

Executive Summary

Country Report Sweden 2008 on measures to combat discrimination

By Per Norberg

1. Introduction

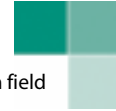
Sweden was until recently a fairly homogenous country. It is also a strongly secular country, albeit within a Lutheran Church tradition. Its population is only around 9 million people. However, the proportion of foreign-born inhabitants has increased from 6.7% in 1970 to 12.2% in 2004. There is no tradition of monitoring ethnicity within society and no long-established tradition as regards non-discriminatory legislation either, although an Equal Opportunities Act relating to sex and employment was introduced in 1979. Lately, however, the Swedish Government has been very active regarding the introduction of non-discrimination legislation, both anticipating and transposing EU law. It is the Government's opinion that protection against discrimination, in principle, should be harmonised regardless of the protected group. A new Discrimination Act entered into force 1 of January 2009.¹ It covers sex, ethnicity (including religion), sexual orientation and disability (the four grounds covered by the repealed Acts). The Discrimination Act also implemented the EU legislation on age discrimination and introduced a new discrimination ground, gender transgressing identity or expressions.

Sweden, with predominantly social democratic governments during the last century, can be said to have developed a fairly comprehensive welfare state relatively early. Social and economic goods have only to a limited extent been articulated as rights giving rise to legal claims though, and there is a weak constitutional tradition as regards fundamental rights.

Swedish law is based to a considerable extent on written law, while case law plays a smaller, though important role. Power to enact laws is vested in the Swedish Parliament. Legislative initiative lies predominantly with the Government. The groundwork in the preparation of bills is laid by commissions of inquiry, legal experts in the ministries and Parliamentary standing committees. The Swedish law-making process thus generates a voluminous body of printed matter which is important in applying the legislation.

Primary responsibility for the enforcement of legal rules devolves upon the courts and the various administrative authorities. The general courts (the district courts, the courts of appeal and the Supreme Court) mainly enforce civil law and criminal law legislation. The administrative courts (the county administrative courts, the administrative courts of appeal and the Supreme Administrative Court) deal with appeals against decisions by public authorities. The Swedish Labour Court is a special court which tries labour disputes. Certain cases can be brought directly before the Labour Court, while other cases (presented by individuals not supported by their professional organisation or – in matters of discrimination – by the Equality Ombudsman) must first be brought before a district court.

¹ Government bill 2007/08:95. The government got the law through the parliament without changes.

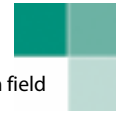


The administration is organised in a well-developed network of administrative authorities with a relatively independent position, regulated in general by instructions laid down by the Government.

In order to understand the functioning of Swedish labour law, and thus important parts of the non-discrimination legislation, it is crucial to have in mind the special role designated to the social partners, whereas other NGOs have a very restricted role. The Swedish labour market is characterised by a high degree of organisational density, roughly 70 %. This is true of employees and employers alike, and whether in the private or the public sector. This organisational structure is reflected in collective bargaining and the fact that important issues are still outside the scope of law, for instance wages. As a general rule, work as a civil servant is ruled by contracts and collective agreements, largely in the same way as private employment, and the same rules apply.

2. Main legislation

The 1975 Instrument of Government states that public institutions shall counteract discrimination against persons on a number of grounds and it also contains an enumeration of protected fundamental individual rights, including the right not to be discriminated against on the grounds of belonging to minorities of race, colour or ethnic origin (covering also religion and belief) or on the grounds of sex. These rules, however, do not really grant any legally enforceable rights. The first rule is mainly a political declaration, whereas the implications of the others are that all Acts of Parliament and other legal regulations must satisfy these basic requirements of non-discrimination. However, laws can be declared unconstitutional only if the violation is manifest. It should be noted that in 1995 the European Convention on Human Rights was incorporated into national legislation and given a quasi-constitutional status. Any law that contradicts the rights set forth in the Convention is void and may not be applied. Sweden has also signed and ratified the Revised European Charter, the International Covenant on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of Discrimination against Women, as well as a number of relevant ILO Conventions. If not incorporated, international agreements are not as such part of the internal Swedish hierarchy of laws and these instruments thus can not be directly relied upon in domestic courts of law.



Although a late starter in the field of non-discrimination legislation, Swedish domestic law in 2008 contained a considerable quantity of explicit prohibitions on discrimination, which were to be found in seven specific acts.²

These seven acts are from 1 of January 2009 repealed and replaced with the new Discrimination Act (2008:567). There are also *criminal law provisions*, such as the provision that bans unlawful discrimination by businessmen on the grounds of ethnicity and sexual orientation with regard to the provision of goods and services and the ‘hate speech’ provision, which makes it a criminal offence to disseminate a message which is threatening or degrading to a group of persons.

