

Introduction

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

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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 ombuds 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.