

Constructing Human Rights from Soft Law: The Swedish Journey towards Protection Against Unlawful Discrimination

Laura Carlson

1	The Starting Point – Discrimination as Addressed up to 1976	77
1.1	The International Instruments Addressing Discrimination	77
1.1.1	United Nations Instruments	78
1.1.2	The European Convention	78
1.1.3	The ILO Conventions Concerning Wage and Employment Discrimination	79
1.1.4	EU Instruments	80
1.2	Sweden’s Starting Point	81
1.2.1	The Swedish Constitutional Tradition – Constitution as Soft Law?	82
1.2.2	The European Convention on Human Rights and Sweden	84
1.2.3	The Swedish Labour Law Model	85
2	The Period from 1976 to 1993 – The First Swedish Discrimination Statutes	87
2.1	International Instruments	87
2.2	Swedish Discrimination Legislation	88
2.2.1	Swedish Legislation Prohibiting Discrimination on the Basis of Sex	88
2.2.2	Unlawful Employment Discrimination on the Basis of Ethnic Origin	91
3	The Period of 1994 to 2007 – The Expansion and Reconciliation of Swedish Discrimination Legislation	92
3.1	International Instruments Addressing Discrimination	92
3.2	Swedish Legislation during the Third Phase	94
4	The Fourth Phase – The Swedish Discrimination Act	95
5	Protection against Discrimination as a Human Right - Are we there yet?	97
6	Conclusion	99

This article traces the Swedish journey with respect to the treatment of discrimination issues. The current Swedish parliamentary understanding of protection against unlawful discrimination as a fundamental human right, can be seen as beginning in a period of no regulation, going over to a soft law approach (on both international and national levels) and then to a progressively hard law approach. This journey can be seen as having been completed by the Swedish parliament but arguably not yet whole-heartedly by the Swedish courts. This change in treatment was brought about mainly due to external forces, namely EU membership and the Europeanization of discrimination protections. Coming to the current Swedish parliamentary perception, that protection against unlawful discrimination on the basis of sex, transgender identity and expression, ethnicity, religion or other belief, disability, sexual orientation or age, is a fundamental human right, has been neither a self-evident, nor a linear, path in Swedish discrimination law. The point at which this parliamentary perception is given the same effect by the Swedish courts can be seen as the end of this journey.

As this volume of *Scandinavian Studies in Law* is dedicated to the topic of soft law, several other of the articles here have addressed the debate and definitional issues surrounding the term “soft law”, with the general conclusion that there is no universally-accepted definition of the term. Existing law and social science literature on hard and soft law can be divided into at least three different camps: legal positivist, rationalist, and constructivist.¹ Legal positivists can be seen as favoring a binary view of the law, with hard law those legal obligations of a formally binding nature, and soft law those which are not formally binding. Rationalists can be seen as contextualists, in that hard or soft law is chosen by the actors involved depending upon the context of the situation, and that these approaches are not mutually exclusive. Constructivists focus on the “socialization processes” which both approaches can facilitate, with an emphasis on the capacity of soft law to “generate shared norms and a sense of common purpose and identity, without the constraints raised by concerns over potential litigation.” Threads of each of these perspectives can be seen in the subject matter of this article, but the primary focus is the conversion of the soft law approach by the Swedish legislator to hard law and human rights with respect to protections against unlawful discrimination.

The starting period of this journey morphing soft law into hard law, and ultimately human rights, can be seen as the period from approximately the end of World War II when several international instruments were drafted, up to 1976 when the new Instrument of Government was amended to include provisions with respect to discrimination. During this first phase, discrimination in general was not unlawful, with few protections in place in Sweden, mainly those as agreed to by the social partners. The second phase begins in 1976 and covers the twenty years just prior to the Swedish legislative preparations for becoming a member of the European Union (then European Community) in 1995. The first significant Swedish employment discrimination

1 For this categorization of soft law, see Gregory C. Shaffer and Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 *MINN.L.REV.* 706 (2010).

statutes came into effect during this second phase and initially were gap-filling legislation, with the social partners free to contract out of them. The third phase begins in 1994 and goes up until 2008 when the present Discrimination Act (2008:567) was adopted, coming into force on 1 January 2009. During this third phase, discrimination on bases other than sex or ethnic origins, and in contexts other than employment, came to be statutorily prohibited in different acts. In addition, this period can be seen as the beginning of a more hard law approach to the issue of discrimination, in part a result of the beginning of a reconciliation between the Swedish Labor law model of self-regulation and the EU liberal individual rights model. The fourth current phase commences with the 2008 Discrimination Act, which ultimately combined the majority of the Swedish discrimination legislation into one universal act and can be seen, at least from the perspective of the Swedish legislator, as the beginning of a perception of protection against unlawful discrimination now being a human right protected under hard law.

Two cases are discussed at the end of this article to demonstrate the legal hurdles that still exist in giving the new “hard law” effect as human rights protections with respect to unlawful discrimination, basically the very liberal judging of the courts with respect to such claims. Parallel developments in both international discrimination instruments as well as Swedish constitutional law are included throughout this article to better illuminate the context in which Swedish discrimination law has developed into a protection viewed as a fundamental human right.

1 The Starting Point – Discrimination as Addressed up to 1976

The starting point for this Swedish journey from no regulation, to soft law, to hard law regulation of discrimination issues, and ultimately human rights, is the period up to 1976, when the new Instrument of Government was amended to include explicit protections as against certain types of discrimination. This first section initially sets out the international and regional instruments that would come to affect the Swedish development, and then the legal theoretical framework for the Swedish approach.

1.1 The International Instruments Addressing Discrimination

World War II and its aftermath gave impetus to several international and regional instruments addressing protections against discrimination. The primary ones during this first phase ultimately influencing Swedish discrimination law include the United Nations Universal Declaration of Human Rights, the European Convention on Human Rights, and the two ILO conventions concerning discrimination.

1.1.1 United Nations Instruments

The first of these instruments was the United Nations Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948. Under it, Sweden and all the other member countries (with the exception of six) declared in its Article 2 that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 7 prescribes that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” Equal pay for equal work is protected in its Article 23(2), stating that “[e]veryone, without any discrimination, has the right to equal pay for equal work.”

Three more instruments were issued by the United Nations in 1966. The United Nations Convention on the Elimination of All Forms of Racial Discrimination was signed by Sweden in 1966 and ratified in 1971. The United Nations Universal Covenant on Civil and Political Rights and the United Nations Covenant on Economic, Social and Cultural Rights were both signed by Sweden in 1967 and also ratified in 1971.

1.1.2 The European Convention

The European Convention for the Protection of Human Rights and Fundamental Freedoms² was drafted almost directly after the United Nations Universal Declaration of Human Rights in 1948. The Convention was signed in Rome in 1950 by the members of the Council of Europe,³ of which Sweden has been a member since its inception in 1949.⁴ Sweden ratified the Convention in 1952. Under Article 14 of the Convention, the signatories committed to that “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Two additional acts were required by the signatories for the implementation of the system regarding the protections under the European Convention, recognition of the Council’s jurisdiction to receive individual applications, which Sweden was the first to do in 1951, and a declaration accepting the

2 For more on the European Convention and Sweden, see Iain Cameron, *An Introduction to the European Convention on Human Rights* (6th ed. Iustus 2011). For more on the Convention, the European Council and the European Court of Human Rights, see the Council’s website at www.coe.int and the Court’s website at www.echr.coe.int.

3 At that time, the Council of Europe consisted of ten Member States: Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and the United Kingdom. It now consists of 46 Member States. See the Council of Europe website at www.coe.int.

