Equality and Non-discrimination in Human Rights Treaties and Nordic Constitutions

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Equality and non-discrimination are rights and principles of universal validity. The right to equality before the law and the right to non-discrimination are the only human rights expressly mentioned in the United Nations Charter, and these rights are at the core of virtually all human rights treaties, as well as the Charter of Fundamental Rights of the European Union (EU Charter). Similarly, domestic constitutions usually, albeit not invariably, enshrine equality and non-discrimination as fundamental or constitutional rights, depending on the terminology used in the given legal order.[1]

Equality and non-discrimination are indispensable for the enjoyment of other fundamental and human rights, and they are also closely interconnected with human dignity. Moreover, as expressed in the Preamble and in Article 2 of the Treaty on European Union (TEU), equality and non-discrimination are founding values shared between the European Union (EU) and its Member States. As underscored by the European Commission for Democracy through Law (the Venice Commission), non-discrimination and equality before the law also constitute core elements of the rule of law, as well as are linked to democracy.[2] While democracy relates to the involvement of the people in the decision-making processes in a society, equality and non-discrimination safeguard and promote democracy by guaranteeing equal involvement of the people without discrimination in these decision-making processes and by protecting minorities against arbitrary rules as imposed by the politically-powerful majority.

The primary aim of this chapter is to provide an overview of equality and non-discrimination[3] in European and international human rights treaties binding upon the five Nordic countries, i.e., Denmark, Finland, Iceland, Norway and Sweden. In addition, the EU Charter will be taken into account as it is binding upon the three Nordic EU Member States - Denmark, Finland and Sweden - when they are implementing EU law, such as the EU's equality and non-discrimination directives.[4] Accordingly, Section 1 below addresses such questions as how

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1 The term 'human rights' in this chapter denotes those rights guaranteed by European and international human rights treaties such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights. The notion of 'fundamental rights' refers to rights as enshrined in the domestic constitutions, as well as the EU Charter of Fundamental Rights.

2 European Commission for Democracy through Law, CDL-AD(2011)003rev, Report on the rule of law - Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011), paras. 41 and 62-65. See also European Commission for Democracy through Law, Rule of Law Checklist, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), pp. 30-32.

3 For a useful overview, see European Agency for Fundamental Rights (FRA), European Court of Human Rights and Council of Europe, Handbook on European non-discrimination law, 2018 edition, pp. 155-226 also available at: https://fra.europa.eu/en/publication/2018/handbook-european-non-discrimination-law-2018-edition. See also European Court of Human Rights, Guide on Article 14 European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Prohibition of discrimination, updated on 31 August 2021, pp. 23-42, available at: https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf.

4 The EU equality and non-discrimination directives include Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal L 180, 19/07/2000,* pp. 0022 – 0026; *C*ouncil 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,* pp. 16–22*;* Directive

human rights treaties enshrine non-discrimination and equality, what is meant by non-discrimination and equality, and when differential treatment constitutes discrimination. In addition, grounds and forms of discrimination are covered.

The secondary aim of this chapter is to offer a brief survey of how Nordic constitutions enshrine equality and non-discrimination, as well as how international human rights treaties may impact on the domestic constitutional systems of rights protection, including equality and non-discrimination. Section 2 examines the Nordic constitutional systems of protection and promotion of equality and non-discrimination. Section 3 offers a brief conclusion.

Given these aims, several important issues pertaining to equality and non-discrimination are unfortunately given scant attention. In particular, as the focus in this chapter is on equality and non-discrimination as human rights and fundamental rights, Nordic equality and non-discrimination legislation, as well as the EU non-discrimination legislation, falls outside the scope of this chapter. The same can be said about various institutional arrangements for the protection and promotion of equality and non-discrimination in the Nordic countries. It also warrants notice that in the following, the focus is not specifically on gender equality or racial or disability discrimination, although observations are made on such treaties as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); and the Convention on the Rights of Persons with Disabilities (CRPD) that are specifically aimed at countering discrimination on such grounds as race, gender and disability.

Given these limitations, the reader is reminded at the outset that the effective protection and promotion of equality and non-discrimination depend much more than simply on human rights treaties and domestic constitutional systems of rights protection. What ultimately counts is how Nordic legislators, public authorities and courts, as well as private actors in such fields as employment, education, supply of goods and services, social security and political participation *de facto* respect, promote and enforce equality and non-discrimination.

1 Equality and Non-discrimination in European and International Human Rights Treaties Binding upon the Nordic Countries

The right to equality before the law and the right to non-discrimination constitute the core of international human rights protection, for these rights are indispensable for the enjoyment of other human rights. As noted by the UN Human Rights Committee: 'Non-discrimination, together with equality before

2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) *OJ L 204, 26.7.2006,* pp. 23–36; and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, *OJ L 373, 21.12.2004*, pp. 37–43.

the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.'[5]

The importance of equality and non-discrimination is reinforced by the status of some dimensions of non-discrimination as absolute, non-derogable rights. While Article 4 (2) of the International Covenant on Civil and Political Right (ICCPR) allows for a State unilaterally to derogate temporarily from a number of its treaty obligations in a state of emergency, such measures cannot involve discrimination on the ground of race, colour, sex, language, religion or social origin.[6] The adoption of the Universal Declaration of Human Rights in 1948 paved the way for the legal consolidation of equality and non-discrimination as human rights by proclaiming in its Articles 1 and 2 that everyone is equal in dignity and rights, and then condemning discrimination on a non-exhaustive number of grounds.

Thereafter, equality and non-discrimination have become embedded in the bedrock of international human rights law. Today, equality and non-discrimination are overarching principles of human rights protection, and virtually all international and regional human rights treaties include provisions which variously enshrine equality and non-discrimination. In addition, such treaties as ICERD, CEDAW, the Convention on the Rights of the Child (CRC) and CRPD are targeted to deal with cases of discrimination on specific grounds in the areas in which people are traditionally denied the right to right to equality before the law and the right to non-discrimination. For instance, non-discrimination (Article 2 CRC) is among the overarching principles of the CRC with regard to the rights of children and, accordingly, is fully applicable, in all its facets, to every child in all actions concerning children and their parents.[7]

Equality and non-discrimination can be regarded as positive and negative dimensions of the same fundamental principle and, accordingly, as complementary and mutually reinforcing.[8] Yet, it is also necessary to distinguish between them since human rights treaties enshrine equality and non-discrimination in different ways. In addition, non-discrimination and equality have distinct functions to fulfill as will be discussed in more detail below.

Such human rights treaties as the European Convention on Human Rights (ECHR) are not explicitly concerned with equality before the law, while some treaties explicitly guarantee both equality and non-discrimination. For instance, Article 26 ICCPR enshrines equality and non-discrimination simultaneously by proclaiming that:

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5 UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989, para. 1.

6 UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 8.

7 See Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, para. 12.

8 AF. Bayefsky, *The Principle of Equality or Non-discrimination in International Law*, 11 Human Rights Quarterly, 1990, p. 5.

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Similarly, equality and non-discrimination are enshrined in tandem in Article 5 CRPD.[9]

Some treaties even include separate provisions on equality and non-discrimination. The International Covenant on Economic, Social and Cultural Rights (ICESCR), for instance, has distinct provisions on equality (Article 3) and non-discrimination (Article 2.2). Similarly, the EU Charter makes a distinction between equality before the law (Article 20) and non-discrimination (Article 21). However, these distinctions cannot lose sight of the complementarity of equality and non-discrimination. The Court of Justice of the European Union (CJEU), for instance, has emphasized that the principle of equal treatment 'is a general principle of EU law, enshrined in Article 20 of the Charter, of which the principle of non-discrimination laid down in Article 21(1) of the Charter is a particular expression'.[10]

1.1 Major Legal Characteristics of Equality and Non-discrimination

While practically all European and international human rights treaties contain non-discrimination clauses, a fundamental difference must be made between those treaty provisions that guarantee the right to non-discrimination as an autonomous and self-standing human right, on one hand, and those treaty clauses that prohibit non-discrimination only in the relation to the exercise of another right guaranteed by the treaty, on the other hand.

