

Gender Equality in the Nordics

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Social gender justice is a hallmark of Nordic welfare state ideology. The Nordic welfare states were among the first to pass general laws on equality between women and men already in the 1970s and 80s. These acts set out to promote gender equality and prohibit discrimination. They represented a turn from a program-based to a rights-based approach to gender equality. Rather than formal equality, they aimed at equal opportunities. They also allowed measures aiming at equal outcomes. To make the protections against discrimination more accessible, special enforcement systems constituting low threshold alternatives to the formal courts were set up.¹ At the international level, the Nordic countries played an active role in the drafting of UN gender policies and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In these arenas, they promoted standards that obliged the states parties to respect, protect and fulfil the rights to equality and non-discrimination in all social areas, including religious and family life.²

The Nordic countries have since promoted substantive gender equality through a wide range of legal and political measures. Two types of gender equality laws that supplement each other, are key.³ The first is ‘workfare’-related welfare laws that provide social and economic rights, such as paid parental leave and affordable child care. The aim of this type of legislation is to change the distribution of paid and care (unpaid) work between women and men, and as such, increase women’s participation in education, working life and public life. The other type of legislation comprises gender equality and anti-discrimination laws prohibiting discrimination and promoting gender equality through proactive measures such as gender quotas in employment, education and on publicly appointed boards, councils, commissions and corporate boards.

The Nordic gender equality and anti-discrimination acts were initially informed by a biological understanding of women and men. Over the years, protection that initially was limited to women because of their reproductive role has been extended to men, homosexuals and transpersons. I therefore use the term ‘gender’ as an overall category while the term ‘sex’ is applied to legislation that is limited to biological women and men.

The ranking of Nordic countries at the top the World Economic Forum Global Gender gap index and other global indexes indicates that this mixed-approach, often referred to as the “Nordic gender equality model”, has been successful.⁴ On the other hand, the CEDAW Committee’s observation that the content and the enforcement of the gender equality and anti-discrimination laws are falling behind international standards, calls for closer scrutiny.⁵ National statistics show

¹ In Norway, this was the Gender Equality Ombud and the Gender Equality Tribunal (today the Equality Ombud and the Discrimination Tribunal), in Sweden the Equality Ombudsman, in Finland the Equality Ombudsman and the Gender Equality Board, in Iceland the Gender Equality Complaint Committee, and in Denmark The Equality Board. The Norwegian and Swedish enforcement systems are further discussed in this volume by Marte Bauge and Lene Løvdal (Norway) and by Paul Lappalainen (Sweden).

² On 18 December 1979, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the United Nations General Assembly.

³ For Norway see Elisabeth Vigerust, *Arbeid, barn og likestilling*, TANO, 1999 and for Sweden see Laura Carlson, *Searching for Equality*, Iustus Förlag, 2007.

⁴ The Global Gender Gap, Report 2020. <https://www.weforum.org/reports/gender-gap-2020-report-100-years-pay-equality>.

⁵ Anne Hellum, ‘Not so Exceptional After All?: Nordic Gender Equality and Controversies Linked to the Convention on the Elimination of All Forms of Discrimination Against

that the Nordic countries, in spite of the high number of women in politics, higher education and working life, by no means have closed the gender gap. In the Nordic countries, the labour market is highly gender segregated. In the Nordic countries, men's salaries in full-time employment are still higher than women's.⁶ The majority of part-time workers and persons with minimum pensions are women. Thus, Nordic women are more exposed to poverty than men.⁷ Furthermore, there are significant differences between different groups of women. Women who belong to several marginalized groups risk discrimination that is exacerbated by the combination of discrimination grounds, often termed 'intersectional' discrimination.

This chapter provides a comparative perspective on the gender equality and anti-discrimination laws in the five Nordic countries. Denmark, Finland, Iceland, Sweden and Norway.⁸ The aim is to show how the Nordic gender equality and anti-discrimination laws respond to the persisting gender inequalities on the ground. Towards this end, the chapter focuses on similarities and differences regarding the histories, political origins and legal designs of the gender equality and anti-discrimination laws in the five Nordic countries. A comparative overview of the gender equality and anti-discrimination laws in Sweden, Finland, Iceland and Denmark are combined with deeper insights regarding the Norwegian legislation that I have studied from the reception up to date.

The Nordic gender equality and anti-discrimination laws are situated in the context of the rapidly increasing body of European and international gender equality and anti-discrimination law. How the gender equality and anti-discrimination standards embedded in EU-law and international human rights obligations, such as the CEDAW, are adopted or resisted is explored here. In line with the structure of this book, this chapter focuses on the normative content and scope of the Nordic gender equality and anti-discrimination laws. A complete picture of the protection against discrimination requires analysis of the close relationship between the normative standards and the enforcement systems.⁹ This chapter thus draws attention to the limitations in the Nordic civil law

Women' in Eirinn Larsen; Inger Skjelsbæk & Sigrun Marie Moss (eds.) *Gender Equality and Nation Branding in the Nordic Region*, Routledge, 2021, 173 – 190.

⁶ See for example Jämställdhetsbarometern (Sweden) 2020 and Statistisk Sentralbyrå Likestilling (Norway) (2020).

⁷ See for example, the website of the The Norwegian Directorate for Children, Youth and Family Affairs (Bufdir) and its statistics regarding gender, https://bufdir.no/Statistikk_og_analyse/kjonnslikestilling/Okonomi_og_kjonn/.

⁸ This Chapter builds on research undertaken in a comparative research project that analysed the relationship between the normative standards of gender equality anti-discrimination laws and the enforcement systems in the different Nordic countries to be published in 2022, Anne Hellum, Ingunn Ikdahl, Åsa Gunnarsson, Vibeke Blaker Strand and Eva-Maria Svensson (eds.) *Nordic Equality and Anti-discrimination Laws in the Throes of Change*, Routledge, 2022/23 (forthcoming).

⁹ For analysis of access to justice in Sweden, see Laura Carlson, 'Access to Justice in Sweden from a Comparative Perspective' in Barbara Havelkova and Mathias Möschel (eds.), *Anti-Discrimination Law in Civil Law Jurisdictions*, Oxford University Press 2020, 118–135. For analysis of access to justice in the field of equality and anti-discrimination law in Norway see Anne Hellum and Vibeke Blaker Strand, *Likestillings- og diskrimineringsrett*, Gyldendal, 2022, Part 6.

systems regarding full access to judicial review in the field of equality and anti-discrimination law.¹⁰

The chapter unfolds in seven parts. Part One shows how the Nordic countries provide protection against gender discrimination through a combination of national, constitutional, European Union law (EU law) and international human rights law. Part Two describes the changing and different designs and definitions of gender in Nordic gender equality and anti-discrimination law. Part Three shows how EU-law has made its mark on the protection against individual discrimination, particularly the strong protection against pregnancy and parental leave-related discrimination in the Nordic countries. In Part Four, Nordic legislation concerning gender equal representation in public decision-making and on public company boards, and its influence on EU-law is presented. In Part Five, positive differential treatment in working life and higher education is discussed in light of the contentious relationship between the Nordic countries' striving towards social gender justice and EU-laws strong protection against individual discrimination. How the duties imposed on public authorities as well as public and private employers to take proactive measures to promote gender equality are faring in the context of the influence of liberal anti-regulatory policies is dealt with in Part Six. Part Seven offers a summary and conclusion.

1 Nordic Blends of Statutory, Constitutional and International Law

The Nordic gender equality and anti-discrimination laws have been in the throes of change since the 1970's up to the present day. In the course of the last fifty years, they have been subject to a series of statutory and constitutional reforms. These changes reflect the growing demand for substantive gender equality coming from below, for example through national women's rights organisations that have joined the Nordic Women's Lobby, and from above, through the growing body of binding international law, both EU-law and human rights law. For example, the CEDAW, which was ratified by all the Nordic countries in the 1980's, requires that constitutional and statutory law ensures that the gender equality principle takes precedence when coming into conflict with other national laws in all areas.¹¹

1.1 Nordic National Laws and Constitutions

The five Nordic national legal approaches are discussed in this section, beginning with Sweden, then Norway, Finland, Denmark and Iceland.

The Swedish 2008 Discrimination Act (DA)¹² replaces the 1980 Equal Opportunities Act that had prohibited discrimination on the basis of sex, and

¹⁰ For a holistic analysis of the relationship between normative protection standards and the enforcement systems in the five Nordic countries, see Hellum et al. (2022).

¹¹ CEDAW, General recommendation No. 28, 47th Session (2010) on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc CEDAW/C/GC/28 para. 31.

¹² An analysis of the Act in its broader legal and political environment can be found in Åsa Gunnarsson, Lena Svenaeus and Eva-Maria Svensson, 'Swedish Gender Equality Policy and

other acts that had provided protection against discrimination on other grounds.¹³ It is a single act covering the discrimination grounds of sex, sexual orientation, transgender identity, ethnicity, religion, belief and disability, but does not recognize any combinations of these grounds.¹⁴ As regards constitutional protection, the Swedish Instrument of Government (IG) Chapter 1 Article 2 obliges public institutions to promote the opportunity for all to attain participation and equality in society. Chapter 2 Article 13 states that law or other provisions cannot disadvantage citizens on the ground of gender. The sex equality principle under the Swedish Constitution does not have the character of binding rules that are subject to judicial review. It can, however, be used as ground for interpretation when applying other rules.¹⁵

Criticism of this formal approach was addressed by Lenita Freidenvall who was the responsible investigator for a legislative inquiry as to applying a gender perspective on the IG.¹⁶ The weak position of the gender equality principle has also been subject to criticism by the CEDAW Committee. In its concluding comments on Sweden's seventh, eighth and ninth reports, the CEDAW Committee expressed concern that 'the provisions of the Convention, even though largely respected, have not yet been fully incorporated into the domestic legal system of the State party and, as a result, are not directly applicable in the national courts.'¹⁷

The Norwegian 2017 Equality and Anti-Discrimination Act (EAD)¹⁸ is a single act that replaces the 2013 Gender Equality Act and three other acts that prohibited discrimination on ethnicity, disability, sexual orientation and gender identity.¹⁹ The 2017 Act prohibits discrimination on the basis of grounds like gender, pregnancy, care, ethnicity, disability, age, sexual orientation, gender identity and also recognizes combinations of grounds.²⁰ In the light of the CEDAW Committee's criticisms in the consideration of Norway's fifth, sixth and seventh periodic reports,²¹ and increasing pressure from civil society, the Stoltenberg II Government in 2009 decided to incorporate the CEDAW in the Human Rights Act so as to give it precedence when coming into conflict with

Law: Between Structuralism and Individualism" in Hellum et al. (2022/23). This draft article has been an important source of information for this chapter.

¹³ Discrimination Act (DA) (*Diskrimineringslagen*) adopted in 2008 (SFS 2008:567), Equal Opportunities Act (*Jämställdhetslagen*), adopted in 1979 (SFS 1979:1118).

¹⁴ DA Chapter 1 Sections 4.1 and 4.2.

¹⁵ Instrument of Government, Chapter 1, Art. 9.

¹⁶ Freidenvalls' critical analysis in the legislative inquiry, SOU 2007:67 was later incorporated into a comprehensive legislative inquiry on the constitution, which inquiry agreed that an explicit substantive gender equality principle needed to be included in the Constitution (Legislative Inquiry SOU 2008:125, Legislative Bill Prop. 2009/10:80).

¹⁷ CEDAW/C/SWE/CO/8-9, para. 14.

¹⁸ For an analysis of the Act in light of the demands of substantive equality, see Hellum and Blaker Strand 2022, Chapter 1 and Anne Hellum, Vibeke Blaker Strand and Ingunn Ikdahl, 'Between Norms and Institutions: Unlocking the Transformative Potential of Norwegian Gender Equality and Anti-discrimination Law' in Hellum et al. (2022).

¹⁹ Act Relating to Equality and a Prohibition Against Discrimination (Equality and Anti-Discrimination Act). Act 16. June 2017 No. 51.

²⁰ EAD Act Section 6.

