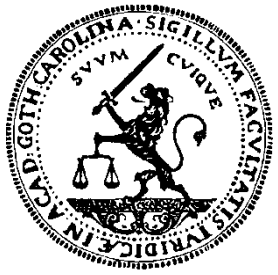

FACULTY OF LAW
Lund University

Sofia Söderberg

Multiple and Intersectional Discrimination in Swedish and EU Labour Law

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Supervisor Mia Rönnmar

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Contents

Summary

This study investigates whether there is protection against multiple and intersectional discrimination in employment in EU law and Swedish law. The study also examines whether the Swedish law is consistent with EU law concerning the protection against intersectional and multiple discrimination in employment. Multiple and intersectional discrimination are defined as two different legal concepts with different legal consequences.

Philosophical observations on the construction of discrimination and equality concepts and ideas about formal and substantive justice constitute a foundation for the study's analytical starting-points. To fulfill the purpose and answer the research questions, notions of multiple and intersectional discrimination are anchored in a broader description of the development and content of discrimination law in the EU and Sweden.

Sammanfattning

Denna studie undersöker om det finns skydd mot multipel och intersektionell diskriminering på arbetsmarknaden i EU-rätt och i svensk rätt. Studien undersöker också om den svenska rätten överensstämmer med EU-rätten gällande skyddet mot intersektionell och multipel diskriminering på arbetsmarknaden. Multipel och intersektionell diskriminering definieras som två olika rättsliga begrepp med olika rättsliga konsekvenser.

Filosofiska iakttagelser om konstruktionen av diskriminerings- och jämlikhetsbegrepp samt idéer om formell och materiell rättvisa utgör ett fundament för studiens analytiska ställningstaganden. För att fullfölja syftet och besvara frågeställningar förankras begreppen multipel och intersektionell diskriminering i en bredare beskrivning av diskrimineringsrättens utveckling och innehåll i EU och Sverige.

Abbreviations

CEDAW	The Convention on the Elimination of All Forms of Discrimination against Women
ECHR	The European Convention on Human Rights
ECtHR	The European Court of Human Rights
ECJ	The Court of Justice of the European Union
ESC	The European Social Charter
EU	The European Union
GOR	Genuine occupational requirement
ICCPR	International Covenant on Civil and Political Rights
ICERD	The International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILC	The International Labour Conference

ILO	The International Labour Organization
TEU	The Treaty on European Union
TFEU	The Treaty on the functioning of the European Union
The Charter	The Charter of Fundamental Rights of the European Union
The EC	The European Community
The EC Treaty	The Treaty Establishing the European Community
UDHR	The Universal Declaration of Human Rights
UN	The United Nations

1 Introduction

1.1 Background

1.1.1 A brief Swedish outlook on multiple and intersectional discrimination in labour law

Discrimination law is a topic that has been subject to much debate within Swedish labour law during the past two years.[1] The introduction of new discrimination grounds has been at the core of the discussion. This discussion is closely connected to the question of protection against multiple and intersectional discrimination, since these forms of discrimination concern situations when two or several of the grounds of discrimination occur simultaneously.[2]

The Swedish discrimination regulation changed when a new Discrimination Act (2008:567) entered into force on the 1 of January 2009. All the existing grounds of discrimination were gathered in this new piece of regulation. The protection against discrimination was expanded to include several, new grounds of discrimination.

Before the Discrimination Act was instituted, the protection against discrimination was to be found in several different acts based on what grounds of discrimination the protection concerned. The legislator's aim to make the new Discrimination Act uniform indicates that the government did not want the specific characteristics of each of the grounds of discrimination to affect the legislation more than necessary.

Nevertheless, it is indisputable that there are *different* grounds of discrimination with *different* societal causes and reasons for the need for protection against discrimination. Hence, the protection against discrimination is different for the different groups that are concerned by the grounds of discrimination. It differs, for instance, regarding the scope and the room for exceptions. The Swedish government has stated that the ones who belong to the groups that are protected against discrimination need a special protection, since they are at higher risk of becoming victims of structural discrimination than others.[3]

The core of the thought behind *all* discrimination regulation generally, is that it is possible to divide individuals into the groups that are protected by the regulation. In the Discrimination Act, the protected groups are individuals with a certain gender, a certain transgender identity or expression, certain ethnicity, of a certain religion or belief, with a certain

[1] For instance, protocol of the Swedish Parliament 2009/10:95 § 4.
[2] See definition in section1.6.
[3] Government Bill 2007/2008:95 p. 79 and Government Bill 2001/2002:72 p. 49.

disability, certain sexuality or certain age, see for instance 1 Chapter § 1 Discrimination Act. Thus, all individuals can be categorized into one of these groups in some way during some part of their lives. The idea is that the characteristics that categorize these groups are not allowed to be relevant within the scope of the law.

The aim with the Discrimination Act was, inter alia, to fully implement the EU Directives which establish the non-discrimination principle[4] and to make the Swedish discrimination regulation more uniform and easier to overview.[5] Hence, the EU law development must be examined to fully understand the aims and the considerations of the Swedish legislator.

A social agenda has been strengthened within EU in several different ways since the Lisbon Treaty came into force in 2009. It is possible that such an agenda might affect the material law in a Member State such as Sweden.

The original idea with the concept of the EU was that EU-law primarily aims to maintain the internal/single market in Europe by protection of economic rights and freedoms. This aim was, and still is, pursued through protection of free movement of goods, services, capital and persons force by counteracting discrimination on grounds of nationality and barriers to competition on the market. When the Lisbon Treaty came into force, Article 6 in the EU Treaty gave the Charter of Fundamental Rights (The Charter) the same legal force as a Treaty. This Charter protects the fundamental rights of individuals within the EU, not only the economical ones.

There was no underlying agenda to broaden the competence of the EU when the decision to give The Charter a new legal status was made. Despite the absence of such an agenda, it might be conceived as if *all* of the legal documents instituted within the EU should be interpreted with consideration of a new, general social aim, as a consequence of the new status of The Charter and of the fact that the EU has signed the UDHR (The Universal Declaration of Human Rights).

If some values are strengthened within the EU, such value changes may give certain effects on the existi
ng regulations within the EU and the future interpretation of these regulations by the Court of Justice of the European Union (The ECJ). Regulations in the Member States may be affected by these value changes, if they are based on EU law. Equality and non-discrimination law is at the core of the vast majority of the social values that have been given more significance in the EU.

[4] Government Bill 2007/08:95, p. 2.
[5] State Official Report 2006:22, p. 213ff.

1.1.2 Analytical starting-points

Reality always seems more complex than the situations that the legislator tried to predict whilst creating the means for protection. Even though it seems to be clear that all human beings are unique in *reality* – they do have a unique human value, unique experiences, etcetera – individuals are supposed to be *treated* as if they were alike under the law. The alikeness in protection is motivated by the goals and ideas that the law wants to realize in general. In Sweden this principle of equality under the law is stated in the Instrument of Government, 1 Chapter 2 § and 1 § Chapter 2.

These assumptions – that individuals are either completely alike by law *or* completely different in reality – are incompatible with the idea that it is possible to divide individuals into certain groups based on the characteristics pointed out in law. An individual cannot be completely alike *or* completely different in relation to somebody else, if this person is thought to have only *one* specific feature in common with this other person. If that would be the case, they would be only *partly* alike according to a defined, constructed common denominator. There are no legal grounds for a principle of all individuals being *partly alike.* So what does the legislator want to achieve with a legal protection that is based on a philosophical and logical paradox? How are these different categories supposed to relate to and interact with each other when the laws are applied in practice?

Ann Numhauser-Henning means that the reason for the legislator to consider anti-discrimination legislation for the protection of a certain group is that it has been found that this group has been subject to unacceptable discriminatory treatment in society at a structural level.[6] Sandra Fredman and Erika Szyszczak hold that the idea of equality is based on the assumption that there is some kind of scale or criterion that we all can be compared to, and that this criterion determines how individuals are divided into the different categories that are protected against discrimination.[7]

In other words, the legal concept of discrimination deals with the consequences of societal norms. This criterion or scale points out a way of being normal – and not marginalized in society. A problem when dealing with this norm is that it is unclear what we are compared to. To *what* are we supposed to be equal?[8] Another problem is to make sure that every unique individual is equal to this norm in a manner that is adequate for this particular person. *How* are we supposed to be equal by law, when in reality our human value and all our features are unique?

Altogether, these thoughts are an analytical background to the study as a whole. They can be summarized in the following general questions: What happens if it is impossible to separate the characteristics that signify the groups protected from discrimination from each other in a certain situation?

[6] Numhauser-Henning, Ann (2011) p. 115.
[7] Fredman, Sandra & Szyszczak, Erika (1992) p. 216.
[8] Fredman, Sandra & Szyszczak, Erika (1992) p. 216.

Or if these characteristics occur at the same time and are inextricably linked to each other? Is it possible to divide individuals into certain groups in need of protection in such a consistent manner that the law will protect us against *all* actions that we find to be contrary to the underlying values of moral and law?

1.2 Purpose

My purpose is to explore and analyse the protection against multiple and intersectional discrimination in Swedish and EU labour law. In the preparatory work to the Discrimination Act it is stated that the concept of multiple discrimination can be defined as follows (translated from Swedish)'…when someone is discriminated on several grounds. For instance when a woman is denied to wear religious clothing (hijab) at work and when there is a question of whether she has been discriminated because of her gender *or* if she has been discriminated because of her religion'.[9] In the report, it is stated that the protection against multiple discrimination is thought to be more accessible if there is only one authority that supervises the protection against all kinds of discrimination.[10] From this statement, I conclude that the concept of multiple discrimination does figure in Swedish law, at least in theory. It is unclear whether the concept of multiple discrimination is relevant in case law and whether the legislator has considered to take action against intersectional discrimination.

This study is a legal analysis of the applicable sources that affects the legal situation in Sweden. Swedish legal sources are of main interest for this specific aim, but because of the Swedish membership in the EU, it is impossible to entirely separate Swedish national law from EU-law and the principles behind the regulations within the union.

The main research questions are:

- Are individuals protected against multiple and intersectional discrimination in Sweden?
- Is the protection against multiple and intersectional discrimination in Sweden harmonized with EU law?

1.3 Limitations

This is a study within the area of European and Swedish labour law. The concept of discrimination may be examined within several different areas of law, but for different reasons, this study is limited to the area of labour law. One reason is that the Swedish Discrimination Act has a broad scope on the Swedish labour market, see Chapter 2 in the mentioned act. The broad scope

[9] State Official Report 2006:22 p. 193.
[10] State Official Report 2006:22 p. 193.

gives that there is a greater chance of finding relevant case law within this area. Moreover, a vast majority of the guiding case law from other judicial systems that concern the matter of multiple and intersectional discrimination involve situations of employment. Since these cases have been subject to relevant analysis, the theories and concepts following the analysis are adjusted to situations in the labour market.[11]

The following study will only focus on cases of multiple and intersectional discrimination on the grounds protected by the Swedish Discrimination Act. Hence, neither discrimination on grounds of form of employment, such as part-time employment nor discrimination on grounds of parental leave will be explored.

1.4 Method and materials

The aim of the study will be pursued through legal dogmatic analysis. In a Swedish context, this method is closely connected to the legal material that is used. In a Swedish context, a legal dogmatic analysis means an analysis of legal sources such as the wording of the legal act, the preparatory work, case law and legal doctrine in order to systematize and conclude the legal situation in a certain judicial system at certain time.[12]

Hence, the outcome of a study in which the legal dogmatic analysis is used is dependent on what sources are analysed and how the relation between these sources are perceived by the analyst. In the following study legal sources from different legal systems are analysed. Thus, the relation between these sources must be examined to maintain a desirable scientific transparency throughout the study.

As mentioned above, the Swedish discrimination regulation is partly a consequence of the Swedish membership in the EU. A vast majority of the EU legal sources are binding to the Swedish legislator. The EU protection against discrimination is stated in the TFEU, TEU and in several, different EU Directives. These Directives have been adopted under the Union treaties that were applicable at the time of the adoption of each Directive, in which the non-discrimination and the equality principle were established as fundamental EU legal cornerstones. Sweden is, as a member state, obliged to implement these Directives and make sure that they are applied efficiently in Sweden, this is stated in TFEU Articles 2-4 and by the ECJ when stating the so called Francovich principle.[13]

Neither EU law, nor Swedish law can be completely separated from the rights and freedoms stated in the European Convention on Human Rights (ECHR). The ECHR is applicable through EU legal principles within the

[11] See, for instance Kimberlé Crenshaw's analysis of case law (1989).
[12] Peczenik, Alexander (2005), p. 249ff.
[13] Joint cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, Judgment of the Court of 9 November 1995, ECR 1995 Page I-03843.

Union. Sweden is obligated to respect the ECHR rights and freedoms due to being a party of ECHR. Hence, these sources of law must be considered in the pursuit of the aim. The material that will be analysed is thus mainly regulations, preparatory work and case law from Europe – referring to EU law *and* the ECHR since these sources are linked to each other – and Sweden.

The most important material subjected to analysis in this study is Swedish and European case law. Case law indicates how the law is applied and implies how general legal change affects tendencies in individual situations. Case law is one of the most important legal sources in the EU. EU case law is more than just a complementary legal source to regulation instituted by the legislator, such as EU Directives and other regulations. Since a majority of the other legal sources in the EU are vague and are in need of interpretation to be applicable, the judgments of the ECJ have an important role when establishing what the outcome of binding EU law actually is in a specific situation.[14]

Swedish case law differs from EU case law in these aspects. The significance of EU case law is a consequence of inspiration by the Anglo-Saxon Common Law-tradition. Swedish case law is set within a Civil Law tradition.[15] This means that Swedish case law is more bound to the written law which is instituted by the legislator.

There are not many cases explicitly dealing with the issue of multiple and intersectional discrimination in European and Swedish case law. The ECJ has chosen not to assess more than one ground of discrimination in some cases when the factual circumstances actually involved other grounds of discrimination than the one subject to ruling.[16]

The lack of case law means that other legal sources than case law are particularly important in the following study, such as legal principles, preparatory works and doctrine. It is important to note that the doctrine, which addresses the issue, often is influenced by critical theories, such as those written by feminist scholars, which is why the theory section of the following study must be given significant evaluation.

In the EU, legal principles are important legal sources. The legitimacy of such principles is retrieved from the fact that the principles are common to the Member States of the EU and that they have legal support in several international legal sources and the EU legal sources, such as Article 2 of the TEU.[17]

It is important to note that there has been a recent change in EU law since the adoption of the Lisbon Treaty. The status and the structure of EU

[14] Hettne, Jörgen (2005) p. 30.
[15] Ibidem.
[16] Nielsen, Ruth (2009) p. 42
[17] Hettne, Jörgen (2005), p. 43.

primary law have changed as a consequence of the adoption of the Lisbon Treaty. The main parts of the legal body in the EU are, however, still the same and he material Case law that precedes the Lisbon Treaty is so forth still relevant. Changes following the Lisbon Treaty will be described in section 2.2.1 below.

In summary, it is in the relationship between all these different sources that I will find the material to analyse in order to answer the questions posed initially. As a complement to all of these biding legal sources, soft law might shed some light on the matter of multiple and intersectional discrimination, even though this source will not give any legal effects in Court. Soft law might give me answers to questions of the motive and the approach of the legislator, in Europe as well as in Sweden.

1.5 Outline

In Chapter 1, I state the purpose of the study, refer some analytical 'starting-points, formulate research questions and describe the method that I use. Further, I define the concepts of multiple and intersectional discrimination in a manner adjusted to the purposes of this study. The aim of the Chapter is to constitute the foundation for the following Chapters.

Chapter 2 is entirely devoted to EU law within the area of equality and non-discrimination. It explores and describes the developments and material substance of the current general legal landscape as it is designed by the different legal sources within EU law. The first section of Chapter 1 contains reviews of international discrimination law influencing the developments in EU and Swedish law. Noteworthy is that I consider the ECHR and case law from the ECtHR as a part of the EU law body, and thus describe discrimination law as regulated by ECHR in a subsection of Chapter 2.

Since Swedish law is dependent on the developments in EU law, Chapter 3 – exploring general Swedish discrimination law – has a complementary function in relation to Chapter 2. Nevertheless, Swedish law has its own features, which is why I will describe the Swedish legislator's aims and purposes with the Swedish Discrimination Act. Further, I will examine the material and personal scope of the Act, as interpreted in preparatory works and relevant Swedish case law from the Swedish Courts.

Emphasis in Chapter 2 and 3 is put on the different discrimination grounds, how they are defined, and to some extent, how they are distinguished from each other. Chapter 2 and 3 also contains definitions of discrimination used in EU and Swedish law. These descriptions are a basis for the explorations and analysis in the following Chapters, in which the interactions between the discrimination grounds are examined.

Chapter 4 explores whether there are legal sources protecting individuals against multiple and intersectional discrimination in EU and Swedish law,

and how situations involving two or several discrimination grounds are handled in case law. Firstly, EU law is referred in relation to what legal scholars have found concerning legal sources and case law developments in ECJ and ECtHR. Secondly, Swedish law is explored in the same manner. Emphasis is put on the Labour Court's rulings in cases involving more than one discrimination ground.

In Chapter 5, my result is analysed and I am linking the findings of the different Chapters to each other. The aim is to answer the research questions posed in Chapter 1, and to discuss how problems and question related to intersectional and multiple discrimination are treated in EU and Swedish law.

1.6 Definitions of multiple and intersectional discrimination

1.6.1 Theoretical development

The idea behind the concept of multiple and intersectional discrimination was introduced by feminist scholars in the early black liberation movement in the USA.[18] They pointed out that 'black' was equated with black men and 'woman' equated with white women too often, a tendency that lead to a marginalization of the specific problems that black women have.[19] Multiple and intersectional discrimination are concepts which have been topics of discussion within the academic debate about human rights.[20] There are several different opinions about how the concepts should be defined.[21]

Generally, these concepts point out cases of discrimination in situations when two or more grounds of discrimination occur simultaneously. What the term 'simultaneously' means in this matter, is nevertheless a matter of discussion. This discussion will be mentioned below when the different concept are examined. In an international context, the concepts have had some significance, but on a national level there has been little – if any – recognition of the problems related to multiple and intersectional discrimination.[22] Different understandings and treatments of the problems related to situations when two or more grounds of discrimination occur simultaneously have been developed over time. As mentioned, the problems have been particularly evident on the labour market. In the following sections, I will discuss and define some of them that I consider important for the following study.

[18] Ashiagbor, Diamond (2009), p. 265 reffering to G.T. Hull, P.B. Scott and B. Smith (1982).
[19] Ashiagbor, Diamond (2009), p. 265.
[20] Nielsen, Ruth (2009), p. 38.
[21] Makkonen (2002), p. 9.
[22] Ibidem.

1.6.2 Multiple discrimination

Multiple discrimination is both considered as a wider, general term that describes all issues related to situations involving more than one ground of discrimination, and a concept that describes a particular situation.[23] In this study, it will be used in the latter sense, as a concept describing a particular situation, distinguished from *intersectional discrimination*, described below.

Multiple discrimination is a concept that in the following study points out situations of discrimination when two or more different grounds of discrimination occur at the same time, but these different grounds are not dependent on each other when building a case. In these situations, the discriminatory treatment could have been based on *either* of the grounds of discrimination, and it does not really affect the legal assessment which one of them that motivated the discriminatory treatment. It may be considered as a concurrence of grounds of discrimination. Some legal scholars call this form of discrimination *compound* or *additive* discrimination.[24] The terms imply that it is a matter of adding one ground of discrimination to another. The grounds are conceived as if they exist side by side, more or less independent of each other. Whether or not this conception affects the legal outcome depends on what protection the applied legal system provides. Multiple discrimination may be considered as a more severe form of discrimination which implies heavier legal penalty, or it might not affect the legal outcome at all. In some cases, as referred below in 1.6.3, the legislation states that a plaintiff has to choose what grounds of discrimination to claim to be able to take action.

It is disputable if the concept of multiple discrimination really is separable from the concept of intersectional discrimination. In reality, it might not be possible to determine on what grounds a certain discriminatory treatment is based. A person's experience of another human being – for instance an employer's experience of an employee – is always an effect of a *mixture* of all the knowledge that this person has about different groups in society. For instance – a discriminatory treatment that is explicitly based on a person's sex may also be linked to the person's ethnicity, even though the judge or any legal practitioner is not aware of this. In a legal context, the reasons behind the discriminatory treatment are of importance to that extent that they give legal consequences. If it is unnecessary to settle all the reasons behind a discriminatory treatment from a legal perspective, the legal practitioners will not try to determine what actually caused the treatment besides what is necessary to prove in a legal context.

In this study there is an important reason behind the legal distinction between multiple and intersectional discrimination. The reason is that the different definitions may give different outcomes in a legal analysis in

[23] Gerards, Janneke (2007), p.171.
[24] Gerards, Janneke (2007), p.171 and Nielsen, Ruth (2009), p. 31.

certain situations. Whether or not this is the case will be subject to discussion in the final analysis.

1.6.3 Intersectional discrimination

Intersectional discrimination will in the following study be defined – in short terms – as discrimination based on two or more grounds of discrimination that are inextricably linked to each other in a certain situation. This definition is influenced by the theories of Kimberlé Crenshaw, and to fully explain what 'inextricably linked to each other' means in this study, her theories and examples will be explained. In other words, her theories and examples will describe how different grounds of discrimination can occur simultaneously in other ways than in situations of multiple discrimination, as this concept is described above. For the legal purposes of this study, the concept of intersectional discrimination should be distinguished from the concept of 'intersectionality', used within social sciences.[25] In reality, these concepts are closely linked to each other, but for legal purposes, it is fruitful to keep the conceptualization strictly legal.

Kimberlé Crenshaw addressed the question of how to handle the problems related to the problem of intersectionality in a legal context in 1989.[26] In *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*[27], she holds that there is a tendency to treat two of the common grounds of discrimination – race and gender – as mutually exclusive categories.[28] According to Crenshaw, this is a result of the fact that 'dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis'.[29] This single categorical axis can be compared with the instrument of measurement that Sandra Fredman and Erika Szyszczak refers to as a standard of equality.[30] The fact that the white, male norm is at the centre of the notion of equality implies that marginalized groups are supposed to conform to a world based on these values within the legal frame of non-discrimination.[31]

The typical example of this phenomenon is the question of black women's right to non-discrimination. Crenshaw illustrates her criticism directed towards the legal concept of equality by referring cases from US Courts in which the plaintiffs claim alleged discrimination of black women as a

[25] See for instance de los Reyes, Paulia, Molina, Irene & Mulinari, Diana (2002).
[26] First published in *The University of Chicago Legal Forum*, Vol. 1989, 'Feminism in Law: Theory, Practice and Criticism', p. 139-169.
[27] Crenshaw. Kimberlé 'Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics', reprinted in *Feminism and Politics*, Ed. Philips, Ann, Oxford University Press, Oxford, 1998.
[28] Crenshaw. Kimberlé (1998), p. 314.
[29] Ibidem.
[30] Fredman, Sandra & Szyszczak, Erika (1992) p. 216.
[31] Ibidem.

specific group: *DeGraffenreid vs General Motors*, [32] *Moore vs. Hughes Helicopter, Inc.* and *Payne vs. Travenol.*[34] She concludes that these cases are 'doctrinal manifestations of a common political and theoretical approach to discrimination which operates to marginalize Black women'.[35] All of these cases are employment claims and the relevant provision was the act called Title VII of the 1964 Civil Rights Act[36]. This was a statue that required the plaintiffs to plead *either* race or sex discrimination, which brings the question of multiple and intersectional discrimination to a head.[37]

In *DeGraffenreid v. General Motors*, the Court rejected an attempt to bring a lawsuit specifically on behalf of black women as a group. The Court stated that there was no legal ground for a decision that gives black women remedies as a special class. To combine statutory remedies to create a new 'super-remedy', which would give the plaintiffs relief, was beyond what the drafters of the relevant statue intended according to the Court. The Court meant that – no matter what the goal of the statue was – the Court would open a 'hackneyed Pandora's box' if they allowed the creation of new classes of protected minorities merely based on the mathematical principles of permutation and combination.[38] Crenshaw finds that the Court's statement implies that black women are protected against discrimination to the extent that their experiences coincide with those of either white women or of black men.[39] Hence, the Court refused to recognize the possibility of compound discrimination against black women, and instead used the experiences of white women as a reference for the concept of sex discrimination. Through this assessment, the Court obscured the distinct experience of black women.[40]

Moore v. Hughes Helicopters was a sex discrimination case in which the plaintiffs alleged that their employer discriminated employees on grounds of race and sex whilst promoting certain positions within the company. Crenshaw finds that the Court's statement shows how narrow the antidiscrimination doctrine actually is. According to Crenshaw, the Court stated that the plaintiff did not have the ability to represent *all* female employees.[41] Consequently, it was irrelevant that the plaintiff managed to prove statistically that black women were discriminated, since they were not

[32] *Emma DeGraffenreid et al. v. General Motors Assembly Division, St Louis*, judgment of July 15, 1977, United States Court of Appeals,Eighth Circuit, No. 76-1599, 558 F.2d 480.
[33] *Tommie Y. Moore v. Hughes Helicopters, Inc., a division of summa corporation*, judgment of June 16, 1983, United States Court of Appeals, Ninth Circuit, Nos. 81-5747, 81-6022, 708 F.2d 475.
[34] *Willie Mae Payne et al. v. Travenol Laboratories, Inc. and Baxter Laboratories, Inc.*, judgment of January 6 1978, United States Court of Appeals, Fifth Circuit, No. 76-1801, 565 F.2d 895.
[35] Crenshaw. Kimberlé (1998), p. 322.
[36] Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, as it appears in volume 42 of the United States Code.
[37] Ashiagbor, Diamond (2009), p. 268.
[38] Crenshaw. Kimberlé (1998), p. 317.
[39] Ibidem.
[40] Crenshaw. Kimberlé (1998), p. 321.
[41] Crenshaw. Kimberlé (1998), pp. 317-319.

by themselves protected against such discriminatory measures. Other women had to be included in their class to make the lawsuit successful. The same argument re-appeared in *Payne v Travenol*, a race discrimination case, but Crenshaw notes that the plaintiff in this case was better off, since they were not denied the use of meaningful statistics showing an overall pattern.[42]

In the end, Crenshaw admits that her critique of the different cases can seem like a paradox. She criticizes the judgment in *DeGraffenreid vs General Motors* because the Court refuses to recognize that black women can have other experiences than white women. The critisism directed towards the two judgments in *Moore vs Hughes Helicopters* and *Payne vs Travenol* is based on the fact that the Courts regarded black women as being so different, that they were denied to represent a larger class. However, she holds that this contradiction – to both criticize that black women are treated *differently* and that they are treated as if they were *the same* - manifests the conceptual limitations of 'the single-issue analyses that intersectionality challenges'.[43]

The single-issue analyses contain an assumption that the claims of exclusion - that discrimination is built upon – must be unidirectional. Crenshaw writes, metaphorically

> 'Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars travelling from any number of directions and sometimes from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination. […]But it is not always easy to reconstruct an accident. Sometimes the skid marks and the injuries simply indicate that they occurred simultaneously, frustrating efforts to determine which driver caused the harm. In these cases the tendency seems to be that no driver is held responsible, no treatment is administered, and the involved parties simply get back in their cars and zoom away.'[44]

What she means is that there is a specific kind of discrimination on two or more grounds that are inextricably linked to each other, and that the experience of such discrimination can be different *and* similar to the experience of either of these two grounds of discrimination. When the experience is similar, the situation is to be thought of as *double discrimination*, and when the experience differs, it is a separate understanding of *intersectional* discrimination. Thus, intersectional discrimination is not equivalent to the sum of the different grounds of discrimination – this kind of discrimination is will in this study be defined as *multiple discrimination* as described above. *Intersectional discrimination* is a very own form of discrimination in itself that requires a special kind of regulation.

