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The boy who has not yet grown up  
– or the realisation of women's rights on the labour  
market in Poland and Sweden

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# SUMMARY

With gender roles still persisting in today's working life and inhibiting women from utilising their rights on an equal basis with men; the aim of the thesis has been to examine the level of realisation of women's rights in relation to the principle of non-discrimination and equality on the basis of gender.

The examination has been in the format of a comparative analysis between Sweden and Poland in relation to each other and the relevant international standards. The analysis examined the laws of the states; the relevant national case law measures such as benefits, to protect the rights of women in working life, the effectiveness of the protection, the drawbacks and, to determine, if it was possible, how the established current situation may be improved. The measurement of the level of realisation has been examined through what laws, policies, methods etc. are working, or not working and what needs to be emphasised or de-emphasised.

The realisation of the right of equal treatment and equal opportunity of men and women and the principle of non-discrimination on the basis of gender on the labour market has been examined through eight different working life perspectives: recruitment, sexual harassment, maternity and parenthood with benefits, the female triple workload, part-time workers and unemployment with benefits, remuneration, career prospects – focusing on managerial positions, and finally old age retirement with pension.

Some specific rights have shown a more direct link than others in hindering women from prospering in their professional career, such as protection against sexual harassment in the workplace and maternity and parental leave. Other rights demonstrated less subtle effect on women's rights in working life and their professional career than expected and had effects projecting into retirement.

Poland and Sweden offer protection in law and access to justice and remedies, with occasional unsatisfactory application of the law. Both states have shown extensive actions and measures attempting to realise equality between men and women on the labour market and the principle of equal treatment in relation to the specific rights examined. Both states are aware that in relation to the specific rights examined there are both practical issues that needs solving and effects of gender roles that need to be taken into account in solving the practical issues. Nevertheless, it could not be established that neither Poland nor Sweden overall effectively realised women's rights on the labour market.

Both states should continue their adopted overall method of realisation as they seem to function well for each state in proportion to their respective phase of development, in order to realise their international obligation to reach equality between men and women in relation to their rights on the labour market.

# PREFACE

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Malin Eriksson

# ABBREVIATIONS

## INTERNATIONAL INSTRUMENTS

AP ESC	Additional Protocol to the European Social Charter
CXXX or RXXX	ILO Convention or Recommendation
CCPR GC	United Nations Human Rights Committee General Comments
CEDAW	Convention on the Elimination of Discrimination Against Women
CEDAW Committee	Committee on the Elimination of Discrimination Against Women
CEDAW GR	Convention on the Elimination of Discrimination Against Women General Recommendation
CESCR GC	United Nations Committee on Economic Social and Cultural Rights General Comment
CoE	Council of Europe
Declaration of Philadelphia	Declaration concerning the aims and purposes of the International Labour Organisation
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ESC	European Social Charter
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ILO	International Labour Organisation
ILO CEACR	Committee of Experts on the Application of Conventions and Recommendations
ILO Constitution	Constitution of the International Constitution Labour Organisation
Istanbul Convention	Convention on preventing violence against women and domestic violence
NGO	Non-governmental organisation
RESC	European Social Charter (Revised)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Charter	Charter of the United Nations Charter

## NATIONAL SOURCES

### Poland

Dz.U.	Dziennik Ustaw Rzeczypospolitej Polskiej [Journal of Laws of Republic of Poland]
<i>Equal Treatment Act</i>	<i>Act of 3 December 2010 to implement some EU regulations concerning equal treatment</i> (Dz.U. 2010 nr 254 poz. 1700, as amended)
NAPE	National Action Plan for Employment
PIP	National Labour Inspectorate
ZUS	Zakład Ubezpieczeń Społecznych [Social Insurance Fund]

#### *Employees' organisations*

IUF	International Food, Agricultural, Hotel, Catering, Tobacco and Allied Workers Associations
“Solidarność”/NSZZ	Niezależny Samorządny Związek Zawodowy [Independent Self-Governing Trade Union]

### Sweden

AMS	Arbetsmarknadsstyrelsen [Labour Market Board]
PES	Arbetsförmedlingen [Public Employment Service]
Proposition/prop.	Swedish <i>travaux préparatoires</i>
RUT	RUT-avdrag [Tax subsidies for household-related services]
SFS	Svensk författningssamling [Swedish Code of Statutes]
SOU	Statens offentliga utredningar [Swedish Government Official Reports]

#### *Employees' organisations*

LO	Landorganisationen [Swedish Trade Union Confederation]
SACO	Sveriges akademikers centralorganisation [Swedish Confederation of Professional Associations]
TCO	Tjänstemännens centralorganisation [Swedish Confederation of Professional Employees]

## OTHER ABBREVIATIONS

GDP	Gross Domestic Product
hpw	hours per week

# **PART I**

## **SECOND STAR TO THE RIGHT AND STRAIGHT ON TILL MORNING – General introduction**

### **CHAPTER 1 – INTRODUCTION**

#### **1.1 Background**

Gender roles inhibit women from utilising their rights in working life. The rights attributed to women in their working life as set out in international law and reflected, mostly, in the law of the two states parties examined in this thesis, are not fulfilled and thus the principle of equality between men and women in the working life is not realised. The difficulties caused by the non-fulfilment of women's rights in the labour market can mostly be identified in society and its attitudes and/or ignorance. However, the solution for the realisation of the rights of women in the labour market may be determined through the effectiveness of the means and measures that the two states concerned have used.

The thesis is a comparative analysis, analysing the similarities and differences of women's situations in working life between Sweden and Poland as the development of the countries in relation to each other makes them comparable for the chosen subject.

#### **1.2 Purpose and research question**

The thesis focuses on the partial or non-realisation of specific rights of which some show a more direct link than others in hindering women from prospering in their professional career, such as, protection of maternity and protection against sexual harassment in the workplace. The effect on women's working life and women's professional career of the partial or non-realisation of other rights is more subtle, but the effects are still great inhibitors of women's rights with effect projecting into retirement. An example is unemployment and benefits. The focus for some specific rights includes a social security insurance point of view as the realisation of those rights is directly linked to obtaining the corresponding social benefit. For analytical purposes it is important to keep in mind that certain benefits may be obtained without being a wage-earning worker. However, as the focus of the thesis is the realisation of rights in working life it is the wage earner's perspective that is examined.

The purpose of this thesis is to demonstrate what protection, by laws and other measures such as benefits, there are to protect the rights of women in working life, the effectiveness of the protection, the drawbacks and, if possible, to determine how the current situation can be improved.

The title of the thesis is a reference to the story about Peter Pan, the boy who does not want to grow-up and face the responsibilities and obligations of the adult world. In this thesis the story becomes the reference to the level of realisation of women's rights on the labour market in both Poland and Sweden, the difficulties and drawback that the two states are facing in realising gender equality on the labour market. The story is thus the reference for the taking on of responsibilities and obligations by the states.

### **1.3 Method and material**

The method and materials is based on analysis of law and practice in the two states, and on a comparison between these and the relevant international standards.

### **1.4 Delimitations**

#### ***1.4.1 Focus***

The focus of the thesis is on wage earning employed or self-employed workers. As the situation of rural women (women working in agriculture without being a wage earner or self-employed) in Poland and Sweden are not comparable their situation is not examined. However, it is an important factor and is kept in mind as one of the variables when comparing statistics and in the analysis, as a large part of the Polish population is farmers. The thesis does not differentiate civil servants, law enforcement workers or similar from other wage earning workers.

As regards the material used from the European Committee on Social Rights, only situations where the Committee has not found the law and/or the situation in Poland and Sweden to be in conformity with articles of the European Social Charter<sup>1</sup> (ESC) or the European Social Charter (Revised)<sup>2</sup> (RESC) have been examined. This is because the focus of the thesis is the present situation in Poland and Sweden, and as the law and case law examined has, as far as possible, been limited to law in force.

#### ***1.4.2 Outline of the thesis***

The chapters are separate yet equally important and intertwined in the realisation of women's rights on the labour market. It is an attempt to cover the most important aspects of the difficulty in women's realisation of their rights on the labour market as at the same time going in depth, in a limited time and space. Unfortunately, for reasons of length, parts of the analysis had to be omitted but their general conclusions for these subjects are consistent with the overall conclusion.

#### ***1.4.3 The law***

Due to time and space constraints only the most important law has been spelled out. But analysis may be based on the examination of the full texts of laws only briefly mentioned.

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<sup>1</sup> 18 October 1961;

<sup>2</sup> 3 May 1996;

Changes to the articles in the Polish Labour Code of 26 June 1974<sup>3</sup> have led to their format often being expressed as, e.g. article 11<sup>3</sup>. The subscript is thus not a footnote.

The Swedish Labour Court relies to a large extent on the *travaux préparatoires* for the interpretation of the law. In the analysis of the cases in the application of the law, the *travaux préparatoires* have been taken into account and where relevant they are referenced in the footnotes.

#### **1.4.4 The Swedish Labour Court**

Having a strictly judicial function the Labour Court is the first and last instance for all labour disputes i.e. the interpretation of the collective labour agreements<sup>4</sup> and its judgments do not set binding precedents.<sup>5</sup> There has in Sweden been debate on the impartiality and independence of the Labour Court as a consequence of the composition of the Court.<sup>6</sup> Due to time and space constraints this has been excluded from examination.

#### **1.4.5 Case law**

In relation to certain rights no case law has been found on discrimination because an individual does not take the matter to Court or these matters are solved by different means than through Court procedure, or they are solved in the lower Courts.

For the analysis of the application of the law through case law the most interesting and/or relevant case law was chosen in order to save space.

Additionally, parts of the Swedish case law were judged under the now repealed *Equality Act*<sup>7</sup> (as amended at the relevant period) and it is in fact inevitable to make reference to such case law because the *SFS 2008:567 Discrimination Act*<sup>8</sup> did not come into force until 1 January 2009. The meaning, of the different provisions in the two Acts, including the meaning in the *travaux préparatoires* and the interpretation in the Labour Court are not sufficiently different to make a difference for the purposes of this thesis.

#### **1.4.6 Language limitations**

The most difficult barrier in the whole thesis has been the language. I had to rely on friends

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<sup>3</sup> Labour Code of 26 June 1974 (Dz.U. 1974 nr 24 poz. 141, including amendments up to amendment Dz.U. 2011 nr 232 poz. 1378) (Labour Code) as published in Jamrózy, Agnieszka (translator), Faulkner, Nicholas (lang. ed.), *The Labour Code – Kodeks pracy* (Official English version, Wydawnictwo C.H. Beck, Warsaw, 2012);

<sup>4</sup> Ann, Numhauser-Henning, ‘Labour Law’, and Stig, Strömholm, ‘General Features of Swedish Law’ in Michael, Bogden (ed.), *Swedish Legal System* (1st ed., Nordstedts juridik, Stockholm, 2010), pp.15 and 347;

<sup>5</sup> Hans-Henrich, Vogel, ‘Sources of Swedish law’ in Bogden, p.34; Non-binding precedents having the same meaning as it would in UK law;

<sup>6</sup> *Ibid.*, pp.15, 374;

<sup>7</sup> SFS 1979:1118 *The law on equality between women and men in the working life*. Stockholm: Civildepartementet, (as amended for the relevant period) repealed; SFS 1991:433 *The law on equality between women and men in the working life*.: SFS 1991:433 *Equality Act*. Stockholm: Integrations- och jämställdhetsdepartementet, also referred to as the *Equal Opportunities Act*.: amended the Act above, in force 1 January 2001 – 1 January 2009 (as amended for the relevant period);

<sup>8</sup> Swedish Code of Statutes (SFS); SFS 2008:567 *Discrimination Act*. Stockholm: Arbetsmarknadsdepartementet, (as amended);

and family for translation from Polish. All translation for understanding, reference and quotation are to be counted as my own translation. Nevertheless, especially in relation to the law, it was necessary to quote as not to give the reader the impression that it was my own text, but the translation is, as far as idiomatically as possible, literal. The exceptions to own translation quoted are the SFS 2008:567 *Discrimination Act* and the Constitution of the Republic of Poland of 2nd April, 1997<sup>9</sup>.

## 1.5 Terminology

### 1.5.1 Discrimination

The definition of discrimination, including direct and indirect discrimination, used in this thesis is the one provided in the Convention on Elimination of Discrimination Against Women (CEDAW)<sup>10</sup> which also includes the discrimination on that the individual is a woman and is based on the Discrimination (Employment and Occupation) Convention 1958, No. 111<sup>11</sup> (C111). It is “*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.*”<sup>12</sup> Formal discrimination is the legal, statutory, legislative and regulatory discrimination.<sup>13</sup> Substantive discrimination is *de facto* discrimination. It requires elimination of discrimination in practice.<sup>14</sup>

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<sup>9</sup> Constitution of the Republic of Poland of 2nd April, 1997 (As published in Dz.U. 1997 nr 78 poz. 483, as amended), as published on the Polish Parliament website: SEJM Rzeczypospolitej polskiej <<http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>> accessed 29 November 2014, art. 32(2);

<sup>10</sup> Convention on Elimination of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) UNGA Res 34/180; ‘United Nations Human Rights Treaty Bodies – Poland Ratifications History’ <[http://www.bayefsky.com/pdf/poland\\_t1\\_ratifications.pdf](http://www.bayefsky.com/pdf/poland_t1_ratifications.pdf)> accessed: 4 November 2014, ratified by Poland on the 30 July 1980; ‘United Nations Human Rights Treaty Bodies – Sweden Ratifications History’ <[http://www.bayefsky.com/pdf/sweden\\_t1\\_ratifications.pdf](http://www.bayefsky.com/pdf/sweden_t1_ratifications.pdf)> accessed: 4 November 2014, ratified by Sweden on the 2 July 1980;

<sup>11</sup> ILO Convention C111: Discrimination (Employment and Occupation) Convention, (42<sup>nd</sup> ILC session Geneva 25 Jun 1958), (C111), ratified by Poland on the 30 May 1961 and by Sweden on the 20 June 1962, art. 1(1);

<sup>12</sup> CEDAW, art. 2; For further information on direct and indirect discrimination see also: UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, available at: <<http://www.refworld.org/docid/453883fa8.html>> [accessed 18 December 2014], (HRC GC 18) para 7; UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, available at:

<<http://www.refworld.org/docid/4a60961f2.html>> [accessed 18 December 2014], (CESCR GC 20) para 10; UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 2004, available at:

<<http://www.refworld.org/docid/453882a7e0.html>> [accessed 18 December 2014], (CEDAW GR 25) note. 1; *Althammer et al. v. Austria*, CCPR/C/78/D/998/2001 UN Human Rights Committee (HRC), 8 August 2003, available at: <<file:///C:/Users/Malin%20Eriksson/Downloads/G0344130.pdf>> [accessed 18 December 2014], para 10.2; See also *Müller and I. Engelhard v Namibia*, Communication No. 919 (CCPR/C/74/D/919/2000 (2000) and *F. Foin v France*, Communication No. 666/1995 (CCPR/C/67/D/666/1995) as cited in Olivier, De Schutter, *International Human Rights Law – cases, materials, commentary* (Cambridge University Press, Cambridge 2011), as examples of direct and indirect discrimination, pp. 597-600 and pp. 625-626;

<sup>13</sup> CESCR GC 20, para 8;

<sup>14</sup> *Ibid.*, para 8;

### **1.5.2 Gender**

Gender refers to “*the fact of being a male or a female.*”<sup>15</sup> For the purpose of this thesis gender shall encompass the following: “*The term gender refers to the socially constructed roles of women and men that are ascribed to them on the basis of their sex, in public and in private life. The term sex refers to the biological and physical characteristics of women and men. Gender roles are contingent on a particular socio-economic, political and cultural context and are affected by other factors, including age, race, class and ethnicity. Gender roles are learned and vary widely within and between cultures. As social constructs, they can change. Gender roles shape women's access to rights, resources and opportunities.*”<sup>16</sup>

### **1.5.3 Equality and gender equality**

Equal means “*having the same rights or being treated the same as other people, without differences such as race, religion or sex being considered*”<sup>17</sup>. Equal opportunity means that “*all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.*”<sup>18</sup> The meaning of gender equality “*refers to the equal rights, responsibilities and opportunities of women and men and girls and boys. Equality does not mean that women and men will become the same but that women's and men's rights, responsibilities and opportunities will not depend on whether they are born male or female. Gender equality implies that the interests, needs and priorities of both women and men are taken into consideration – recognizing the diversity of different groups of women and men. Gender equality is not a 'women's issue' but should concern and fully engage men as well as women. Equality between women and men is seen both as a human rights issue and as a precondition for, and indicator of, sustainable people-centred development.*”<sup>19</sup>

### **1.5.4 Employer**

“*Employers are those workers who, working on their own account or with one or a few partners, hold the type of job defined as a “self-employment job” [...] and, in this capacity, on a continuous basis (including the reference period) have engaged one or more persons to work for them in their business as “employee(s)” [...].*”<sup>20</sup>

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<sup>15</sup> Hornby, A.S., (Sally Wehmeier (Chief Ed.)), *Advanced Learner's Dictionary of Current English* (7<sup>th</sup> ed., OUP, Oxford 2005), p 644;

<sup>16</sup> UN HRI *Integrating the Gender Perspective into the Work of the United Nations Human Rights Treaty Bodies* (3 September 1998) HRI/MC/1998/6, para. 16; See also Office of the Special Advisor on Gender Issues and Advancement of Women, Carolyn Hannan, Principal Officer for Gender Mainstreaming, *Gender mainstreaming: strategy for promoting gender equality* (rev. August 2001) <<http://www.un.org/womenwatch/osagi/pdf/factsheet1.pdf>> accessed 20 August 2014, p.1; *Implementation of the outcome of the fourth world conference on women Report of the Secretary General* (3 September 1996) A/51/322, paras 7-10;

<sup>17</sup> Hornby, p. 513;

<sup>18</sup> ILO Constitution 1919 including Annex the Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia) (4 May 1944), latest amendment entered into force on the 1 November 1974;

<sup>19</sup> *Gender mainstreaming: strategy for promoting gender equality*, p.1;

<sup>20</sup> ILO, ‘ILO Resolution concerning the International Classification of Status in Employment (ICSE) (50<sup>th</sup> International Conference of Labour Statisticians, 1<sup>st</sup> January 1993)’ <[http://www.ilo.org/wcmsp5/groups/public/-/dgreports/---stat/documents/normativeinstrument/wcms\\_087562.pdf](http://www.ilo.org/wcmsp5/groups/public/-/dgreports/---stat/documents/normativeinstrument/wcms_087562.pdf)> accessed: 29 December 2014, para. 9;

### 1.5.5 Employee

*“Employees are all those workers who hold the type of job defined as “paid employment jobs””<sup>21</sup> “[which] are those jobs where the incumbents hold explicit (written or oral) or implicit employment contracts which give them a basic remuneration which is not directly dependent upon the revenue of the unit for which they work (this unit can be a corporation, a non-profit institution, a government unit or a household). [...] (Persons in ‘paid employment jobs’ are typically remunerated by wages and salaries, but may be paid by commission from sales, by piece-rates, bonuses or in-kind payments such as food, housing or training.)”<sup>22</sup> Worker means “an individual who has entered into or works (or has worked) under a contract of employment or any other contract whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business carried on by the individual”.<sup>23</sup> The terms “employee” and “worker” is used interchangeably in the thesis.*

## 1.6 Outline

The thesis is divided into four parts. Part I is on the general introduction. Part II is on women’s specific rights in the labour market relating to career. Part III examines women’s specific rights in relation to promotion and advancement on the labour market. Part IV analyses where the realisation of women’s rights on the labour market in Poland and Sweden is today.

Each chapter covers the realisation of the right of equal treatment and opportunity of men and women and the principle of non-discrimination on the basis of gender on the labour market through: the actual situation – the realisation through measures and actions and information on the situation in both states, the examination of the applicable law to each substantive right and finally the realisation through the applicability of the law through the case law.

Part I covers chapters 1 and 2. Chapter 1 sets out the background, the purpose of the thesis and the research question, theory and method, delimitations and terminology. Chapter 2 provides, in both international and national legal frameworks, the definition of the principle of equality between men and women, the prohibition of gender based discrimination and the right to work. Chapter 2 also provides the status of international law in each state and the yardstick against which the realisation of rights have been measured. Part II covers chapters 3 to 6 on the realisation of the right of equal treatment and opportunity of men and women and the principle of non-discrimination on the basis of gender in relation to recruitment, sexual harassment, maternity and parenthood with benefits and the female triple workload. Part III covers chapters 7 to 10 on the realisation of the right of equal treatment and opportunity of men and women and the principle of non-discrimination on the basis of gender in relation to

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<sup>21</sup> Ibid., para. 8;

<sup>22</sup> Ibid., para. 6;

<sup>23</sup> Curzon, L.B. and Richards, P.H., *The Longman Dictionary of Law* (7<sup>th</sup> ed., Pearson Education Limited, Harlow 2007), p. 623;

part-time workers and unemployment with benefits, remuneration, career prospects, and finally old age retirement with pension. Part IV covers chapters 11 and 12. Chapter 11 analyses the current overall situation of the realisation of the right of equal treatment and opportunity of men and women and the principle of non-discrimination on the basis of gender for women on the labour market and what remains to be done for the full realisation thereof. Chapter 12 concludes the thesis.

## CHAPTER 2 – THE INTERNATIONAL, REGIONAL AND NATIONAL LEGAL FRAMEWORKS AND THE FOUNDATION FOR ANALYSIS

### 2.1 Equality and the prohibition of gender based discrimination/non-discrimination on the basis of gender in the international framework and regional framework

#### 2.1.1 *The international legal framework*

Both Poland and Sweden are members of the International Labour Organisation (ILO) since 1919.<sup>24</sup> The preamble and the annex of the ILO Constitution determines that “*the protection of [...] women, [...], recognition of the principle of equal remuneration for work of equal value*”<sup>25</sup> and that “*all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.*”<sup>26</sup>

In relation to gender equality and human rights the Charter of the United Nations (UN Charter)<sup>27</sup> reaffirms “[...]faith in fundamental human rights,[...] in the equal rights of men and women [...]” and that one of the objectives of the UN lies “[...]in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to [...] sex [...]”.<sup>28</sup> The preamble of the Universal Declaration of Human Rights (UDHR)<sup>29</sup> provides that “[a]ll human beings are born free and equal in dignity and rights”<sup>30</sup> and states the entitlement of everyone to all rights and freedoms in the UDHR without distinction of any kind, including sex<sup>31</sup>.

The International Covenant on Civil and Political Rights (ICCPR)<sup>32</sup> and the International Covenant on Economic Social and Cultural Rights (ICESCR)<sup>33</sup> address the principle of non-

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<sup>24</sup> ILO NORMLEX Information System on International Labour Standards, ‘Country Profiles Poland’ <[http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110\\_COUNTRY\\_ID:102809](http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102809)> accessed: 22 August 2014; ILO, NORMLEX Information System on International Labour Standards, ‘Country profiles Sweden’

<[http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110\\_COUNTRY\\_ID:102854](http://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102854)> accessed: 22 August 2014;

<sup>25</sup> ILO Constitution, preamble;

<sup>26</sup> ILO Constitution, Annex, para. IIa;

<sup>27</sup> Charter of United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119 (UN Charter), preamble; UN, ‘Member States of the United Nations’ <<http://www.un.org/en/members/>> accessed: 4 November 2014, ratified by Poland on the 24 October 1945, ratified by Sweden on the 19 November 1946;

<sup>28</sup> UN Charter, art. 1(3);

<sup>29</sup> Universal Declaration of Human Rights (adopted 10 December 1948,) UNGA Res 217A (III), (UDHR);

<sup>30</sup> Ibid., art. 1;

<sup>31</sup> Ibid., art. 2(1);

<sup>32</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); ‘United Nations Human Rights Treaty Bodies – Poland Ratifications History’ <[http://www.bayefsky.com/pdf/poland\\_t1\\_ratifications.pdf](http://www.bayefsky.com/pdf/poland_t1_ratifications.pdf)> accessed: 4 November 2014, ratified by Poland on the 18 March 1977; ‘United Nations Human Rights Treaty Bodies Sweden Ratifications History’ <[http://www.bayefsky.com/pdf/sweden\\_t1\\_ratifications.pdf](http://www.bayefsky.com/pdf/sweden_t1_ratifications.pdf)> accessed: 4 November 2014, ratified by Sweden on the 6 December 1971;

<sup>33</sup> International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into

discrimination as to sex, in the assurance of the realisation and exercising of the individuals' rights.<sup>34</sup> The ICCPR also sets out that “[a]ll persons are equal before the law” and the entitlement to equal protection of the law without discrimination as to sex<sup>35</sup>.

CEDAW sets out the prohibition of discrimination, the equality of men and women and the equal rights of men and women.<sup>36</sup> Discrimination against women, as defined in chapter one should be condemned in all its forms by the state parties.<sup>37</sup> The principle of equality between men and women encompasses the obligation of states parties to ensure full development and advancement of women through appropriate measures in all fields, especially political, economic, social and cultural.<sup>38</sup>

The applicable ILO conventions<sup>39</sup> are not all ratified<sup>40</sup> by both Poland and Sweden.<sup>41</sup> The principle of equality is manifested in the Equal Remuneration Convention 1951, No. 100<sup>42</sup> (C100) in that equal remuneration for men and women for work of equal value “refers to rates of remuneration established without discrimination based on sex”.<sup>43</sup>

C111 and the Discrimination (Employment and Occupation) Recommendation, No. 111<sup>44</sup> (R111) defines discrimination to include “any distinction, exclusion or preference made on the basis of [...], sex, [...], which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”<sup>45</sup> Preference based on the inherent requirements for the job is an acceptable form of discrimination and is therefore an exception to the definition.<sup>46</sup> R111 additionally supplements C111 in that adopted policies should have regard to the principle of equal opportunity in all areas work such as vocational training and social

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force 3 January 1976) 993 UNTS 3 (ICESCR); ‘United Nations Human Rights Treaty Bodies – Poland Ratifications History’ <[http://www.bayefsky.com/pdf/poland\\_t1\\_ratifications.pdf](http://www.bayefsky.com/pdf/poland_t1_ratifications.pdf)> accessed: 4 November 2014, ratified by Poland on the 18 March 1977; ‘United Nations Human Rights Treaty Bodies – Sweden Ratifications History’ <[http://www.bayefsky.com/pdf/sweden\\_t1\\_ratifications.pdf](http://www.bayefsky.com/pdf/sweden_t1_ratifications.pdf)> accessed: 4 November 2014, ratified by Sweden on the 6 December 1971;

<sup>34</sup> ICCPR, arts. 2(1) and 3; ICESCR, arts. 2(2) and 3; HRC GC 18, para 6;

<sup>35</sup> ICCPR, art. 26;

<sup>36</sup> CEDAW, preamble;

<sup>37</sup> CEDAW, art. 2;

<sup>38</sup> CEDAW, art. 3;

<sup>39</sup> The texts of ILO Conventions and dates of ratifications may be found on the ILO web site at <[www.ilo.org](http://www.ilo.org)>, under Labour Standards;

<sup>40</sup> ILO Constitution, art. 19(5)(a) and (e) on the obligation of members in respect of conventions.

<sup>41</sup> ILO recommendations are not ratified, they are, pursuant to article 19(1) of the ILO Constitution, an international instrument “to meet circumstances where the subject, or aspect of it, dealt with is not considered suitable or appropriate at that time for a Convention” and thus applicable to all ILO member states. Pursuant to ILO Constitution, art. 19(6) recommendations are to be submitted to relevant national authorities for enactment or other action and reports on implementation should be submitted. ILO recommendations complement and/or develop the provisions in the conventions and become a guide on how the provisions in the corresponding convention implemented in the member states and how problems relating to the subject matter are to be resolved.

