Equality and Protection for Gender Identity and Characteristics

Jameson Garland*

1 Nordic Frameworks for Protection from Gender & Identity Discrimination 191

1.1 Nordic National Law 191

1.2 Assessing National Protections Through the Lens of Human Rights Instruments 195

1.2.1 The UN Framework on Gender Discrimination 197

1.2.2 The Council of Europe's Framework on Gender Discrimination 200

2 Assessing the Equality of States' Interest in Governing Gender Identity 204

2.1 Rights to Gender Identity and Expression without Discrimination 204

2.2 Revealing Gender: Registration of "Sex" and Its Discriminatory Power 207

3 Registering Gender Identity – An Obsolete Argument 211

* Jameson Garland is a researcher at the Department of Law at Uppsala University, email: Jameson.Garland@jur.uu.se.

More than a decade ago, the Swedish government noted a significant decrease in the number of sex classifications in Swedish law, almost as if it were an unexpected phenomenon. Despite the passage of its Discrimination Act, more than sixty "sex-based" classifications had remained entrenched in Swedish legislation.[1] Once the government removed gender requirements for marriage – opening marriage to all couples without regard to sexual orientation or gender identity – the majority of these sex-based classifications disappeared.[2] That outcome should have come as no surprise. The UN's Human Rights Committee,[3] the Court of Justice for the European Union,[4] and the Inter-American Court of Human Rights,[5] as well as the US Supreme Court,[6] have all ruled that discrimination on the basis of sex encompasses discrimination based on sexual orientation or gender identity. The reasoning behind these conclusions is straightforward. Discrimination against individuals for being "gay", "lesbian", or "transgender" arises from presumptions that their identity or sexuality is inappropriate for their "sex". This is true when a female employee is harassed at work for placing a picture of her wife on her desk while her male colleagues suffer no harassment for the same act. The same logic applies where a man registered as female at birth is fired after affirming his identity as male. The root of the maltreatment in both cases is the presumption that males and females should fulfil specific roles in accordance with their sex assigned at birth. As the US Supreme Court eloquently put it, in cases such as these, it is impossible to deny that if a person is treated adversely for "traits or actions that the employer would not have questioned in members of a different sex, then sex plays a necessary and undisguisable role in the decision" to discriminate – such that the harms imposed on the victims were ultimately "*because of*" their sex.[7]

The Nordic countries are often considered to be among the most progressive in the world on matters of gender equality, but their actual commitment to eradicating gender-based discrimination is far more varied than outsiders might think. All of the Nordic countries, for example, have finally embraced the concept of gender-neutral marriage after years of attempting to create separate equivalents for "same-sex" relationships, but none of these countries were the first to make their marriage laws open to couples regardless of the spouses' gender. Norway was the sixth in the world to do so – the first of the Nordics – when it made marriage gender-neutral in 2009, followed by Sweden (seventh, 2009), then Iceland (tenth, 2010), Denmark (twelfth, 2012), and Finland

---

1 Legislative Inquiry SOU (2006:22), *En sammanhållen diskrimineringslagstiftning*, 283-4.

2 Legislative Bill Proposition 2008/09:80, *Äktenskapsfrågor*, 11-12 and 17-18.

3 See *Toonen v. Australia*, Communication No 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994); *G v. Australia*, Communication No 2172/2012 (CCPR/C/119/D/2172/2012) (UN HRC, 15 June 2017).

4 The landmark case is C-13/94 *P v S and Cornwall County Council* ECR I-2143 (1996).

5 Inter-American Court of Human Rights, Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples (Advisory Opinion OC-24/17 Requested by the Republic of Costa Rica), 24 November 2017.

6 *Bostock v. Clayton County, Georgia*, 590 U.S. _ , 140 S.Ct. 1731, 1737-42 (2020).

7 Ibid.

(twentieth, 2017).[8] Nordic laws on changes of registered gender have also evolved on very different timetables. In 2014, Denmark became the second country in the world to base such changes primarily on self-determination, followed shortly thereafter by Norway (2016) and Iceland (2018).[9] Sweden and Finland, however, have not yet removed their statutory conditions for transgender persons to secure legal "approval" of their identities.[10] As this chapter explains in detail, a comprehensive review of the Nordic countries' frameworks in relation to gender identity uncovers strong resistance to calls by human rights authorities to combat gender-stereotyping and to formally recognize diverse genders as equally valid identities. All of the Nordic countries, in fact, remain deeply engaged in affirming the State's role in determining individuals' juridical gender identity, limiting their options to two specific sexes. Only Iceland has offered an alternative – a "neutral" gender, one that is potentially null for many as an identity.

A closer look at the Nordic legal frameworks consequently is needed before concluding that their stances on opposing discrimination are as supportive of gender diversity as they could be. Denmark, as of the summer of 2021, has refrained from expressly prohibiting discrimination and violence on the basis of gender identity or sex characteristics, despite its European leadership on gender recognition.[11] The gender equality laws of Finland, Iceland, and Norway have all made discrimination on the basis of gender expression and physical sex characteristics unlawful, but Finland and Norway still promote heteronormative, binary sex categories of juridical parenthood, as does Denmark, and Finland has yet to remove gender-conforming medical procedures and sterilization as preconditions to gender recognition.[12] Sweden formally makes sex, gender identity, and sexual orientation grounds for protection from discrimination in numerous sectors in society,[13] but excludes regulation of gender-stereotyping while attempting to protect gender identity with a repeated, awkward focus on "transvestites".[14] Iceland has taken significant steps to curtail non-consensual gender-modification surgeries on many children who are born with variations of sex characteristics, but has excluded many children coded genetically as males from those protections.[15] None of the Nordic countries, in fact, have put an effective halt to all forced non-consensual genital surgeries that aim, in part, to make gender-variant children appear to be "normal" boys or girls.

---

8 Human Rights Campaign, Marriage Quality Around the World (2021), available at https://bit.ly/3gscOgD (last visited 23 August 2021).

9 See Section 2.2 below.

10 Ibid.

11 Bekendtgørelse af lov om ligestilling af kvinder og mænd, LBK nr 751 af 26/04/2021; Bekendtgørelse af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v., LBK nr 1001 af 24/08/2017.

12 See Sections 2 and 3 below.

13 *Diskrimineringslag* (2008:567), Ch. 1, § 5.

14 Legislative Bill Proposition 2007/08:95, *Ett starkare skydd mot diskriminering*, 109-10, 114-17, 161, 258 and 496.

15 Lög um kynrænt sjálfræði, 2019 nr. 80 1. juli, III. kafli, 11 gr. 1a.

The normative inconsistency reflected in the Nordic reform movements supports the hypothesis that any government may struggle to root out gender discrimination while at the same time trying to perpetuate binary genders as compulsory legal identities. Few would deny that "sex" as a juridical device was used historically to vest power in men, deny women rights to vote and work, and legally enforce men's sexual power over women. It was also used to exclude "hermaphrodites" and other "sexually ambiguous" individuals from the class of men or women, depriving them of numerous rights and pathologizing "gender deviants". Thus, it is worth investigating questions of whether state promotion of "sex" as a legal identity impedes protection against gender identity discrimination, as it reinforces the notion that the world is populated only by "men" distinct from "women" – the only identities that the law officially endorses. Indeed, all of the Nordic laws in some way differentiate "gender", "gender identity", and "sexual orientation" discrimination as something fundamentally different from "sex" discrimination, protecting the latter more rigorously. As many scholars have warned, this stance *disaggregates* sex and gender in ways that have historically been used to marginalize protections of minority groups.[16] That disaggregation also raises important questions about governments' justifications for registering only two sexes while imposing them as juridical identities on persons who may identify otherwise. As Nordic authorities have warned, compulsory registration of binary sex also promotes unequal data collection and impairs governments' abilities to document inequalities imposed on persons with diverse genders.[17]

This chapter, therefore, surveys several legal developments in the Nordic countries to document their advances in prohibiting discrimination on the basis of gender identity as well as their tolerance and promotion of such discrimination. The chapter begins with an examination of the Nordic States' frameworks for the protection of gender identities according to national and international law. The aim in doing so is not to examine how effective these frameworks are in practice but to assess what these laws do *not* address – that is, what protection is lacking no matter how rigorously they enforce their current laws. The chapter then turns to the question of the law's role in "gender assignment", as it is often called, and why the governmental investment in juridical classification is more problematic than governments around the world concede. It explains why "juridical sex" is the hypocenter of harmful practices that implicitly attribute fault to individuals for rejecting their gender assigned at birth or not acting in accordance with the gender roles expected of them. It frames this analysis in human rights doctrine that is often ignored in the anti-discrimination discourse, building significantly on the right to privacy and freedom of expression. It concludes that human rights authorities' calls for greater protection of these rights not only increases the potential risk of liability

---

[16] See e.g., Katherine Franke, 'The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender' (1995) 144 University of Pennsylvania Law Review 1-99; Mary Ann Case, 'Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence' (1995) 105 Yale Law Journal 1-109; and Andrew Koppelman 2-105, 'Why Discrimination against Lesbians and Gay Men Is Sex Discrimination' (1994) 69 NYUL Rev. 197-287.

