



Gender discrimination law within the European Union and its application in one of its member states Sweden: A comparative case study.

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Abstract

In the thesis the aim was to compare the EU legal system with the Swedish national legal system with specific focus on gender discrimination law. Findings showed Sweden applied discrimination law in accordance with EU directives but went further than what the Gender Recast Directive, and the EU law itself, required of it. Findings also revealed Sweden uses bi- and multilateral agreements to further EU discrimination law. If such agreements are in accordance with EU primary laws, to which Sweden as a member state has agreed to follow when it acceded to the Union, such agreements will be accepted by the Union. Other findings were related to the Union institutions themselves. These institutions are much more co-dependent than was originally thought and the democratic function of the institutions are treaty secured as far as voting in of representatives to the Parliament give EU citizens power to influence legislation of the EU, likewise the European Citizens' Initiative giving each EU citizen a chance to propose new legislation. Regulations that are deemed, by member states, to be in breach of EU primary law can be tried and interpreted by the Court of Justice of the European Union and if said regulation is deemed being in breach of EU primary law it can be annulled.

Table of Contents.

Introduction.....	4
Previous research / critical literature review.....	6
More precise aim, research question/problem and operational questions.....	9
Theoretical framework.....	9
Methods, material, and source critical reflections.....	11
Data and Analysis.....	15
<i>The history of gender discrimination law in Europe.....</i>	18
<i>EU Law – the hierarchy of law.....</i>	24
<i>EU institutions involved in forming, changing, and implementing</i>	
<i>EU law.....</i>	27
<i>The European Commission.....</i>	27
<i>The European Parliament.....</i>	30
<i>The Council of Ministers.....</i>	30
<i>The European Council.....</i>	31
<i>The European Court of Justice.....</i>	32
<i>Advisory bodies of the European Union.....</i>	33
<i>EU case law involving Swedish gender discrimination cases, and</i>	
<i>the outcome of such cases.....</i>	33
<i>Sweden – an example of how EU gender discrimination law is</i>	
<i>implemented on a national level.....</i>	35
Conclusion.....	41
Bibliography.....	43

Introduction.

When the European Community was formed in the 1950's (Dinan in Dinan, 2014:46-50, 57-58; Rosamond, 2000:1; Derous & De Roeck, 2019:249-250; Haas, 1961; 371-375; Foster, 2020:4) human rights (Foster, 2020:13) and gender equality (Foster, 2020:422-427) was not prioritized. As time progressed treaties, directives, and charters (Foster, 2020:29-31) have been ratified, making gender equality important. Times were different in the 1950's (Haas, 1961:366-392; Messenger in Dinan, 2014:35-59; Gillingham, 2014:60-90). The European Community was about creating peace and stability (Messenger in Dinan, 2014:37-45) in Europe. In the 1950's, surviving must have been of higher importance for many people.

This bachelor's thesis aims to explore how the European Union and its member states went from the 1950's low interest in gender equality and anti-gender discrimination to today's opposite. The thesis will dive into how the EU, legally, deals with gender discrimination. Likewise, what drives legal production in the European Union and how is it implemented on the member state level. Sweden will be the main case study compared with the legal framework of the EU. How much say the EU has over national implementation of EU rulings will be explored with the help of understanding EU institutions.

The European Union is defined by TEU, the Treaty of the European Union (EUR-Lex, 2020), and TFEU, the Function of the European Union (EUR-Lex, 2020). These two documents decide what is permissible within the EU legal framework. One of the topics that are spelled out in the TEU and the TFEU is the one governing gender anti-discrimination (Foster, 2020:422-464). This thesis wants to display how Sweden implement EU discrimination law. Making sources relevant for such endeavor necessary. Preferably publication years closer to 2023.

Gender- and functionalist theory will be used throughout the thesis (Scarborough & Risman, 2018). Gender theory focuses on the constraints of social and gender identity stereotypes within society. While functionalist theory focuses on biological differences between the sexes and how differences impact treatment of females in society.

Research design will be based on doing a case study of TEU and TFEU, related to gender discrimination. Likewise, the EU Charter of Fundamental Rights (EUR-Lex, 2012) coupled with the Gender Recast Directive (EUR-Lex, 2006) will be analyzed and compared to

Swedish application of said sources. Doctrinal texts such as Foster's "EU law" (Foster, 2020) will help in interpreting legal sources and hopefully give relevant case law references.

Dinan's historical EU references, will be helpful in giving chronological development of EU institutions. Scarborough & Risman (2018) will give the theoretical framework to Dinan and Foster, but also additional texts.

The thesis will focus on first establishing the legal source hierarchy of the European Union, the relevant EU institutions involved in impacting what is done on combatting gender discrimination within the Union and how this impacts member states and how member states can work with or challenge regulative decisions on the EU level.

The research question posed to be answered in this thesis is how does gender discrimination law come to be within the European Union and how does member states implement the same on a national level? This question will be connected to the rapidly changing demographic of Europe, the 2014 migration flow from the Middle East (Human Rights Watch, 2015; Spindler, 2015; Park, 2015; Pew Research Center, 2016) being an example. Demographic change impacts liberal values, especially if migrant waves coming from parts of the world not sharing similar values. Autocratic powers of today, such as Russia, Turkey, Iran, and China, de facto exhibit values contrary to EU values. Very much contrary to what could be seen as Swedish values as well. As will be exhibited later, Sweden is above EU average I gender equality matters. Migrants coming from Middle Eastern countries are not always in line with such values. Diasporas in Sweden, still in line with origin country values on gender equality, might then impact Swedish application of gender anti-discrimination. As the world of today is turbulent and as the demographic of not only Sweden but many European countries change towards more non-EU demographic values this thesis research question seem relevant to pose and answer. Because it brings up the subject of how safe-guarded gender equality issues are in the EU and in Sweden. What we can see in this thesis is a snapshot of how gender equality issues has developed up until now, and how it is at this moment in time, but demographics, as mentioned, change and if the demographic change involves migrants from parts of the world that do not respect gender equality and gender anti-discrimination, then that will pose a problem for the future of EU and Swedish work on the subject. Although the case of Turkey demanding Sweden to extradite supposed terrorists (Alana & Zandonini, 2023; Levin, 2023) to Turkey for Turkey to remove its veto against Sweden joining the NATO, is not gender discrimination related as such, it still displays how foreign powers can potentially erode not

only Swedish gender discrimination law, but likewise EU discrimination law. If such would happen the EU Charter of Fundamental Rights (EUR-Lex, 2012) would be void immediately, because it would then be words on a paper only. Such could question the very integrity of so many other Charters and Treaties of the EU as well. Let us continue now with a literature review and then delve more deeply into the research problem thereafter.

Previous research / critical literature review.

Previous research on the topic of gender equality is understandably greater than the opportunity to explore everything for a bachelor's thesis, but the selection used for this thesis is focused on the interaction between EU institutions, the EU legal framework and the national courts systems. Especially that of Sweden. Nigel Foster has been used as the seminal doctrinal work to describe the inner workings of the EU and how member states can, and will, interact with the EU system. Foster (Foster, 2020) has been instrumental in understanding the original intent of the Treaties and Charters mentioned in this thesis. Without Foster's work this thesis would not have had a backbone. He has also been a good inspirational source for finding other relevant sources also used in this thesis.

The idea behind this thesis was never meant to examine any dialectical differences between various doctrinal authors, but rather give an understanding for how the legal- and institutional structure of the EU looks like and then add on Foster's descriptive- and added interpretative thoughts about such structures. All with the intent to understand how to evaluate the interactive role of the TEU, TFEU, the Charters, especially the EU Charter of Fundamental Rights and the Gender Recast Directive (EUR-Lex, 2006), with various EU institutions. Likewise, how those legal frameworks and EU institutions relate to member states implementing them correctly. When connecting the case studies of Foster with chapters in Dinan's book "Origins and Evolution of the European Union" (Dinan, 2014) one builds a keener understanding of the gender- and functionalist theories posed by Scarborough & Risman (Scarborough & Risman, 2018). Theories are developed and adapted into legal- and institutional structures because of cultural changes, but cultural

changes also come about because of legal- and institutional changes. They tend to feed on each other. One thing spurs a change in the other. Gender- and functionalist theories in a European Union perspective became relevant because of the fundamental freedoms introduced in the TEU and TFEU. Post-Second World war, focus was on repairing a broken Europe (Messenger in Dinan, 2014:35-59). In the 1960's onward abundance in Western Europe started a wave of new opportunities that, one could argue, was grounded in the fundamental freedoms of the Union (Foster, 2020:4). If member states were to be equal it would make sense, one would argue, gender equality should be next on that equality trajectory. Epistemological evidence for this would be found in the establishment of the EU discrimination law and of various other Charters and Treaties additions. More on this in the analytical section. As for Sweden Diskrimineringsombudsmannen (Diskrimineringsombudsmannen, 2023), an institution established for the sole purpose of abiding by EU discrimination law is only one representation on how Sweden is connected to EU decisions, but as will be seen later, based on two European Commission reports (European Commission, 2020; European Commission 2022), Sweden do in many ways over-deliver on its gender anti-discrimination commitment.

