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**Refugee Immigrants and the Access to Work in Sweden: Legal Obligations
under International Human Rights Law?**

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SUMMARY

This study explores the access of refugee immigrants to employment in Swedish labour market. It explores the trend in immigration in Sweden and the transition from labour immigration to refugee immigration. It shows that Sweden adopts a generous immigration and refugee policy and grants protection to a huge number of refugees but it has had difficulties in improving access to employment for these groups.

The rate of participation of refugee immigrants in Swedish labour market has decreased since the beginning of the changes in immigration policies in 1970s. Factors such as the modest human capital of the refugees and the practice of discrimination in labour market has been found as the major explanations for the low rate of participation of immigrants in the Swedish labour market

Sweden has taken some legislative, administrative and financial measures to comply with its international obligations to realize the right to work for refugees; however these measures have shown a little impact on improving access to work for the groups of immigrants.

This study also examines the normative content of the right to work in international law and its applicability to refugees. The nature and scope of Sweden's obligation to promote access to work of refugee immigrants are also examined in this study especially with regard to the principle of non-discrimination.

This study concludes that there is gap between the right of refugee to work which is recognized by the international and national laws and the practice of this right in Sweden. Therefore, and in order to improve access to employment for refugee immigrants the study suggests some recommendations in respect of increasing the human capital of refugees and combating discrimination in labour market.

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ABBREVIATIONS

AIC	Employment and Introduction Center
DO	Office of the Equality Ombudsman
ECHR	European Convention on Human Rights
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EEA	European Economic Area
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO	International Labour Organization
LO	Swedish Trade Union Confederation
OECD	Organization for Economic Cooperation and Development
PACE	Parliamentary Assembly of the Council of Europe
SAF	Confederation of Swedish Enterprise
SCB	Statistic Sweden
SFI	Swedish for Immigrants
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UPR	Universal Periodic Review
VCLT	Vienna Convention on the Law of Treaties
WEP	World Employment Programme

1. INTRODUCTION

1.1. Background

During the periods of 1980s and 1990s the world experienced serious climate and environmental changes which resulted in increasing movements of refugees and immigrants across international borders, not only because of the famine and drought but also because of the armed conflicts and political tensions that coincided with that phenomenon mostly in Africa,¹ Middle East and Eastern Europe.

Since the last two decades the receiving countries in Europe became more restrictive in receiving the growing numbers of refugees and immigrants, and these restrictions take forms of interception of asylum seekers at sea and the border control². Moreover, there has been a growing trend among the receiving countries to adopt narrow interpretations in defining a refugee according to the refugee law in an attempt to restrict the movement and/or the residence of the asylum seekers.³

Unlike other European countries, Sweden adopts relatively a humane refugee policy which aims to safeguard those fleeing from oppression and persecution, and thus it discourages to some extent the trend towards closed border policies.⁴

Although Sweden attempted to adopt restrictive policies since 1970s, it is still one of the good examples of generous refugee and integration policies⁵. The liberalism in refugee policy which followed by generous refugee integration programs are considered to be a unique mechanism applied only by Sweden and the Scandinavian countries in addressing the immigrant and immigration challenges.⁶

However, Sweden faces big economic integration challenges particularly in making the country a country of equal opportunities for immigrants and aliens,⁷ especially with respect to labour market.

Despite the fact that the right to work is being acknowledged as one of the fundamental human rights and it plays a central role in realizing other essential economic and social rights,

¹ Erika Feller, Evolution of the international refugee protection. Journal of Law & Policy. Vol. 5:129. P. 134 http://law.wustl.edu/harris/documents/p129_Feller.pdf .

² Id

³ Ruma Mandel. Protection mechanisms outside of the 1951 convention 2005. UNHCR. Department of International Protection. PPLA/2005/02. P.8. <http://www.refworld.org/pdfid/435e198d4.pdf> .

⁴ BENNY CARLSON, KARIN MAGNUSSON & SOFIA RÖNNQVIST. Somalier på arbetsmarknaden har Sverige något att lära? (Somalis in the labor market , has Sweden something to learn?) REGERINGSKANSLIET. Statsrådsberedningen. Tryckt av Elanders Sverige AB 2012. ISBN 978-91-38-23810-3. P. 52 <http://www.regeringen.se/content/1/c6/21/90/93/3bb29614.pdf> .

⁵ Marko valenta and Nihad Bunar. State Assisted Integration: Refugee Integration Policies in Scandinavian Welfare States: the Swedish and Norwegian Experience. Journal of Refugee Studies. Vol.23, No. 4. Oxford University Press. 2010. P. 464. <http://www.creatingaroadhome.com/new/wp-content/uploads/state-assisted-integration-refugee-integration-policies-in-scandinavian-welfare-states-the-swedish-and-norwegian-experience.pdf> .

