This article is written in honor of my advisor, Professor Ronnie Eklund, Professor of Labour Law at Stockholm University School of Law. As such, the topic of this article, the metamorphosis of Swedish discrimination law, was chosen in part based on the fact that it is the subject of my academic expertise, but mainly due to the burning interest Ronnie has displayed with respect to issues of discrimination law during his career. I have chosen the year Ronnie graduated from law school, 1974, as one line of demarcation. This is not only because 1974 can be seen as the beginning of Ronnie’s academic career, but also because the modern understanding of Swedish discrimination law can be traced back to that period with the adoption of the 1974 Instrument of Government. Coming to the current parliamentary perception, that protection against unlawful discrimination on the basis of sex, transgender identity and expression, ethnicity, religion or other belief, disability, sexual orientation or age, is a fundamental human right, has been neither a self-evident, nor a linear, path in Swedish discrimination law.

This article traces the developments of the current parliamentary understanding of protection against unlawful discrimination as a fundamental human right as marked by four phases. The first phase is the state of the law from approximately the end of World War II up to 1974. During this first phase, discrimination in general was not unlawful, with few protections in place in Sweden. The second phase begins in 1974 and covers twenty years,
until 1993, just prior to the Swedish legislative preparations for becoming a member of the European Union (then European Community) in 1995. The first significant Swedish employment discrimination statutes came into effect during this second phase. The third phase begins in 1994 and traces the developments in the law for a period of fifteen years, up to 2008 when the present Discrimination Act (2008:567) was adopted, coming into force on 1 January 2009. During this third phase, discrimination on bases other than sex or ethnic origins, and in contexts other than employment, came to be statutorily prohibited in different acts. In addition, this period can be seen as one of reconciliation between the Swedish labour law model and the EU liberal individual rights model. The fourth current phase commences with the 2008 Discrimination Act, which ultimately combined the majority of the Swedish discrimination legislation into one universal act. The case law of the Supreme Court and of the Labour Court with respect to discrimination claims is not included in these developments as traced here. The focus of this article instead is on the development of the Parliamentary and legislative treatment of discrimination during Ronnie’s tenure as an academic. Parallel developments in both international discrimination instruments as well as Swedish constitutional law are included to better illuminate the context in which Swedish discrimination law has developed into a protection viewed as a fundamental human right.

1 The Period up to 1974 – The International Seeds of Inception

One must take a step back into the Swedish history of individual rights and constitutional law, as well as into labor and employment law, in order to understand the metamorphosis of Swedish discrimination law, from discrimination basically not being prohibited by statute and also not viewed as problematic, to the present state of the law under which employment discrimination is not only unlawful, but protection from such and in other areas, has begun to be viewed as a fundamental human right. The changes that have occurred in the Swedish legal system since the early 1970’s in these areas have been arguably revolutionary twice over.

This first phase is marked more by action with respect to discrimination issues on the international and regional levels than on the Swedish national level. These international instruments came to be cited fifty years later by the Swedish Parliament as the basis for the 2008 Discrimination Act. Much of this international activity was a fallout of World War II and the racism exhibited, as well as the fact that women in continental Europe were forced
to work to replace the men absent from the work place due to military service. The latter was not as significant a factor in Sweden due to its neutrality during World War II.

1.1 Sweden and International Discrimination Instruments

World War II gave impetus to several international and regional instruments addressing protections against unlawful discrimination. The primary ones during this first phase ultimately influencing Swedish discrimination law include the United Nations Universal Declaration of Human Rights, the European Convention on Human Rights, and the two ILO conventions concerning discrimination.

1.1.1 United Nations Instruments

The first of these instruments was the United Nations Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948. Under it, Sweden and all the other member countries (with the exception of six) declared in its Article 2 that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 7 prescribes that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” Equal pay for equal work is protected in its Article 23(2), stating that “[e]veryone, without any discrimination, has the right to equal pay for equal work.”

1.1.2 The European Convention on Human Rights and Sweden

The European Convention for the Protection of Human Rights and Fundamental Freedoms was one of the first concrete human rights conventions adopted in the wake of World War II, drafted almost directly after the United Nations Universal Declaration of Human Rights in 1948. The Convention was signed in Rome in 1950 by the members of the Council of Europe, of which Sweden has been a member since its inception in 1949. Sweden ratified the Convention in 1952. Under Article 14 of the Convention, the signatories committed to that “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Two additional acts were required by the signatories for the implementation of the system regarding the protections under the European Convention, recognition of the Council’s jurisdiction to receive individual applications, which Sweden was the first to do in 1951, and a declaration accepting the jurisdiction of the European Court of Human Rights, which Sweden did in 1966.