[17] See Section 1.2.

for the Nordic countries but points the way out of the maze of barriers that many nations erect to ensure that gender identity remains binary in their jurisdictions.

1 Nordic Frameworks for Protection from Gender & Identity Discrimination

The five Nordic nations have unquestionably made efforts to improve their approaches to gender identity discrimination over the last two decades. From a national law framework perspective, Finland, Iceland, and Norway align in ways that few others do. All three nations have constitutions that broadly prohibit discrimination in ways that appear to protect everyone.[18] They complement this approach with concrete protections in statutory law that come with uncommon specificity for grounds to prohibit gender identity discrimination. And yet, while the anti-discrimination frameworks of Sweden and Denmark fall short by comparison, all five Nordic nations, in fact, have yet to ensure full equality on the basis of gender identity in accordance with international human rights law.

1.1 Nordic National Law

Within the Nordic region, Finland's Law on Equality Between Men and Women was the first national law to protect gender identity and expression in-depth.[19] The law defines "gender identity" as individuals' "own experience of their gender" and their expression of gender "through clothing, behavior, or by other means". Finland was also the first of the Nordic countries to prohibit "discrimination based on the fact that an individual's physical gender-defining characteristics are not unambiguously female or male".[20] A similar approach is now found in Norway's Act Relating to Equality, with its broad prohibition against discrimination in multiple sectors of society, including protections from discrimination on the basis of gender, sexual orientation, gender identity, gender expression, or other significant characteristics of a person.[21] Finally, Iceland's framework for gender identity protection manifests in two laws. The first is the Act on Equal Status and Rights Irrespective of Gender, defining "gender" as protecting persons who are classified as "women, men, and persons registered as neutral".[22] It pledges, moreover, to change traditional gender images, work against negative stereotypes regarding the roles of women and men, promote gender-neutral classification of jobs, and improve the status of people whose gender is registered as neutral.[23] The second of these laws is the Act on Gender Autonomy, which establishes rights to define one's own gender, to have one's

---

[18] For Finland, see Suomen perustuslaki luku 6, para 2; for Iceland, see Stjórnarskrá lýðveldisins Íslands VII.6 gr.65; and for Norway, see Grunnloven (Grl) § 98.

[19] Laki naisten ja miesten välisestä tasa-arvosta, 609/1986, 3 §, 5-7 st.

[20] Ibid.

[21] Lov om likestilling og forbud mot diskriminering, LOV-2017-06-16-51, Ch. 1, § 1.

[22] Lög um jafna stöðu og jafnan rétt kynjanna, 2020 nr. 150 29. desember, I et seq.

[23] Ibid., at I kafli-III kafli.

gender identity, rights to gender expression recognized by law, to develop one's personality in keeping with one's gender identity, and to physical integrity and autonomy concerning changes to sex characteristics for most children.[24]

Of the remaining two Nordic Countries, Sweden's regulatory approach to gender discrimination reflects an attempt to be expansive and inclusive but falls short on gender diversity. As a constitutional matter, the Instrument of Government prohibits discrimination against a person on the basis of sex, but the legislative preparatory works regarding that protection refer to formal equality between "men" as one class and "women" as another, without reference to gender-stereotyping or other aspects of gender that might be used to disadvantage both men and women.[25] A constitutional prohibition on sexual orientation discrimination was added in 2010, though the government summarily declined to add gender identity protections without further explanation.[26] The Discrimination Act classifies sex discrimination as discrimination on the basis of sex – defined as "that one is a woman or a man" – declaring that this was sufficiently clear to express what sex discrimination is.[27] To comply with European Union (EU) laws,[28] as well the European Convention on Human Rights (ECHR),[29] the statute also clarifies that a person who has changed or is in the process of changing registered gender is protected in the "sex" of identity.[30] For gender identity discrimination, the Swedish statute's view is that it relates to "one who identifies as neither male nor female or who through dress or other expression identify with another sex".[31] The legislative preparatory works explain the motive for this construction as to protect "transvestites and others who express themselves in ways different from what is stereotypical, broadly expected conceptions of men and women".[32] The legislative preparatory works at different turns suggest that transgender persons are intended to be covered by the Act, despite not recognizing that such persons are affirming their gender and do not see themselves living as "the other" sex.[33] The government rejected a proposal to proscribe adverse actions based on stereotyping or "identity, appearance, and behavior associated with sex" that "differs from the norm for men and women" on the grounds that this might apply to everyone.[34] Thus, the law protects those with "transcendent" social sex, as reflected by

---

24 Lög um kynrænt sjálfræði, supra n.15, I kafli 2 gr. & II kafli 3 gr.

25 Legislative Bill Proposition 1975/76:209 *om ändring i regeringsformen*, 101-2.

26 Legislative Bill Proposition 2009/10:80, *En reformerad grundlag*, 153 & 156.

27 Legislative Bill Proposition 2007/08:95, supra n 14, at 113.

28 Ibid., at 112 (relying the Court of Justice of the European Union's doctrine following *P & S v. Cornwall*, supra n 4).

29 *En sammanhållen diskrimineringslagstiftning*, Legislative Inquiry SOU 2006:22, 263-65 and Legislative Bill Proposition 2007/08:95, supra n 14 at 113.

30 Diskrimineringslag (2008:567), Ch. 1, § 5, p.1 and st. 2.

31 Ibid., at Ch. 1, § 5., p. 2.

32 Legislative Bill Proposition 2007/08:95, supra n 14 at 109.

33 Ibid., at 117.

34 Ibid., at 116.

clothing, body language, makeup, and hairstyle, particularly "transvestites" and those who actually identify as transgender or intersex.[35]

Finally, in Denmark, the legal framework, until recently, has expressly prohibited gender discrimination primarily in relation to work, as required under EU law.[36] The law is not formally extended to the protection of gender identity, though it has been judicially interpreted otherwise, and Denmark formally takes the position that gender in national law includes "transgender, intersex and non-binary persons", such that "complaints of discrimination on the grounds of gender identity are heard ... on equal terms as other genders".[37] In August 2020, the government released a comprehensive report proposing multiple corrections to the lack of legal protection of transgender persons in Denmark. These measures aim to proscribe harassment and violence and strengthen protection against discrimination, hate crimes, and hate speech due to sexual orientation, gender identity, gender expression, and gender characteristics in key sectors affecting daily life.[38] They also include rights to remedies and agency support in protection from hate crimes, hate speech, and other forms of harassment.[39] The proposal for these changes is expected to be taken up by the Danish Parliament in 2021. On the question of gender registration, reforms previously supported by the government are also expected to be taken up following public initiatives for a hearing. This includes a proposed abolition of the waiting period for changing the legal gender for persons over 18 years, making it easier to change the first name so that it matches one's gender identity, allowing transgender people to become parents according to their legal gender, and flexibility of registration of co-maternity without the approval of healthcare professionals.[40] Finally, the proposal aims to allow transgender children and young people to have the opportunity to change their legal gender and to obtain an X on their passports, one of the few initiatives to specifically focus on intersex persons.[41]

There is little doubt that the Nordic countries, in comparison to much of the world, have made reforms to combat discrimination through law that many victims of discrimination may envy, but the gaps in their legal frameworks are noteworthy. In 2020, the Nordic Council of Ministers noted multiple significant deficits in the Nordic capacity or willingness to protect transgender, intersex, and other gender-variant people. The first of these concerns may be the most

---

35 Ibid., at 496.

36 *See* Lov om ligestilling af kvinder og mænd, LBK nr 751 af 26/04/2021 (2021), n1, and Bekendtgørelse af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v., LBK nr 1001 af 24/08/2017, kap. 1, § 1 stk. 7.

37 *See* European Commission, *Gender Equality: How Are EU Rules Transposed into National Law? Country Report: Denmark* (2021), 11 (citing one court decision affirming this position, Dom afsagt den 9. juni 2015 af Retten i Aarhus, 72. afdeling i sag nr. BS 72-45/2014).