⁶ Id

⁷ BENNY CARLSON, KARIN MAGNUSSON & SOFIA RÖNNQVIST .P.6

most of the countries including the developed ones such as Sweden seem unable to improve access to this right⁸ especially for immigrants.

The right to work has been recognized in a number of international human rights treaties such as the United Nations Charter (UN Charter), the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) which deals with this right in more depth than the other human rights instruments; and the International Labour Organization (ILO) Standards.

According to the ILO, the number of unemployed people across the world is estimated 201,8 million in 2013.⁹ The unemployment level is higher among refugee immigrants than among natives.¹⁰ However, the nature and scope of States' obligations to combat unemployment and realize the right to work for refugee immigrants remains controversial.

1.2. Purpose

This objective of this study is two-fold. It aims on the one hand to trace and explore the development of immigration trends in Sweden and to examine and analyze the factors that lay behind the higher rates of unemployment among refugee immigrants in recent years than in former periods of immigration.

On the other hand this study aims to analyze the nature of Sweden's obligation under international human rights Law to improve access to work for refugee immigrants, and to identify the scope of this obligation.

1.3. Argument

The argument presented in this study is that since the transition from labour immigration to refugee immigration the rate of participation of refugee immigrants into Swedish labour market has decreased; and they became less integrated into Swedish labour market in recent years than in former periods of immigration not only due to their modest human capital but also because they are discriminated against.

This study also argues that there is a gap between the legal right of refugees to work and their participation in Swedish labour market. The recognition of the refugees' right to work in national laws is not enough to realize this right because there are other obligations must also be fulfilled such as the promotion of integration programmes and the elimination of discrimination against refugee immigrants in the labour market.

⁸ Philip Harvey. Why Is the Right to Work So Hard to Secure? September 12, 2012. CUUS 1806-06, CUUS 1806/Minkler. ISBN: 9781107028029. P. 135. <http://www.philipharvey.info/hardtosecure.pdf>.

⁹ TIME. <http://world.time.com/2014/01/20/u-n-says-over-200-million-unemployed-worldwide>

¹⁰ MARKO VALENTA. State Assisted Integration: Refugee Integration Policies in Scandinavian Welfare States: the Sweden and Norwegian Experience. 2010. Journal of Refugee Studies Vol. 23, No. 4. P.470

1.4. Methodology

This study apply a methodology consists of a descriptive methodology to analyze the changes that have occurred in the immigration trend in Sweden and to examine the impact of the restrictive immigration policies on immigrants' access to work.

A descriptive and explanatory methodology will also be used in this study to examine and explain the inequality between immigrants and natives in accessing labour market in quantitative and statistical analysis. I use this methodology because it is suitable for conducting a comparative examination to explain the level of immigrants' participation in the labour market in relation to the native participation. It enables us to examine and analyze a big amount of data and information and keeping at the same time the ability of showing the pattern of the subject matter and why it looks that way.

This study will also use a descriptive presentation of the international human rights rules relevant to the assessment of Sweden's obligation to promote access to employment to refugee immigrants.

1.5. Scope and delimitation

Trying to present, examine, assess and compare then conclude a large subject such as the right to work and economic integration of refugee immigrants into Swedish labour market is indeed a hard work. It is hard because it has different dimensions at the national and international levels, and because it comprises a large composition of different areas such as legal, social and economic fields. No doubt that each area has its own significance in forming the whole picture. Nevertheless, the examination of all these areas with the limited scope of this thesis may give a broad study without depth in the subject matter. To equalize the depth with the breadth this study will seek to answer the following questions:

- What are the factors that led to the high rates of unemployment among refugees and foreign-born population in Sweden?
- Has there been an attempt to improve access to work for refugee immigrants in Sweden? If so, in which manner?
- What is the nature and scope of Sweden's obligation to promote access to work for refugee immigrants?

1.6. Material

This study will rely on secondary sources of data such as earlier researches and studies, books, journals, articles, governmental reports and reports from NGOs, legal instruments and internet sources.

1.7. Outline

This study consists of two parts. The first part focuses on the trends in immigration in Sweden and the economic integration of the refugee immigrants into Swedish labour market. It consists of three chapters. The first one is an introduction and the second chapter examines the transition from labour immigration to refugee immigration and analyses in particular the immigration trends in Sweden and its development over time in order to understand the shift in Swedish immigration policies. The third chapter concentrates on the participation of refugees and foreign-born population in Swedish labour market, in particular this chapter examines and analyses the economic integration of the refugee immigrants into Swedish labour market, and it explores the major challenges that faced the refugees in accessing employment. Special attention is given to the human capital of refugees and discrimination in labour market in order to examine their impact on refugees' access to employment. This chapter also examines and analyses the measures that have been taken by Sweden to increase the human capital of refugees and to combat discrimination in labour market.

