Social Security for Solo Mothers in Swedish and EU law

On the constructions of normality and the boundaries of social citizenship

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Abstract


Three separate studies brought together in this thesis serve the overarching purpose of revealing historical and context-dependent constructions of normality in social security law, and from that elucidating gender and power relations and processes of exclusion and inclusion in the Swedish welfare model. The feminist approach taken towards law rests on the understanding that the logic of separation segregates and makes invisible women’s life experiences in law. Gender equality in the formal sense is questioned. Each of the studies takes as its point of departure the disadvantaged position of solo mothers not only in the private but also in the public sphere of legislated social rights, and questions gender-insensitive critical positions in academic legal scholarship. A notion of gender as social practice is concerned with highlighting the dynamic and relational aspects of gender – a set of norms and relations embedded in social structure. The analytical concept of solo mothers and the concept of social citizenship constitute a theoretical framework for revealing the various aspects of gender and power in law that normatively and discursively take part in the construction of normality in the welfare model.

Modernisation of national social protection, as part of the Lisbon strategy of the EU, is bound to exert normative pressure on national welfare models. In the opening study current legal regulation of social assistance for solo mothers in Swedish, Norwegian, Finnish, and Danish law are compared and analysed. How the meaning of a social model and gender equality in the EU is understood, regulated, and articulated; the strategies that are used; and the social consequences these strategies and the meanings of EU law might have for social security law and for the position of solo mothers in a Swedish context, are unmasked and analysed in the second study. In the third study, normality in the Swedish welfare model over time is revealed in order to achieve a deeper understanding of the processes of exclusion and inclusion in the Swedish welfare model and to assess the boundaries of social citizenship in the Swedish welfare model at the present time.

Constructions of normality in social security law, and hence the boundaries of social citizenship, are determined by statutory and discursive constructions about who is being included; what needs are to be ensured and how; what responsibilities should the state or the community have; and what individual rights and duties ought to exist. The ideological ideas underpinning the creation of a social model for Europe, which can be interpreted as ‘active citizenship’, seem inconsistent with social security as traditionally laid down in law in the Swedish model. The question is raised of whether the Swedish welfare model, challenged by the Europeanization of values, is in transition. Discussions concerning the welfare of individual persons today largely have a liberal profile: participation, independence and free choice are articulated. Gendered inequality, however, still involves a material component. If welfare models do not take this into account, the prognosis can be seen as relative, if not absolute, poverty for women in general and solo mothers in particular.

Keywords: EU law, Gender equality, Solo Mothers, Social citizenship, Social exclusion, Social inclusion, Social protection, Social security, Swedish law
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List of Abbreviations

Aetat: National Employment Service (Norway)
Art.: Article
BEPGs: Broad Economic Policy Guidelines
BSF: Forslag till folketingsbeslutning, Danish Parliamentary Proposal
C: Case
CDA: Critical Discourse Analysis
CEEP: Partner for Services of General Interest
COM: Communication of the European Commission
CONSLEG: Office for Official Publications of the European Communities
Dir.: Direktiv, Swedish Government Directive
DKK: Danish kroner (currency)
Ds: Departementsserien, Swedish Ministry Publications Series
EC Treaty: Treaty establishing the European Community
EC: European Community
ECHR: European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ: European Court of Justice
ECR: European Court Reports (official reports of the judgments of the European Court)
EEC: European Economic Community
EEPGs: European Employment Policy Guidelines
EES: European Employment Strategy
EISS: European Journal of Social Security
EMU: Economic and Monetary Union
EPAG: The European Panel Analysis Group
ESC: European Social Charter
ESF: European Social Fund
ETUC: European Trade Union Confederation
EU: European Union
EUCFR: Charter of Fundamental Rights of the European Union
EU Treaty: Treaty on European Union
F: Förordning, Finnish Decree
HFD: Finnish Supreme Administrative Court
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<tr>
<th>Acronym</th>
<th>Full Form</th>
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<tr>
<td>ILO</td>
<td>International Labour Organisation</td>
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<tr>
<td>Innst. S.</td>
<td>Instilling til Stortinget, Report of investigate commissions to the Norwegian Parliament</td>
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<tr>
<td>JTF</td>
<td>Tidskrift utgiven av (Journal of the) Juridiska föreningen i Finland</td>
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<tr>
<td>KK</td>
<td>Royal Proclamation</td>
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<tr>
<td>L</td>
<td>Lag, Finnish Act</td>
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<tr>
<td>LBK</td>
<td>Lovbekantgørelse, Danish statutory order to make public a consolidated Act</td>
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<tr>
<td>LSF</td>
<td>Lovforslag, Danish Government Bill</td>
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<tr>
<td>NAPs</td>
<td>National Action Plans</td>
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<tr>
<td>NAV</td>
<td>Norwegian Labour and Welfare Service</td>
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<td>NJA</td>
<td>Nytt Juridiskt Arkiv, Swedish Supreme Court Yearbook</td>
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<tr>
<td>NOK</td>
<td>Norwegian kroner (currency)</td>
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<tr>
<td>OECD</td>
<td>Organization for Economic Cooperation and Development</td>
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<tr>
<td>OJ</td>
<td>Official Journal of the European Communities online</td>
</tr>
<tr>
<td>OMC</td>
<td>Open Method of Co-ordination</td>
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<tr>
<td>PROGRESS</td>
<td>Community Programme for Employment and Social Solidarity</td>
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<tr>
<td>Prop.</td>
<td>Proposition, Swedish Government Bill</td>
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<tr>
<td>RÅ</td>
<td>Swedish Supreme Administrative Court Year-book</td>
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<tr>
<td>rd.</td>
<td>riksdagen (Parliament)</td>
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<tr>
<td>Reg.</td>
<td>Regulation</td>
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<tr>
<td>RevESC</td>
<td>The revised European Social Charter</td>
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<tr>
<td>RP</td>
<td>Regeringspropostition, Finnish Government Bill</td>
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<tr>
<td>rskr</td>
<td>riksdagskrivelse, communication from the Swedish Parliament</td>
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<tr>
<td>RTV</td>
<td>Norwegian National Insurance Service</td>
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<td>SCB</td>
<td>Statistics Sweden</td>
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<tr>
<td>SEA</td>
<td>Single European Act</td>
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<tr>
<td>SEK</td>
<td>Swedish kronor (currency)</td>
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<td>SFS</td>
<td>Svensk författningssamling, Swedish Code of Statutes</td>
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<tr>
<td>Sieps</td>
<td>Swedish Institute for European Policy Studies</td>
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<tr>
<td>SOS</td>
<td>Norwegian Ministry of Social Affairs</td>
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<tr>
<td>SoS</td>
<td>Socialstyrelsen, the Swedish National Board of Health and Welfare</td>
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<tr>
<td>SOSFS</td>
<td>The Swedish National Board of Health and Welfare’s code of statutes</td>
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SOU  Statens offentliga utredningar, Official reports series of
Swedish legislative and investigations commissions
St.meld.  Stortingsmelding, Norwegian Parliamentary Report
St.prp.  Stortingsproposisjon, Norwegian Government Bill
SÖ  Sveriges internationella överenskommelser, Sweden’s International Agreements
TEC  Treaty Establishing the European Community
TEU  Treaty on European Union
TSER  Targeted Socio-Economic Research
UDHR  Universal Declaration of Human Rights
UNICE  Union des industries de la communauté européenne
(federation of European employers’ groups, now replaced by BUSINESSEUROPE)
US  United States
PART I

POINT OF DEPARTURE
1 Introduction

1.1 The problem of social exclusion – a gendered issue

In the Nordic countries, employment strategy is crucial for the arrangement of social security for men and women and for the achievement of gender equality. The assumption that paid work is a precondition for social security and gender equality is largely based on the notion of a dual-earner dual carer-family. This has economic and social repercussions for those parents that are usually categorised demographically as sex-neutral ‘single parents’. The ideal two-income family seems to be a nuclear family where both parents work full-time and each has an income of his or her own. Gender equality is something that is supposed to be realized within the relation of cohabiters or spouses in a nuclear family. A ‘single parent’ living on her or his own together with children, or eventually with children and a step-parent, does not fit into this model. The presupposition of a nuclear dual family for the organizing of work-hours, child care and leisure activities has both economic and social effects for these parents, who are mostly mothers.\(^1\)

In Sweden, the increased risk of being poor among this group of parents has received a lot of attention over the last two decades in various government commissions aimed at reforming the welfare system.\(^2\) Moreover, children with a ‘single parent’ are shown to be more often exposed to economic difficulties.\(^3\) In the present thesis the problem approached is how the lack of recognition of gendered dimensions in maintenance and care in Swedish and European Union social security laws has social consequences for mothers living on their own with children and thus results in exclusionary welfare regimes.

At the present time, there is a need for the social security regulations in Sweden, and in other Nordic countries, to be evaluated in a broader context

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\(^1\) Statistics Sweden (SCB) shows that 72 % of all children up to the age of 17 live in a nuclear family, 22 % live with the mother and an eventual stepfather, 5 % of the children live with the father and an eventual step-mother, see Demografiska rapporter 2007:2 Children and their families 2006, available at http://www.scb.se/statistik/_publikationer/LE0102_2006A01_BR_BE51ST704.pdf.
\(^3\) SCB, Demografiska rapporter 2007:2, p. 270 (in English). Seen in relation to all households that were granted social assistance in 2005 (225,000 households in total), 21 % of all single mothers were allowed social assistance, see Socialstyrelsen, Statistik Socialtjänst 2006:7, Ekonomiskt bistånd år 2005, 2006.
than that of the nation state, since the legal context is increasingly character-
ised by Europeanization. Although the regulation of national social security
is conceived to be a branch of law beyond the scope of European Union (EU) intervention, it is said that membership of the EU is reshaping the
legal environment of welfare provision across Europe and that membership
of the EU is conducive to the reframing of distinctive features in social law
on a national level.4

With fundamental social rights in mind, the EC Treaty has been amended
to incorporate a commitment to high employment and the combating of
social exclusion under Article 136. Reform of social protection5 has turned
out to be not only a national task but also a common interest within the Euro-
pean Union. European welfare states are facing new challenges, for instance
because of changing demographics. The promotion of active policies instead
of passive reliance on welfare provision has become one of the key concerns
expressed by the European Commission and one of the central elements
in the objective, laid down in Article 137.1(k) in the EC Treaty, namely
to modernize the European social model. The goal of the Lisbon strategy,
which was launched in 20006 and re-launched in 2005,7 is to increase the
overall participation of the labour force, including women. Member States’
policies for combating social exclusion are meant to be based on an open
method of co-ordination, combining common objectives, National Action
Plans (NAPs) and on a programme presented by the Commission to encour-
geco-operation in this field. Fighting poverty and social exclusion, part of
the objectives of the Lisbon strategy, entails all relevant bodies, according to
national practice, being mobilised to facilitate: participation in employment,
access to resources, rights and goods and services for all, and to prevent the
risk of exclusion.8

5 The concept of ‘social protection’ is commonly used as an overarching concept encompassing social insurance, social assistance and social security. The concept of ‘social security’, on the other hand, is often seen to include two kinds of instruments: replacement income schemes and adjustment income schemes. A broader understanding of social security also includes prevention and rehabilitation measures. Thus, in the latter meaning of social security, ‘loss of earnings’ as well as ‘loss of well-being’ issues are dealt with through ‘social security’. See Stendahl, 2003, p. 34.
The EU’s objective regarding the modernization of national social protection systems is largely expressed in terms of how to make work profitable for the individual by removing barriers and disincentives to work. Modernising an inclusive labour market that promotes employment as a right and opportunity for all; guaranteeing an adequate income and resources for living in human dignity; preserving family solidarity and protecting the rights of children, are presented as strategic goals in creating social cohesion in the Union.

Modernisation of national social protection as part of the Lisbon strategy is bound to exert normative pressure on national welfare models. The fact that social security regulations are issued by both national and European legislative bodies raises questions of legal pluralism. Legal principles, it is pointed out, today have come to play a different role, from being a means for decision-making to a means for understanding and international dialogue.

There is motivation for a gender perspective on social exclusion. The EC Treaty itself has been amended to incorporate a legally-binding commitment to gender mainstreaming in Article 3(2), introduced by the Treaty of Amsterdam. In the field of social protection, gender mainstreaming requires that all aspects are to be taken into account when setting specific targets, or selecting gender gaps where there is a very significant difference in poverty outcomes in general or in some specific aspect of poverty and social exclusion.

The gender mainstreaming strategy is now further articulated in the roadmap for equality between women and men 2006–2010 that has been launched by the Commission. Equal economic independence for women and men and the reconciliation of private and professional life are two of the six key points in this renewed strategy for gender equality.

One specific aspect in relation to the objective of combating social exclusion in the EU is the situation of those mothers who are mostly categorized sex-neutrally as single parents. As a demographic category ‘single parents’ has been conceptualized in different ways, either as sex-neutral or gendered. Such parents, by reason of their increasing number and dependency on

social benefits, have also been afforded increased attention in many Western countries over recent decades. Thus, the category is believed to have acquired both explanatory and predictive powers.¹⁵ Throughout the European Community this category of mothers is conceived of as problematic, both in the labour market and in the welfare state.¹⁶ In Sweden, these mothers and their children have been shown empirically to be especially affected by reductions in welfare that took place during the 1990s.¹⁷ Data on child poverty in Sweden, based on statistics from 2003, add force to the view that solo mothers are disadvantaged and that there are differences among children depending on the family form in which a child lives.¹⁸ In the most recent report from Save the Children it is shown that child poverty is again on the increase for the first time since 1997. The most significant risk factors for a child being poor are having parents with a foreign background and being a child of a single parent.¹⁹

1.2 Overarching purpose and approach of the thesis

Based on feminist theory, the overarching aim of this thesis in law is to reveal historical and context-dependent constructions of normality in social security law, and from that to elucidate gender and power relations and processes of exclusion and inclusion in the Swedish welfare model. The critical position involves normative critique of current law in relation to its legal and social context. The legal premise of gender equality indicates the measurable reference for critique.

¹⁵ See Duncan and Edwards, 1997; Fineman Albertson, 1995, pp. 205–223. Fineman addresses the role of patriarchal ideology in the process whereby a characteristic typical of a group of welfare recipients has been selected and identified as constituting the cause as well as the effect of poverty. She discusses how the imagery of welfare discourse remains laden with moral and normative judgements, centred on stereotypical assumptions about single mothers in the poverty context corresponding to the popular and political classification of the poor as either ‘deserving’ or ‘undeserving’. The concept of mother is modified by her legal relationship, or lack thereof, to a male, and is classified by whether or not she is single, a fact that is positioned as both central and significant in the discourses. As a methodological point, Fineman assumes that the study of the rhetoric about motherhood reveals something about the existence and content of dominant ideology that in turn reveals something about the power within society.


The feminist approach taken towards law in this thesis rests on the understanding that the logic of separation segregates and makes invisible women’s life experiences in law. The socially and financially disadvantaged situation for those women who are outside the traditional family nexus, which has already been demonstrated empirically in various disciplines, reflects one aspect of this logic of separation. A demographical explanation of the problem of the social exclusion of women is not the purpose here. On the contrary, the concept of ‘solo mothers’ is utilised analytically to disclose gender-based processes of inclusion and exclusion in Swedish and EU social security laws.

Gender equality in the formal sense is questioned here, i.e. the conception of universalism and overall equality in the Nordic welfare states that fails to recognize gender dimensions in maintenance and care, and gendered diversity and difference among citizens. The point of departure in this thesis, i.e. the disadvantaged position of solo mothers not only in the private sphere – in the family and on labour market – but also in the public one of legislative social rights, questions gender-insensitive critical positions in academic legal scholarship. Asking the law question from solo mothers’ point of view raises exogenous questions, which emanate from a social context characterized by diversity and inequality.

The concepts that are briefly introduced below, and further theoretically explained in detail later on in this introductory chapter, constitute a theoretical framework for the attempt to show the various aspects of gender and power relations in law that have a role in the construction of normality in the welfare model, and which are considered to have social consequences for solo mothers.

First, a solo mother in this thesis is understood as a mother who is not living with the person legally defined as the other parent of the child/children. The aim in using the construct solo mothers, rather than lone mothers or single parents, is to attain a broader understanding of the group’s situation than is gained from sex-neutral categorisations. From a legal viewpoint, parenthood and maintenance obligations are primarily based on biological ties. Therefore, the term ‘solo’ is constructed to target my assumption of a woman whose conditions of support and care obligations remain constant, irrespec-

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21 See Davies, 2002, who has inspired me to use the phrase ‘asking the law question’. In her work she attempts to provide a critical understanding of different approaches to law and the un-stated assumptions connected with the way we see the world.
tive of the reason for her being alone, and regardless of new relationships. Most 'single parents' are in fact solo mothers, in that they have the primary everyday responsibilities for the child, even though others, especially the biological father, may take care of the child at times, or a step-father who may also supplementary have involvement in the child’s subsistence and care.

Second, the concept of 'social citizenship' in this thesis constitutes a critical tool for approaching processes of social inclusion and exclusion in law from a gender perspective. Within the concept are comprehended the rights and duties, including the distributive principles and participatory conditions, which enable membership in a society. The concept of social citizenship balances individual rights and duties with relations and dependencies, and thus involves the question of gender equality. This point of view contrasts, for instance, with an explanation of poverty and social exclusion as being merely transitory, varying mostly with matters of employment or lack thereof, age of the person and citizenship of the head of the household.

This latter explanation of poverty and social exclusion, however, fails to recognise the diversity in citizenship that is patterned around gender lines, and is thus too narrow a construct of citizenship. Social citizenship as an idea for a perfectly satisfactory citizenship is not only dependent on economic subsidies, but also on the non-economic conditions that are preconditions for participation within society. Hence, social citizenship might be a useful concept in an attempt to formulate a principle of social inclusion which recognises the plurality of identities and the different forms of contributions made by citizens.

Third, the concept of 'social security' in this thesis refers to social insurance, social assistance and social services. These are legal branches within the boundaries of 'social law' or (social) welfare law, of which the latter for

22 Of the roughly 500 000 children who live separated from one of their natural parents, the majority live with their mother: 21 percent of children live alternately for an equal period with both parents and 10 percent live with the other parent for some of the time, see SCB, Demografiska rapporter 2007:2, available at http://www.scb.se/statistik/_publikationer/LE0102_2006A01_BR_BE51ST0704.pdf.
25 Compare Vahlne Westerhäll, 2002b, p. 66–67. Taking as her point of departure the question of whether law in the welfare state is 'strong' Vahlne Westerhäll’s study of Swedish social security aimed to establish developments in social law, and to understand social law systematically and in its entirety. In her study the objects of study existed within the legal branches that concern social services in the municipalities; social insurance; and medical treatment and care. The first two branches deal with financial security whereas the third deals with care.
many scholars have become a designation of the legal discipline in question. If one wants to capture the whole picture of social security, legal branches beyond the boundaries of social law need to be included. For instance, social security for solo mothers also needs to be seen in relation to how maintenance and care are constructed in family law. Therefore, the concept of ‘social security law’, which might sound foreign in a Swedish context, is sometimes used in this thesis instead of ‘social law’ or (social) welfare law. Even if formal bodies of regulations are required to be sex-neutral in design, they still include gender differences. When sex-neutral regulations are applied within a reality that is systematically structured by gender, the equality of results has to be the key question. As a point of departure, the wide range of social security benefits and advantages in social law, in interplay with other branches of law, are understood to create and reinforce complicated gender-related patterns of dependence between people in a household, between the household and the municipality/community, and the state respectively.

1.3 Theory and method

1.3.1 Gender and power in law

The theoretical and methodological starting points in this thesis are derived from feminist theory. Feminist legal scholars see the legal system as pluralistic, multi-layered, contradictory, constructed, and an expression of power relations. This means that the law and its practitioners cannot be impartial. The law always takes a position. Not only what is regulated, but also what is not, becomes an issue for feminist legal scholars. The boundaries between law and not-law are seen as constructed and not at all self-evident. Feminist critique therefore has the role of making visible the impact of the system in a specific context, which includes both philosophical and sociological concerns. Knowledge about current law as well as about methods used in legal dogmatic works is necessary. Arguments may often be found within the legal system, such as argumentation based on the principle of equality.

26 See Christensen, 1997b; Kjønstad, 2005; Mannelqvist, 2003, p. 41.
28 Ibid. In critical legal positivism, *immanent* normative criticism of positive law is seen as an alternative to traditional legal positivism. In positivist legal theory, the object itself indicates the measurable reference for criticism, for example provided by Marxist-influenced social theory that has criticized bourgeois society for breaking its own promises: the normative ideals of freedom and equality. See Tuori, 2002, p. 53–69, 304; Ewald, 1986a, 1986b, 1988, pp. 37–50, 1990, pp. 138–161; Habermas, 1989. Other alternatives to traditional legal posi-
Feminist legal studies is one of several critical perspectives in legal scholarship, with varying starting points, using different theories and methods, focusing on several fields within the legal system. The boundaries of legal scholarship are, as explained by Eva-Maria Svensson, no longer seen as being determined by its inner logic, but by a social context. Svensson, in her elaboration of a scheme for boundary-work in academic critical legal scholarship, has mapped out various gender-sensitive critical positions. A gender-sensitive critical position could involve a critique of the legal system in a broad context; criticism of current law in relation to its context; or taking gender as one important factor in legal scholarship and its analysis of law.

Feminist legal studies primarily have a revelatory aim, in the sense that they try to show the hidden power relations in legal doctrines and policies. The unmasking and the normative critiques are linked to feminist legal studies. Moreover, feminist legal studies is as pluralistic as many other perspectives, and encompasses different epistemological standpoints.

A constructionist understanding of sex and gender is a common characteristic of various branches of feminist theory. Social constructionism theory in legal research focuses on how law relates to the social, by means of legal regulation of the social, but also how law in itself participates in the social construction of reality. Thus law is not seen to constitute an autonomous

tivism have been elaborated by Eriksson, 1979; Unger, 1986 (law as a symbolic normative phenomenon within the post-structuralism tradition); and Wilhelmsson, 1987 (Finnish alternative jurisprudence). See also Vahlne Westerhäll, 2002b, pp. 62-65 for another example of immanent normative criticism in a study of social security regulations in Sweden 1950–2000. Social law was studied through a division of law into different general categories: legal rules; legal principles; and foundational values. Instead of seeing these categories as a vertical structure, e.g. the multi-layered methodology elaborated by Tuori (see above), they were rather seen as circular, i.e. rules, principles and values continuously and mutually are conceived as affecting each other.


Svensson points out how the boundaries of legal scholarship are the subject of contests. Boundary work in legal scholarship becomes a means of social control. She relates three epistemological aspects of legal scholarship in the ongoing process of boundary-work: the demarcation of the discipline; the sources of knowledge that are recognized; and the concept of knowledge. These three aspects become important for the exclusion and inclusion of new perspectives in legal scholarship.


For one of the most prominent theoretical works on social constructionism, see Burr, 2003. See also Lacey, 1998; Nakano Glenn, 1999, pp. 3–43.

system. Variations of constructivism are frequent and have the common standpoint that there is no true foundation of knowledge. The interesting question is not to ask what something is, but rather how, why and what does it mean. Belief in true knowledge, such as seeing law and the sources of law as a foundation for legal knowledge from a dogmatic perspective, is challenged. Instead, knowledge is understood as something both contextual and constructed as well as dependent on language, and is thus often referred to as the ‘social turn’ and ‘the linguistic turn’ in scientific research.

The gender-sensitive critical approach adopted in this thesis involves conceptual elements, grounded in feminist theory, from which law is appropriated and criticised. These concepts are explained further below.

1.3.1.1 Solo Mothers

Viewing solo, lone or single mothers as an analytical concept in welfare-state regime studies has been utilised and justified earlier, mainly among social scientists. One obvious reason is that these mothers appear as a category in policy discourse, most usually as a problem or risk group as shown particularly in gender research. These mothers are shown to be over-represented in poverty and unemployment traps. One side of this problem, which turns into a normative issue, is concerned with family identities, whilst another concerns women’s dependence on financial support.

In the context of US workfare Fineman has addressed the role of patriarchal ideology in the process whereby a characteristic typical of a group of welfare recipients has been selected and identified as constituting the cause as well as the effect of poverty. She discusses how the imagery of welfare discourse remains laden with moral and normative judgements, centred on stereotypical assumptions about single mothers in the context of poverty, corresponding to the popular and political classification of the poor as either

37 One pioneering work in the shift towards contextual epistemologies in which knowledge is seen as related to the social context was presented by Thomas Kuhn, 1962. Robert K. Merton, 1973, took a further step by pointing out ‘the social turn’ in academic thinking. The dominant theory of knowledge in legal science in Sweden during the 20th century has been influenced by non-contextual epistemologies, such as empiricism and rationalism. Recognition of the social context has come to legal scholarship only more recently, see Svensson, 2007, p. 18 ff. The ‘linguistic turn’ in social sciences is partly explained as the result of growing discontent with traditional positivist approaches in academic thinking, see Howarth, 2007, pp. 9–10.
‘deserving’ or ‘undeserving’. The mother is modified by her legal relationship, or lack thereof, with a male, and is classified by whether or not she is single, a fact that is positioned as both central and significant in the discourses. As a methodological point, Fineman assumes that the study of rhetoric about motherhood reveals something about the existence and content of a dominant ideology that in turn reveals something about the power within society. The fact that women today are allowed to choose to become single mothers has, in her opinion, required the remodelling of patriarchy. Rather than addressing their needs as single mothers, reforms take the form of pushing them into a model family life, and economic subsidies that would be genuinely supportive have been rejected for ideological reasons.39

Björnberg, who has raised the question of the feminisation of poverty, in a European as well as a Swedish perspective, claims that solo mothers are marginalized in the welfare state, in systems of maintenance and on the labour market. They are said to be more likely to be vulnerable and to lose their jobs than married mothers. In her analysis the problem is not motherhood per se but is described rather as being one of gender, in combination with the absence of a marriage or men in the solo mother’s life.40

A more recent thesis on maintenance strategies for solo mothers in Sweden shows how the women interviewed discuss their subsistence-related choices and actions in terms of autonomy and dependency. To be able to maintain an autonomous household and manage by themselves without ‘asking for favours’ or ‘being a burden’ appeared as the goal of the interviewees. The women’s subsistence-related choices and actions also seemed to be guided by a kind of moral rationality, in the sense that economic utilitarianism is weighed against collective and individual norms and values, e.g. of ‘good motherhood’ and the needs of children. It was also shown that the women at this time, i.e. towards the end of the 1990s, regarded it as necessary to be very active in relation to authorities, and to monitor their social rights – such as economic benefits – much more than previously.41

In her argumentation, Barbara Hobson has made clear the special conditions of solo mothers, which challenge a sex-neutral notion of social rights:

… ‘solo motherhood is the reflector or rear-view mirror for the dynamics of power and dependency – the more difficult and stigmatized solo motherhood

41 Gardberg Morner, 2003 (English summary).
is in society, the greater the barriers against opting out of a bad marriage. From this standpoint, the kinds of state support solo mothers can receive can be employed as a barometer of the strength or weakness of the social rights of women with families.42

In a comparative study, Diane Sainsbury has discussed solo mothers’ entitlements as a challenge to the male breadwinner model.43 Solo mothers must often fulfil dual roles as earners and caregivers, and if they actually perform these twin tasks, they adhere to the division of labour of the individual model of social policy rather than the highly gendered division of tasks in the family, as prescribed by the breadwinner ideology. On the other hand, she points out that the ways in which the male breadwinner model and female caregiver model are encoded in legislation affects both the ability of solo mothers’ to fulfil these roles and the quality of their social rights. In addition, she remarks on how solo mothers expose basic contradictions and limitations in Gösta Esping-Andersen’s reasoning on de-commodification.44 This is a concept used in determining the de-commodifying potential of policies, according to the degree to which the policies provide a genuine work-welfare choice, allowing individuals and families to maintain a socially acceptable standard of living, independent of market participation. In her comparative analysis of the social entitlements of solo mothers Sainsbury adds to Esping-Andersen’s reasoning on de-commodification another criterion: their de-familiarizing effects and then uses both of these two criteria in her analysis.45 She concludes that social rights based on citizenship or residence show the fewest stratifying effects, whereas welfare entitlements have stratifying influences on women dependent on whether the women’s access to benefits is granted to them primarily as wives, as mothers, or as workers with a given status on the labour market.46

The collectivisation of women addresses an underlying dilemma in feminist theory, i.e. how to combine the improvement of living conditions for women without reinforcing gender categories that risk being oppressive and restrictive. Fixed categories, like that of ‘single parents’, have a descriptive value, but do not encompass the structural and causal connections. The question therefore has to be raised: Is it possible to construct an analytical concept such

43 Sainsbury, 1996.
44 Esping-Andersen, 1990.
as solo mothers for the purpose of unmasking normality in social security law, without being oppressive and stigmatising?

The concept of solo mothers in this study would be problematic without any questioning of the notion of law as neutral, objective and universal, and without a contextual and relational understanding of the gendered dimensions in solo mother’s lives. The concept of a model family as used in the employment strategy in social security arrangements that are meant to achieve social inclusion and gender equality, risks constructing solo mothers as a somehow defective and dubious group. De-gendered categories only exist as isolated concepts, and will therefore be defined either from the male norm or as gender-neutral. A gender-neutral focus on a certain group, as is usually the case in demographic categorizations, risks constructing solo mothers as responsible for their own subordination. Hence, this dilemma also involves a power dimension.

The constantly disadvantaged position of solo mothers questions the one-dimensional view of poverty and social exclusion for this group in contemporary policies that explains poverty and social exclusion as being mainly the result of inadequate labour-market participation. Such an explanation contrives to make women’s experiences invisible in law and fails to recognise women’s experiences of subsistence. In order to reflect women’s experiences of subsistence, not only incomes and expenses but also unpaid care-work, need to be included. Subsistence in this respect is also concerned with fulfilling fundamental needs that require un-paid domestic work.

47 See de los Reyes and Mulinari, 2005, pp. 24–25. As reported by de los Reyes and Mulinari, the construction of isolated categories belongs to an atomistic and positivistic ontology. They propose a theoretical perspective aimed at making visible how historical and situated-dependent power-relations are created within and through the simultaneous efficacy of intersections such as gender/sex, class and ‘race’/ethnicity. This intersectional theory starts from a different epistemology where people, ideologies, taken for granted knowledge, discourses and material conditions are involved in a continuous construction of power and subordination. Since the stipulated categories of ‘race’ and ethnicity are de-gendered, they will, according to this theory, exist only as isolated analytic concepts. Therefore they will be defined either from the male norm or as gender-neutral. In the same way, class is never gender-neutral but always raced (racialized or concerned with race). Behind the category of ‘sex/gender’, they maintain there is always a set of different social positions inter alia permeated with the hierarchies of class and ‘race’. See also Borschorts, 1999, p. 122, who points out how the a concept of gender like a universal category, based on an essentialist notion of the sexes, may be avoided by means of exploring how gender, ethnicity and class intersect in the welfare state.

48 For a discussion on the impact of welfare regimes on poverty dynamics in the EU, see for example Layte and Whelan, 2002.

49 See Bennholdt-Thomsen and Mies, 1999.
Starting this study from the standpoint of solo mothers in need of welfare provision for their maintenance also seems to obviate the need to take social class into consideration. Women's subordination, in all its various forms, is still tied to economic inequalities in society. Gender inequalities in paid work are part of women's class experience. Focusing entirely on unpaid domestic care work should therefore be of limited explanation in capturing the financial situation of solo mothers. Joan Acker has suggested ways of thinking and doing research that could lead to a rethinking of the concept of class:

These are, first, the recognition that class is formed in and through processes that also create and re-create racial and gender formations; second, the understanding of class not as abstract structures into which people are inserted but as something accomplished through active practises that constitute social relations and structures; third, the recognition that ethnicity, nationality, (and so on) as complexly interrelated at a multiplicity of sites within particular historical developments.

Acker's understanding of class includes the processes through which people acquire economic support, such as the relations between distributions of the welfare state and distributions through family ties.

Solo mothers however are not a homogeneous group, nor a status/a static category. Virginia Held proposes a conception of relations based on the experience of women in society, as seen in terms of 'mothering', which in fact is an activity performed by men as well as women. Such a conception could, in her view, replace the paradigm of 'the economic man' as representative of humanity, and might provide a model for a relational post-patriarchal family that would also affect society in terms of what constitute a citizen. Held uses the phrase 'mothering person' rather than 'mother' in the same gender-neutral way as various writers now speak of 'rational contractors'. She suggests that instead of importing into the household principles derived from the market-place, we should perhaps export to a wider society the relations suitable for mothering persons and children. This model would also yield insights into our notions of equality and show us that equality is not equivalent to having equal rights.

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50 Statistics Sweden shows that the pay gap between women and men during the period 1992-2006 has not changed. In 2006 women's wages in all sectors was 84 percent of those of men, see http://www.scb.se/templates/print____149083.asp.


52 Acker, 1999, pp. 44–45, 60.

In conclusion, as the aim is to unmask constructions of normality in social security law and processes of exclusion and inclusion in the Swedish welfare model, the concept of solo mothers utilized in this legal thesis focuses on the situation of solo mothers’ in a social context that is patterned around gender lines: most single parents are mothers. Although a concept of ‘mothering persons’ could also be analytically applied in a sex-neutral manner, and hence include solo fathers, the disadvantaged situation for solo mothers alone is targeted here: the constant condition of support and care obligations, irrespective of the reasons for being solo, and regardless of new relationships. Accordingly, from a European as well as a Swedish perspective, the feminisation of poverty and the marginalization of solo mothers in the welfare state and on the labour market seem obvious. The use of the analytical concept of solo mothers promotes the achievement of alternative means for understanding social exclusion and gender equality beyond the relationships between man and woman in a nuclear family. In addition the concept also implicitly involves a child perspective and the issue of social exclusion among children.

1.3.1.2 Social Citizenship
Although social exclusion came to the forefront in political and scientific discourses in the 1990s empirical measures to eradicate social exclusion in a given society are still dominated by different measurements of levels of poverty. In Sweden, it has been found that the risks of social exclusion has increased over time for many groups, especially those living in single adult households, and those who are unskilled, less educated and have a low income.

Exclusion has long been a central theme in feminist analysis, regarding women’s position vis-à-vis power relations in the public, private and symbolic domains. Nonetheless, this feminist understanding of exclusion has not influenced mainstream discourses which have used the concept to define individuals and groups living on the margins of society because of some personal or biographical deficit, for example the mentally ill, the handicapped etc. Unlike the poverty concept, social exclusion has come to be perceived as being better able to reveal the mechanisms causing marginalization and the processes associated with it, as the concept focuses on relations rather than average income, the latter seeing wellbeing as primarily financial.

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56 Daly and Saraceno, 2002, p. 87.
In connection with the notion of social exclusion the issue of citizenship and citizens’ rights comes into question. Most modern accounts of citizenship have taken as their starting point Marshall’s definition of citizenship as a status bestowed on those who are full members of a community. Marshall’s exposition of its three elements – civil, political, and social rights – incorporates both classical and socio-liberal notions of citizenship rights. The welfare state ushered in an array of social rights, such as income maintenance and care provisions, which, according to Marshall, ensured that every citizen enjoyed a broad equality of status.57

An important distinction has been made between formal and substantive citizenship.58 Citizenship in its formal, legal sense is a major factor affecting the attribution of rights. However, one can possess formal membership of a state as a citizen, yet be excluded, in law or in fact, from social as well as political and civil rights. On the other hand, social rights may be largely accessible to citizens and legally resident non-citizens on virtually identical terms. The traditional welfare state emerged from the idea of a nation state, and therefore only took responsibility for those persons who lived and resided within the specific community. In a communitarian view, the welfare state is seen as the expression of the nation-state, as being a community with solidarity.59

In its substantive sense, citizenship is experienced by many women and members of ‘minority groups’ as exclusion. In feminist critique and discussion of citizenship in the formal sense, the evaluation of care for determining citizenship in its substantive sense has accordingly, as will be described below, been thematic.

Feminist critiques of the Scandinavian welfare states have raised the question of the notion of woman-friendliness, as explained by the Norwegian sociologist Helga Hernes, who described how states could create ‘gender-just’ societies through the effective participation of women in all stages of policy development,60 and made use of the term ‘public patriarchy’.61 In a Swedish context Ulla Holm, in her feminist-philosophical treatise on mothering and praxis, questioned whether in the early 1990s, it was possible to defend the central values and norms of the praxis of mothering without retreating into a most objectionable form of conservatism.62 In a European con-

61 See Liebert, 2001, p. 263.
text, an increase in differences among women today is both maintained and expected, since EC opportunity regulations magnify inequalities; women with higher education will be able to compete directly with men, while those employed part-time will be further marginalized and disadvantaged, either in a public sector threatened with retrenchment, or locked into the lower and badly-paid segments of the private labour market. With the cutting of public services, it is claimed that these women might also be expected to do more unpaid work in the family.63

Meanwhile, research on care carried out in the Nordic countries has, as reported by Kevät Nousiainen, concentrated on ‘public-private’ forms of caring. In the Nordic context, caring referred to caring for people who, according to commonly accepted norms, cannot manage without help. The ideal of care has been understood as a political ideal without it being associated only or perhaps even just primarily, with the family.64 Joan Tronto and Ruth Lister, among others, have contributed to the discussion on the evaluation of care as a criterion for a political understanding of the ‘ethics of care’ and for determining citizenship when rethinking the welfare state.65

As basic norms for a gender-sensitive welfare regime, Ulrike Liebert has employed the two principles ‘engendering of freedom’ and ‘degendering of care’ for a redefined citizenship that is based on both of these norms.66 The first principle, presented by Nancy Hirchman,67 which recognizes citizenship rights derived from activities of care, in Liebert’s reasoning represents the core device that liberates the welfare state discourse from conservative and neoliberal hegemony. The second principle is based on Tronto’s68 consideration of care responsibilities as collective public responsibilities and no longer as individual and private ones: a caring state helps citizens to reconcile their care responsibilities with their work. On the other hand, this paradigm shift, according to Liebert, also requires replacing predominating conceptions of citizens.69

Barbara Hobson and Ruth Lister, conclude in a contribution to the debate on citizenship, that a gender perspective can help to reorient a consensus of citizenship, and find models for the ‘re-gendering’ of citizenship:

69 Liebert, 2001, p. 283.
The gendering of citizenship involves reconfiguring a paradigm that has been patterned around a male citizen. Not only were women as a group consciously left out of the script in classical theories of citizenship, but also the central spheres of their lives were shaded out of the realm of social citizenship.70

Ruth Lister has used the notion of human agency to critically synthesize the two traditions of citizenship: as status and practise, conceptualizing citizenship both as status, carrying a wide range of rights, and as practice, involving political participation.71 Yet, citizenship has been criticized as an exclusive concept which erects boundaries between those who do or do not belong as full members of the citizenship community. In ‘the age of migration’ feminist theory and the politics of citizenship must, according to Lister, embrace an internationalist agenda of global justice, where international human rights law enforced by global governance could subject the exclusionary powers of nation-states to an internationally agreed set of principles, including that of non-discrimination.72

Lister argues that citizenship as status can be articulated in particularistic as well as universalistic terms, as a ‘differentiated universalism’. In relation to citizenship as practice, she argues in favour of the notion of the politics of solidarity in difference and the pluralist politics of community.73 According to her, a woman-friendly and ‘gender-inclusive’ citizenship is not a matter of having to opt for a claim to full citizenship based on either woman’s equality with or difference from men; inspired either by an ethic of justice or care; premised on an ideal of either the independent or the interdependent citizen.74

Catherine MacKinnon, in more radical terms, has criticized a liberal rights-based approach to citizenship that in her view serves to entrench the real inequalities that women encounter.75 What we are really talking about, according to MacKinnon, are questions of power and dominance, rather than sameness or difference, while more immediate inequalities in practical terms need to be confronted. Thus MacKinnon rejects ‘liberal legalism’ as

70 Hobson and Lister, 2002, p. 47.
71 Lister, 2003, p. 42.
73 Lister, 2003, p. 92.
75 For a summary of MacKinnon’s original position, see MacKinnon, 1989, Chapter 12.

37
a false ideology because it ignores the realities of power, the hierarchies of which are determined on the basis of gender.\textsuperscript{76}

Postmodernism has been seen as an alternative going beyond any of the sameness/difference debates which pervade not only feminism but also theories of exclusion, and the only narrative which honours difference and particularity.\textsuperscript{77} In Catherine MacKinnon’s view, however, postmodernism is not about reality. She claims that feminists need theory which addresses real conditions, real social structures, and the physical nature of the gender hierarchy.\textsuperscript{78} In postmodern thinking it is argued that there can be no single meaning of sex equality, because there is no single meaning of women, and nor of course of men.\textsuperscript{79} Drucilla Cornell’s postmodern alternative, the philosophy of the limit, is meant to identify sex equality as just one destabilized component in a series of free-standing, non-determinative, dialogic encounters, which in themselves are constitutive of a radically pluralistic, participatory and community-determined ‘ethic of citizenship’.\textsuperscript{80} In contrast to the programmes of writers such as MacKinnon, this philosophy denies any identity of ‘woman’; as such an identity would deny the particularity/uniqueness of women and the possibility of emancipation in society.\textsuperscript{81}

Ian Ward, in his proposal for reform beyond sex equality, describes how the debate during the 1990s clung to alternative theories about socially constructed rights that are perceived as better able to reflect the common ‘lived experience’ of women. He urges the replacement of sameness/difference with a focus on disadvantage. The ‘equality’ debate has, in his view, diverted attention away from appreciating the power(lessness) and (dis)advantage which reflect the deeper structures underpinning the real situation of women in contemporary society. Consequently, he advocates a move towards ‘inequality’ that addresses substantive and particular inequalities.\textsuperscript{82}

The theoretical concept of ‘social citizenship’ is commonly used in contemporary research, not always explicitly but in substance, as an instrument

\textsuperscript{77} Ward, 1996, p. 372.
\textsuperscript{78} MacKinnon, 2000, pp. 687–712.
\textsuperscript{79} Hervey, 1996 p. 399.
\textsuperscript{80} See Cornell, 1991.
\textsuperscript{81} See Ward, 1996, pp. 373–374.
\textsuperscript{82} See Ward, 1996, pp. 369–372 for one description of sex equality debates during the 1990s.
for analysing gender, equality and welfare regimes. The normative Swedish model of social citizenship, i.e. the distributive principles which mean that social rights and tax obligations are linked to the individual and a strong state involvement in the care of children, has been put to the test in times of budgetary cuts. From a gender perspective, Åsa Gunnarsson argues that a transformed conception of social citizenship is needed in order to achieve a more inclusive social welfare regime.

In this thesis rethinking the welfare state in terms of more work-related social security regulations and higher levels of activity among welfare claimants is contrasted with a view of citizenship that is based on a metaphor of citizens as earners and carers. The promotion of active policies in the EU and the interpretation of the the concept of 'active citizenship' that belongs to these policies is contested. Ruth Lister points out two sides of the matter, arguing that active citizenship can be interpreted both as conservative, rooted in individualistic and legalistic notions of contract, and radical, emphasising the potential for participation, e.g. community groups where disadvantaged people, often women, create themselves as subjects rather than objects.

Gendered inequality nevertheless involves a material component, while substantive inequalities in law need to be confronted. The concept of social citizenship, which comprehends the rights and duties, including the distributive principles and participatory conditions which enable membership in a society, here is used as a measurable reference for grasping and criticizing historical and context-dependent gender and power relations and the processes of exclusion and inclusion in social security law.

1.3.2 Law as discourse – text in context

Among feminist legal scholars it is maintained that a changed perception of the limits of law and legal scholarship will not only flow from new theoretical explanations, but is also reliant on new methods in legal scholarship. Legal (feminist) scholars may use the limits of the law to the advantage of women whenever this is possible, but also criticize and transcend those limits, i.e. doing boundary-work if need be.

The concepts of sex and gender, in interaction with other concepts such as ethnicity and social class, involve both representational and social structural

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85 Lister, 2003, pp. 23–24.
processes where power is a constitutive element. Feminist theories offer a theoretical context which helps to reveal value-based assumptions hidden within the law, i.e. about what exists, and what is normal and desirable. In reflections on legal texts as discourses, based on social constructionism theory, legal scholars have found the discourse analysis methods developed in sociology and cultural sciences fruitful in the analysis of legal texts. The scientific turn towards language or, more specifically, towards discourse, is also now being reflected in legal science.

‘Discourse’ is used across the social sciences in a variety of ways, often influenced by Foucault. Foucault’s theoretical work and work on ‘grand’ historical processes showed how social phenomena (such as sexuality and punishment) are construed in professional discourse. His main purpose was to demonstrate archeologically the structure in different regimes of knowledge, i.e. the rules that determine what possibly can be said and what it is inconceivable to say during a specific historical epoch.

In later discourse theory, mostly elaborated by Laclau and Mouffe, discourse is explained as being the fixation of meanings within a specific domain. ‘Discourse’ is used in a general sense for language (including for instance, visual images) as an element of social life which is dialectically related to other elements. Social theory has developed in discourse theory through critical readings of Marxist theory. If in Marxist theoretical analysis the existence of an objective social structure is taken for granted, the start-

89 Foucault, 2002 (the original French title L’archéologie du savoir was published in 1969).
90 Foucault, 1971 and 1979. The point of departure in Foucault’s genealogical research on madness related to imprisonment consisted of a problem that then presently was conceived to be problematic.
91 Foucault, 2002.
93 In discourse theory the concepts of ‘discourse’ and ‘element’ are distinguished from each other. By discourse is meant the fixation in articulations of what something means in a certain domain. Element, in contrast, is not discursively fixed in the articulations. See Laclau and Mouffe, 1985, p. 105; Winter Jørgensen and Philips, 2000, p. 33.
94 Marxist-influenced social theory is represented for instance by Habermas, who criticised bourgeois society for breaking its own premises: the normative ideals of freedom and equality, see Habermas 1989.
The starting point for analysis in discourse theory is to disclose the processes that create ‘objectivity’. In contrast to the structuralist tradition that has structural \textit{explanation} as its objective, the interest in discourse theory is rather to analyse \textit{how} the structure, in the form of discourses, is constituted and how it changes. The interest is not to explain social structure, but to analyse \textit{how} social structure, in the form of discourses, is constituted and changes, and how articulations continuously reproduce, challenge and transform the discourses. The more or less determinating role that Marxist thinking ascribes to economics is abolished in discourse theory. Political processes are given primacy, which means that every social phenomenon is understood to result from discursive processes.\footnote{Winter Jørgensen and Philips, 2000, pp. 31–65.}

‘Discourse’ is also used more specifically: different discourses are different ways of representing the world, which can be identified at different levels of abstraction.\footnote{See Fairclough, 2003, p. 133.} For Fairclough discourse analysis entails detailed linguistic analysis of texts, which is not the case for much of the discourse analysis in the Foucault tradition.\footnote{Fairclough, 2003, pp. 214–215.} Fairclough’s text analysis is seen not only as a tool for linguistic analysis, but also as part of a broader project to develop critical discourse analysis – a ‘manifesto’ for critical discourse analysis – as a resource for social analysis and research.\footnote{Fairclough, 2003, pp. 3, 202-211.} In contrast to Laclau and Mouffe, who see all practices as discursive, Fairclough distinguishes between discursive practices and social practices. This means that the function of certain social phenomena, such as the logics of the economy or the institutionalisation of social action, is to be understood according to other logics than discourses. Thus, certain areas, according to Fairclough, have to be examined by means of other methods than discourse analysis.\footnote{See Winter Jørgensen and Philips, 2000, p. 25.}

In discourse analysis it is generally believed that social structures define what is possible; texts, being part of social events, constitute what is actual; and that the relationship between potential and actual is mediated by social practices. One consequence of this for a discourse analytical method is that rather than starting from texts, one starts from social events (and chains and networks of events), and the texts are analysed as elements of social events.\footnote{Fairclough, 2003, p. 223.} Discursive acts or symbolic practices are understood as being embedded in other discursive acts or symbolic practices and so forth. As a result of this,
the aim must be an analytic balance between text and context. In simplified terms, discourse is understood as ‘text in context’. Texts and discourses are not seen as being isolated in space. It is rather the case that individual texts always relate to past or even present texts. This may be characterised as ‘intertextuality’. Discourse analysers claim that discursive changes are taking place when conceptual elements (by way of concepts such as citizenship, social rights and duties) are articulated in new ways.

Critical discourse analysis (CDA), in which Fairclough is situated, involves theories and methods for theoretical problemizing and empirical examination of the relations between a discursive practice and social and cultural developments in different social contexts. In feminist CDA, the central concern is with critiquing discourses which sustain a patriarchal social order: that is, power relations that systematically privilege men as a social group and disadvantage, exclude and disempower women as a social group. Gender is defined as a social relationship that enters into and partially constitutes all other social relationships and activities, and the ‘analytical resistance’ in feminist CDA is aimed at effecting social transformation.

There are some characteristics specified as being common to the different approaches to critical discourse analysis. Social and cultural processes and structures are partly understood to have a linguistic – discursive character. Discourse is seen as one important form of social practice which contributes to the constitution of the social domain, including social identities and social relations. Social practices can be thought of as ways of controlling the selection of certain structural possibilities and the exclusion of others, and the retention of these selections over time, in particular areas of life. At the same time, discourse is also seen as being constituted of other social practices, standing in dialectical relationship to other social dimensions. In critical discourse analysis the particular mix of discourses – interdiscursivity – is regarded as being important for social research. Discourse is seen both as being constitutive and constituted. A broader concept used in CDA is discourse order, which means all the genres and discourses that are used politi-

107 See Fairclough, 2003, p. 216.
cally and structurally in social practices. A genre is understood to be a way of acting in its discursive aspect. Different genres, which are regularly linked together, defined as genre chains, involve systematic transformations from genre to genre. Genre chains, e.g. in the form of official documents, are an important factor in the enhanced capacity to carry out ‘action at a distance’, which has been taken as a feature of ‘globalization’.

Central to discourse analysis is the concept of ideology, conceived to represent aspects of the world which contribute to establishing and maintaining relations of power, domination, and exploitation. In CDA it is claimed that discursive practices contribute to the creation and reproduction of unequal power relations in society, for instance between social classes, between men and women, and between ethnic minorities and the majority sector of the population. These effects are considered to be ideological. CDA scholars do not regard themselves as politically neutral in the same manner as objectivistic social scientists might do. In contrast, CDA can be regarded as a critical approach that is politically engaged in social change. In the struggle for social change, the criticism is aimed at revealing the role of the discursive practice in sustaining unequal power relations. In CDA the concept of hegemony is considered an important tool for analysing how a discursive practice is an integral part of a larger social practice, in which power relations, based on gender, ethnicity and social class, are included.

One way of exploiting the limits of law, i.e. doing legal boundary work, focuses on the relationships between various legal branches, and between law and other normative discourses and social practices in society. Gender and power relations work across networks of practices and structures. Constructions of normality in the structure of law have a discursive character. For a feminist legal study of gender and power in the welfare state, which is aimed at gender equality and social inclusion a discourse analytical approach serves as an addition to the traditional methods used in legal science, providing an intellectual and theoretical framework for the examination and

112 See Winther Jørgenssen and Phillips, 2000, p. 70.
114 For feminists and other critical scholars, Svensson points out that critique is often fundamental to the emancipator project, which is to change law for the better, see Svensson, 2007, p. 39.
analysis of legal texts in context. Discourse analysis is a valuable supplement to both social and legal research, not a replacement for other forms of such research. A discourse analytical approach provides methods for revealing constructions of normality in social security law and the boundaries of social citizenship by asking which discourses become dominant; which discourses are silenced; how does this happen; or what are the legal strategies used. Accordingly, legal discourse here is understood to play an important role in creating and reinforcing specific sets of social values and expectations attached to gender and thus involved in the ideological process in society. The ideological analysis of texts, and especially underlying assumptions and premises in these texts, is one important aspect of criticism but it needs to be framed in a broader social analysis of events and social practices.

1.3.3 Three studies amalgamated

Åsa Gunnarsson has used the concept of normative structure to describe the interplay between the function of and the content in law. Social policy objectives and the idealistic notions of maintenance and care in the family, together with legal principles, legal concepts and legal techniqualesties form, in Gunnarsson's view, a normative structure. In this thesis, the social or linguistic turn in scientific research is also taken up. The construction of normality in law is also about how social structure, in the form of discourses, is constituted and changes and how articulations continuously reproduce, challenge and transform the discourses.

The social construction of solo mothers is a matter of if and how the needs of these mothers are recognized, and the meaning given to such recognition in the normative and discursive structure of social security law. Constructions of normality in law, i.e. how subsistence and care are recognized and construed, have greatly influenced the modelling of work, educational, and participatory conditions, and the opportunity to reconcile waged work and care. Exploring law from the perspective of solo mothers offers one possible framework for revealing constructions of normality in law, constructions in which engendering takes place and in which processes of inclusion and exclusion are involved. If one accepts gender as a variable, then one must acknowledge that it is not essentialist, but is rather being continually contested, constituted and recon-

115 See Fairclough, 2003, pp. 15–16.
stituted in time and space. A notion of gender as social practice, as opposed to a dichotomous logic that describes it as sexual difference rooted in biology, is here concerned with highlighting the dynamic and relational aspects of gender – a set of norms and relations embedded within social structure.118

The gendered dimensions of social power within the structure of welfare state regulations are important aspects of the boundaries between politics and law. On the one hand, the division of power in law in terms of citizenship and social rights and duties is targeted in this thesis. The construction of citizenship and social rights and duties in law and how these constructions are mediated and retained over time in the social practices unmask the ways in which the selection of certain structural possibilities and the exclusion of others are controlled. On the other hand, governance in the form of strategies in national and EU policies is also focused on, i.e. the activities in the Swedish welfare state and in the EU that are directed towards managing or regulating social practices.119

The object of interest is not restricted to the legal system, but also questions and challenges the evident and taken-for-granted assumptions in law. Therefore, law and legal knowledge are not delimited in the strict sense, i.e. law is not conceived to constitute a system that is internal and closed. On the contrary, law is understood to be social and contextual. This critical approach to law also invokes ‘external’ political and ideological discourses, thus extending the field of study beyond a narrow perception of law.

Legal research can be about all aspects of legal norms, as opposed to a legal formalist perspective. The search for how normality is constructed in law and analysis of the social consequences these constructions have for solo mothers necessitates boundary work methodologically. A contextualized study of law

119 The definition of governance is derived from Fairclough, 2003, p. 217. The views represented by social scientists and lawyers have had different approaches to the question of power. As notified by Nousiainen, the concepts used in traditional discourse on political power were largely developed from legal expertise, and evolved around issues of state sovereignty, the limitations of state power introduced by a doctrine of legitimate competence, and a strict division of private and public domains in order to separate private affairs from political issues. Such a legal discourse encompasses the divisions of power, for instance in terms of citizenship and human rights, and in terms of claiming rights and balancing duties in the welfare state. In contrast to legal discourse, social scientists have concentrated more on ‘governance’ that focuses on the processes of how government creates the very subjects of power, and on the power strategies of the authorities which seek to shape the beliefs and conduct of citizens, see Nousiainen, 2004, p. 13.
using the notion of diversity and inequality, instead of an abstract notion of formal equality, elucidates the limitations of a traditional dogmatic approach to the issue.

Traditional legal studies do not provide for the use of methods that theorize about gender dimensions in law, especially if the law is constructed to be gender-neutral. Moreover, a critical feminist perspective on social security, as laid down in law, that searches for tendencies towards change in the light of European integration, would be restricted if a purely positivistic notion of law was adopted. Although traditional legal dogmatic description and the systematisation of national and European social security regulations are necessary, the interrelation between politics and law in the legal regulation of social security stresses the need to combine traditional legal dogmatic methods with other scientific methods.

Embarquing from the theoretical and methodological points of departures now presented, three separate studies were put together as follows. Although differently arranged, each of the studies serves the overarching purpose of unmasking constructions of normality in social security law and historical and context-dependent processes of inclusion and exclusion in the Swedish welfare model.

1.3.3.1 Social assistance for solo mothers in Sweden, Finland, Norway and Denmark – a comparative legal study (PART II)

In the opening study the aim is to compare and analyse the legal regulation of social assistance for solo mothers in Swedish, Norwegian, Finnish and Danish law, asking how one of the main objectives in the EU – to combat social exclusion – and how the guarantee that everyone has the resources necessary to live a life of human dignity are reflected gender-wise in the national regulations of the four countries. The incorporated legally-binding commitments to gender mainstreaming and the combating of social exclusion as encoded in the EC Treaty and in the public policy context, motivate cross-national research into how the risk for solo mothers of becoming poor or socially excluded is tackled in the last-resort safety nets in Member State’s and in Nordic welfare states. How rights and duties are regulated in last-resort social assistance, and how the principles underpinning these regulations are related to principles in family law, constitute a means for revealing gendered dimensions laid down in law about maintenance and care that can function as either inclusionary or exclusionary. The examination of how the notion of an active citizen is understood and related to social assistance, and whether diversity and differences are considered and taken into account in the last-
resort safety net in each of the countries in this study, aims at arriving at an understanding of the boundaries of social citizenship.

In this study a traditional legal dogmatic method is applied to the description and systematisation of the legal material. The legal sources are interpreted by posing questions in regard to the texts about the 'nature' of social assistance in the light of the social and financial situation of solo mothers as shown empirically in other research. The sources comprise mainly written law, decrees and their accompanying policy-making national guidelines. Case law is of minor importance, but some references are made where appropriate.

1.3.3.2 Gender equality and the boundaries of social citizenship in a European social model (PART III)

In the second study the aim is to unmask and analyse how the meaning of a ‘social model’ and gender equality in the EU is understood, regulated, articulated and debated; the strategies that are used; and the social consequences these strategies and the discursive fixation of meanings in EC law might have for social security law and for the position of solo mothers in a Swedish context.

The fact that social security regulations, binding on EU Member States, are issued by European legislative bodies, raises interdiscursive and intertextual questions about Swedish social policies and law. Instead of focusing on EU law and national law separately, their interaction is analysed. The legal basis for regulating social security in the EU and the strategies used are of interest for evaluating the affects EU law might have on the Swedish welfare model. The personal and material scope of EU social security law ought to mirror constructions of normality in EU law and the boundaries of a European social citizenship.

Analysing the social dimension of the EU and a European social model brings different questions into play: first, the making of the meaning of Europe; second, the organising of Europe; and third, the drawing of borders. Although membership of the EU can always be redefined, the study

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120 ‘Naturalization’ is a process that brings about ‘common sense’. Common sense is often seen in discourse analysis to conceal the underlying and hidden assumptions in discursive accounts of the social reality. In discourse analysis the connection between common sense and ideology, based on theories of the Italian Marxist Antonio Gramsci, is seen to contribute to the preserving of unequal power relations. See Nilsson, 2007, p. 33; Winther Jørgensen and Philips, 2000, p. 39.

sets out from the assumption that citizenship depends on structural phenomena of exclusion. Important gate-keepers decide who will have access by means of new laws, new ideologies, and new borders. Similarities and contradictions in current Swedish law in relation to the emerging EU polity and law; and what implications convergence\textsuperscript{122} in social security regulations has in general and specifically for solo mother in a Swedish context, are analysed.

Rule-oriented description and systematisation of positive social security law in the EU is combined in this study with a discourse analysis approach. Highlighting the normative elements in EU law may serve to link the content and form of social security law with political struggles and discourses.

The main sources of knowledge in this study are EU and Swedish law; case law in the EU and in Sweden; communications from the EU institutions, mostly the Commission and the Council; and legal doctrine.

1.3.3.3 Social security for solo mothers in the Swedish welfare model (PART IV)

In the third study, the aim is to reveal normality in the Swedish welfare model over time and hence to achieve a deeper understanding of the processes of exclusion in the Swedish welfare model. A deeper understanding of constructions of gender and power in law in the Swedish welfare model over time, and of inherent processes of exclusion and inclusion, seem necessary for assessing the current transformation in social security law, and for understanding critically and gender-sensitively the boundaries of social citizenship in the Swedish welfare model at the present time.

By means of a discourse analytical approach normality in the structure of the Swedish welfare model is deconstructed\textsuperscript{123} in this study: in the discursive practices of social security law and in social practices in society.\textsuperscript{124} The

\textsuperscript{122} The legal acquis in the social field does not justify harmonisation of social legislation in the Member States, but rather focuses on specific subjects based on common principles. These subjects and principles are, as opposed to harmonisation, aimed at encouraging the convergence of national practices in welfare provision, without prejudice to the powers of the Member States to establish the principles and organisation of their own social security systems. See Pennings, 1998, p. 223.

\textsuperscript{123} The concept of deconstruction originally derived from the French philosopher Jacques Derrida. Deconstruction is understood to constitute the opposite to the concept of hegemony. By means of deconstruction, the indefinableness in hegemonic interventions and alternative means of intervention can be shown. See Winter Jørgenssen and Phillips, 2000, p. 56, with reference to Derrida, 1970, p. 73.

\textsuperscript{124} Compare the three-dimensional model for critical discourse analyses elaborated by Fairclough, 1992, p. 73. Three levels are included in this model: a text level, a discursive practice level, and a social practice level. See also Fairclough, 2003, pp. 202-211 where a 'mani-
concept of solo mothers is utilised analytically to disclose past and present constructions of normality and processes of social inclusion and exclusion in the Swedish welfare model, and how these constructions are constituted, re-constituted and transformed over time.

Constructions of normality in the normative structure of social security law are understood to result from discursive processes, and are considered to have social consequences for solo mothers. What matters here is the perception that law must not be reduced to such normative material as individual regulations and court decisions: law is contextual, multi-levelled, contradictory, constructed, and an expression of gender and power relations. Social security law is here perceived not to constitute a closed and internal system, but to be constituted in a political, economic and historical context, thus boundary work is needed. Constructions of normality in social security law on a social practice level, i.e. the fixation of normative

125 A discourse analytical approach to law implies that law is conceived to be part of social events, i.e. connected to social context and the mix of discourses in which social security law exists. A discourse analytical approach provides an important method for capturing how the social practices of gender and power are constituted, re-constituted, contested and transformed in the Swedish model over time. If and how the needs of solo mothers are recognised in the welfare model is a matter of social, structural and representational processes, which are ideologically mediated in social practices.

By means of deconstruction the indefinableness in hegemonic interventions and alternative means of intervention can be shown. Normality in social security law on a social practice level, i.e. the fixation of normative

festo for critical discourse analysis’ in social research is presented. Compare Vahlne Westerhäll, 2002b, pp. 63–66; and Tuori, Kaarlo 2002, 147–196, 283–322. In Vahlne Westerhäll’s analysis of the social project in Sweden running from 1950–2000, the interest was to elucidate state influence on social law. Her model methodologically divided law into generalized categories: legal rules; legal principles; and fundamental legal values. This division was not conceived to constitute a vertical but rather a circular structure in which rules, principles and values are seen to continuously affect each other. Tuori instead emphasises the multi-layered nature of legal history in his programme for critical legal positivism, in which vertical levels of law: the surface level, the legal culture; and the deep structure of law, are demarcated.

125 Compare Hydén, 2002, p. 268. Hydén argues for normative science (normvetenskap) in law and in social sciences in which the function and connection of a legal norm to other norms in society has to be analysed. Legal phenomena are, in his view, to be seen in relation to the underlying normality, and normative patterns in law are to be integrated with knowledge of the social functions of legal rules. Normative science could, in Hydén’s view, therefore constitute a bridge between moral practices, system imperatives, and normative transition in society on the one hand, and legal transformation on the other hand.
principles, including the fixation of the meaning of gender in the more sta-
bilized forms of law, discloses the ideological representation of solo mothers
and the hegemonic reproduction and resistance of gendered inequality in the
Swedish welfare model. The conditions that, from a historical view, govern
entitlement to benefits, expose the kind of hierarchies into which needs and
social rights are placed vis-à-vis each other. The identification of past and
present legal concepts and legal principles for ensuring the needs of citizens;
of notions of autonomy and dependence in the discursive practices of social
security and family laws; and the value-based assumptions that define the
legal subjects as well as their rights and duties, are understood to reflect the
boundaries of social citizenship for solo mothers over time. The distribu-
tion through which people acquire economic support, such as the relation
of distribution of the state and distribution through family ties, implicitly
reflect what is included in the normal and what is deemed less important,
and hence excluded in constructions of normality in law.

The purpose of this study requires an interdiscursive and intertextual
approach. Deconstruction of normality in the discursive structure of social
security law involves the legislator’s discursive ways of acting by means of
legal regulation in the forms of individual statutes and decrees, policy dis-
semination in government preparatory works, and the meanings judiciary
construed, articulated and fixed in legal dogmatic works. In addition to legal
texts in the form of legal regulations, government preparatory works and
legal doctrine, political, sociological, historical studies and philosophical
works are included.

1.3.4 Concluding the approach

In conclusion, the knowledge sought in this thesis in law is contextual,
multi-levelled and interdisciplinary. The sources of knowledge include other
relevant sources, as well sources of law. Different methods are applied and
different sources of knowledge are drawn on for the different questions
raised in each of the studies. The methodological outlines and specific ques-
tions in each of the studies are further explained in the introduction to each
study. None of the methods is chosen to critically exclude the others. The
opening study, consisting of a cross-national comparison of social assistance,
inspired and motivated further examination of the social dimension in the
EU. In turn, social security law in a legal context increasingly characterised
by Europeanization, urged the necessity of a study of the Swedish welfare
model in time and space in order to achieve an understanding of the current
changes in Swedish social security law. Taken these studies together, in which
solo mothers are used as an analytical concept, the overarching aim – to unmask constructions of normality in Swedish social security law, and from that disclose historical and context-dependent gender and power relations, including processes of exclusion in the Swedish welfare model – is brought to a conclusion in PART V.
PART II

SOCIAL ASSISTANCE FOR
SOLO MOTHERS IN SWEDEN,
FINLAND, NORWAY AND DENMARK
— A COMPARATIVE LEGAL STUDY
2 Introduction

2.1 The empirical background of a vulnerable group

The promotion of ‘active policies’ instead of ‘passive reliance on income maintenance’ has become one of the key concerns expressed by the European Commission and one of the central elements in the modernisation of the European social model. The rising numbers of social assistance recipients have occasioned new questions concerning the role, aims and tasks of the last-resort safety nets in the Member States, and there has been increasing interest regarding comparative research into social assistance schemes and minimum income guarantees.\(^1\) The incentive effects of social assistance are of special interest, and OECD reports concentrate on looking at activating elements and ways of minimizing the disincentive effects of social assistance schemes in European and non-European countries.\(^2\) Activation measures and ‘work for welfare’ policies have also been targeted in comparative research.\(^3\)

The national social assistance and minimum income schemes are seen as important instruments in social protection policy, but access to employment is emphasized as the best safeguard against social exclusion. The European Commission has as one of its objectives to review and modernize social protection systems to make them more employment-friendly, by removing barriers and disincentives to work and creating the right conditions for making work more attractive. However, as part of the effort to improve incentives to work, the Commission emphasises the importance of avoiding stricter conditionality, particularly when imposed on social assistance benefits, which may put especially disadvantaged people at serious risk of poverty and social exclusion.\(^4\)

The vulnerability of single parents in this respect is underscored by survey evidence that the risk of poverty is greatest among the households of such parent (35 % for the EU average according to data from the European Community Household Panel Survey), most of which are headed by women.\(^5\)

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\(^1\) See Ditch et al., 1997; Eardly et al., 1996; Guibentif and Bouget, 1997; Lødemel and Schulte, 1992; Lødemel, 1997; Saraceno, 1997.

\(^2\) OECD 1998a; 1998b; and 1999.

\(^3\) Lødemel and Trickey, 2001; Roche and Amnesley, 1998.


Other research initiated by the European Commission\(^6\) shows that ‘single mothers’ and families with many children run an disproportionate risk of becoming social assistance recipients. Single parents, most of them single mothers, constitute the group at the greatest risk of sinking below the poverty line. In the study this situation was seen most clearly in the Nordic countries in comparison with other European countries. In Denmark and Sweden approximately one third of all single mothers relied on social assistance during at least one period every year throughout the 1990s. In Finland, one third of all single parents – most of them mothers – were in the same situation.\(^7\) The study in question conclusively claimed that the large number of social assistance recipients within the category tells us nothing about the role of social assistance as a means of encouraging social inclusion. High risk of becoming a social assistant recipient can be interpreted as an indication that the social assistance scheme which caters to particular categories is performing well. Short-term social assistance can be seen as both an indicator of inclusion and a result of restrictive eligibility rules. Moreover, long-term assistance does not automatically indicate that the recipients either have been granted a decent level of living or have avoided exclusion.\(^8\) In Norway – the only country examined in the study in question that is not a member of the EU – it had also become more common, despite specific benefits for ‘lone mothers and fathers’ provided by the Norwegian social insurance system, for the means-tested housing allowance to be awarded. In 1999, 17 % of these households were allowed social assistance.\(^9\)

Sensational findings from Swedish epidemiological, longitudinal register-based studies suggest that lone motherhood entails health disadvantages as concerns mortality, severe morbidity and injury.\(^10\) The main explanation for the increased risks seems in most cases to be inadequate household resources.\(^11\) In addition, lack of household resources has been found to play a major part in the increased risk of disadvantages to the health of a child growing up in a single-parent family.\(^12\) A Swedish commission has pointed

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\(^6\) Heikkilä and Keskitalo, 2001. In this work social assistance recipients was examined in project sponsored by the European Commission, titled ‘The role of Social Assistance as a means of Social Inclusion and Activation’.

\(^7\) See Heikkilä and Keskitalo, 2001, p. 45.

\(^8\) See Heikkilä and Keskitalo, 2001, p. 60.


\(^12\) Ringbäck Weitoft et al., 2003: 361:289–295.
out how single mothers, at the end of the decade, had not benefited from improved state finances after the economic crisis of the 1990s.\footnote{Gähler, in SOU 2001:54, pp. 15–99.} Together with their children, they were shown to be poorer than any other group in Sweden. Their vulnerability is not explained by there being little incitement for them to be active on the labour market but is shown to be due to the fact that they are women with lower incomes, solo breadwinners, and have the main responsibility for the support of their children.\footnote{Gähler, in SOU 2001:54, pp. 87–91.}

Another Swedish study showed an increase in child poverty during the 1990s.\footnote{Salonen, 2002, pp. 13–14. In the study two different indicators of poverty were used. The first, identifying the financially poor, relates to incomes at the level of social assistance combined with basic housing expenses. If the income is below that standard (income level below 1, 0) the household has a ‘low income standard’. The second definition of poverty relates to children living in households receiving social assistance. http://www1.rb.se/Shop/Products/Product.aspx?Itemld=168.} Of all the children in financially poor families only 30\% received social assistance during the year in question. The study also pointed out increased variations among children in different communities and between children with Swedish and foreign backgrounds. Four out of ten children with a foreign background lived in poverty in 1999, while for native Swedish children the corresponding figure was approximately one in ten.\footnote{Salonen, 2002, p. 40.} A more recent report\footnote{Ds 2004:41.} shows that the proportion of single mothers receiving social assistance has decreased from 33\% in 1990 to 23\% in 2002. During the same period, the number of single fathers receiving social assistance has decreased from 16\% to 6.3\%. At the same time, the report cites the increase in the proportion of children living in families with a low income standard – from 10\% in 1991 to as much as 24\% in 2002. Of all children living in a single-parent family, 47\% are at risk of experiencing economic vulnerability. It is also pointed out how children of foreign parents are especially vulnerable in this respect. Every second child of a third country national, (that is to say a parent whose origin lies outside of Europe), lives in a family below the poverty line, i.e. that has less than 60\% of the median income. Moreover, a relatively large number of children of parents who are in education, six out of ten, are economically vulnerable according to the report.\footnote{Ds 2004:41.}
2.2 Aim and approach

The gap between formal sex equality and the practice of sex inequalities represents a conflict of interests in welfare-state regulations concerning distributive obligations and rights.\(^\text{19}\) How social assistance is granted and defined can render various groups of women and men to a greater or lesser degree vulnerable to social exclusion. A gender perspective can enrich the contemporary political and legal discourse on social exclusion by referring to specific gender-based risks and disadvantages. The empirical fact that a large number of ‘single parents’ in the Nordic countries have to rely on welfare for support, calls attention to the need for a legal analysis of normative positions on eligibility for social assistance from a gender perspective.

This study comprehends a cross-national comparison of social assistance for solo mothers in Sweden, Finland, Norway and Denmark.\(^\text{20}\) The purpose is to compare and analyse social assistance in the law of the respective countries, asking how one of the main objectives of the EU – to combat social exclusion and to guarantee that everyone has the resources necessary to live a life of human dignity – is reflected gender-wise in the national regulations in the four countries.

Based on feminist theory, ‘solo mothers’ is utilized as an analytical concept. The concept includes mothers who are not living with the person legally defined as the other parent of their child/children. A construct of solo mothers rather than ‘lone mothers’ or ‘single parents’, aims to achieve a broader understanding of the group’s situation than that attained in sex-neutral categorisations. It also targets the assumption that the condition of support and care obligations remains constant, irrespective of the reason for being solo, and regardless of new relationships. The continuously disadvantaged position of solo mothers questions the one-dimensional view that mainly explains poverty and exclusion for this group of mothers as the result of inadequate participation in the labour-market.\(^\text{21}\)

The idea of comparing social assistance in four Nordic countries arises from the EU policies that have been adopted in the EC Treaty. First, the fight

\(^{19}\) See Burman, Gunnarsson, Wennberg, 2004, pp. 135–166.

\(^{20}\) The study was completed in November 2004 and in its entirety was presented as a licentiate dissertation: see Wennberg, 2004. Thus, this study is ‘frozen’. More recent policies and legal amendments in social security, especially as regards Sweden, are treated in PARTS III – V of the thesis.

\(^{21}\) The concept of solo mothers has been further defined and discussed in the introduction to the thesis on pp. 29–34.
against social exclusion, as encoded in the EC Treaty article 137, amended by
the Treaty of Nice\textsuperscript{22}, motivates an examination of how ‘active’ policies are
reflected in national regulations. Second, gender mainstreaming,\textsuperscript{23} which has
become widely accepted in the international community as a new approach
to gender equality and a policy-making tool in the EU public policy con-
text, as well as being occasionally translated into a legally binding norm\textsuperscript{24},
makes the vulnerability of solo mothers worth investigating from a legal
point of view with regard to how their needs are reflected in national last-
resort schemes.

Asking the law question from the social viewpoint of a vulnerable group
can reveal something about notions of dependency and non-dependency in
society. How rights and duties are regulated in last-resort schemes, and how
the principles underpinning these regulations are related to principles in
family law, constitute a means of revealing gendered dimensions laid down
in law about maintenance and care that can function as either inclusion-
ary or exclusionary. The question also arises of whether solo mothers are
seen as worthy citizens, possessing the individual right to live in a manner
compatible with human dignity according to European human rights
and common objectives in governance and law to fight poverty and combat
social exclusion. The examination of how active citizenship is understood
and related to social assistance, and whether gendered diversity and differ-
ences are considered and taken into account in the last-resort safety net in
each of the countries in the study, aims at achieving an understanding of the
boundaries of social citizenship.\textsuperscript{25}

The role, aims, and tasks of last-resort schemes in the nation states are of
interest as they express one aspect of the notion of an active citizenship that
emphasizes employment. Social assistance, which is understood as a means
of achieving social inclusion and activation, and also as the most passive
form of reliance and most unfavourable form of dependency in poverty and
social exclusion discourse, is here contrasted with a gender dimension to
social exclusion. Gender mainstreaming, in the field of social protection, has
emphasized the importance of taking into account all aspects when setting

\textsuperscript{23} The EC Treaty itself has been amended to incorporate a legally binding commitment to
mainstreaming in Article 3(2) EC, introduced by the Treaty of Amsterdam.
\textsuperscript{24} See Beveridge and Shaw, 2002, pp. 209–212.
\textsuperscript{25} The theoretical concept of social citizenship has been further explained and discussed in
the introduction to the thesis on pp. 34–39.
specific targets or selecting gender gaps where there is a very significant difference in poverty cases in general, or in some specific aspect of poverty and social exclusion, in the promotion of equality between men and women. 26 One such specific aspect is the situation of solo mothers.

The attitudes taken by different nation states in social assistance regulations regarding care responsibilities and the need for economic support that results from such responsibilities, especially for sole providers, are of central importance for determining the boundaries of social citizenship. Social assistance in Sweden, Norway, Finland and Denmark has the same purpose: to function as a last resort. Other means available for providing care are also of great value for solo mothers’ subsistence and for an understanding of social assistance in a broader context, and therefore need to be dealt with. Consequently, an overview of the various care provision schemes is part of the comparison, seeking similarities and differences.

The legal strategies and constitutional understanding of social rights in the nation states can play an important role in determining the impact of governance reforms, gender mainstreaming and equality regimes. How the protection for maintaining a life in human dignity is understood in the structure of social assistance schemes and in the constitutions of the nation states, can reveal something about the impact of EU governance on a domestic level. Whether the large number of impoverished solo mothers and their children are treated as perfectly satisfactory social citizens according to equal treatment principles, can hopefully contribute to a gendered understanding and feminist critique in the mainstreaming and social exclusion discussions within the EU. A cross-national comparative study of Nordic welfare-state legislation from a gendered perspective, that examines the construction of solo mothers in the normative structure of the last-resort schemes and other legal care provisions in interplay with regulations on maintenance and care in family law, might be of value in finding models for gender-inclusive social citizenship. How rights and duties are regulated in social insurance and in last-resort schemes, and how the principles underpinning these regulations are related to principles in family law, constitute a means of revealing gendered dimensions laid down in law about maintenance and care that can function as either inclusionary or exclusionary.

26 A gender dimension was requested in National Action Plans against poverty and social exclusion at the 2454th Council meeting, 12746/02 (Presse 306), Employment, Social Policy, Health and Consumer affairs, Luxemburg, 8 October 2002, see http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=PRES/02/306|0|AGED&lg=EN&display=
The questions that constitute the foundation for the comparison of social assistance schemes in Sweden, Finland, Norway and Denmark, reflected in the position of solo mothers’ and their children’s needs, with the aim of tracing inclusionary and exclusionary outcomes are:

• What kinds of legal strategies are used in reforms of social assistance in each country, and what legal status does the right to social assistance have as stipulated in Acts of Parliaments and in constitutions?

• How is the content of social assistance substantially defined in each country?

