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# Legal Harmonization and Intersectionality in Swedish and Norwegian Anti-Discrimination Reform

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This article investigates to what extent the challenging questions emerging from the intersectionality literature have been addressed in the process of reforming antidiscrimination legislation in Sweden and Norway. I find that even though intersectionality is presented as relevant for the policy reforms in both countries, the term largely remains abstract and obscure in the policy documents. As a result, other more practical circumstances become decisive in determining the outcome of the reforms. The existing structure of the national equality legislation in particular seems to have had significant consequences for the variation in outcomes of the two reform processes.

## Introduction

Over the past fifteen years, anti-discrimination and equality legislation in Europe has gone through significant changes. The Amsterdam Treaty of 1997 made it a responsibility of the European Union member states to combat discrimination based on sex, racial or ethnic origin,

religion or belief, disability, age or sexual orientation (European Union 1997). In the same period, the challenges of multiple discrimination increasingly became part of the international human rights discourse. The UN World Conference Against Racism held in Durban, South Africa in 2001 has been pinpointed as the international breakthrough that put multiple discrimination on the human rights agenda (European Commission 2007; Makkonen 2002; Yuval-Davis 2006). Multiple discrimination is often used as an umbrella-term for complex forms of discrimination. It usually refers to situations where a person is discriminated against on two or more grounds, either separately or at the same time. It often, but not always, refers to situations where individuals are simultaneously marginalized on several dimensions of inequality, such as gender, race and class.

Another term that is often used to describe this form of multidimensional inequality is intersectional discrimination. The term originated with American legal scholar Kimberlé Crenshaw's 1989 article "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", and has since gained increasing foothold in the academic literature on equality politics (e.g. Kantola and Squires 2010; Verloo 2006; Schiek and Chege 2009; Krizsan, Skjeie, and Squires 2012). The intersectional perspective challenges the rigidity of categorization and emphasizes that patterns of domination and subordination vary with cross-cutting power relations across different dimensions of inequality (Collins 1990).

However, this complex way of thinking about inequality is challenging for national policy makers. One of the differences between human rights instruments and national anti-discrimination legislation is that whereas the former intends to limit the power of the legislator, the latter intends to affect the behavior of private persons (and in some cases other legal entities, like corporations). This means that national anti-discrimination legislation must define the boundaries of discrimination more explicitly than the human rights instruments normally do.

There are very few examples of successful implementation of these kinds of complex analyses of inequality in national policies (Hankivsky and Cormier 2011; Parken 2010; Williams 2009). This is also the case with regard to anti-discrimination legislation (see Krizsan, Skjeie, and Squires 2012). Central challenges include the characteristics of, and relationship among, different discrimination grounds, and the meaning of equality across multiple, sometimes conflicting, axes of inequality. Moreover, even in the few instances where attempts have been made to include intersectional analyses in decision making processes, the outcomes do not necessarily resonate with the concept's critical intentions (cf. Williams 2009 on the incarceration of Aboriginal women in Canada).

In line with the international developments, revisions of anti-discrimination legislation have been initiated in Norway and Sweden. These changes center on the move from a dominant gender equality framework to a more multidimensional framework covering a range of inequality grounds, and a move towards single equality bodies and integrated equality legislation (cf. Kantola and Squires 2010). In Sweden all anti-discrimination and equality legislation was merged into one comprehensive anti-discrimination law in 2008. In Norway, by contrast, legal harmonization was officially explored and recommended (NOU 2009:14), but the government concluded to keep the legislation separate by inequality strands. However, in both Norway and Sweden separate complaints bodies covering different discrimination grounds have been integrated and expanded into comprehensive complaints bodies covering all legally protected grounds.

This article investigates to what extent the challenging questions emerging from the intersections literature have been addressed in the process of reforming anti-discrimination legislation in the two countries. I compare central policy documents in the two countries and ask to what extent they are framed similarly or differently, whether they discuss intersectional

discrimination in similar or different ways, and to what extent this may help explain the divergent outcomes of the two reform processes.

**The National Contexts**

Prior to the late 1990s, equality legislation was overwhelmingly focused on gender in Sweden and Norway. Anti-discrimination and equality legislation has been instrumental in gender equality work in both countries since the 1970s. From an international perspective Sweden and Norway are considered woman friendly states with a range of policies that facilitate the combination of work and family life. The two countries are characterized by relatively strong corporatist traditions, although it has been argued that corporatism has been in decline in Sweden over the past decades (Lindvall and Sebring 2005; Woldendorp 2011). For the purpose of this article it is significant that the social partners traditionally have played fundamental roles in labor marked related policy making in both countries, including anti-discrimination regulations. Moreover, civil society is included in the policy making processes in both countries through public consultation process. Prior to major policy decisions such as legislative changes, interested parties in civil society are invited to respond to the proposed changes in written form. These consultation responses are reviewed before the government submits its final proposals to parliament. Both Sweden and Norway also have a number of institutionalized consultative bodies that provide more continuous communication between the authorities and civil society organizations (cf. Borchorst et al. 2012).

The two countries consistently rank among the top five countries in the world on measures of equality between men and women (Hausmann, Tyson, and Zahidi 2010). At the same time, gender equality legislation has developed differently in the two countries. Whereas the Norwegian Gender Equality Act (9 June 1978) had a general scope from the outset covering

all areas of social life except the internal affairs of religious communities, the Swedish Equal Opportunities Act (1979:1118/1991:433) covered gender equality in the labor market only, and only later the legal scope expanded to other areas of society such as education and access to goods and services. As a consequence, Norway has consistently had one all-inclusive gender equality law, and Sweden has had a number of gender equality laws for different areas of social life.

Certainly, the progress in gender equality has not come about solely through anti-discrimination and equality legislation. General welfare state arrangements have been of fundamental importance, and they continue to provide the conditions for more gender equal practices. However, anti-discrimination legislation has been and continues to be a useful tool in the path toward gender equality. Both protection against discrimination and positive action in the form of active duties and preferential treatment has been part of the legislation from very early on. Gender equality legislation has contributed to further gender equality in politics and the labor market, regulating equal pay issues, modifying hiring queues and protecting worker rights. In fact, it has been crucial to have these legal protections as a complement to the welfare state arrangements, because these could otherwise have negative side-effects. For example, long parental leaves in Sweden and Norway could have led to an even bigger disadvantage for women in hiring and promotion situations without this legal protection. The objective of the gender equality laws has been to promote women's position in society, but over time there has been a shift from focusing on women to focusing on gender balance. This has had consequences for men's rights to paternity leave and opportunities for preferential treatment of men in female dominated professions, such as teaching and child care.

Bodies responsible for the oversight and enforcement of gender equality legislation were established in 1979 in Norway and 1980 in Sweden, and Sweden had an anti-discrimination

ombudsman for ethnic minorities as well from 1986. Separate acts outlawing discrimination on the basis of ethnicity (including nationality, race, religion etc.), disability and sexual orientation in the work place were enacted in Sweden in 1999 and additional discrimination ombudsmen for disability and sexual orientation were established the same year. Since then a number of additional anti-discrimination laws have been enacted, separately covering education and access to goods and services for different grounds.

By the time the joint Equality Ombudsman was established in Sweden in 2009, there were four enforcement bodies separately covering gender, ethnicity and religion, sexual orientation and disability, which were merged in the process. Age and gender identity and expression were added to the grounds covered by the new Equality Ombudsman, since they were also included in the comprehensive anti-discrimination legislation that came into force at the same time.

In Norway, prohibitions against discrimination on the basis of race, skin color, national or ethnic origin and homosexual orientation or way of living were added to the Work Environment Act in 1998, and disability was added as a protected ground in 2001. A general law against ethnic and religious discrimination in all areas of social life[1], modeled on the comprehensive Norwegian gender equality law, was enacted in 2005, and a similarly comprehensive law for disability was enacted in 2008.

There were no other anti-discrimination ombud's authorities other than the Gender Equality Ombud in Norway until 2006. In 2006 a new Equality and Anti-Discrimination Ombud was established, with mandate to enforce anti-discrimination and equality law covering gender, ethnicity, religion, disability, sexual orientation and age.

The reform processes, through which the enforcement bodies were merged and the legal framework was unified in Sweden and suggested unified in Norway, were partly justified by

emphasizing greater user friendliness, efficiency and compliance with international regulations (NOU 2009:14; SOU 2006:22; Lotherington 2010). However, as will become evident in the analysis below, the challenge of multiple discrimination and intersectional inequality was also a significant argument for legal and institutional integration in both countries.

**Theoretical Framework**

It has been argued that the politics of equality increasingly take the form of politics of recognition rather than redistribution (Kantola and Squires 2010). This view is perhaps particularly relevant in the Nordic countries, where redistributive policies traditionally have enjoyed substantial popular support. According to Charles Taylor (1994) politics of recognition means two different things. On the one hand it means a politics of universal dignity that emphasizes equal worth and equal rights. On the other hand it means the politics of difference. The politics of difference demands recognition of "the unique identity of this individual or group, their distinctness from everyone else" (Taylor 1994, 38). Equality measures are encumbered by the inherent tension between these two aspects of the politics of recognition. Concepts such as "contextual universality" (Lindholt 2001) or "inclusive universality" (Brems 2004) attempt to address universality while simultaneously acknowledging diversity. In practical policy making, however, the tensions still remain.

Nonetheless, most (if not all) injustices are implicated with both symbolic and material marginalization (Fraser 1996). On the symbolic level inequality often implies social devaluation and institutional subordination. On the material level it may imply unequal access to jobs, salaries, goods and services. Moreover, institutionalized injustices that have their root in misrecognition are often material in their effects (Fraser 1997). Although politics of recognition may address both symbolic and material inequality, combating economic inequalities usually

demands some form of redistribution. With regard to gender, we know for example that traditionally female dominated occupations tend to have lower salaries than traditionally male dominated occupations. Women are also more likely to work reduced hours in order to invest time in unpaid care work. This gendered division of labor is both symbolically and materially rooted in gendered norms and preferences as well as institutional structures and the organization of (productive and reproductive) labor. With regard to ethnicity, the story is more complicated. Even though the power and status of men and women vary with their social position and gendered identities may take many forms, ethnic boundaries are arguably even more blurry. Ethnic "othering" is complex and involves various combinations of culture, religion, skin color, national origin, language and heritage, and depend on historical patterns of interaction and power relations among groups. Groups that are categorized as ethnic minorities may be materially marginalized because of past or current racism and oppression, but this is not always the case. Which groups are marginalized may also vary over time and according to social or national context.

On top of these complexities, people can be categorized along several axes of inequality at the same time, since ethnic minorities are also simultaneously men and women, young and old etc, and vice versa. One consequence of this heterogeneity within and among groups is that marginalization and privilege can coexist within the same individual (Bedolla 2007). In the U.S. context, Bedolla asks "How can we compare the experiences of a working-class white woman to that of an upper-class black man? Clearly, both are in privileged positions along one dimension, but also are marginal along others" (Bedolla 2007, 234). A central argument from the intersectional perspective is that material and symbolic structures interact in ways that are complex and not always predictable (Jensen 2006). This implies that we cannot *a priori* know

whether a particular man is more privileged than a particular woman, since that may depend on their class positions, ethnic backgrounds, ages etc.

But devising policies that take the intersectional nature of social categories into account face the additional challenge that inequalities have different causes and may also sometimes be conflicting. Some social categories are more closely associated with struggles for recognition and the celebration of difference, while others are more closely associated with redistribution and the elimination of difference. Certain social categories may be difficult to define, such as ethnic minorities. Other categories, such as LGBT persons, may be more likely to experience institutionalized heteronormativity than systematic labor market inequalities due to their sexual orientation. Although institutionalized heteronormativity may have economic consequences, particularly in countries that do not allow same-sex marriages, the root of this form of inequality lie in misrecognition rather than in the organization of labor (Fraser 1997).

Verloo (2006) argues that social categories differ along at least five dimensions: the range of positions in each category, the common understanding of the origin of the social category, the possible location of the inequalities connected to it, the possible mechanisms producing them, and the norm against which the social category seems to be compared (Verloo 2006, : 216). For example, gender is fixed into two distinct positions that very rarely change over time. Age is continuous and always changes over time. Sexual orientation can be divided into at least four categories and may change over time for some individuals, but not for others. Some differences can be seen as a matter of choice, like religion. But this is contested, as many would argue that religion is not a choice, but rather something you are born into or based on beliefs that cannot be changed at will. Disabilities can be visible or invisible, commonly acknowledged or contested. The same can be said about ethnicity. Some inequalities are more likely to be located in relation to the organization of labor than others, gender being a case in point. The list goes on. These

differences between differences have consequences for whether and how it is possible to devise comprehensive legislation for a variety of inequalities. It also creates a complex web of possible intersections that cannot be thought out in advance.

Within each category people may differ with respect to whether or not they want to be recognized as a minority (cf. Appiah 1994). On top of this, of course, the mechanisms that produce different forms of unequal treatment overlap and intersect. Heteronormativity often overlaps with gender stereotyping; racism and sexism may intersect to produce particular stereotypes of black or Asian women or young minority men. In some discrimination cases it may not be possible to separate out on what "ground" discrimination took place. Not because everyone has more than one social identity, but because marginalization and privilege are often based on complex and interrelated social dynamics.

