The equal pay principle – promises and pitfalls*

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In law & economics the concept of *assumption* is essential; it is part of the economist's way of thinking. In such circles, the "can opener story" is often told; a few of you may thus have heard it before:[1]

A shipwreck has left a physicist, a chemist and an economist without food on a deserted island. A few days later a can of beans is washed up on the shore. The physicist proposes a method of opening the can: his advice is to throw it to a height of twenty feet, based upon the terminal velocity of a one-pond object – the weight of the can – and let it fall on a rock and it would just burst the seams without spilling the beans. The chemist's response is that it is too risky and suggests that a fire is lit and heat the can on the coals for one minute and thirty seven seconds, which will burst the seams. The economist's reaction is: "Both of your methods may work, but they are complicated. My approach is much simpler. Assume a can opener."

Why do I start with this story? Polinsky says:

"The can opener story contains one important truth and one important lie about economists. The truth is that they approach problems by making assumptions. The lie is that they make ridiculous assumptions (though, unfortunately, this is not always a lie)."

It is my view that the equal pay principle tends to be equal to an assumption in the jargon of economists. It is easy to state that once the equal pay principle is made part of the statute book, the legislator has also implemented the equal pay principle. Nothing can ever be more wrong, and that is also where the difficulties start. Therefore, common sense compels us to focus upon the constraints and pitfalls inherent in the equal pay principle in Swedish sex discrimination law.

Since the Swedish law is partly European it should also have some bearing upon the other Member States of the E.U. as well. Yet it is not an easy task for a speaker to focus upon the constraints and pitfalls inherent in the equal pay

* This is a slightly redrafted version of an address that I was invited to hold at The Annual Conference of the Network of Parliamentary Committees for Equal Opportunities for Women and Men in the Parliaments of the E.U. Member States and the European Parliament (N.C.E.O.), Stockholm 26 October 2001.

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[1] Mitchell Polinsky, An Introduction to Law and Economics, Boston and Toronto 1983, pp. 1-2.

principle. Most people want to hear about the good things; I will talk about the bad things. In such a case I am also entitled to question even the self-evident. Thinking ain't illegal yet!

I will highlight five areas of the Swedish wage discrimination law that I find particularly crucial in the application of the equal pay principle. The first aspect is very much overlooked, i.e. the status and position of the wage setter. The second aspect concerns the rather broad scope of Swedish law with respect to the implementation of active measures (positive action). The third aspect involves the contradiction between the equal pay principle and the factors that may justify a wage differentiation between men and women. The fourth aspect relates to the organisation of the labour market, i.e. the way labour market monopolies work when wages are set, in both employer and employee quarters. The fifth and final aspect concerns the proper forum of law when a dispute with respect to wage discrimination between men and women is dealt with.

1. In applying the equal pay principle the target person is the wage setter

First of all, the person in charge of wage-setting must clearly possess both the necessary skills and the qualifications for the job. This means that this particular person must not only have a good apprehension of what subordinate employees are doing but also how they perform their work. Secondly, s/he must have a decent knowledge of what the law provides, in terms of what is found in both the statute book and case law. However, it is not necessary for that person to be a professor of labour law! Thirdly, the wage-setter must have access to a core of robust wage-setting criteria, in order to avoid personal bias in wage-setting. The criteria must be enduring. Why is this the case? The answer is obvious: wage-policy is not like a dragon-fly, whose life is brief indeed. It is my very simple view that if the above-mentioned conditions are met, I would find it very difficult to fail to set sex-neutral wages.

To my dismay, however, too many people do not realise the simplicity of the aforementioned three-step formula. It is remarkable that Swedish legislators in the past have not paid too much attention to the wage-setter. Setting wages is not a glamorous task. Perhaps, it is time to change our mode of thinking? The status of the wage-setter must be elevated and afforded far more weight in the implementation of the law.

