# THE PARIS PRINCIPLES, NHRIS, AND ENABLING LEGAL FRAMEWORKS

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ABSTRACT

*This article examines four national enforcement models with respect to employment discrimination claims against the requirement of enabling legal frameworks for National Human Rights Institutions ("NHRIs") set out under the Paris Principles. The four models identified are the private enforcement as typified by the United Kingdom, hybrid agency-private enforcement as seen in the United States, the works councils model as originated in Germany, and the corporatist model as found in the Swedish labor law model. This comparative analysis leads to the conclusion that the work of NHRIs in promoting and protecting human rights in the context of employment discrimination protections must rest upon a legal framework that enables individuals and civil society to bring discrimination, and more broadly, human rights claims. States cannot have a monopoly with respect to areas of challenge concerning discrimination, but rather, individuals must be enabled to bring claims and thus contribute to defining the areas of concern regarding discrimination.*

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## INTRODUCTION

The need to shift from legal texts simply proclaiming human rights to facilitating the actualization of these rights has been felt for decades, both domestically and internationally, underscored by the distinction between the law in books and the law in action,[1] disparate treatment and disparate impact,[2] formal equality and substantive equality,[3] and the vital role given procedure and access to justice mechanisms.[4] Equally important is the growing focus on national institutions as necessary actors to protect and promote human rights on both national[5] and international levels.[6] The United Nations Economic and Social Council addressed the issue of national institutions in 1946.[7] After decades of reports, the U.N. International Workshop on National Institutions for the Promotion and Protection of Human Rights was held in Paris in 1991, during which the "Principles Relating to the Status of National Human Rights Institutions," or the "Paris Principles," were drafted.[8] The United Nations General Assembly then adopted the Paris Principles in their entirety in Resolution 48/134 on 20 December 1993.[9] The Paris Principles promulgate minimum requirements for a national organization to be considered as a

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[1] Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).
[2] *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).
[3] *See, e.g.*, Sandra Fredman, *Substantive equality revisited*, 14(3) INT'L J. OF CONSTITUTIONAL LAW 712 (2016).
[4] *See, e.g., Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms*, COM (2021) 93 final (Mar. 4, 2021).
[5] *See, e.g.*, Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941) (prohibiting discrimination on the basis of race, color and national origin in the U.S. defense industry and also establishing a Fair Employment Practices Committee); *see also* Ives-Quinn Act (1945) (codified as amended at N.Y. EXEC. LAW § 291(1) (Consol. 2021)) (prohibiting employment discrimination in the state of New York on the basis of race, creed, color, and national origin, and also established a permanent agency to enforce the legislation, the State Commission against Discrimination).
[6] *UN Human Rights and NHRIs*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER, https://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx.
[7] *See History*, GANHRI, https://ganhri.org/history-of-ganhri-and-nhris/ (last visited Oct. 10, 2021); G.A. Res. 74/156 (Jan. 18, 2019).
[8] Twenty-four national human rights institutions attended the 1991 conference drafting the Paris Principles, which the United Nations Commission on Human Rights endorsed in 1992. *See* EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, STRONG AND EFFECTIVE NATIONAL HUMAN RIGHTS INSTITUTIONS 6 (2020), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-strong-effective-nhris_en.pdf.
[9] G.A. Res. 48/134 (Mar. 4, 1994).

National Human Rights Institution ("NHRI").[10] Under the Paris Principles, NHRIs are state-mandated bodies, independent of government, with broad constitutional or legislative mandates to protect and promote human rights at a national level.[11] NHRIs are obligated to address the full range of human rights, including civil, political, economic, social, and cultural rights, and as discussed here more specifically, rights and protections from employment discrimination.

The Council of Europe's 2018 Recommendation reinforced the focus on national organizations and emphasized the need for enabling legal frameworks for individuals, groups, civil society organizations and NHRIs "to strive for the protection and promotion of all human rights and fundamental freedoms."[12] Enabling legal frameworks enable individuals and civil society to raise claims that challenge the legal boundaries of discrimination and raise awareness of such discrimination, effects that are central to the operations of NHRIs.[13] While it may seem self-evident that individuals need to be able to raise claims of violations of human rights, this has historically been mostly unavailable due to the non-recognition of legal personhood resulting from slavery, the lack of standing, access to justice and legal assistance, as well as defendant-friendly procedural rules and liberal legal systems assuming "equality of arms."[14] This article looks at enabling legal frameworks that allow claims of employment discrimination through in the context of four different national labor law models: private enforcement in the UK, hybrid agency-private enforcement in the US, works councils in Germany, and corporatism in Sweden. These four labor law models are embedded within vastly different national, legal, and historical contexts, providing examples of different constellations with respect to the roles of the individual, labor unions, government agencies and lawmakers in questions of employment discrimination.

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[10] *See* GANHRI, *A Practical Guide to the Work of the Sub-Committee on Accreditation (SCA)* (2018) https://ganhri.org/wp-content/uploads/2019/11/GANHRI-Manual_online1.pdf.
[11] *Id.*
[12] COUNCIL OF EUROPE COMMITTEE OF MINISTERS, *Recommendation CM/Rec(2018)11 of the Committee of Ministers to member States on the need to strengthen the protection and promotion of civil society space in Europe* (Nov. 28, 2018), https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016808fd8b9.
[13] GANHRI, *supra* note 10.
[14] According to the Oxford Reference, "equality of arms" is: "A concept that has been created by the European Court of Human Rights in the context of the right to a fair trial (Article 6). Equality of arms requires that there be a fair balance between the opportunities afforded the parties involved in litigation (for example, each party should be able to call witnesses and cross-examine the witnesses called by the other party). In some circumstances this may require the provision of financial support to allow a person of limited means to pay for legal representation (Airey v Ireland (App no 6289/73) [1981] ECHR 1)." Jonathan Law & Elizabeth A. Martin, A DICTIONARY OF LAW (7th ed. 2014).

The first section provides an overview of the objectives and requirements for NHRIs as set in the Paris Principles and different international instruments. The second section briefly describes the four different labor law models: private enforcement (UK), hybrid agency- private enforcement (US), works councils (Germany), and corporatism (Sweden). Given the broad range of human rights to be addressed by NHRIs, the focus in this article is how unlawful employment discrimination claims are treated in each of the four national legal frameworks and labor law models. The labor law models are examined to assess whether they create or avail themselves of enabling legal frameworks to protect and promote human rights, particularly with respect to employment discrimination. Empowering individuals and the right to access justice with respect to claims of employment discrimination is a clear theme in the first three of these models: the UK, US, and German models. The Swedish corporatist[15] model works in the opposite direction. The Swedish social partners, the employers, their organizations and the labor unions, keep a fiercely tenacious grip on controlling all labor market issues including discrimination protections, viewing employment discrimination claims as a collective labor, rather than a human rights, issue with no need for individual access to justice mechanisms. The final section argues that in the absence of an enabling legal framework, individuals, groups, and civil society organizations lack a voice since they cannot bring claims. NHRI monitoring and protection of human rights where individual claims are not enabled will be skewed because of this lack of voice. Such monitoring will be incomplete and consequently ineffective, particularly as in the absence of claims, problem areas can be easily ignored. Effective NHRI monitoring and protection of human rights must rest on a system where individuals and civil society can challenge the status quo and raise claims of human rights violations. Everyone must have a voice to be able to make claims so that human rights can be protected and promoted.

## I. NHRIS AND THE PARIS PRINCIPLES

As described above, the first section provides an overview of the objectives and requirements for NHRIs as set in the Paris Principles and different international instruments. Different models of NHRIs exist; the substance is more important than the form. The recognized need for national organizations

[15] *See* Sven Jochem, *Nordic corporatism and welfare state reforms, Denmark and Sweden compared*, in RENEGOTIATING THE WELFARE STATE 114 (Gerhard Lehmbruch & Frans van Waarden eds., 2003) (defining "Corporatist" and "corporatism" as the "concertation of economic and social policies amongst interest associations and state actors.")

to protect and promote human rights has gained increasing momentum. Twenty-four NHRIs attended the 1991 conference that drafted the Paris Principles, and as of August 2021 eighty-six NHRIs have been accredited with A-status by the Global Alliance of National Human Rights Institutions ("GANHRI"), thirty-two with B-status, and ten with no status.[16] NHRIs are, simply, loosely-defined as bodies that are "established by a government under the constitution, or by law or decree, the functions of which are specifically designed in terms of the promotion and protection of human rights."[17] The Paris Principles comprise three mandatory categories with respect to NHRIs: competence and responsibilities, composition and guarantees of independence and pluralism, methods of operation. A fourth optional category concerns the status of commissions with quasi-judicial competence. The core elements for the effective functioning of NHRIs are independence, defined jurisdiction and adequate powers, accessibility, cooperation, operational efficiency and accountability.[18]

The level of compliance of NHRIs with the Paris Principles is made public through an accreditation process.[19] An NHRI must meet the criteria below to be compliant with the Paris Principles:

- A legislative or constitutional basis;
- A broad mandate to promote and protect human rights;
- Independence from government and other actors;
- Pluralism, including through membership, staff and/or effective cooperation;
- Transparent appointment, dismissal and security of tenure for members;
- Adequate resources, human and financial;
- Adequate powers of investigation;
- Cooperation with national and international actors, including civil society; and
- Accountability, particularly through annual reporting.[20]

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[16] *Chart of the Status of Financial Institutions*, GANHRI (Aug. 3, 2021), https://ganhri.org/wp-content/uploads/2021/08/StatusAccreditationChartNHRIs.pdf.
[17] U.N., NATIONAL HUMAN RIGHTS INSTITUTIONS: A HANDBOOK ON THE ESTABLISHMENT AND STRENGTHENING OF NATIONAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS 6 (1995).
[18] *Id.* at 10.
[19] *See* GANHRI, *supra* note 10.
[20] *See* GANHRI, *General Observations of the Sub-Committee on Accreditation (SCA)* (2018), https://www.ohchr.org/Documents/Countries/NHRI/GANHRI/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf.

An NHRI receives an A-status when GANHRI finds these criteria to be met.[21] Of the national systems discussed below, the UK Equality and Human Rights Commission ("EHRC") and the German Institute for Human Rights (*Deutsches Institut für Menschenrechte*) have A-status.[22] The current Swedish NHRI, the Equality Ombudsman (Diskrimineringsombudsmannen) has B-status.[23] The United States has not sought certification but is included in this comparison as a hybrid agency-private enforcement model.[24]

NHRI benchmarks and indicators can also be found in the 2005 report by the UN International Council on Human Rights Policy, *Assessing the Effectiveness of National Human Rights Institutions*.[25] Of most interest here are the benchmarks of monitoring domestic human rights situations, the power to gather the information, and any evidence needed to fulfill that monitoring function satisfactorily, and the power to monitor the activities of all public and private bodies, including businesses and individuals, regardless of whether quasi-judicial status is granted.

The increasing momentum of the Paris Principles is evidenced not only by the expanding numbers of NHRIs, but also through their continual affirmation and recitation.[26] The Committee of Ministers of the Council of Europe (COE)[27] adopted Recommendation R(97)14 and Resolution R(97)11 in 1997, inviting COE member states to establish effective NHRIs and for the COEs to develop co-operation activities with these NHRIs.[28] A little over twenty years later, the COE Committee of Ministers adopted Recommendation CM/Rec(2018)11 on

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[21] GANHRI, *supra* note 10 at 36.
[22] *Members*, GANHRI, https://ganhri.org/membership.
[23] *Id.* As discussed below, legislation was adopted in June 2021, effective 2022, creating a new Swedish NHRI, *see* LAG OM INSTITUET FÖR MÄNSKLIGA RÄTTIGHETER (Svensk författningssamling [SFS] 1974:371) (Swed.).
[24] U.S. MISSION GENEVA, U.S. MISSION TO INTERNATIONAL ORGANIZATIONS IN GENEVA, ADDENDUM OF THE UNITED STATES OF AMERICA TO THE REPORT OF THE WORKING GROUP ON ITS UNIVERSAL PERIODIC REVIEW § 20 (2015).
[25] INT'L COUNCIL ON HUMAN RIGHTS POLICY WITH OFFICE OF THE U.N. HIGH COMM'N FOR HUMAN RIGHTS, *Assessing the Effectiveness of National Human Rights Institutions* (2005).
[26] *See generally*, Ryan Goodman and Tom Pegram, *Introduction: National Human Rights Institutions, State Conformity and Social Change* in ASSESSING NATIONAL HUMAN RIGHTS INSTITUTIONS 1-22 (Ryan Goodman and Tom Pegram eds., 2012).
[27] Sweden and the United Kingdom are COE founding members as of 1949, Germany joined 1950. *See 47 Member States*, COUNCIL OF EUROPE, https://www.coe.int/en/web/portal/47-members-states.
[28] COUNCIL OF EUROPE COMMITTEE OF MINISTERS, RECOMMENDATION NO. R (97) 14 (Sept. 30, 1997), https://rm.coe.int/16804fecf5; COUNCIL OF EUROPE COMMITTEE OF MINISTERS, *Resolution (97) 11* (Sept. 30, 1997), https://rm.coe.int/1680505a9a.

