Intersectional Discrimination: Gaining Entry to Swedish Workplaces

Eva Schömer*

* Eva Schömer is a law professor at Kristianstad University, specializing in labour law and gender focusing also on law and sociology. Email: eva.schomer@hkr.se.

> … there are times to stand outside the courtroom and criticize the legal system, and there are times to stand inside the courtroom and use the law to further one´s political goals. The point then is that what appears here under the headings 'feminism and race' and 'lesbian jurisprudence' are not subsets of feminism, but intersections, sites of difference. The issue is not only that many women have been left out, and now wish to be included, but more fundamentally that the complexity and specificity of particular forms of oppression need to be recognized. The critical approaches presented … suggest that a new understanding of feminism (and jurisprudence) is differences between women, rather than see them as a source of political fragmentation. (Margaret Davies, 2008).

This chapter[1] investigates the role played by the law in personal experiences of marginalization within Swedish society from an intersectional perspective. This is done by examining several discrimination cases that have been brought before the Swedish Labour Court (*Arbetsdomstolen*).[2] Sweden is often referred to as one of the most equal societies in the world, particularly one of the most gender-equal. This is partly because Sweden is a secular nation, in the sense that its governance is not to be influenced by religious principles. Freedom of religion in Sweden is protected under Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and under the Swedish Constitutional Act, the Instrument of Government.

1 Equal Treatment within Discrimination Law

Discrimination, both direct and indirect, is prohibited also under the national Discrimination Act (SFS 2008:567, Ch. 1, 4§). According to the Act, direct discrimination occurs when:

> [S]omeone is disadvantaged by being treated less favourably than someone else is treated, has been treated or would have been treated in a comparable situation, if this disadvantaging is associated with sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age.

Indirect discrimination occurs when:

> [S]omeone is disadvantaged by the application of a provision, a criterion or procedure that appears neutral but that may put people of a certain sex, a certain transgender identity or expression, a certain ethnicity, a certain religion or other belief, a certain disability, a certain sexual orientation or a certain age at a particular disadvantage, unless the provision, criterion or procedure has a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose.

---

[1] This chapter re-works and substantially revises previous articles by the author, mainly: 'Discrimination at Work: Gaining Entry to the Swedish Workforce', in Sociologia del Dritto. XLIII/2016.

[2] Although the chapter focuses on Sweden, personal experiences of discrimination are certainly not specific to Sweden. Experiences of discrimination and exclusion are in principle the same all over the world.

2 Intersectionality and Ethnic Discrimination

The idea behind this chapter is to discuss personal experiences of ethnic discrimination from the framework of intersectionality, and to set these personal experiences in relation to the way they are evaluated by the Labour Court.[3] In Sweden, *ethnic discrimination* under the Discrimination Act[4] is disadvantaging based on factors related to 'national or ethnic origin, skin colour, or other similar circumstance' (2008:567, Ch. 1, §5).

The very concept of 'ethnicity', however, has drawn criticism on multiple grounds, one being that it conceals the underlying power structures. Additionally, it has been observed that the concept of ethnicity conflates ideas about what 'race' is, being based on the assumption that different races, cultural backgrounds, or religious faiths create different 'types' of people. We might draw a parallel to the concept of gender, which conflates ideas about sex and gender roles, as notions of 'femininity' or 'masculinity' are based on assumptions about what women and men 'are,' and what they 'can' do.

The concept of ethnicity has also been criticized heavily from within postcolonial studies. The 'post' in 'postcolonial' implies something that has succeeded or replaced acts of colonization. Yet this label also depends upon the assumption that we have turned the page on colonialism and now find ourselves in a hegemonic norm system where Western culture and the Western societal model are situated at the top of an evolutionary scale. A postcolonial perspective can help expose the historical connections between colonialism and modern forms of racism and ethnic discrimination.

2.1 Equality Before the Law

If we believe in the principle of equality before the law, then it is of the utmost importance for the legal system to treat (all) people, regardless of sex, race, religion, ethnicity, sexual orientation, age, or disability, in the same way – or at least in equivalent ways. This examines the issue of equality in relation to one of the most central questions in the sociology of law: how law and society cooperate and interact with one another. In the social sciences, *taken-for-granted* ideas are a familiar concept. They are limiting factors in our world, constantly forming and reforming, and finally building an impenetrable barrier around the idea of 'normal.' But this kind of phenomenon is almost never discussed in the field of jurisprudence, where the chief focus lies on developing a systematic understanding of the content of judicial materials: statutes, court decisions, etc. Discussing the law and its repercussions from new and non-traditional perspectives can help us understand and show how people, society, and the law come together to form patterns that eventually seem like common sense: *normal*

---

[3] The Swedish Labour Court is either both the first and last instance if the case is filed by the DO or the unions, or if filed by an individual, the final instance, entailing a monopoly on such claims.

[4] The Discrimination Act replaced the Act (1999:130) on measures against discrimination in working life on the ground of ethnicity, religion or other belief. Since January the term race are replaced with the term ethnicity in the Constitution of Sweden, while the Government will avoid the idea to categorize people on the 'racist' grounds.

patterns on the one hand, *abnormal* on the other. To be abnormal is to be 'other,' by virtue of being strange, rare, or perhaps even 'foreign.' How the Labour Court participates in singling out people whose background is not 'secular Swedish,' using intersectional analysis and concepts such as exoticizing, othering, and marginalizing is analysed here.

2.2 The Limits of Legal Methodology

Like many legal issues, discrimination dwells in the world of everyday life, work life, and society. As such, it falls under the purview of social sciences – to which, as we know, the study of the law belongs. But while most of the social sciences deploy a varied array of methods and methodological approaches, across a wide range of problems, the field of legal scholarship usually confines itself to just *one* method: the legal dogmatic method. I will argue here for an expanded methodology of jurisprudence. I think this is especially important in the area of anti-discrimination, since acts of discrimination ultimately violate not only the rights of their immediate victim, but also the rights of all people who find themselves in similar situations. By this I mean that when a court finds a specific act – say, the use of a racial slur – not discriminatory in a particular context, it can easily lead to a public perception that racial slurs are not discriminatory in general. This creates a mechanism by which people who do not 'look like everyone else' – people of colour, people who wear headscarves, people who come from regions that get bad press – come to be excluded from society.