Article 26 ICCPR illustrates a treaty provision on non-discrimination that provides in itself an autonomous human right independent from other provisions, according to the Human Rights Committee: 'When legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.'[11]

By contrast, Article 2(1) ICCPR, as well as Article 14 ECHR, are examples of such treaty provisions that prohibit discrimination in the enjoyment of the rights and freedoms set forth in these Conventions. Hence, an alleged violation of Article 14 ECHR can only be examined by the European Court of Human Rights (ECtHR) in conjunction with another right guaranteed by the ECHR. However, the ECtHR has held in its case law that even if Article 14 ECHR has

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[9] See Committee on the Rights of Persons with Disabilities, Article 5: Equality and non-discrimination (Adopted 9 March 2018).

[10] See Case C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, EU:C:2014:350, para. 43. See also Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* EU:C:2010:512, paras. 54 and 55 and the case-law cited.

[11] UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, para. 12.

no independent existence in relating to rights and freedoms set forth in the ECHR, the court may nonetheless examine claims under Article 14 taken in conjunction with a substantive right even if there has been no violation of the substantive right itself.[12]

In recent decades, the tendency of international human rights law has been towards the adoption of independent and free-standing clauses on the prohibition of discrimination. The adoption of Article 1 of the ECHR Protocol No. 12 (general prohibition of discrimination) has rendered the prohibition of discrimination a freestanding human right within the framework of the ECHR. Similarly, Article 5 CRPD, as well as Article 21 EU Charter, enshrine the right to non-discrimination as an autonomous right independent from other provisions. However, the scope of application of the EU Charter, including equality before the law under its Article 20 and non-discrimination under Article 21, is limited to the extent that the EU Member States are bound to comply with the EU Charter only when implementing EU law within the meaning of its Article 51(1). According to the jurisprudence of the EU Court of Justice, Article 51(1) EU Charter means that where a legal situation does not come within the scope of EU law, the Court does not have jurisdiction to rule on it and any provisions of the EU Charter relied upon cannot, of themselves, form the basis for such jurisdiction.[13]

Several human rights treaties, such as the ICCPR[14] and CRPD[15], refer to equality and non-discrimination as both rights and principles.[16] As rights, the equality and non-discrimination provisions of human rights treaties are capable of being justifiable and, accordingly, can provide a legal basis for litigation at domestic, European and international levels to the extent that the human rights treaty concerned has a system for individual or collective complaints. From a historical point of view, it should be remembered in this context that the Human Rights Committee extended the justifiability of Article 26 ICCPR to the enjoyment of economic, social and cultural rights already in the 1980s.[17] This

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12 See e.g., *Sommerfeld v. Germany*, No. 31871/96, 8 July 2003. For an overview of the scope of application of Article 14 ECHR, see Council of Europe/European Court of Human Rights, Guide on Article 14 European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Prohibition of discrimination, updated on 31 August 2021, 6-10, available at: https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf.

13 See e.g., Case C-617/10, *Åkerberg Fransson*, EU:C:2013:105, para. 22.

14 See UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination.

15 See also Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6.

16 On human rights as rights and principles, see M Scheinin, *Characteristics of Human Rights Norms*, in Krause and Scheinin (eds.), International Protection of Human Rights: A Textbook, Åbo Akademi University Institute for Human Rights, Åbo, 2009, p. 32.

17 The landmark cases are *Zwaan-de Vries v. The Netherlands* and *Broeks v. the Netherlands* in which the Committee held that the right to employment benefits is subject to subject to the individual petition procedure available under the ICCPR where their domestic implementation includes forms of discrimination. See F. H. Zwaan-de Vries v. the Netherlands, Communication No. 182/1984 (9 April 1987), U.N. Doc. Supp. No. 40 (A/42/40) at 160 (1987); and S. W. M. Broeks v. The Netherlands, Communication No. 172/1984, U.N. Doc. CCPR/C/OP/2 (1990) p. 196. Similar case law extending Article 14

jurisprudence by the Human Rights Committee, effectively protecting individuals from discrimination in the enjoyment of a variety of economic, social and cultural rights, was of supreme significance at a time when there was a lack of individual complaints mechanism for violations of economic, social and cultural rights under UN treaties.[18] Moreover, equality and non-discrimination provisions provide interpretative tools for all the other principles and rights enshrined in human rights treaties, as well as for domestic laws and policies.

As with other human rights, equality and non-discrimination entail a cluster of concomitant legal obligations.[19] Basically, a state party is obliged to respect, protect and promote equality and non-discrimination as human rights. In addition, these obligations include both a negative and positive dimension. On one hand, obligations under equality and non-discrimination require states to refraining from violating the right to equality before the law and the right to non-discrimination. On the other hand, these rights impose various positive legal obligations on states, such as the obligation to protect these rights against interference by others. In particular, states are obliged to modify or abolish existing laws, regulations, customs and practices that may constitute inequalities and discrimination, as well as to take other measures of protection and promotion, including such positive actions or affirmative measures that aim to accelerate or achieve *de facto* equality of persons. Moreover, human rights treaties, as well as EU law, impose on the states obligations to establish various specific bodies and institutions, as well as judicial and other remedies[20], for the purpose of monitoring, protecting and promoting equality and non-discrimination. Positive measures designed for the achievement of factual equality are discussed in more detail below.

ECHR to social rights and providing social rights with possibilities of becoming justifiable can be found from the ECtHR. For overview of the case law of the ECtHR on the protection against discrimination in the context of a variety of social benefits, see European Court of Human Rights, Guide on Article 14 European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Prohibition of discrimination, updated on 31 August 2021, pp. 46-48.

18 The Optional Protocol to the ICESCR was opened for signature in March 2009. Together with the framework of the European Social Charter, the 1995 Additional Protocol to the European Social Charter establishes a system of Collective Complaints which is meant for cases of non-compliance in a State's law or practice with provisions of the European Social Charter. However, the collective complaint procedure does not establish a system of individual complaints; instead, it mainly allows trade unions or their international organisations to file collective complaints with the European Committee of Social Rights in relation to non-compliance with the Charter. Of the Nordic countries, Finland, Norway and Sweden have ratified the collective complaint procedure.

19 For the typology of state's obligations under human rights treaties, see Oliver de Schutter, *International Human Rights Law, Cases, Material.s, Commentary*, Cambridge University Press, 2010, pp. 241-364.

20 According to Article 26 ICCPR, for instance, states parties are obliged to establish judicial remedies in the case of discrimination occurring in the public and even in the private sphere. See also *Nahlik et al. v. Austria*, Communication No. 608/1995, U.N. Doc. CCPR/C/57/D/608/1995 (1996).

1.2 The Concepts of Non-discrimination and Equality

Despite the fact that the term 'non-discrimination' is contained in all human rights treaties, most human rights treaties, as well as the EU Charter, do not expressly define it. However, certain treaties aimed at eliminating discrimination on specific grounds include explicit definitions on discrimination. Article 1 ICERD provides that the term 'racial discrimination' means:

> [A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Similarly, Article 1 CEDAW defines what 'discrimination against women' may include.

These explicit definitions have paved the way for other UN treaty bodies when interpreting the concept of discrimination. For instance, the ICCPR neither defines discrimination nor indicates what may constitute discrimination. However, with reference to the definitions under CEDAW and ICERD, the Human Rights Committee has observed that the term 'discrimination' as used in the ICCPR should be understood to:

> [I]mply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[21]

Accordingly, as with Article 1 ICERD and Article 1 CEDAW, this definition by the Human Rights Committee expressly refers to four types of such arbitrary treatment that may constitute discrimination by undermining equal enjoyment or exercise of human rights: 'distinction', 'exclusion', 'restriction' or 'preference'.