The second part gives an insight into the legal framework of the right to work and the obligations arising from the international law in terms of the realization of this right. This part comprises three chapters. The fourth chapter discusses the normative content of the right to work in international human rights instruments, ILO Conventions and the ECHR. The fifth chapter focuses on the nature and scope of Sweden's obligation to realize the right to work for refugees; it examines the obligations under the Refugee Convention 1951, the UN Migrant Workers Convention and the ICESCR. The sixth chapter examines the nature and scope of Sweden's obligation not to discriminate against refugee immigrants, particularly its obligation under the ICESCR, ILO Conventions and ECHR.

The seventh chapter is the last chapter and it concludes the study and suggests some recommendation.

2. THE TRANSITION FROM LABOUR IMMIGRATION TO REFUGEE IMMIGRATION IN SWEDEN

2.1. Sweden as a country of emigration

The history of emigration from Sweden returns to the period from 1821 until 1930 when about 1,3 million people emigrated to South America, Canada, Australia and New Zealand and, but most of those immigrants emigrated to the United States.¹¹ There are number of factors that led to the emigration of Swedes at that time but the most important factors were the low rate of fertility of the soil which was coincided with the increasing growth in population due to the fall in infant mortality from 21% in 1750s to 15 % in 1850s.¹²

This tendency towards emigration has changed over time especially in the beginning of the Second World War when Sweden had decided to remain neutral. This position of neutrality has contributed to the transition of Sweden from a country of emigration to a country of immigration to receive the immigrants and refugees fled the war in other European countries.¹³

2.2. Trends in Immigration in Sweden 1940- on

2.2.1. Refugees and asylum seekers flows to Sweden 1940 to 1948

During the period of the First World War 1914-1918¹⁴ the Nordic countries applied very restrictive measures to control the flows of immigrants and refugees fleeing the social unrest and political conflicts between the warring powers.¹⁵ The Nordic countries required the possession of entry visa in order to allow the refugees to cross their borders; they also created the “central state immigration authorities” to register the foreigners. However, the Scandinavian countries including Sweden accepted a considerable number of refugees from Tsarist Empire in 1917.¹⁶

As we have noted above Sweden has been a country of net immigration since 1930s¹⁷ when it admitted refugees from neighboring countries including 30,000 victims and survivors of the

¹¹ Ingela Martenius. The Swedish Emigration To America. P. 1 <http://web.comhem.se/~u31263678/genealogy/Emigration-eng.pdf> .

¹² John Simkin. Swedish Immigration. <http://www.spartacus.schoolnet.co.uk/USAEsweden.htm#source>

¹³ Michelle. Immigration Policy in Sweden: Part One. <http://borderlessadventures.com/article/immigration-policy-in-sweden-part-one-295> .

¹⁴ History. <http://www.history.com/topics/world-war-i>

¹⁵ Bernd Parusel. Country Profile No. 18 Sweden. P.2. http://focus-migration.hwwi.de/uploads/tx_wilpubdb/CP_18_Sweden.pdf

¹⁶ Id

¹⁷ DANIEL RAUHUT. Integration of Immigrants in Sweden 1945-1975. P. 107. http://vaestoliitto-fi-bin.directo.fi/@Bin/74a9fa2f65590df9e19594cc789947a/1391959493/application/pdf/850181/YB%202010_Rauhut.pp.103%13122.pdf

Nazi persecutions and oppression.¹⁸ Sweden also accepted about 70,000 refugee children brought from Finland during the Soviet Union attacks on Finnish cities in late 1930s.¹⁹

We can also observe that the period of 1943 to 1948 was a period of growing waves of refugees and asylum seekers from countries around Sweden especially after Germany's attack on Norway and Denmark in April 1940²⁰ which led to the escape of religious and political groups such as Jews, socialist and other vulnerable groups to Sweden.²¹ A considerable number of refugees from Estonia, Latvia and elsewhere fled to Sweden by the end of the Second World War.

The most interesting thing is that most of those refugees were employed in industries and forestry due to shortage in manpower and the availability of jobs at that wartime.²²

2.2.2. Labour immigration to Sweden 1949–1972

The period of 1949 – 1972 is characterized by labour immigration from Finland and Southern Europe to Sweden.

