Multiple discrimination

A smokescreen over differences

By Eva Schömer, Senior Lecturer in Sociology of Law, Lund University and Senior Lecturer in Law, Linneaus University, Sweden

Abstract: Sweden is frequently described both as one of the most advanced Western countries when it comes to social and economic equality, and as one of the most segregated with respect to gender and ethnicity. That kind of ambiguity leads to problems when discussing ways for immigrants to get entrance to the Swedish labour market and to get a permanent position at a Swedish workplace. In order to explore the interaction between everyday life and law in books, this article examines some of the issues that such a situation raises when looking at multiple discrimination from an intersectional perspective within sociology of law.

Keywords: Discrimination, Intersectionality, Gender Equality, Ethnicity, Equality, Sociology of Law, Labour Law, Women’s studies

Introduction

One of the central questions within Sociology of Law is how human behaviour and law in books affect the evolution and status of living law (Hertogh ed., 2009). While social sciences speak of taken-for-granted ideas about images of people and phenomena (re)created by society, law rarely describes such phenomena. I will make the distinction here between questions that involve relationships about (outside) law, as is the case for research in the Sociology of Law, and questions that involve relationships in(side) law, as is the case for traditional legal research. My article proceeds from an intersectional Sociology of Law perspective by attempting to explain what

1 Eugen Ehrlich (1862–1922) described the relationships between law and society in terms of law in books (the content of law in books and the judgments of the judiciary and other agencies that administer justice), law in action (how people relate to, or obey, law in books) and living law (how people behave independently of law in books and law in action). Living law might be defined as ingrained habits. Hertogh ed. (2009), Living Law: Reconsidering Eugen Ehrlich, Hart, Oxford. Original text: Ehrlich, Eugen (1936, orig. 1913), Fundamental Principles of the Sociology of Law, Harvard University Press, Cambridge.
happens when societal norms in the labour market (common sense) encounter law in books in the labour market.²

Sweden is frequently described both as one of the most advanced Western countries when it comes to social and economic equality, and as one of the most segregated with respect to gender and race, religion and ethnicity (Nyberg, 2008). This kind of ambiguity leads to problems when discussing ways for immigrants to get entrance to the Swedish labour market and get a permanent position. In order to explore the interaction between everyday life (event) and law in books, this article examines some of the issues that such a situation raises when looking at multiple discrimination from the perspective of Sociology of Law. An investigation of this type can proceed from an intersectional perspective to analyse how judicial bodies assess everyday life. Intersectionality is an analytical tool for explaining ways in which domination and subordination are constructed and maintained in various social contexts. The concept is based on the assumption that the experiences people have or are ascribed in terms of access to power and societal resources are shaped by structural power relationships and social identities (Grabham, 2009).

This article begins by briefly describing the ethnicization of the Swedish labour market, including a presentation of a few central concepts. In conclusion, it proceeds from the perspective of intersectionality and Sociology of Law to analyse some Swedish Labour Court rulings that focus on multiple discrimination. Although intersectionality has been discussed since the end of 1990s, there are still discussions about how it could be used as an analytical tool. McCall writes of the complexity that arises when subjects of analysis expands to include multiple dimensions of social life and categories of analysis (McCall, 2005). I will apply an intersectional analysis to Swedish Labour Court findings as a reflection of the interplay between everyday life (the testimony of one party) and law in books. This is how everyday life may be said to interact with law (and the legal system), but it also works the other way around. Studying courtroom testimonies and the findings of judges reveals ways in which law could be used as a tool to effect social change.

A comprehensive law against discrimination

Almost half a century after the protracted integration process and five years after the major overhaul of the Swedish concept of gender equality and integration policy, a comprehensive Discrimination Act (Swedish Code of Statutes 2008:567, Gov-


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ernment Bill 2007/08:95) was passed for essentially the entire public sphere: the labour market, education, labour market policy measures, starting or running a business, authorization to practice a profession, membership of certain organizations, trading in goods and services, housing, health care, social services, the social insurance system, military and civilian service, and other equivalent military training in the armed forces. The main purpose of a comprehensive law was to disentangle Sweden’s anti-discrimination legislation and to incorporate remaining EC directives in the area (Government Bill 2007/08:95 p. 79–86). The law has also been described as a response to the intersectional critique of previous legislation (Government Bill 2007/08:95). The argument is often made that legislation alone cannot alter the attitudes, behaviour and social viewpoints of individuals. But some laws target social change, such as the Discrimination Act of January 1, 2009, which includes both affirmative action and prohibitions. The Government has described the Act as a legislative turning point: the various anti-discrimination laws that were previously on the statute books were combined into one (Government Bill 2007/08:95). One could ask if this mean that legislators have understood the importance of an intersectional perspective that considers gender, class, ethnicity and religion? It is my ambition to illustrate how the legal system (legislator and court) has understood the intersectional perspective in cases of discrimination through analyses of some cases from the Swedish Labour Court.

