

ABILITY, INABILITY, DISABILITY, AND ANTI-DISCRIMINATION LAW

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Abstract: In this article the new disability anti-discrimination law in Sweden is considered. The underlying prejudice-causes-discrimination model is criticised. It is argued that the new law - which makes unlawful to discriminate persons with disabilities by applying stereotypes in evaluating them as job applicants outlaws prejudiced behaviour on the part of employers as such, without connecting it with any outcome in employment opportunities. The disability anti-discrimination law is elitist in so far as it only assists those disabled workers whose profile is rather congruous with the profile of non-disabled employees. The law individualises a systemic problem; it makes discrimination and exclusion of disabled persons from the labour market a problem concerning the prejudiced individual, thereby simplifying both the problem and the way to solve it. The lawmaker has not taken into consideration systemic aspects or gain-motivated discrimination, neither that which might appear, as a gulf between ideals and practice are the outcome of a whole range of different practices that respond to different needs. The anti-discrimination law - as if guided by neo-liberal considerations, i.e. rules are not drawn up in order to direct the behaviour of the market - rescues governments from the requirements of acting on behalf of the disadvantaged group..

Introduction

Persons with disabilities are an extremely diverse group. They are alike, if at all, only in that their various disabilities distinguish them from that equally heterogeneous conglomeration of people called non-disabled. This fact poses several difficulties when considering the anti-discrimination law in Sweden. Although no single distinguishing characteristic or unifying trait identifies this diverse aggregate of individuals, disabled persons are nevertheless

perceived in the anti-discrimination law as a distinct group, different from the rest of society.

Disabled persons have experienced and continue to experience many forms of disadvantage and discrimination in the labour market. There is one common denominator in the discrimination experienced by disabled persons and the discrimination experienced by women, homosexuals and immigrants. They all know what it means to suffer from discrimination based upon unawareness

(what it means to come from another country, what impact an impairment really has, etc.). Discrimination of disabled persons - as discrimination of women and ethnic minorities – stumbles upon stereotypes.

The law prohibiting discrimination of disabled persons in the labour market is one in a sequence of anti-discrimination laws enacted in Sweden. A law against discrimination on the basis of ethnic origin in the labour market, a law against discrimination in the labour market on the basis of sexual orientation, and a revision of the law aiming at equality in the labour market, together with the law against discrimination of persons with disabilities were enacted in 1999.

I will in this article show that a traditional and popular view of discrimination guide the creation of the law prohibiting discrimination of disabled persons in the labour market. The focus of attention is on individuals. A prejudice-causes-discrimination-model imbues the reasoning in the Government Bill presenting the law proposal. There are at least two fundamental mistakes related to this focus: (1) Employers or their representatives' actions are always imbedded in organisations and systems. (2) Discriminatory actions can be carried out by employers, even with a negative cost/benefit outcome, but most frequently such actions are carried out by employers acting under the guidance of system prerequisites. Research

within social science revealing that an unprejudiced person might practice discrimination, seems to have passed unnoticed (cf. Weber 1968, Merton 1976 [1949], Banton 1967, 1994, Parkin 1974, 1979, Feagin 1978, Jenkins 1991, Oliver 1998, Byrne 1999, Bourdieu 1998). Theories of a growing number of social scientists re-conceptualising disability as a complex and sophisticated form of oppression or institutional discrimination on a par with sexism and racism, are ignored as well. One may question how – after so many decades of research about attitudes and prejudices indicating that they constitute a very insubstantial phenomenon - the traditional emphasis on prejudice in assessments of labour market discrimination, as if it simply was reflecting attitudes of employers, has not been replaced by theories providing an alternative perspective.

Both the problems and abilities of disabled persons have traditionally been unappreciated and undervalued. The anti-discrimination law in Sweden is not an exemption from that trend. In the following, I will argue that the law does not reflect properly the problems of disabled persons in the labour market and I will put into question the assumption underlying the creation of anti-discrimination law.

Discrimination can be broadly defined without including prejudice or intent to harm in the formulation. In accordance with Feagin, discrimination is in this

article defined as practices, processes, communications, which have differential and a negative impact on individuals (see Feagin 1978), without applying ethics or morality on the behaviour. A distinction is made between lawful and unlawful discrimination.¹

To be connected with a certain group (e.g. persons with disabilities, women, ethnic minorities) that has been placed lower in the social hierarchy is for the individual a great disadvantage on the labour market, whatever his/her actual abilities and inabilities. The job applicant is a priori not judged as an individual but is seen as the actual embodiment of a group. In practice s/he is discriminated against. But why? What are the reasons for such practice in the important and rather formal process – steered by written and unwritten rules – of finding a new employee?

The Swedish Disability Discrimination Act

In the course of the last decades, disability has been identified as a source of discrimination in public life. It has been argued that the differences disabilities entail cannot be taken as cause for not granting political and social rights to individuals. Thus, if there is discrimination it should be legislated against. Disability discrimination legislation is a recent development. It is rooted in the civil rights movement of the 1960s in the U.S.

Disability discrimination legislation found growing support within organisations of disabled persons in the 1970s and 1980s. Anti-discrimination laws, in general, make it unlawful to treat a person unfavourably because of any specific trait (ethnic origin, sexual orientation, gender, disability). Anti-discrimination laws are believed to function as a lever to remove barriers for these persons' participation in society. It is a general trait that those committed to the development of anti-discrimination law for persons with disabilities adopt a minority rights' strategy. By drawing an analogy between ethnic minority groups, women and persons with disabilities, they expect that anti-discrimination law will have similar effects for disabled persons (Jones and Basser Marks 1999). The minority group analysis is claimed to be appropriate for understanding the dynamics of marginalisation in the case of race as well as of disabled people (Bickenbach 1999).

The Swedish Disability Discrimination Act, enacted in 1999 (SFS 1999:132) is as an example of special legislation for persons with disabilities, dealing exclusively with disability matters. The Swedish Disability Discrimination Act is the latest in a line of disability civil rights' laws adopted in a number of industrialised countries. First came the Disabilities Act (ADA) 1990 in U.S., then Disability Discrimination Act 1992 in Australia and Human Rights Act 1993 in New Zealand, followed by

the Disability Discrimination Act 1995 in Great Britain and lastly the Swedish Disability Discrimination Act.

Comparing the other discrimination legislation in Sweden it is clear that the provisions in the Swedish Disability Discrimination Act are virtually identical with the provisions in the Sex Discrimination Act (Jämställdhetslagen SFS 1991:433), the Ethnic Origin Discrimination Act (Lag om åtgärder mot etnisk diskriminering i arbetslivet SFS 1999:130) and the Sexual Orientation Discrimination Act (Lag om förbud mot diskriminering i arbetslivet på grund av sexuell läggning SFS 1999:133).

The overall purpose of the Swedish Disability Discrimination Act is, according to the Government Bill, that every individual who applies for or have an employment will be guaranteed the right to be judged on the basis of his/her personal capacities and qualifications to carry out the work tasks. An employer shall not be able to judge an

applicant from stereotypes about the capacities, which might be ascribed persons who belong the same group. The purpose of the law is to forbid such stereotype judgement in the labour market.