As we have seen earlier, Sweden was not involved in the Second World War therefore the Swedish industrial infrastructure was not destroyed as the case was in the countries that were involved in the war. This situation granted Sweden the opportunity to develop its industrial export whereas other countries had been engaged in the construction and reconstructions of their destroyed cities.²³

There was a huge demand for workers in the Swedish labour market and accordingly the main companies and factories started to recruit different workers from European countries especially from Italy therefore the period of late 1940 and 1950s witnessed an increasing movement of immigrant workers from Italy to Sweden.²⁴

Due to the free immigration policy that adopted by Sweden this period also witnessed the flow of immigrant workers from Finland, Yugoslavia and Greece. Moreover, the Nordic countries signed an agreement in 1950, by which their citizens had the right to live and work in any of the Nordic countries, and accordingly there were mass movements of the workers from Norway, Denmark, Finland and Iceland to Sweden.²⁵

It is important at this point to mention that Sweden did not implement a specific immigration policy during the period of 1950s due to the availability of jobs and shortage in manpower, but however, in late 1960s the authorities granted the immigrants permanent residence and

¹⁸ Michelle. Immigration Policy in Sweden: Part One. No page number

¹⁹ Charles Westin. THE EFFECTIVENESS OF SETTLEMENT AND INTEGRATION POLICIES TOWARDS IMMIGRANTS AND THEIR DESCENDANTS IN SWEDEN. Migration Branch. INTERNATIONAL LABOUR OFFICE GENEVA. P. 3 http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_201879.pdf

²⁰ Planet Company of Heroes. <http://planetcoh.gamespy.com/View.php?view=WWIIHistory.Detail&id=76> .

²¹ Charles Westin. THE EFFECTIVENESS OF SETTLEMENT AND INTEGRATION POLICIES TOWARDS IMMIGRANTS AND THEIR DESCENDANTS IN SWEDEN. Migration Branch. INTERNATIONAL LABOUR OFFICE GENEVA. P. 3

²² Id

²³ Id

²⁴ Id

²⁵ Michelle. Immigration Policy in Sweden: Part One. No page number

adopted a policy which aimed to ensure that the immigrants are entitled to rights and duties in equal footing with the citizens.²⁶

At first glance this transition in immigrant policy seems to be promising for the immigrant workers, but it was not so because the Swedish authorities in 1960s started to require the non-Nordic immigrants to apply for a work permit prior to their arrival, and accordingly they would be granted residence permits.²⁷ This shift in immigration policy was backed up by the Swedish Trade Union Confederation (LO) who influenced the ruling party at that time the Social Democratic Party to adopt more restrictive immigration policy.²⁸ For that reason, the number of immigrant workers was reduced and the labour immigration from non-Nordic countries came to an end in 1972.²⁹

2.2.3. Refugee flows and family reunification from the Third World to Sweden 1972 to 1989

The period from 1972 to 1989 is characterized by asylum seekers flows from developing and least developed Countries and family reunification. As we have noted above during the 1970s Sweden started to implement its restrictive immigration policies and thus the number of refugees and immigrant workers to Sweden had decreased. Nevertheless, Sweden was committed to accept quota refugees annually from UNHCR camps around the world.³⁰

The first group of refugees from outside Europe that accepted by Sweden was a group of 1000 Ugandan Asians who are expelled by General Idi Amin regime due to his Africanization policies in Uganda in 1972.³¹

This African group of refugees was followed by 5,000 refugees fled the political unrest in Chile in 1973, then the number of Chilean refugees admitted in Sweden rose to 18,000 refugee by the end of 1989, taking into account that there were a considerable number of refugees accepted by Swedish authorities who were mainly from Latin American countries such as Argentina, Uruguay, Bolivia, Brazil and Peru.³²

Beside the flow of refugees from Latin American countries during this period we can also observe waves of immigration from Middle East countries in 1970s and 1980s. The immigrants were different groups of refugees from Syria, Turkey, Iran and Iraq sought asylum in Sweden on religious, ethnic and political grounds.³³

²⁶ Michelle. Immigration Policy in Sweden: Part One. No page number

²⁷ Charles Westin. THE EFFECTIVENESS OF SETTLEMENT AND INTEGRATION POLICIES TOWARDS IMMIGRANTS AND THEIR DESCENDANTS IN SWEDEN. Migration Branch. INTERNATIONAL LABOUR OFFICE GENEVA. P. 4

²⁸ Michelle. Immigration Policy in Sweden: Part One. No page number

²⁹ Charles Westin. THE EFFECTIVENESS OF SETTLEMENT AND INTEGRATION POLICIES TOWARDS IMMIGRANTS AND THEIR DESCENDANTS IN SWEDEN. Migration Branch. INTERNATIONAL LABOUR OFFICE GENEVA. P. 4

³⁰ Id

³¹ Charles Westin. Sweden: Restrictive Immigration Policy and Multiculturalism. Centre for Research in International Migration and Ethnic Relations, Stockholm University 2006.