The other side of the coin is: if wage-setters are not apt to implement the equal pay principle properly it is necessary to educate them. Education has always been the key to both development and progress, as well as for the advancement

of the rights of women, as Mary Wollstonecraft once noted.[2] The wage-setter possesses in fact the *master key* to eliminating wage discrimination in working life. But if the ability is lacking? What is done? In fact, nothing whatsoever, as far as the Swedish legislator or the responsible authorities are concerned. No simple guidelines have been issued on how to set wages. Therefore, it is a challenge for the Equal Opportunities Ombudsman to do so! The Ombudsman should launch a national campaign in order to disseminate the simple essence inherent in the equal pay principle. A simple and practical guide-book on how to set equal wages is required.[3]

A lawyer will also ask whether there is another *incentive* to encourage employers and other concerned parties to act accordingly.

A few years ago I suggested[4] that wage discrimination between men and women perhaps should be looked upon as being tantamount to sexual harassment, in order to include it in the harassment schemes as laid down in the Swedish workers' protection law.[5] In such cases the Labour Inspectorate may intervene. A penalty fee may be exacted as a last resort. To my knowledge, however, this scheme does not apply to wage discrimination.[6] I also ventured to say in that context that a *penalty fee* might even work as the adequate *incentive* to make employers act to implement the ban on wage discrimination. Incentives may also amount to being a stick whose meaning is that an employer must take measures to make the wage-setter sufficiently skilled at setting wages properly; under aggravating circumstances the penalty fee should be so high so as to make the employer change his organisation, or even to make him remove the specific person in charge of setting the wages.

I admit that the drawback with such an approach is that a penal law instrument is made part of another civil law legislation like the Swedish Sex Discrimination Act, but to make the "promotional function of law"[7] work properly, such a sacrifice may be acceptable in order to reach the goal of eliminating wage discrimination.

[2] See one of the classics of feminism, Mary Woolstonecraft, A Vindication of the Rights of Woman, 1792 (in Swedish transl. Till försvar för kvinnans rättigheter, Ordfront 1997), passim.

[3] I henceforth refer to the Ombudsman in male terms because the incumbent holder of the Office is a male person. The Office has in the past issued a few guidebooks relating to various themes, *inter alia,* on wage discrimination (JämO:s handbok om lönediskriminering, 1995), but apart from the fact that it is not only outdated, it is too rule-oriented, which is not a good enough practical guide on how to set wages on a non-discriminatory basis from a practical point of view.

[4] Interview in SAF-Tidningen Näringsliv no. 15, 5 May 2000.

[5] See regulations issued by the National Workers' Protection Agency, AFS 1993:17 (Kränkande särbehandling i arbetslivet).

[6] It applies to sexual harassment, which is, however, something different from wage discrimination. See AFS 1993:17.

[7] Vilhelm Aubert, In Search of Law. Sociological Approaches, New Jersey 1983, pp. 152 et seq.

2. The broad applicability of the Sex Discrimination Act – does it create expectations that cannot be met?

The second complication of the Swedish Sex Discrimination Act has to do with the broad applicability of the law with respect to active measures (positive action) and annual wage surveys called for by the Act.

At present, the Swedish Sex Discrimination Act applies to any employer,[8] irrespective of whether the employer has a few employees on the payroll, or 10,000 employees of different sexes.[9] The point of departure in today's Sweden is that wages are set at the specific workplace; that is where there is full knowledge of what the employees are doing and how they perform their work.[10] Wage-setting is hence a highly local matter. Centralised wage-setting structures have gradually vanished. What has been said now applies to both the private and public sectors of the Swedish labour market. The broad approach of the Act creates a problem of co-ordination as applied to large employers. The reason is that a broad applicability collides with the general practice of decentralised wage-setting.

The constraints are most easily seen at workplaces where the employees are numbered in hundreds or thousands. To say it again: it is a fact that wages are set on a local level, but at the same time, the employer as a legal entity is responsible for the implementation of the Act's equal pay principle. If the employer as a legal entity is responsible, someone up there must be empowered to set the wages. But, is it certain that someone up there – a superman or superwoman – has equally good knowledge of what the employees down below are doing and how they perform their work? The answer must be no. I can refer to my own workplace, i.e. Stockholm University. Who would believe that the Personnel Director, working far away from the operations of the various Departments, is a better wage-setter than the Heads of the Departments who are in control of the operations?