The status of the European Convention in Swedish law during this first phase was uncertain, as the issue of whether Sweden had a monistic or dualistic system with respect to international obligations was not clear. Two cases presenting claims under the European Convention were decided by the Supreme Court and the Supreme Administrative Court in 1973 and 1974, respectively. The courts ultimately determined that Sweden had a dualistic system and consequently, individuals could not raise claims under

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1 For more on the European Convention and Sweden, see Iain Cameron, An Introduction to the European Convention on Human Rights (5th ed. Iustus 2006). For more on the Convention, the European Council and the European Court of Human Rights, see the Council’s website at www.coe.int and the Court’s website at www.echr.coe.int.
2 At that time, the Council of Europe consisted of ten Member States: Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and the United Kingdom. It now consists of 46 Member States. See the Council of Europe website at www.coe.int.
4 See NJA 1973 p. 423 and RÅ 1974 p. 121. These judgments, referred to as the “transformation judgments”, established the principle that foreign treaties had to be incorporated or transformed into Swedish law before Swedish citizens could cite them as a direct basis for a remedy. Incorporation entails that the international treaty or convention itself has to be enacted as Swedish legislation, while transformation entails that the Parliament in some fashion, either translates the document into Swedish or reformulates it to better-fit Swedish law. There is no rule as to which of these two procedures is to be applied at any given point, with the Parliament making that decision.
The 1973 case also raised an interesting question of interpretation. When Sweden signed the Convention, the legislative preparatory works stated that the parliamentary investigation demonstrated no need for Sweden to amend its laws as Swedish laws were already in conformance with the requirements of the Convention. The Supreme Court, when addressing issues raised under the Convention almost twenty years later in the 1973 case, stated that as Parliament found Swedish law to be in compliance with the Convention upon signing, Swedish law could not be found by the Court to be in conflict with the requirements of the Convention. This stance by the Supreme Court in essence meant that the Swedish Parliament was to be the ultimate arbitrator as to the content of the Convention, as opposed to the European Court of Human Rights, the institution charged by the Council with this task. Another hurdle in giving effect to the protections in the Convention was the Swedish interpretation of its scope, based on the mistaken assumption by Sweden when ratifying the Convention in 1952, that the civil rights referred to and protected by the Convention referred to private law, rights between private parties, in Swedish civilrätt, and not to public law issues.\(^5\) Finally, another primary obstacle to acceptance of the European Convention in the Swedish context was the resulting judicial protection of human rights, placing the power of the courts above that of the Parliament. This was seen by certain political actors as an unwanted deviation from the power of the Government and of the democratically elected legislature.

1.1.3 The ILO Conventions Concerning Wage and Employment Discrimination

The adoption of ILO Convention No. 100 on the Equal Remuneration for Men and Women Workers for Work of Equal Value of 1951 came three years after the signing of the United Nations Universal Declaration of Human Rights. The equal pay convention was followed seven years later by ILO Convention No. 111 on discrimination (employment and occupation), adopted in 1958. The issue of whether Sweden should ratify these conventions was raised in the 1950’s.\(^6\) As to a guarantee of equal wages, different

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5 See Cameron (note 1) at 90 citing Legislative Bill 1990/91:176 at 3 and Olle Mårsäter, Folkrättsligt skydd av rätten till domstolsprövning (Uppsala 2005).

6 See, for example, Legislative Bill 1952:47 Kungl. Maj:ts proposition till riksdagen med anhållan om riksdagens yttrande angående vissa av Internationella arbetsorganisationens konferens år 1951 vid dess trettiofjärde sammanträde fattade beslut at 1. See also Legislative Bill 1959:23 Kungl. Maj:ts proposition till riksdagen med anhållan om riksdagens yttrande angående vissa
wage tariffs for men and women had existed in the collective agreements since the beginning of the 1900’s. Both the government and parliament opposed ratification as they did not wish to depart from the Swedish labor law model under which the social partners in the labor market have the right to enter into agreements through free contract negotiations as to wage conditions without interference or influence of the state in the form of legislation. The central labor market organizations, the employers’ organization, SAF, and the blue-collar labor organization, LO, entered into an agreement that all such different wage tariffs would be phased out over a period of five years beginning in 1960. Based on this, the Government found that the conditions required to adopt the conventions existed in 1962, and parliament ratified the conventions that same year despite continued opposition by LO and SAF.

1.1.4 Article 119 of the Treaty of Rome

Today’s European Union was also founded during this first stage, with the Treaty of the European Coal and Steel Community signed in 1951 and coming into force in 1952, creating the first of the communities, the European Coal and Steel Community. Belgium, France, the Federal Republic of Germany, Italy, Luxembourg and the Netherlands agreed that “world peace can be safeguarded only by creative efforts commensurate with the dangers that threaten it,” and that Europe could “be built only through practical...
achievements which will first of all create real solidarity, and through the establishment of common bases for economic development.”9 Six years later, the principle of equal pay between men and women was drafted into Article 119 of the Treaty establishing the European Economic Community (also referred to as the Treaty of Rome), the second of the communities. This treaty extended the market sectors from simply coal and steel to all economic sectors in the Member States, with the objective of creating a common economic market by 1970 through the establishment of the four freedoms of movement of goods, persons, capital and services.