4 See Legislative Bill 1949:214 *Kungl. Maj:ts proposition till riksdagen angående godkännande av Sveriges anslutning till Europarådet*.

jurisdiction of the European Court of Human Rights, which Sweden did in 1966. The acceptance of jurisdiction by the European Court of Human Rights can be seen as a step from a soft law approach (basically no accountability) to a more hard law regulation (accountability to the European Court of Human Rights under the Convention).

1.1.3 The ILO Conventions Concerning Wage and Employment Discrimination

The adoption of ILO Convention No. 100 on the Equal Remuneration for Men and Women Workers for Work of Equal Value of 1951 came three years after the signing of the United Nations Universal Declaration of Human Rights. The equal pay convention was followed seven years later by ILO Convention No. 111 on discrimination (employment and occupation), adopted in 1958. The issue of whether Sweden should ratify these conventions was raised in the 1950's.⁵ As to a guarantee of equal wages, different wage tariffs for men and women had existed in the collective agreements since the beginning of the 1900's. Both the government and parliament opposed ratification as they did not wish to depart from the Swedish labour law model under which the social partners in the labor market have the right to enter into agreements through free contract negotiations as to wage conditions without interference or influence of the state in the form of legislation. The central labour market organizations, the employers' organization, SAF, and the blue-collar labour organization, LO, entered into an agreement that all such different wage tariffs would be phased out over a period of five years beginning in 1960.⁶ Based on this, the Government found that the conditions required to adopt the conventions

5 See, for example, Legislative Bill 1952:47 *Kungl. Maj:ts proposition till riksdagen med anhållan om riksdagens yttrande angående vissa av Internationella arbetsorganisationens konferens år 1951 vid dess trettiofjärde sammanträde fattade beslut* at 1. See also Legislative Bill 1959:23 *Kungl. Maj:ts proposition till riksdagen med anhållan om riksdagens yttrande angående vissa av Internationella arbetsorganisationens allmänna konferens år 1958 vid dess fyrtyoandra sammanträde fattade beslut* at 11. See also Ds Ju 1975:7 *PM till frågan om lagstiftning mot könsdiskriminering* at 26, citing Legislative Bill 1952:47, Bet. 1952:2LU21, as well as renewed parliamentary treatment in 1956 (Bet. 1956:2LU37), 1958 (Bet. 1958:B8LU2), 1959 (Bet. 1959:2LU2), 1960 (Bet. 1960:2LU58) and 1961 (Bet. 1961:2LU4) regarding ILO Convention No. 100, Equal Remuneration Convention of 1951, incorporating the principle of equal remuneration for men and women workers for work of equal value, and Bet. 1959:2LU2, Rskr. 1952:83 regarding ILO Convention No. 111, Discrimination (Employment and Occupation) Convention of 1958 (prohibition as to discrimination on the basis of race, creed or sex).

6 An example of the sex-based tariffs as explicitly included in the collective agreements can be seen in the collective agreement, *Verkstadsavtalet*, dated 1960 given as Attachment 1, in Sten E. Son Edlund, *Twisteförhandlingar på arbetsmarknaden – En rättslig studie av två riksavtal i tillämpning* (Norstedts 1967) at 363. Minimum wages are listed in the agreement on the basis of sex, which are then broken down further as to age, with the age of 19 being peak wages for women, and the age of 24 for men. Male wages are further categorized by length of experience. For employees at least the age of 24 with at least seven years experience, a man was entitled to a minimum wage of SEK 3.08 per hour, a woman SEK 2.43, 79 % of the male wages. *Id.* at 364.

existed in 1962, and parliament ratified the conventions that same year despite continued opposition by LO and SAF.⁷

1.1.4 EU Instruments

Today's European Union was also founded during this first stage, with the Treaty of the European Coal and Steel Community signed in 1951 and coming into force in 1952, creating the first of the communities, the European Coal and Steel Community. Belgium, France, the Federal Republic of Germany, Italy, Luxembourg and the Netherlands agreed that "world peace can be safeguarded only by creative efforts commensurate with the dangers that threaten it," and that Europe could "be built only through practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development."⁸ Six years later, the principle of equal pay between men and women was drafted into Article 119 of the Treaty establishing the European Economic Community (also referred to as the the Treaty of Rome), the second of the communities. This treaty extended the market sectors from simply coal and steel to all economic sectors in the Member States, with the objective of creating a common economic market by 1970 through the establishment of the four freedoms of movement of goods, persons, capital and services.

France worked for the inclusion of Article 119 proscribing equal pay for women and men in the draft of the treaty. France had had equal pay provisions in place since World War II and at that time, had one of the smallest pay differentials between women and men, 7 % as compared to up to 40 % in Italy.⁹ France argued that it could not compete with the price of goods from countries in which women were paid less than men.¹⁰ This market distortion, or social dumping, was seen as an impediment to the free movement of goods. Article 119¹¹ of the Treaty of Rome was drafted and adopted, mandating that "[e]ach Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work." Article 119 was to be implemented by the Member States by 1961, the end of the first transitional stage. Sweden was not a member at this stage, simply an observer, but would be significantly affected

7 Legislative Bill 1962:70 *Kungl. Maj:ts proposition till riksdagen rörande ratifikation av Internationella arbetsorganisationens konvention (nr 100) angående lika lön för män och kvinnor för arbete av lika värde, m.m.*, Bet. 1962:2LU26, Rskr. 1962:333.

8 See the second and fourth paragraphs of the preamble to the ECSC Treaty.

9 Catherine Barnard, *EC Employment Law* (3rd ed. Oxford 2006) at 7 citing Budiner, *LE Droit de la femme a l'égalité de salaire et la Convention No. 100 de l'organisation internationale du travail* (Librairie Générale de Droit et de Jurisprudence, Paris 1975).

10 Article 119 was also inspired by ILO Convention No. 100, Equal Remuneration Convention of 1951.

11 Later Article 141 of the Amsterdam Treaty (1997)("EC Treaty") and now after the Lisbon Treaty, Article 157 of the Treaty of the Function of the European Union ("TFEU").

by the developments in Union law with respect to discrimination protections upon its membership in 1995.

1.2 Sweden's Starting Point

The historical developments occurring in Sweden as a result of the above mainly soft law instruments demonstrate simultaneously the disadvantages as well as advantages of soft law as a legal phenomena. The disadvantages can be seen as the difficulty of individuals to receiving redress for injuries arising from a violation of a soft law rule, as well as the difficulties in changing structural discrimination when there is no accountability and consequently no incentive to work towards change. The advantages, however, can be seen as those pointed out by the rationalists in that the opposition of the social partners, the labour unions and the employer organizations, to hard law in this area would have prevented any type of instrument if only hard law was available. Soft law in the form of the Declaration and conventions was simply more palatable within the Swedish context and labour law model at that point of time. The other advantages are those as pointed out by the constructivists, in that Europe and Sweden can be seen as inevitably heading towards a normative, societal acceptance that individuals must be protected against discrimination, at least on certain grounds.

One must take a step back into the Swedish history of individual rights and constitutional law, as well as into labour and employment law, in order to understand the metamorphosis of Swedish discrimination law, from discrimination basically not being prohibited by statute and also not viewed as problematic, through an acceptance of soft law, to the present state of the hard law under which employment discrimination is not only unlawful, but protection from such and in other areas, has begun to be viewed as a fundamental human right. The changes that have occurred in the Swedish legal system since the early 1970's in these areas have been arguably revolutionary twice over.