"[t]he need to strengthen the protection and promotion of the civil society space in Europe," citing in part resolution 48/134.[29]

The 2018 COE recommendation calls for national legal frameworks, political spaces, and public environments to protect and promote civil society space.[30] Several of these objectives hinge upon the efficacy of NHRIs. The first objective under section I(a) of the recommendation is to:

> [E]nsure an enabling legal framework and a conducive political and public environment for human rights defenders, enabling individuals, groups, civil society organisations, and national institutions for the protection and promotion of human rights (NHRIs) to freely carry out activities, on a legal basis, consistent with international law and standards, to strive for the protection and promotion of all human rights and fundamental freedoms…[31]

The recommendation also urges that COE member states should establish effective, independent, pluralistic, and adequately-funded NHRIs with the competence and capacity to carry out their role of protecting civil society.[32] This is to be accomplished through the NHRIs monitoring, investigation, reporting and complaints handling functions.[33] COE member states are expected to ensure access to resources for the purpose of funding human rights defenders, including NHRIs and civil society organizations, and increasing efforts to promote their activities.[34] Member states should explicitly recognize the legitimacy of human rights defenders, including NHRIs and civil society organizations, and publicly support their work, acknowledging their contribution to the advancement of human rights and the development of a pluralistic society.[35]

## II. NATIONAL LEGAL FRAMEWORKS ENABLING EMPLOYMENT DISCRIMINATION CLAIMS

The objective of the comparison below is to examine four different legal models as to whether they enable employment discrimination claims: the private

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[29] COUNCIL OF EUROPE, *Recommendation CM/Rec (2018) 11*, *supra* note 12.
[30] *Id.* at 4.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*

enforcement model as found in the UK, the hybrid agency-private enforcement model of the US, the German works council model, and the Swedish corporatist model. The first three models differ greatly from one another in almost all respects but for one: they facilitate individually-submitted employment discrimination claims, which is absent in the corporatist model. Given space constraints, the focus on the presentations below is on those aspects of the labor law model and the legal system that enable individuals to raise employment discrimination claims. Mediation of employee claims or grievances is a step in all four of these models and the vast majority of employment discrimination claims are settled before reaching trial in all four models.

### *A. The Private Enforcement Model (UK)*

The goal of the UK private enforcement model is to enable individual employment claims. This model is based on facilitating private enforcement, with individual employees asserting claims within a system characterized by both access to justice and natural justice principles. The use of private enforcement in UK employment law can be traced back centuries,[36] and employment tribunals have been in place for decades to be used by employees at no cost, with a brief respite between 2013 and 2017.[37] The respite was due to legislative amendments attempting to change the thrust of employment dispute resolution from the traditional employment tribunals to conciliation and mediation by imposing a fee system on the previously free employment tribunals.[38] The trade union *Unison* brought a case contesting this imposition of fees, and the UK Supreme Court ruled in 2017 that the tribunal fees were unlawful because they impeded the constitutional right of access to justice, which is fundamental to the rule of law.[39] The *Unison* Court also pointed to the importance not only to individuals, but to society, of litigating employment issues and developing the law.[40]

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[36] *See, e.g.*, Statute of Labourers 1351 51 Edw. 3 (Eng); *see also* Lawrence R. Poos, *The Social Context of Statute of Labourers Enforcement*, 1 LAW AND HISTORY REV. 27 (1983).
[37] R (Unison) v. Lord Chancellor [2017] UKSC 51.
[38] Employment tribunal fees were introduced during July 2013 by the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893). Prior to that, since the creation of the employment tribunal system, claimants were not required to pay fees to bring their claims. Under the Order, claimants had to pay separate fees to issue their claims and have them heard. Fee levels differed according to the nature of the claim. HOUSE OF COMMONS LIBRARY, EMPLOYMENT TRIBUNAL FEES, 2017, HC Briefing Report 7081, at 4 (UK).
[39] *Id.* at 59.
[40] *Id.* at 60.

The first stage with respect to an employee grievance in the UK typically involves procedures internal to the employer. The Advisory, Conciliation and Arbitration Service ("Acas"), an independent public body set up for employers and employees, has issued a statutory Code of Practice on Disciplinary and Grievance Procedures (2015) to provide guidance to employers, employees, and their representatives for handling disciplinary and grievance situations in the workplace.[41] Though the Code is not binding, employment tribunals are legally required to take the Code into account where relevant and can adjust any award upwards or downwards by up to 25% for an unreasonable failure by either the employer or employee to comply with the Code.[42] The Code clearly outlines that fairness and transparency must be present when dealing with employee grievance situations, including developing and applying easily accessible, specific, and clear rules and procedures set out in writing and drafted by both employers and employees.[43] The Code also sets out a fairly-detailed procedure to be followed in formal internal hearings.[44]

### *1. Employment Tribunals*

Claimants must notify Acas of their intention to file a claim with an employment tribunal so that Acas can first offer conciliation, mediation, or arbitration depending on the issue and the parties. Acas has published a booklet, *Guidance to Settlement Agreements*, to assist the parties in this process with a section dedicated to discrimination settlements.[45] A little over 110,000 early conciliation notices were lodged with Acas in 2020, with 62% of these either settled or withdrawn, terminating without becoming an employment tribunal claim.[46] If the case is brought to an employment tribunal, a qualified barrister or solicitor acts as the Employment Judge. Two other lay members representing the employer and employee sides can sit on the panel if directed so by the

[41] *Acas Code of the Practice on Disciplinary and Grievance Procedures*, ACAS (2015), https://archive.acas.org.uk/media/1047/Acas-Code-of-Practice-on-Discipline-and-Grievance/pdf/Acas_Code_of_Practice_on_Discipline_and_Grievance.PDF.
[42] *See* Trade Union and Labour Relations (Consolidation) Act 1992, c. 52, §207A, (UK).
[43] *Acas Code of the Practice on Disciplinary and Grievance Procedures*, *supra* note 41, at 3.
[44] *Id*., at 3-4.
[45] *Settlement agreement guidance*, ACAS (2018), archive.acas.org.uk/media/3736/Settlement-Agreements-A-guide/pdf/Settlement_agreements_Dec_18.pdf.
[46] *Bulletins, Tables*, ACAS (2021), https://www.acas.org.uk/about-us/service-statistics/early-conciliation-2020-2021.

judge.[47] Tribunals have an overriding statutory objective to deal with cases equitably, which includes so far as is practical: ensuring that the parties are on an equal footing, saving expense, dealing with a case in ways that are proportionate to the complexity or importance of the issues, and ensuring that the case is dealt with expeditiously and fairly.[48] Decisions by employment tribunals can be appealed to the Employment Appeal Tribunal ("EAT"). Appeals are limited to questions of law or contesting the sufficiency of evidence to support the facts as found. The EAT can order the losing party to pay the prevailing party's fees. An EAT judgment can be appealed to the Court of Appeal on a question of law and ultimately to the Supreme Court.[49] Leave to appeal to the Supreme Court must be granted, and the original decision of the employment tribunal is the object of the appeal.[50]

The Ministry of Justice publishes annual employment tribunal award statistics, reflecting the UK's commitment to the adjudication of employment claims. During the period from 1 April 2020 to 31 March 2021, a total of 117,926 employment tribunal applications were made.[51] Most cases were settled. For example, during 2019-2020 there were 740 compensation awards, and 160 of these were for discrimination claims.[52] The highest discrimination award sum recorded was £265,719 in a disability discrimination claim, followed by £243,636 for an age discrimination claim.[53] Between 2019 and 2020, the median award for sex discrimination was £14,073, the average award was £17,420.[54]

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[47] Employment Rights Act 1996, c. 19 (UK); Employment Tribunals Act 1996, c. 17 (UK); Employment Rights (Dispute Resolution) Act 1998, c. 8 (UK).
[48] Employment Tribunals (Constitution and Rules of Procedure) 2004, No. 1861, sch. 1 (UK).
[49] Employment Tribunals Act 1996, c. 17 (UK) s. 21 and 37.
[50] Employment Tribunals Act 1996, c. 17 (UK) s. 37ZA.
[51] *See Tribunals*, UK, (showing in the UK 117,926 employment tribunals were convened to resolve employment disputes between April 2020 and March 2021) https://data.justice.gov.uk/courts/tribunals (last visited October 10, 2021).
[52] *Id.*
[53] *Id.*
[54] *Official Statistics*, UK GOVERNMENT (Sept. 29, 2020), www.gov.uk/government/statistics/tribunal-statistics-quarterly-april-to-june-2020.

*2. Remedies and Trial Costs and Fees*

Remedies that can be awarded for unlawful discrimination include both compensatory damages and equitable remedies.[55] A 2012 judgment finding unlawful discrimination on the basis of race and sex illustrates the damages approach.[56] The defendants were ordered to pay nearly £4.5 million, including £1.1 million for loss of past and future earnings; £660,000 for loss of pension; £56,000 for psychiatric injury; £30,000 for injury to feelings and £4,000 for exemplary damages.[57] The total compensation awarded was increased by 15% to take into account the employer's failure to comply with the statutory ACAS grievance procedure, and increased again to take into account plaintiff's tax liability as to the award.[58]

The allocation of trial costs and fees in UK discrimination cases does not follow the typical English rule of the losing party paying the prevailing party's costs and fees.[59] Rather, each party bears its own costs and fees, an allocation referred to as the American rule.[60] The tribunal can order the party at fault to pay the legal costs of the other party in cases where a party has acted vexatiously, abusively, disruptively, or unreasonably during the proceedings, has made any claim in the proceedings which had no reasonable prospect of success, or has failed to comply with an order. The Employment Appeal Tribunal can order the losing party to pay the prevailing party's fees.[61]

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[55] UK DEPARTMENT FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY, *Employment Tribunals Power* (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/780614/employment-tribunal-powers-user-guidance.pdf.

[56] Michalak v. Mid Yorkshire Hospital NHS Trust [2008] ET 1810815/2008 (UK).

[57] *Id.*

[58] *Id.*

[59] Senior Courts Act 1981, c. 54 (UK) s. 51.

[60] Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98(2) CORNELL L. REV. 327 (2013).

[61] *Paying Costs After an Employment Tribunal Claim*, CITIZENS ADVICE, https://www.citizensadvice.org.uk/work/problems-at-work/employment-tribunals-from-29-july-2013/what-will-it-cost-to-make-a-claim-to-an-employment-tribunal/paying-costs-after-an-employment-tribunal-claim/.

*3. Trade Union Legal Assistance and Legal Aid*

Trade union density in the UK in 2020 was 23.7 %,[62] and certain trade unions have been active with respect to discrimination issues, as can be seen by the Asda supermarket pay class action[63] and the Unite Pay Up campaign.[64] Union members can request individual legal assistance from their unions in the pursuit of employment grievances where such assistance is provided for in the union's rule book.[65] If such assistance is provided, the union is to follow the Code of Practice for the Provision of Regulated Claims Management Services by Trade Unions of 2006.[66] Six key standards must be followed when trade unions provide this type of assistance.[67] First, the union must give honest, impartial advice to members about whether to pursue a claim and, if pursued, the most appropriate method of doing so. Second, the union is to give members relevant information about the funding of their claim.[68] Third, the union is to take reasonable steps to ensure that any advice given to members is provided by a competent employee or workplace representative, and that such advisers conduct themselves with honesty and integrity in dealing with a member's claim.[69] Fourth, a complaint procedure is to be in place allowing members an effective means to pursue a complaint about the union service in this regard. This is to include the ability of the member to complain to the union itself about any fees or charges to members or deductions from a member's damages and, if the matter cannot be resolved to the satisfaction of both parties, to a third

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[62] DEPARTMENT FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY, *Trade Union Membership, UK 1995-2019: StatisticalBulletin*(2021),https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/989116/Trade-union-membership-2020-statistical-bulletin.pdf.

