

Equal Rights and Discrimination Law in Scandinavia

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1 Introduction

Employment discrimination law in Scandinavia¹ is a relatively recent development—occurring within the past thirty years. As will be discussed further below, the first proposals to legislate in this area met with some initial resistance, largely because such legislation was considered incompatible with the Scandinavian labour law tradition of self-regulation.² Employment discrimination legislation was ultimately adopted despite this resistance primarily because of influences from international law and the women’s movement in Scandinavia. The Scandinavian countries acceded to a number of international agreements banning sex and race discrimination in the 1960s and 70s, such as ILO Conventions 100³ and 111,⁴ and the UN Conventions on Race Discrimination⁵ and Elimination of All Forms Discrimination against Women.⁶

¹ In Scandinavia “equal rights” is the term usually applied to sex discrimination law. Laws concerned with other kinds of discrimination are generally referred to as “discrimination” law. I will use the American term “employment discrimination law” to refer to laws addressing the problem of discrimination against particular groups in the labor market. In this article, “Scandinavia” refers to Denmark, Finland, Norway and Sweden. The *Encyclopædia Britannica* explains that Scandinavia has been historically held to consist of Norway, Sweden and Denmark. Some authorities argue for the inclusion of Finland on geologic and economic grounds. “Nordic” refers to the Scandinavian countries plus Iceland.

² See Reinhold Fahlbeck’s contribution on industrial relations and collective labour law in this volume. See also Ruth Nielsen, *Equality in Working Life: Legislation, Positive Action and Introduction of New Technology* in Ruth Nielsen, editor, *Women’s Law in Scandinavia* (Copenhagen: Kvindevidenskabeligt Forlag 1982).

³ Equal Remuneration Convention 1951.

⁴ Discrimination (Employment and Occupation) Convention, 1958.

⁵ International Convention on Elimination of All Forms of Racial Discrimination 1965 (ICERD).

Accession to these international agreements triggered debates about the extent to which legislation was necessary to live up to the obligations they imposed. The circumstances leading up to the emergence of feminist movements in Scandinavia in the 1970s provided an additional political basis of support for adoption of equal rights legislation despite friction with the Scandinavian labour law model.

The first legislation addressing discrimination in the Scandinavian labour market concerned sex discrimination and appeared in the 1970s. Other kinds of discrimination did not receive any special legislative attention until the 1990s. Section 2 of this article describes the development of laws addressing employment discrimination on the basis of sex. Section 3 describes the development of laws intended to address employment discrimination based on other factors.

2 Sex Discrimination Law in Scandinavia

2.1 Introduction

Scandinavia is sex equality's Promised Land – at least according to international comparisons carried out by the United Nations. These comparisons indicate that the Scandinavian countries have come closer to achieving sex equality, based on such indicators as education, employment, political participation and health, than any other country.⁷ The Scandinavian countries have the highest percentage of women in the labour market than anywhere else, with between 65 and 74 per cent of women employed in 1998.⁸ Nevertheless, the UN's score card on sex equality does not accurately portray conditions on the labour market since the indicator with regard to employment consists only of statistics on the percentage

⁶ Convention on the Elimination of Discrimination against Women 1979 (CEDAW).

⁷ See, e.g., UNIFEM, *Progress of the World's Women 2000: UNIFEM Biennial Report* (United Nations Development Fund for Women. This report presents the first global assessment of obstacles to gender equality and women's empowerment using three key indicators taken from the UN indicator framework for development assessments. (See page 65 of the report). These indicators are the ratio of girls' to boys' enrollment in secondary education; women's share of parliamentary representation; and women's share of paid employment in industry and services (i.e., non-agricultural activities). The report assesses a country's progress towards sex equality based on targets agreed upon by UNIFEM in consultation with NGOs as well as intergovernmental organizations. The target for gender equality in secondary education is a ratio of between 95 and 105 of girls' to boys' enrolment and enrollment of girls at a rate of 95%. A country has achieved gender equality in political representation if women hold 30 per cent or more of the seats in national legislatures. A figure in the range of 45-55 percent of paid employment for women's share is taken as indicating equality. Only Finland, Norway, Sweden, Denmark and Iceland have accomplished all three goals. For discussion of Sweden as the reputed "promised land of sex equality", based on a 1995 UNDP Report, see Ronnie Eklund, *The Swedish Case—The Promised Land of Sex Equality?* in Tamara K. Hervey and David O'Keeffe, editors, *Sex Equality Law in the European Union* (Chichester: Wiley 1996) 337.

⁸ See *Women and Men in the Nordic Countries 1999: Facts and figures 1999* (Copenhagen: Nordic Council of Ministers 1999) 6.

of women's share of paid employment in industry and services. Equal pay and occupational segregation are not considered.

Statistics on women's and men's wages and the distribution of men and women in different sectors indicate that pronounced inequalities between the sexes still exist in the Scandinavian labour market. The average wage gap between the sexes lingers in the range of 15-20% in Denmark, Sweden and Finland although it is much wider in certain sectors of the labour market in those countries and as a whole in Norway.⁹ Women are clustered into public sector jobs in social work, health, personal services and education, while men occupy close to 80% of jobs in private industry, wholesale trade and communication and construction.¹⁰

These inequalities in the labour market suggest that Scandinavian women owe their privileged position in the world more to their countries' social welfare policies than to laws addressing sex discrimination in the labour market.¹¹ Scandinavian social welfare policies include provision of basic services – such as education, health care, and childcare – that are a precondition for sex equality. These services are heavily subsidized by public funds and produced by the public sector, so that fees are quite reasonable, if required at all. These services are also available to all citizens who fulfil the conditions, without regard to employment or family situation. Furthermore, these services are not limited to the bare essentials, but are generally quite extensive, including university education through the graduate level, the full range of health care, from visits to the family doctor to surgery, hospitalisation and specialized medical care, and full-time day-care, supplemented by generous periods of paid maternity leave.¹² Finally, the strong emphasis on collective agreements as the basis for regulation

⁹ According to the latest report from Eurostat, *Statistics in Focus: Population and Social Conditions* (Theme 3, 5/2001), women's average earnings in Sweden in 1995 came closest to men's in the EC (and undoubtedly the world) at 88% of men's average earnings, though the gap has increased somewhat since then. In Denmark, women's average earnings were around 85%. Denmark and Sweden were not the only countries to narrow the gender wage gap to less than 20% – the statistics for Belgium and Luxembourg are just about the same. In regards to the wage gaps in specific sectors of the labour market, in Denmark in 1999, women's average earnings in the business services sector, for example, was only about 75% of men's. In Finland, women's average earnings in the financial services sector was about 65% of men's in 1999. In Norway women's average earnings were at about 67% of men's in 1999, although the average earnings of women working full time ranged from a low of 73% to a high of 95% of men's. See Centre for Gender Equality, *Mini Facts on Gender Equality 2001* (Centre for Gender Equality: Oslo 2001) available at "<http://www.likestilling.no>".

¹⁰ See *Women and Men in the Nordic Countries 1999*, note 8 above, at 8-9. In Norway 32% and in Sweden 27% of women were working part-time in 1998 as compared with only 6% of men in both countries. *Id.* at 6. In Denmark and Finland only 9% of women and 4% of men were working part-time. *Id.*

¹¹ See Kevät Nousiainen and Johanna Niemi-Kiesiläinen, *Introductory Remarks on Nordic Law and Gender Identities* in *Responsible Selves: Women in the Nordic Legal Culture*, edited by Kevät Nousiainen, Åsa Gunnarsson, Karin Lundström and Johanna Niemi-Kiesiläinen, (Ashgate/Dartmouth 2001)(hereinafter "Responsible Selves") 2.

¹² The proportion of all children aged 3-6 in day-care institutions in 1997 gives a good indication of the importance of this service. In Denmark, it was 77%, Norway 71%, and Sweden 62%. In Finland it was only 45%. See *Women and Men in the Nordic Countries 1999*, note 8 above, at 10.

of labour relations has also helped to reduce income inequality in general, which also benefits women.

A quick comparison with the United Kingdom and the United States, for example, lend support to the view that Scandinavia's social welfare policies have had more impact than employment discrimination law on women's position in Scandinavia. Neither the UK nor the U.S. has as extensive social welfare policies nor are collective agreements the basis for regulation of labour relations, but both have had quite robust legislation prohibiting sex discrimination in employment for decades now. In both the U.S. and the UK women fare less well than women in Scandinavia.

While in my view employment discrimination law has not been a significant factor in Scandinavia's achievements in the area of sex equality, recent developments suggest the law's effectiveness may improve in the future. Accordingly, the following sections describe the development of Scandinavian sex discrimination law with a view toward offering some insights into the reasons for its relative ineffectiveness and how recent changes in this area of the law may improve its effectiveness. First, I sketch the history of women's participation in the Scandinavian labour markets before the advent of legislation prohibiting sex discrimination in the labour market in the 1970s. I then describe the processes leading up to adoption of the legislation, the legislation itself, and recent legislative developments. I conclude Section 2 with a brief overview and evaluation of prospects for improvement.

2.2 Women's Participation in the Scandinavian Labour Market up to the mid-1970s

Women in Scandinavia gradually began to enter the labour market in the early days of industrialisation.¹³ As in other countries of Western Europe and North America, industrialisation in Scandinavia brought with it a wave of legal reforms giving women a number of important formal equal rights. First came reforms concerning laws of succession, granting brothers and sisters the same title to inheritance.¹⁴ Then came laws granting unmarried women legal capacity and the right to engage in various trades and in business.¹⁵ Married women were not given legal control of their property nor the right to participate freely (that is,

¹³ See Ruth Nielsen and Marit Halvorsen, *Sex Discrimination: Between the Nordic Model and European Community Law* in Niklas Bruun, Boel Flodgren, Marit Halvorsen, Håkan Hydén and Ruth Nielsen (editors), *The Nordic Labour Relations Model* (Dartmouth 1992) 183.

¹⁴ *Id.*

¹⁵ As in other countries, Scandinavian women did not enjoy independent legal status until the passage of these reforms. Women were subjects of guardianship and had no capacity to enter into contracts. Single women were granted legal capacity in the early to mid-19th century: Denmark, 1857 (majority at the age of 25); Finland, 1864 (age 25); Norway, 1845 (age 25)., Sweden, 1863 (age 25). See generally Ida Blom and Anna Tranberg, *Nordisk lovoversikt: Viktige Lover for Kvinner ca. 1810-1980* (Nordisk Ministerråd 1985). See also Arnaug Leira, *The 'woman-friendly' welfare state?: The case of Norway and Sweden* in Jane Lewis (editor), *Women and Social Policies in Europe: Work, Family and the State* (Aldershot, England: Edward Elgar 1993) 52.

without the consent of their husbands) in trade or factory operations until several decades later.¹⁶

The reasons for these legal reforms lie primarily in the demands of the economic and technological developments that accompanied industrialisation.¹⁷ Industrialisation required a mobile work force and liquid capital.¹⁸ The rights granted to women during this period fit that need.

The distinction the new laws made between unmarried and married women reflected the fact that members of the female labour force¹⁹, with the exception of Finnish women, were typically unmarried, deserted or divorced. All the Scandinavian countries counted more women than men in their populations, and they wanted to ensure that single women could provide for themselves and any children they had without becoming a burden on their families or on public funds.²⁰ The women who could afford to do so left paid work upon marriage and became economically dependent on their husbands. A married woman's paid labour was seen as something made necessary by her husband's lack of ability or will to maintain the family.²¹

Finnish women's experience stands out as the exception to this pattern. Finnish women have traditionally had a higher rate of labour market participation.²² Finland's economy was primarily agrarian until after World War

¹⁶ See Blom and Tranberg, note 15 above, at 12, and the separate chapters on each country (where the laws are listed in chronological order). In Denmark, married women were granted the right to control what they earn from their own business in 1880; married women were granted the same majority as single women (at the age of 25) in 1899. In Finland, married women were given the right to control their property and full legal capacity in 1929. In Norway, women were granted legal capacity in 1888. In Sweden, married women were given some very limited rights over their income and marital property in 1874; they were not granted full legal capacity until 1921. See Karin Widerberg, *Kvinnor klasser och lagar 1750-1980* (Liber Förlag Stockholm 1980) 70-71.

¹⁷ Blom and Tranberg, note 15 above, at 18-22.

¹⁸ Nielsen and Halvorsen, note 13 above, at 183.

¹⁹ Note that historical statistics on the numbers of women in the labor force are more or less misleading, because women often worked in family businesses, on family farms, or at home for an outside employer. Such labor was generally disregarded when accounting for economic activities because it was assumed that every family had a male provider. See Kevät Nousiainen, *Women and Work in Today's Nordic Countries—Introducing the Themes* in Laura Kalliomaa-Puha (editor), *Perspectives of Equality: Work, Women and Family in the Nordic Countries and EU* (Copenhagen: Nordic Council of Ministers 2000)(hereinafter referred to as *Perspectives*) 15.

²⁰ *Id.*

²¹ *Id.* at 16. The labour market participation of adult married women in Norway and Sweden was among the lowest in Western Europe in the 1940s and 1950s. In 1950 95% of Norwegian and 90% of Swedish married women were registered as not formally employed. Presumably the husband's wages sufficed for a family. In 1950 95% of Norwegian married women and 90% of Swedish women were registered as not in formal employment. Leira, note 15 above, at 58-59.

²² Nousiainen, note 19 above, at 18. The labour market participation of married women with children in 1950 was 52%. It dipped to 46% in 1969, but rose again to 54% in 1970 and steadily increased since that time. See Minna Salmi, *Analysing the Finnish Homecare Allowance System: Challenges to Research and Problems of Interpretation* in *Perspectives*, note 19 above, at 198 (Table 7).

II, and most of the population was quite poor. Married women could not afford to dedicate themselves exclusively to housework and childcare. Husbands and wives were mutually dependent for their survival. Married women worked on the farms, in factories and in private homes as domestic servants. The wartime economy and post-war reconstruction offered additional opportunities and made working a necessity for many Finnish married women.