• How is the legal unit constructed in social assistance schemes?

• How are maintenance obligations constructed in social assistance schemes and how are they related to maintenance obligations as laid down in family law?

• What incomes are considered in the assessment of eligibility and how are incomes in different applicant households estimated?

• What kinds of requirements for activity, activation demands and obligations are regulated?

2.3 Methodological considerations

The questions raised above are not in themselves gendered. The legal sources will be interpreted by posing questions in regard to the texts about the ‘nature’ of social assistance in the light of the disadvantaged position of solo mothers’ in the welfare state.

In order to cover the question of dependency and its interpretation in normative terms, the manner in which social assistance is related to family law is examined: Who is the legal entity in social assistance schemes? How are maintenance obligations regulated between individuals within the unit solo mothers are a part of, in relation to children and in relation to an ex-partner or a new one? To what degree is social assistance constructed as a family-based or as an individual right? The relation between the solo mother and the authorities administering and granting social assistance is examined through an evaluation of eligibility for social assistance and the extent to which eligibility and the content of the assistance are constructed as legal rights. How incomes in different units are estimated can reveal something about both dependency on others and what possibilities there are for solo mothers to surmount an economically vulnerable situation. This relation-
ship is also examined by asking what obligations and activating demands, and what sanctions are regulated for in each country. To encompass both universal and particular aspects the question is raised about whether or not the schemes consider and take into account gendered difference and diversity.

This study focuses on the normative positions laid down in law and aims to reflect on social rights in a non-formalistic way. Rather than being concerned with conformity to law, the knowledge sought is diachronic in that it is future-focused and looks for tendencies and processes of change, as part of the emerging EU polity and law. The study is not, however, aimed at finding and determining causal correlations to EU policy.

2.3.1.1 Comparative law

Comparative law and, especially cross-national non-legal research, constitute tools of great importance in contemporary welfare regime studies.\(^{27}\) Comparison of different welfare models involves asking how different legal cultures should be understood. However, the problems connected with the concept of legal culture – its definition, its varieties, its causal and explanatory significance and mechanisms, is discussed. One of the enduring problems of comparative law is its inability to demonstrate convincingly the theoretical value of doctrinal comparisons separated from comparative analyses of the entire political, economical and social matrix in which legal doctrine and procedures exist.\(^{28}\)

Comparative lawyers generally are believed to compare the legal systems of different nations, which can be done on a large as well as on a smaller scale. To compare the spirit and style of different legal systems, the ways of thinking and the procedures they use, is sometimes called \textit{macrocomparison}. Instead of concentrating on individual concrete problems and their solutions, research is carried out into methods of handling legal materials, procedures for resolving disputes, or the roles of those engaged in law. \textit{Microcomparison} by contrast, is concerned with specific legal institutions or problems, that is, with the rules used to solve actual problems or particular conflicts of interest.\(^{29}\)


Zweigert and Kötz have mapped out the dividing lines, which in their opinion distinguish comparative law from related areas of legal science, i.e. what comparative law is not. In their view, one can speak of comparative law only if there are specific comparative reflections on the problem to which the work is devoted. They claim that experience shows that this is best done if the author first lays out the essentials of the relevant foreign law, country by country, and then uses this material as a basis for critical comparison, culminating in conclusions about the proper policy for the law to adopt, which may involve a reinterpretation of the authors own system. Zweigert and Kötz distinguish comparative law from neighbouring areas which may also deal with foreign law, such as private international law, public international law, legal history, legal ethnology, and finally the sociology of law.30

In this study the approach is micro-comparative; comparison of legal systems is not the object. The study critically compares how the last-resort schemes in each of the four Nordic countries, in relation to the emerging EU polity and law, tackle the risk of solo mothers of becoming poor or socially excluded.31 By means of the concept of ‘social citizenship’ processes of social inclusion and exclusion in last-resort social protection schemes are approached from a gender perspective.

Translations of national regulations involve difficulties, since the understanding of legal concepts, principles, and cultures is far beyond a technical issue. ‘Social assistance’, which is administered and arranged on local municipality level in the nation states, is used as the common concept of the last-resort safety nets, even if the assistance is defined differently within each country. Direct translations of the various definitions are, however, stated and used, in order to achieve a comparative analysis of normative principles and functions of the assistance in each country.

2.3.1.2 Material
As social assistance is constructed differently within the nations included in the study, more or less as policies or statutory rules, the sources of knowledge in this study are both legal and political. The sources comprise mainly written law, decrees and their accompanying policy-making national guidelines that function as important tools for the analyses in this study. In the Nordic

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30 Zweigert and Kötz, p. 6 ff.
31 For a description of different approaches to comparative law methodology, including the various critiques of the shortcomings of comparative law as theory and method, see Derlé, 2007, pp. 41–45.
courts, especially in Sweden and Finland, the role of the preparatory works, *travaux préparatoires*, has been fairly central in the interpretation of the laws. They are rich in statements about the functional aims of the acts and often also about how the acts should be interpreted.\(^{32}\) Their importance, though limited as a consequence of mainly administrative decision-making in the interpretation of social assistance legislation, can be seen in the national guidelines. In addition to these traditional doctrinal sources of law, accompanying policy-making general guidelines, which are also addressed to non-lawyers such as administrative decision-makers who have great impact on the outcome in individual cases, will function as important tools for providing a picture of social assistance for solo mothers. General guidelines issued by supervising authorities complement the preparatory works and, also underline their importance. Although case law is of minor importance, references are made to it where appropriate.

\(^{32}\) Nousiainen and Niemi-Kiesiläinen, 2001, p. 20.
3 Social assistance in four Nordic countries

3.1 Social assistance in Sweden

3.1.1 A unified welfare law – from patriarchy to equal rights

The notion of a normative comprehensive structure without legitimate individual interests has characterised the Swedish welfare state. Legislation for particular groups of people in a Swedish context should therefore be a moving away from that notion.1 This opinion is still alive since there are almost no particular benefits in national social insurance in Sweden. Residence-based social insurance benefits are primarily based on need for support and intended to provide basic security for families with children. The child allowance, guaranteed levels for parental insurance, children’s pension allowance, care allowance for children with disabilities, and financial aid to children attending gymnasium, are all general in character. ‘General’ in this context means a fixed-rate benefit for a specified group of children, without means testing based on parental income. Housing allowance is means-tested on the basis of income of the household and numbers of children in the family. Maintenance allowance is constructed as a right for the child. It guarantees a basic minimum standard for children who are not living with both their parents.2

The constitutional protection of social rights in the Swedish Instrument of Government (1974:152) is constructed as a series of public objectives and recommendations addressed to authorities. This means that individuals do not have the right to base their claims directly on the provision of fundamental law. The municipality, however, bears the ultimate responsibility that its residents shall be secured the support and help they are in need of.

The Social Services Act, which came into force in 1982,3 was of epoch-making importance in many ways. Individual social rights were formulated in a framework law with specific objectives to be striven for within the muni-

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1 See Hollander, 1995, p. 32.
2 The Social Insurance Act (1999:799), socialförsäkringslagen, indicates the personal and material scope of social insurance in Sweden.
cialities’ social services. Social equality, a comprehensive view of social problems, and support on a voluntary basis became the leading principles in a unified law intended to take the place of old-fashioned and patriarchal legislation. Apart from individual provisions, general and structural efforts on various levels in the society were part of the municipalities’ tasks in achieving welfare of quality.4

The section regulating the right to social assistance (Section 6) in the Social Services Act of 1980 was very wide-ranging. Assistance meant financial support as well as other forms of help, with no restrictions as to clientele and type of assistance permitted. The individual right to assistance was linked to the prerequisite that the individual was dependent on contributions from social welfare for their support and way of life in general. The section aimed to secure the individual’s right to public support in case of reduced working capacity, functional disorders, age or other relevant circumstances. The statute also laid down that the assistance was meant to secure the individual a reasonable standard of living. However, the concept ‘a reasonable standard of living’ was not defined either in the Act or in preparatory works. Municipalities, on the basis of different local circumstances and conditions, were allowed a great deal of discretion in determining the level and content of the assistance. However, the government proposed that a uniform assessment was desirable.5

The first section of the Act expressed its overall purpose as being the liberation and development of individuals’ and groups’ own resources in any actions of the social welfare services in the municipalities. Social assistance was aimed at strengthening a person’s resources for living a responsible and independent life. As a crucial principle, eligibility for assistance only existed if the individual need could not be fulfilled in other ways. Thus, the law was subordinate to personal responsibility for the individual’s own circumstances in life, and emphasized the normative pattern of working (the work line) as the social norm. However, in the regulations and in case law, no conditions were laid down that legitimised demands that the recipients participate in activating measures as a prerequisite for the awarding of assistance. Respect for the individual’s self-determination and integrity that was laid down in the first section of the Act did not imply permissive treatment.6

4 For an overview see Norström and Thunved, 2002, pp. 31–32; Vahlne Westerhäll, 2002b, pp. 143–146.
6 An extensive overview of how maintenance needs have been met in social security law in Sweden is presented in PART IV of the thesis. See also Vahlne Westerhäll, 2002b, pp. 103–196.
3.1.2 Reforms towards a differentiation of needs

Since coming into existence, the Act has constantly been the object of reform interest. Preparatory works to amendments to the Act, which came into force in 1998, declared social assistance to be intended as an ultimate safety net for people in temporary financial crisis.\(^7\) The assistance was still aimed at ensuring that people could maintain a reasonable standard of living, and since it was based on means testing in each individual case, the strengthening of individual opportunities to live an independent life was emphasized. The first section in the reformed Act was supplemented with the principle of the best interests of the child as one criterion in the decision-making.

Section 6, regulating the right to assistance, was supplemented with additional rules (6b–6f §§) indicating the requirements imposed on recipients which had to be complied with for entitlement. The content of the assistance was defined in detail, and eligibility became differentiated according to varying needs. Maintenance support became distinguished from assistance in other forms, and was subsequently specified in a statutory national standard. The standardized levels for the costs, which were regulated in Section 6b, referred to fundamental needs. Legitimate costs in the national standard, issued in a yearly Decree\(^8\) by the Ministry of Health and Social Affairs on the basis of official price investigations, consisted of provisions, clothes and shoes, play and leisure, consumer goods, health and hygiene commodities, a daily newspaper, telephone and TV licence. In addition, reasonable expenses for accommodation, household electricity, work-related travel, home insurance, medical care, acute dental care, spectacles, and trade union membership fees and payments to unemployment benefit funds should be added to the standardized norm. These reasonable expenses were to be assessed individually with a local low-income earner given as the benchmark.\(^9\) Thus, from an individual perspective, on the one hand fundamental needs were made statutory and strengthened, while on the other the reasonable expenses to be considered in the assessment legitimized the municipalities’ discretion in decision-making. If special reasons existed, the expenses were to be calculated to a higher amount. Similarly, the municipalities were authorized to calculate the expenses to a reduced level. Where there were grounds, the municipalities, under Section 6g, were authorized to allow assistance beyond fundamental needs and the indicated reasonable cost level under Section

\(^7\) Prop. 1996/97:124, p. 81.
\(^8\) Socialtjänstförordningen (1981 : 750).
6b. One remarkable change from previous regulations was that assistance pursuant to Section 6g could not be appealed to Administrative Courts. For instance, financial assistance for childcare fees, furniture, funeral costs and local transportation for individuals outside the labour market, as well as costs for all kinds of health-related treatment, were left to the discretionary powers of the authorities.

### 3.1.3 … and activating measures

The principal obligation for an unemployed person, to comply with the request to be at the labour market’s disposal on a full-time basis and to accept any employment offered, was enforced in 1998. Assistance only became possible if individuals could not provide for their needs on their own, or if their needs could not be provided for by other means. This obligation also included participation in labour market measures, i.e. occupational schemes, training or rehabilitation measures. Participation in skills-enhancing activities and basic language courses for immigrants could be imposed on an applicant in the same way.¹⁰

The reform of the Act implied fundamental changes in the form of increased control and increased demands on the individual. The municipality was now authorized to reduce or withdraw maintenance support, and sanctions attendant on a denial to comply with the demands were introduced in Sections 6c and 6d. The purpose of the new regulations was explained as being to develop the individual’s future possibilities of earning their own living. In Section 6c three different target groups were specified: under-25s, over-25s needing to improve their skills for special reasons, and students enrolled in educational programs financed through a study allowance etc., who required social security during a break in their studies.¹¹

Overall regulations concerning labour-market policy programs give the municipalities the competence to arrange practical experience measures for youngsters outside upper secondary school or full-time activating measures for young people aged 20–25. A person in such an activity who has been allowed maintenance support under the Social Services Act will be compensated with a development benefit corresponding to the maintenance support. Normally, participation in such labour-market programs will not confer the status of employee on the participant.¹²

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Depending on the availability of public means, state recruitment benefit can be awarded to a person aged 25–50 who is unemployed or at risk of becoming so, or to a person with functional disorders in need of extra time to achieve a qualification. The benefit, which is means-tested in relation to income and fixed-rate according to the basic amount geared to the price index, is allowed for 50 weeks at the most.\textsuperscript{13}

3.1.4 A reasonable standard of living between politics and law

Evaluations by the National Board of Health and Welfare of the reduced right to appeal decisions to the courts, through amendments to the Social Services Act in 1998, revealed differences in the interpretation of ‘a reasonable standard of living’. The evaluations pointed out divergent and more restrictive assessments among municipalities; most of them no longer took special reasons into consideration in their decision-making. The national standard was shown to be utilized more as an upper limit and a top level in the assessments of individual needs.\textsuperscript{14}

The restructured and still unified Social Services Act,\textsuperscript{15} which is divided into 16 chapters, is intended to be a welfare law for all citizens but its status in the legal process is debatable. The overall objectives as mentioned above remain in the new Act which could be characterized as a blend of strengthened social rights to ensure the individual’s fundamental needs and the enforced autonomy of the municipalities in their means testing of needs. However, it is now, in principle, possible to lodge an appeal on every decision under the Act.\textsuperscript{16}

No gender perspective was visible in preparatory works in the legislative process. Sex equality has been subordinated to the emphasized sex-neutral non-equality between those inside and outside the labour market.\textsuperscript{17} The Government Bill covering the latest reform of social assistance pointed out how certain people or groups, irrespective of the situation on the labour market, will have difficulties, for reasons of personal problems or worse social conditions, in asserting themselves on the labour market. There are

\textsuperscript{13} Recruitment Benefit for Students of Continuing Education Act, Lag (2002:624) om rekryteringsbidrag till vuxenstuderande.
\textsuperscript{14} Socialstyrelsen, SoS-rapport 1999:2.
\textsuperscript{15} Socialtjänstlag (2001:453).
\textsuperscript{16} Socialtjänstlag (2001:453), Chapter 16, Section 3.
\textsuperscript{17} SOU 1999:97, pp. 402–404.
hints here of the need for a safety net that includes all citizens and makes provision for them to have a dignified and independent life.\(^{18}\)

The principle that it is every citizen's duty to earn their own living is emphasized in the new regulations. The right to social assistance that aims to secure a reasonable standard of living is now regulated in Chapter 4 of the Social Services Act. The construction of the assistance distinguishes between financial assistance as \textit{maintenance support} and \textit{support for way of life in general}.\(^{19}\)

The national standards for maintenance support, which are set out in a new decree,\(^{20}\) are, as in previous regulations, based on calculations made by the Swedish Consumers Agency. The standard for basic needs is individualized but differentiated for singles and cohabiters, who are viewed as a unit, and between children according to their age. In addition, pre-school children in day-care have a lower standard than children cared for in the family. Standardized joint household expenses, depending on the size of the household, are added to the indicated maintenance support. The reasonable real costs to be added to the total household standard, consisting of the individualized standard and joint household expenses as explained above, have been curtailed in the new Act. Medical care, dental care and spectacles are no longer included in basic needs. Instead, the concept \textit{way of life in general} is meant to cover all other individual needs, both financial and other, that are not covered by the maintenance support as indicated in the statute.\(^{21}\) An individualized assessment is to be carried out in each case with guidance from previous case law and the guidelines of the National Board of Health and Welfare.\(^{22}\) In accordance with these guidelines, which are not legally binding on the municipalities in the application of the Act, necessary health care that is medically motivated and necessary dental care, including preventive dental care, should be considered. For dental care the duration of the need for assistance and the consequences of not receiving care should be important in the assessment. Reasonable costs for spectacles or lenses and domestic equipment for a functioning home are also referred to in the guidelines.\(^{23}\)

\(^{18}\) Prop. 2000/01:80, p. 82.

\(^{19}\) Socialtjänstlag (2001:453), Chapter 4, Section 1.


\(^{21}\) Prop. 2000/01:80, p. 93 ff.


\(^{23}\) Ibid, p. 12.
for settlement expenses requires special reasons. Needing a new place to live after being the victim of a crime is indicated as one such reason. Removal expenses can also be allowed if moving is necessary to achieve a reasonable standard of living. Baby equipment and reasonable expenses so that a parent can engage in social intercourse with a child are also, according to the guidelines, within the scope of the municipality’s responsibility. Travel expenses, both domestic and international, as an element of social intercourse with a child, should be adjusted to what a family in general can afford. Recreation for families with children is another exemplified expense to be considered, provided there are special reasons for it. Funeral expenses are limited to a certain amount. Debts, e.g. for accommodation or electricity, should be allowed, if the allowance is the only available possibility of achieving a reasonable standard of living.24

In a joint report from the National Board of Health and Welfare and the supervising County Administrative Board at regional level, a child perspective in administering maintenance support has been commented on. The best interests of the child as a primary criterion in decision-making, laid down in the Social Services Act, should be a reason for allowing more support than that indicated in the national standard. Whether a bicycle for a child in a household receiving assistance should be part of a reasonable standard of living is one question that is raised25 but not, however, answered. According to the non-binding guidelines, the authorities should not force a change in accommodation or neighbourhood if there is a risk that moving will have negative social consequences for the child. Reasonable social intercourse with a parent entailing extra leisure and telephone expenses should also motivate a higher level of maintenance support. The same is true of a need for more expensive food for medical reasons. As regards children, the guidelines state that the support should be estimated at a higher level provided support is a precondition for taking part in leisure activities.26

The municipality is competent to provide other support, in addition to that which is indicated in meeting fundamental needs, if there is good reason for them to do so.27 How this rule should be interpreted is exemplified neither in preparatory works nor in the National Board of Health and Welfare guidelines. However, new supplementary guidance was issued in

27 Socialtjänstlag (2001:453), Chapter 4, Section 2.
2003, aimed at supervising the authorities in the application of the Act, and it clarified some issues. The section should not be interpreted in analogy with the previous discretionary Section 6g, which gave no right to lodge an appeal. Support according to the new rule in Chapter 4, Section 2 cannot be appealed against in Administrative Courts since the municipalities are supposed to give an applicant a decision in accordance with Chapter 4 section 1. Such a procedure is recommended as a means of guaranteeing legal certainty.28

Normally, financial support should be paid monthly and distributed to the individual through normal channels for payment, i.e. by money order, bank or postal giro service. If necessary, the support can be paid in cash. Only in extremely exceptional cases should the support be distributed as requisition orders or food stamps.29

3.1.5 *Incomes and maintenance in the household*

In the general guidelines30 on how to apply the Social Services Act, the household has acquired a definition. Married couples, registered partners, heterosexual and homosexual cohabiters, children and youngsters up to 20 years of age are recommended to be seen as forming the unit of a household. The right to social assistance is, as in previous legislation,31 subsidiary to the maintenance obligation for co-habitants from their first day of living together. This regulation contrasts with family law, as there is no such obligation between cohabiters according to the Co-habiting Act.32 The statutory obligation to support a spouse or registered partner, even if they are not *de facto* living together, is underlined as the primary source of maintenance.33

The notion of a reciprocal maintenance obligation for cohabiters was emphasized in the amendments to the Act in 1998 that emphasised the responsibility of the individual to support her/himself in the first place, including the obligation to support one another in the household, cohabiters as well as

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28 Socialstyrelsen, 2003b, p. 37, Ekonomiskt bistånd – Stöd för rättstillämpning och handläggning av ärenden i den kommunala socialtjänsten. The National Board of Health and Welfare classify their publications in different types. This guidance supplements SOSFS 2003:5(S) by means of including legislation texts, referees of decrees, motives behind the law, references of cases etc.
30 Socialstyrelsen 2003a, SOSFS 2003:5(S).
33 Socialstyrelsen 2003a, SOSFS 2003:5(S), pp. 18–19.
married couples and registered partners. In the new supplementary recommendations from the National Board of Health and Welfare, certain exceptional cases should motivate a different interpretation. Only in exceptional cases should financial support for only one of the parties be allowed, if the one with an income does not contribute to the maintenance of the family. For instance, if one of the partners has been exposed to threat or violence by the other partner, this is classified as an exceptional reason.

Social assistance is subsidiary to all kinds of social insurance benefits, incomes and disposable assets, entitled or earned individually as well as by members of the household. Indispensable incomes, for instance a child's means controlled by and without consent of requisition by the chief guardian, should be exempted. Only senior citizens and children are targeted as being allowed to save a small sum according to the guidelines. A step-parent's contribution for a non-biological child's maintenance is statutory but subordinate to the biological parent's primary responsibility.

In the preparatory work for the Act, the Government has clarified certain questions about how to interpret the Act in relation to the function of maintenance support as an ultimate safety net. The principle of equal treatment of citizens of the community and the notion of maintenance support as a last resort means that other compensations, e.g. non-financial (indirect) damages, must generally be estimated as real means and therefore available for securing a reasonable standard of living. However, it is intended that an individual assessment be made in every case. Moreover, children's means, for example income from a holiday job, are mentioned in the preparatory work, and considered to reduce or eliminate the assistance, despite there being no obligation for children to contribute to their maintenance under the Paren-

34 This emphasis on maintenance as a vital responsibility in the family was reinforced in several cases during the 1990s. For example RÅ 1995 ref 79 revealed more restrictive eligibility rules. A family consisting of a married couple and two small children were in the precedent denied social assistance during a period of one month. The reason was that one of the spouses was not available for the labour market because she travelled abroad to visit relatives. Because of her absence she did not fulfil her responsibility to maintain the living of the family through remunerated work. In RÅ 1995 ref 48 it was laid down that cohabitants have a duty to provide for each other from the first day of starting to live together.
36 Föräldrabalken, Chapter 7, Section 5. The maintenance obligation arises if the step-parent is living together with the child, married to the other parent or if they have a joint child. In the case of special reasons the obligation also remains when the child moves away from home.
37 Prop. 2000/01:80, p. 94.
tal Code. Child assets controlled by the chief guardian are interpreted in the same way in the text. Each municipality is free to determine its own policy on whether a child in a family in need of social assistance has to contribute to the maintenance or should be allowed to dispose completely its own earned money.\textsuperscript{39} However, the National Board of Health and Welfare has made clear in its guidelines that a child’s contribution to the household should cover only the child’s own living expenses. A child should always be able to have control over part of its own earned money, to an amount estimated individually in relation to the needs of the child in each case. In addition, a child’s assets that are not at the parents’ disposal should not affect eligibility for social assistance. The municipality should also, according to the National Board of Health and Welfare, allow financial aid to a child if the parents fail to fulfil their maintenance obligation.\textsuperscript{40}

A precedent from 1997, implying that grown-up children are considered to have a reasonable standard of living if they stay in the parental home, is one example of the notion of dependency within the household. Only where there are special circumstances can support for separate accommodation be seen as part of a reasonable standard of living.\textsuperscript{41} In contrast, the non-binding guidelines note that a grown-up child should be allowed help to obtain a new place to live if staying in the parental home would obstruct a normal independent adult life. Severe personal hostility between household members, e.g. between parents and step-parents and a grown-up child, or between spouses or cohabitees, are also given as reasons for allowing financial help for the acquisition of a more expensive place to live.\textsuperscript{42}

For students the state study allowance system\textsuperscript{43} is meant to secure a living standard, irrespective of family situation, since students in principle are not entitled to maintenance support. On the other hand, it is recommended that a student during a holiday break who has fulfilled the duty to apply for employment, or is waiting for the first remuneration to be paid, should be allowed support. Moreover, support should be allowed in a situation of acute distress, even during term-time. In addition, the guidelines recommend the municipalities to allow maintenance support for adults to finance primary education. It is also noted that a partner who is studying should not be forced

\textsuperscript{39} Prop. 2000/01:80, p. 95.
\textsuperscript{40} Socialstyrelsen 2003a, SOSFS 2003:5(S), p. 19.
\textsuperscript{41} RÅ 1997 ref 79.
\textsuperscript{42} Socialstyrelsen 2003a, SOSFS 2003:5(S), pp. 9–10.
\textsuperscript{43} Study allowance is regulated in a decree; SFS 2000:655 and an Act; SFS 1999:1395. For adult students the support is part benefit, part state loan.
to give up an education in order to make use of their capacity to work on the labour market, provided the studies are a condition for earning a future living.44 Those participating in language programmes for immigrants are first and foremost expected to secure their living through part-time work.45

3.1.6 Conclusions
The notion of Swedish welfare as a normative comprehensive system without legitimate particular and individual interests is still very much alive. The empirical fact shown earlier, that a large number of solo-mother households are in need of social assistance, often on a long-term basis, has received no consideration when constructing social assistance as an ultimate safety net and temporary support for individuals in temporary situations. The principle of the individual duty to make one’s own living, as a wage-earner or by means of support from the household, has been reinforced. A more generous assessment of needs, considering special circumstances, is mainly left in the hands of municipalities and to professional discretion. The general duty to be an active citizen, complying with the prerequisite to work full-time, has also been underlined in the regulations. Gendered diversity and differences among the recipients are not considered in the gender-neutral regulations that construct the legal unit in a gender-neutral way. The reconciliation of waged work and family life seems to assume a dual family. In ignoring gender relations and assuming reliance on the household as a maintenance strategy, legislation seems to create patterns of dependency in relation to private providers that are equivalent to dependency in relation to public providers. The new demanding ingredients in the last-resort scheme regarding individuals in need of financial support underline this normative position.

The notion of an individual right to social assistance can be questioned in many ways. The individual is dependent in relation to the neutralized joint household, irrespective of civil (marital) status. Hence, maintenance obligations go beyond what is stated in family law. A solo mother can end up in economic dependency in relation to a new cohabiting partner as well as in relation to an ex-husband during divorce proceedings. The duty to care for an adult child in the matter of accommodation reflects the constant burden of care and support under which poor families live. Ultimately, children in families in need of social assistance can be expected to contribute to the households’ subsistence in a way that is not in accordance with regulations stated

in family law. Moreover, the construction of social assistance as an ultimate safety net means that poor household units cannot profit from general family benefit improvements as these will be calculated as incomes and deducted in the assessment of eligibility. Hence, the reduced maintenance support will not improve the standard of living for households receiving social assistance. Apparently, the picture of social citizenship in Sweden seems to be that active individuals have rights whereas for those who are involved in care they are reduced. On the other hand, the municipalities’ are competent to grant support in addition to the general rule and this should be applicable on an individual basis, as a means of promoting social inclusion, without transgressing the principle of equal treatment of all citizens. In addition, a more generous standard of living than indicated in the national standards should be determined in accordance with this competence.

The guidelines and supplementary recommendations issued by the National Board of Health and Welfare can function as a tool for identifying the tensions between law and politics, administration and individuals, in how the Act should function in its application and which interests and needs are to be secured. The new recommendations contain a greater number of examples than earlier on how to interpret the concept of a reasonable standard of living, and what exceptions from the two-fold general principles of autonomy on the one hand and dependency on the other in relation to the household should be motivated. The exemplifications thus reveal deficiencies in the protection of a social citizenship of quality and equality.

Although the recommendations have no legally binding status in the application of the Act, they can still function as an important source for the authorities on an administrative level. The legislator has left a large measure of self-determination to the municipalities, again however allowing the recipient access to appeal to court concerning every decision made. The basic needs explicitly defined in the national standards have also been curtailed, and so far precedents for how a reasonable standard of living should be defined are very scarce. Thus, current law is difficult to define. In addition, the constitutional frame for social rights is vague and constructed as a series of public objectives. In other words, social assistance in Sweden does not have the standard of subjective rights protected in fundamental laws, and the power relations between individuals and the authorities, politics and the law are unequal.
3.2 Social assistance in Finland

3.2.1 Constitutional rights and Acts of Parliament

The right to social security is embedded in the Finnish constitution.46 Those who cannot obtain the means necessary for a life of dignity have the right to fundamental subsistence and care. Basic subsistence in the event of unemployment, illness and disability, and during old age as well as at the birth of a child, or the loss of a provider, is to be guaranteed by public authorities that are given the responsibility for this provision in an Act. Moreover, the public authorities shall support families and others responsible for providing for children so that they are able to ensure the wellbeing and personal development of the children. In an article, Paula Ilveskivi discusses how the fact that the right to necessary subsistence and care is provided by sub-constitutional legislation, does not imply that the constitutional right in question lacks legal relevance. Since the right has been given the status of a constitutional subjective right, the constitutional provision guaranteeing that right can be directly applied by courts of law as well as by administrative authorities in individual cases. Basically this means that individuals have a right to base their claims directly on the provision in the constitution.47

Social assistance legislation in Finland was reformed when the Social Assistance Act was introduced in 1998.48 Social assistance became the object of a special law, separate from the Social Welfare Act.49 The Social Welfare Act contains provisions governing the responsibility for providing social welfare and its administration, the procedures for implementing social welfare, and regulations concerning the lodging of appeals against decisions made by municipalities in social welfare cases. The Act defines the social services and other tasks regulated in special legislation and falling within the sphere of municipal social welfare.50 The central provisions in the Act on the Status

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46 The Constitution of Finland (731/1996), Finland’s Constitution, Section 19.
48 Social Assistance Act, Lagen om utkomststöd (1412/1997).
and Rights of Social Welfare Clients,\textsuperscript{51} which came into force in 2001, concern the client’s legal protection. Client participation, loyal client relations, a right to good service and treatment are stated as the main objectives of the Act. It also contains provisions governing confidentiality and access to and handling of information. The Social Welfare Decree\textsuperscript{52} contains certain provisions that supplement the Social Welfare Act.

The Social Assistance Act is supplemented by a decree.\textsuperscript{53} Ministry declarations contained in a handbook\textsuperscript{54} are recommendations, not provisions or directives that are binding on the municipalities, but are intended to support social assistance work and the accompanying decision-making linked. Recommendations are based on the government’s proposal to Parliament, committee reports, and preparatory works of the Ministry and certain decisions of the Supreme Administrative Court.\textsuperscript{55}

In order to ‘improve the functionality of the social assistance system’, changes were made to the statutes in the Act and Decree on Social Assistance in April 2001, which aimed at expanding the use of preventive social assistance in municipalities, reducing client waiting-lists and increasing the use of means-testing when allocating assistance.\textsuperscript{56} An Act concerning rehabilitative working activity, aimed at influencing co-operation between social administration and workforce administration in managing the problems of mutual clients, came into force in September 2001.\textsuperscript{57}

\textbf{3.2.2 A life with human dignity}

Social assistance, which is conceptualized as \textit{livelhood support} is to be granted on application by the body in the municipality where the person or family regularly resides.\textsuperscript{58} Livelihood support is defined as \textit{last-instance} financial assistance under social welfare where the purpose is to ensure the \textit{subsistence}


\textsuperscript{52} Social Welfare Decree (607/1983), Socialvårdsförordningen.

\textsuperscript{53} Social Assistance Decree (66/1998), Förordningen om utkomststöd.

\textsuperscript{54} Social- och hälsovårdsministeriet, Handbook 2002:2 for the Application of the Social Assistance Act, Handbok för tillämpning av lagen om utkomststöd.

\textsuperscript{55} Handbook 2002:2 for the Application of the Social Assistance Act, p. 7.


\textsuperscript{58} Social Welfare Act, Section 13 and Social Assistance Act, Section 14.
Livelihood support is intended to guarantee the minimum necessary support that is needed for a life in human dignity, which is also encoded in the Finnish constitution. Moreover, the purpose of the Act is to prevent exclusion and long-term dependency on assistance. In the Ministry handbook the individual duty to meet the responsibility to support oneself, as well as one’s spouse, young and adopted children, is underlined. However, the assistance is interpreted as having a wider purpose than simply sustaining life; it is also intended to cover costs other than those necessary to pursue active measures aimed at social inclusion, expressed as involvement in the society. In all situations where the Act is applied, the necessary support must be guaranteed.

The preventive livelihood support, added to the first section of the Act is not dependent on the same prerequisites as for necessary support, but aims to ensure that a person or family is socially secure and able to manage on their own, and to prevent exclusion and long-term dependency on livelihood support. The compensation for work-related expenses as a rehabilitating measure is intended to support a person’s participation in labour.

### 3.2.3 Activating measures and statutory sanctions

The prerequisites for obtaining livelihood support have been given a more detailed description in the new Act. All those in need of support and unable to make a living through gainful employment, self-employment or other methods of securing a living, or from other incomes or assets, or by being cared for by people duty-bound to provide them with maintenance, or in some other way, are entitled to livelihood support. The section also refers to duties in the Marriage Act and maintenance obligations relating to children given in other regulations. Usually, in fact a shortage is in itself sufficient criterion for obtaining support, no groups excluded.

The intended activity on the part of recipients has been clarified by legal changes, the latest in 2002. According to the reform of Section 2a, a person...
aged 17–64 who applies for support is obliged to register as unemployed at the employment office. If the person does not hold a position as a wage-earner or as self-employed, is neither a full-time student nor included in a category referred to in an Act governing security for the unemployed, there is an obligation to register. Applicants are exempted from this duty if they are in institutional care or are suffering an illness which is certified by a physician as preventing them from working, or for any other acceptable and comparable reason. If the applicant for livelihood support does not register at the employment office, the basic benefit can be reduced.

The handbook gives examples of acceptable reasons for not registering. A person engaged in family care according to the Family Carer Act, or caring for an elderly, handicapped or sick person for not less than 4 hours a day according to a contract for care of a close relative/friend as mentioned in the Social Welfare Act, Section 27b, are such examples. In the assessment of an acceptable reason, domestic care of a child who is either under school age (seven) or has the right to support according to the Act on the Child Home Care Allowance and the Private Care Allowance must be considered, with the best interest of the child as a primary criterion. Even if a person’s own actions cause her/him not to receive primary benefits, the factual possibility of a necessary livelihood should be calculated.

There have also been reforms stipulating the required reaction to a refusal to work or to participate in trainee programs and activation measures. If a person, without an acceptable reason, refuses to accept a job offer or to participate in an activating measure that would secure a living, or through personal negligence prevents work or activation being offered, the basic level can be reduced a maximum of 20 %. If someone without good reason repeats such a refusal or act of negligence, the basic level can be reduced the maximum of 40 %. This also applies to immigrants and asylum seekers who refuse or fail to participate in preparatory integration plans or activating measures. Those in rehabilitative activities who refuse to participate in the

67 L 1290/2002 replaced the Unemployment Security Act (602/1984), Lagen om utkomstskydd för arbetslösa.
69 Family Carer Act (312/1992), Familjevårdarlagen.
70 Child Home Care Allowance and the Private Care Allowance Act (1128/1996), Lagen om stöd för hemvård och privat vård.
72 L 191/2001. Changes in the Social Assistance Act, Sections 10 and 10a refer to other reforms aimed at activation of the unemployed; L 1294/2002 and the adoption of a new Act; the Public Employment Service Act (1295/2002), Lag om offentlig arbetskraftsservice.
preparation of an activation plan or refuse to take part in or quit measures can also have the basic level of benefit reduced by the same amount. An activation plan aimed at the promotion of self-support has to be made for the client in such cases. The reduction of support may only be applied insofar as it does not jeopardize the person’s chances of securing a dignified life or is in any other way unreasonable. The reduced amount can be paid for a maximum of two months at a time. The target group for this reform is primarily people under 25 who are obliged to participate in trainee programs. Participation in such activities for those over the age of 25 has been changed from voluntary to obligatory after a prolonged period of unemployment or receiving social assistance for more than 12 months. Special employment pay and compensation for travel expenses have become statutory, in Section 10a, for those receiving livelihood support who are simultaneously participating in rehabilitative activity programs.

3.2.4 Maintenance obligations in the family

In the calculation of livelihood support, the definition of a family stated in Section 3 of the Act is applied. A family is defined as, living in a joint household, parents, a parent’s underage and adopted children, spouses, and a man and woman living in circumstances similar to marriage. This also applies to registered partners. When livelihood support is allowed all family members are considered, and the support is generally seen as being divided between the recipients.

The maintenance obligation for the individual, within the marriage and towards underage and adopted children, is defined in the Act. As there is no legal maintenance obligation for a non-biological child, only parents or adoptive parents are obliged to support a child. Even being awarded custody of a non-biological child does not entail a maintenance obligation. A child’s right to maintenance stops at 18 but can be extended in the event of studies continuing after 18, if the need is assessed as reasonable considering the child’s own resources. A student can only be denied livelihood support, if they receive real support from their parents. Failing to support a child does

73 Amendments to the Rehabilitating Work Service Act, (1293/2002), Lagen om ändring av lagen om arbetsverksamhet i rehabiliteringssyfte, Section 3.
74 L 1294/2002.
75 Registered Partnerships Act (950/2001), Partnerskapslagen.
76 Social Assistance Act (1412/1997), Lagen om utkomststöd, Section 2 mom. 2.
77 Child Maintenance Act (704/1975), Lagen om underhåll för barn, Section 3.
not constitute grounds for a denial of livelihood support, but can be a reason for reclaiming payment from the parents if the child is under age.

Livelihood support can also be granted by virtue of the Child Welfare Act and the Services and Assistance for the Disabled Act. If there is a need to protect a child the Child Welfare Act states that municipalities must without delay, according to the need, arrange sufficient financial support and remedy deficiencies in housing. A municipal duty to support a child can arise under other circumstances, for example if there is a need for support in school, in out-of-school activities and so on.78

Whoever is of age in a family can apply for livelihood support. If it is granted for a child it can be reclaimed from the parents. Family members residing in different municipalities can apply for support where they reside, while combined support from different authorities may be an option for the family unit. The perception of the family has been exemplified in case law, interpreting maintenance obligation for a spouse in such a way that only real means can be calculated as disposable income.79

3.2.5 A minimized consumption level

Livelihood support is defined as the difference between disposable incomes and assets and expenses specified in accordance with the Act. Livelihood support is constructed as a last resort and comprises two levels, a basic benefit and a supplementary benefit to the amount of other expenses considered necessary, which are indicated in the Decree. The basic benefit, regulated in Section 7, is intended to cover expenses for food and clothing, minor healthcare costs, personal and housing hygiene costs, use of local transport, subscription to a newspaper, TV licence, use of telephone, recreational and hobby pursuits, and the corresponding everyday living expenses of the person or family. In addition, the basic benefit should cover seven per cent of the housing expenses considered necessary according to Section 6 in the Housing Allowance Act.80

The amount of the support is regulated in Section 9 and varies according to the person’s household, age and category of municipality as referred to in the National Pension Act.81 The amounts that are adjusted by index

80 Housing Allowance Act, (408/1975), Bostadsbidragslagen.
are calculated to correspond to a *minimized consumption level* and are made statutory in Section 9. Singles and single supporters, even those living with a grown-up child, receive a higher amount than other people over the age of 18. Adults, with no age limits, living together with their parents, are assessed separately. Underage children are assessed together with their parents and the amounts decrease after the second child. According to the handbook it is possible, in the case of special needs, to deviate from the given amounts in favour of the clients.\(^{82}\)

### 3.2.6 Supplements

The supplementary benefit, defining other necessary expenses to be considered, is also laid down in Section 7 of the Act. Share of housing expenses and healthcare costs other than those included in the basic benefit, and other personal and family expenses arising from special needs or conditions have to be considered, i.e. expenses for childcare and expenses to cover a person’s or family’s special needs in promoting independence as laid down in the Decree.\(^{83}\) The recipients of social assistance, as described above, are granted a share of their housing expenses as part of their basic benefit, while only 93% of their housing expenses will be calculated as a supplement. The purpose of this reform was to promote the recipients’ own interest in their housing expenses.\(^{84}\) In the Decree special needs or conditions, such as social assistance for a long period, prolonged or serious illness and special needs in relation to children’s recreational and hobby pursuits, were added in 2001.\(^{85}\) In exceptional cases, housing expenses that are covered in the basic level can also be added. According to the handbook, reasonable and real expenses must be assessed in accordance with what is general in the neighbourhood.\(^{86}\)

Fees for public childcare can be considered according to family size and income.\(^{87}\) The need for livelihood support also considers expenses for private day-care. Prolonged livelihood support may motivate an inquiry into whether the family qualifies for community day-care for the child.

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\(^{82}\) Handbook 2002:2 for the Application of the Social Assistance Act, p. 31.

\(^{83}\) Social Assistance Decree, 66/1998, Förordningen om utkomststöd, Section 1.


\(^{85}\) F 112/2001.


\(^{87}\) Handbook 2002:2 for the Application of the Social Assistance Act, p. 41, with reference to 1134/96.
3.2.7 Preventive livelihood support

The preventive livelihood support aims to achieve more flexibility and efficiency within the system in order to counteract social exclusion and prolonged dependence, and promotes the wider use of livelihood support in systematic social work.\textsuperscript{88} Section 13 states that it may be permissible in activating measures or in order to secure accommodation, to alleviate difficulties arising as a result of debts or a sudden deterioration in financial situation, and also for other purposes aimed at promoting independence.\textsuperscript{89} The authority to award preventive livelihood support is left in the hands of the municipality responsible for allocating funding for it. Preventive livelihood support is also commented on in the ministry handbook. Allowing the benefit should not be restricted to conditions stated in Section 13, it should be given according to need. If the payment of benefit is allowed at an early stage and put into practice in a systematic way, the risks and financial problems threatening a person or family may be diverted. According to evaluations of the reform it has proved to be a useful tool in crisis situations. Families that have suffered death or severe illnesses or have been exposed to violence have been allowed the benefit. It has also been used to cover mortgage payments and as an option for continuing ongoing studies.\textsuperscript{90}

3.2.8 Incomes with exemptions

The incomes that are to be taken into consideration in the assessment are the disposable incomes of the person or the family members in question. Exemptions from this rule are laid down in Section 11. Financial assistance and earned income that is considered insignificant, income insofar as it represents travel expenses and other work-related expenses, are exempted.\textsuperscript{88} A proportion of waged work income or income from self-employment that could promote the recipients’ independence were previously possible exemptions, at the municipalities’ discretion, but were made obligatory through a reform that came into force in 2002.\textsuperscript{91} A minimum of 20\% of earned income, or a maximum of 100 Euros each month, shall be exempted in the assessment of incomes. Maternity allowance, pensioners’ care allowance, disability allowance or childcare allowance and the special compensations for the unemployed and persons in rehabilitative measures as regulated in other

\textsuperscript{88} 3.11.2000/923, Section 1 mom. 2.
\textsuperscript{89} 3.11.2000/923, Section 13.
\textsuperscript{90} Handbook 2002:2 for the Application of the Social Assistance Act, pp. 64–65.
\textsuperscript{91} 21.12.2001/1410.
legislation are also exempted. The same rule applies to the regular income of a minor, in so far as the income exceeds the expenses covering the maintenance of the child according to the provisions in the granting of basic and supplementary benefits. The share of the child’s income is primarily calculated to cover the basic benefit and housing expenses of the child.\footnote{Handbook 2002:2 for the Application of the Social Assistance Act, p. 48.}

Disposable assets are taken into account as personal means of securing a living. The regular dwelling used by the person or family and the necessary, movable equipment for working and studying, assets belonging to an under-age child (except the share of its own livelihood) and other assets necessary to ensure a continuous living, are however exempt. According to the Handbook small savings can also be exempted. Saving the disposable assets for a child in the event of a future need can also be motivated. Livelihood support can be granted retroactively to cover expenses under special circumstances, e.g. in the case of a threat of eviction or lack a place to live or a feared family separation.\footnote{Social Assistance Act, Section 15 mom. 3, Handbook 2002:2 for the Application of the Social Assistance Act, p. 50.}

Primary benefits and other sources of income are subsidiary to livelihood support and are commented on in the Handbook. For example students, who are primarily guaranteed their living by study allowances, including study allowance, housing supplement and a state-guaranteed study loan, must be treated on a par with others in need of support. It is noted that the study allowance only covers nine months of the year. If the student is unable to obtain a study loan because of non-payment of previous debts, livelihood support can be awarded for the financing of studies, possibly at a reduced amount.\footnote{Handbook 2002:2 for the Application of the Social Assistance Act, p. 19.}

3.2.9 Conclusions

Social assistance is constructed as a subjective social right in the Finnish constitution. The constitutional interpretation of the right to livelihood support is also manifested in the Act of Parliament that regulates the assistance. The Social Assistance Act is rich in definitions and explicitly defines the prerequisites for being allowed livelihood support. The constituents of the assistance are also laid down in the Act.

The benefit, although it only covers a minimum consumption level, paves the way for considering difference and diversity among citizens. Difference is expressed by means of differentiated amounts for individuals in different
family constellations and different types of municipalities. The single parent is made visible and given a larger amount than other people, married or cohabiting, in need of support. Care within the family for children up to school age and other dependents, is acknowledged in the Act and supplemented by other legislation protecting particular interests.

The legal entity is constructed as a person, within or outside a family that is defined in the Act as a heterosexual couple, but with the same legal effects for registered partners. Spouses and registered partners are responsible for supporting each other, in contrast to cohabitees, and biological or jointly adopted children. However, the maintenance obligation between married couples according to case law has been determined on the basis of a real, de facto support from a spouse or a partner. This reality-based assessment, together with the circumstance that family members can individually apply for and be allowed livelihood support in different municipalities, indicates that livelihood support in a judicial sense can be seen as an individual right. Failing to support a child cannot result in the rejection of an application, but the amount can be reclaimed. The child’s own self-support is also laid down in the Act, and is limited to the cost of living according to basic benefit and housing expenses. The parental obligation to support an adult child who is studying has been formulated as a question of reasonability, considering the young person’s own resources. Apart from this, a child perspective is made visible in the regulation, which is supplemented by the Child Welfare Act that enforces a municipality’s obligations to secure a child’s living.

The normative message is that every adult person has the responsibility to be independent, and livelihood support is constructed as a last resort for securing a dignified life. On the other hand, certain incomes are explicitly laid down in the Act as exempted from being considered as disposable incomes. Certain assets are also exempt in the calculation of the benefit. In contrast, the share of the housing expenses that is included in the basic benefit expresses the idea of the importance of not permitting livelihood support to be too generous and to be seen as an easy way out. Nevertheless, the legislator allows a discretionary assessment only in favour of the recipients, clearly expressing a constitutional interpretation of a life in human dignity.

The preventive livelihood support that supplements the minimized consumption level can be allowed irrespective of the prerequisites under the general principle, expressing the insight that living on a minimal welfare support might have an exclusionary effect in the long term. However, the judicial strength of this benefit can be questioned. Preventive livelihood support is constructed as a discretionary support decided by the municipalities.
The activation measures are expressed as a requirement for the recipient to register at the employment office, and rules governing reduced social assistance in the case of refusal have been introduced. However, the legislation limits the length and extent of such measures. Care work in the family is, in correlation with other legislation, stated as being an acceptable reason for not registering. The Act has a gender-neutral design, but written law paves the way for a differentiated social security, expressed by mentioning different circumstances that are to be taken into account. The constitutional protection of a living is visible in the Act of Parliament, though amended to be more coercive, but limited, as a consequence of the constitutional interpretation. However, studying written law does not prove a substantial legal certainty but the clear rights discourse and the constitutional protection in Finland should represent a legal foundation for social protection.

3.3 Social assistance in Norway

3.3.1 Individual problems and particular benefits

Norwegian legislation on social assistance is integrated into the Social Services Act, which according to the first section aims to further economic and social security, ensure decent living conditions for vulnerable people, promote equal opportunities and prevent social problems. The first section also contains the stated objective of promoting an independent life for the individual, and an active and meaningful existence in fellowship with others. The municipality has the responsibility of meeting these tasks according to the Act, in principle embracing all residents, insofar as the county council or the state does not deal with them. The Social Services Act has been interpreted in Norwegian legal studies as bidding farewell to poor relief but it is still characterized by an unsettled ambiguity between a philosophy of taking care of people and seeing social deprivation as an individual problem, and legal certainty.

Social security is not explicitly visible in the Norwegian constitution. Section 105, which protects ownership from public intervention unless there is compensation, has been interpreted in Norwegian doctrine as constitutional protection for the supplementary pension. Moreover, the Norwegian ban on retroactivity in Section 97 has been perceived to be a useful tool in claiming constitutional protection of social rights.

95 Social Services Act, Lov om sosiale tjenester m.v. 1991-12-13 nr. 81, Section 1.
96 See Bernt, 2000, p. 55.
3.3.2 Support for lone mothers and fathers

Social security in Norway has traditionally been seen as a local responsibility on the municipal level and is consequently characterized by increased differentiation in the form of local variations in how support is allowed, especially at present when general social insurances have been reduced. However, the Norwegian social insurance system consists of benefits intended for certain categories. Resident, lone parents are entitled to special benefits laid down in the national insurance scheme, the basic condition being that they must have been insured for three years immediately prior to claiming the benefit. Help for self-help is emphasized as a means of achieving the aim of securing an income for insured sole childcare providers and self-support through waged work.

In order to be allowed lone-parent benefit the parent must be unmarried, separated or divorced. A life together that in reality has come to an end is counted as equivalent to a separation from the month that one of following conditions is fulfilled: divorce proceedings in court have been initiated and at least six months have passed; at least six months have passed since a reconciliation request was made according the Marriage act; at least one year has passed after the life together ended; or court proceedings have not been initiated for special reasons and at least one year has passed.

The lone mother or father is defined in the statutes. The daily care of the child has to be one parent’s sole responsibility, and thus parents living close to each other are not eligible. The benefit is not allowed if the parent in question is living with a person with whom s/he has a child or is divorced or separated, or if the parent has been a cohabitee during 12 of the last 18 months. If the paternity of the child is unknown and the mother is living with a man who might possibly be the father of the child, the mother has to prove non-paternity to be able to retain the benefit. A non-biological custodian given parental responsibilities after the death of a biological parent is also covered by the statute.

The benefit comprises transitory support, support for childcare, educational support and a special supplement to cover essential removal expenses incurred in taking up employment. The transitory support is aimed at compensating

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98 See Kjønstad et al., 2000.
100 National Insurance Act, folketrygdloven, Chapter 15, Section 1.
101 National Insurance Act, folketrygdloven, Chapter 15, Section 4.
102 National Insurance Act, folketrygdloven, Chapter 15, Section 5.
lone parents for not being able to support themselves because they are responsible for childcare or need an education in order to become independent. It may be granted until the child attains the age of eight, but for no longer than three years after the birth of the youngest child. The period of support can be prolonged for two years, until the child is eight, if the parent is in education or training at least part-time, provided the support is necessary for the achieving of independence. Beyond this, as a result of recent amendments, it can be prolonged to cover completion of a school year for the parent, or while waiting for the start of school, a tangible proposal for work or childminding. Further, after a divorce or separation payment of transitory support can be prolonged for up to two years before the youngest child reaches the age of ten. However, this option is linked to a requirement to participate in activating or educational measures. If engaging in waged work is temporarily impossible by reason of the parent’s or child’s illness, the benefit is paid until the child is 10. The statute also makes it possible to compensate beyond this if the child needs to be looked after as a consequence of functional disorder, sickness or extreme social problems, up to a maximum age of 18.\textsuperscript{103} When the child has reached three years of age the transitory support is linked to preconditions. The mother or the father must engage in education or work not less than part-time, or be registered as unemployed and looking for work. For the unemployed the precondition can be supplemented with a requirement to participate in motivation courses, in active employment measures and/or to accept a work offer. However, even if the preconditions are not met, the benefit can be allowed if there is insufficient non-parental childcare or in a case of documented illness of the child.\textsuperscript{104} Yearly wages or other social insurance provisions\textsuperscript{105} consisting of more than half of the basic amount will reduce the benefit, which is twice 1.85 of the basic amount, by 40 \%.\textsuperscript{106}

Childcare support to lone mothers or fathers is subject to a means test and may be granted up to when the youngest child has completed the fourth grade in school. This provision also requires training, work or registration as unemployed. Child support can also be granted for one year because of a parent’s temporary illness.\textsuperscript{107}

\textsuperscript{103} National Insurance Act, folketrygdloven, Chapter 15, Section 6.
\textsuperscript{104} National Insurance Act, folketrygdloven, Chapter 15, Section 8.
\textsuperscript{105} Provisions according to Chapters 4, 8 9, 10, 11 12 and 14 in National Insurance Act, folketrygdloven.
\textsuperscript{106} National Insurance Act, folketrygdloven, Chapter 15, Sections 7 and 9.
\textsuperscript{107} National Insurance Act, folketrygdloven, Chapter 15, Section 11.
The aim of the educational support is to make the lone parent independent. It can be granted, provided the parent is entitled to the transitory benefit, to pay for vocational training, or form part of an educational plan or supplementary training. The benefit is intended to cover specific expenses for education and travel, and essential housing and removal expenses may also be allowed. In addition, it can be granted to lone parents participating in follow-up activities on a client-contact basis aimed at qualification and stimulating sole providers to take up work or education.\textsuperscript{108}

Supplementary support for moving home can be granted in combination with the transitory support, if this is necessary in order to get a job.\textsuperscript{109}

The impact of the special benefits for sole providers’ maintenance has been of interest in discussions on the recognition of care in the welfare state. As pointed out by the Norwegian legal scholar Hege Brækhus, the benefit has not been sufficient to constitute a living, and a large number of sole providers have also had to apply for social assistance.\textsuperscript{110} A report from Statistics Norway shows that more than 50\% of sole providers received some form of social insurance benefit in 1999. The most important benefit for this category is the time-limited transitory support. However, the numbers receiving this support have decreased during the last decade mainly; it is explained, as a result of changed eligibility rules. Activation on the labour market or participating in education is now required for the support to be allowed. Lone parents living in a relationship as ‘steady cohabiters’ lost their eligibility for this support in 1999. The right to childcare support was also removed from such households in 1999. As most sole providers in Norway are active on the labour market (84\%), they derive their living mainly from salaried work. However, as shown in the report from Statistics Norway, it has become more common for the means-tested housing allowance to be granted in this group, and 17\% were allowed social assistance in 1999.\textsuperscript{111}

3.3.3  Support to families

Another special benefit, the cash benefit for families with small children, was adopted in 1998.\textsuperscript{112} It is provided for children between 1 and 3 years of age, who are resident in Norway and do not attend a day-care centre funded from government subsidies, or who attend such a day-care centre only on a part-

\textsuperscript{108} National Insurance Act, folketrygdloven, Chapter 15, Section 12.
\textsuperscript{109} National Insurance Act, folketrygdloven, Chapter 15, Section 13.
\textsuperscript{110} Brækhus, 2004, p. 95.
\textsuperscript{111} Andersen, Birkeland, Epland and Kirkeberg, 2002, pp. 55–59.
\textsuperscript{112} Home Care Allowance Act, Lov nr. 1998-06-26 nr. 41, kontantstøtteloven.
time basis. The grant amounts to NOK 3,000 a month. If the family makes use of a state-subsidized day-care centre temporarily, the payment will be gradually reduced in proportion to the time spent in day-care. For children spending less than eight hours a week in day-care full benefit is allowed, while attendance for 32 hours will reduce the benefit to zero.113

A woman who gives birth to a child but does not qualify for maternity benefits has the right to a non-recurrent benefit to cover special expenses connected with the birth, e.g. a bed, a stroller and other equipment for the child.114

3.3.4 Discretionary economic support

Economic support, which is regulated in Chapter 5 of the Social Services Act, is the last resort in Norwegian social security aimed at self-help and is subsidiary to other benefits. Those who cannot make a living by means of waged work or receiving support from other current economic rights are entitled to economic support. The chapter provides few definitions and the content and levels of the support are not explicitly defined in the Act. As noted by Kjønstad, it is doubtful whether social subsistence aid can be considered something to which citizens are entitled.115

The municipality has both a right and a duty to be discretionary both when assessing an application for support and how it is to be allowed. In a circular,116 which has the function of guiding the municipalities in their application of the Act, the Ministry of Social Affairs expresses a hope that unreasonable differences between different municipalities will be reduced. Local standards and the Ministry guidelines in circulars117 are subordinated to an individual assessment by the authority, and an applicant is in no position to claim a right by virtue of the Ministry guidelines. It is noteworthy that lodging an appeal to an administrative court in a case of economic support is only possible if a decision is contrary to the law or a regulation, or if a discretionary assessment is obviously unreasonable.118 Complaints are

113 For an overview of Home Care allowance, see Korsnes, 2004, pp. 107–134.
114 National Insurance Act, folketrygdloven, Chapter 14, Section 12.
118 Social Services Act, Lov 1991-12-13 nr 81 om sociale tjenester m.v., Chapter 8, Sections 6–7.
managed in a stricter way than is generally stated in the Norwegian Act on administrative procedures. The Civil Ombudsman in Oslo, who is appointed by the government, may also manage cases within the social field, but this rarely happens. In addition, as has been noted in Norwegian doctrine, social workers are not particularly familiar with the few legal sources existing in their application of the law.

Economic problems are explained as being part of other social problems where the municipality has to secure the applicant a defensible living, through reality-based considerations of possibilities and justifiable needs. The support aims at the achievement of independence, and help for self-help to earn one’s own living is emphasized. The reason for the need should not be decisive for eligibility.

What constitutes a living is not explicitly defined in the Act but has to be determined in a concrete assessment of reality-based individual needs. Equality under the law in order to further independence from economic support has to be considered. The function of the circulars, which are rich in statements and definitions, is to provide guidelines for securing a reasonable but modest living. As the contents have to be estimated concretely the level is expected to differ according to family situation, size of the household, housing, age and duration of the need.

The Ministry points out the special concern that should be taken regarding children’s needs and what expenses the welfare office has a duty to consider when assessing needs. Food and drink must be based on balanced and nourishing food, including one hot meal a day prepared at home. Clothing and shoes of acceptable quality for everyday use, for leisure and other occasions are part of a living. Some clothing can be bought at sales but that they should be second-hand, as an alternative, may not be a requirement. Consumer goods and hygiene articles, television licence, subscription to a newspaper, telephone rental fee and a reasonable number of calls are assumed to form part of a reasonable living. General expenses for leisure activities, especially for children’s leisure equipment, are included for promoting a normal growing-up period for children irrespective of the economy in their families. In necessary daily activities, such as work or leisure, cover for the use of public

119 Administrative Procedure Act, Lov 1967-02-10, Forvaltningsloven.
120 See Andenes, 1992.
121 Circular, Rundskriv SOS – 1-34/2001, p. 4.
transport has to be determined individually. Current housing expenses, for example rents and fixed expenses for housing association tenants and housing interests should be adjusted to a good standard in line with the size and composition of the household. Household insurance is seen as a necessary part of a living. When setting up a household or when renewal is needed, an applicant can, in accordance with the guidelines, be allowed reasonable support for household utensils and furniture. The municipality can demand that housing expenses be reduced in order to further self-maintenance.

In a supplementary circular the Ministry comments on what line the municipalities should take on increasing electricity expenses as a consequence of the situation on the electricity market in recent years. Individual responsibility for dealing with such a situation is emphasized, e.g. negotiating with the supplier or seeking private solutions. In commenting on exceptional electricity expenses the Ministry makes clear the public responsibility to consider necessary expenses. The concrete assessment has to consider that all means, possibly even those of children, must have already been spent before economic support can be allowed. Support can also be allowed according to Chapter 5, Section 2 as an aid to overcoming difficulties in life. In addition, it should also be possible to allow support in the form of a loan under Chapter 5, Section 4.

Special expenses, which are not seen as core of necessities for living, have to be decided according to Chapter 5, Section 2. This section is typically discretionary. It indicates the limits for allowing support but gives no guidance about when support should be allowed. However, the municipality is expected to attach great importance to other circumstances than economic ones when applying the statute. Hence, certain situations and expenses are specified in the circular. Special feasts and ceremonies, for example Christmas celebrations and feasts from other cultures, expensive leisure equipment and baby equipment may be considered. Childcare fees that cannot be claimed according to Chapter 5, Section 1 may be allowed if the care of the child is a prerequisite for participating in education or the labour market. As a general rule, expenses connected with starting school are to be considered in the municipalities’ assessment of needs. Regarding expenses for parent visitation, the municipality is expected to strive to keep such expenses at a reasonable level. The public duty to pay for dental care is limited to essential

preservative or curative treatments. Expenses for the upkeep of housing and maintenance of a car normally fall outside the municipality’s duty. Special needs such as tobacco, cosmetics and nightlife are mentioned in the circular as falling within the sphere of individual disposal of means.

Principally, economic support under the Social Services Act is seen as a temporary benefit. A short-term need can reduce the support to a level where it covers only necessary current expenses. In an emergency situation the support can be restricted to a minimum amount, regardless of whether or not the general prerequisites according to Chapter 5, Section 1 are complied with.\textsuperscript{128}

3.3.5 Maintenance obligations in the family

In the circular the Ministry distinguishes between various types of households.\textsuperscript{129} A single household is one in which the single person bears all the expenses alone. As a general principle, those who rent a room are to be considered as independent, even if they are living with parents or other relatives. Regarding youngsters in parental accommodation, the municipality can demand school attendance.

According to the Marriage Act and the Registered Partnership Act, spouses and registered partners have a reciprocal maintenance obligation. When the partners are separated, legally or in reality, the applicant must be seen as an independent unit. However, the subsidiary character of economic support means that the municipality can require the recipient to make use of maintenance from a spouse and from the national insurance benefit for lone fathers and mothers. If the support is granted as a loan, both spouses are normally responsible for its repayment.\textsuperscript{130}

The circular makes it clear that cohabitees are not obliged to support each other but have to be assessed separately. If they are living with children they have in common or separately, each of the cohabitees is granted half of the amount for spouses. However, as a result of a recent commission and report to the Norwegian Parliament,\textsuperscript{131} a newly-issued circular\textsuperscript{132} lays down a new interpretation. Cohabitees should from now on be treated in the same way as spouses in the matter of allowing economic support. Consequently, accord-

\textsuperscript{128} Circular, Rundskriv SOS – 1-34/2001, pp. 20–21.
\textsuperscript{129} Circular, Rundskriv SOS – 1-34/2001, p. 21 ff.
\textsuperscript{130} Circular, Rundskriv SOS – 1-34/2001, pp. 21–22.
According to the Ministry, cohabitees should not be treated more favourably than spouses. Constructions of maintenance obligations in family law should not have a decisive impact as regards eligibility for economic support under the Social Services Act.

A child is defined as a minor but the term can also include a child over the age of 18 in basic education. The maintenance obligation is then prolonged, relative to the parental economy. Parents have a maintenance obligation towards a child regardless of whether they are married, cohabiting or separated. This obligation can be prolonged beyond the age of 18 if the child is pursuing basic studies. Those over 18 applying for economic support should normally be evaluated as independent of their family, even if they are living with them. A family with children is normally evaluated as a unit. In families with children of a second relationship, the various family elements should be assessed separately. According to the circular, variations in the needs of different families must be considered. However, the Ministry also warns that it might be an unfortunate signal if the municipality allows support for expensive activities that other children's families cannot afford.

3.3.6 Subsidiary incomes

As is clear from the statute (Chapter 5, Section 1), wage earnings and other economic rights take priority over economic support. The circular interprets the concept of economic rights as all the revenues the applicant is entitled to or can apply for. Demand for maintenance support from a spouse according to the Marriage Act can be counted as an economic right; regardless of whether or not the spouses are living together. However, when in reality one spouse does not get her living from the other, the Ministry indicates that there are special circumstances to be taken into consideration. Women staying in crisis shelters or at risk of exposure to violence or coercion should not be treated according to the general rule.

Parents have a maintenance obligation for underage children, regardless of whether or not they live with the child. The parental maintenance obligation continues to apply even if the child moves away from home. If the child has personal means, an application can be denied as support would then be considered subsidiary. However, the Ministry makes it clear that it might be

133 Child Act, Lov 8. april 1981 nr. 7 om barn og foreldre, Sections 51–53.
135 Circular, Rundskriv SOS – 1-34/2001, p. 43.
137 Circular, Rundskriv SOS – 1-34/2001, p. 41.
unreasonable to require that a child’s self-earned money or confirmation gifts be used to secure its maintenance.\textsuperscript{138}

Child maintenance from a provider not living with the child is normally counted as income. Maintenance allowance can be calculated from an overall economic assessment of the circumstances of the parent living together with the child. In other words it can be included in the assessment of income when considering an application for support for expenses that would normally be covered by the applicant. The amount of the allowance and the family’s economic situation as a whole has to be considered. According to the Ministry, long-term recipients capable of sensible economic self-administration should be awarded support in a way that enables them to save for future expenses.\textsuperscript{139}

The construction of economic support as a last resort is modified in the Act. Chapter 5 section 2 lays down the municipality’s competence to allow support in addition to what is stated in Chapter 5, Section 1. Helping a person to overcome or adapt to a difficult situation in life is grounds for such a modification. This section may, for example, be applicable when damages as a source of income for maintenance are not taken into account.\textsuperscript{140}

The subsidiary nature of economic support means that students in need can be required to apply for student loans (Lånekassen). An applicant who is studying will primarily be required to take paid employment as the loan is not calculated to cover for vacation periods. The overarching principle is that the municipality is not responsible for financing studies. Real maintenance from parents for an adult child who is studying can be decisive in the assessment of an application.\textsuperscript{141}

### 3.3.7 Conditions laid down in law

The level of assistance can vary as a consequence of the interpretation of economic support as a temporary benefit. The principle that an applicant should be secured a defensible living contrasts with a statement in the Ministry circular that the benefit should not be too generous. Economic support from the social services should not counteract the recipient’s motivation to work or participate in trainee programs or in other ways act responsibly. The duty to work encompasses all those fit for work, and those who are unemployed

\textsuperscript{138} Circular, Rundskriv SOS – 1-34/2001, p. 23.
\textsuperscript{139} Circular, Rundskriv SOS – 1-34/2001, pp. 9–10.
\textsuperscript{140} Circular, Rundskriv SOS – 1-34/2001, p. 11.
\textsuperscript{141} Circular, Rundskriv SOS – 1-34/2001, pp. 11–12.
are obliged to be in contact with the employment office (aetat) or trying in other ways to find employment. This duty is laid down regardless of the applicant’s entitlement to unemployment benefit or inclusion in the social insurance scheme. He or she has to accept whatever job is available.\textsuperscript{142}

Chapter 5, Section 3 authorizes the municipality to impose conditions on the recipient when allowing economic support. However, conditions according to this section are something other than the principle of self-maintenance referred to in Chapter 5, Section 1. Conditions have to be individually adjusted. Although it is not a question of a contract situation between two equivalent parties, there is reciprocal duty that has to be performed in cooperation. In order to guarantee the legal certainty of the individual, the government requires written decisions and information to be made available on how to lodge an appeal.\textsuperscript{143} Registration at the employment office and participation in work training programs are exemplified in the circular as suitable requirements. Furthermore, a duty to take up appropriate employment in the community of residence is laid down in Chapter 5, Section 3. Such employment is not legally the equivalent of a job on the regular labour market. Requirements to change housing, to participate in discussions or to engage in contact with a vocational counsellor are other examples noted in the circular. The recipient can also be requested to prove various items of information, or to dispose of the support in the ‘best way’ or open up a negotiation with a creditor.\textsuperscript{144} There is no guidance in the Act on how to react if a recipient refuses to comply with the conditions. However, in the circular the Ministry explains that any refusal must result in cessation of the support and of the desirable ends that may ensue if the conditions are complied with. If withdrawal of the support is clearly unreasonable, it can be distributed in the form of goods and services.\textsuperscript{145}

Chapter 5, Section 4 lays down that the support can be distributed in the form of subsidies, loans or goods and services but does not give any indication of a general principle governing such distribution. Although the cash principle has manifested itself in preparatory works and comments on the Act, it is expected that the ways of distribution and the periods of payments will be tangibly assessed in each situation.\textsuperscript{146}

The subsidiary nature of economic support and the notion of a last resort are statutorily encoded. Under Chapter 5, Section 8 the municipal-

\textsuperscript{142} Circular, Rundskriv SOS – 1-34/2001, p. 7.
\textsuperscript{143} Circular, Rundskriv SOS – 1-34/2001, p. 29 ff.
\textsuperscript{144} Circular, Rundskriv SOS – 1-34/2001, pp. 29–30
\textsuperscript{145} Circular, Rundskriv SOS – 1-34/2001, p. 34.
\textsuperscript{146} Circular, Rundskriv SOS – 1-34/2001, p. 35.
ity is authorized to reclaim economic support. Social insurance benefits can also be reclaimed under Chapter 5 section 9. If the recipient is married the spouse can be obliged to repay to the extent that he or she has profited from the support. Whether cohabiters, as a result of the new interpretation of maintenance obligations putting them on an equal footing with spouses, should be covered by this section, has been commented on in detail in a supplementary circular from the Directorate for Health and Social Affairs. From this it may be concluded that reclamation under Section 9 from the other party implies that they are married.

3.3.8 Conclusions

Social assistance cannot be evaluated as having constitutional protection in parity with doctrinal analyses on pension rights, as referred to above. A Norwegian citizen in need of assistance might more successfully refer to international human rights with reference to Section 110c in the Norwegian constitution, where the respect for and protection of human rights is embedded. Moreover, as a defensible living under the Social Services Act is constructed as entirely discretionary and not defined or explained in the Act, economic support cannot be interpreted as a legal right. In addition, the possibility of lodging an appeal in court is severely restricted, as it has to be proved that a decision is against the law or is obviously unreasonable. Government circulars, which are meant to guide and are without any legal cogency, complement the sparseness of definitions in the Act. In the guiding texts there are elements of a poor relief discourse where welfare claimants are understood as being problematic people or families who will not achieve independence by way of over-generous assistance. The core of a living is limited to fundamental needs and special expenses, allowed under Chapter 5, Section 2, reflecting the notion of the support as temporary with an authoritative competence to restrict it to a minimum.

The solo mother, conceptualized as a lone parent in the national social insurance system, is entitled to special social insurance benefits as long as she can prove that she is not cohabiting. Care is evaluated in relation to the age of the child, but probably not to the extent that solo mothers will be liberated from public demands that are reminiscent of a poor relief discourse. The cash benefit for families with small children seems not to apply to solo mothers. Because of the limited level of the benefit and its function to promote private

147 Circular, Rundskriv SOS – 1-34/2001, p. 42.
childcare within the traditionally conceived nuclear family, the benefit would not seem to improve a solo mother’s inclusion and independence. A reform aimed at evening out benefits by subsidizing private forms of childcare seems to be more a protection of the principle of freedom of choice in the family as traditionally conceptualized, than a form of social protection for the support of disadvantaged groups. Nevertheless, the national insurance benefit for lone mothers and fathers, together with the non-recurrent maternity benefit, are secured economic rights in a system of a totally discretionary last resort under the Social Services Act. Despite this, dependency in relation to a new partner and a demanding welfare state has been reinforced through recent amendments both in national social insurance schemes and the Social Services Act.

During divorce proceedings the maintenance obligation remains, although the government specifies particular circumstances to be considered, which should legitimize departures from the main principle. The main principle in family law, that cohabitees have no maintenance obligation towards each other, is modified in the opposite direction in the last-resort scheme. The previous standpoint, which posited that real maintenance could be counted as an income, has been replaced with a clear articulation that cohabitees should not be favoured in comparison with spouses. Other patterns of dependency are evident in the circulars in the interpretation that maintenance allowance for a child can be calculated to cover the living of the parent who lives with the child, the assumptions about the family as a unit, now extended to the household, and how, depending on the family economy, an adult child receiving basic education is part of the family unit.

The use of conditions for securing a defensible living is also described in open terms and left to the discretionary powers of authorities. In the circular, a range of situations is described that may be of significance in the use of conditions. Economic support seems to be constructed less as a social right and more as a benefit with therapeutic objectives, the aim being to make the recipient independent of public support. The claimants are entirely dependent on the evaluation in each case, and the form of distribution of support is unpredictable. Moreover, there is no legal rule for securing a cash principle in the distribution of the support. In brief, economic support seems to be a benefit with normative fostering functions expressed in an Act more suited to the claims and interests of authorities than to adjusting to diversity and particular welfare needs among citizens.
3.4 Social assistance in Denmark

3.4.1 From a unified law to differentiation

In Denmark reform in the 1970s founded new principles for the welfare state. Kirsten Ketscher has described how, through an efficient system, the intention was that the rules would be adjusted to a greater extent to modern objectives regarding prevention, rehabilitation, security and comfort. The principle of loss of income and the principle of need were seen as important in preventive work, and the aim was to prevent deterioration in conditions in cases of unemployment, sickness or similar circumstances. The reason the benefits were needed should not play a decisive role in allowing help. The principle of comprehensiveness was largely interpreted as a family principle. Counselling and guidance were seen as other important principles for effective measures. The citizens should have their needs secured in contact with the municipality as a whole, which was made responsible for fulfilling the objectives of the reforms.149

In contrast to these principles, welfare reforms of the 1990s were, as explained by Ketscher, characterized by differentiation. The unified system was in the process of collapsing as a consequence of reforms resulting from public finance cuts and political interests.150 Social assistance, regulated in the Benefit Act,151 became a benefit combined with demands for activation as the main principle. More specific criteria for entitlement to cash benefits were introduced in 1994. In 1998 three different Acts were adopted that introduced new principles and reinforced previously introduced changes and new values. The Benefit Act was replaced by the Active Social Policy Act,152 which regulates economic assistance, and The Act on Social Services153 which regulates the various forms of care provision. The Legal Protection and Administration in Social Matters Act154 gave rise to a new organization of social administration, and a range of new procedural principles was introduced. The appeal system was simplified and made more uniform.155

152 Lov nr. 455 af 10. juni 1997 om aktiv socialpolitik.
153 Lov nr. 454 af 10 juni 1997 om social service.
154 Lov nr. 453 af 10. juni 1997 om retssikkerhed og administration på det sociale område. Amendments to the Act have been made, the latest made public in Lovbekendtgørelse nr. 72 af 6. februar 2004; Bekendtgørelse af lov om retssikkerhed og administration på det sociale område.
155 Appeals on decisions according to the Active Social Policy Act became regulated in Chap-
Ketscher\textsuperscript{156} has described how social law in Denmark during the 1990s was characterized on the one hand by an increased judicialization and on the other by a reduction in regulations that made the law more vague and therefore more flexible. At the same time social law became oriented towards an emphasis on the rule of law, shifting the focus in regulations from public administration to the citizen. Another characteristic described by Ketscher is the orientation towards a notion of negotiation between equal parties, which reflects the new idea of citizens as having an active relation to their own rights. Legislation on social assistance became more judicially constructed and was thus given increased legal meaning. In contrast to previous regulations on social assistance, which were based on a family principle, the new regulations emphasized employment and self-support as fundamental principles. Ketscher claims that the explicit rules laid down in law, together with the idea of active citizens in relation to their own rights, follow an international trend emanating from the International Court of Justice and the European Court of Human Rights. Similarly, the Danish constitution protects the right to public support on condition that the citizens fulfill their duties according to regulations laid down in law.\textsuperscript{157} In 2001, however, the Social Ministry was authorized to introduce rules that deviated from the Active Social Policy Act with the aim of promoting employment, but exempting statutory amounts of the benefits.\textsuperscript{158}

The Active Social Policy Act has been in constant transition since then, seemingly following the route described by Ketscher referred to above. In 2003 a new Act was issued with the aim of creating a well-functioning labour market, which stresses the importance of getting benefit recipients into work as soon as possible, thus furthering independence.\textsuperscript{159} This Act codifies the distribution of responsibilities and intensified co-operation between the municipality and the employment office as a way of creating active citizens. The right to be offered and the duty to accept activating measures for persons outside the labour market are explicitly laid down\textsuperscript{160} and harmonise with

\textsuperscript{156} Ketscher 1998, pp. 46–55.
\textsuperscript{157} Danmarks Riges Grundlov af 5. juni 1953, Section 75.
\textsuperscript{158} Consolidated Version of the Active Social Policy Act, LBK nr 614 af 26/06/2001, Bekendtgørelse af lov om aktiv socialpolitik, Section 110.
\textsuperscript{159} The Active Employment Contributions Act, Lov om en aktiv beskæftigelseindsats, Lov nr 419 af 10/06/2003, Section 1.
\textsuperscript{160} The Active Employment Contributions Act, Lov nr 419 af 10/06/2003, Chapters 16–17.
the demands laid down as preconditions for being allowed economic assistance. The Employment Ministry is authorized to issue other rules regarding the content of economic assistance, and how it shall be calculated and distributed in cases of people whose maintenance is entirely or partly covered by public contributions regulated in other legislation, and for people who have been taken into custody or are serving a prison sentence.

3.4.2 Within or without social protection

Any person lawfully resident or permitted to reside legally in Denmark is entitled to assistance under the Active Social Policy Act. To be eligible for permanent assistance the claimant must be a Danish national or EU/EEC citizen, or a family member of such a citizen authorized to reside in the country according to EC law, or subject to treaties with other countries or international organizations. If the support has been allowed for or is expected to last for more than 6 months it shall be deemed to be of a permanent nature, while a non-European with less than seven years residence can be transferred to the country of origin. For a foreigner with no time-limit imposed on her/his residence permit, the qualification period of 7 years is calculated from the time when the introduction period was completed. People covered by a Nordic convention on social protection can be transferred if they have resided for less than three years in Denmark. A European convention of December 11, 1953 restricts the transfer of Europeans, which may only be carried out under the terms of the convention. The Active Social Policy Act sets out specific conditions to be considered. If the foreigner is married and is living with a Danish citizen, or is a refugee or foreigner who has been legally residing in the country for more than seven years, the duration of the residence, or other equally important circumstances are specified. Moreover, a family connection to Denmark compared to family connection to the country of origin, and private means of subsistence from a private contributor, are conditions possible to consider in a transfer decision.