I write as a sociologist of law, and so I recognize three kinds of law: *law in books*, or the content of the law as it is written, plus the decisions of judicial and other public authorities; *law in action*, or how people conduct themselves in relation to the law (compliance with the law); and *living law*, or how people act, independent of both law in books and law in action (Hertogh, M. ed. 2009). If a scholarly analysis only seeks to either reaffirm or refute the reasoning of the courts, then it will naturally inquire only about what repercussions the verdict might have in law, and about how a specific question of law should be understood and interpreted if a similar question arises on a later occasion; for the main goal of this kind of analysis is to create coherence in the law. The question I ask here is basically the opposite one: namely, how ethnic discrimination cases may be interpreted outside of the judicial sphere (that is, by laypeople).

In order to explore the interaction between everyday life (events) and law in books, this chapter examines some of the issues that such a situation raises when looking at intersectional discrimination from the perspective of Sociology of Law. An investigation of this type can proceed from an intersectional perspective to analyse how judicial bodies assess everyday life. Intersectionality is an analytical tool for explaining ways in which domination and subordination are constructed and maintained in various social contexts. The concept is based on the assumption that the experiences people have or are ascribed in terms of access to power and societal resources are shaped by structural power relationships and social identities (Grabham, 2009). The concept of intersectionality originated in the American antidiscrimination discourse, within which Black women challenged a fairly homogeneous feminist movement by questioning the assumptions that guided privileged white women. Kimberlé Crenshaw is one of the first scholars who developed *intersectionality* in legal

context, in which she shows how social identities and systems of structures of oppression are intimately related to each other.

2.2.1 Intersectionality as an Analytical Tool

Kimberlé Crenshaw, in her famous article 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics,' used the U.S. case of *DeGraffenreid v. General Motors (GM)* to show how 'black women' became the subjects of discrimination, since they found themselves in a category that was formed by the intersection of two others and thus not specifically protected under U.S. anti-discrimination legislation. The plaintiffs were a group of 'black women,' and they accused GM of discriminating against them as 'black women' (Crenshaw, K. 1989). However, the court ruled that the women had not been the victims of either race- or sex-based discrimination. The women could not show that GM refused to hire 'blacks,' since nearly all the floor employees were 'black men.' Nor could they show that GM would not hire women, as the office staff consisted of 'white women.'

An intersectional analysis can shed light on how the law acts in society. To grasp the full extent of what is meant by intersectionality, and how we can use this tool in analyses of discrimination against subordinated groups, it is important to remember the critique directed by Crenshaw at the U.S. legislation – namely, that the law *both* rendered invisible *and* discriminated against the most vulnerable groups in society – and to recognize the problems that arise because legal categories can never cover the full spectrum of phenomena that occurs in society. The grounds of discrimination are isolated, which means that there is no possibility to recognize discrimination on a combination of grounds: for example, a 'Roma woman' cannot prove discrimination on that ground, because that category does not exist. The result is the exclusion of people that are the most vulnerable of all: even more vulnerable than 'just' women or 'just' Roma. A further complicating factor is that the Labour Court must always rule specifically on the question of whether discrimination has taken place on the ground or grounds charged. When that question is answered in the negative, the vulnerable person experiences yet another exclusion.

Crenshaw's article had an enormous impact in the Anglo-American literature, where a history of colonization and slavery threw the problem of intersectionality into especially high relief. To date, however, few lawyers have discussed these questions in a Swedish and Scandinavian context. Although intersectionality began to be invoked already at the end of 1990s, there are still discussions about how it could be used as an analytical tool. McCall writes of the complexity that arises when the subjects of analysis expand to include multiple dimensions of social life and categories of analysis (McCall, 2005). In *Intersectional Discrimination* (2019) Shreya Atrey develops the concept of intersectionality from a legal point of view. I will apply an intersectional analysis to the Swedish Labour Court's reasonings as a reflection of the interplay between everyday life (the testimony of one party) and law in books. This is how everyday life may be said to interact with law (and the legal system), but it also works the other way around. Studying courtroom testimonies and the findings of judges reveals ways in which law could be used as a tool to effect social change.

Although the concepts of multiple discrimination and intersectionality are closely-related, they are by no means synonymous. The frequent confusion of the terms creates both perplexity and lack of comprehension when it comes to interpreting current phenomena from a legal point of view. Multiple discrimination involves unequal treatment based on various socially-constructed categories, such as gender, race, transgender identity or expression, ethnicity, religion, disability status and sexual orientation (Crenshaw, 1989; Williams, 1991). An intersectional perspective may also be understood as an acknowledgement that 'those who have experienced discrimination speak with a special voice to which we should listen' (Matsuda, 1987: 324). However, the concept of multiple discrimination says nothing about how the various categories interact. Intersectionality, the effect of multiple discrimination, is an analytical tool that is used to address this issue. The concept has attracted a great deal of attention in Sweden and the other Nordic countries over the past few years as a means of identifying concurrent forms of discrimination (gender, class, race, etc.) in hierarchical social structures – (Molina 2004; de los Reyes, Molina & Mulinari eds. 2002) or as Johanna Kantola and Kevät Nousiainen summarize Leslie McCall and Laurel Weldon 'the conjuncture of social structures and not identities (...). The pre-given identity categories that human rights discourse, antidiscrimination act, equality policies and institutions presume are thus rendered problematic' (Kantola & Nousiainen, 2009).

Within the scope of this chapter, only a few examples of ways we might use intersectional analysis are offered. I have selected several disputes which, to the average person, would seem like obvious cases of ethnic discrimination, but where a review by the Labour Court failed to find that any such discrimination occurred.[5] Marie Matsuda has suggested that we might question the norms written into judicial materials by 'asking the other question': 'When I see something that looks racist, I ask 'where is the patriarchy in this?' When I see something that looks sexist, I ask, 'Where is the heterosexism in this?' When I see something that looks homophobic, I ask, 'Where are the class interests in this?' (Matsuda 1990).