In so doing the Swedish Disability Discrimination Act is based upon a distinction between on the one hand direct/indirect discrimination, thereby aiming at what is thought to be the objective dimension of discrimination, and on the other hand the intentional/unintentional, thereby aiming at what is thought to constitute the subjective dimension of discrimination (Government Bill 1997/98:179). The ban on discriminating against persons with disabilities is claimed to include both indirect and direct discrimination and is possible to apply independently whether the discriminator acted intentionally or unintentionally. The four forms of discrimination can be summarised as follows:

Table I

Prejudice-causes-discrimination model			
Subjective \ Objective	Objective	Direct discrimination	Indirect discrimination
Intentional discrimination		1	4
Unintentional discrimination		2	3

(1) 'Direct intentional' discrimination focuses upon a decision-making process. It refers to a decision by

an employer not to employ a disabled person. The term 'intentional discrimination' refers to

discrimination motivated by prejudice or intent to harm. The term 'direct discrimination' occurs when employers discriminate because of the functional impairment by treating disabled persons less favourably than others. The term 'intentional direct discrimination' refers to situations when a disabled person who is *similarly situated* with a non-disabled person has been treated less favourably because of a disability.² In order to prove that direct intentional discrimination occurs, an explicit intention behind the action or practice must be pointed out.

- (2) 'Direct unintentional' discrimination refers to those situations where the employer is not aware about his/her prejudices. The term 'unintentional direct discrimination' refers to discrimination where the discriminator is not conscious about his/her prejudice or harmful actions.
- (3) The term 'unintentional indirect' refers to a not deliberate routine or demand, with the consequences of excluding certain groups. 'Indirect or adverse impact or effects discrimination' occurs when the employer applies a requirement or condition, which is applied equally to all, but to which disabled persons cannot comply, and their inability to comply is to their detriment. Issues of indirect discrimination relate to conditions

imposed upon participation which persons with disabilities are less able to fulfil than those without.

- (4) The term 'indirect intentional' discrimination refers to an unjustifiable application of a requirement, with the consequences of excluding certain groups. Indirect intentional discrimination is subtler and recognises that a person might be subjected to a detriment by the unjustifiable application of a requirement or a condition, which, although applied to all persons, has a disproportionate and negative impact upon certain groups which share a common characteristic.

A significant feature of disability anti-discrimination law generally is the inclusion of the requirement that employers might, in certain circumstances, have an obligation to adjust practices or facilities in order to accommodate to the needs of the person with a disability and minimise the disabling effects of the working environment. This is a statutory duty placed upon employers by 6§ of the Swedish disability anti-discrimination law. A failure to comply with such a duty without justification is an actionable act of discrimination. The duty to make reasonable accommodations marks a move towards the concept of 'equality of opportunity'. Reasonable accommodations include modifying the physical environment or equipment used, but also restructuring

jobs, work schedules and providing aids for personal assistance.³

The Government Bill (Government Bill 1997/98:179) recognises that the problems disabled persons face in the labour market are of a different character than those discriminated on the basis of sex, ethnic origin and sexual orientation. The major difference is that functional impairment may have an influence on the ability to carry out the work tasks. The Government Bill admits that this reduced effectiveness cannot always be compensated for by work place accommodation.⁴ Despite this, no attempt is made to modify what discrimination implies due to gender, ethnicity, and sexual orientation on the one hand and disability on the other. The rules guiding what is and what is not discriminatory treatment on the basis of disability are the same as for other groups. The only difference between the Swedish Disability Discrimination Act and the other Discrimination Acts (gender, ethnicity, sexual orientation) is that the former includes a duty imposed on the employer to make reasonable accommodations.

According to the Swedish Government Bill (Government Bill 1997/98:179) evaluations of the effects of ADA indicate that it has had some impact on the awareness of non-disabled persons, but that the unemployment rate of persons with disabilities is still high in the U.S. In the Government Bill (Government Bill 1997/98:179) it is

stressed that disabled persons are discriminated in the labour market.⁵ But, although there is no indication that prejudice is the major source of discrimination, the law assumes that this is the case.

The Government Bill states that within the field of working life every individual who applies for or already has employment should be judged on the basis of his/her personal capacities and qualifications to carry out the work tasks. In the case a functional impairment impedes on the possibilities of a disabled person to work, the employer has the right to refuse the employment opportunity, according to the law. But, even in the case when the disabled applicant is as qualified as a non-disabled applicant, the employer has the right to employ the non-disabled applicant. In other words, the law does not infringe upon the employer's freedom to decide by him-/herself who he wants to employ, in practice the law guarantees the employer to act according to his/her discretion.

The cost/benefit perspective is evident in the law's statement that ability to do a job is regarded as a relevant factor for employment. If a disabled person is refused an employment opportunity because s/he cannot perform the work or is ill suited to do the job, this is not, according to the law, unlawful discrimination. This is rational, market orientated thinking. What is surprising in the Swedish anti discrimination law

is that refusal to employ a disabled person when s/he is equally qualified with another applicant is not regarded as a discriminatory act. There is only a prohibition to discriminate due to stereotypes about the capacity attributed persons belonging to the same group.

The objective of the law to outlaw discrimination based upon stereotypes, having the focus on individual behaviour is pointless. Stereotypes must be understood as social-historical categories, ever changing, seldom admitted. The very hard nut to crack when it comes to removing the obstacles for unequal opportunities and rights for groups that historically have been treated in an unequal way is the intricate inversion of what belongs to society and what belongs to nature. The oppressive stereotype is, in course of time, turned into nature and nature becomes socialized (cf. Bourdieu 1999). It is a well-known fact that employers discriminating against applicants always refer to some restricted ability as a reason for not employing that person (e.g. restricted ability to learn, to make decisions, to adapt, to speak the language). That stereotypes are hidden in the employer's individual judgement is delicate, if not impossible to prove (this is the experience of the earlier anti-discrimination laws concerning ethnic origin).

The basic difficulty with the group of persons with disabilities is the heterogeneity, as pointed out in the

introduction. As a rule, disabled persons are put in the same category, and this is the very vehicle of discrimination. In the context of the labour market and job seeking, it is a fact that different disabilities have different outcome in combination with the fact that different jobs requires different abilities. The ability of a person with a disability depends on a complex of combinations (kind of disability in relation to the job and the different tasks included, plus the accommodation needed/given). In one case a disability may seriously influence the ability to perform a job, in another case the same disability may not at all influence the ability to perform the job. In order to draw a just conclusion if a job applicant with a disability is able enough, a more thorough analysis must be made, based upon well-informed sources about the disability in question, in combination with the person's qualifications and the specific job. It might be argued that discrimination can be unintentional in the sense that the employer does not have prejudiced attitudes, nonetheless s/he discriminates against disabled persons because of the *information costs* of distinguishing a particular disabled employee from the average disabled employee. The law gives in practice free scope for making a cost/benefit analysis in such situations, thus avoiding the information costs by the claim that recruitment should be based on a "relevant decision".

As have been argued above, discrimination in the Swedish Disability Discrimination Act is always related to individual action. In accordance with the definitions of the types of discrimination in the Government Bill, referred to above (direct/indirect, intentional/unintentional), the common feature of discrimination is prejudice transformed into action. This action can be direct or indirect, intended or unintended but an individual or a group of individuals always undertakes it. The action related types of discrimination presented in the Government Bill always refer to the thinking of an individual or a group of individuals. Thinking in a demeaning way and then promoting practices or conditions that support that thinking is thus what makes up discrimination according to the lawmaker. Basically, there is a tacit assumption in the anti-discrimination law that disabled persons' disadvantage in the labour market is a function of prejudice. This assumption may be questioned.

