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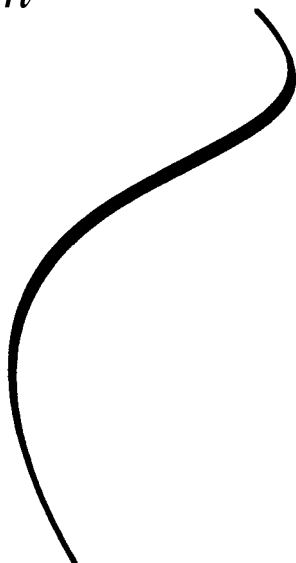
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# *Peculiar restrictions: restraints on women's employment in Sweden*

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ABSTRACT. Restrictions on the employment of women have historically fallen within three categories: work in dangerous environments, night-shift work and working after/during a pregnancy. EU directive 92/85/EEC addresses each of these categories. Sweden was found to be in violation of the third prong, despite the demonstrable practice of women taking leave after giving birth. The directive and its implementation raises the question of whether the legislation is actually beneficial to women or, instead, simply a continuation of an historical treatment of women as objects of guardianship. The EU Commission's view of the directive, and its implementation in Sweden, forces Sweden to take a step backwards with respect to its position of parental leave being a right instead of an obligation.

The peculiar restrictions placed upon the employment of women today cannot be understood unless viewed against the background of the vast movements within the entirety of economic life. (SOU 1938:47, 45)

This comment, made over sixty years ago by the committee appointed by the Swedish Parliament to investigate the issue of working married women, is as true today as it was then.

Restrictions applicable to the employment of women existing in Europe and Sweden must be understood against their historical background in any assessment of their legitimacy.

Legislation directed to any particular group of individuals must, as a rule, be viewed sceptically. With respect to women, the paradox created in the effort to treat women as equals to men, while simultaneously acknowledging the biological differences between women and men, presents a challenge to the legislative schemes of any country attempting to improve the status of women. A fine line must be drawn between giving women access to rights to improve their legal status, and treating them as a group unable to protect themselves, a throwback to the period of history in Europe, and particularly Sweden, in which women were objects of legal guardianship as opposed to legally competent persons. An illustration of the problem created by this paradox arises with the implementation in Sweden of the European Union's Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the

safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

Historically, protective employment legislation with respect to women has been three-pronged, concerning issues of employment within dangerous or hazardous environments (particularly mines and quarries), night-shift work and maternity leave. Council Directive 92/85/EEG takes up each of these prongs, with dangerous environments covered in articles 3–6, night-shift work in article 7 and maternity leave in article 8. Sweden was found by the Commission to have fulfilled its responsibility under the directive except for with respect to the mandatory two-week period of maternity leave found in the second paragraph of article 8. After a token protest, the Swedish parliament adopted legislation effecting the mandatory two-week period, effective August 1, 2000 (SFS 2000: 580).

The issue of conflict that arose under the directive is simple. According to the Commission, the directive mandates that each member state in the European Union enact legislation requiring that pregnant women or new mothers take a two-week maternity leave, either before or after the birth of a child. Sweden, in its initial response to the inquiries of the Commission with respect to the implementation of the directive, argued that the practice already existed within Sweden regarding taking a two-week period. Swedish legislation granted the right to parental leave and 98% of all mothers availed themselves of it during the two-week period. As the practice already existed with respect to the two-week period of maternity leave, Sweden argued that there was no need to make the leave mandatory through legislation.

Sweden's opposition and later capitulation to the legislating of a mandatory two-week period must be understood against the background of the history of women's employment rights in Sweden. Swedish protective employment legislation concerning women generally and the implementation of the directive specifically will be examined here. Afterwards, the

incompatibilities between the interpretations by the Commission and Sweden concerning the directive will be discussed, raising the question of whether membership in the European Union furthers the rights of women in Sweden or sets them back with respect to this issue.<sup>1</sup>

## *Historical perspectives*

Swedish protective employment legislation can be divided into three periods, beginning with the early legislation enacted during the 19th century. The second period, the period of restrictions with respect to women, begins with the passage of the 1900 Act and ends in 1962, when the first of the restrictions, the prohibition against night work, was repealed. The third period begins in 1962 and covers the dismantling of the regulations and the enactment of modern legislation. The development of the legislation from period to period naturally reflects society's attitudes towards working women. In the early period, where women were newly emerging as workers, there is no specific focus on women as a particular group needing protection. The second period, on the other hand, shows the beginning of a focus on women as a special interest group, with the early legislation motivated by a true desire to protect all workers from the rampages of industrialism. In the later part of the period, a negative attitude towards working women developed, motivated in part by the economic situation of the country, culminating in the 1930s with several motions to prohibit married women from holding state employment. The year 1962, with the repeal of the prohibition on night work, is chosen as the beginning of the modern period, but the current approach of women as equals to men in the workplace (and idealistically, in the home), does not come into force until after the adoption of the Work Environment Act in 1977.

The progression from period to period with respect to Swedish legislation is also interesting from an international perspective. The international treatment of these issues is reflected in the steps taken by Swedish

legislation, as well as in the pressure felt by Swedish politicians to harmonize Swedish legislation to be in line with international developments. The progression also demonstrates that the rights of Swedish women concerning employment were often sacrificed in the interests of achieving international harmony.