2.2.2 Combined with a Postcolonial Critique

By linking a postcolonial critique with the methodology of intersectional analysis, we can problematize the mechanisms by which different forms of inequality and the exercise of power arise (Ang, I. & De los Reyes, P. 2012; Ahmed, S. & De los Reyes, P. 2011). We can understand that ethnic (racializing) discrimination does not occur randomly, but rather according to structural patterns, and these patterns unfold from a belief in the innate superiority of privileged, white, Christian Europeans and North Americans. People who deviate from the superior group 'naturally' appear inferior. Here, we will see how those who deviate from the norm (the privileged group) are constructed as

[5] All names in the cited court cases are fictitious

'other,' which automatically puts them in a position of having to 'exculpate' themselves.[6]

Deborah King (1988) is one of a number of critics of 'white' feminist hegemony has written:

> Feminism has excluded and devalued black women, our experiences, and our interpretations of our own realities at the conceptual and ideological level. Black feminists and black women scholars have identified and critically examined other serious flaws in feminist theorizing. The assumption that the family is by definition patriarchal, the privileging of an individualistic worldview, and the advocacy of female separatism are often antithetical positions to many of the values and goals of black women and thus are hindrances to our association with feminism. These theoretical blinders obscured the ability of certain feminists first to recognize the multifaceted nature of women's oppressions and then to envision theories that encompass those realities. As a consequence, monistic feminism's ability to foresee remedies that would neither abandon women to the other discriminations, including race and class, nor exacerbate those burdens is extremely limited. Without theories and concepts that represent the experiences of black women, the women's movement has and will be ineffectual in making ideological appeals that might mobilize such women. Often, in fact, this conceptual invisibility has led to the actual strategic neglect and physical exclusion or nonparticipation of black women. Most black women who have participated in any organizations or activities of the women's movement are keenly aware of the racial politics that anger, frustrate, and alienate us. (King, D. 1988:58).

As a white woman myself, I naturally cannot (as Margaret Davies has put it) 'fully understand the nature and extent of racial oppression, because we [white women] are within the group of the oppressors, and benefit from our position. What this means is that we have a particular responsibility to educate ourselves about racism and about other forms of oppression in addition to sexual oppression' (Davies, M. 2008). But no matter my colour or background, I can certainly critique the hegemonic white discourse, and I can discuss the potential repercussions when a court finds no evidence of ethnic discrimination, though this finding flies in the face of the lived experience described by plaintiffs. One way to understand the mechanisms by which the law perpetuates discrimination is to use 'new' methodologies in order to pose new questions to our judicial materials. It is likewise important that legal science not support or shore up legal practice by excluding or exoticizing people who are different. Instead, my ambition is to try to understand why findings by the Labour Court should not be understood as discriminatory, something I believe is possible with the aid of an extended jurisprudential methodology as presented above.

2.3 The Burden of Proof in Discrimination Cases

It is also important to note that in the area of anti-discrimination law, special rules of evidence apply. The main rule in civil matters is that the burden of proof lies with the party making a claim, often the plaintiff: a plaintiff should not be

---

[6] To exculpate is to exonerate oneself from actionable negligence (culpa) by demonstrating cause.

able to allege that a thing has occurred without having grounds for that claim. In Sweden, the main rule was applied in discrimination cases until the 1990s, when Swedish legislation was harmonized under EU law. Now the burden of proof is a shifted burden of proof, with the plaintiff having the burden of persuasion, and if met, the employer having the burden of proof. If a plaintiff (a job-seeker or employee) presents facts which make it reasonable to believe that discrimination has occurred, this constitutes a so-called *prima facie* case of discrimination; there is a presumption of discrimination. The burden of proof then shifts to the defendant (the employer), who must show that no violation of the principle of equal treatment occurred. In cases of direct discrimination, the employer must demonstrate that any unequal treatment did not qualify as discrimination under the law. In cases of indirect discrimination, employers must demonstrate that their application of any apparently discriminatory procedures was necessary to the operation of the business. For instance, employers commonly seek to refute discrimination charges by arguing that employees or job seekers had an *uncooperative attitude* or lacked *personal suitability*. The Labour Court has generally accepted both of these employer arguments, and has rarely found a *prima facie* case proven by the plaintiff, and with the burden of proof rarely shifted to the defendant.

3 Ethnic Discrimination: An Intersectional Analysis

The first Swedish law taking up ethnic discrimination entered into force in 1986.[7] However, the 1986 Act contained no prohibition as to discrimination, only the objective of combatting ethnic discrimination on the basis of race, colour, national or ethnic origins or faith. Since then, the Swedish Labour Court has ruled just over 75 cases bringing claims of discrimination. Notably, the court has upheld less than 10 percent of the cases, none of these cases addressed racism per se. One case took up the question of whether an employer had engaged in discrimination by requiring female staff in a lingerie store to wear name tags that included their bra size (AD 2013 no. 29). No cases were brought to the Labour Court in 2019 raising discrimination claims.

It is easy to see that an individual's lived experience of discrimination can be crushed under the weight of this type of judicial review, where a court decides that the events that took place were in fact not unlawful. It would be easy for laypeople to conclude that behaviours such as raised in the cases are just fine: making jokes to Muslims about halal pigs; questioning Muslim women for wearing headscarves; telling people of colour to leave Sweden and look for work in London, where there are more coloured people than in Scandinavia; or sending a Christmas card of a half-naked man with an erection and a Santa hat, carrying a whip and Christmas tree balls. Persons trained in the law, of course, might not draw the same conclusion. But even we cannot help but be amazed at both how

[7] Lag (1986:442) mot etnisk diskriminering.

consistent the law is applied, and how limited, when it comes to not seeing the forest for the trees.[8]

Intersectional analysis can help us understand discrimination in both the context of the law and society. It can show us how living law, law in action, and law in books interact to create the framework by which we decide what is acceptable, what is discriminatory, and how people may or may not be treated. The Labour Court has dealt with only a few cases concerning religious symbols in particular, but it deals similarly with all the people who have come before it with experiences of discrimination, regardless of whether the discrimination was based on religion (or the use of religious symbols such as veils), ethnicity and/or cultural origins, skin colour, or foreign accent (if they have one) when speaking Swedish. In nearly every case the Court constructs persons with an experience of discrimination as 'others.' For the layperson, this must immediately raise the question of whether it is even possible for a plaintiff to win an ethnic discrimination suit in Sweden – Sweden, of all places, with its international reputation as a model for justice and equality.[9]

There are certainly ways to explain away the difficulty of proving ethnic discrimination. Perhaps too many actions are brought overall. Perhaps the complaints should have been formulated differently. Or perhaps, if discrimination as experienced by real people is not viewed as such by the Court, the answer lies in the legal system and the way the Court handles discrimination cases. That is the explanation I will focus on here, for I believe that if we can reach a fresh understanding of discrimination cases and discrimination law, redress might become possible for more people who feel that their right to equal treatment has been violated on under current (or previous) Swedish anti-discrimination legislation.

