

1. Introduction

A note of general nature: although there exists legislation on discrimination - including discrimination on the basis of disability - case law and pertinent legal literature on this subject is scarce, and on some points nonexistent. Therefore this report relies rather strongly on the *travaux préparatoires* and the authoritative statements of the Constitutional Committee of the Parliament. The author has deliberately declined from taking a *definite* position as regards some specific questions in which the position of the Finnish legal system is manifestly uncertain.

This introductory chapter focuses on the law making procedure and the division between law- making and the administration of justice.¹

According to the Finnish Constitution [Suomen Perustuslaki (731/1999)], the legislative power is vested in the Parliament together with the President of the Republic. Legislative proposals may be submitted to the Parliament either by the government or by an individual Member of Parliament in the form of a motion. In practice the former way is clearly more important than the latter, by way of which usually only bills alternative to a Government bill are submitted by MP's. Government bills are drafted in the pertinent ministry that has responsibility over the subject matter. Projects of wider general interest are drafted in ad hoc commissions that usually have representatives from relevant ministries and other public bodies as well as from e.g. political parties, social partners and/or other interest groups. It is also customary to invite interest groups to comment upon draft legislation. The Council of State (government) scrutinizes the bills drafted in the ministries in general session prior to their submission to Parliament by the President.

The handling of a Government bill (or a representative's motion) in the Parliament starts with a general debate, after which the matter is referred to a select committee, which hears experts and investigates the issue thoroughly and produces a report. In its report the committee may propose that the bill be adopted as it is, or with certain amendments, or that it be rejected. If it is doubted that the bill encroaches upon the protection of constitutional rights or international human rights, the bill is also referred to the Constitutional Committee, which will provide its authoritative opinion on whether the proposed bill is in accordance with the Constitution and human rights treaties or not. After the committee proceedings phase is over the bill is handled in the plenary sessions of the Parliament in two separate readings, in the latter of which the bill must either be approved or rejected. A simple majority of votes is sufficient for the adoption of regular laws. If the bill means in fact an exception to the Constitution, the bill must be approved by two consecutive Parliaments, in the latter of which the bill must be approved by a majority of two thirds of the votes cast.

¹ These subjects are determined by the Constitution [Suomen perustuslaki (731/1999)]. Division of powers is fixed in section 3 of the Constitution. Sections 70-80 of the Constitution deal with the law making procedure, while sections 98-118 deal with the administration of law and legality control.

Such a bill may also be approved by a single Parliament by declaring it urgent by a majority of five sixths. An adopted act is submitted to the President of the Republic for ratification. If the act is not ratified within three months, it is returned to the Parliament. If the Parliament does not change its opinion the act enters into force even without presidential ratification.

The President, the Government and a ministry may issue decrees (asetus) pursuant to an act adopted by the Parliament, but matters related to the rights or responsibilities of individuals must always be enacted in the form of an act.²

The Constitution guarantees to everyone the right to have her/his case heard appropriately and without undue delay by a court or other public authority.³ Everyone has the right to have a decision affecting her/his rights and duties reviewed by a court or other judicial organ.⁴ In addition to the general and administrative courts of law and the special courts of law (Insurance Court, Labour Court and Market Court), the overseers of legality, i.e. the Parliamentary Ombudsman⁵ and the Chancellor of Justice of the Government,⁶ have in practice had a significant role in ensuring that anti-discrimination provisions are complied with in the work of authorities and public agencies. The Occupational Health and Safety Authority is entrusted with overseeing that employers comply with laws having a bearing to employment relationships. In case there is reasonable doubt to suspect that discrimination has taken place, the Authority shall file a report to the public prosecutor.

The duties of the Ombudsman for Minorities (vähemmistövaltuutettu) pertain only to foreigners and ethnic minorities, though suggestions have been made to the effect that his mandate be broadened to cover other grounds of discrimination as well.⁷ The newly established Discrimination Board (syrjintälautakunta) has been given a mandate to deal with claims of ethnic discrimination only.

Despite the existence of these judicial recourse mechanisms, concerns have been voiced that the implementation of especially social welfare rights for disabled people is often insufficient in practice.⁸ Many have also considered the current situation, under which some discrimination grounds enjoy better remedies and mechanisms of judicial recourse than others, to be inherently discriminatory.⁹ The Parliament has also considered this situation to be fundamentally unacceptable, and has passed a statement requiring the government to

² Section 80 of the Constitution.

³ Section 21 of the Constitution. The Deputy Parliamentary Ombudsman has strongly recommended that the authorities should handle any cases concerning persons with severe disabilities without unnecessary delays. She referred to the section 21 of the Constitution, the section 6 providing for equality and nondiscrimination and the section 22 obligating the public authorities to ensure the de facto realization of basic rights and human rights. Parliamentary Ombudsman, report no. 2606/4/99 and 1129/4/00, decision of 30 January 2001.

⁴ Section 21 of the Constitution.

⁵ The duties of the Parliamentary Ombudsman have been laid down in section 109 of the Constitution.

⁶ The duties of the Chancellor of Justice of Government have been laid down in section 108 of the Constitution.

⁷ E.g. the Minister of Labour Tarja Filatov has suggested that the mandate of the Ombudsman for Minorities should be broadened to cover also sexual minorities. Susanna Kaaja, "Filatov: Vähemmistövaltuutettu huolehtimaan myös seksuaalivähemmistöistä", *Helsingin Sanomat* 24.8.2002.

⁸ Paul van Aerchot, *Vammaispalvelulain toimeenpano ja oikeusvaltion periaatteet* [The Implementation of the Act on Services and Assistance for the Disabled, and the Rule of Law Principles], in Aerchot, Ilveskivi and Piispanen, *Juhlakirja Kaarlo Tuori 50 vuotta*, Helsingin yliopiston julkisoikeuden laitos, Helsinki 1998, p. 164 in particular.