## *The Early Swedish legislation (1846–1900)*

Motions were made as early as the Parliament of 1809/1810 to grant women legal capacity, the right to an equal inheritance and the right to participate in trade. The legal and social structure of Sweden at this time did not grant women independent legal status. Instead, women were objects of guardianship, and thus could not enter into contracts to conduct economic transactions. In this respect, women in Sweden were at a disadvantage in comparison to their counterparts, for example in England and France, who had obtained greater freedom as early as the end of the 18th century. The motions put forward in the 1809/1810 Parliament were based in part upon economic necessity. There was a shortage of men after the recent wars, creating a surplus of “defenseless” women having no male guardians or any economic means of support. Allowing women to trade was proposed as a better alternative than consigning them to the poorhouses (which were already filled to over capacity) (Qvist 1960).

The first elements of workers’ protection can be found in the Factory and Handwork Proclamation of 1846, the response to the motion for greater freedom of trade for women made in the 1809/1810 Parliament.<sup>2</sup> The 1846 Proclamation is exciting from a historical perspective as it gives a glimpse of a society on the cusp of industrialism. People in Sweden were given the right freely to create factory or handwork for their own needs. Swedish male citizens who had received the sanctity of communion could offer such goods for public sale. Women were given a limited version of the

rights granted men. Married women needed the consent of their guardians, their husbands, to enter into trade, and unmarried women had to be declared by the King to be legally competent. The protective elements of the proclamation relate to minor children, with employment of children under the age of twelve forbidden.

In 1852, the King issued a proclamation forbidding the use of minor children under the age of eighteen in employment between the hours of 9.00 p.m. and 5.00 a.m. This proclamation was incorporated into the 1864 Freedom of Trade Proclamation, along with the prohibition against employing children under the age of twelve. The 1864 proclamation expressly gave Swedish men and women the right to participate freely in trade or factory operations, expanding the rights of unmarried women. Married women, however, continued to require the consent of their husbands. At this point in time, there was a continued surplus of women because of the largely male emigration to the United States.

The emancipation of Swedish women had now begun in earnest. Women were given the right, albeit still limited, to participate in trade through these acts. Women were allowed to hold state employment positions, as from the 1860s. Married women were given legal control of their own property in 1874.<sup>3</sup> Women were evolving legally as independent persons at the same time as the number of free laborers was increasing.

The costs of industrialism in terms of human labor also began to be debated in Sweden during this period. The focus of the Swedish Parliament at this point in time was on the employment conditions of children and all adults, with women not discussed as a specific category. Motions were made as early as 1856 to limit the workday of all adults to 12 hours (1856 *Ekonomi-utskottets betänkande* No. 103, *Saml.* 8, 4). The opposition to such measures argued that such prohibitions would be an infringement upon contractual freedom.

In response to these motions, a committee appointed by the King to investigate the issue of child labor submitted a legislative proposal in 1877, which was adopted as the 1881

Proclamation regulating age limits, working conditions and employment hours for children. A prohibition on the employment of children and younger female adults in mines and quarries was included. In 1889, Parliament adopted the Act on Protection against Employment Dangers, applicable to all workers regardless of sex, and created a system of factory inspectors.

Parliamentary discussions during the 1890s began to focus on women as a specific group in need of protection. Motions were introduced to limit the workday of all adults, and in the alternative, the workday of women, so that Sweden could offer at least the minimum of protections as given by other European countries.<sup>4</sup> Sweden sent a delegation to the Intergovernmental Conference held in Berlin in 1890 concerning workers' protection. The program focused on children and women as the two specific groups needing protection, with proposals for legislation forbidding their working in mines and quarries and other dangerous environments, as well as night shifts, and with respect to women, working the first four weeks after the birth of a child. The Swedish committee assessing the outcome of the conference stated, with respect to a general limitation as to the work hours of adult females, that a limitation with respect to the workday of men was a more necessary measure. The statistical survey conducted by the committee demonstrated that adult women were not employed to any great extent in industrial work and that no complaints had been raised regarding the issue of any specific exploitation. The most significant repercussion of the 1890 Berlin Conference for Sweden appears to be the establishing of a framework for Swedish legislation focusing on women as a specific group needing protection.

### *The period of restrictions (1900–1962)*

The restrictions as to the employment of women were legislated separately, beginning with the

1900 Act prohibiting women from working in dangerous environments, mines and quarries, and within four weeks after the birth of a child. The prohibition as to night shift work came in 1909 with the legislation and ratification of the Bern Convention. These restrictions were united in the Swedish Workers' Protection Act of 1949.

#### *1. The prohibition of work in mines and quarries and the mandatory maternity leave – The 1900 Law*

The first protective legislation concerning adult women was enacted in 1900 with the Act concerning Minor Children and Women Employed in Industrial Work. The legislation appears to be the result of a desire by Swedish politicians to be viewed as offering the same amount of worker protection as other industrial, particularly European, countries.<sup>5</sup> Sweden had sent delegations to the 1890 Berlin Conference, the 1897 Zurich International Congress and the 1900 Paris Congress, congresses which all focused on the issues of protective legislation for children and women.

The pertinent section of the 1900 Act with respect to women states:

§7 With employment in industrial work, women who have given birth to a child may not be employed in the first four weeks after the birth of the child, unless they can produce a physician's certificate stating that they can return to work earlier without causing any physical harm.

As to employment underground in mines or stone quarries, women may not be used nor minor children of the male sex under the age of 14 years.

The first paragraph was to remain largely unchanged until 1977. In the Proposition to the 1900 Act, it was recommended that the prohibition of the use of women in mines and quarries be adopted, not based upon any existing abuse within Sweden, but as a preventive measure against potential abuses as cited by other countries during the 1890 conference (Prop. 1900:57, 33). The clause concerning the mandatory maternity leave was not elaborated upon in the proposition.