Based on the theoretical perspectives presented here, the challenge of the intersectional perspective for anti-discrimination law reform can be formulated as follows: How do national policy makers navigate between the aspirations for equality and legal consistency on the one hand, and on the other hand a complex social reality where discrimination takes different forms for different grounds, and different axes of inequality intersect in sometimes unexpected ways?

**Data and Methods**

The main texts analyzed in this paper are the Swedish committee report "En sammanhållen Diskrimineringslagstiftning" (*A Coherent Discrimination Law*) (SOU 2006:22), and the Norwegian committee report "Et helhetlig diskrimineringsvern" (*A Comprehensive Protection against Discrimination*) (NOU 2009:14). Methodologically, the analysis of these preparatory works is inspired by critical frame analysis which, according to Roggeband and Verloo (2007, 273) "seeks to discover dominant and/or competing frames in the discourse of political actors that

make sense of different situations and events, contribute blame or causality, and suggest lines of action".

To structure my reading of the argumentation I have used Walton et al.'s (2008) and Fairclough and Fairclough's (2011) methodological tools for analyzing practical reasoning. Practical reasoning is different from theoretical reasoning in that it is reasoning about what to do rather than about what the case is (Fairclough and Fairclough 2011, 245). It is therefore a common form of argumentation in political discourse. It involves arguing in favor of a claim, i.e. that one should act in one way or another, and the argumentation involves a complex weighing of reasons. Fairclough and Fairclough distinguish between five premises in a typical line of reasoning: The value premise, the goal premise, the means-goal (instrumental) premise, the circumstantial premise and the cost-benefit and efficiency premises (Ibid, 248). The value premise is important because it limits the possible goals and means-goals to actions that are in line with a set of generally accepted or politically endorsed values. The goal premise specifies what end we are pursuing, i.e. what we desire the outcome to be. The means-goal premise specifies the steps of action that need to be taken in order to reach the goal. The circumstantial premise is what is often referred to as "the problem", which we want to solve. Finally, cost-benefit and/or efficiency premises are usually used to support the claims that are being made. Delineating these elements of the discrimination law committees' reasoning allows me to break down the arguments into parts that can be analyzed and compared separately.

The reason why I have chosen to compare the Swedish and Norwegian policy documents is threefold. First, the two countries have similar histories with regard to gender equality and welfare state provisions, and at the same time there is cross-national variation in the development of equality policies for other grounds than gender, as well as the scope and structure of anti-discrimination law. Second, the outcomes of the policy reforms were different in the two

countries, despite relatively similar reform processes. Finally, by comparing two political discourses over the same topic, I am able to read both argumentations from the perspective of a potentially alternative frame.

## Premises and Framings in the Policy Documents

### *The Value Premises*

Not surprisingly, the two committee reports start out by defining the purpose of the legislation within the framework of 'equality'. This is the stated *value premise* on which the argumentations rest. Although the value premises are quite similar, they are nonetheless framed differently in the two reports. Whereas the Swedish report frames the law as a response to a reality where differences are unavoidable, the Norwegian report takes a more universalistic approach. The Norwegian report states that,

> "The committee takes as its starting point that all people are equally valuable and have the same human dignity and that it should be a goal to promote equality (*likestilling*) independent of biological, social and cultural conditions. (...) By equality we mean equal value, equal opportunities and rights, as well as equal access and adaptation in the face of special needs (*tilrettelegging*)" (NOU 2009: 14 p. 23, my translation).

Here we see a focus on equal worth, which is a relatively abstract and largely uncontroversial value premise. By framing the discussion this way, the Norwegian committee articulates its value premise in line with the politics of universal dignity, which according to Taylor (1994) seeks to establish a social space ignorant of 'difference'. In the further specification of the objectives of the law the Norwegian committee adds,

> "An important objective of the discrimination act is therefore to counteract attitudes and actions based on prejudice and stereotypes. Equal worth involves the right to be accepted

> and respected for who you are, independent of biological, social and cultural differences. We must accept, respect and handle that we in fact are different. Society should be organized so that people who do not fit in with what is understood as "normality" or what is common, should not be disadvantaged" (NOU 2009: 14 p. 101, my translation).

Here we see that existing differences between people are brought up as part of the reasoning behind the strive toward equality. However, it is articulated within a framework of discursive difference, that is, as deviations from what is considered "normal". This framework does not address the challenge that people may in fact have different values and interests, and that these may in some cases be conflicting.

By contrast, the Swedish report starts out stating that,

> "The new rules should help to increase equality (*jämlikhet*), improve equality (*jämställdhet*) between men and women and enhance understanding and openness among people. In a society where people with different interests, different backgrounds, different orientations and different values must live together, this is an ambitious objective, but it is considered that the legislation will have a positive influence on the formation of morals in both the short and long term and any lower level of ambition can hardly be contemplated. Inadequate equality between men and women, inequality (*ojämlikhet*) between people, xenophobia and exclusion, mistrust and fear regarding those who 'are different', racism and homophobia – these are all social problems that must be attributed priority in an open society" (SOU 2006:22 p. 41, my translation).

Compared to the Norwegian text, the challenge of real social differences is made more explicit in the Swedish passage, and the Swedish report uses a more structural language (e.g., "xenophobia", "exclusion") compared to the Norwegian report. Moreover, the Swedish committee explicitly distinguishes between the term equality (*jämlikhet* - which implies sameness) and gender equality

(*jämställdhet* - which implies “equal footing” without requiring sameness), implying that equality may not mean the same thing in every situation. The distinction between these two forms of equality is also available in the Norwegian language, but the Norwegian committee choses to apply the “equal footing” term from gender equality politics to frame the general concept of equality in the Norwegian report.

In the framing of the value premises of these reports we thus see a divide between the Norwegian report with its focus on universal dignity, and a more pragmatic starting point for the Swedish committee. The universalistic vs. pragmatic divide is further evidenced in the scope of their deliberations. Whereas the Norwegian committee at least briefly considered a broad range of possible discrimination grounds, including health, overweight, looks, property and economic position, the Swedish committee viewed their mandate more narrowly, to evaluate the merger of existing anti-discrimination laws, except for the specific request for the committee to deliberate on an explicit protection for transpersons. The fact that the Norwegian committee had, and included in the report, a discussion about a range of possible discrimination grounds underscores their value premise, articulated as equality “independent of biological, social and cultural conditions”.

*The goal and means-goal premises*

The *goal premise* for both committees was to create a unified law. It was *not* primarily articulated as finding the optimal protection against discrimination in the respective societies. However, the Norwegian report focuses more on legal harmonization than the Swedish report. This is mirrored in the way in which the two new anti-discrimination acts are suggested formulated. Whereas the Norwegian law proposal explicitly seeks to minimize the use of separate regulations, the Swedish

law proposal specifies regulations for several sectors of social life separately (within the same document).

The Norwegian report states that any variations in protection or regulations across grounds should be understood as necessary exceptions from the ideal of legal harmonization. The committee writes,

> "By harmonizing the rules, the committee means that the goal is to create as equal rules as possible regarding content, unless there are profound reasons for unequal protection. Part of the purpose of unifying the law, is to avoid hierarchies across discrimination grounds that would give some grounds stronger protection than others" (NOU 2009:14 p. 96, my translation).

By contrast, the Swedish committee rarely mentions legal harmonization, and focuses instead on bringing their patchwork-like discrimination legislation into one document, making it "more efficient and comprehensive (*heltäckande*)" (SOU 2006:22 p. 20, my translation).

The *means-goal premises* can be articulated as the causal link between a unified law (i.e. one document) and comprehensive (Sweden) or harmonized (Norway) legal protection against discrimination. In both countries the goal premises and the means-goal premises were all but given in advance, as part of the mandates for the discrimination law committees.

Although it is not made explicit in the text, the central frame through which the goal of harmonization is articulated in Norway is that of similarity across discrimination grounds. That is, it is emphasized that inequalities associated with the various protected grounds can be alleviated through similar measures, which implies that their character and/or causes are not fundamentally different. In fact, without this basic assumption the suggested level of legal harmonization would not be a reasonable solution. In Sweden, by contrast, the committee approached the issue of similarity across grounds in a less general manner. Under the heading

"Equally strong protection" the Swedish committee writes, "An important and fundamental starting point for our work is that the protection against discrimination should be as similar as possible for different discrimination grounds" (SOU 2006:22 p. 226, my translation). Yet, they qualify this initial statement by concluding that, "The goal is to shed light on possible differences between different discrimination grounds and areas of social life and make the law as unified (*enhetlig*) as possible" (Ibid.).

This cross-national difference has likely to do with the way anti-discrimination laws have been organized historically in the two countries. As equality legislation expanded from gender to new discrimination grounds, the existing gender equality legislation was used as a model in both countries. This path dependence has led to additional laws with a general scope in Norway covering ethnicity, religion and disability in nearly all areas of social life without further specification. Similarly in Sweden it has resulted in a number of laws covering ground like ethnicity and disability that, as with the Swedish gender equality legislation, were separate by areas of social life, such as the labor market, education, access to goods and services etc. The structure of the existing equality legislation thus has had consequences for the way the committees framed their suggestions for comprehensive equality legislation. The new comprehensive Swedish discrimination law is divided into sections that separately cover the labor market, education, access to goods and services, membership in organizations, social security, health services etc. This division facilitates a number of exemptions and additions that vary by social fields and discrimination grounds.

*The Circumstantial Premises*

The way existing legislations were structured provided one of several *circumstantial premises* within which the committees were working out their proposals. Another circumstantial premise

was, of course, the complex reality in which several grounds need protection, and increasing political awareness and international pressure. The international debate about multiple discrimination and intersectionality arguably also formed a circumstantial premise for the committees' deliberations, since both committees felt compelled to address it in their reports.

There are potentially a number of ways in which multiple and/or intersectional discrimination could be legally specified. A few countries have already included specific regulations of multiple or intersectional discrimination in their equality legislation. One example is Canada, where Section 3.1 of the federal Human Rights Act reads "For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds".

Both the Swedish and the Norwegian committee reports acknowledge multiple discrimination as a relevant phenomenon. The Swedish committee refers to a report that was completed a year earlier, documenting structural discrimination of ethnic and religious minorities (SOU 2005:56). This report, written by Paul Lappalainen in collaboration with a team of experts, concluded that a unified law would more efficiently counter structural discrimination. The Lappalainen report emphasized that it would be "important to consider the question of intersectionality in relation to the different discrimination grounds within the framework of a unified law" (SOU 2005:56, p. 567, my translation). Referring to Lappalainen's discussion of intersectionality the Swedish discrimination law committee writes,

> "...intersectionality can be said to build on the intersection between different power relations in society, based on for example gender, class, ethnicity etc. The concept of intersectionality brings focus to how power relationships work together with and depend on each other and therefore cannot be seen as easily distinguishable. Different power relations mutually construct and influence each other, *reduce or strengthen each other*,

> *complete or compete with each other*. It is not a question of just adding a disadvantage to another. It is in the dynamic interplay between different power relations that discrimination manifests itself" (SOU 2006:22 p. 138, my emphasis and translation).

In this passage we see a potential starting point for a discussion about the consequences of intersectionality for anti-discrimination legislation. Keeping in mind that both Swedish and Norwegian anti-discrimination legislation contains regulations for active duties and preferential treatment these consequences go beyond the individual complaints framework. What happens when different power relations influence each other such that inequality on one dimension *reduces* inequality on another dimension? For example, correspondence test research in Sweden has shown that male job applicants with Arabic names are more consistently discriminated against than female job applicants with Arabic names (Arai, Bursell, and Nekby 2008). This means that in some situations when gender and ethnicity intersect, the established power relations within each of these grounds may shift. What happens when different inequalities compete with each other? A common example is gender and religion. If a person's religion prohibits certain activities in the presence of members of the opposite sex, this may come into in conflict with principles of gender equality. Mixed sex swimming lessons in public schools is a case in point, but there are many others. These important questions about the practical implications of intersectionality are not asked, and by extension, not answered. In the Swedish discrimination law committee's own deliberations intersectionality is mentioned as one of ten listed arguments for integrating the ombudsman's function into a joint enforcement body. Under the heading "Intersectionality" they state that,

> "Of interest is the cross-disciplinary concept intersectionality that focuses on the overlap of different social power relations based on for example gender, ethnicity, class, age, ability and health. The concept addresses how different power relations work together and

> are intertwined. The primary issue is not that several different discrimination grounds are "stacked on top of" each other, but rather that there are structures that make a specific combination of personal characteristics lead to discrimination (for example a black, lesbian woman), whereas changing any one of these characteristics, could lead to a different treatment" (SOU 2006:22 part 2 p. 216, my translation).

Here they depart from the structural language, which was more clearly used in the Lappalainen report, and reduce intersectionality to describing a person with several characteristics that can be associated with disadvantaged groups. Under a separate heading the Swedish discrimination law committee argues that a joint enforcement body would improve the situation for people who are discriminated against on multiple grounds. They use the examples of a black, lesbian woman with disabilities, an older woman, and a Muslim man in a wheelchair to emphasize their point that with a joint body these people would no longer have to choose which ombudsman to turn to if they would need to file a claim. However, they explicitly use the term multiple discrimination to describe this situation, and argue that this is *not* the same as intersectional discrimination. In fact it is striking that "intersectionality" is the only argument among the ten listed that is not presented in the *form* of an argument. Whereas the other arguments on the list, including "multiple discrimination", are introduced with phrases like "will make it clearer", "will lead to greater…" or "will help avoid problems with" etc., we see that "intersectionality" is introduced as "a concept of interest". The Swedish Gender Equality Ombudsman (JämO) also commented on this in his consultation response to the report where he wrote "however [the report] does not discuss in which ways an intersectional perspective is regarded useful in relation to the proposed integration" (JämO remissvar 2006-09-28, Ärendenr. 348/2006, my translation). This underscores that the complexity of the intersectional perspective remains abstract and as such is challenging to convert into policy measures.