The focus on the individual – the individual employer with his/her rights and the individual with disabilities with his/her rights – where the one has the right to choose but ought to do it without stereotypes – not confounding the specific individual with his/her abilities with an in advanced formed conception about a group – and the other may have and may not have a job as long as s/he is perceived as an individual, is interesting in its extreme narrowness. In

the following I will open the perspectives towards a more thorough analysis, explaining in a more precise way the discrimination of persons with disabilities.

Merton's typology - prejudice and discrimination⁶

Prejudice and discrimination are crucial terms in the study of the anti-discrimination law of disabled persons in the labour market. The terms denote distinct phenomena. Prejudice refers to an unfavourable attitude toward certain individuals or persons by virtue of being members of a particular group. In contrast, discrimination refers to an overt action, such as the denial of opportunities and equal rights to the members of that particular group. Merton's typology shows that prejudice does not always lead to discrimination and suggests that discrimination is not always directly caused by prejudice.⁷

A crucial point in Merton's typology, usually not comprehended beyond the circle of social scientist (the Swedish anti-discrimination law is an example of that), is that individual prejudice does not necessarily express itself in discrimination and, moreover, that discrimination might result from causes other than prejudice. Merton identifies four categories of persons according to how they rate on a scale of prejudicial attitudes and discriminatory behaviour:

1. The unprejudiced non-discriminators: persons who believe and practice the equality of all persons.
2. Unprejudiced discriminators: persons who are unprejudiced but discriminate when it is expedient or profitable to do so.
3. Persons who are prejudiced but involves in discriminatory actions only when there is no sanction against it; their discriminatory practices are situational.
4. Prejudiced discriminators: persons who openly express their beliefs and do not hesitate to discriminate.

In the following I will modify Merton's typology by using employers' right to organise their workforce and production which leads to a third variable; that of always considering an employees working capacity (reduced/unreduced). Employers have a role within a specific system, the labour market system, this role implies - among other things - to act within a competitive world.⁸ As a consequence the organisation of the workforce and production must take into consideration the results of cost/benefit analysis. The use of the variable "working capacity" is motivated when disabled persons' employment opportunities are considered due to the fact that disabled persons - unlike other groups having a disadvantaged position in the labour market - might have a reduced effectiveness due to functional

impairment. Employers act within a system that conditions their decisions. They do not act as private individuals unconstrained by system requirements. Acting within the labour market system implies acting according to the binary economic beneficial/unbeneficial (gaining as much as possible at lowest costs) thus taking into account the employee's effectiveness. The perspective of taking into account what will increase/decrease the costs and what will increase/decrease the benefits is deeply rooted in the market, in fact one could with the terminology of Luhmann call it "the binary defining the very market system".

It is a fundamental point of departure within neoclassical economic theory that employers calculate costs and benefits in employment situations. According to neoclassical economic theory employers don't recognise discrimination as a significant factor in their decision-making. Employers don't see themselves as prejudiced; they see themselves as facing facts. Since employers act within a competitive labour market system they will recruit the person who is most productive for a given price (salary), or the person who can produce a certain quantity to the lowest costs. The conclusion from this reasoning is that prejudice-based discrimination cannot be a lasting phenomenon in the labour market, at least not in the long run (le Grand SFR 1999). Employers' decisions whether to hire or dismiss a disabled person are

taken within the labour market system. This system modifies their behaviour in the direction of conforming to the binary cost/benefit. It is the system that conditions his/her action and not his/her private adherence to the claims of all people to equal opportunities.

To describe the issue of disabled persons' right to be treated fairly in the labour market system and to proceed to its analysis we must consider (1) the claims of equal treatment and the principle of non-discrimination (universal criteria providing justification of the distributive system), (2) employers' attitudes concerning equal treatment of disabled persons and the principle of non-discrimination, (3) their actual behaviour as it is manifested in decisions to employ a disabled person and (4) employers' right to organise their workforce and production efficiently. Employers' attitudes and behaviour are thus viewed in relation to two rights: equal treatment of every person and employers' right to organise their workforce and production.

With respect to the right of equal treatment, employers might *act in accordance with it, without having any private conviction of its moral validity*. Thus, so far as the beliefs are concerned, we can identify two types of employers: those who genuinely believe in equal treatment of disabled persons and those who do not.

Similarly, with respect to actual practices: behaviour might or might not conform to the principle of equal treatment. Thus, behaviour might or might not conform to employers' own beliefs concerning the moral claims of all persons' equal treatment. "Stated in formal sociological terms, this asserts that attitudes and overt behaviour vary independently. *Prejudicial attitudes need not coincide with discriminatory behaviour.*" (Merton 1976 [1949])

Similarly with respect to employers' right to organise their workforce and production efficiently *their attitudes and/or their actual behaviour concerning equal treatment of disabled persons might, or might not, conform to cost/benefit analysis*. Stated in formal sociological terms, this asserts that cost/benefit analysis and the principle of equal treatment vary independently. That which is cost effective/ineffective is not necessarily congruent with employers' conviction as regards the principle of equal treatment. And further: cost effectiveness need not coincide with non-discriminatory behaviour. The question to be considered in the following is how viable those cases are where behaviour is not congruent with cost/benefit analysis. There is no doubt that discriminatory attitudes can exist and live on independent of cost/benefit analysis. (I will refer to this issue later on.)

By exploring the interrelations between attitudes and behaviour towards disabled

persons' right to equal treatment and employers' right to organise their work force and production, we can identify eight types. All types are likely to exist

in social life, although in varying numbers and with different viability.

Table II

Attitude	Prejudiced		Unprejudiced	
	Unreduced	Reduced	Unreduced	Reduced
Working capacity	(a)	(b)	(c)	(d)
Discriminatory	— + —	— — —	+ + —	+ — —
Behaviour	(e)	(f)	(g)	(h)
Non-discriminatory	— + +	— — +	+ + +	+ — +

(a): Preference discrimination i.e. distaste for association with disabled persons. It might be purely a question of aesthetics, based upon a judgement of what is normal and attractive. In this case prejudices weigh heavier than economic rationality. Employers in this type discriminate because they do not believe in equality of opportunity. For these it is clear that even qualified and fully efficient disabled persons ought to be discriminated. This type is the confirmed prejudiced discriminator; his/her prejudices are consistent with his/her deviation from the principles of equal treatment. Discrimination of this type does not imply any discrepancy between ideals and behaviour. But there is a discrepancy between the individual's private belief and practice on the one hand and the economic

rationality of him/her as an employer on the other.

If we presume that employers are rational actors - which is one of the tenets of the classical economic theory - then this type, which is the target group of the Swedish Disability Discrimination law, is virtually non-existent, or their behaviour is transient.

(b): Employers of this type discriminate because they are prejudiced towards disabled persons and because they see it as just and expedient to discriminate people who are less effective than others. Employers use their right to employ others in so far as it is cost effective. Employers of this type are prejudiced, but outside the scope of the Swedish Disability Discrimination law since the law guarantee employers to hire

according to the merit principle, i.e. the most qualified or to choose among equally qualified.

