# Sweden - Balancing Corporatism and Access to Justice

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This chapter examines the efficacy of the Swedish labour law model with respect to employment discrimination protections against the parameters of access to justice. Consequently, the discussion below begins with defining access to justice, then the Swedish labour law model. The question is whether corporatism can be balanced with access to justice in questions of human rights protections.

## 1 Access to Justice

Awareness of the need of access to justice, to be able to actually successfully assert, not just have, human rights, such as protections against unlawful employment discrimination, arose markedly already with the US Civil Rights movement and the dismantling of the apartheid system there in the 1960s. International public law instruments also began to address access to justice in that decade. Recent affirmations of the paramountcy of access to justice can be seen in the 2017 *Unison* judgment by the UK Supreme Court, in which the Court held that access to justice was a constitutional right, founded squarely in both European and UK law.[1] The EU Commission has determined that equal pay for equal work between women and men will not be achieved without access to justice being in place in the EU member states.[2]

What is access to justice? Briefly, it is the ability to successfully and effectively assert rights as granted under law. On the EU treaty level, access to justice is found in the Charter of Fundamental Rights, Article 47 (right to an effective remedy), Article 51 (field of application), Article 52 (3) (scope of interpretation of rights and principles), in the Treaty on European Union (TEU), Article 4 (3)(duty to loyally implement EU law) and Article 19 (effective remedies), and in the European Convention of Human Rights (ECHR) Article 6 (right to a fair trial), Article 13 (right to an effective remedy), Article 35 (admissibility criteria), and Article 46 (binding force and execution of judgments). On the international public law level, a foundation for the right to access to justice can be found in the 1965 International Convention on Elimination of All Forms of Racial Discrimination (ICERD); the 1966 UN International Convention on Civil and Political Rights (ICCPR); the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the 1989 Convention of the Rights of the Child (CRC), the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) and the 2006 Convention on the Rights of Persons with Disabilities (CRPD).

Access to justice issues also permeate many of the individual rights granted under EU law, particularly in this context, employment discrimination protections as seen with the shifted burden of proof.[3] The EU Fundamental

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1 See R (Unison) v Lord Chancellor [2017] UKSC 51.

2 EC Commission Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms {SEC(2021) 101 final} - {SWD(2021) 41 final} - {SWD(2021) 42 final} available at https://ec.europa.eu/info/files/proposal-binding-pay-transparency-measures_en.

3 The application of the shifted burden of proof has been problematic in the EU with member states often applying it instead as a shared burden of proof. For the most recent clarification

Rights Agency[4] has identified several key components, based in part on the above treaties, with respect to access to justice in a non-criminal law context:

- Accessing justice through courts and other bodies;
- Independent and impartial tribunals;
- Fair and public hearings (including the right to equality of arms, adversarial proceedings, reasoned decisions and execution of judgments);
- Legal aid; and
- Right to an effective remedy (substantive and procedural requirements), compensation, specific performance and injunctions.

Many of these access to justice components in place are to create an equality of arms[5] between plaintiffs who have suffered unlawful discrimination and employers who in the vast majority of cases have greater financial and legal resources, as well as information about its own decisions and practices. As seen in the discussion of the Swedish labour law model, the focus on equality of arms, at least in the Swedish context, is unabashedly between the social partners, with the individual who is to be protected and who needs to be able to assert the rights to protection being left out of the model in those cases not of interest to the social partners.

## 2 Corporatism and the Swedish Labour Law Model

Lijphart defines corporatism within majoritarian democracies as "an interest group system in which groups are organized into national, specialized, hierarchical and monopolistic peak organizations."[6] To this he adds the incorporation of interest groups in the process of policy formation as well as acting in concert. The obverse on his scale to corporatism is pluralism, where the interest group system is competitive and uncoordinated. In his study of 36 countries with a spectrum of corporatism versus pluralism, Sweden was found to be the most corporatist system.[7]

### *2.1 Corporatism in the Nordics Generally*

Bipartite corporatism involving labour unions and employer organizations is characteristic of the Nordic labour law models which have been in place since the turn of the twentieth century. The Nordic governments legislate restrictively

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that it is a shifted burden of proof, see Article 16 of the 2021 EC Commission Proposal concerning pay transparency.

4 Fundamental Rights Agency, Handbook on European law relating to access to justice (FRA 2016).

5 Equality of arms is a principle that "speaks to the virtues of procedural equality: the idea that both parties should be treated in a manner ensuring that they have an approximately equal opportunity to make their case during the course of a trial", see for example Roger Gamble and Noel Dias, Equality of Arms is a Blessed Phrase, 21 Sri Lank J. Int'l L. 187 (2009).

6 Arend Lijphart, Patterns of Democracy (Yale University Press 2012) 158.

7 Arend Lijphart, Patterns of Democracy (Yale University Press 2012) 165-66.

"in fields where self-regulation of corporate actors seems possible, particularly with structures that allow for centralised decision-making that reflect the general interest."[8] As to labour law, collective agreements are "regarded as a higher, more desirable form of regulation than the direct state intervention through legislation."[9] Agreements between the central labour and employment organizations creating the regulatory structures of the labour market were entered into in Denmark already in 1899 between the umbrella labour organization, *Landsorganisationen i Danmark* and the employer side, with the *Septemberforlig* ("September-Compromise"). In Norway a Basic Agreement was entered into by the *Landsorganisasjonen i Norge* and the employer side in 1902 and revised in 1935. The Swedish 1906 December Compromise was entered into by the *Landsorganisationen i Sverige*[10] and the employer side, cemented by the 1938 *Saltsjöbadsavtalet* referred to as the Basic Agreement. The development of Finland's labour law model was affected both by Russian and Communist interests, with labour unions becoming stronger bargaining parties with the 1940 Declaration of Principles by labour and employers. Basic agreements then followed in 1944, 1946 and 1997. Iceland, as a Danish colony until 1918, was influenced in its legislation by the 1899 Danish September Agreement, with the still in force 1938 Act on Labour Unions and Industrial Disputes No. 80/1938.[11] It can be pointed out here that while Denmark, Sweden, Norway and Finland had collective agreements regulating the relationship between the social partners, Iceland had legislation already in the 1930's, deviating to a degree from the other more corporatist bipartite structures.

### *2.2 The Swedish Labour Law Model*

The development of the Swedish labour law model can be used here as a rough example of the Nordic corporatist structure in practice. Industrialism came late to Sweden in the second half of the 19th century, but "in record speed", with economic class quickly becoming the primary social question.[12] The modern Swedish labour movement, in many ways the bearer of the guild corporatist system, began in earnest in the 1880s. Both the employer and employee sides were significantly organised already by the 1900s, and both sides were in general, and to a very significant extent still are, sceptical of legislative solutions.

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8 Norbert Götz, Corporatism and the Nordic Countries (Nordics.info Aarhus University 2019), https://nordics.info/show/artikel/corporatism-the-influence-of-trade-unions-and-interest-groups/ (last visited 10 August 2021).

9 Pauli Kettunen, The Society of Virtuous Circles, in Pauli Kettunen and Hanna Eskola, Models, Modernity and the Myrdals (University of Helsinki 1997), 153-177, 166.