[42] Crenshaw. Kimberlé (1998), pp. 320-322.
[43] Ibidem.
[44] Ibidem.

2 Equality and Non-Discrimination in EU law

2.1 The principle of equality and international influences

The principle of equality began to emerge as an organizing social principle with the advent of mercantile capitalism.[45] Equality is a relatively modern ideal in the European society, which emerged alongside greater economic and political freedom of individuals and a growing trade market. The ideal originates from liberal, political ideologies, such as the ones constructed by John Locke.[46]

At the heart of the principle of equality lies an older idea, founded by the ancient Greek philosopher Aristotle: the idea that individuals alike should be treated alike.[47] Embedded in this idea, is a contradiction between the notion of formal equality and material, or substantial equality. To achieve formal equality, only the treatment of individuals has to be alike. To achieve material equality, the outcome of the treatment of individuals must put the individuals in an equally favourable situation.[48] Formal and material equality are contradictory in the sense that it might not be possible to treat individuals alike in order to attain equally favourable situations and vice versa. Discrimination law is an emanation of the principle of equality. To withhold the equality principle in society, it is important not to distinguish people on non-acceptable grounds.

The principle of equality appears in several different judicial systems in the world. It is a basis of a great deal of legislation in national and international law. In Europe, the development of equality law in the EU has been of much importance to individuals' right to equality. The EU principle of equal treatment is an important legal source when dealing with cases of discrimination in Europe. The principle of equal treatment is a binding EU principle based on Article 2 of TEU, where it is stated that 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.

Equality law may have different aims and different outcomes depending on what the legislator wants to achieve. Equality as a mean to protect

[45] Fredman, Sandra (2002), p. 4.
[46] Fredman, Sandra (2002), p. 2.
[47] Numhauser-Henning, Ann, (2011), p. 113ff.
[48] Fredman, Sandra (2002), p. 7-15.

fundamental rights and equality as a mean to sustain free competition in the market might give different legal outcomes and legal interests.
Thus, the development of equality in Europe and Sweden must be linked to a broader, international human rights context to be fully understood.

As international actors obligated by the signing of the UDHR,[49] the EU and Sweden are obliged to submit to the requirements of this Declaration and thus to maintain the respect of human rights as they are declared within the United Nations (UN) in the Member States. In the UDHR Article 1, it is stated that 'all human beings are born free in dignity and rights'. This statement is followed in UDHR Article 2, where it is explicitly forbidden to make distinctions between individuals concerning the rights and freedoms protected by the Declaration of any kind, such as 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Subsequently, this list of protected grounds is not exhaustive. All distinctions are forbidden concerning fundamental rights in the UDHR. In UDHR Article 7 it is stated that all are equal before the law and shall be protected before the law without discrimination. This right refers both to the Declaration as such and to other sources of law. Lastly, the UDHR gives a special protection for equality and against discrimination in the labour market in Article 23. In Article 23 (1) it is stated that everyone has the right to work, to freely chose employment, to just and favourable conditions of work and to protection against unemployment. Article 23 (2) states that everyone, without any discrimination has the right to equal pay for equal work.

However, the UDHR is not in itself a legally binding instrument. It is debated whether it is considered to be a part of customary international law, which make it binding for states on this ground instead.[50] There are other UN legal instruments, often based on the UDHR, which are legally binding. There are general human rights Treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both of these instruments contain several provisions concerning equality and non-discrimination that differ in their scope.[51]

ICCPR Article 26 states that all individuals are equal before the law, equally entitled to protection of the law and against discrimination on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The protection against discrimination is more vague in the ICESCR; Article 2 (2) obligates states to guarantee that 'the rights enunciated in the present

[49] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14,Rome, 4.XI.1950. Text of the Convention as amended by its Protocol No. 14 (CETS No. 194) as from the date of its entry into force on 1 June 2010.
[50] Dixon, Martin, (2007), p. 345ff.
[51] Schiek, Dagmar, Bell Mark & Waddington, Lisa (2007), p. 8.

Convention will be exercised without discrimination of any kind'.[52] Thus, these instruments have open-ended lists of grounds of discrimination. Nevertheless, there is a tendency to take the enumerated grounds of discrimination in the ICCPR more seriously than others, since discrimination based on the grounds specifically 'places a heavy burden of proof on the State Party to explain the reason for differentiation'.[53]

One important function connected to both these general human rights Conventions is the monitoring by specific Convention bodies. The Human Rights Committee and the Committee on Economic, Social and Cultural Rights have the task to monitor the implementation of respectively of these Conventions through periodic national reports. The Human Rights Committee also has the role to receive individual communications concerning states that have acceded the Optional Protocol to the ICCPR. In the Optional Protocol of the ICCPR Article 5 (4) it is stated that the Human Rights Committee shall 'forward its views to the State Party concerned and to the individual' when a communication of this kind implies an alleged violation of the provisions of the ICCPR. The legal status of such views is however unclear.[54]

Neither ICCPR, nor ICESCR contain a legal definition of discrimination.[55] The Human Rights Committee which delivers communications on the ICCPR has stated that it does not consider Article 26 to absolutely ban discrimination, discriminatory treatment can be justified when it is based on objective and reasonable grounds.[56] The Human Rights Committee has also expressed that Article 26 of ICCPR gives protection against indirect discrimination in case law: *UN Human Rights Committee, 8 August 2003, Communication No. 998/2001, Althammer v. Austria*[57] (Althammer). The Committee states: 'a violation of Article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate...'[58].

Several other UN instruments specifically deal with equality and non-discrimination. Two important such instruments are The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All forms of Racial Discrimination (ICERD). Both CEDAW and ICERD are monitored by

[52] Schiek, Dagmar, Bell Mark & Waddington, Lisa, (2007), p. 8.
[53] Office of the High Commissioner for Human Rights, General Comment 18, Non-discrimination, 10 November 1989, ICCRP General Comment No. 18, Human Rights Committee, 37th session, UN Doc. HRI/GEN/1/REV. 1, para 6, as interpreted by Schiek, Dagmar (2007), p. 337.
[54] Schiek, Dagmar, Bell Mark & Waddington, Lisa (2007), p. 8.
[55] Schiek, Dagmar (2007), p. 336.
[56] Schiek, Dagmar (2007), p. 336-337 and *Althammer v. Austria,* UN Human Rights Committee, 8 August 2003, Communication No. 998/2001, U.N. Doc. CCPR/C/78/D/998/2001, section 10.2.
[57] *Althammer v. Austria,* UN Human Rights Committee, 8 August 2003, Communication No. 998/2001, U.N. Doc. CCPR/C/78/D/998/2001.
[58] *Althammer v. Austria,* UN Human Rights Committee, 8 August 2003, Communication No. 998/2001, U.N. Doc. CCPR/C/78/D/998/2001, section 10.2

Committees, CEDAW by the Committee on the Elimination of Discrimination of Women and ICERD by the Committee on the Elimination of Racial Discrimination (CERD).[59]

In the preamble of CEDAW it is stated that the State Parties to this Convention recognize the principle of equal treatment and non-discrimination affirmed by the UDHR, but at the same time they acknowledge the fact that there are inequalities in society that *actually* put women in a less favourable position compared to men. For this reason, instruments that specifically deal with the issue of discrimination against women are needed, even though it might contradict the basic idea of equal treatment. In the preamble of CEDAW it is stated that women as a group have a certain role in society – as inter alia contributors to the welfare of the family – and therefore are in need of special protection.

The term discrimination is in CEDAW defined as followed in Article 1: 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'. This wording illustrates how CEDAW has a clearly asymmetrical approach – all of the provisions in this instrument are constructed to protect *women* against discrimination, because it is based on the idea that women generally are in a less favourable position than others are.[60]

Article 11 of CEDAW gives special protection against discrimination in the field of the employment, since it obligates State Parties to eliminate discrimination against women ob a basis of equality of men and women in this particular field. This obligation entails, first of all, that a State Party shall ensure women the same right to work as men 'as inalienable right of all human beings'. The State Party is also obliged to ensure women the right to the same employment opportunities as men – including application of the same criteria for selection in employment. Moreover, the State Party shall guarantee women the same right to several other employment institutions, such as job security, benefits, social security, sickness, et cetera, as men.

In section 2 of CEDAW Article 11, it is stated that State Parties are obliged to make sure that women are ensured protection against discrimination based on features that are thought to be connected to women as a group in particular, such as pregnancy, maternity leave and marital status.

In ICERD Article 2, it is stated that 'racial discrimination' means 'any distinction, exclusion, restriction or preference based on race colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal

[59] Schiek, Dagmar, Bell Mark & Waddington, Lisa (2007), p. 9.
[60] Schiek, Dagmar, Bell Mark & Waddington, Lisa (2007), p. 71-72.

footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'. 'Race' is thus defined as a broad legal category, covering a variety of ethnic and race-related forms of discrimination. Several different group characteristics, such as cultural, historical or other common denominators can be distinguishing for the ones who are protected by this legislation.[61]

ICERD Article 2 obligates all State Parties to condemn and undertake to pursue racial discrimination by all appropriate means. State Parties are also obliged to promote understanding among all races which and to that end, they shall, inter alia, guarantee the right of everyone to 'work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable', stated in Article 5 (i).

ICERD and CEDAW are said to be to be legal instruments that are meant to repair factual inequality. If that would be the case, they would seek to purport substantial equality.[62] Both these conventions point at specific societal problems; discrimination on grounds of female sex or race does exist, and try to correct these problems by legal means.

Within the UN body called the International Labour Organization (ILO), the International Labour Conference (ILC) has adopted a number of instruments addressing equal opportunity, based on provisions in the ILO Constitution.[63] For the purpose of this study, the Convention No 100 on Equal Pay for Men and Women (1951) (Convention No. 100) and the Convention No 111 on Discrimination in Employment (1958) (Convention No. 111) will be referred below. Even though these instruments were instituted within the UN system, which traditionally deals with human rights, it has been discussed which relation these instruments have to human rights as a legal concept. All the ILO Conventions contribute to protection of human rights to a varying degree, but they are considered as emanated from economic and social rights originally.[64]

Convention No. 111 is one of few international instruments that actually define discrimination. In Article 1 (1) (a) of this Convention, discrimination is defined as 'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'. The definition of discrimination follows the same system as in CEDAW, with the difference in treatment based on a subjective feature of an individual.[65]

[61] Schiek, Dagmar, Bell Mark & Waddington, Lisa (2007), p. 43-44.
[62] Schiek, Dagmar, Bell Mark & Waddington, Lisa (2007), p. 28.
[63] Nielsen, Karl Henrik, (1994), p. 827-828.
[64] Valticos, Nicolas (1998), p. 135-136.
[65] Nielsen, Karl Henrik, (1994), p. 830-831.

The scope of Convention No. 111 seems to be narrower than the scope of Article 26 in the ICCPR, since Article 26 bans *any* kind of discrimination. However, Article 26 of the ICCPR bans *arbitrary* discriminatory treatment, which is why difference in treatment can be justified. Article 26 of the ICCPR is intended to ensure equal, not identical treatment. This is also the case with Article 1 (1) (a) of Convention No. 111. When applied, the difference between Article 26 of ICCPR and Article 1 (1) (a) of Convention No. 111 seems to be that Article 26 covers more ground of discrimination. [66]

2.2 Equality and Non-Discrimination regulations in EU-law

2.2.1 Treaty developments

In the following section, Treaty developments connected to EU equality and non-discrimination law will be explored. To overview the full picture of primary law, the chapter will contain a chronological review of such changes from the middle of the 20th century until present.

Hepple holds that equality appeared in European labour law after the Second World War, and has transformed through four stages since 1948 and onward.[67] The first stage is considered a period of human rights in the new world order, between the years of 1948-1958, the second stage a period of formal equality, between the years of 1957-1975, the third stage a period of substantive equality, between the years of 1976-1999 and the fourth stage a period of comprehensive and transformative equality, between the years of 2000-2004.

In the first stage, equality as an ideal appeared as a consequence of the horrors and misery under the Second World War. Thus, equality law functioned as a mean to achieve human rights goals in Europe at this time, through adoption of international instruments as the European Convention on Human Rights, the European Social Charter, the UN Declaration of Human rights, other UN legal instruments and ILO Conventions. During this period, there was a clear separation between civil and political rights and social and economical rights concerning the right to non-discrimination. This separation had a lasting negative effect on the development of equality as a fundamental human right in the area of labour law. The fact that the legal instruments only covered one or several of the different grounds of discrimination had the effect that a hierarchy among the different grounds arose.[68]

The second European stage of equality took place between 1957 – 1975.

[66] Ibidem.
[67] Hepple, Bob (2009), p. 129.
[68] Hepple, Bob (2009), p. 129-132.

As mentioned, Hepple means that the equality legislation that was instituted during this period had strong tendencies of formal equality. Yet, these tendencies were not a new phenomenon in Europe. As mentioned in section 2.1.1, the notion of formal equality has its roots in ancient Greece. It was expressed in Europe in the French declaration of the rights of man and the citizen in 1789, and was implemented in all the written European national constitutions in the nineteenth and twentieth centuries. Practical or economical equality was considered as something different from formal equality before the law, which is why the European democracies were able to withhold social, economic and cultural discrimination. Subsequently, social, economical and political pressure led to implementation of legal instruments to combat discrimination in these fields as well, initially on grounds of sex and race.[69]

The common legislation concerning equality and non-discrimination in Europe took a giant turn when Article 119 on equal pay in the Treaty of Rome was adopted in 1957. The Treaty of Rome established the European Community (the EC) and its Article 119 was subject to extensive debate among the Member States. The background of the implementation of Article 119 was that the Member State France did not want to be at a competitive disadvantage compared to the other Member States through being the only Member State with legislation on equal pay. Through Article 119, all the Member States were bound to such legislation on a supranational level.[70]

Article 119 stated that the EU Member States shall guarantee 'the application of the principle that men and women should receive equal pay for equal work'. The wording in this article indicates that the legislative development focused on formal equality at this time, since it is a question of the right to equal treatment under equal circumstances.[71] It is the fact that one person is treated less favourably than another person of the opposite sex that is the issue, not the treatment, or the outcome of the treatment independently.[72]

Equality law in the EU originated out of other ideals than the ideologies behind the human rights based instruments instituted after the Second World War. Yet, The European Community (EC), the Community that preceded the EU, was created to fulfil an aim to unite Europe within certain areas, mainly *economical* areas. Through Community law, Member States were bound not to impede free trade in the internal market through national legislation or national measures.[73] To achieve free trade in the internal market, the Community aimed at reaching competition on the same conditions between all the market participants in the Member States. In order to reach that goal, all discrimination on grounds of nationality was banned. In the Rome Treaty Article 7, it was stated 'any discrimination on

[69] Hepple, Bob (2009), p.134-135.
[70] Hepple, Bob (2009), p. 137.
[71] Hepple, Bob (2009), p. 129 and Numhauser-Henning, Ann (2011), p. 113ff.
[72] Fredman, Sandra (2002), p. 94-95.
[73] Numhauser-Henning, Ann (2011), p. 117f.

the grounds of nationality shall be prohibited' within the scope of the application of the Treaty. In Chapter 1 of the Rome Treaty, which specifically dealt with free movement of workers, it was stated in Article 48 that freedom 'of movement for workers shall be secured… [s]uch freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.' The conclusion to be drawn from these different provisions in the Rome Treaty, is that discrimination on grounds of nationality was its main focus, since it was economically motivated. The Treaty aimed to prevent any obstacle that could impede free movement in the internal market. Evidently, equal competition in the market was also the reason why bans on sex discrimination in the area of equal pay were instituted.

No action to implement secondary law based on Article 119 was taken until Council Directives were adopted in the seventies. During this period Directive 75/117/EEC on Equal Pay[74], Directive 76/207/EEC on Equal Treatment[75] and Directive 79/7/EEC on Social Security[76] were adopted under Article 119 of the Roma Treaty. These Directives clarified the legal situation and strengthened the protection against discrimination in the EU.[77] All mentioned Directives except the last one, Directive 79/7/EEC have been replaced. Since Directive 79/7/EEC is applicable within the scope of social security, it will not be explored in the following study.

Important case law on the principle of equality during the seventies brought the legal development in discrimination law forward. The *Defrenne-cases* [78] were such, overthrowing case law, in which the ECJ came to the conclusion that Article 119 was applicable both vertically, against a Member State, and horizontally between the employee and her employer.[79] Since the *Defrenne*-cases became the founding for principles set out in secondary law, they will be referred more narrowly in section 2.2.4.

The third stage of equality in Europe, between the years 1976 – 1999, was a reaction to the shortcomings of the second phase.[80] Hepple argues that focus shifted from formal to material/substantial equality in order to attain real justice among people in society.[81] Human rights activists during this period held that formal equality was inadequate in the fight for justice in society. The questions asked were: When are two people sufficiently similar to

[74] Dir 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relation to the application of the principle of equal pay of men and women, OJ L 45.
[75] Dir 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39.
[76] Dir 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6.
[77] Numhauser-Henning, Ann (2011), p. 117f.
[78] Case C-80/70 *Defrenne v Belgian State* (No 1) 1971 ECR 445; Case C-43/75 *Defrenne v Sabena* (No 2) 1976 ECR 455; Case C-149/77 *Defrenne v Sabena* (No 3) 1978 ECR 1365.
[79] Hepple, Bob (2009), p. 139.
[80] Hepple, Bob (2009), p. 129.
[81] Hepple, Bob (2009), p. 130.

qualify for equal treatment? Since in reality, no two individuals are identical, it is impossible to qualify them in a sufficient manner for equal treatment. Instead, we need to strive for substantive equality to be able to reach real and actual justice among people in society. To achieve such goals, legal instruments such as indirect discrimination and positive action were instituted.[82]

Hepple argues that there was a general tendency during this time to deal with the more structural forms of inequality, and that the regulation on equal treatment of part-time workers and full-time workers were examples of that. These regulations were attempts to attain the same goals as legislation on indirect discrimination, because part-time workers are dominantly women and full-time workers are dominantly men. Equality between full-time and part-time workers should statistically lead to the result that conditions for male and female workers are equal. Hence, both the regulations on part-time workers and regulation on indirect discrimination sought to affect the actual, discriminatory structures in society and to achieve substantial justice. [83]

Even though the concept of indirect discrimination appeared in case law already in *Defrenne* (No. 2), it was not codified until 1997 in the Burden of Proof Directive[84]. The provisions in this Directive are still in force, but in another shape in current secondary law, see section 2.2.4 below.

According to Hepple, the tendencies of substantive equality that led to the right of positive action started to appear during this period.[85] During the period of formal equality, positive action – meaning difference in treatment aiming to prevent structural injustices for a particular group – could be considered a breach of the EC Directives in force at the time.[86] Exceptions from the principle of equality in cases of positive actions were made in case law and later on implemented in secondary law, see section 2.2.4.

The Maastricht Treaty was signed in Maastricht on 7 February 1992 and entered into force on 1 November 1993. It contained 'provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community'. This Treaty introduced the concept of EU, EU citizenship and made way for a new regulating role for the Social Partners in the EU according to the European Social Dialogue.[87] The Treaty did not contain any significant substantial changes as regards equality and non-discrimination law. Article 6 of the Treaty turned into Article 7 and a wording on the decision process concerning secondary law based on this Article was amended. Several Directives handling discrimination and equality in secondary legislation were adopted during this period, such as

[82] Hepple, Bob (2009), pp. 147-148.
[83] Hepple, Bob (2009), p. 148.
[84] Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, OJ L 14.
[85] Hepple, Bob (2009), p. 148.
[86] Hepple, Bob (2009), p. 153.
[87] Numhauser-Henning, Ann (2011), p. 117.

Directive 92/85/EEC on Pregnant Workers,[88] Directive 96/34/EEC on Parental Leave,[89] based on the Framework Agreement between the Social Partners and Directive 97/80/EC on Burden of Proof.[90]

In 1997, the Amsterdam Treaty was adopted. The legal developments following the Treaty amendments due to the Amsterdam Treaty aim for comprehensive and transformative equality, according to Hepple.[91] Such tendencies appeared during the period between the years 2000 – 2004. Comprehensive equality is a concept referring to discrimination law that covers all grounds of discrimination, without any hierarchy between them. Transformative equality implies measure aiming at 'dismantling of systematic inequalities and the capabilities, enabling people to have the skills they need to participate in society, to engage in productive activities and to participate in decision-making'. Hepple means that transformative equality establishes a strong link between substantive equality and social and economical rights. If transformative equality is achieved, the strive for equality is allowed to effect the underlying social framework and is therefore transformative.[92]

Hepple holds that the amendment of Article 13 in the EC Treaty (Article 19 in the TFEU), which followed from the Amsterdam Treaty, was the turning point of comprehensive equality.[93] This Article obligated the Member States to take action to combat discrimination on new grounds of discrimination. In Article 13, it was established that the Council, without prejudice to the other provisions of the Treaty and within the limits of the powers conferred by it upon the Community, 'may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. From this wording it follows that the protection against discrimination was expanded to include new grounds and that the different grounds of discrimination were gathered in one primary-law. Yet, there were other Articles in the Treaty that also concerned equality and discrimination law.

Article 2, Article 3 (2) and Article 141 of the EC Treaty dealt with grounds of discrimination that were protected by the earlier Treaties as well; grounds of gender, aiming at equality between women and men.

Article 141 in the EC Treaty (now Article 157 TFEU) was a modified version of Article 119 in the Rome Treaty. The modification consisted in a new obligation for the Member States to ensure equal pay for work of equal

[88] Dir 92/85/EEC of 19 October 1992 on the introduction of measure sto encourage improvement on the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, O J L 348, pp 1-8.
[89] Dir 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145.
[90] Dir 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 14.
[91] Hepple, Bob (2009) p. 129.
[92] Hepple, Bob (2009), p. 154-155.
[93] Hepple, Bob (2009), p. 155.

value. Earlier, they were obliged to ensure equal pay *for equal work*. In the area of positive action, Article 141established that the principle on equal treatment do not prevent the Member States from 'maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers'. Earlier, positive action could be a breach of the EC Directives in force at the time.

A novelty in the protection against discrimination on grounds of gender was the mainstreaming approach stated in the Treaty. With the changes following the Amsterdam Treaty came the obligation to incorporate gender equality into all Community policies and actions. The mainstreaming approach concerned equality between women and men, and affected secondary legislation based on Treaty provisions governing such equality issues, such as Article 2, Article 3(2) and Article 141 in the EC Treaty. Ann Numhauser-Henning holds that there were differences in the legislative approach related to what grounds of discrimination the legislation concerned. The consequence of such differences was that legislation regarding discrimination on grounds of sex, based on Article 141 of the Treaty, was argued in an equality discourse, in contrast to legislation dealing with other grounds of discrimination – based on Article 13 of the Amsterdam Treaty. The latter were instead argued within the framework of non-discrimination.[94]

Sex equality law was given a special importance in the EU because of its' double aim – market and fundamental rights interest. Protection against other grounds of discrimination found in legislation based on Article 13 of the Treaty aimed clearly solely at human rights and social policies.[95] Such legislation were the Directive 2000/43/EC of June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,[96]the Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[97] and Directive 2006/54 of the European Parliament and of the Council of 5 July 2006 on the implementation of equal opportunities and equal treatment of men and women in matters of employment and occupation.[98]

The mainstreaming strategy concerning sex equality following the Amsterdam Treaty implies, according to Ann Numhauser-Henning, that focus on material, substantial equality in the EU did not appear until the period after the implementation of the Amsterdam Treaty. Through the

[94] Numhauser-Henning, Ann (2011), p 119.
[95] Ibidem.
[96] Council Directive 2000/43/EC of June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. OJ L180/22.
[97] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16.
[98] Directive 2006/54 of the European Parliament and of the Council of 5 July 2006 on the implementation of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204/2.

mainstreaming strategy, equal opportunity – the core of substantial equality – was incorporated into all Community policies and activities.[99]

The Nice Treaty followed the Amsterdam Treaty in 2001. The Nice Treaty did not add any substantial changes to equality and non-discrimination law.[100] However, before the Nice Treaty entered into force, the EU Charter of Fundamental Rights (The Charter) was adopted, in 2000. Later on, the Charter was integrated in the primary law of the EU through the Lisbon Treaty, see section 2.1.3.

After a long political process and debate, the Treaty of Lisbon entered into force on the 1 of December 2009. The Lisbon Treaty was developed as an alternative to the suggested Treaty establishing a constitution for Europe (The Constitution Treaty) (200416C).[101] A constitutional settlement was desirable, alongside a more effective institutional infrastructure that would make the Union more competitive on the world stage. The legislator had an ambition to overcome democracy and legitimacy deficits through the Lisbon Treaty.[102] In other words, the Treaty reform process was about effectiveness, reorganization and simplification of the EU. The aim was to connect the EU to its citizens by overcoming suspicion caused by the mentioned democracy and legitimacy deficits.[103] The outcome of the reform process was a structure with two Treaties: The Treaty on European Union (TEU) and The Treaty on the functioning of the European Union (TFEU). The TFEU is substantially the same as the formal EC Treaty, as amended after the Nice Treaty, but renamed and renumbered.

Syrpis holds that what actually changed in the EU with regard to labour law, since the Lisbon Treaty are the provisions outlining the values, aims and objectives of the union and the provisions dealing with fundamental rights.[104] To spot this change, it is favourable to compare the old EC Treaty Articles with the new Articles in the TEU. The EC Treaty Articles 2 and 3 balanced aims of free movement against social policy. Numhauser-Henning argues that there is a Treaty-based mainstreaming approach regarding sex equality, indicated in Article 3(2) of the EC Treaty.[105]

In Article 2 of TEU it is stated that the Union is founded on values such as respect for human dignity, democracy, equality, human rights, and that these values should be common to the Member States in a society characterized by e.g. pluralism, non-discrimination and equality between men and women. In Article 3 (3) of the TEU it is stated that:

> The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth

[99] Numhauser-Henning, Ann (2011), p 119.
[100] Craig, Paul & de Búrka, Gráinne (2003), p. 44.
[101] Syrpis, Phil (2008), p. 221.
[102] Numhauser-Henning, Ann (2011), p. 122 and Syrpis, Phil (2008), p. 220-221.
[103] Syrpis, Phil (2008), p. 222.
[104] Syrpis, Phil (2008), p. 228.
[105] Numhauser-Henning, Ann (2011), p. 123.

and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.'

Numhauser-Henning holds that TEU Article 3(3) implies a responsibility for the Member States to coordinate economic and employment policies as well as social policies.[106] The introduction of the term 'social market economy' in the TEU is by scholars seen as a successful attempt to establish the social Europe in the Treaty.[107] Such an attempt aims at a good interaction of the economic and the social spheres in Europe.[108] Some scholars question whether the German model of Social Market Economy is the right instruments for this aim.[109] According to Syrpis, it is possible to spot changes towards a social emphasis in these new wordings. However, he does not think that these changes necessarily mean that the ECJ will adjust their interpretation towards a social emphasis in practice.[110] Earlier, in the *Viking*,[111] *Laval*,[112] and *Rüffert*[113] cases, ECJ has stated that the social rights stated in EU law cannot imply 'disproportionate limitations on the employers cross border activities', and thus balance social rights against considerations of an economical nature.[114] The question is whether the changes in value and social rights provisions, would change the *balancing* in legal practice of the ECJ, and the actual outcome of EU law when applied in social areas, such as non-discrimination cases. Syrpis holds that the ECJ is not obligated to interpret the provisions in force in a different way than before, but he hopes hope that the Treaty changes encourage some judges to include social objectives in their balancing assessments.[115]

[106] Numhauser-Henning, Ann (2011), p. 123.
[107] Joerges, Christian & Rödl, Florian (2004), p. 10.
[108] Joerges, Christian & Rödl, Florian (2004), p. 18.
[109] Ibidem.
[110] Syrpis, Phil (2008), p. 228.
[111] Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti.* [2008] ECR I-10779.
[112] Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767.
[113] Case C-436/06, *Dirk Rüffert v Land Niedersachsen*, [2008] ECR I-01989.
[114] Syrpis, Phil (2008), p. 229.
[115] Syrpis, Phil (2008), p. 231.