⁹ Sanna Ahola and Tuomas Himanen : *Vammaisen Pakolaisena. Pakolainen 4/03 verkkoversio*. Article available online at http://www.pakolaisapu.fi/pak_4_03/pak4_03_juttu_4.html (visited 1 April 2004).

make a new proposal for equality legislation.¹⁰ This new draft legislation is required to take as its point of departure the principle that all discrimination grounds are to be treated equally.

2. The Legal Framework

The three most important provisions prohibiting discrimination on the ground of disability are included in the Constitution, the Penal Code [rikoslaki (39/1889)] and the Equality Act [yhdenvertaisuuslaki (21/2004)]. In addition to these, there are more than ten individual acts that include a prohibition of discrimination in the application of that particular law.¹¹

Provisions guaranteeing equality and non-discrimination have been given a pride of place in the Constitution, as they are placed first among fundamental rights. Section 6.1 of the Constitution reads as follows:¹²

Everyone is equal before the law

The reference “before the law” is usually taken to refer to the application of law, meaning that the provision is seen to act as a principle limiting the discretionary power of the person or authority applying the law. In this sense the paragraph is strongly related to conceptions of justice and the right to fair trial. The provision acts as a guarantee against arbitrary decision making and demands that like cases be treated alike.¹³ Lately it has become a widely accepted interpretation, that the provision creates obligations also towards the law makers to ensure that the legislation that is passed is in accordance with the principle of equality.

Corollary to the section 6.1. is section 6.2:

No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.

6.3: Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to them to a degree corresponding to their level of development.

¹⁰ PTK 107/2003 vp, p.7, TyVM //2003 vp.

¹¹ See Timo Makkonen, *Yhdenvertaisuus- ja syrjimättömyyssäännöt Suomen oikeusjärjestelmässä* [Equality and non-discrimination law in the Finnish Legal System], in IOM Helsinki, *Syrjinnän vastainen käsikirja*, Helsinki 2003.

¹² NB: all the translations of legislation in this report are unofficial. A considerable amount of Finnish legislation has been translated into English by the Ministry of Justice, but it is submitted that those translations are at times too imprecise or even a bit faulty for the purposes of accurate legal interpretation, which is why the author has chosen to modify the mentioned translations (which do not have any official status either) when clearly mandated by the need to improve precision.

¹³ Martin Scheinin, “Yhdenvertaisuus ja syrjinnän kieltö” [Equality and the Prohibition of Discrimination], in Hallberg et al, *Perusoikeudet* [Basic Rights], WSOY 1999, p. 233.

The prohibition of discrimination in section 6.2. is rather general in scope: its field of application has not been limited in any way, it covers both direct and indirect discrimination, and the listing of grounds is open-ended. Disability and health are explicitly mentioned as forbidden grounds of discrimination. The provision does not use the concept of “discrimination” as such but speaks instead of “differential treatment without an acceptable reason”. A reason is acceptable if it serves an objectively justifiable end that serves the objectives of the fundamental rights system, and if the means used are proportionate to the ends. The non-discrimination clause of section 6.2 in combination with the obligation of authorities to promote human rights and fundamental freedoms, as written down in section 22 of the Constitution, have been taken to mean that the legislator has an obligation to make sure that the legislation does not contain provisions that without an acceptable reason treat people differently on a prohibited ground.¹⁴

The Equality Act, which entered in force on February 2004, was enacted as part of the process by which the two EU directives on equal treatment were transposed into national law.¹⁵ The act explicitly covers the grounds of ethnic and national origin, age, religion and belief, health, disability, language and sexual orientation, in addition to which the list of grounds is open-ended. The scope of application of the Act is wider in relation to ethnic and racial discrimination than the other grounds, following the approach of the two directives. The Equality act prohibits discrimination on the basis of disability in the fields of 1) conditions for self-employment and to occupation, 2) recruitment criteria, employment and working conditions, promotion, training of staff 3) education, and 4) membership of and involvement in an organizations of workers of employers, or any organizations whose members carry a particular profession, including the benefits provided by such organizations. The act is mainly of administrative nature.

The Employment Contracts Act, which came into force in June 2001, contains a non-discrimination provision with regard to working life.¹⁶ The core provision of Chapter 2, section 1, prohibits “differential treatment without an acceptable reason” and refers to the Equality act as regards the applicable definition of discrimination, prohibition of victimization and the shifting of burden of proof. The list of prohibited grounds of discrimination includes for instance disability, age, health, national or ethnic origin, nationality, sexual orientation, language and religion, in addition to which the list is open-ended.

Chapter 2, section 1 further demands that

The employer must otherwise, too, treat employees equally unless there is an acceptable reason for derogation deriving from the duties and position of the employees.

This means that the employer has a general obligation to improve employer/employee relations as well as relations between employees. Importantly, an employer shall also “strive

¹⁴ HE (Government proposal) 200/2000 vp.

¹⁵ These are the Council directive 2000/73/EC and the Council directive 2000/43/EC.

¹⁶ There is also a specific act concerning civil servants, containing a similar prohibition of discrimination: Act on Civil Servants [virkamieslaki (750/1994)]. The non-discrimination provision is in section 11 of the Act.

to further the employees' opportunities to develop themselves according to their abilities so that they can advance in their careers".

The Penal Code contains two provisions on discrimination, one of general nature (section 11:9) and one specifically targeting discrimination in the field of employment (section 47:3). The general provision (section 11:9) concerns discrimination mainly in the provision of services, exercise of profession, and carrying out of duties in public office, and sanctions, *inter alia*, the placing of a person, without an acceptable reason, into a manifestly unequal or considerably worse position in comparison to others. The employment specific provision (section 47:3) concerns an employer or his representative, who in the recruitment process or during employment places a person into a disadvantageous position without a weighty, acceptable reason. Neither of the provisions explicitly mentions disability as a forbidden ground of discrimination, but both of these provisions refer to e.g. health status and are open-ended in nature. There is no doubt whatsoever about the applicability of these provisions to disability discrimination.

