTICE COALITION, <https://youthjusticela.org/> [https://perma.cc/4CW6-ZXQK]; see also, YOUNG WOMEN'S FREEDOM CENTER, <https://youngwomenfree.org/freedom-2030-charter/> [https://perma.cc/JEK9-MAK4]; UNITED WE DREAM, <https://unitedwedream.org/> [https://perma.cc/N6L5-YYZB].

<sup>29</sup> Indeed, young people must navigate additional restrictions on speech in schools or limitations on assembly rights imposed by status offence laws.

<sup>30</sup> CRC, *supra* note 2, art. 12. The CRC, however, did not recognize voting rights for children.

## Age discrimination exceptionalism? A children's rights perspective

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Discrimination on the basis of chronological age (in short: age discrimination) is an under-researched dimension of human rights discrimination law. In what follows, I will explore some of the conceptual challenges that age discrimination may pose from the perspective of international children's rights law. I ask two questions. First, I wonder whether we need to treat age differentiation differently than other differentiations under international human rights discrimination law. Is there a need for age discrimination exceptionalism within international human rights discrimination law? Second, I explore whether child exceptionalism is required in international human rights law with regard to age discrimination.

### **Age discrimination exceptionalism in international human rights discrimination law: does age differentiation require very weighty reasons?**

In international human rights law, there is no absolute prohibition of differential treatment, whatever the ground on which the differentiation takes place: differential treatment is permissible if a reasonable and objective justification can be offered. Such a justification requires a legitimate aim and proportionality between the differentiation and the aim pursued.

Non-discrimination and equality provisions in international human rights treaties contain a long list of grounds on which discrimination must be prohibited. The grounds that the general United Nations core human rights treaties have in common are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, and other status.<sup>1</sup> Except for the Charter of Fundamental Rights of the European Union (Article 21(1)) and the Inter-American Convention on Protecting the Human Rights of Older Persons (Article 5), age is typically not included in such a list. However, most lists of discrimination grounds are semi-open, and the open category of “other status” allows for inclusion of age. The European Court of Human Rights (ECtHR) – a regional human rights court that monitors the European Convention on Human Rights – seems to accept at least implicitly that age (difference) also comes under the category of “other status”.<sup>2</sup> The Court of Justice of the European Union (CJEU) considers non-discrimination on grounds of age as a general principle of EU law.<sup>3</sup>

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<sup>1</sup> For more details and a thorough comparison, see Wouter Vandenhoele, *NON-DISCRIMINATION AND EQUALITY IN THE VIEW OF THE UN HUMAN RIGHTS TREATY BODIES* (2005).

<sup>2</sup> *D.G. v. Ireland*, App. No. 394/74/98, 115 (May 16, 2002); *Schwizgebel v. Switzerland*, App. No. 25762/07, 90 (June 10, 2010).

<sup>3</sup> Case C-144/04, *Werner Mangold v. Rüdiger Helm* [GC], 2005 E.C.R. I-09981

In principle, I see no reason for age discrimination exceptionalism, that is, for treating age discrimination differently than discrimination on other grounds. All grounds are in principle considered to be of equal importance. A counterargument may be advanced against this position by reference to the case law of the ECtHR, in which some grounds of differentiation are approached more strictly than others.

The ECtHR has argued that some grounds of differentiation are particularly suspect. These particularly suspect grounds include gender, sexual orientation, birth out of wedlock, nationality, disability and ethnic origin (for the latter ground, the ECtHR applies an even stricter approach).<sup>4</sup> The consequence of considering a ground as particularly suspect is that “very weighty reasons” are required in order to be able to justify differential treatment based exclusively on such a ground.<sup>5</sup>

For now, the ECtHR has not yet included age in the list of particularly suspect grounds. Therefore, differentiation on grounds of age does not require very weighty reasons for the ECtHR.

