



NORDIC EQUALITY AND ANTI-DISCRIMINATION LAWS IN THE THROES OF CHANGE

**LEGAL DEVELOPMENTS IN
SWEDEN, FINLAND, NORWAY, AND ICELAND**

Edited by

Anne Hellum, Ingunn Ikdahl, Vibeke Blaker Strand,
and Eva-Maria Svensson



Nordic Equality and Anti-Discrimination Laws in the Throes of Change

The Nordic states were among the first in the world to enact general gender equality and anti-discrimination laws with low threshold enforcement mechanisms. Today, the Nordic countries top the World Economic Forum's Gender Gap Index – but they have still not succeeded in closing the gender gap. This book draws a diverse and complex picture of the long, uneven, and unfinished process towards substantive equality in four Nordic countries: Sweden, Finland, Norway, and Iceland. It presents the Nordic gender equality model's systematic use of three measures: overarching gender policies, legislation that has an explicit or implicit impact on gender relations, and gender equality and anti-discrimination laws with low-threshold enforcement systems. What potentials and limitations do the Nordic gender equality and anti-discrimination law regimes have to combat individual discrimination and structural inequality? Can these regimes function as a driver of political, legal, economic, cultural, and social change and as a corrective to laws, policies, and practices that uphold existing inequalities and, if so, to what extent? Can weaknesses in the equality and anti-discrimination laws and the way they are enforced hamper efforts to close remaining gender gaps? Rather than looking at the Nordic gender equality laws and policies in isolation, the book situates their development and transformative potential within a changing European and international political and legal landscape.

Anne Hellum is professor emerita at the Department of Public and International Law within the Faculty of Law of the University of Oslo, Norway. She was the director of the Institute of Women's Law, Child Law, Equality, and Anti-Discrimination Law from 2000 to 2023 and the director of the faculty research group Rights, Individuals, Culture, and Society (RICS) from 2006 to 2016. She teaches courses on women's human rights in context, national and international equality and anti-discrimination law, and legal anthropology. Her main research interests lie in how law responds to intersecting identities such as gender, ethnicity, religion, sexual orientation, and gender identity and the plurality of intersecting international, national, and local norms. She has published a series of books, articles, and book chapters on these topics. She is the co-editor (with Henriette Sinding Aasen) of *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press 2013), the editor of *Human Rights, Sexual Orientation and Gender Identity* (Routledge 2017), and the co-author (with Vibeke Blaker Strand) of the textbook *Likestillings- og diskrimineringsrett* [Equality and Anti-Discrimination Law] (Gyldendal 2022).

Ingunn Ikdahl is a professor at the Department of Public and International Law within the Faculty of Law of the University of Oslo, Norway. She chaired the faculty's research group Welfare, Rights and Discrimination (VERDI) in 2017–2022. Ikdahl has worked on women's law, non-discrimination, and rights to property and natural resources in sub-Saharan Africa. Currently, she is involved in research projects examining different dimensions of the Norwegian welfare state, including digitalization of the welfare state, welfare and rights after the 22 July terror attack, health rights and health services in prison, and the role of EEA law in Norwegian welfare administration. Her interest in gender perspectives, interdisciplinarity, legal pluralism, and legal theory cuts across these projects. Her publications include *Kjønn og rett: Kvinne-, kjønns- og likestillingsperspektiver i jusstudiet* [Gender and Law: Women's, Gender, and Gender Equality Perspectives in Legal Education] (co-edited with Anne Hellum and others; Cappelen Damm 2022); 'Om kvinnerett og kjønnsperspektiv' [On Women's Law and Gender Perspectives] in A. P. Høgberg and J. Ø. Sunde (eds), *Juridisk metode og tenkemåte* [Legal Methods and Legal Thinking] (Universitetsforlaget 2019); and *Rettigheter i velferdsstaten: Begreper, trender, teorier* [Rights in the Welfare State: Concepts, Trends, Theories] (co-edited with Vibeke Blaker Strand; Gyldendal 2016).

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Preface

For decades, the Nordic Network in Women's Law and Feminist/Gender Legal Studies has been a source of inspiration, knowledge, and discussions between Nordic scholars. This book, like several previous publications, is a result of this network.

The book started as a series of presentations in the keynote session "Nordic equality and anti-discrimination laws in the throes of change" at the Nordic Law and Gender Conference on *Nordic Gender Equality in Transition: Anti-discrimination Laws, Practices and Scholarship Revisited*, which took place at the Faculty of Law at the University of Oslo in September 2019. The conference brought together scholars in Women's Law and Feminist/Gender Legal Studies in the Nordics.

The COVID-19 pandemic, with the closing of borders and disruption of everyday life, did not provide ideal conditions for international cooperation. The Department of Law, School of Business, Economics and Law at the University of Gothenburg, however, managed to host a writers' workshop in September 2021. Getting together was an important step in advancing our analysis of the drive to achieve substantive gender equality in four Nordic countries: Finland, Iceland, Norway, and Sweden.

The book has received generous support from a range of sources. Support for the writers' workshop and open-access publication was given by "Reimagining Norden in an Evolving World" (ReNEW), a university research hub that aims at developing path-breaking research on the Nordic region against the background of an increasingly challenging global context. Editorial assistance was funded by the Department of Public and International Law and the Research Group Welfare, Rights and Discrimination (VERDI) at the Faculty of Law in Oslo. PluriCourts – Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order – at the Faculty of Law in Oslo provided a three months research scholarship for the main editor of the book, Anne Hellum.

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Oslo/Gothenburg 8 March 2023
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Vibeke Blaker Strand is a professor at the Department of Public and International Law within the Faculty of Law of the University of Oslo, Norway. She is the elected vice-dean for research at the Faculty of Law for 2020–2023. Since 2022, she has been the chair of the Faculty of Law's Board for Equality and Diversity. In 2017–2020, she was leader of the faculty's research group on Welfare, Rights and Discrimination (VERDI). She has been teaching on the topic of equality and non-discrimination law for almost two decades. Her research interests are connected to individual and group rights, discrimination, equality, diversity, and freedom of religion and belief. She is interested in legal methodology, the implementation and application of European and international

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Eva-Maria Svensson is a professor at the Department of Law within the School of Business, Economics, and Law of the University of Gothenburg, Sweden. She was the director of the Centre for Interdisciplinary Gender Research at the University of Gothenburg between 2012 and 2017, and deputy head of the Department of Law between 2018 and 2021. Her research interests are feminist legal studies, legal philosophy and theory, freedom of expression, and ageing. She teaches equality and anti-discrimination law and legal theory. She is a co-editor of several books published by Ashgate that bring together feminist legal scholars from the Nordic countries, along with special issues published in the *Nordic Journal of Law and Society*. She is the co-author (with Åsa Gunnarsson) of the textbooks *Rättsdogmatik* [Legal Dogmatics] (Studentlitteratur 2023) and *Genusrättsvetenskap* [Gender Legal Studies] (Studentlitteratur 2009). A second edition of the latter, with two additional authors (Jannice Käll and Wanna Svedberg) was published in August 2018.



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Introduction

Nordic gender equality and anti-discrimination laws in the throes of change

Anne Hellum, Ingunn Ikdahl, Vibeke Blaker Strand, Åsa Gunnarsson, and Eva-Maria Svensson

I.1 The Nordic gender equality model: The role of law and policy

This book provides insights into the drive to achieve substantive gender equality in four Nordic countries: Finland, Iceland, Norway and Sweden. It draws a diverse and complex picture of the long, uneven, and unfinished process towards that goal. These countries' systematic use of a combination of political and legal instruments has been described as the *Nordic gender equality model*.¹ The overall aim of such an approach is to achieve substantive equality through a variety of measures that go beyond formal equality.² Laws and policies on gender equality vary with the political, social and legal context in each of the Nordic countries, but the Nordic gender equality model may be understood as consisting of three key components. The first is an overarching gender equality policy. The second is welfare legislation that has an explicit or implicit impact on gender relations. The third component is what we refer to as 'gender equality and anti-discrimination law regimes': laws that prohibit gender discrimination and promote gender equality through proactive measures, in combination with low-threshold enforcement systems.³

The aim of this book is to offer a legal-scholarly analysis of the relationship between the aim of substantive equality and the Nordic gender equality model. With a focus on the role of the gender equality and anti-discrimination law regimes in each country, the four country studies describe and discuss the relationships between this model's three different components in a changing national and international legal, political, cultural, and economic landscape. The overall questions addressed by the book are: What potential and limitations do the gender equality and anti-discrimination law regimes in these countries have in relation to combating individual discrimination and structural inequality? Can these regimes function as a driver of political, legal, economic, cultural, and social change and as a

1 Mari Teigen and Hege Skjeie, 'The Nordic Gender Equality Model' in Oddbjørn Knutsen (ed), *The Nordic Models in Political Science: Challenged but Still Viable?* (Fagbokforlaget 2017).

2 The different aspects of the concept of equality are addressed in Sections I.4 and I.5 of this introductory chapter.

3 The gender equality and anti-discrimination law regimes of all of the Nordic countries include special enforcement systems that can be accessed free of charge. These special enforcement systems constitute a low-threshold alternative to the ordinary courts.

corrective mechanism to laws, policies, and practices that uphold existing inequalities and, if so, to what extent?

The background to the book is the long history of efforts to combat inequality caused by social, economic and cultural structures in the Nordic welfare states.⁴ The Nordic states are known for the wide range of policies and programmes that, since the middle of the 20th century, have been adopted to ensure the provision of health services, education and economic safety for all, regardless of socioeconomic background and gender. In the 1970s and 1980s, the Nordic countries were among the first in the world to enact general gender equality and anti-discrimination laws with low-threshold enforcement mechanisms as an alternative to the ordinary courts. They also played an active role in the drafting of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁵ The Nordic countries have achieved the highest levels of gender equality in the world and have been ranked at the top of the World Economic Forum's Global Gender Gap indexes since the benchmarking started in 2006.⁶

The empirical starting point for the book is that, despite these wide-reaching gains, not least the success of laws and policies that promote women's ability to combine participation in working life with family life, none of the Nordic countries have succeeded in closing the gender gap. While the national parliaments of all of the Nordic countries are relatively close to being gender-balanced, power relations remain far from equal.⁷ Although women and men in the Nordic region are close to equality in terms of levels of education and employment, only a few percent of women hold a management position or own their own business. However, owing to the introduction of gender quotas, Iceland and Norway have come close to achieving gender balance on the boards of public limited companies and publicly owned companies.⁸ While the percentage of women in full-time work has increased, there is still a considerable pay gap between women and men in full-time employment in the Nordic region.⁹ Although the proportion of parental leave taken by fathers has grown steadily, women still take on a larger share of unpaid care work and housework than men. Regardless of measures to enhance women's ability to combine full-time employment with family life, most part-time workers and persons with minimum pensions are women. Furthermore, gendered violence hampers women's

4 Kari Melby, Anna-Birte Ravn, and Christina Carlsson Wetterberg, *Gender Equality and Welfare Politics in Scandinavia: The Limits of Political Ambition?* (Bristol University Press 2009).

5 See Cecilia Bailliet, 'A Nordic Approach to Promoting Women's Rights within International Law: Internal v. External Perspectives' (2016) 85(4) *Nordic Journal of International Law* 368.

6 See World Economic Forum, *Global Gender Gap Report 2022* <<https://www.weforum.org/reports/global-gender-gap-report-2022/>> accessed 11 January 2023.

7 Nordic Co-operation, 'Influence and Power', 4 March 2022 <<https://www.norden.org/en/statistics/influence-and-power>> accessed 16 November 2022.

8 For more details, see the individual country chapters.

9 Nordic Statistics Database, <<https://www.nordicstatistics.org/areas/nordic-gender-equality-indicators/>> accessed 16 November 2022; Nordic Council of Ministers, 'Nordic Gender Equality in Figures' <<http://norden.diva-portal.org/smash/get/diva2:1573533/FULLTEXT02.pdf>> accessed 16 November 2022.

rights to participation, education, and work.¹⁰ Last but not least, there are significant social and economic differences between different groups of women. Groups such as elderly women, single mothers, disabled women and women belonging to ethnic, sexual, and gender minorities are in particularly vulnerable situations.

The legal context of the book is the interaction among Nordic, European, and international equality and anti-discrimination law. The Nordic gender equality and anti-discrimination laws that were enacted in the 1970s and 1980s were way ahead of international law at the time. The Nordic countries also played an important role as promoters of women's rights and gender equality in international arenas like the United Nations. In spite of this legacy, the gender equality and anti-discrimination law regimes of the Nordic countries are struggling to keep up with the dynamic legal developments within EU/EEA law and international human rights law.¹¹ In the attempt to do so, Nordic gender equality and anti-discrimination laws, along with their enforcement systems, have undergone a series of reforms since the turn of the millennium.¹² Rather than looking at Nordic gender equality and anti-discrimination law regimes in isolation, the contributions in this book situate the legal development and transformative potential of gender equality and anti-discrimination laws in the four selected Nordic countries within a changing European and international legal landscape.

With a focus on the gains that have been made, the remaining gaps and the new challenges in a changing Nordic, European, and international political and legal context, the authors in this book explore how the various gender equality and anti-discrimination law regimes have evolved in each of the four countries examined. Towards this end, they analyse the relationship between, on the one hand, the dynamic development of the individual protection standards and structural obligations of public and private actors and, on the other, the way in which rights and duties are made accessible, enforced and sanctioned. This holistic and systemic approach was adopted as a way of exploring the potential and limitations of the gender equality and anti-discrimination law regimes in terms of their ability to promote substantive equality.¹³

10 Luka de Laat and Julia Hampel, 'The Nordic Paradox: Violence against Women in "Gender-Equal" Societies' *The Perspective* (n.d.) <<https://www.theperspective.se/2022/04/26/article/the-nordic-paradox-violence-against-women-in-gender-equal-societies/>> accessed 16 November 2022.

11 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 Women', in Eirinn Larsen, Inger Skjelsbæk and Sigrun Marie Moss (eds), *Gender Equality and Nation Branding in the Nordic Region* (Routledge 2021); Anne Hellum, 'Making Space and Giving Voice: The 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); Kevät Nousiainen and Merja Pentikäinen, 'Rise and Fall of the CEDAW in Finland: Time to Reclaim Its Impetus', in Hellum and Aasen, *Women's Human Rights*.

12 See the individual country chapters.

13 This approach draws inspiration from the framework adopted in Anne Hellum and Vibeke Blaker Strand, *Likestillings- og diskrimineringsrett* [Equality and Anti-discrimination Law] (Gyldendal 2022) Chapter 1.

In their analyses, the authors draw on a mixture of theoretical, legal, and empirical sources. The analysis stands on the shoulders of a large body of feminist legal research from the different Nordic countries that, from the 1970s up to the present time, has engaged with the strengths and weaknesses of the Nordic welfare states' legal approach to gender equality.¹⁴ To show how the different gender equality and anti-discrimination law regimes have evolved over time, the authors draw on national, European, and international legal sources. To situate the legal developments described within a broader political context, they rely on the vast body of research on gender equality and law and politics in the Nordic countries. To describe how the normative protection standards are translated into practice, the authors look into the ways in which the prohibition on gender discrimination and the duty to promote gender equality through proactive measures are enforced by the courts and the low-threshold enforcement systems in each country.

1.2 Contemporary legal, economic, and sociocultural challenges

The Nordic welfare states are in the throes of social, cultural, economic, political, and legal change. Nordic scholarship on women, gender equality, and law provides a rich and diverse, but fragmented, picture of the ways in which the Nordic gender equality model, with its three key components, is evolving in interaction with such trends.

Since the 1970s, the potential and limitations of international and European gender equality and anti-discrimination law has been a debated issue in Nordic scholarship on women, gender, equality and law.¹⁵ On the one hand, the dynamic development in international and European law might be seen as strengthening national gender equality and anti-discrimination law as a tool of legal, social and economic change.¹⁶ On the other hand, an increased focus on law at the expense

14 The anthology *På vei. Kjønn og rett i Norden* addresses the role of gender equality and anti-discrimination law, welfare law and criminal law; see Eva Maria Svensson, Ulrika Anderson, Hage Brækhus, Monica Burman, Anne Hellum, Stine Jørgensen, and Anu Pylkkänen (eds), *På vei. Kjønn og rett i Norden* [On the Way: Gender and Law in the Nordic Countries] (Makadam forlag 2011).

15 Early works in the field of women, gender equality, and law emphasized the limitations of the Nordic gender equality and anti-discrimination law regimes; see Tove Stang Dahl, Kjersti Graver, Anne Hellum, and Anne Robberstad, *Juss og juks: En arbeidsbok i likestilling* [Law and Deceit] (Pax 1976); Tove Stang Dahl (ed), *Kvinnerett I and Kvinnerett II* [Women's Law] (Universitetsforlaget 1985); Kevät Nousiainen, Åsa Gunnarsson, Karin Lundström, and Johanna Niemi-Kiesiläinen (eds), *Responsible Selves: Women in the Nordic Legal Culture* (Ashgate 2001); Svensson and others (n 14).

16 In the anthology *Scandinavian Women's Law in the 21st Century*, the transformative potential of international law, particularly EU law's strong protection against gender discrimination in the labour market and the CEDAW Convention's holistic approach, calling for legal, socioeconomic and cultural measures in the public and private sphere, is highlighted; see Ruth Nielsen, 'The Impact of EU Law on Scandinavian Law in Matters of Equality' in Ruth Nielsen and Christian Tvarnø (eds), *Scandinavian Women's Law in the 21st Century* (DJØF Publishing 2012); Anne Hellum, 'CEDAW and the Discipline of Women's Law: Continuity and Change in the Understanding of Gender and Law', in Nielsen and Tvarnø, *Scandinavian Women's Law in the 21st Century*.

of welfare policies, along with the transition from the broad and holistic Nordic model to a more narrow, individualized, and legalistic approach, might be seen as weakening the gender equality ambition.¹⁷ This book is the first systematic attempt to analyse the potential and limitations of the constantly evolving gender equality and anti-discrimination law regimes in the Nordic countries.

The authors in this book are deeply concerned about the remaining gender gaps in the countries they examine and how they may be related to weaknesses in their gender equality and anti-discrimination law regimes. An overall concern regarding the transformative potential of these legal regimes is the disjuncture between strengthened normative protection standards and the lack of accessible and effectively sanctioned enforcement systems. The country chapters demonstrate how the various enforcement systems, intended to serve as low-threshold alternatives to ordinary courts, have, to a large extent, failed to ensure access to justice in discrimination cases. Furthermore, several of the chapters also show how the perpetuation of the pay gap is closely linked to a lack of effective enforcement of the equal pay provisions in the existing gender equality and anti-discrimination laws. As the authors point out, the wider context of the gender pay gap is the longstanding conflict between gender equality and anti-discrimination law's equal pay provisions and the power of employers, trade unions and governments (the 'social partners') to negotiate collective wage contracts.¹⁸

The Nordic countries are increasingly culturally diverse. As a result, equality and anti-discrimination law has become, in the Nordics as elsewhere in the world, a burgeoning field of law that deals with discrimination on a wide range of grounds, such as gender, race, disability, religion, sexuality and gender identity.¹⁹ While gender is the core topic of this book, our approach focuses on the relationship between different groups of women and men. We explore the different ways in which gender equality and anti-discrimination law respond to the social, cultural, and religious pluralism that is today challenging Nordic ideas of cultural sameness as a precondition for equality. Key questions in this context concern how discrimination caused by intersecting discrimination grounds (such as gender, ethnicity, religion, sexual

17 Both the potentials and the pitfalls of relying on equality and non-discrimination laws as frameworks for policymaking and adjudication aimed at combating disadvantage are elaborated on in Ingunn Ik Dahl and Vibeke Blaker Strand, 'Responding to Disadvantage and Inequality through Law' (2017) 4(3) *Oslo Law Review* 124 <<https://doi.org/10.18261/issn.2387-3299-2017-03-01>> accessed 16 February 2023; see also Åsa Gunnarsson and Eva-Maria Svensson, 'Gender Equality in the Swedish Welfare State' (2012) 2(1) *feminist@law* <<https://gup.ub.gu.se/file/93377>> accessed 27 February 2023.

18 Lena Svenaeus, *Konsten att upprätthålla löneskillnader mellan kvinnor och män. En rättsociologisk studie av regler i lag och avtal om lika lön* [The Art of Preserving the Gender Pay Gap] (Lund University 2017), 199. The tense relationship between EU law's strong protection against discrimination in working life and the 'Swedish labour model', which leaves the regulation of labour relations to agreements between the social partners, is described in Laura Carlson, *Searching for Equality* (Iustus 2007).

19 For an overview of Nordic equality and anti-discrimination law, see Laura Carlson (ed), *Equality* (Scandinavian Studies in Law, Stockholm Institute for Scandinavian Law 2022).

orientation, or gender identity) and conflicts between different rights, such as the right to gender equality and the right to religion, are handled.

Finally, the book explores the future challenges that the changing economic and political climate poses for gender equality. Attacks on gender equality ideals from different right-wing populist groups spark questions about how gender equality and anti-discrimination law should respond. A related question is how the gender equality and anti-discrimination law regimes of the Nordic countries are influenced by political trends that call for less regulation and control. A central theme here is the question of how robust international and national gender equality and anti-discrimination law is when it comes to resisting political and economic reforms that seek either to privilege individualist and retroactive measures or to weaken proactive measures that set out to change social, cultural and economic structures.²⁰

I.3 ‘Women’, ‘sex’, and ‘gender’ in equality and anti-discrimination law

‘Women’, ‘sex’, and ‘gender’ are key concepts in Nordic and international equality and anti-discrimination law. It is through these terms that the person who is the subject of discrimination law is constructed. In gender equality and anti-discrimination law theory, a distinction is made among women-specific, gender-specific, and gender-neutral instruments.

I.3.1 The subject of discrimination law: Women, sex, and gender

The concepts ‘women’, ‘sex’, and ‘gender’ illustrate the close relationship between law and social science. Social science research has emphasized the distinction between ‘sex’ and ‘gender’. ‘Sex’ is used to refer to the biological categories ‘women’ and ‘men’, while ‘gender’ sees ‘women’ and ‘men’ as socially constructed categories. This change in the way we think about the human being is, as we will show below, making its mark on international and national equality and anti-discrimination law.

The basic legal principle of equality before the law is manifest in a number of international instruments that, according to the wording of the particular text, prohibit discrimination on the basis of personal characteristics such as religion, race, age, or sex. Interpretations of the legal term ‘sex’, however, are not exclusively based on a biological view. In their interpretations of the term ‘sex’, international courts and human rights treaty bodies have used a social understanding that includes gender, sexual orientation and gender identity.

20 In Section I.5.4, we provide an overview of the discussion on the disjunctures between, on the one hand, the individual protection standards and the duties to take active measures to combat structural inequalities and, on the other, international standards requiring accessible enforcement systems with power to hear cases, grant remedies, and impose sanctions.

The terms ‘sex’ and ‘gender’, which were introduced by gender studies in the Nordic countries in the 1980s, are making their way into Nordic gender equality and anti-discrimination laws. As the individual country chapters show, however, the terms ‘sex’ and ‘gender’ do not sit well with the Nordic languages, which have various terms for these categories. The Norwegian term *kjønn*, for example, covers both gender and sex. In contrast, the Finnish language does not have a term for gender, while the term *sukupuoli* refers to biological sex. In terms of pronouns, Finnish is gender neutral, with *hän* meaning both ‘she’ and ‘he’. Icelandic, on the other hand, is a highly gendered language. In general, the masculine forms of adjectives, numerals and pronouns are used for the ‘neutral’ gender. In addition, the word ‘man’ (Icelandic: *maður*), which is a masculine noun, is used, on the one hand, to mean the species *homo sapiens* – that is, human beings – and on the other to mean a male person, which has the effect that many women and non-binary/genderqueer people do not identify with the word. In Icelandic laws, the individual concerned is generally referred to as ‘a man’. In Swedish, the term *kön* refers to biological sex, while ‘gender’ (or, in Swedish, *genus*) has become a term for a variety of categories and also a non-binary concept. Specific to the Swedish context is that the term *genus* is also an analytical concept used to capture how society is organized in power hierarchies based on sex.

In this introduction, we use the term ‘gender’ as an overall category, while the term ‘sex’ is used in the context of legislation that explicitly uses that term.

1.3.2 Women-specific and gender-neutral legal designs

Today, a broad range of international, regional and national laws and policies address discrimination on the basis of sex and gender. However, whether they adopt a woman-specific or a gender-neutral approach varies.

Most international human rights instruments take a gender-neutral and symmetrical approach by prohibiting discrimination against both women and men. Such instruments assume that the unequal distribution of power and resources between women and men can either be in disfavour of women or in disfavour of men.

In contrast, the CEDAW Convention, which prohibits ‘all forms of discrimination against women’, takes a woman-specific and asymmetrical approach. It was developed on the basis of global research showing that women have less power and fewer resources than men. The framers of the Convention were concerned about continued discrimination against women, which the gender-neutral and symmetrical character of the existing international covenants on human rights did not adequately address.²¹

As the country chapters show, the Nordic countries emphasize the need for legislation that applies equally to both women and men. In their input to the framing

21 Along similar lines, recent international policies, such as the 2030 Agenda for Sustainable Development, also have a women-specific focus, while the overall goal is both to achieve gender equality and to empower women and girls.

of the CEDAW Convention, they promoted the ideal of a gender-neutral family model, in which both men and women work outside the home and share responsibilities for care and housework at home.²² Sweden prompted the preambular Paragraph 14: ‘Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women’.²³ Denmark, Finland, and Norway followed Sweden in terms of recognizing ‘the role of both parents in the family and the upbringing of children’.²⁴ Emphasizing this perspective, Sweden stated that ‘true equality between men and women could not be introduced by means of measures dealing exclusively with women: some measures aiming to bring about changes in the traditional role of men would be required’.²⁵ The Nordic countries thus supplemented the CEDAW Convention’s woman-specific prohibition on discrimination with a gender-neutral conception of equality.

In spite of the common views regarding the aim of the CEDAW Convention, there are, as the chapters in this book show, considerable differences in how the gender equality laws and policies of the Nordic countries balance gender-neutral and women-specific approaches. The Swedish and Finnish legislations take a gender-neutral approach. Icelandic legislation is moving back towards gender neutrality. Norwegian legislation, which explicitly aims at ‘improving the position of women’, seeks to combine both a gender-neutral and a woman-specific approach. There is thus a contentious relationship between the CEDAW Convention’s woman-specific and asymmetrical approach and the design of gender equality and anti-discrimination law in the Nordic countries.²⁶

I.4 Substantive equality in the making: A Nordic perspective

Substantive equality is the aim of both international and Nordic equality and anti-discrimination law. It is an evolving concept that calls for measures that address both individual instances of discrimination and structural manifestations of inequality.²⁷

The concept of substantive equality has a special place in the Nordic context. Inequality was and is still considered incompatible with Nordic ideals of equality

22 Our discussion here is based on the detailed analysis of Nordic contribution to the drafting of the CEDAW in Bailliet (n 5), 371–373.

23 L. A. Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff 1993) 40.

24 *Ibid.*

25 *Ibid.*, 41.

26 For an overview of such contestations, see Anne Hellum, ‘Not So Exceptional after All?’ (n 11).

27 There are different theoretical approaches to substantive equality. An important one is Sandra Fredman’s four-dimensional concept of substantive equality, which integrates four aims: redistribution, recognition (respect for dignity and worth), transformation (accommodating diversity and aiming at structural change), and participation; see Sandra Fredman, *Discrimination Law* (Oxford 2011), 25; Sandra Fredman, ‘Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights’ (2016) 16(2) *Human Rights Law Review* 273.

and justice.²⁸ The Nordic states are known for the wide range of policies and programmes that gradually have been put in place to ensure health services, education and economic safety for all, regardless of socioeconomic background and gender. According to the Finnish legal historian Anu Pylkkänen, the Nordic welfare states' attempts to eliminate social and economic inequality through the eradication of 'social hierarchies' and the redistribution of 'social resources' have been far more effective than measures aimed at counteracting discrimination against individuals.²⁹

The *Nordic gender equality model*, which is closely interwoven with the fabric of the Nordic welfare state, is thus based on a sense of social justice that goes beyond the notion of formal equality. Its overall ambition is to achieve substantive equality by combating gender inequality that can be caused both by individual acts and by social, economic and cultural structures. Through a combination of three elements – gender policy, welfare legislation, and gender equality and anti-discrimination law – it sets out to change the unequal distribution of power and resources between women and men. Substantive equality is thus promoted by means of a mixture of legal, sociopolitical, and transformative elements.

The Nordic countries' endeavour to eliminate social and economic inequalities through policy and law has also left its mark on human rights law and EU/EEA law. Nordic scholarship on social, economic and cultural rights has, for example, contributed to developing the duties of states to respect, protect and fulfil their human rights obligations.³⁰ The duty to 'fulfil' such obligations implies that it is not sufficient that a state party bans discrimination: it must also take appropriate steps to ensure that measures to change structural inequality are adopted. In its input to the drafting of the CEDAW Convention's provision on state obligations, Denmark emphasized that legislative measures should not be the only means adopted to achieve the aim of equality: such means should also include measures like information and education campaigns.³¹ This echoes the holistic approach of the Nordic equality model. The Nordic emphasis on promoting democratic and legitimate decision-making – as in, for example, Norway's adoption of corporate

28 Åsa Gunnarsson and Eva-Maria Svensson, 'Special Issue Introduction – Gender Equality in the Arctic and the North: Socio-legal and Geopolitical Challenges' (2017) 1(1–2) *Nordic Journal on Law and Society* 6; Eva-Maria Svensson, 'Special Issue: Exploiting Justice in a Transformative Swedish Society' (2020) 3(2) *Nordic Journal on Law and Society* 1 <<https://journals.ub.umu.se/index.php/njolas/article/download/192/178/855>> accessed 26 January 2023.

29 Anu Pylkkänen, *Trapped in Equality: Women as Legal Persons in the Modernisation of Finnish Law* (Suomalaisen Kijallisuuden Seura/Finnish Literature Society 2009).

30 This conceptual framework was first developed by Asbjørn Eide in 'The Right to Adequate Food as a Human Right', Report of the Special Rapporteur on the Right to Food, E/CN.4/Sub.2/1987/23. The strong Nordic commitment regarding the development of social and economic human rights law is manifest in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1st edn, Brill 1995).

31 L. A. Rehof (n 23) and Bailliet (n 5), 371–373.

gender quotas – has been a central inspiration in the debates on whether other European states or the European Union should adopt such measures.³²

In recent decades, international and European gender equality and anti-discrimination law has been subject to rapid and dynamic change. Equality, as defined by the jurisprudence of the CEDAW Committee, comprises three levels of ambitions: formal equality (*de jure* equality), substantive quality (*de facto* equality, including equality of opportunities and equality of outcome), and transformative equality (elimination of gender stereotypes embedded in legal, social and cultural structures).³³ In contrast to the three-pronged approach of the CEDAW Convention, EU/EEA law's main aim is to promote equality of opportunities by means of strong protection against direct and indirect discrimination.

Increasingly, international human rights law and EU/EEA law are calling for wider protection categories, stronger protection standards and more effective enforcement systems. A fundamental question in this book is whether and to what extent these changing international and European requirements are affecting the transformative potential of the gender equality and anti-discrimination law regimes of the Nordic countries at a time when progressive gender equality policy and social and economic rights are increasingly under pressure.

The various chapters of this book do not provide a simple answer to this question. What they reveal is a complex non-linear dynamic, where Nordic law is sometimes ahead of, sometimes in line with and sometimes behind the developments in European and international law. The country chapters demonstrate how reforms aimed at bringing Nordic law into line with the standards of international law can represent one step forward and one step back. An example of this can be seen in how the adoption of EU/EEA law's equal pay regulations has been blocked by the social partners in the labour market in countries like Sweden and Finland. Another example is how the adoption of EU/EEA law has strengthened the protection against direct and indirect discrimination but, at the same time, weakened efforts to combat structural inequality through affirmative action.

1.5 Substantive equality at the interface: International and Nordic law

1.5.1 The status of EU/EEA law and human rights in the Nordics

In this book, we explore how the interaction among Nordic, European, and human rights law shapes the promotion of substantive equality.³⁴

32 Éléonore Lépinard and Ruth Rubio-Marín, 'Introduction: Completing the Unfinished Task? Gender Quotas and the Ongoing Struggle for Women's Empowerment in Europe' in Éléonore Lépinard and Ruth Rubio-Marín (eds), *Transforming Gender Citizenship: The Irresistible Rise of Gender Quotas in Europe* (Cambridge University Press 2018); Directive (EU) 2022/2381 of 23 November 2022 on Improving the Gender Balance Among Directors of Listed Companies and Related Measures.

33 Rikki Holtmaat, 'The CEDAW: A Holistic Approach to Women's Equality and Freedom', in Hellum and Aasen, *Women's Human Rights* (n 11).

34 How Nordic gender equality policies have been europeanized is analyzed in Catrine Holst, Helge Skjeie, and Mari Teigen (eds) *Europeisering av nordisk likestillingspolitikk* [The Europeanization of Nordic Gender Equality Policy] (Gyldendal 2019).

Our discussion of substantive equality addresses the following questions: How do the standards of protection against discrimination in the Nordic countries respond to women's and men's (and different groups of women and men's) experiences of inequality, vulnerability, and harm? Do these standards address both *de jure* and *de facto* discrimination and inequality caused by social, economic, and cultural structures and, if so, to what extent? And to what extent are the individual and structural standards of protection followed up through an accessible and effectively sanctioned enforcement apparatus?

With a focus on these questions, this book explores how the rapidly evolving gender equality and anti-discrimination standards embedded in human rights law and EU/EEA law are affecting the transformative potential of the Nordic gender equality and anti-discrimination law regimes. All of the Nordic countries have ratified a series of human rights conventions that ban discrimination.³⁵ Accordingly, they are obliged to respect, protect and fulfil the right to protection against discrimination on the basis of sex, race, nationality, religion, sexual orientation, gender identity, disability, and age, or a combination of grounds. As members of the European Union, Finland and Sweden are bound by the Treaty on European Union (TEU) Articles 2 and 3(3)(2) and Treaty on the Functioning of the European Union (TFEU) Article 8, which defines equality between men and women as a fundamental principle, as well as by the EU's gender equality directives. Norway and Iceland are members of the Agreement on the European Economic Area (EEA) and have therefore undertaken to comply with the provisions of Article 69 of the Convention on the European Economic Area on equal pay for equal work and Article 70 on promoting the principle of equal treatment for men and women. This implies that the four Nordic countries in this study are largely bound by the same EU directives in the field of gender equality and anti-discrimination law. Of particular importance are Directive 2006/54/EC (the Recast Gender Equality Directive) and Directive 2004/113/EC (the Goods and Services Directive).

1.5.2 Difference, diversity, and intersectionality

How the design of gender equality and anti-discrimination law should best be approached in order to adequately address women's and men's and different groups of women and men's different experiences of inequality, vulnerability, and harm is a debated issue in the Nordic countries.³⁶ The country chapters in this book address three aspects of this broad theme: Should gender equality and anti-discrimination law be given a gender-neutral or a women-specific design? How

35 The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR); the International Convention on Civil and Political Rights of 1966 (ICCPR); the International Convention on Economic, Social and Cultural Rights of 1966 (ICESCR); and the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW).

36 A comparison between the different designs of the Nordic gender equality and anti-discrimination laws is found in Anne Hellum, 'Gender Equality in the Nordics' in Carlson, *Equality* (n 19).

should discrimination on the basis of gender and other grounds (intersectionality) be handled? How should gender equality and anti-discrimination law respond to gendered harms?

1.5.2.1 The gender-neutrality question

The Nordic gender equality and anti-discrimination laws are, with some exceptions, gender-neutral. This reflects the Nordic countries' calls for measures to change the roles of both women and men. The CEDAW Convention, which sets out to eliminate all forms of discrimination against 'women', assumes that a gender-neutral approach is insufficient for changing the unequal distribution of power and resources between women and men.³⁷ Acknowledging the continued asymmetric distribution of resources and power in the Nordic countries, the country chapters describe and discuss how gender equality and anti-discrimination legislation strikes, and should strike, a balance between women-specific and gender-neutral language. A characteristic feature of the Swedish and Finnish legislations are their gender-neutral designs. The Icelandic and Norwegian legislators have, in response to the women's movement and feminist politicians, adopted designs that, in varying degrees, constitute a mixture of woman-specific and gender-neutral elements.

1.5.2.2 The intersectionality question

A related theme is how gender equality and anti-discrimination law can recognize inequality and vulnerability resulting from combinations of gender and other discrimination grounds, such as race, religion, sexual orientation, gender identity and disability. Unlike the EU's Recast Gender Equality Directive, the CEDAW Convention requires legal protection against discrimination on a combination of grounds (i.e., intersectional discrimination). The CEDAW Committee has stated in its General Recommendation no. 28:

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.³⁸

37 Andrew Byrnes, 'CEDAW Article 1' in Marsha Freeman, Christin Chinkin, and Beate Rudolf (eds), *CEDAW Commentary* (Oxford University Press 2012).

38 CEDAW Committee, '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' (2010) para 18.

The country chapters show the different ways in which the Nordic gender equality and anti-discrimination laws have been adjusted to the changing sociocultural and international legal landscape. The gender equality and anti-discrimination laws in Finland and Sweden lack protection against intersectional discrimination. In Norway and Iceland, the legislation includes an explicit prohibition on intersectional discrimination.

1.5.2.3 The gendered harm question

Different groups of women (and men) can experience harm that hampers their ability to exercise fundamental rights, such as freedom of movement, and to achieve social, economic, and political rights. How gender equality and anti-discrimination law can recognize such gendered harm is a central issue in political and legal debates in the Nordic countries, as elsewhere in the world.

The CEDAW Convention's recognition of violence against women as a gender equality issue was a legal milestone that prompted changes in human rights law, EU law, and Nordic law.³⁹ For example, the EU's Recast Gender Equality Directive defines sexual harassment as an issue of 'damage to gender equality and dignity'.⁴⁰

The country chapters show how the CEDAW Convention and EU/EEA law have prompted reforms that, in various ways, recognize gendered violence and sexual harassment as a gender equality and anti-discrimination law issue. They describe and discuss problems associated with providing adequate protection against these forms of gendered harms under equality and anti-discrimination law.

1.5.3 Individual inequality: Direct and indirect discrimination

As has already been pointed out, the Nordic legal systems are predominantly gender-neutral. A recurrent question regarding the aim of substantive gender equality is how to cope with situations where gender-neutral laws and practices have different effects for women and men because of their different roles in reproduction, family life, and working life.

EU law has responded to challenges associated with the complex relationship between gender-neutral laws and gendered realities, particularly through dynamic interpretation of the EU's gender equality directives by the Court of Justice of the European Union (CJEU). By strengthening the protection against direct and indirect discrimination, it has been a driver of change with regard to the promotion of equality of opportunity.

39 CEDAW Committee, 'General Recommendation No. 19: Violence against Women' (1992); CEDAW Committee, 'General Recommendation No. 35: On Gender-Based Violence against Women, Updating General Recommendation No. 19' (2017).

40 The Preamble (para 6) to the Recast Gender Equality Directive (2006/54/EC) states that 'harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive'.

Article 2(a) of the Recast Gender Equality 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’.⁴¹ In response to the extensive discrimination against pregnant women, the directive lays down that ‘unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex’.⁴²

Article 2(b) of the directive defines as *indirect* discrimination 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’.⁴³

With its strong protection against direct and indirect discrimination, EU/EEA law has prompted law reform in all of the Nordic countries. While all of the Nordic states have amended their gender equality and anti-discrimination laws to bring them into line with the EU directives, there remain considerable variations that are discussed in the chapters on each country.

1.5.4 Structural/systemic inequality: Proactive duties and affirmative action

Laws and policies that promote equality of outcome have a long tradition in the Nordic welfare states. In addition to banning individual acts of discrimination, Swedish, Finnish, Icelandic, and Norwegian gender equality and anti-discrimination legislation imposes duties to prevent discrimination and promote equality on public authorities, educational institutions and public and private employers.

The transformative ambition of the Nordic gender equality acts sits well with human rights instruments like the International Convention on Economic, Social and Cultural Rights (ICESCR) and the CEDAW Convention, which oblige states to respect, protect and fulfil social and economic rights without discrimination. Like the Nordic gender equality and anti-discrimination acts, these instruments emphasize the need to change social, cultural, and economic structures that maintain or create inequalities. In its General Comment no. 20 on discrimination, the ICESCR Committee gives the following definition of systemic discrimination:

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

41 Council Directive (2006/54/EC), the Recast Gender Equality Directive.

42 The strong protection against pregnancy-related discrimination was developed through CJEU case law; see Case C-109/00, *Tele Danmark A/S v. Handels- og Kontorfunktionærenes Forbund i Danmark* (HK) (2001).

43 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).

or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups.⁴⁴

To promote equality of outcome, the Nordic gender equality and anti-discrimination laws that were enacted in the 1970s and 1980s allowed the use of affirmative action in education, working life and public life. The CJEU, however, has interpreted EU law's strong protection against direct discrimination in working life and vocational training as limiting the use of affirmative action to promote gender equality.⁴⁵ As a result, the use of affirmative action is limited to situations where the merits of a candidate belonging to the under-represented sex are equivalent or substantially equivalent to those of a competitor from the opposite sex.⁴⁶ What consequences this limitation has for education in general is not clear.⁴⁷ As the chapters in this book show, interventions by the CJEU and the EFTA Court have made their mark on the Nordic gender equality and anti-discrimination laws and policies with regard to affirmative action. There are, however, differences between the Nordic countries in their interpretations of the limitations stemming from EU/EEA law.

In the Nordic countries, gender equal representation is seen as a question of democratic and legitimate decision-making. Such a view has formed the basis for laws and policies that require gender balance in various areas of public and economic life.⁴⁸ Such efforts to enhance gender equal participation in public and economic life – an objective that is outside the scope of the Recast Gender Equality Directive – have not been subject to interventions by the CJEU. Economic life is, thus, an example of an area where the Nordics, particularly Norway and Iceland, have been ahead of EU/EEA law. In 2022, after ten years of negotiations, the EU adopted a directive on gender balance in corporate boards, which seeks to improve the gender balance in corporate decision-making positions in the EU's largest listed companies.⁴⁹

44 UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (2009) para 12.

45 See Ann Numhauser-Henning, 'Sweden: 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 no. 57, Kluwer Law International 2006).

46 See CJEU Case C-407/98, *Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist* (2000) paras 60–62. Other examples of cases dealing with affirmative action are C-450/93, *Eckhard Kalanke v. Freie Hansestadt Bremen* (1995); Case C-409/95, *Hellmut Marschall v. Land Nordrhein-Westfalen* (1997); Case C-158/97, *Georg Badeck v- Hessische Ministerpräsident und Landesanwalt beim Staatsgerichtshof des Landes Hessen* (2000).

47 The CJEU has not directly dealt with this question.

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

49 EU Directive 2022/2382 of the European Parliament and of the Council of 23 November 2022 on Improving the Gender Balance among Directors of Listed Companies and Related Measures.

1.5.5 Access to effectively sanctioned enforcement

The Nordic countries were among the first in the world to introduce low-threshold institutions as an alternative to ordinary courts in cases concerning discrimination. The aim of these institutions, composed of equality ombudsmen and discrimination tribunals, was to promote access to justice. However, the disjuncture between the widened and strengthened normative protection standards and the limited competences of these low-threshold enforcement systems is, as shown by the country chapters, a recurrent theme in Nordic political and legal debates on gender equality.

In this book, we consider substantive justice in the light of the relationship between the normative protection standards and the systems set up to enforce them. We argue that prohibitions against individual discrimination and duties to take active measures to combat structural inequalities must be accompanied by an accessible enforcement system with power to hear cases, grant remedies, and impose sanctions. This view builds on developments in international and European equality and anti-discrimination law.⁵⁰

In its General Recommendation on Access to Justice, the CEDAW Committee calls for ‘justiciability, availability, accessibility, good-quality, accountability of justice systems, and the provision of remedies for victims’.⁵¹ First, enforcement systems must be made available and accessible, through measures such as the provision of legal information, legal advice, and legal aid.⁵² Second, the enforcement system must have power to consider the full range of individual protection standards and the duties to prevent discrimination and promote equality.⁵³ Third, the enforcement system must have power to handle cases where the gender equality principle comes into conflict with other laws.⁵⁴ Fourth, the enforcement system must have the power to award remedies and sanction breaches.⁵⁵ The requirement of an effectively sanctioned enforcement system is also firmly embedded in the EU’s Recast Gender Equality Directive, which obliges states to ensure that a victim of discrimination has access to a court or an independent administrative agency that has the power to deal with the complaint and award compensation.⁵⁶

The transformative potential of the Nordic gender equality and anti-discrimination law regimes is, as demonstrated by the country chapters, hampered by a lack of effective sanctions for breach of the individual protection standards and the proactive duties. In Norway and Iceland, individuals have the right to make a complaint to a discrimination tribunal. However, this right is, in practice, curtailed by

50 European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to Access to Justice* (2016) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2016-handbook-on-access-to-justice_en.pdf> accessed 22 February 2023.

51 CEDAW Committee, ‘General Recommendation No. 33 on Women’s Access to Justice’ (2015) para 14.

52 CEDAW Committee, ‘General Recommendation No. 28’ (2010) para 34.

53 CEDAW Committee, ‘General Recommendation No. 33’ (2015) para 13(d).

54 *Ibid.*, para 33.

55 *Ibid.*, para 13(e).

56 Recast Gender Equality Directive (2006/54/EC) Articles 17(1) and 18.

several factors, including lack of free legal aid in discrimination cases. In Sweden and Finland, where the equality ombuds decide whether a complaint from a victim of discrimination should go forward, most individual complaints are not heard. The provisions establishing the duty of public authorities and public and private employers to document their work to combat discriminatory structures are challenged in all the Nordic countries. Furthermore, the equality ombuds of the different Nordic countries have been reluctant to use their power to take cases concerning breaches of the proactive duties to the discrimination tribunals.

The potential of the Nordic gender equality and anti-discrimination regimes to serve as a corrective mechanism in situations where other laws come into conflict with the gender equality principle is also limited. Since they are constituted as administrative agencies, the low-threshold mechanisms (tribunals) lack power to adjudicate such cases. While the ordinary courts have such powers, they have often been slow and reluctant to respond to the challenges posed by the 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. How the emphasis on the will of the legislature may limit the judicial route to strengthened protection against discrimination is illustrated by the country chapters.

I.6 The structure of the book

It is challenging to come to grips with both similarities and differences regarding the history, legal design, and political context of the Nordic gender equality model, in general, and the various gender equality and anti-discrimination law regimes, in particular. To allow for comparison regarding the transformative potential and limitations of the Nordic gender equality and anti-discrimination law regimes, each of the chapters in this book is divided into three parts.

Part I of each chapter focuses on six issues that we see as key. These are: the historical background of the Nordic gender equality model and the Nordic gender equality and anti-discrimination law regimes; the relationship between law and policy; the relationship between international, European, and national gender equality and anti-discrimination law; the relationship between gender and other discrimination grounds, such as ethnicity and religion; the relationship between individual and structural dimensions of discrimination; and the accessibility and effectiveness of the enforcement system. With a focus on these overall themes, each chapter describes how law reform in the field of gender equality and anti-discrimination law has been and continues to be debated among different actors, such as political parties; women's rights organizations; scholars in the field of women, gender, equality, and law; social partners; and the equality ombuds.

Part II of each chapter provides in-depth analysis of specific themes in each country. The themes were selected on the basis of their relevance for understanding how gender equality and anti-discrimination law responds to historical and current challenges in each country. Central themes are the weaknesses of the gender equality and anti-discrimination regimes in relation to the gender pay gap and gendered

harms, such as gendered violence and sexual harassment. There are also success stories, such as how the Norwegian ombud and tribunal developed their country's jurisprudence regarding indirect and intersectional discrimination in response to immigrant women's claims for accommodation of diversity.

Part III of each chapter contains reflections from each country, thus providing a basis for understanding the potential and limitations of the gender equality and anti-discrimination law regimes of the Nordic countries in relation to the promotion of substantive equality in times of political, economic and cultural change. A common observation is that the disjuncture between the strong normative protection standards and the weak enforcement systems in these regimes hampers their potential to change social, economic, political, and cultural structures that cause individual and structural inequality and to serve as a corrective mechanism to laws, policies and practices that uphold existing inequalities. One of the main contributions of this book is thus the understanding of enforcement mechanisms as a key element of substantive equality.

Finally, we emphasize the need for a broad perspective that examines the dynamic relationship between gender policies, laws that have a bearing on the situation of different groups of women and men, and gender equality and anti-discrimination law regimes. Gender equality and anti-discrimination legislation does establish a safety net for individuals and groups that may function as an important tool for change. However, such legislation can never replace the ambition and role of the welfare state to promote equal living conditions and the well-being of all citizens. The Nordic countries' progress towards a more equal distribution of resources and power between different groups of women and men is, as shown by the chapters in this book, closely intertwined with general social and economic welfare reforms. To continue to promote equality of opportunity for all in times of change, general political, social, and economic rights must be infused with the aim of substantive gender equality, both by the legislature and by the judiciary. What such infusion entails more specifically, is closely examined in the case studies in the chapters of this book.

Even if we in the Nordic countries see tendencies of resistance, setbacks, and paradoxes, we wish to conclude by acknowledging the many achievements that have taken place over a span of 50 years. The combination of gender policies, welfare law, and gender equality and anti-discrimination law, including specialized enforcement systems, forms an 'infrastructure' for gender equality. This infrastructure provides an enduring frame for societal debates, brings awareness to issues of gender equality, and gives hope that the socioeconomic progress towards the achievement of gender equality in the four Nordic countries will continue.

1 Sweden

From proactive policies to anti-discrimination law

*Åsa Gunnarsson, Lena Svenaeus, and
Eva-Maria Svensson*

1.1 Introduction

Along with the other Nordic countries, Sweden is considered around the world as a role model and a forerunner for gender equality, and the country scores high in global gender gap indexes. The high scoring of the Nordic countries indicates that the Nordic way of striving for gender equality has been successful in a global perspective. Gender equality is an essential element of the Nordic welfare state model, interwoven with and dependent on general welfare measures that shape everyday life for individuals and the organization of society.

A comprehensive, progressive and firmly institutionalized gender equality policy is a key characteristic of the Swedish model. The policy is based on a structural understanding of gender equality, which means that gender equality is perceived as a system produced and reproduced on three levels: the individual, the societal, and the symbolic (or cultural). The theoretical ground for Sweden's gender equality policy, which was adopted by the government at the beginning of the 1990s, is the gender system theory. This theory has shaped a normative path for governmental statements, strategies, and reforms since that time. Even though the focus of the policy and the measures that have been adopted have varied over time, Swedish gender equality policy since the 1990s has viewed the core problem as a matter of unequally shared power between women and men. As a result, the current overarching goal of Sweden's national gender equality policy, announced in 2006, is that women and men should have the same power to shape society and their own lives.

Organized as a distinct policy area, Sweden's comprehensive gender equality policy covers all other policy fields and has been followed up with explicit and extensive legislation to promote gender equality. The legislation covers a broad variety of spheres, both public and private, and it consists of constitutional provisions, anti-discrimination legislation that includes provisions on active measures (Swedish: *aktiva åtgärder*), and a variety of substantive gender equality laws, all aimed at promoting gender equality and providing various social and economic rights. Women's participation in the labour market has been a priority issue, the goal in this context being to enable women to be self-supporting and thus able to make their own decisions. Social and economic rights, such as rights to paid parental leave and affordable childcare, are also important elements of the policy.

Several legal reforms of Sweden's tax and social security systems during the 1970s actively supported this direction. The 1990s saw the enactment of several new laws that addressed the structures of substantive unequal relationships between women and men that had been identified with the help of the gender system theory, for example, through the prohibition of the purchase of sexual services and the creation of a new crime addressing men's violence against women.

Anti-discrimination legislation, primarily directed towards the protection of individuals, forms just part of the comprehensive and progressive measures that have been adopted in Sweden in order to achieve gender equality. The framing of such legislation has changed over time, moving from only addressing equality between women and men to addressing discrimination on several grounds. Swedish legislation uses *kön*, the Swedish word for sex, when it refers to women and men. We will therefore use 'sex' when we refer to the Swedish legislation, and 'gender' when we address gender equality policies and equality between women and men in general terms. 'Gender' is similar to the Swedish concept *genus* used in the theory that forms the normative basis for the policy area. Sweden's anti-discrimination legislation combines prohibitions on discrimination with binding rules that require proactive work in order to prevent discrimination. And it builds on the assumption that these two sets of rules support and cross-fertilize each other.

To sum up, to understand Swedish gender equality, it is necessary to adopt a wide perspective. The measures taken to improve gender equality must be seen within a broader context of policy and law. In Part 1 of this chapter, we will provide an overview of Sweden's gender equality policy before turning to the country's anti-discrimination legislation, including relevant constitutional provisions. After that, we will present some of the pieces of legislation that are viewed as essential for the achievement of gender equality but are not part of Sweden's anti-discrimination legislation. Typical for this legislation is that it is closely intertwined with the welfare state model. We have included legislative initiatives until 1 July 2022.

Despite the high ratings given to gender equality in Sweden in international comparisons and its ambitious gender equality policy and extensive legislation aimed at promoting gender equality and eliminating discrimination, many challenges remain. Statistics provide a rather depressing picture of gender-related socioeconomic inequalities in the country. Gender gaps persist in areas such as unpaid work, income, old age security, poverty, and wealth. In Part 2 of the chapter, we will focus on three issues of current concern. First, we will discuss the deficiencies of the enforcement system established under the Discrimination Act as a question of lack of access to justice. Second, we will address the blind spots in the active measures regarding equal pay. Third, we will address the debate on and critique of the gender equality project as a whole, which has become increasingly prominent in Swedish society.

In Part 3, the final part of the chapter, we will conclude with some analysis of and reflections on how we interpret the changing landscape of policy and legal strategies on gender equality in Sweden. We identify achievements, but also challenges that remain, particularly in relation to discriminatory practices related to

women's work. We end with some comments on the new wave of critique of Swedish welfare state feminism.

Part 1: Swedish gender equality policy and law

1.2 A comprehensive and progressive gender equality policy integrated with the welfare state

Together with the other Nordic countries, Sweden is internationally considered a role model and a forerunner for gender equality.¹ The Swedish gender equality model² has both similarities with and differences from what is called the Nordic³ or Scandinavian⁴ model of gender equality. Common is that gender equality is considered an essential element of the distinct Nordic or Scandinavian welfare state model.⁵ Sweden is considered to have the most institutionalized gender equality policy of all of the Nordic countries.⁶ One characteristic of the Nordic welfare state model has been captured with concepts such as 'state feminism' and 'the woman-friendly welfare state'.⁷ The model is rooted in the active state-driven promotion of the advancement of women's interests, which means that gender equality is interwoven with and dependent on general welfare measures that shape the everyday life of individuals and the organization of society. In this welfare state context, gender equality is thus about dimensions such as redistribution, recognition, and representation.⁸

Women's fight for equal opportunities became an integral part of the Swedish welfare state project at an early stage. A key early initiative was the combined strategy of promoting legal reforms that assisted women to be self-supporting and, at least in theory, enabling both parents to combine work and family life. The 1938 report of a government commission on women's participation in the labour

- 1 Kari Melby, Anna-Birte Ravn, and Christina Carlsson Wetterberg, *Gender Equality and Welfare Politics in Scandinavia: The Limits of Political Ambition?* (Bristol University Press 2009).
- 2 Eva-Maria Svensson and Åsa Gunnarsson, 'Gender Equality in the Swedish Welfare State' (2012) 2(1) *feminists@law* <<https://journals.kent.ac.uk/index.php/feministsatlaw/issue/view/5>> accessed 25 October 2022.
- 3 Mari Teigen and Hege Skjeie, 'The Nordic Gender Equality Model' in Oddbjørn Knutsen (ed), *The Nordic Models in Political Science: Challenged but Still Viable?* (Fagbokforlaget 2017).
- 4 Anette Borchorst and Birte Siim, 'Woman-Friendly Policies and State Feminism: Theorizing Scandinavian Gender Equality' (2008) 9(2) *Feminist Theory* 207.
- 5 Diane Sainsbury, *Gender, Equality and Welfare States* (Cambridge University Press 1996); Diane Sainsbury (ed), *Gender and Welfare State Regimes* (Oxford University Press 1999).
- 6 Anette Borchorst, Lenita Freidenvall, Johanna Kantola, Liza Reisel, and Mari Teigen, 'Institutionalizing Intersectionality in the Nordic Countries: Anti-discrimination and Equality in Denmark, Finland, Norway and Sweden' in Andrea Krizsan, Hege Skjeie, and Judith Squires (eds), *Institutionalizing Intersectionality: The Changing Nature of European Equality Regimes* (Palgrave Macmillan 2012), 60.
- 7 Helga Hernes, 'The Welfare State Citizenship of Scandinavian Women' in Helga Hernes (ed), *Welfare State and Women Power: Essays in State Feminism* (Norwegian University Press 1987); Borchorst and Siim (n 4).
- 8 Borchorst and Siim (n 4).

market, under the lead of Alva Myrdal, paved the way for future legal reforms to implement the strategy.⁹ Another important cornerstone, which initiated a series of radical tax and social reforms, was an intense debate on women's rights in the 1960s–1970s, which was driven by the women's movement.¹⁰ In 1972, under the influence of a campaign from the Social Democratic Women's League, the prime minister and chair of the Social Democratic party, Olof Palme, launched the political concept of *jämställdhet*. This concept made a distinction between general equality for all groups in society and the particular equality between women and men. Gender equality policies subsequently became institutionalized as an official area of governmental policy.¹¹

The goal of promoting equality between women and men has also been a major concern in many Swedish welfare reforms. The most women-friendly social regimes are those with a universal profile. Flat-rate benefits, such as child allowances and free health and care services for children, have a significant redistributive effect in favour of women.¹² The idea of workfare lies at the core of Swedish social security laws. In the Swedish context, the meaning of 'workfare' emphasizes the significance of work for the achievement of economic independence and the right to social security. Under Sweden's workfare-based policy, women and men are regarded as self-supporting individuals who rely primarily on earned income, which fits together with a dual income-earner family ideology. The combination strategy aimed to further encourage women to participate in the labour market, while enabling married women to combine paid work with family life. The abolition of joint taxation, together with progressive social reforms such as the introduction of publicly financed day-care for children and sex-neutral parental leave, also proved to be valuable additional incentives. Similarly, the sex-neutral parental leave reform, coupled with generous parental leave insurance, was designed to encourage fathers and mothers to share responsibility for their children on equal terms.¹³

9 SOU [Swedish Government Official Reports] 1938:47 'Betänkande angående gift kvinnas förvärvsarbete m.m' [Report on Married Women's Paid Work etc.].

10 Christina Florin and Bengt Nilsson, 'Något som liknar en oblodig revolution': *Jämställdhetens politisering under 1960- och 70-talen* [Something That Resembles a Nonviolent Revolution: The Politicization of Gender Equality during the 1960s and 1970s] (Umeå Universitet 2000); Christina Bergqvist, Per Adman, and Ann-Cathrine Jungar, *Kön och politik* [Sex and Politics] (SNS 2008).

11 Åsa Gunnarsson, *Fördelningen av familjens skatter och sociala förmåner* [The Distribution of Taxes and Social Benefits in the Family] (Iustus Förlag AB 2003); Åsa Gunnarsson, Monica Burman, and Lena Wennberg, 'Economic Dependence and Self-Support in Family, Tax and Social Law' in Eva-Maria Svensson, Anu Pylkkänen, and Johanna Niemi-Kiesiläinen (eds), *Nordic Equality at a Crossroads: Feminist Legal Studies Coping with Difference* (Ashgate 2004); Anu Pylkkänen, *Trapped in Equality: Women as Legal Persons in the Modernisation of Finnish Law* (Finnish Literature Society 2009).

12 Sainsbury, *Gender, Equality and Welfare States and Gender and Welfare State Regimes* (n 5).

13 Gunnarsson, Burman, and Wennberg (n 11); Åsa Gunnarsson, 'Gender Equality and the Diversity of Rights and Obligations' in Åsa Gunnarsson, Eva-Maria Svensson, and Margaret Davies (eds), *Exploiting the Limits of Law: Swedish Feminisms and the Challenge to Pessimism* (Ashgate 2007).

But policies have been changing since the 1990s. According to Anu Pylkkänen, there has been a move away from the understanding of equality between women and men as an issue of redistribution,¹⁴ towards a view of it as a question of recognition, owing to the increasing influence of a human rights discourse that emphasizes the importance of the latter.¹⁵ Accordingly, liberal tendencies have been growing in importance, partly at the cost of the Nordic redistributive goal.¹⁶

1.2.1 Recognition of the gendered dimension of power

The workfare ideal that permeates Sweden's social security laws and other legislation, according to which women and men are expected to be equally self-supporting individuals, may end up preserving inequalities between women and men owing to the fact that the living conditions of women are often less favourable than those of men. Gender inequality thus becomes merely a problem suffered by females. The so-called female dilemma, being both the source and the solution of the inequality problem, was addressed in 1990 in the report of a government commission on democracy and power. In this report, the gender system theory was used to provide an analysis of the relationship between power and the social constructions of gender, which, in this context, means women and men.¹⁷ During the following decade, gender equality policy underwent a paradigmatic shift, in which the focus of the analysis of the power relations between genders switched from individuals to structures.¹⁸ The historian Yvonne Hirdman, who introduced the gender system theory into the commission report, explained the contemporary relationship between women and men as a social system that reflects the division of power and responsibilities. She also showed how the power relationship had been structured over time within the Swedish welfare state. This system theory was later thoroughly applied by the Government Bill on Gender Equality Policy,¹⁹ and it has since shaped a normative path for all governmental statements, strategies, and reforms. Hirdman's gender system theory has similarities with Nancy Fraser's social gender justice theory and Sandra Fredman's four-dimensional concept of substantive equality, incorporating Fraser's concept of social gender justice, particularly the dimensions of recognition and participation.²⁰

14 See also Jessica Lindvert, *Feminism som politik: Sverige och Australien 1960–1990* [Feminism as Policy: Sweden and Australia 1960–1990] (Boréa Bokförlag 2002).

15 Anu Pylkkänen, 'Transformation of the Nordic Model: From Welfare Politics to Gendered Rights' (2007) 19(2) *Canadian Journal of Women and the Law* 335.

16 Pylkkänen (n 11), 201–212.

17 Yvonne Hirdman, 'Genussystemet' [The Gender System] in SOU [Swedish Government Official Reports] 1990: 44 *Demokrati och Makt i Sverige* [Democracy and Power in Sweden].

18 Svensson and Gunnarsson (n 2).

19 Prop. [Swedish Government Bill] 1993/94:147 'Jämställdhetspolitiken: Delad makt – delat ansvar' [Gender Equality Policy: Shared Power – Shared Responsibility].

20 Sandra Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16 *Human Rights Law Review* 273; Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (Verso 2003).

The two main elements derived from the gender system theory are the separation of women and men and the superior position of men, also termed the male norm. The notion of separation assumes that there are two genders, women and men, which are perceived as either male or female and as each other's opposites. The separation is both horizontal, when women and men appear in different professions and sectors, and vertical, when men tend to be considered the norm and are valued more highly. These two elements lead to a weaker social, economic, and political position in society for women. Accordingly, the pursuit of gender equality involves an attempt to transform this structural order.²¹

Even though the structural understanding of the relationship between power and the social constructions of gender has formed the rhetorical basis for official policy in Sweden since 1994, the focus of the measures that have been adopted has varied over time. The theory forms the background to the current overarching goal of Sweden's national gender equality policy, which was introduced in 2006.²² This is that women and men should have the same power to shape society and their own lives, and the structural understanding of gender inequality advanced in the gender system theory was explicitly acknowledged in the preparatory works for this policy.²³ Related to the overarching goal are six subgoals that concern gender equality in relation to the specific issues of power and influence, economy and paid work, health, education, unpaid domestic work, and bodily integrity.²⁴

1.2.2 *The strategy of institutionalization*

Gender mainstreaming is Sweden's strategy for achieving its gender equality policy objectives. This approach was introduced in Sweden in 1994, even before it was adopted as a global strategy at the Women's Conference in Beijing in 1995.²⁵ Officially, mainstreaming of gender equality policy is to take place within every field of political policy, including foreign policy. Since 2013, the Swedish government has funded a number of initiatives to gather experiences and develop knowledge and methods for the ongoing gender equality work in a gender-mainstreaming supervision programme called *Jämställdhetsintegrering i myndigheter* (JiM). During the current period of initiatives, 2020–2025, the aim is to improve

21 Regeringens skrivelse [Swedish Government Communication] 2016/17:10 'Makt, mål och myndighet – Feministisk politik för en jämställd framtid' [Power, Goal and Authority: A Feminist Policy for a Gender Equal Future], 65.

22 SOU [Swedish Government Official Reports] 2005:66 'Makt att forma samhället och sitt eget liv – Jämställdhetspolitiken mot nya mål' [Power to Form the Society and One's Own Life: Gender Equality Policy towards New Goals].

23 Prop. 1993/94:147 (n 19); Prop. [Swedish Government Bill] 2005/06:155 'Makt att forma samhället och sitt eget liv – Nya mål i jämställdhetspolitiken' [Power to Form the Society and One's Own Life: New Goals in Gender Equality Policy]; Regeringens skrivelse 2016/17:10 (n 21).

24 Prop. 2005/06: 155 (n 22); SOU [Swedish Government Official Reports] 2015:86 'Mål och myndighet – En effektiv styrning av jämställdhetspolitiken' [Goals and Authority: An Efficient Governance of Gender Equality Policy].

25 Prop. 1993/94:147 (n 19).

the goals and activities of public authorities in relation to the integration of gender mainstreaming in society.²⁶

In 2018, the Swedish Gender Equality Agency was established to further the coordination and integration of the overarching gender equality goal and the six subgoals, as well as to meet the need for a more permanent organization that could facilitate improved coordination of the national strategy and a targeted action programme to prevent and combat men's violence against women. The Agency's tasks are to support and coordinate the integration of gender equality within other public authorities and to evaluate the implementation of the integration and actions taken. Providing grants and contributing to knowledge development and information on gender equality issues also form parts of the Agency's responsibilities. All of the projects established under the JiM programme are now also supported by the Agency.²⁷

The work of the Agency requires close cooperation with other government agencies, municipalities, county councils, regions, and civil society. However, the establishment of the Gender Equality Agency has been the subject of some debate. It was first proposed by an inquiry in 2006,²⁸ but plans to establish it at that time were set aside when the Social Democratic government lost power in the following election. The proposal was raised again and finally implemented when the Social Democrats returned to power. However, as the green–red coalition had only a very weak majority during its last term of office, the right-wing liberal–conservative opposition managed to secure a majority vote for its 2019 budget proposal, which cut the funding for the Agency by half, based on a plan to close the Agency.²⁹

Sweden has applied gender budgeting since the early 2000s, both as a tool in the budget process and as an important instrument for the gender mainstreaming process. The approach is used as a way of assessing whether budget decisions are in line with Sweden's gender equality goals. The importance of gender budgeting was first recognized in the 2004 budget, when it was argued that a budget that can identify where economic equality is lacking both in the market and in the public economy is key for a gender equal society.³⁰ Since 2004, the impact of public benefit transfers to compensate for low market incomes by improving women's disposable income has been reported on and evaluated yearly in an appendix to the government's budget bills on economic gender equality. The reports show that social transfers on a yearly basis narrow the income gap between women and men.³¹

26 Regeringskansliet (Government Office), Jämställdhetsintegrering [Gender Mainstreaming] <<https://www.regeringen.se/regeringens-politik/jamstalldhet/jamstalldhetsintegrering/>> accessed 25 January 2023.

27 SOU 2015:86 (n 24).

28 SOU 2005:66 (n 22).

29 Rskr. [Swedish Parliament Communication] 2018/19:106.

30 Prop. [Swedish Government Bill] 2003/04:1 'Budgetpropositionen för 2004. Bilaga 4. Fördelningen av ekonomiska resurser mellan kvinnor och män' [Government Budget for 2004. Appendix 4. Distribution of Economic Resources between Women And Men].

31 Åsa Gunnarsson, 'Genus- och jämställdhetsperspektiv på skatterätten' [Gender and Gender Equality Perspective on Tax Law] (2019) *Juridisk Publikation 2*.

1.2.3 The challenge of persistent socioeconomic gender gaps and inequalities

Despite its annual high ranking in the Global Gender Gap Index,³² Sweden still has some gender equality gaps to close. The most persistent of these seem to be related to socioeconomic inequalities, and some of those gaps are even getting wider. Gender has an impact on economic conditions over a person's entire life span. Women have lower average incomes from work, are employed to a lesser extent, work fewer hours on average when they are employed and have lower average hourly pay than men. How the present pay gap should be measured has been the subject of debate. Surveys of the gender pay gap have failed to capture the structural problem of how female-dominated work is generally valued less highly than non-female-dominated work. Men's salaries from employment are higher than those of women, which can be explained in terms of both direct and indirect discriminatory practices in working life. Inequality in salaries is in turn mirrored in pension gender gaps.³³

Another large socioeconomic gender gap is related to capital and wealth. There is considerable inequality in the distribution of ownership of capital, property, and other wealth-generating assets. The gender gaps are large over the whole spectrum, from savings and ownership in the small household economy to stocks in listed corporates, intellectual property rights, land rights, and other large capital investments.³⁴ The lower level of women's capital and wealth leads inevitably to a lower share of capital gains and income, which is clearly visible in the fact that women's capital incomes have stagnated at a level of around 50% of the capital incomes of men since the mid-1990s.³⁵

The business sector is full of gender equality gaps and stereotypes, at various levels. The situation in Sweden is not much different from the international situation. At the global level, business ownership and leadership are dominated by men. The bulk of women's entrepreneurship takes the form of livelihood businesses that very seldom develop into expanding and innovation-driven companies. Figures from the end of 2017 showed that only 4% of total stock value was privately owned by women,³⁶ and only 25% of limited companies were owned by women.³⁷

1.3 Anti-discrimination and promotion of equal opportunities between women and men

Swedish anti-discrimination legislation consists of: first, the anti-discrimination principle expressed in the Swedish Constitution, in the Treaty on European

32 World Economic Forum 2022.

33 SOU [Swedish Government Official Reports] 2022:4 'Minska gapet. Åtgärder för jämställda livs-inkomster' [Reduce the Gap: Measures for Gender Equal Lifetime Income].

34 *Who Owns Sweden? A Benchmark on Ownership in Sweden* (Ownership 2019).

35 SOU [Swedish Government Official Reports] 2019:65 'Långtidsutredningen 2019, Huvudbetänkande' [Long-Term Survey 2019].

36 Ownership (n 34).

37 *Skattesystemets utveckling 2006–2015* [The Development of the Tax System 2006–2015] (Skatteverket 2018) 27.

Union (TEU), and in international human rights treaties that Sweden is obliged to follow; and, second, the Discrimination Act and other related acts that have a primary focus on protecting individuals from being treated less favourably than others. Sweden's anti-discrimination legislation combines prohibitions on discrimination on the individual level with binding rules that require proactive work to change patterns that are discriminatory in order to achieve substantive equality on a collective level. There is no clear line between the country's formal anti-discrimination legislation and the requirements for active measures to promote substantive gender equality. These two sets of rules are expected to support and cross-fertilize each other. However, when they come into conflict and a decision needs to be taken on whether the principle of equality between women and men should be interpreted in either a formal or a substantive way, the former approach tends to override the latter. In Subsection 1.3.2.1, we will give an example – the 'Tham professors' case – of such a conflict between the formal and substantive interpretations of the principle of equality between women and men.

1.3.1 Constitutional principles on non-discrimination and substantive gender equality

The general anti-discrimination principle is expressed in Article 2 of Chapter 1 of the Instrument of Government (IG), which is one of the four pieces of legislation that make up the Swedish Constitution. Here, sex is declared as one of a number of protected grounds, along with sexual orientation and a variety of other factors regarding the individual as a person. Exceptions to the general anti-discrimination principle, according to which no act of law or other provision may imply the unfavourable treatment of anyone on grounds of sex, are set out in Article 13 of Chapter 2. It is possible to treat women and men differently or even unfavourably if a provision forms part of efforts to promote equality between women and men or concerns compulsory military service or other equivalent official duties. Thus, the prohibition of discrimination on the grounds of sex is linked to a principle legitimizing active measures to promote gender equality. The latter is formulated as an exception to the general, formal, principle on discrimination against women or men.

It is important to note that the regulations in the IG do not have the character of binding rules. However, they can be used as grounds for interpretation in the application of other regulations. This is also the case for all international conventions that Sweden has ratified, except for the European Convention on Human Rights and the Convention on the Rights of the Child. These two conventions have been incorporated into Swedish law and accordingly are binding.

As a member of the EU since 1995, Sweden is obliged to follow EU law. The gender equality principle expressed in Article 3 of the TEU is articulated as a substantive principle of equality. In the Swedish Constitution, however, the principle of equality of the sexes is still formulated in a formal manner and thus has not been fully brought into line with the equality regulations of the TEU. Criticism of

this formal approach has been voiced both within Sweden³⁸ and internationally.³⁹ As part of a review of the Swedish Constitution in a government inquiry, a report was produced that applied a gender perspective to the IG.⁴⁰ This report proposed that an explicit substantive gender equality principle should be included in the Constitution.⁴¹ Unfortunately, the only action taken in response to the report was to amend the language used in the Constitution to make it sex-neutral.

Even though it has retained the formal principle in the text of its Constitution, Sweden, like all members of the EU, is obliged to follow the substantive, or *de facto*, gender equality principle. In addition, taken together, the body of Swedish regulation that seeks to promote gender equality goes further than what is enabled by the formal principle of equality. The legislation embodies a mixture of anti-discriminatory and equal opportunity regulations, aimed at promoting substantive gender equality.

Despite the criticism mentioned above, the Swedish government seems to consider that Sweden is in full compliance with the obligations that accompanied its ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which are set out in Article 2 of that agreement. The anti-discrimination principle, along with the obligation for states to include the principle of equality between women and men in their constitutions or other legislation, have counterparts in the Swedish Constitution. However, unlike in CEDAW, the main anti-discrimination principle in the Swedish Constitution is still sex-neutral. The CEDAW Committee has repeatedly criticized Sweden over the fact that CEDAW seems to be ignored in the Swedish judicial system. In the Concluding Observations to the most recent periodic reports of Sweden,⁴² the Committee noted that it remains concerned that the provisions of the Convention, the Optional Protocol thereto, and the Committee's general recommendations are not sufficiently known in Sweden, including by women themselves. The Committee also noted that it was concerned about the continued lack of references to the Convention in court decisions. This was despite the fact that the Committee had noted the state party's efforts to disseminate the Convention, including by awarding grants for

38 CEDAW-nätverket Sveriges Kvinnolobby 2021, *Kvinnor i Sverige 2021: En granskning av hur Sverige lever upp till kvinnokonventionen* [Women in Sweden 2021: An Investigation into How Sweden Lives Up to the CEDAW Convention] <<https://fn.se/stockholm/wp-content/uploads/sites/32/2021/03/Kvinnor-i-Sverige-2021.pdf>> accessed 26 October 2022.

39 In its concluding comments on Sweden's seventh periodic report, which was followed up by a combined eighth and ninth report, 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 and, as a result, are not directly applicable in the national courts; see CEDAW/C/SWE/CO/7; CEDAW/C/SWE/CO/8-9 14.

40 SOU [Swedish Government Official Reports] 2007:67 'Regeringsformen ur ett könsperspektiv' [The Instrument of Government from a Sex Perspective].

41 SOU [Swedish Government Official Reports] 2008:125 'En reformerad grundlag' [A Reformed Constitution]; Prop. [Swedish Government Bill] 2009/10:80 'En reformerad grundlag' [A Reformed Constitution].

42 CEDAW/C/SWE/CO/8-9, 4 (n 39).

relevant projects to international and nongovernmental organizations. The same concerns had been raised earlier in a recommendation that the Swedish government conduct a thorough gender-sensitive review of all four of the acts that make up its Constitution.⁴³ So far, the Swedish government has not followed up on this recommendation.

1.3.2 Legislation on sex discrimination and equal opportunities

The first legislation on discrimination and equal opportunities for women and men came into force in 1980. This was the Equal Opportunities Act,⁴⁴ which was passed by the Swedish parliament in 1979 and only applied to working life.⁴⁵ It is interesting to note that Sweden ratified the CEDAW Convention on the day after the enactment of the Equal Opportunities Act. In the ratification document, it was explicitly stated that ‘Swedish ratification has limited practical importance’, but it was seen as urgent to ratify it in an international perspective.⁴⁶

The women-specific focus in CEDAW was considered problematic. The responsible minister expressed regret ‘that the new instrument almost exclusively addresses women’. CEDAW should have concerned sex/gender discrimination in general and not (only) discrimination against women, according to the minister.⁴⁷

This first piece of legislation on sex discrimination was regarded as an unwelcome interference with the established division of power between the state and the so-called social partners. It had long been the practice that national central employer organizations and national central labour union organizations collaborated to decide wages and other important labour market issues through collective agreements.

The Equal Opportunities Act, which introduced two new authorities, the Equal Opportunities Ombudsman and the Equality Board, contained three sets of provisions. The first, which dealt with the prohibition of sex discrimination, targeted discrimination at the individual level in connection with recruitment, wages, notices of termination, dismissals, transfers, and staff management. The second set of provisions covered active measures to promote sex equality at the workplace and addressed structural discriminatory practices. An example of an active measure was the following rule: ‘Where the distribution between men and women at a

43 CEDAW/C/SWE/CO/7, 3, and 2 (n 39).

44 Lag (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet [The Equal Opportunities Act].

45 For a short presentation and an appendix with the legal text, see Lena Svenaeus, ‘The Position of Women in Labor Law and Social Security’ (1982) 5(4) *Comparative Labor Law* 411.

46 SÖ [Sweden’s Agreements with Foreign Powers] 1980:8 Konvention om all slags diskriminering av kvinnor [Convention on the Elimination of All Forms of Discrimination against Women].

47 See Lars Lunning, Olof Bergqvist, and Reidunn Laurén, *Jämställdhet i arbetslivet. Kommentar till den nya lagstiftningen* [Equal Opportunities in Working Life: A Commentary on the New Legislation] (Publica 1980), 28–29; Lena Svenaeus, *Konsten att upprätthålla löneskillnader mellan kvinnor och män. En rättssociologisk studie av regler i lag och avtal om lika lön* [The Art of Preserving the Gender Pay Gap] (Lund University 2017), 199.

workplace is generally uneven in a certain type of work or within a certain staff category, the employer shall make special efforts when recruiting new staff to attract applications from the under-represented sex and seek to ensure that the proportion of employees of that sex is gradually increased'.⁴⁸ Important to note here is that the employer had the option of using preferential treatment to increase the number of under-represented sex among employees.

The third set concerned provisions related to supervision, sanctions such as damages and invalidity, and legal proceedings. Both the prohibitions on discrimination and the duties for employers to take active measures to promote sex equality were binding rules and regarded as equally important. The idea was that anti-discrimination and preventive active measures would interact and thus contribute to stimulating a positive development.