Of the different grounds of discrimination, only sex is at the moment handled in a specific act devoted only to that one particular ground, namely the Act on Equality Between Women and Men [laki naisten ja miesten tasa-arvosta (609/1986)]. The act provides e.g. for specific legal safeguards, especially through the office of the Ombudsman for Equality (tasa-arvovaltuutettu) and the Council for Equality (tasa-arvolautakunta). The act also provides for just satisfaction (hyvitys), the award of which does not require the establishment of criminal guilt and the amount of which does not depend merely on the financial loss of the injured party. "Sex" in the sense of the act does (probably) not include sexual orientation,¹⁷ since an explicit amendment of the law was required before even discrimination on the basis of pregnancy was accepted as discrimination based on sex.¹⁸

Finnish legislation does not as such address multiple discrimination. However, because the main provisions against discrimination are open-ended, this does not seem to pose a problem to the Finnish legal system. There have been, however, some cases in which the Ombudsman for Equality and the Ombudsman for Minorities have had to discuss between themselves which one of these authorities should take up a case possibly involving discrimination on the grounds of both ethnic origin and sex.

Only a small number of cases involving discrimination have been dealt with by the courts over the years. None of these has involved discrimination on the basis of disability. Most cases have involved discrimination on the basis of sex or ethnic origin. These cases have typically been based on the provisions in the Penal Code, the Employment Contracts Act or the Act on Equality between Women and Men.

¹⁷ This goes against the practice of the Human Rights Committee, which in the case of *Toonen v. Australia* noted that "in its view, the reference to 'sex' in articles 2, paragraph 1, and 26 [of the UN Covenant on Civil and Political Rights, TM] is to be taken as including sexual orientation." CCPR/C/50/D/488/1992

¹⁸ The interpretation that discrimination on the basis of pregnancy constitutes discrimination on the basis of sex was rejected by the Supreme Court of Finland before the amendment to that effect of the Act on Equality Between Women and Men. See KKO:1992:7.

3. The Normative and Conceptual Framework

The notion of equality under current law. On a very general level it can be said that as a Nordic welfare state the starting point of the Finnish legal system is the promotion of equal opportunities. Equal opportunities are, however, often advanced by means of social policies and not by means of anti-discrimination law. Anti-discrimination law in itself is largely based on a formal understanding of equality and discrimination, though there are elements providing or allowing for equality of opportunity and even equality of results as well.

Section 6.1 of the Constitution provides for equality before the law. According to the *travaux préparatoires* the section refers not only to formal equality but to substantial equality as well.¹⁹ The prevailing interpretation in legal literature seems to be that in regard to the application of law, section 6.1. presumes that no other distinctions than those that are expressly allowed for in that particular provision (which is being interpreted) are permitted.²⁰ One also has to note, however, that section 22 of the Constitution requires that public authorities see to the realization of basic rights and human rights. This provision obliges e.g. the legislator and the justice system to actively secure the *de facto* realization of rights, which may necessitate the taking into account of the specific situation of e.g. persons with disabilities. As a small step towards that direction can also be seen the evolution of the principles of good administration, which e.g. obligates the administration to take positive steps to ensure that all people before it *de facto* have the same opportunity to successfully present their case, irrespective of e.g. disability.²¹ However, there is no case law at the moment that would clarify whether equality is to be interpreted only as sameness of treatment, or whether it can also be interpreted as equality of treatment.

Section 6.1. of the Constitution is also of importance with respect to law making. According to the (Parliamentary) Constitutional Committee, which *de facto* has a very authoritative position in interpreting the Constitution, the provision does not presume that legislation has in every case to treat population groups in identical ways. Especially if the legislation under drafting is intended to improve the situation of a socially vulnerable group, it does not breach the requirement of “equality before the law”, which is in any case to be interpreted broadly.²² While the Constitution does thus not explicitly refer to “equal protection of the laws”, the demand for equality before the law, widely interpreted, read together with the obligation of the public authorities to see to the realization of fundamental rights and human rights, can be seen as an obligation for the public authority to actively promote the realization of *de facto* equality. That being said, for the moment this kind of doctrine building remains more a matter of theory than practice.

In accordance with what was submitted above, legislation that aims to further *de facto* equality e.g. by promoting the situation of a socially vulnerable group, is not considered to

¹⁹ HE 309/1993.

²⁰ See e.g. Martin Scheinin, “Yhdenvertaisuus ja syrjinnän kieltö” [Equality and the Prohibition of Discrimination], in Hallberg et al (eds) *Perusoikeudet* [Basic Rights], WSOY 1999, p. 234.

²¹ Juhani Kortteinen & Timo Makkonen, *Oikeutta rasismien ja syrjinnän uhreille - rasismien vastainen käsikirja* [Handbook for the Victims of Racial Discrimination], Ihmisoikeusliitto 2000, pp. 58-59.

²² Cf Scheinin, op. cit n 19 above, p. 234.

breach the requirement of equality.²³ Hence there is in force a considerable number of such laws that aim for instance at promoting the employability of disabled people, but which do not make references to the principle of equality. Also, there are a large number of court cases regarding the proper implementation of these laws, but equality or non-discrimination argumentation is usually not used as *ratio decidendi*, which further emphasizes the fact that this kind of social legislation is not seen primarily as an equality issue as such, but as a matter of general social policy.

When considering the nature of Finnish anti-discrimination law, it must also be noted that the Act on Equality Between Women and Men uses quotas to determine the participation of men and women in public committees.²⁴ Quotas, of course, are a means of achieving *equality of results*.