10 LO was founded in 1898 and still is the primary blue collar worker umbrella organisation.

11 Lára V. Júlíusdóttir, Icelandic Labour Law, 43 Stability and Change in Nordic Labour Law, September 2002 Vol. 43 Scandinavian Studies in Law (2013) 358-374, 358. An English translation of the act is available at the Icelandic Ministry of Welfare's website: https://www.government.is/media/velferdarraduneyti-media/media/acrobat-enskar_sidur/Act_on_trade_unions_and_industrial_disputes_No_80_1938_with_subsequent_amendments.pdf.

12 Svante Nycander, Makten över arbetsmarknaden – Ett perspektiv på Sveriges 1900-tal (3rd ed. SNS 2017).

The December Compromise of 1906,[13] a central private sector collective agreement was reached between the employer umbrella organisation, *Svenska Arbetsgivareföreningen* (SAF)[14] and the blue-collar employee umbrella organisation, *Landsorgansiation i Sverige* (LO). The agreement sets out the mainframe for the present-day Swedish labour law model in which the social partners, and not the state, resolve labour market issues. The degree of aversion to legislation by the labour market parties can already be seen with the passage of the first collective agreements' act[15] and the creation of a labour court in 1928.[16] These developments faced protests by over a quarter of a million workers, despite the labour court comprising members appointed by the social partners.

The 1920s and 30s marked the birth of the Swedish welfare state, the folk home (*folkhemmet*). The creation of the folk home coincided with finalisation of the Swedish labour law model. The welfare state, comprising public services such as insurance, education and medical care, emerged in parallel to the completion of the labour law model, in many instances with labour unions providing, authorising and administering social benefits, such as unemployment and sickness insurances, a legacy of the corporatist[17] guild system that had been in place in Sweden up to the 1850s.[18] The central labour market organisations above, SAF and LO, entered into the *Saltsjöbads* Agreement in 1938, reinforcing the Swedish model of self-regulations by the social partners and the state's expressed policy of neutrality as to labour issues by refraining from legislation.

The period following the 1930s into the 1970s is often characterised as one of harmony in the labour market, achieved under this system of self-regulation and political cooperation. The folk home and the labour law model resulted in a pattern of civil society, courts and lawmakers much different compared to more pluralistic systems such as the Anglo-American legal systems. Civil society in the form of the social partners worked in conjunction with lawmakers with respect to labour market issues, much consistent to Lijphart's definition above, creating rather than challenging existing structures, such as discriminatory pay between women and men. The Labour Court, comprising members appointed by the social partners, is still the sole interpreter of labour legislation, with its decisions often being the first and last instance for the parties given that its judgments cannot be appealed. Until 1990, LO members were automatically

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13 An English translation of the Basic Agreement can be found in Ronnie Eklund, Tore Sigeman and Laura Carlson, Swedish Labour and Employment Law: Cases and Materials, (Iustus förlag, 2008) 426-434.

14 SAF was founded in 1902, and was eventually subsumed by the creation of the employer umbrella organisation, Svenskt Näringsliv in 2001.

15 Lag (1928:253) om kollektivavtal.

16 Lag (1928:254) om arbetsdomstol.

17 Corporatist and corporatism as used in this article are defined as the "concertation of economic and social policies amongst interest associations and state actors", see Sven Jochem, Nordic corporatism and welfare state reforms, Denmark and Sweden compared in Renegotiating the Welfare State 114 (Gerhard Lehmbruch and Frans van Waarden eds., 2003).

18 For a more exhaustive historical background as to the Swedish labour law model, see Laura Carlson, Workers, Collectivism and the Law: Grappling with Democracy (Elgar 2017).

enrolled as members of the Social Democrats political party, founded by the LO in 1889,[19] and in power uninterrupted from 1932 to 1976.

By the 1970s Sweden was one of the wealthiest countries per capita in the world, capitalising on an infrastructure left untouched by two world wars due to its neutrality. The by then obsolete constitutional act, the 1809 Instrument of Government, was replaced by a 1974 version, which consciously changed the balance of political power from a separation of power model[20] to a separation of function model with a very strong belief in majoritarianism, the collective. Parliament is the sole lawmaker as expressed in its portal paragraph: "All public power in Sweden proceeds from the people."[21] The courts are not the final arbiter of the law, but instead have a comparatively weak role. A court can declare a law in violation of the constitution in the case at hand, but not more broadly. Even after a judgment as to its unconstitutionality, the law in question remains valid law except for as in the case in hand.[22] With this greater focus on majoritarianism, the adopted 1974 version had only five articles on individual rights, including protection of the social partners' right to take industrial action.[23] The individual rights were expanded in 1976 after a change in government, including two articles prohibiting discrimination on the basis of race and sex respectively. The role of these individual rights, however, was greatly debated already even in the legislative preparatory works, with some legal scholars arguing in favour of a weak judicial system and rights that are more of a policy declaration that are not to serve as a legal basis for a remedy.[24]

Organisational density in Sweden among employers is about 90 %, and among employees, about 68 % (2019).[25] Both employer and employee sides are still very sceptical of legislative solutions in general.[26] The social partners are under a statutory obligation to negotiate most issues, almost always at the local

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19 This process of collective affiliation (*kollektivanslutning*), after years of criticism, was finally removed by the 1987 Congress of Social Democrats, effective 1990, see Peter Santesson, När Socialdemokraterna skulle avskaffa kollektivanslutningen (2010) available at inslag.se.

20 Riksarkivet, Regeringsformen (2020), available at https://riksarkivet.se/regeringsformen.

21 An English translation of the current 1974 Instrument of Government is available at the website of the Swedish parliament, government.se.

22 In 2010, the standard for assessing the constitionality of parliamentary legislation under the Article 11(4) of the Instrument of Government was lowered from unconstitutional on its face to an assessment of whether the act was unconstitutional in its substance. The standard of prima facie unconstitutional demonstrates the restrictive role the courts had with respect to the Parliament.

23 Stridsåtgärder på arbetsmarknaden 14 §: "En förening av arbetstagare samt arbetsgivare och en förening av arbetsgivare har rätt att vidta stridsåtgärder på arbetsmarknaden, om inte annat följer av lag eller avtal", Lag (2010:1408).

24 According to the Swedish Legislative Bill Prop. 1973:90 Kungl. Maj:ts proposition med förslag till ny regeringsform och ny riksdagsordning m.m. 2, Chapter Two of the new Instrument of Government gives certain guidelines for society. For the evolution of the Instrument of Government as for politicians to for individuals, see Anders Eka, Svensk Juristtidning och statsrätten in SVJT 100 år Häfte Festskrift, 353-384 (Uppsala 2016).

25 Mats Larsson, Facklig anslutning år 2019: Facklig anslutning bland anställda efter klass och kön år 1990–2019 (LO June 2019).

26 One example of this is that Sweden is one of the few EU member states that has no minimum wage legislation.

and often also at the central levels, after which they may bring a case to the Labour Court. Cases involving the social partners, including where a union represents an employee, such as with respect to a claim of employment discrimination, are negotiated and then brought directly to the Labour Court.[27]

With respect to employee grievances generally, unions represent their members in any negotiations regarding the grievance, and have the possibility (but not duty) of representing members in litigation.28 There however is no duty whatsoever to represent non-member employees. In the majority of employee grievances, the individual employee member has no mechanism to force a union to litigate a claim, and the unions have no duty to provide legal assistance, in other words, there is no duty of representation. The employee's only redress as against the union is to withdraw membership. Labour unions have the right of first refusal with respect to bringing a discrimination claim on behalf of a member as discussed further below. In the event that the labour union refuses, then the Discrimination Ombudsman (for more see below) can assess whether it wants to bring the claim, which it chooses to do in only a handful of cases each year, if at all. The number of discrimination cases taken by the unions[29] to the Labour Court is historically very low, one case in 2021,[30] four cases in 2020[31] with a nadir reached in 2019 of no discrimination cases heard by the Labour Court.