38 Miljø- og Fødevareministeriet, Udkast til Forslag til Lov om ændring af lov om ligestilling af kvinder og mænd, lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v., straffeloven og forskellige andre love, 1-3, and 11-19.

39 Ibid., at 2-4 and 26-29.

40 Miljø- og Fødevareministeriet, Frihed til Forskellighed – styrkede rettigheder og muligheder for LGBTI-personer (2020), 7-11. LGBT+Danmark has reported sufficient signatures to obtain a hearing on these remaining initiatives.

41 Ibid.

alarming – that the Nordic governments lack sufficient knowledge and data about people needing protection from discrimination to even know how to provide state support to improve their security and quality of life.[42] The Council also warned about the lack of safety for persons with different gender identities, coupled with a lack of a strategy to combat discriminatory organizations, including religious and political ones, which have, in turn, encouraged many transgender, intersex, and other people with diverse "queer" identities to remain hidden.[43] The Council also warned that discrimination persists against gender minorities in health care and schools, as well as stemming from the lack of public education, gender recognition in family status, and outreach to gender minorities to reverse the damage done through discriminatory gender practices.[44]

The Organization for Economic Cooperation and Development (OECD) and the EU's Fundamental Rights Agency (FRA) have also documented persistent threats of violence and harassment toward gender minorities and sexual minorities in the Nordic region – with approximately one-third reporting feeling unsafe and more than forty percent afraid to be open about who they are in public.[45] The FRA has reported a substantial lack of protection for intersex persons in Denmark, Finland, and Sweden.[46] As noted above, Iceland has taken important steps as the first Nordic government to prohibit non-consensual gender-conforming surgeries on children, but even its exclusion of genetic males from those protections affects the class of children with the highest risk of surgical gender assignment rejection.[47] Norway is hailed as pathbreaking regarding changes of registered gender, but its official genders are binary, its parenthood status does not conform to newly-registered genders, and education reform, gender-neutral facilities, and gender-sensitive healthcare have been criticized as lacking.[48] These findings indicate that deeper inquiry is needed – particularly with the aid of human rights authorities – to determine what the Nordic countries must do to effectively protect persons harmed by gender identity discrimination.

---

42 Nordic Council of Ministers, Seven Challenges for LGBTI Equality – and How the Nordic Cooperation Can Solve Them, ed. Gisle August and Gjevestad Agledahl (2020) 5-6.

43 Ibid., at 7-8 and 11-12.

44 Ibid., at 13-19.

45 OECD, Over the Rainbow? The Road to LGBTI Inclusion (2020) See https://bit.ly/3mrj2Bp (last visited 21 August 2021); EU-FRA, A Long Way to Go for LGBTI Equality (2020) 23-50.

46 Ibid., at 51-56.

47 Lög um kynrænt sjálfræði, supra n. 15, III.11a, pkt. 6; For the risk discussed, see Jameson Garland and Milton Diamond, 'Evidence-Based Reviews of Medical Interventions Relative to the Gender Status of Children with Intersex Conditions and Differences of Sex Development' in J.M. Scherpe, Anatol Dutta and Tobias Helms, eds., *The Legal Status of Intersex Persons* (Intersentia: Cambridge 2018) 88-92.

48 Frances Rose Hartline, 'Assessing Norway's Gender Recognition Act of 2016', (2020) International Journal of Gender, Sexuality and Law 193-217; Anniken Sørlie, 'Transgender Children's Right to Non-Discrimination in Schools: The Case of Changing Room Facilities' (2020) 28 International Journal of Children's Rights 221-42; and Anniken Sørlie, 'The Right to Trans-Specific Healthcare in Norway: Understanding the Health Needs of Transgender People' (2018) 27 Medical Law Review 295-317.

1.2 Assessing National Protections Through the Lens of Human Rights Instruments

The Nordic countries have formally obligated themselves to protect human rights established in multiple treaties that they have ratified, each of which prohibits discrimination in one form or another. Finland arguably has the most substantive obligations under national law due to the way its constitution imports the treaties it ratifies into national law.[49] In its Human Rights Act, Norway has incorporated the ECHR and several of its protocols, plus four UN human rights treaties – the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[50] Denmark, Iceland, and Sweden have incorporated the ECHR,[51] and Iceland and Sweden have also incorporated the CRC.[52] The sheer number of human rights instruments that these nations have ratified beyond this may make compliance with all of them seem daunting, assuming that the treaties substantively diverge. The five Nordic national law frameworks, however, reflect a lack of awareness of the rapidly accelerating convergence of interpretations of treaties incorporated into them – with the UN and Council of Europe now referencing each other to establish a consensus on national obligations to protect gender-variant individuals from discrimination.

The UN's human rights framework facilitates cross-pollination and norm-development by design, given that rights set forth in the ICCPR and ICESCR have established obligations that have been imported into other human rights treaties, such as the CRC and Convention on the Rights of Persons with Disabilities (CRPD). The Human Rights Council has also promoted normative harmonization through the appointment of Special Rapporteurs and Independent Experts, who focus on the symmetries among rights that appear in multiple treaties. The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for example, has explained why numerous gender-based harms rise to the level of degrading, cruel, and inhuman treatment, as well as torture, with implications not only for the Convention Against Torture (CAT) but also the ICCPR, CRC, and CRPD.[53] Since the Rapporteur published his findings in 2013, the various UN Committees have received significant input

---

49 Jukka Viljanen, 'The European Convention on Human Rights and the Transformation of the Finnish Fundamental Rights System: The Model of Interpretative Harmonisation and Interaction' (2007) 52 Scandinavian Studies in Law 299-320.

50 For Norway, see Lov om styrking av menneskerettighetenes stilling i norsk rett, nr. 30, 21. mai 1999.

51 For Denmark, see Lov nr. 285 af 29. april 1992 om Den Europæiske Menneskerettighedskonvention; For Iceland, see Lög um mannréttindasáttmála Evrópu. 1994 nr. 62 19. maí. For Sweden, see Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.

52 For Iceland, see Lög um samning Sameinuðu þjóðanna um réttindi barnsins, no. 19/2013 (2013). For Sweden, see Lag (2018:1197) om Förenta nationernas konvention om barnets rättigheter (2018).

53 JE Méndez, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the U.N. General Assembly', (A/HRC/ 22/53, 2013).

on behalf of transgender and intersex persons from human rights advocates relying on the Rapporteur's work, leading to multiple UN Committees' condemnations of non-consensual gender-conforming surgeries as torture, degrading treatment, or other harmful practices.[54] The recently-appointed Independent Expert on Sexual Orientation and Gender Identity has canvassed the UN treaties and their interpretations by their respective treaty bodies to explain how they have reached a consensus that numerous disadvantages imposed on the basis of gender identity and sexual orientation violate international law.[55] Both of these experts have invoked and relied upon the Yogyakarta Principles – the renowned human rights expert recommendations for human rights related to sexuality and gender identities – as affirming UN norms for the protection of transgender and intersex persons.[56]

The ECHR and the consensus doctrine developed by the European Court of Human Rights (ECtHR) have subsequently eclipsed the other treaties within the Council of Europe's framework, as many of those treaties are not fully ratified by the Contracting States to the ECHR. The ECtHR's consensus doctrine has allowed it to harmonize the Convention with the UN treaty framework on the grounds that Contracting States have also obligated themselves to comply with the UN's human rights instruments. Thus, the Grand Chamber of the ECtHR has held that the Court "can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values."[57] Indeed, the Grand Chamber has warned that the "consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases."[58] In doing so, the ECtHR has now officially signaled that norms developed in the UN framework may inform how parallel rights in the ECHR are interpreted and enforced against Contracting States. It has already reached a new milestone in its recent case, *X and Y v. Romania*, deciding for the first time in 2021 that a State cannot require gender-modifying surgery for gender recognition.[59] The Court has also taken a new case in *M v. France*, questioning gender-conforming surgeries on intersex children,

---

54 Jameson Garland and Santa Slokenberga, 'Protecting the Rights of Children with Intersex Conditions from Nonconsensual Gender-Conforming Medical Interventions: The View from Europe' (2019) Medical Law Review 482-508.

55 Victor Madrigal-Borloz, Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, *Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, A/73/152 (2018); and Victor Madrigal-Borloz, Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, *The Law of Inclusion*, A/HRC/47/27 (2021).

56 Méndez, supra n 53 at para. 38 and Madrigal-Borloz (2018), supra n 55 at nn. 2 and 19. For further reading on the influence of the Yogyakarta Principles, see Michael O'Flaherty, The Yogyakarta Principles at Ten, (2015) 33 Nordic Journal of Human Rights 280-298.

