

1 Sweden

From proactive policies to anti-discrimination law

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1.1 Introduction

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

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

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

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

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

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

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

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

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

Part 1: Swedish gender equality policy and law

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

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

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

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

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

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

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

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

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

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

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

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

1.2.1 Recognition of the gendered dimension of power

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

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

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

16 Pylkkänen (n 11), 201–212.

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

18 Svensson and Gunnarsson (n 2).

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

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

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

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

1.2.2 *The strategy of institutionalization*

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

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

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

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

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

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

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

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

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

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

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

27 SOU 2015:86 (n 24).

28 SOU 2005:66 (n 22).

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

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

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

1.2.3 The challenge of persistent socioeconomic gender gaps and inequalities

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

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

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

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

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

32 World Economic Forum 2022.

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

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

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

36 Ownership (n 34).

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

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

1.3.1 Constitutional principles on non-discrimination and substantive gender equality

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

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

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

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

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

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

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

39 In its concluding comments on Sweden's seventh periodic report, which was followed up by a combined eighth and ninth report, the CEDAW Committee expressed concern that the provisions of the Convention, even though largely respected, have not yet been fully incorporated into the domestic legal system and, as a result, are not directly applicable in the national courts; see CEDAW/C/SWE/CO/7; CEDAW/C/SWE/CO/8-9 14.

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

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

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

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

1.3.2 Legislation on sex discrimination and equal opportunities

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

50 SOU 1990:41 (n 49), 317–321.

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

52 Prop. 1993/94:147 (n 19), 43–55.

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

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

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

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

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

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

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

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

1.3.2.1 An attempt to use affirmative action at Swedish universities

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

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

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

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

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

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

62 *Ibid.*

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

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

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

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

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

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

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

67 *Ibid.*, 64–69.

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

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

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

1.3.3 *The current Discrimination Act (2009)*

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

1.3.3.1 *The prohibition against discrimination*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.3.3.2 Additional legislation relevant for discrimination in the labour market

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

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

78 Lag (2008:568) om Diskrimineringsombudsmannen.

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

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

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

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

83 Föräldraledighetslag (n 78).

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

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

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

1.3.3.3 *The enforcement system in the Discrimination Act*

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

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

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

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

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

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

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

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

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

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

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

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

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

1.3.3.4 Pending reform to improve the Discrimination Act

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

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

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

89 SOU 2021:94 (n 74).

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

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

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

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

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

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

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

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

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

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

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

1.3.4.1 Supervision of active measures

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

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

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

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

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

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

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

1.4 Gender equality laws intertwined with the welfare state

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

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

95 Board Decision Nr 1-15.

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

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

1.4.1 Criminalization to protect women's integrity

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

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

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

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

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

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

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

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

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

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

1.4.2 Individualization of social welfare and tax laws

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

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

104 Pyllkkänen (n 11).

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

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

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

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

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

108 Gunnarsson, Burman and Wennberg (n 11).

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

110 Gunnarsson, Burman and Wennberg (n 11).

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

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

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

1.5 Access to justice and the enforcement system

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

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

1.5.1 The vague mandate of the Equality Ombudsman

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

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

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

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

1.5.2 The process of individual complaints about discrimination

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

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

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

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

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

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

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

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

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

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

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

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

1.5.2.1 Negative consequences of downsizing the support to complainants

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

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

121 SOU 2020:79 (n 95).

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

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

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

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

1.5.3 The Ombudsman's supervision of active measures

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

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

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

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

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

123 Svenaeus (n 117).

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

125 SOU 2020:79 (n 95).

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

1.5.4 Other actors and access to justice

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

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

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

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

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

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

1.6 Active measures regarding equal pay have blind spots

1.6.1 Introduction

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

1.6.2 The strategy to map the gender pay gap

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

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

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

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

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

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

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

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

The survey is to monitor the following:

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

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

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

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

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

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

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

1.6.3 The midwife cases on work of equal value

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

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

133 *Ekonomisk Jämställdhet* (n 128).

134 SOU 2022:4 (n 33).

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

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

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

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

1.6.4 The role of the social partners

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

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

1.6.5 Recent evidence on the gender income gap

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

136 Svenaeus (n 47).

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

138 SOU 2022:4 (n 33).

1.7 Growing political critique of the gender equality project

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

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

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

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

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

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

141 Bergquist et al. (n 138).

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

143 Kalonaityté (n 141).

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

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

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

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

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

145 Svensson and Gunnarsson (n 2).

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

147 1993/94:147 (n 19).

148 Svenaeus (n 47).

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

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

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

1.7.3 Controversies and criticism of gender equality

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

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

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

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

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

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

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

156 Kriszan, Skjeie and Squires (n 6).

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

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

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

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

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

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

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

160 Kalonaityté (n 141).

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

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

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

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

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

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

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

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

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

167 Lilja and Johansson (n 165).

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

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

1.7.4 Ideological transformation

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

Part 3: The potential and limits of gender equality legislation

1.8 In the throes of change

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

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

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

172 Nygren, Martinsson and Mulinari (n 164).

173 Mulinari and Nergaard (n 169).

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

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

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

1.8.1 Contradictory ideologies

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

174 Svensson and Gunnarsson (n 2).

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

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

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

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

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

1.8.2 From action to information

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

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

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

1.8.3 Gender equality contested

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

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

1.8.4 To conclude

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

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

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