The Role of Civil Society Advocacy in Equality Law – Lessons for the Nordics

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The 8 minute 46 second killing of George Floyd in the US on 25 May 2020 as seen around the world led to protests and demonstrations not only in the US, but in many other countries. The immediate and spontaneous response in Europe, including Sweden and the other Nordic countries, reflected a deep resonance with Black Lives Matter, at least among parts of these populations in relation to racism and race discrimination in Europe today.

These protests are reminiscent of another time in the EU, the early 1990s, when racist violence was spreading across Europe. At that time, some protection against discrimination in working life due to sex and EU citizenship (free movement of labour) existed, however the EU provided hardly any protection against race discrimination in working life or other areas of society. Similarly, at the member state level, other than the UK, there were few effective national laws against race discrimination. Generally, at best, there were seldom used penal code provisions prohibiting discrimination by merchants in the provision of goods and services. This was the case in Sweden as well as the other Nordic countries.[1]

As authorities across Europe floundered in their responses in the 1990s, certain civil society organisations focusing on ethnicity/migration/racism came together. They assessed the situation, and concluded that Europe lacked a basic minimum of protection against race/ethnic[2] discrimination, and that the EU should provide a baseline. The protections afforded up to the 1990s, sex discrimination in working life and free movement of EU citizens concerning work, had their origins in common market issues rather than in fundamental human rights.[3] These organizations developed a concrete proposal for a directive for adoption by the EU. The name given to the proposed directive was the Starting Line, and the Starting Line Group (SLG) was the name given the informal network that developed the proposal and promoted its adoption. This was also a starting point for an amendment of the treaty as adoption of the SLG'S proposal required broader powers for the EU.[4] After a multi-year process, the EU's powers concerning equality were expanded through Article 13 of the Amsterdam Treaty (now Article 19 of the Treaty on the Functioning of the EU, TFEU) which in turn paved the way for the adoption of an expansive Racial

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1 A number of the key ideas here have been presented in a previously published article, see Paul Lappalainen, 'The Transformation of EU Equality Law: From a Common Market Issue to a Fundamental Right' (2021) EUROPARÄTTSLIGT TIDSKRIFT, ERT 1.

2 The term 'race' in the European continent generates substantial opposition, even to the extent that some policymakers have removed 'race' in the belief that the word itself is somehow a cause of racism or that its removal will somehow reduce racism and/or race discrimination in society. For example, the word race was removed from the Swedish Discrimination Act (2008:567) that went into effect in 2009. According to the legislative materials, the term used in Chap 1 Section 5 para. 3 'Ethnicity: national or ethnic origin, skin colour or other similar circumstance' was sufficient to cover the term 'race'.

3 Lappalainen (2021) at 89. It should also be noted that up to the early 1990s, the EU had adopted several directives concerning sex discrimination in working life well as developing case law particularly concerning sex equality, which in turn referred to case law developed in the US. See ibid., at 89-96.

4 Email from Isabelle Chopin, Director of the Migration Policy Group (MPG), 24 September 2021, on file with the author. MPG was the informal leader of the SLG network. Chopin was also a key figure in the SLG network.

Equality Directive.[5] These were key steps to the provision of a broad minimum of protection against discrimination in working life as well as other fields of social life concerning race/ethnicity; the further consolidation and expansion of the protection against sex discrimination in working life as well as other fields;[6] and the establishment of a minimum level of protection in working life concerning religion, disability, sexual orientation and age.[7] Even though the EU has yet to provide a minimum level of protection outside of working life concerning these last grounds, the EU directives nevertheless contributed to e.g. Sweden, Finland and Norway moving beyond the EU minimum to provide protection to these other grounds.[8]

The key elements of the Racial Equality Directive, as proposed by civil society, had direct sources of inspiration from the laws the UK and thus at least indirectly the US and Canada. As pointed out since in the early 1990s, other than in the UK, the laws in e.g. France, Germany, the Netherlands and Belgium in general had a focus on criminal law and were quite ineffective.[9] The UK along with the US and Canada were jurisdictions where private (civil) laws rather than criminal laws were the primary means of dealing with discrimination. Both direct and indirect discrimination were covered, along with the issue of shifting the burden of proof. The legislation adopted in the US, Canada and the UK was heavily influenced by the civil rights movement, in other words, bottom-up pressure. The legislative proposals of the civil rights movement were often based on their own experiences with strategic litigation.[10] These were also jurisdictions where private enforcement, often supported by civil society, is and was expected to play an important role in achieving the public purpose of the law in addition to providing a remedy for the individual.[11] In this manner, civil society

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5 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive).

6 See e.g., Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); and Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity.

7 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

8 See Sweden's 2008 Discrimination Act (2008:567); Finland's 2014 Non-Discrimination Act (1325/2014); and Norway's 2017 Equality and Anti-Discrimination Act (LOV-2017-06-16-51).

9 See e.g., Ian Forbes & Geoffrey Mead, 'Comparative Racial Discrimination Law: Measures to Combat Racial Discrimination in Employment in the Member States of the European Community,' 14 COMP. LAB. L.J. 403 (1993). The European reliance on criminal law to regulate discrimination seems to mirror the various difficulties in the early attempts to regulate race discrimination through criminal law in the US. These difficulties relate to the burden of proof and the hesitancy by police, prosecutors and judges to see people with power as criminals, i.e., merchants, landlords and employers, as compared to their accusers, minorities with little in the way of resources.

10 See e.g., Jack Greenberg. *Crusaders in the Courts – How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* (Basic Books 1994).

11 See e.g., J Maria Glover, 'The Structural Role of Private Enforcement Mechanism in Public

organisations (CSOs) also established a healthy "competition" and/or complement to public equality bodies.

The purpose of this chapter is to analyse the role of civil society in the European context in the 1990s, particularly those focused on race discrimination. Was there anything new in this European civil society approach? What hindrances did they overcome? Can their actions be compared and contrasted with the bottom-up role of civil society in the development of laws against race discrimination in, e.g., the US? Are there any lessons for civil society at the national level in EU Member States? Is civil society advocacy in terms of legislation and litigation a key to effective implementation of equality law? Sweden is used as a focus in this paper but given the similarities in the legal and social cultures, the ideas should in particular be applicable to at least the Nordic countries.[12]

It should be noted that the references to civil society and civil society organizations in this chapter refer to those actors and organisations representing the victims or targets of discrimination, i.e., a bottom-up perspective, and not mainstream CSOs, such as unions or employer's organisations that often are part of the status quo that needs to be challenged by laws on equality. In other words, the established CSOs are often part of the problem. This applies in particular to Sweden, where the social partners[13] have at various stages, often jointly, prevented or watered down the development of equality law.[14] This often has

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Law' (2012) 53 WM. & MARY L. REV. 1137; and Stephen B. Burbank, Sean Farhang and Herbert M. Kritzer, 'Private Enforcement', 17 LEWIS & CLARK L. REV. 637 (2013).

12 See e.g., Norbert Götz, 'Civil Society in the Nordics', 2019.02.21, Nordics Info, Aarhus University, <https://nordics.info/show/artikel/civil-society/|>, accessed 13 December 2021:

"The concept of civil society as an analytical tool is also clearly applicable to the Nordic countries, with their tradition of strong popular movements and voluntary organisations, as well as their good performance in comparative studies on social capital. For the Nordic countries, any understanding of civil society that claims an antagonist relationship with the sphere of government and state will be inadequate due to their corporatist culture and structures."

Without an understanding of the antagonist relationship with the government and the state, it is difficult for CSOs that represent discriminated groups to actually advocate for effective anti-discrimination measures, since such measures necessarily are antagonistic to the status quo that maintains the role of those with the power to discriminate – employers, unions, government agencies, landlords, etc. Also see Norbert Götz, Corporatism and the Nordic Countries, 2019.02.21, Nordics Info, Aarhus University, <https://nordics.info/show/artikel/corporatism-the-influence-of-trade-unions-and-interest-groups/>, accessed 13 December 2021. See also Pauli Kettunen, (1997) 'The Society of Virtuous Circles' in Kettunen and H. Eskola, (eds.), *Models, Modernity and the Myrdals* (Helsinki University, 1997) 164-165 regarding the immanent critique and interplay between Sweden and the US as well as measuring a country against its own ideals.

13 In Europe, the term 'social partners' is used to designate the organisations that represent employers and employees. The Swedish term, *arbetsmarknadens parter*, is more direct as the translation is the labour market parties. The social partners in Sweden are particularly significant in regard to the so-called Swedish model which means that the social partners have had almost total control over the labour market and its regulation, with politicians in general playing a secondary role – particularly when the social partners are in agreement.

14 For more specifics see below - 4.1 Key Points in the Development of Swedish Equality Law. The opposition of the social partners can be seen in their essentially common opposition or influence over discrimination law since the 1970s. ICERD required adoption of a law against discrimination in working life. The social partners were opposed; thus no law was adopted.

been the case in other Nordic countries as well, given the deference that Nordic policymakers show the social partners, particularly in the field of labour law.

This chapter is divided into five parts: Part 1 presents the actions taken by civil society that contributed to an expansion of the EU's potential power in the field of discrimination, along with the adoption of the Racial Equality Directive in particular. Part 2 examines some of the limitations and potential that can be seen in e.g., the Racial Equality Directive. Part 3 provides the lessons to be learned from the Starting Line process. Part 4 investigates the role of civil society and the development of Swedish equality law. Part 5 concludes with some thoughts going forward. While there is a focus here on Sweden, particularly the need for civil society advocacy in terms of both legislation and litigation, the ideas presumably have a particular relevance to the Nordic countries, as well as many other EU Member States.

1 Civil Society Proposes a Racial Equality Directive

Various racist and xenophobic incidents and actions were taking place throughout Europe in the early 1990s. According to Theo von Boven, Europe at this time is "facing more threats to harmonious and peaceful racial relations than at any other period since the end of World War II."[15] Mosques were burned, Jewish cemeteries were desecrated, and refugee centres were attacked. In Sweden the "laser man" targeted immigrants. In response to these events, certain civil society organizations involved in anti-racism, anti-discrimination and migration came together to form the Starting Line Group (SLG) in 1991.[16]

They also slowed and watered down adoption of the law against sex discrimination in working life that went into effect in 1980. Concerning ethnic discrimination, their opposition led to the 1986 law against ethnic discrimination which established an Ombudsman against ethnic discrimination, with essentially no powers. It was not until the 1999 laws against discrimination in working life due to ethnicity and religion or other belief, sexual orientation and disability were adopted that Sweden had relatively modern laws against discrimination in terms of a shifted burden of proof, individualised damages and indirect discrimination. In general, the unions had switched positions and supported adoption of the 1999 acts. Their adoption was also presumably a recognition that the EU would be establishing some clear minimum standards. As to cooperation on discrimination in specific cases between employers and unions, see e.g. Labour Court judgment 1983 No. 107 and Labour Court judgment 2011 no. 37. The unions asserted that they were focused on broader issues related to employees as a group. The Court held that the agreements between the unions and employers resulted in discrimination against the individual parties. For a more in depth look at the 1983 case, a case brought to court even though there was no law against ethnic discrimination in working life, see Sten de Geer, *I skärningspunkten mellan juridik och politik: nio rättsfall* [At the Intersection of Law and Politics: Nine Cases] Vulkan 2018.

15 Theo van Boven, Combating Racial Discrimination in the World and Europe, 11 NETH. Q. HUM. Rts. 163 (1993) 167.

16 The Churches' Commission for Migrants in Europe (CCME) started the process. Then together with the British Commission for Racial Equality and the Dutch National Bureau a decision was made to take the initiative. Soon other NGOs joined the Group, including the Commissioner for Foreigners of the Berlin Senate, the Belgian Centre for Equal Opportunities and against Racism, Caritas Europa, the European Jewish Information Centre, the Migrants Forum and the European Anti-Poverty Network. Towards the late 1990s the SLG constituted an informal network of nearly 400 NGOs, semi-official organizations, trade unions, churches, independent experts and academics from throughout the EU. See Isabelle

The SLG's main strategy was to combat racism and discrimination through concrete legal measures and sanctions, with a focus on the European level. They determined that few countries had specific laws for counteracting racism and race discrimination. Furthermore, concerning those that provided protection, the laws in place were often lacking in scope and limited in terms of enforcement. Essentially there were no coherent European minimum standards against race discrimination. The SLG's efforts resulted in the drafting of a concrete proposal in 1992 for a directive eliminating racial discrimination, the 'Starting Line'. This proposal both paralleled and went beyond the EU legislation at the time concerning equality between men and women.[17]

As to the concrete inspiration for the SLG proposal, according to Jan Niessen, a key figure in the initial work in the SLG, "During the drafting process we took the lessons at heart from the Anglo-Saxon world: US, Canada and the UK. This was about definitions, scope and enforcement."[18] At the same time, Isabelle Chopin points out that the direct references were largely to the UK, Netherlands, Belgium and the EU gender equality directives.[19] Even the civil society advocacy technique concerning organisations representing less powerful interests of putting forward specific and concrete legislative proposals is similar to examples found in those countries.[20] This is reflective, e.g., of the US civil rights movement, the disability movement, the women's movement and the LGBT movement. Isabelle Chopin, the current director of the Migration Policy Group, emphasizes that "this was the first time CSOs came with a very concrete proposal for a directive. At the time, organisations were more prone to criticise what existed rather than coming with concrete proposals. Since then, this has become a common pattern."[21]

Chopin, 'The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment,' 1 EUR. J. MIGRATION & L. 111 (1999) 111.