[8] The employer here implies the physical or legal person. In the private sector, the employer in question is usually the incorporated entity. But what applies to the public employer? This is no problem as applied to the municipal employer, even if it creates practical difficulties. The Act applies to the entire municipality or county council even if the municipality or county council may have tens of thousands of employees. With respect to the central government it is not entirely clear what applies since only the State (central government) can be a legal person, not the various state agencies, see Labour Court judgement 1996 No. 66. The present central government encompass some 225,000 employees. It has, however, been assumed that the various state agencies will shoulder the responsibilities. See the early legislative history of the Sex Discrimination Act, Government Bill 1978/79:101, p. 111.

[9] With respect to the yearly plan for equal wages the requirement is that the employer should have at least ten employees on the payroll, see s. 11 of the Swedish Sex Discrimination Act.

[10] See one of many recent wage reports, Landstingsförbundet, Lön. Mål eller medel, 2000, p. 22.

Therefore, the conclusion in the abstract must be that the legislative framework may appear to be too all-inclusive, which is made more evident in the light of the requirement imposed upon Swedish employers that they submit annual wage surveys in order to detect and combat wage discrimination and to set up plans to solve the actual wage discrimination within a three year period.[11]

Let me cite two examples to clarify what is at stake.

The first example is practical. It relates to a person who is employed in one unit (A) of the employer's business, and who chooses as a point of comparison a person (comparator) of the opposite sex in a totally different unit (B). Assume that both employees perform the same work or perform work of equal value and that they do it equally well. Assume also that the wages are different. On that basis a wage discrimination claim may be filed. Assume, however, that the wages in question are set by wage-setters who have never actually had contact with each other; they are not even aware of the fact that the wages in question are different. Who is able – in the employer's camp – to know about the different wages within the two different units? The answer is obvious – it must be a person on the central level. The tension between local wage-setting and centralised supervision of wage-setting is obvious.

The second example is of an even greater importance because it has incentive or disincentive impacts. Assume that there is a booming activity in one unit (A) of the employer's entire business. However, another unit (B) of the same business is failing. Assume further that the employees in both units perform the same work, or perform work of equal value, and that they do it equally well. The question is then whether the employer in the first unit (A) is entitled to pay a higher wage to employees, if the unit is compared to the employees of the failing unit (B), where there is no scope at all for a pay rise. It is tempting to say no – following the Swedish legislative scheme. But isn't such a tentative conclusion alarming? If the employer in the booming unit (A) is prevented from paying higher wages to employees – what signal is being sent out? Another way of stating the question is: in such a situation, what are really the incentives to perform well, and perform even better? I would say – none.

Therefore, I am not convinced that the all-inclusive approach with respect to the applicability of the Swedish Sex Discrimination Act with respect to wage discrimination is the best platform to depart from. This is more compelling to spell out since the issues have not even been touched upon in the recent legislative history of the Act. It is clearly compelling that these issues must be discussed in more detail.

I will now proceed to another hotly debated issue, the so-called "market factor".

[11] This is something that follows from the new provisions laid down in s. 10-13 of the Swedish Sex Discrimination Act in force since 2001.

3. Cases when the market factor may justify a wage discrimination

Only a few cases have so far been tried before the Swedish Labour Court on wage discrimination between sexes. However, the Court has recently decided a few cases highlighting one specific issue of the law, i.e. the impact of the "market factor" on wages. Two of the cases have involved female midwives and nurses.[12] In both cases, the comparator has been a male medical engineer, who had a higher wage than the female midwife/nurse. The Labour Court found in both cases that the employees performed work of equal value. However, it turned out to be a Pyrrhic victory! In both cases the respective employers argued that they were forced to pay higher wages to the male engineer since the wages on the alternative labour market available to him were higher. The employers argued that unless the engineer was paid higher wages, the employers would either encounter difficulties in retaining employees, or meet hardships in recruiting such personnel. The employers brought before the Court statistics supporting their view. The Labour Court found the statistics convincing and dismissed the cases. Consequently, the Equal Opportunities Ombudsman lost the cases.