Cost/benefit analysis might or might not be biased by prejudices. Those employers, who stereotype disabled persons and apply preconceptions about their abilities and employability, will reach a misleading conclusion in a cost/benefit analysis. Prejudiced attitudes thus blur the rationality in the cost/benefit analysis since the employer does not start from the applicants' abilities and real productivity, but from his/her preconceptions what it means to be deaf (for instance being slower, less smart).⁹ The employer might have no prejudiced attitudes about what it means to have a certain disability, but may reason in the cost/benefit analysis according to an assumed, average productivity of disabled persons. In the literature on discrimination this is referred to as statistical discrimination.¹⁰ The employer might assume, for instance, that persons with disabilities are more often than non-disabled persons reported sick and this might imply additional costs.¹¹ An employer might assume that an applicant with disabilities has a reduced working capacity. In this case discrimination is based upon ignorance of the specific disabled person's abilities and capabilities.

Ignorance in turn permeates employment decisions. The degree to which this perception – that a disabled person is less productive – is based on bias or represents an objective assessment of worker qualifications is not easy to determine.

- (c): Employers discriminate though they are unprejudiced and the disabled applicant is qualified for the job. Despite his/her own freedom of prejudice and the disabled applicant having necessary qualifications and no reduced working capacity, s/he supports discriminatory practices, due to two reasons. (1) Because it might be a more profitable course (“it may hurt business”); other persons condition his/her pragmatism, employees might be unwilling to cooperate with a disabled colleague or customers might have prejudices and thus avoid visiting places where disabled persons are employed. The discriminator of this type might be merely a conduit on third party discrimination. The discriminator is merely reflecting the tastes of other employees, other employers or customers. Discrimination of this type is prohibited in the Swedish Disability Discrimination law and is covered by the prohibition of indirect discrimination. (2) If the employer can prove that a non-profit or another particular interest is more important than

interest to prevent discrimination of persons with disabilities then his/her action falls outside the scope of law. Examples of such social and non-profit interests that can counter balance interest of not discrimination of disabled persons are, according to the Government Bill, equality between sexes, security of the state, re-arrangement of positions in working life, re-employment of persons (Government Bill 1997/98:179).

- (d): Employers in this type enter into discriminatory behaviour due to the reduced working capacity of the disabled applicant. Acting within the market system implies considering cost/benefit analysis in employment situations. This type is outside the scope of the Swedish Disability Discrimination law, since employers use their right to employ in so far as it is cost effective.
- (e): Despite his/her prejudiced attitude, this type of employers supports non-discriminatory practices when it is the more profitable course. Exploitation takes place due to the strong position employers have and the weak position disabled employees have. Their disadvantaged position in the labour market might depend upon the vulnerability of being unemployed. High unemployment rates among disabled persons encourage discriminators' view that disabled persons might be exploited or treated unfavourably without a risk of complaint. This type of employer does not believe in the claims of equal treatment for disabled persons, but conforms to it in practice when it is economically beneficial to employ disabled persons. It is "the businessman who forgoes his own prejudices when he finds a profitable market among the very people he hates, fears, or despises" (Merton 1976 [1949]). Both types (c) and (e) are people of pragmatism but pragmatism dictates different courses of behaviour in the two cases. Type (e) does not accept the moral legitimacy of equal treatment and non-discrimination; he will cease to conform when e.g. wage subsidy is reduced or abolished. Type (c) on the other hand, is committed to the principles of equal opportunity and non-discrimination and will conform in practice when there is pressure from institutional, legal and interpersonal forces.
- (f): Improbable. This type is virtually non-existent here.
- (g): No discrepancy between attitude, cost/benefit analysis and behaviour. Individuals in this type adhere to the claims of equal treatment for disabled persons in both belief and practice given that the disabled

applicant has not reduced working capacity.

(h): In this type we might find employers within disabled persons' own organisations and within other non-profit making associations. They are neither prejudiced nor given to discrimination even when the cost/benefit analysis is negative since the environment within which they act is non-profit making.

Labour market policy issues

Knowing that disabled persons are disadvantaged in the labour market does not in itself point to appropriate lines of measures in social policy. It is also necessary to know the distribution of prejudices among employers and the underlying motive for their behaviour. Discriminatory behaviour is not the visible expression of one problem, but of many different types of problems. Further, to explain this discriminatory behaviour as a departure from a moral principle for instance, of equal opportunity will lead to serious errors in theory, practice and policy. Any statement of the problem of discrimination as a gulf between ideals and prevailing practice is, according to Merton, overly simplified. "*Overt behavioural deviation (or conformity) may signify importantly different situations, depending upon the underlying motivations.*" (Merton 1976

[1949]) The gulf between ideal and practice as regards employment of disabled persons can be adequately described only when factors such as *employers' right to organise their workforce, labour markets' needs and disabled persons' productivity* are taken into consideration. Thus, we find three types of employers: (1) employers who might discriminate and be prejudiced to disabled persons (types a, b), (2) employers who find it expedient to discriminate e.g. due to a negative outcome in the cost/benefit analysis or because the discriminator is merely reflecting the tastes of other employees, other employers or customers (types c, d) and (3) those who fail to translate their prejudices into active discrimination (type e).

"Those who practice discrimination are *not* people of one kind. *And because they are not all of a piece, there must be diverse social therapies, each directed at a given social situation.*" (Merton 1976 [1949]) Consequently, no single social policy (e.g. anti-discrimination law) can be adequate for all these types. Different kinds of discrimination in different contexts and with different motives require different policies if the problem of discrimination of disabled persons in the labour market is to be tackled. The unprejudiced discriminators (types c, d) will respond differently from the prejudiced non-discriminators (types e, f) or from the prejudiced discriminators (types a, b). Their response is going to be

conditioned by the incentives and demands in the environment of the labour market system, i.e. of the labour market regulations and incentives provided to compensate the loss of effectiveness of disabled persons.¹²

If we assume that employers' decisions are guided by the system within which they operate (predisposing them to employ the most productive for a given price), then there are four types in the typology above that are more stable than others namely: type (b), (d), (e) and (g). They are stable types because the employers' behaviour is consistent with cost/benefit analysis. The other four types are unstable because the behaviour is not consistent with cost/benefit analysis and are in course of time going to be transferred to one of the more stable types when it becomes more economically beneficial (that which is economically rewarding/unrewarding must comply with behaviour), or because both attitude and cost/benefit analysis point in the same direction.

The property space above discerns a dynamic, which consists of certain combinations (those that do not accord with the economic rationality that characterises the labour market system's binary codification of observations), which in the long run turn over to combinations complying with the logic of the system. Those combinations in agreement with system's logic are the

most important; therefore they appear in real life more often than others.

If only one measure is applied - in accordance with the single cause model - the result will be limited. Very likely, the persons with disabilities who after enactment of the anti-discrimination law are going to enter the labour market, are those whose profile accords to non-disabled employees i.e. with no reduced work capacity or whose loss of effectiveness is compensated by wage subsidies. Two questions arise: (a) did not they anyhow find a job in the labour market? As has been pointed out in the beginning, the group disabled persons is so diverse and contains also those who have no, or only a slight, disadvantage due to their disability (in combination with kind of education) to enter the labour market. (b) What happens to those disabled persons whose profile does not accord to non-disabled employees? There is a risk that the Swedish Disability Discrimination law will have none, or only marginal effects as regards the employment situation of persons with disabilities.

Formal equality and substantive justice

The concepts of formal and substantive equality are fundamental in order to understand the exclusion of disabled person from the labour market.¹³ Actually they are fundamental for every

conflict or problem involving legal strategies for its resolution.