4 Discrimination Claims

Being made to feel unwelcome when applying for a job is certainly unnecessary, but it does not mean that the job seeker also should have to feel excluded from the workplace and/or from social interactions at work. Yet this is a recurring theme in most reports of ethnic discrimination by job seekers who have either submitted applications for, or expressed interest in a position.

4.1 Marginalization and Racialization

The marginalization of claimants can be seen in the case law. One such example is Laura, a young woman born in Israel who had resided in Sweden since being adopted at age two. She applied for a job as a hotel receptionist. When she interviewed for the position, her interviewer remarked, 'You're very dark. Where are you from?' When she described her background, he started to sing

[8] By no means does this chapter set out to challenge the legal system as such. The idea is that the Court's written statements might be refined, e.g., by allowing for a fuller, or at least less-biased, interpretation of the evidence on which the Court has ruled.

[9] As an example, the Ombudsman Institute was successfully 'exported' from Sweden to many countries outside Scandinavia.

the pop song *Hallelujah* (Israel's winning entry in the 1979 Eurovision Song Contest [AD 2003:54]). After quickly scanning her grades, he said that he did not want to look prejudiced, but he could not hire someone like Laura, as he had to consider the best interests of the hotel guests. He advised her to go to London, which was more international and had more 'people like [her]'. He also said, 'I can't have an African black [*afroneger*] cleaning my hotel. How would it look?' He mentioned that he had previously had a store where a young Roma woman had come to work as a student trainee. He felt he could not have a person like her in his store, and her teacher had telephoned and called him a racist. He asked Laura if she thought he was a racist. He also said, 'I'm guessing your boyfriend isn't Swedish either.' Laura found the interview offensive and the way she was treated by interviewer extremely upsetting. The Labour Court noted that, although the conversation had probably taken place as Laura described, there had been numerous applicants for the position and Laura had neither the best qualifications nor sufficient references to make it past the interview. In other words, the Labour Court, against the facts above, did not find a *prima facie* case of discrimination proven. The burden of proof never shifted to the employer. It is not difficult to understand how some might construe this as confirmation that commenting on personal appearance, making specific reference to skin colour and ethnic background, and suggesting people should emigrate if their skin is too dark are all perfectly unproblematic behaviours.

That is all the more likely since the Labour Court accepted similar racialized acts on many other occasions. In one case, Lars, a rehabilitation aide of Gambian descent was called denigratory nicknames by his colleagues. The nicknames included 'blackey', 'big black bastard', 'the African', and '*svartskalle*' (literally 'black head/skull'; a derogatory Swedish word for a person with dark hair or skin [AD 2012:27]. He was also accused by co-workers of practicing voodoo, since he was so good with the residents at the centre where he worked. His supervisor had temporarily suspended him for having an uncooperative attitude and had cut his hours from 98 per cent to 80 per cent of full-time, meaning a substantial loss of income.

In another case, Peter, a welder of Nigerian descent who worked at a nuclear power plant, claimed that his employer had discriminated against him on the basis of his ethnicity, in the decisions taken by management in a variety of situations. Peter also claimed that his employer had neglected legal obligations to investigate and take preventative measures against workplace harassment (AD 2009:4). Peter's colleagues called him by the derogatory nickname 'Tony Mogadishu'; when they said it, they also mimicked the sound of a cuckoo. On one occasion, someone wrote 'Mogadishu' on a pipe running through the active side of the plant, where Peter worked. Peter was also prevented from using the restroom, and on occasion his lunch was thrown in the trash.

Neither action was upheld by the Labour Court. In the first case, the Court found that rough slang was habitually used among the employees, and stated that because Lars called his colleagues 'whitey', they had not realized that 'blackey' was offensive. The workers often joked around and had fun with each other, the Court wrote. In the second case, the Court based its decision on testimony by managing supervisors, who claimed they had neither heard nor seen any of the behaviour Peter described.

It would be almost comical if it were not so tragic – the Labour Court relying on a supervisor's testimony to prove that the same supervisor had seen nothing inappropriate. If the supervisor had confessed to seeing what was supposed to have happened, it would have been tantamount to admitting his guilt. Both the young Israeli woman with dark skin and the two men of African descent were constructed as 'others': Laura's prospective employer talked about her in offensive and exoticizing terms; Lars' colleagues suggested that he was a practitioner of voodoo. The Court neutralized the use of nicknames such as 'Mogadishu' and 'blackey' by pointing out that Lars called his colleagues 'whitey.' But the Court missed the point. It did not understand that a racist epithet cannot be cancelled out by another comment, especially an isolated one. The idea that 'whitey' and 'blackey' are somehow equivalent relies on a normalization of discrimination (Schömer, E. 2014). It signals a lack of understanding of what discrimination is. People in a position of constant superiority, rooted in a history of colonialism, cannot be threatened by the use of a nickname, especially one that is not even demeaning.