²¹ CEDAW/C/NOR/5 and CEDAW/C/NOR/6 para. 21, CEDAW/C/NOR/CO/7, para. 14.

other Norwegian laws.²² In 2014, a general non-discrimination clause – as part of a broader human rights reform – was included in Article 98 of the Norwegian Constitution, which reads: ‘All people are equal under the law. No human being must be subject to unfair or disproportionate differential treatment.’ The constitutional norm, in contrast to the EAD Act, does not include a list of discrimination grounds but is an open-ended standard, stating that ‘No human being’ shall be subject to ‘unfair or disproportionate differential treatment’. The courts have an obligation under article 89 of the Constitution to review whether an act or an administrative decision is in line with the constitutional equality principle.²³

The Finnish Act on Equality between Women and Men was passed in 1986,²⁴ prompted by Finland’s obligations under the CEDAW.²⁵ The 1986 Act, which has been amended a number of times, prohibits discrimination on the basis of sex, gender identity and gender expression.²⁶ Discrimination on other grounds is regulated by other separate acts. The Finnish Constitution, which was revised to be in consonance with the European Convention on Human Rights, provides protection against discrimination ‘on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person’ in Section 6. The proactive equality duties under the Act on Equality have support in Section 6(4) of the Constitution that explicitly requires the promotion of equality of the sexes in societal activities and working life, especially in the determination of pay and other terms of employment. The protection against discrimination is subject to juridical review and is as such in line with the demands of the CEDAW.

The Danish Act on Equal Treatment between Women and Men²⁷ prohibiting discrimination between women and men sets out to promote equality between the sexes.²⁸ Discrimination on other grounds, such as sexual orientation and gender identity, are regulated by other separate acts. The forerunner of the Act was the Equal Rights Act from 2000, which was a supplement to The Act on Equal Pay (1975) and the Act on Equal Treatment in the Labour Market (1978)

²² In Norway, the CEDAW was incorporated into the Human Rights Act by the Act of 19 June 2009, No. 80. The process is described in Anne Hellum, ‘Making Space and Giving Voice. CEDAW in Norwegian law’, in Anne Hellum and Henriette Sinding Aasen (eds.), *Women’s Human Rights CEDAW in International, Regional and National Law*, Cambridge University Press, 2013.

²³ Cf. Article 89 of the Constitution which states: ‘In cases brought before the Courts, the Courts have the power and the duty to review whether Laws and other decisions made by the authorities of the State are contrary to the Constitution.’

²⁴ A holistic analysis of the Act and its enforcement is undertaken by Kevät Nousiainen, ‘On the Implementation Deficit of Finnish Equality Law’ in Hellum et al. (2022/23). This draft article has been an important source of information for this chapter.

²⁵ Kevät Nousiainen, ‘The Rise and the Fall of the CEDAW in Finland: Time to Reclaim its Impetus’ in Hellum and Sinding Aasen (eds.)(2013).

²⁶ The Act on Equality between Women and Men was amended in 1988, 1992, 1995, 1997, 2001, 2005, 2009, 2011, 2014, and 2016.

²⁷ A critical perspective is provided by Kirsten Ketscher and Alice Bentzon in Hellum et al. (2022/23). This draft article has been an important source of information for this chapter.

²⁸ The Act on Equal Treatment of Women and Men no. 1678 of 19. December 2013, with changes of Act no. 487 of 30 April 2019 (ligebehandlingsloven).

that were put in place as a result of Denmark's EU-membership.²⁹ The Danish Constitution does not explicitly guarantee gender equality. In its concluding comments on Denmark's seventh, eighth, and ninth reports, the CEDAW Committee has repeatedly called for legal measures that ensure the full incorporation of CEDAW in national law.³⁰ The background for these interventions is that the Danish Supreme Court has ruled that non-incorporated treaties do not have the same status in national law as incorporated treaties. Yet, leading scholars in the field of gender equality and anti-discrimination law such as Kirsten Ketscher and Stine Jørgensen have argued that the CEDAW applies in Danish law.³¹

The current gender equality legislation in Iceland is the 2020 Act on Equal Status and Equal Rights Irrespective of Gender (GEA)³² The Act is the last in a chain of different prohibitions against gender discrimination.³³ Gender is in its Section 1 defined as 'women, men and persons whose gender is registered as neutral in Registers Iceland'. Article 65 of the Constitution states that everyone shall be equal before the law and enjoy basic human rights irrespective of gender, religion, opinions, national origin, race, colour, property, birth or other status.³⁴ It also states that men and women shall enjoy equal rights in all respects. The Constitution takes precedence over other legislation, which must comply with the provisions of the former. Legislation that fails to do so can be judged invalid by the courts.

1.2 The Status of EU-gender Equality and Anti-discrimination Law

Nordic gender equality laws have since the turn of the century developed in close interplay with EU-law. Both work-related welfare laws and gender equality and anti-discrimination laws have undergone a series of changes to be in consonance with the demands of EU-law. Denmark, Finland and Sweden as members of the European Union are bound by EU-law. Norway and Iceland as members of the

²⁹ These two acts were in 2006 merged the Act on Equal Treatment in the Labour Market.

³⁰ CEDAW/C/DEN/CO/7, para. 15; CEDAW/C/DNK/CO/8, para. 11; and CEDAW/C/DNK/CO/9, para. 14 b.

³¹ Kirsten Ketscher, 'Kvindekonventionen gælder i dansk ret' in *Jura og Historie. Festskrift til Inger Dübeck som forsker*, Copenhagen Djøf Forlag 2003, 439-452; Kirsten Ketscher, 'Kvindekonventionen CEDAW og dens placering i international og dansk ret' in Charlotte Ferslev Møller (ed.), *Artikelsamling: CEDAW, FNs Kvindekonvention*, Copenhagen Dansk Kvindesamfund, 2007, 7-13, 7; and Stine Jørgensen, *Etniske minoritetskvinders sociale rettigheder: Arbejdsmarked, seksualitet og uddannelse*, DJØF, 2007.

³² Act on Equal Status and Equal Rights Irrespective of Gender no. 150/2020 (GEA). For an analysis of the Act's history and response to the gender gap see Brynhildur G. Flóvenz, 'The Gap between a Rather Progressive Legislation and a Depressive Reality? The Potential of Icelandic Gender Equality Legislation' in Hellum et al. (2022/23). This draft article has been an important source of information for this chapter.

³³ Act on Equal Rights of Women and Men no. 78/1976; Act on Equal Status and Equal Rights of Women and Men no. 28/1991; and Act on Equal Status and Equal Rights of Women and Men no. 96/2000.

³⁴ Constitution of the Republic of Iceland No. 33, 17 June 1944, as amended 30 May 1984, 31 May 1991, 28 June 1995 and 24 June 1999.

Agreement on the European Economic Area (EEA) are bound by EU's gender equality directives.³⁵

Equality between men and women is a fundamental principle of European Union law under Articles 2 and 3(2) of the Treaty of the European Union (TEU), EU legislation and the case law from the Court of Justice of the European Union (CJEU). Articles 21 and 23 of the Charter of Fundamental Rights of the European Union also prohibit any discrimination on grounds of sex and enshrine the right to equal treatment between men and women in all areas, including employment, work and pay.

The EU Council has passed a number of gender equality directives that apply in working life, employment-related training and vocational education and provision of services and goods.³⁶ Case law from the CJEU has broadened the gender equality directive's protection against individual discrimination. Council Directive (2006/54/EC), the Recast Gender Equality Directive, which constitutes a codification of earlier directives and CJEU case law, prohibits discrimination against women and men and discrimination on the basis of gender identity.³⁷ Discrimination on the basis of a combination of gender and other grounds is not listed as a discrimination ground. CJEU has not explicitly dealt with such cases. How the Nordic countries have responded to the challenges associated with the changing social, political and legal notions of gender varies.³⁸

The CJEU has strengthened the EU-law's protection against direct and indirect gender discrimination.³⁹ Its dynamic interpretation of the gender equality directive has strengthened the protection against discrimination related to pay, part-timework, pregnancy- and parental leave.⁴⁰ This was a game changer in the Nordic countries, as the 'Nordic Labour Model' leaves regulation of labour

³⁵ Article 69 of the EEA agreement, which is the cornerstone of relations between Norway and the EU, implies that EU's gender equality directives are binding for Norway.

³⁶ Council Directive (2006/54/EC), The Recast Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast Gender Equality Directive); Council Directive (2004/113/EC) The Equal Treatment in Goods and Services Directives in the access to and supply of goods and services; Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC; and Council Directive (92/85/EEC) on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

³⁷ Case C-13/94, *P v. S and Cornwall County Council* [1996].

³⁸ See Section 1 in this chapter.

³⁹ The distinction between indirect discrimination, for which an objective justification can be made, and direct discrimination, where an objective justification cannot be made, was first set out in Case C-170/84, *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz* [1986].

⁴⁰ Case C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, [1990]. Many of the key cases came from Denmark, for example Case C-400/93, *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S. Royal Copenhagen*; Case C-109/88, *Handels- og Kontorfuntionrernes Forbund i Danmark v. Dansk Arbejdsgiverforening acting on behalf of Danfoss* (1989); and Case C-109/00, *Tele Danmark A/S v. Handels- og KontorfunktionWrernes Forbund i Danmark (HK)* [2001].

relations to agreements between the social parties.⁴¹ All the Nordic countries have changed their gender equality and anti-discrimination laws to ensure compliance with the CJEU jurisprudence and the demands of Council Directive (2006/54/EC). There are, however, variations regarding the implementation and interpretation among the Nordic countries.⁴²

The strong protection against individual discrimination under EU-law has led the CJEU to impose limitations regarding the use of positive differential treatment to promote gender equality in working life and vocational training.⁴³ Positive action under Council Directive (2006/54/EC) is, as a result, limited to differential treatment of equally qualified candidates from the underrepresented and overrepresented sex.⁴⁴ Interventions by the CJEU and the EFTA Court have made their mark on the Nordic gender equality and anti-discrimination laws that initially allowed a wide use of positive differential treatment. Whether and to what extent these strict standards apply to higher education is today giving rise to contestations in Nordic countries such as Norway and Sweden.⁴⁵

1.3 The Status of International Human Rights Law, Particularly the CEDAW

The Nordic countries are also faced with an accumulating body of international human rights obligations.⁴⁶ The Committee on Social Economic and Social Rights⁴⁷ and the Committee on the Elimination of All Forms of Discrimination against Women⁴⁸ have been in the forefront of developing protections against intersectional and systemic gender discrimination.

The CEDAW, which sets out to eliminate all forms of discrimination against women, assumes that the gender-neutralized approach taken by the other human rights instruments is not a sufficient response to the unequal distribution of

⁴¹ The relationship between EU-laws' strong protection against gender discrimination in the labour market and the Swedish Labour Model is described in Carlson (2007).

⁴² See Section 3 in this chapter.

⁴³ See Section 4 in this chapter and Ann Numhauser-Henning 'Recruitment Targets for Women Professors – Mission Impossible' in Ann Numhauser Henning (ed.) *Women in Academia and Equality Law. Aiming High-Falling Short*, Bulletin of Comparative Labour Relations np. 57, Kluwer Law International, 2006, 171-196.

⁴⁴ Case C-450/93, *Eckhard Kalanke v. Freie Hansestadt Bremen* [1995]; Case C-409/95, *Hellmut Marschall v. Land Nordrhein-Westfalen* [1997]; and Case C-407/98, *Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist* [2000].

⁴⁵ See Section 6 in this chapter.

⁴⁶ All the Nordic countries have ratified a series of conventions that prohibit sex discrimination, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR), the International Covenant of 1966 on Civil and Political Rights (ICCPR) and the International Covenant of 1966 on Economic, Social and Cultural Rights (ICESRC). They have also ratified the CEDAW, which prohibits all forms of discrimination against women.

⁴⁷ CESCR General comment No. 20: Forty-second session (2009) Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/20, paras. 10, 12,13 and 17.

⁴⁸ CEDAW, General recommendation No. 28, 47th Session (2010) on the Core Obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc CEDAW/C/GC/28, paras 16,18 and 20.

power and resources between women and men.⁴⁹ In addition to a woman sensitive approach, it calls for protections against discrimination on the basis of a combination of grounds. The CEDAW Committee in GR 28 states that:

The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.⁵⁰

Both the CEDAW and the CESCR emphasize the need to change social, cultural and economic structures that create or uphold gender inequalities. The CESCR Committee in GC 20 defines this as systemic discrimination, stating that:

The Committee has regularly found that discrimination against some groups is pervasive and persistent and deeply entrenched in social behaviour and organization, often involving unchallenged or indirect discrimination. Such systemic discrimination can be understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups.⁵¹

To eliminate systemic discrimination, the CESCR Committee in GC 20 calls upon States parties to:

[A]dopt an active approach to eliminating systemic discrimination and segregation in practice. Tackling such discrimination will usually require a comprehensive approach with a range of laws, policies and programmes, including temporary special measures.⁵²

How the Nordic states have responded to the call for gender-specific legislation that provides protection against intersectional and systemic discrimination varies.

