*Nordic Journal on Law and Society*
Vol. 07, no. 02 (2024), pp. 1-28
ISSN (online): 2002-7788
https://doi.org/10.36368/njolas.v7i02.396

NJOLAS

# Is the rights-based approach to social justice (really) the right way? Rightification and the question of social injustice

Håkan Gustafsson[1]

*Department of Law, University of Gothenburg*

Eva-Maria Svensson[2]

*Department of Law, University of Gothenburg*

Do extended legal rights for individuals optimize resistance to inequalities and promote social *justice*? Rights-based approaches have gained ground globally, also in the Nordic countries noting a shift from political programmes on general welfare to individual legal rights and anti-discrimination provisions. The shift has taken place in a time when ambitions to create equal opportunities in society debilitates. The trend, captured with the concept 'rightification', relates to a general Neo-liberal transformation. In a Nordic context, this transformation brings with it ambiguous out-comes: it leads to an *individualisation* of rights, a *fragmentation* of rights and to a *disciplinary* function of rights. Social needs are 'framed' as rights, individual rights replace political programmes and solutions. We argue that the traditional Nordic model, a perspective that understands individuals in social context and that context as inherently constituted by relations of power, (still) offers additional value to the rights-based approach.
**Keywords:** rights-based approaches, social (in)justice, rightification, Nordic model, legal rights, equality.

## 1.Introduction and background

The backdrop of this article is the ongoing ideological transformation taking place in Sweden, from a universal and redistributive welfare model towards a neoliberal model characterised by marketisation and privatisation of welfare services. Legally, this means a strengthening of individual rights at the expense of universal welfare legislation with redistributive ambitions. The strengthening of individual rights is addressed by the concept of a *rights-based approach*. In a Swedish context such an approach can be contrasted to a *reform-based approach*. Each type of approaches aims to achieve social justice. However, in the Swedish context there is a risk with a rights-based approach: such an approach might lead to increased social inequalities and injustices. Strengthening individual rights as a mechanism to achieve social justice is a double-edged sword. Rather than using legal rights as a means of welfare, Sweden, as well as the other Nordic

[1] Email:hakan.gustafsson@law.gu.se

[2] Email:eva-maria.svensson@law.gu.se

countries, have a long tradition based on political programmes for general and collective welfare within what is often called the Nordic model or, as termed in this article, a reform-based approach.

The aim of this article is to discuss whether a strengthened rights-based discourse offers a way to resist different types of increasing social inequalities and political injustices in the context of a weakened redistributive welfare state. This article raises the question of whether extended legal rights for individuals are appropriate instruments to address the range of inequalities that dominate current Swedish society, and to counteract social inequalities and promote social justice on a larger scale.

We begin with a short background about the transformation of the Nordic model. The next section identifies various framings of social justice, the rights-based approach and, in an international setting, the contrasting charity-based approach. The reform-based approach is a third alternative, anchored in the Nordic welfare model and now exposed to change. With these sections as background, we introduce the concept of *rightification* (developed by Gustafsson 2018) to address the shift from primarily political solutions to legal rights assertion. The emergence of a rightification process entails some ambiguous outcomes, such as an *individualisation* of rights, a *fragmentation* of rights and a *disciplinary* function of rights, all of which are explained in detail below. We will also relate the concept of rightification to theories of post-politics to explain the new role of (social) rights. We will thereafter apply the concepts, using three examples: elder care, disability legislation and anti-discrimination legislation, and analyse the ongoing transformation of a strengthened rights discourse in the legal context. Finally, we conclude with relating legal rights to a broader context of 'the political'. We argue that there are more productive ways to address social (in)justice than with a regime of strengthened individual rights.

### *1.1 Transformation and changes*

The Nordic model is a well-known label in many areas (The Nordic Branding Project 2022). It signifies an extensive and universal welfare state model and it emerged in close connection with social democracy (Esping-Andersen 1990; Bergquist et al. 1999; Fritzell et al. 2001). Rather than using legal rights as a means of welfare, the Nordic countries have a long tradition based on political programmes for general and collective welfare, within the Nordic model. Such an approach to combat social inequalities and injustice is in this article articulated as a reform-based approach.

The traditional Nordic model has been challenged, both ideologically and in practice, by recent legal transformations of various kinds, including new legislative directions. The universalism and equalisation ambitions that characterised the post-war Nordic model (Stendahl 2016) have been challenged and questioned on economic and ideological grounds. The transformation has

been ongoing since the rise of neoliberalism in the 1990s (Rothstein and Vahlne Westerhäll 2005), but visible effects have intensified in recent years.

These transformations have been widely addressed and related to various aspects at both conceptual and practical levels, at different stages and in different places. We will in section 4 below give some examples relevant to this context. The ideological shift towards neoliberalism involves a rapid process of marketisation combined with new ways of organising services, *New Public Management* (NPM). Neoliberalism is also characterised by a high degree of individualisation (Brodie 2007), needs-tested services, contracts between individuals and organisations, and goal-oriented regulation combined with subsequent control measurements. The changes have been evident in the education system (Dovemark et al. 2018; Novak and Gustafsson 2020) and in healthcare (Katzin 2020; Angelis and Jordahl, 2014). Management through goals and decentralisation is supposed to lead to less detailed micromanagement, but there have been critical voices arguing that the result has been the opposite (SOU 2019:43).

The shift comes also with increased privatisation of publicly funded welfare services in Sweden and other Nordic countries. The welfare sector increasingly follows market rationality, despite signs of increased inequality because of, for example, the introduction of a freedom of choice model (Hartman 2011). The increase in inequality in Sweden between 1985 and the early 2010s was the largest among all OECD countries, although these countries still belong to the group of the most equal ones (OECD 2015). Despite strong overall income growth in 2021, income inequality increased significantly (SCB 2021). The growth of injustices and inequalities are worrying features in the Nordic context, given the area's strong ideological commitment to equality (Pylkkänen 2009). The Nordic countries have long viewed justice in terms of equal outcomes and mandatory political and legal measures (Svensson & Gunnarsson 2018).

This transformation reflects not only a significant economisation and marketisation of the welfare sector, but also similar trends in terms of democracy and its preconditions (see e.g. Brown 2015 for a similar analysis from an American perspective). Thus, the dismantling of democracy is notable also in Nordic legal and political landscapes. Indeed, the very idea of democracy is being transformed: a transition from deliberative participatory democracy to distinct electoral democracy has already taken place (Ålund et al. 2017). According to Brown, law in this transformation becomes a means to economise new spheres and practices, and functions as a medium to spread neoliberal rationality beyond the economic sphere, including to constitutive elements of democratic life itself (Brown 2015). This indicates a change of the expectations for the state, from an active welfare state to a passive state whose primary function is to ensure individual rights (Kenyon et al. 2017). Citizens are recast as consumers who freely choose welfare goods in a free market (Edström et al. 2016; Lewis 2013; Bauman 1998).

The changes described above are part of an ongoing transformation. This means that there are still elements of the Nordic welfare model left. And the model as a brand and idea is still very much alive (The Nordic Branding Project 2022). But the gap between the expectations of the welfare state and what this transforming version of the state delivers is increasing. The examples we discuss later in this article illustrate some of the more apparent changes that have occurred and are occurring.

*1.2 New Contexts*

The question of whether individual rights are appropriate to address inequality and injustice is both justified and reasonable, as various rights-based discourses on social justice have gained ground in Nordic countries (cf. Vik et al. 2018; Kotkas and Veitch 2017; Svensson 2020a), as well as at the global level (Cornwall and Nyamu-Nusembi 2004; Uvin 2010; Banakar 2010a and 2010b, and, from another perspective Moyn 2018). Due to the increasing dominance of rights-based discourse among EU membership, the Nordic countries have witnessed a shift in focus from political programmes for general welfare to an assertion of individual legal rights (Rothstein and Vahlne Westerhäll 2005). This is captured, inter alia, by the concept of *access to justice* (Lucy 2020; Letto-Vanamo 2017; Pylkkänen 2007; Cappelletti and Garth 1978) together with a strong emphasis on anti-discrimination policies (Hellum et al. 2023). This change occurs in parallel with a decrease in political ambitions to create and maintain equal opportunities in society which goes beyond mere economic equality (Flood, Nordblom and Waldenström 2013).

Rights-based discourses are evolving while attention to larger societal and political measures, generally considered more effective in addressing social justice, is increasingly sidelined (Hellum et al. 2023; Pylkkänen 2009). A rights-based approach certainly reflects international human rights standards that aim to counter discriminatory practices and prevent unfair power distribution. But the primary focus of this approach is nonetheless on empowering the individual, i.e. the singular individual. This sends a clear signal that the freedom to make choices and the responsibility to realise oneself lies solely with the individual alone. Thus, it is implied that the choices made by the individual are his or her own responsibility. This assumption reflects the strong individual character of recent rights-based discourse.