The Norwegian committee explicitly addresses whether there should be a clause in the harmonized law to regulate multiple or intersectional discrimination. Under the heading "Discrimination on multiple grounds" they explain that,

> "Multiple discrimination describes a situation where a person is discriminated against on the bases of more than one ground in the same incident. Intersectionality is different from multiple discrimination in that the different grounds cannot be evaluated separately. Depending on the circumstances, women with minority backgrounds for instance can be subject to particular forms of ethnic discrimination that do not affect men with minority backgrounds, because of prejudice and stereotypes. They may also experience gender discrimination that ethnic Norwegian women do not experience" (NOU 2009:14 p. 180, my translation).

Paraphrasing the Ontario Human rights commission's document *An intersectional approach to discrimination* from 2001, they add that,

> "An intersectional approach to discrimination considers historical, social and political context and acknowledges the individual's unique experiences based on the interaction between discrimination grounds. An advantage of the intersectional approach is claimed to be that it acknowledges the complexity in people's experience of discrimination and it considers the particular groups' social and historical context. The focus is on society's response to the individual and *does not require that people are put in rigid categories"* (NOU 2009:14 p. 180, my emphasis and translation).

The issue of categorization can be seen as a fundamental challenge for anti-discrimination law, since group association is the core argument in these kinds of claims of unjustified mistreatment. What is more, proactive duties demand categorization over and above people's own identifications. The committee does not discuss further in which ways this could be a challenge

for the anti-discrimination law they are proposing. However, as part of their general deliberations about a harmonized law, they propose adding an open category ("other similar essential characteristics of a person") to the list of protected grounds. They make the argument that among other things this will make it easier to combat intersectional discrimination, especially when one or more of the intersecting characteristics are not among the listed grounds, such as for example ethnicity and drug addiction. At the same time, this open category is clearly perceived as potentially problematic, as it may make it more difficult to identify the boundaries of the law. As a compromise the committee suggests that people whose claims are filed under the open category should not be eligible for the same financial compensation and restitution as the other listed grounds, and that the principle of shared burden of proof should not apply. It would also not be included in the regulations of active duties. Regarding the feasibility of intersectional claims making, they acknowledge that one problem may be the challenge of identifying a comparator (a comparable person without the "trait(s)" that were treated more favorably). Yet they conclude that multiple discrimination does not need any legal specification in the law and do not discuss the issue further.

*Efficiency and cost-benefit premises*

Because the Norwegian committee had as its goal to harmonize the legislation as much as possible, they also had to weigh the *costs and benefits* of this approach. They argue that it may be necessary to change existing legislation in a way that could be interpreted as downgrading, but that as long as the overall protection is not weakened this is a cost they believe is worthwhile. They write,

> "According to the mandate, the committee's proposal should not weaken current levels of protection. The committee understands this as meaning that the overall protection against

> discrimination should not be weakened. The level of protection in current legislation should be carried over. However, this does not exclude the possibility for making certain adjustments to individual regulations that are necessary to reach a unified and appropriate result of the harmonization. If not, the efforts to unify the legislation would be limited to a purely technical compilation of different laws" (NOU 2009:14 p. 96, my translation).

An example of this type of adjustment is a compromise the Norwegian committee suggests regarding active duties. The active duty to promote equality in the work place is suggested extended to several new grounds, but at the same time employers' duty to make publicly available reports documenting their equality work is suggested removed. This was interpreted as a serious setback for gender equality law by several stakeholders, even though it upgrades equality measures for groups that did not previously have them.

The Swedish committee defines the costs of a unified law quite differently. Because they are not concerned with legal harmonization to the same extent as the Norwegian committee, their main concern is whether the unified law would be too long and cluttered. They write,

> "Among possible disadvantages can be mentioned that the necessary variation in regulation for different discrimination grounds and areas of social life makes a unified law at risk of being "cluttered" and difficult to oversee" (SOU 2006:22 p. 221, my translation).

Here we see that the framework within which the two reform processes operate are in some ways fundamentally different, even though the goals of these processes are relatively similar. That is, both committees deliberate on the issue of unifying existing anti-discrimination law, but they diverge on the general scope of harmonization. This has consequences for the types of reactions the law proposals received from interested parties. The National Confederation of Trade Unions (*LO*) in Norway objected to the inclusion of gender equality legislation in a unified anti-

discrimination act. They argued that “Gender and age are the only grounds that affect everyone, regardless of other conditions that may be associated with a person. It is therefore natural to have a separate law that regulates gender discrimination” (LO’s consultation letter 16 Desember 2009, my translation). The objection raised by Swedish LO’s expert representative was similar, but also emphasized that labor market issues should be regulated separately. She argued that gender equality work differs from other grounds, but specifies that this is particularly relevant with regard to active duties in working life. As a result she proposes to keep the existing Equal Treatment Act, which separately regulates gender equality in working life (SOU 2006:22 reservations pp. 613 and 625).

Figures 1 and 2 present the reasoning in the two proposals schematically. The central claim of the arguments and their potential counter-arguments are presented on top, and the five basic premises are summarized and connected to these claims and to each other, according to their logical relationships. The underlying frames on which the argumentation rests is presented in boxes framed by dashed lines to emphasize that these assumptions are implicit and are only indirectly expressed in the texts.

**Figure 1. Swedish Argumentation (solid lines) and Frames (dashed lines)**

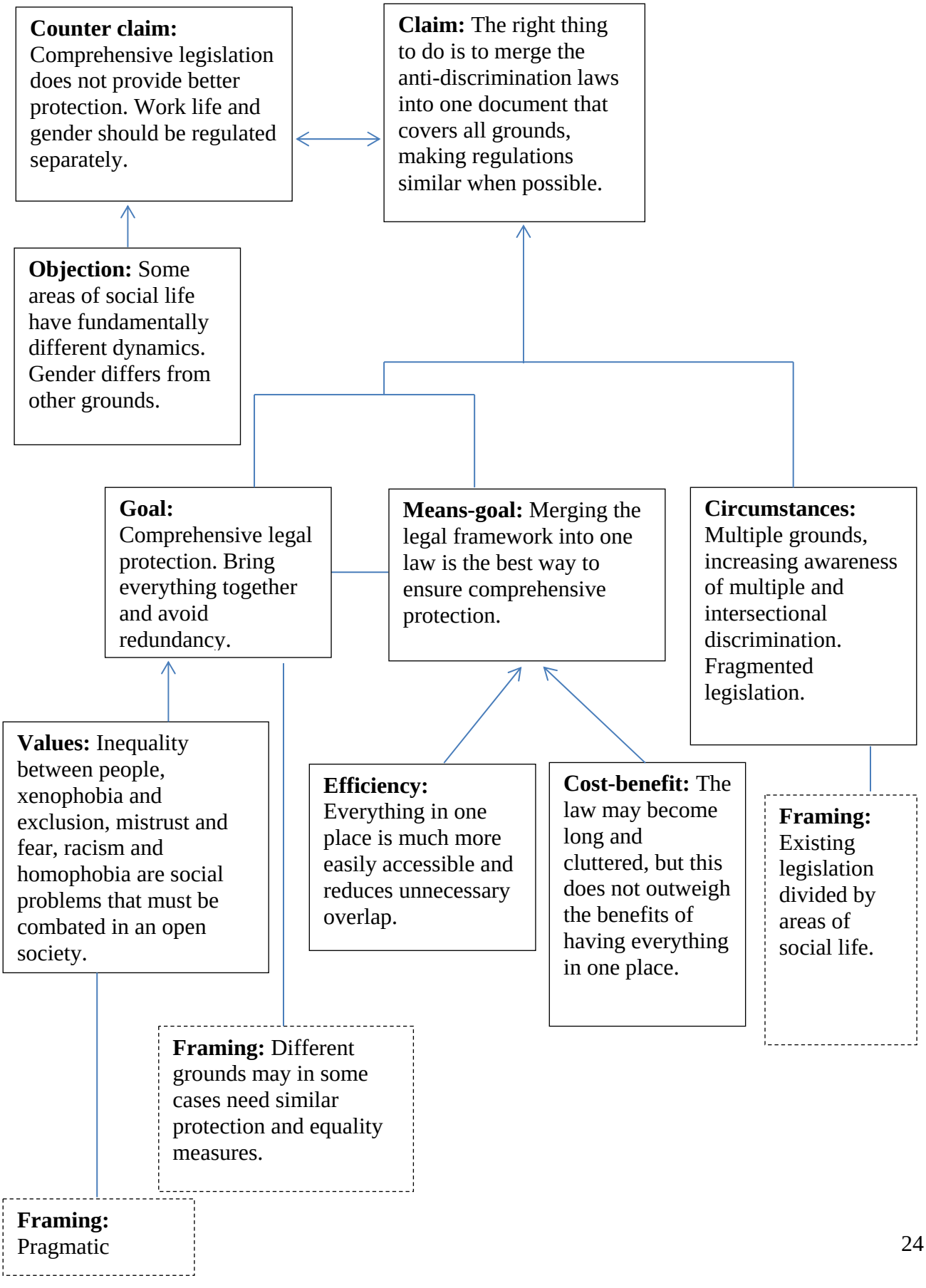
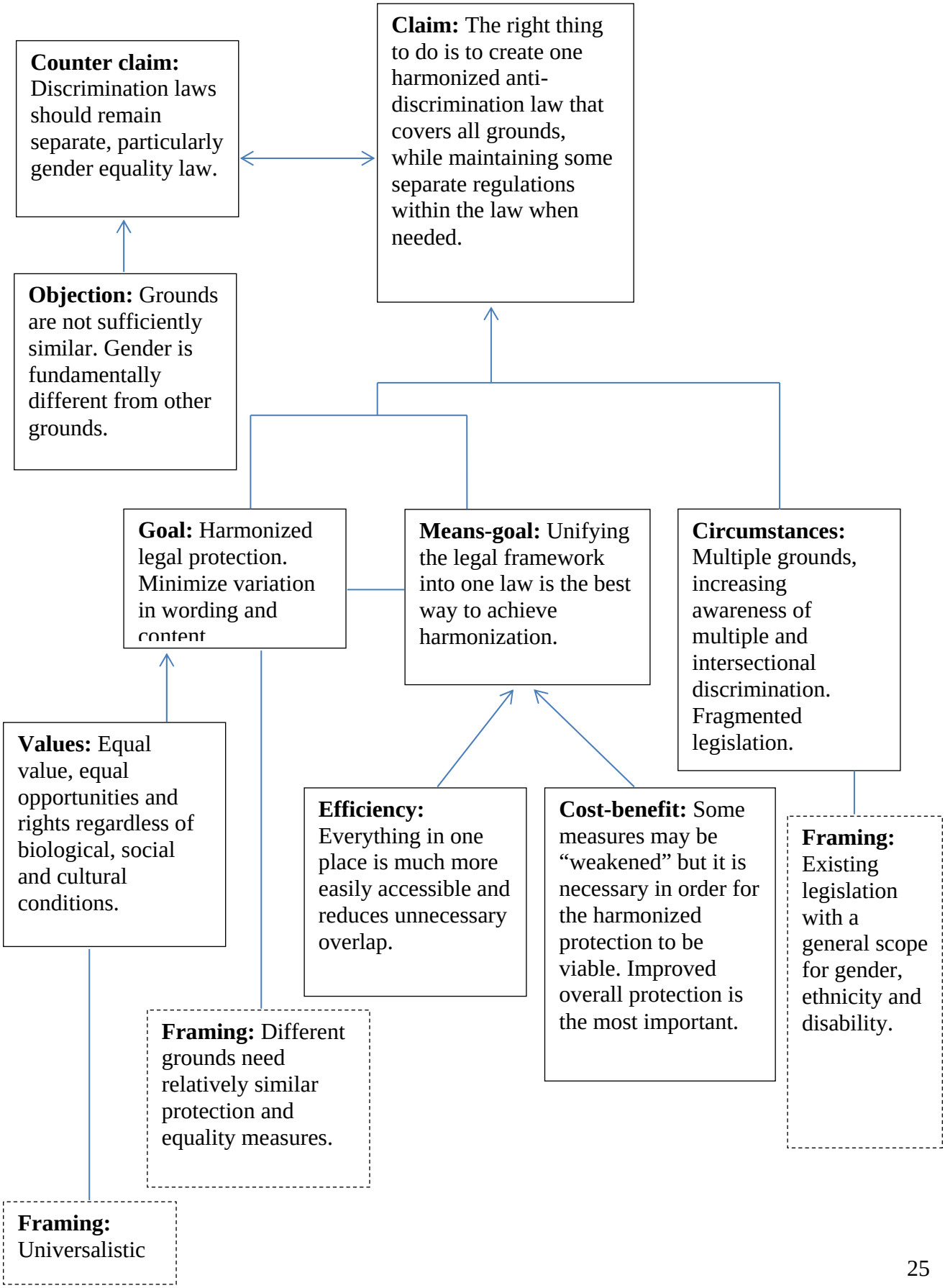


**Figure 2. Norwegian Argumentation (solid lines) and Frames (dashed lines)**



We see from the two figures that the underlying frames are fundamentally different in the two reports. Whereas the Norwegian frames all point in the direction of fewer distinctions between grounds, the Swedish frames are more concerned with differences between discrimination grounds. How is it, then, that Sweden ended up integrating the legislation and Norway did not?