2 Addressing the Gender Gap: Different and Changing Legal Designs

Nordic scholarship on women, gender, equality and the law has, from the 1970's until now pointed to the continued gap between the right to equality and the gendered social and economic realities on the ground.⁵³ According to Tove

⁴⁹ Andre Byrnes, 'CEDAW Article 1' in Marsha Freeman, Christin Chinkin and Beate Rudolf (eds.), *CEDAW Commentary*. Oxford University Press, 2012, 51-70.

⁵⁰ CEDAW GR No. 28, para. 18.

⁵¹ CESCR GC No. 20, para. 12.

⁵² CESCR GC No. 20, para. 39.

⁵³ Tove Stang Dahl, Kjersti Graver, Anne Hellum and Anne Robberstad, *Juss og Juks*, Pax 1975; Tove Stang Dahl (ed.) *Kvinnerett I og I*, Universitetsforlaget, 1986; Kevät Nousiainen, Åsa Gunnarson et al., (eds.), *Responsible Selves, Wwomen in the Nordic Legal Culture*, Ashagate, 2001; Laura Carlson, *Searching for Equality*, Iustus Förlag, 2007; Eva-Maria Svensson, Ulrika Andresson, Hege Brækhus, Monica Burmann (et al.) *På vei - Kjønns og rett i Norden*, Gøteborg: Makadam förlag & bokproduktion AB, 2013; Wanna Swedberg, *Ett*

Stang Dahl, the first professor in Women's Law in the Nordic countries, all laws need to respond to women's life situations and experiences.⁵⁴ A similar approach is taken by Sandra Fredman who calls for 'engenderment' of social and economic rights.⁵⁵

2.1 *The Persistent Gender Gap*

A recurrent concern in the scholarship in the cross-cutting fields of women's law, gender and the law and equality and anti-discrimination law, is that Nordic gender equality and anti-discrimination acts, in spite of their wide-reaching normative protection standards, lack transformative power. This has partly been ascribed to their increasingly individualized and gender-neutralized designs and partly to the lack of robust enforcement systems.

How gender equality and anti-discrimination law should respond to the skewed distribution of resources and power between women and men was and is still a contested issue. In spite of their common quest for social gender justice and common obligations under EU-law and international human rights law, there are significant differences regarding the design of the Nordic gender equality and anti-discrimination laws.

Among the contested issues is whether a symmetrical approach that covers discrimination on the basis of sex sufficiently recognizes the pervasive discrimination against women on the basis of their sex, or whether an asymmetric and gender-specific approach as required by the CEDAW has been adopted. A closely-related question is whether the gender-specific equality and anti-discrimination laws from the 1970's and 1980's should be replaced by single, unified acts encompassing both gender and other grounds, such as ethnicity, disability and age. Another question is whether protection against gender discrimination should be based on a one-dimensional understanding of gender or a multi-dimensional understanding that requires protection against discrimination on the basis of gender in combination with other identity markers. How to handle discrimination in the private, personal and private sphere is also subject to continuous debate.

2.2 *Gender-neutralized and One-dimensional Designs*

A characteristic feature of the Swedish, Finnish and Danish approaches is their gender-neutralized and one-dimensional designs. This design, according to the CEDAW Committee, is inadequate to come to grips with the skewed distribution of power and resources between women and men.

(o)jämsällt transportsystem i gränslandet mellan politik och rätt: en genusrättsvetenskaplig studie av rättslig styrning för jämställdhet inom vissa samhällsområden. Handelshögskolan vid Göteborgs universitet. Juridiska institutionen, 2017; and Lena Svenaeus, *Konsten att upprätthålla löneskillnader mellan kvinnor och män En rättssociologisk studie av regler i lag och avtal om lika lön*, Lunds universite, 2017.

⁵⁴ Tove Stang Dahl, *Women's Law. An Introduction to a Feminist Jurisprudence*, Norwegian University Press, 1989.

⁵⁵ Sandra Fredman, 'Engendering Socio-economic Rights', in Anne Hellum and Henriette Sinding Aasen (eds.) 2013.

The first Swedish gender equality and anti-discrimination act was the 1980 Equal Opportunities Act introduced by the liberal political party.⁵⁶ The 1980 Act prohibited sex discrimination and was limited to working life. The Swedish 2008 Discrimination Act (DA) merges the Equal Opportunities Between Women and Men Act and the other acts that provided protection against discrimination on other grounds than sex, into a single act.⁵⁷ The new act covers grounds like sex, sexual orientation, transgender identity, ethnicity, religion, belief, disability and age.⁵⁸ Discrimination on the basis of a combination of grounds is not recognized.⁵⁹ The prohibition against sex discrimination is, like in the Equal Opportunities Act, based on a symmetric and gender-neutralized model. The Swedish Government was and still is of the view that both women's and men's roles have to change in order to achieve gender equality. In the Swedish CEDAW ratification document, the Government stated that CEDAW 'should have concerned sex/gender discrimination in general' and not only discrimination against women.⁶⁰ The Swedish design does not sit well with Sweden's obligations under CEDAW. In its comments on Sweden's combined eighth and ninth periodic reports, the Committee clearly stated that it did not agree with Sweden's view that a gender-neutralized and single discrimination act was the best way of addressing gender discrimination.⁶¹ The Committee recommended that 'the State party should also evaluate and, if necessary, revise the scope of protection of its Discrimination Act in order to ensure that it contains a definition of discrimination against women in accordance with article 1 of the Convention, covering inter alia, intersecting forms of discrimination'.⁶²

The Finnish Act on Equality between women and men was passed in 1986. The 1986 Act, which has been amended a number of times, prohibits discrimination on the basis of sex, gender identity and gender expression.⁶³ It was passed mainly to implement the CEDAW's requirement that the state prohibit all forms of discrimination against women.⁶⁴ A symmetric and gender-neutralized, as opposed to an asymmetric and woman-specific approach, was, however, seen as the most appropriate means of promoting gender equality. This view was held by both the Government and the Women's movement. A two-track model upholding the gender-specific equality act was chosen, when those discrimination grounds other than gender were collected under the new Non-

⁵⁶ The Equal Opportunities Act (*Jämställdhetslagen*), adopted in 1979 (SFS 1979:1118) and entered into force in 1980.

⁵⁷ Discrimination Act (DA) 2008:567.

⁵⁸ DA Chapter 1 Sections 4.1 and 4.2.

⁵⁹ Eva Schömer, 'Osynliggörande av multipel diskriminering i den svenska diskrimineringslagstiftningen' in Eva-Maria Svensson et al. (eds.), *På vei. Kjønn og rett i Norden*, 2011, 115-144.

⁶⁰ SFS 1979/80:147, 7.

⁶¹ CEDAW/C/SWE/CO/8-9, para. 15.

⁶² Ibid.

⁶³ The Act on Equality was amended in 1988, 1992, 1995, 1997, 2001, 2005, 2009, 2011, 2014, and 2016.

⁶⁴ Kevät Nousiainen, 'The Rise and the Fall of the CEDAW in Finland: Time to Reclaim its Impetus' in Hellum and Sinding Aasen (eds.)(2013).

Discrimination Act in 2004.⁶⁵ The revised Act on Equality between women and men does not prohibit discrimination on the basis of a combination of grounds. The justification is that the two-track system with different mandates and legal prerequisites makes it difficult to take multiple and intersectional discrimination under scrutiny. A recurrent critique from the CEDAW Committee is that the one-dimensional conception of gender discrimination that is prevalent in the Finnish Act is unsuited for addressing the discrimination challenges posed by increasing sociocultural diversity and transnationalism. In its consideration of Finland's sixth periodic report, the Committee stated that 'the Gender Equality Act and the Non-Discrimination Act do not currently provide adequate protection to women against multiple or intersecting forms of discrimination.'⁶⁶ In line with this, the Committee urged the Finnish state to 'ensure that reforms explicitly affording protection to women against multiple or intersecting forms of discrimination in all national gender equality and anti-discrimination laws are adopted in a harmonised manner'.⁶⁷

The Danish Act on Equal Treatment between Women and Men prohibits discrimination against women and men and sets out to promote equality between the sexes.⁶⁸ The Act does not prohibit intersectional discrimination. Like the Swedish and Finnish acts, it has a symmetric, gender-neutralized and one-dimensional design. This legal design does not sit well with Denmark's obligations under CEDAW. In its comments to Denmark's eighth and ninth reports, the Committee expressed concern about this design,⁶⁹ remarking on:

[T]he absence of legislation for the general prohibition of all forms of discrimination against women covered under the Convention and the absence of a comprehensive law on the prohibition of discrimination covering all internationally recognised grounds. The Committee is concerned that this could result in legal ambiguity and inconsistency in addressing the rights of women belonging to disadvantaged or marginalised groups who face intersecting forms of discrimination.⁷⁰

The widespread resistance to protection against intersectional discrimination may, despite its technical legal justification, be understood as part of broader socio-political transformation. Sweden has, according to Mulinari and Nergaard been transformed from a multicultural welfare state which provided equal welfare and work rights to all, to an eroded welfare state pressured by neoliberalism and 'managed migration'.⁷¹ In Finland this shift, according to Nousiainen, became evident with the rise of conservative populist-nationalist politics after mid-1990s. Strongly-felt loss of male and ethnic entitlement has given rise to backlashes against feminism, homo- and xenophobia in the last

⁶⁵ The Non-Discrimination Act 2004 was replaced by a new version in 2014.

⁶⁶ CEDAW/C/FIN/CO/7, para. 10.

⁶⁷ CEDAW/C/FIN/CO/7, para. 11.

⁶⁸ The Act on Equality between Women and Men no. 1678 of 19. December 2013, with changes of Act no. 487 of 30. April 2019.

⁶⁹ CEDAW/C/DNK/8, para. 11 and CEDAW/C/DNK/CO/9, paras. 14 b and c.

⁷⁰ CEDAW/C/DNK/CO /8, para. 11.

⁷¹ Diana Mulinari and Anders Nergaard, 'Doing Racism, Performing Femininity: Women in the Sweden Democrats' in Michaela Köttig, Renate Bitzan & Andrea Petö, *Gender and Far Right Politics in Europe* (Gender and politics), Palgrave Macmillan US, 2017.

decade.⁷² While similar tendencies can be observed in Norway, independent human rights institutions, equal rights bodies, experts in the field of equality and anti-discrimination law have constituted a strong counterforce.

2.3 Combined Gender-neutralized, Woman-specific and Multidimensional Designs

The Icelandic and Norwegian acts have, in response to the women's movement's call for a gender-specific approach, adopted designs that in different ways combine woman-specific, gender-specific and gender-neutralized approaches.

The current gender equality legislation in Iceland is the 2020 Act on Equal Status and Equal Rights Irrespective of Gender (GEA).⁷³ Iceland, like Finland and Denmark, has a two-track system where gender discrimination and discrimination on other grounds, such as ethnicity, disability, age, etc., are regulated in separate acts.⁷⁴ Unlike the Danish and Finnish acts, the Icelandic act provides protection against discrimination on multiple grounds. According to its Section 2.3, multiple discrimination is defined as: 'When an individual is subjected to discrimination on the basis of more than one reason for discrimination that this Act, the Act on Equal Treatment Irrespective of Race or Ethnic Origin, and the Act on Equal Treatment on the labour market provide protection.'

The aim of the GEA Act, which is set out in Section 1, is to 'prevent discrimination on the basis of gender and to maintain gender equality and equal opportunities of the genders in all spheres of society.' In addition to secure equal participation, equal pay, equal education and equal ability to reconcile working life and family life irrespective of gender, the Act is to facilitate: 'specifically improving the position of women and increasing their opportunities in society.'⁷⁵ Whether the Icelandic legislation should be based on a symmetric and gender-neutralized or on an asymmetric and woman-specific model has been a site of contestation since the enactment of Act on Equal Rights of Women and Men in 1976, which was the first general act on gender equality in Iceland.⁷⁶ The increasing number of members of the Women's Alliance in Althingi, the Icelandic parliament, emphasized the need of an act that responded to the situation of Icelandic women. The 1991 Act on Equal Status and Equal Rights of Women and Men was a breakthrough for this demand.⁷⁷ In addition to promoting equality between women and men, a provision was added stipulating that specific measures should be taken to improve women's status.⁷⁸

The contested relationship between a gender-neutralized and a woman-specific approach is demonstrated by the 2000 Icelandic Act on Equal Status and

⁷² Nousiainen, in Hellum et al. (2022).