Multiple discrimination & intersectionality – background and standpoints

Although the concepts of multiple discrimination and intersectionality are closely related, they are by no means synonymous. The frequent confusion of the terms creates both perplexity and lack of comprehension when it comes to interpreting current phenomena from a legal point of view. Multiple discrimination involves unequal treatment based on various socially constructed categories, such as gender, race, transgender identity or expression, ethnicity, religion, disability status and sexual orientation (Crenshaw, 1989; Williams, 1991). An intersectional perspective may also be understood as an acknowledgement that »those who have experienced discrimination speak with a special voice to which we should listen« (Matsuda, 1987: 324). Matsuda suggests that intersectionality works by enabling scholars to »ask the other question«:

The way I try to understand the interconnection of all forms of subordination is through a method I call »ask the other question«. When I see something that looks racist, I ask, »Where is the patriarchy in this?« When I see something that looks sexist, I ask, »Where is the heterosexism in
However, the concept of multiple discrimination says nothing about how the various categories interact. Intersectionality, the effect of multiple discrimination, is an analytical tool that is used to address this issue. The concept has attracted a great deal of attention in Sweden and the other Nordic countries over the past few years as a means of identifying concurrent forms of discrimination (gender, class, race, etc.) in hierarchical social structures — (Molina 2004, de los Reyes, Molina & Mulinari Eds., 2002) or as Johanna Kantola and Kevät Nousiainen summarize Leslie McCall and Laurel Weldon «the conjuncture of social structures and not identities (...). The pre-given identity categories that human rights discourse, anti-discrimination act, equality policies and institutions presume are thus rendered problematic» (Kantola & Nousiainen, 2009).

The concept of intersectionality originated in the American anti-discrimination discourse, within which Black women challenged a fairly homogeneous feminist movement by questioning the assumptions that guided privileged white women. An article entitled »Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics« by Kimberlé Crenshaw used the case of DeGraffenreid v. General Motors to illustrate the way that Black women fell outside the purview of anti-discrimination legislation (Crenshaw, 1989). The plaintiff claimed that the company had discriminated against Black women. The Court ruled that the women could not have been discriminated against on the basis of either race or gender given that nearly all the factory workers were Black men and all the office workers were white women. 3 The article had an enormous impact, particularly in British and American research in social science and legal doctrine (Harris, 1989) . It was followed by a slew of other articles demonstrating that white women were given priority both in the antidiscrimination discourse as such and by the way in which leading white feminists ignored the interests and perspectives of Black women (Frankenberg, 1993). Criticism against thoughts that all feminists share the same interests has a long history all the way back to Sojourner Truth speech »Ain’t I a Woman?« from 1851 at the Women’s Rights Convention in Akron, bell hook’s summarise the critics against the Western thoughts in feminism as a self-conscious struggle against a more generalized ideology of domination:

To me feminism is not simply a struggle to end male chauvinism or a movement to ensure that women will have equal rights with men; it is a commitment to eradicating the ideology of domi-

3  DeGraffenreid v GM, 558 F.2d. 480 (8th Cir. 1977).
An intersectional perspective focuses on how vectors of gender, class, race and sexuality have pervaded the writing of Black feminist scholars. (Davis, 2001; Smith, 2000; Speleman, 1990 and Collins, 2000). It is important to notice that, likewise there is no common ground of «feminism» as such; there are doubts about the idea that all Black feminists share the same history and have the same interests. But as Patricia Hill Collins argues:

Black women’s concrete experiences as members of specific race, class, and gender groups as well as our concrete historical situations necessarily play significant roles in our perspectives on the world. No standpoint is neutral because no individual or group exists unembedded in the world. Knowledge is gained not by solitary individuals but by Black women as socially constituted members of a group.

…Black women intellectuals too numerous to mention suggest a powerful answer to question, »What is Black feminism?« Inherent in their words and deeds is a definition of Black feminism as a process of self-conscious struggle that empowers women and men to actualize a humanist vision of community. (Hill Collins, 1997)

Scandinavian feminists have long turned a blind eye to Black feminism on the grounds that their societies have no history of slavery or colonialism. Their focus on gender equality has neglected differences among women and/or men as such. In my view, this situation is a result of the discourse about equality that pervades Swedish and other Nordic countries. Sweden has long boasted of its high ranking when it comes to social equality. But these statements say more about formal regulations than actual conditions. Criticism of Western ethnocentric feminism has been stronger in countries outside Scandinavia (Mohanty, 2006; de los Reyes, 2011). From my point of view, it would be quite fruitful to apply an intersectional perspective to rulings of the Swedish Labour Court, as there is almost no critical discussion of law or its implications in a Swedish context. I will adapt the method that Crenshaw applied to an American case from 1977, even though the legal systems are not equivalent. However, both systems are based on the idea that it is possible to make sense of the court’s reasoning.