17 Ibid., at 111–115.

18 Email from Jan Niessen, 18 September 2020, on file with the author. Jan Niessen became the founder and director from 1995 to 2014 of the Migration Policy Group, a key organization in this field.

19 Email from Isabelle Chopin, Director of the Migration Policy Group (MPG), 24 September 2021, on file with the author. MPG was the informal leader of the SLG network.

20 In this author's view, it is quite common for powerful interests in most countries to put forward detailed legislative proposals, as well as being willing to invest in court cases if necessary to test and challenge the laws that are in place. This was a lesson learned in particular in the US by less powerful interests through the work of the NAACP LDF. This in turn inspired the development of public interest law firms concerning various other discrimination grounds such sex, disability and sexual orientation and other fields concerning e.g., the environment and consumer issues. The situation in Sweden seems representative of much of Europe. Organisations such as labour unions and employers' organizations produce and market their own legislative proposals and go to the courts when they feel the need. At the same time, those that represent less powerful interests, such as discriminated groups, are only beginning to understand the necessity of these forms of legislative advocacy as well as advocacy in the courts.

21 Email from Isabelle Chopin, Director of the Migration Policy Group (MPG), 19 January 2021, on file with the author. MPG was the informal leader of the SLG network. Note that while this type of advocacy may be common at the EU level, it does not seem to be the norm for advocacy by discriminated groups at the member state level.

Here it is important to note the preliminary work necessary for developing the proposal. The Churches' Commission for Migrants in Europe, through Jan Niessen, took the initiative. Meetings were held with the victims/targets of racial discrimination in various parts of Europe. These consultations led to the conclusion that legislation was a key means to combat racial discrimination. Meetings were then convened with the expert group that drafted the proposal based on input from the UK, Germany, France, the Netherlands, Belgium and Italy.[22]

SLG's initial proposal came about in a time when there was growing support for action at the EU level. This can be seen in the clear support expressed in 1993 by the European Parliament for the Starting Line proposal, in particular recommending that the Commission draw up a directive along those lines.[23] At the same time, there was opposition from parts of the Commission referring to the lack of power in the treaties as well as some Member States invoking the subsidiarity principle and a preference for intergovernmental cooperation. This opposition in turn led the SLG to shift its focus to a proposal amending the EC treaty in order to provide the competence to act on racial and religious discrimination as well as other discrimination grounds. This proposal was known as the Starting Point.[24]

The SLG acted on both the European and Member State levels in order to provide support for the expansion of the EU's power in this regard. This also meant reaching out to a broader base for support. The network expanded to about 400 civil society organizations that had a focus not only on race and religion, but the other grounds as well.[25] It was possible to mobilize broader civil society support and pressure since Article 13 of the Amsterdam Treaty adopted in 1997 was to encompass non-discrimination from a human rights perspective by covering a broad variety of grounds – sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation.

In the end, Article 13 was the result of the compromises necessary to pave the way for its adoption in the Amsterdam Treaty. Even though it was a major step forward, it was quite general and did not focus on racial discrimination, it did not have direct effect, and unanimity was required concerning directives that were based on Article 13.[26] As the movement supporting adoption of Article 13 was ongoing, SLG started revising and updating its original proposal, with a

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[22] Email from Jan Niessen, 17 October 2021, on file with the author. Jan Niessen became the founder and director from 1995 to 2014 of the Migration Policy Group, a key organization in this field.

[23] See Mark Bell, 'Meeting the Challenge? A Comparison Between the EU Racial Equality Directive and the Starting Line' in Isabelle Chopin and Jan Niessen (eds), *The Starting Line and the Incorporation of The Racial Equality Directive into the National Laws of the EU Member States and Accession State* (2001) 22; and Parliament Resolution on Racism and Xenophobia, OJ [1993] C 342/19, 2 December 1993, Par. 4, calling 'on the Commission to draw up as a matter of urgency a Directive laying down measures to strengthen the legal instruments existing in this field in the Member States, using the document entitled the Starting Line'.

[24] Isabelle Chopin, 'The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment,' 1 EUR. J. MIGRATION & L. 111 (1999) 115–116.

[25] Ibid., at 115–118.

[26] Ibid., at 120.

focus on racial or ethnic origin. A new campaign was initiated to build support for the New Starting Line, covering racial discrimination in working life and other parts of society including education, social services and goods and services, along with direct, indirect discrimination and victimization, as well as a right of standing for civil society organizations, a shifted burden of proof, effective sanctions, the establishment of equality bodies and allowed for, but did not require, positive treatment.[27]

1.1 Article 13 Expands the EU's Non-discrimination Mandate

The expansion of the EU's power in Article 13 of the Amsterdam Treaty was significant, but almost as important was that a key driving force, and perhaps the primary driving force, was civil society in the form of the Starting Line Group. While the broad range of organizations involved in anti-racism, equality and/or migration are not generally looked upon as being particularly powerful in Brussels or in the Member States, they were a key to the pressure needed to adopt this expansion of EU law. Article 13 of the Amsterdam Treaty (currently Article 19 TFEU) states:

> Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 13 substantially broadened the EU's power to act within the field of discrimination concerning all of the grounds mentioned. At the same time, the requirement of Council unanimity was expected to be a high hurdle concerning any potential legislation.

1.2 The Racial Equality Directive

During the advocacy work for Article 13 and after, the SLG was developing 'The New Starting Line' proposal. This proposal provided significant inspiration to the directive developed by the Commission. In November 1999 the Commission presented its proposal for a Council directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.[28] While covering direct and indirect discrimination, victimization and harassment, requiring a shifted burden of proof and allowing for positive treatment, the Commission's proposal was somewhat more limited than the SLG proposal in terms of material scope. The major difference was that it did not take into account religious discrimination. Nevertheless, it was substantially more

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[27] Ibid., at 124–127.

[28] Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

expansive than anything to date proposed by the Commission concerning anti-discrimination.[29]

The Commission's proposal was negotiated and adopted by the Council in seven months. This was a record short time given the substantial level of legislative changes that would be required at the national levels. However, this was not an indication of strong support from Member States. Most of them had at best very weak, symbolic laws against racial or ethnic discrimination. Various governments had serious reservations concerning different issues, particularly the far-reaching nature of the Directive. However, there were weightier socio-political factors at work.[30]

1.2.1 The Extreme Right Lends a Hand

At the same time as the difficult negotiations were being conducted concerning the directive, there was also an ongoing concern about the inclusion in the Austrian Government of the Freedom Party of Jörg Haider. While the Racial Equality Directive was being voted on by the Council, the Council was also in the middle of a boycott concerning Austria.[31] This provided some additional impetus and political will focused on speeding up the process concerning adoption of the Racial Equality Directive, while leaving the work on the Framework Employment Equality Directive covering the other grounds for a later time.[32] Consequently, Jörg Haider played an important role with respect to the speed with which the Directive was adopted as well as its scope. Since Article 13 required unanimity, any Member State with objections could have vetoed the Directive when it was put to a vote. Given the fact that the Directive was so far-reaching that it would require an upgrading of the laws in all Member States, including those with comparatively progressive legislation, there were presumably objections that in normal times would have led to delays in adoption. However, at this particular point, no member state had sufficiently strong enough reservations to voice their public opposition at this time. Austria wanted a removal of the boycott, which meant that Austria would not veto the Directive. Any other country that put in a veto would have appeared to have been supporting Austria.

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[29] Isabelle Chopin, 'Possible Harmonisation of Anti-Discrimination Legislation in the European Union: European and Non-Governmental Proposals,' 2 EUR. J. MIGRATION & L. 413 (2000) 415–418.

[30] Adam Tyson, 'The Negotiation of the European Community Directive on Racial Discrimination,' 3 EUR. J. MIGRATION & L. 199 (2001) 201–202.

[31] See e.g., Ian Black, 'Europe issues Haider ultimatum to Austria', *Guardian* (1 February 2000) at https://www.theguardian.com/world/2000/feb/01/austria.ianblack, accessed 13 December 2021, and; Ian Black and Kate Connolly, 'EU Stands Firm on Austria Boycott - The Austrian far right in power: special report', *Guardian*, (1 March 2000), at https://www.theguardian.com/world/2000/mar/01/austria.ianblack accessed 13 December 2021.

[32] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (religion, disability, sexual orientation and age).

1.2.2 The Resulting Directive

In large part, the Directive that was finally adopted included most of what had originally been proposed by the SLG. There was the broad scope covering working life as well as other areas of social life, indirect discrimination, an equality body and a shift in the burden of proof. These had at least some inspiration in the development of equality law in the US, particularly through the direct inspiration provided to the UK's Sex Discrimination Act 1975 and Race Relations Act 1976.[33] According to Mark Bell, the final directive differs only on a few points from the original proposal backed by the SLG.[34]

There were other points as well. Although the language in Article 14 in the Directive concerning sanctions ('compensation to the victim, must be effective, proportionate and dissuasive') borrows from ECJ case law, according to Case and Givens the idea originated with the early proposals from the SLG.[35] They point out the focus of SLG on access to redress and the hope that, after transposition, local NGOs and lawyers would make use of the new laws. SLG, in this regard, put forward two important issues. Empowering NGOs to be part of the enforcement process was one issue. Another was a special focus on the development of strong and independent specialized bodies, such as those that already existed for gender, that could enforce the laws. This was also a means of laying the foundation for the development of strategic litigation.[36]

As a whole, the Racial Equality Directive broke new ground in terms of setting a high minimum standard for the level of protection that was to apply throughout the Member States concerning ethnic and racial discrimination. The Directive, in turn, also became a stimulus for improving the level of protection on all grounds, including sex.

2 Results Related to Article 13 and the Racial Equality Directive

As indicated above, Article 13 in the Amsterdam Treaty (1997), today Art. 19 TFEU, paved the way for new EU initiatives in the field of equality and non-discrimination. The Racial Equality Directive 2000/43/EC (race and ethnic origins), the broadest of the directives in terms of scope, opened the doors. Some key directives are mentioned below. They were influenced by the broader EU mandate created under Article 13 as well as the design of the Racial Equality Directive.

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33 Bob Hepple, The European Legacy of Brown v. Board of Education, 2006 U. Ill. L. Rev. 605 (2006), 607-611,

34 Mark Bell, 'Meeting the Challenge? A Comparison Between the EU Racial Equality Directive and the Starting Line' in Isabelle Chopin and Jan Niessen (eds), *The Starting Line and the Incorporation of The Racial Equality Directive into the National Laws of the EU Member States and Accession State* (2001).

35 Rhonda Evans Case and Terri E. Givens, 'Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive,' 48(2) JOURNAL OF COMMON MARKET STUDIES (2010) 221–241, at 232.

36 Ibid.

2.1 Religion or Belief, Disability, Age and Sexual Orientation - Employment

The Employment Equality Framework Directive 2000/78/EC (religion or belief, disability, age and sexual orientation) followed about six months after adoption of the Racial Equality Directive. The basic difference in relation to the Racial Equality Directive was its limitation to employment and occupation. Otherwise, the legal conceptual apparatus is basically the same: direct and indirect discrimination, harassment, instructions to discriminate, victimization, a shifted burden of proof and an allowance of positive action. The Framework Directive also required the establishment of reasonable accommodation for disabled persons (but not for religious belief). However, the Directive did not require the establishment of an equality body.[37]

2.2 Sex Discrimination

Concerning sex discrimination, the Equal Treatment Directive 2006/54/EC (recast), consolidated and expanded several earlier directives. Along with Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, an EU level of protection against sex discrimination[38] was then established that was comparable to that provided by the Racial Equality Directive. This included the requirement that Member States designate and make the necessary arrangements for an equality body covering the ground of sex.[39]

2.3 Levelling up the Grounds – A Horizontal Directive?

The 2008 proposal for a Horizontal Directive[40] needs to be mentioned here. If it is ever adopted, it would raise the level and scope of protection against discrimination, including the requirement of an equality body, concerning religion or belief, disability, age and sexual orientation provided by EU law to essentially the same minimum level of protection as is provided concerning sex discrimination and discrimination due to race/ethnicity.[41] Although introduced in 2008, the proposal has never been put to a vote. The failure to adopt the Horizontal Directive underlines the fact that in practical terms, EU law

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[37] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (religion, disability, sexual orientation and age).

[38] Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), consolidating several earlier directives; and Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

[39] See Directive 2004/113/EC, Article 12, and Directive 2006/54/EC (recast), Article 20.