The CRPD, which is designed for the protection of equality for and non-discrimination against persons with disabilities, defines in its Article 2 discrimination as meaning:

> [A]ny distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

While taking advantage of other legal definitions of discrimination in international human rights treaties, this definition transcends them by identifying 'denial of reasonable accommodation' as one specific form of disability-based discrimination. In addition, this definition includes phrase 'on an equal basis with others', essentially requiring that persons with disabilities are not to be granted more or fewer rights or benefits than the general population, as well as

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[21] General comment No. 18: Non-discrimination, para. 7.

that States parties are obliged to take concrete specific measures for the purpose of achieving de facto equality for persons with disabilities to ensure that they can in fact enjoy all human rights and fundamental freedoms. [22] Articles 1 and 3 CEDAW include a similar but more limited phrase ´on a basis of equality of men and women'.[23]

In the current state of evolution of international human rights law, the notion of 'equality' is related to a number of expressions that are used to cover particular dimensions or elements of equality. The most traditional is the term 'equality before the law' which serves to indicate that all individuals are subject to the same laws, with no individual or group having special legal privilege. Thus, equality before the law involves the idea of formal equality, to the extent that laws, however unjust in practice, should be equally applied, and consistently implemented. According to the CJEU, for example, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.[24] The Committee on the Rights of Persons with Disabilities, in turn, has defined the term 'equal before the law' as describing 'the entitlement of persons to equal treatment by and in the application of the law, as a field.' The Committee has added that, in order that this right may be fully realized, 'the judiciary and law enforcement officers must not, in the administration of justice, discriminate against persons with disabilities.'[25] The right to equality before the law is also reflected in Article 15 CEDAW which guarantees women's equality before the law and requires the recognition of women's legal capacity on an equal basis with men, including with regard to concluding contracts, administering property and exercising their rights in the justice system.

However, these remarks on equality before the law do not exhaust the spectrum of 'equality' under international human rights law as several human rights treaties also embrace the expression 'equal protection of the law' in addition to 'equality before the law'. For instance, Article 26 ICCPR entitles all persons both to equality before the law and equal protection of the law. Similar expressions can be found in Article 5 CRPD.[26] While both expressions refer to related and complementary ideas of equality and non-discrimination, they should also be kept distinct. 'Equality before the law' denotes to the entitlement of persons to equal treatment by and in the application of the law, whereas the phrase 'equal protection of the law' basically means that national legislatures must refrain from maintaining or establishing discrimination when enacting laws and policies.

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[22] See also Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, para. 17.

[23] For an overview of definitions of discrimination in European non-discrimination law, see Handbook on European non-discrimination law, pp. 39-90.

[24] See Joined Cases C-581/10 and C-629/10 *Nelson and Others* [2012] ECR, para. 33 and the case-law cited.

[25] Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, para. 14.

[26] See Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, para. 16.

The evolution in human rights law has also introduced new forms or dimensions of equality. Article 5 CRPD uses 'equality under the law' and 'equal benefit of the law' which are unique to that Convention. 'Equality under the law' denotes the possibility to engage in legal relationships, i.e., to the right to use the law for personal benefit. According to the Committee the Rights of Persons with Disabilities, persons with disabilities:

> [H]ave the right to be effectively protected and to positively engage. The law itself shall guarantee the substantive equality of all those within a given jurisdiction. Thus, the recognition that all persons with disabilities are equal under the law means that there should be no laws that allow for specific denial, restriction or limitation of the rights of persons with disabilities, and that disability should be mainstreamed in all legislation and policies.

In turn, the phrase 'equal benefit of the law' seeks to ensure equal opportunity for all persons with disabilities and, accordingly, essentially means that States parties must eliminate barriers to gaining access to all of the protections of the law and the benefits of equal access to the law and justice to assert rights.[27]

Moreover, Article 12 CRPD enshrines the right to 'equal recognition before the law' which further describes the content of equality before the law by focusing on the areas in which people with disabilities have traditionally been denied the right to equality before the law. Instead of setting out additional rights for people with disabilities, Article 12 describes the specific elements that States parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others.[28]

1.3 Grounds of Discrimination

Typically, European and international treaty provisions on discrimination contain non-exhaustive lists of grounds, implied by such phrases in treaty provisions as 'any ground such as' or 'any other status'. References here, for instance, can be made to Articles 2(1) and 26 ICCPR, Article 14 ECHR, including Article 1(1) ECHR Protocol 12, Article 5 CRDP and Article 2 CRC, which all prohibit discrimination on an open-ended list of grounds. Article 21(1) EU Charter also contains an open-ended list of grounds.

Since the grounds enumerated in human rights treaty provisions are not intended to be exhaustive, this effectively provides leeway for the courts, treaty bodies and other legal actors as regards the determination of grounds upon which discrimination may be prohibited. Moreover, such open-ended lists of prohibited grounds give room to keep the interpretation of the prohibition of discrimination contemporary and evolutive. For instance, the ECtHR has been able to read into Article 14 ECHR such grounds as age, disability, gender identity, sexual

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[27] Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, paras. 14-16.

[28] See Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014), Article 12: Equal recognition before the law, CRPD/C/GC/1 in which the Committee comments in detail the normative content of Article 12 CRPD on 'equal recognition before the law'.

orientation, parental and marital status, immigration status and status related to employment, none of which are either enumerated in Article 14 ECHR or Article 1 ECHR Protocol 12 that include identical open-ended lists of prohibited grounds.[29]

The case law by courts and international treaty-bodies of human rights on prohibited grounds, including whether there has been a difference of treatment for some other ground, is today vast in scope and rich in details. This body of cases covers a wide variety of discriminatory acts in a context of various situations and other rights, such as the right to private and family life, political rights, cultural, economic and social rights, property rights and access to justice. Given space constraints, it would be a mission impossible to provide more detail here concerning this very rich and dynamic jurisprudence. The reader is advised to familiarize herself with such comprehensive surveys as found in the FRA *Handbook on European non-discrimination law* in which the content regarding the various grounds is described in light of international and European interpretive practice.[30]

1.4 Forms of Discrimination

The primary forms of discrimination recognized under international human rights treaties have traditionally been *direct* and *indirect* discrimination, which also reflect the distinction between *formal* and *substantive* (factual) equality. While formal equality seeks to combat direct discrimination by treating persons in similar situations similarly, substantive equality addresses countering structural and indirect discrimination as discrimination often originates in the structural barriers and power relations of society.

1.4.1 Direct and Indirect Discrimination

Direct discrimination is where a person is treated less favourably than other persons because of a different personal status in a similar situation. According to the ECtHR, for instance, there must exist 'a difference in the treatment of persons in analogous, or relevantly similar, situations' which is 'based on an identifiable characteristics'.[31] Accordingly, direct discrimination can occur when one person is treated less favourably than another is in a comparable situation on such grounds as racial or ethnic origin. The motive or intention of discrimination is irrelevant to a determination of whether discrimination has

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[29] For an overview of the application of 'other status' by the ECtHR, see Guide on Article 14 European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, pp. 34-43.

[30] See Handbook on European non-discrimination law, 2018 edition, pp.155-227. See also e.g., European Court of Human Rights, Guide on Article 14 European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Prohibition of discrimination, Updated on 31 August 2021, pp. 23-42, available at: https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf.

