

Scandinavian Studies in Law
Volume 68

Scandinavian Studies in Law
Volume 68

Editorial Board

Ulf Bernitz
Said Mahmoudi
Antonina Bakardjieva Engelbrekt

Advisory Committee

Ruth Nielsen (Denmark)
Tuomas Pöysti (Finland)
Aðalheiður Jóhannsdóttir (Iceland)
Ole-Andreas Rognstad (Norway)

ISSN 0085-5944
ISBN 978-91-85142-83-5

SCANDINAVIAN STUDIES IN LAW
VOLUME 68

EQUALITY

Volume Editor
Laura Carlson

General Editor
Lydia Lundstedt



*Published under the auspices of
The Stockholm University Law Faculty*

© Stockholm Institute for Scandinavian Law
Stockholm 2022

Distributor
Jure Law Books
Artillerigatan 67
SE-114 50 Stockholm
Sweden
Telefax +468-662 00 86
www.jure.se
E-mail: order@jure.se

Stockholm Institute for Scandinavian Law
Law Faculty, Stockholm University
SE-106 91 Stockholm
Sweden
scandinavianlaw.se
sisl@juridicum.su.se

A searchable index for all articles published in Scandinavian Studies in Law from 1957,
including a full text database is available at scandinavianlaw.se

Produced by Stockholm Institute for Scandinavian Law
Printed in Estonia by Tallinna Raamatutrükikoda 2022

Foreword

Issues of equality have been radically brought to the forefront by #MeToo, Black Lives Matter, the Covid-19 Pandemic and climate justice in a period of less than five years. The structural discrimination identified in these different contestations has raised more questions than can be answered with respect to the legal treatment of equality. In this sixty-eighth volume in the series, *Scandinavian Studies in Law*, twenty authors take up some of these questions, examining equality under the law in the Scandinavian legal context from four different aspects: theoretical and international frameworks for equality, protected grounds, protected areas and enforcement on the national levels.

In part one addressing theoretical and international frameworks for equality, Kári Hólmur Ragnarsson, Faculty of Law, University of Iceland, addresses conceptions of equality and the distribution of human rights in the volume's first chapter. Taking up the tensions between formal, substantive and social equality, Ragnarsson highlights the importance of focusing on equality outcomes, and the roles played by decision-makers, particularly human rights bodies and courts. Anna Bruce, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund, Sweden, continues this discussion as to the fluidity of the legal concept of equality, tracing its delineation through international human rights law. Beginning with the twin 1966 UN covenants, Bruce demonstrates how the legal concept of equality has gone from a fairly contentless universal term, to gaining more and more content as well as definition in the series of grounds-specific conventions following the covenants, up to UN 2006 Convention on the Rights of Persons with Disabilities, often driven by the actual convention negotiations. Mattias Åhrén, The Arctic University of Norway, defines the right of indigenous peoples to remain distinct, as seen in the various human rights instruments. Equality for indigenous peoples cannot be viewed as treating everyone the same before the law, but instead must be based at times on treating certain persons differently, in the case at hand, indigenous peoples, particularly with respect to their beliefs and culture. Otherwise, the same treatment results in a legally-sanctioned form of discrimination.

Tuomas Ojanen, University of Helsinki, follows this development in the international legal conceptual apparatus of unlawful discrimination as binding on the Nordic countries. Ojanen then turns to the incorporation in the Nordic countries of the different international and to a certain extent, European Union, equality instruments, on the national level, either through procedures of dualism or EU member state obligations, concluding the chapter with an overview of Nordic constitutions and their treatment of equality. Michael McEachrane, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund, Sweden, continues the multi-level approach, taking up the problem of systemic racism, and how it is addressed by international, EU and national legal instruments. Finding the UN 1965 International Convention on the Elimination of All Forms of Racial Discrimination to be the only human rights legal instrument that opens the door to addressing structural discrimination in the form of structural racism, McEachrane argues that more must be done on the EU level than that set out in the Race Equality Directive (2000) in order to motivate EU member states, including those Nordic EU members, Sweden, Finland, and

Denmark, and by way of the EEA, Iceland and Norway, to more strenuously address such issues.