[40] Proposal for a Horizontal Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}.

[41] EU law has done this to some extent concerning higher EU law, even if a distinction is nevertheless maintained between gender/sex discrimination and all the other grounds even in higher EU law.

establishes a hierarchy of protection against discrimination. This failure also indicates the current lack of political interest or pressure in the equality field. Nevertheless, the EU directives have contributed to a broadening of the protection provided at the member state level, as demonstrated below by the developments in Sweden.

3 Lessons From the Starting Line Process

The Starting Line process demonstrated that even less powerful advocacy groups can have an influence on EU law, particularly if they have a clear idea of what they want in the form of legislation, i.e., a clear proposal that was drafted as a directive while at the same time functioning as a tool for the development of broader grassroots support. When the Commission reacted to the directive proposal by Starting Line Group (SLG) by stating that the EU did not have the power to adopt such a directive, SLG gave priority to changing the equality mandate of the EU. This included working towards the development of a broad base of support from civil society organisations concerned with e.g., gender, religion, sexual orientation, age, race/ethnicity and human rights more generally. This broader base contributed to the adoption of Article 13. Less powerful interests were thus able to influence mandate of the EU, at least when they had a common goal.

3.1 Strategic Litigation - Enforcement by Whom?

The Racial Equality Directive was not only intended by the SLG to establish a minimum level of protection, it was to provide a foundation for empowerment of civil society, and concrete implementation of national laws adopted as a result of the Directive. The keys to strategic litigation can be found in the Directive. Unfortunately, at least if strategic litigation as developed in, e.g., Canada and the US was hoped for, there was too little recognition of the role played by civil society and public interest law firms in strategic litigation. The primary hope in the Directive seems to be that equality bodies will take on a key role in strategic litigation. This is in stark contrast to the situation in the US and Canada, where civil society has played a key role in strategic litigation, in particular while establishing a "healthy" competition with and complement to government equality bodies.[42] This in turn helps the equality bodies understand that an important part of their role is contributing to changing society, changing the status quo, as compared to most government agencies that are intended to maintain the status quo.

Strategic litigation as an advocacy tool in the field of race equality was initially developed through the dedication of legal resources by the National

[42] Equality bodies in the US do not have a monopoly within the field of equality, and understand that CSOs have the capacity to take on strategic litigation and legislative issues. The Equality bodies also know that CSOs participated in establishing the mandate of the Equality Bodies, and consequently they cannot simply ignore civil society representatives in relation to equality issues. Both sides have a mutual interest in serious cooperation on common issues. While Equality Bodies are not the legal arm of civil society, they cannot simply disregard civil society either.

Association for the Advancement of Colored People's Legal Defense and Education Fund (NAACP LDF), resulting in, e.g., the *Brown v Board of Education*[43] case. After this, during the 1960s in response to the US federal Civil Rights Act of 1964,[44] public interest law firms developed following the lead of the NAACP LDF concerning gender equality as well as other discrimination grounds. In the US some examples are the ACLU Women's Rights Project founded by Ruth Bader Ginsburg,[45] the Disability Rights Education & Defense Fund (DREDF),[46] Disability Rights Advocates (DRA),[47] and Lambda Legal.[48]

In Canada, the Women's Legal Education & Action Fund (LEAF)[49] with its focus on gender equality, had the NAACP LDF as a model. Strategic litigation in the US received a boost in the 1960s and 1970s through the support of important institutions such as the Ford Foundation.[50] In Canada, the Court Challenges Program played an important role in providing support to civil society's efforts in the field of strategic litigation and equality.[51] In the UK, strategic litigation efforts by the voluntary sector have also played an important role.[52]

In general, there is more clear reliance, acceptance as well as encouragement as to private enforcement in the US and Canada. This means that at least the "private" public interest law firms work on discrimination cases. This also means that they have a particular interest in filing strategic litigation cases. Win or lose, they can raise their public profile and trust within and among specific interest

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43 *Brown v. Board of Education*, 347 U.S. 483 (1954). The Court held that the separate but equal doctrine in issues of education violated the equal protection clause of the federal constitution. The case was a high point in a line of cases brought with the goal of challenging the constitutionality of legally sanctioned discrimination.

44 42 U.S.C. § 2000e *et seq*.

45 ACLU, TRIBUTE: THE LEGACY OF RUTH BADER GINSBURG AND WRP STAFF, at https://www.aclu.org/other/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff accessed 17 November 2021.

46 Disability Rights Education & Defense Fund (DREDF), https://dredf.org accessed 17 November 2021.

47 Disability Rights Advocates (DRA), https://dralegal.org/about/ accessed 17 November 2021.

48 Lambda Legal, https://www.lambdalegal.org accessed 17 November 2021.

49 Women's Legal Education & Action Fund (LEAF) https://www.leaf.ca accessed 17 November 2021.

50 See e.g., Helen Hershkoff and David Hollander, 'Rights into Action: Public Interest Litigation in the United States' in Mary McClymont and Stephen Golub (eds.), *Many Roads to Justice. The Law-Related Work of Ford Foundation Grantees Around the World* (2000).

51 Concerning the current program and its background, see the Government of Canada, Court Challenges Program (2020) <https://www.canada.ca/en/canadian-heritage/services/funding/court-challenges-program.html> accessed 13 December 2021. For a more complex analysis of the program, see Ian Brodie, 'Interest Group Litigation and the Embedded State: Canada's Court Challenges Program,' 34(2) CANADIAN JOURNAL OF POLITICAL SCIENCE / REVUE CANADIENNE DE SCIENCE POLITIQUE (June 2001) 357-376.

52 See e.g., Lisa Vanhala, 'Successful Use of Strategic Litigation by the Voluntary Sector on Issues Related to Discrimination and Disadvantage: Key Cases from the UK,' Working Paper No.3: Effective use of the law by the voluntary sector (The Baring Foundation 2017) <https://baringfoundation.org.uk/wp-content/uploads/Working-paper-3_Strategic-Litigation_final.pdf> accessed 13 December 2021.

groups, and presumably achieve some respect or at least the awareness of those with the power to discriminate – e.g., employers, landlords and government agencies.

3.2 Shifting of the Allocation of Legal Costs and Fees

An underlying theme in, e.g., the Racial Equality Directive, is the expectation or hope that government-run equality bodies will play a primary role in enforcement, even if the CSOs were provided with standing. If CSOs or private attorneys general are to play more than a symbolic role, the SLG or the EU could or should have realized that the loser pays rule with respect to legal costs and fees, which is the general rule in procedural law throughout the EU Member States, is a major hindrance to the enforcement of discrimination law. In the US, the concept of private attorneys general developed originally through case law. Legislatures have also created private attorneys general by statute and executive agencies by fiat. While the definition is not clearly defined, what can be said "is that the private attorney general is a placeholder for any person who mixes private and public features in the adjudicative arena."[53] It is based on a realization in the US that if private civil laws are to lead to their public purpose, for example, changing norms concerning discrimination, private enforcement of the laws is a key element. This is why, in the US, there is an important connection between the concept of private attorneys general and the doctrine of standing as well as the rules concerning attorneys' fees. The focus is not just on access to justice for an individual but accessing justice for others through the individual case, thus contributing to a change of norms and fulfilling the purpose of the law.[54]

Persons who are subjected to discrimination will tend to be one shot complainants with little experience with the law, the courts and lawyers. And in general, they will seldom have the economic means to be able to risk losing in court, especially when the best-case scenarios involve a limited potential of compensation, in spite of the EU requirement of sanctions that "must be effective, proportionate and dissuasive". This can be contrasted with the situation of those with the power to discriminate or prevent discrimination. They will often have substantial experience with the law, the courts and lawyers, and/or the means to gain that experience. For private defendants such as employers or businesses, win or lose, the costs will usually be tax-deductible business expenses. For public defendants, the public agencies involved will generally have no problem bearing the cost risks, which are then passed on to the taxpayers. This power imbalance is a clear indication that a parity of arms does not exist in this field. In order to reach a semblance of a parity of arms, a much greater focus on access to justice is needed.[55]

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[53] William B. Rubenstein, 'On What A 'Private Attorney General' Is--And Why It Matters,' 57 VANDERBILT LAW REVIEW 2129 (2004) 2130-2131.

[54] Ibid.

[55] See e.g. Marc Galanter, 'Why the Haves Come out Ahead: Speculations on the Limits of Legal Change,' 9 LAW & Soc'y REV. 95 (1974). Galanter examines the difficulties facing one shot clients (e.g. discriminated persons) as opposed to repeat players (e.g. those with the power to discriminate) in the US – a system where the loser pays is the general rule while at

Given the problems caused by the loser pays system, the power imbalance that is built into procedural law in much of Europe, civil society/NGOs could press for a fee-shifting so that the parties pay their own legal costs, including lawyer's fees, unless the defendant can show that the complainant brought the case in bad faith. Furthermore, the complainant should be able to recover their legal fees if they are successful. This was one of the key tools that was not taken into the EU's equality tools, even though it is clearly important within the US in regard to private enforcement of laws against discrimination through the use of "private attorneys general".[56] This type of fee shifting is particularly important to public interest law firms[57] in relation to laws where enforcement of the law is expected to primarily benefit the public interest and not just the client named in the case.

The recent 2021 Commission proposal for a directive as to pay transparency specifically addresses this point.[58] Regarding legal and judicial costs, Article 19 states:

> Claimants who prevail on a pay discrimination claim shall have the right to recover from the defendant, in addition to any other damages, reasonable legal and experts' fees and costs. Defendants who prevail on a pay discrimination claim shall not have the right to recover any legal and experts' fees from the claimant(s) and costs, unless the claim was brought in bad faith, was clearly frivolous or where such non-recovery is considered manifestly unreasonable under the specific circumstances of the case.

Even if it may be difficult to gain the support needed at the EU level for this proposed directive supporting fee-shifting, this idea should at least be the focus of advocacy at the national level. As is often pointed out, national laws can go

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the same time allowing for the recovery of reasonable legal costs when a discrimination complaint is successful. If applied to a European or Swedish context where the loser pays rule dominates, the problems examined by Galanter concerning access to equality rights become exponentially worse.

56 William B. Rubenstein, 'On What A 'Private Attorney General' Is - And Why It Matters,' 57 VANDERBILT LAW REVIEW 2129 (2004). See also, e.g., Olatunde C. A. Johnson, 'Beyond the Private Attorney General: Equality Directives in American Law,' 87 N.Y.U. L. REV. 1339 (2012); David Shub, 'Private Attorneys General, Prevailing Parties, and Public Benefit: Attorney's Fees Awards for Civil Rights Plaintiffs,' 42 DUKE L.J. 706 (1992); and Lee Anne Graybeal, 'The Private Attorney General and the Public Advocate: Facilitating Public Interest Litigation,' 34 RUTGERS L. REV. 350 (1982).

57 The term 'public interest law firm' refers to law firms in the US that primarily focus on taking on cases where a law has been adopted to serve a public interest, e.g., laws concerning discrimination, consumer rights or pollution, but where it is apparent that government enforcement needs to be complemented by private enforcement. Up to the 1960s, the NAACP LDF was the primary example in the field of equality rights. Since then, a variety of public interest law firms have developed generally with a focus on the interests of the less powerful. At the same time, it was during the 1960s that policymakers starting increasingly limiting the power of those who largely had a free hand in terms of e.g., discrimination, pollution and limiting consumer rights. While most public interest law firms support such progressive interests, there has also been a trend toward the establishment of public interest law firms that promote conservative interests through litigation.

58 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}.

beyond the minimum standard set by the EU directives. This type of fee-shifting could help stimulate and provide added impetus to the development of public interest law firms by CSOs or other civil society interests at the national level. This in turn could contribute to a situation where there is a healthy "competition" with government equality bodies. At least in Sweden, the idea of public interest law being enforced by the private sector is only in its fledgling stages. Presumably this also applies to many of the EU's Member States. Even though US laws have provided inspiration to certain laws in Europe, there is still very much an expectation, that the "public interest" in those laws will be enforced by public bodies. When the public bodies in turn fail to live up to that expectation, there is substantial risk that such an expectation will undermine the potential effectiveness and the stated purpose of the law.

3.3 Reactive or Proactive Measures

Finally, the EU equality directives primarily help to establish a complaints-based system. Such a system places much of the burden for implementation of the law, and thus social change in the public interest, on individuals who bring the complaints. At least at the national level, civil society needs to consider how greater pressure for social change can instead be placed on those with the power to discriminate. The system can be adapted so that individual cases can lead to a greater impact. The CJEU's cases in *Feryn*[59] and *Braathens*[60] recognize the public interest nature of the law, and are thus indications of ways to increase the broader impact, but other tools are available as well.

Examples of proactive measures can be seen in the UK and Sweden. A public duty to promote equality is placed on the UK public sector. In Sweden, employers and education providers, both private and public, have a duty to undertake active measures to counteract discrimination and promote equality. While interesting in principle, both can be questioned in terms of effectiveness given the actual follow-up, sanctions and enforcement. If such ideas are going to be implemented, it will be important that substantial attention is paid to these enforcement issues.