As women entered the workforce in Denmark, Norway and Sweden, some of them joined men's labour unions, organised separate clubs within those unions or formed women-only unions.²³ Employers paid them (and children) less than they paid men, and they considered women to be more docile workers as well.²⁴ These women became concerned with the question of equal pay.²⁵ However, a large majority of the population of Scandinavia continued to cherish the ideal of the male breadwinner/housewife family. Accordingly, Scandinavian labour organisations, as well as the social democratic parties, adopted the (male) family wage as their aim when they were planning the welfare state in the 1930s and 40s.²⁶

The social democratic and labour movements' adoption of the family wage resulted from ideology as well as economic conditions. The ideological roots of the family wage can be traced to the movements' distinction between the labour market and the social dimension. Although the social democratic and labour movements assigned a high value to social equality and solidarity, the labour market and the social dimension were conceived as separate spheres.²⁷ Women's and family issues were seen as belonging to the social dimension, while class solidarity and the rights of workers were connected with the labour market. The social dimension was subordinated to the class issues,²⁸ making it possible to advocate a family wage, despite its negative implications for sex equality with respect to pay. The economic conditions of depression and mass unemployment in the 1930s and 40s also encouraged welfare-state planners to adopt the family wage as the basis of labour market policies.²⁹ Married women were generally unwelcome in the workforce, and equal pay was an unpopular proposition.

²³ Nielsen and Halvorsen, note 13 above, at 184.

²⁴ Nousiainen, note 19 above, at 15.

²⁵ Nielsen and Halvorsen, note 13 above, at 184.

²⁶ Nousiainen, note 19 above, at 17. This held true even in Finland, despite the fact that the single wage-earner family had always been an option for better-off families only. *Id.* at 18. See also Leira, note 15 above, at 57.

²⁷ Birte Siim, *The Gendered Scandinavian Welfare States: The interplay between women's roles as mothers, workers and citizens in Denmark*, in Jane Lewis, editor, *Women and Social Policies in Europe: Work, Family and the State* 42 (Aldershot: Edward Elgar Publishing 1993).

²⁸ *Id.*

²⁹ Nousiainen, note 19 above, at 17. In Denmark, Social Democracy provided the inspiration for a coherent welfare strategy, which was gradually implemented during the 1940s, and 50s. The goals of the Social Democratic strategy were "to achieve universal and solidaristic social rights; to equalise the status of workers, farmers, and salaried strata; to secure good benefits and remove various eligibility conditions; and to promote a major income distribution through flat-rate benefits and progressively financed taxes." Siim, note 27 above, at 32.

However, the tide slowly began to turn after the Second World War, when civilian and military industries abroad – primarily in the United Kingdom and the United States – were forced to employ large numbers of women.³⁰ The war-time experiences of these and other countries with female labour led to international recognition of the concept of equal pay for equal work in 1948 in the United Nations Declaration on Human Rights Article 23, section 2. Three years later, the International Labour Organisation (ILO) adopted Convention 100 on Equal Remuneration for Men and Women Workers for Work of Equal Value.

As these developments in international law made it increasingly difficult for the Scandinavian countries to argue that men should be paid a family wage, equal pay made its way onto the legislative agenda in all the Scandinavian countries in the 1950s.³¹ However, eight years passed before the first Scandinavian country, Norway, ratified ILO Convention 100 in 1959. Denmark, Sweden and Finland ratified the Convention in 1960, 1962 and 1963 respectively.³² The main obstacle to ratification appears to have been opposition by the labour market partners, i.e. the confederations of employers and trade unions. Ratification implied a departure from the generally accepted principle in the Scandinavian countries that labour market partners negotiate contracts and agreements concerning wage conditions without state interference.³³ Labour legislation of any kind is usually only adopted in Scandinavia with the consent of the major labour market organisations and the Social Democratic parties (in Norway, the Labour party), which have traditionally had close links with the trade union movement.³⁴

³⁰ Scandinavia did not experience a large-scale entry of women into the labor market until 15-20 years later. In Denmark, the percentage of women working exclusively as housewives at home stayed between 45-55% from 1855 to 1960. Ruth Nielsen, *Kvindearbejdsret* (Copenhagen: Juristforbundets Forlag 1979) 34. In the late 1940s and early 1950s the labour market participation of adult married women in Norway and Sweden was among the lowest in Western Europe, at 5-10%. See note 21 above and accompanying text. Finland did not experience a new influx of women into the labor market at this time either because Finland did not develop an industrial economy until after the war, and most women had already been working, primarily on farms. See Kevät Nousiainen, note 19 above, at 17-18. See also Päivi Korvajärvi, *Gendering Practices in Working Life* and Irma Sulkunen, *Finland—A pioneer in Women's Rights* on the Virtual Finland website, "<http://www.finland.fi/finfo/english/women/gender.html>". The latter two authors emphasize the fact that Finnish women have been very active participants in Finland's economic and political life from at least the mid-19th century.

³¹ The opening of the equal pay debate in Scandinavia has been traced to a motion to implement equal pay in the public sector presented in 1946 by female representatives in the Swedish Parliament. See Nielsen and Halvorsen, note 13 above, at 186. See also Susanne Fransson, *Equal Pay for Equal and Comparable work—A question of Law or a Question of Labour Contract?* in Perspectives, note 19 above, at 53. The motion was rejected in committee, but a debate was held in the parliament's plenary session when the dissenters demanded a thorough investigation of the question. Nielsen and Halvorsen, note 13 above, at 186, also note that pay equity had been introduced in Denmark in the public sector as early as 1919, but was undermined by provisions on maintenance supplements which were not abolished until 1958.

³² See ratification information on the ILO's website, "<http://www.ilo.org>".

³³ Nielsen and Halvorsen, note 13 above, at 188.

³⁴ *Id.*, at 188.

In the period between the ILO's adoption of Convention 100 and its ratification by Denmark, Norway, Sweden and Finland, the Nordic Council³⁵ took up the question of the legal ramifications of ratification. The committee assigned the task of commenting on the Convention produced two opinions concerning the possibility of implementing the Conventions.³⁶ Some committee members were of the opinion that ratification need not necessarily lead to equal pay legislation because it was possible to allow the labour market partners to implement the Convention through successive collective agreements. On the other hand, some members of the committee thought legislation was unavoidable if the Convention were to assume legal validity in a system built on collective agreements. In the end, the former opinion held sway.

In addition to the deliberations of the Nordic Council, there was a significant amount of activity in the individual countries leading up to and following ratification. Until that time it had been common practice in Sweden, Denmark, and Finland to include sex-specific wage terms in collective agreements. In Sweden, a committee had been formed in 1948 with representatives from the Swedish LO (the Swedish Confederation of Trade Unions) and the SAF (Swedish Employers' confederation) to study the situation of Swedish women in the labour market. Nine years later this committee concluded that both justice and productivity demanded a wage system based on skills and performance rather than on gender.³⁷ This report was an important influence on the Norwegian Equal Pay Committee, which came to the same conclusion two years later.³⁸ The Swedish LO and the SAF made an agreement in 1960 to begin removing directly sex discriminatory wage terms in private sector collective agreements.³⁹ A similar procedure was initiated in Finland,⁴⁰ while in Denmark, the union for clerical workers (HK), obtained an equal pay agreement with the

³⁵ The Nordic Council was founded in 1952 to promote cooperation between the parliaments and governments of Denmark, Norway, Sweden and Iceland. Finland joined later in 1955. The Council consists of 87 elected members, all of whom are members of their respective national parliaments. The Nordic Council makes proposals, acts in a consultative capacity and monitors cooperation measures, and it operates via its Plenary Assembly, the Presidium and standing committees. *See Women and Men in the Nordic Countries 1999*, note 8 above, at 2.

³⁶ *See* Susanne Fransson, *Lönediskriminering* (Uppsala, Iustus Förlag 2000) 174, note 739 or, for an English version, *see* Fransson, note 31 above, at 56, note 68.

³⁷ Nielsen and Halvorsen, note 13 above, at 186.

³⁸ *Id.*

³⁹ Nousiainen, note 19 above, at 20. The progression of events leading to ratification in Sweden seemed to follow the normal procedure. That is, when Sweden considers ratification of an international instrument, Parliament first obtains an opinion as to whether Sweden already complies with the norms stipulated by the instrument before ratification. Usually, it is determined that no further adjustments are necessary. In this case it appears that the general agreement between the Swedish LO and the SAF and the progress made under it was sufficient for Parliament to conclude that no new legislation was necessary. However, it was not until 1965 that sex-differentiated rates were completely removed from collective agreements. *See* Fransson, note 31 above, at 54 and 56.

⁴⁰ Nousiainen, note 19 above, at 20. *See also*, Anja Nummijärvi, *The Implementation of the Equal Pay Principle and Gendered Pay Structures in Perspectives*, note 19 above, at 80.

Danish umbrella employers' organisation (DA) in 1963.⁴¹ Other trades followed, but the Danish umbrella organisation for trade unions (LO) and DA did not reach a general agreement until 1973.⁴² Thus, Convention 100 was initially implemented in all the Scandinavian countries through various collective agreements. Implementation by collective agreements was in accordance with one of the alternatives for implementation offered in Article 2 of the Convention⁴³ and for a number of years, neither the labour partners nor the national parliaments believed implementation of Convention 100 required anything more than removing sex-differentiated pay rates.⁴⁴

The problem with this approach was that although the explicit references to male and female work were removed from collective agreements, the actual occupational segregation remained.⁴⁵ For example, in Sweden, agreement was reached that each branch would distinguish between "qualified" and "unqualified" labour instead of between male and female labour.⁴⁶ The way in which the labour was going to be adjudged "qualified" or "unqualified" was never questioned. Riitta Martikainen has written about gendered practices under formally neutral collective agreements in Finland and shows how men and women are placed in different pay categories.⁴⁷ According to Martikainen formal gender neutrality characterises the whole process of collective bargaining. The possibility that decisions about where to place certain jobs in the pay hierarchy may be affected by gendered assumptions about the value of the work is never considered, precisely because the process is supposed to be unaffected by considerations of gender.

Furthermore, the structure of the Scandinavian labour market is such that women-dominated occupations are often covered by collective agreements that are different from the collective agreements that apply to male-dominated

⁴¹ Nielsen and Halvorsen, note 13 above, at 186. DA's counterpart on the workers' side is LO (*Landsorganisationen i Danmark*—Danish Confederation of Trade Unions). LO's largest member union is HK (*Handels- og Kontorfunktionærernes Forbund i Danmark*—Union of Commercial and Clerical Workers), which organises lower-paid white-collar employees in both the public and private sector. 80% HK's members are female. For more about Danish labour organisations and their positions in the equal value dialogue, see Claire Kilpatrick, *Gender Equality: A Fundamental Dialogue in Labour Law in the Courts: National Judges and the European Court of Justice*, edited by Silvana Sciarra, 77-94 (Oxford: Hart publishing 2001).

⁴² Nielsen and Halvorsen, note 13 above, at 186.

⁴³ *Id.*, at 187.

⁴⁴ On Sweden, see Fransson, note 31 above, at 54-57; on Denmark, see Nielsen, *Kvindearbejdsret*, note 30 above, at 212. It was not until the general agreement between LO and DA in 1973 that references to "men's" and "women's" pay rates disappeared completely from Danish collective agreements. See *id.* at 238.

⁴⁵ See discussion of occupational segregation in the text accompanying note 10 above and notes 53-55 below.

⁴⁶ Nousiainen, note 19 above, at 21.

⁴⁷ Riitta Martikainen and Päivi Yli-Pietilä, *Työehtot ja sukupuoli-sokeat sopimukset* (Terms of employment and gender-blind agreements) as cited and discussed in Anja Nummijärvi, *The Implementation of The Equal Pay Principle and Gendered Pay Structures in Perspectives*, note 19 above, at 82.

groups.⁴⁸ This circumstance has contributed to the elusiveness of equal pay for equal work or work of equal value. For example, in a case concerning a local Danish newspaper, *Vejle Amts Folkeblad*, the skilled female clerical workers claimed that they should be paid the same as skilled male typographers who were doing the same work (typing advertisements), but who were covered by a different collective agreement. The typographers' agreement provided for better pay than what the clerical workers received under their agreement, and the arbitral award (from February 1985) in favour of the employer stated that differences in vocational training justified the different rates of pay.⁴⁹ However, the award failed to explain how the difference in vocational training could justify a difference in pay where someone without that training is performing the same work.⁵⁰

2.3 *Adoption of Legislation Addressing Sex Discrimination in the Labour Market*

Sex equality legislation began to be introduced in Scandinavia in the mid-1970s as a number of circumstances combined in the 1960s and 1970s to create the necessary political conditions to motivate legislation addressing sex inequality in the labour market. First, Norway, Denmark and Sweden experienced the first large-scale entry of women into the labour market.⁵¹ This phenomenon was due in part to pronounced labour shortages.⁵² Second, in all four countries rapid urbanisation in the 1960s opened up new types of jobs, especially in services, which appealed more to traditional, socially feminine traits than to socially masculine traits.⁵³ In particular, a good portion of the care work that women had always performed without pay at home within the family was transferred in the 1960s to the public social, health and education sectors as part of the

⁴⁸ Ruth Nielsen, *The Enforcement of EU Sex Discrimination Law* in *Responsible Selves*, note 11 above, at 229.

⁴⁹ Arbitral award of 11.2.1985, published in *Tidsskrift* 1985, p. 185. For a discussion and critique of the case see Nielsen in *Responsible Selves*, note 11 above, at 228.

⁵⁰ Four years later, in 1989, the ECJ held in Case C-109/88 *Handels- og- Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening (acting for Danfoss)* [1989] ECR 3199, that vocational training could justify pay differences *if, and only if*, that training is relevant to the work actually performed.

⁵¹ As explained above, full-time work had been the norm for most Finnish women for a long time by this point.

⁵² Nousiainen, note 19, at 18-19 (referring to Norway and Sweden). In Denmark, the labor shortage in the 1960s and early 70s drew women and non-European immigrants into the labor market. With regards to immigrants in Denmark, see Roger Cohen, *For 'New Danes,' Differences Create a Divide* in *The New York Times* (Web version), December 18, 2000. Arnlaug Leira, note 15 above, points out that Norwegian women were the late-comers to the labour market, perhaps largely because of an especially strong cultural preference for the housewife-mother family. Leira supports this observation with the fact that Norwegian women did not enter the labor market on a large scale in the post-war period when labour was in such short supply that it was a serious impediment to post-war reconstruction.