[31] See e.g., *Biao v. Denmark* - 38590/10, Judgment 25.3.2014, para. 89. For direct discrimination under European non-discrimination law, see Handbook on European non-discrimination law, pp. 43-52.

occurred. For example, a school that refuses to admit a child with disabilities in order to avoid having to change the scholastic programmes does so just because of his or her disability, and this consequently is direct discrimination.[32]

The essential factor is thus the less favourable treatment of an individual which can be discerned by making a comparison to someone in a similar situation.[33] Hence, the essential questions revolve around the existence of a difference in treatment and the issue of the chosen comparators in an analogous situation to the individual's situation. However, direct discrimination can also occur when two persons in different situations are treated in the same way. For instance, the ECtHR has ruled that 'the right to not be discriminated against in the enjoyment of the rights guaranteed under the ECHR is also violated when states … fail to treat differently persons whose situations are significantly different'.[34]

Indirect discrimination occurs when *prima facie* neutral laws, policies or practices *de facto* disadvantage a person or a group sharing the same characteristics.[35] Hence, indirect discrimination is essentially constituted by the *effects* of a treatment on a person or a group with different characteristics. For instance, the ECtHR has defined indirect discrimination by stating that 'a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group'.[36] According to the settled case-law by the CJEU relating to the concept of indirect discrimination:

> [U]nlike direct discrimination, indirect discrimination may stem from a measure which, albeit formulated in neutral terms, that is to say, by reference to other criteria not related to the protected characteristic, leads, however, to the result that particularly persons possessing that characteristic are put at a disadvantage.[37]

The Committee on the Rights of Persons with Disabilities has given such examples of indirect discrimination as where a candidate with restricted mobility has a job interview on a second floor office in a building without an elevator, that although allowed to sit the interview, the situation puts him/her in an unequal position.[38] Often, albeit not invariably, the key question on whether an apparently neutral practice in fact has an adverse impact upon a group sharing a protected characteristic is demonstrated by means of statistical evidence.

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[32] See Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, para. 18.

[33] See on the criterion of a comparator, Handbook on European non-discrimination law, pp. 44-48.

[34] *Thlimmenos v. Greece*, No. 34369/97, 6 April 2000, para. 44.

[35] On indirect discrimination in light of European and international interpretive practice, see Handbook on European non-discrimination law, pp. 53-59.

[36] *Biao v. Denmark*, No. 38590/10, 24 May 2016, para. 103.

[37] See to this effect, in particular, judgment in *Z.*, C-363/12, EU:C:2014:159, para. 53 and the case-law cited.

[38] Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, para. 18 b.

1.4.2 Multiple and Intersectional Discrimination, Discrimination by Association and Other Discriminatory Conduct

However, discrimination does not necessarily occur on the basis of a single characteristic, such as ethnic origin, disability or gender, and the direct and indirect discrimination division does not necessarily enable adequately recognize all forms of discrimination. For instance, children may be in a situation of double or multiple vulnerability where additional vulnerabilities can relate to such grounds, for instance, as their national, ethnic or social origin; gender; religion; disability; migration or residence status. In addition, discrimination against a child can be against those who are associated with a child, i.e., parents.

Hence, the evolution of European and international non-discrimination laws in recent decades has led to the emergence of such new forms of discrimination as *multiple discrimination*, *intersectional discrimination* and *discrimination by association* for the purpose of eradicating and combating more effectively all discriminatory situations and forms of discriminatory conduct. According to the Committee on the Rights of Persons with Disabilities, for example, *multiple discrimination* occurs in a situation 'where a person can experience discrimination on two or several grounds, in the sense that discrimination is compounded or aggravated'.[39] *Intersectional discrimination*, in turn, refers to 'a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable and thereby expose relevant individuals to unique types of disadvantage and discrimination'.[40] Hence, two or several grounds operate separately in the case of multiple discrimination while in intersectional discrimination several grounds interact with each other simultaneously and inseparably, thereby generating specific types of discrimination. Multiple and intersectional discrimination can occur as both direct or indirect discrimination. *Discrimination by association* occurs when discrimination takes place against persons who are associated with a person with a protected characteristics such as disability. For instance, the CJEU has ruled that it constitutes discrimination on the grounds of the disability of a child if a mother is treated unfavourably at work because her child was disabled.[41]

Moreover, European non-discrimination law nowadays recognize such specific forms of discrimination as *harassment* and *instruction to discrimination*.[42] Harassment is a form of discrimination when unwanted conduct related to some prohibited grounds takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. Instruction to discrimination occurs when there is an expressed instruction, recommendation, preference or

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[39] Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, para. 19.

[40] Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, para. 19. For multiple and intersectional discrimination in European non-discrimination law, see Handbook on European non-discrimination law, pp. 59-63.

[41] See Case C-303/06 *Coleman* [2008] ECR I-5603. See also see Handbook on European non-discrimination law, pp. 51-52.

[42] See in more detail, Handbook on European non-discrimination law, pp. 67-69.

an encouragement to treat individuals less favourably on the basis of some protected ground such as religion or sexual orientation.

Under the CRPD, the Committee on the Rights of Persons with Disabilities has identified such forms of discrimination as 'denial of reasonable accommodation', 'discrimination on the basis of disability' and protection against 'discrimination on all grounds', including equal and effective legal protection against discrimination. However, these forms of discrimination are quite unique to the CRDP and, accordingly, they are not necessarily generally recognized in European and international non-discrimination law.

1.5 Positive Measures

As human rights, equality and non-discrimination impose a variety of positive obligations for the purpose of protecting and promoting equality and non-discrimination rights, as well as accelerating or achieving factual equality in favour of some disadvantageous, under-represented or marginalized group. In practice, state parties have positive obligation to enact specific and comprehensive non-discrimination legislation, as well as are obliged to modify or abolish existing laws, regulations, customs and practices that constitute such discrimination.

However, positive duties may also include such measures as allocation and/or reallocation of resources, targeted recruitment, hiring and promotion, quota systems, advancement and empowerment measures, as well as technological aids. The terminology used to describe these kinds of measures designed for achieving factual equality and removing discrimination varies in European and international human rights law to include such notions as 'positive measures', 'special measures', 'specific measures', 'positive actions' or 'affirmative action'.[43] Here, the notion of 'positive measures' is used.

Positive measures are expressly recognized in such human rights treaties as Article 1 (4) ICERD, Article 4 CEDAW and Article 5(4) CRDP. For instance, Article 1 (4) ICERD provides:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Several human rights treaties, such as the ICCPR and the ECHR, as well as the EU Charter, are silent on positive measures, but their permissibility and even necessity have been acknowledged by their monitoring bodies. The Human Rights Committee, for instance, has pointed out under the ICCPR that 'the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.' According to the Committee, there

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[43] See Handbook on European non-discrimination law, p. 71.

may be a need for these measure for example 'in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions.'[44] However, the Committee has also emphasized that such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. As long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the ICCPR.[45] Likewise, the ECtHR has found that, in certain circumstances, Article 14 ECHR may include 'positive measures' that a state could or should adopt to correct factual inequalities.[46] Similarly, the CJEU has recognized the possibility of positive measures under EU law.[47]

Differential treatment entailed by positive measures does not constitute a distinct form of discrimination but, instead, such measures feature as exceptions to the rule prohibiting discrimination. However, as such measures are needed to correct discrimination and unequal treatment in fact and they cannot be continued after their objectives have been achieved, positive measure are usually temporary in nature. As positive measures are usually designed for acceleration and achievement of factual equality, such measures also tend to entail the consideration of the collective dimension of discrimination, rather than the perspective of only one individual. Positive measures must also be consistent with such principles and provisions of the treaties as the principles of legitimacy fairness and proportionality. The Committee on the Rights of Persons with Disabilities has also emphasized that positive measures must not result in perpetuation of isolation, segregation, stereotyping, stigmatization.[48]

1.6 Justification of Differential Treatment

Differential treatment is an inherent part of everyday life of any human society. Hence, the ECtHR already in the 1960s adopted the position that Article 14 ECHR 'does not forbid every difference in the exercise of the rights and freedoms recognised'.[49] Similarly, the Human Rights Committee has observed that not every differentiation of treatment will constitute discrimination, and that

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[44] UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, para. 10.

[45] UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, para. 10.

[46] For overview of the case law by the ECtHR on 'positive measures', Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Prohibition of discrimination, pp. 13-14.