France worked for the inclusion of Article 119 proscribing equal pay for women and men in the draft of the treaty. France had had equal pay provisions in place since World War II and at that time, had one of the smallest pay differentials between women and men, 7 % as compared to up to 40 % in Italy.10 France argued that it could not compete with the price of goods from countries in which women were paid less than men.11 This market distortion, or social dumping, was seen as an impediment to the free movement of goods. Article 11912 of the Treaty of Rome was drafted and adopted, mandating that “[e]ach Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.” Article 119 was to be implemented by the Member States by 1961, the end of the first transitional stage. Again, Sweden was not a member of the European Community at this stage.

1.2 The Swedish Constitution – The 1809 Instrument of Government
At the point of time when Ronnie was studying law during the 1970’s, the 1809 Instrument of Government13 was still in effect, at least technically. Individual rights, as such, were addressed generally in Article 16 of this constitutional act, which stated that the King was to:

9 See the second and fourth paragraphs of the preamble to the ECSC Treaty.
11 Article 119 was also inspired by ILO Convention No. 100, Equal Remuneration Convention of 1951.
13 The first “Instrument of Government” was drafted in 1634, arguably simply as a precaution to allow for a continued government administration in the event of any absence of Swedish kings during war. The second Instrument of Government, adopted in 1719 after the death of King Karl XII, marked the beginning of a period referred to in Swedish history as the “Age of
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[M]aintain and further justice and truth,
[P]revent and forbid inequity and injustice,
[N]ot deprive nor allow any person to be deprived of life, honor, personal liberty or well-being without a lawful trial or sentence, and [ensure]
[That] no person [should] be deprived of property, whether chattels or real, without a warrant and judgment in the manner as prescribed by Swedish law,
[T]hat no person’s peace should be disturbed in his home,
[T]hat no person should be extradited from one place to another,
[T]hat no person should be forced to act in violation of his conscience but rather be protected and able to freely exercise his religion as long as he did not disturb the public peace or cause public disturbance.

The King was also to ensure that only courts having jurisdiction over a person could sentence that person. This article, and the rights therein contained, had roots extending back to Magnus Eriksson’s letter of proclamation in 1319, which bound the crown to govern by rule of law, assure due process, and allow new taxes to be imposed only after consultation with the Royal Council, evidencing a fairly unbroken constitutional tradition as to certain individual rights of over six hundred years. Otherwise, individual rights as such were not addressed other than those as granted in the Freedom of the Press Act with respect to access to public documents and freedom of the press and speech. A parliamentary committee was appointed in 1938 to oversee Article 16, but its findings were not acted upon in the aftermath of World War II.

The 1809 Instrument of Government espoused a distribution of political power based loosely on a separation of power in line with Baron de Montesquieu’s political theory, between the King, Parliament, the Supreme Court and the National Bank. However, a shift in political power, from the King to the Parliament, had been occurring successively during the twentieth century without any parallel amendments to the Constitution reflecting such. A new committee was charged in the 1960’s with modernizing the constitution as a whole. Its 1963 proposal including a separate chapter on indi-
individual fundamental rights was criticized. A new committee was formed in 1966, first presenting a proposal that did not include a separate chapter on fundamental rights and freedoms. The predominant political view, much in line with a communitarian approach to law, was that such rights and freedoms were unnecessary in a welfare state. This omission was also criticized, and the Government was ultimately forced to include a separate chapter addressing individual rights in the legislative bill.

1.3 Swedish Discrimination Legislation Prior to 1974

As stated in the introduction to this article, it is necessary to understand the Swedish labour law model in order to understand the initial legislative developments with respect to discrimination issues. The Swedish labor law model can be seen to have reached its zenith during this first phase since its inception with the Saltsjöbad Agreement in 1938. The State under this labor law model is to be neutral with respect to the labor market and disputes between the social partners, the employers and labor unions. This neutrality assumes the guise of the absence of legislation as to such issues. When legislation was passed during this period, it amounted in many cases to a subsidiary source of law, as the social partners historically have been granted significant leeway to opt out of legislation through collective agreements. Employment legislation historically has been considered alien to this Swedish Model, as the terms and conditions of work are to be regulated by collective agreements. This also explains why certain areas of labour and particularly employment law, such as minimum wages and redundancy benefits, are still today not regulated by statute.14

In the specific area of employment discrimination, an act had been passed in 1945 prohibiting employment termination on the basis of marital status or pregnancy.15 A government regulation mandating equal pay for equal work in the Swedish state public sector was promulgated in 1948 after the

14 For an example of this, see Gabriella Sebardt, Redundancy and the Swedish Model (Iustus 2005) describing the system of redundancy benefits created through collective agreements between the social partners. Even after concessions by the social partners as to the appropriateness of discrimination legislation, remnants of this attitude remain, see, e.g., Svante Nycander, Makten över arbetsmarknaden – Ett perspektiv på Sveriges 1900-tal (SNS Förlag 2002) at 380 who argues that the inefficacy of Swedish discrimination legislation is a result of trying to artificially impose a foreign system of legislation on the already well-functioning system of agreement between the social partners.