Sweden’s first Anti-Discrimination Act, was actually a Law on gender equality, and took effect on July 1, 1980. Although the measure had long been called for, it’s ethnocentric perspective offered few benefits for immigrant women. In 1986 Woukko Knocke demonstrated that Swedish history was replete with racism and ethnocentrism (Knocke, 1986). Her article, »The Insidiousness of Structural Dis-
crimination – An Historical and Contemporary Perspective« (SOU 2006:60) criticizes the regulation of the labour market, which is permeated by both open and covert racialization (Miles, 1993 and Ålund & Schierup, 1991). Structural discrimination divided up society between the »we« who belong and »the others« who remain outside. This process is commonly characterized as »otherization« (SOU 2006:30). For example, a group is defined on the basis of ethnic affiliation as »other,« as opposed to the normal »we« (SOU 2005:41). Such ideas originate in post-colonialism, which assumes a feminist perspective to examine gender against the backdrop of an historical context in which colonialism involved both economic exploitation and political domination, leading to ideas that view Western ideals as true and universal, thereby calling into question any knowledge that arises elsewhere (Ahmed & de los Reyes, 2011).

The Swedish racialized labour market is a result of the interplay of societal norms and legal regulations. Various aliens laws explicitly sought to preserve the »uniform and unpolluted Swedish race« and its »purity.« For instance, the 1927 law reflected racism against citizens of both southern European countries and Finland, who were regarded as undesirables in Sweden. Due to labour shortages after World War II, foreign workers were welcomed as a means of stimulating industrial growth and development. But they were subject to segregation, based on both ancestry and country of origin, which led to structural processes of domination/subordination, marginalizing mechanisms and consignment to the lowest income brackets. That set the stage for ethnicization of the labour force. Research into the 1960s and 1970s has shown that progressive voices existed but that culturalization and racialization were constantly present in perceptions of »the others« (SOU 2005:41; SOU 2006:30). When non-Europeans began to arrive in Sweden in the 1980s and 1990s and the Act on Measures against Discrimination on the ground of ethnicity or religion Working Life⁴ was passed, racialization took new forms, while structural discrimination became more subtle and insidious. The discriminatory practices of employers and the Public Employment Service, which had previously been transparent and unapologetic, were now more devious and indirect. Knocke argues that the way structural discrimination manifested itself, both before and after the legislation that prohibit discrimination on the ground of ethnicity or religion was passed, caused employers to resort to more sophisticated methods in order to avoid litigation and accusations of racism. For instance, alluding to Swedish social codes was a relatively simple way of excluding immigrants (SOU 2006:60).

⁴ Even though »race« and »ethnicity« is not equivalent, the legislative (the Government of Swedish) has chosen to ignore the difference and decided to only use »ethnicity«. This is why I only use »ethnicity« when I speak about the Swedish Law.
Equality and gender equality – background and standpoints

The concepts of equality and gender equality are often mixed up, but they are no more interchangeable than the concepts of multiple discrimination and intersectionality. Despite their close connection, using them synonymously creates both confusion and lack of comprehension when it comes to phenomena that require explanation and clarity.

Equality may be defined as an umbrella concept, which comprises a number of different aspects of ideal human relations (Government Bill 1987/88:105). Equality reflects the belief that all people are of equal value regardless of gender, race, ethnicity, religion, social class, sexual orientation, etc. The Swedish concept of gender equality reflects the belief that women and men should enjoy the same rights, obligations and equal opportunity to hold a job that provides financial security, take care of a home and children, participate in political, trade unions and other community activities (Swedish Government Official Reports 1990:41).

While equality is a value-laden term that stresses people’s similarities, gender equality is a relational concept that compares women and men as groups. The comparison proceeds from the fact that women and men are not identical, but they are different both biologically and physically. The concept of gender equality captures the highly relevant issue of whether biological differences translate into differences from a social and psychological point of view as well. Feminist research has devoted a great deal of attention to these issues. The point of distinguishing between the Swedish terms for equality and gender equality was to avoid the English and French conflict between equality and difference feminists. Equality feminists, who advocate equal treatment of women and men, argue that women have a subordinate position in the labour market (lower salaries and poorer career prospects, etc.) due to the belief that women cannot «perform» as well as men because they are physically weaker and bear children. Thus, emphasizing the physical gender differences reinforces gender segregation and discrimination. Difference feminists, on the other hand, advocate special treatment, arguing that the differences between women and men should be the starting point. The fact that women bear children necessitates the adoption of special rules that make it easier for them to perform their particular role, such as the opportunity to take maternity leave and use the nurturing qualities that are ascribed to them by virtue of their gender. Difference feminists argue that failure to

5 One reason for the emergence of two different concepts was criticism of the notion of equality and its emphasis on similarity based on the Aristotelian maxim that «equals should be treated equally and unequal’s unequally.» Given that civil rights accrued to all free (Athenian) men, there was no reason to treat women and slaves equally.
improve women’s ability to stay at home and care for children shores up gender discrimination. (Williams, 1993).

Although the equality principle which pervaded public debate had good intentions, the emphasis on rights – that all people are of equal value and should be treated the same – overlooked the injustices that arise when resources and opportunities vary. Having a cultural, educational or linguistic background that differs from the societal norm blocks access to influence and power, or the ability to enter the labour market.