The changes regarding fundamental rights that came with the Lisbon Treaty is firstly noticeable in TEU Article 6.[116] Firstly, this Article states that the Charter, changed in Strasbourg in 2007, is a part of primary law. Secondly, Article 6 (2) TEU obligates the Union to accede to the ECHR. Thirdly, the rights and freedoms stated in the ECHR and as they are recognized by the common traditions of the Member States of the EU, are binding as legal principles in EU law, according to Article 6 (3) TEU.

There are several important Articles on the subject of discrimination in TFEU, which all corresponds to the former Articles of the EC Treaty. Basic principles are set out in Articles 2, 4, 5, 7, 8, 9 and 10.[117] These Articles concern inter alia general goals of high levels of employment, the shared competence between the Union and the Member States concerning social policy, and the role of the Social Partners. Article 8 and 10 of TFEU define the Union's obligations regarding mainstreaming in discrimination matters. The Union aims, inter alia, to combat discrimination on several grounds, and to eliminate inequalities and to promote equality between men and women.

TFEU Article 19 is the formal Article 13 of the EC Treaty renumbered, and thus a very important basis for secondary EU discrimination law regarding all discrimination grounds except sex. The former Article 141 in the EC Treaty is now Article 157 in the TFEU and gives the Council authority to adopt legislation on the subject of sex equality in areas such as equal pay, equal treatment between men and women in matter of employment and occupation generally. Article 157 in TFEU also defines the scope for positive action.[118]

In summary, the legal situation of contemporary EU discrimination law is a consequence of Treaty developments over time. Today, the most relevant novelties of discrimination law at Treaty level is connected to legal instruments outside the actual Treaties, such as the EU Charter of Fundamental Rights and the ECHR. Hence, it is necessary to describe the structure and content of these legal instruments below. After such a description, an examination of the now binding secondary EU law will follow.

2.2.2 The European Convention on Human rights and the European Social Charter

For the purpose of exploring equality and non-discrimination law in EU, the European Convention on Human Rights (ECHR) is one important legal source which must be considered. It is a legal instrument adopted and ratified by the Council of Europe; a legal human rights body which all the

[116] Numhauser-Henning, Ann (2011), p. 123-124.
[117] Ibidem.
[118] Ibidem.

EU Member States are a part of. It is by far the most famous of the instruments that the Council of Europe has created.[119]

In the EU, an individual cannot claim his or her right or freedom guaranteed by the ECHR *directly* through the EU institutions. The ECHR rights and freedoms are instead recognized in the EU as general legal principles.[120] The EU is about to accede ECHR as a party, stated in Article 6(2) TEU, which means that the influence of this legal instrument is to be strengthened in the EU. Nonetheless, the ECHR has its own legal institutions, for example, the European Court of Human Rights (ECtHR). This Court can assess individual complaints based on the ECHR and its decisions are legally binding.[121]

There is no provision in the ECHR that provides comprehensive protection against discrimination in *all* legally regulated state activities. This means that it differs significantly from other human rights instruments, such as Article 26 of the ICCPR. Article 14, the key provision that deals with discrimination in the ECHR, does not have an independent role in the Convention. It is only applicable within the ambit of the other rights set in the ECHR and it is accessory, which means that it normally has to be applied in combination with one or several of the other Articles of the ECHR.[122] This conclusion is drawn from the fact that Article 14 is applicable in order to guarantee that the 'enjoyment of the rights and freedoms set forth in this Convention shall be secured'. Such enjoyment shall take place 'without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

Hence, Article 14 is a subsidiary article. What follows is that individuals are *firstly* entitled to obtain respect for their rights and freedoms, and *secondly* not to be discriminated within the *scope* of the protected rights.[123] It is important to note that the rights and freedoms of ECHR are not only applicable in the relationship between a State Party of the Convention and an individual. The state also has a positive obligation to protect against discrimination in private relationships between individuals, for example in matters of employment.[124]

Protocol 12 of the ECHR contains new provisions, which complements article 14 of the ECHR. Article 1 of Protocol 12 prohibits discrimination regarding 'any right set forth by law'. Consequently, the protocol provides a protection of a more independent character than Article 14. It is still unclear

[119] Schiek, Dagmar, Bell Mark & Waddington, Lisa (2007), p. 10.
[120] Case C-260/89, *Ellinki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, [1991] ECR I-02925, para 41-45.
[121] Schiek, Dagmar, Bell Mark & Waddington, Lisa (2007), p. 10.
[122] Harris, D.J. and others (2009), p. 577-579.
[123] *Cha'are Shalom ve Tsedek v France*, judgment of 27 June 2000 [GC], Appl. No. 27417/95, para. 86.
[124] Harris, D.J. and others (2009), p. 579.

what this provisions cover; if the wording 'law' extends to international law or is limited to domestic law already in force. The uncertainty of the breadth of Protocol 12 has resulted in a reluctance to ratify this protocol. Hence, it is a weaker protection against discrimination than Article 14 of the ECHR in practice. The protection based on Protocol 12 may be strengthened by application in case law by the ECtHR.[125]

Article 14 is not an absolute protection against discrimination. Limitations of the application of Article 14 have been set out in case law. The most important case is the so-called *Belgian Linguistic case.*[126] In this case the ECtHR establishes that it is possible to consider the circumstances under Article 14 by itself, even if other Articles are invoked as well. Later on, the Court has expressed, that Article 14 has an independent signification only if the circumstances imply 'a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case'[127]. It is rare that the ECtHR actually addresses the question of discrimination independently or at all when another right in the ECHR is invoked.[128]

The wording 'such as', when referring to grounds of discrimination in Article 14, indicates that the list of grounds of discrimination is not exhaustive. Hereof, when applying Article 14 in the case *Rasmussen v. Denmark,*[129] the ECtHR did not bother to establish on what specific grounds there has been a difference in treatment. It was sufficient to note that there has been a difference in treatment between a husband and a wife, and that the spouses were in an 'analogous situation'.[130]

It follows from the referred judgment that one of the most important criterions for the application of Article 14 is that there is a difference in treatment between to individuals. Another important criterion is that the individuals must be comparable through being in a similar, 'analogous situation'. However, recent legal development in case law shows that a different in treatment is considered unlawful only if it is not justified by an objective and legitimate aim.[131] The test of whether or not the difference in treatment was motivated by such objective and legitimate aim was developed in the *Belgian linguistic case*.[132] In this case, the ECtHR stated that 'such a justification must be assessed in relation to the aim and the effects of the measure under consideration, regard being had to the

[125] Harris, D.J. and others (2009), p. 611ff.
[126] '*In the case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium'*, judgment of 23 July 1968, Appl. No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64.
[127] Harris, D.J. and others (2009), p. 578 and *Aziz v. Cyprus*, judgment of 22 June 2004, Appl. No 69949/01, para 35 and *Dudgeon v. UK*, judgment of 23 September 1981, Appl. No. 7525/76, para 67.
[128] Harris, D.J. and others (2009), p. 578.
[129] *Rasmussen v. Denmark*, judgment of 28 November 1984, Appl. No. 8777/79.
[130] Harris, D.J. and others (2009), p. 579.
[131] Harris, D.J. and others (2009), p. 579 and *Zarb Adami v Malta*, Judgment of 20 June 2006, Appl. No. 17209/02, para 71.
[132] Harris, D.J. and others (2009), p. 586.

principles which normally prevail in democratic societies'.[133] The measure in question must also be proportionate in relation to the aim sought to be realised, according to the same judgment.[134] When assessing the proportionality between the means and the aims, the ECtHR will condemn arbitrary treatments, but give the State Party a margin of appreciation connected to what public interest that might be at stake in the particular case.[135] In *Petrovic v. Austria*[136] the ECtHR stated that 'the Contracting states enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law'.[137] The wideness of the margin of appreciation differs depending on what grounds of discrimination that is at stake in the specific situation. Some grounds of discrimination, for example race and sex, are considered to be more worthy of protection in a democratic society than others, which is why a State Party must invoke 'very weighty reasons' to justify difference in treatment based on these grounds.[138]

The sister convention of the ECHR is the European Social Charter (ESC). The ESC was adopted in 1961, but was revised in 1996. There are provisions on discrimination in both versions, but in the latter, they are clearer. In Article E of the 1996 version of ESC it is stated that the rights in the ESC 'shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status'. The ESC is monitored by the European Committee on Social Rights (ECSR), which is considered a 'quasi-judicial body', because it has the ability to make legal assessments of 'the conformity of national situations with the European Social Charter'.[139] The ECSR also receives periodical reports, issues 'conclusions' on how the states comply with the ESC and assesses collective legal complaints from certain organizations.[140]

The significance of the ECSR:s decisions in collective actions have increased in the field of non-discrimination law over the years.[141] An important decision is *Autism-Europe v. France*[142] in which the ECSR concluded a breach of Article E of the ESC.

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[133] *In the case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium'*, judgment of 23 July 1968, Appl. No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, para 10.
[134] *'In the case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium'*, judgment of 23 July 1968, Appl. No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, para 10.
[135] Harris, D.J. and others (2009), p. 588.
[136] *Petrovic v. Austria*, judgment of 27 March 1998, Appl. No. 20458/92.
[137] *Petrovic v. Austria*, judgment of 27 March 1998, Appl. No. 20458/92, para 87.
[138] Harris, D.J. and others (2009), p. 590ff.
[139] Schiek, Dagmar, Bell Mark & Waddington, Lisa (2007), p. 10.
[140] Ibidem.
[141] Schiek, Dagmar, Bell Mark & Waddington, Lisa (2007), p. 11.
[142] *Autism-Europe v. France*, European Committee on Social Rights, Complaint No. 13/2002, 4 November 2003.

2.2.3 The EU Charter of Fundamental Rights

There has been a long debate about and several attempts to institute fundamental rights in the EU. In the year 2000, the European Parliament, Commission and Council proclaimed a European Charter of Fundamental rights based on a document formulated by the Cologne European Council of June 1999. At that stage, it was not determined whether the Charter was going to be integrated in to the Treaties in some way.[143]

The creation of the Charter should be viewed in a context in which the enlargement of the EU was discussed – not only to include new Member States, but also to include people in the existing Member States who were considered excluded, inter alia because of poverty or other social shortcomings.[144] In this context, it was discussed whether the people in the EU have specific, social citizenship in the Union, which entitles them to social rights *beyond* the rights that national law in the Member States granted them. For example, national citizenship is not a criterion to be entitled to equal pay, a right that is stated in TFEU Article 141. Third country nationals that fall within the scope of EU law are also entitled to such social rights.[145]

The legal status of the Charter has changed with the adoption of the Lisbon Treaty. Now it is considered as a part of EU 'hard' law, meaning that it is s on the same status level as the Treaties, which is stated in TEU Article 6. Yet, in the same Article, it is also stated that the new legal status of the Charter is not meant to broaden the jurisdiction of the EU or to change the meaning of the jurisdiction as it is formulated in the Treaties.

In the Charter, Article 20 states the principle of equality in general. Article 21 states the principle of non-discrimination, and Article 23 lays down the specific principle of equality between women and men. For the purposes of this study, the scope and the wording of Article 21 will be examined.

Article 21 in the Charter covers all the grounds of discrimination in Article 19 of the TFEU.[146] Furthermore, Article 21 of the Charter also explicitly covers additional grounds, such as social origin, genetic features, language, political or other opinion, membership of a national minority, property and birth.

The scope of Article 21 is wide. It states that 'any discrimination on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'. The wording implies that the enunciation of grounds is not exhaustive, but an open-ended list. The fact that any discrimination is

[143] Bercusson, Brian (2006), p. 16.
[144] Ibidem.
[145] Bercusson, Brian (2006), p. 23.
[146] Koldinská, Kristina (2011), p. 251.

prohibited extends the scope even further. All kinds of acts or omissions, direct and indirect, manifest and hidden, including definitions and distinctions made in ECJ case law are therefore prohibited according to Article 21.[147]

Then again, there are exceptions, even if they are considered quite unclear in lack of ECJ case law. Article 21 has to be red in the light of Article 52 of the Charter, where it is stated that possible limitations on the principle 'must be provided for by law and respect the essence of those rights and freedoms'. Such limitations 'may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others'. It is unclear how Article 21 and Article 52 of the Charter are supposed to be applied in the employment sphere. Can distinctions in the employment sphere be legitimate for other reasons than the mentioned ones, as often is the case in national law?[148]

The possibility to justify a difference in treatment with legitimate aims, and thereby making it lawful, shows that Article 21 of the Charter is influenced by Article 14 of the ECHR. Such an influence is also explicitly stated in Convent 49 that is attached to Article 21.[149] Koldinská holds that Article 51 of the Charter indicates that that the principles in the Charter could point the way to mainstreaming, since she means that the wording of Article 51 tells the EU and the Member States how to develop policy in EU and how these policies should be implemented by national authority.[150] In Article 51 it is stated that the 'provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.'

As previously mentioned, Numhauser-Henning argues that action towards substantial equality was taken in an EU context when a mainstreaming approach was maintained in the provisions of the EC Treaty.[151] Hence, a mainstreaming approach reflected in the Charter could indicate that the Charter in itself strengthens aims of substantial equality in equality and non-discrimination law. Bercusson, on the other hand, argues that the non-discrimination principle in Article 21 refers to a purely legal declaration of equality. He holds that Article 21 withholds the idea of formal equality, since it does not imply any measures on indirect discrimination or positive action. Article 21 does not define discrimination. Bercusson argues that the Charter seems to refer to already existing definitions in supranational judicial institutions, such as other EU sources of law.[152] As mentioned, the Charter is set out prohibit any kind of discrimination, which include all the

[147] Bercusson, Brian (2006), p. 203-204.
[148] Ibidem.
[149] Bercusson, Brian (2006), p. 196.
[150] Koldinská, Kristina (2011), p. 251.
[151] Numhauser-Henning, Ann (2011), p 119.
[152] Bercusson, Brian (2006), p. 195-199.

forms of discrimination that are prohibited in other legal EU instruments, such as Directives.[153]

In contrast to Bercusson's arguments about the legal effects of the Charter in the area of discrimination, Costello argues that 'the creation of a new legal instrument without novel legal effects was inevitably beyond the legal expertise of the drafters and beyond the limits of self-restraint of the legal epistemic community who interpret the instrument'.[154] She holds that the Charter has introduced regulations that introduce novelties within the area of sex discrimination, since it aims at strengthening the protection of fundamental rights 'in the light of changes in society, social progress and scientific and social development' and have a new breadth of application. According to Costello, the Charter may overcome the market orientation within sex equality, it may reinforce weaker aspects of the accumulated regulation in the area and it may put sex equality in the broader equality context and make it transformative. The Charter includes a comprehensive range of different grounds of discrimination and it aims at maintaining civil, political, economic and social rights. Thus, Costello holds that the Charter has potential of legal change in areas such as positive action and multiculturalism.[155]

2.2.4 Secondary EU law

2.2.4.1 Secondary non-discrimination law in employment

Secondary legislation is the third major source of Union law and international agreements promulgated by the EU institutions. According to Article 288 in TFEU, Directives are one of the binding legal instruments considered as secondary legislation. [156] Hence, the following section will examine how equality and non-discrimination law has developed in relevant secondary law, consisting of Directives and case law.

There are several commonalities between the different EU Directives with provisions on equality and non-discrimination, regarding how some legal concepts are defined and the ways in which these instruments work in practice. Yet, there are also several differences depending on what grounds of discrimination are claimed, and what Treaty basis the Directive in question has. The principles set out in the older Directives mentioned in section 2.1.2.3 are still applicable, but somewhat developed and reshaped in new Directives.

Because the following study is in labour law, and because this section examines the secondary law *in force*, only three Directives will be explored concerning their content and structure; the Council Directive 2000/43/EC of

[153] Bercusson, Brian (2006), p. 203.
[154] Costello, Catheryn (2003), p. 112-113.
[155] Ibidem.
[156] Carlson, Laura (2007), p. 52.

June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[157] (the Race Discrimination Directive), the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[158] (the Employment Discrimination Directive)[159] and Directive 2006/54 of the European Parliament and of the Council of 5 July 2006 on the implementation of equal opportunities and equal treatment of men and women in matters of employment and occupation[160] (the Sex Discrimination Directive).[161]

As the names of the Directives indicate, they provide protection against discrimination in different situations and on different grounds. Protection against discrimination on grounds of sex was the first legal non-discrimination instrument in the EU, besides non-discrimination on grounds of nationality. For this reason, the Sex Discrimination Directive will be examined first, even though it is the most recent of the three mentioned.

2.2.4.2 The Sex Discrimination Directive

The Sex Discrimination Directive was adopted in July 2006 based on Article 141 (3) of the EC Treaty (now Article 157 TFEU), and it addresses the issue of sex discrimination. It has replaced and codified seven out of the twelve Directives previously issued with respect to sex discrimination. In the Sex Discrimination Directive, the formal provisions were gathered, alongside principles that earlier only had legal ground in case law.[162] Thus, the story of the Sex Discrimination Directive begins long before its actual implementation.

As mentioned, the principle of equal treatment, based on Article 119 in the Rome Treaty (now Article 157 TFEU), was applied in the *Defrenne*-cases[163] before *any* Directives on discrimination on grounds of sex were adopted. The question in *Defrenne* (No. 1)[164] was whether the wording 'pay' in Article 119 of the Rome Treaty included retirement pension. The ECJ responded that the wording 'pay' did not include retirement pensions. In *Defrenne* (No. 2)[165], the ECJ gave an airline stewardess the right to receive

[157] Council Directive 2000/43/EC of June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180.
[158] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16.
[159] Also known as the 'Framework Directive'. For the purposes of this study, the scope of the Directives will determine how they are referred to.
[160] Directive 2006/54 of the European Parliament and of the Council of 5 July 2006 on the implementation of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204/2..
[161] Also known as the 'Recast Directive'. For the purposes of this study, the scope of the Directives will determine how they are referred to.
[162] Carlson, Laura (2007), p. 55.
[163] Case C-80/70 *Defrenne v Belgian State* (No 1) 1971 ECR 445; Case C-43/75 *Defrenne v Sabena* (No 2) 1976 ECR 455; Case C-149/77 *Defrenne v Sabena* (No 3) [1978] ECR 1365.
[164] Case C-80/70 *Defrenne v Belgian State* (No 1) [1971] ECR 445.
[165] Case C-43/75 *Defrenne v Sabena* (No 2) [1976] ECR 455.

the same pay as the male stewards based on Article 119, and gave the Treaty Article direct effect, even though this was not explicitly stated in the Treaty. The ECJ reasoned that Article 119 forms 'part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples as is emphasized to the Treaty'[166]. In *Defrenne* (No. 3)[167], the ECJ went further and stated that there is a general principle prohibiting discrimination in the Community, because of 'the respect for fundamental personal human rights is one of the general principles of Community law'.[168] The judgment referred to the ESC and ILO Convention No. 111. This decision implemented a principle on equal pay, which was binding for the Member States after the judgment was issued in 1976. However, the Court expressed that the principle was only applicable for open and direct discrimination, not hidden and indirect discrimination.[169]

Traces of the ECJ:s statements in the *Defrenne*-cases are found in the preamble of the Sex Discrimination Directive Recitation No. 3 and 8. Preamble Recitation No. 3 states that equality between men and women is a fundamental principle in the EU based on Treaty provisions and the ECJ:s case law. The principle of equal pay between men and women is an important part of this principle of equality, according to Recitation No. 8. Hence, there is a distinction made between the principle of equal pay, as set out in *Defrenne* and further developed in later case law, and the principle of equal treatment. The former is regulated in Chapter 1 of the Sex Discrimination Directive, and the latter in Chapter 2 of the same Directive, as regards access to employment, vocational training and promotion and working conditions. Hereafter the principle of equal treatment as regulated in Chapter 2 will be further examined for the purposes of this study.

Article 1 of the Sex Discrimination Directive states that the aim of the Directive is to implement the principle of equality considering remuneration, including promotion and vocational training (a), working conditions, including pay (b) and social security schemes (c). Article 2 defines discrimination and is identical with Article 2 in the previous Directive 76/207/EEC as amended by Directive 2002/73/EC.

Article 14 of the Sex Discrimination Directive prohibits direct and indirect discrimination on grounds of sex in the public or private sectors as regards access to employment, vocational training, promotion, working conditions and involvement/membership in an organisation of workers etcetera. Article 2(1) (a) of the Sex Discrimination Directive states that direct discrimination occurs when 'one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation'. To

[166] Case C-43/75 *Defrenne v Sabena* (No 2) [1976] ECR 455, para 10.
[167] Case C-149/77 *Defrenne v Sabena* (No 3) [1978] ECR 1365.
[168] Hepple, Bob (2009), p. 139 & Case C-149/77 *Defrenne v Sabena* (No 3) [1978] ECR 1365, para 26.
[169] Hepple, Bob (2009), p. 139.

establish a case of direct discrimination, a situation in which different, and less favourable treatment in comparison with another situation on grounds of sex, must be sufficiently shown.[170] The first question to answer is thus; is there a less favourable treatment caused by a person's sex? The second question that follows is; compared to *whom* in *what situation* is this treatment less favourable?

To answer the first question there is a need to define what it means to be discriminated against on grounds of sex. Sex is not explicitly defined in the Directive. Yet, preamble Recitation No. 3 states that it is a matter of equality between men and women. Preamble Recitation No. 3 settles that 'the principle of equal treatment cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex'. Further Recital No. 3 establishes that the principle of equal treatment also applies to discrimination arising from the gender reassignment of a person. This principle arose before the implementation of the Sex Discrimination Directive. The ECJ has stated that discrimination based on transsexuality constitutes discrimination on grounds of sex in *P v S and Cornwall County Council*[171] already in 1994. The ECJ stated that the purpose and the nature of the rights granted by Directive 76/207/EEC also applied to discrimination when dismissing an employee due to the employee's gender reassignment.[172]

In *Grant v. South-West Trains,*[173] the ECJ distinguished between discrimination on grounds of sex and discrimination on grounds of sexual orientation in a manner that is heavily debated.[174] The ECJ found that an employer was allowed to refuse an employee an employment benefit granted to all the other employees and their spouses, since the benefit in question was granted only to partners of the opposite sex. Such a conclusion was drawn from the fact that the condition of the benefit 'the effect of which is that the worker must live in a stable relationship with a person of the opposite sex in order to benefit from the travel concessions, is, like the other alternative conditions prescribed in the undertaking's regulations, applied regardless of the sex of the worker concerned'.[175] Thus, the ECJ partly excluded the possibility of classifying discrimination against gays, lesbians and bisexuals based on gender. This decision may seem unfortunate, since the protection against discrimination on grounds of sex is stronger than discrimination on grounds of sexual orientation, since the scope of the Sex Discrimination Directive is wider than the scope of the Employment Discrimination Directive. [176]

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[170] Bell, Mark (2007), p. 205.
[171] Case C-13/94, *P v S and Cornwall County Council*, [1996] ECR I-2143.
[172] Case C-13/94, *P v S and Cornwall County Counci*l, [1996] ECR I-2143, para 20.
[173] Case C-149/96 *Grant v. South-West Trains*, judgment of 17 February 1998, ECR I-621.
[174] Gerards, Janneke, 'Discrimination grounds', In: Schiek, Dagmar, Bell Mark & Waddington, Lisa (2007), p. 76.
[175] Case C-149/96 *Grant v. South-West Trains*, judgment of 17 February 1998, ECR I-621, para 27.
[176] Gerards, Janneke (2007), p. 76.

Preamble Recitation No. 23 of the Sex Discrimination Directive establishes that discrimination on grounds of sex includes discrimination on grounds of pregnancy and marital status. The ECJ stated in 1990, that discrimination on grounds of sex includes discrimination on grounds of pregnancy, because 'only women can be refused employment on grounds of pregnancy...' [177] in *Dekker v VJV Centrum.*[178] Discrimination on grounds of marital status may be limited to discrimination on grounds of a marital relationship between partners of the opposite sex, according to the ECJ judgment in *P.D. and Sweden v. Council of Europe.*[179] According to Gerards, such a principle is problematic since it would constitute discrimination on grounds of sexual orientation.[180]

To answer the second question, about the comparison, there is a need to find a relevant comparator to establish direct discrimination. This is often a problem, since it is disputable what standard that is applicable in a certain situation. Is there even an actual person who is or has been in the same situation as the plaintiff? In *P v. S and Cornwall County Council,*[181] an employer decided to terminate the contract of an employee, after learning that the employee intended to undergo gender reassignment from male to female. The employee claimed that the decision constituted unlawful sex discrimination. In this judgment, the ECJ applied Directive 76/207/EEC and used the comparator test. [182] The ECJ stated that in a situation when 'a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment'.[183] Reference was made to the principle of equality as one of the fundamental principles of Community law and that the right not to be discriminated against on grounds of sex is a human right, which the ECJ is obligated to ensure.[184] Hence, the choice of comparator seems determined by consideration of fundamental values and pointing out a situation in which the comparator had not undergone such a gender reassignment.[185] In other words, the comparator was a hypothetical version of the plaintiff in the actual situation, the hypothetical aspect being that the ground of discrimination did not exist. In *Dekker v VJV Centrum*[186], the ECJ found no need for a comparator in a case of discrimination because of pregnancy, because in case of normal pregnancy, it is impossible to find a man in a comparable situation. In a case of pregnancy-related illness, it is

[177] Case C-177/88, *Dekker v VJV Stichting*, [1990] ECR I-3941, para 12.
[178] Case C-177/88, *Dekker v VJV Stichting*, [1990] ECR I-3941.
[179] Joined Cases C-122/99 and C-125/99, *P. D. and Sweden v. Council*, [2001], ECR I-4319.
[180] Gerards, Janneke (2007), p. 94.
[181] Case C-13/94, *P v S and Cornwall County Council*, [1996] ECR I-2143.
[182] Bell, Mark (2007), p. 205.
[183] Case C-13/94, *P v S and Cornwall County Council*, [1996] ECR I-2143, para 21.
[184] Case C-13/94, *P v S and Cornwall County Counci*l, [1996] ECR I-2143, para 19-20.
[185] Bell, Mark (2007), p. 208.
[186] Case C-177/88, *Dekker v VJV Stichting*, [1990] ECR I-3941.

thus possible to compare the women to a male worker absent because of ill health.[187]

The Sex Discrimination Directive also prohibits indirect discrimination, in Article 2(b) defined as 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'. As previously mentioned, the concept of indirect discrimination was introduced by the ECJ in case law.