By way of conclusion one may thus say that the Finnish system is based on legislation providing for equality of opportunity, which is strongly backed up by non-discrimination provisions, on top of which even means used to attain equality of results are used to a small extent.

The notion of discrimination under current law. Finnish legislation contains more than a dozen non-discrimination provisions in different laws. These laws are not formulated in an identical way. Some of the non-discrimination provisions (e.g. the Constitution and the Penal Code) prohibit “differential treatment without an acceptable reason” and do not explicitly refer to “discrimination”, while some other acts, including the Equality Act, prohibit “discrimination” as such. To complicate matters further, the Employment Contracts Act, as amended in December 2003, prohibits “differential treatment” but also refers to the Equality Act for the definition of “discrimination”. The reason why it is necessary to make a distinction between these two basic types of formulations is that they are also in practice to be interpreted differently, which is why these two approaches are discussed separately here as well.

Section 6.2. of the Constitution defines discrimination as “putting of a person into a different position without an acceptable reason”. Section 11:9 of the Penal Code defines discrimination as “putting a person into a manifestly unequal position or into substantially worse position than the others, without an acceptable reason”. Section 47:3 of the Penal Code defines discrimination in employment as “putting of an employee or a prospective into a disadvantageous position without a weighty, acceptable reason”.

The putting of a person into a different position covers also segregation, i.e. the provision of services separately for different groups, unless an acceptable reason can be provided for such action. While the Constitution does not explicitly refer to the differentiation between direct and indirect discrimination, section 6.1 covers both.²⁵ As the provisions of the Constitution are to be given precedence in comparison to the provisions of regular acts where the two are in a manifest conflict,²⁶ this means that if the application of a law would

²³ Ibid, p. 236, where the author refers to the practice of the Constitutional Committee.

²⁴ Section 9 of the Act.

²⁵ HE 309/1993.

²⁶ Section 106 of the Constitution. The precedence of Constitutional provisions over the provisions of regular acts is a

prove to be directly or even indirectly discriminatory, it must not be applied. No established practice or legal opinion exists as to how *exactly* the Constitutional prohibition of indirect discrimination is to be determined, but the base line is to evaluate the factual consequences of an action.

The relevant sections in the Penal Code do not distinguish between direct and indirect discrimination, and it is highly unlikely, given the requirements of the legality principle, that they would be interpreted to cover indirect discrimination.

The Equality Act was adopted in December 2003 in order to transpose into national law the year 2000 EU directives on equal treatment. Its definition of discrimination has been modeled after the two directives and thus the definition explicitly encompasses both direct and indirect discrimination. While the “putting of a person to a different position without an acceptable reason” –formulation allows the use of justification arguments to rebut a presumption of discrimination, the Equality Act does not allow the use of justification arguments as regards direct discrimination.

The Act on Equality Between Women and Men expressly prohibits both direct and indirect discrimination for the purposes of that specific act. Indirect discrimination is in the act defined as a procedure by way of the effects of which some people are put in a *de facto* different situation.²⁷

None of the above non-discrimination provisions seems to say anything as regards similar treatment of dissimilar people. One must note though, that there is no case law as yet as regards the interpretation of the Equality Act. However, as previously discussed, the legislator does have an obligation to actively promote *de facto* equality on the basis of sections 6.1. and 22 of the Constitution.

Differentiation on grounds of characteristics closely related to disability (e.g. the assistance of a dog for a blind person) would most probably constitute discrimination under the relevant laws. There is, however, no case law or legal literature on the subject.

Failure to provide reasonable accommodation may amount to discrimination, but not automatically. The law or the *travaux préparatoires* are not explicit on the subject, but it may be argued e.g. that if a disabled person was not hired, but was in fact the best candidate when obligatory reasonable accommodation measures are taken into account, then this is a clear case of discrimination on the basis of disability (it would seem to constitute direct discrimination). Whenever a failure to provide reasonable accommodation constitutes discrimination, it gives raise to a right to claim just satisfaction (either under the Equality Act or the Employment Contracts Act). In the light of the wording of section 5 of the

rather new feature of the Finnish legal system, as it was introduced by the 1999 constitutional reform. Before the reform the provisions of the Constitution could not override the provisions of a regular act, even though regular acts were to be interpreted in way which best fulfilled the realization of constitutional provisions and even though constitutional rights could be directly applied. In a recent case the Supreme Court interpreted a section of a regular act, which was in contradiction with the constitutional protection of property rights, against its wording and in accordance with the Constitution, thus confirming the precedence of the constitutional provisions over those of an ordinary act (KKO 2004:26. 20).

²⁷ Section 7.2 of the Act.

Equality Act and its *travaux préparatoires*, if the failure does not amount to discrimination as defined in section 6 (2) of the act, no sanctions apply, but this is without prejudice to the possibility of obtaining satisfaction through general law, e.g. the Torts Liability Act [vahingonkorvauslaki (412/1974)].

Harassment and instruction or order to discriminate, constitute discrimination under the Equality Act. The definition of harassment has been modeled after the two directives. Some forms of harassment may also constitute (petty) assault or defamation under the Penal Code. Similarly, an instruction to discriminate may also constitute an unlawful threat (section 25:7), instigation (section 5:2) or aiding and abetting to a crime (section 5:3) under the said Code.

There is a well-established line of case law on that an instruction to discriminate constitutes discrimination in itself under the Penal Code as well. Three exemplary cases can be referred to.²⁸ Two of these cases dealt with a situation in which immigrants were denied access to a restaurant on the grounds of their origin, and one with a situation in which people of Romani origin were denied access to a camping site. In all of these cases the fault of an employer was deemed to have been greater than that of an employee who actually carried out the discriminatory actions, either because the employer had given an outright instruction to discriminate or because he had failed to make sure that his employees did not engage in discriminatory activity on the basis of instructions he had given.