[47] See, to that effect, e.g., cases C-450/93 *Kalanke* [1995] ECR I-3051 and C-407/98 *Abrahamsson and Anderson* [2000] ECR I-5539. See also on 'special or specific measures' Handbook on European non-discrimination law, pp. 69-80.

[48] Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, para 29.

[49] *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' (Merits)*, judgment of 23 July 1968, Series A, No. 6, p. 33, para. 10.

the right to equality before the law and equal protection of the law without any discrimination, does not make all differences of treatment discriminatory.[50] The Committee has also held that the enjoyment of rights and freedoms on an equal footing without discrimination does not mean identical treatment in every instance.[51]

Accordingly, the key question is how to establish whether a certain difference in treatment constitutes a violation or is justified. As with several other important questions of international human rights law, human rights treaty provisions remain quite silent on the justification of differential treatment with the outcome that the issue of justification has essentially been a matter of treaty interpretation by courts and treaty-bodies of international treaties.

Under the ECHR, the ECtHR already ruled in the famous 1968 *Belgian Linguistic* case that 'the principle of equality of treatment is violated if the distinction has no objective and reasonable justification.' According to the Court, the existence of such a justification:

> [M]ust be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[52]

This justification test applies to both direct and indirect discrimination under Article 14 ECHR and Article 1 ECHR Protocol 12.[53] Similarly, the Human Rights Committee stated in 1989 that differentiation of treatment is permissible 'if the goal is to achieve a legitimate purpose; and the criteria for such differentiation are reasonable and objective.'[54]

Under EU law, the CJEU has also largely adopted, if not exclusively, a similar justification test. Accordingly, the CJEU has consistently held in its case law that as regards the general principle of equal treatment in the context of grounds such as age or sex, that a difference of treatment which is based on a characteristic related to such grounds does not constitute discrimination — that is to say, an infringement of Article 21(1) EU Charter — where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining

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[50] UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, paras. 8 and 13. See also Communication No. 172/1984, *S. W. M. Broeks v. the Netherlands* (Views adopted on 9 April 1987), in UN doc. *GAOR*, A/42/40, p. 150, para. 13.

[51] UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, para 8.

[52] *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' (Merits)*, judgment of 23 July 1968, Series A, No. 6, p. 33, para. 10.

[53] For a detailed overview of the justification test under the ECHR, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Prohibition of discrimination, pp. 13-14 and 16-20.

[54] UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, para. 13.

occupational requirement, provided that the objective is legitimate and the requirement is proportionate.[55]

Accordingly, the difference in treatment must, first, pursue a legitimate aim. Second, there has to be a reasonable relationship of proportionality between the difference in treatment and the legitimate aim sought to be realized. It warrants emphasis that the requirements of 'legitimate aim' and 'proportionality' are *cumulative* tests that have an autonomous function to fulfil. Hence, a disproportionate differential treatment constitutes discrimination and is not allowed, even for the sake of achieving legitimate objectives, no matter how desirable. Given these criteria, the justification test of differential treatment bears many points of resemblance to the permissible limitations test relating to the justification of limitations of human rights. Under Articles 8-11 ECHR, for instance, the permissibility of restrictions is addressed through the following three distinct, yet cumulative criterion of (i) being prescribed by the law, i.e., having a proper legal basis; (ii) serving a legitimate aim; and (iii) being necessary in a democratic society.

While the criterion of legitimate aim is quite simple and straightforward, in practice the criterion of proportionality tends to be more demanding. In light of the case law of the ECtHR, it includes such elements as the choice of the least intrusive measures and the requirements of necessity and proportionality. Hence, the ECtHR must, among others, be satisfied that there is no other more lenient means of achieving the legitimate aim. As with other rights under the ECHR, the ECtHR also takes advantage of the margin of appreciation doctrine in the context of Article 14 ECHR and accordingly, tends to allow a sphere of discretion for the States for the purpose of determining whether a given differential treatment can be deemed to be justified. The wider the margin of discretion is, the lower the intensity of judicial review by the Court – and *vice versa*. However, the scope of the margin of discretion varies *in casu* according to the circumstances, the subject-matter and the background of the cases. For example, in cases involving racial discrimination, a particularly invidious form of discrimination with perilous consequences, the case law by the ECtHR actually shows that 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures'.[56] The Court's reasoning strongly suggests that differences of treatment based on ethnic origin can scarcely ever be justified.

Under EU law, the justification test of differential treatment is largely similar to that under the ECHR. For example, the CJEU has often first noted that the principle of equal treatment requires the EU legislature 'to ensure, in accordance with Article 52(1) of the Charter, that comparable situations must not be treated differently and that different situations must not be treated in the same way

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[55] See, e.g., cases C-356/12, *Wolfgang Gazel v. Freistaat Bayern*, para. 49; C-229/08 *Wolf* EU:C:2010:3, para. 35; C-447/09 *Prigge and Others* EU:C:2011:573, para. 66; and, as regards discrimination based on sex, cases C-222/84 *Johnston* EU:C:1986:206, para. 40; and C-273/97 *Sirdar* EU:C:1999:523, para. 25. For justification of differential treatment under European non-discrimination law, see in detail Handbook on European non-discrimination law, pp. 91-108.

[56] *Timishev v. Russia* (Appl. nos. 55762/00 and 55974/00), judgment of 13 December 2005, para. 58.

unless such treatment is objectively justified'.[57] Next, the Court has continued that 'a difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment concerned'.[58]

However, the justification test under EU law includes some notable differences. To start with, justification of differential treatment under EU law is primarily applicable to indirect discrimination, whereas justification of direct discrimination can only be justified in accordance with particular aims expressly set out in the EU non-discrimination directives. Furthermore, the CJEU does not apply the margin of discretion doctrine adopted by the ECtHR. It is a different thing that, as far as judicial review by the CJEU of the requirements of the principle of proportionality are concerned, the CJEU has acknowledged that the EU legislature has broad discretion as to the nature and scope of the measures to be adopted in the fields of action of the European Union. As a result, judicial review of the proportionality by the CJEU Court is limited to verifying whether there has been a manifest error of assessment or a misuse of powers, or whether the legislature has manifestly exceeded the limits of its discretion.[59] Yet, the Court has also emphasised that in cases involving such discretion, the EU legislature must base its choice on objective criteria, as well as it must ensure that fundamental rights are observed. In observance of the principle of proportionality, this requires that limitations on rights under the EU Charter, including Articles 20 and 21 on equality and non-discrimination, may only be made if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others, as laid down in Article 52(1) EU Charter. [60]

Under European non-discrimination law, the application of the objective justification test usually includes the shifting the burden of proof so that the state authorities, or the plaintiffs in general in domestic litigations, must provide an acceptable and convincing explanation for differential treatment.[61] This is because it often can be extremely difficult for the individual subject to differential treatment to prove that the differential treatment received has been based on a certain prohibited characteristic, such as ethnic origin, gender origin or disability. Both European Courts[62] have recognized the need for the reversal

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[57] See, to that effect, Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* EU:C:2010:512, paragraphs 54 and 55 and the case-law cited.

[58] Case C-127/07 *Arcelor Atlantique and Lorraine and Others* EU:C:2008:728, paragraph 47, and Case C-101/12 *Schaible* EU:C:2013:661, paragraph 77.

[59] See to that effect, cases C-425/*08 Enviro Tech (Europe)* EU:C:2009:635, para. 47; C-343/09 *Afton Chemical* EU:C:2010:419, para. 28; and C-15/10 *Etimine* EU:C:2011:504, para. 60.

[60] See, to that effect, Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* EU:C:2010:662, paragraph 46; and Case C-236/09 *Association belge des Consommateurs Test-Achats and Others* EU:C:2011:100, paragraph 17.

[61] See in detail Handbook on European non-discrimination law, pp. 231-239.