People residing abroad are in principle not eligible for assistance under the Act. However, special circumstances can be taken into consideration in order to retain support during short-term visits abroad, e.g. if the recipient is parti-

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cipating in measures aimed at activation, or, in the case of legally enforced parental social intercourse with a child living abroad, is exercising their right of access to children under 18, or if there is a need for urgent medical treatment that is not available in Denmark. In addition, visiting a close relative suffering from serious illness is specified in the statute. A Danish citizen with longstanding residence abroad has special protection. In such a case assistance can be allowed up to an amount corresponding to the national basic old age pension.\textsuperscript{164}

Persons in education are not entitled to assistance, unless they are not covered by the rules governing at qualification measures stated in the new Act\textsuperscript{165} on active employment contributions, to further employment mainly for people under the age of 30. Legislation makes it possible to take action to support a state-financed educational benefit. Those with maintenance obligations for a child living at home are also noted in the statute as being specially protected irrespective of age.\textsuperscript{166} When assistance is being provided to a married person whose spouse is in education, no assistance will be granted to the studying spouse.\textsuperscript{167}

A survivor’s benefit, as laid down in the Active Social Policy Act, can be allowed on application for a person not entitled to a survivor’s pension. It is maximized to DKR 10,000, on condition that the surviving spouse or cohabitee has had the same domicile in the country as the recently deceased for the last three years before the death. The support is related to the surviving spouse’s income and is allowed only as long as the income does not exceed DKR 250,000. 30\% of any capital in excess of DKR 100,000 will be counted as income.\textsuperscript{168}

\textsuperscript{164} Consolidated Version of the Active Social Policy Act, Bekendtgørelse af lov om aktiv socialpolitik, LBK nr 709 af 13/08/2003, Sections 5 and 6.
\textsuperscript{165} The Active Employment Contributions Act, Lov om en aktiv beskæftigelseindsats, Lov nr 419 af 10/06/2003.
\textsuperscript{166} The Active Employment Contributions Act, Lov om en aktiv beskæftigelseindsats, Lov nr 419 af 10/06/2003, Section 37.
\textsuperscript{167} Consolidated Version of the Active Social Policy Act, Bekendtgørelse af lov om aktiv socialpolitik, LBK nr 709 af 13/08/2003, Section 12 stk. 2.
\textsuperscript{168} Consolidated Version of the Active Social Policy Act, Bekendtgørelse af lov om aktiv socialpolitik, LBK nr 709 af 13/08/2003, Chapter 10a, Section 85a. The sums which are allowed within the field of social protection are annually regulated and issued by the Ministry of Social Affairs. See Vejledning nr. 124 af 12. November 2003, These regulations do not apply to the cash and introduction benefits, which are now issued by the Ministry of Employment.
3.4.3 Care provision

There are special social service provisions in Denmark laid down in the Social Services Act which recognize care within the family. Parents choosing private day-care are entitled to a supplement, maximized to three children for each household and 70% of the expenses. It is also possible to obtain a home care allowance to finance parental domestic care, which is maximised to one year but can be extended by the municipality. A parent receiving other public living support or who has an income from waged work is not entitled to this supplement. Non-Europeans residing fewer than seven of the last eight years in Denmark are also excluded. Another care provision, maximized to DKK 35,000 a year and not exceeding 80% of previous income, is intended for those who are allowed parental-leave benefit. However, for unemployed people this benefit may not exceed the unemployment benefit, and for recipients of economic assistance the cash benefit is the benchmark. In addition, single-parent providers on parental leave are allowed a special supplement if they are wage earners or self-employed, provided the municipality has not been able to arrange appropriate day-care for a child between the ages of 24 weeks and five years. This additional supplement represents the difference between the parental-leave benefit and the cash benefit under the Active Social Policy Act. Necessary additional expenses for domestic care of a child under the age of 18 with a significant and lasting functional disorder, or a chronic or longstanding illness, are allowed by the municipality to a standardized monthly amount. Moreover, lost earnings for the same reasons as above in relation to previous gross income can be compensated for. This compensation can be supplemented by a special benefit allowed for a period of three months after becoming unemployed. However, this benefit may not be allowed in combination with other maintenance provision laid down in other legislation.

3.4.4 Activation measures

The overarching objective to promote independence in the legislation on economic assistance is underlined and constructed as a statutory duty with

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169 Consolidated Version of the Social Services Act, LBK 764 af 26/08/2003, Bekendtgørelse af lov om social service.
170 Consolidated Version of the Social Services Act, LBK 764 af 26/08/2003, Bekendtgørelse af lov om social service, Sections 26, 26a, 27 and 27a.
which every man and woman must comply. Guidance is stated to be the primary response to an application. Unemployed recipients and applicants for assistance are registered at the employment office by the municipality, which also has to report when assistance is no longer allowed. The intention is that a person in need of assistance should be helped by cash or introduction benefits and activation measures.

By way of legal changes in 2003, the content of and procedures governing the arrangement of activating measures were transferred to the new Active Employment Contributions Act, which, in combination with the Active Social Policy Act, strengthens the measures to promote independence from public support. The municipality has a duty to regularly evaluate whether the preconditions for receiving assistance have been fulfilled, and whether there are other options for allowing help. Such an evaluation has to be made every third month from the first month of receipt, or every third month after becoming the subject of an active employment measure laid down in an individual contact plan aimed at the promotion of self-support through salaried work. Individual contact between the municipality and the person in question is laid down in the Active Employment Contributions Act. Ways of handling the contact vary in the statutes depending on the reason the benefit is needed. For the unemployed, with or without unemployment benefits, contact must be made at least every third month, by telephone, digitally or other means. Those with a reduced working capacity, conceptualized as *revalidends*, like the unemployed come under the rules in Chapter 7 on individual contacts, the measures for arranging job-plans in Chapter 9, guidance, re-qualification and activating measures laid down in Chapters 10–12, and other means of assistance for special equipment and mentorship laid down in Chapter 14. There are also other groups targeted as being in need of help to overcome dependence on public provision. These are people receiving cash benefits in the event of illness, those under the age of 65 with a permanent reduction in working capacity, irrespective of whether or not they have

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been granted an early retirement pension, and disabled people who, having completed an education lasting not less than 18 months, have not been able to find a job after a period of two years. However, these groups are exempted from the statutory duty to accept any active employment measures that are offered, as laid down in Chapters 16–17. The municipality is responsible for arranging flexible working hours (fleksjob) for those under 65 with a permanently reduced working capacity. For this category, and for those who have a duty to participate in an activation measure, the evaluation is to be made after they have been in the receipt of financial assistance for six months. After this, the case will be evaluated again after 12 months at the latest.176

In arranging various activation measures, such as guidance and qualification measures, job training, subsidized wage for private or public employment, or measures decided upon in a job-plan, it is the intention that the individual’s own choice be considered. However, market interests and the promotion of independence and self-support as soon as possible are emphasized in the statute.177

The individual’s rights and duties to accept an offer of active employment measures are clearly laid down in the Active Employment Contributions Act.178 Unemployed recipients of economic assistance under the age of 30 who do not have the right to membership of an unemployment fund after a completed education are obliged to accept and start an activation measure lasting a total of 18 months. Unemployed people below 25 years of age have a right and duty to participate in educational measures which can be arranged in combination with other activation measures. The duty to accept active employment measures also applies to unemployed persons aged 25–30 years, who may, however, be given the option to choose occupational training or a subsidized wage with a private or public employer as alternatives. The measures are intended to occupy not less than 30 hours per week. Unemployed persons who have completed an education which entitles them to membership of an unemployment fund are obliged to start an activation measure lasting for six months after a continuous benefit period of 13 weeks. Those receiving cash or introduction benefits for reasons other than unemployment have the same duty but the length of the measures is

177 The Active Employment Contributions Act, Lov om en aktiv beskæftigelseindsats, Lov nr 419 af 10/06/2003, Section 22 stk. 3.
extended to 18 months. The right and duty are modified for people over the age of 30 years. For this category a period of 12 months on benefits is made the statutory limit for activating requirements. New periods of receipt of economic assistance will entail new demands for activation.\textsuperscript{179}

\subsection*{3.4.5 Benefits in exchange for activity}

The content of the assistance is explicitly laid down in the Active Social Policy Act. The support can be in the form of \textit{cash benefits} (kontanthjælp), \textit{start-up benefit} (starthjælp) or \textit{activation measures} under the new Act on active employment contributions which coordinates the measures taken by the employment office and the municipality. First, the benefits are aimed at preventing people who have, or will have, trouble keeping a job from needing support in the future. Second, the benefits aim to secure an economic safety-net for anyone unable to provide for her/his own necessities and those of the family. Self-help through the acceptance of offered work and activation is emphasized. The recipient, on the basis of personal needs and conditions, shall be jointly responsible together with the relevant authorities for drawing up the assistance plan.\textsuperscript{180} As a prerequisite, the applicant’s situation is assumed to have undergone a change, for example the occurrence of sickness, unemployment or the breaking up of a family. The changed circumstances must result in an incapacity to meet the basic needs for the applicant’s and the family’s subsistence, which are not covered by other benefits.\textsuperscript{181} Thus a low income \textit{per se} does not constitute entitlement to a benefit.

The distinction between those outside and those within protection has recently been reinforced by legal changes.\textsuperscript{182} Eligibility for the cash benefit requires that the applicant has been residing in the country for at least seven of the last eight years. Living abroad for more than two months of the year will have an exclusionary effect. If an applicant is unable to fulfil the residence demands, only the lower introduction benefit will be allowed.\textsuperscript{183}

The utilization of capacity for work is explicitly laid down as a prerequi-

\textsuperscript{179} The Active Employment Contributions Act, Lov om en aktiv beskæftigelseindsats, Lov nr 419 af 10/06/2003, Sections 92-96.
\textsuperscript{180} Consolidated Version of the Active Social Policy Act, LBK 709 af 26/08/2003, Bekendtgørelse af lov om aktiv socialpolitik, Section 1.
\textsuperscript{181} Consolidated Version of the Active Social Policy Act, LBK 709 af 26/08/2003, Bekendtgørelse af lov om aktiv socialpolitik, Section 11 stk. 2.
\textsuperscript{182} Amendments to the Active Social Policy Act and the Integration of foreigners Act, Lov nr. 361 af 6. juni 2002.
\textsuperscript{183} Consolidated Version of the Active Social Policy Act, LBK nr 709 af 13/08/2003, Section 11, stk. 3–5.
site in the Act with reference made to the duties laid down in the new Act on active employment contributions. Eligibility for assistance requires that the applicant and, if married, the spouse as well, lack a reasonable offer of work and actively make use of their employment opportunities. It is the duty of the municipality to consider withdrawing support if a person refuses a job offer, does not turn up for a discussion or contact meeting at the employment office or the municipality, or fails to report impediments caused by illness that obstruct participation in activation measures or discussion appointments with an employer. However, there are certain exceptions to the rule concerning the obligation to be available for activation measures.\textsuperscript{184}

The measure in question must have a reasonable content and should not jeopardize or risk the recipient's health, while transport difficulties caused by distance between accommodation and place of work should not impose an unreasonable strain on the recipient. Caring activities, for which compensation is received in the case of pregnancy, birth or adoption of a child, or if the one affected by the regulations is compelled to take care of her/his children because of lack of other childcare possibilities, are exempted from the rule. Caring for a handicapped or severely ill child, or for a terminally ill intimate, carries an exemption from the general duty to be active. In the new Act on active employment contributions a free period is made statutory, which is also exempted from activation. The Act paves the way for other situations to be considered, apart from unemployment, which can motivate deviation from the main principle. A spouse who exclusively engages in domestic work is free to choose not to utilize their work capacity. In such a case, the breadwinner will be allowed an additional benefit. Economic compensation for parents choosing to take on domestic childcare under the Social Services Act, Section 26a, is not available for these families.

The demands on applicants or recipients of benefits are further exemplified in the statutes where the obligation to search for tangible work opportunities and the duty to be registered in a special Job and CV database are laid down. A qualifying month is stipulated as well as the requirement to be registered at the unemployment office.\textsuperscript{185}

 Principally, benefits are only allowed for expenses arising after an application. Normally the living support is distributed monthly but it can be paid

\textsuperscript{184} Consolidated Version of the Active Social Policy Act, Bekendtgørelse af lov om aktiv socialpolitik, LBK nr 709 af 13/08/2003, Section 13 stk. 1–9.

\textsuperscript{185} Consolidated Version of the Active Social Policy Act, Bekendtgørelse af lov om aktiv socialpolitik, LBK nr 709 af 13/08/2003, Sections 13a, 13b, 13c.
out for shorter periods if the recipient is suspected of not complying with the demands related to the benefit. In exceptional cases, if a person despite guiding measures is incapable of administering the whole amount, the benefit can be paid by other means.\textsuperscript{186}

A reduced, as well as a terminated support, is explicitly defined in the Act with references to the Active employment contributions Act.\textsuperscript{187} The support will be reduced by one-third for three weeks if an unemployed person or the person’s spouse, without reasonable motivation, quits work, rejects a work offer or an active employment measure, or fails to inform the employment office, municipality or employer about sickness. Failure to seek employment or to send a CV to the Employment Ministry database also constitutes grounds for reduction. There is a further reduction, extended to 20 weeks, if instances of such negligence and omission occur two or more times within a 12-month period, or as long as the person has not re-qualified by working without support for more than 300 hours during a 10-week period. However, those married to or cohabiting with a person on the lower start-up benefit are exempted from these reductions. The reduced benefit is allowed provided the applicant and spouse utilize their working possibilities. For persons in active employment measures or training, the reduction will correspond to the hours of absence. The compensation for participating in activation measures will also be reduced in the case of absence without reasonable motivation. The assistance will cease if the applicant or spouse rejects a job offer, an active employment measure or other offered measures aimed at promoting occupation, as long as the offer is available. Absence that can be equated with a rejection will be sanctioned in the same way. A person over the age of 25 years with a maintenance obligation for a child will, as well as a person under the age of 25 living with and responsible for the maintenance of a child, lose the support.

Situations entailing re-claiming of assistance are carefully specified in the statutes.\textsuperscript{188} Managing one’s economy in an indefensible way, quitting a job or active employment measure without good reason, or provoking dismissal from a job are all given as grounds for reclamation of benefit. Refusing to accept an activation or work offer, becoming involved in a strike, or if

\textsuperscript{186} Consolidated Version of the Active Social Policy Act, LBK nr 709 af 13/08/2003, Sections 88, 89, 90.

\textsuperscript{187} Consolidated Version of the Active Social Policy Act, LBK nr 709 af 13/08/2003, Sections 38a, 39, 40, 41.

\textsuperscript{188} Consolidated Version of the Active Social Policy Act, LBK nr 709 af 13/08/2003, Sections 91, 92, 93, 94, 95, 96, 97.
it is obvious that the recipient will shortly be able to repay compensation are other grounds. The benefit can also be reclaimed in cases of retroactive incomes. Unpaid accounts for care provision under the Social Services Act can also be deducted from the benefit. Benefits allowed for a spouse or a child can be re-claimed from a person with maintenance obligations.

Previous regulations in the Active Social Policy Act\(^{189}\) regarding contributions and compensation for participating in activating measures have been cancelled by the new legislation. In the previous regulations, at the discretion of the municipality, DKr 1 000 could be allowed as compensation for participation in an activating measure.\(^{190}\) Recipients engaged in activation are now allowed a benefit equivalent to the cash or start-up benefit, or the cash benefit in the event of illness. However, certain amounts of compensation can be added for transport expenses or expenses for equipment needed for the activation. Start-up benefit recipients, or cohabiters or spouses of such recipients, who participate in training, receive additional compensation for each hour spent in training.\(^{191}\)

3.4.6 Maintenance in the family

Self-support, and support of a spouse and children under the age of 18 years, are statutory duties in relation to the public authorities, laid down in the Active Social Policy Act, which correspond to the responsibilities for spouses laid down in the law on marriage.\(^{192}\) If a separation or divorce occurs, or if the duty to support a child lapses as the child itself becomes responsible for supporting a spouse or a child, the maintenance obligation is abolished. Despite the parental responsibility for support, the municipal authority shall provide assistance for a pregnant daughter under the age of 18 to meet all pregnancy-related requirements.\(^{193}\)

The cash benefit is geared to people but the amounts are individually differentiated according to whether the recipient has reached the age of 25, is living with parents or on their own, or has a maintenance obligation for a


\(^{190}\) The Active Employment Contributions Act, Lov nr 419 af 10/06/2003, Section 38, stk. 2.

\(^{191}\) The Active Employment Contributions Act, Lov om en aktiv beskæftigelseindsats, Lov nr 419 af 10/06/2003, Section 45.

\(^{192}\) Consolidated Version of the Legal Consequences of Marriage Act, LBK nr 37 af 05/01/1995, Bekendtgørelse af lov om ægteskabets retsverkninger.

\(^{193}\) Consolidated Version of the Active Social Policy Act, LBK nr 709 af 13/08/2003, Bekendtgørelse af lov om aktiv socialpolitik, Section 2.
child. A recipient under 25 years who can provide evidence of a maintenance obligation for a child is allowed a monthly supplement corresponding to child allowance from a legal provider, but the assistance may not exceed the statutory amount set for persons over 25.\(^{194}\)

After a six-month period on cash benefit, in which periods of participation in active employment measures are included, the monthly support for a married couple will be reduced by DKR 500 for each person. If it is not possible to make the reduction for one spouse, the benefit of the other spouse will be further reduced by the amount in question. However, this reduction will not be made if the spouse is receiving a state old age pension, early retirement pension or the start-up benefit. A new six-month period without cash benefit is required to restore eligibility to the full amount of the cash benefit.\(^{195}\) Certain situations are to be disregarded in the assessment of the six-month period. This applies to periods of receipt of cash benefit in combination with pregnancy, childbirth, adoption and parental leave. Caring, compensated for by other care provisions, for a handicapped child or handicapped intimate person, or a severely ill or dying intimate person, or caring for a severely sick child are other situations which will be disregarded in the estimation of the period.\(^{196}\)

Start-up benefit for people who do not comply with the qualification requirement of legal residence for not less than seven years is less than half the amount specified for those who qualify for the cash benefit.\(^{197}\) The amendments to the Act that introduced the start-up benefit implied that cohabiting and married start-up benefit recipients, who lived with a cash benefit recipient, could have the start-up benefit reduced or withdrawn.\(^{198}\) Thus the question was raised of whether the changes implied that start-up benefit recipients living with a cash benefit recipients were guaranteed the constitutionally embedded right to a living, provided that they fulfilled the corresponding obligations. Experiences showing how foreigners on start-up benefit used all

198 Amendments to the Active Social Policy Act and the Integration ofForeigners Act, Lov nr. 361 af 6. juni 2002 om ændring af lov om aktiv social politik och integrationsloven, Section 26, stk. 1, 2. pkt.
their energy to survive and consequently did not have the inner resources to seek employment at the same time, led to a government proposal in 2003 which suggested the abolition of the start-up benefit and the securing of the cash benefit for all.\textsuperscript{199} A parliamentary proposal reached the conclusion that, as a result of the rules, start-up benefit recipients were no longer secured a living in accordance with the constitution.\textsuperscript{200} The Danish constitution protects the right to a living, which is subject to the duties that are likewise laid down, on condition that the responsibility for maintenance does not lie with someone other than the public authority.\textsuperscript{201} However, although there is no legal maintenance obligation between cohabitees, the Ministry emphasized the idea that it always has to be profitable to work, since the rules governing reduction of the benefit were left unchanged in the proposal to amend the Act.\textsuperscript{202} The new rules mean that the assistance is distributed in such a way that both a married and a cohabiting recipient of the start-up benefit will be allowed the benefit including other possible maintenance supplements. The cohabiting or married cash benefit recipient will have the benefit reduced to a total amount corresponding to the cash benefit, but not less than twice the start-up benefit. This also became applicable to those allowed support according to the Integration Act.\textsuperscript{203}

For persons receiving the start-up benefit an additional maintenance support is allowed, which is designed to be higher for singles than for cohabitees and married couples. If both parents are living with one or more children, the additional support can, at most, be allowed once for each child. For each household the additional support is maximized to cover two children, and where there are more than two children in the household the support is allowed for the two youngest. The household is defined as consisting of the applicant, the applicant’s spouse or cohabitee, and children under 18 years old living at home and domiciled in the accommodation. A child with personal obligations for the support of a spouse or a child will not be considered a part of the household unit.\textsuperscript{204}

\textsuperscript{199} \url{http://www.retsinfo.dk/_GETDOCI_/ACCN/20021BB00105-%C5LF2%2520,2002/1BSF105}.
\textsuperscript{200} See 2002/1 LSF 89, Forslag till Lov om ændring af lov om aktiv social politik och integrationsloven.
\textsuperscript{201} The Constitutional Act of Denmark, Danmarks grundlov, Section 75, stk. 2.
\textsuperscript{202} See 2002/1 LSF 89, Forslag till Lov om ændring af lov om aktiv social politik och integrationsloven.
\textsuperscript{203} Consolidation Version of the Active Social Policy Act, LBK nr 709 af 13/08/2003, Section 26 Stk. 1–3, Integration of Foreigners Act, Integrationsloven, Section 27, stk. 1, 2 pkt.
\textsuperscript{204} Consolidated Version of the Active Social Policy Act, LBK nr 709 af 13/08/2003, Sec-
A one-off benefit can be allowed by the municipality to people who have not fulfilled the conditions to be able to register at the employment office or utilize their working capacity and are waiting for the benefit to be paid.\textsuperscript{205} The total benefit is maximized for those who have received continuous maintenance help for a period of six months. The maximal amounts indicated in the statute vary in relation to whether there is maintenance obligation for a child and whether the recipient is single or either married or cohabiting. The supplementary support for heavy housing expenses which can be allowed under Section 34, is included in the estimation of the total benefit. This also applies to the individual housing allowance which is stipulated in a special law. The rules on how to estimate the total amount of support do not apply to a spouse or a cohabitee living with a person allowed the start-up benefit or help according to the Integration Act. The reduction in benefit, which is also explicitly defined, will last as long as both spouses or cohabitees or the individual have not re-qualified through a new period of six months without receiving benefit.\textsuperscript{206}

For those under 25 years of age the cash benefit will be reduced after six months’ receipt once the person has started an active employment measure or without motivated or sanctioned reason has quit or rejected such a measure. However, a means-tested benefit can be allowed if the person is unable to complete an education that could be financed by state study grants, or if revalidation is not an option for getting the young person into work and if the person is unable to take up work.\textsuperscript{207}

For certain categories there are deviations from the main principle that the support for lawfully wedded couples is the total amount of what both are entitled to pursuant to Section 25.\textsuperscript{208} As shown above, there are special regulations if the cash benefit and the start-up benefit are allowed concurrently in the same household. If only one of the spouses is entitled to support and the other receives a public care contribution or the additional home care allowance for domestic care of a child under the Social Services Act, the cash

\textsuperscript{205} Consolidated Version of the Active Social Policy Act, LBK nr 709 af 13/08/2003, Section 25a.
\textsuperscript{206} Consolidated Version of the Active Social Policy Act, LBK nr 709 af 13/08/2003, Section 25b, c and d.
\textsuperscript{207} Consolidated Version of the Active Social Policy Act, LBK nr 709 af 13/08/2003, Section 25f.
\textsuperscript{208} Consolidated Version of the Active Social Policy Act, LBK nr 709 af 13/08/2003, Section 26, stk. 1–6.
benefit will not be allowed for the caring spouse. If a spouse chooses not to utilize her/his working capacity, as is legitimate for married couples pursuant to Section 13, subsections 7 and 8, the breadwinner will receive an additional benefit of approximately half the amount for a person available for work. Home-care allowance is not available where this option is utilized.

Another particular category subject to special regulations includes people over the age of 60 and those not entitled to the social pension owing to the qualification rules. These people are allowed support at the same level as a married old age pensioner without income other than the state pension. If a person in this category has a child and is not entitled to the additional child benefit, a monthly support payment is allowed.209 Those who are not entitled to full early retirement pension will be allowed at most support equivalent to the start-up benefit.210

3.4.7 Calculation of incomes

The main principle that earned incomes are deducted from the indicated amounts of the benefit is likewise modified in the statutes. When support is calculated for a married person receiving public maintenance support or home-care allowance for domestic childcare under the Social Services Act, Section 26, Subsection 4, only incomes of the other spouse which exceed the amounts laid down for subsistence in the Active Social Policy Act, Section 25, will be deducted. If the applicant or applicant’s spouse earns a wage as part of an active employment measure, DKR 10.24 for each working hour will be disregarded. If the recipient is allowed the reduced cash benefit as a consequence of having been a recipient of support for six months, DKR 28 for each hour of participation in an unpaid employment measure will be exempted from the calculation of the benefit. For a start-up benefit recipient DKR 28 will not be taken into account. No more than 160 hours each month will be disregarded.211 Statutory holiday compensation and holiday compensation covered in the special lost earnings benefit for parents taking care of a child with functional disorders212 will also be deducted from the

212 Consolidated Version of the Social Services Act, LBK nr 764 af 26/08/2003, Section 29.
benefit. Compensation for expenses arising from participation in active employment measures and training measures will be disregarded. This also applies to invalidity pensions and benefits, grants from recognized social funds and foundations exempt from taxation, and remuneration for political commissions. A child’s own earnings and revenues intended for the child, with the exception of the home-care allowance for domestic care of the child according to Section 26a in the Social Services Act, are disregarded when allowing support. This also applies to compensation for non-economic damages.

The municipality is not authorized to allow support if the applicant and the applicant’s spouse can cover their economic needs by their own means. However, capital up to DKR 10,000 for singles and DKR 20,000 for married couples is ignored. Furthermore, means that are required to maintain or achieve a necessary standard of housing, or to protect gainful employment or educational possibilities, may also be disregarded according to the Act. Moreover, compensation for personal injury and victims of crime, and insurance for work-related injury compensation, are ignored in the assessment. The Minister of Employment can also issue rules to exempt capital pensions, other savings related to quitting the labour market, and life insurances that may be surrendered.

3.4.8 Discretionary supplements to the cash and start-up benefits
Those qualifying for the cash or start-up benefit may in cases of heavy housing expenses or a heavy maintenance burden be entitled to special support – with the exception of certain groups who are excluded from this possibility. This exclusion applies to married couples where one spouse chooses not to make use of her/his working capacity, persons under 25 without maintenance obligations, pensioners and asylum seekers, and persons receiving parental-leave benefit. This support is awarded on the assumption that action to find cheaper accommodation has been taken. The support is also unavailable to those receiving a one-off benefit and to those who have reached the age of 60. Pursuant to Section 92, support for payment of interest charges for

216 Consolidated Version of the Active Social Policy Act, LBK nr 709 af 13/08/2003, Sec-
owner-occupied houses or condominiums, or support for an investment in a co-operative apartment is to be repaid.

Provided there are special circumstances, the municipalities are authorized to allow help to cover reasonable non-recurrent expenses. The prerequisite for such an allowance is a change of the person’s and family’s circumstances and that refusing the expenses would decisively complicate future maintenance. In principle, this support can only be allowed if the expense is a result of needs that were impossible to foresee. In exceptional cases a foreseeable expense may be allowed if refusing it would be of decisive importance for the person’s or family’s subsistence. In addition, the municipality can allow help for medical care, medicine, dental care or similar contingencies not covered by other legal provisions, if the applicant is without personal resources. The treatment has to be necessary and important for the applicant’s health, and assistance is only allowed for private treatment in exceptional cases. Another possible subject for special consideration is the need for expenses connected with parental contact with a child, provided that the applicant lacks personal financial resources. It is also possible to allow expenses for travelling abroad to visit a child who has been illegally taken out of the country. If a custodian dies and custody is transferred to someone other than a biological parent with a maintenance obligation for the child, the municipality is authorized to allow support to the child if the child’s own means, child benefits and advance payment of child support are insufficient to cover maintenance expenses for the child. Removal expenses, both domestic and international that improve gainful employment or housing conditions, provided that the applicant is not personally capable of paying for the expenses, are also within the competence of the municipalities.
3.4.9 Conclusions

Social assistance, which in Denmark is conceptualized as a cash benefit and start-up benefit, is allowed in exchange for activation. Interestingly, the Act that regulates economic assistance is now issued by the Ministry of Employment, a circumstance which reveals how far the Danish welfare regime seems to have aligned itself with the European activation strategy. The notion of an active citizen being primarily a wage earner and maintained in the family unit is laid down in an act on legislated politics. The emphasis on active citizenship is also embedded in the constitution. Supporting oneself and child/children within one’s marriage has been made the statutory duty of every man and woman. This notion has been reinforced through the adoption of the Active Employment Contributions Act, which sets out greater demands for activation as a citizen’s duty.

The recognition of care in the Danish last-resort scheme is mainly reserved for a spouse in a traditional nuclear family. However, such a choice will be counted as being less important than making oneself available for activation measures. In addition, the benefit will not be distributed to the caring spouse, but paid as a supplement to the breadwinner. Solo mothers on parental leave, entitled to supplementary benefits under the Social Services Act, are at the most secured a living on a level with the cash benefit. The provision, which is based on an employment principle, is only available for wage earners or self-employed people. The other supplementary care allowances seem to be designed primarily to fit a traditional breadwinner model. Home-care allowance is not available in combination with other public provision or wage earnings. Hence, home-care allowance might not be an option for solo mothers who probably find it difficult to manage without a wage and public authority support for their caring activities.

The legal strategy of using detailed regulations to define the amount, the content of benefit and the preconditions for eligibility could be interpreted as reinforcing legal rights and predictability, thus securing legal protection of the individual. On the other hand, the legislation might give little scope for assessing reality-based needs that are not specified in the regulations.

The cash benefit is formally directed in a gender-neutral way and determined in relation to maintenance obligations. The rules introduced governing qualification periods for cash benefit eligibility, and the distinction made between national citizens, EU/EEC citizens and foreigners, give the impression of an ethnocentric policy separating those contained within and those falling outside the state’s notion of social citizenship.
The particular rules for those not guaranteed the cash benefit in accordance with the qualification periods have attracted political attention. But the contradictory exclusionary outcomes of the start-up benefit and the fact that cohabitees are not always guaranteed the constitutional right to subsistence, but assumed to be dependent on their close relations, are mainly left unchanged. Regarding those eligible for the cash benefit, cohabiting couples are made independent without obligations in relation to each other, in contrast to persons receiving the lower start-up benefit, for whom the dependence is also extended to cohabitees. Accordingly, for cash benefit recipients the marriage contract is decisive for how dependencies are constructed in the regulations. For start-up benefit recipients dependence is extended to cover cohabitees as well, and the household is constructed as the unit which is to be relied on. However, after cash benefit receipt for a period of six months a maintenance obligation between cohabitees is legally established. The fact that the benefits are determined in relation to age, and assume that persons aged below 25 years without child maintenance responsibilities are less needy than others, might indicate that maintenance obligations within the family, in relation to adult children, are indirectly prolonged. The statutory duty to comply with demands for activation, which is also differentiated according to age, has partly been extended to include those granted benefits in the event of illness and early retirement pensions, who are also now expected to fulfil the citizen’s duty to be active. Child maintenance is constructed entirely as a parental obligation in Danish regulations. The only explicit circumstance giving a child the status of a legal entity entitled to social assistance is if a custodian dies and leaves the child without maintenance or an under-age pregnant daughter in need related to the pregnancy. Consequently, the child’s self-earned money is exempted as income in the calculation of the benefit. In addition, a new partner has no obligation to provide for a non-biological child. Where economic assistance is allowed for a child, the sum will be reclaimed from the lawful providers.

The notion of an active citizen fulfilling her/his societal duty in cooperation with the authorities can be questioned. The conditions show little sign of relations characterized by equality. Socially excluded recipients are forced to be included through legislation that contains elements of coercion. In Denmark, applicants and recipients of economic assistance seem to be dependent for their life chances on the notion of citizen’s duties, and a refusal or inability to comply with the demands could well lead to exclusion from a life of human dignity.
## 4 Comparison

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</tbody>
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The table above presents a summarized comparison of the last-resort schemes, conceptualized as social assistance, in Sweden, Finland, Norway and Denmark. The questions which were raised regarding the national regulations in the introductory part of this study are used in the table. Comparatively, the cross-national examination of social assistance as legally constructed, shows how all the countries in the study have moved towards a liberal notion of an active, autonomous citizen, poorly adjusted to the living conditions of solo mothers. Clearly, social assistance legislation in Sweden, Finland, Norway and Denmark has the same objective: to encourage the development of an autonomous citizen through waged work or support from the family, a citizen who is independent of public support. The Nordic employment strategy in combination with a general social protection in solidarity with those in need is still visible in social assistance schemes, though seemingly advancing the notion of active citizenship that underlines a work-related social protection. The contradictory elements of the human rights discourse in the activating strategy that protect private autonomy within the traditionally conceived ‘normal’ family in order to eliminate dependence on public support, seem to be a formal understanding of gender equality that does not take seriously the vulnerable situation of solo mothers. This also applies to the Nordic countries examined in the study.

Clearly, solo mothers belong to a group which has historically been and still is in contemporary society particularly vulnerable economically. They are women, who in general earn less than men, and they are family providers, bearing the main economic responsibility for others. Moreover, as theoreti-

<table>
<thead>
<tr>
<th>SOCIAL ASSISTANCE</th>
<th>Sweden</th>
<th>Finland</th>
<th>Norway</th>
<th>Denmark</th>
</tr>
</thead>
<tbody>
<tr>
<td>Activation demands</td>
<td>Yes, for indicated groups.</td>
<td>Yes, obligatory but differentiated according to age and duration of receipt. Exemptions for certain groups.</td>
<td>Yes, for all persons fit for work.</td>
<td>Yes, a pre-condition for assistance. Caring activities and a spouse engaged in domestic work exempted.</td>
</tr>
<tr>
<td>Sanctions</td>
<td>Reduced or terminated assistance.</td>
<td>Reduced assistance.</td>
<td>Assistance terminated or distributed as goods or services.</td>
<td>One-off benefit. Reduced and terminated assistance. Repayment.</td>
</tr>
</tbody>
</table>

1 See for example Florin and Kvarnström, 2001.
cally understood in this study they are solo, and shown to be dependent in relation to a new partner or an ex-husband through divorce proceedings, dependent on the other parent’s provision for the child and dependent on a more or less demanding welfare state.

Why then is the notion of the active citizen, as expressed in the social assistance schemes, not compatible with solo mothers’ living conditions? The care responsibilities that form part of the situation of solo mothers do not seem to be adequately recognized in a legislation that favours and presupposes the dual family as a guarantee for achieving social security, mainly through paid labour and maintenance, either within a perceived traditional family or in a household. In Norway, care has been a criterion for special arrangements in national social insurance, and Denmark and Finland have moved in the same direction. None of the systems seems to have elaborated adequate strategies for providing for solo mothers in need. Seemingly, Home Care Allowances have mainly been constructed to fit a traditional dual-earner family and special benefits for single parents have not been sufficient to reach the levels indicated in social assistance schemes. In Denmark, the special care allowances for families with children are not applicable in combination with other public provision. Thus, indicating that these provisions are not an option for solo mothers. Sweden is the only country in the study that has no particular social insurance benefits geared to the needs of solo mothers. Hence, the legislation is general and gender-neutral without any particular interests being visualized. A Swedish solo mother seems to be the least noticed in social assistance regulations as well as in social insurance schemes, in comparison with her Nordic fellows.

In social assistance regulations, dependence within the family is assumed in all the countries examined but is legally constructed in different ways. Similarly, the legal subject is also constructed in different ways. In Finland the legal subject is a person with or without a traditional family, in Sweden a single or cohabitee with or without children of different ages forming a joint household. In Norway the legal subject is an individual without or with a family calculated as a unit, in reality irrespective of marital status, despite the general principle in family law exempting cohabiters from reciprocal maintenance obligations. In Denmark the legislator distinguishes precisely between persons dependent on their parental, marital and national status. Sweden seems to be the country where social assistance constructed as a last resort has gone furthest. The household, which is conceptualized as the unit for maintenance in social assistance regulations, is understood as gender-neutral. Irrespective of marital and parental status, individuals forming a
household from the starting-point of a sexual relationship, if they come to be in need of maintenance support under the Social Services Act, are obliged to maintain members of the household. In addition, social assistance is subsidiary to all kinds of incomes and disposable assets of members of the household, adults as well as underage children. Both in Denmark and Finland certain incomes and assets are statutorily exempt from the calculation of the assistance, in contrast to Norway and Sweden where the discretionary principles leave the decision in the hands of authorities.

Sweden seems to be the country that uses to the fullest extent a gender-neutral understanding of human needs without any particular interest in need of special legal protection. In contrast to Sweden, the marriage contract is still alive in Norway, Denmark and Finland, though now extending maintenance obligations to cohabiters. In Denmark the marriage contract is valid for persons who have qualified for the cash benefit. A spouse choosing to engage in domestic work is one category that is released from the societal duty to be active on the labour market, in contrast to persons allowed the lower start-up benefit, where the household is assumed to be the unit to be relied on in situations where there is a need for economic assistance. Differentiation, as understood in the Danish regulations, seems to have had as its main outcome an ethnocentric exclusion rather than inclusion of poor people. In addition, Denmark is the only country that in principle deprives children of the status of legal entities in the last-resort scheme. In Norway the marriage contract as decisive for maintenance obligations has recently been abandoned, whereas in Finland de facto maintenance will be decisive in assessing eligibility for a separated, solo mother.

New demanding principles have been introduced in all the countries but to different extents. In Norway the demands are reminiscent of a poor relief discourse in strengthening the powers of the administrative body in combination with an entirely discretionary social assistance. In Sweden there are statutory rights to assistance, though in combination with general demands on the recipient to actively strive for independence through waged work. Individuals below the age of 25 years, students and others in special need of further qualification measures are targeted as having to meet the greatest number of obligations in order to be entitled to social assistance. In Denmark in particular, a workfare policy is supported by the idea that a citizen has the duty to participate in order to be entitled to assistance, which is also strongly embedded in the Danish constitution. In addition, social assistance in Denmark has become a matter for the Employment Ministry and is no longer constructed as a social concern. In contrast, the Finnish constitution
focuses on the right of the citizen to the subsistence and care necessary to lead a life in human dignity, since a total exclusion from eligibility to social assistance is prevented in the interpretation.

A comparison of the contents, what the assistance is aimed at, and the legislation strategy chosen in each country, reveals both similarities and differences. Norway and Sweden partly rely on the notion of individual assessment of needs, still retaining a framework legislation strategy. In Sweden there is a blend of statutory individual rights and discretion within the municipality. Social assistance is intended to cover a reasonable standard of living with reference to fundamental needs. The fundamental needs explicitly protected in the statutes have, however, been curtailed. There is now an assessment of reasonable support for a way of life in general referring to all other possible individual needs. These needs have been exemplified in greater detail in documents issued by the national supervisory body, but they are not binding for the determining authorities.

It is interesting that Norway, the only country outside the European Union, shows the least influence from a human rights discourse. Trust in the ‘good’ state, the existence of which is presumed as a guarantee of the fulfilment of social needs, is still very much alive in Norwegian legislation without any inherent guarantees of social protection in the social assistance scheme. Social assistance in Norway concerns itself with a defensible living and reality-based considerations of individual needs. Norway seems to be the country with the least legal certainty, while the Norwegian legislation makes the awarding of assistance totally discretionary, guided by recommendations that are not legally binding.

In Denmark and Finland the framework legislation strategy has been abandoned in social assistance legislation, in favour of an explicit rights discourse. In Denmark the regular cash benefit, which is statutory, is aimed at preventing exclusion from the labour market and is intended to serve as an economic safety-net for the provision of necessities. The assumption of an active citizen is reflected in the precondition for eligibility. The terms of the precondition are that the applicant has undergone changes that have resulted in incapacity to provide the necessities for the applicant’s or the family’s living. The Danish regulations are largely constructed as workfare, underlined by the fact that regulations are issued by the Ministry of Employment, and might provide little scope for assessing reality-based needs that are not enumerated in the Act. However, the competence to allow help for reasonable non-recurrent expenses implies the possibility that such needs might be considered.
It is questionable whether the Danish start-up benefit, which differentiates between national citizens, EU/EEC citizens and other foreigners, protects the necessities for a life in human dignity, on the precondition that other demands are complied with. In contrast, Finnish social assistance is expressed as protecting what is necessary for a life in human dignity and aims to fulfil a wider task than simply maintaining life: it is intended to cover costs over and above the essential, in activation measures aimed at social inclusion. The constitutional interpretation protects the needs of the individual or family in its relations with the authorities. However, the basic level of assistance is related to a minimized consumption level with the addition of supplementary support. In Finland, the discretionary powers of the authorities are limited to the preventive livelihood support.

At a time when welfare has become constructed more as workfare, the constitutional protection of subsistence and care for a life in human dignity could well become important for vulnerable groups. Finish legislation could function as a promising example. The Finnish constitutional protection of subjective social rights prevents total exclusion from social assistance. Consequently, sanctions are limited in time and range while reduction of social assistance is not allowed to its fullest extent and in principle the statutory right to a dignified life can only be deviated from in favour of the recipient. In all other countries in this study, any constitutional protection is vague or non-existent. In Denmark the right to social assistance is firmly connected with employment as a duty, while a recipient and family can lose benefit partially or even completely, for not complying with the demands. The protection of children’s social security is similarly most fully developed in Finnish legislation compared to the other countries in the study, and supplemented by the Children’s Welfare Act.

The present study can say nothing about the social consequences and social justifications of legal decisions in reality, but this examination of legislation in the different countries, seen from the perspective of solo mothers, could function as a legal-strategic tool for evaluating the protection of one economically and socially vulnerable group. In order to find models for inclusive citizenship, a broader approach is needed than is used in this study, which merely focuses on social assistance. One conclusion – not new but still worth strongly emphasising – is that the concepts underlying legal constructions and techniques, how these are constituted and re-constituted over time, need to be the subject of constant analysis and discussion if solutions are to be found that correspond more closely to human needs in a changing and pluralist context.
Appendix

Glossary

Sweden

care allowance for disabled children vårdbidrag
child allowance barnbidrag
children's pension allowance barnpension
County Administrative Board länstyrelse
development benefit utvecklingsersättning
genral guidelines allmänna råd
housing allowance bostadsbidrag
maintenance allowance underhållsstöd
maintenance support försörjningsstöd
Ministry of Health and Social Affairs Socialdepartementet
parental insurance föräldraförsäkring
reasonable standard of living skälig levnadsnivå
social insurance socialförsäkring
Swedish Consumers Agency Konsumentverket
The National Board of Health and Welfare Socialstyrelsen (SoS)
way of life in general livsföring i övrigt

Swedish legal acts

*Employment Policy Programs Act Lag om arbetsmarknadspolitiska program
*Reception of Asylum Seekers Act Lag om mottagande av asylsökande m.fl.
*Recruitment Benefit for Students of Continuing Education Act Lag om rekryteringsbidrag för vuxenstudierande
Cohabitees Act Sambolag
Instrument of Government Regeringsform
Marriage Code Äktenskapsbalk
Parental Code Föräldrabalk
Social Insurance Act Socialförsäkringslag
Social Services Act Socialtjänstlag
Social Services Decree Socialtjänstförordning
Finland

- basic benefit: utkomststödets grunddel
- childcare allowance: vårdbidrag för barn
- handbook: handbok
- livelihood support: utkomststöd
- maternity allowance: moderförsörjningsbidrag
- minimum consumption level: minimikonsumtionsnivå
- Ministry of Social Affairs and Health: Social- och hälsovårdsministeriet
- preventive livelihood support: förebyggande utkomststöd
- study allowance: studiebidrag
- supplementary benefit: utkomststödets tilläggsdel

Finnish Legal acts

Act Concerning the Status and Rights of Social Welfare Clients: Lag om klientens ställning och rättigheter inom socialvården
Child Home Care Allowance and the Private Care Allowance Act: Lag om stöd för hemvård och privat vård
Registered Partnerships Act: Partnerslagslagen
Child Maintenance Act: Lag om underhåll för barn
Social Assistance Act: Lag om utkomststöd
Child Welfare Act: Barnskyddslag
Social Assistance Decree: Förordning om utkomststöd
Family Carer Act: Familjevårdarlag
Housing Allowance Act: Bostadsbidragslagen
Marriage Act: Åktenskapslagen
National Pension Act: Folkpensionslagen
*Public Employment Service Act: Lag om offentlig arbetsverksamhet
Social Welfare Act: Socialvårdslagen
Social Welfare Decree: Socialvårdsförordning
Rehabilitating Work Service Act: Lag om arbetsverksamhet i rehabiliteringssyfte

The Constitution of Finland: Finlands konstitution
Unemployment Security Act: Lag om utkomstskydd för arbetslösa

Norway

- basic amount: grunnbeløp
- cash benefit: kontantstøtte
- childcare support: stønad til barnetilsyn
circular
client contact
defensible way of life
Directorate of Social Affairs and Health
economic rights
economic support
educational support
employment office
livelihood support
lone parents
maintenance allowance
Ministry of Social Affairs
transitory benefit

**Norwegian Legal acts**
*Registered Partnerships Act*
*Administrative Procedure Act*
*Child Act*
The Constitution of Norway
Home Care Allowance Act
Marriage Act
National Insurance Act
Social Services Act

**Denmark**
activation measures
advance payment of child support
cash benefit
child benefits
early retirement pension
employment contribution
employment office
flexible working hours
homecare allowance

rundskriv
brukerkontakt
forsvarlig levesett
Sosial- og helsedirektoratet
økonomiske rettigheter
økonomisk stønad
utdanningsstønåd
aetat
stønad til livsopphold
enslige foreldre
barnebidrag
Sosial- og helsedepartementet
overgångstønåd

Lov om regisereret partnerskap, partnerskapslov
Lov om behandlingsmåten i forvaltningsaker, forvaltningslov
Lov om barn og foreldre, barneæt
Kongeriget Norges Grundlov
Kontantsstøttelov
Lov om ekteskap, ekteskapslov
Folketrygdlov
Lov om sosiale tjenester m.v., sosialtjenestelov

tilbud om aktivering
børnebidrag
kontanthjælp
børnetilskud
førtidspension
beskæftigelseindsats
arbejdsformidling
fleksjob
økonomisk tilskud til pasning af egne børn

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<table>
<thead>
<tr>
<th>English</th>
<th>Danish</th>
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<tbody>
<tr>
<td>housing allowance</td>
<td>boligstøtte</td>
</tr>
<tr>
<td>lost earnings benefit</td>
<td>hjælp til dækning af tabt arbejdsfortjeneste</td>
</tr>
<tr>
<td>Ministry of Social Affairs</td>
<td>Socialministeriet</td>
</tr>
<tr>
<td>Ministry of Employment</td>
<td>Beskæftigelseministeriet</td>
</tr>
<tr>
<td>one-off benefit</td>
<td>engangshjælp</td>
</tr>
<tr>
<td>persons with reduced working capacity</td>
<td>revalidends</td>
</tr>
<tr>
<td>sick benefit</td>
<td>dagspenge under sygdom</td>
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<tr>
<td>special support</td>
<td>særlig støtte</td>
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<tr>
<td>start-up benefit</td>
<td>starthjælp</td>
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<tr>
<td>training</td>
<td>virksomhedspraktik</td>
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<tr>
<td>unemployment fund</td>
<td>arbejdsløshedskasse</td>
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</table>

**Danish Legal acts**

Active Social Policy Act

Benefit Act

Child Benefits and Advance Payment of Child Support Act

Individual Housing Benefit Act

*Integration of Foreigners Act

*Legal Consequences of Marriage Act

*Act Concerning Legal Protection and Administration in Social Matters

Social Services Act

The Constitutional Act of Denmark

*Active Employment Contributions Act

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* Unofficial translation of legal acts made by the author.
PART III

GENDER EQUALITY AND THE BOUNDARIES OF SOCIAL CITIZENSHIP IN A EUROPEAN SOCIAL MODEL
5 Introduction

5.1 Social policy and law in the context of the EU

Social policy measures, conventionally defined as government action concerned with establishing and maintaining the welfare state for the benefit of its citizens, are formed at both national and European Union (EU) level. The European Union level has mainly been concerned with the establishment of the single market focusing on employment, enhancing labour mobility and creating a level playing field of competition for employers within the Member States.¹ Even though responsibility for welfare provision remains primarily in the hands of the Member States, EU law² nevertheless may have a significant impact upon the domestic systems of social protection. There seems to be a shared opinion among legal scholars that the European Union today is a ‘multi-level welfare system’ characterised by a complex combination of local, national and Community policies. The idea of ‘social solidarity’ has become a vital Community component.³

Doughan and Spaventa note how the Community’s contribution to what they conceptualise as ‘multi-level solidarity’ can, however, be seen in both negative and positive terms. A negative focus raises the question of how far the core Treaty provisions on economic policy – aimed at the effective operation of the internal market – threaten national choices about social protection. The process of European economic integration also puts pressure on national welfare choices. The monetary union may also have a negative impact upon domestic social protection systems. It is argued that EU law may make a significant positive contribution to social provision within the European Union,

² The term European Union was introduced in Art. 1 of the Treaty on European Union (TEU) to describe the union of Member States as comprised under the European Community treaties and the TEU. The term is not strictly applicable to the matters of law relating to the EC Treaty (ECT), although it is widely used in that context. The term EU is, however, used for example to describe ‘the EU’ or ‘EU countries’ or ‘EU citizens’, see Steiner, Woods, and Twigg-Flesner, 2006, p. 7.
³ Doughan and Spaventa, 2005, pp. 181–218. In the 1990s academic writing on the subject of ‘multi-level governance’ appeared seeking to explain how the Union is governed rather than focusing on the ‘nature’ of the integration process, resulting in a picture which is not simply based on a conception of the EU as driven by the Member States or by the actions of the EU institutions, see Steiner, Woods and Twigg-Flesner, 2006, p. 16.
which supports and supplements the domestic welfare states. For example, at the domestic level, a refusal to recognise certain forms of welfare need can effectively exclude many individuals from membership of the solidarity community; and indeed, national welfare systems can be organised in a manner which systematically discriminates against disadvantaged groups such as women and ethnic minorities. Similarly, at the supranational level, long-term resident third-country nationals have been excluded from membership of the Union's solidarity community.4

At the Lisbon Summit, the Member States pledged that Europe would become the most competitive, knowledge-based economy in the world by 2010 while simultaneously maintaining commitment to solidarity and equality. Among the areas thought to be in need of reform are employment and social policy.5 A proposal for a decision on the European Year for Combating Poverty and Social Exclusion in 2010, ‘making a decisive impact on the eradication of poverty’, was presented by the European Parliament and the Council in December 2007.6

The creation of a truly integrated market and a common currency has led to a new context for social policy, setting the stage for enhanced EU involvement. One stage on the road to monetary union is the objective of ensuring the convergence of the economies of the Member States, measured by criteria set out in the EC Treaty.7 These are commonly referred to as the ‘convergence criteria’. Only countries which satisfy the convergence criteria will be able to join the single currency.8 All Euro-zone countries are seen as having a stake in the success of each other’s efforts to change their policies on work and welfare to ensure fiscal sustainability. Issues previously treated strictly as national concern have now moved onto the EU agenda, and a new social policy vision has emerged that gives greater attention to increased participation in the labour market and places more emphasis on active welfare-state measures. Among the focal themes proposed for the European Year 2010 for Combating Poverty and Social Exclusion are, in addition to an inclusive labour market, child poverty, the gender dimension of poverty, access to basic services, overcoming discrimination and addressing the needs of disabled and other vulnerable groups.9

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7 Articles 98–124 EC Treaty.
9 COM (2007) 797 final, p. 3.
5.1.1 Aim and approach

European integration and common objectives in the EU are bound to exert normative pressure on national welfare models. A European social model invokes certain underlying cultural and political tensions regarding social rights and duties. Moreover, cross-border mobility within the EU highlights the question of boundaries in European social citizenship, i.e. who is included or excluded from the right to move freely and the rights ancillary to such free movement. The way the EU institutions and the Member States choose to deal with these tensions, is a perennial issue that ought to shape the future of the EU.

In this study, gender is used as one important factor for analysing processes of social exclusion and inclusion in social security law in the context of the EU. The aim is to uncover and analyse how the meaning of a European social model and gender equality is understood, regulated and articulated; the strategies that are used; and the social consequences these strategies and the discursive fixing of meanings in EU law might have for social security law and for solo mothers in a Swedish context. A gender perspective, utilising the concept of solo mothers as an analytic concept, on a European social model and on the objectives for its modernisation, raises several questions from a legal point of view.

First, the legal basis for regulating social security and the legislation strategies chosen in the EU are of interest in evaluating what effects these strategies might have on national social security, if they are being harmonising, converging, co-ordinating strategies, or strategies in the form of non-binding soft law measures and co-operation between the Member States.

Second, the personal and material coverage as stipulated in EU law is another question for the analysis of social security in the context of EU. The concepts of worker, family, citizenship, and of social rights and duties for various groups of people, e.g. the degree of which the less economically or ‘non-active’ section of the population is included in social security regulation at the EU level, ought to mirror constructions of normality in EC law and the boundaries of European social citizenship. Which norms are privileged, and hence, how is normality constructed in the EU?

10 The analytical concept of solo mothers is presented in the introduction to the thesis on p. 29–34.
11 The concept of social citizenship is presented in the introduction to the thesis on p. 34–39.
Third, the fact that social security regulations binding on the Member States are issued by European legislative bodies, raises inter-discursive and inter-textual questions for Swedish social policy and law. Instead of focusing on EU law and national law separately, it seems more appropriate to analyse their interaction.

Highlighting the normative elements in EC law may act to link the content and form of social law with political struggles and discourses. Social security law, as explained in the introduction to this thesis, is understood in this study to be constructed and articulated in a mix of discourses at different levels of abstraction. The EU may well be understood to constitute one ‘culture’ that is determined by many cultures. In interdisciplinary analyses of European Union discourses, Europe is characterised as unified by common goals and values, by a particular model of society, and by economic and legal agreements. Historical and sociological studies today are moving from a cultural definition to a sociological and political construction of a European identity.12 The range of different meanings and aspects of European identities, are highlighted by statements such as ‘Europe is a discourse’, ‘a normative center’ and ‘a political program’.13

5.1.2 Methodological considerations

Rule-oriented description and systematisation of social security law in the EU is in this study combined with a discourse analysis approach.14 A range of different meanings of Europe and European citizens stresses the constructive aspect of ‘doing Europe’, and places the action, the ‘doing’, the conscious discursive construction in the foreground.15 Hence, examination of how strategies and discourses in legal regulation and in the textual production of policy documents take part in the construction of a social model for Europe, including the construction of normality is – with inspiration from critical discourse analysis – also the object of this study.

A gender-sensitive examination of the social dimension in the EU requires an interdiscursive approach. The boundaries between the legal branches of employment law and EU action in the field of social law are to some extent dissolved. Employment law aims to provide common standards of protection for workers throughout the EU while social rights aim to promote and

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12 See Wodak and Weiss, 2005, p. 121.
14 The discourse analysis approach to law is theoretically and methodologically presented in the Introduction to the thesis on p. 39 ff.
encourage the wellbeing of Union citizens. From a Swedish perspective, this separation of employment law from social law also seems unclear, since social security legislation in Sweden is mostly placed within the branch of social law. In this study, social law is therefore given a broader interpretation than in the delimitations of legal branches commonly drawn up in international laws.

The main sources of knowledge in this study are European human rights instruments; Community and Swedish law; jurisprudence of the European Court of Justice (ECJ),¹⁶ and Swedish case law; communications from EU institutions, mostly the Commission and the Council; preparatory works to legal acts of the Swedish government; and legal dogmatic works.

¹⁶ The entire jurisprudence of the European Courts is commonly referred to as judicial legis-
lation. Judicial legislation embraces not only decisions, but general principles and even expres-
sions of opinion, provided they concern matters of Community law, and now, to a limited extent, some aspects of Union law. See Steiner, Woods and Twigg-Flesner, 2006, p. 61.
6 The EU – a multilevel welfare system

6.1 International social security law

International social security law is a term that denotates a variety of phenomena. On the one hand it is supposed to mean the social security rules which are promulgated by international organisations, for example the International Labour Organisation (ILO), or the European Council or the European Community. In this context, social security law means the law of social security that is enacted by international organisations and imposes on their member states the obligation to adapt their national social security laws to international standards. The notion of international social security law can also mean the specific branch of national social security law that is designed to cope with problems emerging from the existence of different national social security laws. In this context, international social security law has the function of solving problems by establishing choice of law rules. International agreements aimed at accomplishing these tasks, can assume the form of an international treaty under international public law, or assume the form of a binding law of an international organisation.¹

Social security issues in Europe were primarily dealt with in labour conventions concluded between states, but a number of bilateral agreements devoted solely to social security emerged at the early 1900s. The first multilateral social security agreement appeared in 1919. It was concluded between the Scandinavian countries, namely Sweden, Denmark and Norway and concerned compensation for employment injury. The Nordic convention on Social Security was concluded in 1955 by the five Nordic countries – Denmark, Norway, Sweden, Finland and Iceland – after the establishment in 1954 of a Nordic labour market.² The currently valid Nordic convention in principle only covers persons and benefits that are not covered by EC Regulations of co-ordinations.³

The EEC Treaty represented the culmination of a movement towards international cooperation which had been growing throughout the twentieth century. Although the EEC was designed to create an economic community and to create a single ‘common market’ in Europe, the founder members

³ SÖ 2004:32; Prop. 2003/04:44.
were fired by ideals of a closer union among the peoples of Europe in order to preserve and strengthen peace and liberty.\textsuperscript{4} Article 48 in the original EEC Treaty (now Article 39) that laid down the principle of equal treatment between national and migrant workers and which embodied principles in previous multilateral agreements is one example of an international agreement in the form of international public law. In the EEC Treaty the Council was afforded the power to adopt measures necessary to provide freedom of movement for workers and their dependants according to Article 51 (now Article 42). Examples of such binding laws are EC regulations on free movement and on the co-ordination of social security systems.\textsuperscript{5}

6.2 Social rights as human rights

The Universal Declaration of Human Rights (UDHR) adopted by the UN General Assembly in 1948, was underpinned by the image of the indivisibility of human rights.\textsuperscript{6} This image expresses that all human rights are universal, indivisible and interdependent and interrelated. The international community is supposed to treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. However, the reality is the schism between ‘classic’ civil and political rights and freedoms, the foundations of which were laid in the eighteenth century, and ‘modern’ or ‘second generation’ economic and social rights and principles, associated with the twentieth century welfare state and the introduction of international labour standards.\textsuperscript{7} At regional level this schism was also mirrored in the Council of Europe’s drafting of two separate treaties, the European Convention on Human Rights 1950 (ECHR)\textsuperscript{8} and the European Social Charter 1961

\textsuperscript{4} See Steiner, Woods, and Twigg-Flesner, 2006, p. 3.
\textsuperscript{5} Regulation 883/2004 that not yet has been applicable was adopted by the Council and the Parliament in 2004 and will replace Regulation 1408/71. Directive 2004/38 which harmonizes the rules on free movement for EU citizens and their family members was adopted in 2004 and amended Regulation 1612/68.
\textsuperscript{6} Kenner 2003, pp. 1–2.
\textsuperscript{7} Ibid.
\textsuperscript{8} The Convention was incorporated, that is to say inserted without any changes whatsoever, into the Swedish legal order when Sweden joined the EU in 1995. Incorporation is the form of implementation that provides the strongest position for an international agreement. The fundamental human rights laid down in the European Convention together with constitutional traditions in the Member States constitute according to Article 6.2 TEU the general principles of EC law. In several recent cases regarding free movement the Court has ruled with reference to the Convention. See Ingmansson, 2005, p. 26.
ECS). The former was prioritized over the latter and different mechanisms were established for enforcement and monitoring.

Economic and social rights have been highly contested as a consequence of disagreements, based on liberal and communitarian theories, about the framework of ‘rights’ and of ‘citizenship’. Liberalism, individualism and property ownership have been given overriding importance. Thus, civil and political rights, in contrast to economic and social rights, are regarded as truly fundamental. Economic and social rights, such as the right to social assistance, are often not regarded as rights, or at least not fundamental rights (granted in general on an equal footing to citizens and non-citizens alike whatever their content), but rather as mere policies or programmes. In human rights discourse, the state’s obligation is one of non-interference rather than positive action. A difference between human rights – granted to everyone within the territory of a state – and citizenship rights – reserved for certain individuals only – have been established in constitutional texts. EU citizenship, which is understood to add a second layer of new rights enjoyed in any member state to the first layer of nationality rights enjoyed within a member state, has been developed mainly through negative integration which has facilitated a liberal-inspired form of social contract for the EU.

The idea of a social contract is part of the notion of citizenship. Citizenship was established within bounded and defined communities, and this automatically created a criterion for exclusion. Nationality became the essential attribute for determining an individual’s entitlement to citizen rights. The construction of EU citizenship reflects an indirect link between an individual and the Union, mediated by the nationality of a member state. From a liberal standpoint, there is no contradiction in granting certain rights (such as the right of free movement) to nationals from EU member states as a precondition for the operation of the single market. From the communitarian standpoint this redefinition of the privileges of national citizenship requires that EU citizenship rights are subordinated to respect for national identities.

The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR) and the European Social Charter of 1961 (ESC) have had the task of improving living and working conditions for migrant workers. These instruments contain norm sentences defined by

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9 The European Social Charter (ESC) was adopted in 1961, and came into force in 1965. The ESC is available at http://www.coe.int/T/E/Human_Rights/Esc/.
case law, primarily through the practice of the European Court of Human Rights (Convention) and the European Committee of Social Rights (Charter). The European Social Charter, which was revised in 1996 (Revised ESC), is meant to guarantee social and economic human rights, especially for workers. Sweden has approved the revised Charter without any legal amendments whatsoever. Another human rights instrument is the Community Charter of fundamental rights for workers (Community Social Charter) that was adopted as a political declaration by Member States in 1989.

In recent years attempts have been made to render economic and social rights more legally effective, despite the formal separation between fundamental rights and policies. The potential of the European Social Charter to serve as an effective instrument for complementing the European Convention and upholding human rights has been realized during recent decades. The Charter’s key areas in social protection are: protection of the family; social insurance; social care; and social assistance. Non-discrimination on the grounds of sex in matters of employment and occupation is the right of all workers. Hence, the Social Charter is not concerned with social rights for citizens but with fundamental rights for workers. Although the legally unenforceable Community Social Charter principally targets the social protection of workers, reference is nonetheless made to ‘social exclusion’. Under Point 10 it is stipulated that Member States should provide sufficient resources and social assistance to individuals who have been unable either to enter or re-enter the labour market and have no means of subsistence. Women are no longer treated as the ‘weaker sex’, and special protection for women is restricted to pregnancy and motherhood (art. 8). Article 27, added in the revised Charter in 1996, states that ‘all persons with family responsibilities and who are engaged or wish to engage in employment have a right to do so without being subject to discrimination and as far as possible without conflict between their employment and family responsibilities.’ It is also stated that every person has the right to protection against poverty and social exclusion (art. 30).

As a consequence of the present emphasis on active labour-market participation in social policy, there are issues in relation to the Social Charter

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14 At the Strasbourg Summit in 1989, the eleven Member States adopted the Community Charter in the form of a declaration. The European Council took note that the Commission had drawn up an action programme and invited the Commission to submit initiatives falling within the competence of the Community. The Community Charter is available at http://europa.eu/scadplus/leg/en/cha/c10107.htm.
15 See also Closa, 1998, pp. 266–283.
that need to be reconsidered by the EU. The measures to encourage the unemployed to take up rehabilitation programmes and training courses while at the same time respecting their right to earn a living in an occupation freely entered upon (Art. 1) is one such issue. The new activation criteria limiting the entitlement to subsistence level social assistance (Art. 13) is another.16

One of the most explicit statements of European policy regarding poverty is to be found in the Council Recommendation from 1992 on ‘common criteria concerning sufficient resources and social assistance in social protection systems’.17 The Council urged that the fight against social exclusion should be regarded ‘as an important part of the social dimension of the internal market’ (§ 7) and should be conducted in a spirit of solidarity (§ 8), in line with the Community Social Charter. The recommendation recognised ‘the basic right of a person to sufficient resources and social assistance to live in a manner compatible with human dignity’ (part IA). Interpretation and implementation of this non-binding Recommendation are however left to the Member States, in the name of subsidiarity.18 This principle of subsidiarity means that the Community shall take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

6.3 Social objectives in Community law

EU social policy objectives in the EC Treaty (Articles 136–145) are clearly stated, following the example of the European Social Charter of 1961 (ESC) and the Community Charter of the fundamental social rights of workers of 1989 (Community Social Charter). These objectives are the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high levels of employment and the combating of exclusion.19 Article 2 in the EC Treaty gives to the EU the additional task of attempting to seek for a high level of employment and of social pro-

17 Council Recommendation of 24 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems (92/441/EEC), OJ L 245 of 26 August 1992. A recommendation has no binding force, i.e. is ineffective in law, although it has persuasive authority. See Steiner, Woods and Twigg-Flesner, p. 57.
19 Article 136, consolidated version of the Treaty establishing the European Community.
tection, equality between men and women, the raising of the standard of living and quality of life, economic and social cohesion and solidarity among Member States. Article 3(2) lays down that the ‘Community shall aim to eliminate inequalities, and to promote equality, between men and women’ in all activities. The Council may unanimously, according to Article 13, take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 2 in the Treaty on European Union (TEU)20 comprises a number of social goals, including economic and social progress; a high level of employment; economic and social cohesion; the introduction of citizenship of the Union; and the free movement of persons within the Community. These objectives are meant to be achieved while respecting the principle of subsidiarity as defined in Article 5 of the EC Treaty. This principle of subsidiarity was introduced by the Maastricht Treaty (TEU) and has become one of the cornerstones of EU decision-making. The subsidiarity test, it is argued, is applied only in a political way in the EC decision-making process.21

The original EEC Treaty22 contained few articles (Art. 48 and 51) specifically covering social policy. The Single European Act23 gave new impetus to social policy, especially in the areas of health and safety at work, dialogue with social partners and economic and social cohesion. The important changes to the Treaty of Amsterdam24 that took effect from 1999 gave the EU institutions greater powers to adopt social policy measures onto the agendas of key actors such as the Commission and the Council Presidency.

The Treaty of Amsterdam incorporated into the EC Treaty the Agreement on Social Policy, which was annexed to the Treaty on European Union (Maastricht) and from which the United Kingdom ‘opted out’. Article 136 in the consolidated version after the Treaty of Amsterdam, confirmed that social policy falls under the joint responsibility of the European Community

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20 Treaty on European Union, (TEU), signed in Maastricht on 7 February 1992; Protocol and Agreement on Social Policy, concluded between the Member States of the European Community, with the exception of the United Kingdom. The TEU came into force on November 1 1993. From that date on the EEC Treaty became the EC Treaty.
22 Treaty establishing the European Economic Community (EEC), signed in Rome on 25 March 1957.
23 Single European Act (SEA), signed in Luxembourg on 17 February 1986 and at the Hague on 28 February 1986.
24 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed in Amsterdam on 2 October 1997.
and the Member States. Article 137 provides that the Council may primarily, by adopting directives by a qualified majority, act or reinforce its action in areas such as the integration of persons excluded from the labour market and equality between men and women with regard to labour market opportunities and treatment at work. The Council may also unanimously adopt measures designed to encourage the combating of social exclusion.

The Treaty of Nice,\textsuperscript{25} that came into force on 1 February 2003, stipulates the fields in which the Community is to support and complement the activities of the Member States. The Council is authorised to adopt harmonising measures by means of directives and minimum requirements for gradual implementation as regards social security and social protection for \textit{workers} under Article 137.1 (c), and the integration of persons excluded from the labour market, under point (h) without prejudice to Article 150. Pursuant to the latter Article the Community shall implement a vocational training policy and adopt contributive measures, excluding any harmonisation of the laws and regulations of the Member States.

With regard to the combating of social exclusion listed in Article 137.1 (j) and the new competence field of modernisation of social protection systems under subparagraph (k), without prejudice to the objective concerning social security and social protection of workers, the Council is only allowed to adopt ‘soft law’ measures designed to encourage co-operation between the Member States, without any power whatsoever of legal enforcement. The Treaty restricts itself to introducing both the open method of co-ordination (OMC), a soft governance technique which is meant to influence national policies\textsuperscript{26} and the Social Protection Committee established under Article 144 into the Social Policy Chapter of the EC Treaty, attempting to give both OMC and the managing body some constitutional status.

Social exclusion is a matter to be dealt with by the Member States themselves. Europe can, however, interfere up to a point, by imposing minimum norms, or by encouraging and coaching the Member States in the use of techniques such as the open method of co-ordination (OMC).\textsuperscript{27} A further move towards informal approaches to law-making such as the use of soft law methods, e.g. the OMC, can be seen following the conclusions of the Lisbon Council Summit in 2002. The disadvantage of this model is pointed out.


\textsuperscript{26} See de la Rosa, 2005, pp. 618–640; Trubek and Trubek, 2005, pp. 343–364. For a discussion on OMC as a legal source in a Nordic context, see Määttä, 2006, pp. 553–571.

\textsuperscript{27} Schoukens, 2002, pp. 136–140.
OMC allows the democratic structures of the European Parliament to be bypassed, increasing concerns about democratic deficit in policy-making.28

6.3.1 The EU Charter of Fundamental Rights

The Charter of Fundamental Rights29 (EUCFR) was adopted as a political declaration at the Nice Council in 2000 and linked the combating of exclusion with the revised Social Charter of the Council of Europe. The promotion of employment and improved living conditions is underlined in the Charter, ‘so as to make possible their harmonization while the improvement is being maintained’. Equality between men and women is according to Articles 2 and 141 EC, a fundamental principle of the European Union. Articles 21 and 23 of the Charter of Fundamental Rights of the European Union prohibit any discrimination on the grounds of sex and require equality between men and women to be ensured in all areas.

Under the term of solidarity, the EU Charter contains a regulation on social security, which is addressed to the institutions of the EU only when they are acting as agents of the EU by implementing EU law. The EU Charter does not provide for any extension of Community power in the area of social security. Rather it will impact upon standard-setting and policy-making in the field of social security under the EU institutions existing competence.30 Social security should only be regarded as a negative right, implying that the EU institutions cannot restrict/inhibit the distribution of rights.31

The EU was nonetheless established for the purposes of economic interests rather than for the protection of human rights. The latter task was first and foremost entrusted to the Council of Europe, which oversees the implementation of the European Convention on Human Rights (ECHR). Moreover, Article 12 (1) of the European Social Charter (ESC), which can be utilized as an aid to interpretation, only means that there is an obligation for the States Parties to adopt, maintain and progress improvement of a system of social security, but not to provide a specific level of social security to all persons. Behind the drafting of the Charter was to clarify which ‘rights’ were of relevance for the EU.32

Both social security and social assistance fall within the scope of the EU’s Social Policy Agenda. Article 34 in the EU Charter (EUCFR) covers social security and social assistance. Article 34 (1) however makes clear that no right to social security exists. The Charter clarifies that rights are to be ‘respected’ whilst principles are to be ‘observed’. Article 34 (1) refers to ‘entitlement to social security benefits’. This tends to confirm the status of Article 34 as being that of a principle. Article 34 (3) in contrast contains a right to social and housing assistance. In order to combat social exclusion and poverty, the Union ‘recognizes’ and ‘respects’ the right to social and housing assistance in order to ensure a decent existence for all those who lack sufficient resources, in accordance with rules laid down by EU law and national laws and practices. This would imply an enforceable individual right where there is none in respect of social security entitlement generally under Article 34 (1). On the other hand, the recognition of national laws and practices has implications for the outcome in individual cases as this right may be substantially restricted.

6.3.2 Treaty of Lisbon
The draft Treaty establishing a Constitution for Europe was designed to replace the treaties on which the Union is based, and thus followed a constitutional course. The draft incorporated into the Constitution, and gave binding legal force, to the Charter of Fundamental Rights. In the Draft Treaty Chapter III on Policies in other specific areas, social policy was given its own section (Section 2). Diverse forms of national practices should according to the Draft Treaty be taken into account by the Union and the Member States. In the Draft constitution the belief was expressed that ‘such a development will ensue not only from the functioning of the internal market, which will favor the harmonization of social systems, but also from the procedures provided for in the Constitution and from the approximation of provisions laid down by law, regulation or administrative action’ (Article III-103). The combating of social exclusion, an objective laid down in Article III-104, 1 (j), in the draft Treaty, was however exempted from those fields where European framework laws may establish minimum requirements for gradual implementation (Article III-104, 2(b)).

A constitution for the EU, however, was never realised. Instead, in June 2007 the Council agreed on a negotiating mandate for the presidency to

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33 Tooze, 2003, p. 163.
elaborate a reformed Treaty to be signed before the end of 2007. In early October 2007 the Draft Treaty was presented and thereafter adopted at the Intergovernmental Conference Meeting in Lisbon. The Lisbon Treaty, which was finally signed in December 2007, means inter alia that the EU has become a juridical person; the distinction between Community and Union is removed, i.e. the concept of the European Community no longer exists; the legislation procedures are simplified; and the legislative competence of the EU is extended. The EU Charter of Fundamental Rights is not incorporated into the Treaty but is made binding and thus given the same value as the Treaty itself. In policy analysis it is maintained that the fundamental rights laid down in the Charter will become more visible in the legal order of the EU and in national courts since the Charter gives instructions about which rights EU citizens possess. Hence, it is assumed the Charter will become an obvious source for interpretation but no new rights or principles whatsoever are produced. Although the word constitution is not used in the amended Treaty, increased emphasis, it is explained, is to be laid on democracy, participation, and the rights of individuals, and the values of the Union.

McMahon points out that the European Court of Justice has long held that equal treatment between the sexes is a fundamental right protected in Community law, which is used even when there is no legislative basis for such a principle. The EU Charter of Fundamental Rights, according to McMahon, recognizes equality as a fundamental right taking the existing paradigm away from the existing focus on negative rights – the right not to be treated differently, without objective justification – towards ideas of a positive right to equality. The Charter, which has now been given binding force, contains in McMahon’s opinion, a number of provisions relating to equality as well as recognition of the principle of diversity. As he puts it, equality is seen as a value and as an objective in the EU.

In a Communication the Commission previously launched legislative proposals for a methodology for systematic and rigorous monitoring of

compliance with the EU Charter of Fundamental Rights. Legal scholars, however, point out that the main impact of Article 34 EUCFR is likely to be in the field of the EU Social Policy Agenda. There is scope for certain limited ‘regulation’, in terms of the EU’s new methods of governance, of social security and social assistance under this Agenda. The suitability of the OMC for regulation of social security and social assistance is, therefore, emphasized.

6.4 Toward a European social model

6.4.1 Hard vs soft law

The question of whether European-level social policy is necessary or justified has a legal perspective, expressed in terms of whether institutions of the European Union have a legal basis on which to enact social policy provisions. These are political questions the answers to which depend on the political perspective adopted. According to the neo-liberal market tradition, a social dimension is undesirable. It is argued that the EU institutions should not set European-level standards, but should leave the internal market to function unimpaired. The convergence model, related to the neo-liberal model, requires co-ordination as a result of economic and political forces that promote a tendency towards convergence, but do not justify a harmonised European-level social policy. The conservative social cohesion or social justice model sees social policy measures as necessary for maintaining and supporting the established social order. Divergent social standards might lead to trade distortions and social dumping. A more radical version of the social cohesion or social justice model that is associated with the Scandinavian Member States in particular, is based on notions of solidarity, viewing social welfare as a collective activity, and the notion of social citizenship rather than emphasising the responsibility of individuals. Social policy measures are conceived as being necessary for the correction of tendencies towards inequality. Each of the four models described above can, according to Tamara Hervey, be found in the Treaty provisions on social policy.

The gradual ‘Europeanization’ of social policy raises questions and presents challenges for the EU about how to realize these policies: through hard law, through governance approaches, or through the development of a

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42 See Tooze, 2003, pp. 191–192,
44 Ibid.
theory of hybrids in order to adapt the legal culture to new circumstances and challenges. Trubek and Trubek, who are proponents of the last mode of approach, plead for a new and richer understanding of what we mean both by ’law’ and ‘European integration’. They explain how the theory of the nature of law makes hard law proponents incapable of grasping the value of soft-law processes as follows:

First, if one thinks that law by its nature must establish uniform rules, the rules must bind the behaviour of all to whom they are addressed, the rules, to be legitimate, must have the sanction of elected representatives of the people and cannot be changed without the consent of those representatives, and that to the extent that the rules create rights, they must be enforceable by courts or quasi-courts, then whatever else a ‘soft’ mechanism is, it cannot and should not be called ‘law’. Second, if one believes that law, so defined, has been important to the integration of Europe, and that the progress of integration can in part be measured by the number of areas that are brought under uniform rules originating at the EU level, then any shift from hard to soft law means a decline in the possibility of integration itself. […] Because of the dominance of the hard law model in our imaginations, proponents of the newer, soft measures have had to carry a heavy burden of proof.

Social policies in the EU seem no longer to make a clear distinction between the Member States and the EU. Annikki Savio starts from an assumption that the EU social policy is no longer EU jurisdiction for either in her argumentation for an alternative perspective on the ‘social’ Europe. From a Finnish view, she points out the discovery that Finland as an EU Member State and the European Union as a New Europe are now talking quite officially about EU social policy in a new way. She expresses this as follows:

The EU’s soft means have succeeded in “infiltrating” … The EU’s “soft social” has, at the national level, now assumed the form of EU informational guidance, but not so much in order to objectify the transformation of national welfare. At the EU level, “soft” has taken the place of “hard”. The role of the Commission is now to act as the stimulus for reflection and as the catalyst for change, benchmarking and innovations, without public discussion that its “partnership” and “policy development” are targeted to encourage Member States to reform their own welfare models.

48 Ibid, p. 45.
The Treaty, however, precludes the adoption of harmonising measures to combat social exclusion or to modernise social protection for citizens for other than workers. Community action in the social sphere must not affect the right of the Member States to define the fundamental principles of their own social security systems. Therefore, the option for the Union has been to fall back upon a less ambitious ’assimilation model’. Without questioning the competence of each Member State to determine its own forms and levels of social protection this model of assimilation is seen to be sufficient to guarantee equal treatment between EU citizens and nationals of the individual Member States, so that foreign migrants are fully integrated into the solidarity system of their host society.

