



UMEÅ UNIVERSITY

INTERSECTING HOUSING DISCRIMINATION

**A socio-legal study on the limits of
Swedish anti-discrimination law**

Sandra Klinth

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Abstract

This qualitative socio-legal study critically examined the protection against housing discrimination found in chapter 2 § 12 of the Swedish Discrimination Act (SFS 2008:567), in light of United Nations, Council of Europe and European Union housing and non-discrimination (human rights) standards. As an applied socio-legal study it aimed to be critical towards the limits of law in context. By applying an intersectional approach as the theoretical framework for the study, it aimed to identify legal weaknesses from an intersectional point of view. The study made use of a descriptive doctrinal analysis method and a critical text analysis method. The material for analysis consisted of civil housing discrimination law: legislation, preparatory works and case law. The case law, anonymized for this study, consisted of three district court judgments and three appeal court judgments processed during the years 2007-2016. The first research question asked what, if any, forms of intersectional discrimination the housing discrimination law face and comprise. The descriptive doctrinal analysis revealed that all cases shared the discrimination ground ‘ethnicity’ and discrimination form ‘direct discrimination’. The critical text analysis resulted in three themes illustrating intersectional discriminating facing the law: “aggressive men” (the intersection of sex and ethnicity), “resourceless women” (the intersection of sex, socio-economic class and ethnicity) and “unsettled strangers” (the intersection of socio-economic class and ethnicity). The second research question asked what, if any, the limits of law are from an intersectional point of view. By discussing the three themes in relation to the legal landscape and previous research it was possible to identify several limits of law relating to intersectionality, such as the exhaustive list of discrimination grounds, absent discrimination grounds and an absence of intersectional awareness. The study concluded that Swedish housing discrimination law rely on formal equality, which renders intersectional discrimination invisible and the power of housing human rights disputable.

[Key words: anti-discrimination law; critical legal studies; discrimination; housing; human rights; intersectionality; law; limits of law; socio-legal studies]

Abbreviations¹

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CFREU	Charter of Fundamental Rights of the European Union
CoE	Council of Europe
Ds.	Ministry publication series [Departementsserien]
DO	The Equality Ombudsman [Diskrimineringsombudsmannen]
ECHR	European Convention of Human Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
MmD	Non governmental organisation ‘Malmö against Discrimination’ [ideella föreningen Malmö mot Diskriminering]
OMED	Ombudsman against Ethnic Discrimination [Ombudsmannen mot etnisk diskriminering]
Prop.	Government Bill [Proposition]
SFS	Swedish statutes [Svensk författningssamling]
SOU	Official government committee report [Statlig offentlig utredning]
UDHR	Universal Declaration of Human Rights
UN	United Nations

¹ This list of abbreviations is written in English, but Swedish translations are provided within brackets if the organisation/document is originally Swedish, in order to enhance understanding for Swedish readers in this study on Swedish law.

² Before the decision to limit this study to civil law only, the case law investigation searched for both criminal and civil law cases. The most recent criminal law case found was from 1999.

³ Swedish criminal law cases are searchable through the Swedish National Council for Crime Prevention. Swedish civil law cases are more difficult to obtain and demand more active investigations. For this study a previous study by Ingemarsson (2013) provided what is believed to be a complete list

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1. Introduction

Housing is an acknowledged human right that “addresses the basic need for human shelter and facilitates the essential human requirement for a home (Kenna, 2014, p. 1)”. Even so, access to and quality of housing is not equal – neither by international or national comparisons. This inequality stems from several social factors that affect the supply, allocation and occupation of housing. One such factor is discrimination. The occurrence of housing discrimination has been established on a European level by among others the European Monitoring Centre on Racism and Xenophobia (2005) and the European Commission (Ringelheim & Bernard, 2013) as well as on a Swedish level by among others the Ombudsman against Ethnic Discrimination (OMED) (2008) and the Equality Ombudsman (DO) (2010).

Chapter 2 § 12 of the Swedish Discrimination Act (SFS 2008:567) contains a protection against housing discrimination. If law fails to bring about the intended effect, one must re-evaluate its goals, provisions and structures, because “if the law is ineffective and does not deliver the policy goods, it must be technically flawed (Banakar, 2004, p. 167)”. Sweden belongs to the group of countries that for the longest has had comprehensive anti-discrimination laws in place. Sweden’s next step should therefore be to identify legal weaknesses, gaps and inconsistencies (Petrova, 2006). In Sweden, DO is the government agency whose assignment is to oversee the compliance with the Discrimination Act, promote equal rights and possibilities as well as counteract discrimination. In August of 2017 the Swedish government assigned DO a mission to counteract, inter alia, housing discrimination (Kulturdepartementet, 2017). The mission stated that it is a human right not to experience discrimination, but despite this, housing discrimination occurs in Sweden. The mission further stated that discrimination has severe consequences for individuals as well as for society as a whole and must therefore be combated. The general knowledge of housing discrimination in Sweden is nonetheless low, and often kept in the background of equality discussions (Malmö Mot Diskriminering, ND; OMED, 2008). Following the government mission, DO acknowledged three main problem areas in the housing market that relate to discrimination, which DO is to focus on during the years 2017-2019 (DO, 2018). None of the problems identified directly concern the law itself. In 2017 DO performed a legal investigation to map the anti-discrimination protection within the tenant-owned apartments market, in order to

establish if there are any legal gaps. The investigation is yet to be finalized, but according to DO the preliminary result is that law covers most situations (DO, 2018). This study therefore aims to raise knowledge of and shed more light on housing discrimination by identifying weaknesses, gaps and inconsistencies in Swedish law. By applying a different approach than DO, and not assuming law to be all encompassing, this study hopes to nudge housing discrimination towards the forefront of equality discussions.

This study believes that a Discrimination Act that covers only *most* situations of discrimination must be further scrutinized in order to identify what situations it does not cover. “It is increasingly recognised that discrimination can occur on the basis of more than one ground. A person who is discriminated against on grounds of her race might also suffer discrimination on grounds of her gender, her sexual orientation, her religion or belief, her age or her disability. Such discrimination can create cumulative disadvantage (Fredman, 2016a)”. Law that covers only “most” situations is probably even more likely to overlook complex situations of discrimination because of simultaneous and multiple oppressions. The complexity of intersecting discriminatory structures, such as racism, class oppression and patriarchy, must not scare the researcher. On the contrary, effectively counteracting discrimination demands an understanding of the complexity that is social inclusion (Molina, 2015). With the aim to highlight the complexity of intersecting structures, this critical study will apply an intersectional approach.

In short, the topicality of both housing discrimination and intersectionality discussions, combined with an existing hesitance to question the law itself, calls for a criminal examination of the Swedish housing discrimination law.

1.1 Aim

With a point of departure in housing human rights, the aim of this study is to highlight if and how Swedish housing discrimination law is faced with intersectionality, and how law comprises and deals with it. The study does so by asking these two research questions:

- *What (if any) forms intersectional discrimination does Swedish housing anti-discrimination law face?*

- *What (if any) are the limits of Swedish discrimination law from an intersectional point of view?*

In order to answer these questions this critical and qualitative study will intersectionally analyse Swedish civil housing discrimination law. Law is understood in a broad sense, including legislation (chapter 2 § 12 of the Swedish Discrimination Act, SFS 2008:567), preparatory works and case law as well as legal reasoning (Gunnarsson & Svensson, 2009).

1.2 Delimitations

This study is limited to legal and individual discrimination in civil law.

1.2.1 Legal and individual discrimination

‘Discrimination’ is a commonly used word with various formal and informal connotations. This study understands discrimination as a normative legal concept meant to draw precise lines between what is allowed and what is not. It entails treatment of a person in a less favourable way than another person was or would have been treated in a comparable situation (Fransson & Norberg, 2007).

Discrimination can also be conceptualized on different levels. The different conceptual levels go hand in hand with the acknowledgment that anti-discrimination laws is only one way of addressing housing inequality.

Figure 1. Discrimination conceptualised on different levels (in large based on Bråmås et al., 2006).

Structural discrimination		
1. Institutional systems (such as the principles for housing financing)	2. Institutional actors (such as real estate agents, loan givers, housing company administrators)	3. Housing consumers (such as the attitudes and preferences of the public)
Individual discrimination		

Figure 1 illustrates the difference between structural and individual discrimination. The Discrimination Act can address individual discrimination (box 2 and 3). Therefore, this study examines discrimination as it is manifested on an individual level. Structural and individual discrimination are however interrelated and reciprocally influential. Apart from legal measures, housing equality is affected by

other institutional and political measures such as housing planning, constriction policies, integration actions, shelters and social housing (box 1 and 2) affected by structural discrimination. While this study acknowledges the importance of such structural measures and systems, as a study on law, it is limited by the properties of law.

1.2.2 Civil law

A criminal law (Penal Code, SFS 1962:700 chapter 16 § 9) and a civil law (the Discrimination Act) covering housing discrimination co-exist in Sweden since 2003. Before then, housing discrimination could and was legally processed according to the Penal Code. This study is limited to solely study civil law. The criminal law protection is narrower and the burden of proof is more demanding. Therefore it is nowadays unlikely for housing discrimination to be processed according to the criminal law². Because of the time and scope of this study it was reasonable to limit the range to one of the two laws. Because this study aims to say something about the present and future housing discrimination situation, it is sensible to examine the law by which cases have more recently been processed and are most likely to be processed by in the near future, which is the civil law.

1.3 Methodology and theoretical perspectives

This study was a qualitative applied socio-legal study with an intersectional approach. Because of the interpretative aspects of qualitative research, theory and methodology are “inextricably inter-linked (Banakar & Travers, 2005c)”. Therefore, socio-legal methods are not just techniques, but a part of a theoretical perspective (Banakar & Travers, 2005b). Attempts to establish a clear boundary between theory and methodology are therefore of little or no value. Consequently, this joint part presents all theoretical and methodological underpinnings of this study, as well as the material.

Socio-legal research does not prescribe a certain method, which allows for creative investigation of law (Banakar & Travers, 2005a). Resembling the duality in ‘socio-legal’, the actual analysis consisted of two methods: a descriptive doctrinal legal method and a critical text analysis. This twofold approach is motivated by a

² Before the decision to limit this study to civil law only, the case law investigation searched for both criminal and civil law cases. The most recent criminal law case found was from 1999.

need to understand legal texts both within its field (in law) and from outside of its field (on law).

1.3.1 A qualitative and constructionist approach

Qualitative research is characterized by a focus on ambiguous empirical material and analytical openness. Rather than just ascribing dimensions already decided upon onto the material, qualitative research is interpretative and allows for the material to guide the study (Alvesson & Sköldbberg, 2017). Different perspectives can guide qualitative research. This study relied on a social constructionist perspective, meaning an understanding of knowledge as constructive processes. A social constructionist study questions essentialist and taken for granted, objective and natural truths (Justesen & Mik-Meyer, 2011).

1.3.2 An applied socio-legal approach

By ‘socio-legal’ is meant interdisciplinary studies of law informed by social scientific theory (Banakar, 2015). Since the socio-legal research field is diverse, varied and evolving (Banakar & Travers, 2013a) it is not fruitful to distinctly position this study. On the whole however, this study pursues an applied socio-legal approach. Such an approach recognises of the role of social forces in creating legal order and legal behaviours (Banakar, 2015), which is especially important in research on anti-discrimination laws (Banakar, 2004). Applied socio-legal studies aim to be critical towards the limits of law in context and action and can draw attention to gaps between the intentions of the legislator and how law is interpreted and enforced in reality (Banakar, 2015).

1.3.3 An intersectional approach

This study applies an intersectional approach. The concept of intersectionality has its roots in feminist legal theory and critical race theory. Both feminist legal studies and critical race studies stem from the field of critical legal studies. Critical legal theory emphasizes social conflict in social development and views social life as dependent on power struggles between dominant and subordinate groups. As such, law is seen as an important part of continued economic exploitation and upheld unequal social relations (Banakar & Travers, 2013b). Critical legal studies are often critical towards the individual rights based orientation of law, and originate from Marxist ideas of law

as reflecting and maintaining the position of dominant economic groups (Ibid.). Marxist legal approaches today examine the social interests of those who enforce the law and the inhibitions on economic and political power that law imposes (Fine, 2013).

Critical legal scholar Crenshaw, who studied the intersection of gender and race (1989), is often mentioned as an intersectional pioneer. Nowadays intersectionality “marks the imbrication of race with other axes of subordination (Harris, 2013, p. 158)” and forces critical race theorists to realize that no given set of categories can capture social complexity (Ibid.) An intersectional approach allows for racism not to be treated as a stand-alone factor but as mutually constructive with other ‘isms’, such as classism and sexism (Carlson, 2017).

Feminist legal theory has traditionally questioned the neutrality and objectivity of law (Banakar & Travers, 2013b) by acknowledging women’s exclusion from law (Hunter, 2013). Feminist legal theory aspires to produce a critique of legal arrangements and visions of how law could instead be constructed (Lacey, 1998). Feminist legal research has historically aimed towards gender equal law and legal studies. Nowadays feminist legal research also acknowledges that law is dependent on subjective knowledge and circulates around individuals who are complex and positioned. The position is dependant on gender, but also on class, ethnicity, religion, sexual orientation and so forth. An intersectional perspective can therefore make visible and problematize inequalities that are a result of several social power imbalances (Gunnarsson & Svensson, 2009). Belonging to a group (such as ‘women’) can be of politically strategic importance, but assuming a fixed identity of a group can have negative consequences. Gender must therefore not be assumed to be the most foundational social relation (Ibid.).

The exact definitions of intersectionality and whether it is a theory, a method or politics, is still up for debate (Carbin & Edenheim, 2013). This study holds intersectionality as an analytical perspective that can make visible the simultaneous effects of gender, class and ethnic social structures in constituting power and inequality (de los Reyes and Mulinari (2005). Further, an intersectional perspective can draw attention to law’s insistence that discrimination is to be read through predetermined categories (Samuels, 2013). Intersectional research must therefore question simplified, essentialist, homogenous and fragmented categorisations, because fixed representations dissimulate and deny other identities and oppressions;

pay attention to the institutional context. The aim is not to highlight stigmatized groups, but to acknowledge how social institutions lead to exposure of such groups, and challenge the normative narrative (de los Reyes & Mulinari, 2005).