[63] *Asda Workers Win Key Appeal in Equal Pay Fight*, BBC (Mar. 26, 2021), https://www.bbc.com/news/business-56534988.

[64] *Unite to Hold Consultative Ballot Over 'Contemptible' Pay Offer for Council Staff*, UNITE THE UNION (Aug. 19, 2021), https://www.unitetheunion.org/news-events/news/2021/august/unite-to-hold-consultative-ballot-over-contemptible-pay-offer-for-council-staff/.

[65] *See, e.g.,* WORKERS OF ENGLAND TRADE UNION, RULE BOOK (2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1009458/Rule_Book_2020.pdf.

[66] MINISTRY OF JUSTICE, *Code of Practice for the provision of Regulated Claims Management Services by Trade Unions* (2006), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/313317/trade-unions-claims-management-services-code-of-practice.pdf.

[67] *Id.*

[68] *Id.*

[69] *Id.*

party.[70] Fifth, where unjustifiable fees have been charged, these should be repaid by the union. Finally, the union is to give members access to the records it keeps in respect of claims.[71]

For example, the University and College Union ("UCU") follows this Code of Practice, and it has a webpage offering legal service FAQs as to when legal services will be provided with the explicit statement that the union follows the above Code of Practice standards.[72] A UCU Legal Support Review Panel evaluates applications for member legal assistance based on articulated criteria to determine whether expenditure on legal casework will be proportionate to the objectives sought.[73] The Committee is to give "particular weight to the Union's objective of promoting equality for all and the opposition of all forms of harassment, prejudice, and unlawful discrimination because of a person's protected characteristics."[74] The union member has the right of review of a decision taken under the Legal Scheme by the Committee. If UCU decides to represent a member, UCU pays the tribunal/court fees. However, the union member would pay the opposing party's costs and fees when ordered by the tribunal/court.[75]

### *4. UK Equality and Human Rights Commission*

The UK Equality and Human Rights Commission (EHRC) is an independent statutory body that is an A-status NHRI.[76] A distinction with the US federal Equal Employment Opportunity Commission (EEOC), which is discussed later, is that plaintiffs in the UK are not required to first contact the EHRC before pursuing a discrimination claim. The EHRC does litigate claims, having taken up 34 cases in 2019, with the objective to take more cases in the future, but it is not a gatekeeper with respect to private enforcement.[77] The EHRC's responsibilities include encouraging equality and diversity, eliminating unlawful discrimination, and protecting/promoting the human

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[70] *Id.*
[71] *Id.*
[72] *UCU Legal Support*, UCU, www.ucu.org.uk/legal.
[73] UCU, *Legal Scheme Regulations* (2021), https://www.ucu.org.uk/media/5929/UCU-Legal-Scheme-Regulations-April-2021/pdf/ucu_legal-scheme_april2021.pdf.
[74] *Id.* at § 2.5.
[75] *Id.*
[76] *Who We Are*, EQUAL. AND H.R. COMM'N, https://www.equalityhumanrights.com/en/aboutus/who-we-are.
[77] EQUAL. AND H.R. COMM'N, *2019/20 Business Plan* (2019), www.equalityhumanrights.com/sites/default/files/business-plan-2019-2020.pdf.

rights of all British citizens.[78] The EHRC has a range of powers, including providing advice and guidance to individuals, employers, and other organizations, reviewing the effectiveness of the law and taking legal enforcement action to clarify the law and addressing significant breaches of rights.[79] Recent EHRC projects include assessing the response to the COVID-19 pandemic,[80] investigating allegations of antisemitism in the Labour Party,[81] reviewing the pay structures of *BBC* for a gender pay gap,[82] and assessing whether legal aid enables individuals to bring discrimination claims in England and Wales.[83]

### *5. Private Enforcement as an Enabling Framework*

The private enforcement model as represented here by the UK legal framework is an enabling legal framework that takes into account access to justice, natural justice, and transparency through the procedures it sets out.[84] The initial complaint procedures, those of the internal employer as well as those of the tribunals, impose no cost on employees.[85] Consequently, there are no significant economic risks with raising such claims. Employers are to have procedural safeguards in place, including the right to appeal any decision.[86] Acas offers conciliation, mediation, and arbitration for employee–employer grievances.[87] Most trade unions provide legal assistance in certain types of

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[78] *Id.*
[79] *Id.*
[80] *Coronavirus (COVID-19) Guidance for Employers*, EQUAL. AND H.R. COMM'N, https://www.equalityhumanrights.com/en/advice-and-guidance/coronavirus-covid-19-guidance-employers (last updated Sept. 1, 2021).
[81] EQUAL. AND H.R. COMM'N INV. INTO ANTISEMITISM IN THE LABOUR PARTY (2020), https://www.equalityhumanrights.com/sites/default/files/investigation-into-antisemitism-in-the-labour-party.pdf.
[82] *Equality Commission to Investigate BBC Over Pay Discrimination*, BBC (Mar. 12, 2019), https://www.theguardian.com/media/2019/mar/12/equality-commission-investigate-bbc-gender-pay-gap.
[83] *Legal Aid for Victims of Discrimination: Our Inquiry*, EQUAL. AND H.R. COMM'N, https://www.equalityhumanrights.com/en/inquiries-and-investigations/legal-aid-victims-discrimination-our-inquiry (last updated May 19, 2021).
[84] EQUAL. AND H.R. COMM'N, *supra* note 76.
[85] *Make a claim to an employment tribunal*, GOV.UK, https://www.gov.uk/employment-tribunals/make-a-claim; *Solve a workplace dispute*, GOV.UK, https://www.gov.uk/solve-workplace-dispute/formal-procedures.
[86] Employment Tribunals (Constitution and Rules of Procedure) 2004, No. 1861, sch. 1 (UK).
[87] *Dispute Resolution*, ACAS, https://www.acas.org.uk/dispute-resolution (last visited Oct. 26, 2021).

cases, and as the example of UCU demonstrates, procedural guarantees and even an appeals process are often in place to insure members' equal treatment.[88] Natural justice has also been invoked by the courts to guarantee procedural due process in the form of an opportunity to present the employee's case and to highlight that decisions should be made by unbiased tribunals.[89] The 2017 *Unison* decision held that the right of access to justice is both a constitutional common law right as well as a right under EU law and the European Convention of Human Rights based squarely on the rule of law:

> Equally, although it is often desirable that claims arising out of alleged breaches of employment rights should be resolved by negotiation or mediation, those procedures can only work fairly and properly if they are backed up by the knowledge on both sides that a fair and just system of adjudication will be available if they fail. Otherwise, the party in the stronger bargaining position will always prevail.[90]

The private enforcement model as in the UK fosters the filing of discrimination employment claims by individuals, labor unions, and civil society in general, and governmental agencies, with the courts acting independently of the lawmaker as seen in the *Unison* case.[91] The EHRC as an independent body sees its primary role as actively promoting and protecting human rights.[92]

### *B. The Hybrid Agency-Private Enforcement Model (US)*

The second model, the hybrid agency-private enforcement model, is typified by both the federal and state US legal frameworks. The US, like the UK, has underscored access to justice and effective enforcement as necessary tools for achieving equality.[93] With regard to bringing civil rights and unlawful employment discrimination claims, the US systems rely heavily on a hybrid

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[88] *Code of Practice on Disciplinary and Grievance Procedures*, ACAS, https://www.acas.org.uk/acas-code-of-practice-for-disciplinary-and-grievance-procedures/html#the-code-of-practice (last visited Oct. 26, 2021).
[89] *See Unison*, 2017 UKSC 51 [72].
[90] *Id*. at 72.
[91] *Id.*
[92] EQUAL. AND H.R. COMM'N, *supra* note 76.
[93] Robert W. Gordon, *Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History*, 148(1) DÆDALUS, THE JOURNAL OF THE AMERICAN ACADEMY OF ARTS & SCIENCES 177 (Winter 2019).

enforcement model, and for this reason the American federal and state legal systems are purposefully procedurally plaintiff-friendly.[94] Plaintiffs are permitted to file complaints based upon a plausible[95] claim for relief, and the parties are free to amend their pleadings up to a fairly late stage in the case management.[96] The power of the courts to compel discovery production is very strong, with the ultimate penalty for failure to comply consisting of a party (or their counsel) being held in contempt of court, subject then to fines and/or imprisonment.[97] Much of the federal and state discrimination legislation has record-keeping requirements as to hiring and employment practices facilitating evidentiary production.[98] Courts are empowered to grant both compensatory and punitive damages as well as equitable remedies.[99]

Access to justice has taken both substantive and procedural forms with respect to employment discrimination claims. As to the substantive, the United States Supreme Court early invoked a delineation in defining and proving discrimination between disparate treatment (direct or intentional discrimination)[100] and disparate impact (indirect discrimination).[101] Disparate treatment is the "most easily understood" type of discrimination.[102] The employer simply treats some people less favorably than others because of their race, color, religion, sex, or [other protected characteristic]."[103] To establish a *prima facie* disparate impact claim based on evidence of a pattern or practice,

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[94] *See* Paul MacMahon, *Proceduralism, Civil Justice, and American Legal Thought*, 34:3 U. PA. J. INT'L L. 546-610 (2013) (discussing the historical development in American procedural law).
[95] *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009).
[96] *Id.*; FED. R. CIV. P. 15.
[97] MacMahon, *supra* note 94; FED. R. CIV. P. 37.
[98] MacMahon, *supra* note 94; 29 C.F.R. § 1602 (2009).
[99] MacMahon, *supra* note 94; 42 U.S.C. § 2000e-5(g); 42 U.S.C. § 1981a.
[100] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (invoking a disparate impact analysis for the first time); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. (1973) (holding disparate treatment is based on section one of §703(a) of Title VII, which states that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, or national origin") (quoting 42 U.S.C. § 2000e-2 (1964)).
[101] *See* Griggs, 401 U.S. at 430-432 (holding disparate impact is based on section two of §703(a) of Title VII, which states that it is unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin") (quoting 42 U.S.C. § 2000e-2 (1964)).
[102] *Id.*
[103] Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003) (citing Int'l. Brotherhood of the Teamsters v. United States, 431 U.S. 324, 335 (1977)).

plaintiff must show a specific, facially-neutral employment practice, a statistically significant disparity among members of different groups affected by the practice, and a causal nexus between the facially-neutral employment practice and the statistically significant disparity.[104] Disparate impact claims do not require proof of intent to discriminate.[105] In the landmark 1977 case of *Teamsters,*[106] the Court emphasized the inability of defendants to rebut an inference of discrimination based on the "inexorable zero," the total absence of a protected group from the jobs at issue.[107] Almost simultaneously, the 1973 case of *McDonnell Douglas Corp.* set out a burden-shifting framework in discrimination cases.[108] The plaintiff must first establish a *prima facie* case of discrimination based on indirect evidence.[109] Once it is shown that the employment standards are discriminatory in effect, the defendant must meet "the burden of showing that any given requirement (has) ... a manifest relationship to the employment in question."[110]

Enforcement agencies at both the state and federal levels are empowered and obligated to investigate claims.[111] Congress, however, has emphasized the importance of retaining a private right of action in the Title VII of the 1964 Civil Rights Act enforcement scheme: "The retention of the private right of action...is intended to make clear that an individual aggrieved by a violation of Title VII should not be forced to abandon the claim merely because of a decision by the Commission or the Attorney General as the case may be, that there are insufficient grounds for the Government to file a complaint."[112] Congress perceived it as paramount that all legal avenues be left open for quick and effective relief.[113]

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[104] 42 U.S.C. § 2000e-2(a)-(k*); see also* Johnson v. Uncle Ben's, Inc., 965 F.2d 1363, 1367 (5th Cir. 1992) Black Fire Fighters Ass'n v. City of Dallas, 905 F.2d 63 (5th Cir. 1990).
[105] *Griggs*, 401 U.S. at 430-432.
[106] *Teamsters*, 431 U.S. 335 at n. 3.
[107] *Id.* at n. 23.
[108] *McDonnell Douglas*, 411 U.S. 792.
[109] Texas Dep't of Comty. Affs. v. Burdine, 450 U.S. 248, 252 (1981).
[110] Dothard v. Rawlinson, 433 U.S. 321 (1977).
[111] *See* 29 CFR § 1601.15.
[112] 118 Cong. Rec. 7565 (1972).
[113] EEOC v. Associated Dry Goods Corp., 449 U.S. 590, n. 21 (1981).