Although Member States positively continue to have exclusive power to determine, organise and finance their national social security systems, new forms of instruments aimed at convergence and increased powers for EU institutions to take actions, have become constitutionally embedded in the Treaty. The open method of cooperation has introduced a shift with traditional legal instruments. In contrast to the logic of binding regulations, it lays down procedures. In fact the model is known as knowledge organisation. In contrast to proponents of soft law, Paul Schoukens in his legalistic analysis of EU social policies concludes that the combating of social exclusion, as a European objective and field of competence, and the modernization of social protection, are kept out of the legal ambit. Only the open method of cooperation can be applied according to Article 137, on condition that it does not affect the fundamental principles of existing social security systems. As he puts it, this competence ground in the fields of social exclusion and modernization of social protection, is introduced in the EC Treaty in a strictly non-legal manner, as only using soft intergovernmental co-operation.

6.4.2 Capability, flexibility and security
Comparisons show that the mix of national models of welfare depends on the political context in which they occur and the national human and social processes involved in policy development. By the late 1990s it became clear that emphasis had shifted towards more active labour-market policies designed to move the unemployed away from benefits and into work. New models of ‘social solidarity’ in the EU are apparently discussed as a consequence of the

introduction of a Union citizenship. To what degree union citizenship will provide a sufficient identity to justify the assimilation of foreign residents and of economically inactive migrant Union citizens and thus promote what could constitute a ‘European social citizenship’ is debated, and questioned, by legal scholars.52

In reshaping the European Union’s social and employment policies, the concept of ‘capability’, developed by Amartya Sen in a series of economic and philosophical texts, has come to the attention of legal thinkers and is seen as a new cornerstone for social law.53 The Supiot Report54 argued that a capability-based approach would help to overcome the opposition between ‘security’ and ‘flexibility’ which had been established in neo-liberal critiques of labour law and the welfare state, and would provide a basis for ‘real freedom of choice’ in relation to labour-market participation. Simon Deakin uses the notion of contractual capacity in relation to the set of ideas associated with the duty to work in labour and social security law. An individual’s capability is, according to this idea, to some degree seen as a consequence of their entitlements, that is to say, their ability to possess, control and extract benefits from a particular economic commodity or resource.55 The idea of conversion factors is pivotal in Sen’s capability approach. In addition to the characteristics of an individual’s person, their society and their environment, institutional or societal characteristics would include social norms, legal rules and public policies.

These can act to entrench inequality of capability, as is the case with social norms which result in institutionalised racial discrimination, or gender stereotyping, or, conversely, to offset inequality through legal interventions of various kinds, including anti-discrimination law.56

As reported by Deakin, in the Supiot report, the capability concept appears in the context of a discussion of the meaning of labour flexibility, where the report notes that flexibility is frequently associated with greater variability in the application of social protection and labour standards, and thereby appears to be opposed to ‘security’.57 However, this view, it is argued, over-

54 Supiot, 1999.
55 Deakin, 2005, p. 4.
56 Deakin, 2005, p. 5.
57 Ibid.
looks the degree to which the capabilities of an individual depend on them having access to the means they need to realise their lives and the resources needed to maintain an ‘active security’ in the face of economic and social risks. In contrast to the tradition based on Marshall’s idea: a model of social citizenship, which sees social rights as conflicting with the market, based on employment and a notion of the ability to work and the presupposition of a particular (bread-winner) family structure, the capability approach sees one of the principal purposes of social legislation and social rights as encouraging the participation of individuals in the labour market. The capability approach seems to be a particular way of thinking about social rights with respect to market processes, but is believed to have potential as a way of breaking out of the impasse established by neo-liberal policies, which view social rights as fettering the growth and integration of markets. The parity accorded to social and economic rights in the Charter of Fundamental rights of the European Union, adopted in 2000, according to Deakin, may be juridical support for the appearance of the capability idea, also found in the developing case-law of the European Court of Justice. Nevertheless, the idea is still based on the market-creating function of the rules of social law. The capability approach appears to concentrate on the notion of ‘active security’ in the face of economic and social risks, risks that are linked to ideas about the freedom of choice and contractual relations, also extended to the risks and contractual relations taken by workers on the free market. However, it is said, the male breadwinner model offers an example of the urgent need to review and renew the mechanisms for the sharing and distribution of social risks arising from the operation of the markets.58

In the new politics of ‘welfare contractualism’, Danny Pieters points out how the state provides welfare benefits in return for which it can require individual citizens to fulfil certain obligations, most notably the obligation to seek and to undertake paid work. In his discussion on freedom of choice in European social security, he claims that ‘contract’ in this context is about the way the administration will exercise its discretion and the way the applicant or recipient of social security will have his/her freedom limited in order to comply with the legal duties imposed on him/her. These contracts, which entail the presence of a real ‘freedom of choice’, can therefore be questioned in the context of social security.59

The Belgian economist, André Sapir, argues that globalization implies changes that create both threats and opportunities. The challenge is in his view for Europe to become flexible, which requires reforming labour market policies and social policies. When thinking about such reforms, he points out how the notion of a single ‘European social model’ is largely irrelevant. In his view the Nordic and the Anglo-Saxon models are both efficient, but only the former in his view manages to combine equity and efficiency. The Continental and Mediterranean models are in his opinion inefficient and unsustainable and therefore in need of reform.60

6.4.3 Combating poverty and social exclusion
Traditionally, EC action has focused on legislation. The legal acquis in the social field does not cover social legislation in the Member States, but rather focuses on specific subjects. The enactment by the EU institutions of non-binding measures of soft law, strategically meant to promote close co-operation between the Member States in the social field, has the aim of encouraging the convergence of national practice in welfare provision.61 These measures, therefore, need to be part of the explanation of changes in national social policy and law.

Following the introduction by the Amsterdam Treaty (Articles 136 and 137) of combating of poverty and social exclusion among the Union objectives, the European Council of Lisbon (March 2000) agreed on the need to take steps to make a decisive move towards the eradication of poverty by 2010. Building a more inclusive European Union was thus considered an essential element in achieving the Union’s ten-year strategic goal of sustained economic growth, more and better jobs and greater social cohesion. Member States’ policies for combating social exclusion should be based on an open method of co-ordination, combining common objectives, National Action Plans (NaPs), and a programme presented by the Commission to encourage co-operation in this field. The European Council of Nice adopted, in December 2000, the common objectives which mean that all relevant bodies, according to national practice, are to be mobilized to facilitate participation in employment, to facilitate access to resources, rights and goods and services for all, and to prevent the risks of exclusion.62 Further, to help the

most vulnerable, addressing those at risk of facing persistent poverty, and socially excluded children, is a targeted objective. Developing an inclusive labour market promoting employment as a right and opportunity for all; guaranteeing an adequate income and resources for living in human dignity; preserving family solidarity and protecting the rights of children, are presented as strategic goals in creating social cohesion in the Union.

Decision No 50/2002/EC of the European Parliament and of the Council established the programme of the Community action to encourage cooperation between the Member States to combat social exclusion. Article 2 of the EC Treaty, lays dawn the Community’s commitment to promoting a high level of employment and of social protection, and the raising of the standard of living and quality of life throughout the Community, and economic and social cohesion. As stated in the Preamble, based on Article 136 of the EC Treaty, the programme takes note of the fundamental political principles in the Social Charter of 1961, particularly the right to protection against poverty and social exclusion in Article 30 thereof, and of the Community Charter of the fundamental rights of workers. Combating exclusion also reflects the rights and principles recognised in the Charter of Fundamental Rights of the European Union. The Programme recommends the recognition of the basic right of a person to sufficient resources and social assistance to live in a manner compatible with human dignity, as laid down in Recommendation 92/441/EEC. Member States are also recommended, based on Recommendation 92/442/EEC, to guarantee a level of resources in keeping with human dignity and conformation with EU’s commitment to promote social inclusion in the modernisation and improvement of social protection systems.

65 Decision No 50/2002/EC of the European Parliament and of the Council of 7 December 2001 establishing a programme of Community action to encourage co-operation between Member States to combat social exclusion, OJ L 10, 12.1.2002. Decisions that may be addresed to States or individuals have the force of law as ‘binding’ act and do not therefore require implementation in order to take effect. See Steiner, Woods and Twigg-Flesner, 2006, p. 57.
The knowledge-based society is conceived to offer the potential for reducing social exclusion. However, in Recital 13 of the Preamble to Decision 50/2002, a job is pointed out as the best safeguard against social exclusion: ‘Measures to combat social exclusion should aim at enabling everyone to support himself or herself, by gainful employment or otherwise, and to integrate into society’. Nevertheless, gender is expressed as ‘a crucial cross-cutting issue which has large impact on the effects and causes of exclusion’. By virtue of Articles 2 and 3 of the EC Treaty the elimination of inequalities and the promotion of equality between men and women should be a feature in all of the Community’s activities. Combating social exclusion is considered to be more efficiently achieved by Community action than by the Member States. Thus, in accordance with the principles of subsidiarity as set out in Article 5 in the EC Treaty, and in accordance with the principle of proportionality, the Community may adopt measures. In the context of the open method of coordination, the Programme aims, according to its Article 3, at understanding, mutual learning and the promotion of innovative practices and dialogue. The Community actions may be implemented within a trans-national framework of analysis, exchange of information and the promotion of dialogue.68

The overall objective of modernization is explained as being to strengthen the role of social protection by making it an effective tool for managing change in the EU, while minimizing negative social consequences. The Social Protection Committee, established by the Council in December 2000,69 is intended to be a forum for exchange regarding policy development and enhancing policy cooperation in the area of social protection. Article 144 of the EC Treaty, as amended by the Treaty of Nice, expands the task of the Committee ‘to monitor the social situation and the development of the social protection policies in the Member States and the Community’.70

In the first report adopted by the Social Protection Committee, progress was estimated to be greatest in the domain of social inclusion. Social exclusion is now perceived as a multi-dimensional problem, requiring an integrated policy approach. A stable job, providing a steady source of income is recognized as the key factor in preventing social exclusion. Addressing the sex-neutral concept of ‘lone parents’, improvements in childcare support and parental leave arrangements are upheld as relevant social inclusion policies

in the Member States. The improvement in minimum-income guarantee schemes is also noted as an important step in the inclusion process. Activation is shown to be the main theme of labour market policy reforms in the Member States, and extends beyond those officially registered as unemployed to other people out of work, e.g. lone mothers with young children. Increasing pressure on those receiving benefits to participate in active labour market programs, and a tendency to tighten the rules governing entitlement to benefit, are also shown to be convergent in the Member States. The European Commission identified core challenges in fighting poverty and combating social exclusion after the first round of the National Action Plans. Developing an inclusive labour market, promoting employment as a right and opportunity for all; guaranteeing an adequate income and resources for a dignified human existence, preserving family solidarity and protecting the rights of children, were presented as strategic goals in creating social cohesion in the Union.

In the European strategy to promote social inclusion the National Action Plans of several Member States recognised growing ethnic and cultural diversity and the higher risk of social exclusion for ethnic minorities and immigrants. In the 2002 report the Commission focused on the flow of third-country immigrants, said to represent an increasingly important challenge for employment and social policy in the Member States and in the Union as a whole. Promoting integration, according to the Commission, requires targeted policy efforts towards both the immigrants and the host societies, of which the fight against discrimination is evaluated as particularly important. The rights of nationals of third countries, and the fight against illegal immigration, were seen in the report as essential parts of the EU asylum and immigration policy. Further, to this process of setting up the institutional and legislative framework, the European social policy measures in employment, social inclusion, anti-discrimination, social protection and gender equality, should also support and strengthen policy efforts at national, regional and local levels.

The resilience of the European Social Model was considered in the Commission report. The Commission highlights the conclusion that those Member States that perform best on all crucial indicators are those where the principles of active welfare states are applied with the greatest consistence and commitment. Given current and future population dynamics leading to a shrinking population of working age, the view is expressed that it is of great importance that most Member States have considerable reserves of labour among women and older workers. Unemployment and family breakdown are seen as the major factors leading to social exclusion and the persistence of poverty traps is still seen as a matter for concern. It is noted that inadequate coverage and the inefficient performance of social assistance schemes is often supposed to make it difficult to tackle problems of social exclusion. With reference to the European Household Panel (ECHP), the report gives prominence to the Scandinavian countries as having the lowest income inequality.74

The national social assistance and minimum income schemes are seen as important instruments in social protection policy, but access to employment is emphasized as the best safeguard against social exclusion. In a report from the European Commission,75 Member States were requested to review and modernize their social protection systems to make them more employment-friendly by removing barriers and disincentives to work and creating the right conditions for making work more attractive. However, as part of the effort to improve incentives to work, the Commission underlined the importance of avoiding stricter conditionality, in particular when imposed on social assistance benefits, which may put particularly disadvantaged people at serious risk of poverty and social exclusion.76

6.4.4 A new social agenda for social inclusion

The need for policy co-operation and co-ordination in the field of social protection led the Commission to present a communication in 2003 aimed at streamlining the open method of co-ordination.77 This streamlining would strengthen the quality and coherence of the EU’s global socio-economic governance, as outlined in the Treaties of Amsterdam and Nice. Contributing to the Lisbon vision of an integrated socio-economic strategy involves accord-

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74 Ibid, p. 10, 15, 22.
76 Ibid, p. 22.
ing to the Commission, streamlining the economic and employment policy co-ordination processes. In the field of social protection it was considered that the different procedures in co-ordinating the policies, the overarching objectives of which are full employment, quality at work, the promotion of social cohesion and inclusion, needed better OMC streamlining.78

Economic policy co-ordination is organised within the framework of the Broad Economic Policy Guidelines (BE PGs), multilateral surveillance (aimed at assessing the implementation of the BE PGs), and the Stability and Growth Pact. Employment policy co-ordination is organised within the framework of the European Employment Strategy (EES), and the European Employment Policy Guidelines (EEP Gs), which set out common objectives and priorities for employment policies, and which are put into practice nationally through National Action Plans (NAPs). The Commission proposed replacing the fragmented organisation of work with a unified structure, referring to social protection as a whole, and organised into three pillars: social inclusion, pensions and health and long-term care. The reviewed and substituted objectives should also include issues of more general relevance, such as gender mainstreaming. The intention was also to replace the current reporting mechanisms with a key instrument in the form of a Joint Social Protection Report, drawn up by the Commission and the Council, which would assess progress made across the full range of common objectives.79

In February 2005 the Commission launched a new social agenda for modernising Europe’s social model80 under the revamped Lisbon Strategy for Growth and Jobs.81

In this new Lisbon strategy delivery is set to be the main issue at both European and national level. Thus, implementation of the reform agenda requires a renewed Partnership for Growth and Jobs. In order to implement the Social Agenda, the instruments available are enumerated in the form of legislation, social dialogue, financial instruments – the European Social Fund (ESF) and the PROGRESS programme82 – the ‘open method of co-ordination’, and the principle of mainstreaming. The link between these programmes and the policy framework established by the Social Agenda is to

79 Ibid.
be strengthened. As regards the EU level, the Commission is meant to play its central role of initiating policy and ensuring implementation. In parallel, Member States have to present National Lisbon Programmes. The new Social Agenda specifies the key priorities: employment and fighting poverty and promoting equal opportunities. These key priorities are meant to support two of the Commission’s strategic goals for the next five years: *prosperity* and *solidarity.* Under the employment priority the Agenda focuses on the creation of a European labour market, emphasising the objective of getting more people into better jobs, including support for women (re)-entering the labour market. Under poverty and equal opportunities the Commission intends to put forward a Green Paper on the intergenerational dimension for analysing the demographic changes of European populations and their consequences. As regards the priority to tackle discrimination and inequality the Commission will examine minimum income schemes in the Member States and set out a policy approach for tackling discrimination, particularly against ethnic minorities such as the Roma.

A new framework for the open co-ordination of social protection and inclusion policies in the EU, based on the shared values of social justice and the active participation of all citizens in economic and social life, was launched by the Commission in late 2005. The aim of the communication is to put in place an enhanced open method of co-ordination (OMC) for policies geared to providing social protection and combating poverty. The overarching objectives of the OMC for social protection and social inclusion are to

- **Promote social cohesion and equal opportunities for all through adequate, accessible, financially sustainable, adaptable and efficient social protection systems and social inclusion policies**
- **Interact closely with the Lisbon objectives on achieving greater economic growth and more and better jobs and with the EU’s sustainable Development Strategy**
- **Strengthen governance, transparency and the involvement of stakeholders in the design, implementation and monitoring of policy**
- **Make a decisive impact on the eradication of poverty and social exclusion, which lies within the groups of objectives that complement the overarching objectives. In this area the objective is formulated as being to:**

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84 Ibid.
e) Ensure the active social inclusion of all by promoting participation in the labour market and by fighting poverty and exclusion among the most marginalised people and groups.\(^{86}\)

The strengthened OMC is meant to be more visible and focuses more on policy implementation, tying in more closely with the revised Lisbon Strategy and giving more room for the learning, exchange and policy dissemination. The Communication of the Commission concluded that current debate about the future of Europe’s social model has placed policies for social protection and social inclusion under an unprecedented political spotlight.\(^{87}\)

In more recent communications as part of the EU strategy for growth and jobs the Commission has proposed a holistic strategy termed *active inclusion*.\(^{88}\) In the renewed EU efforts towards achieving active inclusion the 1992 Council Recommendation on ‘Common criteria concerning sufficient resources and social assistance in social protection systems’ is still considered a reference instrument for EU policy in relation to poverty and social exclusion. More needs to be done to implement it fully, in particular regarding clarification of the criteria and statistical tools that can be used as a benchmark to define the adequacy level of minimum income schemes. Minimum income schemes are, according to the Commission, to be seen in the broader context of access to employment. In order to deepen the OMC in this area, common principles are proposed, however with full respect for the principle of subsidiarity. Common principles will stress the importance of breaking down barriers to entering the labour market with active and preventive labour market measures. It is emphasised in order to make work pay for job seekers, the incentives and disincentives resulting from tax and benefit systems need to be reviewed, while ensuring adequate levels of social protection.\(^{89}\)

In 2007, Member States submitted for the first time, integrated National Reports on strategies for social inclusion, pensions, healthcare and long-term care.\(^{90}\) In a Communication from the Commission it is emphasised that all Member States are facing continuing challenges regarding exclusion and

\(^{86}\) COM (2005) 706 final, p. 5.

\(^{87}\) Ibid, pp. 9–10.


inequality and the need to modernise social protection systems. From the analysis of the national reports some key messages emerge, according to the Commission. One challenge is to reduce child poverty. The risk of child poverty is further compounded by living in a ‘lone-parent’ or job-less household. Increased conditionality in accessing benefits is a major component in ‘active inclusion’ as a means of promoting social and labour market integration. More attention, however, needs to be given to ensuring adequate levels of minimum income, according to the Commission. It is also noted that the governance of EU and national social policies is being strengthened. Stakeholders are increasingly involved in preparing social reforms. The Commission underlines the scope for mutual learning available across all strands of co-operation. The view is emphasised that interaction should be reinforced between national and EU policy levels, and regional and local levels where implementation largely takes place.  

6.4.5 The strategy for mainstreaming gender

Most of the social developments and pressures with respect to social security have a gender aspect, and it is also reflected in policy and law in the EU. The strategy for mainstreaming gender, recognized internationally since the 1995 UN Conference on Women held in Beijing, has become the main tool in the promotion of equality between men and women. Gender mainstreaming combines specific actions consisting in particular of legislation and financial programmes and this dual approach is taken to gender equality at EU level. Gender mainstreaming has become widely accepted in the international community as a new approach to gender equality and a policy-making tool in the EU public context, as well as being translated into a legally binding norm. The agreed common objectives providing pathways for modernising

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92 The marginalization of women in general is further underscored by the fact, as reported by the Commission in 2003, that the gender gap in unemployment based on data from Eurostat rates, still remains significant in the EU. The proportion of women in the workforce in 2003 was however shown to be higher in the acceding states (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia, all of them now new Member States), than in the EU Member States (46 % compared to 42 %). Furthermore, in the acceding Member States, part-time work was shown to be less frequent and more equally divided between the sexes: 6 % of men (7 % in the EU) and 9 % of women (32 % in the EU) work part-time, see European Commission, The social situation in the European Union 2003, p. 9. The figures are based on Eurostat – Unemployment rates 2001 (ILO definition).
welfare systems, including the combating of poverty and social exclusion, are manifestations of how social law and policy in the European Union, together with the concept of mainstreaming as a ‘new’ approach to gender equality, have been moving increasingly into the mainstream of the EU, both in terms of the policy-making agenda and the conditions under which law and policy are made, and in terms of academic reflection on that law and policy.\textsuperscript{94}

In terms of policy agendas committed to social inclusion and gender mainstreaming, however, it is open to question whether concentration on a labour-market orientation towards those actually or potentially employed can succeed. Hervey claims that the link between combating social exclusion and (re)employment is quite different from the concept of ‘Europe-wide solidarity’, which underpinned the notion of social inclusion in the Commission’s White Paper on Social Policy 1994.\textsuperscript{95} Nevertheless, a broader view of European social policy has, in fact, been adopted that examines areas where EC law and policy affect national social policies concerned with the welfare of individual human beings primarily as people and as social beings, rather than as economic units of production or consumption.\textsuperscript{96}

Today there are several structures at Commission level for promoting gender equality.\textsuperscript{97} As early as in 1981 the Advisory Committee on Equal Opportunities for Women and Men was created by a Commission decision, amended in 1995.\textsuperscript{98} The Group of Commissioners on Fundamental Rights, Non-Discrimination and Equal Opportunities was created in 2005, to succeed the Group of Commissioners on Equal Opportunities which had been active since 1996.\textsuperscript{99} Its mandate is to drive policy and ensure the coherence of Commission action in the areas of fundamental rights, anti-discrimination, equal opportunities and the social integration of minority groups, and to ensure that gender equality is taken into account in Community policies and actions, in accordance with the EC Treaty. Following the commitment in the 5th Framework strategy on gender equality\textsuperscript{100} the infor-

\textsuperscript{94} See Shaw, 2000, p. 4.
\textsuperscript{95} Hervey, 1998, p. 173, with reference to COM (94) 333 final, p. 37.
\textsuperscript{98} Commission Decision 95/420/EC of 19 July 1995 amending Decision 82/43/EEC relating to the setting up of an Advisory Committee on Equal Opportunities for Women and Men, O/ L 249, 17.10.1995, p. 43–46.
mal High Level Group on gender mainstreaming was created in 2001. This group is responsible for gender mainstreaming at national level, and supports presidencies in identifying relevant policy areas and topics to be addressed in order to achieve gender equality. In addition, the group is also the main forum for planning strategic follow-up of the Beijing Platform for action, including the development of indicators. Since 2003 the group has also assisted the Commission in the preparation of the Annual Report on Equality Between Women and Men to the European Council. In special actions for gender equality the reconciliation of family and working life was a priority in the 2002 Annual Report on Equal Opportunities. Reconciliation policies were seen to be key components of the gender dimension in the European Employment Strategy and the Social Inclusion process aimed at ensuring favourable conditions for women and men to enter, re-enter and remain in the labour market.

Having regard to Article 289 EC Treaty, a European Gender Institute to foster equal opportunities between women and men was established in 2006. The new centre has its seat in Riga. In the proposal for the Gender Institute the Commission underlines that in spite of progress made, significant problems remain in areas such as gender pay gap, women’s access to participation in the labour market, training, career advancement, reconciliation of family and working life and participation in decision making.

In the 2003 Framework Strategy for Gender Equality the Commission pointed out the growing awareness within the European Employment Strategy, of which gender equality is understood to be a crucial component, that gender pay gaps do not decrease as an automatic by-product of the growing female participation rate, as the pay gaps are linked to structural gender inequalities in the labour market. In relation to the Social Inclusion Process the Commission pointed out the wide gaps that appear when sex is cross-classified with other factors. The risk of poverty for single parents,

mainly women, was around 38% according to statistics from 1999. In the EU, 16% of women and 15% of men were at risk of poverty in 1999.106

The roadmap for equality between women and men for the period 2006–2010107 outlines six priority areas for EU action on gender equality: equal independence for women and men; reconciliation of private and professional life; equal representation in decision-making; eradication of all forms of gender-based violence; elimination of gender stereotypes; promotion of gender equality in external and development policies. In each area, priority objectives and actions, which must be strengthened, according to the Commission, are identified. Gender equality is expressed as a fundamental right, a common value of the EU, and a necessary condition for the achievement of the EU objectives of growth, employment and social cohesion.108 Although there has been significant progress in gender equality, the Commission underlines that inequalities remain and may widen, as increased global economic competition requires a more flexible and mobile labour force. This is understood to impact more on women than on men, since women are often obliged to choose between having children or a career, due to the lack of flexible working arrangements and care services, the persistence of gender stereotypes, and unequal sharing of family responsibilities with men. Turning globalisation into a positive force for all women and men and fighting poverty is presented as the major challenge.109

The first priority area of action for gender equality is the achievement of equal economic independence for women and men. In order to ensure that it pays for both women and men to work, the individualisation of rights linked to tax and benefit systems is emphasised. As regards social protection and the fight against poverty, the roadmap proposes that social protection systems should remove disincentives for women and men to enter and remain on the labour market, allowing them to accumulate individual pension entitlements. As women are still likely to have shorter or interrupted careers and, therefore, fewer rights than men, the risk of poverty, especially for single parents, is expected to increase.110 Combating multiple discrimination, in particular against immigrant and ethnic minority women as these women often suffer double discrimination, is another area identified for action to be taken. The Commission, therefore, intends to monitor and strengthen gen-

109 Ibid.
der mainstreaming, in particular through Integrated Guidelines for growth and jobs. The new streamlined open method of co-ordination has now been extended to cover pensions, social inclusion, health and long-term care, including preparation of gender equality manuals for the actors involved in these processes for the assessment of how social protection systems can promote gender equality. The European Year of Combating Exclusion and Poverty 2010 addresses national and European activities in this field.111

The second priority area of action for gender equality of interest here is the enhancing of reconciliation of work, private and family life. Reconciliation policies are seen as a means of helping to create a flexible economy, while improving the quality of women’s and men’s lives. Better work-life balance arrangements are seen to be part of the answer to the demographic decline. Accessible childcare facilities, services that meet the care needs of the elderly and people with disabilities, should therefore be improved. Moreover, incentives for men to take parental leave and paternity leave and to share leave entitlements with women are also identified as important for gender equality.112

Since major progress remains to be achieved in the various key areas identified in the roadmap, the Commission requires better governance at all levels: EU institutions, Member States, parliaments, social partners, and civil society. The Commission indicates certain key actions needed for this commitment: reinforcing the structures in governance, reinforcing networking and supporting social dialogue, supporting gender impact assessment and gender budgeting, and reinforcing the effectiveness of legislation. The monitoring of the roadmap is also meant to be advanced through an annual work programme, political follow-up and further development of indicators.113

6.4.6  Community Programme for Employment and Solidarity – PROGRESS

Community activities in the fields of employment, social inclusion and protection, promoting gender equality and the principle of non-discrimination have been supported, as shown above, by numerous and separate action programmes. With a view to improving coherence and efficiency the European Parliament and the Council adopted Decision No 1672/2006/EC establishing a Community Programme for Employment and Social Solidarity

112 Ibid, p. 5.
113 Ibid, pp. 11–12.
– PROGRESS.114 The Decision establishes a single and streamlined programme providing for the continuation and development of the activities launched in the various decisions concerning discrimination, gender equality and the combating of social exclusion. The aim is to provide financial support for the implementation of the EU’s objectives in the field of employment and social affairs and hence contribute to the achievement of the Lisbon Strategy objectives. Article 2(2) lays down that gender mainstreaming shall be promoted in all sections of and activities under the Programme. The programme will finance analysis, mutual learning, awareness-raising and dissemination activities, as well as assistance for the main players over the period 2007–2013. The programme is divided into five sections corresponding to five main fields of activity:

1) Employment  
2) Social protection and inclusion  
3) Working conditions  
4) Diversity and combating discrimination  
5) Equality between men and women.

Article 8 specifies the objectives for the 5th section: gender equality. This section shall support the effective implementation of the principle of gender equality and promote gender mainstreaming in all Community policies by:

a) Improving understanding of the situation in relation to gender issues and gender mainstreaming  
b) Supporting implementation of Community gender equality legislation  
c) Raising awareness, disseminating information and promoting debate  
d) Developing the capacity of key European-level networks.

Although it is now accepted that gender equality is a fundamental principle of European Union law and forms part of its human rights protection, it is pointed out that a belief that sex equality law is completed is dangerous and might lead to the regression of the gender equality acquis. For instance, the political focus of EC discrimination law has shifted from the achievement of sex equality to the combat of additional forms of discrimination (namely race, ethnic origins, religion, age, disability, and sexual orientation). This could reinforce the idea that sex discrimination represents a lower priority by

comparison to other grounds of discrimination. Moreover, it is articulated that new multiple forms of discrimination against women, in particular with respect to immigrant women, are not being addressed adequately.115

6.5 Legislative provisions in Community law

Social security has become vitally important for the realisation of the objective of free movement. The free movement of workers is a very traditional field of competence affecting social policy within the Union. Articles 39 to 42 EC Treaty establish the right to free movement for workers, which also entails the banning of discrimination based on nationality among workers of the Member States as regards employment, remuneration and other conditions of work and employment. A specific mandate pursuant Article 42 is given to the Council to adopt those measures in the field of social security that are necessary to provide for the freedom of movement for workers. The EC Treaty itself has, in some cases, direct legal effect, which means that it can be invoked directly by citizens in order to claim rights. This is particularly important in connection with the free movement of workers. In addition, the European Court of Justice case law plays a crucial role in defining the rights which citizens and workers may derive from the Treaty provisions, and from secondary EC legislation. Moreover, the Council may, pursuant to Article 13 as inserted in the Treaty of Amsterdam, unanimously take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.116

Social security legislation in the EU context is criticised for being based on the model of a bread-winner family and therefore understood to be poorly adjusted to ‘modern’ risks involving social security.117 The existing coordination of social security for migrants still reflects the bread-winner ideology of the Member States which founded the European Community. Social security systems were conceived and developed in a socio-economic and demographic context that has changed profoundly. Dramatic changes have occurred in the labour market. Atypical work, often performed by women, and unemployment, which is now conceived as a permanent structural prob-

lem, characterise European economies today. Another major change is the feminisation of the labour market, as more and more women in the Member States have become employed. Consequently, the two-income household tends to be the norm in most countries within the European Community. Moreover, these changes have been accompanied by changes in family structures. Traditional marriage is challenged by other forms of cohabitation, and a steep rise in divorce rates has occurred.\textsuperscript{118} In fact, the conception of a new ‘adult-worker model’ from a life-course perspective, is today receiving much attention in research on the social dimension in Europe.\textsuperscript{119} One result of the emergence of a dual breadwinner family is that unpaid work has also come into focus. Traditionally this was not recognised as an insurable risk in models of social security based on a bread-winner family.\textsuperscript{120}

The types, methods and levels of social security provision however remain within the powers of the Member States. Nevertheless, new governance in the form of the OMC and legislative provisions in Community law, such as harmonising measures in secondary legislation in the form of Directives\textsuperscript{121} and binding Regulations\textsuperscript{122}, extend the scope for EU intervention in national law, and thus reflect the new pluralistic legal context in which social security regulations exist.

6.5.1 Equal treatment for men and women in matters of social security

Both binding and non-binding legal instruments, mainly in relation to working life, have been issued with respect to sex discrimination.\textsuperscript{123} Council recommendation 86/635/EEC on the promotion of positive action for

\textsuperscript{118} Paskalia, 2004, pp. 67–72.
\textsuperscript{119} See Klammer, 2005, pp. 335–361.
\textsuperscript{120} See Mills, 2007, p. 234; Paskalia, 2004, p. 70.
\textsuperscript{121} A directive is (Article 249 EC): binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of norms and methods. Directives require implementation by states before they can be fully effective in law.
\textsuperscript{122} A regulation is described in Article 249 EC as of ‘general application … binding in its entirety and directly applicable in all Member States’. The principal feature of a regulation is its general application: it is a normative rather than an individual act, designed to apply to situations in the abstract, to categories of persons envisaged both in the abstract and as a whole, see Steiner, Woods and Twigg-Flesner, 2006, p. 57 f. A regulation does not require further implementation to take effect since a regulation is entirely binding and directly applicable in all Member States.
women recommended Member States to adopt a positive action policy
designed to eliminate existing inequalities affecting women in working
life.124 In the field of social security Directive 79/7/EEC on the progressive
implementation of the principle of equal treatment for men and women in
matters of social security (Social Security Directive) was adopted as early as
in 1978.125 The Directive contains provisions defining the substance, scope,
and arrangements for the application of another Council Directive – Direc-
tive 76/207/EEC126 – which concerned equal access to employment, voca-
tional training and promotion, and working conditions for men and women
(Equal Treatment Directive).127

124 Council recommendation of 13 December 1984 on the promotion of positive action for
of the principle of equal treatment for men and women in matters of social security (Social
ciple of equal treatment for men and women as regards access to employment, vocational
training and promoting of working conditions, (Equal Treatment Directive), OJ 1976 L 39,
p. 40.
127 The Equal Treatment Directive was significantly amended in 2004 through Directive
2002/73, OJ L 291/15. Although the main discussion about the scope of the Equal Treat-
In Directive 79/7/EEC the principle of equal treatment for men and women in matters of social security only applies to the working population. In Article 3 of the Directive, the material scope is limited to applying to statutory, but not occupational schemes, which provide protection against the following risks: sickness, invalidity, old age, accidents at work and occupational diseases, and unemployment. Social assistance is also covered in so far it is intended to supplement or replace the schemes referred to above. On the other hand, the Directive does not apply to provisions concerning survivor’s benefits, nor those concerning family benefits. The principle of equal treatment, pursuant to Article 4, means that there shall be no discrimination whatsoever, except for provisions relating to the protection of women on the grounds of maternity, on the grounds of sex, either directly or indirectly by reference in particular to marital or family status. This is especially valid as regards the scope of the schemes and the conditions of access thereto, the obligation to contribute and the calculation of benefits. However, Member States are, pursuant Article 7, allowed to exclude from the scope of the Directive the determination of personal age for the purposes of granting old-age and retirements pensions. Moreover, the granting of advantages in old-age pension schemes attributed to the bringing up of children, and entitlements derived from old-age and invalidity schemes for a wife, as well as increases of long-term invalidity, old-age, accidents at work and occupational disease benefits for a dependent wife, are allowed without the prejudice to the right of Member States to make exemptions. Members States are, however, in the light of social developments, supposed to examine whether there is any justification for maintaining the exemptions concerned.

Amendments to the Swedish Parental Leave Act\textsuperscript{128} that were issued in the year of 2000 exemplify how Swedish law is affected by underlying gendered assumptions in EC law. Council Directive 92/85\textsuperscript{129} pursuant Article 8.1 requires that pregnant women and women after childbirth, according to national law or praxis, are given the right to take continuous parental leave of not less than 14 weeks. Article 8.2 prescribes that two weeks of this period of leave is \textit{obligatory} for the mother. The Directive, which is a minimum directive, is aimed at protecting women in connection with childbirth, since

\textsuperscript{128} Föräldraledighetslagen (1995:584), (Parental Leave Act).
these women are seen to be an especially vulnerable risk group. The Directive was partly implemented in Sweden when the Parental Leave Act was reformed in 1995. The right to take parental leave was extended to comprise seven weeks before and seven weeks after childbirth. A reform in line with Article 8.2 of Directive 92/85 was seen as unmotivated and strange in Swedish circumstances. In preparatory works for the current regulation after the amendments in 2000, the Government maintained that Swedish parental leave is not imperative, but based on the right of the parent. The Directive was nonetheless implemented through the adoption of rules which mean that the mother has to take two weeks of the parental leave ‘during the time before or after childbirth’, if the woman in question is not on leave for other reasons. A female employee, according to current Parental Leave Act, also has the right to take leave for nursing.

A new Directive was adopted in July 2006, which consolidated into one directive several of the directives issued with respect to sex discrimination, and which codified the principles established in the case law of the Court. Five of the twelve directives with respect to discrimination have, however, been omitted from the Directive because of the belief that their integration would overcomplicate the system. Neither the Social Security Directive, nor the Pregnancy Directive are included in the Discrimination Directive. The Parental Leave Directive as well as the Part-Time Work Directive, and the most recent directive regarding equality of access to and supply of goods and services are also not within Directive 2006/54/EC. Article 1 of Title I in the new Directive expresses its purpose: ‘to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation’. To that end, the Article contains in (a)–(c) provisions for implementing the principle of equal treatment in relation to access to employment, and working conditions, including pay and occupational social security

schemes. The Member States are urged to continue to address the problem of gender-based and marked gender segregation on the labour market by such means as flexible working-time arrangements in order to enable both men and women to reconcile family and work more successfully (para. 11), including parental leave arrangements and accessible child-care facilities. The directive explicitly states that the principle of equal treatment does not prevent Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue vocational activity or to prevent or compensate for disadvantages in professional careers (para. 22). Discrimination on the basis of pregnancy or on the taking of maternity leave is explicitly prohibited in the directive (paras. 23–25).136

Decisions of the Court with respect to the protection of women have been criticized for re-enforcing and perpetuating the single male bread-winner model and for ignoring the reality of a dual-earner model and the double burdens that women face in the family and at work.137 Traditional welfare states and their social policies, together with the notion of social citizenship derived from these provisions, have evolved around the relationship between paid work and welfare. Feminist research has shown, however, that such a relationship between work and welfare has also been mediated by another relationship, one that links men’s waged labour to women’s unpaid domestic work. Women performing domestic work according to the bread-winner model were thus not included in social protection and social rights on an individual basis. At the same time, this key part of the construction of this model, operated as an obstacle to their integration in the labour force.138

A lesson to be learned from European comparisons of social security claimed by social scientist Ann-Christin Ståhlberg is that if countries want to encourage women and men to engage in paid work and enjoy economic independence, they need to link insurance rights to the extent to which an individual participates in gainful employment. Although income-tested and means-tested benefits are effective regarding redistribution and less costly than universal benefits, European experience shows that they restrict the ability of individuals – especially women – to support themselves through paid work.139

136 For a discussion on the potential to improve and modernize Community equality law through the recast technique: see Burrows and Robison, 2007, pp. 186–203.
The Discrimination Directive includes exceptions rendering different treatment lawful. With respect to indirect discrimination\(^\text{140}\) a provision, criterion or practice can be objectively justified by a legitimate aim, if the means of achieving that aim are proportionate and necessary (Article 2 (1) (b)). Positive action is according to Article 3 (2) lawful, e.g. the protection of a woman’s biological condition during pregnancy and maternity. The Discrimination Directive refers to the Parental Leave Directive, which is a framework directive establishing minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents (clause 1), and which grants working men an individual and non-transferable right to paternity leave, while maintaining their rights relating to employment (para. 26).

6.5.2 The right of EU citizens and their family members to move and reside freely

Article 18 of the EC Treaty, as amended by the Treaty of Nice, lays down union citizenship as the fundamental status of nationals of the Member States when they exercise their right to move and reside freely. The EU enlargement has signalled political and legal considerations of the rules on EU citizenship and the free movement of workers within the EU. The Court’s interpretation of the rules on citizenship has opened three pathways for an EU citizen to migrate freely within the Union and reside in another Member State. First, a citizen can qualify through the classic criteria: as an employee or as a self-employed person; second, by virtue of EU citizenship; or third, by virtue of being a member of the family to an EU citizen.

Regulation 1612/68 on freedom of movement of workers was, regarding the EEC Treaty, and in particular 49 thereof (now Article 40 EC), the first comprehensive legislative provision concerning the right to free movement adopted by the Council of the European Communities.\(^\text{141}\) Regulation 1612/68 was largely based on the notion of a male bread-winner family. Based

\(^{140}\) Sex discrimination is defined in Article 2 of Directive 2006/54/EC. Direct discrimination is where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation; indirect discrimination is where an apparently neutral provision, criterion or practice would put persons of one sex at particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and means of achieving that aim are appropriate and necessary. Harassment and sexual harassment, instructions to discriminate and any less favourable treatment of a woman related to pregnancy or maternity leave are also included.

on Article 39 EC (previously Article 48 EEC), the Regulation, which is still valid in an amended form,⁴¹⁴ lays down in Article 1 the fundamental right of any national of a Member State, irrespective of his place of residence, to take up an activity as an employed person, and to pursue such an activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State. Mobility of labour within the Community must, according to Regulation 1612/68, be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions. He shall, in particular have the right to take up available employment in the territory of a Member State with the same priority, and on the same conditions, as are applicable for nationals of that State. Article 7(2) Regulation 1612/68 extends the principle of non-discrimination concerning access to social and tax advantages to migrant workers, without any further regulatory European-level harmonising measures. The term social advantage under Regulation 1612/68 EEC has been interpreted to include social assistance. Moreover, the European Social Charter (ESC) Article 13(4) provides for treatment of non-nationals in respect of social assistance.⁴¹³

The objective of Regulation 1612/68 was to eliminate obstacles to the mobility of workers, in particular the worker’s right to be joined by his family, and the conditions for the integration of that family into the host country. These rights have been supported by provisions for the enactment of ‘flanking’ measures to ensure more uniform standards of worker protection (then Articles 117–122, now replaced by Articles 136–145) and by the principle of equal pay for equal work for men and women (then Article 119 EEC, now 141 EC).⁴¹⁴

The rules on free movement were not only found in Regulation 1612/68 but also in various other Directives and Regulations, making it difficult to obtain an overview of the field. Moreover, the introduction of EU citizenship has signified the deceptiveness of secondary legislation. Dealing separately

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with workers, the self-employed and with new groups, which have come to have the right to cross-border mobility, i.e. students and other economically inactive persons, has been confusing. With a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence, and to facilitating the exercise of this right, the need for a single legislative Act amending Regulation 1612/68, and repealing various other Acts, became obvious. A new harmonising instrument, Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely, was adopted in 2004. The new directive is commonly referred to as the ‘Citizen Directive’, or, as in Sweden, the ‘Free Movement Directive’. This Directive includes what was contained in former directives and is largely a codification of the extensive praxis of the European Court of Justice.

The introduction of the concept of citizenship raises questions about the kind of rights citizens should expect and has, as shown earlier, fuelled the debate on whether the Community should do more to protect the individual citizen. Recital 31 of Directive 2004/38 expresses respect for fundamental rights and freedoms. Reference is made to the principles recognised in particular by the Charter of Fundamental Rights of the European Union, although the Charter not yet is binding or incorporated into the EC Treaty. Accordingly, the Charter is already relevant for social security law in the EU.

An individual who has never sought to exercise his or her right to freedom of movement will not, in principle, be able to rely on rights under EC law. Such matters will be regarded as wholly internal. The impact of this principle has, however, been limited. But once a connecting factor has been established migrants will be able to rely on EC rights on returning to their own Member State. In more recent cases concerning citizenship, no cross-border movement was involved. The Community link was shown by citizens of one Member State challenging the rules in another Member State.


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In spite of the right of citizens to move and reside freely within the Union, equal treatment for migrating Union citizens and their family members, provided for in the Treaty, still depends on how concepts such as ‘residence’, ‘worker’, ‘job-seeker’, ‘self-employed person’, ‘family’, and ‘dependant’ are constructed in secondary regulations. Although these concepts, in comparison with earlier concepts laid down in Regulation 1612/68, are now mostly constructed so as to be gender neutral, they nonetheless reflect and identify gendered assumptions and reveal the boundaries of social citizenship in the EU context. The meanings given to these concepts in Directive 2004/38 are explored below.

6.5.2.1 Right of residence

Union citizens and family members have, pursuant to Article 6 of Directive 2004/38, the right to reside in another Member State for a period of up to three months without any conditions other than the requirement to hold a valid identity card or, in the case of a family member who is not an EU citizen, a passport. The right to reside for a period exceeding three months is, under Article 7, established for all Union citizens if they are workers or self-employed, or have sufficient resources for themselves and their family not to become a burden on the social assistance system of the host Member State during their period of residence. In addition, comprehensive sickness insurance coverage in the host state is required. This right of residence also applies to a Union citizen following a course of study, including vocational training, under the provision that he/she has sickness insurance and sufficient resources not to become a burden on social assistance.

From Article 8 in Directive 2004/38 it follows that Member States may not require the declaration of sufficient resources to refer to any specific amount of resources. As regards ‘sufficient resources’ the Member States should, according to Article 8 (4), take into account the personal situation of the person concerned. The threshold below which nationals become eligible for social assistance or minimum social security pension, paid in the host Member State, is indicated as comparative figures. Accompanying or joining national and non-national family members have the same right under Article 7(1)(d) and Article 7(2), provided that the Union citizen whom they join or accompany can be defined as a worker; has sickness insurance and sufficient resources for him or herself and his/her family not to become a burden on social assistance.

The host Member State shall, pursuant to Article 9, issue a residence card to family members of a Member State citizen who are not nationals, if the
period of residence is expected to exceed three months. Union citizens who fulfill the terms of Article 7 do not even need to have a residence permit, although they may need to register in accordance with host Member State rules.

The right of residence shall cover the whole territory of the host Member State. Territorial restrictions are, pursuant to Article 22, only possible where they also apply equally to the Member States own nationals. Irrespective of nationality, a family member who has a right to residence, or has a permanent residence permit, has, according to Article 23, a related right to take up employment or self-employment in the host Member State. In a recent ruling the Court has made clear that for a third country national this right to take up work is applicable only in the State where the spouse works, but not in the State where they reside. Non-nationals have no right to move freely on their own, since Article 11 of Regulation 1612/68, according to the Courts’ judgement, is per se meant to favour the free movement of workers.148

6.5.2.2 The definition of worker

The right of residence is dependent on how the concepts of ‘worker’ and ‘self-employed’ are constructed. The definition of worker is shown to vary with the field of application. The concept of worker in Article 39 of the EC Treaty and in Regulation 1612/68 does not necessarily coincide with the one in Article 42 of the EC Treaty or in Regulation 1408/71, in which the rules governing co-ordination of social security for migrating citizens are laid down.149 This lack of coherence was pointed out by the Court in Martinez Sala (C-85/96).150 Furthermore, in Collins (C-138/02)151 it became obvious that Regulation 1612/68 does not apply the concept of worker uniformly.152

There are two aspects to the definition of worker: a formal aspect and an economic aspect. The formal aspect asks whether an individual is employed, rather than self-employed, while the economic test asks about the nature, duration and quality of the work. It is clear from Directive 2004/38 that

149 The rules on the coordination of social security are described in Chapter 6.5.3 on pp. 182 ff.
152 Ibid, subparagraph 32. See also Fritz, 2004, p. 61.
only a national of a Member State can be defined as a worker: as long as the worker is a ‘worker’ he or she will be entitled to reside in the host Member State without formalities. And, as long as he or she is entitled to stay, the family will also be entitled to stay. A third country national can only have rights through membership of a worker’s family.

Based on Article 39 EC and Regulation 1612/68, the Court has ruled that an EU national who pursues a genuine and effective activity as an employed person, even on a part-time basis, can not be excluded from the scope of Community rules. In *Martinez Sala*, the concept of ‘employment’ was judged to include a situation when a person performs some kind of service for someone else, under that person’s direction, for a certain period of time, in exchange for remuneration. In *Ninni-Orasche* (C-413/01), the Court ruled that only the objective criteria as regards the employment position should be considered, not what the worker did before or after having been employed.

The duration of employment can be taken into account when judging whether an activity is in fact to be deemed genuine. Part-time workers and recipients of various benefits are included within the concept of worker, as is shown in *Reed* (59/85), and in *Kempf* (139/85). In *Levin* (53/81), a part-time worker, who earned less than the stipulated minimum income was considered to be a worker. In *Trojani* (C-456/02), the question was whether a person with a very small income, who was in need of social assistance in order to come up to the existence minimum, was to be seen as a worker. From this case, it follows that rehabilitation does not constitute work for the purposes of Article 39. In *Ninni-Orasche*, the Court ruled that employment for two and a half months was sufficient to attain the status of employee, if the employment was not only conceived as marginal.

Article 7 in Directive 2004/38 lays down the conditions for retaining the status of worker. The status of worker is retained if the person: is temporarily unable to work due to illness or accident; is in duly recorded involuntary unemployment after having been employed for more than one year and has


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registered as a job-seeker; is involuntary unemployed after completing a
fixed-term employment contract of less than one year; has been involuntary
unemployed during the first twelve months; has embarked on vocational
training.

6.5.2.3 Job-seekers
Job-seekers who go to another Member State and there actively seek employ-
ment do not fall within the definition of worker under Article 39 EC but
their rights have been extended along with European integration, not least
by the Court's interpretation of Union citizenship, which has strengthened
the right to equal treatment for job-seekers. Article 39.3 EC, as was also the
ruling in Antonissen (C-292/89)\textsuperscript{159}, gives a job-seeker a limited right to reside
in the territory for the purpose of seeking employment. The general right
of EU citizens according to Article 18.1 EC, has been ruled in Baumbast
(C-413/99)\textsuperscript{160} to have \textit{direct effect}. This right means that a Union citizen,
as long as he/she is not a burden on the social assistance system in the host
state, has the right to be treated as equal to nationals. This right is extended
to include job-seekers according to Article 39.3 EC. In Collins (C-138/02)\textsuperscript{161}
it was, pursuant to Article 39.2 EC, judged inappropriate to exclude from
the field of application a benefit intended to facilitate re-entrance into the
labour market. The Court clarified that there needs to be a real connection
between the job-seeker and the labour market, and if such a connection is
established, no requirement for residence in the host state to receive such a
benefit is allowed. Collins, however, could not be seen as a 'worker' since his
connection to the labour market was deemed to be too weak.

In Antonissen (C-292/89)\textsuperscript{162} the Court judged that a job-seeking claim-
ant should have the right to reside in the host Member State for at least six
months. This implied the right to equal treatment as regards benefits intend-
ed to facilitate employment. According to Article 24.1 of Directive 2004/38
every union citizen who bases his/her right of residence on the directive has
a right to be treated the same as nationals within the fields included in the

\textsuperscript{159} Case C-292/89, \textit{The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius

\textsuperscript{160} Case C-413/99, \textit{Baumbast and R v Secretary of State for the Home Department} [2002] ECR
I–07091.

\textsuperscript{161} Case C-138/02, \textit{Brian Francis Collins v Secretary of State for Work and Pensions} [2004]
ECR I–02703.

\textsuperscript{162} Case C-292/89, \textit{The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius
Treaty. Article 24.2 of Directive 2004/38, however, makes it clear that equal treatment is not an obligation on the host Member State during the first three months of residence or, for job-seekers, for a longer period of time. Hence, Article 24.2 contradicts to previous ruling of the Court in which a job-seeking period of six months was approved. Member States are not obliged to confer entitlement to social assistance during these periods. Nor is the host state obliged to grant maintenance aid for students, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.\(^{163}\)

The introduction of Union citizenship as basis for cross-border mobility implies an extended right to entitlement to non-exportable ‘special non-contributory cash benefits’ for job-seekers. These benefits are defined in Regulation 1408/71 on the co-ordination of social security systems and will be described in more detail below.\(^{164}\)

6.5.2.4 Family members

The family members of a worker who is a national of one Member State have, irrespective of their nationality, the right to install themselves with the worker in the territory of another Member State; on condition that they hold a valid passport.

Originally, Regulation 1612/68 was based on the traditional notion of a male bread-winner family. The rules governing the workers’ families were established in Title III. Workers’ families, according to Article 10, should irrespective of their nationality, have the right to install themselves with a worker who is a national of a Member State, and who is employed in the territory of another Member State. Article 10(1) laid down who came within the definition of a family member. Cross-border mobility for family members was, according to this definition, only meant for a spouse, descendants of the spouse who were under 21 years of age, or otherwise dependent, and dependent relatives in the ascending line of the worker and his spouse.

The interpretation of the rules governing workers families has been under constant development through case law of the European Court of Justice. In *Lebon* (316/85)\(^{165}\) the Court judged, as regards the ‘dependence’ criteria,

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\(^{163}\) For an overview of the rights of migrating students, see Ingmansson, 2007, pp. 241–274.

\(^{164}\) The concept of special non-contributory cash benefits and their interpretation are further described on pp. 191–192, pp. 203–205.

that the factual situation is decisive in the interpretation, irrespective of the reason for being dependent. Whether or not, the dependants are living with the worker, has been judged irrelevant in *Diatta* (267/83)\(^{166}\) and in *Baumbast* (C-413/99).\(^{167}\) Moreover, in *Baumbast* the Court came to the conclusion that not only children in common, but also children from a previous marriage, should be included within the concept of family members. Article 11 of Regulation 1612/68 laid down the right of family members to take up an activity as an employed person throughout the territory of that same State, even if they not are nationals of any Member State. Children of a national who is or has been a worker should, according to Article 12, be admitted to the State’s general educational, apprenticeship and vocational training courses, under the same conditions as the nationals of that State, if such children are residing in its territory.

The concept of ‘family member’ is defined in Article 2 (2) of Directive 2004/38. The definition given in Title III to Regulation 1612/68, except for Article 12, has thus been repealed. One departure in Directive 2004/38 is that registered partners are also included as family members on the basis of the legislation in the host Member State, if the legislation in that State treats registered partners as equivalent to spouses, and in accordance with the conditions laid down in the relevant legislation of the host Member State. Cohabitees still do not fall within the scope of the freedom of movement for family members. This indicates that the notion of family in the EU is still based on the nuclear family, where there is either a marriage or a registered partnership, but the latter only if this type of family formation is regarded as legally equal in the host country in question.

Recital 6 of the Directive comments on the fact that unmarried people still have no automatic right to enter and reside in a host Member State, meaning that un-married/non-partners are excluded from the concept of family. In order to maintain the unity of the family in a broader sense, and without prejudice to the prohibition of discrimination on the grounds of nationality, in decisions about whether entry or residence should be granted to them, these people should be treated according to national legislation in the host Member State. The relationship with the Union citizen, or any other circumstances, such as financial or physical dependence on the Union citizen, are also indicated as grounds to be taken into account.


Article 3 of Directive 2004/38 lays down that the special account must be taken of those beneficiaries who do not come within the general definition of family. The host Member State shall facilitate entry and residence for every/any other dependent family member or dependent members of the household of the Union citizen. Moreover, if a member of the Union citizen’s family strictly requires his/her personal care on serious health grounds; and if there is a durable relationship between the partner and the Union citizen, there are grounds which also have to be considered. However, family members of a Union citizen who is following a course of study, including vocational training, are given the right to reside for longer periods than three months pursuant to Article 7 (4). In this Article it is clarified that in such cases only dependent direct relatives in the ascending line, and those dependants of a spouse or a registered partner, have the right of residence. Members of job seekers’ families can only claim rights in their own names, and this is a possibility only if the family member is a Union citizen, as ruled in Baumbast.168

6.5.2.5 Retention of right of residence
The general rule concerning residence for Union citizens and their family members, laid down in Article 16 in Directive 2004/38, provides family members with a more independent right to permanent residence than previously. Pursuant to Article 16, a person who has resided legally for a continuous period of five years can acquire a permanent residence permit, under the provision that the person concerned meets the conditions laid down in Article 7 (1). This Article limits this permanent residence right to workers or to the self-employed; to students following a course of study, including vocational training, provided that they have sufficient resources not to become a burden. Recital 17 of the Directive emphasizes that permanent residence is a key element in promoting social cohesion, which is stated to be one of the fundamental objectives of the EU. Thus, permanent residence for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in the Directive, for a continuous period of five years, should provide protection against being expelled.

For how long an unemployed person has the right to retain the status of worker and the accompanying right of residence has been clarified in Directive 2004/38. The person shall pursuant to Article 7 (3) (a–d) retain the status of worker or self-employed under special circumstances. The status of worker is retained when a person is temporarily unable to work as the

168 Ibid.
result of an illness or accident; is involuntary unemployed after having been employed for more than one year and has registered as a job-seeker; is involuntary unemployed after having completed a fixed-term employment contract of less than one year duration; or has become involuntary unemployed during the first twelve months. If a person has been employed for more than one year the status of worker is retained, and hence, the right of residence is, according to Directive 2004/38, unlimited.

As regards the demand for continuous residence in a host Member State, temporary absences that do not exceed a total of six months per year do not, according to Article 16, affect the retaining of the right of residence. Moreover, one single absence for important reasons such as pregnancy and childbirth, serious illness, studies or vocational training, or a posting in another Member State or in a third country for a maximum of twelve consecutive months, are also permitted. Once acquired, the right to permanent residence will only be lost if the absence from the host state exceeds two consecutive years.

As laid down in Articles 12 and 13, the death or departure of a Union citizen shall not entail loss of the right of residence for his/her family members. For family members who are not nationals of a Member State, a residence period of not less than one year before the death of the Union citizen is required for right of residence pursuant to Article 12(2). The right of residence for his/her children or for the parent who has actual custody of these children, is retained according to Article 12(3), if the child resides in the host state and is studying there, until the studies are completed, regardless of the nationality of these family members. Moreover, pursuant to Article 13 the right of residence is also retained in case of divorce, if a marriage is annulled, or if a registered partnership is dissolved. For non-national family members, the marriage or registered partnership is required to have lasted for at least three years, including one year in the host Member State. Moreover, if the spouse or the partner, according to an agreement, is the custodian of the Union citizen’s child, the right of residence is retained. The right of residence for a family member may also be warranted by particularly difficult circumstances, such as domestic violence, or if the spouse or the partner has the right of access to a minor in the host Member State, for as long as this is required, according to Article 13(2) (a–d).

Union citizens and their family members have, pursuant Article 14(1), the right to reside for a period up to three months as long as they do not become an unreasonable burden on the social assistance system of the host state. Residence for longer periods than three months, and residence for family mem-
bers in the event of the death or departure of the Union citizen, and in the event of divorce, annulment of marriage or termination of registered partnership, remains a right as long as the conditions set out in Article 14 are met. If there is a reasonable doubt about whether the conditions set out in Articles 7, 12, and 13 are being met, Member States may, pursuant Article 14 (2), verify the situation. Article 14 (4) lays down that an expulsion order may in no case be adopted against a Union citizen or his/her family members, if the said citizen is a worker or is self-employed. Union citizens who seek employment, and their family members, may not, under Article 14 (4)(a–b), be expelled as long as the citizen can provide evidence that he/she is continuing to seek employment and has a genuine chance of being employed.

6.5.3 Co-ordination of social security

The general phenomenon that States have restricted their responsibility in the area of social security to their own territory and/or own nationals, a so-called territorial principle – has been seen as an impediment to the realisation of the free movement of workers. The place where the worker works, where the worker resides, or where the employer has his registered office or place of business are, when related to the territorial principle, criteria for conflict among national rules. Social security rules are unilateral which means that they can establish only that a particular subject is either within the competence of a particular State or beyond that competence. Therefore, when a State applies criteria for the awarding of a certain benefit, for instance residence criteria that differ from those of another State, conflicts are likely to occur. A migrant worker can end up falling simultaneously under the legal system of more than one country – a positive conflict of laws – or falling under no system at all – a negative conflict of laws. Difference of substance in national rules can also lead to conflicts. These conflicts can have a multi-lateral character, as they can refer to facts occurring in other countries relevant to the country’s own benefit rules. For instance, a national scheme may provide that periods of residence abroad are taken into account for the acquisition of the right to a benefit in the host country.169

These discrepancies made it clear that co-ordination of social security was needed and this got under way in 1971 with the adoption of Council Regulation (EEC) No 1408/71.170 This Regulation, containing rules binding on all

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Member States, guarantees equal treatment of all workers who are Member State nationals, regardless of their place of employment or residence, and social security benefits within the material scope of the Regulation. In respect of social security Regulations 1408/71 and 1612/68/EEC also concern treatment of non-nationals. The wording in Article 34 (2) EUCHR: ‘Everyone residing and moving legally within the European Union’ suggests that this provision is valid regardless of whether or not a person is a Community national.171

Regulation 1408/71, which is based on Article 42 EC, is a Community instrument that restricts the power of the Member States to decide exclusively on major elements of their social security systems, including personal and territorial scope, and distribution of the costs of the benefits.172 From the very beginning co-ordination was chosen before harmonisation.173 The Treaty did not, therefore, contain any specific proposals for harmonisation, but only provisions that could be used as a basis for harmonisation. On the other hand, the idea of ‘convergence’ was reinforced, which maintains the view that legislative provisions in the Member States do not have to be identical, but the effects of national legislation that implement common objectives should be convergent.174 In Regulation (EEC) No 574/72 the procedure for implementing Regulation 1408/71 is laid down.175

The legal basis for the co-ordination of social security lies, in addition to Article 42, in Article 308 of the EC Treaty. This means that if action by the Community should prove necessary in the course of the operation of the common market, and the Treaty does not provide the necessary powers, unanimous action is required throughout the procedure referred to in Article 251 of the EC Treaty.

Since 1971 Regulation 1408/71 has been subject to several amendments in order to accommodate trends in national legislation and progress resulting from the rulings of the Court of Justice of the European Communities. These amendments have added to the complexity of Community co-ordination, which may have led to uncertainty and infringe of the main objective – free movement of workers – of Regulation 1408/71. The Council presented a

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173 Reg. 3/58, which implemented Article 51 of the EC Treaty (Article 42 after the Treaty of Amsterdam), was the first social measure of the Community.
proposals for a new Regulation in 1998, designed to simplify and clarify the rules.\textsuperscript{176} The final text, which differs considerably from the proposal, was adopted by the Council and the Parliament in April 2004 as Regulation 883/2004.\textsuperscript{177} With a view to simplifying and clarifying the rules governing the co-ordination of the Member States’ social security systems, the European Parliament and the Council have endorsed Regulation (EC) No 883/2004.\textsuperscript{178} The new Regulation will not be applicable until the date the new implementing Regulation comes into force. A proposal for such an implementing Regulation was presented by the Commission in January 2006.\textsuperscript{179} Through the adoption of Commission Regulation (EC) No 311/2007 and Regulation (EC) 101/2008, Annexes to Council Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation 1408/71, has already been amended in line with the new rules adopted in Regulation 883/2004.\textsuperscript{180}

6.5.3.1 Principles for the co-ordination of social security

Co-ordinating legal provisions in Community law, as is laid down in Regulation (EEC) No 1408/71, imposes certain rules and principles for ensuring that application of the different national systems does not harm those persons who exercise their right to free movement.

Although the subsidiarity principle applies, the Regulation contains general principles that allow the co-ordination to function. These principles include \textit{single applicable legislation; assimilation of facts; and equal treatment}. The co-ordination of national social security systems is meaningful only at Community level: its basis lies in the free movement of persons within the EU and co-ordination is justified by this free movement. Member States continue to have exclusive competence in determining, organising and financing their national social security systems. The choice of instrument

\textsuperscript{176} COM (1998) 779 final.
\textsuperscript{178} \textit{OJ} L 200, 7.6.2004, pp. 1–49 (amended version).
is, therefore, seen to be in line with the proportionality principle. A regulation may be amended only by another Regulation, although Member States remain solely responsible for organising and financing their own social security schemes. The Regulation makes it easier for the Member States to coordinate social security schemes, and is therefore perceived to be beneficial for both citizens and national social security authorities. Any financial and administrative burden, it is maintained, is minimized and proportionate to the objective of the Regulation. In short, Regulation 1408/71, which will be replaced by Regulation (EC) No 883/2004, is a co-ordinating but not a harmonising regulation.

Article 39 EC states that workers must not be discriminated against on the basis of nationality. The principle of equal treatment, which is a fundamental principle in the EC Treaty according to Article 12, prohibits any discrimination on the grounds of nationality. This is explicitly manifested in Article 3 of Regulation 1408/71. Article 4 in Regulation 883/2004 states:

‘Unless otherwise provided for by this regulation, persons to whom this regulation applies enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the national thereof’.

Not only is direct discrimination based on nationality forbidden, but also national regulations which, although they are based on neutral criteria, still have discriminatory outcomes, i.e. indirect discrimination. This is the case if a rule predominantly affects a particular category, such as migrant workers for instance, regardless of whether or not the legislator’s intention was to discriminate. Vicki Paskalia shows in a study of free movement of persons and social security and gender implications how Regulation 1408/71 in general is not very well adjusted to the needs of female migrant workers who interrupt work because of childbirth/childrearing or migration, that is to say combine professional and family life. In fact, the same risk has unequal effects for different categories of the population. In her view, the Regulation has not yet satisfactorily met the major current challenge of the reconciling work with family life. There are, in her view, considerable gaps in adjusting to new family conditions.

The aggregation principle is found in Article 42(a) of the EC Treaty. This principle maintains that all periods must be taken into account, under the

laws of the several countries, for migrant workers and their dependants, and be aggregated for the purpose of acquiring and retaining the right to benefit and for calculating the amount of benefit. Without this kind of rule, migrant workers and their dependants would become disadvantaged, as social security schemes are mostly based on qualification rules, which require the recipient to be insured for certain periods of time; to be in work or resident for certain periods of time. Article 5 of Regulation 883/2004 makes clear the principle of equal treatment regarding benefits, income, facts or events occurring in the territory of another Member State. In Recital 10 of the Preamble to the Regulation it is emphasised that periods completed under the legislation of another Member State, should be taken into account solely for applying the principle of aggregation of periods under Article 6. In the light of proportionality, it is also stated under Recital 12 that care should be taken to ensure that the principle of assimilation of facts or events does not lead to objectively unjustified results, or to the overlapping of benefits of the same kind for the same period of time.

The exportability principle is laid down in Article 42 (b) of the EC Treaty, meaning that the payment of benefit is ensured, even if a person, or his/her dependants, moves within the Union. In Regulation 883/2004 this principle is expressed in Article 7 on waiving of residence rules, which corresponds to Article 10 in Regulation 1408/71. This principle however has its limitations. Given Regulation 1408/71, Article 10a, ‘special non-contributory cash benefits’ referred to in Article 4 (2a) shall be exclusively granted in the territory of the Member State in which the person resides, under the provision that such benefits are listed in Annex IIa to the Regulation. These are benefits characterized as being a blend of social insurance and social assistance.184

6.5.3.2 Extension of personal scope to all nationals
Free movement under Article 39 of the EC Treaty is restricted to being a right of migrant workers and also, according to Article 42, of their dependants. The personal scope in Regulation 1408/71, however, has gradually been extended to include not only workers but also self-employed workers, students, pensioners, and civil servants. The new Regulation concerns all European citizens moving within the Union for any reason whatsoever. Regulation 883/2004

184 Special non-contributory cash benefits came to be included within the matters covered by Regulation 1408/71 through Regulation 1247/92, OJ L 136, 19.5.1992, pp. 1–6.
includes all *insured* persons who satisfy the conditions required under the applicable legislation of the competent Member State.\textsuperscript{185}

Article 2(1) in Regulation 883/2004 extends personal scope for the freedom of movement – in so far as social security is involved – to all nationals of a Member State, stateless persons and refugees residing in a Member State who are, or have been, subject to the legislation of one or more Member States. It also applies, according to Article 2(2), to survivors of persons subject to legislation in one or more Member States, irrespective of the nationality of such persons, if these survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States, as well as to members of their families and to their survivors.

‘Member of family’ is given a broader definition in Regulation 883/2004 than previously where the definition was merely based on marriage. The definition and recognition of family members or designation of member of household in national legislation under which benefits are provided are, according to Article 1(i)(1)(i), decisive. In addition, with regard to benefits in kind, pursuant to Title III, Chapter 1 on sickness, maternity and equivalent paternity benefits, any person defined or recognised as a member of the family or designated as a member of the household by the legislation of the Member State in which he resides, comes within the definition of family member pursuant to Article 1(i)(1)(ii). The spouse, children who are minors, and dependent children who have reached the age of majority shall always, irrespective of national distinctions between members of the family and other persons to whom legislation is applicable, pursuant to Article 1(i)(2), be considered members of the family. The person in question need not live in the same household as the insured person to be defined as a family member. If such a condition exists under the legislation which is applicable, this condition shall, according to Article 1(i)(3) be considered to be met if the person in question is mainly dependent on the insured person.

As can be read in Recital (2) of the preamble, the Treaty does not provide powers other than those in Article 308: i.e. unanimous action, to take appropriate measures within the field of social security for persons other than those employed. For such persons, the non-discrimination rule under Article 12 EC would be the most important.\textsuperscript{186} The Court has deemed Arti-

\textsuperscript{185} Regulation 883/2004 EC, Title I General Provisions, Article 1(c), and Article 2; Title III, Special Provisions concerning the various categories of benefits, Chapters 1 and 3.

\textsuperscript{186} In Case 308/93, *Cabanis-Issarte* [1996] ECR I–2097, the Court ruled that members of an employed or self-employed person’s family, can invoke all the provisions of Regulation 1408/71 unless these specifically refer to employed or self-employed persons.
cle 18 EC to be relevant in extending the non-discrimination principle to all nationals and not just applicable to the active population. In *Martinez Sala*, the Court ruled that the claimant, a Community national, could invoke Articles 12 and 18 EC to have discrimination on the grounds of nationality removed in a social security scheme.187

6.5.3.3 Third-country nationals
The personal scope in Regulation 1408/71 has often been criticised for only including nationals of one of the Member States. Pennings has noted that modernisation of the co-ordination rules is not yet complete as regards third-country nationals.188 Council Regulation 859/2003,189 which is based on Article 63(4) EC Treaty, extends the provisions of Regulation 1408/71, and its implementing Regulation 574/72, to nationals of third countries who are not already covered by these provisions solely on the basis of their nationality. Subject to the provisions of the Regulation’s Annex, Regulation 1408/71 also applies to family members and survivors, provided they are legally resident in the territory of a Member State and are in a situation which is not completely confined to one single Member State.190

As can be read in Recital (1) of the Preamble of Regulation 859/2003, the Council refers to a proclamation from 1999, which stated that the EU should ensure fair treatment of third-country nationals who reside legally in the territory of its Member States, grant them rights and obligations comparable to those of EU citizens, enhance non-discrimination in economic, social and cultural life and make their legal status approximate that of Member States’ nationals. However, in the preamble it is also emphasized that the application of Regulation 1408/71 to these persons does not give them any entitlement to enter, to stay, or to reside in a Member State, or to have access to its labour market. Being legally resident is a prerequisite for the application of these provisions, which are not applicable in situations concerning a third-country national who has links only with a third country and a single Member State.

190 Ibid, Article 1.
The continued right to unemployment benefit when people move to seek a job in another Member State, as laid down in Article 69 of Regulation 1408/71, is subject to their registering as job-seekers. These provisions may, therefore, as is stipulated in Recital (13) of the preamble, apply to third-country nationals only if they have the right to register as job-seekers with the employment service of the Member State entered and under provision that they have the right to work legally. However, Article 63(4) EC allows Member States to maintain or introduce, in the areas concerned, national provisions which are compatible with the Treaty and with international agreements. In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the EC Treaty and to the EU Treaty, Denmark has not adopted Regulation 859/2003, and is therefore not bound by or subject to it.

Article 90 (1) in Regulation (EC) 883/2004 lays down that Regulation 1408/71 shall remain in force and continue to have legal effect for the purposes of Regulation 859/2003, for as long it has not been repealed or modified. A proposal for a new Council Regulation was presented by the Commission in July 2007, extending the provisions of Regulation 883/2004 to nationals of third countries. Technically, the proposal is virtually a copy of current Regulation (EC) No 859/03, and is conceived to be a key extension to the co-ordination of social security systems, both in terms of equal treatment and of non-discrimination. The fact that the scope of Regulation 883/2004 also covers people who are not professionally active (non-active persons) will not, according to the proposal, have a significant impact on the burden born by the Member States for two reasons. First, the numbers of people who will be concerned is small, and second, co-ordination of the rights of these persons is based on the principle of the competence of the Member State of residence. Article 3 of the proposed Regulation lays down that the Regulation shall be binding in its entirety and directly applicable in all Member States.

6.5.3.4 The material scope in the co-ordination of social security
The matters covered in Regulation 1408/71 are limited to the specified risks enumerated in Article 4. In the new Regulation (EC) No 883/2004 the matters covered are specified in Article 3 and have been extended to include paternity benefits and pre-retirements benefits. According to Article 3.1 of

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Regulation 883/2004, co-ordination regulation shall apply to all legislation concerning the following branches of social security:

a) sickness benefits  
b) maternity and equivalent paternity benefits  
c) invalidity benefits  
d) old-age benefits  
e) survivor’s benefits  
f) benefits in respect of accidents at work and occupational diseases  
g) death grants  
h) unemployment benefits  
i) pre-retirement benefits  
j) family benefits  

Regulation 1408/71 applies to all general and special social security schemes, contributory and non-contributory, and to schemes concerning the liability of an employer or ship owner in respect of the benefits referred to above. In addition, according to Article 4.2(a), the Regulation also applies to benefits which are provided under other legislation or schemes intended either to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 4(a) to (h), or solely as specific protection for the disabled. Regulation 1408/71 is not applicable to social and medical assistance, or to benefit schemes for victims of war or its consequences.

Through the adoption of Regulation 1247/92, ‘special non-contributory benefits’ were also included in the matters covered by Regulation 1408/71.193 The concept of non-contributory benefits referred to those benefits that are characterised as being both social insurance benefits and social assistance. Special rules apply for these benefits. If a benefit is conceived as a special non-contributory benefit, it is no longer exportable. Persons who leave the country are thus excluded from such a benefit. Sweden listed three such benefits: Housing supplements for persons receiving a pension (Law 1994:338); Handicap allowances which are not paid to a person receiving a pension (Law 1962:381 reprinted 1982:120); Care allowance for handicapped children (Law 1962:381 reprinted 1982:120).194

194 Consolidated Text produced by the CONSLEG system of the Office for Official Publications of the European Communities, CONSLEG: 1971R1408 – 01/06/2004, p. 80. The
Regulation 883/2004, Article 70, introduces the concept of special non-contributory cash benefits, which are payable only in the State of residence. Article 70(2) defines special non-contributory cash benefits as benefits which:

(a) are intended to provide either:

supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation on the Member State concerned, or

solely specific protection for the disabled, closely linked to the said person’s social environment in the Member State concerned, and

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone, and

(c) are listed in Annex X.

In contrast to the earlier rules, a means test is no longer a precondition for defining a benefit as being within the definition of special non-contributory cash benefits. Instead, Regulation 883/2004 requires that the benefit has to provide for a minimum subsistence income. Such benefits shall be granted by and at the expense of the institution of the place of residence. Article 70 in Regulation 883/2004 makes clear that those non-contributory cash benefits that are listed in Annex X, are intended to provide a minimum subsistence income and specific protection for the disabled, and shall be provided by and at the expense of the place of residence. Under Article 3(5) it follows that the co-ordinating rules in Regulation 883/2004 do not apply to social and medical assistance. Hence, these benefits are not covered by Article 70.

With regard to the Court’s most recent praxis and changes in social security regulations in the Member States, Regulation 647/2005 was adopted in 2005. This Regulation is an early manifestation of amendments in the co-ordinating rules, which are stipulated in Regulation 883/2004. The con-
cept of special non-contributory cash benefits was established to provide a definition of the benefits concerned. A new listing was elaborated and presented in Regulation 1408/71, Annex IIa, and Regulation 574/72. Sweden listed housing supplements for persons receiving a pension (Law 2001:761); financial support for the elderly (Law 2001:853); and disability allowance and care allowance for disabled children (Law 1998:703). In Annex III certain provisions of social security conventions entered into by the Member States before the date of application of Regulation 647/2005, provided that they are more favourable to the beneficiaries, or arise from specific historical circumstances and have a limited effect, could be listed. One example is the listing by the Nordic countries of coverage of extra travel expenses in case of sickness during a stay in another Nordic country, according to Article 10 of the Nordic Convention on Social Security of 15 June 1992.

In Article 1 of Regulation 1408/71 the concept of ‘family benefits’ is meant to cover all the care and cash benefits which are intended to meet family expenses, according to the field of legislation indicated in Article 4.1 (h), with the exception of benefits connected with childbirth or special benefits in connection with adoption. Previously, the European Court, in an Avis juridique important, summarized that the distinction between benefits excluded from the scope of Regulation 1408/71 and those that fall within its scope, is essentially based on the constituent elements of each particular benefit, in particular its purposes and the conditions under which it is granted, and not on whether or not a benefit is classified as a social security benefit in national legislation. A benefit which is automatically granted to persons who fulfill certain, objective legally defined criteria, without any individual and discretionary assessment of personal needs, and which is intended to meet family expenses and more particularly as remuneration for the service of bringing up a child, to meet other costs of caring for and bringing up a child and, as the case may be, to mitigate the financial disadvantages entailed in giving up an income from full-time employment, as the allowance must be granted whether or not the recipient is in employment, must be treated as a family benefit within the meaning of Article 4.1 (h) of Regulation 1408/71. As can be read in Recital (34) of the Preamble of Regula-


tion 883/2004, the necessity of regulating all family benefits is underlined, since family benefits have a very broad scope, affording protection in situations which could be described as classic as well as in others which are very specific in nature. Payments of maintenance allowance are considered to be recoverable as they are intended to compensate for a parent’s failure to fulfil her/his legal obligation of maintenance for her/his own child, which is an obligation derived from family law. These advances should not, therefore, be considered as a direct benefit from collective support in favour of families, as can be read in Recital (36) of the Preamble. Given these particularities, the co-ordinating rules should no longer be applicable to such maintenance allowances. In Article 1(z) of Regulation 883/2004 the concept of family benefits, therefore, is given a new definition, covering all kinds of benefits in kind or in cash intended to meet family expenses, excluding advances in lieu of maintenance payments and special childbirth and adoption allowances mentioned in Annex I. Sweden has listed maintenance allowance under the Maintenance Support Act.

The fact that Article 42 EC requires measures for ‘social security’, a concept which is not explicitly defined could, according to Pennings, be used as an argument for a broader approach than that used in Regulation 882/2004. The extension of the material scope carried out under, Regulation 883/2004 Article 3, is limited to statutory pre-retirement (i) and paternity benefits (b). Supplementary social security provisions in collective agreements do not fall within the scope of Regulation 1408/71 and there is no further extension to include such benefits in the new Regulation. Moreover, social assistance (socialt stöd, social hjälp) remains excluded from the material scope of co-ordination. However, in Martinez Sala, the Court has nonetheless adjudged the non-discrimination rule to be applicable to social assistance, on the basis of the EC Treaty. The rules in Regulation 883/2004 also set a boundary for the exportability of benefits: e.g. as regards maintenance allowance.

198 Compare judgement of the Court in Ingrid Hoever C-245/94 and Iris Zachow C-312/94 v Land Nordrhein – Westfalen above.
6.6 Swedish social security law in the context of the EU

6.6.1 The concept of social security

Historically, the construction of social security in Sweden has been characterised as a miscellaneous body of social advantages and contributions which vary considerably and partly show few similarities. From a legal point of view, it has been pointed out that social security is not a system based on coherent legal norms and principles. How the classification of social security should be determined in relation to the personal and material scope in EC co-ordination regulation came to be a confusing issue that needed reform when Sweden joined the EU in 1995.