This result is merely a reflection of what the European Court of Justice (ECJ) outlined in the Enderby Case.[13] The case concerned the comparison between a male pharmacist and a female speech therapist. The woman had a lower wage. The ECJ held that the employer must support its view with substantial statistics. The ECJ held, *inter alia, that:*

"The state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract candidates, may constitute an objectively justified economic ground ..... How it is to be applied in the circumstances of each case depends on the facts and so falls within the jurisdiction of the national court. How it is to applied in the circumstances of each case depends on the fact and so falls within the jurisdiction of the national court."

If necessary, the national court should apply the principle of proportionality. Accordingly, the elevated state-of-the-art is that the ECJ has left it to the national court to decide whether the employer is successful in convincing the court with respect to whether there is an "objectively justified economic ground" for the wage discrimination in question. And the proportionality principle is applied: the employer's decision must correspond to a real need and be adequate and necessary.[14] The Swedish Labour Court has held in a third case that the employer's wage decision "must be objective and have a rational

[12] Labour Court judgements AD 2001 No. 13 (midwife) and 2001 No. 76 (nurse).
[13] C-127/92 Enderby v. Frenchay Health Authority [1993] ECR 5535, para. 26.
[14] Case 170/84 Bilka-Kaufhaus v. Karin Weber [1986] ECR 1607.

basis".[15] Given this background I find no reason to blame the Swedish Labour Court for taking into consideration the "market factor". One may of course question whether the statistical data referred to in the specific cases is adequate counter-evidence to uphold the employer's view. On the other hand, it follows from the Enderby Case that the national court is entitled to some leeway.

However, I do not find that this specific aspect is the core issue involved with respect to wage discrimination between the sexes. It is necessary to be more challenging to find a basis for the criticism against the Swedish Labour Court's judgements.

You have to ask the question: is there any alternative solution? If the "market factor" is not a legitimate parameter – what is? Tariff wages? And set by whom? By the Government, as it was done in Sweden in the 18th and 19th centuries? Or a central governmental agency? Perhaps the Equal Opportunities Ombudsman? Another crucial issue is: if the legislature decided to design the wage standards – on what basis could it be done? What would those standards be? Is it possible at all – in a decentralised market system where wages are set on a local level – to enforce such standards? I would not recommend that legislators revert to the Middle Ages or the 18 and 19th centuries, when wages were set by the central Government. In practice, this meant the same wages for all workers performing the same work, irrespective of whether they did it well or not. That was a counterproductive scheme which was later abandoned. Reintroducing the wage scheme of the past would only imply the entry of another *planned economy* with respect to wages, in an otherwise mixed Swedish market economy. If this happened, the only thing that I am convinced of is that it would provoke welfare losses.

When the Swedish Labour Court is criticized for being employer-friendly, it is a token of the fact that the legislator has failed to set forth statutory provisions that are clear and convincing when implemented by the judiciary. In this context it is my sincere view that the legislator – as the composer of the music – has a much larger responsibility for the failures of the promises inherent in the equal pay principle than politicians will admit. The political body has created expectations that cannot be met. If expectations cannot be met, frustration will follow. *The Swedish legislator has overlooked or shunned the constraints or pitfalls inherent in the equal pay principle.*

It is tempting to draw a parallel to what we experienced when the Swedish Joint Regulation Act was implemented in 1976. Many people believed at that time that the new legislative framework meant that the trade unions were about to take over control of private industry. Nothing was ever more wrong. In fact, private employers have since then increased their strength.[16]

[15] Labour Court judgement AD 2001 No. 51.