Another form of complementary action that puts a proactive pressure on certain private actors is the use of contract compliance (anti-discrimination clauses in public contracts) in the US. The connection between public procurement and anti-discrimination, "contract compliance", in the US has historically been a very important complement to the laws against discrimination, particularly concerning proactive or affirmative action measures, both at the federal, state and local levels.[61] In essence, businesses are put on

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[59] CJEU, Judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding* v. *Firma Feryn NV*, C-54/07, EU:C:2008:397.

[60] CJEU, Judgment of 15 April 2021, *Diskrimineringsombudsmannen* v. *Braathens Regional Aviation AB*, C-30/19, EU:C:2021:269. For more information see the Swedish Equality Ombudsman's website at https://www.do.se/kunskap-stod-och-vagledning/tillsynsbeslut-och-domar/varor-tjanster/flygbolag-kravde-att-en-person-skulle-genomga-utokad-sakerhetskontroll accessed 13 December 2021.

[61] See e.g., US Department of Labor, Office of Federal Contract Compliance Programs, 'History of Executive Order 11246' and 'History of the Office of Federal Contract

notice that they risk losing their public contracts and/or be prevented from bidding on other contracts for a certain period, if they violate the laws against discrimination or, concerning larger contracts, if they fail to establish affirmative action plans or fail to follow up those plans in good faith. While the effectiveness of the follow-up of contract compliance can be questioned due to the vast number of contracts, the potential severity of the sanctions themselves provide an incentive given the private sector's interest in receiving public contracts. Note that EU law today provides clear support for the use of public procurement conditions to counteract discrimination and promote equality.[62]

Here again it is also important to mention the Commission's proposal for a pay transparency directive.[63] Beyond requiring effective penalties according to Article 20, Article 21 on equal pay matters in public contracts and concessions states that, concerning public procurement contracts covered by the EU procurement Directives, Member States "shall include measures to ensure that, in the performance of public contracts or concessions, economic operators comply with the obligations relating to equal pay between men and women for equal work or work of equal value." Member States are also encouraged to include, as appropriate, penalties and termination conditions ensuring compliance. Furthermore, Article 21 points out that economic operators can also be excluded from participation in public procurement procedures if they fail to comply with pay transparency obligations or have an unjustified pay gap of more than 5 per cent.

Again, even if it may be difficult to gain the support needed at the EU level for this directive, the ideas concerning effective penalties and increased cost risks related to public procurement should at least be the focus of advocacy at the national level.

4 Civil Society and the Development of Swedish Equality Law

As stated, Sweden is taken as the example of the Nordic countries here, as the labour law models and discrimination laws while not exactly the same, share basic characteristics. Swedish and Nordic discrimination laws basically originally developed piecemeal resulting in different equality silos concerning sex, race/ethnicity/religion, disability and sexual orientation from the 1970s to the 1990s. These applied to employment. From the 2000s onwards there was an increasing focus on multiple ground laws, largely due to the influence of the EU Racial Equality Directive. This process ultimately culminated in Sweden with the Discrimination Act[64] that essentially consolidated the seven previous civil

Compliance Programs' at https://www.dol.gov/agencies/ofccp/about accessed 13 December 2021.

62 Directive 2014/24/EU on public procurement. See also Lappalainen (2021) 107-109.

63 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}.

64 Discrimination Act (2008:567). An English translation of the Discrimination Act is available at the website of the Swedish Equality Ombudsman, https://www.do.se/choose-language/english/discrimination-act. accessed 13 December 2021.

laws against discrimination while retaining their internal hierarchies of protection and added the grounds of age and transgender identity or expression. Beyond this, the four previous equality ombudsmen (equality bodies covering sex/gender, ethnicity/religion, disability and sexual orientation respectively) were merged into the office of the Equality Ombudsman.[65]

The hierarchies that developed between the grounds, at least in the earlier stages, are largely reflected in the varying power and influence of the civil society actors and organisations representing the differing silos. It should be noted that Swedish civil society organisations representing discriminated groups or equality interests more generally seem to trust, or at least have long trusted, that once politicians adopt laws, that the laws developed will necessarily be structured in such a way that enforcement will follow. This has meant that while such organisations have supported the adoption of laws on equality/non-discrimination, they have not necessarily participated in the actual development of the legislation, much less in enforcement. In general, the different CSOs have also not focused their power on their common interests, e.g., such as stronger laws against discrimination and improved enforcement. One explanation, both between as well as within the silos, is the underlying competition for public funding. There is not much private sector funding available for such CSOs. They have also generally lacked a strategy for participation in actual enforcement of the legislation, essentially expecting and trusting that the designated equality body would carry out the enforcement needed.

Particularly in recent years, some changes in Swedish civil society can be detected. There are indications of some coordinated efforts among CSOs, as well as changes in the advocacy role of CSOs, both in regard to legislation as well as strategic litigation.

4.1 Key Points in the Development of Swedish Equality Law

Sweden's first law against discrimination, adopted in 1970, was a criminal law provision prohibiting discrimination due to race or religion by merchants in the provision of goods and services. This crime of unlawful discrimination is still found in Penal Code Ch. 16 § 9. The law was adopted as a part of the process of ratifying the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[66] At the time, in spite of Article 5 ICERD, the Swedish Government determined that it was not necessary to adopt a prohibition against race discrimination in working life. In particular, if such problems existed at all, it was expected that the social partners would effectively deal with such issues through, e.g., collective agreements and awareness-raising.[67] An underlying issue that may have influenced the government during the late 1960s and early 1970s was the decision by the government and the unions to seriously limit non-

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65 Act concerning the Equality Ombudsman (2008:568). An English translation of this Act is available at the website of the Swedish Equality Ombudsman, https://www.do.se/choose-language/english/act-concerning-the-equality-ombudsman, accessed 113 December 2021.

66 Legislative Bill Prop. 1970:87 concerning ratification of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

67 Ibid., 31-32.

Nordic immigration and move towards greater reliance on the internal labour force reserve in the form of married women, disabled persons and older people as a part of the labour force.[68]

Penal Code Ch. 16 § 9 has seldom been invoked. For a variety of reasons, it has been and is ineffective, a primary reason being high burden of proof that applies in criminal procedure. To a large extent, convictions have been the result of some form of admission or confession by the accused.[69] There may be some symbolic value in such a law, but the practical results are minimal. This can relate, among other factors, to the idea that criminal law generally has a focus on deviant social behaviour while civil law is used to regulate undesirable but more common social behaviour. The failure to recognize and understand discrimination as a societal issue was thus in itself a hindrance to effective legislation. A similar pattern can be seen in the variety of countries that have tried to prohibit discrimination through criminal law. As to the development of the equality silos, the later civil laws against discrimination in working life established a pattern of separate ground-based laws and enforcement authorities. Sex discrimination was the first and foremost of the grounds.

4.1.1 Sex Discrimination in Working Life

As in many other European countries, one of the key issues promoted by at least part of the Swedish women's movement during the 1970s was the adoption of a law prohibiting sex discrimination in working life. The act prohibiting sex discrimination in working life entered into effect in 1980. It also established the office of the Sex Equality Ombudsman (JämO).[70] An impetus for passing the act

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[68] Torbjörn Lundqvist, 'Arbetskraft och konkurrensbegränsning: Aktörsperspektiv på den svenska modellen och framtiden' ['Labour and Limitation of Competition: An Actors' Perspective on the Swedish Model and the Future'], ARBETSRAPPORT/INSTITUTET FÖR FRAMTIDSSTUDIER 2002:1, 12-17. See also, e.g., Jesper Johansson, *'Så gör vi inte här i Sverige. Vi brukar göra så här' Retorik och praktik i LO:s invandrapolitik* ['We don´t do that here in Sweden. We usually do this' - Rhetoric and Practice in LO's Immigration Policy] (2008), Växjö University Press, 207-209 http://lnu.diva-portal.org/smash/get/diva2:206116/FULLTEXT01.pdf accessed 13 December 2021. See also Yvonne Hirdman, *Med kluven tunga. LO och genusordningen* [With a Forked Tongue. LO and the Gender Order] (Stockholm 1998); Zeki Yalcin, 'Arbetskraftsinvandrare eller kvinnor? Om LO och bristen på arbetskraft under tidig efterkrigstid' [Labour Immigrants or Women? On LO and the Lack of Labour During the Early Post-war Period] in Victor Lundberg (ed.), *Arbetarhistoria i brytningstid. Landskrona i maj 2005* [Workers' History at a Turning Point. Landskrona in May 2005] (Malmö 2007).

[69] See Legislative Inquiry SOU 2001:39, Ett effektivt diskrimineringsförbud - Om olaga diskriminering och begreppen ras och sexuell läggning [An Effective Prohibition of Discrimination – On Unlawful Discrimination and the Terms Race and Sexual Orientation] 11-13; and Paul Lappalainen, Analytical Report on Legislation - RAXEN National Focal Point Sweden (2004), EXPO Foundation, European Monitoring Centre on Racism and Xenophobia (EUMC), Vienna, 36-37. See also Legislative Inquiry SOU 2006:22, En sammanhållen diskrimineringslagstiftning [A Consolidated Discrimination Legislation] which concluded that, in spite of the problems concerning the effectiveness of Penal Code Ch. 16 § 9 and the dual regulation through civil and criminal law, Penal Code Ch. 16 § 9 should nonetheless be retained primarily due to the symbolic value of criminalization, 51, 251-253.

[70] The Swedish Act, Lag (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet

was the proposed Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which was signed by Sweden on 7 March 1980 and ratified on 5 June 1980.[71] It should also be noted that CEDAW contained language similar to ICERD's prohibition of race discrimination in working life that was not given any effect in Swedish law.

Concerning the tools for counteracting discrimination brought up by the government inquiry proposing the 1980 Act, the inquiry addressed the experiences of the US and UK. At the time, these were essentially the only jurisdictions where laws against sex discrimination in working life had been in place long enough so that there was a body of case law that could be evaluated. Generally speaking, these jurisdictions had developed, concerning individual claims, the concepts of direct and indirect discrimination, the right to damages, shifting the burden of proof, an equality body (UK – Equal Opportunities Commission and US Equal Employment Opportunities Commission), and concerning the US, the use of proactive affirmative action plans applied in relation to public contracts. The Swedish Act had three key elements, a prohibition that included, in theory, an eased burden of proof (§ 3), a requirement of active measures (§§ 6-7) and the establishment of an equality body (§ 10) to promote active measures as well as the right to represent individual complainants in court – the Sex Equality Ombudsman.[72] Among many, the primary focus and the hope for broader change, was on the active measures portion of the Act. At the same time, the prohibition and issue of the individual's rights were an important complement.

Passage of this Act and the others to follow was marked by controversy, in particular as the proponents essentially had to overcome the combined opposition of the unions along with the employers' associations. Concerning the law that went into effect on 1 July 1980, it was passed by a one vote majority in the Parliament.[73] The controversial nature of this initial law can be seen in several of the limitations established in the Act. Concerning damages, there was a group rebate established in § 8. This meant that if there was more than one victim of discrimination, "the damages shall be determined as if only one had been disadvantaged and divided equally between them." Concerning active measures and the duty of employers to promote equality between men and women in working life (§ 6), §7 went on to state that rules in a collective bargaining agreement could be used to replace those in § 6. Beyond this, the

[Act (1979:1118) on Equality between Women and Men in Working Life].

71 Sweden's Agreements with Foreign Powers, SÖ 1980:8, Konvention om avskaffande av all slags diskriminering av kvinnor, New York den 18 december 1979 [Convention on the Elimination of All Forms of Discrimination Against Women].

72 See Legislative Inquiry SOU 1978:38, Jämställdhet i arbetslivet [Sex equality in working life], Legislative Bill Prop. 1978/79:175 and The Swedish Act, Lag (1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet [Act (1979:1118) on Equality between Women and Men in Working Life]. It can also be pointed out that the English translation used by the office was the Equal Opportunities Ombudsman. However, Sex Equality Ombudsman is used in this text as the Swedish term is ground specific as well as to avoid confusion with the various other Swedish equality ombudsmen.

73 See Laura Carlson, *Searching for Equality: Sex Discrimination, Parental Leave and the Swedish Model with Comparisons to EU, UK and US Law*', Iustus förlag, 2007, 125.

burden of proof was interpreted by the courts in such a way that there was no eased burden of proof.