<sup>42</sup> ILO Convention C100: Equal Remuneration Convention, (34<sup>th</sup> ILC session Geneva 29 Jun 1951), (C100), ratified by Poland on the 25 October 1954 and by Sweden on the 20 June 1962;

<sup>43</sup> C100, art. 1;

<sup>44</sup> ILO Recommendation R111: Discrimination (Employment and Occupation) Recommendation (42<sup>nd</sup> ILC session Geneva 25 Jun 1958), (R111);

<sup>45</sup> C111, art. 1(1) a and b; R111, para. 1;

<sup>46</sup> C111, art. 1(2);

security measures.<sup>47</sup>

The Maternity Protection Convention (Revised) 1952, No. 103<sup>48</sup> (C103) only mentions the equality principle or the principle of non-discrimination in relation to that maternity benefits contributions be paid without distinction of sex “[...] *in respect of the total number of men and women employed by the undertaking concerned.*”<sup>49</sup>

In the Workers with Family Responsibilities Convention 1981, No. 156<sup>50</sup> (C156) and the Workers with Family Responsibilities Recommendation No. 165<sup>51</sup> (R165) effective equality of opportunity between men and women workers shall be ensured through national policy. The policies shall enable workers with family responsibilities engaged or wishing to engage in employment to exercise their right without discrimination and “*to the extent possible, without conflict between their employment and family responsibilities.*”<sup>52</sup> Furthermore, “[w]ith a view to creating effective equality of opportunity and treatment for all men and women workers all measure compatible with national conditions and possibilities shall be taken to enable the exercise of free choice of employment and “*to take account of [the workers] needs and conditions of employment and in social security.*”<sup>53</sup> Pursuant to R165 the national policy “[...] *measures should be adopted and applied with a view to preventing direct or indirect discrimination on the basis of marital status or family responsibilities.*”<sup>54</sup> There is also here an acceptable form of discrimination: “[D]uring a transitional period special measures aimed at achieving effective equality between men and women workers should not be regarded as discriminatory.”<sup>55</sup> Furthermore, the recommendation determines the effective realisation of equality of opportunity for men and women in respect of free choice of employment, terms and conditions, social security, childcare etc.<sup>56</sup>

The Employment Promotion and Protection against Unemployment Convention 1988, No. 168<sup>57</sup> (C168), provides for “[...] *equality of treatment [...]*” on the basis of sex for all protected persons in the Convention.<sup>58</sup>

The Part-time Work Convention 1994, No. 175 (C175)<sup>59</sup> is included due to the

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<sup>47</sup> R111, para. 2;

<sup>48</sup> ILO Convention C103: Maternity Protection Convention (Revised), (35<sup>th</sup> ILC session Geneva 28 June 1952), (C103), ratified by Poland on the 10 March 1976;

<sup>49</sup> C103, art. 4(7);

<sup>50</sup> ILO Convention C156: Workers with Family Responsibilities Convention (67<sup>th</sup> ILC session Geneva 23 Jun 1981), (C156), ratified by Sweden on the 11 August 1962;

<sup>51</sup> ILO Recommendation R165: Workers with Family Responsibilities Recommendation (67<sup>th</sup> ILC session Geneva 23 Jun 1981), (R165);

<sup>52</sup> C156, art. 3, the definition of discrimination in the convention is that of articles 1 and 5 of the C111; R165, para. 3;

<sup>53</sup> C156, art. 4;

<sup>54</sup> R165, para. 7;

<sup>55</sup> C156, art. 3(2); R165, para. 8;

<sup>56</sup> R165, para. 9, similar to articles 7, 4(b) and 5 of C156;

<sup>57</sup> ILO Convention C168: Employment Promotion and Protection against Unemployment Convention (75<sup>th</sup> ILC session Geneva 21 Jun 1988);

<sup>58</sup> C168, art. 6(1);

<sup>59</sup> ILO Convention C175: Part-time Work Convention (81<sup>st</sup> ILC session Geneva 24 Jun 1994), (C175) ratified by Sweden on the 10 June 2002;

disproportionate effect of part-time employment for women. Discrimination on the basis of gender is demonstrated through that a part-time worker shall have the same rights and “[...] protection as accorded to comparable full-time workers in respect of [...] discrimination in employment and occupation.”<sup>60</sup> Additionally, in the Part-Time Work Recommendation No. 182 (R182)<sup>61</sup> provides that the rights of part-time workers should not be less to comparable full-time worker.

### **2.1.2 The regional legal framework – the Council of Europe (CoE)**

Both Poland and Sweden are members of the Council of Europe since 26 November 1991<sup>62</sup> and 5 May 1949<sup>63</sup> respectively. Sweden and Poland are state parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (Human Rights and Fundamental Freedoms) (ECHR) since 1952 and 1993 respectively.<sup>64</sup> The human rights principles of the European Union (EU) have been excluded from this examination upon the consideration that the EU is a regional transnational trade agreement albeit the Treaty of Lisbon 2009<sup>65</sup> provides that the principles of the ECHR will with the accession to the same apply to the EU itself as a legal person.

The ESC sets out the economic social and cultural rights<sup>66</sup> in the Council of Europe. Both Poland and Sweden have signed and ratified the Charter with declarations.<sup>67</sup> As regards RESC Sweden has ratified it with declarations, while Poland has signed it.<sup>68</sup> RESC “[...] brings together [...] all the rights guaranteed in the Charter and the 1988 Additional Protocol, along with the amendments to these rights and the new rights [...]” “[I]f a Contracting State accepts the provisions of the Revised Charter, the corresponding provisions of the initial Charter and its Protocol cease to apply to that State.”<sup>69</sup> Only the provisions that the states have declared themselves bound by in each instrument have been taken into account.<sup>70</sup>

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<sup>60</sup> C175, art. 4;

<sup>61</sup> ILO Recommendation R182: Part-Time Work Recommendation (81<sup>st</sup> ILC Session Geneva 24 June 1994) (R182);

<sup>62</sup> Council of Europe, ‘Poland – Member State’ <<http://www.coe.int/en/web/portal/poland>> accessed: 25 August 2014;

<sup>63</sup> Council of Europe, ‘Sweden – Member State’ <<http://www.coe.int/en/web/portal/sweden>> accessed: 25 August 2014;

<sup>64</sup> 4 November 1950; Council of Europe, ‘Convention for the Protection of Human Rights and Fundamental Freedoms CETS No.: 005’, <<http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=25/08/2014&CL=ENG>> accessed: 25 August 2014;

<sup>65</sup> European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C306/01, available at <<http://www.refworld.org/docid/476258d32.html>> [accessed 18 December 2014], para. 8 and 55;

<sup>66</sup> De Schutter, p. 22;

<sup>67</sup> Council of Europe, ‘European Social Charter CETS No.: 035’, <<http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=035&CM=8&DF=30/12/2014&CL=ENG>> accessed 4<sup>th</sup> November 2014; Poland ratified on the 25 June 1997 and Sweden ratified on the 17 December 1962;

<sup>68</sup> Council of Europe, ‘European Social Charter (Revised) CETS No.: 163’, <<http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=163&CM=8&DF=04/11/2014&CL=ENG>> accessed 4<sup>th</sup> November 2014, Poland signed on the 25 October 2005 and Sweden ratified on the 25 May 1998;

<sup>69</sup> Council of Europe, ‘European Social Charter (Revised) Explanatory Report’ <<http://www.conventions.coe.int/Treaty/en/Reports/Html/163.htm>> accessed 4<sup>th</sup> November 2014;

<sup>70</sup> Council of Europe, ‘List of declarations made with respect to treaty No. 035 European Social Charter’,

Though the ECHR primarily encompasses civil and political rights<sup>71</sup> article 1 puts the obligation on the state parties to ensure the specific rights and freedoms in the Convention including the right of non-discrimination, on the grounds of sex, as provided in article 14.

Only Sweden has ratified the Additional Protocol to the European Social Charter (AP ESC)<sup>72</sup> but it contains significant improvement of the protection of workers' rights. Workers have the right "[...] to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex."<sup>73</sup> Specific measures to remove *de facto* inequalities are allowed.<sup>74</sup> "Occupational activities which, by reason of their nature or the context in which they are carried out, can be entrusted only to persons of a particular sex may be excluded from the scope of this article or some of its provisions"<sup>75</sup>.

Pursuant to RESC "[a]ll workers have the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex".<sup>76</sup> The operative part of the RESC states that the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex should apply to most areas of employment.<sup>77</sup>

### 2.1.3 The national legal framework

#### 2.1.3.1 Poland

The principle of non-discrimination for any reason whatsoever is found in article 32(2) of the Polish Constitution.<sup>78</sup> Article 33(2) establishes that "[m]en and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations."<sup>79</sup> The other two main instruments in relation to equal treatment of men and women and the principle of non-discrimination are the Labour

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<<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=035&CM=3&DF=25/08/2014&CL=ENG&VL=1>> accessed: 25 August 2014, Poland: Arts. 1; 2(1), (3)-(5); 3, 4(2)-(5); 8\*; 9; 10(1)-(2); 12; 13(2)-(3); 14(1); 16; 17; \* Declaration contained in a Note verbale from the Permanent Representation of Poland, dated 27 January 2011, registered at the Secretariat General on 31 January 2011 Or. Engl. "In accordance with Article 37, paragraph 2, of the Charter, the Republic of Poland denounces the provision of Article 8, paragraph 4.b, of the Charter following the Decision of the President of the Republic of Poland of 26 november 2010 on this denouncement". Period covered: 25/7/2012 -, Sweden: Arts. 1; 2(3), (5), 4(1), (3)-(4); 8(1), (3); 9; 10; 12(1)-(3); 13; 14; 16; 17; Council of Europe, 'List of declarations made with respect to treaty No. 163 European Social Charter (revised)'

<<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=163&CM=3&DF=25/08/2014&CL=ENG&VL=1>> accessed: 25 August 2014, Sweden: Arts.1; 2(3),(5)-(6); 4(1), (3)-(4); 8(1), (3); 9; 10; 12(1)-(3); 14; 16; 20; 23; 26; 27 Period covered: 1/7/1999 -;

<sup>71</sup> De Schutter, p. 22;

<sup>72</sup> 5 May 1988; Council of Europe, 'Additional Protocol to the European Social Charter, CETS, No.:128',

<<http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=128&CM=8&DF=04/11/2014&CL=ENG>> accessed: 4 November 2014, ratified by Sweden on 5 May 1999;

<sup>73</sup> AP ESC, part I, paras. 1 and 4;

<sup>74</sup> Ibid., part II, art. 1(3);

<sup>75</sup> Ibid., part II, art. 1(4);

<sup>76</sup> RESC, part I, paras. 20, 23, 24, 26, 27;

<sup>77</sup> Ibid., part II, art. 20;

<sup>78</sup> Constitution of the Republic of Poland, art. 32(2);

<sup>79</sup> Ibid., art. 33(2);

Code and the *Act of 3 December 2010 to implement some EU regulations concerning equal treatment* (Dz.U. 2010 nr 254 poz. 1700, as amended) (*Equal Treatment Act*).

According to the Labour Code the principle of equality between men and women and the principle of non-discrimination on the basis of gender is set out in article 11<sup>1</sup> on respect for dignity and personal rights, in article 11<sup>2</sup> on principle of equality of employees (men and women) in respect of the “[...] *same performance of the same duties* [...]” and in article 11<sup>3</sup> on prohibition against direct or indirect discrimination in employment on basis of gender. Article 18<sup>3a</sup> prohibits gender based discrimination in employment, defines direct and indirect discrimination, including encouragement, order or conducts with the purpose or effect to violating dignity and also defines sexual harassment. A violation of equal treatment may exist in termination or creation of the employment relationship. It may exist in disadvantageous conditions of remuneration, in promotion, work-related benefits, training, professional qualifications.<sup>80</sup> There is no discrimination when the employer can justify his actions through objective reasons meaning that conduct must have a legitimate aim. This principle may apply in situations regarding genuine and determined occupational requirement, length of working time, parenthood, establishing employment and dismissal conditions, remuneration and promotion principles, as well as access conditions to training to improve professional qualifications which justifies a different treatment of employees in respect of age. Temporary special measures including affirmative action do not amount to discrimination.<sup>81</sup> Employees have the equal treatment in remuneration for the same work or for work of an identical value.<sup>82</sup> In the event of violation of the principle of equal treatment, the employee is entitled to “*compensation of at least the amount of the minimum remuneration for work, determined in separate provisions.*”<sup>83</sup> There is also a prohibition of reprisals towards the employee or a supporting employee in the exercise of rights in respect of the principle of equal treatment in employment.<sup>84</sup>

The provision defining direct and indirect discrimination, harassment and sexual harassment in the *Equal Treatment Act*<sup>85</sup> are almost identical to the corresponding provisions in the Labour Code, possibly more explanatory extending the protection. The Act prohibits unequal treatment on the basis of sex.<sup>86</sup> The Act is applicable to self-employed persons to employees with a signed contract of employment relationship.<sup>87</sup> Upon violation the victim is entitled to compensation.<sup>88</sup> Reprisals are prohibited in relation to the usage of the Act.<sup>89</sup>

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<sup>80</sup> Labour Code, art. 18<sup>3b</sup>;

<sup>81</sup> *Ibid.*, art. 18<sup>3b</sup>;

<sup>82</sup> *Ibid.*, art. 18<sup>3c</sup>;

<sup>83</sup> *Ibid.*, art. 18<sup>3d</sup>;

<sup>84</sup> *Ibid.*, art. 18<sup>3e</sup>;

<sup>85</sup> *Equal Treatment Act*, art. 3(1)-(6);

<sup>86</sup> *Ibid.*, arts. 6 and 9;

<sup>87</sup> *Ibid.*, art. 4(2)

<sup>88</sup> *Ibid.*, art. 13(1);

<sup>89</sup> *Ibid.*, art. 17;

### 2.1.3.2 Sweden

Pursuant to the SFS 1974:152 *Instrument of Government*,<sup>90</sup> (one of the four instruments of the Constitution<sup>91</sup>) “[...] law or other ordinances cannot disfavour/treat unfairly somebody because of gender unless the treatment is a step towards achieving equality between men and women or concerns the military service or other professional service.”<sup>92</sup> The instrument further provides that no-one should be treated unfavourably because of their gender.<sup>93</sup>

SFS 2008:567 *Discrimination Act* prohibits discrimination on the basis of sex.<sup>94</sup> The Act defines direct and indirect discrimination and sexual harassment.<sup>95</sup> Discrimination by the employer or “[a] person who has the right to make decisions on the employer’s behalf” is prohibited when a person with respect to the employer “is an employee, is enquiring about or applying for work, is applying for or carrying out a traineeship or is available to perform work or is performing work as temporary or borrowed labour.”<sup>96</sup> Discrimination does not occur when “differential treatment [is] based on a characteristic associated with one of the grounds of discrimination if, when a decision is made [...] the characteristic constitutes a genuine and determining occupational requirement that has a legitimate purpose and the requirement is appropriate and necessary to achieve that purpose, measures that contribute to efforts to promote equality between women and men and that concern matters other than pay or other terms of employment, the application of age limits with regard to the right to pension, survivor’s or invalidity benefits in individual contracts or collective agreements, or 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”<sup>97</sup> Additionally, “[i]f a person who considers that he or she has been discriminated against or subjected to reprisals demonstrates circumstances that give reason to presume that he or she has been discriminated against or subjected to reprisals, the defendant is required to show that discrimination or reprisals have not occurred.”<sup>98</sup> Reprisals against employees exercising their rights in relation to discrimination are prohibited.<sup>99</sup> In the case of discrimination the victim should be afforded compensation.<sup>100</sup>

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<sup>90</sup> SFS 1974:152 *Instrument of Government*. Stockholm: Justitiedepartementet, (as amended);

<sup>91</sup> Regeringskansliet, Government Offices of Sweden, ‘The Constitution’ <<http://www.government.se/sb/d/2853/a/16199>> accessed: 29 December 2014;

<sup>92</sup> *Ibid.*, ch. 2 s.13;

<sup>93</sup> *Ibid.*, ch. 2 s.13; Reinhold, Fahlbeck, and Bernard Johann, Mulder, *Labour and employment law in Sweden*, [New, rev. ed.], Juristförlaget, Lund, 2009, p.78; Numhauser-Henning, Bogden, p. 367;

<sup>94</sup> SFS 2008:567 *Discrimination Act*, ch. 1 ss. 1, 4(1) and 4(2), see also s. 5(1) for definition of sex: somebody is a man or a woman;

<sup>95</sup> SFS 2008:567 *Discrimination Act*, ch. 1 s. 4;

<sup>96</sup> *Ibid.*, ch. 2, s. 1;

<sup>97</sup> *Ibid.*, ch. 2, s. 2, see also ch. 2 s. 9 on labour market policy activities and employment services not under public contract, ch. 3, ss.7-9 on active measures in recruitment for more general provisions on promotion of gender equality in the labour market;

<sup>98</sup> *Ibid.*, ch. 6, s. 3;

<sup>99</sup> *Ibid.*, ch. 2, ss.18 and 19;

<sup>100</sup> *Ibid.*, ch.5, s. 1;

## 2.2 The right to work in the international legal framework

### 2.2.1 The international legal framework

The UDHR, the ICESCR and the CEDAW expressly provide for the right to work. The UDHR and the ICESCR both set out the principle of free choice of employment as well as just and favourable conditions of work, both instruments especially underlining equality in terms of remuneration.<sup>101</sup> The UDHR also specifies protection against unemployment.<sup>102</sup> The Employment Policy (Supplementary Provisions) Recommendation 1984, No. 169 (R169)<sup>103</sup> also set out the right to work.<sup>104</sup>

### 2.2.2 The regional legal framework – the CoE

The ESC determines that “[e]veryone shall have the opportunity to earn his living in an occupation freely entered upon”<sup>105</sup> but also freely chosen.<sup>106</sup>

### 2.2.3 The national legal framework

#### 2.2.3.1 Poland

Pursuant to article 65 of the Constitution “[e]veryone shall have the freedom to choose and to pursue his occupation and to choose his place of work”.<sup>107</sup> Everyone has the right to work, with exceptions specified by law and to choose it freely.<sup>108</sup>

#### 2.2.3.2 Sweden

Pursuant to SFS 1974:152 *Instrument of Government*, “[...] the public power shall be exercised with respect for the equal worth of humans and the freedom and dignity of the individual. The public power shall in particular secure the right to work [...]”.<sup>109</sup>

## 2.3 The status of international treaties in Polish and Swedish law

### 2.3.1 Poland

Pursuant to the Polish Constitution international agreements are directly applicable and do not specifically require incorporation/changes in the national law to apply domestically. International agreements ratified upon prior consent granted by statute have precedence over contradictory national statutes.<sup>110</sup>

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<sup>101</sup> UDHR, art. 23; ICESCR arts. 6 and 7; See also UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18, available at: <<http://www.refworld.org/docid/4415453b4.html>> [accessed 18 December 2014], especially para. 1;

<sup>102</sup> UDHR, art. 23;

<sup>103</sup> ILO Recommendation R169: Employment Policy (Supplementary Provisions) Recommendation (70<sup>th</sup> ILC Session Geneva 26 June 1984) (R169);

<sup>104</sup> R169, paras. 1 and 2;

<sup>105</sup> ESC, part I, para 1;

<sup>106</sup> *Ibid.*, art. 1;

<sup>107</sup> Constitution of the Republic of Poland, art. 65;

<sup>108</sup> Labour Code, art. 10(1);

<sup>109</sup> SFS 1974:152 *Instrument of Government*, ch. 1 s.2(1)-(2);

<sup>110</sup> Constitution of the Republic of Poland, art. 91(1)-(2); See also articles 188 on 190(1) on the issues on non-conformity of international agreements with the Constitution;

### 2.3.2 Sweden

In accordance with SFS 1974:152 *Instrument of Government*, an international agreement is binding upon Swedish citizens and authorities as Swedish law when the international agreements have been integrated into the national law either through transformation of existing laws and regulations or through incorporation i.e. creation of new laws and regulations.<sup>111</sup> For the purposes of the analysis, the relevant laws have been considered by Sweden to be in conformity with the relevant international agreements.

## 2.4 The yardstick for realisation

The analysis of the different labour rights in relation to the realisation of principle of non-discrimination on the basis of gender and the principle of equality between men and women have been measured through what laws, policies, methods etc. are working, or not working and what needs to be emphasised or de-emphasised for Poland and Sweden respectively in relation to the international standards and in relation to each other.

Poland and Sweden are in the final analysis examined on the progressive realisation of women's right to non-discrimination on the basis of gender and the principle of equal opportunity between men and women, compared to each other so as to provide to give perspective to each state's progress.

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<sup>111</sup> SFS 1974:152 *Instrument of Government*, ch. 10, ss.3 and 9; Act on promulgation of laws and other regulations (1976:633), s.14 and *Kommentar till lag 1976:633* [Comments to Act 1976:633], Stockholm, Jermsten: 1;

## PART II

### HOIST THE SAILS – Career

#### CHAPTER 3 – RECRUITMENT

##### **The relevant international legal framework in relation to recruitment**

UDHR, art. 23; ICESCR, art. 6(1); CEDAW, art. 11; C111, arts. 1(3) and 2; R111, para 2; ESC, art. 1; AP ESC, part II, article 1(1); the Employment Policy Convention 1964, No. 122 (C122)<sup>112</sup>, arts. 1(1), (2)(a) and (c); R169, paras. 2, 3, 7 and 15.

#### **3.1 Realisation of women’s rights in relation to recruitment – the actual situation**

##### **3.1.1 Poland – facts and analysis**

The Polish Government is aware of the need to ensure non-discrimination at the recruitment stage. The Government reported to the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), that such realisation requires standardisation of recruitment interviews (very much in the same model of how vacancy announcements has been standardised – elimination of gender requirements inherent to one gender) to eliminate questions on family and private life. The realisation of non-discrimination also requires training of employees responsible for recruitment.<sup>113</sup> Looking at the measures taken by the Polish Government, as reported in Poland’s latest response to the list of issues to the CEDAW Committee,<sup>114</sup> the Polish Government is aware that despite the legal provisions that prohibit discrimination in recruitment, the reality looks very different and indicates that especially private life and family life is targeted during employment interviews also leading to discrimination.

The Polish Government has attempted to counteract discrimination at the recruitment stage in the Ministry of Regional Development’s 2011 advertisement and campaign which pointed out the gender segregation in the Polish labour market which also manifests itself at the recruitment stage. It resulted in that one-third of the individuals that saw the campaign felt encouraged to search for information about the rights of employees. Many of these individuals were inspired to look into the practices in their own workplaces (49% of the one-third). 25% of those who saw the spot were encouraged to look for “[...] *information on the support offered in the area of equal opportunities of both sexes under EU programmes and*

<sup>112</sup> ILO Convention C122: Employment Policy Convention (48<sup>th</sup> ILC Session Geneva 9 July 1964), (C122);

<sup>113</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *UN Committee on the Elimination of Discrimination against Women: List of issues in relation to the combined seventh and eighth periodic report of Poland: Addendum: Replies of Poland to the list of issues*, 20 June 2014, CEDAW/C/POL/Q/7-8/Add.1, (CEDAW/C/POL/Q/7-8/Add.1), reply to question 6;

<sup>114</sup> CEDAW/C/POL/Q/7-8/Add. 1, reply to question 6;

*funds.*”<sup>115</sup> The latest observation of the Committee of Experts on the Application of Conventions and Recommendations (ILO CEACR) reported that the Polish Government included in their report “[...] *greater efficiency of employment services, cooperation of labour market partners, and professional activation measures for vulnerable categories of workers.*”<sup>116</sup> The advertisements and the campaign were awareness raising measures which seem to have had quite an effect but practical measures, mechanisms and methods to effectively decrease discrimination when recruiting are still missing. What these measures portray is the willingness to try to tackle the existent problems, to try to raise awareness in society and at a later stage to achieve social change. Nevertheless, there is still an existent threshold on women’s equal opportunities to access to work.

### **3.1.2 Sweden (no relevant sources found)**

## **3.2 The relevant national legal framework in relation to recruitment**

### **3.2.1 Poland**

Pursuant to article 18<sup>3b</sup> paragraph 1(1) of the Labour Code, a violation of the principle of equal treatment may occur when the employer treats differently, on the basis of gender, the employees in “[...] *terminating or rejecting the establishment of an employment relationship*”<sup>117</sup> unless the employer can prove that his actions did not amount to discrimination or the conduct of the employer was aimed at legitimately differentiating the situation of the employee.<sup>118</sup>

### **3.2.2 Sweden**

The most direct provisions on rights in relation to recruitment is found in chapter 2 section 1(2) of SFS 2008:567 *Discrimination Act*: “*An employer may not discriminate against a person who, with respect to the employer, is enquiring about or applying for work*” with the exception of “*differential treatment based on a characteristic associated with one of the grounds of discrimination if, 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 requirement is appropriate and necessary to achieve that purpose.*”<sup>119</sup> With the exception being when an employer can prove that his actions held objective reason.<sup>120</sup>

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<sup>115</sup> CEDAW/C/POL/Q/7-8/Add. 1, reply to question 8;

<sup>116</sup> International Labour Organization Committee of Experts on the Application of Conventions and Recommendations (ILO CEACR) Observation of 2011 on Poland, C122, (ILO Observation on 2011 of Poland, C122 – the same reference format will be used for all CEACR Observations);

<sup>117</sup> Labour Code, art. 18<sup>3b</sup> 1(1);

<sup>118</sup> Labour Code, art. 18<sup>3b</sup> 2(1); See also Labour Code art. 18<sup>3e</sup> and thesis chapter 2;

<sup>119</sup> SFS 2008:567 *Discrimination Act*, ch. 2 s. 1(2), s. 2(1);

<sup>120</sup> *Ibid.*, ch. 2 s. 4;

### **3.2.3 Analysis**

Both states effectively provide protection of equal opportunities and non-discrimination in law when an employment relationship is created.

The limitation of discrimination in both states is as follows: A case of discrimination occurs only when the link between discrimination and the ground for discrimination, for the purposes of this thesis the ground is gender, is genuine and the discrimination applies in relation to the decisive occupational requirements. The Swedish provisions are perhaps slightly more detailed than the Polish provisions, especially taken in conjunction with the general provisions on discrimination and the right to work in chapter 2. This leaves the interpretation of the provisions open to the courts and leaves the national legal frameworks in conformity with the international legal frameworks.

## **3.3 Realisation through case law of women's rights and equal opportunities with men in relation to recruitment**

### **3.3.1 Poland (no case law found)**

### **3.3.2 Sweden – facts and analysis**

In addition to the cases relating to parenthood and recruitment which are discussed in chapter 5, the following are selected cases on alleged gender discrimination in situations of recruitment.

In AD 2006 nr 126<sup>121</sup> it was found that there had been no gender discrimination as there was no disadvantageous treatment in relation to how the employer had collected references and in relation to how the references were summarised: one of the other employees that also applied for the position, but who already had a similar position, was asked to give a reference as the claimant's references had left unfavourable information about her. The second motive to ask the other employee had been to get a woman's opinion of the claimant. The Labour Court additionally found that the person (the employer) who did the summary of the merits of the employment seekers had read all the material, and simplifications in such summaries were necessary. Neither had there been any gender discrimination in relation to the fact that one of the two men who applied for the position was employed instead of the claimant. According to the Labour Court the man's personal qualifications were much higher than the woman's, with the result that the woman and the man were not in a similar situation. This view was based on that the importance on the personal suitability of individual for the position of external command officer. The determination of the qualification of the applicants was just as the man clearly had better qualifications than the woman. In essence, the case demonstrates the evaluation of the employer's objectiveness in assessing qualifications. It seems that perhaps the result of the application of the law is not entirely just in relation to that the employer asked a rival for the same position for references about the claimant. Finally, there had been no

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<sup>121</sup> Relevant law in AD 2006 nr 126: SFS 1991:433 *Equality Act* as amended in 2004: ss. 15, 17 and 22 ; AD 1996 nr 59; AD 2003 nr 32; AD 2003 nr 115; AD 2004 nr 56; AD 2005 nr 69; AD 2005 nr 77;

reprisals in relation to the reduction of the woman's wages and in relation to retroactive wage deduction as the wage was set in accordance with what the employer thought that the employee was worth when she had finished her temporary employment. Looking at the Labour Court's reasoning the determination of reprisals is technical which on the face of it may make it seem unjust but in reality is not so.

AD 2005 nr 87 concerned an employer who had as employment criteria a height minimum. It is a typical example of indirect discrimination against women where the motivation for the discriminatory action, i.e. the employer's genuine intention had been to reduce occupational injuries with the employees, could not be explained objectively.

In AD 2004 nr 44 where two employment seekers for a police position were not in a similar situation and thus no gender discrimination, pursuant to that the Labour Court had weighed the educational qualifications, working experience and personal qualifications against each other. The Labour Court more clearly than in other cases clarified that it is not only the qualifications in themselves that matter in determining if the applicants were in a similar position, but the quality of those qualifications is the real yardstick.

AD 2003 nr 63<sup>122</sup> defined the limit to the time frame in practical terms to when the employer can treat an applicant for employment so disadvantageously that it amounts to discrimination on the basis of gender which ends with the termination of the recruitment process. However, if it had been possible to show that the employer deliberately and explicitly applied a dress code that disadvantaged persons wearing head scarfs – which is mostly done by women – then there would have been indirect discrimination.

The case law demonstrates a few classical cases of discrimination where there is no doubt about whether discrimination occurred. On the other hand, the Labour Court put a great deal of emphasis on each different step amounting to discrimination in the previous SFS 1991:433 *Equality Act*, which arguably not always gave a coherent reasoning or a desired or even just result, which puts into question the effective realisation of women's rights and equal opportunities with men in recruitment for employment. The Swedish Government has made available appropriate remedies accessible in cases of violation of the principle of equal treatment or discrimination on the basis of gender.

### **3.4 Conclusion**

Both Poland and Sweden have in law realised the principle of non-discrimination and equal opportunities of men and women on the labour market in relation to recruitment. The Swedish court system is working in the sense that it makes available a system of remedy in cases of violations. Poland has demonstrated that their measures do create progress through the standardisation of vacancy announcement and an increased interest for discrimination at

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<sup>122</sup> The relevant law in AD 2003 nr 63: SFS 1991:433 *Equality Act*, ss. 16 and 17(1); AD 2004 nr 8, AD 2005 nr 3, AD 2005 nr 47;

the recruitment stage. At the same time there is a persistent ignorance of labour rights at the recruitment stage among the general public as well as employers. The Polish Government should keep up and increase its awareness raising, but also advocate for the recourse to justice in cases of suspected violation of the principle of equal treatment and gender discrimination in relation to the recruitment process. Consequently, the Governments of Sweden and Poland should continue to work for realisation of the right not to be discriminated against on the basis of gender or the equality of men and women in recruitment.