Indirect discrimination as a legal concept in EU law was influenced by US case law, in which it was stated that even seemingly neutral criteria could be unlawful, if it sustains and reinforces a disadvantaged group's less favourable position.[188] In Europe, the legal concept indirect discrimination developed independently.[189] In *Sotgiu v. Deutsche Post*[190] the ECJ stated that the 'rules regarding equality of treatment... forbid not only over discrimination by reason of nationality but also all covert forms of discrimination, which, by the application of other criteria of differentiation, lead in fact to the same result' [191]. The Court held that the interpretation was necessary to guarantee the effective working of one of the fundamental principles of the Community – the ban on discrimination on grounds of nationality. [192]

As regards sex discrimination, the ECJ firstly developed the principle on indirect discrimination in *Jenkins v. Kingsgate (Clothing Productions) Ltd.*[193] The ECJ ruled on the grounds of Article 119 in the Rome Treaty (now Article 157 TFEU), and stated that a 'difference in pay between full-time workers and part time works does not account to discrimination prohibited by Article 119 of the treaty unless it is in reality merely an indirect way of reducing the level of pay of part time workers on the ground that that group of workers is composed exclusively or predominantly of women'.[194] In this decision, the concept was defined, but the employer's intent was a necessary element of the prohibition of indirect discrimination.[195]

Later on, the ECJ kept the definition established in *Jenkins*, but abandoned the requirement of intent in *Bilka – Kaufhaus GmbH v. Karin Weber von*

[187] Bell, Mark (2007), p. 216-217 and Case C-177/88, *Dekker v VJV Stichting*, [1990] ECR I-3941, para 12.
[188] Fredman, Sandra (2002), p. 106.
[189] Hepple, Bob (2009), p. 148.
[190] Case C-152/73, *Sotgiu v. Deutsche Post*, [1974] ECR 153.
[191] Case C-152/73, *Sotgiu v. Deutsche Post*, [1974] ECR 153, para 11.
[192] Case C-152/73, *Sotgiu v. Deutsche Post*, [1974] ECR 153, para 11.
[193] Case C-96/80 *Jenkins v. Kingsgate (Clothing Productions) Ltd*, [1981] ECR 911.
[194] Case C-96/80 *Jenkins v. Kingsgate (Clothing Productions) Ltd*, [1981] ECR 911, para 15.
[195] Schiek, Dagmar (2007), p. 355.

Hartz.[196] In *Bilka*, the ECJ also developed a test to establish whether such indirect discrimination is objectively justified. The test consists of three elements: the employer must show that the aims pursued by any policy that affects one sex more than the other corresponds to a real need(1), and that the distinction is appropriate(2) and necessary(3). The result of the test shows if a less discriminatory alternative was possible, and if that was the case, the policy was not objectively justified. According to the ECJ, national Courts shall decide whether the objective justification is sufficient.[197] Indirect discrimination on grounds of sex was proved by statistics in the *Bilka*-case, and hence it was sufficient that a majority of the group, affected by the disadvantage were women. [198] As mentioned, indirect discrimination on grounds of sex was codified in the Directive on the burden of proof[199], which is now replaced by the Sex Discrimination Directive.

The need for statistical evidence in cases of indirect discrimination shows that the assessment requires a comparator. The difference regarding comparison between direct and indirect discrimination is that in the latter case, groups will be compared to each other, not individuals. It may be disputable what evidence in forms of statistics s usable, and whether the difference between the groups is sufficient to constitute indirect discrimination.[200] In *R. V. Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*[201] the ECJ gave preliminary ruling on the question whether a proportion of 72 – 77,4 percent men in relation to 63,8 – 68,0 percent women was sufficient to establish that the proportion of women 'was considerably smaller'. The ECJ concluded that the national Court was to decide on this matter, but took the view that the statistics did not appear to show that a 'considerably smaller' percentage of women than men were able to fulfil the requirement.[202] Yet, the ECJ also suggested that a difference between the groups that was 'lesser' than 'considerably smaller' could prove indirect discrimination, it the difference was 'persistent and relatively constant'. [203]

This implies that the role of evidence showing how different groups are represented is crucial in cases of indirect discrimination. Ultimately, this underlines the importance of distinguishing the different groups from each other in a consistent manner in cases of indirect discrimination.

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[196] Case C-170/84, *Bilka – Kaufhaus GmbH v. Karin Weber von Hartz*, [1986] ECR 1607.
[197] Schiek, Dagmar, (2007), p. 357.
[198] Case C-170/84, *Bilka – Kaufhaus GmbH v. Karin Weber von Hartz*, [1986] ECR 1607, para 29.
[199] Directive 97/80/EC of 15 September 1997 on the burden of proof in cases of discrimination based on sex [1998] OJ L 14/6.
[200] Fredman, Sandra (2002), p. 109-110.
[201] Case C-167/97, *R. V. Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, [1999] ECR.1-623.
[202] Case C-167/97, *R. V. Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, [1999] ECR.1-623, para 63-64.
[203] Case C-167/97, *R. V. Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, [1999] ECR.1-623, para 61 as interpreted by Fredman, Sandra… p. 110.

Harassment is regarded as a species of discrimination, and is defined as follows in Article 2.1(c) of the Sex Discrimination Directive: 'where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment'. This definition is distinguished from the ban on *sexual* harassment, defined in Article 2(d) as 'any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person in particular when creating and intimidating, hostile, degrading, humiliating or offensive environment'. Because harassment has been conceived as an issue of discrimination, the ban on harassment has been considered as a ban on less favourable treatment in situations of harassment.[204] This issue has not been solved, but it is settled that there is no need for a comparator in harassment cases. [205]

The definition of discrimination in the Sex Discrimination Directive also includes less favourable treatment based on a person's rejection of or submission to harassment or sexual harassment, Article 2.2(a), instruction to discriminate against persons on grounds of sex, Article 2.2(b) and any less favourable treatment of a woman related to pregnancy and maternity leave, Article 2.2(c).

The role of evidence in equality and non-discrimination law is generally a disputed one. It has been shown, that it is hard to prove a case of discrimination of any kind. In early case law the ECJ held that in situations where there is a lack of transparency concerning the measures taken by an employer, it is for the employer to prove that the measures taken were not discriminatory.[206] Article 19 of the Sex Discrimination Directive states that Member States shall ensure the burden of proof shifts to the defendant, when the plaintiff shows facts before a Court, from which it may be presumed that there has been some kind of discrimination. The shift of the burden of proof means that the defendant hereafter must show that the alleged discrimination in question was no breach of the principle of equal treatment. In summary, this means that the burden of proof is lighter for the plaintiff, and heavier for the defendant, since the plaintiff only must make the alleged discrimination presumable.

As indicated when describing the ban on indirect discrimination above, there are several exceptions from the ban on discrimination, and they differ depending on what kind of discrimination is alleged. Measures considered as positive action are not unlawful, since they aim at combating discrimination on a structural level, even though they technically are a breach of the principle of equal treatment. Article 3 of the Sex Discrimination Directive explicitly states that 'Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty [now

[204] McGolgan, Aileen (2007), p. 477.
[205] McGolgan, Aileen (2007), p. 548.
[206] Case C-109/88 *Handels- og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening acting on behalf of Danfoss,* [1989] ECR 3199.

Article 157 TFEU] with a view to ensuring full equality in practice between men and women in working life'. Previously, Article 2 (4) of the Equal Treatment Directive 76/207/EEC stated that discrimination was banned 'without prejudice to measures to promote equal opportunity for men and women in particular by removing existing inequalities with affect women's opportunities'.[207] The ECJ was forced to deal with this matter in the nineties, when ruling in the *Kalanke-case*[208], the *Marshall-case*[209] and the *Abrahamsson-case*[210] . In the *Kalanke*-case, the ECJ held that Article 2 (1) and Article 2 (4) in Directive 76/207/EEG on the implementation of the principle of equal treatment, ban national regulation that gives an employer the possibility to affirmative action that automatically gives female applicants priority within employment areas in which they are in minority. The ECJ modified this principle in the *Marshall*-case, when it ruled that positive action is compatible with Articles on equal treatment, if there is an element of flexibility in the positive action measure. Even after the changes following the adoption of the Amsterdam Treaty Article 141, the flexibility requirement remained.[211] In the *Abrahamsson-case*, the ECJ stated that the measure applied to take positive action, must be proportionate to the aim pursued to the aim pursued.[212]

Besides the possibility to take positive action, there are formal exceptions from the bans on direct discrimination in the Sex Discrimination Directive. The justification test in cases of indirect discrimination has already been described, but there are also narrow exceptions from the ban on direct discrimination on grounds of sex. The Sex Discrimination Directive contains the following wording in Article 14(2) 'a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective and legitimate and the requirement is proportionate'. Such an exception from the ban on direct discrimination is called Genuine Occupational Requirement (GOR). Such an exception requires a case-by-case assessment, which means that the Courts have a central role in elaborating how this exception should be applied.[213] The ECJ has stressed the need for this exception to be given a narrow interpretation.
In *Johnston v. Chief Constable of the Royal Ulster Constabulary*[214], the ECJ ruled on Directive 76/207/EEC, considering whether a Chief Constable in the Irish Police Force discriminated women when dismissing a female

[207] Hepple, Bob (2009), p. 153.
[208] Case C-450/93 *Kalanke v Freie Hansestadt Bremen*, [1995], ECR I-3051.
[209] Case C-405/95 *Marshall v Land Nordrhein*, [1997] ECR I-6363.
[210] Case C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, [2000], ECR I-05539.
[211] Hepple, Bob (2009), p. 153.
[212] Case C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, [2000], ECR I-05539, para 55.
[213] Bell, Mark (2007), p. 283.
[214] Case C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651.

police officer as a consequence of a decision excluding women from general police duties, since these duties entailed carrying firearms. The Chief Constable held that armed women would become a more frequent target of assassination under the special circumstances of serious internal disturbances in Northern Ireland.[215] Determining for the outcome of the case was the principle of proportionality that the ECJ applied. The Court acknowledged the fact that women's safety may be such a genuine occupational requirement under certain circumstances, but it held that the dangers that female police officers were exposed to in Northern Ireland did not differ from the dangers that male police officers were exposed to in the same circumstances. [216] The Court held that derogation from an individual right such as the equal treatment of men and women, 'the principle of proportionality, one of the general principles of law underlying the Community legal order must be observed'.[217] The principle of proportionality 'requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view and requires the principle of equal treatment to be reconciled as far as possible with the requirements of public safety which constitute the decisive factor as regards the context of the activity in question' .[218]

The possibility to invoke exceptions or to justify discrimination differs widely depending on what grounds of discrimination is alleged. Such differences become obvious when exploring the Employment Discrimination Directive.

The Member States are obliged to ensure that judicial procedures are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, according to Article 17 of the Sex Discrimination Directive. Article 18 states that real and effective compensation shall be ensure to those who suffer damage because of discrimination on grounds of sex by the Member States.

In view of the fact that Directives may be invoked directly in the Member States before the national Courts by an individual against a state body (vertically), or against any party in order to interpret national laws in their light (horizontally), the provisions in Article 17 and Article 18 of the Sex Discrimination Directive secure that individuals are guaranteed effective remedies for breaches of the Sex Discrimination Directive.[219]

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[215] Case C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651, para 35.
[216] Case C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651, para 45-46.
[217] Case C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651, para 38.
[218] Case C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651, para 38.
[219] Craig & De Búrka (2003), p. 228.

2.2.4.3 The Employment Discrimination Directive

The Employment Discrimination Directive was adopted based on Article 13 of the EC Treaty (now Article 19 TFEU), because of the EU Commissions initiative to take action to combat discrimination in 1999.[220] It establishes a general framework for equal treatment in employment and occupation. The purpose of the Directive is expressed in Article 1, where it is stated that it aims to combat discrimination on grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, 'with a view to putting into effect in the Member States the principle of equal treatment'.

Article 3 of the Employment Discrimination Directive maps out the scope. The provision states that the Directive applies to both the public and the private sectors in relation to access to employment, vocational training, employment conditions and involvement in organisations of workers. Hence, the scope differs from the Sex Discrimination Directive, since the latter also is applicable in among others, occupational social security schemes according to Article 1 of the Sex Discrimination Directive. Article 3(2) of the Employment Discrimination Directive explicitly excludes difference of treatment based on nationality from the scope of the Directive.

Discrimination on the grounds listed in Article 1 is prohibited in Article 2 (1). Article 2(2) defines the different forms of discrimination in a similar manner as Article 2 of the Sex Discrimination Directive does. However, there is a difference concerning indirect discrimination in Article 2(2) (b). This provision states that 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would persons having a particular religion or belief, a particular disability, a particular age or a particular sexual orientation at a particular disadvantage compared with other persons unless (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliges, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice'. It is clear that the definitions of discrimination vary depending on what ground of discrimination is alleged.

Otherwise, the definitions comply with the Sex Discrimination Directive. Harassment is deemed a form of discrimination, Article 2.3, defined in a similar manner as in the Sex Discrimination Directive. It is also prohibited to instruct to discriminate against persons of any of the listed grounds in Article 1, Article 2.4 of the Employment Discrimination Directive.

[220] Numhauser-Henning, Ann (2010), p. 447.

The Directive does not contain a definition of the different grounds of discrimination. Concerning religion or belief, it is clear that the two are different, separable grounds of discrimination. In a European context, it is clear that 'religion' refers to all recognised religions and faiths, but it is unclear whether the term also includes unrecognised religions. The notion of religion does not only cover adoption or professing a religion, it also includes the right not to be imposed a religion or not to believe.[221] Generally, the most important case law concerning religion and belief originates from the ECtHR and rulings such as *Kokkinakis v. Greece*,[222] *Buscarini et al. v. San Marino,*[223] *and Leyla Şahin v. Turkey.*[224]

The definition of disability in the meaning of the Employment Discrimination Directive was assessed by the ECJ in *Sonia Chacón Navas v. Eurest Colectividades SA.*[225] The ECJ defined the concept of disability as 'a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'[226]. Disability was clearly distinguished from illness in the referred judgment. Unlike illness, disability is considered as probable to last for a long time, according to the ECJ.[227] Hence, the ECJ found that the plaintiff, who was dismissed from her employment because of a long-term leave of absence due to illness, was not discriminated against on grounds of disability.[228]

What discrimination on grounds of age refers to may seem clear in the light of the Directive; no difference in treatment between younger and older persons shall be allowed. Yet, the Member States of the EU often chose to define clarify that discrimination on grounds of age both refers to younger and older persons. [229] However, in the preamble Recital 8 of the Employment Discrimination it is stated that there is a need to pay special attention to supporting older workers, 'in order to increase their participation in the labour force'.

Sexual orientation is not defined in the Employment Discrimination Directive. In the EU Commissions proposal for the Employment Discrimination Directive, there is a distinction between sexual orientation

[221] Gerards, Janneke (2007), p. 102-110.
[222]*Kokkinakis v. Greece*, judgment of 25 May 1993, Appl. No. 14307/88.
[223] *Buscarini et al v. San Marino*, judgment of 18 Februari 1999 [GC], Appl. No. 24645/94.
[224] *Leyla Şahin v. Turkey*, judgment of10 November 2005 [GC], Appl. No. 44774/98, as interpreted by Gerards, Janneke (2007), p. 110.
[225]Case C-13/05, *Sonia Chacón Navas v. Eurest Colectividades SA,* [2006] ECR P. I-06467.
[226]Case C-13/05, *Sonia Chacón Navas v. Eurest Colectividades SA,* [2006] ECR P. I-06467, para 43.
[227]Case C-13/05, *Sonia Chacón Navas v. Eurest Colectividades SA,* [2006] ECR P. I-06467, para 45.
[228] Case C-13/05, *Sonia Chacón Navas v. Eurest Colectividades SA,* [2006] ECR P. I-06467, para 47.
[229] Gerards, Janneke (2007), p. 148.

and sexual behaviour, the latter not covered by the protection provided by the Directive.[230]

The protection against discrimination on grounds of sexual orientation is usually applied in cases where gays, lesbians and bisexuals have been subjected to discrimination.[231] Hence, the ECJ has stated that legislation that puts same sex couples in a less favourable position than married couples of the opposite sex constitutes discrimination on grounds of sexual orientation, if the circumstances are comparable concerning survivor's benefit after the death of a partner.[232]

The Employment Discrimination Directive allows for positive action for all grounds of discrimination listed in Article 1 in Article 7. However, disabled persons have a distinguished position concerning such actions. Article 7(2) states that 'the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions of facilities for safeguarding or promoting their integration into the working environment'. The distinguished position of disabled persons concerning positive action, reaffirmed by the above-referred definition of indirect discrimination on grounds of disability, implies that there is a wider space for justification concerning such differences in treatment.

Exceptions from the ban on discrimination in the Employment Discrimination Directive are allowed, but the room for such exceptions depends on what grounds of discrimination are invoked *and* on what form of discrimination that is alleged. Article 4 of the Employment Discrimination Directive states a GOR exception, similar to the exception in the Sex Discrimination Directive. However, since the Employment Discrimination Directive cover additional grounds of discrimination, the case-to-case application of the GOR test tends to differ depending on what grounds of discrimination are alleged. Characteristics of the protected groups considered as visible tend to explain cases when the GOR exception is applicable. However, such characteristics are often connected to grounds not covered by the mentioned Directive, such as race and sex.[233] Less visible characteristics connected to inter alia sexual orientation or belief, are rarely accepted as GOR exceptions, which makes the GOR exception in the Employment Discrimination Directive narrow in these aspects. Concerning indirect discrimination, there is a possibility to justify the discriminatory policy, similar to the provision in Article 2 of the Sex Discrimination Directive.

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[230] Commission of the European Communities, *Proposal for a Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation* Brussels, 25.11.1999, COM(1999) 565 final, 1999/0225 (CNS), p. 8.
[231] Gerards, Janneke (2007), p. 83.
[232] Case C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, [2008] ECR p. I-01757, para 72-73.
[233] Bell, Mark (2007), p. 278-279.

Discrimination on grounds of age has an exceptional position concerning the room for exception in the Employment Discrimination Directive. Article 6(1) states that difference in treatment on ground of age is not considered unlawful under a number of circumstances. Such differential treatment complies with the Directive if, 'within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objective, and if the means of achieving that aim are appropriate and necessary'. This exception reflects the difficulties in application of the age discrimination provision, caused by the fact that the ban is contrary to deeply founded traditions in the labour market.[234]

In practice, there is often a conflict between employment protection connected to a certain age of the workers and alleged discrimination on grounds of age.[235] Article 6 of the Employment Discrimination Directive has been applied several times by the ECJ. In *Werner Mangold v. Rüdiger Helm*[236], the ECJ stated that legislation that decreased the employment protection level for older workers went beyond what is appropriate and necessary in order to pursue the stated objective. The objective was vocational integration of unemployed older workers. The Court ruled that the legislation went beyond what is appropriate and necessary, because the defendant failed to show that fixing an age threshold as such 'regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned',[237] was objectively necessary to obtain the stated objective. In summary, the defendant must link the fixing of an age threshold in national legislation to aims concerning labour market structure and/or the concerned person's individual situation to justify a difference in treatment. Hence, the room for exceptions concerning discrimination on grounds of age must be considered as broad.[238]

As previously mentioned, the Employment Discrimination Directive includes a provision on the burden of proof in Article 10, similar to Article 19 of the Sex Discrimination Directive.

The EU Member States are obliged to take the necessary measures to ensure that any laws, regulations and administrative provision contrary to the principle of equal treatment are abolished and that provisions contrary to this principle in contracts or collective agreements, etcetera, be declared null and void or amended according to Article 16 of the Employment Discrimination Directive. Article 17 of the Employment Discrimination Directive compels the Member States to 'lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are

[234] Numhauser-Henning, Ann (2010), p 452.
[235] Ibidem.
[236] Case C-144/04, *Werner Mangold v. Rüdiger Helm,* [2005] ECR I-9981.
[237] Case C-144/04, *Werner Mangold v. Rüdiger Helm,* [2005] ECR I-9981, para 65.
[238] Numhauser-Henning, Ann (2010), p. 456-457.

applied'. As is the case with the corresponding Articles of the Sex Discrimination Directive, these provisions ensure that individuals are guaranteed effective remedies for breaches of the Sex Discrimination Directive.[239]

2.2.4.4 The Race Discrimination Directive

The Race Discrimination Directive was adopted in the 29 of June 2000.[240] It prohibits discrimination on grounds of racial or ethnic origin, stated in Article 2(1). It is based on Article 13 of the EC Treaty, now Article 18 in TFEU. Its purpose is to 'combat discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment', stated in Article 1. The principle of equal treatment means 'there shall be no direct or indirect discrimination based on racial or ethnic origin' for the purposes of the Race Discrimination Directive, which is settled in Article 2 (1).

In the preamble of the Race Discrimination Directive, Recital 3 and12, it is stated that the Directive is needed to obtain universal rights of equality and non-discrimination, to fulfil the objectives of the Treaty, in particular attaining high levels of employment and developing the EU as an area of freedom, security and justice. Recital 8 of the preamble states that the European Council has agreed to 'stress the need to foster conditions for a socially inclusive labour market by formulating a coherent set of policies aimed at combating discrimination against groups such as ethnic minorities'. The Directive also ensures the development of democratic and tolerant societies and the participation of all persons irrespective of racial or ethnic origin, according to the preamble, Recital 12. In Recital 14, it is stated that 'the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination' when implementing the principle of equal treatment irrespective of racial or ethnic origin.

The material scope of the Race Discrimination Directive is mapped out in Article 3. It is remarkably broad compared to the Sex Discrimination Directive and the Employment Discrimination Directive.[241] It is applicable within employment, vocational training, social protection, social advantages, education and access to goods and services that are available to the public. None of the other referred Directives is applicable within the area of education. Noteworthy is that the Race Discrimination Directive explicitly exclude discrimination on grounds of nationality from its scope, according to Article 3(2) in the Directive.

Article 2 of the Race Discrimination Directive defines the elements of discrimination. The construction of the different forms of discrimination on

[239] Craig & De Búrka (2003), p. 228.
[240] Bell, Mark (2008), p. 64.
[241] Bell, Mark (2008), p. 66.

grounds of race or ethnic origin; direct discrimination, indirect discrimination, harassment and instruction to discriminate is more or less identical with how these concept are defined in the Sex Discrimination Directive and the Employment Discrimination Directive.[242] In cases of direct discrimination, it is a matter of situations in which a person has been less favourably treated than another person is, has been or should be in a comparable situation. However, in *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v NV Firma Feryn* [243] the ECJ stated that it cannot 'be inferred […] that the lack of an identifiable complainant leads to the conclusion that there is no direct discrimination within the meaning of [the Race Discrimination Directive]. The aim of that Directive, as stated in recital 8 of its preamble, is 'to foster conditions for a socially inclusive labour market'. For that purpose, Article 3 (1) (a) covers, inter alia, selection criteria and recruitment conditions' [244]. Hence, there was no need to show that an individual was affected by a recruitment policy that excluded individuals of a certain origin to consider the policy in question as directly discriminatory.

Racial or ethnic origin is not explicitly defined in the Race Discrimination Directive.[245] Recital 8 in the preamble indicates that the protected group is considered 'ethnic minorities'. To define who is actually protected by the Directive in question is a complicated, possibly impossible task. A consequent and general distinction between individuals who belong to an ethnic minority and individuals who belong to an ethnic majority seems impossible to make.[246] Concerning the notion of race, the Race Discrimination Directive seems to be built on a contradiction – even though the Directive in itself is built upon the presumption that all human beings belongs to a single *human* race (Recital 6 of the preamble) it still recognizes the fact that individuals might be conceived as belonging to different, racial groups.[247] From the scope of the Directive, it can be concluded that nationality is considered as something different from race and ethnicity, since the scope explicitly excludes protection against discrimination on grounds of nationality. Yet, as Mark Bell has noted, there is an interaction between nationality and religion in the construction of ethnicity that has been recognized by the ECtHR in *Timishev v Russia*.[248]

A distinguishing feature for the Race Discrimination Directive is its relatively narrow scope for justifying discrimination. [249] Article 4 of the

[242] Ibidem.
[243] Case C-54/07, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v NV Firma Feryn*, [2008] ECR I-05187.
[244] Case C-54/07, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v NV Firma Feryn*, [2008] ECR I-05187, para 23.
[245] Ellis, Evelyn (2005), p. 30.
[246] Bell, Mark (2008), p. 17.
[247] Ellis, Evelyn (2005), p. 30.
[248] *Timishev v. Russia*, judgment of 13 December 2005, Appl. Nos. 55762/00 and 55974/00, para 37.
[249] Bell, Mark, *Racism and Equality in the European Union*, Oxford University Press, New York, USA, 2008, p. 66.

Directive provides the possibility of a GOR exception. From the wording, it seems as the exception is meant to function in the same way as when applying GOR exceptions provided by the Sex Discrimination Directive and the Employment Discrimination Directive. In fact, Article 4 is only applicable in very limited circumstances where ethnic origin is relevant to an individual's ability to perform work tasks.[250] Positive action is allowed and considered a lawful exception from the principle of equal treatment provided by Article 5.

The burden of proof, as stated in Article 8 of the Race Discrimination Directive, has the same construction as provided by the Sex Discrimination Directive and the Employment Discrimination Directive – the burden of proof shifts from the plaintiff to the defendant if the plaintiff shows facts from which it may be presumed that there has been discrimination.

Article 14 and 15 of the Race Discrimination Directive are identical with Article 16 and 17 of the Employment Discrimination Directive, and thus obliges The EU Member to ensure that individuals are guaranteed effective remedies for breaches of the Race Discrimination Directive.[251]

In summary, the differences between the referred Directives seem to be largely influenced by what grounds of discrimination that is invoked in specific situation.

[250] Bell, Mark, *Racism and Equality in the European Union*, Oxford University Press, New York, USA, 2008, p. 66.
[251] Craig & De Búrka (2003), p. 228.

3 Equality and Non-Discrimination in Swedish law

3.1 Development of Non-Discrimination in Swedish labour law

The foundation of Swedish discrimination law is instituted in the Instrument of Government Chapter 1 § 2, where it is stated that public power shall be exercised with respect for all human beings equal value and the individual human beings freedom and dignity. In Chapter 1 § 9, it is stated that all human beings are equal before the law. Hence, the Swedish legislator is obliged to implement the principle of equality in all pieces of legislation.

The late development of national Swedish non-discrimination law has been largely influenced by EU legislation after the Swedish membership in 1995. In Chapter 10 § 6 of the Instrument of Government it is stated that parts of the legal competence is transferred to the EU. Thus, the legal concepts and the structure of the Swedish instruments are best understood with EU law in mind. Sweden is also a party of all UN instruments mentioned in section 2.1 and the ECHR is directly applicable as Swedish law (SFS 1994:1219).

The first piece of Swedish discrimination legislation was instituted already in 1979, long before the EU membership: the Act on Equality between Women and Men at Work (1979:1118) (The Equality Act of 1979). The Equality Act of 1979 was subsequently altered several times after the Swedish EU membership.[252]

In the area of employment, no regulation on other grounds of discrimination than sex was instituted until 1994, when the Act against discrimination on grounds of ethnicity was implemented (1994:134). In 1999, several Acts on discrimination were adopted; the Act on measures against discrimination in employment on grounds of ethnicity, religion or belief of 1999,[253] the Act prohibiting discrimination on grounds of disability,[254] the Act prohibiting discrimination on grounds of sexual orientation in employment.[255] Thus, the protection was strengthened.

[252] Gabinus Göransson, Håkan and others (2011), p. 21.
[253] Lagen (1999:132) om åtgärder mot diskriminering i arbetslivet på grund av etnisk tillhörighet, religion eller annan trosuppfattning.
[254] Lagen (1999:132) om förbud mot diskriminering i arbetslivet på grund av funktionshinder.
[255] Lagen (1999:133) om förbud mot diskriminering i arbetslivet på grund av sexuell läggning.