<http://www.migrationinformation.org/Profiles/display.cfm?ID=406>

³² Id

³³ Id

Although some of those refugees were Christian minority from Turkey, Syria and Lebanon and they applied for asylum on the grounds of ethnic and religious persecutions, the Swedish authorities granted them asylum on humanitarian grounds not as 1951 Convention refugees³⁴, and this restriction in the definition of refugee was arguably the starting point for the transition towards the restrictive refugee policy

The admission of refugees was not only limited to those religious groups but also covered the Kurds ethnic group who emigrated from Turkey, Iran and Iraq in 1980s, and the largest group among those immigrants was the Iranians who were more than 55,000 people.³⁵

The number of refugees from African countries during this period was also considerable especially refugees from Ethiopia, Eritrea and Somalia.³⁶ In addition, during early 1980s there were more than 3,000 refugees from Vietnam were granted asylum in Sweden, beside the admission of a considerable number of refugees fleeing Poland after the trade union organization solidarity crisis in 1981.³⁷

By the end of 1980s about 50 percent of the immigrants in Sweden were refugees, 25 percent were immigrants from Nordic countries and the other 25 percent were non-Nordic immigrants who came to Sweden on the grounds of family reunification.³⁸

2.2.4. Refugee flows and family reunification from Eastern Europe 1990

The period of 1990s is characterized by mass movements of political refugees and family reunification due to the political changes and unrest in Eastern Europe following the Post-Cold war transitional period.

This period was considered as a period of a great immigration challenge for Sweden because there was mass immigration of refugees from Bosnia-Herzegovina and Kosovo to Sweden. The number of the immigrants was estimated 53,000 asylum seekers and refugees per year in 1990s, taking into account that in 1994 there were more than 84,000 asylum seekers waiting for recognition of their status in order to be granted residence permits in Sweden.³⁹

The number of immigrants from other European countries to Sweden was about 6,200 persons per year in 1990-1992, and then the number has rose dramatically during the following three years to reach 28,000 immigrants per year due to the armed conflict in former Yugoslavia.⁴⁰

³⁴ Charles Westin. THE EFFECTIVENESS OF SETTLEMENT AND INTEGRATION POLICIES TOWARDS IMMIGRANTS AND THEIR DESCENDANTS IN SWEDEN. Migration Branch. INTERNATIONAL LABOUR OFFICE GENEVA. P. 5

³⁵ Id

³⁶ Id

³⁷ Ministry for Foreign Affairs, Department of Migration and Asylum Policy. Sweden in 2000: A Country of Migration. Past, present and Future. Bull's Printers Ltd, Halmstad. 2001. ISBN 91-7496-245-0. P. 18

³⁸ EVA LUNDBERG LITHMAN. Immigration and Immigrant Policy in Sweden . Published by the Swedish Institute in cooperation with the Swedish Ministry of Labour. Printed in Sweden by Norstedts Tryckeri AB, 1987. ISBN 91-520-0198-9. P. 10

³⁹ Ministry for Foreign Affairs, Department of Migration and Asylum Policy. Sweden in 2000. P. 20

⁴⁰ Id. P. 21

The immigration from countries other than European countries such as Asian and African countries was also noticeable, at least there were 15,500 persons immigrated to Sweden in 1990s.⁴¹

In 2000, there were 58,700 persons who came to Sweden as immigrants including a huge number of asylum seekers, and this number is obviously more than the average level of the period of 1990s.⁴²

During the year of 2000, about 16,300 persons from Bosnia-Herzegovina, Iraq, Yugoslavia and Iran also sought asylum in Sweden which represents an increase of 5000 person compared with the end of 1990s.⁴³

The most important thing in this regard is that during 2000 the authorities in Sweden granted 9,000 residence permits to asylum seekers on humanitarian grounds, in addition to another 3,500 residence permits for family reunification.⁴⁴

If we make a comparison, we can observe that the numbers of residence permits in 2000 were more than the number of residence permits that were granted in 1995, which represented 5,600 residence permits for asylum seekers and 8,000 residence permits for family reunification.⁴⁵

It is evident that Sweden was very generous in its refugee and immigration policies, and as we have seen through our description to different immigration's era that the *de facto* refugees- such as war resisters and those fleeing political unrest- who fall outside the scope of the Refugee Convention had been granted asylum for many years, but the actual immigration's restriction took its legal form in 1975.⁴⁶ This legal step followed the mass flows of asylum seekers with Assyrian and Syrian backgrounds who came from Turkey and sought asylum in Sweden in 1970.⁴⁷

⁴¹ Ministry for Foreign Affairs, Department of Migration and Asylum Policy. Sweden in 2000. P.21