How many and how distinct categories one acknowledges in an intersectional analysis differs. Historically gender, race and class have been the key social divisions in intersectional analyses, and many still adhere to this triple oppression analytical kit (Yuval-Davis, 2006). Yuval-Davis states that “there are some social divisions, such as gender, stage in the life cycle, ethnicity and class, that tend to shape most people’s lives in most social locations, while other social divisions such as those relating to membership in particular castes as indigenous or refugee people tend to affect fewer people globally (Ibid., p. 203)”. At the same time, the social divisions that affect fewer people globally can make out a crucial struggle locally or individually. Yuval-Davis therefore calls for recognition of social power axes of political importance, rather than beforehand established social identities. This study therefore paid special attention to class, ethnicity and gender while staying open to other possible social divisions revealed in the material.

1.3.4 The descriptive doctrinal analysis

A doctrinal method aims to reconstruct legal rules and establish how they can and should be applied to legal problems (Kleineman, 2013). It interprets and systematizes established law (Sandgren, 2015) by searching for legal answers, ‘de lege lata’, within doctrinal sources (Kleineman, 2013). In Sweden, established doctrinal legal sources are law, preparatory works, case law and doctrinal literature. The intentionally basic descriptive doctrinal analysis of this study focused on the necessary prerequisites of the law. As the doctrinal descriptive analysis was not the main analytical method in this study its aim was to delineate law on a descriptive level against which the critical analysis could be compared and discussed.

1.3.5 The critical text analysis

This main analytical method of this study was a qualitative and critical text analysis method with discursive features. The rationale behind applying critical text analysis is an understanding of legal texts as sources of sociological data. While doctrinal studies hold legal texts as neutral, objective and lead by dispassion, socio-legal studies can focus on how legal texts are “empirical indicators of various institutional,

organisational, racial or gender specific properties of law, which are either ignored or neglected by the traditional methods of legal studies (Banakar & Travers, 2005d, p. 135)”.

Critical text analysis methods can take many forms. At large, this study followed the analytical and interpretative process presented by Esaiasson et al. (2017) according to whom critical text analysis builds on careful reading of texts, with systematic attention to the parts, the whole and the context. Qualitative text analysis pays attention to manifest content as well as themes and ideas expressed as secondary content, and is therefore suitable when one expects the analytical findings to be more than just the sum of the parts (Ibid.). Esaiasson et al. discern between systematic and critical text analyses. Critical approaches go further than just describing reality, and are applied in order to expose power relations (Ibid.). Even though this study is not a pure discourse analysis it borrows elements from critical discourse analysis (CDA) by approaching discourses as “secondary routes to things beyond the text, like attitudes (Senevirantne, 2005, p. 171)”. As such, this study examined texts affected by and producing of discourses, rather than highlighting the discourses themselves. CDA naturally connects to an intersectional perspective, since it can be used to show how power in society is an effect of discursive configurations privileging the status and positions of some people over others (Bergström & Boréus, 2012). CDA also assumes that oppression has many faces, and that focusing upon only one emits the interconnections between oppressions (Locke, 2004).

Figure 2. The critical analytical method presented step by step

Step 1	Establishing a theoretical framework
	<ul style="list-style-type: none"> - Inductive readings in order to gain an overview of the material and formulate an applicable theoretical framework, which based on the researcher’s socio-legal preunderstandings resulted the idea of intersectional analysis. - Established the theoretical and methodological perspectives. - Established what socio-legal questions the material could answer, and what the limitations of the material were.
Step 2	Critical individual analyses
	<ul style="list-style-type: none"> - Close readings of each text where the main query was converted into more precise questions directed towards the texts. - The following questions were directed to each text’s manifest content as well as the themes and ideas surrounding the text: What social divisions are present? How are

<p>Step 2 (continued)</p>	<p>the social divisions presented? Are the social divisions related to each other?</p> <ul style="list-style-type: none"> - Because case documentation revolves around actual living individuals, unlike the conceivable subjects of preparatory works, the following questions were directed specifically to the cases: What kinds of subjects are presented? What characteristics, motives and agency are they ascribed? What discourses surround and permeate the subject positions/social divisions/discrimination grounds?
<p>Step 3</p>	<p style="text-align: center;">Critical joint analysis</p> <ul style="list-style-type: none"> - Interpretative comparisons of the texts to identify existing patterns or lack of existing patterns. - Resembling a mind map, the findings were linked to each other if and where it revealed patterns of theoretical interest. - Questions were asked about how the parts relate to whole and to the context of the texts.
<p>Step 4</p>	<p style="text-align: center;">Relating the analytical findings to theory and previous research</p> <ul style="list-style-type: none"> - Relating the findings of step 2 and 3 to the theoretical and methodological perspectives guiding the study. - Bringing forward what is ignored or neglected in the doctrinal analysis.

A scientific analysis demands a methodological ideal applied in the same analytical manner to all text (Esaiasson et al., 2017). The analytical procedure was set up by a combination of elements borrowed from Esaiasson et al. on how to perform critical text analysis, and Banakar (2005) on how to study case law. Even so, as qualitative research demands interpretation, the analytical process was not entirely bound by the chronology of these steps. Rather, moving back and forth between steps was common. Nonetheless, the analytical procedure guided the analysis of all texts. The result of step 1 is presented in the introduction (part 1.1-1.3). The result of step 2 is presented in the individual analysis section (part 3). The result of step 3 is presented in the joint analysis section (part 4). The result of step 4 is presented in the discussion section (part 5).

1.3.6 Material

The analysed material consisted of Swedish civil housing discrimination law: legislation, preparatory works and case law. Preparatory works make out an important part of Swedish law as legal sources. Government bills are not just political documents, but directly referenced by courts of law when interpretations of the legal

text is necessary. Government bills are, in their turn, based on the reports of examining committee reports.

Figure 3. Laws and preparatory works included in the analysis

Laws	SFS 2003:307
	SFS 2008:567
Government Bills	Prop. 2002/03:65
	Prop. 2004/05:147
	Prop. 2007/08:95
Committee Reports	SOU 2001:39
	SOU 2002:43
	SOU 2006:22

Figure 3 portrays the laws and preparatory works included in the analysis. Preparatory works are extensive documents. Due to the time frame for this study, and because most of each work does not relate specifically to housing or intersectionality, content regarding housing and discrimination grounds were extracted from each work. The extractions were cross-checked against Fransson and Stüber's (2015) doctrinal comment of the Discrimination Act. The summaries of each preparatory work were also consulted in order to note possible overarching discussions of discrimination, in light of which the paragraphs of housing should be understood. Nonetheless, it must be noted that because the preparatory works have not been read in their entirety possibly relevant parts might have been overlooked.

Six cases were analysed: three district court cases and three appeal court cases. According to case law investigations³ for this study these six cases make out all existing civil law housing discrimination cases that have been adjudicated. It is possible that more civil law housing discrimination cases exist. Even so, the six cases

³ Swedish criminal law cases are searchable through the Swedish National Council for Crime Prevention. Swedish civil law cases are more difficult to obtain and demand more active investigations. For this study a previous study by Ingemarsson (2013) provided what is believed to be a complete list of Swedish civil housing discrimination cases up until spring of 2013. Cases A, B, C, D and E were found through Ingemarsson's study. Case F, from 2016, was brought to my attention during an internship at the anti-discrimination agency of Helsingborg in 2017. Swedish legal databases Zeteo and Karnov along Fransson and Stüber's (2015) doctrinal legal comment were consulted to search for other cases (before, during and after 2013) but did not provide any new findings. The exhaustiveness of Ingemarsson's study was confirmed by personal contact with Ingemarsson in January of 2018. Furthermore, project coordinator of Malmö mot Diskriminering's housing discrimination project Ellen Forsblad and DO lawyer Anna Werner, currently working within a housing discrimination project, communicated in January of 2018 that to their knowledge no other civil housing discrimination cases have been judged before, during or after 2013.

made out a suitable volume for analysis based on the scope of this study. Had there been more cases, a representative sample would probably have been necessary. Based on the assumption that these six cases make out all cases, they are per default a representative sample.

1.3.9 Ethical considerations

The study's methods or material do not demand an ethical vetting according to the Ethical Review Act (SFS 2003:460). Nonetheless, researchers should always take ethical concerns into consideration. In my opinion, this study needed to consider intrusiveness and reflexivity. Although the cases revolve around plaintiffs in possibly vulnerable positions, the analyses were performed on events that have already taken place. As such, the analysis did not affect the individuals directly and the study is non-intrusive. Although all case documents are available to the public (online or requested as public records from the court) the names are unimportant for the analytical result. All names were therefore replaced with anonymous initials (A.A., B.B. and so forth).

Within qualitative research reflexivity is a tool by which to establish an ethically informed research practice (Guillemin & Gillam, 2004). As research is a knowledge constructing practice, the researcher is highly present and engaged in producing subjective and situated knowledge (Alvesson & Sköldböck, 2017). This process therefore demanded self-scrutiny and self-reflection in all stages of the study (Guillemin & Gillam, 2004.). Thus, in line with feminist research ethics' call for strong objectivity (Harding, 1995) I acknowledge that my position as a researcher is subjective and positioned. Although aiming to be objective, my preunderstandings, lived experiences and personal values affected the interpretative process. Some feminist researchers provide a written account of their positions, in order to be transparent. I will therefore disclose information about myself that relates to this study, which the reader is free to acknowledge if and how they find useful: I am biologically, legally and socially a woman. I carry a "Swedish" name and my physical appearance contains no characteristics typically contributed to ethnicities other than Swedish. My native tongue is Swedish and I have no reading or writing disabilities that limit my communicative capacity. I grew up in mixed class environment with working class features, immigrant features and academic middle class features. I now identify as academic or cultural middle class. I have lived in subletted flats, rented my

own apartments and gone to viewings in order to buy an apartment and in none of those situations experienced housing discrimination. All in all, based on my current circumstances, I am unlikely to experience housing discrimination. Therefore it must be acknowledged that my analysis, interpretation and conclusions came from an outside perspective of sorts.

1.4 Previous research

This brief presentation of previous research on housing human rights and housing discrimination is to provide the reader with a basic understanding of the field, within which this study is located. Previous anti-discrimination research is presented later, in connection to the legal landscape.

1.4.1 International housing human rights research

‘Human rights’ has been defined and conceptualised by many. Even though the definitions differ, they circulate around an idea of fundamental rights that all individuals can demand from society (Fischer, 2017). Human rights are “literally, the rights we have simply because we are human (Donnelly, 2006, p. 601)”. Housing is a human right, sometimes included in what is called second generation human rights. This generation is made out of economic, social and cultural rights. The underlying idea of second generation human rights is that one can demand distribution of official resources in a way that promotes individual well being (Fischer, 2017). Housing human rights, as an integral part of economic, social and cultural rights, have received greater recognition during the 21st century (Kucs et al., 2008). Many researchers agree that housing human rights are now widely recognised (Gómez et al., 2005) and that there is an international and general hegemony of housing human rights principles (Kenna, 2010). While some claim that housing human rights have the capacity to tackle the problematic field that is housing equality, others claim that housing human rights are often downgraded to soft policies, which fit into existing public policies (Kenna, 2005). In short, the inherent power of housing human rights as a concept is debated.

Researchers have found that despite international recognitions of the right to housing, a broad justiciable acceptance of this right has not been reached (Kucs et al., 2008). Several researchers have pointed to the need of national justiciability in order

to reach actual implementation of housing human rights (Kenna, 2010). The key lies in effective use of domestic and international legal remedies (Kucs et al., 2008). There is however a lack of consensus of the scope of housing as a human right (Ibid.). It has been found that housing rights will manifest themselves differently in different states, since the scale of the problems differ as well as the resources and approaches available (Leckie & Gallagher, 2006). Levels of state recognition and obligations differ, on a scale from full recognition to mere principles (Oren et al., 2014). According to Kucs et al. (2008) there is however a consensus surrounding the minimum core obligation of essential housing elements. Kenna (2010) has defined this minimum core obligation as a “guarantee that everyone enjoys a right to adequate shelter and a minimum level of housing services, without discrimination (p. 105)”.

Violations of housing human rights are most evident in developing countries. Even in well-developed countries there are however gaps between the human rights principle of housing and the housing situation (Gómez et al., 2005). Compared to the world at large, Europe is of high standards, also in matters of housing. Still, many Europeans are affected by housing related issues (Kenna & Jordan, 2014). In part because the right to housing is closely entwined with other human rights (Kucs et al., 2008) - inadequate housing risks forcing people to choose between basic needs (Gómez et al., 2005) such as health, employment and education (Ringelheim & Bernard, 2013). Although many researchers have pointed out that housing is an issue for the very poor (e.g. Langlois-Therrien, 2012), a common misconception is that violations of housing rights only occur “amidst the grinding poverty of the developing world (Gómez et al., p. 3)”. This preoccupation with subsidized and social housing is a reason for the ineffectiveness in the implementation of housing human rights (Kenna, 2010).

Some groups in society are further away from having their housing human rights fulfilled than other groups. Gómez et al. (2005) list women, racial and ethnic minorities, the elderly and children, and the socio-economically poor as such groups. Kenna (2008) mentions Romani, women victims of violence, disabled people, refugees and asylum-seekers, immigrants, third-country nationals, national minorities and those belonging to the lower working class. Kenna and Jordan (2014) also mention vulnerability that comes with being unemployed, a single parent or suffering from mental health problems. According to Paglione (2006) restrictive and

androcentric interpretations of the right to housing have led to a failure to recognise the centrality of securing women's right to housing in combating domestic violence.

1.4.2 Swedish housing discrimination characteristics research/studies

Many organisational (housing) discrimination studies in Sweden have pointed to ethnic discrimination as the main problem (Integrationsverket, 2005; Bråmås et al., 2006; Boverket, 2007; Ombudsmannen mot etnisk diskriminering, 2008; Diskrimineringsombudsmannen, 2010). Housing discrimination of Romani in particular has been established as an especially difficult problem (Ombudsmannen mot etnisk diskriminering, 2004). The National Board of Housing, Building and Planning claimed that immigrated middle-aged men who had lived in Sweden for a long time filed most housing discrimination complaints. There was however, according to the study, no reason to believe that men experience more housing discrimination than women. An explanation for the skewed statistics is that women are less likely to be familiar with their housing rights or experiencing less power to change their situation, and therefore allowing the discrimination to continue (Boverket, 2007).