*1. Agency Action*

Claims of unlawful discrimination based on federal law must as a rule be brought first to the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing the federal anti-discrimination legislation.[114] All of the laws enforced by EEOC, except for the Equal Pay Act, require that the individual file a Charge of Discrimination with the EEOC prior to commencing litigation against the employer.[115] In addition, an individual, organization, or agency may file a charge on behalf of another person to protect the aggrieved person's identity.[116]

Mediation is typically the first step, and if not successful, the charge is given to an investigator.[117] If the investigator finds no violation of the law, the individual is given a Notice of Right to Sue, which allows them to commence with a private action.[118] If a violation is found, the EEOC will attempt to reach a voluntary settlement with the employer.[119] If no settlement can be reached, the case is referred to the EEOC legal staff, or to the Department of Justice in certain cases, which then decides whether the agency should file a lawsuit.[120] If the decision is made not to file a lawsuit, the individual is given a Notice of Right to Sue.[121] In some cases—if a charge appears to have little chance of success, or if it is something that the EEOC does not have the authority to investigate—the charge will simply be dismissed without an investigation or mediation.[122] In the 2019 fiscal year, 72,675 discrimination charges under the different federal statutes were filed with the EEOC, 80,806 merit resolutions were achieved with $346.6 million in monetary relief obtained through mediation and conciliation settlements, and 157 lawsuits were filed by the EEOC recovering $39.1 million for plaintiffs.[123]

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[114] *Overview*, EEOC, https://www.eeoc.gov/overview.
[115] *Id.*
[116] *Id.*
[117] *Mediation*, EEOC, https://www.eeoc.gov/mediation.
[118] *What You Can Expect After You File a Charge*, EEOC (2021), https://www.eeoc.gov/what-you-can-expect-after-you-file-charge.
[119] *Id.*
[120] *Id.*
[121] *Filing a Lawsuit*, EEOC, https://www.eeoc.gov/filing-lawsuit.
[122] *Filing a Charge of Discrimination with the EEOC*, EEOC, https://www.eeoc.gov/filing-charge-discrimination.
[123] *See* CHARGE STATISTICS (CHARGES FILED WITH EEOC) FY 1997 THROUGH FY 2020 (2021), eeoc.gov/statistics.

Many states and local jurisdictions have their own employment and anti-discrimination laws, with comparable state agencies responsible for enforcing those laws (a Fair Employment Practices Agency, FEPA).[124] If a discrimination charge is filed with a FEPA, it will automatically be "dual-filed" with the EEOC if federal laws apply-- the individual does not need to file with both agencies.[125] The status of a charge can be checked by the individual online on the EEOC website.[126]

*2. Remedies and Trial Costs and Fees*

Despite the judicial acceptance of disparate impact, statistical evidence, and the shift in the burden of proof, by the late 1980's civil rights activists were frustrated over the inefficacy of litigating under Title VII, focusing on the inadequacy of the remedies and lack of deterrence.[127] Prior to the Civil Rights Act of 1991, Title VII plaintiffs were limited to equitable remedies.[128] Title VII now grants a right to compensatory and punitive damages awards in disparate treatment cases.[129] An additional showing is required for punitive damages: that the "respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[130] Punitive damages are not available for disparate impact claims, nor are compensatory damages other than back-pay and interest.[131] Caps for compensatory and punitive damages are established on a sliding scale from $50,000 to $300,000 based on the size of the employer.[132] Back pay (the amount awarded as compensation lost during the period between the triggering event and the judgment) and front pay (commencing with the

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[124] *Fair Employment Practices Agencies (FEPAs) and Dual Filing*, EEOC (2021), https://www.eeoc.gov/fair-employment-practices-agencies-fepas-and-dual-filing.
[125] *Id.*
[126] *Checking the Status of Your Charge*, EEOC (2021), https://www.eeoc.gov/checking-status-your-charge.
[127] *See, e.g.*, Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301 (1989-1990).
[128] U.S. Landgraf v. USI Film Prods., 511 U.S. 244, 252 (1994).
[129] 42 U.S.C. § 1981a(a)(1), (b)(1).
[130] Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999).
[131] *Id.*
[132] EEOC, ENFORCEMENT GUIDANCE: COMPENSATORY AND PUNITIVE DAMAGES AVAILABLE UNDER SEC 102 OF THE CRA OF 1991 (2021), https://www.eeoc.gov/laws/guidance/enforcement-guidance-compensatory-and-punitive-damages-available-under-sec-102-cra.

running of damages to the reinstatement of employment) are not subject to the damage caps.[133]

An example of the interplay and breadth of these different remedies can be seen in the 2005 Consent Order issued in *EEOC v. Abercrombie & Fitch Stores, Inc.*, requiring the defendant to:

- Have marketing materials that as a whole portray diversity reflective of the major racial/ethnic minority populations of the United States;
- Create an Office of Diversity headed by a Vice President who is to report directly to defendant's CEO;
- Hire 25 full-time diversity recruiters;
- In consultation with an industrial organizational psychologist, develop a recruitment and hiring protocol requiring that affirmatively seeks applications from qualified African-Americans, Asian Americans, and Latinos of both genders;
- Advertise for in-store employment opportunities in periodicals or other media that target African-Americans, Asian Americans, and/or Latinos of both genders; attend minority job fairs and recruiting events; and use a diversity consultant to aid in identifying sources of qualified minority candidates;
- Establish percentage benchmarks for the selection of African-Americans, Asian Americans, Latinos, and women into sales associate, manager-in-training, assistant manager, and store manager/general manager positions;
- Pay the costs of a court-appointed monitor who is to prepare annual reports as to defendant's compliance with the terms and objectives of the order:
- Establish a settlement fund of $40 million to provide monetary awards (15% back pay and 85% compensatory damages) to a settlement class consisting of African-Americans, Asian Americans, Latinos, and women who applied or were discouraged from applying for positions with defendant since 24 February 1999, and were not hired, or who were employed in one of defendant's stores for any length of time since that date.[134]

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[133] Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001).

[134] EEOC v. Abercrombie & Fitch Stores, Inc., Case File No. 04-4731 (N.D. Cal. Apr. 13, 2005) (unpublished). *See* EEOC, The EEOC's Performance and Accountability Report for the Fiscal Year 2005 (2005) and the EEOC Press Release, EEOC Agrees to Landmark Resolution of Discrimination Case Against Abercrombie & Fitch (Nov. 18, 2004), www.eeoc.gov/newsroom/eeoc-agrees-landmark-resolution-discrimination-case-against-abercrombie-fitch.

A broad range of civil remedies and sanctions are listed in the federal discrimination legislation.[135] Certain conduct in violation of civil rights can also be criminally prosecuted, including civil rights conspiracy and hate (bias-motivated) crimes.[136]

The American rule with respect to the allocation of trial fees and costs is that each party is to bear its own legal expenses, again from the perspective of facilitating litigation by reducing the economic risks taken by plaintiffs.[137] Congress has granted courts the discretionary authority to award reasonable attorney's fees to plaintiffs in civil rights litigation to ensure "effective access to the judicial process" for persons with civil rights grievances.[138] Accordingly, a prevailing plaintiff in a civil rights case will ordinarily recover attorney's fees unless special circumstances would render such an award unjust.[139] The amount of fees awarded is to be assessed against certain factors.[140] A prevailing defendant may recover attorney's fees only where the lawsuit was vexatious, frivolous, or brought to harass or embarrass the defendant.[141]

### *3. Duty of Fair Representation by Trade Unions*

Union density in the United States is a little over 10%. The labor unions can support individual plaintiffs due to the duty of fair representation imposed on labor unions.[142] This duty developed in the 1940s in a series of cases involving

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[135] *See* 18 U.S.C. §§ 241, 249.
[136] *Id.*
[137] For a discussion of this rule and its exceptions, *see* Gregory C. Sisk, *A Primer on Awards of Attorney's Fees against the Federal Government*, 25 ARIZ. ST. L. J. 733-735 (Winter 1993). There are currently over 200 federally created statutory exceptions to the American Rule. *Id.*
[138] 42 U.S.C.A. §1988*; see also* Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (citing legislative history to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, H.R.Rep. No. 94-1558 at 1(1976)).
[139] *Id.*
[140] The factors to be considered include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability*"* of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See* Hensley, *supra* note 138, at 429 n. 3.
[141] *Id.* at 429 n. 2 (citing H.R.Rep. No. 94-1558 at 7 (1976); *see also* Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978)).
[142] Canada enacted a very similar structure regarding a duty of fair representation by unions, as first framed in the 1969 case Fisher v. Pemberton, (1969) 8 D.L.R. (3d) 521 (B.C.S.C.).

alleged racial discrimination by unions.[143] It is seen as a counterbalance to the exclusivity rule of union representation in order to prevent potential "tyranny of the majority" by trade unions.[144] The unions, as the exclusive representative of the employees within the bargaining union, have a duty to afford equal protection to all employee interests within the unit. As it is a duty, the failure to fulfill the duty provides a cause of action.

*4. Hybrid Agency-Private Enforcement as an Enabling Legal Framework*

The combination of agency and private enforcement facilitates the bringing of employment discrimination claims. As mentioned, the American legal systems are plaintiff-friendly and access to justice issues, particularly in the form of effective remedies and allocation of trial costs and fees, have been taken into account. Plaintiffs are fairly successful in discrimination claims. Research shows that plaintiffs in discrimination cases in the United States have a 35.4% success rate in federal court, with average damages of $150,500; a 59% success rate in state (California) court, with average damages of $296,991; and a 21.4% success rate in private arbitration, with average damages of $36,500.[145] Access to justice issues, particularly punitive damages, are continually adjusted and debated within the US legal systems on both federal and state levels. Starting with the premise that individuals should be able to bring lawsuits to enforce the laws and rights, and the understanding that the law and particularly the courts are vehicles for social change, the necessity of having an enabling legal framework for promoting and protecting human rights is accepted by the courts and lawmakers. The European Union has looked to several of these enabling American legal mechanisms when grappling with the question of the effective enforcement of EU discrimination rights, for example, the shifting of the burden of proof, the shifting of the allocation of attorneys' fees.[146]

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[143] Tunstall v. Bhd of Locomotive Firemen, 323 U.S. 210 (1944).
[144] Emporium Capwell Co. v. W. Addition Community Org., 420 U.S. 50, 64 (1975).
[145] Alexander J.S. Colvin, *American Workplace Dispute Resolution in the Individual Rights Era*, 23(3) INTL. J. OF HUM. RES. MGMT. 459, 459–75 (2012).
[146] The shifting of the burden of proof in discrimination cases was first invoked by the Court of Justice in an equal pay case, *see* Case 109/88, Handels-og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening, acting on behalf of Danfoss, 1989 E.C.R. 383. The main rule in Europe with respect to the allocation of fees and costs is that the losing party pays the prevailing party's trial costs and fees. The American allocation of fees as to civil rights cases is included in the EU Commission's recent proposal on pay transparency, *see* European Commission, *Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value*

### *C. The Works Councils Model (Germany)*

The Works Councils model originated in Germany. This dual-channel structure of employee voice was affixed after World War II and features an interplay between employers and employee representation on corporate supervisory boards, works councils, and trade unions. The latter two are the focus here as concerning individual claims of unlawful discrimination.

Works councils are to be set up in all private sector workplaces having at least five employees as required by the 2001 Works Constitution Act (*Betriebsverfassungsgesetz*).[147] Section 75 of the act superimposes an overarching principle of equal treatment on both works councils and employers.[148] In both cases, this is to ensure that all persons working in the establishment are treated in accordance with principles of law and equity. No one is to be subjected to discrimination on the grounds of race, ethnic origin, descent or other origin, nationality, religion/belief, disability, age, political/trade union activities or convictions, or gender/sexual identity.[149]

Works councils are purely employee bodies, and all employees except those in senior management are covered by the works councils.[150] There are specific representation rules for certain worker categories: blue/white-collar, temporary, sex, age, and disability status.[151] The sex that is in a minority in the workforce is to be represented proportionately on all works councils having more than one member.[152] Younger workers as well as workers with disabilities are to participate in works council discussions concerning topics of importance to

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*between men and women through pay transparency and enforcements mechanisms*, COM (2021) 93 final (Mar. 4, 2021).

[147] There is a system of staff councils (*Personalrat*) in the public sector with similar structures. In the private sector, a higher percentage of works councils is found at employers with larger workplaces. In 2014, approximately 10% of all eligible private sector workplaces had a works council covering approximately 40% of all employees. *See* Lionel Fulton, *Worker Representation in Europe*, LABOUR RESEARCH DEPARTMENT AND ETUI *citing* PETER ELGUTH AND SUSANNE KOHAUT, TARIFBINDUNG UND BETRIEBLICHE INTERESSENVERTETUNG: AKTUELLE ERGEBNISSE AUS DEN IAB-BETRIEBSPANEL, WSI-MITTEILUNGEN, 4/20124 (2013); Betriebsverfassungsgesetz [BetrVG] [Works Constitution Act], Sept. 25, 2001, BUNDESGESETZBLATT, Teil I [BGB I] at 1044, § 85 (Ger.).