The notion of reasonable accommodation under current law. Section 5 of the Equality Act deals with reasonable accommodation:

In order to promote equal treatment in accordance with section 2.1 [of the same act, deals with the material scope of the act], an employer or education provider shall, when necessary, take reasonable measures in order to enable a disabled person to have access to employment or education, to keep his or her work, and to advance in his or her career. In assessing what is reasonable, account must be taken especially of the costs arising thereof, the financial situation of the employer or education provider, and the availability of public funding or other resources.²⁹

As is clear from the text, section 5 is a disability-specific provision. There are no similar provisions for other discrimination grounds. The concept used is “kohtuulliset toimet”, which literally translates as “reasonable measures”, not reasonable accommodation. Measures are to be taken “when necessary”, which according to the preparatory works means that the need for reasonable accommodation is to be determined on a case-by-case basis.³⁰ In the work place, appropriate accommodation measures may relate e.g. to work conditions, organization of work, working hours, methods of work, work aids, training and work guidance.

In determining which measures are “reasonable”, one must take into account especially the

²⁸ Court of Appeal of Helsinki 29.10.1998, Nro 3258, R 97/1136; Court of First Instance of Riihimäki, 23.5.2000, Nro 10093, R 00/13; Court of First Instance of Jyväskylä, 22.11.1994, R 94/882.

²⁹ Unofficial translation by the author.

³⁰ He 44/2003.

costs arising thereof, the financial situation of the employer or education provider, and the availability of public funding or other resources for such purposes. According to the preparatory works, one may also take into consideration the size of the organisation or business enterprise. Also such a situation may be considered unreasonable where the taking of “reasonable measures” would alter the operation of the work place “too much” and would at the same time endanger occupational safety and health.³¹

At this point it must be emphasized that reasonable accommodation is an obligation for individual subjects under the national law and is separate from the duty to take positive action. The public power (the legislator in particular) fulfills its more general duty to take positive action in part by demanding accommodation from private subjects. Whether the public power meets its obligations cannot thus be measured by means of the reasonability test, but this matter is to be judged against the standard set by its objective duties.

With this in mind, we may take a look at some other pieces of legislation which may have a bearing on the issue:

According to the Employment Contracts Act [työsopimuslaki (55/2001)] an employer shall “strive to further the employees’ opportunities to develop themselves according to their abilities so that they can advance in their careers”.³² This obligation extends also to disabled employees. Pursuant to section 28 of the Occupational Safety and Health Act [työturvallisuuslaki (738/2002)], employer has to take employee’s physical and psychological ability into account when planning the work to be carried out, in order to eliminate or decrease any potential danger or harm that the work may inflict on the health or safety of the employee.

An employer may receive a refund for costs that result from work and training experimentations, medical examinations, and consultations aiming to support the opportunities of a disabled person to gain or keep her/his work.³³ An employer may also receive compensation for such accommodation measures (with regard to changes to machines or other physical environment or e.g. the rearrangement of the method of work) that it has taken in order to enhance the opportunity of a disabled person to gain or keep his/her work.³⁴ To be compensated for these kinds of accommodation measures, they must be *necessary* in order to eliminate or decrease disadvantage resulting from a disability or an illness.³⁵ Maximum compensation for such measures is 1 681,88 € per person. An employer may also receive compensation in a situation in which a fellow employee provides help to a disabled employee in order to enhance his/her ability to perform his/her work properly. The maximum compensation in this case is 168,19 € per month for a maximum period of one year.

We might also note that the Act on Services and Assistance for the Disabled provides for

³¹ Idem.

³² Section 2:1 of the Act.

³³ Employment Services Act, section 12.

³⁴ Decree on Employment Service Benefits [asetus työvoimapalveluihin liittyvistä etuuksista 17.12.1993/1253], section 14.

³⁵ Idem.

transportation services, interpretation services, service housing, personal assistance, reimbursement of costs relating to home alterations, rehabilitation counselling and adaptation training.

The notion of positive action under current law. Section 7 (2) of the Equality Act deals with positive action. It states that the Equality Act does not preclude special measures that aim at attaining de facto equality in order to prevent or compensate for disadvantages linked to discrimination, as long as such measures are proportional. If a certain measure does not meet the given criteria it would seem to constitute discrimination.

The wording of the provision on positive action indicates that the permission to take positive action measures should be understood to be an integral part of the principle of equal treatment. The taking of positive action is not required, only allowed, although it must be kept in mind that the public authorities are under an explicit obligation to promote the realization of equal treatment “in everything they do”.³⁶ Also the Constitution underlines the obligation of the public authorities, including the Parliament, to actively promote the realization of equality in fact.³⁷

That being said, the doctrine on positive action is rather unclear especially with regard to the boundary between positive action and legislation aiming to advance the situation of groups that are socially in a vulnerable situation. The legislator has a rather wide margin of appreciation in determining what kind of measures are necessary in a given social situation, especially if the draft legislation intends to improve the situation of socially disadvantaged groups or individuals.³⁸ Most of the *travaux préparatoires* for legislation that aim at e.g. improving the employability of disabled persons do not use positive action argumentation in their reasoning. For instance, the Government proposal 169/2001 on legislation enhancing the employability of disabled persons refers to the constitutional obligation to promote employment (section 18.2 of the Constitution), the obligation of the public authorities to promote the realization of basic rights (section 22 of the Constitution), and the need for the realization of *these* rights not to be discriminatory *against* the disabled people (section 6.2. of the Constitution). While the objective of the legislation was indeed the promotion of employment opportunities of a specific, disadvantaged group of people, its possible character as positive action legislation was not spelled out.³⁹ The lack of clarity referred to above relates exactly to this question: was for instance this legislation needed to implement an existing right in practice, in which case it was not to be considered positive action, or was it a positive action measure deviating from the principle of non-discrimination? In the opinion of the author, only such pieces of legislation, or only such concrete actions, which create or make use of a clear order of preference to be applied in a concrete decision making situation which deals with people with different situations who are competing for the same

³⁶ Section 4 of the Equality Act.