Swedish researcher Ali Ahmed has conducted several situation-testing projects on the Swedish housing market. Situation testing, also known as discrimination testing, is a research method that comparing how individuals are treated in situations that are part simulated and part real (Molina, 2016). Through such research Ahmed and Hammarstedt (2008) as well as Ahmed et al. (2010) found that Arabic/Muslim males were discriminated in the housing market. Further, it was found that Swedish females experiences less difficulty in finding an apartment compared to Swedish men (Ahmed & Hammarstedt, 2008). They therefore concluded that the Swedish rental housing market is pervaded by both gender and ethnic discrimination. Ahmed & Hammarstedt however noted that they could not be sure whether the discrimination was due to ethnicity or religion or both: "it might have been caused by other factors or by a combination of factors (Ibid., p. 371)". Ahmed and Hammarstedt (2009) also studied housing discrimination against male homosexuals and found that homosexual males are discriminated against, when compared to heterosexual couples. These results were most interesting when viewed in light of the results of discrimination against lesbian couples (Ahmed et al., 2008). That study revealed no indication of differential treatment. Ahmed et al. claimed that the gender composition

of the couples explained the results: “[l]esbian females do not face discrimination when they search for rental apartments since landlords prefer females to males as tenants (Ibid., p. 237)”. As such, gender and sexual orientation discrimination in the housing market has various dimensions and is a complex issue (Ibid.).

2. The legal landscape

This section presents the legal landscape of housing and anti-discrimination human rights in and surrounding Sweden. The section ends with a presentation of previous critical anti-discrimination research, which is to shed light on the legal landscape.

2.1 *United Nations standards*

The first and second articles of the United Nations (UN) Universal Declaration of Human Rights (UDHR) establish the right to equality and freedom from discrimination. Article 1 states that all human beings are born free and equal in dignity and rights. Article 2 states that everyone is entitled to the rights and freedoms of the UDHR without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The right to freedom from anti-discrimination is further strengthened by Article 26 of the International Covenant on Civil and Political Rights (ICCPR):

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Housing is specifically mentioned in Article 25(1) of the UDHR which establishes that everyone has the right to a healthy standard of living, that includes, inter alia, adequate housing. The UDHR right to adequate housing is then further strengthened by an explicit recognition in Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 2(2) of ICESCR regards anti-discrimination:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of

any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The United Nations' Committee on Economic, Social and Cultural Rights (CESCR), whose role is to monitor the implementation of ICESCR, has issued three general comments (No. 4, No. 7 and No. 20) which are to guide the interpretation of the right to housing. General Comment No. 4 is a general but in-depth comment on the right to adequate housing. It defines what adequate entails, and makes some remarks relating to discrimination grounds. Its section 6 states that the concept of family must be understood in a wide sense, and both families and individuals are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular it is not to be subjected to any form of discrimination. Section 11 establishes that states parties must prioritise social groups living in unfavourable conditions. As such, policies and legislation should not be designed to benefit already advantaged social groups at the expense of others. General Comment No. 7 specifically regards forced evictions. Its section 10 establishes that women, children, youth, older persons, indigenous people, ethnic and other minorities, and vulnerable individuals and groups all suffer disproportionately from forced evictions. In an intersectional notion, it says that:

“[w]omen in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless”.

General comment No. 20 regards non-discrimination in combination with all economic, social and cultural rights. Paragraph 11 of comment n°20 mentions housing rights specifically. The paragraph says that actors in the private housing sector may not directly or indirectly deny access to housing on the basis of ethnicity, marital status, disability or sexual orientation. Further, it says that states parties must therefore adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.

UN anti-discrimination articles have evolved from general regulations (such as those found in ICCPR and ICESCR) towards detailed regulations aimed at systematically disfavoured groups. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is in its entirety an anti-

discrimination convention. Its Article 5e(iii) establishes that states parties to this convention undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right to everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law in the enjoyment of the right to housing. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is less explicit on the right to housing, but according to Article 14 point 2h, concerning rural women, states parties are to take appropriate measures to guarantee the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications. Alongside ICERD and CEDAW, the right to housing is also found in Articles 16.1 and 27.3 of the Convention on the Rights of the Child, Article 43.1 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, in several articles in the Convention on the rights of Persons with Disabilities, in several articles in the Declaration on the Rights of Indigenous People, as well as in several international labour organisation conventions.

2.2 Council of Europe standards

Unlike UN treaties, the European Convention on Human Rights (ECHR) does not specifically mention housing as a human right. Instead, its Article 8 (respect for private life, family life and home) along with supplementary Article 1 of Protocol No. 1, on the right to property, has developed Council of Europe (CoE) housing rights. The ECHR covers civil and political rights. The European Social Charter is meant to complement the ECHR by guaranteeing fundamental social and economic rights. Unlike the ECHR, it specifically addresses the right to housing in its Article 31, according to which the parties undertake to promote access to housing of an adequate standard, prevent homelessness and make prices of housing accessible to those without adequate resources. Article 14 of the ECHR prohibits discrimination, and has sometimes been invoked together with Article 8 and/or Article 1 of Protocol No. 1 in the European Court of Human Rights cases. Article 14 reads:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

As the first sentence reveals, article 14 is bound to the rights and freedoms set forth in ECHR. It has therefore been kept in “the shadows” for a long time (O’Connell, 2009; Fredman, 2016b) and has been regarded as an insipid or parasitic right, because of its dependence on the invocation of one or more other article(s) (Fredman, 2016b). Protocol No. 12 to the ECHR was therefore developed in order to take further steps to promote equality by a collective enforcement of a general prohibition of discrimination. While Article 14 of the Convention can be applied to the other rights of the ECHR, Protocol No. 12 would apply to all rights in state constitutions. Article 1(1) of the Protocol reads:

The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2.3 European Union standards

Article 7 of the Charter of Fundamental Rights of the European Union (CFREU) guarantees the right to respect for one’s home. Housing specifically is mentioned in Article 34(3) on social security and social assistance. The Article establishes that in order to combat social exclusion and poverty, housing assistance is necessary for those who lack sufficient resources. Article 21(1) of the Charter on non-discrimination reads:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

As the European Union (EU) was initially established to create a common market in labour, goods and services it has focused much on a unified European market. Therefore, much EU law does relate to housing in various ways. Council Directive 1993/13/EEC on unfair terms in consumer contracts has been invoked in many housing related EU cases. When it comes to housing as a social rather than a financial matter, the most cited EU documents are Council Directive 2000/43/EC on the right to equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2004/113/EC on implementing the principle of equal treatment between men and women in the access to and supply of goods and services. Housing is

included in goods and services. Directive 2004/113/EC only covers equal treatment between men and women, which has led the EU to initiate work towards another goods and services directive covering sexual orientation, religion and other beliefs, disability and age. This directive, known as the Horizontal Directive, is still being debated. It was presented by the European Commission in 2008, but has not yet been unanimously accepted by the European Council.

2.4 Swedish standards

This section briefly presents the Swedish standards. The next section describes the current Discrimination Act in more detail.

2.4.1 General promises and the Instrument of Government

Sweden has ratified or in other ways undertaken to follow all but one of the above mentioned UN, CoE and EU treaties and regulations. The exception is CoE Protocol no. 12 which Sweden has neither ratified nor signed. The explanation given at the adoption of the protocol was that Sweden would have preferred a separate instrument with more detailed and lengthy provisions aiming to combat discrimination in those areas of society where it mostly occurs. The general prohibition of Protocol No. 12 would demand too many years and individual cases to clarify its scope and prove effective (Ds 2001:10). Chapter 2 § 23 of the Swedish Instrument of Government (SFS 1974:153) states that no law or regulation may contradict the ECHR.

In chapter 1 § 2 of the Swedish Instrument of Government (SFS 1974:152) housing is listed as a fundamental goal of public authority. Further, public authority is to act towards the participation and equality of all members of society, and against discrimination because of sex, skin colour, national or ethnic origin, language or religious belonging, disability, sexual orientation, age or other circumstances.

2.4.2 Unlawful discrimination in the Penal Code

A criminal law protection against unlawful discrimination is found in chapter 16 § 9 of the Penal Code (SFS 1962:700) since 1971. The first sentence states that business traders (such as housing companies and private landlords) may not discriminate because of race, skin colour, national or ethnic origin or confession of faith. Sexual orientation was later added (SFS 2008:569).

Official government report SOU 2001:39 was the result of a mission to examine the efficiency of the criminal law protection and discuss an implementation of a civil law protection. SOU 2001:39 stated that a law should counteract the undesirable behaviour it regards, and according to the report, the discrepancy between unlawful discrimination police reports and prosecutions was unacceptably large (p.11-12). A civil law protection with an alleviation of evidentiary burden was recommended and soon after put in place, alongside the Penal Code protection.

2.5.2 A short history of the civil law(s)

The first civil Swedish anti-discrimination law covered equality between men and women in the workplace (SFS 1979:1118, later replaced by 1991:433). An act prohibiting ethnic discrimination (SFS 1986:442) was put in place in 1986. However, this act was fairly ineffective and up until the year 2000 almost all case law concerned equality between men and women (Fransson & Stüber, 2015). For a long time Swedish anti-discrimination law covered only working life matters (Ibid.). Due to developments within the EU, Sweden experienced an extensive evolution of its anti-discrimination law between 1999 and 2008. In 1999 three laws were enacted. These laws regarded discrimination in working life because of ethnicity, religion or other belief (SFS 1999:130), disability (SDS 1999:132) and sexual orientation (SFS 1999:133). Each of these now mentioned laws contained sections on ombudsmen agencies that were to oversee legal compliance. These ombudsmen were the Ombudsman against Ethnic Discrimination (OMED⁴), the Disability Ombudsman (HO), the Ombudsman against Discrimination on grounds of Sexual Orientation (HomO) and the Gender Equality Ombudsman (JämO).

In 2003 the first civil anti-discrimination law covering housing was enacted (SFS 2003:307). This was a result of SOU 2002:43 and Prop. 2002/03:65, which suggested supplementing the criminal law with civil law. A main reason for making legal amendments was the need to adapt to EU directives 2000/43/EC ("the race directive") and 2000/78/EC ("the employment equality directive") which both covers more than just the working life oriented protection Sweden had at the time. The

⁴ When active the ombudsman against ethnic discrimination was abbreviated as DO. The current Equality Ombudsman is also abbreviated as DO. In order not to confuse the reader the abbreviation DO will be only be applied to the current ombudsman (active since 2009). The abbreviation OMED will be used when referring to the former ombudsman against ethnic discrimination.

protection against sex discrimination in housing was later strengthened by amendments to the law (SFF 2005:480, a result of Prop. 2004/05:147).

January 1st 2009, The Discrimination Act (SFS 2008:567), replaced the above mentioned separate acts, following suggestions in SOU 2006:22 and Prop. 2007/08:95. This merging of the previously separate laws was intended to make the law clearer and more effective, as well as enhance equality between discrimination grounds and lead to a more uniform application (SOU 2006:22, part 1, p. 220). A merging of the laws went hand in hand with a merging of the existing ombudsmen agencies. A joint supervision agency (DO) was to have more impact and authority as well as leading to a more equal treatment of the different human rights (SOU 2006:22, part 2, p. 205). According to chapter 6 § 2 of the current act, DO and non-governmental organisations such as anti-discrimination agencies also have the right to bring an action before court on behalf of a person if the person allows it.

2.5 A doctrinal description of the current Discrimination Act

This section doctrinally describes the Discrimination Act in order to provide the reader with an understanding of the legal concepts referred to in the analyses and discussion.

2.5.1 The area of housing (chapter 2 § 12)

The law aims to counteract discrimination and in other ways promote equal rights and opportunities in eight areas out of which housing is one. Chapter 2 § 12 section 1 covers “goods, services, and housing et cetera”, and states that discrimination is prohibited when providing goods, services and housing to the public, outside of private and family life. ‘Housing’ is to be understood as both permanent and non-permanent housing of various types of ownership or forms of tenure (Prop. 2007/08:95, p. 518). The paragraph differentiates between public and private spheres. This differentiation has been cause for changes during the years. The current act includes all transactions that occur outside of the private sphere (Prop. 2007/08:95, p. 247) by offering and supplying to a public arena (Fransson & Stüber, 2015). It is meant to protect the relationship between tenant and landlord (Ibid.). Transactions completely within the private sphere, such as choosing someone to share a household with, are not included.

Chapter 2 § 12a contains an exception regarding sex. It says that the prohibition against discrimination in § 12 does not apply of women and men are treated differently because of a justified cause and if the means applied are appropriate and necessary to reach that cause. The exception stems from Prop. 2004/05:147 and is meant to allow for example sheltered housing (Fransson & Stüber, 2015).

Chapter 1 § 4 of the act defines insufficient accessibility as a form of discrimination. It aims to enhance the substantive rights and possibilities for people with disabilities in all social areas (Fransson & Stüber, 2015). However, chapter 2 § 12c section 1 contains an exception regarding disability and insufficient accessibility. It says that the prohibition against discrimination manifested in insufficient accessibility does not apply in the area of housing. Absence of an elevator is an example of insufficient accessibility (Prop. 2007/08:95, p. 520). The exception in chapter 2 § 12c in the area of housing was put in place because the implications would otherwise have been too far-reaching for landlords and housing companies (Prop. 2013/14:198, p. 94).

2.5.2 Covered grounds (chapter 1 § 1)

Chapter 1 § 1 includes an exhaustive list of the seven discrimination grounds covered by the law: sex, gender transcending identity and expression, ethnicity, religion or other belief, disability, sexual orientation and age. No other social division can be processed according to the act. As this study is focused upon sex/gender⁵, race/ethnicity⁶ and social class special attention will be paid to the legal definitions of

⁵ As can be seen there is no clear differentiation between sex and gender in the law. It builds on a dichotomy of two biological and legal sexes, but also acknowledges identities transcending this dichotomy. This vagueness combined with the fact that the same Swedish word (“kön”) is most often applied to describe both ‘sex’ and ‘gender’, causes some problems in this study. Since this study is not a pure discourse gender study there is however no absolute need to clearly define sex and gender. Therefore, this study will aim for the following basic rationale: when referring to the male/female biological and legal dichotomy proscribed in the law, the word “sex” will be used in this study. When more loosely discussing how biological, legal and/or social gender intersects with other social divisions this study will say “sex/gender”. The reader should note that all reflections made in this study aim away from a biological understanding of sex differences, towards a discursive understanding of gender.