The analysis here echoes that given by the

1875 committee, stating that as the number of women engaged in this type of work was not great, it was just as well to legislate a prohibition to prevent future abuses such as those found in England and Belgium (SOU 1877, 113). These findings can be contrasted with those in SOU (1938:47, 73), stating that during the 1600–1700s, women comprised 10 to 20% of the workers in mines and in 1805 up to 25% in certain sectors. Though these are not the statistics for the years 1875 and 1900, it is difficult to imagine that the numbers had gone from 25% to almost 0% in that relatively short time frame.

Two items should be noted concerning the legislation adopted. A woman, if she could produce a physician's certificate, could return to work earlier than four weeks. Leeway existed in the act, if somewhat miniscule, for exceptions, mainly owing to the fact that a mandatory four-week period was seen as not fulfilling the needs of all women (Prop. 1900:57, 16) and that at that time, no compensation was available for the enforced maternity leave. Second, the legislation was restricted to industrial work, affecting only a segment of working women.

## *2. The prohibition concerning night work – The Bern Convention*

The next restriction placed upon the employment of women was the prohibition against night work adopted in 1909. The committee appointed in 1905 to investigate the issue of night work hesitantly tendered a legislative proposal, stating that:

The committee finds that these statements [from several different women's organizations], coming from such circles, most closely affected by the legislation in question, should not be ignored, especially now, when more and more voices are being raised for the removal of the limitations which to date have been placed in the path hindering women's efforts to attain complete equality with men in public life as well as in employment. Portions of the [Bern] Convention's proposals would, however, in segments of the labor market where women have to date been mainly treated as equals to men, create rather significant changes in a direction altogether contrary to the

one, as stated above, taken by the continually increasing opinion underlying these efforts.

It also appears to the committee that the question can be raised as to how the care of present and future generations, and a consideration of women's generally weaker body constitution in comparison to men's – the two main viewpoints which ought to be the basis for the convention – require so significant a limitation of the freedom to adapt work hours to existing need, a limitation which must be the consequence of the convention's, according to the committee's understanding, altogether too restrictive regulations (SOU 1907, 8).

The committee further noted that the statistical investigation demonstrated that women were not employed in night-shift work to any significant extent in Sweden. However, women within a certain industrial operation, namely women typographers, would be significantly affected by the convention.

As noted by the committee, the proposal for the prohibition against women working night shifts was hotly debated. The Social Democratic Women's Organization submitted a rebuttal, arguing that night work was harmful to both men and women and that there was no evidence demonstrating that it was more harmful to women (Carlsson 1986).

When originally drafted in the late 1800s, the restriction with respect to night work was sought primarily for the purpose of ending the exploitation of vulnerable workers. The debate concerning night work took on another facet in the 1900s, the competition for employment between male and female workers: "One must always with sympathy favor laws that drive women away from the labor market. If there were no women in the factories, unemployment would not be so great" (Bohman 1979). In certain industries, women's wages were half those of their male counterparts, creating a larger demand for female workers than male workers. Women, as competitors with men in the labor market, began to be blamed for unemployment, a theme that would be prevalent until after World War II.

Despite the committee's clear hesitation, and the opposition to the prohibition by different women's groups, the King submitted a proposal in 1908 for a proclamation restricting night work in accordance with the Bern Convention. Several reasons were given by Parliament for its rejection of the prohibition: despite the fact that only a small number of women were currently affected by the proposed legislation, the statistics showed that an increasing number of women would be affected. A provision against night work would not guarantee that women would be able to fulfill their duties in the home. With such a restriction, women would be placed at a disadvantage to men on the labor market owing to the limitations on working times and overtime, and industries would be inconvenienced (*Riksdagens skrivelse* 1908, No. 198, 3–4).

Motions reintroducing the legislation were made during the next session of Parliament. The strongest argument in favor of the restriction was that its international character should be given significant consideration: It was obvious that if the abuses of modern industrialism were to be curbed, it must happen on the international level. As international cooperation had succeeded in drafting the prohibition, it was both in the interests of the prohibition and in future areas of cooperation that it be adopted and that no link in the chain be broken. It was further argued that Sweden was the only country present at the Bern convention that had not yet adopted suitable legislation (Motions 1909 (FK No. 34, 5) and (AK No. 64, 5)).

The Legal Committee once again recommended rejection of the proposal (1909 Lagutskottets Utlåtande No. 43, Saml. 7, 21). In a reservation made about the Committee's reasoning, Lindhagen summarizes the history of the protective legislation with respect to women, characterizing it as a remnant of the guardianship attitude, noting that no actual investigation had been conducted with respect to the effects of nightwork on women or men. He also points at the fact that, with respect to the issue of protection of future children, men as well as women contribute to the creation of

children, with both sexes meriting protection (1909 Lagutskottets Utlåtande No. 43, Saml. 7, 23–24). He concludes by stating:

When we come down to the wire, it is argued that the main motivation for casting ourselves in the arms of this legislation is that it is international. It is an injury and disgrace for us to not be included in the European concert in this area. A contrary opinion is seen as an expression for a one-sided feminism. The rebuttal to this, with reference to that stated above, can only be that it cannot be considered advantageous or flattering to be included in the finale of this male chorus of a dying masculine culture. We could have been the first European people to enact a general voting right for both men and women, but we chose to be the last, adhering to old ways. We can still be the first, in employment protective legislation, to place adult men and women at each other's side as comrades. (1909 Lagutskottets Utlåtande No. 43, Saml. 7, 25.)

The proponents of the prohibition termed themselves as belonging to the "masculine renaissance" (Motion 1910, AK No. 150, 3).

However, the attitude in the Parliament had changed and the prohibition was adopted. The reasons for the adoption were not given, but the most apparent reason, based on the existing legislative history, is that the proposal was reintroduced as an act, and not a proclamation, placing the matter within the ambit of Parliament's legislative power as opposed to that of the King. A circumstance that had little to do with the rights of women. Nothing else, as mentioned, with respect to Parliament's rejection in 1908 had changed in favor of adopting the prohibition in 1909.