The 1980 Act was updated over the years and revised in 1991 through the Equal Opportunities Act. The major changes included a duty on employers to produce annual sex equality plans (§ 13), a specific reference to indirect discrimination (§ 16) and a slightly revised burden of proof.[74] In the following, the 1980 and the 1991 acts are referred to as the Sex Discrimination Act (SDA).[75]

4.1.2 Race/ethnic Discrimination in Working Life

The road towards a prohibition of racial/ethnic discrimination in working life was even rockier than for the one relating to sex. At about the same time that the structures for the Sex Discrimination Act were being developed and adopted, an inquiry had been given the task of examining xenophobia and race discrimination in Sweden. There were concerns about immigration and higher levels of unemployment among immigrants. One of the proposals of the inquiry, presented in 1983, was the adoption of a law against race discrimination in working life, largely similar to the Sex Discrimination Act, along with expansion of the mandate of the Sex Equality Ombudsman to ethnicity. The inquiry determined that this legislation was necessary due to the existence of ethnic discrimination in working life as well as the need to fulfil Sweden's obligations under ICERD.[76] There were immigrant organisations and others that supported adoption of such a law.[77] However, it was clearly not the type of bottom up political pressure that different parts of the women's movement had been able to mobilise concerning sex discrimination. The negative reaction to a proposal for law prohibiting ethnic discrimination working life led instead led in a much different direction.

4.1.2.1 Ethnic Discrimination Act 1986

Due to opposition to the inquiry proposal by powerful interests in Sweden, particularly but not only by the social partners, the Swedish Government instead proposed and adopted the 1986 Ethnic Discrimination Act.[78] The Act's primary function was the establishment of the Office of the Ombudsman against ethnic discrimination. The power of the Ombudsman was primarily limited to the power of persuasion concerning ethnic discrimination in society. More

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[74] Jämställdhetslag (1991:433) [The Sex Discrimination Act]. The focus in 1991 was still on sex discrimination and working life.

[75] For a deeper analysis of the development of the legislation against sex discrimination in working life see Carlson (2007) 122-128.

[76] Legislative Inquiry SOU 1983:18, Lag mot etnisk diskriminering i arbetslivet [Act Against Ethnic Discrimination in Working Life] 11-14.

[77] See Legislative Bill Prop. 1985/86:98 om invandrarpolitiken, bilaga 5 [On Immigrant Policy, appendix 5]. The appendix summarizes the various consultation responses to SOU 1983:18, from the various immigrant organisations and others who wanted an even stronger law to the unions hoping for voluntary solutions in terms of collective agreements to the extremely negative response by SAF, the primary employers' organization.

[78] Lag (1986:442) mot etnisk diskriminering [Act Against Ethnic Discrimination].

specifically, the law contained no prohibition against ethnic discrimination in working life or any other parts of society.[79] The Ombudsman was to counteract ethnic discrimination at both an individual and collective level by explaining the wrongfulness of ethnic discrimination.[80] At the same time, the government pointed out, as to the legislative technique applied, that the method of giving a task to a government agency that essentially has no direct support in a substantive legal prohibition or order, was not entirely unknown in Swedish law.[81] The government also noted that that the Ombudsman could be considered to have a "sanction possibility" given the Ombudsman's right to provide reports to the government about its activities and thereby propose changes in legislation.[82] Concerning the support for the 1986 law, the Government noted that "Most of the organisations etc. that represent employers and employees have endorsed the proposal or stated that they will not oppose it. Most of the organisations that represent immigrants instead wanted other, more far-reaching legislative measures."[83]

4.1.2.2 1994 Act Prohibiting Ethnic Discrimination in Working Life

An act prohibiting ethnic discrimination in working life was adopted in 1994, based on a proposal by a 1992 legislative inquiry. The inquiry paid particular attention to Sweden's international undertakings. The inquiry seemed to have been primarily initiated due to some 20 years of criticism from the UN for the failure to prohibit ethnic discrimination in working life – as required by ICERD.

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79 Legislative Bill Prop. 1985/86:98 om invandrarpolitiken [On Immigrant Policy]. This can be contrasted with the principle enunciated in the US case, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) that if there is a right there has to be a remedy, a very important principle within Anglo-American law. This differs substantially from the legislative technique that is used on occasion in Sweden, in particular concerning interests representing the less powerful in Sweden. There are various laws creating 'rights' without remedies, the most interesting example being the European Convention of Human Rights, transposed into Swedish law in 1998, and having no remedy until developed through case law in e.g., NJA 2005 s. 462 and NJA 2013 s. 502. In 2018 a provision regarding the right to damages for breach of the ECHR was introduced in Ch. 3 § 4.1 the Torts Act (1972:207) (skadeståndslagen), see Legislative bill, proposition 2017/18:7. It seems highly unlikely for example that the social partners would accept the use of creating remedies for rights within their spheres of interest.

80 Legislative Bill Prop. 1985/86:98 om invandrarpolitiken [On Immigrant Policy], 61-62.

81 Legislative Bill Prop. 1985/86:98 om invandrarpolitiken [On Immigrant Policy], 62, 'Den här föreslagna tekniken, att en myndighetsuppgift av här avsett slag delvis bedrivs utan direkt stöd av någon uttrycklig bakomliggande materiell förbuds- eller påbudsregel, är inte helt okänd i svensk rätt.' ['This proposed technique, that an official task of the kind referred to here is partly conducted without any direct support from an explicit, underlying substantive prohibition or command, is not completely unknown in Swedish law. '].

82 Legislative Bill Prop. 1985/86:98 om invandrarpolitiken [On Immigrant Policy], 67.

83 Ibid, 53. "Flertalet av de organisationerna m. fl. som företräder arbetsgivare och arbetstagare har tillstyrkt förslaget eller förklarat att de inte vill motsätta sig detta. Flertalet av de organisationer som företräder invandrare önskar i stället andra, mer långtgående lagstiftningsåtgärder."

Even the signing by Sweden of the UN Covenant on Economic, Social and Cultural Rights and ILO convention no. 111[84] played a role.[85]

The 1994 Act included prohibitions of unlawful discrimination concerning both job applicants and employees. The new rules were to be combined with the 1986 law in order to create a new law. The primary sanction was damages, with a maximum of one discrimination award per discriminatory situation, meaning that if several people were discriminated against through the same events, the award was to be divided among them. The SDA had the same group rebate with respect to damages. The Ethnic Discrimination Ombudsman was authorized to litigate cases on behalf of individual complainants with their consent. These points and others were essentially the same as with the SDA.[86]

At the same time, there was a clear difference in relation to the Sex Discrimination Act. According to the inquiry: "The grounds for such discrimination are race, colour, national or ethnic origin or religious faith. The relationship between the ethnic factor and the employer's actions is to be formulated so that the employer must have acted as he or she did *on grounds of race*, etc. The ethnic factor must have been an indispensable element in explaining the employer's action."[87]

The inquiry put forth the idea that:

> Cases of real discrimination due to ethnicity should be affected by the prohibition, while employers that have not had discriminatory intentions should go free. The inquiry has determined that special care should be applied to formulating the prohibition rules so that the risk of a negative backlash is limited. A "boomerang effect" from rules that go too far, according to the inquiry, is a factor to be counted on to a greater extent than in regard to equality between the sexes.[88]

Given this as a starting point, the inquiry admits that the law will be less effective in that it can be more difficult to succeed in litigation than would be the case concerning sex discrimination. Nevertheless, the inquiry assumes that a law covering intentional discrimination by an employer due to race, skin colour etc. is what the general sense of justice among the public would say should be forbidden.[89]

Where the "boomerang" would come from was never really clarified. Nor why. One possibility would be from the general public's sense of justice, but how aware was the public of the idea of a new law? Or aware of the details of the Sex Equality Act? Another possibility was the social partners, as they were already against encroachment on their territory. What about the women's

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[84] ILO Convention No. 111, Discrimination (Employment and Occupation), Convention of 1958 (prohibition as to discrimination on the basis of race, creed or sex).

[85] Legislative Inquiry SOU 1992:96 Förbud mot etnisk diskriminering i arbetslivet [A Prohibition Against Discrimination in Working Life] , 11.

[86] Legislative Bill Prop. 1993/94:101 Åtgärder mot rasistisk brottslighet och etnisk diskriminering i arbetslivet [Measures Racist Crime and Ethnic Discrimination in Working Life], 1-2.

[87] Legislative Inquiry SOU 1992:96, Förbud mot etnisk diskriminering i arbetslivet [A Prohibition Against Discrimination in Working Life], 28-29.

[88] Ibid., at 158.

[89] Ibid.

movement – would equivalent legislation concerning sex and ethnic discrimination set off a boomerang?

Concerning this Act, it seems clear that effectiveness was not a priority. This was a conscious decision. While a great deal was talked about in the legislative inquiry and the government bill, the above seems to indicate that ineffectiveness was possibly even the goal. Essentially proof of intent to discriminate was required as compared to the lower burden of proof that applied concerning sex discrimination in working life.[90] In fact, even though the act has the form of civil law/labour law, the inclusion of a requirement of proof of specific intent is generally the burden of proof that applies in criminal procedure.

It is likely that the main issue here was satisfying international opinion, particularly the UN, through the adoption of a law, however superficially. At the same time, removing the tools needed for the law to have a chance to be effective would mean that few problems would be created for those in a position to discriminate, thus eliminating or at least reducing the risk of a backlash. Those in a position to discriminate, are also often those who can cause a political backlash. The symbolic but weak nature of the 1994 Act was apparent. This and other factors led to the relatively quick appointment of a new inquiry in 1997 leading to a new law in 1999 concerning ethnic discrimination in working life. Similar inquiries were also set up in relation to disability and sexual orientation.[91]

4.1.3 Relatively Modern Discrimination Acts in 1999

The year 1999 saw the adoption of three new Swedish laws prohibiting discrimination in working life. These covered the grounds of ethnicity and religion or other belief, disability and sexual orientation, respectively.[92] On some points, concerning individualized-damages and a clear shifting of the burden of proof, these laws surpassed some of the protections provided in the 1991 Sex Discrimination Act.[93]

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90 Even if there was a lower burden of proof concerning sex discrimination, this is not to say that it was easy to prove sex discrimination. It would still take a number of years before Sweden, due to the EU, adopted a clear rule shifting the burden of proof in discrimination cases in the legislation. Its application by the courts is still tenuous.

91 Legislative Inquiry SOU 1997:174, Räkna med mångfald! Förslag till lag mot etnisk diskriminering i arbetslivet m. m. [Count on Diversity! Proposal for a Law Against Ethnic Discrimination, etc.]; Legislative Inquiry SOU 1997:175, Förbud mot diskriminering i arbetslivet på grund av sexuell läggning [Prohibition of Discrimination in Working Life Due to Sexual Orientation]; and Legislative Inquiry SOU 1997:176, Förbud mot diskriminering i arbetslivet av personer med funktionshinder [Prohibition of Discrimination Against Persons with Disabilities in Working Life].

92 Lag (1999:130) om åtgärder mot diskriminering i arbetslivet på grund av etnisk tillhörighet, religion eller annan trosuppfattning [Act on Measures Against Discrimination in Working Life on Grounds of Ethnicity, Religion or Other Belief]; Lag (1999:132) om förbud mot diskriminering i arbetslivet på grund av funktionshinder [Act Prohibiting Discrimination in Working Life Due to Disability]; and Lag (1999:133) om förbud mot diskriminering I arbetslivet på grund av sexuell läggning [Act Prohibiting Discrimination in Working Life Due to Sexual Orientation].

93 The 1991 Sex Discrimination Act was amended in 2000, at least in part to ensure that the

Soon after the 1994 Act went into effect, there was some realization that something was lacking. In addition, during the early 1990s Sweden went through an economic crisis, as did much of Europe. There was also a large influx of refugees due to the civil war in the former Yugoslavian countries. General unemployment levels rose to levels that had not been seen since the 1930s. The unemployment levels of immigrants rose even higher. The employment gap between so-called Swedes and immigrants seemed huge. The 1994 election brought the Social Democrats into power again. These various factors led to the relatively quick appointment of the new inquiry that eventually led to a new law that went into effect in 1999.

At the Interior Department there was dissatisfaction with the head of the Ombudsman against Ethnic Discrimination, based on his actions or actually lack of action. A new discrimination inquiry was called for by the minister, Leif Blomberg, the former head of the metalworkers' union. The initial proposals for a government inquiry directive were limited by the civil servants to investigating the ineffectiveness of the current Ombudsman. At the same time there seemed to be a growing understanding that the law itself was a problem. Furthermore, the minister was clear in his desire for effective legislation. Thus, in the end, the terms of reference stated that the inquiry was to examine both the work of the Ombudsman as well as the need for a more effective law, along with a deeper analysis of examples in foreign law that had greater potential of being effective.[94]

At about the same time, the government was also examining the issue of laws covering disability and sexual orientation discrimination in working life. An internal departmental inquiry (Ds 1996:56) had already developed a proposal concerning disability discrimination. The proposal was essentially based on the 1994 ethnic discrimination act. When it was sent out for public comments, while there was support for a law, this proposal was rejected by various actors including the Sex Equality Ombudsman and the Disability Ombudsman because of, among other things, the weakness of the rules on the burden of proof.[95]

The Interior Minister, Leif Blomberg, discussed the possibility in 1997 of an inquiry into a comprehensive equality law covering all grounds. Due to gender equality interests in the Government, this idea was essentially shut down. A broad inquiry covering ethnicity, disability and sexual orientation could be

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protection provided was equivalent to the 1999 Acts, see Lagen (2000:773) om ändring i jämställdhetslagen (1991:433)[Act on amending the Sex Discrimination Act (1991:433)].