To satisfy demands from the employer organizations and the unions, the provisions on active measures were made 'semi-dispositive', which meant that they could be replaced by collective agreements if the latter were signed by central labour market organizations. A consequence of this arrangement was that the Ombudsman had no authority to supervise active measures in workplaces where such an agreement was in force. Already in 1977, the social partners had made sure that such agreements covered most of the labour market. In summary, it could be said that this first piece of legislation created a strong protective wall against any attack on collective agreements and the established right of employers to recruit staff according to their own discretion and to decide how work should be organized. An illustrative example of this was that the ban on pay discrimination was construed in a way that made it almost impossible to be successful in a dispute on equal pay for equal work or work of equal value.

The Ombudsman could represent an employee seeking damages for discrimination before the Labour Court and, in relation to active measures, could apply to the Equality Board for a conditional fine in order to put pressure on employers to fulfil the legal demands regarding the duty to carry out proactive work to promote gender equality. According to the law, the Ombudsman was primarily to try to impel employers to respect the law voluntarily. This meant that, before making use of the sanction system, the Ombudsman was to seek to use information, deliberations, and similar methods to convince an employer to obey the law. Another of the Ombudsman's responsibilities was to be opinion-forming in equality issues. The task of the Equality Board, which consisted of nine members, was to decide on applications brought by the Ombudsman for the imposition of a conditional fine.

Some of the regulations contained in the act were subsequently strengthened over time. A first thorough examination of how the act had been applied in practice was published ten years after it came into force. The commission responsible for this study emphasized that the prohibition of sex discrimination in the context of both employment and pay ought to be clarified and strengthened to make it more

48 See Section 6 of the act (n 44).

effective.⁴⁹ Among proposed improvements was a prohibition on sexual harassment. Regarding collective agreements on active measures, the commission stated that the wordings of such agreements were often vague and not action-oriented, and that such agreements had not been successful in speeding up the work for equality between women and men in the labour market. To improve the work on achieving gender equality, the commission proposed the addition of a regulation stipulating that collective agreements had to be in accordance with the level of ambition in the act. If they failed to reach that level, the agreements would be invalid.⁵⁰

In 1992, a revised Equal Opportunities Act came into force. Among important changes were a new provision declaring that the primary aim of the act was to improve conditions for women and the establishment of an obligation for employers with ten or more employees to draw up an annual equality plan. A limited regulation on prohibiting sexual harassment was introduced, as well as a duty for employers to make it possible for both women and men to combine employment and parenthood.⁵¹ In their equality plans, employers were to provide an account of how goal-oriented activities in line with the prescriptions on active measures had been carried out. In 1995, a regulation regarding collective agreements was added, addressing the critique raised in the 1990 inquiry. It stipulated that an employer could not evade the obligations regarding active measures through agreements. As a consequence, the Equality Ombudsman could now fully supervise the work on active measures in the labour market. In parallel with this extension of the Ombudsman's role, the first regulations on mapping of pay differences between men and women were introduced.⁵²

The Equal Opportunities Act subsequently came to serve as a model for other discrimination acts that were introduced when the legal protection against discrimination was expanded to cover other kinds of discrimination and new authorities were introduced: the Ombudsman against Ethnic Discrimination, the Ombudsman against Discrimination on Grounds of Sexual Orientation, and the Disability Ombudsman. Besides the labour market, other fields of society were gradually included. A Law on Equal Treatment of Students in Higher Education⁵³ came into force in 2002, prohibiting unfair treatment of students on the basis of their sex, ethnicity, religion or other belief system, sexual orientation, or disability.⁵⁴

49 SOU [Swedish Government Official Reports] 1990:41 'Tio år med jämställdhetslagen – Utvärdering och förslag' [Ten Years with the Equal Opportunities Law: Evaluation and Proposals].

50 SOU 1990:41 (n 49), 317–321.

51 Prop. [Swedish Government Bill] 1990/91:113 'Om ny jämställdhetslag' [A New Equal Opportunities Law]. Jämställdhetslag (1991:433) [Equal Opportunities Act of 1992].

52 Prop. 1993/94:147 (n 19), 43–55.

53 Lag (2001:1286) om likabehandling av studenter i högskolan [Act on Equal Treatment in Higher Education].

54 A similar piece of legislation, applicable to schools, which also prohibited victimization, was introduced in 2008; see Lag (2006:67) om förbud mot diskriminering och annan kränkande behandling av barn och elever [Act on Anti-discrimination and Harassment of Children and Students].

Sweden became a member of the European Union in 1995. The EU membership has since had considerable influence on the development of Swedish legislation on gender equality as well as on anti-discrimination prohibitions. EU law on equal pay can be described as the driving force behind the inclusion of a definition of the concept of ‘work of equal value’ in the Equal Opportunities Act in 2001.⁵⁵ A sharpening of the legal obligation to carry out mapping of pay differences took place at the same time. Another example of the EU influence can be seen in the Act on the Prohibition of Discrimination,⁵⁶ which came into force in 2003 as a way of implementing two EU directives: Directive 2000/43/EC of June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin and Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation. This new piece of legislation was intended to provide protection against discrimination connected with ethnicity, religion or other belief system, sexual orientation, and disability. It extended the protection against discrimination to many fields of Swedish society beyond those of the labour market and education. However, protection against discrimination associated with sex was missing. An amendment to address this deficiency came into force in 2005.⁵⁷ It is obvious that EU Directive 2002/73/EC on Equal Treatment in Working Life⁵⁸ played an important role when the discrimination ground regarding sex was finally included in the Act on the Prohibition of Discrimination.

Notwithstanding the efforts to harmonize the Swedish legislation on discrimination, differences remained regarding the level of protection offered. As a result, 20 years after the Equal Opportunities Act came into force, a debate was launched in the parliament and among civil society organizations in which it was emphasized that more had to be done to ensure that Sweden entirely respected EU provisions regarding discrimination law. It was seen as necessary to take a comprehensive approach to the whole field of anti-discrimination legislation and to create an equal level of protection for all discrimination grounds. This was the background to the government’s decision in 2002 to set up a parliamentary committee to investigate and make recommendations on what ought to be done.

55 Prop. [Swedish Government Bill] 1999/2000:143 ‘Ändringar i jämställdhetslagen m.m.’ [Changes in Equal Opportunities Act], with reference to Directive 75/117/EEC of 10 February 1975 on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women (Repealed in 2009) and to case law of the European Court.

56 Lag (2003:307) om förbud mot diskriminering [Act on the Prohibition of Discrimination].

57 Prop. [Swedish Government Bill] 2004/05:147 ‘Ett utvidgat skydd mot könsdiskriminering’ [An Extended Protection Against Sex Discrimination].

58 Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 Amending Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions.

1.3.2.1 An attempt to use affirmative action at Swedish universities

The Higher Education Ordinance⁵⁹ used to include provisions that enabled the use of affirmative action in higher education (Section 15a of Chapter 4). A progressive attempt to implement such affirmative action was taken with the passing of an ordinance to create a number of positions for professors and research assistants⁶⁰ in order to promote gender equality in the university sector. This eventually led to a very famous case at the European Court of Justice (ECJ), known as the Tham professorships case.⁶¹ The background to this case was that progress towards a fairer allocation of teaching posts between women and men had been particularly slow. The Swedish minister of education at the time, Carl Tham, put forward an ordinance that entered into force in 1995. Thirty new professorships were introduced in order to achieve a significant increase in the number of female professors. The provision specified that a candidate who belonged to an under-represented sex and who possessed sufficient qualifications should be granted preference over a candidate of the opposite sex who would otherwise have been chosen where such an approach was necessary to ensure that a candidate of the under-represented sex was appointed. The gap in terms of the candidates' merits, however, could not be so large that it could risk being contradictory to objectivity.

The ordinance obliging the use of affirmative action to improve the rate of employment for the under-represented sex among Swedish university professors eventually came before the ECJ for consideration.⁶² The Court decided that this action did not comply with Article 2(1) and Article 2(4) of Council Directive 76/207/EEC⁶³ and Article 141(4) of the Treaty Establishing the European Community. As a result of the ECJ's decision, the Swedish ordinances were adjusted to bring them into line with the Council Directive, and the special rule on affirmative action was abolished. The Court's decision also made clear that positive discrimination had to be practised in a more restricted way than had been the case up until that point. The Court regarded the Swedish ordinance as discriminatory because it judged it to be coercive to the advantage of women.⁶⁴

It is interesting to note here that even though the aim of the progressive legislation in question was to increase the percentage of female professors in Swedish universities, the outcome was that just one professor (out of 31) was appointed with

59 Högskoleförordningen (1993:100) [Higher Education Ordinance].

60 Förordning (1995:936) om vissa anställningar som professor och forskarassistent i jämställdhetsyfte [Ordinance on Certain Professor and Postdoc Positions Promoting Gender Equality].

61 C-407/98 *Abrahamsson, Anderson och Fogelqvist*.

62 *Ibid.*

63 Council Directive 76/207/EEC of 9 February 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions.

64 C-450/93 *Kalanke v Freie Hansestadt Bremen*; C-409/95 *Marschall v Land Nordrhein- Westfalen*; C-158/97 *Georg Badeck and others*.

the help of affirmative action.⁶⁵ Even though the ECJ established the legality of the possibility of using positive action, it rejected the attempt to do so in a field that obviously needed radical gender equality reforms.⁶⁶

These types of measures have been widely criticized not just in relation to employment contracts but also with regard to educational admissions procedures, both in the EU and in Sweden. Swedish regulations have had to incorporate EU law based on decisions by the ECJ. From this, it follows that preferential treatment under the Discrimination Act is today only permitted when the merits of the relevant candidates are equal or close to equal. The merits and personal qualities of the candidates have to be judged on the basis of objective criteria. Thus, when formal equality, which seeks to address the individual level, clashes with active measures, which seek to address the collective level, the legal system seems to prefer formality.⁶⁷ The prohibition of discrimination and the implementation of active measures to achieve gender equality do not always sit comfortably with each other, and when they come into conflict within the legal system it seems easier to hold to the former than to the latter. This tension between radical active measures and conservative passive guarantees of equal treatment operates at both the national and the international level and is a huge challenge that will need to be overcome if gender equality is ever to be achieved.

Another measure that is closely related to affirmative action is the use of quotas. In the Swedish context, quotas for equal representation in institutions such as corporate boards and public authorities have mostly been a matter of political rhetoric and have not been used as a legislative measure. The political parties have been very keen to put forward (almost) as many women as men for election, and the level of representation of women in Swedish politics is high compared to that in other countries. In other areas, the use of quotas has been more controversial. For example, quotas have been used in the education system, but the possibility of using quotas or affirmative action in the admissions process for higher education has been closed since 1 August 2010.⁶⁸ The most controversial issue today is the use of quotas in the context of the gender composition of corporate boards. Two propositions to use quotas in this context were put forward in 2006 and in 2016 but did not proceed further.⁶⁹ Under EU law, it is not permitted to base quotas automatically on sex. Preferential treatment has to be proportional to the goal of the action, and this normally requires the use of a timeframe and the adoption of less interventionary measures as a first step.⁷⁰

65 Birgitta Jordansson, *'Tham-professorerna': Symboler eller förebilder?* [The Tham Professors: Symbols or Role Models?] (Genus 1999).

66 Åsa Gunnarsson and Eva-Maria Svensson, *Genusrättsvetenskap* [Gender Legal Studies] (Studentlitteratur 2009), 198.

67 *Ibid.*, 64–69.

68 Higher Education Ordinance (n 59) Chapter 7, Section 12.

69 Ds 2006:11 [Ministry Communication] 'Könsfördelning i bolagsstyrelser' [Gender Composition in Corporate Boards]. Ds 2016:32 [Ministry Communication] 'Jämn könsfördelning i bolagsstyrelser' [Equal Gender Composition in Corporate Boards].

70 EU Parliament did recently, in November 2022, adopt the Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures. Sweden will, as member of the EU, have to adjust to this.

1.3.3 *The current Discrimination Act (2009)*

Along with Sweden's other anti-discrimination acts, the Equal Opportunities Act was replaced in 2009 by a composite Discrimination Act.⁷¹ The reform was based on an extensive report and aimed to create uniform regulations providing equal protection against discrimination on all grounds of discrimination.⁷² An important goal was also to ensure that EU law was correctly implemented within Swedish discrimination law. Age and transgender identity or expression were added as grounds for discrimination. Active measures, efficiency in the enforcement of the legislation, terminology, and procedural regulations are equally important in the Discrimination Act, just as they were in the Act on Equality between Women and Men, and those aspects were also strengthened in the Discrimination Act.

1.3.3.1 *The prohibition against discrimination*

The 2009 Discrimination Act thus covers seven protected grounds of discrimination: sex, transgender identity or expression, ethnicity, religion or other belief system, disability, sexual orientation, and age. There are no provisions dealing with intersectionality in the act. The act applies only to natural and not to legal persons and is limited to the fields of working life, education, and supply of goods and services, as well as areas of society that are connected to those fields, such as employment services, membership in certain types of organizations (such as labour unions and employers' organizations), social services and insurance, financial aid for studies, health care, and so on. For each field, the act defines the subjects and types of situations that are covered by the protection.

The Discrimination Act defines six forms of discrimination: direct discrimination, indirect discrimination, inadequate accessibility,⁷³ harassment, sexual harassment, and instructions to discriminate. Added to the prohibition on these forms of discrimination is a provision on protection for individuals against reprisals from an employer in certain situations, such as when the employee has reported or called attention to the fact that the employer has acted contrary to the Discrimination Act. In relation to discrimination by public officials, both formal and informal contacts between individuals and officials are covered by the act, and the provisions target the behaviour of the officials concerned rather than the content of decisions or counselling provided. This limitation has been criticized by the Equality Ombudsman (DO, see below), however, who has approached the government with

71 Diskrimineringslagen (2008:567) [Discrimination Act].

72 SOU 2006:22 [Swedish Government Official Reports] 'En sammanhållen diskrimineringslagstiftning' [A Coherent Legislation on Discrimination]; for an English summary, see 41–70.

73 Inadequate accessibility is when an establishment fails to take reasonable accessibility measures to enable a person with a disability to come into a situation comparable with that of a person without this disability. The requirement is only that 'reasonable measures' be implemented. Whether a measure is reasonable depends, for example, on the establishment's practical and financial ability to implement it.

a formal request for the act to have broader coverage in relation to the field of public service.⁷⁴ As a result, a public inquiry has now proposed that the prohibition on discrimination should be extended to cover the exercise of public authority in relation to individuals, decisions, the content of advice provided in connection with the processing of cases, and so on.⁷⁵

Like the earlier Equal Opportunities Act, the Discrimination Act does not contain any gender-specific provisions aimed at the promotion of gender equality.⁷⁶ However, the Discrimination Act's stipulations on the obligation to take active measures both to prevent discrimination against individuals and to promote equal rights and opportunities are seen as targeting problems that are mostly women-specific, such as sexual harassment, difficulties in combining work and family life, and partial or non-objective wages. In contrast to the CEDAW Convention, the Discrimination Act is thus not women-specific and does not apply to private life, religion, and culture.

The Discrimination Act covers acts in which a specific person is harmed by someone responsible, directly or indirectly, on the grounds explicitly identified in and covered by the act. The discrimination ground of sex refers to the biological aspect of sex. An individual is either a man or a woman. Transpersons are included if a sex change has been carried out or is planned. This definition is based on practical reasons. The category of transgender identity or transgender expression is supposed to provide protection against discrimination for those who do not wish to be defined as belonging to a particular sex. Disadvantages connected with pregnancy are defined as sex discrimination. The government, the DO, and others have been working with the issue of equal rights regardless of sex identity since 2014. An action plan on LGBTQ+ persons was presented in the spring of 2021.⁷⁷

The Discrimination Act applies the same provision on the burden of proof as EU law: 'If a person who considers that he or she has been discriminated against or subjected to reprisals demonstrates circumstances that give reason to presume that he or she has been discriminated against or subjected to reprisals, the defendant is required to show that discrimination or reprisals have not occurred' (Chapter 6, Section 3).

All of the previous Ombudsmen positions were merged into one government agency, which now carries out all public supervision related to the act. The name

74 Petition to the Government 20 February 2014, 'Enskildas skydd mot diskriminering vid kontakt med offentligt anställda' [Protection for Individuals against Discrimination in Contacts with Public Officials] ><https://www.do.se/om-do/vad-gor-do/skrivelser/enskildas-skydd-mot-diskriminering-vid-kontakt-med-offentligt-anstallda>> accessed 11 January 2023.

75 SOU 2021:94 [Swedish Government Official Reports] 'Ett utökat skydd mot diskriminering' [An Extended Protection Against Discrimination].

76 See revised Jämställdhetslag (1991:433) [Equal Opportunities Act] of 1992.

77 *Handlingsplan för hbtqi-personers lika rättigheter och möjligheter* [Action Plan for LGBTQ+ Persons' Equal Rights and Opportunities] (21 January 2021) ><https://www.regeringen.se/4ab5b0/contentassets/93e20976982b4d798400b20ac57a966f/handlingsplan-hbtqi-221031.pdf>> accessed 1 December 2022.

in Swedish is *Diskrimineringsombudsmannen* or DO, the established acronym for both the agency and the person holding the position as head of the agency. The agency monitors compliance with the Discrimination Act according to the mandate set out in the Discrimination Act and the Act Concerning the Equality Ombudsman.⁷⁸ The Ombudsman is also entitled to handle complaints regarding the prohibitions against disfavoured parents in the Parental Leave Act.⁷⁹

In the consultation process that formed part of the preparations for the law reform, voices were raised against the abolition of the agency of the Equal Opportunities Ombudsman, as it was argued that this would lead to the loss of both competence and efficiency. An argument in the opposite direction was that a unified Ombudsman agency could better support those individuals discriminated against on two or more grounds. Despite this, no regulations that captured the concept of intersectionality or intersections of discrimination were introduced into the law. Instead, as stated in the government bill, if a discriminatory action has taken place on more than one ground, this may be considered as an aggravating circumstance when the level of the compensation is to be decided.⁸⁰ However, to date, this principle has not been implemented in case law. For example, in Case AD 2010 no. 91, the Labour Court came to the conclusion that a woman had been discriminated against on two grounds: sex and age. Despite this, the court chose not to comment on this circumstance or take it into consideration when the level of the compensation was set.⁸¹

1.3.3.2 Additional legislation relevant for discrimination in the labour market

Although these are not directly formulated as anti-discrimination provisions, there is another category of regulations that are important as they address anti-discrimination in specific vulnerable situations in women's working life that result from the socioeconomic subordination of women. The Prohibition of Discrimination of Employees Working Part Time and Employees with Fixed-Term Employment Act⁸² falls under this category. This law has its origin in EU law and contains, for example, regulations that act against wage discrimination.

The Parental Leave Act⁸³ contains regulations that protect both employees and job seekers from being disadvantaged by an employer when utilizing the right to parental leave. Its protections also cover temporary parental leave for the care of

78 Lag (2008:568) om Diskrimineringsombudsmannen.

79 Föräldraledighetslag (1995:584) [Parental Leave Act].

80 Prop. [Swedish Government Bill] 2001/02:27 'Likabehandling av studenter i högskolan' [Equal Treatment of Students in Higher Education], 72.

81 Susanne Fransson and Eberhard Stüber, *Diskrimineringslagen. En kommentar*, andra upplagan [The Discrimination Act: A Commentary, 2nd edn] (Norstedts Juridik AB 2015) 495.

82 Lag (2002:293) om förbud mot diskriminering av deltidsarbetande arbetstagare och arbetstagare med tidsbegränsad anställning.

83 Föräldraledighetslag (n 78).

a child who is ill, and protect pregnant employees from being assigned physically strenuous work.

There are no specific regulations on discrimination in the Employment Protection Act,⁸⁴ but, in practice, it has been of significant importance in cases of discrimination as it specifies that a notification of termination of employment has to be based on objective grounds. Statistics show that discrimination cases based exclusively on the actual anti-discrimination act (the earlier Equal Opportunities Act) had a much lower success rate than other labour law cases, except for those cases in which the Employment Protection Act also applied. From this it can be concluded that the general labour law context is of considerable importance for the interpretation of sex discrimination cases. The Labour Court rendered 64 judgements on sex discrimination during the years 1980–2008 (not including conciliations confirmed by court). Statistics show that claims of sex discrimination were upheld in only 16 cases. Owing to the support of the Employment Protection Act, another four cases were upheld.⁸⁵

Collective agreements within the labour market have long been very important for the interpretation of labour law and as a manifestation of fixed patterns of thinking about what actions and/or conditions should be judged as discriminatory or non-discriminatory. In recent years, however, this has changed. Up until 2001, a common statement in preparatory work for legislation was that the opinions of the social partners should be respected. Against this background, it is important to note that, already at the start of the 2000s, a government bill⁸⁶ specified that collective agreements cannot be excluded from the application of the prohibitions on discrimination in the Discrimination Act, citing EU law principles and decisions by the European Court of Justice in defence of this stance. Accordingly, the opinion of the social partners should no longer determine what is considered to be equal work or work of equal value in equal pay disputes.

1.3.3.3 The enforcement system in the Discrimination Act

The Discrimination Act specifies that the Equality Ombudsman should supervise the enforcement of the law. In discrimination disputes, the Ombudsman has the authority to represent an individual in court procedures, provided that the individual consents to be represented by the Ombudsman. If the dispute concerns discrimination within the labour market, the case is tried before the Labour Court as first and last instance. In other types of discrimination disputes, the Ombudsman has to apply for a summons using the ordinary court procedures for civil disputes. In such a process, the Code of Civil Procedure applies and the first instance for the dispute is the district court. The judgements of the district court can be appealed against, in which event the case will be examined by a Court of Appeal and finally by

84 Lagen (1982:80) om anställningsskydd [Act on Employment Protection].

85 Lena Svenaeus, 'Makten eller de maktlösa redskap' [The Power or the Tool of the Powerless] in *Lag & Avtal arbetsrättslig tidskrift* (19 February 2009).

86 Prop. 1999/2000:143 (n 55).

Sweden's Supreme Court. An individual who is not supported by the Ombudsman or by a union can always use the ordinary court system in a discrimination dispute. In relation to active measures, the Ombudsman can apply to the Equality Board for a conditional fine in order to put pressure on employers to fulfil the requirements of the law in relation to proactive work to combat gender inequality.

The mandate and tasks of the Equality Ombudsman are further described in the Act Concerning the Equality Ombudsman. The duties of the Ombudsman include civil law commitments in relation to the prohibitions on discrimination and public law commitments in relation to active measures. The duty of supervision embraces both parts of the law. Thus, the responsibilities of the Ombudsman include the monitoring of compliance and other measures to support individuals who have been discriminated against, as well as monitoring of the implementation of active measures taken by employers and educational organizers.

In addition to these two tasks, the Equality Ombudsman has a duty to support the development of a society free from discrimination and to promote equality of treatment. This function is described in the Act Concerning the Equality Ombudsman and is specified as involving counselling, the provision of information, and cooperation with government agencies, enterprises, individuals, and organizations. The Equality Ombudsman is also obliged to follow international developments and research on discrimination, as well as to take action, when this is considered appropriate, by proposing legislative amendments or other anti-discrimination measures to the government and initiating other appropriate measures. This support role does not involve the use of sanctions.

The Equality Ombudsman may bring a court action on behalf of an individual who consents to this (Chapter 6, Section 2).⁸⁷ When conducting investigations, the Equality Ombudsman has the right to visit workplaces, to obtain access to relevant documents, and to call for deliberations with parties. The powers of the Ombudsman in this context include a right to obtain information about conditions and facts that could be of importance for the monitoring of compliance with the act (Chapter 4, Section 3). A natural or legal person who does not comply with such a request may be ordered by the Ombudsman to fulfil their obligation under penalty of a fine. Appeals against the imposition of a conditional fine by the Ombudsman may be made to the Board Against Discrimination.

Sanctions are regulated in Chapter 5 of the Discrimination Act and are of two kinds: financial compensation and invalidity. A natural or legal person that violates the prohibitions on discrimination or reprisals or who fails to fulfil their obligations to investigate and take measures against harassment or sexual harassment shall pay a special kind of damages, called compensation for discrimination, for the offence resulting from the infringement. When that type of compensation is set, particular attention is to be given to the purpose of discouraging infringements of the act. The compensation is to be paid to the person affected by the infringement. According to a precedent set by the Swedish Supreme Court, such compensation should consist

87 The references in this section are to the Discrimination Act (n 70).

of two parts: an amount to cover compensation for harm and another amount for preventive purposes, for which the minimum threshold is SEK 10,000.⁸⁸ An employer can also be obliged to pay compensation for economic loss. However, this does not apply in decisions concerning employment or promotion.

The sanction of invalidity is used to change provisions in individual contracts or in collective agreements that are prohibited under the Discrimination Act. Contracts and agreements can also be declared invalid in their entirety.

In Subsection 1.3.4.1, the Ombudsman's supervision of the provisions regarding active measures will be discussed.

1.3.3.4 Pending reform to improve the Discrimination Act

In 2021, a government commission on extended protection against discrimination⁸⁹ presented a report in which it proposed three areas of improvement of the Discrimination Act. The first covers measures to strengthen protection against discrimination in cases where there is no identifiable victim. The provisions of the Discrimination Act require that the prohibition on discrimination has been breached in relation to an individual for it to be possible to award compensation for discrimination. They also specify that there is no possibility of awarding compensation in cases where a group of persons belonging to a category protected by the Discrimination Act have been disadvantaged. The report proposes the insertion of a new provision in Chapter 4 of the Discrimination Act to expand the protection in the areas of society covered by Chapter 2 of the Discrimination Act. The proposal would make it possible to prevent the dissemination of statements or communications expressing contempt for a person or a group of persons linked to a ground of discrimination by a person who has a leading position. The report's proposal would entail adding a new concept, *contempt*, to the Discrimination Act. It is also proposed that the Equality Ombudsman should be given the possibility of requesting that the Board against Discrimination impose a financial penalty in such cases. In addition, it is proposed that the Board against Discrimination be assigned the task of ordering a financial penalty to prevent dissemination of discriminatory statements or communications.

The second area in which reforms have been proposed relates to the exercise of public authority. The commission's report proposed that the prohibition on discrimination in Section 17 of Chapter 2 of the Discrimination Act be amended to cover measures, or failure to take measures, in relation to the public and within the framework of their employment, by a person covered wholly or partly by the Public Employment Act.⁹⁰ This would mean that the prohibition would cover not just the treatment of individuals but also, for example, the exercise of public authority in relation to individuals, decisions, the content of advice and information provided in conjunction with the processing of cases, and positions taken that form the basis for substantive assessments.

88 NJA 2014:499 I and II [Swedish Superior Court cases].

89 SOU 2021:94 (n 74).

90 Lag (1994:260) om offentlig anställning [Act on Employment for Public Officers].

The third area of proposed reform concerns expanded protection against harassment and threats for workers. The commission took the view that it was not appropriate to propose that, in cases of harassment and sexual harassment committed by a third party, an employer should have the same obligation, backed up by the sanction of compensation, to investigate and take measures that it has in cases when this happens between employees.

Another challenge is that workplaces, such as shops, restaurants, and libraries, are public places, to which the public has a constitutional right of access. An employer can, for instance, call on a guest to leave or not serve the guest, but sharper measures may require support from society in the form of, for example, a report to the police or the issuance of a prohibition on entry under the new legislation.

The commission emphasized, however, that an employer is able to take unilateral measures regarding an employee, such as ensuring that they do not work alone or providing access to alarm equipment – that is, measures adopted for the purpose of protecting the employee. On this basis, the commission drew the conclusion that any expanded protection ought to contain clearly defined obligations for the employer to protect employees in various ways from acts by third parties and that this requires a regime other than an expanded obligation to investigate and take measures. It was therefore suggested that it should be made clear both that the employer's work on active measures under the Discrimination Act also relates to harassment and sexual harassment by third parties and that the employer has an obligation under work environment legislation to address such acts. The commission proposed amending the current provision in Section 6 of Chapter 3 of the Discrimination Act so that it would clearly state that harassment and sexual harassment by third parties against employees are also covered by the requirements for guidelines and routines to be put in place by the employer.

1.3.4 Active measures: Prevention of discrimination and promoting of equal opportunities in the Discrimination Act

Even though the Discrimination Act is not women-specific, it still addresses, through the concept of prevention of discrimination and promotion of equal opportunities, the structural conditions of women's subordinated position in society in relation to men. The regulations on the prevention of discrimination and promotion of equal opportunities were revised in 2017 and are defined as preventive and supporting measures to work against discrimination and equal rights and opportunities independent of sex and other discrimination grounds. They are applicable only to working life and education, and they comprise all seven grounds of discrimination.⁹¹ The regulations in the act place higher demands on preventive work than

91 SOU [Swedish Government Official Report] 2014:41 'Nya regler om aktiva åtgärder mot diskriminering' [New Rules on Active Measures Against Discrimination] 292; Prop. [Swedish Government Bill] 2015/16:135 'Ett övergripande ramverk för aktiva åtgärder i syfte att främja lika rättigheter och möjligheter' [A Comprehensive Framework for Active Measures with the Purpose of Promoting Equal Rights and Opportunities]; Discrimination Act, Chapter 3, Paras 1–16.

earlier regulations and emphasize the modus operandi and documentation of such measures. The revised regulation replaced the earlier models on annual gender equality and equal treatment plans.

The provisions on active measures entail that all employers each year at all working places with at least 25 employees are obligated to:

- continuously apply a four-step approach (investigate, analyse, take measures, and monitor/evaluate) within the following areas: working conditions⁹²; provisions and practices regarding pay and other terms of employment; recruitment, promotion, education and training, and other skills development; possibilities of reconciling gainful employment;⁹³ and parenthood;
- promote gender balance in different types of work, including in management positions;
- establish, follow up, and evaluate guidelines and routines to prevent harassment, sexual harassment, and reprisals; and
- carry out annual pay surveys (workplaces with ten or more employees).

There is a general obligation for employers and labour organizations to collaborate regarding the adoption of active measures. In addition, labour organizations have a right to information, and the regulations are also, in the preparatory work for the act, described as a framework to which employers in cooperation with unions should give a substantive content, preferably through collective agreements. So far, however, Swedish employers' organizations have been unwilling to conclude collective agreements that are based on binding provisions in the law. Even if such an agreement does not duplicate the law but contains additional clauses, for example, concerning how the parties shall work together with active measures in the workplace, employers regard such agreements as entailing a risk that they might be punished twice for negligence. Demands for semi-dispositive provisions have long been voiced both by Swedish employer organizations and by Swedish unions.

1.3.4.1 Supervision of active measures

A natural or legal person who violates the rules of the Discrimination Act concerning active measures may be ordered to fulfil their obligations by the Equality Ombudsman, who also has the right to request that the Board against Discrimination impose a conditional fine in such cases. The Ombudsman can have the Board's decision executed by a court order if an employer fails to comply with the instructions in the decision. A national central employee organization to which an employer is

92 Working conditions relate to the employer's way of organizing the work, distributing task assignments, and taking other decisions that affect the work situation for the employee. The concept of working conditions also includes forms of employment, working schedules, the right to holidays, and the design of the physical and psychosocial working environment.

93 'Gainful employment' means that employers are obliged to try to facilitate parents combining the performance of their work as employees with their responsibilities towards their children.

bound by a collective agreement may also make an application to the Board, but only if the Ombudsman has declared that the Ombudsman does not wish to make such an application. When an employee organization has made such an application, the Ombudsman is to be given an opportunity to comment.

The Board against Discrimination was set up in 2009, replacing the Equality Board and another board with a similar function in relation to the legislation on ethnic discrimination. The 13 members of the Board are expected to bring in expertise regarding the labour market, the educational system, and different types of discrimination. Cases are decided after an oral hearing. In deciding a case concerning the ordering of a financial penalty, the Board can take measures other than those requested in an application, as long as such measures are not obviously more burdensome for the relevant party. In the event of failure to comply with the decision of the Board, only the Ombudsman, not an employee organization, can initiate proceedings before a district court for the imposition of the financial penalty.

So far, the Ombudsman has not brought a single case to the Board, arguing that the main method through which it supervises the duties to carry out active measures should be information and not sanctions.⁹⁴ Since 2009, Swedish unions have exercised their right to apply for a financial penalty in a few cases. An application was made by the union *Försvarsförbundet* against the employer *Försvarsmakten* because a correct mapping of wage differences had not been carried out. The Board ordered *Försvarsmakten* to carry out the mapping of wages within four months. A conditional fine of SEK 2 million was set. The employer respected the order, and the dispute with the union was solved.⁹⁵

In 2018, the government appointed a special investigator to provide an overview of what measures ought to be taken to secure compliance with the regulations on active measures in the Discrimination Act. In the investigator's final report, several proposals were made regarding how to increase the efficiency of the work of the Office of the Ombudsman,⁹⁶ but no legal reforms in this direction have yet been proposed.

1.4 Gender equality laws intertwined with the welfare state

In the earlier section on gender equality policy, we have highlighted how legal reforms have created social and economic rights with the explicit purpose of promoting gender equality. These reforms and the rights they established are not built on the legal tradition of anti-discrimination that has increased in importance since Sweden joined the EU. What we here emphasize are specific legal measures that relate to other aspects of life, not covered by the anti-discrimination legislation,

94 Fransson and Stüber (n 80), 461–470.

95 Board Decision Nr 1-15.

96 SOU [Swedish Government Official Report] 2020:79 'Effektivare tillsyn över diskrimineringslagen – Aktiva åtgärder och det skollagsreglerade området' [More Efficient Supervision of the Discrimination Act: Active Measures and the Education Area].

that need to be reformed if the gender equality goals set by the Swedish government are to be achieved. The reforms concern criminal, social, and tax laws, and they are representative of the transformative ambition of promoting gender equality in accordance with the structural understanding of gender equality as expressed through gender system theory.⁹⁷

1.4.1 Criminalization to protect women's integrity

When sexuality is expressed through violent pornography, gender-discriminatory advertising, men's violence against women, and the purchase of sexual services, the inequalities in power relations between men and women are obvious.⁹⁸ Some of these relations have long been criminalized – for example, rape. Other actions have been more difficult to tackle through prohibition or criminalization, such as gender-discriminatory advertising. The constitutional freedom of the press has been one of the central arguments against limitations on gender-discriminatory advertising.⁹⁹ On the other hand, Sweden has introduced two very important criminal law reforms that recognize men's oppression of, exploitation of, and violence against women. The first is the prohibition on the purchase of sexual services and the other consists of legislation on gross violations of a woman's rights in close relations.

The purchasing of sexual services does not occur as frequently in Sweden as in many other countries in the world. According to the preparatory works for the prohibition on the purchase of sexual services, this is due to several factors, notably Sweden's general welfare system, its progressive gender equality policy and its social measures directed at the sex market.¹⁰⁰ The criminalization of the purchaser of sexual services was unique to Sweden in 1999 and comprised a truly representative reform for the structural understanding of gender equality. The underlying aim of the legislation was normative, namely, that it should be socially unacceptable to buy sex so that prohibiting such purchases would lead to the elimination of, or at least a significant reduction in, prostitution. With prostitution defined as an expression of the unequal relationship between men and women, the reasoning was influenced both by gender equality and welfare policies.¹⁰¹ The effects of the legislation from 1999 to 2008 were evaluated in 2010, and it was found to have had effects in line with its purpose.¹⁰² Another evaluation performed by the Swedish National Council for Crime Prevention took place in 2022. The report pointed out several

97 Åsa Gunnarsson, Eva-Maria Svensson, Jannice Käll, and Wanna Svedberg, *Gensrättsvetenskap* [Gender Legal Studies] (Studenlitteratur 2018).

98 SOU 2005:66 (n 22) Section 3.

99 Eva-Maria Svensson and Maria Edström, 'Freedom of Expression vs. Gender Equality: Conflicting Values When Regulating Gender Stereotypes in Advertising' (2014) 127(5) *Tidskrift for Rettsvetenskap* 479.

100 Prop. [Swedish Government Bill] 1997/98:55 'Kvinnofrid' [Women's Peace], 100–104.

101 Gunnarsson, Svensson, Käll and Svedberg (n 96).

102 SOU [Swedish Government Official Reports] 2010:49 'Förbud mot köp av sexuell tjänst. En utvärdering 1999–2008' [Prohibition of Purchase of Sex: An Evaluation 1999–2008].

fields for improvement, but it concluded that the law was an important tool for the work of the police, particularly in relation to escort services.¹⁰³

In Sweden, the self-supporting ideal, embodied in the workfare model, has been important for the independence of women, but the question of male partner violence became an issue relatively late on. One explanation for this is that violence against women has not been defined as an important integrity and equality issue in Swedish criminal law. Promoting women's rights as workers and mothers seems to have been closer to the welfare state ideology, while violations that concern women's human dignity and personal and bodily integrity have been regarded as a private, domestic issue.¹⁰⁴ Criminalization of violence in close relationships also came into conflict with legal principles on objectivity and the normative structure of criminal law. The crime was defined as sex-specific on the basis that the nature of the crime emanated from the unequal power relation between men and women.¹⁰⁵ After extensive research in the 1980s, revealing the special character of violence within relationships, a government report was commissioned, which resulted in the creation of a new crime, gross violations of a woman's integrity, in 1999. The crime is radical in two ways. First, the focus is not on separate, detached actions, but on the process over time, which in gender violence research is called the process of 'normalization of violence'. Second, the crime is women-specific, which, not surprisingly, was widely questioned.¹⁰⁶ Even though it is obvious that the criminalization of this type of behaviour represented an important step forward, men's violence against women is a much larger societal issue that cannot be solved by legal measures. In 2016, the Swedish government launched a national ten-year strategy and targeted action programme on men's violence against women, which came into effect from 2017. It supports the elaboration of action plans at different levels of society and recommends recurring evaluations. It also creates the obligation for public authorities to develop knowledge and competence to elaborate best practices on how to detect violence.

1.4.2 Individualization of social welfare and tax laws

Family plays a role in defining the economic status of women. One important and early welfare state reform that improved women's economic rights was the

103 Lina Fjelkegård, Kristin Franke Björkman, and Emma Patel, *Köp av sexuella tjänster. En uppföljning av lagens tillämpning. Rapport 2022:3* [Purchase of Sexual Services: An Evaluation of the Application of the Law. Report 2022:3] (Brottsförebyggande Rådet 2022).

104 Pyllkkänen (n 11).

105 Monica Burman, *Straffrätt och mäns våld mot kvinnor. Om straffrättens förmåga att producera jämställdhet* [Criminal Law and Men's Violence against Women: On the Ability to Produce Gender Equality by Criminal Law] (Iustus Förlag AB 2007); Moa Bladini, *I objektivitetens sken: En kritisk granskning av objektivitetsideal, objektivitetsanspråk och legitimeringsstrategier i diskurser om dömande i brottmål* [In the Light of Objectivity: A Critical Review of the Ideal of Objectivity, the Claim for Objectivity and Strategies of Legitimacy in Discourses about Judging in Criminal Cases] (Lunds Universitet 2013).

106 Gunnarsson, Svensson, Käll and Svedberg (n 96).

abolition of joint and family taxation, of which the first step was introduced in 1971. The main argument behind this reform was that the assessment of an individual's ability to pay should not be made dependent on sex or civil status. Joint taxation was seen as an obstacle for married women wishing to enter the workforce and obstructed the achievement of equality between women and men.¹⁰⁷ The tax reform was the start of a long series of reforms on social and economic rights that enabled women's participation in the labour market and created the normative standard of a dual-breadwinner family model. Equal sharing of parental responsibility is an important objective behind Swedish gender equality policy. The parental leave insurance is a work-related, individual social benefit, based on one's right and obligation to support oneself. In formal terms, it gives both parents the same legal right to paid parental leave.¹⁰⁸

However, the concept of parents as free agents, equal both in regard to the obligation to contribute support, care, and money to the family and in regard to their activity in the labour market, has turned out to be at odds with reality. Over the years, women have claimed the right to parental leave to a far greater extent than men. To encourage fathers to take more responsibility for the care of their small children, a new regulation was introduced in 1995, popularly referred to as 'daddy's quota month' (in Swedish *pappamånad*). The reform gave, in a sex-neutral fashion, mothers and fathers 30 days each of parental leave, which could not be transferred to the other parent. By increasing fathers' responsibilities for caring for their children, the reform was expected to reduce the 'family obstacles' to women's participation in the labour market, while measures to increase the involvement of fathers in the upbringing and care of their children were declared to be a state responsibility.¹⁰⁹ In addition to the 'daddy's quota', joint custody of a child in the event of parental separation was introduced as the main rule in 1998, even if one of the parents objected.¹¹⁰ The number of non-transferable parental leave days for each parent increased to 60 in 2002 and to 90 in 2017.¹¹¹ This individualization, the introduction of non-transferable parental leave for each parent, has resulted in men taking up a greater part of the total amount of available parental leave, although not much more than the non-transferable part. The latest statistics show that men use a third of parental leave benefit.¹¹²

107 Prop. [Swedish Government Bill] 1970:70 'Förslag om ändring av kommunalskattelagen' [Proposition for Change of the Municipality Tax Law].

108 Gunnarsson, Burman and Wennberg (n 11).

109 Prop. 1993/94:147 (n 19), 17, 66–70.

110 Gunnarsson, Burman and Wennberg (n 11).

111 Prop. [Swedish Government Bill] 2001/02:44 'Föräldraförsäkringen och föräldraledighet' [Parental Leave Insurance]; Prop. [Swedish Government Bill] 2014/15:124 'En mer jämställd föräldrapenning' [A More Equal Parental Leave].

112 TCO:s [Tjänstemännens centralorganisation] Gender Equality Index 2021.

Part 2: Contemporary issues at the intersection between gender equality and anti-discrimination law/policies and other laws and enforcement systems

1.5 Access to justice and the enforcement system

The efficiency of the enforcement system is essential for the realization of access to justice. The concept of access to justice is based on international and European legislation on human rights and is thus applicable also in Sweden. Such access shall ensure the right of victims of discrimination to have a judicial review or an alternative dispute resolution. The concept of access to justice is usually interpreted to include the availability of means or necessary preconditions to enable individuals to take advantage of this right.¹¹³ An important purpose of the rules on active measures in the second part of the Discrimination Act is to identify conditions or circumstances that are or could be discriminatory, thus producing a basis of facts that could be used in complaints of discrimination. Owing to the close connection between the prohibitions on discrimination in the first part of the Discrimination Act and the duties to take active measures in the second part, we regard the efficiency of those rules as an important precondition for access to justice in working life and education. Therefore, in addition to an overview of the situation for victims of discrimination, we will examine how the Equality Ombudsman's supervision of active measures has worked so far. A short presentation of actors within civil society, besides the Ombudsman, who can assist victims of discrimination in court procedures will also be provided.

There are worrying challenges regarding the application of Swedish anti-discrimination law as there seems to be limited access to justice for victims of discrimination. Statistics from the annual reports published by the Ombudsman show that very few individuals receive any assistance in their efforts to obtain redress and justice. Moreover, the Ombudsman's supervisory function regarding the duties of employers and educational institutions to take actions to prevent discrimination seems to be inefficient. The legal obligation to conduct annual pay surveys and effective supervision of this duty are important in the fight for equal pay for equal work and work of equal value. Pay surveys give women the information required for any reaction against wage discrimination. No sanctions have yet been used in supervision of that part of the legislation, and no supervisory activities have been announced by the Ombudsman in recent years.

1.5.1 The vague mandate of the Equality Ombudsman

Personalizing the agency through the use of the concept of an Ombudsman, introduced already in the Equal Opportunities Act of 1979, was a conscious choice, representing the idea that a physical person would be acting in the interests of individuals in discrimination cases and, hence, that victims of discrimination would

113 Laura Carlson, 'Sweden: Balancing Corporatism and Access to Justice' (2022) *Equality Scandinavian Studies in Law* 68, 405.

be assisted in obtaining justice by the Ombudsman. In the preparatory work for the 1979 act, it was stated that the Ombudsman's duties should be carried out by examining complaints of discrimination. However, neither the law nor the preparatory work gave any specific instructions regarding the management of complaints apart from the prescription that court procedures should be used only when a precedent was needed in order to clarify the legal situation.¹¹⁴ In the revised Equal Opportunities Act ten years later, it was added that special circumstances could also legitimize a decision to initiate a court procedure.¹¹⁵

Those limitations were abolished when the broad reform of discrimination law came into force in 2009. The parliament – responding to a proposal by the government – wanted to give the DO a free hand to decide which cases should be decided by a court. In this respect, the government emphasized the importance of the independency of agencies working on human rights issues, referring to the UN's Paris Principles.¹¹⁶ However, the Paris Principles do not define independence as meaning that there are no regulations on how complaints of discrimination should be dealt with by an agency or on the duties of the agency towards complainants. Rather, the opposite seems more to be the case, as can be seen in the following: 'A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence' (Paris Principles, Paragraph 2). As we will discuss below, the lack of a clear and specified mandate for the Ombudsman has resulted in substantial obstacles for victims of discrimination seeking access to justice. It is important to keep in mind that the parliamentary committee that prepared the merge of the former Ombudsmen institutions into one new Ombudsman agency had suggested a collective leadership representing expertise in the various discrimination grounds. The new agency, however, was organized as a traditional governmental body with one director.¹¹⁷

1.5.2 The process of individual complaints about discrimination

During the first three years after the reform in 2009, the work of the new agency very much continued along the same lines as that of the former Ombudsmen. The focus was on the investigation of complaints of discrimination, and the Ombudsman was criticized for neglecting supervision of other parts of the law dealing with preventive measures and information.¹¹⁸ In 2011, a new head of the Ombudsman

114 Lag om jämställdhet mellan kvinnor och män i arbetslivet (1979:1118) [The Equal Opportunities Act] Section 11 (n 44).

115 Jämställdhetslag (1991:433) Section 46 (n 75).

116 The Paris Principles, which were adopted by the UN General Assembly in 1993, are a set of international standards that frame and guide the work of national human rights institutions.

117 Prop. [Swedish Government Bill] 2007/2008:95 'Ett starkare skydd mot diskriminering' [A Stronger Protection Against Discrimination], 366.

118 Lena Svenaeus, 'Tio år med Diskrimineringsombudsmannen. En nedmontering av diskrimineringsskyddet' [10 Years with the Discrimination Act: A Dismantling of the Protection against Discrimination] (Arena Idé 2020).

institution was appointed by the government. A radical change of goals and activities then began. The process of change concerned the handling of discrimination complaints as well as the supervision of the legal rules on promotion of equality (active measures). The new ombudsperson in charge declared that she interpreted the duties of the agency as promotional rather than reactive. Complaints of discrimination should be viewed as tip-offs and as information that mainly ought to be used in the preventive anti-discrimination work. Only a small number of complaints should be examined, and still fewer selected for the pursuit of a judicial remedy. Decisive for the choice of cases was the goal of securing court decisions that could provide guidance for many individuals. On the website of the DO (www.do.se), the terminology was changed to indicate the aims of the Ombudsman's work and to make clear that complainants should not expect personal assistance from the agency. Accordingly, complainants were called 'informants'. The word 'complaint' was eventually replaced by terms such as 'information' and 'tip-offs'.

Notwithstanding the fact that only a few cases per year have been brought to court, some have been important. As an example could be mentioned the Labour Court's judgment AD 2018 no. 51, which attracted considerable attention as it dealt with freedom of religion in relation to equality between women and men. A woman had applied for a job as an interpreter at an enterprise specializing in interpretation services. At the job interview, she greeted the director of the enterprise by bowing her head and putting a hand on her heart. She explained that she could not shake hands with a man owing to the requirements of her Muslim religion. The director terminated the interview as he felt offended by her refusal to take his hand and decided that she was no longer a candidate for the job. On behalf of the woman, the Ombudsman sued the enterprise for indirect discrimination, claiming that the demand on greeting by shaking hands specially disfavoured persons who because of their religion did not want to shake hands with persons of the opposite sex. However, before the Labour Court, the enterprise argued that the only reason for terminating the recruitment process was that the employer found it unacceptable that employees should treat women and men differently. Thus, the demand on shaking hands had nothing to do with religion as it was aimed at ensuring equal treatment. The Labour Court stated that a special way of greeting at a job interview did not by itself constitute evidence that, if employed, the woman would not respect the employer's policy of equality between women and men. The enterprise was ordered to pay SEK 40,000 to the woman in compensation for discrimination.

On its own initiative, without any legal obligation or recommendation from the government, the Ombudsman, beginning in 2014, successively introduced new ways of processing complaints, which were very different from the practices of the Equal Opportunities Ombudsman during the period 1980–2008. The interpretation of the Equal Opportunities Ombudsman's mandate during that period was that all complaints had to be examined as long as the Equal Opportunities Act was applicable to the case.¹¹⁹ Similar practices were followed by the three other Ombudsman

119 For a comparison, see Svenaeus (n 117), 21.

agencies before the merge, but also continued during the years 2009–2011, after the 2009 reform. Besides a limited numbers of complaints that were chosen for judicial review, new ways of handling complaints were then introduced. They were called *immediate closure*, *document analysis*, and *individual supervisory decisions*. *Immediate closure* of complaints has had the consequence that about 90% of complaints have not been investigated. *Document analysis* means that a certain number of complaints are picked up for textual analysis of the complainant's description of what they have experienced as discrimination. The results have been presented in reports published on the Ombudsman's website.¹²⁰ The practice of *individual supervisory decisions* means that the Ombudsman uses a smaller number of complaints to give information to the reported 'offender' in relation to whether that person has discriminated against a complainant or not. It is a written procedure, and no testimonies can be given. The Ombudsman's decision is not legally binding and cannot be appealed against. The complainant gets a copy of the decision but no assistance from the Ombudsman's office to resolve the dispute.

In defence of this way of dealing with complaints, the Ombudsman has pointed to Section 1 of Chapter 4 of the Discrimination Act, which states: 'The Ombudsman is to try in the first instance to induce those to whom the Act applies to comply with it voluntarily.' In a recent commission report,¹²¹ it has been suggested that the section on voluntary solutions should be abolished. An important argument for this proposal is that it is something of a paradox for a piece of legislation that aims to protect human rights proclaims that the protection in the first hand should be achieved through voluntary compliance.

1.5.2.1 Negative consequences of downsizing the support to complainants

According to its annual report for 2020, a total of 3,012 discrimination complaints were submitted to the Ombudsman's office in that year. Of these, 676 complaints concerned discrimination on grounds of sex. Sexual harassment was reported in 152 complaints. Working life was the most prominent context in complaints of sex discrimination. The number was also fairly high in the education field, particularly in relation to complaints of sexual harassment (102 complaints in 2020). Compared to the number of complaints of discrimination, very few individuals received assistance from the Ombudsman in bringing their complaints before the courts. In 2020, the Ombudsman applied for a summons in three cases. One of these concerned

120 Johanna Kumlin, *Delar av mönster. En analys av upplevelser av diskriminering och diskriminerande processer. Rapport 2014:1* [Parts of a Pattern: An Analysis of Experiences of Discrimination and Discriminatory Processes] (Diskrimineringsombudsmannen 2014). This report aims to find general patterns of discrimination by analysing how 812 persons, in complaints to the Ombudsman, describe their experiences of discrimination. Document analysis has also been used as a method in supervision of active measures, replacing further control of legal compliance. See also Johanna Kumlin, *Sakligt motiverad eller koppling till kön. Rapport 2016:1* [Justified Pay Difference or Related to Gender] (Diskrimineringsombudsmannen 2016).

121 SOU 2020:79 (n 95).

discrimination against a pregnant woman. In comparison, in 2019 the Ombudsman went to court in six cases, and in 2018 in four cases. In the period of 2018–2020, two discrimination disputes, handled by the Ombudsman, were solved through conciliation. As a condition for such a solution, the Ombudsman required that the party who had been reported for violation of the legal rules admitted discrimination.

In November 2020, a new Ombudsman came into office, announcing a return to the earlier practices of the agency, working with complaints in order to support individuals seeking compensation for discrimination. The core of such activity consists of legal investigations and court cases.¹²² So far, however, the results of this shift in focus have not been encouraging.

According to its 2021 annual report, a number of 585 complaints of sex discrimination and 177 concerning sexual harassment were submitted to the Ombudsman. Three cases were taken to court during the year. One of these was a dispute over alleged pay discrimination against a woman in relation to her period of parental leave. In 2021, four complaints were solved through conciliation. Two of these were classified as sex discrimination associated with unfair treatment due to pregnancy. During the first six months of 2022, six conciliations were reported. Two of these concerned sex discrimination. A dispute about disadvantages due to parental leave has been brought to judicial review.

It is legitimate to ask whether the Ombudsman agency needs to be completely reorganized if it is to be able to handle the large number of complaints that are annually submitted to it. Owing to the narrow focus on information and promotional activities from 2012 up to 2021, there is a substantial lack of staff trained to handle cases before court. However, in our opinion, the most burning concern is to safeguard the rule of law. There must be equal access for everyone to obtain assistance from the Ombudsman, and it must be possible for individuals, against a background of clear provisions in the Discrimination Act, to estimate whether a complaint of discrimination will be investigated and processed by the Ombudsman. The mandate of the Ombudsman regarding complaints of discrimination thus needs to be clarified in the Discrimination Act. The power to decide to what extent and in what way victims of discrimination shall get assistance from the Ombudsman cannot be left to the discretion of one person, namely, the Ombudsman.

1.5.3 The Ombudsman's supervision of active measures

Since 2014, the duty of the Ombudsman to monitor whether employers and education providers respect the provisions of the Discrimination Act regarding active measures to prevent discrimination and promote equal opportunities has been performed via information activities. Follow-ups to check that a supervised actor has responded to criticism and instructions from the Ombudsman are only rarely carried out. Nor has the Ombudsman used the right to apply to the Board of Discrimination

¹²² The terminology was changed by 1 January 2022. Complaints will be called ‘complaints’, and complainants are no longer referred to as ‘informants’.

for the imposition of a conditional fine. Employers and education providers are expected to respect the provisions of the act as soon as they have been informed by the Ombudsman of their obligations and without any checks or further action by the Ombudsman. The following example provides an illustration.

At the end of 2017, the Ombudsman initiated a supervisory project to examine whether Swedish municipalities, in their role as employers, had guidelines and routines for their activities to prevent harassment, sexual harassment, and reprisals, as specified in Section 18 of Chapter 2 of the Discrimination Act. The inspection process was preceded by the provision of extensive information about the new rules prescribing guidelines and routines. The reason for the project was that an inquiry had indicated that more than 50% of the employers were unaware of the new and strengthened provisions regarding active measures that came into force in January 2017. After the information activities, all employers were requested to supply the Ombudsman with adequate documents for examination. The result of the Ombudsman's check-up was that 262 out of 287 municipalities were found to have shortcomings in their guidelines and routines. After the submitted documents were returned to the municipalities with comments and the Ombudsman's assessment, the inspection process was closed. The employers were expected to correct on their own what was faulty or missing. However, when the Ombudsman decided to repeat the check in 2020, it became clear that only a limited number of the municipalities had responded to the issues raised.

A study of the Ombudsman's inspections in connection with active measures during the last ten years has made it clear that it is necessary to use sanctions if the supervision is to be effective.¹²³ In 2018, the government appointed an inquiry into how more effective compliance with the provisions regarding active measures in the Discrimination Act could be achieved.¹²⁴ A first report was presented in autumn 2020, containing proposals for amendments of the act. The proposals addressed how the Ombudsman should use its supervisory powers and how the act's sanctions system could be made more effective.¹²⁵ One suggestion was that the Ombudsman should be given the authority to issue regulations that define and specify the provisions regarding active measures. It was proposed that the existing system that grants the Ombudsman the right to submit an application for a financial penalty to the Discrimination Board should be retained, but that the composition of the Board's membership should be adjusted to ensure a higher level of judicial competence. It was also suggested that national central unions that are bound by collective agreements should be given a right to request that the Board impose a conditional fine on employers who fail to respect the provisions regarding active measures. Another proposal was that the Ombudsman, the social partners, and the Swedish Work Environment Authority should cooperate more closely.

123 Svenaesus (n 117).

124 Directive [Swedish Government Directive] 2018:99 'En effektiv och ändamålsenlig tillsyn över diskrimineringslagen' [An Efficient and Appropriate Supervision of the Discrimination Act].

125 SOU 2020:79 (n 95).

Our conclusion is that supervision performed as information activities and expectations of voluntary obedience to the law should not comprise the main method for an institution whose task is to take measures against discrimination.

1.5.4 Other actors and access to justice

In discrimination disputes, employee organizations have the exclusive right to represent and bring an action before court for members of the organization (compare Section 2 of Chapter 6 of the Discrimination Act with Section 5 of Chapter 4 of the Labour Disputes Act). Unions, which are obliged by their statutes to give assistance in labour disputes to all members, take more disputes to the Labour Court than the Ombudsman, but the number of cases is still rather low. When asked about that in interviews, union representatives usually refer to the fact that most disputes are solved by conciliation through the negotiation systems established by law or collective agreements.

In addition to unions, a non-profit organization whose statutes state that it is to look after the interests of its members may also bring an action, as a party, on behalf of an individual who agrees to this. To be allowed to bring an action, the association must be qualified to represent the individual in the case, taking into consideration its activities and its interest in the matter, its financial ability to bring an action, and other circumstances. When an employee organization has the right to bring an action on behalf of one of its members, the Ombudsman or another association may only bring an action if the employee organization does not do so.

In Sweden, there are 18 politically and religiously independent non-profit organizations that promote the right to equality and non-discrimination and the belief that all human beings are born equal in dignity and rights. Their main activities involve counselling and the provision of information, but some of these organizations also engage in court procedures to assist victims of discrimination. They are partly financed by the state. There are also other organizations, for example within the disability movement or in the area of human rights, that bring cases to court in order to assist individuals. So far, women's organizations have not used this possibility.

When the above-mentioned organizations engage in court procedures to assist individuals, they usually choose to set the requested level of compensation for discrimination at a very low amount so that the provisions in the special 'Law of Legal Proceedings in Simplified Civil Cases' are applicable (Code of Judicial Procedure, Chapter 1, Section 3d). In civil cases governed by these provisions, each party pays its own legal costs. Fears of losing the case and of consequently being ordered by the court to pay the other side's legal costs have thus had the effect that claims for compensation may not exceed half of a *prisbasbelopp* (a basic amount geared to the price index and decided by a provision in the Act on Social Insurance). Calculated for the year of 2021, the relevant amount was SEK 23,800. This practice undermines the principle that discrimination is a serious violation of a human right that should give rise to a considerable sanction.

Both in the Labour Court, which deals with discrimination in the labour market, and in the general courts, which handle discrimination disputes in other areas of

society, case law is scarce. This is usually explained by reference to the difficulties involved in getting support and assistance from the Equality Ombudsman in conjunction with the fact that few persons can afford or want to take the economic risks of losing a case and being responsible for the other side's legal expenses. In recent years, considerable criticism of this situation has begun to emerge, voiced by, among others, interest groups working to support disadvantaged categories – for example, people with some form of disability or who are disadvantaged because of their non-European background or religion.¹²⁶

1.6 Active measures regarding equal pay have blind spots

1.6.1 Introduction

The devaluation of women's work and the gender pay gap have deep cultural and economic roots. The problem, which is a global one, is a subject of concern for many international institutions and has been well documented in the introductory guide to equal pay produced by the International Labour Organization (ILO).¹²⁷ Since the 1990s, equal pay for equal work and work of equal value has formed part of the Swedish economic gender equality goal, which, in its latest version, is given the formulation that women and men must have the same opportunities and conditions in terms of paid work that gives financial independence.¹²⁸ There is a clear link between the composition of the goal of economic gender equality in Sweden and international commitments resulting from the EU Commission Gender Equality Strategy 2020–2025, Agenda 2030, the Istanbul Convention, and various ILO conventions.¹²⁹

1.6.2 The strategy to map the gender pay gap

Chapter 3 of the Discrimination Act stipulates that employers and employees are obliged to collaborate on active measures to close the gender pay gap. Section 10 stipulates that they should endeavour to equalize and prevent differences in pay and other terms of employment between women and men who perform work that is to be regarded as equal or of equal value. They are also to promote equal pay growth opportunities for women and men. Work is to be regarded as of equal value

126 See, for example, Paul Lappalainen, *Lika rätt! Ställ krav på kommunen. Verktyg för alla som vill motverka diskriminering och främja mänskliga rättigheter* [Equal Rights! Put Demands on the Municipality – Tools for Everyone Who Wishes to Hinder Discrimination and Promote Human Rights] (Mänkulturellt Centrum 2016).

127 Martin Oelz, Shauna Olney and Manuela Tomei, *Equal Pay: An Introductory Guide* (ILO 2013) >https://www.ilo.org/global/publications/WCMS_216695/lang--en/index.htm> accessed 15 November 2022.

128 Prop. 2005/06:155 (n 24).

129 *Ekonomisk Jämställdhet. En uppföljning av senare års utveckling av det jämställdhetspolitiska delmålet* [Economic Gender Equality: An Evaluation of Recent Years' Development of the Gender Equal Subgoal]. (Jämställdhetsmyndigheten 2022).

to other work if this can be confirmed by an overall assessment of the requirements and nature of the work. The assessment of the requirements of the work is to take into account criteria such as knowledge and skills, responsibility, and effort. In assessing the nature of the work, particular account is to be taken of working conditions.¹³⁰ These requirements are in line with EU principles regarding how work of equal value is to be measured.¹³¹

Inspired by the Ontario Pay Equity Act of 1990, regulations on the mapping of wage gaps have been in place in Sweden since 1994. Wage discrimination gained priority within the office of the Equal Opportunities Ombudsman, and the so-called *Million-project* during 2006–2008, named after the number of female employees whose wages were reviewed, contributed to a large number of upgraded wages for women. A follow-up five years later showed that employers continued to perform annual pay surveys.¹³²

On the current website of the office of the DO, it is stated that the yearly pay survey should assess whether differences in pay between women and men who perform work that is equal or of equal value are linked to their sex. Making this assessment requires both a survey and an analysis. The fundamental question is whether sex has been of significance in the setting of pay in any way.

The survey is to monitor the following:

- provisions and practices regarding pay and other terms of employment that are applied at the workplace;
- pay differences between women and men who perform equal work;
- pay differences between groups of employees who perform work that is (or is considered to be) female-dominated and other groups of employees that are performing work that is regarded as being equivalent to such work (but that is not or is not normally considered to be dominated by women).

At the Swedish Gender Equality Agency, wages are also a recurring theme in research and inquiries. The main problem with all of these studies on the gender pay gap, however, is that the statistics on wage differences between women and men normally only compare women and men in the same types of professions. Such a comparison for 2021 shows that women's wages are on average 90.1% of those of men, which gives a pay gap of 9.9%. When broadening the comparisons by including factors such as wage differences between sectors and professions, the gap is reduced to a level of 4.2–5.5%, depending on the method of calculation. Yet another figure has been presented in comparisons of women's share of men's wages

130 Lag (2022:848) om ändring i diskrimineringslagen (2008:567) [Act on Change of the Discrimination Act].

131 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast).

132 *Miljogranskningen – Resultat av etapp 2 och slutrapport* [The Million Assessment: Result of Phase 2 and End Report] (JämO 2008).

in the population aged 20–64. On this basis, the figure was estimated at 77% for 2020, which gives a gap of 23%.¹³³ Calculating on the basis of disposable income for the same age group, the figure is 22%. A recent public investigation tasked with investigating structural factors affecting gender-unequal lifetime incomes presented some interesting figures and system-related factors on the income gap. If the average gap in disposable income will continue to decrease at the same pace as it has done since 2005, it will take a hundred years to close the gap. The gender gap of lifetime incomes was estimated at € 320,000.¹³⁴

The most striking problem, however, is the failure to use indicators that can produce statistics capable of capturing the structural problem of how female-dominated work is generally valued less highly than non-female-dominated work. In relation to Target 8.5 of the Sustainable Development Goals – to ‘achieve full and productive employment and decent work for all women and men’ – an indicator based on the ILO standards is proposed. On this basis, the Swedish Gender Equality Agency has developed an indicator that, applied to figures from 2019, gives an estimate of 19% for the structural pay gap regarding work of equal value.¹³⁵

1.6.3 The midwife cases on work of equal value

When summarizing decades of efforts to measure the structural gender pay gap, we end up with a kaleidoscope of figures from 4.5% to 22%. If we instead look to case law for boundary-breaking decisions that might change the structural patterns leading to the pay gap, we will again be disappointed. Case law in the Labour Court is poor. As an example, for the period 1980–2021, there are only ten judgements on equal pay for equal work or work of equal value. In only one of these disputes, AD 1995 no. 158, the right to equal pay has been approved. Since 2013, no case on equal wages has been tested by the Labour Court. It is thought to be extremely difficult to be successful in such a case owing to the fact that the Labour Court is unwilling to regard a collective agreement as discriminatory and also wants to uphold the employer’s right to decide on wages in a recruitment situation.

The two so-called midwife cases about equal pay for work of equal value, AD 1996 no. 41 and AD 2001 no. 13, well illustrate how different values are assigned to women’s and men’s work. Two female midwives employed by a county council received substantially lower basic salary than a male clinical engineer employed by the same county council, all of them working at a hospital in the city of Örebro. The midwives were represented by the Equal Opportunities Ombudsman, who presented job evaluation studies and extensive evidence concerning the demands of the midwives’ work in comparison to the work of the clinical engineer. The comparisons were about skill, effort, responsibility, and working conditions. The background to this case was rather special.

133 *Ekonomisk Jämställdhet* (n 128).

134 SOU 2022:4 (n 33).

135 *Ekonomisk Jämställdhet* (n 128), 124.

One of the midwives had been represented by the Ombudsman in an earlier case, AD 1996 no. 41, built on comparisons of pay and work duties with the purpose of seeking general and special damages for the midwife and an annulment of the collective agreement that specified lower pay for the midwife than for the clinical engineers she was compared with. However, the Labour Court rejected the claims on the ground that the job evaluation studies presented by the Ombudsman were more detailed regarding the midwife's work than those describing and analysing the work of the clinical engineers and therefore could not be used as an objective point of departure for an assessment on sex discrimination regarding pay. When the second case came before the Labour Court a couple of years later, a request for a preliminary ruling was sent to the European Court of Justice.

The county council had argued that the jobs performed by a midwife and a clinical engineer were so different that they could not be compared from a perspective of pay equity. The council also contested the claim that the midwives were paid less than the clinical engineers. The Swedish Labour Court referred to the ECJ the question of whether the inconvenient-hours supplement and the value of the reduced working time enjoyed by the midwives due to the so-called three-shift scheme formed part of the pay to be compared. In its decision C-236/98, the ECJ stated that the inconvenient-hours supplement was not to be taken into consideration in the calculation of salary that served as the basis for a pay comparison for the purposes of Article 119 of the EC Treaty (Articles 117–120 of the EC Treaty have since been replaced by Articles 136–143 and Council Directive 75/117/EEC of 10 February 1975 on the Approximation of the Laws of the Member-States Relating to the Application of the Principle of Equal Pay for Women and Men. Nor was the reduction of working hours a factor to be recalculated and taken into account.

The procedures continued in the Labour Court. The Court now considered that the work of the midwives was at least of the same value as the work of the comparator. In relation to the differences in pay, the Court was of the opinion that they were not discriminatory since they were related to 'market forces'. As interpreted by the Labour Court, 'market forces' meant that as the salaries of the midwives and the clinical engineer paid by the county council were at the same levels as those generally in use within the Swedish labour market, there was no discrimination. An additional argument was that the engineer was older than the midwives, a fact that could legitimately explain part of the difference in pay. Notwithstanding the outcome of the ECJ ruling, the Ombudsman was considered to have lost the whole case and was obliged to pay the legal costs of the county council to the amount of SEK 829,251.

1.6.4 The role of the social partners

An important factor that explains the persistent pay gap is rooted in the strong resistance from the social partners in the labour market against legislative measures that would increase the state's control in this area. The social partners in the labour market share the view that the traditional order of collective agreements between the parties should be maintained. Hence, power over the regulation of working life is

characterized by argumentation over the value of safeguarding the Swedish labour market model. This model is based on the principle that the state should leave it to the social partners to regulate labour market issues. To minimize the effect of new legislation on equal opportunities, the most dominant parties within the labour market entered into a collective agreement on equal opportunities just a few years before the new legislation came into force. This initiative had an impact on the drafting of the 1980 Equal Opportunities Act, as the regulations on active measures became conditional: they could be replaced by central collective agreements by the social partners, and thus also avoid supervision by the Ombudsman. A review of the act ten years after it came into force showed that the arrangement under which agreements could replace legal provisions had not contributed to a positive development. Consequently, the law was changed in 1994, but the attitude of the parties within the labour market towards legislative measures that might undermine the existing labour market model remains the same. Some women-dominated unions, however, have gradually become more positive towards legislation on wage discrimination and mapping of wage differences.¹³⁶ There is a fairly extensive body of research that has analysed the opposition to discrimination legislation in Sweden.¹³⁷

1.6.5 Recent evidence on the gender income gap

An alarming analysis was presented by the Commission for Gender-Equal Lifetime Incomes in its final report in 2022. The Commission provided a comprehensive overview of how the welfare system, other forms of public support, and the tax system contribute to the lifetime income gap. Most obvious is the increasing gender gap concerning capital, supported by low taxation of capital income and assets, and also by direct public funding, such as venture capital, to assist business development as a complement to the private market. The Commission also showed how the long-term effect on the labour market and business support is more beneficial for men than women in terms of lifetime incomes. The recommendations from the Commission did not include any proposals for radical legal reforms. Instead, they focused on mapping and measuring. More and better statistics from public agencies are required if pay differences are to be followed over time, and new measures are needed to target tendencies towards increased gender inequalities within the labour market and the distribution of public support.¹³⁸

136 Svenaeus (n 47).

137 Susanne Fransson, *Lönediskriminering: En arbetsrättslig studie av könsdiskriminerande löneskillnader och konflikten mellan kollektivavtal och lag* [Pay Discrimination: A Labour Law Study of Sex Discriminatory Pay Gaps and the Conflict between Collective Agreements and Legislation] (Iustus Förlag AB 2000); Eva Schömer, *Konstruktion av genus i rätten och samhället: En tvärvetenskaplig studie av svenska kvinnors rätt till jämställdhet i ett formellt jämlikt rättssystem* [The Construction of Gender in Law and Society: An Interdisciplinary Study of Swedish Women's Right to Gender Equality in a Formally Equal Legal System] (Iustus Förlag AB 1999); Laura Carlson, *Searching for Equality: Sex Discrimination, Parental Leave and the Swedish Model with Comparisons to EU, UK and US Law* (Iustus Förlag AB 2007); Svenaeus (n 47).

138 SOU 2022:4 (n 33).

1.7 Growing political critique of the gender equality project

1.7.1 *The Swedish gender equality project in a changing political landscape*

The Swedish gender equality project, well anchored in Sweden's self-image and solidly institutionalized, is today being challenged as a result of various transformations of Swedish society and exposed to severe critique from various influential groups and interests. The legitimacy of reforms aimed at changing society and people's behaviour in order to achieve equality, such as individualized, non-transferable parental leave for each parent, to give one example, is today challenged by arguments that such reforms collide with individual freedom and are imposed on individuals. It seems as though the era of radical and far-reaching reforms is over. This is an urgent contemporary issue to highlight owing to the political nature of the gender equality project.

1.7.2 *From universalism and redistribution to individual rights and anti-discrimination*

Gender equality in Sweden has primarily been built on a general equality ideology and political reforms to transform the society in accordance with this ideology. It was formed as a policy area and institutionalized in the 1970s, with roots in the social democratic *folkhem* and the Swedish welfare state model.¹³⁹ The importance of the historical and conceptual background to the notion of equality and its connection to the building of the welfare state has been highlighted.¹⁴⁰ Sweden's commitment, along with the other Nordic countries, to promote equality has been described as the greatest legacy of the 20th century. Until the start of the 21st century, these countries were broadly perceived as showing the greatest will to reduce inequalities and as having achieved the greatest degree of equality between women and men. In recent years, however, this will, effort, and capacity have been questioned.¹⁴¹ Studies have also highlighted the decreasing ambition of the Swedish gender equality project to reduce inequalities and how it has lost its former anchoring as a social and economic equality project: it has become more individualistic and market-oriented.¹⁴² According to Kalonaityté,¹⁴³ this change has

139 Christina Bergquist, Anette Borchorst, A-D. Christensen, Viveka Ramstedt-Silén, Nora C. Raaum, and A. Styrkardóttir (eds), *Equal Democracies? Gender and Politics in the Nordic Countries* (Scandinavian University Press 1999).

140 Åsa Gunnarsson (ed), *Tracing the Woman-Friendly Welfare State: Gendered Politics of Everyday Life in Sweden* (Makadam 2013); Pykkänen (n 11); Eva-Maria Svensson, 'Ökad målstyrning och ny kunskap inom jämställdhetsområdet' [Increased Management by Objectives and New Knowledge on Gender Equality] in Bo Rothstein and Lotta Vahlne-Westerhäll (eds), *Bortom den starka statens politik* [Beyond the Politics of the Strong State] (SNS Förlag 2005).

141 Bergquist et al. (n 138).

142 Katharina Tollin, *Sida vid sida: En studie av jämställdhetspolitikens genealogi 1971–2006* [Side by Side: A Study of the Genealogy of Gender Equality Policy 1971–2006] (Stockholms Universitet 2011); Viktorija Kalonaityté, *Normkritisk pedagogik: För den högre utbildningen* [Norm-Critical Pedagogy for Higher Education] (Studentlitteratur 2014).

143 Kalonaityté (n 141).

meant that gender equality politics since the 1990s have focused more on issues such as women's possibilities for becoming leaders than the conditions of working women. Jordansson and Lane have also stated that the conditions for working-class women have been neglected.¹⁴⁴

The ambitious political goals that characterized the Swedish gender equality project have been transferred to legal principles and rules in various parts of the legal system covering broad areas of society.¹⁴⁵ The principle of equality between women and men, expressed in one of the constitutional acts in the middle of the 1970s, has mainly been interpreted in a formal manner. However, for a period of time, particularly during the 1990s, exceptions to the principle were accepted if the purpose was to promote gender equality on a general level. This possibility of prioritizing gender equality on a group level on behalf of the individual interest has been almost closed through subsequent legal actions. A similar trend can be seen in relation to the promotion of ethnic heterogeneity among students.¹⁴⁶ Also, based on the proposition on gender equality put forward in the early 1990s,¹⁴⁷ several radical legal reforms were introduced, such as the criminalization of the purchase of sexual services, the creation of the crime of gross violation of a woman's peace, and a strengthening of the demands for active gender equality work among employers.

What has happened since then has been an increased focus on individual rights and anti-discrimination provisions. Such a focus could be more effective if the judiciary system were more active in trying cases, but the situation is that the judiciary system is quite reluctant to promote gender equality, as we have discussed above.¹⁴⁸

What is more, when general equality goals are translated into legal rules, the way in which this is done may be notably inefficient, as Svedberg has shown in her study of the gender equality goal in the transportation sector.¹⁴⁹ Over time, owing to the increased importance of law beyond the nation-state, as well as the general transformation captured by the concept of 'juridification' (or legalization and judicialization), it is increasingly expected that gender equality, also in Sweden, is to be built on strengthened (individual) legal rights and anti-discrimination provisions rather than on political reforms.¹⁵⁰ 'Juridification' means 'a process whereby

144 Birgitta Jordansson and Linda Lane, *Vilka är 'vi' i jämställdhetspolitiken? Klass, kön och etnicitet i RUT-tjänsternas Sverige. Rapport nr 8* [Who Are 'We' in Gender Equality Policy? Class, Sex and Ethnicity in Domestic Services in Sweden] (Katalys 2018).

145 Svensson and Gunnarsson (n 2).

146 See NJA (Nytt Juridiskt Arkiv) 2006 s. 683 [New Legal Archive].

147 1993/94:147 (n 19).

148 Svenaeus (n 47).

149 Wanna Svedberg, *Ett (o)jämställt transportsystem i gränslandet mellan politik och rätt: En genusrättsvetenskaplig studie av rättslig styrning för jämställdhet inom vissa samhällsområden* [An (Un)Equal Transport System on the Border between Politics and Law: A Gender Legal Study of Legal Governance for Gender Equality] (Bokbox Förlag AB 2013).

150 Eva-Maria Svensson, 'Exploiting Justice in a Transformative Swedish Society: Special Issue Introduction' in special issue on 'Exploiting Justice in a Transformative Swedish Society' (2020) 3(2) *Nordic Journal on Law and Society*.

a situation or an issue takes on a legal or a stronger legal character'.¹⁵¹ It may also indicate a proliferation of the rights discourse, and, on a general level, it increases the prominence of the legal system in governance.¹⁵²

1.7.3 Controversies and criticism of gender equality

As a legal principle, gender equality is hardly questioned within the Swedish context, but controversies arise when active measures to improve gender equality are proposed. Calls have been made for the introduction of legislation against sex-discriminatory adverts since the 1970s, but it has not been regarded as possible to take such a step.¹⁵³ The introduction of gender quotas for corporate boards is likewise a controversial topic in Sweden, although such quotas have been introduced in, for example, Norway.¹⁵⁴

Even though the Nordic countries can be considered relatively successful in reaching a high level of gender equality in comparison with other countries, the implementation of gender equality ambitions has been criticized as being exclusive, confirming the gender binary, insufficiently radical,¹⁵⁵ one-dimensional, and lacking an intersectional perspective.¹⁵⁶ Gender equality politics may confirm the gendered order they aim to contest while also reproducing a norm that primarily reflects the dreams and conditions of the white, heterosexual, enlightened, workable, middle-class couple.¹⁵⁷ Legally, intersectional considerations of multiple discrimination, based on several grounds, have not been opened for consideration.¹⁵⁸ And it has been stated that gender no longer has a privileged position in

151 Leila Brännström, *Förrättsligande: En studie av rättens risker och möjligheter med fokus på patientens ställning* [Juridification: A Study of the Risks and Possibilities of Law with Focus on the Position of the Patient] (Bokbox Förlag 2009), 13.

152 Håkan Gustafsson, 'Rättighetifiering – Om rättigheternas tragedi' [Rightification: On the Tragedy of Rights] in Thomas Erhag, Pernilla Leviner, and Anna-Sara Lind (eds), *Socialrätt under omvandling: Om solidaritetens och välfärdsstatens gränser* [Social Law Under Transition: On Solidarity and the Limits of the Welfare State] (Liber 2018); Brännström (n 150); Lars Blichner and Anders Molander, 'Mapping Juridification' (2008) 14(1) *European Law Journal* 36.

153 Jannice Käll, Marie Sundström, and Elnaz Zare, *Kartläggning av förekomsten av könsstereotyp och sexistisk reklam – slutredovisning* [Mapping of Sex Discriminatory and Sexist Advertising] (Diskrimineringsombudsmannen 2019); Svensson and Edström (n 98).

154 Mari Teigen, *Gender Quotas for Corporate Boards in Norway* (European University Institute, Department of Law 2015).

155 Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* Article 8; Paulina de los Reyes and Diana Mulinari, *Intersektionalitet: Kritiska reflektioner över (o)jämlighetens landskap* [Intersectionality: Critical Reflections on an Unequal Landscape] (Liber 2005); Tollin (n 141).