According to Doyle (1997) there are two models of anti-discrimination law that have been developed by legal theorists. Doyle describes the weaknesses of these models as follows: The first is the *individual justice model*, which seeks to reduce discrimination by focusing upon the decision-making process. It aims to achieve justice for the individual, rather than for an identifiable class or group in society. It is a model based upon the idea of distributive justice, which requires treating *similarly situated* persons similarly. Discrimination, therefore, in this model, involves treating similarly situated persons differently.

The individual justice model fails to recognise that discrimination can be institutionalised and reinforced by social and economic disadvantage, that discrimination might occur as a result of the very function of social systems (cf. Jenkins 1991). Discrimination is instead viewed as a result of discriminating individuals. It is furthermore almost impossible to define the term "*similarly situated*". As regards the issue under consideration in this article, namely disabled persons' employment opportunities, these are as a rule never similarly situated. The formal equality principle - equals should be treated equally - cannot be used by disabled workers to challenge the workplace environment and practices,

because these have been designed according to the needs and preferences of the non-disabled majority; they are not simply "equals". Another weakness with the individual justice model is that the principle of formal equality wipes out differences. By categorising the members of a society as citizens, the differences between them are ignored. Formal equality thus assumes that it is possible to ignore an individual's disabled status that the distinguishing feature disability is never relevant, despite much evidence that disability in respect to employment is a difference, which can never be ignored but rather recognised and accommodated. Equal treatment refers to decisions made on the basis of established rules; regardless of how fair they are in the individual case. The system of rules and propositions is applied equally to all cases irrespective of particular characteristics. However, despite that protection against unlawful discrimination is the overriding principle in all anti-discrimination law, inequalities and their impact on participation are neglected, while systemic mechanisms which provide individuals with dissimilar opportunities are taken for granted. Formal equality does not imply that exclusion and discriminatory effects produced by social systems ought to be removed. (The only exemption made by the Swedish disability discrimination law from the formal equality principle, is that reasonable adjustments of the working place have to be made.)

The second model is the *group justice model*. This is concerned with the results, the consequences of institutionalised discrimination that is discrimination that does not occur due to prejudiced individuals' decisions but as a consequence of the institutions and functions of social systems. The group justice model is based upon the idea of substantive justice because it aims to change the position of the disadvantaged group (rather than just for selected individuals). It recognises the legacy of past discrimination, that discrimination practices are embedded in social systems and identifies the oppressed group as the intended beneficiary of legal intervention. "As a result, it tends not to be even-handed, but acts to advance the economic position of disabled persons." (Doyle 1997) Legislation must take into account the effects of past discrimination and present disadvantage. This might require the utilisation of strategies such as preferential treatment and positive discrimination for instance wage subsidy in order to assist disabled persons to gain and retain employment.

Substantive justice thus necessitates governmental obligations to create conditions for inclusion in the labour market. Governments must take the responsibility for and undertake measures, rather than enacting laws refraining from discriminatory practices. Such obligations require investments, or the admission that politics cannot interfere in the economic system.¹⁴

Substantive justice implies significant expenditures for the state in order to ensure equality of outcomes for disabled persons (e.g. to reduce unemployment rates among disabled persons on the same level as for non-disabled persons), whereas there are no significant expenditures in the enactment of anti-discrimination law. Substantive equality policies, as regards disabled persons' opportunities in the labour market, require that employment opportunities are to be not only open in a formal sense, but that all (even persons with disabilities) should have a fair chance to attain them (Rawls 1990).¹⁵

The conflict between equal treatment and equality of outcomes cannot be easily resolved, nor finding a balance of peaceful coexistence. The demand for equal treatment leads to the extension of formal equality, but this advances at the expense of justice in outcomes (Kronman 1983). Further, formal equality is inadequate and inappropriate where the affected groups or individuals are in fact not similarly situated. It is, as Alston (1995) argues, quite possible to accord equal protection under the law to persons with disabilities, while effectively disenfranchising and silencing them through the maintenance of systems (e.g. the market system operating according to binary cost/benefit) which consider as irrelevant the particular situations and needs of persons with disabilities. Unless the substantive

equality dimension is also addressed, equal opportunity to gain and maintain employment, despite equal treatment under the law is arguably inappropriate in the area of disability because people with disabilities are not similarly situated when compared to their non-disabled counterparts (Quinn 1995).

It must also be pointed out that enactment of laws guided by formal equality principles reflects the smallest possible public sector, deregulation in the labour market and minimal state interference.¹⁶ In contrast, substantive equality strives to ensure equality in outcomes, by compensating for the consequences of unequal initial positions. To ensure equality in outcomes, e.g. employment opportunities for disabled persons, presupposes the design of policies and programmes, which aim at diminishing or eliminating disabling conditions.

There is a parallel, on the one hand, between the understanding of disability as an individualised medical problem and the formal equality model since both individualises social problems and pay less attention to the role played by the economic system in the process of constructing disability and, on the other, between the understanding of disability as a social phenomenon and the substantive equality model since both emphasise the role of the environment in bringing about equalisation of opportunities for disabled

persons (Michailakis 1997, Jones and Basser Marks 1999).

An alternative approach, according to Doyle, is an equality of opportunity.¹⁷ Equality of opportunity concentrates upon the notion of *merit* in a competitive world. The law acts to promote equal opportunity in order to create conditions of perfect competition in which merit is the distinguishing feature or determining factor rather than disability status. Equality of opportunity, like the individual justice model, is concerned with *formal equality* by adjusting or regulating the decision-making process by which jobs or employment benefits are distributed. "It may be contrasted with equality of outcome which, like the group justice model, is concerned with *substantive justice* and the results of competition on merit." (Doyle 1997)

The Swedish disability discrimination law is guided by the principles of formal equality, focusing upon the decision-making process and requiring that similarly situated persons should be treated similarly. According to it, discrimination means in application process not seeing and judging the applicant as an individual (the outcome of the application process is wholly irrelevant). It includes requirements on reasonable accommodations in order to create conditions of perfect competition. The law does not involve any interventionist strategies in order to achieve true equality of opportunity

such as preferential treatment, affirmative action, positive discrimination, quota schemes etc. The law does not take into account the effects of past discrimination, disadvantage due to reduced effectiveness, restricted education opportunities, etc.

Doyle (1997) refers to Dworkin's distinction between 'equal treatment' versus 'treatment as an equal'. Equal treatment is the right to an equal distribution of some opportunity or resource. Treatment as an equal is the right to be treated with the same respect and concern as anyone else. Treatment as an equal is called fundamental, while equal treatment is called derivative. This raises the question, according to Doyle, of whether the goal of law with regard to employment opportunities of disabled persons should be the levelling of the playing field so that all groups can compete on merit under similar conditions, or whether it should be the recognition that different groups have different qualities and needs which the law must accommodate.