The 1909 Act prohibited, within certain industrial operations consisting of more than ten persons, the use of women in shifts of more than 13 hours and between the hours of 10.00 p.m. and 5.00 a.m. The King, after the passage of the legislation, ratified the 1906 Bern Convention. With the enactment of this legislation, all three of the restrictive prongs as found in Council Directive 92/85/EEC existed in some form within Swedish law.

In 1910 and 1911, motions were introduced for a similar prohibition with respect to men.

Both motions were voted down. Motions to exempt typographers from the prohibition were also introduced and voted down. The negative impact of the law was almost immediately apparent. Women typographers, the industrial group mentioned by the committee, a highly paid, educated and skilled group of employees, numbering approximately 500 at the time the legislation was passed, were reduced to only 4 by 1934 (Bohman 1979, 34).

### *3. The 1912 Swedish Workers' Protection Act*

In 1912, the King's proposition regarding an overhaul of the laws with respect to workers' protection to strengthen their enforcement mechanisms and to incorporate the several different pieces of legislation into one law was adopted. The 1912 Act was in force, in a more or less amended condition, until 1949. The prohibition against the use of women in mines and quarries was retained. Maternity leave was extended to six weeks instead of four. The right to a leave of absence two weeks prior to the birth of a child was created, as well as the right to work-breaks for nursing mothers.<sup>6</sup> The King was given the authority to determine that certain types of work were too dangerous for women and prohibit their employment within those areas. The 1909 Act and the ratification of the 1906 Bern Convention with respect to the prohibition of the use of women in night shifts were retained separately in their entirety.

The arguments in favor of retaining the prohibition basically repeated those given in favor of the adoption of the restrictions; women's weaker constitutions (and here, weaker understanding), their duty to the home and to future generations. The arguments proffered by women's groups concerning the prohibition against night work were simply swept away. The other arguments offered in favor of the proposed legislation once again were dominated by a reliance upon the experiences and arguments as given by other European countries as opposed to any actual need or experiences in Sweden (Prop. 1912:104, 177).

An international revision of the 1906 Bern Convention was drafted at the 1919 Washington Conference. The Swedish delegation noted:

That which has not been remarked upon is the fact that representatives of specific women's issues have eagerly fought the legislation as unjust and for women, harmful and humiliating. It must be admitted that this last-mentioned viewpoint is not completely lacking in reason. (Prop. 1931:40 at 106.)

The Social Political Delegation went on to state that the current legislation with respect to women working night shifts, as based on the 1906 Bern Convention, could be seen as going beyond its purpose of protecting the health of women workers as well as their capacity to fulfill their roles as mothers. The legislation, as proven by experience, according to the delegation, created unmotivated difficulties for women workers, had the contemptuous character of a "class"-motivated legislation, and favored men in the competition for employment between men and women. In addition, the legislation was almost impossible to enforce. As the 1919 convention would extend the jurisdiction of the legislation to all sectors of labor, the delegation recommended not adopting the convention.

The Swedish National Board of Health and Welfare, in its comments issued in 1925 about the 1919 convention, concurred with the delegation's 1922 conclusions. It cautioned, however, that the actions demanded by the women's organizations would require the repeal of the Bern Convention, an act that would create considerable attention within the circles of international cooperation and which should only be taken for compelling reasons. The Board did not dare state whether such reasons presently existed, calling for further investigation (Prop. 1931:40, 108). The 1919 convention was not implemented in Swedish law.

The early 1920s were positive for women with respect to several legal developments. Married women finally received full legal capacity in 1920 with the enactment of the new Marriage Code. They could now freely accept employment, or enter into trade without their

husband's consent or suretyship, as was still required by the 1864 Proclamation. Women were given the right to vote in 1921 and were given the right of equal access to state employment (with the exception of the priesthood) in 1923. Access to the right of public employment coincided with a period in which men were leaving the low-paid public sector jobs in favor of higher-paid private sector jobs (Frangeur 1998).

A depression hit Sweden in the 1920s, with unemployment reaching over 27% according to the statistics kept by the labor unions. Motions were introduced to restrict the right of married women to state employment. In 1925, 1926 and 1927, motions were put forward for the state to take action to encourage women voluntarily to terminate their state employment upon marriage for the purpose of providing better income possibilities for men and unmarried women in order to help fight the rampant unemployment existing at the time.<sup>7</sup>

In 1931, revisions were made to the 1912 Workers' Protection Act, prompted in part by the 1919 Washington Conventions. The resulting modifications with respect to women's issues were modest: women now had the right to a six-week period of leave before the birth of a child without needing to demonstrate a health risk. The prohibition on women working night shifts was discussed, with a consensus that the legislation was satisfactory neither to women nor to industry (Prop. 1931:40, 11). Despite this, the prohibition was integrated into the revised 1912 Act. Revisions were also made to the maternity leave compensation program: industrial female workers were now entitled to 56 days of economic compensation for maternity leave, while other female employees were entitled to 30 days, reflecting the difference in the job sectors between industrial workers with their mandatory maternity leave of six weeks, and the remaining female workers having no such obligation.

The motions introduced in the 1920s calling for restrictions to state employment of married women were renewed in the 1930s. In 1934, nine such motions were submitted to the

Parliament.<sup>8</sup> Two state investigations were commenced specifically to address the issues raised in the motions, and generally to address issues relating to the employment of married women, to be conducted by the Population Commission and the Women's Employment Committee. The Population Commission investigated issues concerning the low marriage and birth rates, and the family structure generally.<sup>9</sup> It proposed legislation, enacted in 1939, prohibiting employers from terminating employment based upon marriage or pregnancy, as the commission found that many women were choosing not to marry, as a marriage often resulted in the termination of employment (SOU 1938:13, 12). In the 1945 proposed amendment to strengthen the act, it was estimated that as many as 10% of the abortions performed were motivated by a fear of losing employment (Prop. 1945:368, 9).