Part two takes up certain grounds as protected from unlawful discrimination, with disability and race already included in part one. Anne Hellum, University of Oslo, describes how issues of gender equality are addressed and driven by the Nordic countries on several levels, internationally, particularly in the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women, on the EU-level and on Nordic national legal levels. Hellum points to the contrast between the Nordic countries being among the top ranked with respect to gender equality, while at the same time, being criticized for taking too narrow an approach to gender, ignoring at times issues of multiple or intersectional discrimination including ethnicity as well as socio-economic status. Hellum also analyses the at times conflicting objectives in these legal systems between individualism and collectivism, and access to justice. Jameson Garland, Uppsala University, next delineates the protected ground of gender identity, also looking at the international, EU and national legal frameworks. Garland describes how the gender binary is an obsolete identification marker that the Nordic countries are having difficulty managing, with several legislative proposals exacerbating instead of resolving the situations which give rise to unlawful discrimination, arguing that the Nordic countries should look to the international Yogyakarta Principles, and the suggestion there of ending the registration of gender as part of one's legal personality. Virve Toivonen, University of Eastern Finland, analyses how the UN Convention on the Rights of the Child has been incorporated in the Nordic countries, and the criticisms the latter have received with respect to the protection of children's rights, in particular the best interests of the child and the right to be heard. Toivonen argues that the Nordic countries should, and could as economically prosperous democratic states, do more to better implement and protect the rights of children.

Liisa Nieminen, University of Helsinki, takes a broader approach to unlawful discrimination in light of the social economic rights under the Nordic legal structures against the backdrop of international human rights law, with a particular focus on the 2000 Finnish Constitution. Nieminen notes the contrast between the wording of the latter and the reality of certain groups in society, highlighting comments made by international committees to Finland with respect to gender, children, older persons, person with disabilities, ethnic minorities as well as vulnerable groups, and the difficulties experienced in achieving de facto equality. Eva Schömer, Kristianstad University, concludes part two by addressing intersectionality and unlawful discrimination, particularly when combined with racism and discrimination on the basis of religion. Schömer emphasises the importance of legal methodology with respect to recognizing and addressing unlawful discrimination, and the vital role that the courts have in discrimination claims.

Part three of this volume takes up certain protected (or not) areas of daily life. Beginning with Lotta Vahlne Westerhäll, University of Gothenburg, we see how patient care during the covid-19 pandemic initially in Sweden resulted in different care dependent upon age and institutionalization. The vulnerability of this group, and the gap in the legal treatment with respect to patient rights allowed for the provision of unequal patient care based on age within several Swedish municipalities. Westerhäll also notes the deviation from the hierarchy

of legal sources in addressing care issues during the pandemic, with an agency decision arguably changing the content of parliamentary legislation in violation of the rule of law. Ida Gundersby Rognlien, University of Oslo, addresses the vulnerability of Danish health care workers during the pandemic, with the workplace injuries predominantly suffered by female health care workers assessed differently by the Danish authorities than those typically suffered by men. Gundersby Rognlien assesses this difference in treatment by agencies of workers as a component of structural gender discrimination, highlighting the need for greater gender awareness as to types of work injuries as well as a redress system for those agencies' decisions that are later found to be incorrect.

Ann Numhauser-Henning, Lund University, continues on the topic of structural gender discrimination in the workplace, and more specifically, sexual harassment. After setting out the regulations on both the EU and national levels, Numhauser-Henning examines the paradigm of the dignity harm v. discriminatory approaches, concluding that a combination of both of these approaches is necessary in order to tackle sexual harassment and structural gender discrimination. Carin Ulander-Wänman, Umeå University, is also examining structural discrimination in the workplace, but through the lens of age. Ulander-Wänman analyses a recent Swedish legislative proposal with respect to the right for workers to receive competence development in employment, particularly crucial for keeping older workers abreast of the new developments at the workplace as well as new technologies. Ageism is problematic at workplaces, and this structural change in employers providing competence development is a step towards addressing it.

Susanne Sørholt, Norwegian Institute for Urban and Regional Research, ends part three of this volume by turning to another pivotal area of daily life, housing, and questions of equality. Sørholt points to the tension between universal policy objectives combined with market mechanisms in the realm of equality opportunities for housing in Norway. Looking at the situation of immigrants seeking stable and safe housing, Sørholt analyses the difficulties in defining housing equality, as well as the limits of the law particularly as pitted against market mechanisms, and the endemic presence of structural racism in the housing market.

Part four focuses on the enforcement of discrimination claims as within two Nordic countries, Norway and Sweden, also as with respect to the (non)use of statistical evidence at least in Sweden in discrimination claims, and last, the role civil society needs to play in moving equality law forward. Marte Bauge and Lene Løvdal, both European discrimination experts for Norway as well as human rights lawyers, trace the two paths available to discrimination claimants in Norway, namely, litigation before the courts and tribunal claims, identifying both the advantages and disadvantages with each. They also take up the issue of proactive v. reactive measures with respect to addressing issues of equality. Laura Carlson, Stockholm University, examines the Swedish procedures for making employment discrimination claims, particularly the role of the labour unions and the Equality Ombudsman. Based very much on a collective system of making employment claims, Carlson identifies areas in which access to justice could be more securely provided.