[16] This is in particular true with respect to the way in which the wage-setting process was decentralised during the 1980's and the 1990's, and the concurrent breakthrough of individual and differ-

With respect to wage discrimination the difficulties are mainly to be found in the Swedish public sector, where one may find huge numbers of women in low-paid jobs. The politicians have put the ultimate responsibility for eradicating wage discrimination on the labour market parties. Is this fair? The answer is no. Clearly, the labour market parties can contribute a lot. But one must recall that in the public sector, which is a large employer in Sweden, the politicians are the ultimate decision-makers; they set the scope of the budget. If they do not want to raise taxes, they have set the wage ceiling. What is needed – as many critics have held – is that the politicians must allocate more money to wage increases for the lowest-paid employees, i.e. the women holding jobs in the segregated segments of the Swedish labour market.[17]

A component in this context is, of course, that there is a plethora of collective actors on the Swedish labour market where the more successful ones will not yield one Swedish crown to another weaker party in the employee camp.[18] If the politicians, acting as employers, want to do something to it, they must accordingly see to it that "ear-marked" money is allocated to the disadvantaged groups. In fact, the ban on wage discrimination in the Sex Discrimination Act poses the question of whether the legalistic approach inspired by the E.C. law will destroy the inherent values of systems based upon collective agreements in wage-setting; it may eventually marginalise the role of the social partners in the future.[19]

4. When monopolies on the supply and demand sides of the labour market distort wage-setting

An issue which has been totally disregarded in the analysis with respect to wage discrimination between the sexes in Sweden is the existence of actual monopolies on the supply and demand sides of the labour market. Given the rather monolithic structure of the Swedish labour market, I am not at all surprised. Let me provide two examples to illustrate this issue.

entiated wages on the whole of the Swedish labour market, see Ronnie Eklund, Deregulation of Labour Law – The Swedish Case, in Juridisk Tidskrift 1998-99, pp. 531 et seq.

[17] See, for example, interviews of the General Director in the newly created Mediation Institute, Anders Lindström, in LO-Tidningen No 34/2001, and the President of the Central Organisation of the Salaried Employees, Sture Nordh, in Svenska Dagbladet, Näringsliv 24 December 2001.

[18] The fact that one trade union is more successful than another union in the wage rounds is not a sufficient justification for the difference in pay in applying the equal pay principle according to Art. 119 of the E.C. Treaty (now Art. 141), see the Enderby Case, para. 22 (*supra*, note 13).

[19] This is the question that I previously posed in my contribution ("The Swedish Case – The Promised Land of Sex Equality?") in the anthology, Sex Equality Law in the European Union (Ed. T. Hervey & D. O'Keeffe), 1996, p. 356. See also my analysis of the Labour Court's arguments in the so-called Barnmorskemålet II (The Second Midwife Case), Labour Court judgement AD 2001 No. 13, in Juridisk Tidskrift 2001-02, pp. 108 et seq.

The first example relates to the monopoly on the supply side of the labour market. By Swedish standards, commercial airline pilots are extremely well paid. There are no official statistics with respect to pilots' wages, but it is fair to say that a senior captain in the Scandinavian Airlines System (SAS) will easily earn more than one million SEK a year. Further, it is a fact that pilots' trade unions are extremely strong; most pilots are organised. The pilots' unions are probably the strongest unions in the entire world.

But – is the strength of their union the reason why the pilots have high wages? If I am pressed, my answer would have to be no. Commercial airline pilots have high wages because they have a monopoly with respect to the *supply* of labour in the commercial airline industry. First of all, it is easy to see that no other person can be a substitute. Secondly, going by train, car or ship is rarely a viable alternative for prospective passengers. Thus, when sitting at the bargaining table the pilots' representatives need only subtly indicate that they will ground the corporation's aircraft unless their demands are met. In such circumstances, the airline employer will yield. We need merely refer to the Lufthansa dispute in May 2001.[20]

Hence, a first conclusion is that a monopoly on the *supply* side of labour will create a distortion in competitive wage-setting.

