

Religion and Discrimination Law in the European Union – Sweden

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Historical, Cultural, and Social Background

Sweden entered the European Community on January 1, 1995¹. Although Sweden had ratified the European Convention for Human Rights and Basic Freedoms² early, it was not until that very same date that Sweden through an act of Parliament³ made the Convention directly applicable in Sweden⁴.

As a background to the historical Swedish views on the matter, it must also be pointed out that Sweden at that time had an unchallenged state-church system⁵. Thus, before 2000 there was no equality between the religious communities in Sweden, as the Lutheran *Church of Sweden* was a part of the State.

This mentioned, religious freedom was upheld from 1952, when it became possible for a Swedish citizen to opt out of the *Church of Sweden*, without announcing membership in another church⁶. (Until the middle of the 19th century, Swedish citizens were obliged to be members of the state-church. Later, they were given the possibility to choose another recognized church⁷.)

The matter of discrimination for religious reasons has been foremost discussed as a part of the overarching issue of religious freedom. This discussion, it has been argued⁸, started already in the 18th century, during the Enlightenment Period. The debate eventually hardened, leading to reforms step-by-step⁹. The latest (but perhaps not the last) reform was the decisions of the late

¹ Act (1994:1500) due to Sweden's Connection to the European Union (Sw. *lag med anledning av Sveriges anslutning till den Europeiska unionen*); Ordinance (1994:2063) on Inauguration of the Act (1994:1500) due to Sweden's Connection to the European Union (Sw. *förordning om ikraftträdande av lagen (1994:1500) med anledning av Sveriges anslutning till Europeiska Unionen*)

² Prop. 1951:165, bet. 1951:UU11, rskr. 1951:251

³ Act (1994:1219) on the European Convention Regarding Protection of the Human Rights and the Basic Freedoms (Sw. *lag om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna*)

⁴ The general Swedish position was that an international convention has to be adopted by an act of Parliament in order to be direct applicable in Sweden, although the Swedish membership in the European Union has somewhat changed this position.

⁵ This was changed in the year 2000, see i.e. Act (1998:1592) on Inauguration of the Church of Sweden Act (1998:1591) – Sw. *lag om införande av lagen om Svenska kyrkan*

⁶ Act (1951:680) on Religious Freedom (Sw. *religionsfrihetslagen*)

⁷ Göransson, *Svensk kyrkorätt* (Stockholm 1993) p. 38 f.

⁸ *Brohed*, *Stat – religion – kyrka; ett problemkomplex i svensk akademisk undervisning under 1700-talet* (Stockholm 1973) p. 111 ff.

⁹ Examples of this discussion can be found in Göransson, *ibid.* p. 54 f.

1990s, mentioned above, regarding disestablishment of the *Church of Sweden*¹⁰. Along the way, several decisions were made that loosened the ties between the State and the *Church of Sweden* and which also affected the matter of discrimination. For instance, in the 1980s, there was still a provision in Swedish law stating that a non-member of the *Church of Sweden* was not allowed to handle matters regarding the *Church of Sweden*¹¹, i.e. as a civil servant or a member of government.

During a long time span, from the 1920s until the principal parliamentary decision in 1995¹², there was an ongoing political debate over the state church system. One of the main arguments in this debate was, of course, the matter of religious freedom. The debate grew in its own right, and it would be difficult to argue that it was affected by either the United Nations' or the European Convention's provisions regarding religious discrimination. The main focus of the debate was to give those citizens who were not members of the *Church of Sweden* a real religious freedom, irrespective of whether they were affiliated with another religious community or were non-believers. Other religious communities than the *Church of Sweden* were quite active in their efforts to bring the state church system to an end¹³. Also within the *Church of Sweden* the debate was strong, with some groups in favour of changes, other groups against¹⁴.

As the position of the Swedish Government in relation to draft legislation of the European Union is secret, there is normally no public debate in Sweden before a decision in the Union¹⁵. Regarding the directives 2000/43/EC and 2000/78/EC, there might have been some attempts, from different groups, to influence the Government's decisions, but no public debate. However, the implementation of the directives caused some debate. Since Sweden already had legislation against religious discrimination of almost the same standard as is prescribed by the directives¹⁶ in some areas, these parts of the implementation did not cause much debate¹⁷. In the debate there was no special emphasis on the religious aspects.