This first phase is marked more by action with respect to discrimination issues on the international and regional levels than on the Swedish national level. These international instruments, as set out above, came to be cited fifty years later by the Swedish Parliament as the basis for the 2008 Discrimination Act. Much of this international activity was a fallout of World War II and the racism exhibited, as well as the fact that women in continental Europe were forced to work to replace the men absent from the work place due to military service. The latter was not as significant a factor in Sweden due to its neutrality during World War II.

The political understanding in Sweden during this first stage can be seen as characterized by a great faith in majoritarianism, that the will of the majority cannot be wrong. This is a remarkable stance given World War II, but again can be explained at least partially, by Sweden's neutrality during the war. This faith in majoritarianism is reflected in the new Instrument of Government adopted in 1974.

1.2.1 The Swedish Constitutional Tradition – Constitution as Soft Law?

It is difficult to understand the rather, at least initially, lackadaisical approach taken to such fundamental issues such as human rights by the Swedish Government during this period if one is not familiar with Swedish constitutional history. The 1809 Instrument of Government¹² was still in effect up to the 1970's, covering the period under which many of the international instruments were being signed by Sweden, at least technically. Individual rights, as such, were addressed generally in Article 16 of this constitutional act, which stated that the King was to:

- [M]aintain and further justice and truth,
- [P]revent and forbid inequity and injustice,
- [N]ot deprive nor allow any person to be deprived of life, honor, personal liberty or well-being without a lawful trial or sentence, and
- [That] no person [should] be deprived of property, whether chattels or real, without a warrant and judgment in the manner as prescribed by Swedish law,
- [T]hat no person's peace should be disturbed in his home,
- [T]hat no person should be extradited from one place to another,
- [T]hat no person should be forced to act in violation of his conscience but rather be protected and able to freely exercise his religion as long as he did not disturb the public peace or cause public disturbance.

The King was also to ensure that only courts having jurisdiction over a person could sentence that person. This article, and the rights therein contained, had roots extending back to Magnus Eriksson's letter of proclamation in 1319, which bound the crown to govern by rule of law, assure due process, and allow new taxes to be imposed only after consultation with the Royal Council, evidencing a fairly unbroken constitutional tradition as to certain individual rights of over six hundred years. Otherwise, individual rights as such were not addressed other than those as granted in the Freedom of the Press Act with respect to access to public documents and freedom of the press and speech. A parliamentary committee was appointed in 1938 to oversee Article 16, but its findings were not acted upon in the aftermath of World War II.

The 1809 Instrument of Government espoused a distribution of political power loosely based on a separation of power in line with Baron de Montesquieu's political theory, between the King, Parliament, the Supreme

12 The first "Instrument of Government" was drafted in 1634, arguably simply as a precaution to allow for a continued government administration in the event of any absence of Swedish kings during war. The second Instrument of Government, adopted in 1719 after the death of King Karl XII, marked the beginning of a period referred to in Swedish history as the "Age of Liberty" from 1718-1772. The power of the King was diminished, giving greater political authority to the central administration and the Parliament. The third Instrument of Government was drafted by the politically strong King Gustav III in 1772, giving greater political power back to the king and marking the end of the Age of Liberty. The fourth Instrument of Government, adopted in 1809 after King Gustavus IV was removed from the throne for losing Finland to Russia, once again redistributed the political power.

Court and the National Bank. However, a shift in political power, from the King to the Parliament, had been occurring successively during the twentieth century without any parallel amendments to the Constitution reflecting such. A different committee was formed in the early 1960's, charged with modernizing the constitution as a whole. Its 1963 proposal including a separate chapter on individual fundamental rights was criticized. Another committee was formed in 1966, first presenting a proposal that did not include a separate chapter on fundamental rights and freedoms. The predominant political view, much in line with a communitarian approach to law, was that such rights and freedoms were unnecessary in a welfare state. This omission was also criticized, and the Government was ultimately forced to include a separate chapter addressing individual rights in the legislative bill.

The Instrument of Government adopted in 1974 to replace that of 1809 was to embody the constitutional changes that had successively occurred during the interim. The failure of the 1809 Instrument of Government to reflect the political reality, and the marginalization of the outdated Instrument of Government, is seen as giving rise to a sort of anti-constitutionalism. The constitution did not and should not reign in popular sovereignty.

A second departure consciously taken from the 1809 Instrument of Government was the decision to change the balance of political power from that of separation of power to a separation of function. Parliament is to be the sole legislator as seen from the portal paragraph of the 1974 Instrument of Government: "All public power in Sweden proceeds from the people." As a result, a comparatively weak court system was created with only limited powers. This is also clear from the fact that the third branch of political power, after the legislative and executive branches, is generally not perceived of as the judicial branch in Sweden, but rather the press. The courts were not given a power of judicial review, simply the possibility in the case at hand to declare a law in violation of the constitution. If an act of parliament or a government regulation, a higher threshold was required, with a court being able to declare it to be so only if manifestly not in compliance with the constitution.

Within this focus on majoritarianism, the draft including a chapter on individual rights was adopted in 1974. These individual rights comprised only of five articles, concerning freedom of speech, expression, assembly, demonstration, association, religion and movement, as well as the right to information, protection from forced disclosures as to associations or religion, protection from unlawful searches of person, home or correspondence, access to public documents and the right for the social partners to take lawful industrial actions.

The chapter two rights were expanded in 1976, including the addition of Article 15 stating that no law or other type of legal provision can entail that a citizen is treated less favourably on the basis of race, color or ethnic origin. Article 16 was also added in 1976 forbidding the state from discriminating against any person by law or regulation due to sex. Exceptions to this were included in the article, however, in that the discrimination is to be deemed legal if the legal instrument constitutes a step in the endeavor to achieve equality between men and women or unless it relates to compulsory military service or other similar official duties.

The role of the rights as cataloged in chapter two, however, was still greatly debated in certain circles. Those legal scholars in favor of a weak judicial system argued that chapter two rights should be more of a policy declaration as were certain of the rights in chapter one, in essence, soft law, and not be meant to serve as a legal basis for a remedy. Instead, they should more be meant to serve as guidelines for the Parliament in its legislative work, giving precedence to the principles of parliamentary rule and popular sovereignty. These different views are reflected in the legislative preparatory documents for the 1974 constitution¹³ and 1976 amendments.¹⁴ The emphasis in the second chapter as to limiting the rights therein contained and the categorization of the rights as absolute or qualified rights was part of the compromise finally reached. Absolute rights can only be limited by the Instrument of Government, while qualified rights can be limited through legislation. In addition, a distinction is made in the Instrument of Government as to those rights accruing to Swedish citizens, and those to non-Swedish citizens.

The 1974 Instrument of Government was amended effective 2010 in several rather significant ways, at least from the perspective of soft law becoming hard law. The courts are still simply empowered under Article 14 of the eleventh chapter to disregard a legal provision in conflict with a constitutional act only in the case at hand. Prior to 2011, if the provision was enacted by the Parliament or Government, the courts could only disregard it if the provision was manifestly, on its face, in contradiction to the constitutional acts. This requirement of “manifestly” was removed as of 1 January 2011. This can be seen as a small step away from the original majoritarian emphasis. In addition, certain protections under Chapter Two were extended to non-Swedish citizens, with a renumbering of the articles so that the discrimination protections are included with the other individual protections and not at the end.