The Swedish concept of social security in preparatory works of the government was seen to be unclear from an international perspective, since there are no commonly agreed clear definitions of concepts such as ‘social insurance’, ‘social security’ and ‘social assistance’. Each country has its own definition inherent in its systems. Social security, however, is commonly used when social insurance is discussed in an international context although the concept of social security in general is given somewhat a broader interpretation. Even care provision and social assistance administered by the social services in the municipalities are also often considered to come within the definition of social security. The least common denominator for the concept of social security is, according to the preparatory work to the Swedish reform that followed in 1999, the mandatory solidarity in situations usually conceived of as social risks.

A pragmatic method was chosen for a Swedish definition of ‘social insurance’. The meaning of social insurance is delimited through an enumeration in the Social Insurance Act of those advantages and benefits that, in a Swedish context are within the definition of social insurance. These advantages and benefits were not simply limited just to the matters covered in Regulation 1408/71 (EEC). Some benefits in the Swedish social insurance system, it was pointed out, are only covered by Regulation 1612/68. The Swedish Government, however, did not intend to change the preconditions for eligibility for those benefits that are allowed solely on the basis of residence, e.g. maintenance support for children living with only one of their parents.

201 See Mannelqvist, 2003, p. 16.
and the allowance for the care of close persons\textsuperscript{206}. Similarly, it was not the intention to broaden the concept of social insurance to include those other forms of social security, which are only meant to protect certain specified groups of people, i.e. state protection for personal injury,\textsuperscript{207} state compensation for non-profit injury,\textsuperscript{208} and the right to medical treatment pursuant the Health and Sick Care Act.\textsuperscript{209} Social insurance in a Swedish context is instead meant for people in general. The demarcation from other social security schemes originates from how social insurance is administered. Consequently, the legal definition of social insurance in Sweden now comprises the majority of social security systems, which are administered by the Swedish Social Insurance Administration and the Premium Pension Authority.\textsuperscript{210} Hence, Swedish unemployment insurance, in contrast to EC co-ordination regulation, does not fall within the definition of social insurance, since the unemployment scheme is based on voluntary membership in an unemployment fund, and is administered by those funds.

Taking France, Ireland, Norway, and Germany as models, a new coherent Social Insurance Code was proposed by a Committee in 2005. The current Swedish social insurance, consisting of 30 different laws, would, according to this proposal, be replaced by a Code, but without any changes to the present content in law. The reasons for reform were declared to be the need of an improved and coherent legal structure, bearing in mind Regulation 1408/71 and Regulation 883/2004, and a citizen-perspective.\textsuperscript{211} In late 2007 the Government referred a proposal for a new social insurance code to Lagrådet for consideration. In the proposed social insurance code, which is proposed to take effect from January 1 2009, the various social benefits are arranged according to the citizen's needs during the course of his/her life.\textsuperscript{212}

6.6.2 Capability in a Swedish context

The EU’s integrated socio-economic strategy, involving streamlining of economic and employment policies in the Member States and the social agenda for social inclusion, is visible in the reform of Swedish social security.

\textsuperscript{206} Lag (1988:1465) om ersättning och ledighet för närståendevård (Compensation and Leave for the Care of Close Persons Act).

\textsuperscript{207} Lag (1977:265) om statligt personskadeskydd.

\textsuperscript{208} Lag (1977:266) om statlig ersättning vid ideell skada.

\textsuperscript{209} Hälso- och sjukvårdslag (1982:763).


\textsuperscript{211} SOU 2005:114, p. 29.

\textsuperscript{212} Socialdepartementet, Lagrådsremiss, Socialförsäkringsbalk, 14 December 2007.
During recent years the capability approach has also become visible in Swedish Government investigatory works where the organisation and regulation of present and future social insurance are discussed and where the linking of insurance to economic and work processes is increasingly emphasised in proposals for reform.\textsuperscript{213} The idea of convergence, which maintains that the effects of national legislation that implements common objectives should be convergent, but not necessarily identical, is visible in Government investigatory works preparing for reform of the Swedish social security regulations. The expression of ideas coloured by EU strategies had a break-through in a Government Commission that presented the first in a series of projected inquiries’ into future reform of Swedish social security. The need for adjustments in legal regulations was said to be motivated by reasons of control, based on the fact that individuals can now move freely within the EU, without losing their social rights.\textsuperscript{214}

The pros and cons of the ‘Nordic model’ in comparison to other welfare models are now being discussed. The tension between freedom and security is articulated as part of living and the effect social insurance has on labour supply is said to represent effectiveness.\textsuperscript{215} Since social insurance is claimed to imply subsistence without working, attitudes to work are underlined as being of crucial importance. Indeed, the idea of work is explained as constituting a moral issue that needs strengthening, not only for individuals, but also in relation to those around. In fact, the view that the Nordic models are the most sustainable, without losing effectiveness is questioned. An ideal insurance, should according to the Commission in question, normatively be based on the value of work and on the expectation that a good life will be achieved without insurance.\textsuperscript{216}

Most recently, the Swedish Government has appointed a Committee to overhaul the concepts of sickness and of work capability, and to present a more coherent judgement of capability for work in social insurance and in labour-market politics. The starting point for the inquiry is that the individual’s capacity to function (\textit{funktionsförmåga}) must be more important in the assessment of capability to work (\textit{arbetsförmåga}).\textsuperscript{217} Moreover, the Swedish

\textsuperscript{213} Dir. 2004:129; Dir. 2005:10; Dir. 2008:11; Ds 2008:4; SOU 2005:66; SOU 2006:86, p. 27 ff. These preparatory works are further described in more detail in Chapter 10.3 on pp. 309 ff.
\textsuperscript{214} SOU 2006:86, p. 44.
\textsuperscript{215} Ibid, p. 30 ff.
\textsuperscript{216} Ibid, p. 49, 63.
\textsuperscript{217} Dir. 2008:11.
National Board of Health and Welfare (Socialstyrelsen) and the National Insurance Agency (Försäkringskassan) have been given the task of guaranteeing the harmonisation of the international system of clinical concepts.\(^{218}\)

Previously in Sweden, compensation for the number of days lost due to illness in the form of sickness cash benefit has not been limited. In a proposed Government Bill this will now be limited: in principle one year (364 days), unless there are special reasons: e.g. sickness that demands long-term medical treatment. In the latter case the sickness cash benefit is reduced and cannot exceed 550 days of compensation. The main purpose of the reformed sickness insurance is said to be to combat social exclusion. It is proposed that the process of getting people on the sick list should become more active. In future only those who are not capable of working because of illness will be awarded sickness cash benefits.\(^{219}\) The pros and cons of introducing obligatory unemployment insurance, as opposed to unemployment insurance in the current law that is based on membership of an unemployment fund, are also part of the current political debate in Sweden.\(^{220}\)

Measures in the last-resort redistributive scheme in Sweden, i.e. maintenance support pursuant to the Social Services Act that focuses on reducing the growing exclusion, are discussed and proposed.\(^{221}\) Taking economic incentives as the starting point for activation of individuals in need of social assistance, a more coherent welfare organisation on the local level, inspired by the example of other European countries, is being considered.\(^{222}\) Statistical

\(^{218}\) Socialstyrelsen, 2007, Dnr. S2005/9201/SF.


\(^{220}\) Prop. 2006/07:89.

\(^{221}\) Dir. 2005:10; Dir. 2006:72; Dir. 2006:120; SOU 2007:2a and SOU 2007:2b.

\(^{222}\) SOU 2007:2a, p. 301 ff., SOU 2007:2b, p. 107 ff. In Norway labour market and social policies since 2006 have been integrated in a new ministry: the Ministry of Labour and Social Inclusion. The Ministry is responsible for labour-market policy, Working environment and Safety, Poverty and Welfare, Integration and Diversity, Sami and Minority Affairs and Migration. On 1 July 2006, the Labour and Welfare Service (NAV) took over the responsibilities and tasks of the National Employment Service (Aetat) and the National Insurance Service (RTV). The Norwegian Labour and Welfare Administration (NAV) consists of the municipalities’ social services and the Norwegian Labour and Welfare Service. The NAV reform has as its main goal to get more people into employment and activity and to have fewer people on benefit, to make it easier for users and to adapt services to user’s needs, and to create a comprehensive and efficient labour and welfare administration. As a result of their responsibility for preventing social problems and improving living conditions for the disadvantaged, the local labour and welfare offices (NAV Offices) administer financial support pursuant to the Social Services Act. See Stortinget’s proposition 46/2004–2005, available at http://www.regjeringen.no/en/dep/aid.html?did=165. In a Danish welfare report, the Welfare Commission that was
models, validation and instruments for assessing person’s capacity for work are advocated as useful means for strengthening the work and ‘competence’ argument and as incentives to work in the Swedish last-resort scheme. It is clear that the income for certain people, e.g. ‘single women’ who work part-time and are living with children, is not sufficient in relation to the burden of maintenance, which means that although they have a job they still are dependent on social welfare assistance, but the ambition is to end social exclusion for as many as possible of those who are in need of financial assistance. The links to the labour market and the individuals’ own motivation are central in the proposed measures which are focused on reducing growing exclusion. Thus in this Government Commission the concept of exclusion seems to be equated with benefit dependence.

Equal financial opportunity as regards education and paid work in attaining independence during the course of one’s life is also underlined in recently amended equal opportunity politics in Sweden. The recognition of dependence as being relational is only accepted in relation to care. Financial independence is seen desirable, and that work performed on a full time basis ought to be more profitable than benefit dependence. The incentives to look for paid and full-time employment are thought to be the means by which the vulnerable situation of solo mothers will be strengthened.

6.6.3 Implementation of the Free Movement Directive
The ultimate responsibility of the social services to ensure the need for social assistance is met, pursuant to Chapter 2 section 2 in the Social Services Act, so-called the stay principle (vistelseprincipen) has, because of the requirements of Directive 2004/38 concerning the right of citizens of the Union and their family members to move and reside freely, become in need of re-evaluation. Appointed in 2003, proposed in 2005 the abolition of incomes in the household as the unit for maintenance in favour of the earnings of the individual for eligibility to last-resort social protection social assistance. See Velfærdskommissionen, 2005, Fremtidens velfærd, Forslag 10. Moreover, a job-bonus for those long-term unemployed who start working was proposed. See Velfærdskommissionen, Fremtidens velfærd, Forslag 15. In November 2007 a new Welfare Ministry was established in Denmark, which included the tasks of the Social Ministry, see http://www.social.dk/ministeriets Omraader.html. A social policy action plan aimed at flexible social policy measures was presented by the Danish government in 2007, see Socialministeriet, Socialpolitisk Redegørelse og Handlingsplan, Mål og Indsatser 06/07, available at http://www.social.dk/netpublikationer/2007/p7/social0301/pdf/publikation.pdf.

appoint: 223 SOU 2007:2a, pp. 46–47.
One question of special interest in connection with the enlargement of the EU in 2004 was whether there was a need for transfer rules for migrating citizens from the new Member States. In Swedish debate the concept of ‘social tourism’ was employed in articulating the apprehension that the relatively generous welfare system in Sweden would demand rules for preventing such ‘social tourism’.

The stay principle pursuant to the Social Services Act (2001:453) means that the municipality in which a person is staying has the ultimate responsibility for ensuring that the person gets the need they need, provided the need cannot be met by other means. Article 22 in Directive 2004/38 establishes that the right to stay and permanently reside applies for the whole territory of the host Member State, meaning all the Swedish municipalities. Hence, only restrictions that are applied to nationals can be applied to migrating EU citizens. Directive 2004/38 contains provision for how the right to social benefits, and thus the last-resort rights attached to the Social Services Act, may be restricted. Certain categories of persons, apart from employees and the self-employed, persons that retain such status, and their family members may, according to the Directive, be exempted from the right to social assistance during the first period of stay in a host Member State.

The legal provisions laid down in Directive 2004/38 occasioned a need to investigate the social services’ area of responsibility in relation to free movers. A Committee was appointed to examine on the one hand the possibilities of delimiting the right to social assistance for non-national citizens coming to Sweden as job-seekers, and on the other hand to examine if a qualification rule could possibly be introduced for persons staying temporarily in Sweden for activities such as work and studies. In the Government directive it was specified that there should be a gender perspective for the appointed inquiry and a special concern for the situation of children.

In the Committee Report the question of how long a person is permitted to stay as a job-seeker, and thus be embraced by the discrimination prohibition in EC law, was analysed. For job-seekers, six months was proposed as a rule of thumb, with reference to Antonissen (C-292/89), for the social services

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227 The right to social assistance in the form of maintenance support (försörjningsstöd) and support for way of life in general (bistånd för livsföring i övrigt) is regulated in Socialtjänstlag (2001:453) (Social Services Act), Chapter 4.
228 Dir. 2004:61.
229 SOU 2005:34.
when hearing an application for support under the Social Services Act. As was ruled in *Collins* (C-138/02), the Report maintained that a job-seeker who has sufficient attachment to the labour market, and who has applied for work over a reasonable period of time, may not be excluded from the right to equal treatment as regards social benefits that are intended to facilitate entry into employment. The Report’s conclusion, supported by *Collins* and Article 24.2 in Directive 2004/38, was that social assistance pursuant to the Social Services Act should only be allowed in acute emergency situations during the first three months of their stay for other EU citizens than employees, self-employed, job-seekers, or their family members. It was proposed that EES citizens be covered in the same way. In contrast, it was concluded that this limitation rule should not apply to Swedish and Nordic citizens. With reference to the Nordic Convention on Social Assistance and Social Services, the Report maintained that this interpretation, which gives Nordic citizens a more favourable position, does not conflict with the discrimination prohibition in EC law, as long as free movement for other Union citizens than Nordic citizens is not restricted. For third-country nationals, who can only derive rights as family members of Union citizens, no limitation rules were proposed. No other special measures, beyond the right to acute support in emergency situations, were considered necessary, e.g. measures aimed at protecting children or other vulnerable groups. Nor was it seen as necessary to insert into the Act an explicit demand for residence for eligibility to assistance pursuant to the Social Services Act. Such demand for residence, it was maintained, is already in place according to case law.

The Committee concluded that a person who resides in Sweden or a person who has come to Sweden with the intention of becoming a resident, and legally stays in Sweden according to EC law or national law for the rest, is in principle entitled to assistance pursuant to Chapter 4 section 1 in the Social Services Act. Other applicants for support are only entitled to assistance in acute emergency situations under the provision that other preconditions for support, as laid down in the Act, are complied with. In order to clarify this interpretation and implement Directive 2004/38 a new section to the Act – Chapter 4 section 1a – was proposed by the Committee, yet no amend-

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232 Iceland, Liechtenstein, and Norway.
ments have been made. The Directive has, however, chiefly been implemented through amendments to the Aliens Act in April 2006. A new regulation in the Aliens Act stipulates that an EU citizen, who is not qualified for a right of residence (uppehållsrätt), may be expelled if he/she constitutes an unreasonable burden on the social security system in the Host State.

In a recent judgement concerning social assistance for free movers the Administrative Court of Appeal (Kammarrätten i Jönköping) has, with reference to the amendments in the Aliens Act for implementing Directive 2004/38, made it clear that a job-seeking EES-citizen has a right of residence if there is a real possibility of him/her being employed and that this right of residence is retained as long as this condition is fulfilled. The fact that Directive 2004/38 allows for the exemption of job-seekers from the right to social assistance beyond an acute need for help, has not yet been realized in the Social Services Act, even though such an exemption has been proposed. A residence permit is not, according to the opinion of the court, a precondition for being entitled to social assistance as there is any legal basis for the municipality to deny a job-seeking EES-citizen social assistance.

6.6.4 Co-ordination of work-based and residence-based Swedish social security

The free movement of workers is meant to realize an optimal allocation of labour, which is assumed to be in the interest of the economies of the Member States. The purpose of the anti-discrimination clause is clearly related to the objective of the free movement of workers, and not a general anti-discrimination clause. The EU co-ordination regulation uses the state of employment principle – lex locii laboris – for determining the legislation applicable when people migrate, deriving, as shown earlier, from Regulation 1408/71 and from Title II Article 11 of Regulation 883/2004.

There are several criticisms of this principle; meaning that it has its roots in the Continental or Bismarckian model of the Founding States of the European Economic Community in 1957. This model of social security schemes devised as insurances for employees, based on the notion of a nuclear family consisting of a single bread-winner and a housekeeper, no longer seems appropriate. The Community is now expanding and schemes in many

Member States are in contrast based on residence – *lex locii domicilii* – as for instance mostly is the case in the Scandinavian countries.\(^{238}\)

The national interpretation and implementation of residence as the basis for social security may nonetheless be affected by the interpretation of the concept of residence on the European level of social security. In Nordic reflections on the concept of residence in Finnish, Swedish and Community legislation it has been pointed out how residence as the basis for social security may simultaneously imply inclusion and exclusion of persons.\(^{239}\)

In the classification of various systems of social security, the universal scope of the Atlantic or Beveridgean model, which was elaborated by Beveridge\(^ {240}\) and Marshall,\(^ {241}\) contrasts with the Bismarckian model. A characteristic feature of the Beveridge model is understood to be the notion of social citizenship and individual benefits granted irrespective of employment history. This model developed in countries with a long-standing poor law tradition emphasized minimum income protection for the entire population, with the aim of combating poverty.\(^ {242}\) The Scandinavian, or Mixed model that is also considered to be universal and conceptualised as social citizenship, has, for certain scholars, constituted a model of its own.\(^ {243}\) This distinction is based mainly on the aims inherent in the systems. As opposed to Beveridge’s model, which aimed to alleviate poverty, the Nordic model is understood as having attained a dual objective: the alleviation of poverty through minimum income benefits at the level of subsistence for all; and income maintenance through earnings-related benefits for those in active employment. Today, however, the notion of a distinct Nordic model is questioned. In a historical reappraisal of the ‘Nordic model of welfare’, the ‘Nordic’ has been regarded as including five exceptions, one for each of the Nordic countries.\(^ {244}\)

In Title III to Regulation 883/2004 special provisions concerning various categories of benefits are exempted from the general *lex locii laboris* principle. Chapter 1, Section 1, Article 17 lay down that sickness, maternity and equivalent paternity benefits are exempted from the general principle of applicable legislation when people move. An insured person or members of his/her family residing in a country other than the competent Member State,

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\(^{238}\) See Pennings, 2004, pp. 185–217.

\(^{239}\) Sakslin, 2000, pp. 157–183.

\(^{240}\) For an overview of the Beveridge Model: see: Larsson, 1943.


\(^{244}\) Christiansen (ed.), 2006.
according to the state of employment principle, shall receive such benefits from the institution of the place of residence, on behalf of the competent Member State.\textsuperscript{245}

The general principle for determining the applicable legislation pursuant to Article 11 in Regulation 883/2004 implies that if an employee works in one country, for instance in Sweden, and resides in another country, for instance Denmark, only Swedish law would apply for the person in question, even if Danish law provides otherwise. If the person has children, family benefits are, pursuant Article 67, due from Sweden, even if they live in Denmark, which means export of benefits. In the event of benefits overlapping priority rules are indicated in Article 68. Article 18 comprises special rules for members of the families or for frontier workers. Such persons shall also be entitled to benefits in kind during their stay in the state where they work, unless the state in question is listed in Annex III to the Regulation. Sweden, Denmark and Finland are all listed there, which means that the applicable legislation for this kind of benefits is that of the state where the person and his/her family members reside.

6.6.4.1 Special non-contributory cash benefit – a conflicting concept
The concept of special non-contributory cash benefits, which mean those benefits that have to provide for a minimum subsistence income and which are only granted by and at the expense of the institution of the place of residence, has caused conflicts about how to interpret the concept in the co-ordination of social security. An action against the European Parliament and the Council was brought before the Court on 26 July 2005 by the Commission.\textsuperscript{246} The Commission claimed that the Court should annul the provisions of Annex I, Point 2, of Regulation (EC) 647/2005, in which the criteria previously laid down by the Court for the co-ordination of special and non-contributory benefits, were accepted. The legislature, according to the Commission, failed to follow all the consequences of these criteria when

\textsuperscript{245} Competent Member State means, according to Title I, Article 1\textsuperscript{(s)} Regulation 883/2004, the Member State in which the competent institution is situated. Competent institution means, according to Article 1\textsuperscript{(q)}, the institution with which the person concerned is insured at the time of the application for benefit; or the institution from which the person concerned is, or would be, entitled to benefits if he or a member or members of his family resided in the Member State in which the institution is situated.

it included, in the list of permitted benefits set out in Annex IIa, the Swedish listing of Disability Allowance and Care Allowance.\(^{247}\).

As can be read in Recital 3 of Regulation 647/2005, the two cumulative criteria for these benefits must be assessed in the light of the definition of non-contributory cash benefits laid down in Article 4.2(a) of Regulation 1408/1. According to this definition, non-contributory cash benefits are those which are intended to provide either supplementary, substitute or ancillary cover against the risks already covered by branches of social security referred to in Article 4(1), and which guarantee the persons concerned a minimum income, or only specific protection for the disabled. Moreover, the financing of these benefits, exclusively, derives from compulsory taxation intended to cover general public expenditure. The conditions for providing and calculating the benefits are not dependent on any contribution in respect of the beneficiary.

The Swedish disability allowance and care allowance complement each other and are in principle granted on the same conditions. Eligibility for the benefits is based on needs-testing. Neither qualification through work performance, nor contribution in respect of the beneficiary, are required. Care allowance is granted until the child reaches 19 years of age. Thereafter, if there is a need, the disability allowance is paid.

In the proposal for a Court judgement, the Advocate General referred to a previous ruling of the Court in *Jauch* C-215/99\(^{248}\) and *Leclere* C-43/99,\(^{249}\) which could be used to solve this kind of conflict where two legal instruments (in this case Regulation 1408/71 and Regulation 647/2005) conflict with each other, and thus undermine the rule of law. In Jauch, Article 4.2(a) of Regulation 1408/1 was ruled to take precedence over the listing of benefits in Annex IIa, which in a formal sense are nonetheless of equal weight. Article 4 of Regulation 1408/71 was seen in the above-mentioned case to make more concrete the freedom of movement for workers laid down in the Treaty, a freedom which has the highest ranking. The objectives in Articles 39, 40, 41 and 51 of the EC Treaty, would be unachievable if workers lost the social security provisions that they are guaranteed in one state, when they exercise their right to move freely to another, especially when these provisions represent a service

\(^{247}\) Lag (1998:703) om handikappersättning och vårdbidrag (Disability and Care Allowance Act).


in return for contributions made.\textsuperscript{250} The Advocate General therefore was of the opinion that it would be contrary to Articles 39 and 42 of the EC Treaty, to list benefits in Annex IIA of Regulation 1408/71, if the preconditions for such a listing, as laid down in Article 4.2(a), are not met.\textsuperscript{251}

In the most recent proposal presented by the Commission for a Regulation of the annexes to Regulation (EC) No 883/2004, only the housing supplements for persons receiving a pension (Law 2001:761), and financial support for the elderly (Law 2001:853) are listed in Annex X, with reference to special non-contributory cash benefits according to Article 70.2(c).\textsuperscript{252}

6.6.4.2 Export of family benefits
Concerning ‘family benefits’, differing interpretations of the concept in the Member States have brought with them conflicts as to whether a benefit comes within the matters covered by Regulation 1408/71 and is therefore exportable. Moreover, whether member states can demand residence as a prerequisite for eligibility to benefits has become a matter of judicial concern. Until the Swedish Social Insurance Act came into force in 2001, the rules of the National Insurance Act in principle demanded residence as a precondition for someone to be included in Swedish social insurance. The division of social insurance into residence-based or work-based in current law has also become confusing as regards a definition of family benefits, which in Swedish law are part of both the residence and the work-based branches of social insurance.

Some parts of Swedish social insurance, i.e. housing allowance in the form of the allowance paid for housing expenses, the special benefit for inter-country adoptions, and the benefit for taking care of close persons, are excluded from the application of Regulation 1408/71. These benefits are covered instead by Regulation 1612/68. In contrast to Regulation 1408/71, the principle of equal treatment/non-discrimination in Regulation 1612/68 is only meant for workers and their family members, and is only applicable when the employee and his/her family members are staying in one Member State. Hence, Regulation 1612/68 means that there is no right to draw or export Swedish benefits outside of Sweden.

The Swedish parental insurance, beyond the general basic level, is constructed as an individually earned work-based benefit, and has conflicted

\textsuperscript{252} COM (2007) 376 final.
with the conception of maternity and paternity benefits under Regulation 1408/71. In EC co-ordination regulation these benefits are in contrast constructed to constitute family benefits and are thus exportable. In Kuusijärvi (C-275/96) the Court first judged in its preliminary decision that Article 13.2 (f) in Regulation 1408/71 does not prevent Member States from initiating rules that require residence as a precondition for eligibility for a benefit covered by the legislation in that Member State, in the case at hand the Swedish parental cash benefit. Second, Regulation 1408/71 does not prevent Ms. Kuusijärvi from being subject to a rule that meant she lost her right to continued payment of her individually earned parental insurance, since she had moved to Finland and no longer pursued an activity as an employee in Sweden.253 However, the Swedish administrative court of appeal, (Mål nr 105-1995 KR i Sundsvall) later determined that Ms Kuusijärvi could continue to receive payment of Swedish parental benefit, although she could no longer be defined as an employee and therefore was no longer within the personal scope of social insurance in Sweden. Ms Kuusijärvi instead retained her parental insurance under Swedish law because her husband still worked in Sweden and she was a member of his family.254 This interpretation was also made by the European Court of Justice, based on Article 73 in Regulation 1408/71, which corresponds to article 67 in Regulation 883/2004. The heart of the matter was that the Court came to the conclusion that Swedish parental insurance falls within the material scope of family benefits, according to the definition in Article 1 (u) of Regulation 1408/71. Thus, no demand for residence could be made. Ms. Kuusijärvi could claim her her right to Swedish parental benefit by being a member of her spouse’s family and he still worked in Sweden and was thus insured in Sweden. The Swedish Supreme Administrative Court later came to the same conclusion.255

Similarly, a woman who had moved from Sweden to Denmark was judged to retain her Swedish parental insurance based on the fact that her husband worked in Sweden and was therefore entitled to benefits pursuant to Swedish law. Moreover, with reference to praxis in the European Court, the Swedish Administrative Court of Appeal concluded that parental insurance lies within the material scope of family benefits.256

254 Kammarrätten i Sundsvall, mål nr 105-1995.
In a similar case concerning Swedish parental insurance, the Swedish Supreme Administrative Court came to an almost opposite conclusion (RÅ 1999 ref 4). Irmeli P., who temporarily had been employed in Sweden, lost her parental insurance after she moved to Finland and was no longer allowed to retain her social insurance in Sweden as her work there had ended. As opposed to Ms. Kuusijärvi, she could not claim her parental benefit in the name of a family benefit. Thus, in her case the residence demand laid down in the Swedish regulation meant that she was excluded from the personal scope of Swedish social insurance.\(^{257}\)

In yet another case, the Swedish Supreme Administrative Court, (RÅ 2003 ref 65) concluded that Swedish parental insurance is protected by EC law. In this case, a father who worked and resided in Sweden was adjudged the right to payment of the temporary parental benefit for taking care of his child, who resided in Finland with his spouse, who was unable to take care of the child due to her own illness. Although the Swedish government, in a decision in 1997, had excluded the temporary parental benefit from the scope of co-ordination covered by Regulation 1408/71,\(^{258}\) the Court nevertheless held that the benefit was to be classified as a family benefit within the meaning of Article 4(1)(h) of Regulation 1408/71. The query in the case at hand was whether the temporary parental benefit falls within the definition of social advantages and benefits that are included in the application of Regulation 1408/71. If the temporary parental benefit is seen as being within the matters defined as family benefits, in line with the general demand there is in the National Insurance Act Chapter 4 Section 1, meaning that the child needs to be a Swedish resident for the parental benefit to be paid, this would conflict with EC law. The Swedish Supreme Administrative Court found that temporary parental benefit is automatically granted to persons fulfilling certain objective, legally-defined criteria, without any individual and discretionary assessment of personal needs, which according to the European Court’s praxis are the characteristics required for a benefit to be treated under Article 4(1)(h) of Regulation 1408/71.\(^{259}\)

In a more recent case regarding export of the Swedish parental benefit the Swedish Administrative Court of Appeal (Kammarrätten i Göteborg, mål...
nr 525-06, 2007-01-12) came to a conclusion which contradicts previous rulings on how to apply the exportability principle laid down in Community law. In this case, a woman who had earlier been employed in Sweden now resided in Denmark with her spouse. When she became pregnant she left her job in Sweden with no intention of returning to it later. She was allowed the work- and income-related Swedish parental benefit for taking care of her child, who was born in November 2003. In April 2004 the Swedish Social Insurance Agency (Försäkringskassan) stopped her payment referring to the ruling in Kuusijärvi, since the woman could no longer be defined as a worker in Sweden and now lived with her spouse in Denmark. The County Administrative Board (Mål nr 14850-04) came to the same conclusion and the women lost her Swedish insurance from the day she left her job in Sweden.

The Swedish Administrative Court of Appeal, however, reversed this judgement and came to the conclusion that as far as insurance affiliation was concerned, the woman met the preconditions for eligibility to the work-based and income-related parental benefit after April 2004. The Administrative Court’s judgement was based on Regulation 1408/71 Article 13.2(f) and the regulation concerning the application of Regulation 1408/71 – Regulation EEC 574/72 – in which it appears that the right to social insurance has to be judged in relation to regulations in the state in which the person was last active as a worker, unless a regulation in another Member State becomes applicable. In this case, the woman had interrupted her work in Sweden less than six months prior to childbirth on account of child care. She could therefore retain her Swedish insurance for two reasons: first, according to the rules in the Social Insurance Act on prolonged protection (efterskyddstid), and secondly as long as the benefit in question is paid. Moreover as long as the safety provisions for the calculation of the SGI are applicable, parental benefit is exportable, e.g. if a parent gives up work and takes parental leave to care for a child, provided the work is interrupted or delimited no earlier than six months prior to the birth of the child and that the child has not reached one year of age.

The preliminary ruling in Humer (C-255/99) regarding the public guarantee in the form of advances of maintenance payments for children who

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261 SGI means the level of income which qualifies people for sickness cash benefit.

live with one of the parents, has given rise to different interpretations in different Member States about whether the granting of this benefit is to be based on residence, or falls within the definition of family benefit and is thus exportable. A child has, therefore, been at risk of losing advance maintenance payments if the parent liable to pay it worked in another Member State. A solo mother has been supposed to apply for maintenance allowance in the state where the parent liable to pay the maintenance works, even though no such benefit exists in that Member state. In addition, the different regulations and various interpretations in different Member States have meant that maintenance allowances has not been allowed if the child resided in another Member State. In *Humer* the Court ruled that a benefit such as the advance on maintenance payments provided for by the Austrian Federal Law on the Grant of Advances for the Maintenance of Children, firstly is a family benefit within the meaning of Article 4(h) of Council Regulation (EEC) 1408/71. Secondly, a person, one or other of whose parents is an employed person or is out of work, comes within the scope *ratione personae* of Regulation 1408/71 as a member of the family of a worker within the meaning of Article 2.1 thereof. Thirdly, Articles 73 and 74 of Regulation 1408/71 are to be construed as meaning that, where a child resides with the parent who has custody in a Member State other than the Member State providing for the benefit, and where the other parent, who is under the obligation to pay maintenance, works or is unemployed in the Member State providing the benefit, that child is entitled to receive a family benefit such as the Austrian advance on maintenance payments.\(^{263}\)

In principle, Swedish maintenance allowance (*underhållsstöd*) is only granted if the child and the parent with whom the child resides are Swedish residents. The Swedish interpretation, as concluded in guidelines from the Swedish Social Insurance Agency (*Försäkringskassan*), is now that a solo mother who moves from Sweden has the right to export maintenance allowance provided the parent who is liable to pay maintenance for the child works in Sweden. If the child resides in Sweden with a solo mother, maintenance allowance is granted based on the child's residence in Sweden, even though the parent obliged to pay maintenance for the child works in another Member State. If maintenance allowance in these cases is not granted from the state where the other parent works, or if maintenance allowance is allowed from that country but at a lower level, a child residing in Sweden is not to be disadvantaged in comparison with children living in another Member State.

\(^{263}\) *Case C-255/99 Anna Humer [2002] ECR I-01205.*
The new definition given in Article 1(z) of Regulation 883/2004, which excludes advances of maintenance payments from the material scope of family benefits, could well mean a re-evaluation of the Swedish interpretation.

264 Försäkringskassan, Vägledning 2004:8, p. 20.
7 Conclusions

7.1 Social security law, political struggles and discourses in the EU

The aim in this study was to reveal and analyse how the meaning of a European social model and gender equality is understood, articulated and regulated, what strategies are used in creating the meaning, the consequences they have and what consequences the discursive fixing of meanings in EU law might have for social security law in a Swedish context. Below follows the conclusion from this study.

Commonly agreed social policy objectives in the EU and legal principles in Community law seem today to constitute a common language and frame for interpretation. Recent reforms of community law in the areas of employment and social policies are characterised by enhanced EU involvement. The project to remove obstacles to the common market is substantially led or driven by ‘multi-level governance’ that finds expression both in policy discourse and in law. Concepts such as a ‘European social model’, ‘social cohesion’ and ‘social exclusion’ seem to play an enhanced role in initiating social change, as implied in characterisations of the EU as a ‘knowledge’ economy and a ‘knowledge’ organisation. The concept of social exclusion, like that of social cohesion, seems through the power of vocabulary alone to bring into being the very realities it claims to describe. The conception of the social exclusion of various groups of people is strongly linked to active policies meant to achieve active inclusion based on economic and market interests in flexible labour.

Although the EU today may be characterised as a ‘multi-level welfare system’, based on the legalistic idea of subsidiarity, the Commission plays a central role in initiating policy and ensuring implementation at both European and national level under the social agenda for modernising Europe’s social model. Soft law is the main method applied in attaining convergence of the economies of the Member States by means of enhanced opportunities for more learning, exchange and policy dissemination. In the new social agenda under the revamped Lisbon Strategy for growth and jobs, the notions of a European social model and of social cohesion are expressed as if a common
European model is a reality, despite the variety of conflicting ideas that exist in the various welfare models in the Member States.

Convergence in the economies of the Member States invokes conflict regarding how social rights should be understood and what quality these rights substantially should be given. Reform of the Swedish social security legislation in recent years reflects to some extent how the convergence criterion, which is one of the cornerstones for a European social model, exerts an influence when Swedish social security regulations are reconsidered. Moreover, the freedom of movement and implementation of EC law in cross-border situations signify reconsideration of social protection in Sweden. The capability approach, much debated and also found in the case law of the European Court of Justice and in Swedish preparatory works for legal reform, is based on ideas of freedom of choice and contractual relations involving workers in the free market and seems merely to have a market-creating function.

Gender equality is now understood to be a fundamental principle in the EU. Although involvement in paid work, solely or mainly, is regarded as essential for gender equality, and is also seen as necessary for economic growth and social cohesion in the EU, the new framework for gender equality nevertheless seems quite radical in many respects. Compared to the bread-winner family model that characterised the founding Member States and social security law in the Community, the achievement of equal economic independence for men and women, and enhancing the reconciliation of work, private and family life are among the areas given priority in strategies aimed at gender equality. Moreover multiple forms of discrimination against immigrant and ethnic minority women is also now coming to be recognised as a part of the processes of exclusion in the EU and in the Member States. The polit-ical focus moving from gender equality to combating of additional forms of discrimination in the community programme for employment and solidarity may reinforce and improve the strategy of gender mainstreaming by including additional forms of discrimination (intersectionality), but it may also lead to regression of the gender equality acquis.

7.1.1 The boundaries of a European social citizenship

Is it then possible that the idea of social cohesion and the introduction of a Union citizenship will promote the notion of a European social citizenship that will allow those who cannot claim membership of the national solidarity community on the basis of their nationality or economic contribution to enjoy the range of social protection benefits in each Member State?
A social model for Europe is given a liberal profile while the rights and duties allotted to Union citizens are given derogations in the EC Treaty as well as in secondary legislation and in the jurisprudence of the European Court of Justice. Yet the many entitlements that can be interpreted as social rights in EC law are expressly grounded in the economic activity of individuals. An individual claiming equal treatment must establish that he or she comes within an area covered by non-discrimination in the Treaty.

Free movement in the EU has largely been based on the notion of contractual relations and independence for working men while for women family dependence has been acknowledged and thus constructed as the norm. The notion of active citizenship and the objective of active inclusion today, however, also targets women. The notion of an adult worker model now appears in policy discourse and the reality of family breakdown and new forms of cohabitation are also reflected in EC law. Social rights in cross-border situations in EC law are constructed to be more individualized and are no longer only or merely based on a breadwinner ideology. However, a precondition for cross-border mobility is still that those involved do not become a burden in the host State and the criteria that allow for dependence only in the nuclear family still reflect a breadwinner ideology.

The ideas about a social contract and negative rights that underpin the idea of a European social model in relation to ideas about positive rights in a ‘strong’ Swedish welfare state signify value-based conflicts and contradictions concerning social rights and duties and gender equality that ought to have an affect on the boundaries of social citizenship.

As is shown here, the co-ordination of social security when EU citizens access their right to move and reside freely brings with it conflicts regarding the definitions of various benefits and the personal and material scope of social insurance and social assistance in national welfare models. Moreover, the constructions of the family unit and of the ‘dependence criteria’ determine who – depending on the family form in which the person is a member – is excluded from the freedom of movement and rights ancillary to this freedom. Rights are linked to the status of citizenship and divergent national legislation as regards the definitions of citizenship and of social rights delimit access to rights belonging to EU citizens. The case of Martínez Sala, however, resulted in something approaching a universal right of access to all manner of welfare benefits for all those who are Union citizens and who are lawfully resident in a Member State. On the other hand, this case could also, as explained in feminist analysis of it, be seen as part of a continuing process of historical exclusion, in which the Court has refused
to recognise ‘care work’ as a ‘proper’ form of work for the purposes of interpreting the Treaties.¹

Although Union citizenship has been introduced and EU citizens’ protection in cross-border situations has been improved, persons who, for one reason or another, cannot provide for their subsistence by themselves or by being a member of a worker’s family have low priority in Community law. One example of this is the attitude taken to social assistance in EC law.

Reasons for limiting the export of social assistance can be questioned in the light of the co-ordination objective of enabling not only free movement of workers but also free movement of people. Export of social assistance could have been excluded on the basis of a specific rule, which is the reason for defining some benefits as ‘special non-contributory cash benefits’ and thus non-exportable. The definition of ‘special non-contributory cash benefits’ in Community law also entails, as is shown here, conflicts in interpretation. The construction of certain benefits in Swedish law is inconsistent with their construction in EC law.

The fear of social tourism in Sweden and in other Member States, as a consequence of the right to move freely, not only for workers, but also for EU citizens, may well imply that certain benefits will be reconsidered in the Member States to make them fit the definition of ‘special non-contributory cash benefits’ in EC law. On the other hand, the definition of special non-contributory cash benefits in EC law could, in certain situations, produce alternative and inclusive interpretations. Social assistance pursuant to the Swedish Social Services Act has, under certain conditions, the blended characteristic of social security benefits included in the scope of Article 3.1 of Regulation 883/2004 and of social support. For instance, a prerequisite for being allowed financial assistance pursuant to the Social Services Act for unemployed persons who have not joined the voluntary part of the unemployment insurance, is that they comply with the demand for active participation. In such cases maintenance support (försörjningsstöd) according to the Social Services Act could alternatively be understood as part of the branch of social security that concerns unemployment benefits, as laid down in Regulation 883/2004 Article 3.1 (h). Financial assistance in the form of maintenance support is meant to ensure a reasonable standard of living and thus resembles the minimum income that special non-contributory cash benefits are meant to guarantee. Moreover, like special non-contributory cash ben-

efits as defined in EC law, maintenance support under the Social Services Act derives from compulsory taxation and the conditions for providing and for calculating the benefit are not dependant on any contribution in respect of the beneficiary.

How Swedish law conflicts with the definition of maternity and paternity benefits in EC law was clearly demonstrated in *Kuusijärvi*. The parental cash benefit in Sweden is classified as an individually earned benefit and was not exportable on an individual basis until the Social Insurance Act came into force in 2001, dividing the various schemes into being either residence- or work-based. Although the protection of persons under the co-ordinating regulations depends substantially and ultimately on how social security is regulated in national legislation, the cases concerning co-ordination of family benefits referred to in this study show how EC law will be decisive for the outcome in individual cases. Depending on family form, EC law, in situations where social security benefits are co-ordinated, can irrespective of national rules, lead to the inclusion or exclusion of a person involved in a cross-border situation.

The judgement in *Kuusijärvi*, which was based on the notion of a breadwinner family, construed parental insurance as a family benefit and hence as being exportable only on this ground. The ruling in the most recent case referred to above\(^2\), in contrast, recognises parental insurance as an individually earned benefit and, based on the *lex locii laboris* principle, is retained in a cross-border situation, and is thus exportable. Given that the bread-winner model still characterises several national social security models in Europe, a parent who moves to another Member State should no longer be at risk of losing her individually earned parental insurance in Sweden, and should not, therefore, risk becoming a burden or dependent on the eventual schemes there are in place in the host Member State.

7.1.2 *Solo mothers in the context of active citizenship*

The disadvantaged position of solo mothers demonstrates how gender equality has not been achieved in practice. Given this disadvantaged position, a consequence of being solo breadwinners in a sex-segregated labour market and mostly being solo caregivers, inadequate resources and the denial of access to social rights in combination with the active inclusion objective may separate solo mothers from the normal living patterns of the mainstream of society. In the context of ‘active citizenship’, this group of women, if they

\(^2\) Kammarrätten i Göteborg, mål nr 525-06, 2007-01-12.
are unable to secure their social rights, will be at particular risk of suffering processes of generalised and persisting disadvantage and their social and occupational participation is therefore at risk of being undermined. The EU Charter of Fundamental Rights, which has now been made binding, but is only applicable in cross-border situations, recognizes and respects the right to social assistance so as to ensure a decent existence. However, as national laws and practices still have implications for the outcome in forthcoming interpretations of the Charter, the personal and material scope of benefits laid down in national legal orders may substantially restrict this right and thus make the Charter less significant.

Solo mothers become especially problematic in relation to the overarching goal of active inclusion. Substantive and particular inequalities that entrench the inequalities of solo mothers are still largely ignored. This logic of separation divides off and makes invisible women’s – especially solo mothers’ – life experiences in relation to subsistence and care in active policies aimed at active inclusion. The challenge of reducing child poverty, identified by the Commission, and mentioned particularly as a risk for children in ‘lone-parent’ families, exemplifies how poverty and social exclusion are simply assumed to be effectively attacked by means of reviewing the incentives and disincentives resulting from tax and benefit systems. Although adequate levels of social protection are to be ensured, according to common policy objectives and human rights instruments of the European Council and of the EU, the creation of a flexible economy is primarily meant to be achieved by removing disincentives for women and men to enter and remain in the labour market, and not by means of redistribution.

A solo mother who moves within the Community is still at risk of incurring disadvantage in contrast to a mother who lives in a nuclear family. A precondition for free movement is obviously not to become a burden in the Host State. Dependence is accepted exclusively in the family. A married woman, or a woman living in a household without being married, is assumed to have her subsistence ensured in a bread-winner family. Economically non-active unmarried persons still have no automatic right to enter and reside in a host Member State, even though the family unit, attributed to relational dependence is maintained in a broader sense in the Free Movement Directive than previously. The death or departure of a Union citizen no longer entails loss of the right of residence for family members. In the case of divorce or if a marriage is annulled retention of the residence right depends on whether the marriage lasted long enough (three years). Custody or access to a minor child and domestic violence are also recognised as bases for not being expelled.
These new interpretations in the Free Movement Directive and in EC co-ordination regulations regarding what constitutes a family and the extension of rights for members of this extended family might also imply increased demands, not only for a European social model but also for a European family model through increased harmonisation of family law.³

As a final reflection, the function of anti-discrimination rules in human rights instruments on a regional European level in a Swedish context appears to be an important issue for further legal studies. Moreover, the similarities and contradictions in current Swedish law in relation to the emerging EU polity and law shown in this study, and the implications discussed concerning convergence in social security regulations in general, and for solo mothers in particular, are of delimited explanation. Convergence in social law, as in other branches of law, is not only a technical issue but needs to be seen in the context of each culture and each political economy. In order to provide a basis for gender-sensitive assessment of statutory transformation and of new interpretations in current social security law, and for critiquing the deeper influence on the discursive ways of representing the social reality European integration might have in a Swedish context, a deeper examination of the ‘Swedish model’ in time and space is necessary.

³ For a discussion on Nordic family law in the context of EU: see Melby, Pylkkänen, Rosenbeck and Carlsson Wetterberg, 2006, 376 ff. See also MacGlynn, 2001, for a discussion on the European bread-winner model of family.
PART IV

SOCIAL SECURITY FOR SOLO MOTHERS
IN THE SWEDISH WELFARE MODEL
8 Introduction

8.1 Constructions of normality in the Swedish welfare model

8.1.1 Aim and approach

A deeper understanding of constructions of gender and power in law in the Swedish welfare model over time, and of inherent processes of exclusion and inclusion, seems necessary in order to assess the present transformation in social security law, and to understand critically and gender-sensitively the boundaries of social citizenship in the Swedish welfare model at present time. In this study, by means of a discourse analysis approach¹ normality in the structure of the Swedish welfare model is deconstructed² in the discursive practices of social security law³ and in social practices in society.⁴ The concept of solo mothers⁵ is utilised analytically for disclosing past and present constructions of normality and processes of social inclusion and exclusion in the Swedish welfare model, and how these constructions are constituted, re-constituted and transformed over time.

Solo mothers’ lives are represented through different discourses in the social practices of government, politics and law. Discourses are diverse representations of social life which are inherently positioned – differently positioned social actors ‘see’ and represent social life in different ways. Different

¹ The theoretically and methodologically of discourse analysis is presented in the introduction to this thesis on pp. 39–46.
² The concept of deconstruction is presented in the introduction to this thesis on pp. 48–49, note 123.
³ Constructions of normality in the legal branches that regulate social security are to be found not only in social (or welfare) law, but also in family law, labour law, constitutional law, and anti-discrimination law. The concept of ‘social security law’ is used here as a generic term without making any claim to establish a new branch of law.
⁴ The discourse analysis approach to law adopted in this study is in the introduction to the thesis compared with other multi-levelled approaches theoretically and methodologically adopted in scientific research, including law; see on pp. 48–49 and note 124.
⁵ A definition of the concept of solo mothers used analytically in this study is presented in the introduction to this thesis on pp. 25–26, 29–34. As will be shown, in the text-level formations that provide the basis in the search for how normality has been constructed in the Swedish model over time, this group of mothers have mostly been discussed in other terms: e.g. as ‘unmarried mothers’ or as ‘single parents’.
discourses within each of these practices correspond to the different positions of social actors.\(^6\)

The object in this study is not to provide a structural explanation but an analysis of *how* social structure in the form of discourses is constituted and changes over time, and how articulations continuously reproduce, challenge and transform the discourses. The fixing of normative principles in law, including that of the meaning of gender, and how these fixations embedded in the structure of the welfare model have been constituted, re-constituted and transformed over time, reveal ideological representation and hegemonic reproduction of gendered inequality in society. By means of a discourse analysis approach to law, that which is indefinable in hegemonic interventions can be shown, and thus provide an intellectual framework for alternative explanations and interventions aimed at social inclusion and gender equality for solo mothers.\(^7\)

Deconstruction of normality and the position of solo mothers in the Swedish welfare model focuses on how social actors produce representations of other practices, as well as representations of their own practice, in the course of their activity within the practice. Representation is a process of social construction of practices, e.g. the social construction of gender and power, including the construction of normality. Representations enter and shape social processes and social practices, such as the processes of exclusion and inclusion, and social practices such as gender and power in the welfare regime.

If and how the needs of solo mothers are recognised in the welfare model is a matter of social, structural, and representational processes, which are ideologically mediated in social practices. In order to expose the kinds of hierarchies into which needs and social rights are placed vis-à-vis each other, the conditions that govern entitlement to benefits are, in this study, historically unmasked in the discursive practices of law. The discursive identification of past and present legal concepts and legal principles for ensuring the needs of citizens, of notions of autonomy and dependence in social security and family law, and the normative assumptions that define the legal subjects as well as their rights and duties, is understood to reflect the boundaries of social citizenship for solo mothers over time. The distribution through

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\(^7\) Compare Vahlne Westerhäll, 2002b, p. 66. The various legal institutions formed the basis for her description of development in Swedish social security law 1950–2000. In her view, the ideologies that form the rule of law state and the welfare state are not usable for illustrating the conflicts between the different modes of thinking in these alleged state formations.
which people acquire economic support, such as the relationship of distribution through the welfare state and distribution through household or families, implicitly reflects what is included as normal and what is deemed less important and hence excluded in constructions of normality in law. What matters here is the perception that law must not be reduced to such normative material as individual regulations and court decisions: law is contextual, multi-levelled, contradictory, constructed, and an expression of gender and power relations.

8.1.2 Methodological considerations
Discourses figure within processes of change. Since legal discourse is constituted in relation to different discourses and social practices, legal discourse stands in a dialectical relationship with other social dimensions, which comprehend various social practices and discourses. Constructions of normality and inherent processes of exclusion and inclusion in the Swedish welfare model are part of the social structure in society, in which law in a relatively stabilized form, as a social practice, is included. Foucault uses the term *episteme* to demonstrate how the common core of legal cultures is linked to the present general basic epistemological and linguistic structures of culture.8 The discursive structure of the welfare regime clears the way for legal regulation, thought, and articulation, and also closes off this space from fundamentally alternate ways of regulating, thinking, and articulating legally.9

Understood as discourse, law does not constitute a vertical structure; rather the discursive and social practices of law are closely connected. The structure of law in a more stabilized form, i.e law as a social practice, reproduces or restructures the existing structure in society that law is part of. The presentation that follows includes law both as discursive and social practice, and is arranged thematically. Where the domain of the discursive practice level ends and the social practice level begins ought to allow for different interpretations.

The unmasking of normality in law over time discloses the political, structural and ideological transformation of gender and power relations in the Swedish welfare model.

9 Compare Tuori, 1997, p. 434. In his multilayered programme for critical legal positivism the ‘deep structure’ that represents the most inert level of law regarding its development, divides legal history into epochs, each dominated by a specific type of law with a conceptual structure delineating what can be said and thought during a given epoch.
Principally, structural classification\(^{10}\) of welfare models in which the space for legal thought, argumentation and regulation are demarcated seems fraught with difficulties. In order to grasp transformation in the discursive structure of the Swedish welfare model, two periods based on the text material that is deconstructed in this study, are classified:

I. Poor relief for solo mothers in a patriarchal welfare model (–1950s)

II. Social security for solo mothers in the Swedish welfare state (1950s–)

These periods are mainly methodologically formed and are meant to function as a working method, rather than a classification of structures understood to be clearly demarcated from each other. Foucault has explained how in contrast the positivism of a discourse is characterised by its unity over time.\(^{11}\) Legal discourse, according to Foucault, defines and indicates the field in which formal identities, the thematic continuity, the conceptual displacements and the polemic play develops. Thus, the positivism in law, in Foucault’s view, is conceptualised as constituting a historical \textit{a priori} – the quantity of rules that characterise a discursive practise over time.\(^{12}\) Following this line of argumentation, demarcation of the welfare state from a patriarchial welfare model faces difficulties, and illustrates the uncertainty that exists in periodical classifications according to period.

Deconstruction of normality and of solo mothers’ position in the discursive structure of the Swedish welfare model \textit{before} and \textit{after} the 1950s is approached thematically. To begin with, in each of the two periods classified, the contextual meaning of social security law and of social rights in their more stabilized form are presented. Thereafter follows a presentation of normality and of solo mothers’ position in the discursive practices of social security law – in legal regulations, including how these regulations are construed in legal discourse – and in the mix of discourses that are involved in

\(^{10}\) In discourse analysis, classification is, often with references to Bourdieu, understood in terms of a relationship between ‘vision’ and ‘di-division’: pre-constructed and taken-for-granted ways of dividing up parts of the world continuously generate particular ‘visions’ of the world, ways of seeing it, and acting upon it. Fairclough suggests that we can research the development, as well as the challenging, contesting and mixing, of classificatory schemes by analysing how discourses are drawn upon and articulated together in texts, and realized in representations, meanings and forms. See Fairclough, 2003, p. 213.

\(^{11}\) Foucault, 2002, p. 155.

the social construction of the welfare model. Finally, deconstruction of nor-
mality and of solo mothers’ position is brought to a close through revealing
the social practices of gender and power in each period.

Legal discourse contributes to the constitution of the welfare regime,
including the construction of social identities and social relations. Given that
the boundaries between law and not-law are understood as constructed, decon-
struction of normality in social security law involves interdisciplinary
discourses. The limits of law need to be transcended for the purpose of a
gender-sensitive, unmasking and critical deconstruction of normality in the
Swedish welfare model, where the aim is to disclose the social consequences
constructions of normality in law have for solo mothers’. Concepts and prin-
ciples in legal discourse are continuously constituted and re-constituted in
interplay with other discourses. Unmasking the discursive structure of social
security law, therefore, involves not only internal legal discourses, but also
an inter-discursive mix of discourses, e.g. economic, political, and sociologi-
cal discourses. Boundary-work is needed in order to grasp how law, not in
isolation, but in interaction with other discourses in time and space, takes
part in the social construction of reality. Discourse analysis of law relies on
discursive text-level formations that exercise symbolic power by creating and
reinforcing a specific way of conceiving the social world.

Analytically, legal discourse can be distinguished by conceptual, norma-
tive and methodological elements in law. Legal concepts, such as the concept
of ‘social exclusion’ in EU law for example, and general principles in social
law, e.g. the principles of solidarity and of (gender) equality, exemplify how
such concepts and principles play a central role in the symbolic power of
law. The deconstruction of normality in the discursive structure of social
security law involves legal regulation, such as individual statutes and decrees,
policy dissemination in preparatory works of the government and the mean-
ings judicially construed, articulated and fixed in legal dogmatic works. In
Sweden the role of preparatory works – travaux préparatoires – has been fairly
central in the interpretation of the laws. Preparatory works here is understood
to represent the legislator acting in its discursive aspect. Deconstruction of
law that is now in the past, i.e. of past laws, largely draws on systematisation,
interpretation and articulations in legal doctrines.

positivism, the ‘legal culture’ represents legal understanding. Legal culture in Tuori’s view
consists of two types of legal understanding: first, the expert culture of legal professionals and
legal experts, second, the public’s legal consciousness.
Deconstruction of normality and inherent processes of exclusion and inclusion in the Swedish welfare model, however, need to move beyond legal regulation and interpreting activities in the legal culture of the ‘elite’\textsuperscript{15} in a strict sense. Social security law is constituted in a political, economical and historical context where boundary-work is needed.\textsuperscript{16} Law is part of social events, i.e. connected to social context in time and space. Since the discursive structure of social security law is continuously constituted and reproduced, challenged and transformed in a social context, non-legal material as well as legal texts is also needed in this study. Constructions of normality in the Swedish welfare model include philosophical and historical concerns and need to be interdiscursively and intertextually disclosed. The sources of knowledge in this study thus include non-legal and legal philosophical and historical works.

8.2 The basic structure of the Swedish model

By way of introduction, a brief overview of the general features that are commonly said to represent the basic structure of the ‘Swedish model’ are presented here, in comparison to other institutional welfare models. Moreover, current social security regulations are also outlined here, the intention being to provide a starting point for a deconstruction of normality in the discursive structure of social security law in the Swedish welfare model over time that follows in Chapters 9 and 10. This introduction is meant to function as a measurable reference laying the foundation for a contextualized and historical understanding of social security law and of the position of solo mothers in the Swedish welfare model.

The type of solutions in different countries regarding social security has been of great interest in the comparative research that has defined various

\textsuperscript{15} Max Weber pointed out how the ‘legal expert culture’ constitutes one of the distinctive characteristics typical of the rule of law state, see: Vählne Westerhäll, 2002b, p. 48, with reference to Weber, 1971. Compare Foucault, 2002, pp. 57–67, and his explanation of how the formation of objects takes place in discourses: how they are demarcated, defined, objectified, thus making it possible to name and describe them.

\textsuperscript{16} Compare Hydén, 2002, p. 268. Hydén argues for normative science (normvetenskap) in law and in social sciences in which the function and connection of a legal norm to other norms in society has to be analysed. Legal phenomena are in his view to be seen in relation to the underlying normality, and normative patterns in law are to be integrated with knowledge on the social functions of legal rules. Normative science could in Hydén’s view, therefore, constitute a bridge between moral practices, system imperatives, and normative transition in society on the one hand, and legal transformation on the other hand.
welfare state regimes, how these regimes should be explained and their consequences. In the pioneer work of the Danish sociologist, Gösta Esping-Andersen, the different regimes was defined as to the extent to which the social security system could handle wage-earners’ chances of retaining their standard of living when the market failed, termed ‘de-commodification’.\footnote{Esping Andersen, 1990.} Sweden, together with Denmark, Finland, Norway and the Netherlands, are defined in this typology as social democratic, having as a special feature the liberation of the waged worker from market dependence, through systems of social security. An alternative direction in welfare research, represented by Pierson, Korpi and Palme, distinguishes between different systems of social security by means of concentrating on institutional social security arrangements, and is interested in the consequences the solutions originally chosen in each country have for further developments of social security. Pierson has emphasised how various branches of social security in the same country can in fact be constructed in different ways, thus questioning Esping Andersen’s idea on welfare state regimes.\footnote{Pierson, 1994, Pierson, (ed.), 2001.} In their analysis, Korpi and Palme focus on social rights and claim that Swedish (and Norwegian) social security was based from the beginning on means-tested poor relief which, through state contributions, developed into voluntary organisations and models of basic security and thereafter into a general model of standard security. This is also valid for the model in Finland. In contrast to Esping-Andersen, who emphasised the de-commodifying effects of social security systems, Korpi and Palme emphasise the power struggle between labour and capital in their social class-based analysis of social security that is especially interested in the redistributive effects of social policy.\footnote{See Korpi, 2001(b); Korpi and Palme, 1998.}

Korpi and Palme distinguish between five different types of institutional social security models in the OECD countries:

1) A needs-tested model targeting the poor and those in need for other reasons.

2) A voluntary, state-subsidised model organised in the form of voluntary funds, mainly sickness and unemployment funds.

3) A corporative model founded by the state in co-operation with interest groups, characterised by separate programs for different occupational groups and self-management by employers and employees. Compensation is mostly
based on waged work, is income-related and thus excludes ‘housewives’. These programs initially targeted industrial workers but have also been successively extended to comprise separate programs for other groups.

4) A general model of basic security that in principle includes all citizens but the compensation is limited.

5) The general standard security model guarantees income security in all its systems, i.e. the compensation is income-related. The general and uniform social security program that in principle includes all citizens also provides income-related compensation for all those who are gainfully employed.

In their welfare typology that focuses on class and gender inequalities, Korpi and Palme indicate that Nordic welfare is based on an encompassing and dual-earner constellation, which combines universalism with earnings-related benefits.20

8.2.1 Characteristics of the Swedish model
The Swedish social system in general and the Swedish welfare state in particular have often been described as the ‘Swedish model’. There are several distinctive features that usually are said to belong to the Swedish welfare state.21 First, the rules and power systems on the labour market has been characterised as a historical compromise between capital and labour that is also underlined by the strong notion of consensus between the parties. Secondly, in the welfare state, politics was based on employment for all and the wage policies were based in solidarity. Thirdly, the strong expansion of the public sector during the 1960s and 1970s, which was meant to secure the welfare of the citizens, leads to the notion of a strong state. Fourth, the principle of universalism was intended to include, without means-testing, all citizens or categories of citizens in the social security schemes. The assumption was that such an inclusive system, where everyone shares the costs and the goods, should legitimize the system and gain it support among the people.22 Another commonly expressed specific of the Swedish welfare model is the strong belief in social engineering: a strategy for ‘setting life in order’.23

21 One description of the Swedish model that is referred to here was presented in SOU 1990:44. The Committee in question was appointed through Dir. 1985:36.
The question of whether these descriptions of the Swedish model rather portrayed features of the past, and whether the Swedish model was at a cross-roads was raised as early as in the year 1990 by an Inquiry on Power and Democracy in Sweden.\textsuperscript{24} Other characterisations of the Swedish welfare model, based on works primarily by researchers representing disciplines such as sociology, economy and political science, have been summarised as follows:

- A comprehensive universal/institutional welfare model with the state as the dominant supplier of – decommodifying – welfare, centred on a public provision of education and care;

- Strong support for the principle of replacement of lost earnings in social insurance along with a firm work-orientation and an institutionalized commitment to full employment;

- A relatively egalitarian distribution of income achieved by a fair/high degree of redistribution through general taxes that constitute the main source of welfare financing.\textsuperscript{25}

In Sara Stendahl’s recent work on cases regarding sickness cash benefits in Swedish administrative courts a complementary list to the Swedish model was presented, that summarised the distinct changes or possible future trends observed by researchers when comparing the traditional Swedish welfare state with the Swedish welfare state of the 1990s. In the 1990s the welfare state was characterised by the following features:

- A less generous welfare state

- Increased income inequality

- A move towards more active labour measures followed by a shift from a policy of de-commodification to a policy of re-commodification

- A possibly more segmented welfare state with an increased plurality of actors providing benefits, a welfare state that might become more responsive to diversified demands.\textsuperscript{26}

\textsuperscript{24} SOU 1990:44, p. 22.

\textsuperscript{25} Stendahl, 2003, p. 255, and the attached sources referred to.

\textsuperscript{26} Stendahl, 2003, p. 262, and the attached sources referred to.
8.2.2 Social security law and legal principles

Solidarity, redistribution and equality of opportunity are often described as legal principles which constitute the basis for Swedish social security, together with such perspectives as justice and effectiveness.27 Solidarity in social insurance is expressed through mandatory affiliation for all those who reside in the country.28 The constructions of eligibility to and levels of compensation granted in social insurance are mostly based on a ‘loss of income’ principle: a circumstance which maintains the employment strategy of the welfare model. Eligibility for most social advantages presupposes gainful employment, and is thus believed to encourage people to work. The national social insurance system is redistributive both over the course of a person’s life but also between people.29

Although social security regulations can be characterised as a miscellaneous body of social benefits and contributions, which vary considerably and in same instances show few similarities, there are some characteristics that may be specified initially. Most social advantages and benefits are constructed to be individual, not based on family membership. The welfare system in the Swedish welfare state is workfare-oriented and requires work-force participation on the part of women as well as men. Traditionally, even solo mothers are expected to participate in salaried labour. Since most women work, they have a right to work-related pensions, social insurance and unemployment benefits. Basic social security in the form of social insurance cash benefits have mainly been based on residence, rather than contribution, labour or citizenship and are often therefore described as being universal in scope.

The notion of a normative comprehensive structure without legitimate particular and individual interests has characterized the Swedish welfare state. Legislation for particular groups of citizens in a Swedish context, beyond general allowances such as the child allowance or the means-tested housing allowance, would therefore be a move away from that notion.30 Consequently, there have been almost no particular benefits, e.g. for solo mothers, within national social insurance in Sweden. However, the municipalities which administer the last-resort social protection system are given the ultimate

responsibility for guaranteeing that those who stay in a municipality will be secured the support and the help they need, if that need cannot be provided for by other means. Social security for asylum seekers is governed by special regulations and is primarily constructed as a state responsibility.

Constitutional protection of social rights in Sweden for the first time was established in the Instrument of Government of 1974. Until then Swedish legislation had been based on an Instrument established in 1809, although it was successively amended in the direction of a rule of law state. The authorities’ independence in relation to the parliament and the government is declared to be a necessary precondition for obtaining the division of power characteristic of the rule of law state. In the 1974 Instrument social rights were constructed as a series of public objectives: to secure the right to occupation, a place to live, and education. Social care and security, and a good living environment are from that date and still, explained in a less positive way as public recommendations addressed to authorities. This means that individuals in their relation to more or less independent authorities do not have the right to base their claims for welfare provision directly on fundamental law. A characteristic feature of the Swedish welfare state, noted by Vahlne Westerhäll, is the tension between the fact that social rights traditionally (in the rule of law state) had no constitutional protection, and the ambition of the welfare state to establish legal rights.

In Sweden scepticism has persisted with respect to statutory regulation in the area of anti-discrimination legislation. Such legal regulation has only occurred in labour law. In 1979 the first Swedish Act prohibiting unequal

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31 The right to support is regulated Socialtjänstlagen (2001:453), Chapter 4, (Social Services Act).
32 Lag (1994:137) om mottagande av asylsökande m.fl., (Reception of Asylum Seekers Act).
34 See Vahlne Westerhäll, 2002b, p. 45.
35 regeringsformen, (1974:152), Chapter 1, Section 2.
36 Vahlne Westerhäll, 2002b, p. 52.
37 See Lag (1999:130) om åtgärder mot diskriminering i arbetslivet på grund av etnisk tillhörighet, religion eller annan trosuppfattning; lag (1999:132) om förbud mot diskriminering i arbetslivet på grund av funktionshinder; lag (1999:133) om förbud mot diskriminering i arbetslivet på grund av sexuell läggning. These laws are commonly known as the 1999 working life laws. Anti-discrimination laws beyond working life have been enacted thereafter: lag (2001:1286) om likabehandling av studenter i högskolan; and lag (2003:307) om förbud mot diskriminering.
treatment of women and men at work was adopted. Like the later and now current 1991 Equal Treatment Act, the 1979 Equal Treatment Act had three sections: prohibitions against discrimination, active measures to be taken by the employer, and enforcement mechanisms and procedures, including the establishment of the Equal Opportunity Ombudsman, Jämo.

The Anti-Discrimination Act enacted in 2003 also addresses societal fields beyond working life and higher education. In 2005 extended protection against discrimination on the basis of sex was enacted. This latter Act intended to counteract discrimination on the grounds of sex, ethnicity, religion or some other religious belief, sexual orientation and functional disorders. Social welfare services, social insurance, unemployment insurance and health and sick care are included among the fields covered by the prohibition of discrimination.

8.2.3 The personal and material scope in Swedish social insurance

The rules indicating who is included in the social security system by means of social insurance and social benefits, excluding the last-resort system under the Social Services Act which is not conceptualised as social insurance, are to be found in the Social Insurance Act. The branches of social security that constitute Swedish social insurance, including certain benefits, are indicated in Chapter 3 to the Act. The social security system is divided into two parts; one part that is based on residence and is meant for basic social insurance payments and benefits; and a second part that is work-based and meant to cover losses of income. In principle, eligibility for advantages and benefits is either to be based solely on residence or work. The status of resident is mainly awarded to anyone who enters Sweden legally with the intention of

40 Lag (2003:307) om förbud mot diskriminering.
42 For an overview of the Swedish approach to sex discrimination with regard to parental leave and the Swedish model, see Carlson, 2007. Carlsson suggests that Sweden may need to reassess its legal approach to equality between the sexes, as well as issues of discrimination in general, incorporating aspects of access to justice into the legal system, as well as reassessing the role of the labour unions, and the Swedish model, with respect to such questions in general.
staying more than one year. Such a person needs a residence permit. The person retains this status if he or she leaves the country for a period of time of less than one year.\textsuperscript{44} EC law, including EES and agreements with other states in bi- or multi-lateral situations may, however, signify divergent applications of the Act. A Union citizen, or an EES member citizen, will in accordance with the rules in EC co-ordinating regulations, be insured in Sweden from the first day of work in Sweden.

A Swedish resident is included within the personal scope of the acts concerning child allowance, prolonged child allowance, support to the disabled to travel by car, allowance for inter-country adoption, special pension supplement to the old age pension scheme attributed to prolonged care for a sick or disabled child, assistance allowance for the disabled, housing allowance, maintenance allowance for children not living with both their parents, guaranteed pension, disability and care allowance, survival pension and survival support to children, and maintenance support for the elderly.\textsuperscript{45} Social insurance based on residence also includes compensation for medical treatment, basic parental benefit (SEK 180 per day), sickness and activation benefits on a guaranteed level for pre-retired people and those in activation, and rehabilitation.

Beyond these above mentioned basic general benefits, the working population who reach the level of income which qualifies them for sickness cash benefit (SGI), are also insured against such risks as sickness and pregnancy, temporary care of a child, pre-retirement compensation (sjukersättning) or activation compensation (aktivitetsersättning), and rehabilitation. In addition, workers are insured against risks in connection with accidents at work, leave to take care of close persons, old-age pension, survival pension and survival support for children within the survival pension scheme.\textsuperscript{46}

In principle, work-related insurance expires after three months from the day that work came to an end for reasons other than leave for holiday or vacation or similar break off – prolonged protection time. Those who are granted the income-related compensation for sickness and the income-related activity compensation, however, retain insurance for one year. In addition, as long as a person is granted compensation pursuant any of the work-related national insurance schemes, his or her social insurance is retained.\textsuperscript{47}

\textsuperscript{44} Socialförsäkringslagen (1999:799), Chapter 2, Section 1.
\textsuperscript{45} Ibid, Sections 1–2.
\textsuperscript{46} Ibid, Sections 4–5.
\textsuperscript{47} Ibid, Section 6.
meant to ensure that people do not ‘fall between two stools’ and thus lose their social security. In addition, the work-related part of insurance is retained as long as the safety provisions for the calculation of the SGI, indicated in the National Insurance Act, are applicable.\textsuperscript{48} According to the main principle, the SGI is protected against being reduced if an insured person pursues continuing education, participates in labour market policy programs, is pregnant and limits or interrupts work at the earliest six months prior to the birth of the child, gives up work due to parental leave or adoption, or is engaged in military service.\textsuperscript{49}

Insurance is mainly based on contributions according to level of income, and is paid by the employer; thus in fact having a tax construction. Contributions are paid on the total amount of income but loss of income is only compensated up to the level of a top income.\textsuperscript{50} Beyond the top, loss of income is normally compensated for through collective agreements between the labour market parties. The share of the income that is compensated for, and the top income, based on current price base amounts that determine the level of compensation in relation to income, have fluctuated and have largely been connected to state finances and budget deficits. During the 1990s the benefits in most of the schemes were reduced. Basic residence-based cash benefits were also reduced by cutting the amount of benefit; this was e.g. the case for the housing and child allowances. Maintenance allowance for children who do not live with both their parents was no longer, as was the case in previous regulations, adjusted and altered in relation to the price base amount and thus became fixed from year to year. Recovery in state finances after the crisis of the 1990s implied altering the levels of compensation, regarding the percentages of income that is compensated for and the top of income on which the compensation is based.

\textsuperscript{48} Socialförsäkringslagen (1999:799), Chapter 3, Section 10.
\textsuperscript{49} Lag (1962:381) om allmän försäkring (National Insurance Act), Chapter 3, Section 5, subparagraph 3, points 1–6.
\textsuperscript{50} The income ceiling for work-related benefits is related to the price base amount which is indicated in the National Insurance Act (1962:381), Chapter 1, Section 6. The price base amount is related to the price index which is available at http://www.scb.se/templates/Product____3379.asp, Statistics Sweden. The price base amount for 2008 is SEK 41000 (EUR 1=approx. SEK 9), see Förordning (Decree) 2007:699 om prisbasbelopp och förhöjt prisbasbelopp för år 2008. The income ceiling for parental cash benefit in connection with childbirth is ten price base amounts. The income ceiling for temporary parental benefit and pregnancy benefit is seven and a half price base amounts.
8.2.4 Family benefits and services

The residence-based part of social insurance comprises most of the benefits that are subsistence related and is meant to cover basic welfare needs through provision that is largely targeted on families with children, the disabled, the elderly with no or low income related pensions, and survivors.

The Swedish model has long been characterised by the objective of providing financial support for families with children within the framework of universal welfare, thereby reducing the financial differences between families with and without children. Financial support for families in Sweden consists of a number of benefits, e.g. child allowance,\(^{51}\) parental insurance,\(^{52}\) including a benefit for temporary care of the child;\(^{53}\) care allowance for sick and disabled children,\(^{54}\) maintenance allowance,\(^{55}\) housing allowance,\(^{56}\) inter-country adoption allowance,\(^{57}\) child pension and pension right for child-care years.\(^{58}\) Some of these benefits are general in character (the child allowance and financial aid to children attending upper-secondary school, the guaranteed levels of parental insurance, and children's pension allowance). ‘General’ in this context means a fixed-rate benefit for a specified group of children, without means testing and not based on parental income. In contrast to this, the residence-based housing allowance is means-tested on the basis of the income of the household and number of children in the family. In contrast to other family benefits, care allowance for sick and disabled children and the guaranteed basic level of parental insurance, which are also part of the national insurance scheme, are taxed.

The political objective of financial security for families and children, within the framework of general welfare referred to above, has recently been abolished. The new objective is to improve conditions for all families with children in order for them to achieve a good standard of living.\(^{59}\) Rather than

\(^{51}\) Lag (1947:529) om allmänna barnbidrag (General Child Allowance Act), and lag (1986:378) om förlängt barnbidrag (Prolonged Child Allowance Act).

\(^{52}\) Lag (1962:381) om allmän försäkring (National Insurance act), Chapter 4.

\(^{53}\) Ibid, Sections 10–13.

\(^{54}\) Lag (1998:703) om handikappersättning och vårdbidrag (Disability and Care Allowance Act).

\(^{55}\) Lag (1996:1030) om underhållsstöd (Maintenance Allowance Act)

\(^{56}\) Lag (1993:737) om bostadsbidrag (Housing Allowance Act).

\(^{57}\) Lag (1988:1463) om bidrag vid adoption av utländska barn (Intercountry Adoption Allowance Act).

\(^{58}\) Lag (2000:461) om efterlevandepension och efterlevandestöd till barn (Survival Pension and Survival Support to Children Act).

\(^{59}\) Prop. 2007/08:1 Utgiftsområde 12, p. 11.
considering the anonymous collective of families and the relative difference between households with and without children, the new objective is meant to mirror the new and ‘modern’ direction in family policies of targeting all families – families who are different, have different expectations and needs, and who are to be equally valued. Hence, the importance of free choice and flexibility is underlined, as opposed to the previous objective which emphasised redistribution.

The municipalities’ responsibility to provide daycare for pre-school and school children up to the age of 12\[^{60}\] is a service of significance for the Swedish ‘employment strategy’ in the ‘Swedish model’ and of crucial importance, especially for solo mothers, in the reconciliation of waged work and family life. In 2007 the degree of municipal responsibility for providing pre-schooling for children of parents who work on a full-time basis was adjudged to have its limitations. The Supreme Administrative Court found that the municipality had no responsibility to provide care for children at night or during weekends. The judgement, however, was not unanimous. A divergent explanation in the judgement claimed that municipalities cannot, according to current law, claim insufficient resources as a reason for rejecting an application for pre-school care at inconvenient working hours.\[^{61}\]

8.2.4.1 Maintenance allowance for children

Maintenance allowance is constructed to be a right for the child. It guarantees a basic minimum standard for children who are not living with both their parents.\[^{62}\] The maximum amount in 2008 is SEK 1,273 per child per month. Maintenance allowance can also be paid as a top-up benefit. In that case, the parent required to pay maintenance makes a direct payment to the other parent and the Swedish Social Insurance Agency pays the difference up to SEK 1,273 per month. Maintenance allowance can also be paid as a top-up benefit in cases where the child lives with both parents – so called alternating residence (växelvis boende).\[^{63}\] In this case, the benefit is up to one half of the maintenance allowance amount for each parent and depends on each parent’s income.

The concept of alternating residence is normally meant for situations when the child stays with each parent for approximately the same amount of time.

\[^{60}\] Skollagen (1985:1100) (School Act), Chapter 2a, Section 6.
\[^{61}\] RÅ 2007 ref 2. The same outcome was judged in a similar case the same day, see Regeringsrätten (Supreme Administrative Court), mål /case nr 2828–05.
In determining the dividing line between access (umgänge) and alternating residence, access has been judged to mean situations when the child spends only one third of the time with one parent.  

The Supreme Administrative Court concluded in this case that even though the difference in the time the child stayed with one of its parents is less, the determination of this period of stay should be construed to represent access and not alternating residence, if there are no reasons for doing otherwise. Other factors used in determining whether or not there is alternating residence are: the length of the child’s stay with a parent; national registration of the child; how the child’s housing is arranged; which of the parents accommodates the child’s property; and how the child’s subsistence is arranged. If the child has an annual income exceeding SKR 48,000 maintenance allowance is reduced. A parent who is liable to reimburse maintenance allowance under the Maintenance Allowance Act has, up to the amount that is granted from the state, fulfilled his or her civic duty to provide maintenance for the child under the Parental Code. Parents involved in alternate residence and who receive the supplementary top-up support have no obligation to repay. Maintenance allowance in these cases in fact constitutes a social benefit.