Generally speaking, Swedish law may be said to be in conformity with the Article 13 Directives. Especially as regards religion and other beliefs and sexual orientation, domestic law goes beyond the requirement of EU law. This is also true with regard to discrimination on the grounds of disability. Nevertheless, there are some flaws in the implementation. The following flaws remains with new Discrimination Act.

- The protection against discrimination or victimisation does not fully cover self-employed people.
- Discrimination against legal persons is not prohibited.
- Discrimination and harassment from fellow workers or third parties are not as such prohibited.

The unwillingness to make harassment from fellow workers prohibited as such is connected to a more general restriction of vicarious liability for employers. It can be illustrated with Labour Court 2007 case no 15 and 45. In the latter case all parties started from the fact that the Iranian had been discriminated against, but no person could be held responsible since the erring employee did not have the authority to reject his application for the job. In these cases we have a person being discriminated against by an employee not liable under the civil discrimination law. The plaintiff must go through the employer and the employer can only be liable if he or she has been negligent by for instance not reacting promptly on being informed of an harassment or by giving authority to represent the employer to an employee who have bad judgement. The principle of vicarious liability in relation to discrimination law is restricted when employees act outside their authority to an extent that is problematic in relation to discrimination law.

² The (1991:433) Equal Opportunities Act (jämställdhetslagen)

The (1999:130) Act on Measures against Discrimination in Working Life on grounds of Ethnicity, Religion or other Belief (the Ethnic Discrimination Act, lagen om åtgärder mot etnisk diskriminering i arbetslivet)

The (1999:132) Prohibition of Discrimination in Working Life of People with Disability Act (the Disability Discrimination Act, lagen om förbud mot diskriminering i arbetslivet av personer med funktionshinder).

The (1999:133) Act on a Ban against Discrimination in Working Life on grounds of Sexual Orientation (the Sexual Orientation Discrimination Act, lagen om förbud mot diskriminering i arbetslivet på grund av sexuell läggning).

The (2001:1286) Equal Treatment of Students at Universities Act (the Students at Universities Discrimination Act, lagen om likabehandling av studenter i högskolan).

The 2003 Prohibition of Discrimination Act (2003:307)

The (2006:67) Pupils Discrimination Act (lag om förbud mot diskriminering och annan kränkande behandling av barn och elever).



3. Main principles and definitions

The definition of direct discrimination in the Discrimination Act Ch. 1 Sec 4 first point reads as follows:

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

This definition requires a person to be disadvantaged. A discriminatory statement directed at the general public, thus do not amount to direct discrimination.

An employer, an education institution or a provider of goods and services etc., may not disadvantage any individual from any of the protected groups by treating him or her worse than the employer etc., treats, has treated or would have treated someone else in a comparable situation, if the disadvantage is *associated* to the protected ground. The protection thus covers discrimination by association situations.

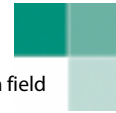
The ban on direct discrimination is limited by the possibility of justification. The new Discrimination Act reduces the possibility to justify direct discrimination in comparison with the old acts. Except for age discrimination, there are no longer any examples of justifications in national law which may be too wide to be acceptable according to EC-law.

The definition of indirect discrimination in the new Discrimination Act is in close adherence to the Article 13 Directives. Since there is only limited case law regarding the old acts and no case law on the new act, it is too early to tell what ‘the test to be satisfied’ in these situations really is.

The Discrimination Act defines harassment and instructions to discriminate as forms of prohibited discrimination. Furthermore, the acts oblige an employer or educational institution, which has knowledge of the fact that an employee/student feels that she or he has suffered harassment related to any protected ground, to investigate the matter and, when appropriate, to take action to prevent such harassment from continuing. Victimisation is also forbidden.

The prohibition of direct discrimination also applies when an employer or a university, by providing support and adaptation measures, may create a situation for a person with a disability that is similar to that for persons without such a disability and it may reasonably be required that the employer/university implements such measures. The duty of reasonable accommodation is thus an integral part of the concept of direct discrimination.

The issue of multiple discrimination has not really been dealt with by the courts, so far. The new Discrimination Act has however solved some problems by making the same prohibitions apply to all grounds and by having one Equality Ombudsman dealing with all grounds.



4. Material scope

Regarding all areas, including working life, the new Discrimination Act contains no enumeration of the material scope. In some areas a few situations *not* covered by the prohibitions are enumerated. The material scope is thus wider than required by EC-law. Age is the only ground which is exempted from some of the areas to which the Discrimination Act applies.

The Discrimination Act applies to all aspects of the employer-employee relationship. Self-employed people are, however, not covered by the prohibition of discrimination in working life. The Discrimination Act does not protect legal persons.

Self-employed persons can however be protected as natural persons regarding for instance, starting or running a business and professional recognition (Ch. 2 Sec. 10). Professional organisations are prohibited to discriminate the self employed as well as the employed (Ch. 2 Sec. 11) Permits, approvals certification and financial support, are other examples of areas covered by these two provisions. Several other provisions in the Discrimination Act apply to self-employed as well as to employed persons.