57 *Demir and Baykara v. Turkey* [GC], App no 34503/97 (ECHR 12 November 2008) paras. 69 and 85.

58 Ibid. See also *X. v. Latvia* [GC] App no 27853/09 (ECHR 26 November 2013) para. 94.

59 *X and Y v. Romania*, App nos 2145/16 et 20607/16 (ECHR 19 January 2021).

notably under Article 3, which prohibits torture or cruel, inhuman, and degrading treatment.[60] The questions to the parties therein are framed in light of multiple documents not only from the UN and the Council of Europe but also the Yogyakarta Principles as context.[61] For the Nordic countries, therefore, governments should take notice that the convergence of human rights norms has ever-increasing potential for parties seeking damages against them, both in national courts and ultimately at the ECtHR.

1.2.1 The UN Framework on Gender Discrimination

Several UN treaties contain prohibitions on status-based discrimination, including sex, gender, and "other status", thus taking an open view of their protections against discrimination on the basis of diverse gender identities and bodily variances. Their respective treaty bodies have consistently taken the position that the source of all sex and gender discrimination is the "generalised view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, men and women".[62] States that have ratified these treaties, especially CEDAW, therefore, cannot claim that these obligations were merely interpretive nonbinding opinions of the treaty bodies. Article 5 CEDAW specifically requires State Parties to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women". The Committee on Elimination of All Discrimination Against Women (CEDAW Committee) has consistently reinforced the position that gender discrimination stems from "constructed identities, attributes, and roles for women and men", based on notions of biology, such that discrimination against women "based on sex and gender" is "inextricably linked" with other forms of discrimination, including "sexual orientation and gender identity".[63] Thus, CEDAW requires State Parties to review their "constitutional provisions, laws, regulations, procedures, customs and practices that are based on traditional gender-stereotypes and norms and are therefore discriminatory".[64] It has made clear that the refusal to specifically acknowledge, educate, and take action against gender-stereotypes undermines States' abilities to ensure the enforcement of rights, as "stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths

---

60 *M. v. France*, 42821/18 (2020) (questions presented).

61 Ibid., at para. C.2.

62 Office for the High Commissioner of Human Rights, Gender Stereotyping as a Human Rights Violation (2013) 8ff.

63 Committee on the Elimination of Discrimination against Women, General recommendation No. 28 on the core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28 (2010) paras. 5 and 28.

64 Committee on the Elimination of Discrimination against Women, General recommendation on women's access to justice, no. 33, CEDAW/C/GC/33, para. 21.

rather than relevant facts" and "can cause judges to misinterpret or misapply laws and compromises the impartiality and integrity of the justice system".[65]

Consistent with the Human Rights Committee's interpretation of "sex" and "other status" in the ICCPR as including sexual orientation and gender identity, other treaties have justified their enforcement along the same lines. The Committee on Economic, Social and Cultural Rights has elaborated on the rights of sexual and gender minorities, concluding that "the notion of the prohibited ground 'sex' has evolved considerably to cover not only physiological characteristics but also the social construction of gender-stereotypes, prejudices and expected roles", whereas "other status" includes gender identity, protecting "persons who are transgender, transsexual or intersex [and] often face serious human rights violations, such as harassment in schools or in the workplace".[66] The Committee also mandated that non-discrimination in the context of the right to sexual and reproductive health encompasses the right of all persons, including lesbian, gay, bisexual, transgender, and intersex persons, to be fully respected for their "sexual orientation, gender identity and intersex status" and that such persons do not need to be "cured".[67] The Committee on the Rights of Persons with Disabilities also clarified that the CRPD and other UN treaties require all State Parties to "combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life".[68] The Committee has made clear that the CRPD protects transgender and intersex persons when "perceived" as disabled or intersecting with other characteristics and needing multifaceted efforts to combat stereotyping and to advance "inclusive equality".[69]

Finally, the Committee on the Rights of the Child has aligned with these views in several contexts, as the Committee has warned that "gender-based discrimination is particularly pervasive ... [with] gender-stereotyping."[70] In the context of most relevance to each child's right to identity, the Committee has also explained:

> Children are not a homogeneous group and, therefore, diversity must be taken into account when assessing their best interests. The identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, [and] personality.... The right of the child to preserve his or her

---

65 Ibid., at para. 26.

66 Committee on Economic Social and Cultural Rights, General comment No. 20, Non-discrimination in economic, social and cultural rights (Article 2 of the International Covenant on Economic, Social and Cultural Rights) (2009) E/C.12/GC/20 paras. 20 and 32.

67 Committee on Economic Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (Article 12) E/C.12/GC/22, paras. 23, 27, and 31-33.

68 Convention on the Rights of Persons with Disabilities, Article 8(1)(b).

69 Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, paras. 7, 11, and 33.

70 Committee on the Rights of the Child, General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (Article 24) paras. 7-9.

> identity is guaranteed by the Convention (Article 8) and must be respected and taken into consideration in the assessment of the child's best interests.[71]

UNICEF, which aided in drafting the CRC and provides expert advice under Article 45, affirmed that Article 8 protects self-determined cultural identities and includes "the child's physical appearance, abilities, gender identity and sexual orientation".[72] The CRC Committee reaffirmed that principle in its comment on the right to health, reminding State Parties that they "have an obligation to ensure that children's health is not undermined as a result of discrimination", including for children on the basis of "sexual orientation, gender identity, and health status".[73] The Committee also requires State Parties to have national legal frameworks that mainstream legislative, administrative, social, and educational measures to stop violence against vulnerable children, including but not limited to children who are "lesbian, gay, bisexual, transgender or intersex".[74] A Joint Comment from the Committee on the Rights of the Child and the CEDAW Committee reaffirmed their position that "sex- and gender-based attitudes and stereotypes, power imbalances, inequalities and discrimination perpetuate the widespread existence of practices that often involve violence or coercion" and that the obligations under CEDAW to eliminate gender-stereotyping apply universally.[75]

The consistency among these recommendations leaves little doubt that national frameworks must take action against gender identity discrimination and puts burdens on States not simply to react when individuals are harmed or plea for remedies. Thus, States are expected to counteract stereotypes proactively by promoting equality through education, developing programs for gender equality and diversity, and eradicating practices based on gender-stereotypes. All five of the Nordic countries have been criticized by human rights committees for failing to do just that.[76] The Committee Against Torture and all of the five UN committees discussed in this section have reprimanded nations worldwide and directed them to stop non-consensual surgeries on children with variations of sex characteristics, to protect intersex and other diverse identities, and to take action to support parents and medical professionals.[77] Denmark has been reprimanded

---

71 Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as primary consideration, para. 55.

72 UNICEF (eds), Implementation Handbook for the Convention on the Rights of the Child (3rd ed, 2007) 115.

73 Committee on the Rights of the Child, supra n 70, para 8.

74 Committee on the Rights of the Child, General Comment No. 20 (2016) on the implementation of the rights of the child in adolescence, paras. 33-34.

75 Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices, CEDAW/C/GC/31-CRC/C/GC/18 (2014) paras. 6 and 31.

76 For the latest recommendations from the CEDAW Committee, see CEDAW/C/DNK/CO/8 (Denmark), paras. 15-16, 27-28; CEDAW/C/FIN/CO/7 (Finland) (2015) paras. 14, 25, 29; CEDAW/C/ISL/CO/7-8 (Iceland) (2016) paras. 17-18, 27 47; CEDAW/C/NOR/CO/9 (2017) paras. 22-23 (Norway), and CEDAW/C/SWE/CO/8-9 (2016) paras. 24-25 (Sweden).

77 Garland and Slokenberga, supra n 54.

by three different UN treaty bodies on this issue,[78] but has taken no action in response. Sweden has received the same criticism in its Universal Periodic Review of human rights matters and has claimed to be considering how to protect these children.[79] Finland was sharply questioned by the Human Rights Committee on this very subject in its most recent periodic review.[80] Without specifically calling out the Nordic countries, the Human Rights Council's Independent Expert on Sexual Orientation and Gender Identity has also documented repeated criticisms of how nations worldwide have cast transgender and other gender-variant persons as deviants and have historically subjected them to pathologization, coerced medical interventions, and extreme juridical scrutiny of their personal lives. The Expert concluded that the consensus among human rights authorities is that if registered gender is part of legal identity, it *must* protect free and informed choice and bodily autonomy to ensure that (1) gender identity is self-determined, (2) no unreasonable and unnecessary conditions are imposed upon accepting identities, particularly medical ones, (3) change must be confidential, administratively simple, and cost-free and (4) the law must permit multiple gender options beyond the binary.[81] In short, the requirements for stopping harm inflicted by States are extensive, and education and social reforms are expected to be part of any anti-discrimination framework.