⁴² Id. P. 27

⁴³ Id. P. 28

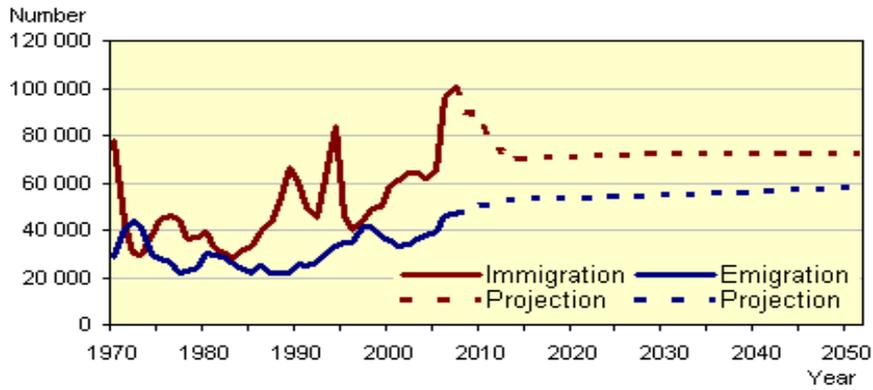
⁴⁴ Id. P. 29

⁴⁵ Id

⁴⁶ PETER NOBEL. What happened with Sweden's Refugee Policies? International Journal of Refugee Law Vol. 2 No 2. Oxford University Press 1990. Downloaded from <http://ijrl.oxfordjournals.org/> at Lunds Universitet on February 11, 2014. P. 265

⁴⁷ Id. P. 271

The following figure No. 1 shows the immigration and emigration to Sweden 1970-2050. Source: SCB.⁴⁸
Figure 1



⁴⁸The figure is taken from the study of Heda Saijeva. Segregation and Employment in Swedish Regions. Jönköping International Business School 2011. Jönköping University. <http://hj.diva-portal.org/smash/get/diva2:430594/FULLTEXT01.pdf>. Figure 1-1. P.3

3. PARTICIPATION OF REFUGEE IMMIGRANTS IN SWEDISH LABOUR MARKET

3.1. The economic integration of immigrants into Swedish labour market

The immigrants who came to Sweden as migrant workers and the members of their families from the post Second World War in 1945 to the period of 1970s have integrated well in the Swedish labor market.⁴⁹ This applies also to refugees who arrived during this time.⁵⁰

Christer Lundh argues that this ease of economic integration of immigrants during this period could be explained by the industrial expansion and the rapid economic growth that coincided with the huge labour shortage, therefore it was easy for immigrants to get jobs, either within the experience and the profession they had or in unskilled jobs in manufacturing or service sectors.⁵¹ In particular, the refugee immigrants who arrived since the 1970s had been employed in the service sector.⁵²

Until early 1970s, the rate of employment was higher for immigrants than for natives in Sweden and accordingly the difference was small between the immigrants and natives regarding the dependence on unemployment benefit or social assistance.⁵³ The explanation for this difference as argued by Christer Lundh is that the number of the immigrants in the age of 25 - 50 was higher than that of natives.⁵⁴

Furthermore, Karl-Olov Arnstberg and Billy Ehn point out in their study that in 1972 there were more than one thousand Turks in Stockholm⁵⁵ and many of them increased their incomes by engaging in two jobs, one as cleaners in offices during day time and the other as dish washers in restaurants in the evening.⁵⁶

An interview survey conducted by Wadensjö Eskil also shows that the rate of employment in 1960s and early 1970s was higher among immigrants aged 16 - 67 years from Finland, Italy, Yugoslavia and Germany than among natives of the same age.⁵⁷

⁴⁹ Christer Lundh. *Invandringen till Sverige (Immigration to Sweden) 2010*. SNS Förlag Stockholm 2005. Norhaven A/S Danmark. ISBN 978-91-86203-68-9. P. 61

⁵⁰ DANIEL RAUHUT, Ph.D. *Integration of Immigrants in Sweden 1945-1975*. Finnish Yearbook of Population Research XLV 2010, pp.103-122. P. 103
<http://eds.a.ebscohost.com.ludwig.lub.lu.se/eds/pdfviewer/pdfviewer?sid=8fd6fab7-3038-42cf-9574-4e26236aa673%40sessionmgr4003&vid=2&hid=4113> .