1.2.2 The European Convention on Human Rights and Sweden

The European Convention as stated above was signed by Sweden in Rome in 1950 and ratified in 1952, with Sweden signing the declaration accepting the jurisdiction of the European Court of Human Rights in 1966. The status of the European Convention in Swedish law during this first phase was uncertain, as the issue of whether Sweden had a monistic or dualistic system with respect to international obligations was not clear. Two cases presenting claims under the European Convention were decided by the Supreme Court and the Supreme Administrative Court in 1973 and 1974, respectively.¹⁵ The courts ultimately

13 See Legislative Bill 1973:90 *med förslag till ny regeringsform och ny riksdagsordning*

14 See Legislative Bill 1975/76:209 *om ändring i Regeringsformen*.

15 See NJA 1973 p. 423 and RÅ 1974 p. 121. These judgments, referred to as the “transformation judgments”, established the principle that foreign treaties had to be incorporated or transformed into Swedish law before Swedish citizens could cite them as a direct basis for a remedy. Incorporation entails that the international treaty or convention itself has to be enacted as Swedish legislation, while transformation entails that the Parliament in some fashion, either translates the document into Swedish or reformulates it

determined that Sweden had a dualistic system and consequently, individuals could not raise claims under the Convention as it had neither been incorporated nor transformed into Swedish law.

The 1973 case also raised an interesting question of interpretation. When Sweden signed the Convention, the legislative preparatory works stated that the parliamentary investigation demonstrated no need for Sweden to amend its laws as Swedish laws were already in conformance with the requirements of the Convention. The Supreme Court, when addressing the issues raised under the Convention almost twenty years later in the 1973 case, stated that as Parliament found Swedish law to be in compliance with the Convention upon signing, Swedish law could not be found by the Court to be in conflict with the requirements of the Convention. This stance by the Supreme Court in essence meant that the Swedish Parliament was to be the ultimate arbitrator as to the content of the Convention, as opposed to the European Court of Human Rights, the institution charged by the Council with this task. Another hurdle in giving effect to the protections in the Convention was the Swedish interpretation of its scope, based on the mistaken assumption by Sweden when ratifying the Convention in 1952, that the civil rights referred to and protected by the Convention referred to private law rights between private parties, in Swedish *civilrätt*, and not to public law issues.¹⁶ Finally, another primary obstacle to acceptance of the European Convention in the Swedish context was the resulting judicial protection of human rights, placing the power of the courts above that of the Parliament. This was seen by certain political actors as an unwanted deviation from the power of the Government and of the democratically-elected legislature.

1.2.3 The Swedish Labour Law Model

As stated in the introduction to this article, it is necessary to understand the Swedish labor law model in order to understand the initial legislative developments with respect to discrimination issues. The Swedish labor law model can be seen to having reached its zenith during this first phase, with its inception through the *Saltsjöbad* Agreement in 1938. The State under this labour law model is to be neutral with respect to the labour market and disputes between the social partners, the employers and labor unions. This neutrality assumes the guise of the absence of legislation as to such issues. When legislation was passed during this period, it amounted in many cases to a soft law approach, in that the social partners historically have been granted significant leeway to opt-out of legislation through collective agreements. Employment legislation historically has been considered alien to this Swedish Model, as the terms and conditions of work are to be regulated by collective agreement. This also explains why certain areas of labor and particularly

to better-fit Swedish law. There is no rule as to which of these two procedures is to be applied at any given point, with the Parliament making that decision.

16 See Cameron at 90 citing Legislative Bill 1990/91:176 at 3 and Olle Mårsäter, *Folkkrättslig skydd av rätten till domstolsprövning* (Uppsala 2005).

employment law, such as minimum wages and redundancy benefits, are still today not regulated by statute.¹⁷

In the specific area of employment discrimination, an act had been passed in 1945 prohibiting employment termination on the basis of marital status or pregnancy.¹⁸ A government regulation mandating equal pay for equal work in the Swedish state public sector was promulgated in 1948 after the United Nations Universal Declaration of Human Rights.¹⁹ A government regulation was adopted in 1973 prohibiting discrimination on the basis of sex or age in state employment.²⁰ Otherwise, the work of women was instead restricted as to certain aspects by statute during this period, particularly with respect to night work and forced maternity leave for industrial workers, resulting in lawful discrimination on the basis of sex in certain areas of employment.

The issue of whether legislation should be used as a means to promote equality between women and men had been the object of general debate during the entirety of the 1970's in Sweden. Proposals for legislation as well as calls for government investigations of the issue of sex discrimination were raised in several motions to the Swedish Parliament by the liberal political party, *Folkpartiet*.²¹ The original motions included prohibitions against unlawful discrimination on other grounds, such as race, based on the American federal Civil Rights Act of 1964.

An Equality Delegation was appointed at the end of 1972 to further investigate and develop an overarching perspective that was to guide the work towards achieving equality between women and men. The delegation presented its report in 1975, concluding that legislation could easily freeze the current injustices in the system and impede more active equality measures.²² The delegation found overwhelming reasons against adopting legislation similar to that in the United States. In addition, statutory regulation of discrimination in the private sector had long been fought by both employer and employee

17 For an example of this, see Gabriella Sebardt, *Redundancy and the Swedish Model* (Iustus 2005) describing the system of redundancy benefits created through self-regulation and collective agreements between the social partners. Even after concessions by the social partners as to the appropriateness of discrimination legislation, remnants of this attitude remain, see, e.g., Svante Nycander, *Makten över arbetsmarknaden – Ett perspektiv på Sveriges 1900-tal* (SNS Förlag 2002) at 380 who argues that the inefficacy of Swedish discrimination legislation is a result of trying to artificially impose a foreign system of legislation on the already well-functioning system of agreement between the social partners.

18 *Lag (1945:844) av 21 dec. 1945 om förbud mot arbetstagares avskedande i anledning av äktenskap eller havandeskap.*

19 *Statens allmänna avlöningsreglemente* (1948:436).

20 *Kungörelse (1973:279) om förbud mot köns- och åldersdiskriminering vid tillsättning av tjänst.*

21 Legislative Bill 1978/79:175 med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m. at 9. See also Gudrun Nordborg, *Jämställdhet – synpunkter utifrån jämställdhetslagstiftningen och vissa ärenden hos jämställdhetsombudsmannen*, 1984 SvJT 190.

22 *Ds Ju 1975:7 PM till frågan om lagstiftning mot könsdiskriminering.*

organizations. The social partners argued that discrimination did not and should not differ in any aspect from other employment issues as already regulated by them through self-regulation and soft law.²³

2 The Period from 1976 to 1993 – The First Swedish Discrimination Statutes

This period is delineated by activity on the Swedish national level with respect to both the Swedish Instrument of Government and the enactment of Swedish legislation prohibiting unlawful discrimination in employment initially on the basis of parental leave, later on the basis of sex and then eventually, less vigorously, on the basis of ethnic origins.

2.1 International Instruments

Sweden participated in the first United Nations World Conference of Women in 1975, resulting in another international push towards legislation prohibiting discrimination on the basis of sex. Sweden signed the 1979 United Nations Convention as to the Elimination of All Forms of Discrimination Against Women (“CEDAW”) in 1980. CEDAW is seen as the first international treaty to address fundamental rights for women in politics, health care, education, economics, employment, law, property, marriage and family relations.

Although still not yet a member of the European Community, the Swedish Parliament closely followed the developments in Community law. Almost twenty years after the adoption of the equal pay provision in Article 119, a triad of directives was issued by the Council addressing issues of sex discrimination, the 1975 Equal Pay Directive mandating equal pay between men and women,²⁴ the 1976 Equal Treatment Directive mandating equal treatment in employment between men and women²⁵ and the 1979 Social

23 Legislative Bill 1978/79:175 *med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m.* at 25. All the social partners were negative to the proposal in the responses they submitted with the exception of SACO/SR. *Id.* at 196.

24 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 men and women (“Equal Pay Directive”), OJ 1975 L 45/19, Celex No. 31975L0117. The Equal Pay Directive is now incorporated in the Discrimination Directive.