8.2.4.2 Child allowance

The general child allowance from its introduction in 1947 was meant as fundamental compensation for the increased maintenance burden when children were born into the family. Child allowance was primarily paid to the mother. This has been retained over the decades, even though under certain circumstances the father has also been granted the allowance. Such a paternal right has come about because of a common agreement between the parents, or if there was proof that the child stayed with only one of the parents. In case of any impediment to taking care of the child, e.g. due to sickness, absence or any other similar reason, child allowance can also be granted to the other parent. If there are extreme reasons, the social services

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65 Ibid. For an overview of the interpreting activity in the application of the Maintenance Support Act, see also Guideline 2001:9 Version 2 issued by the administering body: the Swedish Social Insurance Agency (Försäkringskassan).
66 Civic maintenance duty for a child is regulated in Föräldrabalken (1949:381), (Parental Code), Chapter 7.
67 Regeringsrätten (Supreme Administrative Court) case nr 2693-04, 2005-11-23.
68 See lag (1947:529) om allmänna barnbidrag, Section 4.
may also ask to have the allowance paid to the other parent, to some other appropriate person, or to the Social Services Board.69

Important changes to the Child Benefit Act were introduced in 2006,70 because, according to the government, there were changes in family structure and in conditions regarding custody and housing. Thus, it was maintained that there was now a need to change the rules about which of the parents should be allowed the child benefit. The government also pointed out the need to consider similar changes as regards study support for youngsters in secondary school.71 The amended rules mean that the right to receive the child allowance for parents who have joint custody has been changed and is now based on a joint declaration from the parents as to which of them is to be granted the benefit. If no such declaration is made the benefit will still be granted to the mother. For parents who have the child alternately, which formally is only an option for joint custodians,72 the child allowance can be divided equally between them. If there is a judgement on alternate residence for the child, or if payment of maintenance allowance73 is allowed for the child, a division of the benefit does not need to be commonly agreed by the parents. Only if a parent can prove that the child does not in fact stay with the other parent can an application from the other parent to share the benefit be rejected by the managing body: the Swedish Social Insurance Agency. For parents who share the child allowance equally, the several-child supplement, that is allowed if child allowances are granted for at least three children, is shared proportionally in relation to the number of child allowances (one for each child) that the parents receive.74

8.2.4.3 Care allowance
The gender neutrally constructed care allowance for parents of sick or disabled children, or children with some other functional disorder that requires special care or surplus expenses, is constructed gender neutrally.75 This allowance was amended at the same time and in almost the same way as the child

69 Ibid, Section 5.
70 Prop. 2005/06:20.
71 Ibid. Study support is regulated in Studiestödslagen (1999:1395) (Study Support Act), Chapter 2. For youngsters in upper-secondary school the support consists of study allowance, a boarding supplement and a special supplement tested in relation to parent’s income.
72 Föräldrabalken (1949:381) (Parental Code), Chapter 6, Section 14 a.
73 Lag (1996:1030) om underhållsstöd (Maintenance Allowance Act), Section 3.
74 Lag (1947:529) om allmänna barnbidrag (General Child Allowance Act), Section 2 a.
75 Lag (1998:703) om handikapparsättning och vårdbidrag (Disability Allowance and Care Allowance Act), Sections 8–11.
allowance, making it possible for it to be shared equally by the parents. It is worth noting that this care allowance is under re-evaluation by a Committee that was initially meant to be ready in April 2007. The new government that came to power in the 2006 parliamentary elections is further preparing a reform in this area because of ‘the old-fashioned regulation that badly fits into today’s society’.

8.2.4.4 Parental insurance

Parental insurance first introduced in Sweden in 1974, had as its fundamental objective the promotion of equal opportunity between the sexes. The equal opportunity policies that were adopted in 1994 resulted in new legal regulations in the Equal Opportunity Act and in National Insurance Act. With regard to parental insurance, the objective of equal involvement in parental leave with compensation from parental insurance for men and women, was meant to promote the opportunity to reconcile waged work with parenthood. Each parent had the right to the parental cash benefit during half of the total period of compensation, in contrast to the previous order in which only 90 days were meant to be shared. It was seen as important to influence the attitudes that were one important factor that hampered fathers taking parental leave. The right to transfer days to the other parent was, however, retained, except for 30 days. A single custodian retained access to all days with compensation from parental insurance.

The equal share principle within current regulations means that each of the parents who have joint custody of the child, have the same right to make use of parental benefit by sharing equally a total of 480 days, that are for taking care of the child in connection with childbirth. It is though possible, however, to transfer days to the other parent, except for 60 days that are reserved for each parent individually. A single custodian has the right to make use of all the days. For 390 days the benefit paid is equivalent to the

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76 Prop. 2005/06:159.
77 Prop. 2006/07:1 Ugiftsområde 12, p. 17.
78 Vahlne Westerhäll, 2002b, p. 272.
80 Jämställdhetslag (1991 : 433) (Equal Opportunity Act), Sections 2; 9a; 11; 12; 18; and, 46.
81 Lag (1962:381) om allmän försäkring, National Insurance Act, Chapter 4.
parent’s qualifying income for sickness benefits (80 % of income subject to the ceiling in the scheme).\textsuperscript{84} This work-based benefit requires the parent to qualify by having worked at least 240 days prior to the birth of the child.\textsuperscript{85}

The National Insurance scheme also includes pregnancy benefit for the mother that is part of sickness insurance\textsuperscript{86} and temporary care of the child until the child reaches the age of 12.\textsuperscript{87} Temporary care compensation is also allowed for parents of seriously ill children beyond 12 years of age if the illness prevents them from working. For children below 16 years of age the temporary parental benefit can also be allowed if the child is in need of special care for special reasons, such as sickness, physical disability or some other kind of disability. Moreover, if the child is within the personal scope of the Act (1993:387) concerning support and services for certain disabled, a parent can be allowed the temporary care benefit until the child reach the age of 23.\textsuperscript{88} The temporary parental benefit can also be given to someone else who is insured, and who instead of the parent, does not work in order to take care of the child, provided the child or the child’s’ ordinary carer is sick.\textsuperscript{89} The temporary parental benefit normally compensates for 60 days each year at the most. If a child below 18 years of age is seriously ill the number of days of compensation is unlimited.\textsuperscript{90}

The parental insurance scheme also consists of a residence-based basic level of compensation for care of the child in connection with childbirth, irrespective of previous income, provided the recipient of the allowance him- or herself takes care of the child.\textsuperscript{91} In 2006 this basic compensation level was raised from SKr 69 to SKr 180 per day.\textsuperscript{92}

\subsection*{8.2.5 Unemployment insurance}

Although unemployment insurance does not come within the legal definition of social insurance there are in principal many similarities to social insurance. Unemployment insurance protects against the risk of unemploy-
ment and compensation is granted according to the loss-of-income principle. The unemployment benefit presupposes qualification through working for a period prior to unemployment. For people who are not members of an unemployment fund that administers the unemployment insurance, there is also a basic protection scheme, which requires qualification in the form of a work history. The unemployed who receive this kind of basic benefit also pay a fee for the funds administration costs. The first unemployment insurances were mainly funded by fees paid by the members. In 2005 90% of the compensation from the funds was state subsidized. In 2007 the rules of unemployment insurance were amended. The need was expressed by the government in 2006 to restructure unemployment insurance into a compulsory insurance. How a more radical reform of this insurance should be constructed needed further inquiry, however, thus a more permanent solution for the funding of the unemployment insurance was not yet proposed. Nevertheless, increased self-funding for the scheme was seen as being very important and needing early introduction. Hence, the fees for insurance were raised in the new rules that came into force in 2007.

Making work pay was strongly emphasised in the Government Bill. Unemployment insurance that was far too generous was thought to risk people’s willingness to find a new job and should be counteracted. The incentives to find a new job, according to the Government, were too weak since unemployment benefit covered 80% of lost income for considerable length of time. Thus, qualification for the unemployment benefit was made more stringent through extension of the required work period prior to unemployment for eligibility to unemployment cash benefit: this was set at not less than 80 hours per month during six months within the frame of 12 months. Earlier, this latter 12-month period could be discounted during a period of seven years for special reasons, e.g. if the applicant had been sick, had completed a fulltime education, or had received parental cash benefit under the provision that the insured person had earlier qualified for unemployment insurance. This period has now been limited to five years.

93 Prop. 2006/07:15, p. 29.
94 Prop. 2006/07:15.
95 Prop. 2006/07:15, p. 34.
96 Prop. 2006/07:15, pp. 33–34.
97 Prop. 2006/07:15, p. 17.
98 Lag (1997:238) om arbetslöshetsföräkring (Unemployment Insurance Act), Section 12.
Unemployment insurance is now meant to protect against loss of income from permanent work. The opportunity for students to qualify for unemployment benefit without working has been abolished. The change in the rules underlines the main objective for unemployment insurance to become ‘adaptation’ insurance.\textsuperscript{100} Payment of unemployment cash benefit is now limited to 300 days. The total compensation period is extended for parents having underage children but cannot exceed 450 days.\textsuperscript{101}

The funding of unemployment insurance has already been radically changed in recent reforms and further reform has been articulated but is not yet established in law. The differentiation of members’ fees is now meant to mirror the risk of unemployment in various sectors of labour market; the more members in a fund who are unemployed, the higher the fees.\textsuperscript{102} More independent unemployment insurance and the need for further reforms and restructuring of this insurance to make it obligatory have been announced as part of their new labour-market policies in a more recent Government Bill.\textsuperscript{103}

Scientific support in preparatory works for the assumption that the level of compensation does in fact influence unemployment rates was derived from international economics. The reduction in work tax, which was also introduced in 2007, is supposed to compensate for the rise in members’ fees and also promote financial equality since the assumption is that the changed rules will make work pay. More people are meant to increase their working hours from part time to full time basis.\textsuperscript{104}

\textsuperscript{100} Prop. 2006/07:15, p. 21.
\textsuperscript{101} Lag (1997:238) om arbetslöshetsföräkring (Unemployment Insurance Act), Section 22.
\textsuperscript{102} Prop. 2006/07:15, p. 33 f.
\textsuperscript{103} Prop. 2006/07:89.
\textsuperscript{104} Prop. 2006/07:89, pp. 45–46.
9 Social security for solo mothers in a patriarchal welfare model

The origin to social security legislation lies in social events, i.e. is connected to the actual social context in which social security legislation first emerged. European political, economic, social, and cultural influences during the period 1500–1800 implied an Europeanization of the Nordic countries. The foundation of church legislation from ancient times, to the breakthrough of ideas in the Age of Enlightenment at the end of 18th century, had its basis in biblical interpretation as in natural law. In Sweden, the clergy held a powerful position in legislation and in the administration of justice, e.g. in family law. Legal culture, in the Nordic, as in other European countries, was however marked by a transition from church moral theology to secularized natural law. The French Code Civil: individualistic democracy’s first comprehensive legal collection produced at the end of 18th century, was designed to function as a framework for patriarchal society. The mercantilist thesis that national wealth was composed of national resources, including many poor people, was gradually replaced by the Age of Enlightenments’ conception of natural law in which a citizen’s right to subsistence was emphasised.

Up to the beginning of the 20th century Sweden was one of the poorest countries in Europe and a large proportion of the population were forced to emigrate in order to survive. The debate that emerged during the second part of the 19th century on the ‘workers issue’ was a broad international phenomenon. Modern waged work in the capitalist economy and urbanisation broke down the patriarchal responsibility of masters for employees in agricultural production. When people left the farms in rural parts of Sweden they lost their security which was strongly connected with production in the households and household responsibility for reproduction in the form of domestic work, child care and care for the ill and the elderly. When people changed their place of residence the links between salaried and un-salaried work were severed. New problems with insecurity emerged that required new kinds of

1 See Anners, 1980, pp. 68–70.
2 See Anners, 1980, p. 9 ff, p. 50.
3 See Bramstång, 1985, pp. 21–22.
safety nets. Thus, the elaboration of voluntary sick and funeral funds or publicly organised social insurances became necessary. New political movements spread ideological suggestions about how society should tackle these problems. Ideological and political notions of the state and of human beings as ‘good’ were formulated and concepts of individual rights and duties became established in the international debate. Political and ideological visions of the future advanced views of a good and legitimate social order.4

9.1 From *raison d’état* to liberalism

The bourgeois state governed by law became established during the second part of the 19th century. Legal certainty, equality before the law, openness, predictability, and access to legal remedy were all features of the rule of law state then under development. The notion of law as a coherent system based on perceptions of rational decisions in accordance with abstract rules (Weber), in combination with a growing public administration was a precondition for the elaboration of the social state and social (welfare) law. Another change that assumed great significance for this progress was the emergence of a social profession in the 1920s.5 When social policy became constructed on legal grounds the lawyers’ field of activity also successively embraced social law, which in turn is believed to explain the increased conformity with other jurisprudence that took place of this branch of law.6

Foucault introduced the concept of *government* and outlined the history of government, and of political rationalities and political technologies, in early modern Europe, up to the beginning of the 19th century. Government, and the *art of government*, referred to a particular way of guiding the behaviour of individuals and groups, e.g. the guidance of children, families, communities and individual behaviour.7 Political rationality: *raison d’état*, constituted, according to Foucault, the systematic matrix in which the objectives and methods of governing a state were articulated.8 The practices of governing were analysed through the notion of *police*. In Foucault’s view, police aimed at securing the existence of the state and at increasing its strength. Foucault has characterised *bio-power* as the central form of modern power, which is linked to police. *Bio-politics* focuses on the population as a collective, which

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4 See Åmark, 2005, pp. 44–45.
5 Åström, 2000, pp. 18–23.
6 Vahlne Westerhäll, 2002b, p. 79.
7 Foucault, 2000, p. 68; 1990, pp. 201–222; 1981.
8 Foucault, 1990, p. 73.
constitutes the immediate target for police measures: on its health, hygienic conditions, birth rate, life expectancy etc.\textsuperscript{9} In Foucault’s view, the exercise of power focused on \textit{individuals}, and the technologies of power meant \textit{disciplinary power}.\textsuperscript{10}

The breakthrough of a new political rationality, i.e. \textit{liberal political rationality} questioned the legitimacy of government. The political technology of liberalism, diverging from \textit{raison d’état}, emphasised the \textit{juridical} form in the regulation of state interventions. Interventions were permitted only in the form of general laws which did not allow for particular or exceptional measures. Thus, the conceptual separation of ‘state’ and ‘society’ belongs to the epistemological presuppositions of liberalism: society is conceived of as a domain separate from the state and manifests its own regularities.\textsuperscript{11}

In the overall systematisation of Swedish (and Nordic) law, social law is generally placed within the box labelled ‘administrative’ law. One reason for this is that internationally social policy measures during the 18th and 19th centuries normally came to be organised under the responsibility of public administration entities. However, social politics and reforming social legislation was still patriarchal and motivated by Christianity. The emergence of modern social law and of the first systems of social security are commonly understood to be derived from the German Empire in the 1880s and the well-known social legislation of Chancellor Otto von Bismarck. The new systems of social security were meant to pacify revolutionary currents through increased security for employees’.\textsuperscript{12} Gradually social law was perceived to constitute a discipline of its own, however, the definition of social law was essentially judicial-technical.\textsuperscript{13}

\subsection*{9.2 Rights for a delimited proportion of the population}

The Age of Enlightenment laid the foundation for new thinking, and the 19\textsuperscript{th} century can in many ways be defined as a period of experiment and regeneration in many societal fields. The state came to be considered a citizen’s state with the advocating of individual claim-rights.\textsuperscript{14} However, civic majority and personal freedom were strongly connected to the civic duty

\begin{itemize}
  \item \textsuperscript{9} Foucault, 1981, p. 136, Foucault, 2000, p. 73.
  \item \textsuperscript{10} Foucault, 1979.
  \item \textsuperscript{11} Foucault, 2000, pp. 74–77.
  \item \textsuperscript{12} See Åmark, 2005, p. 45.
  \item \textsuperscript{13} See Anners, 1980, pp. 170–175.
  \item \textsuperscript{14} See Bramstång, 1964, p. 51.
\end{itemize}
of maintenance (försörjningsplikt). In Sweden, the only guarantee of a sense of civic responsibility during the 19th century was personal capital.15 The first publicly organized poor relief measures in Sweden in the 18th century, organised by the state or the municipalities in the form of health care, poor relief, and care of children, can be characterised as patriarchal and repressive.16

Legally constructed rights at the end of the 18th and in the early 19th centuries were maintained by European philosophers as well as legislators. The notion of law in the ideas of the Age of Enlightenment was that of natural law and the idea that individuals possessed a right to subsistence was given prominence.17 The French Revolution represents a dramatic turning point in the history of the concept of equality, egalité. The theory that all human beings are equal became a legal concept from which concrete demands and a political program for social justice could be derived. In Montesquieu’s work The Spirit of the Laws it was asserted that equality, which was seen to have been lost in the state of nature, should be regained in civilized society.18

Nevertheless, the first French constitution in 1789 presupposed two contradictions to this equality. First, the proclaimed equality drew the line at property: ‘a certain quantum’ of property was even a prerequisite for citizenship. The other contradiction that had far-reaching consequences was the exclusion of women, a contradiction that was actually opposed. In 1791 Olympe de Gouge offered a systematic counter-argument and counter-proposal to the first French constitution in her Declaration of the Rights of Woman and Citizen. In her catalogue of rights for all people, including men, she stressed the necessary union of Woman and Man in demanding the preservation of the natural and irrevocable rights of both sexes.19

The fundamental ideas of the French Revolution, that found expression in the catchwords liberté and egalité, implied a request for conformity to law. The principle of legality – nulla poena sine lege – expressed this aspiration towards legality. The judicial procedure was considered to provide for legal certainty and the rule of law.20 However, in the field of social protection, a counter-reaction ensued. The ideological rights that had been emphasised

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20 See Bramstäng, 1964, p. 51.
in the French declaration were the rights that were seen to be inalienable: rules that were considered to be unchangeable and given to men by nature. Thus, these rights that were declared to be inalienable were the liberal rights of life and freedom, which concerned personal freedom, integrity, freedom of thought, the inviolability of property, and resistance against oppression. In the reform of poor relief Christian mercy was instead articulated as the legitimate foundation for maintaining the poor – not statutory claim-rights.

The concept of right and its corresponding concept in poor relief regulations were, however, rapidly turned into a domiciliary right. The reaction against generous systems of relief, i.e. the English Speenhamland Act of 1795 and the French Constitution of 1791, was that public support was considered to involve alms and not claim-rights.21

The ideas that were expressed in the French declaration in 1789 were declared, and also extended, to comprise a certain number of social rights in other national constitutions, for instance in the United States of America in 178722 and in the Japanese constitution from 194623. The ideas on personal freedom, but not those on social rights, also recurred in the catalogue of rights in the Universal Declaration of Human Rights, which was adopted by the United Nations Assembly in 1948.24 Moreover, these ideas were also positively expressed in the European Convention that was signed by the European Council in 1950.25

Liberal society was thought to consist of autonomous and responsible individuals, whose reciprocal social ties were primarily based on voluntary contracts. As explained by Ewald in his philosophical developments of social law in the ‘welfare state’, the main task of liberal law was to safeguard the rights of autonomous individuals and their reciprocal contractual relations. In liberal thinking, accidents were conceived of as natural realities, which the individual was obliged to confront him/herself and against which she/he should take their own precautions.26

Views on the concept of rights in legal science have varied over time and have been said to be ideologically biased. At the beginning of the 20th century the American legal theorist Hohfeld presented his most influential defi-

21 See Bramstäng, 1985, p. 21.
nition of rights. He made an analysis of the founding components of the concept of rights, intending to arrive at the lowest common denominator of rights. These founding elements in his theory consisted of the concepts of right, privilege, power, and immunity. According to Hohfeldt, these founding concepts derive their meaning in relation to their jurally opposites, and in relation to their correlatives. Hohfeldt used the following dichotomous formation of concepts in order to clarify these jural opposites:27

<table>
<thead>
<tr>
<th>Jural opposites</th>
<th>Right</th>
<th>privilege</th>
<th>power</th>
<th>immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>non-right</td>
<td>duty</td>
<td>disability</td>
<td>liability</td>
<td></td>
</tr>
</tbody>
</table>

In older doctrines, the notion of individual social rights in relation to the state or the community was of central importance. The view of poor relief and social benefits and assistance as a public duty, or as a voluntary expression of Christian mercy, runs like a thread through poor relief and social welfare legislation.28 The point of departure among legal scholars has mostly been the individuals’ position in relation to the authorities. Seen from a historical perspective, legislation strategies bore the impress of time in being voluntary, mandatory or constructed as claim-rights.29 Up to the mid 18th century it is inappropriate to talk about public provisions as either public responsibilities or claim-rights.

As pointed out by Eek, a cautious attitude was taken in Swedish law to defining the concept of rights. In preparatory works for the first Poor Relief Act from 1918 it was maintained that poor relief was ‘of quite another nature than the rights that were regulated in civil law and that could be claimed in court’.30

9.2.1 Social security in the form of relief payments

The rules laid down in law have, as pointed out by Karsten Åström, been of a constitutional as well as material and procedural character.31 The constituting rules indicate who or whom has or have the responsibility to decide and

29 See Åström, 2000, pp. 17 ff.
30 Eek, 1954, p. 76.
31 Åström, 2000, pp.16–17.
implement the law. The material rules indicate what is meant to be done and the prerequisites for allowance of benefits and how the benefits can be claimed. Finally, the preparation and management of cases, and how decision-making is meant to be realized is indicated in the procedural rules.32

During the Middle-Ages the church arranged help for the poor and sick persons, in the monasteries and hospitals of the time, in the form of charity and care.33 The legal branches traditionally considered to belong to social law, had their basis in social policies provided by the Catholic Church during the Middle Ages.34 Poor relief was first publicly organised in Sweden during the 17th century. Since the end of the 18th century there have been laws, in Sweden as well as in other European countries, either regulating the extent to which societal institutions are responsible for providing for the welfare of people, or whether people have a right to claim public social provision. Welfare policies emerged from the shortcomings of poor relief in tackling the new problems of insecurity for people in the societal development towards a ‘free market’ and waged work ushered in in the 19th century. The problem of insecurity also illuminated and raised questions of power: Which solutions were to be chosen and who was to be included when the first social security schemes were elaborated?

9.2.1.1 Legislation for the ‘deserving’ poor

In 1624 a hospital decree laid down a voluntary responsibility for the church and its congregations – the parishes – to help the poor through charity and through the establishment of poor- or work-houses. The first Decree on poor relief that was introduced in 1763 fixed the form of poor relief more than previously. Poor relief came to be regulated as a more or less mandatory task for the parishes. Relief payments were connected to probation for beggars and vagrants, and a coercive exercise of duties or living in the workhouse for the beneficiaries. Influenced by social policies in Europe, the Decree distinguished between the needy and those reluctant to work and therefore divided the beneficiaries into the ‘deserving’ and ‘undeserving’. Hence, poor relief had its limitations. In addition, the organisation of the parishes was rather undeveloped and the resources available for distribution to the poor were limited. If relief was denied, the claimant had very few possibilities of obtaining redress.35

32 Åström, 2000, p. 17.
35 Åström, 2000, pp. 21–22.
The right of the parishes’ to return people to their place of origin (hemsändningsrätt) meant that a person could be coercively transported to the place where he or she had his or her domicile. That place then had to take responsibility for the impoverished person’s subsistence. This lex locii domicilii principle gave rise at the time to disagreements about which parish was responsible and in which parish the poor person could claim his or her domiciliary rights. These rights remained even though a person left and moved to another place to live. In the following poor relief Decrees that were issued in 1847 and 1853 the basis was laid for concepts that rejected the idea of social rights, although the parishes’ responsibilities and the beneficiaries’ right to appeal in court then became established. Notions concerning the illegitimate use of poor relief and that poor relief constructed as a social right in itself caused poverty were asserted.36 In the Swedish legislative process during the 19th century it was articulated that individuals would, as rights-holders, choose to live on relief rather than take responsibility for their own maintenance. In the legislative process it was claimed that Christian mercy was the fundamental basis for poor relief and the most far-reaching law on social rights of that time – the English Speenhamland Act from 1795 – was held up as a warning example. The latter Act lay down that everybody, not only those who were incapacitated, could in principle claim a supplement in order to reach a minimum income. The Swedish Decrees never went that far.37

The contractual notion of poverty (samhällskontraktet), whereby poor people were seen to possess a right to subsistence, which had characterised the Swedish poor relief decrees of 1847 and 1853, was replaced by, in Bramstång’s words, the other extreme in a proposal for reform in 1869. The notion that support was an ‘act of love’ was then articulated. A certain kind of compromise was reached between these opposite positions when poor relief became divided into obligatory for the most ‘needy’ (§ 1) and voluntary (§ 2) for the rest in the 1871 Decree.38

Failing crops increased the parishes’ commitments to their residents, resulting in a withdrawal of the right to appeal in court in the Poor Relief Decree of 1871. Poor relief was then targeted only on orphans and ‘insane’ people. The poor relief authority had at that time the power to reclaim relief payments and the power of the master of the house (husbondemakten) was successively extended. This power legitimised the arrangement of coercive

36 See Jägerskiöld, 1955, p. 270.
37 See Åström, 2000, pp. 18–22.
38 Bramstång, 1985, pp. 21–22.
work for people who were considered to be reluctant to take up work and the municipality, as it was organized at that time, was authorised to dispose of the earnings and property of these people’s. During this period poor relief was constructed as voluntary and could not, therefore, be characterised as a social right. The responsibility for poor relief had by that time been transmitted to bourgeois municipalities through the Municipality Decrees of 1862.  

This principally restrictive legislation was replaced by the Poor Relief Act in 1918. The power of the master was then abolished and, to a certain degree, a right to appeal was re-introduced. Targeted groups for relief payments from the municipality were, according to the Act those that were incapacitated (regarding work) and minors. The municipalities were still, as had been laid down in 1871, authorized to allow voluntary, and more generous poor relief, beyond the mandatory limits. Nonetheless, the *lex locii domicilii* principle, the duty to work and the authority’s right to reclaim relief payments remained. A manifested intention to work in combination with the impossibility in fact of finding employment were, pursuant to Section 1 in the Poor Relief Act, preconditions for eligibility for relief payments. Legal scholar Eek stated at the beginning of the 1950s, when the Poor Relief Act was still in force, that the fact of the matter was that beneficiaries had a duty to prove willingness to work at the time when an application for support was made or when support was received.  

A state subsidy to municipalities had been introduced in 1914, aimed at the arranging for needs-tested unemployment relief. This relief could be allowed in the form of cash benefits or as relief work. Eligibility was strongly connected to insistence on the recipient complying with participatory demands. Taking relief often meant working far away from the place of residence and a living in over-crowded barracks. Eligibility for the unemployment cash benefit involved, even more clearly than in poor relief, the same duty to make use of one’s capacity to work. Similarly, benefits to family members of military servicemen, according to the later Family Benefit Regulation from 1946, required that family members of such servicemen were registered at the employment office.

The poor relief authorities had the right to reclaim benefits allowed, not only from the beneficiary but also from their family members, as benefits were

39 Bramstång, 1985, p. 22.  
40 Eek, 1954, pp. 103–104.  
41 Ibid, p. 198.  
42 Familjebidragsförordningen (Fbf) and familjebidragskungörelsen (Fbk) enacted in 1946 (nr. 99 resp. 101). See Eek, 1954, pp. 197–200.
in principle considered to be granted as loans. This attitude to beneficiaries was underlined by coercive measures against neglectful breadwinners pursuant to the Poor Relief Act, sections 71, 74 and 75. These measures could take the form of injunctions, cautions and coercive work arrangements. However, in the 1950s Eek noted a general tendency to concede refunds.43

In 1950, when reform of poor relief was under preparation, the Welfare Committee (Socialvårdskommitten) expressed the view that needs-tested benefits could not be characterised as either part of natural or of civil law.44 Instead, certain criteria were postulated, such as the possibility to go to trial and the degree of discretion for the administrative authorities who decided. Sweden did not see social rights as to some extent constitutional rights in line with the ideas of the French Revolution in 1789 and such a notion of social rights was also rejected by Swedish legal scholars.45

In 1957 the Poor Relief Act was replaced by the Social Assistance Act46 and although the concept was changed the fundamental features remained. The support was, as in previous regulations, divided into obligatory (§ 12) and voluntary (§ 13) social assistance. The right to social assistance, subsistence and necessary care was limited to those under the age of 16 and those who could not make the living through their own work, due to age, sickness, disability, or reduced physical or mental resources; or, who could not work, partly or completely, for other health reasons. In general, social assistance was only allowed if the person in question lacked means and if their personal needs could not be secured in other ways. For those who had not reached the age of 16 the help also involved education. Maintenance obligation according to family law remained until the child reached the age of 16. The same age limit applied for for awarding social assistance to minors according to Section 12 (obligatory assistance).

In principle, the Social Welfare Board was only authorised to allow obligatory assistance (§ 12) if the need for assistance was acute. Voluntary assistance according to Section 13, on the other hand, gave the Welfare Board competence to allow support in line with decisions in each municipality based on political considerations. Assistance on these grounds was seen as complementary to other social advantages and was meant to be habilitating, rehabilitating and preventive. The main purpose of social assistance was social

44 SOU 1950:11, p. 29.
rehabilitation intended to further self-support and the support of dependants in the future. Although the Social Welfare Board had the ultimate responsibility for people in need, collaboration with other authorities, such as rehabilitation treatment (*arbetsvård*) and social insurance agencies (*försäkringskassorna*) was emphasised.

The stay principle, laid down in Section 1 of the Social Assistance Act meant that the municipality had to ensure the needs of persons who were staying in the specific municipality. However, this was not intended to grant an individual right to social provision, but to clarify the municipality’s competence and general responsibility in a given case. Nonetheless, in preparatory works it was indicated that social assistance was a citizen’s right and should be allowed in forms that did not humiliate the recipient’s dignity. The *lex locii domicilii* principle was in principle retained in the Social Assistance Act. Up to the 1960s it happened that poor people were allowed removal expenses in order to prevent them from gaining domiciliary rights. The dependants were thus subjected to coercive resettlement and were more likely to be excluded than included as members of the community.

Recipients of obligatory social assistance and children below 16 years of age receiving voluntary assistance were, pursuant to Section 33 in the Social Assistance Act, in principle not obliged to re-pay any support awarded. Only in exceptional cases could the assistance be reclaimed, i.e. if the assistance was awarded in advance in place of another benefit the recipient was entitled to and later received. Refund liability also existed if the assistance allowed was based on information that consciously or through gross carelessness was false or misleading. For receipt of voluntary assistance for those over the age of 16, the recipient in principle had a refund liability pursuant to Section 34. Generally, the refund liability covered the total amount of assistance.

Family members could only, according to Section 35 in the Social Assistance Act, be liable to repay obligatory assistance awarded for a spouse or for a child below 16 years of age. If the spouses lived separately, after judicial separation, and the recipient of social assistance neither according to a judgement nor to an agreement was entitled to maintenance from the other spouse, this latter spouse was released from the refund liability.

48 B Bramstäng, 1985, p. 22.
51 Ibid.
For assistance awarded for a child under 16 years of age, parents had, pursuant to Section 36 of the Social Assistance Act, a refund obligation in solidarity, irrespective of whether the child was legitimate or illegitimate. If a parent, who was liable to pay maintenance for its child, neglected this duty, the other parent had no liability to re-pay social assistance that had been awarded for the child instead of maintenance. If parents who had a maintenance liability were personally in need of social assistance, the refund liability was also void. In cases where there was a documented need for regular social assistance the county administrative board (länsstyrelsen) could, on the municipality’s request, order a spouse or a parent to pay a reasonable contribution to the municipality for the recipient’s subsistence. Wages could be attached for this purpose but this was rarely done.52 Generally, the municipality could, pursuant to Section 39 of the Social Assistance Act at the county administrative board claim refund of assistance allowed that had not been re-paid on voluntary basis.53

An applicant or recipient of social assistance could, pursuant to Section 54 of the Social Assistance Act, lodge an appeal but could only plead their own case in the form of a ‘municipality appeal’ (kommunalbesvär) at the county administrative board, but not in the form of an ‘administrative appeal’ (förvaltningsbesvär) at the administrative court. In administrative appeal the body of appeal has to try the case entirely and thus has the competence to come to a new decision, replacing the previous decision appealed against. In contrast to this, the municipality appeal in cases regarding social assistance meant that the Social Welfare Board had to try the point of issue without transferring this to the body of appeal. Thus, decisions as regards social assistance had fewer legal guarantees, in terms of legal certainty, than decisions that could be appealed in the first instance to the administrative court and hence had the status of administrative appeal. In addition, the county administrative board also had the double function of supervising the welfare boards. Nonetheless, final decisions of the county administrative board concerning social assistance could, in the second instance, be appealed to the Administrative Court of Appeal.54

52 SOU 1977:40, p. 266.
9.2.2 Social security in the form of social insurances

The legally stable and unchangeable part of social security in the form of relief payments, contrasts to the high degree of legislative and reform activity regarding social insurance that was first initiated at the end of the 19th century.

The Swedish debate on a social dimension, ‘Die soziale Frage’ (den sociala frågan) that blazed during the 1880s was influenced by the Bismarckian social legislation in Germany. Social security had then become a controversial issue among conservative and liberal politicians, as they were anxious about the threat from the growing workers’ movement and the working class. This epoch is often conceptualised as the ‘Social state-period’ and seen as a transitional period between the state governed by law and the establishment of a welfare state. In the Social state, private ownership was still unrestricted and social problems were to be solved within and through support from that order. The first of Bismarck's social insurances in Germany was designed to counteract the working-class political movement. Those who were considered to constitute social problem were, however, excluded from social politics and its definition of how these problems should be solved.

In legal science the Social state era has been divided into three phases. The first covers the period 1850–1900 when the former passive laissez-faire ideology changed to a more active notion of the state. The social dimension, die soziale frage, was the main feature of this phase, which retained the existing political power. The second phase from the turn of the 19th century to the 1930s was characterised as a political compromise that extended democracy to include new groups of people in political processes. The third phase came after the 1930s, thus also understood to comprise the ‘welfare state’. The change that brought with it an extended and bureaucratic administration whose task it was to distribute the reduced resources was primarily seen from an economic standpoint. The 1930s, therefore, has been considered to be the time when laissez-faire, as both an economic philosophy and practical politics, came to an end.

9.2.2.1 The social dimension – a worker issue
The elaboration of Swedish social security was dominated from the beginning by liberal ideas. The idea of ‘help to self help’ was a thread through the reform. The Swedish system seemed in its early form to be very heterogeneous, comprising a variation of different institutional models. As Åmark suggests, it is not easy to conclude what were the valid principles in Swedish social security at the beginning of the 1930s. Early poor relief had a residual input, as provision targeted the poor or a limited portrait of the population in need. Social security in the form of social insurance schemes in contrast targeted conscientious and responsible wage-earners. Security through social insurances was meant to prevent a humiliating dependence on poor relief that limited the rights of citizens.

In the Nordic countries the Social Democrats, in collaboration with peasant parties, took political power during the 1930s. This has been explained as a contributory factor that paved the way for the ‘Nordic model’ of social security in the otherwise problematic and threatening 1930s. Politically, the workers’ movement changed from being a party that emphasised social classes to a party of the people. In ideological terms, this political change, it has been explained, was a move from socialism to reformism. The concept of *folkhem*: in other words the Swedish welfare state, became the symbol of unified Social Democratic politics during the 1930s. In the foundation of a Swedish ‘folkhem’ economic policies were seen as superior to policies in other fields. The main task was to bring workers back to the market through active labour and unemployment policies. Even as early as in the 1920s, the conception of a ‘work-line’ became established in Swedish policy discourse.

The Social Democratic movement was meant to liberate citizens from the oppressive, humiliating and needs-tested poor relief that was managed by the municipalities. As pointed out by Åmark, the social democrats fought for civic rights through the work of Social Minister Gustav Möller, however, these rights were not unconditional or universal, but on the contrary, the legitimate claim-rights of conscientious workers. The first social insurances

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61 Ibid, p. 65.
63 Ibid, p. 70.
introduced at the end of the 19th century had the distinctive character of bourgeois reform policy, based on the notion of rights for male workers rather than on the notion of rights for citizens. The assumption that women were first and foremost provided for within marriage long had effects for the unprovided reality of which unmarried mothers was part. Their disadvantaged position was additionally reinforced by their situation on a fundamentally sex-segregated labour market. Accordingly, women's life experiences were in general separated and made invisible in law. This kind of logic of separation meant that solo mothers especially were at risk of becoming poor and rather than being included in social insurance schemes primarily had to rely on punitive poor relief.

The development of social security has often been described as being divided into phases. The ‘introductory phase’, contained fumbling efforts to set up social insurances in a broader sense. The reforms were preceded by commissions and debates in the Swedish Parliament. Once the foundations for the system had been laid down in the 1930s, further reforms came into effect without influence from foreign social insurance models. Institutional rules, like social insurances, are difficult to change, as has been pointed out by many historians and social scientists; a path once chosen is hard to deviate from. Thus, the institutional roots to social security are understood to affect future courses of action.

The second ‘stabilisation phase’ that is considered to date from the 1930s to the post-war period brought further developments in insurance against accidents at the work place. The injured person’s right was emphasised and occupational disease was identified as a risk needing socially insurance. The pension scheme was also amended by the General Pension Act that was adopted in 1935. The Act was constructed as gender equal, at least in a formal sense, as differentiation based on sex was ended. Sickness insurance was also improved, but affiliation was still on a voluntary basis. The first voluntary unemployment insurance that had been introduced in 1935 was improved in 1941. The increase in the daily allowance and the introduction of a child

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64 See Dahlberg, 1994, pp. 3 ff; Mannelqvist, 2003, pp. 65 ff;
68 Lag (1931:280) om erkända arbetslöshetskassor (Approved Unemployment Funds Act).
69 Prop. 1934:38.
70 Prop. 1941:214.
supplement resulted in increased affiliation to the unemployment scheme. In addition, a supplement for a wife was introduced, which in 1946 was transformed into a gender-neutral spouse supplement.\textsuperscript{71}

Not until 1946, during the time that is considered to constitute social insurances 'post war phase', was general and compulsory sickness insurance adopted.\textsuperscript{72} This Act in an amended form first came into force in 1955. During the 1940s a 'minimum standard principle' was advocated but in the 1950s the current idea on social insurance was that of income security. The amended Act therefore came to be based on a 'loss-of-income principle'.\textsuperscript{73}

Legal scholar Eek pointed out how private insurances regulated in civil law had served as a model for the way social policy was formulated to counteract certain social risks through insurance's. He also saw private law as the starting point for a judicial definition of the concept of social insurance.\textsuperscript{74} Contrary to private insurances, social insurances were compulsory and, in his view, the charges were not in principle affected by special elements of risk in each case: such as age, biological sex, occupation, or state of health. Moreover, social insurances were state subsidised.\textsuperscript{75} The abandoning of needs-testing characterised, in Eek's view, social insurance and therefore social insurance was distinguished from other forms of social support and social assistance.\textsuperscript{76}

9.2.2.2 Social insurance for (male) workers

The earliest social insurances established in Sweden were connected with risks facing industrial workers. A very limited national subsidy for voluntary sick funds had been introduced in 1891. The (social) right to insurance in the event of sickness was therefore not individual, but limited to be a right for the sick funds to receive subsidies. Insurance in the event of accident at the work place was introduced for employees in 1901. The insurance was to be financed by the employers as they were held responsible for accidents at work. The Act did not constitute an insurance law in a traditional sense, but made employers liable to damages. On the other hand, the employers could escape this liability by taking out their own insurance at a national insurance institution (\textit{Riksförsäkringsanstalten}).\textsuperscript{77} The insurance in the event of sickness

\textsuperscript{71} Mannelqvist, 2003, pp. 68–70.
\textsuperscript{72} Lag (1947:1) om allmän sjukförsäkring (National Sick Insurance Act).
\textsuperscript{73} Mannelqvist, 2003, p. 70.
\textsuperscript{74} Eek, 1954, p. 135.
\textsuperscript{75} Ibid, p. 139
\textsuperscript{76} Ibid, pp. 140–141.
\textsuperscript{77} See Mannelqvist, 2003, p. 66.
did not include all employees, but only those occupations and branches that were enumerated in the Act. First, work typically performed by women, such as domestic work, domestic industrial work and work performed in unintended places was exempted. Secondly, a worker occasionally engaged by a person who was not normally considered to be an employer was not included. Thirdly, the insurance did not include a spouse and other family members of the employer, with the exception of a mother performing domestic work for two sons.\textsuperscript{78}

In 1916 the Accident at Work Insurance Act was adopted. The insurance then became compulsory and covered the entire labour market. The previous very low and fixed-rate compensations were now related to income. Thus, the notion of there being a need for income security for workers was expressed for the first time. Accidents at work were no longer seen as a ‘natural phenomena’.\textsuperscript{79} In this scheme, the right to compensation was made statutory and included also a right to appeal in court, thus granting a certain level of legal guarantee. In the assessment of eligibility for compensation in the event of accidents at work, the reasonableness of a measure was delimited by the purpose of the law and the assessment had to to objective. In Eek’s view, power had to be exercised with consideration to loyalty; to the extent that legal remedies were available, there should always be a possibility to take the case to a higher court.\textsuperscript{80}

The use of differentiated scales of compensation with different income brackets was prevalent and chosen as strategy for the voluntary sick insurance and the first unemployment funds that came into existence at the end of the 19th century. This strategy, it has been pointed out, aimed at a differentiating within the working-class, as opposed to the more recent principle after the Second World War of income security for all, including the well-paid part of the population.\textsuperscript{81}

In 1913 the Swedish Parliament adopted the National Pension Act.\textsuperscript{82} One part of the scheme consisted of a pension insurance similar to that of a private insurance, but of an almost universal character. It was funded by the insured themselves, through contributions in relation to income, and was thus based on a ‘connection principle’. The scheme with its very low compensations was, despite its universal character, typical of the liberal ‘help to self-help’

\textsuperscript{78} Eek, 1954, pp. 147–148.
\textsuperscript{79} Mannelqvist, 2003, p. 67
\textsuperscript{80} Eek, 1954, p. 79.
\textsuperscript{81} Åmark, 2005, pp. 48–49.
\textsuperscript{82} Lag (1913:120) om allmän pensionsförsäkring (National Pension Act).
discourse that had a great influence on social policy at that time. Those who could not pay contributions were excluded. The other part of the scheme consisted of a supplementary tax-funded pension that was both means- and income-tested, and thus based on a ‘principle of need’. Initially, this supplement was supposed to constitute invalidity insurance. Gradually, all those over 67 years of age without a waged-work record were granted this supplement. Thus, it turned out to be an income-tested general pension. However, this income- and needs-tested pension, that future reforms would be based on, proved to be insufficient to live on. From a gender perspective, this first pension scheme was sex discriminatory. The contributions were differentiated according to biological sex and were related to income. Significantly, pensions in general were lower for women than for men.

Some trades unions arranged voluntary unemployment funds before the national unemployment insurance was first introduced after the transfer of power to the Social Democrats in 1932. Women, youths and other low-paid earners paid reduced charges and thus received less compensation. In contrast to the Accident at Work Insurance act from 1916, which expressed the notion of income security for workers, the cash benefit for the unemployed established in the Unemployment Decree of 1949, was only to give the municipalities the opportunity to allow unemployment benefit when there was a real need, but it was not meant to allow the benefit to be paid as soon as a need could be verified.

Obviously, the first systems of social security mainly targeted workers. On account of the ineffective decision-making processes at this time, the connections between politics and the economy seem to have been limited. A concept such as basic security does not seem to appropriately describe the first social insurance schemes. The compensation was too low to guarantee security and could rather be characterised as complementary. Its limits are underlined in historical analysis of the first systems of social security. First, the occurrence of a need was a precondition for financial security through eligibility for the social insurance schemes. Secondly, this criterion of need in turn only included those who acted correctly. Thirdly, the need for control

83 Mannelqvist, 2003, p. 67
84 Åmark, 2005, p. 51.
86 Prop. 1934:38.
87 See Åmark, 2005, p. 51.
89 Åmark, 2005, pp. 46–47.
was used as an important argument. Groups of people who were considered hard to control were therefore excluded, irrespective of their own ability to solve their security problems.90

9.2.2.3 Maternity as a risk in social security

Although social insurance was primarily addressed to wage workers, some of the reforms targeted women as mothers.

Unmarried mothers were considered to be a social problem during the time when social insurances were first introduced. The assumption that women were relationally dependent on men was of great importance as marital status determined the distribution of social security. The more closely she was connected to a man the easier it was for a woman to be entitled to benefits. Widows had prime of place for eligibility, followed by married women. When a woman got married or after the birth of her first child she was, according to the dominant ‘gender contract’, supposed to prioritize domestic/household work. Consequently, women were not considered to be in the same need of security through social insurances as men. On the other hand, housewives were considered to have the same need for an old age pension as men in gainful employment. Hence, women were also included in the supplementary tax-funded pension scheme that was part of the national pension scheme adopted in 1913.91

Financial support for women in connection with pregnancy and childbirth was an important issue on the political agenda at the turn of the 19th century. The voluntary sick funds could voluntarily decide whether or not their scheme should include a maternity insurance. If they did so, the state allowed a subsidy for this purpose. This kind of insurance was available for both women in domestic work and women in gainful employment, provided they were members of the fund. In contrast, when a voluntary state subsidised Maternity Insurance Act was adopted in 1912, women in gainful industrial employment were the prioritized group.92 The promulgation of state subsidies to sick funds for maternity support underlined the view that it was not to be thought of as prioritizing general maternity insurance over other social needs. Thus, the idea of support through relief payments was advocated prior to including maternity as a risk within the scope of social insurance.93

90 Åmark, 2005, p. 59.
91 See Åmark, 2005, p. 56.
92 Åmark, 2005, p. 57.
93 Abukhanfusa, 1987, p. 163.
In 1924 the Social Ministry proposed the introduction of support for mothers granted by the municipalities’ poor relief authorities. Every mother in distress should, irrespective of her civil status, be entitled to this support as a domiciliary right. The fear of favouring ‘undeserving’ unmarried mothers over married mothers resulted in a proposal that included married as well as cohabiting women. Child maintenance paid in advance by the municipality was also part of the proposal, in spite of the strong perception that maintenance of a child was first and foremost a parental duty. This proposal did not result in legislation. In contrast, a Government Bill in 1926 proposed maternity relief for women giving birth only if they were employed in industrial work.94

In 1931 a needs- and means-tested maternity relief payment was introduced. It was modelled as a complement to maternity support from the sick funds but could not be granted simultaneously. The Act concerning officially approved sick funds, adopted in 1931, had established that every insured woman in such a fund was guaranteed maternity support paid by her fund. The state-subsidised support included midwifery care as well as a cash maternity benefit. To qualify for the benefit that corresponded to the sickness cash benefit, membership in the fund was required for at least 270 days (equivalent to days of pregnancy).95

The declining birth rate at this time resulted in the appointment of a Population Commission in 1935. With improving security for mothers as one of its tasks reforms followed. A reformed system for maternity security in 1937 introduced a state-subsidised general maternity cash benefit that was to be paid by the sick funds as a lump sum: the same for both ‘housewives’ and mothers in gainful employment. For mothers who were not insured in a fund the benefit was limited by income, joint income in the case of spouses. The reform also comprised a special needs-tested maternity support that could be granted if the need was considered to be ‘obvious’.96 The Social Welfare Committee proclaimed in their report in 1946, a move towards cash benefits, as opposed to the strategy advocated by the Population Commission that emphasised fringe benefits (naturaförmåner). The stand-point that no ideas of worthiness should determine the right to basic maternity benefits was quite a radical declaration by the Welfare Committee. However, for obviously ‘bad’ mothers the ultimate punishment in the form of steriliza-

94 Prop. 1926 nr. 112; SOU 1924 nr. 57, pp. 15–18; see Abukhanfusa, 1987, p. 162.
95 Prop. 1931 nr. 75; see Abukhanfusa, 1987, pp. 167–168.
tion\textsuperscript{97} still was recommended. Moreover, sterilization could be demanded as a precondition for maternity support allowed by the municipalities, in regard to a woman's insufficient ability to satisfactorily provide for the care of her child.\textsuperscript{98}

The improvement in security for mothers that was proposed by the Welfare Committee never resulted in legislation. In 1954 a general maternity insurance instead was introduced in Sweden.\textsuperscript{99} The main outlines implied that there was obligatory insurance for all registered residents, except those who were excluded from the sickness insurance system, i.e. women cared for in hospitals for more than two years or inmates in mental homes. These groups of women were supposed not to need such insurance. The new benefit was still defined as maternity cash benefit and consisted of a flat-rate basic benefit and a child supplement granted when a woman gave birth to a second child. A woman in gainful employment in addition to the cash benefit was entitled to a supplementary benefit from the maternity insurance that corresponded to her sickness insurance benefit. Thus, from 1955 women had the same social protection when they gave birth to a child as when they fell sick. The maternity insurance was based on the same principle as the sickness insurance: every insured person, irrespective of sex, in solidarity took his or her share of responsibility for the funding.\textsuperscript{100} The reform, it has been pointed out, meant that maternity then came to be considered as representing a reduction of work and subsistence capability.\textsuperscript{101} Women taken into custody, however, continued to be excluded from the personal scope. Not until nationalized general insurance was realized in 1962,\textsuperscript{102} was the exclusion of these mothers removed. On the other hand, the municipalities were still authorised to take over the disposition of the benefits paid to these 'bad' mothers.

\textsuperscript{97} About 63 000 persons were sterilised in Sweden while the 1934 and 1941 Sterilization Acts were in force, i.e. between 1935 and 1975. More than 90 % of them were women. The Sterilization Act of 1934 solely applied to certain 'legally incompetent persons' who were incapable of giving their consent to sterilization. The Sterilization Act of 1941 in principle governed all the sterilization procedures that not purely had a medico-therapeutic purpose, including sterilization at the request of the person concerned. In reality, much sterilization was performed against the will of the individual. See SOU 1992:2, pp. 29–50 (English summary).


\textsuperscript{99} SFS 1954 nr. 266.

\textsuperscript{100} Abukhanfusa, 1987, pp. 184–185.

\textsuperscript{101} Abukhanfusa, 1987, p. 190.

\textsuperscript{102} Lag (1962:381) om allmän försäkring (National Insurance Act).
Kerstin Abukhanfusa has described and analysed indepth Swedish discourses on maternity in Swedish social security. During the 1920s, when the Social Ministry considered introducing maternity support, a precondition for such support was that the woman fulfilled her ‘motherly duties’. The most important precondition for being entitled to the proposed support for mothers was that, instead of handing over her responsibility to an orphanage or a foster family, she herself took care of the child. Measures in the form of a placement in an orphanage or a foster family for distressed mothers had been provided in Sweden against infanticide since the 18th century. Such proceedings however were proved to result in the neglect and death of many children. According to Abukhanfusa, the ambition was obviously to foster motherhood through moral conditioning and strengthening the connection between mother and child, sometimes accomplished by coercive methods under the supervision of the child welfare officer. Mother and child could be transferred to an infant home so that the mothering instinct could be encouraged. In order to prevent these mothers from going to the large cities with all their temptations the Social Committee proposed that maternity support should only be a domiciliary right. Moreover, it was emphasised that the maintenance duty of fathers had to be laid down in order to avoid encouraging of illegitimacy.

9.2.3 Family benefits and services
Various family social laws aimed at promoting the establishment of families appeared during the late 1930s and 1940s. Employees came to be protected against dismissal in the event of betrothal, marriage, or childbirth. This protection, however, was limited. For a female employee such protection required her to have been employed permanently for more than one year before she got pregnant or before the birth of her child. Nonetheless, her employer could not dismiss her if she was absent from her work during a reasonable time. ‘Reasonable’ meant not exceeding six months. She could only claim benefits attached to her salary through collective agreements. Her benefits, however, could never be restricted by agreements. In other words, the rules were indispositive and imperative.

103 Abukhanfusa, 1987, pp. 198–234.
105 Lagen 21 dec. 1945 om förbud mot arbetstagares avskedande i anledning av äktenskap eller havandeskap, SFS 1945:844.
106 See Bramstång, 1969, p. 183.
A state loan for setting up a home was introduced in 1937. It was meant to facilitate the setting up of families and counteract indebtedness through *inter alia* hire-purchase of furniture. This loan could be granted to an unmarried mother or father in Sweden who intended to establish a home of his or her own with under-aged children. For foreign citizens it was required that they had permanently resided in Sweden for not less than two years. A general precondition for this loan was a need for such a loan and that the applicants were known to be ‘conscientious and economically prudent’.107

The general child allowance was established in 1947 and is considered to be the framework for Swedish family policy. There were conflicting large-scale political debates on a child benefit in kind vs. in cash, or on a preference for tax deduction vs. a general uniform cash benefit. The first child allowance that had been introduced in 1937 was needs-tested in relation to income and was therefore characterised as a relief payment.108 A general child benefit was of crucial significance in Social Democratic Minister Gustav Möller’s struggle for uniformity and universalism in social security, in opposition to others, among them Alva and Gunnar Myrdal, who had a great influence in the reform of Swedish family policy, and who advocated benefits in kind.109

The child allowance was granted to children who were domiciled, i.e. registered in a Swedish parish and, as a main principle, held Swedish citizenship. Non-citizens could qualify for the allowance, if the child or its parents had resided in Sweden for at least six months. The allowance was paid until the quarter the child reached the age of 16. In general, the benefit was paid to the mother, even though the parents had joint custody of the child, and eligibility for child allowance presupposed an application to the Child Welfare board in the municipality. If the Child Welfare board found that a mother who had custody was not a suitable person to be in charge of the benefit, it could be paid to someone else.110

The advance payment of maintenance allowance (*bidragsförskott*) that was introduced in 1937 came to be a benefit that was at the intersection of the two main branches in law: civil and public. Advanced maintenance allowance was originally income-tested and meant to be a financial guarantee for children in ‘incomplete’ families, consisting of only one custodian.111

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The scheme has been reformed several times since its introduction in 1937. When the benefit was first introduced, its primary purpose was to prevent solo mothers from becoming dependent on poor relief. The amended Act in 1943 retained the income-test. On the other hand, certain proposals to replace the Act from 1937 onwards with an Act more geared to relief payments for children of divorced and unmarried women were rejected. Through amendments to the Act in 1947 the income-test was abolished and the advanced maintenance allowance was to be granted up to the sum corresponding to the amount the father was obliged to pay according to the rules in family law, but not exceeding SK 600 a year. The fundamental prerequisites for eligibility for advance maintenance allowance were of three kinds. First, the father’s maintenance obligation had to be established according to civil law. Secondly, advanced maintenance was only allowed if the father failed to pay maintenance due. Thirdly, it was a requirement that the mother was not cohabiting with the father of the child and that the child did not live with the father. In addition, eligibility for the allowance stipulated that the child had to have only one custodian.

Legal scholar Eek considered in the 1950s that this kind of allowance was a form of social assistance, a kind of provision. However, a certain degree of financial distress was not a precondition for the allowance and it could not therefore be characterised as a relief payment. Instead, this kind of allowance, in Eek’s view, was considered to be a service. The support was meant to be a claim for maintenance which, according to civil law, the recipient was entitled to.

The bringing up of children was a salient feature of the ‘population issue’ during the 1930s. Alva and Gunnar Myrdal advocated in their most influential work on the population crisis – *Kris i befolkningsfrågan* – transferring the upbringing of children under school age, from the family to public forms of daycare. In their view, the home had ceased to be a good place for this task. The reasons for such service reforms were declared to be pedagogical, psychological and implying a more rational and effective specialization of other spheres of life than the home, and would therefore enhance women’s participation in the labour market. Later on, child-minding became a

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state-subsidised responsibility for the municipalities, laid down in the Child Welfare Act.\textsuperscript{118} This reform was seen as especially important for solo mothers. Moreover, in line with Myrdal’s visions, since 1946 children in compulsory school have received free school books and free school lunches.\textsuperscript{119}

9.3 Gender and power in a patriarchal welfare model

The Swedish system of social security was from the start based on labour-market wages. Industrialization required new more flexible forms of social security that enhanced people’s mobility. The early social policy strategies that featured a static system of control and power in the hands of the masters were replaced by more flexible means of control, moving from a strategy of the stick to a strategy of the carrot, in Abukhanfusa’s words.\textsuperscript{120} For unmarried women and mothers in the poor sections of society, who represented reality of non-provision in opposition to the idealistic notion of maintenance supplied through marriage, the strongly sex-differentiated pension reforms in the early 20th century had only a symbolic value. Women’s fundamentally disadvantageous position, constituted through their minority status, was of such a fundamental character that statutory rights for women could not be admitted.\textsuperscript{121}

When women’s equality to men was formally improved, the gender order remained hierarchical with segregation as its fundamental feature. Women’s political equality to men, however, became successively established, for instance through the universal suffrage reform in 1921 and the reform in 1927 that gave women access to higher education. On the other hand, it was still legitimate to claim the male norm as prime on the labour market. Thus, the driving force for the subordination of women came to be transferred to the labour market.\textsuperscript{122}

When social insurance solutions were first introduced in Sweden, they were limited and constructed for specific groups, characterised by low levels of compensation and restrictive conditions. The early systems of social insurance did not target those most in need of public support. Women’s life experiences in general, and especially those of solo mothers, long were not recognised as instances of risk and were thus separated from the notion

\textsuperscript{118} Barnavårdslagen, SFS 1960:97 (Child Welfare Act), Section 55.
\textsuperscript{119} Bramstång, 1984, p. 197.
\textsuperscript{120} Abukhanfusa, 1987, p. 60.
\textsuperscript{121} See Abukhanfusa, 1987, p. 61.
\textsuperscript{122} SOU 1990:44, p. 85. See also Wikander, 1992, pp. 21–84.
of social insurance. This logic of separation characterises the first elaborations of social insurance in Sweden that were based on a conception of non-interventionist liberal law. Private law was the starting point for a judicial definition of social insurance.

The targeted group was the conscientious and responsible wage-earners who fulfilled their obligations in relation to society and their families. This group should be given support so that they could become independent of residual poor relief, which was seen as humiliating and restrictive for citizens. However, as the compensation was very low, the concept of security was misleading. The criterion of need was made conditional and only those who acted correctly were included. When social insurance in Sweden was extended, the lowest common denominator was the wage-earner status and not citizen status and universal rights.123

Scandinavian social policy was, as explained by the historian Klas Åmark, dominated from the 1890’s to the 1950’s by a fight against poverty, but this fight was strictly organised along gender lines. The male breadwinner model was the ideal, although most families could not live up to it. It was often required that other family members, i.e. women and children, contributed to the subsistence. In Åmark’s view it is, therefore, more appropriate to define the model as being a patriarchal model of multi-providers.124

Through asking which groups were excluded from social security provision normality in the welfare model is disclosed. First of all, a sex-segregated notion of providers and those provided for was established in law. In her extensive historical work on the allocation of rights and duties to the sexes in Swedish social security, Abukhanfusa makes clear the significance of waged working as the primary basis for eligibility to benefits. When gender was recognised in social policy it was chiefly considered to be a circumstance of secondary and modifying importance.125 A hierarchal valuation of human needs, based on gender, class and morals, was significant.126

9.3.1 Unmarried mothers – workers without priority

Women’s relations to men at this time affected their access to relief payment.127 The possibility of gaining relief payments was strongly connected to notions on gender and on social class. Marital status determined how a

124 Åmark, 2005, p. 228.
125 Abukhanfusa, 1987, p. 157
126 Plymoth, 2001, p. 89.

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woman was to be treated. Children of unmarried mothers, therefore, had a hard time managing and orphans were especially vulnerable in this respect. The point of departure at the turn of the 19th century was that mothers were supported within marriage. Historical works show that widows and married women had a relatively high priority among the beneficiaries. In contrast to poor men who were often inmates of poorhouses, poor women were frequently granted domestic relief in their homes. Unmarried mothers, in contrast, were primarily seen as workers and, thus had the lowest priority.

Solo mothers were primarily supposed to be workers. Whereas for a man, the duty to work implied a responsibility to put himself, his capital or labour at the disposal of the labour market, the implication for a woman was that she put her resources at the disposal of the marriage market. Only when she was in a situation of being unable to find a purchaser for her resources, or her spouse neglected his obligation to maintain her according the marriage contract, did the duty to work have the same implication as for a man. Thus, the ‘work-line’ for men was general in character, whereas for women the work-line was exceptional. Nevertheless, the duty to work also meant a duty to achieve utility and this duty embraced both the sexes.128

An expert report from 1929 that was definitely dominated by women, under the chair of Kerstin Hesselgren, had confidence in the power of enlightenment and thus advocated good quality education for mothers. The report was coloured by a patronizing attitude that put the blame on the unmarried and poor mothers themselves, as expressed in the following quotation from the Report:

‘To a large extent the mothers in view here, neither know how nor intend to give their children satisfactory care.’129

Until 1921 all women in Sweden were considered minors, and therefore had a male guardian. This meant that women in principle could not compete with men on the labour market; they could not choose where to live and could not dispose of their own earnings and property. In return, a woman was supposed to be maintained within marriage, even though this ideal was in fact hard to live up to for many families. If a Swedish woman in the mid 19th century made the choice to stay unmarried or failed to find a spouse, she had the same duty as every man to arrange for her livelihood through earnings from salaried

129 The quotation is taken from SOU 1929 nr 28 p. 127.
work. Her possibilities for work were strongly limited in comparison to men, and in addition her work was also less valued, conditions laid down in order to deter her from obtaining a position as a bread-winner.130

The Illegitimate Children Act, which was adopted in 1917, established a new form of support for unmarried mothers and their children.131 It introduced an institutionalised child welfare officer for supervising unmarried mothers and their children. The notion that children belong to wedlock was manifested in the Act, which had a disciplinary touch in that it brought children under the observance of the child welfare officer in the municipality. The regulation indicated that every child who was born in Sweden should have a right to both its parents. The Act laid down the authorities’ responsibility to prove paternity and to provide for maintenance support from the father. Primarily, the Act was intended to put an end to the anonymity of fathers. Likewise, a woman was no longer allowed to give birth to a child anonymously. At the same time, the need for a certain standard of living for unmarried mothers and their children was recognised, and that these mothers ought not to be dependent on a stigmatising poor relief.132 An unmarried mother was no longer considered to be merely sinful but also seen as a victim of unfortunate circumstances.133

In the 1930s the Swedish social insurance system was under reconstruction. A huge range of new legislation and new statutes appeared in the 1930s, after the Social Democrats assumed power, and Sweden was on the way of becoming the most advanced social welfare state in the world.134 Family policy was affected by formations of power and ideology and the major aspects of politics – rationalization and effectivization – resulted in legal regulations that seem to have been largely based on behavioural science. Political intervention in the family sphere became a crucial part of creating the ‘Swedish model’. This process featured a discursive struggle about the function of the family and the role of the state in regulating the form and function of the family. Preparatory works in the form of Government Commissions and Government Bills were of crucial importance in this process and the close connection between behavioural science and the state in the reform seems

131 SFS 1917:376; SFS 1950:146. The Illegitimate Children Act was through SFS 1973:819 repealed in the 1970s.
133 Åmark, 2005, p. 46.
134 Åmark, 2005, p. 75.
obvious. The social practices of government had to prepare people for the new policies and create a consensus.\footnote{See Lundqvist, 2007, p. 253 ff.}

In contrast to Sweden, where solo mothers were primarily supposed to arrange for their subsistence through salaried work, in Norway as early as in the 1910 decade special support for ‘lone parents’ was introduced. This was a controversial reform in its recognition of the needs of unmarried mothers. The Norwegian reforms were largely influenced by a notion of law that put children in the centre, which originated from Castberg: the first Norwegian Minister of Social Affairs. The lone parent benefit, which focused on rights in the society for the child and emphasised the relation between children and their parents, was much influenced by the political debate on a ‘mother’s wage’.\footnote{See Brækhus, 2004, pp. 92; Haavet, 2006, pp. 189–214; Åmark, 2005, p. 57.} A local mother’s wage, the Oslo insurance, was based on the notion that unmarried mothers should have the option to stay out of work in order to be able to take care of their children, especially when the children were small. In contrast, in Sweden unmarried mothers were often forced to hand over their children to other carers in order to be able to work. Thus, waged work was the norm in Sweden for these mothers, whereas motherhood was prioritized in the Oslo model.\footnote{Åmark, 2005, p. 246.}

9.3.2 Solo mothers and the population issue

Social engineering emerged in the 1930s as a strategy for societal change. During the 1930s and 1940s maternity became a population issue.\footnote{See Abukhanfusa, 1987, pp. 202–209; Åmark, 2005.} In hindsight, the result appears to be a peculiar combination of modernity in form and conservatism in fact: in new, modern and functional homes the housewife was supposed to raise a new generation of good citizens. Modern social policy in the growing welfare state emphasised the home rather than the workplace. Womanliness became physically and institutionally transposed into housewifeliness. Thus, a more modern and legitimate form of sex segregation was created through the notion of a housewife contract: a continued division of the little and the large, as incompatible forms of life.\footnote{SOU 1990:44, p. 86.}

Alva and Gunnar Myrdal, in their extremely influential work on the population crisis, were influenced by neo-Malthusian population theories. Malthus himself, at the beginning of the 19th century, had criticized radical ideas on equality that conceived of social institutions as the cause of misery.
According to Malthus, who based his critique on conservative property ideas, the individuals themselves caused and were to be blamed for their financial need. Measures aimed to improve the working class would, according to Malthus, in the long run only lead to increased populations and reinforced misery. The neo-Malthusians’ advocated more radical arguments based on utilitarianism moral philosophy.\footnote{Myrdal and Myrdal, 1997, p. 21.}

In contrast to Malthus, the watchword in family policy that was advocated in Myrdal’s work was early marriage in combination with limiting the number of children in marriage. In their work, the last battle field in Sweden for this strategy concerned a claim for new legislation: the abolition of the prohibition of contraceptives and the legalisation and regulation of abortion.\footnote{Ibid, p. 39.} The large proportion of illegitimate childbirths in Sweden was observed particularly by the Myrdals.\footnote{Ibid, p. 93.} The overwhelming majority of these births were assumed to be ‘accidental’. Through birth control, information and the proposed reform of the prohibition of contraceptives and abortion, they expected to see a decline in the number of illegitimate births.\footnote{Ibid, p. 93.}

The Myrdals’ proclaimed prophylactic social policies in the form of improved healthcare and education for unsatisfactory individuals who, according to their calculations, composed as much as one fifth of the population, and who according to them had great difficulties in securing their survival in modern society.\footnote{Ibid, p. 225.} Sterilisation was strongly advocated by the Myrdals and came to be an important method in Swedish efforts to achieve a qualified population. In their writings, they underlined their opinion, which was given scientific prominence at that time, that the greatest risks were not to be found among those people considered to be imbeciles, but among those outside the institutions whose freedom to breed was regulated neither by reason, nor by society.

The Population Commission proclaimed in 1936 that women at the very bottom at the social ladder, those who were permanently maintained by the poor relief authorities, in the same manner as in previous legislation, were to be excluded from the national maternity support.\footnote{SOU 1936:15, p. 36.} As shown by Abukhan-
fusa, the Population Commission showed the existence of a tendency value
women differently according to their social background.146 The Population
Commission also implicitly to the establishment forwarded the expectation
that there would be a new coercive sterilization regulation that would sup-
posedly reduce unwanted maternity among ‘bad’ mothers’.147

Nevertheless, to some extent the Commission recognised unmarried
mothers as being ‘worthy’ mothers. In order to help unmarried mothers’ to
keep their secret, voluntary care provision at infant homes was seen impor-
tant, as opposed to former care provision that were seen as being coercive.
On the other hand, these homes had by 1936 rather turned into homes for
‘vicious’ mothers and doubts regarding poor mothers’ sense of responsibility
were expressed by the Commission and by the bodies to which the proposed
actions were submitted for preparation. The view of people that governed
social legislation during the 1930s was one that allotted social class the same
biologically determining role as sex.148

In social policy, since the mid 1930s the family had been upheld as the
natural environment for the raising the next generation. The aim of level-
ing out costs for families with children in comparison to other population
groups also left marks in the legislation. Family social legislation became a
concept among legal scholars.149 Its purpose was to facilitate the establish-
ment of a family, its existence and development, and as far as possible elimi-
nate the risk for its dissolution.

Alva and Gunnar Myrdal suggested in their most influential work of
that time Kris i befolkningsfrågan, fundamental social policy reforms as a
remedy for, in their view, the disorganised and outdated family.150 In their
vision of ‘the new family’ they pointed out three transitional periods for the
family and its organisation: the patriarchal family in peasant and craftsmen
society; the disorganised, individualistic semi-patriarchal family at the full
emergence of industrialised society; and finally, the perfect, modern family
that then, in the 1930s, took form in order to adapt to changed economic
and social conditions.151 The Myrdals foresaw liberal and conservative ideas
losing force and a turning to more radical and collective family policies.
The population issue demanded, according to them, the destruction of the

147 SOU 1936:15 p. 206 ff.
149 See Bramstång, 1969, p. 182.
150 Myrdal and Myrdal, 1997, p. 322.
kind of anti-social individualism that characterised the transition period in industrialised society.\textsuperscript{152}

During this period of time, families consisting of unmarried mothers were constructed as problematic which also seems obvious in Alva and Gunnar Myrdal work. Social policy measures mostly assumed the family to be a nuclear family despite the fact that unmarried mothers constituted quite a widespread family form. In the Myrdals proclamation of prophylactic social policy as a future strategy that concentrated on children’s needs, they nonetheless gave prominence to the vulnerable situation of ‘lone’ mothers (\textit{ensamma mödrar}). They emphasised the need to introduce a child pension in order to give pecuniary aid to solo mothers ‘that in one or another way had lost their breadwinners and, for a reason not caused by themselves, could not replace a breadwinner’. The stipulated context for these mothers should result in legal regulation of welfare provision, in contrast to a continuing needs-test that in their view characterised poor relief. They also proposed an extended maternity benefit, maternity support and tax-free deductions for children without provision living at home.\textsuperscript{153}

A precondition for collective social rights in Sweden during this time was that the claims could, in practice, be controlled. Groups of people without a documented need for security through insurances were of low priority, contrary to the notion of public solidarity. The needs of groups outside the traditional labour market were seen as troublesome and their social rights in systems of social security were mostly rejected. Social rights and public solutions to problems of insecurity were based on the notion of a legitimate social order.\textsuperscript{154} In the 19th century independence and autonomy were only valid for a defined section of the male population in Swedish society. For women, independence and autonomy were not the norm.

\subsection*{9.3.3 Disciplining of solo mothers}

A concept of gender inclusive social citizenship did not emerge in Swedish social policies during this period, especially not before the the welfare state started to expand during the 1930s. Instead, there was a hierarchal set of values based on sex, class and morality.\textsuperscript{155} However, as pointed out by a Government Commission in 1990, which analysed democracy and power in

\begin{itemize}
\item\textsuperscript{152} Myrdal and Myrdal, 1997, p. 325.
\item\textsuperscript{153} Ibid, p. 201.
\item\textsuperscript{154} Åmark, 2005, p. 127.
\item\textsuperscript{155} See Florin and Kvarnström, 2001, p. 23.
\end{itemize}
Sweden from a historical perspective, the industrial revolution and the full emergence of modernity implied a development of sex-integrative impulses, as opposed to the strongly sex-segregated notion of gender in peasant communities. The capitalist system did not pay much heed to the earlier gender order when more inexpensive labour, performed by women, was preferred in many branches of the industrialised society. Nevertheless, from a gender perspective, it seems obvious how the growing and new kinds of conflict between the sexes in modern society resulted in the re-enforcement of the domains of men, their activities and qualities. In contrast, for women the domains were shrinking. As a counterbalance to the legitimized expansion of the interests of men, explicitly female domains for women were created through the abstract as well as the physical glorification of the home. For women in the growing proletariat, of which solo mothers were most often a part, this ideological notion seems to have been inaccessible.

The early women’s emancipation movement that was based on the new ideas on democracy and equality claimed the inclusion of women, (at least some of them) in modern expansion. When industrialisation and urbanisation started at the end of the 19th century, the Nordic countries had been little affected by the economic and judicial modernisation processes that long had been a feature of other parts of Europe. In a study on marriage and politics in the Nordic countries, it is claimed that the elaboration of a distinctive Nordic marriage legislation can be explained by the fact that modernisation in these countries ran parallel with the democratisation processes. Liberalisation of economics and democratisation of political life diminished the church’s influence on law. Popular movements, secular as well as revivalist, had great influence in these processes, in addition to women’s movement that demanded individual rights for all women, regardless of their civil status.

During this period, in the triangular drama between industrialism/capitalism, democracy and the gender system, antagonistic ideas about integration or segregation of the sexes played an intrinsic part. Thus, the growing conflict between the sexes created the ideological dilemma for women: either emphasising sameness (likhet) or difference (särart) in relation to men. The conflict between the sexes however came to be defined as a woman’s issue (kvinnofrågan) that was transformed into conflicts that the system could

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manage, a point of view considered to be, in the form of a silenced ideology, the fundamental feature of the Swedish welfare state that followed. In this conflict between the sexes, open antagonism within the collective of women, between married and unmarried, employees and housewives, was significant. Family law reform, which was also motivated by race-biological ideas, became one of the tools for maintaining order and stability in society. Equality in marriage law was a means of reinforcing the institution of marriage.

Social security in Sweden at this time could be described as reflecting two faces of social law. On the one hand, social security in Sweden was characterised by governance. Non-satisfactory individuals and groups of people seen to be hard to control were the target of poor relief. This technology of disciplinary power, using Foucault’s words, also permeated the population issue and social engineering and its objective of creating social change, especially as regards the family, and a qualified population. Most of the provisions, as in ‘family-social’ legislation, that solo mothers could be given were permeated by this kind of disciplinary power. On the other hand, social security in the form of social insurance, which mainly targeted industrial workers, was given a juridical form. Solo mothers were, however, still at risk of disadvantage, given that social insurance came to be based on the notion of a male-breadwinner family.

Finally, deconstruction of gender and power in the patriarchal welfare model ends with an example of how solo mothers could be represented discursively and thus socially constructed during the 1930s:

‘Again and again, for example, we encounter baby booms with large numbers of children being born to unmarried, imbecilic mothers, where the whole tribe has to be supported by the state and where their frequent recurrences of asocial behaviour and crime will, in the future, give rise to further problems. That a number of such individuals were prevented from coming into the world would mean therefore in itself substantial relief for society, to say nothing of the effect on the future quality of the population stock that such a limitation could be assumed to entail.’

This clause provides an example of how solo mothers were constructed and represents the kind of normative arguments that could be used for tackling the ‘social problem’ of unmarried mothers, and their children. It seems

159 SOU 1990:44, pp. 82-83.
160 See Melby, Pylkkänen, Rosenbeck, and Carlsson Wetterberg, 2006, p. 16.
open to question whether all the women this passage refers to were ‘imbeciles’. Rather it tells us something about the stigma and social exclusion poor unmarried mothers risked during the 1930s, and exemplifies the boundaries of social citizenship for solo mothers in a period characterised by its idealistic visions promises of an inclusive welfare state.
10 Social security for solo mothers in the Swedish welfare state

The notion of a rule of law state was from its beginning fundamentally based on liberal thoughts concerning individual freedom with predictability as its most characteristic ideological feature. Legal norms became politically the most important instruments of control and the constitutional rules became the foundation for the legal system. Formal norm rationality and the notion of the legal system as a coherent and autonomous system characterise the rule-of-law state. Professional lawyers and the expert legal culture are in the rule of law state, considered to be in control of interpretation of the legal system.¹

At the beginning of the 20th century Max Weber predicted the increase in law of material rules, affected by economic, political, ideological and ethical views, in contrast to the notion in the rule-of-law state of law as consisting of formal rules. Law came to be a means for the realization of such economic, political, ideological and ethical purposes. The expressed aims therefore came to be considered as more important than law. In the welfare state, that from the 1930s gradually replaced what has been termed a transitory ‘social-state’ period, the focus was on people’s material interests and social needs rather than protection and equality before the law.

A distinctive feature of the ‘welfare state’ therefore is understood to be that the state positively has duties in relation to its citizens. This notion is based on the perception that persons/individuals or groups of persons/citizens are to be ensured a certain standard of living. The individual, societal and national aims that require that these needs have to be ensured, are therefore understood to constitute the material and purposive rationalities of the welfare state, thus implying another conception of the idea of legal certainty and the rule of law. Moreover, new modes of interpretation and a non-legal expert culture grew up in the welfare state. The increasing use of frame-work laws in the welfare state reflects the idea of a changed function of legal orders, moving from judicial to administrative and goal-oriented decision making. Law in the welfare state is characterized as meaning a struggle between two forms of legality: on the one hand a system of private law

resulting in the accumulation of power and wealth, and on the other hand 
laws aimed at compensating for social disadvantages: i.e. administrative law, 
social and labour law. Debates among Nordic social law scholars reflect how 
this struggle has led to theoretical and methodological explanations of how 
to understand critically and how to develop social law so that it is better 
adjusted to meet social needs.

The origin of the Swedish welfare state is found in ideas articulated in a 
mix of discourses during the 1930s and 1940s that questioned a patriarchal 
system of social security, badly adapted to social and economic conditions in 
a society in transition. In the 1950s the ideas promising a welfare state were 
given a more stable form. Social assistance was modernised in the 1950s, 
although the fundamental features of poor relief were largely retained; family 
benefits and services were improved, e.g. in the form of general child allow-
ance, advance payments of maintenance allowance, and housing allowance; 
and the mandatory maternity insurance recognised maternity as a risk within 
the scope of social insurance. These ideas were further reinforced by the adop-
tion of a national social insurance at the beginning of the 1960s. School social 
legislation further evolved which made education possible not only for the 
wealthy but for all. The ‘Swedish model’ came to mean that all residents in 
principle were included, but still on different terms.