15 Lag (1945:844) av 21 dec. 1945 om förbud mot arbetstagares avskedande i anledning av äktenskap eller havandeskap.
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United Nations Universal Declaration of Human Rights. A government regulation was adopted in 1973 prohibiting discrimination on the basis of sex or age in state employment. Otherwise, the work of women was instead restricted as to certain aspects by statute during this period, particularly with respect to night work and forced maternity leave for industrial workers, resulting in lawful discrimination on the basis of sex in certain areas of employment.

The issue of whether legislation should be used as a means to promote equality between women and men had been the object of general debate during the entirety of the 1970’s in Sweden. Proposals for legislation as well as calls for government investigations of the issue of sex discrimination were raised in several motions to the Swedish Parliament by the liberal political party, Folkpartiet. The original motions included prohibitions against unlawful discrimination on other grounds, such as race, based on the American federal Civil Rights Act of 1964.

An Equality Delegation was appointed at the end of 1972 to further investigate and develop an overarching perspective that was to guide the work towards achieving equality between women and men. The delegation presented its report in 1975, concluding that legislation could easily freeze the current injustices in the system and impede more active equality measures. The delegation found overwhelming reasons against adopting legislation similar to that in the United States. In addition, statutory regulation of discrimination in the private sector had long been fought by both employer and employee organizations. The social partners argued that discrimination did not and should not differ in any aspect from other employment issues as already regulated by them.

16 Statens allmänna avlöningsreglemente (1948:436).
17 Kungörelse (1973:279) om förbud mot köns- och ålderdiskriminering vid tillsättning av tjänst.
18 Legislative Bill 1978/79:175 med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m. at 9. See also Gudrun Nordborg, Jämställdhet – synpunkter utifrån jämställdhetslagstiftningen och vissa ärenden hos jämställdhetsombudsmannen, 1984 SvJT 190.
19 Ds Ju 1975:7 PM till frågan om lagstiftning mot könsdiskriminering.
20 Legislative Bill 1978/79:175 med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m. at 25. All the social partners were negative to the proposal in the responses they submitted with the exception of SACO/SR. Id. at 196.
2 The Period from 1974 to 1993 – The First Swedish Discrimination Statutes

This period is delineated by activity on the Swedish national level with respect to both the Swedish Instrument of Government and the enactment of Swedish legislation prohibiting unlawful discrimination in employment initially on the basis of parental leave, later on the basis of sex and then eventually, less vigorously, on the basis of ethnic origins.

2.1 International Instruments

Sweden participated in the first United Nations World Conference of Women in 1975, resulting in another international push towards legislation prohibiting discrimination on the basis of sex. Sweden signed the 1979 United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1980. CEDAW is seen as the first international treaty to address fundamental rights for women in politics, health care, education, economics, employment, law, property, marriage and family relations.

Although still not yet a member of the European Community, the Swedish Parliament closely followed the developments in Community law. Almost twenty years after the adoption of the equal pay provision in Article 119, a triad of directives was issued by the Council addressing issues of sex discrimination, the 1975 Equal Pay Directive mandating equal pay between men and women,21 the 1976 Equal Treatment Directive mandating equal treatment in employment between men and women22 and the 1979 Social Security Directive prohibiting different treatment with respect to social security schemes on the basis of sex.23


2.2 The 1974 Instrument of Government

The Instrument of Government adopted in 1974 to replace that of 1809 was to embody the constitutional changes that had successively occurred during the interim. The failure of the 1809 Instrument of Government to reflect the political reality, and the marginalization of the outdated Instrument of Government, is seen as giving rise to a sort of anti-constitutionalism. The constitution did not and should not reign in popular sovereignty.

A second departure consciously taken from the 1809 Instrument of Government was the decision to change the balance of political power from that of separation of power to a separation of function. Parliament is to be the sole legislator as seen from the portal paragraph of the 1974 Instrument of Government: “All public power in Sweden proceeds from the people.” As a result, a comparatively weak court system was created with only limited powers. This is also clear from the fact that the third branch of political power, after the legislative and executive branches, is generally not perceived of as the judicial branch in Sweden, but rather the press. The courts were not given a power of judicial review, simply the possibility in the case at hand to declare a law in violation of the constitution. If an act of parliament or a government regulation, a higher threshold is required, with a court being able to declare it to be so only if manifestly not in compliance with the constitution.

Within this focus on majoritarianism, the draft including a chapter on individual rights was adopted in 1974. These individual rights comprised only of five articles, concerning freedom of speech, expression, assembly, demonstration, association, religion and movement, as well as the right to information, protection from forced disclosures as to associations or religion, protection from unlawful searches of person, home or correspondence, access to public documents and the right for the social partners to take lawful industrial actions.