**Discussion**

At first glance the two discrimination law committee reports are quite similar, proposing a unified equality and anti-discrimination law that covers all relevant grounds in one legal document. However, as we have seen the two reports differ in the articulations of their value premises and goals, where the Norwegian committee takes a more general universalistic approach and the Swedish committee seems to be somewhat more pragmatically attuned to the challenges associated with social differences.

On the one hand one could expect that the universalistic frame would be more open for the complexity of intersectional inequality. The compromise-like addition of an open category can be seen as an expression of this. On the other hand one could expect that the framing of the Swedish report would be somewhat more conducive to handling the question of intersectional discrimination, because of the more explicit consideration of differences as well as the structural aspects of inequalities. Yet neither of the reports attempts to come to terms with empirical or theoretical challenges that the intersections literature poses to an anti-discrimination and equality law.

In fact, the absence of a discussion of empirical evidence of discrimination in the two reports is striking. Some studies are referred to but there is hardly any discussion or evaluation of the results. This has partly to do with the fact that discrimination is notoriously difficult to study. However, it also makes it even clearer that the primary political issue at stake in these reform

processes has not been combating discrimination, but rather combating legal fragmentation. It is therefore likely that the level of detail of the comprehensive Swedish equality legislation made the legal reform less controversial in Sweden than in Norway. It is also likely that the social partners have retained somewhat more political clout in Norway than in Sweden, and consequently that their objections to the legal changes were more decisive for the outcome in Norway than in Sweden. At the same time, the fragmented Swedish equality legislation was also more clearly seen as being in need of reform. The committee argued that there were holes in the legislation even for gender in the field of social services and health services, and for disability in relation to social services, social security and other government services (SOU 2006:22 p. 192). A new law would therefore give a more comprehensive protection for women as well in Sweden. In this respect the Swedish legal reform differed significantly from the proposed legal changes in Norway.

Whether the proposed legal harmonization of the Norwegian legislation would have been an improvement relative to the current situation is still a matter of debate. As Verloo (2006) argues, social categories are constituted by different mechanisms and processes, and by focusing on similarities we risk ignoring the differentiated dynamics of inequalities. The Norwegian government's subsequent argumentation for keeping the laws separate reflects this concern. The Minister of Children, Equality and Social Inclusion at the time stated that "A separate law for gender equality will provide the best framework for the efforts to improve the position of women in society. Likewise it is my conviction that separate laws will provide the best framework for equality efforts regarding ethnicity and disability (Lysbakken 2011, my translation). At the same time keeping the acts separate obstructs the possibility for adding an open category, which perhaps could have contributed positively to the protection against complex discrimination.

The two reports have in common that when they bring up the issue of intersectional inequality they refer to other reports or papers that have dealt with the topic more in-depth, but they do not independently deal with its complex consequences for anti-discrimination law. Both committees also summarize the problem in terms of combinations of demographic traits (e.g., a black lesbian woman), thus moving away from the structural language and ignoring the inherent challenge of categorization. From a theoretical perspective, one of the strengths of the intersectional perspective is that it does not position any social category as privileged or marginalized *a priori* (Jensen 2006; Hancock 2007). This means that combinations of structural factors can lead to counter-intuitive results, such as racial or ethnic minority women sometimes being privileged over their male peers because of certain gender-coded stereotypes about minorities, especially about young minority men. This is a fundamental challenge for equality legislation, especially in countries like Norway and Sweden where positive action is such an integral part of the equality apparatus.

**Conclusion**

Through a comparison of the political discourse in the Swedish and Norwegian discrimination law committee reports, I have attempted to investigate to what extent the challenging questions that emerge from the intersections literature have been addressed in the process of reforming anti-discrimination legislation in the two countries.

The Swedish and Norwegian policy documents differ in their framing regarding equality and harmonization. Whereas the Norwegian committee starts from the value premise of universal dignity, the Swedish committee is more pragmatic in its initial approach. Through its discourse on legal harmonization the Norwegian committee argues for equal measures unless there are exceptional reasons for variation. The Swedish proposal emphasizes difference between grounds

to a larger extent than the Norwegian and argues primarily for making the legal framework more comprehensive and less fragmented. Yet none of the reports conclude that a comprehensive or harmonized legislation needs to regulate multiple or intersectional discrimination, although they acknowledge the issue as theoretically relevant. Even though the committees address multiple discrimination and intersectionality, they do not present empirical evidence or problematize how intersectional inequalities may have unexpected consequences for the relative standing of discrimination grounds, and how that may be compatible with the kinds of anti-discrimination and equality measures covered by the law.

Nonetheless, it is possible that the new Swedish legislation, by virtue of being unified into one document, will make it easier to address intersectional discrimination. However, some of the fragmentation of the Swedish equality legislation remains in the new anti-discrimination act, and no explicit regulation of multiple or intersectional discrimination was included in the new law. Conversely, the general scope of the separate Norwegian anti-discrimination acts[2] could facilitate intersectional analyses of discrimination cases, despite the stand-specific legal structure. These technical variations make the effective difference between the Swedish and Norwegian outcomes less obvious.

My analysis suggests that the different outcomes of the reform processes cannot be attributed to the ways in which intersectional perspectives were discussed in the policy documents. Comparative empirical analyses of practices, like the implementation of active duties or the handling of actual discrimination cases, are needed in order to evaluate the consequences of the two reform processes. In the absence of explicit regulations of multiple or intersectional discrimination, the ability of these two legal frameworks to address more complex inequalities will largely depend on how the legislation is implemented in practice. As this analysis has shown, the preparatory works offer relatively few explicit guidelines in this respect.

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**Notes**

[1] With exceptions for internal affairs of religious communities and strictly personal relations.

[2] As part of their alternative response to the halted reform process, the Norwegian government has promised an additional separate law against discrimination on the basis of sexual orientation, sexual identity and expression (Lysbakken 2011). With the enactment of this planned legislation, such general scope anti-discrimination laws would cover gender, ethnicity/religion, disability and sexual orientation/identity/expression in Norway.

**References**

Appiah, K. Anthony. 1994. "Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction". In *Multiculturalism: Examining the Politics of Recognition*, edited by A. Gutmann. Princeton, NJ: Princeton University Press.

Arai, Mahmood, Moa Bursell, and Lena Nekby. 2008. "Between Meritocracy and Ethnic Discrimination: The Gender Difference". *IZA Discussion Paper Series* No. 3467.

Bedolla, Lisa García. 2007. "Intersections of Inequality: Understanding Marginalization and Privilege in the Post-Civil Rights Era". *Politics & Gender* 3 (02):232-248.

Borchorst, Anette, Lenita Freidenvall, Johanna Kantola, Liza Reisel, and Mari Teigen. 2012. "Institutionalizing Intersectionality in the Nordic Countries: Anti-Discrimination and Equality in Denmark, Finland, Norway, and Sweden". In *Institutionalising Intersectionality? Comparative Analyses*, edited by A. Krizsan, H. Skjeie, and J.Squires. Basingstoke: Palgrave Macmillan.

Brems, Eva. 2004. "Reconciling universality and diversity in international human rights: A theoretical and methodological framework and its application in the context of Islam". *Human Rights Review* 5 (3):5-21.

Collins, Patricia Hill. 1990. *Black Feminist Thought: Knowledge,Consciousness, and the Politics of Empowerment*. Boston, MA: Unwin Hyman.

Crenshaw, Kimberle. 1989. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics". *The University of Chicago Legal Forum* 1989 (139):139-167.

European Commission. 2007. Tackling Multiple Discrimination - Practices, policies and laws. Luxembourg: Office for Official Publications of the European Communities.

*Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts*.

Fairclough, Isabela, and Norman Fairclough. 2011. "Practical reasoning in political discourse: The UK government's response to the economic crisis in the 2008 Pre-Budget Report". *Discourse & Society* 22 (3):243-268.

Fraser, Nancy. 1996. Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation. In *The Tanner Lectures on Human Values*. Stanford University, April 30-May 2, 1996.

Fraser, Nancy. 1997. "Heterosexism, Misrecognition and Capitalism: A Response to Judith Butler". *Social Text* 52/53: 279-289.

Hancock, Ange-Marie. 2007. "When Multiplication Doesn't Equal Quick Addition. Examining Intersectionality as a Research Paradigm". Perspectives on Politics 5 (1):63–79.

Hankivsky, Olena, and Renee Cormier. 2011. "Intersectionality and Public Policy: Some Lessons from Existing Models". *Political Research Quarterly* 64 (1):217-229.

Hausmann, Ricardo, Laura D. Tyson, and Sadia Zahidi. 2010. The Global Gender Gap Report 2010. Geneva, Switzerland: World Economic Forum.

Jensen, Sune Qvotrup. 2006. "Hvordan analysere sociale differentieringer?". *Kvinder, Køn og Forskning* 2-3:70-79.

Kantola, Johanna, and Judith Squires. 2010. "The New Politics of Equality". In *New Directions in Political Science: Responding to the Challenges of an Interdependent World*, edited by C. Hay. Basingstoke: Palgrave Macmillan.

Krizsan, Andrea, Hege Skjeie, and Judith Squires, eds. 2012. *Institutionalising Intersectionality? Comparative Analyses*. Basingstoke: Palgrave Macmillan.

Lindholt, Lone. 2001. "VII. The African Charter: Contextual Universality". *In Human Rights on Common Grounds: The Quest for Universality*, edited by K. Hastrup. The Hague: Kluwer Law International.

Lindvall, Johannes, and Joakim Sebring. 2005. "Policy reform and the decline of corporatism in Sweden." *West European Politics* 28 (5): 1057-1074.

Lotherington, Ann Therese. 2010. "LDO er løsningen- hva er problemet? En analyse av opprettelsen av likestillings- og diskrimineringsombudet". In *Likestilte norskheter: Om kjønn og etnisitet*, edited by A.-J. Berg, A. B. Flemmen and B. Gullikstad. Trondheim: Tapir Akademisk Forlag.

Lysbakken, Audun. 2011. "Arbeidet med ny diskrimineringslovgivning". *Pressemelding fra Barne-, likestillings- og inkluderingsdepartementet* 2. september 2011:Tilgjengelig på www.regjeringen.no/nb/dep/bld/aktuelt/nyheter/2011/arbeidet-med-ny-diskrimineringslovgivnin.html?id=653933.

Makkonen, Timo. 2002. Multiple, compound and intersectional discrimination: Bringing the experiences of the most marginalized to the fore. Institute for Human Rights: Åbo Akademi University, available at http://web.abo.fi/instut/imr/norfa/timo.pdf.

NOU. 2009:14. *Et helhetlig diskrimineringsvern*. Oslo: Norges Offentlige Utredninger, Barne- og Likestillingsdepartementet.

Parken, Alison. 2010. "A multi-strand approach to promoting equalities and human rights in policy making". *Policy & Politics* 38 (1):79-99.

Roggeband, Conny, and Mieke Verloo. 2007. "Dutch Women are Liberated, Migrant Women are a Problem: The Evolution of Policy Frames on Gender and Migration in the Netherlands, 1995–2005". *Social Policy & Administration* 41 (3):271-288.

Schiek, Dagmar , and Victoria Chege, eds. 2009. *European Union Non-discrimination Law. Comparative perspectives on multidimensional equality law*. London and New York: Routledge Cavendish.

SOU. 2005:56. *Det blågula glashuset - strukturell diskriminering i Sverige*. Stockholm: Statens Offentlige Utredningar, Regeringskansliets förvaltningsavdelning.

----------. 2006:22. *En sammanhållen diskrimineringslagstiftning*. Stockholm: Statens Offentlige Utredningar, Regeringskansliets förvaltningsavdelning.

Taylor, Charles. 1994. "The Politics of Recognition". In *Multiculturalism: Examining the Politics of Recognition*, edited by A. Gutmann. Princeton, NJ: Princeton University Press.

Verloo, Mieke. 2006. "Multiple Inequalities, Intersectionality and the European Union". *European Journal of Women's Studies* 13 (3):211-228.

Walton, Douglas, Christopher Reed, and Fabrizio Macagno. 2008. *Argumentation Schemes*. New York: Cambridge University Press.

Williams, Toni. 2009. "Intersectionality analysis in the sentencing of Aboriginal women in Canada: what difference does it make?" In *Intersectionality and beyond: Law, power and the politics of location*, edited by E. Grabham, D. Cooper, J. Krishnadas and D. Herman. Abingdon and New York: Routledge-Cavendish.

Woldendorp, Jaap. 2011. "Corporatism in small North-West European countries 1970-2006: Business as usual, decline, or a new phenomenon?" *Working Paper Series* Department of Political Science, VU University Amsterdam.

Yuval-Davis, Nira. 2006. "Intersectionality and Feminist Politics". *European Journal of Women's Studies* 13 (3):193-209.