*Should* the ECtHR require “very weighty reasons” for age differentiation? In my view, that depends on what unites the particularly suspect grounds. The unifying element – in the words of the ECtHR in the *Guberina* case – is a concern with a:

“particularly vulnerable group in society that has suffered considerable discrimination in the past [...]. The reason for this approach, which questions certain classifications *per se*, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs.”<sup>6</sup>

Whereas *Guberina* concerned differentiation on grounds of disability and sought to address ableism, a similar reasoning could arguably be applied to ageism against children (adultism) as well. Children have historically been subject to prejudice, which has led to legislative stereotyping that “prohibits the individualised evaluation of their capacities and needs”, and which continues to

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<sup>4</sup> D.H. and others v. Czech Republic, App. No. 57325/00, ¶ 176, 196 (Nov. 13, 2007), [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22002-2439%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-2439%22]})

<sup>5</sup> *Guberina v. Croatia*, App. No. 23682/13, ¶ 73 (March 22, 2016), <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-5332264-6646797&filename=Judgment%20Guberina%20v.%20Croatia%20-%20failure%20to%20take%20account%20of%20handicapped%20child%27s%20need%20in%20application%20of%20tax%20legislation.pdf>. Note that the suspect nature of the ground of differentiation is not the only element that defines the scope of the margin of appreciation a state enjoys in assessing whether different situations justify differential treatment. Other elements that impact on the breadth of the margin of appreciation are “general measures of economic or social strategy”. When it comes to such measures, the margin of appreciation allowed to a State will usually be a wide one (*Stec and others v the United Kingdom* [GC], Nos. 6531/01 and 65900/01, ¶ 52 (March 22, 2016)). However, “even a wide margin in the sphere of economic or social policy does not justify the adoption of laws or practices that would violate the prohibition of discrimination.” (*J.D. and A. v the United Kingdom*, Nos. 32949/17 and 34614/17, ¶ 83 (October. 24, 2019)).

<sup>6</sup> *Id.*

result in their social exclusion. The new sociology of childhood has convincingly argued that children were and continue to be considered as “not-yets”, which has led to legislative stereotyping in which children are depicted as vulnerable and immature, and therefore considered legally incompetent. An important difference, however, is that persons by definition belong only temporarily to the group of children, that is, until they reach the age of majority. So, perhaps, not age discrimination exceptionalism but child exceptionalism is needed.

### **Child exceptionalism: does the position of vulnerability of children trump the general human rights discrimination logic?**

I approach children’s rights as the human rights of children, and children’s rights law as part and parcel of human rights law.<sup>7</sup> Therefore, the approach to age discrimination in children’s rights law must be aligned as much as possible with the approach taken to age discrimination more generally in human rights law. In the previous section, I concluded that age is not considered, and perhaps should not be considered by the ECtHR as a particularly suspect ground in relation to children. Whereas children share some characteristics with other groups with regard to whom differential treatment has been considered particularly suspect, people inevitably belong to the category of children for a limited period of time only (until the age of majority). But perhaps the unique position of children, as having agency but also being in a position of vulnerability, necessitates child exceptionalism?<sup>8</sup>

Children’s rights can be grouped in three categories so as to reflect that unique position of children: the equal rights that children share with adults; their differentiated (often enhanced) rights; and their special (protection) rights.<sup>9</sup> Special protection of children is epitomized by the best interests principle. So, could it be argued that the best interests principle requires child exceptionalism – special treatment of children – in human rights non-discrimination law?

Article 3.1 of the Convention on the Rights of the Child (CRC) requires States to ensure that the best interests of the child are a primary consideration in all decisions regarding children, including in questions of differential treatment. The CRC Committee has assigned the best interests of the child a threefold status: that of a substantive right, an interpretative legal principle, and a rule of procedure.<sup>10</sup> However, the weight that is to be given in the abstract to the best interests of the child is unclear: does it imply prioritisation or does it trump the other rights and interests? Prioritisation of the child’s best interests means that, “[i]f a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child’s best interests should be

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<sup>7</sup> Wouter Vandenhoe, *Children’s Rights from a Legal Perspective: Children’s Rights Law*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF CHILDREN’S RIGHTS STUDIES (Wouter Vandenhoe ed., 2015).