The latter pluralist perspective may be more appropriate for the development of disability discrimination theory. Whereas Dworkian equal treatment would ignore the different experiences, backgrounds and physical needs of disabled persons, Dworkian treatment as an equal would entitle disabled people to be recognised as different: entitled to be measured and judged

on their own terms and in their own environmental conditions. The ability to be measured upon their own terms is crucial, because the traditional Aristotelian idea of justice involves treating persons alike in like circumstances, but the standards of measuring like with like are typically those of the majority or dominant group (for example, white, European, able-bodied males). (Doyle 1997)

The fact that disabled persons are proportionately under-represented in the labour market could be seen primarily not as an indication of prejudiced discrimination but as a case of disadvantage and inequality of opportunity due to unequal initial positions. Anti-discrimination law cannot redress their unequal initial positions. "The denial of opportunities and resources is an issue, not of discrimination, but of distributive injustice – an unfair distribution of social resources and opportunities that results in limitations of participation in all areas of social life." (Bickenbach 1999)

The exclusion from the labour market and the related poverty disabled persons experience cannot be reduced to individual discrimination. Their exclusion might depend on socially produced disadvantages such as education, lack of resources to meet impairment related needs, minimal political influence etc. The most accurate indicator of the

social status of being a person with a disability is, according to Bickenbach, poverty. Distributional injustice is in line with the claims of the economic system. International capital, for instance, can cut across national frontiers in search of better investment opportunities, which leads to an intensified competition between national-states and their citizens. A country's workers must become more productive and competitive in a global economy (Dominelli 1999).

The omitted aspects

Unemployment undoubtedly is three or four times higher among disabled persons than among non-disabled, but why does the law assign the responsibility for this complex, multi-dimensional and systemic phenomenon only to discriminating individual employers? Discrimination certainly occurs and it is appropriate to outlaw it. But, where the economic system creates the disadvantages; according to the law there is no discrimination since no individual discriminator can be discerned. There is exclusion and denial of employment opportunities; there is injustice and inequality, but as long it cannot be related to individuals it falls outside the scope of the law.

Discrimination can be interpreted as the institutionalisation and bureaucratisation of privilege and utility. Merton, Feagin *et al.*, argue that discrimination can be

found institutionalised in the social structure. "If the assumption of ignorance as the root source of discrimination is to put to one side, then *we must be prepared to find that discrimination is in part sustained by a socialized reward system.*" (Merton 1976 [1949]) Exclusionary rules must always be justified by universal criteria that are indifferent to disability/ability, such a universal criterion is that of equal treatment. *There is a permanent tension within the distributive system resulting from the need to legitimate itself by preserving openness of access (equal opportunity) and the desire to reproduce itself by resort to closure on the basis of merit.* (Cf. Parkin 1979)¹⁸ That is, one can formulate the problem the other way round, from the system's point, and state that there is a denial of access to employment opportunities for disabled persons, and this denial may contribute to the nature of the distributive system, including the distribution of power.

Discrimination can be seen as a rational response over scarce resources leading to the establishment of a stratification system in which the dominant group benefits economically, politically, and psychologically, i.e. gain-motivated discrimination. Theories of gain-motivated discrimination have a long tradition within sociology. They can illuminate the discrimination disabled people are subjected to. The core idea of these theories is that discrimination is the predominant form of closure. A

group enjoys access to scarce resources which gives them a shared interest and which they seek to preserve through processes of social closure, whereby others are kept out against their will. In turn, the discriminated seek to gain access through claims of citizenship and equal rights.

Usually one group of competitors take some externally identifiable characteristic of another group of (actual or potential) competitors – race, language, religion, local or social origin, descent, resident, etc. – as a pretext for attempting their exclusion. It does not matter which characteristic is chosen in the individual case: whatever suggests itself most easily is seized upon. Such group action may provoke a corresponding reaction on the part of those against whom it is directed (Weber 1968).

Rewards, according to Merton, might be of two kinds: psychic gains and preferential access to opportunity. When a population is divided in non-disabled/disabled with a subsequent disadvantage for the group of disabled persons, the non-disabled group of the population derives psychic and material gains from this institutionalised superiority status. It is a system, which in the labour market might supply preferential access to opportunity for the non-disabled part of the population. Thus, rewards for the non-disabled part of the population supply motivation for

discrimination. Jenkins (1991) argues that disability is a factor contributing to the production and reproduction of stratification in its own right, independently of class relations. Disability, he states, is a factor that contributes to the reproduction of the stratification system in two ways: (1) impairment is a disability in the labour market for a great number of people, disability of family members also affects the labour market prospects of non-disabled family members; (2) impairments also entails social and economic disabilities irrespective of the labour market and employment status.

There are many reasons for arguing that the individualised approach of anti-discrimination law is less appropriate and capable in providing an alternative for combating disadvantage and advancing employment opportunity among disabled persons, than the group justice model which recognises that different groups have different characteristics and needs which the law must accommodate.

There are three problems related to the application of anti-discrimination legislation. Firstly, as Jones and Basser Marks (1999) point out, the question of who has a disability very often becomes central to the application of law and therefore relies heavily on the much-criticised medical model of disability. Secondly, the concept 'similarly situated' is, as Doyle (1997) observes, almost impossible to define and

especially when it comes to disabled persons' employment opportunities since they are as a rule never similarly situated. As a consequence the law shares all the weaknesses of the formal justice model. The principle of equal treatment in anti-discrimination law assumes that equals should be treated equally and unequals unequally. By ignoring differences in working capacity, however, the idea of formal equality treats unequals equally. It imposes the same requirements of productivity on the visually impaired and the non-visually impaired. On all such occasions, by treating the dissimilar as similar, it places the 'other' (the visually impaired) in a disadvantage. Adherence to the principle of equal treatment allows for this kind of discrimination. It sets aside relevant differences between individuals and subjects them to the same uniform law. Thirdly, a causal connection is a precondition to prove that direct discrimination is at hand between unfair treatment and disability. Discrimination 'because of' disability requires making a causal connection between the discriminatory act and the complainant's disability (Doyle 1995).¹⁹

The common denominator for these three weaknesses is that, instead of focusing on institutional or system discrimination, anti-discrimination law individualises the question of disadvantage disabled people experience in the labour market. The indi-

vidualisation of the problem is apparent both in the sense that disabled persons' disadvantage is understood either as lack of skills, lesser degree of competence or due to prejudices they face and that employers are seen as private individuals outside the market system. Disabled persons' "failure" to gain and retain employment is overdetermined by the egalitarian values of equal opportunity. Failure to gain and retain employment can be interpreted as disabled persons' inability. This conclusion, which adherents to equal treatment principle might see as simply "facing the facts", reinforces the belief and is reinforced by the belief that the labour market – a neutral system – provides equal opportunity to all comers and that the talented and hard working succeed in making their way into it. In consequence, the new law might actually reinforce the barriers that disabled people actually confront. Past discrimination is going to be, to a considerable degree, replaced by a new disadvantage grounded on egalitarian values. The lawmaker therefore essays a private solution to a social problem, but fails to recognise that individualised solutions cannot be achieved for problems that are essentially systemic in nature (Drake 1999). That is to say, even if individual discrimination due to prejudice is removed, poverty and unemployment will remain due to distributional injustice.