5. Enforcing the law

Civil processes regarding working life under the Discrimination Act is to be dealt with in accordance with the Labour Disputes Act. Should the individual concerned be a member of a trade union the Ombudsmen's right to represent the victim (see also section 6 below) is subsidiary to the right of the trade union to represent its member. Procedures are the same regardless of whether the case concerns a private or a public employee. However, with regard to state employees there is, due to the constitutional rules on objective grounds in hiring, sometimes also the alternative or complementary route of appealing against a decision through administrative procedures.

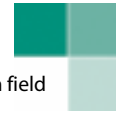
Cases outside working life will be dealt with by the ordinary court system, i.e. the relevant district court in the first instance. Discrimination in connection with for instance social security (an example of an area normally falling under administrative law) is thus dealt with by the ordinary civil court system and the ordinary rules on civil process apply.³

The new Discrimination Act also gives non-profit organisations whose statutes states that it is to look after its members, the right to bring actions in their own name as a party.

Relevant criminal procedures may be initiated by a public prosecutor or the private party him or herself. The Ombudsman and non-profit organisations do not have legal standing before the courts in criminal procedures.

A shared burden of proof of discrimination was introduced with the old acts.

³ Some university or higher education cases may also be brought before the Board of Appeal for Higher Education.



Nevertheless, very few cases of alleged discrimination have been won so far. In most cases this is due to the plaintiff's failure to prove a prima facie case of discrimination. The statistics from the Ombudsmen's offices show that a considerable number of cases are settled out of court, however. The same is probably true for the trade unions.

Situational testing is not explicitly touched upon in Swedish law and thus there is no definition, nor any explicit procedural law dealing with the conditions for admissibility. However, situational testing can be permitted and the value of such evidence has to be assessed in accordance with the circumstances at issue. Testing is accepted both in relation to criminal offence and civil damages claim. However, in 2008 the Supreme Court ruled that the damage suffered by persons involved in situation testing was lower than the damage suffered by other persons and therefore reduced the civil damage substantially.

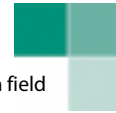
As regards statistical evidence this is normally used in indirect discrimination cases. The (1998:2004) Act on Personal Information (Personuppgiftslagen) contains the general rules on the right to register personal information. There is a general prohibition to register (among other things) such 'sensitive personal information' as ethnicity, religion or other beliefs and information concerning health and sexual life including sexual orientation (Sec. 13). There is no case-law in the areas of discrimination outside sex discrimination using statistics to the knowledge of the author. As regards sex discrimination: statistics have first and foremost been used in cases concerning equal pay but to some extent also employment. In these cases, there has been no real legal dispute as regards the statistics as such.

A contract (collective or individual) is invalid to the extent that it prescribes or permits discrimination, and a discriminatory provision or legal act may be declared invalid if so requested. There is also a right to damages for the violation caused by the discrimination and – in employment cases not relating to hiring or promotion – for the economic loss that arises. Damages are known to be low in Sweden. The new Discrimination Act introduced a new form of civil damages, the discrimination award. The courts are by law instructed to give particular attention to the purpose of discouraging infringements. The level of damages will therefore be higher in the future. Generally speaking, sanctions must be said to be proportionate, effective and dissuasive.

6. Equality bodies

The Ombudsmen who counteract discrimination on various grounds were the key public institutions for the promotion of equal rights. There were in 2008 the Equal Opportunities Ombudsman (JämO – sex equality), the Ombudsman against Ethnic Discrimination (DO), the Disability Ombudsman (HO) and the Ombudsman against discrimination due to sexual orientation (HomO). Now the four ombudsmen have merged into a single authority, the new Equality Ombudsman.

Like the old ombudsmen, the new Equality Ombudsman has the right to investigate complaints concerning discrimination according to any of the non-discrimination acts mentioned as well as the right to represent individuals in discrimination cases that are of importance in terms of case law or otherwise.



Furthermore, the Ombudsman is also required to give advice and support more generally to individuals and institutions; engage in education, information and opinion-shaping efforts to combat discrimination; and propose to the Government legal and other measures that may be of use to combat discrimination and monitor international developments. The Ombudsman, – though appointed by the Government – has independent status to reach its own decisions in individual matters. It is state-funded, decisions on funding being taken annually by the Swedish Parliament, based on Government recommendations and as part of the general state budget.

As was already indicated, the role played by NGOs other than trade unions and employer organisations in Sweden has been known to be fairly weak, perhaps with the exception of the different organisations within the disabled movement.

Lately, there are more NGO activities also in the field of ethnicity discrimination, though. To the extent that there are NGOs, the Ombudsman has an ongoing dialogue with them.