4.2 Marginalization of Muslims

Another case of discrimination based on personal appearance concerned Sonja, a Muslim woman who wore a headscarf. Sonja applied for a job as a grocery store product demonstrator and was told over the phone that positions were available (AD 2003:63). She scheduled a meeting with Eva, a company representative, for the following day at a large shopping centre. When Sonja arrived, Eva asked, 'Is that you?' She then turned away from Sonja and spent about ten minutes talking on her telephone. Eva then said that Sonja would absolutely not be allowed to wear clothes like the ones she was wearing to work, because the product demonstrators were the public face of the company. Eva said that she also lived in Malmö, where the most common given name was Mohammed, and she was used to meeting people from all over the world, but in her opinion, it would take a hundred years for people to get used to seeing women with their hair covered. Then Eva informed Sonja that the job of product demonstrator would require her to be clean and neatly dressed. The conversation made Sonja extremely uncomfortable. It shocked and offended her. However, the Labour Court ruled that even if Eva had indeed made all of these comments, because the company had suspended its hiring process, it could not be found guilty of ethnic discrimination against Sonja. Given that an employer has the right to suspend a hiring process at any time, this exposes an additional impediment for job seekers to win an ethnic discrimination case, and how easily the legal protections against unlawful discrimination can be undermined.

Another case that illustrates mechanisms of exclusion and marginalization concerned two hourly temporary workers at a sports club, Muslim women who wore headscarves. They said their employer had engaged in unlawful discrimination by subjecting them to harassment on the basis of their gender and religion (AD 2010:21). For example, a club representative had called Muslims stupid for practicing a tradition of fasting. On several occasions, the representative had also entered the locker room when the women were changing. On one such occasion, one of the women had not been wearing her headscarf. Afterwards, she began changing clothes at home instead of at work. The same

man had made jokes about halal pigs and said that Arab men killed women who were unfaithful. He had asked one of the women if she thought it was right for unfaithful wives to be stoned to death. As the man described the incident, after the woman answered yes twice, he realized they held incompatible views and did not pursue the topic further. The Court found that the plaintiff failed to refute the man's account and thus the incident could not be held against the employer. Citing the preparatory documents, the Court also noted the definition of harassment as:

> [A]ctions, behaviours, or conduct that violate the dignity of the victim in a manner related to a ground of discrimination, in this case religion or gender. These may be physical or verbal acts or acts of another nature. The actions or conduct must result in a disadvantaging of the victim, in the form of harm or inconvenience that violates the dignity of the individual. Discriminatory harassment may include verbal abuse, defamation of character, ridicule, or demeaning actions, such as commenting on personal appearance and behaviour or making offensive gestures. It is the victim who determines whether the actions or behaviours are unwanted and offensive. It should be the responsibility of the person being harassed to make it clear to the harasser that the behaviour is experienced as offensive. In certain cases, however, the circumstances may be such that the offense must reasonably been obvious to the harasser. Trivial differences in conduct do not constitute harassment. There must be clear and noticeable violations. Generally speaking, harassment does not include attitudes, jokes, etc. that are not directed toward one or several individuals. However, an act or manner of conduct that appears harmless in isolation can become harassment if it is repeated and if the affected person makes it clear that the behaviour is offensive (AD 2010:21).

The Court acknowledged that the women in this case felt discriminated against, but said they had not stated clearly enough that the man's comments made them uncomfortable. The Court also wrote that although a joke about 'halal pigs' could certainly be considered a form of ridicule, it did not constitute harassment under the law in this case, because the joke had not been repeated and the women had not protested clearly enough. The Court said the plaintiff had successfully established that the man had brought up the topics of fasting and unfaithful women, but it concluded that these did not fall under the 'definition of harassment' according to the law.

This reasoning becomes even more interesting if we compare it to another case in which the Court discussed what it means to be 'disrespectful.' That case concerned a woman of Czech descent who had applied for a job as a car rental/vehicle service agent. She did not receive an interview for the position (AD 2009:11). One reason given was that she 'did not fit in' at the car company, because she had turned up 'without an appointment' to inquire about an advertised position. When she was informed that it was not a good time to discuss the job, as a rental car was being prepared for a customer, she did not listen; the employer thought this was equivalent to 'showing disrespect' and being 'disagreeable'. She also failed to fill out her application completely, leaving her home address and her age blank. The woman objected that she had left a business card with her contact information at the firm when she visited. However, the Labour Court concluded that the information requested on the application was important for the rental agency to form a first impression of applicants, and missing information 'would tend to give the impression that the

woman was either not careful enough or had intentionally ignored the company's request for information.' Moreover, although the woman had stated in her application that she had worked as a CEO, the Court said that this could in no way be considered an additional qualification for the position in question.

These cases show women in headscarves being marginalized and constructed as 'others.' Sonja, who had sought a job as a product demonstrator, had no legal right to question her treatment at her interview because the selection process had been terminated, an action employers are free to take at any time. But the Court could have – as has happened in other disputes – challenged the employer's conduct by writing that it was inappropriate for the recruiter to say what she did. It described the two temp workers at the sports club as timid and not able to speak out for themselves, which is even more interesting when juxtaposed with the case of the car rental agency (AD 2010:21). There, the Court criticized the woman job seeker for being demanding and discourteous; her attitude robbed her of her right to legal redress. Instead, her qualifications were devalued by the Court. The woman was originally from a country in the former Eastern bloc, a circumstance that coloured the entire case and ultimately provided a 'natural' explanation for refusing her the job. All in all, it would appear impossible for a woman who is 'other,' of foreign descent, to act correctly. If she makes clear demands, she is arrogant, which excuses prospective employers from charges of unlawful discrimination. If she does not make clear demands, the employer cannot understand what she wants, which leads to precisely the same outcome (AD 2009:11).

In a third case, the Court had to decide whether a male supervisor had engaged in unlawful ethnic discrimination (and/or sexual harassment) against two women by making certain statements and pinning up a drawing with sexual innuendo. One of the women was originally from the former Soviet Union, the other from Bosnia (AD 2011:13). The two women had previously criticized the supervisor because no measures were in place to prevent violence at the sheltered housing where they worked, and because the security system did not function properly. The conflict between the parties escalated and the women believed that the man was making reprisals against them for their criticism of management. The man gave the women the derogatory nickname of 'Eastern girls.' On one occasion, a housing resident was violent towards one of the women, but the supervisor did not file a police report or take any other measures, because he 'wanted to see how long the shock lasted. You girls from the East can usually take a lot.' The woman asked him to address her by name, but he ignored her request and continued to use the nickname. Based on these facts, the Labour Court ruled that one of the women had been subjected to harassment on the basis of her ethnicity as she had asked the supervisor to stop. The other woman, subjected to the same behaviour, was not found to have been harassed as she had not asked the supervisor to stop. This was not on the basis of gender, as the Court found no evidence that the man's comment was an allusion to the sex trade and prostitution (Integration report; 2010), which the plaintiff, the Ombudsman against Ethnic Discrimination, had argued was often associated with Eastern European women, thus the derogatory nickname. The Ombudsman also failed to establish that the man kept using the name 'Eastern girls' after being asked to stop.