⁵³ Nousiainen, note 19 above, at 19.

implementation of the modern Scandinavian welfare state.⁵⁴ Women continued performing their traditional care work, but now they performed it as paid workers in the public sector instead of as housewives.⁵⁵ Third, the social conditions of motherhood changed dramatically during the 1960s and 70s due to the introduction of the Pill and the liberalisation of abortion.⁵⁶ Suddenly women could decide if, when and how many children they would have. Women began marrying later and chose to have fewer children and postpone the arrival of the first child.⁵⁷ Postponement of childbearing meant that entering the labour market became a real possibility for married women. Indeed, married women accounted for a large part of the increased participation of women in the labour market, even though the welfare reforms that facilitated their entry into the labour market – such as public child care, home care allowances and lengthy paid maternity leave – still lay in the future.⁵⁸ Finally, sex equality began to register as an issue in political discourse as feminist movements emerged in Scandinavia in the 1970s.⁵⁹

⁵⁴ See Nielsen, *Kvindearbejdsret*, note 30 above, at 16-17, 25.

⁵⁵ In Denmark, women entered into waged work on a big scale in the public, not the private business sector. See Hanne Petersen, *Industrial Relations in the Public Sector in a Feminist Perspective*, at page 23, collection of papers presented at a Critical Legal Studies Conference in London, edited by Kirsten Ketscher (Copenhagen: 1986). By the mid-1980s the public sector in Denmark employed about 800,000 people, which represents more than 1/3 of the total Danish labor force, and 60% of public employees were women.

⁵⁶ Siim, note 27 above, at 36. The contraceptive pill was approved in Denmark in 1966, Norway in 1967 and Sweden in 1964. See *id.* and Leira, note 15 above, at 52. Women gained the right to decide on abortion first in Denmark in 1973, see Siim, note 27 above, at 36, then in Sweden in 1975 and in Norway in 1978. See Leira, note 15 above, at 52.

⁵⁷ Leira, note 15 above, at 52.

⁵⁸ See Nielsen, *Kvindearbejdsret*, note 30 above, at 33-34; Leira, note 15 above, at 57 and 63. The front end of the wave of married women entering the labour market took care of their childcare needs through use of part-time work—except in Finland where part-time work was not available—and informal childcare arrangements. Publicly funded collective day-care systems appeared on the political agendas of all the Scandinavian countries in the 1970s, but the end results have varied widely, Leira, note 15 above, at 58-59, which may indicate that the relationship between the availability of publicly funded childcare and women's employment may be more complicated than first appears. Denmark and Sweden have the most developed public childcare systems. *Id.* at 64. In Norway, political disagreement over the issue of childcare persisted into the late 1980s. As recently as 1989, when close to 70% of the Norwegian mothers of children under three were in the workforce, only 10% of these children had access to public childcare. *Id.* at 64-5. In Finland, laws guaranteeing a place in municipal day-care for every child were introduced in 1985 and 1986. At the same time, though, parents were offered a choice whereby one of them could remain at home to take care for children under three years old in exchange for a State allowance and the right to keep the job they had before going on child care leave. The result has been full time jobs for Finnish women since the 1980s but with long leaves of absence from work to care for small children. See Nousiainen, note 19 above, at 24-25.

⁵⁹ Strong feminist movements emerged in Denmark, Finland and Norway while a weaker form emerged in Sweden. See Joni Lovenduski, *Women and European Politics: Contemporary Feminism and Public Policy* 72 (Amherst, Massachusetts: University of Massachusetts Press 1986). Strong feminist movements were emerging in other European countries as well—including Britain, Italy and Holland. Weaker forms appeared in West Germany, France and Belgium.

The changes in women's reproductive behaviour and the blossoming women's movement eroded the basis of the social democratic distinction between the labour market and social dimension. Welfare state policies began to turn from emphasising the male-breadwinner model of the family to supporting women as economic providers. The goal pursued by the Scandinavian welfare state was economic and social equality built upon full employment and tax-funded, residence-based social security benefits. All, including women, were expected to contribute, through their work, and all, it was said, would benefit.⁶⁰

Legislation prohibiting sex discrimination on the labour market followed these developments. Denmark passed the first legislation in 1976 (Equal Pay Act) and 1978 (Equal Treatment Act), followed by Norway in 1978, Sweden in 1979, and then finally Finland in 1986.⁶¹ In Denmark's case, additional, perhaps decisive pressure, to adopt legislation in this area came from the developing sex discrimination law of the European Economic Community (EEC), which Denmark joined on 1 January 1973.⁶²

Because the circumstances leading to adoption of sex discrimination legislation and the end results vary considerably, I will briefly describe how the sex discrimination legislation of each country came about and what it provides before presenting a general assessment of Scandinavian legal approaches to sex discrimination in the labour market.

2.3.1 Denmark

As explained above, the basic rules of Scandinavian labour law are found in collective agreements and general principles of law, not in statutory provisions. Moves to introduce equal pay legislation in Denmark failed during the 1960s and early 70s because such legislation was considered incompatible with the Danish collective labour law tradition.⁶³ That tradition is based on the first important legal text in Nordic labour law, the Danish September Agreement of 1899, which includes a commitment on the part of labour organisations not to encroach upon the managerial prerogative of the employer, in particular, the employer's discretionary power in matters of recruitment, dismissal, and supervision and allocation of work. The labour organisations' commitment to respect the employer's managerial prerogative was given in exchange for the employers' recognition of the workers' positive right to unionise. From the

⁶⁰ See generally Nousiainen and Niemi-Kiesiläinen, in *Responsible Selves*, note 11 above.

⁶¹ Note that I am referring to the years the legislation was passed, not the years it became effective (usually only a difference of one year).

⁶² Finland's and Sweden's membership in the European Community has also influenced the development of employment discrimination law in those countries, but they became members a little more than 20 years later. Likewise, Norway's membership in the European Economic Area has meant that EC law on employment discrimination has had an influence in Norway as well, but again only since 1994.

⁶³ Ruth Nielsen, *Equality in Working Life: Legislation, Positive Action and Introduction of New Technology* in Ruth Nielsen, editor, *Women's Law in Scandinavia* (Copenhagen: Kvindevidenskabeligt Forlag 1982). See also Ruth Nielsen, *The Enforcement of EU Sex Discrimination Law in Scandinavia* in *Responsible Selves*, note 11 above, at 224-227.

beginning, managerial prerogative was understood to include freedom to discriminate on grounds of race, sex, or any other factor.⁶⁴

Nevertheless, Denmark dutifully adopted a statute on equal pay in 1976 in order to implement the EEC's Equal Pay Directive (Directive 117/75/EEC). Although the Directive mandated equal pay for both equal work and work of equal value, Denmark's Equal Pay Act of 1976 mandated equal pay only for equal work. This wording was taken from the collective agreement between the Danish LO and DA of 1973.⁶⁵ Although both LO and DA agreed that "equal work" was to be interpreted as including also work of equal value,⁶⁶ the EC Commission was not satisfied with this informal way of implementing Community legislation.

The Commission initiated an enforcement procedure against Denmark, and the European Court of Justice (ECJ) ultimately ruled against Denmark in 1985.⁶⁷ While the ECJ was willing to permit Member States to leave the implementation of the equal pay principle in the first instance to representatives of management and labour, it did not regard such implementation as discharging the obligation of ensuring, by appropriate legislative and administrative provisions, that all workers are afforded the full protection provided for in the Directive. As a result of this ruling, Denmark was required to amend its equal pay act, which it did in 1986.

A number of smaller changes were made to the Equal Pay Act in 1989, 1992, and 2000, but the only change of real significance was made in 2001, when Parliament passed Law number 445 of 7 June 2001. That law required employers with 10 or more employees to provide pay information on all employees upon request to an employee, trade union, or the Equality Board⁶⁸ and established the right of an employee to share information about his own pay with anyone he or she chooses.⁶⁹ Previously, it was common practice for employers to forbid their employees from sharing with each other information about their own pay. The new law had the obvious purpose of eliminating those practices and making it easier to discover and prove instances of pay discrimination.

Denmark implemented the Equal Treatment Directive by adopting the Equal Treatment Act in 1978. Once again the Commission threatened Denmark with an enforcement procedure because the Danish legislation required that the differential treatment alleged to be discriminatory should involve workers at the same workplace. This provision was removed in March 1984. In 1989 the law on maternity leave was combined with the Equal Treatment Act in 1989, five years before the implementation deadline for the 1992 Community Directive on

⁶⁴ Nielsen, *Enforcement of EU Sex Discrimination Law* in *Responsible Selves*, note 11 above, at 225.

⁶⁵ Nielsen and Halvorsen, note 13 above, at 193.

⁶⁶ *Id.*

⁶⁷ See Case 143/83 *EC Commission v Denmark* [1985] ECR 427.

⁶⁸ Section 5a of the Act provides that the pay statistics must be based on wages paid within the entire business, divided by sex and by the other criteria relevant to determination of pay. Furthermore, the employer may not provide statistics on groups of less than 5 employees.

⁶⁹ Section 2a.

protection of pregnant and breastfeeding women.⁷⁰ A number of smaller changes were made to the Act after that, primarily to implement the Community Directives on pregnant and breastfeeding women (to the extent the protections provided there were not yet provided by Danish law) and the burden of proof in sex discrimination cases.

The wording of section 1 of the Danish Equal Treatment Act, implementing Article 1 of the Equal Treatment Directive, follows the Directive's wording quite closely. Like the Directive, it prohibits both direct and indirect discrimination, and includes only a definition of indirect discrimination. The only difference between the Directive and the Danish Act is that the Danish Act mentions pregnancy in addition to marital or family status as prohibited grounds for discriminating against women. Departing somewhat from the precise wording of the Directive, the Equal Treatment Act also prohibits positive action without special permission – originally from the Equality Council,⁷¹ but now, after the Council was abolished by the new Equality Law in May 2000, from the appropriate government Minister.⁷²

In terms of legal priority, both the Equal Pay and Equal Treatment Acts are subordinate to collective agreements that contain equivalent equality provisions.⁷³ The general rule in Denmark is that a union member who has a right under a collective agreement must leave it to the trade union, which is a party to that agreement, to seek enforcement of the right before the Industrial Arbitration Boards (IABs).⁷⁴ As equal pay is generally guaranteed in collective agreements, few equal pay disputes go to the civil court system, but rather are normally decided by IABs.⁷⁵ Although most collective agreements include equal treatment provisions, Danish unions tend to bargain much less on equal treatment issues than on pay issues and pregnancy-related issues have not been

⁷⁰ Directive 92/85/EEC. See Agnete Andersen, Ruth Nielsen, Kirsten Precht, *Ligestillingslovene med kommentarer* (Copenhagen: Jurist- og Økonomforbundets Forlag, 4th edition, 2001).

⁷¹ However, pursuant to §13, paragraph 4 of the Equal Treatment Act, the Ministry of Labor issued order (*bekendtgørelse*) number 757 of 5 December 1989, regarding exemptions from this requirement. The Equality Council was composed of representatives from the labour market organisations, women's organisations and academia.

⁷² According to Section 3 of the 2000 Equality Law, the Minister for Sex Equality can lay down general rules for positive action measures while each of the other Ministers has authority, within the subject area covered by their Ministry, to grant special permission to employers to adopt positive action measures.

⁷³ Ruth Nielsen, *Lærebog i Arbejdsret* 215 (Copenhagen: Jurist- og Økonomforbundets Forlag, 8th edition, 1998).

⁷⁴ However, if the employee's trade union will not seek enforcement of his or her rights in the industrial arbitration system, the employee may bring the claim in an ordinary court. See 1994.953H (a 1994 decision by the Danish Supreme Court expressly holding that section 11(2) of the Act on Labour Law (*Arbejdsretsloven*) must be interpreted, consistently with Article 6(1) of the European Convention on Human Rights, as permitting an individual to bring his claim for back-pay in connection with wrongful termination in the ordinary courts when the trade union refuses to pursue the case in the unions' arbitration system).

⁷⁵ Kilpatrick, *Gender Equality: A Fundamental Dialogue*, note 41 above, at 79.

covered at all in collective agreements.⁷⁶ Thus, a series of equal treatment cases concerning pregnancy-related issues and sexual harassment have gone to the ordinary courts.

Denmark has adopted only a couple of sex equality measures that were not required to implement EC legislation: (1) the law on maternity leave, which was combined with the Equal Treatment Act in 1989 and (2) the Act on Equality between Women and Men (Equality Act),⁷⁷ which was passed on 30 May 2000.

The 2000 Equality Act represents an effort to mainstream the prohibition against sex discrimination in all areas of Danish law. It lays down a general prohibition against differential treatment on grounds of sex in all fields of society and introduces a private law remedy of compensation for both economic and non-economic loss available to all aggrieved individuals. Most relevant to the labor market is the new machinery the Act establishes for the enforcement of both the new general Equality Act and the older equal pay and equal treatment legislation. The Act dissolved the Equality Council and established instead a new Equality Board, which is empowered to hear complaints of alleged sex discrimination in violation of the Equality Act, the Equal Pay Act, the Equal Treatment Act and legislation on equality in respect of occupational pension schemes⁷⁸ (hereinafter referred to collectively as the “sex equality legislation”). The Equality Board can also hear workers’ complaints of breach of collective agreements that contain the same prohibitions against sex discrimination as those found in the sex equality legislation if the aggrieved individual shows that the relevant trade union is unwilling to pursue the case. The Equality Board is only permitted to decide cases on the basis of a written record. It cannot hear testimony. The Equality Board can award compensation and set aside dismissals when those remedies are provided for in the sex equality legislation.⁷⁹ Compensation covers both economic and non-economic loss. Once the Equality Board has made a decision, either one of the parties can bring the case before an ordinary court. The Equality Board must also refuse to handle cases that it regards as better suited to handling in the courts, for example sexual harassment cases, which often require hearing witness testimony.⁸⁰ Otherwise, if one of the parties does not comply with the Board’s decision or a settlement agreed upon before the Board, the Minister for Sex Equality must, upon request and on behalf of the wronged party, bring the case before the courts.