25 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 (“Equal Treatment Directive”), OJ 1976 L39/40, Celex No. 31976L0207. The 1976 Equal Treatment Directive was amended in 2002 by 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, OJ 2002 L 269/15, Celex No. 32002L0073. It is now incorporated in the Discrimination Directive.

Security Directive prohibiting different treatment with respect to social security schemes on the basis of sex.²⁶

2.2 *Swedish Discrimination Legislation*

A major reform of labor and employment law occurred during the 1970's, with several of the currently key acts passed in this decade. These changes need to be seen in the context of the national economy. During the 1950's and 1960's, Sweden was one of the wealthiest countries in the world, partially as it capitalized on an infrastructure left untouched by two world wars. Europe was rebuilding, and Sweden provided much of the materials and tools. As such, labor had the upper hand at the beginning of the 1970's. The Act on Employment Protection was adopted in 1974.²⁷ Statutory protection was established for union representatives in the Trade Union Representatives (Status at the Workplace) Act.²⁸ A right to a leave of employment for educational purposes was also created.²⁹ The Labour Disputes (Judicial Procedure) Act was also passed in 1974.³⁰ The acts were followed two years later by the Employment (Co-determination in the Workplace) Act.³¹ Discrimination issues were addressed in legislation at the tail end of this reform. Three areas of discrimination were addressed during this second phase in the development of Swedish discrimination legislation: Unlawful employment discrimination on the basis of exercising parental leave, on the basis of sex or on the basis of race. Only the protections with respect to sex and race are discussed below.

2.2.1 **Swedish Legislation Prohibiting Discrimination on the Basis of Sex**

An Equality Committee had been appointed in 1976 and given the task of investigating and drafting legislation prohibiting unlawful sex discrimination in employment. The new mandate was based on the conviction that a law prohibiting sex discrimination was significant as one of several societal mechanisms for bringing about change.³² In response, the social partners

26 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security ("Social Security Directive"), OJ 1979 L 6/24, Celex No. 31979L0007.

27 *Lag (1974:12) om anställningsskydd.*

28 *Lag (1974:358) om facklig förtroendemans ställning på arbetsplatsen.*

29 *Lag (1974:981) om arbetstagares rätt till ledighet för utbildning.*

30 *Lag (1974:371) om rättegången i arbetstvister.*

31 *Lag (1976:580) om medbestämmande i arbetsliv.*

32 Its first report was SOU 1978:38 *Jämställdhet i arbetslivet med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet*. The Committee issued a second report, SOU 1979:56 *Steg på väg* concerning a national plan of action resulting from the 1975 United Nations Women's Conference in Mexico.

entered into an Equality Agreement in 1977 covering large segments of the work population. In the private sector, all areas except transportation were covered in an effort to prevent later regulation by the proposed statute or Equal Opportunity Ombudsman, *JämO*.³³ The social partners then argued that these agreements should be given time to assess their effectiveness prior to the adoption of legislation.³⁴ In the alternative, the social partners argued that legislation would impede work with equality and increase the bureaucracy.³⁵

The Equality Committee issued its report in 1978³⁶ and the Government thereafter presented a first legislative bill with respect to prohibiting unlawful sex discrimination in employment.³⁷ As to the goals of the law, the Minister stated that:

A law gives a material and tangible expression for society's recognition of the principle of equality between men and women. It can be a starting point for actively influencing opinion and attitudes and give good support for those working at promoting equality and also remove any remaining sexual stereotypes. In addition, a prohibition against discrimination as stated in the law gives a protection to individuals from violations or unfair treatment based upon such prejudices, on incorrect and uncritical ideas as to the differences between the abilities of men and women as well as suitability for certain types of work.³⁸

Only a "half-law" was initially passed by the Swedish parliament with a vote of 155 to 150, namely simply the paragraphs in the legislative bill containing the general prohibition against discrimination.³⁹ The proposed parts covering the creation and jurisdiction of the Equal Opportunity Ombudsman, *JämO*, as well as the obligation of the employer to carry out active measures, were not adopted. Certain resistance existed as to placing collective agreements within the jurisdiction of *JämO*, as evidenced by the 1977 Equality Agreement, a

33 As to the efficacy of the Equality Agreements reached by the social partners, see Ronnie Eklund, *Är jämställdhetsavtal värda pappret?*, 1990 JT 105. See also Anita Dahlberg, *Jämställdhetslagen som paradox och dekonstruktion* in Gudrun Norborg, ed. 13 *Kvinnoperspektiv på rätten* (Iustus 1995) at 34.

34 See Legislative Bill 1978/79:56 med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, *m.m.* at 9.

35 *Id.* at 196.

36 SOU 1978:38. A precursor to this governmental report was SOU 1975:58 *Målet är jämställdhet*. There were subsequent investigations on the conditions of part-time work, SOU 1976:6 *Deltidsanställdas villkor* and SOU 1978:28 *Kvinnornas förvärvsarbete och förvärvshinder*.

37 Legislative Bill 1978/79:175 med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, *m.m.*

38 *Id.* at 18.

39 *Lag* (1979:503) om jämställdhet mellan kvinnor och män i arbetslivet. See Bet. 1978/79:AU39 and SOU 1990:41 *Tio år med jämställdhetslagen – utvärdering och förslag* at 59. This first law, comprising seven paragraphs effective 1 January 1980, was replaced by *lag* (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet before it came into effect. See Prop. 1978/79:175, Bet. 1978/79:AU39, Rskr. 1978/79:411 as well as the Equality Committee's Report, SOU 1978:38.

resistance that prevailed until 1994. A second legislative bill was submitted in 1979, to a large extent simply the same as the first proposal.⁴⁰ It was adopted in its entirety by Parliament, passing by only one vote.⁴¹ After decades of discussion and debate, the first Swedish act prohibiting unequal treatment of women and men in work finally came to pass, effective 1 July 1980.⁴² It was to the highest degree a political compromise not based solely on the actual issue of equality for women but on the power of the Swedish labour law model. This partially explains the skepticism that has persisted with respect to statutory regulation in this area.

The 1979 Equal Treatment Act had three parts: prohibitions against discrimination, active measures to be taken by the employer, and enforcement mechanisms and procedures, including the establishment of *JämO*. The objective as set out in the first part was to promote equal rights between women and men in questions regarding employment, employment conditions and opportunities for development within work. This was to be achieved through a prohibition against discrimination to be invoked in individual cases, as well as active measures to be taken by employers. The social partners were empowered to deviate from the active measures in collective agreements.

Under the 1979 Act, employers were prohibited from disfavoring an employee or person seeking employment on the basis of sex. Disfavoring existed if an employer in employment, promotion or training, appointed a person of the opposite sex while overlooking a person with better qualifications. This difference in treatment was justified where the employer could prove that the decision did not depend on a person's sex, or that the decision was a step in an endeavor to promote equality in employment, or was justified with respect to a charitable or other interest that ought not be subordinated to the interest of equality in employment. A disfavoring occurred on the basis of sex when an employer applied worse employment conditions for an employee than those for an employee of the opposite sex in the performance of employment, management or distribution of work, in a manner in which the employee is obviously disadvantageously treated in comparison with persons of the opposite sex, or terminates, relocates, lays off or fires any person or comparable measure thereto if the measure depends upon the employee's sex. Collective agreements prescribing differences as to employment terms on the basis of sex were to be declared invalid. Damages could be awarded for violations of the Act. A "group rebate" was created for certain harms, in the event an employer discriminated against more than the one person, the damages were to be assessed for one person to be shared equally by the group.