Foster particularly has the ontological approach that the EU decide from top down (Foster, 2020:9, 21, 382), from the EU level down to the individual member state. But he is not cemented in that view. He does point to the democratic aspect of the EU system. The European Parliament is lifted as being the connection to each member states citizens (Foster, 2020:52-54). He also lifts the much important European citizen's initiative (Foster, 2020:41, 90). The two reports written by the European Commission give added support to how much power EU member states do have in impacting the EU system indirectly. Foster does come across as a factual and unbiased book insofar he always refers to original legal sources which can be verified by the reader. Case laws are richly cited throughout the book. Just as specific treaty articles, protocols etcetera. Making Fosters interpretative arguments so much more compelling and trustworthy. Epistemologically Foster increases the readers knowledge of the EU legal framework and how it translates into EU and national institutional implementation of the legal aspects of gender anti-

discrimination. Dinan's various book chapters, by comparison, position the matter-of-fact material of Foster in a wider historical context. Although Foster do give a brief introduction to the EU historical development in his first chapter it is just that, a brief overview (Foster, 2020:3-33). Such historical context is then neatly connected with Scarborough & Risman's theoretical accounts of gender- and functionalist theories. Theories implicitly driving the development of gender equality within most aspects of societal life in the Union. Although the book of Foster seems unbiased due to its direct original source references Dinan's various chapters, written by various scholars, could be due to its historical narrative telling include some kind of bias. One could claim the author of this thesis should have had cross-referenced historical descriptions in Dinan with other historical accounts, but the author of thesis has due to time restraint deliberately chosen not to make such cross-references. Such cross-referenced comparison could be something for a future essay. As for Scarborough & Risman's text about gender- and functionalist theories. The chosen chapter written by these authors does not come across as ideologically driven, but rather as a descriptive text. That is also why these authors have been brought into the reference list.

These sources have been chosen specifically for the purpose of epistemologically establishing the relationship between the EU legislative system and how EU and Swedish national institutions implement gender anti-discrimination specifically. All other sources used in this thesis has been added only as supportive or clarifying literature. News articles have been used only to describe present day political developments. Such articles give an understanding to why the research topic raised in this thesis is relevant to consider.

More precise aim, research question/problem and operational questions.

The research question for this thesis aims to study Sweden in the context of how its national discrimination law compares to EU discrimination law. Such study aims to describe a dynamic legal system that changes in an integrative manner. Operational questions will focus on the legal structure of the EU both with regards to the legal sources' hierarchy, as well as on the institutional level through which legal sources are implemented. Then the focus will aim to look at how Sweden implements such EU legal sources on its national level. As part of operational questions an interest in evaluating the applicability of discrimination law in the future will be examined. The ontological assumption by the author of this thesis is that discrimination law of today and discrimination law of the future will be tightly connected to demographic changes within European Union borders. As member states have signed up to the previously mentioned fundamental freedoms, involving amongst many things' free movements of people between member states, increased migratory flows from non-EU states could potentially negatively impact demographic views on such things such as gender anti-discrimination laws. Demographic changes will impact the kind of theories driving the Union forward in the future. For such reason let us look at the theoretical framework being used in this thesis.

Theoretical framework.

The subject of this thesis is the legal aspects of gender discrimination within the European Union and one of its member states, Sweden. For that reason, gender- and functionalist theories (Scarborough & Risman, 2018) seem highly relevant theories to apply to the research topic. One could argue social constructivism could have been used and it would have been hard to argue against it as gender equality of course is a form of social construct of sorts. The author of this thesis still believe gender-and functionalist theories reach closer to the topic at hand. One could also claim these two theories are sub-theories of social constructivism.

Gender theory will be the first one presented and defined. The second one will be functionalist theory. As for the first one, gender theory, could be defined as the focus on gendered, specific social constructs of identities. And how these almost stereotypical identities impact social structures and varied social constellations such as family and workplace reality.

As for the second one, the functionalist theory, relevance comes in the form of complementarity to gender theory. In functionalist theory the focus is on how biological differences between genders and the associated strengths and weaknesses associated between the two impact how we value and subsequently devalue by way of hindering or creating opportunities for all genders in various aspects of social life. Up until the 1950's Europe was a much more patriarchal continent than what is the case in present day Europe (Brooke, 2001). Meaning, women was viewed as home wives, with the role of giving birth and take care of home chores (Brooke, 2001:774, 777-779). Males, on the contrary, were supposed to provide for the family, make a career and keep everyone safe. What the two theories display is there having been a drive for social innovation called modern feminism. Taking hold of Europe, and elsewhere in the West, for real during the 1960's and 1970's (Brooke, 2001:779). A social change that made legislation against gender discrimination highly relevant. Not only on a national level, but also on an EU level. For these reasons it seems relevant to apply both theories when analyzing and giving answers to the research question posed for this thesis.

Important thinkers writing about functionalist theory in relationship to the modern feminism movement and the social changes concerning gender discrimination are Lopata & Thorne (1978) and Stacey & Thorne (1985). As for the gender theory Ferree (1990:867) could be mentioned.

The epistemological stance, or the hypothetical assumption, of this thesis is that gender anti-discrimination legislation hinges on theories driving legislation does not alter too much opposite of the aim of said theories. Meaning, theories that are based on patriarchal theory structures could undo gender theory driven gender discrimination laws of today within the European

Union. As mentioned above gender discrimination is assumed, by the author of this essay, to be heavily connected to the social constructs of identities we as a collective, both as a European collective and as a national collective, believe to be true and valid. Constructs that are then repeated and made into traditions and customs. Such customs and such traditions can be changed, just like one can change a bad habit to a good one or vice versa. The ontological proof of such should be possible to be found in EU treaties, EU charters and national legislation. Likewise in EU and national institutions implementing said legal sources. From the days of the European Community in the 1950's when human rights, and even less gender equality, was of low standing relevance, until today when employers can de facto be sued in court and lose (Regeringskansliet, 2008) if they treat women less equally than males on a varied number of topics such as pay, being employed on equal terms based on equal qualification et al (Diskrimineringsombudsmannen, 2023). But it can also be ontologically proven in, perhaps not for Sweden, but surely so for many other member states of the Union, the many case laws that could be found via the EUR-Lex database.

Methods, material, and source critical reflections.

This thesis will use a case study of EU discrimination law and Swedish discrimination law. Such case studies will later be compared with each other. With the aim of revealing similarities and dissimilarities.

Discrimination law is a topic that has grown in importance since the 1950's when the European Community was established (Dinan in Dinan, 2014:2-3). This thesis aims to display how development of discrimination law on an EU level also tend to influence member states in the same direction. Not evenly amongst member states (European Commission, 2020; European Commission, 2022) but impacting domestic view on gender equality and even lowering gender discrimination over time. Sweden has been used as just one of many other potential member states to study on this matter. Sweden, one might argue stands out as an extreme case due to how it applies the Gender Recast Directive (European Commission, 2020:14, 22). For that reason, it has been

used as a case study in this thesis. At the same time Poland could potentially be used as a diametrically opposed example of Sweden. These two member states could potentially, the analysis will display if this assumption is true or not, be seen as the extremes of EU discrimination law. Although Poland will be mentioned from time to time in the analysis section, the seminal aim of this thesis is to compare Sweden and the European Union.

When choosing literature for this thesis it was of high importance to research how EU law and EU institutions, such as the European Court of Justice, the European Parliament, the European Commission, and the Council of Ministers function as these institutions impact regulations, directives, charters and treaties which are later implemented on a member state level.

At the same time there was a need to read doctrinal texts giving insight into how to interpret Articles, Protocols and the thinking behind case law decisions and implementation of such. For that reason, a couple of books, including books by Foster, previously mentioned.

As political institutions are formed due to a need to structurally change and implement a new socially constructed reality, for example the need to address gender discrimination, there will be a need to describe the historical reasons for such happenings. For that reason, various chapters in Desmond Dinan's book "Origins and Evolution of the European Union" (Dinan, 2014) will be referenced throughout the thesis when historical aspects are important to highlight.