Legal practice under the Danish sex equality legislation has not amounted to large numbers of cases. Until the mid-1980s the Equal Pay Act was simply not used much. This situation changed when some of the bigger unions recognized

⁷⁶ *Id.* at 86 and Nielsen, *Lærebog*, note 73 above, at 215-16.

⁷⁷ Lov nr. 388 of 30 May 2000 om ligestilling mellem kvinder og mænd.

⁷⁸ The law on occupational pension schemes, Lov nr. 134 of 25 February 1998, implements Directive 96/97/EF on the implementation of the principle of equal treatment for men and women in occupational social security schemes.

⁷⁹ There are ceilings on the amount of compensation awardable for termination of employment: 39 weeks pay for termination not based on pregnancy or maternity leave, *Ligebehandlingsloven* § 15 Stk. 2. and 78 weeks pay for pregnancy-related termination. § 16 Stk. 3.

⁸⁰ Andersen, Nielsen, Precht, note 70 above, at 357.

the potential for winning important changes in pay structures in the national and E.C. rules on equal pay. As of the year 2001 legal practice in the area of equal pay comprised about 30 arbitration decisions within the trade union system and 35 judicial decisions by the ordinary courts, most of which were decided after 1989.⁸¹ In addition to equal pay, legal practice in the area of sex discrimination in employment has concentrated on the issues of pregnancy-related discrimination (especially termination) and sexual harassment.⁸² The Equality Board has handed down 30 decisions since its establishment by the Equality Act of 2000, twenty-six of which were handed down in 2001.⁸³ However, only 16 of those cases had to do with employment, seven of which concerned pregnancy-related discrimination. The remaining 9 included a complaint of discrimination in connection with child-care leave, five employment announcement cases, one discriminatory hiring, one discriminatory termination (in both the hiring and termination cases, the complaining parties were men in traditionally female occupations), and one equal pay case. The majority of the decisions were either in favour of the employer or refused to decide the case on the grounds of the limited competence of the Board to consider any evidence other than documents.

2.3.2 Norway

Norway is not a member of the European Union, but of the European Economic Area (EEA) with Iceland and Liechtenstein. The EEA Agreement, was signed in May 1992 and went into force January 1, 1994. The EEA Agreement obligates the parties to implement and enforce Community discrimination law.⁸⁴ Norway's involvement in the development of sex equality law precedes its membership in the EEA by several decades, however, beginning with the establishment of an Equal Pay Council in 1959 upon Norway's ratification of the ILO Convention No. 100.⁸⁵ By the early 1970s, when the women's movement was beginning to peak in Europe, sex discrimination legislation became an issue in Norway's parliamentary elections. In the campaign leading up to the

⁸¹ *Id.* at 87.

⁸² *Id.* at 8.

⁸³ A list of the Board's decisions is available at the Board's homepage, "<http://www.ligenaevn.dk>".

⁸⁴ This obligation applies to the principles of equal treatment and equal pay as established by Article 141 (formerly 119) of the EC Treaty, the various directives concerning equal treatment and equal pay, and the European Court of Justice's case law interpreting these provisions. *See* Article 6 of the EEA Agreement, which requires that the provisions of the EEA Agreement, "in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community" and to acts adopted under that Treaty should be "interpreted in conformity with the relevant rulings of the Court of justice of the European Communities given prior to the date of signature of this Agreement." Article 69 of the EEA agreement requires the parties to implement the principle of equal pay for equal work and refers to Annex XVIII for the specific provisions for implementation. Article 70 requires the parties to "promote the principle of equal treatment for men and women by implementing the provisions specified in Annex XVIII."

⁸⁵ *See* Anne Lise Ryel, *The Nordic model of gender equality law* in *Sex Equality Law in the European Union*, note 7 above, at 358.

parliamentary elections in 1973 the Labour Party promised that it would submit a proposal to ban discrimination against women in all areas of society.⁸⁶ The background for this promise was the fact that despite formally equal rights in most areas, women were consistently worse off than men in the home, the labour market and the rest of society. Statistical reports showed that women's participation in the labour market varied far more than men's according to marital status, age, number of children, and educational level.⁸⁷ A large number of women worked part-time. Overall, women in the labour market had lower ranking and lower-paid jobs than men.

After the election a working group was established to prepare a legislative proposal. The final draft was finished in the summer of 1974 and sent out to a series of institutions and organisations for hearing, of which 68 expressed opinions.⁸⁸ The general attitude was positive with regard to the idea that a sex equality law should be prepared, but there was substantial disagreement with regard to the actual content of the proposal. One of the exceptions to the generally positive attitude was the Norwegian Employers Association, which was of the opinion that there was no need for a sex discrimination law because sex equality could be furthered through other means.⁸⁹

In March 1975 the Government submitted a proposal to the Parliament for a law on equality between the sexes. The proposal was based on the working group's draft and the statements of the different parties who had participated in the hearings. The proposal was not in the form of a law banning discrimination against women, as the Labour Party had suggested in its 1973 campaign, but as a largely gender neutral law on equality between the sexes.⁹⁰

Parliament's Social Committee had the job of reviewing the proposal and gave its opinion to Parliament in 1976. A majority on the committee recommended that Parliament reject the proposal, but for widely different reasons.⁹¹ The main reasons concerned disagreement over whether the purpose of the law should be equal treatment or eliminating discrimination against women specifically, whether the law should affirmatively aim to improve women's position or be gender neutral in approach, and how the law should (or should not) apply to the social partners.⁹²

A new proposal was submitted to the Parliament in June 1977. This proposal largely followed the same path marked by the first one, although it did to some extent take into account the comments and criticisms it had evoked, and which had led to its ultimate rejection.⁹³ After yet another parliamentary election in

⁸⁶ Gudrun Holgersen, *Likestillingsloven 12* (Universitetsforlaget 1984).

⁸⁷ *Id.* at 11.

⁸⁸ *Id.* at 12.

⁸⁹ See Elisabeth Vigerust, *Arbeid, barn og likestilling: Rettslig tilpasning af arbeidsmarkedet* (Work, the child and equality: adaptation of the labour market through law) (Oslo: Tano Aschehoug 1998) 94.

⁹⁰ Holgersen, note 86 above, at 12.

⁹¹ See *id.* at 12-13.

⁹² See Odelting proposition (Ot.prp.) nr. 77 (2000-2001).

⁹³ *Id.* at 13.

1977 the new proposal was taken up for consideration. The Social Committee gave its opinion in May 1978. This time the majority agreed that the proposal should be adopted, and Parliament passed it unchanged on 9 June 1978.⁹⁴ The Sex Equality Act (*Lov om likestilling mellom kjønnen*) became effective 15 March 1979.

According to §2, the Sex Equality Act applies generally to all areas of social life, with the exception of situations internal to the church. Note that formally at least, the Act applies to family life and personal relationships, reflecting the Government's view that family life is one of the most important areas of social life where sex discrimination occurs, and that to permit an exception for it would reflect the view that sex discrimination is acceptable so long as it concerns actions that occur in the home.⁹⁵ Military service is the only additional exception to the ban on sex discrimination.⁹⁶

The Sex Equality Act's provisions on equality can be divided into two groups. In the first group, §3, is the general rule prohibiting differential treatment of the sexes in all areas. In the other group (§§4-8) is a series of specific rules regulating the equal treatment principle within certain areas of social life. These rules apply to job announcements and hiring, pay,⁹⁷ education, school curriculum,⁹⁸ and associations. The basic rule is that the sexes should be treated equally, however, a certain amount of room for differential treatment is provided in the third paragraph of §3 where it is deemed necessary to grant special advantages to one gender group in the short term in order to increase the possibility of achieving equality in the long term.

Enforcement issues are dealt with in §§10-14 of the Act. Section 10 provides that the King (in actual practice, the Government) shall appoint an Equality Ombudsman to serve 6-year terms. The Ombudsman's function is to oversee compliance with the Act, and he or she may act on his/her own initiative or on the basis of reports from others. The Ombudsman must try first to achieve voluntary compliance and does not have the authority to issue binding orders. Where the Ombudsman is unable to persuade an employer to comply voluntarily with the Act, he or she may refer the case to the Sex Equality Complaint Board, which does have the power to issue binding orders. The seven members of the Complaint Board are appointed by the King and handle cases brought to them by the Ombudsman or by a party in a case or by someone who has raised a case without being party to it. The Board must give reasons for its decisions, and its decisions can be brought to court for full review.

Intentional or negligent violation of the Act triggers civil liability for compensation under § 17. No criminal liability attaches directly to violations,

⁹⁴ *Id.* at 14.

⁹⁵ *Id.* at 22.

⁹⁶ *Id.*

⁹⁷ The Act includes the principle of equal pay for work of equal value without specifying how the "value" of a specific job is to be determined.

⁹⁸ §7. The Act prohibits the use of materials in schools and universities that contain directly sex discriminatory expressions or otherwise express a discriminatory attitude toward one sex.

but §18 provides that intentional or negligent failure to abide by decisions taken by the Board or Ombudsman trigger criminal fines.

The Sex Equality Act has been amended a number of times since its adoption. Among the most significant changes were introduction of rules about gender representation in publicly appointed committees, councils, and other bodies.⁹⁹ Those rules were later changed several times, first in 1983, then 1987 and 1988.¹⁰⁰ These changes ultimately resulted in the requirement that public decision-making bodies should consist of at least 40% of each sex. In 1995 another law introduced a provision providing a legal basis for the adoption of positive action measures directed towards men seeking education and work involving caring for or teaching children.¹⁰¹ At the same time rules regarding a divided burden of proof were introduced.

Legal practice under the Sex Equality Law consists primarily of the Ombudsman's handling of complaints.¹⁰² The Ombudsman's office handles between 200-300 written cases per year, while the Complaint Board handles roughly 10 cases per year and the total number of court decisions to date number in the tens – most by the lower courts.¹⁰³ The cases have clustered around the issues of equal pay, employment announcements and hiring, and pregnancy and leave.¹⁰⁴

Disappointment with the pace of progress towards sex equality has prompted another proposal for a major revision of the Sex Equality Act. On 27 April 2001 the Government's Ministry of Children and Family Affairs submitted a proposal to Parliament to amend the Sex Equality Act.¹⁰⁵ Because Parliament did not finish reviewing the proposal during the election period in which it was submitted, the Ministry had to resubmit the proposal for review on 5 October 2001. It is still currently under review at this time (February 2002). The contemplated revisions are intended, according to the Ministry's proposal, to respond to social developments since passage of the original law, including developments in European Community law.¹⁰⁶ In particular, the proposal takes note of the fact that increasing numbers of women obtain a higher education and have since the beginning of the 1990s comprised over half of the students at the higher educational institutions. At the same time however, statistics show that women consistently receive lower pay than men, are underrepresented in positions of leadership and make up the majority of part-time workers. In light of these developments, the Ministry concludes that Norway has not come far enough in its efforts to achieve sex equality.

⁹⁹ Lov 12 June 1981 Nr. 59 (*See* Odelting proposition nr. 67 (1980-81).

¹⁰⁰ *See* Law of 25 March 1983 nr. 12; Law of 5 June 1987 nr. 25 and Law of 19 February 1988 nr. 6., Ot. Prop. Nr. 53(1981-82), Ot. Prp.nr. 85 (1986-87) and Ot prop. Nr. 29 (1994-95).

¹⁰¹ Law of 30 June 1995 nr. 43, *see* Ot. Prp. Nr. 29 (1994-95).

¹⁰² Elisabeth Vigerust, note 89 above, at 64.

¹⁰³ *Id.* at 66.

¹⁰⁴ *See* Ombudsman's homepage at "<http://www.likestillingsombudet.no/om/nokkeltall.html>".

¹⁰⁵ Ot.prp. nr. 77 (2000-2001).

¹⁰⁶ *Id.*

To address the gap between women's qualifications and their employment profile, the Ministry proposes to require public and private undertakings to actively work toward sex equality. Besides imposing a general obligation to promote sex equality, the proposal would also impose an obligation on companies that are required by law to produce annual reports to include in those reports sections describing the sex equality situations in their workplaces and what is being done to bring about sex equality and prevent discrimination. Public authorities and undertakings that are not required to prepare annual reports would be required to provide the same information in the annual budgets. These requirements would be enforced by the Ombudsman.

Other suggested provisions to make the Act more stringent include changing the definitions of direct and indirect discrimination so that they correspond more closely to European Community law and the practice of the Equality Ombudsman; changing the provision on equal pay, §5, so that comparisons across occupations and collective agreements are clearly permitted and specify the factors to be considered in determining what is work of equal value; giving the Complaint Board the authority to declare, independently of a concrete case, whether a collective agreement violates the Sex Equality Act, thereby pushing the parties to submit the agreement to the Labour Court for a legal decision; introducing a provision for compensation regardless of whether the person discriminated against has suffered economic loss, as currently required by Community law; introducing a new §8a obligating employers, organisations and educational institutions to prevent sexual harassment, which would be enforceable by the Ombudsman and Complaint Board plus a general prohibition of sexual harassment which would apply to society as a whole and could be enforced by the ordinary courts; and a new §3a providing that unequal treatment in accordance with the goal of the law to promote sex equality does not violate the prohibitions against direct or indirect discrimination.

2.3.3 Sweden

While Denmark has enacted most of its employment discrimination legislation under the pressure of its European Community membership, Sweden did not join the European Community until 1995 – a good twenty years after changes in the labour market and the women's movement generated the political climate in which sex discrimination in employment could become an acceptable subject for legislative action. Accordingly the Swedish legislation addressing sex discrimination in employment was more the product of domestic political developments than it was in Denmark.