During the Christmas season the man put up a picture that was sexual in nature, showing a man with a naked erection, wearing leather and a cap and holding a whip and two Christmas tree balls. A speech bubble read, 'Are there any naughty children out there?' The Court held that there had to be *scope to put up pictures of a sexual nature that are not directed at any one person, even if a member of a group protests that the picture makes him or her uncomfortable*. The Court also said that it had not been ascertained whether the picture was intended to offend either of the two women. The following year, the same picture was e- mailed to a group of recipients that included the two women. The man had since been promoted to acting head of the psycho-sociological unit for the entire workplace, and the women had already told him clearly that the picture made them uncomfortable. The Court found that the e-mail constituted unlawful sexual harassment, but that the workplace had not violated the prohibition against reprisals, since e-mail per se cannot be considered a 'typical' reprisal.

The cases above are typical cases of multiple effects, in which the experience of discrimination is strengthened when it occurs on more than one ground. Failure to understand social codes and norms leads to social exclusion, which more than doubles the effects of discrimination. As I see it, there is no legal basis nor any possibility for the Court to reach alternative conclusions encompassing multiple grounds in these cases. Existing legislation does not address intersectionality, and as in the Swedish system, this means the Court cannot rule based on anything other than the letter of the law. The Court's impotence becomes visible in all three of these cases. Once again, we can see that the Court is hampered in its ability to recognize the full vulnerability of these vulnerable people, even though that is ostensibly its role: to ground its actions in their perspectives (Prop. 2002/03:65 p. 97; Prop. 2002/03:65).

4.3 Marginalisation through Othering

We can look briefly at two additional cases with respect to 'othering', in which the claimants felt they had experienced discrimination, but saw their claims rejected by the Court. In the first case, Ahmed, a man originally from Bosnia, had applied for work as a production artist (AD 2009:16).[10] Ahmed was highly-skilled and had extensive experience in his field, but he was not hired. The prospective employer said he was 'too' good: more a designer than a production artist. One witness who gave evidence in court said that she would describe Ahmed as detail-oriented and focused achieving excellent results. She considered this trait to be a disadvantage, since he should have tried to standardize the work and not been so concerned with making it perfect. The paradox is evident: skills that ought to have made Ahmed well-suited for the position actually ended up making him less employable. The Court agreed that Ahmed was a more skilled candidate in certain respects, but noted that the company had specifically expressed a desire to prioritize 'personal suitability'. This made the fact that Ahmed was a highly-skilled and capable professional irrelevant. Yet again, we see the job seeker depicted as 'other,' and this 'othering' excluded Ahmed from the possibility of winning legal redress.

[10] A production artist receives sketches from designers or art directors and then combines images and text, selecting a printing process and using suitable print materials and formats.

In the second case, Konrad, a man originally from Serbia, had been told at a work function that 'you Serbs are the worst kind of people, always looking for a fight. Just look at Yugoslavian history. You start all the wars' (AD 2009:27). On the same occasion he was told that he spoke bad Swedish and that he should practice Swedish with his father-in-law and his daughters. The following day, he was asked why he seemed irritated and whether anything had happened. Konrad took great offense and felt the comment was an insult. He began to have difficulty sleeping and eventually went on sick leave. His claim was rejected by the Court, which said it was uncertain whether the employer, who has responsibility for the emotional well-being of employees at work and to take steps to prevent harassment, had actually heard the remarks. Thus, the employer, not found to have had any knowledge of the discrimination, had had no opportunity to take action.

5 Exclusion, Exoticization, Ethnicization

The role played by the legal system in experiences of exclusion within Swedish society has been the focus of this chapter. A number of anti-discrimination cases heard by the Labour Court, in order to illuminate the mechanisms of exclusion, exoticization, and ethnicization that operate there were presented above. We have seen that the people most in need of society's protection are those whom the courts and the law ultimately fail to support. People who experience ethnic discrimination, either in the workplace or as they seek to enter it, turn to the Labour Court, which fails to recognize their experiences. The Labour Court in the vast majority of discrimination cases does not even shift the burden of proof to the employer. The experiences are dismissed on various grounds which all share one common denominator: a failure to see the individual and recognize to what he or she has been subjected. Racist comments are reshaped and defused by the judicial machinery. Terms such as 'personal suitability' and 'uncooperative attitude' are used to exclude people who experience discrimination. They are made into misfits and complainers, rather than targets of inappropriate and unlawful conduct.

I have tried to uncover some of the underlying structures that inform the reasoning of the Labour Court in matters of ethnic discrimination, by showing how not only race but also religion (in the form of religious symbols) serves as markers in this context. Headscarves or dark skin become labels that signal untrustworthiness. A 'white' supervisor may be taken at his word, for no other reason than that he is a 'white' man in a position of power. By this and similar mechanisms, skin colour becomes an important determiner of credibility in court. Similarly, for non-Swedes making claims of discrimination, the reasoning becomes a paradox and a logical impossibility, since the arguments are either that that they were too timid and did not protest enough, or that they were too pushy and demanding (and thus un-Swedish), both working equally well.

By such means the Labour Court becomes complicit in the ethnicization of people who do not meet the specifications of normal Swedishness. The consequence is that permissible walls go up between people in Sweden, especially in the Swedish job market. Ethnicization leads to marginalization and exclusion from Swedish society. The stereotype of 'black and lazy' is reinforced and extended when the Court decides, instead of applying the principle of the

shifted burden of proof, to engage in a discussion of the relative credibility of a discrimination victim and a white foreman whose defence is that the workplace had a joking atmosphere. The Court might have challenged the claim that the atmosphere was jovial, perhaps by noting that saying everything was just a joke is, in fact, a way of belittling the person who experienced it has discrimination. But instead, the Court completely dismantled the credibility of the man of colour. It is precisely such moments that the dominant discourse, in which 'white' skin is invisible and neutral, is built, and 'black' skin is ethnicized.[11] 'Black' people come out as untrustworthy, lazy, and humourless.