94 This author was working at the Interior Department unit responsible for developing the directive for the government inquiry, witnessed the internal discussions and provided input to the final directive. The terms of reference underscored the need to examine other legal systems where the laws against discrimination were deemed to be comparatively effective. Once the inquiry was established, I was appointed as an assistant secretary to the inquiry. The directive for the inquiry can be found in the Legislative Inquiry SOU 1997:174, p 305. An English summary of the inquiry can be found on page 13.

95 Legislative Inquiry SOU 1997:176, 63-68. With respect to ongoing discussions at the Interior department, this author had a conversation with a key civil servant from the Labour Market Department, asking whether those that worked on the disability proposal had used the 1994 Act as a starting point for their proposal. The answer was positive. The second question posed was: But it seems obvious that the 1994 Act is flawed. Why didn't you use the Sex Equality Act as a model for the proposal? The answer received was that that "would have meant we were rejecting the most recently adopted law in the field."

accepted as long as sex discrimination/gender equality was not part of the terms of reference of the inquiry. There was a sense that gender equality was at the forefront and looking at other issues could only lead to negative effects concerning gender equality. This is the reason why three separate inquiries were appointed to work on discrimination at basically the same time. Even though they were separate, they were placed in essentially the same offices so they could coordinate the work with each other.[96]

The final results of each inquiry were quite similar as to the legal tools. Some examples were indirect discrimination, a shifted burden of proof, and individualized damages. In various ways, these proposals went beyond the "ceiling" represented by the Sex Discrimination Act. According to Margareta Wadstein, the head of the ethnic inquiry, the Sex Discrimination Act represented the floor or the starting point for what the inquiry would and could propose, not the ceiling. The major differences between the new proposed acts were the inclusion of some active measures and allowing positive treatment concerning ethnicity and religion or other belief, but not concerning the grounds of disability and sexual orientation. The possibility of allowing positive treatment concerning ethnicity, in a similar manner as allowed under the Sex Discrimination Act, was removed by the government in the legislative bill presented to the Riksdag, the Swedish parliament.[97]

The legislative bills proposing these three relatively similar laws came up on the same day in the Riksdag. This resulted in a somewhat lively debate. There was also an interesting voting pattern. Two Moderate (Conservative) Party representatives voted for all three laws while the rest of the party voted against all three. The Liberal Party (Folkpartiet) seemed to argue against the laws but voted for them. The Center Party emphasized the importance of counteracting discrimination but abstained since they preferred the adoption of single equality act. The Social Democrats, the Greens, the Left Party and the Christian Democrats voted for all three laws. In any case, given the adoption of three laws on discrimination that to a large extent were identical together with the Sex Discrimination Act, Sweden seemed to slowly be on a path towards a focus on equality in working life rather than the equality silos.

4.1.4 Other Societal Areas and Public Procurement

During the early 2000s, several multi-ground laws against discrimination in fields outside of working life were adopted. At least concerning race and ethnicity, the laws were necessary in order to satisfy the requirements of EU law, more specifically, the Racial Equality Directive. In Sweden, policymakers were under pressure by CSOs to extend the protection against discrimination to religion or other belief, disability and sexual orientation. As to an expanded protection concerning sex discrimination, feminist CSOs were positive to expanded protection, but were not necessarily positive to inclusion of sex in

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96 This is based on my conversations at the department while the terms of reference were being worked out in early 1997 as well my experiences working with each of the three inquiries.

97 Legislative Bill Prop. 1997/98:177 Ny lag om åtgärder mot etnisk diskriminering i arbetslivet [New Act on Measures Against Ethnic Discrimination in Working Life].

multi-ground laws due to the perceived "special" or more important nature of sex discrimination as compared to the others.

4.1.4.1 2001-2006 Expansion of the Scope of Discrimination Protections

An act was adopted in 2001 concerning providing protection to students against discrimination in higher education.[98] One reason for this act was that the EU Racial Equality Directive requires protection against ethnic discrimination in higher education. The Act ended up covering the grounds that were relevant at the time, gender, ethnicity, religion or other belief, disability and sexual orientation. This was Sweden's first multi-ground act.

By 2003, it was time for an additional discrimination act prohibiting discrimination outside of working life and higher education.[99] The EU Racial Equality Directive was an important factor here as well. At the same time, proponents for most of the other grounds did not want to be left behind. The 2003 Act did not include gender. There was some discussion as to whether gender discrimination outside of working life and higher education needed a separate act. In the end, the 2003 Act was amended in 2005 to include gender.[100] Presumably the Government had decided that this should not become an issue in the 2006 elections. Then in 2006, an act went into effect that was to provide protection to pupils in schools against discrimination. This was again a multi-ground act covering the grounds of sex, ethnicity, religion, disability and sexual orientation.[101]

4.1.4.2 2006 – Anti-discrimination Clauses in Public Contracts

The idea of using public contracts to counteract discrimination, as a complementary tool to laws, was brought up already by the 1968 inquiry concerning analysis of potential tools against discrimination, inspired by US law. Among other ideas, the inquiry mentioned public contracts, the removal of licenses, etc.[102] The use of anti-discrimination clauses in public contracts was proposed as an important complementary tool to legislation by the 1997 inquiry concerning ethnic discrimination.[103] Many years later, in 2005, due to the lack of effectiveness of the legal tools to put pressure on those with the power to discriminate to actually implement proactive equality and non-discrimination

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98 Lag (2001:1286) om likabehandling av studenter i högskolan [Act on the Equal Treatment of Students at Universities].

99 Lagen (2003:307) om förbud mot diskriminering [Act Prohibiting Discrimination]. This Act covered discrimination outside of working life and higher education.

100 Lag om ändring i lagen (2003:307) om förbud mot diskriminering [Act amending the Act (2003:307) Prohibiting Discrimination].

101 Lag (2006:67) om förbud mot diskriminering och annan kränkande behandling av barn och elever [Act Prohibiting Discrimination Against Pupils].

102 Legislative Inquiry SOU 1968:68, Lagstiftning mot rasdiskriminering [Legislation Against Race Discrimination] 57.

103 Legislative Inquiry SOU 1997:174, Räkna med mångfald! Förslag till lag mot etnisk diskriminering i arbetslivet m. m. [Count on Diversity! Proposal for a Law Against Ethnic Discrimination, etc.] 266-274.

measures, a government inquiry proposed a specific regulation to apply to all public contracts. More specifically, the supplier was to agree to

1. Abide by Sweden's anti-discrimination laws including the rules on active measures,
2. Reporting in writing on compliance issues,
3. Applying the clause to sub-contractors, and
4. Accept that the government retained the right to cancel the contract if there was a violation of the clause.

The point was to ensure that government agencies, potential suppliers and the public knew what was covered by the condition and what the risks were. The regulation was also a means of underlining the fundamental idea that taxpayers have a right to expect that their tax funds should not go to suppliers willing to discriminate against them or should at least risk losing public contracts if they do. Beyond this democracy argument there were quality and effectiveness arguments.[104] It is worthwhile noting that currently the annual value of all public contracts amounts to more than 800 billion Swedish Crowns, which corresponds to almost one fifth of Sweden's GDP.[105]

Even though the proposal was weakened, it was nevertheless adopted in 2006 by the Government and is still in force today. The regulation currently requires Sweden's largest government agencies to include an anti-discrimination condition in their larger contracts for services or building contracts. However, there is no specificity as to formulation of the condition, which means that government agencies that wish to do so can produce contract conditions that in practice have little or no effect.[106]

4.1.5 The Discrimination Act Goes into Effect in 2009

Sweden's current Discrimination Act[107] is in certain ways fairly straightforward concerning both the grounds covered and its scope. It also contains many of the features found in other more advanced jurisdictions.[108] The Act essentially entailed a merger of the seven civil laws against discrimination discussed above

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[104] Legislative Inquiry SOU 2005:56, Det blågula glashuset: strukturell diskriminering i Sverige [The Blue and Yellow Glass House: Structural Discrimination in Sweden], 63-65, 579-584.

[105] Concerning general issues related to Swedish Public Procurement see National Agency for Public Procurement, 'About Public Procurement,' at https://www.upphandlingsmyndigheten.se/en/about-public-procurement/#public_purchases_are_subject_to_certain_rules accessed 15 December 2021.

[106] Förordning (2006:260) om antidiskrimineringsvillkor i upphandlingskontrakt [Regulation (2006: 260) on Anti-discrimination Conditions in Public Procurement Contracts].

[107] An English translation of the Discrimination Act (2008:567) can be found on the Equality Ombudsman's website at https://www.do.se/choose-language/english/discrimination-act accessed 13 December 2021.

[108] Concerning the laws in Europe and North America, reference here is to the US, Canada, the UK and the EU, based on the idea that as laws against discrimination have developed, there has been a tendency to borrow or refine the ideas developed in these jurisdictions.

while adding the grounds of age[109] and transgender identity or expression. This also meant, to a large extent, moving the hierarchy of protection that existed between the seven previous acts into the new single equality act.

The Act applies to the following grounds: sex/gender, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation and age (Chapter 1, Section 1). The forms of discrimination are set out in Chapter 1, Section 4, direct discrimination, indirect discrimination, inadequate accessibility, harassment, sexual harassment and instructions to discriminate. It is also important to note that an employer may not subject employees or other relevant persons to retaliation/reprisals who e.g., report discrimination or participate in an investigation of discrimination.

4.1.6 The Combined Equality Ombudsman

As seen above, the Sex Equality Ombudsman, JämO, established in 1980, was Sweden's first equality body. Then came the Ombudsman against Ethnic Discrimination in 1986, the Disability Ombudsman in 1994,[110] and the Ombudsman against Discrimination due to Sexual Orientation in 1999.[111] From 1999 to 2009, each of these bodies had relatively similar powers such as the right to take individual cases to court on behalf of individual complainants as well as other equality promotion powers.

These equality bodies were merged into the Equality Ombudsman through an act that went into effect in 2009.[112] The total budget provided was basically the budget received by the four previous ombudsmen. The act provides a very broad mandate ranging from the right to go to court on behalf of individuals to the promotion of equality through reports, consultations with employers, unions, other CSOs, and to taking the initiative concerning other suitable measures.

4.2 Swedish CSOs' Influence on the Law

Naturally, the representatives of discriminated groups had some influence on the laws adopted. However, the weight of the influence can be seen in the contrast of how sex discrimination and race/ethnic discrimination were dealt with. When comparing the Sex Discrimination Act of 1991 and the 1999 Act prohibiting ethnic discrimination in working life, it should be apparent that the SDA was the

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[109] Sweden was required to prohibit age discrimination in working life due to the EU Framework Equality in Employment Directive 2000/78/EC. According to Article 18, the Directive was to be implemented at the latest by all Member States by 2 December 2006. Sweden received an extension, but still failed to legislate the protection within the extension. This means that Sweden was in violation of the Directive due to its delay in adopting a prohibition of discrimination in employment concerning age and that the Directive then had direct effect in Sweden until 2009.

[110] Lag (1994:749) om Handikappombudsmannen [Act on the Disability Ombudsman].

[111] Lag (1999:133) om förbud mot diskriminering i arbetslivet på grund av sexuell läggning [Act on a Prohibition of Discrimination in Working Life due to Sexual Orientation].

[112] Lag (2008:568) om Diskrimineringsombudsmannen [Act concerning the Equality Ombudsman].

result of pressure from at least part of the Swedish women's movement, while the act on ethnicity, although relatively similar to the SDA, seemed to have little relation to civil society pressure, at least by the targets/victims of ethnic discrimination. Reza Banakar had the following explanation concerning the differences in mobilization and enforcement in analysing the complaints filed and the actions taken, they "constitute two different forms of legislation, the one emerging from below as a result of an ongoing rights discourse and acting bottom up, the other being imposed from above to introduce a rights discourse and acting top down."[113]

The women's movement was able to overcome the combined opposition of the social partners in seeing to it that a prohibition went into effect in 1980, which was strengthened in 1991. Even though concessions were made, particularly concerning active measures, the law that was achieved was comparatively modern, at least in form in that it contained a prohibition, a right to damages, an idea about an eased burden of proof, proactive measures and an equality body with enforcement powers. The women's movement was active in the formulation of the act as well as its later enforcement.[114] Rather than being a response to civil society pressure, the law that included a prohibition of ethnic discrimination in working life was initially formulated to satisfy international opinion in 1994. Given the high burden of proof, essentially equivalent to the burden that applies in criminal law, it should not have been difficult to understand that the law would not be effective. The 1994 and 1999 Ethnic Discrimination Acts at the same time were relatively untested. Banakar attributed this to the top-down nature of the law. Another explanation could be that what was needed was greater mobilization of civil society concerning ethnic discrimination.