⁶ Discussions have been and are still taking place in Sweden about whether or not to use the word and concept of ‘race’ (see for example SOU 2001:39 and United Nations Human Rights Office of the High Commissioner, 2018-05-03). This study acknowledges the possible issues that come with acknowledging race, as brought forward in SOU 2001:30. This study also acknowledges that ignoring ‘race’ can lead to a silencing of the power relations that circulate and permeate the word. In this study, the words race and ethnicity are used as they were used by the author or regulation discussed. In the discussion, I will use a combination of the words.

these social divisions in the law. Chapter 1 § 5 defines each ground except for religion or other belief. ‘Sex’ is defined as being biologically woman or man (Prop. 2007/08:95, p.112). The discrimination ground sex is also to include people who have or plan to alter their legal sex (SFS 2014:958). ‘Gender transcending identity or expression’ is defined as not identifying with being man or woman, or through clothing or similar express belonging to another sex. ‘Ethnicity’ is defined as national or ethnic origin, skin colour or other similar relationship. Although religion and ethnicity are separate grounds they often overlap. Religious aspects often have cultural connotations, and culture can be attributed to both ethnicity and religion. According to Prop. 2007/08:95 (p. 120) a definition of religion is unsuitable. Investigating previous preparatory works gives that this ground includes different religions and belief systems, but should not be interpreted too widely. That excludes ethic and philosophical beliefs as well as political affiliation (Prop. 2002/03:65, p. 82) (Fransson & Stüber, 2015). Social/socio-economic class is not included as a ground.

Neither Swedish nor European law contains an explicit prohibition against multiple or intersectional discrimination. EU directives 2000/43/EG and 2000/78/EG does however mention multiple discrimination. The Discrimination Act allows for multiple grounds to be processed simultaneously. This has been done in a few cases mainly relating to discrimination in the workplace, but is scarce (Fransson & Stüber, 2015).

2.5.3 Forms of discrimination and their prerequisites (chapter 1 § 4)

Chapter 1 § 4 defines six forms of discrimination: direct discrimination, indirect discrimination, insufficient accessibility, harassment, sexual harassment and instructions to discriminate. Direct discrimination is the only form processed in the case law of this study and indirect discrimination will be discussed in the concluding discussions. Therefore the prerequisites of these two forms will be described here.

The prohibition against direct discrimination contains three objective prerequisites: disfavourable treatment, comparable situation and causality. There are no subjective prerequisites such as intent. The prerequisites are closely intertwined and in general all three are necessary for direct discrimination to be established (Fransson & Stüber, 2015). ‘Disfavourable treatment’ entails damage or negative effects, such as disadvantage, deprivation, discomfort or similar. In housing this is typically manifested in not being offered to rent an apartment. ‘Comparable situation’

entails a comparison with how somebody else (of for example another sex, ethnicity or age) is treated, was treated or would have been treated in a comparable situation. In housing this is typically made out by a comparison with a Swedish person who was offered to rent the apartment in question. A comparable situation means that apart from the discrimination ground(s) called upon there were no other major differences between the plaintiff and the comparison. ‘Causality’ entails a connection between the treatment, deed or negligence and the discrimination ground. In housing this means that the landlord or housing company must be aware of the discrimination ground (i.e. know that the applicant is for example female, Polish or over 65 years) and treat the person worse because of that. However, the discrimination ground must not be the only reason for the disfavourably treatment – being part of the reason is enough.

Indirect discrimination is more complex than direct discrimination. The prohibition against indirect discrimination covers discrimination because of a regulation, criterion or procedure that appears to be neutral but in reality comes to disfavour certain groups because of their sex, gender, ethnicity, religion, disability, sexual orientation or age. A criterion can for example be language skills on a certain level (Fransson & Stüber, 2015). However, if the criterion has a legitimate aim and the means applied are both suitable and necessary, it does not entail indirect discrimination. As such, establishing indirect discrimination demands both a weighing of interests and proportionality. For an aim to be considered legitimate it must be both important and objectively acceptable. Or in other words the aim must be worth protecting and be of enough social importance to be given precedence over the non-discrimination principle (Prop. 2007/08:95, p. 491).

2.5 Critical research on anti-discrimination law

There have been numerous attempts to capture the idea of equality in legal forms (such as the above mentioned treaties and regulations), but sometimes their “initial logic fades as soon as we begin to ask further questions (Fredman, 2011, p. 1)”. This section presents critical legal research on anti-discrimination laws. Researchers within this field has found that anti-discrimination laws are both insufficient and ineffective, because of (for example) few filings of court cases, low success rates in national courts and rudimentary legislation (Petrova, 2006).

2.5.1 Formal or substantive equality

Equality is a central human rights commitment but even so the meaning of what the right to equality entails is contested (Fredman, 2016c). According to Fredman, choosing between equality conceptions is not a matter of logic but of values and policy: “[e]quality could aim to achieve the redistributive goal of alleviating disadvantage, the liberal goal of treating all with equal concern and respect, the neo-liberal goal of market or contractual equality, and the political goal of access to decision-making processes (Fredman, 2011, p. 2-3)”. Critical legal scholars have often highlighted the important difference between formal equality and substantive equality. Formal equality entails a focus on a liberal notion of equal treatment (‘likes are to be treated alike’), and relies on a neutral language. Critical researchers have acknowledged the limitations of such a formal interpretation of equality and called for substantive equality conceptions (Fredman, 2016b). Substantive equality too can be conceptualised differently but most often reflects the principle that “the right to equality should be responsive to those who are disadvantaged, demeaned, excluded, or ignored (Ibid., p. 712)”. In comparison with the liberal equality of equal treatment, a substantive equality notion acknowledges the needs of redistributive measures. In other words, critical researchers question the idea of equal treatment in itself, and whether it is always just to treat everybody equally.

Pylkkänen and Wennberg (2012) have studied the difference between formal and substantive equality from an intersectional perspective. Implementing intersectionality in law is likely to fail because when oppressed groups are recognised in legislation it mostly concerns formal equality (Ibid.). Formal justice leads to harmonisation and assimilation based on certain standards – such as discrimination grounds. Formal equality focuses on the equal legal treatment and freedom of individuals, but fails to acknowledge marginalisation and vulnerability. Formal equality can solve disputes but cannot affect social and financial power dimensions. Rather, legal processes serve to reproduce existing power dimensions (such as structural discrimination) and dichotomies because they aim for neutrality in regards to power structures (Ibid.). Pylkkänen and Wennberg claim that intersectionality is often invisible in Swedish legal processes. According to them, there is a lack of recognition, which entails acknowledging identities and the living situations of individuals. The court should be able to understand the individual and the problem in its public and private context. The opposite of recognition is assimilating the

individual into clear and divided legal categories visible in the public sphere. According to Pylkkänen and Wennberg many intersectional situations have their roots in practices and identity constructions taking place within the private sphere. What takes place in the private sphere is usually protected from interventions. Through their scrutiny of the anti-discrimination law's tendency to rely on formal equality, Pylkkänen and Wennberg have found that the legal system must pay attention to cultural, social and economic patterns that are created in close and private relationships, in order not to reproduce intersectional oppression (Ibid.).

2.5.2 Exhaustive and non-exhaustive lists

Even if we were to agree on a conceptualisation of equality, the enforcement and compliance methods and mechanisms which come with civil discrimination law can be what Fredman (2011) calls an empty promise: legal proceedings are technically available to all, but in reality difficult for some to access. This unavailability can be explained in several ways. For example, those with scarce resources (such as financial resources, academic resources and low social integration) are less likely to be aware of the legal processes available and less likely to have the resources necessary to make use of them (Ibid.). But the law can also be difficult for some to access because of the design of the law itself. Discrimination laws differ when it comes to the inclusion of discrimination grounds. Lists of grounds can be exhaustive, non-exhaustive (open) or open-textured (no list at all) (Ibid.). The UDHR and the ECHR are non-exhaustive. The list in the Swedish Discrimination Act is exhaustive, which means that it is comprehensive and no other grounds than those mentioned can be legally processed according to the law. According to preparatory works (Prop. 2007/08:95) this exhaustive list of seven grounds is sufficient to fulfil the EU directives. However, this means that Sweden has not included political affiliation, social origin, wealth or ancestry, as listed in the UDHR and ECHR (Fransson & Stüber, 2015).

2.5.4 The male norm

An aspect of the difference between formal and substantive equality is the critique from feminist legal scholars that the legal landscape is gendered. Treaties, regulations and legislation are often gender neutral in their design (i.e. formally equal), but according to feminist legal researchers, this neutrality does not reflect society or law

in practice (i.e. substantively equal). One strand of feminist socio-legal research “critiques the failure of law to acknowledge the gendered nature of the ‘socio’ and its refusal to incorporate gender differences and specifically women’s experience into the constitution of the ‘legal’ (Hunter, 2013, p. 206)”. Within Nordic feminist legal studies anti-discrimination law has been critiqued for its defect objectivity and for maintaining a male norm (Gunnarsson & Svensson, 2009). The legal framework is generally gender discriminating because it assumes a typical male way of life, the male norm, and does not fit women’s lives (Ibid.). ‘The male norm’ is a concept by which to express the fact the men’s opinions, needs and conflicts are the focus of law. The male sex is objective and universal, compared to the female sex, which is subjective and specific (Gunnarsson & Svensson, 2009). It can also be seen as an expression the social gendered power-order or patriarchy (Ibid.). This affects both how cases are adjudicated, and which situations can be adjudicated to begin with. For an on-going process the standard of treatment, which represents the comparison, is founded on a male norm (Lacey, 1999). Situations, which according to the law cannot be processed, illustrate “the blunt critical edges of the legislation, which cannot provide any platform for litigants to criticise the formulation of the ‘nominal’ standard (Ibid., p. 24)”.

2.5.3 Social/socio-economic class as a legal discrimination ground

“As socio-economic inequalities are dramatically increasing, anti-discrimination law should be considered alongside policies tackling poverty (Kantola & Nousiainen, 2009, p. 469)”. According to Kantola and Nousiainen, class may and is often used as a criterion of making distinctions based on prejudice. Critical legal researchers have therefore highlighted the absence of social/socio-economic class as discrimination ground as a possible problem. In part because it has been found that laws which appear equal affect rich and poor differently (Fredman, 2011) and in part because social class is more difficult to define than other grounds (Schömer, 2011) Nonetheless, socio-economically disfavoured groups are among the groups in most need of protections. According to Vieten (2008), many European countries neglect the central impact of “(deprived) social class status and complex notions of transnational belonging (Ibid., p. 102)”. Instead prejudiced conceptions of culture have become central in understanding the subordination of certain groups. The absence of social/socio-economic class as a discrimination ground has specifically been

discussed in relation to Europe's Romani population. European Roma are, according to Goodwin (2008) the most impoverished, marginalised and discriminated group in Europe. They face multi-faceted and entrenched problems, which can be understood through the nexus of race and poverty (Ibid.). "Discrimination and socio-economic injustice have a systematic relationship, in that each reflects and perpetuates past and present patterns of the other (Ibid., p. 146)" Goodwin has questioned the overwhelming focus on racial discrimination to overcome such socio-economic injustice, at the expense of other factors. What is needed is an intersectional approach that addresses both racial discrimination and socio-economic marginalisation (Ibid.).

Another reason for anti-discrimination law's ineffectiveness is that a focus on discrimination attributes blame to individuals, individual communities or society as a whole, and "one of the great difficulties in effecting change is persuading those discriminating that what they are doing is unjust (Vieten, 2008, p. 151)". Anti-discrimination laws do not address the interaction between prejudice and disadvantage. In the case of Roma exclusion, it dates so far back, "the charge of discrimination finds no hook to hang (Ibid., p. 151)". Goodwin claims that the label discrimination can only lead to change if the accused actually knows that discriminating the group in question is wrong.

2.5.5 The difference between multiple and intersectional discrimination

"There are several different ways of conceptualising discrimination when it occurs on more than one ground. Terms such as 'multiple discrimination,' 'cumulative discrimination,' 'compound discrimination,' 'combined discrimination' and 'intersectional discrimination' are often used interchangeably although they might have subtly different meanings (Fredman, 2016a, p. 27)". Most legal researchers find it important to distinguish between these different conceptualisations even though the terminology is not yet uniform (Schiek, 2008). Additive or multiple discrimination is used to describe the interplay of separate and distinct criteria. Intersectional discrimination refers to invisible and inseparable interactions of grounds (Ibid.). As such, intersectional discrimination is not just an addition of two sources of discrimination, but a qualitatively different and synergistic effect (Fredman, 2016a).

Kantola and Nouisiainen (2009) have examined how the concept of intersectional discrimination has been institutionalized throughout Europe. They claim that EU regulations focus on multiple discrimination rather than intersectional

discrimination. They therefore attributed European laws' inefficiency in addressing intersectional discrimination to laws' tendencies or a singular focus – both in forms of single equality bodies and the calling upon single grounds.

According to Fredman (2016a) focusing on single or multiple grounds assumes that everyone within a group is the same, and ignores the role of power in the structuring of relationships between people. Simply acknowledging the existence of multiple discrimination will limit the transformative potential of multi-dimensional discrimination laws (Kantola & Lombardo, 2017). According to Kantola and Lombardo the reliance on single equality bodies to tackle intersectional discrimination through acknowledging multiple discrimination grounds has not been altogether successful. Institutional use of additive models instead risks leading to civil society groups having to compete for the title of being the most oppressed because of a single ground (Ibid.). Instead of acknowledging several grounds simultaneously, Fredman (2016a) has found that discrimination laws should focus on relationships of power rather than competing discrimination grounds. Since all individuals have a variety of identities, discrimination laws should acknowledge that the relationship between some characteristics signal privilege while other relationships signal disadvantage (Ibid.). The legal aim of intersectionality should be to acknowledge how circumstances and context shape these relationships.

According to Kantola (2010) European efforts to tackle multiple discrimination has led to many single equality bodies, such as the Swedish united Discrimination Act and Equality Ombudsman. Schömer (2011 and 2013) has examined if and how intersectional discrimination is recognized in Sweden after the united act came into place in 2009. Schömer has found that a unified act has not led to recognition of neither multiple discrimination grounds nor intersecting grounds. Instead, Schömer has found that the grounds are kept apart, and either one or another is called upon in legal processes. Schömer states that this leads to a juxtaposition and ranking of discrimination grounds. According to Schömer, the Discrimination Act is not intersectional. Rather, it is an answer to EU directives that ask for coherence in the member states (Ibid.).

3. Individual analyses

The preparatory works analysis is presented first since preparatory works make out a legal source for the courts. The case law analyses are presented in the chronological order of the judgments.

3.1 *Preparatory works*

The doctrinal description of the preparatory works has already been presented in part 2. The critical analyses of the preparatory works are assembled into one headline, because individual presentations would be more repetitive than they would be rewarding. A joint presentation is motivated by the fact that preparatory works to a large extent quote each other, and therefore the same reasoning is recurrent. To increase readability, the presentation is presented divided into three sections. These section headlines are not the final joint result of the analysis, but a tool by which to delineate the preparatory works analysis. The headlines were chosen based on the questions directed to the texts: what social divisions are present, how they are related to each other and how they are presented.