Discrimination law is a diverse legal field. The same is true for gender discrimination. Gradually a key part of what the European Union stands for ideologically. Which is why they are encompassed in the Treaty on European Union and the Treaty on the Functioning of the European Union. The Lisbon Treaty led to Articles 20-23 TFEU, what is called the EU Charter on Fundamental Rights being added (Foster, 2020:423). Part of this ideological and legally binding primary EU law is the ECHR, or the European Convention on Human Rights (Foster, 2020:423). Liberal values encompass all genders.

Not only males. This thesis will display the genuine importance Sweden, and most of the other member states of the Union, put on embracing gender equality. To such a degree in fact that many member states, Sweden being a prime example of such, over deliver against EU Charters. As will be displayed later in the analysis section a certain EU institution has as one of its primary responsibilities to make sure member states implement EU law. Although many member states may implement gender discrimination law generously some members do not, and in such cases, there are TFEU articles established to make sure such member states implement and follow primary law of the Union. More on that later. Before moving on a brief mentioning of the most prominent and important EU institutions might be needed. These being the European Commission, The Council of Ministers, the European Court of Justice, and the European Parliament. All of them do, as will be displayed later, work in an integrative fashion. Neither institution being free from checks-and-balances against which other institutions hold them accountable. None of these EU institutions, as will be examined later, are free from the scrutiny of the European citizens voting representatives into the European parliament.

This thesis will use a comparative case study of the EU legal hierarchal structure, the EU legal sources impacting member states, specifically Sweden, implementation of EU gender discrimination law. Already mentioned treaties and charters will be central in this analysis. Of course, the Swedish discrimination law and the Diskrimineringsombudsman institution will be central in building an epistemological understanding for how Sweden implements EU gender discrimination law. Likewise, evaluation reports from the European Commission will give an EU perspective of the Swedish implementation of the same.

Discrimination as such is a large topic area. It involves so many different forms of discrimination (Diskrimineringsombudsmannen, 2023). For that reason, delimitation was kept to gender discrimination. As the European Union consists of twenty-eight member states it made obvious sense to limit the comparison study to one member state. As the author of this thesis is a

Swedish national it made sense to keep it close to home. Therefor Sweden was chosen as a comparison study to the EU legal system.

No source is dependable on its own. For that reason, the writer of this thesis has tried to diversify the list of sources to make sure they are contradictory and/or complementary to each other. Doctrinal sources have been used, Foster's "EU law" being one of the primary sources used for this thesis. Doctrinal sources, by its nature, are interpretive meaning they are guideposts, not necessarily objective truths. Good doctrinal sources do point to more original sources. With Foster this is really the case. As his body of work in a clear manner point to legal original sources such as specific treaties, charters, regulations, directives, protocols, and case laws. Doctrinal sources in this thesis are used to display leading thinkers in the field of gender discrimination and what kind of similarities or controversies various leading thinkers on the topic might display. Such sources will give the writer of this thesis an opportunity to speculate on the topic and further the discussion in some way for future research. As the reader will notice this thesis is not about comparing seminal authors of doctrinal texts, but rather use these as mentioned – as guideposts to find relevant legal original sources. Because that is what good research is all about. Focusing on the most original, primary sources one can find and then base one's analysis on such.

Member states do have a degree of legal autonomy which member states do enjoy and use frequently. The analysis will help showcase it. Case law is a primary location for finding ontological proof legal autonomy at member state level still exist despite EU supremacy being the main driver for what is implemented legally within the Union. But there are two tools, one European Citizen's can apply and one which member states can apply to challenge EU directives and regulations that are deemed being in breach of EU primary law, the treaties. As will be displayed this challenge of EU legal decisions are conducive with the acceptance of the *Acquis Communautaire* (Foster, 2020:13, 17, 27, 100; Michalski, 2014:275-276), which are given by each new member state to the Union. More on this in the analysis section.

Data and Analysis.

When reading doctrinal texts by Foster (Foster, 2020) and Dinan (Dinan, 2014), one sees the legal EU framework developing treaty by treaty, article by article. Gender discrimination is no exception. One could claim gender discrimination legislation being still an on-going work in progress due to trans- and transgender change issues now facing European, and in fact westernized, culture. Another thing emerging when reading Foster is how entrenched EU law is with international law and likewise how member states, Sweden being a prime example of this as will be displayed later, by way of bilateral and multilateral agreements can impact how the European Union legislate on gender discrimination issues. Basically, proving how member states can circumvent the EU system to impact it by indirect means. The European Union is deemed to have something called “supremacy” (Foster, 2020:68-69), meaning EU legislation should rule sovereign in member states, but this as Foster points out only applies as long as Union primary law, mainly treaties such as the TEU and the TFEU are not breached (Foster, 2020:68, 145) by new legal decisions made by the Union institutional structure. The European Commission, as will be described in more detail later in the sub-section covering EU institutions and their functions, has an important watchdog function in this regard.

As this thesis is about gender discrimination it was deemed relevant applying gender theory and functionalist theory (Scarborough & Risman, 2018) for answering the research question. As Messenger display in Dinan’s book (Messenger in Dinan, 2014:35-59) focus was on rebuilding a structurally destroyed Europe and for Western Europe to protect itself from the Communist threat from the Soviets. There was no genuine room for discussing gender equality. But slowly, as the Cold war progressed and the 1960’s and 1970’s was reached, gender theory and gender equality with it started to be connected to basic freedoms of the Union. Freedoms such as free movement of goods, capital, labor, and services (Brusse in Dinan, 2014:106-107). As Brusse mentioned with free movement of goods being the precursor for freedoms of movement of labor capital and services, these movements in turn were the

precursor needed for gender equality to be deemed important next integrations in the TEU and TFEU?

Theories, and EU centered historical doctrinal texts alike, display how gender discrimination law grew in importance within the European Union over time due to liberal causes being championed by its two seminal treaties, the TEU (“Treaty on European Union”) (Foster, 2020:4; EUR-Lex, 2020) and the TFEU (“Treaty on the Functioning of the European Union”) (Foster, 2020:114-123; EUR-Lex, 2020), and by their human rights charters (Foster, 2020:13, 18, 107, 113; EUR-Lex, 2012). Being part of EU grand strategy makes anti-discrimination laws so much more important within the Union itself. One could claim values supporting this kind of legislation, and being part of EU grand liberal strategy, reinforces the need for member states to keep up with the ambitious goal of combatting discrimination of all sorts within the Union. To be credible outside the Union. This could be one explanation why Sweden, and most other member states are so overly ambitious relative the stipulations of the so-called Gender Recast Directive (EUR-Lex, 2006). One could draw a speculative conclusion from this. Soft power, which are the main prerogative of the European Union (Leonard, 2022; Foster, 2020:58), is connected to the credible implementation of the before mentioned liberal values within the Union. Bad implementation within member states therefor could potentially hurt European soft power internationally. Not that this is of any seminal importance for the topic of this thesis, but it is tangent on the topic covered in this thesis as far as it gives a potential explanation to why member states are so good at implementing some EU legislation while it might be sorely lacking in other aspects of the legislation. The driving seems not only to be about internal use, but about portraying the right image outside EU borders with the intent of expanding or only conserving the soft power the Union might have abroad.

This thesis as is clear by now is covering specifically gender anti-discrimination. Which is part of EU discrimination law (Foster, 2020: 422-462). On a Swedish, national level, said legislation is covered in the “Diskrimineringslagen” (Regeringskansliet, 2008). With Diskrimineringsombudsmannen (Diskrimineringsombudsmannen, 2023) being

one of the seminal institutions implementing Swedish discrimination legislation. Foster neatly and chronologically covers which TEU and TFEU articles that are being involved in upholding Union discrimination law (Foster, 2020:423). For gender discrimination cases articles 2 and 3 of the TEU covers the need for equality between males and females. Of the remaining 12 TFEU articles mentioned by Foster, articles 8, 10, 153 and 157 stands out as highly relevant for this thesis. As mentioned before, these are considered primary law, according to Foster's hierarchy of legal sources (Foster, 2020:105). Just like Sweden, and other member states, have their own constitutional hierarchy of legal sources. Senior and junior law, in which junior must be in no breach of more senior law, the same goes for EU directives, regulations and the like. They all must be in accordance with primary law, meaning in no breach of treaties and the EU Rights' Charter. Hence the term "hierarchy." The reason this is brought up is due to gender discrimination being so tightly connected to human rights legislation (European Parliament, 2015; EUR-Lex, 2012). Legislation, which is global in nature, due to the United Nations (The Office of the High Commissioner for Human Rights, 2021) being part of the same legislative ambition.

