Executive Summary
Swedish Country report on measures to combat discrimination, 2007
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 and it has proposed a new comprehensive discrimination law. The proposed law was accepted by the Parliament on the fourth of June 2008 and will enter into force in 2009.[1] This law will inter alia implement the EU legislation on age discrimination and introduce 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.

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

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 an Ombudsman) must first be brought before a district court. 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 85%. 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 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 today contains a considerable quantity of explicit prohibitions on discrimination, which are to be found in a number of specific laws.

First out was the 1979 Equal Opportunities Act, later on replaced by the 1991:433 Equal Opportunities Act dealing with workplace discrimination on the grounds of sex. Similar acts concerning workplace discrimination on the grounds of ethnicity (and religion and other belief), sexual orientation and disability were adopted and came into effect in 1999 – *the 1999 Acts*. These acts can be said to have anticipated the Article 13 Directives (Directives 2000/43/EC and 2000/78/EC) and drew heavily on the Burden of Proof Directive *97/80/EC* (In addition, the 1991 Equal Opportunities Act on sex discrimination was later amended to bring it into line with the 1999 anti-discrimination laws.) Later on, in 2003, the 1999 Acts were amended in order to better fulfil the requirements of the Article 13 Directives. Since then, the 1999 Ethnic Discrimination Act has also expressly addressed religion and other beliefs.

Furthermore, *the 2001 Equal Treatment of Students at Universities Act*, applies to discrimination in higher education on grounds of sex, ethnicity and religion and other beliefs, disability or sexual orientation. Since 2003 there has also been *the Prohibition of Discrimination Act* (the 2003 Act), banning discrimination on the grounds of ethnicity, religion and other belief, sexual orientation and disability in other areas of society than working life, such as labour market policy activities, membership of unions and occupational organisations, goods and services (including housing), social security and related benefits systems as well as health and medical care. It was considered to be unjustifiable to provide a higher level of protection for ethnicity than for other grounds. Nevertheless, today the greatest amount of protection is given to the grounds of ethnicity and religion and other beliefs. Only recently, however, the scope of the 2003 Act was broadened considerably as regards sexual orientation and also as regards sex. Additionally, as of 1 April 2006 a new Act on a ban against discrimination and other degrading treatment of children and pupils entered into force, covering discrimination in pre-school facilities, school-age childcare, primary and secondary school and municipal adult education. This Act covers the grounds of sex, ethnic origin, religion and other beliefs, sexual orientation and disability. None of the anti-discrimination legislation so far covers age.

There are also *criminal law provisions*, such as the provision that bans unlawful discrimination by traders on the grounds of ethnicity and homosexual 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, which is partly, but to a lesser extent covered by the 2003 Act as it relates to areas outside working life. The 2001 Student at Universities Act and the new 2006 Pupils' Discrimination Act imply an implementation beyond the Directives regarding all grounds but ethnicity.

As regards the ban on age discrimination in Sweden, implementation measures are about to be undertaken and age will from the 1 of January 2009 become a discrimination ground.

Nevertheless, there are some flaws in the implementation: The protection against discrimination or victimisation does not fully cover self-employed people (the 1999 Acts); there are statutory limits to economic damages in certain situations related to the Employment Protection Act (the 1999 Acts) and there are no rights for NGOs other than unions or employers' organisations to engage themselves on behalf or in support of victims of discrimination (all the Acts). Some of these flaws will be amended from the 1 of January 2009.

Generally speaking, case law on civil law bans on discrimination is rather scarce, also as regards employment. In 2007 it may be interesting to note 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. Such cases are related to the unwillingness in Sweden to make the employer directly responsible for harassments between employees. 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.

3. Main principles and definitions

The four different laws concerning discrimination in the workplace on the grounds of sex, ethnicity and religion, disability and sexual orientation are quite similar in terms of definitions, nature and scope of legal protection. These four laws can be said to form the basic structure for equal rights in working life in Sweden. Later non-discrimination legislation, like the 2001 Students at Universities Act, the more general 2003 Prohibition of Discrimination Act and the 2006 Pupils' Discrimination Act, has been drafted in close accordance with the four acts relating to employment.

The definition of direct discrimination is in principle identical in all the relevant national statutes. 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 connected to the protected ground. The protection covers discrimination by association situations.

The ban on direct discrimination is limited by the possibility of justification. The exception is generally stated in the 1999 Acts. The prohibition of direct discrimination does not apply in connection with decisions on employment, promotion or training for promotion if a particular characteristic is necessary owing to the nature of the work or the context in which it is performed.