In the case concerning the rehab aide, the plaintiff alleged that a unit head, who was a 'white' woman, accused the aide, a 'black' man, of practicing voodoo, and also attributed other aspects of his behaviour to his culture. Moreover, the woman was supposed to have said that the residents of the home where the aide worked obeyed him out of fear, because he was large and black. The Court said it was not satisfied that these statements had actually been made and dismissed the action. Once again, the dominant discourse is reinforced by a 'white' superior granted credibility by the Court. And if the 'white' woman is trustworthy, that makes the 'black' man a liar. Again, the 'black' man is ethnicized: constructed as 'other' compared to the 'white' woman. 'Whiteness' remains a neutral parameter, something the Court reinforced in this case in the way it weighed the evidence, as in an unexplained leap of logic it 're-reversed' the burden of proof. In other words, instead of applying the *prima facie* principle, the Court elected to weigh the stories of the two parties against one another, in terms of their relative credibility.

It is true that in neither of these cases was skin colour overtly discussed. But not talking about the skin colour of the superiors keeps 'whiteness' invisible – although, of course, as Sara Ahmed writes:

> [W]hiteness is only invisible for those who inhabit it. For those who don't, it is hard not to see whiteness; it even seems everywhere. Seeing whiteness is about living its effects, as effects that allow white bodies to extend into spaces that have already taken their shape, spaces in which black bodies stand out, stand apart, unless they pass, which means passing through space by passing as white. (Ahmed 2011:201).

This implies that it is impossible for the Labour Court to act according to ideals of 'neutrality' and 'objectivity'. The reason is that the Court cannot perceive how it and the context in which it is situated have been constructed within the dominant 'discourse of whiteness'. This becomes especially clear when we contrast these two cases with a case concerning a 'white' elderly woman, who is not even assigned a colour (AD 2001:91). Here we can observe how 'white' becomes neutral and invisible to the court.

In the judgments of the Court, men with 'black skin' are 'othered' in relation to the 'white' managers and supervisors who are their workplace superiors. This makes the Court participatory in the ethnicization of human beings, as 'blacks' who deviate from the norm, and 'whites' who define the norm. The tools of

[11] 'Ethnicization' is a name for those institutional practices which – depending upon political, economic, and cultural claims and power relationships – lead to the systematic exclusion of minorities (Miles, R. 1993).

postcolonial feminism, however, can make the position of marginalized groups more visible and help us work for social change.

The Labour Court applies shifting standards in cases of ethnic discrimination. As in Ahmed's case, it is fine for an employer to reject the best-qualified applicant on the grounds that he is too conscientious and too highly-skilled. As in Laura's case, it is also fine to reject an applicant for having mediocre qualifications – even as the prospective employer suggested Laura leave the country because the colour of her skin was too dark! These examples offer just a glimpse of the difficulties faced by immigrants of non-European descent in Sweden, but they are vivid proof that it is, in principle, impossible for a person who deviates from normal, ordinary Swedishness to gain entrance to the Swedish job market.

Martha Minow has described how the law, which is intended to help people escape discrimination, instead participates in creating 'differences' among people and perpetuating a hierarchy that raises some people up and subordinates others. The law becomes not a force for justice, but a way to patrol the borders between groups of people – which actually, paradoxically, makes it a barrier to justice:

> [The] law provides vivid contexts for studying the assignment of the label of difference, whether by traits of race, gender, disability, or other minority identities. Law uses categories. Judges and administrators identify traits and place people and problems in categories on that basis. Law also backs up words and concepts with power. The names given by law carry real consequences in people's lives. In law, the press of the past has a special weight. Judges deliberately maintain continuity with ideas and practices of the past in order to promote social stability and protect expectations. Even the judicial model of individualized hearings and individualized judgments preserves and reinvents categorical solutions and neglects the relational dimensions of problems of difference. (Minow, M. 1994:97).

One of the foremost voices in postcolonial feminism, Chandra Talpade Mohanty (2006), also discusses the possibility of using feminist methods and analytical strategies grounded in the perspectives of subordinated groups. Mohanty believes that a vision of universal justice is:

> [T]he very opposite of 'special interest' thinking. If we pay attention to and think from the space of some of the most disenfranchised communities of women in the world, we are most likely to envision a just and democratic society capable of treating all its citizens fairly. Conversely, if we begin our analysis from, and limit it to, the space of privileged communities, our visions of justice are more likely to be exclusionary, because privilege nurtures blindness to those without the same privileges. (Mohanty 2006:257).

An approach such as this can help us better see the lives and concerns of marginalized women and men, which in turn can help us uncover the workings of power and transform the way it is used and abused. The intersectional perspective seeks to effect change for subordinated groups. Thus, intersectionality can be a tool for strengthening our faith in society, helping us believe that it can be both democratic and inclusive. No matter whether we are looking at preventing racism against women or men, we have much to gain from developing new methodologies and applying existing methodologies from

postmodern feminism to analyse the instrument of the law and its governing functions. It does not matter that feminist methods were primarily developed to prevent the subordination of women, for the same mechanisms are used to exert power over other subordinated groups. Both racism and sexism can be prevented if the courts will open their eyes to new methodologies and consider discussing how the law can assist in achieving this aim. To prevent everyday racism and follow the spirit of the law in books, the Court must also take into account both living law and law in action. If the Court is allowed to continue applying the law according to its whim, however, with no sensitivity to is position as a representative of the power held by dominant 'white' groups over subordinated people of colour, then it is obvious that the living law, in the sense of the dominant discourse of 'white' normalcy, will never change. The law imagined in books will never be more than an idea, just words on a page in the real world of law in action.