156 Kriszan, Skjeie and Squires (n 6).

157 Josefin Kjellberg, 'Jämställdhet, maskulinitet och (o)privilegerade subjektspositioner: Den svenska jämställdhetsdiskursens exkluderingar' [Gender Equality, Masculinity and Unprivileged Subject Positions: The Exclusions in the Swedish Gender Equality Discourse] (2013) *NORMA* 2.

158 Eva Schömer, 'Intersectional Discrimination: Gaining Entry to Swedish Workplaces' (2022) 68 *Scandinavian Studies in Law* 249; Eva Schömer 'Osynliggörande av multipel diskriminering i

anti-discrimination law, which has been adjusted to address other discrimination grounds, but it is still privileged in the political administration, while, for example, class is not included as a ground for discrimination at all.¹⁵⁹

From an intersectional perspective, equality is also prevalent in so-called norm-critical studies.¹⁶⁰ The norm-critical project evolved in Sweden during the 2000s as a new branch of the gender equality project, manifested in official policies or strategies in municipal authorities, schools, preschools, and other institutions as well as in children's literature.¹⁶¹ In the school and preschool system, gender equality has been part of the pedagogical content and framework of values, inscribed into curricula and the Education Act in Sweden, since the late 1990s. Since 2010, a specific form of non-oppressive or anti-discrimination pedagogy, called norm-critical pedagogy, has been frequently used within legally mandated gender equality and non-discrimination work.¹⁶² The implementation is anchored in laws against harassment and discrimination.¹⁶³ This relatively new branch of gender equality has met with massive resistance. Alongside the attacks on the political project in general, criticism has been directed towards such legislation adopted with the specific objective of transforming society in a gender equal direction.¹⁶⁴

In recent years, the political project of gender equality has been challenged from a variety of angles, such as neoliberalism, anti-gender movements, and anti-immigration groups claiming to safeguard European and Swedish values.¹⁶⁵

den svenska diskrimineringslagstiftningen' [Invisibility of Multiple Discrimination in the Swedish Discrimination Legislation] in Eva-Maria Svensson et al. (eds), *På vei. Kjønn og rett i Norden* [On the Way: Gender and Law in the Nordic Region] (Makadam 2011).

159 Andrea Krizsan, Hege Skjeie, and Judith Squire, 'The Changing Nature of European Equality Regimes: Explaining Convergence and Variation' (2014) 30(1) *Journal of International and Comparative Social Policy* 53; Mia Liinason, *Equality Struggles: Women's Movements, Neoliberal Markets and State Political Agendas in Scandinavia* (Routledge 2018).

160 Kalonaityté (n 141).

161 SOU [Swedish Government Official Reports] 2014:34 'Inte bara jämställdhet. Intersektionella perspektiv på hinder och möjligheter i arbetslivet' [Not Just Gender Equality: Intersectional Perspectives on Obstacles and Opportunities in Working Life], 247–272; Karin Salmson and Johanna Ivarsson, *Normkreativitet i förskolan: Om normkritik och vägar till likabehandling* [Norm Creativity in Preschool: About Norm Criticism and Equal Treatment] (Olika Förlag 2019).

162 Skollagen (2010:800) [School Act] Chapter 6; Discrimination Act (n 70).

163 Kristina Hermansson and Anna Nordenstam, 'Doing Justice: Uses of Norm Critical Children's Picture Books in Swedish Preschools' (2020) 3(2) *Nordic Journal on Law and Society* 1.

164 See, for example, Ivar Arpi, 'Ett tredje kön gör få glada' [A Third Sex Will Not Amuse Many] *Svenska Dagbladet* (20 January 2018).

165 Katarina Giritli Nygren, Lena Martinsson, and Diana Mulinari, 'Gender Equality and Beyond: At the Crossroads of Neoliberalism, Anti-gender Movements' "European" Values, and Normative Reiterations in the Nordic Model' (2018) 6(4) *Social Inclusion* 1; Anders Neergaard, 'Tankar om rasism: Den nya extremhögern, etnopluralism och könad omsorgsrasm' in Kerstin Sandell, Maja Sager and Nora Rätzzel (eds), *Kritiska gemenskaper: Att skriva feministisk och postkolonial vetenskap: En vänbok till Diana Mulinari* [Critical Communities: To Write Feminist and Postcolonial Science] (Lunds Universitet 2014); Eva Reimers, 'En av vår tids martyrer – Fadime Sahindal som mediehandling' [One of Our Time's Martyrs: Fadime Sahindal as a Media Event] in Paulina de los Reyes and Lena Martinsson (eds), *Olikhetens paradigm: Intersektionella perspektiv på ojäm*

Sweden's anti-discrimination and related legislation seem to offer no protection against such challenges. What has been labelled the 'gender ideology' by such groups is claimed to have been imposed on society with negative consequences for individual and academic freedom, and accused of being elitist, making it difficult for men to begin relations with women, etc. On a European level, the anti-gender movement includes not just the groups mentioned above but also complex networks of different actors, including 'angry white men', anti-abortion groups, religious groups, family associations, nationalists and populists, far-right groups, and others.¹⁶⁶ The messages of the anti-gender movement mobilize people who in their everyday lives are active in Internet forums, in Facebook groups, and on the editorial pages of newspapers, spreading the anti-gender agenda. Together, these movements and their individual followers cause the anti-gender discourse to grow.¹⁶⁷

Hate speech against women often accompanies the general anti-gender mobilization.¹⁶⁸ Hate speech on the grounds of sex is not prohibited, unlike hate speech on the grounds of ethnicity or sexual orientation. Nor is the Discrimination Act applicable in such a context, owing to its limitation to working life, education, and some other areas. The anti-gender agenda is directed not just at the government policy on gender equality but also at gender studies at the universities, as well as at individual women academics and journalists. The critique against gender studies is put forward by well-established journalists and other commentators, often from a (neo)liberal point of view. Gender studies has been called a 'dominant religion' (*överkyrka*) imposed on Swedish universities and exposing Sweden to brainwashing.¹⁶⁹ The critique from right-wing political groups has similarities but is often anchored in a nationalistic and conservative political ideology. Far-right communicative strategies use the Internet and social media as tools to spread malicious and manipulative information about gender theories and gender ideology.

likhetsskapande [The Paradigm of Difference: Intersectional Perspectives on the Doing of Inequality] (Studentlitteratur 2005); Pernilla Ouis and Anne Sofie Roald, *Muslim i Sverige* [Muslim in Sweden] (Wahlström & Widstrand 2003), 131–241.

166 Mona Lilja and Evelina Johansson, 'Feminism as Power and Resistance: An Inquiry into Different Forms of Swedish Feminist Resistance and Anti-genderist Reactions' (2018) 6(4) *Social Inclusion* 82; Roman Kuhar and David Paternotte, 'The Anti-gender Movement in Comparative Perspective' in Roman Kuhar and David Paternotte (eds), *Anti-gender Campaigns in Europe: Mobilizing against Equality* (Rowman & Littlefield 2017).

167 Lilja and Johansson (n 165).

168 Moa Bladini, 'Silenced Voices: Online Violence against Women as a Threat against Democracy' (2020) 3(2) *Nordic Journal on Law and Society*; see also the GENHA reports <www.genha.eu> accessed 1 December 2022.

169 Ivar Arpi, 'Så blev genusvetenskap överkyrka i Lund' [This Is How Gender Studies Became the Dominant Ideology in Lund] *Svenska Dagbladet* (4 November 2017) <<https://www.svd.se/sa-blev-genusvetenskap-overkyrka-i-lund>> accessed 28 April 2020.

1.7.4 Ideological transformation

Despite its diverging sources, the attack on gender equality ideology and policy practice may be understood within a broader perspective of societal transformation. The political shift Sweden has undergone, according to Mulinari and Nergaard,¹⁷⁰ from a multicultural welfare state that extended substantial citizenship, welfare, and labour rights to all within its borders to an eroded welfare state pressured by neoliberalism and ‘managed migration’, is part of the explanation. There is also, according to Edström,¹⁷¹ a connection between nationalism and misogyny, and the general political shift towards nationalistic agendas in the Nordic countries tends to include anti-feminist themes and threats that affect female journalists not only professionally but also in their private lives. In the last decade, the gender equality ideology has become the focus of anti-gender movements and ethno-nationalistic parties, as being both emblematic of the Nordic nations and a threat that must be destroyed to save the nation.¹⁷² An important aspect of what have been named the ‘new assimilation’ policies is a strong emphasis on gender equality as a national cultural symbol, an essential aspect of ‘Swedishness’, which is portrayed as conflicting with immigrants, especially immigrants with a Muslim background. Right-wing parties have increasingly argued for policies aiming at connecting citizenship rights with assimilation, sometimes linking immigrants with welfare ‘cheating’, criminality, and failing to identify with ‘Western values’.¹⁷³

Part 3: The potential and limits of gender equality legislation

1.8 In the throes of change

As indicated by its title, our aim in this chapter has been to capture processes of changing legal strategies and policy influences on how to achieve substantive gender equality in Sweden. In this field, active legal and policy measures exist side by side with both formal legal principles on non-discrimination and substantive legal principles on gender equality as a fundamental democratic value. The gender system theory, which addresses gender inequality as unevenly shared power, has been repeatedly reaffirmed and remains the starting-point for gender equality policy. Following the progressive decade of the 1990s, which saw active legal measures such as the prohibition of the purchase of sexual services, special reforms aimed at changing the gender balance in academia, individualized, non-transferable parental leave for each parent, and more, the ambitions have become more moderate.

170 Diana Mulinari and Anders Nergaard, ‘Doing Racism, Performing Femininity: Women in the Sweden Democrats’ in Michaela Köttig, Renate Bitzan, and Andrea Petö (eds), *Gender and Far Right Politics in Europe* (Palgrave Macmillan 2017).

171 Maria Edström, ‘The Trolls Disappear in the Light: Swedish Experiences of Mediated Sexualised Hate Speech in the Aftermath of Behring Breivik’ (2016) 5(2) *International Journal for Crime, Justice and Social Democracy* 96.

172 Nygren, Martinsson and Mulinari (n 164).

173 Mulinari and Nergaard (n 169).

During the last 20 years, the presumptions on which introduced measures have been based have increasingly differed from those of the structural understanding of gender inequality as a matter of unequal shared power on a societal level.

International principles and rules on gender are often constructed as anti-discrimination provisions. During the process of harmonizing gender equality in line with the policies and laws of the EU, the broader scope of gender equality that characterized the Swedish gender equality project was narrowed to a focus on anti-discrimination provisions and access to justice on an individual level.¹⁷⁴ In addition, our study of both access to justice in discrimination cases and legal processes for equal pay highlights a less successful implementation and perhaps also scope of the anti-discrimination legislation.

However, the development during the past 20 years has not been one-sided. Several reforms that have institutionalized the knowledge development on gender equality issues and the monitoring of active legal and policy measures and various forms of gender mainstreaming have been implemented during the period. At the international level, the establishment of the Gender Equality Agency is an exceptional reform. In research, international legal obligations have been used as normative arguments for change, both in analyses of national law and in *de lege ferenda* argumentation.¹⁷⁵

1.8.1 Contradictory ideologies

Faith in the ability of the state to organize society in a way that creates equal conditions has been apparent in all of the Nordic countries, but perhaps more so in Sweden. As we have highlighted, gender equality in Sweden has been intertwined with an extensive and inclusive welfare system. Social gender justice has been a part of the gender equality project. The driving force for gender equality has been a combination of claims formulated in politics and a growing body of research identifying the unequal living conditions for women, offering analytical theories through which to understand inequality and providing the necessary knowledge basis for various measures, such as legislation targeting men's purchase of sexual services and men's violence against women. The judicial system has not been the prime arena in which the battle for gender equality has taken place. On the contrary, we have shown in Part II that there are deficiencies when it comes to the enforcement system. Anti-discrimination provisions can be said to have limited importance, especially when their implementation seems to be quite weak. Also, through our discussion of the issue of equal pay, we have shown that social partners

174 Svensson and Gunnarsson (n 2).

175 Eva-Maria Svensson, 'Older Women, the Capabilities Approach and CEDAW: Normative Foundations and Instruments for Evaluation of the Governance of the Nordic Arctic' in Päivi Naskali, Joan R. Harbison, and Shahnaj Begum (eds), *New Challenges to Ageing in the Rural North: A Critical Interdisciplinary Perspective* (Springer Switzerland 2019); Monica Burman and Eva-Maria Svensson, 'Women's Human Rights in the Governance of the Arctic: Gender Equality and Violence against Indigenous Women' (2018) 9(1) *The Yearbook of Polar Law Online* 53.

are not a radical force when it comes to the promotion of women. Discriminatory practices within the labour market display considerable resilience. And at a time when the gender equality project seems to be increasingly challenged from various angles, and there is obviously an ideological struggle around gender equality as a societal goal, it is reasonable to be concerned for the future.

One thing that is important to acknowledge is the two to some extent contradictory ideologies that form the backdrop to Sweden's anti-discrimination legislation. This legislation is primarily based on a liberal and individual ideology. The first Equal Opportunities Act with anti-discrimination provisions for individuals was championed by the liberal Folkpartiet (now the Liberals). This legislation was not in line with the Swedish labour market model. The compromise that was reached was that the social partners were made responsible for active measures addressing the collective level. Other laws, especially those adopted during the 1990s, were promoted by parties on the left side of the political spectrum with the help of gender research on men's violence against women and theories addressing unequal power relations, among which the gender system theory was the most influential, as it came to form the knowledge ground for the gender equality policy area.

In general terms, the Swedish welfare model has been weakened at the same time as the country's anti-discrimination legislation has been strengthened. At the general level, the concepts of juridification and rightification address this shift towards the law's expansion and differentiation, as increased conflict-solving with reference to law, as increased judicial power, and as legal framing. The emphasis on personal autonomy and self-determination in a context of human rights has constructed discrimination as an opposite to equal opportunities on an individual level. However, although Sweden also recognizes anti-discrimination as one means for achieving equal opportunities, its tradition of egalitarian social citizenship focuses more on social institutions and structures than on individual rights. In other words, the Swedish welfare state model demands *equality of outcome* rather than equality of opportunity.

Discrimination that comes with patterns and norms in society often has no responsible subject and perhaps no specific subject that is harmed. The Discrimination Act has a limited applicability to patterns of gender inequality in general terms, for instance in relation to men's violence against women or the unequal share of unpaid work. The obligations to do something about such patterns rests on the state and other actors – for instance, through the provision of high-quality care facilities for children and older persons and legislation on shared parental leave. A comprehensive gender equality policy is therefore an important complement to the anti-discrimination legislation. The human rights instruments on gender equality that CEDAW emphasizes have considerable potential when it comes to promoting the structural changes societies need to make to combat inequalities related to sex and gender. In our opinion, this potential remains under-used in Sweden, particularly as a strategy to resist ideological transformations that would dismantle the legal reforms that have contributed to substantive gender equality. CEDAW could also be used as an efficient tool through which to advocate for legislation in fields of society that previously have been free from legal interventions, such as sex-discriminatory advertising.

1.8.2 From action to information

When studying policies and legal strategies on gender equality after what we regard as a proactive period during the 1990s, we have targeted a dominant discourse on knowledge mapping and information as the main strategy for gender inequality problems. A main concern, as we showed in Part II, consists in the worrying challenges regarding the limited access to justice for victims of discrimination in Sweden. The enforcement system in the Discrimination Act is not efficient. Supervision and counselling before making use of the sanction system seems to have become the key principle. Not bringing cases to the Discrimination Board and instead trusting that information activities will be a more efficient measure is a misinterpretation of the basic aim of the law. Legislation on anti-discrimination is about protecting rights and equal treatment. To make the interpretation that it would be voluntary to obey the provisions in the act is to undermine the basic purpose of the need to legislate against discrimination, which is to ensure the right of victims of discrimination to have their claims for justice tested in a judicial process. Information provision rather than sanctions is also the main rule in the supervision of the duties related to active measures stipulated in the Discrimination Act.

We have observed a similar approach in the institutionalization of gender mainstreaming of the implementation of the overarching goal of equal opportunities and the six connected subgoals. When the Gender Equality Agency supports, coordinates, and evaluates measures taken as part of the work to integrate gender equality measures, information is the key instrument used. This should not be read as a critique of the Agency's achievements. The Agency is clearly a hub for knowledge production and expertise, which are very important. It is more a shortcoming of the government's limitations on the tasks assigned to the Agency and the lack of legal remedies associated with those tasks. Without new radical legal tools, structural patterns of inequality cannot be conquered. The long-lasting gender pay gap serves as testimony to how gender policies have failed. It is well documented and a central target when it comes to achieving the goal of equality of opportunities between women and men. Nevertheless, governments continue to safeguard the Swedish model for the labour market, leaving wage formation to the social partners. The result is the conservation of pay differences between women and men. The Commission for Gender-Equal Lifetime Incomes has shown how these differences lead to million-kronor gaps in lifetime earnings. The Commission was very clear about the necessity for legal reforms to close or at least reduce the pay gap, beginning with the implementation of the expected EU directive on pay transparency.¹⁷⁶ However, the Commission did not deliver any proposals for an equal pay legislative reform, as this was not part of its assignment. Instead, it promoted measures that were very much in line with the discourse on knowledge mapping and information. Mapping and analysis of pay differences over time and measures for more gender-equal information and guidance were two central packages of measures proposed by the Commission.

176 Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.

1.8.3 Gender equality contested

Gender equality remains an important aspect of Sweden's democratic system and is anchored in Swedish legislation. And knowledge production continues to add knowledge about gender inequalities. At the same time, the gender equality project appears to have become rather defensive. It seems that the project is facing a number of deficiencies and threats, some of which we have addressed in this chapter. In all, the gender equality project can be characterized as a kaleidoscope. It can be described as both successful and not so successful. The relative success of the level of gender equality in Sweden must be understood as a combination of radical political reforms, progressive legislation, and a broad societal commitment to gender equality as a democratic value. At a time when the welfare state is in decline, there appears to be increasing inequality not only between women and men but also between groups with a lot of resources and groups with fewer resources. Intersectional inequality, consisting of several interacting patterns of unequal power based on factors such as sex, gender, ethnicity, social conditions, and more, may increase inequality also within groups of women and men. Even though the growing income inequalities in Sweden are not exceptional, but are also occurring globally, they have a specific resonance in the Swedish context given its strong ideological commitment to equality. Furthermore, Sweden is one of the countries in which inequality is increasing the most, and a common experience is that this provides ground for conservative, nationalist, and anti-gender equality movements in Sweden. On the basis of this development, we, as law scholars with expertise in gender issues and the law, need to raise the question of how we can mobilize equality and anti-discrimination law to defend already achieved rights. What direction should anti-discrimination law take in order to be a useful tool under such social, economic, and political circumstances?

With the latest election in September 2022 showing a powerful turn towards conservative parties in Sweden, some of them displaying clear elements of xenophobia and sexism, the climate for a progressive gender equality project has certainly become harsh. It is not a wild guess to say that the Swedish Gender Equality Agency may be shut down and that the individualized, non-transferable parental leave period for each parent, which is three months out of approximately eight, may not be extended. This situation, together with a defensive and passive judiciary system not advocating individual rights efficiently in practice, may open up a continued backlash against gender equality as a hallmark for Sweden. As gender equality is seen as being about equal power and when inequalities and uneven power are contested, reactions of counterpower are born, and, over time, such reactions have become more open. Some of the open critiques have also produced an alternative doctrine, describing the power relations between women and men differently. This represents a backlash against gender equality and the possibility of fulfilling the global sustainability goals of Agenda 2030.

1.8.4 To conclude

A shift from politics to law, inefficient enforcement tools, and dislodgment from action to information as well as criticism of gender equality from various angles have all had an impact on the law's ability to contribute to the achievement of

gender equality in Sweden. It is not primarily through anti-discrimination legislation and litigation that gender equality has been achieved in Sweden, and such an approach will probably not be the main strategy in the future. Still, we have to continue to improve the protection provided to victims of individual discrimination and harassment. The Swedish case shows how the individual's right to access to justice can be undermined in a context where state bodies – such as the Ombudsman – are given wide discretionary powers to promote equality as a collective public interest.

On a general level, our advice is that gender equality policies and laws should continue to be based on a broad and structural understanding of gender equality. With a focus on a single strategy of individual legal rights and anti-discrimination provisions, national and global goals on gender equality will not be achieved. It is essential to continue to legislate on active measures and welfare measures to fulfil the ambition that women and men should have the same power to shape society and their own lives. Our study of the pay gap in Sweden shows how the social partners, upholding the Swedish labour market model, have failed to live up to the commitments on all levels in relation to equal pay and work of equal value. Thus, one of the most prioritized legal reforms on gender equality ought to be legislation that prescribes active measures aimed at achieving the goal of closing the pay gap.

2 Paradoxes in Finnish gender equality law and policies

Kevät Nousiainen

2.1 Introduction

This chapter on Finnish equality law and politics discusses a number of developments and paradoxes in relation to gender equality in Finland. Measured against certain criteria, such as political power and participation in paid work, the situation for Finnish women appears to be rather good.¹ Both the European Gender Equality Institute's Gender Equality Index and the United Nations' Gender Inequality Index place Finland near the top of their lists, although below other Nordic states, in their comparisons of gender equality. Can we say, then – in line with the widely held view within the country – that gender equality has been achieved in Finland and that there is little need for any new political or legal measures?²

Statistics show that, in many respects, Finnish women and men lead rather different, or gendered, lives. Not only do women and men lead different lives, but their lives generally differ to the detriment of women, although in some regards it is men who are disadvantaged: they have shorter life expectancy, are more prone to accidents, and end up in prison more often than women, for example. Gender equality politics aim to reduce disadvantages experienced by men. For example, policies against students dropping out of education in the current Government Equality Programme are aimed at preventing male marginalization. Anti-discrimination law has a narrower scope than equality politics, and it does not deal with marginalization, which often has complex cultural and social causes. Anti-discrimination requires that someone can be held legally responsible for causing an alleged disadvantage.

Anti-discrimination law has been criticized by Nordic scholars for not addressing social inequalities effectively. In the view of these scholars, prohibiting discrimination can neither replace welfarist policies nor provide social justice in the traditional sense. Certain disadvantages and exclusions are based on 'ascribed

1 Statistics Finland, *Sukupuolten tasa-arvo Suomessa 2021* [Equality of the Sexes in Finland, 2021] <https://www.doria.fi/bitstream/handle/10024/184395/yyti_sts_202100_2021_23460_net_p2.pdf?sequence=1&isAllowed=y> accessed 28 August 2022.

2 Anu Pylkkänen captures the historical ramifications of the dilemma well in *Trapped in Equality: Women as Legal Persons in the Modernisation of Finnish Law* (Suomalaisen Kirjallisuuden Seura Studia Historica 2009).

otherness', which differs from differentiation on the basis of social class.³ In itself, anti-discrimination law cannot provide substantive equality.⁴ That said, the history of the legal concept of equality has been marked by dynamic historical changes.⁵ That there is legally a positive duty to promote equality,⁶ for example, is a principle recognized by international, EU, and national law, and the development of Finland's gender equality law has been greatly influenced by international standards. The Nordic welfare state played an important but ambiguous role in this development. This chapter looks at the interplay of external and internal influences in Finnish law.

Both equality politics and law necessarily depend on public opinion: if inequality goes unnoticed or is considered justified, policies against it rarely prosper. Finnish equality barometers⁷ show a consistent difference between women's and men's views on gender equality: Men believe more often than women that equality between women and men has already been achieved. In 2017, 20% of women and 45% of men in Finland believed this to be the case. Few Finnish women, and even fewer Finnish men, believe that men are in a clearly better position than women. Furthermore, 50% of men and 43% of women think that equality in the workplace has largely been achieved. Few of them observe pay, recruitment, or other work-related discrimination at their workplaces.⁸

The chapter explains how gender equality policies and law have developed in Finland as, over time, they shifted away from a focus on social and economic policies towards one on anti-discrimination measures, and away from prohibiting discrimination on the ground of sex to prohibiting discrimination on an open list of grounds. The underlying perspective of the article is that a profound change took place in Finnish politics in the 1990s, when the country's welfare state ethos was

3 Dagmar Schiek, 'Revisiting Intersectionality for EU Anti-Discrimination Law in an Economic Crisis: A Critical Legal Studies Perspective' (2016) 27(2) *Sociologia del Diritto* 23.

4 Kevät Nousiainen, 'Anti-Discrimination Law Setting the Standard for Social Europe' in Kerstin Ahlberg and Niklas Bruun (eds), *The New Foundations of Labour Law* (Peter Lang 2017).

5 Kevät Nousiainen, 'On the Limits of the Concept of Equality: Arguments for a Dynamic Reading', in Eva-Maria Svensson, Anu Pylkkänen, and Johanna Niemi-Kiesiläinen (eds), *Nordic Equality at a Crossroads: Feminist Legal Studies Coping with Difference* (Routledge-Cavendish 2004).

6 Both national law and international law have developed towards an understanding that states have a duty to carry out positive action to promote freedom and substantive equality; see Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2010).

7 The Ministry of Social Affairs and Health has provided information on experienced equality since 1998. The latest Barometer was provided in 2017; see Ministry of Social Affairs and Health, 'Tasa-arvobarometri 2017' [Gender Equality Barometer 2017] <https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/160920/STM_08_2018_Tasa-arvobarometri%202017_net.pdf?sequence=4&isAllowed=y> accessed 20 August 2022.

8 Statistics Finland, 'Työsyrintää tai eriarvoista kohtelua eri tilanteissa kokeneiden palkansaajien osuus 2018' [The Percentage of Employees Who Have Experienced Discrimination or Unequal Treatment at Work 2018] in *Sukupuolten tasa-arvo Suomessa 2021* [Gender Equality in Finland 2021] <https://www.stat.fi/tup/julkaisut/tiedostot/julkaisuluettelo/yyti_sts_202100_2021_23460_net.pdf> accessed 9 February 2023.

replaced by a political regime attuned to liberalism and neoliberalism. Since then, anti-discrimination has come to play an increasingly prominent role in Finnish politics. A turn to 'gender' rather than 'sex' and the extension of protection to cover new grounds of discrimination further changed the landscape of equality politics in Finland a decade later.

These developments in Finland have depended on both national and international pressures that will be discussed in this chapter. The particular legal instruments – both prohibitions on discrimination and the requirement of positive action – that were chosen to combat gender discrimination also reflect those pressures. Gender equality has increased during the years in which explicit equality law has been in place, but the extent to which anti-discrimination law has played a decisive role in that development remains unclear.

Finnish equality and anti-discrimination law does not provide powerful tools for promoting equality or reducing discrimination. The paradox of a relatively high level of gender equality under relatively weak equality law indicates that other processes besides law have had an impact on the situation in Finland. The historical changes that have taken place in Finnish politics grant us insight into the effects of different approaches: while welfare state policies improved social conditions to help women gain economic and social rights, these policies failed to address violations of individual integrity. With the more individualistic approaches adopted under a more liberalistic regime, the safety net provided by the public sector on which women could rely socially and economically became weaker, but more attention was directed towards the personal integrity of women than had previously been the case. The ugly problem of violence against women was revealed.

In Part 1, as well as throughout the chapter, the social, political, and economic forces behind particular developments in Finnish legislation are considered. One of the issues examined is the strong position of women in politics in Finland, along with other sources of power in Finnish society that seem to oppose feminist politics. Corporatism plays a powerful role in the definition of labour-related issues, including legislation, and it is important to understand the ambiguous role of social partners in the development of Finland's gender equality law. In this chapter, the term 'social partners' refers to representatives of management and labour as key actors within systems of industrial relations.

Two examples of longstanding equality problems are considered in Part 2: violence against women and pay discrimination. These two examples have partly been chosen because they represent long-term severe problems. In addition, they were selected to illustrate in detail how recognition of discrimination has been influenced by particular power structures and specific features of Finnish society. The case studies also show how national politics on equality depend not only on the government in power but also on structures supported by traditions and institutions that are difficult to change.

Part 3 discusses the provisions and limitations of past and present gender equality and anti-discrimination law in Finland in the light of recent legal developments.

Part 1: National gender equality landscape: Norms and enforcement

2.2 Finnish gender equality policies and law: Social, political, and economic context

First, a linguistic issue must be explained, as it may have an effect on how gender-related policies in Finland are understood. The Finnish language does not have a linguistic term for gender. The language is gender-neutral in terms of pronouns: *hän* means both ‘she’ and ‘he’. The Finnish word *sukupuoli* refers to biological sex (*suku* meaning ‘kin’ and *puoli* meaning ‘half’). ‘Gender’ was introduced to Finnish by feminist and gender studies as *sosiaalinen sukupuoli* (‘social sex’) in the 1980s, but the term is seldom used even in the context of gender studies, which is referred to as *sukupuolentutkimus* (literally ‘study of sex’). Legislation uses the terms ‘sex’, ‘woman’, and ‘man’, and it prefers gender-neutral formulations. Preparatory works for criminal law, for example, emphasize that gender-neutral formulations should be used. The strong emphasis on gender-neutral social practices makes gender-sensitive policies difficult to understand and implement. International and EU law distinguishes between ‘sex’ and ‘gender’, but both terms are routinely translated into Finnish using the term *sukupuoli*. The national legislature seems to pay little attention to social and cultural aspects involved in the use of the term ‘gender’.

Finnish political rhetoric often presents the country as ‘a model for gender equality’.⁹ Women’s political rights are pointed to as immutable evidence of the validity of such a claim. Finnish women’s rights to participate fully in parliamentary elections date back to 1906. The percentage of women members of parliament has risen from 9.5% following the 1907 elections, the first after women obtained the right to vote and stand for election, to 47% in 2019.¹⁰ In elections to the European Parliament in 2019 and regional elections in 2022, a majority of those elected were women. At the present time, Finland has a woman prime minister and all of the parties in government are led by women. The success of women in Finnish politics is often taken as a proof that gender equality has already been completely achieved in Finland, which makes it difficult to combat remaining inequalities.

Many positions of power show gendered patterns that favour men. Certain parliamentary standing committees have clear majorities of men (Finance, Commerce, Defence, Foreign Affairs, Constitutional Law, Agriculture and Forestry), and others of women (Social Affairs and Health, Education). High ministerial officials are more often men than women, as are the experts heard by the parliament. Three mayors out of every four are men, and less than 40% of chairpersons of municipal

9 Finnish media often refer to Finland as a model for gender equality. Lately, the reference may have an ironic undertone. For example, an article in the leading daily newspaper *Helsingin Sanomat* discusses existing gender inequalities under the heading ‘Suomi, tasa-arvon mallimaa’ [Finland, a Model for Gender Equality]; see Minna Pölkki, ‘Suomi, tasa-arvon mallimaa’ [Finland, a Model for Gender Equality] *Helsingin Sanomat* (Helsinki, 23 September 2021).

10 Finnish Parliament, Päivi Erikkilä, and Joni Krekola, ‘Women’s Suffrage 110 Years Information Package’ (May 2016) <<https://www.eduskunta.fi/EN/naineduskuntatoimii/kirjasto/aineistot/yhteiskunta/womens-suffrage-110-years/Pages/default.aspx>> accessed 20 January 2023.

councils are women. The number of women among leaders of the national employer organization is very low. Less than one-third of the board members in listed companies are women.

Finland is often described as a Nordic ‘social democratic’ welfare state.¹¹ In the pre- and post-World War II world, ‘Norden’ as a region consisting of five Nordic states was often characterized as representing a ‘middle way’ between socialism and capitalism. The concept of the ‘Nordic welfare state’ holds a privileged position in international and academic discourses on welfare,¹² as the small Nordic states had succeeded in overcoming poverty and social backwardness under democratic rule. Sweden was in practice seen as the model for Nordic innovations. Finland willingly adopted Swedish ideas and social models. For Finns, the Nordic identity also functioned as a bulwark against the Soviet Union¹³ – a feature that seems to be gaining ground again since the Russian invasion of Ukraine.

Even during the formative years of Finnish welfare state-building, however, it would be misleading to consider Finland a social democratic regime, as coalition governments have been the norm, and such governments have involved political denominations that spanned the range from communists to right-wing parties. Finland’s welfare state-building was based on solving societal problems by means of expansive administrative organization and regulation. National and local governments were expected to actively impact society through the provision of public goods.¹⁴

The expansion of the Finnish welfare state in the 1970s coincided with the rise of a new wave of feminism.¹⁵ The first wave of the Finnish feminist movement that had focused on formal equal rights for women had largely achieved its aims and subsided by the 1970s, while *de facto* inequality remained. Finnish feminism of the 1970s stressed women’s social and economic rights, and gender equality was promoted for its social utility.¹⁶ Women were traditionally economically active:

11 Danish sociologist Gøsta Esping-Andersen’s typology of welfare state regimes describes the Nordic model as based on universal rights and social services, rather than mere monetary social benefits that are typical for conservative welfare regimes; see Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press 1990).

12 Nils Edling, ‘Introduction’, in Nils Edling (ed), *The Nordic Countries as Welfare States* (Berghahn 2021).

13 Mary Hilson, *The Nordic Model: Scandinavia Since 1945* (Reaktion Books 2008).

14 Olli Mäenpää, *Julkisen hallinnon muutosvaiheista Suomessa* [On Transitions of Finnish Public Governance] (VAPK-kustannus 1991), 36–48.

15 Solveig Bergman, *The Politics of Feminism: Autonomous Feminist Movements in Finland and in West Germany in the 1960s to the 1980s* (Åbo Akademi University Press 2002); Riitta Jallinoja, *Suomalaisen naisliikkeen taistelukaudet: Naisasioliike naisten elämäntilanteen muutoksen ja yhteiskunnallis-aatteellisen murroksen heijastajana* [The Fighting Periods of the Finnish Women’s Movement: Women’s Movement as a Reflection of Women’s Situation in Life and Societal-Ideological Turning Points] (WSOY 1983).

16 Kevät Nousiainen, ‘Utility-Based Equality and Disparate Equalities: From a Finnish Perspective’ in Dagmar Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish 2008).

they worked on small family farms, participated in the war economy, and worked full-time already in the postwar period.

After 1968, ‘income policy agreements’ between the state and its main social partners (the national central labour market organizations) were frequently used to determine pay levels through a collective approach. Working hours, pensions, social security contributions, and, at times, even prices and rents were decided through compromises that involved political decisions.¹⁷ The aim was to keep inflation within a level conducive to productivity. These arrangements involved centralized collective agreements. In practice, pay levels were defined by the (male) export sector. Special ‘low-pay extras’ were sometimes paid to (women’s) low-pay branches. The corporatist approach to politics in Finland meant that any proposed legal reforms related to the labour market needed to be negotiated through a tripartite cooperation between the government and the main labour market organizations. Anti-discrimination law was and is consistently prepared through such negotiations and compromise. Finland has been a member of the International Labour Organization (ILO) since 1920 and has ratified the main ILO gender equality conventions.¹⁸ Implementation of those conventions, however, was (and continues to be) left largely to the government’s social partners.

In its foreign policy, Finland stressed Nordic cooperation and wished to be identified as a Nordic state in the bipolar Cold War world. Finland’s gender equality politics were also measured against related developments in the other Nordic countries. Finland participated eagerly in United Nations activities during the Cold War years, and the promotion of gender equality in foreign politics in that period has been referred to as ‘Cold War UN feminism’, as Finland was presented to the international audience as a country of advanced gender equality. The first woman deputy secretary general of the UN, nominated in 1972, was the lawyer Helvi Sipilä from Finland. She was given woman-specific tasks, among them the preparation of the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹⁹ In the 1990s, the concept of gender became more widely adopted, and the issue of men and masculinities was given a prominent role in Finnish equality politics. Nordic gender equality became a brand to be actively promoted internationally.²⁰

17 Maiju Wuokko, Niklas Jensen-Eriksen, Henrik Tala, Elina Kuorelahti and Aaro Sahari *Loputtomat kihlajaiset: Yritykset ja kolmikantakorporatismi Suomessa 1940–2020* [Endless Engagement: Business and Tripartite Corporatism in Finland in 1940–2020] (Siltala 2020) records the history of tripartite corporatism and income policy agreements.

18 The Equal Remuneration Convention C100 (1951) was ratified in 1960, and the Discrimination (Employment and Occupation) Convention C111 (1958) in 1970.

19 Marjaana Jauhola and Minna Lyytikäinen, ‘Kutistettu feminismi? Suomen ulkosuhteiden tasa-arvopoliittikka kylmän sodan YK-feminismistä 2010-luvun tolkkutasa-arvoon’ [Shrunken Feminism? Equality Politics in Finnish Foreign Affairs from the UN Feminism of the Cold War to the Common-Sense Equality of the 2010s] in Johanna Kantola, Paula Koskinen Sandberg, and Hanna Ylöstalo (eds), *Tasa-arvo muutoksessa* [Equality in Transformation] (Gaudeamus 2020).

20 Pirjo Markkola, ‘Nordic Gender Equality: Between Administrative Cooperation and Global Branding’, in Jani Marjanen, Johan Strang, and Mary Hilson (eds), *Contesting Nordicness: From Scandinavianism to the Nordic Brand* (De Gruyter 2022).

That Finland's approach to gender equality relied on social politics is apparent in the fact that responsibility for gender equality was assigned to the Ministry of Social Affairs and Health. The focus of equality policies was, in Nancy Fraser's terms, more on redistribution than recognition.²¹ Unlike feminists in many other countries, Finnish second-wave feminists believed in influencing social structures from within, through cooperation among state officials, women's organizations, and researchers mobilized to solve social issues.²² The expansion of the welfare state between the 1970s and the 1990s advanced social rights and created a new balance of responsibility between public and private actors.²³ Cooperation on equality between women and men was institutionalized in the 1970s, and since 1978 the Nordic Council of Ministers has regularly approved an action plan for Nordic equality policies. Such politics from above were referred to as 'state feminism'.²⁴

That Finland's anti-discrimination law was originally limited to discrimination on the ground of sex may be explained by the country's nationalist traditions and low level of immigration. Finland may be considered an epitome of the nation-state,²⁵ with a uniform national culture and a tendency to superimpose 'society' and 'state'.²⁶ Finland gained independence from the Russian Empire in 1917, following cultural and political nation-building in the 19th century. Nations are 'imagined communities'²⁷ with real-life effects. Finland was the only state among the new

21 Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (Verso 2004).

22 Anna Elomäki, Johanna Kantola, Anu Koivunen, and Hanna Ylöstalo, 'Samettikolmiosta uuteen politisoitumiseen: Muuttuva feministinen toimijuus' [From Velvet Triangles to a New Political Activism: Changing Feminist Agency], in Johanna Kantola, Paula Koskinen Sandberg, and Hanna Ylöstalo (eds), *Tasa-arvopolitiikan suunnanmuutoksia* [Changes of Direction in Equality Politics] (Gaudeamus 2020).

23 Even care of the elderly was to a great extent transferred to the public sector. In 1970, the legal responsibility of grown-up children to support their parents was removed. Spouses continued to be responsible for maintaining each other during a marriage, but, in practice, maintenance from one spouse to another had become a dead letter. Parents remained responsible for the maintenance of their under-age children.

24 The idea that 'state feminism' was a form of feminism typical for the Nordic states was much discussed within the political sciences. The term originated from Helga Hernes's *Welfare State and Woman Power: Essays in State Feminism* (Norwegian University Press 1987).

25 Finnish nationalism was created consciously in the 19th century. The motivations and aims of the nationalist movement were expressed by the maxim of A. I. Arwidsson (1791–1858): 'We no longer may be Swedes; we do not want to become Russians; so let us be Finns.' The nation-building stressed the need of the Finnish Swedish-speaking elites to adopt the Finnish language but encouraged nationalism also by emphasizing the shared history, culture, and religion of the population, in contrast to Russia.

26 In the Nordic conceptual universe, social problems are often seen as something to be addressed by the 'society', meaning public authority and the state; see Edling (n 12) 11.

27 Scholarship on nation-states stresses that nations may be built on various grounds, such as shared history, common language, ethnic origin, religion, or some other quality used as the distinctive ground for unity. They certainly are in many ways 'imagined communities' in the pejorative sense used by Benedict Anderson in *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (Verso 1983).

eastern European states that emerged at the end of World War I in former territories of the Austrian, Russian, and Turkish empires to survive the aftermath of World War II. A strong nation-state may be assumed to boost the solidarity needed for the welfare state project.²⁸ Finnish nationalism has democratic roots, but nationalism also motivates anti-democratic politics and exclusion of others, as discussed below.

Promoting gender equality in Finland has often involved social policies that guarantee services that enable women's paid work.²⁹ The Nordic welfare state has been presented as women-friendly, in contrast to conservative welfare states organized around a male breadwinner/female homemaker model.³⁰ Critics note, however, that the claim to women-friendliness rests on a selective image of women as middle-class heterosexual mothers. Nor is the welfare state necessarily a good employer. The Finnish welfare state (or the public sector) employs a great number of women at low pay. Accordingly, the welfare state may be held partly responsible for the broad gender pay gap in the country.³¹

2.3 Gender equal laws and policies: Different phases

Important social policy measures were adopted in the 1970s and 1980s. A family leave system providing for universal mandatory maternity, paternity, and parental leave with income-related benefits was introduced in gradual steps from the 1960s onwards, first through an extension of maternity leave and then through the introduction of paternity and parental leave. Several governments, the parliament, and Finnish labour market organizations debated these steps.³² Until 1976, spouses

28 For theoretical discussions on the relation of the nation-state and welfare state policies, see Peter Flora, Stein Kuhnle, and Derek Urwin (eds), *State Formation, Nation-Building, and Mass Politics in Europe: The Theory of Stein Rokkan* (Oxford University Press 1999).

29 Margaretha Mickwitz, Agneta von Essen, and Elisabeth Norgren (eds), *Roolien murtajat: Tasa-arvokeskustelua 1960-luvulta 2000-luvulle* [Breakers of Gender Roles: Equality Discussions from the 1960s to the 2000s] (Gaudeamus 2008).

30 Anette Borchorst and Birte Siim, 'Woman-Friendly Policies and State Feminism: Theorizing Scandinavian Gender Equality' (2008) 9(2) *Feminist Theory* 207. The feminist discussion highlighted gendered characteristics of the different models of the welfare state described by Esping-Andersen (n 11).

31 Milja Saari, Johanna Kantola, and Paula Koskinen Sandberg, 'Implementing Equal Pay Policy: Clash between Gender Equality and Corporatism' (2021) 28(2) *Social Politics: International Studies in Gender, State & Society* 265 <<https://academic.oup.com/sp/article/28/2/265/5511609>> accessed 21 January 2023.

32 Family-related leaves were introduced gradually, first through the extension of maternity leave in the 1970s. Paternity and parental leaves were introduced in the 1980s. See Anita Haataja, 'Suomalainen äitiys-, isyys' ja vanhempainvapaajärjestel [The Finnish System of Maternity, Paternity and Parental Leave] in Anna-Maija Castrén (ed.), *Työn ja perheen tasapaino: sääntelyä, tutkimusta ja kehittämistä* [Balance of Work and Family: Regulation, Research and Development] (University of Helsinki 2007). Labour market organizations were highly involved in the debate. Many collective agreements provide pay for some periods of family-related leave. The income-related benefits paid through social insurance do not compensate fully for the loss of income during such periods of leave.

were taxed together, which did not encourage spouses with lower income (usually wives) to work outside the home. Since then, spouses have been taxed separately. Mandatory universal social insurance legislated in the 1960s and 1970s consists of individual rather than family-based benefit schemes. Day-care for children was seen as a way to make it easier for mothers to enter the labour market. The first Act on Day-Care (36/1973) required municipalities to arrange day-care facilities. In 1985, the duty of municipalities to provide this service was turned into the right of parents to receive childcare, seen as mothers' ticket to paid work. The right to remain at home taking care of a child under three years of age, with a flat-rate benefit, was adopted simultaneously as a compromise with more traditional family-caring patterns. The right to home-care benefits remains in force and is an option almost exclusively used by mothers.

Up until the 1990s, Finland was a country of emigration, but since then immigration has increased. 'Old' minorities, such as the Swedish-speaking population and the Sami, enjoy political, cultural, and social protection that is not extended to the 'new' minorities³³ made up of EU citizens (mainly Estonians), Russians, and immigrants from crisis areas outside the EU. Gender equality politics grounded on national unity and social utility lose credibility when measured against increasing diversity.³⁴ In 2019, 8% of Finland's inhabitants were of foreign origin, with much higher percentages in major cities.³⁵

Neoliberal distaste for collective political aims and public institutional structures appeared in Finnish politics in the new millennium. At this point, the fact that Finland is a nation-state began to cause complications. Increasing immigration coincided with a turn towards growing income inequality. Income differentials that had decreased with the expansion of the welfare state remained stable in the 1980s and grew in the 1990s, although Finland remains a country with comparatively small income differentials.³⁶

The economic recession of the 1990s brought Finland's welfare state project into a crisis that weakened the social institutions and structures on which it was based. The state had been the main provider of social welfare, but in the 1990s the

33 Kevät Nousiainen, 'Minorities' Right to Day Care: Liberal Tolerance or Identity Maintenance?' in Dagmar Schieck and Anna Lawson (eds), *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination* (Routledge 2011).

34 Nousiainen, 'Utility-Based Equality and Disparate Diversities' (n 16).

35 In 2019, 1% of the whole population but 25% of immigrants lived in Helsinki; see Helsinki Statistics, 'Population with Foreign Background in Helsinki' <<https://ulkomaalaistaustaisethelsingissa.fi/en/>> accessed 20 August 2021.

36 Measured by the most common indicator for income differentials, the gini coefficient, relative income differentials have grown from 1995 to 2021. The income of the lowest income decile grew 31% during that period, while the income of the highest income decile increased by 103%. The median rise of income for the whole population during that period was 52%; see Statistics Finland, 'Tuloerojen kehitys Suomessa – tuloerot kasvoivat vuonna 2021 [Development of Income Differentials in Finland: Income Differentials increased in 2021] <https://stat.fi/julkaisu/clubks9mb7xzkn0bumw1pbcgc6>> accessed 23 January 2023.

main responsibility for providing social services was relegated to the municipalities, which went from being subcontractors of the state to being entrepreneurs.³⁷ Social services that had mostly been provided by municipalities were outsourced.³⁸ Since 1990, the educational goals of day-care have been stressed, rather than the right of women to work in the labour market. Both municipal and state coordination of day-care was largely dismantled in the 1990s, owing to neoliberal ideas about the need for market-based coordination. The egalitarian ethos of Finland's welfare politics gave way to claims that such politics lead to passivity among citizens. In policy documents, gender equality was increasingly understood as equality of opportunities.³⁹

Right-wing populism gained ground in the 1990s, motivated by discontent against conceived social and economic loss caused by globalization and European integration. The populist Finns Party gained popularity among men in particular⁴⁰ and established a profile for itself as a party opposed to immigration.⁴¹ Closing the borders against immigration was presented as the only way of protecting the welfare state. The party and its supporters hold nationalist values and opinions⁴² and stress conservative family values. Small right-wing extremist groups were activated when a higher number of asylum-seekers arrived in Finland in 2015.⁴³ Finnish populists claim they represent a silent majority of the 'people' against national and European elites.⁴⁴

37 Elina Palola and Antti Parpo, 'Kunnallista sopeutumisen politiikkaa' [Municipal Policies of Adaptation] in Elina Palola and Vappu Karjalainen (eds), *Sosiaalipolitiikka – hukassa vai uuden jäljillä* [Social Politics: Lost or Heading for Innovation] (National Institute for Health and Welfare 2011).

38 Helena Blomberg, 'Do Cutbacks Pay Off? Perceived Changes in the Standard of Municipal Services and Attitudes towards Services among Citizens and Municipal Decision Makers in Finland' (2002) 8(3) *International Journal of Social Welfare* 206.

39 Katri Hellsten, 'Onko puhe Suomesta pohjoismaisena hyvinvointivaltiona perusteltua' [Is It Appropriate to Talk About Finland as a Nordic Welfare State] in Palola and Karjalainen (n 37).

40 The Finns Party election programme for 2019, 'Vote Finland Back', declares that 'the Finnish government is for the Finns' and that 'the Finnish people ... must always come first and foremost in its policies and actions'; see <https://www.perussuomalaiset.fi/wp-content/uploads/2019/06/Eduskuntavaaliiohjelma-2019_SU_In_English_1.pdf> accessed 8 January 2022.

41 Supporters of the Finns Party differ from the supporters of other parties through their negative attitudes towards immigration and multiculturalism, sexual minorities, and environmental policies. The supporters of the Finns Party are opposed to more immigration, which they consider a problem for Finland. They are more often men than women. See Aleksi Suuronen, Kimmo Grönlund, and Rasmus Sirén, 'Puolueiden äänestäjät' [Voters in Different Parties] in Sami Borg, Elina Kestilä-Kekkonen, and Hanna Wass (eds), *Politiikan ilmastonmuutos: Eduskuntavaalitutkimus 2019* [Climate Change in Politics: Finnish National Election Study 2019] (Ministry of Justice 2020).

42 Jussi Martinen, *Mikä perussuomalaisia vaivaa* [What Is It That Bothers the Finns Party Members] (Vastapaino 2021).

43 One of these groups, the Nordic Resistance Movement, a Nordic group with national member associations, opposes multiculturalism, homosexuality, and immigration. The organization was prohibited by Finland's Supreme Court in 2020.

44 For a political analysis of global populism, see Jan-Werner Müller, *What Is Populism?* (University of Pennsylvania Press 2016).

In the 2010s, the concept of the Nordic welfare model was increasingly explained in cultural rather than political and economic terms. Extremist groups could identify as ‘Nordic Freedom’ or ‘the Nordic Resistance Movement’.⁴⁵ For such political actors, Finnish equality between women and men is a thing to be proud of as an expression of Finland’s cultural values and ethnic inheritance, but it should not be understood in terms of gender or as a principle that involves intersectional discrimination or LGBT rights. Inequality became treated as a characteristic of immigrants, and equality as an inherently Finnish characteristic. Gender equality was thus harnessed to create differences and utilized in anti-immigration and anti-Islamic discourses. When the number of asylum-seekers grew tenfold in 2015, the media quickly framed the issue as a social crisis that threatened security and welfare. Sexual crimes and harassment became behaviour deemed culturally typical for immigrants, not for Finns.⁴⁶ Equality bodies and feminist and human rights organizations demanded rights for trans and LGBT people and campaigned for legislative amendments as part of their agenda.

As a core concept in modern societies, equality is necessarily a contested term. Traditionally, equality politics were based on economic and social interests and driven by right- and left-wing political parties. Today, political divisions are increasingly based on identities and values. A chasm has opened up between the different meanings given to gender equality. For the opposites on the new political map, gender, LGBT rights, diversity, and intersectionality are concepts to be used as shibboleths through which to distinguish friend from foe.

The position of Finnish trade unions weakened considerably when industrial production moved to countries with lower labour costs. New jobs and workplaces tend to be established within the field of private services, often provided by small employers who offer non-permanent, often part-time jobs. These new circumstances threaten the ability of trade unions to negotiate good conditions for work. The employers’ organization EK (Confederation of Finnish Industries) seeks to negotiate local collective agreements. Employees at the local level face more difficult negotiations.⁴⁷ After almost 50 years of comprehensive corporatist policies in Finland, the tripartite model of income policy agreements came to an end in 2016, when EK⁴⁸ changed its rules to exclude centralized collective agreements.

45 Johan Strang, Jani Marjanen, and Mary Hilson, ‘A Rhetorical Perspective on Nordicness: From Creating Unity to Exporting Models’ in Marjanen, Strang, and Hilson (n 20).

46 Sociologist Sara Farris refers to ‘femonationalism’ as making use of feminism and gender equality to support anti-immigrationist and Islamist speech; see Veronika Honkasalo and Titus Hjelm, ‘Tasa-arvo erojen tuottajana ja eriarvoisuuden oikeuttajana: Femonationalismi, turvapaikanhakijat ja media’ [Equality in Creating Difference and Justifying Inequality: Femonationalism, Asylum-Seekers and Media] in Kantola, Sandberg, and Ylöstalo (n 22).

47 Ville Kainulainen, ‘Prekaari palvelutyö ja ammattiyhdistystoiminnan muutospainee’ [Precarious Service Work and Pressures to Change Trade Union Activities] in Kantola, Sandberg, and Ylöstalo (n 22).

48 The Confederation of Finnish Industries (EK) represents the interests of the Finnish business community both nationally and internationally. It represents 20 member associations and 15,300 member companies that employ a total of 900,000 employees.

Even after that decision, the social partners are considered the government's legitimate parties when it comes to preparing reforms that affect working life, including anti-discrimination law. The repercussions of the withdrawal of the employers' organization EK from the tripartite model have been felt in the preparation of subsequent legislation, however, as will be discussed below in the context of equal pay legislation.

Cuts in social spending were made by the government led by Prime Minister Juha Sipilä (Centre Party) (2015–2019).⁴⁹ According to critics, Sipilä's government made 'women pay the bill' for the delayed national effects of the global financial crisis of 2007–2009. The far-right Finns Party, one of the parties in the coalition, sought to impress its conservative values and male standards upon governance in general.⁵⁰ To help Finland's export industry in its efforts to compete with international competitors, the government sought to achieve lower pay costs through a tripartite agreement to freeze pay levels, lengthen working hours, and reduce employer costs. Most trade unions were persuaded to make collective agreements that reduced employee rights. In practice, these agreements were implemented to the letter in the public sector, while not all private-sector employers increased working time or cut wages. The overall aim was a 'Finnish model' of income policy, where the export sector would lead pay levels.⁵¹ The implementation of such a model within Finland's gender-segregated labour market has meant that women working in the public sector cannot demand pay rises to close the gender pay gap.

In 2016, cuts in social spending led Prime Minister Sipilä's government to limit the subjective right to day-care by making both parents' full-time activity (work or education) a condition for access to full-time day-care for their children. Children of an unemployed parent had access to only half-time care, and the costs for parents of day-care rose. Service provision was targeted for concrete cuts in social spending.⁵² Given that the unemployment rate for immigrants is higher than that for persons born in Finland, and the unemployment rate for non-Finnish-speaking mothers of small children much higher than that of non-Finnish-speaking fathers,⁵³

49 The government of Prime Minister Juha Sipilä consisted of the Centre Party, Kokoomus, and the Finns Party. The Finns Party divided into two parties in 2017, and only a fragment of the party remained in the government until 2019. Following the division of the Finns Party, the government continued in power with its original government programme.

50 Johanna Kantola, Paula Sandberg Koskinen, and Hanna Ylöstalo, 'Johdanto' [Introduction] in Kantola, Sandberg and Ylöstalo (n 22), 10.

51 Miika Kyla-Laaso, 'Sivutettu sukupuoli: Kilpailukykysojimus, julkinen sektori ja tasa-arvopuhe eduskunnassa' [Neglected Gender: Contract for Competitiveness, Public Sector and Equality Speak in the Parliament] in Kantola, Sandberg, and Ylöstalo (n 22), 188.

52 Marja Lindberg, Mikael Nygård, Janne Autto, Axel Rappe, and Emily Gichuchi, 'Toimeentulosta investointimaailmaan? Lapsiperheiden hyvinvointi ja perhepolitiikka Suomen hallitusareenalla vuosina 2007–2019' [From Subsistence to a World of Investments? Welfare of Families with Children and Family Politics in Finnish Government 2007–2019] (2020) 62(3) *Politiikka* 251.

53 Hanna Sutela, 'Lähi-Idästä ja Afrikasta kotoisin olevien naisten kotoutumiseen kiinnitettävä huomiota' [We Need to Pay Attention to the Integration of Women from the Near East and Africa] Asiantuntija- ja ajankohtaisblogi [Statistics Finland] 12 May 2016 <<https://www.stat.fi/tietotrendit>

cutting the right to day-care was especially detrimental to immigrant women and children, who risked facing intersectional discrimination as a result. Many Finnish municipalities did not implement the Sipilä government's policy of limiting full-time access to day-care.

At the time of writing, political leaders at both the national and the EU level are pushing gender equality policies that are more ambitious than those of their predecessors. The European Commission is currently promoting policies against pay inequality and gender-based violence. Gender equality has returned to national politics. The Government Programme of Finland's current prime minister, Sanna Marin, seeks to promote national gender equality through traditional economic and social rights as well as the protection of women's integrity. The subjective parental right to day-care has been reinstated, and a reform of the family leave system carried out. Extensive reforms of criminal law and victim services were promised under the new government's programme, and these have already been implemented to some extent, as discussed in Section 2.7.

2.4 Three phases in the development of anti-discrimination and equality law

2.4.1 Introduction

In this section, I will discuss three phases in the development of Finnish gender equality and anti-discrimination law, but first it is necessary to explain a few words from the terminology of Finnish equality law. *Tasa-arvolaki*, the Finnish Act on Equality between Women and Men, uses the word *tasa-arvo*, denoting 'equal value', for equality. The Non-Discrimination Act (*yhdenvertaisuuslaki*), which covers other grounds of discrimination, uses the word *yhdenvertaisuus*, which contains an element of comparison (*vertailu*). Before the introduction of the Non-Discrimination Act, *tasa-arvo* often connoted political and social substantive equality, whereas *yhdenvertaisuus* was used in the context of formal legal equality (typically, equality before the law).⁵⁴ The different terms used in these contexts may reflect a wish to distinguish more substantive aims from a merely formal requirement of equality. If such a distinction was intended, it has little ground in law, as several grounds of discrimination under Finnish equality and non-discrimination law both enjoy protection against discrimination and require positive action.

/artikkelit/2016/lahi-idasta-ja-afrikasta-kotoisin-olevien-naisten-kotoutumiseen-kiinmitettava-huomiota/> accessed 10 February 2023.

54 Kevät Nousiainen, 'Käsitteellisiä välineitä tasa-arvon erittelyyn' [Conceptual Tools for Analysing Equality] in Johanna Kantola, Kevät Nousiainen, and Milja Saari (eds), *Tasa-arvo toisin nähtynä: Oikeuden ja politiikan näkökulmia tasa-arvoon ja yhdenvertaisuuteen* [Equality Considered in Another Way: Legal and Political Insights into Gender Equality and Non-discrimination] (Gaud-eamus 2012).

2.4.2 *The first phase of equality law*

The first phase culminated in the enactment of the Act on Equality between Women and Men of 1986, which remains in force despite numerous amendments made during the following decades (in 1988, 1992, 1995, 1997, 2001, 2005, 2009, 2011, 2014, and 2016). The original act was strongly influenced by the CEDAW Convention,⁵⁵ and duties to carry out positive action were a hallmark of the act. Authorities and employers were obliged to promote equality, and equality in education was to be ensured.

Unlike the CEDAW Convention, the Act on Equality prohibits not just discrimination against women but also discrimination against men, but the aim was also to ‘improve the position of women in working life in particular’.⁵⁶ The choice of a symmetrical prohibition on discrimination was not contested. Unlike, for example, in Norway, there was little pressure to adopt woman-specific legislation. Finnish women’s organizations understood equality of the sexes as an aim pursued by both women and men acting side by side.⁵⁷ Radical feminism was limited to academic scholars and small feminist groups. Anti-discrimination law to promote equality was not brought to the political agenda by national minority-rights groups. The contents of the Act on Equality were largely defined by labour market organizations through preparatory works carried out in a tripartite fashion (i.e., state, employer, and employee organizations negotiating the outcome).⁵⁸

Under Section 7 of the original act, both ‘putting women and men in a different position on the ground of sex’ and measures that put ‘women and men *de facto* clearly in a different position’ were prohibited as discrimination. The wording used differs from the wording of Article 1 of CEDAW, but it contains the idea that both differential treatment on the grounds of sex and treatment that has the ‘effect of impairing or nullifying’ women’s rights were discriminatory. These two definitions aimed at prohibiting direct and indirect discrimination. Interestingly, the act did not stipulate that discriminatory treatment must have a detrimental effect on the person discriminated against.

However, only discrimination in working life carried a sanction (compensation). Section 8 of the original act prohibited discrimination in working life in relation to recruitment, pay, treatment at work, and dismissal. While the provisions have been amended several times, the initial structure remains: the act contains a general but not justiciable prohibition on and definition of discrimination with a

55 Kevät Nousiainen and Merja Pentikäinen, ‘Rise and Fall of CEDAW in Finland: Time to Reclaim Its Impetus’ in Anne Hellum and Henriette Aasen Sinding (eds), *Women’s Human Rights* (Cambridge University Press 2013).

56 Laki naisten ja miesten välisestä tasa-arvosta [Act on Equality between Women and Men] 609/1986, original, Section 1.

57 Milja Saari, ‘Rintaa rinnan Suomea kehittämättä’ [Developing Finland Side by Side] in Mika Helander and Mats Nylund (eds), *Palkka työstä: Ay-liike ja edunvalvonnan uudet muodot* [Pay for Work: Trade Unions and New Forms of Promotion of Interests] (Into 2012).

58 Anu Pylkkänen, ‘Muodollisen tasa-arvon pitkä historia ja sen sisäänrakennetut erot’ [The Long History of Formal Equality, Differences Built in It] in Kantola, Nousiainen and Saari (n 54).

broad material scope, along with narrower, specific prohibitions covered by a right to compensation on the part of the victim.

Under Section 9(2) of the Act on Equality, Finland's policy of mandatory male conscription was defined as non-discriminatory. Voluntary military service for women was introduced in 1995. Extending mandatory service to women has been proposed from time to time. Section 127 of the Finnish Constitution requires all Finnish citizens to participate in or assist in the military defence of the country. The mandatory male conscription is an exception to the equality principle that keeps alive ideas on male and female citizenship that have linked male citizenship to military duties and female citizenship to motherhood since the time of the French Revolution.⁵⁹

The first equality body, the Council for Gender Equality, was established in 1972 as a parliamentary advisory body. Simultaneously with the passing of the Act on Equality, the office of Ombud for Equality was put in place to monitor the implementation of the act in all areas of life covered by its terms.

2.4.3 The second phase of equality law

The end of the Cold War formed the context for the second phase of the development of equality law in Finland. Finnish membership of the Council of Europe (1989) and the European Union (1995) introduced more formalistic non-discrimination provisions into Finnish law. Many Finnish gender equality activists worried that gender equality would suffer under EU law, which was known for its lack of positive action and social policies. Many feminists were disgusted by the *Kalanke* case (C-450/93), in which the European Court of Justice held that positive measures were derogations from the formal principle of equality, which should be interpreted strictly. The Court later moderated its position but retained a cautious approach. A provision allowing positive measures was added to the Treaty of Amsterdam (1997), however, and the Treaty also strengthened gender mainstreaming in EU policies. Some lacunae in social policy were closed by means of 'social dialogue' – that is, agreements made by European Union-level social partners,⁶⁰ which were later turned into directives. The first EU law on parental leave, for example, was achieved through such social dialogue in 1995. Since Finland became a member of the EU, EU gender equality law has had a strong impact on Finnish law. In the 1990s, EU law concentrated on gender equality in the labour market. In other areas, such as combating violence against women, the EU

59 Joan Wallach Scott, 'French Feminists and the Rights of "Man": Olympe de Gouges's Declarations' (1989) 28(1) *History Workshop* 1.

60 European social partners are EU-level management and employment organizations that are engaged in 'European social dialogue', a procedure under Articles 154 and 155 of the Treaty on the Functioning of the European Union. An agreement by the European social partners may under certain conditions be turned by Council decisions into binding legislation. One organization (ETUC) represents employees. On the employer side, one organization represents private firms (BUSINESS EUROPE), another small businesses (UEAPME), and a third public employers (CEEP).

used soft-law measures only. With the expansion of the EU's mandate to legislate, however, the situation has altered.⁶¹

The direct effect of EU non-discrimination law and the direct applicability of the European Human Rights Convention are apparent in Finnish legislation in many ways. Definitions of discrimination have been amended to conform to EU law. The European Court of Justice developed the doctrine of indirect discrimination in its case law in the 1990s.⁶² The Act on Equality has been amended several times owing to the requirements of EU law. In 1992, an explicit statement to the effect that discrimination on the ground of pregnancy was sex discrimination was added to the act. In Finnish case law, discrimination on the ground of pregnancy had previously been considered a specific form of discrimination that could lead to compensation under the Employment Contracts Act, but not under the Act on Equality.⁶³ Under EU law, discrimination on the ground of pregnancy had been classed as direct discrimination by the European Court of Justice.⁶⁴ In 1995, the Act on Equality was further amended with reference to EU law.⁶⁵ Prevention of harassment on the ground of sex and sexual harassment was also added to the duties of employers, owing to recommendations from both the ILO and the EU.⁶⁶

Increasing attention to individual human rights was reflected in the reforms of the Finnish Constitution carried out in 1995 and 1999.⁶⁷ The 1995 reform introduced Chapter 2 on 'Basic Rights and Liberties' to the Constitution. The reformulated Section 6 on equality consists of four subsections, the first stating the general principle of equality before the law and the second containing the prohibition of discrimination. The prohibition defines discrimination as differential treatment of an individual on explicitly listed grounds or on the basis of any 'other reason that concerns his or her person'. The constitutional definition strengthened the tradition of stressing differential rather than detrimental or 'less favourable' treatment, terms used by EU law. The third subsection of Section 6 requires equal treatment of children, and the fourth subsection contains a duty to promote (substantive) gender equality 'in societal activity and working life, especially in the determination of pay and the other terms of employment'

61 Johanna Kantola and Kevät Nousiainen, 'European unionin tasa-arvopoliittikka' [Equality Politics of the European Union] in Kantola, Nousiainen, and Saari (n 54).

62 Cases *Rinner-Kuhn* C-171/88, *Nimz* C-184/1989 and *Kowalska* C-33/1989.

63 Government Bill HE 63/1992 vp. Hallituksen esitys Eduskunnalle laiksi naisten ja miesten välisestä tasa-arvosta annetun lain 9 ja 14 §:n muuttamisesta [Government Bill to the Parliament on the Amendment of Sections 9 and 14 of the Act on Equality between Women and Men].

64 Case *Dekker* C-177/88.

65 Amendments were made to implement directives 75/117/EEC, 76/207/EEC, 79/7/EEC, 86/378/EEC, and 86/613/EEC on equal pay, equal treatment at work, social protection, social security in professions, and equal treatment of self-employed persons, respectively.

66 Government Bill HE 90/1994 vp. Hallituksen esitys eduskunnalle laiksi naisten ja miesten välisestä tasa-arvosta annetun lain muuttamisesta [Government Bill to the Parliament on the Amendment of the Act on Equality between Women and Men].

67 Suomen perustuslaki [The Constitution of Finland] 731/1999. In 1995, a chapter on basic rights was adopted. It became Chapter 2 of the Constitution in the 1999 reform.

by legal provisions. Chapter 2 was incorporated into the Constitution as part of the total constitutional reform of 1999. A shift towards a more individualistic understanding of fundamental rights took place with the passing of the new Constitution, but it is worth noting that the promotion of gender equality was still defined in terms of social and economic rights.

Traditionally, the Nordic position regarding judicially protected rights and judicial review has been followed in Finland. Rights-based constitutionalism has gained ground since the late 1980s. The new Finnish Constitution combined parliamentary, judicial, and supranational forms of review. The traditional preview of legislation by the Constitutional Committee of the parliament was complemented by a new constitutional provision on judicial review (Section 92). The turning point for admitting judicial review was the signing of the European Convention on Human Rights. With EU membership, Finnish courts were granted the power to review national law in relation to its compatibility with EU law.⁶⁸ Provisions under Chapter 2 of the Constitution define the rights and liberties of ‘everyone’ and should be understood as coinciding with human rights and be interpreted in line with key human rights instruments.

Positive measures under the Act on Equality were made more explicit through the requirement that larger employers not just promote gender equality but also draw up an equality plan for the promotion of gender equality.⁶⁹ As positive action under Finnish law has never included quotas in the context of working life, EU law restrictions on quotas had little impact.

2.4.4 *The third phase of equality law*

As the EU offers little in the field of social welfare law, anti-discrimination law tends to become the standard for social inclusion and welfare.⁷⁰ In the wake of the financial crisis of 2007–2008, EU policies required cuts in social spending. Such policies were economically detrimental for women in many ways. On the other hand, EU anti-discrimination law expanded. The ‘2000 Directives’⁷¹ expanded EU anti-discrimination law by requiring protection in relation to four new grounds of discrimination. The implementation of the EU’s ‘2000 Directives’ expanded the

68 Juha Lavapuro, Tuomas Ojanen, and Martin Scheinin, ‘Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review’ (2011) 9(2) *International Journal of Constitutional Law* 505.

69 Government Bill HE 90/1994 vp. Hallituksen esitys eduskunnalle laiksi naisten ja miesten välisestä tasa-arvosta annetun lain muuttamisesta [Government Bill to the Parliament on Amendments to the Act on Equality between Women and Men].

70 Kevät Nousiainen, ‘Anti-Discrimination Law Setting the Standard for Social Europe?’ in Kerstin Ahlfors and Niklas Bruun (eds), *The New Foundations of Labour Law* (Peter Lang 2017).

71 The Race Directive (2000/43/EC) and the Framework Directive (2000/78/EC) were adopted soon after the Treaty of Amsterdam had mandated the EU to combat discrimination on several grounds by ‘hard’ legislation that should be implemented in all member-states.

personal scope of prohibited discrimination in many European states and often led to a unification of former ‘single track’ equality laws and bodies.⁷²

In Finland, discrimination on any grounds other than sex was prohibited by the Non-Discrimination Act in 2004. This act was adopted hastily for the purpose of implementing Directives 2000/43/EC and 2000/78/EC. Already at the time of the act’s adoption, the Finnish parliament required that it be amended within a short space of time, as it implemented the ‘2000 Directives’ incorrectly. Among other reasons, expanding anti-discrimination law to cover grounds other than gender was originally motivated by a desire to enhance efforts to combat multiple and intersectional discrimination. In the first phase of the preparatory works for an amended Non-Discrimination Act, the idea of unifying Finland’s two non-discrimination acts (the Act on Equality and the Non-Discrimination Act) was discussed,⁷³ but was abandoned as the preparatory work for the law proceeded. There were many reasons for this. Conciliating constitutional ambitions, corporatist motivations, and feminist fears about the possibility that unified legislation would lead to a weakening of the protection of gender equality was difficult.

Section 6(2) of the new Finnish Constitution prohibits discrimination on an open-ended list of grounds, which gave grounds to require that anti-discrimination law should provide protection against discrimination on an open list of discrimination grounds in an equal manner. Most national anti-discrimination acts cover only a limited number of grounds. Similarly, EU law only requires prohibition against a limited number of discrimination grounds.⁷⁴ It is difficult to extend similar protection to discrimination grounds, such as race, gender, and all other possible grounds, nor does international human rights law require that all discrimination grounds be treated similarly. After ten years of preparatory work, the new Non-Discrimination Act (1325/2014) was finally passed and came into force on 1 January 2015. Section 8 of this act follows the Constitution in prohibiting discrimination on an open list of grounds, but access to compensation differs depending on the ground. Compensation for discrimination is available only to the extent required under EU law.

Gender discrimination continues to be covered by the Act on Equality, but all other discrimination grounds are protected under the Non-Discrimination Act. Equality bodies were partly unified, as the former Gender Equality Board was merged with the Non-Discrimination Board into a new Non-Discrimination and

72 Johanna Kantola and Kevät Nousiainen, ‘Institutionalising Intersectionality in Europe: Introducing the Theme’ (2009) 11(4) *International Feminist Journal of Politics* 459.

73 Johanna Kantola and Kevät Nousiainen, ‘Pussauskoppiin? Tasa- ja yhdenvertaisuuslakien yhdistämisestä [To the Kissing Booth? On Unification of the Act on Equality and the Non-Discrimination Act]’ (2008) (2) *Naistutkimus* 6.

74 Directive 2000/43/EC, which prohibits discrimination on the ground of racial or ethnic origin, has a broader material scope than Directive 2000/78/EC, which is limited to the field of employment and covers the grounds of religion or belief, disability, age, and sexual orientation.

Equality Tribunal.⁷⁵ The Non-Discrimination Ombud monitors implementation of the Non-Discrimination Act, except in issues related to working life, which are monitored by occupational safety officials. The Ombud for Equality continues to monitor the Act on Equality. No provisions on intersectional or multiple discrimination were added to the Act on Equality. However, according to the preparatory works for the Non-Discrimination Act, the Non-Discrimination Ombud monitors intersectional discrimination.

The result of such an approach is problematic.⁷⁶ A two-track model of anti-discrimination law was chosen, with separate legislation and enforcement bodies for gender and other forms of discrimination.⁷⁷ The material scope of protection against discrimination varies across different grounds of discrimination, both under the EU's 2000 Directives and in the national legislation put in place to implement them. Although expansion of the number of prohibited grounds allows better insight into multiple and intersectional discrimination, the separation of acts and their material scopes according to different grounds for discrimination creates a complicated system.⁷⁸

New positions related to gender equality have since been attached to the office of the Non-Discrimination Ombud, rather than the Ombud for Equality. These include the National Rapporteur on Trafficking in Human Beings (2009) and the Rapporteur on Violence Against Women (2022).

Discrimination claims decided by the Non-Discrimination and Equality Board usually concern ethnicity and age.⁷⁹ In public discussion, claiming discrimination has become more common, with issues such as differential treatment of vaccinated and unvaccinated persons recently in focus. Under international human rights law, the margin of appreciation allowed to states in cases of differential treatment varies according to the ground of discrimination. Certain discrimination grounds, including gender, are covered by their own specific human rights instruments, and derogations from the prohibition on discrimination must not involve discrimination on certain grounds even under public emergencies. The current discussion in the media seems to stress the equality of all grounds of discrimination, rather than equality of human beings.

75 Laki yhdenvertaisuus- ja tasa-arvolautakunnasta [Act on Non-Discrimination and Equality Tribunal] 1327/214. Even after the reform, the name of the body in Finnish continues to be *lautakunta*, which should be translated 'Board', but the body itself refers to itself as the 'Tribunal', which refers to a body with a mandate to decide on cases; see the website <<https://www.yvtltk.fi/en/>>.

76 Kevät Nousiainen, 'When Does More Become Less? Proliferation and Hierarchy of Grounds in Finnish Non-Discrimination Law' (2014) (2) *European Journal of Social Law* 210.

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

78 Johanna Kantola and Kevät Nousiainen, 'The European Union: Initiator of a New European Anti-discrimination Regime?' in Andrea Krizsan, Hege Skjeie, and Judith Squires (eds), *Institutionalizing Intersectionality? The Changing Nature of European Equality Regimes* (Palgrave MacMillan 2012).

79 For case reports of the Board, see 'Decisions' <<https://www.yvtltk.fi/en/index/opinionsanddecisions/decisions.html>>.

Directive 2004/113/EC extended protection against gender discrimination to access to goods and services. Section 7 of the Act on Equality was reformulated in 2005, and the material scope of the act covered by compensation was expanded to implement EU law.⁸⁰ The amendment also introduced the duty to conduct gender mainstreaming under the provision on the duty of officials to promote equality. The provision on employers' duty to conduct equality planning was also amended. The definition of discrimination under Section 7 of the act was extended through the inclusion of definitions of direct and indirect discrimination that follow EU law. Sexual harassment and harassment on the ground of sex were defined as discrimination.⁸¹

An important extension to the personal scope of the Act on Equality was made in 2014 when the prohibition on discrimination was extended to cover differential treatment on the grounds of gender identity and expression of gender. The comparator in cases of such discrimination is a person 'whose characteristics do not include these features [i.e. physical or social transgender attributes]'.⁸² Discrimination was also extended to discrimination by association, as well as situations in which discrimination is based on (falsely) assumed characteristics. As noted above, responsibility for intersectional discrimination was assigned to the Non-Discrimination Ombud.

The emphasis on the use of social policies to promote gender equality was largely abandoned in the era of neoliberal politics, which stress the individual's right to equality of opportunity. A turn to anti-discrimination rather than social politics⁸³ can be understood as a shift from a politics of equality to a politics of identity, a turn described by Nancy Fraser in the US context.⁸⁴ The rise of right-wing populism strengthened this tendency.⁸⁵ The idea of welfare state services as a tool for gender equality grew dimmer also in Finland. As an example, provision of day-care for children, which once was a major feminist aim, has given way to an emphasis on the idea that day-care is provided as a right of children to early

80 Several members of parliament questioned whether it was necessary to extend justiciable protection to access to goods and services in the expert hearings of the parliament's Employment and Equality Committee.

81 Government Bill HE 195/2004 Hallituksen esitys eduskunnalle laiksi naisten ja miesten välisestä tasa-arvosta annetun lain muuttamisesta [Government Bill to the Parliament for Non-Discrimination Act and Related Acts].

82 Government Bill HE 19/2014 Hallituksen esitys eduskunnalle yhdenvertaisuuslaiksi ja siihen liittyviksi laeiksi [Government Bill to the Parliament for Non-Discrimination Act and Related Acts] 57, 120.

83 Kevät Nousiainen, 'For Equality or against Discrimination' in Vesa Puuronen (ed), *New Challenges to the Welfare Society* (University of Joensuu 2004); Kevät Nousiainen 'What Is Happening to Nordic Women's Income through Labour, Social Protection and Family?' in Krister Ståhlberg (ed), *The Nordic Countries and Europe: 2, Social Sciences* (Nordic Council of Ministers 2001).

84 In what Fraser describes as Act Two of the drama of feminist policies, when broader egalitarian aims give way to narrower goals of 'recognition' and identity politics; see Nancy Fraser, *Fortunes of Feminism: From State-Managed Capitalism to Neoliberal Crisis* (Verso 2013).

85 Kantola, Sandberg and Ylöstalo (n 50), 10.

education. In 2013, day-care and pre-school education were transferred from the Ministry of Social Affairs and Health to the Ministry of Education.⁸⁶ The changes did not diminish the reliance of women on such services, however, as became clear in the spring of 2020 when kindergartens were closed owing to the COVID-19 pandemic.

In 2012, the introduction of a provision on citizens' initiatives in the Finnish Constitution⁸⁷ established a channel through which civil society actors could bring legislative proposals to the parliament. This development has been important for proposals related to equality. So far, the parliament has accepted an initiative on same-sex marriage (2014), an initiative on genital mutilation (2019), and an initiative to increase self-determination in abortion law (2022). In addition, the concurrence of a citizens' initiative on a consent-based definition of rape with a similar government initiative led to the passing of new legislation (2022).

The positions of Ombud for Equality and Non-Discrimination Ombud were transferred to the Ministry of Justice in 2014. The Council for Gender Equality and the Gender Equality Unit (the body mandated to prepare government policies on equality) remained under the aegis of the Ministry of Social Affairs. As gender equality policies have traditionally been considered mainly in terms of social policies, the distinction between equality politics and law remains rather vague. In social scientific terms, inequality is usually considered as marginalization, which may be ameliorated by social policies.⁸⁸

Such a distinction is not made by all men's movement activists. 'Men' is not a homogeneous category, and different 'men's movements' have different relations with feminism. National, global, and transnational developments divide men's movements in relation to feminism.⁸⁹ The Finnish men's movement consists of both pro-feminist and other groups that demand more attention be paid to men's access to equality and discrimination against men. Since 1988, the Council for Gender Equality has had a Subcommittee on Men and Gender Equality. Some men's studies scholars claim that discrimination against men continues to go unnoticed and that equality bodies refuse to take steps against mandatory male military

86 Kirsi Alila, Mervi Eskelinen, Eila Estola, Tarja Kahiluoto, Jarmo Kinos, Hanna-Mari Pekuri, Minna Polvinen, Reetta Laaksonen, and Kirsi Lamberg, *Varhaiskasvatuksen historia, nykytila ja kehittämisen suuntalinjat* [History, Present and Development of Pre-School Education] (Työryhmämuitioita ja selvityksiä [Ministry of Education and Culture] 2014).