<sup>8</sup> See generally WOUTER VANDENHOE AND GAMZE ERDEM TÜRKELI, *ADVANCED INTRODUCTION TO CHILDREN’S RIGHTS* (2022).

<sup>9</sup> *Id* at 3.

<sup>10</sup> General Comment No. 14 on the Right of the Child to Have His or Best Interests Taken as a Primary Consideration (art. 3, para. 1), U.N. Doc. CRC/C/GC/14, para. 6 (2013).

chosen.”<sup>11</sup> In general, the best interests of the child do not trump other rights and interests. Article 3 CRC clearly reads that the best interests of the child shall be (only) ‘a primary consideration’, not *the* primary or paramount consideration. The best interests of the child are therefore to be balanced with other interests,<sup>12</sup> although they enjoy “a larger weight”.<sup>13</sup> In specific cases, where the child’s best interests are the paramount or primary consideration, for example in the context of adoption (see Article 21 CRC), the best interests of the child go beyond prioritisation, and become the decisive factor. Instead of an abstract approach, we have suggested a case-by-case best interests test, accompanied by three safeguards: the best interests of the child cannot be defined without hearing and taking into account the views of the child; the best interests needs to be defined by reference to all other human rights of the child; and the best interests of the child must be considered chronologically prior to and as hierarchically higher than other interests.<sup>14</sup> In this case-by-case approach, the best interests of the child do enjoy prioritisation, but they do not categorically trump other rights and interests.

What does this mean for the question of child exceptionalism in the context of age differentiation? The CRC Committee has mainly emphasized that the best interests principle may require States to take, “appropriate proactive measures...to ensure effective equal opportunities for all children to enjoy the rights under the Convention. This may require positive measures aimed at redressing a situation of real inequality.”<sup>15</sup> In other words, in the CRC Committee’s view, the best interests of the child principle takes us beyond negative obligations (obligations not to discriminate), and mainly necessitates differential treatment of children to bring about substantive equality. This may be the case between children and adults, and between children of different age ranges.

The ECtHR has argued that differential treatment is required if someone finds themselves in a relevant different situation, unless an objective and reasonable justification for equal treatment can be given.<sup>16</sup> It accepts that, “with regard to all actions concerning children with disabilities the best interest of the child must be a primary consideration.”<sup>17</sup> Even more so, where a family tie is established between a parent and a child, “particular importance must be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent.”<sup>18</sup> In other words, sometimes the best interests of the child may trump the rights and interests of the parents. However, this argument was accepted in a case about differential treatment

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<sup>11</sup> *Id* at para. 6(a).

<sup>12</sup> *Id* at para. 60.

<sup>13</sup> *Id* at para. 39.

<sup>14</sup> Wouter Vandenhole and Gamze Erdem Türkelli, *The Best Interests of the Child*, in *THE OXFORD HANDBOOK OF CHILDREN’S RIGHTS LAW* 203, 216-17 (Jonathan Todres and Shani M. King eds., 2019).

<sup>15</sup> General Comment No. 14 on the Right of the Child to Have His or Best Interests Taken as a Primary Consideration (art. 3, para. 1), U.N. Doc. CRC/C/GC/14, para. 41 (2013).

<sup>16</sup> *Thlimmenos v. Greece*, App. No. 34369/97, ¶ 44 (April 6, 2000); *Stummer v. Austria* [GC], App. No. 37452/02, ¶ 88 (July 7, 2011).

<sup>17</sup> *Guberina v. Croatia*, App. No. 23682/13, ¶ 73 (March 22, 2016).

<sup>18</sup> *Schwizgebel v. Switzerland*, App. No. 25762/07, ¶ 95 (June 10, 2010).



of adults; the Court has not extended this reasoning to questions of differential treatment *of children* so far.