1.2.2 The Council of Europe's Framework on Gender Discrimination

The ECtHR is often considered the most influential institution in the Council of Europe, as it has developed a comprehensive body of human rights case law, including setting precedent on matters of all forms of discrimination. While its gender jurisprudence has been substantial, its doctrine on gender identity has taken several conceptual turns, as examined below. The Court has largely avoided discrimination claims when it comes to transgender issues. That changed in 2021 when it held that court-restricted access of a transgender parent to her children on the grounds of her gender identity not only violated Article 8 but also Article 14, as the court presumed her gender identity could be harmful to her children.[82] Together with a series of decisions opposing medical

---

[78] Convention against Torture, Concluding observations on the combined sixth and seventh periodic reports of Denmark, CAT/C/DNK/CO/6-7 (2016) §§ 42-43; Convention on the Rights of the Child, Concluding observations on the fifth periodic report of Denmark, CRC/C/DNK/CO/5 (2017) §§ 12 and 24; Committee on Economic, Social and Cultural Rights: Concluding observations on the sixth periodic report of Denmark, E/C.12/DNK/CO/6 (2019) §§ 64-65.

[79] Ministry of Employment, Response from the Swedish Government regarding UPR recommendations (2021) 7 and 62-63.

[80] See StopIGM.org, Finland questioned about Intersex Genital Mutilation, https://bit.ly/3t1n0BV (last visited 22 August 2021).

[81] Madrigal-Borloz (2018), supra n 55 at para. 81(d).

[82] *A.M. and Others v. Russia*, App no 47220/19 (ECHR 7 June 2021).

interventions as requirements for gender recognition,[83] the Court has now moved closer to the UN's position than ever before, especially with its pending case on intersex conditions, invoking the Yogyakarta Principles alongside UN documents that classify non-consensual gender-conforming procedures as medical abuse that may rise to the level of torture and degrading treatment.[84]

The Court's "sex discrimination" jurisprudence has aligned with the principle that the Convention prohibits differential treatment of individuals or groups "in relevantly similar situations,"[85] unless there is an "objective and reasonable justification" to treat people differently "to correct factual inequalities".[86] For gender discrimination, the Court has traditionally required "very weighty reasons" to justify differential treatment, with the margin of appreciation being very narrow, and there must be "particularly serious reasons" for it when "a most intimate part of an individual's private life" is at stake.[87] These weighty reasons are required even when the difference in treatment is not directed at "sex" but results in "disproportionately prejudicial effects on a group of people" that are difficult to explain without reference to sex traits,[88] or under-enforcement of the law to protect individuals equally.[89] This reasoning has also been applied to violations of Article 14 regarding laws that affected gay and lesbian claimants judged to have been based on gendered presumptions without directly referencing or targeting the sexuality of the persons affected.[90] Invoking CEDAW as an influence, the Grand Chamber in 2012 formally recast its jurisprudence as focused on gender discrimination in the case of *Markin v. Russia*.[91]

The recognition of the Court that discrimination based on gender is encompassed in "sex" roles is significant because of its alignment with the UN treaties on questions of gender-stereotyping and traditions as the primary source of "sex" discrimination. In *Markin*, the Grand Chamber reversed prior precedent of deference to Contracting States on parental leave policies and scrutinized the

---

83 *S.V. v. Italy*, App no 55216/08 (ECHR 11 October 2018); *A.P., Garçon and Nicot v. France*, App nos 79885/12, 52471/13 and 52596/13 (ECHR 6 April 2017); and *Y. Y. v. Turkey*, App no 14793/08 (ECHR 10 March 2015).

84 *M. v. France*, supra n 60 at para. 2.C.3.

85 *Ünal Tekeli v. Turkey*, App no 29865/96, para. 49 (ECHR 16 November 2004).

86 *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01 (ECHR 12 April 2006) para. 40.

87 *Schuler-Zgraggen v. Switzerland*, App no 14518/89 (ECHR 24 June 1993) para. 67 and Dudgeon v. the United Kingdom (plenary) App no 7525/76 (22 October 1981) para. 52.

88 *Zarb Adami v. Maltano*, App no 17209/02 (ECHR 20 June 2006) para. 80.

89 *Opuz v. Turkey*, App no 33401/02 (ECHR 9 June 2009).

90 For example, the Court judged gender classifications as "sexual orientation" discrimination, including (1) objection to any two persons of the same gender adopting as co-parents, even an aunt and her sister, *X and Others v. Austria*, [GC] App no 19010/07 (ECHR 19 February 2013) §75; (2) presumptions that two persons of the same gender cohabiting were not a couple, *J.M. v The United Kingdom* (App no 37060/06) (ECHR 28 September 2010) and (3) requirements that a single person have a person of the "other sex" as a partner for adoption, *E.B. v. France*, [GC] App no 43546/02 (ECHR 22 January 2008).

91 *Markin v. Russia*, App no 30078/06 (ECHR 22 March 2012) paras. 49-51 and 127.

differential treatment based on gender in that case. Expressly invoking "gender-stereotyping" for the first time in its jurisprudence, the Court held that Contracting States "may not impose traditional gender roles and gender-stereotypes" on individuals or "perpetuate" such stereotypes through law.[92] According to the Court, its jurisprudence had repeatedly confirmed the impermissibility of using stereotypes to justify differential treatment.[93] Thus, it was "not convinced" by "biological" claims as justification for gender discrimination, "even if confirmed by research", to exclude persons from protections of private and family life.[94] The Court thus held that "references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex".[95] In short, the Grand Chamber's doctrine puts a significant burden on States to justify "sex classifications" arising from gender roles and traditions.

Until recently, the Court's gender jurisprudence operated apart from its gender identity jurisprudence, which was taken up primarily under the right to private life (Article 8). The Court's landmark case affirming a right to gender recognition arose in *Goodwin v. The United Kingdom*, after the Court had deferred on prior litigation on that subject in the absence of a European consensus on gender recognition, including the possibility to marry someone with the "same" registered gender as the applicant's before it was officially changed. The Grand Chamber in *Goodwin* still lacked that consensus in 2002 when it released its opinion and, thus, chose to attach "less importance to the lack of evidence of a common European approach" than to the "clear and uncontested evidence of a continuing international trend in favour ... of legal recognition of the new sexual identity of post-operative transsexuals".[96] The Grand Chamber also relied on an emerging medical consensus that allowed diagnostic aid to justify gender classifications, concluding that the applicant, Christine Goodwin, had demonstrated her level of commitment and conviction to her gender identity through "numerous and painful interventions involved in such surgery required to achieve a change in social gender role".[97] The Court also ruled in favor of Goodwin's right to marry a man in accordance with her gender of identity.[98] Having declined to take up the discrimination claim under Article 14, the Court did not address the consequences of States' controls of gender roles, and the aftermath underscored why. Indeed, the Court subsequently rejected same-sex marriage claims, invoking a lack of European legal consensus.[99] It has since limited the rights of same-sex couples abstractly to undefined "core" rights on the grounds that the right to marry in international law was understood as limited to male-female couples, branding same-sex

---

92 Ibid., at paras. 124-128.

93 Ibid., at paras. 127 and 42.

94 Ibid., at para. 132.

95 Ibid., at para. 127.

96 *Goodwin v. United Kingdom* [GC] App no 28957/95 (ECHR 11 July 2002) para. 85.