In the Nordic context this is clearly a challenge to the "strong tradition of turning to parliament to solve societal problems" (Bailliet 2016; see also Rothstein and Vahlne Westerhäll 2005). Despite this tradition, social needs now tend to be increasingly articulated or framed as rights. It is questionable whether individual rights can replace or counteract a weakening of trust in political programmes and solutions, and whether substantive social policy issues can be resolved in courts characterised by a deeply formalistic legal culture.

The strengthening of individual rights is thus a double-edged sword in a legal culture that has traditionally been characterised by legislative action rather than reliance on the judiciary. (Sunde 2021).

## 2. Framing social justice

In this section, we will briefly identify three ways of approaching social (in)justice. All are present in the dominant discourse and form the comparative basis for this study. These approaches are theoretically constructed, but reflect particular political discourses and sociological conditions, and are used in different contexts. As theoretical constructs, they are distinct, but as political and sociological approaches they overlap and coexist. They are labelled as follows: (1) the rights-based approach; (2) the charity-based approach; and (3) the reform-based approach or the traditional Nordic model. In international research, the first two options are widely referenced (e.g. Johnstone and Ámundadóttir 2013; Uvin 2004) and often implicitly regarded as the only available options, each in tension with each other. The charity-based approach is sometimes also described as the welfare-based model (Johnstone and Ámundadóttir 2013), which is confusing due to the different character of this model as compared to the Nordic welfare model, or, as we call it here, the reform-based approach. Arguments from the rights-based approach often challenge the charity-based approach, arguing that a model based solely on charity may violate the dignity of the individual. Far from being acknowledged in standard international discussion, the Nordic model is different from both the rights-based and the charity-based approach. We will take a closer look at the three approaches, analyse their ideological context and contrast them to each other.

### 2.1 *Three approaches*

The *rights-based approach*[3] argues that social justice and rights are based on legal obligations (Cornwall and Nyamu-Nusembi 2004; Uvin 2010; Banakar 2010a, 2010b; Moyn 2018; Kotkas and Veitch 2017; Svensson 2020a). Rights are transferred to the individual and perceived as an instrument that promotes freedom of choice and self-realisation. For a neoliberal rights proponent, the responsibility for the fulfilment of rights rests with the individual alone. Especially in the case of legally protected rights, the burden is on individuals to go to court and effectively enforce their rights. The court system thus has an important role in enforcing the rights of individuals. Rights are usually understood as negative or positive, depending on different views on the role of the state to simply refrain from interfering with or to actively promote rights (Kenyon 2021). While this liberal rights system includes obligations, inequalities and vulnerabilities, and aims to address discriminatory practices

[3] In fact, there are several different rights-based approaches, but we choose not to distinguish or elaborate on them in this text.

and unfair power distributions, its main focus is nevertheless to legally empower individuals as rights holders and to hold accountable the parties on whom the corresponding obligations rest, such as the state but also private, semi-private or semi-state actors, that in fact and in real life blurs the line of liability. (see e.g. ENNHRI 2022).

The *charity-based approach,* sometimes referred to as welfare or needs-based approach (Uvin 2004), is differently informed. When welfare solutions are based on charity, they are often seen as disrespectful of the individual (Uvin 2004), sometimes even offensive. Such a model, which views charity as selective, dependent on the generosity of others and not linked to entitlements, increases the administrative and discretionary powers of the state. It imposes no enforceable obligations on the state, and is also discrediting to the individual (Johnstone and Ámundadottir 2013; Uvin 2004). In the Nordic context, this model has been explicitly rejected, and, indeed, one of the rationalities in building the Nordic welfare state was to avoid a (historical) model based on charity (von Essen 2019), relying on a private civil society, or resting on religious communities or the church. This does not mean that charity does not exist in the Nordic countries. Especially during the 2015 refugee crisis, civil society contributions were crucial (Törngren et al. 2018; Ideström and Linde 2019). However, in a Nordic context, the charity-based approach is very different from a welfare-based model, with the latter characterising a universalist welfare state. That is, charity is not the primary means for addressing welfare and inequality.

The Nordic model, or the *reform-based approach*, relies on social-democratic welfare principles (Esping-Andersen 1990). It is characterised by economic and social policy reforms aimed at equality, based on universal tax-financed welfare measures, a unionised workforce, collective bargaining systems, an extensive public sector and an ambitious gender equality policy (Rothstein and Vahlne Westerhäll 2005). The model uses a concept of social citizenship that emphasises solidarity, responsibility and active participation (Pylkkänen 2009; Lister 2003; Fraser and Gordon 1992). Although this model has been relatively successful in its equalisation ambitions, it has been criticised for being paternalistic (Martinsson et al. 2017).

The Nordic model may become more comprehensible to a wider international audience when it is shown to resonate with the work of the American political theorists Nancy Fraser and Iris Marion Young. Nancy Fraser uses similar concepts of social justice as something more than just guaranteeing legal individual rights (Fraser and Honneth 2003). Fraser argues that justice has three dimensions: recognition, redistribution and participation. If, in the 'glory days' of the construction of the universal welfare model, Nordic society emphasised 'redistribution' through extensive tax revenues and a participatory democratic model (SOU 2000:1), the value of 'recognition' has come onto the scene more recently. Recognition means that the state identifies and respects marginalised

groups. It is an important objective for traditionally marginalised identity groups in their struggle against discrimination and neglect. However, individual discrimination provisions overseen by an authority that has no legal obligation or practical ability to proactively investigate all complaints is hardly sufficient to dismantle historical patterns of inequality. Moreover, the scope for courts to enforce rights in this model is rather limited. Fraser's theory combines the aspects we identify as important in the search for social justice. Iris Marion Young has developed an account of justice that brought together her theorization of structure with her concern to respond to contemporary claims of injustice (Young 2021). This understanding of injustice as something impregnated in the organisation of society and as structural is a characteristic of the Nordic model. Young's rejection of or disinterest in general abstract theories of justice is something that also characterises proponents of the Nordic model.

### *2.2 The path towards rights*

The rights-based approach has become a dominant discourse, both as a general social discourse and as a specific legal approach (Banakar 2010b). As already mentioned, it is often contrasted with the negatively perceived charity-based approach as the only alternative. This construction of only two possible options excludes other options, such as the reform-based or Nordic approach. And, when presented as the only possible choices, the rights-based and the charity-based approaches tend to go hand in hand with neoliberalism. We claim that there is an urgent need to critically analyse neoliberalism's transformations at the systemic level. In the international context, it has also been argued that the rights-based approach and its assumptions clearly need to be scrutinised to a greater extent than before (Miller and Redhead 2019). Neoliberalism is often criticised for assuming people are strictly autonomous, capable of making informed free choices, and also for neglecting power differences related to such dynamics as gender, ethnicity and class (Olsen 2011; Schwartzman 1999). This critique is emphasised at a time when the dominance of neoliberal ideology has far-reaching consequences (Brown 2015), not least of which is the dismantling of the welfare state and its equalising ambitions based on economic redistribution. In addition to an emphasis on individual rights, neoliberalism naturally encourages private actors and assumes that non-profit welfare support is provided by civil society, rather than by the state.

The rights-based approach has increasingly gained ground in the Nordic context (Banakar 2010a; Svensson 2020a). Nordic societies have, at least until recently, placed more emphasis on mutual solidarity and responsibility than societies with liberal traditions, that is, Nordic societies are traditionally more receptive to a discourse of responsibility as opposed to a discourse of rights (Nousiainen 2001). However, due to the influence of the global human rights discourse and EU membership, the focus in Nordic countries has shifted from

political programmes with general measures to assertion of individual legal rights, with an emphasis on *access to justice* (see e.g. Lucy 2020; Letto-Vanamo 2017; Cappelletti and Garth 1978), and anti-discrimination provisions. The Nordic reform-based approach considers law and legislation as tools to achieve certain policy goals (to "put life in order", in Hirdman's words in 2018). This approach has been seen as "women-friendly" (Hernes 1987) or as promoting gender equality, but has also been criticised for being nationalistic and assuming homogeneity (Martinsson et. al. 2017; Giritli Nygren et al. 2018). Regardless, the rights-based approach has increasingly weakened the dominance of the reform-based approach. The spread of the rights-based approach is linked to transformations of a more general nature.

We now turn to the legal arena where the transformations resulting from this ideological shift have catalysed the emergence of a legal and a social culture of rights, i.e. a "rightification" (Gustafsson 2018).