In the 2001 Students at Universities Act the possibility of justifying direct discrimination is somewhat more generally stated: "The prohibition does not apply if the treatment is justified by taking into account a special interest that is manifestly more important than the interest of preventing discrimination at the university". Also, the 2003 Act is differently designed, with the general definition of the discrimination concepts in Section 3, followed by the scope of the prohibition of discrimination and possible exceptions (not many) area by area. The 2006 Pupils' Discrimination Act does not contain any explicit rule on exceptions.

The concept of indirect discrimination is also the same, regardless of the non-discrimination act concerned. The Swedish regulation uses the expression 'disadvantage in practice' instead of 'put… at a *particular* disadvantage', which seems to indicate a somewhat broader scope than the corresponding Directives. Furthermore, there is in Swedish law with regard to the concept of indirect discrimination no explicit reference to the comparison with other persons. The expression 'objectively justified' is changed to 'justified for a reasonable goal'. Since there is no case law, it is too early to tell what 'the test to be satisfied' in these situations really is.

All the relevant Acts contain provisions defining harassment as a form of prohibited discrimination. Furthermore, the Acts oblige an employer/educational institution, which has knowledge of the fact that an employee/student feels that she 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 and all the acts include a provision which prohibits orders or instructions to discriminate against someone, directly, indirectly or through harassment.

The 1999 Disability Discrimination Act indicates that the prohibition of direct discrimination also applies when an employer, 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 implements such measures. The duty of reasonable accommodation is thus an integral part of the concept of direct discrimination. The 2001 Students at Universities Act also contains a rule on reasonable accommodation.

The issue of multiple discrimination has not really been dealt with by the courts, so far. The new comprehensive discrimination law will however solve many problems by making the same prohibitions apply to all grounds and by having one authority dealing with all grounds.

4. Material scope

The 1999 Acts apply whenever an employer, whether private or public and regardless of the number of employees, takes a decision to employ, decides to take a job applicant for an employment interview or undertakes other measures during the employment process; makes a decision concerning promotion or chooses an employee for training that will lead to promotion; makes a decision on or implements other measures concerning work experience; makes a decision on or implements other measures concerning other training or vocational guidance; applies salary or other employment conditions; leads or distributes work; or dismisses, terminates a contract with, lays off or undertakes other intrusive measures against an employee.
Self-employed people are not covered by the 1999 Acts. The 2003 Prohibition of Discrimination Act, however, covers the self-employed "in connection with qualification, certification, authorisation, registration, approval or similar arrangements that are needed or may be of importance in enabling an individual to engage in a certain occupation" as regards labour market policy measures and financial services. The same goes for membership of or involvement in labour unions or employers' unions as well as professional organisations.
The 2003 Act against Discrimination aims to prohibit discrimination on all grounds covered by the Directives 2000/43/EC and 2000/78/EC in areas of application other than working life, see section 2 above. The 2001 Student at Universities Act applies to decisions on access to, examinations in and other important actions against a student or applicant in higher education. The 2006 Pupils´ Discrimination Act applies to any action against pupils by the principal or other personnel.

5. Enforcing the law

Civil processes under the 1999 Acts are to be dealt with in accordance with the Labour Disputes Act. Should the individual concerned be a member of a trade union the Ombudsman'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.

The Ombudsmen may also represent a victim in accordance with the 2001 Students at Universities Act and the 2006 Act against discrimination and other degrading treatment of children and pupils. In these cases the claim is presented to the ordinary court system and the ordinary rules on civil process apply.

The same goes for the 2003 Prohibition of Discrimination Act. Some decisions covered by these Acts can also be appealed against within the administrative system. When relevant, criminal procedures may be initiated by a public prosecutor or the private party him or herself. The Ombudsmen do not have legal standing before the courts in criminal procedures. Other than the unions and the ombudsmen there are no organisations with a legal standing to represent victims of discrimination.

A shared burden of proof of discrimination is enforced by all the non-discrimination acts relevant to this report. 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 was accepted both in relation to criminal offence and civil damages claim.

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 and are nothing special with regard to discrimination. Generally speaking, sanctions must be said to be proportionate, effective and dissuasive.

6. Equality bodies

The Ombudsmen who counteract discrimination on various grounds are the key public institutions for the promotion of equal rights. There are 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). From the 1 of January 2009 the four ombudsmen will be merged into a single authority.

Each of these Ombudsmen thus 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 Ombudsmen are also required to give advice and support more generally to individuals and institutions; engage in education, information and opinion-shaping efforts to combat discrimination in their respective areas; and propose to the Government legal and other measures that may be of use to combat discrimination and monitor international developments. The Ombudsmen, – though appointed by the Government – have independent status to reach their own decisions in individual matters. They are 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 Ombudsmen have an ongoing dialogue with them.