## CHAPTER 4 – SEXUAL HARASSMENT

### **The relevant international legal framework in relation to sexual harassment**

Convention on preventing violence against women and domestic violence (Istanbul Convention),<sup>123</sup> art. 40; Domestic Workers Recommendation 2011, No. 201 (R201),<sup>124</sup> para. 7; ESC, art. 16; ESCh Revised, part I, para. 26;

Discussions, references and actions to prevent and protect and to act against sexual harassment as such have been scarce in the research, therefore violence against women has served as the analogy of sexual harassment in the workplace.

### **4.1 Realisation of women’s rights in relation to sexual harassment – the actual situation**

#### **4.1.1 Poland**

Despite numerous actions and awareness raising there has been little focus on sexual harassment as such. The positive aspect is that in the need of reporting to the police and processing a case through the Court system both the police and the judiciary are supposedly effectively trained to deal with cases of sexual harassment as they have received training in handling cases of violence.<sup>125</sup> Judging by the scarcity of case law filed with the Human Rights Defender and the Labour Inspectorate in the recent years the Courts really are the most effective way of redress in cases of sexual harassment.<sup>126</sup> It is also suggested that there is no effective way of reporting sexual harassment,<sup>127</sup> or little is publicly known about the existing channels for effective reporting that lead to that few are reporting incidents (as it is hard to believe that there are none). In the light of the above, the idea of a new action plan, proposed by the trade unions Niezalezny Samorzadny Zwiasek Zawodowy “Solidarność” (NSZZ) [Independent Self-Governing Trade Union] and International Food, Agricultural, Hotel, Catering, Tobacco and Allied Workers Associations (IUF) focusing specifically on the prevention, protection and remedies of sexual harassment is positive, as long as it generates positive results, as pointed out by the ILO CEACR.<sup>128</sup>

<sup>123</sup> 11 May 2011, in force 1 August 2014; Council of Europe, ‘Convention on preventing violence against women and domestic violence CETS No.: 210’

<<http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=210&CM=8&DF=05/11/2014&CL=EN>>, accessed: 5<sup>th</sup> November 2014, Sweden ratified the Convention on the 1 July 2014 (in force since 1 November 2014), Poland signed the Convention on the 18 December 2012;

<sup>124</sup> ILO Recommendation R201: Domestic Workers Recommendation (100<sup>th</sup> ILC session Geneva 16 June 2011);

<sup>125</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Consideration of reports submitted by States parties under article 18 of the Convention: combined seventh and eighth periodic reports of States parties: Poland*, 11 March 2013, CEDAW/C/POL/7-8, (CEDAW/C/POL/7-8), para. 213 e.g. the handbook *Say no to sexual harassment in the workplace*;

<sup>126</sup> CEDAW/C/POL/7-8, para. 54, 57, 64-65; CEDAW/C/POL/Q/7-8/Add.1, reply to question 16; ILO Observation of 2006 of Poland, C111;

<sup>127</sup> CEDAW/C/POL/Q/7-8/Add.1, reply to question 6; See also Labour Code art. 94<sup>3</sup>;

<sup>128</sup> ILO Observation of 2006 of Poland, C111;

### 4.1.2 Sweden

It seems that the Equality Ombudsman has had some progress in the realisation of the right not to be subjected to sexual harassment at work through training of employers, reports and settlements. The drawback in the work of the Equality Ombudsman is that cases often present situations where one person's word stands against another's, and trade unions have the right to primarily represent their members.<sup>129</sup> Both Government bills and action plans have included the aspect of violence against women.<sup>130</sup> The focus of training of judges has been on violence against women at large which is positive, but focus has been elsewhere than at sexual harassment at work.<sup>131</sup>

## 4.2 The national legal frameworks in relation to sexual harassment

### 4.2.1 Poland

The Labour Code provides the definition and prohibition of sexual harassment in employment: "*Discrimination on the grounds of sex also includes any form of unwanted conduct of a sexual nature, or in relation to the sex of an employee with the purpose or effect of violating the dignity of an employee, in particular when creating an intimidating, hostile, degrading, humiliating or offensive atmosphere; this conduct may include physical, verbal or non-verbal elements (sexual harassment).*"<sup>132</sup> The employer is under the duty to act against discrimination which pursuant to the above includes sexual harassment.<sup>133</sup>

### 4.2.2 Sweden

As already stated in chapter 2, SFS 2008:567 *Discrimination Act* prohibits sexual harassment and reprisals as a consequence thereof.<sup>134</sup> Sexual harassment is conduct of a sexual nature that

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<sup>129</sup> RAP/RCha/SWED/13(2014), paras. 17, and 19-21;

<sup>130</sup> UN Committee on the Economic, Social and Cultural Rights (CESCR), *Implementation of the International Covenant on Economic, Social And Cultural Rights: Fifth periodic reports submitted by States parties under articles 16 and 17 of the Covenant: Addendum: Sweden*, 6 September 2006, E/C.12/SWE/5 (E/C.12SWE/5), para. 40, referring to Proposition. 2005/06:155 *Makt att forma samhället och sitt eget liv - nya mål i jämställdhetspolitiken*. [Power to Shape Society and One's Own Life - New Gender Policy Objectives] Stockholm: Näringsdepartementet; ; CEDAW/CSWE/Q/7/, para. 63, referring to Sweden's second action plan on human rights: Skr. 2005/06:95 *En nationell handlingsplan för de mänskliga rättigheterna 2006-2009*. Stockholm: Justitiedepartementet;

<sup>131</sup> CEDAW/C/SWE/Q/7, paras. 89-90;

<sup>132</sup> Labour Code, art. 18<sup>3a</sup>(6);

<sup>133</sup> Labour Code, art. 94(2)(b); See *Act of 29 July 2005 on preventing domestic violence on changes to article 72 of the Penal Code* (Dz.U. 2005 nr 180 poz. 1493, as amended), arts. 3,5, 6, 7, 8, 8a, 9a e.g. arts. 3§2, 4, 6§2(1) and (2), 6§ 4(1) and (2), 6§6(4), 9§2 and 15; In this respect see also *Regulation of the Minister of Labour and Social Policy of 22 February 2011 on the standard of basic services provided by specialist support centres for victims of domestic violence, qualifications of the staff in these centres, special directions of corrective and educational programs for people using domestic violence and qualifications of persons conducting corrective and educational impact* (Dz.U. 2011 nr 50 poz. 259); Council of Europe: European Committee of Social Rights, *Conclusion XIX-4 – Poland – Article 16 (for the period 01/01/2005 – 31/12/2009)*, 9<sup>th</sup> December 2011, 2011/def/POL, (*Conclusion XIX-4 – Poland – Article 16 (for the period 01/01/2005 – 31/12/2009)*), all conclusions by European Committee on Social Rights are available at European Committee on Social Rights Search Screen, <<http://hudoc.esc.coe.int/esc2008/query.asp?language=en>> accessed 24 September 2014;

<sup>134</sup> SFS 2008:567 *Discrimination Act*, ch. 1 s. 4(4), ch. 2 s. 18(1)(3);

violates someone's dignity.<sup>135</sup> The employer shall “[...] take measures to prevent and hinder any employee being subjected to harassment or reprisals associated with sex, ethnicity, religion or other belief, or to sexual harassment”<sup>136</sup> meaning that the employer is obliged to take active measures to prevent sexual harassment at the workplace and that he in any case adopts a policy stating that sexual harassment is absolutely prohibited. The employer should also make clear to the workers the consequences of breaches of the policy.<sup>137</sup>

#### **4.2.3 Analysis**

The two states' legislations have definition and scope of sexual harassment, prevention methods and intervention to stop sexual harassment. Polish law affords more extensive protection including description of the victim's feelings amounting to sexual harassment, violating dignity and compensation in the event of sexual harassment. The Swedish definition implies any type of behaviour of a sexual nature that violates somebody's dignity. The Polish law sets out the duty of the employer to act but does not mention through what type of actions against this type of behaviour and the right to compensation in the event of violation. The Swedish law is slightly more specific providing that the employer should take active measure to prevent sexual harassment. To emphasise the lack of specificity on this point the European Committee on Social Rights has recalled the extent of member states' obligation to act against violence against women, including sexual harassment.<sup>138</sup> Consequently, Poland's protection in law is stronger in detail than Sweden's, but both states have quite extensive protection against sexual harassment at the workplace.

### **4.3 Realisation through case law of women's rights and equal opportunities with men in relation to sexual harassment**

#### **4.3.1 Poland – facts and analysis**

Despite the above legislation the following case law demonstrates the existing discrimination in the form of sexual harassment and demonstrates the socially prevailing views of the higher value of men's work than women's, but also men's higher worth as a gender. As a consequence the actions of the supervisor in the case indicate a belief that sexual harassment is accepted and even justified conduct. The case (in proceedings in 2007) involved 100 women working night shift under the supervision of three supervisors. “[E]ight women were either dismissed on disciplinary grounds or being pressured to resign due to the fact that they lodged sexual harassment complaints or supported such complaints. The public prosecutor initiated criminal proceedings against the accused supervisor who, while suspended from his duties, continue[d] to receive his salary as well as legal assistance from the employer. By contrast, the women lost their jobs which caused moral and financial suffering, and the compensation claims raised by them in the labour court [were] still pending [in 2007].”<sup>139</sup>

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<sup>135</sup> Ibid., ch. 1, s. 4;

<sup>136</sup> Ibid., ch. 3, s. 6;

<sup>137</sup> *Kommentar till lag 2008:567* [Comments to Act 2008:567], Stockholm, Härenskog and Malmberg: 105;

<sup>138</sup> *Conclusion XIX-4 – Poland – Article 16 (for the period 1<sup>st</sup> January 2005 to 31<sup>st</sup> December 2009)*;

<sup>139</sup> ILO Observation of 2006 on Poland, C111;

The case demonstrated breaches of the labour law against reprisals and that protection of employees had failed.

The Gdańsk Court of Appeal, held in the case III APa 6/13, that internships are equivalent to employment relationships,<sup>140</sup> but rejected the appeal of sexual harassment as the appellant could not in a consistent manner indicate the facts that *prima facie* shift the burden of proof to the employer.<sup>141</sup> The determining factors were as provided by law,<sup>142</sup> the conduct of a sexual nature relating to the employee's sex should be unwanted, related to gender and have the purpose and effect of violating the dignity of the employee. Not to mention that the employer's duty to counteract discrimination is particularly important as regards sexual harassment.<sup>143</sup>

Despite accessible remedies for the protection against sexual harassment in the workplace, the case law demonstrates a shocking insight into the judicial protection against sexual harassment as a consequence to that a third party is allowed to continue to support sexual harassment during judicial process and as a result interfered with the appellants' rights. On the other hand the case law indicates (rapid) development in the area of sexual harassment at the work place and improvement in the worth of women.

#### 4.3.2 Sweden<sup>144</sup> – facts and analysis

There is need for many conditions for sexual harassment to occur. In AD 2013 nr 71<sup>145</sup> determined that actions amounting to sexual harassment may consist of undesirable proposals, comments and undesirable physical contact of sexual nature. The person harassing should also have insight in that his/her behaviour is violating somebody and that behaviour may be discrimination. The undesirability of the actions should be determined from the point of view of the person subjected to the harassment. There is a need for the victim to speak up and stress that the acts are not welcomed. Furthermore, it should be clarified that the employer bears the burden of proof in cases for alleged discrimination. Additionally, AD 2013 nr 29<sup>146</sup> demonstrated effects outside work of the employer's action should be of real loss or

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<sup>140</sup> Gdańsk Court of Appeal, III APa 6/13, p.4 and 15, citing *Regulation of the Minister of Labour and Social Policy dated 20.08.2009 on the detailed conditions of the placement by the unemployed* (Dz.U. 2009 nr 142 poz. 1160) para. 8;

<sup>141</sup> Council Directive 2000/78/ EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation, (Dz. U. UE L 303 z 02.12.2000, s. 16-22) art. 10, as cited in Gdańsk Court of Appeal, III APa 6/13, p.16; the Labour Code, art. 18<sup>3d</sup>; Judgment of the Supreme Court 3<sup>rd</sup> September 2010, PK 72/10 (LEX No. 653657) as cited in Gdańsk Court of Appeal, III APa 6/13;

<sup>142</sup> Gdańsk Court of Appeal, III APa 6/13, p.3, reference to the Labour Code, art. 18<sup>3a</sup>(6);

<sup>143</sup> *Ibid.*, p. 3, art. 94(2)(b);

<sup>144</sup> Settlements by the Equality Ombudsman: ANM 2011/1319, ANM 2011/1599, ANM 2009/1936, ANM 2009/699, JämO 2008/1239 as cited in Council of Europe: European Committee of Social Rights, *Thirteenth National Report on the implementation of the Revised European Social Charter submitted by the Government of Sweden (Articles 2, 4, 5, 6, 21, 22, 26, 29 for the period 01/01/2009 – 31/12/2012)*, 31 October 2013, RAP/RCha/SWED/13(2014) (RAP/RCha/SWED/13(2014)), pp. 17-18;

<sup>145</sup> The relevant law in AD 2013 Nr 71: SFS 2008:567 *Discrimination Act*, ch. 2 ss. 1(1), 1(3) and 18 and ch. 1 s. 4(4), Proposition 2007/08:95. *Ett starkare skydd mot diskriminering*. Stockholm: Integrations- och jämställdhetsdepartementet, p. 493-494 and 531;

<sup>146</sup> The relevant law in AD 2013 nr 29: SFS 1974:371 *The Trial in Labour Disputes Act*. Stockholm: Arbetsmarknadsdepartementet, (as amended), ch. 40 s.7(1); SFS 2008:567 *Discrimination Act*, ch. 1 s. 4, ch.2 s.1; AD 1985 nr 65; AD 1985 nr 112; AD 2003 nr 32; AD 2011 nr 23; AD 2013 nr 18;

discomfort for the victim to establish sexual harassment. The harassment may not necessarily mean that the employee is treated worse than somebody else. Thus, harassment includes actions, behaviours and responses e.g. statements from the employer to the employee that in themselves are experienced as violating.<sup>147</sup> A situation of sexual harassment is case specific, eg. displaying the bra size on the name tag of a lingerie shop assistant was not a reasonable motivated work tool as it displayed personal information about the own body which an employee should not have to show publicly. The Labour Court developed in AD 2011 nr 13<sup>148</sup> that sexual harassment may take the form of non-verbal conduct of sexual nature which may be in the form of showing pornographic images, goods or written material. It may take the form of whistling, staring or doing other gestures that are offensive. Such conduct may result in that the individual may feel insecure and threatened. It undermines their position in the workplace when they try to socialise with their work colleagues as colleagues with respect for each other. Other conduct based on gender concerns behaviour that blackens and ridicules or that is frightening or physically degrading for the employee on the basis of her or his gender such as gender based insults and offensive comments about appearance and clothing. Such conduct may create a working environment that is offensive for the person subjected to it.<sup>149</sup> Finally, AD 2002 nr 102,<sup>150</sup> demonstrated that the employer has a duty to investigate within a reasonable time situations of suspected sexual harassment. The case is a good example of the employer's duty to take effective measures to prevent cases of sexual harassment. This case provides teeth and substance to the law.

The case law of the Swedish Labour Court is a development of the law and adds many more requirements than in the law itself. Having examined the case law and extent of the use of the *travaux préparatoires* the case law on sexual harassment does above all demonstrate the importance of the *travaux préparatoires* for the interpretation of the law. It seems seldom that the Labour Court tries to deviate from them. The case law provides substance and teeth to the law for the realisation of women's right not to be sexually harassed at work and consequently Sweden provides accessible remedies.

#### 4.4 Conclusion

Poland and Sweden have reached realisation of the right not to be subjected to sexual harassment at work in law. Both states provide access to justice which significantly, at least for Sweden, developed the law. On the contrary, the effective remedies through the judicial system in Poland do not always function correctly, demonstrated by the employer's failure to

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<sup>147</sup> Prop. 2007/08:95 pp. 487 and 492-493;

<sup>148</sup> The relevant law in AD 2011 nr 13: SFS 1942:740 *Code of Judicial Procedure*. Stockholm: Justitiedepartementet, (as amended), ch.13 s.3; SFS 1991:433 *Equality Act*, ss.16a, 17, 22, 25 and 27; See also RAP/RCha/SWED/13(2014), pp. 17-18;

<sup>149</sup> Proposition 1997/98:55. *Kvinnofrid*. Stockholm: Arbetsmarknadsdepartementet, pp. 139-140;

<sup>150</sup> The relevant law in AD 2002 nr 102: SFS 1991:433 *Equality Act*, ss.22, 22a and 27; Proposition 1981/82:71. *Om ny anställningsskyddslag m.m.* Stockholm, p. 124; AD 2005 nr 22; See also UN Committee on the Elimination of Discrimination Against Women (CEDAW), *UN Committee on the Elimination of Discrimination against Women: List of issues in relation to the combined sixth and seventh periodic report of Sweden: Replies of Sweden to the list of issues*, 30 November 2007, CEDAW/C/SWE/Q/7/Add.1, (CEDAW/C/SWE/Q/7/Add.1), para 10, p.5;

protect employees despite existent law. The research further indicates failure to take recourse to justice in cases of sexual harassment, demonstrating employees' lack of knowledge of their rights and/or the right to justice. Both states have demonstrated that they do put in efforts of creating policy and measures and judicial and law enforcement training in respect to violence against women. However, specific focus on measures and policies on sexual harassment in the workplace as such is lacking. Thus, Poland and Sweden need to emphasise and spread awareness, preferably through education on the existent protection in law against sexual harassment to pre-empt sexual harassment and encourage recourse to justice for victims. In this respect focus should be put on policies and measures specifically on sexual harassment.

## CHAPTER 5 – MATERNITY PROTECTION AND PARENTAL LEAVE INCLUDING BENEFITS

### **The relevant international legal framework in relation to maternity and parental leave and their benefits**

UDHR, art. 22, 25; CEDAW, arts. 4-5, 11 and 13; C103 arts. 1-6; R111, para 2; Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities Recommendation, No.165 (R165)<sup>151</sup>, para 23; Maintenance of Social Security Rights Recommendation 1983, No. 167<sup>152</sup> (R167); The Maternity Protection Recommendation, No. 191 (R191)<sup>153</sup>, paras 1-3, 6(3)-(6), 7-10; ESC, part I, paras. 8, 12, 14, 16, 17, part II art. 8 (1)-(4), 12, 13, 14, 16, 17 (referring to Social Security (Minimum Standards) Convention, No. 102<sup>154</sup>(C102)), arts. 1-6, 39-44, 46-52, 65-66 and 69-72; RESC Part I para 27; European Code of Social Security, arts. 39, 42-47, 49-50 and 52<sup>155</sup>; addendum 2 Supplementary services or advantages, paras. 9 and 10.

### **5.1 Realisation of women’s rights in relation to maternity, parental leave and their benefits – the actual situation**

As the realisation of women’s rights in relation to maternity, parental leave and their benefits and concept of the female triple workload are so intertwined the main discussion on the actual situation follows in chapter 6.

#### **5.1.1 Poland**

In absence of any other data on family benefits, the European Committee of the Social Rights, considered the child allowances in Poland to be low. This, in relation to that child allowance

<sup>151</sup> ILO Recommendation R165: Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities Recommendation (67<sup>th</sup> ILC session Geneva 23 Jun 1981);

<sup>152</sup> ILO Recommendation R167: Maintenance of Social Security Rights Recommendation (69<sup>th</sup> ILC session Geneva 20 Jun 1983);

<sup>153</sup> ILO Recommendation R191: Maternity Protection Recommendation (88<sup>th</sup> ILC session Geneva 15 Jun 2000); Either Poland nor Sweden have ratified the ILO Convention C183: Maternity Protection Convention (88<sup>th</sup> ILC session Geneva 15 Jun 2000);

<sup>154</sup> ILO Convention C102: Social Security (Minimum Standards) Convention (35<sup>th</sup> ILC session Geneva 28 Jun 1952), applicable parts of C102: Applicable parts of C102 are for Poland Parts II, V, VII, VIII and X, and for Sweden, Parts II, IV and VIII;

<sup>155</sup> 16 April 1964; Council of Europe, ‘European Code of Social Security CETS No.: 048’, <<http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=048&CM=8&DF=04/01/2015&CL=EN>> accessed 4 January 2015, Sweden ratified on the 25 September 1965;

Council of Europe, ‘List of declarations made with respect to treaty No. 009 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms’, <<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=009&CM=8&DF=04/01/2015&CL=EN&VL=1>> accessed 4 January 2015, Declaration contained in the instruments of ratification, deposited on 25 September 1965 - Or. Swedish [Sweden accepts] the obligations of Parts II to V and VII to X (arts. 7-30 and 39-64) of the Code and of Parts III to V, VII, IX and X of the Protocol, without wishing to avail itself of the provisions of paragraph 2 of Article 2 of the Code and Protocol. Period covered: 17/3/1968 -, The preceding statement concerns Article(s): 2, 3;

should amount to a significant percentage of the median equalised income.<sup>156</sup> The allowance was only 4 per cent of the income for parents to children under the age of five.<sup>157</sup> Furthermore, entrepreneurs are not entitled to child care leave even though government work has been ongoing since 2011 “[...] to grant pension contributions paid from the state budget to persons raising a child of up to 3 years of age, irrespective of the form of their employment”.<sup>158</sup>

### 5.1.2 Sweden

The Swedish Government has claimed that part of its gender equality policy is that women and men should not have to choose between work and family, which explains the situation of parental insurance, child care and care for the elderly measures.<sup>159</sup> Altogether the parents have 480 parental leave days with benefits per child. Family benefits are not dependent on gender and is payable to all parents with children under the age of 18.<sup>160</sup> For the first 390 days the benefit amounts to 80 per cent of the parent’s income. For the remaining 90 days the benefit amounts to 180 SEK per day. For a parent with low or no income, the benefit is 180 SEK per day.<sup>161</sup> Since 2002 60 days of the 480 days are earmarked for each parent.<sup>162</sup> The changes to the SFS 1995:584 *Parental Leave Act* in force since 1 July 2001 lead to more influence over working hours.<sup>163</sup> Despite the generous parental leave afforded to both parents, mothers still take out the majority of parental leave;<sup>164</sup> even though mothers, for biological reasons, have to take out a certain amount of days for health reasons, the gap between men and women in use of parental leave has decreased over time. In an attempt to counteract the gap days taken out by parents “[t]he income ceiling for parental insurance [was] increased from 7.5 to 10 price base amounts as of 1 July 2006.”<sup>165</sup> It is an incentive for the higher earning parent (which often happens to be the father) to take out more parental leave days by increasing the ceiling for parental leave insurance the family income would suffer less with a higher ceiling on the parental insurance. The extra month of earmarked parental leave and the 2006 year’s increased ceiling on the parental insurance together with an equality bonus for equally shared parental leave days is meant to work as an encouragement to change social attitudes and come closer to gender equality.<sup>166</sup>

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<sup>156</sup> *Conclusion XIX-4 – Poland – Article 16 (for the period 01/01/2005 – 31/12/2009)*;

<sup>157</sup> *Ibid.*;

<sup>158</sup> CEDAW/C/POL/7-8, para 195;

<sup>159</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: combined sixth and seventh periodic report of States parties: Sweden*, 14 September 2006, CEDAW/C/SWE/7, (CEDAW/C/SWE/7), para. 303;

<sup>160</sup> E/C.12/SWE/5, paras. 233-237;

<sup>161</sup> CEDAW/C/SWE/7, paras. 134-135;

<sup>162</sup> *Ibid.*, para 136;

<sup>163</sup> *Ibid.*, para 305;

<sup>164</sup> E/C.12/SWE/5, paras. 213-216; Ulrika, Hagström, 'Tio argument för en jämställd föräldraförsäkring: Hög tid för nästa steg' [Ten arguments for an equal parental leave: High time for the next step] (Tjänstemännens centralorganisation [Swedish Confederation of Professional Employees] (TCO), Stockholm, 2014), p.9; See also Landorganisationen [Swedish Trade Union Confederation] (LO), *Ökad jämställdhet ger fler jobb*, [Increased equality creates more jobs/gives more employment], LO, December 2013, p.2;

<sup>165</sup> E/C.12/SWE/5, paras. 213-216;

<sup>166</sup> CEDAW/C/SWE/7, para. 138;

## 5.2 The relevant national legal framework in relation to maternity and parental leave and benefits

### 5.2.1 Poland

“The principle of equal treatment in employment is not violated by conduct aimed at legitimately differentiating the situation of an employee [i.e.] applying means that differentiate the legal situation of an employee in respect of the protection of parenthood [...]”.<sup>167</sup> 14 of 20 weeks of maternity leave are compulsory. Afterwards, two weeks of the remainder of the weeks may be waived to the father of the child.<sup>168</sup> The two parents may be on leave at the same time.<sup>169</sup> Note that, at least in 2009, a mother had to use the parental leave that the father did not use<sup>170</sup> thus strengthening the role of the mother as the sole care-giver. In addition to provisions in the Labour Code<sup>171</sup>, child care leave is regulated by the *Regulation of the Minister of Economy, Labour and Social Policy of 16 December 2003 on the particular conditions of granting child care leave* (Dz.U. 2003 nr 230 poz. 2291). The provisions in the Labour Code cover the right to take childcare leave and its length, protection from termination of contract while on childcare leave, taking on paid work during childcare leave. The Labour Code also provides that training or studying may be undertaken during the leave, the waiving childcare leave, employment after childcare leave, delegation, obligatory reduction of the length of working time and prohibition on notice of termination.<sup>172</sup> Parents may only exercise the right to leave together for three months.<sup>173</sup> From the day child care leave is being taken it is included in the employment period and thus influences employment benefits. Child care leave should not influence promotion opportunities.<sup>174</sup>

For biological reasons, pregnant workers and nursing workers are prohibited from performing certain types of work.<sup>175</sup> Termination of employment is prohibited during the leave<sup>176</sup> and after leave an employee shall go back to her previous position, or equivalent position or a position for which she is qualified.<sup>177</sup> In the event of unlawful termination of employment the

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<sup>167</sup> Labour Code, art. 18<sup>3b</sup>(2),(3);

<sup>168</sup> Ibid., arts. 180,182<sup>2</sup> and 182<sup>3</sup>;

<sup>169</sup> CEDAW/C/POL/7-8, para. 193;

<sup>170</sup> UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: sixth periodic reports of States parties: Poland*, 17 July 2009, CCPR/C/POL/6 (CCPR/C/POL/6), para 17;

<sup>171</sup> Labour Code, arts. 186-186<sup>8</sup>, 188 and 189;

<sup>172</sup> Labour Code, arts. 186-186<sup>8</sup>;

<sup>173</sup> Ibid., art. 186;

<sup>174</sup> CEDAW/C/POL/7-8, para 195;

<sup>175</sup> Labour Code, arts. 148, 176-179; See also amended *Ordinance of the Council of Ministers of 10 September 1996 listing occupations particularly onerous or harmful for the health of women* (Dz.U. 1996 nr 114 poz. 545 and of 2002, nr 127 poz. 1092); As observed in CEDAW/C/POL/7-8, paras. 186-7 the limitations concern physical workload values and norms of manual transport of loads and ban on employment of women in permanent, physical underground work in mines – of which the latter has now been denounced;

<sup>176</sup> Labour Code, arts. 177, 186<sup>7</sup> and 186<sup>8</sup>; *Act of 13 March 2003 on the specific rules of terminating employment agreements with employees for reasons independent of the employees* (Dz.U. 2003 nr 90 poz. 844, as amended) for the exceptions to protection of childcare leave see e.g. arts. 5(1), 10(1) and (2); CEDAW/C/POL/7-8, paras. 181, 183 and 194; ILO Observation on 1995 of Poland, C111; Council of Europe: European Committee of Social Rights: *Conclusion XIX-4 – Poland – Article 8-2 (for the period 01/01/2005-31/12/2009)*, 9<sup>th</sup> December 2011, 2011/def/POL, accessed 24 September 2014 (*Conclusion XIX-4 – Poland – Article 8-2 (for the period 01/01/2005-31/12/2009)*);

<sup>177</sup> Labour Code, art.183<sup>2</sup>;

worker benefits from remuneration for the entire period of unemployment.<sup>178</sup> Pregnant or new mothers are afforded special protection during unemployment.<sup>179</sup> Women who did not take up employment after child birth are given special labour market status to protect child-raising mothers.<sup>180</sup> Compensation shall be afforded in the case of violation of working time in connection with parenthood.<sup>181</sup> The Polish labour law also covers the right to maternity allowance for both parents, family allowance and child care allowance.<sup>182</sup> In Poland family benefits is a non-contributory budget funded benefit, receivable even without employment.<sup>183</sup>