³⁷ Sections 6 and 22 of the Constitution.

³⁸ Martin Scheinin, “Yhdenvertaisuus ja syrjinnän kielto” [Equality and the Prohibition of Discrimination], in Hallberg et al, *Perusoikeudet* [Basic Rights], WSOY 1999, p. 236.

³⁹ To complicate matters further, the Government proposal mentions the Framework Employment Directive and its approach on positive action in a section in which it discusses “other international obligations of relevance”. It does not, though, explicitly spell out whether the directives’ stance on positive action had any effect on the preparation of the proposal.

goods, are to be considered positive action provided the aforementioned requirements are fulfilled.

A summary of existing obligations with regard enhancing the situation of people with disabilities in the field of employment and occupation. The responsibility to enhance and promote the employability of disabled people belongs to a large extent to the state and the municipalities. According to the section 18.2 of the Constitution

The public authorities shall promote employment and work towards guaranteeing for everyone the right to work. Provisions on the right to receive training that promotes employability are laid down by an Act.

This constitutional obligation is mainly implemented by Employment Services Act [työvoimapalvelulaki (1005/1993)], according to which the primary means for the enhancement of employability are provided by the state labour force services (valtion työvoimapalvelut).⁴⁰ The labour administration provides occupational rehabilitation services through 120 employment offices all over the country. Disabled persons have access to vocational guidance and guidance relating to job placement and training, employment counseling, employment-promoting training and work and training try-outs at workplaces and vocational education institutions. The municipalities on their part have, according to the Social Welfare Act [sosiaalihoitolaki (710/1982)] section 17, an obligation to provide for rehabilitation and other measures supporting the employability of disabled people.

It might also be noted that the Act on Services and Assistance for the Disabled provides for transportation services, interpretation services, service housing, personal assistance, reimbursement of costs relating to home alterations, rehabilitation counseling and adaptation training.

According to the Employment Contracts Act the employer on his part shall “strive to further the employees’ opportunities to develop themselves according to their abilities so that they can advance in their careers”.⁴¹ This obligation extends also to disabled employees. The employer has also to take an employees physical and psychological ability into account when planning the work to be carried out, in order to eliminate or decrease any potential danger or harm that the work may inflict on the health or safety of the employee, pursuant to the Occupational Safety and Health Act [työturvallisuuslaki (738/2002), entered into force on 1.1.2003], section 28.

The employer may receive a refund for costs that result from work and training experimentations, medical examinations, and consultations aiming to support the opportunities of an disabled person to gain or keep her/his work.⁴² The employer may also receive compensation for such accommodation measures (with regard to changes to machines or other physical environment or e.g. the rearrangement of the method of work) that she/he has taken in order enhance the opportunity of a disabled person to gain or keep

⁴⁰ Section 1 of the Act.

⁴¹ Section 2:1 of the Act.

⁴² Employment Services Act, section 12.

his/her work.⁴³ To be compensated for these kinds of accommodation measures, they must be *necessary* in order to eliminate or decrease disadvantage resulting from a disability or an illness.⁴⁴ Maximum compensation for such measures has been laid down to be 1 681,88 € per person. An employer may also receive compensation in a situation in which a fellow employee provides help to a disabled employee in order to enhance his/her ability to perform his/her work properly. The maximum compensation in this case is 168,19 € per month for a maximum period of one year.

The purpose of work try-outs is to acquaint disabled persons with working life for the period of up to six months. During a try-out period the employer does not pay the disabled person wages, but the person receives remuneration either from the labour administration or the Social Insurance Institution. Work try-outs can be arranged at the same workplace for a maximum of six months. In order to support the access of disabled job seekers to the labour market an employer can receive an employment subsidy for a maximum of two years (up to 760 €/month). The majority of disabled persons who obtain jobs through this support are employed either by municipalities or the state.⁴⁵ Employment subsidy is also payable to companies that improve the vocational facilities of disabled persons and employ them provisionally. Employment subsidy is granted to companies on the basis of an employment contract concluded for a fixed period, if the company provides employment counseling and employment-promoting rehabilitation in the context of supported employment. Such a combination of supported employment, education and rehabilitation is valid for a maximum of two years. In this case employment subsidy is paid to the company for a maximum of ten months.

Some obligations for the employer may also flow from the non-discrimination provision of the Employment Contracts Act, which prohibits the putting of persons into different position on the grounds of e.g. disability. It might be argued that if an employer is not taking the necessary accommodation measures he/she is putting a disabled person to a disadvantaged and thus different position with regard to other employees if the disabled employee cannot perform his/her duties with the same level of effort as the other employees. This line of thinking has not been tested through the case law, though.

Act on Social Undertakings entered in force in January 2004. The Act defines the conditions under which an undertaking may be registered as a social undertaking and be eligible for certain employment policy subsidies from the state. At least 30 % of the workers of such an undertaking must be people with disabilities or people with a history of long-term unemployment.

Treatment of medical examinations under current law. The Occupational Health Care Act [työterveyshuoltolaki (1383/2001)] regulates the use of medical examinations in relation to employment (including recruitment process).⁴⁶ The Act e.g. lays down duties of the

⁴³ Decree on Employment Service Benefits [asetus työvoimapalveluihin liittyvistä etuuksista 17.12.1993/1253], section 14.

⁴⁴ Idem.

⁴⁵ Independent Living - Challenge for Disability Policy. Brochures of the Ministry of Social Affairs and Health, 1999:5.