I argue that the Swedish concept of gender equality should be seen as a response to criticism of the equality principle in view of the above considerations. Nevertheless, the concept of gender equality gave rise to other problems, because it was used primarily as a means of comparing women and men on the basis of a normality perspective, the chief aim of which was to ensure equal rights between ethnic Swedish women and all men (Schömer, 2011). One consequence of this normality perspective is that women who are not ethnic Swedes have been excluded from discussion on gender equality. This has also widened the gulf between »we Swedish women« and the »other foreign women,« further solidifying otherization (Swedish Government Official Reports 2005:41).

One problem in the jurisprudential area is that the law de facto supports otherization, for example by hiding those who are not normally part of the mainstream through setting up separate discrimination categories, i.e., speaking of discrimination in terms of gender, race, religion, origin, ethnicity, disability, etc. I would argue that this process helps to ethnically code the Swedish concept of gender equality; women of non-Swedish ethnic origin are overlooked in the Swedish gender equality debate (Schömer, 2009).

The debate on gender equality has been focused on establishing conditions whereby women and men can enjoy the same rights, obligations and opportunity to hold a job that provides financial security, take care of a home and children, and participate in political, trade unions and other community activities. The basic perspective has always been »Swedish,« the idea that there is a universal, »normal« brand of justice. But the downside of the concept of normality is that it denies the validity of that which is »different« or »deviant«. The ideal of normality thereby proceeds from an absolute standard of hegemonic feminism (Ahmed, & De los Reyes, 2011).

In the following section I will use an intersectional method to understand the arguments of the Swedish Labour Court in cases with intersectional complexity, which Ferguson (2005) describes as subject positions that are fundamentally constituted by the interplay of race, gender, sexuality, class, etc. The Swedish legal system belongs to the German-Roman legal tradition in which law is studied in a strictly formal way, starting with the particular section of law and going backwards to the Government Bills and Official Reports to give sense to the judicial decision. This means

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that there is almost no room for criticism of decisions; the aim for this traditional legal method is to stabilize the legal system i.e. to create consensus in law. So, to shed light on intersectional complexity, I will compare the court’s arguments through an intersectional analysis in cases with multiple complexities based on at least two grounds of discrimination. Even though Peter Kwan (1996) argues that intersectionality should focus on marginalized subjects, I maintain that one of the cases based on an older Swedish woman’s experience of working life also could be used in this analyse, while the intersectional complexity is based on sex and age illuminate the problematic situation of elderly women (Zach, 2005).

Analysis of multiple discrimination – intersectional consequences

Studying the court’s findings is the most common way of clarifying the content of law (Bernitz, 2010), but it is also a good way to understand interactions between law and society. The idea of this analysis is not to present a complete general overview, but rather to illustrate the legal system and how the Swedish Labour Court rules in cases with at least two grounds of discrimination. From the perspective of Sociology of Law, a discussion of how law interacts with society and the other way around is of particular interest. In this context, law is also examined as an instrument of social change (Hydén, 2002; Mathiesen, 2005). Although I illustrate the intersectional complexity only through a few cases, I would argue, that the relationship between law, justice and society could be understood through an analysis of the courts findings. As defined above, intersectionality could be seen as a tool for analysing discrimination of subordinate groups (Nash, 2008).

Normalization of subtle racism

A revealing Labour Court case, in which intersectionality was not discussed but nevertheless played an undeniable role, concerned a woman of Czech origin who was not granted an interview for a job at a car rental service (AD 2009:11). The company argued that she »didn't fit in;« she turned up »unannounced« to ask about a job advertisement she had read. She was told that it was not the right time to talk about the job, because a car was in the process of being rented out. However, the woman ignored the remark. According to the company, she was thereby being »disrespectful and disagreeable.« Moreover, she had not put her address and age on the

Although these events took place before the new Anti-Discrimination Act came into effect, the same arguments could still be effectively employed today.
application form. The plaintiff objected that she had left her business card instead. The findings of the Court stated that the information requested on the form was relevant to assessing the qualifications of applicants and that the plaintiff’s failure to provide all such information suggested that she was either careless or intentionally ignored the company’s wishes. Furthermore, the plaintiff claimed that she had once been a CEO, which the Court did not regard as a qualification for the job. While somewhat subtle, the intersectional aspects of the case become fairly apparent when scrutinizing the accusations of «not fitting in» and being «disrespectful.» From a typical Swedish point of view, it might be obvious that a remark to the effect that it is not the right time to discuss a job should be respected. However, that is far from a universal principle; it is rooted in a particular cultural context. In another context it would be just «natural» for a woman to stand her ground and show that she is genuinely interested in the job. In my view, she was stigmatized both as a foreigner who could not conduct herself «properly» and as a rude woman who was unable to control herself and who failed to understand that she should not try to blow her own horn, but should be willing to cooperate. The arguments that the Labour Court accepted – that the woman «didn’t fit in» and that she had filled out the job application incorrectly – bear a strong resemblance to Knocke’s definition of «subtle racism.»