## 3. Rightification

### 3.1 The emergence of a rights-based discourse

The granting and strengthening of legal rights generally carry positive connotations, as they are intended to promote the legal position of weaker groups and have potential conflict resolution effects. In contrast to pre-welfare state rights that favoured established positions, modern welfare rights aim to provide increased opportunities to secure groups or individuals in an essentially equal situation. Rights are often used to strengthen other legislative approaches that are not always sufficient and to complement key policy areas such as gender, environment, climate and integration. The emergence of positive social rights and general welfare rights are examples of strengthening functions related to economic and political governance. The different ideological versions of rights readily come to mind here – such as the well-known relationship between social rights and political rights, and the difference between positive and negative liberal rights (cf. Bobbio 1996; Waldron 1985; Wellman 1997) – but they are not in themselves the primary focus of our analysis.[4] Rather, we

[4] On this matter see e.g. H. Gustafsson "Taking *Social* Rights Seriously (I)" and "Taking *Social* Rights Seriously (II)", from 2005 and 2007 respectively. Furthermore, we do not intend to duplicate, in this essay, the well-known theoretical "rule and rights skepticism" of the Scandinavian and American legal realists. And to be even more precise, this is not an essay that deals with the moral justification of rights, nor does it seek the proper definitions and legitimization of rights. And it does not actually concern itself with the critical legal studies approach to and critique of rights in general as part of a liberal paradigm (although of course true to some extent) and therefore politically oppressive or invalid from a radical point of view. On this strand of arguments see of course C. Douzinas seminal work (2000) and C. Douzinas and C. Gearty (2014).

Rather, in this text we focus on the functions and effects of rights in a specific context, which has changed as we describe above.

focus on analysis of the possible limitations of fragile and precarious welfare rights in the context of neoliberalism.

An increased focus on rights represents a shift, as more social, economic, political and administrative problems receive rights-based solutions. This is usually formulated as a 'right' to fresh air, healthcare and education, housing and work, health and livelihood to achieve a reasonable standard of living. However, the discourse shift from general welfare policies to individual rights entails that rights become the interpretative framework through which social problems and areas are understood and resolved. As interests and needs come to be defined as legal rights, the courts will necessarily play a significant role in guaranteeing them through judicial proceedings. While there have undoubtedly been historical advantages to this type of judicial procedure, it is problematic when rights discursively dominate and even replace the redistributive policies or care-centred functions of the welfare state typified by the Nordic model.

It is clear that rights discourse has also claimed a public space in the legal field, specifically a foothold in legal discussions. It seems apt to term this shift of discourse as a "rightification" where the emphasis is on rights rather than rules and regulations. We use the concept of rightification to encapsulate and conceptualise a transition, described above, where a general discourse of rights is emerging, but, secondly, also a process where political and economic solutions are translated into a terminology of (legal or moral) rights. Finally, the concept of 'rightification' aims to draw attention to the fact that unforeseen effects and negative outcomes of an intuitively important rights-based discourse may be incorporated into legislation with consequences for the application of the law.

The concept of rightification might seem similar to, and close to the concept of *juridification*. But there is a key distinction. The discussion on 'juridification' has gone through several waves. The first wave, originating with Max Weber (see Teubner 1987) focused on the shift from formalisation to materialisation of law as a piece of the process of modernisation of liberal democracy and modernist legal development in the early 20th century. The second wave is based on Gunther Teubner's understanding of juridification as the legal expansion of welfare state legislation, resulting in so-called over-regulation in the 1970s. In particular, this has been called the *juridification of social spheres* (Teubner 1987), or, in Habermas' words, the colonisation of the lifeworld. This trend, which was the subject of an intense socio-legal debate in the early 1980s, is aimed at overcoming regulatory dilemmas, for example, how hitherto unregulated areas of society are 'invaded' by (welfare) legislation, leading to subsequent steering deficits in governing these areas by the rationale of the public sector and through state control and supervision.

Neither the first nor the second wave of juridification places any particular emphasis on rights. Rather, the outcome, initiated by Teubner's theory of 'reflexive law' (1983), quickly shifted to deregulation, decentralisation and self-regulation alongside the growing idea of market-oriented mechanisms for

welfare systems. However, together with the rapid neoliberal global economic change and the so-called restructuring of the public welfare sector in the 1990s, the emergence of a strengthened discourse of individual rights emerged at the beginning of the millennium.

In this way, the rightification process could be described as a third wave of juridification, which in the current post-political state in part constituting the post-welfare situation. However, when different challenging societal situations are described and subjected to different solutions, it becomes clear that what is at stake is not a shift in justifications for juridification such as the necessity of expanded legislative regulations but, rather, a clear discursive shift to rights, that is, a process of rightification.

Rightification thus refers to the increasing tendency in politics to frame social, economic, political and administrative circumstances using a rights-focused terminology. It also implies an over-optimistic view that problematic circumstances can be resolved, or at least managed effectively, by a simple legal transformation of circumstances into rights issues. Rights have emerged as tools for resolving issues that are, in fact, genuinely political. Rights are increasingly expanded to address socio-political problems with the risk that rights are given responsibility for a greater socio-political burden than they can fulfil. They are overloaded with capabilities they do not possess and societal expectations they cannot meet.

However, we would like to emphasise that rights and, in particular, social rights have been of great importance in ensuring basic levels of social security and a minimum standard of social well-being, as well as providing access to social equality at multiple levels. Consequently, rights have been effective tools for social empowerment. The emphasis on social rights has been described from a liberal perspective as a profound infringement of traditional negative or liberal rights, but, in fact, collective social rights have largely been implemented in parallel with these rights, without overshadowing them. Nevertheless, a focus on purely formal individual rights - as in the case of negative liberal rights - is not persuasively a constructive route compared to a reform-based welfare agenda. Rights must be underpinned by substantial material preconditions, such as political commitments to social justice and economic resources, both of which are essential to make rights meaningful for individuals in need. Without this back-up, the mere quantity of rights does not in itself solidify their implementation. In fact, several negative shortcomings can be detected as the result of an over-emphasis of rights.

The idea that social (mis)conditions can be effectively addressed through a allocation of legal rights highlights disadvantages of rightification. Three negative effects feature in the process of rightification.[5]

[5] On thoughts on similar effects of the rights discourse, see e.g. Rua Wall (2014), Golder (2015), Douzinas (2019) and Christodoulidis (2021).

- First, *individualisation through rights* implies that collective needs and interests are solely meaningful at the level of the individual rights holder. When he or she receives a theoretically enforceable right, it is assumed that the underlying need is thereby fully met by the state, authorities and the municipalities. This clearly is not often the case. Instead, the issue is shifted to the legal arena: the right holder is expected to realise his or her right through a court. This means that the individual is given individual rights, to be activated by the individual. The burden of proof is thus on the individual. The person is assumed to be an autonomous legal subject, with the capacity to assert rights through legal process.
- Secondly, *fragmentation by rights* means that complex needs, interests and relationships are turned into narrow formal rights that fail to ensure an overall holistic view of the person's needs and specific conditions. The individual's situation becomes regulated, generalized and restricted in detail by different rights, losing sight of the broader evaluation of his or her needs.
- Finally, *disciplining by rights* means that the determination and delimitation of social needs are disciplined in a particular discursive understanding dominated by legal rights, i.e. a 'reframing' of needs into rights. Rights can, of course be genuinely constructive, but there is also a risk that they will be used in an opposite - almost repressive - way, against the self-interest of the rights holder. The distribution of rights may, in theory, favour the interests and needs of the right holder, but not in the way the right holder wants.

In general terms, rights can, on the one hand, be seen as positive and proactive legal constructs that provide for accountability, clarify the responsibilities of the state and provide legal entitlements. On the other hand, rights can be described as constructs that respond only to a violation or offence, necessarily triggered by the individual's reaction and thus dependent on the individual's own responsibility to act.

In a balancing of interests, those who can claim a right are usually in a more favourable position, but, as more and more groups are granted (incompatible) rights, rights may also result in a conflict-driving effect. Overall, rather than helping to resolve conflicts, rights can create or even intensify conflicts, triggering a need for increased monitoring and intensified control. A well-known consequence of the contemporary ideology of NPM is that new governance structures thrive and evolve, with effects on rights. When social needs are anchored in a legal discourse of rights, the rights themselves are subject to a cost-limitation of the legal qualifications and control mechanisms or monitoring of governance structures. Rights are at risk of becoming subjected to the 'ideology of the measurable' (Bornemark 2018), i.e. the needs-based content is assessed in terms of what can be measured, such as economic units, or, in other words, cost-benefit analyses, or a shift of emphasis to formal due process procedures. The broader nuances and context of welfare concerns are lost in the reductive logic of such economic or process-based measurements. On the one

hand rights are the means to achieve individual liberty, but in the hands of the market they are legitimately narrowed down in terms of promoting economic efficiency. Rights become tokens in a game where the private market sets the price and controls the cost of them.