The Women's Employment Committee investigated the effects of married women's employment on the labor market and whether further restrictions of employment rights in accordance to the motions would be feasible or desirable. The committee concluded that any further restrictions regarding women's employment, particularly married women's employment, would be unreasonable, given women's increasing role in the economic sector. With respect to the existing prohibition of night work, the committee was against the prohibition, understanding that international obligations made its repeal difficult. The committee suggested amending the prohibition to make it more flexible, concluding by "expressing the hope, that equality in this respect can be reached for men and women through the cessation of night work generally as an unsuitable and unhealthy form of work for one and all" (SOU 1938:47, 201). The central problem, as viewed by the committee, was not the employment of women, but rather facilitating women's rights to marriage and children, goals that ought to be the focus of any legislation enacted with respect to women's employment rights (SOU 1938:47, 333).

#### 4. *The proposed extension of the night-shift prohibition*

In 1935, the question was raised about whether Sweden should ratify yet another convention with respect to women working night shifts, the 1934 Geneva Convention, a revision of the 1919 Washington Convention. This Convention differed from the current Swedish legislation in three main aspects, operations of less than ten employees would be included, the time frame would be changed, and women having management positions would be exempt from the prohibition. One argument offered against the adoption of the Convention was that no reason existed to prohibit older, unmarried women from having the same jobs as men (a fact that was true since the beginning of the debate about the prohibition). As the range of labor covered under the new convention was much broader, it was determined that it would “unquestionably cause, in many areas, effects which for women workers would be noticeable and unjust” (Prop. 1935:84, 4). The convention was not adopted.

#### 5. *The 1949 Swedish Workers’ Protection Act*

An overhaul of the 1912 Act was proposed in 1948. The proposed legislation would extend the coverage of the mandatory maternity leave to include all female workers, not just industrial workers. Each of the women’s organizations consulted with respect to the proposal was against it, arguing that instead of a general prohibition in the law, the problem should be resolved by giving the *right* to women of a maternity leave with adequate economic compensation (SOU 1946:60, 479).

The night work prohibition was retained without change. The proposal was made also to extend this prohibition to all female workers, as compatible with ILO Convention 89. Women’s groups argued that the prohibition should be repealed in its entirety. The Legal Committee found that as Sweden was currently bound by the 1906 Bern Convention, it could not amend the existing law (1948 Andra lagutskottets

utlåtande No. 62, 53). The prohibition was retained in its entirety, as was the prohibition on women working in mines and quarries. The Minister responsible stated that although the prohibitions regarding mines and quarries ought not to have a significant impact, they should be retained as Sweden had ratified the 1935 Convention regarding the Employment of Women in Mines (1961 Andra lagutskottets utlåtande No. 23, 3).<sup>10</sup>

The 1906 Bern Convention was denounced in 1949. Freed from the constraints of the international cooperation, changes were proposed in 1950 to the night work prohibition, to renew the authority to grant exemptions and to render the prohibition consistent with ILO Convention 89. Although ILO Convention 89 was not ratified by Sweden, it was viewed as desirable for Swedish legislation to mirror the resolutions agreed upon by the San Francisco Convention. The proposed changes, enacted in 1951, were a softening of the prohibition: the mandatory night rest could consist of either a prohibition of work between 10.00 p.m. and 5.00 a.m., or any seven-hour stretch falling within the time period of 10.00 p.m. and 7.00 a.m. (Prop. 1950:43).

In 1957, motions were put forward to investigate the repeal of the prohibition of night work for women, with the recommendation of the Legal Committee to reject the motions being adopted.<sup>11</sup> In 1960, the Board of Occupational Safety proposed amending the 1949 Workers’ Protection Act by transferring the authority to grant exemptions to the Board. A state investigation of the proposal was commenced.

Motions were again presented in both chambers in 1960 for an investigation into the repeal of the prohibitions concerning night work for women. The prohibition, it was argued, prevented Swedish industry from maximizing its labor force, placing Sweden at a disadvantage with respect to competing countries. Sweden, it was argued, was losing the industrial advantage it had after World War II, and was even lagging behind with respect to capital investments owing to industry’s inflexibility as a result of the prohibition (Motion 1960; AK No. 26, 25).

## *The birth of the modern period*

The dismantling of the restrictions with respect to women's employment, once begun, took a period of 15 years to complete, beginning with the repeal of the prohibition of night work in 1962, then the transformation of maternity leave from an obligation to a right in 1976, and finally, the repeal of the prohibition of women working in mines and quarries, with the passage of the Work Environment Act in 1977.

### *1. The repeal of the night work prohibition*

Motions were put forward again in both chambers in 1961 for the repeal of the prohibitions concerning night work for women. The prohibition, it was argued, was antiquated and inconsistent, as women were prohibited from working in industrial sectors at night owing to health reasons, but could work night shifts, for example at hospitals, without any harm. The Legal Committee recommended that treatment of the motions be postponed until the already commenced state investigation had been completed (Motion 1961 (AK No. 234, 7); 1961 Andra lagutskottets Utlåtande No. 23, 10). The legislative proposition, finally submitted in 1962, as a result of the investigation went a step further than the proposed amendments of the Board of Occupational Safety. It proposed that the prohibition concerning women and night work be repealed in its entirety, that the required night rest be applicable to both sexes and that the Board of Occupational Safety be given the authority to grant exceptions to the prohibition of women working in mines. Among the reasons given for the proposal was the fact that "[a]mong our women, there is a labor force reserve, which our industry is eagerly seeking for its continued expansion" (Prop. 1962:167, 10). The proposal was accepted by the Parliament in its entirety.