My second example concerns a situation where there is a monopoly on the demand side of the labour market. A good example is the Swedish health & care sector. It is common knowledge that nurses/midwives have long claimed that they deserve higher wages than they actually receive from their employers (i.e. the public county councils). At present in Sweden, there is a great demand for nurses/midwives. So, what happens? The answer is that quite a few of them quit their employment, and start taking up employment with professional temporary health & care employment agencies.[21] What happens next? *Yeah, you are perfectly right*. Shortly thereafter, the nurses/midwives are back at the same workplace they previously left but with a pay rise of more than 3-5,000 SEK per month.

[20] See, e.g. the reports in Der Spiegel 2 April, 6 May, 9 May, 10 May, 28 May and 11 June 2001 (On-Line). The Lufthansa pilots demanded a 30 % wage increase and the two main arguments alleged were: 1) the pilots had to keep pace with other global airlines' pilots, and 2) the German pilots' work-pressure had increased tremendously. The pilots also compared themselves with the highly paid Cathay Pacific pilots, earning up to 800,000 DM a year. The pilots' slogan in the strike was: "Top Pay for Top Performance". Even if Lufthansa had an emergency plan to combat the strike, the company had to yield. The final compromise meant that the pilots would earn, all in all, between 335,000 DM and 600,000 DM per year. The pilots got nearly everything they wanted, including concessions with respect to rest periods and the like. With respect to the pilots' strike it was noted (in the 2 April issue of Der Spiegel): "Der Tarifkonflikt zwischen der Lufthansa-Fuhrung und den Cockpit-Mitarbeitern zeigt, welche Machtposition die kleine, aber feine Elittruppe inzwischen erreicht hat."

[21] Amendments in the Swedish law in 1991 and 1993 made temporary work agencies legal, see Government Bills 1990/91:124 and 1992/93:118.

Why is this the case? The explanation is to be found in the organisation of the public health & care sector in Sweden. There are very few private providers of health & care services in Sweden, or at least those which do exist do not have enough impact upon the wage-setting on the labour market. In fact, the public county council employers have been able to exert a monopoly on the *demand* of labour. They have in fact been able to set the wages unilaterally. But with the entry of the private temporary agencies, a "market" was created for the nurses/midwives; they were able to choose who was to be their employer. However, it is at the same time a mystery that the public employer is willing to pay a much higher cost when nurses/midwives are leased from external providers of manpower instead of paying higher wages for employees.[22] A taxpayer will also question whether it is a cost efficient solution when the public employer pays rental fees equivalent to the profit of the private provider of manpower, if the alternative is merely to raise the wages of the employed nurses/midwives.

Hence, the lesson is that whenever there is a monopoly on the *demand* side of labour there is a distortion in wage-setting. I submit the idea that for the labour market to work well it is a necessary condition that there are several employers available to meet the demand for employment, i.e. that the employees affected must have other alternatives to turn to than the current employer, if they are to be able to raise their wages.[23] However, this does not imply that the public health & care sector is totally privatised; the effect may come about if the public services are organised differently, with a far greater independence for the hospitals compared to what is the case today.

5. The proper forum to decide wage discrimination disputes

The last issue that I will discuss is the proper legal forum in deciding wage discrimination disputes. In Sweden all labour disputes are ultimately decided by the Labour Court. This also applies to wage discrimination disputes.[24]

[22] A similar situation relates to the U.K. situation where it is argued that huge amounts are spent on agency nurses to provide temporary cover, ("Will our nurses ever get a fair deal?") in Daily Mail, December 18, 2001.

[23] Similarly in an article in Dagens Nyheter, 2 November 2001(Birgitta Rydell, "Tusentals kronor skiljer i vårdlöner") where it is demonstrated that the competition in Stockholm relating to the care of the elderly among employers gives rise to higher wages for the employees affected.

[24] This does not apply in, e.g., Denmark, Finland and Norway where wage discrimination disputes are dealt with in the general courts. Nor does this imply that there is a plethora of such cases to be found there with the exception of Denmark, where one will find quite a few wage discrimination cases due to the impact of the E.C. law.