## 3 Influences on Nordic Employment Discrimination Legislation Historically

The Nordic countries have a history of legislative (and other) cooperation, now exercised through the Nordic Council. In the field of employment discrimination law, however, there are some outliers among the Nordic countries, both in positive and in negative directions. With respect to human rights and discrimination protections, each of the Nordic countries are signatories to the UN 1948 Declaration of Human Rights (UNDHR), ICERD, ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), CEDAW, CRC and the CRDP. Despite ICERD being ratified almost a decade

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27 The Labour Court's primary task is to resolve labour law issues, disputes regarding the interpretation and application of collective agreements. Its jurisdiction was broadened in the 1970's to include discrimination claims. Iceland, faced with the same question, gave jurisdiction to the general courts, reasoning it was outside of the expertise of the labour court to address such human rights issues.

28 It is estimated that well over 90 % of employment termination disputes are settled out of court, but there are no official statistics on this number or how they are settled, particularly with respect to discrimination claims, see Jenny Julen Votinius, Sweden in Resolving Individual Labour Disputes in Minawa Ebisui, Sean Cooney & Colin Fenwick (eds.), Resolving Individual Labour Disputes: A Comparative Overview 239 (ILO Geneva 2016).

29 As the labour union is a party to the case, it is easy to count the number of cases the labour unions are involved in before the Labour Court.

30 AD 2021 no. 38 in which the Labour Court found that a local collective agreement containing a provision restricting maritime pilots from working after reaching the age of 60 years was suitable and necessary for the purpose of providing for older persons increased need to rest.

31 AD 2020 nos. 3, 9, 13 and 53.

before CEDAW, the focus in all the Nordic countries was on equality between women and men at work.[32]

On the European level, Denmark, Norway and Sweden are founding members of the Council of Europe (1949). Iceland joined in 1950, and Finland in 1989. Denmark, Norway, Sweden and Iceland all signed the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) in 1950, Finland upon its accession in 1989.

On the European Union (EU) level, those Nordic countries who are EU member states, Denmark since 1973, with Finland and Sweden since 1995, have the duty to loyally implement EU law, here specifically the protections against unlawful employment discrimination. Such employment discrimination provisions hark back to the 1957 Treaty of Rome and its Article 119 mandating equal pay between women and men for equal work or work of equal value (now Article 157 of the Treaty on the Functioning of the European Union, TFEU). The primary EU directives prohibiting discrimination in employment include: The Recast Directive (2006/54/EC) on equal opportunities and equal treatment of women and men in employment and occupation; the Pregnancy Directive (92/85/EEC): the Parental Leave Directive (2010/18/EU), the Part-time Work Directive (97/81/EC); the Racial Equality Directive (2000/43/EC); and the Employment Equality Directive (2000/78/EC) covering the grounds of religion or belief, disability, age and sexual orientation.

Iceland and Norway are, however, not EU member states but members instead of the European Free Trade Association (EFTA) and the European Economic Area (EEA). EFTA does not give rise to any EU law obligations, while the EEA extends the EU single market to EEA's signatories in return for EEA members adopting EU legislation concerning the single market. EU directives on anti-discrimination are not binding on EEA countries, as the EEA 1992 Agreement only provides obligations on those countries vis-à-vis EU legislation related to the internal market. The EEA Agreement explicitly includes an equal pay between women and men for equal work provision, while its Annex XVIII contains an equality treatment between women and men provision.[33] This focus simply on gender equality is a reflection of the goals of the EU in 1992, when gender equality was still the primary focus of EU discrimination protections.

EU discrimination law has been placing an ever-greater emphasis on empowering individuals to bring discrimination claims successfully, focusing on access to justice mechanisms as well as deterring and effective damages. However, as discussed below, the individual human right not to suffer unlawful discrimination in employment has been placed within the Nordic corporatist labour law system, giving rise to a dissonance between the exercise of collective rights and individual rights. A recent example of this can be seen with the feedback given by several Nordic social partners, but dominated in numbers by the Swedish feedback, concerning the EU Commission's proposal for a directive

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[32] As to the legislative developments with respect to gender, see the chapter in this volume, Anne Hellum, Gender Equality in the Nordics, and as to race, see the chapter in this volume, Michael McEachrane, Anti-Discrimination Law and Systemic Racism in the EU.

[33] EEA Agreement, Main Part, Article 69 and Annex XVIII.

concerning pay transparency and enforcement mechanisms in March 2021.[34] Both approaches in the proposed directive, creating pay transparency and increasing access to justice mechanisms, challenge the corporativism of the Nordic labour law models.

Three Swedish social partners responded in the first round of the Commission feedback open 6 January – 3 February 2020, TCO,[35] the Swedish Association of Local Authorities and Regions,[36] and the Confederation of Swedish Enterprise.[37] Four of the nineteen responses received to date in the second feedback round (15 April 2021 – 6 October 2021) by the Commission were from Swedish social partners, the Swedish Trade Union Confederation - *Landsorganisationen i Sverige* (LO),[38] the Swedish Confederation of Transport Enterprises

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[34] European Commission, Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcements mechanisms (Brussels 4 March 2021) 2021/0050 (COD) {SEC(2021) 101 final} - {SWD(2021) 41 final} - {SWD(2021) 42 final}, hereinafter Commission Proposal, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0093.

[35] Gender pay gap – transparency on pay for men and women, feedback from: Tjänstemännens Centralorganisation (TCO), feedback reference F504753, submitted on 03 February 2020, simply stating that "[t]ransparency is a decisive factor in combatting unlawful wage differences and discrimination. There is no need today from a Swedish perspective for further European regulation. Any future discussions must have as a starting point that the initiative must respect for example the Swedish labour law model", available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12098-Gender-pay-gap-transparency-on-pay-for-men-and-women/F504753_en.

[36] Gender pay gap – transparency on pay for men and women, feedback from: Swedish Association of Local Authorities and Regions, feedback reference F504693, submitted on 03 February 2020: "Our role is to sign central collective agreements, make our members stronger in their role as employers and create conditions for local solutions. SALAR wants to emphasise, with regards to the gender pay gap, that there is a strong European legal framework providing women and men with the right to equal pay for equal work and work of equal value. There is no need to amend the current European legislation or to introduce new instruments. It is better to focus on the full and comprehensive implementation of existing regulation at national level", available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12098-Gender-pay-gap-transparency-on-pay-for-men-and-women/F504693_en.

[37] Gender pay gap – transparency on pay for men and women, feedback from: Confederation of Swedish Enterprise, feedback reference F503430, submitted on 31 January 2020, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12098-Gender-pay-gap-transparency-on-pay-for-men-and-women/F503430_en.