97 Ibid., at para. 81.

98 Ibid., at paras. 94-104.

99 *Schalk and Kopf v. Austria*, App no 30141/04 (ECHR, 24 June 2010).

relationship recognition as a sensitive, moral issue, requiring deference to the Contracting States.[100]

For transgender persons, the consequence of this doctrinal approach harshly impacted married "male-female" couples who refused to surrender their marital status in order to secure gender recognition for one spouse when doing so would effectively transform a "traditional" marriage into a same-sex marriage (once the registered gender of one spouse changed). In 2014, the Grand Chamber in *Hämäläinen v. Finland* upheld the State's requirement that such couples must convert their marriages to a "registered partnership" or divorce.[101] As the Court explained, the protections in *Goodwin* depended on the recognition of the "new gender" of "post-operative" transsexuals[102], also taking into account that Christine Goodwin sought to marry a man. The Grand Chamber explained that, in its view, partnership rights were essentially the same rights, such that the "minor" differences and the administrative burden of divorcing and reregistering a partnership were not disproportionate in light of Article 8.[103] The Court held:

> While it is regrettable that the applicant faces daily situations in which the incorrect identity number creates inconvenience for her, the Court considers that the applicant has a genuine possibility of changing that state of affairs: her marriage can be converted at any time, *ex lege*, into a registered partnership with the consent of her spouse. If no such consent is obtained, the possibility of divorce, as in any marriage, is always open to her.[104]

Given that the Grand Chamber concluded that a registered partnership and marriage were much the same, it did not clarify what aspect of marriage, other than its status, Finland sought to protect, or whether it was the petitioner's "sex" or juridically reconstructed "sexuality" (from "heterosexual" to "homosexual" by change of registered sex) that was so problematic. Though the petitioner raised a discrimination claim under Article 14 on the grounds that cisgender persons receive a gender they accept at birth while transgender persons do not, the Grand Chamber dismissed her claim categorically on the grounds that she was "not in the same situation as cissexuals".[105] In passing, the Court invoked consensus as a reason not to apply its gender-role doctrine from *Markin* in the context of marriage.[106]

Though the controversy over gender-neutral marriage may be unique, the Court's doctrine in its early Article 14 jurisprudence has consistently relied on "the principles which may be extracted from the legal practice of a large number

---

[100] *Oliari and Others v. Italy*, App nos 18766/11 and 36030/11, § 103, (ECHR, 21 July 2015); and *Orlandi and Others v.* Italy, App nos 26431/12 and 3 others, §§ 110-14 (ECHR, 14 December 2017).

[101] *Hämäläinen v. Finland*, App no 37359/09 (ECHR, 16 July 2014).

[102] Ibid., at paras. 195-196

[103] Ibid., at paras. 81-87.

[104] Ibid., at para. 87.

[105] Ibid., at para. 112.

[106] Ibid., at para. 109.

of democratic States" in the Council of Europe.[107] Thus, its willingness to classify a dispute as involving sensitive, moral, or ethical issues may yield a wide margin of appreciation when it comes to any future challenge against registering only "male" and "female" sexes. This, however, may explain why the Court has protected gender identity through other rights – not only the right to private life but the freedom of expression and the freedom from degrading treatment – where the law often robustly protects self-determination and intimacy. If the Court's case law on coercive gender-conforming rules and medical procedures are any indication, however, even an indirect application of the Court's gender equality doctrine may have significant implications for the practice of gendered classifications of legal identities, making the Nordic countries' gender registrations ultimately vulnerable to liability, as explained below.

2 Assessing the Equality of States' Interest in Governing Gender Identity

Until recently, the right to an identity has played an insignificant role in national juridical debates over how much discretion States actually have to define what a person's registered gender identity will be. Registration of a juridical identity is required under international law for all children, under both the ICCPR (Article 24) and the CRC (Article 7). These provisions mandate the registration of birth and a name for the child, with the right to acquire a nationality, but not a child's "sex". The CRC's Article 8, however, also grants the right of the child to *preserve* "his or her" identity, "*including* nationality, name, and family relations". The Committee on the Rights of the Child affirms that Article 8's language is intended to be inclusive of any elements of identity, such as sex, sexual orientation, and other important aspects of personality that the treaties do not require to be registered.[108]

2.1 Rights to Gender Identity and Expression without Discrimination

The above is consistent with Article 2 of both the ICCPR and CRC, which require the freedom of expression and the right to an identity to be protected without discrimination. Given that all five Nordic nations have ratified the ICCPR and the CRC, these considerations should inform not only what they must register but what identities they are allowed to impose on children. States should be required to justify imposing a characteristic not required under international law on a person's identity, especially on a child before the child's identity has actually developed.

Once a person is born, that person's right to an identity is protected by other human rights, including the right to private life and freedom of expression. The ECtHR's Grand Chamber has ruled that the "guarantee afforded by Article 8 of the [ECHR]" is "primarily intended to ensure the development, without outside

---

[107] *Belgian Linguistic Case* (No. 2), App nos 1474/62 et al (ECHR 23 July 1968) para. 10.

[108] Committee on the Rights of the Child, General Comment no. 14 (2013) on the right of the child to have his or her best interests taken as primary consideration, CRC/C/GC/14, para. 55.

interference" of the "personality of each individual in ... relations with other human beings ... even in a public context".[109] As the Grand Chamber has explained, the concept of "private life" is "a broad term not susceptible to exhaustive definition" that "covers the physical and psychological integrity of a person" and "can therefore embrace multiple aspects of the person's physical and social identity" – such that "*gender identification, name, and sexual orientation and sexual life*" fall within Article 8's sphere of protection.[110] Indeed, the Court has held that Article 14 intersects with Article 8 and permits families to take a female parent's last name over a male's or for male-female couples to merge their last names.[111] Thus, while the Court has refrained so far from questioning how gender should be registered at birth, it has held that States are restricted in their ability to prevent changes of names on gendered grounds or to require surgery for individuals in order to change their registered gender.[112]

All of these obligations flow from the States' obligations to actively protect the right to private life, not simply to refrain from interfering with it. In *Söderman v. Sweden*, the Grand Chamber held that States have an obligation to protect individuals' private lives, and "if a particularly important facet of an individual's existence or identity" or "a most intimate aspect of private life" is at stake, the margin of appreciation for the State to protect individuals is "correspondingly narrowed".[113] The Grand Chamber has also made clear that governments may not store and retain data without a "fair balance" between "competing public and private interests", even if it is never used, requiring justification of any "blanket and indiscriminate nature of the powers of retention" of that data.[114] In *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, the Grand Chamber held that the States have obligations to protect private data held by the government from indiscriminate release to the public – in that case, data about the income and assets of more than one million people.[115] While members of the press have rights to collect and publish truthful private data in the public interest, the State's interests in publishing data are correspondingly limited. Of significance, the Grand Chamber has established that, under Article 10, individuals cannot be compelled to express conformity with the State's agenda unless the necessity for such requirements is "convincingly established" as serving "a pressing social need".[116]

Finally, it is now well-established that the Contracting States cannot discriminate in how they protect the expression of identity, nor may they attempt

---

[109] *Von Hannover v. Germany* (No. 2) [GC], App nos 40660/08 and 60641/08, para. 95 (ECHR 7 February 2012), para 99.

[110] *S. and Marper v. The United Kingdom* [GC] App nos 30562/04 and 30566/04 (ECHR 4 December 2008) para. 66.

[111] See e.g., *Cusan and Fazzo v. Italy*, App no 77/07 (ECHR, 7 January 2014); and *Burghartz v. Switzerland*, App no 16213/90 (ECHR 22 February 1994).

[112] See the cases cited in n 83, supra.

[113] *Söderman v. Sweden* [GC], App no 5786/08 (ECHR 12 November 2013) para. 79.

[114] *S and Marper*, supra n 110 at para. 125.

[115] *Satakunnan Markkinapörssi Oy and Satamedia Oy* [GC] App no 931/13 (ECHR 27 June 2017) paras. 129-161.

[116] *Vogt v. Germany* [GC] App no 17851/91 (ECHR 26 September1995) paras. 54-61.

to suppress it. In a series of cases, the ECtHR has found violations of the freedom of expression when government officials have taken action to suppress public speech on the grounds that it is contrary to the values and norms of society on matters of sex and gender.[117] In *Bayev v. Russia*, the Court held that Russians' moral stances could not justify suppression of the free expression of homosexuality. Directly invoking its reasoning from its gender jurisprudence in *Markin*, the Court reaffirmed that "negative attitudes, references to traditions or general assumptions in a particular country cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment, any more than similar negative attitudes towards those of a different race, origin or colour".[118] The Court held that the suppression attempted "to create a distorted image of the social equivalence of traditional and non-traditional sexual relationships" in specific contexts and was "incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority".[119] The obligation of States is not simply to refrain from interference but to protect minorities from harms inflicted on them because of their expression. The Court has repeatedly held that States have violated the ECHR when they have allowed persons to be subjected to violence or intimidation while defending their rights to express their gender identity and sexual orientation,[120] or have been subjected to intimate governmental scrutiny.[121]

Given the robust commitment that the ECtHR has for the right to private life and freedom of expression, it is worth considering how the Court might rule in cases where persons are forced to express an identity – or accept a degrading gender marker – against their will. What would happen, for example, if one of the Nordic countries, in a surge of nationalism, chose to replace the gender marker on identity cards, requiring instead that individuals either embrace a Nordic nationality or were otherwise marked as an "X"? Could a State alternatively require persons to prove and register their predominantly "Scandinavian heritage" or a "mixed Scandinavian heritage", marking those with neither heritage with an "X"? The histories of discrimination against nationality and ethnicity are by no means symmetrical with gender discrimination. But the history of marking individuals with a symbol of erasure should raise serious questions as to whether a person who refuses to identify as male or female can only have that identity protected if marked out with an X.