Examining the formation and support requirements that applied to immigrant organisations from the 1970s to the beginning of the 1990s, sociologist Carl-Ulrik Schierup concluded that there was an increasing need for a broad mobilization against ethnic discrimination given the deteriorating situation for immigrants in Sweden at the time.[115] Schierup concludes that while immigrants in Sweden have among the highest levels of organisation in Europe, their organisations have little in terms of political power and can hardly be considered to constitute a movement against discrimination. Schierup relates this to the government subsidies that encourage organization in terms of separate ethnicities, resulting in a de-politization and ethnicization that inhibits the potential influence of immigrants.[116] This analysis was later confirmed in 2005

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[113] Reza Banakar, 'When Do Rights Matter? A Case Study of the Right to Equal Treatment in Sweden' in S. Halliday and Schmitt (eds.), *Human Rights Brought Home. Socio-Legal Perspectives on Human Rights in the National Context* (2004) 165, at 184.

[114] Ibid. See also Anita Böcker, 'Can Non-discrimination Law Change Hearts and Minds?', 3 ERASMUS LAW REVIEW (2020) 21-33, at 29.

[115] Aleksandra Ålund and Carl-Ulrik Schierup, *Paradoxes of Multiculturalism: Essays on Swedish Society* (Avebury Aldershot 1991).

[116] Legislative Inquiry SOU 2005:56, Det blågula glashuset: strukturell diskriminering i Sverige [The Blue Yellow Glass House: Structural Discrimination in Sweden], 63-65, 579-584.

in a government inquiry into structural discrimination and political participation.[117]

In the later legislative developments concerning e.g., the grounds of disability and sexual orientation and working life, the relevant civil society interests were naturally involved. However, this seems more to have been the case that they demanded similar treatment in relation to ethnicity, and not that the different interest groups should cooperate in order to achieve legislation that would serve their common interests, such as increased damages or procedural rules making it easier for individuals to take cases to court. Given the breadth of the Racial Equality Directive requiring laws against discrimination both in working life and other areas of society, it was relatively easy to pressure policymakers with the idea that "our" ground should be covered too. Thus, the resulting laws on higher education and other areas of society.

The lack of strong influence by civil society can also be seen in the Discrimination Act (2008:567) that consolidated the other laws. The hierarchy of protection that was apparent in e.g., the laws concerning working life were simply transferred into the "new" act. This can be seen in particular concerning the allowance of positive treatment in employment related to sex and not the other grounds, as well as the more specific active measures requirements related to sex. There was no levelling up of the protection provided concerning active measures. This has changed somewhat due to a formal levelling up of the general active measures requirements so that they apply not just to sex, ethnicity and religion or other belief, but to all of the other grounds as well – disability, sexual orientation, transgender identity or expression and age.[118] At the same time the more specific active measures rules in Chapter 3, Sections 7-10, concern only sex. Furthermore, the Equality Ombudsman has declared its unwillingness to attempt to enforce the current active measures requirements, while relying on and expecting voluntary compliance.[119] This is a good indication that the changes in the act concerning the levelling up of the general active measures have more symbolic rather than practical value. There were no changes that related to enforcement, follow-up or sanctions.

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[117] Legislative Inquiry SOU 2005:112, Magnus Dahlstedt & Fredrik Hertzberg eds., Demokrati på svenska? Om strukturell diskriminering och politiskt deltagande [Democracy in Swedish? On Structural Discrimination and Political Participation].

[118] Lagen (2016:828) om ändring i diskrimineringslagen (2008:567) [Act on Amending the Discrimination Act (2008:567)]. See also Legislative Bill Prop. 2015/16:135 Ett övergripande ramverk för aktiva åtgärder i syfte att främja lika rättigheter och möjligheter [An Overall Framework for Active Measures to Promote Equal Rights and Opportunities].

[119] See the 'Law as a Tool for Social Change' project (2018), Interview with Ola Linder, 'GRANSKNING: Svag tillsyn motverkar inte diskriminering' [ANALYSIS: Weak Oversight Does Not Counteract Discrimination], Independent Living Institute <https://lagensomverktyg.se/2018/do-tillsyn/> accessed 13 December 2021. See also Ola Linder, *Diskrimineringsombudsmannens tillsynsarbete - särskilt fokus gällande aktiva åtgärder* [Report - The DO's Work with Oversight – Special Focus on Active Measures](2018), <https://lagensomverktyg.se/wp-content/uploads/sites/4/2018/10/RapportomDOstillsyn181018.pdf> accessed 13 December 2021.

4.3 Civil Society, the Equality Ombudsman and Enforcement Options

Another indication of a lack sufficient influence by civil society in Sweden concerning equality law and its enforcement is the work of the Equality Ombudsman. With regard to discrimination cases, inside as well as outside the labour market, there are various obstacles for potential discrimination litigants, such as low levels of rights awareness, low levels of trust in the legal system, low levels of experience with lawyers and the legal system and limited awards if successful. These factors tend to complement what is presumably the most important practical deterrent: the substantial economic risk related to litigation, particularly given the 'loser pays' rules. Potential litigants seldom have the resources to be able to risk paying at least EUR 10 000 – 15 000 for the other party's legal costs if they lose, which is the general rule. This is on top of their own costs for a lawyer. Even if they are successful, the potential compensation awards generally range from EUR 500 – 8 000. According to Laura Carlson, the potential compensation or damages in labour law discrimination cases, primarily involving sex discrimination, over a 45 year period has increased marginally by about 4.5%. However, during the same period, going through the same cases, she estimates that trial costs and fees have risen 170%.[120] Thus, not only are the economic risks for the discriminated individual substantial, they have worsened over time. On the other hand, those with the power to discriminate, such as employers, business owners and government agencies, generally have a natural advantage due to their economic position as well as familiarity and experience with the legal system and access to expertise. Furthermore, the costs for legal services for those accused of discrimination are generally considered to be normal business expenses. The same essentially applies to government agencies. This also applies if they are required to pay compensation to a victim.[121] Beyond these advantages, a new type of insurance has been made available in recent years to potential discriminators such as municipalities and employers.[122]

CSOs have a right to take cases to court as the named party, which means that they are taking on the economic risks concerning a loss. However, as CSOs often have limited experience with advocacy in the courts and also lack resources for such work, they tend to file cases as small claims cases. In such cases, each party essentially pays their own legal costs, but the potential compensation is also limited to a maximum of about EUR 2 060 in 2019.[123] Until recently, a party accused of discrimination could simply pay the amount asked for, without any admission of discrimination, and the case would be dismissed. However, according to the decision in the *Braathens* case, the CJEU has essentially determined that if there is no admission, a complainant can have the court hear the case in order to receive a judicial determination on the issue of

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120 See Laura Carlson, 'Discrimination Damages - Promoting or Preventing Access to Justice?' in Mia Rönnmar (ed.) *Festskrift till Ann Numhauser-Henning*, Juristförlaget, Lund, 2017, 129-143, 141-142.

121 Ibid. See also Paul Lappalainen, 'Country Report Non-discrimination Sweden 2020', EU Directorate-General for Justice and Consumers, 2020, 61-62.

122 Laura Carlson (2017) 142.

123 Lappalainen (2020) 62.

discrimination.[124] The DO initiated the case as a small claims case and appealed it through the Swedish courts, presumably primarily to test this issue.

There is a rule in the Discrimination Act, Chapter 6 Section 7, which allows a court to order that each party shall bear their own legal costs, if the individual, including CSOs, had good reason for bringing the case. This possibility has seldom been asserted, which means there is a lack of clarity on how the courts will apply this exception to the loser pays rule.[125] Individuals simply do not want to take the risk. Rather than addressing what is an important issue concerning access to justice, the courts, particularly the Labour Court, seem to be more concerned about ensuring a restrictive application of this exception to the general rule. One example is a 2015 case where the district court determined that the claimant had good reason to bring his case. Thus even though the claimant lost, the court ruled that both parties should bear their own costs. On appeal, the Labour Court disregarded the trial court's analysis and ordered the losing claimant to pay the winning party's legal costs in the amount of SEK 1 663 400 (EUR 156 322).[126]

The realistic options that individuals can hope for is if a union or the Equality Ombudsman takes on a case. Unions take on the economic risks when they represent their members. As the unions take so few discrimination cases to court, they presumably settle a number of cases. Concerning the Equality Ombudsman, in recent years 4-5 cases per year have been taken to court out of thousands of complaints. In 2019, the Ombudsman had five cases decided by the general courts and none in the Labour Court.

In October 2020, Lena Svenaeus, the Sex Equality Ombudsman during the 1990s, released a thorough examination of the Equality Ombudsman (DO) entitled *Ten Years with the Equality Ombudsman – A Report on the Dismantling of the Protection Against Discrimination.*[127] As the title indicates, the report is critical as it shines a light on the major drawbacks that have developed during the last 10 years. Svenaeus underlines the idea that the Equality Ombudsman (DO), instead of focusing on its primary task, which is the protection of individuals from discrimination, has directed the activities of the DO towards so-called preventive work through information, awareness-raising and decisions that are not legally binding – in other words, work that is known to be ineffective or at least where there is little research to show that it is effective. This has resulted in a clear deterioration of the protection against discrimination and reduced respect for the Discrimination Act. Among other things she points out

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[124] CJEU, Judgment of 15 April 2021, *Diskrimineringsombudsmannen* v. *Braathens Regional Aviation AB*, C-30/19, EU:C:2021:269. For more information see the Equality Ombudsman's website https://www.do.se/kunskap-stod-och-vagledning/tillsynsbeslut-och-domar/varor-tjanster/flygbolag-kravde-att-en-person-skulle-genomga-utokad-sakerhetskontroll accessed 13 December 2021.

[125] Lappalainen (2020) 63.

[126] Labour Court judgment 2015 No. 57 (30.09.2015).

[127] Lena Svenaeus, 'Tio år med Diskrimineringsombudsmannen - En rapport om nedmontering av Diskrimineringsskyddet [Ten Years with the Equality Ombudsman – A Report on the Dismantling of the Protection Against Discrimination] (Arena 2020) <https://arenaide.se/wp-content/uploads/sites/2/2020/11/svenaeus-2020-tio-ar-med-diskrimineringsombudsmannen-komprimerad.pdf> accessed 13 December 2021.

the decrease in the cases filed by the DO during those 10 years from about 30 to only three or four per year, as well as the shift in terminology where 'complaints' filed by individuals have been reduced to 'tips and notifications of discrimination' from the public. This has occurred in a situation where the DO has more than 100 employees and an annual budget that has grown to more than EUR 12 million. Svenaeus is also critical of the Government for not providing greater guidance concerning the protection of equality rights and calls on the Government to establish an inquiry on clarifying the DO's mandate and how it can best be fulfilled.

By way of comparison, human rights advocates in the US have formulated part of the issue in the following manner.

> Even where systemic change remains elusive, it must not be forgotten that small victories are meaningful. This brings us back to the client advocacy model of public interest litigation. In striving for greater impact, practitioners must not neglect the client. In many respects, an enduring value of human rights litigation is the transformative potential of litigation on individual participants. Indeed, the highest ideals of the law can in many respects be achieved through good client advocacy: the representation of persons in pain, one individual at a time.[128]

This at least presents a public interest law perspective that does not seem to be the one functioning at the Equality Ombudsman today. Producing small victories at a minimum helps individuals. This also increases trust within the communities that are the targets of discrimination, which can in turn lead to complaints that lead to greater victories. Small victories can in turn also provide training for the Equality Ombudsman's lawyers in educating the judges, and also preparing them for greater victories.

The Act establishing the Equality Ombudsman provided a broad and independent mandate to the head of the agency to set its own priorities. This was a means of ensuring the independence of the agency while enabling the Equality Ombudsman to take on controversial issues, including taking those with the power to discriminate to court. Internationally, having the power to go to court is something most equality bodies have fought hard to achieve. Civil society has supported these efforts, knowing that if equality bodies take on such challenges to the status quo, they could help to correct the imbalance in power that exists between the potential targets of discrimination and those with the power to discriminate or prevent discrimination. Concerning the Swedish Equality Ombudsman it is doubtful that civil society, policymakers, researchers or others ever expected the Equality Ombudsman to use its broad mandate to severely limit its own power to take cases to court, so that it could focus on awareness raising in different forms.

Some complications concerning an understanding of the development of equality bodies and equality law can be seen in the Equality Ombudsman's explanation of its policy concerning settlements on behalf of individuals:

> Due to the imbalance in the power relations between the Equality Ombudsman and the party accused of discrimination, it is also problematical that the Equality

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[128] Beth Van Schaack, 'With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change,' 57 VAND. L. REV. 2305, 2348 (2004).