An important additional problem lies in how the public sector has changed by way of privatization trends: an increasing share of welfare is run by the private sector, often with the assistance of civil society. New alliances are managed through PPP (Public Private Partnerships) and VSOPP (Voluntary Sector Organisation Public Partnership). In the conventional sense, positive social rights and negative liberal rights are historically formulated in an environment that focused exclusively on the relationship between the state and the individual. This idea lives on in socio-legal theory and in discussions about the welfare state. However, social rights now must be placed in a broader context of these partnership that assign key roles to the private sector of the market and the nonprofit sector of civil society (Gustafsson 2018). The welfare state has delegated the provision of welfare services to profit-making and/or nongovernmental actors reflecting a shift from *political constitutionalism* to *market constitutionalism* (see Christodoulidis 2021). Rights – regardless of value and theoretical designation – must be seen in this context.

A specific result of the fragmentation of rights is that obligations of the welfare state are spread across different sectors and fragmented by accountability mechanisms across unclear spheres and actors with unclear obligations. Thus, there is also a corresponding fragmentation of responsibilities. The question of responsibility is displaced and blurred. Rightification both reflects and creates new constellations concerning the organisation of welfare and the structural transformations of the welfare state. This ideological discourse change follows from various contemporary rights discourses and ideas originating from an increasingly prominent constitutionalism of rights.

## 3.2 The post-political condition

In the following we consider the changing role of politics often been discussed in terms of *post-politics* (Swyngedouw and Wilson 2014) and *post-democracy* (Crouch 2005). This concept describes the consensus politics developed, it is argued, within the framework of the global market economy and liberal democracy that has become dominant since the 1990s which saw the fall of the Soviet Union and the Berlin Wall, for example. The 'post-political state' refers to a situation where traditional political ideologies are weakened, blurred and where politics becomes pragmatic, technocratic, policy oriented and administratively focused.

The political scientist and political theorist Chantal Mouffe, in her significant book *On the Political* (2005), distinguishes between *politics* and *the political*. The former refers to the set of practices and institutions through which order is

created and human coexistence is organised in the conflictual context of the political. In short, the term references various political bodies, parties, organisations and democratic institutions. By the term *political* she means the dimension of antagonism that is constitutive of society, that is, the core of power and conflict.

Mouffe's analysis of today's post-political condition is that any engagement with controversial and hard-to-manage political contradictions and disagreements are cut off by the established politics. There is a shift from the political to an established uncontroversial politics that increasingly seeks broad consensus solutions and avoids polarisation by casting a narrow band of assumed plausible alternatives. Behind this state of affairs lies an inability to recognise the political dimension, and this inability to think politically is, according to Mouffe, due to the undisputed hegemony of liberalism. The global market economy is assumed to be an undeniable fact, with no plausible political alternatives.

The shift away from the political is often understood as a primary shift to the market, to new administrative governance structures managing technical details of efficiency, and to the moral sphere (often defined as 'us' versus 'them', opening for populist parties of right-wing nationalism). This shift is, according to Mouffe, a result of the politics itself displacing the political antagonistic dimension into other areas, paradoxically pushing away the political from the domain of politics, where it should belong. This is due partly to the globally dominant neoliberal worldview that seem to permeate and affect all areas of our social life.

As politics withdraws from the political the void left is not only pushed into populist morality, administration and the market economy, but also into law, we claim.[6] This legal void has been filled by rightification. Conflicts are expected to be handled by the individual, right holders contest other right holders. In this sense, the discourse of rights or rightification diverts focus from the political, and the discourse around social problems will instead be dominated by the concept of rights and how rights should solve the individual's particular problems. Attention shifts from systemic, larger distributional questions, different conceptualizations of the state and society to the legal rights-based discourse in support for neo-liberal marketisation and privatisation of the public sector. In a similar way, Samuel Moyn (2018) has noticed the new setting of "human rights in the neoliberal maelstrom" on a global scale alongside the demise of socialism.[7]

[6] This theme is further developed in Gustafsson (2018: 59-64).

[7] Moyn is fundamentally interested in the phenomenon of the last thirty years in which the discourse of human rights has grown and consolidated alongside the global market fundamentalism of the neoliberal hegemony. And, says Moyn, instead of human rights being a challenge, "neoliberalism has changed the world, while the human rights movement has posed no threat to it" (2018: 216), and – even – "human rights have been the signature morality of a neoliberal age because they merely call for it to be more humane" (2018: 217).

Rightification – both as a human rights discourse consonant with global neoliberalism and as a more restrictive sense of welfare rights – fits within theories of post-politics in order to explain the new role of (social) rights. An evaluation of legal reforms, whether they weaken or strengthen social rights, should take into account this new social context, as it challenges the core values of the traditional welfare state. Thus, discourses and legislation shifting from the Nordic welfare reform-based model to the rights-based approach are best understood as consequences of the post-political condition.

## 4. Examples of rightification

In moving from a general level of trends and movements within the political discourse regime affecting the legal domain to a couple of examples in this section, the reader should bear in mind that the specific context pictured here is Nordic welfare states and, in particular, Nordic welfare legislation grappling with increasing pressure to implement rights. Our examples are from Sweden, a country where the transformation of the public sector has been unusually rapid with far-reaching consequences. The following sheds light on the arguments proposed above, and we will highlight some examples of social relations and interpersonal contexts that are particularly sensitive to rightification trends.

### 4.1 Elder care services

The population in most countries in the world is growing older. In 2020 2,6 million out of 10,5 million people in Sweden were over 60 years, and the group over 90 years old has increased the most (it has been more than doubled in the last 50 years; Statistics Sweden 2022). Ageing is not equal, various factors impact individual health and need for care (Socialstyrelsen 2023). Municipalities are obliged to offer various forms of elder care, basically home care and short-time or long-time elder care housing. The system of elder care has in Sweden been transformed several times, from poverty relief to public elder care housing, and from a service within the publicly funded welfare system to a right to choose between public and private providers within a free-choice system (however still mainly publicly funded). The monitoring of elder care has increasingly come to be characterised by NPM, bringing governing models from the private sector into the provision of services and combining public financing with private delivery to the sector (Anttonen and Karsio 2017; Katzin 2020; Hoppania et al. 2022). State regulation is goal-oriented, combined with follow-up controls (Svensson and Valokivi 2023).

Municipal actors decide whether an older person should be given a place at special elder care housing. In 2022 almost 30 % of the municipalities had inadequate numbers of such places. The average waiting time to receive care at a special elder care housing was in 2022 more than 50 days, more for women

than men. The fee for the accommodation varies extensively, depending on the municipality in which the care recipient lives and resides (Socialstyrelsen 2023).

Elder care models that emphasise individual choice were introduced in Sweden in 2008, allowing private pro-profit enterprises to provide elder care services through a strict regulation of public procurement procedures. Municipalities decide whether a choice system is to be introduced. Since the introduction of the choice system, municipal take up of this option gradually increased. In 2023 municipalities, regions and the state together offered approximately 450 services. Municipalities offered most of them, mainly within the sector of services in the home (Upphandlingsmyndigheten [The National Agency for Public Procurement] 2023). These systems emphasise the importance of individuals' abilities to make informed choices. Yet, older adults can have limited ability to access information, depending on such things as health, education, language skills, and assistance from relatives. If so, this might mean a risk of increased inequalities among older adults with care needs. In the Nordic countries, such inequality risks are in stark contrast to former universal equal access to care services (Erlandsson et al. 2022). What is more, the introduction of the pro-profit choice model has become the dominant value.

The older person can, if the municipality has introduced the choice system, choose between various service providers. The choice can, as indicated above, be variously conscious. But the municipality has no obligation to fulfil the wishes of an older person. The choice system therefore has been criticised as inappropriate for older persons, but a system which allows private enterprises and thus marketization can result in increased inequalities (Katzin 2014; Szebehely and Meagher 2018; Katzin 2020). Simply put, regional differences and diversification in service supply across municipalities and regions increase the risk of inequalities in accessing adequate care services (Svensson and Valokivi 2023).

The *Health and Social Care Inspectorate* (IVO) agency supervises both public and private elder care services. Individuals have the right to make complaints to IVO. However, IVO has no obligation to act on a complaint. A limited study of IVO data shows that the trust-based management system does not guarantee response to complaints; what is obvious is that the level of administration increases (SOU 2019:43). The complaints may lead to supervision (a controlling function). Yet, whether a supervision is initiated is based on the authority's own discretion (Svensson and Valokivi 2023). Thus, the right for individuals to complain is not mirrored by an obligation to investigate or to respond at all. This might be described as formal, but not substantive, access to justice.