3.1.1 The seven discrimination grounds

The preparatory works contain some, although not many or lengthy, discussions about the number of grounds and how the grounds relate to each other. SOU 2006:22 and Prop. 2007/08:95 contain discussions of the list of the seven grounds, the possible inclusion of more grounds or of having an open list. SOU 2006:22, when discussing the ECHR, also mentions the possibility of including social class, but still ends up recommending an exhaustive list of seven grounds without social/socio-economic class. Prop. 2007/08:95, following SOU 2006:22, suggests an exhaustive list but claims that an open list is to be further considered. From a critical point of view it is noteworthy that both SOU 2006:22 and Prop. 2007/08:95 are hesitant towards having an exhaustive list, but even so recommend it.

Already in Prop. 2002/03:65 it is written that Swedish law can and should go further than EU directives, in that all discrimination grounds are to be treated equally. Prop. 2007/08:85 states that the aim of the Swedish Government is for all discrimination grounds to be treated as similar as possible, which is why the all seven discrimination grounds will be protected equally in the area of housing in the new

merged law. From a critical point of view, it must be noted that preparatory works are nonetheless reluctant to discuss how the grounds relate to each other. There is just one exception to this reluctance. SOU 2006:22 explicitly mentions intersectional and multiple discrimination. By quoting a government report on structural discrimination (SOU 2005:56) in which the investigator called for a more intersectional understanding of the discrimination grounds, SOU 2006:22 contains some suggestions of intersectional awareness. According to SOU 2006:22 an intersectional awareness would make it possible to understand the complexity of discrimination (part 2, p. 138). In SOU 2006:22 intersectionality is explained and defined as the intersection of social power structures such as sex/gender, class and ethnicity. Intersectionality is claimed to be “of interest “(part 2, p. 216) and a joint ombudsman agency is claimed to be more accessible in cases of multiple discrimination. It says that if a person who has experienced multiple discrimination only has to turn to one agency it will make things easier (part 2, p. 216). This is illustrated by examples including a black lesbian disabled woman, an elderly woman and a Muslim man in wheelchair. The report states that it is unreasonable for a victim of discrimination to have to consider which ground he or she was mostly discriminated by, and that with a unified ombudsman agency this will not be a problem, according to SOU 2006:22. This reasoning can be seen as promising, as it contains notions of an intersectional awareness. However, it does seem like the committee confuses multiple and intersectional discrimination. It is a simplification to equate intersectional discrimination with multiple discrimination. The examples given by the committee serve to illustrate how a black lesbian disabled woman would not know which ombudsman agency to turn to, as if intersectional discrimination would allow for her to turn to any ombudsman. In reality, intersectional discrimination could just as well manifest itself in a way that would lead no ombudsman to take on her case. A joint ombudsman could change this, but it is no guarantee. Especially if the same confusion between multiple and intersecting discrimination that SOU 2006:22 manifests was to prevail. Nonetheless, it must be noted that while SOU 2006:22 at least attempts to discuss multiple and intersectional discrimination, the following Prop. 200708:95 does not mention it at all.

3.1.2 The discrimination ground 'ethnicity'

The discrimination ground ethnicity is much discussed. As is the word and concept of 'race' and whether or not to phase this word out from Swedish law, in favour of the word 'ethnicity'. In the discussion of 'race' in SOU 2001:39 it is stated that race can be understood as physical characteristic such as skin colour or facial shape (p. 55) but it also says that it can also be understood as individuals with a certain ethnic origin that share a relatively monolithic cultural pattern (p. 55). Race, ethnicity and culture are mixed together and it is difficult to understand if and how the authors of the report tell them apart. No matter what, this must be interpreted as the acknowledgement of an existing or possible connection between race, ethnicity and culture. In the discussions of how to implement the racial directive (2000/43/EC) SOU 2002:43 discusses the concept of 'race'. It quotes the EU directive and states that EU does not accept the idea of separate human races. The report states that race is often given a biological connotation, but could also be understood as having sociological meaning (p. 149). It quotes a 2001 UN conference where the UN urged States "to recognize the challenges that people of different *socially constructed races*, colours, descent, national or ethnic origins, religions and languages experience in seeking to live together and develop harmonious multiracial and multicultural societies [report's italics]". The report does not take a final stand on 'race' or how to understand or use it.

SOU 2006:22 (p. 648) brings up the unique situation for Romani people. Referencing a DO report SOU 2006:22 acknowledge how antiziganist thoughts and prejudice is common and unquestioned in Sweden, which fuels discrimination against the Romani. It says that the Romani have fewer possibilities in Swedish society compared to other people with another ethnicity. 'Another ethnicity' must be interpreted as meaning 'other than Swedish'. As such, the report states that Romani people suffer discrimination that differs from the discrimination faced by other minorities. They further state that, in regards to housing, the situation of the Romani people could be grounds for affirmative actions. However, the report does not discuss if or how courts are to be aware of the situation for the Romani. Notably, the discussion of the Romani situation is not brought up as a discussion about 'ethnicity'. It is noted in the section about affirmative actions. That is in itself not a bad thing, but it is worth mentioning because all preparatory works seem to avoid discussing how being Roma fits into the discrimination ground ethnicity. It is almost as if the

preparatory works realize that being Roma is more than the ethnic origin, but shy away from acknowledging this.

3.1.3 The discrimination ground 'sex'

In regards to the ground sex and housing, there are recurrent discussions about the exception in chapter 2 § 12a of the Discrimination Act. The exception states that the protection against discrimination in housing because of sex does not apply if the treatment is justified and the means used are appropriate and necessary. In preparatory works (SOU 2006:22; Prop. 2004/05:147; Prop. 2007/08:95) there are two commonly mentioned examples of what this exception might entail: safe houses (for victims of violence) and traditional foundations that have set up certain living arrangements (such as all female student housing). The fact that Prop. 2004/05:147 is to be entirely focused on matters of sex and gender leads this bill to stand out in some aspects, such as its acknowledgment of gendered power relations. It says (p. 81) that society is pervaded by a gender-power order that give reasons to emphasize women's subordination and men's superiority. It further says that social structures are arranged according to a male norm, and gendered violence functions to maintain this order (p. 81). Based on this, Prop. 2008/08:95 discusses the necessity of an exception in the area of housing discrimination. The bill states that when designing housing discrimination law in Sweden one cannot overlook unequal gender power relations and the exploitation of women (p. 83). Non-governmental organisations or municipalities must therefore be allowed to provide women with all-female housing. Prop. 2007/08:96 mentions emergency safe houses and more long-term living arrangements. What long-term arrangements this could be is not stated, why emergency safe houses is actually the only example provided. These acknowledgements can be interpreted as being understanding of the problems women face in regards to housing – at least in particular delimited situations. In an attempt to counteract or compensate women for the negative effects of the gender-power order safe female spaces are necessary. However, on page 86 of the same government bill another picture is painted of how women are treated in the housing market. Here the bill begins by stating that in Swedish society there are many everyday situations in which women *or* men are disfavouredly treated because of their sex, in the supply of housing. As the bill acknowledges disfavouredly treatment of both men and women, one could assume that they would call upon another social divisions to explain why

both these grounds can suffer from housing discrimination. However, they do not. Instead, they go on to claim that these circumstances are often made of situations where women are given a more favourable treatment. Either, women are being offered housing that men are not, or women are being offered housing at a more beneficial price (p. 86). This must be understood as discrimination of men because of their sex. The bill does not address the fact that this is the opposite of what was previously said about women in the housing market. Also here, one could assume the bill to acknowledge another social division to explain why some women are victims of the gender-power order and some women benefit from it. However, it does not. Instead it claim that most people would not consider women being offered housing at a more beneficial price than men, as prejudice, unfair or as discrimination of any particular importance. This section ends with a warning, where the bill says that such situations (women being offered apartments which men are not, or women being offered apartments at a better price) would become impossible if the law did not include an exception to sex discrimination. The bill recommends that such situations remain lawful. The bill provides no sources to any of the claims in this passage.

Report SOU 2006:22 (p. 516) notes that most single parents are women. According to the report such women tend to be unemployed, suffer from poor health and financial difficulties to a larger extent than single fathers. This, according to the report, is relevant in regards to social services, but is not discussed in relation to housing. Neither is this acknowledgment of women's particular situations as single mothers discussed in relation to any discrimination ground or discrimination form. It is brought up in in relation to social services and non-discrimination in that field. From a critical point of view one might ask why these subordinated positions for women are only acknowledged in relation to social services, and not in relation to housing.

3.2 Case A (2007)

3.2.1 Doctrinal descriptive analysis

In case A, OMED represented A.A. The claim was direct discrimination in the allocation of housing because of ethnicity. According to OMED, the housing company had knowingly neglected rental applications from A.A., while handling applications sent by at least two other applicants with Swedish or Nordic names. The

housing company admitted to have neglected the applications from A.A, however not because of his ethnicity but because of his inappropriate behaviour. Their assessment of his behaviour was based on what he had said during phone calls. According to the housing company, A.A. had been aggressive and too assertive to be considered a suitable tenant. The court found that the housing company had not managed to provide reasonable explanations for the disfavourable treatment and established that discrimination had occurred.

3.2.2 Critical analysis

Case A contains many comments on A.A. and his personality. A.A. is described as being originally from Croatia, but his ethnicity is in this case mostly attributed to his name, which “is foreign”. The defence builds in part on an intention of having an even distribution of tenants when it comes to “income, age and other factors”. This entails a balanced mixture of tenants, “also including their ethnicity”. From this one can speculate on whether the housing company considers ethnicity to be a personal characteristic or trait alongside income and age, despite the fact that these three categories overlap to a large degree. This also gives reason to discuss if the housing company considers ethnicity to be constant and visible from name or national identification number. In regards to A.A. as a person, negative words regarding his behaviour are recurrent. He is said to have been too assertive, fairly aggressive, nagging, threatening, the kind of tenant who is demanding, unfitting as a tenant, and having made the housing company feel uneasy and intimidated. OMED’s description of A.A. as a family man can be interpreted as intentionally trying to paint a different picture. Such information is actually not necessary for the case, which is why its presence in the argumentation can be interpreted as OMED giving in to the housing company’s narrative.

3.3 Case B (2008)

3.3.1 Doctrinal descriptive analysis

In case B, OMED represented B.B. The claim was direct discrimination in the occupation of housing because of ethnicity. OMED claimed that B.B. had been disfavourably treated for reasons relating to her being Roma. The disfavourable treatment consisted of the private landlord (X.X.) cancelling a rental agreement and

changing the locks of the apartment when realizing B.B. was Roma. X.X. claimed that B.B. was negligent with payments, moved things into the apartment unlawfully and then disappeared. Two witnesses testified that X.X. had spoken derogatory about the Romani origins of B.B. The court found that there was reason to believe that the ethnicity of B.B. had affected the actions of X.X. The unusually high financial discrimination compensation sum was motivated by the act being intentional and that it affected B.B. as well as her family with young children.

3.3.2 Critical analysis

In case B there are many more or less explicit comments about being Roma. OMED's statement starts with "B.B. is a travelling Roma". Being travelling is mentioned only here, and it is unclear why. From the rest of the text it seems as B.B. is settled in the municipality. Neither OMED or the court discuss any comparable situation. It is therefore unclear in comparison to whom B.B. was unfavourably treated. An interpretation is that the court does not know what to compare it to. According to X.X.'s statement he, at his first encounter, did not understand that B.B. was of another origin (other than what is not stated but can assume to be 'other than Swedish') but that this was not a problem for him. According to witnesses X.X. had said that B.B. had then "lured" him into thinking she was from Thailand. He found out that she was "actually" Roma because other tenants had "discovered" it and told him. Thai origins were apparently less disturbing than Romani. This can be interpreted as the court being presented with different layers of ethnicity.

3.4 Case C (2009)

3.4.1 Doctrinal descriptive analysis

In case C, DO represented B.B. The claim was direct discrimination in the allocation of housing because of ethnicity. C.C., who is Roma, responded to an advertisement to rent an apartment from private landlord Y.Y. After meeting with C.C., Y.Y. did not offer him the apartment. According to DO, the decision not to offer him the apartment was related to his Roma origin, and a non-Roma would have been treated more favourably in a comparable situation. The district court that first tried the case (2008) found that DO had not managed to present conditions making discrimination presumable. When appealed, the judgment was changed in the plaintiff's favour. The

court of appeal found that witness testimonies from family members were believable. The testimonies regarded how Y.Y. had reacted and what he had said when meeting with C.C. The court stated that it was likely that a non-Roma would have been treated differently in a comparable situation, and that this had at least some connection to ethnicity.

3.4.2 Critical analysis

The case highlights negative attitudes surrounding Romani without explicitly discussing the discrimination ground or being Roma. The defence revolves around C.C.'s financial debts, which can be read in conjunction with ethnicity and a Roma identity. According to DO, Y.Y. had both verbally and through body language, expressed negative feelings of surprise when understanding that C.C. was Roma. Apparently, Y.Y. felt "lured" about C.C.'s identity, since his name, appearance and language skills gave the impression that he was Swedish. Y.Y. is to have wanted him to "admit to" being Roma, because Y.Y. wanted to "know the truth". There are also several mentionings of the neighbours, and how they would feel about having "that kind of" neighbour. The defence mainly discusses the financial situation of C.C., including his debts to the Swedish Crime Victim Fund. This leads to mentionings of being economically untrustworthy, despite the present financial guarantor, and of criminality. Y.Y. is quoted saying that he was worried that C.C. had committed a serious crime that could have led to imprisonment, and that it frightened him.

3.5 Case D (2009)

3.5.1 Doctrinal descriptive analysis

In case D, DO represented D.D. The claim was direct discrimination in the occupation of housing because of ethnicity. D.D. was already a tenant with the housing company, and the case regarded the actions of the company when D.D. (who is of "Turkish origin") wished to swap apartments with another tenant (who must be assumed to be of Swedish origin). DO claimed disfavoured treatment because the inspections performed on the two apartments were conducted differently and the housing company were more lenient towards the other tenant, regarding damages that were found in the inspection. DO claimed that this disfavoured treatment related to D.D.'s non-Swedish ethnicity, and that several tenants with this housing company had felt

disfavourably treated because of ethnicity. The court discussed the prerequisite of disfavourable treatment and found that DO had not managed to present conditions which gave reason to believe that D.D. had been disfavourably treated in comparison to the other tenant.