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# Legal Harmonization and Intersectionality in Swedish and Norwegian Anti-Discrimination Reform

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This article investigates to what extent the challenging questions emerging from the intersectionality literature have been addressed in the process of reforming antidiscrimination legislation in Sweden and Norway. I find that even though intersectionality is presented as relevant for the policy reforms in both countries, the term largely remains abstract and obscure in the policy documents. As a result, other more practical circumstances become decisive in determining the outcome of the reforms. The existing structure of the national equality legislation in particular seems to have had significant consequences for the variation in outcomes of the two reform processes.

## Introduction

Over the past fifteen years, anti-discrimination and equality legislation in Europe has gone through significant changes. The Amsterdam Treaty of 1997 made it a responsibility of the European Union member states to combat discrimination based on sex, racial or ethnic origin,

religion or belief, disability, age or sexual orientation (European Union 1997). In the same period, the challenges of multiple discrimination increasingly became part of the international human rights discourse. The UN World Conference Against Racism held in Durban, South Africa in 2001 has been pinpointed as the international breakthrough that put multiple discrimination on the human rights agenda (European Commission 2007; Makkonen 2002; Yuval-Davis 2006). Multiple discrimination is often used as an umbrella-term for complex forms of discrimination. It usually refers to situations where a person is discriminated against on two or more grounds, either separately or at the same time. It often, but not always, refers to situations where individuals are simultaneously marginalized on several dimensions of inequality, such as gender, race and class.

Another term that is often used to describe this form of multidimensional inequality is intersectional discrimination. The term originated with American legal scholar Kimberlé Crenshaw's 1989 article "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", and has since gained increasing foothold in the academic literature on equality politics (e.g. Kantola and Squires 2010; Verloo 2006; Schiek and Chege 2009; Krizsan, Skjeie, and Squires 2012). The intersectional perspective challenges the rigidity of categorization and emphasizes that patterns of domination and subordination vary with cross-cutting power relations across different dimensions of inequality (Collins 1990).

However, this complex way of thinking about inequality is challenging for national policy makers. One of the differences between human rights instruments and national anti-discrimination legislation is that whereas the former intends to limit the power of the legislator, the latter intends to affect the behavior of private persons (and in some cases other legal entities, like corporations). This means that national anti-discrimination legislation must define the boundaries of discrimination more explicitly than the human rights instruments normally do.

There are very few examples of successful implementation of these kinds of complex analyses of inequality in national policies (Hankivsky and Cormier 2011; Parken 2010; Williams 2009). This is also the case with regard to anti-discrimination legislation (see Krizsan, Skjeie, and Squires 2012). Central challenges include the characteristics of, and relationship among, different discrimination grounds, and the meaning of equality across multiple, sometimes conflicting, axes of inequality. Moreover, even in the few instances where attempts have been made to include intersectional analyses in decision making processes, the outcomes do not necessarily resonate with the concept's critical intentions (cf. Williams 2009 on the incarceration of Aboriginal women in Canada).

In line with the international developments, revisions of anti-discrimination legislation have been initiated in Norway and Sweden. These changes center on the move from a dominant gender equality framework to a more multidimensional framework covering a range of inequality grounds, and a move towards single equality bodies and integrated equality legislation (cf. Kantola and Squires 2010). In Sweden all anti-discrimination and equality legislation was merged into one comprehensive anti-discrimination law in 2008. In Norway, by contrast, legal harmonization was officially explored and recommended (NOU 2009:14), but the government concluded to keep the legislation separate by inequality strands. However, in both Norway and Sweden separate complaints bodies covering different discrimination grounds have been integrated and expanded into comprehensive complaints bodies covering all legally protected grounds.

This article investigates to what extent the challenging questions emerging from the intersections literature have been addressed in the process of reforming anti-discrimination legislation in the two countries. I compare central policy documents in the two countries and ask to what extent they are framed similarly or differently, whether they discuss intersectional

discrimination in similar or different ways, and to what extent this may help explain the divergent outcomes of the two reform processes.

**The National Contexts**

Prior to the late 1990s, equality legislation was overwhelmingly focused on gender in Sweden and Norway. Anti-discrimination and equality legislation has been instrumental in gender equality work in both countries since the 1970s. From an international perspective Sweden and Norway are considered woman friendly states with a range of policies that facilitate the combination of work and family life. The two countries are characterized by relatively strong corporatist traditions, although it has been argued that corporatism has been in decline in Sweden over the past decades (Lindvall and Sebring 2005; Woldendorp 2011). For the purpose of this article it is significant that the social partners traditionally have played fundamental roles in labor marked related policy making in both countries, including anti-discrimination regulations. Moreover, civil society is included in the policy making processes in both countries through public consultation process. Prior to major policy decisions such as legislative changes, interested parties in civil society are invited to respond to the proposed changes in written form. These consultation responses are reviewed before the government submits its final proposals to parliament. Both Sweden and Norway also have a number of institutionalized consultative bodies that provide more continuous communication between the authorities and civil society organizations (cf. Borchorst et al. 2012).

The two countries consistently rank among the top five countries in the world on measures of equality between men and women (Hausmann, Tyson, and Zahidi 2010). At the same time, gender equality legislation has developed differently in the two countries. Whereas the Norwegian Gender Equality Act (9 June 1978) had a general scope from the outset covering

all areas of social life except the internal affairs of religious communities, the Swedish Equal Opportunities Act (1979:1118/1991:433) covered gender equality in the labor market only, and only later the legal scope expanded to other areas of society such as education and access to goods and services. As a consequence, Norway has consistently had one all-inclusive gender equality law, and Sweden has had a number of gender equality laws for different areas of social life.

Certainly, the progress in gender equality has not come about solely through anti-discrimination and equality legislation. General welfare state arrangements have been of fundamental importance, and they continue to provide the conditions for more gender equal practices. However, anti-discrimination legislation has been and continues to be a useful tool in the path toward gender equality. Both protection against discrimination and positive action in the form of active duties and preferential treatment has been part of the legislation from very early on. Gender equality legislation has contributed to further gender equality in politics and the labor market, regulating equal pay issues, modifying hiring queues and protecting worker rights. In fact, it has been crucial to have these legal protections as a complement to the welfare state arrangements, because these could otherwise have negative side-effects. For example, long parental leaves in Sweden and Norway could have led to an even bigger disadvantage for women in hiring and promotion situations without this legal protection. The objective of the gender equality laws has been to promote women's position in society, but over time there has been a shift from focusing on women to focusing on gender balance. This has had consequences for men's rights to paternity leave and opportunities for preferential treatment of men in female dominated professions, such as teaching and child care.

Bodies responsible for the oversight and enforcement of gender equality legislation were established in 1979 in Norway and 1980 in Sweden, and Sweden had an anti-discrimination

ombudsman for ethnic minorities as well from 1986. Separate acts outlawing discrimination on the basis of ethnicity (including nationality, race, religion etc.), disability and sexual orientation in the work place were enacted in Sweden in 1999 and additional discrimination ombudsmen for disability and sexual orientation were established the same year. Since then a number of additional anti-discrimination laws have been enacted, separately covering education and access to goods and services for different grounds.

By the time the joint Equality Ombudsman was established in Sweden in 2009, there were four enforcement bodies separately covering gender, ethnicity and religion, sexual orientation and disability, which were merged in the process. Age and gender identity and expression were added to the grounds covered by the new Equality Ombudsman, since they were also included in the comprehensive anti-discrimination legislation that came into force at the same time.

In Norway, prohibitions against discrimination on the basis of race, skin color, national or ethnic origin and homosexual orientation or way of living were added to the Work Environment Act in 1998, and disability was added as a protected ground in 2001. A general law against ethnic and religious discrimination in all areas of social life[1], modeled on the comprehensive Norwegian gender equality law, was enacted in 2005, and a similarly comprehensive law for disability was enacted in 2008.

There were no other anti-discrimination ombud's authorities other than the Gender Equality Ombud in Norway until 2006. In 2006 a new Equality and Anti-Discrimination Ombud was established, with mandate to enforce anti-discrimination and equality law covering gender, ethnicity, religion, disability, sexual orientation and age.

The reform processes, through which the enforcement bodies were merged and the legal framework was unified in Sweden and suggested unified in Norway, were partly justified by

emphasizing greater user friendliness, efficiency and compliance with international regulations (NOU 2009:14; SOU 2006:22; Lotherington 2010). However, as will become evident in the analysis below, the challenge of multiple discrimination and intersectional inequality was also a significant argument for legal and institutional integration in both countries.

**Theoretical Framework**

It has been argued that the politics of equality increasingly take the form of politics of recognition rather than redistribution (Kantola and Squires 2010). This view is perhaps particularly relevant in the Nordic countries, where redistributive policies traditionally have enjoyed substantial popular support. According to Charles Taylor (1994) politics of recognition means two different things. On the one hand it means a politics of universal dignity that emphasizes equal worth and equal rights. On the other hand it means the politics of difference. The politics of difference demands recognition of "the unique identity of this individual or group, their distinctness from everyone else" (Taylor 1994, 38). Equality measures are encumbered by the inherent tension between these two aspects of the politics of recognition. Concepts such as "contextual universality" (Lindholt 2001) or "inclusive universality" (Brems 2004) attempt to address universality while simultaneously acknowledging diversity. In practical policy making, however, the tensions still remain.

Nonetheless, most (if not all) injustices are implicated with both symbolic and material marginalization (Fraser 1996). On the symbolic level inequality often implies social devaluation and institutional subordination. On the material level it may imply unequal access to jobs, salaries, goods and services. Moreover, institutionalized injustices that have their root in misrecognition are often material in their effects (Fraser 1997). Although politics of recognition may address both symbolic and material inequality, combating economic inequalities usually

demands some form of redistribution. With regard to gender, we know for example that traditionally female dominated occupations tend to have lower salaries than traditionally male dominated occupations. Women are also more likely to work reduced hours in order to invest time in unpaid care work. This gendered division of labor is both symbolically and materially rooted in gendered norms and preferences as well as institutional structures and the organization of (productive and reproductive) labor. With regard to ethnicity, the story is more complicated. Even though the power and status of men and women vary with their social position and gendered identities may take many forms, ethnic boundaries are arguably even more blurry. Ethnic "othering" is complex and involves various combinations of culture, religion, skin color, national origin, language and heritage, and depend on historical patterns of interaction and power relations among groups. Groups that are categorized as ethnic minorities may be materially marginalized because of past or current racism and oppression, but this is not always the case. Which groups are marginalized may also vary over time and according to social or national context.

On top of these complexities, people can be categorized along several axes of inequality at the same time, since ethnic minorities are also simultaneously men and women, young and old etc, and vice versa. One consequence of this heterogeneity within and among groups is that marginalization and privilege can coexist within the same individual (Bedolla 2007). In the U.S. context, Bedolla asks "How can we compare the experiences of a working-class white woman to that of an upper-class black man? Clearly, both are in privileged positions along one dimension, but also are marginal along others" (Bedolla 2007, 234). A central argument from the intersectional perspective is that material and symbolic structures interact in ways that are complex and not always predictable (Jensen 2006). This implies that we cannot *a priori* know

whether a particular man is more privileged than a particular woman, since that may depend on their class positions, ethnic backgrounds, ages etc.

But devising policies that take the intersectional nature of social categories into account face the additional challenge that inequalities have different causes and may also sometimes be conflicting. Some social categories are more closely associated with struggles for recognition and the celebration of difference, while others are more closely associated with redistribution and the elimination of difference. Certain social categories may be difficult to define, such as ethnic minorities. Other categories, such as LGBT persons, may be more likely to experience institutionalized heteronormativity than systematic labor market inequalities due to their sexual orientation. Although institutionalized heteronormativity may have economic consequences, particularly in countries that do not allow same-sex marriages, the root of this form of inequality lie in misrecognition rather than in the organization of labor (Fraser 1997).

Verloo (2006) argues that social categories differ along at least five dimensions: the range of positions in each category, the common understanding of the origin of the social category, the possible location of the inequalities connected to it, the possible mechanisms producing them, and the norm against which the social category seems to be compared (Verloo 2006, : 216). For example, gender is fixed into two distinct positions that very rarely change over time. Age is continuous and always changes over time. Sexual orientation can be divided into at least four categories and may change over time for some individuals, but not for others. Some differences can be seen as a matter of choice, like religion. But this is contested, as many would argue that religion is not a choice, but rather something you are born into or based on beliefs that cannot be changed at will. Disabilities can be visible or invisible, commonly acknowledged or contested. The same can be said about ethnicity. Some inequalities are more likely to be located in relation to the organization of labor than others, gender being a case in point. The list goes on. These

differences between differences have consequences for whether and how it is possible to devise comprehensive legislation for a variety of inequalities. It also creates a complex web of possible intersections that cannot be thought out in advance.

Within each category people may differ with respect to whether or not they want to be recognized as a minority (cf. Appiah 1994). On top of this, of course, the mechanisms that produce different forms of unequal treatment overlap and intersect. Heteronormativity often overlaps with gender stereotyping; racism and sexism may intersect to produce particular stereotypes of black or Asian women or young minority men. In some discrimination cases it may not be possible to separate out on what "ground" discrimination took place. Not because everyone has more than one social identity, but because marginalization and privilege are often based on complex and interrelated social dynamics.