The chapter two rights were expanded already in 1976, including the addition of Article 15 stating that no law or other type of legal provision can entail that a citizen is treated less favorably on the basis of race, color or ethnic origin. Article 16 was also added in 1976 forbidding the state from discriminating against any person by law or regulation due to sex. Exceptions to this are included in the article, however, in that the discrimination is to be deemed lawful if the legal instrument constitutes a step in the endeavor to achieve equality between men and women or if it relates to compulsory military service or other similar official duties.

The role of the rights as cataloged in chapter two, however, was still greatly debated in certain circles. Those legal scholars in favor of a weak judicial
system argued that chapter two rights should be more of a policy declaration as were certain of the rights in chapter one, and not be meant to serve as a legal basis for a remedy. Instead, they should more be meant to serve as guidelines for the Parliament in its legislative work, giving precedence to the principles of parliamentary rule and popular sovereignty. These different views are reflected in the legislative preparatory documents for the 1974 constitution24 and 1976 amendments.25 The emphasis in the second chapter as to limiting the rights therein contained and the categorization of the rights as absolute or qualified rights was part of the compromise finally reached. Absolute rights can only be limited by the Instrument of Government, while qualified rights can be limited through legislation. In addition, a distinction is made in the Instrument of Government as to those rights accruing to Swedish citizens, and those to non-Swedish citizens.

2.3 Swedish Discrimination Legislation
A major reform of labour and employment law occurred during the 1970’s, with several of the currently key acts passed in this decade. These changes need to be seen in the context of the national economy. During the 1950’s and 1960’s, Sweden was one of the wealthiest countries in the world, partially as it capitalized on an infrastructure left untouched by two world wars. Europe was rebuilding, and Sweden provided much of the materials and tools. As such, labour had the upper hand at the beginning of the 1970’s. The Act on Employment Protection was adopted in 1974.26 Statutory protection was established for union representatives in the Trade Union Representatives (Status at the Workplace) Act.27 A right to a leave of employment for educational purposes was also created.28 The Labour Disputes (Judicial Procedure) Act was also passed in 1974.29 The acts were followed two years later by the Employment (Co-determination in the Workplace) Act.30

Discrimination issues were addressed in legislation at the tail end of this reform. Three areas of discrimination were addressed during this second

24 See Legislative Bill 1973:90 med förslag till ny regeringsform och ny riksdagsordning.
25 See Legislative Bill 1975/76:209 om ändring i Regeringsformen.
30 Lag (1976:580) om medbestämmande i arbelslivet.
phase in the development of Swedish discrimination legislation: Unlawful employment discrimination on the basis of exercising parental leave, on the basis of sex or on the basis of race.

An Equality Committee had been appointed in 1976 and given the task of investigating and drafting legislation prohibiting unlawful sex discrimination in employment. The new mandate was based on the conviction that a law prohibiting sex discrimination was significant as one of several societal mechanisms for bringing about change. In response, the social partners entered into an Equality Agreement in 1977 covering large segments of the work population. In the private sector, all areas except transportation were covered in an effort to prevent later regulation by the proposed statute or the proposed Equal Opportunity Ombudsman, JämO. The social partners then argued that these agreements should be given time to assess their effectiveness prior to the adoption of legislation. In the alternative, the social partners argued that legislation would impede work with equality and increase the bureaucracy.

2.3.1 The Parental Leave Act

A right to leave from employment to take care of children encompassing both parents was passed in 1976 in the effort towards formal equality between the sexes in the law. The original period of leave under the 1976 Act was seven months and a parent could take either one-hundred or fifty percent leave from employment. The decision to take parental leave was left in the hands of the parents, with employers barred from refusing to respect the decision of a parent. An ideological shift occurred with the passage of the act, with maternity leave as an obligation for certain women within industry transformed into a right for each parent to decide to exercise. The 1945 Act concerning protection against employment termination on the basis of marriage or pregnancy was simultaneously repealed.

31 Its first report was SOU 1978:38 Jämställdhet i arbetslivet med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet. The Committee issued a second report, SOU 1979:56 Steg på väg concerning a national plan of action resulting from the 1975 United Nations Women's Conference in Mexico.
32 As to the efficacy of the Equality Agreements reached by the social partners, see Ronnie Eklund, År jämställhetsavtal värda pappret?, 1990 JT 105. See also Anita Dahlberg, Jämställdhetslagen som paradox och dekonstruktion in Gudrun Norborg, ed. Kvinnoperspektiv på rätten (lustus 1995) at 34.
33 See Legislative Bill 1978/79:56 med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m. at 9.
34 Id. at 196.
35 Lag (1976:280) om rätt till föräldraledighet.
The 1976 parental leave act was replaced by a new act already in 1978.\textsuperscript{36} An unequivocal right to leave was retained in the new act, with a right to reduced hours introduced. However, the employer had the right to schedule the reduction of hours, and in the absence of agreement, to do so unilaterally at the end and beginning of each day. The right to opt out of the legislative provisions through collective agreements was added. The 1978 Act was amended again in 1979, strengthening the protections by making any unlawful decision by the employer invalid, and granting pregnant women the right to reassignments in the event of strenuous physical work.\textsuperscript{37} The 1978 Act was amended seven times during the 1980’s and again six times in the 1990’s, to be ultimately replaced by the 1995 Parental Leave Act.