Normalization of harassment and everyday racism

Two additional cases illustrate the Labour Court’s lack of understanding or concern about the intersectional critique that people may find themselves simultaneously inside and outside mainstream society by virtue of having a job, but still being excluded because they are not ethnic Swedes. Both cases were heard under the old legislation, but are still relevant. In the first case consider, two employers for a large exercise association had discriminated against two hourly employed women who wore hijabs, by harassing them because of their gender and religion (AD 2010:21). The employer’s representative had said that fasting was a stupid thing to do. He had gone into their dressing room several times when they were changing, even when one of them had taken off her hijab. As a result, she decided to change at home instead. He had joked about «halal pigs,» claimed that Arabic men kill unfaithful wives and asked one of them if she thought it was right to stone adulteresses. The Court ruled that the latter incident had not been proofed and could not be held against the employer. In reference to the preparatory work on a proposed law, the Court conceded that harassing someone could be equivalent to insulting the their dignity. However, it found that petty acts, attitudes and jokes that are not di-

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rected at a particular person are not covered by the Law. In my view, the Court helped to normalize everyday racism by adopting such a stance.7

The Court ruled that the women had felt discriminated against on the grounds of gender and religion, but that they had not clearly stated that the man’s remarks insulted their dignity. While a joke about »halal pigs« could be interpreted as ridicule, the fact that it was not repeated and that the women did not object sufficiently suggested that it wasn’t an insult in the legal sense. The Court found that the man had demonstrably talked about fasting and the punishment of unfaithful wives. But it ruled that the law did not regard such comments as harassment.

In the manner presented above, this case can be interpreted and discussed from an intersectional point of view, which examines whether it is possible to object sufficiently without crossing the line and becoming rude. Standing outside secularized Swedish society and knocking on the door to the labour market requires thorough knowledge of social codes. Sweden has a wider employment gap between natives and immigrants than any other OECD country (Riksdag & Departement, May 19, 2011). Because the women were working on a temporary basis, they were dependent on their employer and had to tiptoe about, so as not give offense. Is it reasonable to demand that a person who is subjected to insulting treatment has the courage to object so strenuously before being taken seriously? Jokes about »halal pigs« are assuredly not funny, and especially not if one happens to be a Muslim. Under the Work Environment Act, an employer is responsible for maintaining a safe and healthy workplace. Thus, the employer should certainly see to it that employees are not the targets of jokes with racist overtones.

In the second case (AD 2011:13), a male supervisor at a Swedish municipality had made various statements and drawn a picture that discriminated against two women employees, one from the former Soviet Union and the other from Bosnia, by means of gender, ethnic and sexual harassment, as well as retaliation. The women had criticized the supervisor several years earlier for the lack of affirmative actions and for not ensuring that the alarm system at the assisted living facility where they worked functioned properly. The conflict escalated and the women felt that the supervisor had retaliated against them for having criticized the way he did his job. He nicknamed them the »Eastern girls.« When one of the women was attacked by a client, the supervisor did not report it to the police or take any other action because he »wanted to see how long the shock would last. Women from the East can put up with a lot.« According to the woman, she asked him to address her by name but he ignored her request. With that in mind, the Labour Court ruled that the woman had been harassed due to her ethnicity, but not her gender, given the lack of evidence that the remark was an allusion to trafficking or prostitution, as the Equality

7 The concept of »everyday racism« and »gendered racism« has been explored by Essed, 1991.
Ombudsman had alleged. Nor could the Ombudsman prove that the supervisor had continued to call them the »Eastern girls« after they objected. During the 2007 Christmas season, a picture with sexual content was put up. The picture showed a man with an erect penis. Dressed in leather and a knitted cap, he had a whip and two Christmas tree balls in his hand. The caption was, »Are there any naughty children here?« Even though the Government’s official report argued that the perspective of the abused should be considered and not the other way around (SOU 1990:41), the Court argued that there must »be latitude for putting up pictures of a sexual nature that are not directed at anyone in particular, even if a member of the group finds them disagreeable.« This statement is actually in direct opposition to the Swedish Work Environment Act (1977:1160), which provides inter alia that the work will be satisfactory with regard to the nature of work and the social and technological developments in society and that the employer shall take all measures necessary to prevent worker exposure to illness or accidents. This means that the employer already working teams are obliged to ensure that workers are not exposed to such racist or sexist jokes. According to the court, it had not been established that the picture was intended to insult either of the employees. The same picture was e-mailed to the women and others the following year. At that point, the man was acting director of the social psychology unit at the municipality and the women had already made it clear to him that they were offended by the picture. The Court found that the man had sexually harassed them by sending the e-mail but that the municipality had not violated the prohibition against retaliation given that e-mailing was not in itself a »typical« retaliatory measure.

Normalization of social codes

In my view, the Court would have arrived at the same conclusion if the issues were to be considered today. So even though the Discrimination Act covers a various categories on which discrimination is based, the law says nothing about how and in which they interact, accumulate; compounds. Which means that even though the total experience of being discriminated against as both a woman and a Muslim actually is more than the sum of its parts, is nothing that is taking to consideration.