87 Government Bill 46/2011 vp Hallituksen esitys Eduskunnalle kansalaisaloitelaksi [Government Bill to the Parliament on Act on Citizens' Initiative] was adopted in 2012. Five Finnish citizens may make a proposition for legislation, which may be supported through an electronic service. A proposal that is supported by a minimum of 50,000 citizens may be submitted to the parliament. Signatures must be collected within a period of six months. An initiative may propose the enactment or drafting of new legislation, or the amendment or repeal of existing legislation.

88 Kevät Nousiainen, 'Käsitteellisiä välineitä tasa-arvon erittelyyn' [Conceptual Tools for Analysing Equality] (n 54).

89 Jeff Hearn 'Men, (Pro-)Feminism, Organizing and Organizations' (2003) 3 *Finnish Journal of Business Economics* 350.

service, discrimination in the context of divorce and child custody,⁹⁰ or recorded marginalization of men.⁹¹

Boys' and young men's underachievement in education and male health problems are listed as issues requiring anti-discrimination measures,⁹² even though it is difficult to point out a party or 'source' that is responsible for these disadvantages, as required under anti-discrimination law. In its opinion on the Ombud for Equality's report to the parliament in 2022, the Central Association of Men's Organizations in Finland demanded that Section 1 of the Act on Equality be amended, as it requires promoting the position of women in society, particularly in working life. The section follows the wording of Section 6 of the Constitution. The Association found it improper that the Ombud speaks about gendered violence against women, as both men and women should be equally considered both victims and perpetrators. The Association also demanded that factors that improve boys' welfare and educational achievements should be listed as equality aims by the Ombud, and that men's organizations should receive state funding equal to that of women's organizations, which comprise a far greater number of associations and members.⁹³

Among politicians, value conservatives have refused to promote certain international and national aims and policies, such as reform of the legislation on legal recognition of the gender of transsexuals. New feminist NGOs and groups have appeared, and traditional women's organizations with their established state contacts have stagnated. In a situation where gender has become a politically contested issue, national consensus on gender equality has lost ground.⁹⁴

2.5 Finnish equality and anti-discrimination law today

2.5.1 The scope of application of the Act of Equality

The material scope of the Act on Equality is quite broad, as the act applies to all fields of life, save those explicitly excluded under Section 2. Excluded areas include the activities of religious communities, family, and other private relations, and the acts of members of parliament and the president. The right of religious

90 Pasi Malmi, *Discrimination against Men: Appearance and Causes in the Context of a Modern Welfare State* (Lapland University Press 2009) 404–405.

91 Arno Kotro and Hannu Sepponen (eds), *Mies vailla tasa-arvoa* [Man without Equality] (Tammi 2007).

92 Since 2011, the Finnish men's movement has been organized under the Central Association of Men's Organizations in Finland, an umbrella organization for both pro- and anti-feminist men's associations.

93 Central Association of Men's Organizations in Finland, *Lausunto tasa-arvovaltuutetun kertomuksesta eduskunnalle 2022* [Opinion on the Equality Ombud's Report to the Parliament] <https://asiakas.kotisivukone.com/files/miesjarjestojenkeskusliitto.kotisivukone.com/Lausunnot_6_2022_alkaen/MJKL_Lausunto_Tasa-arvovaltuutetun_kertomuksesta_eduskunnalle_2022.pdf> accessed 20 January 2023.

94 Elomäki and others (n 22).

communities to define what is acceptable in terms of gender equality varies considerably. Since the Lutheran Church, which is the largest religious community in Finland, opted to allow women to become priests, the Act on Equality has been applied to discrimination in access to Church offices.

The Ombud for Equality has referred to the exclusion of private relations from the material scope of the Act on Equality as a ground for not having a mandate concerning violence against women. The exclusion has thus helped to uphold a widely shared understanding that violence against women is not a form of discrimination. From the start of 2022, the Non-Discrimination Ombud became the host for the National Rapporteur on Violence against Women. The responsibilities of this position include studies on such violence and reporting to the government and parliament on the issue. Sexual harassment and harassment on the ground of sex remain under the Act on Equality and supervision by the Ombud for Equality. The position of National Rapporteur on Trafficking in Human Beings was relocated under the Non-Discrimination Ombud at an even earlier date, as the Non-Discrimination Ombud is also responsible for promoting the rights of foreign nationals and monitoring the removal of foreigners to be deported from Finland. The separation of the monitoring of gender-based discrimination from reporting on violence against women and trafficking may obscure the gendered nature of violence further in national policies. The exclusion of members of parliament has protected them from accusations of sexual harassment. Persons employed as personal assistants to members of parliament have reported such harassment.⁹⁵

Even setting these issues aside, the width of the material scope of the Act on Equality is somewhat delusory. Section 7 defines discrimination on the ground of sex. The prohibition applies to the whole material scope of the act as well as the monitoring mandate of the Equality Ombud. The provision may have an impact on administrative law, as the prohibition on discrimination also applies to public authorities. Section 7 does not provide a victim of discrimination a justiciable right to demand compensation for discrimination, however. Section 7 has legal effect only through the monitoring of legality by the Ombud for Equality and other authorities tasked with such activity. In most respects, the victim of discrimination has a right to compensation only to the extent that it is required by EU law. Discrimination in certain contexts of life – in working life (Section 8), in educational institutions (Section 8b), in trade unions (Section 8c), and in access to goods and services (Section 8e) – is justiciable and may lead to compensation for the victim.

95 Harassment has been revealed in studies conducted by the parliament and the Finnish Broadcasting Company, YLE. In 2017, a YLE study found that 14% of personal assistants had experienced sexual harassment; see *YLE News* (12 December 2017) <<https://yle.fi/uutiset/3-9972340>> accessed 20 August 2022.

2.5.2 Protected discrimination grounds

The aim of the Act on Equality is to prevent discrimination on the ground of sex and to promote equality between women and men, especially in working life. Following a 2014 amendment, the act also aims to prevent discrimination on the ground of gender identity or expression of gender. The act uses the word *sukupuoli* (sex) to refer to what is here translated as ‘gender’. A similar choice has been made, for example, in the translation of the Istanbul Convention to Finnish, where ‘gender-based violence against women’ could be understood as ‘sex-based violence against women’ in the Finnish translation.

In 2014, two Subsections (5 and 6) were added to Section 3, which contains the definitions of terms used in the act. Gender identity is defined as ‘the person’s own experience of (his or her) gender’ (*sukupuoli*), and expression of gender as ‘articulating one’s gender [*sukupuoli*] by clothing, behaviour or in some other similar manner’. Gender identity (or sex identity) and expression of gender (or sex) are now defined as discrimination grounds falling under the Act on Equality. Discrimination on the ground of sexual orientation is protected under the Non-Discrimination Act. The arrangement resembles the one under EU law, where gender discrimination and other protected discrimination grounds come under different sets of directives.

The provisions of the Act on Equality do not expressly refer to gender reassignment. However, since gender reassignment concerns gender identity and the expression of gender, the provisions protect persons who have undergone gender reassignment. There is no further definition of *sukupuoli* (gender) beyond the recognition that it may be expressed through the choice of clothes and other similar means. Although there is no legal definition of transgender, intersex, or non-binary characteristics, gender identity and a person’s own experience of gender seem to cover these characteristics.

The most problematic aspect of Finnish legislation concerning transgender, intersex, and non-binary persons has been the Act on Legal Recognition of the Gender of a Transsexual (563/2002), which formally required infertility and extensive medical examinations as preconditions for gender reassignment surgery. Under the act, legal recognition of reassignment was tied to the medical procedure. In 2013, the Ombud for Equality found that the requirement of infertility violates constitutional rights.⁹⁶ In its 2018 report to the parliament, the Ombud demanded a reform of the act,⁹⁷ and the present government’s Action Plan for Gender Equality promised legislation that would increase self-determination in gender reassignment, remove the requirement of infertility, and separate the legal from the medical reassignment procedure.⁹⁸ Simultaneously, a citizens’ initiative demanded that

96 Equality Ombudsman’s opinion, TAS/297/2013.

97 K22/2018 Equality Ombudsman’s Report to the Parliament, 20 December 2018.

98 Ministry of Social Affairs and Health, ‘Suomi tasa-arvon mallimaaksi: Hallituksen tasa-arvo-ohjelma 2020–2023’ [Finland to Become a Model for Equality: The Government Action Plan for Gender Equality 2020–2023] (2020) 35, 46 <https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/162588/STM_2020_35_J.pdf?sequence=6&isAllowed=y> accessed 21 August 2022.

individuals under the age of 18 should have the right to decide their legal sex. The initiative received the 50,000 signatures needed for an initiative to proceed to the parliament in just one day in April 2021.⁹⁹ In September 2022, a government bill for new legislation was finally submitted to the parliament.¹⁰⁰ The new act on gender recognition was adopted by the parliament in February 2023. The act limits the right to legal sex reassignment to persons over 18.

There is no explicit prohibition of multiple and intersectional discrimination under Finnish anti-discrimination law. The preparatory works for the amended Non-Discrimination Act (135/2014) note that a person discriminated against on multiple grounds may refer to the Non-Discrimination Act but also has access to the remedies provided under the Act on Equality.¹⁰¹ Such a solution does not benefit all victims of multiple or intersectional discrimination, as the rules concerning access to the National Non-Discrimination and Equality Tribunal are different for victims of sex discrimination and victims of discrimination on other grounds. The scope of protection also varies according to the ground.

The Ombud for Equality's 2018 report to the parliament¹⁰² addressed the European Commission Recommendation (EU) 2018/951 on standards for equality bodies and noted that the Finnish bodies do not meet the required standards. In 2019, the Non-Discrimination Ombud published a policy brief entitled 'Multiple Discrimination and the Need to Identify It Better'.¹⁰³ The brief notes that such discrimination may be common, but often not recognized, and that it often involves gender. The 2022 reports of both the Ombud for Equality and the Non-Discrimination Ombud address the problems faced by victims of intersectional discrimination, particularly the issue of how pay discrimination on multiple grounds lies outside the Non-Discrimination Ombud's mandate, as occupational safety authorities monitor work-related discrimination on all grounds under the terms of the Non-Discrimination Act.¹⁰⁴ The Ombud for Equality has requested a

99 *YLE News*, 'Kansalaisaloite translain uudistamisesta keräsi 50 000 kannattajaa vauhdilla' [Citizens' Initiative for Reform of the Trans Act Speedily Gathered 50,000 Proponents] (9 September 2021) <<https://yle.fi/uutiset/3-11873108>> accessed 10 January 2022.

100 Government Bill HE 189/2022 vp Hallituksen esitys eduskunnalle laiksi sukupuolen vahvistamisesta ja siihen liittyviksi laeiksi [Government Bill to the Parliament for an Act on Gender Recognition and Related Legislation].

101 Government Bill HE 19/2014 vp Hallituksen esitys eduskunnalle yhdenvertaisuuslaiksi ja siihen liittyviksi laeiksi [Government Bill to the Parliament for a Non-Discrimination Act and Related Legislation] 121.

102 Equality Ombudsman's Report to the Parliament (n 97).

103 Ministry of Justice, 'Multiple Discrimination and the Need to Understand It Better' (Discrimination in Finland, Policy Brief 2, 2019) <<https://yhdenvertaisuus.fi/documents/5232670/5376058/Policy+Brief+moniperusteinen+syryint%C3%A4+EN/cb153ed3-ad4a-fd32-8bec-bd2c7580240f/Policy+Brief+moniperusteinen+syryint%C3%A4+EN.pdf?t=1660546558590>> accessed 21 January 2023.

104 The Non-Discrimination Ombud has pointed out the problem of multiple and intersectional discrimination, for example, in an opinion on the context of an amendment to the Act on Equality, VN/11746/2020. Both the Ombud for Equality and the Non-Discrimination Ombud have noted that their mandates differ for no legitimate reason; see the Ombud for Equality's Report

mandate to act in intersectional discrimination cases involving sex, gender identity, or gender expression.¹⁰⁵

Few cases dealing with intersectional discrimination have been brought before Finnish courts. While occupational safety directorates have a mandate to monitor legislation on discrimination grounds other than gender, some of the cases dealt with may *de facto* involve intersectional or multiple discrimination even though such terms are not explicitly mentioned in the documents related to the case. Few studies have focused on the recognition and elimination of multiple discrimination in general, even though the issue has long been the subject of discussions.¹⁰⁶

The Non-Discrimination Ombud has begun to monitor algorithmic discrimination, as such discrimination often involves multiple discrimination grounds. One case concerning algorithmic discrimination has been brought before the Non-Discrimination and Equality Tribunal by the Non-Discrimination Ombud. In this case, a credit company had made decisions regarding which applicants would be granted loans by awarding points based on the sex, place of residence, age, and native language of applicants – which are all grounds of discrimination under Finnish law – rather than on an individual analysis of an applicant’s income and economic position. The Tribunal found that discrimination on the grounds of sex, native language, age, and place of residence had taken place.¹⁰⁷

2.5.3 Definition of discrimination

The Finnish Act on Equality repeats the definitions provided by EU law, with some differences. The definitions of direct and indirect discrimination are inserted under Section 7 of the act. Direct discrimination is defined under Section 7(2) as ‘treating women and men differently on the ground of gender’ or ‘treating someone differently for reasons of pregnancy or childbirth’. ‘Treating someone differently on the ground of gender identity or gender expression’ is also defined as direct discrimination. The definition makes no reference to a comparator, nor does it require that differential treatment is less favourable. It also avoids any open reference to

to the Parliament 2022, 29 <[https://tasa-arvo.fi/documents/25249985/26183599/TAS+lausunto+TyV+tasa-arvoaltuutetun+kertomus+\(1\).pdf/dad6e2a8-de9e-4b88-7ea7-a2661ead81ae/TAS+lausunto+TyV+tasa-arvoaltuutetun+kertomus+\(1\).pdf?t=1653489719119](https://tasa-arvo.fi/documents/25249985/26183599/TAS+lausunto+TyV+tasa-arvoaltuutetun+kertomus+(1).pdf/dad6e2a8-de9e-4b88-7ea7-a2661ead81ae/TAS+lausunto+TyV+tasa-arvoaltuutetun+kertomus+(1).pdf?t=1653489719119)> accessed 28 November 2022; and the Non-Discrimination Ombud’s Opinion on the Ombud for Equality’s Report to the Parliament 2022 <<https://syrjinta.fi/-/yhdenvertaisuusvaltuutetun-lausunto-tasa-arvoaltuutetun-kertomuksesta-eduskunnalle>> accessed 23 August 2022.

105 Ombud for Equality’s Opinion to the Parliament’s Employment and Equality Committee 2022 <<https://tasa-arvo.fi/-/lausunto-eduskunnan-tyoelama-ja-tasa-arvoaliokunnalle-yhdenvertaisuusvaltuutetun-kertomuksesta-eduskunnalle-2022-k-7-2022-vp-tas-270-2022->>> accessed 23 August 2022.

106 Outi Lepola, *Koko ajan jännittyneenä: Moniperusteinen syrjintä seksuaali- ja sukupuoli vähemmistöjen kokemana* [Tense All the Time: Multiple Discrimination Experienced by Sexual and Sex Minorities] (Report 51/2018, Ministry of Justice 2018) 26.

107 Non-Discrimination and Equality Tribunal, Decision 216/2017, 21 March 2018.

a ‘comparable situation’ and thus places less emphasis on the need to present a comparator. Some type of comparison is still required to establish that a person has received differential treatment, however, and the more specific provisions on various forms of prohibited discrimination may require that a comparator be presented. The fact that the definition of direct discrimination was introduced into the Act on Equality long after the enactment of provisions on specific forms of discrimination, such as pay discrimination, were in place makes legal interpretation of those provisions somewhat difficult.

In Section 7(3), indirect discrimination on the ground of sex is defined, in line with EU law, as ‘treating a person differently by virtue of a provision, criterion or practice that appears to be gender-neutral in terms of gender, gender identity or gender expression, but where the effect of the action is such that the persons may actually find themselves in a less favourable position on the ground of gender’. Unlike the definition in EU law, the Finnish definition does not require that the person should suffer a ‘particular disadvantage’, which is required under the definition of indirect discrimination in Directive 2006/54/EC.¹⁰⁸ Under Finnish law, any disadvantage is sufficient. Within EU case law, ‘particular disadvantage’ has been demonstrated statistically or in some cases through the use of qualitative reasoning. The requirement limits the relevance of the concept of indirect discrimination. The potential of the concept of indirect sex discrimination has accordingly not been fully realized in the EU member-states¹⁰⁹ – including Finland.

Even ‘treating someone differently on the ground of parenthood or family responsibilities’ is classed as indirect discrimination under the Act on Equality but could also be considered direct discrimination under the Non-Discrimination Act, as the list of prohibited grounds under the latter is open-ended and thus covers even parenthood. No compensation would be available under the Non-Discrimination Act, however.¹¹⁰ While men become victims of discrimination on the ground of pregnancy only in exceptional cases,¹¹¹ they may suffer indirect discrimination

108 See Article 2(1)b of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (recast).

109 Jule Mulder, *Indirect Sex Discrimination in Employment: Theoretical Analysis and Reflections on the CJEU Case Law and National Application of the Concept of Indirect Discrimination* (European Commission Directorate-General for Justice and Consumers 2022), 87–90.

110 The definition of differential treatment due to parenthood and childcare does not give a justiciable right under the Act on Equality except in the context of the specific prohibitions on discrimination, such as Section 8 on discrimination in working life. These do not include the right to family-related leave, but Section 7(3) would be useful in the case of an employer’s prohibitive attitude towards a father’s family leave.

111 What is thought to be the first time in which a person registered as a man gave birth after having undergone gender reassignment was in 2018. Legislation then in force in Finland required infertility as a condition for gender reassignment, but hormone treatments do not necessarily lead to infertility. See *Helsingin Sanomat*, ‘Mieheksi sukupuolensa korjannut synnytti ensimmäistä kertaa Suomessa’ [A Man Who Had Undergone Gender Reassignment Gave Birth for the First Time in Finland] (Helsinki, 4 April 2018) <<https://www.hs.fi/kotimaa/art-2000005628271.htm>> accessed 10 February 2023. New legislation passed in 2022 defines the person who has given birth to a

on the ground of parenthood and childcare. Section 7(4) sets out various factors that might be regarded as justifying indirect discrimination: the means mentioned under Section 7(3) are not considered discriminatory if they are used to achieve an acceptable objective and if they are appropriate to and necessary for achieving that objective. In principle, under EU law, direct discrimination may not be justified. The issue of justification or ‘acceptable reasons’ for detrimental treatment is somewhat obscure under Finnish law, as the general prohibition on discrimination that contains definitions of direct and indirect discrimination and the specific provisions on various forms of discrimination should be read together.

Few cases of indirect discrimination come before Finnish courts. Statistical evidence has been used to establish indirect sex discrimination, for example, in Case TT:1998-34,¹¹² a judgement of the Labour Court on indirect discrimination. In this case, under the terms of a collective agreement, pay increases were determined on the basis of experience, and all ‘lawful absences from work’ not exceeding 30 days were to be included in the calculation. Although the condition was apparently gender-neutral, it disproportionately disadvantaged women, as women were often on maternity leave for longer than 30 days and statistically took parental leave significantly more often than men. The Labour Court found that both maternity leave and parental leave were to be counted as time in the calculation of pay benefits.

In Case KKO 2004:59, the Supreme Court applied the objective justification test, in a more limited manner than that required by EU law. A municipality had made redundant only some of its employees, which it justified by reference to economic difficulties. The personnel made redundant worked in departments (social and health) in which more than 90% of the employees were female, and not in departments where more than 90% of the employees were male. The Supreme Court found that the disproportionate redundancies of women could not be justified by budget restrictions alone. However, according to the Supreme Court, since the budget objectives were set for all departments without discrimination, and the expenditure of the female-dominated departments had been higher than that of the male-dominated departments, the measure had not been discriminatory because there were objective grounds for saving expenses. Unlike the lower courts before it, the Supreme Court did not consider EU law in its judgement and has been criticized in the legal literature for failing to apply the EU objective justification test. The Court should have considered whether budgetary grounds were sufficient to justify the measure by comparing them with several EU cases. The Court did not consider whether it was necessary to dismiss only female employees, or whether

child as the child’s mother. In the case of fertility treatment for couples consisting of two women, parenthood is determined on the basis of consent; see Vanhemmuuslaki [Act on Parenthood] (775/2022).

112 The case is available at <<http://www.finlex.fi/fi/oikeus/tt/1998/19980034>> accessed 10 February 2023.

the economic objective could have been achieved by means of non-discriminatory measures.¹¹³

Further prohibitions concern discrimination in working life (Section 8), victimization (Section 8a), discrimination in educational institutions (Section 8b) and labour-market organizations (Section 8c), workplace harassment (Section 8d), and discrimination in access to and supply of goods and services (Section 8e). Authorities and actors that violate these provisions are required to compensate the victim(s) of discrimination.

2.5.4 *Sexual harassment and harassment on the ground of sex*

Section 7 of the Act on Equality prohibits sexual harassment and harassment on the ground of gender, which are both classified as discrimination under the act. Sexual harassment is defined as unwanted verbal, non-verbal, or physical conduct of a sexual nature by which a person's psychological or physical integrity is violated intentionally or factually, in particular through the creation of an intimidating, hostile, degrading, humiliating, or offensive atmosphere. Harassment on the ground of gender is unwanted conduct that is not of a sexual nature but that is related to the gender of the person, their gender identity, or their gender expression, by which the person's psychological or physical integrity is intentionally or factually violated and an intimidating, hostile, degrading, humiliating, or offensive atmosphere is created. Employers, educational institutions, labour market organizations, and providers of goods and services are guilty of discrimination if they neglect to take action to eliminate harassment of which they are aware. The victim must show that harassing conduct has taken place, that it has been unwanted, that it has been detrimental, and that the employer or other responsible party has received information of harassment but not taken measures against it.

The international *#MeToo* campaign revealed the weaknesses of existing protection against sexual harassment. The campaign found support in Finland among artists, especially in filmmaking, theatre, and music. Encouraged by a Swedish example, a group of women collected a list of 1,244 signatures of people who alleged that they had suffered from sexual harassment and published it.¹¹⁴ An actor who had actively mentioned names of harassers was investigated by the police for suspected defamation, following calls for her investigation by men she had mentioned. The police investigation, however, did not lead to prosecution. A singer named as a harasser was dismissed from a musical production, and the artistic director of the national ballet was dismissed for harassment. The singer brought a case of defamation against

113 Outi Anttila, *Kohti tosiasiallista tasa-arvoa? Sukupuolisyrjinnän kiellot oikeudellisen pluralismin aikana* [Towards De Facto Equality? Prohibitions of Sex Discrimination in the Period of Legal Pluralism] (Suomalainen lakimiesyhdistys 2012), 306–308. For justifications of indirect discrimination, see Dagmar Schiek, 'Indirect Discrimination' in Dagmar Schiek, Lisa Waddington, and Mark Bell (eds), *Materials, Cases and Texts on National, Supranational and International Non-Discrimination Law* (Hart Publishing 2007), 323, 456–460.

114 Heidi Lindén and working group, *#Metoo vallankumous: Miten hiljaisuus rikottiin* [The *#Metoo* Revolution: How Silence Was Broken] (Like 2018).

women who in 2017 had claimed in Facebook and Twitter that he had committed sexual crimes, and four women were sentenced for defamation by the Helsinki District Court in 2018.¹¹⁵ Some male punk artists accused of harassment made apologies, while others denied having committed the crimes of which they were accused. One artist's lawyer reported a crime of aggravated defamation to the police. All texts on the campaign account were soon removed by the webmaster. The legal repercussions of the campaign seem to have fallen on the women who alleged harassment rather than on the men they accused. The alleged victims were unable to provide the types of evidence required by law, and the statute of limitations had in some cases made criminal law action impossible.

ILO Convention No. 190 of 2019 requires that states parties realize the right of everyone to a world of work free of harassment and violence. Members are to adopt an inclusive and gender-responsive approach to the development of laws and policies to achieve this aim, in consultation with social partners. The tripartite consultation and preparations that led to ratification of the Convention caused little stir in Finland. Trade unions raised no objections to ratification, although they stressed that the protection of employees against harassment and violence at the workplace required under the Convention was by no means at an adequate level. Finland's employer organizations saw that nothing in the Convention created new responsibilities for employers to prevent violence. The employer organization representing small enterprises regarded the existing Finnish legislation on harassment and violence as rather inclusive and saw no grounds for legislative amendments.¹¹⁶ The government aimed at ratification in 2022 but has announced that ratification will not take place during the remaining electoral period.

Woman ministers in Prime Minister Sanna Marin's coalition government have been targets of coordinated abusive messages on the Internet, as a study on politically motivated abusive language found in February 2021. The study sought to assess the level of automated or international political activity in Twitter. The main topics triggering abusive messages were measures taken against the COVID-19 pandemic, immigration, Finnish–EU relations, and socially liberal politics. A 'startling portion of this abuse' contained sexist and sexually explicit language. Many users focused on abusing the government, with the bulk of abusive messaging originating from clusters of right-wing accounts.¹¹⁷

115 Leena Ylimutka, 'Tomi Metsäketo voitti Me too -käräjät: Neljä naista sai rikostuomion kunnianloukkauksesta' [Tomi Metsäketo Won the Case: Four Women Were Sentenced for Defamation] *Iltalehti* (5 October 2018) <<https://www.iltalehti.fi/viihdeuutiset/a/32e0e238-08f6-4b11-b84a-23c26eef6064>> accessed 21 January 2023.

116 Ministry of Health and Social Affairs, 'Summary of Opinions concerning the ILO Violence and Harassment Convention, 2019 (No. 190)' <https://api.hankeikkuna.fi/asiakirjat/80c4721a-834f-44e8-9e72-ec643e615a85/6fe6a4d7-aa35-4124-9f10-85277118b716/YHTEENVETO_20200102094317.PDF> accessed 24 August 2022.

117 Kristina van Sant, Rolf Fredheim, and Gundars Bergmanis-Korats, *Abuse of Power: Coordinated Online Harassment of Finnish Government Ministers* (NATO Strategic Communications Centre of Excellence, 24 January 2021) <<https://stratcomcoe.org/publications/abuse-of-power-coordinated-online-harassment-of-finnish-government-ministers/5>, accessed 28 August 2022.

The prohibition of harassment under the Act on Equality in no way covers new types of online violence against women in public positions. With the 2022 reform of Chapter 20 of the Criminal Code, which covers sexual crimes, however, protection against non-consensual touching was introduced (Sections 3 and 4). The amended provision on harassment also covers sexual acts in the form of verbal acts and messages that violate the sexual autonomy of a person, and the provision against harassment was extended to verbal acts and online harassment (Sections 6 and 7). Online hate speech against women in positions of power was one of the reasons behind a proposal to amend the Criminal Code provision on general aggravating factors by adding the gender of the victim to the list of discriminatory motivations (such as race, colour, ethnic origin) already mentioned in the provision. The government bill, however, did not propose amending the Criminal Code provision on hate speech by adding gender to the definition of the crime.¹¹⁸

2.5.5 Positive action

Compared with similar legislation in other countries, the original Act on Equality was stronger in terms of positive duties than in terms of its prohibition of discrimination. The present Act on Equality contains provisions on positive duties for authorities, employers, and educational institutions. A new positive duty for these actors was added to the act in 2014: to prevent discrimination on the ground of gender identity and expression of gender. This positive duty is to be taken into account when employers and educational institutions prepare equality plans. The duty requires measures on the part of officials, educational institutions, and employers.

The positive equality duties set out within the Act on Equality have constitutional support. Since the constitutional reform of 1995, Section 6(4) of the Constitution 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, ‘as provided in more detail by an Act’. The reference to secondary legislation refers to the Act on Equality but can also include other legislation. For example, amendments of the Criminal Code aimed at reducing violence against women may be necessary for the promotion of gender equality. Preparatory works for the provision further note that even the principle of (formal) equality under Section 6(1) involves the duty to promote equality.

Sections 6, 6(a), and 6(b) of the Act on Equality require employers to implement positive action: all employers have a duty to promote equality within the scope of their resources. This requires employers to take action to ensure that both women and men apply for jobs; to employ women and men at various levels and provide them with equal career paths; to promote equality in working conditions, particularly pay; to develop working conditions suitable for both women and men; to facilitate combining working and family life for both women and men, with particular attention to working-time arrangements; and to prevent gender-based discrimination.

118 Government Bill HE 7/2021 vp Hallituksen esitys eduskunnalle rikoslain muuttamisesta [Government Bill to the Parliament on Amending the Criminal Code].

Employers with 30 employees or more must produce an equality plan every second year. The plan is not submitted to an authority but must be made public in the workplace. The plan can be a separate document or incorporated into personnel, educational, or safety-at-work plans. It must list positive-action measures concerning pay and other conditions of work and is to be drafted in cooperation with an employee representative, who should be given appropriate resources to participate in and influence the planning process. The plan should include an analysis of gender equality in the workplace and a pay audit that addresses the classification, pay, and pay differentials of women and men. The plan must also list the actions required to ensure equality and equal pay and include an assessment of earlier actions and their effects. A recent study shows that the majority of organizations draw up an equality plan and a pay survey, but the scope and quality of these plans vary considerably.¹¹⁹ The pay-transparency measures contained in Section 6(b) of the Act on Equality and an attempt to amend them are discussed in detail below in the context of pay discrimination.

Although several provisions impose positive-action duties upon authorities, employers, and educational institutions in line with the Constitution, problems arise as a result of their relatively weak implementation and monitoring. The weakness of positive duties lies in the impunity attached to their violation. The Ombud for Equality monitors equality planning and may set a date by which the duty to produce equality plans must be fulfilled or submit a complaint regarding violation to the Non-Discrimination and Equality Tribunal.

Perhaps the most effective of the positive duties established by the Act of Equality is set out in Section 4(a), which requires that state committees and other similar bodies, as well as municipal and regional bodies whose members are not elected but nominated, must ensure that whichever sex is under-represented on those bodies must make up at least 40% of their members. The provision was initially adopted in 1986, but then required only that ‘both women and men’ were members of these types of bodies. After the Supreme Administrative Court found that only one woman on a municipal body was enough to fulfil the requirement, the provision was amended by adding a quota. The quota provision was quite contested, and many women have feared being given the label of ‘quota women’ when nominated to a position in a body. The legitimacy of the provision has grown with time, however,¹²⁰ and it has had a certain spill-over effect in other areas of life. Nongovernmental organizations with no legal obligation to follow the provision often do so in practice.

Boards of publicly owned companies must be made up of equal numbers of women and men. This provision, however, has not been extended to the boards of private companies owing to opposition from businesses. The Chambers of

119 Henna Attila and Hanna Koskinen, *Työpaikkojen tasa-arvosuunnitelmat ja palkkakartoitukset 2020* [Equality Plans and Pay Audits in 2020] (Ministry of Social Affairs and Health 2020).

120 Mervi Parviainen, *Tasa-arvoa laskimella* [Gender Equality by Calculator] (Edita Publishing 2006). Parviainen carried out a survey among respondents from 150 municipalities, asking about the implementation of the quota provision and the extent to which it has promoted gender equality.

Commerce responded to calls to extend the quota provision to private companies by recommending gender-balanced representation through self-regulation rather than mandatory legislation. Since 2003, the national Code of Conduct for listed companies has required that both sexes must be represented on their boards, but no quota is set in the self-regulatory code.¹²¹ Listed companies are to follow the ‘comply or explain’ rule when reporting on the requirements of the Code of Conduct. In 2022, women made up 31% of the members of all company boards.¹²²

2.6 Equality bodies, monitoring, access to justice, and remedies

2.6.1 *Criteria for effective access to justice and remedies*

A report by the EU’s Fundamental Rights Agency (FRA) on access to justice in discrimination cases declares that effectively combating discrimination requires that people recognize when they have suffered a violation, are emboldened to seek redress, and have accessible and effective remedies.¹²³ EU law requires the creation of equality bodies with certain powers. Such bodies, either courts or quasi-judicial bodies, may promote equality and/or adjudicate. Different types of intermediaries may be involved in the process, such as nongovernmental organizations, trade unions, and lawyers. Complainants expect legal advice and support, while equality bodies complain that they lack sufficient resources to assist the alleged victims.¹²⁴ Combating discrimination benefits from strategic litigation, which differs from classical litigation in that it strives to bring about changes in the law by winning a case that may become a positive precedent. Strategic litigation and access to justice, in general, are impeded by a lack of suitable cases, as well as long and costly procedures and a lack of legal aid.¹²⁵

Finland’s anti-discrimination law relies heavily on monitoring by equality bodies. There is no independent access to a low-threshold remedy for victims of gender discrimination. Compensation claims in gender discrimination cases remain individual, with no class action or standing for nongovernmental organizations available. Labour market organizations act as gatekeepers to crucial remedies. Strategic litigation has little institutional support and is uncommon.

121 Keskuskauppakamari [Finnish Chamber of Commerce], ‘Naiset pörssiyritysten hallituksissa 2020’ [Women on the Boards of Listed Companies 2020] <<https://kauppakamari.fi/wp-content/uploads/2020/06/Naisjohtajakatsaus-06-2020.pdf>> accessed 28 August 2020.

122 Keskuskauppakamari [Finnish Chamber of Commerce], ‘Naiset pörssiyritysten hallituksissa 2022’ [Women on the Boards of Directors of Listed Companies 2022] <https://kauppakamari.fi/wp-content/uploads/2022/07/Naisjohtajakatsaus_062022.pdf> accessed 29 August 2022.

123 European Union Agency for Fundamental Rights, *Access to Justice in Cases of Discrimination in the EU: Steps to Further Equality* (FRA 2012).

124 *Ibid.*, 58.

125 Marion Guerrero, *Strategic Litigation in EU Gender Equality Law* (European Commission Directorate-General for Justice and Consumers 2020).

2.6.2 Equality bodies

The Ombud for Equality is an independent equality body with a mandate to monitor, analyse, promote, and support equal treatment.¹²⁶ The Ombud is to monitor the implementation of the Act on Equality; promote its aims through initiatives, advice, and guidelines; follow how *de facto* gender equality is realized; conciliate among parties in discrimination cases; and assist victims of gender discrimination in compensation cases. The Ombud is mandated to assist victims in court (Section 3 of the Act on the Ombud for Equality), but the mandate is restricted to cases that the Ombud views as having ‘considerable importance for implementation of the Act on Equality’. The Ombud does not have powers to bring cases on his or her own initiative. The provision on assistance to victims is something of a dead letter, however, as the Ombud has never assisted a victim in a court case, citing lack of resources and the possible procedural costs for the victim if a case is lost as the reason for this. The Ombud reports to the government every year and to the parliament every four years.

The Non-Discrimination and Equality Tribunal¹²⁷ is a quasi-judicial body that has competence to deal with cases under both the Non-Discrimination Act and the Act on Equality. The mandate of the Non-Discrimination and Equality Tribunal in cases of gender discrimination has remained unchanged from that of its predecessor, the Gender Equality Board. A victim of gender discrimination (unlike a victim of discrimination based on other prohibited grounds) cannot submit a case to the Tribunal independently: the Act on Equality permits cases of sex discrimination to be submitted only by the Ombud for Equality or the main labour market organizations, in which case the Tribunal only has a mandate to prohibit the continuation of a discriminatory act. No compensation to the victims of discrimination can be ordered by the Tribunal. The mandate of the Ombud for Equality was extended to cover conciliation between parties in 2014, but the Tribunal needs to confirm such conciliations.

On the other hand, the Tribunal has a mandate concerning employment-related gender discrimination if a case is brought to it by the Ombud for Equality or a labour market organization, but no mandate to address employment-related discrimination that is based on other discrimination grounds. Discrimination related to working life on grounds other than gender is monitored by Finland’s occupational health authorities. The disparity between victims of gender discrimination and victims of other forms of discrimination in relation to access to the Tribunal has no justification in international or constitutional legal standards.

Individual litigation for compensation remains the main remedy available in cases of gender discrimination. Finnish procedural law restricts strategic litigation by civil society organizations, as only parties to a case have legal standing rights. Class action is not allowed in discrimination cases. The Ombud for Equality does

126 Laki tasa-arvovaltuutetusta [Act on the Ombudsman for Equality] 1328/2014.

127 Laki yhdenvertaisuus- ja tasa-arvolautakunnasta [Act on the Non-Discrimination and Equality Board] 1327/2014.

not, in practice, assist victims in court, but possible monetary or legal assistance may be provided by trade unions or other organizations or by private insurance schemes. The evidence required to prove discrimination is often difficult to obtain, despite a provision on the burden of proof that shifts the onus to the respondent once a plaintiff has provided sufficient evidence for an assumption that discrimination has taken place to be established (Section 9[a] of the Act on Equality).

There is no upper limit under Finnish law on the amount of compensation that may be ordered in cases of discrimination, except in cases of recruitment discrimination. The amount of compensation that is granted depends on the possible compensation available under other pieces of legislation, as well as on the type of discrimination that has occurred and its duration. The sum may be lowered or even reduced to zero if that is considered fair, depending on the economic position of the discriminator, whether attempts to address the impact of the discrimination have been made, or other circumstances (Section 11 of the Act on Equality). A victim of discrimination in recruitment to a municipal or state office may make an appeal to the administrative court to have the illegal decision overturned, under the Act on State Officials (750/750) and the Act on Municipal Officials (304/2003). A favourable court decision in such cases does not mean that the person is automatically nominated to the office in question, however. Instead, a new decision on the relevant appointment must be made.

The costs of litigation are high and continue to rise. A study analysed costs in civil law cases in 2019 and compared them with findings from earlier studies. Where the parties were equal (i.e., were either both private persons or both corporations), the parties won and lost in even numbers. Where a corporation faced a private person, the corporation was more often the winning side. Costs for a private party in 2019 were three times what they had been in 1995, and in labour law cases between employers and employees the costs had risen 80% since 2008. The monetary interests in cases that end up in the courts are far higher than was previously the case. Free legal aid is available only to people with very low income.¹²⁸

Victims of gender discrimination thus have formal access to the courts, but the costs of litigation are prohibitive. The losing party pays both the costs of the other party and their own costs. According to a recent study, 103 gender discrimination cases involving violation of the Act on Equality between Women and Men were brought to district courts in the period 2015–2019. Of these, the plaintiff (victim) won in 18 (or 17%) and lost in 50 cases; a conciliation was reached in 22 cases; and 13 cases were dismissed.¹²⁹ The study showed that compensation claims are seldom brought to court by victims of gender discrimination, and fewer than one in

128 Laura Sarasoja and Chris Carling, *Oikeudenkäyntikulut pääkäsitellyssä ratkaistuissa riita-asioissa 2019* [Legal Costs in Court Cases 2019] (Edilex 2020). Earlier studies on litigation costs have been carried out in 1997, 2005, and 2009.

129 Kati Nieminen, Laura Jauhola, Outi Lepola, Kati Rantala, Risto Karinen, and Tuomas Luukonen, *Aidosti yhdenvertaiset: Yhdenvertaisuuslain arviointi* [Truly Equal: Assessment of the Non-Discrimination Act] (Publications of the Government's Analysis, Assessment, and Research Activities 2020: 50, Prime Minister's Office, 2020), 61.

five of such cases are won. The study was undertaken to assess the need for amendment of the Non-Discrimination Act, but the researchers recommended that the Act on Equality and the Non-Discrimination Act should both be amended simultaneously, taking into account international and EU criteria and comparisons with other Nordic states to indicate how provisions on the monitoring of the acts should and could be amended to increase its effectiveness.¹³⁰

The parliament's Employment and Equality Committee presented detailed comments to the 2022 reports by the Equality and Non-Discrimination Ombuds.¹³¹ Both reports described the deficiencies in the monitoring of prohibitions on discrimination and the legal remedies available under the Act on Equality and the Non-Discrimination Act. The Committee noted that it is problematic that the Ombud for Equality has no mandate in relation to intersectional discrimination. Cases concerning gender equality are seldom brought to court, evidently owing to the high costs of litigation and the low amounts of compensation granted. The Ombud for Equality has made no use of its mandate to represent victims in court, owing to lack of resources and because the victim would be responsible for the other party's costs if a case were lost. The Employment and Equality Committee stressed that individual court procedures are not an efficient means for addressing collective forms of discrimination, such as pay discrimination. According to the Committee, the Ombud should have an independent mandate to bring cases of discrimination to court, and the possibility of giving trade unions and other organizations legal standing in discrimination cases should be examined. The Non-Discrimination and Equality Tribunal should be given powers to order compensation for a victim of gender discrimination, and consideration should be given to the question of whether victims should be given the right to submit cases to the Tribunal themselves. The Employment and Equality Committee also stressed the need to develop low-threshold legal remedies for victims.¹³²

Part 2: In-depth studies on current gender equality issues

2.7 Gendered violence against women

2.7.1 Nordic paradox with a vengeance

The 'Nordic paradox' is that, against expectation, gender equal Nordic countries have high levels of gender-based violence against women. In a 2014 survey by the FRA, Denmark, Finland, and Sweden were among the EU member-states

130 Outi Anttila and Kevät Nousiainen, *Selvitys tasa-arvolain valvontasäännösten toimivuudesta* [Study on the Effectivity of the Provisions on Monitoring the Act on Equality] (Ministry of Social Affairs and Health 2013) <http://www.stm.fi/c/document_library/get_file?folderId=6511574&name=DLFE-28645.pdf> accessed 29 August 2022.

131 Equality and Employment Committee Report TyVM 8/2022 vp on the Report of the Ombud for Equality to the Parliament K 1/2022.

132 Equality and Employment Committee Report (n 131), 8–19.

with the highest prevalence of violence against women.¹³³ Nordic states have a high prevalence of sexual violence.¹³⁴ An average of 30% of women in these countries had experienced intimate partner violence, which is higher than the EU average of 22%, according to the 2017 Gender Equality Index in the EU. The assumption that gender equality has already been achieved may have prevented efforts to address protection of women's integrity, reflecting the tendency of women to become 'trapped in equality'.¹³⁵ The assumedly 'strong Finnish woman' has since the postwar period been reluctantly presented as a victim in Finnish politics.¹³⁶

In certain ways, the Nordic paradox has roots in the ideals of the Nordic welfare state. A comparison of the Nordic and British political approaches to gender-based violence reveals that violence against women was understood to require different political policies. Where British politics relied on criminal and civil law measures, the Finnish approach was based on social policy measures.¹³⁷ An international comparison of implementation of the CEDAW Convention shows that gender neutrality is typical for the Finnish approach.¹³⁸ I suggest that stable social conditions have helped to reduce violence in Finnish society, and criminal policies have successfully reduced the prison population. These developments are related to welfare state policies. On the other hand, the same criminal policies have hindered recognition of violence against women as a social problem and, moreover, as a form of discrimination and violation of human rights.

2.7.2 Violence in Finland: A gendered phenomenon

Crime is a highly gendered aspect of Finnish life. Of persons suspected of crime, between 74% and 96% are men, depending on the type of crime. Men are also in a clear majority among those convicted of crimes. In terms of punishments, circa 4,500 men and fewer than 500 women were sentenced to imprisonment in 2019. Even victims of violent crimes are more often men than women, while victims of sexual crimes are preeminently women. When the perpetrator is the victim's

133 See Table 2.1 in European Union Agency for Fundamental Rights, *Violence against Women: An EU-Wide Survey – Main Results* (FRA 2015).

134 Marie Bruvik Heinskov, May-Len Skilbrei, and Kari Stefansen (eds), *Rape in the Nordic Countries: Continuity and Change* (Routledge 2019).

135 Pylkkänen, *Trapped in Equality* (n 2) 78.

136 Suvi Ronkainen, 'Kenen ongelma väkivalta on? Suomalainen hyvinvointivaltio ja väkivallan toimijuus' [Whose Problem Is Violence? The Finnish Welfare State and the Agency of Violence] *Yhteiskuntapolitiikka* (2008) 4, 388, 391–392.

137 Johanna Kantola, *Feminists Theorize the State* (Palgrave Macmillan 2006).

138 The dissertation by Susanne Zwingel includes case studies on Chile and Finland; see Susanne Zwingel, *How Do International Women's Rights Norms Become Effective in Domestic Contexts: An Analysis of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* (Bochum 2005) <<https://hss-opus.ub.ruhr-uni-bochum.de/opus4/frontdoor/deliver/index/docId/701/file/diss.pdf>> accessed 3 September 2022.

present or former partner, the victims of violent crimes are mostly women, and women victims of violence receive physical injuries more often than men.¹³⁹

Comparing the level of violent crime in societies is far from simple, owing to varying legal definitions and levels of hidden crime. The number of homicides is considered the most reliable basis for comparison. Homicide rates in Europe are comparatively low in global terms and have declined from premodern times.¹⁴⁰ Historically, the rate of homicides in Finland in the 18th century was on a level similar to that of western Europe, but while the rate of homicides fell in the other Nordic states during the industrial age, their rate rose in Finland, especially in the context of political unrest and war.¹⁴¹ In the 20th century, unlike other Nordic countries, Finland underwent both a civil war (1918) and a long active involvement in World War II (1939–1940, 1941–1944). Unlike in most European countries, the war in Finland took place at the frontier, as the country was not occupied at any point. Traumas caused by warfare accumulated among men. The effects were felt in Finnish culture in the following decades,¹⁴² also in the form of high levels of violence. Mandatory military service for males has also had an impact on men's identities.¹⁴³ Finland has kept military defence at a high level since the end of the Cold War. Since the war in Ukraine, the level of military preparedness has risen further.

Although the level of homicides has diminished during the last decades, Finland still has a higher rate of homicides in comparison with other Nordic states. The number of victims of homicide is three times that of Iceland and Norway, and one-third higher than in Denmark and Sweden.¹⁴⁴

Most homicides committed in Finland are literally homicides: acts committed by men against other men. During 2010–2018, in 60% of cases a man had killed another man. Only 2% of homicides were connected to organized crime. The number of crimes of domestic violence has changed but little compared with the overall fluctuation in levels of violent crime. The majority of women victims were killed

139 Statistics Finland, *Sukupuolten tasa-arvo Suomessa 2021* (n 1), 138–144.

140 Lethal violence has declined in Europe over 600 years. The homicide rate in Europe fluctuated in the 1990s, but it declined by 6% in 2002–2017; see United Nations Office on Drugs and Crime, *UNODC Global Study on Homicide: Homicide Trends, Patterns and Criminal Justice Response* (UNODC 2019).

141 Hans von Hofer and Tapio Lappi-Seppälä, 'The Development of Crime in Light of Finnish and Swedish Criminal Justice Statistics' (2014) 43(1) *Crime and Justice* 169; Janne Kivivuori and Matti Lehti, 'Homicide in Finland and Sweden' in Tapio Lappi-Seppälä and Michael Tonry (eds), *Crime and Justice in Scandinavia* (University of Chicago Press 2011), 40.

142 Marja Tuominen, *Me ollaan kaikki sotilaiden lapsia: Sukupuolihegemonian kriisi 1960-luvun suomalaisessa kulttuurissa* [We Are All Soldiers' Children: The Crisis in the 1960s Gender Hegemony in Finnish Culture] (Otava 1991).

143 Arto Jokinen, *Panssaroiatu maskuliinisuus: Mies, väkivalta ja kulttuuri* [Armoured Masculinity: Man, Violence and Culture] (Tampere University Press 2000), 127–202.

144 Maria Wemrell, Sara Stjernlöf, Justine Aenishänslin, Marisol Lila, Enrique Gracia, and Anna-Karin Ivert, 'Towards Understanding the Nordic Paradox: A Review of Qualitative Interview Studies on Intimate Partner Violence against Women (IPVAW)' (2019) (13)6 *Sweden's Sociology Compass* <<https://doi.org/10.1111/soc4.12699>> accessed 20 August 2022.

by a present or former partner.¹⁴⁵ As elsewhere in the world, women are killed more seldom than men, but they bear the greatest burden in terms of intimate partner violence.¹⁴⁶ The term ‘femicide’ never became common in Finland.

2.7.3 ‘*Humane Nordic criminal policy*’ and violence against women

The Nordic paradox is even more perplexing owing to the tradition of impunity in cases of gendered violence against women. Impunity of partner violence was the rule in most or all cultures in the past. Also, Finnish penal law was traditionally lenient on violence against spouses and allowed rape in marriage.¹⁴⁷ Finnish equality policies of the 1970s and 1980s paid little attention to subjective integrity in general. Unlike in many Western societies, feminists did not stress a need for shelters or reform of criminal law. Criminal law allowed impunity of violence against women in various ways.¹⁴⁸ Legal amendments have been made slowly since the 1990s, mainly owing to external pressure.

One of the reasons for the delayed response to the need to address violence against women may be the (in itself) admirable attempt to bring Finnish criminal law more into line with the other Nordic countries. Not only was violence more prevalent in Finland in the postwar period but also the Finnish Criminal Code (39/1889) required, and courts issued, prison sentences that were longer than those of Finland’s Nordic counterparts. In consequence, the prison population in Finland was much larger.

In 1962, the Scandinavian Research Council for Criminology was established. As a science based on empirical studies of criminality, criminology was seen as an important means for improving criminal policies. The Finnish Institute of Criminology, established in 1963 under the Ministry of Justice,¹⁴⁹ cooperated keenly with its Nordic counterparts and played an important role in the development of Finnish criminal law policies. A paradigmatic change of criminal policies followed. Criminal policies focused on reducing the number of prisoners and succeeded in cutting the number of the prison population by half between

145 Martti Lehti, *Henkirikoskatsaus 2020* [Homicides 2020] (Kriminologian ja oikeuspolitiikan instituutti Katsauksia 2020) <https://helda.helsinki.fi/bitstream/handle/10138/319479/Katsauksia_41_Lehti_2020.pdf?sequence=1&isAllowed=y> accessed 20 August 2022.

146 United Nations Office on Drugs and Crime, *Global Study on Homicide: Gender-Related Killings of Women and Girls* (UNODC 2018) 18.

147 Kevät Nousiainen and Anu Pylkkänen, *Sukupuoli ja oikeuden yhdenvertaisuus* [Gender and Legal Equality] (Forum Iuris 2001). For early modern Europe, see Satu Lidman, *Gender, Violence and Attitudes: Lessons from Early Modern Europe* (Routledge 2018).

148 Heini Kainulainen and Johanna Niemi, ‘Parisuhdeväkivallan tunnistaminen rikosoikeudellisessa järjestelmässä’ [Recognition of Violence in Intimate Relationships in the Criminal Law System] in Johanna Niemi, Heini Kainulainen, and Päivi Honkatukia (eds), *Sukupuolistunut väkivalta: Oikeudellinen ja poliittinen ongelma* [Gendered Violence: A Legal and a Political Problem] (Vas-tapaino 2017).

149 Later, the Institute was renamed the National Research Institute of Legal Policy, and later still turned into an institute under the Faculty of Social Sciences of Helsinki University.

1970 and 1990.¹⁵⁰ The focus was on perpetrators, who were viewed almost as vicarious sufferers for failures of social welfare. Victims of crimes received little attention.¹⁵¹

Decriminalization was an important tool, especially in relation to acts considered wrong on moral grounds – such as homosexuality, pornography, and blasphemy – and sexual crimes motivated by absolutist, fixed sexual morals. Even punishments for rape were thought to be too harsh, as changing sexual mores had allegedly made the violation involved in rape less severe. Chapter 20 of the Criminal Code, which deals with sexual crimes, was amended in 1970, with preparatory works arguing that the criminal law was not a valid means through which to regulate sexual life. Homosexual acts between adults were decriminalized in 1971 (by comparison, decriminalization took place in Sweden in 1944). Preparatory works for the amendment launched the principle that became the standard for criminal policy, namely, that criminal law should be the *ultima ratio* or last resort of social policy, to be used only when all other policies fail. A total reform of Finland's criminal law was initiated in 1972. Proposals made in the 1970s became the basis for subsequent reform.¹⁵²

The ethos of Finnish – or Nordic – criminal policies is to avoid punitive policies. 'Moderate' penal policies are believed to go together with high levels of social trust and political legitimacy, as well as a strong welfare state. In terms of keeping incarceration at a low level, such an approach has been a success: as prisoner rates rose in 30 years from 1975 in the USA by 320%, the prisoner rate in the Nordic states remained stable.¹⁵³ 'Humane Nordic criminal policy' became the default position of Finnish criminal law experts from the 1960s onward, and also required that criminal policy be left to such experts, as the media and lay opinions tend to call for strict order and harsh punishments. Such a development forced feminist critics of criminal policies into a problematic corner: by demanding protection of women's integrity under the criminal law, or even demanding new criminalizations, feminists came to be counted among bloodthirsty laypersons.

150 Tapio Lappi-Seppälä, 'Inkeri Anttila ja kriminaalipolitiikan murrosvuodet' [Inkeri Anttila and the Turning Point in Criminal Politics] in Raimo Lahti (ed), *Inkeri Anttila (1916–2013): Rikosoikeuden uudistajan ammatillinen ura ja vaikutus* [Inkeri Anttila (1916–2013): The Career and Impact of a Renovator of Criminal Law] (Forum Iuris 2016), 167–171.

151 This is no new finding. Tove Stang Dahl described the invisibility of women victims in Nordic criminology and criminal law more than 40 years ago; see Tove Stang Dahl, 'Kvinner som ofre' [Women as Victims] (1979) 66(1–2) *Nordisk tidskrift for kriminalvidenskap* 56.

152 Lappi-Seppälä (n 150), 177–191.

153 The development was quite radical, as Finland went from having a level of prison sentences that exceeded the high one in the USA to having 40–60 prisoners per 10,000 inhabitants, while the US figure rose to over 700 per 10,000 inhabitants; see Tapio Lappi-Seppälä, 'Explaining National Differences in the Use of Imprisonment' in Sonja Snacken and Els Dumortier (eds), *Resisting Punitiveness in Europe* (Routledge 2011); Tapio Lappi-Seppälä, 'Penal Policy and Prisoner Rates in Scandinavia' in Kimmo Nuotio (ed), *Festschrift in Honour of Raimo Lahti* (Faculty of Law, University of Helsinki 2007).

There has been no lack of feminist analyses of penal law,¹⁵⁴ but Finnish criminal law theory has found it difficult to incorporate feminist approaches into the doctrine of criminal law,¹⁵⁵ which is based on male patterns of behaviour. The *ultima ratio* principle makes it difficult to add new crimes to the Criminal Code. Instead, criminal law experts maintain that existing definitions of crime cover acts of violence against women, since, for example, deprivation of liberty covers trafficking in human beings and assault covers female genital mutilation.

2.7.4 *The impact of international law*

Combating violence against women (wife-battering, sexual crimes), which elsewhere became an important target of feminist politics in the 1970s, gained recognition in Finland first in the 1990s, and then owing to international pressure. The Council for Gender Equality created a subcommittee on violence against women (1990–1998) to chart its prevalence and existing measures against it, largely because Finland's first report to CEDAW in 1989 led to embarrassing questions about the lack of such measures. The Council found that policies to be adopted could be based on Nordic experiences. At that time, under Finnish criminal law, assault 'in a private place', rape, and other sexual or gender-based crimes were not indictable offences. Protection orders were not available, and support services to victims were scarce. Only in the 1990s did violence against women begin to be culturally defined as a crime, rather than being viewed as a social problem.¹⁵⁶

Pressure for recognition of violence against women as a violation of human rights began to be felt in the 1990s. The recognition of violence against women as a human rights violation in human rights law was hindered and delayed by

154 See, for example, Johanna Niemi-Kiesiläinen, *Rikosprosessi ja parisuhdeväkivalta* [Criminal Law Procedure and Intimate Violence] (WSOY 2004); Minna Ruuskanen, *Hätävarjelu ja parisuhdeväkivalta: Rikosoikeudellinen ja diskurssianalyttinen tutkimus* [Intergender Violence and Self-Defence] (Suomalainen lakimiesyhdistys 2005); Helena Jokila, *Tahdonvastainen suostumus ja liiallisen luottamuksen hinta: Raiskauksen ja muiden seksuaalirikosten oikeudellisen tiedon konstruktio* [Consent against One's Will and the Price of Undue Trust: The Legal Constructions of Knowledge in Finnish Sexual Crimes] (Suomalainen lakimiesyhdistys 2010); Johanna Niemi, Heini Kainulainen, and Päivi Honkatukia (eds), *Sukupuolistunut väkivalta: Oikeudellinen ja sosiaalinen ongelma* [Gendered Violence: A Legal and Social Problem] (Vastapaino 2017); Tuuli Hong, *Kunniaan liittyvän väkivallan uhrin oikeudellinen asema* [Legal Position of Victims in Honour-Related Crimes] (Annales Turku University 2020).

155 See, for example, Sakari Melander's dissertation that examined whether it is possible to construct a theory of criminalization built on the model of moral theory. An excursion to feminist critique lies somewhat outside the overall framework of the dissertation and is not integrated into the overall argumentation. Sakari Melander, *Kriminalisointiteoria: Rangaistavaksi saamisen oikeudelliset rajoitukset* [A Theory on Criminalization: Legal Constraints to Criminal Legislation] (Suomalainen lakimiesyhdistys 2008).

156 Saara Kuusinen, 'Väkivaltajaosto: Naisiin kohdistuvan väkivallan vastustamistyötä 1990–1998' [Violence Section: Action against Violence against Women 1990–1998] in *TANE: n aiheet ja vaiheet – tasa-arvoasiain neuvottelukunta 40 vuotta* [40 Years of the Council for Gender Equality] (Council for Gender Equality 2012).

the reluctance of scholars of international law to adopt a different view on the responsibility of states in the field of criminal law and the absence of women in the institutions of international law.¹⁵⁷ The traditional role of human rights law within criminal law is to protect the rights of persons suspected and/or accused of crime against repression by the state, not to set a standard for the duty of states to prevent crime. A profound change in theoretical and practical orientation in human rights law has taken place since the 1990s, as exemplified by General Recommendations 19 (1992) and 35 (2017) to the CEDAW Convention. In these instruments, the CEDAW Committee framed violence against women as discrimination under the Convention and a violation of human rights to be combated by states with due diligence. The Council of Europe's Istanbul Convention (2011)¹⁵⁸ requires states to adopt criminal policies to eradicate such violence.

The European Court of Human Rights had already adopted a similar position in its case law, with the case *M.C. v. Bulgaria* of 2003 laying down that states bound by the European Human Rights Convention have a positive duty to amend their criminal codes to ensure that rape is defined in terms of lack of consent on the part of the victim, rather than in terms of coercion by the perpetrator.¹⁵⁹ Nordic criminal law experts regarded this case with disbelief. When Sweden's Professor Madeleine Leijonhufvud proposed in a 2008 report that lack of voluntariness should be taken as the main criterion for definitions of sexual crimes and backed up her position by reference to *M.C. v. Bulgaria*, the Swedish government found such a reform unnecessary. Several criminal law experts doubted that a positive duty under international human rights law could possibly require more effective criminal law to protect victims, as human rights law existed for the purpose of limiting governments' abuse of criminal law.¹⁶⁰ Finnish criminal law specialists echoed Swedish reactions to the case.

International human rights bodies disagreed with the above-mentioned experts. Under the CEDAW and Istanbul Conventions, states parties have an obligation to take necessary legislative and other measures to prevent, investigate, punish, and

157 Hilary Charlesworth, Christine Chinkin, and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85(4) *American Journal of International Law* 613; Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000).

158 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS No. 210.

159 In the case, the European Human Rights Court stresses that states have a positive duty to criminalize all sexual acts undertaken without consent; see case of *M.C. v. Bulgaria*, Judgement 4 December 2003, *supra* 166.

160 For example, Petter Asp took a position opposite to that of Leijonhufvud on the question of whether the case laid down a positive duty for states parties to the European Convention of Human Rights to implement criminal law reform; see Peter Asp, 'M.C. v. Bulgaria: A Swedish Perspective' in (2009) 54 *Scandinavian Studies in Law* 191. P. O. Träskman, a Finnish-born criminal law professor in Sweden, held that feminists had made a total mistake in promoting such a view in Anna Norée, Catharina Durling Sitten, Susanne Wenneberg, and Josef Zila (eds), *Festschrift till Madeleine Leijonhufvud* [Festschrift for Madeleine Leijonhufvud] (Norteds Juridik, 2009).

provide reparation in cases of acts of gendered violence against women, under a duty of due diligence.¹⁶¹ The CEDAW Committee has repeatedly highlighted Finland's insufficient measures against violence against women. In 2014, the Committee requested that Finland direct economic resources to implementation of such measures, establish a coordinating body, amend its rape legislation, and provide better access to shelters. Finland was requested to reply to the Committee's concluding observations by as early as 2016 (the normal cycle of reporting being four years).¹⁶²

The pressure from the CEDAW Committee had some effect. The first explicit Action Plan against Violence against Women (2010–2015) was motivated by human rights concerns, whereas earlier action plans had been directed against 'violence in intimate relations'. The new plan followed the principle of the 'three Ps' (prevention, protection, prosecution) required by the main human rights instruments against violence against women, paying particular attention to victims and their need for support and services, although it did not define violence against women or gendered violence against women. The plan consisted of 66 separate measures. However, no separate budget was provided for these measures. The coordinator of the Action Plan resigned in 2014, and the plan was discontinued after 2015. Of the ten recommendations of the CEDAW Committee, seven were implemented in part, while implementation of two failed. Only one recommendation was fully implemented: ratification of the Istanbul Convention.¹⁶³

Finland signed the Istanbul Convention in 2011 and ratified it in 2015, but the working group tasked with preparing the ratification conducted no analysis of the possible changes that might be required for its implementation.¹⁶⁴ The requirements of the Istanbul Convention are in many respects the same as those under the CEDAW Convention. Many of the requirements of these instruments had not been fulfilled at the time of Finland's ratification of the Istanbul Convention, contrary to what was assumed by the government in power at the time. Since then, government actors, including the Ministry of Justice, have become more aware of the extent of gendered violence against women in Finland and of the frequent observations made by human rights bodies, including the CEDAW Committee and GREVIO,¹⁶⁵

161 See Article 5 of the Istanbul Convention.

162 7th Periodic Report of Finland (CEDAW/C/FIN/CO/7).

163 Anna Lindfors, *Naisiin kohdistuva väkivalta, Suomi ja CEDAW: Tutkielma naisiin kohdistuvaa väkivaltaa koskeva kansainvälisen sitoumuksen toimeenpanosta Suomessa* [Violence against Women, Finland and CEDAW: A Study of the Implementation of an International Commitment to Combat Violence against Women] (Master's degree thesis, University of Helsinki 2016).

164 Kevät Nousiainen and Merja Pentikäinen, 'Väkivallan vastaisen sopimuksen kivinen ratifointi Suomessa' [The Rocky Road to Finnish Ratification of the Convention against Violence against Women] (2013) 4 *Oikeus* 455.

165 GREVIO (Group of Experts on Action against Violence against Women and Domestic Violence) is the independent expert body that monitors the implementation of the Istanbul Convention. GREVIO makes evaluation visits to evaluate reports by states parties and draws up evaluation reports. There is no individual complaints mechanism under the Istanbul Convention.

over the last few years. A national Action Plan for the Istanbul Convention was produced in 2017.¹⁶⁶

One of the requirements under the Istanbul Convention is that definitions of sexual crimes should be based on lack of consent on the part of the victim, not on violence by the perpetrator. In 1999, when the chapter on sexual crimes in the Finnish Criminal Code was amended, rape was defined as coercion to sexual intercourse, although in the preparatory works for the amendment sexual crimes were conceived as violations of the victim's sexual autonomy. In 2014, at the time when ratification of the Istanbul Convention was under preparation, the provisions on sexual crimes were amended again. However, despite pressure from human rights and women's organizations, lack of consent was not adopted as the basis for the definition of rape. Sexual autonomy was understood in contrast to sexual moralism. Provisions were written using gender-neutral language.¹⁶⁷

The first GREVIO report on Finland¹⁶⁸ noted the use of gender-neutral terminology in the Action Plan and found little reference to experiences of women victims of crimes covered by the Istanbul Convention or to the need to address the gendered nature of such crimes. It also noted that there were no specific guidance tools on how to address violence against women as a gender-based crime, and that statistics showed low reporting rates, high rates of attrition, and low conviction rates in cases involving violence against women. Criminal law provisions assumed to cover the requirements of the Convention did not adequately cover all forms of violence against women.¹⁶⁹ The report also found that existing legislation on sexual crimes did not fully capture the realities of women experiencing sexual violence and their responses. As a result, not all forms of sexual violence were criminalized, as required by the Convention. High thresholds of evidentiary standards of physical resistance were required, with the focus being on the victim's behaviour rather than the accused's actions. GREVIO also noted with concern that the penalties that might be imposed for sexual crimes were very low, especially in cases of sexual abuse of a child.¹⁷⁰ GREVIO 'strongly encouraged' Finland to speedily reform Chapter 20 of its Criminal Code, which covers sexual crimes.¹⁷¹

Changes in Swedish policy also had an impact on the Finnish approach. After the Swedish definition of rape was amended in 2018 to base it on lack of consent, the Finnish Ministry of Justice nominated a working group to prepare a reform

166 Ministry of Social Affairs and Health, *Istanbulin sopimuksen toimeenpanosuunnitelma 2018–2021* [Action Plan for the Istanbul Convention] (Ministry of Social Affairs and Health 2017).

167 Minni Leskinen, 'Raiskaus 2010-luvulla: Yhä vain väkisinmakaamista?' [Rape in the 2010s: Still Intercourse by Force?] in Johanna Niemi, Heini Kainulainen, and Päivi Honkatukia (eds), *Sukupuolistunut väkivalta: Oikeudellinen ja sosiaalinen ongelma* [Gendered Violence: A Legal and Social Problem] (Vastapaino 2017).

168 GREVIO Baseline Evaluation Report Finland 2019 <<https://rm.coe.int/grevio-report-on-finland/168097129d>> accessed 20 January 2023.

169 *Ibid.*, supra 5 and 153 of the Baseline Report.

170 *Ibid.*, supra 166.

171 *Ibid.*, supra 169.

of Chapter 20 of the Criminal Code. Several Finnish NGOs submitted a citizen's initiative on reform of the law on rape to the parliament in 2019.¹⁷² The Swedish reform was presented and assessed in legal literature,¹⁷³ and the Finnish government commissioned a study on professional and lay views on punishments in certain types of crimes. The study found that lay people did not favour more severe punishment than law professionals across all types of crime, but that they did regard violence against women as deserving more severe punishments than judges thought justified.¹⁷⁴ The Ombud for Equality added pressure by recommending in his 2018 report to the parliament that a comprehensive gender assessment of the Criminal Code, including its provisions on sexual crimes, should be carried out.¹⁷⁵

The political decision to begin a reform of the Criminal Code's chapter on sexual crimes was also a reaction to the high number of asylum-seekers (or migrants) in 2015. The media followed crime statistics and reported on the nationality of the perpetrators.¹⁷⁶ When the minister of justice initiated a process of amending the Criminal Code in 2018, the motivation was not merely to enhance protection of women but also to introduce harsher punishments, with immigrant perpetrators in mind. According to a study commissioned by the government, immigrant men are over-represented among persons suspected of rape and sexual abuse of a child, and the degree of their over-representation has risen steadily since the beginning of the 2010s.¹⁷⁷ A more clear-cut turn in equality politics took place with the change of government. In 2019, Juha Sipilä's centre-right government resigned and was replaced by a left-centre coalition led by Sanna Marin. Marin's Government Programme framed violence against women as a rule-of-law issue, with an emphasis on the need to enhance the position of crime victims. Many of the measures promised had been required by the CEDAW Committee and GREVIO. The Government Programme also promised reform of the Criminal Code's provisions on sexual

172 Citizens initiative KAA 2/2019 Raiskauksen määritelmä suostumusperusteiseksi -Suostumus 2018 [Definition of Rape to Be Based on Consent – Consent 2018].

173 Minni Leskinen, 'Uusi pohjoismainen seksuaalirikosoikeus? Ruotsin lainsäädännöllisten valintojen hyödynnettävyydestä Suomessa' [New Nordic Sexual Offences Law: On the Applicability of Swedish Legislative Solutions in Finland] (2020) 3–4 *Lakimies* 373.

174 Juha Kääriäinen, *Seitsemän rikostapausta: Käräjätuomareiden arvioima rangaistuskäytäntö ja väestön rangaistusvalinnat* [Seven Crime Cases: Evaluations of Punishment by District Court Judges and the Population at Large] (Helsinki University, Institute of Criminology and Social Policy 2017).

175 Ombud for Equality's Report to the Parliament 2018 (n 97), 91–101.

176 For example, on 12 December 2018, the daily newspaper *Iltalehti* 12 published an article by Mika Koskinen entitled 'IL selvitti: Irakilaisten osuus peräti 12 prosenttia Suomessa vuonna 2017 tehdyistä raiskauksista' [*Iltalehti* Investigated: Iraqi Perpetrators of 12% of the Rapes Committed in Finland 2017]. The tabloid had listed the number of immigrants sentenced for sexual offences by nationality, as well as the percentage of these offenders among immigrants by country of origin residing in Finland.

177 Teemu Viihkonen, Markus Kaakinen, and Tommi Hoikkala, *Seksuaalirikosten tekijät, tekotilanteet ja ennaltaehkäisemisen mahdollisuudet* [Perpetrators, Crime Situations, and Possibility of Prevention] (Publications of the Government's Analysis, Assessment and Research Activities 2021:56, Prime Minister's Office 2021), 32–35.

crimes, whose definitions would be based on lack of consent rather than coercion, and a reassessment of whether sanctions for the most serious sexual and violent crimes were proportional to the injury they caused or appropriate in comparison with other crimes.¹⁷⁸ A reform proposal that was presented in spring 2020 went through a number of amendments¹⁷⁹ before being passed in July 2022.

Mere reform of the Criminal Code provisions on sexual crimes cannot achieve much without proper implementation, however. NGOs (Amnesty Finland in particular) and researchers have noted that sexual crimes are seldom reported to the Finnish police, and, when they are, the police investigation seldom leads to a conviction. In 2008, Amnesty International published a study on rape and human rights in the Nordic states, showing very low investigation and conviction figures.¹⁸⁰ Amnesty Finland has since carried out several surveys of key persons in Finnish municipalities¹⁸¹ on measures taken against violence against women at the local level, showing that local decision-makers pay little attention to national recommendations and policies. In 2019, Amnesty Finland published a study on rape victims' access to justice.¹⁸² On the basis of prevalence studies carried out by the Institute of Criminology and Legal Policy¹⁸³ and the European Fundamental Rights Agency, the study found that between 41,000 and 62,000 women become victims of sexual violence each year, but in one year only 358 cases were brought to court, and in 209 of these the perpetrator was convicted. The study recommended not only legislative reform but also the provision of adequate resources to the police, prosecutors, and courts as well as resources to support centres for rape victims. In 2020, researchers at Turku University conducted a study of cases of reported rape (as defined under Sections 1–5 of Chapter 20 of the Criminal Code) that had not been investigated or where the perpetrators had been acquitted. The reasons for attrition were manifold, but the study revealed problematic issues regarding the interpretation and application of the Criminal Code. In many cases, the consent

178 The Government Programme's measures concerning violence against women are listed under the title 'Safe and Secure Finland Built on the Rule of Law' <<https://valtioneuvosto.fi/en/marin/government-programme/safe-and-secure-finland-built-on-the-rule-of-law>> accessed 20 January 2022.

179 HE 13/2022 vp Hallituksen esitys eduskunnalle seksuaalirikoksia koskevaksi lainsäädännöksi [Government Bill to the Parliament for Legislation on Sexual Crimes].

180 Amnesty International, *Case Closed: Rape and Human Rights in the Nordic Countries* <<https://amnesty.dk/wp-content/uploads/media/1557/case-closed.pdf>> accessed 15 January 2022.

181 Satu Lidman and experts from Finnish Amnesty, 'Amnestyn seurantatutkimus 2021' [Amnesty Follow-Up Study] <<https://www.amnesty.fi/uploads/2021/05/amnestyn-seurantatutkimus-2021.pdf>> accessed 15 January 2021.

182 Otava Piha, *Oikeuksien arpapeli: Naisiin kohdistuvat raiskausrikokset ja uhrien oikeuksien toteutuminen Suomessa* [Lottery of Justice: Crimes of Rape against Women and Realization of Women's Rights in Finland] (Amnesty Finland 6 March 2019) <https://www.amnesty.fi/uploads/2021/03/oikeuksien-arpapeli_final.pdf> accessed 20 October 2022.

183 The Institute of Criminology and Legal Policy (Krimo) at the University of Helsinki is the main Finnish research body on criminology.

of the victim was the key issue in the court procedure, and often the threshold of evidence needed for conviction was very high.¹⁸⁴

Failures in police investigation have led to interventions by the authorities. In 2019, Deputy Chancellor of Justice Mikko Puumalainen found that the police had failed to report a case of domestic violence. In 2020, Parliamentary Ombudsman Petri Jääskeläinen found that the police had acted illegally in many ways when it did not investigate the alleged rape of a 16-year-old girl. The girl's inquiries had not been answered, nor had she been directed to victim support services. In January 2022, Puumalainen promised in a press release to launch an examination of police investigation of sexual and domestic violence to ascertain whether there are general problems in the investigation of such crimes.¹⁸⁵

2.7.5 *Change in sight?*

There are signs that international pressure and public opinion are changing Finnish criminal policies. The position of Rapporteur on Violence against Women was established and placed under the Non-Discrimination Ombud in 2022. The Action Plan for Combating Violence against Women for 2020–2023 is in many ways related to the requirements of the Istanbul Convention. Officials involved in criminal investigation and court procedure are to be educated with the aid of existing materials to recognize violence and take preventive action – as demanded by GREVIO. The due diligence standard, or the state's responsibility to take measures against non-state actors to protect human rights, is increasingly evoked in the context of minimum standards on anti-discrimination and violence against women.¹⁸⁶ Increasing pressure as a result of EU policies against violence against women has also had an impact.

The present government promised several amendments to legislation that is relevant to violence against women in its programme. Some, but not all, of these have

184 Daniela Alaattinoğlu, Heini Kainulainen, and Johanna Niemi, *Raiskausrikosten eteneminen rikosprosessissa* [How Cases of Rape Move Forward in the Criminal Procedure] (University of Turku 2020) <<https://www.utu.fi/fi/yliopisto/oikeustieteellinen-tiedekunta/tutkimus/katsauksia-ja-tutkimusraportteja>> accessed 28 October 2022.

185 Paavo Teittinen, 'Poliisin seksuaali- ja lähisuhdeväkivaltatutkinnassa isoja ongelmia – apulaisoikeuskansleri käynnistää selvityksen' [Huge Problems in Police Investigations on Sexual and Intimate Partner Violence: Vice Chancellor of Justice Starts an Investigation] *Helsingin Sanomat* (Helsinki, 29 January 2022) <<https://www.hs.fi/kotimaa/art-2000008575023.html>> accessed 8 February 2023.

186 Rebecca Cook proposed that the CEDAW Convention set a standard of due diligence; see Rebecca Cook, 'Obligations to Adopt Temporary Special Measures under CEDAW' in Ineke Boerefijn, Fons Coomens, Jenny Goldschmidt, Rikki Holtmaat, and Ria Wolleswinkel (eds), *Temporary Special Measures: Accelerating De Facto Equality of Women under Article 4(1) UN Convention on the Elimination of all Forms of Discrimination against Women* (Intersentia 2003). Sandra Fredman has developed the doctrine of positive duties under human rights law; see Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008). Human rights instruments and case law provide the standard to be followed by states in combating violence against women.

been realized. The biggest effort was the reform of the Criminal Code provisions on sexual crimes. Other amendments have fared less well. A memorandum on criminalization of forced marriage¹⁸⁷ found that crimes of trafficking and coercion cover even forced marriage. Criminal law amendments on hate speech promised in the Government Programme resulted in the addition of sexist motivation to the list of aggravating grounds for all crimes set out in the Criminal Code, which lists many other discriminatory grounds, such as race and colour. However, no changes to the Criminal Code provision on hate speech itself were proposed. The provision on hate speech in its present form concerns speech against ‘groups of people’, and the law preparators found it unsuitable to extend the provision to sex.¹⁸⁸ That meting out aggravated punishment for crimes with a sexist motivation was added to the Criminal Code was important as such; however, as there is no specific provision regarding hate speech on sexist grounds, it does not address the problem of increasing hate speech against women.

2.8 Gender pay gap and pay discrimination

2.8.1 The Finnish gender pay gap is deep

Women’s mean earnings per month in 2019 were 3,229 euros, those of men 3,838 euros. Women earned 84% of what men earned in full-time work. The gender pay gap in Finland (16.6% in 2019 according to Eurostat statistics) is greater than the European average,¹⁸⁹ and it is larger than the gap in the other Nordic countries except Iceland. Statistics Finland measures the gender pay gap using the average regular monthly pay of full-time employees, which does not include overtime or part-time earnings.¹⁹⁰

Working patterns are gendered: In 2020, the employment rate among persons aged between 15 and 64 in Finland was 70.7% for women, 72.5% for men. The employment gap between women and men is at its broadest in the age group 25–34 years (73.5% for women and 82.5% for men), which is explained by an unequal use of family leaves in families. Women work part-time more often than men (22% vs 10%) and for different reasons. Female part-time workers often cannot find full-time work, and almost all persons working part-time owing to family reasons are women. Men often work part-time during their studies. More women than men

187 Ministry of Justice, ‘Arviomuistio avioliittoon pakottamisen rangaistavuudesta’ [Memorandum on the Punishability of Forcing a Person to Enter into Marriage] (Ministry of Justice, Memorandums and Statements 2021: 29).

188 Government Bill HE 7/2021 Hallituksen esitys eduskunnalle laiksi rikoslain muuttamisesta [Government Bill on Amendment of the Criminal Code].

189 Eurostat Statistics Explained, ‘Gender Pay Gap Statistics’ <https://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics#Gender_pay_gap_levels_vary_significantly_across_EU> accessed 9 March 2021.

190 Statistics Finland, ‘Average Monthly Earnings by Sector and Gender, 2000–2021’ <https://pxweb2.stat.fi/PxWeb/pxweb/en/StatFin/StatFin__ati/statfin_ati_pxt_122k.px/> accessed 20 October 2022.

(19% vs 13%) work under fixed-term contracts, most commonly at parenting age. Men on average work longer weekly hours than women (38 hours versus 32 hours per week).¹⁹¹ The pay gap is broader if measured using an indicator based on overall income, not by an indicator based on the number of full days worked. When part-time pay and bonuses are included, the pay gap is around 24%. Women are more highly educated than men, but that fact does not lead to high income. The disadvantage of women's lower pay is often explained by reference to the 'wrong choices' made by girls and women: by choosing education in health and educational studies, they allegedly choose low pay and, as a result, low pensions at the end of their working lives.