The central legal question then is this: What *legitimate* and *proportional* reasons exist to register gender as part of a juridical identity in a country where the law is *predominantly* gender-neutral? The current recommendation supported by the Human Rights Council and the Parliamentary Assembly of the Council of Europe is that States must ensure that "wherever gender

---

[117] *See e.g., Alekseyev v. Russia* App no 4916/07 (ECHR 21 October 2010); *Bączkowski and Others v. Poland*, App no 1543/06 (ECHR 3 May 2007).

[118] *Bayev v. Russia*, App nos 67667/09, 44092/12 and 56717/12 (ECHR 20 June 2017).

[119] Ibid., at paras. 69-70.

[120] *M.C. and C.A. v. Romania*, App no 12060/12 (ECHR 12 April 2016); *Identoba and Others v. Georgia*, App no 73235/12 (ECHR 12 May 2015).

[121] *Aghdgomelashvili and Japaridze v. Georgia*, App no 7224/11 (ECHR 8 October 2020).

classifications are in use by public authorities, ... *a range of options are available for all people,* including those intersex people who do not identify as either male or female" and that "the registration of sex on birth certificates and other identity documents" should be "*optional for everyone*".[122] In other words, if the Nordic countries accept the view from the ECtHR and UN Committees that the rights to identity, privacy, and freedom of expression are actually enforceable rights in their jurisdictions, they must justify a juridical gender identity that imposes and expresses a false view of any person's true identity. All States, including in the Nordic region, should be compelled to give a legitimate reason as to why it is necessary to impose one of two genders on individuals– or otherwise mark out their identities altogether.

2.2 Revealing Gender: Registration of "Sex" and Its Discriminatory Power

Currently, all of the Nordic countries require registration of each person's gender at birth for children born in their jurisdictions. The only gender registered in these countries with actual substance is male or female, assuming that no one in Iceland who is registered as "X" considers that mark a true identity.[123] Thus, these laws by design are not models of "*self-determination*", and they are certainly not so for those who do not feel that the options given offer them meaningful choices. In Denmark, Iceland, and Norway, the laws are touted as self-determined only to the extent that no criteria must be met to qualify for a registered change.[124] But their laws make clear that the government has the final say in many instances. Iceland allows minors to make these changes themselves only at age 15 and older,[125] while Norway and Denmark set those age limits at 16 and 18, respectively.[126] Whether these decisions are truly without conditions in practice remains to be seen. Despite purporting to respect the autonomy of the person, Denmark requires a 6-month reflection period marked by the date of the request for the change, and the legislative preparatory works chide that the

---

[122] Parliamentary Assembly for the Council of Europe, Resolution 2191/Recommendation 2116: Promoting the Human Rights of and Eliminating Discrimination against Intersex People (2017) (emphasis added).

[123] For *Denmark*, see Bekendtgørelse om folkeregistrering m.v., LBK Nr. 1167, 3/09/2018. 1 ka1 §, stk. 2 and Bekendtgørelse af lov om Det Centrale Personregister, LBK nr 1297 af 03/09/2020; for *Finland*, see Laki väestötietojärjestelmästä ja Digija väestötietoviraston varmennepalveluista 661/2009, §§ 11-12; for *Iceland*, see Lög um skráningu einstaklinga (2019) nr. 140 13. desember, Article 6 and 9-11 and Barnalog, I kafli A., nr. 76, 27 March 2003, 7 gr.; for *Norway*, see Lov om barn og foreldre, 4 augusti 1981 nr 7, 1 § and Forskrift til folkeregisterloven 15 juli 2017 nr. 1201, 2.2.1 & 2.2.2; and for *Sweden*, see Folkbokföringslag (1991:481) 18 and 24 §§ and Lag (2001:182) om behandling av personuppgifter i Skatteverkets folkbokföringsverksamhet, 2 kap. 3 §.

[124] European Commission, Legal Gender Recognition in the EU: The Journeys of Trans People Towards Full Equality, 19, n 27.

[125] Lög um kynrænt sjálfræði, supra n 15, II. kafli, 4. gr and 5 gr.

[126] For Denmark, see Lov om Det Centrale Personregister, supra n 123 at 1. I § 3 stk. 6; and for Norway, see Lov om endring av juridisk kjønn, 17 juni 2016 nr 46 §§ 2, 4 & 5.

gender cannot be changed for "fun".[127] Iceland strictly provides that the gender change may be made only once unless special circumstances warrant.[128] Norway currently has no express restrictions but still permits regulations to be enacted in the future.[129] Sweden and Finland still require multiple conditions for changes to registered gender.[130]

The registration of gender in all five countries takes two forms, first as entries to their population registries, then once again registered on official identity documents.[131] It is the second part of the registration that has cascade effects. Traditionally, the Nordic countries required a child to have each name gendered consistently with their registered sex. Today, Iceland, Norway, and Sweden have dropped these requirements, though they still permit authorities to reject names that might embarrass a child.[132] Denmark retains the gendered naming requirement but has approved unisex options available in its database that parents may choose.[133] Finland formally requires names to correspond to male or female classifications but appears to permit names common to both sexes, despite its professed protection against discrimination of gender identity and sex characteristics.[134] Parenthood in all five of the Nordic countries is gendered with proxies for parental status – affirming that the person who gives birth is the mother and the male non-birth spouse is the father, with other men presumed to be the father in many instances.[135] Swedish law, through a complex maze of cross-references, permits registered men who give birth to be called fathers and women who have been registered as women by changes to the registry to be recognized as mothers – though it reroutes these classifications elsewhere in the law to align them with protections and responsibilities traditionally assigned to cisgender persons.[136] Only Iceland permits a person who is registered as gender-neutral to be a gender-neutral parent, but parental classifications otherwise must correspond with roles associated with the registered "sex".[137] All of these gendered controls of identity, parenthood classification, and names are state-

---

[127] Forslag til Lov om ændring af lov om Det Centrale Personregister, 2013/1 LSF 182 (2014) § 2.2.

[128] Lög um kynrænt sjálfræði, supra n 15, II kafli, 7 gr.

[129] Lov om endring av juridisk kjønn, supra n. 126, § 7.

[130] For Finland, see Laki transseksuaalin sukupuolen vahvistamisesta 563/2002, For Sweden, see Lag (1972:119) om faställande av könstillhörighet i visa fall ("Könstillhörighetslag").

[131] See the laws and regulations at n 123, supra.

[132] For Norway, see Lov om personnavn, 6 jul 2002, nr 2019 § 10. For Iceland, Lög um mannanöfn, 1996 nr. 45 17. maí, II. kafli, 5 gr., & III. kafli, 6 gr. For Sweden, see Lag (2016:1013) om personnamn 28 §.

[133] Bekendtgørelse af navneloven, LBK nr 1816 af 23/12/2015, Ch. 3, § 13 stk. 2-3 (regulations must allow for process to accommodate transgender or other similarly situated persons).

[134] Etu- ja sukunimilaki, 946/2017 (2017). Ch. 1, § 2 st. 2.

[135] For *Denmark*, see Børneloven nr. 274 af 22.12.1908, §§ 1-24; For *Finland*, see Moderskapslag 253/2018 and Faderskapslag 11/2015; For *Iceland*, see Barnalög 2003 nr. 76 27. mars, I. kafli, 2-7 gr. For *Norway*, Lov om barn og foreldre, supra n 123, kap 2.; For *Sweden*, see Föräldrabalk (1949:381) 1 kap 1-14. §§.

[136] Föräldrabalk (1949:381) 1 kap 10-14. §§.

[137] Lög um kynrænt sjálfræði, supra n 15 at 4 and 8 gr.

mandated identities based on gender and required to be used by law unless changed with their authorities' permission.