The question of whether legislation against sex discrimination in the labour market should be adopted was discussed in the Swedish Parliament beginning in 1970.¹⁰⁷ However, the idea was initially rejected because the majority felt that equality between men and women in employment could and should be achieved through cooperation and education, and that such efforts should be left in the

¹⁰⁷ SOU 1990:41 *Tio år med jämställdhetslagen—utvärdering och förslag* (Ten Years with the Equal Opportunity Law") at 55.

first instance to the social partners.¹⁰⁸ In 1972, Olaf Palme's government established a delegation to study various aspects of sex equality, including laws and experiences in other countries.¹⁰⁹ The delegation concluded in its report that legislation was not desirable because it would not have the desired effect. It was felt that legislation would make positive action measures more difficult and primarily address only obvious discrimination in individual cases.¹¹⁰

Meanwhile, work on a new constitution, which had been underway since the late 1950s, was drawing to a close. The final proposal, submitted to Parliament in 1972, included various constitutional guarantees of equal treatment of men and women and was ultimately approved with regard to all the central provisions in 1974.¹¹¹ The new constitution came into force on 1 January 1975. There is a general provision guaranteeing equal rights to men and women¹¹² while public employees are protected from discrimination by provisions requiring that appointments to posts within the State administration be made only on the basis of objective factors such as length of service and competence.¹¹³ Accordingly, discrimination on the basis of gender or ethnic background, or any other non-objective factor, is prohibited. Municipal employees enjoy constitutional protection from discrimination under Chapter 1 Section 9 of the Constitution, which requires municipal officials to observe the equality of all persons under the law and to perform their functions objectively and impartially.¹¹⁴ On the basis of this provision, it has become customary to evaluate applicants for municipal posts, including jobs in all public institutions such as schools and hospitals, according to a merit system like that used in the state sector.¹¹⁵

In 1976 the Government proposed to amend the new Constitution to include an additional prohibition against sex discrimination by the public authorities.¹¹⁶ Parliament approved the proposed amendments the same year.¹¹⁷ Chapter 2 Section 16 now states: "No law or other decree may imply discrimination against any citizen on account of sex, unless the relevant provision is part of an

108 *Id.*

109 *Id.* at 56.

110 *Id.*

111 See generally Gustaf Petrén and Hans Ragnemalm, *Sveriges Grundlagar* (Stockholm: LiberFörlag 1980) 13-15.

112 See Chapter 1 §2(3), *Regeringsformen* (the Instrument of Government, one of the four instruments making up the Swedish Constitution.) The provision in Swedish reads ("Det allmänna skall tillförsäkra män och kvinnor lika rättigheter...").

113 Chapter 11 Section 9(2), *Regeringsformen*.

114 This provision is a statement of the objectivity principle which applies in Swedish administrative law. See Eklund, note 7 above, at 338.

115 Ann Numhauser-Henning, *Discrimination in Employment: Swedish National Report to the 15th World Congress of the International Society of Labour Law and Social Security* (Lund: Norma 1996:2) 3.

116 SOU 1990:41, note 103 above, at 56.

117 *Id.* at 57. These amendments were added to the Instrument of Government now in force, which was adopted in 1974 and became effective 1 January 1975.

effort to bring about equality between men and women...¹¹⁸ Thus, all Acts of Parliament and other legal regulations – no matter what the subject matter – must fulfil the basic formal requirement of non-discrimination.

While public sector employees could claim constitutional rights to equal treatment from 1 January 1975, strong opposition from the trade unions and organized employers blocked progress on legislation prohibiting sex discrimination in private employment until the end of the 1970s. The social partners persistently tried to fend off legislative intervention by doing something about the issue themselves. In 1977, the major social partners entered into two collective agreements that were intended to implement the principle of equal treatment through the application of some affirmative action measures, and they wanted to assess the effects of those agreements before Parliament took any legislative action.¹¹⁹ Nevertheless, a commission appointed by the non-socialist government after the national elections in 1976 submitted a report entitled “Report on Sex Equality in Working Life”¹²⁰ which included proposals implying the desirability of more intervention. Especially galling to the social partners was the suggestion that their collective agreements on sex equality must include provisions equivalent to the affirmative measures contemplated by the proposed Act *and* that the Equal Opportunities Ombudsman should be given powers to supervise the collective agreements.¹²¹ The Social Democrats accordingly heavily criticized the suggestion of placing collective agreements under the supervision of an ombudsman and would not support a legislative proposal that included any provisions establishing an Ombudsman for Equal Opportunities.¹²²

The Government partially yielded to this criticism and submitted a legislative proposal giving broad powers to the social partners with respect to the affirmative measures laid down in section 6 of the 1979 Act. In essence, the social partners were permitted to agree on their own affirmative action measures and incorporate them into their collective agreements, which would apply instead of the measures required by Section 6 of the new Act – even if the measures agreed upon were not as effective as those required in Section 6. These agreed upon measures then would be beyond the scope of the Ombudsman’s supervisory powers. The revised proposal finally passed with a one-vote majority in Parliament after the Liberal election victory in 1979.¹²³

The basic structure of the Act consisted of three parts: 1. general and specific prohibitions against sex discrimination (Sections 2-5); 2. affirmative measures to be undertaken by employers (Sections 6-7); and 3. enforcement (Sections 8-9) and establishment of the office of Equal Opportunity (EO) Ombudsman (Sections 10-21). The purpose of the Act is stated in Section 1 as being to further

¹¹⁸ Contrary to the immediate impression given by Section 16, it has not been interpreted as providing a basis for affirmative action in hiring. *See* Eklund, note 7 above, at 338.

¹¹⁹ Eklund, note 7 above, at 340.

¹²⁰ SOU 1978:83, *Jämställdhet i Arbetslivet*.

¹²¹ Eklund, note 7 above, at 340 (citing SOU 1978:83 at 130, 172, prop 1978/79:175 at 24-25).

¹²² SOU 1990:41, note 103 above, at 59.

¹²³ Proposition 1979/80:56, Jämställdhetslag SFS 1979:1118, reprinted after a few adjustments and issued as SFS 1980:412).

women's and men's equal rights in issues relating to work, working conditions and opportunities for advancement and development.

Discrimination against employees and applicants on the basis of sex was generally prohibited by Section 2 of the Act. Section 3 established a presumption of discrimination where an applicant is hired or promoted (or selected for training leading to promotion) instead of another applicant of the opposite sex who is in fact better qualified. The employer could rebut the presumption by proving that the decision was not based on the sex of the applicants, or that it was part of an effort to further equal opportunity, or that it could be justified on the basis of some other special interest that outweighs the interest in equal opportunity. Section 4 contained three additional specific prohibitions against discrimination covering (1) poorer employment conditions (including wages) for equal work or work of equal value, (2) distribution and management of work, and (3) termination and transfer. The 1980 law did not apply to actions, measures or requirements of the employer during the recruitment process. Only the actual decision to employ or promote someone was subject to the ban on discrimination. The justification for this rather large exception from the law's scope was a concern about fulfilling the requirements of foreseeability and legal security in light of the fact that the rules are enforced with compensation awards.¹²⁴

The affirmative measures to be undertaken by the employer (and from which the unions could derogate by collective agreement) were described generally as "goal-directed work for the active furtherance of equal opportunity in employment."¹²⁵ More specifically, Section 6 required employers to make special efforts to achieve equal representation of both sexes within the workplace and within job categories. What kinds of measures should be adopted were to be judged according to the resources available to the employer.

The enforcement options for individuals not covered by collective agreements included civil actions brought directly by them in the civil courts of first instance or on their behalf by the Equal Opportunity Ombudsman in the Labour Court, though the Ombudsman must first find that the case raised important legal questions of principal that should be resolved by the Labour Court. The possibility of group actions, like the American class action, was not provided. If the individual is a member of a trade union, he or she could not bring his or her own lawsuit, but must rely instead on the trade union to pursue his or her claim in the Labour Court. If the trade union decided not to proceed, the Ombudsman could bring the case to the Labour Court, again with the caveat that the case raised important legal issues. The District and Labour Courts could order compensation in the form of damages, although compensation for economic loss caused by the employer's discriminatory failure to hire or promote was not available, nor could the court order the employer to hire or promote the wronged individual. Employers subject to section 6, i.e. those not excluded by virtue of a collective agreement, could be fined by the Ombudsman for failure to fulfil their

¹²⁴ Lotta Lerwall, *Könsdiskriminering: en analys av nationell och internationell rätt* 65 (Uppsala: Iustus Förlag 2001).

¹²⁵ In Swedish, "målinriktat arbete för att aktivt främja jämställdhet i arbetslivet."

obligations. Finally, the Act required the Ombudsman to provide advisory and information services, and, when handling claims of discrimination, to first seek to persuade employers to comply with the Act's provisions voluntarily.

The Equal Opportunity Act has been amended several times since its adoption in response to various criticisms that have arisen in the course of experience with its application. During the 1980s, the criticisms related primarily to the scope of the definitions of sex discrimination, difficulties in enforcing the equal pay principle, the exclusion of employers covered by collective agreements from application of the Act's provisions requiring affirmative measures to further sex equality,¹²⁶ and the Act's silence on the issue of sexual harassment.¹²⁷ Some relatively minor changes were made in 1985, relating to, for example, deadlines for filing complaints, the right of employees and applicants passed over for promotion and hiring to obtain information from employers about their decisions, and reimbursement of costs accrued by persons cooperating in the Ombudsman's investigations.¹²⁸ The criticisms of the Act continued, however, and the Government appointed an investigator in 1988 to look into them. A report was produced in 1990, which essentially concluded that most of the progress towards sex equality had already taken place before the 1980s, and that although the Act should not be considered inconsequential on that account, the pace of change had been too slow.¹²⁹ Thus, the report called for making the Act more stringent. Parliament received the report favourably and quickly replaced the 1979 Act with a new Equal Opportunities Act in 1991.¹³⁰

The 1991 Act did not change the basic structure or approach of the 1979 Act, but it did present a stricter approach to sex discrimination by broadening the scope of its application and improving its enforcement mechanisms. For example, the 1991 Act added a prohibition of sexual harassment by the employer,¹³¹ explicitly prohibited both direct and indirect discrimination,¹³² and eased the requirements for proving unequal pay for work of equal value.¹³³ It

¹²⁶ As it turned out, none of the social partners took any affirmative action of the kind envisaged by section 6. *See* Eklund, note 7 above, at 340.

¹²⁷ These criticisms are summarized in SOU 1990:41 at 17-30 (*see* pages 31-46 for a summary in English).

¹²⁸ SFS 1985:34. *See also* SOU 1990:41, note 84 above, at 65-66.

¹²⁹ SOU 1990:41, note 103 above, at 33, in the English summary of the report.

¹³⁰ Jämställdhetslag, SFS 1991:433.

¹³¹ Section 22, SFS 1991:433.

¹³² Section 15 reads, "Med könsdiskriminering avses i denna lag att någon missgynnas under sådana omständigheter att missgynnandet har ett direkt eller indirekt samband med den missgynnades könstillhörighet". (my translation: "Sex discrimination occurs when someone is disadvantaged in situations where the disadvantage has a direct or indirect connection with the person's sex").

¹³³ Section 4 of the 1979 Act stipulated that sex discrimination with regard to pay for work of equal value occurred when two employees of the opposite sexes were paid differently when "the work in question, ... is of equal value according to the job evaluation agreed upon". The 1991 Act removed the requirement of an agreed upon evaluation. Where there is an accepted or recognized job evaluation, it may still be applied by the court, provided that they are not sex-discriminatory. If no job classification system is found, the 1991 Act provided that a job evaluation may be based on other evidence, such as hearings of

also extended and reformulated the provisions relating to the affirmative measures required of employers not covered by collective agreements. Instead of a loose requirement that affirmative measures be undertaken, the 1991 Act specified what measures should be undertaken. Every employer (not covered by a collective agreement) with at least ten employees would be required to prepare, each year, a plan in relation to the work for equality between men and women at the workplace.

One change that is difficult to assess in terms of whether it represents an advance is Section 17 of the Act, which provided a new presumption of discrimination in cases where the plaintiff was only equally qualified, not better qualified as Section 16 requires, than a person of the opposite sex. The problem with seeing Section 17 as expanding the scope of the prohibition very much is that besides showing that he/she was (merely) equally qualified, he/she would also have to show that "it is probable that the employer aimed to discriminate on grounds of sex." Evidence of such intentions is often hard, if not impossible, to obtain.¹³⁴

The 1991 Act was amended in 1994 to tighten up, once again, certain perceived deficiencies with the Act. The positive action measures were reformulated, expanded and finally made mandatory even for employers covered by collective agreements, and they were made subject to the Ombudsman's supervisory authority.¹³⁵ Further, a provision requiring employers to report annually on wage differences between male and female workers was inserted.¹³⁶ In 1998, a provision on sexual harassment was added, obligating employers to take measures to prevent sexual harassment, backed up by the possibility of being required to compensate employees who suffer damage as a result of failure to do so.

The Equal Opportunities Act was amended once again in 2001, largely to meet Community law requirements.¹³⁷ The Government appointed a Committee in 1998 to review certain parts of the Act in light of EC law. The provisions under review were the prohibition against discrimination, compensation for violation of the prohibitions against discrimination, wage surveys, *locus standi*, and issues related to work evaluation for purposes of determining equal value.¹³⁸ Based on the committee's report, the Government prepared the following amendments to the Equal Opportunities Act:¹³⁹ (1) a definition of indirect discrimination; (2) the prohibition of sex discrimination was extended to cover

witnesses or experts in court. See Section 18 of the 1991 Act and Eklund, note 7 above, at 351-55.

¹³⁴ See Lynn Roseberry, *The Limits of Employment Discrimination Law in the United States and European Community* (Copenhagen: DJØF 1999) 186-87.

¹³⁵ Section 12. A recent survey has revealed that only one in four employers actually prepares an annual plan. See *Bulletin: Legal Issues in Equality* No. 2/2001 (European Commission: Directorate General for Employment and Social Affairs) at 38.

¹³⁶ Section 9a.

¹³⁷ See SOU 1999:91 at 17.

¹³⁸ *Id.*

¹³⁹ See Proposition 1999/2000:143. See also *Bulletin: Legal Issues in Equality* No. 1/2000 at 104.

the entire recruitment process irrespective of whether any employment decision was taken in the matter and without any requirement of a comparison against a person of the opposite sex; (3) a definition of work of equal value; (4) the principles of the Community's burden of proof directive would be applied in all situations, including wage discrimination disputes (this amendment went further than the Committee's recommendation); (5) the rule on annual wage surveys, §9 in the Act, would be amended to specify that the purpose of these surveys is to discover and prevent wage discrimination and that the surveys must include an action plan with calculations of the cost of making any wage adjustments and a timetable for such adjustments that must not exceed three years; (6) all employers – not only those with ten or more employees – must analyse their payroll to make sure that they are respecting the equal pay principle, although employers with fewer than ten employees will not be obliged to draw up written action plans. The unions would be entitled to receive restricted information on individual wages if such information is considered necessary for a serious discussion of the causes of certain wage differentials with the employer. The rules on wage surveys would be enforceable by either the EO Ombudsman or a union bound by a collective agreement, who could call for an order, backed up by conditional fines, to force an employer to comply.