The ECtHR came closest to the need for differential treatment of children in the area of juvenile justice, in cases about placement of children in detention pending placement in a suitable institution. It held that a difference in treatment between children in provisional placement in a remand prison and adults held in custody pending trial does not amount to discrimination, because the differential treatment of the children “stems from the protective – not punitive – nature of the procedure applicable to juveniles.”<sup>19</sup> There was therefore an objective and reasonable justification for any such difference in the treatment.<sup>20</sup> A similar decision was reached in *D.G. v. Ireland*, where the Court held that in case, “there would be a difference in treatment between minors requiring containment and education and adults with the same requirements, any such difference in treatment would not be discriminatory stemming as it does from the protective regime which is applied through the courts to minors in the applicant’s position.”<sup>21</sup>

In sum, in the context of juvenile justice, children *may* be treated differently compared to adults in their best interests, for the sake of their protection. The ECtHR has not yet established in the context of juvenile justice that they *must* be, but it did so in a migration detention case. In that case, the Court had to assess the deprivation of liberty of an unaccompanied, five year old child that was irregularly on the territory of Belgium, in a detention center for adults. The ECtHR held that in view of, “the absolute nature of the protection afforded by Article 3 of the Convention [the prohibition of torture, inhuman and degrading treatment or punishment], it is important to bear in mind that [her being in an extremely vulnerable situation] is the decisive factor and it takes precedence over considerations relating to the [young girl]’s status as an illegal immigrant.”<sup>22</sup> In assessing the lawfulness of her detention, the Court found that the young girl’s detention, “in a closed centre intended for illegal immigrants in the same conditions as adults [took place in] conditions [which] were consequently not adapted to the position of extreme vulnerability in which she found herself as a result of her position as an unaccompanied foreign minor.”<sup>23</sup> In other words, differential treatment was required for protection reasons, given her position of extreme vulnerability.

A similar approach was taken by the Belgian Constitutional Court (BCC) on the question of the permissibility of euthanasia for children. In 2014, euthanasia was made possible in Belgium for children at their own request. The BCC held that heightened protection measures to safeguard the right to life were to be offered to children in comparison with adults, because of their

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<sup>19</sup> *Bouamar v Belgium*, App. No. 9106/80, ¶ 67 (Feb. 29, 1988).

<sup>20</sup> *Handbook*, *supra* note 7, at 191.

<sup>21</sup> *D.G. v. Ireland*, App. No. 394/74/98, ¶ 115 (May 16, 2002).

<sup>22</sup> *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App. No. 13178/03, ¶ 55 (Oct. 12, 2006).

<sup>23</sup> *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App. No. 13178/03, ¶ 103 (Oct. 12, 2006).



vulnerability.<sup>24</sup> Those protection measures include a more restrictive scope of application (psychological suffering cannot justify euthanasia for children, nor suffering that will not lead within a short time span to death), a binding assessment of the competence of the child by a child or youth psychiatrist or psychologist, and consent of the child's legal representatives.

In sum, child exceptionalism may be permissible or required, for protection reasons and based on a position of vulnerability. Child exceptionalism is not a form of age discrimination exceptionalism, but an application of standard approaches in non-discrimination and equality law. Those standard approaches require that equal cases are treated equally, and unequal cases unequally. However, by acknowledging the need for unequal (protective) treatment of children due to their position of vulnerability, the stereotype that children are in a position of vulnerability and different from adults is reinforced. Child exceptionalism also reinforces an approach in which chronological age rather than maturity is considered. This illustrates once more the difference dilemma, as coined by Minow:<sup>25</sup> there is a tension between the acknowledgement that children are equal to all other (adult) human beings, and the need for a child-specific approach. The dilemma lies in the fact that, “both neutral strategies that ignore difference and special treatment strategies that explicitly acknowledge difference backfire and curiously end up reinforcing or recreating the stigma of being different.”<sup>26</sup>

## Conclusion

There are no strong reasons for age discrimination exceptionalism. General human rights law principles on non-discrimination and equality can be applied to age differentiation. In the current case-law of the ECtHR, age differentiation does not require “very weighty reasons” to be justifiable. It is unclear whether age may ever qualify as a particularly suspect ground that requires “very weighty reasons” to justify differentiation between children and adults, since people by definition only temporarily belong to the category of children.