What could be seen from the above description of EU legislation is that it is a complex web of legal constructions spanning from international level agreements down to EU level primary law which then dictate its whole hierarchy of "junior" law if one so will. The hierarchy of the EU in its turn pose a modifying effect on member state, national constitutions due its supremacy effect, which was mentioned prior to this.

But here is where the democracy aspect of the European Union de facto comes in. Prior to this Citizen's Initiatives (European Union, 2023) was mentioned, individuals and corporations alike, can through the help of the European Commission raise a claimed breach of Union primary law, or propose a legal change of any kind, and have it evaluated. It could also be raised in the Court of Justice of the European Union, the CJEU (Foster, 2022:19-23, 58-61). And in so doing create case law that might over-rule EU regulations and/or directives being in clear violation of EU primary law. Undoing EU supremacy

as far as making the junior EU legislation be in accordance with EU primary law, Community law or the “acquis communautaire” (Foster, 2022:105).

If the Citizen’s Initiative is one democratic aspect of the European Union, the democratic election of national representatives in the European Parliament is another one. In which the Parliament has larger powers to influence the institutional integrity than was the case in earlier times of the Community (Foster, 2022:52-54). A sub-section in this analytical section will be specifically dedicated to each EU institution of importance, but it is important to mention the Commission and the Parliament with regards to the democratic functions of them both within the Union.

The history of gender discrimination law in Europe.

Research into the topic of gender discrimination has displayed a sharp shift in events from the 1950’s onwards. Prior to the 1950’s gender discrimination was not as well-defined and legalized as it is today. The norm was, as described earlier, to stereotypically keep woman housebound and males bound to support the family lifestyle with work (Brooke, 2001). The author of this thesis speculated earlier about how this might have been connected to the European project itself needing to uphold an international ideal image of liberal values. Values not necessarily espoused prior to the project evolving. When the European continent was a set of nationalistic states driven more by patriarchal structures (Stirk in Dinan, 2014:11-32) the stereotypical distinction between the two sexes, as described by Brooke (2001), was in some way connected to a kind of conservative realism that seem the opposite of today’s more modern social constructivist ideals.

Gender theory and functionalist theories could be said to have helped illuminate this stereotypical division between males and females and by so doing helped support the cultural, legal, and institutional changes that followed post 1960’s (Scarborough & Risman, 2018). Whether the theories evolved because of the European Community evolving its TEU and TFEU or whether the TEU and TFEU evolved because of the gender theories is hard to ascertain.

Because gender theory could be said to have evolved much earlier than the 1950's if one is to make references to the Suffragette movement in the early 1900's (UK Parliament, 2023) or to Wollstonecraft in the late 1700's (Wollstonecraft, 1792:12-26), herself a staunch feminist of her time. Albeit with more peaceful means of protesting against gender inequality than the much more violent Suffragette's.

Usually, one could assume theories evolve to describe what is ontologically observed. As a way of epistemologically understanding what is observed. One could also assume theories could exist first and then lead the change for a utopian ideal. One could speculatively claim the European Community was the latter, but with the backing of an enormous good-will from the various national citizens of Europe. Albeit with some qualms about the technical design of how to integrate Europe, as has been posed by various authors in Dinan. Notably by Brusse in Dinan (2014:106-112), there was a will to sign-up to a new way of doing things in Europe. In a sense that could have given rise and power to the gender theory break-through. Clearly the case was that various EU legislations and integrational efforts combined with a strong pro-sentiment to enforce such legal modifications in member states everywhere, did not make the theory less relevant.

Brusse in Dinan (2014) also points to changes aimed to increase ease of movements of people, goods, capital and the like. A vision of equal opportunity. That combined with the flower power generation of the 1960's (PBS, 2023), where Europe was very much influenced by the simultaneous sexual revolution taking place in the United States, made for a perfect storm with regards not only to the development of EU discrimination law, but also to the idea of legal equality between the genders. Legislatively it made sense, one could imagine, to heed the sexual revolutionary outcries of females, and males alike, back then and make it part of the new liberal European project. A more peaceful and inclusive Europe. It is a pure speculative thought, but it could have been like that. Many similar variables crossing paths at the same time do make for a perfect storm. Females of yesterday, the Wollstonecraft's and the

Suffragette's, must have rejoiced seeing the day this notable change happened for females' gender equal rights. In a so, speaking, peaceful manner.

When the European Community was formed the focus was to establish territorial division between the Western- (The United States, Great Britain, and France) and Eastern (The Soviet Union) hemisphere (Messenger in Dinan, 2014:56-57; Haas, 1961:387, 389; Foster, 2020:5-6) part of Europe. And thereafter finding a way forward rebuilding the infrastructure and economy of the Western European states with the likes of the Schuman- and Marshall plans. Such plans later lead to the establishment of the TEU and the TFEU treaties. For implementation of said treaties EU institutions were formed. Since then, Community development has been followed by further institutions being created, with the express intent of dealing with, what Haas (1961:377, 379, 386-387) would have called, the "upgrading of common interests." Meaning forming supranational institutions to make sure all member states interest were equally and fairly dealt with. What we would call the Community method (Foster, 2020:4, 6).

By way of the Community method and this methods way of having member states bargain (Haas, 1961:379, 382-385) its way to a more integrated whole, Haas calling it "upgrading of common interest" as it served each member state having an equal application of doing things. Through such bargaining evolutions, the EU gradually built a peaceful unity between priorly warring parties. When such stability was made possible, discrimination law became just another layer of ensuring an ongoing integration of values. What Haas called "spill-over effects" could also be described as the development of equality on more fronts than just movement of goods, capital, and labor. One such equality addition could be said to have been the EU discrimination law and the focus on lessening gender inequality in the workplace, but also in education and in society at large. Haas, which has been shown, spoke to how integration led to further integration, and as such institutions were formed to supervise implementation of such furthered integration.

The hierarchy of legal sources, as presented by Foster earlier was applied to discrimination law just as it had been to any other legal source. As with all new legislation it was not a straightforward thing including gender equality into legislation, albeit the cultural wave during the 1960's spawning good-will for it, considering how many member states are part of the Union. And considering how many political self-interest angles needed to be accounted for in order for a deal to be ratified. Just because there is a general interest in achieving a similar outcome, still intricate details can make or break an agreement of being reached. Ontological proof for this argument could easily be found in the climate efforts to stop global warming, most countries in the world seem to agree there is global warming going on and that something needs to be done to combat it, but national self-interest make a binding and equally implemented climate agreement hard to achieve. Brusse pointed (Brusse in Dinan, 2014: 102-110) to the complexity of negotiations regarding currency convertibility, quota restrictions and the like. Gender equality inclusions into law would assumably not have been any different. Whatever it went during negotiations it is now clear gender equality is part of EU legislation and likewise part of Swedish legislation. This thesis will not delve into the deeper part of negotiations but would rather focus on what has historically developed on a surface level, to create some context for the aim of the thesis, and then move into how gender discrimination law impacts the EU and Sweden at this present moment. Likewise, the interaction between the two actors.

Although the European Community, later called the European Union (Foster, 2020:4), started discussing discrimination law aspects very early on (Foster, 2020:382), still gender discrimination law as such was influenced mostly from the 1960's onward with influences from the sexual revolution, as has been displayed earlier, in the United States. The suffragette movement and Wollstonecraft was mentioned as early forms of feminist activists, but what happened during the 1960's, one could claim, was that modern feminism took form and was supported by males in a way that earlier generation of feminists had not experienced. That was the reason this formidable change could take place. Again, as was speculated on earlier, it was in conjunction with a post-

Second World war tiredness of the old way of doing things that made the gender equality transformation happen legally and as a result institutionally as well. With this global, cultural social constructive modification of how the world looked at females and gender ethics spilled over into international agreements, EU charters (EUR-Lex, 2006) and Treaties (EUR-Lex, 2020). Human rights were not seldom involved in the debate on gender equality, hence the legal association seen in the EU Charter of Fundamental Rights (Foster, 2020:29-31; EUR-Lex, 2012). One argument being that females had no human rights if they had no real autonomy to decide what they wanted to devote their lives doing. Being home wives and giving birth to babies and then spend all day tending to such babies were not part of all females' dreams, considering the success of the sexual revolution in the 1960's. Still, females had been conditioned to such a life, up until the latter part of the 1900's. Limited by a lifestyle not directly chosen by themselves. Despite being just as bright as any other male who lived life was in some way predetermined and limited (Brooke, 2001:773-795). Prior to the social- and cultural revolution of the Western hemisphere in the 20th Century on gender discrimination, alluding to what was mentioned earlier in this thesis, there had been numerous feminist attempts to claim and establish such gender autonomy. Males, even those that were priorly considered non-legal subjects, had been converted into legal subjects of their own due to the French Revolution in France (National Assembly of France, 1789). Prior to the revolution such males where not even gender equal with their own gender. Wollstonecraft was one such leading woman pointing to such (Wollstonecraft, 1792) and the Suffragette movement was the most extreme version of the fight against gender discrimination. But all of them failed because, one could speculate, the time was not ready for such a change. The legal framework and hence the institutions needed to safeguard a real gender anti-discrimination evolution was not a plausible idea. But such a natural evolution came vigorously after two world wars had transpired and people were willing to try something new. Politically, socially, and culturally. One could only speculate whether the disillusion over the fallibility of the national state system or the mayhem nationalism had caused countless millions of people in two subsequent world wars up until that point, was the reason for this willingness to look at the world anew. As has been shown already, Dinan's

book host countless chapters hinting on there being a willingness to try something entirely new that differed from the nationalistic system Europe had been structured upon up until that point when the Community was formed.