[62] For case law by the ECtHR, see Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, Prohibition of discrimination, pp. 21-23.

of the burden of proof, which equally applies in cases of both direct and indirect discrimination. Under EU law, such a shifting of the burden of proof is also regulated in the EU equality directives.

Finally, it must be recalled in this context that the right to non-discrimination is non-derogable to the extent that derogation measures cannot involve differential treatment solely on the ground of race, colour, sex, language, religion or social origin under Article 4(1) ICCPR. In addition, differential treatment on the basis of such grounds as race and national and ethnic origin is subject to a strict level of scrutiny. For example, the ECtHR has held in *Timishev*, in which a Chechen lawyer was refused registration in another part of Russia on account of his ethnic background, that 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures'.[63] This statement by the ECtHR seems to exclude that any difference in treatment based on ethnicity may be justified, where this leads to imposing disadvantages on the basis of this criterion alone or to a decisive extent.

2 Equality and Non-discrimination in Nordic Constitutions: Setting the Scene

Nordic constitutions are characterized by certain traditional idiosyncrasies and dualities that also shape the protection and promotion of equality and non-discrimination in the Nordic countries.[64] The Nordic countries have had a long tradition of written constitutions with a range of constitutional rights. All five countries are also strong democracies based on the rule of law, as well as being amongst the wealthiest countries in the world. In addition, the Nordic countries are still relatively homogeneous in ethnic, religious and linguistic terms despite recent waves of immigration.

All these characteristics combine to foster the ability of the Nordic countries to *de facto* uphold and respect their constitutional and international human rights obligations, including those related to equality and non-discrimination. The

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63 *Timishev v. Russia* (Appl. nos. 55762/00 and 55974/00), judgment of 13 December 2005 (final on 13 March 2006), § 58.

64 For characteristics of Nordic constitutions, see R. Hirschl, 'The Nordic Counternarrative: Democracy, Human Development and Judicial Review', *International Journal of Constitutional Law*, Vol. 9, 2011, pp. 449-469; T Ojanen, *Human Rights in Nordic Constitutions and the Impact of International Obligations*, In Krunke and Thorarensen eds., The Nordic Constitutions – a Comparative and Contextual Study, Hart 2018, pp. 133-166; E. Smith, 'Judicial Review of Legislation', *in* H. Krunke & B. Thorarensen (eds.), *The Nordic Constitutions: A Comparative and Contextual Study*, Hart Publishing, 2018, pp. 107-132; J. Lavapuro, T. Ojanen & M. Scheinin, 'Rights-based Constitutionalism in Finland and the Development of Pluralist Constitutionalist Review', International Journal of Constitutional Law, Vol. 9, 2011, pp. 505-531; and J.O. Rytter & M. Wind, 'In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms', *International Journal of Constitutional Law*, Vol. 9, 2011, pp. 470-504. *See also* J. Nergelius, 'The Nordic States and Continental Europe: A Two-Fold Story', *in* J. Nergelius (Ed.), *Nordic and Other European Constitutional Traditions*, Leiden, Martinus Nijhoff, 2006, pp. 3-4.

Nordic countries have a tradition of strong commitment to equality, in particular to gender equality, where they have carved out a worldwide reputation. However, this naturally does not mean that the Nordic countries are free from all problems with respect to equality and non-discrimination. In light of the observations by the international treaty bodies, principal matters of concern encompass the human rights problems of domestic violence against women and children, and various deficiencies regarding legal frameworks of non-discrimination and equality, including human trafficking and the rights of migrants, refugees and asylum seekers.

While the Nordic countries can be applauded in many ways as 'model' countries in human rights, including those pertaining to equality and non-discrimination, it is somewhat paradoxical to note at the same time that the traditional Nordic constitutional position regarding fundamental and human rights has been quite reserved and even reluctant, particularly concerning any strong judicial safeguards for these rights. Indeed, Nordic constitutional law has traditionally been agonistic towards 'rights talk' and 'strong courts' due to long-lived adherence to constitutional legislative supremacy and ideas about democracy as majoritarian rule, as well as the influence of Scandinavian legal realism which is renowned for its almost nihilist approach to rights and courts. Although Nordic constitutionalism has witnessed a remarkable shift from the legislative sovereignty paradigm to one in which domestic legislation and other legal measures are increasingly subordinated to rights-based judicial review, both by domestic courts and such European courts as the ECtHR and the Court of Justice of the European Union, the Nordic hesitance vis-a-vis human rights and strong courts is still tacitly and by implication shaping the Nordic constitutional systems of rights protection. With the exception of Norway, where the Supreme Court has for a long time exercised the power of judicial review,[65] the Nordic constitutions still adhere to various forms of weak judicial review within which the courts are inclined to exercise their powers against a backdrop of judicial self-restraint.[66]

2.1 The Domestic Status and Effects of International Human Rights Treaties

Dualities also characterize the ratification and incorporation of international human rights treaties by the Nordic countries. which have traditionally adhered to dualism insofar as the domestic status of international treaties are concerned. Hence, international treaties cannot enter part of domestic law only by

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[65] See E. Smith, 'Judicial Review of Legislation', *in* H. Krunke & B. Thorarensen (eds.), *The Nordic Constitutions: A Comparative and Contextual Study*, Hart Publishing, 2018, pp. 107-132.

[66] See J Nergelius, 'The Nordic States and Continental Europe: A Two-Fold Story' in J Nergelius (ed.), Nordic and Other European Constitutional Traditions (Leiden, Martinus Nijhoff, 2006) pp. 3–4. See also E Smith, 'The Legitimacy of Judicial Review of legislation: A Comparative Approach' in E Smith (ed), Constitutional Justice under Old Constitutions (The Hague, Kluwer Law International, 1995); and J Lavapuro, T Ojanen and M Scheinin, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' (2011) 9(2) ICON 511.

ratification. A separate domestic enactment is also necessary for all the Nordic countries for the purpose of giving the treaty provisions domestic legal validity and direct applicability.[67]

On one hand, the Nordic countries have actively and systematically promoted the protection and promotion of human rights on European and international levels. Denmark, Norway and Sweden were among those ten European states that founded the Council of Europe (COE) in 1949, as well as signed and ratified the ECHR in the early 1950s. Today, all five Nordic countries have signed and ratified almost without exception[68] all human rights treaties adopted by COE, the UN and the International Labour Organization (ILO), including all those thematic international and regional human rights treaties that are designed for countering discrimination on specific grounds. Reservations to international human rights treaties by the Nordic countries have also remained relatively minor and small in number.

On the other hand, with the exception of Finland, which has traditionally incorporated all international human rights treaties into domestic law, the other four Nordic countries have traditionally pursued a very cautious approach to incorporation. To be sure, while Denmark, Iceland, Norway and Sweden already ratified the ECHR in the 1950s, it was not until the 1990s that the ECHR was incorporated into their domestic law; the ECHR was incorporated into Danish law in 1992, Icelandic law in 1994 and Swedish law in 1995.

Norway enacted the Human Rights Act in 1999 for the purpose of strengthening the position of human rights in the Norwegian legal order. The Human Rights Act has not only incorporated the ECHR, but also the ICCPR, including its the two optional Protocols, and the ICESCR. In 2003, Norway also incorporated the CRC, and took a further step of incorporation in 2009 by inserting CEDAW in the Humans Rights Act, following the recommendations by the CEDAW Committee.

However, Denmark, Iceland and Sweden have continued to follow a reserved, even reluctant, approach to incorporation although monitoring bodies of international human rights treaties, such as the UN Human Rights Committee, have continuously criticised the lack of incorporation of human rights treaties by them.[69] According to this criticism, certain areas of Danish, Icelandic and Swedish law are not entirely aligned with international human rights norms due to the lack of incorporation which induces domestic courts to give judicial effect to human rights treaties predominantly indirectly, through the human rights-

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[67] The following overview of the domestic status and effects of human rights treaties in Nordic countries is largely based on T Ojanen, *Human Rights in Nordic Constitutions and the Impact of International Obligations*, in Krunke and Thorarensen (eds.), The Nordic Constitutions – a Comparative and Contextual Study, Hart 2018, pp. 133-166, especially 151-165.