There is a case for child exceptionalism in the best interests of the child, for protection reasons. Therefore, age differentiation in favor of children may be justifiable or even mandatory in light of the different position of vulnerability of children. But any plea for child exceptionalism on grounds of age comes at a price: it reinforces ageism/adultism and stereotypes of children, and illustrates how the difference dilemma plays out with regard to children.

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<sup>24</sup> BCC, Oct. 29, 2015, n °153/2015, ¶ B.18.

<sup>25</sup> MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990).

<sup>26</sup> Martha Chamallas, *Making All the Difference: Inclusion, Exclusion, and American Law* by Martha Minow (Book Review), 18 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY, 678, 679 (1993).

## Children's Rights and Voting Age Discrimination

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International and national law rarely refer explicitly to age discrimination, and even when they do, they typically focus on age discrimination against the elderly, not the young. Even the Convention on the Rights of the Child (CRC), one of whose foundational principles in article 2 is prohibition against discrimination, refers to a long list of factors such as race, ethnicity, sex, and disability, but not age, except potentially under “other status.” This essay takes up two lines of thought stemming from this situation. First, it explores what it means for children and young people to be discriminated against as children by a legally normative adultism. And second, it tests this problem against the issue of children's rights to vote, that is, their fundamental right to participate in democratically determining rights. I argue that discrimination against children needs to be met with a systemically childist critique that can illuminate societal adultism and reimagine rights such as to vote beyond a regime of biases around age.

The invisibility of age as a discriminatory factor for the young represents a kind of adultism or patriarchy with deep roots in social and legal history. The term adultism has been in use since 1903 when the educator Patterson DuBois coined it to refer to the ways that children's development is hindered by undue impositions of adult points of view. Since the 1990s, the term has come to signify, not just individual actions, but systemic normative biases across societies. Some refer to this type of discrimination against the young as an inherited form of social “prejudice” similar to racism and sexism (Gregoire and Jungers 2007, Young-Buehl, 2011). Others speak of adultism as a type of political “oppression” that uses structures of power to silence and dominate over children's lives. And others still use the term adultism in a poststructuralist sense to mean young people's epistemological “marginalization” or consignment to social invisibility (Moosa-Mitha 2005, Wall 2010).

If discrimination against the young has such profound normative roots, an adequate response must be critical, systemic, and political. To this end, I and others have developed the theoretical concept of childism, in analogy to critical perspectives like feminism, decolonialism, antiracism, and posthumanism. (Others like Young-Buehl 2011 have used the word childism differently as another word for adultism). As I define it, childism is a critical lens for deconstructing adultism across research and societies and reconstructing more age-inclusive scholarly and social imaginations (Wall 2019). Feminism addresses gender discrimination by undoing patriarchal assumptions and developing gender-inclusive social norms. Decolonialism unpacks the continuing domination of the global north and empowers epistemologies arising from the grassroots global south. Likewise, childism fights children's systemic discrimination by empowering children and young people's otherwise marginalized lived experiences to transform shared normative structures for all (Childism Institute 2022).

The right to vote is a central and continuing concern in anti-discrimination movements around gender, race, ethnicity, and more. But less well known is that it has also and more recently arisen as a concern for the third of humanity who are children and youth under the age of 18. Calls have been made to eliminate all voting age discrimination since at least the 1970s (Farson 1974, Holt 1974). But the movement gained steam in the 1990s when child-led groups such as KRÄTZÄ, Foundation for the Rights of Future Generations, Association for Children's Suffrage, National Youth Rights Association, and We Want the Vote started campaigning for ageless voting rights by organizing, pressuring representatives, and suing in courts. This movement has now been joined by adult-led groups such as YouthLaw Aotearoa, Freechild Institute, Children's Voice Association, Children's Rights International Network, Amnesty International UK, and most recently a global organization that I co-founded called the Children's Voting Colloquium (2019). In recent years, there has been a gradual increase in media attention to the issue as well in Ted Talks, op-eds, white papers, blogs, and the like (Wall 2022).