With this strong trend toward constant gender equality development for the better, trends do stop somewhere. As was displayed earlier there was a political, social, and cultural will to have gender equality laws put in place and institutions to safeguard the implementation of them. But just the opposite can occur if such will disappear. Changes of can occur, Brexit being a prime ontological proof of such (House of Commons, 2023). Poland being the outcast of gender anti-discrimination (European Parliament, 2021), with its view on abortion rights for females is a way, one could argue, of challenging Community cohesion in favor nationalistic autonomy. Demography change in European member states could also impact how strong the gender equality trend may stay. As for Sweden it is reported that at least 10% of its total demographic (Pew Research Center, 2017; Open Society Institute, 2007:11, 15, 37, 47; Lee Tomson, 2020) originate from states in the Middle East and or Africa. A part of the demographic that may, or may not, be entirely pro-gender equality and hence might not support gender equality rights in Swedish democratic elections. Or may work against such gender equality activities in other ways, for example by not following Swedish regulations on the topic and/or not respecting legal implementation by police and other Swedish institutions. Future research on how demographic change, when heterogenous groups come together, impact gender equality legislation in Sweden, and in the European Union at large, could be a continuation on this thesis. As will be described in the institutional sub-section further on, each institution has its own way of thwarting negative impacts on the European Community. In some way there will be an answer to be had on how heterogenous demographics in society can still be kept in a moderate balance despite there being fringe aspects in society wanting something wildly different. But Brexit proves as a reminder that those checks-and-balances posed by the European Union institutions might not safe-guard a member state post-existing the Union. With regards to keeping gender equality legislation in place and having it properly implemented.

EU Law – the hierarchy of law.

As mentioned before Foster's book "EU Law" (Foster, 2020:105) displayed a legal hierarchy of the EU. Displaying how primary law such as Treaties and Charters determine what is possible to legalize on in regulations and directives. There is an amendment possibility of said primary law, but such is only possible through the European Council (Foster, 2020:49-50; European Parliament, 2019:1-2) deciding upon amendments to treaties, primary law. It is obvious that discrimination laws were possible only because the EU Charter of Human Rights (Foster, 2020:105) was part of primary laws. As gender equality could be considered part of fundamental rights as well, as can be seen in the second highest level of the hierarchy of EU law sources, it comes naturally that secondary legislation and likewise case law go in the same supportive direction. As member states have agreed to follow the treaties when they accede to the Union it become automatically so that gender anti-discrimination legislation is implemented into national level legislation as well.

This explains, in a very rudimentary manner, the legal connection between the EU and its member states, such as Sweden. It is important to display this before doing studies of how and why Sweden implements gender discrimination legislation in the way it does. As have been proven earlier member states and EU citizens can critique and ask the EU Commission and the CJEU to challenge EU legislation or even ask for an evaluation of whether EU legislation could be changed or ask the EU to have member states change its legislation with the argument of the member state in some way being in breach of EU legislation. Even if Foster mentioned the idea of EU supremacy and how member states are to follow EU legislation it is never a static dictatorial demand that never be questioned or challenged.

In the next sub-section this thesis will delve more into the institutions of the EU. But for now, a closer look at the hierarchical legal sources of the EU would be warranted. Although this definitional text seems far from answering the research question, understand that context is everything for understanding

why a member state might or might not implement a certain kind of regulation decided upon on an EU level. To understand why a certain actor in a system reacts or acts in a certain way it makes sense, one would assume, to first understand the construction of the system, and the function of its various parts, within which the actor operates. Because member states are in many ways, one could argue, responsive to EU legislation. At the same time, as will be seen in the institutional sub-section, the EU in many ways is responsive to each member state as well. So, it is a complex dynamic system with pre-arranged and pre-determined rules for engagement. For that reason, it should make sense to first build up this contextual knowledge of how things work within the EU community. With that said let the thesis move on to a more detailed description of the beforementioned hierarchal view on the legal sources of the European Union. Of which there are five, according to Foster (Foster, 2020:105).

At the very top we find primary law sources, meaning treaties, protocols, and the EU Charter for Fundamental Rights. This charter in turn is intricately connected to an EU institution called the European Court of Human Rights, or ECtHR for short (Foster, 2020:114-115). Although this institution is important to the Charter of Fundamental Rights, and indirectly to gender anti-discrimination law, it will not be part of this thesis any more than as this brief mentioning. These top-level legal sources are then followed by a fourth, more junior level of legal sources. All junior levels, just like within a national legislative system must be in accordance with the stipulations made in higher levels of legal sources. If they are not, they will be annulled when challenged (Foster, 2020:105). That is why member states do have a prerogative, from time to time, to challenge EU regulations which they find might be in breach of legal EU hierarchy.

The next highest legal source level within the EU covers leading general principles and fundamental rights. Foster defines fundamental rights as being connected to social protection, standard of living, and quality of life (Foster, 2020:111). Pointing to Articles 2-3 and 6 TEU and Articles 8-10, 18-19, 40, 45, 153 and 157 TFEU covering such rights. Whereas he defines general principles as being EU legal sources with influence from external sources

originally. Principles such as subsidiary and proportionality which are found in Article 5 TEU (Foster, 2020:116).

The third legal source from the top is covering international treaties and agreements of international origin (Foster, 2020:117-118). The most notable of such international agreements is the one connected to the Common Foreign and Security Policy, CFSP for short (Foster, 2020:4-5, 117; Michalski in Dinan, 2014:278, 291-292), but also the General Agreement on Tariffs and Trade (Foster, 2020:118; Messenger in Dinan, 2014:58; Gillingham in Dinan, 2014:62, 87; Brusse in Dinan, 2014:93, 96). The next level will be much closer to member states and EU citizens.

The second level from the bottom covers what is termed “secondary” legislation (Foster, 2020:105). Meaning regulations, directives, international conventions and various other kinds of legal decisions and opinions (Foster, 2020:117-123) which are implemented by member states as part of them having agreed to follow primary law when they acceded to the Union. This brings us finally to a legal source level creating the dynamic which was mentioned earlier in this thesis.

The bottom level of the EU legal sources hierarchy is the directly most relevant part for this thesis as it relates to how member states can interact outside the voting for representation for the Parliament (Foster, 2020:51) where the interesting part starts. At this level member states and European citizens, as was shown earlier, can impact the EU with Citizens Initiatives and by member states raising legal requests with the European Commission (Foster, 2020:40-41) and the CJEU (Foster, 2020:57). This opportunity to challenge regulations is important for the democratic aspect of the Union. Although supranational institutions, such as the ones that will be described in the institutional section later, might be claimed to dictatorially steer member states in an unwished-for direction, really, they are there to make sure equal implementation of EU law is made possible (Brusse in Dinan, 2014:107).

EU institutions involved in forming, changing, and implementing EU law.

Foster dedicates a whole chapter (Foster, 2020:36-64) to various EU institutions that is making sure the legal framework of the Union is upheld, not only implemented. Each institution has its own competency and function, so they each play a relevant role for how discrimination law is implemented. Each institution also has its own specific functional value for member states.

Likewise, each institution needs to interact and answer to other EU institutions in numerous ways. The word complex was used by the author of this thesis earlier. One can notice how there are intricate checks-and-balances for various sources of legal, as was defined above, but there are similar intricate checks-and-balances for how institutions are allowed to act. As will be displayed later in this sub-section the Commission is one of the main watchdogs making sure EU institutions do not act in breach of EU primary law or in breach with regulations, directives, international agreements and the like. But it surely is not the sole watchdog, as all EU institutions in some way have the responsibility of keeping the integrity of the European system intact.