The labour market is highly gender-segregated: women work in health, education, administration, and services; men in science and technology, transport, construction work, and heavy industry. In 2019, the fields of health and social services (86% women), education (68% women), and catering (68% women) were dominated by women employees, whereas fields with a male majority included construction work (91% men), transport and storage (80% men), and industry and the provision of electricity, gas, water and waste management (75% men). Less than 10% of employees work in occupations with balanced gender participation.¹⁹² Men tend to work in the private and women in the public sector. Women employees working for the municipalities and private service providers earn less than men working in the private sector and for the state. The pay gap in Finland is broader in the private than in the public sector.¹⁹³ On the other hand, public-sector employees in Finland, as in Denmark, Norway, and Sweden, are paid less than similar employees in the private sector. In Finland, the private–public pay gap is around 5%, but the differentials are greatest in areas with high employment rates.¹⁹⁴

Pay equality policies have concentrated on decreasing gender segregation in the labour market and increasing men's participation in childcare.¹⁹⁵ Pay discrimination as a cause for the pay gap tends to be ignored or denied.

191 Finnish Institute for Health and Welfare, 'Työllisyys ja työsuhteet sukupuolittain' [Employment and Employment Contracts by Gender] <<https://thl.fi/fi/web/sukupuolten-tasa-arvo/tasa-arvon-tila/tyo-ja-toimeentulo/tyollisyys-ja-tyosuhteet-sukupuolittain>> accessed 20 March 2021.

192 Finnish Institute for Health and Welfare, 'Ammattialojen sukupuolen mukainen segregatio [Professional Segregation by Gender]' <<https://thl.fi/fi/web/sukupuolten-tasa-arvo/tasa-arvon-tila/tyo-ja-toimeentulo/ammattialojen-sukupuolen-mukainen-segregaatio>> accessed 20 January 2023.

193 Centre for Equality Information, 'Sukupuolten palkkaero' [The Gender Pay Gap], 21 December 2020 <<https://thl.fi/fi/web/sukupuolten-tasa-arvo/tasa-arvon-tila/tyo-ja-toimeentulo/sukupuolten-palkkaero>> accessed 9 March 2021.

194 Terhi Maczulskij and Eetu Isotalo, 'Yksityisen ja kuntasektorin väliset palkkaerot – onko maakunnalla väliä?' [Pay Differentials between Private and Municipal Sectors: Does the County Matter?] (2021) 86(1) *Yhteiskuntapolitiikka* 16.

195 These topics are prominent in the tripartite Equal Pay Programme 2020–2023. The parties involved in the programme-based measures are the Ministry of Social Affairs and Health, the Ministry of Education and Culture, the Ministry of Economic Affairs and Employment, and central labour market organizations; see Ministry of Social Affairs and Health, 'Samanpalkkaisuusohjelma 2020–2023' [Equal Pay Programme 2020–2023], <https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/162623/STM_2020_38_rap.pdf?sequence=1&isAllowed=y> accessed 24 October 2022.

2.8.2 *Historical roots of the persistent pay gap*

On average, Finnish women have a longer and stronger presence in the labour market than women in the European Union.¹⁹⁶ In a country of small farms, women needed to participate in agricultural work. During wartime, women replaced men in many jobs. The formation of the welfare state took place during a period when pay was openly differentiated by gender, with different pay categories for men and women in use. The open differentiation came to an end by the 1970s, with the implementation of ILO Convention No. 100.¹⁹⁷ Finland's accession to the Convention in 1963 led to implementation through the removal of collective agreement clauses that differentiated between men and women explicitly, but no assessment of the value of the work done by women and men was made. Structures and practices in the labour markets continued to favour the primacy of the male norm, and pay differentials remained high.¹⁹⁸ Nevertheless, the gender pay gap diminished rather quickly until the 1980s, though the rate of decrease has since slowed. The undervaluation of women's work remained hidden behind seemingly gender-neutral collective agreements. The growth of the welfare state brought work especially to women, and the level of pay in public-sector jobs in welfare services was low. The generally shared understanding of the proper pay levels in social and health services, which are predominantly staffed by women, was established at that point.¹⁹⁹

Finnish women are more highly educated than men, but the educational choices of both women and men reflect the gendered nature of the labour market. Furthermore, even men and women with the same education receive different earnings already at the start of their careers. Women's careers develop more slowly and less often lead to managerial positions, even in fields where a majority of the employees are women. Men tend to hold leading positions in business, whereas women lead activities such as personnel management, communications, and legal affairs.²⁰⁰ In occupations with higher pay levels, the pay gap is broader than in

196 The Finnish Centre for Pensions provides gender-segregated statistics on all income on which pensions are based. Part-time and fixed-term work, as well as taking family leaves, are more common among women; see Outi Viitamaa-Tervonen, 'Samapalkkaisuudesta' [On Equal Pay] in Outi Viitamaa-Tervonen, Niklas Bruun, Anja Nummijärvi, Kevät Nousiainen, and Paula Koskinen Sandberg, *Samapalkkaisuuden perusteet ja edistäminen* [Grounds and Promotion of Equal Pay] (Sosiaali- ja terveysministeriö [Ministry of Social Affairs and Health] 2019).

197 Equal Remuneration Convention (1951), International Labour Organization Convention No. 100.

198 Finland's implementation of the Convention resembles that in other developed countries; see Paula Määttä, *The ILO Principle of Equal Pay and Its Implementation* (Tampere University Press 2008).

199 Anneli Anttonen, 'Hyvinvointivaltion ystävälliset kasvot' [The Benevolent Face of the Welfare State] in Anneli Anttonen, Lea Henriksson, and Riiitta Nätkin (eds), *Naisten hyvinvointivaltio* [Women's Welfare State] (Vastapaino 1994); Paula Koskinen Sandberg, 'The Corporatist Regime, Welfare State Employment, and Gender Pay Inequity' (2018) 26(1) *NORA – Nordic Journal of Feminist and Gender Research* 36.

200 Centre for Equality Information, 'Johtamisen ja urakehityksen tasa-arvokysymyksiä' [Equality Issues in Leadership and Career Development] 29 June 2020 <<https://thl.fi/fi/web/sukupuolten-tasa-arvo/tasa-arvon-tila/tyo-ja-toimeentulo/johtamisen-ja-urakehityksen-tasa-arvokysymyksiä>> accessed 9 March 2021.

those with lower pay levels. Women entering ‘male’ occupations face discrimination, and the dismantling of masculine privilege gives rise to men experiencing discrimination.²⁰¹

Collective agreements have an important role in pay formation. Collective agreements often are binding *erga omnes*. The strong tradition of collective agreements in Finland has helped to freeze the undervaluation of women’s pay. The tripartite income policy agreements of 1968–2008 were based on similar pay rises in all fields. Percentual rises in all fields deepened the pay gap between women and men. Traditional forms of undervaluation of women’s work became a part of formal structures whose gendered nature remains invisible.²⁰²

The strong position of collective bargaining is weakening, however. The percentage of employees who are organized has decreased over the years (73.3% in 1995, 64.6% in 2013, and 55.1% in 2017). Notably, women have been more organized than men throughout this period.²⁰³ The employers’ central organization EK changed its rules in 2016 to exclude national, centralized collective agreements, leaving the activity to field-specific unions. A 2020–2021 collective agreement for technology industries left pay to be negotiated locally, at the workplace or employer level. Such developments indicate a weakening of Finland’s corporatist traditions.

Finnish equal pay policies and preparatory works for amendments on equal pay have been heavily dominated by the social partners. Any legislation that might affect the labour market has traditionally been prepared in tripartite equal pay policies, with the state and central unions for employers and employees participating in the process. The preparation of legislative amendments on equal pay has been heavily dominated by the cooperation of the social partners, who hold on to their prerogative despite the weakening of their power in other areas. In 2016, the social partners agreed on a new model for collective agreements. The ‘agreement on competitiveness’ required that the highest pay rises be awarded to the export sector to support national price competitiveness of export prices. The aim was also to reduce public expenditure. The agreement increased working time and cut public-sector

201 A survey on discrimination among persons with university degrees in technology highlighted the contradictory experiences of women and men working in the technology field; see Susanna Bairah and Sanna Putila “‘Pätevät naiset eivät etene’ vai ‘naisia suositaan’? Sukupuoleen perustuvan syrjinnän ristiriitaiset kokemukset tekniikan korkeakoulutettujen ryöpaikoilla” [‘Competent Women Are Not Promoted’ or ‘Women Are Given Preferential Treatment’? Contradictory Experiences of Gender-Based Discrimination in the Workplaces of University-Educated Technology Professionals] (2021) 19(4) *Työelämän tutkimus* 595.

202 Paula Koskinen Sandberg, Maria Törnroos, and Roosa Kohvakka, ‘The Institutionalised Undervaluation of Women’s Work: The Case of Local Government Sector Collective Agreements’ (2017) 32 *Work, Employment and Society* 707.

203 The figures are from studies carried out by Statistics Finland, presented in Lasse Ahtiainen, *Palkansaajien järjestäytyminen vuonna 2019* [Employees’ Membership in Trade Unions in 2019] (Ministry of Economic Affairs and Employment 2019) 46–47 <https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/161433/TEM_10_2019_Palkansaajien%20jarjestaytyminen.pdf?sequence=1&isAllowed=y> accessed 20 October 2021.

holiday bonuses.²⁰⁴ Statistics Finland estimated that the agreement would reduce pay far more in the public than in the private sector.²⁰⁵ Employer representatives considered the agreement a success in terms of competitiveness.²⁰⁶ Public-sector employee trade unions claimed that working conditions in the public sector deteriorated as a result of the agreement and have since demanded compensation.

In 2007, a trade union representing nurses secured a considerable pay rise for its members after it threatened strike action. The agreement that was reached, however, covered only the members of one of several unions that represent nurses.²⁰⁷ A member of another union, also a nurse, who did not get a pay rise claimed discrimination on the ground of trade union membership. The Supreme Court found that both employers and organized employees are bound by their collective agreements, and that the conditions of one collective agreement may be better than those of another. The claimant had chosen their union freely and was not an active trade union member. According to the Court, there had been no discrimination on the ground of union membership and the Act on Equality had no relevance to the case. However, as the claimant's work was equal to or of equal value to that of the comparator, the employer had a duty under the Employment Contracts Act to treat them equally, and the employer had an obligation to prevent permanent pay differentials between them. As the employer had harmonized its pay system within the following two years, the claim for compensation had no merit.²⁰⁸

The latest collective agreement negotiations in 2022 were difficult, especially in the public sector. Public-sector trade union leaders stressed in January 2022 that all public-sector employees should be awarded a considerable pay rise, as the public sector had been left behind in comparison with the private sector, mainly owing to extra pay rises in the private sector that went beyond what had been specified in collective agreements. The unions pointed to labour shortages in many public-sector occupations.²⁰⁹ Later, public-sector unions signed a three-year agreement that guarantees relatively high pay rises and links wages in the public sector to pay rises

204 On 29 February 2016, the employer organization Confederation of Finnish Industries announced that an agreement had been reached among the social partners; see 'Neuvottelutulos: Kilpailukykysojimus' [Negotiated Agreement: Agreement on Competitiveness] <<https://ek.fi/wp-content/uploads/neuvottelutulos-290216-klo-0045.pdf>> accessed 23 January 2023.

205 Harri Nummila, 'Kilpailukykysojimus muuttaa ansiotasoindeksin laskentaa' [The Competitiveness Agreement May Change Calculation of Income Level] (Statistics Finland blogs, 6 April 2017) <<https://www.stat.fi/tietotrendit/artikkelit/2017/kilpailukykysojimus-muuttaa-ansiotasoindeksin-laskentaa/>> accessed 20 October 2022.

206 For example, a report by the Research Institute of the Finnish Economy (ETLA), which is supported by employer organizations and foundations, presented a study according to which the agreement improved national economic competitiveness considerably; see Antti Kauhanen and Markku Lehmus, *Työaika, työllisyys ja kilpailukyky* [Working Time, Employment and Competiveness] (ETLA reports 92, 12 August 2019).

207 Olli Ainola, 'Kypsyyskoe läpäisty?' [Maturity Test Passed?] *YLE News* (19 November 2007) <<https://yle.fi/a/3-5810515>> accessed 10 February 2023.

208 Supreme Court KKO 2013:10, supra 11, 14, 17, 27–30.

209 Communication by all central public-sector trade unions, 18 January 2022 <<https://www.jhl.fi/2022/01/18/juko-jyty-ja-jhl-palkankorotukset-kuuluvat-kaikille/>> accessed 20 August 2022.

in industries and export branches.²¹⁰ Nurses' trade unions refused to accept this agreement, however, and demanded that their members receive pay rises higher than those granted to members of other public-sector unions, threatening strikes in intensive care units. The government drew up legislation to prohibit the strikes and curtail the right to resign from tasks considered necessary for patient safety,²¹¹ and the parliament quickly passed the act. Under the new law, if unions fail to safeguard care, an employer may order individual health-care workers to work.²¹² The employers' representative organization EK held that high public-sector pay rises would be disastrous for the national economy.²¹³ In October 2022, the nurses signed a compromise agreement.

2.8.3 *Explanations of the gender pay gap and measures against it*

Equal pay policies in Finland have involved tripartite action plans since 2006. These plans have been based on the assumption that gender segregation of the labour market is the main reason for the pay gap. The action plans have been evaluated and found rather ineffective.²¹⁴ Positive action has been required on the part of employers under the Act on Equality. Such measures have been rather ineffective, as an ILO expert committee noted in its observations on Finland in 2017, as the concept of 'equal work' has been interpreted too narrowly. The CEDAW Committee has also recommended more active measures for pay equity.²¹⁵ An expectation that pay systems based on job evaluations would help to establish the equal value of work by women and men seems optimistic, as evaluations of demands and performance

210 Communication by all central public-sector trade unions, 8 June 2022 <<https://www.jhl.fi/2022/06/08/tallinen-on-kolmevuotinen-sote-sopimus-ja-sen-palkkaohjelma/>> accessed 20 August 2022.

211 Else-Mai Kirvesniemi (executive director for Tehy, the largest trade union for health and social care professionals), 'Hoitajien perusoikeudet 2022: Ei palkkatasa-arvoa, ei lakko-oikeutta, ei oikeutta vaihtaa työnantajaa' [Nurses' Fundamental Rights 2022: No Equal Pay, No Right to Strike, No Right to Change Employer] <<https://www.tehy.fi/fi/blogit/hoitajien-perusoikeudet-2022-ei-palkkatasa-arvoa-ei-lakko-oikeutta-ei-oikeutta-vaihtaa>> accessed 20 October 2022.

212 HE 130/2022 vp Hallituksen esitys eduskunnalle laiksi välttämättömän terveydenhoidon ja kotihoidon turvaamisesta työtaistelun aikana [Government Bill to the Parliament on an Act to Secure Necessary Health and Home Care during Strike]. The Act on Patient Security was passed in a very short period of time.

213 Employer union representatives were 'furious' about public-sector pay rises that broke the 'unwritten rule' that public-sector employees should not receive higher pay rises than private-sector employees. The private export sector trade union allegedly also tried to overturn the public health sector collective agreement, according to Teemu Muhonen, 'Vientialat mieluummin rapauttavat Suomen kilpailukyvyn kuin hyväksyvät kuntatyöntekijöiden suuremmat palkankorotukset' [Export Sector Would Rather Hurt Finnish Competitiveness Than Accept Higher Pay Rises for Municipal Workers], *Helsingin Sanomat* (Helsinki, 8 June 2022) <<https://www.hs.fi/politiikka/art-200008868134.html>> accessed 10 February 2023.

214 Kevät Nousiainen, 'Country Report Gender Equality: How Are EU Rules Transposed into National Law? Finland 2022' (European Commission Directorate-General for Justice and Consumers 2022), 23–24.

215 Niklas Bruun, 'Samapalkkaisuuden perustaa säännöstävä kansainvälinen normisto' [International Provisions That Regulate the Basis of Equal Pay] in Viitamaa-Tervonen and others (n 196).

may be carried out within groups of equal (similar) jobs, omitting comparisons of jobs that may be of equal value.

Women's organizations emphasize direct and indirect discrimination, pregnancy-related discrimination, part-time and fixed-term work, and women's care responsibilities as causes for the pay gap. There is broad agreement in Finland that the gender pay gap has several causes. The Centre for Gender Equality Information lists gender segregation of jobs and education, lower pay levels in municipal jobs, and gendered use of family leaves as causes for the pay gap.²¹⁶ In recent years, two prominent means for promoting equal pay have been stressed: increased pay transparency and reform of the provisions on family-related leave.²¹⁷

Undoubtedly, the gender pay gap is a many-headed hydra that must be combated through various measures. It is remarkable, however, that discrimination is seldom named as a cause for the gap in Finnish discussions. Even when discrimination is mentioned, the focus is on 'unexplained pay differentials', a term coined by economists. The website of the Centre for Gender Equality Information defines such 'unexplained pay differentials' as the pay differentials between women and men in the same age class, with similar education, in similar fields and jobs. The unexplained pay differential in 2018, counted at the most detailed level and taking into account similarities of fields, was 6.7% in men's favour.²¹⁸ The discussion relies on arguments from economics rather than law. Employer organizations often refer to studies that show that when comparisons of women's and men's pay are carried out among persons performing exactly the same jobs in the same field, pay differentials are even narrower or non-existent. When pay discrimination is assumed to coincide with 'unexplained pay differentials', the question of equal pay for work of equal value falls outside the frame of study. Indirect discrimination may also fall out of focus. Work of equal value may be carried out under the same or different collective agreements. Under EU law, the employer may not justify unequal pay for work of equal value by reference to collective agreement provisions.

2.8.4 Provisions on pay discrimination and positive action for equal pay

Under Section 8(3) of the Act on Equality, an employer applying pay or other terms of employment in such a way that one or more employees find themselves in a less favourable position on the ground of their gender than one or more other employees in the employer's service performing the same work or work of equal

216 Centre for Gender Equality Information, 'Gender Equality: Work and Income: Pay Gap' <<https://thl.fi/en/web/gender-equality/gender-equality-in-finland/work-and-income>> accessed 10 February 2023.

217 Naisjärjestöjen keskusliitto [The National Council of Women of Finland], 'Toimintasuunnitelma 2021' [Action Plan 2021] <<https://naisjarjestot.fi/wp-content/uploads/2020/12/Toimintasuunnitelma-2021-hyvaksyty-16.11.2020.pdf>> accessed 20 August 2022.

218 Centre for Gender Equality Information, 'Sukupuolten palkkaero' [Gender Pay Differentials] <<https://thl.fi/fi/web/sukupuolten-tasa-arvo/tasa-arvon-tila/tyo-ja-toimeentulo/sukupuolten-palkkaero>> accessed 23 January 2023.

value constitutes discrimination. There are no definitions in the act of equal work or work of equal value, although the preparatory works note that examples of work of equal value may be quite dissimilar.

Like most EU member-states, Finland follows an ‘individual legal strategy’ in providing a legal remedy for pay discrimination: the victim may bring a case of pay discrimination to court and demand compensation. The victim must show that a comparator or comparators of the opposite sex are paid more for equal work, or work of equal value, which requires access to comparator pay information, as well as information on other circumstances of the comparator’s work. The burden of proof shifts to the employer once the victim has been able to show ‘facts that make it possible to presume that discrimination has taken place’ (Section 9a of the Act on Equality). The claimant alleging discrimination must show that they have been placed at a disadvantage in comparison with at least one person or a group of persons who perform equal work or work of equal value.

The standard on when the burden of proof turns to the defendant in pay discrimination cases changed with the so-called judge cases. In earlier case law, the claimant was allowed to select a comparator, and if they could show that they were in a less favourable position in regard to the comparator, the burden of proof turned to the defendant. In 2000, judges were brought under a new collective agreement and divided into different pay categories. Both women and men judges complained about their pay categories and claimed discrimination at court. The Supreme Court found that in order to establish an assumption of discrimination and shift the burden of proof, the claimant must present proof of a causal connection between having been put into a lower pay category and their sex. As the claimants were both women and men, their lower pay could not be caused by their sex.²¹⁹

Proof may be difficult to obtain in pay discrimination cases. Under Section 10 of the Act on Equality, an employee who suspects they are a victim of pay discrimination may require a written explanation from the employer, and the employer must provide the employee with an explanation on the grounds of their pay, along with ‘the information that is necessary so that the employee may estimate whether the prohibition of pay discrimination has been violated’. The employee is not entitled to receive information on the pay of a comparator, only information on their own pay. If the comparator consents to make their pay information available, a shop steward may receive this information, under Section 10(4) of the Act on Equality. If there is reason to suspect pay discrimination, the shop steward may receive information concerning an individual employee’s pay and conditions of work, if that person consents, and on groups of employees in a manner that has been agreed upon. If an individual employee’s pay information has been given, they must be informed of that fact. The shop steward may not divulge pay information to others. If the comparator refuses access to their pay information, the shop steward may ask for it via the Ombud for Equality (Section 17[3]). The procedure is rather complicated, and the option is in practice not in use. It is problematic that the victim has

219 Supreme Court Case KKO:2009:78, supra 13–16.

no individual right to receive pay information that is necessary for establishing pay discrimination.

A positive duty to conduct equality planning was introduced for employers in 1995. The preparatory works for the provision state that employers should provide information on women's and men's pay and pay structures on an annual basis and identify factors that cause unequal pay for equal work or work of equal value. The provision had little effect in practice. In a 2005 amendment of the Act on Equality, pay audits (*palkkakartoitus*) were made mandatory (Section 6a). The mandatory duty was made more explicit by a separate provision (Section 6b) in 2015. The Finnish provisions were inspired by Swedish provisions on pay audits (*lönekartläggning*) but are not similar to them. The constitutional duty to promote equality (Section 6[4] of the Constitution) was also a motivation for these legal amendments.

The parliament expected that the amendment of the pay-survey provision would be explicit on how comparisons of work of equal value should be carried out, and that comparisons should be made across collective agreements. Even information on individual pay should be available for the surveys. According to the legal provision, pay surveys should ensure that there are no 'unjustified pay differences between women and men working for the same employer and engaged in either the same work or work of equal value'. If the analysis of different employee groups defined by competence, duties, or some other ground reveals 'clear' pay differences, the employer must analyse their causes. The 'main pay components' must be analysed separately. If differentials cannot be justified, the employer must rectify the situation. The preparatory works for the provision note that attention should be paid to groups doing work of equal value and also define such work. Comparisons across collective agreements are also referred to in the preparatory works. On the other hand, groupings already used by the employer can be used. The provisions are unclear, which is explained by the conflicting interests represented in the preparation of the law.²²⁰

The amendment of 2015 did not meet the parliament's expectations. The tripartite working group nominated to prepare the amendment opted to exclude a number of measures that might challenge established patterns of pay formation: access of employees to pay information, assessment of equal value of jobs, comparisons across collective agreements, and comparison of all pay components.²²¹ The promotion of pay transparency was on the agenda of the European Commission and was also adopted as a political goal in Finland.

220 Anja Nummijärvi, 'Palkkakartoitukset samapalkkaisuuden toteutumista edistämässä?' [Pay Audits Promoting Equal Pay?] in Viitamaa-Tervonen and others (n 196).

221 Paula Koskinen Sandberg, 'Non-Decision Making in the Reform of Equal Pay Policy: The Case of Finnish Gender Equality Legislation' (2016) 35(4) *Equality, Diversity and Inclusion: An International Journal* 280.

2.8.5 Failed amendment of the pay transparency reform

In 2018, the Ombud for Equality was requested by the Ministry of Social Affairs and Health to write a report on pay transparency. The Ombud's 2018 report²²² contains an analysis of the legal prerequisites of pay transparency, including the need to achieve the right balance between the requirements of the equal pay principle and the right to privacy and data protection. The divulgence of individual pay information should be prescribed by law, and the information should be processed in ways that comply with the requirements of the EU's General Data Protection Regulation (GDPR). Individual pay information should be available even without the comparator's consent, as such information is necessary for a victim of discrimination's right to access to justice and effective remedy. The Norwegian legislation on access to individual pay data was pointed out as a model for legislation. The Ombud's report recommended that transparency should be enhanced by legislative means. A working group set up in 2019 proposed legal amendments in that year, but the government resigned before a bill to implement the amendments could be prepared. The proposed amendments show a Nordic path-dependency rather than the influence of EU law. The European Commission's recommendation on pay transparency²²³ did not motivate new policies.

In its Government Programme, Sanna Marin's administration promised to combat discrimination by increasing pay transparency through legislative means. Provisions on the right of staff, staff representatives and individual employees to access pay information and to address pay discrimination more effectively were on the agenda.²²⁴ A new tripartite working group was nominated in 2020 and published its report in 2021.²²⁵ The report proposed the types of legislative amendments that had been promised. However, the main employer's organization, EK, withdrew from the working group in November 2020, claiming that the ministry representatives had not honoured the tradition of tripartite cooperation in the drafting of the legislation: the working group should have started with a clean slate in the preparation of new laws. The ministry stated that the aim was to follow the Government Programme. Representatives for small private, municipal, state, and church employers presented dissenting opinions, claiming that the working

222 Kevät Nousiainen 'Palkka-avoimuuden oikeudelliset edellytykset' [Legal Prerequisites of Pay Transparency] in Jukka Maarianvaara, *Selvitys palkka-avoimudesta* [Report on Pay Transparency] (Ministry of Social Affairs and Health 2018) <http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/161103/R_41_18_Selvitys_palkka-avoimudesta.pdf?sequence=1&isAllowed=y> accessed 7 December 2022.

223 European Commission Recommendation of 7 March 2014 on Strengthening the Principle of Equal Pay between Men and Women through Transparency (2014/124/EU).

224 See Section 3.5 of the 2019 Government Programme <<https://valtioneuvosto.fi/en/marin/government-programme/finland-built-on-trust-and-labour-market-equality>> accessed 21 January 2023.

225 Ministry of Social Affairs and Health, 'Palkka-avoimuuden lisääminen tasa-arvolaisissa. Työryhmän loppuraportti' [Advancing Pay Transparency Through the Act on Equality] (Sosiaali- ja terveystieteiden ministeriön raportteja ja muistioita [Ministry of Social Affairs and Health 2021]) <<http://urn.fi/URN:ISBN:978-952-00-7189-9>> accessed 20 August 2020.

group's proposals were unnecessary and detrimental in many ways. The media coverage largely echoed employers' opinions: that the proposed amendments were unnecessary, as pay discrimination was already prohibited; pay discrimination is no problem, as gender equality in Finland is excellent; and access to individual pay information would only foster envy and strife at the workplace. The minister responsible for gender equality announced in August 2022 that preparatory works for legislation on pay transparency had been dropped, as there was no consensus on the main points of the reform – particularly on the right of an individual employee to receive comparator pay information.²²⁶

The European Commission is currently pursuing pay transparency legislation, since a soft law instrument for pay transparency²²⁷ failed to achieve its objective. In 2021, the Commission presented a hard law proposal for a directive on pay transparency as a part of other measures aimed at reducing the gender pay gap.²²⁸ The proposed directive would establish mutual standards and measures for member-states, including the duty to introduce methodologies for assessing and comparing the value of work with a set of objective criteria. The Finnish parliament received the government's so-called u-brief on the Commission's proposal for a directive in May 2021.²²⁹ The government stated in the brief that it was in favour of the measures proposed by the Commission, though it admitted that proposals concerning law enforcement would be a challenge for Finnish legislation. In hearings of the parliament's Equality and Employment Committee, employer representatives claimed that the proposal lacked any legal basis and would require bureaucratic and ill-suited amendments to Finnish gender equality law, stressing that the gender pay gap was caused by gender segregation in the labour market, not discrimination. Trade union representatives supported the government's standpoint, as did the only expert heard besides the social partners.²³⁰

In its present form, Finnish equality law goes further than the Commission's proposals in that it provides for better access to comparator pay information, even though the victim currently does not have a right as an individual to access that information. The Act on Equality also requires employers with more than 30 employees to carry out a pay audit, whereas the Commission's proposal to establish a duty to carry out pay audits would affect only employers of at least 250 workers. The Commission proposal would provide the victim no access to an

226 *YLE*, 'Sukupuolten välistä palkkatasa-arvoa tavoitellut uudistus pysähtyi hallituksen erimielisyyksiin' [The Reform Aiming at Equal Pay Failed Owing to Government Disagreement] (15 August 2022) <<https://yle.fi/uutiset/3-12577314>> accessed 20 August 2022.

227 European Commission Recommendation of 7 March 2014 (n 223).

228 Proposal for a Directive of the European Parliament and of the Council to Strengthen the Application of the Principle of Equal Pay for Equal Work or Work of Equal Value between Men and Women through Pay Transparency and Enforcement Mechanisms. COM(2021) 93 final.

229 The Finnish procedure for informing the parliament involves a 'u-brief', a government document that informs the parliament about a European Union proposal or issue that would require parliamentary decision-making.

230 Expert opinions concerning U 23/2021 vp <https://www.eduskunta.fi/FI/vaski/KasittelytiedotValt-iopaivaasia/Sivut/U_23+2021_asiantuntijalausunnot.aspx> accessed 20 August 2022.

individual comparator's pay information, only access to average pay levels broken down by sex. The proposal does not explicitly prohibit disclosure of co-workers' pay to another worker, but the information may be divulged to workers' representatives or the equality body only. Yet the discussion on the directive proposal in the parliament shows that EU legislation on pay transparency would be opposed by Finnish employer representatives. The prerogative of the social partners to define equality law seems to effectively block reforms that seek to use transparency as a means for combating pay discrimination.

Part 3: Options and limits of gender equality and anti-discrimination law

2.9 Reflections and observations

This chapter on Finnish equality law and politics has revealed a number of paradoxes. In certain areas of life, such as political and educational achievements, women do very well in Finland. Women gained access to parliamentary politics very early, but it took a long time to achieve parity of women and men in parliamentary representation. Political representation, as such, is not enough to change all power relations in society and administration. The provision of the Act on Equality that requires that nominated members of state and municipal bodies shall consist of both women and men, later strengthened to require a minimum quota, has, with time, enhanced the principle of gender parity in committees, councils, and other bodies whose members are nominated (not elected). It seems that gains in gender equality in the public sphere take time.

The chapter has also described how the composition of the national government affects Finland's gender equality policies. A government 'by women' shows more willingness to carry out reforms 'for women' than a traditional government 'by men'. The chapter has also shown, however, that institutionalized power structures efficiently direct the reform process and prevent reforms that they consider detrimental to their interests. Wishes expressed by the parliament and governmental programmes give way to established understandings on the *justum pretium* or 'just price' for men's and women's work.

Given that access to the labour market was a primary goal for the women's movement in the 1960s and 1970s, it seems paradoxical that the inclusion of women in paid work remains far from complete. Women work in traditional women's occupations and branches, with low pay and often under strenuous working conditions. Anti-discrimination should provide some means for tackling the gender pay gap and opening up more varied careers for women. However, pay discrimination, discrimination at recruitment, and pregnancy-related discrimination are not in focus in Finland's equality politics.

In the first phase of equality politics in Finland, prominent measures for equality included the provision of various social services, such as day-care for children. The utility of women seeking paid work was readily recognized, as so many women were already working in the labour market or on family farms in the 1960s and 1970s. Introducing anti-discrimination law was more difficult: it seems that little

need for such legislation was felt. The Act on Equality between Women and Men was adopted perhaps more as a way of demonstrating Finland's willingness to join the UN's CEDAW Convention than as a result of internal political pressure. The act does not provide victims of discrimination effective access to justice. The social partners act as gatekeepers that decide whether a gender discrimination case goes to the low-threshold equality body and also as arbiters in the preparation of anti-discrimination law.

During the decades since the end of the Cold War, international human rights standards and EU legislation have provided standards and requirements for national actors to follow. Both Finnish anti-discrimination law and international standards on gendered violence against women have led, albeit with a certain amount of delay, to changes in national legislation. The implementation of such standards reveals a national tendency to forgo demands for gender sensitivity. Finnish law relies on gender-neutral formulations, which seem to be based on cultural understandings of gender. The understanding of gender as a multidimensional phenomenon has increased within Finnish equality law, but, so far, there is little legal support for victims of intersectional discrimination.

As shown in this chapter, the disadvantages that women face are often explained through reference to their educational and career choices and gendered childcare patterns. The strong emphasis on gender neutrality in legal and social policies is a paradox given that gendered patterns are so highly visible in social life. Male disadvantage receives attention in equality politics, but it is rarely expected that men should make different choices to overcome disadvantage.

The case study on equal pay shows that it is extremely difficult for women employees in the public sector to negotiate pay rises that exceed those negotiated by (male) workers in the export sector – even when the desperate shortage of workers in health care and education shows that the labour market mechanism is unable to balance demands for labour.

Violence against women was not addressed until the ongoing development of international human rights law made it practically impossible not to act on the issue. Gender neutrality has been a constant hallmark of Finnish equality law and Finnish legislation in general. While international treaties, such as the Istanbul Convention, allow gender-neutral norms to be used in national implementation, in practice Finnish gender neutrality entails a lack of gender-sensitive implementation.

3 Between norms and institutions

Unlocking the transformative potential of Norwegian equality and anti-discrimination law

Anne Hellum, Ingunn Ikdahl, and Vibeke Blaker Strand

3.1 Introduction

Women's right to equality has been a central element in Norwegian laws, policies, and research for decades. In 1975, the Faculty of Law at the University of Oslo was one of the first law faculties in the world to introduce women's law as a legal discipline that set out to describe, understand, and improve the position of women in law and society. In 1978, a general gender equality act that aimed to promote gender equality and improve the position of women was passed.¹ Norwegian politicians played an active role in the drafting of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which was adopted by the UN General Assembly in 1979. Norway's 'women's government' headed by Gro Harlem Brundtland made international headlines in 1986, as did the introduction of gender quotas for company boards in 2006. These and other achievements have given rise to the image of Norway as a champion of women's human rights and gender equality both at home and abroad.²

In 2021, Norway was ranked third in the world in gender equality out of 156 countries and is only 15.1% away from closing the gender gap, according to the Global Gender Gap Report 2021.³ In its last report to the CEDAW Committee, the Norwegian government linked this success to a series of laws and policies that set out to promote women's ability to combine participation in working life with family life. It stated that these achievements had been made possible by

a major commitment to kindergarten, a generous parental leave scheme, focus on fathers' participation at home, and extensive flexible working hour arrangements. Both parents have the right to work shorter days at home, if necessary, on compelling compassionate grounds, and they have the right to stay home with sick children. Mothers are entitled to paid time off from work

1 Lov om likestilling mellom kjønnene [Gender Equality Act] 9 June 1978 no. 45.

2 Eirinn Larsen, Sigrun Moss, and Inger Skjelsbæk (eds), *Gender Equality and Nation Branding in the Nordic Region* (Routledge 2021).

3 World Economic Forum, *Global Gender Gap Report 2021* <<https://www.weforum.org/reports/global-gender-gap-report-2021>> accessed 31 November 2022.

to breastfeed. At present 92 per cent of all children aged 1–5 have a place in a kindergarten, and unprecedented numbers of fathers are exercising their right to parental benefit.⁴

As shown by this example, the aim of substantive gender equality is promoted through a series of interacting policies and laws that cut across sectors such as work life, social life, and family life. In addition, the report emphasizes that

several Acts and statutory provisions have been adopted as a result of women's particular need for protection against e.g. discrimination, violence and abuse. One example of this is the protection against discrimination laid down in the Equality and Anti Discrimination Act.⁵

There is an interactive relationship between gender equality policy, laws that may promote or prevent equality (such as those related to universal welfare rights), and gender equality and anti-discrimination law. As an overarching standard, the principle of gender equality and anti-discrimination constitutes a corrective mechanism for all laws as well as for policies, practices, and regulations. The realization of the transformative potential of equality and anti-discrimination law, however, also depends on how such legislation is enforced. Therefore, the relationship between the rapidly expanding normative standards and the special enforcement system that has been established in the field of equality and anti-discrimination, which constitutes an alternative to the ordinary courts, calls for close scrutiny.

Recognizing both the legal, political, and social achievements and the remaining gaps, this chapter describes and discusses the potential and limits of Norway's gender equality and anti-discrimination law regime in the context of the promotion of substantive gender equality.⁶ Our conception of substantive gender equality is premised on the assumption that a robust, accessible, and effective enforcement system is necessary to make the normative protection standards embedded in gender equality and anti-discrimination law work.⁷ Such an understanding builds on the work of the Norwegian Gender Equality Commission. In its 2012 report, the Commission, for the first time in Norwegian history, set out a framework for a

4 Norway's Tenth Report to the UN Committee on the Elimination of Discrimination Against Women (CEDAW), paras 4–6 <<https://www.regjeringen.no/no/dokumenter/norges-10.-rapport-til-fns-kvinne-diskrimineringskonvensjon-cedaw/id2864796/>> accessed 31 November 2022.

5 Ibid.

6 The concept of substantive equality is presented in the introductory chapter of this book.

7 Our discussion of the disjuncture between the normative standards and the enforcement system stands on the shoulders of a large body of research that has emphasized this weakness; see Tove Stang Dahl, Kjersti Graver, Anne Hellum, and Anne Robberstad, *Juss og Juks* [Law and Deceit] (PAX 1976); Marit Halvorsen, 'Diskriminering ved ansettelse' [Discrimination in Hiring] and 'Kjønn og lønn' [Gender and Wages] in Tove Stang Dahl (ed), *Kvinnerett II* [Women's Law II] (Universitetsforlaget 1985); Anne Hellum and Vibeke Blaker Strand, *Likestillings- og diskrimineringsrett* [Equality and Anti-Discrimination Law] (Gyldendal 2022).

holistic gender equality policy.⁸ According to the Commission, to be effective, a gender equality policy must be backed up by a gender equality and anti-discrimination law regime that functions as a corrective measure in relation to policies, laws, and practices in all areas.

This law regime today consists of the 2017 Equality and Anti-Discrimination Act (EAD Act)⁹ and the enforcement system for that act that was embedded in the 2017 Equality and Anti-Discrimination Ombud Act (EADO Act).¹⁰ Both of these acts were part of the Conservative Solberg government's equality reform in 2017, which entered into force in 2018. The EAD Act is a single act that merges the former Gender Equality Act with three other anti-discrimination acts. In addition to prohibiting individual discrimination and harassment, the EAD Act seeks to promote gender equality through the establishment of proactive duties for public authorities and public and private employers. One of the specific aims of the act, which otherwise has a gender-neutral design, is to improve the position of women and minorities. The act regulates the use of affirmative action to promote gender equality in employment, in education, and within publicly appointed boards, councils, and commissions. To prevent discrimination and promote equality, the low-threshold enforcement system that to some extent complements the role of the ordinary courts was reorganized. The EADO Act regulates the organization and power of the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal.

Norwegian gender equality policy is premised on the assumption that law – and particularly the interplay between gender equality and anti-discrimination law, social welfare law, family law, and criminal law – constitutes a tool of social change.¹¹ Seeing gender equality and anti-discrimination law as a source of empowerment, Norwegian women's rights organizations and scholars in the cross-cutting fields of gender policy, women's law, and equality and anti-discrimination law have contributed actively to debates over law and policy in this area, and they continue to do so. A series of political and legal interventions, aimed at ensuring

8 Likestillingsutvalget [The Gender Equality Commission] was a commission of experts in the field of gender policy headed by Professor Hege Skjeie. The Commission was mandated by the red–green Stoltenberg I government to take stock of Norwegian gender policy and set out a framework for a holistic and effective gender equality policy. The Commission's analysis and recommendations are available in two public reports: NOU [Norwegian Government Official Reports] 2011: 18 'Struktur for likestilling' [Structure for Equality] and NOU [Norwegian Government Official Reports] 2012: 15 'Politikk for likestilling' [Policy for Equality].

9 Lov om likestilling og forbud mot diskriminering [Act Relating to Equality and Prohibition against Discrimination] 16 June 2017 No. 51, hereinafter 'the Equality and Anti-Discrimination Act' (EAD Act). An unofficial English translation of this act is available at Lovdata Pro <<https://lovdata.no/pro/#document/NLE/lov/2017-06-16-51>> accessed 2 December 2022.

10 Lov om Likestillings- og diskrimineringsombudet og diskrimineringsnemnda [Act Relating to the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal] 19 December 2017 No. 114, hereinafter 'the Equality and Anti-Discrimination Ombud Act' (EADO Act). An unofficial English translation of this act is available at LovdataPro <<https://lovdata.no/pro/#document/NLE/lov/2017-06-16-50>> accessed 2 December 2022.

11 NOU 2011: 18 (n 8). The role of gender equality and anti-discrimination law as a tool for gender equality policy is described in Section 3.2 below.

that the gender equality principle is integrated into other areas of law, such as family and marriage law, labour law, health law, social welfare law, and criminal law, have been made over the years.¹² In addition, efforts have been made to strengthen the enforcement of the prohibition on gender discrimination and sexual harassment in the light of the duty to promote substantive gender equality.¹³ The dynamic legal development, reflected in strengthened legal protection against direct, indirect, and intersectional discrimination along with a strengthening of structural obligations and changes in the enforcement system, reflects this longstanding commitment.¹⁴ Legal developments related to the content of the gender equality principle and its enforcement over more than four decades clearly exceed the low expectations of women's law scholarship during the 1980s that saw the gender equality norm as inherently male and, as such, a dead end.¹⁵

In spite of the progress that has been made, however, political and legal efforts to promote gender equality have by no means succeeded in fully closing the gender gap. While the Norwegian parliament (Stortinget) is relatively close to being gender-balanced, power relations are far from equal in other political arenas.¹⁶ Owing to the introduction of gender quotas, gender balance has nearly been achieved on corporate boards, but not for chief executive officers (CEOs).¹⁷ Although Norway no longer has the most gender-segregated labour market when compared to other European states,¹⁸ there are still significant gender differences.¹⁹ Women tend to choose teaching, health, and care services, while men dominate technical subject areas and natural sciences. There has been, however, a slight increase in women entering male-dominated professions.²⁰ Another trend is that women and men

12 The Gender Equality Commission saw the weak enforcement of the Gender Equality Act as an institutional barrier to the implementation of gender equality law and policy; see NOU 2011: 18 (n 8), Section 2.

13 See Section 3.5 below.

14 For an overview of the legal development in Norwegian equality and anti-discrimination law, see Hellum and Strand (n 7) Chapter 1.

15 See Tove Stang Dahl, *Women's Law: An Introduction to Feminist Jurisprudence* (Norwegian University Press 1987), 37–53, where Dahl argues that equality and anti-discrimination law, like social insurance law, is modelled on a male model, which has the result that life situations typical for women fall outside the rules.

16 Nordic Council and Nordic Council of Ministers, 'Influence and Power: Statistics' <<https://www.norden.org/en/statistics/influence-and-power>> accessed 28 December 2022.

17 Ibid.

18 CORE – Senter for likestillingsforskning [Centre for Research on Gender Equality], 'Stabilitet og endring i det kjønnsdelte arbeidsmarkedet' [Stability and Change in a Gender-Segregated Labour Market] <<https://www.samfunnsforskning.no/core/publikasjoner/core-indikator-status/stabilitet-og-endring-i-det-kjønnsdelte-arbeidsmar/index.html>> accessed 31 November 2022.

19 Statistics Norway, 'Fakta om likestilling' [Facts about Gender Equality] <<https://www.ssb.no/befolkning/faktaside/likestilling>> accessed 31 November 2022.

20 Kjersti Misje Østbakken, Liza Reisel, Pål Schöne, Erling Barth, and Inés Hardo, 'Kjønnssegregering og mobilitet i det norske arbeidsmarkedet' [Gender Segregation and Mobility in the Norwegian Work Market] (Report 2017:09, Institutt for samfunnsforskning [Institute for Social Research] 2017) <<http://hdl.handle.net/11250/2467872>> accessed 31 November 2022.

with migrant backgrounds are taking up jobs that traditionally were dominated by women. The continued wage gap, where women's monthly average wage is 87.5% of men's, is closely connected to the gender segregation within the labour market.²¹ The large percentage of women working part time (35%) in comparison to men (15%) is another barrier to economic equality between women and men.²² The majority of people who receive minimum pensions are women who have worked part time. In 2018, 26% of female pensioners received a minimum pension, in comparison with 4% of male pension-holders.²³ The prevalence of gendered violence is a factor that affects gender equal participation and freedom in relation to education, work, and public life. In Norway, one out of ten workers experiences violence, threats, and sexual harassment at work, and women are more exposed to gendered violence than men.²⁴ Furthermore, there are inequalities between different groups of women. Ensuring substantive equality for immigrant, refugee, and minority women is a major challenge. Research shows that there is a lower percentage of work-life participation among these groups and that they encounter barriers that are related to gender stereotypes as well as a combination of gender and other discrimination grounds, such as ethnicity and religion.²⁵

Unlike English, the Norwegian language does not make a distinction between 'sex', which in the English language refers to biological differences between women and men, and 'gender', which refers to social differences. The Norwegian word *kjønn* covers both. The official legal translations use the word 'gender'. The first Norwegian gender equality act's prohibition on discrimination was, however, 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.²⁶ The English translation of the EAD Act uses the term 'gender' in relation to differential treatment that is based on both biological and social difference.²⁷ In this chapter, we use the term 'gender' as

21 Tanja Askvik, 'Alder og yrke påvirker lønnsgapet' [Age and Occupation Influence the Pay Gap] (Statistics Norway, 16 November 2020) <<https://www.ssb.no/arbeid-og-lonn/artikler-og-publikasjoner/alder-og-yrke-pavirker-lonnsgapet>> accessed 31 November 2022.

22 Statistics Norway (n 19).

23 NAV [Norwegian Labour and Welfare Administration], '9 700 færre minstepensjonister' [9,700 Fewer Receive the Minimum Pension], press release 13 November 2018 <<https://www.nav.no/no/nav-og-samfunn/statistikk/pensjon-statistikk/nyheter/9-700-faerre-minstepensjonister>> accessed 28 December 2022.

24 Mari Lande With, 'Kvinner og menn i helseyrker møter mest vold og trusler' [Women and Men Working in the Health Sector Experience Violence and Threats Most Often] (Statistics Norway, 5 November 2018) <<https://www.ssb.no/arbeid-og-lonn/artikler-og-publikasjoner/kvinner-og-menn-i-helseyrker-moter-mest-vold-og-trusler>> accessed 31 November 2022.

25 Janis Umblijs, 'Kunnskapsoppsummering om deltakelse i arbeidslivet for kvinner med innvandrerbakgrunn' [Knowledge Summary on Participation in Working Life for Women with an Immigrant Background] (Report 2020:2, Institutt for samfunnsforskning [Institute for Social Research] 2020) <<https://hdl.handle.net/11250/2641207>> accessed 31 November 2022.

26 Hellum og Strand (n 7) Chapter 3.

27 EAD Act 2017, Section 6.

an overall category, while the term ‘sex’ is applied to legislation that is limited to biological differences between women and men.

The chapter is divided into three main parts. An overview of the long lines of development and the current legal situation is given in Part 1. Section 3.2 describes the close relationship between Norwegian gender policy, laws that promote gender equality (particularly welfare laws), and gender equality and anti-discrimination legislation. In Section 3.3, the Norwegian gender equality and anti-discrimination law regime is situated within its broader historical, political, legal, and international contexts. Sections 3.4 and 3.5 describe and discuss the relationship between the equality and anti-discrimination law regime’s normative standards and its enforcement system.

The transformative potential of law as a form of counterpower is a central theme in the Norwegian tradition of sociology of law and women’s law.²⁸ To shed further light on central aspects of the gender equality principle, including how it interacts with other state law, we have in Part 2 selected three topics for further elaboration. With a focus on sexual harassment (Section 3.6), the protection against discrimination for women from religious and ethnic minorities (Section 3.7), and how welfare state law may contribute to gender equality (Section 3.8), we discuss the potential and limits of equality and anti-discrimination law in promoting substantive gender equality. Through our examination of these three topics, we seek deeper insight into whether and how the structural character of gender inequality is recognized and to what extent and how difference and diversity are recognized in discrimination cases. We also look more closely at how conflicts and tensions between the equality and anti-discrimination principle and other laws are handled.

In Part 3, we reflect on how our analyses can shed light on the potential and limits of Norwegian gender equality and anti-discrimination law by presenting four considerations that we see as key to unlocking its transformative potential.

Part 1: Development of law and policy in the field of gender equality and anti-discrimination law

3.2 The relationship between law and policy

Gender equality is part and parcel of Norway’s social and political identity, and, as such, it is a political objective pursued by all Norwegian political parties. Since 2012, the Gender Equality Commission’s framework for a holistic gender equality

28 On analysis of law as a form of power and counterpower in the Norwegian women’s law and sociology of law tradition, see Anne Hellum, Kristin Bergtora Sandvik, and May-Len Skilbrei, ‘Kjønn, makt og rett: Samfunnsfaglige perspektiver på og i kvinneretten’ [Gender, Power and Law] in Ingunn Ik Dahl and others (eds), *Kjønn og rett: Kvinne-, kjønns- og likestillingsperspektiver i juss-tudiet* [Gender and Law: Women’s, Gender and Gender-Equality Perspectives in Legal Education] (Cappelen Damm Akademisk 2022) <<https://press.nordicopenaccess.no/index.php/noasp/catalog/book/164>> accessed 2 December 2022.

policy has served as an overarching point of reference.²⁹ Pointing to the fragmented character of the sector, the Commission called for an overall strategy encompassing political and legal measures that could promote a fair distribution of unpaid care work, paid work, education, and political participation between women and men. Seeing violence against women as a barrier to gender equality, the Commission called for laws and policies that improved protection against domestic violence, gender harassment, and sexual harassment. Recognizing the vulnerability of women belonging to several weak and marginalized groups, the Commission set out an intersectional gender equality policy. The Commission emphasized that if gender equality policies were to have a transformative effect, they needed a robust legal structure and institutional backing. It called for the creation of a new Directorate for Gender Equality, in addition to changes to the 1978 Gender Equality Act and its enforcement system.

While all political parties pledge their support to the principle of gender equality, each government sets out its overall priorities regarding gender equality in its Government Declaration.³⁰ Furthermore, Norwegian public administration is based on the principle of sectorial responsibility for gender equality. This means that all public bodies have a responsibility to promote the government's gender equality policy as well as to ensure that laws and policies in their respective areas of work are in line with the EAD Act and Norway's international obligations.³¹ To ensure that the government's gender equality policy is mainstreamed, one ministry is assigned the role of initiator and coordinator.³² This ministry, currently the Ministry of Culture and Equality, is also in charge of matters concerning gender equality and anti-discrimination legislation. In line with public authorities' duties to report on measures taken to promote equality and combat discrimination, the Minister of Culture and Equality issues annual reports to the Norwegian parliament (Stortinget).³³

29 The Gender Equality Commission's analysis and recommendations in NOU 2011: 18 (n 8) and NOU 2012: 15 (n 8) were followed up by the Conservative Solberg government in Meld. St. [Report to the Storting] 7 (2015–2016) 'Likestilling i praksis – Like muligheter for kvinner og menn' [Equality in Practice: Equal Opportunities for Women and Men]. The Commission's recommendations served as a point of reference in the preparatory works to the EAD Act and the EADO Act.

30 The current Labour-dominated Støre government set out its policies in 'Hurdalsplattformen: For en regjering utgått fra Arbeiderpartiet og Senterpartiet 2021–2025' [The Government Declaration 2021–2025]. Among other things, the government emphasized that it will 'pursue an offensive equality policy that ensures that everyone is included in society, regardless of gender, sexual orientation, ability to function and ethnicity. Targeted work must be done to increase diversity in working life and better representation between the sexes in the gender-biased industries'; see 'Government Declaration 2021–2025', 69 <<https://www.regjeringen.no/no/dokumenter/hurdalsplattformen/id2877252/>> accessed 2 December 2022.

31 NOU 2012:15 (n 8) Section 2.1.5.

32 In 2022, this is the Ministry of Culture and Equality. In the past, the Ministry of Family Affairs has most often held this role.

33 The Conservative Solberg government's and the Labour-dominated Støre government's Equality Reports to the Storting can be found at <<https://www.regjeringen.no/no/tema/likestilling-og-mangfold/likestilling-og-inkludering/likestilling-mellom-kjonna/id670481/>> accessed 2 December 2022.

Gender equality policy thus constitutes a mixture of interacting policies and laws that cut across a wide range of political and administrative sectors.³⁴ In practice, there is a close and interactive relationship between Norwegian gender equality policy, national and international gender equality and anti-discrimination law, and other welfare state law, such as labour law and social insurance law. The gender equality policy is premised on the assumption that the obligation of public authorities to prevent discrimination and promote equality under the EAD Act will ensure that gender equality is mainstreamed into all laws, policies, and practices. Such an approach gives national and international gender equality and anti-discrimination law a central role in contestations over how substantive gender equality is – and should be – promoted through laws and policies in different sectors.

In the following, we describe different subfields of Norwegian gender equality policy with a focus on the interactive relationship between such policy, equality and anti-discrimination law, and other laws that promote or hinder gender equality. Our overview builds on the work of scholars in the field of gender equality politics, who have highlighted four key areas: *equality and anti-discrimination legislation*, *work–family life balance*, *gender mainstreaming*, and *gender balance in decision-making*.³⁵ Another crucial area is *gender-based violence, particularly violence against women*.

First, in all these fields, the equality and anti-discrimination principle embedded in national and international law constitutes a corrective to existing laws and policies. As emphasized by the Gender Equality Commission, a robust and enforceable equal rights framework is closely intertwined with national gender equality policy.³⁶ The Norwegian equality and anti-discrimination law regime is made up of a mixture of national and international laws and policies. Both EU/EEA law (through Norway’s membership of the European Economic Agreement [EEA]) and international human rights law are today part of Norway’s national law.³⁷ Norwegian gender equality laws have been in the making for more than four decades. The entry into force in 2018 of two new acts represents the most recent phase of this development. During this phase, several laws were merged into one general equality and anti-discrimination act, the 2017 Equality and Anti-Discrimination Act (EAD Act).

34 Catrine Holst and Mari Teigen, ‘Silenced at the Border: Norwegian Gender-Equality Policies in National Branding’ in Eirinn Larsen, Inger Skjelsbæk, and Signe Moss (eds), *Gender Equality and Nation Branding in the Nordic Region* (Routledge 2021) .

35 Hege Skjeie, Cathrine Holst, and Mari Teigen, ‘Splendid Isolation? On How a Non-member is Affected by – and Affects – EU Gender Equality Policy’ in Moira Dustin, Nuno Ferreira, and Susan Millns (eds), *Gender and Queer Perspectives on Brexit* (Palgrave Macmillan 2019).

36 NOU 2011: 18 (n 8) Chapter 2.

37 The webpage www.gender.no was established by Kilden, which is a Norwegian knowledge centre for gender perspectives and gender balance in research. The webpage contains an overview of facts, policies, national legislation, and international obligations in the field of gender equality. See also Hege Skjeie, Cathrine Holst, and Mari Teigen, ‘Benevolent Contestations: Mainstreaming, Judicialisation, and Europeanisation in the Norwegian Gender+ Equality Debate’ in Heather McRaw and Elaine Weiner (eds), *Towards Gendering Institutionalism: Equality in Europe* (Rowman and Littlefield 2017).

This act includes individual protection and structural obligations on the basis of a wide range of grounds, such as gender, ethnicity, disability, age, sexual orientation, and gender identity, or a combination of grounds. In addition, the 2017 Equality and Anti-Discrimination Ombud Act (EADO Act) aims to establish a streamlined and time-efficient enforcement system. The system, however, has been criticized for providing too little support to victims of discrimination because it fails to take sufficient account of socioeconomic differences in the population, weak language skills, etc.³⁸

Second, policy in the area of *work–family balance* sets out to facilitate women’s full-time participation in work life and equal sharing of care work by women and men. According to the Norwegian government’s tenth periodic report to the CEDAW Committee:

Women being in employment benefits society from a socioeconomic perspective, and it offers personal gains for individuals, by giving them greater room for manoeuvre and financial independence, as well as more equal distribution of resources between women and men.³⁹

This political ambition is reflected in laws establishing rights to kindergartens and day-care services as well as extensive rights for both parents to paid parental leave and paid leave to care for sick children under the National Social Insurance Act. To ensure that these rights are accessible, the EAD Act provides strong legal protection against discrimination related to pregnancy, parental leave, and caring duties. A recurrent challenge is to ensure that laws and practices that regulate women and men’s access to these services and benefits are in line with the prohibition on direct and indirect discrimination.⁴⁰ Furthermore, family and marriage laws governing economic relations between spouses tend to favour the (male) full-time wage-earner despite being neutral on paper.⁴¹ The current government strongly emphasizes that ‘permanent, full-time positions must be the main rule in Norwegian working life’.⁴² The government acknowledges that ‘involuntary part-time work and the lack of a full-time culture are ... a major problem in parts of both the public and private sectors, and it particularly affects women’.⁴³ Public debates, however, show that there is considerable disagreement regarding the balance between, on

38 The measures to promote equality listed in the Government Declaration (2021–2025) include ‘Strengthen the Equality and Discrimination Ombudsman, the Equality Centre, the Discrimination Board and the organizations that work to increase equality’; see Government Declaration 2021–2025 (n 30), 69.

39 Tenth Periodic Report Submitted by Norway to the UN Committee on the Elimination of Discrimination against Women (CEDAW), CEDAW/C/NOR/10, Section 6.

40 The relationship between social welfare law and gender equality and anti-discrimination law is analysed in Section 3.8 below.

41 Katrine Kjørheim Fredwall, *Familierettens korreksjonsmekanismer* [Correction Mechanisms within the Field of Family Law] (Gyldendal 2020).

42 Government Declaration (2021–2025) (n 30), 49.

43 Ibid.

the one hand, promoting full-time work and two-income families and, on the other, strengthening the ability of women and men to decide what path to pursue in different life situations.

Third, *gender mainstreaming* has been the official strategy of gender equality policy in Norway since the enactment of the Gender Equality Act in 1978. The main goal of that act was ‘to promote equality and in particular the position of women’.⁴⁴ To fulfil this aim, the act laid down that ‘all public authorities shall promote gender equality in all areas of responsibility’.⁴⁵ From 1994, gender mainstreaming was anchored in the Government Instruction for Law and Policy Preparation, which required that attention be given to gender equality consequences in the preparation of all laws and policies. This explicit requirement was, however, removed when the Instruction was simplified and all references to gender were removed in 2016.⁴⁶ The EAD Act, however, sharpens the duty of public authorities to ‘make active, targeted and systematic efforts to promote equality and prevent discrimination’ and to report annually on their activities.⁴⁷ This can be seen as a strengthening of the principle of gender mainstreaming.

Fourth, *gender balance in decision-making* is a hallmark of Norwegian gender equality policy. In official committees, gender balance has been mandatory since 1981.⁴⁸ When a public body appoints or selects a committee, board, etc., both genders shall, according to the EAD Act, be represented.⁴⁹ On corporate boards, gender representation has been mandatory since 2006, when a legal requirement of at least 40% representation of both men and women was introduced in the Public Limited Liability Companies Act.⁵⁰ The act covers public limited companies, publicly owned companies, and cooperative companies.⁵¹ Gender balance is not yet required on the boards of privately owned limited companies.

Finally, efforts to combat *gendered violence* – particularly violence against women in the form of rape, domestic violence, gender harassment, and sexual harassment – form an integrated part of Norwegian gender policy. Various laws have been adjusted to the demands of equality and anti-discrimination law, and the Crisis Centre Act establishes a right to crisis centres for women, men, and children

44 Gender Equality Act 1978, Section 1.

45 Ibid.

46 ‘Instruks om utredning av statlige tiltak (utredningsinstruksen)’ [Government Instruction for Law and Policy Preparation], revised through royal decree 19 February 2016; available at LovdataPro <<https://lovdata.no/pro/forskrift/2016-02-19-184>> accessed 2 December 2022.

47 EAD Act, Section 24.

48 Ot.prp. [Proposition to the Odelsting] no. 67 (1980–81) ‘Om lov om endring av likestillingsloven’ [Changes in the Gender Equality Act] 5.

49 EAD Act, Section 28, para 1.

50 Lov om allmenaksjeselskaper [Public Limited Liability Companies Act] 13 June 1997 no. 45.

51 Mari Teigen (ed), *Gender Balance on Company Boards: A Summary from a Research Project about the Impact of the Norwegian Gender Quota Legislation* (Institute for Social Research Report 2015:02); Mari Teigen, ‘The Making and Circulation of Nordic Quotas’ in Haldor Byrkjeflot, Lars Mjøset, Mads Mordhorst, and Klaus Petersen (eds), *The Making and Circulation of Nordic Models, Ideas and Images* (Routledge 2022).

exposed to domestic violence.⁵² The EAD Act prohibits gender harassment and sexual harassment and obliges public authorities and employers to take measures to prevent gendered violence and sexual harassment. It thus significantly expands the protection previously offered solely by criminal law.⁵³ This development, which can be ascribed to Norway's obligations under the CEDAW Convention and EU/EEA law, was further strengthened through Norway's ratification of the Istanbul Convention in 2017.⁵⁴

3.3 Background: Three phases in the development of gender equality and anti-discrimination law

3.3.1 Three phases of legal development and its international backdrop

The current equality and anti-discrimination law regime in Norway stands on the shoulders of earlier laws and practices. It did not evolve in a national vacuum but in close interplay with Norway's international legal obligations under EU/EEA law and international human rights law. Legislation has been introduced and amended a number of times, but, overall, the development can be divided into three phases: establishing, expansion, and merger.⁵⁵

3.3.2 The establishing phase (1978–2004)

The first Gender Equality Act (GE Act) was adopted in 1978, two years before Norway ratified the CEDAW Convention. This act constituted a legal turning point. Up until then, the main tools for promoting gender equality had been policies, collective agreements, and programmes that involved the state, labour unions, and women's organizations. Furthermore, gender equality had been promoted through piecemeal reforms aiming at formal equality, mainly the repeal of legislation that denied women citizenship rights, such as the right to vote or own property. In contrast, the Gender Equality Act was a general act that provided protection against gender discrimination and set out to improve the position of women in all areas of society (with the exception of 'internal affairs' in religious communities).

A contested issue regarding the design of the act was whether a women-specific approach was necessary to address the skewed distribution of power and resources between women and men. The initial proposal from the Labour Party government took a symmetrical and apparently gender-neutral approach, prohibiting discrimination on the basis of sex. This met with criticism from large parts of the women's movement and women's law researchers, who argued that a 'gender-neutralized'

52 Lov om kommunale krisesentertilbod [Act on Public Crisis Centres] 19 June 2009 no. 44.

53 See Section 3.6 below.

54 The Støre government stated that it will 'strengthen the work against sexual harassment, i.e. by ratification of the ILO Convention no. 190 and by getting work against sexual harassment into the HMS regulations in the Working Environment Act'; see Government Declaration (2021–2025) (n 30) 70.

55 This perspective is further developed in Hellum and Strand (n 7).

act failed to recognize the pervasive discrimination against women.⁵⁶ An asymmetric and woman-specific legal guarantee was seen as necessary to promote substantive equality.⁵⁷ In 1976, the Norwegian parliament debated two proposals representing these opposing strands. Neither the Labour Party's proposal for a formally gender-neutral equality act nor the Socialist Left Party's proposal for an act that would prohibit discrimination against women received a majority vote. In 1978, the Storting passed the Gender Equality Act, which was a compromise between the two strands. It prohibited gender discrimination, but it allowed differential treatment that promoted gender equality if it was in line with the purpose of the act: to improve the position of women in society.

To make the protection against gender discrimination accessible, a cost-free and simple enforcement system was set up as an alternative to the ordinary courts.⁵⁸ A claimant could make a complaint (oral or written) to the Gender Equality Ombud, who could issue an unbinding advisory opinion. If the parties did not accept the advisory opinion, the Equality Tribunal could make a binding decision on the case. The labour unions and the Norwegian Employers' Confederation, both powerful parties in the negotiations on the act, were represented in the Tribunal alongside scholars and legal practitioners in the field of women's law and equality and anti-discrimination law. However, the Tribunal could neither provide victims of discrimination with damages or compensation nor impose a coercive fine to ensure implementation of a decision.

In the coming years, the Gender Equality Act's protection standards were gradually strengthened. The act, which initially was home-grown, was subject to a series of amendments prompted by dynamic developments in both human rights law and EU law. Norway ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1981. While Norway has remained outside the EU, the European Economic Area (EEA) Agreement between the EU and the European Free Trade Association (EFTA) countries implied that rights and obligations within the EU internal market were binding also for Norway from 1994. Owing to this Agreement, a range of EU directives relevant to gender equality, as interpreted by the European Court of Justice (CJEU) and the EFTA Court, have become part of Norwegian law.

Norway's obligations under the EEA Agreement prompted a series of legislative changes in the early 2000s.⁵⁹ The protection against direct and indirect discrimination was strengthened, particularly concerning discrimination related to pregnancy, parental leave, and part-time work. In addition, protection against sexual harassment and gender harassment was included in the Gender Equality Act. To

56 We use the term 'gender-neutralized' to denote laws and policies in which explicit references to sex or gender are removed or omitted despite being relevant to the material content or purpose.

57 The legal and political controversies surrounding the act are described in Dahl, Graver, Hellum, and Robberstad (n 7).

58 See Hellum and Strand (n 7) Part 6.

59 Ot.prp. [Proposition to the Odelsting] no. 77 (2000–2001) 'Om lov om endringer i likestillingsloven mv.' [Changes in the Gender Equality Act].

strengthen protection against discrimination, an explicit duty for public and private actors to take active measures to promote gender equality and prevent discrimination, harassment, and sexual harassment was included in the act. However, cases concerning sexual harassment could be brought only before the ordinary courts, as the Equality Tribunal was not granted competence to deal with such cases. The decision not to grant the Tribunal such competence was underpinned by the view that sexual harassment had more in common with criminal law than with gender equality and anti-discrimination law.

International law also made its mark on case law. Through their interpretations of the Gender Equality Act, the Ombud and the Tribunal extended the protection against gender discrimination to homosexuals and transpersons who had undergone sex reassignment surgery and sterilization.⁶⁰ By invoking the CEDAW Convention's prohibition on gender stereotypes, the Ombud and the Tribunal strengthened the right to gender equal education and gender equal reproductive health rights. In many of these decisions, Tribunal members with expert backgrounds in the field of gender equality and anti-discrimination law were in the majority, while members from the labour unions and the Norwegian Employers' Confederation dissented.⁶¹

3.3.3 *The expansion phase (2004–2014)*

During this phase, three new anti-discrimination acts were passed, prohibiting ethnic discrimination (2005), disability discrimination (2008), and discrimination on the basis of sexual orientation and gender identity (2013).⁶² In 2009, a government-appointed Discrimination Law Commission proposed that the different anti-discrimination acts should be merged into a single act for all discrimination grounds and specific references to the situation of women omitted.⁶³ The idea encountered strong resistance from the women's rights movement, the Norwegian Confederation of Trade Unions (LO), the Equality Ombud, scholars in the field of equality and anti-discrimination law, and the CEDAW Committee.⁶⁴ The Labour Party government in power at the time (Stoltenberg II) decided to keep the four

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

61 See, for example, the *ACE* case LDN 2001-1 and the *sterilization* case LDN 2003-4.

62 Lov om forbud mot diskriminering på grunn av etnisitet, religion mv. (diskrimineringsloven) [Act Prohibiting Discrimination Based on Ethnicity, Religion, etc.] 3 June 2005 no. 33; Lov om forbud mot diskriminering på grunn av nedsatt funksjonsevne (diskriminerings- og tilgjengelighetsloven) [Act Prohibiting Discrimination Based on Disability] 20 June 2008 no. 42; Lov om forbud mot diskriminering på grunn av seksuell orientering, kjønnsidentitet og kjønnsuttrykk (diskrimineringsloven om seksuell orientering) [Act Prohibiting Discrimination Based on Sexual Orientation, Gender Identity and Gender Expression] 21 June 2013 no. 58.

63 NOU [Norwegian Government's Official Reports] 2009: 14 'Et helhetlig diskrimineringsvern' [A Holistic Protection against Discrimination].

64 UN Committee on the Elimination of Discrimination against Women, 'Concluding Observations to Norway's Seventh Periodic Report', CEDAW/C/NOR/CO/7, 10 August 2007.

anti-discrimination acts, but undertook a reform to streamline them and harmonize the level of protection they offered.⁶⁵

In 2005, the first separate Equality and Anti-Discrimination Ombud Act (EADO Act 2005) was passed.⁶⁶ The act extended the existing enforcement system for the Gender Equality Act to the new anti-discrimination acts – with the exception of sexual harassment cases, which were still to be heard only by the courts. In response to the critique of the weak enforcement system, the Tribunal was given the power to impose coercive fines to ensure implementation of its orders. However, powerful actors, such as the Ministry of Justice, retained the view that the Tribunal, as an administrative, low-threshold agency, was not suited to award remedies to victims of discrimination or harassment. Owing to the continued mismatch between the strong normative protection standards and the weak enforcement system, the equality and anti-discrimination law regime was described as ‘a Rolls Royce with a Volkswagen Beetle motor’.⁶⁷

While the anti-discrimination acts kept the different discrimination grounds separate, the Ombud and Tribunal covered new legal ground through their interpretation. These bodies extended the protection standards beyond the grounds that were listed explicitly in the various acts, to include situations such as when discrimination was related to a *combination* of discrimination grounds.⁶⁸

A longstanding controversy among the Ministry of Justice, the Ombud, and the Tribunal concerned the power of the Ombud and the Tribunal to hear cases in which the Gender Equality Act came into conflict with other Norwegian laws. Since the Tribunal is an administrative body, not a court, it was argued by the Ministry of Justice that the Tribunal could not interfere with decisions made by the legislature. However, in the *egg donation* case, the Tribunal concluded that it had the power to issue (unbinding) statements concerning conflicts between the Gender Equality Act and other Norwegian laws.⁶⁹ The decision in the *egg donation* case was followed by a number of unbinding statements in which the Tribunal

65 This resulted in four new acts being adopted in 2013. One law, the 2013 Act Prohibiting Discrimination Based on Sexual Orientation, Gender Identity, and Gender Expression (n 62), was new. The three other equality and anti-discrimination laws were repealed and replaced by new laws: the 1978 Gender Equality Act (n 1) was replaced by Act 21 June 2013 no. 59 (the 2013 Gender Equality Act); the 2005 Act Prohibiting Discrimination Based on Ethnicity, Religion, etc. (n 62) was replaced by Act 21 June 2013 no. 60, which prohibited discrimination based on ethnicity, religion, and belief; the 2008 Act Prohibiting Discrimination Based on Disability (n 62) was replaced by Act 21 June 2013 no. 61, which prohibited discrimination based on disability.

66 Lov om Likestillings- og diskrimineringsombudet og Likestillings- og diskrimineringsnemnda (diskrimineringsombudsloven) [Act Relating to the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal] 10 June 2005 no. 40.

67 Anne Hellum and Helga Hernes, ‘Diskrimineringsvernet er ikke effektivt’ [The Protection against Discrimination Is Not Effective] *Aftenposten* (Oslo, 18 April 2013) <www.aftenposten.no/meninger/i/3JEev/diskrimineringsvernet-er-ikke-effektivt> accessed 29 November 2022.

68 This is further discussed in Section 3.7 below.

69 LKN-2006-9. The Tribunal’s decision has not been appealed.

concluded that other laws were in conflict with the Gender Equality Act.⁷⁰ The Tribunal's approach to its own competence was accepted by the Ministry of Justice and the Storting through the process that led to the incorporation of the CEDAW Convention into the Norwegian Human Rights Act in 2009.⁷¹

Another important development in this phase was the 2010 repeal of the exemption concerning internal affairs in religious communities that was contained in the Gender Equality Act.⁷² This expansion of the scope of protection against discrimination was closely linked to Norway's human rights obligations, particularly under the CEDAW Convention, as well as Norway's obligations under the EEA Agreement.

A new milestone was reached in 2014 when a general non-discrimination clause was included in Article 98 of the Norwegian Constitution as part of a broader human rights reform. The article 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 provisions of the EAD Act, does not include a list of discrimination grounds, but it is an open-ended standard. The courts have an obligation under Article 89 of the Constitution to review whether a piece of legislation or an administrative decision is in line with the constitutional principle of equality.⁷³

3.3.4 *The merger and simplification phase (2015–present)*

The unified Equality and Anti-Discrimination Act (EAD Act) and the Equality and Anti-Discrimination Ombud Act (EADO Act), which were both adopted in 2017 and entered into force in 2018, represent the merger and simplification phase. The four specific anti-discrimination acts were merged into a single equality and

70 Vibeke Blaker Strand, 'Håndheving av diskrimineringsvernet i møte med andre lover i velferdsstaten' [Enforcement of the Prohibition against Discrimination in Meeting with Other Acts in the Welfare State] in Ingunn Ikdahl and Vibeke Blaker Strand (eds), *Rettigheter i velferdsstaten. Begreper, trender, teorier* [Rights in the Welfare State: Concepts, Trends and Theories] (Gyldendal 2016); Aslak Syse, 'Diskrimineringsvernets normative styrke – et norsk eksempel til advarsel' [The Normative Strength of the Prohibition against Discrimination: A Norwegian Example] in Mette Hartlev, Stine Jørgensen, and Anne Hellum (eds), *Ketsch me if you can: Sociale rettigheter og ligestilling* [Social Rights and Equality] (Karnov Group 2017).

71 Ot.prp. [Proposition to the Odelsting] no. 93 (2008–2009) 'Om lov om endringer i menneskerettsloven mv.' [Changes in the Human Rights Act] 3. In Norway, the CEDAW Convention was incorporated into Lov om menneskerettigheter [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).

72 Vibeke Blaker Strand, *Diskrimineringsvern og religionsutøvelse* [Prohibition against Discrimination and Religious Practice] (Gyldendal 2012).

73 See Article 89 of the Norwegian Constitution, which states: 'In cases brought before the Courts, the Courts have the power and the duty to review whether applying a statutory provision is contrary to the Constitution, and whether applying other decisions under the exercise of public authority is contrary to the Constitution or the law of the land.' An unofficial English translation is available at <<https://lovdata.no/pro/#document/NLE/lov/1814-05-17>> accessed 29 November 2022.

anti-discrimination act. The originally two-level enforcement system, established in the 2005 EADO Act, was replaced with a one-tier system in which the Tribunal was granted the power to award remedies to victims of discrimination.

The Conservative (Solberg) government's proposal for this overhaul of the previous Labour (Stoltenberg II) government's 2013 reform was fiercely debated. A contested issue was whether the strong protection against gender discrimination should be 'levelled down' to the lower level of protection against discrimination on other grounds. A related issue was the relationship between gender-neutralized and woman-specific regulation, as the initial proposal repealed the existing Gender Equality Act's aim of 'improving the position of women'. Another suggestion was to remove family life and the personal sphere from the scope of the bill. Furthermore, in line with the government's anti-bureaucratic agenda, it was suggested to abolish the duties of employers to report on gender equality status and initiatives and to do away with the Ombud's and the Tribunal's supervision and control of the proactive duties of employers.

The outcome of the struggle was the adoption of a single act that had both gender-neutralized and woman-specific elements. The 2017 EAD Act prohibits gender discrimination, but it has the particular objective of improving the position of women and minorities. By and large, the new act extended the higher standards of the Gender Equality Act to all of the protected discrimination grounds. The reporting duties of private and public employers were repealed in 2017, but were reinstated by a majority in the Storting in 2019, and even extended to governmental agencies.

In the 2017 EADO Act, the Tribunal retained its power to consider whether public and private employers fulfilled their reporting duties. The new Discrimination Tribunal was given power to grant compensation and damages to victims of discrimination and harassment in certain cases. In 2019, the Storting decided to also give the Tribunal competence to handle cases regarding sexual harassment. However, these gains went hand in hand with the introduction of a one-tier enforcement system: the Ombud's power to adjudicate cases was abolished. Whether these changes would strengthen or weaken access to justice and effective enforcement was a contested issue.⁷⁴

3.4 The equality and anti-discrimination regime's potential to promote substantive equality

3.4.1 The two current acts and their potential to promote substantive equality

The two current acts have been in force since 2018. What potential do they have to transform laws, regulations, policies, and practices that create or uphold unequal

74 Anne Hellum and Vibeke Blaker Strand, 'Solberg-regjeringens forslag til reformer på diskrimineringsfeltet: Uniformering, individualisering, privatisering og avrettsliggjøring' [The Solberg Government's Proposal for Reforms of Anti-Discrimination Law: Uniformity, Individualization, Privatization and De-legalization] (2017) 43(1) *Hefte for kritisk juss* [Journal of Critical Legal Studies] 4 <www.idunn.no/doi/10.18261/issn.2387-4546-2017-01-02> accessed 2 December 2022.

gender relations, and what are the limitations on their abilities to do this? To answer this question, we now turn our attention to the normative protection standards; how they are translated into practice by the Ombud, the Tribunal, and the courts; and how they are made available to different groups of women and men who experience discrimination, harassment, and sexual harassment.

3.4.2 The purpose and scope of the EAD Act: Gender-neutralized and woman-specific

The Equality and Anti-Discrimination Act, like earlier gender equality acts, combines gender-neutralized and woman-specific elements.

This double approach is visible already in Section 1: the general objective of the act is ‘to promote equality and prevent discrimination on the basis of gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age or other characteristic features of a person’.

However, the same section also states that the particular objective of the act is ‘improving the position of women and minorities’ and to ‘help to dismantle disabling barriers created by society and prevent new ones from being created’. The woman-specific element originates from the Gender Equality Act 1978. In their struggle to uphold the woman-specific objective, women’s rights proponents invoked the CEDAW Committee’s concern 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’.⁷⁵

Like the previous gender equality law, the EAD Act, according to Section 2, applies in all areas of society. Yet the Tribunal, according to the Equality and Anti-Discrimination Ombud Act, shall not enforce the prohibition on discrimination in family life and other purely personal circumstances. The Tribunal’s lack of power to intervene in cases concerning gender discrimination in family and personal life does not sit well with the CEDAW Convention, which applies in both the public and the private spheres.

3.4.3 Gender as a discrimination ground

A basic condition for substantive equality is that law and practice recognize every person’s right to be treated with respect and dignity regardless of group-based identity markers. Section 6 of the EAD Act prohibits discrimination on the basis of ‘gender, pregnancy, leave in connection with childbirth or adoption, care

75 United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee), ‘Concluding Observations on the Eight Periodic Report of Norway’ (2012) UN Doc CEDAW/C/NOR/Co/8, para 9.

responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age or combinations of these factors’.

‘Gender’ is a translation of the Norwegian term *kjønn*, and *kjønn* includes both sex and gender.⁷⁶ The inclusion of pregnancy, parental leave, and care for children or disabled, sick or elderly people as distinct discrimination grounds signals that these situations constitute a discrimination risk, regardless of gender, sexual orientation, gender identity, or gender expression.

Sexual orientation, gender identity, and gender expression are defined as separate discrimination grounds. Lesbian, homosexual, and transgender persons are, however, also protected against discrimination on the basis of their sex, pregnancy, parental leave, or care responsibilities. The particular discrimination ground that is considered relevant will depend on the circumstances of individual cases.