¹⁰ The discussion whether the decisions resulted in a true disestablishment or not is here left aside

¹¹ *Göransson*, *ibid.* p. 87

¹² Prop. 1995/96:80, bet. 1995/96:KU12, rskr. 1995/96:84

¹³ See i.e. SOU 1994:42

¹⁴ See i.e. 2KL 1995:1, kskr. 1995:15

¹⁵ Before the Government decides a Swedish position, it has to take advice from the EU Committee of the Parliament. Regarding certain questions, the Committee has open meetings, where the public can follow the debate. In the matter of discrimination directives there were no such open meetings.

¹⁶ Act (1994:134) on Ethnic Discrimination (Sw. *lag om etnisk diskriminering*)

¹⁷ Prop. 2007/08:95

The Duty not to Discriminate; the Prohibition against Discrimination

The main state actor within the field of discrimination in Sweden is the *Equality Ombudsman*¹⁸. The principal task of the *Ombudsman* is to supervise the application of the Discrimination Act¹⁹. The first step of the *Ombudsman*, when taking measures against somebody, is trying to convince him or her to follow the provisions of the Act²⁰. If the provisions of the Act are not followed, the person in question may be urged to fulfill his or her obligations, by consequences of a penalty. The decisions are in some cases made by the *Ombudsman*²¹, in some cases by the *Committee against Discrimination*²². The *Committee* has no other tasks than the matters of penalty²³.

The *Ombudsman* as well as the members of the *Committee* are, as most national authorities in Sweden²⁴, appointed by the Government. The *Committee* has no representation from the religious communities.

Other matters of discrimination are handled by the courts. Cases concerning employment and other working-life issues are treated just like any other labour disputes²⁵. Other cases are handled by the civil courts²⁶.

The Discrimination Act defines direct discrimination as

somebody being disadvantaged through being treated worse than someone else, has been treated, or should have been treated in a comparable situation, if the disadvantage has connection with --- religion or other religious conviction ---.

Indirect discrimination is defined as

somebody being disadvantaged through applying a provision, a criteria, or a way of acting which appears as neutral but which may especially disadvantage persons --- of a certain religion or other religious conviction --- if not the provision, criteria, or way of acting has a justified aim and the measures which are used are appropriate and necessary for achieving the aim.

¹⁸ Sw. Diskrimineringsombudsmannen

¹⁹ SFS 2008:567; Sw. *diskrimineringslagen*

²⁰ 4:1 Discrimination Act

²¹ 4:4 Discrimination Act

²² 4:5 Discrimination Act

²³ 4:7 Discrimination Act

²⁴ There are a few exemptions, when the persons in charge of an authority are appointed by Parliament

²⁵ According to the Act (1974:371) on Law-Suites Regarding Labor Disputes (Sw. *lagen om rättegång i arbetstvister*), such cases are handled by the Labor Court or, if the involved person does not have the support of a trade union, by the local District Court as the first instance and the Labor Court as the second instance.

²⁶ 6:1 Discrimination Act

The Act defines harassment as

a behavior that violates somebody's dignity and has a connection with any of the bases for discrimination --- religion or other religious conviction²⁷.

The word "religion" has not been defined²⁸. The matter of non-religious beliefs has not been examined by the courts and was not commented on neither by Government nor by Parliament when the Act was drafted and approved. As the wording of the Act goes "religion or other religious conviction", it is likely that non-religious beliefs are not included.

The remedy if discrimination is shown to have taken place is remuneration from the person (physical or legal) who has discriminated the victim²⁹.

According to the Discrimination Act, discrimination is prohibited within the fields of working-life³⁰, education³¹, working-life policy and private employment agencies³², business and professional competence³³, membership in trade unions, associations for employers, and professional associations³⁴, provision of goods, services, and housing³⁵, health care and social services³⁶, social security, unemployment security, and financial aid for studies³⁷, military service and other corresponding education within the armed forces³⁸, as well as other forms of bureaucratic action when the agent is a public employee³⁹.