### *2. The Work Environment Act of 1977*

In 1976, the committee appointed to draft a Work Environment Act issued four separate

reports on the revision of the regulations found in the 1949 Act and the shape modern legislation should take with respect to workers' protection. The committee noted that §35, forbidding the employment of women within four weeks after the birth of a child, as drafted in 1900, was the only regulation in Swedish legislation which guaranteed all female employees the right to maternity leave after the birth of a child. The legal status regarding an employee's right to maternity leave was unclear from the different applicable laws, but the issue was more suitable to legislation other than the Work Environment Act. The committee proposed amending the 1945 Act prohibiting employers from terminating employment on the basis of a marital engagement, marriage or childbirth, to include a provision allowing a maternity leave beginning six weeks prior to and ending six weeks after the birth of a child, in compliance with the European Social Charter (SOU 1976:1, 443).

The Work Environment Act Committee also found that the restriction placed on women working in mines and quarries was unwarranted, as no evidence existed demonstrating that women suffered more unduly than men in such an environment (SOU 1976:1, 113). The repeal of the paragraph was recommended. The committee found that it would instead be more appropriate for the Board of Occupational Safety to be authorized to determine suitable levels of work exposure for both sexes and to issue regulations accordingly.

Before the proposal was accepted by Parliament, the 1976 Parental Leave Act was passed, rendering the committee's proposal on maternity leave a moot point. The Work Environment Act was legislated in 1977, repealing the prohibition of women working in mines and quarries

### *3. The transformation of an obligation to a right*

An extended right to leave encompassing both parents, as well as economic compensation, was implemented with the Parental Leave Act of 1976. The 1945 Act was repealed, and a

prohibition against terminating the employment of employees for exercising their rights under the new Act was included. The right of employees to parental leave was established in §3 of the Act. The right allotted was in accordance with the 1962 Act regarding Public Insurance, with the employee entitled to leave in accordance with §3 after either 6 months of continual employment, or 12 months of employment within the past two years. Female workers not eligible for parental leave under §3 were given the right to maternity leave beginning six weeks before and ending six weeks after the birth of a child. The decision on whether to take parental leave was left in the hands of the parents, with employers barred from refusing to accommodate the decision of the parents.

### *Swedish legislation in compliance with EU directives*

In response to Council Directive 92/85/EEC, Sweden originally amended several statutes to insure compliance, including the Parental Leave Act, which was amended in §4 to extend the periods from six weeks to seven weeks in accordance with Article 8.1 of the directive.

A specific requirement of an obligatory two-week maternity leave was originally considered unnecessary, based on the findings of the committee. Nothing within the Swedish employment environment indicated that women, who had recently given birth or who were nursing, had difficulty under the current legislative scheme in taking maternity leave.

The present legislation was found sufficient. The requirement of a mandatory maternity leave was considered alien and unmotivated with respect to the view of women taken by Swedish legislation as a whole. Ninety-eight percent of all women having children took leave in connection with the birth of a child, and the remaining 2% were assumed to take sick leave instead. A Swedish practice, that women who

have recently given birth take maternity leave, was found to exist. A mandatory requirement was viewed as unnecessary to fulfill the requirements of the directive (SOU 1994:41, 195).

In addition to the legislative amendments, the Board of Occupational Safety issued specific regulations in 1994, applicable to workers who are pregnant, nursing or have given birth to a child within the previous 14 weeks, and have notified their employer about their status. Under the regulations, the employer has to assess the risks to the employee and take any measures necessary to avoid them, and where they cannot be avoided, the employee is to be given a different work assignment, or where that is not possible, a leave of absence. Certain types of work are totally prohibited after the employee has given notice of her condition. The topic of night work emerges here once again, but in a different form. Pregnant or new mothers cannot be assigned night-shift work if a physician's certificate is shown stating that such work would be harmful to the employee's safety or health. In such cases, she is to be offered daytime employment whenever possible. The Board notes that night-time employment generally does not pose any risk to a pregnancy or nursing, but in individual cases, can be too taxing. The decision on whether to work night shifts has to be made between the employee and her physician.

### *The Commission's response*

In December of 1998, the European Commission, in accordance with Article 226,<sup>12</sup> gave formal notice to Sweden for its failure to legislate a mandatory two-week maternity leave in compliance with Article 8, paragraph 2 of directive 92/85/EEC, resulting in the Commission finding that Sweden was in violation of the directive. As support for its interpretation of the need for mandatory

legislation to comply with Article 8.2, the Commission stated:

The two weeks of mandatory maternity leave are necessary for the health of the mother and the child, and to secure and protect against the pressuring of women to work until the last minute or to return to work too early. They also guarantee that women wishing to work late into their pregnancy, or to return immediately to work, must be away at least two weeks due to health reasons.<sup>13</sup>

The Swedish Government, in its response to the Commission dated February 25, 1999, argued that according to the Swedish legislative scheme, an employer cannot deny an employee the right to maternity leave for a period of up to 14 weeks. The effectiveness of the Swedish legislation, the Government argued, is demonstrated by the fact that the practice exists in Sweden that women who have recently given birth utilize their right to take maternity leave. Sweden fulfilled the requirements of the directive.