3.5.2 Critical analysis

The case text reveals nothing about how long D.D. has been in Sweden, her language skills or similar. DO does not elaborate on how, when and why other tenants of foreign origin have felt disfavourably treated by the company. No further discussions of ethnicity are brought forward by any part. The case contains lengthy description of the inspection protocols that, according to the court, are stipulated facts even though they have been interpreted differently in the case of D.D. and the other woman. However, the court finds this difference in treatment to be expected and therefore independent of ethnicity. However, this is not discussed or motivated. One can question why the court acknowledges difference in treatment and is satisfied with dismissing ethnicity as the reason for the difference, without establishing another reason.

3.6 Case E (2010)

3.6.1 Doctrinal description

In case E, DO represented E.E. The claim was direct discrimination in the occupation of housing because of ethnicity. E.E. and her family had recently come to Sweden as refugees. The housing company had applied a different rent standard for refugee families, resulting in higher rents. According to DO, higher rent for refugee families was discrimination because of ethnicity. The district court (2009) discussed whether or not being 'refugee' was supposed to be covered by the discrimination ground ethnicity and found that preparatory works did not stipulate such coverage. The court of appeal dismissed this reasoning, and found that the company had discriminated E.E. According to the court of appeal the intention of the legislator was for refugee status to be covered by the ground ethnicity. The court states a literal interpretation could give the result that the district court came to, but found such in interpretation too isolated. The court of appeal therefore stated that DO had made discrimination presumable, and that the company had not managed to counterproof that the rent was

not dependant on ethnicity, nor managed to prove that higher rents was objectively justifiable.

3.6.2 Critical analysis

The case revolves around the discrimination ground ethnicity. E.E. is almost invisible in the case documents, which are mainly made out of legal interpretations. What is known is that she came as a war refugee from Afghanistan with seven children. The family size receives some attention. Family size, together with the economic unreliability of refugees, is highlighted by the defence, the court and to some extent also by DO. Large refugee families are assumed to lead to higher costs for the landlord. These higher costs relate to things such as water and disposing of garbage as well as higher costs for maintenance and repairs. According to the defence, refugees cause “abnormal wear” in apartment. They are also claimed to be hard to reach after moving out, leaving the landlord with unpaid rents. The defence further claims that refugees lack financial resources in general, and E.E. specifically. According to the defence, the higher rent did not affect E.E. since it was the municipality and not her that was paying the rent.

3.7 Case F (2016)

3.7.1 Doctrinal description

In case F, the non-governmental anti-discrimination agency Malmö mot Diskriminering (MmD) represented F.F. The claim was direct discrimination in the allocation of housing because of ethnicity. F.F. had applied for an apartment with private landlord Z.Z. Another person wrote an application via e-mail on behalf of F.F. Z.Z. replied that he wanted tenants who could speak Swedish. MmD claimed that denying F.F. an apartment because of his language skills was disfavourable treatment in comparison to how a person of another ethnicity would have been treated. The district court (2015) initially ruled against this claim. The case was first tried by a district court (2015) because Z.Z. had had reasons to believe that F.F. did not speak Swedish. Because Swedish language skills was something Z.Z. demanded from all tenants, it was disfavourable treatment but not because of any discrimination ground. However, the court of appeal ruled in the plaintiff's favour. The appeal court paid attention to the fact the Z.Z. had made assumptions about language skills based on

F.F.'s name and personal identification number. The court stated that Z.Z. would have not given the same answer to a person with a more "Swedish sounding" name.

3.7.2 Critical analysis

Case F highlights how the discrimination ground ethnicity is manifested through language. A critical analysis of case F gives that the defence relies on two assumptions. First, it was assumed that F.F. did not speak Swedish. The assumption was due to his name and personal identification number. Second, there is an assumption that F.F. and Z.Z. must be able to communicate with each other in Swedish. The district court deemed that it was reasonable to dismiss the application based on belief that F.F. did not speak Swedish. Z.Z.'s explanation for this was that he needs to be able to communicate with his tenants regarding the management of the apartment building. Although the court of appeal reversed this reasoning, one can question this underlying assumptions of the need for communication.

4. Joint analysis

In this section the individual analysis are linked to each other, the whole and the social context.

The doctrinal descriptive analyses revealed that all cases share the same discrimination ground (ethnicity) and discrimination form (direct discrimination). Although the preparatory works give examples of housing discrimination because of ethnicity, the preparatory works do not convey the same message as the case law does: housing discrimination and ethnicity are very closely related. Preparatory works highlight the relationship between housing and the discrimination ground sex. It is possible that certain features of ethnic housing discrimination render it easier to process legally than housing discrimination because of other grounds, but if that is the case the preparatory works fail to acknowledge that.

The establishment of this close relationship between housing discrimination and ethnicity calls for a critical examination of 'ethnicity'. These six cases are different, despite sharing the same discrimination ground. This difference can be explained by applying the critical and intersectional approach of this study. The critical analysis gives that ethnicity is not an objective label definitely ascribed to people. The stability and changeability of ethnicity can be discussed. Further, the

variety within groups of people ascribed the same ethnicity can be large. Even so, discrimination law holds ethnicity as a unifying characteristic (shown in preparatory works), while at the same time different ethnicities are treated differently (shown in case law). Through intersectional interpretation three themes arose from comparing and patterning the individual texts: 1) “aggressive men” (the intersection of ethnicity and sex/gender), 2) “resourceless women” (the intersection of ethnicity, sex/gender and class) and 3) “unsettled strangers” (the intersection of ethnicity and class).

4.1 “Aggressive men”

In all six cases analysed, there is an underlying assumption that having an ethnicity other than Swedish comes with being untidy, financially unreliable and negligent. In the three cases specifically discussed here (cases A, C and F) such assumptions are combined with ideas of aggressiveness, assertiveness and attitude problems in the men. From both preparatory works and case law one can discern an understanding and/or presumption of men being more aggressive and assertive than women. This theme acknowledges how this understanding and/or idea is manifested at the intersection of sex/gender and ethnicity.

The exception in chapter 2 § 12a is gender neutral. The exception states that the prohibition against discrimination in § 12 of the Discrimination Act does not apply if men *or* women are treated differently because of a justified goal with appropriate and necessary measures. The preparatory works are however not gender neutral. All mentionings of this exception highlight the need to protect women from aggressive men, through all-female safe houses and similar. Preparatory works, especially SOU 2006:22 acknowledges gendered power relations that exploits and disfavours women. The acknowledgment of gendered power relations and men’s violence against women is necessary, since violence against women is an unquestionable and documented problem. This acknowledgment of men’s aggressive tendencies is therefore motivated. As such, safe houses and protection for women victims of abuse are legitimate to acknowledge in regards to housing discrimination. However, an interpretation of the case law in light of the preparatory works reveals that the acknowledgment of patriarchy likely intersects with ethnicity, and serves to reflect more poorly on men who are also ascribed an ethnicity other than Swedish.

In case A the defence seems to hold ethnicity as personality trait, and both parts call upon the plaintiff's character to explain their stance. When put under pressure by the court on what the plaintiff did to be described as nagging and threatening, the defence explains that he had called them up multiple times. Calling multiple times is probably less likely to reflect poorly on the attitude of a "Swedish man". The plaintiff in case C had a criminal record. Although the existence of a criminal record explain why the defendant speculated on what crime the plaintiff had committed at all, it does not fully explain why the defendant assumed the crime to be severe and violent and why this criminal record was reason to be fearful of the plaintiff. Criminality exists in all social classes. The assumption that the plaintiff was severely criminal and/or dangerous is likely a result of the intersection of his Roma identity and his social class. The connection between this theme and case F is admittedly more speculative. The case document provides little or no information, but it is possible that a presumed idea of foreign aggressive men gives reason to stretch the importance of being able to communicate freely. Communication between landlord and tenant becomes more important if problems arise. It is not unlikely that the landlord, because of assumptions of foreign aggressive men held problems as more likely to occur with the plaintiff in case F, than with other tenants.

To summarize: Patriarchal knowledge of men's violence intersects with racist assumptions of untidiness and unreliability and lead to a form of intersectional prejudice of "non-Swedish" men. This can lead to men of other ethnicities than Swedish being condemned as less attractive tenants, and/or to such explanations being valid when denying a non-Swedish man housing even if the reason is something else.

4.2 "Resourceless women"

As stated above all six cases contains an underlying assumption that having an ethnicity other than Swedish comes with being untidy, financially unreliable and negligent. In the three cases specifically discussed here (cases B, D and E) such assumptions are viewed in combination with women's subordination and the lack of resources that subordination leads to. Women are positioned as resourceless and are therefore more likely to be exploited and neglected. This theme is more interpretative than the first one, in that it acknowledges also intersectional positions not visible from the case law. This theme revolves around the intersection of sex/gender, social class

and in some cases also ethnicity. Women are more likely than men to victims of violence, single parents and have strained finances. These socio-economic factors deem women less resourceful in the housing market. Based on interpretations of the three cases including women plaintiffs (cases B, D and E), this theme examines how the social divisions ethnicity, sex/gender and social/socio-economic class intersect and position women as resourceless. Resources, in this theme, relates to social power dimensions, financial resources and social resources (such as language skills and knowledge on when and how to speak up for oneself).

Although SOU 2006:22 speak both of women being favoured on the housing market, and in need of special measures to guarantee safe living arrangements, this theme draws on the latter. Preparatory works acknowledges that unequal gender power relations lead to exploitation of women. Women are portrayed as in need of safe houses because of domestic violence or similar. Although this theme does not question the existence of gendered social power relations, and its negative effect for women, this theme aims to acknowledge other kinds of subordinations women face in the area of housing discrimination. Much attention is paid to domestic violence in the preparatory work. Domestic violence is however completely invisible in case law. As is attention to other circumstances which limits women's resources. This theme claims that women as victims of gendered violence is only one aspect, and law faces other particular women situations, not sufficiently acknowledged in preparatory works and case law.

In cases B, D and E the plaintiffs are women. Unlike the male plaintiffs of other ethnicities than "Swedish" in this study, women are not ascribed an unpleasant and possibly aggressive personality. Instead, it can be noted that the cases in which the plaintiff is a woman all concern situations where the woman already has a rental contract (whereas the remaining cases, in which the plaintiff is a man, all concern situations where the men are denied a rental contract). Women of other ethnicities than Swedish are treated less favourably than Swedish women is likely to have been treated. This theme interprets this theme as due to resourcelessness: these women either lack the financial resources or cultural resources to be able to "stand their ground". Women of other ethnicities than "Swedish" with limited socio-economic and/or cultural capital are treated less favourable. It is interpreted as likely that the disfavoured treatment of the Roma woman in case D is due to both ethnicity, socio-

economic class and gender. As can be interpreted from case E the plaintiff had none or low language resources, and could therefore be exploited by the landlord.

Being a single parent is a factor that receives little attention in the documents of this study. Both cases E and B regard women who also have children. Especially in case E, where a refugee family was forced to pay higher rent, the size of the family and the fact that it contained children is key for the defence, and held as motivation for disfavoured treatment. Preparatory works have acknowledged that most single parents are women. From that, according to the preparatory works, follows unemployment, poor health and financial difficulties – all possible matters of socio-economic or social class. When the previously separated laws were united into one single Discrimination Act, the preparatory works spoke warmly of the positive side effects of also having a unified ombudsman. According to the preparatory works, this would lead to individuals not having to choose where to turn in case of multiple (or intersectional) discrimination. However, social or socio-economic class is not a discrimination ground in Sweden and cannot be called upon as a ground in a discrimination process. Single mothers who suffer the employment, poor health or poor financial situation therefore cannot turn to the Discrimination Act for help.

To summarize: The absence of social/socioeconomic class as discrimination ground affects women differently and more negatively than it affects men because of women's general subordination. Social/socio-economic class describes resources such as economy, language, cultural capital and knowledge of Swedish customs. Housing discrimination resulting from social/socio-economic subordination affects women to a larger degree than men and is also likely to affect women of other ethnicities than "Swedish" differently and more negatively.

4.3 "Unsettled strangers"

This last theme regards the treatment of people who are held as "unsettled" and "strange" to Sweden, by exploring the intersection of ethnicity and social/socio-economic class. In the cases and preparatory works these are made out of Romani people and refugees. In cases B, C and E the discrimination ground is ethnicity, but readings of the texts in connection gives that explaining the disfavoured treatment as due to only ethnicity is not wrong is a simplification, which does not pay sufficient attention to context. Ethnicity intersects with social or socio-economic class and leads

to an alienation that is more than “just” ethnicity. SOU 2006:22 does touch upon this, although not as explicit intersectional subordination. Close readings of the preparatory works and case documents give that in situations involving Romani people the comparable situation or comparative group is very vague. It is as if the neither the legislator or the courts want to acknowledge the particularity of being Romani. The preparatory work does say that the Romani have fewer possibilities in Swedish society compared to other people with another ethnicities. As written above, ‘another ethnicity’ must be understood as an ethnicity other than Swedish, but the report does not state this explicitly. If Romani people have fewer possibilities in Sweden compared to those of “Swedish” as well as “non-Swedish” there must be another intersecting explanation present. Case B explicitly describes the plaintiff as “travelling” although there are no other mentionings of such a life style. In case C the plaintiff and his family press on the fact that they do not live according to the Romani life style, which can be understood as a way to gain the trust of both the landlord and the court.

The situation of being refugee is very similar. As with Romani people, refugees are assumed to be unsettled strangers to Sweden, with no firm affiliation and no incentives to earn the trust of their potential landlords. Before the appeal in case E the district court found that refugees were not be covered by the discrimination ground ethnicity. The court discusses the difference between belonging to a community and belonging to a group (i.e. a discrimination ground). The difference between group and community is relevant for this theme. Is being a refugee either or? Is being Romani a group or community? This analysis shows that such questions have permeated adjudication in housing discrimination cases.

To summarize: race/ethnicity intersects with social/socio-economic class and leads to a unique subordination situation for individuals who are seen as unsettled and strange to Sweden. In housing discrimination cases these individuals are made out of Romani and refugee families. This intersection builds on the presumptions that people of other ethnicities/races/cultures than Swedish are untrustworthy and neglectful. For Romani and refugees however, social/socio-economic class intersect with this preunderstandings and leads to discrimination which is more than “just” ethnic discrimination.