Based on the theoretical perspectives presented here, the challenge of the intersectional perspective for anti-discrimination law reform can be formulated as follows: How do national policy makers navigate between the aspirations for equality and legal consistency on the one hand, and on the other hand a complex social reality where discrimination takes different forms for different grounds, and different axes of inequality intersect in sometimes unexpected ways?

**Data and Methods**

The main texts analyzed in this paper are the Swedish committee report "En sammanhållen Diskrimineringslagstiftning" (*A Coherent Discrimination Law*) (SOU 2006:22), and the Norwegian committee report "Et helhetlig diskrimineringsvern" (*A Comprehensive Protection against Discrimination*) (NOU 2009:14). Methodologically, the analysis of these preparatory works is inspired by critical frame analysis which, according to Roggeband and Verloo (2007, 273) "seeks to discover dominant and/or competing frames in the discourse of political actors that

make sense of different situations and events, contribute blame or causality, and suggest lines of action".

To structure my reading of the argumentation I have used Walton et al.'s (2008) and Fairclough and Fairclough's (2011) methodological tools for analyzing practical reasoning. Practical reasoning is different from theoretical reasoning in that it is reasoning about what to do rather than about what the case is (Fairclough and Fairclough 2011, 245). It is therefore a common form of argumentation in political discourse. It involves arguing in favor of a claim, i.e. that one should act in one way or another, and the argumentation involves a complex weighing of reasons. Fairclough and Fairclough distinguish between five premises in a typical line of reasoning: The value premise, the goal premise, the means-goal (instrumental) premise, the circumstantial premise and the cost-benefit and efficiency premises (Ibid, 248). The value premise is important because it limits the possible goals and means-goals to actions that are in line with a set of generally accepted or politically endorsed values. The goal premise specifies what end we are pursuing, i.e. what we desire the outcome to be. The means-goal premise specifies the steps of action that need to be taken in order to reach the goal. The circumstantial premise is what is often referred to as "the problem", which we want to solve. Finally, cost-benefit and/or efficiency premises are usually used to support the claims that are being made. Delineating these elements of the discrimination law committees' reasoning allows me to break down the arguments into parts that can be analyzed and compared separately.

The reason why I have chosen to compare the Swedish and Norwegian policy documents is threefold. First, the two countries have similar histories with regard to gender equality and welfare state provisions, and at the same time there is cross-national variation in the development of equality policies for other grounds than gender, as well as the scope and structure of anti-discrimination law. Second, the outcomes of the policy reforms were different in the two

countries, despite relatively similar reform processes. Finally, by comparing two political discourses over the same topic, I am able to read both argumentations from the perspective of a potentially alternative frame.

## Premises and Framings in the Policy Documents

### *The Value Premises*

Not surprisingly, the two committee reports start out by defining the purpose of the legislation within the framework of 'equality'. This is the stated *value premise* on which the argumentations rest. Although the value premises are quite similar, they are nonetheless framed differently in the two reports. Whereas the Swedish report frames the law as a response to a reality where differences are unavoidable, the Norwegian report takes a more universalistic approach. The Norwegian report states that,

> "The committee takes as its starting point that all people are equally valuable and have the same human dignity and that it should be a goal to promote equality (*likestilling*) independent of biological, social and cultural conditions. (...) By equality we mean equal value, equal opportunities and rights, as well as equal access and adaptation in the face of special needs (*tilrettelegging*)" (NOU 2009: 14 p. 23, my translation).

Here we see a focus on equal worth, which is a relatively abstract and largely uncontroversial value premise. By framing the discussion this way, the Norwegian committee articulates its value premise in line with the politics of universal dignity, which according to Taylor (1994) seeks to establish a social space ignorant of 'difference'. In the further specification of the objectives of the law the Norwegian committee adds,

> "An important objective of the discrimination act is therefore to counteract attitudes and actions based on prejudice and stereotypes. Equal worth involves the right to be accepted

> and respected for who you are, independent of biological, social and cultural differences. We must accept, respect and handle that we in fact are different. Society should be organized so that people who do not fit in with what is understood as "normality" or what is common, should not be disadvantaged" (NOU 2009: 14 p. 101, my translation).

Here we see that existing differences between people are brought up as part of the reasoning behind the strive toward equality. However, it is articulated within a framework of discursive difference, that is, as deviations from what is considered "normal". This framework does not address the challenge that people may in fact have different values and interests, and that these may in some cases be conflicting.

By contrast, the Swedish report starts out stating that,

> "The new rules should help to increase equality (*jämlikhet*), improve equality (*jämställdhet*) between men and women and enhance understanding and openness among people. In a society where people with different interests, different backgrounds, different orientations and different values must live together, this is an ambitious objective, but it is considered that the legislation will have a positive influence on the formation of morals in both the short and long term and any lower level of ambition can hardly be contemplated. Inadequate equality between men and women, inequality (*ojämlikhet*) between people, xenophobia and exclusion, mistrust and fear regarding those who 'are different', racism and homophobia – these are all social problems that must be attributed priority in an open society" (SOU 2006:22 p. 41, my translation).

Compared to the Norwegian text, the challenge of real social differences is made more explicit in the Swedish passage, and the Swedish report uses a more structural language (e.g., "xenophobia", "exclusion") compared to the Norwegian report. Moreover, the Swedish committee explicitly distinguishes between the term equality (*jämlikhet* - which implies sameness) and gender equality

(*jämställdhet* - which implies “equal footing” without requiring sameness), implying that equality may not mean the same thing in every situation. The distinction between these two forms of equality is also available in the Norwegian language, but the Norwegian committee choses to apply the “equal footing” term from gender equality politics to frame the general concept of equality in the Norwegian report.

In the framing of the value premises of these reports we thus see a divide between the Norwegian report with its focus on universal dignity, and a more pragmatic starting point for the Swedish committee. The universalistic vs. pragmatic divide is further evidenced in the scope of their deliberations. Whereas the Norwegian committee at least briefly considered a broad range of possible discrimination grounds, including health, overweight, looks, property and economic position, the Swedish committee viewed their mandate more narrowly, to evaluate the merger of existing anti-discrimination laws, except for the specific request for the committee to deliberate on an explicit protection for transpersons. The fact that the Norwegian committee had, and included in the report, a discussion about a range of possible discrimination grounds underscores their value premise, articulated as equality “independent of biological, social and cultural conditions”.

*The goal and means-goal premises*

The *goal premise* for both committees was to create a unified law. It was *not* primarily articulated as finding the optimal protection against discrimination in the respective societies. However, the Norwegian report focuses more on legal harmonization than the Swedish report. This is mirrored in the way in which the two new anti-discrimination acts are suggested formulated. Whereas the Norwegian law proposal explicitly seeks to minimize the use of separate regulations, the Swedish

law proposal specifies regulations for several sectors of social life separately (within the same document).

The Norwegian report states that any variations in protection or regulations across grounds should be understood as necessary exceptions from the ideal of legal harmonization. The committee writes,

> "By harmonizing the rules, the committee means that the goal is to create as equal rules as possible regarding content, unless there are profound reasons for unequal protection. Part of the purpose of unifying the law, is to avoid hierarchies across discrimination grounds that would give some grounds stronger protection than others" (NOU 2009:14 p. 96, my translation).

By contrast, the Swedish committee rarely mentions legal harmonization, and focuses instead on bringing their patchwork-like discrimination legislation into one document, making it "more efficient and comprehensive (*heltäckande*)" (SOU 2006:22 p. 20, my translation).

The *means-goal premises* can be articulated as the causal link between a unified law (i.e. one document) and comprehensive (Sweden) or harmonized (Norway) legal protection against discrimination. In both countries the goal premises and the means-goal premises were all but given in advance, as part of the mandates for the discrimination law committees.

Although it is not made explicit in the text, the central frame through which the goal of harmonization is articulated in Norway is that of similarity across discrimination grounds. That is, it is emphasized that inequalities associated with the various protected grounds can be alleviated through similar measures, which implies that their character and/or causes are not fundamentally different. In fact, without this basic assumption the suggested level of legal harmonization would not be a reasonable solution. In Sweden, by contrast, the committee approached the issue of similarity across grounds in a less general manner. Under the heading

"Equally strong protection" the Swedish committee writes, "An important and fundamental starting point for our work is that the protection against discrimination should be as similar as possible for different discrimination grounds" (SOU 2006:22 p. 226, my translation). Yet, they qualify this initial statement by concluding that, "The goal is to shed light on possible differences between different discrimination grounds and areas of social life and make the law as unified (*enhetlig*) as possible" (Ibid.).

This cross-national difference has likely to do with the way anti-discrimination laws have been organized historically in the two countries. As equality legislation expanded from gender to new discrimination grounds, the existing gender equality legislation was used as a model in both countries. This path dependence has led to additional laws with a general scope in Norway covering ethnicity, religion and disability in nearly all areas of social life without further specification. Similarly in Sweden it has resulted in a number of laws covering ground like ethnicity and disability that, as with the Swedish gender equality legislation, were separate by areas of social life, such as the labor market, education, access to goods and services etc. The structure of the existing equality legislation thus has had consequences for the way the committees framed their suggestions for comprehensive equality legislation. The new comprehensive Swedish discrimination law is divided into sections that separately cover the labor market, education, access to goods and services, membership in organizations, social security, health services etc. This division facilitates a number of exemptions and additions that vary by social fields and discrimination grounds.

*The Circumstantial Premises*

The way existing legislations were structured provided one of several *circumstantial premises* within which the committees were working out their proposals. Another circumstantial premise

was, of course, the complex reality in which several grounds need protection, and increasing political awareness and international pressure. The international debate about multiple discrimination and intersectionality arguably also formed a circumstantial premise for the committees' deliberations, since both committees felt compelled to address it in their reports.

There are potentially a number of ways in which multiple and/or intersectional discrimination could be legally specified. A few countries have already included specific regulations of multiple or intersectional discrimination in their equality legislation. One example is Canada, where Section 3.1 of the federal Human Rights Act reads "For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds".

Both the Swedish and the Norwegian committee reports acknowledge multiple discrimination as a relevant phenomenon. The Swedish committee refers to a report that was completed a year earlier, documenting structural discrimination of ethnic and religious minorities (SOU 2005:56). This report, written by Paul Lappalainen in collaboration with a team of experts, concluded that a unified law would more efficiently counter structural discrimination. The Lappalainen report emphasized that it would be "important to consider the question of intersectionality in relation to the different discrimination grounds within the framework of a unified law" (SOU 2005:56, p. 567, my translation). Referring to Lappalainen's discussion of intersectionality the Swedish discrimination law committee writes,

> "...intersectionality can be said to build on the intersection between different power relations in society, based on for example gender, class, ethnicity etc. The concept of intersectionality brings focus to how power relationships work together with and depend on each other and therefore cannot be seen as easily distinguishable. Different power relations mutually construct and influence each other, *reduce or strengthen each other*,

> *complete or compete with each other*. It is not a question of just adding a disadvantage to another. It is in the dynamic interplay between different power relations that discrimination manifests itself" (SOU 2006:22 p. 138, my emphasis and translation).

In this passage we see a potential starting point for a discussion about the consequences of intersectionality for anti-discrimination legislation. Keeping in mind that both Swedish and Norwegian anti-discrimination legislation contains regulations for active duties and preferential treatment these consequences go beyond the individual complaints framework. What happens when different power relations influence each other such that inequality on one dimension *reduces* inequality on another dimension? For example, correspondence test research in Sweden has shown that male job applicants with Arabic names are more consistently discriminated against than female job applicants with Arabic names (Arai, Bursell, and Nekby 2008). This means that in some situations when gender and ethnicity intersect, the established power relations within each of these grounds may shift. What happens when different inequalities compete with each other? A common example is gender and religion. If a person's religion prohibits certain activities in the presence of members of the opposite sex, this may come into in conflict with principles of gender equality. Mixed sex swimming lessons in public schools is a case in point, but there are many others. These important questions about the practical implications of intersectionality are not asked, and by extension, not answered. In the Swedish discrimination law committee's own deliberations intersectionality is mentioned as one of ten listed arguments for integrating the ombudsman's function into a joint enforcement body. Under the heading "Intersectionality" they state that,

> "Of interest is the cross-disciplinary concept intersectionality that focuses on the overlap of different social power relations based on for example gender, ethnicity, class, age, ability and health. The concept addresses how different power relations work together and

> are intertwined. The primary issue is not that several different discrimination grounds are "stacked on top of" each other, but rather that there are structures that make a specific combination of personal characteristics lead to discrimination (for example a black, lesbian woman), whereas changing any one of these characteristics, could lead to a different treatment" (SOU 2006:22 part 2 p. 216, my translation).

Here they depart from the structural language, which was more clearly used in the Lappalainen report, and reduce intersectionality to describing a person with several characteristics that can be associated with disadvantaged groups. Under a separate heading the Swedish discrimination law committee argues that a joint enforcement body would improve the situation for people who are discriminated against on multiple grounds. They use the examples of a black, lesbian woman with disabilities, an older woman, and a Muslim man in a wheelchair to emphasize their point that with a joint body these people would no longer have to choose which ombudsman to turn to if they would need to file a claim. However, they explicitly use the term multiple discrimination to describe this situation, and argue that this is *not* the same as intersectional discrimination. In fact it is striking that "intersectionality" is the only argument among the ten listed that is not presented in the *form* of an argument. Whereas the other arguments on the list, including "multiple discrimination", are introduced with phrases like "will make it clearer", "will lead to greater…" or "will help avoid problems with" etc., we see that "intersectionality" is introduced as "a concept of interest". The Swedish Gender Equality Ombudsman (JämO) also commented on this in his consultation response to the report where he wrote "however [the report] does not discuss in which ways an intersectional perspective is regarded useful in relation to the proposed integration" (JämO remissvar 2006-09-28, Ärendenr. 348/2006, my translation). This underscores that the complexity of the intersectional perspective remains abstract and as such is challenging to convert into policy measures.