[38] Gender pay gap – transparency on pay for men and women, feedback from: The Swedish Trade Union Confederation- Landsorganisationen i Sverige (LO), LO's yttrande över EU:s förslag till direktiv om åtgärder för transparens vid lönesättning, feedback reference F2256513, submitted on 12 April 2021, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12098-Gender-pay-gap-transparency-on-pay-for-men-and-women/F2256513_en.

(*Biltrafikens arbetsgivareförbund*),[39] TCO[40] and *Unionen*.[41] All of these statements emphasize the importance of the Swedish collective model not only in setting wages, but also the collective model with respect to resolving conflicts.[42] LO makes the argument specifically that a reallocation of costs and fees is not necessary as it is almost exclusively the Equality ombudsman or the unions that litigate equal pay claims, and that such a reallocation would result in an increase in claims. As seen from these statements by the social partners, the lack of access to justice mechanisms is a conscious choice, as equality of arms needs only be between the social partners, and not between employers and workers, in basically any question concerning employment, but here, specifically with respect to discrimination claims.

## 4 Swedish Employment Discrimination Legislation

Discrimination legislation, the protection of the individual against unlawful discrimination, challenges the corporatist model on two levels. The first is that the collective is not the subject of the regulation, but rather the individual, and at times, as against the collective. The second is that it is legislation, which as seen above in the Swedish example, is seen as antithetical to the corporatist bi-partite model.

A recent resistance illustrating the tensions between corporatism and individual access to justice can be seen with the feedback

### *4.1 Early Swedish Employment Discrimination Legislation*

Taking Sweden again as a rough example within the Nordic countries as to the early discrimination legislation, gender equality was the primary focus of any

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[39] Gender pay gap – transparency on pay for men and women, feedback from: The Swedish Confederation of Transport Enterprise, submitted on 3 June 2021, feedback reference F2353025, also states that the inefficacy of wage audits has been tested in Sweden and found to be limited, citing the 2019 Report by the Swedish National Audit Office, and that the proposed enforcement mechanisms would lead to an increase in claims, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12098-Gender-pay-gap-transparency-on-pay-for-men-and-women/F2353025_en.

[40] Gender pay gap – transparency on pay for men and women, feedback from: The Swedish Confederation of Professional Employees (Tjänstemännens Centralorganisation (TCO), The initial position of TCO on the European Commission proposal for a pay transparency directive, submitted on 2 July 2021, feedback reference F256513, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12098-Gender-pay-gap-transparency-on-pay-for-men-and-women/F2660618_en.

[41] Gender pay gap – transparency on pay for men and women, feedback from: *Unionen*, submitted on 2 July 2021, feedback reference F2660595, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12098-Gender-pay-gap-transparency-on-pay-for-men-and-women/F2660595_en.

[42] Similar arguments as to the primacy of the labour law model are made in feedback by the Swedish social partners with respect to the Commission proposal for a directive on adequate minimum wages in the European Union, see https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12721-Adequate-minimum-wages-in-the-EU/feedback?p_id=13087675.

legislative actions long before issues of race or other grounds, resulting eventually in a dual-track approach, gender and then everything else decades later.[43] Among the first non-discrimination legislation (other than the protections given union membership) in the Nordics is arguably the Swedish 1939 prohibition against discrimination on the basis of marital status[44] and the Icelandic 1961 law concerning equal pay between women and men.[45] Gender equality became an issue not in itself, but also coincided with the booming Swedish post-war economy leading to the political objective in the 1960s and 70s of greater female workforce participation to support this economic growth. This gender objective coincided with a determination to cut off labour migration from non-Nordic countries. This was to be achieved first by implementing individual instead of family taxation, dismantling family law support structures, greatly restricting alimony and maintenance to the detriment of women in existing family structures, as well as the extensive provision of child care facilities. The political campaign for *jamställdhet*, a specific term referring only to the equality between women and men, worked for freeing both sexes from the roles that society historically had placed on them, in principle giving women and men equal rights as well as equal responsibilities, both paid and unpaid.[46]

Whether legislation should be used as a means to promote sex equality in employment however was debated. Proposals were made during the 1970s for legislation including prohibitions against unlawful discrimination on other grounds, such as race, based on the US Civil Rights Act of 1964.[47] An Equality Delegation presented its conclusions in 1975, that overwhelming reasons existed against adopting legislation similar to that in the United States as such could easily freeze the current injustices and impede more active equality measures.[48] The social partners, namely both employer and employee organisations, argued against legislation as discrimination did not and should not differ in any aspect from other employment issues already falling within their self-regulation under the Swedish labour law model.[49] The social partners entered into equality agreements during the 1970s covering large segments of the private sector in an

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[43] For a more detailed historically background as to equality legislation in the Nordics, see Lynn Roseberry, Equal Rights and Discrimination Law in Scandinavia, Vol. 43, Scandinavian Studies in Law (2002) 215-256.

[44] Lag om förbud mot arbetstagares avskedande i anledning av trolovning eller äktenskap m. m.(SFS 1939:171).

[45] For an extensive analysis of Swedish pay discrimination efforts in a Nordic context, see Susanne Fransson, Lönediskriminering (Iustus förlag) 2000.

[46] For the historical background and analysis of *jämställdhet* in Sweden, see Laura Carlson, Searching for Equality: Sex Discrimination, Parental Leave and the Swedish Model with Comparisons to EU, UK and US Law (Iustus 2007), available as a pdf at SSRN.

[47] Prop. 1978/79:175 med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m. at 9.

[48] Legislative preparatory work Ds Ju 1975:7 PM till frågan om lagstiftning mot könsdiskriminering.

[49] Legislative Bill 1978/79:175 med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m. 25. All the social partners were negative to the legislative proposal with the exception of the labour union organisation SACO/SR, ibid. 196.

effort to prevent the adoption of legislation and the creation of the proposed Equal Opportunity between Women and Men Ombudsman (*JämO*).[50]

Much of the legislative discrimination protections eventually adopted in Sweden are the products of external pressures and not domestically-initiated. Sweden participated in the first United Nations World Conference of Women in 1975, resulting in another push towards adopting sex discrimination legislation. A "half-law" was passed in 1978 by a vote of 155 to 150, containing simply those paragraphs regarding a general prohibition of discrimination.[51] The proposed Equal Opportunity Ombudsman, *JämO*, as well as active measures, were not adopted. Strong resistance by the social partners existed against placing collective agreements within the jurisdiction of *JämO*. A second bill, largely identical to the first, passed by one vote, and the Equal Treatment between Women and Men at Work Act (1979) became effective on 1 July 1980.[52]

The 1979 Equal Treatment Act had three components: the discrimination prohibition, active employer measures, and enforcement mechanisms and procedures, including the establishment of *JämO*. The social partners could derogate from the statutory active measures through central collective agreements. Damages could be awarded for violations of the Act with a "group rebate" created in the event an employer discriminated against several persons. Damages were then assessed in respect of one person and shared equally by the group, a very corporatist solution.

Pressured again by international obligations and criticism of Sweden's failures to implement certain instruments, the first act prohibiting discrimination on the basis of race and ethnic origins was passed in 1986.[53] Containing only seven paragraphs, it did not explicitly prohibit discrimination based on race, colour, nationality, ethnic origins or religion. Its focus instead was on combatting ethnic discrimination and the creation of the Ombudsman against Ethnic Discrimination. Although technically legislation, no sanctions were included in the act and consequently, plaintiffs had no rights to any remedies and, tellingly, no cases were brought. This late date of passage of the act is also noteworthy given the legal oppression of several ethnic groups historically, including the Sami,[54] Romani[55] and Jews.[56]

The 1991 Act Concerning Equal Treatment Between Women and Men at Work retained much of the 1979 Act, particularly its layout and enforcement

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50 See Legislative Bill 1978/79:56 med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, 9 and 196.