The prohibition of discrimination covers direct discrimination, indirect discrimination, harassment, sexual harassment, and incitement to discriminate⁴⁰. As already mentioned, indirect discrimination is not considered to have taken place, if the discrimination has a justified aim and the measures which are used are appropriate and necessary for achieving the aim⁴¹. Other

²⁷ 1:4 Discrimination Act

²⁸ The Government, though, discussed the matter of defining the word "religion" but came to the conclusion that no definition was needed, see prop. 2007/08:95 p. 120

²⁹ 5:1 Discrimination Act

³⁰ 2:1 Discrimination Act

³¹ 2:5 Discrimination Act

³² 2:9 Discrimination Act

³³ 2:10 Discrimination Act

³⁴ 2:11 Discrimination Act

³⁵ 2:12 Discrimination Act

³⁶ 2:13 Discrimination Act

³⁷ 2:14 Discrimination Act

³⁸ 2:15 Discrimination Act

³⁹ 2:17 Discrimination Act

⁴⁰ 1:4 Discrimination Act

⁴¹ Ibid.

possible justifications apply to the different fields of discrimination. For example is it acceptable to discriminate against somebody on grounds of their age, because of age-limits for retirement⁴².

There seems to be only one case in Sweden concerning religious discrimination. It deals with two women, originally from Libanon but grown up in Sweden, Muslims and wearing head-scarves, who were employed as receptionists on an hour-to-hour basis by a fitness center. Initially, it was regarded as an advantage by the employer that they were of Arab origin and wore head-scarves, as the center had many clients from abroad. But eventually the two women felt discriminated by the head of the center. They choose to quit after about two months of employment and made an renouncement to the *Ombudsman*, who sued the center. The Labour Court found evidence that the questions of Muslim faith, ways of living, lent, and handling of unfaithful women had been discussed, i.e. during coffee-breaks. The Court also considered it to be proved that the head on one occasion had mentioned that he ate ham, and added jokingly that the ham came from a “halal pig”. However, none of these incidences could, according to the Court, be considered discrimination. The *Ombudsman* therefore lost the case⁴³.

There has also been a case, handled by the *Ombudsman*, but which was never brought to the courts. It concerned a female student in an upper secondary school, who wore a niqab. The school did not accept that the student wore the niqab during lessons, for to pedagogic reasons. A solution was reached, where the student was offered to sit in front of the class and with the male students behind her. In that situation, the student was ready to take off her niqab. The *Ombudsman* concluded that she was not convinced that she could win a case against the school and dropped the matter⁴⁴.

The *Ombudsman* also has paid special attention to the *Church of Sweden*. As the *Church* is from 2000 independent from the State, the *Church* now has its own *Church Ordinance*⁴⁵, decided by the Church Synod. One of the provisions of the *Church Ordinance* states that persons who are employed by the *Church* are supposed to be members of the *Church*⁴⁶. The *Ombudsman* criticized this statement of the *Church*'s, saying that this amounted to discrimination of persons of other religious believes. Negotiations were held between the *Ombudsman* and the *Church*. Finally, an agreement was

⁴² 2:2 Discrimination Act

⁴³ AD 2010:21

⁴⁴ Case 2009/103

⁴⁵ See *Edqvist&al*, Kyrkoordning för Svenska kyrkan 2010 med angränsande lagstiftning och kommentarer (Stockholm 2010)

⁴⁶ As the *Church of Sweden* is responsible for the cemeteries for most Swedish inhabitants, the *Church Ordinance* has an exemption for those working with the cemeteries.

reached, where the *Church* was obliged to co-operate with the *Ombudsman* regarding information and education within the *Church*. The aim for these activities is to make clear to leading church actors what is necessary, according to the Discrimination Act, when following the *Church Ordinance* provisions⁴⁷.

The Right to Distinguish or Differentiate; Exceptions to the General Prohibition

The question of the right to distinguish or to differentiate is quite easy to answer from a Swedish perspective: There are no possibilities to distinguish or to differentiate, according to the Swedish law. From a Swedish legal point of view all subjects are supposed to follow the prohibition to discriminate. The problems of this point of view, though, is somewhat illustrated by the above mentioned agreement between the *Ombudsman* and the *Church of Sweden*⁴⁸.

⁴⁷ Ombudsmannen för etnisk diskriminering, dnr 216-2001

⁴⁸ Ibid.