The Government's proposal was adopted with some minor clarifications in October 2000 with an effective date of 1 January 2001. The most controversial part of the bill was the rules prescribing wage surveys and action plans to eliminate wage discrimination.¹⁴⁰ The proposal to entitle unions to obtain information on salaries of members of other unions and of unorganised workers was particularly controversial as it is contrary to the tradition in the private sector labour market of keeping pay information secret. In addition, members of the Conservative Party argued that the wage gap probably has nothing to do with sex discrimination, but is rather caused by the segregated labour market, and that the problem should be solved by increased competition and privatisation of the public sector.¹⁴¹

Legal practice under the Equal Opportunities Act appears to consist primarily of cases handled by the Ombudsman. In the report on the first 10 years of the Act, the number of cases brought by individuals in the ordinary courts was described as insignificant based on the fact that during the previous three years no cases had been brought in the ordinary courts in the three largest metropolitan areas of Stockholm, Göteborg and Malmö. Fifty-one cases have been decided by the Labour Court, 41 of which were decided in the first 15 years of the Act's existence. In contrast to these numbers, the Ombudsman received a total of 151 complaints within the first 10 years and by the year 2000 the Ombudsman's office was receiving nearly that many on an annual basis. Given the large volume of cases handled by the Ombudsman's office, it appears that the Act's requirement that the Ombudsman bring only "important" cases to the Court has had the desired limiting effect. Trade unions do not appear to be especially

¹⁴⁰ Lena Svenaeus on Sweden in *Bulletin: Legal Issues in Equality* No. 2/2000 at 76.

¹⁴¹ *Id.*

active in bringing complaints. The Ombudsman's annual report for 2000 states that unions were involved in and settled only 10 cases in 2000.

2.3.4 Finland

Debate on the issues that are now included in the concept of sex equality began in the 1960s in Finland. The Council of State set up a committee to examine the status of women in 1966. The work of that committee led to the establishment of the Council for Equality in 1972. The Council for Equality acts as a forum for gathering opinions and expertise in order to prepare legislative initiatives that address discrimination against women.

The first law to address discrimination in the labour market was the Contracts of Employment Act.¹⁴² It was enacted 30 April 1970 in order to fulfil Finland's obligations under ILO Conventions 98 on the right to organise and collective bargaining and 111 on employment discrimination.¹⁴³ The Employment Contracts Act applies only to concluded employment contracts and not to the hiring process¹⁴⁴ and requires employers to treat all employees impartially so that no one is treated differently based on a number of specified factors, including sex.¹⁴⁵ Employers who violate this prohibition shall be fined. The Penal Code was accordingly supplemented in July 1970 to prescribe penalties in the case of discrimination on grounds of sex, and a number of other factors.¹⁴⁶ The penalties prescribed are fines or a maximum 6-month's prison sentence. Similar provisions banning discrimination in employment applied to the public sector.¹⁴⁷

The need for a special legislative program addressing sex discrimination in the labour market began to gain recognition approximately a decade after the

¹⁴² Nr. 320/1970 Lag om arbetsavtal.

¹⁴³ See Niklas Bruun and Pirkko K. Koskinen, *Jämställdhetslagen* 50 (Helsinki: Juristförbundets Förlag 1987). Finland ratified Convention 98 on 22 December 1951 and Convention 111 on 23 April 1970.

¹⁴⁴ See Section 1 of the Employment Contracts Act. Already in the beginning of the 1970s, the Employment Contracts Act was criticized for its inapplicability to the hiring process. See Bruun and Koskinen, note 143 above, at 50.

¹⁴⁵ Section 17 of the 1970 Employment Contracts Act prohibited discrimination on the basis of birth, religion, sex, age, political or union activity or other comparable circumstance. When the Sex Equality Act was passed in 1986 the Employment Contracts Act was amended to provide that the provisions regarding sex discrimination would merge with the 1986 law. The 1970 Act was superseded by a new Employment Contracts Act adopted in 2001, *Arbetsavtalslag* 26.1.2001/55 (effective 1 June 2001) which specified a number of additional prohibited bases for discrimination in its Section 2, which are discussed below in the section on discrimination based on other factors than sex.

¹⁴⁶ Law Nr. 465/1970. The other factors are race, national or ethnic origin, skin colour, language, age, family situation, sexual orientation or health as well as religion, political or union activities or beliefs.

¹⁴⁷ Niklas Bruun and Anders von Koskull, *Allmän Arbetsrätt* 54 (Svenska handelshögskola: Institutionen för handelsrätt 1999) 54.

adoption of the Act on Employment Contracts.¹⁴⁸ A proposal for such legislation was included in a 1981 report issued by a working group put together after the Second World Conference on Women held in Copenhagen in 1980.¹⁴⁹ This working group's assignment was to determine whether Finland needed to adopt any legislative or other measures before ratifying the 1979 UN Convention on elimination of discrimination against women (CEDAW), which Finland had signed on 17 July 1980. The working group concluded that a law on equal opportunities was a prerequisite for ratifying CEDAW.¹⁵⁰ However, the proposal for an equal opportunities legislative measure awoke such strong resistance in Finland that no sex discrimination legislation was passed (nor was CEDAW ratified) until 1986, thus making it the last Nordic country, and one of the last western European countries, to pass sex discrimination legislation.¹⁵¹

Niklas Bruun and Pirkko Koskinen explain that the Equal Opportunity Act was so long in the making for two reasons.¹⁵² First, the employer organisations opposed the legislation because in their view it interfered too much in the labour market. Second, the Equal Opportunity Act was a completely new type of legislation borrowed from the Anglo Saxon legal tradition – arising primarily from the American civil rights legislation of the 1960s, and it presented substantial technical and systematic problems in fitting it into the Finnish legal system because it cuts across central Finnish dichotomies between private and public law.

Finland's Equal Opportunity Act became effective 1 January 1987. The stated purpose of the Act is to promote equality between women and men. It seeks to achieve equality both by prohibiting discrimination in all areas of social life¹⁵³ – not just in the labour market – and by imposing a duty on both the public and private sector to promote equality. Thus, the Act contains 3 kinds of measures: 1. Program provisions, which oblige public officials, educational institutions and employers to adopt positive measures to further equal opportunity, although the Act imposed no penalties for failure to do so; 2. both general and specific bans on discrimination; and 3. enforcement provisions, which besides laying down various penalties for different categories of violations, also established the office of the Equality Ombudsman (hereinafter the “Ombudsman”) and the Equality Board.

148 However, it should be noted that other measures to support women's participation in the labour market were adopted in the 1970s. The 1973 Act on Child Day Care obligated the municipalities to provide day care for pre-school-aged children. In 1974 provisions on paid maternity and paternity leave and on leave to care for a sick child were adopted.

149 The Finnish government launched a program to further sex equality on 29 April 1980 to coincide with the last half of the UN's decade on women. In the program, the Finnish government confirmed that it should sign CEDAW as soon as possible and enact legislation if necessary for the ratification of CEDAW. Bruun and Koskinen, note 143 above, at 51.

150 Bruun and Koskull, note 147 above, at 52.

151 *Id.*

152 Bruun and Koskinen, note 143 above, at 54.

153 However, the law does not apply to relations between family members or relationships in private life, nor does it apply to churches or religious groups or businesses, nor to certain departments within the military services.

Unlike the Swedish Equal Opportunity Ombudsman, the Finnish Ombudsman has no authority to bring lawsuits or settle disputes, although the Ombudsman's office can provide legal assistance to individuals seeking compensation in the court system if the Ombudsman considers the matter to be of substantial importance.¹⁵⁴ The Finnish Ombudsman's authority consists primarily of investigative powers, as the duty with which this office is charged is simply to monitor compliance with the law. The Ombudsman can collect information from various authorities and from anyone who has information that might be relevant to the issue of compliance. The Ombudsman can also undertake workplace inspections and get assistance from other authorities if necessary. He or she can also issue fines for failure to provide information or act according to his or her instructions. If necessary the Ombudsman can refer violations of the Equality Act or discriminatory job announcements to the Equality Board for handling. The Equality Board can issue orders prohibiting anyone who has violated the bans on discrimination from continuing or repeating the practice, if necessary under penalty of a fine. Decisions of the Equality Board, except decisions to impose penalties, can be appealed to the Supreme Administrative Court (*högsta förvaltningsdomstolen*). While the Ombudsman can issue a conditional fine, payment of which is then subject to an order by the Equality Board, compensation can be granted only by the courts and was originally fixed at a minimum of 10,000 and a maximum of 30,000 Finnish marks with a possibility provided in 13§ for combining compensation awardable under other provisions of Finnish Law. The minimum and maximum are adjusted every 3 years, as required by section 23. The last adjustment in 1998 brought the range up to a minimum of 15600 and a maximum of 51900 Finnish marks.

On 1 August 1992 the Equal Opportunity Act was amended to further specify employment practices to be regarded as sex discriminatory. The Act now made it explicit that sex discrimination occurs when an employee is transferred to a different job because of pregnancy or childbirth. Furthermore, a provision was added prohibiting employment or transfer decisions based on parenthood, family responsibility, or any other factor related to gender.

The Equal Opportunity Act was substantially revised in 1995. The revisions were undertaken partly in order to ensure that it met the requirements of EC sex equality law as Finland joined the European Economic Area in 1994 and then the European Community in 1995. However, the government's 1994 proposal for the amendments also expressly noted that in many respects the goals of the 1986 Act had not been achieved.¹⁵⁵ It observed that women still occupied a clearly worse position as compared with men in the family, in political life, and especially in working life. The most important revisions from the government's point of view concerned expanding and further specifying the positive action measures that the public sector and employers should undertake. Section 4 (4§) of the Act was amended to set the minimum percentage of either women or men working in government committees, delegations and other similar governmental

¹⁵⁴ The law establishing the office of the Equal Opportunity Ombudsman and the Equality Board (Lag om jämställdhetsombudsmannen och jämställdhetsnämnden) is found at SFS 610/1986.

¹⁵⁵ RP 90/1994 (available at "<http://www.eduskunta.fi>").

bodies at 40% of the members, unless special circumstances call for some other proportion. The Act was also revised to specify more concretely how employers are to live up to their obligation to further equal opportunities. The new provisions in Section 6 require employers to make systematic efforts, according to their available resources and other relevant circumstances to: (1) ensure that both men and women apply for vacant positions; (2) promote equal allocation of various tasks between women and men as well as ensure equal opportunities for promotion for women and men; (3) develop working conditions that suit both men and women and ease the coordination of work and family life and (4) ensure where possible that employees are not sexually harassed. The new section 6a requires employers with at least 30 employees to specify in their annual personnel and training plan or labour protection action programmes¹⁵⁶ the equality measures they have adopted. However, failure to adopt equality measures does not provide a basis for any kind of sanction or penalty, and it appears that this particular provision has had little practical impact. Finally, the possibility of enforcing all the specific bans on discrimination in section 8, including in matters of pay, were enhanced by introducing an obligation on the part of employers to provide relevant information at the request of the employee or his representative where violation of any of the specific bans is suspected.¹⁵⁷

Case law under the Equal Opportunity Act is sparse. The 1994 proposal for amending the Act reports that by 1994, a total of 40 cases had been decided by the highest courts, 30 of them were decisions of the Supreme Administrative Court and involved primarily municipal appointments and gender distribution in municipal decision-making organs. The other ten decisions were from the Supreme Court and dealt primarily with hiring. Only two cases concerned the issue of equal pay. An additional four cases have been decided by the Supreme Court since 1994: in one case the Court held the Equal Opportunity Act applicable to the State church; another case dealt with an issue regarding the running of the statute of limitations; the remaining two decisions were in favour of employers with regard to allegations of discriminatory hiring. In contrast to the low activity in the courts, the Office of the Ombudsman reports handling 150-200 requests annually for statements on application of the Equal Opportunity Act.¹⁵⁸ More than a third of the cases concern discrimination in recruitment or hiring and interpretation of the general prohibition against sex discrimination. Only one fifth of these requests concern private employers. The majority concern municipal employers. Very few of these requests have been

¹⁵⁶ These plans or programmes have been required since 1978 according to the Act on Co-operation within Undertakings (*Lag om samarbete inom företag* Nr. 725/78). Equality measures were added by law in 1996 to the areas listed by the Co-operation Act as being subject to the duty to co-operate (which includes preparing these personnel, training and/or labour protection plans).

¹⁵⁷ Previously, the employer was only required to provide a written explanation, on request, of its decision not to hire, promote or train someone. *See* section 8, first paragraph.

¹⁵⁸ *See* the Ombudsman's home page at "<http://www.tasa-arvo.fi/wwweng/publications/publications2.html>".

referred to the Equality Board, on the basis of which the Ombudsman has stated that the Board has been of very little significance.¹⁵⁹

2.4 Conclusion

In all four Scandinavian countries, the Scandinavian collective labour law tradition slowed adoption and development of legislation addressing sex discrimination in the labour market. All four countries recognised the principle of equal pay for equal work and work of equal value in the early 1960s, but deference to the wishes of the trade unions and confederations of employers prevented adoption of legislation delayed adoption of legislation banning pay discrimination for another 15 or more years. When legislation banning sex discrimination with regards to pay and other aspects of employment was finally adopted, it was weakened by substantial exceptions for collective agreements in both Sweden and Denmark, and relatively weak enforcement in all four countries. While the Ombudsmen in Norway, Sweden and Finland have handled a large number of complaints administratively, court decisions interpreting the legislation are quite low in comparison. In Denmark as well, which has not had an ombudsman or any other designated office or entity to handle sex discrimination complaints, most sex discrimination cases have been handled by Industrial Arbitration Boards, and there have been few court decisions. The dearth of published court decisions has created a situation of relative uncertainty with regard to the obligations employers have under the legislation and what the consequences of failure to live up to those obligations are. It also seems likely that in the absence of well developed and well publicised case law in this area, the hoped for attitudinal and norm-setting effects of the legislation have been minimal.