51 Lag (1979:503) om jämställdhet mellan kvinnor och män i arbetslivet.

52 Lag (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet.

53 Lag (1986:442) mot etnisk diskriminering.

54 See Ombudsmannen mot etnisk diskriminering, Samers rättigheter ur ett diskrimineringsperspektiv (2008) available at https://www.do.se/om-diskriminering/publikationer/diskriminering-av-samer/.

55 See Ombudsmannen mot etnisk diskriminering, Diskriminering av romer i Sverige (2004) available at https://www.do.se/om-diskriminering/publikationer/diskriminering-av-romer-sverige/.

56 See Karin Kvist Geverts, Ett främmande element i nationen (Uppsala University 2008).

mechanisms.[57] However, the duty to take active measures was placed first, followed by the discrimination prohibition. Central collective agreements could still replace the Act's provisions on active equality measures. The burden of proof, that the plaintiff demonstrate that she was better objectively qualified, was retained. A prohibition against harassment based on a refusal of sexual advances or a reporting of a sex discrimination claim was now included, as were equal pay provisions for the first time. Sweden became a EU member in 1995 and the ECHR finally was enacted as Swedish law (but not a constitutional act) in 1994, effective 1998.[58]

### *4.2 Current Swedish Discrimination Legislation*

Sweden had by 2006 eleven discrimination acts, most of which were eventually replaced by the 2008 Discrimination Act.[59] The 2008 Act forbids unlawful discrimination on the bases of sex, ethnicity, religion or other belief, disability, sexual orientation, with the new grounds of transgender identity or expression as well as age. The Act explicitly states that it is mandatory (and not gap-filling as before), and that any agreements in contravention of the Act's rights or obligations are void. The discrimination prohibition is now first, with active measures being addressed second. The protections as well as the duty bearers under the act faithfully mirror the requirements of European Union law with the exception of race.[60] The word "race" was removed from the Swedish discrimination legislation, leaving "ethnicity" as the protected ground.

Just as most of the different discrimination acts were combined under the 2008 Act, four of the five different ombudsmen were also merged in 2009 into the Office of the Ombudsman against Discrimination (DO).[61] DO is to work to eliminate discrimination in all areas of society, to promote equal rights and opportunities, equality between men and women and prevent and counteract racism, xenophobia and homophobia, provide advice and assist in ensuring that those exposed to discrimination can exercise their rights, and provide information to the public and governmental authorities in general. DO has the legislative mandate to pursue individual claims of discrimination, but does so only sparingly, choosing instead to prioritize education over litigation. By way of example, DO in 2013 received 294 complaints of ethnic discrimination and not one was pursued, with DO stating that the employers had "provided objective explanations for their actions and that it was difficult to determine whether any

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57 Jämställdhetslag (1991:433).

58 See lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.

59 Diskrimineringslag (2008:567).

60 The Swedish legislator deliberately removed "race" from the list of protected grounds in the 2008 Discrimination Act. According to the act's legislative preparatory works, this was to demonstrate that a biological concept of race is unacceptable: "[T]here is no scientific basis for dividing human beings into different races and from a biological perspective, consequently there is neither any reason to use the word race with respect to human beings", see Legislative Bill 2007/08:95, *Ett starkare skydd mot diskriminering*, 119.

61 The Children's Ombudsman is still separate.

discrimination had occurred."[62] This can be compared to the fact that the Labour Court has only found two cases of unlawful discrimination on the basis of ethnicity since the passage of the 1986 Act, the first of which was in 2002.[63] After criticism for the low number of complaints investigated, DO according to its 2019 Annual Report took three cases to court, on the protected grounds of age, disability and pregnancy.[64] This is against the background that 2,661 reports of discrimination were made to the DO, 735 with respect to ethnicity in 2019 with no statistics provided by DO as to how many of these were investigated. DO's 2019 Annual Report states that it has focused its investigations on issues of precedence.[65] This lack of engagement as to the enforcement of non-discrimination rights is reflected in the recent concluding observations by The Committee on the Elimination of Racial Discrimination pointing out, among other things, that the DO's present interpretation is that the mandate of the "Equality Ombudsman is limited, that cases successfully resolved are relatively low in number."[66] This reflects very much the lack of enforcement that has characterized the DO:s work in the past decade.

The historical trends that can be seen from the example of Sweden is that the collective has dominated in the treatment of discrimination, with a cognitive dissonance with respect to the existence of discrimination, the desire by the social partners to address discrimination issues without the interference of legislation, the lack of access to justice mechanisms/thinking to empower individuals, and the scarcity of case law in the area of discrimination generally.

## 5 Individual Employment Discrimination Claims in Sweden

If an individual brings a claim of employment discrimination without the support of the union or DO, the claim must first be filed with a general trial court and then that judgment can be appealed to the Labour Court, as the court of final instance. If the trial court judgment is appealed, the individual runs the risk of being ordered to pay the employer's trial costs and fees for both instances if the individual is not successful before the Labour Court. Sweden arguably can be

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62 See the editorial, Eve Schömer, Lena Svenaeus and Lars Viklund, DO sviker diskriminerade (15 April 2014) Svenska Dagbladet. Svenaeus was herself the Sex Equality Discrimination Ombudsman from 1994 to 2000. According to the statistics there cited, DO received almost 2000 complaints in 2012, 379 were dismissed without investigation, 21 were filed with the court and 27 were settled. After a Government missive concerning this poor performance, during 2013 DO received 1827 complaints and 887 were dismissed without any investigation. The newly-appoint current DO has stated that the agency will again begin to litigate cases to have a better balance of duties at the DO, see Lars Arrhenius, *Vi ska bedrive ett kraftfullt arbete* (*Svenska Dagbladet* 8 March 2021).

63 See AD 2002 no 128 and AD 2011 no 13.

64 See Diskrimineringsombudsmannen Årsredovisning (2019).

65 Ibid., at 4, 7 and 94.

66 Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twenty-second and twenty-third period reports of Sweden, 11 May 2018, CERD/C/SWE/CO/22-23.

seen as the Nordic country that has stayed truest to the dominance of labour law corporatism in the human rights area of discrimination law.[67]

Employment discrimination claims can be brought directly to the Labour Court (*Arbetsdomstolen*, "AD") by the social partners or the Discrimination Ombudsman. The Labour Court, where a labour union or DO is representing an employee, is both the first and final instance, and its judgments cannot be appealed to any higher Swedish court unless for extraordinary reasons.[68] This limited right comprises petitioning the Swedish Supreme Court to vacate a Labour Court's final judgment where the judgment is found to manifestly contradict the law and the Supreme Court then enters a judgment de novo. This alternative is seldom invoked and never successfully. Arguably this lack of a right to appeal the judgments of the Labour Court to a higher court is the retention of the interpretation of labour issues by the social partners as sitting on the Labour Court. Despite this threshold as applied, the State of Sweden argued before The Committee on the Rights of Persons with Disabilities[69] that the author had not exhausted all of his remedies as he filed the petition with the Committee after the Labour Court's judgment, without applying for such an appeal. The Committee did not agree with the State of Sweden, but the State's argument of exhausting even hopeless avenues puts access to justice even economically further out of reach for the majority of individuals.