⁵¹ Christer Lundh. *Invandringen till Sverige*. P. 61

⁵² Id. P.69

⁵³ Id. P. 62

⁵⁴ Id

⁵⁵ Karl-Olov Arnstberg and Billy Ehn. *Etniska minoriteter i Sverige förr och nu 1976 (Ethnic minorities in Sweden past and present)*. Lund: Liber Läromedel. 1976. ISBN 91-40-03988-9. P. 128

⁵⁶ Id. P.131

⁵⁷ Wadensjö, Eskil. *Immigration och samhällsekonomi (Immigration and Economics) 1973*. Lund: Studentlitteratur. ISBN 91-44-09901-0. P. 187

According to Jan Ekberg and Lars Andersson the employment rate for immigrants declined and the unemployment rate increased over time in relation to the native population in Sweden. For instance, in the 1950s and 1960s the employment rate for immigrants was very high especially during the period when immigration was consisted mainly of migrant workers and the overall labor market situation was good.⁵⁸

It is also argued by Daniel Rauhut that the immigrants and refugees are less economically integrated into Swedish labour market in recent years than in former periods of immigration.⁵⁹ He claims that since the end of 1970s and the beginning of 1980s the rate of participation of immigrants and refugees in the labour market has decreased dramatically.⁶⁰

As we have noted earlier, in the 1970s the trend in immigration was changed and turned increasingly to become refugee immigration and family reunification; and the labor market situation in Sweden had declined due to the oil crisis of 1973-1974.⁶¹

Jan Ekberg and Lars Andersson argue that both of these factors can be expected to decrease the employment rate for immigrants; and according to their argument there are explanations for this reduction in the rate of employment from both the labor market's supply and demand perspectives. From the supply perspective, Sweden has changed the character of immigration with groups of refugees that have lower labor skills than the former labor immigrants, and they were often carriers of a human capital which was not directly requested in the Swedish labor market. From the demand perspective both natives and immigrants suffered from the difficult labor market conditions in the late 1970s and early 1980s, but the immigrants suffered probably harder than the native.⁶²

Daniel Rauhut also indicates that the rate of the relative income of immigrants and refugees which was 99 % of the native's income in 1978 and then declined to 67 % in 2002.⁶³ He also points out that the relative unemployment rate and the duration of unemployment for immigrants and refugees have increased since early 1990s⁶⁴, and thus the rate of dependence on social benefits has also increased in this period.⁶⁵ During the financial crisis of 1990s both natives and immigrants were affected by that crisis but the decline of the employment rate for immigrants was larger.⁶⁶

⁵⁸ Jan Ekberg and Lars Andersson. *Invandring, Sysselsättning och Ekonomiska Effekter* Stockholm, Fritzes kundtjänst 2005. ISBN 91-38-20093-7. P. 52

⁵⁹ DANIEL RAUHUT, Ph.D. *Integration of Immigrants in Sweden 1945-1975*. Finnish Yearbook of Population Research XLV 2010, pp.103-122. P. 103
<http://eds.a.ebscohost.com.ludwig.lub.lu.se/eds/pdfviewer/pdfviewer?sid=8fd6fab7-3038-42cf-9574-4e26236aa673%40sessionmgr4003&vid=2&hid=4113> .

⁶⁰ DANIEL RAUHUT, Ph.D. P. 103

⁶¹ Structural Problems and Reforms. *Ekonomi fakta*. www.ekonomifakta.se/sv/Swedish-economic-history/Structural-Problems-and-Reforms/

⁶² Jan Ekberg and Lars Andersson. P. 52

⁶³ DANIEL RAUHUT, Ph.D. PP. 103-104

⁶⁴ Id. P. 104

⁶⁵ Id

⁶⁶ Pieter Bevelander and Christer Lundh. *Employment Integration of Refugees: The Influence of local Factors on Refugee job Opportunities in Sweden*. January 2007. IZA Discussion Paper No. 2551. IZA 2007. P.3
<http://ftp.iza.org/dp2551.pdf> .

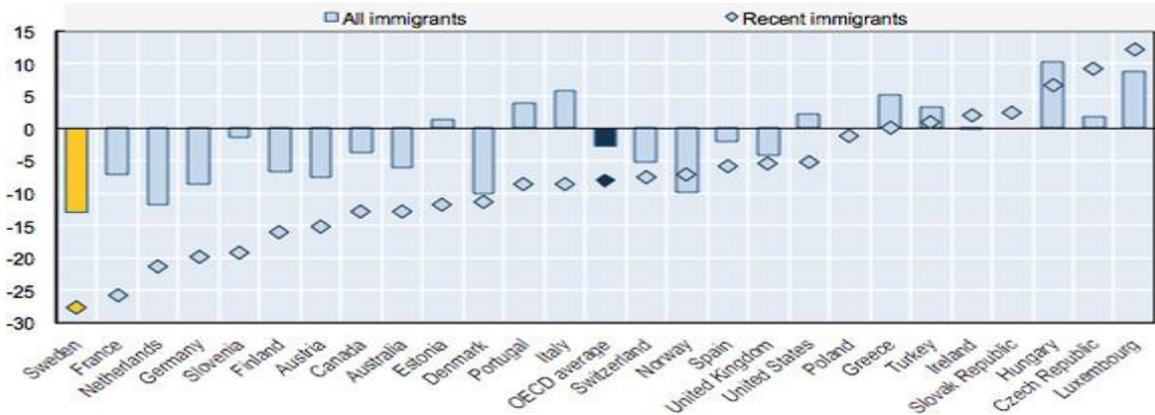
Christer Lundh in his study observes that the immigrants who came to Sweden in the early 1990s, were on average better educated than the native population, however even well-educated immigrants often have difficulties in finding jobs that match their education level.⁶⁷