In line with earlier practice, the act provides explicit protection against discrimination on the basis of a combination of the listed discrimination grounds: intersectional discrimination. As in earlier acts, discrimination based on *association* with persons with particular characteristics, such as disability or a particular ethnicity or sexual orientation, is prohibited.⁷⁷

With its broad, intersectional, and relational approach to gender, the EAD Act recognizes difference and sameness between and within different groups of women and men. Accordingly, it recognizes different groups of women’s and men’s experiences of marginalization and discrimination in different life situations.

3.4.4 Direct and indirect gender discrimination

Recognition of difference and diversity is another necessary condition for substantive equality. In many situations, a one-size-fits-all standard is not enough to ensure substantive equality for women and men belonging to different minority groups – whether in terms of gender identity, sexual orientation, ethnicity, or other factors. Given the wide variety of living conditions and life situations that the law encounters, it remains contested what constitutes ‘like cases’ that should be treated alike, and what are ‘different cases’ and should thus be treated differently.⁷⁸ Feminist legal theory has called for standards that take into account the biological, social and economic factors that influence the different paths of women and men.⁷⁹

The Court of Justice of the European Union (CJEU) has responded to this call through its dynamic interpretation of the EU’s gender equality directives,

⁷⁶ See also Section 3.1 of this chapter.

⁷⁷ EAD Act, Section 6, para 3.

⁷⁸ A clear example of how this can manifest in a concrete case is the discussion by Lady Hale in *Nadine Rodriguez v (1) Minister of Housing of the Government (2) The Housing Allocation Committee* [2009] UKPC 52, Court of Appeal of Gibraltar, paras 17–23 <https://www.jcpc.uk/decided-cases/docs/JCPC_2009_0028_Judgment.pdf> accessed 14 December 2022.

⁷⁹ Tove Stang Dahl shows how gender-neutralized legislation, modelled mainly on the basis of the experiences of men, can tend to overlook the gender-specific reality and therefore may result in de facto discrimination of women; see Dahl (1987) (n 15), 48–51.

particularly by elaborating definitions of direct and indirect discrimination.⁸⁰ Through the EEA Agreement, these international legal changes have had a significant impact on Norwegian legislation.

According to Section 6 of the EAD Act, ‘discrimination’ means direct or indirect differential treatment, on the basis of a discrimination ground, that is not lawful under the provisions of the act. Direct differential treatment is defined as ‘treatment of a person that is worse than the treatment ... afforded to other persons in a corresponding situation’.⁸¹ The protection against direct discrimination ensures formal equality, but it fails to take difference into account. In contrast, indirect differential treatment is defined as ‘any apparently neutral provision, condition, practice, act or omission that results in a person being put in a worse position than others’.⁸² The protection against indirect discrimination thus acknowledges the need to consider difference and diversity in order to ensure substantive equality.

Direct and indirect differential treatment is, according to the EAD Act, lawful if it has an objective purpose, is necessary to achieve that purpose, and does not have a disproportionate negative impact on the person subject to differential treatment.⁸³ This so-called proportionality test is stricter for direct differential treatment than for indirect differential treatment.⁸⁴ Whether a case is classified as direct or indirect differential treatment is thus key. However, both the preparatory works for the EAD Act and cases decided by the Tribunal lack clarity and consistency in drawing the line between the two.⁸⁵ This is a weakness if the aim is to achieve substantive equality in practice.

In line with EU law, the EAD Act provides stronger protection against direct discrimination in employment relationships than in other social areas.⁸⁶ Direct differential treatment in working life is only permitted if the ‘gender’ of the person constitutes a so-called *genuine occupational requirement*, which means that the gender must be of decisive significance for ‘the performance of the work’. In addition, the differential treatment must comply with the principle of proportionality.

Furthermore, under the terms of the EAD Act, differential treatment in connection with recruitment, dismissal, and extensions of temporary positions can never be justified if the differential treatment is based on pregnancy, childbirth, breastfeeding, or leave in connection with childbirth or adoption.⁸⁷ In this way, the EAD Act provides *stronger* protection in situations of parental leave than is required by EU law.⁸⁸ Unlike the Recast Gender Equality Directive and the legislation in the

80 See the introductory chapter to this book.

81 EAD Act, Section 7.

82 EAD Act, Section 9.

83 EAD Act, Section 9, para 1.

84 Prop. [Legislative Proposition] 81 L (2016–2017) ‘Lov om likestilling og forbud mot diskriminering’ [Act on Equality and Anti-Discrimination] 119 and Prop. [Legislative Proposition] 88 L (2012–2013) ‘Diskrimineringslovgivning’ [Laws Regarding Discrimination] 161.

85 As an illustration, see the following decision by the Discrimination Tribunal: DIN-2018-1.

86 EAD Act, Section 9, para 2.

87 EAD Act, Section 10, para 3.

88 Hellum and Strand (n 7) Chapter 14.

other Nordic countries, the EAD Act's absolute protection against pregnancy- and leave-based discrimination does not distinguish between leave that is intended to protect the birth-giving and breast-feeding woman and longer leaves related to the child's need for care from both parents. To implement EU/EEA law in a way that responds to the Norwegian social, political, and legal context, the act takes into consideration the fact that the period of paid leave to which parents are entitled under Norwegian law is longer than that of most European countries.⁸⁹ Consequently, the EAD Act recognizes the particular vulnerability not only of women but also of men who are taking parental leave. It thus has a potential to change the pattern of distribution of care and full-time paid work between women and men.

3.4.5 Positive differential treatment⁹⁰

3.4.5.1 The relationship between individual rights and structural duties

Positive differential treatment may contribute to substantive equality by correcting the existing skewed distribution of power and resources between women and men in public life, working life, and education. However, its apparent tension with the individual protection against differential treatment has given rise to conflicts in the field of working life and education.

It is also a field of mutual interaction between domestic and international law. Norway spearheaded the use of mandatory gender quotas in public life and on company boards. This is having ripple effects on laws and policies in Iceland and several other European countries, as well as in the EU.⁹¹ However, in areas such as working life and education, the influence is going in the opposite direction. Here, the Norwegian gender equality legislation's wide scope for positive differential treatment is challenged by EU/EEA law's strong protection against individual discrimination in working life.⁹² The legal contestations regarding this development illustrate what the Finnish historian Anu Pykkänen 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*.⁹³

89 Ibid.

90 Section 11 of the EAD Act uses the term 'positive differential treatment', while the EU's Recast Gender Equality Directive uses the term 'positive action'; see Article 3 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast).

91 These ripple effects are discussed in Mari Teigen, 'The Making and Circulation of Nordic Quotas' in Haldor Byrkjeflot, Lars Mjøset, Mads Mordhorst, and Klaus Petersen (eds), *The Making and Circulation of Nordic Models, Ideas and Images* (Routledge 2022). By November 2022, the EU adopted a new Directive of the European Parliament and of the Council on Improving the Gender Balance among Directors of Listed Companies and Related Measures, Directive (EU) 2022/2381.

92 For details, see Hellum and Strand (n 7) Chapter 12, particularly Section 12.8.

93 Anu Pykkänen, 'Transformation of the Nordic Model: From Welfare Politics to Gendered Rights' (2007) 19(2) *Canadian Journal of Women and the Law* 335.

3.4.5.2 *Public life*

Equal representation of women and men has been a cornerstone in Norwegian gender equality policies and laws since the 1970s. In line with the idea of the women-friendly welfare state, it was assumed that increased female participation in public life would contribute to increased gender equality in all areas of society.⁹⁴ To speed up the process of recruiting qualified women, the Gender Equality Act in 1981 mandated that both women and men be represented on public committees. The justification was twofold.⁹⁵ First, gender equal participation was seen as a matter of promoting representative democracy and thus legitimate decision-making. Second, it was also seen as a way of ensuring that the experiences and views of women were taken into consideration in public decision-making.

Today, Section 28 of the EAD Act makes gender balance mandatory when a public body appoints or selects a committee, board, council, tribunal, or delegation. The act specifies that if a committee has two or three members, both men and women shall be represented. If there are four or five members, each sex shall be represented by at least two members. Since 2003, other acts have made gender balance mandatory on the boards of public limited companies and publicly owned companies.⁹⁶ Neither of these acts has similar regulations regarding other discrimination grounds such as ethnicity, disability, sexual orientation, or gender identity.

3.4.5.3 *Working life*

The EAD Act permits differential treatment as a means to promote equality on the basis of all discrimination grounds that are listed in Section 6 of the act. Under the earlier gender equality law, the use of positive differential treatment in favour of men was limited. From 2018, positive differential treatment is allowed in favour of both women and men, in order to promote greater gender balance.

According to Section 11, differential treatment is permitted only if three conditions are met. First, the measure must be suited to promoting the purpose of the act (which is to promote equality, and, in particular, strengthen the position of women and minorities and to help dismantle disabling barriers). Second, the negative impact on the person or persons who are negatively affected by the treatment must be ‘reasonably proportionate in view of the intended purpose’. Third, the differential treatment must cease when its purpose has been achieved.

94 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).

95 Ot.prp. [Proposition to the Odelsting] no. 67 (1980–81) (n 48) 1.

96 Ot.prp. [Proposition to the Odelsting] no. 97 (2002–2003) ‘Likestilling i styrer i statsaksjeselskaper, statsforetak, allmennaksjeselskaper mv.’ [Gender Equality in Boards of State-Owned Limited Companies, State-Owned Enterprises, Public Limited Companies, etc.].

In the field of employment, the strict proportionality principle embedded in the EU Gender Equality Directive applies.⁹⁷ According to a 2002 ruling by the EFTA Court, an earmarking of positions for women only was in conflict with the EU Gender Equality Directive, despite being allowed by the Norwegian Gender Equality Act of 1978.⁹⁸ Case law from the CJEU has established that a person from the under-represented sex may be preferred only if both they and the person from the over-represented sex possess ‘equivalent or substantially equivalent merits’. In addition, all applicants have to be ‘subjected to an objective assessment which takes account of the specific personal situations of all the candidates’.⁹⁹

3.4.5.4 Higher education

In spite of the significant increase in the number of women who take higher education, the Norwegian labour market remains highly gender-segregated. This situation has set the scene for new contestations at the intersection of the individualistic approach to positive action in EU laws and broader concerns for substantive equality in Norwegian gender equality policy.¹⁰⁰

To promote gender balance in higher education, administrative regulations allow institutions of higher education to give one or two extra study points to applicants from the under-represented gender in studies with marked gender imbalance.¹⁰¹ This increases the possibility that individuals from the under-represented gender will be admitted to study programmes in situations where they would otherwise not fully be able to meet the admission requirements pertaining to grades. The government Gender Equality Commission discussed such measures in its 2012 report and called for more systematic and targeted use.¹⁰² As the EAD Act removed restrictions regarding positive differential treatment of men, these regulations now apply equally to both women and men. The study programmes in psychology at the University of Oslo and the University of Bergen are examples where male applicants are granted one extra study point, in order to improve the gender balance.¹⁰³ Yet the majority of the 126 university programmes using gender-based study points are studies where women are under-represented. The preparatory works to the Equality and Anti-Discrimination Act assume that this

97 Directive 2006/54/EC (n 90) Article 3.

98 EFTA Court, Case E-1/02 *University of Oslo*.

99 CJEU C-407/98 *Abrahamson*; see also CJEU C-409/95 *Marschall*.

100 See Hellum and Strand (n 7) Chapters 4 and 12.

101 Today, this is embedded in Forskrift 6. januar 2017 nr. 13 om opptak til høgare utdanning [Regulation of 6 January 2017 No. 137 on Admission to Higher Education].

102 NOU [Norwegian Government Official Reports] 2012:15 (n 8) 331ff.

103 Prop. [Legislative Proposition] 81 L (2016-2017) (n 84) 175. The preparatory works to earlier gender equality acts emphasized that positive differential treatment is a measure that mainly should be used to improve the position of women; see Ot.prp. [Proposition to the Odelsting] no. 33 (1974–75) ‘Lov om likestilling mellom kjønnene’ [Gender Equality Act] 32–34; Ot.prp. [Proposition to the Odelsting] no. 29 (1994-95) ‘Om lov om endringer i likestillingsloven’ [Changes in the Gender Equality Act] 4.

use of differential treatment to promote gender equality in higher education is in consonance with EU law.¹⁰⁴

A commission appointed to revise the Higher Education Act, however, was of a different view. This commission argued that the strict proportionality test, developed by the Court of Justice of the EU, applies both in working life and in higher education.¹⁰⁵ It concluded that regulations concerning the use of gender points are in conflict with the Recast Gender Equality Directive, because a person from the under-represented sex receives favourable treatment based on gender, sometimes leading to admittance at the expense of a person with better grades.¹⁰⁶ However, the material scope of the Recast Gender Equality Directive in relation to higher education is contested.¹⁰⁷ The Conservative Solberg government disagreed with the Higher Education Commission and decided to uphold the regulations without any further consideration of the demands of EU law.¹⁰⁸

3.4.6 Proactive duties to combat discriminatory structures

In line with the concept of substantive equality, the EAD Act (like earlier Norwegian gender equality acts) is premised on the assumption that gender inequality is not just a result of individual actions: it can be ascribed to deep-rooted social, economic, and cultural structures. To address such societal discrimination requires measures that can generate change at the institutional and structural level.

The act therefore establishes obligations to put in place measures that promote gender equality and prevent gender discrimination, gender harassment, sexual harassment, and gender-based violence in employment. These obligations are imposed on both public and private employers, in addition to employer and employee organizations.¹⁰⁹ All public employers, and private employers with more than 50 employees, are obliged to follow a statutory methodology involving risk

104 Prop. [Legislative Proposition] 81 L (2016–2017) (n 84) 175.

105 The Commission on Higher Education made reference to Stine Jørgensen, 'Køn og uddannelse' [Gender and Education] in Eva-Maria Svensson and others (eds), *På vei: Kjønn og rett i Norden* [On Its Way: Gender and Law in the Nordics] (Makadam, 2011).

106 NOU [Norwegian Government's Official Reports] NOU 2020:3 'Ny lov om universiteter og høyskoler' [New Act on Universities and Institutions of Higher Education], 158–164.

107 Ballangrud and Søbstad have expressed doubts about whether these CJEU judgements imply that Directive 2006/54/EC (n 90) applies to higher education; see Anne Jorunn Bolken Ballangrud and Margrethe Søbstad, *Likestillings- og diskrimineringsloven. Lovkommentar* [Commentary on the Equality and Anti-Discrimination Act] (Norwegian University Press 2021) 269. In a similar vein, see also Hellum and Strand (n 7) Sections 4.2.3.3 and 12.8.3.

108 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-kjonnspoenng>> accessed January 2022, and Prop. [Legislative Bill] 111 L (2020–2021) 'Endringer i universitets- og høyskoleloven, utdanningsstøtteleven, fagskoleloven og yrkeskvalifikasjonsloven mv. (samleproposisjon)' [Changes in the University Act], 18.

109 EAD Act, Sections 25 and 26.

analysis, implementation of measures, and evaluation of results.¹¹⁰ Private employers who hire more than 20 employees must follow this methodology if requested to do so by employees or their representatives.

Following suggestions from the Gender Equality Commission, the obligation to ‘make active, targeted and systematic efforts to promote equality’ was in 2017 extended beyond the field of employment to also include public authorities in their role as such.¹¹¹

The effectiveness of these measures depends on whether they are accompanied by duties to document and report, and on how such duties are monitored, controlled, and sanctioned if not complied with. Documentation and reporting are key to ensuring transparency and accountability in relation to what employers have done to handle challenges they face. The documents and reports lay an empirical foundation for assessing whether measures that have been taken to promote gender equality are effective.

The imposition of reporting and documentation duties has been challenged by the growing demand for reforms that reduce bureaucratic control. In Norway, the Conservative Solberg government proposed to abolish the reporting duty that was monitored by the Ombud and enforced by the Discrimination Tribunal.¹¹² This proposal was criticized by the Ombud, the Norwegian Confederation of Trade Unions (LO), women’s rights organizations, and the CEDAW Committee. In its concluding comment to Norway’s ninth periodic report, the CEDAW Committee expressed concern that

the implementation of the Law [the EAD Act] may weaken the promotion of gender equality in the State party, which used to be governed by a separate Gender Equality Law before, and that the duty of private and public employers to report on their gender-related activities was repealed.¹¹³

The Committee recommended that the Norwegian state

take 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.¹¹⁴

110 EAD Act, Section 26, para 2.

111 EAD Act, Section 24.

112 Hellum and Strand (n 74).

113 The CEDAW Committee, ‘Concluding Observations on the Ninth Periodic Report of Norway’ (2017) UN Doc CEDAW/C/NOR/CO/9, para 12.

114 *Ibid.*, para 13(c).

After lengthy debates, the Storting decided to maintain the reporting duty alongside the Ombud's monitoring role and power to take cases concerning breach of the reporting duty to the Discrimination Tribunal.

The combination of duties to take measures, duties to report on these, and the monitoring system sets the scene for a transparent and open process based on dialogue among employees, employers, and the Ombud. The obligation to report also includes an obligation to report every other year on pay statistics between women and men. Employees of an undertaking and their representatives, the Anti-Discrimination Tribunal, the Equality and Anti-Discrimination Ombud, and researchers shall have an additional right to disclosure of the results of the pay review.¹¹⁵ How these duties will be carried out and controlled remains to be seen.

3.5 The enforcement system

3.5.1 Access to justice

'Access to justice' is a core element in substantive equality. Without access to justice, individuals will be unable to have violations of their rights recognized and remedied. The concept has evolved on the basis of international human rights law and EU law.¹¹⁶ In our view, close attention to the enforcement system is necessary if we are to understand the potential and limits of equality and anti-discrimination law as a tool for substantive equality.

In the following, we briefly outline the organization of the Norwegian enforcement system, before we assess that system in the light of three key criteria concerning access to justice.¹¹⁷ First, the enforcement system should have power to consider the full range of the EAD Act, both the individual protection standards and the duties to prevent discrimination and promote equality. Second, the enforcement system must be accessible and available for rights-holders and duty-bearers, including through legal information, legal advice, and legal aid. Third, the enforcement agency must have the power to award remedies and sanction breaches.

3.5.2 The organization and procedures of the Ombud and the Tribunal

Since 1978, a low-threshold enforcement system has been in place to ensure access to justice in the field of gender equality and anti-discrimination law. Today, the

115 EAD Act, Section 26(a), para 4.

116 For an important contribution to the development of the concept of 'access to justice' as an international framework across international human rights and EU/EEA law, see European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to Access to Justice* (2016) <<https://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice>> accessed 29 November 2022.

117 Hellum and Strand (n 7) Chapter 6. A separate question influencing access to justice and the enforcement system relates to the rules regarding burden of proof. The vague provision in the EAD Act and its roots in EU/EEA law have caused significant confusion in the enforcement system, as described, for example, in Hellum and Strand (n 7) Chapter 9.

organization, composition, and power of the Tribunal and the Ombud are regulated by the EADO Act. The Tribunal and the Ombud are public administrative agencies that shall enforce the anti-discrimination standards set out in several acts, most importantly the Equality and Anti-Discrimination Act and the Working Environment Act. Under the EADO Act, the individual has a right to make a complaint to the Tribunal, while the Ombud has a duty to provide advice to a claimant.¹¹⁸ This system is a free-of-charge alternative to court proceedings and handles the majority of cases in the field of equality and anti-discrimination law.¹¹⁹

According to the EADO Act, the Ombud has four main tasks.¹²⁰ The first is to take initiatives to promote substantive equality and prevent discrimination in all sectors of society and on the basis of all of the discrimination grounds that are listed in the EAD Act. The second task is to provide guidance to individuals who have grievances. The third task is to supervise the proactive duties and reporting duties of public authorities and public and private employers. The fourth task is to monitor whether Norwegian law and administrative practice is in line with Norway's obligations under the CEDAW Convention, the 1965 UN Convention on the Elimination of Racial Discrimination (CERD), and the 2006 UN Convention on the Rights of Persons with Disabilities (CRPD).

The task of the Tribunal is to hear complaints concerning breaches of the EAD Act and the other acts. Membership of the Tribunal is a part-time position, and the majority of the members are lawyers or judges from the Appeals Court. In comparison to earlier Tribunals, there is more emphasis on finding candidates with a generalist legal background from court proceedings than on candidates with specialist competence in the fields of gender studies, ethnic studies, disability studies, or equality and anti-discrimination law.¹²¹

3.5.3 *The scope of the power of the Ombud and the Tribunal*

The scope of the powers of the Tribunal and the Ombud in relation to violations of the individual protection standards and the proactive duties has given rise to a series of controversies.

118 The right to make a complaint is a significant difference from the Swedish system, where the Discrimination Ombud decides whether a complaint shall go forward; see the chapter on Sweden in this book.

119 See Anne-Marie Gulliksen, *Likestilling og diskriminering i sivilrettslig og strafferettslig håndhevingspraksis. Del 1: Nemndspraksis fra Klagenemnda for likestilling, Likestillings- og diskrimineringsnemnda og Diskrimineringsnemnda. Praksis fra Markedsrådet om diskriminerende markedsføring. Fra tidsrommet 1974 til 2019* [Equality and Anti-Discrimination in Civil and Criminal Procedure. Part 1: Practice from the Three Discrimination Tribunals in the Period 1974–2019] (published in *Kvinnerettslig skriftserie* [Working papers in Women's Law] no. 106, University of Oslo 2019) <<https://www.jus.uio.no/ior/forskning/omrader/kvinnerett/publikasjoner/skriftserien/kvinnerettslig-skriftserie-nr.-106-2019---likestil.html>> accessed 5 December 2022.

120 EADO Act, Section 5.

121 Hellum and Strand (n 7) Section 18.6.4.

3.5.3.1 *Enforcement of proactive duties*

The proactive duties of private and public actors to promote gender equality and prevent discrimination, as well as to report on their work in this area, are central to the transformative potential of Norway's equality and anti-discrimination law regime.

To realize this potential, the relationship between the proactive duties and the enforcement mechanisms is central. The Ombud plays a vital role in the guidance on, and control of, how private and public employers carry out their duty to take proactive measures. According to the EADO Act, the Ombud shall supervise both the proactive duty and the reporting duty.¹²² So far, the Ombud has followed up the employers' duty to report through an extensive lecture programme.¹²³

The Tribunal has the power to process cases concerning breaches of the reporting duty if such cases are submitted to it by the Ombud or 'other persons with legal standing'.¹²⁴ How the Ombud will use its power to bring cases concerning breaches of the reporting duty to the Tribunal remains to be seen.

3.5.3.2 *Enforcement of individual cases: A public-private divide*

The Tribunal has the power to make binding decisions in individual cases concerning breaches of the prohibition on discrimination, harassment, or sexual harassment.

However, a number of provisions in the EAD Act are exempt from the Tribunal's competence, including the prohibition on discrimination in family life and other 'purely personal circumstances'.¹²⁵ According to the EADO Act, the Tribunal's enforcement does not encompass:

the activities of the Storting, the Office of the Auditor General of Norway, the Parliamentary Ombudsman or other agencies of the Storting. Nor does it encompass the activities of the courts, the Norwegian Courts Administration, the Judicial Appointments Board or the Supervisory Committee for Judges.¹²⁶

As noted earlier, the question of whether the Tribunal may or should have the power to consider cases where there are conflicts between the EAD Act and other

122 EADO Act, Section 5, para 4.

123 Likestillings- og diskrimineringsombudet [Equality and Anti-Discrimination Ombud], *Årsrapport 2020* [Annual Report 2020].

124 EADO Act, Section 8.

125 EADO Act, Section 7, para 2. Para 1 of Section 7 further exempts the following provisions of the EAD Act: Section 24 (on the activity duty of public authorities and the duty to issue a statement), Section 25 (on the duty of employer and employee organizations to promote equality), Section 26 (on the activity duty of employers), Section 26(b) (on the employer's duty of disclosure in relation to equality work), Section 28 (on the gender balance of public committees, etc.), Section 32, para 2 (on the processing of information on pay); and Section 39 (on penalties for aggravated contravention of prohibitions against discrimination by several persons acting together).

126 EADO Act, Section 1, para 3.

laws has been a site of contestation. Between 2006 and 2015, the Tribunal issued several unbinding statements in which it concluded that other acts were in conflict with Norway's equality and anti-discrimination legislation.¹²⁷ The preparatory works to the present act, however, state that the Tribunal does not have the power to consider, even in the form of unbinding statements, decisions made by the legislature (the Storting). The preparatory works refer to the separation of powers between the legislative, judicial, and administrative branches of government, along with the Tribunal's formal status as an administrative body. Conflicts between laws, it argues, must be dealt with by the ordinary courts, which have a constitutional mandate and obligation under Article 89 of the Constitution to review whether particular acts are in line with the constitutional equality principle.¹²⁸ The Tribunal, however, has power to make unbinding statements in cases concerning administrative decisions.¹²⁹

As a consequence, and although the principle of equality and non-discrimination applies to all areas of life and law, the Tribunal does not have the same competence as courts in cases that involve discrimination by public authorities. This means that access to justice depends on whether a complaint is brought against a private party or against public authorities. In practice, the regulation of the competence of the Tribunal and the courts thus constructs a public–private divide that undermines the accountability of public authorities.

It is a paradox that the Tribunal, with its special competence in the field of equality, is not competent to issue unbinding statements in cases where the equality principle comes into conflict with other laws. Over the years, the Tribunal has made significant contributions to the development of the normative protection standards set out in Norwegian equality and anti-discrimination law, for example, by extending the protection to homosexuals and transpersons, by developing the concept of intersectional discrimination, by concretizing the proactive duties of private and public employers, and by clarifying the lower threshold of protection against sexual harassment. With some rare exceptions, the contribution of the ordinary courts has been far more limited in terms of developing the standards of protection set out in the EAD Act.

3.5.4 Access to the enforcement system: From low to high threshold

The new enforcement system is a one-tier system, aiming at a more time- and cost-effective procedure. In practice, the reform has led to a procedure that in several ways limits access to justice.

127 See Strand (n 70); Syse (n 70).

128 Article 89 of the Constitution 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.'

129 EADO Act, Section 14.

The Tribunal processes written complaints submitted by a claimant, the Ombud, or other persons with legal standing.¹³⁰ The proceedings of the Tribunal are free of charge, but they are conducted in writing.¹³¹ The use of written proceedings is a barrier for persons who lack knowledge of the law or are not in full command of the Norwegian language. The Ombud, who no longer has competence to adjudicate cases, has a duty to provide advice to claimants.¹³² In addition, the Secretariat of the Tribunal, which prepares the cases, has a duty to provide information to claimants. The content of this duty was not given any attention in the preparatory works.

Under the 2005 EADO Act, the Ombud had a duty to deal with all complaints, oral or written. Most complaints were resolved through the adjudication of the Ombud, who sought to find common ground and a solution that both parties could agree on. Consequently, only a limited number of cases were brought before the Tribunal. An advantage of this two-tier system was that no cases were closed without a conclusion, and the Ombud's involvement ensured that the facts of each case were considered in the light of the relevant legal norms.

In the one-tier system of the current act, the chairpersons of the Tribunal have been granted the competence to singlehandedly dismiss or close a case, thereby stopping further adjudication.¹³³ A case can be dismissed if 'the conditions for processing the case are not met'.¹³⁴ A case may be closed if 'the matter is trivial in nature' or if 'the submitted evidence fails to elucidate the case sufficiently'.¹³⁵

Since the new act entered into force in 2018, there has been a dramatic increase in the number of cases that are dismissed, closed, or ended without a decision.¹³⁶ An overview of the complaints submitted to the Tribunal in 2020 illustrates this trend.¹³⁷

The 2020 success rate was highest in areas with the strongest normative protection standards: discrimination on the basis of gender, pregnancy, and parental leave in working life. The low success rate in complaints concerning discrimination on ethnic grounds has been addressed by the European Commission against Racism

130 EADO Act, Section 8, para 1.

131 EADO Act, Section 9.

132 EADO Act, Section 5.

133 EADO Act, Section 10.

134 EADO Act, Section 10, para 1.

135 EADO Act, Section 10, para 3.

136 Statistics are available at the Tribunal's homepage <<https://www.diskrimineringsnemnda.no/klagesaker-og-statistikk/s%C3%B8kstatistikk>> accessed 15 December 2022.

137 Of the 312 complaints that were received by the Tribunal, 95 were rejected, 30 cases were closed, and 83 cases were ended without a decision. Breach of the prohibition on discrimination was found in 24 cases, while no breach was found in 7 cases. Overall, the share of cases that were struck out in 2020 was 66%. The trend seems to have further increased in 2021, when out of the 424 complaints handled by the Tribunal, 73% of the cases were either dismissed, closed, or ended without a decision. The statistics are available at <<https://www.diskrimineringsnemnda.no/klagesaker-og-statistikk/s%C3%B8kstatistikk>> accessed 15 December 2022.

and Intolerance (ECRI), which called for measures to improve access to justice in cases concerning ethnic discrimination.¹³⁸

An important feature of equality and anti-discrimination law is the reversed burden of proof, which aims to ensure that protection against discrimination and harassment is accessible and effective. According to Section 37 of the EAD Act:

Discrimination shall be assumed to have occurred if circumstances apply that provide grounds for believing that discrimination has occurred and the person responsible fails to substantiate that discrimination did not in fact occur.¹³⁹

The wording of this provision, which builds on the EU/EEA anti-discrimination directives, implies that it is the responsibility of the claimant to establish a presumption of discrimination.¹⁴⁰ If a court or the Tribunal believes that the claimant has succeeded in establishing such a presumption, it shall conclude that discrimination has taken place unless the person who is responsible succeeds in disproving the presumption.

Rather than interpreting the burden-of-proof rule in the light of EU/EEA law (hereunder the Gender Equality Directive), the legislature, the Supreme Court, and the Tribunal have interpreted it in the light of national civil procedural law. According to both the preparatory works and Supreme Court practice, the burden-of-proof rule in Section 37 in the EAD Act is not an exception from the general standard of proof applied in civil cases.¹⁴¹ The general standard of proof is, according to the Supreme Court, that ‘the most probable fact – after an overall assessment of the evidence – prevails’.¹⁴² The Supreme Court has stated that, in line with civil procedural law, the burden-of-proof rule in the EAD Act is limited to situations where ‘one fact is as probable as the other’.¹⁴³ Only then will the reversed burden of proof be applied in favour of the person who claims to be subject to discrimination. This understanding limits the application of the reversed burden-of-proof rule and – as we see it – does not correspond to the understanding that it shall be sufficient from the side of the applicant to establish a presumption for discrimination.

A recent study, based on interviews with successful claimants in cases concerning gender discrimination, points to a number of barriers regarding the complaints

138 Council of Europe, *ECRI Report on Norway (Sixth Monitoring Cycle)*, adopted 4 December 2020, para 6 <<https://rm.coe.int/6th-report-on-norway-/1680a17dd8>> accessed 4 June 2021.

139 EAD Act, Section 37.

140 Hellum and Strand (n 7) Chapter 9.

141 Prop. [Legislative Proposition] 63 L (2018–2019) ‘Endringer i diskrimineringsombudsloven og likestillings- og diskrimineringsloven’ [Amendments in the Equality and Anti-Discrimination Ombud Act and the Equality and Anti-Discrimination Act] 17; HR-2014-40212; HR-2020-2476-A.

142 Supreme Court of Norway, HR-2020-2476-A, para 75.

143 *Ibid.*, para 77.

procedure. Among the most important was lack of information and advice.¹⁴⁴ Although the Ombud has a duty to provide guidance and advice, many of the claimants had not been in contact with the Ombud or received any other form of legal assistance.

This indicates that access to justice has declined as a result of the enforcement reform. Influencing factors in this regard are the introduction of written complaints, the power of the chairperson of the Tribunal to dismiss or close a case without involving the Tribunal, the Tribunal's narrow conception of who has legal standing, the misconception of the burden-of-proof rule, and the lack of free legal aid in discrimination cases. The Tribunal is also subject to strong pressure to reduce its average case-processing time.¹⁴⁵

3.5.5 *Access to remedies in discrimination cases: A privilege of the few*

Compensation and damages are the main sanctions for breach of the standards embedded in the EAD Act. According to Section 38 of the act, these can be claimed by persons who have been subject to treatment in breach of selected provisions in the act.

Damages shall, according to the act,¹⁴⁶ cover the economic loss resulting from the unlawful treatment. In contrast, *compensation* shall cover non-economic loss and shall be set at an amount that is seen as 'reasonable in the light of the nature and scope of the harm, the relationship between the parties and circumstances otherwise'.¹⁴⁷ Sanctions in the field of equality and anti-discrimination law have both a reparative and a preventive function. This double function follows from EU law, but it was given scarce attention in the preparatory works.¹⁴⁸

In employment relationships, the employer's liability regarding discrimination, harassment, and sexual harassment is strict: responsibility exists irrespective of

144 Camilla Winterstø, 'Det norske lavterskeltilbudet i diskrimineringsaker. En kritisk rettsdogmatisk og retts sosiologisk analyse i kjølvannet av 2017-reformen' [The Norwegian Low-Threshold System in Discrimination Cases: A Critical Study in the Wake of the 2017 Reform] (master's degree thesis, Faculty of Law, University of Oslo; published in *Kvinnerettslig skriftserie* [Working papers in Women's Law] no. 110, University of Oslo 2022).

145 Vibeke Blaker Strand and Anne Hellum, 'Håndhevingslabyrinten. Om individuelle klagere i diskrimineringsvernets nye håndhevingsstruktur' [The Enforcement Labyrinth: Individual Claimants in the New Enforcement System for Protection Against Discrimination] (2022) 39(2) *Nytt norsk tidsskrift* 145 <<https://doi.org/10.18261/nnt.39.2.5>> accessed 5 December 2022.

146 At the time of this writing, the English translations of the EAD Act and the EADO Act available at LovdataPro use different terminology to translate the Norwegian concepts 'erstatning' and 'oppreising'. These translations have no formal status, but the confusion this creates is unfortunate. For consistency, we use the terms found in the translation of the EAD Act.

147 EAD Act, Section 28, para 3.

148 See Anne Marie Frøseth, 'Hybridsanksjoner etter krenkelse av den personlige integritet' [Hybrid Sanctions Regarding Violations of the Right to Integrity] in Magnus Matningsdal and Asbjørn Strandbakken (eds), *Integritet og ære. Festskrift til Henry John Mæland* [Integrity and Honour] (Gyldendal Juridisk 2019).

whether the employer can be blamed or not.¹⁴⁹ In other sectors, liability requires fault or blame.

Since 2018, the Tribunal has been empowered to grant damages for economic loss in so-called simple cases in all areas, as well as compensation for non-economic loss in cases of individual discrimination and harassment in the context of an employment relationship.¹⁵⁰ In 2020, these powers were extended to include complaints from victims of sexual harassment.

By giving the Tribunal power to grant damages to victims of individual discrimination, harassment, and sexual harassment in ‘simple cases’, the reform does, to a certain degree, rectify misrecognition. Cases are defined as ‘simple’ if the Tribunal gives a unanimous decision and the respondent has put forward only ‘manifestly untenable objections’. For a long time, it was contested whether the Tribunal had power to award full compensation. In recent cases, however, the Tribunal has clarified that it has the power to grant damages for the *full* economic loss.¹⁵¹ This strengthens the EAD Act’s deterrent effect and brings the promise of change at both the individual and the collective level.

The Tribunal also has competence to award compensation for non-economic loss.¹⁵² However, this power is limited to breach of the prohibition on discrimination, harassment, and sexual harassment in *employment* cases only.¹⁵³ Claims for compensation for breach of anti-discrimination law in areas such as education, goods and services, or housing have to be taken to the courts. Accordingly, there is a mismatch between the EAD Act’s normative protection standards – which give victims of discrimination, harassment, and sexual harassment a right to remedy in *all* societal areas – and the special enforcement system’s limited competence to award compensation for non-economic loss.¹⁵⁴ This suggests a continuing lack of recognition of the widespread discrimination, harassment, and sexual harassment that different groups of women experience in areas such as services, goods, and housing.

3.5.6 Protection and enforcement: Three disjunctures

On paper, the EAD Act’s normative protection standards, providing protection against direct, indirect, and intersectional discrimination as well as harassment and sexual harassment, strengthen the act’s transformative potential. These standards

149 EAD Act, Section 38, para 2.

150 EADO Act, Section 12.

151 The Tribunal awarded full compensation in DIN-2020-57, DIN-2020-171, DIN-2020-207 and DIN-2021-544.

152 In 2019, in a case concerning discrimination related to pregnancy, the Tribunal awarded the claimant NOK 60,000 in compensation for non-economic loss. It emphasized that pregnant women were particularly vulnerable in the labour market. In 2020, compensation for non-economic loss was awarded in the seven cases in which the Tribunal found that the prohibition on gender discrimination or pregnancy-related discrimination had been breached. The amounts awarded ranged from NOK 20,000 to NOK 75,000.

153 EADO Act, Section 12.

154 EAD Act, Section 38.

are partly the outcome of initiatives from Norwegian lawmakers and judicial bodies and partly the outcome of interventions rooted in international law. All in all, they respond to the Gender Equality Commission's call for legislation that recognizes the asymmetric distribution of power and resources between different groups of women and men, as well as the vulnerable position of women who are members of several marginalized groups.

In spite of efforts to develop strong individual and structural protection standards and an available, accessible, and sanctioned enforcement system, there are still gaps and mismatches in the relationship between the normative protection standards and the low-threshold enforcement system. This limits the transformative potential of Norway's equality and anti-discrimination law.

First, the abolishment of the Tribunal's power to adjudicate cases involving conflicts between the equality and anti-discrimination law and other laws constitutes a step backward.¹⁵⁵ This aspect of the reform amplifies the two-tracked nature of the enforcement system, in which only courts and specialized administrative bodies, such as the National Social Insurance Tribunal,¹⁵⁶ can adjudicate cases against the state in which discrimination is caused by laws and regulations. This system constructs a private–public divide that impedes holistic enforcement of the EAD Act by the Tribunal.

Second, the Tribunal's competence to consider breaches of both the individual protection standards and the structural duties, and to award compensation and damages to victims of discrimination, was expected to enhance access to justice. Since the reform entered into force, however, there has been a dramatic increase in the number of cases that are dismissed, closed, or ended without a decision. Several factors may have contributed to this: the replacement of the Ombud's role as an informal first instance with an advisory role, the introduction of written complaints, the Tribunal chairperson's power to dismiss or close a case without involving the Tribunal, the misconception of the burden-of-proof rule, and the lack of free legal aid in discrimination cases.

Third, there is disjuncture between the scope of the EAD Act, which applies in all areas of society, and an enforcement system that privileges working life. At the structural level, the combination of proactive duties and reporting duties brings a promise of change. However, these duties are limited to public authorities and public and private employers, largely leaving out areas like housing, services, and goods. At the individual level, the enforcement system seeks to prevent discrimination through damages and compensation. Nevertheless, while the strong normative protection standards for individuals apply in all areas of society, the Tribunal's power to award damages and compensation is mainly restricted to discrimination, harassment, and sexual harassment in work life. Again, there is a continued lack of recognition of the widespread discrimination that different groups of women face in areas like family and private life, services, goods, and housing.

155 In Section 3.8 of this chapter, we discuss an example of how the Tribunal, prior to the reform, used its competence to issue unbinding statements on the relationship between welfare legislation and the equality and anti-discrimination law.

156 See Section 3.8 below for a discussion on the role of the National Social Insurance Tribunal.

Together, these three elements limit the EAD Act's potential to challenge existing inequalities. To unlock the transformative potential of the EAD Act, these gaps between the normative standards set out in the act and their implementation must be addressed.

Part 2: Three contemporary challenges

For further analysis of the potential and limits of equality and anti-discrimination law as a driver of change, we have selected three topics. Sexual harassment (Section 3.6) was chosen because it shows what equality and anti-discrimination law has to offer with regard to combating violations of women's integrity and dignity. Minority women's claims for the right to wear religious headscarves at work (Section 3.7) were chosen because they demonstrate the ability of gender equality and anti-discrimination law to develop in ways that accommodate diversity and difference. Welfare and social insurance rights (Section 3.8) highlight how other fields of law can both form part of gender equality policy and be in tension with equality and anti-discrimination law.

3.6 Sexual harassment

3.6.1 Sexual harassment: A gender equality issue

The individual's protection against physical and mental breaches of integrity, such as sexual harassment, is rooted in both criminal law and gender equality and anti-discrimination law. The gender equality approach, which was pioneered by feminist legal scholars in the 1970s and 1980s, sees sexual harassment as a means of suppression of women and, as such, an obstacle for the achievement of substantive equality.¹⁵⁷ In the 1990s, the CEDAW Committee stated that gendered violence constituted a form of discrimination against women. The Committee's dynamic interpretation of the CEDAW Convention recognized the close link among sexual harassment of women; deprivation of integrity and liberty; and unequal access to education, work, and political participation.¹⁵⁸

In 2002, the EU's Equal Treatment Directive (2002/73/EC)¹⁵⁹ defined sexual harassment as a combined gender equality and dignity harm issue.¹⁶⁰ In the same year, the Norwegian Gender Equality Act (GE Act) included a ban on sexual

157 Catharine MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Yale University Press 1979); Catharine MacKinnon, 'Creating International Law: Gender as a New Paradigm' in Cecilia Bailliet (ed), *Non-State Actors, Soft Law and Protective Regimes* (Cambridge University Press 2012).

158 CEDAW Committee, 'General Recommendation No. 19: Violence against Women' (1992) UN Doc A/47/38(SUPP) paras 1–6.

159 Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 Amending Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions. The directive has been replaced by Directive 2006/54/EC (n 90).

160 EU law's equality and dignity harm approach is presented in Section 3.6.2.

harassment. The act defined sexual harassment as ‘troublesome’ and unwanted sexual attention. Unlike EU law, it did not require dignity harm.¹⁶¹ Today, the ban is rooted in the EAD Act. To enhance access to justice, the Discrimination Tribunal was in 2019 given power to handle complaints concerning sexual harassment. In 2020, the Norwegian Supreme Court heard its first case concerning sexual harassment.

Sexual harassment thus makes an interesting case through which to examine the transformative potential of Norwegian and international equality and anti-discrimination law.

In the following, we discuss the added value of the Norwegian equality approach in comparison with the combined equality and dignity harm approach in EU law and criminal law’s blame-based approach.¹⁶² Insight into legal developments from 2002 to the present time shows how Norwegian lawmakers have handled conflicts and tensions between the equality approach and the blame-based criminal law approach. Recent case law shows how the Supreme Court and the Tribunal give content to the ban on sexual harassment and whether and to what extent sanctions that may have a preventive effect are imposed.

3.6.2 *EU law’s ‘double equality and dignity harm’ approach*

The EU’s adoption of Equal Treatment Directive 2002/73/EC, which defined sexual harassment as a gender equality and dignity harm issue, was not an isolated event.¹⁶³ It was a response to the claim of the global women’s rights movement that gendered violence should be understood as a human rights and gender equality issue.¹⁶⁴

In line with earlier directives, the Recast Gender Equality Directive (2006/54/EC) sees sexual harassment that violates the dignity of a person as a form of discrimination.¹⁶⁵ It defines sexual harassment as:

any form of unwanted verbal, non-verbal or physical conduct of a sexual nature ... with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.¹⁶⁶

161 Ot.prp. [Proposition to the Odelsting] no. 77 (2000–2001) (n 59).

162 This perspective is further elaborated in Anne Hellum, ‘One Step Forward and One Step Back: Sexual Harassment in Norwegian Equality and Non-Discrimination Law’ in Maja Lundquist (ed), *Re-imagining Sexual Harassment: Perspectives from the Nordic Region* (Bristol University Press, Imprint Policy Press 2023).

163 Directive 2002/73/EC (n 159).

164 This development is described in Hellum and Strand (n 7) Chapter 7.

165 Directive 2006/54/EC (n 90) Article 2.2(a).

166 *Ibid.*, Article 2.1(d).

On paper, the EU's combined equality and dignity harm approach provides a wider and more accessible protection than the criminal law approach. According to the Recast Gender Equality Directive, sexual harassment is unwanted sexual attention that violates a person's dignity. Unlike criminal law, this does not require that the offender is found to be at fault. Furthermore, the Recast Gender Equality Directive requires that EU member-states put in place legislation ensuring that judicial procedures are available to the offended person. In criminal law, the public prosecuting authority decides whether or not to prosecute.

The Directive, on the one hand, states that sexual harassment is a breach of the equality principle. On the other hand, it requires that the unwanted sexual attention has 'the purpose or effect of violating the dignity of a person'. This construction of sexual harassment has been termed the 'double equality and dignity harm' approach.¹⁶⁷ A study of how this approach has been implemented in a number of EU countries points out a key weakness: sexual harassment is often 'hidden' behind more general regulations against victimization.¹⁶⁸ According to this study, the ban often competes with mobbing or bullying. As a consequence, its scope tends to focus on the perpetrator as someone who commits a criminal misdemeanour rather than a breach of the victim's right to equality.¹⁶⁹ In the light of this effect, it is argued that the 'double equality and dignity harm' approach does not fully recognize sexual harassment as a matter of inequality, and particularly the unequal power relations, rooted in social institutions, between the sexes.¹⁷⁰

3.6.3 Beyond EU law: The Norwegian gender equality approach

Today, the Norwegian ban on sexual harassment is embedded in the EAD Act. In line with earlier legislation (the GE Act), it provides stronger protection than the EU's Recast Gender Equality Directive. In the EAD Act, sexual harassment is defined as:

any form of unwanted sexual attention that has the purpose or effect of being offensive, frightening, hostile, degrading, humiliating or troublesome.¹⁷¹

To constitute sexual harassment, an individual act must fulfil three requirements. First, the incident must constitute 'sexual attention'. Second, the attention must

167 Ann Numhauser-Henning, 'Sexual Harassment at Work – Discrimination versus Dignity Harm: A Comment in the Wake of the #metoo Movement' in Lydia Lundstedt (editor in chief) and Laura Carlsson (volume editor), *Scandinavian Studies in Law 68* (Stockholm Institute for Scandinavian Law, 2022).

168 Ann Numhauser-Henning and Sylvaine Laulom, 'Harassment Related to Sex and Sexual Harassment Law in 33 European Countries' (European Commission, Directorate-General for Justice 2013).

169 Ibid.

170 Numhauser-Henning (n 167).

171 EAD Act, Section 13, para 3.

be ‘unwanted’. Third, the sexual attention must have one of the following effects: ‘being offensive, frightening, hostile, degrading, humiliating or troublesome’. In addition to incidents that result in dignity harm, degradation and humiliation, the act thus recognizes sexual attention that is ‘troublesome’.

The ‘troublesome’ criterion implies that ‘dignity harm’ is not required. Accordingly, Norwegian law differs from EU law, which requires that the ‘dignity of the person is violated’. It provides a stronger protection that has less in common with the criminal law approach than is the case with EU law.

Another difference is that the EAD Act, unlike EU law, is not limited to individual actions. By placing a duty on employers and managers of organizations and educational institutions to ‘preclude and seek to prevent harassment and sexual harassment in their area of responsibility’, the EAD Act recognizes the institutional power relations that create and uphold such behaviour.¹⁷²

A milestone regarding the implementation of the ban on sexual harassment was a change in the Discrimination Ombud Act in 2019 that granted the Tribunal the power to handle complaints from individual victims of sexual harassment. Unlike EU law, the ban in the EAD Act applies in all areas of society. However, the Tribunal’s power to award compensation to victims of sexual harassment is limited to working life.¹⁷³

3.6.4 The legal development: Between gender equality and criminal law

The EAD Act’s ban on sexual harassment and the Tribunal’s power to enforce it is the endpoint of a long and twisted path that epitomizes the tense relationship between different perceptions of sexual harassment, particularly the equality approach and the criminal law approach.

The Gender Equality Act, adopted in 1978, did not explicitly address sexual harassment. The Gender Equality Ombud, however, received a number of complaints from women exposed to unwelcome sexual attention at the workplace.¹⁷⁴ Sexual harassment was also given attention by Nordic feminist scholars in the growing field of women’s law.¹⁷⁵

In 2002, an explicit ban on sexual harassment, applying in all areas of society, was included in the Gender Equality Act. It was prompted by proposed revisions

172 EAD Act, Section 13, para 5.

173 EAD Act, Section 38, para 1.

174 Reidun Slåen, ‘Seksuell trakassering – en rettslig beskrivelse’ [Sexual Harassment: A Legal Description] in Marianne C. Brantsæter and Karin Widerberg (eds), *Sex i arbeidet i Norge* [Sex at Work in Norway] (Tiden Norsk Forlag 1992).

175 Hanne Petersen, ‘Retsbeskyttelse af kvinders værdighed – seksuel chikane i komparativ og retsteoretisk belysning’ (1988) *Tidsskrift for rettsvitenskap* 101(3) 253; Stine Andreassen, *Arbejds miljølovens vern mot uønsket seksuell oppmerksomhet* (Ad Notam Forlag 1997).

to the EU's Gender Equality Directive (76/207/EEC) and supported by empirical studies in the growing field of women's studies.¹⁷⁶

The recognition of sexual harassment as a breach of the non-discrimination principle was a legal milestone. By defining sexual harassment as 'unwanted sexual attention' that was 'troublesome' for the person affected, the ban included both intended and unintended actions and was not limited to actions that resulted in dignity harm. Thus, the act offers a stronger protection than EU law, which requires dignity harm, and criminal law, which requires that the offender could be blamed.

In spite of this, victims of sexual harassment were not put on an equal footing with victims of other forms of discrimination. An example of this is the EAD Act's special right to claim compensation on objective grounds in employment matters. According to the Ministry of Children's and Family Affairs, this right should not be extended to victims of sexual harassment because the latter 'is of a different character than other types of gender discrimination, because it is perceived as particularly burdensome to be found guilty of sexual harassment'.¹⁷⁷ Thus, the blame-based perception, embedded in criminal law, took precedence when it came into conflict with the equality approach.

The lack of sanctions did not sit well with the EU's Gender Equality Directive (2002/73/EC). In 2005, the Gender Equality Act's rules concerning compensation for discrimination in working life were extended to victims of sexual harassment.¹⁷⁸ With reference to EU law, the Ministry stated: 'It is not unreasonable that an employer who has behaved in a way that results in harassment is made responsible even though it was not the intention to harass. To be effective, sanctions must ensure that a person whose rights are breached is compensated.'¹⁷⁹

Another contested issue was whether victims of sexual harassment should have their cases heard by the Tribunal or have to go to court. Powerful actors like the Ministry of Justice and the Attorney General argued that sexual harassment had more in common with criminal law offences than with a breach of the equality principle. Against this background, they were of the opinion that sexual harassment was not suited to be handled by the Tribunal because it was an administrative low-threshold agency. In line with this perception of sexual harassment, the preparatory works to the 2005 reform concluded that the offender's right to due process must be given precedence.¹⁸⁰

This standpoint was strongly criticized by actors like the Equality and Anti-Discrimination Ombud and the Gender Equality Commission, who emphasized the commonalities between gender discrimination, gender harassment, and sexual

176 Ot.prp. [Proposition to the Odelsting] no. 77 (2000–2001) (n 59) 68. Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions was later replaced by Directive 2002/73/EC (n 159).

177 Ot.prp. [Proposition to the Odelsting] no. 77 (2000–2001) (n 59), 152.

178 Ot.prp. [Proposition to the Odelsting] no. 5 (2004–2005), 48–51.

179 *Ibid.*, 50.

180 *Ibid.*

harassment. In 2011, in her Supplementary Report to the CEDAW Committee, the Ombud stated:

It follows from the Gender Equality Act section 8 (a) that sexual harassment is prohibited, and that only the courts shall enforce this prohibition. The Ombud questions whether the current system is good enough, as the risk involved in bringing a lawsuit is high. Almost no cases are brought before the courts.¹⁸¹

In response, the CEDAW Committee recommended that Norway ‘extend the authority of the Tribunal to award compensation in cases other than employment discrimination, including cases of sexual harassment’.¹⁸² In 2019, the Tribunal was authorized to enforce the prohibition on sexual harassment in the EAD Act, as well as to grant compensation to victims of sexual harassment in the field of employment. The large number of cases of sexual harassment, which was made visible by the Norwegian #Metoo movement, was a factor that contributed to tilting the power balance between those who saw sexual harassment as an equal rights issue and those who saw it as better approached as a crime.

3.6.5 Individual protection: The roles of the courts and the Tribunal

3.6.5.1 The first Supreme Court case

For a long time, the strong protection rooted in the ‘troublesome’ criterion stood in stark contrast to the low number of court cases concerning sexual harassment. The cases that were handled by the courts were few and of a very grave character.¹⁸³ The risk involved in bringing a lawsuit was high because of the unclear and contested character of the ‘troublesome’ criterion.

In 2020, the Norwegian Supreme Court made its first ruling in a sexual harassment case.¹⁸⁴ The litigant, who was represented by a lawyer from the Norwegian Confederation of Trade Unions (LO), was a female trainee who was the only

181 Equality and Anti-Discrimination Ombud, ‘Supplementary Report to the 8th Norwegian Report to the CEDAW Committee from the Equality and Anti-Discrimination Ombud’ (LDO 2012) 17 <https://www.ldo.no/globalassets/brosjyrer-handboker-rapporter/rapporter_analyser/rapporter_diverse/cedawrapport_pdf.pdf> accessed 29 December 2022. In 2017, the Ombud reaffirmed this point; see Equality and Anti-Discrimination Ombud, ‘The Ombud’s Report to the UN Committee on the Elimination of Discrimination against Women: A Supplement to Norway’s Ninth Periodic Report’ (LDO 2017) 7 <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx> accessed 29 December 2022.

182 CEDAW Committee (n 113) para 18b.

183 Else Leona McClimans, ‘Plagsom uønsket seksuell oppmerksomhet – et vern for de få?’ [Troublesome Unwanted Sexual Attention: Protection for the Few] (2018) 46(2) *Kritisk juss* [Critical Legal Studies] 91.

184 Supreme Court of Norway, HR-2020-2476-A, the *mechanic* case. The Supreme Court applied Section 8 of the Gender Equality Act, which has now been replaced by Section 13 of the EAD

woman among 15 employees in a mechanics workshop.¹⁸⁵ A customer had come from behind and placed his hands under her sweater on the lower part of her back when she was down on her knees working. On a later occasion, he had pretended to grab her crotch. Finding these facts proved, the Supreme Court concluded that the trainee had been subject to sexual harassment by the customer.

The Court made clear that the ‘troublesome’ criterion in the EAD Act provides stronger protection than EU law, which is limited to dignity harm. The Court stated: ‘The Directive is a minimum directive and does thus not preclude stronger protection against sexual harassment under national law’.¹⁸⁶

According to the Supreme Court, the assessment of whether sexual attention is ‘troublesome’ must be ‘objective, while at the same time it must be based on a “woman’s norm”’.¹⁸⁷ In this regard, the Court quoted the preparatory works stating that the assessment of whether the attention was ‘troublesome’ must rely on ‘what a generally sensible woman would have perceived as troublesome’.¹⁸⁸

In addition, the Court made clear that assessment of what constitutes ‘unwanted’ sexual attention must rely on what ‘a reasonably alert person after an overall assessment should understand ... is unwanted’. Relevant factors in this assessment would be the power relation between the parties and whether the person at whom the attention is directed is in a particularly vulnerable situation.¹⁸⁹

By undertaking a holistic assessment of the two incidents, instead of a separate assessment of each incident, the Supreme Court avoided having to give content to the lower level of protection. Whether the ‘back episode’, where the customer came from behind and placed his hands under the woman’s sweater on the lower part of her back, in and of itself constituted sexual harassment was left open by the Court’s statement:

It seems fair that the ‘back episode’ in itself did not amount to sexual harassment under Section 8 of the Gender Equality Act 2013. However, I will not take a clear stand on this issue, as I consider it substantiated that the following incident outside the break room took place, and that both episodes must be included in the overall assessment of whether B subjected A to sexual harassment.¹⁹⁰

Act, which maintains the ‘troublesome’ criterion. The case is analysed in Hellum and Strand (n 7) Chapter 8.

185 An interview with the lawyer Tina Nordstrøm can be found in the journal of the Norwegian Bar Association; see Thea N. Dahl, ‘Vi mangler tilstrekkelig vern av mennesker som vil ta seksuell trakassering til retten’ [We Do Not Have Sufficient Protection for People Who Want to Bring Cases of Sexual Harassment to Court] *Advokatbladet* (25 December 2020) <<https://www.advokatbladet.no/advokat-jul/vi-mangler-tilstrekkelig-vern-av-mennesker-som-vil-ta-seksuell-trakassering-til-retten/156561>> accessed 29 December 2022.

186 HR-2020-2476-A (n 184) para 35.

187 *Ibid.*, para 69.

188 Ot.prp. [Proposition to the Odelsting] no. 77 (2000–2001) (n 59).

189 HR-2020-2476-A (n 184) paras 63–64.

190 *Ibid.*, para 87.

A criticism against the Supreme Court's holistic approach is that it does not sit well either with the preparatory works for the Gender Equality Act or with the EU Gender Equality Directive, which does not require several incidents in order to conclude that sexual harassment has taken place.¹⁹¹

3.6.5.2 *The Tribunal: Filling the gap?*

Since 2019, the Discrimination Tribunal has been authorized to enforce the prohibition on sexual harassment in the EAD Act. The proponents of this change, such as the Gender Equality Commission and the Equality Ombud, assumed that it would enhance access to justice in sexual harassment cases. However, the low success rate, the low number of victims who have been granted compensation, and the high number of sexual harassment cases that are rejected, closed, or ended without decision calls the law's promise into question.¹⁹²

Critics of the Supreme Court decision feared that the lack of clarity as to what constituted sexual harassment in one-off incidents would have a 'chilling' effect on the Tribunal's decisions in sexual harassment cases.¹⁹³ Several of the cases decided by the Tribunal, however, contribute to clarification of this question.¹⁹⁴

In the *health worker* case, a female employee complained about sexual harassment by a male leader on several occasions.¹⁹⁵ Unlike the Supreme Court, the Tribunal carried out a separate assessment of each incident. The Tribunal concluded that the first incident, in which the leader asked in front of other colleagues at the bar during a hotel seminar whether it was time to go and have sex in the hotel room, constituted sexual harassment. It concluded that 'this form of attention that under such circumstances is made by a leader is clearly unwanted, even though the person who is exposed has not stated beforehand that it is unwanted. The Tribunal is, for the same reason, not in doubt that this was troublesome.' The Tribunal was also of the view that the second incident, in which the leader touched the woman's thighs during a bar visit after a summer party for the employees, constituted 'unwanted' and 'troublesome' sexual attention, amounting to sexual harassment.

191 Hellum and Strand (n 7) Chapter 8.

192 By November 2022, the Tribunal had received 76 cases concerning sexual harassment. Violations were found in six cases and no violations in seven cases. Forty-four cases have been rejected, dropped, or closed without a decision, while 20 remain pending. The statistics are available at <<https://www.diskrimineringsnemnda.no/klagesaker-og-statistikk/s%C3%B8kstatistikk>> accessed 15 December 2022.

193 Hellum and Strand (n 7) Chapter 8.

194 Anne Hellum, 'Kommentar til HR-2020-2476-A Mekaniker-saken og dens betydning for Diskrimineringsnemndas praksis i saker som gjelder seksuell trakassering' [Commentary to HR-2020-2476-A] (Juridika 2022) <<https://juridika.no/innsikt/kommentar-til-hr-2020-2476-a-mekaniker-saken>> accessed 15 December 2022.

195 DIN-2020-191 the *health worker* case. Another example is DIN-2021-169 the *pub kiss* case.

3.6.6 One step forward and one step back

The explicit recognition of sexual harassment as not only a crime but also a form of discrimination was a significant step forward in terms of recognizing the effect of sexual harassment on gender equality. The extension of the Tribunal's power to handle sexual harassment cases formed a breakthrough for the equality approach to sexual harassment. As noted above, this tool to implement the strong protection in the EAD Act was met with significant resistance, partly based on emphasizing commonalities with criminal law's ban on sexual harassment.

The Supreme Court's decision was an important clarification of the law in this field, and of the 'troublesome' criterion in particular. However, by leaving open whether the 'back incident' in and of itself constituted sexual harassment, the Supreme Court missed an opportunity to clarify the floor level of the protection standard. This lack of clarity creates an uncertainty that benefits the alleged offender and sets the scene for continued contestations between different perceptions of sexual harassment. Although the Tribunal has contributed to clarification of the lower level of protection, it remains uncertain how ordinary courts will rule in similar cases.

Furthermore, the high number of sexual harassment cases that are rejected by the Tribunal, along with the low number of cases where the claimant is awarded compensation, speaks to a continued disjuncture between the strong protection standards and an increasingly inaccessible enforcement system.

3.7 Equality and diversity: Women from religious and ethnic minorities

3.7.1 Introduction

An understanding of the relationship between the normative protection standards of equality and anti-discrimination law and its enforcement system is key to understanding the potential and limits of such law as a tool for substantive equality. In this section, our focus is on how the two supervisory bodies in the field of equality and anti-discrimination law have used their competence to interpret and apply the law. With a focus on case law, we explore how the Ombud and the Tribunal have responded to claims involving accommodation of diversity and difference from women belonging to ethnic and religious minority groups.

As we shall see, these groups' claims for accommodation of diversity have been granted space through a gradual, three-step development. This has promoted the recognition dimension of substantive equality.¹⁹⁶ The various stages of this development have taken place in a changing legal setting, where new groups have been included in the anti-discrimination legal framework and international legal sources have been given increased attention. The changes have provided space for new

196 See the introductory chapter of this book.

legal approaches to be developed, which has resulted in a broader and more multi-faceted legal response to claims for accommodation of diversity.

3.7.2 *Background*

As a result of immigration, globalization, and secularization, Norwegian society has become more pluralistic. This has led to a more diverse population in terms of the religious and ethnic backgrounds of people who reside in Norway. Laws and regulations are often developed on the basis of the experiences and needs of the majority population.¹⁹⁷ This may lead to disadvantage for women and men who belong to religious and ethnic minority groups, as laws and regulations do not take their situation sufficiently into account. Religious and ethnic minority groups may experience obstacles in relation to special dietary requirements, prayer during working hours, use of gender-specific clothing and head coverings, etc.

Owing to the interrelatedness of gender, religion, and ethnicity, women from religious and ethnic minorities experience disadvantage that other people do not face in the same way or to the same extent. Real equality, according to the 2012 report of the Gender Equality Commission, requires that attention be given to how different groups of women experience marginalization and human rights violations, which is linked not only to gender and sex but also to other aspects of their identities, such as ethnicity, class, or age. The report itself, as well as its mandate, built on and contributed to the consolidation of an intersectional gender equality policy in Norway. This was, according to the Commission, necessary to break down the country's 'white dominance' as well as the 'dominance of heteronormativity'.¹⁹⁸

Today, intersectional gender equality policy exists side by side with the (gender) equality and anti-discrimination legislation that applies to minority women and men. In legal adjudication, the prohibition on discrimination on the basis of gender, ethnicity, and religion is a tool that minority women and men can invoke to bring forward claims for accommodation of diversity.

To investigate how the Equality and Anti-Discrimination Ombud and the Anti-Discrimination Tribunal have responded to claims related to diversity, we will in the following focus on the situation of Muslim women who want to wear the hijab in employment. We find that the claims for accommodation of diversity have been responded to in a three-step development that in a concrete way sheds light on the transformative potential of gender equality and anti-discrimination legislation.

197 This has been referred to as the Norwegian sameness model; see references to Marianne Gull-estad's research in Anne Hellum, 'The Global Equality Standard Meets Norwegian Sameness' in Anne Hellum, Shaheen Sardar Ali, and Anne Griffiths (eds), *From Transnational Relations to Transnational Laws* (Routledge 2011) 82.

198 NOU [Norwegian Government's Official Reports] 2012: 15 (n 8) 66.

3.7.3 *The first step: Accommodating diversity through the prohibition on indirect gender discrimination*

The first step towards the accommodation of diversity took place through the Ombud's and the Tribunal's interpretation of the prohibition on indirect gender discrimination in the 1978 Gender Equality Act, which at that point in time was the only Norwegian act that banned discrimination. Through this approach, the situation of minority women was compared to that of minority men.

The *Oslo Plaza* case from 2001 was the first case that involved the use of the hijab in employment.¹⁹⁹ In this case, the Equality Tribunal concluded that the dress requirements for room attendants (*romverter*) at the Oslo Plaza hotel violated the prohibition on indirect gender discrimination in the 1978 Gender Equality Act. The background for the case was the hotel's refusal to hire a Muslim woman who wore a hijab as a room attendant. The woman was in the process of being hired when she was made aware of the hotel's dress requirement, which stated: 'Head gear shall not be used. Exception: Door-men, bell-men.' After she was made aware of the mandatory character of the dress regulation, she left the hotel without an employment contract. Subsequently, she contacted the Norwegian Centre against Ethnic Discrimination (SMED),²⁰⁰ a state institution that had been established in 1998 to combat ethnic discrimination. SMED was already paying attention to Muslim women who had experienced obstacles in the job market owing to the wearing of the hijab. On behalf of these women, SMED brought this case before the Equality Ombud, arguing that the dress requirement of Oslo Plaza Hotel harmed Muslim minority women to a greater extent than minority men and, therefore, amounted to indirect gender discrimination. As part of its argument, the Centre referred to statistics showing that Muslim women constituted the group in Norway that was most likely to be disadvantaged through dress requirements that prohibit the use of head covering. The Ombud concluded in an unbinding statement that the dress requirement amounted to discrimination. The hotel disagreed, and the case was therefore brought before the Tribunal. The Tribunal found that the hotel's dress regulation put Muslim women in a disadvantaged position and did not find that the hotel had a sufficient justification. The Tribunal emphasized that the hotel could have taken steps to accommodate the claim for diversity from Muslim women, for instance through making hijabs that were part of the uniform. It was concluded that the hotel's dress regulation amounted to indirect gender discrimination. The way in which this case was argued was – in our opinion – unique at the time. Through this case, a new line of legal reasoning was developed as the result of one Muslim women's claim for accommodation of diversity.

This line of reasoning was applied in subsequent cases – for instance, in a case handled by the Equality Ombud in 2004 that involved a female employee at a

199 LKN-2001-8.

200 In 2005, the Centre was closed as the new Equality and Anti-Discrimination Ombud was established.

furniture store.²⁰¹ The woman started to wear the hijab. The employer's dress regulations stated that employees working in contact with costumers were obliged to wear a uniform at work. The uniform did not include head coverings, and the woman was therefore dismissed. The Ombud concluded that the woman had been subject to indirect gender discrimination in violation of the 1978 Gender Equality Act.²⁰²

These examples from case law show how indirect gender discrimination can function as an important tool in efforts to accommodate diversity. However, the focus on indirect discrimination risks overlooking the potential embedded in the prohibition on direct discrimination, as the prohibition on direct discrimination in employment is stronger than the protection against indirect discrimination.²⁰³ The distinction between direct and indirect discrimination is rarely elaborated on in domestic adjudication.²⁰⁴ This calls for increased awareness regarding the relationship between direct and indirect discrimination.

3.7.4 The second step: Accommodating diversity through an intersectional approach

As a second step, the Ombud and the Tribunal acknowledged the intersecting nature of ethnicity, religion, and gender that underlay claims for recognition of diversity from ethnic minority women. This intersectional approach opened up a broader and more multifaceted understanding of the situation of minority women, as their situation was compared not only to that of minority men but also to that of majority women and people belonging to the Christian majority religion in Norway. However, for a long time, the domestic anti-discrimination legislation did not reflect the fact that disadvantage in many instances may be caused by several intersecting factors at the same time.

The 2005 Discrimination Act introduced a general prohibition on discrimination related to ethnicity, national origin, descent, colour, language, religion, and belief.²⁰⁵ Through the 2005 Equality and Anti-Discrimination Ombud Act, the act that first established the joint enforcement system in Norway,²⁰⁶ the Ombud and the Tribunal were granted competence to adjudicate cases involving not only gender discrimination but also discrimination based on the list of grounds set out in the

201 The Equality Ombud, case reference 2003/470 (*A-Møbler*).

202 More examples are given in Strand (n 72), 316–327.

203 Direct differential treatment in employment is only allowed if a characteristic amounts to a so-called genuine occupational requirement; see Hellum and Strand (n 7), 262–266.

204 The EU Court of Justice has established that criteria that are ‘inextricably linked to one or more specific religions or beliefs’, such as the instruction to refrain from wearing conspicuous, large-sized political, philosophical, or religious signs in the workplace, may amount to direct, not indirect, discrimination; see C-804/18 *IX v WABE eV* and C-341/19 *MH Müller Handels GmbH v MJ* (joined cases), Section 73. For further elaboration, see Hellum and Strand (n 7), 307.

205 See Section 3.3.3 of this chapter.

206 See Section 3.5 of this chapter.

Discrimination Act.²⁰⁷ This served as a stepping-stone for the development of a more multidimensional approach to the situation of minority women.²⁰⁸

Intersectional discrimination was not explicitly prohibited under the 2005 Discrimination Act. However, the preparatory works explicitly acknowledged the vulnerability of immigrant women experiencing discrimination on more than one ground, for instance owing to the combination of gender and ethnicity.²⁰⁹ Furthermore, the preparatory works to the 2005 Equality and Anti-Discrimination Ombud Act emphasized the need for a unified enforcement system that could handle cases concerning intersectional discrimination.²¹⁰ The aim that the Ombud should take a holistic approach to the different discrimination grounds and develop its ability to handle intersectional discrimination was explicitly stated in the rules that regulated the Ombud's mandate under the new act.²¹¹

These preparatory works and rules reflected the increased attention from NGOs (e.g., the MiRA Centre for minority women), the Ombud, legal scholars, and international human rights organs on how disadvantage for minority women often stemmed from many intersecting factors.²¹²

In a landmark case in 2008, the Tribunal concluded that a hotel's refusal to offer rooms to two Norwegian women who both had an Asian background amounted to a combination of gender discrimination and ethnic discrimination.²¹³ This constituted a first building block for protection against intersectional discrimination.

The following year, in 2009, the Tribunal handled a case about a Muslim woman who was pressured to quit her job as a result of her starting to wear the hijab at work.²¹⁴ The Tribunal concluded that the woman had been subject to a combination of direct religious discrimination and indirect gender discrimination.²¹⁵

207 As time passed, the competence was further extended to new groups as new laws on equality and non-discrimination were adopted.

208 For more details of the legal development, see Hellum and Strand (n 7), 151–159.

209 Ot.prp. [Proposition to the Odelsting] no. 33 (2004–2005) 'Om lov om forbud mot diskriminering på grunn av etnisitet, religion mv.' [Act Prohibiting Discrimination Related to Ethnicity, Religion, etc.], 48–49.

210 Ot.prp. [Proposition to the Odelsting] no. 34 (2004–2005) 'Om lov om Likestillings- og diskrimineringsombudet og Likestillings- og diskrimineringsnemnda' [Act Regarding the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal], 32.

211 Regulation 18 December 2013 no. 1613 Regulating the Organization and the Activities of the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal, Section 1, para 2.

212 Theoretically, the research carried out by Kimberlé Crenshaw on critical race theory was central in the development of intersectional approaches to disadvantage. Crenshaw's research was given attention and developed within a Norwegian setting in Ronald Craig, *Systemic Discrimination in Employment and Promotion of Ethnic Equality* (Martinus Nijhoff Publishers 2007).

213 LDN-2008-1.

214 LDN-2009-26.

215 The first cases that offered an intersectional approach to inequality were analysed in 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 2008).

A case from 2014 concerned dress requirements for security personnel at Oslo Airport Gardermoen. According to the requirements, it was not permitted to wear jewellery that had political or religious connotations or religious head coverings and veils together with the uniform.²¹⁶ The Tribunal stated that the head-covering issue was situated at the ‘intersection between religion, ethnicity and gender’ and therefore involved several discrimination grounds at the same time. Through the restriction on the use of religious head coverings by security personnel, an issue of discrimination due to religion emerged, according to the Tribunal. The Tribunal also made it clear that the case involved ethnic discrimination owing to the fact that ‘people who wear religious head coverings often have a background from an ethnic minority group’. Finally, a gender dimension was thought to exist because restrictions on the wearing of religious head gear primarily affect Muslim women who wear the hijab. In the Tribunal’s opinion, the dress requirements constituted direct differential treatment due to religion and indirect differential treatment due to gender. However, in the Tribunal’s view, the requirements had a legitimate and proportionate justification and therefore did not violate the prohibition against religious discrimination and gender discrimination.

In 2017, an explicit prohibition on intersectional discrimination was established in the EAD Act, which states in Section 6(1) that discrimination on the basis of, for instance, gender, ethnicity, and religion, or ‘combinations of these factors’, is prohibited. In the preparatory works, it was stated that this formalized an understanding of the legal situation that was already well established in practice.²¹⁷ This approach is in line with the intersectional approach to gender discrimination taken by, for instance, the CEDAW Committee and the CERD Committee.²¹⁸

Even though there are examples of the Tribunal applying an intersectional approach to Muslim women who face disadvantage in employment due to the wearing of hijab, there are also examples of a more one-dimensional approach.²¹⁹ The adoption of a one-dimensional approach to diversity that focuses on religion as the main relevant discrimination ground, however, serves to conceal the specific ways in which women are affected by certain types of treatment.

In 2000, the CERD Committee explained the intersection between gender and ethnicity in its General Comment no. 25 in the following manner:

racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life.²²⁰

216 LDN-2014-2.

217 Prop. [Legislative Proposition] 81 L (2016-2017) (n 84) 113ff.

218 Hellum and Strand (n 7), 152–155.

219 LDN-2017-2 (the *nursing home* case) is an example of this.

220 Committee on the Elimination of Racial Discrimination, General Recommendation XXV on Gender-Related Dimensions of Racial Discrimination (2000) UN Doc CERD/C/GC/25, para 1.

In the time ahead, it is important that claims related to diversity are not just approached through the lens of possible discrimination due to religion. A multidimensional approach that acknowledges the specific ways in which disadvantage is experienced by minority women should be applied, as this is the approach that is most in line with the practice of UN treaty bodies, the intentions of the Norwegian legislature, and Norwegian gender equality policy.

3.7.5 *The third step: Accommodating diversity through integration of international human rights*

The third step regarding accommodation of difference is the integration of EU/EEA law and human rights law. While the strong protection against indirect discrimination and intersectional discrimination has been developed by the Ombud, the Tribunal, and, to some extent, the courts, international law has the potential to uphold and strengthen the accommodation of diversity. The integration of human rights practice, in particular, has the potential to strengthen individual claims related to diversity from minority women.

Minority women's claims for accommodation of diversity constitute a site of contestation not only on the domestic level but also in human rights law and EU/EEA law. The fact that human rights law and EU/EEA law have strong legal status within Norwegian domestic law makes international legal sources relevant when the EAD Act is interpreted. When it comes to claims for accommodation of diversity in employment, the practice of UN treaty bodies pulls in the direction that strict scrutiny should be applied when the justifications for rules or practices that lead to disadvantage for minority women are assessed. Legal research shows that UN treaty bodies are protecting claims for diversity from individuals to a larger extent than the European Court of Human Rights and the EU Court of Justice.²²¹ Integrating UN treaty body practice into legal reasoning can therefore contribute to a strengthening of the legal argument that pulls in the direction of accommodating diversity.²²²

One example of this is the *nursing home* case from 2017, which concerned a Muslim woman who had worked at a privately run nursing home since 2010.²²³ The employers wore a uniform at work. For years, there had been no formal rules regarding dress, and employees who wanted to wear a hijab could receive one that

221 Strand (n 72), 313–316. See also Vibeke Blaker Strand, 'Menneskerettigheter som rammeverk i det nye mangfoldssamfunnet' [Human Rights as Framework in a More Diverse Society] in Andreas Føllesdal, Morten Ruud, and Geir Ulfstein (eds), *Menneskerettighetene og Norge. Rettsutvikling, rettsliggjøring og demokrati* [Human Rights and Norway: Legal Development, Juridification and Democracy] (Universitetsforlaget [Scandinavian University Press] 2017).

222 In cases involving minority women, the Tribunal often refers to international legal sources. However, the extent to which these sources are actively integrated into the concrete legal reasoning varies.

223 LDN-2017-2.

fitted the uniform upon request. However, in 2016 the board of the nursing home adopted new dress regulations that stated the following:

All employees at X nursing home (that have contact with residents) shall wear work clothes that have been handed over from the nursing home, and it is not permitted to wear religious or political clothing, such as the hijab or Palestinian scarves.

One employee, A, who wore a hijab at work, brought a complaint before the Tribunal. She argued that she had been discriminated against because of ethnicity, religion, and belief. She did not invoke gender discrimination. The Tribunal chose to frame the case as an issue of possible indirect discrimination because of religion, and it concluded that the dress regulations amounted to discrimination. A central element in the Tribunal's reasoning was the integration of UN treaty body practice that pulled in the direction of applying a strict legal assessment.

Questions relating to discrimination against minority women are characterized by many layers of normative overlap between Norwegian law, EU/EEA law, and human rights law. EU/EEA law and human rights law are constantly developing. To develop and interpret Norwegian law in line with international legal obligations, the legislature and legal adjudicators have to pay constant attention to international legal developments.

3.7.6 The next step

We have seen how minority women's diversity-related claims have been responded to by gender equality and anti-discrimination law, including in legal reasoning from the Ombud and the Tribunal, in a three-step trajectory. The claims were first responded to through the prohibition on indirect gender discrimination, then an intersectional approach to diversity was developed, and finally the claims were strengthened through the integration of international human rights.

The explicit prohibition on intersectional discrimination in the 2017 Equality and Anti-Discrimination Act reflects important legal developments that have taken place both domestically and within the field of international human rights. The prohibition also connects well with the ambition of an intersectional gender equality policy in Norway.

However, the examples used to illustrate this development all originated from the previous two-step enforcement system, where the Ombud had a role in investigating and forming statements in individual cases, as well as bringing cases before the Tribunal. In coming years, the transformative potential of gender equality and anti-discrimination legislation will to a large extent depend on the ability of the new one-tier enforcement system to respond to various claims related to diversity from different groups of minority women and men.

3.8 Welfare, social insurance, and work–family life balance

3.8.1 Support and tension: Intersections between welfare law and anti-discrimination law

Interaction among gender equality policy, gender equality and anti-discrimination law, and other laws that may promote or prevent equality is crucial for the achievement of substantive gender equality. In Norway, welfare legislation has played a key role in supporting gender equality by improving the situation of different groups of women, as well as being used as a tool to change traditional gender roles. However, in instances where there are tensions between such legislation and the prohibition on discrimination, fundamental problems of hierarchy and enforcement become visible. This section explores the intersection of welfare law and anti-discrimination law as an example of how different fields of law shape the conditions for gender equality.