Yamam Al-Zubaidi, independent consultant formerly with the Swedish Equality Ombudsman, squarely discusses the use in discrimination litigation of

statistics relating to racial and ethnic minorities, both on the EU and Swedish national legal level. Al-Zubaidi addresses the historical European reluctance to track such statistics in light of the modern need for such to address issues of equality and structural discrimination. Pointing to a system of socialization in order to create better understanding and acceptance of such statistical information, Al-Zubaidi sees in the EU's 2020-2025 action plan the potential for renewed discussion and socialization as to the use of such a key instrument for combatting inequality. Paul Lappalainen, Stockholm University and Sweden's non-discrimination expert in the European Equality Law Network, concludes the volume in a chapter dedicated to the importance of civil society in addressing issues of inequality. Particularly, Lappalainen underscores the role of the civil society organisation, The Starting Line Group was instrumental in bringing about changes to not only the EU treaty but also to the content and actual adoption of the Racial Equality Directive. This involved legislative advocacy as well as mobilization, especially concerning civil society organisations representing the victims of discrimination. Noting the influence that a relatively small number of individuals had on the direction of EU law in addressing racial discrimination, Lappalainen reminds the reader that this approach, in spite of current power structures, is within the grasp of individuals seeking to make society and life opportunities equal for all.

The authors in this volume dedicated to Equality have taken up only a few of the many aspects that need to be addressed in order to truly reach equality and eradicate structural discrimination. We hope that this volume has furthered the readers interest in these issues, and look forward to continuing the conversation.

Knivsta, January 2022

Laura Carlson

The series Scandinavian Studies in Law is published by a non-profit trust. The first volume was presented in 1957 and to date some 900 articles have been made available in the series. The overall objective of the series is to present Scandinavian law and legal theory to a wide English-language readership. The volume editor for this volume has been Professor Laura Carlson, Stockholm University.

More information about Scandinavian law and the series is available at scandinavianlaw.se.

Table of Contents

Theoretical and International Frameworks for Equality

Conceptions of Equality and the Distribution of Wealth in Human Rights Adjudication <i>Kári Hólmur Ragnarsson</i>	13
The Unfolding of Equality in International Human Rights Conventions <i>Anna Bruce</i>	37
Indigenusness as a Protected Ground of Discrimination <i>Mattias Åhrén</i>	67
Equality and Non-discrimination in Human Rights Treaties and Nordic Constitutions <i>Tuomas Ojanen</i>	91
Anti-Discrimination Law and Systemic Racism: Challenges for the EU and the Nordic Countries <i>Michael McEachrane</i>	119
Protected Grounds	
Gender Equality in the Nordics <i>Anne Hellum</i>	151
Equality and Protection for Gender Identity and Characteristics <i>Jameson Garland</i>	187
Children’s Right to Equality <i>Virve Toivonen</i>	213
Equality and Social Rights within the Finnish Welfare State <i>Liisa Nieminen</i>	231
Intersectional Discrimination: Gaining Entry to Swedish Workplaces <i>Eva Schömer</i>	249

Protected Areas

Equality Within Medical Care Discrimination of Elderly With Covid-19 in Residential Homes <i>Lotta Vahlne Westerhäll</i>	271
Care Workers in the Covid-19 Pandemic: Questions of Injury Compensation from a Gender Perspective <i>Ida Gundersby Rognlien</i>	287
Sexual Harassment at Work – Discrimination versus Dignity Harm A Comment in the Wake of the #metoo Movement <i>Ann Numhauser-Henning</i>	313
Equality and Lifelong Learning: Facilitating Employment Transitions for Aging Workers in Sweden <i>Carin Ulander-Wänman</i>	329
The Problem of Equal Opportunities of Housing Immigrants in a Liberalized Housing Market <i>Susanne Søholt</i>	347
Enforcement	
Access to Justice in Discrimination Cases in Norway <i>Marte Bauge and Lene Løvdal</i>	373
Sweden - Balancing Corporatism and Access to Justice <i>Laura Carlson</i>	403
Racial and Ethnic Statistics in Sweden: Has the Socialization Process Started Yet? <i>Yamam Al-Zubaidi</i>	425
The Role of Civil Society Advocacy in Equality Law – Lessons for the Nordics <i>Paul Lappalainen</i>	451
Contributors	491

**Theoretical and
International Frameworks
for Equality**