10.1 From liberal law to social law

Although social law as an independent legal discipline has been firmly estab-
lished, the governing principles for determining the boundaries of social law 
in a Swedish context have been explained differently, mostly in a pragmatic 
sense, without questioning the possibility of identifying a distinct unit of legal 
material that should be labelled ‘social law’. In the 1950s Eek demarcated 
social policy from social law and defined the latter as the normative basis for 
social administration. The scope of social administration was, according to 
Eek, delimited by three criteria. First, the social measures performed by the 
administrative entity should be based on law. Second, the activity should be 
continuously supervised by the state. Third, the activities performed should 
be carried out on behalf of the state. Eek pointed to the function of social 
law to provide the normative base for the administration. On the one hand, 
a definition of the subject field of social law involved, according to Eek, a

2 Ibid.
systematic determination of the dividing lines between social law and labour
and criminal law, and on the other hand the demarcation of social law within
administrative law.\textsuperscript{5}

In more recent legal dogmatic work Westerhäll defines social law accord-
ing to its functions of regulating society’s efforts in the sphere of social policy
and presents a list of areas of concern in social protection measures regulated in law, traditionally defined as ‘social law’. The obvious link between
social policy and social law, could according to Westerhäll, be illuminated
by the two concepts of ‘governing’ and ‘legal certainty’, thus connecting
social policy with governing and social law with the values contained in the
concept of legal certainty.\textsuperscript{6}

Francoise Ewald, who was Foucault’s assistant in France, elaborated in
the 1980s a somewhat more philosophical and theoretical definition of
social law of the welfare state.\textsuperscript{7} Based on ‘Foucauldian’ legal philosophy,
Ewald’s account of the welfare state linked the new type of social law to the
political rationality of the welfare state. In Ewald’s genealogy of the welfare
state, he pointed out how liberal politics and legal rationality did not allow
for the moral virtues of charity and generosity on judicial grounds, which
included supporting the victims of accidents. The problem posed by industrial
accidents in an industrialised society could not be solved without a new
technology, the technology of risk and insurance, which executed a new, soli-
daristic (or sociological) political rationality, replacing liberalism.\textsuperscript{8}

According to Ewald, the welfare state actualises the political rationality of
solidarity primarily through the political technologies of risk and insurance.
Social problems in this theory are formulated and specified through the cat-
egory of risk, and insurance proffers a general model for solving them. Risk
for Ewald is an epistemological concept, a category of thought. Nothing
constitutes a risk in itself, but anything can become a risk. Although the
welfare state stands for reciprocal insurance, disciplinary power, according to
Ewald, is still aimed at normalising the individuals.\textsuperscript{9}

In Ewald’s conception of social law, the law of the welfare state, three
levels can be discerned: the ‘surface’ of legal practices, general legal principles

\textsuperscript{5} Eek, 1954, p. 35.
\textsuperscript{6} Westerhäll, 1990, pp. 20–21.
\textsuperscript{7} The description of Ewald’s conception of social law is primarily derived from Tuori,
2002, pp. 53–69, with reference to Ewald, 1986a, pp. 40–75; Ewald, 1986b; Ewald, 1988,
\textsuperscript{8} Ibid.
\textsuperscript{9} Ibid.
as the rule of judgement of social law, and the Norm as the rule of justice of modern society. This ‘Norm’ expresses in Ewald’s view the political rationality of the welfare state. The legal subjects in this conception of social law are no longer defined as the equal subjects of liberal law but as members of social groups, such as consumers, employers and employees.\(^{10}\)

In Ewald’s view Social law abandons liberal law’s characteristics of generality and equality. Social law on the contrary is a law of inequalities and is aimed at correcting social inequalities. Social law is tolerant and relies on limits, thresholds and averages, and is the law of a society in constant motion. Thus, social law has to be sensitive to this motion. In Ewald’s conception of social law, legal norms are themselves determined as a function of specific situations, which is reflected in provisions such as the so-called general clauses in social law that are meant to be applied in particular cases. Ewald argues that in the era of social law, the Norm has become society’s rule of justice, whose logic even the law obeys and whose rationality permeates the rationality of legal practices.

Social law is explained as the law of transactions, which relies on balance and tolerance instead of establishing dichotomies such as prohibition/permission. Social law establishes limits and thresholds; it has lost liberal law’s characteristics of constancy and generality. Social law in Ewald’s critical positivist theory is also interventionist law, which according to him contributes to the solidaristic government of society. General legal principles, including human rights, function as the critical instance of and limit to social law. Unlike in liberal law, these principles do not gain their validity from ideas or principles external to the positivism of law.\(^{11}\) Hence, Ewald’s positivist conception of social law, on which for instance Tuori’s model for critical legal positivism largely is based, delimits law.

In contrast to Ewald’s rather ‘pure’ social law theory, theoretical and methodological debates among Nordic legal scholars have since the 1970s, been characterized by a critical distance to traditional dogmatic law studies that could be more or less described to mean boundary-work, however with some exemptions, mostly insensitive to gender.\(^{12}\)

The Finnish legal scholar Matti Mikkola pleaded for a neo-normative juris-

\(^{10}\) Compare Wilhelmsson, 1987. Wilhelmsson has elaborated a concept of social civil law in which he includes need-oriented elements in the general principles of contract law.

\(^{11}\) See note 7 on p. 280.

\(^{12}\) In his review of the debate that took place in the critical Nordic journal Retfærd, Kristian Andenæs has described the theoretical and methodological discussions among legal scholars during the 70s and 80s, see Andenæs, 1992, pp. 39–51.
prudence as an alternative to legal dogmatics. He considered that social law had to deal with the broad patterns and not the fine interpretation details. As management by objectives and discretion largely characterizes social welfare law, which is founded on a huge administrative praxis without the status of traditional case law, legal dogmatic studies in social law needed, according to Mikkola, to be combined with a theoretical and methodological approach. In the 1970s, in more problem-oriented research, it was largely the women-law studies contribution that brought new dimensions to social law studies. During this time the hermeneutic theory of jurisprudence, based on women’s insights about the characteristics and manifestations of law in its context, evolved by the Norwegian legal scholar Tove Stang Dahl, became important. In Finland, during the same period, the ideas of Lars D Eriksson were presented as a foundation for the deployment of social law. According to Eriksson, the issues that legal scholars needed to deal with should be taken from social reality and channeled through social politics. The improvement in the situation of those who were marginalized, excluded and discriminated against was thus the central task.\textsuperscript{13}

In a contribution to a discussion on the crisis of the welfare state another example of Eriksson’s new position was manifested in 1995. Eriksson then argued for a revival of an ‘ethic of responsibility’ where the family should be allotted welfare functions that had been removed from them during the welfare state period.\textsuperscript{14}

At present, the concept of risk in Swedish social law is given prominence and reflected on in legal scholarship. One approach that is not evident in the distribution of social protection has been adopted by Sara Stendhal, who uses a conflict perspective in her study of cases regarding sickness cash benefits in Swedish administrative courts. From this perspective she describes social protection as corresponding to a social (collective) risk, as distinct from a predominantly individual need/risk. From a conflict perspective, although the different social protection schemes could be described as meeting the (income) needs of individuals, and as addressing risk situations on an individual basis, the constitutive element would still be the social risk of the collective. One assumption in her reasoning is that the interests of the individual and the collective will correspond as long as individual need and social risk overlap, and conflicts will potentially arise when they do not. Protection is not delivered primarily as an answer to an individual need, but to collective

\textsuperscript{13} Ibid.
\textsuperscript{14} Eriksson, 1995, p.11.
risks such as social fragmentation, political regime illegitimacy, and ultimately social upheaval caused by people’s lack of well-being.15

The present description of a less generous welfare state, of increased income inequality and the move towards active policies and the more segmented welfare state provides for Stendahl the necessary empirical base for her analysis of the normative foundation of the Swedish welfare state. Her analytical framework, based on the empirically-based observations mentioned above,16 and influenced by the work of Anna Christensen and Bo Rothstein, contained three clusters of values: ‘social stability’, ‘individual freedom’ and social equality.17

10.2 Certain social rights belong to citizens

During the 1950s–1970s poor relief was replaced by modernised social assistance regulation, general sickness insurance was adopted followed by a national social insurance system. During this period framework laws, which indicate the scope of the public authorities’ responsibilities for providing for the welfare of residents and citizens without combining these public responsibilities to any large extent with claim rights for the individual person, appeared to be a new strategy in regulating the social services and health care systems.18

Whether or not social benefits should be characterised as legal rights is traditionally an issue of great interest among legal scholars. Social security in terms of social rights, an issue often influenced by Marshall’s ideas in the 1950s19, also deals with the principle of universalism, i.e. who is to be or not to be included in systems of social security. Moreover, as regards levels of compensation, the question is whether the system should guarantee a minimum standard of living or give income security. Additionally, equality before the law as a legal principle raises questions on the diverse positions of citizens’ in the social security system.

Although the Welfare Committee in 1950 advocated a rights discourse in the reform of poor relief, the intention was that the new concept of social assistance that was established in the Act that followed, only meant a general commitment for the municipality, not a ‘right’ for the citizen. Moreover, the

15 Stendahl, 2003, pp. 32-35.
16 See on p. 229.
Committee also proposed dropping the procedural right to appeal in court and transferring the trying of cases to the social administration authorities: the County Administrative Board.\textsuperscript{20}

In 1954 Eek gave prominence, seen in a comparative and international overview, to the significance of an aspiration towards the foundation of a principle – constitutional in its form and legislative in fact, that certain 'social rights' belonged to citizens.\textsuperscript{21} The legislative principle that he emphasised was the principle of self-support which was much debated in legal doctrine and in social policy investigatory works. Poor relief legislation was in the 1950s, still considered to be based on the belief that the citizen had a bounded duty to support himself. In principle, relief payments were considered to be granted as loans, and were therefore meant to be refunded by the beneficiary or by those who according to civil law had a duty of maintenance in relation to the beneficiary. Eek found it reasonable to assume that this self-support principle should retain as legislative maxim and guiding principle in social law, as public finances required that all, of necessity, worked.\textsuperscript{22} This interpretation was also endorsed in the Social Welfare Committees report in 1942.\textsuperscript{23} The right to subsistence was seen as a complement to the principle of self-support and could only be claimed if such capability was lacking provided there was no other available means of getting a living.\textsuperscript{24} In contrast to poor relief, Eek ascertained in the 1950s, as regards social insurances, that the principle of self-support was not appropriate. Instead, these provisions aimed to protect income security in a system of insurances, thus enabling the continuity of self-support.\textsuperscript{25}

Social law was, as explained by Andenæs, in the 1980s seen as being in crisis, since the principles of individual legal rights did not function in a legal system that was increasingly oriented towards and favoured the administrative system. When full employment no longer characterized the Nordic countries, a system was advocated that emphasized the citizen instead of the wage earner and replaced means-tested benefits with a minimum income for all. Eriksson has taken part in the later discussion on developing reflexive law, focusing on self-sufficient social networks, questioning the distinctions between politics and law. On the other hand, he has rejected arguments for

\textsuperscript{20} See Eek, 1954, p. 81.
\textsuperscript{21} Eek, 1954, p. 73.
\textsuperscript{22} Eek, 1954, pp. 73–76.
\textsuperscript{23} SOU 1942:56, p. 31.
\textsuperscript{24} Eek, 1954, p. 75.
\textsuperscript{25} Eek, 1954, p. 76.
justice as the foundation in case law. Andenæs in his review however claimed a connection between Eriksson’s new position and the curtailment of welfare state ideals that became obvious during the 1980s. Alternative jurisprudence had, according to Andenæs’ analysis, been taken over by the authorities and transformed into individual-oriented and anti-social administrative aspects of the system.26

Anna Hollander concluded in the 1990s that the notion of social rights had survived the doctrinal analyses. According to her, change in social welfare law mirrors social change, and is governed by economic and public demands. Hence, differences in opinion about aims and content in law between the state, the administrative system and individuals are concealed by demands for a law of explicit rights.27 In a study of Swedish welfare legislation, Hollander used a model involving characteristic components in determining entitlement to a benefit. The model28 examines whether the benefit is formulated as an individual right or as a general regulation, and whether the prerequisites for entitlement and the content of the benefit are specified in detail in law. Moreover, the model asks if the benefit is dependent on budgetary allocations and whether the applicant has the right to appeal decisions in court.29 In Hollander’s study, the components for the evaluation of a social right were extended to include the question of whether the law lays down state supervision and control of the authorities. Hollander’s conclusion was that a legalistic notion of a law of claim-rights does not guarantee the fulfilment of needs. For vulnerable categories, a high level of ambition in choice of legislative strategy and legitimacy in relation to the public and the authorities is also needed. An explicit rights discourse is, in her opinion, important in pointing out the legal subject in relation to the authorities. However, a further development of principles that also allows for judicial, political, economic, moral, and ethical perspectives affecting the decisions is, in her view, important in a system of social security that aims to promote the fundamental welfare needs of all.30

During recent decades a constitutional protection of social rights has been increasingly discussed and advocated within Nordic legal scholarship.31 In

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28 The model originates from Stoor, 1990.
human rights discourse it is common to conceptualize social rights as belonging to the second generation of human rights, whereas the first generation consists of negative freedom and negative rights. In the second generation social rights are shared with economic and cultural rights. The first generation of human rights is seen as comprising active and political rights aimed at participation, or negative liberal rights aimed at protecting the spheres of citizens' personal freedom from intervention by the state, as opposed to positive social rights where the state has to fulfil a duty in relation to the citizen. Håkan Gustafsson points out social justice as key for positive social rights, which in his view are typical of the welfare state, rather than participation or liberal freedom. In a state governed by law, a citizen-state, he proposes that individuals should possess not only private but also public rights.

Social rights have also been analysed as normative relations between a state and its citizens, including aspects of both conflict and harmony. Anna Christensen, discussing social security in Sweden in the 1990s, argued that the element of social order as a normative pattern has always been very strong in the welfare and social security system:

‘The social order is the work line. The work-line is not only a right to work but also a duty to comply with the social work order. The work-line is carried through even in situations where other basic human and social rights are at stake. […] The present crisis of wage work, evident not only in the persistent high rates of unemployment but also the declining proportion of the European population in work, has not weakened the work order as a superior normative pattern within social security. On the contrary, this pattern is reinforced.’

Maja Sakslen, in her discussion on social security systems in transition, focuses attention on how we use concepts which create categories that not only differentiate but also favour and exclude, and create hierarchies and opposition. Using citizenship or work in social security systems as an inclusive and exclusive concept, we create a group of citizens who have rights, and ‘margizens’ who do not have rights. In defining the personal scope of our schemes we should, according to Sakslen, consider the possibilities of using a

34 For a description of the notion of social rights in legal doctrine, see Hollander, 1995, p. 32. Hollander refers to Anna Christensen, 1988, p. 39, who developed theories on normative structures in her analyses of the concept of rights.
35 Christensen, 1997a, pp. 24–25.
‘more-active/less-active scale instead of worker/non-worker inclusion/exclusion judgements. The question of how the co-ordination of social security in EC law, that is primarily applied to persons active on the labour market and their family members, will affect national social security in the Nordic countries, which applies to all residents, was also raised by Sakslin during the 1990s.

10.2.1 Legal certainty in connection with legislation strategy

Much of Nordic legal scholarship has focused on legal certainty in social welfare legislation. When they lack concrete substance and meaning, the constructions of social rights have been critically analysed failing to fulfill judicial demands for predictability. The use of framework laws in Nordic welfare legislation is the manifestation of a strong belief in law governing change in society, and has led to a wide-ranging debate. The traditional rule of law, suited to a detailed law with a formal notion of justice, contrasts with framework law which aims at material justice laid down in statutory general objectives. Hence, legal scholars have declared a rights discourse to be more suitable for obtaining material justice, since the content of the rule is then explicit and specified in detail.

The distinguishing feature of the classical state governed by law, that rights are directly mediated to the individual through legislation, stands in contrast to the Swedish welfare state, where social rights are often indirectly mediated to individuals through authorities. The framework construction favoured in the reform of social welfare legislation during the 1980s, in which a ‘good’ state is presumed to guarantee the fulfilment of social needs, conflicts with traditional demands of the rule of law. In the Swedish welfare state authorities have per definition been seen as ‘good’, since no protection for individuals against authorities has apparently been needed. Consequently, this represents, as explained by Håkan Hydén, an increased discretionary power for the authorities that might well be turned against individuals. In order to compensate for failures in both the state governed by law and the welfare state Hydén has proposed a combination of models: a welfare state governed by law, with legal guarantees inherent in the system.

37 Sakslin, 1995, pp. 34–47.
40 Hydén, 1998, pp. 64–76.
From an individual viewpoint, benefits and services have been defined as genuine claim-rights, when they are regulated as clear and predictable rights, flowing from the welfare state to the individual. In such types of social rights, the authorities’ responsibility to provide for a need is not discretionary. This is mostly the case for social insurance, although social insurance, which is based on a huge range of statutory regulations, is nonetheless characterised by administrative decision-making by non-lawyers. The public-individual relationship has almost the same autonomous characteristics as the classical, liberal freedoms and rights. While the local determining authorities in a framework legislation strategy, which is mostly the case for social assistance, are given a great deal of discretion and to a large extent use sources other than judicial in interpreting law, the points to be observed in social welfare law have been transferred from courts and the legislative level to public officials at the administrative level. It has therefore been argued that decisions in a framework design are at risk of being affected by the decision-makers’ own values as a result of obscurity in the rules of fact and its legal consequences, thereby affecting the legal certainty of the individual person.41

In asking whether administrative law, of which social law is part, has a future as a legal discipline, Kaarlo Tuori advocates that legislation in the welfare state should be elaborated primarily from the perspective of the state governed by law, as a counterpoint to the instrumentalist aspects of the welfare state. In his view, the belief in ruling through framework laws has led to a biased and instrumentalist approach to law.42

10.2.2 Social assistance in a unified welfare law – from patriarchy to equal rights

The Social Assistance Act from 1956 was retained into the 1980s. The Social Services Act, which came into force in 1982,43 was of epoch-making importance in many ways. Individual social rights were formulated in a framework law with specific objectives to be striven for within the municipalities’ social services. Social equality, a comprehensive view of social problems, and support to individuals on a voluntary basis became the leading principles in a unified law intended to take the place of an old-fashioned and patriarchal legislation. Apart from individual provisions, general and structural efforts

41 Ibid. See also Andenæs, 1992; Gustafsson, 2002; Åström, 1988.
on various levels in the society were part of the municipalities’ tasks achieving welfare of quality.\footnote{See Norström and Thunved, 2002, pp. 26–27, Vahlne Westerhäll, 2002b, pp. 143–146.}

The section regulating the right to social assistance (Section 6) was given a considerable range in the Social Services Act of 1980. Assistance meant financial support as well as help in other ways, with no restrictions as to clientele and types of assistance that could be allowed. The right to assistance was not linked to any reason, which distinguished this measure from previous regulations. Unemployed and foreign citizens who lacked a work permit were thus also included within the personal scope in the new regulation.\footnote{See Holmberg, 1985, p. 91.}

The individual right to assistance was linked to the prerequisite that the individual was dependent on social welfare provision for support and for way of life in general and was no longer divided into obligatory and voluntary assistance. The general tasks for the social service agencies were specified in Section 5 of the Social Services Act. The responsibility to allow support pursuant to Section 6 did not preclude the welfare board from allowing support beyond what was stated there. The social welfare boards’ were also authorised to allow support in accordance to the general commitments laid down in Section 5, i.e. to guarantee care and services, information, counselling, support and treatment, financial help and assistance to families and individuals in need. Municipalities, on the basis of different local circumstances and conditions, were allowed a great deal of discretion in determining the level and content of the assistance, with the general guidelines from the National Board of Health and Welfare serving as a guide.\footnote{Ibid, p. 92.} However, the government proposed the desirability of a uniform assessment.\footnote{Prop. 1979/80:1.}

Social assistance was meant to ensure that the individual person had a reasonable standard of living. However, the concept ‘a reasonable standard of living’ was defined neither in the Act nor in preparatory works. In the legislative process that preceded the new Act it was, however, articulated that the concept ‘reasonable standard of living’ was meant to ensure resources for personal growth and meaningful and active living in such areas as leisure activities, recreation and social contacts. Preventive and rehabilitating aspects were also included within the matters covered by the right to social assistance.\footnote{SOU 1977:40, p. 121.} It was also maintained that there was no need to construct social assistance as an especially regulated form of help since the starting point was
the individual’s *possibility* to ensure his/her daily living. Moreover, in the preparatory works for the Act, the Social Committee, in a final Report, proposed the introduction of a general *social insurance supplement* that should cover most of the financial needs that were ensured in accordance with obligatory social assistance regulated in Section 12 Social Assistance Act.

In the political debate during the late 1960s the advantages of transferring the administration of social assistance from the social welfare boards to the social insurance agencies had been advocated. Financial support could, in that way, come to be seen holistically and the welfare board could concentrate on special needs, rather than compensate for the ‘un-balanced amounts’ that were not covered by current social insurance schemes. A general social insurance supplement could free up welfare resources for increased preventive and treatment measures. Based on research findings the Social Committee noted in the Report that problems on the labour market, sickness or simply low incomes, rather than individual problems, were what caused the need for social assistance.

The non-binding general guidelines were seen as important, but were issued in a legal context in which government normative steering of rules and state supervision had to be limited, in line with the Social Services Act framework legislation strategy. Once the Social Services Act had come into force, however, the government emphasised in a supplementary budget bill that the municipalities were not allowed to increase their spending. In order to make the disposition of their local resources effective, municipalities it was felt ought to be given more freedom. Hence, the general guidelines were only meant to serve as a guide in the application of Section 6 of the Social Services Act.

The first section in the Social Services Act stated that its overall purpose was the liberation and development of individual’s and groups’ own resources in the actions of social welfare services in the municipalities. Social assistance was aimed at strengthening a person’s resources for living a responsible and independent life. As a crucial principle, eligibility for assistance only existed

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49 SOU 1977:40, p. 121.
50 SOU 1977:40, p. 120.
51 SOU 1977:40, p. 301.
53 The first general guidelines of the Swedish National Board of Health and Welfare on how to interpret the right to social assistance according to the Social Services Act was presented in *Rätten till bistånd* (1981:1).
54 Holmberg, 1985, p. 93; Prop. 1980/81:150, Annex 2, p. 30, p. 120.
if the individual need could not be met in other ways. Thus, the law was subsidiary to the individual responsibility for his/her own living conditions. Hence, the normative pattern of a work-line was made statutory. A person who was capable of working and who could be offered a suitable job was only entitled to support on a temporary basis pursuant to Section 6. Social assistance was subsidiary to measures taken by the individual personally or to the individual’s own financial means that could be used to meet his/her needs.

Praxis generated according to previous regulations was meant to serve as a guide for the application of the new law. However, in the regulations and in case law, no conditions were laid down that legitimised demands on the recipients to participate in activating measures as a prerequisite for being awarded social assistance. Respect for the individual’s self-determination and integrity, laid down in the first section of the Act, did not imply permissive treatment.

How social assistance was to be judged in relation to maintenance liability laid down in civil law was commented on in the general guidelines issued by the National Board of Health and Welfare. If there was a civic maintenance duty this should be brought to the fore. On the other hand, if the welfare board was not successful in their efforts to help a person who had a right to maintenance from a spouse or a parent to receive their maintenance, assistance could be granted temporarily. Cohabiting and un-married couples, without a civic maintenance duty towards each other according to family law, who lived together in a joint household, were however also primarily considered to share incomes and expenses. On the other hand, if they could prove that they kept the housekeeping to be separate, or, despite living in a joint household, they could prove their finances were separate, the parties were not assumed to contribute to each other’s expenses. Social assistance to one of the parties then had to be calculated independently and regardless of the other party’s financial situation.

Social assistance for children was in principle subsidiary to maintenance from the parents. First, the parent liable to pay maintenance was required

55 Holmberg, 1985, p. 91.
56 See Vahlne Westerhäll, 2002b, pp. 103–196.
58 Holmberg, 1985, p. 97.
59 Föräldrabalken (1949:381) (Parental Code), Chapter 7. Parents’ maintenance duty was later extended until the child reached 18 years of age, or, if the child followed a course of study
by the welfare board to pay maintenance on a voluntary basis for a child in need. Secondly, the welfare board had a responsibility to support the child having the maintenance established by law, or to have the maintenance that had been established actually paid. Only when these measures failed was the child entitled to social assistance. The child could also be allowed assistance while awaiting the maintenance allowance from a parent to be established. In this case the assistance was seen as a payment in advance which therefore had to be repaid. Juveniles beyond 15 years of age were, according to Section 56 in the Social Services Act, adjudged to have a right to plead for social assistance before the Welfare Board. Even though social assistance for a child was subsidiary to maintenance from parents, such an application, regardless of the parents’ point of view, had to be recognised and independently assessed.\(^{60}\)

Financial assistance allowed pursuant to Section 6 Social Services Act was not in principal meant to be reclaimed. Only two exemptions to this rule were indicated in Section 33: if the assistance was awarded \textit{in advance} of a social benefit or compensation, e.g. wages, pensions or sickness cash benefits, or if the allowance had been awarded to a person involved in a \textit{labour dispute}. Assistance could however only be re-claimed if the recipient had been informed that the assistance was paid in advance of a social benefit or compensation in so far as the amount to be re-paid was commonly agreed at the time the assistance was awarded. Financial assistance beyond what was stated in Section 6, i.e. assistance within the discretionary powers of each municipality, could only be reclaimed if such assistance had been awarded on \textit{condition} that it had to be repaid. In contrast, the Social Services Act of 1980 did not inlude any rules about refund liability for social assistance awarded on the grounds of incomplete, false or in other ways misleading information. Such cases instead were meant to be tried as public lawsuits. In contrast to previous regulations in the Social Assistance Act, a spouse, according to the Social Services Act, was no longer duty bound to repay assistance allowed to the other party. In principle, social assistance for children could not be reclaimed from parents, exempt from assistance for treatment measures.\(^{61}\)

When the Social Services Act came into force in 1982 trial cases arising from matters regulated in the Act, such as social assistance, were transferred

\(^{60}\) Holmberg, 1985, p. 97.

from the supervising county administrative board (*länsstyrelsen*) to the administrative courts. Rule of law and legal certainty in a frame-work law, such as the Social Services Act were meant to be guaranteed through court proceedings. Legal scholar Holmberg noted how the lack of specification could easily give rise to interpretation difficulties as regards the assessment of eligibility, in what form and at what level the assistance should be allowed. Instead, he emphasised the intention of the statutes to be fundamental for the interpretation, since the wording of the Act functioned as a secondary source. Legal analysis was seen to be problematic as the construction of the rule for eligibility for social assistance did not include any prerequisites in the common legal sense. The limits between the various responsible authorities for people in need of social provision and the interpretation of the 'stay-principle' came to be of central importance in social law.62

10.2.3 Social security in the form of general social insurance

In 1962 national social insurance was radically reformed in the National Social Insurance Act.63 The Act that came into force in 1963 replaced previous legislation on social insurance, maternity benefits and maternity support, and the national basic and supplementary pension schemes. From then on, Swedish social insurance was systematised into five branches: 1) sickness insurance including maternity insurance 2) basic national pension 3) supplementary pension insurance (ATP) 4) occupational disease insurance, and 5) unemployment insurance.64

The mandatory sickness insurance, national pension and ATP were characterised as general as in principle they embraced the entire population, the employed as well as the self-employed. The personal scope was in fact extended to include every Swedish citizen and every foreigner who was being a Swedish resident. In addition, a precondition for affiliation to national social insurance was registration at the nationalized regional social insurance office. Affiliation was compulsory and linked to a contribution duty, i.e. to pay the insurance charge. Married women’s sickness insurance for those engaged in domestic work, was no longer derived from membership of a breadwinner family, but was individual. These women however were excluded from the supplementary sickness insurance as it was held that their charge would

64 See Holmquist, 1969, p. 392.
be much too burdensome.\textsuperscript{65} This kind of insurance for ‘housewives’ was amended through a reform aimed at realizing the principle of equal opportunities for men and women through the introduction of a ‘house-spouse’ insurance (\textit{hemmamakeförsäkring}) that became part of sickness insurance.\textsuperscript{66} This kind of insurance comprised a basic and supplementary scheme, the latter based on payment of a charge. This ‘house spouse’ insurance came to be typically a woman’s insurance and was of little significance for subsistence on account of the low level of payment, a (maximum of SKr 20 per day). When the general voluntary sickness benefit was further improved in the 1980s this insurance came to an end.\textsuperscript{67}

\textbf{10.2.4 From maternity benefit to sex-neutral parental insurance}

Even after the introduction of mandatory maternity insurance in 1954, every sixth woman giving birth was still in need of needs-tested maternity support.\textsuperscript{68} The national insurance reform in 1962 signified change. Every insured woman who gave birth was now entitled to certain special benefits which became part of the sickness insurance.

The maternity benefit (\textit{moderskapspenning}) and sickness benefit, however, were not uniform. In contrast to the latter, maternity benefit was paid as a lump sum. Moreover, the supplementary sickness benefit paid at childbirth, which became all-encompassing, required qualification through a work period amounting to not less than 270 days prior to the birth of the child. The reform also included special compensation for dental care for pregnant women. This right to compensation for dental care was retained for nine month after childbirth. The most important change was the abolition of the needs-tested maternity support. A principle of justice and the elaboration of general support for women in confinement characterised the reform, which took place in a time marked by growing optimism.\textsuperscript{69}

Two main viewpoints were emphasised as central to the reform. First, the expenses arising from pregnancy and childbirth had to be levelled out by transferring them from individuals to the whole of society. Second, the basic part of the maternity allowance emphasised a minimum standard standpoint, whereas the supplementary allowance emphasised income security for working mothers. Nonetheless, the fact that working mothers gave birth to

\textsuperscript{65} See Vahlne Westerhäll, 2002b, p. 226.
\textsuperscript{66} Prop. 1970:60.
\textsuperscript{67} Vahlne Westerhäll, 2002b, p. 268.
\textsuperscript{68} A bukhanfusa, 1987, p. 191.
\textsuperscript{69} See A bukhanfusa, 1987, p. 195.
and cared for their child was still seen as more important than a redistribution of resources based on the loss-of-income principle.\textsuperscript{70}

In 1974 the maternity benefit was replaced by a general and sex neutral parental insurance which extended the right to take parental leave with compensation in the form of a parental allowance (föräldrapenning) to fathers.\textsuperscript{71} The parental insurance also included a basic allowance irrespective of previous income, provided the recipient of the allowance cared for the child himself or herself. Moreover, parental insurance included a right to compensation corresponding to the sickness benefit for taking care of a sick child.\textsuperscript{72} In Abukhanfusa’s words, the parental insurance established in 1974, definitely rejected the notion of maternity as being a feat. Although the parental allowance was granted only when a child was in need of care, the amount and type of allowance still depended on the parents’ relation to the labour market.\textsuperscript{73} One aim with the new regulation, which monitored parental insurance, formulated as a principle of the equal sharing between the parents of care responsibilities, was to contribute to the equality of opportunities between the sexes for combining waged work and good care of the children.\textsuperscript{74}

The parental insurance was further improved and extended during the 1970s. In 1978 parental insurance covered three forms of parental allowances: six months in connection with childbirth, temporary care of the child, and a special allowance of 90 days allowed until the child turned eight years of age.\textsuperscript{75} This last allowance was meant to further both parents’ relations to the child, for instance by introducing or visiting the child in daycare or at the child-minders. In 1980 it was extended to 180 days, of which the first 90 days were fully compensated, but the following 90 days only at the basic level (SKr 37 per day). The age of the child for this latter allowance was raised to 12. These improvements in parental insurance resulted in parallel adaptation rules for parental leave legislation, to make them the same for fathers and mothers.\textsuperscript{76}

\textsuperscript{70} See Vahlne Westerhäll, 2002b, pp. 226–227.
\textsuperscript{71} Prop. 1973:47.
\textsuperscript{72} Prop. 1973:129.
\textsuperscript{73} Abukhanfusa, 1987, p. 196.
\textsuperscript{74} Vahlne Westerhäll, 2002b, p. 272, with reference to SOU 1978:39, pp. 39, 79.
\textsuperscript{75} Prop. 1976/77:117.
\textsuperscript{76} Lag (1978:410) om rätt till ledighet för vård av barn, m.m. (Leave of Absence for the Care of Children Act). Current regulation on parental leave is to be found in Föräldraledighetslagen (1995:584) (Parental Leave Act).
Insurance for pregnant women was initially aimed at achieving justice among different groups of pregnant women. The pregnancy benefit that was introduced in 1980, could be allowed under the provision that a doctor’s certificate could prove that the work of the expectant mother was a health hazard. In 1985 this kind of insurance was improved for mothers employed in physically trying work and a new perspective was introduced, namely the safety of children. Like sickness, pregnancy then became recognised as a risk in social security.⁷⁷

During the 1990s there were frequent revisions of parental insurance motivated by state economies and the achievement of equal opportunities between the sexes. Although parental insurance was constructed gender neutrally (except for 10 days from the birth of the child to allow the father to take temporary care of the child and meant to promote fathers to make use of the benefit) it was still mostly mothers who made use of it. The equal sharing principle that was emphasised in the reform meant that parents, who had joint custody of the child, could each have the same right to make use of the parental benefit by sharing of the compensated days equally, instead of only 90 days as in previous regulation. The possibility to transferring days to the other parent was also retained but restricted as 30 days could not be transferred to the other parent. This was successively extended to 60 days for each parent.⁷⁸ Another rule that was introduced, primarily meant to promote equality of opportunities between the sexes, made it possible to transfer parental benefit to close persons other than parents.⁷⁹ This reform was the only one within the parental benefit scheme, however much it was sex-neutrally constructed, which explicitly recognised the special needs of ‘single parents’. For reasons of justice this option came to comprehend all parents, and thus extended the concept of parent.⁸⁰

10.2.5 Family benefits and services

10.2.5.1 Family-social legislation

In family social legislation benefits and services for families were successively improved and extended. Income-tested housing allowance for families was introduced in 1957. As a precondition for receipt of this benefit the housing

⁸⁰ See Vahlne Westerhäll, 2002b, p. 353.
had to have ‘modern’ comfort. For a solo parent with one child the housing had to consist of one room that did not exceed 30 square meters. The benefit thus seems to have been an early attempt to move towards better and more spacious homes for the new family, a strategy that was emphasised still more when this allowance was replaced by a new income-tested housing supply for families with children in 1969.81

A state subsidy for home help that was introduced in 1964 was meant for families with children in whom the housewife was unable to carry out her care activities. The subsidy meant that childcare was also available in precarious situations, for example when the child fell ill and both parents were employed. This subsidy was also meant for domestic care of the elderly and the handicapped. Home help was allowed irrespective of the financial situation of the recipient and the fee was income-related. Integrated state subsidies issued in 1967 to the municipalities for arranging holiday homes for schoolchildren and holiday homes for housewives simplified and coordinated previous regulations.82 Children of solo parents had priority for places in the school homes that were primarily meant to provide childminding during the summer and to supplement the entire child-minding service arranged by the municipalities.

Of great importance for working mothers, especially for solo mothers, was the introduction of childminding through daycare centres and registered child-minding homes that became possible through state subsidies during the 1960s. The daycare centres and the childcare in private homes became part of the general preventive work of the municipalities, which controlled and supervised the activity.83 Later, daycare became part of the municipalities’ responsibilities, regulated in the Social Services Act. The municipalities had to offer these kinds of services, arranged within the pre-school sector, to all resident children in Sweden who lived permanently in the municipality. This responsibility also included childcare for school children up to 12 years of age.84 These rules were repealed at the end of 1997 and responsibility for providing childcare was transferred to the school sector and laid down in the School Act.85 The new regulations established that pre-school childcare for children over one year of age and out of school care for children up to twelve years of age should be supplied if there was a need by reason of the

82 KK 1967:473.
parents’ gainful employment or studies, or if the child had a personal need. Later amendments to the Act clarify that the children of unemployed parents should be offered at least three hours of childcare each day or 15 hours per week.\textsuperscript{86}

The homecare allowance (vårdnadsbidrag) that was introduced in 1994\textsuperscript{87} has a short history in Sweden, in contrast to other Nordic countries. In Norway care has historically been a criterion for special arrangements in national social insurance, such as homecare allowance, and Denmark and Finland have moved in the same direction. None of the systems, however, seems to have elaborated strategies sufficient to provide for solo mothers in need.\textsuperscript{88} In Sweden the benefit was much criticised for undermining gender equality and the expansion of public financed daycare, and for constituting a trap for women. The total of 90 days, which the parents could choose freely how to use until the child reached eight years of age, were taken away when the homecare allowance was introduced. Instead, homecare allowance was granted for care of children between one and three years of age who were not cared for in publicly financed daycare. This allowance, which was SKr 1 600 per month, was also criticised for being poorly adjusted to the needs of single parents or families in need of two incomes. In 1995, when the Social Democratic party regained political power, homecare allowance was abolished and the 90 guaranteed days were re-introduced. Parental benefit in connection with childbirth then amounted 450 days, of which 90 days were compensated for at the basic level.\textsuperscript{89}

10.2.5.2 School-social legislation

Social legislation connected with schooling, traditionally in terms of school-social, also evolved further during the 1960s. The financial aid to pupils studying at the upper-secondary level was extended and improved. A study allowance system for students in continuing education at universities and colleges was established in 1964. It consisted partly of a study grant which had to be refunded and partly of a study allowance. The scheme included a child supplement for a custodian or for a student provided she or he had a maintenance obligation towards a child. The study allowance was tested in relation to personal income and/or that of a spouse but not in relation

\textsuperscript{86} SFS 2000:1375, Skollag (1985:1100), School Act, Chapter 2a, Section 6a.
\textsuperscript{87} Prop. 1993/94:148
\textsuperscript{88} See Brækhus, 2004, pp. 91–106.
to the financial situation of parents. In addition, a suitability-test preceded the allowance, which in principle could not exceed 16 semesters. The study allowance was age-limited and could only be granted to a student up to the age of 40. Apart from Swedish citizens, study allowance could also be granted to non-citizens, provided they had not taken up residence mainly for the purpose of education.90

The first study allowance system has been frequently revised. In 1973 a new Study Allowance Act91 came into force, which in turn was amended throughout during the late 1980s. In 1993 it followed by the Act in which the state allowed study support in the form of study assistance (studiehjälp), study allowances (studiemedel), short term/temporary study support (korttidsstudiestöd), boarding school grants (internatbidrag), and a special study support for adult students in continuing education. The study support system for adult students then provided a study allowance and study loan and the earlier child supplement was discontinued.92 Current study support is regulated in a new Act issued in 1999.93 Study support is now allowed by the state in the form of study assistance (studiehjälp) for students in upper-secondary school aged 16 to 20, and study allowances (studiemedel) for students over the age of 20 in continuing education. Study allowances are granted both in the form of a loan and in the form of a benefit. In 2005 a supplementary benefit for parents who study and have custody of a child less than 18 years of age, was introduced.94 This reform promotes the possibilities for solo mothers’ to study, especially since students are not in principle entitled to maintenance support pursuant to the Social Services Act.

10.2.5.3 Maintenance allowance – a benefit at the intersection of family and social law

In 1957 the possibility of receiving a supplementary allowance was introduced into the advance payment of maintenance allowance, whereby every child entitled to maintenance from a parent was guaranteed a minimum amount. The allowance thus changed from having been individually granted into a general benefit. Legal amendments in 1964 implied that the advance payment of maintenance allowance could be granted from the time the child was born, even though paternity remained to be established. The previous

91 SFS 1973:349.
93 Studiestödslag (1999:1395), (Study Support Act).
94 Ibid, Chapter 3, Section 13a, Prop. 2004/05:111.
demand that maintenance be established pursuant to civil law was abandoned and the extent of the advance payment of maintenance was therefore no longer related to civic maintenance.\footnote{See Beijstam, 1994, p. 493.} However, if the mother did not contribute to the establishment of paternity, the allowance could be refused or withdrawn.\footnote{Lag (1964:143) om bidragsförskott, Section 2 a.} This rule came into existence as a means of bringing pressure on mothers to contribute to establishing the paternity of the child.\footnote{See Beijstam, 1994, p. 121.}

Initially, it was emphasised that the child or its custodian had to hold Swedish citizenship and reside in Sweden to be awarded maintenance allowance. In principle it was maintained that the child had to be registered (kyrkoskriven) and reside in Sweden. Payment of the allowance, however, continued if the child was abroad for a period of time not exceeding one year. In exceptionally circumstances, for special reasons e.g. sickness, the allowance could continue for a child who was abroad for longer periods. Children who were citizens of neighbouring Nordic states, in the Nordic Convention on Social Security of 1955, ratified by Sweden, Denmark, Finland, Island, and Norway, were awarded the allowance on the same terms as for Swedish children, if they lived in Sweden. Moreover, maintenance allowance was also meant for non-citizens, provided the child and its custodian were stateless or political refugees, and under the precondition that the custodian had resided in Sweden for not less than for six months.\footnote{Bramstång, 1969, pp. 203–204.}

In 1978 amendments as regards maintenance laid down that maintenance for a child was to be determined in relation to financial capability of both parents and in a balanced manner. This meant that advance payment of maintenance only guaranteed the share of maintenance from the parent who did not live with the child, i.e. the parent liable to pay maintenance (underhållsskyldig förälder). The previous income test in relation to the mother’s income now changed direction: the higher the income of the mother, the larger the share of support from society in the form of the supplementary allowance.\footnote{Beijstam, 1994, p. 494.} The previous requirement that the child had to be permanently in the country was replaced with residence requirement similar to the precondition for granting child benefit and in line with rules of residence in national registration. When joint custody for unmarried parents became possible through amendments to the Parental Code in 1977, the advance maintenance allowance was reformed, in 1979. The reform implied that the advance payment of maintenance could

\footnote{See Beijstam, 1994, p. 493.}
also be granted to unmarried parents with joint custody, provided the child only lived with one of the custodians.\textsuperscript{100}

During the 1980s the situation of single parents and their children and the need for reform concerning maintenance and advance payment of maintenance allowance aroused a great deal of interest in government investigative works.\textsuperscript{101} The single parent committee that was appointed rejected the introduction of a needs test for the allowance and emphasised the common direction of social security as general.\textsuperscript{102} In 1987 another committee was appointed who presented alternative models for advance payment of maintenance in 1990, which also did not result in any new legislation.\textsuperscript{103} Yet another proposal for reform was presented in 1993 that signified radical changes to the maintenance regulations. The committee proposed the re-introduction of means test in relation to the custodians’ income, including the income of a potential new spouse or cohabitee. The proposal faced massive criticism for its reduction of support to single parents and did not result in any far-reaching changes.\textsuperscript{104} Instead, yet another committee was appointed in 1993.

The succeeding Government Bill\textsuperscript{105} proposed a new form of support from society called maintenance allowance (\textit{underhållsstöd}), to replace the advance payment of maintenance. The Maintenance Allowance Act,\textsuperscript{106} which came into force in 1997, laid down that the support can be paid to children whose parents do not live together. Maintenance allowance is a social benefit addressed to the child but a parent who is liable to pay maintenance according to civil law must reimburse the State for all or part of the maintenance allowance in relation to his/her income. The amount of support corresponds to approximately half of the normal expenses for a child after deduction of the general child allowance.\textsuperscript{107}

The adoption of the Maintenance Allowance Act meant that the task of establishing maintenance for children of un-married parents not living together was transferred from the social service agencies in the municipalities to the Swedish Social Insurance Agency.

\textsuperscript{100} Prop. 1978/79:12.
\textsuperscript{102} SOU 1983:51, p. 184.
\textsuperscript{103} SOU 1990:8.
\textsuperscript{104} Prop. 1992/93:100.
\textsuperscript{105} Prop. 1995/96:208.
\textsuperscript{106} Lag (1996:1030) om underhållsstöd (Maintenance Allowance Act).
In 2002 a special inquiry was appointed to overhaul maintenance allowance for children who do not live with both parents. During the inquiry, and in the ensuing report, it was questioned whether the supplementary support for parents of children who stay alternately with their parents should be dropped. No such rule, however, was introduced. The inquiry into maintenance allowance was also seen in the context of financial vulnerability among children, which was the task given to another Committee that was appointed to analyse the causes of children's financial poverty. The labour market and general welfare were considered to be of special importance for improving the financial situation for families with children. Measures aimed at reducing the number of families living in a vulnerable situation were prioritized and the problem was tackled on a wide front, including not only measures in family policies but also in other policy fields. This aim left its mark in the 2005 spring budget that set aside SKr one billion for reforms for the following year, aimed at improving the situation for poor children. In this context, the government also announced improvements in maintenance allowance and in the housing allowance for families, and the introduction of a child supplement for adults in continuing education. The portrait of the housing allowance that is allowed as a special benefit to families with children was increased in the new rules that came into force at the end of 2005. In addition, a special benefit was introduced for parents who, on the basis of legal custody or socialising (umgåinge), periodically spent time with the child.

The starting point for the rules on maintenance payment (underhållsbidrag) pursuant to family law and maintenance allowance (underhållsstöd) pursuant to public law is, as was pointed out in the government bill and the new rules that came into force in 2006, that parents had the primary and joint responsibility for maintaining their children. This responsibility is seen to be valid irrespective of whether the parents live together or not, and it is to be seen in relation to the fundamental principle of the child's right to both its parents. Thus, the Government pointed out, with reference to the Convention on the Rights of the Child (the CRC), that maintenance

110 Ds 2004:41.
111 Prop. 2004/05:1 Bilaga 17.
112 Prop. 2004/05:112.
liability and the public’s subsidiary responsibility for the child’s subsistence must not infringe on this right. Article 27 of the Child Convention is seen as especially relevant for emphasizing the main maintenance responsibility of the parents prior to allowing public advances of maintenance payments.\textsuperscript{115}

In a reply to the Government, the Swedish Social Insurance Agency put forward in a proposition that the Social Insurance Agency be appointed to improve their help to parents in coming to agreements on maintenance payment for children.\textsuperscript{116}

Most of the recent amendments to the Maintenance Allowance Act\textsuperscript{117} have in view the parents’ liability to pay maintenance for the child, i.e. the parent who does not live with the child. The concept of justice between the parents frequently recurs in the Government Bill. Although the maintenance support for the child was raised by SKR 100 per month,\textsuperscript{118} the parent who is liable to pay maintenance and is obliged to re-pay the public support awarded in advance, had the amount to be deducted from their income for own living expenses raised from SKR 72,000 to SKR 100,000. It was also underlined that the maintenance allowance should be seen as a ‘subsidy’ to the parent who is liable for repayment of the support awarded to the child. Although differentiated reservations concerning repayment could be motivated by reasons of justice, the Government concluded that the amount reserved for personal living should be the same for all, irrespective of whether the parent is living with a new family or is single. This stand-point was based on ‘the contemporary general attitude that every adult person is to be financially independent and not dependent on close persons for their subsistence’. General social security is supposed to have the function of providing subsistence in temporary situations of dependence, and is meant to take measures aimed at promoting participation in the labour market, either by entering or remaining there. Moreover, differentiated reservations might, according the Government contribute to fraud and undermine confidence in the regulations, and lead to violations of the integrity of individual person.\textsuperscript{119} It was also emphasised that all of the children of a parent, who has an obligation to pay maintenance (according to the rules in family law) and a refund liability

\textsuperscript{115} Prop. 2004/05:116, p. 22.
\textsuperscript{116} Försäkringskassan, 2006, D nr S 2006/2920/SF.
\textsuperscript{117} Lag (1996:1030) om underhållsstöd.
\textsuperscript{118} In 1994 the yearly fixing of the amount of advance payments of maintenance support in relation to the price index was abolished, and hence the amount is frozen.
\textsuperscript{119} Prop. 2004/05:116, p. 35.
(according to public law), should be treated the same.\textsuperscript{120} The refund liability was still, as in previous regulations, meant to be calculated as a percentage of the liable parents’ surplus, in a descending scale in relation to the number of children.\textsuperscript{121}

The rules governing deductions from the sum to be re-paid, by reason of socialising with the child, for the parent who has a re-fund liability were also amended for reasons of justice between the parents. The days when the child was sent for and delivered were now, in contrast to previous regulations, included in the calculation of days to be deducted from the amount of maintenance payment or maintenance allowance that is paid to the parent with whom the child resides.\textsuperscript{122} Moreover, a net calculation was introduced provided the parent was with the child for at least 30 days per year, and the socialising is established in a judgement or in a joint agreement that is approved by the local Social Services board.\textsuperscript{123}

Finally, the Government Bill also included an analysis of the consequences from a gender perspective, or more exactly that of ‘equality of opportunity’ for the sexes. This analysis was, however, limited to a notification which pointed out that the increased maintenance allowance was mainly received by women (87 %), and that 38 % of the parents with a refund liability (86 % men) would now have a poorer financial situation by up to SKr 100 per child per month.\textsuperscript{124}

\section*{10.2.6 From patriarchy to gender neutrality in family and social law}

From a legal point of view, Mannelqvist points out how Swedish social insurance has been used as an instrument in promoting equality among various socio-economic groups, and has performed the function as a promoter in increasing equal opportunities between the sexes. Equality politics have strongly affected the elaboration of gender neutrality in law that is based on the ideological notion of sameness, which is aimed at equal treatment.\textsuperscript{125} This has also been underlined in historical studies. A recent study of the family concept in the Swedish model points out how the main theme in family policies has been a replacement of the patriarchal tradition in which poli-

\begin{footnotesize}
\textsuperscript{120} Prop. 2004/05:116, p. 37.
\textsuperscript{121} Ibid, pp. 38 ff.
\textsuperscript{122} Ibid, pp. 40–42.
\textsuperscript{123} Ibid, pp. 42-48.
\textsuperscript{124} Ibid, p. 80.
\textsuperscript{125} Mannelqvist, 2005, p. 334.
\end{footnotesize}
tics did not interfere in the family with (relatively) institutionalized gender neutrality.\textsuperscript{126}

Connections between private family law and welfare law have also been clearly articulated and used as arguments for the liberalization of family law.\textsuperscript{127} Based on the politically prioritized aim of liberating individuals, economic independence and individualism are upheld as the main principles in Swedish family law.

The liberal equality approach to family law began in the 19th century. During the period 1909–1929, the Scandinavian countries co-operated in harmonizing their laws, which resulted in an almost identical construction of egalitarian marriage, involving its liberalization.\textsuperscript{128} In Sweden, the concepts of individualism and formal equality of the sexes were introduced in a new Marriage Code in 1920. Married women were given the same legal position as men and the husband’s right of guardianship was abolished. Each spouse also obtained an individual right to control and dispose of his or her marital property and each became responsible only for his or her own debts. On the other hand, equality was strongly connected to concerns about marriage as an institution and based on a notion of sexual difference through which a traditional model of the family was maintained. Gendered division of work and married women’s financial dependence on their husbands were clearly articulated.

At the end of the 1960s, changing social structures and family patterns were used as arguments for reviewing family law. An expert Committee on family law was therefore appointed in 1969. The basic principles of the rules on maintenance by that time had been laid down during the early decades of the century, and were therefore seen as being poorly adapted to the changes that had since taken place in Swedish society and in family structure.\textsuperscript{129}

The number of women who were gainfully employed had increased and fewer and fewer people were financially dependent on their relatives. The Committee gave special attention to how growing legislation in the field of social insurance and other social benefits affected questions on maintenance.

\textsuperscript{126} Lundqvist, 2007, p. 260.
\textsuperscript{129} The directives for the Family Committee’s inquiry into maintenance obligations are to be found in a Council protocol from 1969 and in a Government Commission to the Committee in 1976, see SOU 1977:37, pp. 47–51.
Thus, it was considered to what extent the existence of social benefits on the part of the recipient should influence the obligation of the payer to pay a maintenance allowance. It was also suggested that the legal obligation of parents to support their children should cease when the child reached majority, at 18 years of age. This meant that children who pursued higher education or who on account of illness for similar reasons could not make their own living would not be able to claim support from their parents. Instead, study grants and other financial assistance from the community or, in case of illness and the like, social insurance benefits were considered sufficient. The Committee also suggested that the legal obligation to support stepchildren should cease but emphasised that children in mixed families should be treated equally and be given the same standard of living.

Moreover, in line with the new rules on joint custody for unmarried parents, it was also suggested that parents who shared legal custody but did not permanently live with the child should be required to pay maintenance allowance for the child. The child should in these cases also be entitled to public advance payment of maintenance allowance (bidragsförskott). The Committee recommended that the obligation of the parent should always depend on the ability to pay. Further, if the child received a social benefit of some kind, e.g. for its upbringing or education, the obligations of the parent should be reduced. This principle had already been valid in practice but should, according to the Committee, also be stated in the law.

The aim of this reform of family law, which was not fully completed until the end of the 1980s, was to reach beyond equal opportunities – to equality of result promoted by both family law and welfare policies – and to abolish old-fashioned concepts of gender roles in family law. Hence, the notion of sexual difference was replaced by a concept of equality based on likeness. The most important normative change for sex equality principally in the family was the articulation of financial independence, in addition to the existing norm of individualism. The notion of dependence was however retained in the 1987 Marriage Code. The fundamental right of spouses to the same economic standard within marriage was explicitly stated in preparatory works. Household work was no longer regarded as one of the optional ways of fulfilling the reciprocal support obligation. The male bread-winner model was regarded as outdated in the 1970s and at odds with the sex equality that ought to exist.

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131 SOU 1977:37, pp. 41–46 (English summary).
both in the home and on the labour market. Instead, the introduction of a new rule stated that each spouse was responsible for both the economy of the family and household work.\textsuperscript{133}

Maintenance obligation has mainly been discussed as a matter between spouses. Although the neutrality principle in family law resulted in neutrality in relation to how individuals chose to cohabit, the Cohabiting Act that was introduced in 1987 had a more limited scope than the law on marriage, since the special function attributed to cohabitation was considered to be the ‘freedom of choice’.\textsuperscript{134}

Maintenance after divorce was also introduced in the 1920 Marriage Code. In the divorce reform of the 1970s all the moral dimensions of divorce were abolished and the no-fault divorce was introduced. The meaning of the maintenance principle changed: both men and women were assumed to be independent after divorce. The state, rather than ex-partners, now assumed the secondary responsibility for the welfare of individuals.\textsuperscript{135}

The expert Committee in family law that was appointed in 1969, in an opening Report in 1972\textsuperscript{136} had recommended reforms mainly in marriage and divorce law and on this basis new rules had been enacted in 1974.\textsuperscript{137} As a consequence of the increasing percentage of women who were gainfully employed and the measures taken by society to provide for people in illness, old age etc., the Committee pointed out how the need for maintenance was greatly reduced. The Committee foresaw a further development in this direction meaning that each spouse should support him-/herself after a divorce. Two exceptions from this rule were proposed by the Committee. First, there could be a need for a maintenance allowance during a transition period, fixed to a certain length of time, in order for example to allow a previous spouse to study, to find a better job or arrange care for the children. Second,

\textsuperscript{133} Äktenskapsbalken (1987:230), (Marriage Code), Chapter 1, Sections 2 and 4; Prop. 1986/87:1.
\textsuperscript{134} Sambolag (1987:232), (Cohabitation Act). Lag (1987:813) om homosexuella sambor, (Homosexual Cohabitation Act), was enacted the same year. In 1994, Lag (1994:117) om partnerskap, (Partnership Act), was enacted, giving homosexuals’ the right to register their partnership. A registered partnership has almost the same legal and financial consequences as heterosexual marriage. In 2003 the Homosexual Cohabitation Act was abolished and a new act, the Cohabitation Act (2003:376) was enacted, which includes all cohabiters irrespective of sexual orientation. Compared to heterosexual marriage, in registered partnership and homosexual cohabitation some important exceptions still remain, mainly regarding reproduction.
\textsuperscript{135} SOU 1977:37, p. 109.
\textsuperscript{136} SOU 1972:41.
\textsuperscript{137} Prop. 1973:32.
in exceptional cases it should also be possible for the maintenance allowance to be granted for longer periods, envisaged for those cases in which marriage had lasted for many years and if one of the spouses, usually the wife, had difficulties in earning a living. In the existing law at that time, there were rules concerning the obligation of children to maintain their parents when they were unable to support themselves because of illness or for similar reasons. These rules were, in view of the actions taken by society to provide for people in illness, old age etc., considered to be of little practical importance and the Committee thus recommended their abolition.138

This gender neutrality trend was also illustrated in social insurance through the reform in 1974 which replaced maternity benefit with a general and sex-neutral parental insurance. The reform extended the right to take parental leave139 with compensation in the form of a parental cash benefit (föräldrapenning) to include fathers. In Abukhanfusa’s words, the parental insurance that came into force in 1975 definitely rejected the notion of maternity as ‘a performance’. Although the parental allowance was granted only when a child was in need of care, the size and type of the allowance still depended on the parents’ relation to labour market.140 One aim with the new, monitoring parental insurance regulation, formulated as a principle of equally shared care responsibilities, was to contribute to equality of opportunities between the sexes in combining waged work and good care of the children.141

Although the maintenance obligation in family law was mainly assumed to be a matter between spouses, support from a cohabitee was considered to be subsidiary to social assistance pursuant to the Social Services Act, even though cohabitation was understood as a representation of free choice and individuality between the parties. This duty comes into effect from the first day of living together, albeit an application for social assistance was judged to be assessed comprehensively.142 In a recent judgement the court found that a person who regularly met his girlfriend at her place, without having any intention of moving in with her and without pooling their money, was entitled to social assistance.143

138 SOU 1977:37, pp. 41–46 (English summary).
142 RÅ 1995 ref. 48; NJa 1994 p. 256.
143 Kammarrätten i Göteborg, 2007-10-13, 2156-07.
10.3 Reconsideration of the Swedish model

Whether solidarity and collective activities are still valid as features of the Scandinavian model in the new century, is questioned by Nordic legal scholars. In a legal study of social security in Sweden running from 1950 to 2000\(^{144}\) Vahlne Westerhäll's hypothesis is that the 1950s to 1960s represented the ‘high-water mark’ of the rule-of-law state in Sweden, followed by the welfare state with its most important period during the 1970s and 1980s. In her analysis that sets out from the principles of solidarity and subsidiarity, Vahlne Westerhäll holds that the 1990s were characterised by large-scale changes in social services, social insurance and healthcare, with effects on the ideas on which the rule-of-law state and the welfare state are based.\(^{145}\)

Vahlne Westerhäll, who makes the point that social law in a Swedish context can be characterized as a form of politicized law,\(^{146}\) raises the question of the fall of the strong Swedish state, in the loss of characteristics of both formal and material justice, as welfare ideologies have been replaced with a purified economic market during the last decade.\(^{147}\) She has described the characteristics of Swedish entitlements to welfare provision in the 1990s as an individual quasi-justice, as opposed to a former legalistic conception of rights. ‘Quasi-rights’ in her analysis means a justice that is based on legal rights and social service by turns, and on varying chances of entitlement to social assistance for different categories of people.\(^{148}\) According to her, for demographical, political, economical, legal and ethical reasons, a future issue will be a reconstruction of the state as not only administering but also creating new projects, open-minded towards new needs, claims and options.\(^{149}\)

In Ruth Mannelqvist’s view current changes in social security in Sweden should in principle be regarded merely as tendencies, and not as a paradigm shift in social security and the welfare state.\(^{150}\) In her view, the normative development in social insurance can be described through the use of a theoretical framework of ‘normative patterns’, which is a theory that originates from the work of Anna Christensen.\(^{151}\) In the normative fields, changes in legislation can result in a normative transfer towards different normative

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\(^{144}\) Vahlne Westerhäll, 2002b.


\(^{146}\) Vahlne Westerhäll, 2002b, p. 630.

\(^{147}\) Vahlne Westerhäll, 2002b, p. 635; Vahlne Westerhäll, 2004, pp. 335–361 (in English).

\(^{148}\) Vahlne Westerhäll, 2002b, p. 622.

\(^{149}\) Vahlne Westerhäll, 2002b, p. 654.

\(^{150}\) Mannelqvist, 2003, p. 250.

\(^{151}\) Christensen, 1997c, pp. 69–79; Christensen, 1996, pp. 519–574.
poles. The normative poles ‘Protection of Established Position’ and ‘Just Distribution’ are, according to this theory, reflected in the large extent of social security that is based on the ‘loss of income’ principle. The aim of establishing an effective and more ‘insurance-like’ social insurance in Mannelqvist’s view shows a shift towards another normative pattern: the Market-Functional Basic Pattern.152

At the beginning of the new millennium Håkan Gustafsson paraphrased Ronald Dworkin in his argument for taking social rights seriously. In his work he discusses how the hostility between positive and negative rights, and municipalities’ claim to the right to self-determination, have subordinated welfare rights and, for ideological reasons, favoured the economic system where private autonomy and non-intervention are upheld as principles.153 He proposes a ‘substantial’ conception of legal certainty as a tool for reinforcing social rights under the regime of the neo-liberal market economy, and the dismantling of the welfare security systems. He regards the concept ‘social certainty’ as a legal-strategic tool for the protection of weak or marginalized groups as it focuses on the social consequence and social justification of legal decisions.154

In the Directive to a Committee of inquiry of the Swedish social insurance system the need to increase the insurance component through increased self-financing, as opposed to state contribution, and thereby establish a more independent social insurance, was announced in 2004. Moreover, the need to overhaul the levels of compensation in comparison to ‘last-resort’ social assistance pursuant to the Social Services Act was also underlined. The elaboration of new rules was said to have as its main objective the strengthening of the work line and incentives to work. In the Directive it was also noted that current Swedish regulations apparently differ from those of other countries in the EU.155

Another new direction in Swedish policy discourse is, in contrast to legal certainty for the individual person, the emphasis on the need for measures to counteract benefit fraud. A new penal benefit crime law was therefore proposed in 2006.156 The new regulation is meant to comprehend loans, compensations and benefits that are managed within the social security system. Although not all of these payments are benefits in a strict sense, but social

155 Dir. 2004: 129.
insurance payments that are based on contributions, the benefit concept was pragmatically chosen by the Committee in order to effect a preventative function. The benefit concept *per se* was supposed to give an ‘immediate feeling of what it all is about’.\textsuperscript{157} The bourgeois government that took over political power in October 2006 rendered these measures for counteracting fraud more effective and a Government Bill was presented in 2007.\textsuperscript{158} The Benefit Crime Act came into force in July 2007.\textsuperscript{159}

In 2005 another Committee was appointed to inquire into whether there was a need to introduce new rules in the Social Services Act in order to strengthen the work-line and ‘competence’ line and to strengthen incentives to work for recipients of social assistance by means of reinforcing the demands for activity. The concept of ‘competence line’ was explained as taking advantage of all competences, irrespective of sex, age and ethnicity and it was indicated that the individual person was at the centre in the reform of social assistance. Moreover, the allocation of responsibilities between the state and the municipalities was also seen to be in need of clarification and improvement.\textsuperscript{160}

Increased emphasis on active policies for political change is laid down in the programme of the new Government that came in power in 2006. The main objective is to get people into work as opposed to dependent on social benefits. This is especially visible in the amended rules for unemployment insurance that have so far come into effect.\textsuperscript{161} Re-enforcement of the work-line is seen in the cutting of levels of compensation, curtailing of the number of days of compensation and sharpening of the demands for a work history for eligibility. The expenses for unemployment insurance are to be increasingly self-financed through higher fees for insured persons. Moreover, a committee to analyse the introduction of mandatory unemployment insurance was also announced in the new Governments’ first budget.\textsuperscript{162}

This re-enforcement of the work-line is a commonly articulated attitude. Different groups of people, e.g. immigrants, single parents and those sick-listed on a long-term basis are especially targeted. Some of the Government preparatory works that have followed from these directives, which seem to indicate political consensus, are described below. These preparatory works

\textsuperscript{157} SOU 2006:48, p. 129.
\textsuperscript{158} Prop. 2006/07:80.
\textsuperscript{159} Bidragsbrottslag (2007:652).
\textsuperscript{160} Dir. S 2005:10.
\textsuperscript{161} Prop. 2007/08:118; Prop. 2006/07:15.
\textsuperscript{162} Prop. 2005/06:1.
mirror current social security discourses and indicate the meaning these new directions might have for future social security law, and the social consequences the proposed directions might have for solo mothers.

10.3.1 More insurance and more work

The Government Commission that was appointed in 2004 to carry out a thorough analysis of Swedish social insurance from a broad perspective, presented its first report in October 2006 as a projected series of inquires intended to consider reform of the current Swedish social insurance system. Three starting points were specified for the Commission which focuses on the cross-roads confronting the Swedish system today. First, the needs of those insured and their two folded roles are emphasised as being of central importance. Simultaneously, those insured are seen to be both financers and exposed to the risks of sickness and unemployment. Thus, how insurance performs its functions is seen to be in need of re-evaluation in view of the insured. Second, the notion of insurance and the need for its enforcement as opposed to the notion of benefit is emphasised. Third, not only general insurance but also insurance based on agreements between labour-market parties should be included in a new calculation of the value of insurance.

The commitment to active policies and to strengthening the ‘work-line’ has led the Commission to focus on sickness insurance in interplay with unemployment insurance. The work injury insurance is also part of the analysis, given that supplementary compensations in the case of work injury are also considered in relation to the work-line. Along with the aim of analysing social insurances, their shortcomings and good points in relation to future demands, the Commission was also charged with looking into general education. In addition to this, in the report the expectation is expressed that the inquiry will not only be seen as a normal Government Commission (SOU), but also as providing a contribution to debate and further discussions.

The Commission emphasises the vulnerability of the insurance system and the need for reform that became obvious at the end of the 1990s when public resources were strongly affected by increased absence due to illness. It is, however, noted that future social insurance is still meant to have a general scope and to be compulsory. The fees should not be based on differentiated

163 Dir. 2004:129.
166 Ibid, p. 17.
fees in relation to varying risks for different groups of people, nor should eligibility be based on health testing. For the future, it is felt that the connection between the fee and the insurance service has to be strengthened through a re-construction of the insurance into a system which independently bears its own expenses. Insurance should, in accordance with the Commission, still constitute protection against loss of income, but how the functions and the elaboration of the social insurance system affect its exploitation and the supply of labour, also needs to be examined in the light of Swedish and international research findings.

The need is to adjust the insurance system to a labour market that is now characterised by more flexible forms of employment and the fact that people increasingly move between work and study. Moreover, the Commission was also meant to examine how increased mobility in Europe and the EC co-ordination rules may effect future elaboration of the Swedish social insurance system. The Report lays stress on how anxiety over financing large-scale social insurance, given the sharpened international competition as a result of globalisation, demography and wide variations in expenditure of money on social insurance, has coloured the directives for the Commission.168

The Commission discusses and proposes certain conceptual changes that imply fundamentally new directions in Swedish social insurance. Since one of the starting points for the inquiry is strengthening the connection between payment of fees (avgift) and compensation for lost incomes, the concept of ‘insurance’ is seen to be of significant importance. Insurance, in the view of the Commission, is the service that supplies financial support when this is needed. Regulation, on a collective basis, of the consequences of unexpected events before these events have happened is seen as essential for insurance. The handling of the risk element in advance is central, indicating the value of the insurance service and constituting the reason for paying the fee.169 Another starting point is the need to regard and deal with social insurance as ‘insurance’. Otherwise, the risk is that the relatively expensive sickness insurance will be undermined.170

Although the Commission certifies that social insurance is fundamentally quite contrary to insurance that is based on individual risk, a wide range of references to free market insurances are to be found in the Report. Market insurances, it is declared, like social insurances, have certain advantages.

170 Ibid.
‘More insurance’, however, according to the Commission does not mean individualization of premiums. If the preventive effect of risk differentiation were seen as sufficiently important for some part of social insurance, it should rather be excluded from social insurance and instead be managed by private insurance companies. Nonetheless, like the third party motor insurance (trafikförsäkringen), such insurance should still be constructed compulsory for social reasons.\textsuperscript{171}

The Commission find it important to stress the difference between ‘social insurance’ and ‘benefits’, how the ‘pay-roll taxes’ that are meant to finance social insurance have come in a confusing way to be termed as ‘taxes’, and how certain events, e.g. parental insurance, that do ‘not deal with risks and consequently are not insurance’, are officially conceptualised to constitute insurance. Briefly, according to the Commission, insurance concerns risk and protection against risks and presupposes payment of a premium. Delivery of the service is then direct. The self-interest that characterizes insurance thus, it is declared, convert the premium into a charge (avgift). In contrast, the Commission suggests that benefits are paid by taxes and are based on general interests (allmänintresse) and therefore, there is no demand for a connection between payment and right. Moreover, the Commission argues that no one other than those insured pay for insurance, in contrast to benefits. The tension between the parties of interests, according the Commission, constitute an un-exploited potential that would, if appropriately utilized, have an effect on the willingness to pay for insurance, on the forming of morals as regards exploitation of the insurance, and on the incentives to establish proper, preventive and rehabilitating measures. However, these effects can only be achieved under the provision that the connection between rights and duties, i.e. the terms of the insurance and the payment, are made more distinct.\textsuperscript{172}

The need to increase awareness on the part of those insured of fluctuations in insurance expenditure is underlined. Pay-roll taxes, and thus the space for labour-market bargaining, should be more distinctly affected by what happens in insurance. Since the connection between fees and insurance expenditure is seen as fundamental, the point of departure for the Commission is that this connection has to be stronger. Another point of departure is that reform of general insurance and its effects need to be considered in relation to insurance based on collective agreements.\textsuperscript{173}

\textsuperscript{171} SOU 2006:86, p. 22.
\textsuperscript{172} SOU 2006:86, p. 23.
\textsuperscript{173} SOU 2006:86, pp. 23–24.
The Commission discusses present and future social insurance with reference to the ‘capability approach’ elaborated by Amartya Sen and gives prominence to the relations between security and freedom and between efficiency and equality. In the Report it is asserted that the tension between freedom and security is part of the condition of living.174

The Nordic model, in which work constitutes the fundamental basis for the welfare of individuals and society, and in which income-related social insurance schemes are based on individually earned income, is compared to other welfare models. In the view of the Commission, the minimalist Anglo-Saxon models of welfare, in which protection from state intervention is emphasised, represents negative rights of freedom. The work-line and compulsory insurance in the Nordic model, in contrast is explained as representing positive freedom. Individual social rights, it is pointed out, have meant that work pays and these rights have also been established to be the genuine rights of women.175

As to the continental bread-winner model, which represents another attitude towards the relationship between family, state and market, the inherent dilemma regarding incentives to take up paid work for a spouse, the lock-in effects in this kind of system that is mainly based on agreements between the parties on the market, and the relatively large differences between various groups of people, is noted by the Commission. No further considerations whatsoever of a gender perspective are visible in the Report. Ultimately, which of the systems in fact leads to work for most people and thus access to the self-determination that self-subsistence implies, is considered to be an empirical question.176

With regard to the consensus on the value of insurance, the compulsory affiliation to insurance, which in the Commission’s view represents a restriction on freedom, is not as grave as would be the case if large groups of people would prefer to be excused from affiliation.177

The relation between efficiency and equality is presented as one of the cornerstones for the reform of social insurance. The Commission, with support from economists, makes the introductory remark that ‘the one who can earn the same income without endeavour, or almost the same income in addition to having more time for leisure, will choose the path of least

174 SOU 2006:86, p. 27.
175 Ibid, p. 29.
176 Ibid.
endeavour’ and draws the conclusion that ‘in certain situations this is of course true.’ Thus, the reason for observing two instances of risk in social insurance is emphasised: first, the gateway in and second, the gateway out. A valid way of measuring efficiency in social insurance in line with this would be to measure the effects that social insurance has on labour supply, since the largest loss of efficiency is the failure to produce which is the result of fewer hours of work. This kind of argumentation is largely based on both national and international economics, which in considering the positive and negative implications that social insurance may have in terms of efficiency, emphasise the importance of how social insurance is modelled. In the report there are several references to the Belgian economist Sapir who has elaborated a model for analysing the efficiency and equality of different systems of social security. The Commission, however, questions Sapir’s analysis in which the Nordic model, in comparison to the Continental, Anglo-Saxon and Mediterranean models, is considered the most sustainable, and the only model in which equality does not result in loss of efficiency.

The norms and attitudes to social insurance are also given a prominent place in the Report. Once again, the articulation is based on the growing interest in economics in the complexity of human behaviour. A reasonable conclusion, according to the Commission, is that the modelling of social security systems send different and contradictory orders about and to individuals, thus affecting individual expectations in different situations. The economic incentives for individuals are emphasised in the Report, since it is, according to the Commission, generally believed that the generosity of the system in each country affects human behaviour and exploitation of the system. Legitimacy for the system therefore requires well-thought-out adjustments regarding excesses (självrisker), check-ups, and levels of compensation. The Commission maintains that the attitudes to work are of crucial importance since social insurance implies subsistence without personal work. Thus, legal

179 See Sapir, 2006, pp. 369–390. Sapir argues that globalization implies changes that create both threats and opportunities. The challenge in his view is for Europe to become flexible, which requires reforming the labour market and social policies. When thinking about such reforms, he points out how the notion of a single ‘European social model’ is largely irrelevant. The Nordic and the Anglo-Saxon models are according to Sapir both efficient, but only the former manages to combine equity and efficiency. The Continental and Mediterranean models are seen as inefficient and unsustainable and these models therefore need to be reformed.
180 SOU 2006:86, p. 35.
regulations and the administration of insurance need to be based on a strong work-line, the stronger the more generous a system is.\textsuperscript{181} The fact that individuals now can move freely within the EU, without losing their social rights is seen as one of the advantages in social insurance, but also demands adjustments in legal regulation \textit{inter alia} for reasons of control.\textsuperscript{182} The obvious obligation of those who have problems with their health, competence or ability to find a place on the labour market is emphasised. Thus, the work-line is explained as constituting a moral issue, not only for the individuals but also in relation to those around them and therefore it need to be sharpened.\textsuperscript{183}

As regards sickness insurance, the Commission specifies the softness within this branch of insurance as the central problem.\textsuperscript{184} By ‘soft’ refers to the shifts of meaning in the application of legal regulations, the variations in time and place for exploitation of sickness insurance, and the general acceptance of the role this insurance has unintentionally been given. Sickness insurance has, according to the Commission, become ‘a parking-lot’ for problems that it is not supposed to cover, e.g. labour market problems. This softness has, it is maintained, resulted in insecurity, legal uncertainty, high rates of absence, long periods on the sick list, and a large-scale exclusion of people from the labour market. The fact that the Swedish sickness insurance has no time limit for being sick-listed has occasioned absence due to illness going on for several years. Thus, sickness insurance, it is explained, has become a route out of working life.\textsuperscript{185} A less soft insurance would, it is claimed, give protection in adversity, but the protection would only be for those who are entitled to protection and for the correct period of time. On the other hand, sickness insurance is also considered to be too strict. Nonetheless, the creation of a less soft insurance would not necessarily imply the punishment of sick people. Instead, as part of the inquiry’s objective to pursue general education, an ideal insurance would normatively be based on the value of work and be seen as a foot-hold based on the expectation that the good life is to be achieved without insurance.\textsuperscript{186}

A specific change and the nucleus for future reform that is advocated by the Commission is that sickness insurance should be more independent. An

\begin{footnotes}
\footnotetext{181}{SOU 2006:86, p. 40.}
\footnotetext{182}{Ibid, p. 44.}
\footnotetext{183}{Ibid, p. 49.}
\footnotetext{184}{Ibid, p. 52.}
\footnotetext{185}{Ibid, p. 56.}
\footnotetext{186}{Ibid, p. 63.}
\end{footnotes}
independent insurance provides that incomes from premiums correspond to insurance expenditures. If the premium, or the conditions for eligibility for insurance, change it is the insured that should be affected. The Commission also clarifies that ‘only the one who pays the premium is insured’. With a more independent insurance there is no reason for the state to be responsible for handling it. Instead, there are, according to the Commission, certain advantages in leaving greater responsibility for insurance to the labour market-parties. A crucial issue, therefore, is to consider what should of necessity be the responsibility of the state and what could be delegated to other entities.\textsuperscript{187}

The concept of social insurance is given a somewhat new definition by the Commission. From the Commission’s point of view, the notion of ‘more insurance’ means that people who are exposed to the same risk, pool their risk buffers. By refraining from some part of their earned income in the form of paying a premium, the insured is entitled to compensation if their ability to earn an income is lost. The service that one pays for is the cognizance of being insured. If deficits within insurance emerge, the above definition means that premiums/pay-roll taxes have to be raised; or that the conditions for eligibility have to be changed, e.g. qualification rules, levelling down of compensation, limited compensation periods, or cessation of compensation for certain diagnoses. Another suggested option is to leave it to the gate-keepers, i.e. the administration, to take care of certain deficits. It is also stressed that only those who are insured will be affected by increased premiums, but not the tax-payers. If it would be desirable for the unemployed, students, persons on parental leave, or those newly employed, to be excused from paying the premium, but nevertheless be insured; their premiums ought to be paid by those already included in insurance, or by the state. The notion of ‘more insurance’ is meant to change the perception of the premium, so that it is considered an individual fee providing a distinct and individualised service, rather than being one tax among others.\textsuperscript{188}

The Commission points out the lack of a connection between premiums and rights in law and calls attention to the fact that it is quite possible for a person to be insured irrespective of whether the premium has been paid by the insured person or by some one else. The Commission claims that social insurance’s connection to work is more of a technical issue, which in turn addresses the linkage of premiums to rights. Income security is therefore

\textsuperscript{187} SOU 2006:86, p. 66.
\textsuperscript{188} SOU 2006:86, p. 69.
seen to be a manifestation of a societal norm which leads the Commission to argue that ‘compensation through insurance is not an option for any one who does not wish to work. It is a right for the person who works’. Even though social insurances are compulsory the Commission recommends that future social insurance be based on the perception of insurance as based on an implicit agreement that provides individual compensation in the case of injury. An independent sickness insurance based on agreement is thought to be better adjusted to providing for clarity and reliability. Although rights and duties for the insured and the insurer are clearly formulated in current law, and in the appurtenant documents, including a right to appeal in court, the conditions for insurance can easily and at any time be changed by unilateral agreement. An independent insurance should, through the rule of law and through uniform application as an integrated part of a stable and distinct rule of practice, in contrast provide security in the event of sickness. Insurance should in such an order no longer be dependent on the amount of unemployment, but only on what happens within the independent insurance scheme.

In line with the emphasis on a strengthened connection between premium and compensation, the concept of income that determines qualification for and levels of compensation is also seen to be of principal importance for reform of social insurance. The Commission presents three possible models for future calculation of the sickness cash benefit. First, a model that is based on SGI, second, a model that involves a historical concept of income, and third, a model based on the principles in the Sick Wage Act (sjuklönelagen). A future elaboration of social insurance that would abandon the current SGI-model would have implications for the rules on prolonged protection, currently amounting to three months. The more insurances that become independent, the more evident it will become that each insurance or benefit scheme has to determine eventual rules on prolonged protection. To the degree that the Parliament decide to provide protection in the event of sickness for those who do not work, protection for these groups has, according to the Commission, to be elaborated within the frame of a system other than the sickness insurance, or alternatively to be paid by taxes. Rights for those who do not work, however, need to be measured in relation to the value of retaining the insurance’s proper connection to work.