\textbf{2.3.2 Legislation Regarding Unlawful Employment Discrimination on the Basis of Sex}

The Equality Committee appointed in 1976 issued its report in 1978\textsuperscript{38} and the Government thereafter presented a first legislative bill with respect to prohibiting unlawful sex discrimination in employment.\textsuperscript{39} As to the goals of the law, the Minister stated that:

\begin{quote}
A law gives a material and tangible expression for society’s recognition of the principle of equality between men and women. It can be a starting point for actively influencing opinion and attitudes and give good support for those working at promoting equality and also remove any remaining sexual stereotypes. In addition, a prohibition against discrimination as stated in the law gives a protection to individuals from violations or unfair treatment based upon such prejudices, on incorrect and uncritical ideas as to the differences between the abilities of men and women as well as suitability for certain types of work.\textsuperscript{40}
\end{quote}

Only a “half-law” was initially passed by the Swedish parliament with a vote of 155 to 150, namely simply the paragraphs in the legislative bill containing the general prohibition against discrimination.\textsuperscript{41} The proposed parts

\textsuperscript{36} Lag (1978:410) om rätt till ledighet för vård av barn, m.m.
\textsuperscript{37} Lag (1979:645) om ändring i lagen (1978:410) om rätt till ledighet för vård av barn, m.m.
\textsuperscript{38} SOU 1978:38. A precursor to this governmental report was SOU 1975:58 Målet är jämställdhet. There were subsequent investigations on the conditions of part-time work, SOU 1976:6 Deltidsanställdas villkor and SOU 1978:28 Kvinnornas förvärvsarbete och förvärvshinder.
\textsuperscript{39} Legislative Bill 1978/79:175 med förslag till lag om jämställdhet mellan kvinnor och män i arbetslivet, m.m.
\textsuperscript{40} \textit{Id.} at 18.
\textsuperscript{41} Lag (1979:503) om jämställdhet mellan kvinnor och män i arbetslivet. See Bet. 1978/79:AU39 and SOU 1990:41 Tio år med jämställdhetslagen – utvärdering och förslag at 59. This first law, comprising seven paragraphs effective 1 January 1980, was replaced by lag
covering the creation and jurisdiction of the Equal Opportunity Ombudsman, *JämO*, as well as the obligation of the employer to carry out active measures, were not adopted. Certain resistance existed as to placing collective agreements within the jurisdiction of *JämO*, as evidenced by the 1977 Equality Agreement, a resistance that prevailed until 1994. A second legislative bill was submitted in 1979, to a large extent simply the same as the first proposal.\(^4\) It was adopted in its entirety by Parliament, passing by only one vote.\(^4\) After decades of discussion and debate, the first Swedish act prohibiting unequal treatment of women and men in work finally came to pass, effective 1 July 1980.\(^4\) It was to the highest degree a political compromise not based solely on the actual issue of equality for women but on the power of the Swedish labor law model. This partially explains the skepticism that has persisted with respect to statutory regulation in this area.

The 1979 Equal Treatment Act had three parts: prohibitions against discrimination, active measures to be taken by the employer, and enforcement mechanisms and procedures, including the establishment of *JämO*. The objective as set out in the first part was to promote equal rights between women and men in questions regarding employment, employment conditions and opportunities for development within work. This was to be achieved through a prohibition against discrimination to be invoked in individual cases, as well as active measures to be taken by employers. The social partners were empowered to deviate from the active measures in collective agreements.

Under the 1979 Act, employers were prohibited from disfavouring an employee or person seeking employment on the basis of sex. Disfavouring existed if an employer in employment, promotion or training, appointed a person of the opposite sex while overlooking a person with better qualifications. This difference in treatment was justified where the employer could prove that the decision did not depend on a person’s sex, or that the decision was a step in an endeavor to promote equality in employment, or was justi-
fied with respect to a charitable or other interest that ought not to be subordinated to the interest of equality in employment. A disfavouring occurred on the basis of sex when an employer applied worse employment conditions for an employee than those for an employee of the opposite sex in the performance of employment, management or distribution of work. This had to be in a manner by which the employee was obviously disadvantageously treated, terminated, relocated, laid off, fired or comparable measure thereto in comparison with persons of the opposite sex if the measure depended upon the employee’s sex. Collective agreements prescribing differences as to employment terms on the basis of sex were to be declared invalid. Damages could be awarded for violations of the Act. A “group rebate” was created for certain harms, in the event an employer discriminated against more than one person, the damages were to be assessed based or one person to be shared equally by the group.