The Swedish Equal Opportunities Ombudsman has recently claimed that these disputes should not be dealt with in the Labour Court.[25] In essence, the Ombudsman argues that the ban on wage discrimination is a human right. And human rights should not be dealt with in the Swedish Labour Court, where usually four out of seven judges are from labour market organisations. This is – he argues – in violation of Article 6 of the European Convention on Human Rights. Art. 6 of the Convention provides, *inter alia*, that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal of law". The laymen-members of the Labour Court are biased, says the Ombudsman, since they only interpret their own collective bargaining agreement (CBA) in wage discrimination disputes.

I respectfully submit that I do not share this view and my objections are as follows.

First of all, I wish to state that the Labour Court never interprets the CBA in these disputes. The wage dispute is about whether the employer's decision to set a wage in the individual case violates the Sex Discrimination Act. And that is something other than interpreting the CBA. In fact, most wage-setting systems in Sweden today, both in private industry and in the public sector, provide that wages will be set on an individual and differentiated basis.[26] In fact, the individual and differentiated wage system had already come under fire in a wage discrimination dispute before the Labour Court in 1991; it was upheld by the Labour Court.[27] It may be a surprise to a few of you that the same wage system applies to professors, like myself. The wage gap between the highest and lowest paid professor at my own workplace is more than 10,000 SEK a month.

Secondly, the European Convention on Human Rights in no way outlaws the existence of special courts as long as those courts are composed in a manner that will make sure that the court of justice is *independent* and *impartial*. Nothing indicates that the Swedish Labour Court is not such a tribunal.[28]

[25] See the debate between the Ombudsman, myself and several others in Lag & Avtal Nos. 4-10/2001.

[26] This is also something that the employees themselves prefer, see, e.g., Landstingsförbundet, Löner. Mål eller medel, 2000, p. 22.

[27] Labour Court judgement AD 1991 No. 62. The case involved two journalists performing the same work. The Court dismissed the wage discrimination claim from the female employee. When she was employed she was given a lower wage than another, male journalist. The wage difference was later adjusted in favour of the female journalist. The Court held, *inter alia*, that it was natural for the employer to pay attention to the fact that the employer wanted a certain person to be employed, i.e. the male journalist, and accordingly yield to the demand for a higher wage. The Court said that this is something that any serious employer will consider within a wage system which is based upon the concept of individual and differentiated wages. On the other hand, the employer must adjust the wages at a later stage if the employees are doing the same work and do it equally well.

[28] No other cases are to be found to the contrary in the case law of the European Court of Human Rights. The Langborger case, decision of 27 January 1989, Series A no 155, sometimes referred in order to reject my view, is special. In that case the laymen members had a *joint interest* in sus-

Thirdly, it is easily proven from past practice that the Labour Court has been a far better arbiter than any Swedish District Court has been when a *violation of a human right* has occurred in working life. In the past the Labour Court has often reversed the judgements of the District Courts in such cases. Suffice to say, that one case concerned the discrimination of persons of Finnish origin,[29] and another case concerned the employee's right to freedom of speech and assembly.[30]

Fourthly, and this is a highly pragmatic argument. If the district courts, the courts of appeals and even the Supreme Court were to be empowered to ultimately decide wage discrimination disputes, the "signal function" of these judgements would be extremely weak. What do I mean? When the Labour Court hands down a judgement, the labour market parties act accordingly. They disseminate circulars, periodicals, they hold seminars etc., irrespective of whether a party has won or lost the case. The Labour Court is in fact dependent upon the labour market parties in that respect; the Court has no website to disseminate the same information and it would also be improper for the Court to "popularise" its own judgement. This means that the social partners will in various ways consolidate the developing "industrial common law", as explained by the Labour Court on a case-by-case basis. They would not do so if a similar judgement from a District Court is handed down; they couldn't care less about such a judgement, since that court is not "theirs". In fact it is my advice to the Ombudsman to realise that he is more dependent upon social partners to combat wage discrimination in Swedish working life than he hitherto has tentatively shown.