The coverage of law is generally extremely limited and will only address

a small range of issues confronting persons with disabilities. The target group of the law - prejudiced discriminators who treat a person unfavourably because of his/her disability - is very small. Due to its limited approach it is questionable if the law can lead to any real changes within the labour market. Experiences from other countries also show that, although anti-discrimination law is designed to benefit persons with disabilities, a very small group of people with disabilities is able to benefit from it (see Government Bill 1997/98:179). Bickenbach claims that anti-discrimination law favours intelligent people with late onset mobility or sensory impairments. If discrimination stemmed from negative attitudes only, anti-discrimination law, in combination with accommodation of work places would be enough, because a great number of persons with mobility impairments or sensory impairments equipped with information and communication technologies (ICT) can work with full capacity. Evaluations studies concerning policy programmes within the labour market in Sweden using ICT in order to increase the job opportunities of persons with disabilities, also show that it is the visually and the mobility impaired persons that gained most (Michailakis 2000). The effects of mobility and sensory impairments are in a lot of cases possible to reduce radically. Against this background, it seems rather plausible that anti-discrimination law is going to help those with the disabilities

that can be reduced by technology in combination with the highest level of education. The approach promoted by anti-discrimination laws could thus produce an underclass of disabled persons. With the risk, as Bickenbach points out that, "Their impairment-related needs go unmet, and they remain unemployed, uneducated and powerless." (Bickenbach 1999) These groups are people with emotional disabilities, developmental disabilities, people with dual diagnosis or psychiatric problems and generally all these occupationally disabled people whose impairment implies reduced work capacity. It is a telling example that despite the above mentioned programme in Sweden has existed for more than a decade the number of persons with learning difficulties who had benefited from the programme receiving computer based ICT, was so low so it was meaningless including this group in the investigation, as well as that the visually and mobility impaired dominated unrivalled among the receivers (Michailakis 2000). The rule of reasonable accommodations has until now benefited and will most likely continue to benefit people with physical, rather than intellectual or psychiatric disabilities.

To conclude, in the event an anti-discrimination law will result in that more disabled people are going to gain and maintain employment depends not only on the law itself, but also on other

measures in a strategy for inclusion of the excluded disabled persons.²⁰

Elimination of discrimination continues to face two obstacles, one irrational, the other rational. Although the elimination of prejudices and 'exclusionary stereotypes' takes time, it is easier than tackling rational discrimination. The reason is a cruel economic rationale whereby some people are deemed to be a bad investment, and it leads to the exclusion of pregnant women, elderly persons or people with disabilities from the labour market. (Tomasevski in Jones and Basser Marks 1999)

Sometimes they are a bad investment, sometimes it will show up that they were not, that they are capable and/or bringing a new quality to the work that was not foreseen (as with the emergence of multicultural groups, showing that persons with different backgrounds working together, after some initial difficulties, create a good working milieu). Many may however remain outside the labour market, in the general trend of reduced need of labour power (Bauman 1998).

Conclusion

There is a paradox with anti-discrimination law. Formal equality, anti-discrimination law and adherence to the principle that the market is a space

where everyone is treated equally are interrelated issues. The rules of anti-discrimination law aim at promoting this basic characteristic of the market i.e. equal treatment. The law aims at prohibiting the prejudiced behaviour of individual employers who act against the market principle. But, if it is true that the labour market does not treat everybody according to the same standards out of some moral principle working in its system, but that the market system functions according to the binary cost/benefit, then discrimination from employers might occur only as irrational acts, or not occur at all since the system binary is more powerful than individual preferences.²¹ Divergence from the binary can only be understood as irrationality due to sheer ignorance or prejudice.

The market system and the consequences it has for disabled persons are not called into question by the anti-discrimination law (a telling example is in the Swedish Disability Discrimination Act the respect for the employers' right to employ the one s/he wants). Equal treatment – the common denominator of the market, anti-discrimination law and formal equality – on the one hand and the individual's right on the other collide with any real attempt to redress disadvantages and inequalities produced by the labour market system itself. "The libertarian framework perceives policies of redistribution as an unacceptable infringement of individual liberty and the

market principle.”(Rawls 1998) By definition, according to neo-classical economic theory, a system based on equal treatment does not produce disadvantages and inequalities. That the labour market system is built upon and functions according to male-well educated-non-disabled-super-efficient persons as a norm, leading to the exclusion of more and more people, is taken for granted.²² Every attempt to redress disadvantages is interpreted as an interference in the system, and/or an infringement on the rights of individuals and as an attempt to give advantages to some groups. The possibility that everybody does not have equal prospects of success is not taken into account, it is rather understood in terms of ‘lack of skills’, ‘lesser degree of competence’, that is, as factors belonging to the disabled person itself.

When the neoclassical economic theory asserts that the labour market system is an open system which everyone with necessary educational credentials or qualifications can gain and retain access to, the under-representation of disabled people might be explained as due to their individual faults. Any relative lack of success to gain employment on the part of disabled people might be attributed to the individual. “People who are successful are praised as being ambitious, imaginative, industrious, preserving, talented, and the like; those who are not successful are blamed as lacking in these qualities.” (Gould 1999) Neoclassical economic theory as

a model of formal equality values, demonstrates the disabling consequences embedded in labour-market discrimination, treating disabled persons the same as non-disabled, implementing universalistic standards that implicitly privilege non-disabled. The under-representation of disabled people in the labour market does not represent a deficiency on the part of disabled people, but a form of discrimination embedded in the organisational structure. The debate about disabled persons’ discrimination/exclusion in the labour market which takes as its point of departure the prejudice-causes-discrimination model, functions as a political smoke screen which hide politicians’ inability to confront the incompatibility between the principle of disabled persons’ equal opportunity in the labour market and their actual exclusion from employment.

To outlaw discrimination against disabled persons is to make opportunities for employment open in the formal sense, while the systems impeding participation in the substantial sense remains unchallenged. Equal treatment provided by the discrimination law, is insufficient because it does nothing to further the chances of disabled persons to employment opportunity. Ensuring that no one is *de jure* excluded on account of their functional impairment is one thing, quite another is to pursue the ideal of equal employment opportunity in practice, i.e. that all persons should face roughly the same

obstacles in the pursuit of their goals. It is one thing to provide equal rights and quite a different to provide equal opportunities to exercise those rights and enjoy the advantages they provided. The anti-discrimination law does not presuppose the existence of collectivities or a social system.

The basic structure of the social system affects the life-prospects of typical individuals according to their initial places in society, say the various income classes into which they are born, or depending upon certain natural attributes, as when institutions make discrimination between men and women or allow certain advantages to be gained by those with greater natural abilities. The fundamental problem of distributive justice concerns the differences in life-prospects which come about in this way. (Rawls 1998)

In the Swedish Disability Discrimination Act neither employers, nor persons with disabilities are considered as part of the wider whole. They appear as individuals, the one duly equipped with an abstract equality, the other addressed with the respect for the market's functioning, and implying no intrusion into their traditional right to choose whomever s/he finds suitable. It is thus a hollow victory for those fighting for anti-discriminatory legislation. For persons with disabilities it will most likely become a boomerang; once

discrimination is outlawed, their exclusion from the labour market must depend on themselves, their own individual lack of employability. Individualised reasoning generates individualised causality.

Notes:

- ¹ Applying the binary of cost/benefit does not imply that a moral quality is ascribed to the distinguished part, or that less effective persons are distained or depreciated. But the effects of the binary are, as regards many disabled persons, negative and disadvantage them with respect to labour market opportunities.
- ² "4§ An employer is not allowed to treat a job applicant or an employee with a disability less favourable than s/he treats or should have treated persons without such a disability in a similar situation." (Government Bill 1997/98:179)
- ³ There is a major difference between the impact of disability and gender, ethnic belonging, sexual orientation seen from a labour market perspective. Intellectual, mental impairments or severe physical impairments limit to a greater or lesser extent ability so that the individual has difficulties in competing successfully in the labour market without accommodation of the work place and/or other measures, whereas being male or female, having the one or the other sexual orientation or coming from another country do not have bearing upon the individual's working capacity as such (it could temporarily be reduced, for instance due to inability to speak and understand the language). Disabled persons, unlike women and ethnic minorities, might also face discrimination due to architectural and communication barriers.
- ⁴ In many cases, a disability implies a reduced effectiveness compared with not having one, and extra resources are needed for

accommodation of the physical environment and accommodation of the information (sign language, Braille). Communication at the work place takes in many cases longer and in the case of intellectually occupationally disabled, communication becomes considerably limited. A recent study among those who have received ICT-based accommodations at the work place shows that despite the accommodation many needed help from others in order to carry out their work (see Michailakis 2000). This becomes a disadvantage since a production system can bear strains only up to a certain limit. Time strain is, for instance, a very sensitive factor for the production system.