[148] Betriebsverfassungsgesetz [BetrVG] [Works Constitution Act], Sept. 25, 2001, [BGB I] at 1044, § 85 (Ger.).

[149] *Id.*

[150] *Workplace Representation*, WORKER-PARTICIPATION.EU, https://www.worker-participation.eu/National-Industrial-Relations/Countries/Germany/Workplace-Representation.

[151] Betriebsverfassungsgesetz [BetrVG] [Works Constitution Act], Sept. 25, 2001, [BGB I] at 1044, § 15 (Ger.).

[152] *Id.* at § 15(2).

these groups.[153] The works councils have enhanced duties to certain groups such as men and women, youths, the elderly, employees with disabilities, and foreign workers. These groups also coincide with protected non-discrimination grounds as set out by international, EU, and German law: sex and gender, age (both youths and the elderly), disability, and race.[154]

Works councils have the statutory authority to make recommendations to the employer for measures promoting the implementation of equality between women and men, in particular with respect to recruitment, employment terms, training, vocational advancement, and the reconciliation of family and work. Where tenable, the works council is to negotiate for their implementation with the employer, keeping the employees informed about these negotiations and any results. Works councils are also under the Act to promote the employment and rehabilitation of severely disabled employees and others in particular need of assistance, such as the elderly. Works councils are to a better cultural understanding at the workplace and the integration of foreign workers, as well as request measures to combat racism and xenophobia in the establishment.

### *1. Pursuing Employee Grievances in the German Model*

The system of addressing employee grievances in Germany involves mediation, arbitration, and litigation. An employee can raise a grievance individually, through or with the support of a works council, or as a member of a trade union. The right for an employee in the private sector to raise a grievance predates the provisions in the Works Constitution Act.[155] This right is based on an implied term in the employment agreement, derived by the courts from the employer's duty of care.[156] This duty of care requires the employer to consider the employee's moral rights and well-being, thus to hear the employee when grievances are raised as to unfair or disadvantaged treatment. Each employee is entitled to make a complaint against the employer to the competent bodies at the workplace if the employee feels that they have been discriminated against, treated unfairly, or otherwise put at a disadvantage by the employer or by other employees of the establishment. The employer is to inform the employee as to

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[153] *Id.*
[154] *Id.*
[155] Bernd Waas, *Germany*, in RESOLVING INDIVIDUAL LABOUR DISPUTES: A COMPARATIVE OVERVIEW 135, 148 (Minawa Ebisui et. al. eds., 2016).
[156] *Id. (citing* G. Thüsing, *Section 84 Works Constitution Act* in BERTRIEBSVERFASSUNGSGESETZ (R. Richardi ed. 4th ed. 2014)).

how her complaint will be handled and if the employer considers the complaint justified, remedy her grievance.

Works councils are given a specific role in dealing with employee grievances under section 85 of the Act: Employees can bring a grievance against the employer directly to the works council, which is to hear the employee's grievance and if it appears justified, request that the employer remedy the situation.[157] If the employer and works council disagree as to whether the complaint is well-founded, the works council may appeal to a conciliation committee.[158] A decision by the conciliation committee is to be issued and the employer is to inform both the works council and the employee on how the grievance will be dealt with.[159] If no works council exists at the workplace, then the trade union is the only collective representative for the employees.[160]

### *2. Remedies and Trial Costs and Fees*

The Works Council model is included here as providing several options for bringing discrimination claims and minimizing the economic risks for plaintiffs. However, the remedies are limited and the amounts of damages for discrimination claims modest.

Under § 21 of the German General Equal Treatment Act (*Allgemeine Gleichbehandlungsgesetz*, AGG), discrimination claims must be made in writing within two months of the alleged discrimination taking place. Individuals who have proven discrimination in violation of the AGG have the right to claim damages and compensation.[161] However, those who experience discrimination while applying for a job are not entitled to be awarded the position for which they applied. The primary remedy for discrimination claims is damages. Equitable remedies are not generally available in the German legal system as it is a civil law, and not common law, system.[162] The amounts of

[157] Betriebsverfassungsgesetz [BetrVG] [Works Constitution Act], Sept. 25, 2001, [BGB I] at 1044, § 85 (Ger.).
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] Allgemeines Gleichbehandlungsgesetz [AGG] [General Equal Treatment Act], Aug. 18, 2006, BUNDESGESETZBLATT, Teil I [BGB I] at 1897, last amended by Gesetz [G], at Feb. 5, 2009, BGB I at 160 (Ger.).
[162] In civil law systems, such as Germany and Sweden, the only remedies available as a rule are those explicitly included in the relevant legislation. For a more in-depth examination of civil law systems, *see* John Henry Merryman and Rogelio Pérez-Perdomo, THE CIVIL LAW TRADITION – AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA (4th ed., 2018).

damages awarded are rather modest.[163] The strength in the German model is in the several avenues it offers allowing employees to raise grievances, as well as the duty of care imposed on the employer.

Employment discrimination claims are brought to the labor courts, which since the passage of the 1926 Labor Court Act, have had exclusive jurisdiction over all labor disputes between employees and employers, as well as between trade unions and employers.[164] There are three tiers of labor court in place; local trial labor courts (110 in total), appellate regional labor courts (18 in total), and the highest Federal Labor Court.[165] All these courts have panels comprising non-partisan and partisan members.[166] At the labor trial court level, the parties may represent themselves or be represented by a lawyer or a representative of an employer's association, a trade union, or any other authorized person.

Each party must pay its own fees at the trial court level, which deviates from the general German (and European) rule that the losing party pays the prevailing party's fees and costs.[167] This approach is designed to reduce the economic risks to employees, who otherwise could be financially deterred from seeking judicial redress. At the appellate levels, the parties must be represented by either a lawyer, the union, or the employer's association representatives.[168] On appeal, the losing party pays the prevailing party's court costs and attorneys' fees only for the appeal.[169] If an employee cannot pay such costs without endangering his or her livelihood, the employee may apply for legal aid.[170] An award of fees is

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[163] *See, e.g.*, Klaus M. Alenfelder, *Damages in discrimination cases*, 13 ERA FORUM 257 (2012) (citing a rule of thumb for German courts at 1.5 times a monthly salary as discrimination compensations, but noting an upwards trend, *Id*. at 270).

[164] Arbeitsgerichtsgesetz in der Fassung der Bekanntmachung [ArbGG] [The Labor Courts Act], Jul. 2, 1979, BUNDESGESETZBLATT, Teil I [BGB I] at 1036, as amended by Gesetz [G], Oct. 5, 2021, BGB I at 4607 (Ger.).

[165] Orrick, *Legal Q&A, Labor Court Proceedings* (2021), https://www.jdsupra.com/legalnews/orrick-s-101-employment-law-in-germany-7588141/; *See* STATISCHES BUNDESAMT, Rechtspflege Arbeitsgerichte (2019) https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Gerichte/arbeitsgerichte-2100280197004.pdf?__blob=publicationFile.

[166] In 2012, 59% of all cases (app. 234,920) were settled through conciliation. INGRID SCHMIDT, THE FEDERAL LABOUR COURT 16 (2014), https://www.bundesarbeitsgericht.de/wp-content/uploads/2020/06/broschuere_bag_englisch.pdf.

[167] Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327 (2013).

[168] Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 1 (1984).

[169] *Id.* at 50.

[170] *Id.* at 59.

to be set low in accordance with the Court Fees Act (*Gerichtskostengesetz*).[171] An employee can request representation by a lawyer if the other party has legal counsel. The Federal Labour Court is charged with the administration of justice, with its main tasks being promoting consistency in judicial precedents and developing the law in those areas left unregulated by the legislation.

### *3. Trade Union Legal Assistance*

The German trade unions are active in addressing issues of discrimination, particularly regarding the gender wage gap.[172] The umbrella employee organization, *Deutscher Gewerkschaftsbund* (DGB), for example, which represents unions with 6.6 million members (German union density is about 19%), is actively working on pay transparency.[173] In the absence of a works council at a workplace, the trade union will often assume its functions. Trade union members are also entitled to support from the union in labor disputes, including legal advice.[174] If the conflict cannot be resolved, a trade union may represent a member in court even where the trade union counsel is not a registered lawyer. The assistance is usually provided for free to members, with the union paying the trial costs and fees as well as the employer's costs and fees in the case of a loss.[175]

### *4. Agency Action*

The German Federal Anti-Discrimination Agency (*Antidiskriminierungsstelle des Bundes*) was established in 2006 under the German General Equal Treatment Act as an independent body to assist individuals who have experienced discrimination. In addition to conducting research and reporting to the German Parliament (*Bundestag*), the Federal Anti-Discrimination Agency:

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[171] Gerichtskostengesetz [GKG] [Court Fees Act], July 4, 2004, FEDERAL LAW GAZETTE [BGBI I] at 3047.
[172] *Trade Unions*, Worker-Participation, https://www.worker-participation.eu/National-Industrial-Relations/Countries/Germany/Workplace-Representation.
[173] *See,* DEUTSCHER GERWERKSCHAFTSBUND, DGB-STELLUNGNAHME ZUR EVALUATION DES GESETZES ZUR FÖRDERUNG DER TRANSPARENZ VON ENTGELTSTRUKTUREN ZWISCHEN FRAUEN UND MÄNNERN (2019), https://www.dgb.de/downloadcenter/++co++ffa66f9c-a30a-11e9-917f-52540088cada.
[174] INT'L LAB. ORG., NATIONAL LABOUR LAW PROFILE: FEDERAL REPUBLIC OF GERMANY (2001).
[175] *Id.*

- Provides individual information as to legal claims through the website by filling in a form and receiving a response from the agency;
- Outlines possibilities for taking legal action under the law;
- Provides referrals to counselling by other agencies;
- Seeks an amicable settlement between those involved; and
- Has a reporting system for registering discrimination claims anonymously without the individual further pursuing the claim.

The agency received 3,455 requests in 2018 for counselling as to individual's rights under the law.[176]

The German NHRI is the German Institute for Human Rights (*Deutsches Institut für Menschenrechte*). It does not have a complaints-mandate, focusing instead on promoting and protecting human rights.[177] The Institute conducts interdisciplinary and application-oriented research on human rights issues and observes the human rights situation in Germany. It advises federal and state politicians, the judiciary, the legal profession, business, and civil society organizations on the implementation of international human rights treaties.[178] The Institute also reports to the German Bundestag and prepares statements for national and international courts as well as international human rights bodies. The Institute acts as a forum for exchanges between the state and civil society, science and practice, national/international organizations and institutions, and works closely with the human rights bodies of the United Nations, the Council of Europe, and the European Union.[179]

### *5. The Works Council Model as an Enabling Framework*

The German labor law model is built on the works councils, strong social partners, and strong individual employee rights. The dual-channel system, with employee representation through both works councils and trade unions, provides several avenues for employees to raise issues directly with the employer, with support from the works council or the trade union. The works

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[176] FEDERAL ANTI-DISCRIMINATION AGENCY, ANNUAL REPORT 2018 (2019) www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/annual_report_2018.pdf?__blob=publicationFile&v=4.
[177] EUROPEAN NETWORK OF NAT'L HUM. RIGHTS 1NST., GERMAN INSTITUTE FOR HUMAN RIGHTS (2021).
[178] *Id.*
[179] *Id.*

councils have enhanced statutory duties towards certain protected groups based on sex, age, disability status, and race. Two key points in the procedural rules concerning labor disputes facilitating plaintiffs bringing claims are relevant here. The first is the prioritization by the courts of securing quick and efficient solutions that are transparent and focused on the needs of the public. The second is the requirement for employees to have access to justice and courts, with a scheme for reallocation of trial costs and fees that minimize the economic risks to employees and keeps the costs and fees from becoming excessive. Through this awareness of the economic risks employees take when contesting employer decisions, the German model provides several low-risk employee avenues for raising claims. The system that has been created in Germany protects not only collective labor interests but also individual employee rights, particularly those of equality and protection against unlawful discrimination.