It now appears, however, that dissatisfaction with the rate of progress towards sex equality has spread throughout Scandinavia, leading to substantial revisions of the legislation in all four countries in the last five to six years. Those revisions have included measures, for example the newly enacted provisions in Denmark and Sweden for collection of pay information, that intervene in significant ways in areas previously considered reserved for action by the social partners. Perhaps more important than the actual revisions is the growing recognition that continued progress towards sex equality often requires acting without the social partners' voluntary co-operation.

3 Discrimination Based on Factors Other than Sex

Laws against discrimination in employment based on other factors than sex did not begin appearing in Scandinavia until the 1990s. Denmark and Sweden adopted fairly comprehensive legislation in 1996 and 1999. Norway and Finland have also adopted, in 1998 and 2001 respectively, legislation that prohibits

¹⁵⁹ *Id.*

employment discrimination based on other factors than sex, but neither country's legislation is as comprehensive as their sex discrimination legislation.

The recent vintage of legislative efforts to address employment discrimination based on other factors than sex reflects three facts that have influenced Scandinavian political and legal discourse about employment discrimination. First, legal and political discourse about sex discrimination in the 1970s, when legislation was being adopted, did not generalize the principle of equal treatment of the sexes to all improper differential treatment of individuals or groups. It was very much tied to the political discourse of the Scandinavian women's movement, which has been and continues to be primarily a movement among white Scandinavian women.¹⁶⁰ Second, with regards to racial or ethnic origin discrimination, non-European ethnic minorities did not begin appearing in any sizeable numbers in Scandinavia until the 1970s, when labour shortages in Norway, Sweden, and Denmark brought non-European guest workers, primarily from Turkey and Pakistan, and refugees – first from Chile and then Christian Assyrians – began arriving in all three countries in increasing numbers from the 1970s forward.¹⁶¹ Presumably discrimination against these ethnic minorities did not show itself as a particular problem from the beginning because the majority at first came as “guest” workers – not bona fide immigrants who had come to stay. By the 1990s, however, the high unemployment rates among these ethnic minorities began to become a matter of public concern.¹⁶² The attention given to

¹⁶⁰ For discussion of the reasons for an apparent lack of interest among Scandinavian feminists in examining diversity and difference among women, see Nousiainen and Niemi-Kiseläinen, *Responsible Selves*, note 11 above, at 12-13.

¹⁶¹ On immigration patterns in Sweden, see Johan Wahlberg, *Invandring under 1900-talet* on the website of Immigrant-institutet, “<http://www.immi.se/invandring.htm>” (last visited 15 December 2001); in Norway, see Thomas Hylland Eriksen, *Norway – a multi-ethnic country* on the website of the Ministry of Foreign Affairs, “<http://odin.dep.no/odin/engelsk/norway/social/032091-990909/index-dok000-b-f-a.html>” (last visited 15 December 2001); in Denmark see *Fakta om flygtninge, indvandrere og deres efterkommere i Danmark 2001*, available on the website of Mellemløst Samvirke, “<http://www.ms-dan.dk/minoritet/ekspertpanelet/Default.htm>”. All three countries discontinued guest-worker programs and work-related immigration in the 1970s when their economies slowed down. Since then the only immigration allowed is political asylum and family reunification (including marriages between nationals and foreign nationals, foreign nationals with permanent residence permits and foreign nationals, adoptions, etc.). With regard to immigration patterns in Finland, see section 3.4 on Finland below.

¹⁶² Statistics on the unemployment rate of foreign nationals is commonly used as an indicator for the unemployment rate of the different ethnic minorities. (The following statistics on the situation of ethnic minorities in Denmark, Finland and Sweden are taken from European Monitoring Centre on Racism and Xenophobia, *Annual Report 1999*.) In Denmark, the unemployment rate for foreign nationals in 1998 was 16.5% against the total unemployment rate of 5.5%; 48% of Lebanese, 36% of Turkish, and 34% of Somali immigrants participating in a survey reported being turned down for jobs for which they were qualified within the last five years because of their ethnic background. In Finland, as many as 60% of African immigrants participating in a survey said that they had experienced some form of discrimination in the labour market. In Sweden 40% of immigrants believe that they have been denied employment because of their foreign background. Every fifth immigrant in Sweden reported being subjected to harassment at work or by neighbours or being badly treated by social services. Ethnic minorities appear to be better off in Norway where the unemployment rate among immigrants was only 6.6

this problem in Scandinavia was also undoubtedly influenced by the fact that the European Community institutions had begun focusing their attention on troubling manifestations of racism and xenophobia throughout Europe.¹⁶³ The third factor contributing to the delay in expanding the prohibited bases of employment discrimination is the same factor that made adoption of the original legislation in the 70s and 80s difficult: the Scandinavian tradition of letting the social partners regulate the labour market.

As there are substantial differences in the way each of the four Scandinavian countries have approached discrimination based on other factors than sex, I will describe the situation in each country separately before concluding with an overview of developments in this area of Scandinavian employment discrimination law.

3.1 Denmark

On 1 July 1996 an Act banning discrimination on the basis of race, colour, religion, political opinion, sexual orientation, or national, social or ethnic origin in the labour market went into effect.¹⁶⁴ Until then, employers could quite legally reject job applicants on the basis of any of those factors. However, it was also widely believed that Danish employers did not behave that way in Denmark.¹⁶⁵ For example, a 1969 report by the Ministry of Justice in 1969 on the legal implications of ratifying the 1965 UN Race Discrimination Convention (RDC) states that both the trade unions and employer organisations had informed the Ministry that race discrimination did not exist within the areas of pay or other conditions of employment.¹⁶⁶ Accordingly, Denmark ratified the RDC in 1972 without introducing any legislation banning employment discrimination based on the factors listed in the RDC.¹⁶⁷ Furthermore, then

percent as of May 2001, as compared with 2.3 per cent for the entire population. Still, African immigrants had the highest unemployment rate in Norway at 12.6%. (Statistics on Norway from Statistik sentralbyrå (Statistics Norway) available in both Norwegian and English at "<http://www.ssb.no>". Last visited 31 August 2001).

¹⁶³ See generally Catherine Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (London: Verso 1996) at 177-80. The European Union took its first significant step towards combating racism in 1996 with the adoption of a Resolution by the Council and Representatives of the Member States proclaiming 1997 as the European Year Against Racism. OJ C 237, 15.8.1996.

¹⁶⁴ Law nr. 459 banning discrimination on the labour market (*Lov nr. 459 om forbud mod forskelsbehandling på arbejdsmarkedet*).

¹⁶⁵ Niels-Erik Hansen, *Diskriminationsloven er begyndt at virke*, nr. 6 – October 2001 (available on the website of the Documentation and Advisory Centre on Race Discrimination (DRC—Dokumentations- og rådgivningscenteret om racediskrimination) at "<http://www.drcenter.dk/artikler/lov-virker.html>").

¹⁶⁶ *Id.*

¹⁶⁷ However, the Penal Code §266b was amended to apply to hate speech, which can be punished by a fine or prison up to 2 years. Parliament also enacted legislation banning discrimination on the basis of race, colour, national or ethnic origin, belief or sexual orientation but it applied only to services provided by commercial and non-profit enterprises. For example, the Race Discrimination Law applies to discotheques or similar

Minister of Justice Thestrup explicitly stated that if it appeared discrimination was a problem in the labour market, it should be left to the social partners to resolve.¹⁶⁸

The situation began to change after the publication in 1990 of a visiting Australian scholar's study of race discrimination in Denmark, which provided ample documentation that race discrimination in the labour market was in fact a very widespread problem.¹⁶⁹ Soon Danish legal scholars began publishing articles pointing out that the RDC's ban on discrimination in the labour market was not properly implemented in Danish law. In November 1993 the head of the employment office for greater Copenhagen disclosed to the daily newspapers that the employment offices situated around the country were frequently instructed by employers – public and private – to refer only Danes or that they would not employ any Turks.¹⁷⁰ The Labour Minister commented on this situation as follows:

I do not at all find it acceptable that employers make discriminatory demands when they contact the employment offices. But as the situation is today, where there is no legal prohibition against discrimination in employment, neither I nor anyone else can intervene. I believe, actually, that the employment offices display good judgment and save many refugees and immigrants stinging defeats and disappointed hopes when they do not refer them to vacant positions in some cases.¹⁷¹

The Documentation and Advisory Centre on Race Discrimination (a non-governmental organisation primarily financed by the Ministry for the Interior) submitted a complaint to the Parliamentary Ombudsman, who confirmed that if the labour market organisations no longer had complete control over the situation, then there was reason to consider whether the international obligations Denmark had undertaken in this area should instead be fulfilled through legislation.¹⁷² The Labour Minister responded on 16 June 1995 to the Ombudsman's report by informing him that she would introduce in the fall a legislative proposal forbidding discrimination in the labour market.¹⁷³ That proposal then became the 1996 Law on the Prohibition of Discrimination in the Labour Market (*Lov om forbud mod forskelsbehandling på arbejdsmarkedet mv.*)

Section 1 of the 1996 Act prohibits “differential treatment” defined as any direct or indirect differential treatment based on race, colour, religion, political

establishments that refuse to admit people on the basis of colour, etc. See *Ligestillingslovene*, note 70 above, at 365-66.

168 Hansen, note 165 above.

169 *Id.* (citing Meredith Wilkie, *Victims of Neutrality, Race Discrimination in Denmark*).

170 *Id.*

171 *Id.* (My translation).

172 *Id.*

173 *Id.*

opinion, sexual orientation, or national, social or ethnic origin.¹⁷⁴ The commentary to the legislative proposal¹⁷⁵ offers two motivations for proposing a legislative ban on differential treatment on the grounds of race, colour, religion, political opinion, national, social or ethnic origin. First, combating such discrimination receives high priority in all civilized countries. Second, the high unemployment rate of ethnic minorities indicates discrimination is a problem on the labour market.

The commentary offers noticeably little insight into the reasons for including sexual orientation in the ban, stating only that it was included because a number of other legislative provisions provide protection against sexual orientation discrimination in both the private and public sector. As those provisions do not apply to employment, apparently it was felt that protection against such discrimination should be extended to this area as well.

The Act uses the term “differential treatment” rather than “discrimination” because, according to the commentary on the legislative proposal, it is a familiar concept from the sex equality laws. Thus, the concept of differential treatment in the 1996 Act was intended to be interpreted in conformity with sex equality law, which is based primarily on EC sex equality law. However, with the adoption of Community Directives on race discrimination¹⁷⁶ and a general framework for equal treatment in employment¹⁷⁷ the 1996 Act will have to be interpreted consistently with the new Directives and the case law of the European Court of Justice, even if they diverge from the familiar concepts of EC sex equality law.

One of the consequences of using the term “differential treatment” is that the Act prohibits both positive and negative discrimination. The Act does not contain any provision for positive action measures.

As is the case with the sex equality legislation, the 1996 Act contains a provision in Section 1(2) excluding the application of the Act to the extent a collective agreement contains the same protection against differential treatment.

Section 2 of the Act defines the specific areas in which employers may not discriminate: hiring, termination, transfers, pay and other conditions of employment. Section 3 offers protection in connection with job training and establishment of independent businesses. Section 4 forbids acquiring or using information about the employee’s ethnic origin, race, etc. Section 7 provides that victims of discrimination in violation of Sections 2-4 have the right to compensation. Section 5 prohibits discriminatory job announcements. Violation of this provision can be prosecuted by the public prosecutors and punished with a fine.

¹⁷⁴ Disability was not included as a prohibited basis for unequal treatment because it is not one of the bases mentioned in the RDC.

¹⁷⁵ 1995 LSF 181 *Forslag til Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.* (available on the Internet at “<http://www.retsinformation.dk>”).

¹⁷⁶ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

¹⁷⁷ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

As of October 2001, only five cases have been decided by the courts.¹⁷⁸ Of those only two resulted in judgments for the plaintiffs with damages awarded in the amounts of 10,000 and 75,000 Danish Kroner.¹⁷⁹ The future may bring encouraging developments for plaintiffs in discrimination cases in that the two new EC Directives require a more advantageous allocation of the burden of proof and an official body that can receive and resolve complaints.¹⁸⁰

3.2 Sweden

Sweden has three separate laws from 1998 that target employment discrimination on the basis of ethnic origin, sexual orientation and disability. However, Sweden's response to the problem of ethnic origin discrimination predates its efforts to address sexual orientation and disability discrimination by nearly a decade with the establishment of an Ethnic Discrimination Ombudsman and Counsel in 1986.¹⁸¹ The Ombudsman's duties essentially consisted of working against ethnic discrimination, especially discrimination in the labour market, through educating and advising businesses and organisations. At most, the Ombudsman could impose fines on employers who refused to cooperate. The duties of the Counsel, which consisted of three persons with legal education and experience as judges, consisted of advising the Ombudsman on the scope of his duties and hearing employers' appeals against fines imposed by the Ombudsman. In addition, it was charged with the task of proposing legislative amendments or other measures needed to combat ethnic discrimination. On 7 April 1994 the 1986 law was repealed and replaced with a new law prohibiting ethnic discrimination,¹⁸² which greatly expanded the duties and powers of the Ethnic Discrimination Ombudsman and the Ethnic Discrimination Counsel. Most notably, the 1994 law gave the Ombudsman the power to prosecute cases on behalf of individual employees and job applicants in Labour Court and provided for sanctions in the form of voidability of contracts and damages.

Two months after the passage of the 1994 law prohibiting ethnic discrimination, a law establishing the office of Ombudsman for the Disabled was

178 Ugeskrift for Retsvæsen (hereinafter "U") 2001.207 V (termination of an ethnically Danish Jehova's Witness); U 2001.83 H (Muslim Somalian requested to leave an employment training centre (*arbejdsmarkedsuddannelsescentre*) after refusing to abide by request to refrain from praying with other Somalians in a common area near the centre's canteen); U 2000.2350 Ø (large department store refused to allow 14-year-old female trainee to wear Muslim headscarf while working); U 1999.1809 H (termination of bakery assistant; alleged sexual harassment and ethnic origin discrimination during employment); Bs 3-1211/97 (case decided by Lyngby municipal court regarding transfer on the basis of problems with co-workers allegedly because of harassment on the basis of ethnic origin).