The historical arguments for structuring the law by "sex" are well-known but not often defended today by the Nordic governments. This includes the circular argument – that the law once treated men and women differently and therefore "needed" registered gender. It also includes the pathologizing argument – that gender-variant persons are mentally and physically defective, needing and wanting to be integrated into the gender binary. While the lack of credibility of these arguments has radically minimized their invocation, the lingering harms they perpetuate require emphasis. Sweden, for example, is heralded as the first country in the world to develop a statutory framework for changes of juridical gender identity, often glossing over its authorization of non-consensual gender-conforming surgery on children in connection with gender assignment.[138] These latter practices were already occurring in Sweden as correction of "birth anomalies" on gender-variant children's bodies but ratified by Swedish law to support changes of registered gender for children if doctors and parents questioned a child's "sex" after it had been registered at birth. Globally, the impact of these practices today is well known – with estimates of 50% or greater gender rejection for some groups of children and pain and dysfunction inflicted on others.[139] The Swedish government in 1972 acknowledged that the law might surgically impose a wrong gender on children, as well as causing psychological harm for transgender persons, who were subject to requirements for divorce and sterilization to change the identity imposed on them.[140] Indeed, the Gender Classification Act retains a provision to this day allowing for a second change of registered gender for children whose sex was already changed once because the government knew that such changes could be catastrophically wrong.[141] None of the Nordic countries have taken full responsibility for non-consensual gender-conforming surgeries inflicted on children to conform them to binary, registered sex.

Most countries appear to have a strong interest in registered gender which emerges from the history of population data collection, exemplified again by Sweden, which is also credited with coordinating the first national register for identity purposes, following a royal proclamation in 1631. Sweden's bishops were directed to register inhabitants, in part to keep track of them and ensure that "neither man nor woman, boy or girl" relocated to another parish without a certificate of permission.[142] By 1749, Sweden's register was centralized, with parishes tasked with recording each person's sex, age, marital status, and

---

[138] See Könstillhörighetslag, supra n 130 at 4 and 4a §§.

[139] Garland and Diamond, supra n 47, 89-90.

[140] Erika Alm, 'A State Affair?: Notions of the State in Discourses on Trans Rights in Sweden', *Pluralistic Struggles in Gender, Sexuality and Coloniality* (2021) 209-237.

[141] Könstillhörighetslag, supra n 130 at 1 § st. 2.; see also Legislative Bill Proposition 1972:6: *Kungl. Maj:ts proposition med förslag till lag om fastställande av könstillhörighet i vissa fall,* m.m., 13 and 51-59; Legislative Inquiry SOU 1968:28, *Intersexuallas könstillhörighet*, 12-13 and 33-44.

[142] Skatteverket, Den svenska folkbokföringens historia under tre sekler (2021) available at https://bit.ly/3sir7ZY (last visited 21 August 2021).

occupation at year's end.[143] Sweden was not alone in this project. In 1703, Iceland – then formally part of Denmark-Norway – undertook what is believed to be the first national census as conducted today.[144] The harsh conditions in Iceland and their effect on population mortality created a need for data, revealing important information about birth rates, marital patterns, and alarms regarding the low population of males.[145] The Nordic countries, notably, took the lead in establishing modern versions of these registers more quickly and efficiently, with Iceland the first to do so in 1953 as the computer age was emerging, followed by Sweden (1966), Norway (1968), Denmark (1968), and Finland (1970).[146] With a longstanding practice of registering binary sex at birth as a biological "reality", one might wonder how these States reacted when a key marker such as "sex" no longer had a constant or stable meaning for data collection, especially when their authorities were asked to correct the registries.

Indeed, the Swedish Gender Classification Act (1972:119) originated from a government moratorium in 1963 on changes of registered gender when it became clear that increasing numbers of changes to juridical sex were administratively made without consistent criteria to qualify a person as male or female by law.[147] With 100 persons a year or more in treatment for gender incongruence in Sweden by 1968, the official investigation for the Act was aimed at establishing criteria to control changes of registered sex.[148] For transgender persons today, with sterilization and other requirements no longer rigorously enforced as of 2013, the diminished power of the law is transparent. In 2000, only 10 to 15 applications per year in Sweden were lodged for changes of registered gender, compared to 446 applications lodged in 2018.[149] The percentage of the population with a change of registered gender in Sweden has increased approximately 700% since 2005.[150] Combined with the risk of gender rejection by children surgically altered without their consent – to surgically impose a juridical gender chosen for them – these changes confirm that rote binary gender assignment to children before they can develop an identity means that *many* gender identities in the register – any single one selected at random – might be wrong. For the Nordic governments purporting to prohibit gender identity discrimination in society, their demands for imposing a gender identity at birth, knowing that people may suffer from it, raises questions of actionable indirect discrimination, at least.

---

143 Michel Poulain and Anne Herm, 'Central Population Registers as a Source of Demographic Statistics in Europe' (2013) 68 *Population* 183, 186.

144 Ian Watson, 'A Short History of National Identification Numbering in Iceland' (2010) 4 *Bifröst Journal of Social Science* 51-89.

145 Richard F. Tomasson, 'A Millennium of Misery: The Demography of the Icelanders' (1977) 31 *Population Studies* 405-427.

146 Poulain and Herm, supra n 143 at 188.

147 Legislative Inquiry SOU 1968:28, supra n 141 at 12 and 34-36.

148 Ibid.

149 Folkhälsomyndigheten, *Psykisk ohälsa, suicidalitet och självskada bland unga transpersoner* (2020) 12.

150 Ibid.

With prior justifications for such laws abandoned, the human rights question remains whether there is a proportional and legitimate reason for compelling everyone to identify as male or female. Even if gender identities were needed to police changing rooms and restrooms,[151] there are numerous focused approaches to doing so, such as placing a code on the back of an ID card, if necessary, rather than legally requiring individuals to identify by routinely exhibiting the State's gender preference for them. Without more justification, it appears that governments have become particularly attached to registering gender as part of their authority to reinforce sex differences and protect a specifically gendered vision of their worlds. As historian Erika Alm documented, the 1968 legislative investigative proposal for Sweden's Gender Classification Act warned of "strong pressure from parents and family but also from society, in particular *from the parish registration*, to quickly designate a child as a boy or a girl" and that it was important "to other individuals and to society" to maintain that status quo.[152] Indeed, the final government bill endorsed the view that the law could not be designed to protect a "small group of people" but should be designed to respect "the fundamental values of society".[153] Reliance on the values of a country is not, however, likely to justify a law today. It remains to be seen what justifications governments may offer – perhaps in court – to defend forced binary gender registration.

3 Registering Gender Identity – An Obsolete Argument

The law's role in registering and classifying individuals is a legal tradition that is now centuries old. That tradition arose long before the right to identity was recognized, as well as before governments understood the importance of protecting private, sensitive data. It is more than odd, however, that the Nordic States claim to understand the need to combat discrimination on the basis of gender identity among their citizens but openly impose one of two "sexes" as identities on its people at birth. As Alm has explained, the claim that a person's identity is controlled by law "frames sex and gender as a discernible property of the individual and simultaneously as the site where the individual is articulated as a property of the state".[154] While registering gender identity may help inform all States about the quality of life of their people, possessive governmental stances on controlling registered identity merit bolder critiques. One only needs to reflect on the "no-no" undercurrents from Denmark's government that gender registration cannot be changed "for fun" – or Iceland's requirement that gender

[151] The increasing support for single, unisex restrooms in public spaces is testimony to Nordic ingenuity that has been a tool for equality in restroom access and undermines the claims for the need for gender-policing. Worldwide, these spaces have a history as a locus of direct discrimination and disparate impacts on individuals based on their perceived race, ethnicity, gender, sex, sexual orientation, and gender identity. *See* Kathryn H. Anthony and Meghan Dufresne, 'Potty Parity in Perspective: Gender and Family Issues in Designing Public Restrooms' (2007) 21 Journal of Planning Literature 267-294.

[152] Alm, supra n 140 at 219 (emphasis added).

[153] See Legislative Inquiry SOU 1968:28, supra n 141 at 39; see also Legislative Bill Proposition 1972:6, supra n 141 at 17.

[154] Alm, supra n 140.

can only be officially changed once – to understand that governments are asserting their authority over individual identities.

The Nordic countries have made many positive strides in outlawing gender-identity discrimination. But their growing support for contemplating only a "third" neutral identity is poorly rationalized. Human rights authorities have made extensive efforts to focus States' efforts on eradicating gender-stereotypes in society at large, as well as the growing consensus that if governments insist on maintaining gender as a juridical identity, they must accept diverse gender identities equally. If the Nordic governments consider that imperative to be unacceptable – requiring them to register genders they disfavor – the Yogyakarta Principles offer another way forward by ending "the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licenses, and as part of their legal personality".[155] It really is that simple. It will be interesting to see if the Nordic governments embrace a diversity of gender identities in our lifetime, either by being open to those identities or leaving them to individuals' freedom to express themselves as they choose.

[155] Yogyakarta Principles (+10), *Principle 31 – The Right to Legal Recognition* (2017). https://bit.ly/38cwmRL (last visited 23 August 2021).