That the 1979 Equal Treatment Act was not a happy compromise can be seen not only from the fact that the first proposal adopted did not have a chance to become effective before it was repealed. Only one year later, the act was amended again rather significantly. Seven new paragraphs were added, due to factors both internal and external to Sweden.45 Three legislative bills had already been submitted that year concerning sex equality, one with respect to the costs for the enforcement agency, JämO and the Equality Council,46 one for amendments to the 1979 Equal Treatment Act, and the third as to ratifying the United Nations Convention on the Elimination of all Forms of Discrimination against Women. The turbulence of the initial passing of the act seems to have quieted down somewhat after this barrage of legislation and amendments. The 1979 Equal Treatment Act was amended three times during the 1980’s.


46 Bet. 1979/80:AU30 at 1.

kept much of the 1979 Equal Treatment Act, particularly its layout and enforcement mechanisms. A very central aspect of the Swedish Model was retained in the 1991 Equal Treatment Act, namely that collective agreements could replace the Act's provisions on active equality measures to the extent the agreements were approved on the central level by the social partners. The requirement that plaintiff demonstrate that she was better objectively qualified was also retained. A prohibition against harassment based on a refusal of sexual advances or reporting of a sex discrimination claim was included.

2.3.3 Unlawful Employment Discrimination on the Basis of Ethnic Origin

A first act prohibiting discrimination on the basis of ethnic origins was passed in 1986. Containing only seven paragraphs, it prohibited ethnic discrimination based on race, color, nationality, ethnic origins or religion. The office of an Ombudsman against Ethnic Discrimination was created to work towards preventing ethnic discrimination in employment and other societal areas.

3 The Period of 1994 to 2007 – The Expansion and Reconciliation of Swedish Discrimination Legislation

While the first period discussed above is characterized by the absence of discrimination legislation, and the second period by the emergence of such, this third period can be seen as a period of both expansion and reconciliation. Expansion in that the number of protected groups and areas was enlarged, but also reconciliation in that the demands of Community law in certain aspects forced a confrontation between the Swedish labour law model and the more liberal, individual employment rights model of the EU.

There was a flurry of activity during the 1990’s on the European Union level, with several directives adopted addressing discrimination issues: The Pregnant Workers and Breastfeeding Directive, the Parental Leave

48 Lag (1986:442) mot etnisk diskriminering.
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Directive, the Burden of Proof Directive and the Part-Time Work Directive. This level of activity continued into the new millennium, with directives extending the scope of unlawful discrimination to include discrimination based on race as prohibited by the Racial Equality Directive and based on religion or belief, disability, age or sexual orientation as prohibited by the Employment Framework Directive. The Equal Treatment Directive was significantly amended in 2002. The Equal Treatment in Access to Goods and Services Directive was issued in 2004. Ultimately, seven of


57 The seven directives now included in the Discrimination Directive are:

- The Equal Pay Directive 75/117/EEC;
- Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes as amended by Directive 96/97/EC; and
the twelve\(^{58}\) directives issued with respect to sex discrimination, along with certain of the principles established in the case law of the Court of Justice, were codified into one, the 2006 Discrimination Directive.\(^{59}\)

The European Convention was finally enacted as Swedish law in 1994, effective 1998, a requirement under dualism.\(^{60}\) The timing of this was predominantly due to the requirements of pending membership in the European Union scheduled for 1995. The European Convention was not enacted as a Swedish constitutional act, but was given protection by Article 23 of the second chapter of the Instrument of Government prescribing that “[n]o act of law or other provision may be adopted which contravenes Sweden’s undertakings under the European Convention.”

By the end of this third phase, Sweden had nine legislative acts covering different grounds of discrimination in different settings:

- The 1991 Equal Treatment Act;\(^{61}\)
- The 1995 Parental Leave Act;\(^{62}\)

\(^{58}\) Five of the twelve directives with respect to discrimination were omitted from the proposal because of the belief that their integration would overcomplicate the system:
- The Equal Treatment in Social Security Directive 79/7/EEC;
- The Equal Treatment of Self-employed Directive 86/613/EEC;
- The Protection of Pregnant Workers and New Mothers Directive 92/85/EEC; and

Also not included in the Discrimination Directive are the Part-Time Work Directive 97/81/EC and the most recent directive 2004/113/EC as to equality of access to and supply of goods and services.


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- The 1999 Measures to Counteract Ethnic Discrimination in Working Life Act;\(^{63}\)
- The 1999 Prohibition of Discrimination in Working Life of People with Disability Act;\(^{64}\)
- The 1999 Act Prohibiting Discrimination in Working Life based on Sexual Orientation;\(^{65}\)
- The 2001 Act on Equal Treatment of Students at Universities;\(^{66}\)
- The 2002 Act Prohibiting Discrimination on the Basis of Part-Time and Fixed-Time Work;\(^{67}\)
- The 2003 Act Prohibiting Discrimination with respect to Goods and Services;\(^{68}\) and
- The 2006 Act Prohibiting Discrimination with respect to primary school children.\(^{69}\)


\(^{67}\) Lag (2002:293) om förbud mot diskriminering av deltidsarbetande arbetstagare och arbetstagare med tidsbegränsad anställning.