To reach further, we must do as Marie Matsuda has suggested: adopt a strategy of 'outsider jurisprudence' to illuminate these mechanisms of oppression. Margaret Davies writes:

> As 'standpoint' feminists have argued, the oppressed person understands the nature of her oppression better than the oppressor, because she has access to knowledge about both the process and forms of oppression, and what the consequences of oppression are. Men cannot understand the nature of oppression on the basis of sex in the same way that women can, because the experience of the oppression is the basis for our understanding of it. And white women cannot fully understand the nature and extent of racial oppression, because we are within the group of the oppressors, responsibility to educate ourselves about racism and about other forms of oppression in additions to sexual oppression. (Davies 2008:203).

In other words, to prevent ethnic discrimination, it is critical to understand the nature of the exclusion that is experienced by the people pushed to the margins of Swedish society. To tear down the walls around discrimination victims, we will have to extend and refine the traditional legal dogmatic method. One way to begin might be if the rulings of the Labour Court could take into account more than just 'black letter law', the law in books. The Court might seek to understand how their rulings will be received and what signals they will send to society about law in action. For now, the decisions of the Court are so inconsistent that it is frankly impossible for workers and job seekers to make correct decisions: whether to protest to employers or not, whether to be skilled at one's job or not. The result is enormous frustration, not only for the people excluded from normal society, but also for those of us who would like nothing more than to see a job market that was truly inclusive. At present, the only thing about the Labour Court's actions that seems consistent is the fact that it is basically impossible for people constructed as 'other' – people of colour, women who wear headscarves – to receive legal redress in cases of ethnic discrimination.

6 Bibliography

6.1 Swedish Labour Court

AD 2001:91

AD 2003:54

AD 2003:63

AD 2009:4

AD 2009:11

AD 2009:16

AD 2009:27

AD 2010:21

AD 2011:13

AD 2012:27

AD 2013:29

6.2 Literature

Ahmed, S. (2011). *Vithetens hegemoni*. [The Hegemony of Whiteness] Tankekraft Förlag

Ahmed, S. & De los Reyes, P. (2011). *Postkolonial feminism*. 1. [Postcolonial Feminism. 1.] Stockholm: Tankekraft

Ang, Ien & De los Reyes, P. (2012). *Postkolonial feminism*, 2. [Postcolonial Feminism. 2.] Stockholm: Tankekraft

Atrey, Shreya (2019). *Intersectional Discrimination.* First Edition Oxford: Oxford University Press

Crenshaw, K. (1989). 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics.' In *U. Chi. Legal F*. pp. 139–

Davies, M. (2008), *Asking the Law Question*. 3rd. ed. Sydney: Lawbook

de los Reyes, P. Molina, I. & Mulinari, D. (ed.) (2002). *Maktens (o)lika förklädnader: kön, klass & etnicitet i det postkoloniala Sverige: en festskrift till Wuokko Knocke*. [The Domination of (Un)similar Disguise : Gender, Class & Ethnicity in the Postcolonial Sweden : A Miscellany in Honour of Wuokko Knocke] (Stockholm: Atlas)

Diskrimineringslagen [Discrimination Act](2008:567)

Gorski, Philip S. (ed.) (2012). *The Postsecular in Question: Religion in Contemporary Society*. New York: Social Science Research Council

Government Bill 2002/03:65, *Ett utvidgat skydd mot diskriminering* [An Extended Protection Against Discrimination]

Government Bill 2004/05:147, *Ett utvidgat skydd mot könsdiskriminering* (An Extended Protection Against Sex Discrimination]

Grabham, E. (ed.) (2009). *Intersectionality and Beyond: Law, Power and the Politics of Location* (Abingdon: RoutledgeCavendish)

Hertogh, M. (ed.) 2009. *Living Law: Reconsidering Eugen Ehrlich*. Oxford: Hart

Kantola, J. and Nousiainen, K. (2009). 'Institutionalizing Intersectionality in Europe', *International Feminist Journal of Politics*, 11(4), 459-477

King, D. (1988), 'Multiple Jeopardy. Multiple Consciousness: The Context of a Black Feminist Ideology,' *Signs*, Vol. 14, No. 1 (Autumn, 1988), pp. 42-72

Matsuda, M (1990) 'Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition' Stanford Law Review, Vol. 14: 297-300

Matsuda, M. (1987) 'Looking to the Bottom: Critical Legal Studies and Reparations' *Harvard Civil Rights Civil Liberties Law Review*, Vol. 22: 323-399

McCall, L. (2005). Intersektionalitetens komplexitet. [The Complexity of Intersectionality]. *Tidskrift för genusvetenskap*. 2005(26:2/3), 31-56

Miles, R. (1993). *Racism Aafter 'Race Relations'*, London: Routledge

Minow, M. (1990) *Making All the Difference: Inclusion, Exclusion, and American Law*. Ithaca: Cornell U Press

Mohanty, C. T. (2006). *Feminism utan gränser: avkoloniserad teori, praktiserad solidaritet*. [Feminism without Borders] (Stockholm: Tankekraft)

Molina, I. (2004). *Intersubjektivitet och intersektionalitet för en subversiv antirasistisk feminism. Sociologisk forskning.* [Intersubjectivism and Intersectionality Towards a Subversive Antiracist Feminism] 2004 (3), 19-24

Schömer, E. (2008,). 'Rätten att säga det som tänks eller mänskliga rättigheter i ett intersektionellt perspektiv' [The Right to Say What is Thought or Human Rights in an Intersectional Perspective] in Staaf, A. & Zanderin, L. (ed.), *Mänskliga rättigheter i svensk belysning*, Malmö: Liber förlag

Schömer, E. (2012) 'Multiple Discrimination. A Smokescreen Over Differences', *Retfærd*, 138, nr. 3, 2012, s. 29-50

Schömer, E. (2014) 'Etnisk diskriminering, en rättslig paradox', [Etnical Discrimination A Legal Paradox] Ryberg-Welander, Lotti (ed.) (2014). Festskrift till Catharina Calleman: *I rättens utkanter*. Uppsala: Iustus

Schömer, E. (2016a). 'Sweden – A Society of Covert Racism. Equal from the Outside: Everyday Racism and Ethnic Discrimination in Swedish Society' *Onati Social-Legal series*

Integrationsrapport (Integration Report; 2010)

Williams, P. J. (1991). The Alchemy of Race and Rights. Cambridge, Mass.: *Harvard University Press*

Protected Areas