That the 1979 Equal Treatment Act was not a happy compromise can be seen not only from the fact that the first proposal adopted did not have a chance

40 Legislative Bill 1979/80:56 *med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m.*, Bet. 1979/80:AU10, Rskr. 1979/80:117.

41 Nycander at 375.

42 *Lag (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet*, Prop. 1979/80:175, Bet. 1979/80:AU10, Rskr. 1979/1980:117.

to become effective before it was repealed. Only one year later, the act was amended again rather significantly. Seven new paragraphs were added, due to factors both internal and external to Sweden.⁴³ Three legislative bills had already been submitted that year concerning sex equality, one with respect to the costs for the enforcement agency, *JämO* and the Equality Council,⁴⁴ one for amendments to the 1979 Equal Treatment Act, and the third about ratifying the United Nations Convention on the Elimination of all Forms of Discrimination against Women. The turbulence of the initial passing of the act seems to have quieted down somewhat after this barrage of legislation and amendments. The 1979 Equal Treatment Act was amended three times during the 1980's.

The results of a ten-year evaluation of the 1979 Equal Treatment Act formed the bases for the 1991 Act Concerning Equal Treatment Between Women and Men at Work ("1991 Equal Treatment Act").⁴⁵ The 1991 Act kept much of the 1979 Equal Treatment Act, particularly its layout and enforcement mechanisms. A very central aspect of the Swedish Model was retained in the 1991 Equal Treatment Act, namely that collective agreements could replace the Act's provisions on active equality measures to the extent the agreements were approved on the central level by the social partners. The requirement that plaintiff demonstrate that she was objectively better qualified was also retained. A prohibition against harassment based on refusal of sexual advances or reporting of a sex discrimination claim was included.

2.2.2 Unlawful Employment Discrimination on the Basis of Ethnic Origin

A first act prohibiting discrimination on the basis of ethnic origins was passed in 1986.⁴⁶ Containing only seven paragraphs, it prohibited ethnic discrimination based on race, color, nationality, ethnic origins or religion. The office of an Ombudsman against Ethnic Discrimination was created to work towards preventing ethnic discrimination in employment and other societal areas. Although technically legislation, as no sanctions were included in the law. A plaintiff had no right to redress under that act as it stood at that point of time, in effect, and no cases were brought under this act. It can be seen as a type of quasi-soft law intended to give normative guidance to the social partners.

43 *Lag (1980:412) om ändring i lagen (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet*. Prop. 1979/80:129 *om ändring i lagen (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet*, Bet. 1979/80:AU30 also referring to Prop. 1979/80:92 *om bestridande av kostnader för jämställdhetsombudsmannen och jämställdhetsnämndens verksamhet* and Prop. 1979/80:147 *om godkännande av Förenta nationernas konvention om avskaffande av all slags diskriminering av kvinnor*, Rskr. 1979/80:327.

44 Bet. 1979/80:AU30 at 1.

45 *Jämställdhetslag (1991:433)*, Legislative Bill 1990/91:113 *Om en ny jämställdhetslag*, m.m., Bet. 1990/91:AU17, Rskr. 1990/91:288.

46 *Lag (1986:442) mot etnisk diskriminering*.

3 The Period of 1994 to 2007 – The Expansion and Reconciliation of Swedish Discrimination Legislation

While the first period discussed above is characterized by the absence of hard law in the field of discrimination, and the second period by the emergence of such, although still fairly toothless with the right of the social partners to contract out of the legislation, this third period can be seen as a period of both expansion and reconciliation to a more hard law model. Expansion in that the number of protected groups and areas was enlarged, but also reconciliation in that the demands of Community law in certain aspects forced a confrontation between the Swedish labor law model and the more hard law model of individual employment rights under EU law.

3.1 *International Instruments Addressing Discrimination*

There was a flurry of activity during the 1990's on the European Union level, with several directives adopted addressing discrimination issues: The Pregnant Workers and Breastfeeding Directive,⁴⁷ the Parental Leave Directive,⁴⁸ the Burden of Proof Directive⁴⁹ and the Part-Time Work Directive.⁵⁰ This level of activity continued into the new millennium, with directives extending the scope of unlawful discrimination to include discrimination based on race as

47 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ 1992 L 348/1, Celex No. 31992L0085.

48 Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC ("Parental Leave Directive"), OJ 1996 L 145/4, Celex No. 31996L0034. Later extended to the United Kingdom and Northern Ireland by Council Directive 97/75/EC of 15 December 1997 amending and extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ 1998 L 10/24, Celex No. 31997L0075.

49 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex ("Burden of Proof Directive") OJ 1998 L 14/6, Celex No. 31997L0080. Later extended to the United Kingdom and Northern Ireland by Council Directive 98/52/EC of 13 July 1998 on the extension of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex to the United Kingdom of Great Britain and Northern Ireland, OJ 1998 L 205/66, Celex No. 31998L0052. This directive has been incorporated into the Discrimination Directive.

50 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC ("Part-time Work Directive") OJ 1998 L 014/9, Celex No. 31997L0081. Later extended to the United Kingdom and Northern Ireland by Council Directive 98/23/EC of 7 April 1998 on the extension of Directive 97/81/EC on the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC to the United Kingdom of Great Britain and Northern Ireland, OJ 1998 L 131/10, Celex No. 31998L0023.

prohibited by Racial Equality Directive⁵¹ and based on religion or belief, disability, age or sexual orientation as prohibited by Employment Framework Directive.⁵² The Equal Treatment Directive was significantly amended in 2002.⁵³ The Equal Treatment in Access to Goods and Services Directive was issued in 2004.⁵⁴ Ultimately, seven⁵⁵ of the twelve⁵⁶ directives issued with respect to sex discrimination, along with certain of the principles established in the case law of the Court of Justice, were codified into one, the 2006 Discrimination Directive.⁵⁷

51 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (“Racial Equality Directive”), OJ 2000 L 180/22, Celex No. 32000L0043.

52 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (“Employment Framework Directive”), OJ 2000 L 303/16, Celex No. 32000L0078.

53 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, OJ 2002 L 269/15, Celex No. 32002L0073.

54 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373/37, Celex No. 32004L0113.

55 The seven directives now included in the Discrimination Directive are:

- The Equal Pay Directive 75/117/EEC;
- The Equal Treatment Directive 76/207/EEC as amended by Directive 2002/73/EC;
- Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes as amended by Directive 96/97/EC; and
- The Burden of Proof Directive 97/80/EC as supplemented by Directive 98/52/EC on the extension of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex to the United Kingdom of Great Britain and Northern Ireland.

56 Five of the twelve directives with respect to discrimination were omitted from the proposal because of the belief that their integration would overcomplicate the system:

- The Equal Treatment in Social Security Directive 79/7/EEC;
- The Equal Treatment of Self-employed Directive 86/613/EEC;
- The Protection of Pregnant Workers and New Mothers Directive 92/85/EEC; and
- The Parental Leave Directive 96/34/EC as well as Directive 98/52/EC extending the Parental Leave Directive to the United Kingdom and Northern Ireland.

Also not included in the Discrimination Directive are the Part-Time Work Directive 97/81/EC and the most recent directive 2004/113/EC as to equality of access to and supply of goods and services.

57 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).

The European Convention was finally enacted as Swedish law in 1994, effective 1998, a requirement under dualism.⁵⁸ The timing of this was predominantly due to the requirements of pending membership in the European Union scheduled for 1995. The European Convention was not enacted as a Swedish constitutional act, but was given protection by Article 23 of the second chapter of the Instrument of Government prescribing that “[n]o act of law or other provision may be adopted which contravenes Sweden’s undertakings under the European Convention.”