The case against the exercise association and the one involving the woman of Czech origin are typical of the way that incomprehension of social codes leads to exclusion, which produces the compound effect. While the law does not mention the concept of compound effect, the Court must limit itself to the criteria that the rules specify. The Court is inability to draw any other conclusion is also evident in the case of the two women who had been offended by the expression »Eastern girls,« which they viewed as a condescending invective triggered by their previous criticism of the way the supervisor did his job. Once again, the Court is incapable of appreci-

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ating the situation of vulnerable groups, even though that is one of its primary re-
sponsibilities.

Normalization of Swedes

In 2010, the Labour Court drew the opposite conclusion comparing to the case on
the exercise association and the car rental firm. The Court ruled that an employer
had discriminated against a 60-year-old ethnic Swedish woman in relation to of two
younger men (AD 2010:91). Although the woman was exceedingly capable and
easily met the qualifications for a position as a job coach, she was not even granted
an interview. There was no doubt that she was the most skilled and qualified appli-
cant. The employer admittedly interviewed more women than men, as well as peo-
ple of different ages. Because the woman was far more qualified than the younger
men, however, the employer could not refute the charge that it had discriminated
against her on the basis of gender and age. While the ruling was based on the new
law, the reasoning itself is not very different from what might have been expected
earlier. Since the case involved an ethnic Swedish woman who was considerably
more qualified than the male applicants, enforcement of the first law would have
produced the same outcome. Although age had not earlier been one of the catego-
ries of discrimination, it is important to keep in mind that the new Discrimination
Act does not entail any significant changes without regard to protection of disad-
vantaged individuals. The Court stated:

The defendant violated the prohibition against disc rimination as stipulated  by the law both by
not interviewing the plaintiff and by not offering her employment. In determining compensa-
tion, the Court does not believe that it is either possible or meaningful to assess the two viola-
tions separately. Nor are there any grounds for giving special consideration to the fact that one
violation was associated with both gender and age and the other violation with age only.
(AD 2010:91)

The statement may be interpreted as indicating that discrimination categories
should not be separated unless there are special grounds for doing so and that mul-
tiple categories should not be regarded as compound. The fact that the woman was
an ethnic Swede is highly relevant, while it separates »us« from »the other« not Eu-
ropean white women (Ahmed, 2011). The Court never mentions that the woman
was of Swedish origin, which suggests that her ethnicity is the normal state of af-
fairs. I will elaborate on the complexity inherent to the various assessments of this
case, as well as the case involving the woman of Czech origin, in the section entitled
Normalization of discrimination.

The new law was accompanied by the adoption of discrimination compensation.
The Equality Ombudsman had requested compensation of EUR 32,868.79 (SEK
300,000), but the Court awarded the plaintiff only 8,217.20 Euro (75,000 SEK).
The Court stated that treating the violations separately was neither possible nor meaningful, but that they were of the same type as those that an employer may commit in connection with the right of priority to re-employment. However, the statement has no basis in either the preparatory work or the Discrimination Act. The preparatory work stresses that the measure should enable compensation to the plaintiff for having been discriminated against and that the amount should be high enough to discourage offenders from continuing to violate the prohibitions against discrimination and retaliation, as well as encourage them to investigate and work with affirmative actions to prevent sexual or other types of harassment. The only logical conclusion appears to be that the Court lacks the ability to assess multiple discrimination and compensate the plaintiff for them.

Normalization of discrimination

An intersectional perspective sheds light on the compound effect of discrimination. A woman who wears a hijab is already disadvantaged by virtue of her gender. In addition, she is at risk of being discriminated against on the basis of her religion (de los Reyes & Mulinari, 2005). However, the compound effect is more than the sum of the individual parts (Ahmed & De los Reyes, 2011). The cases discussed above illustrate exclusion from the Swedish labour market due to lack of knowledge about social codes and norms.

The assumption that discrimination on the ground of religion refers only to outward characteristics such as wearing a hijab, promotes otherization of women with non-Swedish behaviour. This becomes obvious when comparing the case of the woman of Czech origin with that of the older ethnic Swedish woman. Arguments central to one case were accorded no significance in the other. The case of the woman of Czech origin fell outside the purview of the law on the basis that she »did not fit in.« She had suggested that the rental car company had no choice but to hire her. Her »non-Swedish behaviour« was equated with being »rude.« A woman who argues and makes demands in this manner places herself in a marginal position and is not protected by the Swedish Discrimination Act (AD 1996:41, Schömer, 1999). But the opposite reasoning was applied in the case of the two women who worked for an exercise association: they had failed to express their preferences with sufficient clarity; they should have protested sufficiently so that there was no doubt that they were offended by jokes about halal pigs. Thus, social norms concerning right and wrong are essentially impossible to comprehend. As a result, exclusion becomes even stronger, since the Court appears to be grasping for straws to protect the position of the ethnic Swedish woman on the one hand and to exclude the Czech woman who challenges the Swedish behaviour to be polite on the other hand.