⁴⁶ A translation of the Act in English can be found from the following www-address:

<http://www.finlex.fi/pdf/saadkaan/E0011383.PDF>

employer to arrange occupational health care (section 4), the duty of the employer to make sufficient use of occupational health care experts and professionals (section 5), mandates how the health care is to be arranged (section 7), has a provision on employee protection in case she/he would be put at risk because of personal health characteristics (section 10), on the duty of the employer to have a written occupational health care action plan (section 11), and the duty of the employee to attend a medical examination (section 13).

In accordance with section 12 of the Act, an employer has a duty to provide for, e.g.

2) investigation, assessment and monitoring of work-related health risks and problems, employees' health, working capacity and functional capacity, including any special risk of illness caused by the work and the working environment, and any medical examinations as a result of the aforementioned points, having regard to the individual characteristics of the employee;

5) monitoring and supporting the ability of a disabled employee to cope at work, having regard to the health requirements of the employee, provision of advice on rehabilitation and directing for treatment or medical or vocational rehabilitation;

In accordance with point 5) above, an employer has a duty to ensure that the health status of a handicapped employee does not deteriorate due to conditions relating to work.⁴⁷ The measures taken to promote the ability of a handicapped person to work should not only be directed at the handicapped employee, but also the working environment and the arrangement of the working methods; this means that the work should be adapted to the needs of a handicapped employee, and not (always) vice versa.⁴⁸

An employee may not without a good cause refuse to attend a medical examination referred to in the Occupational Health Care Act if such examination is necessary for: 1) investigating the employee's health in performing work or being in a working environment that presents a special risk of illness; or 2) investigating the employee's working capacity or functional capacity for the purposes of the health requirements associated with the job (section 13). The medical examination shall be performed by mutual agreement with the employee.

According to the Act on the Protection of Privacy in the Working Life [laki yksityisyyden suojasta työelämässä (477/2001)], the employer shall collect information concerning the employee primarily from the employee him/herself. In order to collect information from elsewhere, the employer must obtain the consent of the employee (section 4). With the employee's consent, his/her capacity to perform work or need for training and other occupational development may be assessed by means of personality and aptitude tests. The employer shall ensure that the test methods used are reliable, the persons conducting the assessment are experts, and the findings of the assessment are free from error (section 5). The employer has no right to require the employee to take part in genetic testing during recruitment or during the employment relationship, and no right to know whether or not the employee has ever taken part in such testing (section 7).

⁴⁷ HE 114/2001.

⁴⁸ Idem.

According to Personal Data Act [henkilötietolaki (523/1999)], section 11, the data on a persons state of health, illness or handicap is to be considered “sensitive data”, the processing of which is prohibited. Section 12 of the Act contains a limited number of express derogations to this prohibition, and provides that the processing of sensitive personal data is allowed e.g. when the subject has given his/her express consent and when the processing of a data is based on an Act.

The defences available under current law. According to section 7 of the Equality Act, following types of treatment shall not constitute discrimination: 1) measures taken to achieve de facto equality, if these measures are pursued according to a specific equal treatment plan and aim at the realization of the purpose of the Act in practice, 2) difference of treatment which is based on a genuine and determining occupational requirement related to the nature of the particular occupational activity or the context in which the activity is carried out, 3) differential treatment on the basis of age if such treatment has an objective and legitimate aim, provided that the aim is objectively justified by e.g. employment policy concerns and 4) positive action (as defined above). The list of available defences is exhaustive. While the text says that the above enumerated types of treatment do not constitute discrimination, and the notion of discrimination covers not just direct and indirect discrimination but also harassment and an instruction to discriminate, it seems clear that these defences are only available with regard to direct and indirect discrimination. The Act or its *travaux* do not specify if and when a particular disability may be considered to constitute a genuine and determining occupational requirement.

4. The Personal and Material Scope of Law

Definition of ‘a person with a disability’ under current law. The national anti-discrimination law defines neither ‘a disability’ nor ‘a disabled person’: no definitions can be found from the legislation or deduced from the case law. Other pieces of legislation do contain definitions. The Act on Services and Assistance for the Disabled, section 2, defines a disabled person as a person who because of impairment or an illness has longstanding difficulties to get by ordinary activities of life. Functional capacity cannot thus be assessed only medically. Decree on Labor Force Services [työvoimapalvelusetus (1251/1993)] on its part defines “a handicapped” as a person whose opportunities in the working life have considerably lessened due to an appropriately established impairment or illness.⁴⁹ Both of these definitions are specific and have no bearing on anti-discrimination law as such.

As all the main non-discrimination provisions are open-ended in their list of grounds, the issue how exactly disability is to be defined under them does not have any major significance. The Constitution, for instance, expressly refers to both disability and health status as prohibited grounds of discrimination, and covers also “other characteristics relating to the person”. The Equality Act expressly covers for instance disability and health, in addition to which it covers “other reasons (grounds/characteristics) related to a person”.⁵⁰

⁴⁹ Section 10, subsection 2 of the Decree.

⁵⁰ Section 6 (1) of the Equality Act.

Thus such demarcation issues as whether disability has to be severe to be covered, or whether temporary or reversible impairments are included, or whether high propensity toward ‘future’ disabilities (as revealed e.g. through genetic testing) count as disability, should usually pose no problem for the national anti-discrimination law. In the opinion of the author, also ‘perceived’ disability is covered, even in situations in which this perception is completely unfounded.