5. Discussion and conclusions

In this part the analytical findings will be discussed in relation to the theoretical and methodological perspectives, the legal landscape and previous research. The aim of this section is to draw logical conclusions and formulate possible answers to the research questions. The section ends with methodological reflections and a summarizing conclusion.

5.1 Does law face intersectional discrimination?

The three themes presented in the joint analysis give that the short answer to the first research question is: yes, Swedish housing discrimination law faces intersectional discrimination. While the doctrinal descriptive analysis shows that all six cases revolve around the discrimination ground ethnicity, in line with previous European and Swedish research (European Monitoring Centre on Racism and Xenophobia, 2005; OMED, 2008; Boverket, 2007; Integrationsverket, 2005; LED 2009/268; Ahmed & Hammarstedt, 2008; Ahmed, Andersson & Hammarstedt, 2010) the critical analysis shows that ethnicity alone does not fully explain the housing discrimination law must deal with. Intersectional research is to challenge the normative narrative and acknowledge how fragmented categorisations render certain forms of oppression invisible (de los Reyes and Mulinari, 2005). The three themes in this study illustrate the result of such a challenge of predetermined categories.

The intersectional discrimination found is shaped by the interactions of sex/gender, social/socio-economic class and race/ethnicity. Gender, race and class have historically been the corner stones of intersectional analysis (Yuval-Davis, 2006). As stated in the introduction (1.3.3), this study was to pay special attention to these three corner stones, while also staying open to other social power divisions. As this was a qualitative and interpretative study, the result can never be held as an absolute truth. Despite continuous analytical openness it was nonetheless the social power axes of ethnicity/race, sex/gender and social/socio-economic class that revealed themselves.

5.1.1 Reflections on the intersection "aggressive men"

This theme, which reveals that knowledge of men's patriarchal violence intersects with assumptions of untidiness and unreliability, is perhaps the least interpretative

theme of this study. Housing discrimination in Sweden against “non-Swedish” men, for example Arabic/Muslim men (Ahmed & Hammarstedt, 2008; Ahmed, Andersson & Hammarstedt, 2010) has already been established. This study provides a possible explanation as to why Arabic/Muslim men as well as other men who are read as “non-Swedish” run a higher risk of being discriminated in the housing market than “Swedish” men. This study therefore confirms Ahmed’s and Hammarstedt’s suspicion that housing discrimination is caused “by a combination of factors (Ahmed & Hammarstedt, 2008, p. 371)”.

The intersectional discrimination in this theme shares a trait with the theme of “unsettled strangers”. This trait relates to the general tendency in society, and in these themes, to use ‘culture’ as an explanation for unjust or different treatment. Critical legal scholars, such as Vieten (2008), have established that conceptions of culture have become central in understanding the subordination of certain groups. Difference in treatment is held as legitimate because it stems from an acknowledgement of the culture of the person being discriminated. Rather than ascribing blame to the person discriminating, the unjust treatment is validated by references to cultural awareness.

This trait can be understood as a form of reversed intersectionality. It stems from an awareness of, for example, that non-Swedish are not in the same position as Swedish men. But, instead of ascribing the difference to social power axes, it is ascribed to the culture of the person. The rationale becomes that it is reasonable to treat “non-Swedish” men differently because their culture or personality calls for it. The difference in treatment is almost always disfavoured. What this leads to is justification of prejudice. In short, disfavoured treatment is being legitimised by referring to the culture of the person being discriminated rather than to discriminatory intent or prejudice of the person or system performing the discriminating action.

5.1.2 Reflections on the intersection ”resourceless women”

This theme is more interpretative than the first. Previous research, preparatory works and case law are also more ambiguous. In short, this theme acknowledges the subordination of women at the intersection of social/socio-economic class and race/ethnicity. However, previous Swedish research has shown that although the Swedish housing market is affected by gender discrimination this works in favour of women (Ahmed & Hammarstedt, 2008). Ahmed, Andersson & Hammarstedt’s (2008) explanation is that landlords prefer female tenants. This idea reveals itself also in one

preparatory work, which claims (albeit without sources) that women are favoured in the housing market. This theme questions this conclusion and instead claims that even if it were true that landlords prefer female tenants in general, all women are not the same. A critical legal approach, and a critical race approach particularly, acknowledges that ‘woman’ is not a fixed identity. Gender cannot be assumed to be the most foundational social relation (Gunnarsson & Svensson, 2009.). Therefore, although *some* women might be favoured in the housing market, such a sweeping statement renders all other women invisible. Women with less socio-economic, cultural and linguistic resources are obscured. Feminist and intersectional legal theory proclaim that law circulates around complex individuals, whose position is dependent on gender but also on class, ethnicity, religion, sexual orientation and so forth (Ibid.). This theme highlights that if one acknowledges the intersection of sex/gender with other categories, the statement that landlords prefer female tenants crumbles.

This theme also highlights how many situations of intersectional discrimination are rooted in practices and identity constructions within the private sphere (Pylkkänen & Wennberg, 2012). These private sphere practices are deliberately not within the reach of law. Not only are women who lack financial, cultural, linguistic or other social resources likely to experience housing discrimination in more and different ways than men (in general). Compared to men (in general), women’s resourcelessness is also likely to affect their possibilities of utilizing the Discrimination Act for remedy. The law is able to comprise the discrimination of “aggressive men” to a much higher degree than the discrimination of “resourceless women”. This is an example of how equality aimed towards a liberal goal of treating all equal (Fredman, 2011), or a neo-liberal goal of market equality (Fredman, 2011), fails to acknowledge women’s lived lives (Hunter, 2013). In this respect, the Discrimination Act can be seen as following a male norm. Law often fails to acknowledge gendered power relations and assumes a typical male way of life (Lacey, 1999; Gunnarsson & Svensson, 2009; Hunter, 2013). This theme makes visible how the male norm operates in Swedish housing anti-discrimination law. As such, this theme illustrates the difference between formal and substantive equality. Sex/gender and social/socio-economic class intersect and lead to discrimination of financially resourceless women in the housing market.

Further, reviewing the analytical results of this study in light of previous research reveals a complex and elusive pattern of gendered features intersecting with

social/socio-economic class and race/ethnicity. In short, what can be seen is an acknowledgment of the situation of “Swedish women” at the expense of “non-Swedish women” - the same kind of concealing acknowledged by Crenshaw (1989) three decades ago. Law holds ‘women’ as a unified and homogenous group. One can claim that previous research, preparatory works and case law present two possible positions for women in the housing market: either you are favoured by landlords or you are the victim of gendered violence. Law is not designed to address the particular situations that for example single mothers or female refugees (with or without large families) face in the housing market. In addition, the patriarchal subordination which renders women less resourceful lead to landlord and housing companies exploiting them.

Ironically, preparatory works and the design of the Discrimination Act acknowledge one specific situation for women: (domestic) violence against women demand special measures (in line with the arguments of Paglione (2006)). This theme does not question the existence of gendered violence, or the need to apply special measures to help women who are victims of violence. However, this theme acknowledges that sex/gender intersects with social/socio-economic class and race/ethnicity, which leads to other subordinated positions – domestic violence is not the only problem. General Comment No. 7 voices these concerns when stating that women are especially vulnerable to statutory and other forms of discrimination. CEDAW does something similar, when acknowledging the special situation for rural women. All in all, preparatory works contain lengthy discussions about women’s special housing needs, but still fail to acknowledge most of the intersectional discrimination “resourceless women” face. The focus on victims of violence is an example of how law renders the male sex objective and universal, while the female sex is necessarily subjective and specific (Gunnarsson & Svensson, 2009).

5.1.3 Reflections on the intersection ”unsettled strangers”

Previous research and studies have shown that Romani populations are highly exposed to housing discrimination (Kenna, 2008; OMED, 2004; Goodwin, 2008). Further, critical legal research has questioned the focus on racial discrimination when discussing Romani subordination. Rather, poverty and race need to be addressed simultaneously (Goodwin, 2008). SOU 2006:22 acknowledged the need to apply affirmative actions for the Swedish Roma community. Such measures are a start, but

do not address the legal protection of the Discrimination Act. Goodwin (2008) states that ethnic discrimination claims are unlikely to overcome socio-economic exclusion. This theme of “unsettled strangers” highlights the complexity that is race/ethnicity, by emphasizing how race/ethnicity intersects with social/socio-economy class. The intersection leads to assumptions of strangeness, “knowledge” of culture and prejudice. These assumptions and prejudice risk leading to discrimination as well as permeate legal reasoning, which affects how law deals with the discrimination. As such, this intersection is a dually vulnerable position of disadvantage, exclusion and ignorance.

This theme is the most interpretative, and perhaps also the most controversial, since it goes beyond traditionally demarcated groups. This is due to the fact that the analysis shows how law harmonises and assimilates very different cases into one single standard. That standard is the discrimination ground of ethnicity. Law is not capable of acknowledging the full extent of the marginalisation and vulnerability that the individuals viewed as ‘unsettled strangers’ are victims of. Individuals in this intersection are simultaneously ascribed negative assumptions of untrustworthiness or non-Swedishness, and rendered invisible in law. This clearly illustrates how legal processes reproduce existing power dimensions and dichotomies (Pylkkänen & Wennberg, 2012) as a result of assimilation into clear legal categories.

The first theme discussed “reversed intersectionality”, or how prejudice is mistaken for cultural awareness. The same skewed cultural awareness pervades this theme. Unjust treatment is justified by arguing that the plaintiff must be assumed to be unreliable and untidy. These characteristics are claimed to be part of the plaintiffs’ personalities, or in other words their cultural traits. Instead of ascribing the difference in treatment to social power axes, it is ascribed to the culture of the person - discrimination of “unsettled strangers” is legitimised by referring to their unreliable cultural values. This simplification and equation between ethnicity/race and culture leads to individuals with highly differentiated backgrounds being understood based according to the same cultural template. The case law analysis shows that in cases of “unsettled strangers” the defence is much more likely to acknowledge difference in treatment and provide, in their view, valid explanations. According to Vieten, one of the difficulties that come with equality aspirations is “persuading those discriminating that what they are doing is unjust (Vieten, 2008, p. 151)”. Treating “unsettled strangers” unjust is less likely to be coined discrimination. This theme illustrates the

very strong connection and interaction between prejudice and disadvantage, and how law is both faced with and contributes to this interaction. Individuals in the intersection “unsettled strangers” are deemed as untrustworthy. One cannot count on them to stay in an apartment or house, because one assumes them to feel no connection to the housing. That assumption ascribes values onto these individuals. These assumed values stem from a prejudiced idea of how Romani and refugees reason. The fact that they are unsettled to begin with can be explained by war, poverty and a history of discrimination. But, instead of acknowledging the difficulties that come with such circumstances, the unsettledness is ascribed to their inherent culture and personality. The person is made accountable for their need to move. It is seen as a choice, rather than something that has been forced upon them. The liberal notion that every individual should be able to choose how and where to live obscures the fact that for many housing is not a matter of preference. Housing companies and law lack an understanding of this intersectionality vulnerable situation, and instead attribute the complexity to personality and culture. This results in discrimination that can be explained and justified by landlords’ need to be able to trust their tenants. This connects to Goodwin’s (2008) statement that one reason for the ineffectiveness of discrimination law is the attribution of blame to individuals. It is possible to discriminate and be aware that what one is doing is unjust. In cases of “unsettled strangers” that is however not the case. The individual on whom we are to assign blame would not label their acts as unjust or discriminating, but as reasonable decision-making. Therefore, even though the courts established that discrimination had occurred, it is unlikely to lead to any change because “the charge of discrimination finds no hook to hang (Ibid., p. 151)”.

5.2 Are there limits to law from an intersectional point of view?

Based on the findings of this study, the short answer to the second research question is: yes, there are limits to law from an intersectional point of view. Housing human rights researchers have emphasised the absolute need of successfully incorporating housing human rights into national law, and make effective use of domestic remedies (Kucs et al., 2008) if housing human rights are to have any power. Freedom from discrimination in housing has been listed as a minimum or core obligation (Kenna, 2010). This section circulates around five legal insufficiencies, that can be called

upon in order to explain what limits the Discrimination Act from acknowledging intersectional discrimination: a) the exhaustive list of grounds, b) the absence of certain grounds, c) the lack of intersectional awareness, d) the forms of discrimination and d) the accessibility of law.

Before elaborating further on the limits to law from an intersectional point of view, general limits of discrimination law will be acknowledged. One point of departure for this study was the fact that non-discrimination in housing is part of a world wide human rights discourse. All in all, it must be claimed that Sweden acknowledges its UN, CoE and EU obligations. Additions and alterations to Swedish anti-discrimination law during the last decades tell of legislative efforts to do right by housing and anti-discrimination human rights – both because the legislator is obliged to and because the legislator wants to. Apart perhaps from the exhaustive list in the Discrimination Act (discussed in more detail below) there are no obvious violations against the treaties and regulations identified in the legal landscape. This comes as no surprise since Sweden has a longstanding history of comprehensive anti-discrimination law (Petrova, 2006). Nonetheless, incorporating human rights into national law is not a guarantee for substantive equality. In Sweden, the right to housing and freedom from discrimination have led to, inter alia, the Discrimination Act. A discrimination act itself comes with limitations. There is a clear difference between a ‘right to housing’ and a ‘right to freedom from discrimination housing’. The latter obviously only make a small part of the endeavours towards the human right of right to housing. The ‘right to housing’ is much wider, and efforts to ensure this right includes programmatic state measures such as national housing politics and social housing. Such measures are aimed towards future change. The ‘right to freedom from discrimination in housing’ is much more. Such an approach is focused on violations and remedies through legal measures. The Discrimination Act can only process what has already taken place. As such, the legal tool is blunt to begin with. Further, the law is only capable of addressing individual discrimination. In the area of housing, the problem is of course also structural. Individual after individual who have been discriminated against in the housing market can initiate legal processes, but if structural discrimination is not addressed that is unlikely to have effect. As such, the liberal and individual focus of the law does not fully match the actual circumstances.