⁷³ Act on Equal Status and Equal Rights Irrespective of Gender no. 150/2020.

⁷⁴ By Act 85/2018 on Equal Treatment irrespective of Race and Ethnic Origin, Council Directive 2000/43/EC was implemented. By Act 86/2018 on Equal Treatment on the Labour Market, Council Directive 2000/78/EC was implemented.

⁷⁵ Act on Equal Status and Equal Rights Irrespective of Gender Section 1 c.

⁷⁶ Act on Equal Rights of Women and Men no. 78/1976.

⁷⁷ Act on Equal Status and Equal Rights of Women and Men no. 28/1991.

⁷⁸ Section 1.

Equal Rights of Women and Men.⁷⁹ While eliminating almost all specific measures for women, the notes to the Act stated that: ‘New points of focus have emerged in recent years, where the emphasis is on equal rights as a matter of interest to all of society and not to women alone.’⁸⁰ The purpose of the Act was to establish and preserve equal rights and equal opportunities for men and women.⁸¹ Improving women’s status and opportunities in society was, however, listed as one of the seven means of achieving gender equality.⁸²

The Norwegian 2017 Equality and Anti-Discrimination Act (EAD) replaces the 2013 Gender Equality Act and three other anti-discrimination acts.⁸³ It is a single act that prohibits discrimination on the basis of the grounds of gender, pregnancy, care, ethnicity, disability, age, sexual orientation, gender identity and a combination of grounds.⁸⁴ The aim of the EAD Act is to promote equality and prevent discrimination for all the protected groups, and particularly improve the position of women, minorities and persons with disabilities.⁸⁵ As such, it constitutes a combination of a gender-neutralized, woman-specific and multi-dimensional design. This design stands on the shoulders of the 1978 Gender Equality Act which was replaced by the 2013 Gender Equality Act.

In Norway, the question of whether a gender-neutralized approach is sufficient in order to come to grips with the skewed distribution of power and resources between women and men has been and still is a contested issue. The 1978 Gender Equality Act, which was replaced by the 2013 Gender Equality Act, was the outcome of a longstanding political battle. The initial proposal from the Labour Party took a symmetrical and gender-neutralized approach that covered discrimination on the basis of sex.⁸⁶ It was met with criticism from large parts of the women’s movement who argued that it did not sufficiently recognize the pervasive discrimination against women on the basis of their gender, and that an asymmetric and woman-specific legal guarantee was needed.⁸⁷ In 1976, two proposals representing these opposing strands were debated in the Norwegian Storting. Neither the Labour Party’s proposal of a gender-neutralized equality act nor the Socialist Left Party’s proposal of an act against discrimination of women received a majority vote. In 1978, the Storting passed the Gender Equality Act that was a compromise between the two strands. It prohibited gender discrimination, but allowed differential treatment that promoted gender

⁷⁹ Act no. 96/2000 on Equal Status and Equal Rights of Women and Men.

⁸⁰ *Parliamentary Gazette*, Section A, 1998-99, 3259.

⁸¹ Act no. 96/2000 on Equal Status and Equal Rights of Women and Men Section 1

⁸² *Ibid.*, Section 1(1)d.

⁸³ Act Relating to Equality and a Prohibition Against Discrimination (Equality and Anti-Discrimination Act). Act 16. June 2017 No. 51.

⁸⁴ EAD Act Section 6.

⁸⁵ EAD Act Section 1.

⁸⁶ Utkast til Lov om likestilling mellom kjønnene (White Paper, Gender Equality Bill from the Ministry of Government Administration and Consumer Affairs). Notat fra Forbruker og administrasjonsdepartementet (Oslo: Ministry of Government Administration and Consumer Affairs, July 1974).

⁸⁷ The legal and political controversies surrounding the Act are described in Tove Stang Dahl, Kjersti Graver, Anne. Hellum and Anne Robberstad, *Juss og Juks* (Law and Deceit) (PAX 1976).

equality in conformity with the purpose of the Act, which was to improve the position of women.

The 2017 EAD Act was part and parcel of the conservative Solberg Government's liberal reform policy aiming at a simple, unified, and less time and cost-effective equality and anti-discrimination law regime. To ensure a unified legal framework, the Solberg Government initially proposed to repeal the Gender Equality Act's aim of 'improving the position of women'. This proposal encountered fierce resistance from most women's organizations, the national labour union (LO), experts in equality and anti-discrimination law, human rights treaty bodies and politicians inside and outside government.⁸⁸ In their struggle to uphold the woman-specific objective, proponents of women's rights invoked the CEDAW Committee's concern that that the proposal would weaken women's protection against gender discrimination. The Committee in its Concluding Observations to Norway's eighth periodic report stated that: 'the use of gender-neutralized legislation, policies and programmes might lead to inadequate protection of women against direct and indirect discrimination and hinder the achievement of substantive equality between women and men.'⁸⁹ In the face of strong national and international criticism, the Solberg Government backtracked. Thus, the EAD Act, like the earlier gender equality acts, constitutes a combination of a gender-neutralized and a woman-specific act.

The Solberg Government, unlike the Stoltenberg II Government, responded to the quest for an explicit prohibition against intersectional discrimination coming from the CEDAW Committee, women's organizations and experts in the field of equality and anti-discrimination law.⁹⁰ The prohibition against intersectional discrimination, however, was already rooted in sources of law like case law from the Discrimination Tribunal and the courts. The driver of change was the Equality Ombud's and the Equality Tribunal's dynamic interpretation of the gender equality and anti-discrimination act.⁹¹ The legal starting point was the preparatory works to the Anti-Discrimination Ombud Act from 2005, that emphasized the need for a single enforcement system that could deal with discrimination on the basis of a combination of grounds.

Against this background, the Ombud and the Tribunal extended the discrimination grounds to situations where discrimination was related to a combination of grounds. The Hotel Plaza case, which was decided by the Discrimination Tribunal in 2008, was a landmark case, both at the national and international levels.⁹² In this case, two Norwegian women who were born in Asia and had been adopted by Norwegian parents, were refused a room at the hotel. To prevent prostitution and drug-dealing, the Hotel's written guidelines

⁸⁸ An overview of the debate is given in Anne Hellum and Vibeke Blaker Strand, 'Solberg-regjeringens forslag til reformer på diskrimineringsfeltet: Uniformering, individualisering, privatisering og avrettsliggjøring' in *Kritisk juss* 53(1) 2017, 4-34.

⁸⁹ CEDAW/C/NOR/C08, para. 8.

⁹⁰ The Gender Equality Commission, with reference to the CEDAW Committee's GR 28 suggested an explicit prohibition against intersectional discrimination in the text of the Act in Struktur for likestilling. NOU 2011:18, 43-46.

⁹¹ The process of change is described in Anne Hellum 'Vern mot sammensatt diskriminering etter internasjonale menneskerettigheter og norsk rett: kvinner i krysset mellom kjønn og etnisitet' in Anne Hellum & Julia Köhler-Olsen (eds.), *Like rettigheter - ulike liv: Rettslig kompleksitet i kvinne-, barne- og innvandrerperspektiv*. Gyldendal juridisk, 2014, 39-68.

⁹² See the following case from the Discrimination Tribunal: LKN-1-2008.

permitted staff to refuse access to people domiciled in Oslo and its environs. When assessing the case, the Equality Tribunal found circumstances that gave grounds to believe that the hotel had attached negative importance to the women's gender and ethnic backgrounds. It also found that the hotel was unable to substantiate that there were reasons other than gender and ethnicity behind the refusal to give the two women a room. This decision was followed up by the courts.⁹³

2.4 *Changing Constructions of Gender as a Discrimination Ground*

The definition of gender as a discrimination ground is in a state of flux. The Nordic gender equality and anti-discrimination acts were initially limited to discrimination between heterosexual women and men. The call for legal recognition of the mixed-nature gender identity and the plurality of genders and sexualities that exist in society has challenged the one dimensional, binary and heteronormative conception of gender. How the Nordic gender equality and anti-discrimination acts have responded to these challenges varies.

Today, the separate gender equality and anti-discrimination acts in Iceland and Finland encompass discrimination on the basis of sex, gender identity and gender expression while the Danish act is confined to women and men. The Icelandic GEA Act defines gender as 'women, men and persons whose gender is registered as neutral in Registers Iceland'.⁹⁴ The shift from a binary to a plural conception of gender was prompted by the 2019 Act on Gender Autonomy passed by the Icelandic Parliament, Althingi.⁹⁵ According to that Act, everyone has the right to define their own gender and change their gender registration in Registers Iceland (the national register). Gender-neutral registration is permitted, and people who are so registered are protected by the provision prohibiting discrimination in the Gender Equality Act. The Finnish Act on Equality provides protection against discrimination on the basis of sex, gender identity and gender expression. Gender identity is defined as 'the person's own experience of (his or her) gender' and expression of gender as 'articulating one's gender by clothing, behaviour or in some other similar manner'.⁹⁶

The Swedish Discrimination Act prohibits discrimination on the basis of sex, sexual orientation and transgender.⁹⁷ Sex as a ground of discrimination refers to biological women or men. Transsexual individuals are included if a sex change is done or planned. Transgender identity or expression is supposed to give protection against discrimination for those who do not want to be defined as belonging to a particular sex. Disadvantages connected to pregnancy are defined as sex discrimination but have in practice been extended to both sexual minorities and gender minorities.

The Norwegian Equality and Anti-Discrimination Act prohibits discrimination on the basis of 'gender, pregnancy, leave in connection with

⁹³ Øst-Finnmark District Court, judgment of 17 March 2010 in case no. 09-136827TVI-OSFI.

⁹⁴ Act on Equal Status and Equal Rights Irrespective of Gender Section 1, para. 1.

⁹⁵ Act on Gender Autonomy no. 80/2019, as amended by Acts nos 159/2019, 152/2020 and 154/2020.

⁹⁶ The Act on Equality Section 3, subsection 6.

⁹⁷ DA Chapter 1, Sections 4.1 and 4.2.

childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age or combinations of these factors'.⁹⁸ Sexual orientation and gender identity were not listed as discrimination grounds in the 1978 Gender Equality Act. Through cases adjudicated by the Gender Equality Ombud and the Gender Equality Tribunal, the protection against gender discrimination was gradually extended to sexual orientation and to transpersons who had undergone sex reassignment surgery and sterilization.⁹⁹ A separate act prohibiting discrimination on the basis of sexual orientation, gender identity and gender expression was passed in 2013. Like, the Swedish Discrimination Act, it includes persons who have undergone sex change and persons who do not want to be defined as belonging to a particular sex.

'Gender' as listed in the Norwegian EAD Act encompasses differential treatment on the basis biological and social differences between women and men. In addition, the Act lists a series of gender-related discrimination grounds such as 'pregnancy, leave in connection with childbirth or adoption, care responsibilities'. By including 'care responsibilities' as a standalone ground, the Act signals that the protection against discrimination on the basis of care not only applies to women but also to men. Most importantly, the Act makes clear that pregnancy, parental leave or care for children, disabled, sick or elderly, are situations that constitute a discrimination risk, regardless of the sex, sexual orientation, gender identity or gender expression of the carer. The Act thus extends the strong protection that initially was limited to women to men, other genders and sexualities. Women were, because of their biological and social reproductive functions, given stronger protection against discrimination related to pregnancy, birth and childcare than men were. New legislation that gave fathers' a right to parental leave in the event of childbirth, the so-called fathers' quota, challenged this biological construction of men and women. In 2002, it was in line with the demand of EU-law that made it clear that male employees who took parental leave should have the same protection against discrimination as women.¹⁰⁰

2.5 *The Scope of the Acts*

Gender discrimination takes place in all spheres of society. Whether gender equality and anti-discrimination law should take a workfare-related approach or include discrimination in family, private, personal and religious life, is a contested issue in the Nordic countries as elsewhere in the world. While EU-law is confined to working life, vocational education and services and goods, the CEDAW, which sees the elimination of gender stereotypes embedded in family and social life as an overall goal, applies in all spheres of life, including the private, personal and religious sphere.

The Swedish 1980 Equal Opportunities Act only applied to working life. Today, the Discrimination Act encompasses working life, education and supply

⁹⁸ EAD Act Section 6.

⁹⁹ See the following decisions by the Discrimination Tribunal: LDN 2011-32, LDN 2008-19, and LDN 2009-15.