The Commission responded on August 6, 1999 with a reasoned opinion in accordance with Article 226, repeating verbatim the reasons given above for the mandatory nature of the leave. In addition, Sweden's argument that the directive was implemented through practice was rejected by the Commission, relying on the cases of *Commission v. The Netherlands*<sup>14</sup> and *Commission v. France*,<sup>15</sup> for the proposition that a practice mirroring the protections mandated by a directive does not excuse the omission of legislating the protection. The Commission argued that legislation was required to ensure that individual persons are aware of their rights and are able to assert them. As a result, the Commission found Sweden still to be in violation of the directive.

In the response to the reasoned opinion submitted by the Swedish Government on September 30, 1999, Sweden stated that Swedish legislation created the right for women, not the obligation, of a maternity leave. However, as the Commission found Sweden to be in violation of the directive, a legislative

proposal would be drafted in the fall of 1999 and submitted to the Parliament in March 2000. This was enacted as law as of August 1, 2000.

## *The lessons of history*

Before we can discuss the alternatives available to the Swedish government concerning the actions of the Commission, we must first identify the lessons that can be drawn from the history of women's employment rights, as presented above. The rather lengthy historical narrative presented above was necessary to demonstrate that none of the actions, taken individually, were a fluke, but rather consistent with the pattern of behavior and attitudes prevalent with respect to these issues.

The first, and most immediate, lesson that can be drawn is that the rights of women in Sweden concerning employment have seldom been restricted, or expanded, based upon any actual consideration of women. Instead, they have been more strongly tied to the economic situation of the country or the need to protect future generations, as opposed to any desire for equality between the sexes. The same issue can be raised regarding the law of the European Union. The first article on women's rights, Article 141 (formerly Article 119) concerning equal pay, was France's resolution to the problem of unfair competition between the Benelux countries. France, having a national policy of equal pay for equal work, found itself at an economic disadvantage when competing in the market place with countries such as the Benelux countries, as women in those countries were paid less than men. To force more equal market conditions, France proposed Article 119, which was adopted (Arnulf 1999).

The earliest motions in Sweden to expand women's rights were based on economic necessity: a surplus of women existed in a society in which all rights hinged upon men. The alternative to expanding women's rights was to send them *en masse* to already over-flowing workhouses. Restrictions were placed upon the employment of women at times when the

country was suffering low economic conjunctures. When the depression hit, motions were passed to restrict the rights of married women even further, for the benefit of the employment of men and single women, despite the fact that women could vote and married women had finally attained complete legal capacity. After World War II, when Sweden was enjoying one of the highest standards of living in the world, the dismantling of the restrictions began so that industry could exploit the potential labor force to its fullest capacity.

The second lesson that can be learned is that a consistent deference has been given by Swedish politicians to international efforts of cooperation at the cost of women's rights. The original restrictions, as enacted in the 1906 law, were not in response to any actual needs or experiences within Sweden, but rather as a result of the influence of the international conferences. This is true of each of the restrictions adopted; the problem did not exist to any great extent in Sweden, but based on the experience of other countries, the potential abuse should be remedied. With the adoption of the 1906 Bern Convention, the opinions of Swedish women, as well as Swedish statistical evidence, were blatantly ignored in favor of the experiences and statistics of other European countries, as presented at the conventions – foreign experiences and statistics for which there was little or no ability or desire to verify for their accuracy or objectivity.

Once the international conventions were adopted, and proven to be disadvantageous to Swedish women, the argument was put forward that international obligations made it difficult, if not impossible, to repeal the legislation. Even after the repeal of the 1906 Bern Convention, when Sweden was free to repeal its legislation concerning the night work prohibition, the proposal instead was to follow the next convention as faithfully as possible. Another interesting aspect of the international cooperation is the Swedish response to conventions restricting the rights of adult males. As seen with the legislation on general restrictions of the workday and work week

applicable to all workers, Swedish politicians found that they could then deviate from the international cooperation. When it came to restrictions on the employment of women, a fairly inexpensive concession from the male perspective, the need for participating in the international arena became overwhelming.

The development of the legislation with respect to Sweden is unique within Europe, for several reasons. First, Sweden has extensive legislative history records available, so that it is fairly simple to follow the debates with respect to these issues. Sweden was also rather late with respect to women's rights, with England and France almost a hundred years ahead in certain issues. Despite this tardiness, Sweden was one of the first countries to implement an extensive parental leave program based on the view that parental leave was a right for the parents, not an obligation. The circle with respect to maternity leave, with the obligatory leave at the beginning of the century, to the expanded right to leave in the 1970s, was closed in a way that was unique in Europe. The council directive forced open this closure. The focus on the development of Swedish law here does not detract from the universality of the lessons that can be drawn. As stated in the beginning, legislation singling out a group must be viewed sceptically. Here, what appears to be a step forward for women in fact cloaks a patriarchal attitude that was, to a certain extent, already dismantled in Sweden in the 1970s.

## *The choices*

Now, almost one hundred years after the adoption of the first restrictions on women's employment, Sweden once again faces the choice of appeasing international pressures, or fighting for the rights of its citizens. What argument could the Swedish government have made?

Sweden's membership in the European Union entails the obligation to harmonize Swedish legislation with that of the European Union, in accordance with Article 10 of the Treaty. The choices presented by the Commission with

respect to the directive were simple: either enact the directive as prescribed by the Commission or the Commission would file a lawsuit for a breach of the treaty, in accordance with Article 226.

The argument presented by the Commission is not as clear as it seems. Both of the cases cited by the Commission, *Commission v. The Netherlands*, and *Commission v. France*, for the proposition that practice is not legislation, are distinguishable with respect to Sweden's implementation of Council Directive 92/85/EEC. In the older case, *Commission v. France*, a French governmental regulation existed favoring French nationals in direct violation of the treaty. The French government argued that though the regulation existed, the practice was to enforce it in a non-discriminatory manner. The court naturally rejected this argument. No such legislation exists in the present case that can be viewed as a direct violation of the treaty.