[68] The major exception is the ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries. While Norway (1990) and Denmark (1996) have ratified this Convention, Finland and Sweden are still struggling to do so, since both are still to resolve adequately the rights of the indigenous Sámi people, particularly insofar as their land rights are concerned. The Sámi live in northern parts of Norway, Finland, Sweden and Russia, with the majority living in Norway.

[69] For overview, see T Ojanen, *Human Rights in Nordic Constitutions and the Impact of International Obligations*, pp. 152 and 153.

oriented interpretation of domestic law. For instance, the UN Human Rights Committee noted in 2016 as a principal matter of concern as regards Denmark that 'the State party does not intend to incorporate the Covenant in the domestic legal order, which results in a situation in which the national legislation may not be in full accordance with the Covenant (art. 2).' Thus, the Committee called upon Denmark 'to review its position and consider incorporating the provisions of the Covenant in order to give full effect to them in its domestic legislation.'[70]

Yet, the ECHR is still the only human rights treaty incorporated into domestic law in Denmark. Iceland has incorporated the CRC in 2013, but it is still to incorporate several other UN human rights treaties whereas Sweden is yet to incorporate other human rights treaties beyond the ECHR and the CRC, the latter of which Sweden incorporated in 2020.

Given the lack of incorporation by Denmark, Iceland and Sweden, it follows that the ICCPR and ICESCR with their provisions on equality and non-discrimination, as well as such human rights treaties adopted specifically to counter discrimination on such grounds as race (ICERD), gender (CEDAW) and disability (CRPD), are not formally part of the domestic law in these Nordic countries. As incorporation warrants direct applicability of international treaties by domestic courts and authorities, the lack of incorporation somewhat inhibits the effective domestic implementation and protection of equality and non-discrimination in these three Nordic countries.

However, incorporation is not the only way of giving domestic effect to human rights treaty norms on equality and non-discrimination. The Nordic countries have usually taken advantage of the method of transformation and, accordingly, have amended their domestic legislation so as to achieve harmony with the treaty in question. Some Nordic countries have even amended their constitutions so as to enhance the domestic status and applicability of international human rights treaties. In Iceland, for instance, the 1995 amendments made to the human rights provisions of the Icelandic Constitution have also enhanced the status of those unincorporated international human rights conventions in Icelandic law.

One can also find in the Nordic constitutions special clauses that oblige State organs or public authorities in general to respect and ensure human rights. Such clauses can be found in the Finnish Constitution (Chapter 2, section 22), the Norwegian Constitution (Part E, Article 92) and the Swedish Constitution (Chapter 2, section 23). In Finland and Sweden, such constitutional provisions on human rights have been regarded as giving semi-constitutional status to international human rights norms, thereby rendering them constitutionally special among international treaty obligations.

Moreover, Nordic courts are in the habit of giving judicial effect to international human rights norms indirectly, through a human rights-oriented interpretation of constitutional provisions on fundamental rights and domestic law in general. There is today an embarrassment of riches in terms of human rights case law from the Nordic courts. As an interpretive effect of international human rights norms can also extend to cover non-incorporated human rights

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[70] UN Human Rights Committee (HRC), *Concluding observations on the sixth periodic report of Denmark*, 15 August 2016, CCPR/C/DNK/CO/6, para 5 and 6.

treaties, the interpretive effect has diminished those obstacles to the effective domestic implementation of human rights that originate in the absence of incorporation. For instance, Danish, Icelandic and Swedish courts have made references to the ICCPR even if these countries have still yet to incorporate it.

Accordingly, the tendency in Nordic countries has increasingly been towards the harmonisation of the constitutional and international protection of human rights, partly through the significant impact of international human rights treaties on domestic constitutional reforms and partly through the influence of international human rights norms on the interpretation of domestic legislation, as well as domestic principles and doctrines pertaining to rights, including equality and non-discrimination. This tendency, as well as the above remarks on the domestic effects of international human rights treaties, should be kept in mind below, offering an overview on equality and non-discrimination clauses in the Nordic constitutions.

2.2 Equality and Non-discrimination in Nordic Constitutions

All five Nordic countries have written constitutions with provisions on human rights. Some Nordic constitutional systems of rights protection are even fairly broad and progressive as a result of constitutional reforms since the 1990s. In 1995, for instance, Finland and Iceland made profound changes to their constitutional chapters on fundamental rights. In Norway, several rights already guaranteed by international human rights treaties binding upon Norway were included in the new Part E of the Constitution in 2014. Yet, the Nordic constitutions are far from uniform insofar as constitutional provisions on equality and non-discrimination are concerned.[71]

The Constitution of *Denmark* stands out as most silent and opaque in so far as equality and non-discrimination are concerned. One looks in vain for general clauses that would expressly enshrine equality and non-discrimination as fundamental rights guaranteed by the Danish Constitution. The plausible explanation for this absence is probably the age of the Danish constitution, combined with the fact that the Danish Constitution is extremely difficult, if not impossible, to amend. However, some provisions of the Danish constitution can be seen as lifting into attention specific dimensions of equality and non-discrimination in the fields of religion and conscientiousness. The impact of international human rights treaties and EU law insofar as the domestic protection

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[71] For various provisions on non-discrimination and equality in Nordic constitutions, see country reports on non-discrimination which have been recently made within the European network of legal experts in gender equality and non-discrimination: Denmark 2021 (available at: https://www.equalitylaw.eu/downloads/5477-denmark-country-report-non-discrimination-2021-1-53-mb); Finland 2021 (https://www.equalitylaw.eu/downloads/5507-finland-country-report-non-discrimination-2021-1-21-mb); Iceland 2021 (available at: https://www.equalitylaw.eu/downloads/5509-iceland-country-report-non-discrimination-2021-1-22-mb; Norway 2021 (available at: https://www.equalitylaw.eu/downloads/5514-norway-country-report-non-discrimination-2021-1-77-mb); and Sweden 2021 (available at: https://www.equalitylaw.eu/downloads/5493-sweden-country-report-non-discrimination-2021-1-61-mb).

and promotion of equality and non-discrimination are concerned in Denmark must also be highlighted.

The Constitution of *Finland* includes separate, yet intertwined, general provisions on both equality and non-discrimination that are greatly inspired by human rights treaties binding Finland. Section 6, 'Equality', first provides in its paragraph 1 that everyone is equal before the law, while paragraph 2 enshrines the prohibition of non-discrimination as follows: 'No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.' As seen by the expression 'or other reason', the list of prohibited grounds is non-exhaustive even if the grounds explicitly mentioned in Section 6(2) are intended to be subject to stricter scrutiny insofar as the justification of differential treatment on the basis of those grounds is concerned. Moreover, the language 'without an acceptable reason' neatly communicates that not every difference in treatment will amount to discrimination. Separate provisions on the equality of children and gender equality also can be found in Section 6 of the Finnish Constitution.

The Constitution of *Iceland* contains a general clause on equality and non-discrimination, providing that everyone shall be equal before the law and enjoy human rights irrespective of sex, religion, opinion ethnic origin, race, colour, property, or birth or other status (Article 65). As indicated by the words 'other status', the grounds enumerated in this provision are non-exhaustive with the outcome that several grounds not explicitly mentioned, such as age, disability and sexual orientation may also be regarded as prohibited grounds.

The Constitution of *Norway* includes a general clause that enshrines both equality and non-discrimination as follows: 'All people are equal under the law. No human being must be subject to unfair or disproportional differential treatment.' What warrants notice is that the provision is framed in a broad, open-textured manner without specifying any particular grounds, thereby leaving relatively much latitude for the legislator and courts to decide what exactly may constitute discrimination. At the same time, however, the words 'unfair' and 'disproportional' convey that differential treatment does not constitute discrimination if that treatment can be regarded as being fair and proportionate. In this context, Article 92 of the Norwegian Constitution features as a general human rights clause that obliges authorities to enforce human rights conventions binding upon Norway at the level they are implemented in Norwegian law, and that the Human Rights Act incorporates such human rights treaties as the ICCPR, ICESCR and CEDAW with their provisions on equality and non-discrimination.