¹⁰⁰ Proposition to the Odelsting 77 (2000–2001) 37. The reform was prompted by the demands of Council Directive 2002/73/EC (Equal treatment in access to employment).

of goods and services and areas in society that are connected to these fields such housing, health and medical services and national military and civilian services.¹⁰¹ The Act does not apply in private, personal and religious life. Legislation that prohibits sex discriminatory advertisements has, in spite of the strong call for change, not been introduced.¹⁰²

The Finnish Act on Equality between Women and Men prohibits discrimination in working life, educational institutions, and in the access to and supply of goods and services.¹⁰³ The private and religious sphere is not included. The Danish Act on Equal Treatment of Women and Men applies to public and private employers, public administration, general business and provision of services and goods in the public and private sector outside private and family life.¹⁰⁴

The Icelandic Act provides protection against discrimination in employment, schools and other educational institutions, after-school activity centres and sports and leisure activities, advertisement and in relation to trade in goods and services.¹⁰⁵ The general prohibition against discrimination in Section 16, however, does not exclude any field of the society.

The Norwegian EAD Act, like earlier gender equality acts, applies in all social areas but is not enforced in family and personal life.¹⁰⁶ Discriminatory advertisement is included in the Marketing Act. The scope of the gender equality act was, and is still, a site of legal and political contestation.¹⁰⁷ The religious sphere has been included since 2010 when the exemption for religious societies in the 1978 Gender Equality Act and the Working Environment Act was repealed with reference to Norway's obligations under the CEDAW and EU-law. This implies that differential treatment by religious societies is illegal unless it has an objective reason. Hege Brækhus, as a member of the Discrimination Law Commission, suggested that discrimination in private and public life should be enforced but was voted down.¹⁰⁸ The conservative Solberg Government initially proposed to exempt family and personal life from the EAD Act. The proposal, which was met with resistance from the women's rights movement, civil society, experts in the field of gender equality and anti-discrimination law and the Equality Ombud, was withdrawn.

3 Protection Against Individual Gender Discrimination

All the Nordic gender equality and anti-discrimination laws provide protection against direct and indirect discrimination. To keep up with the CJEU's dynamic

¹⁰¹ DA Chapter 2.

¹⁰² Eva-Maria Svensson, and Maria Edström, 'Freedom of Expression vs. Gender Equality.' *Tidsskrift for Rettsvitenskap*, 2014 (05), 479–511.

¹⁰³ The Act on Equality, Sections 8, 8a, 8b, 8c, 8d and 8 e.

¹⁰⁴ Danish Act on Equality Section 2.

¹⁰⁵ EAG Act Chapter 3 Sections 16, 17, 18, 19, 20, 21 and 22.

¹⁰⁶ EAD Act Section 2.

¹⁰⁷ See Anne Hellum and Vibeke Blaker Strand (2022), Chapter 4.

¹⁰⁸ See Hege Brækhus, 'Diskriminering i private og personlige relasjoner' in Eva-Maria Svensson et al. 2011, 248–272.

development of these concepts, codified in the Recast Gender Equality Directive, the different Nordic legislations have undergone a series of reforms.

3.1 The Legacy of EU-law: Strengthened Protection Against Individual Discrimination

The wording of the Nordic gender equality and anti-discrimination acts are, by and large, identical to the Recast Gender Equality Directive.¹⁰⁹ Article 2a of the Directive defines direct discrimination as situations where ‘one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.’ Article 2b defines situations where ‘an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;’ as indirect discrimination.

In spite of these commonalities there are, however, variations depending on the different legal designs and the political context. Sweden, with its gender-neutralized design has no specific provision addressing pregnancy and parental leave-based discrimination. Norway, with its mixed gender-neutralized and woman-specific design provides protection that is stronger than EU-law.

3.2 Direct Discrimination in Working Life – Pregnancy and Parental Leave

Examples of EU law’s impact on protection against discrimination in working life is the ‘genuine occupational requirement’ (GOR) and the absolute protection against pregnancy and maternal leave-related discrimination. These interventions have strengthened the workfare-related approach to gender equality that is hampered by the Nordic Labour Model where the trade unions and the employers, to a large extent, are seen as better suited than legislation to deal with regulations of employment. In spite of these interventions, the relationship between gender equality and anti-discrimination law and labour law is still a site of contestation.

To ensure equal access to employment and vocational training, all the Nordic countries have adjusted their legislation to the requirements of the Recast Gender Equality Directive. It states that exceptions for direct differential treatment can only be justified:

[B]y 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 occupational requirement, provided that its objective is legitimate and the requirement is proportionate.¹¹⁰

EU-legislation and the CJEU have responded to the high risk of discrimination in relation to pregnancy and parental leave. The Court has ruled that financial

¹⁰⁹ See for example DA Sections 4.1 and 4.2; GEA Act Sections 2.1 and 2.2; and EAD Act Sections 7 and 8.

¹¹⁰ Council Directive (2006/54/EC) Article 14.

loss cannot justify differential treatment on the basis of pregnancy.¹¹¹ It has also ruled that women, under any circumstances, are not obliged to inform employers of their pregnancy.¹¹² According to the Recast Gender Equality Directive:

It is clear from the case-law of the Court of Justice that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. Such treatment should therefore be expressly covered by this Directive.¹¹³

The Recast Gender Equality Directive protects both women and men against parental leave-based discrimination.¹¹⁴ Until 2002, men who were discriminated against on the basis of parental leave were not protected.¹¹⁵ Yet, only leave that sets out to protect the health of the person who has given birth and the child, is included in the strong protection against direct discrimination. Furthermore, different conditions for parental leave are seen in a ruling from the EFTA Court as outside of the scope of Council Directive 2006/54/EC because they do not concern ‘employment and working conditions.’¹¹⁶

The way in which the Nordic countries have sought to harmonize their legislation with the demands of EU law varies. The Swedish Equality Act does not explicitly prohibit pregnancy and parental leave-based discrimination. Pregnancy-based discrimination is indirectly covered through interpretation in line with the CJEU case law. Furthermore, there is a prohibition on unfavourable treatment related to parental leave in any form (pregnancy, maternity, paternity or parental) in the Parental Leave Act.¹¹⁷ The Swedish implementation of the Recast Gender Equality Directive thus lacks transparency.

The Icelandic GEA Act states that: ‘It is prohibited to allow maternity/paternity leave, or other circumstances relating to pregnancy and childbirth, to have a negative effect’ on decisions regarding application, promotion, vocational training and working conditions.¹¹⁸ The Finnish Act on Equality between Women and Men defines direct discrimination as ‘treating someone differently for reasons of pregnancy or childbirth’.¹¹⁹ The Danish Act on Equal Treatment between Women and Men addresses ‘the negative differential treatment in connection with pregnancy and during women’s 14 week’s leave in connection with birth constitutes direct discrimination.’¹²⁰

¹¹¹ Case C-177/88, *Dekker*.

¹¹² Case C-109/00, *Tele Danmark*.

¹¹³ Para. 23.

¹¹⁴ Article 15.

¹¹⁵ The 2002 Equal Treatment Directive specifically referred to protecting both women and men exercising their rights to parental leave.

¹¹⁶ Case E-1/18, 13 December 2019. This provision governing the scope of the directive is found in art. 14(1)c.

¹¹⁷ Section 16 of the Parental Leave Act (1995:584).

¹¹⁸ GEA Act Section 19.

¹¹⁹ Act on Equality between Women and Men, Section 7, para. 1.

¹²⁰ The Act on Differential Treatment between Women and Men, Section 1:2 (this author’s translation).

The most comprehensive definition of pregnancy and parental leave-based discrimination is found in the Norwegian EAD Act. The unclear wording of the initial proposal was improved on the basis of criticism from experts in the field of gender equality.¹²¹ Section 10 in the EAD Act makes it clear that differential treatment on the basis of pregnancy, childbirth, breastfeeding and leave pursuant to the Working Environment Act and leave reserved for each of the parents of the National Insurance Act is only allowed ‘to protect the woman, the foetus or the child in connection with pregnancy, childbirth or breastfeeding, or if other obvious grounds apply.’¹²² There is, according to the third paragraph, an absolute protection against differential treatment on the basis of pregnancy, childbirth, breastfeeding or leave in connection with recruitment and dismissal. Unlike the Recast Gender Equality Directive and the legislation in the other Nordic countries, the EAD Act’s absolute protection against pregnancy and leave-based discrimination does not make a distinction between leave that sets out to protect the birth-giving and breast-feeding woman and longer leaves that is directed at the child’s need for care from both parents. To adjust EU-law to the Norwegian social, political and legal context, the Act takes into consideration that the right to paid parental leave under Norwegian law is longer than in most European countries.¹²³ Most of the successful complaints regarding this provision are, however, related to pregnancy-related discrimination and not parental leave.¹²⁴

A highly controversial and unresolved issue is whether legislative regulation of men’s and women’s parental benefits is in consonance with EU-law and the EAD Act.¹²⁵ According to the Norwegian Social Insurance Act, a man applying for more than the father’s quota has to demonstrate that the child’s mother has assumed activities outside the home by either being back at work or being back in education. No similar requirement exists for women applying for more than the mother’s quota. Since the EFTA Court has concluded that parental benefits are outside the scope of the Directive, the ball is in the lap of the Ombud, the courts and the politicians.¹²⁶ The Equality Ombud, who is to promote gender equality, has called upon the politicians to change the Social Insurance Act. According to the Ombud, the ‘activation requirement’ lacks objective justification in relation to the EAD Act since it upholds the traditional division of work and care between men and women – whereby men are seen as the financial providers, and women were seen as the care-givers.¹²⁷ The case has been subject to judicial review by National Social Insurance Court (NSIC).¹²⁸

¹²¹ Vibeke Blaker Strand ‘Forenklingssjuss – En trussel mot individets vern mot kjønnsdiskriminering?’ in *Lov og Rett* vol. 54, no. 8 (2015a) 449–470.

¹²² Differential treatment on the basis of leave not covered by these time periods are, according to Section 10, para. 2, regulated by the main rule in Section 9, para. 1.

¹²³ See Anne Hellum and Vibeke Blaker Strand (2002) Chapter 15.

¹²⁴ LH-2008-99829, Discrimination Tribunal DIN-2020-57, DIN- 2019-115.

¹²⁵ For an in-depth analysis, see Ingunn Ikdahl, ‘Livsløp, normer og kropp: Kjønnsperspektiv på velferdsretten’ in Ingunn Ikdahl, Anne Hellum, John Asland, Hermann Bruserud, Maria Hjort og May-Len Skilbrei (eds.) *Kjønn og rett i juss studiet*, Cappelen Dam 2022 (forthcoming).

¹²⁶ Case E-1/18, 13 December 2019.

¹²⁷ Case number 12/340, statement of 26 March 2013.

¹²⁸ TRR-2015-1542, followed up in subsequent cases: TRR-2015-2010, TRR-2015-3349, TRR-2015-3925, TRR-2016-809, TRR-2016-1405, TRR-2016-1688, and TRR-2016-3421.

The NSIC's rulings constitute an ambiguous and contradictory response to the challenges posed by the growing and strengthened body of national and international equality and anti-discrimination law. It has expressed the view that the 'activation requirement' is unfortunate from a gender equality perspective, and as such a potential violation of the EAD Act. While recognizing its role as an independent court that has to take the full range of sources into consideration it maintains that the legislators had made a conscious choice regarding the gender-specific 'activation requirement'.¹²⁹

3.3 *Indirect Discrimination: Different Norwegian and Danish Interpretations*

Gender-neutralized laws, regulations and practices that have different effects for women and men or different groups of women is a widespread problem in all the Nordic countries where laws and practice are lagging behind the dynamic development of anti-discrimination standards. On paper, the Recast Gender Equality Directive's definition of indirect discrimination responds to such situations. Article 2b defines situations where 'an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;' as indirect discrimination. This definition constitutes a codification of case law from the CJEU which has also been adopted by international human rights treaty bodies in the interpretation of the concept of discrimination in the respective conventions.¹³⁰

While the Nordic countries' definitions of indirect discrimination are almost identical with the directive, there are differences as to what is seen as objective justification of rules and practices that have different consequences for women and men. An example of this are the different considerations of Norwegian and Danish courts regarding the legality of rules that prohibit the use of religious headscarves in the workplace. Danish courts, including the Danish Supreme Court, have ruled that prohibition against religious headscarves at the workplace does not constitute ethnic discrimination.¹³¹

Unlike the Danish courts, the Norwegian Discrimination Tribunal has seen prohibitions against the use of religious headscarves at the workplace as indirect gender discrimination.¹³² The first case was the Oslo Plaza case.¹³³ The question was whether the hotel's clothing requirements for room attendants, stating that

¹²⁹ The foundational case, TRR-2017-2195 is not published, but cited with support in a number of cases such as TRR-2017-2799.