A judging panel of the Labour Court is typically comprised of seven non-partisan and partisan members. The three non-partisan members are a chair and a vice-chair trained in law, and an expert in the labour market. Of the four partisan members, two are appointed by the employer organizations and two by the employee organizations.[70] As of 2008, the judging panel in cases concerning claims of unlawful discrimination is to be comprised of only five members, three non-partisan and two partisan members. The parties to the case however can request the typical seven-member panel. It can also be noted that there is only one labour court in Sweden, located in Stockholm, covering the entire Swedish population of ten million persons and geographic area of 450 295 km². Most of the social partners and DO have a presence in Stockholm, but for an individual from Haparanda facing an appeal, the distance of over 700 km can be seen as daunting.

The case law of the Labour Court demonstrates a consistency of result and approach as to claims of employment discrimination.[71] The significance of case

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67 See the chapter in this volume by Marte Bauge and Lene Løvdal, Access to Justice in Discrimination Cases in Norway, which by way of example takes up that Norway has adopted a dual track with the courts and the Equality Tribunal with a very active role for the Equality Ombud.

68 See Chapter 58 § 1(4) of the Swedish Code of Judicial Procedure.

69 Committee on the Rights of Persons with Disabilities, Decision adopted by the Committee under article 5 of the Optional Protocol concerning communication No. 45/2018, 23 September 2020.

70 The State of Sweden also argued before the Committee on the Rights of Persons with Disabilities that "the Labour Court is a specialised court with expertise in assessing claims concerning discrimination." See Decision 23 September 2020 § 4.20.

71 For an overview of the discrimination damages case law of the Swedish Labour Court, see Laura Carlson, Addressing Unlawful Discrimination: The Swedish Journey in Laura Carlson,

law is not highlighted by the Labour Court, as seen from a 2017 case brought by a deaf university lecturer concerning a lack of hiring. The Labour Court found that the costs of interpreters was a continual cost that other employees with disabilities could not benefit from.[72] The Labour Court's assessment was solely a financial one, that the costs for interpreters was not proportional, without taking into consideration any broader societal aspects of integration.[73] This can be contrasted with the UK Supreme Court's holding of access to justice as a constitutional principle under both UK and European law, with the Court underscoring the need for litigation not just for the individual but also to effect change in society.[74] The EU Commission's proposal for a directive on pay transparency also has a focus on access to justice as necessary to enforce rights.[75]

Reflecting the statistics with respect to both DO and the unions, the Labour Court did not issue a single judgment taking up a discrimination claim in 2019. In the three-year period of 2018-2021, twelve discrimination cases were taken up to the Labour Court,[76] of which three were successful on the claim of discrimination.[77]

In one of the 2018 successful cases claiming discrimination before the Labour Court, AD 2018 no 42, plaintiff was awarded SEK 110,000[78] in discrimination damages[79] from a temporary work agency. Plaintiff had a 50 % work capacity,

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Örjan Edström and Birgitta Nyström (eds), *Globalization, Fragmentation, Labour and Employment Law: A Swedish Perspective* 139-160 (Iustus 2016).

72 AD 2017 no 51 at 12.

73 This lack of a broader discussion was brought up by The Committee on the Rights of Persons with Disabilities in its decision at § 8:10: "The Committee finally notes that according to the author, State authorities did not take into account the positive impact that hiring a deaf lecturer could have had on the attitude of students and co-workers to promote diversity and reflect the composition of society, but also for possible future candidates with hearing impairments. In that regard, the Committee welcomes that the Labour Court addressed the issue of the benefit that the employment of the author could have had for other employees with disabilities. However, it also notes the Court's conclusion that the sign language interpretation provided to the author would not have benefited other potential employees with hearing impairment. The Committee considers that this reasoning focussed on the specific measure taken for the author, but failed to take into account the negative impact of the Court's assessment in more general terms, by discouraging potential employers from considering the possibility to employ individuals with hearing impairment for positions similar to the one the author applied to."

74 R (UNISON) v Lord Chancellor [2017] UKSC 51 at para. 69.

75 See Brussels, 4.3.2021, COM(2021) 93 final, 2021/0050 (COD) Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms {SEC(2021) 101 final} - {SWD(2021) 41 final} - {SWD(2021) 42, 9 and 16.

76 AD 2021 no. 38, AD 2020 nos. 3, 9, 13, 53 and 58, AD 2018 nos. 11, 19, 42, 51, 74 and 80,

77 AD 2018 no 42, AD 2018 no 51 and AD 2020 no 13.

78 At the time of this writing (March 2021), the exchange rate is approximately € 1 to SEK 10.

79 Discrimination damages are a fairly recent category of damages in the Swedish legal system as created under the 2008 Discrimination Act. Prior to that, a plaintiff could only receive compensatory damages (for economic losses, but not for example, for hurt feelings or other types of harm) and nominal damages. The category of discrimination damages was created

and was denied a contract with the agency as she was not employed the other 50 % but rather on sick leave. The agency had a requirement of other employment, and as plaintiff was on sick leave, the agency denied plaintiff the contract. The Labour Court found the requirement of other work to be indirect discrimination on the basis of disability. In the second case, AD 2018 no 51, concerned discrimination on the basis of religion, where an interpreter was not hired due to her refusal to shake hands. The Labour Court found this employer policy, under the circumstances, to be indirect discrimination and awarded plaintiff SEK 40,000 in damages.

The third case, AD 2020, no 13, concerned discrimination on the basis of disability, here dyslexia, raises interesting questions with respect to the allocation of attorney's fees. The Police Authority had terminated an operator's trial employment because of poor work performance. The operator was to take notes of telephone conversations, which she was not able to do because the employer had not provided her with the accessibility tools she needed due to her dyslexia. The Police Authority had not sufficiently investigated the tools she required, and the Labour Court found that this was direct discrimination on the basis of lack of accessibility. Plaintiff was awarded SEK 75,000 in discrimination damages. However, the labour union representing the plaintiff was ordered to pay 4/5's of the Police Authority's legal costs in fees as the labour union had alleged both direct and indirect discrimination and inadequate accessibility, as well as pled for damages in the amount of SEK 175,000. The Labour Court, finding that the plaintiff had actually lost the majority of the claims, ordered the labour union to pay SEK 140,682 to the Police Authority.

### *5.1 Access to Justice and Effective Remedies*

Sweden generally is a defendant-friendly judicial forum with few concessions to access to justice issues. Amendments to pleadings are limited, with complaints to be filed based on facts and to include already at the time of filing a list of the evidence. There are limited discovery mechanisms with weak sanctions for failures to produce discovery, mostly in the form of insignificant fines. Recordkeeping requirements as to employers were added in 2018, mostly however more systematically in relation to equal pay and gender, and no other grounds, and not as systematically with respect to employment hires or terminations on any grounds.