## 5.2.2 Sweden

“[The employer is] to help enable both female and male employees to combine employment and parenthood.”<sup>184</sup> The general protection of parenthood and maternity is found in the SFS 1995:584 *Parental Leave Act*, particularly in the prohibition in any circumstance of disadvantageous treatment of workers who are parents.<sup>185</sup> Under the Act the expecting mother has right to leave for at least seven weeks prior the expected birth and seven weeks after birth of which at least two are compulsory and there is also the right to decide on the distribution of the leave. The Act provides six different ways in which leave can be taken: Full maternity, full parental leave, partial parental leave with or without parents’ allowance, leave with temporary parents’ allowance, and parental leave with childcare allowance.<sup>186</sup> The employer is prohibited from terminating or dismissing an employee for reasons solely connected to the parental leave in accordance with the Act, it is void on the employee’s request.<sup>187</sup> For biological aspects of motherhood there are special protections, i.e. work prohibited for health reasons including work transfer or forced leave, for pregnant employees, employees who have

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<sup>178</sup> Ibid., arts. 47 and 57;

<sup>179</sup> *Act of 20 April 2004 on employment promotion and labour market institutions* (Dz.U. 2004 nr 99 poz. 1001, as amended), Arts. 33(4)(d) and (g), art. 61 on reimbursement for the cost of fostering a child up to age of 7, art. 73(3) on unemployment benefits are paused when the maternity benefits takes over; See also CEDAW/C/POL/Q/7-8/Add.1, reply to question 1;

<sup>180</sup> *Act of 20 April 2004 on employment promotion and labour market institutions* (Dz.U. 2004 nr 99 poz. 1001, as amended)) art. 49 as cited in CEDAW/C/POL/Q/7-8/Add.1, para. 184; CCPR/C/POL/6, para. 12;

<sup>181</sup> Labour Code, art. 281;

<sup>182</sup> Labour Code, art. 184,189; See also *Act on the Amendment of the Act on the Alimony Fund, the Act on Family, Nursing and Childcare Allowances and the Act on Benefits in case of Sickness or Maternity* (Dz.U. 2001 nr 154 poz. 1971, as amended); *Act of 28 November 2003 on Family Benefit* (Dz.U. 2003 nr 228 poz. 2255, as amended) on child care; UN Committee on the Economic, Social and Cultural Rights (CESCR), *Implementation of the International Covenant on Economic, Social And Cultural Rights: Fifth periodic reports submitted by States parties under articles 16 and 17 of the Covenant: Addendum: Poland*, 4 August 2008, E/C.12/POL/5 (E/C.12/POL/5), para. 290;

<sup>183</sup> Council of Europe: European Committee of Social Rights, *European Social Charter Governmental Committee Report Concerning Conclusions XIX-4 (2011) of The 1961 European Social Charter (Austria, Croatia, Czech Republic, Denmark, Germany, Greece, Iceland, Latvia, Luxembourg, Netherlands (Aruba, Antilles), Poland, Spain, “The Former Yugoslav Republic Of Macedonia” And United Kingdom)*, 13 February 2013, GC(2012)31, para. 97;

<sup>184</sup> SFS 2008:567 *Discrimination Act*, ch.3, s.5;

<sup>185</sup> SFS 1995:584 *Parental Leave Act*. Stockholm: Arbetsmarknadsdepartementet, (as amended), s.16 – the section is similar to ch. 2 s.1 of SFS 2008:567 *Discrimination Act* including situations of recruitment, promotion or training for promotion, training or professional guidance, remuneration or employment conditions, division of work, termination of employment, general provisions are ss. 11, 12, 15;

<sup>186</sup> SFS 1995:584 *Parental Leave Act*, s.3-7 and 9;

<sup>187</sup> SFS 1982:80 *Employment Protection Act*. Stockholm: Arbetsmarknadsdepartementet, (as amended), ss. 7 and 18, ss. 11, 16 and 17; SFS 1995:584 *Parental Leave Act*, s.17; See also CEDAW/C/SWE/7 para 118, p.20; See also ILO Observation on 2008 of Sweden, C156;

recently given birth or are breastfeeding.<sup>188</sup> The burden of proof is transferred to the employer in cases where the worker shows that the circumstances of the case give reason to believe that there has been disadvantageous treatment for reasons connected to the parental leave.<sup>189</sup> Discrimination as regards social insurance is prohibited<sup>190</sup> but does not prevent the application of acts on child allowance<sup>191</sup>. For the realisation of protection of maternity and parental leave parents are entitled to benefits governed by the SFS 2010:110 *Social Insurance Security Code*. It covers pregnancy allowance, parents' allowance, child benefits, maintenance allowance and special family benefits.<sup>192</sup>

### 5.2.3 Analysis

Both Sweden and Poland have law that, on the one hand, prohibits discrimination on the basis of gender, and on the other hand protects the right to parental leave and the right to employment in relation to each other of which the protection of parental leave, in particular, is continuously improving. However, there is no realisation justified in Poland in realisation to equal opportunities to parental leave, which ironically, forces women to work less than they perhaps want and at the same time to become more economically dependent and does not allow fathers to spend as much time with their children as they want. A noteworthy step forward is that a paternity month has been under consideration.<sup>193</sup> In conclusion, women's realisation of right on the labour market in relation to maternity is in principle quite well protected with required non-discrimination provisions and the right to maternity leave and benefits in both states even though Sweden has come significantly further than Poland.

## 5.3 Realisation through case law of women's rights and equal opportunities with men in relation to maternity and parental leave and their benefits

### 5.3.1 Poland<sup>194</sup>

Surprisingly enough, almost all Polish cases concerned granting of sickness benefits by Zakład Ubezpieczeń Społecznych [the Polish Social Insurance Fund] (ZUS) due to pregnancy or maternity benefits. Pursuant to the case Łodz III AUa 1146/13 social insurance is mandatory for employees<sup>195</sup> and the employment contract needs to demonstrate the characteristics of the employment contract pursuant to article 22 of the Labour Code<sup>196</sup> incl.

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<sup>188</sup> SFS 1995:584 *Parental Leave Act*, ss.18-20;

<sup>189</sup> *Ibid.*, s.24, see also ss. 23 and 25 for dispute resolution;

<sup>190</sup> SFS 2008:567 *Discrimination Act*, ch 2, s.14;

<sup>191</sup> *Ibid.*, ch 2, s.14a;

<sup>192</sup> SFS 2010:110 *Social Insurance Security Code*. Stockholm: Socialdepartementet, (as amended), ch 6, ss. 6(1) and 6(2), ch 8, s. 2, chs. 10-22, 10, s.2-5, 7a;

<sup>193</sup> CEDAW/C/POL/Q/7-8/Add.1, reply to question 4;

<sup>194</sup> For similar cases see also: Białystok Court of Appeal III AUa 659/13, Gdańsk Court of Appeal III AUa 86/13, Gdańsk Court of Appeal III AUa 1254/13 and Lublin Court of Appeal III AUa 580/13, Wrocław Court of Appeal III AUa 1481/11;

<sup>195</sup> *Act of 13 October 1998 on the social insurance system*, (Dz.U. 1998 nr 137, poz. 887, as amended), art. 6(1)(1), 8(1), 11(1) and 12(1); Łodz Court of Appeal III AUa 1146/13, p.5;

<sup>196</sup> Labour Code, art. 22: "By establishing an employment relationship, an employee under-takes to perform work of a specified type for the benefit of an employer and under his supervision, in a place and at the times specified by the employer, the employer undertakes to employ the employee in return for remuneration."; Łodz III AUa 1146/13, p.5; Łodz Court of Appeal III AUa 1355/12; Łodz Court of Appeal III AUa 86/13;

conclusion of contract and performance of task as provided by that contract i.e. execution of work.<sup>197</sup> The Łodz Court of Appeal held III AUa 1254/13 that “[t]he mere desire to obtain social security benefits as an incentive to take up employment does not indicate any intention to circumvent the law” just as the desire to obtain a livelihood does not circumvent the law.<sup>198</sup> Circumvention of the law is particularly difficult to prove in relation to pregnancy, as among other things, it is prohibited to not employ a woman on reasons of pregnancy.<sup>199</sup> The Supreme Court judgment, II PK 245/11 on the 22 May 2012, extended the protection of workers from redundancy in the period in close proximity to the parental leave, the period closely before and afterwards, with reference to EU law that prohibits redundancy at the beginning and the end of maternity leave<sup>200</sup> and thus strengthened both the right to employment and the right to parental leave.

### 5.3.2 Sweden

The Swedish Labour Court applies the law very strictly, even narrowly: In AD 2013 nr 63,<sup>201</sup> pursuant to the meaning of disadvantageous treatment i.e. that there should have been a negative effect,<sup>202</sup> excluding trivial differences the claimant had been disadvantageously treated<sup>203</sup> when the employer demanded medical certificate for child care leave and threatened with termination of employment. Parents’ allowance which requires medical certificate after eight days is decided by the Social Insurance Fund.<sup>204</sup> It is non-decisive whether the parental leave is the only or decisive reason to determine that the employee has been disadvantaged, i.e. there is a negative effect and thus it is insignificant whether the employee had been late on other occasions.<sup>205</sup> The same reasoning applies in cases of pregnancy and possible future pregnancies.<sup>206</sup>

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<sup>197</sup> Katowice Court of Appeal III AUa 270/12, p.4;

<sup>198</sup> Łodz Court of Appeal III AUa 1254/13, p.8;

<sup>199</sup> Ibid., pp.8-9 citing *the judgment of the Supreme Court of 9 August 2005., III UK 89/05 and the judgment of the Supreme Court of 14 February 2006., III UK 150/05, LEX No. 272551;*

<sup>200</sup> Supreme Court II PK 245/11, 22 May 2012, referring to European Union, *Directive 76/207/EEC of the European Parliament and of the Council 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*, 9 February 1976, 76/207/EEC, art. 6 and European Union, *Directive 92/85/EEC of the European Parliament and of the Council of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)*, 19 October 1992, 92/85/EEC, art. 10, the Supreme Court additionally discussed the need for protection of employees;

<sup>201</sup> The relevant law in AD 2013 Nr 63, SFS 1995:584 *Parental Leave Act*, ss. 13 and 16; SFS 2007:612 *Allowance Crime Act*. Stockholm: Finansdepartementet, (as amended), ss.2-4; SFS 2010:110 *Social Insurance Security Code*, ch. 110, s. 14,

<sup>202</sup> See also AD 2011 nr 2;

<sup>203</sup> SFS 1995:584 *Parental Leave Act*, s.16; AD 2013 nr 63 citing Proposition 2005/06:185. *Försäkring och förenkling – ändringar i anställningsskyddslagen och föräldraledighetslagen*. Stockholm: Näringsdepartementet, pp. 81-83 and 122; See also Prop. 2007/08:95 p.486 and e.g. AD 2013 nr 18;

<sup>204</sup> AD 2013 nr 63 citing Prop. 2005/06:185 p. 82 and e.g. AD 2011 nr 23;

<sup>205</sup> SFS 1995:584 *Parental Leave Act*, s.16; SFS 2008:567 *Discrimination Act*, ch.2 s.1; Prop. 2005/06:185 pp. 81-82 and 122-123; Prop. 2007/08:95 p.489 ; e.g. AD 2009 nr 56;

<sup>206</sup> See AD 2011 nr 2; AD 2011 nr 23;

In relation to raise in wages, there was in AD 2013 nr 18<sup>207</sup> proof that the employer's reason for not granting a wage raise was the forthcoming parental leave i.e. that the employee was pregnant, which lied behind the withdrawal to grant raise in wage, which is contrary to the intent of the *travaux préparatoires* to the SFS 1995:584 *Parental Leave Act*.<sup>208</sup> The employer's conduct should be related to a supposed "normal standard" i.e. the standard that the employer "should" have applied to the employee concerned if he or she has not requested or taken parental leave. A disadvantage may exist, provided that an employee had lost a privilege, a promotion (etc.) that he or she had reasonable cause to assume that he or she would receive.<sup>209</sup>

AD 2009 nr 15<sup>210</sup> distinguished the biological difference between sickness and maternity, maternity being something natural excluding entitlement to the difference in wage when receiving maternity allowance.<sup>211</sup> Additionally, as pension premiums are based on the wages paid, if there are no wages paid there is nothing to base the premiums on. Finally, to receive the pension premiums when on maternity leave would benefit the individual on parental leave unfairly, in comparison, to another person on leave who does not receive wages or pension premiums.

Participation in a professional development course could not be considered better treatment of the pregnant woman than an employee who was going on leave for other reasons and thus, in AD 2009 nr 45<sup>212</sup> rejecting an application to a professional development course did not put into effect the exception to disadvantageous treatment. The purpose of this strong protection of the parental leave is that the worker should not have to sacrifice other employment rights in comparison to other employees as this could lead to discriminatory treatment of workers who are parents.

### 5.3.3 Analysis

The case law of the two states has entirely different focuses. While the majority of Polish cases focused on payment of benefits in relation to parental leave, the Swedish case repertoire

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<sup>207</sup> The relevant law in AD 2013 Nr 18: SFS 1995:584 *Parental Leave Act*, ss. 16 and 22; SFS 2008:567 *Discrimination Act*, ch. 1 s. 4 ch. 2 s. 1 and ch. 5 s. 1; See also AD 2011 nr 2;

<sup>208</sup> AD 2013 Nr 18 citing Prop. 2005/06:185 pp. 81-82;

<sup>209</sup> See also AD 2009 Nr 56;

<sup>210</sup> The relevant law in AD 2009 Nr 15: SFS 1991:433 *Equality Act*, ss. 15 and 17(1)(5) and 25; SFS 1995:584 *Parental Leave Act*, ss. 16(1)(5), 16(2) and 22; C-170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986], Swedish special edition, p. 583; C-342/93, *Joan Gillespie and others v Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board* [1996], ECR, p. I-475; C-66/96, *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Berit Høj Pedersen v Fællesforeningen for Danmarks Brugforeninger and Dansk Tandlægeforening and Kristelig Funktionær-Organisation v Dansk Handel & Service* [1998], ECR, p. I-7327; C-411/96, *Margaret Boyle and others v Equal Opportunities Commission*, [1998], ECR, p. I-6401; C-191/03, *North Western Health Board v Margaret McKenna*, [2005], ECR, p. I-7631;

<sup>211</sup> SFS 1991:1047 *Sickness Wages Act*. Stockholm: Socialdepartementet, (as amended); SFS 1995:584 *Parental Leave Act*, s. 20;

<sup>212</sup> The relevant law in AD 2009 Nr 45: SFS 1991:433 *Equality Act*, s.15; SFS 1995:584 *Parental Leave Act*, s. 16; C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, [1990], ECR, p. I-3941; C-179/88, *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening*, [1990], ECR, p. I-3979; C-32/93, *Carole Louise Webb v EMO Air Cargo (UK) Ltd*, [1994], ECR, p. I-3567; C-394/96, *Mary Brown v Rentokil Ltd*, [1998], ECR, p. I-4185; AD 2002 nr 45;

is more diverse. The Swedish case law demonstrated an almost fierce attitude in the protection of parental leave in relation to employment. It is impossible to say whether Polish Social Insurance Fund, ZUS, is particularly suspicious in granting maternity benefits or whether other parental rights are particularly well realised for ZUS to be dominating the majority of the case law. Thus the Government of the states provide effective remedies to violations of parental rights, including the right to benefits.

#### **5.4 Conclusion**

Both states have a comprehensive and continuously improving legal protection of maternity. The Swedish law is very generous and on track to achieve equality in respect of parental leave. Poland has also showed significant improvement in their protection of maternity leave. In contrast, the application of the rights provided by law demonstrate that there could still be improvement though there is progress in the equality between men and women in relation to parental leave, even when taking into account the necessary maternity leave for biological reasons. This may be linked to the states' margin in relation to the realisation of human rights with respect to the national context<sup>213</sup>. In this case the national context means the reached level of gender equality. Thus, the maternity protection and protection of parental leave becomes a barometer to measure the development of gender equality. Both states should promote among employer, employees and the general public the exercise of the existing rights in relation to maternity and parental protection as it provides a more equalised maternity and parental leave and more equal opportunities to career, as explained in chapter 6. Additionally, both Sweden and Poland have demonstrated protection of parental leave through the justice system and Poland, in particular, as regards the right to benefits. On the other hand, the case law provided the impression that the access to benefits in Poland seems significantly difficult, which might be a deceiving perception as it is compared to the Swedish case law where no similar case law was found. Moreover, in the absence of any other information Polish child care benefits seem insufficient in proportion to the average income. Adding on that is the need for compulsory benefits for entrepreneurs especially as women are encouraged to enter the labour market through self-employment, as seen in chapter 7.

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<sup>213</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, available at: <http://www.refworld.org/docid/43f3067ae.html> [accessed 18 December 2014], (CESCR GC 16), paras. 32-33;

## CHAPTER 6 – THE FEMALE TRIPLE WORKLOAD: WORK, HOME AND FAMILY

### The relevant international legal framework in relation to the female triple workload

CEDAW article 5 and 13; C156 arts. 1,2 4 5 6 7 8 9 ; R165 paras. 1, 2, 3, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23; ESC Part I para 16, Part II art. 8, 12, 13, 14, 16, 17; RESC Part I para 27; European Code of Social Security, arts. 39, 42, 43-47, 49, 50, 52; addendum 2 Supplementary services or advantages, para 9 and 10;

This chapter is more interrelated with other parts of the thesis than any other chapter on the substantive rights. Most of all, however, it is related to the protection of maternity and parental leave.

### 6.1 Realisation of women's right and equal opportunities with men in relation to the female triple workload – the situation at hand

#### 6.1.1 Poland

Poland has argued that amendments to the Labour Code which entered into force 1 October 2013<sup>214</sup> increased the chances of a more equal division of child care and thus lowering the burden of women's triple workload. The new provisions provide for maternity leave and parental leave to amount to one year of leave including benefits. Nothing provides for better paternity conditions even if one month in the first five years is earmarked as non-transferrable for each parent.<sup>215</sup> The fathers are now in a better position, but for real change between men and women in sharing the triple workload, the rights protected should also be used.

In Poland's 2004 survey on the gross domestic product (GDP) of women's household work, the female unpaid household work amounted to 19 per cent of the GDP.<sup>216</sup> Poland's past, current and future plans and measures to reduce the triple workload of women include promotion of sharing of parental duties and rights including stressing the importance of fatherhood respect and partnership models, women's rights in relation to motherhood including reintroduction on the labour market through e.g. entrepreneurship, development of childcare and care for dependants so that the worker does not have to stay home one hundred per cent or has to reduce their gainful employment as a consequence and through promoting partner family-models.<sup>217</sup> Consequently, Polish projects have managed to start a change in the

<sup>214</sup> Labour Code, art. 94<sup>2</sup>;

<sup>215</sup> *Act of 26 July 2013 amending the Act - Labour Code* (Dz.U. 2013 poz. 1028), art. 1 on the amendments of articles 186, 186<sup>2</sup>, 186<sup>6</sup>, 189<sup>1</sup> and 293 of the Labour Code; CEDAW/C/POL/Q/7-8/Add.1, reply to question 9;

<sup>216</sup> CEDAW/C/POL/7-8, para. 172: the unpaid work included "[...] household maintenance, preparing food for household members, maintenance of clothing and care for children and adults, including supplementary activities within the four groups";

<sup>217</sup> CEDAW/C/POL/7-8, paras. 38, 199, 205, 207; CEDAW/C/POL/Q/7-8/Add.1, reply to questions 7, 9, 16;

social pattern on the view and division of the triple workload where the projects have been performed. In conclusion Poland more than Sweden, though modest in progress, has focused and will focus more on community facilities to facilitate parenthood in combination with work while Sweden, as demonstrated below, having come farther in development, has and will focus on encouraging the individual to utilise their rights as protected and enabled by the state.

### 6.1.2 Sweden

Sweden's focus to eliminate the female triple workload is mainly on parenthood, but it does not neglect another workload that women are taking on, aiming at more equally divided care of the elderly.

Swedish women carry out between 58-65 per cent of the unpaid work.<sup>218</sup> Consequently, differences in economic resources between men and women persist as shown in the 2008 (the latest) gender equality policy,<sup>219</sup> despite good progress in the possibility to divide parental leave between the parents, despite the introduction of the equality (monetary) bonus for equally shared parental leave, despite the increased ceiling for benefits and despite the slight increase of men taking out parental leave.<sup>220</sup> These are significant steps forward but the question is if the bonus is a morally acceptable carrot. However, the increased ceiling for the amount of benefits actually reduces the economic loss for the family when the higher earning parent takes out parental leave and enables the use of parental leave by the higher earning parent without jeopardising the family economy and thus removing the pressure to work when he/she wants to take the parental leave that she/he by law is entitled to.

Part of the triple workload includes taking care of elderly family members. In Sweden this task is mostly performed by middle-aged daughters or older wives, whose workload has increased recently while the workload for men performing the same tasks has not increased similarly. In its 6<sup>th</sup> and 7<sup>th</sup> combined periodic reports to the CEDAW Committee, Sweden expressed the importance of mainstreaming women's care of elderly men and women to assess among other things the effects on women's opportunity to participate in paid work<sup>221</sup> with the subsidiary target aiming at equal distribution of the unpaid household work between men and women, especially in relation to care of the elderly, child care and household work.<sup>222</sup>

The creation of a gender equality bonus and RUT-avdrag [tax subsidies for household-related services] (RUT) as well as highly subsidised childcare<sup>223</sup> constitute Sweden's main strategy

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<sup>218</sup> CEDAW/C/SWE/Q/7/Add.1, para. 1; Hagström, 'Tio argument för en jämställd föräldraförsäkring: Hög tid för nästa steg', p.9;

<sup>219</sup> CEDAW/C/SWE/Q/7/Add.1, para. 1;

<sup>220</sup> CEDAW/C/SWE/7 para. 121:

<sup>221</sup> Ibid., para. 290;

<sup>222</sup> Ibid., para. 122; Some might blame the higher rate of older wives taking care of their elderly husbands on population demographics that women tend to live longer than men, but is there not an equal responsibility to take care of each other. I will not venture further into this argument as it will commence the journey into the unknown jungle of responsibility of elderly care.

<sup>223</sup> CEDAW/C/SWE/Q/7/Add.1, paras. 23 and 82; CCPR/C/SWE/6, para 31; UN Committee on Economic, Social and Cultural Rights (CESCR), *Implementation of The International Covenant on Economic, Social And*

for facilitating increased gender equality of women in board positions, but which should result in reduced triple workload for women in that it facilitates combining working life and family life. With RUT and the equality bonus the state and the individual is in a way bought free from the responsibility of social attitude change. It is understandable that the measure in the long run can lead to a change in social attitude change, because the norm becomes that women are to work the amount of time that they want but as a result of RUT. Consequently, women are not expected to spend so much time on home chores. But (if or) when RUT is abolished will men consider it their responsibility to share the workload at home? Note that it might also be so that the persons needing RUT the most. E.g. parents working two low-paid jobs in order to support their families or part-time or single parents cannot benefit from RUT as even paying 50 per cent the amount for the relevant service is more than they can afford. Another part of the strategy to address general inequality is women's entrepreneurship, strengthened right to full-time employment and promotion of equal pay,<sup>224</sup> and if realised will help reduce the female triple workload. Taking into account the CEDAW Committee's latest severe criticism for additional measures to realise *de facto* equality between men and women in the labour market, Sweden's current situation in tackling the female triple workload is insufficient.<sup>225</sup>

Missing in the debate is the discussion on laws regarding working conditions at work for the facilitation of combining work and family. Especially Poland has a long way to go. Becoming a parent is equally transformative for both parents. Equally divided use of parental leave between men and women, could be expected to lead to a more equal division of household work over time during and after the parental leave has come to an end, but also to the realisation of other rights as woman's improved health, remuneration, pension, career developments, and connection to the labour market.<sup>226</sup> Strangely enough, woman's remuneration is more positively affected by the increase of her partner's use of parental leave than if she was to abstain from the equivalent period of parental leave. It seems possible to decrease both the wage gap and the statistical discrimination (the expectation of women's lower presence at work due to motherhood and men's higher presence, not expected to use their parental leave) with more equal proportion and use of the parental leave.<sup>227</sup> The equally proportioned parental leave would eliminate perception of need for special solutions for parenthood.<sup>228</sup> The negative view on male workers' use of parental leave and part-time work as a consequence of parenthood would be eliminated, not to mention the improved relationship and support that fathers may give to their children if they build a good

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*Cultural Rights: Consideration of Reports Submitted By States Parties in Accordance with Article 16 of the International Covenant on Economic, Social and Cultural Rights: Replies by the Government of Sweden to the list of issues (E/C.12/SWE/Q/5) to be taken up in connection with the consideration of the fifth periodic report of Sweden (E/C.12/SWE/5)*, 4 September 2008, E/C.12/SWE/Q/5/Add.1, (E/C.12/SWE/Q/5/Add.1), para 6;

<sup>224</sup> E/C.12/SWE/Q/5/Add.1, para. 6;

<sup>225</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women: Sweden*, 8 April 2008, CEDAW/C/SWE/CO/7, (CEDAW/C/SWE/CO/7) available at: <http://www.refworld.org/docid/48e346b8d.html> [accessed 27 December 2014], para 27;

<sup>226</sup> Hagström, 'Tio argument för en jämställd föräldraförsäkring: Hög tid för nästa steg', p.9;

<sup>227</sup> *Ibid.*, p.10;

<sup>228</sup> *Ibid.*, p.14;

relationship already from the birth of the child.<sup>229</sup> Additionally, social change regarding gender attributed qualifications may additionally change on a long-term perspective.<sup>230</sup> The above, due to its general nature is also applicable to Poland.

## **6.2 The relevant national legal framework in relation to the female triple workload**

For the relevant law and the discussion thereon see primarily chapter 5.

### **6.2.1 Poland**

The *Act of 14 March 2014 amending the act on promotion of employment and labour market institutions and certain other acts*,<sup>231</sup> provides for solutions facilitating the work-family balance and the flexibility for labour offices “[...] to apply labour-market services and instruments through their better adaptation to the needs of particular groups of the unemployed, including women with children [...]”.<sup>232</sup> Moreover, other relevant articles in the Labour Code are those regulating working time are of importance in facilitating the combination of work, home and family<sup>233</sup> and the prohibition of discrimination in relation to part-time work.<sup>234</sup>

### **6.2.2 Sweden**

The SFS 2008:567 *Discrimination Act* attempts to protect both parenthood and employment in relation to each other: “[The employer is] to help enable both female and male employees to combine employment and parenthood.”<sup>235</sup>

### **6.2.3 Analysis**

The very presence in both states of at least a mention that facilitation should be realised was more than expected. The female triple workload is not exactly a very tangible subject. However, there is a lack of specificity in how facilitation for managing home, work and family should be realised. It remains open to see whether such specification can and should, with a satisfactory positive outcome, be made in law.

## **6.3 Conclusion**

In conclusion, in Poland there are, together with the law in chapter 5, foundational and advancing legal prerequisites and in Sweden good legal prerequisites for an equally shared triple workload between the genders, though it can be developed. The actions and measures as

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<sup>229</sup> Ibid., pp.12-13;

<sup>230</sup> Ibid., pp.5 and 15-17;

<sup>231</sup> *Act of 14 March 2014 amending the act on promotion of employment and labour market institutions and certain other acts* (Dz.U. 20114 poz. 598);

<sup>229</sup> Ibid., see e.g. art 1(32); CEDAW/C/POL/Q/7-8/Add.1, reply to question 16;

<sup>233</sup> Labour Code, art. 104<sup>1</sup>(1)(1) scheduling of working time, art.143 shortened working weeks, art. 144 working hours limited to weekends and holidays, art. 186<sup>7</sup> reduction to half-working hours in relation to child care leave, arts. 113 and 942; CEDAW/C/POL/7-8, paras. 196-197;

<sup>234</sup> Labour Code, arts. 11<sup>3</sup>, 94<sup>2</sup>, 142, 143, 144, and 186<sup>7</sup>; CEDAW/C/POL/7-8, paras. 196-197;

<sup>235</sup> SFS 2008:567 *Discrimination Act*, ch.3, s.5;

taken by both Poland and Sweden are encouraging but mostly attitudes in society are working against their realisation and use while at the same time it is those attitudes that the measures attempt to change and should change in order to reach the goal of equally divided triple workload. Poland should continue to develop the law and the social institutions enabling equal participation on the labour market through e.g. access to kindergartens.<sup>236</sup> Both states should continue to promote the individuals' use of the rights provided by law relating to equal division of the triple workload.

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<sup>236</sup> See chapter 9, p. 73;

## PART III

### ON THE OPEN SEA OF STARS – Promotion

#### CHAPTER 7 – UNEMPLOYMENT, UNEMPLOYMENT BENEFITS AND PART-TIME EMPLOYMENT

**The relevant international legal framework in relation to unemployment and part-time work**

*Relevant provisions for part-time employment*

C175, arts. 1, 3-4, 6, 8-10; R182 paras. 1-22; ESC, Part I, para 1, part II, arts. 12, 13;

*Relevant provisions for unemployment and unemployment benefits*

UDHR, arts. 22, 23; CEDAW, art. 11; C102, arts. 1-6, 19-24, 65-67 and 69-72; C122, arts. 1 and 2; C168, especially arts. 1-2 and 6-8; R111, para 2; R167; R169, paras. 2-4, 7, 15-16 and 18-19; Employment Promotion and Protection against Unemployment Recommendation 1988, No. 176<sup>237</sup> (R176); European Social Charter, part I, paras. 1, 12, 14; AP ESC, part II, article 1(1); RESC, part II, art. 10(4);

#### **7.1 Realisation of women’s rights in relation to unemployment and part-time work – the actual situation**

##### **7.1.1 Part-time employment**

Part-time employment also means part-time unemployment, with consequences not only affecting remuneration, but also different forms of benefit including maternity benefits as already discussed, unemployment benefits as discussed below but also sickness benefits and retirement pension.<sup>238</sup> Part-time workers should not be afforded lesser protection or be subject to discrimination all examined in the light of the realisation of women’s right and their equality with men on the labour market.