Prior to going through an overview of the EU institutions it is important to declare that this will not be an in-depth analysis of EU institutions but rather a way of mapping out the landscape in which gender discrimination law exists and why it is implemented in the manner it is on an EU level, but also why it might be implemented in the way it is on a member state level. Next, this thesis will display various EU institutions, their core competency, and functions within the EU legal system. After this sub-section, the analysis will finish with describing how Sweden implements gender discrimination law within its own national legal system and in what way this relates to the European Union and its hierarchy of legal sources.

The European Commission.

In no chronological order, but rather the same sequence mentioned in Foster's book, the function and competency of the European Commission (Foster, 2020:40-41) could, in some sense, be analogically compared to the function of a member state government. The role being primarily to propose legislation in

accordance with Article 17(2) TFEU (EUR-Lex, 2020) and to ensure, to mention just one actor amongst a couple of others, member states do follow EU legislation. If member states are in breach of said legislation, then it should be brought to the European Court of Justice in accordance with Article 258 TFEU (EUR-Lex, 2020). Likewise, it is the function of the European Commission to ensure EU institutions follow EU legislation as well. Together with the European Parliament the Commission is also expected to propose and implement annual budgets for the Union (Foster, 2020:41). Which is legislated in Articles 263 and 314-319 TFEU, respectively. Foster sums up the function of the Commission as it being the “guardian” of the Union (Foster, 2020:40). Such guardianship is still very much dependent on other EU institutions. The Parliament being a primary example of this, as was just described, and the Council of Ministers (Foster, 2020:42-47) being another one. This co-dependency, if one so will, is stipulated in Articles 225 and 241 TFEU. Although these institutions do have a guardian function and although the co-dependency creates an accountability setup, still the most potent guardian is, or should be the EU citizens and the voters voting EU Parliamentarians into office. Articles 11 and 241 TFEU (EUR-Lex, 2020) do lift this democratic aspect of the Union.

European Citizens’ Initiatives (Foster, 2020:41,90) is one-way individual actors on non-member state level can propose and influence European Union changes. The Commission being obligated to propose such to the European Parliament and the Council of Ministers for evaluation (Foster, 2020:41). Such initiative can also be tried in CJEU. If the request is not in breach of primary law, it could be voted on for new legislation. Or existing regulations or directives could be tried by the European Court of Justice (Foster, 2020:58-59). Mentioned Initiative will be of interest to this thesis due to how it could potentially lead to gender discrimination law modification in the future if demographic change occurs, which is considering how globalized the world is today. Such modifications could be modified for the better or for the worse. Of course, primary laws of the EU do make for an assurance that modifications for the worse is less likely, but changes in member state compilation could pose a future threat to primary law amendments if new accessions of less-than-

ideal members are allowed to occur. An implicit result of such less than ideal changes in primary law could, potentially, pave way for a negative change in gender anti-discrimination laws. The author of this thesis does understand this argument is far-fetched from where the European Union stands today, but it is not unlikely either that it could occur. Various new treaties through history, from the 1950's onward, as shown by various authors in Dinan (Stirk in Dinan, 2014:20; Dinan in Dinan, 2014:3; Gillingham in Dinan, 2014:84; Brusse in Dinan, 2014:92; Rittberger in Dinan, 2014:328) do prove treaty amendments are rather normal. And such changes do impact the whole hierarchal chain of EU legal sources and their validity. It impacts also which new legislation that is then possible, as was shown in the section covering the legal sources hierarchy of the Union. And as each member state has agreed to follow primary law and implement EU legislation that is in accordance with EU primary law it makes sense to argue for the potential threat of new letting new member states in which may have less than ideal intent for the EU value system. Likewise, it makes sense, although it is unlikely it could have any real immediate effect on EU level functioning, to argue for keeping some watchful eye on less-than-ideal changes in member state demographics. Diasporas in EU member states, for example the Eritrean state (Ekman et al., 2023:5) but surely many other states, China not the least, could, without being acceded members of the European Union, impact how Sweden as a member state interact with the European Union and how the Swedish demographic votes in future European Parliamentary elections. This ties together with so much more than gender discrimination laws, of course, but for this thesis, again, the focus is on the current application and future application of gender discrimination law and the dynamic between the European legal system and the legal implementations of EU law in Sweden. This seeming digression from the topic of the thesis is not a digression at all, rather it displays how dynamic the legal field is and how one can never assume the future will be the same as the present. All the amendments of EU treaties and how Europe has gone from glowing nationalism prior to 1945 (Stirk in Dinan, 2014:11-32) to a diametrically opposite existence display how gender discrimination law hinges on a will to maintain and value it. There are, which has been shown in both factual references and through the pure speculations of the author of this thesis, good

grounds to be vigilant of the world we all live in. Because the world could be argued to have become more polarized than ever. And as was shown in the beginning of this thesis, when things turn chaotic and polarized tolerance for opposites seem to fall behind more present matters.

The European Parliament.

If the European Commission was said to be the “guardian” of the Union, then the European Parliament (Foster, 2020: 51-55) could be said to be the legislator of the Union. But as will be shown, EU institutions usually work in tandem with other EU institutions. The parliament, as Foster points out, have received more power since the European Community was founded (Foster, 2020:53). Such has also proven to be a step toward a more democratic Union (Foster, 2020:51-52). solely or with absolute powers. The fact that the Parliament is also allowed to revise and propose treaties (Foster, 2020:53) amendments to the European Council, in accordance with Article 49 TEU, also a testament to such an argument.

The Council of Ministers.

The Council of Ministers is higher up the organizational structure of the European Union institutions. This gives it the right to delegate actor power to the Commission (Foster, 2020:43), seen in Articles 290-291 TFEU. Just as was the case between the European Parliament and the European Commission there is a co-dependency between the Council of Ministers and the European Parliament and Commission (Foster, 2020:43).

Foster rather succinct spells out how each EU institution is bound by the limitations of its own institutional competency and how it is not allowed for any EU institution, even if they accede to such things such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (Foster, 2020:48; Council of Europe, 1950:4-34), to act in breach of primary law (Foster, 2020:48). Referring to the checks-and-balances mentioned earlier in this thesis. There is much more to mention about this institution and the pages are there to read (Foster, 2020:42-49) for those inclined to do so, the reason for bringing this institution up in the first place is to show its proximity

to treaty amendment considerations. As was mentioned before treaty amendments are relevant to keep an eye on, because it impacts how gender discrimination law is applied within member states, specifically Sweden, and likewise impacts future implementation of the same.

If one would describe the function of the Council of Ministers it would be more of an overarching umbrella meddling in both policymaking, legislative, budgeting, and decision-making competencies Foster, 2020:43). These functions are to be found in Articles 16(1), 289, 290-291, 294 and 314 TFEU (Foster, 2020:43). According to Article 16(8) TFEU (EUR-Lex, 2020; Foster, 2020:43) the Council of Ministers are required to meet in public for display of legislation conducted. Transparency could be said to be in accordance with democratic values. Transparency of conducting legislation is also part of the ability to keep the European Union accountable to the rule of law. Another important value factor of the European Union.

The Council of Ministers lead us to the European Council. Followed thereafter by the Court of Justice of the European Union, or the CJEU. Those last institutional definitions will then finally lead us to the last analytical section of this thesis. A case study of Sweden and its member state implementation of EU discrimination law. With specific focus on gender discrimination law.

The European Council.

With legal support in the Lisbon Treaty (Foster, 2020:49) the stipulated role of the European Council is clearly a bit different from other Union institutions. For example, according to Articles 4, 15(1), 22 and 68 TEU (EUR-Lex, 2020; Foster, 2020:49) the European Council should define general political guidelines for EU institutions. Which brings thoughts to an umbrella institution. What makes this institution relevant as it relates to gender discrimination law, and member state implementation of the same, is its focus area, its competency. According to Foster the European Council have a strategic focus on freedom, security, and justice (Foster, 2020:49). Meaning, strategically offering guidelines for other European institution on these topics. The European Council is not allowed to legislate, only guiding other

institutions (Foster, 2020:49). Such prohibition can be found in Article 15(1) TEU (EUR-Lex, 2020). Consultations with regards to foreign policy, monetary cooperation and social security concerns is, according to Foster and Article 4 of TEU (Foster, 2020:49; EUR-Lex, 2020), part of the competency of the European Council. As such the European Council seem to be a mute institution unless there is a sentiment already within the Union, and its leading institutions, that is in alignment with the consultation given. One should not underestimate a good consultation that changes minds though and if connected to gender discrimination law one might imagine how a changed social dynamic of the European demographic might be used by the European Council in some way to impact the primary law covered in an earlier speculation about how demographical change can impact treaties amendment wise. The Court of Justice is the last institution to be covered in any length. With its vital role in vetting EU legislation against primary law and likewise vetting member state implementation of valid, in accordance with primary, EU legislation

The European Court of Justice.