\(^{69}\) Lag (2006:67) om förbud mot diskriminering och annan kränkande behandling av barn och elever. This act was amended in 2008 by lag (2008:224) om ändring i lagen (2006:67) om förbud mot diskriminering och annan kränkande behandling av barn och elever.
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Many of these acts were direct products of the requirements of Community law, such as the 2002 act protecting part-time and fixed-term workers. During this period, Ronnie contributed greatly to the debates concerning these different discrimination issues, writing on such topics as the equality agreements as entered into by the social partners,\(^70\) affirmative action,\(^71\) the existence of an employment relation under which discrimination protections could be invoked,\(^72\) mandatory maternal leave under Community law,\(^73\) equal pay for comparable work,\(^74\) wage discrimination,\(^75\) and the Part-time Work Directive.\(^76\) There is no question that Ronnie left his mark on the scholarship and the development of discrimination law in Sweden during his academic career.

4 Protection Against Discrimination as a Human Right – Metamorphosis Complete

In the first proposal submitted by the committee investigating the Swedish discrimination legislation in 2006, the Committee began its report by discussing the human rights bases for the prohibitions against discrimination, citing:

- The 1948 United Nations Universal Declaration of Human Rights;
- The 1966 United Nations Universal Covenant on Civil and Political Rights;

\(^70\) Ronnie Eklund, Är jämställdhetsavtal värda pappret? 1990 JT 105.
\(^72\) Ronnie Eklund, Att ingå avtal om anställning – Ett blad ur arbetsdomstolens praxis in Festskrift till Jan Ramberg (Juristförlaget Stockholm 1996).
\(^74\) Ronnie Eklund, Barnmorskemålet II, 108 JT 2001-02 at 112.
The committee, based on the above, concluded that discrimination constitutes a violation of fundamental human rights and that legislation is one of several means of combating discrimination and thereby supporting these rights. Finding that the then current regulatory situation in Sweden could best be described as piecemeal legislation, the committee proposed the introduction of a universal discrimination act.

77 See SOU 2006:22 En sammanhållen diskrimineringslagstiftning, del 1 at 45.
Such a universal act was passed two years later in 2008, the Discrimination Act,\textsuperscript{78} coming into effect 1 January 2009.\textsuperscript{79} The 2008 Discrimination Act forbids unlawful discrimination on the basis of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age. Transgender identity or expression as well as age are new protected grounds under the 2008 Act. The protection against unlawful discrimination is to encompass employment (both private and public), education, labour market policy, starting a business and profession recognition, membership in organizations such as labour unions, housing, providing goods and services both as the provider and as the customer, social benefits, social insurance and military service. The 2008 Discrimination Act prohibits unlawful discrimination, defined as direct and indirect discrimination, harassment, sexual harassment and instructions to discriminate.\textsuperscript{80} In addition, the third paragraph of the new Discrimination Act states explicitly that the law is mandatory, and that any agreements in contravention of the rights or obligations as afforded under the act are void.

5 The Next Step

By breaking down the history of the discrimination legislation in Sweden into these four periods, the effects of international instruments as well as of the Swedish labor law model become clear. Discrimination law has progressed in Sweden from being seen as an encroachment on the employer’s prerogative and on Swedish labour law model as a whole, to its current status of granting protection of a human right, buttressed not only by the most recent Swedish legislation and their legislative preparatory works, but also firmly by international instruments. During the most recent two decades of this legislative development, Ronnie has enriched the scholarship in

\textsuperscript{78} Diskrimineringslag 2008:567. The 2008 Discrimination Action replaces:
  \begin{itemize}
  \item The 1991 Equal Treatment Act concerning unlawful discrimination on grounds of sex;
  \item The 1999 Measures to Counteract Ethnic Discrimination in Working Life Act;
  \item The 1999 Prohibition of Discrimination in Working Life of People with Disability Act;
  \item The 1999 Act Prohibiting Discrimination in Working Life based on Sexual Orientation;
  \item The 2001 Act on Equal Treatment of Students at Universities;
  \item The 2003 Act Prohibiting Discrimination with respect to Goods and Services; and
  \item The 2006 Act Prohibiting Discrimination with respect to primary school children.
\end{itemize}

\textsuperscript{79} An English translation of the 2008 Discrimination Act can be found at the website of the Equality Ombudsman of Sweden at www.do.se/Documents/pdf/new_discrimination_law.pdf?epslanguage=sv.

\textsuperscript{80} Two of the Swedish discrimination acts are still in place, namely the 2002 Act Prohibiting Discrimination on the Basis of Part-Time and Fixed-Time Work and the 1995 Parental Leave Act.
this area by his articles pointing out both the strengths and weaknesses in this area of law, on both the Swedish and the European Union levels. Now that the legislator has given protection against unlawful discrimination the status of a fundamental human right, it is now up to the courts to give effect to the legislator’s intent.