###### *7.1.1.1 Poland*

The only statistics found that indicates the actual situation of part-time employment is how many hours per week workers perform work. In 2013, both women and men in Poland worked mostly between 40-48hours per week (hpw), i.e. full-time employment, (approximately 60,5 per cent, men slightly more than women). However, men performed

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<sup>237</sup> ILO Recommendation R176: Employment Promotion and Protection against Unemployment Recommendation (75<sup>th</sup> ILC session Geneva 21 Jun 1900);

<sup>238</sup> CEDAW/C/SWE/7, para. 254, the Swedish report gives examples of what might be affected by part-time un-/employment;

substantively less part-time work in comparison with women. Of all men 14,8 per cent worked between 1-34hpw and 23,4 per cent of all women worked 1-34hpw. In the category of workers working 35-39hpw about twice as many women as men worked in this group.<sup>239</sup> Taken together 11,8% of women perform part-time work (1-39hpw) while only 9,1% of the men perform part-time work.<sup>240</sup>

#### *7.1.1.2 Sweden*

Part-time employment in Sweden means 1-34 hours of work per week<sup>241</sup> out of a 40 hour working week (i.e. 2.5 per cent – 85 per cent of full-time employment). Part-time unemployment is prevalent in employment sectors dominated by women,<sup>242</sup> indicating that more women than men are employed part-time. It may also suggest that women traditionally are drawn to sectors where part-time employment is more common form of employment.

In 2013, 29 per cent of all employed women worked full-time or more, while among men the percentage was 41,8 per cent. Of all women 10 per cent worked 35-39hpw while 8,3 per cent of the men worked 35-39hpw. 38 per cent of all women worked between 1-34hpw while only 25,6 per cent of the men. The equality may be rooted in sick leave and parental leave.<sup>243</sup> The percentage of women and men working full-time and part-time is completely opposite. The percentage of men working full-time is almost equivalent to that of women working part-time and vice versa. But more women work almost full-time hours per week, suggesting more sick leave or time spent elsewhere, maybe taking care of family and home. 33-48 per cent of the women and 11-15 per cent of the men registered as part-time unemployed during 2001-2005 were jobseekers.<sup>244</sup> 36 per cent of all employed women (aged 20-64 and with children younger than 17 year) worked part-time in 2003, while only 6 per cent of the men worked part-time. 30 per cent of the women without children worked part-time the same year while only 12 per cent of the men did so. Since the 1990's the proportions have changed and more men are becoming part-time un-/employed and fewer women are part-time un-/employed.<sup>245</sup> However, comparing the above statistics with those from 1996 part-time unemployment has decreased for both men and women.<sup>246</sup>

#### *7.1.1.3 Analysis*

The above statistics show that women dominate in part-time employment. Significantly more men than women have full time employment but significantly more men than women do not work at all. More women have full-time employment in Poland than in Sweden. Poland also has a lower percentage of all working women in part-time employment than Sweden. More

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<sup>239</sup> ILO, 'Employment distribution by sex and weekly hours actually worked – Poland', All statistics are available on the ILO website <[www.ilo.org](http://www.ilo.org)> under statistics and databases, ILOSTAT – ILO database of labour statistics, browse by country, accessed: 29 September 2014;

<sup>240</sup> Ibid.;

<sup>241</sup> CEDAW/C/SWE/7, para. 254;

<sup>242</sup> Ibid.;

<sup>243</sup> ILO, 'Employment distribution by sex and weekly hours actually worked – Sweden', accessed: 30 September 2014;

<sup>244</sup> E/C.12/SWE/5, para. 63; CEDAW/C/SWE/7, para. 256; E/C.12/SWE/Q/5/Add.1, para. 8;

<sup>245</sup> CEDAW/C/SWE/7, para. 255;

<sup>246</sup> ILO, 'Employment distribution by sex and weekly hours actually worked – Sweden', accessed: 30 September 2014;

women in Poland than in Sweden belong to the almost full-time employed. Unemployment is a consequence of part-time employment, the fact that significantly more women than men work part-time taken together with the additional long-term effects of part-time employment the following analysis includes the protection of full-time and part-time workers in relation to unemployment.<sup>247</sup>

## **7.1.2 Unemployment**

### *7.1.2.1 Poland – facts and analysis*

The statistics demonstrate that more women than men are unemployed, with a particularly high difference between the genders among young persons.<sup>248</sup> The unemployment rate at the labour offices decreased more slowly for women than for men.<sup>249</sup> Women's decreased unemployment among the aged 55+ may be a consequence of women's earlier retirement in comparison to men.<sup>250</sup> Unemployment generally lasts for less than six months, or longer than twelve months. With 40 per cent of the unemployed in long-term unemployment women's higher percentage is not large. Young women are a strong group as they most rapidly of all groups of unemployed employees leave unemployment while older male workers have most difficulty to return to work.<sup>251</sup>

The Polish unemployment programmes have been focusing on ensuring equal access to the labour market “[...] by overthrowing the existing stereotypes, raising the level of awareness among workers and labour market institutions, as well as providing access to institutionalized forms of childcare.”<sup>252</sup> National Action Plan for Employment (NAPE) 2012-2014 aimed at the simplification of procedures for running employment agencies for the increased protection for persons using these agencies; develop cooperation system between the agencies and local authorities to improve effectiveness and efficiency of action for the labour market's disadvantaged groups.<sup>253</sup> Despite the actions taken the trade union Solidarność emphasised that temporary agencies have not received proper supervision. The trade union felt that more resources should be allocated towards the vulnerable groups such as older workers, unemployed women and young persons.<sup>254</sup> However, the Polish Government has not allocated funding that would be sufficient to provide employment services, sufficiently effective services to the vulnerable groups is not afforded, to at least decrease their unemployment to comparable levels with the main body of the unemployed.

The creation of the current system of unemployment benefits focused on the enhancement of control of the granting “[...] social insurance benefits, shortening the periods of collecting certain short-term benefits and limiting the possibilities of combining retirement and

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<sup>247</sup> See chapter 8 for more effects on the individual of part-time employment;

<sup>248</sup> ILO, ‘Unemployment rate by sex and age – Poland’, accessed: 29 September 2014;

<sup>249</sup> ILO Observation on 2009 of Poland, C122;

<sup>250</sup> ILO, ‘Unemployment rate by sex and age – Poland’, accessed: 29 September 2014; See also chapter 10;

<sup>251</sup> ILO Observation on 2012 of Poland, C122; ILO, ‘Unemployment distribution by sex and categories of unemployed persons – Poland’, accessed: 29 September 2014;

<sup>252</sup> ILO Observation on 2012 of Poland, C122;

<sup>253</sup> Ibid.;

<sup>254</sup> Ibid.;

*disability pensions with incomes from employment.*<sup>255</sup> Nevertheless, the unemployment benefits have been called unduly restrictive by the ILO CEACR<sup>256</sup> and as the benefits resulted in that the employee's income fell below 50 % of median equalised income the European Committee on Social Rights has deemed them inadequate.<sup>257</sup> In effect, women, especially part-time working women, are more affected than men as women's unemployment does not decrease as the men's unemployment do.

#### 7.1.2.2 Sweden – facts and analysis

The statistics tell us that Swedish women are slightly less unemployed than men but that women's unemployment is increasing faster than men's. Nevertheless, more women than men are first time job seekers indicating an increase of women's employment.<sup>258</sup> Sweden suffers from very high youth unemployment. The difference in unemployment between the genders is seen for the group with less than ten years to retirement where women are less unemployed than men.<sup>259</sup> Women between 55-64 years are those mostly found in long-term unemployment. In relation to the law this group is the most vulnerable, as it to a larger extent than other groups will be affected by the non-payment of benefits.<sup>260</sup>

The Government of Sweden is of the opinion that the value of work is the freedom, security, community and opportunities that it provides.<sup>261</sup> At the same time the Swedish Government has argued that a decrease in part-time unemployment or unemployment in general requires “[...] a high demand for labour” and that “[t]he Government [has] therefore [put] forward a whole range of measures for job creation and increased employment. In addition, an important component of the Swedish labour market model is that the state should not legislate on matters better dealt with in negotiations between the social partners. Questions concerning full-time and part-time work, various requests about working time arrangements, etc, are very much matters that should be resolved through collective agreements.”<sup>262</sup> This comment demonstrates the awareness of need for change for better protection of the unemployed but also the living trade union movement in Sweden and the dependence thereupon by the State to handle the protection of workers and their rights of the labour market through negotiation.

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<sup>255</sup> E/C.12/POL/5, para 316;

<sup>256</sup> Council of Europe: European Committee of Social Rights, *Conclusion 2009 – Poland – Article 12-3 (for the period 01/01/05 – 31/12/2009)*, 7<sup>th</sup> January 2010, 2009/def/POL, accessed 24 September 2014, (*Conclusion 2009 – Poland – Article 12-3 (for the period 01/01/05 – 31/12/2009)*);

<sup>257</sup> Council of Europe: European Committee of Social Rights, *Conclusion 2009 – Poland – Article 12-1 (for the period 01/01/05 – 31/12/2007)*, 7<sup>th</sup> January 2010, 2009/def/POL, accessed 24 September 2014 (*Conclusion 2009 – Poland – Article 12-1 (for the period 01/01/05 – 31/12/2007)*); Council of Europe: European Committee of Social Rights, *Conclusion 2009 – Poland – Article 12-2 (for the period 01/01/05 – 31/12/2007)*, 12<sup>th</sup> January 2010, 2009/def/POL, accessed 24 September 2014;

<sup>258</sup> ILO, ‘Unemployment distribution by sex and categories of unemployed persons – Sweden’, accessed: 30 September 2014; ILO, ‘Unemployment rate by sex and age – Sweden’, accessed: 30 September 2014; ILO, ‘Unemployment rate by sex and education – Sweden’, accessed: 30 September 2014;

<sup>259</sup> ILO, ‘Unemployment rate by sex and age – Sweden’, accessed: 30 September 2014;

<sup>260</sup> ILO Observation on 2012 of Sweden, C122; ILO, ‘Unemployment distribution by sex, age and duration – Sweden’, accessed: 30 September 2014;

<sup>261</sup> ILO Observation on 2012 of Sweden, C122;

<sup>262</sup> E/C.12/SWE/5, para. 63; E/C.12/SWE/Q/5/Add.1, para 8;

There is, according to the Swedish Government, poor resource utilisation of unemployment services.<sup>263</sup> To address and remedy the weak employment development there was a labour market package in the 2012 Budget Bill including measures to improve the Public Employment Service through stronger support and mediation to persons at risk of long-term unemployment and better monitoring of the job-seeking activities, job guarantee for young persons and higher quality and more activities in special employment support mechanism.<sup>264</sup> Sweden claimed to reduce unemployment by increasing the supply and demand flow through among other things in-work tax credits i.e. reducing taxation on labour.<sup>265</sup> Reform focus on strengthening among others the youth and long-term unemployed to get into the labour market. According to the Government of Sweden signs of improved labour market functioning are increased employment for the young, middle-aged and older people. Sweden has tried to decrease unemployment through cooperation with e.g. matching the education system with the needs of the labour market. This would be achieved through vocational training and better cooperation between universities and schools and the business community.<sup>266</sup>

Swedish trade unions have strongly criticised the changes in the unemployment policy that commenced in 2007 and that are reflected in the above discussion.<sup>267</sup> Landorganisationen [Swedish Trade Union Confederation] (LO) and Tjänstemännens centralorganisation [Swedish Confederation of Professional Employees] (TCO) pointed out that women's needs when unemployed, as they are more affected by the exemption on parental leave, had not been taken into account.<sup>268</sup> The "New Start Jobs" programme had a lower participation rate in the private sector than in the public, indicating that more women as part of the public sector benefited more from them.<sup>269</sup> More women than men take part in preparatory training and career guidance while there are more men than women in subsidised employment schemes.<sup>270</sup> Consequently, there may be a relationship between women's lower unemployment rate and participation in policy programmes. The discontinuance of the "Activity guarantee" and the reduction of policy programmes have been criticised by the major trade unions even though they were meant to reach those who for which it had traditionally been most difficult to return to the labour market. LO and TCO criticised the new system with income tax reduction on full-time employment and the new fixed-term contract policy to be more favouring work as

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<sup>263</sup> ILO Observation on 2012 of Sweden, C122;

<sup>264</sup> Ibid.;

<sup>265</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Implementation of The International Covenant on Economic, Social And Cultural Rights: Consideration of Reports Submitted By States Parties in Accordance with Article 16 of the International Covenant on Economic, Social and Cultural Rights: Replies by the Government of Sweden to the list of issues (E/C.12/SWE/Q/5) to be taken up in connection with the consideration of the fifth periodic report of Sweden (E/C.12/SWE/5)*, 10 October 2008, E/C.12/SWE/Q/5/Add.2, (E/C.12/SWE/Q/5/Add.2), para. 16;

<sup>266</sup> ILO Observation on 2012 of Sweden, C122;

<sup>267</sup> See Mats, Essemyr, 'Arbetslöshetstid och inkomstförsäkringar' ['Unemployment times and income insurance'] (TCO, Stockholm, 2013); LO, 'Fritt fall i arbetslöshetsförsäkringen' ['Free fall in the unemployment insurance'] (LO, February 2013); LO, 'I arbetsmarknadsprogram utan aktivitetsstöd' ['In labour market policy programme without activity guarantee'] (LO, February 2013); Göran, Zettergren, 'A-kassan och arbetslösheten (2)' ['Unemployment allowance and the unemployment (2)'] (TCO, Stockholm, 2014);

<sup>268</sup> ILO Observation on 2009 of Sweden, C122;

<sup>269</sup> Ibid.;

<sup>270</sup> E/C.12/SWE/5, para 78;

the only state of being for a person as e.g. a pensioner, a part-time worker or a student did not receive the similar tax reductions.<sup>271</sup>

The unemployment benefits have been deemed inadequate by the European Committee on Social Rights. It resulted in that the employee's income fell below 50 per cent of median equalised income. This affects women more than men as women's unemployment increases more than men's.<sup>272</sup> LO argues that the possibility to receive unemployment allowance is more difficult now as the time frame on which the employment allowance is calculated is twelve months – twice as long as before,<sup>273</sup> and that the allowance is less but the contributions have increased.<sup>274</sup> During 2005-2007 changes in unemployment insurance caused half a million employees – mostly low income earners, part-time workers (thus especially women) and workers close to retirement age – to cancel their unemployment insurance and become recipients of basic unemployment benefits.<sup>275</sup> Additional disadvantage is the increased hours of work per month prior to unemployment requested for receiving unemployment allowance now is equivalent to 80 hours per month, which for a worker employed 50% may be difficult to reach. Part-time workers are further disadvantaged as their timespan during which allowance may be received has decreased from 200 days to 75 days.

As a consequence of the changed unemployment laws, 50 per cent fewer persons receive unemployment allowance. LO has argued that social security benefits are advertised as an attractive alternative to those not fulfilling the requirements for unemployment or whose benefit allowance is used up. Presumably part-time workers more than other workers are affected as their period to receive unemployment allowance has been limited even more than other workers, to approximately one-third in comparison to pre-reform levels. Social security benefit is meant to be the ultimate safety net, only for short-term use though one-third of recipients are long-term recipients.<sup>276</sup>

To counter-act the disadvantages sprung from the reform, LO proposes among other things subsidized employment with remuneration determined by collective agreement, reducing the 80 hours per month to 40 to qualify for allowance, reintroduce allowance for students entering the labour market, increase the allowance to be 90 per cent of the wages, eliminate the 75-day rule for part-time workers, reduce the membership fee to the Fund.<sup>277</sup>

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<sup>271</sup> ILO Observation on 2009 of Sweden, C122;

<sup>272</sup> Council of Europe: European Committee of Social Rights, *Conclusion 2009 – Sweden – Article 12-1 (for the period 01/01/05 – 31/12/2007)*, 7<sup>th</sup> January 2010, 2009/def/SWE, accessed 24 September 2014;

<sup>273</sup> LO 'Fritt fall i arbetslöshetsförsäkringen', p.3;

<sup>274</sup> LO 'I arbetsmarknadensprogram utan aktivitetsstöd', p.4;

<sup>275</sup> Council of Europe: European Committee of Social Rights, *Conclusion 2009 – Sweden – Article 12-3 (for the period 01/01/05 – 31/12/2007)*, 7<sup>th</sup> January 2010, 2009/def/SWE, accessed 24 September 2014;

<sup>276</sup> E/C.12/SWE/Q/5/Add.2, paras. 6-8; LO, 'I arbetsmarknadensprogram utan aktivitetsstöd', p.7;

<sup>277</sup> LO 'Fritt fall i arbetslöshetsförsäkringen', p.7; LO 'I arbetsmarknadensprogram utan aktivitetsstöd', p. 9;

## 7.2 The relevant national legal framework in relation to unemployment and part-time work

### 7.2.1 Part-time employment

#### 7.2.1.1 Poland

The Labour Code prohibits discrimination against part-time employees including remuneration and work-related benefits.<sup>278</sup> Additionally, the employer should inform employees, in the standard method used by the employer, about the possibility of full-time or part-time employment, and in relation to employees employed for a definite period of time about vacant job positions.<sup>279</sup>

#### 7.2.1.2 Sweden

SFS 2002:293 *Prohibition of Discrimination of Employees Working Part Time and Employees with Fixed-term Employment Act*<sup>280</sup> prohibits any direct and indirect discrimination of part-time workers and of workers with limited employment duration. There is an existent priority for part-time employees to increase their working hours if the worker possesses the necessary qualifications for reemployment.<sup>281</sup>

### 7.2.2 Unemployment

#### 7.2.2.1 Poland

The main provisions on protection against and in situations of unemployment are found in the *Act of 20 April 2004 on employment promotion and labour market institutions* (Dz.U. 2004 nr 99 poz. 1001, as amended).<sup>282</sup> The principle of non-discrimination on the basis of gender and the principle of equality apply to the unemployed.<sup>283</sup> The unemployed encompass persons able and ready to take part at least in the middle of working time, registered in the proper place of residence for permanent or temporary county office work and seeking employment or other gainful activity.<sup>284</sup> The individual should be 18 years of age, has not reached retirement age<sup>285</sup> and not entitled to any type of pension, has submitted an application for entry in the register of economic activities or after the application for registration, has no income over the lower minimum wage.<sup>286</sup> Benefits are afforded to unemployed referred to above.<sup>287</sup> The remaining conditions for receiving unemployment benefits are found in section 15 of the Act.

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<sup>278</sup> Labour Code, art. 29<sup>2</sup>;

<sup>279</sup> Ibid., art. 94<sup>2</sup>;

<sup>280</sup> Stockholm: Arbetsmarknadsdepartementet;

<sup>281</sup> SFS 1982:80 *Employment Protection Act*, s. 25a;

<sup>282</sup> *Act of 20 April 2004 on employment promotion and labour market institutions* (Dz.U. 2004 nr 99 poz. 1001), art. 1(3)(1);

<sup>283</sup> Ibid., arts. 2a and 2b; See also *Regulation of the Minister of Labour and Social Policy of 23 April 2012 on the making of the Labour Fund reimbursement of the cost of equipment or retrofit jobs for the unemployed and the allocation of funds for starting a business* (Dz.U. 2012 poz. 457);

<sup>284</sup> *Act of 20 April 2004 on employment promotion and labour market institutions* (Dz.U. 2004 nr. 99 poz. 1001), art. 1(3);

<sup>285</sup> *Act of 17 December 1998 on pensions and pensions from the Social Insurance Fund* (Dz.U. 1998 nr 162 poz. 1118, as amended), art. 24(1)(a) and (1)(b) and art. 27(2) and (3);

<sup>286</sup> *Act of 23 April 1964 – Civil Code* (Dz. U.1964 nr 16 poz. 93, as amended); *Act of 20 April 2004 on employment promotion and labour market institutions* (Dz.U. 2004 nr 99 poz. 1001), art. 2(2)(c)-(l);

<sup>287</sup> *Act of 20 April 2004 on employment promotion and labour market institutions* (Dz.U. 2004 nr. 99 poz. 1001), art. 1(5) and (6);

Benefits are granted from the first day of registration with the district labour office subject to the conditions in article 75 on when an unemployed person is not entitled to benefits.<sup>288</sup> Benefits are granted to the unemployed if there is no proposal for job, internship proposals, no prepared education for adults, training, intervention works, or public works and if the unemployed is unemployed for 18 months immediately prior to the date of registration, for at least 365 days: was employed and received remuneration in the amount of at least the minimum wage with the obligation to pay contributions to the Labour Fund excluding leave for more than 30 days; performs work under a contract of work with at least the minimum wage; paid social insurance contributions subject to article 104b(2).<sup>289</sup> Benefits are afforded within 7 days from the date of registration with the district office.<sup>290</sup> The unemployment allowance is specified in PLN, after the first 90 days the amount is reduced to 78,5 per cent of the original sum.<sup>291</sup> For periods shorter than five years the sum is 80 per cent of the 78,5 per cent. If the unemployed on the other hand has at least 20 years working experience the allowance amounts to 120 per cent of the original amount.<sup>292</sup> The duration of benefits is 180 days in a county where the unemployment is less than 150% of the average in the State on the 30<sup>th</sup> June each year preceding entitlement to unemployment benefits. It is 365 days if the unemployment exceeds 150% under the same conditions, the unemployed is 50 years old and has at least 20 years of working experience, has at least one dependent child younger than 15 years old.<sup>293</sup>

#### 7.2.2.2 Sweden

SFS 2008:567 *Discrimination Act* prohibits discrimination in relation to unemployment insurance.<sup>294</sup> SFS 1997:238 *Unemployment Insurance Act* applies to all unemployed employees and entrepreneurs, 20-65 years of age, who are members of an unemployment insurance fund or a supplementary unemployment insurance fund and fulfil the conditions in this Act.<sup>295</sup> The benefits consist of a basic and income insurance.<sup>296</sup> The basic insurance is provided to those who are not members of an unemployment insurance fund or member but do not fulfil the requirement to obtain an income based benefit.<sup>297</sup> Benefits from the income insurance received provided the individual was a member of an unemployment insurance fund for a minimum twelve months and meets the requirements in sections 12-14 of the Act on membership requirements.<sup>298</sup> A person has the right to unemployment benefits if he is able-bodied and unrestrained to undertake work on behalf of an employer for at least 3 hours each workday and on average at least 17 hours a week, is registered as a jobseeker of Arbetsförmedlingen [the Public Employment Service] (PES) and otherwise available for work

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<sup>288</sup> Ibid., art. 71(1)(1);

<sup>289</sup> Ibid., art. 71(1)(2);

<sup>290</sup> Ibid., art. 71(2)(2) and 71(6);

<sup>291</sup> Ibid., art. 72(1);

<sup>292</sup> Ibid., art. 72(2)-(3);

<sup>293</sup> Ibid., art. 73(1);

<sup>294</sup> SFS 2008:567 *Discrimination Act*, ch2 s.14(2);

<sup>295</sup> SFS 1997:238 *Unemployment Insurance Act*. Stockholm: Arbetsmarknadsdepartementet, (as amended), ss. 1-3, 6 and 22(4);

<sup>296</sup> Ibid., s. 4;

<sup>297</sup> Ibid., s. 6;

<sup>298</sup> Ibid., s. 7;

on the labour market.<sup>299</sup> If these conditions are not met PES may decide to withhold the benefits.<sup>300</sup> An individual is not entitled to unemployment benefits if he or she is participating in training/education, in short-time work/work for a restricted period entitling the employer to the preliminary support under SFS 2013:948 *Act on support for short-term work, or rejects introduction to the job guarantee for young people*.<sup>301</sup> The right to benefits in the case of unemployment also has conditions on previous work: the individual should have had within twelve months immediately prior to having become unemployed gainful employment for at least 6 months and carried out the work for a minimum of 80 hours per calendar month, or should have had gainful employment at least 480 hours during a continuous period of six calendar months, and have performed the work for at least 50 hours during each of these months. 330 of the 480 hours should have been performed within four months of which 50 hours should have been performed in each month.<sup>302</sup> The daily allowance<sup>303</sup> is granted only if the individual has during a period of twelve months continuously for twelve days been unemployed counting only the days in which the allowance may have been received (Mondays-Fridays).<sup>304</sup> The benefits may be paid for up to 300 days or 450 days for parents with children under the age of 18.<sup>305</sup>

Income based allowance is based on earlier income normal working hours and the minimum and maximum amounts that the government sets, unless otherwise provided by this Act.<sup>306</sup> Daily allowance means the 1/5 earned per week or 1/22 per month.<sup>307</sup> Generally it is calculated to be equivalent to 80 per cent of the income for the first 200 days and 70 per cent of the income for the remainder of the period for which allowance is paid.<sup>308</sup> Persons receiving retirement pension or persons entering a second immediately following unemployment period or a person leaving or that have left the job and development guarantee or job guarantee for the young receive only 65 per cent calculated on her/his supposed income.<sup>309</sup> Part-time workers receive allowance corresponding to their level of employment in accordance with a government approved conversion table.<sup>310</sup>

SFS 1997:835 *Unemployment Insurance Ordinance*<sup>311</sup> offers compensation in the case of unemployment pursuant to SFS 1997:238 *Unemployment Insurance Act*,<sup>312</sup> covering calculation and size of daily unemployment benefits, coordination with occupational retirement pension, compensation for part-time work etc. For the period that a person performs part-time work benefits may only be received for 75 days in that period. The remaining benefit days in the period may only be used for weeks when the person does not

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<sup>299</sup> Ibid., s. 9;

<sup>300</sup> Ibid., s. 66;

<sup>301</sup> Ibid., ss. 10-11;

<sup>302</sup> Ibid., s. 13a(2);

<sup>303</sup> Ibid., s. 19;

<sup>304</sup> Ibid., ss. 20 and 21;

<sup>305</sup> Ibid., s. 22;

<sup>306</sup> Ibid., s.25;

<sup>307</sup> Ibid., s.25a;

<sup>308</sup> Ibid., s.26;

<sup>309</sup> Ibid., ss.27 and 27a;

<sup>310</sup> Ibid., s.38, see also s.38a;

<sup>311</sup> SFS 1997:835 *Unemployment Insurance Ordinance*. Stockholm: Arbetsmarknadsdepartementet;

<sup>312</sup> Ibid., s.1;

perform or declare any work. Part-time work means work that is below the person's employment per week.<sup>313</sup>

The SFS 2007:414 *Working and Employment Guarantee Ordinance* offer to long-time unemployed persons personalised actions to enable return to work as soon as possible.<sup>314</sup>

### 7.2.3 Analysis

Both states' legislation affords protection for part-time workers in relation to the principle of non-discrimination and equality in comparison to full-time workers. Both states have extensive protective legislation of the unemployed including the conditions counting towards unemployment, benefits, duration of benefits and the calculation of benefits as well as programmes meant to reintegrate individuals on the labour market.

## 7.3 Conclusion

Poland has impressed by having more women in full-time employment than Sweden and has demonstrated that young women are the most attractive employee group on the labour market. On the other hand, in Sweden the employment gap between men and women is a lot less than in Poland. Both Poland and Sweden have demonstrated extensive legislation protecting the unemployed, providing unemployment benefits and protecting the part-time worker in relation to full-time workers and in relation to unemployment. However, as the employment policies and critique have demonstrated the law does not afford sufficiently effective protection of the unemployed workers. Poland has had a gender focus in the employment policies focusing on access to the labour market. On the downside is the ineffectiveness of the labour offices, requiring more supervision in addition to that Poland need to focus on the unemployed vulnerable groups, including women and part-time workers. Sweden, with the insight of need for change from high level of part-time work to full-time work, has had an all-encompassing approach to protect all types of groups that are unemployed, especially focused on the young. Sweden delegates the responsibility of the regulation of the labour market to employers and employees organisations and the process of collective bargaining, which arguably could need better support in how to tackle the very high part-time employment, especially among women that exists in Sweden. The above analysis has shown that in both Poland and Sweden women, despite all measures and efforts put into the protection of the unemployed, are more affected by unemployment than men as a consequence of that more women than men work part-time. Despite the right to access to unemployment allowance, to access and to keep unemployment allowance in Sweden has become more difficult, especially for part-time workers. Additionally, the unemployment allowance falling below the poverty threshold creates economic spouse- or partner-dependence, where the part-time workers, who are mostly women, become a high risk group. There should be changes in law to reach sustainable living standard among the unemployed. In the case of Sweden, the social security benefits should

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<sup>313</sup> Ibid., s.7 see also ss.8-11 on part-time work regulations;

<sup>314</sup> SFS 2007:414 *Working and Employment Guarantee Ordinance*. Stockholm: Arbetsmarknadsdepartementet, (as amended), s.1;

not be an attractive alternative to unemployment allowance as it is contradictory to the measures encouraging re-employment.