The original statute of limitations under the 1979 Equal Treatment Act was four months, extended to six months in the 2008 Discrimination Act. However, with respect to claims of employment discrimination, even shorter statutes of limitations can apply. An employee, with respect for example to a claim to invalidate a wrongful termination on the basis of discrimination, has two weeks to notify the employer of the wrongful termination claim.[80] A claim for damages

by the legislator to allow for higher damages for reasons of deterrence, see Ds 2007:10, Skadeståndsfrågor vid kränkning (2007).

[80] See section 40 of the Employment Protection Act (Lag 1982:80 om anställningsskydd).

for a violation of the right to parental leave under the 1995 Parental Leave Act has a statute of limitations of four months.[81]

A vital component of access to justice is the remedies available for violations of discrimination protections. Remedies under the 2008 Discrimination Act are damages (compensatory, nominal or discrimination damages) and the voiding of certain employment decisions. The court can void an employer's decision concerning existing employment, but the employer ultimately cannot be forced to effect the ruling, such as reinstating a former employee, and instead can simply pay damages. Equity is not an institution in Swedish law, so equitable remedies are not available, such as ordering employers to hire discriminated applicants.

Damages can be reduced to zero if this is deemed fair by the court. Punitive damages are not available generally in Swedish law. Economic damages are only awarded where the plaintiff is already an employee. Nominal damages are awarded by the Labour Court in modest amounts, typically somewhere between SEK 25,000 and 50,000. The third category of damages, discrimination damages, was introduced by the 2008 Discrimination Act as comprising "enhanced" damages so that employers would be deterred from discriminating. The Labour Court has at the time of this writing awarded discrimination damages in sixteen cases, with an average award of SEK 68,125 per plaintiff.[82] To determine whether there truly is an enhanced award of damages in these cases, a comparison can be made to the nominal damages awarded in the discrimination cases since the first 1979 Act. The average of nominal damages awarded for discrimination in the 1980s was SEK 19,000, the 1990s SEK 37,000, the 2000's SEK 51,600, the 2010s, SEK 61,923,[83] with only one case awarding discrimination damages in 2020[84] of SEK 75,000 (including both nominal and discrimination damages awarded under the Discrimination Act). Adjusting for inflation, the average award of SEK 19,000 in 1980 is today worth SEK 64,475.[85] Taking the average of the discrimination damages awarded up to 2020, SEK 68,125, the amounts of damages awarded since the 1979 Act have only marginally increased by less than one percent, a trend that cannot be seen as enhanced or in any way deterring as to employer conduct.

This trend in damages must also be assessed against the trial costs and fees as awarded by the Labour Court. The Labour Court can order that each party bear

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81 See section 23 of the Parental Leave Act (Föräldraledighetslag 1995:584).

82 AD 2020 no. 13 (SEK 75,000), AD 2018 no 51 (SEK 40,000), AD 2018 no 42 (SEK 110,000), AD 2016 no 56 (SEK 50,000), AD 2016 no 38 (SEK 50,000), AD 2015 no 72 (SEK 75,000), AD 2015 no 51 (SEK 40,000), AD 2015 no 44 (SEK 25,000), AD 2015 no 12 (SEK 120,000), AD 2014 no 19 (SEK 50,000), AD 2013 no 71 (SEK 75,000), AD 2013 no 29 (SEK 50,000), AD 2013 no 18 (SEK 50,000), AD 2011 no 37 (SEK 125,000 per plaintiff), AD 2011 no 23 (SEK 50,000), AD 2011 no 02 (SEK 30,000) and AD 2010 no 91 (SEK 75,000).

83 For the calculation of these statistics, see Carlson, Addressing Unlawful Discrimination 139–160.

84 Only in one of the five cases pleading discrimination damages brought in 2020, AD 2020 nos 3, 9, 13, 43 and 53, were discrimination damages awarded, AD 2020 no. 13.

85 According to Statistics Sweden's consumer price index, SEK 100 in 1980 is worth SEK 339.34 in 2020 compensating for inflation, see scb.se.

its own costs if the losing party had reasonable cause to have the dispute tried,[86] but has seldom done so, and then almost evenly in favour of employers and employees. Losing is also not defined as losing the case, but losing the issues pled. For example, in AD 2020 nr. 13, as discussed already above, the discrimination award of SEK 75.000 can be seen as offset by the fact that the Labour Court ordered the union to pay 4/5's of the employer's trial costs and fees, SEK 140,682, as the plaintiff was not successful on the argument as to indirect discrimination, nor did the plaintiff receive the full amount initially pleaded of SEK 175,000, but only SEK 75,000. Losing on these two issues entailed that the employer recovered 4/5 of its trial costs and fees.

The amount of trial costs and fees as awarded by the Labour Court in employment discrimination cases demonstrates a trend that deviates radically from the static amounts of damages, with trial costs and fees increasing, taking into account inflation, by approximately 153 % since the 1980's. The Court can be seen as assuming an equality of arms that outside the relationship between the social partners does not exist. The average trial costs and fees in the 1980's was almost in parity with the damages awarded, SEK 19,000 in damages and SEK 22,000 in trial costs and fees awarded, SEK 64,475 and 74,688 respectively after inflation.[87] The average of the four cases alleging discrimination damages as addressed on the merits in 2020 is SEK 113,900. Consequently, during this 45-year time span in which discrimination laws have been in place, the amounts of damages per plaintiff has remained basically unchanged even after the implementation of enhanced discrimination damages, while the trial costs and fees have risen 153 %. To this risk calculation can be added the success rates of the different claims, with the lowest success rate for claims of ethnic discrimination; only two of over thirty such cases have been brought successfully by plaintiffs, a less than 6 % chance of prevailing.

The Swedish discrimination jurisprudence gives several examples of an assumption of equality arms that does not exist, particularly with respect to the relationship between damages and trial costs fees. By way of example, in NJA 2008 p. 915, plaintiffs, law students tired of the discrimination protections not being enforced, had brought claims of unlawful discrimination on the basis of ethnic origin against a restaurant owner. The students documented the discriminatory behaviour themselves as they attempted to gain entrance into the restaurant. The trial court found unlawful discrimination and awarded the three plaintiffs SEK 20,000 each. This judgment was affirmed by the appellate court. The Supreme Court on appeal 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 reduced 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 what can

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86 Section 5(2) of the 1974 Labour Disputes (Judicial Procedure) Act (1974:371).

87 The calculations for the AD for the1980s are based on the 39 judgments by the Labour Court raising the issue of equality during that decade: AD 1989 nos 122 and 40, AD 1988 no 50, AD 1987 nos 152, 140, 132, 101, 98, 83, 67, 51, 35, 23, 8 and 1, AD 1986 nos 103, 87, 84 and 67, AD 1985 nos 134 and 65, AD 1984 nos 140, 100, 22, 12, 6 and 1, AD 1983 nos 104, 102, 83, 78, 50, AD 1982 nos 139, 102, 96, 56, and 17, AD 1981 nos 171 and 169.

be considered reasonable compensation for the degradation that the violation entailed.

As the students knew that they would not be admitted to the restaurant, the Supreme Court found that the degradation they suffered as resulting from that discrimination could not be seen as too great. The Court lowered the damages to the amount of SEK 5000. In addition, despite the fact that the main rule in Swedish litigation is that the losing party must pay the winning party's legal costs and fees, the Court ordered the parties to bear their own legal costs and fees for the litigation at all three instances, in essence wiping out any of the already modest damages the plaintiffs received. Luckily for the students the case had been filed on their behalf by the DO, meaning that the DO was required to pay the court ordered legal costs and fees.