¹³⁰ Case C-170/84, *Bilka*.

¹³¹ UfR 2005 1265 *Føtex*. See Kirsten Ketscher, 'Etnisk likebehandling, religionsfrihed og ligestilling mellem kvinder og mænd - set i lyset af Føtex-sagen', *Ugeskrift for Retsvæsen* (2005) 235-243.

¹³² Vibeke Blaker Strand, *Diskrimineringsvern og religionsutøvelse: hvor langt rekker individvernet (Equality and religion)*, Gyldendal 2012. Vibeke Blaker Strand 'Prohibitions Against Religious Clothing and Symbols in Public Schools and Universities: Narrowing the Scope by Introducing the Principle of Equal Treatment of Religious Manifestations' in *Religion & Human Rights*, (2015) 10(2), 160-190.

¹³³ Discrimination Tribunal LKN-2001-8.

the use of any headgear was forbidden, constituted indirect gender discrimination. The case was adjudicated in 2001, four years before the Discrimination Act that prohibited discrimination on the basis on ethnicity and religion was enacted. The Tribunal concluded that the requirement constituted indirect gender discrimination in violation of the 1978 Gender Equality Act. The rationale was that the clothing requirements, that were the same for women and men, put Muslim women in a worse off position than men in a similar situation. The Tribunal, who was of the view that it was reasonable to expect the hotel to design clothing outfits with headgear, concluded that the requirement constituted indirect discrimination. In 2009, after the Discrimination Act 2005 was adopted, the Tribunal handled a case about a Muslim woman who was pressured to quit her job because she had started to wear the hijab at work.¹³⁴ In this case, the Tribunal concluded that the women had been subject to both direct discrimination because of religion and indirect discrimination because of gender. The different designs of the Norwegian and Danish gender equality and anti-discrimination acts, is one factor that may explain the different rulings in headscarf cases. The Norwegian, unlike the Danish legislation, provides protection against discrimination on multiple grounds, such as a combination of gender, ethnicity and religion.

These differences show how the legal design in combination with different gender policies may influence what is seen as objective justification of indirect differential treatment. The rulings in the Norwegian headscarf cases by the Equality Ombud and Norwegian scholars in the field of equality and anti-discrimination law are seen as a way of providing protection against intersectional discrimination.¹³⁵ Furthermore, there are significant differences between Norwegian and Danish gender policies regarding the need to recognize cultural and religious diversity as a means of promoting substantive gender equality.¹³⁶ A characteristic feature of Danish policies, according to the political scientist Trude Langvassbråten, is the focus on what is believed to be conflict between minority cultural traditions and 'Danish' gender equality. Norwegian gender policies, is according to Langvassbråten, a more pragmatic and *ad hoc* based approach to promote equal participation in working life.¹³⁷ The latter is in line with the CEDAW Committee, that has been worried that prohibitions against headscarves in working life and schools may function as a barrier to substantive equality.¹³⁸

¹³⁴ Discrimination Tribunal LDN-2009-26.

¹³⁵ The political scientist and gender equality expert, Hege Skjeie, who was a member of the Discrimination Tribunal, has argued that the Tribunal's ruling in the headscarf cases constitute intersectional discrimination. See, Hege Skjeie 'Multiple equality claims in the practice of the Norwegian anti-discrimination agencies' in Dagmar Schiek and Victoria Chege (eds.), *European Union Non-Discrimination Law. Comparative Perspectives on Multidimensional Equality Law*, Routledge Cavendish, London, 2009, 295–309.

¹³⁶ See Trude Langvassbråten, 'A Scandinavian Model? Gender Equality Discourses on Multiculturalism' in *Social Politics*, Vol. 15, Issue 1, 32-52, 2008.

¹³⁷ The Gender Equality Commission, Norges offentlige utredninger (2011) *Struktur for likestilling*. NOU 2011:18, Oslo.

¹³⁸ Committee on the Elimination of Discrimination against Women, Concluding comments of the Committee on the Elimination of Discrimination against Women: France, (2008) UN Doc CEDAW/C/FRA/CO/6, para. 20; Committee on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of France, (2016) UN Doc CEDAW/C/FRA/CO/7-8.

4 Gender Equal Representation in Public Life and on Public Company Boards

Gender equal representation is key in the Nordic countries to ensuring democratic and legitimate decision-making.¹³⁹ The first Nordic gender equality and anti-discrimination acts allowed the use of positive differential treatment to promote gender equality. These general provisions paved the way for the introduction of mandatory gender quotas in public life and on public company boards in many Nordic countries. These areas, that are outside the scope of the Recast Gender Equality Directive, have not been subject to interventions from the CJEU.

4.1 *The Legacy of Nordic Legislation*

While gender equal participation is an overall political aim in all the Nordic countries, there are significant differences regarding the use of legislation to promote this goal. Unlike Norway, Finland, Iceland and Denmark, the Swedish Discrimination Act allows positive differential treatment in public life but does not make it mandatory. While gender equal participation on public company boards is mandatory in Norway, Finland and Iceland, it is highly controversial in Sweden and Denmark. Norway's pioneering role in promoting gender balance on company boards has been a central element in the debates on whether other European states or the European Union should adopt corporate quotas.¹⁴⁰ The EU-Commission has in a recent statement on gender equality in EU stated that it will continue its work to reach a compromise in the European Parliament on EU-Commission's 'Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures'.¹⁴¹

4.2 *Mandatory Gender Representation in Publicly-appointed Committees*

Equal gender representation has been a cornerstone in Norwegian gender equality and anti-discrimination law since the 1970's. The Gender Equality Act 1978, which allowed positive differential treatment, provided space for administrative regulations requiring gender equal participation in public decision-making.¹⁴² It was, in line with the state feminist politics of the time,

¹³⁹ See Elina Haavio-Mannila, Drude Dahlerup, Maud Eduards, Esther Gudmundsdóttir, Beatrice Halsaa, Helga Maria Hernes, Eva Hänninen-Salmelin, Bergthora Sigmundsdóttir, Sirkka Sinkkonen and Torild Skard (eds.) *Unfinished Democracy. Women in Nordic Politics*, 1986.

¹⁴⁰ Éléonore Lépinard E. and Ruth Rubo-Marin, 'Introduction: Completing the Unfinished Task? Gender Quotas and the Ongoing Struggle for Women's Empowerment in Europe' in Éléonore Lépinard and Ruth Rubio-Marin (eds.), *Transforming Gender Citizenship: The Irresistible Rise of Gender Quotas in Europe*. Cambridge University Press, 2018, 1–39.

¹⁴¹ *A Union of Equality: gender Equality Strategy 2020-2025. Report on Gender Equality in the EU*, EU-Commission, 2020.

¹⁴² The administrative rules that preceded the 1981 regulations are referred to in Proposition to the Odelsting No. 67 (1980–81) 5.

¹⁴² Proposition to the Odelsting No. 67 (1980–81) 5.

assumed that increased female participation in public life would contribute to increased gender equality in all areas.¹⁴³ To speed up the process of recruiting qualified women, the 1981 Gender Equality Act mandated that both genders be represented on public committees. The justification was twofold.¹⁴⁴ Firstly, gender equal participation was seen as matter of representative democracy. Secondly, it was seen as a way of ensuring that the experiences and views of women were taken into consideration in public decision-making.

Today, mandatory gender representation is embedded in Section 28 of the EAD Act. Like in earlier gender equality acts, gender balance is mandatory when a public body appoints or selects a committee, board, council, tribunal or delegation. To ensure gender balance, public authorities are obliged to select among male and female candidates that have the necessary qualifications. Section 28 of the act requires that if a committee has two or three members, both genders shall be represented. If the committee has four or five members each gender shall be represented by at least two members. The Act does not have similar regulations regarding other discrimination grounds such as ethnicity, disability, sexual orientation or gender identity.

Most Nordic countries make similar requirements. The Finnish Act of Equality requires that the proportion of both women and men in government committees, advisory boards and other corresponding bodies, municipal bodies and bodies established for the purpose of inter-municipal cooperation, must be at least 40 %.¹⁴⁵ The Icelandic GEA Act requires that appointments to national and local government committees not be lower than 40 % when there are more than three representatives in a body.¹⁴⁶ The Danish Act on Equal Treatment of Women and Men has a series of provisions that aims at gender equal representation in publicly-appointed committees.¹⁴⁷ Sweden's Discrimination Act allows the use of differential treatment to promote gender equality but does not have any specific provisions that make quotas for equal representation in public life mandatory. In Sweden, gender equal public representation is mainly promoted by political and not legal measures. This speaks to the history of the Swedish gender equality project which initially was built on wide-reaching political reforms rather than on legal rights.¹⁴⁸

4.3 Mandatory Gender Representation on Company Boards

In 2003, the Norwegian Storting, as the first in the world, adopted mandatory gender quotas for corporate boards, including public limited liability companies (PLCs), intermunicipal companies, and state-owned companies. These regulations were placed in the company legislation and not in the Gender

¹⁴³ The term 'state feminism' refers to cooperation between the women's movement and state authorities. The idea of the women-friendly Scandinavian welfare states was introduced by Norwegian political scientist Helga Hernes in the book *Welfare State and Woman Power: Essays in State Feminism*. Norwegian University Press, 1987.

¹⁴⁴ Proposition to the Odelsting No. 67 (1980–81) 1.

¹⁴⁵ Act on Equality between Women and Men, Section 4a.

¹⁴⁶ GEA Act, Section 28, para. 1.

¹⁴⁷ Act on Equality between Women and Men, Chapter 4.

¹⁴⁸ Eva-Maria Svensson and Åsa Gunnarsson, 'Gender Equality in the Swedish Welfare State' in *Feminists@law*, 2012, Vol 2, No. 1.

Equality Act.¹⁴⁹ The proposal, which came from the conservative-centre Government coalition, was inspired by earlier suggestions presented by the Gender Equality Ombud and the Gender Equality Centre.¹⁵⁰ The proposal was questioned by the EEA surveillance agency (ESA) who on its own initiative started an investigation into whether mandatory gender quotas on company boards constituted a violation of the strict rules regarding positive differential treatment in working life under EEA-law. ESA, however, concluded that the proposal did not constitute a violation since participation on corporate boards did not constitute a form of work.¹⁵¹ Breaches of the rules concerning the mandatory gender balance in public companies are sanctioned by forced liquidations if warnings, fines or other corrective measures fail. These sanctions, that follow the normal procedures for contraventions of company legislation, are much stronger than those concerning breaches of EAD's Act's provisions regarding the mandatory gender balance. While commending Norway for the high level of participation of women in many fields, the CEDAW Committee in its concluding comments to Norway's eighth periodic report was also concerned about the low number of women in many areas.¹⁵² It for example encouraged the State party to: 'Consider expanding the rules concerning gender balance on boards of public limited companies to other types of enterprises and other areas of the private sector.'¹⁵³

On Iceland, the Act on Equal Status and Equal Rights Irrespective of Gender requires an equal representation of women and men, and not lower than 40 % on the boards of publicly-owned limited companies and enterprises in which the state or a municipality is the majority owner.¹⁵⁴ The introduction of corporate gender quotas was prompted by the financial collapse.¹⁵⁵ Iceland's financial crisis, it was argued, was partly due to male dominance and nepotism in economic and political decision-making. The proponents of the act emphasized the need to include more women in economic decision-making in order to counteract future economic mismanagement. In this situation Icelandic lawmakers drew inspiration from the Norwegian experiences.¹⁵⁶

¹⁴⁹ Proposition to the Odelsting No. 97 (2002–2003); Public Limited Companies Act, Sections 6–11a; and the Municipalities Act Sections 5–9 and Section 21.

¹⁵⁰ The background, content and impact are described by Mari Teigen, 'The Making and Circulation of Nordic Quotas' in *The Making and Circulation of Nordic Models, Ideas and Images*, Haldor Byrkjeflot, Lars Mjøset, Mads Mordhorst, Klaus Petersen (eds.), London: Routledge, 2022.

¹⁵¹ See Norwegian Official Report NOU 2012:2, para. 17.5.4, 501.