In the academy, the argument for ageless voting – now being made across disciplines such as law, political science, philosophy, childhood studies, history, economics, and pediatrics – is essentially two-fold. First, children's exclusion from suffrage on grounds of incompetence is discriminatory, as it applies a false double standard to which adults are not held. Any legal age of voting is both under- and over-determinative, excluding some capable and including some not (or not as much). Legal scholar Samantha Godwin claims that denying children the right to vote violates US antidiscrimination law by failing a rigorous application of established equal protection jurisprudence (2011). Legal scholars Robert Goodin and Joanne Lau show that child voters would not reduce but, on the contrary, add to the pool of democratic competence by increasing the range of voting perspectives (2011). Political philosopher Claudio López-Guerra argues that the franchise capacity belongs to children as much as to adults if properly understood as the ability to experience the benefits of enfranchisement and the harms of disenfranchisement (2014). Others demonstrate that the most democratic definition of voting competence is neither literacy, knowledge of government processes, nor maturity, but rather the ability to participate in political discourse – something evidently possessed by children of most ages participating, for example, in climate movements, Black Lives Matter marches, gun legislation suits, religious freedom demonstrations, abortion campaigns, queer rights protests, labor unions, children's parliaments, and a great deal more else (Munn 2018, Wall 2020, Wiland 2018).

And second, the argument is made that ageless voting would systematically benefit children, adults, societies, and democracies. The idea here is that, compared to the alternatives, democracy works. Put differently, there is a government interest in being pressured by all instead of just a selection of a society's great diversity of citizens. Some fear that children's voting would adultify children, open them to manipulation, or lead to further harmful children's rights such as to marry and drive. But scholars have argued, on the contrary, that children and youth would finally gain equal consideration in the minds of representatives (Hinze 2020, Priest 2016). Adults who have or work with children would enjoy generally greater government support (Wall 2020). Governments would have to think about environmental sustainability, health care, and economics

in the longer-term (Campiglio 2009, Modi 2018). And citizens no longer being taught in their early years that their voices do not count would likely grown up into less disengaged citizens and more resistant to authoritarian appeals (Cummings 2020).

These nondiscrimination claims find at least implicit support in international law. The 1948 Universal Declaration of Human Rights (UDHR) states in article 21.3 that “the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage.” The International Covenant on Civil and Political Rights (ICCPR) asserts in article 25 that “Every citizen shall have the right and the opportunity ... [t]o vote and to be elected at genuine period elections which shall be by universal and equal suffrage.” And the Convention on the Rights of the Child (CRC) – while arguably an attempt to remove rather than include children from international law (Imoh and Okyere 2020) – nevertheless supports in article 12 children’s “right to express [their] views freely in all matters affecting the child,” which clearly includes politics. Perhaps even more forcefully, CRC article 13 requires that “The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information of all kinds,” with restrictions “only” when it comes to the rights of others and public order: suggesting the right to impart one’s views via voting and without restrictions of age. Indeed, the CRC Committee has already taken steps in this direction already by recommending lowering the voting age in countries like Germany to 16 (Zlotnik 2017).

How these theoretical and legal implications are translated into national law is another matter. In the US, for example, the gradual expansion of suffrage to landowners, the poor, racial minorities, women, and 18-21-year-olds has been accomplished through a combination of revised state law protections and constitutional amendments. The US Supreme Court held in *Dunn v Blumstein* (1972) that voting rights are a “fundamental interest” that therefore must be subject to “strict scrutiny by the courts”; and that “the U.S. government entity limiting voting rights must carry the burden to justify the infringement.” However, no such government justification has ever to my knowledge been provided for denying voting rights to minors. The Twenty-Sixth Amendment protects the vote for citizens 18 and older without necessarily denying it for those younger. Most importantly, the Fourteenth Amendment guarantees “any person within [a state’s] jurisdiction the equal protection of the laws.” It could be argued that citizens under 18 in the US are currently discriminated against by being denied their fundamental interest in the right to vote.

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