The Norwegian committee explicitly addresses whether there should be a clause in the harmonized law to regulate multiple or intersectional discrimination. Under the heading "Discrimination on multiple grounds" they explain that,

> "Multiple discrimination describes a situation where a person is discriminated against on the bases of more than one ground in the same incident. Intersectionality is different from multiple discrimination in that the different grounds cannot be evaluated separately. Depending on the circumstances, women with minority backgrounds for instance can be subject to particular forms of ethnic discrimination that do not affect men with minority backgrounds, because of prejudice and stereotypes. They may also experience gender discrimination that ethnic Norwegian women do not experience" (NOU 2009:14 p. 180, my translation).

Paraphrasing the Ontario Human rights commission's document *An intersectional approach to discrimination* from 2001, they add that,

> "An intersectional approach to discrimination considers historical, social and political context and acknowledges the individual's unique experiences based on the interaction between discrimination grounds. An advantage of the intersectional approach is claimed to be that it acknowledges the complexity in people's experience of discrimination and it considers the particular groups' social and historical context. The focus is on society's response to the individual and *does not require that people are put in rigid categories"* (NOU 2009:14 p. 180, my emphasis and translation).

The issue of categorization can be seen as a fundamental challenge for anti-discrimination law, since group association is the core argument in these kinds of claims of unjustified mistreatment. What is more, proactive duties demand categorization over and above people's own identifications. The committee does not discuss further in which ways this could be a challenge

for the anti-discrimination law they are proposing. However, as part of their general deliberations about a harmonized law, they propose adding an open category ("other similar essential characteristics of a person") to the list of protected grounds. They make the argument that among other things this will make it easier to combat intersectional discrimination, especially when one or more of the intersecting characteristics are not among the listed grounds, such as for example ethnicity and drug addiction. At the same time, this open category is clearly perceived as potentially problematic, as it may make it more difficult to identify the boundaries of the law. As a compromise the committee suggests that people whose claims are filed under the open category should not be eligible for the same financial compensation and restitution as the other listed grounds, and that the principle of shared burden of proof should not apply. It would also not be included in the regulations of active duties. Regarding the feasibility of intersectional claims making, they acknowledge that one problem may be the challenge of identifying a comparator (a comparable person without the "trait(s)" that were treated more favorably). Yet they conclude that multiple discrimination does not need any legal specification in the law and do not discuss the issue further.

*Efficiency and cost-benefit premises*

Because the Norwegian committee had as its goal to harmonize the legislation as much as possible, they also had to weigh the *costs and benefits* of this approach. They argue that it may be necessary to change existing legislation in a way that could be interpreted as downgrading, but that as long as the overall protection is not weakened this is a cost they believe is worthwhile. They write,

> "According to the mandate, the committee's proposal should not weaken current levels of protection. The committee understands this as meaning that the overall protection against

> discrimination should not be weakened. The level of protection in current legislation should be carried over. However, this does not exclude the possibility for making certain adjustments to individual regulations that are necessary to reach a unified and appropriate result of the harmonization. If not, the efforts to unify the legislation would be limited to a purely technical compilation of different laws" (NOU 2009:14 p. 96, my translation).

An example of this type of adjustment is a compromise the Norwegian committee suggests regarding active duties. The active duty to promote equality in the work place is suggested extended to several new grounds, but at the same time employers' duty to make publicly available reports documenting their equality work is suggested removed. This was interpreted as a serious setback for gender equality law by several stakeholders, even though it upgrades equality measures for groups that did not previously have them.

The Swedish committee defines the costs of a unified law quite differently. Because they are not concerned with legal harmonization to the same extent as the Norwegian committee, their main concern is whether the unified law would be too long and cluttered. They write,

> "Among possible disadvantages can be mentioned that the necessary variation in regulation for different discrimination grounds and areas of social life makes a unified law at risk of being "cluttered" and difficult to oversee" (SOU 2006:22 p. 221, my translation).

Here we see that the framework within which the two reform processes operate are in some ways fundamentally different, even though the goals of these processes are relatively similar. That is, both committees deliberate on the issue of unifying existing anti-discrimination law, but they diverge on the general scope of harmonization. This has consequences for the types of reactions the law proposals received from interested parties. The National Confederation of Trade Unions (*LO*) in Norway objected to the inclusion of gender equality legislation in a unified anti-

discrimination act. They argued that “Gender and age are the only grounds that affect everyone, regardless of other conditions that may be associated with a person. It is therefore natural to have a separate law that regulates gender discrimination” (LO’s consultation letter 16 Desember 2009, my translation). The objection raised by Swedish LO’s expert representative was similar, but also emphasized that labor market issues should be regulated separately. She argued that gender equality work differs from other grounds, but specifies that this is particularly relevant with regard to active duties in working life. As a result she proposes to keep the existing Equal Treatment Act, which separately regulates gender equality in working life (SOU 2006:22 reservations pp. 613 and 625).

Figures 1 and 2 present the reasoning in the two proposals schematically. The central claim of the arguments and their potential counter-arguments are presented on top, and the five basic premises are summarized and connected to these claims and to each other, according to their logical relationships. The underlying frames on which the argumentation rests is presented in boxes framed by dashed lines to emphasize that these assumptions are implicit and are only indirectly expressed in the texts.

**Figure 1. Swedish Argumentation (solid lines) and Frames (dashed lines)**

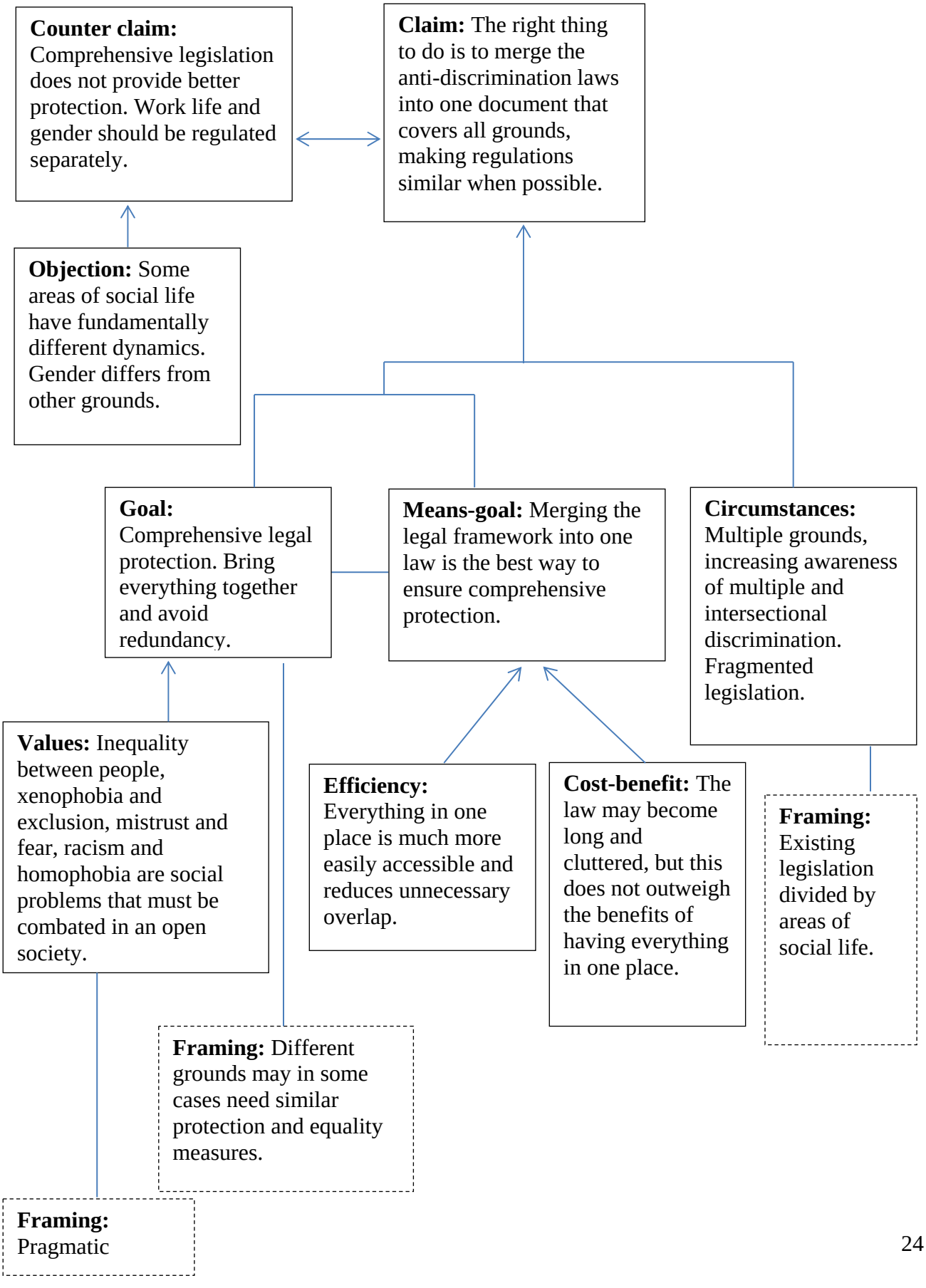
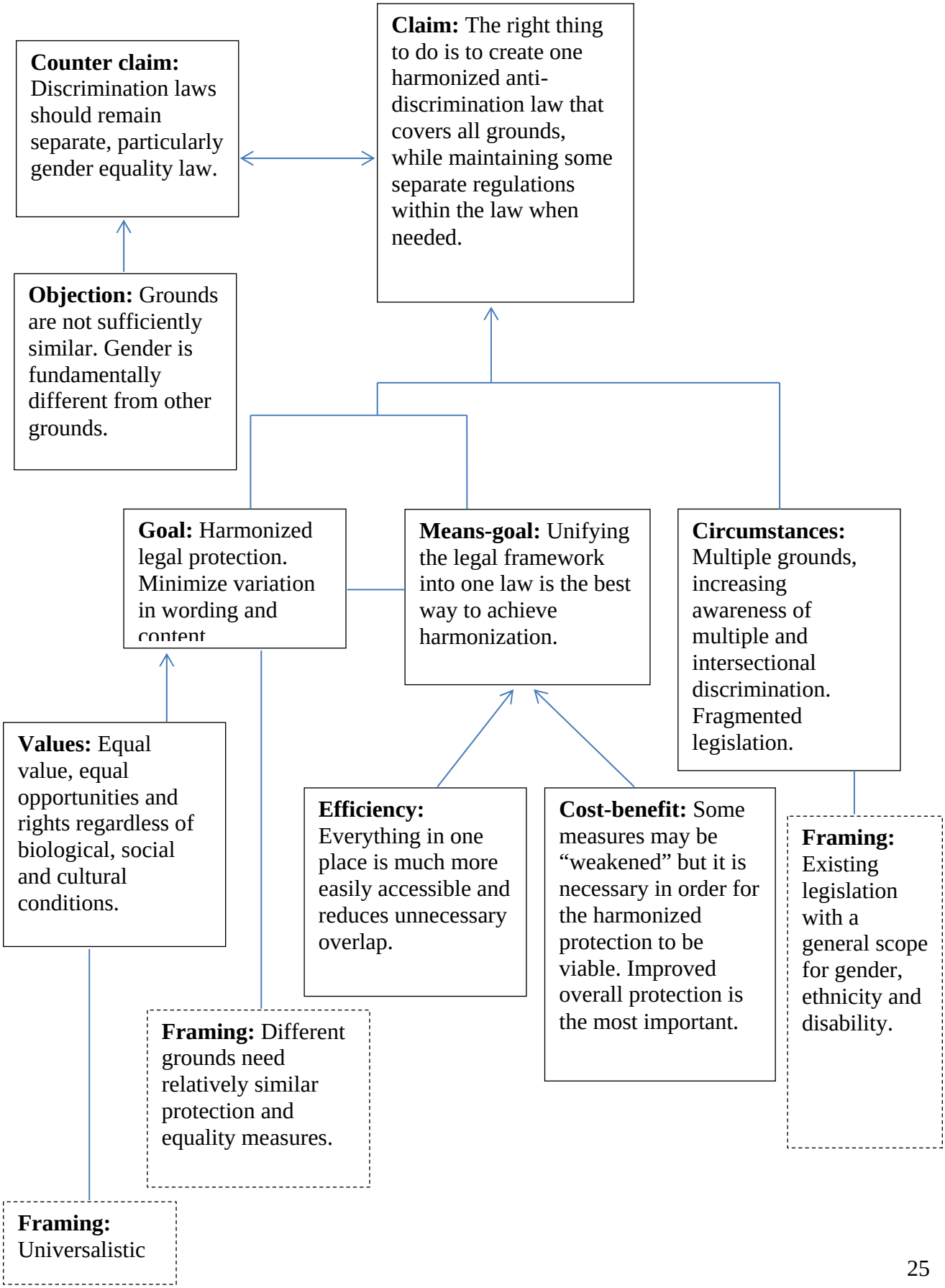


**Figure 2. Norwegian Argumentation (solid lines) and Frames (dashed lines)**



We see from the two figures that the underlying frames are fundamentally different in the two reports. Whereas the Norwegian frames all point in the direction of fewer distinctions between grounds, the Swedish frames are more concerned with differences between discrimination grounds. How is it, then, that Sweden ended up integrating the legislation and Norway did not?