Moreover, elder care service has been fragmented in several other aspects. The providers of various elder care services have increased. For example, in 2022, a care recipient taker of home service on average met 16 persons during a fortnight and a high degree of the employees have temporary positions (Socialstyrelsen 2023). Depending on in which municipality a care recipient

lives and resides in, the options and fees vary, as does accessibility. Assessment of care needs is also fragmented as a consequence of the division between various care services. In all, the social needs of elder care are turned into quasi-rights, illusionary rights that are not counteracted by obligations to meet the demands (Gustafsson 2018; Vahlne Westerhäll 2002).

## 4.2 Disabilities and rights

Another visible pattern of rightification is exemplified by the Swedish *Act Concerning Support and Service for Persons with Certain Functional Impairments* [Swedish abbr. LSS]. Enacted in 1994, the *Act*, seeks to provide disabled people with assistance in various forms, for example, aid resources, rehabilitation, services, contact persons, and special housing facilities (9 §). Under previous legislation, welfare goods were publicly provided but such provision was inadequate. It was evident that acknowledged needs were neglected and decisions delayed by municipalities due to lack of resources etc. It became necessary to introduce individual social rights in order to clarify the basis of public responsibility and legal obligations. These were introduced as individual claims rights,[8] with strictly correlated obligations for the public sector. The aim was also to raise awareness of the needs of certain groups of people, in line with the *European Social Charter* on the guaranteed right to independence, social integration and participation in society. The introduction of strong individual rights in welfare legislation was a new, previously untried path for Sweden (Gustafsson 2002).

This can also be formulated in terms of the fact that traditionally social legislation had been subject to fairly general, goal-oriented legislation establishing state obligations of varying degrees of precision, which functioned comparatively well under the welfare state. State responsibility for welfare was relatively clear. Thus, one way of responding to the uncertainty that emerged in the mid-1990s, through incipient market-orientation, was to reinforce public accountability by introducing these individually enforceable rights. And, at the same time, to introduce clear public obligations. The regulation was intended to secure the right to welfare provision in a traditional context characterised by the conventional poles of the rule of law and the welfare state, but now cast in relation to a growing market orientation.

However, the legal path of LSS rights gradually led to effects that partly deviated from the original intention, due to the individual characteristics that were made visible in the efforts to strengthen the social positions of persons in need of legal support. This went hand-in-hand with inefficiencies in governance, shortcomings in regulatory oversight, ineffective sanctions, increasing financial costs and, finally, significant marketisation of assistance services. The transformation of the societal context and the market-driven welfare system, as

[8] In the terminology of W. Hohfeld (1913; 1917) and his analytical scheme, see Gustafsson (2005).

described above, has taken the individual rights for LSS in new directions that can be partly explained within the framework of rightification.

LSS constitutes an example of rightification. That is, the effects of LSS can be explained through the various components of rightification. It is noticeable that the rights in this welfare area contain an inherent strong tendency towards individualisation and fragmentation. Despite its intentions, LSS thus contributes to a type of legal lock-in that does not contribute to "promoting participation in living conditions and full participation in society," as stipulated in Section 5 of LSS (see Gustafsson 2007, but also Bäckman 2013).

Effects of this contradictory situation are several. For example, the LSS provisions on the assessment of "good living conditions" (Section 7 of the LSS) or "basic needs" with regard to assistance compensation (Section 9a of the LSS) depart from an overall assessment of the applicant's needs and are, instead, fragmented and quantified to become the subject of calculations in minutes (with regard to time taken for showering, feeding, supervision, etc.). When rights are operationalised, they become the subject of routines and are fragmented both in practice (social security, social services, etc.) and in legal application. This problem is particularly striking when different measures and rights are combined in relation to different levels of need and compensation, e.g. when assistance is to be combined with short-term care outside the home, or short-term supervision with respite care, and so on.

It is fairly obvious that individualised social rights have pushed LSS into a legal straitjacket that does not necessarily promote social participation and individual empowerment. Rather, the various rights of LSS have, in effect, become so minute in detail that the assessment of the individual lacks holistic approach. The individual is left with a jigsaw puzzle, trying to match pieces of rights together (Gustafsson 2018; 2021). The fragmentation of rights is obvious, and courts are not able to put the pieces together again. In LSS, as in similar legislation, of rightification means that the person's special needs for various types of interventions are presented and framed in rights terminology. That is, complex disabilities and difficult problems must, in order to succeed, be disciplined into a formal and narrow rights framework, which risks capturing only a limited section of the complexity.

## 4.3 Discrimination legislation

Anti-discrimination legislation is only one of several measures to counteract discrimination and promote equality. The Swedish welfare model has traditionally employed redistributive general welfare policies rather than anti-discrimination legislation, but the latter has increased in importance over time, following influences of EU membership and international rights-based approaches. An ideological shift emphasising individual choice rather than systemic reform addressing structural inequality, has become more influential in the transformation of the society, resulting in a turn from universalism and

redistribution to individual rights and anti-discrimination legislation (Pylkkänen 2009; Gunnarsson et al. 2023).

The *Discrimination Act* from 2009, replacing previous gender equality and anti-discrimination acts, defines when a behaviour might be considered discriminatory in a legal sense. This definition does not include all actions and behaviour that might be perceived as discriminatory (DO 2023:3). The discrimination grounds are exclusively specified in the Act. The authority which supervises the discrimination legislation, *Equality Ombudsman* (DO), conducts supervision to ensure that the *Discrimination Act* is complied with. DO *may* intervene to ensure that individuals subjected to discrimination obtain redress, for example, by receiving and investigating complaints. The investigations *may* lead to DO requesting discrimination compensation, entering into settlements or taking proceedings to court. DO is also *able to make* supervisory decisions, i.e. opinions on whether an organisation is in breach of the *Discrimination Act*. Such decisions are intended to help to clarify what the law entails and contribute to preventing future discrimination (DO).

Thus, the individual has a right to turn to DO and submit a complaint about discrimination. In 2022 the total number of complaints concerning discrimination was approximately 3600. The number increased by approximately 100 percent between 2015 and 2022. Most complaints concern discrimination on the grounds of ethnicity and disability. Most complaints are from these areas of society: working life, education and goods and services (DO 2023:2). The authority has, however, no obligation to investigate the complaints that are filed. Compared to the number of complaints of discrimination, very few individuals receive assistance from the Ombudsman in bringing their complaints before the courts (Svensson 2020b; Gunnarsson et al. 2023). In 2020, the Ombudsman applied for a summons in three cases. In comparison, in 2019 the Ombudsman went to court in six cases, and, in 2018, in four cases (Gunnarsson et al. 2023; cf. DO statistics). The Act also contains preventative measures and active measures to hinder discrimination in advance but DO, who is in charge of this responsibility, has been criticised for being inefficient and ineffective (SOU 2020:79). The supervision is mainly performed as information activities and expectations of voluntary obedience to the law. According to Gunnarsson et al. 'information activities and expectations of voluntary obedience to the law' should not comprise the priority for an institution whose task is to take measures against discrimination (2023).

The enforcement system of the *Discrimination Ac*t is inefficient. There seems to be limited access to justice for victims of discrimination. The Ombudsman's supervisory function regarding the duties of employers and educational institutions to take actions to prevent discrimination seems to be inefficient (Gunnarsson et al. 2023). The right for individuals to complain is not mirrored by an obligation to investigate. The prohibition against gender discrimination has even been considered a facade (Svenaeus 2017). Thus, the individual has

been given a right which does not really correspond to an obligation to investigate. As in the other examples, this might be described as formal, but not substantive, access to justice. It certainly does not appear to be a meaningful right. In addition, what individuals experience as discrimination is not always defined as discrimination in law. The result may be described as a fragmentation of the individual's situation, one that ignores broader contextual factors and systems. The increasing emphasis on anti-discrimination provisions is part of a more general transformation from proactive policies to anti-discrimination law. The social needs are disciplined into a discursive framework of quasi-rights.