¹⁵² The CEDAW Committee Concluding observations to Norway's 8th Periodic Report, CEDAW/C/NOR/Co/8 para. 17.

¹⁵³ *Ibid.*, para. 18b.

¹⁵⁴ GEA Act Section 28, para. 1.

¹⁵⁵ Auður Styrkársdóttir, Rósa G. Erlingsdóttir & Guðbjörg Linda Rafnsdóttir, 'Jámstalldhet och svågerpolitik på island: Ett historisk perspektiv på jämställdhetspolicyn på island' in Kirsti Niskanen and Anita Nyberg (eds.), *Kön ock makt i Norden. Del II Sammanfattande diskussion och analys*, TemaNord 2010, Copenhagen: Nordisk Ministerråd, 525.

¹⁵⁶ Hege Skjeie, Catrine Holst and Marie Teigen, 'Benevolent Contestations: Mainstreaming, Judicialization, and Europeanisation in Norwegian Gender + Equality Debate' in H. McRae and E. Weiner (eds.), *Towards Gendering Institutionalism*, Rowman & Littlefield International, 2017, 121–141.

The Finnish Act on Equality requires that the administrative board, board of directors or some other executive or administrative body consisting of elected representatives of a company where the Government or a municipality is the majority shareholder, must comprise an equitable proportion of both women and men, unless there are special reasons to the contrary.¹⁵⁷ Like in Norway and Iceland, mandatory gender balance has not been extended to the boards of private companies, due to opposition from the business.

Neither Denmark nor Sweden have followed suit. In Sweden, the use of gender quotas on corporate boards is a controversial issue. A proposal was put forward in 2006 but it proceeded no further.¹⁵⁸

5 Positive Differential Treatment as a Means to Promote Gender Equality in Working Life and Education

The use in the Nordic countries of mandatory gender quotas is slowly but surely making its mark on EU policies and laws that set out to democratize decision-making in public life and on company boards. In areas like working life and education, the development is going in the opposite direction. In these areas, Nordic legislation's wide use of positive differential treatment does not sit well with EU-law's strong protection against direct discrimination.

5.1 Nordic Social Justice and Individualist EU-law at Loggerheads

The legislation in the Nordic countries concerning positive differential treatment in working life and vocational education has, through a long and twisted path, adjusted to the demands of EU-law as embedded in Article 3 in the Recast Gender Equality Directive and the case law of the CJEU.¹⁵⁹ The legal contestations regarding this shift illustrates what the Finnish historian Anu Pylkkänen characterizes as a transition from a welfare state model that demands equality of *outcome* to a liberal model that is limited to equality of opportunity.¹⁶⁰

Positive differential treatment, in all the Nordic gender equality and anti-discrimination laws, is seen as an exception from the prohibition against direct discrimination. The criteria for permitting positive differential treatment in areas that are encompassed by the Recast Gender Equality Directive are, by and large, the same. *Firstly*, the differential treatment must have an objective justification, such as the aim of promoting gender equality. Under Norwegian and Icelandic law, such measures should be suited to improve the position of women. *Secondly*, positive differential treatment must be suited to promote the objectively justified aim. *Thirdly*, the negative impact of the differential treatment of the person or persons whose position will worsen must be proportionate in view of the intended purpose. In accordance with the CJEU case

¹⁵⁷ The Act on Equality between Women and Men, Section 4.

¹⁵⁸ Ds 2006:11.

¹⁵⁹ Case C-450/93 *Kalanke*, Case C-409/95 *Marschall*, Case, C-158/97 *Badeck*.

¹⁶⁰ Anu Pylkkänen, 'Transformation of the Nordic Model: From Welfare Politics to Gendered Rights', *Canadian Journal of Women and the Law*, 2007, Vol. 19, 335-354.

law, candidates from the underrepresented sex may be preferred if they are equally-qualified with the candidates from the overrepresented sex.¹⁶¹

5.2 Working Life

The conflicts between EU-law's strong protection against direct discrimination in working life and the Nordic countries strive for equality of outcome is illustrated by the case law from the CJEU court and EFTA Court.

In 1998 the CJEU examined the Swedish Government's measures that were introduced to increase the number of female professors.¹⁶² A special regulation, demanding that 30 professorships funded for certain universities during the budgetary year 1995/96 were filled in accordance with special provisions concerning positive discrimination, was passed.¹⁶³ According to this special regulation, candidates belonging to an under-represented sex who possessed sufficient academic qualifications, must be granted preference over a candidate of the opposite sex who would otherwise have been chosen where it proved necessary to do so in order for a candidate of the under-represented sex to be appointed. The CJEU, in its examination of the *Abrahamson* case, concluded that the University of Gothenburg's decision to appoint Fogelquist, a woman, who by the academic selection board was seen as less qualified than Abrahamsson, a man, was not in consonance with Council Directive (76/207/EEC) Article 2 (1) and (4). The CJEU stated that the directive:

[P]recludes national legislation under which a candidate for a public post who belongs to the under-represented sex and possesses sufficient qualifications for that post must be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed, where this is necessary to secure the appointment of a candidate of the under-represented sex and the difference between the respective merits of the candidates is not so great as to give rise to a breach of the requirement of objectivity in making appointments.¹⁶⁴

The 1978 Norwegian Gender Equality Act allowed a wide use of differential treatment to promote gender equality in work. In the preparatory works, it is stated that equal treatment of individuals and groups cannot always be reconciled and that it 'in certain situations from a holistic perspective will appear as more desirable to ensure social than individual gender equality.'¹⁶⁵ To promote gender equality, qualified persons from the underrepresented gender, could be preferred. In 1998, the University of Oslo, to improve the recruitment of women for high-level academic positions, earmarked a certain number of PhD scholarships, post doc scholarships and professorships for women. The scholarships were funded by the Labour Government as a means of promoting gender equality in the

¹⁶¹ Case C-409/95 *Marschall*, para 35.

¹⁶² Case C-407/98 *Abrahamsson*. The implications of the case for Swedish universities' ability to promote substantive gender equality is discussed in Ann Numhauser-Henning 2006. It is also discussed in *Genusrättsvetenskap* (Gender legal studies), Åsa Gunnarsson and Eva-Maria Svensson, Lund: 2009, 198.

¹⁶³ Regulation 1995:936,

¹⁶⁴ CaseC-407/98 *Abrahamsson*, para 56.

¹⁶⁵ Proposition to the Odelsting No. 1 (1977-78) 12 (this author's translation).

university sector. Two years later, the EFTA Surveillance Authority (ESA) received a complaint from a male post-doc fellow alleging that the use of earmarking was incompatible with Articles 2 and 3 of the gender equality directive.¹⁶⁶ The Norwegian Government maintained that earmarking of positions and scholarships was in line with the gender equality directive that should be interpreted in the light of the CEDAW. This led the EFTA Surveillance Authority to file a case against Norway.¹⁶⁷ The EFTA Court found that earmarking, as applied by the University of Oslo, gave ‘absolute and unconditional priority to female candidates’. It found that there was ‘no provision for flexibility’ and that ‘the outcome is determined automatically in favor of the female candidate’.¹⁶⁸ Against this background, the Court concluded that Norway was in breach of its obligations under the EEA agreement and articles 2 and 3 of the gender equality directive. Since the case was decided before the revision of the Amsterdam Treaty, the Court did not discuss the relationship between the gender equality directive and CEDAW, which recommended the use of radical quotas to speed up the number of female university professors.¹⁶⁹

Nordic law-makers and courts see these cases as binding. The Norwegian Supreme Court has for example stated that differential treatment in working life under the 1978 Gender Equality Act must be interpreted in line with case law from the CJEU. According to the Norwegian Supreme Court it is required that ‘the candidates possess equivalent or substantially equivalent merits, where the candidatures are subjected to an objective assessment which takes account of the specific personal situations of all the candidates.’¹⁷⁰

5.3 *Still Unsettled: Positive Differential Treatment in Higher Education*

The labour markets in the Nordic countries are, in spite of the significant increase in the number of women who take higher education, highly gender-segregated. This situation has set the scene for new contestations regarding the Nordic countries’ concern for social gender justice and EU-law’s individualistic approach to gender equality. The situation in Norway epitomizes the unsettled relationship between the two.

Whether EU law’s strict proportionality test regarding the use of positive differential treatment applies in higher education is not crystal clear.¹⁷¹ Article 1 in the Recast Gender Equality Directive states that the ‘purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.’ According to Article 1, provisions to implement the principle of equal treatment must be taken in relation to ‘(a) access to employment, including promotion, and

¹⁶⁶ Council Directive 76/207/EEC Articles 2 (1), 2(4) and 3 (1).

¹⁶⁷ Case E.1/02.

¹⁶⁸ *Ibid.*, para 54.

¹⁶⁹ Anne Hellum and Ruth Nielsen, ‘Menneskerettighetene og EØS-retten på kollisjonskurs?’ in *Kritisk Juss* vol. 29, nr. 1–3 (2002), 113–132.

¹⁷⁰ The Supreme Court of Norway, Rt. 2014, 402 *Kontreadmiral*, para 61.

¹⁷¹ The lack of clarity regarding the scope of Recast Gender Equality Directive is thoroughly discussed in Anne Hellum and Vibeke Blaker Strand (2022) Chapters 4 and 12.

to vocational training; (b) working conditions, including pay'. The wording of Article 3 in the Race Directive, which is much broader, states that: 'All types of education are covered, from pre-school to higher education, technical and vocational.'¹⁷² These differences give rise to uncertainty whether the term 'vocational training' in the Recast Gender Equality Directive encompasses higher education or is limited to higher education which is related to a work contract. So far, there is no case law from CJEU that directly considers what the consequences these differences have regarding the use of gender quotas to promote gender balance in higher education. The CJEU has, however, in two cases concerning free movement of workers under Council Regulation 1612/68 EEC concluded that 'vocational training' included higher education.¹⁷³

In Sweden, gender quotas and ethnic quotas were at times used to promote both gender balance and ethnic balance in higher education.¹⁷⁴ Until 2010, the use of such measures was allowed in situations where special interests were clearly more important than the interest in preventing discrimination in higher education.¹⁷⁵ The use of such measures was, however, contested in two court cases, one concerning gender balance and one concerning ethnic balance. Both court cases concluded that differential treatment that negatively affected the best qualified students from the overrepresented gender or from the overrepresented ethnic group, constituted breach of the Swedish legislation.¹⁷⁶ The preparatory works to this legislation indicates that the different scopes of the Race Directive and the Recast Gender Equality Directive was discussed by Swedish lawmakers who decided that the rules concerning positive differential treatment in working life and higher education should be the same regardless of discrimination grounds.¹⁷⁷

In Norway, the Gender Equality Commission recommend the introduction of gender quotas, as a means of promoting gender balance in higher education.¹⁷⁸ Administrative rules that allow institutions of higher education to give one or two study points to the underrepresented gender in studies where more than 80 % of the students are men or women, have recently been put in place.¹⁷⁹ Pertaining to the removal of restrictions regarding positive differential treatment of men in the Equality and Anti-discrimination Act, these regulations apply to both women and men. In psychology, male quotas were set out to improve the gender balance.¹⁸⁰ The majority of the 126 university programs using gender quotas, are

¹⁷² Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

¹⁷³ Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. See also C-293/83 *Gravier*, and C-24/86 *Blazit*.

¹⁷⁴ Lagen om likabehandling av studenter i högskolan (SFS 2001:1286).

¹⁷⁵ Higher Education Ordinance SFS 1993:100 Chapter 7 Section 12.

¹⁷⁶ Högsta Domstolen NJA 2006:84; Svea Hovrätt 2009-12-29/3552-09.

¹⁷⁷ Prop. 2001/2002:27 s. 21. For a discussion see Anne Hellum and Vibeke Blaker Strand (2022) Chapter 4.

¹⁷⁸ The Gender Equality Commission, *Struktur for likestilling*. NOU 2011: 18.

¹⁷⁹ Forskrift 6. januar 2017 nr. 13 om opptak til høgare utdanning, endret ved forskrift 30. januar 2018 nr. 137 om endring i forskrift om opptak til høgare utdanning.