### *D. The Corporatist Model (Sweden)*

The corporatist model is typified here by Sweden, where self-regulation by central organizations instead of legislation in general is an integral component of the legal system; perhaps strongest and most institutionalized within labor law, with both employers and employees organized at several levels. Organizational density among employers is about 90%, and among employees about 68% (2019).[180] Both employer and employee sides were significantly organized already by the early 1900's, and both sides were, and to a very significant extent still are, skeptical of legislative solutions in general.[181]

The Swedish labor law model is based on collective and not individual solutions, and has been so since its inception in the early twentieth century. Recent examples of the ferocity by which this collective approach to solutions and dispute resolution is guarded by the social partners are evident in the feedback the social partners submitted to two recent directive proposals by the EU Commission in 2020 and 2021. The first concerns minimum and adequate wages and the other concerns pay transparency and enforcement mechanisms.[182] With respect to the minimum and adequate wages proposed

[180] Mats Larsson, FACKLIG ANSLUTNING ÅR 2019: FACKLIG ANSLUTNING BLAND ANSTÄLLDA EFTER KLASS OCH KÖN ÅR 1990–2019 (2019).

[181] For a more exhaustive historical background as to the Swedish labor law model, *see* Laura Carlson, WORKERS, COLLECTIVISM AND THE LAW: GRAPPLING WITH DEMOCRACY (2017).

[182] *Proposal for a Directive of the European and of the Council on adequate minimum wages in the European Union*, COM (2020) 682 final (Oct. 28, 2020); *Proposal for a Directive of the*

directive, *Landsorganisation* (LO), the largest blue-collar employee umbrella organization, submitted feedback that the proposed directive "creates rights for even domestic workers. For the Swedish collective agreement model, where the labor unions and employers negotiate on wages and conditions of employment, a fundamental uncertainty is created."[183] Again, this is the organization of labor unions arguing that individual employees should not be empowered under the proposed directive. The second proposed directive on pay transparency and enforcement mechanisms has been met by a similar response by the social partners. For example, a white-collar umbrella organization wrote that "In [its] view, reinforcements of non-discrimination law should, when applicable, be carried out by the social partners within the framework of national collective bargaining systems," as "there is a risk that the provision on legal costs [the application of the American rule] will have a dispute increasing effect within its scope of application."[184] One of the larger labor unions, *Unionen*, wrote that "Furthermore, the procedural provision, regarding the burden of proof, limitation periods and the distribution of legal costs are in some parts both problematic and unbalanced from the perspective of the dispute resolution mechanisms established by the social partners."[185] In the three systems seen above, the UK, US, and Germany, the effort is made to remedy the imbalance in favor of the employer to the employees' advantage. Here the labor unions are arguing that an imbalance to the favor of the individual employee is not wanted nor warranted. It can also be mentioned here that collective agreements in Sweden cannot be declared universally applicable, *erga omnes*. In other words,

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*European Parliament and of the Council to strengthen the application of the principle of equal pay for equal* work, COM (2021) 93 final, *supra* note 4.

[183] Maria Falk, Förfrågan om yttrande gällande EU-kommissionens förslag till direktiv om tillräckliga minimilöner i EU, 9 (Dec. 17, 2020), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12721-Adequate-minimum-wages-in-the-EU/F1317592_en.

[184] TCO (THE SWEDISH CONFEDERATION OF PROFESSIONAL EMPLOYEES), *The initial position of the TCO on the European Commission proposal for a pay transparency directive*, 2-3 (July 2, 2021), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12098-Gender-pay-gap-transparency-on-pay-for-men-and-women/F2660618_en. *Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms*, COM (2021) 93 final (Mar. 4, 2021).

[185] UNIONEN, Summary of Unionen's position on the Commission's proposal for a Pay Transparency Directive (July 2, 2021), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12098-Gender-pay-gap-transparency-on-pay-for-men-and-women/F2660595_en.

Swedish collective agreements are applicable only to the social partners entering into the agreements and their respective employees and members.[186]

*1. Union Representation*

The social partners are under a statutory obligation to negotiate most issues, almost always at the local and often also at the central levels, before they can bring a case to the Labour Court.[187] Concerning employee grievances, unions have the possibility (but not duty) of representing their individual members before the Labour Court.[188] However, in the majority of employee grievances, the individual employee has no mechanism to force a union to litigate a claim and the unions have no duty to provide legal assistance; in other words, there is no duty of representation.[189] There is no Swedish legislation concerning member rights. The only rights a member has against the union are those as stated in the collective agreement.[190] Often a member's only redress as against the union often is to withdraw membership. Cases involving the social partners, including where a union represents an employee with a claim of employment discrimination, are brought directly to the Labour Court as it has almost exclusive jurisdiction over the social partners in such issues.[191] Trade unions have the right of first refusal with respect to bringing discrimination claims on behalf of members. In the event the trade union refuses, then the Equality Ombudsman can assess whether it wants to bring the claim.[192] The number of

[186] *See* Ronnie Eklund, Tore Sigeman and Laura Carlson, SWEDISH LABOUR AND EMPLOYMENT LAW: CASES AND MATERIALS 27 and 37 (2008); and Axel Adlercreutz and Birgitta Nyström, LABOUR LAW IN SWEDEN 212 (2021).
[187] *Id.* at 163.
[188] It is estimated that well over 90 % of employment termination disputes are settled prior to trial, but there is no official statistics on this number, the cause for the termination or as to the how the disputes are settled, particularly with respect to discrimination claims, *see* Jenny Julen Votinius, *Sweden in Resolving Individual Labour Disputes* in RESOLVING INDIVIDUAL LABOUR DISPUTES: A COMPARATIVE OVERVIEW 239 (Minawa Ebisui, Sean Cooney & Colin Fenwick eds., 2016) (stating that 90–98% of all claims are settled before coming to the Labour Court, but citing no references and giving no further definition of "resolved" in terms of, for example, settlements and withdrawals.) *See also* Statens Offentliga Utredningar [SOU] 2012:62 UPPSÄGNINGSTVISTER - EN ÖVERSYN AV REGELVERKET KRING TVISTER I SAMBAND MED UPPSÄGNING AV ARBETSTAGARE [government report series] 73 (Swed.). *Compare* UK Acas and Employment Tribunal Statistics, *supra* note 46, *and* US EEOC Enforcement and Settlement Statistics, *supra* note 123.
[189] Adlercreutz, *supra* note 186, at 193.
[190] *Id.* at 192.
[191] *Id*. at 166.
[192] 6 ch. 2 § Diskrimineringslag (Svensk författningssamling [SFS] 2008:567) (Swed.).

discrimination cases taken by the unions to the Labour Court is very low--- less than a handful a year.[193] There is no transparency with respect to labor union decisions to pursue a grievance, nor is there any viable appeal avenue open to union members within the organizations such as exists in the UK and US.

*2. The Labour Court*

Employment discrimination claims are brought directly to the Labour Court by either the social partners or Equality Ombudsman. In Sweden, negotiation and mediation are conducted both before filing with the Labour Court and as a first step before the legal proceedings.[194] If an individual brings a claim of discrimination without the support of the union or Equality Ombudsman, the claim must be filed first with a general trial court and then the judgment can be appealed to the Labour Court.[195] Reflecting the statistics with respect to both Equality Ombudsman and the unions, the Labour Court did not issue a single judgment in 2019 taking up a discrimination claim. In the four-year period of 2018-2021, twelve cases have been taken up to the Labour Court with discrimination claims.[196]

A judging panel of the Labour Court comprises typically seven members: three non-partisan members as the chair and vice-chair trained in law, and an expert in the labor market, and four partisan members, two appointed by the employer organizations and two by the employee organizations.[197] In cases concerning claims of unlawful discrimination, as of 2008, the judging panel can

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[193] The Labour Court's primary task is to resolve labor law issues, disputes regarding the interpretation and application of collective agreements. The Labour Court's jurisdiction was broadened in the 1970's to include discrimination claims, *see* Tore Sigeman, *Arbetsdomstolen i internationellt perspektiv*, SvJT (2004); *see also* Section 6:2 of the Equality Act. Iceland, faced with the same issue, did not expand their labor court's jurisdiction to include other than industrial disputes, reasoning it was outside of the expertise of the labor court to address individual claims. For example, employment discrimination claims are taken to the Equality Complaints Board, *see* European Commission, *European Network of Legal Experts in Gender Equality & Non-discrimination*, COUNTRY REPORT NON-DISCRIMINATION ICELAND (EC 2021) 8.

[194] *Sweden: Individual Disputes at the Workplace-- Alternative Disputes* Resolution, EUROFOUND (Feb. 9, 2010), https://www.eurofound.europa.eu/publications/report/2010/sweden-individual-disputes-at-the-workplace-alternative-disputes-resolution.

[195] *Presentation of the Swedish Labour Court*, ARBETSDOMSTOLEN, http://www.arbetsdomstolen.se/pages/page.asp?lngID=7&lngLangID=1.

[196] *See* Arbetsdomstolen [AD] [Labor Court] 2018 case nos. 11, 19, 42, 51, 74, 80 (Swed.); AD 2020 case nos. 3, 9, 13, 53, 58; AD 2021 case no. 38.

[197] *See* 3 ch. 1 § 1 LAG OM RÄTTEGÅNGEN I ARBETSTVISTER (Svensk författningssamling [SFS] 1974:371) (Swed.).

comprise only five members: three non-partisan and two partisan members.[198] However, the parties to the case (in other words, the social partners) can request the typical seven-member panel. The Labour Court, when a union or the Equality Ombudsman is representing an employee, is both the first and final instance, and its judgments cannot be appealed to any higher Swedish court except for extraordinary reasons. Such a petition has never been successful.[199]

Most of the different mechanisms for facilitating access to justice as discussed above with respect to the UK, US, and Germany cannot be found in the Swedish legal system. Sweden has a very defendant-friendly litigation forum. Pleadings must be based on already-evidenced facts when filed, with limited rights as to amendments. The statutes of limitations in employment claims are short, in some cases only weeks. There are few employer record-keeping requirements. Judicial powers as to ordering the production of discovery are limited, as there are only minimal sanctions for non-compliance. Statistical evidence, as a rule, is admissible, but is judicially not given any weight. Even if there is a clear disparate impact, such as the total absence of a protected group among employees, courts have not shifted the burden to the employer or considered this to be a *prima facie* showing of unlawful discrimination.[200] The shifted burden of proof is often applied as a shared burden of proof, with plaintiffs often held to a high evidentiary standard before the burden is shifted. A physical aspect can be added to this list concerning access to justice, the lack of physical access to the Labour Court. There is only one labor court in Sweden, covering a population of 10 million and a geographic area of 447,000 $km^2$.[201]

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[198] *Id*. at § 6a.

[199] The most recent petition concerning a judgment of the Labour Court was denied leave to appeal by the Supreme Court in 2018. Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 2020 p. 147 Ö 5731-18 (Swed.).

[200] *See, e.g*, Arbetsdomstolen [AD] [Labor Court] 2004 case no. 44 (female plaintiff's claim of discrimination with respect to the hiring of man as detective, where no women were permanently hired as a detective, was not proven).

[201] For purposes of comparison, the sole Swedish Labour Court published 70 judgments in 2020. *Announced judgments*,ARBETSDOMSTOLEN,http://www.arbetsdomstolen.se/pages/page.asp?lngID=4&lngLangID=1&Year=2020. As described *supra* note 51, 117,926 UK employment tribunals were convened to resolve disputes between April 2020 and March 2021 and while the number of cases is not known, Germany has 110 local trial labor courts, 18 appellate regional labor courts, and a Federal Labour Court as the apex court, *see supra* note 165. In the UK, US and Germany, there are several instance and appeal possibilities, while in Sweden the Labour Court is often the first and final instance.

The discrimination jurisprudence of the Labour Court demonstrates a consistency of result and approach.[202] Plaintiffs have prevailed in three cases on claims of indirect discrimination.[203] Approximately thirty cases of unlawful ethnic discrimination have been brought to the Labour Court since the passage of the initial 1986 Act, with plaintiffs prevailing only in two cases.[204]

*3. Remedies and Trial Costs and Fees*

With respect to discrimination claims, equitable remedies are generally not available, and any awarded damage amounts are not high and outpaced greatly by attorneys' costs and fees as awarded to the prevailing parties.[205] The Labour Court is limited in the relief it can grant:

- Declaratory judgment (*fastställesletalan*);
- Order performance based on a legal obligation (*fullgörelsetalan*);
- Declare invalid certain agreements by the social partners (*ogiltigförklaring*); and
- Damages either to individual employers or employees, the organizations, or very often both the individual and the organization.