5.2.1 Reflections on the exhaustive list

The Discrimination Act contains an exhaustive list. Preparatory works came to recommend this in part because it was in line with EU directives demands from Sweden. From a critical and intersectional point of view this is an example of law as imprinted by a formal equality agenda. The world wide human rights discourse give that all persons are equal before the law and entitled, without discrimination, to the equal protection of law. This includes housing. General comment No. 4 of the CESCR establishes that social groups living in unfavourable conditions must be prioritised. By applying an exhaustive list of grounds, it can be argued that the Discrimination Act neither provides equality in treatment nor prioritises those in need. As such, the exhaustive list promotes neither formal nor substantive equality but something in between. The exhaustive list is an obvious limit of law, as only these seven grounds can be called upon. This limitation is acknowledged in preparatory works, and in previous critical legal research and need not be much further discussed. In short, this is a clear example of law's insistence that discrimination must be read through predetermined categories that leads to a failure to capture certain types of discrimination (Samuels, 2013). In relation to this, Sweden's choice not to sign CoE Protocol No. 12 can be further problematized. Sweden abstained from signing because Protocol No. 12 was said to be too vague. However, it can be argued that 'vague' is exactly what Sweden needs, in order to exploit the limits that the exhaustive list in the Discrimination Act sets up. One illustrative example of the need to exploit these limits is case E, in which the refugee family were to pay higher rent than other families. The district court initially determined that refugees were not to be embraced by the Discrimination Act. The exhaustive list resulted in detailed discussions on exactly how the existing grounds are to be identified and to an appeal. Had the Discrimination Act contained an open list, or had Sweden signed Protocol No. 12, the same legal wrestling would perhaps not have been as necessary.

Critique can also be aimed towards the conceptualisations of the grounds in themselves. Both sex and ethnicity are held as static, closed and objective. They aim to be clearly definable. Although the definition of ethnicity in chapter 1 § 5(3) has an open ending ("other similar circumstances") neither preparatory works nor case law fully acknowledge that both gender and race can just as well be seen as socially constructed phenomena. Preparatory works quote UN documents in claiming that race is a socially constructed matter, but as the preparatory work then recommend not

applying the word and concept of “race”, that acknowledgment of social construction is left behind. Holding discrimination grounds as static and objective is a limit of law. Further, it affects law’s capability of acknowledging intersectional discrimination. This is illustrated by all themes, but perhaps most by the theme of “aggressive men”. This theme shows how men with “non-Swedish” names experience discrimination, at the intersection of sex/gender and race/ethnicity. It is much easier to recognise the intersection of social divisions, if one admits that sex/gender is socially constructed and lead to ideas of, in this case, masculinity. Holding the discrimination grounds as socially constructed would open up for intersectional awareness to a much larger degree than objective and fixed grounds.

5.2.2 Reflections on the existing and absent grounds

Even with an exhaustive list, it is possible to extend the numbers of grounds. Another obvious limit of law is therefore the absence of certain grounds. One such social division that has permeated this entire study is social/socio-economic class. One can claim that social/socio-economic discrimination is a structural and social problem, which a law focused on individual discrimination cannot encompass. Nonetheless, this study shows that social/socio-economic class intersects with other grounds, and if it is left out of the list, it becomes more difficult to address those intersections. Therefore, the absence of this ground must be considered a limit.

The absence of social/socio-economic class as a discrimination grounds leads to a legal inability to deal with cultural prejudice as discussed in relation to “aggressive men” and “unsettled strangers”. Another example of what the absence of social/socio-economic class as a discrimination ground contributes to, is law’s inability to address prejudice because of a criminal record. In case C the plaintiff’s criminal record was connected to the disfavourable treatment. The landlord assumed the crimes committed to be severe and perhaps also violent. In this study, this is understood as a prejudice assumption at the intersection of social/socio-economic class and race/ethnicity. One must ask if the landlord would have made the same assumptions about a non-Roma person with financial wealth. How and according to what ground is the Discrimination Act to be able to address such prejudice? Social/socio-economic class is of course not equivalent to criminality. Criminality is a subcategory that does not fit into any particular discrimination ground - people of all ages, genders, ethnicities, abilities and so on, can commit crimes. However, this study

argues that a social/socio-economic class discrimination ground would at least help in addressing such prejudice. On the similar note, one can discuss the need to somehow incorporate culture into law or at least into legal reasoning. As the theme “unsettled strangers” shows, ideas of culture play into people’s understanding of ethnicity in a way that particularly affects Romani and refugees. How is law to acknowledge these prejudiced conceptions of culture? And perhaps more importantly, how is law to avoid fuelling such prejudice?

The existing grounds reflect the public/private dichotomy. To begin with, the differentiation between public and private is explicit in the choice of wording in chapter 2 § 12 - only housing available publically can be processed according to the Discrimination Act. This is in itself not an intersectional limit, but it illustrates the existence of the public/private dichotomy. This dichotomy reflects the difference between formal and substantive equality. By not acknowledging housing discrimination in its context (affected by for example socio-economic class) law forces discriminating actions into established legal categories. Those categories are the ones visible in the public sphere (Pylkkänen & Wennberg, 2012). In other words, those are categories in line with an objective male norm. To be intersectionally effective the court should be able to understand the individual and the problem in its public and private context, not just assimilate them into categories visible in the public or structural sphere.

The exception for disability must be also be touched upon. The reasons for the exception in chapter 2 § 12c of the Discrimination Act for disability in housing discrimination is explained in Prop. 2013/14:198. However, one must ask what such an exception risk leading to. Even if the purpose is to not force housing companies and private landlords to extensive rebuilding of each single apartment, what are the side-effects of the exception? If we understand knowledge as constructive and discursive, does such an exception risk leading to discrimination being overlooked also in cases that does not regard rebuilding needs? In cases where ability intersects with other grounds, can and will law address this?

5.2.3 Reflections on intersectional awareness

As the critical analysis of preparatory works revealed there were hopes that a united piece of legislation and a united ombudsman agency would lead to more intersectional considerations. However, as pointed out by Kantola (2010), Kantola

and Nousiainen (2009), Fredman (2016b) and Kantola and Lombardo (2017) a united equality act is not necessarily a solution. The result of the analysis of this study does not tell of legal intersectional awareness. This is in line with critical legal research by Schömer (2011 and 2013), who found that the unified Swedish act did not lead to intersectional recognition. Instead, it resulted in ranking of discrimination grounds. There is a difference between multiple and intersectional discrimination, which remains despite a single equality act. Fredman (2016b) has claimed that assuming everyone within in a group to be the same is an ignorance of the role power plays in structuring the relationships between people. This study showed that the six plaintiffs are different despite claiming the same discrimination ground. The discrimination ground ‘ethnicity’ does not address the power dimensions these six plaintiffs are positioned within. This study claims, due to its constructionist approach, that it is important to recognise that knowledge is a constructionist process. Raising awareness is a first step towards change – both in public and legal reasoning. The discussions in 5.2.1 and 5.2.2 regard the construction of the law, and possible amendments to definitions within the law as it is written. However, it is unlikely that amendments to the law will have any affect if those who apply the law lack an intersectional awareness, or the will to apply an intersectional awareness. It would not matter if the Discrimination Act contained a non-exhaustive list with many more grounds if parts, representatives and courts do not acknowledge intersectional discrimination as a phenomenon. Thus, awareness is key. Research, such as this study, could function to illuminate the need for courts and government employees to be intersectionally aware. Making changes or amendments to the law is also a solution, but not necessarily the most successful strategy.

5.2.4 Reflections on the forms of discrimination

In addition to raising intersectional awareness through research and knowledge (as mentioned in 5.2.3) law, as it is currently designed, could actually be applied in a more intersectional way. The Discrimination Act lists several forms of discrimination. However, in the case law of this study direct discrimination is the only form processed. Indirect discrimination is less stringent than direct discrimination, in that it does not demand the same attribution of intent to the person discriminating. Critical legal researchers have highlighted how challenging the attribution of blame is in anti-discrimination law (Vieten, 2008). A rule, regulation or criterion can of course be put

in place with the intent to discriminate, but it becomes less important in indirect discrimination legal processes to assign values or prejudice to the person discriminating. This gives that indirect discrimination is a better tool in order to address structural discrimination as it is manifested in individual discrimination. As themes “resourceless women” and “unsettled strangers” have shown, socio-economically subordinated groups face housing discrimination. Their situations are however difficult for the law to grasp, since rent levels and rental policies (including language demands) can very well seem as neutral criteria on a surface level. Indirect discrimination is more dynamic, and therefore allows for more intersectional reasoning. For those reasons one can discuss why the discrimination was not argued to be indirect in cases E and F. In both cases the landlords claimed that their criteria were neutral and applied to all in the same way. They both claimed that their goal to secure the maintenance of the house was legitimate and that higher rent or Swedish language skills were suitable and necessary to reach this goal. From a critical point of view, this is an example of how law simplifies complex course of events into beforehand decided categories (in this case the form of discrimination).

In addition to making more use of the indirect discrimination form, acknowledging intersectional discrimination in a concrete way in the legislative text could possibly spur courts to address intersectional discrimination. This would demand amendments to the law, but these amendments would be smaller than switching to an open list or adding more grounds. These changes would be cosmetic and in line with what has been touched upon in preparatory works already. The definition of both direct and indirect discrimination lists the discrimination grounds with an “or”: (“sex, gender identity or expression, ethnicity, religion or other belief, disability, sexual orientation **or** age”). Changing the formulation to say for example “one or several grounds” or even “intersecting grounds” would send a message of the importance of acknowledging intersectional discrimination. However, here it must be noted that Sweden applies the same wording as UN and ECHR treaties.

5.2.5 Reflections on law’s inaccessibility

In only one of the six cases analysed for this study, the action was dismissed. The courts have therefore mostly established the occurrence of housing discrimination. A doctrinal legal analysis of the same material could therefore have concluded that the protection against housing discrimination is strong. As this study aims to examine

housing discrimination law from an intersectional perspective, the court decisions of course matter, but the analytical findings are not dependent on whether the defendant was held accountable or not. The analysis aims to identify intersections of social divisions that law face, and that affect how cases are adjudicate. However, this study also aims to discuss which situations lead to legal processes and what circumstances are not legally processed at all. This socio-legal study, therefore, pays more attention to the fact that only six cases have been legally processed since the establishment of the civil law in 2003, than to the outcome of the judgments. Six cases in 15 years equivalent to one case every third year. This does of course not paint an accurate picture of the occurrence of housing discrimination (it is probably not an exaggeration to claim that at least six incidents of housing discrimination has taken place during the time this study has been carried out). If intersectional discrimination can be found in an analysis of these six cases, it is reasonable to assume that it can be found in situations, which have not been legally processed. It is conceivable that because of law's inability to process intersectional discrimination, some or many incidents are not legally processed *just because* the discrimination is intersectional. Therefore, the establishment of discrimination in five out six cases does not equal an effective law.

If we place the Discrimination Act within a conceptualisation of human rights as fundamental rights that we all should be able to call upon, and social human rights as demanding a distribution of resources to promote individual well being, it becomes obvious that the Discrimination Act is limited. Critical legal theory holds law as maintaining the power of dominant economic groups and is critical toward the individual rights based orientation of law (Banakar & Travers, 2013b). Not everybody has the same possibility to call upon the law, and the distribution of legal resources does promote well-being for all. On this note, it must be noted how dependant housing discrimination law is on equality ombudsmen (such as DO) and anti-discrimination agencies (such as MmD). In none of the six cases did an individual legally process their own case. Individuals in subordinated and exposed intersections are probably even more dependent on such actors than others.

5.3 Methodological reflections

As a qualitative applied socio-legal study, this study has presented different answers than a doctrinal legal study would have. The readings of the preparatory works and

case law have been highly interpretative, and deviating far from the doctrinal idea of legal texts as neutral legal instruments. Through analytical openness towards the material this study has stayed away from essentialist, taken for granted and objective truths. Rather than looking to establish legal rules, this study has questioned legal rules. Rather than establishing how the legal rules are to be applied, this study has questioned whether the law can be applied at all. By applying a socio-legal and intersectional analysis on legal texts, this study has challenged the normative narrative that is doctrinal studies of law. Nonetheless, pitfalls and possible improvements can be identified in all research. This study is no exception. Especially the reflexive ambitions of this study must therefore be acknowledged. Reflexivity regards the inherent qualities of qualitative studies, in which the result is built on interpretations performed by a subjective and positioned researcher. The result is therefore highly, if not totally, dependant on the researcher. This allows for creative and elaborative ideas, but must not be mistaken for an attempt to produce essentialist or objective truths. As revealed in the introduction, I must be considered to fall within the scope of what is the “norm” in the housing market. I have not personally experienced any of the intersections that this study has found, neither will I ever do so. Presenting and discussing experiences from such an outsider perspective comes with risks of ascribing onto others things that are not actually there. Because of this risk, all cases were anonymized in order to avoid insensitive intrusion. Despite this precaution, as a researcher I have influenced the results. For the same reasons, the possibilities of confirmation bias should be acknowledged. Qualitative analyses guided by a theoretical framework run the risk of confirmation bias in that one finds what one is looking for, while ignoring other parts of the material. However, the results of this study bears resemblance to what previous critical legal scholars and human rights researchers have already established that occurrence of intersectional discrimination. What this study does is make use of this established theoretical perspective to highlight intersectional discrimination in an ignored equality area. As such, the knowledge it contributes with is new, but not groundbreaking. Therefore, the acknowledgment of intersecting housing discrimination is valuable despite the risk of confirmation biases. Ergo, a halting intersectional awareness is at least a starting point, and therefore better than no intersectional awareness at all.

5.4 *Conclusions*

Housing human rights is part of the second generation human rights, according to which the distribution of official resources is to promote individual well being (Fischer, 2017). Law and legal processes are such official resources. All persons are to be equal before the law and entitled without discrimination to the equal protection of law, according to Article 26 of the ICCPR. This applied socio-legal study recognises the role of social forces in law and is critical towards the limits of law in context. The findings of the intersectional analysis, combined with previous critical research, show that Swedish housing discrimination law face discrimination at the intersections of sex/gender, race/ethnicity and social/socio-economic class. The design and application of the Discrimination Act makes it difficult for law to successfully comprise these intersections. Law relies on a formal interpretation of equality which leads to an unresponsiveness to those who are the most disadvantaged. Law is capable of recognizing formally established and clear discrimination grounds but is faced with discrimination at the intersection of these grounds. Law is to quite a large extent capable of solving housing discrimination disputes (i.e. establishing the occurrence of housing discrimination) if the events fall within the established boundaries. Law is however much less capable of affecting social power dimensions (i.e. the counteraction pronounced in chapter 1 § 1) if the events cannot be incorporated into the formal limits law has set up. As such, the Discrimination Act does exactly what critical legal studies have claimed that law tends to do: reflects and maintains the power positions of dominant groups (Banakar & Travers, 2013b). This study must therefore conclude that Swedish housing discrimination law does not fulfil its human rights responsibilities to distribute official resources in a way that renders all persons substantively equal. Thus, the inherent power of housing human rights, as they are manifested in anti-discrimination law, remains debatable.

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