In 2002, further developments within non-discrimination labour law occurred. The Act (2002:293) prohibiting discrimination against part-time workers and workers with temporary employment was adopted, which is still in force. For the purposes of this study, this piece of regulation will not be further explored. During the same year, the Government appointed a Committee. The Committee's task was to consider the need of a uniform legislation against discrimination that includes several areas of society and whether the legislation in force complied with EU law. The outcome of the investigation performed by the Committee was the Government Official Report (2006:22) 'A coherent discrimination legislation' (En sammanhållen diskrimineringslagstiftning). Eventually, the Government issued a bill (2007/2008:95) with a proposal for a new act on discrimination based on the report, but with certain changes. The act was adopted by the parliament and entered into force as the Discrimination Act (2008:567) on 1 of January 2009.[256]

Numhauser-Henning criticizes the recent changes in Swedish Discrimination law regarding the aim to make the protection against discrimination on all grounds coherent. She holds that the changes might entail a risk for the legislation to focus on the lowest common denominator between the different grounds of discrimination. Since the societal structures and causes behind discrimination diverge, the lowest common denominator between the grounds of discrimination is the principle of equal treatment from an Aristotelian point of view. If the maintaining of the Aristotelian principle of equal treatment would have been sufficient to combat discrimination in society, legislation prohibiting discrimination is unnecessary, because such a principle is embedded in the legal system in itself. Numhauser-Henning argues that legislation prohibiting discrimination should focus on the perceived, actual differences in treatment connected to each of the discrimination grounds, in order to succeed in the aim to combat discrimination.[257]

Further, Numhauser-Henning holds that the changes following the adoption of the Discrimination Act in 2009 are of a formal, more than of a material character. The legal development of the protection against discrimination on each of the grounds was already more or less coherent, since the previous Acts on discrimination were applied and interpreted in a similar manner. A coherent non-discrimination legislation such as the Discrimination Act will only make it obvious that the Aristotelian principle of formal equality is not sufficient to combat discrimination in society. Numhauser-Henning asserts that the combat against discrimination must entail a pluralistic definition of discrimination implying measures such as positive action in a broad sense.[258]

[256] Gabinus Göransson, Håkan and others (2011), p. 22.
[257] Numhauser-Henning, Ann (2009), p. 514.
[258] Numhauser-Henning, Ann (2009), p. 515-516.

3.2 The Swedish Discrimination Act

3.2.1 The purpose of the Discrimination Act

The Discrimination Act replaced seven older instruments on discrimination; The Equality Act of 1991,[259] the Act on measures against discrimination in employment on grounds of ethnicity, religion or belief of 1999,[260] the Act prohibiting discrimination on grounds of disability,[261] the Act prohibiting discrimination on grounds of sexual orientation in employment,[262] the Act on Equal Treatment of students at Universities,[263] the Act prohibiting discrimination[264] and the Act prohibiting discrimination and other degrading treatments of children and pupils.[265]

Generally, the Discrimination Act of 2008 gives the same level of protection against discrimination as earlier legislation. Several of the provisions in the previously existing Acts are now found in the Discrimination Act.[266] Older preparatory works are still usable when applying the new Discrimination Act, but they shall be used with precaution, since there are material changes in the new regulation.[267]

One of the most important material changes is the implementation of the new grounds of discrimination transgender identity or expression (könsöverskridande uttryck eller identitet) and age. The introduction of discrimination on grounds of age was motivated by the obligation to fully implement EU Directive 2000/78/EC in Swedish law.[268] Concerning protection on the grounds of age, a new form of justification was introduced, complying with the room for justification of discrimination on grounds of age in EU law.

In Sweden, there is a system of Ombudsmen, institutions whose supervision aims to safeguard the respect for human rights in authority practice.[269] Before the implementation of one, uniform Act on discrimination, the different grounds of discrimination had an 'ombudsman' of their own.

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[259] Jämställdhetslagen 1991:433.
[260] Lagen (1999:132) om åtgärder mot diskriminering i arbetslivet på grund av etnisk tillhörighet, religion eller annan trosuppfattning.
[261] Lagen (1999:132) om förbud mot diskriminering i arbetslivet på grund av funktionshinder.
[262] Lagen (1999:133) om förbud mot diskriminering i arbetslivet på grund av sexuell läggning.
[263] Lagen (2001:1286) om likabehandling av studenter i högskolan.
[264] Lagen (2003:307) om förbud mot diskriminering.
[265] Lagen 2006:67) om förbud mot diskriminering och annan kränkande behandling av barn och elever.
[266] Gabinus Göransson, Håkan and others (2011), p. 29
[267] *Ett starkare skydd mot diskriminering*, proposition 2007/08: 95, 13 of March 2008, p. 485.
[268] Proposition 2007/2008:95 p. 45.
[269] *Regeringens webbplats om mänskliga rättigheter, Ombudsmännen,* 2011-09-29, http://www.humanrights.gov.se/extra/pod/?id=11&module_instance=6&action=pod_show

These different ombudsmen were condensed into one supervisory authority with the name 'Diskrimineringsombudsmannen'.

Since the Discrimination Act came into force, some amendments have been suggested concerning active measures to promote equality on the labour market in a Government White Paper (2010:7).[270] The proposed amendments would mean that the social partners would be obligated to cooperate with regarding active measures, with the beneficiaries of such active measures. To promote equal rights and opportunities, employers shall be responsible for the implementation of active measures. The proposed amendment would mean that this obligation to promote equal rights and opportunities shall entail *all* grounds of discrimination.[271] Under current law, such an obligation only applies to discrimination on grounds of sex, ethnicity, religion or belief.[272] Yet, the legislator wants to limit the range of this obligation to working places with more than 25 employees, a demand that has been heavily debated.[273]

The main purpose of the Swedish Discrimination act in force, is to 'combat discrimination and in other ways promote equal rights and opportunities regardless of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age', which is stated in 1 Chapter 1 §. Such protection is given, because the right to non-discrimination is considered a human right that the legislator guarantees to everyone through the ban on discrimination in the Discrimination Act.[274]

The aim of the Discrimination Act is to maintain a tolerant and humane Swedish society, characterized by diversity and respect for individual human rights and freedoms. Further, the legislation is considered necessary to ensure that pursuit of equality before the law prevails, that the right to equality is respected in all areas and that all human beings are treated with respect for their person and unique human value. The principle of equality is generally considered as an expression for the free, democratic society and its' values.[275]

The legislator states in the preparatory works of the Discrimination Act, that a society which safeguards the equal value of all human beings, is a society that gives every individual the opportunity to grow and develop on her or his own conditions and by his or her own choice.[276]

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[270] State Official Report 2010:7.
[271] Gabinus Göransson, Håkan and others, *Diskrimineringslagen*, Second Edition, Norstedts Juridik, Stockholm, 2011, p. 23.
[272] Gabinus Göransson, Håkan and others, *Diskrimineringslagen*, Second Edition, Norstedts Juridik, Stockholm, 2011, p. 97.
[273] Gabinus Göransson, Håkan and others, *Diskrimineringslagen*, Second Edition, Norstedts Juridik, Stockholm, 2011, p. 23.
[274] Proposition 2007/2008:95 s. 79 och proposition 2001/2002:72 s. 49.
[275] Proposition 2007/2008:95 s. 79.
[276] Ibidem.

The legislator's aim to protect the listed groups against discrimination is motivated by the perception of these groups as particularly vulnerable in society in comparison with other societal groups. In spite of the identification of particularly vulnerable groups in society, the legislator explicitly states that the listed groups only are examples of what groups at risk of being victims of discrimination in society.[277]

To fulfill the purpose of the Discrimination Act, as outlined above, the legislator has instituted two different general, legislative approaches. Firstly there are provisions that prohibit certain conducts and policies. Secondly, there are provisions which obligate to prevent discriminatory treatment. Which provisions to apply in a certain situation, depend on (1) what grounds of discrimination are alleged (2) within what area of society the alleged discriminatory treatment occurred. Thirdly, there is a Chapter regulating active measures, applicable within a certain societal areas regarding certain grounds of discrimination. The Discrimination Act is thus structured in a way that shows that it applies differently within different areas of society. It seems less clear that the different grounds of discrimination are treated differently. In the preparatory works, the legislator holds that there is no hierarchy between the different grounds of discrimination[278]. Hence, the different grounds of discrimination are treated similarly to the extent considered possible. Nevertheless, as we shall see below, the protection against discrimination does differ depending on what ground of discrimination is alleged in a certain situation.

3.2.2 The ban on discrimination in Swedish labour law

3.2.2.1 The personal and material scope of the Discrimination Act

The Swedish Discrimination Act begins with Chapter 1, containing 'Introductory provisions', applicable within all different scopes of the legislation in question. This section states the purpose of the Act (§1), the outline of the Act (§2), the binding force of the legislation concerning contracts or agreements (§3), common definitions of discrimination (§4) and common definitions of the different grounds of discrimination (§5).

Chapter 2 provides provisions prohibiting discrimination and reprisals. It contains different subsections mapping out the scope within different societal areas. The areas in which the Discrimination Act is applicable – but with a different scope, are: working life (2 Chapter 1-4§§), education (2 Chapter 5-8§§), labour market policy activities and employment services not under public contract (2 Chapter 9 §), starting and running a business and professional recognition (2 Chapter 10 §), membership of certain

[277] Proposition 2007/2008:95 s. 79 och proposition 2001/2002:72 s. 49.
[278] Proposition 2007/2008:95 s. 364.

organisations (2 Chapter 11 §), goods, services and housing etc. (1 Chapter 12 §), health and medical care and social services etc. (2 Chapter 13 §), social insurance system, unemployment insurance and financial aid for studies (2 Chapter 14 §), national military service and civilian service (2 Chapter 15-16 §§), public employment (2 Chapter 17 §). In 2 Chapter 18-19 §§ there are provisions prohibiting reprisals within several of the above scoped out areas.

Chapter 3 contains provisions on active measures, applicable in working life (3 Chapter 1-15§§) and education (3 Chapter 14-16§§). Provisions on supervision are stated in Chapter 4 and provisions on compensation and invalidity are stated in Chapter 5. Lastly, Chapter 6 provides provisions on the legal proceedings in discrimination cases.

The ban on discrimination in the area of working life, stated in Chapter 2 of the Discrimination Act, has been designed in a manner that is adjusted to who needs protection in this specific area. Within working life, the protection against discrimination is wide and covers all grounds of discrimination in a number of situations, see 2 Chapter §§ 1-4. In 2 Chapter § 1 first section of the Discrimination Act, it is stated that the protected individuals within this scope are; employees, individuals making inquiries about a job, individuals applying for a job, individuals applying for or performing work practice, individuals who are available as workers or are rented or borrowed manpower. The aim of the ban on discrimination is to cover all situations in which an employer and an employee may interact in the working place or in situations that are naturally connected to work.[279]

The ban on discrimination is directed towards an employer in relation to the listed groups of individuals. An employer is defined as a natural or a legal person who has entered into an agreement with someone concerning performance of work in such circumstances that an employment relationship exists.[280] Persons who are in position to make decisions binding for the employer are also covered by the ban, see 2 Chapter 1 § third section. The ban covers every act and decision made by individuals with influence or leadership in relation to others, and whose decisions, influence or assessments may affect the conditions or circumstances for an employee and others who are covered by the protection against discrimination.[281]

An employee is defined as the party of an employment contract, including apprentices and those who are hired during education. The ban on discrimination covers all employees regardless of the form of employment.[282] The width of the protection is not connected to employment protection, as stated in the Employment Protection Act (1982:80).[283]

[279] Proposition 2007/2008:95 p. 498.
[280] AD 1984 nr 141 and AD 2003 nr 10.
[281] Gabinus Göransson, Håkan and others (2011), p. 60.
[282] Ibidem.
[283] Employment Protection Act (1982:80).

The ban on discrimination is applicable during the entire recruitment process. Even if an employer decides not to recruit, a discriminatory treatment may have occurred. An inquiry about whether there are any open positions may lead to a case of discrimination, if the employer behaves in a discriminatory manner when responding such an inquiry and if there actually was a possibility of acquiring a job.[284]

Employment ads are generally not covered by the ban on discrimination, but in the case *Feryn*[285], referred in section 2.2.4.4, the ECJ has stated that a discriminatory recruitment policy should be actionable in a civil law proceeding.

A fundamental prerequisite is that the employer is free to decide whom to employ within the private sector in Sweden. Hence, a legal discrimination procedure never gives the result that an employee actually acquires the desired position. Instead, damages are adjudged by the Court if a case of discrimination is established, based on the Discrimination Act, 5 Chapter §§ 1-2. Consequently, the employer is free to decide what methods to apply when recruiting and the relevance of merits in the recruitment process. Yet, the method and the selection cannot be discriminatory in themselves; they must be explainable and essentially rational.[286]

3.2.2.2 Definitions of discrimination in the Discrimination Act

The definitions of discrimination are similar to the corresponding Articles of the Sex Discrimination Directive, the Employment Discrimination Directive and the Race Discrimination Directive. Yet, the concept of discrimination existed in Swedish law since 1979.[287] In the preparatory works to the Swedish Discrimination Act, the different conditions that must be met in order to successfully establish a case of discrimination are narrowly described and exemplified.[288] A difference between EU law and Swedish law is that the Swedish ban on discrimination explicitly prohibits reprisals. There is no such prohibition in EU law.

The definitions of discrimination in Chapter 2 § 4 read as follows;

1. 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.
2. Indirect discrimination: that someone is disadvantaged by the application of a provision, a criterion or a procedure that appears neutral

[284] Gabinus Göransson, Håkan and others (2011), p. 62-63.
[285] Case C-54/07, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v NV Firma Feryn*, [2008] ECR I-05187.
[286] Gabinus Göransson, Håkan and others (2011), p. 63-64.
[287] Proposition 2007/2008:95 p. 96.
[288] Proposition 2007/2008:95 p. 486-487.

but that may put people of a certain sex, a certain transgender identity or expression, a certain ethnicity, a certain religion or other belief, a certain disability, a certain sexual orientation or a certain age at a particular disadvantage, unless the provision, criterion or procedure has a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose.
3. Harassment: conduct that violates a person's dignity and that is associated with one of the grounds of discrimination sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age.
4. Sexual harassment: conduct of a sexual nature that violates someone's dignity.
5. Instructions to discriminate: orders or instructions to discriminate against someone in a manner referred to in points 1–4 that are given to someone who is in a subordinate or dependent position relative to the person who gives the orders or instructions or to someone who has committed herself or himself to performing an assignment for that person.[289]

When establishing a case of direct discrimination, the first crucial condition is to show that there has been a disadvantage of some kind. In the preparatory works, it is stated that an individual suffers from a disadvantage when she or he is caused damage or detriment. Treatments typically associated with actual loss, inconvenience or equivalents of such effects, are considered as disadvantages. The crucial condition is that a negative effect occurs, not what may be the reason behind the treatment in question.[290]

The second element is the comparison. The mentioned application problems in EU law regarding what standard an individual should be compared to, exist in Swedish law as well. In the preparatory works of the Discrimination Act, a distinction is made between a comparable person (comparator) and a comparable situation. To establish a case of direct discrimination, it is required that the individual who claims to be discriminated against, proves that she or he has been less favourably treated than a comparable person in a comparable situation. [291]

Because of the application problems concerning the comparison, considered by the ECJ in, inter alia, *P v S and Cornwall County Council*,[292] the Swedish legislator explicitly recognizes a hypothetical comparator as an alternative. A hypothetical comparator is an imagined individual in the same situation as the individual who alleges discrimination, but who does not belong to the group protected against discrimination, for instance a certain sex or ethnicity. Examples of comparators are two individuals applying for

[289] English translation downloaded from http://www.regeringen.se/sb/d/108/a/115903 2011-09-26.
[290] Proposition 2007/2008:95 p. 486-487.
[291] Proposition 2007/2008:95 p. 487.
[292] Case C-13/94, *P v S and Cornwall County Council*, [1996] ECR I-2143.

the same job with the same qualifications and experiences.[293] The Labour Court ruled in a case of alleged discrimination on grounds of ethnicity, sex and age in case no. AD 2009 nr 11.[294] In this case, the plaintiff was not comparable with the other job applicants, since she had failed to fill in the application form correctly.

It seems evident that the comparator test will differ depending on what grounds of discrimination that are alleged. In working life, the comparison may also differ depending on what kind of treatment is alleged to be discriminatory. When deciding whether job seekers, workers or other individuals covered by the protection are in a comparable situation, merits is an important source of assessment.[295] If two applicants/employees are equally qualified, they are comparable. The Labour Court has stated that merits of employees and job seekers should be valued according to what education, what experience and what personal suitability the employee/job seeker in question has.[296] However, in situations of inquiry – as referred above, everyone who inquires is in a comparable situation.[297]

The third condition is the causation between the less favourable treatment and a discrimination ground. In the preparatory works, it is stated that even if intent to discriminate is the strongest proof of causation, such intent is not necessary to establish a case of direct discrimination. All that is required is a connection between the treatment and the ground of discrimination. The discrimination ground may be one of many causations resulting in a less favourable treatment, it does not have to be predominant in a certain situation. To establish a case of direct discrimination it is sufficient if the less favourably treatment is connected to a *perceived* belonging to the groups protected against discrimination, or that an individual is less favourably treated because of a connection to *another* individual who belongs to these protected groups.[298]

Nevertheless, an employer is not obliged to hire the objectively most qualified individual when recruiting. As long as the employer can prove that there is no connection between a ground of discrimination and the recruitment method, the recruitment method can be however arbitrary that the employer prefers. The Labour Court has stated that the employer's decision to throw away half of all applications was not discriminatory in AD 2003 nr 58.[299] In AD 2003 nr 73,[300] a failure to prove that a job application was received refuted an alleged discriminatory treatment, since there was no proof of causation between the decision not to hire the applicant and the ground of discrimination.

[293] Proposition 2007/2008:95 p. 487.
[294] AD 2009 nr 11.
[295] Fransson, Susanne & Stüber, Eberhard (2010), p. 157.
[296] AD 2005 nr 69 and AD 2010 nr 91.
[297] Gabinus Göransson, Håkan and others (2011), p. 62-63.
[298] Proposition 2007/2008:95 p. 488-489.
[299] AD 2003 nr 58.
[300] AD 2003 nr 73.

The elements, of which indirect discrimination consists, are also described in the preparatory works to the Discrimination Act. As in cases of direct discrimination, there a disadvantage of some kind is required. Disadvantages are found when individuals from the protected groups have difficulties meeting a seemingly neutral provision, criterion or procedure. It is important to note that hypothetical comparators are not accepted in order to establish a case of indirect discrimination. An actual difference between the groups must be established. There must be a significant difference between the groups compared. The ECJ has stated establish that the proportion of the alleged disadvantaged group must be 'considerably smaller'.[301] It is, as referred for the national Court to decide the actual meaning of such a significant difference in an individual case. [302]

The Labour Court stated in AD 2005 nr 87,[303] that a proportion of 25 % disadvantaged women in relation to 2 % disadvantaged men, was a significant disadvantage within the meaning of the applicable § 6 of The Equality Act of 1991,[304] now replaced by the Discrimination Act. The case concerned a length requirement applied by an employer when recruiting new employees, which affected women more than men.

Similar to the corresponding Articles of the Sex Discrimination Directive, the Employment Discrimination Directive and the Race Discrimination Directive, indirect discrimination can be justified according to 1 Chapter 4 § p. 2 of the Discrimination Act, if the 'provision, criterion or procedure has a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose'. The purpose must be worthy of protection in itself and important enough to motivate an exception from the principle of non-discrimination. In the preparatory works, such purposes are exemplified. An acceptable purpose may be an 'acceptable business needs' (godtagbara verksamhetsbehov) or application of national rules, which are intended to meet societal objectives in the context of a country's social and employment policies.[305]

In the case AD 2005 nr 87,[306] the disputing parties recognized that the length requirement had a legitimate purpose; to reduce the risk of strain injuries among the workers. Yet, it was unclear whether the means used to achieve the purpose were appropriate and necessary. The defendant, who had the burden of proof to show that the means used complied with the legal requirements, failed to prove that there was an actual connection between increased risks of strain injuries and the chosen parameters of length; 163 centimetres. Consequently, the chosen measures were too arbitrary in

[301] Case C-167/97, *R. V. Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, [1999] ECR.1-623.
[302] Proposition 2007/2008:95 p. 490-491.
[303] AD 2005 nr 87.
[304] Jämställdhetslagen 1991:433.
[305] Proposition 2007/2008:95, p. 491.
[306] AD 2005 nr 87.

relation to the stated purpose and were not considered appropriate and necessary by the Labour Court.

Harassment, as prohibited by 1 Chapter 5 § section 3 in combination with 2 Chapter 1 §, is based on three elements; disadvantage, unwanted, knowledge and causation. Trivial differences in behaviour are harassing. The behaviour must be unwanted by the individual who is exposed to them, and they must be typically meant to violate someone's dignity and in that way cause a disadvantage. The element 'unwanted' is deduced out of the unwanted violation of the dignity of an individual. It must be established that the perpetrator had knowledge of the fact that his or her behaviour is violating someone's dignity in a way that may be discriminatory. The causation between the grounds of discrimination and the harassing behaviour is assessed in the same way as in other cases of discrimination. Examples of harassment are demeaning epithets connected to the grounds of discrimination, racist texts, ridiculing or humiliating behaviour.[307]

Sexual harassment is constructed in a similar way as harassment connected to either of the discrimination grounds. The difference is that the behaviour must be of a sexual nature, such as physical contact of some kind. Verbal behaviour of a sexual nature may be unwelcome suggestions or pressure for sexual intercourse. [308]

In 1 Chapter 4 § section 4, it is stated that instructions to discriminate in a manner consistent with the different definitions of discrimination, is prohibited as well. Such instructions are banned when they are given to someone who is 'in a subordinate or dependent position relative to the person who gives the orders or instructions or to someone who has committed herself or himself to performing an assignment for that person'.

3.2.2.3 Discrimination grounds in the Discrimination Act

In contrast to the Sex Discrimination Directive, the Employment Discrimination Directive and the Race Discrimination Directive, the Swedish Discrimination Act contains a provision defining all grounds of discrimination except religion, 1 Chapter § 5. This provision is common for all the scopes mapped out in the Discrimination Act and reads as follows:

1. Sex: that someone is a woman or a man.
2. Transgender identity or expression: that someone does not identify herself or himself as a woman or a man or expresses by their manner of dressing or in some other way that they belong to another sex.
3. Ethnicity: national or ethnic origin, skin colour or other similar circumstance.
4. Disability: permanent physical, mental or intellectual limitation of a person's functional capacity that as a consequence of injury or illness existed at birth, has arisen since then or can be expected to arise.

[307] Proposition 2007/2008:95 p. 492-493.
[308] Proposition 2007/2008:95 p. 494.

5. Sexual orientation: homosexual, bisexual or heterosexual orientation.
6. Age: length of life to date.

A person who intends to change or has changed the sex they belong to is also covered by sex as a ground of discrimination.

The list of discrimination grounds is closed. Hence, a case of discrimination cannot be established on any other than the listed grounds.

Earlier, there was no definition of the concept of sex, neither in previous Swedish legislation, nor in EU law. It has been discussed whether 'sex' includes gender, the comprehension of sexes a socially constructed.[309] The Discrimination Act of 2008 makes a clear distinction between sex and gender, since 'sex' defines as the biological – not the social – comprehension of being a woman or a man.[310] The ambition with defining sex in this manner is to be as clear as possible. A purpose of the aim to establish a clear definition was to distinguish 'sex' from 'transgender identity or expression', since the obligation to take active measures in working life only applies to men and women.[311] Otherwise, sex is defined similarly as in EU law, including pregnancy in line with the ECJs judgment in the *Dekker*-case and established in Swedish case law through AD 2002 nr 45.[312] It is explicitly stated in 1 Chapter 5 § last sentence, that a transgendered person, who intends to or has changed his or her sex, is included in the definition of discrimination on grounds of sex. Such protection is giving in order for the Swedish legislation to explicitly comply with EU-law as referred above and stated by the ECJ in the case *P v. S.*[313] The protection against discrimination against transgendered person may include situations when an individual changes gender socially through expression or clothing. Such social gender changes are also likely to be included in the protection against discrimination on grounds of transgender identity or expression.[314]

Transgender identity or expression is, as mentioned earlier, a new ground of discrimination in Swedish law. The protection against discrimination on such grounds does not have any corresponding provisions in EU law. It refers to persons who do not identify as woman or man through clothing or through other expressions of gender. Other examples of transgender expressions may be makeup, body language or haircuts. Hence, the concept refers to socially conceived sexes; gender. The usage of the word 'transgender' (könsöverskridande) refers to the person's own conception of his or her gender or somebody else's conception of his or her gender. 'Transgender' also refers to situations when a person does not define its' gender and thus is considered as 'intergender'.[315]

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[309] Fransson, Susanne & Stüber, Eberhard (2010), p. 101, referering to Lerwall, Lotta (2001), p. 91-115.
[310] Proposition 2007/2008:95 p. 112f.
[311] Fransson, Susanne & Stüber, Eberhard (2010), p.101-102.
[312] Case C-177/88, *Dekker v VJV Stichting*, [1990] ECR I-3941and AD 2002 nr 45.
[313] Fransson, Susanne & Stüber, Eberhard (2010), p. 103 and Case C-13/94, *P v S and Cornwall County Council*, [1996] ECR I-2143.
[314] Fransson, Susanne & Stüber, Eberhard (2010), p. 103-106.
[315] Ibidem.