The Constitution of Sweden includes four distinct enactments enjoying the status of a constitution. Of them, the most important for present purposes is the Instrument of Government which contains the following general clause on discrimination: 'The public institutions shall combat discrimination of persons on grounds of gender, colour, national or ethnic origin, linguistic or religious affiliation, functional disability, sexual orientation, age or other circumstance affecting the individual'. As with the Finnish and Icelandic constitutional provisions on the prohibition of discrimination, this provision also addresses discrimination on a non-exhaustive number of grounds as the expression 'other circumstance' displays. The Swedish Constitution also includes specific clauses that prohibit laws or other provisions entailing discrimination in relation to those

who belong to a minority group due to ethnicity, colour or other similar circumstances or due to sexual orientation, on one hand (Chapter 2, Section 12), or prohibit laws or other provisions that entail discrimination due to sex, while on the other hand at the same time creating an exception for positive action as well as concerning military service (Chapter 2, Section 13). There are also separate provisions that require the state to use only objective criteria when hiring employees (Chapter 12, Section 5), as well as oblige the courts to set aside parliamentary acts that violate the ECHR, thereby also strengthening the domestic status of Article 14 ECHR and ECHR Protocol 12 on the prohibition of discrimination (Chapter 2, Section 19).

2.3 The Significance of Domestic Legislation and Institutional Arrangements

While constitutional provisions play a role in the establishment of rights to equality and non-discrimination, the foregoing observations on Nordic constitutions do not exhaust the spectrum of the legal framework of equality and non-discrimination in the Nordic legal orders. As already noted, human rights treaties, as well as EU law and European Economic Area (EEA) law, basically oblige the Nordic states to respect, protect and fulfil the right of individuals to equality and non-discrimination. In this respect, on one hand, States must refrain from any actions that discriminates against persons. On the other hand, States are obliged to take positive actions, such as modify or abolish existing laws, regulations, customs and practices that constitute such discrimination. Moreover, the effective enjoyment of the rights to equality and non-discrimination calls for the adoption of a variety of enforcement measures and institutional arrangements designed for supervising and promoting the effective implementation and progress of equality and non-discrimination laws and policies at the national level.[72]

Accordingly, it is important to note that in addition to constitutional provisions, the Nordic legal framework is essentially constituted by equality and non-discrimination legislation that implements at the national level the EU equality and non-discrimination directives, as well as State's obligations under human rights treaties to enact legislation forbidding discrimination. For instance, such human rights treaties as ICERD and ICCPR expressly require the states to penalize racial discrimination. Moreover, as the direct horizontal effect (also often referred to as *Drittwirkung*) of fundamental and human rights tends to be

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[72] For overviews of Nordic laws and policies, including institutional regimes related to equality and non-discrimination, see country reports on non-discrimination which have been recently made within the European network of legal experts in gender equality and non-discrimination: Denmark 2021 (available at: https://www.equalitylaw.eu/downloads/5477-denmark-country-report-non-discrimination-2021-1-53-mb); Finland 2021 (https://www.equalitylaw.eu/downloads/5507-finland-country-report-non-discrimination-2021-1-21-mb); Iceland 2021 (available at: https://www.equalitylaw.eu/downloads/5509-iceland-country-report-non-discrimination-2021-1-22-mb; Norway 2021 (available at: https://www.equalitylaw.eu/downloads/5514-norway-country-report-non-discrimination-2021-1-77-mb); and Sweden 2021 (available at: https://www.equalitylaw.eu/downloads/5493-sweden-country-report-non-discrimination-2021-1-61-mb).

limited, and the principle of legality under the Nordic constitutions also requires that legal obligations and liabilities may only be imposed on the individuals and other private parties by Acts of Parliament, the enactment of this ordinary legislation is of utmost importance for the purpose of ensuring that non-discrimination and equality norms extend to the private sphere, as well as appropriately cover such important areas of Nordic societies as education, employment, goods and services. Hence, a comprehensive picture of the Nordic legal frameworks of the protection and promotion of equality and non-discrimination also requires an in-depth analysis of these legislative measures, as seen in light of their interpretive practice by Nordic courts and authorities. Such an analysis falls, however, outside scope of this chapter.[73]

A range of specific bodies and institutions designed for the enforcement and promotion of equality and non-discrimination laws and policies can be found in all the Nordic countries. Finland, for instance, has the *Non-Discrimination Ombudsman*[74] and the *Ombudsman for Equality*[75] that are both autonomous and independent authorities charged with the tasks of promoting equality and non-discrimination and preventing discrimination. Sweden has the *Equality Ombudsman*[76] with a broad mandate to promote equal rights and opportunities and to combat discrimination. The *Danish Institute for Human Rights* is to further the equal treatment of all people regardless of gender, race or ethnic origin, as well as has the tasks of monitoring, promoting and protecting the implementation of the CRPD in Denmark.[77]

Moreover, there are such independent, quasi-judicial institutions such as the *Board of Equal Treatment*[78], the *National Non-Discrimination and Equality Tribunal* in Finland[79], the *Equality Complaints Committee* in Iceland and the *Anti-Discrimination Tribunal* in Norway.[80] Aside from these special bodies and institutions charged with a variety of tasks of supervision and promotion, the legislatures, all branches of government and public authorities in general, as well as courts contribute to the protection and promotion of non-discrimination and equality in Nordic countries.

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73 For an overview of Nordic mechanisms for the protection and promotion of human rights, see T Ojanen, *Human Rights in Nordic Constitutions and the Impact of International Obligations*, pp. 148-151.

74 More information is available at: https://syrjinta.fi/en/front-page.

75 More information is available at: https://tasa-arvo.fi/en/front-page.

76 More information is available at: https://www.do.se/choose-language/english.

77 More information on the task of the Institute in the fields of equal treatment and disability is available at: https://www.humanrights.dk/our-work/our-work-denmark.

78 More information on the Board is available at: https://ast.dk/naevn/ligebehandlingsnaevnet/ligebehandlingsnaevnet.

79 More information on the Tribunal, supervising compliance with the Non-Discrimination Act and the Act on Equality between Women and Men (Equality Act) both in private activities and in public administrative and commercial activities, is available at: https://www.yvtltk.fi/en/index.html.

80 More information on the Norwegian Tribunal is available at: https://www.diskrimineringsnemnda.no/spr%C3%A5k/1230.

3 Concluding Remarks

Equality and non-discrimination are at the heart of European and international human rights law, as well as Nordic constitutions. Aside from being central to the enjoyment of all other fundamental and human rights, equality and non-discrimination feature as independent and self-standing principles and rights. They are also an indispensable and integral part of the development of society as a whole and within a democratic framework based on the rule of law. Despite all the progress at national, European and international levels in enhancing the protection of individuals and groups of individuals against discrimination, various forms of inequalities and discrimination are still commonplace and remain anything but a memory from the past in all parts of Europe and the world, including the Nordic countries.

As with other European countries, all five Nordic countries have also witnessed in recent years the rise of populism, including neo-nazi and anti-immigration movements. These may at their worst even mutate into such authoritarian and illiberal forms of government that can start to erode the very foundations of the domestic constitutions based on democracy, rule of law and the protection of human rights, including such overarching rights and principles as equality and non-discrimination. In addition, climate change and digitalization introduce entirely new and unprecedented forms of discrimination and harmful impacts on equality. Accordingly, non-discrimination and equality must be evergreens, and their protection and promotion is a never-ending and burning issue of concern at national, European and international levels for the years to come.