Furthermore, even if the Ombudsman's suggestion for reforming the dispute procedure is seriously considered – how would you know that a District Court will act in a more "politically correct" manner than the Swedish Labour Court is doing? I have difficulties in seeing that any other court of law could reach other conclusions, as compared to what the Labour Court has done so far. The only outcome would be that the transaction costs for handling wage discrimination disputes will definitely increase. It is also clear that it will take a lot more time to reach justice (when such a case is ultimately decided by the Supreme Court after several years); this is not something that is in accordance with the standard in labour cases, i.e. to attempt to settle the disputes as quickly as possible.

In fact, the Ombudsman's proposal would marginalise the labour market parties in wage-setting. And this is alarming! This is a blow against the Swedish labour market model. It is of vital importance that the social partners not be

taining the agreement in question. However, this is not the case in wage discrimination disputes – what joint interest have the laymen members of the trade unions in the Labour Court in upholding a decision by the employer to wage discriminate? None at all, I would say.

[29] Labour Court judgement AD 1983 No. 107. The Court held that it was contra *boni mores* on the labour market to discriminate Finnish seamen in a redundancy case.

[30] Labour Court judgement AD 1991 No. 106.

ousted from wage-setting, but instead fostered to participate in the development that legislators are trying to foster.[31] Swedish legislators have in the past rejected the view that sex discrimination disputes is a matter for criminal law,[32] and this is still good law. It is not a good omen that quite recently – due to the active intervention of the Equal Opportunities Ombudsman – another point of view has been advocated by several political parties in the Swedish Parliament.[33]

6. Summing up

Of course, there is only one proper standard, i.e. the equal pay principle. But this same principle is based upon an assumption that ours is a perfect world. The assumption is wrong. This article is about the pitfalls and constraints inherent in the equal pay principle.

It is my view that more importance should be paid to the wage-setters. They are the masterminds of the equal pay principle. If the legislator/authorities could educate/train wage-setters in order to make them more apt to implement the equal pay principle in accordance with the law a major contribution would in fact be made. Furthermore, the broad applicability of the Sex Discrimination Act with respect to the yearly wage surveys may confound the expectations of the architects of the Act. It is also tempting to question whether there really are other parameters to assess market wages as set by the Swedish Labour Court in full accordance with E.C. law. It also follows from the experience of law & economics that monopolies will have a negative impact upon wage-setting. These aspects relate to both the supply and demand sides of the labour market. Why not let the market do the job of attaining the ultimate goal – equal wages? Finally, I find that the Swedish Labour Court is unjustly being questioned in wage discrimination disputes. No tenable arguments have so far been alleged in favour of such a view, not even in the light of Article 6 of the European Convention on Human Rights. The motions submitted to the Swedish Parliament relating to the Labour Court's case law do not deserve serious attention since they all have misapprehended the Labour Court's role.

[31] This view was already embraced by the 1979 legislators when the first Swedish Sex Discrimination Act came into force, see Government Bill 1978/79:175, p. 176 et seq.

[32] Op. cit., p. 179.

[33] Several motions have been submitted in the Parliament (see 2001/02:v462, 2001/02:mp326, 2001/02:c018, 2001/02:s37101, 2001/02:m245, 2001/02:fp012) advocating the view that it is doubtful whether the Labour Court should in the future adjudicate wage discrimination disputes. The respective MPs seem to be of the view that the Labour Court applies the CBA in force in these disputes. I have shown in the foregoing that this is definitely not the case. It will be interesting to see in what way the motions will be dealt with in the forthcoming deliberations in the Parliamentary Labour Market Committee.

Finally, I need to add: You read and you suffered. Make your own assessment.[34]

[34] A slightly revised quote from the Greek orator Lysias, as cited by Göran Hägg, Praktisk retorik, 2001 (W&W pocket), p. 98.