189 SOU 2006:86, p. 70.
190 Ibid, p. 72.
191 See on p. 233.
192 SOU 2006:86, p. 82.
Regarding the levels of compensation, the Commission has adopted a *demand perspective*. The question is raised as to whether the levels in national insurance should be adjusted to the demands for compensation that are reflected in collective agreements, which now compensate beyond the general schemes. However, the Commission recommends the state take a cautious attitude to taking over engagements that are now regulated in collective agreements.\(^\text{193}\)

Excess insurance is considered to be a part of every insurance, e.g. for sickness insurance the qualifying period. A more far-reaching change to the Swedish sickness insurance would be to exclude short-term absence due to illness from insurance and introduce a system of *compulsory savings on individual accounts* that would cover losses of income during the initial period of a sickness period. This would, according to the Commission, promote the *empowerment* of individuals’. The individual person alone should make the decision about whether he or she feels so ill that they need to take a day off work.\(^\text{194}\)

For those persons who are permanently incapable of work, especially young persons within this category, the Commission recommends that it should be more preferable to introduce a separate benefit system within the frame of support for the disabled.\(^\text{195}\)

Current social insurance is described as a system of failure which, according to the Commission, is reflecting the high rates of people on the sick list, which in turn is seen as the result of failed steering and discontented actors.\(^\text{196}\) The main thread in the Commission’s proposals on how to solve these problems is to move away from detailed rule steering to increased professional assessments and more responsibility for different actors. As regards the *claims adjustment* in sickness insurance, the concepts of *sickness* and of *inability to work* are seen as most uncertain.\(^\text{197}\) An independent insurance is supposed to afford space for *professional attitudes* in combination with stricter frames through fixed patterns. The adoption of *guidelines* on reasonable sickness periods for various diagnoses should provide for the formation of a reasonable praxis in sickness insurance.\(^\text{198}\)

In principle, the Commission proposes that sickness insurance becomes a one-year *occupational insurance*. Claims adjustment of sickness certification and the responsibility for primary care should be transferred to an occupa-
tional health service. This new function for occupational health services, is proposed to constitute the hub of future sickness certification processes and has, according to the Commission, to be based on agreements on the labour market and not on dictation from above. For unemployed sick people, the Commission thinks that this function should be developed within the frame of the Swedish Social Insurance Administration and/or the unemployment office.\textsuperscript{199}

A sickness insurance more suited to its function would result in higher rates of unemployment, which is not seen to constitute a risk to be avoided, but as one of the objectives in the reform. The Commission, however, finds there is motivation for harmonising the different insurances for sick and for unemployed people. The main objective is to make it less profitable to be sick-listed than to be unemployed. It is not proposed, however, that unemployment insurance should be an independent insurance. Independent unemployment insurance during periods of high unemployment would mean that premiums would need to be raised considerably. Independent sickness insurance should encourage the work-line since it provides proper incentives to make visible those people who have labour market problems and should not therefore be sick-listed.\textsuperscript{200}

Harmonisation of the concept of income, of qualification, and of levels of compensation should be optional to reduce the risk of unleasing the wrong driving forces. Interplay between the different insurances mainly concerns how to reduce the obstacles that prevent encouragement of people to move from the sick leave to unemployment. The one-year time limit within sickness insurance, proposed by the Commission, is meant to put a ‘best before date’ on occupational security. Some kind of authority organised as a ‘one-stop-shop’, should be allotted the function of judging who is ill and who is unemployed. Persons in need of social assistance would also come within the personal scope of this new authority that the Commission, inspired by Norway, proposes. In Norway, this kind of one-stop-shop is meant to function as a common gate-keeper, and has replaced the unemployment offices, the social insurance and social services agencies’ in the mobilization of the labour supply.\textsuperscript{201}

In the concluding part of the report of the Government Commission, ‘three extremes’ for further reform that would be possible but not probable are rejected. First, nationalized insurance would lose the involvement of

\textsuperscript{200} Ibid, p. 123.
\textsuperscript{201} Ibid. p. 132.
labour-market parties which are supposed to be better suited to taking care of the practical handling of insurance. Second, a system in which administration of insurance is reserved for the parties, in combination with conditions laid down in law is not recommended. Such a system would imply increased insecurity and diminished legal certainty. If the parties were given enough space to make their own decisions, social insurance could probably be excluded from the public sector and the state budget. Third, a national minimum level of protection and insurances based on agreement for the rest is also not recommended. The compromise which is sketched by the Committee is meant to be a combination of the advantages of an effective and risk-allocating insurance that can be anticipated by individuals, with a clear division of the state’s and the parties’ responsibilities for insurance. In such insurance, the Parliament will have more power to decide regarding the conditions for compensation, but less regarding administration issues. A reform of the Swedish Social Insurance Administration in line with the Commission’s proposal would dramatically change its functions. The approach would mean a transformation from parliamentary and government rule-steering to an emphasis on insurance as linked to economic and work processes.\textsuperscript{202}

So far the actions proposed in 2006 by the Commission have partly resulted in amendments to social insurance legislation. A committee has been appointed to overhaul the concepts of sickness and of work capability, and to present a more coherent judgement of work capability in social insurance and in labour-market policies. The individual’s own capacity to function is supposed to be more important in the assessment of work capability.\textsuperscript{203} The concept of work capability is also of interest in multidisciplinary research in Sweden, including political perspectives on redistribution.\textsuperscript{204} Moreover, the Swedish National Board of Health and Welfare (Socialstyrelsen) and the National Insurance Agency (Försäkringskassan) have been tasked with guaranteeing the harmonisation of the international system of clinical concepts.\textsuperscript{205} The number of days compensated in the form of sickness cash benefit, which in Sweden has been unlimited, is now delimited: in principle to a period not exceeding one year (364 days), unless there are special reasons, e.g sickness that demands long-term medical treatment. In such cases the sickness

\textsuperscript{202} SOU 2006:86, p. 183.
\textsuperscript{203} Dir. 2008:11.
\textsuperscript{204} Vahlne Westerhäll (ed.) 2008, pp. 225–255.
cash benefit is lowered (from 80 % to 75 % of lost income according to the SGI)\(^{206}\) and cannot exceed 550 days of compensation.\(^{207}\) The pros and cons of introducing obligatory unemployment, as opposed to insurance, in current law that is based on membership in an unemployment fund, are also part of the political debate in Sweden. In 2008 the introduction of a mandatory unemployment insurance has been proposed.\(^{208}\)

10.3.2 From financial support to work

In the year 2005 the Social Democrat Government set up an inquiry to overhaul and propose measures to facilitate inclusion on the labour market of persons who are dependent on financial assistance from the social services.\(^{209}\) The starting point for the Directive was to strengthen the work-line and competence-line and incentives to work, and the need to increase the demands on recipients of financial assistance was emphasised. The individual competence of persons, irrespective of sex, age and ethnicity, was seen as most important and greater coherence in the application of legal regulations was advocated. Moreover, a need to clarify and improve the responsibility that different authorities bear, and co-operation between state and municipality were emphasised as important starting points for the inquiry. In a supplementary Directive the inquiry was also commissioned to analyse the consequences that may arise if the main principle for maintenance support (försörjningsstöd) under the Social Services Act for families with children were to be abandoned. This central principle in the Social Services Act means that all incomes, e.g. the child benefit and children’s incomes from holiday work are estimated when eligibility to financial assistance is assessed. This supplementary task for the inquiry, however, still had as its objective to strengthen the financial incentives to work.\(^{210}\) In a new supplementary Directive, the new Government, consisting of an alliance between four right-wing parties, withdrew this commission. The Government pointed out that no new benefits whatsoever should be proposed and the inquiry had to adjust to the new political direction which is aimed at increased employment.\(^{211}\)

The group targeted for the inquiry was indicated as persons of working age who are dependent on financial welfare assistance and who could possibly get

\(^{206}\) For a further description of the SGI, see on pp. 233–234.
\(^{207}\) Prop. 2007/08:136.
\(^{208}\) Prop. 2006/07:89; SOU 2008:54.
\(^{209}\) Direktiv 2005:10.
\(^{210}\) Direktiv 2006:72, (S 2005:01).
\(^{211}\) Direktiv 2006:120, (S 2005:01).
a job if there were different measures of support. Based on existing economic research and in-depth studies occasioned by the inquiry, the difficulties in establishing the targeted group are pointed out. The need for financial assistance is seen as complicated and resulting from several reasons. Although the core group for the inquiry was persons receiving social assistance, attributed only to labour-market reasons and with no need for other social welfare measures, the inquiry declared its ambition to target the majority of long-term recipients of social assistance in the proposals for reform. One demarcation made, however, is that the proposals target neither individuals who are only temporarily in need of assistance, nor those who are in need of financial assistance in order to supplement a too low income. Singles with children are specifically mentioned as part of the latter group. Nevertheless these introductory comments signify that definite consideration and proposed actions target the great majority of people currently receiving social assistance for labour-market reasons. The inquiry’s ambition is ‘to break up social exclusion’ (utanskapet) by means of proposals that facilitate entry into the labour market for as many as possible of those who are in need of financial assistance. A special focus for the inquiry was on unemployed men since men more often than women are allowed assistance on the grounds of unemployment. The inquiry points out how the need for financial assistance differs for men and women and a clarification is therefore made. Certain people, although they have a job, are still dependent on social welfare assistance since their income is not sufficient in relation to their maintenance burden, e.g. single women who work part-time and are living with children.

Based on a socio-economic approach the links between the labour market and the individuals’ own motivation are central to the proposals, which have a cross-sector perspective as they include different responsible authorities. A change of methods in the public employment services, i.e. the public employment services and the Swedish Labour Market Administration, are among the inquiry’s main suggestions. The social welfare services, through amendments to the law in 1998, were given a more active role in supporting persons entering or re-entering the labour market and thus, by means of increased demands on recipients of social assistance, could counteract benefit dependence. In contrast to the legislator’s intention to target under-25s, over 25s needing to improve their skills for special reasons, and students enrolled in education programs financed through study allowance etc., who required

social security during a break in their studies, evaluations by the National Board of Health and Welfare show how a great number of municipalities have applied these rules to all unemployed persons.²¹⁴

The inquiry proposes an amendment to Chapter 4, Section 4 of the Social Services Act to clarify the authority responsible for the measures that social welfare committees may require recipients of social welfare assistance to participate in for a certain time. The Swedish Labour Market Administration is to be responsible for work-experience placements and other labour-market measures. Municipal measures must serve as supplements to central government action.²¹⁵ The common goal in policies to increase the employment rate for everyone of working age should, according to the inquiry, also be reflected at agency level. This, it is said, will make it natural for measures to focus on reducing the growing exclusion. Moreover, this goal can also be regarded as a social investment ahead of possible future labour shortages.²¹⁶ The inquiry also draws attention to the role of education in putting young people in a good position to obtain work and reducing the future need for action on part of society. Thus, better profiling of vocationally-oriented programmes, better access to study and vocational guidance, and an increase in work experience for everyone in upper-secondary school is proposed.²¹⁷

Although the terms of reference for the inquiry did not include proposing any major organisational change in welfare services, a more coherent welfare organisation at local level is, as in many other European countries, believed to achieve positive results and a ‘one-stop portal’ for society’s support to all unemployed people is therefore advocated. Statistical models, validation and instruments to assess a person’s capacity for work are advocated as useful means and are seen as mutually complementary serving as an aid for the different actors.²¹⁸

One of the inquiry’s terms of reference included analysing the influence of the design of maintenance support on economic inducements to move from social assistance to employment. Two changes for better economic incentives for individuals were proposed by the inquiry in this area: the introduction of an activity incentive, and an additional exception to the basic principle for calculating financial assistance. Since social welfare assistance has a 100 percent marginal effect, which according to the inquiry means that it is not

²¹⁴ SOU 2007:2a, p. 110.
²¹⁵ Ibid, p. 43.
²¹⁶ Ibid, p. 45.
²¹⁸ Ibid, pp. 46–47.
always financially advantageous to go from assistance to employment, people risk getting stuck in prolonged dependence on assistance. The inquiry therefore, concluded that there may be grounds for making certain essential exceptions from financial assistance serving as society’s last-resort safety net. Exceptions may be warranted, in order to signal that it pays to work and for use in financial assistance as a means of encouraging individuals to make their way into working life, if the result is reduced dependence on assistance and strengthened ties to the labour market. First, the introduction of an activity incentive was therefore proposed for people who have received financial assistance for a period of six months under the Social Services Act and who have found work, increased their working hours or changed jobs and thereby increased their income from work. It was proposed that the increased income from work be disregarded, up to an amount not exceeding SEK 1 500 per month, according to a new section – Chapter 4, Section 1a – in the Social Services Act. Under the other exception, proposed to be laid down in Chapter 4, Section 1b, young people working in the school holidays and living in a household that is dependent on financial assistance should be allowed to keep their earnings up to a certain limit (up to half a price base amount as defined in the National Insurance Act). This rule, it was proposed, should cover households receiving financial assistance where the parents are responsible for the support of children living at home and attending compulsory school and young people below the age of 21 who are studying at upper-secondary level.219

To date the proposal for legal amendments to the Social Services Act has not been realised, apart from a new rule in the Social Services Act, Chapter 4, Section 1a. This rule, that came into force on the 1 January, 2008, lays down that children’s earnings from their own work, or the earnings of those school-children who are below the age of 21 and who are living at home, are not to be taken into account in their entirety when the right to social assistance according to the Social Services Act is assessed. Earnings that exceed a half price base amount, however, can still be taken into account. The new rule is motivated for reasons of justice and is seen to be a way of stimulating young people to be attatched to the labour market even when they are studying.220

Labour-market policy programs linked to maintenance support pursuant to the Social Services Act have undergone changes during recent years. The overall regulations on labour-market policy programs that gave the munici-

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219 SOU 2007:2a, pp. 47–49.
palities the power to arrange practical experience measures for youngsters outside upper-secondary school or full-time activating measures for young people aged 20–25 have now been repealed and replaced by a work guarantee for young persons aged 16 to 24, which came into force on the 1 January, 2008. The compensation in the work guarantee is meant to be given in such a way as to deter young people from choosing unemployment instead of regular education. Every measure within the work guarantee is to be entered upon with guidance and activities for seeking jobs at the Employment Agency (arbetsförmedlingen) A person in such program is compensated through a development benefit, SKR 1,535 per month for those under the age of 20. Persons aged 20–25 who have qualified for unemployment insurance are entitled to activation support (aktivitetstöd). A person who is allowed maintenance support under the Social Services Act when the work guarantee is entered upon is allowed a development benefit corresponding to the maintenance support. Other persons aged 20–25 are awarded SKR 3,280 per month. Normally, participation in labour-market programs does not convey the status of employee.

The recruitment benefit for unemployed persons, or for persons at risk of becoming so, or for persons with functional disorders in need of extra time to achieve a qualification, aged 25–50, was repealed in 2006. The government found it unjust to favour those over 25 years of age in the study support system since they were already established in the labour market. The liquidation of the recruitment benefit took effect from January 2007.

The increased demands on recipients of social assistance in the municipalities’ application of the Social Services Act have been reflected in case law during the few last years. The questions raised in these cases have concerned the extent to which the municipality can demand vocational training and job-seeking activity from the claimants. Moreover, the question of whether students in continuing education are entitled to social assistance throughout holiday breaks has also become an issue for the courts.

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221 Lag (2006:625) om arbetsmarknadspolitiska program, see on p. 68.
222 Arbetsmarknadsdepartementet, 2007, p. 15.
224 Lag (2002:624) om rekryteringsbidrag till vuxenstuderande.
225 SFS 2006:1448.
226 Prop. 2006/07:1 Utgiftsområde 15.
228 Kammarrätten i Göteborg 2005-02-03, mål nr 5540-04.
10.3.3 Justice for parents and the freedom of choice in family policies

The conceptions of family and of the private responsibilities within the family unit in relation to the welfare state, the rights and duties of the individual person in relation to the family and in relation to the state and the community, seem to be under re-evaluation.

The political direction in current policy as regards financial security for families and children is to take the family as the fundamental unit in society. The government’s expressed objective is to strengthen parents’ power over their living circumstances and to increase families’ freedom of choice. Hence, political steering is meant to be reduced to the advantage of the family’s own, free choice.

The proposal in a previous Government Commission, on the allocation of quotas within parental insurance as one possible strategy for promoting equal opportunities for parents and the reconciling of parenthood with waged work received little support. The proposal, with referring to the Child Convention, had the best interests of the child in view, but was rejected and met with political consensus by most of the political parties, and no longer seems to be an option on the political agenda. The same Commission also proposed certain measures targeting single parents that were never realized. Single parents, according to the Commission, would under certain circumstances be in need of assistance from a person other than the other parent. This person, according to the proposal, would be entitled to the temporary parental cash benefit for up to ten days for taking care of the child of a single parent. Moreover, a special parental cash benefit was proposed to compensate a person who cared for the child of a single parent’s due to the latters’s sickness or infection. In principle, temporary parental cash benefit, according to current rules, can only be allowed for others than fathers and mothers under certain circumstances: first, if there is no father who has the right to be allowed the benefit, second, if the mother is deceased, third, if the father relinquishes his right, or fourth, if the father cannot take care of his child because his visitation rights have been suspended. Temporary parental cash benefit may, however, be transferred to some other insured person, provided the child is sick or infected.

229 Prop. 2006/07:1, Utgiftsområde 12, p. 18
231 SOU 2005:73.
233 Lag (1962:381) om allmän försäkring (National Insurance Act), Chapter 4, Section 10.
234 Lag (1962:381) om allmän försäkring (National Insurance Act), Chapter 4, Section 11a.
The previous objective in the political field of financial security for families and children was, within the frame of general welfare, to level out and reduce financial differences between families with and without children. This objective has recently been abandoned. The new objective is to work towards improved conditions where all families with children reach a good standard of living. 235 Rather than considering the anonymous collective of families and the relative difference between households with and without children, the new objective is meant to mirror the new and 'modern' direction in family policy which is to target all families – families who are different, have different expectations and needs, and who are to be given equal value. Hence, emphasis is laid on the importance of free choice and flexibility in contrast to the previous objective, which was aimed at redistribution. 236

One example that reflects the Government’s reform of family policy is the introduction of a competence rule laid down in law that authorises the municipalities to subsidise domestic care for children, instead of placing the child in publicly financed childcare arrangements. 237 The recent decisions in certain municipalities to introduce such a ‘home-care allowance’ were appealed against in court, based on the argument that the power of the municipality to support individual persons needs to be specified in law. A rule that would legitimise the municipality subsidising parents’ domestic care of their own children is not to be found in neither the School Act, or in any other regulation whatsoever. Consequently, the decisions were adjudged to be illegal in the County Administrative Court and in the Administrative Court of Appeal, since the decisions were deemed to be contrary to the law. 238

In late 2007, the Government announced new rules laid down in law to legitimise ‘home-care allowances’ in a Swedish context. 239 This kind of re-enforcement of the freedom of choice for dual families, or the re-familiarization of family policies, is now being proposed 240 in combination with payment of a bonus to those parents who decide to divide parental leave more equally: the more equal the division the higher the bonus. 241

235 Prop. 2007/08:1 Utgiftsområde 12, p. 11.
236 Prop. 2007/08:91, p. 17.
237 Prop. 2006/07:1, Utgiftsområde 12, p. 18; Prop. 2007/08:91.
238 Kammarrätten i Stockholm, 2496-06, 4491-06, 2007.03.06. The municipalities’ competence to take action is regulated in Kommunallag (1991:900).
239 Ds 2007:52.
For parents who are joint custodians, the new equal opportunity bonus, which came into force in July 2008, introduces a tax subsidy (SKr 100 per day at the most) awarded to the parent who has cared for the child during the longest time with parental cash benefit, and who returns to work while the parental cash benefit is then granted to the other parent. The new rules are intended to stimulate equal opportunity as regards parental leave and participation in working life. To be awarded the bonus, income must be at least SKr 200 per day. The equal opportunity bonus (SKr 3 000 per month at the most) is meant to ensure that the great majority of families will profit by choosing to share the days compensated for by parental insurance.

The Home-Care Allowance Act gives the municipalities the power to decide to introduce this allowance, but does not confer on parents a right to claim it if no such decision has been taken. Home-care allowance can only be approved for custodians of a child aged 0–3 years of age, who are living with the child. Home-care allowance may also be divided between parents if the parents do not live together. Home-care allowance cannot be granted in combination with other social security benefits and can amount to a maximum of SKr 3 000 per month. The rules exclude the allowance being paid if the child is in publicly financed daycare on a full time basis.

In weighing the pros and cons of the redistributive effects of family policies, the marginal effects of income-tested benefits, e.g. maintenance support under the Social Services Act and housing allowance, are underlined and seen as embodying a risk of people becoming trapped in benefit dependency. The objective lays stress on families' chances of achieving a good standard of living rather than on the outcome of family policies. According to the government, different outcomes need to be accepted, since the outcomes depend on different conditions and on the priorities that families make on their own, resulting in the financial consequences being different. Waged work is seen to be of most importance for a good standard of living and policies in this field need to be seen in the broader context of public finances. The work-line is the starting point for family support, reflecting the main objective that families with children are to earn their incomes from waged work. It is assumed that in the future, maintenance support will be increasingly regulated by means of private agreements between parents.

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243 Prop. 2007/08:93, p. 18.
244 Prop. 2007/08:91, p. 17.
in childcare, through increasing the variety of suppliers, is targeted as part of the main objectives, including the introduction of a child care sum that will finance the increase in private forms of childcare.\textsuperscript{246}

Family policy is expressed as respect each family’s free choice and providing support, but not steering. A child perspective in this branch of policy is declared to mean all parents’ possibilities to meet the needs of their children. Children who are financially vulnerable are, however, to be given support.\textsuperscript{247} The Government announced the appointment of an inquiry to analyse the marginal and distributive effects of the housing allowance, and how it affects household’s labour supply and the financial situation in those families that receive it. Housing allowance in general is only awarded to families with children, particularly to single-parent households. Alternative elaborations of support targeting financially vulnerable households with children are meant to be evaluated in general. A more integrated inquiry concerning the effect of benefit rules on children living in split families is under further preparation by the Government.\textsuperscript{248}

The misuse of benefits within social insurance is targeted as one of the objectives in the Governments’ reform of social security for families. Thus, a demand for a certification when the temporary parental cash benefit is applied for in connection with caring for a sick child has been established in law.\textsuperscript{249} This certificate is to prove that the child was absent from day care in pre-school or domestic childcare or attendance at an after-school recreation centre or school at the relevant time.\textsuperscript{250} Moreover, the income-related compensation for parental cash benefit, temporary parental cash benefit, and pregnancy cash benefit is levelled down, taking effect from January 2008. This move has been taken while awaiting a new regulation on the calculation of the SGI to determine amounts of compensation, which in the future will be based on past income instead of being based on current income and thus the expected loss of income, which is the valid model today.\textsuperscript{251}

\textsuperscript{246} Prop. 2007/08:1 Utgiftsområde 12, p. 11 ff.
\textsuperscript{247} Ibid.
\textsuperscript{248} Ibid, p. 19. See also bet. 2005/06:SfU7.
\textsuperscript{249} National Insurance Act, Chapter 4, Section 13, SFS 2008:316.
\textsuperscript{250} Ds 2007:41.
\textsuperscript{251} Prop. 2007/08:1, p. 21.
10.3.4 Human rights and anti-discrimination in a Swedish context

Swedish scepticism with respect to statutory regulations in the area of anti-discrimination legislation now seems to be under re-evaluation. Today, the anti-discrimination concept is not only reflected in labour law but is also addressed to societal fields outside working life, such as higher education, social welfare services, social insurance and unemployment insurance. The human rights instruments that Sweden has ratified and hence is bound by, caused the Government to adopt a national action plan for human rights in 2006, running from 2006–2009. The same year, a human rights delegation was appointed to support the long-term task of ensuring that human rights will be fully respected in Sweden. The new objectives, which were enacted for equal opportunity politics in 2006, are meant to be attained by means of gender mainstreaming. The 2008 Budget contained proposals on how to clarify and make concrete these objectives in certain respects.

Of special importance for a human rights perspective on social security, are the economic, social and cultural rights which are meant to ensure the fundamental needs of individuals, i.e. work, education, and satisfactory standards of living and health. Central to national and international human rights are that these rights are universal and indivisible, and treatment should be equal. This means that human rights are to be afforded to all human beings, without discrimination on the grounds of sex, ethnicity, sexual orientation, religion or belief, disability, age, or any other circumstance concerning the person in question. Thus, fighting discrimination is seen as central. Respect for fundamental human rights is expressed in the Swedish Instrument of Government. Beyond the anti-discrimination clause laid down in Chapter 1, Section 2, this section also emphasises the state’s responsibility to promote participation and equality in society. Public authorities are instructed to keep in mind equal opportunities for women and men, e.g. to counteract the gender segregated labour market. Corresponding regulations for the municipalities is sparse. The fundamental point of departure for the municipalities is not equal opportunities, but equal treatment and favourable treatment for members or groups of members in the community is prohibited. Favourable treatment is only possible on objective grounds. The School Act, how-

253 Dir. 2006:27; Dir. 2007:114.
254 Prop. 2007/08:1, utgiftsområde 14, jämställhetspolitik.
ever, explicitly requires the schools to include in their activities the objective of equal opportunities for the sexes.256

The Discrimination Committee in 2006 proposed that current discrimination legislation be unified and more coherent.257 A new Act has been proposed to replace the seven existing anti-discrimination laws in Sweden.258 The Committee pointed out that neither sex, nor disability/functional disorders are included as grounds for discrimination within the social welfare services field. Similarly, for health and medical care sex is not included in the grounds for discrimination. Regarding sex as grounds for discrimination in the social welfare services, the Committee clarifies that the discrimination prohibit on the grounds of sex does not apply to the measures taken in social services, if different treatment of women and men can be motivated as justified in light of a specific objective and if the means utilized to achieve this objective are appropriate and necessary.259 Hence, the Committee proposed that sex should be generally exempted as grounds for discrimination in the social services and points out how the different measures that in fact are offered to women and men and the different methods used in social welfare services would contravene the principle of equal treatment. Favouring either men or women, when this is reasonable, e.g. offering shelter to women exposed to violence, would in the same way contravene a prohibition of discrimination.

The proposal for more powerful protection against discrimination, excluding the prohibition of discrimination on the grounds of sex in the social services if different treatment of women and men can be justified, was presented in a Government Bill in March 2008.260

Anti-discrimination and equal opportunity perspectives certainly represent a new direction in social welfare services. In 2002 the National Board of Health and Welfare was appointed by the Government to follow up, analyse and give an account of differences based on sex261 in the work of the social

256 Skollag (1985:1100), (School Act), Chapter 1, Section 2..
257 SOU 2006:22.
258 Prop. 2007/08:95.
261 In the report the concept of 'sex' was utilised and meant to include both biological sex and gender as culturally constructed. In English the concept of sex is limited to biological sex while the Swedish concept of sex is given a further meaning and also includes the meaning given in English to the concept of gender. The use of the concept of gender in a Swedish context therefore is perceived to reinforce the understanding of sex and gender as being separated from each other (logic of separation). Thus, using the concept of gender is perceived
welfare services, and, to submit proposals for any needed measures. In 2004 the National Board of Health and Welfare submitted their report in which it was pointed out that a perspective involving equality of opportunity for women and men is lacking in the Social Services Act, although the overarching objectives laid down in the introductory chapter of the act are focused on equality. The concept of sex is similarly invisible in the Act or in preparatory works for the Act. The individual is conceptualised as gender neutral in private form: ‘in person’ (den enskilde), hence not as ‘woman’ or ‘man’. The focus on individual needs has (as is also shown earlier in this thesis) rendered discrimination based on sex and a gender perspective invisible in social welfare services.262

The equal opportunity perspective applied in the report was worded as the need perspective of the social welfare services.263 Structural and individual conditions were explained, with reference to research findings, as reasons why women, and especially solo mothers, are in need of welfare support, often for a long time. On the other hand, it was also pointed out how men are allowed social assistance more often than women. In addition, men’s need for social assistance is often shown to be connected with social and abuse problems. For women, a new relationship and cohabitation is often the way out of being a long-term recipient of social assistance. Moreover, how ethnicity intersects with sex was seen as important in the report, since women with foreign backgrounds are shown to be only weakly connected to the labour market and therefore are often in need of social assistance. One conclusion drawn in the report was that social assistance compensates for deficits in social insurance but also combines to make invisible the unjust conditions that exist between men and women.

In the report it was also emphasised how the role of the transfer system, e.g. social insurance, differs for men and women. Female recipients of social assistance more often than men receive sickness insurance, pre-retirement insurance, parental insurance and housing allowance, while men are more often compensated through unemployment insurance. Almost all the children living with parents born within the country and in receipt of long-term social assistance were children of ‘single parents’.264 The National Board of

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264 Ibid, Chapter 3, pp. 45–64, in which financial assistance was analysed from a gender perspective.
Health and Welfare points out the need to treat men and women differently sometimes.

The Board’s approach to equal opportunity, which is defined as the needs perspective, is commented on in the report since this perspective reflects a dilemma: In order to satisfy the specific needs of women and men, and hence promote increased justice between the sexes, differences between men and women as groups need to be recognised, while at the same time this recognition implies a risk that these differences will be reconstituted and that gender stereotypes will be reinforced. On the one hand the notion of equality reduces this risk while on the other hand it increases the risk that differences based on different needs and abilities attributed to sex will be ignored.265

According to a more recent inquiry that was appointed to help public administration to analyse and consider measures in view of sex discrimination it is pointed out how gender neutrality in law may have sex-based consequences. The abolition of the concept of sex in legal regulation could imply that important differences between women and men are missed. Financial support to solo mothers is one such instance that is pointed out and which motivates the view that the concept of sex should be relevant within social welfare services and that equality of opportunity is one perspective that needs to be kept in mind.266

An additional Commission which has been commissioned to consider more distinct and coherent state supervision on the actions of the social welfare services has urged that the main objective in the Social Services Act, termed as equality, should also imply support for taking action aimed at achieving equal opportunities for women and men within the social welfare services.267 The Commission bases this conclusion on the fact that equal opportunity is one of the most important issues in relation to the concept of equality.268

Although anti-discrimination ideas are currently expressed in various sources, as described above, and sex discrimination is given more attention in the welfare state, yet the concepts of sex and gender are mostly still not very visible in the welfare state, while the principle of the best interest of the child, as laid down in the Child Convention, has been inserted into family and social laws. Since 1998 the best interest of the child has been part of the overarching

266 Dir. 2006:1.
267 SOU 2007:82.
268 Ibid, p. 312.
The supervising authorities, however, have shown that the municipalities have been deficient in their hearing of cases concerning social assistance, i.e. maintenance support under the Social Services Act. The needs of children are sufficiently not made visible and the consequences for children in households with limited financial resources in need of social assistance are not made visible in the hearing of cases. In 2005, 47,927 children lived in families receiving long-term social assistance. The problem of homelessness among children has led the Government to consider amendments in housing regulations and the National Board of Health and Welfare has been tasked with guiding municipalities in developing their support for homeless families.

The Government confronted widespread criticism of their reform of unemployment insurance regarding aspects of equality of opportunity and anti-discrimination. The Swedish Confederation of Professional Employees (TCO) claimed that the new rules concerning the demand for length of work for eligibility to unemployment benefit would discriminate against women as women, more often than men, work part-time. The union questioned whether the new rules were compatible with Council Directive 79/7/EEC, especially Article 4 on equal treatment for men and women in matters of social security. The Government defended the new regulation claiming that the amendments in unemployment insurance are legitimate in the light of current social and labour market policies that are aimed at the creation of new vacant jobs. The kind of social exclusion that unemployment implies is, according to the Government, supposed to decline as a consequence of the new rules.

10.4 Gender and power in the Swedish welfare state

10.4.1 The gender system

Women’s inequality to men in the Swedish welfare state has resulted since the 1960s in equal opportunity political objectives and in legal reforms. In 1969 the first Equality Report was presented at the Social Democrat congress where the notion of a nuclear family was questioned, articulating instead the idea of justice between men and women and of freedom of choice.

The gender system is explained as being socially patterned by two principles. First, the sexes are to be kept apart, and secondly, with the male norm as prime, the keeping apart of the sexes is a precondition for women’s subordination. This subordination is based on the notion of women and men as being fundamentally different to each other. In the societal processes in which gender is constructed the hierarchies and differences between the sexes are, therefore, reproduced. Based on this theoretical understanding of a gender system a new tension is explained as having emerged when universal reforms also came to include women: the tension between equality as a universal principle and the gender order that in reality exploited women’s subordinated position. Once again, or still, women were constructed as socially problematic, and urgently in need of a solution.275

In the context of the Swedish welfare state democracy was understood to be socially rather than individually centred. The individual was primarily a member of the collective and thus had a collective identity. Dependence and reciprocity among the members of society were emphasised and the common best was the centre of attraction. These features contrast with a liberal notion of individuals as autonomous and the priority of the private sphere over the public sphere. Hirdman’s theory of the gender system points out how, in Sweden, this liberal individualized view was replaced by a generalised and societal perspective.

In Sweden, the historical compromise based on a housewife contract, which was designed during the 1930s and 1940s, did not fit into an economically expanding system that needed women’s labour. During the period 1950–1965 the proportion of married women gainfully employed increased from 15.6 % to 36.7 %. However, statistically these women were still conceptualised as gainfully employed housewives.276 This period, which has been considered transitional, did not imply any fundamental changes as regards the sex-segregated gender system. But a new ideology was proclaimed during the 1960s through the articulation of an equality contract.277 Of principal importance was a statement by the Social Democrat party together with the

275 SOU 1990:44, p. 73.
276 SOU 1990:44, p. 87.
277 SOU 1990:44, p. 89.
unions in 1969, which declared that there were good reasons for basing future reforms of the social security system on the notion of a dual-earner family. Every person was supposed to earn their own living and economic independence came to be the overarching norm. However, the conflict between the sexes was still constructed to be a female problem and these conflicts were thus reduced or abolished with the help of radical political reforms.278

In the 1970s a new future utopia was presented by the unions, the political and the women's organisations within the workers movement. A gender-equal contract, that had its base in the proposition of a six hour working day, should guarantee equality between the sexes in domestic as well as waged work, and in politics. The principal clause was that every person should be economically independent. Childcare should not only be a concern for mothers, but also a concern for fathers. In her analysis, based on the theory of a gender system, Yvonne Hirdman points out how the lower social status of women on a structural level is not linked with concerns for democracy and political steering, but with a concern that focuses on weak and/or insufficient resources for citizens. Therefore, the power dimension between the sexes was transformed into a social problem. This 'resource idea' that is used to explain the poorer social, financial and political position of women has thus, according to Hirdman's analysis, acted to conceal the real situation.279

Rather than emphasizing the responsibility of fathers the emphasis was laid on social responsibility for childcare. Hence, the gendered conflict merely came to be constructed as a female problem.280 It shall be added here that some Nordic scholars instead of using the concept of gender have turned to a concept of 'sex' which they consider to be better suited to comprise both the biological/physical and social conditions for the actions of women and men.281

Gendered concepts were abandoned in social security law during the 1970s. 'Women' were replaced by gender neutral concepts such as spouse or parent, or disappeared into the collective family. As was pointed out by the Power Commission this aversion to gendered constructs may be understood in the light of there being only one accepted social explanation during this equality-contract period: i.e. the one between capital and work. Gainful employment was seen as the only way for a woman to become a productive member of society.282

278 SOU 1990:44, p. 90.
279 SOU 1990:44, p. 73.
10.4.2 Division of power and division of responsibility

Based largely on Yvonne Hirdman’s theory of the gender system, the concepts of citizenship and power came to be points of departure for the equal opportunity objectives that were adopted in the 1990s. In a Government Commission that preceeded the new objectives, the concept of democracy was said to presuppose a balance between individual rights and duties in relation to the collective, and collective rights and duties in relation to individuals. The realization of democratic ideals could only be realized when citizens were capable of exercising their power over their own and over their society’s future.

The Government Bill based the proposal for new objectives on power analysis. The title of the bill – Division of Power and Division of Responsibility – reflected this direction. An overall view of equal opportunity politics was emphasized which meant that equal opportunity was not to be seen in isolation but should penetrate all other policy fields. In other words, mainstreaming became a strategy for the realization of equal opportunity policies.

The overall objectives for equal opportunity policies at the 1990s meant that women and men should have the same rights, the same responsibilities and opportunities in all essential areas of life. Substantially, this overall objective, among other objectives, came to mean equal distribution of power and influence; the same opportunity for women as for men be financially independent; and the same responsibility for men and women to take care of the home and the children. The notion that women’s subordination was based on women’s lack of resources was rejected and was instead seen as a question of democracy and steering. The government underlined how the former explanation might lead to blaming women for being responsible for their subordination, instead of blaming the system. The notion of financial power on an individual level was explained to mean the individual opportunity to attain one’s desires.

284 SOU 1990:44, p. 15.
10.4.3 Active citizenship and financial independence

Transformations in the allocation of financial resources between men and women in the 1990s, with a special focus on ‘single parents’, was one of the main tasks for the Equal Opportunity Inquiry that was appointed in 2004 followed by a Report in 2005.\textsuperscript{289} The political aims in equal opportunity policies that had been adopted in the early 1990s, and the achievements in this policy field that had then become based in the overall strategy for equal opportunity policies – the strategy of gender mainstreaming – were surveyed. In a 2005 Government Bill a new overall objective for equal opportunity policies, supplemented by four sub-objectives, was laid down. Gender mainstreaming is retained as forwarding strategy for Swedish equal opportunity policies.\textsuperscript{290}

In their Report, the Government Commission dealt critically with the attitudes taken to conceptual use and the meanings of concepts in Swedish equal opportunity policies. The need for caution when theoretical concepts are imported into politics was articulated.\textsuperscript{291} The concept of the ‘gender system’, it was pointed out, had been given an exhaustive and theoretical explanation when introduced into politics in the early 1990s. In contrast to this, the Commission pointed out how changes in recent equal opportunity policies have emphasised the concept of power and a ‘power order based on sex’ (könmaktsordning) without any consideration of theoretical or methodological statements whatsoever. This would, according to the Commission, imply a democratic problem, if such conceptual usage is utilised in a way that results in the exclusion of certain people. The meaning of the concept of equal opportunity and its implementation in the gender mainstreaming strategy is explained as being more radical if it can accomplish change.\textsuperscript{292}

The Commission also expressed a critical attitude towards recent government documents on equal opportunity policies in which it is claimed that there is as yet no change in structural power based on sex. The return to a focus on attitudes, especially in Reports regarding men’s violence to women, is criticized for being an analysis of power that is too static to capture historical changes, and therefore inappropriate for the work of alteration. In contrast, the Commission pointed out that not all women live under the same conditions and argues that a biased emphasis on the inequality between the

\textsuperscript{289} SOU 2005:66.
\textsuperscript{290} Prop. 2005/06:155.
\textsuperscript{292} Ibid.
sexes is acting to conceal other forms of oppression. Other factors also need to be included in analysis, e.g. how sex intersects with other power orders, i.e. class, sexuality, nationality and ethnicity, that is to say *intersectionality*.\textsuperscript{293}

In contrast to the previous overall objective, which expressed the aim of attaining the same rights, the same responsibilities and opportunities in all essential areas of life for men as well as women, the new overall objective for equal opportunity policies expresses the belief that women and men should have the *same power to form society and their own life*.\textsuperscript{294} A precondition for this objective is said to be that the same rights, opportunities and responsibilities prevail in all areas of life. The concept of power, however, is still seen as essential in equal opportunity policies, and is thus explicitly articulated in the overall objective. The objective is designed to express the Government’s approval of equal opportunity in society, that is to say a society in which women and men collectively and individually have the same power to shape society and their own life. In the Government Bill, the continuation of equality of opportunity for women and men is emphasised, and it is expressed as being in need of following up concerning different *groups*.\textsuperscript{295}

In the first sub-objective that concentrates on *power and influence*, the conditions for decision-making are emphasized. Here, the concept of *active citizenship* is explicitly introduced into Swedish discourse. In contrast to national citizenship the concept of active citizenship is seen to be better suited to expressing the including and democratic idea that women and men should have the same opportunities to *participate* in the development of society.\textsuperscript{296}

The second sub-objective is about financial equal opportunity as regards education and paid work for attaining *self-sufficiency* throughout the life. The various concepts used in defining the different models: the male breadwinner model, the dual-earner model and the dual-earner-dual-carer model is commented on by the Commission. The last concept, which has been used among gender researchers, is criticized for having its weak points since the concept standardizes the notions of togetherness between two people (*tvåsambet*) and the nuclear family. In contrast to these notions, individual responsibility for subsistence and care for both men and women is emphasized. ‘We are *single supporters* irrespective of the form of coexistence’.\textsuperscript{297}

\textsuperscript{293} SOU 2005:66, pp. 47–63.
\textsuperscript{294} Prop. 2005/06:155, p. 43.
\textsuperscript{295} Ibid, pp. 44–45.
\textsuperscript{296} Ibid, p. 45–46.
\textsuperscript{297} SOU 2005:66, p. 131.
study of the factual individual incomes for men and women that was carried in preparatory works for the new objectives illuminated the ‘fall-back position’ available to women, e.g. the financial opportunities there are for women to become singles.298

The concept of financial independence in equal opportunity policies has now been replaced with a concept that emphasizes one’s own independence based on full-time work as normative for achieving the opportunity to become self-maintained and the opportunity to maintain one’s children. The notion of dependence as relational is meant to be used rather in care relations, since everyone is dependent on the care of others during various phases of life, i.e. when we are children, fall ill or become old.299 The dependence on benefits, especially for ‘single mothers’, was nevertheless explained as one reason for introducing a tax reduction for this group.300 This proposal, which was largely based on economic theory on the rationalization of human behaviour, however, was not included in the Government Bill, and has not yet resulted in legal regulation. Nonetheless, this proposal was based on the supposed function of tax reduction to stimulate employment and to make work pay, i.e. work should be more profitable than benefit dependence. Tax reduction for these parents would, according to the proposal, also reduce marginal thresholds for single parents on low incomes, increase incentives to take on full-time work and strengthen a group that in reality is financially vulnerable. Generous compensations and benefits might, according to the preparatory work, reduce incentives to work and thus produce poverty traps, in which single mothers are overrepresented. The assumption is that this group of mothers is most sensitive to changes in the tax and transfer systems.301

In the preparatory work for the new equal opportunity objectives the idea of the feminisation of poverty in a Swedish context was rejected, without any definition whatsoever of the concept of poverty, although it was noted how the vulnerable situation of single mothers derives from the objective of financial equality of opportunity for men and women. The concept of single mothers was likewise not defined. The gainful employment tax allowance for ‘single parents’ was aimed at ‘lowering the threshold and marginal effects for ‘lone parents’ with low incomes, increasing the incentive to look for paid employment and full-time employment, and strengthening a group

301 Ibid.
that is financially vulnerable'. The rules for the housing benefit were seen as appropriate in defining the personal scope of the proposed tax reduction. According to the Housing Benefit Act cohabitees are equal to spouses, that is to say, the income of the household unit is calculated when cohabitees apply for the housing benefit. If there are circumstances which probably signify that two persons are in fact cohabiting they are treated as equal to spouses. In these cases the applicant has the burden of proving otherwise. Hence, only those mothers, who are living on their own, without a partner, would have been entitled to the proposed reduction. Solo mothers would, therefore, still be dependent on a new partner, despite the expressed objective of one’s own independence. The new rules issued in the Housing Benefit Act should, according to the Commission’s proposal, be useful for counteracting fraud concerning the proposed tax reduction. How this kind of argumentation correlates to the notion expressed that all of us are single supporters irrespective of form of coexistence seems for me to be open to question.

The third sub objective is about men’s and women’s equal share of unpaid care work, including equal conditions for giving and receiving care. The Equal Opportunity Commission proposed the formulation ‘care without subordination’ be included in the wording of this sub-objective. This proposal was omitted from in the Government Bill.

The fourth sub-objective states that men’s violence against women must stop and the opportunity and right to physical integrity must be upheld.

Preparatory works for the newly adopted equal opportunity objectives included research reports, of which one focused on the sources of income for low-paid women and on how the income for these women intersects with social class, ethnicity, age and life-course. This particular report was based on interviews with 10 women born in Iraq and 10 Swedish-born women. Income sources for Iraqi-born women were shown to be affected by their ethnic background. Their wage earnings and social insurance transfers were very restricted over several years and the incomes were often instable and of a more unusual character, i.e. study allowance, earnings from work in a family business, compensation for the care of close persons and unregistered labour. The income for Swedish-born women seemed to intersect with class background. Low level of education, physically and mentally heavy and low-

paid work over a long period of time in combination with sole responsibility for the subsistence and the care of children were factors that were shown to result in the deterioration of health among the middle-aged Swedish-born informants. For young and healthy Swedish-born women the lack of time was found to be the main problem. For these women, the ability to work enough to make a living conflicted with the time needed to take care of and provide for the needs of the children. It was also found that short professional experience on the labour market implied a worse position vis-à-vis income-related social insurance. The system of legal regulation and women’s bad experiences were shown to explain why women choose other means of subsistence than applying for social benefits.307

In reality, it is concluded women and men in Sweden have the opportunity to combine waged work with care of the children, although anxiety about the backlash in gender policies is expressed.308 In relation to this conclusion, ‘objectivity is said to be an underestimated feminist strategy’. The title of the report – The Power to Shape Society and the Own Life – is meant to reflect the forward direction that is proposed for the future. Despite the ongoing national and international changes, which mean displacement of power and responsibilities from the centralised nation state level on the one hand, to a regional and international level on the other hand, the challenges in equal opportunity politics remain. The conditions for work and subsistence, for having a family and being able to discharge one’s freedom and rights as a citizen are (still) said to be the factors in focus. Although perspectives other than that of sex/gender have to be included in policies, the order of the sexes is assumed to be the fundamental power order in each society.309

10.4.4 Solo mothers – constructed to constitute a dependent and defective family formation

The distinctive features that characterised the Swedish model up to the 1950s were based on the notion of a male labour market and a sex-segregated mode of thinking, implying full employment, equality and universalism, in fact merely for men. The second compromise in the Swedish model, comprehending the normative relation between women and the state, and the unpaid domestic and care work performed by women that was a precondition for welfare reforms, started to change during the 1960s. Women’s right

307 Yazdanpanah, in SOU 2005:66, pp. 120–121.
to perform waged work was established and the care of children gradually came to be a societal responsibility. From a gender perspective, social policies in Sweden were, up to the mid 1950s, dominated by a bread-winner ideal that belonged to the normative gender order of a 'housewife contract'. During the later part of this period of reconstructing the notion of income security became increasingly dominant, paving the way for the conception of a dual bread-winner model.

This new type of social contract, a sexual or a gender contract, was undeniable based on the individuality of men and women. The Nordic legal culture has often been differentiated from the Anglo-Saxon and Continental by the way in which care is understood and by how the state and the market are involved. A special feature in Nordic culture, as described by Nousiainen, is the notion of individual duties and responsibilities as being more important than individual rights. Thus, social security in the Nordic welfare states has an individual base, in combination with a supportive community when needed, in contrast to other legal cultures which mainly emphasize the family as the caring unit. Scandinavian countries, characterized by their individual models of social security, have accordingly favoured women's waged work. Hence, Nousiainen claims that Nordic legal culture is based on social rights oriented towards 'positive freedom', and thereby has the potential to split the private-public divide.310

In feminist legal studies, Nordic women have been conceptualized as 'Responsible Selves', often bearing the double burden of a job and housework.311 One characteristic of the Nordic welfare regimes that has in fact been crucial for women is the legal opportunity for women to opt out of families and family dependence.312 Feminist accounts in welfare analysis, as explained by Kevät Nousiainen, have concentrated more on 'the opting out of family', or a loosening of people's dependence on their family relationships. A gendered social citizenship, taking into account both paid and unpaid care work in society, has thus been thematic in feminist work.313

However, in Women Law studies in the Nordic countries it seems as if maintenance, as a gendered issue, and the problems of the combination strategy, or reconciliation of care work and waged work, has still largely been

310 Nousiainen, 2001, p. 34 ff.
analysed from the perspective of a marriage- or family contract, supplemented more by a family principle than a principle of equality of opportunity between men and women, irrespective of family form. The triangular relation, evolved by Tove Stang Dahl, between the ‘marriage contract’ in the family, the state and the market, has been one tool for evaluating the relational aspects of maintenance and care from a gendered perspective. Kirsten Ketscher describes these relations in a model of two triangular relations. The first refers to money in the maintenance relation and the second refers to time in the care relation. The purpose of this model is to emphasize the important connection between these maintenance relations in reality and in the structures of distributive welfare law.

The time spent on domestic work, including the care of children, has been seen as an important factor for determining how families with children distribute maintenance and care within the family and in relation to the market and society. As the legal system mainly regulates economic family provision, the reciprocal relation between time and money is seldom considered in law. As a result of the function, on a structural level, of women as caregivers, and the function of the family in society being to provide for care, the gendered dependence in the family has been explained as being reproduced in gender-neutral regulations. Kirsten Ketscher in her analysis foresees a new fundamental structure for maintenance laid down in law. She assumes the decline of the marriage contract in favour of the labour contract, which will be the fundamental basis for the maintenance of adults, while for children the fundamental basis will be parenthood. The special conditions for solo mothers in their approximation to dual roles as earners and caregivers, however, have not, in my opinion, been sufficiently recognized in these analyses.

The strong notion of a dual-earner family in which equality is assumed to be attained through the parties being in a nuclear family conceals the structurally disadvantaged position for solo mothers. The benefit – waged work – for married or cohabiting mothers could also be seen as a loss: women were coercively constructed to become breadwinners. For solo mothers, who even earlier had primarily been supposed to be workers, this new freedom did not imply any far-reaching changes. In general, solo mothers fitted

317 See Ketscher, 2002, p. 73.
318 SOU 1990:44, p. 93.
neither into previous nor into the new perception of maintenance relations in the family.

Constructions of normality in social security regulations in the welfare state still involved processes of exclusion and inclusion. Gendered constructs, which in the 1950s were largely still based on the notion of a male labour market and a sex-segregated mode of thinking – based on a notion of sexual difference which maintained the traditional model of family, and hence women’s financial dependence on a husband – had an effect on the boundaries of social citizenship for solo mothers. The explanation of social law in the welfare state as being solidaristic, in general seems insensitive to women’s life experiences, and especially to the life experiences of solo mothers.

On the other hand, this group of mothers has come to the attention of government investigatory works. The Single Parent Committee, appointed in 1977, had the task to overhaul social support for single parents. The single concept, according to the committee, meant those custodians who lived on their own, in line with Statistics Sweden, which used a cohabiting concept for all households with children where the parents lived together, the same for nuclear families as for mixed families. In the Directive the Committee was given the task of clarifying the need for special support measures that then existed for single-parent families, beyond general social provision for families with children. The starting point was declared to be that support had to be directed to the children. The widest possible social justice and equal living conditions for children living in different family forms was affirmed as the aim of social support.

Single parents, in comparison with mixed families, according the Committee, were characterized by worse financial conditions, worse financial security, and fewer resources for the single parents to spend time with their children. In these circumstances, the Committee thought it important to find an explanation, not only for public views, but also for views among responsible politicians that diverged from the scientifically supported fact, that single parents in general had a poorer situation than cohabiting parents.

During the 1990s power analysis and gender mainstreaming became the new strategies in equal opportunity politics. Incentives to work today are increasingly emphasised in active policies. In the directive to a Committee

that was appointed by the Swedish government in 2000 to analyse financial family support, the concept of poverty-traps was a starting-point in the search for an incentive structure in social security that would not limit the benefit of taking up work or working more. Single parents and parents in education were groups of special concern for this Committee.\textsuperscript{322} Rather than targeted support for single parents, the direction was to level out support between families with children and people without children, and to level out financial support for everyone, in a life cycle perspective. In addition, it was emphasised that parents bore the main responsibility for the maintenance of their children. Proposals to introduce a more generalized family support, e.g. of the housing benefit, did not result in new regulations. Nevertheless, the starting points for the Committee and the considerations in the final report about reforming social security for families reflect the move towards increased emphasis on individual responsibility for subsistence.

During the 1990s there were many policy debates about how to balance the provision of adequate income support to single parents, while preserving the incentive to return to the labour market. For instance, increased emphasis on activation, even for mothers with relatively young children, was shown to be converging in Norway, Denmark and Sweden in a study on work-line policies in six European countries in the 1990s.\textsuperscript{323} The Norwegian social scientist, Arnlaug Leira, has discussed the constructions of social rights from the perspective of working mothers in the Nordic countries in comparison with continental traditions. She found that there is no strong Nordic universalism concerning social rights for mothers and that there are in fact big differences between the Nordic countries in this respect.\textsuperscript{324} The Swedish family support system has been legally explored in a gender analysis by Åsa Gunnarsson, who claims that welfare support has been eroded as an effect of poorly co-ordinated reforms in tax and social welfare law.\textsuperscript{325} As a new approach she proposes an individual-based family-support system as a tool for achieving gender equality, and the improvement of children’s wellbeing as the normative foundation for family support.\textsuperscript{326}

Solo motherhood in the Swedish welfare state is still constructed as problematic and this family form fits badly into the gender contract, which has largely come to be based on the notion of a dual-earner dual-carer family.

\textsuperscript{322} SOU 2001:24.
\textsuperscript{323} Skevik, 2001 p. 134 (English summary).
\textsuperscript{324} Leira, 1992 and 2002.
\textsuperscript{325} Gunnarsson, 2003.
\textsuperscript{326} Gunnarsson, 2003, p. 224.
The recognition of solo mothers in the Swedish welfare state has merely been based on the notion of insufficient resources – the resource idea.

Although solo mothers are at risk of being disadvantaged in the public and the private sphere, the generalised Swedish welfare system has, nonetheless, made it possible to opt out of family dependence. Solo mothers have been more or less able to manage by themselves with support from relatively generous benefits and services in the welfare system. Hence, it may be claimed that the Swedish welfare state has to some extent afforded a model of social citizenship in which family life and waged work can be reconciled. At least for a short period during the welfare state’s ‘high-water mark’, solo mothers were to some extent constructed as normal. Social security was based on individual needs in combination with a supportive community when needed. Although the resource idea concealed the structurally disadvantaged position of solo mothers, it did mean that material and social needs rather than protection and equality in a formal sense were the focus, which in fact prevented solo mothers from becoming poor. Social rights in the welfare state could well be explained as meaning positive freedom and a splitting of the private-public divide.

A strategy of targeting different groups of people, e.g. ‘single parents’, seems obvious in current equal opportunity politics. The need for reform of social and labour law now being interdiscursively articulated and the reforms now being prepared, consider the capability approach, which is explained as constituting a cornerstone for further social law common to Member States of the EU. Once again, the need to control the beneficiaries of social benefits is significant in current welfare discourse and the perception of ‘benefit dependence’ underpins the notion of social exclusion as being caused by an all too generous Swedish welfare model. Given the social conditions that have been proved to be characteristic of solo mothers – being solo breadwinners on a sex-segregated labour market, and largely being solo care givers – solo mothers in general, in spite of the vision of gender equality, risk being among the losers in a Swedish welfare model socially transformed in line with the ideas now being articulated in policy discourse.
PART V

FINAL CONCLUSION AND DISCUSSION
11 Social security for Solo Mothers in Swedish and EU law

Based on the feminist understanding in feminist theory of the logic of separation, which separates and makes invisible women's life experiences in law, the overarching aim of this thesis is to unmask historical and context-dependent constructions of normality in social security law, and hence to elucidate gender and power relations and the processes of exclusion and inclusion in the Swedish welfare model. The three separate studies that were carried out, in which the concepts of ‘solo mothers’ and ‘social citizenship’ were utilised analytically to grasp and criticise gender and power relations in law, are now summarised.

A summary of the conclusions drawn in each of the studies: of cross-national social assistance, of a European social model, and on solo mothers’ position in social practices in the Swedish welfare model, open this final part of the thesis. Put together, these studies provide the basis for further criticism of the normative and discursive structure of law concerning the constructions of normality and of gender and power relations in social security law, and for analysis of the social consequences these constructions have for solo mothers. The challenge of the Europeanization of values in the context of ‘active citizenship’ is taken as the point of departure for concluding the gender-sensitive normative critique of social security law in a Swedish and Nordic context, and in the context of the EU.

11.1 Constructions of normality in past and present social security law – a summary

From a historical view, the elaboration of Swedish social security seems more or less to have been affected by European influences. Poor relief was long based on Christian mercy and a strict division of the ‘deserving’ and ‘undeserving’ poor. Social law in the Swedish (and Nordic) welfare regimes gradually replaced a system of social security based on a patriarchal ideology, in which solo mothers and their children were constructed as problematic, that resulted in social exclusion and stigmatization and their having a hard time to manage. In Sweden, ideas articulated in relation to the population issue expressed a modern vision of the family and justified social protection.
To some extent solo mothers were recognised of being in need of social welfare protection. However, the measures were characterised by moral conditioning and by disciplinarianism. In contrast to the kind of patriarchal practices that characterised the earlier social order, social insurances, social assistance and social services developed in the ‘welfare state’ compensated for social disadvantages by means of redistribution.

Admittedly, active policies are not foreign in a Swedish context, but part of institutional dependence. Historically the ‘employment strategy’ and the ‘self-support principle’ that was initially based on liberal law, characterise the Swedish model. The employment strategy in the Swedish model, firmly established after the 1950s, was combined with collective responsibility in solidarity for ensuring the financial needs and care needs of the citizens.

The elaboration of family social legislation was significant for the Swedish welfare state. The state was positively conceived to have duties in relation to its citizens, who were to be ensured a certain standard of living. The welfare state materially implied another concept of the ideas on the rule of law. Material interests and social needs, rather than social protection and equality in a formal sense, were the focus and this needs perspective characterises social practices in the Swedish welfare state. Social security law was constructed and construed the primary responsibility for the state to provide welfare benefits for all residents who lacked sufficient resources, e.g. for solo mothers and children. This ‘resource idea’ was discursively embedded in politics and law and resulted in a general welfare system.

Although social security in the Swedish welfare state came eventually to be gender neutrally constructed without the visualization of particular needs, and to be based on the notion of a dual-earner and dual-carer family, the general welfare system was key for the inclusion of solo mothers and their children. Through the construction of a general system of social security with individualised social security benefits and services that enhanced women’s labour-market participation, it became possible for women to opt out of family dependence without stigmatization and without becoming poor. Having the features of ‘social citizenship’, the Swedish model of social security provided general protection and made it possible for women to form households of their own.

Solo mothers however are not yet fully included, but still confront disadvantages and exclusion in social practices in the welfare state and on labour market. Even if these mothers are shown demographically to be a group with specific needs and living conditions, they have not been legally targeted as a group, in Sweden especially. This could be seen as being rooted in a hidden
value, a concept of a model family that has not been sufficiently systemati-
cally criticized and reflected upon. It may, however, be concluded that the
justification for financial and care provision in the Swedish welfare state has
in many respects implied the inclusion of solo mothers into the mainstream
of society. The special needs of solo mothers was clearly recognised in policy
discourse during the 1970s and 1980s and during this period of time solo
mothers were supposed to be ‘resourced’ by means of redistributive measures
laid down in law. This ‘resource idea’ is now being questioned in family poli-
tics, in equal opportunity policies and in government investigatory works
preparing for future reform of the ‘Swedish model’.

Although these new political directions have not yet resulted in legal regu-
lation to any great extent, the notions of autonomy and independence are
nonetheless clearly being articulated, e.g. in recent reform of social security
that has the overt purpose of promoting free choice, to counteract benefit
dependence and to combat social exclusion. In contrast to the state steering
family choices it is now supposed to further free choice in the family, private
agreements and justice between parents are emphasised and the objective
– to counteract dependence on social security benefits – is central in the dis-
courses. Private arrangements and agreements within the family for ensuring
subsistence and care are emphasised in government investigatory works and
in other policy discourses.

The cross-national comparison of social assistance reflects how EU activa-
tion objectives and strategies have affected Nordic welfare states in tackling
the poverty and social exclusion of solo mothers. General social protection
in solidarity with those in need is, however, still visible in social assistance
regulations, though apparently moving closer to the notion of ‘active citizen-
ship’. Social assistance is increasingly constructed as work-related and finan-
cial dependence in the household or family is emphasised and increasingly
made statutory. These new directions appeared in Swedish case law during
the 1990s and have since been further reinforced.

Social security provision for various groups of people is today being dif-
ferentiated, based on whether a person is or is not a worker, is an EU citi-
zen, a Nordic citizen or a third-country national. In addition, labour market
policies are now increasingly being linked to the elaboration of future social
security laws since these policy fields are increasingly intermingled in ‘active
inclusion’ policies at European as well as national levels. Moreover, the Swed-

1 See Gunnarsson, Burman, and Wennberg, 2004, p. 140.
ish unemployment insurance has undergone changes and been reconstructed in order to make work pay.

Co-ordination of social security when EU citizens and their family members access their right to move freely, brings with it conflicts as regards the definitions of different benefits and the personal and material scope of social insurance and social assistance. The constructions of the family unit and of the ‘dependence criteria’ in EC law clearly exemplify the conflicts caused by European integration. The kind of ‘family’ form a person belongs to might still be decisive for whether a person who moves within the EU will be fully included in or more or less excluded respectively from the freedom of movement and from co-ordination of social security benefits.

The human rights discourse in the EU, which emphasises private autonomy within the conceived ‘normal’ family in order to eliminate dependence on public support, seems to be in fact a formal understanding of gender equality, and thus poorly adjusted to the living conditions of solo mothers. Social security regulations in the EU, which are based merely on human rights discourse, principally target EU citizens that are workers, and members of their families. Free movement in the EU is largely based on the notion of autonomy and independence for working men, while for women family dependence is acknowledged as normal. The idea of ‘active citizenship’ and the objective of active inclusion, however, today also targets women. Active policies under the influence of the ‘capability approach’ though largely seem to be based merely on economic and market interests in flexible labour.

The notion of an adult-worker model however now appears in policy discourse and the reality of family breakdown and new forms of cohabitation are also reflected in EC law. Social rights in cross-border situations in EC law are constructed as more individualized and are no longer only or merely based on a bread-winner ideology. However, a precondition for cross-border mobility is still avoidance of burdening the Host State and the dependence criterion, which delimits the personal scope acknowledged and justified by being dependent, still reflects a breadwinner ideology. Although Union citizenship has been introduced and EU citizens’ social protection in cross-border situations has been improved, persons who for one reason or another cannot themselves provide for their subsistence are given low priority in community law.
11.2 The challenge of the Europeanization of values

‘Some hold the view that the Welfare State is ‘withering away’ and that the tasks of the Welfare State must now be taken over by private entities and the civil society. As far as I can see, it is the private system of work and wages that is withering away as a distributive order capable of guaranteeing a Basic Subsistence for the great majority of the population. Nothing says that it is the state which must bear the burden of guaranteeing Basic Subsistence. However, in today’s situation, I cannot see any alternative to the Welfare State capable of filling the new gaps in employment relations as a distributive order, and thus maintaining Basic Subsistence as a basic normative pattern.’

Almost a decade has passed since Anna Christensen expressed her opinion in the late 1990s that an alternative to the welfare state as a distributive order lacks the ability to maintain basic subsistence for the great majority as a basic normative pattern.

The contextual dependence in law today spells out the need for structural analysis of the welfare model – normatively and discursively – beyond the nation-state. Accordingly, constructions of normality in social security regulations, in equality of opportunity policies, and in social and family politics are affected by the Europeanization (and globalisation) of politics and law. Legal ideas, concepts and principles of social rights and duties in the Swedish welfare state to some extent, at least in a discursive sense, reflect this contextual dependence in law. Whether these new directions, as part of European integration and the EU objectives aimed at a European social model, which taken together have appeared in the studies carried out in this thesis, will have implications for Swedish social security law, and hence for the boundaries of social citizenship for solo mothers, are discussed below.

Based on the findings in each of the studies, there are several questions to discuss further. What attitude is one to take to current changes in Swedish social security law and to future trends? Will the capability approach, which seems to have become a new cornerstone for social law in the context of the EU, influence the ‘Swedish model’ more fundamentally? Will principles and concepts in Swedish social security law, such as the principle of solidarity in social security regulations designed to be general, come to be reproduced, questioned and/or transformed and less valid for the determination of who is to be statutorily included in or excluded from social security schemes in the Swedish welfare model? Discursive elements in Swedish social security law,

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2 Christensen, 1999, p. 98.
by way of concepts such as citizenship, social rights and duties, and gender equality, are articulated in new ways. Do these articulations imply statutory transformation in social security law that in general will have an effect on the construction of normality, and in particular affect the boundaries of social citizenship for solo mothers?

11.2.1 The Swedish model in transition?
The strategic combination of politics and law for the creation of a European social model, which is suggestive of social engineering significant for the elaboration of the Swedish Welfare State (folkhemmet) dating back to the 1930s, should not in my opinion, be underestimated. Analysis of the manipulation and transformation of Swedish social security law, however, is faced with uncertainties. It is not easy to establish the meaning of legal concepts and of legal principles in the normative structure of current social security law, which is increasingly characterised by Europeanization and globalisation, is multi-levelled, contextual and in addition is in a state of constant change. Writing contemporary history, therefore, seems hazardous.

Current changes in social security legislation take place in a legal and political context, in which national law is increasingly affected by international laws, and in which domestic power struggles, international politics and economic globalisation have a greater impact on legal regulation and on the discursive ways of representing social reality. In order to depict transformation in the normative structure of social security for solo mothers in the Swedish welfare state, which has to be seen in the context of the EU, the need to transcend the terms of the hard/soft law debate is clear. The very notions of law, its legal concepts, its potential for change and its limitations are also called into question. EU governance extends deep into the Member States, not necessarily through social policy as it is conventionally understood, but rather in terms of shaping discourses and processes through subtle patterns of influence on and insinuation of particular values, ways of thinking and agency. The commonly agreed strategy of mainstreaming in equal opportunity policies, the objective of combating social exclusion and the Lisbon Strategy for a new social agenda for social inclusion in the EU, signify a review of the ‘Swedish model’. The institutional roots of Swedish social security – how social security is organised and administered – and the assumptions underlying legal regulation and legal principles, are questioned in policy discourse.

As has been shown, the concepts of active citizenship and of social exclusion (social utevägning) and active inclusion, today frequently appear in
policy discourse on national and EU levels. The notion of active citizenship and social inclusion, as opposed to a passive dependence on welfare benefits and services, and hence social exclusion, are emphasized in current policy discourse. It is argued that this shift in the use of concepts, from poverty to social exclusion, is not merely a change on a semantic level but also on a scientific and political level, indicating a shift from redistribution, to emphasising relational issues in social policies. In this new version, ‘social exclusion’ evokes those who are outside or different, not partaking of mainstream resources and values because of processes within the polity itself. However, in this version of social exclusion, now seemingly adopted by the EU, the problem of the exclusion of women has not been central. However, the fundamental principle of gender equality in the EU is approached quite radically in the most recent strategic objectives within the field of gender mainstreaming.

In Swedish policy discourse, the starting point for explaining social exclusion has today largely come to be the abuse of social security and the assumption that social rights per se cause poverty, dependence and social exclusion. Strategies in legal regulation and in policies for strengthening the incentives to work, for enforcing justice between parents in family and social law, and for enforcing the freedom of choice in the perceived dual-earner dual-carer family, reflect the kind of logic of separation that obscures the lived experiences of solo mothers. Solo mothers mostly exist, if this group of women is recognised at all, as gender-neutral isolated analytic concepts. Hence, solo mothers are constructed as a dependent and defective family formation. Hegemonic gender and power relations, therefore, are continuously constructed and re-constructed.

The emphasis on social exclusion of various groups of people, and the discursive use of the concept of social exclusion, could well be explained as reflecting a shift from a vision of general and distributive welfare state into a vision of the state that emphasises the liberal notions of autonomy and independence. Based on economic theory, independence and self-support, and individual responsibility are said to constitute the main principles and the normative foundation for future social law in the EU and in the Member States. Moreover, contractual relations and the notion of free choice are today increasingly articulated even in Swedish family and social policies. Swedish legal scholars, however, with some expectations, seem to be too little involved in the discussion on the social transformation that these ideological

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values might signify for social security law. In my opinion, the meaning
given to the concept of social exclusion does not sufficiently reflect the social
positions and gendered dimensions in maintenance and care that construct
solo mothers as dependent on public or private provision for their subsis-
tence and for the care of their children, or ultimately as poor.

Today the concept of a new adult-worker model and a life-cycle perspec-
tive has caught the attention of research into the social dimension in Europe.
However, it is questionable whether this debate goes beyond a liberal under-
standing of the citizen as autonomous, the notion of free choice and contract-
tual relations. The active citizenship emphasized in the fight against poverty
and social exclusion, seen from the perspective of gender relations and the
position as citizens of disadvantaged groups should also require new pluralist
approaches to determine who comes within the scope of a social citizenship
that has both quality and equality. The active citizenship advocated in the
European Union has emphasized citizenship obligations over rights, appeal-
ing to the common good in identifying engagement in paid work as the
prime obligation of welfare recipients in supporting their families.

In Sweden it is suggested that social insurance should become increasingly
work-related. The legal principles which constitute the basis for national
insurance, i.e. solidarity and redistribution, are questioned in government
investigatory works. The introduction of occupational insurance based on
agreements between the parties on labour market is discussed. A definition
of social insurance in line with this would mean the exclusion of groups of
people who are not fully integrated into the labour market. Remembering
the main features of the first social insurances established in Sweden more
than a century ago, which meant that insurance was only meant for those
workers who acted correctly and that insurance had to be combined with
strict control, it could well be questioned whether the new directions pro-
posed for reform of social insurance could rather be characterised to mean
de-modernization of the Swedish model.

In a Swedish and Nordic context, the ideal of care has referred to caring
for people who according to commonly accepted norms cannot manage with-
out help. This political ideal has not been associated only, or even primar-
ily, with the family, but also with public care provision. Public care services
indeed have had de-familiarizing effects, and have been especially important
for solo mothers in reconciling care responsibilities with their work, and
hence for their social inclusion. The objectives of promoting private arrange-
ments of care and free choice within the family, which is mostly conceived
to be a nuclear family, are increasingly expressed in policy discourse today.
One example of this re-enforcement of family responsibilities is the home-care allowance that has now been put into practice in Sweden. These new directions could well be characterised as *re-familiarization* of Swedish family social regulations.

The principle of solidarity, or rather the lack thereof, is increasingly expressed in terms of misuse of the welfare system. In policy discourse the overarching aim of making work pay is expressed, and targeted groups, rather than the collective, are the centre of interest in preparatory works aimed at reforming the social security system. One such targeted group in the discourses is solo mothers. However, modernization of social security does not seem to take a strong stance since gendered diversity and differences in citizenship are not sufficiently recognized. Rather than solidarity in a distributive welfare state, the talk is of subsidiarity on a horizontal level, i.e. the individual responsibility and the private responsibilities in the family and in the household to ensure needs are met. Thus, de-commodification as a characteristic of the Swedish welfare state seems less valid today. On the contrary, *re-commodification* is on the increase in the Swedish model.

11.2.2 Social security for solo mothers in the context of active citizenship

Constructions of normality in social security, and hence the boundaries of social citizenship, are determined by statutory and discursive constructions about who is being included; what needs are to be ensured and how; what responsibilities should the state or the community have; and what individual rights and obligations ought there to be.

The ‘Swedish model’ of social security, in which the employment strategy is combined with general social security, provided by ordinary law, i.e. Acts of Parliament, and in which all residents in principle, at least in a formal sense, are included – social citizenship – contrasts with the main features in the European social model. The latter model seems to be based on an employment strategy, however, in contrast to the Swedish model it is instead combined with a social security system that is work-related and based on contractual relations, human rights discourse and market interests. The ideological ideas underpinning the creation of a social model for Europe, which can be interpreted as ‘active citizenship’, seem inconsistent with social security as traditionally laid down in law in the Swedish model.

The active policies that are articulated today in Swedish policy discourse reflect how international dialogue and common objectives and frameworks for social and economic change in a pluralist context have an effect on the discursive ways of representing society. The notions of social exclusion and
of ‘active inclusion’ and a legalistic and formalistic understanding of gender equality are articulated in ways that could well mean new directions and principles in the normative structure of Swedish social security law. This would have an effect on the constructions of normality in social security law and the boundaries of social citizenship in a Swedish context.

Admittedly, it still is claimed that equality of rights for women in Sweden start and ends within the family, despite Sweden’s reputation as the most gender-equal country in the world. The solo-mother family is at risk of appearing to be a problematic and dependent family constellation and brings to a head such dichotomies such as autonomy and dependency, private and public. Gender neutrality in law, based on the liberal notion of an active citizen being primarily a wage-earner, that does not recognise and acknowledge gendered diversity among citizens, runs the risk of reproducing solo mothers as defective family formations and second-rate citizens.

From a gender perspective, a theory of ‘social citizenship’ based on a principle of inclusion, must not only consider dependence on the market but also pay attention to redistribution and material equality and the possibilities for women to live independently of a breadwinner. The solo-mother family deviates in many respects from the perceived dual-earner dual-carer family in social policies that are meant to promote reconciliation of waged work and family life. In Sweden solo mothers are not explicitly recognised in social assistance regulations or in social insurance schemes. However, even when formal bodies of regulations are required to be sex-neutral in design, the outcome in social insurance and protection systems still contains gender differences. When sex-neutral regulations are applied in a reality that is systematically structured by gender, the equality of the results has to be the key issue.

The development of social rights based on a liberal tradition of human rights instruments in Europe differs from the mutual solidarity and responsibility visible in the rights discourse of the Swedish and Nordic welfare regimes. Social rights seen as traditional human rights or as traditional responsibilities give rise to different views of the idea of discrimination as a lack of equality. A human rights approach to social rights raises the basic legal question of discriminatory practices and anti-discrimination laws. Extensive welfare policies, based on solidarity and public responsibility have, in Sweden, given the impression of a universal, overall equality. Equality has come to mean non-discrimination.

There are, however, examples of how gender mainstreaming and anti-discrimination ideas are working anew in a Swedish context. In the preparation of a new and comprehensive Swedish anti-discrimination act the gender-neutral understanding of human needs without any particular interest in the need for special legal protection in the Swedish welfare state is questioned. In the construction of social assistance as a last resort, which has been reinforced in recent years, the recognition of gender (kön) – which was previously alien to the needs perspective that is applied in the social services’ management of cases – is one such example. The recent modification of the rules in the Social Services Act leading to exemptions to the subsidiarity principle, i.e. social assistance being subsidiary to all kinds of incomes and assets in the household, justifies the exemption of part of the income earned by a child living in a family allowed social assistance. In contrast to the notion of ‘benefit dependence’ this new rule, although only motivated by the objective to make work profitable, recognises the special conditions that children in poor families live under. This modification of the construction of social assistance as a last resort has improved the position of solo mothers and children in relation to the authorities.

11.3 Final reflections

A feminist notion of social citizenship committed to the principle of inclusion cannot stop at the borders of the nation-states. European integration highlights issues beyond the nation-state concerning the construction of normality in social security law and the boundaries of social citizenship.

If taken seriously, gender mainstreaming could be used strategically to reveal the sex and gender-biased inequality that has historically been part of the silenced ideology of the Swedish welfare state – and still is. It has been argued that the ‘constitutionalizing’ endeavour of the European Union provides a frame of reference for scholarship which engages with the EU as a ‘non-state constitutional polity’, guiding us to a better understanding of the place of gender and gender equality within the system. The normative change in the Scandinavian or Nordic welfare states can be questioned on account of the concept of mainstreaming as a new approach to gender equality, which is aimed at systematically integrating supportive measures to achieve equality and to take into account the effects of women’s and men’s situations.

A lack of recognition of the living conditions of solo mothers in the legal constructions of rights and duties leads to social exclusion. At the same time, the disadvantages and risks in targeting certain categories must be considered. A fear of imprisoning women in the family by revealing the lack of recognition, in policy and law, of solo mothers’ special conditions as solo care-givers and solo breadwinners, needs to be contrasted, as I see it, with the question of how to adapt legally and politically to this group’s high risk of being exposed to poverty. A dynamic view of poverty, seeing waged labour as the central determinant of poverty and social exclusion, seems too narrow to explain or reveal the relational gender and power dimensions that create dependency as a human condition, mostly borne by mothers. For citizenship to be of equal value, the substance of equality must vary according to the diverse circumstances and capacities of citizens, men and women.

The disadvantaged situation of solo mothers in the welfare state clearly demonstrates that the Nordic strategy of combining labour-market work with family life is too narrow a concept for long-term improvements in gender equality for all citizens. Nevertheless, the normative structure of social security law and social citizenship as conceptualized in the Nordic countries have provided general protection with both de-commodifying and de-familiarising effects, making it possible for women to form households of their own, without being socially stigmatized or excluded. There are lessons to be learned here for gender mainstreaming as conceptualized in the EU, and for the demand for a review and modernization of social protection systems.

At the same time, the Nordic countries should learn from the European objectives and, by critically examining constitutional law and discourse on a national level, reveal selectivity and collective and structural discriminatory practices within national systems that have become invisible in gender-neutral regulations emphasizing formal equality. Such an approach, open-minded to difference and diversity among citizens, can tell us which norms are privileged and how individual and collective entitlements and obligations are constructed and can, therefore, be useful in normative critique aimed at gender equality and social inclusion.

Gender-neutral social security law runs the risk of itself generating new problem categories, going hand-in-hand with an evolving dependency discourse in which welfare claimants are stigmatized as pathological because of their reliance on welfare. A more pluralistic notion of the citizen than that now perceived seems to be necessary to prevent marginalization, poverty and exclusion. Dependent solo mothers, bringing dichotomies such as autonomy and dependence and private and public to a head, need measures other
than largely restrictive eligibility rules. In order to include solo mothers, the idea of the autonomous citizen as desirable needs to be questioned. As long as society is structured by gender with gender inequalities, restrictive measures in social security law, aimed at fostering active citizens, risk intensifying existing inequalities related not only to gender, but also to ethnicity and social class. Dependency, if seen as a human condition in caring relations, has to be acknowledged and justified. Solo mothers as well as other ‘mothering persons’ need to be valued as worthy citizens with the personal right to live a dignified life.

In post-modern thought issues concerning identity and subjectivity are important concepts in analysing power and gender in society. Discussions concerning the welfare of individuals today largely have a liberal profile: participation, independence, and free choice are discursively articulated in the Swedish and European debates. The turn away from social theory in post-modern and post-structural feminist theory that is concerned with cultural diversity and issues surrounding ‘identity’ and ‘subjectivity’ still needs to be combined with considerations of material and substantial inequality and issues of redistribution. Gendered inequality still involves a material component. The responsibility for unpaid work and low-paid work will in probability continue to burden women more than men. If welfare models do not take this into account, the prognosis can be seen as a relative, if not absolute, poverty for women in general and solo mothers in particular.

6 A critique of how in feminist theory cultural considerations have taken over material considerations, is the challenging standpoint for the research group ‘Challenging Democracy and Social Justice’, which is part of Umeå Center of Gender Studies – Challenging Gender. See http://www.umu.se/genusforskning/aktuellt/ume_adv_gender_stud_eng.html; http://www.jus.umu.se/forskning/Genus/kort_svensk.htmGunnarsson
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