The definition is deliberately vague, since it is meant to be open for interpretation. [316] It is not clear whether this ground of discrimination may be included in the definition of discrimination on grounds of sex. The Swedish government stated that such an extension of discrimination on grounds of sex might lead to ambiguities, because certain provisions in the Discrimination Act only refer to women and men.[317] However, Fransson and Stüber hold that the ECJ judgment in *P. v S*[318] may imply that such inclusion is possible.[319]

To establish a case of discrimination based on transgender identity or expression, such an identity or expression must be visible to others through some kind of manifestation. This requirement concerns all grounds of discrimination.[320]

Discrimination on grounds of ethnicity refers to discrimination on grounds of ethnical origin, skin colour or other similar circumstance. In contrast to the Race Discrimination Directive, the term race is not explicitly covered by the definition. Instead, discrimination on perception of 'race' is included in the wording 'other similar circumstance'.[321] It refers to perceptions of 'immigrants' characteristics, appearances or backgrounds as a basis of conduct or treatment and to disadvantages based on degrading designations about people with a foreign or Swedish background.[322] In the preparatory works of the Discrimination Act, the Government has stated that the term 'race' is excluded, because an inclusion could give the impression that it is possible to divide human beings into different races, even though the Discrimination Act is based on the presupposition that all human beings belongs to one and the same human race.[323] The usage of race as a discrimination ground could legitimize racist notions of race an existing category.[324]

Generally, ethnicity is a wider concept than ethnical origin. Presumed ethnicity is also covered by the definition. It is sufficient to prove that ethnicity is one of several reasons that caused the difference in treatment to establish a case of discrimination. It is not necessary that the person who has been subject to a discriminatory treatment based on ethnicity consider him- or herself as belonging to the ethnic group in question. [325]

The presupposition is that all human beings have an ethnicity and a national or ethnical origin. The legal definition of ethnicity includes so-called

[316] Ibidem.
[317] Proposition 2007/2008: 95 p. 115.
[318] Case C-13/94, *P v S and Cornwall County Council*, [1996] ECR I-2143.
[319] Fransson, Susanne & Stüber, Eberhard (2010), p. 105-107.
[320] Ibidem.
[321] Ibidem.
[322] Proposition 2007/2008:95 p. 120.
[323] Proposition 2007/2008:95 p. 496.
[324] Proposition 2007/2008:95 p. 120.
[325] Fransson, Susanne & Stüber, Eberhard (2010), p.107.

national minorities, such as the Sami, the Sweden Finns, the Tornedalers, the Romans and the Jews.[326] The Labour Court has issued several judgments including assessments of discrimination on grounds of national or ethnical origin. In such assessments, the Labour Court has compared persons of a certain origin, such as Albanian origin or Czech origin, with persons of Swedish origin in order to rule on claims of discrimination.[327] The Swedish Supreme Court concluded that ethnic origin was defined based on the parents' birthplace in a case concerning discrimination on grounds of ethnicity regarding alleged positive action when admitting students to Uppsala University.[328]

The term 'skin colour' refers to the fact that all human beings are perceived as having a colour of skin, and to the perception that this colour may be connected to a certain ethnicity. Fransson and Stüber conclude that this term should refer to appearances in general, such as 'foreign looking'. Hence, appearances may fall under the wording 'skin colour' and the wording 'other similar circumstances'. [329]

The concept of 'disability' refers to a permanent physical, mental or intellectual limitation of a person's functional capacity that is a consequence of injury or illness existed at birth, has arisen since then or can be expected to arise. The concept relates to an individual's personal characteristics and to the relation between the individual and the surroundings that imposes certain limitations of the individual's functional capacity.[330]

The definition is corresponds with EU law, it is closely connected to an individual's capacity to participate in working life, as stated by the ECJ in the *Chacón Navas-case*[331]. It is irrelevant how the disability occurred. There is no need for a medical diagnosis to consider a person disabled.[332] The legislator does not want to fix the personal scope of the protection, because such a fixation is at risk of becoming obsolete.[333] The aim was to map out the personal scope through case law. The Labour Court has addressed the issue in several cases, in which disabilities such as diabetes, multiple sclerosis, food allergies and chronic fatigue syndrome.[334]

An important component of the legal definition of disability is the duration of the limitation in capacity. It is not clear how long the duration of the

[326] Ibidem.
[327] Fransson, Diskrimineringslagen en kommentar, p. 109 and AD 2006 nr 60, AD 2006 nr 96, AD 2009 nr 11.
[328] NJA 2006 s. 683.
[329] Fransson, Susanne & Stüber, Eberhard (2010), p. 109-110.
[330] Fransson, Susanne & Stüber, Eberhard (2010), p. 119.
[331] Case C-13/05, *Sonia Chacón Navas v. Eurest Colectividades SA*, [2006] ECR P. I-06467.
[332]Fransson, Susanne & Stüber, Eberhard (2010), p. 119.
[333] SOU 1997:179 s. 107, as interpreted by Fransson, Susanne & Stüber, Eberhard (2010), p. p. 119.
[334] Fransson, Susanne & Stüber, Eberhard (2010), p. 119-120.

limitation must be, but Inghammar, Fransson and Stüber hold that 12 months is a probable requirement in Swedish law.[335]

The ban on discrimination on grounds of disability includes situations when a person discriminated against on grounds of a faulty presumption of disability[336] and on grounds of association with a person who is disabled.[337]

Sexual orientation is defined as 'homosexual, bisexual or heterosexual orientation' in 1 Chapter 5 § section 5 of the Discrimination Act. The listed is exhaustive and intended to include all sexual orientations.[338] However, it does not provide protection for individuals who define themselves as asexual.[339]

In preparatory works to previous discrimination banning discrimination on grounds of sexual orientation[340], the Government held that sexual orientation is distinguished from sexual behaviour.[341] Such a distinction complies with the definition made by the Commission in the proposal for the Employment Discrimination Directive, referred above. Sexual behaviour goes beyond the sexual orientation; paedophilia is an example of such behaviour mentioned in the preparatory works.[342]

Fransson and Stüber hold that sexual orientation consists of identity, practice and preferences. The ban on discrimination on grounds of sexual orientation covers all of these different parts. 'Practice' refers to behaviour and experiences, 'identity' refers to what an individual feels like and calls her/himself, and 'preferences' refers to what an individual likes in sexual behaviour and lifestyle. The ban on discrimination on grounds of sexual orientation covers treatments connected to expressions of the sexual orientation, such as sexual intercourse, visits to gay bars or living as a same-sex couple. If the treatment in question has a connection directly linked to a person's sex or transgender identity, the treatment is discriminatory on grounds of sex.[343] Transsexuals are not included in the protection on grounds of sexual orientation.[344] The ban on discrimination on grounds of sexual orientation includes faulty presumptions about a person's sexual orientation and discrimination on grounds of association with somebody

[335] Fransson, Susanne & Stüber, Eberhard (2010), p. 120, referring to Inghammar, Andreas (2007).
[336] Proposition 2007/2008:95 p. 123.
[337] Fransson, Susanne & Stüber, Eberhard (2010), p. 123
[338] SOU 2006:22 p. 314 as interpreted by Fransson, Susanne & Stüber, Eberhard (2010), p. 125.
[339] Fransson, Susanne & Stüber, Eberhard (2010), p. 125.
[340] Act (1999:133) prohibiting discrimination on grounds of sexual orientation in employment.
[341] Proposition 1997/98:180 p. 21.
[342] Proposition 1997/1998:180 p. 21 and proposition 1007/2008:95 p. 124.
[343] Fransson, Susanne & Stüber, Eberhard (2010), p. 125-126.
[344] SOU 2006:22 Del I, p. 315.

else's sexual orientation.[345] The Labour Court has not explicitly assessed or ruled any case on discrimination on grounds of sexual orientation.[346]

Age is defined as 'length of life to date' in the Discrimination Act. As abovementioned, it is a new ground of discrimination in Swedish labour law. The chosen definition refers to chronological age, which means a human beings lifespan from birth until present. Such definition is distinguished from perceived age, referring to at what age an individual is perceived to have.[347] There is no upper or lower age limit for the protection against age discrimination; all human beings are covered by the protection.[348]

As mentioned, religion or belief is the only ground of discrimination not explicitly defined in the Discrimination Act or in the preparatory works of the Discrimination Act.[349] However, the protection against discrimination on grounds of religion or belief is intended to remain unchanged as stated in previous legislation, such as the Act (1999:130) on measures against discrimination on grounds of ethnicity in working life.[350] Hence, older preparatory works are still usable to define the concept of religion or belief. In older preparatory works, the Government held that there might be interpretational problems, if the concepts of religion and belief are defined.[351] In the Act (1999:130) on measures against discrimination on grounds of ethnicity in working life, religion or belief were included in discrimination on grounds of ethnicity through the term 'confession'. The separation of religion or belief from ethnicity was a consequence of the implementation of the Employment Discrimination Directive, since such a separation was compliable with the wording in Article 1 of this Directive.[352]

Discrimination on grounds of religion or belief covers both discrimination connected to an established religion and to beliefs, such as atheism and agnosticism. Yet, the scope is limited concerning beliefs; ethical, political and philosophical convictions are not included.[353] The fact that agnosticism – a philosophical ideology that denies the existence of God – is covered by the provision implies that the discrimination on grounds of religion or belief also refers to negative freedom of religion. This interpretation would comply with the protection given by ECHR, applicable as Swedish law, since Article 9 in combination with Article 14 of ECHR provides protection

[345] SOU 2006:22 Del I, p. 315, proposition 2007/2008:95 p. 125 and proposition 2002/2003:65 p. 91 as interpreted by Fransson, Susanne & Stüber, Eberhard (2010), p. 126.
[346] Fransson, Susanne & Stüber, Eberhard (2010), p. 127.
[347] Fransson, Susanne & Stüber, Eberhard (2010), p. 130.
[348] SOU 2007/2008:95 p. 497.
[349] Fransson, Susanne & Stüber, Eberhard (2010), p. 116.
[350] Proposition 2007/08:95 p. 121.
[351] Proposition 2002/03:65 p. 82.
[352] Proposition 2007/08:95 p. 122, as interpreted by Fransson, Susanne & Stüber, Eberhard (2010), p. 117.
[353] Proposition 2002/03:65 p. 82.

against discrimination on grounds of negative *and* positive freedom of religion.[354]

In the Discrimination Act of 2008, it is clear that discrimination on grounds of ethnicity and discrimination on grounds of religion are supposed to complete each other in practice.[355] The Government states that 'what may be perceived as a cultural or traditional behaviour or expression may presumably fall under the provision on discrimination on grounds of ethnicity, if not considered as connected to religion or belief'.[356]

In summary, although the scopes of the Discrimination Act have common definitions of discrimination and the grounds of discrimination, it is clear that they tend to interact with each other in many ways. What consequences such interactions will have in a context of multiple and intersectional discrimination will be explored in section 4.2. It is also clear that the application of the concepts may differ depending on within what societal area the alleged discriminatory treatment occurred.

3.2.2.4 Exceptions from the ban on discrimination

There are several exceptions from the ban on discrimination in working life listed in 2 Chapter 2 § of the Discrimination Act. The only accepted positive actions in the area of working life are on grounds of sex. The Swedish Discrimination Act differs from EU law in this aspect, since EU law provides the possibility for the Member States to adopt regulation on positive action on all protected grounds of discrimination.[357]

In 2 Chapter 2 § section 2, positive action is described as 'measures that contribute to efforts to promote equality between women and men and that concern matters other than pay or other terms of employment'. It does not apply to wages and other working conditions.[358] The Swedish regulation on positive action as an exception to the principle of equal treatment complies with the corresponding regulations in EU law. Hence, requirements such as a range of flexibility in selection method and proportionality in execution of the measure in question in relation to a reasonable aim assessment must be met. Otherwise, the positive action is an unlawful breach of provisions on the ban on discrimination. [359]

Exceptions from the ban on discrimination in 2 Chapter § 1 are lawful 'when a decision is made on employment, promotion or education or training for promotion, by reason of the nature of the work or the context in which the work is carried out, the characteristic constitutes a genuine and determining occupational requirement that has a legitimate purpose and the

[354] Fransson, Susanne & Stüber, Eberhard (2010), p. 117-118.
[355] Proposition 2007/08:95 p. 122, as interpreted by Fransson, Susanne & Stüber, Eberhard (2010), p. 116.
[356] Proposition 2007/08:95 p. 122.
[357] Fransson, Susanne & Stüber, Eberhard (2010), p. 212.
[358] Gambinius Håkansson, Göran and others (2011), p. 86.
[359] Fransson, Susanne & Stüber, Eberhard (2010), p. 222-223.

requirement is appropriate and necessary to achieve that purpose', stated in 2 Chapter 2 § 1 section of the Discrimination Act. Hence, there is also a GOR exception in Swedish law. The wording of the provision in question is not identical with wordings of previous Swedish legislation in the area of discrimination. The new phrasing is a consequence of ambitions of harmonization with EU law. As in EU law, the employer must show that there is a genuine occupational requirement concerning the decision on employment, promotion or education or training for promotion, directly connected to the alleged ground of discrimination. No other employment decisions may constitute exceptions from the ban on discrimination. [360]

In the preparatory works to the Discrimination Act, a genuine occupational requirement is described as a 'characteristic or an ability of the applicant that makes her more suitable to perform the work tasks than others' (translated from Swedish).[361] To succeed when objecting to a discrimination claim on grounds of a genuine occupational requirement, the employer need to establish that the ability/characteristic of being, for instance, a women or disabled, makes an individual better suited to perform the work task.[362]

As required in EU law, the Swedish GOR exception is to be applied narrowly, it is not permitted to withhold a general on employee or applicants implying that they must have a certain ability or characteristic directly connected to one of the discrimination grounds.[363]

The exceptions from discrimination on grounds of age are of a special character in the Discrimination Act, similar to the corresponding provisions in EU law. The general GOR exception stated in 2 Chapter 2 § section 1 is applicable on discrimination on grounds of age, but the scope for exceptions is wider regarding age than the other grounds of discrimination due to regulation in another provision.[364] In 2 Chapter 2 § section 4 it is stated that 'differential treatment on grounds of age, if there is a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose'. This provision is thought to comply with Article 6 (1) of the Employment Discrimination Directive, which gives the Member States a broad space to legislate on exceptions from the ban on discrimination on grounds of age.

In the preparatory works of the Discrimination Act, several examples of such legitimate aims are mentioned. Purposes such as protecting younger workers regarding work environment, protecting older workers need for rest and recreation or to remain employed may be such legitimate aims. Other examples are protection against wage dumping for younger workers and redundancy of older workers. In general, decisions or procedures aiming at

[360] Fransson, Susanne & Stüber, Eberhard (2010), p. 214ff.
[361] Government Bill 2007/08:95 p. 158.
[362] Fransson, Susanne & Stüber, Eberhard (2010), p. 215.
[363] Government Bill 2007/08:95, p. 160 as interpreted by Fransson, Susanne & Stüber Eberhard (2010), p. 218.
[364] Fransson, Susanne & Stüber, Eberhard (2010), p. 218.

protecting younger workers' employments and decisions or procedures aiming at giving older workers the opportunity to leave the workplace in exchange for compensation are considered as legitimate aims in the Swedish, national context.[365]

In summary, even though the aims of the Discrimination Act was to make the protection against discrimination on all grounds comprehensive and coherent, it is obvious that every step of the assessment in a case of discrimination differs depending on what grounds of discrimination are alleged. The definition of the concept of discrimination, the aims of the protection for the listed groups and the room for exceptions are all aspects that distinguish the assessment of the grounds of discrimination from each other. However, such cracks in the aspired uniformity must be seen within the procedural legal context to be fully comprehended. The procedural framework of Swedish Discrimination law in employment will be explored below.

3.2.2.5 Procedural characteristics of Swedish non-discrimination law

The ban on discrimination in 2 Chapter 1 § of the Discrimination Act states that 'discrimination' in working life is prohibited. The wording refers to the definition of discrimination in the 1 Chapter, and thus implies that an action may be taken against an alleged discriminatory decision, measure or procedure, on all grounds of discrimination simultaneously.

Chapter 6 of the Discrimination Act contains procedural provisions on discrimination disputes. In 6 Chapter 1 § it is stated that discrimination disputes in the area of working life, as stated in 2 Chapter 1-3 or 18 §§, are treated as other disputes in working life from a procedural point of view. Hence, the Labour Disputes Act (1974:371) is applicable. One effect of the application of the Labour Disputes Act is that trade unions have primary standing in such disputes, and that the parties are obliged to negotiate to be able to take action in court in such disputes, 4 Chapter 7 § and 5 Chapter 1 § of the Labour Disputes Act. In such disputes, the Labour Court is the first and only instance of Court.[366]

Other organisational bodies that have standing are the Equality Ombudsman in Sweden (the Ombudsman) and non-profit associations, stated in 6 Chapter 2 § of the Discrimination Act. The standing of these organisations are secondary, the Union of which the worker concerned is member must firstly be given the possibility to take action. No action may be taken by these organisations without consent from the worker concerned. [367] Action taken by the Ombudsman shall also be addressed to the Labour Court, as the first and only instance of Court in these proceedings. When the

[365] Government Bill 2007/08: 95 p. 179-180, as interpreted by Fransson, Susanne & Eberhard, Stüber (2010), p. 232.
[366] Fransson, Susanne & Eberhard, Stüber (2010), p. 221ff.
[367] Fransson, Susanne & Eberhard, Stüber (2010), p. 531-533.

Ombudsman or a non-profit association have standing on behalf of a worker, the action shall be treated as if the worker took action by him- or herself regarding certain aspects, such as communication and the obligation to appear in Court, stated in 6 Chapter 10 § of the Discrimination Act.[368]

Other discrimination disputes than when the trade unions and the Ombudsman have standing, shall be addressed by the ordinary Swedish Courts.[369] Individuals have standing by themselves, or in assistance of a representative, even though the wording of the Discrimination Act is silent on this matter.[370]

The effects of applying the Discrimination Act in practice are generally compensation and invalidity of contracts. With the adoption of the Discrimination Act, a new form of remedy called 'compensation for discrimination' (diskrimineringsersättning) was implemented in Swedish law through the 5 Chapter 1 § of the Act. The purpose is to comply with the EU law obligation to offer victims of discrimination real and effective compensation, stated in the Sex Discrimination Directive, the Employment Discrimination Directive and the Race Discrimination Directive. The introduction of compensation for discrimination is meant to ensure that the compensation levels are high enough to be dissuasive. In previous legislation, the levels of damages were adjusted to the general level in labour law. The Government held that these levels were not high enough to punish perpetrators of discrimination, since discrimination is a serious delict, and in violation of human rights.[371]

The aim of the provision is to ensure that the victim of discrimination is compensated for the offence resulting from the infringement in question. Hence, there is no need for the victim to show an actual financial loss in order to obtain such compensation. If an actual financial loss is shown as a result of the discrimination in working life, the defendant is obliged to compensate the loss, except considering loss that arises in connection with a decision concerning employment or promotion.

In 5 Chapter 1 § of the Discrimination Act, it is stated that 'particular attention shall be given to the purpose of discouraging such infringements' when the compensation is decided. Thus, the level of compensation may rise of the infringing offence is considered serious. If the defendant shows that there are special grounds, the compensation may be reduced or set at zero.

If a provision in an individual contract or a collective agreement is in breach of a ban on discrimination in the Discrimination Act, such a provision shall be modified or declared invalid by the Court. This is stated in 5 § Chapter 3 § of the Discrimination Act, and gives the Act a binding effect to those whom it applies.

[368] Fransson, Susanne & Eberhard, Stüber (2010), p. 221ff.
[369] Fransson, Susanne & Eberhard, Stüber (2010), p. 225.
[370] Fransson, Susanne & Eberhard, Stüber (2010), p. 533-534.
[371] Government Bill 2007/08:95, p. 386ff.

The allocation of the burden of proof is stated in 6 Chapter 3 § of the Discrimination Act. It is thought to comply with the corresponding Articles of the Sex Discrimination Directive, the Employment Discrimination Directive and the Race Discrimination Directive. The general principle in Swedish law, is that the plaintiff who claims to have been subject to injury through an act performed by the defendant, is obliged to prove this claim. This principle is not explicitly stated in any piece of regulation. [372] Hence, the provision on burden of proof is an exception from the general rule.

To fully comprehend the actual impact of the provision, it must be interpreted in the light of the different elements of the definitions of discrimination. The consequence of the shifting of the burden of proof in a Swedish context is that the plaintiff must show the circumstances that make it probable that he or she has been discriminated against. When showing such circumstances, the plaintiff must make probable that he or she has is at a disadvantage in comparison to others. If such circumstances are established, a presumption of causation between the ground of discrimination and the disadvantage is created. Such a presumption may be rebutted by the defendant, if he or she can prove that the action had other causes than the plaintiff's characteristic or ability connected to a ground of discrimination. [373]

The Swedish Supreme Court has ruled on the matter in NJA 2006 s. 170.[374] The Court stated that the type of circumstances that may constitute a presumption must be examined and alleged in relation to the prerequisites in every individual case. Yet, the circumstance that has creates a presumption, must differ from the circumstance that the defendant pleads to counter-prove the alleged discrimination.[375]

Before the adoption of the Discrimination Act, the burden of proof was not constructed as a rule of presumption in Swedish discrimination law. In the preparatory works of the Discrimination Act, the Government refers to the judgment in NJA 2006 s. 170, which implies that the new provision is not merely a strict interpretation on the burden of proof.[376] In previous legislation, the burden of proof only concerned the establishment of causation, and such a limited interpretation of the burden of proof may obstruct the purpose of such a provision according to EU law. Malmberg argues that Swedish Courts are obliged to exercise the law in a manner that fulfils the purposes of EU law; to maintain an actual relief of evidence in discrimination cases to withhold the effective implementation of the principle of equal treatment.[377] The new shape of the burden of proof is better suited to comply with the purposes of EU law.

[372] Ibidem.
[373] Ibidem.
[374] NJA 2006 s. 170.
[375] Fransson, Susanne & Eberhard, Stüber (2010), p. 535.
[376] Ibidem.
[377] Malmberg, Jonas (2001), p. 812.

In Swedish case law, the plaintiff's obligation to meet his or her burden of proof has turned out to be a matter of proving circumstances that show that he or she is a comparable situation. A disadvantage is often easy to prove, the comparison is apparently more difficult. In AD 2003 nr 58[378], AD 2003 nr 73[379] and AD 2005 nr 3[380], the plaintiff failed to show that he or she had been treated in a different manner compared to how the employer was expected to normally behave in a similar situation. The cases concerned recruitment processes of different kind

The defendant's obligation to meet the burden of proof requires more than making the counter-proving of the causation probable. In AD 2003 nr 55,[381] the Labour Court stated that the defendant employer must specify the reason of the action in question, and the reason must be acceptable. The reason cannot be irrelevant, subjective or not provable in Court. Generally, the employer must show that the pleaded reasons for the act in question did not relate to a ground of discrimination, in a convincing manner.

In summary, the application of the burden of proof has a decisive impact on the outcome of an alleged case of discrimination. It determines how narrowly the different elements of discrimination must be examined and what circumstances are relevant in a pleading.

[378] AD 2003 nr 58.
[379] AD 2003 nr 73.
[380] AD 2005 nr 3.
[381] AD 2003 nr 55.

4 Multiple and Intersectional Equality and Non-Discrimination law in Swedish and European labour law

4.1 Multiple and Intersectional Discrimination in EU-law

4.1.1 Sources of protection against multiple and intersectional discrimination in EU law

There are no binding legal EU sources explicitly prohibiting multiple and intersectional discrimination. Yet, the concept of multiple discrimination appears in some binding instruments, and in soft law. The concept intersectional discrimination is still absent in binding instruments. In *Is EU law capable of addressing discrimination yet?* [382] published in 2009, Nielsen has structured and explored all EU legal sources in force at the time that contain any wordings referring to multiple discrimination. Her conclusion is that the substantive content of the existing bans on sex discrimination covers multiple and intersectional discrimination. Yet, she holds that the combination of discrimination grounds 'may reduce transparency and create evidential and enforcement problems'. Nielsen concludes that multiple discrimination in EU law has mainly been addressed explicitly regarding gender mainstreaming of the fight against discrimination on other grounds, such as ethnic origin, age, and etcetera.[383]

Since the publication of Nielsen's analysis in 2009, Schiek and Mulder have followed up the EU development in the area of intersectional and multiple discrimination, with a special focus on intersectional discrimination.[384] They base their findings on what Nielsen has concluded and review the consequences of recent hard and soft law developments. In the following, I will add my own explorations within this field of research.

Nielsen holds that the EU Council and the EU Parliament came close to defining multiple discrimination in an EU context while connecting the concept to the grounds of discrimination in Article 13 of the EC Treaty

[382] Nielsen, Ruth (2009), p. 32.
[383] Nielsen, Ruth (2009), p. 47-48.
[384] Schiek, Dagmar & Mulder, Jule (2011).

(now Article 19 TFEU).[385] The Council and the Parliament concluded that they will 'seek to address issues of multiple discrimination, that is discrimination on two or more of the grounds listed in Article 13 EC'.[386] However, this definition was made in a recital of the Decision establishing the European Year of Equal Opportunities for All, a policy making soft law instrument, which was not legally binding. The statement showed an aim to balance the grounds of discrimination against each other, and the grounds listed in Article 13 were the ones concerned – thus, discrimination on grounds of nationality was left out.[387]

The pattern of connecting Article 13 EC (now Article 19 TFEU) to multiple discrimination can be traced in secondary legislation based on Article 13. In the preambles of the Race Discrimination Directive, Recital 14, and of the Employment Discrimination Directive, Recital 3, it is explicitly stated that the Directives in question aim at promoting equality 'between women and men, especially since women are often the victims of multiple discrimination'. According to Nielsen, the EU requires gender mainstreaming of the fight against discrimination on grounds of ethnicity, religion, disability and sexual orientation through these preamble Recitals.[388]

Still, there are no corresponding wordings in the preamble of the Sex Discrimination Directive, the Directive recasting gender equality law through gathering some of the previous Directives based on Article 141 EC (now Article 157 EC). In the preamble of the amendment adopted in 2002 of the previous Equal Treatment Directive[389], reference was made to fundamental rights and to the Charter. Such references may have indicated that discrimination on grounds of sex was to be viewed in a larger discrimination context, in which discrimination on all grounds is considered. There is no similar wording in the preamble of the new Sex Discrimination Directive. Hence, the reference to multiple discrimination is clearer concerning discrimination on other grounds than sex, since the combat of such types of discrimination requires gender mainstreaming. It is nevertheless uncertain what legal consequences references in preambles of Directives have in general. The habit of mentioning issues in preambles, without follow up in the binding provisions has been criticized.[390]

Recently, multiple and intersectional discrimination have been debated by the EU institutions. There is a proposal for a Council Directive on discrimination outside the area of employment and occupation, which may

[385] Nielsen, Ruth (2009), p. 32.
[386] Preamble Recital 14 of *Decision 771/2006/EC establishing the European Year of Equal Opportunities for All (2007) – towards a just society* [2006] OJ L 146/1.
[387] Nielsen, Ruth (2009), p. 32.
[388] Nielsen, Ruth (2009), p. 34.
[389] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39 as amended by Directive 2002/73/EC of the European Parliament and the Council.
[390] Koldinská, Kristina (2011), p. 251.

contain a positive legal provision defining multiple and intersectional discrimination. The European Parliament has proposed such a definition through an amendment, containing the following definition in Article 1.2:

> Multiple discrimination occurs when discrimination is based (a) on any combination of the grounds of religion or belief, disability, age, or sexual orientation, or (b) on any one of the grounds set out in paragraph 1, and also on the ground of any one or more of (i) sex (in so far as the matter complained of is within the material scope of Directive 2004/113/EC as well as of this Directive), (ii) racial or ethnic origin (in so far as the matter complained of is within the material scope of Directive 2000/43/EC as well as of this Directive), or (iii) nationality (in so far as the matter complained of is within the material scope of Article 12 of the EC Treaty).

Schiek & Mulder do not think that the proposed Directive and the amendment will be adopted for some time. They believe that an explicit definition in one piece of binding secondary law may have negative impact on the other discrimination Directives. A systemic interpretation approach by the ECJ may lead to the conclusion that the lack of an explicit definition and reference to the concept of multiple and intersectional discrimination in the other Directives on discrimination, implies that such types of discrimination fall outside the scope of these Directives.[391]

The TEU and the TFEU are nowadays not the only binding primary sources of equality and non-discrimination law in the EU. The adoption of the Lisbon Treaty resulted in a changed legal status of the Charter, containing an entire chapter (III) on the subject of equality. Besides the grounds of discrimination covered by Article 19 TEU, Article 21 of the Charter explicitly exemplifies additional grounds of discrimination. Some scholars believe that the new legal status of the Charter may strengthen the significance of protection against multiple and intersectional discrimination in EU law. According to Koldinská, the open-ended character of the list on grounds of discrimination supports the possibility to address multiple discrimination cases.[392] Before the status change of the Charter, Nielsen held that the Charter does not address multiple discrimination or intersectionality.[393] The wording of Article 21 of the Charter that '[a]ny discrimination based on any ground such as...' indicates that all forms of discrimination on all grounds are equally condemnable.