## CHAPTER 8 – REMUNERATION

### **The relevant international legal framework in relation to remuneration**

UDHR, art. 23; ICCPR, preamble; ICESCR, art. 7; CEDAW, art. 11; ILO Constitution, preamble; C100, art 1; R90, para 1, 2, 4; R111, para 2; ESC Part I, para 1, 4; AP ESC, part II, article 1(1); See also the ILO Observation on 2005 of Poland. C100, on the general definition of remuneration;

### **8.1 Realisation of women’s rights in relation to remuneration – the actual situation**

#### **8.1.1 Poland**

##### *8.1.1.1 Statistics*

The total average gender wage gap is 15 per cent. Women’s salary increased from 2002 to 2010 from being 83.1 per cent of men’s salaries to being 85 per cent. During the same period women in the public sector earned 78.4 and 83.6 per cent of men’s wages. In the private sector women earned 83.6 and 80.1 per cent of men’s wages in the same years.<sup>315</sup> Some of the difference in certain economic activities may be explained by that they are traditionally male dominated activities, while at the same time the lowest difference is seen in what may be perceived as a male dominated activity. Developing this line of thought may lead to the conclusion that the few women in the activity therefore have wages more equivalent to men.

With reference to the differences of the gender wage gap between the sectors it is here suitable to have a look at the gender segregation on the labour market to better understand how the differences may emerge. It is also important for the discussion in chapter 10.

##### *8.1.1.2 Gender segregation on the labour market*

In 2013, 74,8% of all employed worked in the private sector and 25,2 per cent worked in the public sector, five years earlier the situation was reversed. Women’s employment was 44,5 per cent while the men’s were 55,5 per cent in 2013. Of all employed women 33,9 per cent worked in the public sector and 66,1 per cent in the private sector. Of all employed men 18,4 per cent worked in the public sector and 81,6 per cent worked in the private sector.<sup>316</sup> More women than men work in the public sector but a considerable larger portion of both genders work in the private sector. Public administration, community, social services and activities is the economic activity in which most women are employed (16,3 per cent). Men are mostly employed in trade, transportation, accommodation and food, and business and administrative services (17,6 per cent).<sup>317</sup> The largest employment by occupation group is managers, professionals and technicians. Women’s three top occupations are managers, professionals

<sup>315</sup> ILO, ‘Mean nominal monthly earnings of employees by sex and occupation – selected ISCO level 2 – Poland’, accessed: 29 September 2014; CEDAW/C/POL/7-8, paras. 164-166;

<sup>316</sup> ILO, ‘Employment distribution by sex and institutional sector – Poland’, accessed: 29 September 2014;

<sup>317</sup> ILO, ‘Employment distribution by sex and economic activity – Poland’, accessed: 29 September 2014;

and technicians (44,27 per cent of all employed women). In these occupations they outnumber men.<sup>318</sup> The above demonstrates the segregation of the Polish labour market as a result of gender stereotypes where professions characteristics are associated with qualifications and characteristics that are stereotypically attributed to the different genders. For example “[...] men are typically viewed as strong and active, which translates into their being stereotypically associated with jobs that require physical strength, technical professions and jobs related to new technologies.”<sup>319</sup> The Polish Government has determined that a profession is dominated by women when over 75 per cent of the workforce is constituted by women.<sup>320</sup>

### 8.1.1.3 Measures

The Government of Poland has attempted to address the pay difference between the genders through information, publication and monitoring,<sup>321</sup> in which the Government Plenipotentiary for Equal Treatment has played an important role. There exists no mechanism to measure the realisation of the principle of equal remuneration for work of equal value. However, the Ministry of Labour and Social Policy planned to create a mechanism to monitor the wage gap between men and women. The Ministry also has an informal team which includes non-governmental organisations’ (NGO), academics and businesses, to monitor the wage gap. The National Action Plan for Equal Treatment 2013-2016 sets as one of its objectives to reduce the wage gap including assessment and monitoring.<sup>322</sup>

## 8.1.2 Sweden

### 8.1.2.1 Statistics

The average gender wage gap in Sweden was 11 per cent in 2013, with the largest gap found among construction workers (22 per cent difference) and with the lowest difference in Human health and social work activities (0,9 per cent difference).<sup>323</sup> In 2004 women’s wages in the public sector remained around 82-83 per cent of men’s and in the private sector it remained around 84-85 per cent.<sup>324</sup>

At this point it seems reasonable to examine the gender segregation on the labour market as this, too, has an impact not only on remuneration as demonstrated in this chapter but also on career prospects in form of promotion to managers as accounted for in chapter 10.

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<sup>318</sup> ILO, ‘Employment distribution by sex and occupation – Poland’, accessed: 29 September 2014;

<sup>319</sup> CEDAW/C/POL/7-8, paras. 162-163;

<sup>320</sup> Ibid., paras. 162-163;

<sup>321</sup> Ibid., paras. 167, EU funded project such as the Equal Pay day and the 2009 and 2010 EU-level campaign on equal pay; E/C.12/POL/5, para 191, Sektorowy Program Operacyjny (SPO) Rozwój Zasobów Ludzkich (RZL); CEDAW/C/POL/Q/7-8/Add.1, reply to question 6 referring to *Ordinance No. 1 of the President of the Council of Ministers of 7 January 2011 on the principles of description and job evaluation in civil service* (MP 2011 nr. 5 poz. 61) and the Gender Index Study in 2010;

<sup>322</sup> CEDAW/C/POL/Q/7-8/Add.1, reply to question 16;

<sup>323</sup> ILO, ‘Gender wage gap by economic activity – Sweden’, accessed: 30 September 2014: All statistics were from 2008 and ISIC-Rev.4 but one which was from ISIC-Rev.3 in 2007;

<sup>324</sup> CEDAW/C/SWE/7, para. 274, the figures from 1990 have been excluded as the thesis examines the current situation of the wage gap;

### 8.1.2.2 Gender segregation on the labour market

In 2013 about 84,8 per cent of the employed men worked in the private sector and 15,2 per cent worked in the public sector. Approximately 58,3 per cent of the employed women worked in the private sector and 41,7 per cent worked in the public sector.<sup>325</sup> Most employed women worked in public administration, community, social and other services and activities (56,25 per cent). The largest economic activity group for men is trade, 46,15 per cent. The leading group for each gender is the second largest group of economic activity for the other gender. While the two groups account for almost all employment for women, men's economic activity is spread over more groups. It may be noted that there are more women today working in construction than in agriculture, while more men now work in public administration community, social and other services and activities than in manufacturing.<sup>326</sup> Looking at employment distribution by occupation most men and women are employed as managers, professionals and technicians (men: 46,15 per cent, women: 50,00 per cent) followed by clerical, service and sales workers (men:15,96 per cent, women: 37,50 per cent). More women than men are employed in elementary occupations, skilled agricultural and trades workers. More men now work as clerical, service and sales workers than as plant and machine operators and assemblers.<sup>327</sup> The decreased segregation since the 1990's depends on change in women's employment behaviour through the fact that women are seeking traditionally male dominated professions that require high education, but men have not entered female-dominated professions.<sup>328</sup> Arbetsmarknadsstyrelsen [the Labour Market Board] (AMS) is tasked with reducing part-time unemployment and gender segregation<sup>329</sup> and is meant to make employers choose less traditional demands of labour.<sup>330</sup> Active measures to overcome gender segregation include "pattern breaker projects,"<sup>331</sup> e.g. making less gender-bound professional choices, demonstrating the need for both long-term and short-term measures not only within the labour market.<sup>332</sup>

### 8.1.2.3 Reasons: Explaining the gap

One variable in determining the wage difference is the variable of what is taken into account in the equation. Sweden uses standard weighting of the wages which results in that the difference of women's and men's wages is less than what wage comparison normally show, as a result of the factors taken into account. The Government of Sweden has claimed that the gap can be explained in part by the fact that "*women and men are found in different professions, sectors and positions; the presence of women in part-time employment; gender stereotypes which influence the choice of study and training programmes; parenthood which*

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<sup>325</sup> ILO, 'Employment distribution by sex and institutional sector – Sweden', accessed: 30 September 2014; Statens offentliga utredningar [Swedish Government Official Reports] (SOU), SOU 2004:43 Utredningen om den könssegrerade svenska arbetsmarknaden, *Utredningen om den könsuppdelade arbetsmarknaden: betänkande. (the Investigation on the Swedish gender divided labour market: reflections)*, Fritzes offentliga publikationer, Stockholm, 2004; E/C.12/SWE/5, paras. 75-76; CEDAW/C/SWE/7, para 260, p.44, citing SOU 2004:43;

<sup>326</sup> ILO, 'Employment distribution by sex and economic activity – Sweden', accessed: 30 September 2014;

<sup>327</sup> ILO, 'Employment distribution by sex and occupation – Sweden', accessed: 30 September 2014;

<sup>328</sup> CEDAW/C/SWE/7, para. 260, citing SOU 2004:43; E/C.12/SWE/5, paras. 75-76; RAP/RCha/SWED/13(2014), para. 3;

<sup>329</sup> CEDAW/C/SWE/7, paras. 258, 261;

<sup>330</sup> *Ibid.*, paras. 261-263;

<sup>331</sup> ILO Observation on 2001 of Sweden, C122;

<sup>332</sup> CEDAW/C/SWE/Q/7/Add.1, paras. 80-81;

*reduces women's employment rate; and the higher rate of sickness absences for women.*” According to the Swedish Government the main disparity is occupation and is also varies upon the sub-sector studied.<sup>333</sup> In the public sector the disparities within a municipality are quite small while they are significantly larger in the county councils as a result of the large number of professions being examined which include comparison between male and female dominated professions.<sup>334</sup> Occupations dominated by women generally have lower wages than occupations dominated by men. Additionally, the Government of Sweden has indicated that women's lower wages within national authorities depends on that “[...] *that higher-level employees, a category in which women are under-represented, tend to receive bigger pay increases.*”<sup>335</sup> It shows that not only sector but segregation in position is of importance for wage differences. The Swedish Government has claimed that the eight per cent in wage difference that remains after taking into account predetermined factors cannot be proven to be a result of wage discrimination.<sup>336</sup>

From an age perspective the difference is small in the beginning of the working career but increases with age. In theory there is no reason for that the wage differences should increase as a consequence of age and gender as men and women “[...] *should benefit equally with men from increased experience and seniority.*”<sup>337</sup> To exemplify: Newly graduated males still enter the labour market and start their first job with a higher wage than newly graduated females with the same degree and experience.<sup>338</sup> Among academic workers, women have a slower wage increase than men which stops at the age of 46, where women's wage has reached the same wage which men reach at the age of 35. Men's wage increases rapidly until the age of 37-38 after which it slows down to stop at the age of 52-53. At the age of 60 women earn approximately 70 per cent of men's wages.<sup>339</sup> Despite the largest decrease in disparities has been seen in the age group of women over 45, which may be explained by women going into managerial positions, the highest wage disparities are still found at the top levels in the labour market.<sup>340</sup>

#### 8.1.2.4 Measures

Among the measures trying to redeem the wage gap has been a long-term measure originally destined to realise equality as such in other areas in the labour market for men and women: E.g. by RUT, the gender equality bonus, measures aiming at encouraging women's entrepreneurship, inquiries analysing gender segregation in education choices and rehabilitation guarantee to help women on sick leave's return to work, a programme to increase women on national boards and a programme to improve women's opportunities in

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<sup>333</sup> E/C.12/SWE/5, para. 125; CEDAW/C/SWE/7, paras. 274 and 280;

<sup>334</sup> CEDAW/C/SWE/7, paras. 280 and 284;

<sup>335</sup> ILO Observation on 2000 of Sweden, C100;

<sup>336</sup> E/C.12/SWE/5, paras. 129 and 131; ILO Observation on 1997 of Sweden C100; ILO Observation on 2000 of Sweden, C100; RAP/RCha/SWED/13(2014), para. 3;

<sup>337</sup> ILO Observation on 1997 of Sweden, C100; Thomas, Ljunglöf and Galina, Pokarzhevskaya, 'Olika kön – olika lön – Löneskillnader mellan kvinnor och män i 76 akademikeryrken 2009' ['Different gender – different wage – Wage differences between women and men in 76 academic professions 2009'] (Sveriges akademikers centralorganisation [Swedish Confederation of Professional Associations] (SACO), 2009), p. 50;

<sup>338</sup> RAP/RCha/SWED/13(2014), para. 3;

<sup>339</sup> Ljunglöf and Pokarzhevskaya, p. 50;

<sup>340</sup> Ljunglöf and Pokarzhevskaya, p. 47;

the public sector.<sup>341</sup> The Equality Ombudsman also has an important role to play in raising awareness among labour market actors for the promotion and effective measures to realise equal remuneration for work of equal value between men and women.<sup>342</sup>

### 8.1.3 Analysis

Looking at the general difference in pay including the public and private sectors the wage balance in percentage, is remarkably not very far apart to the Swedish non-standard weighed wages. On this note it would mean that Sweden has hardly come any further in their pursuit of equal pay between men and women than Poland. In contrast, Poland has not attempted to explain the reasons for differences in wage, but has acknowledged it and expressed the willingness to remedy the situation. Independently of a minimum wage law, the overall difference in wages is that women earn around 80 per cent of the men's wages. Usually, the difference in wages between men and women is larger in the public sector than in the private sector. Standard weighting changes the relationship between a wages in the private and public sector. Using it may be a way for the Government to emphasise its good practices in the sector over which it has control. For the difference to be larger in the public sector than the private would mean that the state has failed to protect those over which it has direct control. Wage discrimination, is additionally, generally very difficult to prove in front of a court.

As undeniably established above there are differences in remuneration for men and women which is different depending on variables that are taken account in the calculation process. Sometimes, at least for Sweden it has been argued that it is not possible to credit the difference to wage discrimination.<sup>343</sup> Thus, here follows an examination of what may cause the differences in remuneration for men and women, which though taken from Swedish articles may be valid for the analysis of the Polish labour market as well, especially considering its high inequality in remuneration but also its highly segregated labour market.

In 'What explains wage disparities?'<sup>344</sup>, Lena Granqvist and Håkan Regnér discuss various aspects of which three are taken up here: discriminatory wage disparities, wages of effectiveness and business specific wage structures. With regards to discriminatory wage disparities there may be at least three types. Firstly, there is conscious discrimination i.e. when a certain individual is especially wanted. Secondly, there are discriminatory wages as a result of the difficulty and high cost to determine an applicant's or worker's productivity. This may lead to statistical discrimination i.e. the expected lower presence at work due to future or current parenthood in combination the requirement of extreme work performance for promotion.<sup>345</sup> Thus, gender becomes an indicator on productiveness and how the wages shall be set as a consequence of it. With this, Granqvist and Regnér argue that discrimination is not the sole cause or explanation for the remuneration disparities on the Swedish labour market as

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<sup>341</sup> ILO Observation on 2011 of Sweden, C100;

<sup>342</sup> Ibid.;

<sup>343</sup> See e.g. Ljunglöf and Pokarzhevskaya, p. 44;

<sup>344</sup> Lena, Granqvist and Håkan, Regnér, 'Vad förklarar lönespridning?' ['What explains wage disparities?'] in Lena, Granqvist (ed.), *Lönespridning* [Wage disparities] (SNS Förlag, Stockholm, 2013), pp.11-20;

<sup>345</sup> Ibid., p. 7;

“[...] large wage differentials means that a company can save money by hiring the cheaper (discriminated) workforce. The increased demand would in turn contribute to increasing the wage for the discriminated group. Large wage differentials also mean that it would be profitable to invest resources to obtain information about individuals' productive capacity and thus not discriminate in the first place.”<sup>346</sup> Wages of effectiveness concern the reason for difference why a person gets a certain wage. Work ability tends to be measured in terms of productivity which in turn is measured in production of hours worked. There may be a relationship between wages and the motivation and the productivity. A company having higher wage levels may attract persons with higher motivation which means that they are going to perform better. Consequently, wage by effectiveness leads to that the company does not have to search for the more productive workers themselves. This type of reasoning also motivates the higher salary of i.e. a technician in comparison to a cleaner where the former use both more expensive equipment and have a longer learning period.<sup>347</sup> Business specific wage structures may also impact on the wage disparities between men and women. In production based wage setting it is the person who performs the most who gets the highest raise. That is to say that it is the person who is seen to have performed the best during the year receives the highest raise. I.e. the person who seems to have been the most beneficial for the company that year receives the highest raise. In this type of structure the prize e.g. highest wage increase or even promotion motivates production but only to the extent before the employees start to counter productiveness and fight each other to secure the prize. The other side of the coin promotes a narrow wage range where the workers are more focused on the productiveness as a group especially where it may be difficult to determine the individual productiveness. Therefore, it is for the employer to set a wage structure that works for both types of groups. In consequence, there is a negative relationship between wage disparities and productiveness as the need for disparities depend on professions.<sup>348</sup>

A second perspective or reason for disparities in the difference in remuneration between men and women is the psychological perspective. It has been suggested that the perception of wage justice is strongly connected to perceived justice rather than actual justice. The perception of justice – which is often different from the manager's opinion of the worker – what is the worker's performance worth, in turn, also puts in perspective the result in wage negotiations: the expectations the worker has on the wage he will receive. The higher wage the more justice the worker perceives. There is justice between people where the manager explains the reasoning for the wage has higher degree of perceived justice than those who do not. Even informative justice, reasoning and justifiable action in the case of negative results at wage negotiations creates a perception of justice.<sup>349</sup> Women have, up to recently, had a lower expectation on wages than men with the result that they have had a higher rate of perceived justice than men.<sup>350</sup> Another factor, that may explain women's up to recently higher satisfaction with their wages, is the stereotype threat. It means that women are expected to be less skilled in wage negotiations

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<sup>346</sup> Ibid., pp. 14-15;

<sup>347</sup> Ibid., pp. 15-16;

<sup>348</sup> Ibid., p. 18;

<sup>349</sup> Karin, Karlström, 'Ett psykologiskt perspektiv på lön' ['A psychological perspective on wages'] in Lena, Granqvist (ed.), *Lönespridning* [Wage disparities] (SNS Förlag, Stockholm, 2013), pp.21-35, see in particular pp. 22, 24-25;

<sup>350</sup> Ibid., p.27;

than a man and perform thereafter, thus they are going to be satisfied with less than a man<sup>351</sup> who generally have higher expectations on the wage that they deserve and thus perform accordingly. Prejudice or discrimination in recruitment may lead to unwillingness to negotiate on wages – the woman may be so relieved that she got the employment that she does not want to enter into negotiations on the wages. But also the experience and the unwillingness in negotiations may affect the outcome. The unwillingness to argue her case in negotiations may also be a result of women's traditional role performing work with no monetary value.<sup>352</sup> In combination with women's chances to get a higher position as described earlier the stereotype threat puts women in a significantly worse position than men in wage negotiations.

A third angle is the differences in behaviour of men and women in strategic interaction. Men react with aggression to risks and women with fear. Men are more often prone to hubris in that they more often than women believe in positive outcomes. Lastly, men take higher risks than women as men more often than women see risks as a challenge while women see it as a threat.<sup>353</sup> In wage negotiations, taking the above and studies indicating women's lesser tendency to take challenges in negotiations together with the stereotype threat (i.e. a cultural norm) and the expectation of the social norm it results in, that a woman that acts outside those boundaries is punished more severely in wage negotiations because she is perceived to be both demanding and unfeminine. Consequently, gender stereotypes are both normative and descriptive. In relation to the discussion above it means that women are seen as bad negotiators and should therefore be bad negotiators. The stereotype threat can only disappear with information and education of both employees and employers on how the stereotype threat affects wage negotiation for women.<sup>354</sup> Men are more likely than women to enter the labour market with the possibility to make a career i.e. to rise within an organisation, which gives rise to more occasions to where the wages may rise substantially. The hypothesis is that if there is less room for subjective evaluation then the risk for wage discrimination increases.<sup>355</sup>

Despite the above, one solution to counteract gender based wage discrimination is wage negotiations with the employer especially for employees at the lower end in an organisation.<sup>356</sup> The wage negotiation provides opportunity for women to show their worth to the organisation and thus remove wage disparities based on gender.<sup>357</sup>

Granqvist's and Regnér's arguments provide interesting reasons for the difference in remuneration. Nevertheless, the argumentation points towards that the women themselves are to blame for their lower remuneration in comparison with men, as the women are either unwilling or unable to fight for their own interests. Going one step further the conclusion may

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<sup>351</sup> Ibid., p.28; Lena, Granqvist and Håkan, Regnér, 'Kvinnor och män i en individualiserad lönebildning' ['Women and men in individualised wage creation'] (Lena Granqvist and Håkan Regnér and SACO, Grafisk form och design, 2011), p.7;

<sup>352</sup> Granqvist and Regnér, 'Kvinnor och män i en individualiserad lönebildning', pp.7-8;

<sup>353</sup> Ibid., p.10;

<sup>354</sup> Ibid., p.11;

<sup>355</sup> Ibid., p.13;

<sup>356</sup> Ibid., p.19;

<sup>357</sup> Ibid., p.27;

be that there is a greater burden on the state to make up for this failing, but that lies in the realm of policy.

## 8.2 The relevant national legal framework in relation to remuneration

### 8.2.1 Poland

The Labour Code contains the principle of equal treatment in remuneration<sup>358</sup> (including the right to respectful remuneration<sup>359</sup>), where the violation thereof may be justified by objective reason.<sup>360</sup> However, the article does not specify equal remuneration for work of equal value between men and women. In defence, Poland has argued that the general prohibition of discrimination is applicable in any circumstances.<sup>361</sup> Establishing an employment relationship, including remuneration conditions, requires a unanimous statement of intent from the employer and the employee.<sup>362</sup> There shall be equal remuneration for work of identical value including all components of remuneration, “[...] regardless of their name or characteristics, as well as other work-related benefits granted to employees in cash or non-cash form.”<sup>363</sup> The components of identical value are “work that demands from employees not only comparable professional qualifications, certified by documents provided for in separate provisions or by practice and professional experience, but also comparable responsibility and effort”.<sup>364</sup> The remuneration should be proportional to the work performed, qualifications required to perform it, reflect the amount and the quality of the work performed.<sup>365</sup> There is no longer any limit to damages for violation of the principle of equal pay for work of equal value.<sup>366</sup> Poland has a law on minimum wage: *Act of 10 October 2002 on minimum wage for work* (Dz.U. 2002 nr 200 poz. 1679, as amended).<sup>367</sup> Many categories of workers have their own ordinance or act that determines their specific wage.<sup>368</sup>

### 8.2.2 Sweden

The provisions governing remuneration in SFS 2008:567 *Discrimination Act* are as follows:

*“Employers and employees are in particular to endeavour to equalise and prevent differences in pay and other terms of employment between women and men who*

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<sup>358</sup> Labour Code, art. 18<sup>3c</sup>;

<sup>359</sup> Ibid., art. 13;

<sup>360</sup> Ibid., art. 18<sup>3b</sup> (2);

<sup>361</sup> Labour Code, art. 18<sup>3a</sup>; UN Committee on Economic, Social and Cultural Rights (CESCR), *Implementation of The International Covenant on Economic, Social And Cultural Rights: Consideration of Reports Submitted By States Parties in Accordance with Article 16 of the International Covenant on Economic, Social and Cultural Rights: Replies by the Government of Poland to the list of issues (E/C.12/POL/Q/5) to be taken up in connection with the consideration of the fifth periodic report of Poland (E/C.12/POL/5)*, 7 August 2009, 4 August 2008, E/C.12/POL/Q/5/Add.1 (E/C.12/POL/Q/5/Add.1), reply to question 16;

<sup>362</sup> Labour Code, art. 11;

<sup>363</sup> Ibid., art. 18<sup>3c</sup> (1)-(2);

<sup>364</sup> Ibid., art. 18<sup>3c</sup> (3);

<sup>365</sup> Ibid., art. 78 and 80; E/C.12/POL/5, paras. 166-168;

<sup>366</sup> E/C.12/POL/5, para. 185;

<sup>367</sup> Labour Code, art. 10; *Act of 10 October 2002 on minimum wage* (Dz.U. 2002 nr 200 poz. 1679, as amended);

<sup>368</sup> ILO, ‘NATLEX – Browse by country’, available under Poland, Wages

<[http://www.ilo.org/dyn/natlex/natlex\\_browse.details?p\\_lang=en&p\\_country=POL&p\\_classification=12.02&p\\_origin=COUNTRY&p\\_sortby=SORTBY\\_COUNTRY](http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=POL&p_classification=12.02&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY)> accessed 13 November 2014;

*perform work which is to be regarded as equal or of equal value. They are also to promote equal pay growth opportunities for women and men. Work is to be regarded as of equal value to other work if, on an overall assessment of the requirements and nature of the work, it can be deemed to be equal in value to the other work. The assessment of the requirements of the work is to take into account criteria such as knowledge and skills, responsibility and effort. In assessing the nature of the work, particular account is to be taken of working conditions.”<sup>369</sup>*

Employers are, in order to, detect and prevent and remedy unfair remuneration on the basis of gender, to conduct, every three years, a survey and implement a subsequent action plan.<sup>370</sup> Neither should an employer “*treat an employment seeker unfavourably for reason related to parental leave pursuant to this act when the employer applies wages- or employment conditions*” unless it is a necessary consequence of the leave.<sup>371</sup> Pursuant to SFS 2002:293 *Prohibition of Discrimination of Employees Working Part Time and Employees with Fixed-term Employment Act* employers shall pay equal wages to part-time worker or workers on fixed-term contracts for work of equal value.<sup>372</sup> Sweden does not have any minimum wage legislation. Instead, wages are primarily set through collective agreement and collective bargaining.<sup>373</sup>

### **8.2.3 Analysis**

Both states define the characteristics of equal value essentially the same way. Poland includes the variables of certified professional qualifications, practice and professional experience, responsibility and effort in the work position. In Sweden, an overall assessment of the knowledge and skills, responsibility and effort as well as the working conditions determines if the work is of equal value. The Polish law gives the impression of being more overarching, trying to encompass all possibilities in the protection of remuneration. The Swedish law on the other hand has a promotion approach with action plans and surveys expressly leaving the obligations with the employer.

## **8.3 Realisation through case law of women’s right and equal opportunities with men in relation to remuneration**

### **8.3.1 Poland – facts and analysis**

In the case II PK 116/07, the Supreme Court admitted the appellant’s claim of discrimination at her workplace with regards to her gender, age, family situation under article 18<sup>3a</sup> of the Labour Code. She received smaller salary (only 58% of the average salary). The Supreme

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<sup>369</sup> SFS 2008:567 *Discrimination Act*, ch. 3 s.2;

<sup>370</sup> *Ibid.*, ch.3 ss.10-13;

<sup>371</sup> SFS 1995:584 *Parental Leave Act*, s. 16(5);

<sup>372</sup> ILO Observation on 2003 of Sweden, C100; ILO Observation on 2011 of Sweden, C100; RAP/RCha/SWED/13(2014), para. 3;

<sup>373</sup> *Evaldsson and others v. Sweden* App no 75252/01 (ECtHR, 13 May 2007), para 54; E/C.12/SWE/5, para. 123; RAP/RCha/SWED/13(2014), para. 1; Mats, Glavå, *Arbetsrätt* [Labour law] (Studentlitteratur, Lund, 2001), p.408; Additional statutes on remuneration: SFS 1992:497 *Wage guarantee Act*. Stockholm: Arbetsmarknadsdepartementet, (as amended); SFS 1992:501 *Wage Guarantee Ordinance*. Stockholm: Arbetsmarknadsdepartementet, (as amended);

Court had previously held<sup>374</sup> that there was a violation of the principle of equal treatment when, due to gender or age, workers are granted fewer rights than those enjoyed by other employees, located in the same factual and legal situation. However, diversity of the situation of workers is not discrimination when it is decided on objective considerations. In Gdańsk III APA 30/12 there was no wage discrimination, as the claimant failed to demonstrate a link between her struggle for a better environment and the fact that she received no pay raise. Additionally, her salary was within the same range as other persons in an equal position in the workplace. Nothing in the evidence in the case Lublin III AUa 582/13 showed that the employment contract had been concluded for other purposes than to receive social benefits. The contract was a sham as according to article 22 of the labour Code the contract needs to include tasks and responsibilities of the employee and remuneration should be paid, as payment for work is a constitutive feature of the employment relationship. The Court held that the principle of equitable remuneration for performed work taking into account quantity and quality of work as well as the minimum wage is mentioned.<sup>375</sup> In all cases the provisions guarding the right to equal remuneration for work of equal value or the principle of non-discrimination on the basis of gender in relation to remuneration are applied and clearly explained. Only the case from the Gdansk Court of Appeal had more complex reasoning.