¹⁸⁰ Prop. 81 L (2016-2017) para. 17.9.4, 175. The preparatory works to earlier gender equality acts emphasize that positive differential treatment is measure that mainly should be used to

studies where women are underrepresented. The preparatory works to the Equality and Anti-Discrimination Act assumes that the use of differential treatment to promote gender equality in higher education is in consonance with EU-law.¹⁸¹ The Commission appointed to revise the Higher Education Act is, however, of a different view. The Commission assumes that higher education is included in the Recast Gender Directive.¹⁸² It concludes that regulations concerning the use of gender points is in conflict with the Recast Gender Equality Directive because a person from the underrepresented sex is automatically preferred on the basis of gender.¹⁸³ The conservative Solberg Government, who disagreed with Higher Education Commission, has without any further consideration of the demands of EU-law or consultations with ESA, decided to uphold the regulations.¹⁸⁴

6 Proactive Duties at the Crossroads

Most of the Nordic gender equality and anti-discrimination acts are based on an understanding of gender equality as a social responsibility. In line with this view, they impose positive duties to prevent gender discrimination and promote gender equality. Unlike EU-law's call for 'gender mainstreaming' the CEDAW requires proactive measures that are monitored and sanctioned.

All the Nordic gender equality and anti-discrimination acts, with the exception of the Danish, impose duties to prevent discrimination and promote equality on public authorities, educational institutions and public and private employers.¹⁸⁵ There are, as a comparison between the Swedish and Norwegian legislation shows, differences that may be ascribed to the way in which the CEDAW was invoked in Norwegian reform processes.

According to the Swedish Discrimination Act, active measures are 'prevention and promotion measures aimed at preventing discrimination and

improve the position of women. Proposition to the Odelsting No. 33 (1974-75, 32-34 and Proposition to the Odelsting No. 29 (1994-95) 4.

¹⁸¹ Prop. 81 L (2016–2017) para. 17.9.3.2, 175.

¹⁸² The Commission refers to Stine Jørgensen, 'Køn og uddannelse' in Eva-Maria Svensson et al. (eds.), *På vei Kjønn og rett i Norden*, Makadam, 2011, 215-230. In *the Commentary to the Equality and Anti-Discrimination Act*, Norwegian University Press, 2021, 269, Anne Jorunn, Bolken Ballangrud and Margrethe Søbstad express doubts whether these CJEU judgments imply that the Recast Gender Equality Directive applies to higher education.

¹⁸³ NOU 2020:3 para. 17.5.4.3.

¹⁸⁴ See the Norwegian Government's website for an analysis of the gender points system, <https://www.regjeringen.no/no/dokumentarkiv/regjeringen-solberg/aktuelt-regjeringen-solberg/kd/pressemeldinger/2020/kunnskapsdepartementet-vil-analysere-bruken-og-effekten-av-kjonnspoeng> and Legislative Bill 111 L (2020–2021) *Endringer i universitets- og høyskoleloven, utdanningsstøtteleven, fagskoleloven og yrkeskvalifikasjonsloven mv. (samleproposisjon) 18*.

¹⁸⁵ The Danish Act on Equality between Women and Men does not impose positive duties to prevent discrimination and promote equality on employers and educational institutions. Public authorities, in accordance with Section 4, have a duty to mainstream gender equality within their area of public planning and administration. See Agnete Andersen 'Gender Mainstreaming from a Danish and International Perspective' in Ruth Nielsen & Christina D. Tvarnø (eds.) *Scandinavian Women's Law in the 21st Century*, 2012 DJØF.

serving in other ways to promote equal rights and equal opportunities.’¹⁸⁶ The Act sets out a detailed framework concerning, the methods, scope and process that applies to all employers and education providers.¹⁸⁷

The Norwegian EAD Act establishes a general obligation to make active, targeted and systematic efforts to promote equality and prevent discrimination, harassment, sexual harassment and gender-based violence. This general obligation is imposed on employers and employee organizations and public and private employers.¹⁸⁸ In 2017 it was, as suggested by the Gender Equality Commission, extended to public authorities.¹⁸⁹ In Norway, private and public employers with more than 50 employees are obliged to follow a statutory methodology involving risk analysis, implementation of measures and evaluation of results.¹⁹⁰ Employers who hire more than 20 employees are also obliged to follow this methodology if requested to do so by one of the social partners.

The effectiveness of these measures depends on whether and to what extent they are combined with documentation and reporting duties that are monitored, controlled and sanctioned. Reporting and documentation duties are key to ensuring transparency and accountability concerning what employers have done to handle the challenges they are faced with. They lay an empirical foundation for the assessment of whether and to what extent the measures that have been taken to promote gender equality are successful. The imposition of reporting and documentation duties have been challenged by the growing demand for reforms that reduce bureaucratic control.

Swedish employers, who employ 25 or more workers, must document the fulfilment of the duties to promote and prevent in writing at the end of every year.¹⁹¹ On paper the Ombudsman, who supervises the fulfilment of these duties, may instigate and order to fulfil if these obligation are not fulfilled.¹⁹² In practice the Ombudsman’s role has, however been limited to a communication and information-oriented approach.¹⁹³

In Norway, the conservative Solberg Government, in line with its anti-regulatory agenda, proposed to abolish the reporting duty that was monitored by the Ombud and the Discrimination Tribunal.¹⁹⁴ This proposal, which was met with resistance from civil society, women’s organization and the unions, did not have a majority in the Storting, but was passed by an error. The Storting subsequently requested the Government to reinstate the reporting duty.¹⁹⁵ This controversy was given attention by the CEDAW Committee who in its

¹⁸⁶ DA Chapter 3 Section 1.

¹⁸⁷ DA Chapter 3 Sections 2-12 and Sections 15-19.

¹⁸⁸ EAD Act, Sections 25 and 26.

¹⁸⁹ EAD Act, Section 24.

¹⁹⁰ EAD Act Section 26 para. 2.

¹⁹¹ Da Chapter 3, Sections 13,14 and 20.

¹⁹² DA Chapter 4, Section 5.

¹⁹³ Lena Svenaeus, *Tio år med Diskrimineringsombudsmannen En rapport om nedmontering av diskrimineringsskyddet*. Arena idé 2020.

¹⁹⁴ Anne Hellum and Vibeke Blaker Strand (2017).

¹⁹⁵ Anmodningsvedtak nr. 119 (2016–2017).

Concluding Observations to Norway's ninth periodic report the Committee called upon Norway to:

[T]ake the necessary measures to ensure that the new Equality and Anti-Discrimination Law does not erode structural activities for the promotion of gender equality, including by closely monitoring its implementation and by reinstating the reporting obligations for private and public employers in relation to gender as a ground of discrimination, as requested by Parliament.¹⁹⁶

The outcome of the struggle was that the reporting duty along with the Ombud's monitoring role, which involves the power to take cases concerning breach of the reporting duty to the Discrimination Tribunal, was legislated. This sets the scene for a transparent and open process based on dialogue between the workers, the employers and the Ombud. The Ombud has so far followed up the employers' duty to report through an extensive lecture program.¹⁹⁷ How the Ombud will use its power to exercise control and bring cases concerning breach to the Tribunal remains to be seen.

7 What is Nordic About the Nordic Gender Equality Laws Today?

As shown by this comparative overview, Nordic gender equality and anti-discrimination laws have been changing from the 1970's to the present day. Today, these laws constitute different national amalgamations of statutory laws and policies, EU-law and international human rights law. Their legal designs differ. Unlike Denmark, Iceland and Finland, Sweden and Norway have replaced their gender-specific equality acts with single acts that prohibit discrimination on a wide range of grounds. The Danish, Finnish and Swedish laws are gender-neutralized while the Icelandic and Norwegian laws combine a gender-neutralized and woman-specific approach. So, what is Nordic about these laws today? To answer this question I have adopted a processual and longitudinal perspective that focuses on contestations regarding the relationship between national and international laws and policies.

The changing constructions of the subject of the Nordic, European and international gender equality and anti-discrimination laws, directives and conventions demonstrates the contentious relationship between gender and nationalism. Human rights law and EU-law have been in the forefront of extending protection that initially was limited to heterosexual women and men to a plurality of sexualities and genders. This has prompted changes in both the gender-specific and the single Nordic equality acts that today include protection against sex, gender, sexual orientation, gender identity and gender expression. There are, however unresolved issues, such as protection against discrimination on the basis of gender in combination with other grounds, such as ethnicity, age and disability. While the CEDAW Committee has called for legal protection against intersectional discrimination in all the Nordic countries, the only Nordic country that is in compliance is Norway. This development, as suggested by the Swedish scholar Diana Mulinari calls for closer attention to the contentious

¹⁹⁶ CEDAW Committee Concluding observations ninth periodic report Norway (2017) CEDAW/C/NOR/CO/9, paras. 12 and 13 c.

¹⁹⁷ LDO 2020 report.

relationship between gender and nationalism, both in the Nordic countries and in the wider Europe.

Gender equality and anti-discrimination laws are, as this overview has shown, sites of national resistance to the internationalization of law. An example of this is the Nordic countries' resistance to the CEDAW Committee's call for incorporation of the CEDAW in national laws and constitutions so that it takes precedence when coming into conflict with other national laws. In Norway, the CEDAW was incorporated in the Human Rights Act after a decade of struggle. The state resistance was based on the view that direct application of CEDAW in Norwegian law constituted a threat to national democracy. Yet, the quest for gender equality was so strong that the Government gave in. Today, the Finnish, Norwegian and Icelandic constitutions' equality principles are subject to judicial review. The sex equality principle under the Swedish Constitution, however, does not have the character of a binding rule subject to judicial review.

The role of EU-law is, in spite of its binding character contested. On the one hand, EU-law's strong protection against individual discrimination in working life has been a welcome intervention in the Nordic countries where equality and anti-discrimination law are resisted by employers and trade unions who want to maintain their power to regulate working conditions. EU-law's strong protection against pregnancy and parental leave-related discrimination sits well with the workfare-related Nordic gender equality policies setting out to change the distribution of caring work and paid work between women and men. In Norway, where equality and anti-discrimination law constitutes the backbone of gender equality policy, the pregnancy and parental leave-related protection is elaborated in the text of the act. In Sweden, where policy and not law constitutes the main vehicle for gender equality, there are no specific provisions in the equality act addressing pregnancy and parental leave-related discrimination.

On the other hand, EU-law's individualistic equal opportunity approach does not sit well with the Nordic countries' endeavours towards collective changes and equality of outcome. The continuous legal battles concerning the use of positive differential treatment in working life and higher education speaks to this tension. Norway's introduction of gender study points, to promote gender balance in higher education, demonstrates the continued resistance. In other social areas, such as participation in public life and public companies, Nordic countries like Norway, Finland and Iceland are making a mark on EU-gender laws and policies. There are, however differences between the Nordic countries. Sweden, who sees gender policy and not law as the main tool for gender equality is promoting gender equal participation through other means.

In line with striving to change the social and economic structures that cause or uphold gender inequalities, most of the Nordic laws impose positive duties to promote gender equality and prevent gender discrimination on employers and educational institutions. This aspect of the Nordic legislation parallels international human rights law that obliges the states to respect, protect and fulfil the right to equality and non-discrimination. The reporting and documentation duties going hand in hand with the proactive duties, are, however, faced with increasing resistance from anti-regulatory liberal political and economic forces. In Norway, the conservative Solberg Government's attempt to abolish the reporting duty was unsuccessful. In Sweden, the Ombudsman's control with the documentation duty only exists on paper.

The demands of international law have, in the context of the Nordic civil law system, by and large taken the legislative route. Reforms have partly been

prompted by revisions of the Gender Equality Directive and partly in response to direct intervention by the CJEU. EU-law has had a particularly strong impact on Danish equality and anti-discrimination law while Sweden has maintained an approach where policy and not legislation constitutes the main vehicle for gender equality. The CEDAW has had a stronger impact on Norwegian law-making than the other Nordic countries.

The national courts have often been slow and reluctant to respond to the challenges posed by growing body of national and international legal sources. A common characteristic of the Nordic civil law tradition is the widespread use of preparatory works as a source of law. The emphasis on the will of the lawmaker is closely connected to a notion of democracy that sees the role of judicial review as limited. The Nordic courts, although they have the power to intervene in cases where the gender equality comes into conflict with other national laws, are reluctant to reinterpret the legislation in the light of the CEDAW or EU-law. In addition, the special enforcement systems that have been put in place to enhance access to justice in the field of equality and anti-discrimination law, have limited power with regard to handling such cases. Under these circumstances, access to international legal arenas where national authorities can be held accountable to its citizens, makes a welcome contribution to proponents of gender equality. The increasing production of shadow reports to the CEDAW Committee produced by the Nordic Equality Ombuds and the national branches of the Nordic Women's Lobby, speaks to this trend which also illustrates the blurred boundaries between national and international law-making.