A vital component of access to justice is effective remedies. Remedies available under the 2008 Discrimination Act are damages (compensatory, nominal, or discrimination damages) and the voiding of certain employment decisions.[206] A decision made by an employer with respect to existing employment can be voided but the employer ultimately cannot be forced to comply with the judgment, such as taking back a former employee, and can instead simply pay damages.[207] An award of damages can be reduced to zero if such is deemed fair by the court. In contrast, an award cannot be increased for exacerbating circumstances such as repetitive discrimination. Punitive damages

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[202] For an overview of the Labour Court's jurisprudence as to discrimination, see Laura Carlson, *Addressing Unlawful Discrimination: The Swedish Journey*, GLOBALIZATION, FRAGMENTATION, LABOUR AND EMPLOYMENT LAW: A SWEDISH PERSPECTIVE 139-60 (Laura Carlson et al. eds., 2016).
[203] *See* Arbetsdomstolen [AD] [Labor Court] 2005 case no. 87; AD 2018 case no. 42; and AD 2018 case no. 51.
[204] *See* Arbetsdomstolen [AD] [Labor Court] 2002 case no. 128; AD 2011 case no. 13.
[205] *Pay Equity Laws in Sweden*, L&E GLOBAL (Nov. 22, 2020), https://knowledge.leglobal.org/pay-equity-laws-in-sweden/.
[206] *See* DISKRIMINERINGSLAGEN (2008:567), *supra* note 193.
[207] *Pay Equity Laws in Sweden*, *supra* note 206.

are not available generally in Swedish law.[208] Economic damages with respect to discrimination claims are only awarded where the plaintiff already is an employee.[209] Before the 2008 Discrimination Act, simply nominal damages were awarded in modest amounts.[210]

The 2008 Discrimination Act introduced a third category of damages, discrimination damages, that were to be "enhanced" damages so that employers would be deterred from discriminating. The Labour Court has of the time of this writing awarded discrimination damages in fifteen cases, with an average award of approximately SEK 64,333 per plaintiff.[211] To determine whether there truly is an enhanced award of damages in these cases, a comparison can be made to the nominal damages awarded in the discrimination cases since the first 1979 Act. The average of nominal damages awarded for discrimination in the 1980's was SEK 19,000, the 1990's SEK 37,000, the 2000's SEK 51,600, and during the 2010's, SEK 61,923 (the latter including both nominal and discrimination damages). Adjusting for inflation, the average award of SEK 19,000 in 1980 is today worth SEK 63,460.[212] Taking the average of discrimination damages at SEK 64,333, this entails that the amount of damages since the 1979 Act has remained static, not even near to reaching the threshold of enhanced. Additionally, damages in the average amount of SEK 64,333 cannot in any way be seen as any true deterrence with respect to employer conduct.

This treatment of discrimination claims and damages is echoed by judgments from the general courts. By way of example, in NJA 2008 p. 915, plaintiffs, law students tired of the discrimination protections not being

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[208] Robin Oldenstam et al., MANNHEIMER SWARTLING'S CONCISE GUIDE TO ARBITRATION IN SWEDEN, 147 (2nd,2019),https://www.mannheimerswartling.se/app/uploads/2019/05/Concise-guide-to-arbitration_2019_second_edition.pdf.

[209] *See* 5 ch. § 22 DISKRIMINERINGSLAGEN (2008:567), *supra* note 193.

[210] For these statistics, *see* Laura Carlson, *Discrimination Damages—Promoting or Preventing Access to Justice?,* FESTSKRIFT TILL ANN NUMHAUSER-HENNING 129 (Mia Rönnmar ed., 2017).

[211] At the time of this writing, 100 Swedish Crown (SEK) were worth almost € 10, USD $ 11.37, and £ 8.36. The amount of SEK 64,333 consequently is € 6,333.22, $ 7,319.73 and £ 5,3390.79, *see* Oanda.com. The average of SEK 64,333 is the average per plaintiff in the following cases: Arbetsdomstolen [AD] [Labor Court] 2018 case no. 51 (SEK 40,000), AD 2018 no. 42 (SEK 110,000), AD 2016 no. 56 (SEK 50,000), AD 2016 no. 38 (SEK 50,000), AD 2015 no. 72 (SEK 75,000), AD 2015 no. 51 (SEK 40,000), AD 2015 no. 44 (SEK 25,000), AD 2015 no. 12 (SEK 120,000), AD 2014 no. 19 (SEK 50,000), AD 2013 no. 71 (SEK 75,000), AD 2013 no. 29 (SEK 50,000), AD 2013 no. 18 (SEK 50,000), AD 2011 no. 37 (SEK 125,000 per plaintiff), AD 2011 no. 23 (SEK 50,000), AD 2011 no. 02 (SEK 30,000) and AD 2010 no. 91 (SEK 75,000).

[212] According to Statistics Sweden's consumer price index, SEK 100 in 1980 is worth SEK 334 in 2020 compensating for inflation. *See Statistics Sweden*, scb.se.

enforced, had brought claims of unlawful discrimination on the basis of ethnic origins against a restaurant owner. The students had documented the discriminatory behavior themselves as they attempted to gain entrance into the restaurant. The trial court found unlawful discrimination and awarded the three plaintiffs SEK 20,000 each. This judgment was affirmed by the appellate court.

The Supreme Court on appeal also found that the restaurant had committed unlawful discrimination, but that this:

> [M]ust be assessed against the risk that the public's confidence in the legislation can be reduced if the legislation is perceived as a means for allowing individuals to in a planned and systematic manner enrich themselves, a risk which becomes specifically more tangible if the compensation is in an amount that exceeds what can be considered reasonable compensation for the degradation that the violation entailed.[213]

As the students knew that they would not be admitted to the restaurant, the Supreme Court found that the degradation resulting from the discrimination could not be seen as too great. The Court lowered the damages to the amount of SEK 5,000. Additionally, despite the fact that the main rule in Swedish litigation is that the losing party must pay the winning party's legal costs and fees, the Court order the parties to bear their own legal costs and fees for the litigation at all three instances, in essence wiping out any damages the plaintiffs received.[214]

Where an individual pursues a claim of employment discrimination without being represented by a union or the Equality Ombudsman, they risk paying attorney costs and fees for both instances, even if they are successful at the trial court. In contrast, as the social partners and Equality Ombudsman take any such cases directly to the Labour Court, they risk the costs and fees for only one instance.[215] An egregious example of the allocation of trial costs and fees can be found in a case commenced by a midwife who argued that the employment duty of assisting with the provision of abortions violated her right to freedom of religion.[216] She went to the Equality Ombudsman in 2014, and the Equality Ombudsman did not find a claim (the agency received 1,810 discrimination

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[213] Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 2008 p. 915 T 2224-07, 927 (Swed.).
[214] *Id.* at 928.
[215] *See* Laura Carlson, Sweden's Experience in Combating Employment Discrimination, 39 (Institute of European and American Studies, Academica Sinica, Taipei, Taiwan, 2007).
[216] Arbetsdomstolen [AD] [Labor Court] 2017 case no. 23, http://www.arbetsdomstolen.se/upload/pdf/2017/23-17.pdf.

reports in 2014, and filed 14 lawsuits, basically in less than one percent of the reports filed).[217] She brought the case individually to the trial court, which found against her in 2015. The trial court stated that the plaintiff had reasonable cause to have the matter proven, and that the review by the Equality Ombudsman was sufficient to fulfill this function. The trial court ordered the plaintiff to pay the trial costs and fees of the public employer in the amount of SEK 925,854. She appealed to the Labour Court, which upheld the trial court's judgment and ordered the plaintiff to pay an additional SEK 606,000 in trial costs and fees.[218] The Labour Court stated that the legal and evidentiary questions raised gave no reason to depart from the main rule as to the allocation of costs and fees. Neither did the Labour Court find that the plaintiff as a result of applying this main rule was denied her right under Article 13 European Convention on Human Rights to an effective remedy. The total of the awards against plaintiff was over SEK 1.5 million. This is equivalent to 46 months of average before taxes wages for a midwife at SEK 32,400.[219] An individual employee pursing litigation thus takes a significantly greater economic risk then the labor unions or the Equality Ombudsman, even though both of the latter have significantly more resources. Of the four national systems examined here, the Swedish legal system is the only one that allows and arguably promotes such an outcome.

The Labour Court can order that each party bear its own costs if the losing party had reasonable cause to have the dispute tried,[220] but has seldom done so almost evenly in favor of employers and employees. The amount of trial costs and fees as awarded by the Labour Court in discrimination cases demonstrates a trend that deviates radically from the static amount of damages, with trial costs and fees increasing by approximately 170% since the 1980s. Consequently, during this 45-year time span in which discrimination laws have been in place,

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[217] *See* DISKRIMINERINGSOMBUDSMANNEN [Equality Ombudsman], ÅRSREDOVISNING [Annual Accounts] 47 (2014), https://www.do.se/download/18.277ff225178022473141e0c/1618941248702/arsredovisning-2014.pdf.

[218] AD 2017 case no. 23, *supra* note 217.

[219] *See also, e.g.* Arbetsdomstolen [AD] [Labor Court] 2006 no. 54, http://www.arbetsdomstolen.se/upload/pdf/54-06.pdf. (In which a former employee prevailed in the trial court as applying the case law of the Labour Court, and was awarded SEK 85,000 in damages for the unlawful termination and SEK 15,525 for the employer's failure to give notice. The employer appealed the case to the Labour Court, which departed from its earlier case law and found that termination based on sexual harassment was lawful but that the former employee was correct in that he did not receive proper notice, for which the Labour Court awarded him SEK 5,000 in damages. Determining that the former employee had not prevailed as to the majority of the issues in the case, the Labour Court ordered him to pay the employer's trial costs and fees in both instances for a total of SEK 236,152 plus interest.)

[220] 5 ch. 2 § LAG OM RÄTTEGÅNGEN I ARBETSTVISTER (SFS 1974:371).

the amount of damages per plaintiff has remained basically unchanged even after the implementation of enhanced discrimination damages, while the trial costs and fees have risen 170%. This disparity in the past decade becomes between average damages of SEK 64,333 as against the average of SEK 192,122 for court-awarded costs and fees for one party. To this risk calculation can be added the success rates of the different claims, with the lowest success rate for claims of ethnic discrimination; only two of over thirty such cases have been brought successfully by plaintiffs, a less than 6 % chance of prevailing.

The trends with respect to damages and attorneys' costs and fees, combined with the low success rates create a significant deterrent for plaintiffs bringing discrimination claims in Sweden.[221] The counterargument to empowering individuals to bringing employment claims is leaving such to the collective, as can be seen from the feedback from the Swedish social partners cited above with respect to proposed directives, is that this would create "rights for even domestic workers. For the Swedish collective agreement model, where the labor unions and employers negotiate on wages and conditions of employment, a fundamental uncertainty is created."[222] It should be emphasized that "reinforcements of non-discrimination law should, when applicable, be carried out by the social partners within the framework of national collective bargaining systems…," as "[t]here is a risk that the provision on legal costs [the application of the American rule] will have a dispute increasing effect within its scope of application."[223] As has also been noted above, "the procedural provision, regarding the burden of proof, limitation periods and the distribution of legal costs are in some parts both problematic and unbalanced from the perspective of the dispute resolution mechanisms established by the social partners."[224]

Litigation under the present system arguably is not an affordable option for most individual discrimination plaintiffs. This is particularly true in light of the fact that it is often cases of discrimination with respect to hirings or firings, consequently individuals who are already economically vulnerable. Though the Equality Ombudsman and trade unions can take up such claims, they often choose not to do so. Given the financial risks for plaintiffs, many claimants have opted to take discrimination claims to small claims court, which has a ceiling as

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[221] Carlson, *supra* note 216, at 40.
[222] Falk, *supra* note 183.
[223] TCO, *The initial position of the TCO on the European Commission proposal for a pay transparency directive*, 2-3, *supra* note 184.
[224] UNIONEN, Summary of Unionen's position on the Commission's proposal for a Pay Transparency Directive, *supra* note 185.

to damages of approximately SEK 22,000, with a filing fee of SEK 900 with a limited risk of liability as to paying the other party's trial costs and fees. Given this ceiling in damages, it is questionable whether small claims court is a suitable alternative from an access to justice and effective remedies perspective.

There is a limited right to receive state legal aid and then at the most one hundred hours of legal assistance. An individual cannot have assets and a yearly income of more than SEK 260,000. If the individual is a member of a trade union, the trade union is to be first contacted before legal aid. If an individual has legal assistance coverage in their home insurance, the insurance coverage is to be used instead.[225] A caveat here though is that most if not all insurance policies exempt employment disputes, relying instead on the trade unions to pursue such claims.