The case of the *Commission v. The Netherlands* can also be distinguished from the present situation. In this case, a directive drafted for the protection of wild birds mandated that the member states "shall take the requisite measures to establish a general system of protection for all species of birds referred to..."<sup>16</sup> This language differs from that found in Directive 92/85/EEC, which states that "[t]he maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice". The first argument that can be made here is that practice is acceptable under this directive where it was not in the case cited. Requiring a compliance of more than 98%+, as the Commission appears to be doing, in order to constitute a sufficient practice, would be rendering meaningless the use of practice in the efforts towards harmonization.

The other distinction that can be made is that The Netherlands' government argued that restrictions with respect to certain birds had not been enacted, as those birds did not exist in The Netherlands, thus there was a practice of not hunting those birds. This "practice", based on an omission, is also distinguishable from the

practice existing in Sweden, based upon actions supported by the legislation.

If the case of the *Commission v. The Netherlands* were not distinguishable, Sweden's capitulation would be inevitable, as no further argument could be made. In such a case, the interpretation the Commission must be giving the case, and Sweden's implementation of the directive, is that as the two-week maternity leave is not mandatory, women have the choice of not taking it, rather like the hunting of hypothetical birds, thus the practice in Sweden is not sufficient.

If this is the interpretation given by the Commission, then we are back to where we began. Women are not capable of making correct decisions on behalf of themselves and their children, so legislation will be implemented that will make the decisions for them, reminiscent of each of the restrictions placed on women's employment during the early 1900s. The reason given by the Commission, to prevent women from hurrying back to work, supports this conclusion. An argument based on the best interests of the child also falls short here, as women have the choice of taking the mandatory two weeks leave either directly before or after the birth of the child, and if taken before, the leave is of a reduced value to the child. The legislation is not even tailored to meet the needs it supposedly protects. Women once again are objects of guardianship, and the rights of women have once again been sacrificed to appease the gods of international cooperation.

#### NOTES

1. This article looks only at the very narrow issue of the mandatory maternity leave as implemented in Sweden and by EU law. For a more extensive analysis of EU law generally with respect to the rights of women, see Karin Lundström (1999).
2. Translating is always problematic, especially with respect to the differences not only between languages, but also between the political systems, cultures, etc., behind the languages. In Sweden, different types of laws were legislated in a manner dependent upon the prevalent division of power. *Ordning, förordning* and *kungörelse* (each translated

- here for the sake of simplicity as “proclamation”) could be issued by the King (and after 1975 formally by the Government) without requiring Parliament’s approval. A *lag* (“act”) was legislated by the Parliament as proposed by the King and later the Swedish Government.
3. The granting of legal capacity to married women, as well as the right to enter into trade without their husbands’ consent and suretyship, did not occur until 1920, with the new Marriage Code.
  4. See Motion 1893 (AK No. 215). Much of the debate in the early 1890s can be attributed to one gentleman, Fridtjuv Berg, who introduced motions in the second chamber to limit the workday of all adults, and, at the very least, of women, in 1891 (No. 191), 1893 (No. 215), 1894 (No. 139) and 1895 (144). Berg relied heavily on the statement made by the 1875 committee, that a restriction concerning women would not be too arduous for industry, in his arguments for a limitation of the workday. This comment made by the 1875 committee had no basis in any actual investigation conducted on that specific issue, but rather was in the nature of a general observation.
  5. Of the several motions connected to the proposal for the 1900 Act, not one discusses the inclusion of women in the act. See Motions 1899 (AK No. 238) and 1900 (AK No. 165, 171, 172 and 178).
  6. Concerns were raised about extending the maternity leave to six weeks. The Finance Committee stated that the leave should not be extended until after a social insurance program was enacted providing compensation for mothers (Prop. 1912:104 at 55 and 132). The Committee expected that a maternity leave compensation program would be implemented within the next year, 1913, but it was not implemented until 1931. Instead, a sick-leave compensation program was introduced in 1913, and new mothers were compensated under that program until the passage of the 1931 law (SOU 1954:4, 14).
  7. Motion 1925 (AK No. 229), 1926 (AK No. 26 and 201) and 1927(AK No. 252 and 256).
  8. Motion 1931 (AK No. 51), 1933 (AK No. 394) and 1934 (AK Nos. 29, 146, 366, 368, 488, 489 and 502) and (FK No. 23 and 269). The motions introduced in the 1920s and 1930s appear to follow the pattern of unemployment, with unemployment reaching a high (27%) in the early 1920s, then a lull

(12%), then a high again (22%) in the early 1930s, following a decline that by 1950 was at a level of only 3%, which lasted until the 1970s (Norborg 1995).

9. In 1930, Sweden’s marriage frequency reached an all-time low and in 1934, Sweden’s nativity rate reached an all-time low.
10. In 1936, ILO Convention No. 45, drafted in Geneva in 1935, concerning the use of women in underground work, was ratified in Sweden. A denouncement of the convention could occur at the earliest in 1967 (Prop. 1962:167 at 7).
11. Motion 1957 (AK No. 413) and (FK No. 330), 1957 Lagutskott Utlåtande No. 37.
12. Formerly Article 169 of the Treaty of Rome.
13. Letter dated December 30, 1998 from Pádraig Flynn, Member of the European Union’s Council, directed to Statsrådet Anna Lindh.
14. *Commission v. The Netherlands*, Case No. C-339/87 [1990], Rec. I-851.
15. *Commission v. France*, Case No. 167/73 [1974] Rec. 359.
16. *Commission v. The Netherlands*, Case No. C-339/87 [1990], Rec. I-851 at 867.

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