In EU soft law, the concept of multiple discrimination is more frequently used than in binding provisions. Multiple discrimination was used already in 2000, in preamble Recitals of Council decisions establishing different policy programmes. In preamble Recital 4 and 5 of the Council Decision establishing a Community action programme to combat discrimination, it is stated that equality of women and men requires action on multiple

[391] Schiek, Dagmar & Mulder, Jule (2011), p. 260.
[392] Koldinská, Kristina (2011), p. 251.
[393] Nielsen, Ruth (2009), p. 35.

discrimination, and that all forms of discriminations are equally intolerable.[394] Consequently, new policies to combat these types of discriminations were demanded. In Article 3(b) and in the preamble, Recital 3, of the Council decision establishing a programme on gender equality, the relevance of combating multiple discrimination against women is stressed.[395]

Further, the Council held that raised awareness of problems of multiple discrimination was one of its objectives in the decision on the European Year of Equal Opportunities for All (2007).[396] This objective was perused in the follow-up, in which the Council urged the Commission and the Member States to take full account of the 'special issued arising from multiple discrimination'.[397]

In 2008, the Council recognized the cumulative effects of gender and disability in Council Resolution on the situations of persons with disabilities.[398] Schiek and Mulder hold that such a recognition logically implies a conclusion that disabled women often suffer from multiple discrimination.[399]

In summary, the soft law development shows the same tendency to put focus on multiple discrimination within gender mainstreaming of other equality contexts. Because of this imbalance, the EU Commission has promised to address multiple discrimination within its policies combating multiple discrimination on other grounds than gender. This may lead to a demand on mainstreaming of other grounds of discrimination within a gender equality context. The consequence of neglecting such mainstreaming measures in gender equality law may for instance result in difficulties in addressing the situation of women suffering disadvantages at the intersections of gender with race and disability.[400]

In conclusion, Schiek and Mulder agrees with Nielsen's observations regarding neglects to address issues of multiple and intersectional discrimination.[401] They hold that EU law and policy do not yet recognize disadvantage at the intersection between grounds such as gender, race and

[394] Council decision 2000/750/EC of 27 November 2000, OJ L 303.
[395] Decision 1554/2005/EC amending Council Decision 2001/51/EC establishing a programme relating to the Community framework strategy on gender equality [2005] OJ L255/9 and Council Decision 848/2004/EC establishing a Community action programme to promote organiszations active at European level in the field of equality between men and women [2004] OJ L 159/18.
[396] Council Decision No. 771/2006/EC of the European Parlimaent and of the Council of 17 May 2006 establishing the European Year of Equal Opportunities for All (2007) – towards a just society [2006] OJ L 146/1.
[397] Council Resolution of 17 March 2008 on the follow-up of the European Year of Equal Opportunities for All (2007) OJ C 308/1.
[398] Council Resolution of 17 March 2008 on the situation of Persons with disabilities in the European Union, OJ C 75/1.
[399] Schiek, Dagmar & Mulder, Jule (2011), p. 261.
[400] Schiek, Dagmar & Mulder, Jule (2011), p. 261.
[401] Schiek, Dagmar & Mulder, Jule (2011), p. 259.

disability. EU law and policy do not provide sufficient support for combating such disadvantages. Multiple and intersectional discrimination are still looked upon as novelties within EU law, but Schiek and Mulder find it surprising that the ECJ, that normally embraces novelties long before everyone else does, has not involved these concepts in its rulings.[402]

Further, they highlight the unevenness between the different grounds of discrimination concerning the appraisal of multiple and intersectional discrimination. There is an outspoken focus on gender mainstreaming in discrimination legislation on other grounds than sex, but not vice versa.[403] Such an unevenness could be explained by the fact the mainstreaming strategy following the Amsterdam Treaty, as observed by Numhauser-Henning, concerned discrimination on grounds of sex.[404] Obstacles, such as differences in material scope and the comparator-based definition of discrimination should be removed when addressing multiple and intersectional discrimination, according to Schiek and Mulder.[405]

Multiple and intersectional discrimination are widely recognized in international and European human rights contexts. As the sources of EU law are connected to the legal standards emanating from such international and European human rights instruments, legal ECHR developments and ultimately the legal UN developments, have impacts on EU law. One of the most important non-EU sources with impact on multiple and intersectional discrimination within EU law is ECHR Article 14. This provision is similar to Article 21 of the EU Charter, since the list on discrimination grounds is open. The legal approach is meant to provide a comparable scope of protection and similar exemptions for all grounds, with sufficient flexibility concerning choice of comparator. Article 14 ECHR does not establish a system of specific exceptions explicitly stated in the provision. As a result of this approach, it is not necessary to show that a difference in treatment is based on one specific discrimination ground; the ECtHR has the possibility to decide each case on its own merits without concern if the discriminatory treatment was based on one or several of the discrimination grounds. [406]

To fully understand the purpose of the incentive to clarify and strengthen the protection against multiple and intersectional discrimination, one must gain an insight into what problems that the binding EU legislation in force may implicate in cases of multiple and/or intersectional discrimination.

As argued by Schiek and Mulder, the personal and material scope of the different pieces of legislation may entail problems in cases of multiple and intersectional discrimination. In an established case of multiple or intersectional discrimination, the circumstances may only partly be covered by the legislation. Gerard holds that in cases of intersectional discrimination

[402] Schiek, Dagmar & Mulder, Jule (2011), p. 273.
[403] Schiek, Dagmar & Mulder, Jule (2011), p. 273.
[404] Numhauser-Henning, Ann (2011), p 119.
[405] Schiek, Dagmar & Mulder, Jule (2011), p. 273.
[406] Gerards, Janneke (2007), p. 174-175.

– when the discrimination grounds are inseparable – it might be hard to determine whether the legislation provides protection at all. To determine whether a case falls into a certain scope, legislators or judges may regard themselves forced to make 'strange and arbitrary classification', in order to draw the line between the different groups protected by the legislation. Such classifications are necessary in legal systems where the list of protected grounds is closed and will have major consequences for scope of the protection against discrimination.[407]

Other problems that may appear in cases of multiple and intersectional discrimination, is the application of different exceptions. Gerard exemplifies situations when an elderly disabled worker is discriminated, and holds that it may be hard to determine whether the broad exception from discrimination on grounds of age or the more narrow exception from discrimination on grounds of disability is applicable, both found in the Employment Discrimination Act. The problem can be solved in cases of multiple discrimination (by Gerard referred as added discrimination), because the two grounds can be examined separately on their own merits. In cases of intersectional discrimination, for instance in cases concerning Muslim headscarves, it is hard to separate the grounds and the merits from each other. [408]

As observed by Schiek and Mulder, there are comparison problems when applying legislation in force in cases of multiple and intersectional discrimination. Gerard holds that the comparison problem is most apparent in cases of indirect discrimination. In these cases, a hypothetical comparator is not allowed; the plaintiff must provide evidence, such as statistics, showing a disproportionate between the different groups. As the proportion between the groups is the main element when establishing such types of discrimination, it must be clear *what* groups are comparable. For instance, statistics showing that a proportion of 15 % of the women and 20 % of the Asians are at a disadvantage compared to men and the ethnic majority at a work place group, do not establish a case of indirect discrimination neither for the Asians, nor for the women. Yet, the same statistics could be used to show that a proportion of 70 % of the *Asian women* are at a disadvantage compared to *ethnic majority men.* Nevertheless, it is hard to determine who the relevant comparator is in such situations. There may be several ethnicities or people belonging to other protected groups. The most important problem that appears in this situation is that *Asian women* – as such – are not included in a group protected by the grounds of discrimination in EU law. Because the lists of protected grounds are closed in EU law, they are likely to fall outside the scope of the legislation in situations as the one referred.[409]

[407] Gerards, Janneke, (2007), p. 172ff.
[408] Gerards, Janneke, (2007), p. 172ff.
[409] Gerards, Janneke, (2007), p. 172ff.

4.1.2 EU and ECHR case law involving questions of multiple and intersectional discrimination

In the following circumstances in case law in which it would have been possible to establish multiple or intersectional discrimination will be described. Relevant cases ruled by the ECJ and the ECtHR will be referred. The ECJ has so far not used the terms multiple or intersectional discrimination in any of its rulings. The only case in which two grounds of discrimination involved in the proceedings, is the *Lindorfer*-case.[410] Yet, neither the Court, nor the Advocate General chose not to involve assessments of multiple or intersectional discrimination. In the *Lindorfer* case, the Court ruled that a pension system for employees of the Council of Europe that took account of both sex and age when distributing pension rights was discriminatory on grounds of sex, since the system put the female plaintiff at a disadvantage. One of the Advocate Generals in the case explicitly referred to discrimination on grounds of age in his opinion, noting that discrimination on grounds of age was not brought to the ECJ's attention, but the Court still chose to remain silent on the matter.[411]

Schiek and Mulder have examined ECJ case law where the merits pointed at assessments of multiple or intersectional discrimination. Such assessments would have been possible, since the jurisdiction of the ECJ is wide. Before the adoption of rules prohibiting discrimination on grounds of age and sexual orientation, the ECJ ruled in a number of cases concerning discrimination on grounds of sex, in which the circumstances involved age or sexual orientation.[412]

Firstly, there are several cases in which the ECJ ruled on alleged discrimination on grounds of nationality concerning migrant women. In *Scholz,*[413] the ECJ assessed whether the selection to a list of candidates for recruitment to a canteen staff post at an Italian University was discriminatory on grounds of nationality, since the selection did not take account of the plaintiff's previous employment in Germany. The plaintiff was of German origin and of Italian nationality by marriage. The employment in Germany preceded the marriage, and thus the Italian nationality of the plaintiff. The Court ruled that the selection was discriminatory on grounds of nationality. In this case, and other of it likes, the marital status and thus the sex of the plaintiff, is connected to the change

[410] Case C-227/04 P, *Maria-Luise Lindorfer v Council of the European Union* [2007], ECR I-06767.
[411] Opinion of Advocate General Sharpston delivered on 30 November 2006, Case C-227/04 P, *Maria-Luise Lindorfer v Council of the European Union* [2007], ECR I-06767.
[412] See for instance Case C-149/77 *Defrenne v Sabena* (No 3) 1978 ECR 1365 and Case C-405/95 *Marshall v Land Nordrhein,* 1997 EcR I-6363.
[413] Case C-419/92 *Ingetraut Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda*, [1994] ECR I-505.

of national status.[414] How an individual acquires national status may very well affect how an individual is treated in a Member State. There is a possibility that other ways of acquiring national status than by marriage, may not lead to discriminatory treatment.

Further, the ECJ has assessed alleged cases of discrimination on grounds of age in which it would have been possible to assess discrimination on grounds of sex or ethnicity/race.[415] Generally, the merits of these cases involve examination of accumulation structures in pension systems that presuppose certain models of working life, similar to the one assessed by the ECJ in *Lindorfer*. Such presuppositions exclude individuals who do not follow traditional career patterns in working life. The individuals' way of life may differ from traditional career patterns because of their age, their sex, their ethnicity or of other reasons. Hence, a pension system who excludes these individual may be discriminatory on several grounds.

When exploring the merits in *Kücüdeveci*,[416] Schiek and Mulder hold that the circumstances implied underlying ethnic discrimination and potentially indirect gender discrimination. In *Kücüdeveci*, a woman of Turkish origin was denied transferral within her employment from one department to another, partly because of her accented German. As a result, she was dismissed from her employment. The reference for a preliminary ruling in the ECJ only assessed her statutory notice period and the fact that her age shortened her notice period according to national law, and stated that such regulations are discriminatory. Schiek and Mulder hold that it would have been possible to establish a case of discrimination on grounds of ethnicity and indirect gender discrimination, it all of the merits were fully explored.[417]

As aforementioned, the distinction between discrimination on grounds of sex and on grounds of sexual orientation has been heavily debated. The ECJ has repeatedly excluded that the merits in a certain case may entail both types of discrimination. Generally, the cases concerned the question whether same-sex couples in a civil union were discriminated against on grounds of sexual orientation in comparison with opposite-sex couples in marriage regarding certain rights. The overall opinion seems to be that marriage is an institution connected to a union between the opposite sexes, and is thus not comparable to civil unions between same sex couples concerning

[414] See for instance Joined cases C-259/91, C-331/91 and C-332/91, *Pilar Allué and Carmel Mary Coonan and others v Università degli studi di Venezia and Università degli studi di Parma* [1993] ECR I-4309, Case C-33/88, *Pilar Allué and Carmel Mary Coonan v Università degli studi di Venezia* [1989] ECR 1591, Case C-272/92 *Maria Chiara Spotti v Freistaat Bayern* [1993] ECR I-5202 and Case C-15/96 *Kalliope Schöning-Kougebetopoulou v Freie und Hansestadt Hamburg* [1998] ECR I-47.
[415] Case C-388/07 *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR Page I-01569 and Case C-341/08 *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR 00000.
[416] C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG.* [2010] ECR I-00365.
[417] Schiek, Dagmar & Mulder, Jule (2011) p. 263.

discrimination on grounds of sex.[418] Exclusion of the sex dimension in such cases means that the broader scope of the Sex Discrimination Directive is not applicable.

Legal scholars[419] have argued that the ECJ has admitted that two different factors grounded discriminatory treatment in the *Coleman case*.[420] The ECJ ruled that the ban on discrimination on grounds of disability includes cases in which non-disabled persons who are associates of individuals with disabilities are discriminated against because of that association. The plaintiff Coleman was a mother and caretaker of a disabled child. The Court stated that she had been less favourably treated as an employee because of the disability of her child *and* because of the fact that the plaintiff provided for the care of the child.[421] According to Degener, the ECJ recognized the multidimensional nature of the discrimination in question, even though the Court never explicitly stated such recognition and ruled that the treatment was discriminatory only on the ground of disability.[422] It would have been possible to draw the conclusion that the care taking was related to Mrs Coleman's role as a mother, and thus to establish a case of discrimination on grounds of sex.

Schiek and Mulder argue that the merits in *Feryn*[423] indicate that the case also may have involved discrimination on grounds of sex. In *Feryn*, an employer's statement in a job advertisement implied that the employer would not employ Moroccans as up-and over door fitters. The motivation for such a discriminatory measure was that the customers would not feel comfortable with Moroccans in their houses. By 'Moroccans', the employer meant male Moroccans, according to Schiek and Mulder, since the costumers that the employer had in mind, would largely be ethnic majority females, frightened by having an ethnic minority male around. The employer's presupposition is regarding as resulting in a sex discrimination aspect of the treatment.[424]

In the recent case *Wardyn*,[425] the ECJ assessed an alleged case of discrimination on grounds of ethnical or racial origin *and* on grounds of nationality. The case concerned the lawfulness of national rules regulating what language associated spelling rules to use on certificates of civil status in a Member State. According national rules in Lithuania, a person's

[418] Case C-149/96 *Grant v. South-West Trains*, judgment of 17 February 1998, ECR I-621, Case C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, [2008] ECR p. I-01757, Case C-247/08 *Jürgen Römer v Freie und Hansestadt Hamburg* [2011] ECR 0000.
[419] Degener, Theresia (2011), p. 42 and Schiek, Dagmar (2011) p. 17.
[420] Case C-303/06, *S. Coleman v Attridge Law and Steve Law* [2008] ECR I-5603.
[421] Case C-303/06, *S. Coleman v Attridge Law and Steve Law* [2008] ECR I-5603, para 56.
[422] Degener, Theresia (2011), p. 42.
[423] Case C-54/07, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v NV Firma Feryn*, [2008] ECR I-05187.
[424] Schiek, Dagmar & Mulder, Jule (2011) p. 263.
[425] Case C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, [2011] ECR, 00000.

surnames and forenames may be entered on such certificates of civil status only in a form that complies with the rules governing the spelling of the official national language.

The plaintiffs, a married couple named Wardýn, claimed to be discriminated against on grounds of ethnicity or/and nationality, when they were forced to have their Lithuanian names spelled in a way that was adjusted to the spelling rules in Poland. The Wardýns failed to carry out their action; the ECJ did not consider the treatment discriminatory on grounds of ethnicity or on grounds of nationality. Yet, the ECJ considered the circumstances to be within the *scope* of Article 18 and 21 TFEU, and stated the following regarding the application of the Race Discrimination Directive:

> It should be noted in those circumstances that, in the light of the objective of Directive 2000/43 and the nature of the rights which it seeks to safeguard, and in view of the fact that that Directive is merely an expression, within the area under consideration, of the principle of equality, which is one of the general principles of European Union law, as recognised in Article 21 of the Charter of Fundamental Rights of the European Union, the scope of that Directive cannot be defined restrictively.[426]

The ECJ's statement may be interpreted as if the material circumstances concerning the plaintiffs' *ethnical or racial origin* could have fallen within the scope of the Race Discrimination Directive. Hence, the merits seem to fall within the personal scope of both the Race Discrimination Directive *and* Article 18 and 21 TFEU. If that would be the case, a Member State's application of spelling rules related to a national language, could be a case of discrimination on grounds of ethnicity *and* on grounds of nationality, if the circumstances fell into the material scope of *both* TFEU and the Race Discrimination Directive.

In contrast to ECJ case law, the ECtHR has paid less overall attention to the discrimination grounds in its rulings. As the Article 14 list is open and non-exhaustive, the ECtHR did not find it necessary to determine on what grounds a discriminatory treatment was based in the case *Rasmussen v. Denmark.*[427] *Rasmussen* was a case in which the plaintiff claimed to be discriminated against when treated differently than his formal wife concerning time limits for proceedings determining paternity. In Denmark, there were no such time limits for determining maternity. This situation could have been a case of discrimination on grounds of sex, but the Court never examined on what grounds Mr Rasmussen was discriminated. It merely focused on the actual difference in treatment between the husband and the wife. Gerard argues that this approach may solve problems of intersectional discrimination, since it gives a plaintiff a possibility to base a complaint on a number of factors. However, Gerard emphasizes that it is

[426] Case C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, [2011] ECR, 00000, para 43.
[427] *Rasmussen v. Denmark*, judgment of 28 November 1984, Appl. No 8777/79.

still important to show that a difference in treatment is actually based on a certain ground, since the ECtHR treats the different grounds differently when assessing whether the discriminatory treatment was justified.[428]

What determines that the ECtHR treats some grounds differently when assessing justification is whether it deems an invoked ground suspect. If the ground is suspect, the defendant State Party must show very weighty reasons to justify a discriminatory treatment. A case in which the ECtHR assessed justification of discrimination on a suspect ground – religion – is *Leyla Şahin v. Turkey*.[429] In this case, the ECtHR assessed whether the ban on wearing a Muslim headscarf at a University may be a justified breach of the right to freedom of religion in Article 9 or a justified discrimination on grounds of religion, Article 14 in combination with Article 9. The Court concluded that the ban on Muslim headscarves was a justified treatment in that national context, partly because the Court balanced the right to freedom of religion against the rights of women. The ban on wearing headscarves could be interpreted as a measure to reinforce women's situation in Turkey. Consequently, the need to differ between the different grounds when taking action in the ECtHR is also motivated by the fact that the safeguarding of non-discrimination on *one* ground may require justified discrimination on *another* ground.[430]

In summary it seems as if the ECHR and the ECHR inspired EU Charter is better equipped to address situations of multiple and intersectional discrimination when applied in case law. As the Charter has the legal status of primary law, the future will show whether the ECJ will apply an inspired legal view to the interaction between the different grounds of discrimination when applying EU law. To solve problems of hierarchies between the grounds and of the ignorance towards the need to address every aspect and reason behind every individual case of discrimination, such an approach may be fruitful when combating multiple and intersectional discrimination.

4.2 Multiple and Intersectional Discrimination in Swedish law

4.2.1 Sources of protection against multiple and intersectional discrimination in Swedish law

As in EU law, there is no explicit protection against multiple or intersectional discrimination in the Swedish Discrimination Act or in any other national legislation applicable in labour law.[431] In the Government White Paper preceding the Discrimination Act, it is mentioned that the

[428] Gerards, Janneke, (2007), p. 176f.
[429] *Leyla Şahin v. Turkey*, judgment of10 November 2005 [GC], Appl. No. 44774/98.
[430] Nielsen, Ruth (2009), p. 31-32.
[431] Fransson, Susanne & Eberhard, Stüber (2010), p. 99.

reinforcement of the discrimination legislation and national combat against discrimination, will increase the possibilities to invoke discrimination on several grounds, so called multiple discrimination.[432] The Government shared this opinion in the preparatory works of the Discrimination Act, but chose not to use the term 'multiple discrimination'. In the preparatory works, the Government argues that a comprehensive Act on discrimination could facilitate the possibility to take action against discriminatory treatment, especially if the discriminatory treatment can be attributed to more than one ground of discrimination. The Government holds that a victim of discrimination should not need to ponder upon on what grounds he or she has been mostly discriminated on, in order to bring the complaint to the right Ombudsman.[433]

Subsequently, the Swedish Government has recognized one of the problems mentioned by Schiek and Mulder; the problem of finding the bans on discrimination on different grounds in separate pieces of legislation. However, the scopes of the bans on discrimination within the Discrimination Act are distinguished from each other.

In 2 Chapter 1 § of the Discrimination Act it is stated that a plaintiff has the possibility to bring a discrimination complaint to Court, if he or she can establish that a difference in treatment is connected to one or several of the discrimination grounds. Numhauser-Henning holds that the legislative method indicates a wish to facilitate complaints in multiple and intersectional discrimination cases.[434]

The fact that there is just one Ombudsman who has standing in all discrimination disputes in the Labour Court may facilitate the possibility to take action in multiple and intersectional discrimination cases. However, there were no procedural obstacles to take action in such cases before the adoption of the Discrimination Act. In AD 2003 nr 63,[435] the Labour Court ruled in an alleged case of discrimination on grounds of ethnicity and on grounds of sex. The defendant pleaded that the Ombudsman against Ethnic Discrimination (now replaced by the Ombudsman against Discrimination), did not have a standing in cases of discrimination on grounds of sex. Only the Ombudsman for Sex Equality had such standing, according to the defendant. The Labour Court stated that the Ombudsman against Ethnic Discrimination had standing regarding discrimination on grounds of sex, as long as the Ombudsman for Sex Equality participated within the frame for the two Ombudsmen's internal relationship. Hence, the proceedings were allowed in the Labour Court. It is noteworthy is that the competence for the Ombudsman for Sex Equality to take action in other cases, was recognized as more narrow by the Labour Court.

[432] State Offical Report 2006:22, p. 193.
[433] Government Bill 2007/08: 95, p. 364.
[434] Numahuser-Henning, Ann (2009), p. 515f.
[435] AD 2003 nr 63.

In the preparatory works of the Discrimination Act, the Swedish Government acknowledges the fact that an open list of discrimination grounds is a desirable instrument in the combat against discrimination. Yet, the Government held that the most 'suitable contemporary solution is that the legislation on discrimination includes the grounds that the Discrimination Committee involved in their preparations, the same grounds that substantially are equivalent to the protection in EU secondary law' (translated from Swedish). In other words, the Government did not think that such a solution was investigated enough, but acknowledged that the amount of discrimination grounds was not finally determined. In the long run, the Government found that it may be of interest to examine whether it is appropriate and possible to design a general and comprehensive ban on discrimination on the basis of the principle of equal dignity and rights, inspired by instruments such as ECHR. Further, the Government emphasized that Article 14 ECHR is already applicable as Swedish law.[436]

Numhauser-Henning holds that it is surprising that the Swedish Government did not explicitly mention multiple and intersectional discrimination in the Swedish Discrimination Act. She points out several problems that the new structure of the legislation has regarding the aim to make it comprehensive and to put the different discrimination grounds on an equal footing. She argues that when fulfilling the aim to equalize the different grounds of discrimination, there is a risk that the legislator will settle for the lowest common denominator between all the grounds; the Aristotelian principle of equality. This principle is not sufficient in the combat of the real, pluralistic character of the different kinds of discrimination in society. To combat discrimination, positive action and measures aiming at substantial equality are necessary.[437] Parallels may be drawn from this criticism regarding multiple and intersectional discrimination. If the Discrimination Act appears to be truly comprehensive, but yet contains the same overlapping character between the different scopes and the different discrimination grounds as before, the actual and distinguished problems regarding *each* of the grounds *and* regarding the grounds in combination, will remain hidden. The focus remains on the common denominator between all the grounds; alike should be treated alike, without taking account of the fact that individuals may not enjoy equal opportunities at the starting-point.

According to Numhauser-Henning, positive action may be the most rewarding legal instrument in the combat of discrimination.[438] Schömer concurs and holds that positive action is by far the most effective measure in the combat of discrimination, especially multiple and intersectional discrimination. Schömer argues that it is obvious that positive action is not at the core of the ambition with the Discrimination Act. The result of the uniform Discrimination Act is that the different groups are set against each other and ranked among themselves. The Discrimination Act does not override the gaps and differences between the groups protected by the

[436] Government Bill 2007/08: 95, p. 110f.
[437] Numhauser-Henning, Ann (2009), p. 514ff.
[438] Numhauser-Henning, Ann (2009), p. 514ff.

legislation, instead treated as different categories within sealed compartments.[439]

To summarize the legal situation concerning the sources of protection against multiple and intersectional discrimination in Sweden, it seems as if the legislator realized that the legislation in force was insufficient to combat such types of discrimination already before the adoption of the Discrimination Act. The concept of intersectional discrimination and the problems concerning the comparator in cases of indirect discrimination are not even mentioned in any of the official documents or in the legal debate concerning the relationship between the different discrimination grounds. Neither is it discussed whether a combination of discrimination grounds should give accumulated effects on the damages award to the victims of such types of discrimination. Yet, the Ombudsman recently reported that of all the complaints in 2009, 148 cases were considered as cases of multiple discrimination since they involved two or more discrimination grounds.[440] Such an amount shows that the problems related to multiple and intersectional discrimination are very much real and must be dealt with from a legal perspective.

4.2.2 Swedish case law involving several discrimination grounds

Several cases involving one or more grounds of discrimination have been examined by the Swedish Courts. In the following, the Court's assessments in cases relevant to purposes of understanding of multiple and intersectional discrimination will be referred and explored. Some of the cases are based on previous legislation, but the rulings were not affected significantly by the legal changes. The referred cases are all within the area of labour law, except the last one, ruled by the Appeal Court of Western Sweden. However, the principles applied in this case are still relevant within the area of labour law.

In AD 2003 nr 63, the Labour Court assessed an alleged case of direct discrimination on grounds of ethnicity and sex. The plaintiff held that she had been discriminated against when the employer made the decision to end a recruitment procedure. The first contact between the plaintiff and the employer was by phone, during which the plaintiff stated that she was interested in an employment. The plaintiff did not say that she was a Muslim, wearing a headscarf. The Labour Court concluded that there were no employments available at the time of the phone call. Thus the conversation fell outside the scope of the legislation in force at the time, even though the plaintiff was not informed that there were no open positions within the company.

[439] Schömer, Eva (2011), p. 11f.
[440] Government Bill 2010/2011:1, p. 38f.

After the phone call, the plaintiff visited the work place to personally show her interest in an employment within the company. During her visit, a representative of the employer made remarks on the plaintiff's clothing, when discovering that she wore a Muslim headscarf. In brief, the representative communicated that the plaintiff's headscarf did not comply with the company's dress policy. The representative did not inform the plaintiff that there were no open positions within the company at that time. According to the Labour Court, the meeting between the representative and the plaintiff also fell outside the scope of the legislation in force, since the Labour Court held that there is no obligation to inform a job applicant that an employment is no longer available. Further, the Court did not find that 'the purpose of the Act on measures against discrimination in employment on grounds of ethnicity, religion or belief of 1999[441] is to [...] give protection for job applicants long after the position in question has been filled'.

What is interesting in this case, is that the Labour Court admits that it could have been a case of indirect discrimination, if the dress policy related treatment of the plaintiff would have fallen within the scope of the legislation. The Labour Court holds that the dress policy would have been a seemingly neutral provision that puts women at a disadvantage in comparison with men. However, the Court considered it as clear that the recruitment procedure was completed when the employer received information about the plaintiff's clothing and religion. Hence, the employer's recruitment decision was not affected by the plaintiff's sex or in breach of the legislation in force. This assessment may be compared to the ECJ:s conclusion in *Feryn.*[442] In *Feryn*, The ECJ found that a recruitment policy in an employment ad was discriminatory, even though it was not established that an individual was affected by the discriminatory measure. If the same principle would have been applied in AD 2003 nr 63, the Court may have found that the dress policy was discriminatory, in spite of the fact that the encounters between the employer and a certain employee fell outside the scope of the legislation. It is also interesting that the Court made such elaborations only regarding indirect discrimination on grounds of sex. Regarding indirect discrimination on grounds of ethnicity, the Court shortly stated that the treatment in question fell outside of the scope.