*4. Equality Ombudsman*

The purpose of the Office of the Equality Ombudsman is to work to eliminate discrimination via two areas of operations: developing and disseminating knowledge, and monitoring and litigating.[226] The Equality Ombudsman had an annual budget in 2019 of SEK 130 million, received 2,661 reports of discrimination, and brought five cases to court.[227] With respect to claims of employment discrimination, the Equality Ombudsman can represent union members whose union has decided not to pursue the case, or non-union members.[228] Of the twelve employment discrimination cases taken to the Swedish Labour Court between 2018-2021, five were taken up by the Equality Ombudsman.[229] The Equality Ombudsman has had a general policy of not pursuing litigation, which has been seen to work against the protections the

[225] Legal assistance generally is limited under most home insurance policies, with a range from SEK 75,000 to SEK 200,000 and often a deductible of 20%. Some policies also cover liability for the other party's fees for up to 80%. Most exempt employment disputes.
[226] *See* LAG OM DISKRIMINERINGSOMBUDSMANNEN (Svensk författningssamling [SFS] 2008:568) (Swed.); *and* DISKRIMINERINGSOMBUDSMANNEN [Equality Ombudsman], ÅRSREDOVISNING [Annual Accounting] 55, 82 (2020), https://www.do.se/download/18.277ff225178022473141e13/1618941249249/arsredovisning-2020.pdf.
[227] *Id.*
[228] *See* 4 ch.2 § DISKRIMINERINGSLAGEN (2008:567), *supra* note 193.
[229] Arbetsdomstolen [AD] [Labor Court] 2018 case nos. 42, 51, 74, and 80; Arbetsdomstolen [AD] [Labor Court] 2020 case no. 53.

Equality Act is to provide.[230] The new DO has announced in 2021 that he intends to start litigating more discrimination cases.[231]

The Equality Ombudsman's lack of follow-through with respect to enforcing engagement non-discrimination rights through litigation is reflected in the Committee on the Elimination of Racial Discrimination's (CERD) recent concluding observations.[232] The Committee pointed out that the present mandate of the "Equality Ombudsman is limited, [and] that cases successfully resolved are relatively low in number."[233] In 2019 the Office issued 553 decisions with respect to employers' compliance with active measures, and monitored 472 employers with respect to routines concerning preventing harassment, sexual harassment, and victimization.[234]

### *5. The Newly-Founded Swedish NHRI*

Sweden adopted an Act (2021:642) on an Institute for Human Rights on 17 June 2021, effective 1 January 2021 (NHRI Act), comprising ten sections.[235] Under Section 2, the Institute NHRI has the following mandate: to follow; investigate and report how human rights are respected and effected; to submit proposals to the Government as to measures needed to ensure human rights; to liaise with international organizations and participate in international co-operations; and promote education, research, the development of competence, information and increased awareness within the field of human rights.[236] The section specifically states that the NHRI is not to assess individual claims as to

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[230] *See* Lena Svenaeus, TIO ÅR MED DISKRIMINERINGSOMBUDSMANNEN: EN RAPPORT OM NEDMONTERING AV DISKRIMINERINGSSKYDDET (2020), https://arenaide.se/wp-content/uploads/sites/2/2020/11/svenaeus-2020-tio-ar-med-diskrimineringsombudsmannen-komprimerad.pdf. Of the twelve employment discrimination cases taken to the Swedish Labour Court between 2018-2021, five were taken up by the Equality Ombudsman; Arbetsdomstolen [AD] [Labor Court] 2018 case nos. 42, 51, 74, and 80; Arbetsdomstolen [AD] [Labor Court] 2020 case no. 53.

[231] Mikael Bergling, *Nya DO vill ta fler diskrimineringsfall till AD*, AKAVIA ASPEKT (June 17, 2021), https://www.akaviaaspekt.se/lon/nya-do-vill-ta-fler-diskrimineringsfall-till-ad/.

[232] *Id.*; Committee on the elimination of Racial Discrimination, *Concluding Observations on the Combined Twenty-Second and Twenty-third period reports of Sweden* (Advance Unedited Ed., May 11, 2018) A/CN.4/CERD/C./2018/22-23.

[233] *Id.*

[234] *Id.*

[235] LAG OM INSTITUTET FOR MÄNSKLIGA RÄTTIGHETER (Svensk författningssamling [SFS] 2021:642) (Swed.). For the legislative preparatory works, *see* Departementsserien [Ds] 2019:4 Förslag till en nationell institution for mänskliga rättigheter i Sverige [government report series] [hereinafter Ds 2019:4]; *and* Proposition [Prop.] 2020/2021:143 Institutet for mänskliga rättigheter [government bill] (Swed.).

[236] 2 § LAG OM INSTITUTE FOR MÄNSKLIGA RÄTTIGHETER (SFS 2021:642).

violations of human rights.[237] The 2018 committee found that the monitoring obligation was not to be directly found in the Paris principles, but could be read into them under the task of protecting human rights.[238] However, the term "monitoring" is not included in the act.[239] The NHRI is granted the authority, under Section 4, to determine its organization and the more specific focus of its work.[240] The NHRI is to submit an annual report to the Government as to its operations and its observations in the field of human rights.[241]

A key question becomes what the Swedish NHRI will base its observations upon. Sweden has taken a very narrow view of what is permissible data to collect.[242] The processing of sensitive data as defined by the General Data Protection Regulation (EU) 2016/679 (GDPR) is not addressed in the NHRI Act, but was addressed in its legislative preparatory works.[243] According to Swedish canons of statutory interpretation, the legislative preparatory works can be seen as guiding where the legislation is silent.[244] Sensitive data under the GDPR includes data concerning: racial or ethnic origin; political opinions; religious or philosophical beliefs; membership of a trade union; health; a person's sex life or sexual orientation; genetic data; and biometric data that uniquely identifies a person.[245] Four of these are protected grounds under discrimination legislation: racial or ethnic origin; religious or philosophical beliefs; membership of a trade union; and a person's sex life or sexual orientation.[246] Instead of balancing the need for data with the importance of data protection, the Swedish interpretation of the GDPR is that sensitive data can only be collected for exceptional reasons.[247] The legislation committee for the Swedish NHRI Act reasoned that in many tasks, such as examining how human rights were implemented, there would be no significant need to such need to use

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[237] *Id.*
[238] Ds 2019:4 at 40.
[239] *See* LAG OM INSTITUTET FOR MÄNSKLIGA RÄTTIGHETER (SFS 2021:642).
[240] *Id.* § 4.
[241] *Id.*
[242] Ds 2019:4; *Sensitive Personal Data*, SWEDISH AUTHORITY FOR PRIVACY PROTECTION (last updated Sept. 15, 2021), https://www.imy.se/en/individuals/data-protection/introduktion-till-gdpr/what-is-actually-meant-by-personal-data/what-is-meant-by-sensitive-personal-data/.
[243] Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and repealing Directive 95/46/EC, 2016 O.J. (L 119). For the legislative preparatory works, *see* Ds 2019:4 *and* Prop. 2020/2021:143.
[244] RUTH BADER GINSBURG & ANDERS BRUZELIUS, CIVIL PROCEDURE IN SWEDEN 36–37 (1965).
[245] Regulation 2016/679, *supra* note 244.
[246] *Id.*
[247] SWEDISH AUTHORITY FOR PRIVACY PROTECTION, *supra* note 243.

sensitive data.[248] Instead, the committee anticipated the NHRI could look, for example, to the case law and decisions and reports by other authorities as to the effects of human rights implementation.[249]

The assumption by the lawmaker that the Swedish NHRI could base assessments as to the implementation of human rights on case law and decisions by governmental authorities is fundamentally flawed, at least with respect to employment discrimination claims, as seen above.[250] Few employment discrimination cases are brought in Sweden, and even fewer are successfully litigated, due to the significant access to justice impediments.[251] One might conclude there is little ethnic discrimination because few ethnic discrimination cases are pursued. That conclusion would be a blatantly inaccurate depiction of the situation as shown by the many different government investigations held over the past fifty years.[252]

### *6. The Corporatist Model as an Enabling Framework*

Under the corporatist model as seen in Sweden, the interplay between civil society, government agencies, courts, and lawmakers, relies to a great degree on consensus characterized by the absence of any type of challenge to the status quo. The lack of an enabling legal framework for raising human rights claims, such as employment discrimination protections, is very much a result of this consensus, as seen from the feedback given by the social partners. No discernible tensions exist between the goals of the trade unions, the Equality Ombudsman, the decisions of the Labour Court, and the aspirations of lawmakers. The individual is not quite present, and consequently, particularly in the area of discrimination protections, there is almost no litigation. An enabling legal framework for bringing employment discrimination claims is essential not only as a basis for the NHRI's conclusions but also as a check as to any such conclusions, as well as more essentially, to allow individuals to obtain redress for violations of their human rights.

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[248] Ds 2019:4, at 147-148 ("Treatment of sensitive personal data is however generally prohibited according to Article 9.1 of the GDPR").
[249] *Id.*
[250] *Id. See* Arbetsdomstolen [AD] [Labor Court] 2018 case nos. 42, 51, 74, 80 *and* AD 2020 case no. 53.
[251] *See* DISKRIMINERINGSOMBUDSMANNEN, *supra* note 227.
[252] *See, e.g.*, Statens Offentliga Utredningar [SOU] 2005:56 Det blågula glashuset – strukturelll diskriminering i Sverige [government report series] (Swed.); Statens Offentliga Utredningar [SOU] 2006:30 Är rättvisan rättvis? [Is Justice just?] [government report series].

## III. CONCLUSION

As seen from the comparison, the corporatist model is the only one of the four legal systems explored that has not facilitated the bringing of unlawful employment discrimination claims. Plaintiffs take significant economic risks when bringing cases and with respect to certain protected grounds, such as ethnicity, the number of successful claims has been negligible. When facing the odds of prevailing, the economic risks, and the minimal damages, many potential plaintiffs choose to not litigate. No viable agency alternative is available either as the Equality Ombudsman has chosen the policy of not bringing individual claims. The main civil society actors, the social partners, have not been active with respect to bringing individual claims in the area of employment discrimination, particularly with respect to race and ethnicity. This absence of presenting employment discrimination claims (either individually, by the Equality Ombudsman or the unions) in its turn entails that the extent of employer discriminatory practices, as well as the types of practices, is not in any way tracked. This dearth provides a very thin basis upon which a NHRI is to assess the protection of human rights.

Each of the other three legal models: private enforcement, hybrid agency-private enforcement, and the works councils model, brings something to the table with respect to facilitating employment discrimination claims. For example, the German Works Councils pay particular regard to certain categories of employees on the council, representing most of the protected grounds in the discrimination legislation. Employees can freely take up issues such as unlawful discrimination with the Works Councils, who, if reason exists, negotiate the claim with the employer. The union can also take up such claims on behalf of members. Employees are to have access to the courts and fees and costs are assessed by the courts according to financial ability.

The private enforcement model in the UK legal system creates transparent procedures and offers internal avenues of appeal. The system of employment tribunals is of no cost to employees, and litigation is considered a necessary check. The hybrid agency-private enforcement model of the U.S. system also has procedural transparency and cost mitigation as a fundamental premise. On the federal level U.S. agencies are in charge of investigating each claim of discrimination implemented, with this information being easily accessible. Additionally, procedural rules create a plaintiff-friendly litigating forum, and remedies include both damages and equitable remedies, with the overriding objective of changing employers' discriminatory behaviors.

These three models can be seen as robust and facilitating a better understanding of how employment discrimination manifests, and, to a certain degree its extent as well as its many faces. This allows for a broad approach to discrimination defined by individual experiences: a strong basis upon which NHRIs can act. Having a system where individuals are not enabled to bring discrimination claims runs the risk of the NHRI, and its chosen actors, defining discrimination instead. Without this foundation in how individuals actually experience discrimination, this power of definition can be used to give certain discrimination grounds more space than others, for example, issues of gender discrimination over those of racism.

As stated in the COE 2018 recommendation, a framework enabling individuals, groups, civil society organizations and NHRIs "to strive for the protection and promotion of all human rights and fundamental freedoms" is key to NHRIs.[253] In essence, an enabling legal framework constitutes the difference between complying with the spirit, and not just the letter, of those protections of fundamental rights as required regionally, nationally, and internationally.

[253] COMM. OF MINISTERS, *Recommendation CM/Rec(2018)*11, *supra* note 12.