Work–family life balance is one of the four key areas of Norwegian gender policy, and Norway performs well according to a number of indicators in this field: high female participation in paid employment, a high number of men taking leave from work when they have children, and an increasingly equal share of domestic work. Nevertheless, gendered differences remain – in wages,²²⁴ in part-time work,²²⁵ in the share of unpaid care work,²²⁶ and in levels of old age pension.²²⁷ Such differences are even greater when one looks at different groups of women: immigrant women fare worse than ethnic Norwegian women on many indicators.²²⁸

The EAD Act addresses important questions concerning the work–family balance from an equality and anti-discrimination point of view. It provides a near absolute prohibition on differential treatment on the basis of pregnancy, childbirth,

224 In 2020, women's monthly average wage was 87.5% of that of men's; see Askvik (n 21).

225 In 2020, 37% of employed women worked part time, compared to 17% of men; see Karin Hamre Gran 'Likestillingsutfordringer i deltidsarbeid og utdanningsnivå' [Gender Equality Challenges in Part-Time Work and Levels of Education] (Statistics Norway, 1 April 2022) <www.ssb.no/befolkning/likestilling/statistikk/indikatorer-for-kjonnslikestilling-i-kommunene/artikler/likestillingsutfordringer-i-deltidsarbeid-og-utdanningsniva> accessed 29 November 2022.

226 In 2012, women spent on average 3.5 hours on household work every day, compared to 3 hours for men; see Statistics Norway, 'Tidsbruksundersøkelsen' [Survey of Use of Time] <www.ssb.no/kultur-og-fritid/tids-og-mediebruk/statistikk/tidsbruksundersokelsen> accessed 29 November 2022.

227 By September 2022, the average state old age pension for women was 20,630 NOK per month, compared to 24,851 NOK for men; see NAV [Norwegian Labour and Welfare Administration] 'Alderspensjon' [Old Age Pension] <www.nav.no/no/nav-og-samfunn/statistikk/pensjon-statistikk/alderspensjon> accessed 29 November 2022.

228 Women with immigrant backgrounds from non-Western countries are less active in employment than the average for women (53.2% compared to 64.5%). They earn less (90% of the average income of non-immigrant women) and are over-represented among those with only basic education; see Eva Myklebust, 'Så langt har minoritetskvinnene kommet i likestillingskampen' [Minority Women Moving towards Gender Equality] *Fædrelandsvennen* (Kristiansand, 5 March 2021) <www.fvn.no/nyheter/lokalt/i/vAw415/enkelt-forklart-saa-langt-har-minoritetskvinnene-kommet-i-likestillingskampen> accessed 29 November 2022.

breastfeeding, and parental leave in the context of employment. It also provides protection against discrimination on the basis of care obligations.²²⁹

For the majority of individuals, however, the everyday life of balancing work and family depends heavily on public services and benefits arising from other laws. Welfare policies have been influential in shaping developments in this field in Norway since the mid-1970s, thus also serving as a tool for gender equality policy.

The relationship between welfare law, in particular the National Social Insurance Act,²³⁰ and the EAD Act is complex. On the one hand, welfare law can promote gender equality through measures and rights that are targeted at specific situations and groups – sometimes moving further than what is achieved through stand-alone prohibitions on discrimination. On the other hand, such targeted measures can fail to discover unequal effects on different groups of men and women. They may also constitute direct or indirect differential treatment on the basis of sex in potential violation of the prohibition on discrimination.

This section starts by interrogating the recognition, protection and support provided by welfare law to groups in different situations (Sections 3.8.2–3.8.5). By emphasizing how welfare law has recognized the experiences and needs of different groups of women and men, it demonstrates how such legislation can serve as a tool for substantive gender equality – but also how equality and anti-discrimination legislation continues to play a complementing role in this field. Finally, Section 3.8.6 uses a case of potential conflict between welfare law and the prohibition on discrimination as a lens through which to examine how specialized enforcement systems can serve as obstacles to realization of rights.

3.8.2 Welfare rights supporting women in a traditional care-giving role

As the modern welfare state grew rapidly after World War II, social insurance law was largely modelled for a household with a male provider and a female carer. Benefits upon unemployment, sickness, disability, and old age were conditioned on previous permanent paid employment, entailing lower payments to women who could not demonstrate a background of earlier permanent income.²³¹ In families where the man was receiving disability benefits or old age pensions, additional benefits were in place to help him provide for a wife and children – rather than economic support being targeted directly at the wife.

But alongside such benefits primarily targeted at men, benefits intended to support women without a male ‘head of household’ were put in place: Already in 1919, the Oslo municipality provided benefits for widows and single mothers, and this was gradually expanded to national law. Both types of benefits remained

229 See Section 3.4.4.

230 The first National Social Insurance Act was enacted in 1967. In 1997, it was replaced by the current Lov om folketrygd [National Social Insurance Act] of 28 February 1997 nr. 19.

231 Tone Sverdrup, ‘Folketrygdloven i kvinneperspektiv’ [The National Social Insurance Act in a Women’s Perspective] in Asbjørn Kjønsdal (ed), *Folketrygden i støpeskjeen* [The National Social Insurance in the Mould] (Universitetsforlaget 1984).

women-specific for decades. Moreover, the child benefit, instituted as a universal benefit in Norway in 1946, was primarily paid directly to the mother. Old age pension rights could also be accrued on the basis of care work, and unmarried women who had spent years caring for family members could receive a specific type of pension.

These measures created at least some degree of *redistribution* and *recognition* in a system otherwise set up to support a male provider.

However, the implementation of such benefits – in particular, the disadvantageous effects for women who were neither full-time housewives nor full-time employees – met with critique from women’s law scholars in the 1980s. The body of literature they produced largely based its critique on broader concepts of justice and equality, rather than on equality and anti-discrimination legislation. The following quote is illustrative: ‘To improve the position of women with the help of the law necessarily means the development of a women’s law with a foundation broader and different from sex-discrimination legislation’.²³²

3.8.3 *Welfare rights supporting a changing role for women*

In the 1970s, the political climate changed. The one-income family model was challenged, and gender equality moved higher on the political agenda. Public policy increasingly sought to include women in the workforce. As the practical difficulties of combining care work and employment were recognized, the need to ensure care for children while the mother was at work became a prominent political issue.

This resulted in increasing attention to the provision of public kindergartens, which eventually became a legal entitlement in 2008. It also led to the emergence of sick-leave benefits for employees caring for children who were ill (1975) or disabled (1985), a necessary condition for combining employment with care responsibilities in practice. Moreover, rights to paid parental leave were gradually expanded – from 18 weeks with full compensation of salary in 1977 to the current 49 weeks.

These developments provided a necessary foundation for combining paid employment with care responsibilities. The ensuing expansion of women’s range of choices for their lives was facilitated through welfare law, supporting the *transformative* dimension of substantive equality. Women’s participation in the labour market increased markedly, challenging stereotypical gender roles.

However, gendered differences have remained within the labour market. Women experience, among other things, unequal pay, greater levels of part-time work, sexual harassment at the workplace, and discrimination on the basis of pregnancy and care work. These factors also give rise to some of the most common

232 Tove Stang Dahl, *Women’s Law: An Introduction to Feminist Jurisprudence* (Norwegian University Press 1987), 53. See also *ibid.*, 52: ‘These interests [of women] can be promoted with the use of arguments founded on equality, whether or not derived from the Equal Status Act.’

cases brought before the EAD Tribunal. The high number of such cases suggests that the EAD Act has an important role to play alongside Norway's welfare and employment legislation.

3.8.4 Changing the role of men: Promoting the caring father

Over time, Norwegian welfare law has also come to recognize the role of men as care-givers. An early step was the gender neutralization of rights to sole providers. Such rights were initially an entitlement only for women, but a legal amendment in 1981 provided that single fathers could claim the benefit on the same terms as single mothers.

The *transformative dimension* of substantive equality became further visible in the 1990s, as legislators took more active steps to increase men's role in caring for children. Such efforts to change the gendered division of care work are widely understood as not only improving men's situation in the family but also improving women's equality in the public sphere by changing existing asymmetries. Until the early 1990s, a father's right to parental leave was derived from the mother's right, and it was little used in practice. A 'father's quota' of the parental benefit was established in 1993 and rapidly led to fathers taking leave from work when having children. This quota has been increased step by step, with the actual leave taken by the average father following suit. Today, the parental leave (with the exception of three weeks before the expected birth date) is divided into three parts: one part for each parent, and one part for the couple to decide freely. In practice, most fathers take the father's quota – no more, no less. This uptake of the father's quota implies that the father spends months as the child's primary carer, and it is often referred to as an example of how the law can serve as a tool for transforming the division of domestic care work between mothers and fathers.²³³

In contrast, the recognition of fathers as holders of rights against discrimination was slow in the context of equality and anti-discrimination law.²³⁴ The recognition of protection against indirect discrimination was important for women seeking to combine employment with providing care for family members. If care obligations for young children were used against them by employers – for example, in hiring processes or decisions concerning wage increases – women could claim that this was indirect discrimination on the basis of gender, as these were situations predominantly experienced by women. Whether men in similar situations could claim the same protection remained unclear, and practice from the Ombud and Tribunal was inconsistent. Using sex as a proxy for care obligations/care work thus led to misrecognition of the vulnerabilities

233 However, the use of the father's quota of parental leave remains dependent on education and income levels. It also remains contested to what extent it influences involvement in care work as the child grows older.

234 Anne Hellum, 'Hvem er likestillings- og diskrimineringsrettens subjekt? Om kjønn som diskrimineringsgrunnlag' [Who Is the Subject of Equality and Anti-Discrimination Law? On Gender as the Basis for Discrimination] in John Asland, Aslak Syse, Katrine Kjærheim Fredwall, and Tone L. Wærstad (eds), *Livsfellesskap – Rettsfellesskap. Festskrift til Tone Sverdrup 70 år* [Community of Life – Community of Law] (Gyldendal 2021).

experienced by men in similar situations. The problem was not solved until care obligations were included as a stand-alone ground of discrimination in the 2017 Act.

The rights provided in welfare law were thus important stepping-stones for changing the gender roles of men – and, by redistributing unpaid work, also for improving the situation of women. While the father’s quota has largely been welcomed, contestations remain, in particular, over whether gender neutralization has gone too far. Opening the access to rights for sole providers to men did not challenge or limit the rights of women. However, the partial neutralization of parental rights through the gradual increase of the ‘father’s quota’ has, in practice, limited the paid parental leave of mothers. This has been repeatedly criticized on the ground that it disregards the specific needs and situation created by birth and breast-feeding.²³⁵

3.8.5 Moving beyond the heteronormative parents?

While welfare law has opened up the roles available to both men (as care-givers) and women (as workers), heteronormativity continues to shape welfare law. An illustrative case concerns the rights to parental benefits for lesbian couples.

A couple cannot receive parental benefits for two children simultaneously unless the children are twins. Any remaining rights that parents have from a first-born child are struck out when a second child is born. This provision has unintended consequences for lesbian couples when both mothers use reproductive technology. The reproductive ability of both women creates a situation that does not arise with heterosexual couples: If the children are born within a close timespan, the mother who gives birth first will lose her economic rights as soon as the second child is born. In such cases, the mother faces a difficult choice: either to take unpaid leave from work, with potentially high economic loss, or to return to work and thus lose the possibility for care and rehabilitation that other new mothers enjoy.

This effect of the technically complex legislation was not foreseen by legislators at the time the rule was enacted. It can serve as an illustration of the difficulties of ensuring that potential consequences of different situations, relations, and reproductive abilities are recognized and dealt with during legislative processes.

Could the courts remedy the problem? JURK, an organization providing free legal advice to women, received a case in which social services had declined a mother’s claim for continued maternal benefits on the basis of this provision. The case was brought before the National Social Insurance Tribunal (NSIT), an independent administrative tribunal that takes the place of the primary courts in social insurance cases. JURK argued that this practice was discriminatory on the basis of a combination of grounds: gender, sexual orientation, and pregnancy/birth. It provides a type of vulnerability and loss that is experienced only by women in lesbian relationships who both give birth within a short space of time.

235 It has also been argued that this can amount to a violation of EEA law; see, for example, Helga Aune and Gro Nylander, ‘Barseltid et faktum – barselpermisjon en rettslig sannhet’ [Maternity as a Fact: Maternity Leave as a Legal Truth] (2015) 11–12 *Nordisk Socialrättslig Tidskrift* 45.

However, the court case was lost. The decision of the Tribunal demonstrates the limited scope for remedying legal problems through strategic litigation, in particular, where the legal text leaves little room for discretion. While the legislator had failed to see the problem, the Tribunal failed to find legal arguments to remedy it.

This specific legal rule was amended in autumn 2022. Nevertheless, the problem of recognizing and remedying legal problems that stem from heteronormative assumptions in law remains. This may cause legal provisions to affect groups other than those they were intended to target. It underlines the importance of the structural duties of the lawmaker to consider discriminatory consequences when legislation is drafted (Section 24 of the EAD Act).

3.8.6 Conflicts between the EAD Act and the social insurance legislation: The importance of enforcement structures

A specific type of challenge occurs where the legislator has made conscious decisions to give men and women formally different rights. Although the number of such provisions has been decreasing over time,²³⁶ some remain – particularly in relation to parental leave. The high-profile case of the ‘activation requirement’, which applies only to men applying for the part of parental benefits that goes beyond the father’s quota, demonstrates the twisting paths of attempts to litigate a case of differential treatment in law.

A man applying for more than the father’s quota has to demonstrate that the child’s mother is ‘active’ elsewhere – either back at work or in education. As no similar requirement exists for women applying for more than the mother’s quota, this activation requirement is a clear example of direct differential treatment on the basis of sex. The question of whether this contravenes the prohibition against discrimination has been repeatedly raised.

A first legal challenge occurred already in 2013, when the Ombud – on its own initiative – considered the requirement in the light of the (then) Gender Equality Act.²³⁷ The Ombud found that by making it more difficult for fathers to take parental leave, the provision served to uphold a traditional division of work between men and women whereby men were the financial providers and women the care-givers. It did not serve to promote gender equality, and, in the absence of sufficient justification, the requirement was found to be a violation of the (then) Gender Equality Act. Yet, owing to the limited competence of the Ombud to give binding decisions where the equality and anti-discrimination law conflicts with other legislative norms, the Ombud stated that it was up to the political authorities how the conflict should be resolved – whether the law should be changed and, if so, how. No legal

236 As mentioned above, the ‘single mother benefit’ became gender neutralized as a ‘sole provider benefit’ in 1981. The ‘widow’s pension’ was extended to men in several steps: most obstacles were removed in 1976, with full formal equality obtained in 2009.

237 Gender Equality Ombud case 12/340, statement of 26 March 2013.

amendment or change of practice took place following the clear statement, which demonstrates the limits of the (then) Ombud as an enforcement mechanism.

A second legal basis for contestation – EEA law – received attention from 2015, when the European Court of Justice decided a case concerning a Greek provision for parental leave.²³⁸ The Greek provision, with strong similarities to the Norwegian ‘mother’s activation requirement’, was found to be in violation of two EU directives, and Greece was thus required to amend its legislation.²³⁹ As both directives were also part of the EEA Agreement, the EEA Surveillance Agency (ESA) immediately started an own-initiative investigation into whether the Norwegian provision was similarly violating EEA law. In 2016, the Agency also received an individual complaint about the provision, further underpinning its attention to the theme. After extensive communication between the ESA and the Norwegian government, the ESA issued its conclusion in November 2017. The direct differential treatment of men and women instituted by the National Social Insurance Law was, the ESA held, a violation of EEA law, specifically the Recast Gender Equality Directive.²⁴⁰ The Norwegian government maintained its contrary view, and the case was brought before the EFTA Court. In December 2019, the EFTA Court decided in favour of Norway: The parental benefit was found to be outside the scope of the directive, as it did not concern ‘employment and working conditions’.²⁴¹ Accordingly, the Court conducted no discussion or assessment of whether the legislative grounds offered by the Norwegian state would satisfy requirements of justifications or proportionality. EEA law and its enforcement mechanisms had proven a dead end for contesting this specific provision.

In parallel to the ESA process, contestations continued within the relevant domestic mechanisms. A series of individual cases were brought before the National Social Insurance Tribunal (NSIT), bringing up EEA law, the EAD Act, and the constitutional equality provision adopted in 2014. The NSIT took a lukewarm approach to engaging with the legality of the requirement. It held that the provision was potentially in violation of both the EAD Act and EEA law, but still upheld current practice. As the legislators had made a conscious decision to make the condition gender-specific, the NSIT found that it was not the right instance to conclude on the matter before an authoritative decision on the interpretation of EEA law or other prohibitions on discrimination had been made elsewhere.²⁴² The system of specialized low-threshold enforcement, with separate branches for social insurance law, EEA law, and equality and anti-discrimination law thus made

238 CJEU, C-222/14 *Maïstrellis v. Greece*, decided 16 July 2015. EU:C:2015:473.

239 Directive 2006/54/EC (n 90) and Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on Parental Leave.

240 EEA Surveillance Agency (ESA), Reasoned Opinion No. 193/17/COL, 15 November 2017.

241 EFTA Court case E-1/18 *Parental benefits* 13 December 2019. The scope of Directive 2006/54/EC (n 90) is defined in Article 14(1)(c).

242 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.

it difficult to handle cases where the relationship between these legal fields was at the core of the issue. Ordinary courts have full competence over all legal fields, but they are difficult to access.

Since the judgement by the EFTA court, new cases have been brought before the NSIT. In these cases, it was emphasized that although EEA law did not govern the question, the prohibition on discrimination in the EAD Act and the Constitution remained relevant. Again, the conscious decision of the legislators ended up tilting the balance towards leaving the activation requirement in place. However, the NSIT took a step towards more intense review of the social insurance legislation in the light of both the EAD Act and the Constitution. Departing from its earlier practice, the NSIT stated that its independent role meant that it had to include the full range of relevant legal sources – even when that entailed deciding on legal questions beyond its specialized field.²⁴³ While this may be seen as stating the obvious, it was an important step towards ensuring that the EAD Act is enforced also in fields of law where specialized administrative bodies have been put in place.

The comprehensive EAD Act also applies to specialized legislation such as welfare law, and the equality and non-discrimination norms embedded in the Constitution as well as in international law should, in principle, take precedence over the Social Insurance Act. However, it remains unclear whether the activation requirement, which constitutes direct differential treatment, can be justified as fulfilling the EAD Act's requirements for legitimate purpose, necessity, and proportionality. The lack of success of the different litigation attempts demonstrates that not only the material norms of the EAD Act but also its enforcement mechanisms, are key to giving effect to the principle of non-discrimination.

At present, enforcement of equality and anti-discrimination law faces significant hurdles in situations where there are tensions between different fields of law. As noted earlier in this chapter, the EAD Tribunal has limited competence in questions with conflicting legislation. The complex system of different enforcement mechanisms, specialization of bureaucratic control mechanisms, and fragmentation of legal subfields further reduces the impact of equality and anti-discrimination law.

3.8.7 Looking back and looking forward: The role of welfare law

Norwegian welfare law, and social insurance law in particular, has served as an important driver of change towards recognition of difference, redistribution of resources, and equality for all. Over time, rights have been developed that support individuals in different situations: women in traditional care-giving roles, women seeking to combine paid work and family life, and fathers taking on more active

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

roles in parenting. Together, the comprehensive system of rights supports a diversity of life choices.

Nevertheless, the heteronormative family still tends to remain the focus in legislative processes. Furthermore, efforts to target rights towards specific situations and groups involve risks of creating differential treatment that may violate the prohibition on discrimination. The lengthy debates about the ‘mother’s activation requirement’ provide an example of the importance of the overarching principle of non-discrimination. However, they also demonstrate the difficulties of giving effect to this principle in a legal setup where the enforcement structures of equality and anti-discrimination law are side-lined, and other control mechanisms are reluctant to step up.

Part 3: Potential and limits

3.9 Gender equality and anti-discrimination law at the crossroads

In this chapter, we have explored the relationship between gender equality policy, gender equality and anti-discrimination law, and other laws that influence gender equality in Norway. What does our analysis demonstrate in terms of the potential and limits of gender equality and anti-discrimination law in relation to the promotion of substantive equality? We see four considerations as key to unlocking its transformative potential.

First, substantive equality requires close and systematic consideration of the relationship between equality and anti-discrimination law and other areas of law.

Welfare law reforms have been a main driver of change in Norway. Social and economic rights targeted at different groups of women and men in different situations are a powerful tool for promoting both redistribution of resources and recognition of difference, vulnerability, and dignity. However, rights targeted at specific groups in specific situations may also overlook the situation of women and men belonging to other groups. Thus, welfare rights legislation can, in practice, lead to exclusion that constitutes direct or indirect discrimination. In such instances, gender equality and anti-discrimination law can function as a corrective to welfare policy and legislation. However, as noted above, to achieve this effect in practice is difficult in a fragmented and specialized enforcement system. The realization of gender equality and anti-discrimination law’s corrective function calls for careful consideration of the limitations of the existing enforcement system.

Criminal law has been criticized because its normative standards are moulded on men’s experience of violence and harms. The recognition of sexual harassment as a gender equality issue, rather than solely a matter for criminal law, demonstrates the added value of gender equality and anti-discrimination law. On the one hand, equality and anti-discrimination law provides new paths for victims of sexual harassment to have their case heard. Yet the continued contestations between perceptions of sexual harassment as a breach of the gender equality principle or as primarily a criminal law issue demonstrates that, in order for legal changes to have an impact, ongoing and nuanced debates on many fronts are required.

Second, substantive gender equality calls for careful consideration of the relationship among equality, difference, and diversity.

The expanding list of discrimination grounds in the EAD Act, including, for example, care obligations and intersectional discrimination, prepares the ground for an understanding of equality and anti-discrimination that recognizes difference and diversity. The act's stated objective of 'improving the position of women and minorities' allows for specific attention to groups in vulnerable or disadvantaged positions.

Our analysis of the situation of women from ethnic and religious minorities shows how gender equality and anti-discrimination law has gradually developed in ways that take difference and diversity into account when approaching the issue of equality.

Welfare rights have been central to provide recognition, protection, and support both for individuals pursuing full-time employment and for those providing unpaid care work in families. However, while policies and laws seek to facilitate the combination of employment and family life in practice, individuals who seek to use such rights may still experience discrimination in the labour market. The extended list of discrimination grounds, including, for example, care work and leave in connection with childbirth or adoption, thus contributes to make the range of choices that exist on paper real to both women and men.

Third, substantive equality calls for legal measures that address inequality and discrimination rooted in social, economic, and cultural structures.

In Norway, the EAD Act establishes proactive duties to combat discriminatory structures, as well as obligations to document and report on measures taken for such a purpose. These provisions provide both continuity and change with welfare state policies and programmes aimed at redistribution of power and resources.

In the fields of employment and education, the use of quotas to achieve substantive equality has been limited to measures that promote equal opportunity rather than equal outcomes, owing to the rules of EU/EEA law as interpreted by the CJEU and the EFTA Court. However, in public and economic life, measures that require equal representation, such as mandatory gender quotas in public appointments and on company boards, have been put in place. The aim is to promote representative democracy and to ensure that the experiences and views of women from different walks of life and with different political opinions are taken into consideration.

The provisions establishing the duty of public authorities and public and private employers to document their work to combat discriminatory structures have been highly contentious, and the concrete effects are yet to be seen. However, we see such measures as having great potential for creating systematic change. In the field of sexual harassment, the courts have the competence to consider whether an employer has complied with the obligations regarding proactive measures. This is an important steppingstone to ensure that sexual harassment is not only addressed as a breach of individual rights but also subject to systematic prevention work.

Moreover, the duty of public authorities to work systematically to prevent discrimination also applies in the field of welfare law. It can thus provide an anchor for more comprehensive analysis of effects on different groups of women and men

when laws are being drafted and implemented. This may be a useful tool for preventing tensions between the EAD Act and other pieces of legislation. Given the enforcement system's limitations in handling such tensions, preventive work is important.

Fourth, and finally, our analysis shows that substantive equality relies heavily on the relationship between the normative content of the protection standards and the effectiveness of the enforcement system.

While existing theoretical literature on substantive gender equality tends to focus on the normative content of the right to equality and non-discrimination, our study addresses the relationship between law on the books and law in action. This chapter thus emphasizes the need for a robust enforcement system that can handle breaches of individual rights and failures to carry out proactive duties.

The Norwegian equality and anti-discrimination regime aims to ensure access to an independent and effective enforcement system that is empowered to grant remedies and impose sanctions. However, as pointed out in this chapter, there exist several disjunctures between the high normative protection standards set out in the regime and the specialized enforcement system established to ensure that these are followed.²⁴⁴

As regards the intersection of welfare law and anti-discrimination law, the limitations of the enforcement system are evident. Without the competence to issue non-binding statements on tensions between the EAD Act and other legislation, the Tribunal cannot fulfil its function as a corrective mechanism to other laws that constitute direct or indirect discrimination. Other administrative bodies, such as the National Social Insurance Tribunal, are, in practice, reluctant to consider the standards anchored in national and international discrimination law, and the courts are often out of reach for individuals in vulnerable situations.

However, there has also been progress.

As described in our analysis of sexual harassment, the Tribunal has through its decisions contributed to filling the gap in protection left by the Supreme Court judgement in the *mechanic* case. Furthermore, the Ombud and the Tribunal have both played important roles in clarifying minority women's right to protection against indirect and intersectional discrimination. In a series of cases concerning the relationship between the non-discrimination principle and claims related to diversity, they have developed a responsive jurisprudence that has moved the boundaries of law. How the new one-tier enforcement system will respond to various claims for accommodation of diversity from different groups of minority women and men remains to be seen.

We thus conclude that the dynamic development of gender equality and anti-discrimination law's normative standards holds great potential for the promotion of substantive gender equality in Norway. The realization of this potential, however, will require access to an effectively sanctioned enforcement system for all.

244 See, in particular, Section 3.5.6.

4 The potential of Icelandic gender equality legislation

Brynhildur G. Flóvenz

4.1 Introduction

Since 2009, Iceland has been ranked number one in gender equality in the world by the Global Gender Gap Report published by the World Economic Forum.¹ The current gender equality legislation in Iceland comprises Act 150/2020 and Act 151/2020.² The country has been seen and described in many ways as some kind of ‘feminist paradise’, and the image of strong women, highly educated, with high levels of participation in the labour market and a high birth rate, has been tenacious. Many Icelandic women do not identify with this image and point out that the statistics on which the ranking is based do not reflect the reality of women’s life in Iceland.³

This chapter discusses the relationship between Iceland’s gender equality legislation and the importance of a feminist approach in the preparatory phases of such legislation in parliament. It highlights the gap between the gender-neutral character of Iceland’s equality legislation – the exception to this being the 1991 Act on Equal Status and Equal Rights of Women and Men, which was highly influenced by the Women’s Alliance in the Icelandic parliament – and women’s realities on the ground. A related theme is how the impact of the perceived homogeneity of Icelandic society affects the rights of women of non-Icelandic origin to gender equality and leads to the absence of marginalized groups of women in mainstream gender equality policy and law-making.

Another closely related theme that is examined in the chapter is what can be described as a lack of progressive use, application, and interpretation of Iceland’s gender equality legislation and the need for more effective enforcement. The lack of support for complainants will be discussed, along with the development by the

1 World Economic Forum, ‘Global Gender Gap Report 2021’ <http://www3.weforum.org/docs/WEF_GGGR_2021.pdf> accessed 7 January 2022.

2 Lög um jafna stöðu og jafnan rétt kynjanna [Act on Equal Status and Equal Rights Irrespective of Gender], hereafter Gender Equality Act or GEA 150/2020; Lög um stjórnýslu jafnréttismála [Act on the Administration of Matters Concerning Equality], hereafter AAMCE 151/2020.

3 Þorgerður Einarsdóttir, ‘All That Glitters Is Not Gold: Shrinking and Bending Gender Equality in Rankings and Nation Branding’ (2020) 28(2) *NORA – Nordic Journal of Feminist and Gender Research* 140.

Supreme Court of Iceland and the Equality Complaints Committee (ECC) of a margin of appreciation for employers in equality cases. Furthermore, the gender bias in the enforcement of other legislation, such as criminal law, is addressed.

In Part 1 of the chapter, the legislative development in the field of gender equality legislation in Iceland is described and analysed chronologically from the first act, passed in 1976, to the latest, dating from 2020. An attempt is made to shed light on the gender policies that had the greatest impact in any given period. Special emphasis is placed on the impact of the Women's Alliance in the Icelandic parliament. Moreover, the impact of international obligations, such as those arising out of the European Economic Area (EEA) Agreement, is addressed.

The way in which the various Gender Equality Acts have been enforced is crucial when it comes to evaluating the potential of Iceland's equality legislation and is therefore also discussed in Part 1. The focus in that discussion is mainly on the development of the case law of the Equality Complaints Committee and the Supreme Court of Iceland.

In Part 2, the focus is on three issues that might be described as being currently emphasized in Iceland's gender equality legislation and much debated within the country. These are non-discrimination in the labour market in relation to (1) *equal pay* and (2) *access to employment*, which are protected in the Gender Equality Act, along with gender discrimination in the field of criminal law in relation to (3) *violence against women*.

In Part 3, Iceland's gender equality legislation is considered in the light of Sandra Fredman's four-dimensional approach to substantive equality. Here, options and limitations related to the promotion of substantive equality are discussed, with a focus on the enforcement system and the lack of resources and remedies for addressing and resolving structural discrimination, which is essential if substantive equality is to be achieved.

Part 1: The national gender equality and anti-discrimination legal landscape: Norms and enforcement

4.2 The development of gender equality legislation and policy in Iceland

4.2.1 Introduction

There has been a long tradition of comprehensive gender equality legislation in Iceland since the passing of the first general Act on Equality of Women and Men 78/1976.⁴ As in other Nordic countries, this type of legislation was prompted by pressure from the feminist movement to improve women's rights and combat discrimination. At the time of the passing of this act, there had already been an act on equal pay in force for 15 years.⁵ However, although limited, the first legislation concerning gender equality was the Act on Women's Right to Education

4 Lög um jafnrétti kvenna og karla [Act on Equality of Women and Men], hereafter GEA 78/1976.

5 Lög um launajöfnuð kvenna og karla [Act on Parity of Wages Between Women and Men] 60/1961.

in Preparation for Public Office, Scholarship Grants, to Service in Public Office 37/1911, which granted women the same rights as men to study in all educational institutions and has remained in force to this day.

4.2.2 *The first steps in gender-neutral legislation, 1975–1985: GEA 78/1976*

The year 1975 is memorable in Iceland's history of women's rights. The United Nations had designated that year as an international woman's year. In Iceland, an Act on Counselling and Education concerning Sex Life and Childbearing and on Abortions and Sterilization,⁶ which permitted abortion for social reasons, was passed. This act addressed an issue on which the women's movement in Iceland had fought for many years. On 24 October 1975, Icelandic women went on a day-long strike to demonstrate the indispensability of women's work for Iceland's economy and society. In Reykjavík, about 25,000 women gathered in the city centre, just over 20% of the entire population of the Reykjavík area at that time.⁷ The time was clearly ripe for the enactment of gender equality legislation.

But what was the situation in Iceland in 1975? According to official data on the situation in educational institutions, an equal number of boys and girls graduated from grammar schools, 48% of the students at the universities were female, but only 25% of students graduating from universities were female. Men were dominant in the institutions of power: 95% of the members of the Icelandic parliament, the Althing, and 90% of the directors of government agencies were male. The government of Iceland was exclusively male, and the Supreme Court had always been exclusively male. The gender pay gap at this time was huge. For example, female workers' average wage per hour in 1975 was only 76% of that of male workers.⁸ However, 60% of Icelandic women aged between 16 and 74 were active in the labour market.⁹

At the 97th session of the Althing, during the winter of 1975–1976, the members of the Althing deliberated on what kind of equal rights legislation would be best suited to improving the status of women. One of the few female MPs, Vilborg Harðardóttir (Socialist Party), questioned whether an act on equality between men and women would be the best way to address the issue. Her preference was to focus on 'a direct discrimination ban'. In Harðardóttir's view, it would not be enough to pass legislation on equality between men and women; instead, it would be

6 Lög um ráðgjöf og fræðslu vaðandi kynlíf og barneignir og um fóstureyðingar og ófrjósemissaðgerðir [Act on Counselling and Education Concerning Sex Life and Childbearing and on Abortions and Sterilization] 25/1975.

7 Kvennasögusafn Íslands [The Women's History Archives], 'Women's Day Off 1975' <<https://kvennasogusafn.is/index.php?page=womens-day-off-1975#ae-image-0>> accessed 29 October 2021.

8 Hagstofa Íslands [Statistics Iceland], 'Hagtiðindi: Heilbrigðis- félags- og dómsmál' [Statistical Series: Health, Social Affairs, Justice] (2005) 1.

9 See statistics available at the following webpage of Hagstofa Íslands [Statistics Iceland]: <https://px.hagstofa.is/pxis/pxweb/is/Samfelag/Samfelag_felagsmal_jafnrettismal_3_kk75/HE111504.px/table/tableViewLayout1/?rxid=720e6a34-61d5-4215-8ab3-99863f1e09c5> accessed 7 July 2022.

necessary to grant women certain temporary privileges, as well as to take into consideration women's roles in relation to pregnancy and childbirth.¹⁰ Another female MP, Svava Jakobsdóttir (Socialist Party), suggested that a provision on gender equality should be incorporated into the Constitution. She was the first to make such a suggestion in parliament, one that became reality 20 years later. However, neither idea was accepted at the time, and GEA 78/1976 was passed instead.

According to the text of GEA 78/1976, the new law aimed to promote equality and equal status for women and men. In general, what characterized the new act is described below.

First, the legislation was very male-oriented in the sense that it emphasized women's right to be equal to men, not women's rights as such. Men were the norm to which women should 'have the right' to adapt.¹¹ Such an approach was consistent with the discourse prevalent at that time, in which liberal feminists had emphasized women's access to the world of men, along with gender-neutral and formal equality legislation rather than women-specific legislation. Furthermore, liberal feminism postulated that, aside from their physical differences, men and women were the same. Liberalism in general emphasized that a distinction should be made between the public and the private spheres of life and that the state should not intervene in the private sphere, so one might say that the legislation was in harmony with the mainstream discourse of the time.¹²

Second, GEA 78/1976 was completely gender-neutral. Reading the act, it was impossible to see that the situation for women in Iceland was in any way worse than that of men. There were no provisions for any positive measures to improve women's status, neither on an individual basis nor structurally. Among the 60 members of parliament at the time, there were only three women; these questioned the gender neutrality of the legislation and tried to obtain acceptance of the specific need to improve women's status in the law, but without success.

The scope of the legislation was rather wide. In addition to the labour market, which was the main subject, GEA 78/1976 covered schools and other educational institutions. It is worth noting that religious institutions were not excluded from the scope of the act. There was also a general ban on advertisements that diminished or degraded either of the sexes.

An Equality Council (EC) was established to enforce the new law. Two of the Council's five members were to be appointed by two of the main labour unions, a third by the employers' union, a fourth by the minister of social affairs, while the chairperson was appointed by the Supreme Court. The EC could open a case regarding an alleged violation of GEA 78/1976 either on its own initiative or after receiving notice of a possible violation. If the Council found that a violation of the

10 Alþingistiðindi B-deild [Parliamentary Gazette, Section B] 1975–1976, 1628.

11 Brynhildur G. Flóvenz, 'Jafnréttislög í 30 ár' [Gender Equality Law for 30 Years] (2007) 60(1) *Úlffjótur Law Journal* 5.

12 On liberal feminism in general, see, for instance, Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Cavendish Publishing 1998), 121–135.

terms of the GEA had occurred, it sent a reasoned recommendation on improvements to the relevant party. If the party did not agree to this recommendation, the EC could, with the victim's agreement, take the case to the courts.

The first judgment made on the basis of Iceland's gender equality legislation was passed during the term of effect of GEA 78/1976.¹³ The case in question concerned wages and will be discussed in Section 4.6 of this chapter.

In general, although limited, this first GEA was acceptable as a first step. It addressed the problem of gender inequality and provided some remedies. However, the subsequent enforcement of the legislation would prove to be unsatisfactory, and the act's gender neutrality was viewed as problematic by, among others, the Equality Council.

4.2.3 The entry of the Women's Alliance in the Althing and GEA 65/1985

Nine years passed before GEA 78/1976 was reviewed, in 1985. In the meantime, in 1980, the Icelandic people elected the first democratically elected female president in the world, Vigdís Finnbogadóttir. In addition, public discussion began to take place on the subject of violence against women; the first women's shelter opened in 1982 in Reykjavík; and Women's Counselling, an organization staffed by female feminist lawyers and social workers who provided free legal and social counselling for women, was established in Reykjavík in 1984.¹⁴

In 1981, a feminist party, the Women's List, was founded in Reykjavík and Akureyri. In the 1982 municipal elections, the party got two women elected to Reykjavík City Council and two women to the local government of Akureyri. A year later, the Women's Alliance, a party mostly based on the Women's List, was established, and in 1983 three women from the Women's Alliance won seats in the parliamentary elections of that year.

The Women's Alliance was a feminist party that focused its efforts on improving the situation of women in society, increasing the number of female members of parliament and fighting for women's rights in general.¹⁵ The Alliance's candidates in the parliamentary elections were exclusively women.

In the period from 1976 to 1984, several proposals were submitted in parliament that called for amendment of GEA 78/1976 or the enactment of new legislation

13 Supreme Court of Iceland, *Heilbrigðisráðherra v stjórnarnefndar ríkisspítalanna og fjármálaráðherra f.h. ríkissjóðs gegn Jafnréttisráði f.h. Guðrúnar Emilsdóttur og Guðrúnu Emilsdóttur persónulega og gagnsök* [The Minister of Health on Behalf of the Steering Board of the State Hospitals and Minister of Finance on Behalf of the Treasury v The Equality Council on Behalf of Guðrún Emilsdóttir and Guðrún Emilsdóttir Personally and Recrimination] 117/79 (1982).

14 Gunnhildur Sigurhansdóttir, 'Skjól og skjöldur – Stofnun Samtaka um Kvænnaathvarf og Kvænnaathvarfs í Reykjavík 1982' [The Establishment of the Association of Women's Shelter and Women's Shelter in Reykjavík in 1982] (2008) 28(1) *Sagnir* 28.

15 Kristín Jónsdóttir, '*Hlustaðu á þína innri rödd*' – *Kvænnaframboð í Reykjavík og Kvænnaalisti 1982–1987* ['Listen to Your Inner Voice': The Women's List in Reykjavík and the Women's Alliance 1982–1987] (Sögufélag [The Icelandic Historical Society] 2007).

aimed at expanding and deepening its terms. In the winter of 1983–1984, two bills were proposed, one by the incumbent minister of social affairs¹⁶ and the other by members of the opposition.¹⁷ In the autumn of 1984, the minister of social affairs¹⁸ tabled a legislative bill that, after various amendments in the course of parliamentary debate, became the Act on Equal Status and Equal Rights of Women and Men 65/1985.¹⁹

The Equality Council received both bills for comment. In its report, the Council noted that the rejection of provisions for positive measures to improve the status of women had eliminated the main benefit of amending the legislation in effect at the time. The Council also noted that experience had shown that gender-neutral legislation was ineffective and would not change the situation in society. The Council's report was unusually sharp and included the following comment: 'The Council thinks that after nine years of poor experience of gender-neutral legislation in Iceland, the Althing cannot oppose changes of the kind recounted above on any reasonable grounds.'²⁰

In the discussion on the legislative bills in the parliament, a clear division emerged in the positions taken by members of parliament regarding the kind of equality being sought and the methods to be used to achieve it. The position taken by members of the Women's Alliance showed some signs of cultural feminism,²¹ which could be detected, among other things, in their insistence that women were not seeking equal rights to follow in the footsteps of men, but rather the right of women to obtain full recognition on their own terms. In the debate on the legislative bill that, with some amendments, eventually became Iceland's second act on gender equality,²² Kristín Halldórsdóttir, a member of the Women's Alliance, had the following to say:

16 Alþingistiðindi, A-deild [Parliamentary Gazette, Section A] 1983–1984, 2058, Parliamentary Session 106, Item 243, Parliamentary Document 431.

17 Alþingistiðindi, A-deild [Parliamentary Gazette, Section A] 1983–1984, 2155, Parliamentary Session 106, Item 259, Parliamentary Document 478.

18 The minister was from the Progressive Party (a centrist party), which had formed a coalition government at this time with the Independence Party (a conservative, right-wing party).

19 Lög um jafna stöðu og jafnan rétt kvenna og karla [Act on Equal Status and Equal Rights of Women and Men] 65/1985, hereafter GEA 65/1985.

20 Alþingistiðindi, B-deild [Parliamentary Gazette, Section B] 1984–1985, 650–652.

21 Cultural feminism questions dominant gender norms and institutions and the need for women's lives and experiences to be valued in legislation as well as in society in general. Cultural feminists consider that, given that there are differences between women and men, both social and physical, legislation needs to reflect that fact. They also highlight the need to break down the barriers between the 'private' and the 'political' both in legislation and in its monitoring. On cultural feminism in general, see, for instance, Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Cavendish Publishing 1998), 143–161; William J. Turner, Pamela Johnston Conover, and David Lowery, 'Redistributive Justice and Cultural Feminism' [1996] 45 *The American University Law Review* 1279.

22 Lög um jafna stöðu og jafnan rétt kvenna og karla [Act on Equal Status and Equal Rights of Women and Men] 65/1985.

We emphasize ideas on women's emancipation that enshrine the right of women to be appreciated as equals of men on their own terms. We set aside ideas of equal rights that entail the right of women to be like men. Women have been shaped by their role of bearing and raising children. We do different jobs and therefore possess experiences that differ from those of men. Women's experience leads to an appreciation and values that are different from those held by men. Women therefore see things from a different perspective.... We want the common experience and values of women to be valued as equal to the experience and values of men as a shaping power in society.... Ideas of equality grow from the roots of the values held in society, and we believe it is primarily a change in our perception of values that the world needs, in the direction of recognizing the values of life and the contributions of women, rather than to force women to adopt the values of life held by men as their own. That line of thought has unfortunately been dominant in the struggle for equal rights.²³

The member's words crystallize the fundamental difference in MPs' visions of gender equality and the way to achieve that equality. The Women's Alliance emphasized a new approach to valuation in society, at the core of which was the need to reevaluate the status of women and recognize women's culture, experiences, and lives. At the same time, they called for redistribution of the goods in society and did not find it problematic to advocate redistribution at the same time as they were valorizing the specificity of one group – women – as could later be seen in Nancy Fraser's ideas of the incompatibility of recognition and redistribution approaches. According to Fraser, claims for recognition often take the form of calling attention to the putative specificity of some group and then affirming the value of that specificity, and such claims tend to promote group differentiation. In contrast, redistribution claims focus on abolishing the economic arrangements that underpin the specificity of groups and they tend to promote group de-differentiation. Fraser takes feminist demands for the abolition of the gender division in the labour market as an example of redistribution.²⁴

However, recognition of traditional women's professions and the re-evaluation of professions in general can also be an example of redistribution in the labour market. The Women's Alliance highlighted such an approach in its work.

The Women's Alliance emphasized the need for reforms of the existing gender equality legislation, as well as other legislation, in order to improve women's status through the use of various positive measures and by transforming values, both in the labour market and in society in general. Furthermore, their ideas might in

23 Alþingistiðindi, B-deild [Parliamentary Gazette, Section B] 1984–1985, 365–366.

24 Nancy Fraser 'From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age' (1995) 212 *New Left Review* 68.

many ways be described as conforming with ideas on transformative equality,²⁵ as described by Sandra Fredman.²⁶

Iceland is a state party to the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).²⁷ However, the Convention was not mentioned in the notes attached to the proposal for the bill that became GEA 65/1985.²⁸

During the proceedings in the Althing, the Social Affairs Committee made some changes to the bill, adding, among other things, a provision to the effect that special temporary measures designed to improve the position of women in the pursuit of gender equality were not contrary to law. The proposal to include such a provision was made with reference to a comparable provision in CEDAW, and the implementation of this provision, therefore, formed part of the implementation of the Convention.²⁹ The provision was controversial in the Althing but was eventually passed.

The material scope of GEA 65/1985 was wide. According to Section 1, the act aimed to obtain equality and equal status for women and men in all fields, and Section 3 stated that all types of discrimination based on sex/gender³⁰ were prohibited. It was reaffirmed that special consideration for women due to pregnancy or childbirth should not be regarded as discrimination. So, according to the act, no sphere of society was excluded from its material scope.

The principal conclusion about GEA 65/1985 on the Equal Status and Equal Rights of Women and Men was that, with the act, the idea of complete gender neutrality in the gender equality legislation was abandoned, and a step was taken in the direction of facing the reality, namely, that it was discrimination against *women* that was the reason for the passing of equal rights legislation.

4.2.4 Moving from gender neutrality: GEA 28/1991

Just three years passed from the entry into force of GEA 65/1985 before work began on its review. In 1988, the minister of social affairs appointed a committee with a mandate to review GEA 65/1985 following a survey that had been conducted on the status of female civil servants, which revealed a significant pay gap

25 See further discussion on Sandra Fredman's ideas on transformative equality in Section 4.9.2 of this chapter.

26 Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712.

27 Stjórnartíðindi [Official State Gazette] Section C, 5/1985; 4/2001.

28 The Convention was signed on behalf of Iceland on 24 July 1980 and ratified on 18 June 1985. The Optional Protocol to the Convention was signed on 10 December 1999 and ratified on 6 March 2001.

29 Alþingistiðindi [Parliamentary Gazette] (1985) 'Opinion of the Social Affairs Committee', Parliamentary Session 107, Item 48, Parliamentary Document 1159.

30 In Icelandic, the concept is *kynferði* and *kyn*, which may be translated as 'sex' or 'gender'. In Act 65/1985, the translation would probably have been 'sex', referring to biological sex.

and differences in work-related benefits between women and men.³¹ The minister of social affairs³² submitted a legislative bill in the winter of 1990.³³ After several amendments in the Althing, the minister submitted a revised legislative bill on the equal status and equal rights of women and men in the autumn of 1990,³⁴ which became Act 28/1991.³⁵

In the six years that passed between the entry into force of GEA 65/1985 and the passing of GEA 28/1991, significant changes occurred in the Althing. In the 1987 parliamentary elections, the Women's Alliance doubled its support and sent six representatives to parliament out of 63 members, giving them just short of 10% of the seats. The proportion of women in parliament had gone from 5% in the 1979 elections to 21% in the 1987 elections.³⁶

GEA 65/1985 had not been put to any severe tests. A few cases were referred to the Equality Council during the act's term of effect, but only one found its way to the courts of law.³⁷ However, by the time the Supreme Court of Iceland concluded on that case, the new GEA 28/1991 was already in place. It is therefore difficult to assess the material impact of GEA 65/1985.

With GEA 65/1985, the obligation was imposed on the minister of social affairs to submit a four-year action plan providing for measures to achieve the equal status of women and men, as well as a report to the Althing every two years on the status and development of equal rights matters. The first such action plan was submitted in 1986. It was brief – a mere three and a half pages.³⁸ It is difficult to see from the action plan that there was any specific policy in effect in the area of gender equality. In brief, it appears that the equal status targeted was that women should educate themselves in the traditional work of men, and at the same time day-care for children should be reinforced and childbirth leave extended. With that, equal status would be achieved.

31 Alþingistíðindi A-deild [Parliamentary Gazette, Section A] 1988–1989, 2933, Parliamentary Session 111, Item 437, Parliamentary Document 797.

32 The minister was Jóhanna Sigurðardóttir (Socialist Democratic Party), who later became the first female and publicly gay prime minister in Iceland.

33 Alþingistíðindi A-deild [Parliamentary Gazette, Section A] 1989–1990, 3173. Parliamentary Session 112, Item 435, Parliamentary Document 756.

34 Alþingistíðindi A-deild [Parliamentary Gazette, Section A] 1990–1991, 900, Parliamentary Session 113, Item 69, Parliamentary Document 71.

35 Lög um jafna stöðu og jafnan rétt kvenna og karla [Act on Equal Status and Equal Rights of Women and Men] 28/1991, hereafter GEA 28/1991.

36 Hagstofa Íslands [Statistics Iceland], 'Candidates and Elected Members to the Althing by Sex 1959–2017' <https://px.hagstofa.is/pxen/pxweb/en/Ibuar/Ibuar_kosningar_althingi_althkjornir/KOS02055.px/?rxid=69201617-1c40-4f04-96a6-6335731645da> accessed January 2022.

37 Supreme Court of Iceland, *Menntamálaráðherra gegn Jafnréttisráði f.h. Helgu Kress og gagnsök* [The Minister of Education v the Equality Council on behalf of Helga Kress and Recrimination] 339/1990 (1993).

38 Félagsmálaráðherra [Minister of Social Affairs], 'Skýrsla félagsmálaráðherra um framkvæmdaáætlun ríkisstjórnarinnar til fjögurra ára um aðgerðir til að ná fram jafnrétti kynjanna' [Report on the Government's Four-Year Plan of Action to Achieve Gender Equality] Parliamentary Session 109, Item 214, Parliamentary Document 229.

Concurrently with the action plan, the minister submitted the first report on the situation for and trends within equal rights matters. The report is not detailed, but it does show a rapid increase in women graduating from university and some increase in the ratio of women in municipal governments. In other respects, however, the status of women was improving at a slow pace.³⁹

The new GEA passed in 1991 brought about considerable changes in the arrangement of equal rights matters.⁴⁰ The role of the Equality Council was changed: it no longer dealt with violations of the law but was, instead, intended to serve in an advisory capacity and oversee education, research, and policymaking.

The Equality Complaints Committee (ECC), composed of three legal experts, was formed to address violations of GEA 28/1991. If the ECC found that the provisions of the act had been violated, its task was to direct reasoned recommendations for corrective action to the party in question. If that party did not accept the recommendations of the Committee, it was empowered to instigate proceedings before the courts of law to obtain a declaratory judgment on the right of the applicant, in consultation with the applicant.

It was not stated explicitly in GEA 28/1991 who was permitted to bring complaints before the ECC. Instead, it was provided that the ECC should investigate notifications of violations brought before it. Access to the ECC was therefore quite open under the terms of the act.

In addition to the changes in administration and enforcement of the law, the other principal reforms under GEA 28/1991 concerned specific actions to improve the status of women. An important provision was added to Section 1, stipulating that positive measures should be taken to improve women's status. As noted earlier, this issue had been the subject of much dispute in the parliament during discussions on previous bills. As before, the prohibition on discrimination provided that special temporary measures to improve the status of women in order to achieve equal rights and equal status of women and men were not contrary to the law.

A new provision was included, providing that municipal equal rights committees should monitor and take the initiative on the implementation of temporary actions to improve the status of women in their respective municipalities. A related provision concerned the duty of the Equality Council to initiate certain temporary actions to improve the status of women. Finally, worth mentioning is a provision in Section 18 whereby the minister of social affairs was authorized to appoint a gender equality advisor to work in collaboration with the Equality Council on the rectification of the status of women, *inter alia* in public institutions and private enterprises.

A provision on the burden of proof in cases concerning discrimination in employment was the subject of another dispute in parliament. If someone considered that rights according to the provision had been violated and referred the

39 Félagsmálaráðherra [Minister of Social Affairs] 'Skýrsla félagsmálaráðherra um stöðu og þróun jafnréttismála' [Report on the Situation and Development of Equality Matters] Parliamentary Session 109, Item 215, Parliamentary Document 230.

40 Section 19(2) of GEA 28/1991.

matter in question to the Equality Complaints Committee, it was for the employer to demonstrate that their decisions rested on grounds other than gender.⁴¹ Several members of parliament thought that this rule was contrary to the basic principles of Icelandic law. It should be noted that this was before Iceland became a member-state of the European Economic Area.

The new GEA 28/1991 continued on the path away from the gender neutrality of Iceland's first gender equality legislation, GEA 78/1976. Indeed, a clear trend in a direction away from the gender neutrality of the earliest equality legislation and towards recognition of the need for a more women-specific approach can be detected. Concurrently with demanding gender equality and prohibiting all discrimination, it was necessary to provide a variety of measures to improve the status of women. In other words, it was admitted, at least to a certain degree, that positive measures were needed if substantive gender equality was to be achieved.⁴²

It appears clear that the Women's Alliance had a significant influence at this time, as the legislation bears the marks of its policies, including the emphasis on positive measures to improve the status of women. One of the principal points of focus for the Women's Alliance was that women's experiences, perceptions, values, and culture should be specifically recognized as a shaping force in society, and that traditional women's professions should be reevaluated.⁴³ It is clear from the platform of the Women's Alliance that there was a sharp focus on the need for structural changes in society if equality was to be achieved. Four parties formed the government when GEA 28/1991 was enacted: the Icelandic Progressive Party (*Framsóknarflokkurinn*), which defined itself as a typical centrist political party and has through the decades enjoyed strong support in rural areas and little support in the capital area; the Social Democratic Party (*Alþýðuflokkurinn*); the People's Alliance (*Alþýðubandalagið*), which was a socialist party; and the Citizen's Party (*Borgaraflokkurinn*), which could be described as a liberal party. Generally, the government was rather a left-wing one.

In general, considerable improvements were made with GEA 28/1991. Measures to ensure the enforcement of the law were strengthened, and both the government and municipalities were charged with various obligations to improve the status of women. Women-specific provisions were increased, while gender neutrality was decreased.

4.2.5 EEA and equal rights in the Constitution: 1991–2000

Equal rights affairs were a regular subject of debate in the Althing in the following years and, with the constitutional amendments effected in 1995, a general provision on equality before the law was included in Section 65 of the Constitution.⁴⁴

41 Alþingistiðindi, B-deild [Parliamentary Gazette, Section B] 1989–1990, 5056–5088 and 7483–7486.

42 The concept of substantive equality is defined in the introductory chapter of this book.

43 The Women's Alliance's Platform in 1987 (The Women's Alliance 1987) 2.

44 Stjórnarskipunarlög um breyting á stjórnarskrá lýðveldisins Íslands, nr. 33/1944, með síðari breytingum [Constitutional Act Amending the Constitution of the Republic of Iceland, no. 33/1944, with Later Amendments] no. 97/1995.

The legislative bill on amending the Constitution had initially proposed the following general equality provision: 'everyone shall be equal before the law, irrespective of sex, religion, opinion, national origin, race, colour, financial standing, birth or status in other respects'.⁴⁵ During deliberations in parliament, however, comments were made to the effect that it was necessary to provide more explicitly for the equal rights of women and men and that it was not stated sufficiently clearly whether 'positive discrimination'⁴⁶ was permitted.

The Constitutional Committee considered it appropriate to add a second paragraph to Section 65 of the Constitution, providing that 'men and women shall enjoy equal rights in all respects'. The Committee felt that it was not necessary to provide for special authorization for 'positive discrimination', however, as the principle of non-discrimination entailed such authorization, provided that its exercise was based on objective grounds, so the legislative bill was approved in this form.⁴⁷ This position taken by the Committee is very interesting and underlines an understanding of the concept of 'equal rights' according to which it entails authorization to resort to affirmative action to correct the status of disadvantaged groups, and in which 'positive discrimination' for such a purpose does not represent an exception to the principle of equal rights and non-discrimination.

The terms of Section 65(2) of the Constitution were soon put to the test in the Supreme Court. The case in question was a claim for damages, where a 13-year-old girl had been injured and her future income needed to be estimated so that the amount of damages might be determined. In a similar case in January 1995, before the entry into force of Section 65(2), the Supreme Court had found that it was not contrary to GEA 28/1991, then in force, to award lower compensation to girls than to boys for lost future income, as the average wages of female skilled workers were lower than those of male skilled workers. In the determination of compensation for children, the practice in Icelandic law had been to use the wages of skilled workers as a reference.⁴⁸ However, judgment in the case of the 13-year-old girl was pronounced on 20 February 1997, after the entry into force of Section 65(2). The judgment addressed the question of differences in the amount of compensation awarded to girls and boys.

Even though computations may show that the wages of women have been generally lower than those of men, this cannot be a deciding factor for the

45 Alþingistiðindi, A-deild [Parliamentary Gazette, Section A] 1994–1995, 2070, Parliamentary Session 118, Item 297, Parliamentary Document 389.

46 The concept of 'positive discrimination' was not explicitly defined, but it corresponds in many ways to the concept of 'affirmative action'.

47 Stjórnarskrárnefnd [The Constitutional Committee], 'Nefndarálit um frumvarp til stjórnskipunarlaga um breytingu á stjórnarskrá Íslands' [Committee Report of the Constitutional Committee on a Legislative Bill for Constitutional Amendment] Parliamentary Session 118, 1994–1995, Item 297, Parliamentary Document 758.

48 Supreme Court of Iceland, *Ólafur B. Ólafsson og Sjóvá-Almennar tryggingar hf. gegn Vivian D. Ólafsdóttur og gagnsök* [Ólafur B. Ólafsson and Sjóvá-almennar tryggingar v Vivian D. Ólafsdóttir and Recrimination] 5/1993 (1995).

future. Discrimination in the estimation of future income, when there are no clear indications as regards the victim himself/herself, cannot be justified by referring to average income; Section 65 of the Constitution provides that everyone shall be equal before the law and that men and women shall enjoy equal rights in all respects. For this reason, the unimpaired average earnings of skilled workers should be used as a reference in estimating the future loss of the appellant.⁴⁹

Further decisive judgments were handed down in the 1990s that formed the case law on the interpretation and application of GEA 28/1991.

In 1992, representatives of Iceland signed the Agreement on the European Economic Area (EEA).⁵⁰ Under this Agreement, Iceland undertook to incorporate the principal directives of the European Community regarding gender equality into Icelandic law. On 13 March 1997, the Supreme Court rendered judgment in a wage dispute comparable to Guðrún Emilsdóttir's case,⁵¹ and in doing so made reference to the EEA Agreement.⁵²

The first Supreme Court judgment in an employment case was handed down in 1993, with a decisive interpretation of GEA 65/1985 and GEA 28/1991.⁵³

The period from 1991 to 2000 was in many ways a period of optimism and progress. The Supreme Court seemed to be progressive in its judgments when it came to gender equality, and the opinions of the ECC were in general promising. The various obligations of both the government and municipalities to take action to improve women's status in accordance with GEA 28/1991 represented a wake-up call for the authorities, and various projects were implemented.

4.2.6 A step backwards – privatization and individualism: GEA 96/2000

In the summer of 1998, the minister of social affairs⁵⁴ appointed a committee to review GEA 28/1991. There were two principal reasons for this review: first, not enough progress had been made in the direction of gender equality in important areas, such as equal pay and women's access to positions of authority; second, several changes had taken place since the enactment of GEA 28/1991 in relation to

49 Supreme Court of Iceland, *Guðrún Eiríksdóttir gegn íslenska ríkinu* [Guðrún Eiríksdóttir v the Icelandic State] 147/1996 (1997).

50 The Agreement was ratified through *Lög um Evrópska efnahagssvæðið* [Act on the European Economic Area] 2/1993.

51 Referred to in Section 4.2.2 and further discussed in Section 4.6 of this chapter.

52 Supreme Court of Iceland, *Kærunefnd jafnréttismála f.h. Guðrúnar Erlu Ólafsdóttur gegn íslenska ríkinu og Ríkisútvarpinu* [Guðrún Erla Ólafsdóttir v the Icelandic State and the Icelandic National Broadcasting Service] 255/1996 (1997).

53 Supreme Court of Iceland, 339/1990 (1993) 40. This case is discussed further in Section 4.6 below.

54 The minister was from the Progressive Party (Framsóknarflokkur), which was in government together with the Independence Party.

both methodology and tasks related to gender equality.⁵⁵ In the drafting of the legislative bill for a new Gender Equality Act, the focus was on fulfilling all obligations related to gender equality resulting from Iceland's membership in the European Economic Area.⁵⁶ The committee also took into account international agreements, such as the United Nations Action Plan approved in Beijing in 1995.

The committee drafted a legislative bill, which the minister submitted to the Althing in the winter of 1998–1999.⁵⁷ The bill was in many respects progressive. Among other things, it provided that the ECC should be granted the power to issue binding decisions instead of giving non-binding opinions and recommendations. It also provided for gender quotas in nominations and appointments for members of state and municipal boards, councils, and committees, along with a number of other changes.

As described earlier, considerable advances had been made in Iceland's gender equality legislation, first with GEA 65/1985 and subsequently with GEA 28/1991. Additional changes in the legislative framework related to gender equality – both as a result of the accession of Iceland to the European Economic Area and, equally important, with the new provision on gender equality in the Constitution – raised hopes for further improvement of the legislation. It is therefore interesting to observe the commotion that occurred in parliament in the course of deliberations on legislative bills for a new equal rights act in 1999 and 2000.

There was a general consensus regarding the committee's legislative bill in 1999 in the Althing, and most of the speeches given by members, both supporters of the government and the opposition, expressed satisfaction with the bill in broad terms.⁵⁸ However, although it went through the first reading in parliament, it never progressed to the second reading and did not pass into law. In December 1999, the minister of social affairs⁵⁹ tabled a new and amended bill.⁶⁰ With some minor amendments, this became the Act on Equal Status and Equal Rights of Women and Men 96/2000.⁶¹

The amendments made to the later bill between parliamentary sessions related to, *inter alia*, the administration and enforcement of the act. The Office of Equal Rights Matters was replaced by the Directorate of Equality (DE), which in most respects had the same functions, but the reconciliatory role in disputes assigned to the Office in the earlier legislative bill was abandoned. At the third reading of

55 Alþingistiðindi, A-deild [Parliamentary Gazette, Section A] 1998–1999, 3260, Parliamentary Session 123, Item 498, Parliamentary Document 810.

56 Note was taken of the following directives of the EU: 75/117, 76/207, 92/85, 96/34 and 97/80.

57 Alþingistiðindi, A-deild [Parliamentary Gazette, Section A] 1998–1999, 3252, Parliamentary Session 123, Item 498, Parliamentary Document 810.

58 Alþingistiðindi, B-deild [Parliamentary Gazette, Section B] 1998–1999, 3825–3843 and 3851–3878.

59 This was the same minister who had tabled the bill in 1998.

60 Alþingistiðindi, A-deild [Parliamentary Gazette, Section A] 1999–2000, 2527, Parliamentary Session 125, Item 272, Parliamentary Document 373.

61 Lög um jafna stöðu og jafnan rétt kvenna og karla [Act on Equal Status and Equal Rights of Women and Men] 96/2000, hereafter GEA 96/2000.

the bill in the Althing, an amendment was proposed to Section 2, to the effect that the minister of social affairs should decide on where the DE should be located. Following the entry into force of the act, the DE was relocated from the capital city, Reykjavík, to Akureyri, a town on the north coast of Iceland. The idea of a new ECC was abandoned, and the ECC was maintained in its earlier form – that is, as a committee giving non-binding legal opinions. During deliberations in the Althing, a provision was added to Section 3 on the Directorate of Equality, authorizing that body, subject to certain conditions, to take legal action to obtain a declaratory judgment regarding the rights of an applicant on the basis of a legal opinion prepared by the ECC. During the period in which GEA 28/1991 was in force, the ECC was itself authorized to take legal action under Section 21 of the act if a party to a case would not accept its recommendations.

A provision in Section 6 of the earlier legislative bill regarding the criteria to be used in the assessment of the qualifications of individuals in employment cases was abandoned.

In Section 20 of the new legislative bill from December 1999, on participation in public boards, committees, and councils, a return was made to the arrangements that existed under GEA 28/1991. It was no longer required to nominate both a woman and a man, as provided in the earlier legislative bill. The section now provided that public committees, councils, and boards should, *to the extent possible*, be composed of an equal number of women and men, and that the nominating parties should always be reminded of this duty. The only exception to this was the Equality Council: according to Section 7 of GEA 96/2000, for appointments to this body, the nominating parties should nominate both a woman and a man, and the minister should ensure equal representation of women and men on the Council.

Notwithstanding the reforms envisaged in the legislative bill, a change was now made back to the earlier arrangement, as in GEA 65/1985, regarding the gender neutrality of the act, which was virtually complete. GEA 96/2000 did not indicate that one gender was disadvantaged in comparison with the other, except in Section 1.1(d), which stated the purpose of the act, namely, to establish and preserve equal rights and equal opportunities for men and women. Section 1.1 describes in seven subsections the means of achieving the act's objectives, and one of these, Section 1.1(d), provides that the status of women, specifically, should be improved and their opportunities in society increased. Section 22.3 retains the provision that special consideration for women in connection with pregnancy and childbirth should not be regarded as discrimination. In other respects, however, there was no specific mention of the status of women.

All other references to positive measures to improve the status of women, as in GEA 28/1991, were withdrawn. The municipal equality committees, which previously had a duty to take special initiatives to improve the status of women, now had a duty to take special initiatives to ensure the equal status and equal rights of women *and* men. The same applied to the Equality Council. Furthermore, equal rights advisors were no longer authorized to take initiatives involving specific actions in favour of women. Surprisingly, there was limited debate in the Althing regarding the amendments made to the legislative bill. It is difficult to see that there

were any conscious ideological issues at play in the debate, and no deliberations took place regarding the nature of or ideas behind the legislation, unlike during the deliberations that preceded the equal rights legislation passed in 1985 and 1991.

However, a positive step was taken to directly address sexual harassment for the first time in the new legislation. Although limited, Section 17 obliged employers and managers of institutions and social activities to protect employees, students, and clients from sexual harassment in the workplace, institution, social activities, or schools. Although sexual harassment had not been explicitly mentioned in the previous acts on gender equality, a provision in GEA 28/1991 on non-discrimination in employees' working environments and working conditions had been interpreted as covering sexual harassment.

By the time that GEA 96/2000 entered into force, there had been some changes in the Althing. The Women's Alliance had been dissolved in 1999 and was not represented in the Althing in 2000. The number of women in parliament had grown significantly, although women still represented only 35% of the total number of members following the parliamentary election of 1999.⁶²

Two parties formed the government in the period 1995–2003: the Progressive Party (*Framsóknarflokkurinn*) and the Independence Party (*Sjálfstæðisflokkurinn*), a conservative right-wing party that had been the largest party in Iceland for decades and that led the government in this period.⁶³

The new GEA 96/2000 was in many respects a disappointing step backwards in the development of gender equality legislation in Iceland. The step back to gender-neutral legislation and the abolition of various measures to improve the status of women, which had been an important part of GEA 28/1991, was conspicuous. The changes to the powers and roles of the bodies tasked with enforcing the law on gender equality were less problematic, although no progressive steps were made in this context. However, some backwards movement could be seen in relation to the support provided to applicants. According to GEA 28/1991, the ECC was authorized to instigate proceedings before the courts of law on behalf of an applicant if a party did not accept the recommendations of the ECC. This authorization was abandoned with GEA 96/2000.

4.2.7 A progressive period 2008–2020: GEA 10/2008

Like other societies, Icelandic society underwent a great deal of turbulence in the first decade of the 21st century. There was a tremendous surge in the Icelandic economy, and banks that had previously been owned by the state were privatized in a process that began just before the turn of the century and ended with the sale

62 Alþingi [Althing], 'Konur á Alþingi' [Women in Parliament] <<https://www.althingi.is/thingmenn/althingismannatal/konur-a-althingi/kjornar-konur/>> accessed 12 April 2022.

63 Hagstofa Íslands [Statistics Iceland], 'Úrslit alþingiskosninga' [The Outcome of the Parliamentary Election] 1963–2017 <<http://px.hagstofa.is/pxis/pxweb/is/Sogulegar/Sogulegarkosningar/SOG13002.px/table/tableViewLayout1/?rxid=b73cd032-a958-4b57-b448-65aa610595e1>> accessed January 2022.

of the country's two largest banks in 2002–2003.⁶⁴ The coalition government of the Independence Party and the Social Democratic Alliance took power in 2007, and in the autumn of 2007 the minister of social affairs, Jóhanna Sigurðardóttir, a member of the Social Democratic Alliance, tabled a legislative bill for a new act on gender equality, which passed as GEA 10/2008.⁶⁵ Sigurðardóttir had been a member of the parliament for many years and became the first female prime minister in Iceland in 2009. She was one of the female members of the parliament that had emphasized gender equality for decades and, in 1990, as minister of social affairs, she had submitted the bill of legislation that was enacted as the above-mentioned GEA 28/1991.

The principal change from GEA 96/2000 to GEA 10/2008 was that GEA 10/2008 was more detailed, particularly in relation to the Equality Complaints Committee (ECC). Under GEA 10/2008, the ECC was authorized to return binding decisions that could not be referred to a higher authority, although disputing parties could refer its decisions to the courts of law. The Committee was also authorized to decide that the respondent to a complaint should pay to the complaining party the costs involved in making the complaint if the ECC found for the latter. Under the new legislation, individuals, businesses, organizations, and associations, acting in their own names or on behalf of their members, could submit complaints to the ECC. Also, if the Directorate of Equality had reason to suspect that an organization, business, or association had violated the act, the DE was required to investigate whether there were grounds for requesting that the ECC should subject the matter to process.

However, access to the Committee was narrowed. The time limit for filing a complaint was shortened from one year to six months unless some special circumstances could justify a longer time limit, in which case a complaint could be filed up to one year after an alleged violation. A provision on the criteria to be used by the ECC in its assessment of the qualifications of individuals in employment cases was also included in the new legislation.

Steps were taken to address structural discrimination.⁶⁶ Gender mainstreaming was introduced as a part of all policymaking, planning, and, where appropriate, decision-making within ministries and public institutions under their aegis.

64 Report of the Special Investigation Commission established by Act 142/2008 by the Althing in December 2008.

65 *Lög um jafna stöðu og jafnan rétt kvenna og karla* [Act on Equal Status and Equal Rights of Women and Men] 10/2008, hereafter GEA 10/2008.

66 Structural discrimination is defined neither in Icelandic laws nor in EU legislation. In this chapter, I have used the definition of the European Commission against Racism and Intolerance (ECRI) in its General Policy Recommendation No. 2: Equality Bodies to Combat Racism and Intolerance at National Level. According to the ECRI, structural discrimination refers to rules, norms, routines, patterns of attitudes, and behaviour in institutions and other societal structures that, consciously or unconsciously, present obstacles to groups or individuals in terms of access to the same rights and opportunities that others enjoy and that contribute to less favourable outcomes for them than for the majority of the population.

Equal representation of men and women in government and municipal committees, councils, and boards became obligatory, and nominating parties to such bodies were to nominate both a man and a woman.

Gender-based harassment and violence were also addressed in GEA 10/2008. Employers and the directors/managers of institutions and civil society organizations were required to take special measures to protect their employees, students, and clients from gender-based or sexual harassment in the workplace, institution, social activities, or schools.

Amendments were made to various acts of law over this period to secure gender quotas on corporate boards of directors. Through amendments to various acts regulating companies and societies,⁶⁷ gender quotas on the boards of directors became obligatory. Similar provisions were introduced in the Act on the National Power Company 42/1983 and the Act on the Establishment of Reykjavík Energy 139/2001.

In the period from 2008 to 2020, some amendments were made to GEA 10/2008, mostly due to EEA obligations. Directives 2006/54/EC, 2010/41/EU, and 2004/113/EU were implemented by amendments to GEA 10/2008 in 2014 and 2015.⁶⁸ No extensive changes were needed to the act to implement the substance of these directives; however, particularly since the scope of application of Iceland's gender equality legislation had been extensive for most of its period of existence and, according to the ECC, access to goods and services was already covered by the general prohibition on discrimination.⁶⁹ The changes mainly involved some adjustments to the definitions of certain concepts.

In general, GEA 10/2008 was a rather progressive piece of legislation, rectifying the step backwards taken in 2000 and giving hope for further improvement of women's rights. The enforcement of the legislation was in general improved, and positive measures, such as gender quotas in firms and institutions as well as in public boards, councils, and committees, were strengthened.

67 Lög 13/2010 um breytingu á lögum um hlutafélög og lögum um einkahlutafélög [Act 13/2010 Amending the Act on Private Limited Companies and the Act on Public Limited Companies]; Lög nr. 49/2011 um breytingu á lögum um stofnun sameignarfyriretækis um Orkuveitu Reykjavíkur, lögum um Landsvirkjun, lögum um samvinnufélög og lögum um sameignarfélög [Act no. 49/2011 Amending the Act on Reykjavík Energy, Act on Landsvirkjun, Act on Cooperative Societies and Act on General Partnerships].

68 Lög 62/2014 um breytingu á lögum um jafna stöðu og jafnan rétt kvenna og karla nr. 10/2008 (atvinna, störf o.fl. – EES-reglur) [Act 62/2014 Amending Act on the Legal Status and Legal Rights of Women and Men 10/2008 (employment, jobs, et al. – EEA rules)]; Lög 79/2015 um breytingu á lögum um jafna stöðu og jafnan rétt kvenna og karla nr. 10/2008 (vörukaup og þjónusta – EES-reglur) [Act 79/2015 Amending Act on Legal Status and Legal Rights of Women and Men 10/2008 (goods and services – EEA rules)].

69 Equality Complaints Committee, Case 4/2002, 26 June 2002. The case concerned different membership fees for women and men in a golf club.

4.3 The current equality and anti-discrimination legislation

4.3.1 Introduction

In 2019, equal rights matters were transferred from the Ministry of Social Affairs to a separate Office of Equal Rights Affairs under the Prime Minister's Office.⁷⁰ In October 2020, Prime Minister Katrín Jakobsdóttir⁷¹ presented two legislative bills, one on Equal Status and Equal Rights Irrespective of Gender, which became GEA 150/2020,⁷² and the other on the Administration of Matters concerning Equality, which became Act 151/2020.⁷³ The reason for these two acts was that the role of the enforcement bodies, the Directorate of Equality and the Equality Complaints Committee, had been expanded to cover the enforcement of acts addressing discrimination on grounds other than gender.⁷⁴

Gender equality thus continued to be separate from other discrimination parameters in Icelandic law. The main reason was probably opposition from women in Iceland, who feared the weakening of legal protection for women. Many feared that it would prove impossible to reach a consensus on general equal rights and non-discrimination legislation that would ensure that such legislation would be as extensive as that of the country's gender equality legislation, and that this would lead to reduced protection of women's rights.

Apart from the gender equality legislation, two equality acts are currently in force in Iceland: the Act on Equal Treatment in the Labour Market⁷⁵ and the Act on Equal Treatment Outside the Labour Market.⁷⁶ These two acts cover discrimination based on race, ethnic origin, religion/belief, life stance, disability, reduced working capacity, age, sexual orientation, gender identity, sexual characteristics, or gender expression and will be discussed further in Section 4.3.3.2.

70 According to the Presidential Decree on the Division of Political Affairs between Ministries in the Government of Iceland no. 19/2018, all equal rights matters – that is to say, equal status and equal rights irrespective of gender, equal treatment outside the labour market, equal treatment in the labour market, and gender autonomy as well as the functions of the Directorate of Equality, the Equality Complaints Committee, and the Icelandic Equality Fund – fell under the aegis of the Office of Equal Rights Affairs.

71 Katrín Jakobsdóttir is a member of the Left–Green Movement (Vinstri hreyfingin–grænt framboð).

72 Lög um jafna stöðu og jafnan rétt kynjanna [Act on Equal Status and Equal Rights Irrespective of Gender] 150/2020.

73 Lög um stjórnýslu jafnréttismála [Act on the Administration of Matters Concerning Equality] 151/2020, hereafter AAMCE.

74 Lög um jafna meðferð á vinnumarkaði [Act on Equal Treatment in the Labour Market] 86/2018 and Lög um jafna meðferð óháð kynþætti og þjóðernisuppruna [Act on Equal Treatment Irrespective of Race and Ethnic Origin] 85/2018. The title of the latter was changed in June 2022 to Lög um jafna meðferð utan vinnumarkaðar [Act on Equal Treatment Outside the Labour Market], hereafter AETOLM.

75 Act 86/2018.

76 Act 85/2018.

A progressive step was taken when gender autonomy was ensured through the Act on Gender Autonomy (AGA).⁷⁷ This act declares that every person has the right to define their own gender, and, thereby, it seeks to guarantee the recognition of an individual's gender identity and to protect the rights of persons to physical integrity. Under the AGA, every person from the age of 15 has the right to change their gender registration in Registers Iceland. Alongside such a change, the applicant also has the right to a name change. Moreover, it is prohibited to require the performance of a surgical procedure or the use of medication, hormonal treatments, or other medical interventions as a condition for changing the registration of a person's gender. Neutral gender registration is also allowed, and public and private bodies that register gender shall provide for the possibility of registering gender as neutral.

Children born with atypical sex characteristics have the right to physical integrity concerning their sex characteristics. Permanent changes to the sex characteristics of a child under the age of 16 born with atypical sex characteristics are to be made only in conformity with the will of the child.

It is stated in the AGA that a person who has changed their official gender registration shall enjoy all legal rights of the registered gender and that everyone is entitled to health-care services in accordance with their sex characteristics, irrespective of gender registration. On 6 July 2021, there were 40 individuals in Registers Iceland with a neutral gender registration, including two children.⁷⁸

The rest of the present section aims to clarify the terms of the current gender equality legislation in Iceland, along with its scope, both personal and material, and the concept of gender in the legislation, starting with a brief overview of the role of international law. It also examines Iceland's legislation on equality based on grounds other than gender, as well as the impact of international obligations.

4.3.2 *The role of international law*

In terms of the impact of international agreements and obligations, Iceland has ratified the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), as well as its Optional Protocol, but these have not been incorporated as Icelandic law.⁷⁹ CEDAW has not been prominent in the legislative procedure in Iceland and was not even mentioned in the legislative bills on GEAs until 2020, when one reference was made to the Convention in the notes to a legislative bill for GEA 150/2020. However, the Beijing Declaration and Platform for Action (BDPA) has been the subject of debate, and the prime minister has stated that the

77 Lög um kynrænt sjálfraði [Act on Gender Autonomy] 80/2019 as amended by Acts 159/2019, 152/2020 and 154/2020, hereafter AGA 80/2019.

78 Information from an employee of Registers Iceland in an email message dated 6 July 2021.

79 See further details in note 28.

Convention and the BDPA have influenced the ideology, legal development, and, especially, the government's project choices in the area of gender equality.⁸⁰

In a report of the CEDAW Committee related to the Committee's seventh and eighth periodic reports on Iceland, the Committee expresses its concerns regarding limited awareness of the Convention in the following manner:

7. The Committee notes the public commemoration of the 100th anniversary of women's suffrage in the State party. It is concerned, however, that there is a general lack of awareness of the Convention and the Optional Protocol thereto in the State party, in particular among government officials, the judiciary and other law enforcement officials, in addition to a lack of cases adjudicated by the courts, including the Supreme Court, in which reference has been made to the Convention. It is also concerned that women themselves are not aware of their rights under the Convention and of the individual communications and inquiry procedures under the Optional Protocol, and thus lack the information necessary to claim their rights. That may be due to the non-incorporation of the Convention into the national legal order.⁸¹

In addition, the CEDAW Committee has commented on the gender-neutral approach of Iceland's gender equality legislation and, in its concluding observations in 2016, which are the last observations published, the Committee recommended that Iceland comprehensively address its gender-neutral approach in legislation and policymaking, emphasizing the potentially negative implications of gender-neutral policies for public funding programmes.⁸²

Iceland is a member-state of the EEA and has therefore undertaken to comply with the provisions of Article 69 of the Convention on the European Economic Area on equal pay for equal work and Article 70 on promoting the principle of equal treatment for men and women. However, the ramifications of this membership have not been put to any significant test in the area of gender equality, the exceptions being that the EFTA Surveillance Authority (ESA) has commented on the phrasing of GEA 10/2008 and the EFTA Court, at the request of the ESA, has declared that Iceland failed to fulfil its obligations according to Directive 2006/54/EC within the time limits set for implementing the directive correctly into Icelandic legislation.⁸³ The ESA's comments concerned the phrasing in GEA 10/2008 of the definitions of some concepts of Directive 2006/54/EC,⁸⁴ and the most important of

80 Jafnrétti 2020, Skýrsla forsætisráðherra um jafnréttismál 2018–2019 [Equality 2020: The Prime Minister's Report on Equality Matters 2018–2019] 108.