**Discussion**

At first glance the two discrimination law committee reports are quite similar, proposing a unified equality and anti-discrimination law that covers all relevant grounds in one legal document. However, as we have seen the two reports differ in the articulations of their value premises and goals, where the Norwegian committee takes a more general universalistic approach and the Swedish committee seems to be somewhat more pragmatically attuned to the challenges associated with social differences.

On the one hand one could expect that the universalistic frame would be more open for the complexity of intersectional inequality. The compromise-like addition of an open category can be seen as an expression of this. On the other hand one could expect that the framing of the Swedish report would be somewhat more conducive to handling the question of intersectional discrimination, because of the more explicit consideration of differences as well as the structural aspects of inequalities. Yet neither of the reports attempts to come to terms with empirical or theoretical challenges that the intersections literature poses to an anti-discrimination and equality law.

In fact, the absence of a discussion of empirical evidence of discrimination in the two reports is striking. Some studies are referred to but there is hardly any discussion or evaluation of the results. This has partly to do with the fact that discrimination is notoriously difficult to study. However, it also makes it even clearer that the primary political issue at stake in these reform

processes has not been combating discrimination, but rather combating legal fragmentation. It is therefore likely that the level of detail of the comprehensive Swedish equality legislation made the legal reform less controversial in Sweden than in Norway. It is also likely that the social partners have retained somewhat more political clout in Norway than in Sweden, and consequently that their objections to the legal changes were more decisive for the outcome in Norway than in Sweden. At the same time, the fragmented Swedish equality legislation was also more clearly seen as being in need of reform. The committee argued that there were holes in the legislation even for gender in the field of social services and health services, and for disability in relation to social services, social security and other government services (SOU 2006:22 p. 192). A new law would therefore give a more comprehensive protection for women as well in Sweden. In this respect the Swedish legal reform differed significantly from the proposed legal changes in Norway.

Whether the proposed legal harmonization of the Norwegian legislation would have been an improvement relative to the current situation is still a matter of debate. As Verloo (2006) argues, social categories are constituted by different mechanisms and processes, and by focusing on similarities we risk ignoring the differentiated dynamics of inequalities. The Norwegian government's subsequent argumentation for keeping the laws separate reflects this concern. The Minister of Children, Equality and Social Inclusion at the time stated that "A separate law for gender equality will provide the best framework for the efforts to improve the position of women in society. Likewise it is my conviction that separate laws will provide the best framework for equality efforts regarding ethnicity and disability (Lysbakken 2011, my translation). At the same time keeping the acts separate obstructs the possibility for adding an open category, which perhaps could have contributed positively to the protection against complex discrimination.

The two reports have in common that when they bring up the issue of intersectional inequality they refer to other reports or papers that have dealt with the topic more in-depth, but they do not independently deal with its complex consequences for anti-discrimination law. Both committees also summarize the problem in terms of combinations of demographic traits (e.g., a black lesbian woman), thus moving away from the structural language and ignoring the inherent challenge of categorization. From a theoretical perspective, one of the strengths of the intersectional perspective is that it does not position any social category as privileged or marginalized *a priori* (Jensen 2006; Hancock 2007). This means that combinations of structural factors can lead to counter-intuitive results, such as racial or ethnic minority women sometimes being privileged over their male peers because of certain gender-coded stereotypes about minorities, especially about young minority men. This is a fundamental challenge for equality legislation, especially in countries like Norway and Sweden where positive action is such an integral part of the equality apparatus.

**Conclusion**

Through a comparison of the political discourse in the Swedish and Norwegian discrimination law committee reports, I have attempted to investigate to what extent the challenging questions that emerge from the intersections literature have been addressed in the process of reforming anti-discrimination legislation in the two countries.

The Swedish and Norwegian policy documents differ in their framing regarding equality and harmonization. Whereas the Norwegian committee starts from the value premise of universal dignity, the Swedish committee is more pragmatic in its initial approach. Through its discourse on legal harmonization the Norwegian committee argues for equal measures unless there are exceptional reasons for variation. The Swedish proposal emphasizes difference between grounds

to a larger extent than the Norwegian and argues primarily for making the legal framework more comprehensive and less fragmented. Yet none of the reports conclude that a comprehensive or harmonized legislation needs to regulate multiple or intersectional discrimination, although they acknowledge the issue as theoretically relevant. Even though the committees address multiple discrimination and intersectionality, they do not present empirical evidence or problematize how intersectional inequalities may have unexpected consequences for the relative standing of discrimination grounds, and how that may be compatible with the kinds of anti-discrimination and equality measures covered by the law.

Nonetheless, it is possible that the new Swedish legislation, by virtue of being unified into one document, will make it easier to address intersectional discrimination. However, some of the fragmentation of the Swedish equality legislation remains in the new anti-discrimination act, and no explicit regulation of multiple or intersectional discrimination was included in the new law. Conversely, the general scope of the separate Norwegian anti-discrimination acts[2] could facilitate intersectional analyses of discrimination cases, despite the stand-specific legal structure. These technical variations make the effective difference between the Swedish and Norwegian outcomes less obvious.

My analysis suggests that the different outcomes of the reform processes cannot be attributed to the ways in which intersectional perspectives were discussed in the policy documents. Comparative empirical analyses of practices, like the implementation of active duties or the handling of actual discrimination cases, are needed in order to evaluate the consequences of the two reform processes. In the absence of explicit regulations of multiple or intersectional discrimination, the ability of these two legal frameworks to address more complex inequalities will largely depend on how the legislation is implemented in practice. As this analysis has shown, the preparatory works offer relatively few explicit guidelines in this respect.

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**Notes**

[1] With exceptions for internal affairs of religious communities and strictly personal relations.

[2] As part of their alternative response to the halted reform process, the Norwegian government has promised an additional separate law against discrimination on the basis of sexual orientation, sexual identity and expression (Lysbakken 2011). With the enactment of this planned legislation, such general scope anti-discrimination laws would cover gender, ethnicity/religion, disability and sexual orientation/identity/expression in Norway.

**References**

Appiah, K. Anthony. 1994. "Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction". In *Multiculturalism: Examining the Politics of Recognition*, edited by A. Gutmann. Princeton, NJ: Princeton University Press.

Arai, Mahmood, Moa Bursell, and Lena Nekby. 2008. "Between Meritocracy and Ethnic Discrimination: The Gender Difference". *IZA Discussion Paper Series* No. 3467.

Bedolla, Lisa García. 2007. "Intersections of Inequality: Understanding Marginalization and Privilege in the Post-Civil Rights Era". *Politics & Gender* 3 (02):232-248.

Borchorst, Anette, Lenita Freidenvall, Johanna Kantola, Liza Reisel, and Mari Teigen. 2012. "Institutionalizing Intersectionality in the Nordic Countries: Anti-Discrimination and Equality in Denmark, Finland, Norway, and Sweden". In *Institutionalising Intersectionality? Comparative Analyses*, edited by A. Krizsan, H. Skjeie, and J.Squires. Basingstoke: Palgrave Macmillan.

Brems, Eva. 2004. "Reconciling universality and diversity in international human rights: A theoretical and methodological framework and its application in the context of Islam". *Human Rights Review* 5 (3):5-21.

Collins, Patricia Hill. 1990. *Black Feminist Thought: Knowledge,Consciousness, and the Politics of Empowerment*. Boston, MA: Unwin Hyman.

Crenshaw, Kimberle. 1989. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics". *The University of Chicago Legal Forum* 1989 (139):139-167.

European Commission. 2007. Tackling Multiple Discrimination - Practices, policies and laws. Luxembourg: Office for Official Publications of the European Communities.

*Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts*.

Fairclough, Isabela, and Norman Fairclough. 2011. "Practical reasoning in political discourse: The UK government's response to the economic crisis in the 2008 Pre-Budget Report". *Discourse & Society* 22 (3):243-268.

Fraser, Nancy. 1996. Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation. In *The Tanner Lectures on Human Values*. Stanford University, April 30-May 2, 1996.

Fraser, Nancy. 1997. "Heterosexism, Misrecognition and Capitalism: A Response to Judith Butler". *Social Text* 52/53: 279-289.

Hancock, Ange-Marie. 2007. "When Multiplication Doesn't Equal Quick Addition. Examining Intersectionality as a Research Paradigm". Perspectives on Politics 5 (1):63–79.

Hankivsky, Olena, and Renee Cormier. 2011. "Intersectionality and Public Policy: Some Lessons from Existing Models". *Political Research Quarterly* 64 (1):217-229.

Hausmann, Ricardo, Laura D. Tyson, and Sadia Zahidi. 2010. The Global Gender Gap Report 2010. Geneva, Switzerland: World Economic Forum.

Jensen, Sune Qvotrup. 2006. "Hvordan analysere sociale differentieringer?". *Kvinder, Køn og Forskning* 2-3:70-79.

Kantola, Johanna, and Judith Squires. 2010. "The New Politics of Equality". In *New Directions in Political Science: Responding to the Challenges of an Interdependent World*, edited by C. Hay. Basingstoke: Palgrave Macmillan.

Krizsan, Andrea, Hege Skjeie, and Judith Squires, eds. 2012. *Institutionalising Intersectionality? Comparative Analyses*. Basingstoke: Palgrave Macmillan.

Lindholt, Lone. 2001. "VII. The African Charter: Contextual Universality". *In Human Rights on Common Grounds: The Quest for Universality*, edited by K. Hastrup. The Hague: Kluwer Law International.

Lindvall, Johannes, and Joakim Sebring. 2005. "Policy reform and the decline of corporatism in Sweden." *West European Politics* 28 (5): 1057-1074.

Lotherington, Ann Therese. 2010. "LDO er løsningen- hva er problemet? En analyse av opprettelsen av likestillings- og diskrimineringsombudet". In *Likestilte norskheter: Om kjønn og etnisitet*, edited by A.-J. Berg, A. B. Flemmen and B. Gullikstad. Trondheim: Tapir Akademisk Forlag.

Lysbakken, Audun. 2011. "Arbeidet med ny diskrimineringslovgivning". *Pressemelding fra Barne-, likestillings- og inkluderingsdepartementet* 2. september 2011:Tilgjengelig på www.regjeringen.no/nb/dep/bld/aktuelt/nyheter/2011/arbeidet-med-ny-diskrimineringslovgivnin.html?id=653933.

Makkonen, Timo. 2002. Multiple, compound and intersectional discrimination: Bringing the experiences of the most marginalized to the fore. Institute for Human Rights: Åbo Akademi University, available at http://web.abo.fi/instut/imr/norfa/timo.pdf.

NOU. 2009:14. *Et helhetlig diskrimineringsvern*. Oslo: Norges Offentlige Utredninger, Barne- og Likestillingsdepartementet.

Parken, Alison. 2010. "A multi-strand approach to promoting equalities and human rights in policy making". *Policy & Politics* 38 (1):79-99.

Roggeband, Conny, and Mieke Verloo. 2007. "Dutch Women are Liberated, Migrant Women are a Problem: The Evolution of Policy Frames on Gender and Migration in the Netherlands, 1995–2005". *Social Policy & Administration* 41 (3):271-288.

Schiek, Dagmar , and Victoria Chege, eds. 2009. *European Union Non-discrimination Law. Comparative perspectives on multidimensional equality law*. London and New York: Routledge Cavendish.

SOU. 2005:56. *Det blågula glashuset - strukturell diskriminering i Sverige*. Stockholm: Statens Offentlige Utredningar, Regeringskansliets förvaltningsavdelning.

----------. 2006:22. *En sammanhållen diskrimineringslagstiftning*. Stockholm: Statens Offentlige Utredningar, Regeringskansliets förvaltningsavdelning.

Taylor, Charles. 1994. "The Politics of Recognition". In *Multiculturalism: Examining the Politics of Recognition*, edited by A. Gutmann. Princeton, NJ: Princeton University Press.

Verloo, Mieke. 2006. "Multiple Inequalities, Intersectionality and the European Union". *European Journal of Women's Studies* 13 (3):211-228.

Walton, Douglas, Christopher Reed, and Fabrizio Macagno. 2008. *Argumentation Schemes*. New York: Cambridge University Press.

Williams, Toni. 2009. "Intersectionality analysis in the sentencing of Aboriginal women in Canada: what difference does it make?" In *Intersectionality and beyond: Law, power and the politics of location*, edited by E. Grabham, D. Cooper, J. Krishnadas and D. Herman. Abingdon and New York: Routledge-Cavendish.

Woldendorp, Jaap. 2011. "Corporatism in small North-West European countries 1970-2006: Business as usual, decline, or a new phenomenon?" *Working Paper Series* Department of Political Science, VU University Amsterdam.

Yuval-Davis, Nira. 2006. "Intersectionality and Feminist Politics". *European Journal of Women's Studies* 13 (3):193-209.