⁵ The Government Bill refers to a survey carried out by the Statistics Sweden in 1997 on the request of the Disability Ombudsman. The study reveals that a great part of the 5 400 persons with disabilities which responded the questionnaire had experienced or do experience discrimination in working life. The Government Bill concluded that the results of the survey couldn't be interpreted otherwise than that discrimination takes place in working life, but that its prevalence is difficult to estimate (Government Bill 1997/98:179).

⁶ The following draws on Merton's "Discrimination and the American Creed" (1976 [1949]).

⁷ The assumption inherent in the prejudice-causes-discrimination model is, as Feagin (1978) notes, that the way to eradicate discrimination is to eradicate prejudice, because in the prejudice-causes-discrimination model discrimination is viewed as the denial of rights and opportunities to certain groups due to prejudice and stereotypes.

According to Feagin, it is less frequent that discriminatory actions are carried out by isolated or small groups of bigoted individuals. More frequently discriminatory actions are carried out by a very large number of individuals acting routinely under the guidance of organisational regulations or institutional requisites. Feagin considers, in

other words, that discrimination carried out by bigot individuals acting with no support of institutional requisites is practically non-existent. Most frequently discrimination also appears in the form of institutional discrimination, which is a denial of society's institutions of opportunities and equal rights to disabled persons. Institutional discrimination refers to the manner in which the very operation of institutions leads to – directly or indirectly – to favour some groups over others regarding access to opportunities and valued resources. When studying direct or indirect forms of institutional discrimination, consequences are the most important indicator of discrimination. If the results or consequences of a policy, practice or function are unequal with respect to non-disabled/disabled persons' opportunities to gain and maintain employment, e.g. the convincing statistical evidence of disabled persons disadvantage in the labour market, then institutional discrimination is thought to exist.

Institutional discrimination, in my opinion, cannot meaningfully refer to actions. Institutional discrimination is a *consequence* of how systems operate rather than individual intentions.

⁸ The functionalist tradition from Durkheim to Luhmann via Parsons and Merton has sought to explain 'social facts' regardless of the intentions of individual actors, by reference to the role they play within an interrelated whole.

⁹ Productivity is not an individual characteristic; rather, the social relations of the work place shape it. If these relations are strained because of tastes of discrimination on the part of the employer, supervisor, co-workers, or consumers, lower productivity might result. Thus which begins as irrational practice based on prejudice or mistaken beliefs might end up as self-fulfilling prophecy (Gould 1999).

¹⁰ The term statistical discrimination refers to situations when employers apply disability stereotypes to individuals with disabilities

and judging them accordingly. It is called so because it relies upon imperfect knowledge, the employer applies mean statistics to individual cases.

¹¹ Women with small children are in a similar way victims of statistical generalisations. They are for instance assumed to be frequently absent from their jobs. The employer takes for granted that small children are often sick thus concluding that all mothers are often absent from their jobs.

¹² For instance, with respect to type (a): Prohibition by law can have effects as regards this group of employers. The critical problem is to ascertain the proportions of this type in a given population in order to have some clue to the probable effectiveness or ineffectiveness of anti-discrimination legislation as a means to enhance disabled persons' opportunities in the labour market. It is probable that (a) moves to (e) in order to conform with the law, even though he/she does not surrender his/her prejudices. It would be reasonable to assume that anti-discrimination law might produce different results in different types (a), (c). With respect to type (c): Policy might be directed to change the social situations in which discrimination proves rewarding. He/she might move from (c) to (g). Both types (d in case of statistical discrimination) and (c) might abandon discriminatory practices as they come to find that these do not always pay. Because their beliefs correspond to the type (g), the most appropriate policy is to change their behaviour through incentives.

¹³ Exclusion from the labour market signifies long-term unemployment with no prospect of new work.

¹⁴ The market system's responses are not to an environment that impacts directly on it but to an environment that the market system itself constructs intellectually in its own terms and understands in terms of its own criteria (cost/benefit). Economy as a self-reproductive system does not imply that the system is self-sufficient. But that different demands from the environment, for instance, equal employment opportunities for disabled

persons, remain wholly ineffective as long as these demands cannot be transformed into economic relevant issues. There might be legal regulations over the market system concerning equal opportunities for disabled persons, but only the market system is able to alter its rule of conduct towards disabled persons' opportunities. Even the strongest legal pressure influences the market system only insofar as there can first be constructed in terms of cost/benefit (Luhmann 1995).

¹⁵ Commitment to substantive equality is something quite different from commitment to meritocracy in which each individual's position in the labour market is the result of natural or fairly acquired abilities (Rosenberg 1995).

¹⁶ "Hayek goes a step further. [Than Nozick, explanation added.] He says that the concern for social justice is a sign of the immaturity of the mind. To demand justice from an impersonal process (the market) that brings about a greater satisfaction of human desires is absurd. Besides, in his view, the imposition of moral precepts and patterns of remuneration can only lead to the increase in the powers of the state and interference by it in the affairs of the society – an ideal that is surely undesirable in a liberal democracy." (Rawls 1998)

¹⁷ Equal employment opportunity refers to the right of everyone to have a job. Equality of opportunity refers to the condition under which everyone in society has the same opportunity to enter any occupation or social class.

¹⁸ "Exclusionary rules and institutions must always be justified by universal criteria that are indifferent to the pretensions or stigmata of birth. There is thus a permanent tension within this class resulting from the need to legitimate itself by preserving openness of access, and the desire to reproduce itself socially by resort to closure on the basis of descent." (Parkin 1979)

¹⁹ "An additional necessary condition for direct discrimination should be at hand, is that there is a correlation between the unfair – the

effect or result – and functional impairment.”

- ²⁰ Numhauser-Henning (1999) argues that laws – as well as every normative system – implicate ideas of inclusion and exclusion. Employers, for instance, might have their own ideas on who is to be included in the labour force. But their ideas might not be congruent with those of the lawmaker. Numhauser-Henning sees the enactment of anti-discrimination law as an intervention in the normative system, an attempt to change, by administrative means, conceptions about inclusion. In order to understand what discriminatory behaviour is all about it is important to realise, according to Numhauser-Henning, that all normative systems implicate conceptions with a strong legitimacy. Changing such conceptions though anti-discrimination laws can be a very difficult task.
- ²¹ Is it possible to prove that discrimination is a rational act? As it is described by conventional economic theory discrimination appears as an irrational act. But, discriminating disabled people in order to sustain the wage subsidy system is a rational act indeed.
- ²² "Let us recall that the criteria set for entry to European monetary union were set with the securing of a 'healthy economy' in mind, and that a falling rate of unemployment does not figure among these criteria. As a matter of fact, these desperate attempts to reach what passes today for the standard of 'economic health' are widely seen as the major obstacle against doing anything really effective to raise employment levels through job criterion." (Bauman 1998)

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