The Court of Justice of the European Union, also named CJEU or CoJ (Foster, 2020:55), is one of the most important institutions of the Union. At least seen from the perspective of the democratic aspect of the Union. In thesis prior the CJEU has been presented as being the place where European Citizens´ Initiative can be evaluated. Likewise, it has been shown prior how member states can, via the European Commission try European law and get an interpretation by the CJEU on how to implement it on a member state level or perhaps have CJEU´s take on how new EU legislation stands against EU primary law (Foster, 2020:55). This institution is defined by a procedural Protocol called “the Statute on the Court of Justice” (Foster, 2020:56) that, according to Foster, defines procedure for legal case management. The jurisdiction and competency of the Court is found in Articles 19, 19(3) and 256-279 TEU (EUR-Lex, 2020; Foster, 2020:58). The Court could be said to function as an observer, interpreter, and implementer of European Treaties (Foster, 2020:59), the before mentioned primary laws of the Union. While the natural geographical jurisdiction of the Court of Justice is within the European Union itself still Foster point to the ironic side-effect that CJEU rulings do

have from time to time. Case law in which non-member state actors, corporations and the like, can become subject to Union law just by the act of being associated with a legal citizen of a member state or its various institutions (Foster, 2020:58).

Just like other Union institutions the CJEU has limitations to its competency and jurisdiction. For CJEU these limitations are found in Article 275 TFEU, in which it is stated that the Court is not to engage with CFSP matters nor in any of the matters mentioned in Articles 40 and 263 TFEU (Foster, 2020:58). These last Articles seem paradoxical considering the indirect effects CJEU rulings can have on non-EU member state legal citizens (Foster, 2020:58).

Advisory bodies of the European Union.

Although the Union's advisory bodies do exist as part of the European Union still it will bear no coverage or definitions in this thesis. This sub-section therefor exists only to recognize that such advisory bodies do exist.

The research question was very much connected to not only the EU legal sources and the institutions implementing them, but also the theories behind this kind of legislation. Assumed to be supporting gender discrimination legislation culturally. One way of studying how gender- and functionalist theory is applied within the European Union is by way of a member state case study. Sweden was chosen as the case study in this text. With EU legal sources and its hierarchy defined, and likewise EU institutions defined, let us progress toward the Swedish case study to see how Sweden has implemented EU gender discrimination law and how it deals with the legal system of the Union with regards to cases of potential disagreements of such legislation.

EU case law involving Swedish gender discrimination cases, and the outcome of such cases.

When raising questions concerning discrimination in Sweden there exists a specific institution called "Diskrimineringsombudsmannen" (Diskrimineringsombudsmannen, 2023) Which deals specifically with cases

concerning discrimination. On its website seven cases of discrimination exists, them being gender, gender identity, ethnicity, religious faith and belonging, handicap, sexual orientations, and age. Such discrimination categories are then defined as being either direct or indirect in nature. These are concurrent with EU discrimination law, for example Articles 2-3, 8, 10, 18-19 TFEU (EUR-Lex, 2020) and Articles 20-23 of the EU Charter of Fundamental Rights (European Parliament, 2000:13). Said Swedish institution is regulated by a nationally applied discrimination law, “Diskrimineringslagen” (Regeringskansliet, 2008), Chapter 1 §§4-5 and Chapter 2 of the same, which in turn is influenced by EU discrimination law priorly mentioned (Foster, 2020:422-462). As a member state of the EU Sweden is required, by the existence of EU legal supremacy (Foster, 2020: 58, 60), to abide by EU decided legislation, but as will be shown national court cases could, and are, brought in front of the CJEU for legal interpretation. Case-law is one way to gauge member state implementation of EU legislation. The EUR-lex database is the easiest access point for such reference material, but various other sources, mentioned below, are good complementary sources if one wants to pay for it. As far as the EUR-lex database was concerned, Sweden produced no case law results in the gender discrimination search. Albeit other discrimination cases related to ethnicity was presented, but of course of no relevance for this thesis. Why no search results were shown on gender discrimination could be answered by a European Commission evaluation report a bit later in the thesis.

In the Common Market Law Report (Faculty of Law/University of Oxford, 2023) and in Westlaw (Thomson Reuters, 2023) one is said to find case law related to EU member states. Unlike the EUR-Lex database, these sources are paid-for sources, usually expensive as well. Such made these sources out of the reach for the author of this thesis due to no budget for such outlays. Next will be the actual member state case study for Sweden. The case study will then be followed by a conclusion part.

Sweden – an example of how EU gender discrimination law is implemented on a national level.

When a new regulation or directive is proposed there is an understanding between the EU and its member states that such regulation should be implemented in each member state. As we have seen in the definitional sections earlier, this understanding also includes the implicit agreement that new EU regulation should never be in breach of EU primary law. If such breach is the case, or is deemed to be, then CJEU is there to interpret the EU law and then make a judgement on it. All that is covered, but it is good to remind the reader of what the member states can and cannot do within the EU system when we now delve into Sweden's implementation of EU gender discrimination law.

As was priorly described, the case law search in the EUR-Lex produced no search results and the more expensive database options was out of this thesis budget. For that reason, the author went to the European Commission's own evaluations report to have an EU perspective on how Sweden is doing in EU evaluative terms.

But first let us start with a report from 2015, published by the European Parliament called "*Directorate-general for internal policies. Policy Department C. Citizens' rights and constitutional affairs*" in which the European Parliament gives an EU perspective on how Sweden had dealt with gender discrimination up to that point in time. It says Sweden comes out way above the average in the European Union with regards to the so-called gender equality index (European Parliament, 2015:7). This could be one probable explanation why the EUR-Lex database displayed no search results when one searched for Sweden in combination with gender discrimination. The report continues saying Sweden has something called "gender mainstreaming" (European Parliament, 2015:7, 9) meaning the whole culture of Sweden seem to have a basic understanding, a social contract of sorts, aimed at gender equality. Which tends to permeate all layers of society. From work life to life outside work. The "Swedish Code on Corporate Governance" (Swedish

Corporate Governance Board, 2020) is one example of how society voluntarily takes on the role of engaging in gender equality, according to the report (European Parliament, 2015:7, 17).

Although the report notes the Gender Pay Gap is large at 19% (European Parliament, 2015:6) between genders, Sweden solves such discrimination in national courts, not on EU level. Many discrimination cases in Sweden seem to follow a similar pattern. The penal code, for example, according to the same report, is said to have been reformed to make it easier to penalize offenders of gender discrimination (European Parliament, 2015:8-9). Again, making the case-law national, not EU level based. This does display a member state living up to the EU discrimination law very well.

Other cases displaying Sweden proactively preventing gender discrimination is found in its regulation of prostitution and human trafficking (European Parliament, 2015:9). In this regard one could claim gender- and functionalist theories are well applied in many respects in Sweden. At the same time there is a double-edged perspective to prostitution, for example, where females, doing it out of their own volition and self-interest, want to be able to sell their bodies for sexual encounters, earning money from it, if they so wish. As was defined earlier in the theory section both theories are prone to defend genders, whether females or males, right to their own bodies. That goes for both those wanting to sell their bodies and them wanting not to have anyone sell their bodies for them. So, it is a complex debate requiring a nuanced legal perspective, which does not seem to be existing in Swedish discrimination law. And as it seems, from references given in this thesis so far, not on EU legal level either.

Another case in which Sweden show its protection of gender equality rights is when it supports abortion rights (European Parliament, 2015:9-10, 29-30). In countries such as Poland or any other Catholic driven European member state, abortion rights are not as obvious (Martuscelli, 2023) as they are reported to be in Sweden. Abortion rights are in alignment with earlier mentioned EU discrimination law. Likewise, in alignment with priorly mentioned EU Charter of Fundamental Rights. As abortion could be dangerous just as giving birth,

abortion prohibition laws could be argued to be against human rights and that would implicitly mean it would be against EU primary law as well, referring to EU legal source hierarchy covered earlier, to instigate national laws aiming for such an outcome.

Since 2006, the same report from the European Parliament says, Sweden has engaged internationally in bilateral and multilateral cooperation called “International Policy on Sexual and Reproductive Health and Rights” (European Parliament, 2015:9, 33-34). As will be seen in an evaluation report from the European Commission from just two-three years ago, international agreements are a preferred way for Sweden to influence on gender anti-discrimination. Not only does Sweden go above average on EU regulations and directives, but it also voluntarily takes on a leading international role. Again, it seems feasible why search results in the EUR-Lex database showed no results.