3.2 *Swedish Legislation during the Third Phase*

By the end of this third phase, Sweden had nine legislative acts covering different grounds of discrimination in different settings:

- The 1991 Equal Treatment Act;⁵⁹
- The 1995 Parental Leave Act;⁶⁰
- The 1999 Measures to Counteract Ethnic Discrimination in Working Life Act;⁶¹
- The 1999 Prohibition of Discrimination in Working Life of People with Disability Act;⁶²

58 See The Act on the European Convention on Human Rights and Fundamental Freedoms, *lag* (1994:1219) *om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna*.

59 Amended in 1994 by *lag* (1994:292) *om ändring i jämställdhetslagen (1991:433)*, in 1998 by *lag* (1998:208) *om ändring i jämställdhetslagen (1991:433)*, in 2000 by *lag* (2000:580) *om ändring i jämställdhetslagen (1991:433)* and *lag* (2000:773) *om ändring i jämställdhetslagen (1991:433)*, as well as in 2005 by *lag* (2005:476) *om ändring i jämställdhetslagen (1991:433)*.

60 *Föräldraledighetslag* (1995:584) replaced the 1978 Parental Leave Act. The 1995 Parental Leave Act has been amended in 1996 by *lag* (1996:1545) *om ändring i föräldraledighetslagen (1995:584)*, in 1997 by *lag* (1997:99) *om ändring i föräldraledighetslagen (1995:584)*, in 2001 by *lag* (2001:143) *om ändring i föräldraledighetslagen (1995:584)* and *lag* (2001:144) *om ändring i föräldraledighetslagen (1995:584)*, in 2003 by *lag* (2003:373) *om ändring i föräldraledighetslagen (1995:584)*, in 2004 by *lag* (2004:1251) *om ändring i föräldraledighetslagen (1995:584)*; and in 2006 by *lag* (2006:442) *om ändring i föräldraledighetslagen (1995:584)*.

61 *Lag* (1999:130) *om åtgärder mot etnisk diskriminering i arbetslivet*. The act was amended in 2000 by *lag* (2000:762) *om ändring i lagen (1999:130) om åtgärder mot etnisk diskriminering i arbetslivet*, in 2003 by *lag* (2003:308) *om ändring i lagen (1999:130) om åtgärder mot etnisk diskriminering i arbetslivet* and finally in 2005 by *lag* (2005:477) *om ändring i lagen (1999:130) om åtgärder mot etnisk diskriminering i arbetslivet*.

62 *Lag* (1999:132) *om förbud mot diskriminering i arbetslivet av personer med funktionshinder*. This act was amended in 2003 by *lag* (2003:309) *om ändring i lagen (1999:132) om förbud mot diskriminering i arbetslivet av personer med funktionshinder*, in 2005 by *lag* (2005:478) *om ändring i lagen (1999:132) om förbud mot diskriminering i arbetslivet av*

- The 1999 Act Prohibiting Discrimination in Working Life based on Sexual Orientation;⁶³
- The 2001 Act on Equal Treatment of Students at Universities;⁶⁴
- The 2002 Act Prohibiting Discrimination on the Basis of Part-Time and Fixed-Time Work;⁶⁵
- The 2003 Act Prohibiting Discrimination with respect to Goods and Services;⁶⁶ and
- The 2006 Act Prohibiting Discrimination with respect to primary school children.⁶⁷

Many of these acts were direct products of the requirements of Community law, such as the 2002 act protecting part-time and fixed term workers.

4 The Fourth Phase – The Swedish Discrimination Act

In the first proposal submitted by the committee investigating the Swedish discrimination legislation in 2006, the Committee began its report by discussing the human rights bases for the prohibitions against discrimination, citing:

- The 1948 United Nations Universal Declaration of Human Rights;
- The 1966 United Nations Convention on the Elimination of All Forms of Racial Discrimination;
- The 1966 United Nations Universal Covenant on Civil and Political Rights;

personer med funktionshinder, and in 2006 by lag (2006:1330) om ändring i lagen (1999:132) om förbud mot diskriminering i arbetslivet av personer med funktionshinder.

63 *Lag (1999:133) om förbud mot diskriminering i arbetslivet på grund av sexuell läggning.* This act was amended in 2003 by *lag (2003:310) om ändring i lagen (1999:133) om förbud mot diskriminering i arbetslivet på grund av sexuell läggning* and in 2005 by *lag (2005:479) om ändring i lagen (1999:133) om förbud mot diskriminering i arbetslivet på grund av sexuell läggning.*

64 *Lag (2001:1286) om likabehandling av studenter i högskolan,* as amended in 2003 by *lag (2003:311) om ändring i lag (2001:1286) om likabehandling av studenter i högskolan* and in 2006 by *lag (2006:308) om ändring i lag (2001:1286) om likabehandling av studenter i högskolan.*

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

66 *Lag (2003:307) om förbud mot diskriminering.* This act was amended in 2004 by *lag (2004:1089) om ändring i lagen (2003:307) om förbud mot diskriminering* and in 2005 by *lag (2005:453) om ändring i lagen (2003:307) om förbud mot diskriminering.*

67 *Lag (2006:67) om förbud mot diskriminering och annan kränkande behandling av barn och elever.* This act was amended in 2008 by *lag (2008:224) om ändring i lagen (2006:67) om förbud mot diskriminering och annan kränkande behandling av barn och elever.*

- The 1966 United Nations Covenant on Economic, Social and Cultural Rights;
- The 1979 United Nations Convention on the Elimination of All Forms of Discrimination of Women;
- The 1989 United Nations Convention on the Rights of the Child;
- ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation;
- Article 14 of the European Convention on Human Rights;
- That the European Union is founded on the principles of respect for human rights and fundamental freedoms as provided by Article 6.1 EU Treaty, and which according to Article 6.2, the Union is to respect fundamental rights as guaranteed by the European Convention on Human Rights;
- The case law of the European Court of Justice which has declared that human rights constitute an integral part of the general principles of law and should be safeguarded by the courts, and that the protection of human rights also embraces the rights contained in the European Convention on Human Rights;
- Article 13 of the EC Treaty which empowers the Council, acting unanimously on a proposal from the Commission and following consultation with the European Parliament, to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation; and
- Article 21.1 of the Charter on Fundamental Rights of the European Union (the EU Charter), which prohibits any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.⁶⁸

The committee, based on the above, concluded that discrimination constitutes a violation of fundamental human rights and that legislation is one of several means of combating discrimination and thereby supporting these rights. Finding that the then current regulatory situation in Sweden could best be described as piecemeal legislation, the committee proposed the introduction of a universal discrimination act.

Such a universal act was passed two years later in 2008, the Discrimination Act,⁶⁹ coming into effect 1 January 2009.⁷⁰ The 2008 Discrimination Act

68 See SOU 2006:22 *En sammanhållen diskrimineringslagstiftning, del 1* at 45.

69 *Diskrimineringslag* 2008:567. The 2008 Discrimination Act replaces:

- The 1991 Equal Treatment Act concerning unlawful discrimination on grounds of sex;
- The 1999 Measures to Counteract Ethnic Discrimination in Working Life Act;
- The 1999 Prohibition of Discrimination in Working Life of People with Disability Act;
- The 1999 Act Prohibiting Discrimination in Working Life based on Sexual Orientation;

forbids unlawful discrimination on the basis of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age. Transgender identity or expression as well as age are new protected grounds under the 2008 Act. The protection against unlawful discrimination is to encompass employment (both private and public), education, labor market policy, starting a business and profession recognition, membership in organizations such as labor unions, housing, providing goods services both as the provider and as the customer, social benefits, social insurance and military service. The 2008 Discrimination Act prohibits unlawful discrimination, defined as direct and indirect discrimination, harassment, sexual harassment and instructions to discriminate.⁷¹ In addition, the third paragraph of the new Discrimination Act states explicitly that the law is mandatory, and that any agreements in contravention of the rights or obligations as afforded under the act are void.