## 5. Towards a political reform-based idea of social justice

It is clear, as the discussions above illustrate, that the reform-based approach has given way to a rights-based approach. Examples from other legal fields, for example, the education system (Novak 2018; Novak and Gustafsson 2020; Refors Legge 2021; Ryffé 2019), environmental law (Darpö 2021), labour law (Herzfeld Olsson 2017), tort law (Stenlund 2021; Bengtsson 2021), and social law (Rennerskog 2021; 2023), all point in the same direction. Rights have taken a strong foothold, reflecting a consistent response to or outcome of marketisation and privatisation of the welfare system. The short examples show how the rightification trend entails an emphasis on an *individual's* responsibility to push their own rights (LLS) or make effective care choices (elder care). *Fragmentation of rights,* leading to fragmentation of an individual's interests by inserting such interest into the legal form rights take. This risks piecemeal solutions that fail to respond in a holistic way and weakens state responsibility for compliance; fragmentation of liability follows (discrimination). This is also a logical consequence of out-sourcing former state responsibilities to private profit-based actors. The only way for the single individual to manoevre this state of affairs seems to be to surrender to the rights-based discourse in order to have any chance of realizing needs enshrined in the mentioned legislations. The rights discourse tends towards *disciplinary effects* to accept the rights-based approach as *the* proper way, even when it is fair to ask whether this really is the right way. This disciplining by rights seems to be enhanced in the post-political post-welfare system of today, which, in turn, transforms needs into rights as the proper way to meet individual injustices and personal inequalities.

Consequently, the trend towards rightification also implies a subsequent shift from the *content* of legislation that focuses on the distribution or allocation of welfare goods or services to the person in need, to an emphasis on more or less strict *procedures* or due processes for the person in question. This might be seen as a formalisation of procedure, akin to strengthening *access to justice* for the individual, but assumes that he or she has the autonomous capability to engage in these processes. This goes contrary to the reform based Nordic model, an approach that rather ensures social protection in the name of political general welfare systems, and not individual rights.

Welfare rights in general have been a means to empower and strengthen social positions of the weak and vulnerable, and to promote participation in society and enhance the livelihood for the poor. But as social rights gradually have been subjected to the private sector and played out on the market, they are no longer guaranteed by the solid welfare state alone. They are cast in a new setting managed by the market and civil society organisations.

The amplified rights discourse and the use of specific rights does, in effect, not guarantee individual legal protection. Legal rights alone are not proper means to handle social problems in the welfare system, and thus are not able to counteract social injustices. This puts focus, on the one hand, on the proper definitions of social rights themselves, but, on the other hand, also on the implicit socio-political functionality they have been burdened with. A critical inquiry of the functions of rights in the welfare system must also pay attention to the possible down-sides of social rights (on strategic ambivalence see Golder 2015). It is, of course, vital to acknowledge the necessity of social rights as tools of real social empowerment, but it also highlights the need for a conceptual reconstruction. This reconstruction is due to contemporary transformations, such as the post-welfare state situation, the re-emergence of civil society, and the continuing marketization, that in some way or another resonates to transformations of welfare legislation and the diminishing interest in the Nordic reform-based approach.

The rights-based approach and processes of rightification aim for empowerment, but given the limitations of extended individual rights and the consequences of the abandonment of the universal welfare state model, they seem to lead to a *disempowerment*. What should be considered in this context is how to ensure a process of *re-empowerment.* Elements of both a reform-based and a socially critical rights-based approach could serve as a way to better counteract the negative consequences of a reinforced rights-based approach based on neoliberal ideology, and 'marketisation' of Nordic society. It would allow for acknowledging the previous characteristics of the Nordic society's explicit ambition to achieve an equal society.

To conclude, extended legal rights for individuals do not alone optimise resistance to inequality or counteract social injustices, in particular, as rights presuppose individual autonomy, a fully developed judiciary system and efficient sanctions and remedies to fulfil the legally acknowledged rights. These presuppositions are lacking, as shown in the three examples above. On the other hand, extended legal rights might assist to promote social justice, if combined with reform-based measures. This implies that the discourse of rights itself must be brought back to the political, i.e. in the sense that the underlying values, interests, power relations and societal contexts behind rights are clarified in the political agonism that, for example, Chantal Mouffe envisaged. In other words, the basis and limits of rights must be evaluated considering a political reform-based idea of social justice.

## References

Angelis, J. and Jordahl, H. 2014. *Att styra och leda äldreomsorg. Hur går det till och vad kan förbättras?* [To control and lead elder care. How is it done and what can be improved?]. Stockholm: SNS Förlag.

Anttonen, A. and Karsio, O. 2017. How Marketisation Is Changing the Nordic Modelof Care for Older People. In Martinelli, F., Anttonen, A. and Mätzke, M. (eds.) *Social Services Disrupted: Changes, Challenges and Policy Implications for Europe in Times of Austerity*. Cheltenham: Edward Elgar: 219–238.

Bailliet, C. M. 2016. A Nordic Approach to Promoting Women's Rights within International Law: Internal v. External Perspectives. *Nordic journal of international law* 85: 368-394.

Banakar, R. (ed.). 2010a. *Rights in Context: Law and Justice in Late Modern Society*. Ashgate.

Banakar, R. 2010b. Studying the Rights Discourse: A Tentative Socio-Legal Framework. In Lemann Kristiansen, B. and Storgaard, A. (eds.). *Nordisk retssociologi: Status – aktuelle udfordringer – visioner.* Jurist- og Økonomforbundets Forlag.

Bauman, Z.1998. *Work, Consumerism and the New Poor*. Philadelphia: Open University Press.

Bengtsson, B. 2021. *Rättighetsansvar* [Rights responsibility]. Stockholm: Norstedts.

Bergquist, C., Borchorst, A., Christensen, A-D., Ramstedt-Silén, V., Raaum, N. C. and Styrkardóttir, A. (eds.).1999. *Equal Democracies? Gender and Politics in the Nordic countries*. Oslo: Scandinavian University Press.

Bobbio, N.1996. *The age of rights.* Polity Press.

Bornemark, J.2018. *Det omätbaras renässans: en uppgörelse med pedanternas världsherravälde* [The renaissance of the immeasurable: a confrontation with the world domination of pedantry]. Volante.

Brodie, J. 2007. Reforming Social Justice in Neoliberal Times. *Studies in Social Justice* 1 (2): 93–107.

Brown, W. 2015. *Undoing the demos*. The MIT Press.

Bäckman .2013. *Gynnande besluts negativa rättskraft och rättssäkerhet: för människor med funktionsnedsättning inom rättsområdena SoL och LSS* [Principle of legitimate expectations and legal certainty – for disabled persons within the legal areas SoL and LSS]. Jure.

Cappelletti, M. and Garth, B.1978. Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective. *Buffalo Law Review*, 27(2). 181–292.

Christodoulidis, E. 2021. *The Redress of Law: Globalisation, Constitutionalism and Market Capture*. Cambridge University Press.

Cornwall, A. and Nyamu-Musembi, C. 2004. Putting the 'rights-based approach' to development in perspective. *Third World Quarterly* 25 (8): 1415–1437.

Crouch, C. 2005. *Post-democracy.* Polity Press.

Darpö, J. 2021.*Can Nature Get It Right? Policy Department for Citizens' Rights and Constitutional Affairs*. Directorate-General for Internal Policies PE 689.328.

DO Diskrimineringsombudsmannen (2023:2) Rapport 2023:2 *Statistik 2015–2022 Statistik över anmälningar som inkom till Diskrimineringsombudsmannen 2015–2022* [Statistics 2015–2022 Statistics of reports received by the Discrimination Ombudsman 2015–2022] https://www.do.se/download/18.71c46fcf184c78ffadd181d/1680247419321/Rapport-Statistik-anm%C3%A4lningar-diskriminering-2015-2022.pdf, accessed 2024-01-03.

DO Diskrimineringsombudsmannen (2023:3) Rapport 2023:3 *Förekomst av diskriminering 2023Årlig rapport från Diskrimineringsombudsmannen* [Occurrence of discrimination 2023 Annual report from the Discrimination Ombudsman], https://www.do.se/download/18.36cbb9ac1886717f72d1ef/1685702676115/rapport-forekomst-av-diskriminering-2023.pdf, accessed 2024-01-03.

DO Diskrimineringsombudsmannen, Statistics on *Tvister, Domar och tillsynsbeslut* [Disputes, court decisions and decisions on supervision], https://www.do.se/kunskap-stod-och-vagledning/tvister-domar-och-tillsynsbeslut?query=do, accessed 2024-01-03.

Douzinas, C. 2000. *The End of Human Rights: Critical Thought at the Turn of the Century*. Hart.

Douzinas, C. and Gearty, C.( eds.).2014. *The Meaning of Rights: The Philosophy and Social Theory of Human Rights*. Cambridge.

Douzinas, C. 2019. *The Radical Philosophy of Rights*. Routledge.

Dovemark, M., Kosunen, S., Kaukko, J., Magnúsdottír, B., Hansen, P. and Rasmussen, P. 2018. Deregulation, privatisation and marketisation of Nordic comprehensive education: social changes reflected in schooling. *Education Inquiry* 9 (1) 122–141.