81 CEDAW Committee, 'Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Iceland' 10 March 2016, CEDAW/C/ISL/CO/7-8, paras 7 and 8.

82 *Ibid.*, paras 15 and 16.

83 Case E-10/13 *EFTA Surveillance Authority v Iceland* (2013) EFTA Court.

84 Directive 2006/54/EC of the European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast) (2006) OJ L 204/23, Articles 2(1)(a)–(d) and Articles 2(2)(a)–(b).

these related to gender-based and sexual harassment. According to GEA 10/2008, the conduct of an alleged perpetrator would not be understood as harassment unless ‘it is clearly implied that the conduct is not welcome’.⁸⁵ The ESA pointed out that this definition of gender and sexual harassment was not in consonance with the Gender Equality Directive.⁸⁶ The comments made by the ESA have since been taken into account, and the phrasing of GEA 10/2008 has been modified accordingly.⁸⁷ Generally speaking, European law has not come into question to any significant degree in Iceland’s courts of law concerning equality and non-discrimination legislation, and the debate in the society or in the parliament generally does not focus on whether certain circumstances or decisions violate obligations under the EEA Agreement.

4.3.3 Discrimination grounds

4.3.3.1 The concept of gender

The meaning, even the definition, of the concept of gender/sex/sexuality is somewhat vague in Icelandic legislation. According to GEA 150/2020, the scope of application and phrasing of that act is not restricted to women and men; instead, Article 1, which lays down the objective of the act, states that ‘gender’ (Icel. ‘kyn’) refers to ‘*women, men and persons whose gender is registered as neutral in Registers Iceland unless otherwise stated*’.⁸⁸ This phrasing drew some criticism from the gay community, in which it was pointed out that since neutral registration was not the same thing as gender, it was inappropriate to refer to ‘women, men and persons whose gender is registered as neutral’.⁸⁹

The definition of the term ‘gender’ in the Act on Gender Autonomy is different from the one in the GEA. According to Article 2 of the AGA, the term ‘gender (sexuality)’ (Icel. ‘kyn’ [‘kynverund’]) is defined as ‘*a collective term, including, inter alia, sex characteristics, gender, gender identity and gender expression*’.

In June 2022, the Althing submitted a legislative bill extending the scope of application of Act 85/2018 on Equal Treatment Irrespective of Race and Ethnic Origin. This act now includes, among other things, protection against discrimination based on *gender identity, sexual characteristics, and gender expression*. The European Court of Justice has long since concluded that discrimination based

85 Sections 2(1) and (3)–(4) of GEA 10/2008.

86 Article 2(1) (c)–(d) of Directive 2006/54/EC.

87 Lög 62/2014 um breytingu á lögum um jafna stöðu og jafnan rétt kvenna og karla nr. 10/2008 (atvinna, störf o.fl. – EES-reglur) [Act 62/2014, Amending GEA 10/2008 (employment, jobs, et al. – EEA rules)].

88 In Icelandic, the concept of both ‘sex’ and ‘gender’ is expressed by *kyn* or *kynferði*. The official English translation of the concept of *kyn* in GEA 150/2020 is ‘gender’.

89 Alþingistiðindi A-deild [Parliamentary Gazette, Section A] 2020–2021, ‘Comment from the National Queer Association of Iceland and Trans-Iceland on the Proposal to GEA’, Parliamentary Session 151, Parliamentary Documents 209 and 202, 29 October 2020.

on gender reassignment falls within the scope of gender discrimination.⁹⁰ It might therefore have been more reasonable to provide a more detailed account of the concept of ‘gender’ in Act 85/2018 and thereby maintain consistency in legislation concerning rights based on gender. Limiting the definition of gender in GEA 150/2020 to ‘*women, men and persons whose gender is registered as neutral*’ means that it is not clear whether sex characteristics, gender identity, and gender expression are covered by the concept of gender discrimination in that act. This difference in definitions in the legislation has not yet been put to the test.

The new GEA 150/2020 also focuses on changing the androcentric phrasing of previous gender equality legislation. Icelandic is a highly gendered language.⁹¹ In general, the masculine form of adjectives, numerals, and pronouns is used as the ‘neutral’ gender. In addition, the word ‘man’ (Icelandic ‘maður’), which is a masculine noun, is used, on the one hand, to mean the species *homo sapiens* – that is, human beings – and, on the other, to mean a *male person*, which has the effect that many women and non-binary/genderqueer people do not identify with the word. In Icelandic laws, the individual concerned is generally referred to as ‘a man’ (Icelandic ‘maður’). Finally, most job titles and professional titles in Icelandic, such as ‘driver’, ‘teacher’, ‘lawyer’, ‘judge’, etc., are masculine nouns. It can be argued that the androcentric nature of the Icelandic language is a form of structural discrimination and that this trend in the use of masculine job titles represents an effort to address the reality that the norms of society are largely male- or masculine-oriented. The effort made by various institutions, such as the National Radio, to use less androcentric phrasing has been the subject of heated debate in Iceland, as the Icelandic language has always been an important part of the identity of the Icelandic people but at the same time can also be very exclusive.

4.3.3.2 *Protection against discrimination on other grounds*

Under the EEA Agreement, Iceland was not required to implement the non-discrimination directives of 2000.⁹² Even so, the Althing decided to incorporate the substance of those directives into Icelandic law. This was done in 2018 with the enactment of Act 85/2018 on Equal Treatment Irrespective of Race and Ethnic Origin and Act 86/2018 on Equal Treatment in the Labour Market. The legislative bills for these acts noted that the acts did not represent an actual implementation of the directives into Icelandic law; instead, the bills were intended to bring

90 Case C-13/94, *P v S and Cornwall*, Judgment of 30 April 1996 ECLI:EU: C:1996:170, para 20.

91 Jyl Josephson and Þorgerður Einarisdóttir, ‘Language Purism and Gender Icelandic Trans Activists and the Icelandic Linguistic Gender Binary’ [2016] 3(3–4) *Transgender Studies Quarterly* 376–387 <<https://doi.org/10.1215/23289252-3545107>> accessed 13 January 2022; Eiríkur Rögnvaldsson, ‘Má gera kynsla í íslenskunni?’ [Is Gender Havoc Allowed in the Icelandic Language?] University of Iceland website <<https://notendur.hi.is/eirikur/Kyn.pdf>> accessed 13 January 2022.

92 Council Directive 2000/43/EC Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin; Council Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation.

about substantive harmony between Icelandic law and the legislation in force in the European Union based on the directives in question.⁹³

Such an approach also meant that the EFTA Surveillance Authority (ESA) would not be called on to verify whether the legislation constituted adequate transposition of the directives. Nevertheless, it was assumed that the interpretation of the provisions of these acts would take account of precedents of the European Court of Justice in terms of the latter's interpretation of the directives' substance.⁹⁴

The acts are not in all respects identical to the directives. Among other things, Act 86/2018 has a wider personal scope than Directive 2000/78/EC, as it covers discrimination in the labour market based on race, ethnic origin, religion/belief, life stance, disability, reduced working capacity, age, sexual orientation, gender identity, sexual characteristics, or gender expression. Also, Act 85/2018 does not extend to the job market, as discrimination on the basis of racial or ethnic origin in the labour market falls within the scope of Act 86/2018.

In regard to parameters other than gender, it should be noted that when Act 85/2018 on Equal Treatment Irrespective of Race and Ethnic Origin passed into law on 25 June 2018, it included the following interim provision:

Within a year of the entry into force of this Act, the Minister shall submit a legislative bill to the Althing providing for an amendment of the Act, to extend its application beyond the equal treatment of persons, irrespective of race and ethnic origin, and apply it to belief, life stance, disability, age, sexual orientation, gender identity, sexual characteristics or gender expression in all fields of society, except the labour market, cf. the Act on Equal Treatment in the labour market.

In December 2021, the prime minister submitted a legislative bill providing for an amendment to Act 85/2018 in accordance with the interim provision.⁹⁵

Act 85/2018 also provides for a wide scope of application, prohibiting discrimination of all kinds in all areas of society outside the labour market.⁹⁶

The concept of discrimination was extended to cover instructions to discriminate, harassment, and denial of reasonable accommodation. Finally, multiple discrimination is specifically prohibited, which represents a significant step forward.⁹⁷

93 Minister of Social and Equality Affairs, 'Notes to the Legislative Bill on the Act on Equal Treatment Irrespective of Race and Ethnic Origin', Parliament 148, 2017–2018, Item 393, Parliamentary Document 550.

94 Ibid.

95 The bill was submitted in the Althing on 15 June 2022 under the title *Lög um breytingu á lögum um jafna meðferð óháð kynþætti og þjóðernisuppruna* [Act on Amending the Act on Equal Treatment Irrespective of Race and Ethnic Origin] 85/2018. The title of Act 85/2018 became *Lög um jafna meðferð utan vinnumarkaðar* [Act on Equal Treatment Outside the Labour Market] AETOLM 85/2018.

96 Section 7 of Act 85/2018.

97 See the definition of 'multiple discrimination' in Section 2(1:3) of GEA 150/2020 as amended by *Lög nr. 63/2022 um breytingu á lögum um jafna meðferð óháð kynþætti og þjóðernisuppruna* [Act 63/2022 Amending Act on Equal Treatment Irrespective of Race and Ethnic Origin] 85/2018.

4.3.3.3 *Protection against intersectional discrimination*

GEA 150/2020 does not address how to accommodate the situation of marginalized groups of women, such as women of foreign origin, women with a disability, and LGBTQ women. However, multiple/intersectional discrimination was addressed in the act.

Until the last few decades, Icelandic society has generally been considered very homogeneous. In some ways, owing to the country's geographical location and isolation as an island far from the European or American continents, it was not well known in the world, and there were few people in the country who had ethnic origins other than Nordic or, more generally, white European. Class discrimination was not very prominent in Iceland in comparison with other countries until the very late 20th century, when a fundamental change occurred in that regard.⁹⁸ Despite widespread belief in the homogeneity of the Icelandic nation, there were of course disparities in power, based on grounds such as gender, disability, and origin.

Discrimination against people of foreign origin has not been a prominent subject within Icelandic law, but reports of poor living conditions of foreign-born people in Iceland have become ever more frequent in recent years. Studies have shown that women of foreign origin are marginalized, and they are generally in a weaker position than women of Icelandic origin, especially when it comes to gender-based violence.⁹⁹ In addition, the salaries of immigrants were up to 16% lower than those of locals in 2017.¹⁰⁰

In relation to women with disabilities, it has been demonstrated that their situation is far worse than that of women without disabilities in various areas, especially as victims of violence.¹⁰¹

In order to capture this reality and reach out further to marginalized groups, a provision on *multiple discrimination* was added to the new GEA 150/2020. This concept is defined in Section 2 as 'when an individual is subjected to discrimination based on 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, protect against. Multiple discrimination can

98 Stefán Ólafsson and Arnaldur Sölvi Kristjánsson, 'Ójöfnuður á Íslandi. Skipting tekna og eigna í fjölbjódlegu samhengi' [Inequality in Iceland: Division of Income and Assets in a Multinational context] (Háskólaútgáfan [University Publishing] 2017).

99 Þorgerður Einarsdóttir, Thamar M. Heijstra and Guðbjörg Linda Rafnsdóttir, 'The Politics of Diversity: Social and Political Integration of Immigrants in Iceland' 2018 14(1) *Iceland Review of Politics & Administration* 131; Unnur Dis Skaptadóttir and Kristín Loftsdóttir, *Konur af erlendum uppruna. Hvar kveppir að?* [Women of Foreign Origin: What Are the Problems?] (University of Iceland 2019).

100 Statistics Iceland, 'Analysis on Pay Gap by Background 2008–2017', Statistical Series, 19 March 2019, 2, 9.

101 Hrafnhildur Snæfríðar- og Gunnarsdóttir and Rannveig Traustadóttir, *Violence Against Women with Disability and Their Access to Support* (University of Iceland 2015); National Commissioner of the Icelandic Police, *Ofbeldi gegn fötluðum á Íslandi* [Violence Against People with Disability in Iceland] (2020) <<https://www.logreglan.is/wp-content/uploads/2021/01/Ofbeldi-gegn-fotludum-2020.pdf>> accessed January 2022.

either be intersectional in such a way that *two or more reasons for discrimination create a special basis for discrimination*, or it can be *dual/multiple so that the discrimination is based on two or more independent reasons for discrimination*' (emphasis added).

According to the comments on the legislative bill, intersectional discrimination is when two or more protected discrimination grounds together create a *new ground* for discrimination. The example provided is that of a black woman who is discriminated against in a company where neither white women nor black men are discriminated against, but where, when those two grounds come together, they create a new ground for discrimination.¹⁰²

Before the entry into force of GEA 150/2020, one case had been brought before the ECC concerning discrimination based on gender, nationality, and age arising out of a dismissal, where the applicant complained of discrimination based on these three grounds. The case concerned the termination of employment of the applicant, a woman of foreign origin, by a public transport company. The reason given by the company was a complaint from one of the applicant's male co-workers regarding inappropriate messages she had sent him. The company had concluded that the applicant had made sexual overtures to her co-worker in her messages and thereby had been in breach of her duties.

The ECC's decision noted that the applicant's co-worker was a man in a managerial position and considerably younger than the applicant, who had the position of a service representative. The decision includes the following passages:

it cannot be ignored that the messages were written in Icelandic, which is not the applicant's first language. The possibility cannot, therefore, be excluded that language comprehension influenced the substance of the messages, as it is established that this was not specifically investigated by the respondent, even though the applicant is of a different nationality than the co-worker.

With reference to all the above, [...] the ECC finds, that the applicant has shown a probability that discrimination based on gender, age or ethnicity occurred upon the termination of her employment. Accordingly, it falls to the respondent to show that the decision on termination was based on reasons other than gender, race, or ethnic origin. [...]. It is therefore the conclusion of the Equality Complaints Committee that the applicant was subjected to discrimination based on gender – see Section 26(1) of Act 10/2008 – age, or ethnic origin – see Section 8(1) of Act 86/2018 – on the termination of the employment of the applicant.¹⁰³

102 The comments refer to a famous case from the United States in 1976, the so-called DeGraffenreid Case, U.S. District Court for the Eastern District of Missouri, *Emma DeGraffenreid et al. v General Motors Assembly Division, St. Louis, a Corporation et al.* No. 75-487 C (3), (1976).

103 Equality Complaints Committee, Case 2/2021, 15 September 2021.

The ECC's conclusion is remarkable for several reasons, but in regard to multiple discrimination it is interesting that the Committee concludes that the applicant was subjected to discriminatory practices on the basis of gender, age, *or* ethnicity. The Committee, therefore, does not appear to adopt a position regarding each element individually and does not in its decision address multiple discrimination as such. This means that the earlier GEA 10/2008 indeed did extend to multiple discrimination, at least when the discrimination was dual/multiple. However, it is not clear whether the earlier legislation extended to intersectional discrimination as defined in the provision of GEA 150/2020 as involving 'two or more reasons for discrimination [that] create a special basis for discrimination'.

The ECC has ruled in another case on alleged discrimination based on gender and age. In its conclusion, the ECC did not mention the new provision on multiple discrimination but dealt with each ground separately.¹⁰⁴

In any case, it will be interesting to see whether the new provision on multiple discrimination will result in better legal protection for the marginalized groups that the legislation is intended to protect.

The needs of women in marginalized groups have not been a central issue in the various governments' gender equality action programmes over the years. In the equality chapter of the current government's governmental agreement, the matter is not addressed.¹⁰⁵ It must be said that Acts 86/2018 and 85/2018 have not been the tools that many hoped would strengthen the status of the women of non-Icelandic origin that fell under the scope of those acts.

4.3.4 Protection against individual discrimination under GEA 150/2020

4.3.4.1 The aim, scope, and content of the prohibition of gender discrimination

The scope of application remains wide in GEA 150/2020. According to Section 1, the act aims *to prevent discrimination* based on gender and to maintain gender equality and equal opportunities for the genders *in all spheres of society*. According to Section 16, 'All forms of discrimination, direct or indirect, on grounds of gender, are prohibited.' In relation to preventing discrimination in *all spheres of society*, these two provisions must be understood as meaning that discrimination of any kind based on gender is prohibited in all areas of society.

Furthermore, all people shall have equal opportunities to benefit from their enterprise and to develop their skills irrespective of gender. This aim shall be achieved by the various means listed in 13 points in Section 1. Only one of these refers especially to women, where Point (c) says that the aim shall be achieved by, among other things, specifically improving the position of women and increasing their opportunities in society.

104 Equality Complaints Committee, Case 11/2021, 2 March 2022.

105 The Prime Minister of Iceland, *Jafnrétti 2020, Skýrsla forsætisráðherra um jafnréttismál 2018–2019* [Equality 2020: The Prime Minister's Report on Equality Matters 2018–2019] (Prime Minister's Office 2020).

GEA 150/2020 applies equally to the public and private sectors. In general, private life is not specifically exempted from the coverage of the act. The only exceptions are set out in Section 17, where discrimination regarding access to or supply of goods or access to or granting services in private and family life is excluded.

Nevertheless, it may be assumed that there is some doubt regarding the application of the act to personal relations, such as family life, where the constitutional right to personal privacy could conflict with other rights. It is worth noting that in deliberations in the Althing on the first gender equality legislation, it emerged in the contribution of the minister of social affairs to the debate that the act did not extend to family life.¹⁰⁶ However, prior to Section 17 of GEA 150/2020, there had never been any provision in Iceland's gender equality legislation that excluded personal and family life from the legislation's scope.

Apart from the general prohibition of gender discrimination in Section 16 of GEA 150/2020, certain areas are specifically emphasized and referred to in Chapter III on the prohibition of gender-based discrimination. That chapter is divided into seven sections, partly as a way of facilitating harmonization with EU law.

Section 16 of Chapter III sets out the *general prohibition on discrimination*, which includes both direct and indirect discrimination based on gender. Direct discrimination is defined in Section 2 as 'when an individual receives, based on gender, treatment less favourable than another individual receives, has received or would receive in comparable situations'. Indirect discrimination is defined as 'when an apparently neutral provision, criterion or practice puts individuals of one gender at a disadvantage compared with individuals of another gender unless this can be objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'. The definitions of direct and indirect discrimination are identical to those provided in Directive 2006/54/EC. However, differential treatment, whether direct or indirect, can be legitimate if the aim is objective and the method of obtaining the aim satisfies the criteria of necessity and proportionality.

Giving instructions to discriminate on the basis of gender also constitutes discrimination under the terms of GEA 150/2020.

Gender-based harassment or sexual harassment constitutes discrimination under the act, as does all unfavourable treatment of an individual that may be attributed to the fact that the individual has rejected gender-based harassment or sexual harassment or has submitted to it. Gender-based harassment is defined in Section 2 as 'behaviour linked to the affected person's gender, having the purpose or effect of offending the dignity of the person involved and creating circumstances that are threatening, hostile, degrading, humiliating or insulting for the person in question'.

Sexual harassment is defined in Section 2 as 'any kind of sexual behaviour having the purpose or effect of offending the dignity of the person affected by it, especially when this behaviour creates circumstances that are threatening, hostile,

106 Alþingistiðindi, B-deild [Parliamentary Gazette, Section B], 1975–1976, 2480.

degrading, humiliating, or insulting for the person in question. The behaviour can be verbal, symbolic and/or physical.’

The definitions of gender-based and sexual harassment are identical to those provided in Directive 2006/54/EC. In the #MeToo movement, over the last few years, those two concepts have been central in the discussion in the media. However, few cases of gender-based or sexual harassment have been brought to the ECC.¹⁰⁷

The Supreme Court has made strong requirements when it comes to the interpretation of sexual harassment:

In Case 267/2011, a woman (A) raised a case against her employer for not responding to her complaint of sexual harassment from her superior (E) on a work trip in a summerhouse with their third colleague (F). One of the main questions was whether E’s behaviour, going naked in a hot tub connected to the summerhouse in the evening and inviting himself into A’s bedroom later that night, should be defined as sexual harassment. The Supreme Court concluded that E’s behaviour had been inappropriate but could not constitute sexual harassment according to GEA 10/2008. The court emphasized that A had not in any way expressed that E’s conduct was not welcome, wished E and F a good night without mentioning that E was naked, and kept on working with them the day after.¹⁰⁸

This case was ruled before Act 62/2014 amending GEA 10/2008 was enacted.¹⁰⁹

Affirmative actions shall not be regarded as being contrary to GEA 150/2020. The concept of ‘affirmative action’ is defined as

special temporary measures that are intended to improve the position of, or increase the opportunities of, women or men, aimed at establishing gender equality in a specific field where there is a gender imbalance. In such cases, it may prove necessary to give either gender temporary priority to achieve balance. This includes special temporary measures intended to improve the position of, or increase the opportunities of, persons in fields where they are at a disadvantage due to a gender-neutral registration in Registers Iceland, to promote equal treatment.¹¹⁰

In addition, special consideration given to women or other persons who go through pregnancy and give birth shall not be regarded as discrimination.¹¹¹

107 Since 2000, three cases of sexual harassment and one case of gender-based and sexual harassment have been brought to the EEC. Cases ECC 4/2009 and 2/2010 were dismissed, and in cases 10/2002 and 21/2021 the ECC concluded that there had not been a violation of the gender equality legislation in question.

108 Supreme Court of Iceland, *B v A*, 267/2011 (2012).

109 See Section 4.3.2 of this chapter.

110 Section 2(8) of GEA 150/2020.

111 Section 16 (2–3) of GEA 150/2020.

Discrimination by association is not mentioned in GEA 150/2020. The act does not necessarily exclude the use of this type of discrimination in practice, but discrimination by association is unlikely to be included without a positive provision in the act.

Section 17 of GEA 150/2020 elaborates on the *prohibition of discrimination concerning trade in goods and services*. All discrimination regarding access to or supply of goods as well as access to or granting services is prohibited. However, this provision does not apply in the context of private and family life or to matters concerning work in the labour market:

In Case 12/2020 ECC, a man complained about the denial of a beauty salon to offer men so-called ‘Brazilian wax’. The ECC understood that the saloon’s denial was based on its respect for and protection of the female employee’s decency and sense of modesty. Under such circumstances, there was a wide margin of appreciation to assess if such a delicate service should be offered to men. The ECC concluded that the beauty salon had not violated Section 17 as the justification was objective and had a legal aim and the methods used were appropriate and necessary.¹¹²

Section 18 of GEA 150/2020 elaborates on the *prohibition of discrimination regarding terms of employment*. Employers may not discriminate between women, men, and neutral-registered persons, in pay or other terms of employment, on grounds of their gender. If a likelihood is adduced that a person receives different pay for the same work, or work of equal value, on the basis of their gender, then the employer shall demonstrate, if there is a difference in their pay, that the difference is justified on grounds other than the person’s gender.¹¹³ Wage discrimination is discussed further in Section 4.6.

Section 19 of GEA 150/2020 elaborates on the *prohibition of discrimination in the workplace and employment*. Employers are prohibited from discriminating between applicants for jobs on the grounds of their gender. The same applies to promotion, change of position, retraining, continuing education, vocational training, study leave, notice of termination, the working environment, and employees’ working conditions.¹¹⁴ It is also prohibited to allow maternity/paternity or parental leave, or other circumstances related to pregnancy and childbirth, to have a negative effect on employers’ decisions.

In addition, it is prohibited to advertise or publish an advertisement for a vacant position indicating that an employee of one gender is preferred over another unless the advertiser aims to promote a more equal representation of women and men within a particular occupational sector, in which case this shall be stated in the

112 Equality Complaints Committee, Case 12/2020, 26 August 2020.

113 Section 18 of GEA 150/2020.

114 Section 19(1) of GEA 150/2020.

advertisement. The same requirement applies if there are other valid reasons for advertising for a person only of a specific gender.

If a likelihood is adduced that, in the context of the circumstances mentioned in Section 19, individuals have been discriminated against on the grounds of their gender, then the employer shall demonstrate that the decision was based on grounds other than that of the individual's gender.

When assessing whether the provisions of Section 19(1) have been violated, the educational qualifications, working experience, specialized knowledge, or other special talents demanded for the relevant positions according to law or regulations, or which must otherwise be considered as being of benefit in the position, are to be considered. As will be discussed in Section 4.7, this has become problematic in terms of enforcement. Most complaints, both to the ECC and to the law courts, concern access to employment.¹¹⁵

Section 20 of GEA 150/2020 elaborates on the *prohibition of dismissal etc. in connection with a complaint or a demand for redress*. Employers may not dismiss an individual for demanding redress. Furthermore, employers shall ensure that employees are not subjected to injustice in their work – for example, in relation to job security, terms of employment, or performance assessment – on the grounds of their having submitted a complaint or provided information regarding gender-based or sexual harassment or gender-based discrimination.¹¹⁶

Section 21 of GEA 150/2020 elaborates on the *prohibition of discrimination in schools and other educational institutions, after-school activity centres, and sports and leisure activities*. All forms of discrimination on grounds of gender shall be prohibited in schools, other educational institutions, after-school activity centres, and organized sports and leisure activities.¹¹⁷ This prohibition shall be observed in teaching and studies, training, working methods, and day-to-day dealings with pupils and practitioners. It applies to all school levels, from preschools to universities, and also includes all after-school and leisure activities for children, whether these be music classes or football. In the last few years, gender imbalance and gender-based or sexual harassment in sports and arts have been the subject of considerable debate in Iceland and, as described further in Section 4.8, the #MeToo movement seems to have had a significant impact in this area.

Directors of institutions shall ensure that pupils, practitioners, or clients are not made to suffer for having made a complaint concerning gender-based or sexual harassment or gender-based discrimination.

Finally, Sections 22 and 23 of GEA 150/2020 elaborate on *disrespectful or belittling advertisements and prohibition of waiving rights*. Derogative advertisements have been criticized throughout the last half a century in Iceland, and a prohibition

115 Forsætisráðuneytið – Fjármála- og efnahagsráðuneytið [The Prime Minister Office – The Ministry of Finance and Economy], *Kortlagning kynjasjónarmiða – Stöðuskýrsla* [Mapping Gender Perspectives: Status Report] (2021).

116 Section 20 of GEA 150/2020.

117 Section 21 of GEA 150/2020.

on such advertisements has been included in the country's gender equality legislation from the beginning in 1976. However, only three cases have been brought to the ECC since 2000. The ECC concluded in one case that an advertisement for a strip club in which a particular profession – that of nursing, members of which were mostly women – was linked to a strip club through the use of inappropriate pictures and advertising copy was derogative to women and a violation of GEA 96/2000. The two other cases were dismissed.¹¹⁸

4.3.5 Combatting structural discrimination

Various actions have been taken to combat structural discrimination. Among these are gender mainstreaming and the use of gender quotas. According to GEA 150/2020, gender and equality mainstreaming shall be observed in all policymaking and planning on the part of government ministries and the public institutions operating under their aegis.¹¹⁹ The same shall apply, where appropriate, to all decision-making within ministries and institutions. Furthermore, gender and equality mainstreaming shall be observed in all policymaking and planning in the work of schools and educational institutions, including after-school activity centres, and in sports and leisure activities. Taking the interests of women into account when assessing all policy- and decision-making may help to change some structures in society that benefit men rather than women. The different realities and experiences of different groups of women need to be taken into account in such assessments if these are to benefit not just heterosexual women of Icelandic origin without disabilities.

One important provision is found in the Public Finance Act, in which it is stated that the minister of finance shall be responsible for submitting a plan on a gendered national budget. In the writing of the annual bill submitted for approval as the National Budget Act, the impact of the bill on the equal status of men and women is to be reported. Gender budgeting has been practised in Iceland since 2009 and has been mandatory at the state level since 2016, as laid out in the Public Finance Act. The gender budgeting is framed by a five-year plan on gender budgeting, and its implementation is overseen by a steering committee on gender budgeting that includes representatives from all ministries.¹²⁰

According to a report on one five-year plan on gender budgeting (2019–2023), analysis of the gender impact of the National Budget Act has repeatedly shown that many decisions that *prima facie* seem gender neutral are not. Decisions on public expenditure and income have a different impact on the genders owing to the different statuses and conditions of women and men. They can promote equality,

118 Equality Complaints Committee, Case 3/2003, 16 January 2004.

119 Section 30 of GEA 150/2020.

120 Fjármála- og efnahagsráðuneyti [The Ministry of Finance and Economy], 'Fimm ára áætlun um kynjaða fjárlagagerð 2019–2023' [Five-Year Plan on Gendered National Budgeting 2019–2023] 2019, 3.

maintain the prevailing situation, or increase inequality. According to the report, analysis has, not surprisingly, shown a more negative impact on women than men, and it is important to deepen the analysis by looking into multiple discrimination and observing the gender impact by considering factors such as disability, origin, gender identity, and age.¹²¹

Various obligations have been imposed on management and labour, and, under the terms of GEA 150/2020, employers and trade unions are required to work systematically towards equalizing the position of women and men in the labour market. Employers are also required specifically to work towards equalizing the position of women and men within their companies or institutions and to promote a classification of jobs that does not designate particular jobs as specifically women's or men's jobs. Special emphasis is to be placed on equalizing the positions of women and men in managerial and influential positions. Furthermore, companies and institutions normally employing 25 or more employees per year are to establish a gender-equality plan or mainstream gender-equality perspectives into their personnel policy.

4.3.6 Proactive measures and gender quotas

When power and influence are to be redistributed in society, quotas can be an effective method and a tool for achieving transformative equality. First and foremost, quotas are a tool that can be used to correct an unjust social reality and redistribute some benefits or social goods that traditionally have belonged to men. Men have held the power through the ages on the basis of 100% gender quotas for men in national legislative bodies.¹²² There has been reluctance both in the EU and in most European countries to use gender quotas in general, and the use of such quotas has been controversial among both women and men.¹²³ However, surveys in Iceland have shown that, following the experience of gender quotas on corporate boards, the attitude among leaders became more positive.¹²⁴

According to its provisions, affirmative action shall not be regarded as being contrary to GEA 150/2020.¹²⁵

In the course of the amendment of the Constitution of the Republic of Iceland in 1995 through the passing of Act 97/1995, the Constitutional Committee felt

121 Ibid.

122 In Iceland, there was, for instance, a gender quota of 100% for men in the parliament until 1915.

123 Goran Selanec and Linda Senden, 'Positive Action Measures to Ensure Full Equality in Practice Between Men and Women, Including on Company Boards', European Network of Legal Experts in the Field of Gender Equality, European Commission, Directorate-General for Justice (2011) 22 <<https://www.equalitylaw.eu/downloads/3864-positive-action-measures-to-ensure-full-equality-in-practice-between-men-and-women-including-on-company-boards-pdf-2-639-kb>> accessed 15 May 2022.

124 Guðbjörg L. Rafnsdóttir, Þorgerður Einarsdóttir, and Jón S. Snorrason, 'Gender Quotas on the Boards of Corporations in Iceland' in Marc de Vos and Philippe Culliford (eds), *Gender Quota for the Board of Directors* (Intersentia 2014).

125 See the definition in Section 4.3.4.1.

that it was not necessary to provide for special authorization for ‘positive discrimination’, as the principle of non-discrimination entailed such authorization provided that the exercise of positive discrimination was based on objective grounds.¹²⁶

Several amendments have been made to various laws to secure gender quotas for members of the boards of directors of companies, including deputy board members.¹²⁷ In general, companies were expected to be in compliance with gender-quota conditions by 1 September 2013.¹²⁸ Consideration is also to be given to gender ratios in the appointment of executives.

The number of women on the boards of directors in companies with more than 50 employees and more than four members on the board has increased significantly since gender quotas became compulsory, and women now make up 40% of the boards of such companies. The same is not the case with smaller companies with three or fewer members on the board, where the percentage of women is between 22.8% and 35.0%, depending on the number of board members.¹²⁹ The changes in the gender ratios of these boards since the enactment of laws on gender quotas have therefore been significant.

Equal representation of men and women in government and municipal committees, councils, and boards became obligatory under GEA 150/2020, and the nominating parties to such bodies were required to nominate both a man and a woman, which in reality meant a 40% gender quota for men and women on the committees, councils, and boards in question where there were more than three members. All ministries reached the 40% goal in 2019–2020 at the overall level, although the obligation was not fulfilled in every single committee, council, or board.¹³⁰

126 It should be noted that the committee used the concept ‘positive discrimination’, not ‘positive measures’, ‘positive actions’, or ‘affirmative actions’. ‘Positive discrimination’ is a concept with a rather negative impact in comparison with the other three concepts, as it refers to discrimination, which is a negative concept in general.

127 Lög um einkahlutfélög [Act on Private Limited Companies] 138/1994; Lög um hlutfélög [Act on Public Limited Companies] 2/1995; Lög um samvinnufélög [Act on Cooperative Societies] 22/1991; Lög um sameignarfélög [Act on General Partnerships] 50/2007; Lög um skyldtryggingu lífeyrisréttinda [Act on Mandatory Insurance of Pension Rights and on Activities of Pension Funds] 129/1997; Lög um Landsvirkjun [Act on the National Power Company] 42/1983; Lög um sameignarfyrirtæki um Orkuveitu Reykjavíkur [Act on the Establishment of Reykjavik Energy] 139/2001 .

128 It should be mentioned that those acts only presumed two genders.

129 Women make up 34.1% of the members of boards of directors in firms with 50 employees or more. Statistics Iceland <<https://hagstofa.is/utgafur/frettasafn/fyrirtaeki/kyn-stjornarmanna>> accessed 22 April 2021.

130 Directorate of Equality, *The Report of the Directorate of Equality on the Ministries Commissions, Councils and Boards in 2020* (2021) 2.

4.4 Enforcement of the equality legislation

Even though Iceland's equality legislation has been divided into, on the one hand, the Act on the Administration of Matters concerning Equality¹³¹ and, on the other, GEA 150/2020, AETOLM 85/2018 and AETILM 86/2018,¹³² there have been no radical changes in the enforcement system for equality legislation in Iceland. It is still primarily the Directorate of Equality and the Equality Complaints Committee that oversee enforcement.

4.4.1 *The Directorate of Equality*

The tasks of the DE under the terms of the three acts on equality – GEA 150/200, AETOLM, and AETILM – remain extensive. These are listed in Section 4 of the AAMCE under 12 points and can be divided into four main groups. One of these groups addresses individual discrimination, while the other three concern structural discrimination. However, some tasks might be categorized as addressing both individual and structural discrimination, such as providing assistance and information on equality.

In relation to *individual discrimination*, the DE's tasks are as follows:

The DE provides consultancy services for alleged violations of the three equality acts.¹³³ According to the DE's annual report for 2021, however, this is not an extensive part of the DE's work. In that year, the DE provided such consultancy services to 37 individuals.¹³⁴ Furthermore, the DE seeks to settle disagreements regarding the legislative provisions that are brought before the DE, if it considers this appropriate.¹³⁵ This part of its mandate has not been used so far.¹³⁶

Should the DE have a reasoned suspicion that an institution, company, or civil society organization has violated any of the three equality acts, it is to ascertain whether there is reason to take the case to the ECC.¹³⁷ The alleged violations can concern structural or individual discrimination. The entity in question is required to supply the DE with the information and data the DE considers necessary. If the

131 Lög um stjórnýslu jafnréttismála [Act on the Administration of Matters Concerning Equality] (AAMCE) 151/2020.

132 Lög um jafna stöðu og jafnan rétt kynjanna [Act on Equal Status and Equal Rights Irrespective of Gender] (GEA 150/2020); Lög um jafna meðferð utan vinnumarkaðar [Act on Equal Treatment Outside the Labour Market] (AETOLM 85/2018); Lög um jafna meðferð á vinnumarkaði [Act on Equal Treatment in the Labour Market] (AETILM 86/2018).

133 'Ársskýrsla Jafnréttisstofu' [The Annual Report of the Directorate of Equality] 2001–2021 <<https://www.jafnretti.is/is/um-jafnrettisstofu/utgefing-efni/efni-utgefing-af-odrum>> accessed 16 May 2022.

134 'Ársskýrsla Jafnréttisstofu' [The Annual Report of the Directorate of Equality] 2021, 7 <https://www.jafnretti.is/static/files/Arsskyrslur/arsskyrsla_jafnrettisstofu_2021.pdf> accessed 16 May 2022.

135 Section 4(1)–i of the AAMCE.

136 Information from the DE, 31 October 2022.

137 Section 5(2) of the AAMCE.

entity does not respond to a request for such information within a reasonable deadline, the DE can impose per diem fines until the requested information and data have been supplied. According to information from the DE, per diem fines have never been imposed.¹³⁸

However, the authority of the DE to bring matters before the ECC applies now only in cases that may concern the interests of many persons and are of public importance in the opinion of the DE. Thus, the DE's mandate is now narrower than what it was under Act 10/2008. No explanations were provided in the notes to the legislative bill or during parliamentary deliberations on this narrowing of the powers of the DE. According to the DE, the Directorate has brought three cases to the ECC since it was established in 2000.

The DE has a role in the enforcement of ECC rulings. If a complainant so requests, the DE can issue instructions to the entity that the ECC ruled against to take specific measures in accordance with the ECC's ruling within a reasonable time limit, subject to per diem fines until the instructions have been complied with.¹³⁹ This power has never been used.¹⁴⁰

The DE's tasks concerning *structural discrimination* are as follows:

Education, assistance, and research. The DE is responsible for monitoring the implementation of the three equality acts; providing assistance, education, advice, and information on equality; and taking the initiative in preparing reports and conducting surveys or research in the field of equality. It is also responsible for *promoting equality* by encouraging active participation in equality-related activities, including increased participation in gender-equality activities by men, and working against negative gender images and negative gender stereotypes regarding the roles of women and men, as well as negative stereotypes based on the discrimination parameters listed in Acts 85/2018 and 86/2018. In addition, it is tasked with forwarding comments and proposals to the minister¹⁴¹ and other authorities on actions to promote equality, for example, in relation to specific measures in the field of equality and working on preventative measures against gender-based violence, gender-specific harassment, and sexual harassment.

Supervision and overseeing. The DE supervises proactive duties such as the duty of companies and institutions to establish gender-equality plans or mainstream gender equality perspectives into their personnel policies. In addition, the DE has an important role in overseeing the administration of equal pay certification and equal pay confirmation, including through monitoring compliance with equal pay confirmation.¹⁴²

138 Emails from the Directorate of Equality, 26 July 2021 and 17 May 2022.

139 Section 5(3) of the AAMCE.

140 Email from the Directorate of Equality to the author, 17 May 2022.

141 The current minister responsible for equality matters is the prime minister.

142 See Section 4.6.

4.4.2 *The Equality Complaints Committee*

The Equality Complaints Committee (ECC) is an independent complaints committee that is attached to the Office of Equal Rights Affairs in the Prime Minister's Office, and those employed by the Committee are employees of the Prime Minister's Office. All three members of the ECC are now nominated by the Supreme Court and appointed by the prime minister.¹⁴³

Proceedings in the ECC have changed somewhat in the 32 years in which it has been active – for its first 17 years as an advisory body and, from 2008, as an adjudicating body. In particular, more stringent requirements have been made with regard to proof of probability, and the rules of evidence have changed through the years, particularly in recent years.

In the beginning, access to the committee was open, and the accessibility threshold was low. Under the terms of GEA 28/1991,¹⁴⁴ the task of the committee was to take delivery of indications regarding alleged violations of the provisions of that act and carry out an investigation. The rule of evidence of that act was that *if a person believed* that their rights had been violated and referred the matter to the Committee, then it was for the employer to show that a disputed decision was based on a premise other than gender. Broadly speaking, the premise of the provision for the burden of proof was the presumption that women were discriminated against on the basis of their gender.¹⁴⁵ Accordingly, it was sufficient for a woman (or, where applicable, a man) to appear before the Committee and report alleged discrimination for the burden of proof to be shifted to the employer.

In the cases addressed by the ECC during the period in which GEA 28/1991 was in effect, the process was normally both in writing and oral – that is, the parties to the case first sent written submissions to the Committee and then appeared before it, if they so wished. The complainant could get assistance in formulating their complaint at the Equality Council's Office, where the ECC was hosted.

Most of the equality cases that have been brought to the ECC and the courts concern appointments to positions at the state or municipality level, while others involve wages and terms of employment.¹⁴⁶ A small number involve

143 All members are required to possess a master's degree in law or a comparable degree, and at least two members, including the chairperson, shall have specialist knowledge in the field of equal rights, one in the area of gender equality and one in the area of equality in a wider sense, while the chairperson and the deputy chairperson shall have the qualifications required for appointment to the post of a district court judge.

144 Section 19 of GEA 28/1991.

145 See, for instance, Equality Complaints Committee, Case 6/1994, 17 November 1994; Supreme Court of Iceland, *Kærunefnd jafnréttismála vegna Guðbjargar Önnu Þorvarðardóttur gegn íslenska ríkinu* [The Equality Complaints Committee on Behalf of Guðbjörg Anna Þorvarðardóttir v the Icelandic State] 46/1998 (1998).

146 Government of Iceland, Rulings of the Equality Complaints Committee (the ECC's website in which all of its rulings can be found) <

discrimination on the grounds of pregnancy or childbirth. No research has been conducted on why such a small number of cases concerning pregnancy or childbirth have been referred to the ECC. Part of the reason may be the possible consideration by women that a complaint could make it difficult for them to get work, as they would be regarded as troublemakers. It is notable that only a small number of cases involve complaints against private enterprises, and it is important to uncover the reasons for this.

Furthermore, there is a lack of support for complainants, and if the ECC rules in favour of the complainant and the counterparty does not accept the ruling, the latter can refer the decision to the courts for annulment in a case in which both the ECC and the complainant are defendants. However, this situation represents a step forward, as under the terms of GEA 10/2008, the complainant would stand alone in the role of defendant in such circumstances. This can be most inflexible for the complainant, who usually is an individual raising a case against the state or municipalities, as there can be an enormous power imbalance between parties and therefore a heavy burden for the complainants.¹⁴⁷

An example of such a situation is a case in which the ECC concluded that the minister of education and culture had discriminated against a female applicant, who was a director general at the Prime Minister's Office when the minister appointed a man as permanent secretary in her ministry.¹⁴⁸ The minister did not accept the ECC's ruling and brought a case against the complainant and the ECC to court. The minister lost the case at the district court and referred the case to the Court of Appeal. However, before the principal proceedings could take place, a new minister of education and culture was appointed. The new minister withdrew the case and made an agreement with the complainant under which the latter received non-pecuniary damages.¹⁴⁹

As this case shows, access to justice is not sufficiently well ensured for women/other genders who experience discrimination. In particular, there is a need for both financial and legal support for complainants during a case. If they can expect a lawsuit from the opposing party for seeking their rights, this is likely to act as a disincentive, to say nothing of when the counterparty is the state itself.

Overall, an assessment based on the case law of the ECC and the Supreme Court and GEA 150/2020 indicates that there has been something of a step backwards in terms of enforcement of gender equality legislation in Iceland, especially in employment-related cases.

147 Interview with Hafþís Helga Ólafsdóttir, the State Broadcasting Company (26 February 2022) <<https://www.ruv.is/frett/2022/02/26/hun-hefur-aldrei-a-mig-yrt-i-gegnum-allt-thetta-ferli>> accessed 28 February 2022.

148 Equality Complaints Committee, Case 6/2020, 27 May 2020.

149 News from the Ministry of Education and Children's Affairs, 'Case on the Appointment of Permanent Secretary Finished with an Agreement', 25 February 2022.

Part 2: Discrimination in equal pay, access to employment, and gender-based violence

4.5 Introduction

Substantive gender equality will not be obtained exclusively through equality and non-discrimination legislation. Various fields of society are gendered, and the different realities facing women, men, and other genders result in different impacts of law and its interpretation on different genders. It is therefore necessary to look at government policy on gender equality, in action plans and other forms of policymaking, as it is manifested, on the one hand, in equality and non-discrimination legislation and, on the other, in other legislation that impacts upon the status of the genders. Furthermore, it is important to explore the aim and outcome of the legislation and how the legislation is enforced.

Under GEA 65/1985, the government was for the first time required to prepare action plans on gender equality. These action plans set out the focus points of the majority in power at the time in which they are drawn up in relation to the policy area, including the government's general position and prioritization. Over the years, such action plans have emphasized improving women's status in the labour market and, in the last decade, violence against women.

Apart from the gender pay gap and access to positions of authority, the major concerns of Icelandic women in general seem to centre mostly on violence against women and the processing of cases concerning custody and visiting rights of children.¹⁵⁰

4.6 Equal pay: Case law

The gender pay gap is still a problem in Iceland. In 2019, the pay gap between women and men was 13.9%.¹⁵¹ Various measures have been implemented to rectify this bias, such as the duty for companies and institutions to acquire equal pay certification or confirmation, depending on the number of employees. However, more radical tools seem to be needed, based on redistribution as well as recognition, and it should be possible to make use of both transformative and affirmative tools despite the doubts about the use of the latter enunciated by Nancy Fraser.¹⁵²

150 'Is 13% Justice Enough? Nine Women Charge the Icelandic State', *Knúz* (a feminist online magazine, 8 March 2021) <<https://knuz.wordpress.com/page/2/Reykjavik>> accessed 23 May 2022; Sigrún Sif Jóelsdóttir and Grant Wyeth, 'Iceland Supreme Court Leads the Courts on a Dangerous Path in Custody Cases', *Kjarninn* (21 September 2021) <<https://kjarninn.is/skodun/haestirettur-leidir-domstola-a-haettulega-braut-i-malum-barna/>> accessed 23 May 2022; Reykjavík Dialogue 2021, 'Renewing Activism to End Violence against Women: Reykjavík Declaration on Ending Violence against Women and Girls' (18 August 2021) <<https://reykjavikdialogue.is/>> accessed 23 May 2022.

151 Hagstofa Íslands [Statistics Iceland], 'Hagtiðindi [Statistical Series]: The Difference in Women's and Men's Wages' (2020).

152 Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age' (1995) 212(1) *New Left Review* 86.

In her work, Fraser refers to ‘transformative and affirmative approaches’ aimed at remedying injustice. By ‘affirmative remedies for injustice’, she means ‘remedies aimed at correcting inequitable outcomes of social arrangements without disturbing the underlying framework that generates them’.¹⁵³ By ‘transformative remedies’, she means ‘remedies aimed at correcting inequitable outcomes precisely by restructuring the underlying generative framework’.¹⁵⁴

With Act 56/2017 amending GEA 10/2008,¹⁵⁵ a duty was imposed on companies and institutions with more than 25 employees per annum to acquire equal pay certification through a certification body’s audit of the company’s or institution’s pay system in which it is confirmed that the pay system and its implementation meet the requirements of the ÍST 85:2012 Standard.¹⁵⁶

A company or institution that employs an average of 25–49 employees per annum can choose to either undergo an equal pay certification process in accordance with Section 7 of GEA 150/2020 or to seek a confirmation of equal pay from the Directorate of Equality¹⁵⁷ following the submission of documentation showing that its pay system and its implementation comply, in the estimation of the DE, with the requirements set out in Section 8(2) of the same act.

The Directorate of Equality is responsible for overseeing the administration of equal pay certification and equal pay confirmation, monitoring equal pay certification and equal pay confirmation, and granting equal pay confirmation in keeping with GEA 150/2020.

According to GEA 150/2020, employees shall receive equal pay and enjoy equal terms of employment for the same jobs or jobs of equal value. ‘Equal pay’ is defined as meaning that wages shall be determined in the same manner for all persons, regardless of gender. The criteria on which pay is determined should not involve gender discrimination. In addition, workers should always be permitted to disclose their wage terms, should they choose to do so.¹⁵⁸

The concept of pay is defined in GEA 150/2020 as ‘ordinary remuneration for work and further payments of all types, direct and indirect, whether they take the form of perquisites or other forms, paid by the employer to the employee for their work’.¹⁵⁹

‘Terms’ is defined as ‘pay together with pension rights, holiday rights and entitlement to pay in the event of illness and all other terms of employment or entitlements that can be evaluated in monetary terms’.¹⁶⁰

153 *Ibid.*, 83.

154 *Ibid.*, 83.

155 Lög 56/2017 um breytingu á lögum um jafna stöðu og jafnan rétt kvenna og karla [Act 56/2017 Amending Act on Equal Status and Equal Rights of Women and Men 10/2008].

156 Section 7 of GEA 150/2020.

157 Section 8 of GEA 150/2020.

158 Section 6 of GEA 150/2020.

159 Sections 2–9 of GEA 150/2020.

160 Sections 2–10 of GEA 150/2020.

Employers may not discriminate among women, men, and persons whose gender has been registered as neutral, in pay or other terms of employment, on grounds of their gender. If a likelihood is adduced that a woman, man, or person whose gender is registered as neutral receives different pay for the same work, or work of equal value, then the employer shall demonstrate, if there is a difference in their pay, that the difference is justified on grounds other than their gender.¹⁶¹

The first Supreme Court case concerning gender equality legislation was a case on pay discrimination. The main question here was whether collective agreements could justify different wages:

Guðrún Emilsdóttir, an employee at *Kópavogshæli*, an institution for people with disability, complained that men doing work equal to her work at the institution received higher wages than she did. The explanation given was that they belonged to different labour unions and therefore had different professional titles. A panel of three district court judges concluded that there had been a violation of GEA 78/1976. The case was appealed to the Supreme Court, where the opinion was split in the panel, with the majority holding that the difference in wages could be justified by the difference in union membership, while the minority, two judges, disagreed.¹⁶²

The majority did not take notice of the gendered membership of the labour unions, which was such that women were members of the one that had lower salaries, while men were members of the one that had higher ones.

The Supreme Court ruled on a similar case in 1997 when Iceland had become a member of the European Economic Area Agreement:

Guðrún Erla Ólafsdóttir (G) complained to the ECC, that the Icelandic National Broadcasting Service (RÚV) had discriminated against her by paying her male colleague, V, higher wages than herself; both were producers and did the same work. RÚV contended that there was no violation, as the difference in wages was the result of different collective agreements. The ECC found that there had been a violation citing, *inter alia*, the judgment of the European Court of Justice in case *C-172/92: Dr Enderby v. Frenchay Health Authority and others*, 27 October 1993. RÚV did not accept the conclusion, so the ECC initiated legal proceedings against RÚV on behalf of G, claiming damages. The bench of the district court, composed of three judges, found that there was no violation and that the circumstances were different from those in *Enderby*. The ECC appealed the case to the Supreme Court,

161 Section 18 of GEA 150/2020.

162 Supreme Court of Iceland, *Heilbrigðisráðherra v stjórnarnefndar ríkisspítalanna og fjármálaráðherra f.h. ríkissjóðs gegn Jafnréttisráði f.h. Guðrúnar Emilsdóttur og Guðrúnu Emilsdóttur persónulega og gagnsök* [The Minister of Health on Behalf of the Steering Board of the State Hospitals and Minister of Finance on Behalf of the Treasury v The Equality Council on Behalf of Guðrún Emilsdóttir and Guðrún Emilsdóttir Personally and Recrimination] 117/79 (1982).

where five judges unanimously concluded that a violation had been committed against the appellant. According to the Court, collective agreements in and of themselves could not justify a wage difference between men and women, and RÚV had not shown that there were any objective reasons for the wage difference.¹⁶³

In 1999, the ECC concluded that in companies where there is wage secrecy and the pay system is not transparent, employers have a duty according to the GEA in force to regularly review their employees' wages in relation to gender equality and to coordinate the wages of employees that should have the same wages. Furthermore, the ECC stated that where the pay system was not transparent, it was for the employer to prove that any pay gap was based on reasons other than gender.

Two cases against the Municipality of Akureyri concerned partly structural discrimination, as typical women's jobs and education were valued less highly than typical men's jobs and education:

Ragnhildur Vigfúsdóttir (R), the equality and education officer of Akureyri, complained to the ECC that her wages were lower than those of her male colleague who was an employment officer of Akureyri, which she considered a job of equal value to her own and therefore believed that she had been discriminated against on the basis of her gender. Equality and education officers had usually been female and been paid in accordance with the Akureyri Worker's Union collective pay agreement, but the employment officer had usually been male and paid in accordance with the Engineer's Union collective pay agreement. The ECC concluded that Akureyri had discriminated against her. The Committee concluded that if the equality of wages should only apply to people in the same profession, the aim of the GEA in force at the time on equal pay for women and men for comparable work and work of equal value could not be achieved. The Supreme Court approved the ECC's rationale and added that it is inevitable that the freedom of contract in the labour market is limited by the provisions of the GEA in force at the time, so interpreted.¹⁶⁴

Shortly after this case, another woman employed by the Municipality of Akureyri, Guðrún Sigurðardóttir (G), complained on the same grounds as R in the former case. She was the head of department in Akureyri's Social Welfare Office and compared her work and wages with those of her male colleague, T, who was a department engineer. The Supreme Court came to the same conclusion in her case as in the former case, namely, that the jobs could be compared as they were of

163 Supreme Court of Iceland, *Kærufnd jafnréttismála f.h. Guðrúnar Erlu Ólafsdóttur gegn íslenska ríkinu og Ríkisútvarpinu* [Guðrún Erla Ólafsdóttir v the Icelandic State and the Icelandic National Broadcasting Service] 255/1996 (1997).

164 Supreme Court of Iceland, *Akureyrarbær gegn kærufnd jafnréttismála vegna Ragnhildar Vigfúsdóttur* [The Municipality of Akureyri v The Equality Complaints Committee on Behalf of Ragnhildur Vigfúsdóttir] 11/2000 (2000).

equal value and did not have to involve the same tasks to be equal work in content. The Supreme Court referred, among other things, to job evaluations that had been carried out in Akureyri, in which the two jobs had been assessed as having equal value. The claim of Akureyri that market aspects justified the difference in pay was not accepted. The conclusion was that Akureyri had discriminated against G.¹⁶⁵

The most important issue in these judgments is probably where it is stated that equality of wages does not apply only to people in the same profession. This gives some hope that structural discrimination in the labour market, as manifested in the lower wages of individuals in typically female professions – for example, nurses with a BSc in nursing – compared to the wages of individuals in typical male professions – for example, civil engineers with a BSc in civil engineering – could be challenged in the courts. Unfortunately, such cases have so far not been brought before the Icelandic courts.

4.7 Equal access to employment: Case law

The first Supreme Court case concerning equal access to employment was concluded in 1993. The case involved an assistant professor's position in the Faculty of Arts of the University of Iceland, which was advertised in the summer of 1985. A selection board considered a woman, H, and a man, M, to be the most qualified applicants, but H was judged to be more qualified owing to her greater and more extensive experience, and she received an overwhelming majority of the votes in an election held in the Faculty of Arts. At the end of 1985, however, the minister of education appointed M to the post. H referred the appointment to the Equality Council in early 1986, which found that a violation of GEA 65/1985 had taken place. The district court, with a fully constituted bench, arrived at the same conclusion. The minister of education appealed the judgment of the district court to the Supreme Court, which found that it had been adequately established that both candidates were well qualified for the post. The judgment went on to say:

The law would have little meaning in this regard unless the principles laid down in Sections 1, 2, 3 and 9 [of GEA 65/1985] are interpreted to mean, in the circumstances of this case, that a woman should be awarded a post if she is at least equally deserving with regard to education and other matters of importance as the man with whom she is competing if there are few women in the field in question. It is that interpretation that must be used as a basis in this case.¹⁶⁶

The ECC interpreted GEA 65/1985 and GEA 28/1991 to mean that its role in employment cases, which represented many of its cases, was, *inter alia*, and at its own discretion, to reevaluate up to a certain point the assessment of applicants

165 Supreme Court of Iceland, *Akureyrarbær gegn Guðrínu Sigurðardóttur og gagnsök* [The Municipality of Akureyri v Guðrún Sigurðardóttir and Recrimination] 258/2004 (2005).

166 See note 37.

made by employers, and not simply to ascertain whether the appointment process had been formally correct. Some of the ECC cases ended up in the Supreme Court, which did not comment on this methodology of the Committee.¹⁶⁷ In the judgments of the Supreme Court on employment-related cases, the focus has mainly been on ascertaining whether the factors on which employers based their evaluations of applicants were objective.

An example of this practice of reevaluating the employer's assessment is an opinion of the ECC in 1993. Among other things, the case concerned an appointment to the position of human resource manager at the Reykjavík Department of Public Health. After conducting its evaluation of the qualifications of both the applicant, Jenný S. Sigfúsdóttir (J.S.S.), and the man who had been appointed, the Committee had the following to say:

Having regard to the educational and professional careers of the applicants and the job description of the post of human resource manager, both must be regarded as qualified for the job. However, the nature of [J.S.S.]'s experience must be seen as rendering her more qualified, and it is the opinion of the Complaints Committee that it has not been shown that the person appointed had any specific qualifications beyond those of J.S.S. that justified passing over her in the appointment to the position.¹⁶⁸

The Committee therefore held that there had been a violation of GEA 65/1985 and instructed the respondent to find remedies that were acceptable to the applicant. This was not accepted by the respondent, and so the EEC, acting for J.S.S., took legal action in conformity with the provisions of the gender equality legislation in force at the time. The district court found that there had been no violation. The conclusion of the Supreme Court, however, was that the education and professional experience of the two applicants rendered both qualified to fill the position and that there were no grounds to rank them differently. The Supreme Court applied *the rule of precedence in Icelandic equal rights legislation*, mentioned before,¹⁶⁹ in addition to undertaking *its own evaluation* of the candidates. The conclusion was that there had been a violation of GEA 65/1985.¹⁷⁰

According to GEA 28/1991, if an announced job was awarded to a man, and a woman had also applied for it, the employer should give the ECC information on what *education, job experience, and other special qualifications*, over and above those of the woman, the man had. The same applied for men when a woman was

167 Supreme Court of Iceland, *Kærunefnd jafnréttismála f.h. Jennýjar S. Sigfúsdóttur gegn íslenska ríkinu* [The Equality Complaints Committee on Behalf of Jenný S. Sigfúsdóttir v The Icelandic State] 431/1995 (1996).

168 Equality Complaints Committee, Case 8/1992, 30 April 1993.

169 See note 37.

170 Supreme Court of Iceland, *Kærunefnd jafnréttismála f.h. Jennýjar S. Sigfúsdóttur gegn íslenska ríkinu* [The Equality Complaints Committee on Behalf of Jenný S. Sigfúsdóttir v The Icelandic State] 431/1995 (1996).

awarded a job. Both the ECC and the courts of law based their conclusions on these elements when assessing whether the relevant gender equality legislation in force at the time had been violated in employment cases.

However, since the enactment of GEA 96/2000, the Supreme Court has gradually expanded the employer's margin of appreciation in employment cases.

In a case against the University of Iceland, a woman, A, had applied for an announced post as an associate professor in computer science. Although A had longer teaching experience and a considerably higher number of published scientific articles than a male applicant (K), the latter was appointed. The rationale of the university was that the faculty in question emphasized the applicant's skills in teaching undergraduate students. The university claimed that K had been a successful teacher in undergraduate courses, while A had not been a successful teacher in undergraduate courses during the two years that she had been teaching at the University of Iceland according to students' evaluations. Proper notice was not taken of her many years of teaching experience in Denmark and significantly more extensive scientific research and publishing. The ECC concluded that A had been discriminated against, but the Supreme Court found that the University of Iceland had a wide margin of appreciation when it came to choosing which skills to emphasize.¹⁷¹ This case is in many ways similar to that of Helga Kress,¹⁷² in which *the rule of precedence* was confirmed but the outcome was different.

The above case is an example of the development under which employers have gradually been given more margin of appreciation in employment cases. It is a sign of neoliberalism in the first decade of the 21st century.

Such a development is supported in the preparatory work for GEA 150/2020. According to the legislative bill for this act, it is a general principle in Icelandic law that, except when the need for general or particular qualifications is specified by law, it is for the individual or organization appointing employees to public service to decide on which parameters or factors they base their decisions when making such appointments. However, those parameters or factors must be objective, such as education, working experience, competence, or other personal characteristics.¹⁷³

In general, the employer has a wide margin of appreciation to choose which requirements and aspects they want to base their decisions on. However, the employer must bear in mind that the most relevant parameters are reflected in the job advertisement, although other parameters are not excluded from consideration.

According to Section 19(5) of GEA 150/2020, when assessing whether the provisions on non-discrimination in employment have been violated, the ECC should

171 Supreme Court of Iceland, *Jafnréttisstofa vegna Önnu Ingólfssdóttur gegn Háskóla Íslands* [Directorate of Equality on Behalf of Anna Ingólfssdóttir v University of Iceland] 25/2009 (2009).

172 Supreme Court of Iceland, *Menntamálaráðherra gegn Jafnréttisráði f.h. Helgu Kress og gagnsök* [The Minister of Education v the Equality Council on behalf of Helga Kress and Recrimination] 339/1990 (1993).

173 *Frumvarp til laga um jafna stöðu og jafnan rétt kynjanna* [Parliamentary Bill on Act on Equal Status and Equal Rights Irrespective of Gender] Parliamentary Session 151, 2020–2021, Item 14, Parliamentary Document 14.

consider the educational qualifications, working experience, specialized knowledge, or other special talents that are required for the relevant positions according to law or regulations, or should otherwise be considered as being of benefit in the position. However, it is stated in the preparatory work for the act that the ECC cannot, in general, review an employer's assessment of which applicant is best qualified according to the requirements emphasized by the person or organization appointing public employees. Nor can the ECC base its assessment on parameters other than those used by the employer, providing that those parameters were objective and within the margin of appreciation given by law.

The above-mentioned limitations on the ECC's power apply to cases concerning public employees. The question of whether similar limitations apply in cases where the employer is a private entity, company, or association currently remains unanswered.

4.8 Violence against women

Gender-based violence, sexual offences, and violence in close relationships are probably the most serious examples of both structural and individual discrimination in society and have been conspicuous in the gender equality debate in Iceland in recent decades. Despite significant amendments to the General Penal Code and the Act on Criminal Procedure designed to cover crimes against women, and particularly sexual offences, the Icelandic legal system appears unable to come to grips with gender-based violence and sexual offences against women. Only a small number of these offences reach the police, of those only a small fraction goes to the courts, and, in still fewer cases, is there a conviction. To judge from available data on sexual crimes in Iceland, it appears likely that, in general, men will get away with violence against women without consequences.¹⁷⁴

The situation for victims in this regard has been under heavy criticism for a long time, including in relation to the victim's limited rights of involvement in court cases, as under Icelandic law victims have the status of witnesses.¹⁷⁵ Also, both the police and the courts have been subjected to a great deal of criticism for their lack of knowledge about the nature of gender-based violence, especially domestic violence. In 2021, nine women, victims of gender-based and sexual violence, sent an application to the European Court of Human Rights in which they claimed that the Icelandic state had violated several provisions of the European Convention of Human Rights in the process of their cases in the legal system in Iceland. One of these provisions was Article 14 on the prohibition of discrimination. In previous cases, the European Court of Human Rights has concluded that insufficient protection against gender-based violence constitutes gender-based discrimination.¹⁷⁶ At

174 The State Prosecutor, *Annual Report 2020*, 7; Stígamót (a centre for survivors of sexual violence), *Annual Report 2020*, 73.

175 Hildur Fjóra Antonsdóttir, 'A Witness in My Own Case: Victim – Survivors' Views on the Criminal Justice Process in Iceland' (2018) 26(3) *Feminist Legal Studies* 307–330.

176 *Opuz v Turkey*, ECHR 33401/02; *Mudric v The Republic of Moldova*, ECHR 74839/10.

the time of this writing, the Court has remitted to the Icelandic government a number of questions regarding some of the cases, and a decision is currently awaited regarding whether the applications will be admitted.

The potential of gender equality legislation to address gender-based violence appears to be limited. Section 14 of GEA 150/2020 states that ‘employers and the directors of institutions, civil society organizations and sports and youth organizations shall take special measures to protect their employees, students and clients from gender-based violence, gender-based harassment or sexual harassment in the workplace or institution, social activities or schools’. However, in the chapter on the prohibition of gender discrimination, Section 16 of the general prohibition against discrimination states that gender-based harassment or sexual harassment constitutes discrimination under the act, but gender-based violence is not mentioned.

According to victims/survivors of gender-based violence, gender discrimination is widespread in the justice system, mainly in the norms and attitudes of the justice system’s employees.¹⁷⁷

The #MeToo movement has had a great impact on Icelandic society, particularly in 2021, which may be regarded as a sort of watershed year. Growing numbers of accounts were given by women of their experiences of a variety of inappropriate behaviours by men, ranging from inappropriate comments in the workplace to rape, but, in general, these accounts did not have any impact on the position of the perpetrators. Following this development, however, associations and enterprises began to respond to the pressure resulting from the social discourse.

It appeared that some sort of tolerance limit had been reached, and a revolution began: the chairman of the board of the Icelandic Football Association was forced to step down because of a lack of response to accusations of offences committed by football players, and the chief executive officer of a large company and board members of respected companies resigned or withdrew temporarily from their positions for reasons related to their behaviour towards a young woman.

The question has been raised whether the Icelandic legal system is incapable of providing women with legal protection against violence. The apparent obstacles in the legal system appear primarily to be rooted in the system’s norms and attitudes. This has partly been addressed by the CEDAW Committee, which in its last report to Iceland stated:

The Committee is, however, concerned about:

- (a) The high number of discontinuances in criminal proceedings on charges of violence against women, in particular rape and sexual violence, by the State Prosecutor and the low number of convictions;

177 Hildur Fjóra Antonsdóttir and Þorbjörg Sigríður Gunnlaugsdóttir, *Tilkynntar nauðganir til lögreglu á árunum 2008 og 2009: Um afbrotið nauðgun, sakborning, brotþola og málsmeðferð* [Reported Rapes in Iceland in 2008 and 2009: The Offence of Rape, the Accused, the Victim, and the Case Procedure] (EDDA – Centre of Excellence, University of Iceland 2013).

- (b) The lack of a legal analysis of the high number of acquittals in sexual violence cases;
- (c) The absence of a national action plan against sexual and domestic violence that would take into account the specific needs and vulnerabilities of migrant women and women with disabilities.¹⁷⁸

...

The Committee calls upon the State party:

- (a) To ratify the Istanbul Convention and incorporate it into national legislation to strengthen the legal protection of women from domestic and other forms of violence;
- (b) To step up its efforts to prosecute and convict perpetrators of rape and sexual violence against women, and analyse and address the causes of the high number of acquittals in sexual violence cases;
- (c) To adopt, without delay, a national plan against sexual and domestic violence that takes into account the specific needs and vulnerabilities of migrant women and women with disabilities, and provide adequate human and financial support to expand to all police districts the cross-cutting approach of the Reykjavik Metropolitan Police to combating domestic violence.¹⁷⁹

It is in gender-based violence that the core of the existing gender power imbalance is most clearly manifested, and this is accordingly the area where the need for legal protection may be greatest. New tools are therefore needed to redress the subordination of women in this context.

The enforcement of equality legislation has not been used to address gender bias in norms and attitudes within the police and prosecution services, or among judges. Given the independence of the courts, it is difficult to see how to address judges' norms and attitudes in equality legislation. In other sectors, it may be worth attempting to address gender bias in norms and attitudes through changes to the normative standards contained in the equality legislation.

Part 3: Reflections and considerations

4.9 What kind of equality?

4.9.1 Introduction

The objective of GEA 150/2020 is to prevent gender discrimination and to maintain gender equality and equal opportunities for the genders in all spheres of society.¹⁸⁰ In addition, all people are to have equal opportunities to benefit from their

178 CEDAW Committee, 'Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Iceland' 10 March 2016, CEDAW/C/ISL/CO/7-8, para 19.

179 *Ibid.*, para 20.

180 Section 1 of GEA 150/2020.

enterprise and to develop their skills, irrespective of gender. The emphasis is therefore primarily on equality of opportunity, which corresponds to formal equality, and not equality of outcome or result, which corresponds to substantive equality. However, what is meant by equal opportunity is unclear, and what is needed for opportunities to be equal is not set out in any definitive manner. It is not stated that substantive equality is the objective sought, even though a conclusion to that effect may be drawn from the text of the act as a whole, along with the notes on the legislative bill that preceded its enactment.

The concept of substantive equality has various dimensions, and there is no single international definition of the concept. However, in general, it suggests that the state should have a duty to take positive measures to promote equality, such as redistribution of benefits and allocation of resources, as Sandra Fredman has described.¹⁸¹

4.9.2 Unlocking the potential of the four-dimensional approach to equality

Fredman has formulated her ideas on substantive equality as a four-dimensional approach that includes (1) redressing disadvantage; (2) addressing stigma, stereotyping, prejudice, and violence; (3) enhancing choice and participation; and (4) accommodating difference and achieving structural change.¹⁸² It should be mentioned that not all feminist legal scholars agree with Fredman. Among others, Catharine MacKinnon has criticized Fredman's approach, especially for not sufficiently emphasizing hierarchy in society.¹⁸³

The result of a brief analysis of GEA 150/2020 using Fredman's approach indicates the following:

- a) *Redressing disadvantages* might be one of the weakest points in the act. The prohibition of discrimination is meant to redress disadvantages but has not been tested sufficiently in relation to structural discrimination. GEA 150/2020 allows affirmative actions, which are defined as special temporary measures to improve the position or increase the opportunities of women or men in order to achieve gender equality. However, apart from the provisions on gender quotas in company boards, as well as in government and municipal committees, councils, and boards, and some minor projects, this authorization has not been used to address structural hindrances, for example through a reevaluation of the male norms and structures upon which Icelandic society is built. As pointed out by Tove Stang Dahl, among others, the justice system is based on men's norms in most areas,

181 Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21(2) *South African Journal on Human Rights* 163 < <https://doi.org/10.1080/19962126.2005.11865132>> accessed 22 July 2021.

182 Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 727.

183 Catharine A. MacKinnon, 'Substantive Equality Revisited: A Reply to Sandra Fredman' (2016) 14(3) *International Journal of Constitutional Law* 739.

and it is men's understanding, needs, and conflicts that are fundamental within it. Such norms also include ideas about how women are or should be.¹⁸⁴

- b) With regard to *addressing stigma, stereotyping, prejudice, and violence*, the Icelandic legislation, apart from prohibiting discrimination and emphasizing employers' duty to equalize the position of women and men in the labour market, has mostly focused on the criminal justice system, such as police and the prosecution authorities, attempting to change the prejudice and stereotyping women have encountered as victims in cases concerning gender-based violence.

According to provisions of GEA 150/2020, the general objective of the act is to be reached by, among other things, changing traditional gender images and working against negative stereotypes regarding the roles of women and men, and one of the tasks of the Directorate of Equality is to work against negative gender ideas and stereotypes regarding such roles. The relevant provisions are rather weak, however, and are unlikely to have any great impact on society.

Gender equality in the educational system is addressed in GEA 150/2020, which states: 'At all levels of the educational system, pupils shall receive appropriate instruction on equality and gender issues, including about gender stereotypes, gender-based choice of education and occupation and on matters concerning people with disabilities and queer people.'¹⁸⁵

Addressing stigma, stereotyping, and prejudice requires comprehensive remedies and funding, and it cannot be achieved exclusively by equality legislation. Drawing students' attention to the situation of people with disabilities and queer people is a positive step, however, though one may wonder why the status of people of non-Icelandic origin is not addressed by the legislation. Obligatory gender studies in the educational system and measures such as reevaluating typical female professions might be effective for achieving structural changes in norms and values.

- c) *Enhancing choice and participation* is presumably the most successful field in the application of the gender equality legislation. Women's participation is now equal to men's in most fields of society, although the labour market is still partly gendered, both vertically and horizontally, and the top positions in the private sector are still reserved mostly for men.¹⁸⁶ The solution presented has often been to motivate girls or young women to educate themselves in typical men's professions, in the hope that they might thus obtain recognition and reasonable wages. Such an approach, however, sends a message to girls about the lower

184 Tove Stang Dahl, *Kvinnerett I* [Women's Law I] (Universitetsforlaget 1985) 16.

185 Section 15(2) of GEA 150/2020.

186 Starfshópur forsætisráðherra [The Prime Minister's Working Group], 'Verðmætamat kvennastarfa. Tillögur starfshóps forsætisráðherra um endurmat á virði kvennastarfa' [The Valuation of Women's Jobs: The Prime Minister's Working Group's Proposal on Reevaluation of Women's Jobs] 2021, 10 <https://www.stjornarradid.is/library/01--Frettatengt---myndir-og-skrar/FOR/Fylgiskjol-i-frett/Ver%C3%B0m%C3%A6tamat%20kvennastarfa_Sk%C3%BDrsla%20og%20till%C3%B6gur%20starfsh%C3%B3ps%20til%20umsagnar.pdf> accessed 22 July 2022.

value of female professions and female norms instead of emphasizing their freedom to choose their own paths. Instead, a more successful method might be to motivate boys and young men to go into typical women's professions. The structural discrimination according to which typical women's professions are valued less highly than those of men has been tried to some extent in individual cases in which typical women's education and jobs received less remuneration than typical men's education and jobs, and the Supreme Court concluded that this was a form of gender discrimination.¹⁸⁷

- d) *Accommodating differences and achieving structural change* requires a comprehensive framework built on visions of the goal to be reached. There has been no general ideological debate in the Althing regarding the passing of equal rights legislation, except to some extent at the outset of Iceland's gender equality legislation and during the 1980s.

Over the years, official documents related to gender equality – whether legislative bills, plans of action, or government policy documents – have not placed much emphasis on addressing the gendered imbalance of power in general or the subordination of women. Nor has the status of marginalized groups, such as women with disabilities, women of non-Icelandic origin, or queer women, been addressed to any notable extent in the parliamentary debates on equality. The emphasis has been on practical issues, such as equal pay for equal work or work of equal value, equal rights to jobs, and the prohibition of discriminatory practices. This approach has had the effect that the emphasis is on individual issues or individual cases as demarcated challenges that can be resolved without reference to the underlying causes, with a focus on addressing individual discriminatory practices through the use of traditional approaches, with little attention to structural discrimination. However, in recent years, some changes can be seen in the responsible minister's reports to the biannual Gender Equality Forum, in which the minister has addressed the issue of power imbalance and underlying causes for gender discrimination.¹⁸⁸ In 2021, the prime minister's working group on the revaluation of work traditionally performed by women submitted its report, proposing some measures aimed at eliminating the gender pay gap rooted in the gender-divided labour market.¹⁸⁹ In

187 Supreme Court of Iceland, *Akureyrarbær gegn kærufnd jafnréttismála vegna Ragnhildar Vigfúsdóttur* [The Municipality of Akureyri v The Equality Complaints Committee on Behalf of Ragnhildur Vigfúsdóttir] 11/2000 (2000).

188 Félags- og húsnæðismálaráðherra [Minister of Social Affairs and Housing], 'Skýrsla félags- og húsnæðismálaráðherra um stöðu og þróun jafnréttismála 2013–2015' [The Report of the Minister of Social Affairs and Housing on the Development of Equality Matters 2013–2015], Jafnréttisþing [Gender Equality Forum] 2015; Félags og jafnréttismálaráðherra [Minister of Social Affairs and Equality], 'Skýrsla félags- og jafnréttismálaráðherra 2015–2017' [The Report of the Minister of Social Affairs and Equality 2015–2017], Jafnréttisþing [Gender Equality Forum] 2018.

189 Starfshópur forsætisráðherra [The Prime Minister's Working Group] 2021, 188 <https://www.stjornarradid.is/library/01--Frettatengt--myndir-og-skrar/FOR/Fylgiskjol-i-frett/Ver%C3%B0m%C3%A6tamat%20kvinnastarfa_Sk%C3%BDrsla%20og%20till%C3%B6gur%20starfsh%C3%B3ps%20till%20umsagnar.pdf> accessed 22 July 2022.

addition, the #MeToo movement has drawn attention to the gender power imbalance in the context of gender-based and sexual harassment.

The role of the relevant enforcement bodies in the area of structural discrimination has not been decisive. Under Iceland's gender equality legislation, however, the duties of the minister responsible for gender equality include presenting reports, submitting a gender equality action plan to the Althing, and initiating a biannual equality forum. The minister is able to present their policies and plans through these tasks, which serve to keep the debate on gender equality open in society. In that respect, the various gender equality acts have been useful in achieving structural changes.

4.10 Concluding remarks

When we examine the development of gender equality in Iceland from GEA 78/1976 to GEA 150/2020, there does not seem to have been a steady improvement in women's rights and status over time. Rather, the development seems more to have involved two steps forward and one step backwards, resulting in a slow forward movement that might in some way be typical for the story of the development of human rights in general.

The discourse introduced into discussions in the Althing by the Women's Alliance shows the importance of ideology and awareness of the situation of women within the legislative procedure. Furthermore, the contribution of individuals with a specific responsibility for equality matters is clear. Two of the most progressive proposals in relation to GEA 28/1991 and GEA 10/2008 were submitted by Jóhanna Sigurðardóttir in her capacity as minister of equality matters.

One of the main problems in achieving gender equality seems to be the lack of available resources and remedies for addressing and resolving structural discrimination, which is essential if substantive equality is to be achieved.

The material scope of GEA 150/2020 is wide, and the normative standards contained in the act are in many ways strong, especially in relation to employment. However, these need to be clarified in order to avoid the possibility of a strict interpretation of the relevant provisions by the courts of law and the ECC.

The normative standards are partly set by the legislator, but they are more conspicuous in the enforcement of the law. Therefore, when the enforcement system is not sufficiently strong, progressive legislation, policy, and action plans are unable to redress the disadvantages women experience.

The enforcement system in Iceland is rather weak. The Directorate of Equality does not work as a discrimination or equality ombud; women do not get enough support; and those who consider themselves to have suffered a violation receive neither legal nor financial support for their efforts to bring a complaint to the ECC. Access to the ECC has been narrowed over the years and needs to be widened. The ECC's interpretation of the rules on the burden of proof also needs to be clarified in the equality legislation. The ECC has no power to impose compensation. This means that even if the ECC rules in favour of a complainant, the complainant needs to bring a case before the courts of law to seek compensation.

Furthermore, the margin of appreciation that employers have been given in the last 10–15 years in employment cases needs to be addressed and limited in Iceland's gender equality legislation.

When it comes to structural discrimination, employers and trade unions are to systematically work towards equalizing the position of women and men in the labour market.¹⁹⁰ The labour unions in Iceland have not been active in taking cases to the ECC, which could be an ideal way of addressing structural discrimination in the labour market.

Finally, it is interesting to observe the impact of the #MeToo movement. It would have been very difficult for the women who stepped forward in 2021 to obtain any results through the remedies available in Iceland's existing equality legislation or the justice system in general. Women's experience of the criminal justice system and, to some extent, in discrimination cases is not liable to increase their trust in the system. And when they see the effect of standing together and revealing their experience through social media, why should they count on a system built on men's norms and values that repeatedly reveals its lack of knowledge of the life and experience of women?

190 Section 4(1) of GEA 150/2020.

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