In determining whether the ethnic Swedish woman had been discriminated against on the basis of age and gender, the Court ruled that there were no grounds...
for separating the two categories given that she was the most qualified applicant – for instance, she had managed a business previously. On the other hand, the Court stressed that the woman of Czech origin was not qualified merely because she had been a CEO (AD 2009:11). While such criteria clearly vary from work to work, it is extremely difficult to navigate the Swedish labour market without contacts and knowledge of social codes; exclusion grows and opportunities for integration into mainstream society diminish even more. Conflicting assertions that advanced qualifications are either important or irrelevant contribute to a lack of comprehension and construct walls of social norms between those who are capable of understanding the subtleties and everyone else.

The Swedish Discrimination Act; A smokescreen over differences

The new Anti-Discrimination Act goes beyond indirect and direct discrimination to include sexual and other harassment, as well as instructions to discriminate. Furthermore, it adds age and transgender identity or expression to the possible categories on which discrimination may be based. While an important step forward, the law hardly promotes immigrants into the labour market, given that an affirmative actions plan is not required to consider any other category than gender. Affirmative actions to break down existing norms are central to encouraging inclusion, rather than exclusion, from the labour market. Although the new law highlights the categories of gender, ethnicity and religion, it rates them according to a descending scale. Gender is given priority, followed by ethnicity. Employees with transgender identity or expression, disabilities, sexual orientations that deviate from the norm, or who are of a certain age, are essentially shut out from the active anti-discrimination efforts (McCall, 2005).

Both McCall (2005) and Sandra Fredman (2002 and 2008) has underlined that affirmative action is the most effective means of preventing multiple discrimination. For me it is rather obvious that the purpose of the new law was not to change labour market conditions. The objective was rather to comply with EU regulations and harmonize Swedish legislation with them. Fredman writes:

Intersectionality becomes more visible through positive duties to promote equality than under a complaints led approach, since those responsible for instituting change are required to identify group inequalities and to craft solutions, rather than reacting to self-identified complaints. (Fredman, 2008)

The effect of the new Discrimination Act is that various groups of employees are juxtaposed and ranked; rather than bridging gaps and differences; it treats individu-
als as members of groups. Crenshaw distinguishes between structural and political intersectionality (Crenshaw, 1991). Structural intersectionality refers to the experience of discrimination, whereas political intersectionality refers to political strategies and policy documents. Affirmative action to prevent discrimination and change labour market norms is certainly not the only solution, but it represents a commitment by the Government and/or judicial bodies to prioritize such objectives. As Kantola & Nousiainen puts it, «political institutions and structures are theorized as governing and reproducing inequalities. They can be used to remedy existing problems but also have the power to ignore and silence others» (Kantola & Nousiainen, 2009).

An intersectional perspective on discrimination and affirmative actions requires an analysis of all power relationships, both between and within groups (de los Reyes, Molina & Mulinari, 2005). In the cases discussed above, the Court did not examine the issue of power at all, even though each of them involved the relationship between an employee and her supervisor. The law’s assumption that all individuals have the same opportunity to make their voices heard both marginalizes and excludes women in vulnerable positions. While the liberal credo that all people are equal is praiseworthy, enforcement of the law is of limited value unless actual social conditions are considered. Bhabha (1999) argues that the liberal credo and the complexity of the multicultural predicament are extremely crucial:

With zealiveness not unlike the colonial civilizing mission, the «liberal» agenda is articulated without a shadow of self-doubt, except perhaps an acknowledgement of its contingent failings in the practice of everyday life. If the failures of liberalism are always practical then what kind of perfectibility does the principle claim for itself? Such a campaigning stance obscures indigenous traditions of reform and resistance, ignores «local» leavenings of liberty, flies in the face of feminist campaigns within nationalist and anticolonial struggles, leaves out well established debates by minority intellectuals and activists concerned with the difficult «translation» of gender and sexual politics in the world of migration and resettlement.

(Okin ed. 1999:83)

A useful complement to this discussion could be to take the subordinate position of disadvantaged groups into account as a compensatory mechanism. Gender intersects through all categories, and women are still discriminated against vis-à-vis men in most areas (SOU 2005:66). Nevertheless, neither women, men, people with transgender identity or expression – nor particular ethnic backgrounds, disabilities, sexual orientations or ages – are homogeneous groups. However, all groups have a clear need to be protected against discrimination. Prioritizing gender vis-à-vis ethnic minorities in deference to normalization in affirmative actions constructs «the others», which generates problems if the aim is to create an inclusive labour market. In the first place, the category of gender does not comprise only women or men. In the second place, the category also includes individuals of differing ethnic backgrounds and religions and/or creeds. Moreover, women (and men) vary with respect to age

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and sexual orientation. Others have disabilities. Treating the categories as equivalent, while disregarding the possibility of affirmative actions to prevent discrimination, widens the gaps between women, men, ethnic minorities, people with disabilities, the elderly and younger employees and/or people with a non-heterosexual orientation. This ambiguous treatment of the various categories (groups) creates the impression that some of them have a higher priority, as a result of which they are juxtaposed and compared with each other. In line with the EU and American concept, however, Swedish legislation has ignored the issue of class. Presumably, they feel that parameter is much more difficult to define than race, religion or disability.