Edström, M. Kenyon, A. T. and Svensson, E-M. 2016. *Blurring the Lines: Market-Driven and Democracy-Driven Freedom of Expression*. Nordicom.

ENNHRI .2022. European Network of National Human Rights Institutions, *Human Rights-Based Approach*, http://ennhri.org/about-nhris/human-rights-based-approach/, accessed 2022-06-14.

Essen, J. von (ed.).2019. *Det svenska civilsamhället - en introduktion* [Swedish civil society - an introduction]. Idealistas.

Erlandsson, S., Brodin, H., Graff, L. and Karsio, O. 2022. Choice models in Nordic long-term care: care managers' experiences of privilege and disadvantage among older adults". *European Journal of Ageing*. https://doi.org/10.1007/s10433-022-00697-z, accessed 2024-04-25.

Esping-Andersen, G. 1990. *The three worlds of welfare capitalism.* Princeton, New Jersey: Princeton University Press.

Flood, L., Nordblom, K. and Waldenström, D. 2013. *Dags för enkla skatter!* [Time for simple taxes!]. SNS Förlag.

Fraser, N., and Gordon, L. 1992. Contract versus Charity: Why Is There No Social Citizenship in the United States? *Socialist Review* 22: 45–65.

Fraser, N and Honneth, A 2003. *Redistribution or recognition? A political-philosophical exchange*. London: Verso.

Fritzell, J., Hvinden, B., Kautto, M., Kvist, J. and Uusitalo, H. 2001. *Nordic Welfare States in the European Context*. Routledge.

Giritli Nygren, K., Martinsson, L. and Mulinari, D. 2018. Gender Equality and Beyond: At the Crossroads of Neoliberalism, Anti-Gender Movements. "European" Values, and Normative Reiterations in the Nordic Model. *Social Inclusion* 6(4): 1-7.

Golder, B. 2015. *Foucault and the Politics of Rights*. Stanford.

Gunnarsson, Å., Svenaeus, L. and Svensson, E-M. 2023. Sweden: From Pro-Active Policies to Anti-Discrimination Law. In Hellum, A., Ikdahl, I., Blaker Strand, V. and Svensson, E-M (eds.). *Nordic Gender Equality and Anti-discrimination Laws in the Throes of Change*. Routledge.

Gustafsson, H. 2002. *Rättens polyvalens. En rättsvetenskaplig studie av sociala rättigheter och rättssäkerhet* [Legal Polyvalence. A jurisprudential study of social rights and legal certainty]. Lund Studies in Sociology of Law: Lund.

Gustafsson, H. 2005. "Taking *Social* Rights Seriously (I): Om sociala rättigheters status [On the status of legal rights]". *Tidsskrift for Rettsvitenskap* 4 (5).

Gustafsson, H. 2007. Taking *Social* Rights Seriously (II): Den handikappade lagen [The disabled law]. *Retfærd* 116.

Gustafsson H. 2018. Rättighetifiering: om rättigheternas tragedi [Rightification: on the tragedy of rights]. In T. Erhag, P. Leviner and A-S. Lind (eds.) *Socialrätt under omvandling - om solidaritetens och välfärdsstatens gränser* [Social law under transformation - about the limits of solidarity and the welfare state]. Liber.

Gustafsson, H. 2021. Om rättighetslagar: rättigheter och rättssäkerhet [About rights laws: rights and legal certainty]. In SOU 2021:37, *Stärkt rätt till personlig assistans: ökad rättssäkerhet för barn, fler grundläggande behov och tryggare sjukvårdande insatser* [Strengthened right to personal assistance: increased legal certainty for children, more basic needs and safer healthcare interventions], bilaga [amendment] 5.

Hartman, L. (ed.) 2011. *Konkurrensens konsekvenser. Vad händer med svensk välfärd?* [The consequences of competition. What is happening with Swedish welfare?]. SNS Förlag.

Hellum, A., Ikdahl, I., Strand, V. B., Gunnarsson, Å. and Svensson, E-M. .2023. Introduction Nordic gender equality and anti-discrimination laws in the throes of change. In: Hellum, A., Ikdahl, I., Blaker Strand, V. and Svensson, E-M. *Nordic Gender Equality and Anti-discrimination Laws in the Throes of Change.* Routledge.

Hernes, H. M.1987. *Welfare State and Woman Power. Essays in State Feminism*, Norwegian. University Press.

Herzfeld Olsson. P. 2017. Europeiseringen av den svenska föreningsfriheten[The Europeanization of Swedish freedom of association]. In Ahlberg, K., Herzfeld Olsson, P. and Malmberg, J. m.fl. (eds.). *Niklas Bruun i Sverige. En vänbok* [Niklas Bruun in Sweden. A tribute]. Iustus.

Hirdman, Y. 2018. *Att lägga livet till rätta - studier i svensk folkhemspolitik*, [To put life in order - studies on Swedish the folk home's politics]. Carlsson Förlag.

Hohfeld, Wesley N.1913. Some fundamental legal conceptions as applied in judicial reasoning. In W. N. Hohfeld *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*. Yale U.P.: New Haven 1923).

Hohfeld, Wesley N 1917), "Fundamental legal conceptions as applied in judicial reasoning", i: W. N. Hohfeld *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale U.P.: New Haven 1923).

Hoppania, H.-K., Karsio, O., Näre, L., Vaittinen, T. and Zechner, M. 2022. Financialization of Eldercare in a Nordic Welfare State. *Journal of Social Policy*: 1–19.

Ideström. J. and Linde, S.2019. Welfare State Supporter and Civil Society Activist: Church of Sweden in the "Refugee Crisis" 2015. *Social Inclusion* 7 (2): 2, 4–13.

Johnstone, R. and Ámundadóttir, A. 2013. Human rights in crisis: securing the International Covenant on Economic, Social and Cultural Rights (ICESCR) in economic downturns. *International Journal of Human Rights and Constitutional Studies* 1(1): 6–26.

Katzin, M. 2014. Valfrihet i stället för jämlikhet – förändrade målsättningar för äldreomsorgspolitiken? [Freedom of Choice Instead of Equality – Changed Objectives for Elder Care Policy*?]. Socialvetenskaplig tidskrift* 3–4:310–328.

Katzin, M. 2020. *Taking care of business: a study of the governing of care choice systems in Swedish home care*. Lund university.

Kenyon, A. T. 2021. *Democracy of Expression. Positive Free Speech and Law*. Cambridge: University Press.

Kenyon, A., Svensson, E., and Edström, M. 2017. Building and Sustaining Freedom of Expression, Considering Sweden. *Nordicom Review* 38 (1): 31-45.

Kotkas, T. and Veitch, K. (eds.).2017. *Social Rights in the Welfare State: Origins and Transformations.* Routledge.

Letto-Vanamo, P. 2017. Access to justice - a concept with many meanings. *Tidskrift utgiven av Juridiska föreningen i Finland* 153, (2-4): 233-241.

Lewis, J. 2013. *Beyond Consumer Capitalism: Media and the Limits to Imagination*. Cambridge.

Lister, R. 2003. *Citizenship: feminist perspective*. Palgrave MacMillan.

Lucy, W.2020. Access to Justice and the Rule of Law. *Oxford Journal of Legal Studies* 40 (2): 377–402, https://doi.org/10.1093/ojls/gqaa012, accessed 2024-04-25.