Definition of ‘employment’, ‘occupation’, ‘training’ etc under current law. Anti-discrimination laws do not as such define employment, occupation, training or other similar concepts. However, the Employment Contracts Act defines “an employment contract” for the purposes of that Act, including its non-discrimination provision, and the definition of an employment relationship is customarily deduced from it. Thus, unless a specific act otherwise ordains, an employment relationship refers to a situation in which one party, employee, undertakes to work for another party, employer, under his supervision and for remuneration.⁵¹ The national law does not make any distinctions between small, medium and large sized enterprises with regard to the application of non-discrimination provisions.⁵² Anti-discrimination provisions, including those in the Employment Contracts Act and the Equality Act, apply also to work done under ‘sheltered employment’.⁵³

Other than that, there are no definitions of terms such as “occupation” or “training” in the relevant laws or their *travaux préparatoires*. One must note, however, that section 2 of the Equality Act provides that discrimination on the basis of disability is prohibited not just in the area of vocational training etc [as in Art 3.1. (a) of the Framework Directive] but also in the area of education in general.⁵⁴

Vicarious Liability for discrimination and harassment under current law. The Equality Act does not deal with vicarious liability issues, which means that general rules and principles regarding these matters apply. According to the Employment Contracts Act, and the related section 47:3 of the Penal Code, an employer and/or his representative are responsible for any discriminatory action they have themselves taken. An employer who is aware of the existence of discrimination, or who fails to oversee that no discrimination takes place, can also be indicted.⁵⁵ According to an established line of case law, the fault of an employer or a superior has been considered to be greater than that of an employee, even in cases where the fault of the employer has been one of failing to oversee that no discrimination takes place.⁵⁶ As the provisions of the Employment Contracts Act are not to be applied to work carried out by sub-contractors, the employer cannot as such be held liable for their action under these provisions. Should an employer nevertheless try to evade the law by instructing a sub-contractor to discriminate, his liability under section 47:3 of the Penal Code might arise. If an employer places his employee at the disposal of another employer, the latter has

⁵¹ HE 157/2000 vp.

⁵² HE 157/2000 vp .One exception to this rule exists, though. In the Act on Equality Between Women and Men (section 6a) an employer, who has 30 employees or more, is obliged to make a specific yearly plan on how to further equality between men and women in the working place.

⁵³ HE 169/2001 vp.

⁵⁴ This is with the exception that the prohibition of discrimination in the Equality Act does not apply to the objectives or content of education or the educational system in itself. Section 3 of the Equality Act.

⁵⁵ HE 94/1993 vp.

⁵⁶ See e.g. the decision of the Court of Appeal of Helsinki, 29.10.1998, Nro 3258, R 97/1136.

responsibility over matters directly relating to the carrying out of the particular assignment by the employee.⁵⁷

According to the Occupational Safety and Health Act, which entered into force on 1.1.2003, an employer is under an obligation to pursue all measures available after he has learned of undue treatment or harassment which may pose a harm or danger to the health of an employee. Such harassment or undue treatment may take place between employees or between an employee and a superior.⁵⁸ In case the perpetrator is a customer, the employer has to provide instructions to the employees on how to handle such situations. It is possible that inaction from the side of an employer can be deemed to fulfill the essential elements of the discrimination offence as defined by the Penal Code or the Employment Contracts Act.

The employee may also be entitled to compensatory damages under the Tort Liability Act [vahingonkorvauslaki (412/1974)].⁵⁹

Harassment cannot be “objectively justified”.

Remedies, enforcement and sanctions against discrimination under current law. A person who considers him- or herself wronged by way of discrimination may initiate either criminal or civil proceedings. Discrimination is considered a crime under public prosecution in the Penal Code. This means, inter alia, that after a victim of discrimination has filed a crime report to the police, the police has to investigate the matter under the leadership of a prosecutor (pretrial investigation). As a punishment for discrimination the Penal Code prescribes fines or an imprisonment of maximum of six months.⁶⁰ In clear majority of the cases the perpetrator is sentenced to fines and to pay damages. A victim of discrimination (on the basis of disability) may claim just satisfaction from an employer or education provider for up to 15 000 € under the Equality Act.⁶¹ The amount of satisfaction is to be considered in the light of the nature and extent of discrimination, the way in which the perpetrator relates to the offence in retrospect, the result of the possible conciliation proceedings, the financial ability of the perpetrator, and other possible sanctions of financial nature that have been determined by a court in relation to the same offence. The “maximum amount” mentioned in the law may be exceeded if the breach is considered to be particularly serious.

Interested organizations may not start criminal or civil proceedings on behalf or in support of victims of discrimination, but individual lawyers (working for an organization) may, subject to general statutory restrictions for representation, file a crime report on discrimination and represent the victim in the court upon his/her authorization.

The Equality Act provides for a shift in the burden of proof in accordance with the framework directive. The shift of burden of proof does not apply to criminal proceedings or

⁵⁷Section 1:7.3 of the Employment Contracts Act.

⁵⁸ HE 59/2002 vp.

⁵⁹ See e.g. the decision of the Supreme Court (KKO) 1992:180.

⁶⁰ Penal Code sections 11:9 and 47:3.

⁶¹ Section 9 of the Equality Act.

to certain administrative proceedings in which it is up to the court to establish the facts of the case. The rules on burden of proof are same for all grounds of discrimination.

Should an employment contract contain a provision that is arguably discriminatory either in itself or in its effects, such a provision can be adjusted or be completely disregarded.⁶² Discriminatory action from the side of an employer can also constitute grounds for giving a notice by the employee for the termination of the employment contract, or even outright dissolving of the contract.⁶³

If discrimination takes place in the public sector, a person who considers himself wronged can also file a complaint to the Parliamentary Ombudsman or the Chancellor of Justice of the Government. However, these overseers of legality have no jurisdiction to alter the decisions of authorities on the basis of complaints, nor to award damages, but they may e.g. issue admonitions or order criminal prosecution against a public official.

⁶² Employment Contracts Act, section 9:2. Equality Act, section 10.

⁶³ Employment Contracts Act, section 8:1.