### 8.3.2 Sweden – facts and analysis<sup>376</sup>

There have been only ten cases on gender based wage discrimination in Sweden, and only in two cases have the claimants won. It is a consequence of the wage difference between public and private sector, a consequence of recruitment of workers who had had higher wages in previous employment, and a consequence of that the hired workers had more recent and relevant experience and fourthly, because the labour market situation was decisive for the wages.<sup>377</sup> First of all the cases found that the established practice and primary characteristic of the work determines if the work is of equal value. There is no acceptance of differentiating between men and women – as groups – in an individual based wage system, and in comparing the work there is room for insignificant differences in the tasks performed. Finally, the Labour Court held that the differences may even be large as long as they follow practice or agreement. The limit is that wages set by collective agreement is not a sufficiently objective reason to justify wage difference.<sup>378</sup> The assessment of a worker is based on his or her skill, effort, responsibility and working conditions and the objective characteristics are based on the age, labour market situation, overtime compensation and personal qualifications.<sup>379</sup> The

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<sup>374</sup> Supreme Court PKN 246/97, 10 September 1997 (OSNAP I US 1998 nr 12, poz. 360) as cited in case of the Supreme Court II PK 116/07, 8 January 2008, p.5;

<sup>375</sup> Labour Code, art. 29(1)(3), an employment contract should specify: “*the remuneration corresponding to the type of work, with a specification of the remuneration components*”) and arts. 13, 78 and 84, Lublin III AUa 582/13 p.4;

<sup>376</sup> The Swedish case law from the Labour Court in this chapter has been discussed in a previous essay on procedural law in relation to wage discrimination. The same material is used but the summaries have been rewritten and the material has been analysed from a different angle.

<sup>377</sup> AD 1995 nr 158; AD 1996 nr 79; Numhauser-Henning, Bogden, pp. 356-357;

<sup>378</sup> AD 1984 nr 140 citing Proposition 1978/79:175 *med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m. m.*, Stockholm, p.72, see also pp.74 and 76; AD 1991 nr 62, pp.362-368 citing Prop. 1978/79:175, p. 51; AD 1984 nr 140 pp. 898-906;

<sup>379</sup> AD 1991 nr 62 citing Prop. 1978/79:175, p.74; AD 1995 nr 158 citing Prop. 1978/79:175, p. 49-52, 76, 130; Proposition 1990/91:113 *om en ny jämställdhetslag*. Stockholm, p.80; AD 1996 nr 41; AD 1996 nr 79 citing Proposition 1993/94:147, *Jämställdhetspolitiken: Delad makt - delat ansvar*, Stockholm: Socialdepartementet,

power of the labour market situation is a factor that distinguishes cases of remuneration from other discriminatory grounds examined in the thesis, as the case law has shown, it may often prove to be a decisive factor for the outcome of the case in terms of the employer's need to either attract or to keep the employee.<sup>380</sup> It is a criterion which is wholly unconnected with gender. The case law has further demonstrated, to the credit of the Labour Court, the need for assessment procedures to be gender neutral but at the same time put a limit to the demands on the law.<sup>381</sup>

Pursuant to the particularity of the Swedish practice to decide on remuneration, mostly by collective agreement, the case law portrays the labour market situation in terms of the realisation of the right to equal remuneration for work of equal value and the possibility to realise the right through the court-system when the market fails in the realisation.<sup>382</sup> The trade unions represent and uphold a system which is commonly referred to as the Swedish Model – which simply is, that wages are set by collective agreement in a country where there is no minimum wage regulated by statute and very little statute or regulation on remuneration at all. The Labour Court has demonstrated a reluctance to intervene and act in situations best considered to be handled by the trade unions. What the Labour Court, according to Susanne Fransson, in her PhD thesis on wage discrimination, is afraid of is opening the floodgates in if judging in the favour of the individual in cases which really are individual cases relation to the uncertainty of the consequences for there the relevant collective agreement each time. Upon an individual succeeding in a case of wage discrimination the relevant collective agreement may become partially or wholly void. Consequently, the Court resorted to the *travaux préparatoires* in their reasoning and determination of the law though it, when the general norms on the labour market amount to direct or indirect gender discrimination, should follow the precedent of the Court of Justice of the European Union.<sup>383</sup> The Labour Court's approach is questionable in the way that it seemingly means the claimant loses on real technicalities on the Labour Court's application of the law, consequently fostering a notion of gender discrimination or an attitude that accepts gender discrimination in remuneration in accordance with practice which in Sweden is collective agreements.<sup>384</sup> This said, the argument here is not that the Labour Court is completely in the wrong in its application of the law but it demonstrates an unwillingness to interfere in an issue which is contrary to what it should do in cases of discrimination as a court of law. The bottom line is that the Swedish

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pp.52-54; AD 2001 nr 13 citing Prop. 1990/91:113, pp. 51-53, 56, 86-88, 89; p.109; Prop. 1993/94:147, p.55-56; AD 1995 nr 158, p.29, citing C-170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR p.1607; AD 2001 nr 51 citing C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health*, [1993], ECR, p. I-5535; pp.12 and 14; AD 2001 nr 76;

<sup>380</sup> Proposition 2002/03:65. *Ett utvidgat skydd mot diskriminering*. Stockholm: Justitiedepartementet. pp. 87 and 218; Prop. 2007/08:95. pp. 98-100 and 486-488; AD 2013 nr 64 citing SFS 2008:567 *Discrimination Act*, ch. 1 s.4 (1), ch. 3 § 2, ch. 6 § 3(2) and *Kommentar till lag 2008:567* [Comments to Act 2008:567]: 3-7, 101 and 133; AD 1995 nr 158, p.29; AD 2001 nr 13, pp.14-26; AD 2001 nr 76, pp.17-29; AD 2013 nr 64, pp.13-19;

<sup>381</sup> AD 1996 nr 41 citing Prop. 1978/79:175, pp. 72-74; Prop. 1990/91:113, pp. 68, 86-89, 110; Prop. 1993/94:147, pp.51-52, 55-56; AD 1996 nr 41, pp.18-30;

<sup>382</sup> See e.g. AD 1997 nr 68, pp.5-13;

<sup>383</sup> Susanne, Fransson, (2000). *Lönediskriminering: en arbetsrättslig studie av könsdiskriminerande löneskillnader och konflikten mellan kollektivavtal och lag*. Diss. Göteborg: Univ., 2001, pp. 344-346 citing in particular AD 1996 nr 41; AD 1995 nr 158 pp. 24-27 and 35-38;

<sup>384</sup> AD 1996 nr 41, pp. 20-21, 24-29; Fransson, pp. 344-346 citing in particular AD 1996 nr 41; AD 1995 nr 158 pp. 24-27 and 35-38;

Model needs to take into the equation both the possibility of direct and indirect discrimination that might occur as a result of how wages are set on the Swedish labour market, as it is the trade unions themselves, through collective bargaining, that have the real power on determining wages on the market. Change should be realised through the existing systems of agreement and negotiations,<sup>385</sup> especially as the Labour Court only can apply the law and the new SFS 2008:567 *Discrimination Act* only pre-empts discrimination for occurring but does not provide better remuneration conditions in themselves.

Examining the above and Fransson's PhD thesis<sup>386</sup> in relation to that the Labour Court through its argumentation does not work towards the elimination of gender based wage discrimination and the effective realisation of women's right to equal remuneration with men.<sup>387</sup> Most of the cases came from women in the public sector, giving an indication that women in public sector bring more claims than women in private sector although most women in Sweden work in the public sector.<sup>388</sup>

In conclusion, it seems that Sweden does not provide an effective remedy as a result of the application of the law in the Labour Court. Future change is however possible as SFS 2008:567 *Discrimination Act* stands largely untested in this area.

#### **8.4 Conclusion**

In conclusion, the legislations in Poland and Sweden are similar. Poland's legislation is attempting to be overarching and the Swedish legislation is more specific in its instruction towards employers on how to mainstream equality in remuneration. It is something that Poland could look at for inspiration in the creation of their mechanism for monitoring equality in remuneration. Sweden on the other hand does not have minimum wage laws, allowing the trade unions to regulate the wages on the labour market through collective bargaining.

Both states provide effective access to justice and Sweden has clear and structured criteria on how to determine gender based waged discrimination. The disadvantage is the Labour Court's reluctance to intervene in the wage setting, a consequence of that there is no legal guidance on minimum wage. The Labour Court should start taking a clear stand in the cases, for a real change in towards gender equality in terms of remuneration without with no minimum wage legislation, but the change should come through the existent methods setting wages i.e. through negotiation and agreement. The Labour Court should also let SFS 2008:657 *Discrimination Act*, through application, become a powerful tool against discrimination.

Both Poland and Sweden have very segregated labour markets even though the segregation in Sweden has decreased slightly and there are existent measures to reduce it further. Poland's remuneration gap was less than expected. According to Sweden, it can after standard

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<sup>385</sup> Fransson, p. 371;

<sup>386</sup> *Ibid.*, p. 371;

<sup>387</sup> Glavå, p. 409; Numhauser-Henning, Bogden, p. 371;

<sup>388</sup> Numhauser-Henning, Bogden, p. 371;

weighting not be concluded that the remaining remuneration gap is a result of discrimination, indicating that there might not be any gender based discrimination in Sweden. Sweden undeniably has good measures to reduce wage discrimination based on gender, including the mandate of the Equality Ombudsman. Nevertheless, to really get to the bottom of differences in remuneration between the genders such as the faster levelling out of women's wages than men's, may be standard weighting should be deemphasised and other measures emphasised, e.g. some of those suggested by Granqvist and Regnér, despite the critique upon their argumentation.

## CHAPTER 9 – CAREER PROSPECTS: FEMALE CAREER VS MALE CAREER AND TOP POSITIONS

### The relevant international legal framework in relation to career prospects

ICESCR, art 7; CEDAW, art. 11; R111, para 2 and 3; AP ESC, part II, article 1(1);

The aspect of career prospects, comparing the career prospects for women's and men's careers is examined through managerial positions.

### 9.1 Realisation of women's rights in relation to career prospects – the actual situation: Examination of managerial positions

#### 9.1.1 Poland

Women's share of employment in senior and middle management was 35,4 per cent in 2013.<sup>389</sup> Statistics from the National Labour Inspectorate (PIP) (most recently delivered in 2007) showed that “[m]en held higher positions almost twice as often as women.”<sup>390</sup> “In the private sector women were employed on higher managerial positions by [40-]42 per cent less often than men,”<sup>391</sup> while more women had lower managerial positions in the public sector.<sup>392</sup> Women had to work longer than men to get higher positions (*women for ten years and seven months, men for ten years and four months*);<sup>393</sup> but women were promoted at a younger age. However, there has hardly been any difference between men and women working overtime or inconvenient hours but women took out two days of leave for child care much more often than men did.<sup>394</sup> “Women in higher managerial positions use[d] maternity and childcare leaves much less often than women in other positions; men in higher managerial positions included in the study did not use those rights at all.”<sup>395</sup>

In 2005, women held 100 positions per 156 men in upper management positions. The gender proportionality has been observed to be worse within the private sector, especially in companies with more than 500 employees. Imbalance in remuneration was also found in upper management positions. No distinctive disparity in remuneration of men and women in lower managerial positions have been observed.<sup>396</sup>

By 2015 the goal of the Polish Government is that at least 30 per cent of governing bodies and

<sup>389</sup> ILO, ‘Female share of senior and middle management – Poland’, accessed: 29 September 2014;

<sup>390</sup> E/C.12/POL/5, paras. 139-140; CCPR/C/POL/6, para. 13;

<sup>391</sup> Ibid., paras. 139-140, Ibid., para. 13;

<sup>392</sup> Ibid., paras. 139-140, Ibid., para. 13;

<sup>393</sup> Ibid., paras. 139-140, Ibid., para. 13;

<sup>394</sup> Ibid., paras. 139-140, Ibid., para. 13;

<sup>395</sup> Ibid., para. 140; Ibid., para. 13;

<sup>396</sup> CCPR/C/POL/6, para. 14;

companies with the State Treasury boards are women. Other measures such as tools consisting of a guidebook and training module advocating women's presence in top positions have been realised, including pilot programmes in respect of launching the utilisation of the tools mentioned.<sup>397</sup> The Government of Poland has also taken initiative to inspire and change the social attitude to leadership among girls through the Project *I am the boss!* with the purpose to inspire girls to aim for leadership positions in their future career.<sup>398</sup> The Ministry of Labour and Social Policy carries out gender mainstreaming (introduction of gender equality perspective in activities and politics) through a monitoring system on the equal treatment of men and women consisting of focus on “*personal development*,” “*social status*” and “*social support*.”<sup>399</sup> Pursuant to the Gender Index the Polish Government has realised that “[r]egarding the access to promotion, internal mechanisms need to be reviewed from the point of view of sex and age, and the introduction of programmes (such as mentoring, coaching) should be considered to facilitate promotion to executive positions for the workers of the group which is less represented, e.g. women on top-level jobs. In particular, the aim should be to [...] make the government gender-balanced.”<sup>400</sup>

### 9.1.2 Sweden

More men than women are found in managerial positions. Men tend to have higher paying jobs than women and as stated before women more often work part-time than men and 60 per cent of all temporary positions were held by women in 2003.<sup>401</sup> In senior and middle management women hold 36 per cent of employment, i.e. more than one-third. However, if the share increase will continue as it has in the past fifteen years it would take about another eight years before Sweden reaches her minimum target of at least 40% of women in managerial positions. Note that senior management has not been separated here from the middle management. It has been suggested that it is even more difficult to reach gender equality in senior management. Maybe this is holding the development statistics back.<sup>402</sup> With regards to the ratio in boards “[T]he proportion of women on the boards of national-level agencies was 49 per cent on average with 51 per cent men” in 2005 and “the gender distribution of chairs is 38 per cent women and 62 per cent men [2005].”<sup>403</sup> “In wholly state-owned companies, the proportion of women was 47 per cent and the proportion of men 53 per cent, in May 2007.”<sup>404</sup> In order not to lose perspective and as not to create a belief that the gender equality goal disregards any other aspect “[t]he composition of each board should also achieve a balance regarding background, sphere of competence and experience.”<sup>405</sup>

The main strategy of the Swedish Government for facilitating increased gender equality of women in board positions is to facilitate combining working life and family life including

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<sup>397</sup> CEDAW/C/POL/Q/7-8/Add.1, reply to question 6;

<sup>398</sup> CCPR/C/POL/Q/6/Add.1, reply to question 10; CEDAW/C/POL/Q/7-8/Add.1, reply to question 6;

<sup>399</sup> E/C.12/POL/Q/5/Add.1, para. 244; See also CCPR/C/POL/Q/6/Add.1, reply to question 10;

<sup>400</sup> CCPR/C/POL/Q/6/Add.1, reply to question 6; CEDAW/C/POL/Q/7-8/Add.1, reply to question 6;

<sup>401</sup> E/C.12/POL/5, para. 77;

<sup>402</sup> ILO, ‘Female share of employment in senior and middle management – Sweden’, accessed: 30 September 2014;

<sup>403</sup> CEDAW/C/SWE/Q/7/Add.1, para. 24-27;

<sup>404</sup> Ibid., para. 24-27;

<sup>405</sup> Ibid., para. 24-27;

gender equality bonus in parental insurance and RUT.<sup>406</sup> At the other end, the CEDAW Committee has urged the Government of Sweden to increase its protective measures and implement temporary special measures and to include in its legislation quotas or goals to increase women's presence in high-ranking posts both in private and public companies, not to mention in academia as well as in monitoring and accountability mechanisms thereof to realise full equality between men and women.<sup>407</sup> Pursuant to negative response to an inquiry made to business stakeholders the Swedish Government has found it unsuitable to introduce in legislation quotas on boards of directors of private enterprises and was in 2008 looking for other ways to solve the issue of gender inequality on boards, e.g. through dialogue.<sup>408</sup> Other measures include Verva's (the Swedish Administrative Development Agency) "[...] *human resource development programme [that] intended to increase the number of women in leading positions [...]*."<sup>409</sup> Swedish universities and the judiciary are two sectors that particularly have focused on gender equality in promotion with varying success.<sup>410</sup>

More women become managers but they are still highly under-represented in the top-positions and the increase is slow, only 1,5% in past five years. The difference being particularly tangible in management of enterprises, where women are usually working with staff positions – economy, staff and information and where men with result oriented positions, resulting in men's advancement within the enterprise,<sup>411</sup> as discussed previously in the chapter on the triple workload of women.

Women are often economy managers in small businesses and staff managers in larger businesses and in any case they are earning less than their male counterparts, an indication on than women more often work in smaller companies than men.<sup>412</sup>

Female managers have increased mostly within the private health care, private education and care (60 per cent) but women on managerial posts are more present in new sectors such as recruitment which has the highest managerial percentage of female managers, private health care and exercise.<sup>413</sup> 61 per cent of women in the public sector are found in similar professions as in the private sector, i.e. care, health and education.<sup>414</sup>

It seems that it is most profitable for women to be sales and marketing managers. The difference is, in the TCO analysis, to some extent, attributed to the fact that larger companies pay more in wages than smaller ones, a consequence to the level of responsibility given to the employee e.g. the amounts of money handled by an economy manager. To exemplify the difference: a male economy manager earned in 2013 approximately 41 per cent more than a female economy manager. Between 2007 and 2011 the wage increase for male economy

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<sup>406</sup> Ibid., para. 23;

<sup>407</sup> CEDAW/C/SWE/CO/7, paras. 24-25;

<sup>408</sup> CEDAW/C/SWE/Q/7/Add.1, para. 28;

<sup>409</sup> E/C.12/SWE/Q/5/Add.1, para. 11;

<sup>410</sup> CCPR/C/SWE/6, paras. 27-29; CCPR/C/SWE/Q/6/Add.1, para. 32;

<sup>411</sup> Ulrika, Hagström, 'Fler kvinnor leder men få når toppen 2013' ['More women are leading but few reach the top'] (TCO, Stockholm, 2013), pp. 5-6;

<sup>412</sup> Ibid., pp. 5-6 and 12;

<sup>413</sup> Ibid., pp. 5-6 and 14;

<sup>414</sup> Ibid., p. 14;

managers was an average of 23 per cent while for female economy managers it was 14 per cent. Other managerial positions have experienced relatively equal increase of 12 per cent.<sup>415</sup> The statistics show the increased difference in the average remuneration is most likely caused by the remuneration of older men.<sup>416</sup>

Real power in a company is determined by examining the management positions. In companies which are registered at the stock exchange where the largest companies have 18,1 per cent women in their management, the smaller have 15,9 per cent presence while the average large company has 14,3 per cent presence. On the other hand, though women's presence increased in the Ltd-companies, both the number of men and women has increased and 100 Ltd-companies have no women in their management. TCO explains that the reason for the smallest companies lack women in the management is probably due to that the focus on equality is larger in public companies and that when a company is public it can also better attract all types of workers.<sup>417</sup>

It should be noted that the situation in the public sector is reversed to that of the private where 66 per cent of the managers are women. The most common position for a woman to have is school principal. Moreover, female IT-managers and staff managers earn more than the male counterparts.<sup>418</sup>

### **9.1.3 Analysis**

The following discussion is based on materials relevant to Sweden gathered from the Swedish trade union LO, but the cause of difference and difficulty in career opportunities for women on the labour market apply to Poland as well. It is a consequence of the universal prejudice of women's incapability or unsuitability in relation to men.

LO discussed in 'The Equality Barometer of Sweden 2014 – time, power and money'<sup>419</sup> the reason behind the existent puzzle of life and the reasons for its non-realisation. The puzzle of life has come to represent the equation and the solution for realisation of equality between men and women. LO argued that due to its two dimensional structure – solving the lack of time with money – creates a world where women can achieve equality only if they possess the money with which they can buy services that liberate time, time to be with their children and coping with high demands at work with non-regulated working time otherwise defined as work without boundaries. States may realise this type of equality through e.g. as in Sweden's case RUT, the equality bonus and home delivery of groceries.<sup>420</sup> However, there is a second dimension of boundless work to which consists of those who lack the prerequisites to buy themselves free from the lack of time i.e. those who cannot afford to buy equality through labour market policies designed to reach equality. These individuals are usually the working class women i.e. most of those with split working schedule, irregular working hours, part-time

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<sup>415</sup> Ibid., p. 12;

<sup>416</sup> Ibid., p.13;

<sup>417</sup> Ibid., p.16;

<sup>418</sup> Ibid., pp. 18-19;

<sup>419</sup> LO, *Sveriges Jämställdhetsbarometer 2014 – Tid, makt och pengar* [The Equality Barometer of Sweden 2014 – time, power and money] (Landsorganisationen i Sverige 2014, LO-Tryckeriet, Stockholm, 2014);

<sup>420</sup> Ibid., p.3;

employment or employment based on need.<sup>421</sup> The life puzzle depends on women with low wage jobs changing either the profession or sector in which they work, living with a man with whom they equally divide the unpaid work, increasing from part-time to full-time through tax reduction on full-time work, and consequently making the choice about power. LO claims that the discussion is too focused on an individualised understanding of power in a time where the employers have the upper hand on the labour market in that they to a higher extent can use insecure employment contracts and worsened working environments and that the discussion lacks the dimension of how time, power and money creates and recreates social patterns from class and gender.<sup>422</sup> As regards the power perspective, it is based on that employment should be sustainable, which is determined by the lack of influence on employment conditions including security in employment, working time, distribution of working time and distribution of working tasks. As stated above the most vulnerable group is working class women. The lack of power of the own work rate often affects negatively the health of the most vulnerable groups of women in the working class working, both in the public and private service and the industrial sector.<sup>423</sup> Temporary employment/employment for a limited duration and part-time employment in which one quarter of all women in the work class are employed and in which half of the women in the working class are employed makes it even more difficult to have any control over the employment conditions and thus realise equality themselves. Consequently, women in the working class have least power followed by men in the working class which is followed by women in office employment. Most power belongs to men in office employment.<sup>424</sup>

LO claims that the foundation for the unequal distribution of the unpaid work in the household and family duties is the unequal worth of the employment of men and women, where a man's work is valued more. I.e. women gain social power at the cost of economic power.<sup>425</sup> For individuals quick to defend the current situation arguing women's choice to work part-time, studies have shown that most women want to work full-time but that due to the labour market situation there is lack of appropriate full-time employment.<sup>426</sup> Other related problems are posed by the women's higher responsibility for children and elderly with the result that employment is adapted, with the expectation that women shall be more absent as a consequence, in both the working class and office employment because they still are not seen as a family bread winner.<sup>427</sup> Additionally, more nuanced problems are realised in the social norm of expectation of use of welfare services such as e.g. the restricted opening times of kindergartens or low standard thereof leading to compromises of working-life and family life.<sup>428</sup>

The economic qualifications also play a part in the life puzzle and realisation of real equality. As have been demonstrated in the chapter on remuneration there is a persistent gender wage

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<sup>421</sup> Ibid., p.3-4;

<sup>422</sup> Ibid., p.4;

<sup>423</sup> Ibid., pp. 5,7 and 11;

<sup>424</sup> Ibid., pp. 11-12;

<sup>425</sup> Ibid., pp. 13 and 20;

<sup>426</sup> Ibid., p.21;

<sup>427</sup> Ibid., p.22;

<sup>428</sup> Ibid., p. 28;

gap. 32 per cent of women in working class employment working irregular hours feel that it is a necessity for them, due to economic reasons. The norm in professions dominated by women is part-time employment with the consequence of lower income and pension. This work is often also combined with contracts of limited duration which results in re-occurring periods of unemployment result in that women receive a very low pension.<sup>429</sup>

Consequently, women's non-realisation of their rights in labour market related to career prospects is a result of lack of power and material requirements. It is a lack of power that results in economic vulnerability, creating more lack of power and a chase for employment without boundaries which is the only way in which the private economy will hold. It is a consequence of that the women in the working class are those who mostly have employment contracts for a limited time frame and the insecure temporary employments – employment by need – are increasing. A consequence to that the parent with the least strong employment positions takes the highest family and home responsibility. This is often the part-time worker, a consequence to women's lack of economic vulnerability mirrors the lack of power in their employment situation.<sup>430</sup> Finally, LO, claims that it is clear that the working class women are not considered as fully participating workers on the labour market. For equality on the labour market it is required that there be a change in strategy for the redistribution of the time, power and money to reach a equality in all classes not only the office employment and that there be elimination of the notion that equality is the concern of the individual and can be reached through careful individual study. There is also need for change in the meaning of full-time, because it is clear that women's right to an economically sustainable employment still needs defending.<sup>431</sup>

There is in both Poland and Sweden protection against discrimination on the basis of gender and the right to equal treatment in relation to promotion in employment. Both states have a very similar percentage of women in managerial positions, where Poland's development has been significant while Sweden's development has been very slow. The increase of female managers should improve both for the sake of reaching equality on management level but also as simile to women's equal opportunity with men on the labour market. Both states have undertaken active measures to improve the equality of men and women on the labour market. The Government of Poland has focused more directly than the Government of Sweden on measures to increase the number of women in managerial positions, while once again the Swedish Government has had a more overarching approach focusing on the improved equality between men and women in general of which will lead to more equalised opportunities for women with men and thus more women in managerial positions. The difference in focus is perhaps a consequence of the states' difference in development, or perhaps not. Nevertheless, the Swedish Government stands, for the moment without any new measures to increase women in managerial position. According to the life puzzle theory the measures taken has had the wrong focus not in practice not facilitating the reconciliation of family and working life including the advancement in the professional career. The life puzzle did not allow or count on women to be a force on the labour market to the same extent as

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<sup>429</sup> Ibid., pp. 29-30;

<sup>430</sup> Ibid., p. 34;

<sup>431</sup> Ibid., p. 25;

men. It may be exemplified with some of the facts from the research: E.g. women had to work longer than men to become managers, women to a higher extent than men take out parental leave, Ltd-companies are not even half the way to reach the 40 percentage equality level in their management and women's advancement is mostly within very specific sectors, sectors that in general are dominated by women. Both states should learn from each other in providing equal opportunities for men and women on the labour market. The Government of Poland needs to keep up and increase their measures to ensure that at least 40 per cent of all managers are women. The Polish Government also needs to improve their efforts to increase general equality of men and women on the labour market as has been identified in other chapters. It will facilitate for an increased equality in managerial positions and equal opportunities. The Government of Sweden should find a more direct strategy on how to tackle the inequality managerial positions and to realise equal opportunities for men and women in addition to those measures and problems as has been identified in other chapters.

## **9.2 The relevant national legal framework in relation to career prospects**

### **9.2.1 Poland**

See the general anti-discrimination provisions as cited in chapter 2.<sup>432</sup>

### **9.2.2 Sweden**

See the relevant provisions as cited in chapter 3.<sup>433</sup> SFS 2008:567 *Discrimination Act* provides the probation on discrimination in “[...] promotion or education or training for promotion [...]”.<sup>434</sup> Pursuant to the Act the individual who is not “[...] selected for education or training for promotion, [...] shall, upon request, receive written information from the employer about the education, professional experience and other qualifications that the person had who [...] obtained [...] the place in education or training”.<sup>435</sup> “Employers are to promote an equal distribution of women and men in different types of work and in different employee categories, by means of education and training, skills development and other appropriate measures.”<sup>436</sup> Additional protection is afforded to parents in relation to vocational training and education and parental leave under section 16 of the SFS 1995:584 *Parental Leave Act*.<sup>437</sup>

### **9.2.3 Analysis**

Both states afford a general protection against discrimination in relation to promotion in employment. In the case of Sweden, the legal protection with respect to career covers the right to promotion and the principle of non-discrimination and equal treatment. Most importantly and most interestingly the Swedish SFS 2008:567 *Discrimination Act* attempts to achieve equal distribution of men and women on the labour market i.e. equality in positions and

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<sup>432</sup> Constitution of the Republic of Poland, art. 33(2); Labour Code, art. 18<sup>3b</sup>;

<sup>433</sup> SFS 2008:567 *Discrimination Act*, ch. 2 ss. 1(2), and 2(2);

<sup>434</sup> *Ibid.*, ch. 2 s.2;

<sup>435</sup> *Ibid.*, ch. 2 s.4;

<sup>436</sup> *Ibid.*, ch. 3 s.8;

<sup>437</sup> SFS 1995:584 *Parental Leave Act*, s. 16(2) and (4);

categories, by creating an obligation of the employer to train the employees to this effect. It is quite an inventive obligation under discrimination legislation and it leaves doubt to whether the principle will ever be invoked, because of the difficulty in measuring whether the employer has complied fully with the provisions. The question in such an event will be whether the employer had promoted enough. What is the threshold that determines whether the employer has complied with the obligation to promote equally men and women? Is the threshold that of official equality of at least 40 per cent of all managers in an enterprise should be women?<sup>438</sup>

### **9.3 Conclusion**

In conclusion, there is a persistent inequality in promotion and for women to advance in their career. Upon this discussion and the discussion on remuneration, workers should be less treated based on the stereotypes associated with their gender and more on the personal qualifications. Women do not have the same career opportunities as men which have a much larger index of reasons ever expected and which requires measures that aim on equality in promotion and career prospects but also cover all the other substantive issues related to other chapters in this thesis – parenthood, remuneration, the female triple workload, professional training and retirement benefits.