Vulnerable groups (subordinate classes) are among those that most needs protection. Johanna Kantola & Kevät Nousiainen writes:

We have already hinted that anti-discrimination may not be the most suitable tool of political intersectionality. At least, it should not be the only one. If the mismatch between intersectionality and Discrimination Act is too profound, should the umbilical cord between them be cut in favour of a wider consideration of different types of policies and legal measures?

(Kantola & Nousiainen 2009:19)

Sweden’s self-image of being a gender equal pioneer encourages attempts to export an ideology based on the triumph of reason, secularism and enlightenment as the building blocks of the ideal of modernity (Ahmed & de los Reyes, 2011). The ideology of the concept gender equality, however, translates the notion of women and men who are »different« into an opposition between the we who belong to the enlightened world and the others who still have a long way to go. Such ideas are designed in rulings of the Labour Court when it comes to employment discrimination cases. Similarly, images of the »other« (different)« women are constructed by means of markers in Labour Court rulings, such as pointing out that women who had been harassed through allusions to their religion had not objected strenuously enough, whereas a woman who had not managed to fill out a form correctly was seen as »giving the impression of either being careless or ignoring the company’s preferences and information« (AD 2009:11).

I would argue that the new Swedish Discrimination Act is the kind of mismatch that Kantola & Nousiainen describe and that the opportunity to create legislation that promotes equality between people of various categories in addition to gender has been squandered (Schömer, 2009). If the intent of the law had been to create genuine change, the basic perspective would not have been to juxtapose various subordinate groups as separate categories, as though they had nothing to do with each other (Scott, 1989). Instead, their inferior positions would have served as a foundation for a type of compensatory (commutative) global justice. Such an approach would pay greater attention to the compound effect of multiple discrimination. It might also justify an increase in compensatory discrimination compensation, i.e., without any connection to the compensation to which an applicant is entitled.
after being bypassed for re-employment. Given the thoroughgoing effort and extensive criticism of the way in which subordinate groups are excluded from Swedish society that are evident in the preparatory work for the new law, the Court would be making a useful gesture if it were to assume its responsibilities and take advantage of the options it already has for stressing that disadvantaged people must not be discriminated against. The idea was that high punitive damages would help prevent vulnerable women (and men) from falling victim to discrimination. Such an approach would also have improved the chances of ending social exclusion and combating the norms with which it is associated.

The Discrimination Act has clearly achieved its purpose of integrating previous legislation, but it will fail to change conditions either in terms of active gender equality efforts, given that its fundamental assumptions are the same as in the first law from 1980 (based again on a hegemonic Swedish concept), or in terms of preventing or deterring discrimination, because it proceeds from the same discourse and excludes arguments that depart from the traditional Swedish view of women and men. Instead of enabling change, the law has permitted the idea that women and men are «comparable», in order to hide difference by refusing to consider departures from the norm. This has eliminated any prospects of preventing discrimination because it is always possible to refer to conditions outside normality, such as being too pushy and making excessively strident demands on one hand, and being too cautious and not forcefully objecting to attacks that allude to religion and appearance on the other hand.

The fact that equality is a value-laden term, which stresses similarities between people, throw a smokescreen over that which is different. Thus, fear or conscious choice when it comes to not seeing «the others» becomes a kind of covert racism, which flourishes because nobody makes an effort to reject it (Ahmed & de los Reyes, 2011:33). The relational term gender equality, which was intended to be a way out of the difficult debate about similarity (Equality feminists vs. Diversity feminists), has turned into a cover for discrimination of those who choose not to live in accordance with Swedish norms. The abandoned assimilation politics, notions of difference and deviation in day-to-day working life, has led to one hegemonic discourse that gender equality is a matter for ethnic Swedish women who are denied the ability to pursue a career because of men. The «other» women gum up the work with gender equality – they are seen as standing in the way of a successful gender equality effort by abstaining from the good secular life. The effort with gender equality becomes fragmented, because it must also concentrate on normalising «deviant» women who for example want to wear hijabs.

One way of altering the discourse about gender equality and fairness would be to follow Chandra Talpade Mohanty's approach and proceed from the most «powerless groups of women in the world» in order to understand what a just and democratic society would be like. Proceeding from the most privileged groups excludes and ig-

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nores those who do not live like »us«. »Privilege nurtures blindness to those without
the same privileges» (Mohanty, 2006:257). Changing the starting point would
thereby permit another sight on »the other« – perhaps greater understanding of
why people are marginalised, which might make the mechanisms of power more
visible and thereby transform its use and abuse. To the extent that the gap between
formal and real gender equality narrows, faith in society as democratic and inclusive
will increase. Adopting such a point of departure may not be the only solution to
the problems, but it reflects a genuine desire to create change for subordinate
groups; allowing room in the discussion for more perspectives may alter views about
similarity and fairness as well.

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