Martinsson, L., Griffin, G., and Giritli Nygren, K. 2017. *Challenging the Myth of Gender Equality in Sweden*. Policy Press.
Miller, H. and Redhead, R. 2019. Beyond 'rights-based approaches'? Employing a process and outcomes framework. *The International Journal of Human Rights*, 23 (5): 699-718.
Mouffe, C. 2005. *On the political.* Routledge.
Moyn, S. 2018. *Not Enough: Human Rights in an Unequal World.* Belknap Press, Harvard University Press.
Nousiainen, K. 2001. Transformative Nordic Welfarism: Liberal and Communitarian Trends in Family and Market Law. In Nousiainen, K., Gunnarsson, Å., Niemi-Kiesiläinen, J. and Lundström, K. (eds.) *Responsible selves. Women in the Nordic Legal Culture.* Routledge.
Novak, J. 2018, *Juridification of Educational Spheres.* Uppsala university.
Novak, J. and Gustafsson, H. 2020. God utbildning i lagens namn? [Good education in the name of the law?]. In A. Fejes and M. Dahlstedt (eds.). *Perspektiv på skolans problem - vad säger forskningen?* [Perspectives on school problems - what does the research say?]. Studentlitteratur.
OECD.2015. *Income inequality data update: Sweden* (January 2015), https://www.oecd.org/sweden/OECD-Income-Inequality-Sweden.pdf, accessed 2022-06-13.
Olsen, F. .2011. Liberal Rights and Critical Legal Theory. *German Law Journal* 12(1): 234-246.
Pylkkanen, A. 2007. Transformation of the Nordic Model: From Welfare Politics to Gendered Rights. *Canadian journal of women and the law* 19 (2):335-354.
Pylkkänen, A. 2009. *Trapped in equality. Women as Legal Persons in the Modernisation of Modern Law.* Helsinki: Finnish Literature Society.
Refors Legge, M. 2021. *Skolans skyldighet att förhindra kränkande behandling av elever* [The school's obligation to prevent abusive treatment of students]. Stockholms universitet.
Rennerskog, J. 2021. "Rightificating' Coercion – A Critical Perspective on the Transformation of State-Driven Coercive Care. *Social & Legal Studies* 30 (5).
Rennerskog, J. 2023. *An object in need of protection but not a subject of rights? A study on rights of children involuntarily placed in care in the Swedish welfare state.* Dept of Criminology: Stockholm University.
Rothstein, B. and Vahlne Westerhäll, L. (2005) Introduktion (Introduction). In Rothstein, B. and Vahlne Westerhäll, L. (eds.). *Bortom den starka statens politik?* [Beyond the policy of the strong state?]. SNS Förlag.
Rua Wall, I. 2014. On a radical politics for human rights. In Douzinas, C. and C. Gearty (eds.). *The Meaning of Rights: The Philosophy and Social Theory of Human Rights.* Cambridge.
Ryffé, D. 2019. *Omöjligt uppdrag [Mission impossible].* Göteborgs universitet.
Schwartzman, L. .1999. Liberal Rights Theory and Social Inequality: A Feminist Critique. *Hypatia*, 14:2: 26-47.

Socialstyrelsen.2023. *Vård och omsorg för äldre - Lägesrapport 2023* [Health care and care for the older - Status report 2023]. Socialstyrelsen.
SOU. 2000:1. *En uthållig demokrati - politik för folkstyrelse på 2000-talet* [A sustainable democracy - politics for democracy in the 21st century]. Norstedts Juridik.
SOU.2019:43. *Med tillit följer bättre resultat – tillitsbaserad styrning och ledning i staten*. [With trust follows a better result – trust-based governance and management within the State. The Delegation of Trust-Based Governance]. Norstedts Juridik.
SOU. 2020:79) *Effektivare tillsyn över diskrimineringslagen – aktiva åtgärder och det skollagsreglerade området* [More efficient supervision of the Discrimination Act - active measures and the sphere regulated by the Education Act]. Norstedts Juridik.
Statistics Sweden. 2021. *Income and taxes*. https://www.scb.se/en/finding-statistics/statistics-by-subject-area/household-finances/income-and-income-distribution/income-and-tax-statistics/pong/statistical-news/income-and-taxes-2021/, accessed 2024-01-02.
Statistics Sweden .2022. *SCB publicerar stor kartläggning av Sveriges äldre*. [Statistics Sweden publishes a large survey of Sweden's older population], https://www.scb.se/pressmeddelande/scb-publicerar-stor-kartlaggning-av-sveriges-aldre/, access 2024-01-02.
Stendahl, S. 2016.To Reside: to live, be present, belong. *European Journal of Social Security* 18 (2): 232–245.
Stenlund, K. 2021. *Rättighetsargumentet i skadeståndsrätten* [The rights argument in tort law]. Iustus.
Sunde, J.Ø. 2021. The History of Nordic Legal Culture and Court Culture: The Story of What Should not Have Been, but Still Came to Be. In Ervo, L., Letto-Vanamo, P., and Nylund, A. (eds.). *Rethinking Nordic Courts.* Ius Gentium: Comparative Perspectives on Law and Justice, vol 90. Springer, Cham. https://doi.org/10.1007/978-3-030-74851-7_4, accessed 2024-04-25.
Svenaeus, Lena.2017. *Konsten att upprätthålla löneskillnader mellan kvinnor och män. En rättssociologisk studie av regler i lag och avtal om lika lön* [The art of maintaining the pay gap between women and men. A legal sociological study of rules in law and agreements on equal pay]. Rättssociologiska institutionen, Lunds universitet.
Svensson, E-M.2020a. Exploiting Justice in a Transformative Swedish Society. In Special Issue: Exploiting Justice in a Transformative Swedish Society. *Nordic Journal on Law and Society* 3 (2): 1-25.
Svensson, E-M. 2020b. *Åldersdiskriminering och ålderism i arbetslivet* [Age discrimination and ageism in working life]. Delegationen för senior arbetskraft [The delegation for senior workers] (S 2018:10), Rapport 18.

Svensson, E-M. and Gunnarsson, Å. 2018. Structuralism versus Individualism in Swedish Gender Equality Policy and Law. N*ORA - Nordic Journal of Feminist and Gender Research*.

Svensson, E-M. and Valokivi, H. 2023. Distanciation and the transformation of Finnish and Swedish monitoring of 'elder care housing' in Arctic Communities. In Naskali, P, Begum, S., Zechner, M. and Harbison, J. (eds.). *Centring the local: Distance, Equity and Older People's Experiences in the Northern Periphery*. Routledge – Polar Regions Series.

Swyngedouw, E. and Wilson, J. (eds.).2014. *The Post-Political and Its Discontents: Spaces of Depoliticisation, Spectres of Radical Politics*. Edinburgh.

Szebehely, M. and Meagher, G. 2018. Nordic Eldercare – Weak Universalism Becoming Weaker? *Journal of European Social Policy* 28 (3): 294–308.

Teubner, G. 1983. Substantive and Reflexive Elements in Modern Law. *Law & Society Review* 17 (2).

Teubner, G. 1987. Juridification. Concepts, aspects, limits, solutions. In G. Teubner (ed.). *Juridification of Social Spheres*. de Gruyter.

The Nordic Branding Project .2022. https://www.uio.no/english/research/strategic-research-areas/nordic/research-groups/nordic-branding/, accessed 2024-04-25.

Törngren, S. O., Öberg, K. and Righard, E. 2018. The role of civil society in the integration of newly arrived refugees in Sweden. In A. ,Lace (ed.). *Newcomer Integration in Europe: Best Practices and Innovations Since 2015*. FEPS Foundation for European Progressive Studies, 13-24.

Upphandlingsmyndigheten [The National Agency for Public Procurement] (2023), Annonserade valfrihetssystem [Systems of free choice], https://www.upphandlingsmyndigheten.se/statistik/upphandlingsstatistik/annonserade-valfrihetssystem-i-sverige-2023/#de_flesta_valfrihetssystem_avser_hemtjanst, accessed 2024-04-24.

Uvin. P. 2004. *Human Rights and Development.* Bloomfield CT: Kumarian Press.

Uvin, P. 2010. From the right to development to the rights-based approach: how 'human rights' entered development. In A. Cornwall and D. Eade (eds.). *Deconstructing Development Discourse. Buzzwords and Fuzzwords*. UK: Practical Action Publishing in association with Oxfam GB, 163–174.

Vahlne Westerhäll, L. 2002. *Den starka statens fall? En rättsvetenskaplig studie av svensk social trygghet 1950-2000* [The fall of the strong state? A legal study of Swedish social security 1950-2000]. Norstedts Juridik.

Vik, H. H., Jensen, S. LB., Lindkvist, L. and Strang, J. 2018. Histories of Human Rights in the Nordic Countries. *Nordic Journal of Human Rights* 36:3: 189-201.

Waldron, J. (ed).1985. *Theories of rights.* Oxford University Press.

Wellman, C.1997. *An approach to rights. Studies in the philosophy of law and morals.* Kluwer.

Young, I. M. 2021. *Gender, justice and the Politics of Difference*. Routledge.

Ålund, A., Schierup, C., and Neergaard, A. (eds.).2017. *Reimagineering the Nation*. Bern, Switzerland: Peter Lang.

## Notes on contributors

Håkan Gustafsson (LL.M., LL.D., Associate Professor [Docent]) is Professor in Jurisprudence at the Department of Law, School of Business, Economics and Law, University of Gothenburg. Areas of interest and research are legal philosophy, critical legal theory, sociological jurisprudence, theories on rights, legal subjectivities, power relations and general social welfare law.

Eva-Maria Svensson (LL.D, Docent) is professor emerita at the Department of Law, School of Business, Economics and Law, University of Gothenburg. Her research is mainly concentrated on legal philosophy and theory, particularly in the field of feminist/gender legal studies, but she also does research in other fields like ageing studies, gender equality law and policy, and freedom of speech.