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<sup>438</sup> *Kommentar till lag 2008:567* [Comments to Act 2008:567]: 106;

## CHAPTER 10 – RETIREMENT: SAVING FOR PENSION AND PENSION BENEFITS

### The relevant international legal framework in relation to retirement

UDHR, art. 22; CEDAW, art. 11; C102, arts. 1-6, 25-30, (59-64), 65-67 and 69-72; R111, para 2; ESC, Part I, para 12, 13, Part II arts. 12, 13; AP ESC, part I, paras. 1 and 4, part II, article 4; RESC, part I, para. 23, Part II art. 23; European Code of Social Security, arts. 25-26, 28-30 and addendum 2 Supplementary services or advantages, para 8;

### 10.1 Realisation of women’s rights in relation to retirement – the actual situation

#### 10.1.1 Poland

The retirement age reform is to be completed in 2020 for men and in 2040 for women.<sup>439</sup> Trying to increase the retirement age for women has been difficult as it has socially been a very sensitive issue. The early retirement age has been considered a compensatory benefit for women.<sup>440</sup> The retirement age in Poland was set at the age of 60 for women and 65 for men. The average retirement age was 61.1 for men and 56.2 for women in 2008. First of all it is hard to see how this is an economically profitable benefit for women as they are more likely to have fewer years of working to their credit than men (due to among other things child rearing) when it comes to calculating their pension. In combination with early retirement and in many cases a working life, where the woman has had lower pay than her fellow male colleagues, it means that a woman will live on much less than a man taking into account that women are expected to live longer than men.<sup>441</sup> In other words, women’s pension is stretched thin over the years like “[...] butter [...] scraped over too much bread”<sup>442</sup>. The completion of the reform is expected to “[...] increase the adequacy of benefits and is justified in the social context by demographic change in the Polish population which significantly affects the age structure of the population.”<sup>443</sup> As benefits are determined by amount of contributions by the insured worker as well as the duration of the workers’ professional activity and the life expectancy, women’s increased professional career will result in higher pension benefits.<sup>444</sup> Thus, the reform seems to balance the existing inequality between men and women with regards to the consequences of difference in retirement age. Then, as discussed below on the

<sup>439</sup> CEDAW/C/POL/Q/7-8/Add.1, reply to question 16;

<sup>440</sup> CEDAW/C/POL/7-8, paras. 174-175;

<sup>441</sup> Central Intelligence Agency (CIA), ‘The World Fact Book: Europe: Poland’ (Central Intelligence Agency (CIA)) <<https://www.cia.gov/library/publications/the-world-factbook/geos/pl.html>> accessed 16 September 2014; World Health Organization, ‘World Health Report – Poland’ (World Health Organization) <<http://www.who.int/whr/2004/annex/country/pol/en/>> accessed 16 September 2014; World Life Expectancy – live longer live better, ‘Poland Population Pyramid’ <<http://www.worldlifeexpectancy.com/poland-population-pyramid>> accessed 16 September 2014;

<sup>442</sup> J.R.R., Tolkien, *The Fellowship of the Ring: Being the First Part of The Lord of the Rings* (2<sup>nd</sup> ed. Houghton Mifflin Harcourt, New York, 1994), p.32;

<sup>443</sup> CEDAW/C/POL/Q/7-8/Add.1, reply to question 16;

<sup>444</sup> Ibid., reply to question 16;

labour market effects on pension it is unclear whether the new reform allows for breaks during the working life for e.g. parental leave, sickness, unemployment and forced part-time work in lack of full-time employment.

The employers' pension programme, *Law of April 2004 on employees' pension programmes*<sup>445</sup> (Dz.U. 2004 nr 116 poz. 1207), provides for voluntary additional contribution by the employer to his/her employees resulting in that payment to the employee is made “[...] on request from the participant, after s/he attains 60 years of age, after the participant attains 70 years of age (without a request) or on request from the participant, upon obtaining retirement entitlements.”<sup>446</sup> This extra pension seems so far to have benefited mostly men as they tend to work longer and have a later retirement age, but with no statistics thereupon it is difficult to say. In contrast to the above and to the level of retirement pension as it stands today the minimum retirement pension falls close or slightly below the poverty threshold i.e. 50 per cent of median equalised income, calculated on the basis of the Eurostat at-risk-of-poverty threshold level. The retirement pension will not be rectified by an increased retirement age. The European Committee on Social Rights has claimed that a one-off benefit (not social assistance) would be appropriate. It could be paid off at a later stage.<sup>447</sup> Persons receiving pension that did not exceed the minimum retirement pension were entitled to a single benefit payment.<sup>448</sup> This would affect women more than men as women more often than men are without a sufficient retirement pension. It is however, questionable if it is a sustainable solution in relation to an adequate livelihood for the pensioner in a long-term perspective.

The Supreme Court resolution on the 21<sup>st</sup> January 2009 declared “[...] that attaining the retirement age and acquiring the right to retirement may not constitute the sole reason for terminating the employment relationship by the employer.”<sup>449</sup>

### 10.1.2 Sweden

The retirement age in Sweden is flexible and retirement may be taken at the age of 61.<sup>450</sup> Swedish workers tend, provided that they are employed at the age of 50, to retire at the age of 63 (women) and at the age of 64 (men).<sup>451</sup> Termination of employment on the grounds that the employee has reached the age of 67 is a valid reason, without taking into account the amount of pension that the person will receive.<sup>452</sup> Pension is entitlement to income which has been

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<sup>445</sup> *Law of April 2004 on employees' pension programmes* as cited in CCPR/C/POL/6, para. 29;

<sup>446</sup> *Law of April 2004 on employees' pension programmes* (Dz.U. 2004 nr 116 poz. 1207) art. 42; CCPR/C/POL/6, paras. 29-30;

<sup>447</sup> *Conclusion 2009 – Poland – Article 12-1 (for the period 01/01/05 – 31/12/2007)*;

<sup>448</sup> *Conclusion 2009 – Poland – Article 12-3 (for the period 01/01/05 – 31/12/2009)*;

<sup>449</sup> E/C.12/POL/Q/5/Add.1, reply to question 4;

<sup>450</sup> Council of Europe: European Committee of Social Rights, *Conclusion 2009 – Sweden – Article 23 (for the period 01/01/05 – 31/12/2007)*, 8<sup>th</sup> January 2010, 2009/def/SWE, accessed 24 September 2014, (*Conclusion 2009 – Sweden – Article 23 (for the period 01/01/05 – 31/12/2007)*);

<sup>451</sup> Mats, Morin, and Renée, Andersson, *Pensionsreformen i full tid* [The pension reform completed] (LO, June 2013), p.21;

<sup>452</sup> European Social Charter Governmental Committee Report Concerning Conclusions 2012 of the European Social Charter (Revised) (Albania, Andorra, Armenia, Azerbaijan, Belgium, Bosnia And Herzegovina, Bulgaria, Cyprus, Estonia, Finland, France, Georgia, Hungary, Ireland, Italy, Lithuania, Malta, Republic Of Moldova, Montenegro, Netherlands (Kingdom In Europe), Norway, Portugal, Romania, Russian Federation, Serbia, Slovenia, Slovak Republic, Sweden, Turkey And Ukraine), GC(2013)25, Article E;

earned during the entire lifetime.<sup>453</sup> Retirement pension is based on reported lifetime earnings. “[T]he guarantee pension, eligibility starts at age 65, having resided in Sweden for at least 3 years, and receiving low or zero income from an earnings-related pension.”<sup>454</sup> However, the full guaranteed pension for a low income elderly person in Sweden is between 40-50 per cent of the median equalised income, which is below the international threshold of 50 per cent.<sup>455</sup> In 2019, retirement pension will be based on three different types of pensions for everyone starting to take out retirement pension at the age of 65.<sup>456</sup>

### **10.1.3 Analysis**

LO has in its report ‘The pension reform completed’ examined the effects of the current labour market on the pension of the individual, in particular, the working class women. These types of pension are income related benefits, guaranteed pension and pension from premiums.<sup>457</sup>

Today’s pension system in Sweden is not adapted to take into account breaks in the working life, may they be for studies, parental leave or sick leave.<sup>458</sup> The prerequisites for a just pension are based on the ‘life-income-principle’, an equal working life that is inclusive and has equal working conditions.<sup>459</sup> The measurement for the worker’s ability to continue to work is in how many years that is lost due to employment conditions and health. Women lose approximately 3,3 years and men 2,5 years. Persons in employment that is physically straining and has low education requirement lose even more years.<sup>460</sup> Thus, the division of risk of losing the work ability is unequal between men and women.<sup>461</sup> E.g. women are more disadvantageously affected by the working environment and employers that refuse to adapt the workplace, the working tasks and the organisation is low, leading to that women take out pension earlier.<sup>462</sup> On the other hand, sick leave at the age of 60-65 has little effect on the pension in comparison to the worker that continues to work until 65 as the pension is calculated on the earnings prior to the sick leave. The 2008 sick leave reform (though altered since then) made it more difficult to base the pension on the earnings prior to sick leave. Other sources of income such as unemployment allowance and social security benefits do not base pension on the prerequisites. An improvement would be to allow part-time sick leave benefits and part-time work for a worker with a few years left to retirement to enable him/her to work until he/she is eligible for retirement.<sup>463</sup>

The effect of part-time and temporary employment contracts on retirement pension is another factor. Part-time work is often combined with work during evenings and weekends and temporary employment contracts often lead to periods of unemployment or working during

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<sup>453</sup> E/C.12/SWE/5, para. 218;

<sup>454</sup> *Conclusion 2009 – Sweden – Article 23 (for the period 01/01/05 – 31/12/2007)*;

<sup>455</sup> *Ibid.*;

<sup>456</sup> Morin and Andersson, p.4;

<sup>457</sup> *Ibid.*, p. 4;

<sup>458</sup> *Ibid.*, pp. 3 and 29;

<sup>459</sup> *Ibid.*, p. 20;

<sup>460</sup> *Ibid.*, p. 22;

<sup>461</sup> *Ibid.*, p. 24;

<sup>462</sup> *Ibid.*, p. 25;

<sup>463</sup> *Ibid.*, p. 24;

inconvenient hours may lead to being forced to accept part-time work as a negative consequence.<sup>464</sup> In essence women's lower pension is caused by three things according to LO: Bad work environment which causes early retirement, part-time work and the temporary employment of which the two latter are consequences of the labour market.

This discussion has primarily been focused on Sweden but having examined the unemployment statistics and part-time work in Poland in previous chapters. The emerging picture in relation to the effects on women's pension by the labour market factors and involuntary or voluntary absence from work, the result may not reach the same magnitude or reach far beyond but in essence the result is the same: Women receive a lower pension than men, maybe even more so as the retirement age has so far been different between men and women in Poland.

In relation to women's situation on the labour market, retirement is affected by the years of remunerated work, the age of retirement, the wage which usually determines the pension. In Poland where women have had lower retirement age, the pension for women is significantly reduced. It has been very difficult to try to change the retirement age in Poland, in particular with regards to that early retirement has been regarded as a privilege rather than a choice. Apart from a just state pension system, the voluntary saving system to ensure adequate pension upon retirement there is a need of adequate support to the workers in making choice on contributions to retirement pension. Many of the issues accounted for in previous chapters affect equal retirement for men and women as retirement is regarded as retroactive wage, a consequence of working life. For the fulfilment of equal retirement for men and women these issues should be rectified.

## **10.2 The relevant national legal framework in relation to retirement**

### ***10.2.1 Poland***

Pursuant to *Act of 11 May 2012 amending the act on pensions and disability pensions paid from the Social Insurance Fund and certain other acts* (Dz.U. nr 2012 poz. 637), 1<sup>st</sup> of January 2013 initiated a pension reform where the retirement age is systematically meant to increase until it is 67 years of age for both men and women.

The main pieces of legislation on retirement pension are as follows and seem to complement each other: *The Act of 13 October 1998 on the Social Insurance System* (Dz.U. 1998 nr 137 poz. 887, as amended).<sup>465</sup> The benefit system is contributory based.<sup>466</sup> The sickness insurance is compulsory or voluntary depending on the type of worker.<sup>467</sup> It covers who is subjected to retirement pension, acquisition of thereof, determination of contributions and basis for calculation of contributions. *The Act of 17 December 1998 on pensions and pensions from the*

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<sup>464</sup> Ibid., pp. 3, 29-31;

<sup>465</sup> *Act of 13 October 1998 on the Social Insurance System* (Dz.U. 1998 nr 137 poz. 887, as amended), art. 1(3)-(4);

<sup>466</sup> Ibid., art. 3(2);

<sup>467</sup> Ibid., arts. 6, 6a, 6b, 7 and 13;

*Social Insurance Fund* (Dz.U. 1998 nr 162 poz. 1118, as amended)<sup>468</sup> defines the conditions for entitlement to cash benefits and pension insurance, calculation of benefits and the rules granting payment of benefits. The *Act of 30 April 2004 on the retirement benefits* (Dz.U. 2004 nr 120 poz. 1252, as amended)<sup>469</sup> provides the conditions for the acquisition and loss of the right to retirement benefits and the rules for payment of retirement benefits and financing.

### 10.2.2 Sweden

SFS 2010:110 *Social Insurance Security Code* covers the general right to retirement pension which is constituted of income based pension, additional pension and premium pension and guaranteed pension.<sup>470</sup> SFS 1998:676 *Contribution to Public Retirement Pension Act*<sup>471</sup> is applicable to individuals who are covered in the Social Security Code and covers how to calculate the pension.<sup>472</sup>

### 10.2.3 Analysis

Both states do have extensive legislation regulating retirement pension and equality between men and women in relation to the right to retirement.

## 10.3 Realisation through case law of women's rights and equal opportunities with men in relation to retirement

### 10.3.1 Poland

No cases were on discrimination *per se* and none concerned gender based discrimination. Instead discrimination was part of the claim but never the main reason for the claim and was often only commented on briefly, a cause of the claim that never succeeded. Instead the case law regarded the right to pension as such. In Warsaw Court of Appeal III AUa 1859/12 the Court held that the provisions in the Constitution incl. the right to pension is compatible with article 14 of the ECHR in conjunction with article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>473</sup> In Łódź Court of Appeal III AUa

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<sup>468</sup> *Act of 17 December 1998 on pensions and pensions from the Social Insurance Fund* (Dz.U. 1998 nr 162 poz. 1118, as amended); CESCR/C/POL/5, paras. 309-315;

<sup>469</sup> *Act of 30 April 2004 on retirement benefits* (Dz.U. 2004 nr 120 poz. 1252, as amended); See also *Act of 28 August 1997 on the Organization and Functioning of Retirement Pension Funds* (Dz.U. 1997 nr 139 poz. 934, as amended);

<sup>470</sup> SFS 2010:110 *Social Insurance Security Code*, ch. 60 on pension basing amounts, chs. 62-65 on income based pension, additional pension, premium pension, guaranteed pension, see also chs. 76-78 and chs. 83-84;

<sup>471</sup> SFS 1998:676 *Contribution to Public Retirement Pension Act*. Stockholm: Socialdepartementet;

<sup>472</sup> For additional information see also SFS 1995:584 *Parental Leave Act*, s.16; SFS 1997:909 *Respecting Handling of Cases Concerning State Pension Benefits Ordinance*. Stockholm: Socialdepartementet, (as amended); SFS 2000:192 *Public pension insurance fund Act*. Stockholm: Finansdepartementet, (as amended); SFS 2000:194 *New Law for Public Pension Insurance Funds*. Stockholm: Finansdepartementet, (as amended); SFS 2002:782 *Respecting Application for and Payment of Pension and Other Benefits Ordinance*. Stockholm: Socialdepartementet, (as amended); SFS 2002:869 *Respecting the Payment of Pension and Group Life Benefits to Persons in Public Employment Ordinance*. Stockholm: Socialdepartementet, (as amended); SFS 2003:56 *Pension and Group Life Insurance for Certain Non-State Employment Ordinance*. Stockholm: Socialdepartementet, (as amended);

<sup>473</sup> 20 March 1952; Council of Europe, 'Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No.: 009'; Warsaw Court of Appeal III AUa 1859/12, p.8; <<http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=009&CM=8&DF=04/01/2015&CL=ENG>> accessed 4<sup>th</sup> November 2014, Poland ratified on the 10 October 1994 and Sweden ratified on the 22 June 1953;

2382/13 it was held that without an employment contract and only tasks carried out there is no right to social security of any kind. In Szczecin Court of Appeal III AUa 384/12<sup>474</sup> the employee had to resign to be able to receive pension under the new pension law. The new pension rules to receive retirement pension requires the employee to first terminate the employment when he/she reaches the age of retirement. The employee may continue to work if she/he finds employment. The new rules were not contrary to the constitutional right to a pension. The new rules were introduced as a means to pave the way for the young to enter the labour market. The nine months between enactment and entry into force was a sufficiently long time for the employees to decide whether to start taking out retirement pension or seek to be employed again. Pursuant to Wrocław Court of Appeal III AUa 265/12 the new provision is a non-discriminatory article as it applies equally to every pensioner and professional group. A person that on the 1 January 2011 received both retirement pension and worked at the same time could continue to do so until September 2011. The new law did not violate article 65 of the Constitution: Polish citizens enjoying full public rights shall have a right of access to the public service based on the principle of equality. The new provision allows for minimum standard of living as required by the Constitution and that the individual should choose between pension and employment. The individual should at the age of retirement resign and then may immediately take up employment again, with the same employer if the employer agrees. It was held in Gdańsk Court of Appeal III AUa 519/12 individuals having acquired the right to pension between 8 January 2009 and 31 December 2010 and who continued to work at the same time were allowed to continue to benefit from both after the entry into force of the new pension law on the 1 October 2011. Pursuant to Katowice Court of Appeal III AUa 623/13 new pension law also meant “[...] to encourage those who meet the conditions for obtaining a pension to delay a decision on the transition to retirement and continuing employment.”<sup>475</sup>

In Warsaw Court of Appeal III AUa 1741/12 the allegations that there was discrimination in accordance with ECHR, were found to be misguided: Following the establishment of the position of the Supreme Court contained in its resolution of 3 March 2011 (sygn. akt II UZP 2/11) there had been no violation of the ECHR as the same rules are provided in the domestic law “and, therefore, the provisions of international law are gaining practical significance only in the event of a collision with national standards. Without such a conflict to refer to them is unnecessary.”<sup>476</sup>

### **10.3.2 Sweden (no cases found)**

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<sup>474</sup> Act of 17 December 1998 on pensions and pensions from the Social Insurance Fund (Dz.U. 1998 nr 162 poz. 1118, as amended), art. 103a; Szczecin Court of Appeal III AUa 384/12, p.5; See also among others: Gdańsk Court of Appeal III AUa 929/12; Katowice Court of Appeal III AUa 209/12; Szczecin Court of Appeal III AUa 495/12; Szczecin Court of Appeal III AUa 573/12; Szczecin Court of Appeal III AUa 585/12; Szczecin Court of Appeal III AUa 956/13; Wrocław Court of Appeal III AUa 469/12;

<sup>475</sup> Katowice Court of Appeal III AUa 623/13, p.3;

<sup>476</sup> Warsaw Court of Appeal III AUa 1741/12, p.4;

### ***10.3.3 Analysis***

The right to social security in relation to gender equality and discrimination has not been lifted in the case law, thus the exact relationship between the two cannot be discussed here. The remark by the Łódz Court of Appeal on that without an employment contract there is no right to social security of any kind, is not entirely true. Some benefits, if not pension benefits, like family benefits are obtainable without, but they then fall under social security benefits. Secondly, the new pension scheme does not discriminate against women, unless employers decide not to re-employ persons that have reached the age of retirement and thus force women as a consequence of their early retirement age to retire earlier than men.

## **10.4 Conclusion**

There is in both Poland and Sweden legal protection of the right to retirement pension to afford protection of workers at old age and extensive laws regulating the access to retirement pension. The increased and now equal retirement age for both men and women in Poland significantly weighs heavily on the scale to reach equality in relation to pension between men and women and increases the possibilities to higher pension for both men and women, but especially women. The Polish case law demonstrated good protection of the right to retirement pension. The new pension law prohibiting remaining in employment without re-employment and receiving pension at the same time did arguably affect women more than men as a consequence of the different retirement ages still existing. For both states it is curious that no case purely on gender discrimination has been found in relation to retirement pension. In both Poland and Sweden retirement pensions should be regarded as too low as they do not amount to an adequate living standard. Neither do the accumulation of a decent retirement pension at old age allow for natural breaks in the working life or reduced working capacity with the result of early retirement. But states try to make sure that the pensioners do receive adequate pensions and that the savings for adequate retirement pension at old age take into account for break in the working life. After all, these breaks are natural consequences of life and/or the working life.

Consequently, the difficulty with the realisation of equality in relation to retirement pension lie both in the inadequacy of the pension systems and in issues related to the non-fulfilment of other rights in relation to equality between men and women.

## **PART IV**

### **NEVERLAND – The level of realisation**

#### **CHAPTER 11 – ANALYSIS**

Having come this far in the analysis of the realisation of women's right to equal opportunities with men on the labour market and the principle of non-discrimination on the basis of gender in each specific area of labour law, it remains to see how far Poland and Sweden each have come in the realisation of the those rights, how far have they come in relation to each other and finally where does that leave us.

##### **11.1 The realisation of women's right to equal opportunities with men on the labour market and the principle of non-discrimination in each specific area on the labour market**

###### ***11.1.1 Poland***

When looking at the overall situation in Poland and how well the State has succeeded in the progressive, but yet expeditious realisation of women's rights to equal opportunities with men and the principle of non-discrimination on the basis of gender on the labour market, an image emerges that indicates progress and willingness to progress and active work for progress. The image nevertheless demonstrates that the bridge between women's equality with men has only commenced to be built. To exemplify Poland has provided training of judges to handle cases of violence against women, promotional campaigns for a partnership model between spouses and civil partnerships, specific focus on employment of women and protection against unemployment and high increase of women in managerial positions. There are measures that do not effectively address the issues on discrimination of women in working life such as wide spread ignorance and low recourse to justice in relation to recruitment, no specific focus on the sexual harassment at work, insufficient allowances e.g. unemployment allowance and retirement benefits and difficulty to access the labour offices.

Poland has to a large extent legislation that provides protection of equal opportunities between men and women on the labour market and the principle of non-discrimination in each specific area on the labour market. Especially the new retirement laws provide better possibilities for women to achieve equal retirement pension with men. The exception is the protection of parental leave despite extensive and continuously improving law. The good prerequisites for equal partition of the triple workload between the genders do require further development and so does the law protecting the unemployed despite the legal provisions being extensive.

Poland does provide access to justice. Only, in one case on the application of the law, i.e. when individuals seek effective remedy to violations of their rights has demonstrated the

employer's failure to protect employees despite existent law, indicating failure to take recourse to justice in cases of sexual harassment, demonstrating employees' lack of knowledge of their rights and/or the right to justice. Additionally, the case law on the new retirement regime indicates that women might be more negatively affected than men, until everyone retires at the age of 67 in 2040.

### *11.1.2 Sweden*

As demonstrated in relation to each specific right, Sweden is very well developed in gender equality and one of the most gender equal states in the world. Sweden has undertaken active and effective measures to realise equal opportunities for women on the labour market and prohibit gender based discrimination in relation to employment. E.g. training of judges to handle cases of violence against women, creation of a gender equality bonus, measures trying to protect all groups of the unemployed including part-time workers and the situation might even be such that there is no gender based wage discrimination. On the other hand, there are measures that do not effectively address the issues on discrimination of women in working life such as no specific focus on sexual harassment at work, insufficient allowances e.g. unemployment allowance and retirement benefits and there is no effective way to address the issue of inequality in managerial positions.

Sweden offers for the majority of the specific rights legal protection against gender based discrimination and realises the right to equal opportunity. The legal protection of maternity leave and parental leave is extensive but lacks elements that would give equal opportunities to parental leave. The legal protection afforded to minimize the female triple workload offers good prerequisites for an equally shared female triple workload, but, partially as a result of the laws protecting parental leave and maternity leave, the law in this field would benefit from extension. The third exception to otherwise very good legal protection of equal opportunities of men and women on the labour market and the prohibition of gender discrimination on the labour market is in relation to remuneration mainly as a result of the lack of laws regulating wages and the results thereof.

In relation to case law, i.e. in the effective remedy to violations of rights the application to the existing law, Sweden has demonstrated effective access to justice that has on issues of sexual harassment led to development of the law. In the case of maternity and parental leave the Labour Court has come to a fierce defence of the right to leave and the protection of parenthood and has in relation to remuneration developed very structured criteria for how to measure equal work for equal value. The drawback is the Labour Court's sometimes odd application of the law and practice to specific cases and its reluctance or lack of authority to intervene with regards to cases relating to gender based wage discrimination.

## **11.2 Comparison between Poland and Sweden of the realisation of women's rights to equal opportunities with men on the labour market and the principle of non-discrimination in each specific area on the labour market**

In comparison to Sweden, Poland seems to work more with the aspect of equalising the realisation of rights for women on the labour market, recognising that there is an existing difference in the values of worth, rights and traditional roles of men and women. Poland tries to actively incorporate remedies to this situation in her general measures to the realisation of a right or creates parallel project to that effect. In contrast to Sweden, Poland's approach is building everything up from the bottom at the same time, be it workers' rights and women's empowerment, everything is equally important. It is an honourable strategy that expresses the equal worth of all rights but it is also a strategy that will take substantial time for realisation. Thus, Poland has in this respect shown a better awareness in its own shortcomings than Sweden.

Sweden should be proud of its continuous work and achievement in the advancement in the realisation of women's rights on the labour market and recognise that it is a role model for many countries across the globe in the fight both for labour rights and women's rights. Sweden, is taking actions for the protection and realisation for all citizens in relation to work but struggles in reality with deep-rooted prejudice of the different worth of men and women without even realising it herself. It may be a result of that Sweden, in comparison to many other countries, has come far in gender equality and the principle of non-discrimination and Sweden has thus stagnated in its development because it has done so much already and there is only so much that Sweden can do. The alternative is that Sweden has initiated a new phase of realisation of the rights of women on the labour market which cannot be realised through other means than real social change on all levels as regards women's status in comparison to men's. This has been suggested in the analysis of different rights in the thesis. To exemplify, Sweden is going to focus the levelling out of gender domination in different professions through increased resources and cooperation between the world of education and the labour market. The third alternative is that there might be a real-world barrier to the realisation of equality beyond which it may be difficult to reach.

Finally, it can, upon the examination of the specific rights, be said that both states have realised the progressive nature of equality and the principle of non-discrimination and in light of this both states have come far and show all signs of continuing the realisation of the right to equality opportunity between men and women and the principle of non-discrimination on the basis of gender.

## **11.3 Where do Poland and Sweden stand today and what are the reasonable next steps?**

Looking forward, Sweden has entered and embraced the next vital phase of realisation of the rights of women on the labour market which is realised through other means than real social change on all levels as regards women's status in comparison to men's, as demonstrated in the

rights specific chapters. Poland should continue to realise its adopted course of action, equal realisation of all human rights in all areas simultaneously and continuously. Nothing in the research found, speaks for that one state's overall approach would be the better option for the other state, the reason being the difference in development of Sweden and Poland.

## CHAPTER 12 – CONCLUSION

The purpose of this thesis has been to demonstrate what protection is afforded in Poland and Sweden, by laws and other measures such as benefits, to protect the rights of women in working life, the effectiveness of the protection, the drawbacks and, to determine, if possible, how the established current situation may be improved.

The thesis has focused on the partial or non-realisation of specific rights of which some have shown a more direct link than others in hindering women from prospering in their professional career, of which protection against sexual harassment in the workplace and maternity and parental leave are examples. The demonstrated effects of the partial or non-realisation of others' rights on women's working life and women's professional career have been less subtle than expected, and carry great inhibition of women's rights with effect projecting into retirement.

Upon the method used, the states' obligations in relation to the international instruments and obligations in relation to international organisational membership the following has been concluded: The thesis has demonstrated that in on an overall examination the rights that are attributed to women in relation to their working life as set out in the international law in relation to the principle of non-discrimination on the basis of gender and the principle of equality, Poland and Sweden do offer legal protection and both states offer access to justice and remedies. On occasion, the states have demonstrated unsatisfactory application of the law. In the case of Poland it was manifested particularly in the case law on sexual harassment in the workplace as a consequence of failure to allow recourse to justice despite the existent law. In the case of Sweden it was manifested particularly in the case law on remuneration as a consequence of the attitude of the Labour Court. Both states have also shown extensive actions and measures attempting to realise equality between men and women on the labour market and the principle of equal treatment in relation to the specific rights examined. Both states are aware that in relation to the specific rights examined there are not only practical issues that need solving but there are also the effects of gender roles that need to be taken into account. However, it could not be established that neither Poland nor Sweden overall effectively realised the women's rights on the labour market.

Poland and Sweden should nevertheless continue their adopted line of realisation as the respective line of realisation seem to function well for each state in relation to their respective phase of development, in order to realise their international obligation to reach equality between men and women in relation to the rights on the labour market. Even so, it is important that both states do remain open to take into account good practices of other states when moving forward in their respective realisation of women's equal opportunities with men on the labour market and the right not to be discriminated on the basis of their gender.

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