In AD 2009 nr 11,[443] a recruitment procedure undoubtedly fell within the scope of the legislation prohibiting discrimination at the time, since a vacancy within the company had been advertised. In this case, the court assessed whether a plaintiff who claimed to be discriminated against on grounds of ethnicity, sex and age when denied to be called for interview and the vacant position, was in a comparable position with the other job applicants. The Court held that since the plaintiff failed to fill in the

[441] Lagen (1999:132) om åtgärder mot diskriminering i arbetslivet på grund av etnisk tillhörighet, religion eller annan trosuppfattning.
[442] Case C-54/07, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v NV Firma Feryn*, [2008] ECR I-05187.
[443] AD 2009 nr 11.

application form correctly, she was not comparable to the other job applicants. The application form required among other things information about the job applicants age and home address. According to the Court, it is normal that job applicants provide employers with this kind of information, and since it was stated in the form that such information was required, the information was obviously relevant for the employer. The fact that the plaintiff omitted such information indicated that the plaintiff 'lacked in precision and ignored the company's request'[my translation]. Under such circumstances, the Court found that the plaintiff was not comparable to job applicants who followed the company's application instructions and thus were not lacking in precision and perceptiveness of the company's wishes.

The Court did not take account of the fact that the plaintiff visited the company and left her business card, since the Court found it established that the recruitment officers at the company did not associate the job applicant to her application letter. The Court did not find the plaintiff's work experiences as an executive director as an advantage in the recruitment procedures, since the vacant employment was referring to work of simpler kind; working with car rentals. What is interesting in this case is that the Court gives the employer a broad right to set the standards when recruiting. The Court states that the required information is of a type that an employer normally needs when recruiting. Since age and home address obviously are pieces of information that an employer must not be denied in a recruitment process, one may wonder what conclusions based on such information are allowed. If the employer based the decision on grounds of age, it may be unlawful according to the discrimination legislation in force. The Court explicitly held that it was not sufficient that the employer was able to figure out how old the plaintiff was by the length of her resume. It seems as if the fact that the plaintiff lacked in meeting the employer's requirements wishes in *itself* was considered as detriment for the plaintiff.

AD 2010 nr 91[444] is a case with several features in common with AD 2009 nr 11. The accusations against employer in AD 2010 nr 91 were that the plaintiff was discriminated on grounds of sex and age when denied to be called for a job interview and denied the employment in question. Another similarity is that the employer did not find her personally appropriate and did not consider the plaintiff comparable with the other job applicants. A difference is that the employer does not claim that the plaintiff had done any formal errors when applying for the job. Another difference is that she did not claim to be discriminated against on grounds of ethnicity.

The plaintiff applied for a vacant position as a job coach within the Swedish Employment Service. 10 job applicants were called to interview, 4 of whom were men, 6 women. All of them were younger than the plaintiff, who was 62 years of age. 2 of the younger women were hired. The Court held that it was obvious that the plaintiff was more formally qualified than the other job applicants, even though the employer held that she lacked in breadth of

[444] AD 2010 nr 91.

experience and education. The Labour Court concluded that the plaintiff's level of qualification made her comparable with the other applicants. Discrimination on grounds of sex and age was considered probable concerning the interview and discrimination on grounds of age concerning the decision of whom to employ.

Hence, the burden of proof shifted to the employer. The employer held that there was no causation between the decisions and the plaintiff's age and sex, since the plaintiff was not personally appropriate for the vacant position. The employer held that two associates of the recruiter had told her that the plaintiff had 'a superior attitude and a lack of empathy', and that this was the reason why she was not interview, nor hired. The Labour Court stated that the employer should have inquired the personal suitability more narrowly with the plaintiff's qualification in mind. Lastly, the employer argued that the age and sex spread among the employees weighed against a case of discrimination against the plaintiff. The Court gave this argument a certain value, and gave the following argument which may be one of the most interesting writings in Swedish case law from a multiple and intersectional perspective:

> The age and sex spread may to some extent speak in favour of the employer, particularly with regard to whether the selection for interviews constituted sex discrimination. Mostly women were called for interview, six out of ten, and two women were hired. This speaks against the idea that the employer was primarily interested in hiring women. With regard to that the plaintiff seems so obviously qualified for the vacant position in relation to two of the men who were called for interview – regarding qualifications such as education and work experience – the Labour Court considers that the arguments about the spread of sexes per se are not sufficient to refute that it was also case of discrimination on grounds of sex. [My translation.]

Hence, the Labour Court concludes, is that it is irrelevant that other women with poorer qualifications, *as well as* other men were called to interviews. The qualifications of the men chosen were considerably low, and the women called were mostly younger than the men. In this writing, the Court seems to take account of certain intersectional aspects of the discrimination in question. Instead of separating the merits for each of the alleged discrimination grounds from each other, the Court assessed them together. The Court did not compare the plaintiff's age strictly with the other job applicants ages. Neither did the Court compare the plaintiff's sex strictly with the other job applicants' sexes. Instead, the Court assessed all the merits together through distinguishing and separating the *younger* women out of the comparison of the plaintiff with the men. Through this distinction emerges a new group of comparators; younger women *and y*ounger men. In comparison with these individuals, it was concluded that the plaintiff was discriminated against on grounds of sex and age when denied interview and employment.

The following two cases differ significantly from the latter ones, concerning the legal assessment. They concern employees who allegedly have been harassed by their employers or representatives for their employers. Two Muslim women wearing headscarves were employed by the hour at a fitness club. They claimed to have been harassed by their employer on grounds of religion and sex during this employment in AD 2010 nr 21.[445] During the employment, their immediate supervisor discussed religion and the Islamic way of life with the plaintiffs. For instance, the supervisor questioned the reasons behind wearing a headscarf as a Muslim and why Muslims do not eat pork. He made jokes about their religion, for instance it is undisputed that he used the word 'Halal pork'. Further, the plaintiffs held that the supervisor indicated that he wanted to look underneath the headscarves of the plaintiffs'. According to the Labour Court, none of the parties' versions of the circumstances precede the other. Yet, the fact that the supervisor undisputedly looked upon the Muslim headscarves as an advantage when hiring new staff, spoke against the plaintiff's statements about the supervisor's attitude, according to the Court.

Further, the Court held that an individual, who claims to be harassed by an employer, must prove that they demonstrated that they consider themselves harassed for the employer. According to the Court, the plaintiffs failed to do so, and the established general discussion was according to the Court not of such kind that it in itself was harassing. The joke about 'Halal Pork' could be perceived as a mockery, but it is clear that the supervisor intended it to be a joke, however a plump one, according to the Court. Because it was not proven that the joke was repeated, and because the plaintiffs did not clarify how offended they felt by the joke, the joke was not considered as harassment.

Several of the indisputable circumstances were not included in the Labour Court's final judgment. For instance, it was indisputable that the supervisor had discussed intimate hair growth with the plaintiffs. It was also indisputable that the plaintiffs had a very unstable form of employment, which made them especially vulnerable in relation to the supervisor, who had a superior position. In conclusion, the Labour Court ruled that two Muslim women are obliged to tolerate speculations and jokes about their religion and about how their religious beliefs interact with their positions as women in their private life, since such treatments are not considered as harassment and thus not discriminatory.

AD 2011 nr 13[446] is also a case involving accusations of harassment directed against an employer. Two women were hired as mental care workers in a group home. One of the women was originally from the former Soviet Union and the other woman was from Bosnia. During their employment, their supervisor made certain statements regarding the two women and exposed them to an image of a sexual nature. The plaintiffs held

[445] AD 2010 nr 21.
[446] AD 2011 nr 13.

that the statements constituted harassments on grounds of sex and ethnicity and that the exposure to the image was sexual harassment and/or reprisals.

Regarding one of the women, the Labour Court stated that it was clear that the supervisor called her 'eastern girl' ('östflicka', translated from Swedish) on at least two occasions. The Labour Court held that is clear that the plaintiff in question clarified that she did not want to be called that way when telling the supervisor that she 'had a name'. Yet, the supervisor continued to call her 'eastern girl' even after she stated that she did not want to be called that way. Hence, it was an established case of harassment on grounds of ethnicity. However, the Labour Court did not consider it a case of harassment on grounds of sex, since it was not established that 'eastern girl' alludes to sex trafficking and prostitution. Further, it was not established that the supervisor used the term with that meaning in mind. Considering the problems associated with multiple and intersectional discrimination, the Court's statement may be regarded as a choice to set aside aspects of sex and ethnicity in combination. It is clear that the supervisor explicitly pointed out *women* from the East, not every individual from the East, through these indisputably harassing statements. One could wonder whether it would have been an established case of harassment on grounds of sex if the supervisor would have called the women 'girls' repeatedly against their will.

Further the Court assessed whether statements about the two women in their absence constituted harassment on grounds of ethnicity and/or sex. The Court held that such statements could constitute harassment, if the supervisor made them with certainty that the statements would reach the women. It was established that the supervisor used some kind of expression referring to the women's sex and their origin, yet the Court found it unclear to what extent such expressions have been used. Since it was not established that the supervisor continued to use such expressions after the women spoke out against such expressions, the Court concluded that a case of harassment was not established concerning these statements.

Besides calling the plaintiffs 'eastern girls', the supervisor exposed them to a picture of a sexual nature on two occasions. The first time was during Christmas in 2007, the supervisor hung a picture on the wall of the staff rum. The picture showed an image of a man with erection, wearing a leather suit, a hood and with a whip equipped with Christmas baubles. The Labour Court concluded that the picture was indubitably inappropriate, but nothing in the investigation proved that the hanging was directed specifically towards the two women. Because the picture in question must be understood as a satire, and hence is not of such a nature that the hanging of the picture in itself is a violation of the women's dignity, it was necessary for the women to point out the offensive nature of the picture to their supervisor, according to the Court. The Court held that there must be a range to hang pictures of a sexual nature, directed towards no one, even if someone in the group to whom the picture is exposed, complains about the picture.

What the Court overlooked may be the fact that a complaint in itself gives the consequence that the decision to let the picture *remain* is contrary to the complaining employees' will and wellbeing. Hence, such a decision is directed towards these employees dignity and may be harassing in itself. It is undisputed that one of the plaintiffs did complain about the picture. She told the supervisor that the picture was inappropriate. But, the Court did not find such a complaint sufficient to convey the supervisor that the employee herself felt violated by the picture. It is unclear whose opinion about the suitability of the picture she was presumed to speak, if not her own. Further, the Court holds that the complaints were stated after the hanging of the picture. It seems as if the Court requires that the complaints must precede the hanging to be valid. Such complaints are impossible, since the employees had no knowledge of the hanging of the picture before it was made. Nevertheless, merely the hanging of the picture in the staff room was thus not considered as a case of sexual harassment by the Labour Court.

During the next Christmas season in 2008, the supervisor exposed the employees to the picture again, through sending it by e-mail. The supervisor held that it was mistake, but failed to prove so. The Labour Court concluded that the supervisor knew what the women felt about the picture in question, and with that knowledge in mind, it was sexually harassing to send the picture directly to them by e-mail.

The plaintiffs held that the e-mail also constituted reprisals in reaction to their former complaints, but the Court did not consider it as a typical measure of reprisal. Neither did the Court find that the plaintiffs made it probably that the e-mail was sent with a purpose of penalty. Hence, it was not considered as a case of reprisals.

It is clear that cases of harassment significantly differ from other cases of discrimination when analyzing the Court's conclusions in this case. There is no review of the reasons behind the treatment of the employees in a harassment case of this kind. The employer's acts do not need an objective reason to be lawful. It is sufficient that they did not fall outside what an employee should tolerate during an employment. The tolerance for an individual employee is closely connected to what he or she explicitly opposes in relation to the employer. The ambiguity in what an employee must tolerate during his or her employment, makes it hard to combat cases of multiple and intersectional discrimination. For instance, there may be a higher level of expected tolerance towards being called a 'girl' against ones will, than being called an 'eastern girl'. The consequence of this lack of transparence in the legal assessments may be one of the major obstacles in the combat of multiple and intersectional discrimination.

The last case that will be referred falls outside the scope of labour law. Yet, the principle established in this case may be applicable within labour law as well, and is important concerning the reasoning about the comparator in

cases of discrimination on several grounds. The case T 2049-07[447] was ruled by the Court of Appeal in Western Sweden. Two Muslim Women wearing headscarves claimed that they had been discriminated against on grounds of sex and religion when denied access to a public bath because of their outfit. The Muslim way of life implies that a woman must cover all of her body when she is present in a public space. According to the rules of the public bath, it was allowed that accompanying parents wore clothes. Yet, these rules gave the bath supervisors some margin of appreciation to decide whether a dress was appropriate in an individual situation. In this case, the supervisors of the bath considered the women's dresses inappropriate, since the women were too covered. One of the women's sweater was considered too thick, and the other woman was overdressed because of the fact that she was wearing a skirt on top of her trousers. From a security and hygiene aspect, such clothing was inappropriate taking account of an emergency situation in which the women were forced to jump into the water, according to the defendant. The defendant held that the decision did not have any 'racist motives' and that there were no causations between the decision and the women's sex and religion.

The Court of Appeal held that the women's clothing were not in breach of the rules of the bath considering accompanying parents from an objective point of view, irrespective of the fact that there was a margin of appreciation for the supervisors. Such an exclusion was a disadvantage according to the Court. Further, the Court held that the women had no possibilities to comply with rules pronounced by the supervisors. The Court stated that the clothing was an obvious marker of the fact that the plaintiffs were religious, Muslim women. Hence, the Court found it probable that the plaintiffs were discriminated against, but it is not explicitly stated by the Court on what ground discrimination is probable.

The burden of proof shifted to the defendant, who was to prove that there was no causation between the treatment and the plaintiffs' religion and sex and possibly ethnicity. When assessing the defendant statement that the treatment was caused by security and hygiene reasons, the Court concluded that there was no actual comparator in this case. The way the Court reasoned concerning the comparator is interesting for the purposes of this study. The Court chose a hypothetical comparator to establish whether or not the treatment was discriminatory. The starting-point of the judgment was that every individual has the right not to be discriminated against when visiting a public bath. Because the defendant was unable to prove substantive and objective reasons for the behavior of the bath supervisors, it must be assumed that a hypothetical comparator would not have been treated in the same way. Thus, there was no need to separate the different grounds of discrimination from each other when establishing who the relevant comparator is. The Court merely ruled that a person who is *no*t a Muslim woman wearing headscarf and who fully covers her body when visiting a bath would not have been treated in the same way. Yet, the Court only

[447] T 2049-07.

referred to discrimination on grounds of religion when it finally ruled that it is was an established case of religion. The defendant appealed the judgment to the Supreme Court, but the appeal was refused and thus the judgment stands.[448]

[448] Mål nr T 941-08.

5 Analysis and Conclusions

The purpose of this study is to explore and analyse the protection against multiple and intersectional discrimination in Swedish and EU labour law. To pursue such a purpose, I have found it necessary to define the concepts and examine the legal landscape of Swedish and EU law. In the following section, I will answer the research question and analyse my findings.

Initially I conclude from my exploration, that the usage and understanding of multiple discrimination, as distinguished from intersectional discrimination gives a specific result. It is clear that multiple discrimination is accepted as a legal concept, and that EU law and Swedish law do provide protection against multiple discrimination to some extent. It is obvious that the protection against multiple discrimination differs from the protection against intersectional discrimination. Multiple discrimination is mentioned in the preambles of several EU Directives and mentioned in the Swedish Government White Paper. Intersectional discrimination is not mentioned in any legislative documents at all, neither in EU law, nor in Swedish law.

Multiple discrimination is a concept that points out situations of discrimination when two or more different grounds of discrimination occur at the same time, but these different grounds are not dependent on each other when building a case. Intersectional discrimination is discrimination based on two or more grounds of discrimination that are inextricably linked to each other in a certain situation. It is evident that there are significant differences between these concepts, as well as the understanding for their usage within a legal context. Multiple discrimination is a concept that appears within both EU and – to a lesser extent – in Swedish law. The current legal situation provides protection against multiple discrimination. The procedural obstacles found by Crenshaw in the application of US law in cases involving several discrimination grounds from the 1980's do not exist in EU or Swedish case law.

There are, however, problems related to the different breadths of scope regarding each of the discrimination grounds. In EU law, such problems are mainly caused by the fact that the Sex Discrimination Directive, the Employment Discrimination Directive and the Race Discrimination Directive have different scopes and have emanated out of different legislative contexts. As an example, discrimination on grounds of sex has an exceptional position within discrimination law in comparison with the other grounds of discrimination. Hence, the application of the standards set in the Sex Discrimination Directive covers more cases of discrimination than application of the Employment Discrimination Directive. A tendency to try fit the circumstances in discrimination cases under grounds of sex may have appeared as a consequence. This follows from the rulings in *P v S and Cornwall County Council* and *Grant v South-West Trains*, in which the ECJ has ruled that discrimination on grounds of transsexuality does constitute

discrimination on grounds on sex, whereas discrimination of same-sex partners did not constitute discrimination on grounds of sex.

Nevertheless, it is possible to invoke more than one ground of discrimination in an action taken based on Swedish and/or EU law. As previously mentioned, the European Parliament has suggested a definition of multiple discrimination in a proposal for a Council Directive, covering all combinations of the discrimination grounds. However, there are no specific provisions dealing with the situation in which the discrimination grounds are inextricably linked to each other in this proposal, and therefore it does not explicitly cover cases of intersectional discrimination. In addition, it does not seem plausible that the Directive will enter into force.

In Swedish law, many of the discrimination grounds are defined and explicitly discussed in preparatory works. There seems to be an awareness that the setting of the scope of the discrimination grounds may entail certain problems concerning the limitation. Nonetheless, the Swedish Government chose not to solve or discuss how the different grounds of discrimination should be distinguished from each other when adopting the Discrimination Act, although there must have been an awareness of the EU debate on the matter.

In spite of the recognition of the possibility to invoke more than one discrimination ground, the legislators in EU and Sweden seem to hold that is sufficient that a plaintiff succeeds in taking action on *one* ground of discrimination. A treatment that is discriminatory on more than one ground does not constitute a more severe case of discrimination.

The understanding of intersectional discrimination, as distinguished from multiple discrimination, is limited. Perhaps such a lack of understanding is caused by the difficulties to comprehend when and why problems of intersectional discrimination are legally relevant. The comparator-based definition of discrimination is a greater problem to situations of intersectional discrimination than situations of multiple discrimination, since it is more or less impossible to separate the merits from each other in the former case. Such problems make it difficult to separate and compare individuals with each other in a consistent and transparent manner.

The explanation of the differences in understanding between the two concepts may be that multiple discrimination is more compliable with the current discrimination legislation, in which the Aristotelian principle of equality is embedded. Intersectional discrimination, on the other hand, may be dependent on perceptions of structures and societal norms. Such perceptions are presumptions to aims of substantial equality through mainstreaming.

Ann Numhauser-Henning and Eva Schömer hold that legislation that is silent on the *specific* societal problems related to the *interaction* between several discrimination grounds puts individuals at risk of lacking in

protection against such forms of discrimination. Gerard, Schiek and Mulder find several problems embedded in the current legislation that makes it unfit to address these problems. They promote the removal of a comparator-based definition of discrimination, seemingly because a comparison implies that there is a scale or criterion that we can all be compared to, as described by Fredman and Szyszczak. Such a criterion or scale implies that the aim of achieving equality is based on a presumption that individuals are originally alike. In reality, individuals are never completely alike and every case of discrimination is caused by a unique set of circumstances. Promoters of substantial equality focus on the actual structures and situations in society causing discrimination. Their aim is to put all individuals in an equally favourable situation, whilst admitting that there is no original alikeness, or equality standard/scale/criterion to which everyone is comparable. Positive action is a legal institute that may provide individuals with better opportunities to reach equally favourable situations.

Yet, there are severe difficulties when deciding what is favourable for a certain individual. Thus, it is hard to determine what to achieve in order to put a certain individual in a situation that is equally favourable in comparison with another individual. Interests and preferences of individuals and groups are always balanced against each other. The ECtHR is often required to make such considerations in cases where the protection of one group of people is weighed against the protection of another group. In *Leyla Sahin v. Turkey*, the ECtHR approved the breach of the positive right to freedom of religion, because it was legitimated by the aim to promote equality between women and men. Thus, questions of multiple and intersectional discrimination involves problems of balancing the different interests connected to the discrimination grounds against each other, without creating a hierarchy between the grounds.

The process of involving multiple and intersectional discrimination in legislation appears to be a future project, and not a current priority within EU and Swedish law. The fact that limited attention is given to multiple discrimination, and that intersectional discrimination has been completely left out of the legal debate, may be explained by the periodization made by Hepple, as explored by Numhauser-Henning. Hepple argues that the most recent discrimination legislation period within the EU is dominated by tendencies of comprehensive and transformative equality. Numhauser-Henning holds that tendencies of comprehensive and transformative equality provide the legislation with the features required to achieve substantial equality through mainstreaming approaches. Hence, there may be a connection between the tendency to understand substantial equality, as achieved by mainstreaming approaches, and the understanding of problems related to multiple discrimination.

There is a connection between mainstreaming strategies within the EU and the combat against multiple discrimination in the EU. This connection has been observed by Mulder and Schiek. The recent tendencies to propose legislation on multiple discrimination shows that the tendency towards

mainstreaming strategies within discrimination law is likely to be strengthened onwards. Changes in value approaches following the Lisbon Treaty may strengthen such tendency even further, since the mainstreaming approach is explicit in the TEU, and because there are explicit aims to withhold a social market economy in the EU. One of the most important components in the social views of the EU is indisputably the combat against discrimination on all grounds.

Mulder and Schiek have found that multiple discrimination in the EU is addressed within non-discrimination legislation concerning *other* discrimination grounds than sex, through preamble stated requirements on mainstreaming of sex equality when combating discrimination on other grounds. Unfortunately, the mainstreaming approach is affected by an imbalance, which is why there are no requirements on mainstreaming of protection against discrimination on other grounds than sex in the preambles of legislation on sex equality.

The mentioned problems regarding the general relationship between the different grounds of discrimination in terms of avoiding a hierarchy, and the differences in scope that distinguish them from each other, are complex and multidimensional. The review of the EU and Swedish Courts' difficulties to distinguish discrimination grounds from each other, for instance concerning sex in relation to sexual orientation, ethnicity in relation to religion or/and nationality, shows that efforts to draw a straight line between the different groups are contested. Gerard holds, for instance that the ECJ:s attempt to distinguish sex from sexual orientation in the case *P v S and Cornwall County Council*, was discriminatory in itself.

The narrow exploration of the definitions of grounds of discrimination in EU and Swedish law referred above in Chapter 2 and 3 shows how difficult it is to establish what determines what discrimination ground is relevant in an individual case. As mentioned in section 1, human beings are actually unique, and features, such as sex and race that are assigned to them, are a consequence of societal norms and structures. Since it is impossible to draw a hard line between the different grounds of discrimination, it would be highly questionable if the legislation in force did not cover situations in which it is impossible to distinguish discrimination grounds from each other.

The recent *Wardýn* case from the ECJ shows that the distinction between discrimination on grounds of ethnicity and discrimination on grounds of nationality is largely motivated by the political implication behind the different legal basis of the protection. The same circumstances in an individual situation may very constitute discrimination on grounds of ethnicity as well as discrimination on grounds of nationality. In the Swedish case T 2049-07, the Court of Appeal avoids to distinguish between the religious aspect, the ethnical aspect and the sex aspect of wearing a Muslim headscarf. The aspects were all there, but left out of the judgment until the Court stated that it was a case of discrimination based on religion. One way

to avoid difficulties when distinguishing the discrimination grounds from each other may be to use the hypothetical comparator more extensively. This is what the Court of Appeal did in T 2049-07, with the result that the legal review was reduced to an assessment of whether the defendant's treatment of the plaintiff would apply to other individuals, not wearing Muslim headscarves and clothing motivated by religious reasons. Since the Court concluded that the defendant failed in proving objective reasons to treat individuals that way, a case of discrimination was concluded.

A problem may appear when eliminating the features related to each of the discrimination grounds in the assessment in the described manner. Through the usage of a hypothetical comparator, the assessment boils down to one common denominator for all the discrimination grounds; the question of objective reasons for the alleged discriminatory treatment. Such a tendency is strengthened by the legislation on the burden of proof. The shifting of the burden of the proof causes a focus on the defendant's argument and proof concerning the causation behind the treatment, or the justification of the treatment in case law. In a broader perspective, this focus implies that there is no need for the Courts to explore and review the distinguished features for each of the discrimination grounds in a legal assessment.

The consequence of the lack in understanding regarding intersectional discrimination is that one specific situation of intersectional discrimination is not covered by EU law or Swedish law. The situation that falls outside the scope of the discrimination legislation, is actually the one described by Crenshaw, similar to the situation in *Degraffenreid v. General Motors.* In cases of indirect situation, the groups protected by the legislation are identified and compared to other groups at a working place. The list of discrimination grounds Swedish law is closed. Lists of discrimination grounds in EU Treaties and secondary legislation are also closed. Usage of a hypothetical comparator is not permitted in cases of indirect discrimination. The result is that a plaintiff in a case of indirect discrimination must show that a protected group is disadvantaged in comparison with a group that is not protected by the legislation. Normally, such a disadvantage is connected to the group through statistical evidence. If the statistical evidence lacks in establishing causation between the protected group and the disadvantage, it is not a case of indirect discrimination.

The lists of discrimination grounds in Swedish and EU law do not include protection for 'black women', 'Muslim women' or other combinations of grounds *per se*. Hence, a situation of indirect discrimination on grounds of, for instance ethnicity *and* sex will fall outside the scope of the legislation, because the group affected is smaller than the relevant comparator group. Not *all* women or *all* individuals with a certain ethnicity, or a relevant majority of the women and/or the people with this ethnicity will be affected by the disadvantage. This is a serious shortcoming that must be addressed, both within the EU and within Swedish law. One way to tackle such a gap in the protection is to adopt and apply open lists of discrimination grounds, inspired by the Charter and the ECHR. The changed legal status of the

Charter might entail such possibilities, if the ECJ accepts such an application of the Charter. Yet, open lists of discrimination grounds may accelerate the tendency to focus on causation and justification in case law, and divert the legal assessments from the particular features that every discrimination ground may entail. The core in the mainstreaming strategy is the principle of substantial equality according to Numhauser-Henning. Thus, mainstreaming strategies entailing focus on multiple and intersectional discrimination should aim at obtaining equal opportunities, not equality *per se* for all individuals. A legal focus on causation and justification is contradictory to such aims.

Lastly, the question of the Swedish protection in comparison with the EU law protection against multiple and intersectional discrimination remains unanswered. It is difficult to answer this research question, since the protection is consistently vague within both legal systems. A feature that distinguishes EU law from Swedish law is the proactive debate about multiple discrimination within policymaking processes in the EU. The debate about intersectional discrimination is still more or less absent on EU level. In Swedish labour law, it seems as if the legislator is aware of the fact that the debate about both multiple *and* intersectional discrimination is conspicuous by its absence. This is what the writings in the preparatory works of the Discrimination Act imply. It is also clear that multiple discrimination is mentioned in the preambles of the Employment Discrimination Directive and the Race Discrimination Directive. In the Swedish Discrimination Act, multiple discrimination is not mentioned, nor indirectly referred to. It is only mentioned in the Government White Paper preceding the Discrimination Act. In these preparatory works, it is mentioned that it should be possible to take action against discrimination on more than one discrimination grounds. There are no wordings compelling Courts to behold mainstreaming aims when applying the Discrimination Act, or any wordings on what policy is governing such situations. From my findings in this study, I must conclude that the Swedish Government was wrong in this aspect. It is also evident that Swedish legislation is falling behind in comparison with EU law, through being deliberately silent on the problems related to intersectional and multiple discrimination.

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