> Ombudsman works towards a settlement in cases where the legal situation is unclear or there is a dispute on the issue of guilt.[129]

This can be combined with the response of the Equality Ombudsman rejecting the recommendations of a government inquiry encouraging the Ombudsman to investigate more individual cases in order to provide increased support regarding settlements and taking more cases to court: "Especially concerning the inquiry's recommendations concerning the agency's work with oversight and settlements, the Equality Ombudsman has determined that its public law mission concerning ensuring compliance with the Discrimination Act can hardly be combined with an oversight where the purpose is to investigate and put forward the civil law claims of private individuals."[130]

While the balance of power between a government agency and the party complained against is important, it would also be important to recognize that a key reason for the existence of and need for equality bodies, in Sweden as well as elsewhere, is the imbalance of power built into the civil law side of the legal system that exists between the targets of discrimination and those with the power to discriminate. This imbalance becomes particularly stark in a loser pays system.

The direction taken by the Equality Ombudsman, has in a broad sense led to less trust by CSOs representing the various grounds. At the same time, the Equality Ombudsman's current direction, as described by Svenaeus, indicates the extremely limited influence of those same CSOs.

4.4 Signs of Change in Civil Society Advocacy

There are various interesting developments that have taken place in recent years relating to civil society litigation and legislative advocacy. CSOs are discovering that the courts can be an important forum for advocacy.

The largest LGBT organization, RFSL, has brought cases in the administrative courts that involve discriminatory treatment (but not within the

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[129] Legislative Inquiry SOU 2016:87, Bättre skydd mot diskriminering [Better Protection Against Discrimination] 160: 'På grund av obalansen i maktförhållandena mellan DO och den som anklagas för diskriminering är det inte heller oproblematiskt att DO verkar för förlikning i fall där rättsläget är oklart eller tvist råder i skuldfrågan.' ['Due to the imbalance in the power relations between the Equality Ombudsman (DO) and the party accused of discrimination, it is also problematical that the Equality Ombudsman (DO) works towards a settlement in cases where the legal situation is unclear or there is a dispute on the issue of guilt.'].

[130] See the Equality Ombudsman's response to Legislative Inquiry SOU 2016:87, 15 September 2017 'Vad särskilt gäller utredningens rekommendationer om myndighetens arbete med tillsyn och förlikningar bedömer DO att myndighetens offentligrättsliga uppdrag att säkerställa diskrimineringslagens (2008:567) efterlevnad svårligen kan förenas med en tillsyn vars ändamål är att utreda och framställa enskildas civilrättsliga anspråk' ['Especially concerning the inquiry's recommendations concerning the agency's work with oversight and settlements, the Equality Ombudsman has determined that its public law mission concerning ensuring compliance with the Discrimination Act can hardly be combined with an oversight where the purpose is to investigate and put forward the civil law claims of private individuals.'] At <http://www.do.se/om-do/vad-gor-do/remissvar/remissvar-under-2017/battre-skydd-mot-diskriminering/> accessed 13 December 2021.

terms of the Discrimination Act), partly with the help of a local anti-discrimination bureau. In one such case in 2012, the Administrative Appeal Court decided that the requirement of sterilization prior to a person applying for a change of gender marker violated the Swedish Constitution as well as Articles 8 and 14 of the European Convention of Human Rights (ECHR). This ultimately resulted, at least in part due to the potential of a class action, in the establishment by the Riksdag of a compensation fund for those who had been subjected to forced sterilization since the 1970s.[131]

The CSO known as Disability Rights Defenders Sweden (DRDS) has provided support for key cases concerning disability and discrimination. In a 2019 article, DRDS explained that it was formed to help ensure that more discrimination cases are tested, even in the courts. Having rights under the Discrimination Act does not mean much without a focus on access to justice. DRDS pointed out that it had helped to file six lawsuits in 2018, essentially without any funding, primarily through the use of volunteers. This could be compared to the four lawsuits filed in 2018 by the DO, and zero in 2019. The article ended by reaching out to the private legal profession concerning the need for more pro bono work on discrimination cases in Sweden.[132]

One of the successful cases involves the assistance provided by DRDS as well as other CSOs concerning the submission of an individual communication to the UN Committee on the Rights of Persons with Disabilities due to a failure by Sweden to properly apply the principle of reasonable accommodation. This involved a case that the DO lost in the Labour Court in 2017.[133] The Committee agreed that Sweden had violated the rights of the applicant, particularly due to the lack of a dialogue with the applicant concerning appropriate reasonable accommodation. The Committee stated that "In particular, it considers that the Labour Court's assessment of the requested support and adaptation measure upheld the denial of reasonable accommodation, resulting in a de facto discriminatory exclusion of the author from the position for which he applied, in violation of his rights under Articles 5 and 27 of the Convention."[134]

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[131] See TGEU (Transgender Europe e.V.) "Swedish Court Repeals Sterilisation Requirement" <https://tgeu.org/swedish-court-repeals-sterilization-requirement/> accessed 13 December 2021. The actual judgment in the case, Administrative Appeal Court case number 1968-12, is available at <http://databas.infosoc.se/rattsfall/24519/fulltext> accessed http://databas.infosoc.se/rattsfall/24519/fulltext 2021. See also RFSL's press release concerning compensation for those who had been sterilised, "Historic Victory for Trans People – the Swedish Parliament Decides on Compensation for Forced Sterilizations" at <https://www.rfsl.se/en/aktuellt/historic-victory-trans-people-swedish-parliament-decides-compensation-forced-sterilizations/> accessed 13 December 2021.

[132] DRDS, 'De flesta har inte råd att processa – det behövs fler pro-bono-advokater i diskrimineringsmål' [Most People Cannot Afford to Enforce their Rights – More Pro Bono Lawyers are Needed in Discrimination Cases], DAGENS JURIDIK, 05.03.2019, <https://www.dagensjuridik.se/nyheter/de-flesta-har-inte-rad-att-processa-det-behovs-fler-pro-bono-advokater-i-diskrimineringsmal/> accessed 13 December 2021. Note that the author of this chapter was one of the signatories.

[133] Labour Court judgment 2017 No. 51, *Equality Ombudsman v. Södertörn University*.

[134] UN Committee on the Rights of Persons with Disabilities, *Sahlin v. Sweden*, CRPD/C/23/D/45/2018, p 15-16, <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2f23%2fD%2f45%2f2018&Lang=en> accessed 13 December 2021.

Another CSO, Civil Rights Defenders, has over the past few years taken on certain public interest cases that touch on discrimination protection as a fundamental right. One important case involved the Skåne police register on travellers (kringresanderegister). The thousands of persons in the register essentially had one thing in common; they were Roma or relatives of Roma. The Swedish government accepted responsibility for certain violations of law, but not for discrimination, and was willing to provide a compensation of SEK 5 000 per person. Several people took the Government to court asking for a decision that the register constituted discrimination against them as Roma, as well as higher damages. A shifted burden of proof was applied referencing Swedish discrimination law, the EU Racial Equality Directive and the case law of the ECtHR - i.e., European non-discrimination law. The Government was unable to meet its burden of proof as to lawful conduct. The Swedish Court of Appeal held that Sweden had violated Articles 8 and 14 ECHR and granted the plaintiffs' demand of SEK 30,000 as damages given the gravity of the case.[135] The case presumably would never have been taken to court without the support of Civil Rights Defenders.

Government subsidies have also been provided to local anti-discrimination bureaus that are run by CSOs. These were established to provide advice and assistance to discriminated individuals. They have generally been wary of going to court but are nevertheless increasingly contemplating the idea of litigation. However, due to the economic risks, their cases have generally been filed as small claims cases. In particular, the CSO, Malmö mot diskriminering, has been successful in developing its work with litigation; in some years even having more cases in court than the Equality Ombudsman.[136]

There is a public interest law firm that should be mentioned, the Centre for Justice (Centrum för rättvisa). Its creation was inspired by a conservative public interest law firm in Washington D.C. and its financing seems to come primarily from the business sector. Through litigation and the threat of litigation the Centre has successfully challenged government policies promoting affirmative action. At the same time, the Centre shows that an increased focus on access to justice in strategic cases can lead to important cases being taken to the Swedish courts in a manner that strengthens human rights and individual rights.[137]

In general, Swedish CSOs representing the targets of discrimination believe that they do not need to develop an expertise concerning the law, legislation, and advocacy in the courts. The idea of developing this expertise is considered to be foreign, something done by CSOs in the US, Canada or the UK. The problem with this perception is that only the less powerful CSOs believe in it. Sweden's more powerful CSOs, i.e., the labour unions and the employer's associations, have no problem in dedicating resources to taking cases to court, when it is in their interest, or producing their own proposals for legislation. In addition to each union having their own lawyers, the larger unions have invested in the

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[135] Svea Court of Appeal, Case T 6161-16, *Fred Taikon (and ten more claimants) v. Swedish State through the Chancellor of Justice* (judgment of 28.04.2017).

[136] Malmö mot diskriminering (Malmö Against Discrimination) <https://malmomotdiskriminering.se> accessed 13 December 2021.

[137] Centrum för rättvisa [The Center for Justice] <https://centrumforrattvisa.se> accessed 13 December 2021.

development of a specialized law firm to serve their interests, the Legal Bureau of the Swedish Trade Union Confederation.[138] In approaching policymakers, the unions and employer's associations are very specific concerning the law and policy proposals they want. They are also always appointed as experts to government inquiries into laws that touch their interests, e.g., inquiries into laws on discrimination. On the other hand, those representing the discriminated are seldom appointed.[139] This does not mean that CSOs representing the targets of discrimination should focus their limited resources on only legislation and enforcement, but it does mean that they should not attach all of their hopes to the good will of politicians and civil servants.

5 Going Forward

Civil society in the form of the Starting Line Group was able to help move the EU from an idea of equality as a common market issue to a more substantive idea of equality as a fundamental right within the European Union. One important issue here was having a clear starting point in the form of SLG's own proposal for a directive as well as in the follow-up work on Article 13, creating a broad basis for different equality interests to cooperate. This was not just the anti-racist CSOs, but CSOs with a variety of equality interests that concentrated their focus on a common goal. Together they were able to contribute to an expansion of the EU's power to legislate on equality issues. This in turn led to concrete moves forward for equality in the form of the Racial Equality Directive and other directives that followed. This also contributed to various Member States, such as Sweden, Finland and Norway in moving towards a more comprehensive fundamental human rights approach at the national level.

The EU equality directives set a minimum standard. Civil society can move beyond this minimum, particularly if they act in common, through advocacy at the member state level for specific reforms such as:

- The establishment of an NGO-controlled fund for test cases concerning discrimination law;[140]

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[138] See The Legal Bureau of the Swedish Trade Union Confederation (LO-TCO Rättsskydd AB) <https://www.fackjuridik.se/the-legal-bureau-of-the-swedish-trade-union-confederation/> accessed 13 December 2021.

[139] The only CSO representing targets of discrimination appointed as an expert to the inquiry that led to today's Discrimination Act was the LGBT organisation RFSL, while the unions had three representatives and the employer's associations had four. See Legislative Inquiry SOU 2006:22 En sammanhållen diskrimineringslagstiftning [A Consolidated Legislation Against Discrimination] 3-5.

[140] See e.g., the Canadian Court Challenges Program https://pcjccp.ca accessed 13 December 2021. Also see Morris Lipson and Peter Noorlander, 29 June 2020, Feasibility Study for financial support for litigating cases relating to violations of democracy, rule of law and fundamental rights, European Commission, Directorate-General for Justice and Consumers https://ec.europa.eu/info/sites/default/files/feasibility_study_for_financial_support_for_litigating_cases_relating_to_violations_of_democracy_rule_of_law_and_fundamental_rights.pdf accessed 13 December 2021.

- Fee shifting so that good faith complainants do not risk losing more than their own costs if they lose, while being awarded their legal costs if they are successful;
- An equality duty is placed on all government agencies, possibly entailing budget reductions for failure to live up to that duty;
- The development of equality data that can be useful in monitoring discrimination and promoting change in terms of greater equality in relation to grounds other than sex and age;[141]
- A duty to undertake active measures to promote equality is placed on larger employers, with fines related to the size of the employer and the type of failure involved with a primary follow-up duty by the national equality body, and a possibility of follow-up by civil society organisations if the equality body does not carry out that duty;
- An anti-discrimination clause in all larger public contracts clearly specifying that contract cancellation is a potential sanction; and
- Guarantees of some influence over the management of the national equality body.

Not only anti-racist organisations, but all organisations concerned with equality as a human right should be interested in actively advocating for these types of reforms. They are not ground specific, but would clearly help to establish a more effective equality law framework. With this type of common interest, they could help to channel the energy displayed in the George Floyd / Black Lives Matter demonstrations in Europe in a manner that leads to real change.

[141] See e.g. High Level Group on Non-discrimination, Equality and Diversity, Subgroup on equality data, Guidance note on the collection and use of equality data based on racial or ethnic origin, European Commission 2021; Yamam Al-Zubaidi, "Some reflections on racial and ethnic statistics for anti-discrimination purposes in Europe," European Equality Law Review Issue 2 / 2020, 62-72, and; Yamam Al-Zubaidi, Jämlikhetsdata på arbetsplatsen – med fokus på etnisk tillhörighet [Equality data in the workplace – with a focus on ethnicity], Länsstyrelsen Stockholm 2021.