As stated above, where an individual pursues a claim of employment discrimination without being represented by a union or DO, they risk paying the trial costs and fees for both instances, even if successful at the lower court. This is in stark contrast to the social partners and DO, who only risk the trial costs and fees in one instance, namely the Labour Court. An individual employee pursing litigation thus takes a significant economic risk, liability for the trial costs and fees of both parties and two instances if appealed. A more egregious example of this was litigation brought by a midwife regarding the claim that her freedom of religion would be violated if required to perform abortions in her employment as a midwife. She had gone to DO in 2014, and DO did not find any discrimination (DO received 1,810 discrimination reports in 2014, and filed 14 lawsuits, basically in less than one percent of the reports filed).[88] She brought the case as an individual unsuccessfully to the trial court. The court stated that the plaintiff had reasonable cause to have the matter proven, and that the cursory review by DO was sufficient to fulfil this function of review from an access to justice perspective. The trial court in its 2015 judgment ordered the plaintiff to pay the trial costs and fees of the public employer in the amount of SEK 925,854. She appealed the case to the Labour Court, which in its 2017 judgment, AD 2017 no. 23, upheld the trial court's judgment and ordered the plaintiff to pay an additional SEK 606,000 in trial costs and fees. The Labour Court stated that the legal and evidentiary questions raised gave no reason to depart from the main rule as to the allocation of costs and fees. Neither did the Labour Court find that the plaintiff as a result of applying this main rule was denied her right under Article 13 ECHR to an effective remedy. The total of the awards of trial costs and fees against the plaintiff was over SEK 1.5 million. This is equivalent to 46 months of average wages before taxes for a midwife at SEK 32,400.[89]

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88 See Diskrimineringsombudsmannen, Årsredovisning 47 (DO 2014).

89 See also, for example, AD 2006 no. 54, in which a former employee prevailed in the trial court as applying the case law of the Labour Court, and was awarded SEK 85,000 in damages for the unlawful termination and SEK 15,525 for the employer's failure to give notice. The employer appealed the case to the Labour Court, which departed from its earlier case law and found that termination based on sexual harassment was lawful but that the former employee was correct in that he did not receive proper notice, for which the Labour Court awarded him SEK 5 000 in damages. Determining that the former employee had not prevailed as to the majority of the issues in the case, the Labour Court ordered him to pay the employer's trial costs and fees in both instances for a total of SEK 236,152 plus interest.

The trends with respect to damages and trial costs and fees, combined with the low success rates create a significant deterrent for plaintiffs to bring discrimination claims, in essence blocking access to justice. Litigation is arguably not an affordable option for most discrimination plaintiffs. This is particularly true in light of the fact that it is often cases of discrimination with respect to employment hires or terminations, consequently individuals who are already economically vulnerable. Though DO and the labour unions can take up such claims, they most often choose not to do so. The labour unions have no duty of fair representation, meaning that with respect to their members, after the first set of negotiations with the employer, they can decline defending a member on a claim of discrimination, and with respect to non-member they have no obligations. Neither does DO have any explicit obligation to investigate complaints as lodged with the DO, nor to act upon them. In light of the financial risks for plaintiffs, many claimants have opted to take discrimination claims to small claims courts, which have a ceiling as to damages of approximately SEK 22,000, a filing fee of SEK 900 and a limited risk of liability as to paying the other party's trial costs and fees. Given this ceiling in damages, it is questionable whether small claims courts can be seen as a suitable alternative from an access to justice and effective remedies perspective.

When reviewing different procedural mechanisms which can be seen as facilitating access to justice, most of these are not taken up in the Swedish legal system. From a procedural perspective, pleadings are to be based on the facts (with a list of the evidence already at the filing) with limited rights to amend pleadings, the limitation periods in employment issues are very short, employers have few record-keeping requirements, the courts have limited abilities to order the production of discovery of documents (on the penalty of small fines), statistical evidence as a rule is not used, the shifted burden of proof is applied more often as a shared burden of proof, equitable remedies are not available, and any awarded amounts of damages are not high and greatly outpaced by the trial costs and fees as seen above.[90] There is, in essence, at best limited legal aid and no contingent fees or *pro bono* systems.

### *5.2 Corporatism versus Access to Justice in Sweden*

As seen historically, legislative proposals with respect to employment discrimination protections were seen as an incursion in the corporatist system set up between the social partners in Sweden's labour law system. Discrimination issues were labour law issues to be left solely to the social partners and were not perceived as human rights issues until relatively recently.

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[90] One of the few interesting access to justice issues is in the Swedish Discrimination Act 2:4 "If a job applicant has not been employed or selected for an employment interview, or if an employee has not been promoted or selected for education or training for promotion, the applicant shall, upon request, receive written information from the employer about the education, professional experience and other qualifications that the person had who was selected for the employment interview or who obtained the job or the place in education or training."

Given the predominant role of the social partners in the Swedish labour law model, and the monopoly of the Labour Court with respect to employment discrimination issues, the corporatist interests are set squarely in contrast with the individual interests. In some ways, in Sweden the human right to protection from unlawful employment discrimination hinges upon union membership for assertion, as individuals raising such claims on their own are faced with too great of an economic risk with respect to trial costs and fees. The most recent successful employment discrimination claim in 2020 resulted in an award of discrimination damages in the amount of SEK 75,000 as well as the union bringing the claim paying the employer's trial costs and fees to the amount of SEK 140,682. The judgments of the Labour Court clearly show an assumption of equality of arms regardless of whether it is an individual or union bringing the case. Where an individual brings the case, the economic risks are even greater as there are two, not one, judicial instances for which the trial costs and fees can be ordered. Given the low number of cases brought by the unions and DO, with the individual having no recourse (and often no record) as to such decisions by these organisations not to bring a claim, an individual suffering unlawful discrimination has few options, and definitely no equality of arms.

These serious deficits with respect to access to justice can be seen as the determining factor with respect to any efficacy of employment discrimination protections, resulting in a significant gap between the law in books and the law in action. Discrimination protections as human rights are afforded under the law to individual employees, and such protections must be upheld by all actors concerned in the labour market, the state, the courts, and the social partners. Private enforcement in the form of individuals litigating claims is an important avenue in this field of law and must be facilitated and not hindered. Sweden does not have a historically strong tradition of private enforcement, nor of individual rights in general, instead continuing in the field of labour law the corporatist structures created under the guild system. Even those legislative discrimination protections finally adopted in the late 1970s were placed within a collective labour law model, as seen most clearly with the employers' group rebate as to damages awarded. The first Race Discrimination Act did not even contain any prohibitions, sanctions or remedies, which under the Swedish legal system entails that there then can be no sanctions or remedies. It is only since 2018 that there is a legislative right to damages for violations of the ECHR as the text of the convention does not explicitly include any remedies or sanctions for individuals.

A fundamental necessary premise with respect to human rights law is that it must be enforceable by individuals, to benefit both individuals and society, and absent that, little can be gained only through the law in the books. Enforcement is central, as are also deterring remedies and access to the courts, in efforts to eradicate unlawful discrimination. A final necessary component for propelling the law forward, particularly in the case of discrimination protections, are vibrant and provoking interactions between civil society, government agencies, courts and lawmakers that challenge rather than preserve the existing historical corporativist structures.