5 Protection against Discrimination as a Human Right - Are we there yet?

The true test in this journey, however, is whether these initially soft law rights, which have become hard law, have risen to the level of human rights protections as applied by the Swedish courts. Two fairly recent cases are examined here as indicative of the application of these hard laws as discussed above. As can be clearly seen in both cases, the courts, the Swedish Supreme Court and the Swedish Labour Court (acting as the highest instance), assess the application of the laws to parties they treat as having equal bargaining positions, a very liberal application of the law.

In the first case as decided by the Swedish Supreme Court, NJA 2008 p. 918, plaintiffs had brought claims of unlawful discrimination on the basis of ethnic origins against a restaurant owner. The plaintiffs were law students, frustrated with the fact that the law prohibiting discrimination in pubs and restaurants on the basis of ethnic origins, was never successfully invoked due to the high burden of proof required by the courts. The students divided themselves up into four teams, two teams with blonde hair and blue eyes, two teams with black hair and brown eyes. All the team members dressed in the same style, same hair, etc., so that the differences in essence were simply hair, skin and eye color. Armed with recorders to document the treatment, the first

-
- The 2001 Act on Equal Treatment of Students at Universities;
 - The 2003 Act Prohibiting Discrimination with respect to Goods and Services; and
 - The 2006 Act Prohibiting Discrimination with respect to primary school children.

70 An English translation of the 2008 Discrimination Act can be found at the website of the Equality Ombudsman of Sweden at “[www.do](http://www.do.se)”.

71 Two of the Swedish discrimination acts are still in place, namely the 2002 Act Prohibiting Discrimination on the Basis of Part-Time and Fixed-Time Work and the 1995 Parental Leave Act.

black/brown team was sent in and refused admittance to the restaurant. The next team, blonde/blue was sent in and admitted. The third team, brown/black, sent in to confirm the discrimination, was not admitted, with the fourth blonde/blue team being sent in and being admitted. Based in part on the documentation collected by the teams, the trial court found unlawful discrimination and awarded plaintiffs SEK 20,000 (approximately € 2,200) each. This judgment was affirmed by the appellate court.

The restaurant owner appealed to the Supreme Court, which also found that the restaurant had committed unlawful discrimination, but that this:

[M]ust be assessed against the risk that the public's confidence in the legislation can be lowered if the legislation is perceived as a means for allowing individuals to in a planned and systematic manner enrich themselves, a risk which becomes specifically more tangible if the compensation is in an amount that exceeds that which can be considered reasonable compensation for the degradation that the violation entailed.

As the team members alleging unlawful discrimination knew that they would not be admitted to the restaurant, the Court found that the degradation could not be seen to be too great. The Court lowered the damages to the amount of SEK 5,000 (€565) each. In addition, despite the fact that the main rule in Swedish litigation is the English rule with respect to trial costs and fees, in other words that the losing party must pay the winning party's legal costs and fees, the Court order the parties to bear their own legal costs and fees for the litigation, in essence annulling the benefit of any damages plaintiffs received.

In the second case as decided by the Labour Court, AD 2009 no. 4,⁷² the plaintiff employee, originally from Gambia and having lived in Sweden for twenty-two years, was working as a rehabilitation assistant at a care facility for autistic adults for the municipality of Härryda, a public employer. He had worked at this facility since 2002. In 2004 a new head of the facility was appointed, Andersson. Plaintiff alleged that Andersson made statements such as that plaintiff took such good care of the patients because he used voodoo, and that they did what he requested them to do because they were afraid of him since he was big and black. Plaintiff alleged that he made it clear to Andersson that he thought such statements inappropriate. In addition, he alleged that three other of the employees called him names such as "Blackey", "Big Black Bastard", "Black Head", "The African", "Kunta Kinte", "gangsta" and also told him that they did not understand what he said. At an employee review in 2006, Andersson informed plaintiff that none of the employees wanted to work with him, but refused to tell him who or why. The day after, the plaintiff wrote down his reaction to this conversation and had it read by another employee to all the employees on 14 February 2006. Plaintiff continued to work until almost two months later when he received written notice on 10 April 2006 that

⁷² This case must also be assessed against the background that of the approximately twenty-five cases brought to the Swedish Labour Court since 2000 when the act was amended to include sanctions for claims of ethnic discrimination, the court has found unlawful ethnic discrimination for the plaintiffs in two cases.

he need not come to work as well as a warning. Orally he was informed that the other employees were afraid of him. The municipality had not involved the union in this proceeding as required by the collective agreement. Plaintiff was not given written notice of the reason for these actions until 1 June 2006 and only after the union became involved. Plaintiff was forced to stay home for 37 days and then transferred to another work place. The municipality alleged that it did not know that plaintiff had felt discriminated against so that it had no duty to investigate. The municipality also alleged that the letter written by plaintiff was threatening and that Andersson knew that something needed to be done at the work place.

The Labour Court began with the statements made by the unit head, Andersson, finding it strange that if she had made such statements often, that none of the other employees had heard them, thus DO had not met the burden of proof with respect to them. As to the other employees calling plaintiff names such as “Big Black Bastard”, “Black Head”, “The African”, “Kunta Kinte” and “gangsta”, the Labour Court again found that none of the other employees had heard such and thus the behavior was not proven. However, there was banter at the workplace, including the use of nicknames such as “Blackey”, to which plaintiff responded at times with “Whitey.” The Labour Court found that as plaintiff had participated in this banter, the employer had no reason to believe that it was inappropriate and discriminatory, and as such, no duty to investigate.⁷³

The reasoning by the highest courts in both the cases can be seen as very liberal, with the parties having equal bargaining positions and in no need of any type of heightened protection as afforded in most other legal systems with respect to claims of human rights violations. In fact, the Swedish courts appear to place a type of heightened burden on the plaintiffs instead. In the restaurant case, as the plaintiffs had no reasonable expectations of admittance to the restaurants, the Court found that they were not truly harmed, and that the actual harm would come to the public confidence in the legal system if plaintiffs received damages. In the Blackey case, as the plaintiff had not made it clear that such language and treatment was not acceptable, the plaintiff basically had to bear the harm due to this failure. In both cases, plaintiffs are treated as if alternative actions are freely available, and the parties to be protected are those committing the discrimination, as it was not clear that they actually could be successfully prosecuted under the law.

6 Conclusion

By breaking down the history of the discrimination legislation in Sweden into these four periods, the effects of the originally soft law international instruments as well as of the Swedish labor law model with its internal self-regulation and hostility to legislative intervention become clear. From a

⁷³ The Labour Court did assess damages due to the employer’s failure to involve the union with respect to the order to stay home from work.

question that in essence was not regulated at all, to the acceptance of international soft law instruments, to a quasi-soft law domestic legislation, to hard law and finally, from the perspective of at least the Swedish legislator, human rights, one can identify the role that the international soft law has played in the Swedish progression. One can also easily discern both the advantages and disadvantages with respect to soft law approaches to certain topics. Discrimination law has progressed in Sweden from being seen as an encroachment on the employer's prerogative and on Swedish labour law model as a whole, to its current status of granting protection of a human right, buttressed not only by the most recent Swedish legislation and their legislative preparatory works, but also firmly by international instruments. Now that the legislator has given protection against unlawful discrimination the status of a fundamental human right, it is now up to the courts to give effect to the legislator's intent.