In two more recent reports by the European Commission, one for 2021 and one for 2023 (European Commission, 2021; European Commission, 2023), called "A comparative analysis of gender equality law in Europe" the Commission mention Sweden's progression over two separate years with regards to gender discrimination. In its report from 2021 the Commission compare a couple of member states, Sweden being one of them. The author has had an unfounded bias towards Poland relating to gender equality and gender discrimination. According to the Commission report from 2021 Poland are more like Sweden than might have been previously assumed. For example, both member state does have an Anti-Discrimination Act (European Commission, 2021:11) while other member states such as Finland and Bulgaria have divided up the gender anti-discrimination efforts into one Anti-Discrimination Act and one Gender Equality Act (European Commission, 2021:11). Whether two separate Acts is more efficient than one, is outside the scope of this thesis. It is still clear member states of the Union engage in EU discrimination law in diverse ways, but still with a high and serious dedication.

Poland and Sweden do differ very much on other issues, such as the topic of transgender and gender identity (European Commission, 2021:12). According

to the 2021 Commission report Sweden is one of a few trailblazer member states as it relates to recognizing gender identity and gender interaction in its legislation. Ontological proof of such could be found in chapter 1 of section 5.1 of the Discrimination Act (Regeringskansliet, 2008). It was trailblazing in as far as it was front running the EU legislation on the definition of sex, gender or transgender. According to the Commission report the EU had no such definition. Nor did the EU back then have any clear definition of the differences between the word “sex” and “gender” (European Commission, 2021:12). What such a specific example display is how member states, in something Haas would call “upgrading of common interest” (Haas, 1961:377, 379, 386-387), front run something and the European Union level can then pick it up and apply it either through secondary legal sources, due it being in alignment with existing primary law, or by amendments to the treaties. At which point EU supremacy on the matter takes hold. This is the dynamic model in which the member state level can interact with the European Union level, and vice versa. Such gives the impression that the EU and member states does function as a community. Dynamically interacting and influencing each other.

Pregnancy and maternity leave are a great test of quality when it comes to gender equality and gender anti-discrimination According to the Commission report Sweden do have a strong legal protection in place for females. Which is not the norm for all member states as they seem to have implemented this aspect of gender discrimination law in diverse ways (European Commission, 2021:82). Poland, for example, seem to have specific exemptions to the pregnancy and maternity leave protection while Sweden gives little to no wiggle room for employers to avoid responsibility. In the Court of Justice, a Directive called the Gender Recast Directive (European Commission, 2021:14, 126-127) states discrimination based on pregnancy- and maternity leave is to be considered a form of sex discrimination. A conclusion not shared by all EU member states, as it seems. One could speculate as to why that is, but it could be revenue driven. It might be seen as expensive for corporations retaining females that are not productive employees. At the same time pregnant employees can be assigned other tasks with the employer that is conducive

with the competency of the female employee but still less physically challenging.

The 2021 report is lifting a particularly crucial point. To combat, or just keep the good accomplishments at par with what EU Directives demand from each member state. Unbiased collecting of data and an unbiased representation of the same is needed. With no such data and such statistical representation, the implementation of gender discrimination legislation will be thwarted. This is telling the obvious. Some discrimination though is hard to measure in the first place even less so to collect and input to a statistical representation. This is called “indirect discrimination” which explains itself. Discrimination that cannot to be proven in hard data is indirect. To make the dealing of such discrimination manageable the EU Court of Justice has devised something called an “objective justification test” (European Commission, 2021:17) which, according to the Commission report, is defined by Article 2(1)b of the Gender Recast Directive. According to the CJEU this justification test should be used strictly as devised, but as the Commission report show (European Commission, 2021:17, 33) it is applied not at all in some member states while it in others are strictly applied.

As it relates to direct discrimination member states are to act pro-actively to combat discrimination of all kinds, gender related. The Discrimination Ombudsman is part of member states implementation of EU discrimination law. The European Commission give varied referenced examples of said institution throughout its report and display, by doing so, the importance of that institution being in place (European Commission, 2021:40, 50, 52). The competency of the Ombudsman is to detect and then pro-actively work against number of cases of direct, likewise indirect, discrimination. In Sweden, for example, this is very well implemented in the educational sector and in the labor market (European Commission, 2021:60). It is part of the responsible governance of universities, schools, private and non-private employers to actively manage discrimination and make sure the Discrimination Ombudsman is informed of such cases. In Sweden discrimination cases, gender related or

not, can and often is tried against this institution
(Diskrimineringsombudsmannen, 2023).

Meanwhile in the Commission's report for 2023, as one could imagine, a lot is the same for Sweden on the already mentioned areas of gender discrimination. For that reason, the first half of the 2021 report was covered above, while for the 2023 report the focus was the latter part of the report. If work against gender discrimination in the labor and educational market was the end use of the 2021 report, the 2023 report will start off examining how sexual harassment is dealt with in Sweden. The 2023 report says Sweden follows the earlier mentioned Gender Recast Directive, but like many EU member states it goes beyond the demands of the Directive when it deals with sexual harassment cases (European Commission, 2021:23).

It may seem far-fetched connecting the good effort of Sweden on the gender discrimination front with the sexual liberation of the 1960's but upholding a bettering gender equality and lessen gender discrimination in the way Sweden is doing and has done, is still relevant. Sweden is clearly embodying the ideals of the gender- and functionalist theories as stated in the theory section. This is clearly with or without the European Union forcing Sweden to do so. In some regards Sweden seem to push the European Union to become better at upholding the discrimination law. This is, for the author of this thesis, an uplifting notion, being a Swedish a national.

Gender theory and the liberation of female rights from the 1960's onward has had a significant impact on how the Union functions, as has been proven throughout this thesis. With such a cohesion amongst member states, referring to the findings from the European Commission reports, on gender anti-discrimination it makes sense that credibility towards third states, non-EU member states, should build or conserve hegemonic soft power. At least on the topic of gender discrimination. This thesis will not speak on any other aspects of discrimination law or how it is perceived by outside observers.

Sweden is a member state with an incredibly good track record on gender discrimination issues. It assuming an international leadership role on gender equality is also impressive considering it outperforms the requirements of the Gender Recast Directive. Likewise, it and many other member states leading the definitions of sex and gender points to how member states have the power to influence how the European Union and its institutions should deal with gender discrimination in the future. In a way, Sweden engages in intergovernmental bargaining which then could turn into either new EU secondary law or even lead to an amended EU primary law structure. It would also be safe to assume Sweden, being a member state with a good record within the Union, is not just accepting any new regulations or directives on its face value but applies its member state prudence making sure new regulations and directives are in line with EU primary law.

Conclusion.

The aim of the thesis was to answer how the European Union and Sweden, are similar or dissimilar on gender discrimination. How is EU law implemented in Swedish legislation and how can member states such as Sweden challenge EU legislation with regards to gender discrimination.

Findings showed Sweden teamed up with other member states and non-member states in bi- and multilateral agreements rather than taking cases to the EU level. By so doing surpassed the Gender Recast Directive. Sweden apply EU discrimination law through the Discrimination law. A very much culturally grounded law in Sweden. In Sweden, anti-discrimination regulation is strongly implemented through the labor market, for example the “Swedish Code on Corporate Governance,” and in the educational sector.

Swedish application of TFEU Articles covering gender discrimination and its implementation of the EU Charter of Fundamental Rights is to be found in Chapter 1 §§4-5 and Chapter 2 of its Discrimination Law.

“Diskrimineringsombudsmannen,” the Swedish institution instigated to implement Swedish discrimination law, is like other EU member states

institutions on the topic. According to a Commission report Sweden go beyond the requirements of the Gender Recast Directive.

The hierarchy of European Union law sources and the interaction with a member state show the dynamic interaction between the two. It also shows the dynamic aspect between the various EU institutions. The EU legal system must be seen as an ecosystem of sorts in which there are various avenues for a member state to interact and function.

The hypothesis for this thesis was social constructs around gender stereotypes and biological differences between genders lead to motivations behind legal development on gender equality. Findings in this thesis did not explicitly display how historical feminist movements in the 1960's and 1970's drove the European Union and Sweden, to adopt gender- and functionalist theory when forming the legal code and the surrounding institutions in charge of implementing the legal code, but could be assumed to have impacted sentiments towards the outcome.

In this thesis the functioning of the EU legal system based on legal source hierarchy, EU institutions connected to such legal framework and member states interaction with it, has not explicitly proven to be a driver for making gender- and functionalist theory strongly immersed in how member state's function. When doing a case study of Sweden, it was displayed how it does not see itself restricted by the EU.

It is feasible looking at the demographics of Sweden and its impact on EU participation. Treaties and institutions can be modified and amended. Demographic changes change the will of member states. Which impacts EU regulations. Gender discrimination being one impacted.

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