179 Hansen, note 165 above. These cases concerned the 14-year-old trainee, who received 10,000 Kroner and the Jehovah's Witness.

180 *Id.*

181 SFS 1986:442 Lag mot etnisk diskriminering.

182 SFS 1994:134 Lag mot etnisk diskriminering.

passed. The Disability Ombudsman was given similar powers, with the exception of the authority to prosecute cases in court.¹⁸³

In May 1998 the Swedish government submitted proposals for three new laws against discrimination in the labour market: one targeting ethnic discrimination, a second one targeting discrimination on the basis of disability, and the third, sexual orientation discrimination. As explained in the report of the Parliamentary Committee on the Labour Market, the 1994 law against ethnic discrimination was deemed to be inadequate, especially as compared with the rights of EU nationals with regard to nationality discrimination, which the Committee accepted as a reference point.¹⁸⁴

With regard to discrimination on the basis of disability, the Committee's report indicated that the impetus for the proposal arose from two studies by the Central Bureau of Statistics (Statistiska Centralbyrån or SCB) at the request of the Disability Ombudsman. The studies showed a lower employment rate among disabled persons than among the general population and documented discriminatory conduct toward the disabled in the labour market. Furthermore, no existing law expressly prohibited discrimination in the labour market against disabled persons, and the report argued that the disabled should receive the same kind of protection as other groups that suffer discriminatory treatment. Finally, the report notes that experience in the United States indicates that anti-discrimination laws affect attitudes and the development of norms.

The Committee's report notes a similar lack of an express prohibition against discrimination in employment on the basis of sexual orientation as one of the main motivations for the legislative proposal on this subject. It also refers to studies showing the occurrence of unacceptable discrimination on the basis of sexual orientation. The report repeats the same rationale as that expressed in connection with the proposal on disability discrimination with regard to the norm-building and attitudinal effects of such legislation. In both cases, the Government asserts that in any case, every individual who seeks or has employment has the right to be judged according to his personal ability to perform the work, and that such laws will provide the basis for compensation of those who experience discrimination.

By February 1999, the Labour Market Committee recommended adoption of these three proposals, despite some reservations expressed by representatives of three parties, and that all three laws should be made effective on 1 May 1999.¹⁸⁵ All three legislative proposals were adopted by Parliament on 11 March 1999, and all three proposals became effective on 1 May 1999.

183 SFS 1994:749 Lag om Handikappombudsmannen.

184 Arbetsmarknadsutskottets betänkande 1998/99:AU4, *Ny lagstiftning mot diskriminering i arbetslivet*.

185 See Press Release 16 February 1999, *Nya lagar mot diskriminering i arbetslivet* available on the Swedish Parliament's website, at "<http://www.riksdagen.se/debatt/9899/pressmed/diskri2.htm>". The Moderates expressed the view that a general law on human rights would have been preferable. The Centre Party wanted more uniform legislation on the various kinds of discrimination, and the Left Party asserted that the legislation was inadequate on a number of points.

The law on ethnic discrimination¹⁸⁶ prohibits discrimination on the basis of “ethnic background”, which is defined as belonging to a group of persons who have the same race, skin colour, national or ethnic origin or religious faith.¹⁸⁷ The law on disability discrimination defines disability as including permanent physical, psychological or mental impairment of a person’s functional ability as a result of injury or illness, or which has existed from birth or thereafter, or which can be expected to arise.¹⁸⁸ The law on sexual orientation discrimination defines sexual orientation as including homosexual, bisexual and heterosexual orientation.¹⁸⁹ Each of the laws applies to the entire labour market and applies to all categories of employees as well as those seeking employment. They all forbid both direct and indirect discrimination in decisions taken in recruiting, hiring, promotion, choosing employees for an education that will lead to promotion, salary or other employment conditions, supervision and distribution of work, and dismissal, termination and lay offs. The employer must also investigate and take action against problems among employees that are based on ethnic background, disability or sexual orientation and which offend an employee’s integrity. The law also forbids reprisals for reports of discrimination. Only the act on ethnic discrimination requires employers to adopt positive action measures, subject to enforcement by the Ombudsman. With regard to the ban on disability discrimination, the law requires that when an employer makes the decision to hire, transfer or train someone, it must take reasonable measures to create a work environment in which a person with physical disabilities can function as well as a person without any physical disabilities. As regards enforcement, all three laws provide for Ombudsmen and Boards to oversee compliance with all the same powers as the Ethnic Discrimination Ombudsmen was given in 1994. The legal consequences for violation of any of these laws are basically the same as provided in the 1994 ethnic discrimination law: damages for actual loss and the violation of integrity that the discrimination involves and/or voidability of contracts in whole or in part.

Since the effective date of these laws, there have been hundreds of complaints.¹⁹⁰ If recent cases settled by the Ombudsmen are any indication of the effectiveness of the new laws, the future holds exciting times ahead for employment discrimination lawyers. The Sexual Orientation Ombudsman reports that an employer in southern Sweden agreed to pay 800,000 Swedish Kroner in damages as compensation for pay discrimination and failure to prevent a hostile environment.¹⁹¹ The Ethnic Discrimination Ombudsman reports a similarly spectacular settlement, in which both the Ethnic and Disability Discrimination Ombudsmen participated, of a claim involving discriminatory

186 SFS 1999:130.

187 *Id.*, 3§. An English translation of this law is available on the website of the Ethnic Discrimination Ombudsman, at “<http://www.do.se.oas.funcform.se>”.

188 SFS 1999:132, 2§.

189 SFS 1999:133, 2§.

190 See the websites of the three Ombudsmen: ethnic discrimination, at “<http://www.do.se>”, disability discrimination at “<http://www.ho.se>”, sexual orientation discrimination at “<http://www.homo.se>”.

191 Reported on the Ombudsman’s website, last visited 15 December 2001.

termination on the basis of a woman's medical problems. The employer agreed to pay 700,000 Swedish Kroner, which included 32 months pay and an additional amount of slightly over 100,000 Kroner for rehabilitation expenses. These settlements are so far the biggest for all three Ombudsmen. It appears that many more such cases may arise, as a recent study undertaken at the Ombudsman's request shows that 75% of employers say they do not know what their obligations are under the ethnic discrimination law and 70% cannot give a single example of the kind of preventive measures required by the law.

3.3 Norway

On 30 April 1998 the Norwegian Parliament passed a law amending section 55a of the Law on Work Environment. Section 55a governs the legal conditions concerning employment. When the law was originally adopted in 1994, it merely prohibited employers from requiring applicants or new employees to provide information about their political, religious or cultural beliefs, sexual orientation, or whether they might be members of a trade union. The 1998 amendment added a prohibition against discrimination in employment based on these factors plus race, colour, and national or ethnic origin, although no sanctions were connected to violation of the prohibition. Discrimination against the disabled was also considered for inclusion in the amendment, but the department sponsoring the legislation decided that the issue needed further investigation before including it in this statute. On 1 July 2001, a number of significant changes were made to Section 55a, including a provision on a shared burden of proof, a provision for compensation for unlawful discrimination, and the addition of disability as a prohibited basis for discrimination.

In addition to Section 55A, section 60, which dates from 1977, prohibits termination of employment based on anything other than objective reasons related to the business's, employer's or employee's circumstances. Legal practice under this section had already clearly indicated that termination on the basis of ethnic origin could hardly be considered objectively justifiable.¹⁹²

At the same time as the amendments to section 55a were being proposed and discussed, the Norwegian Parliament approved and funded, on a trial basis, the establishment of a Centre Against Ethnic Discrimination, which was given the assignment of providing legal aid to individuals and of documenting and monitoring the extent and types of discrimination occurring in Norwegian society.¹⁹³ The Centre was established on 11 September 1998 for a period of four years, expiring on 31 December 2002. It reports to the Municipal and Regional Department, but is managed by a board appointed by the Government. In June 2001, the Government at that time decided that the work of the Centre

¹⁹² See Kommunal- og Regionaldepartementet, "*Handlingsplan mot rasisme og diskriminering*" [Action plan against racism and discrimination] (1998-2001), available on the homepage of the Kommunal- og Regionsaldepartement of the Norwegian Government, "<http://odin.dep.no/krd/norsk/publ/rapporter/index-b-n-a.html>".

¹⁹³ See *Mandat for Senter mot etnisk diskriminering*, available at the homepage of Norway's Ethnic Discrimination Center, "<http://www.smed.no>".

should be continued on a permanent basis, but the subsequently elected Government has not yet indicated whether it intends to follow up on the previous Government's decision.

In the first 2½ years of its existence, the Centre handled 626 cases.¹⁹⁴ Cases concerning employment and labour market issues make up by far the largest category, amounting to 182 cases. In a report issued in December 2001, the Centre asserts that current Norwegian law is insufficient to provide satisfactory protection against ethnic discrimination. It identifies a substantial need for a general prohibition against ethnic discrimination backed up by sanctions that would both deter discriminatory acts and compensate for the damage done by such acts. In addition, it advocates adoption of positive action measures.

A Parliamentary committee was formed in 1999 with the mandate to introduce a legislative proposal including options for sanctions and enforcement measures. The deadline for the committee to submit its report is 15 June 2002. The Centre Against Ethnic Discrimination estimates that the earliest date by which such legislation could be passed is sometime in the year 2003.¹⁹⁵

3.4 Finland

To date Finland has not adopted any comprehensive legislation like the 1986 Equal Opportunity Act to address employment discrimination based on factors other than sex. However, a number of provisions exist that can be used to address other kinds of employment discrimination. Finland amended its Constitution in 1995 and gave constitutional status to the principles of equal protection under the law and non-discrimination regardless of origin or any other reason related to a person's inherent characteristics.¹⁹⁶ Section 3 of the Penal Code, amended in 1995, also provides for criminal penalties ranging from a fine to 6 months in prison for discriminatory hiring practices (including announcements) and working conditions based on race, national or ethnic origin, colour, language, age, family circumstances, sexual orientation, health status, religion, political or union activity or other comparable factors. In addition, legal practice under the 1970 Employment Contracts Act has led to interpretation of its prohibition against discrimination as prohibiting employers from treating employees differently unless that treatment is based on objective factors. Accordingly, the Act has been understood to prohibit discrimination in employment on the basis of race, ethnic origin, sexual orientation and disability, even though these specific factors were not expressly mentioned.

¹⁹⁴ Senter mot etnisk diskriminering, *Underveis mot et bedre vern 2001* (December 2001).

¹⁹⁵ *Id.*

¹⁹⁶ It specifically lists sex, age, origin, language, religion, conviction, opinion, health, and disability. Neither race nor skin colour are listed, as those factors are felt to be covered by the word "origin". See *Towards Ethnic Equality and Diversity: Government Action Plan to Combat Ethnic discrimination and Racism*, adopted by the Finnish government plenary session on 22 March 2001, available on the Website of the Finnish Ministry of Labor, "<http://www.mol.fi/migration/>".

In 2001, the Finnish Parliament replaced the 1970 Employment Contracts Act with a new, heavily revised version, primarily in response to broad changes in the nature of employment contracts and to obligations imposed by recent European Community Directives.¹⁹⁷ Part of the revision of the 1970 Act involved adding race, ethnic origin, sexual orientation and disability as prohibited bases for differential treatment to the 2001 Employment Contracts Act.¹⁹⁸ The government's comments to the legislative proposal indicate that the background for these additions were the 1995 amendments to the Constitution (Section 6) and the Penal Code (Section 3).¹⁹⁹ Positive action measures are expressly permitted by the new Employment Contracts Act.

Probably one of the main reasons for Finland's lagging somewhat behind in the area of legislation prohibiting discrimination on the basis of ethnic origin or race is that Finland has historically been a country of migration rather than immigration, although foreigners, mostly from the rest of Scandinavia, Europe and Russia, have migrated to Finland throughout the whole of its history.²⁰⁰ Non-national ethnic minorities were not present in any substantial numbers until after Finland had taken in substantial numbers of refugees by the 1990s.²⁰¹ The fact that disability discrimination and sexual orientation discrimination have not received any additional attention is probably due to some of the same dynamics that slowed the adoption of sex equality legislation.

4 Conclusion

One of the most salient features of Scandinavian responses to the problem of employment discrimination is their piecemeal approach. The social and political debates about sex equality in the 1960s and 1970s did not spawn debates about equality and discrimination in general. The piecemeal nature of the Scandinavian responses may be at least partially due to the influence of the collective labour law model. Discussion of each additional kind of employment discrimination may have been perceived as an additional encroachment on that model, which necessitated renewed consideration of the question of whether the problem was something better handled by the social partners. With regard to discrimination

¹⁹⁷ See the government's proposal RP 157/2000. Note that the proposal was made before the EC Council's adoption of the two new directives on discrimination so that the new act is not a response to those directives.

¹⁹⁸ The prohibition against discrimination in employment contracts is found in Section 2 of the new Act.

¹⁹⁹ See RP 157/2000.

²⁰⁰ See Olavi Koivukangas, *Foreigners in Finland* at "<http://virtual.finland.fi/finfo/english/foreign.html>" and *The State of Refugee Integration in the European Union*, Background Paper for the Conference on the Integration of Refugees in Europe, ECRE Task Force on Integration 12-14 November 1998, Antwerp, Belgium.

²⁰¹ Finland first began taking refugees under the Geneva Convention of 1951 from Chile, in the years between 1973 and 1977, and from Vietnam starting in 1979. By the end of 1998, Finland had taken about 2,600 refugees from Iraq, 1700 from both Turkey and Iran, and 5000 Somalis. Koivukangas, note 200 above.

on the basis of ethnic origin, race, and religion, the failure to consider this issue at the same time as sex discrimination was also probably in large part to the relative homogeneity of Scandinavian society at that time. With the due recent adoption of legislation addressing other kinds of employment discrimination, though, it appears that many of the lessons learned in connection with sex discrimination legislation are being applied to the new legislation. Deference to the social partners has not played such an important role in this round of legislation. It seems that legislative intervention in the labour market for purposes of promoting equality has gained a large measure acceptance.