According to the Organization for Economic Cooperation and Development (OECD), in 2010 the immigrants and foreign –born populations in Sweden are on rate of 31% of highly educated compared with 31% (the average of the OECD is 31%) across OECD countries. 36 % come from OECD high income country and 13 % from a country with the same official language.⁶⁸

A survey conducted in 2000 showed that 90 % of the native academics have qualified jobs, while the rate for the immigrants is only 40 %, and that 25% of the immigrant academics working in unskilled occupations and many were unemployed or studying.⁶⁹

The following figure No. 2 shows the differences in employment rates of the foreign- born population (all and recent immigrants) compared with those of native population (15-64) in OECD countries, 2009-2010- Percentage points.⁷⁰

Figure 2



According to the OECD, and as indicated by the above figure, Sweden had a high gap between native and immigrant employment rate in 2009 - 2010. Almost 63 % of immigrants were employed compared to 76 % of the natives with a point gap of 13%, which is higher than 3% the standard average of the OECD.⁷¹

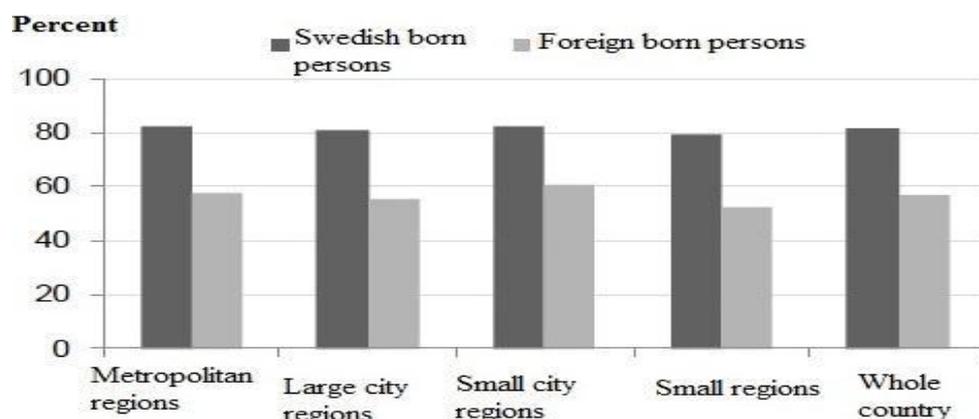
According to the Swedish Employment Service (Arbetsförmedlingen) in October 2011, at least 35 % of the persons registered as unemployed in Sweden were immigrants or foreign-

⁶⁷ Christer Lundh. Invandringen till Sverige. P. 69
⁶⁸ Organization for Economic Cooperation and Development (OECD)
<http://www.oecd.org/migration/integrationindicators/keyindicatorsbycountry/name.218347.en.htm>
⁶⁹ Christer Lundh. Invandringen till Sverige. P. 69
⁷⁰ Organization for Economic Cooperation and Development OESD. Figure 6.5.
http://www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/settling-in-oecd-indicators-of-immigrant-integration-2012_9789264171534-en#page97.
⁷¹ Organization for Economic Cooperation and Development (OECD)
<http://www.oecd.org/migration/integrationindicators/keyindicatorsbycountry/name.218347.en.htm>

born individuals, whereas the rate was 22% in January 2005 with an increase of 13%. The Swedish Employment Service also indicates that among the 372389 job seekers in the same period there were 132241 immigrants or foreign-born individuals.⁷²

The following figure No. 3 shows the employment of Swedish and foreign born 20-64 years old in regions, year 2008 Source: SCB 2010.⁷³

Figure 3



3.2. Refugees and the employment challenges in Sweden

Inequalities between native and immigrants in the level of participation in Swedish labour market are arguably attributed to the differences in general features of the labour market between the receiving country and the country of origin.⁷⁴ The inequalities can partly be explained by differences in human capital between the native and the refugee immigrants, and this explanation relies on what is called human capital theory; and it can also be explained by the different kinds of discrimination by employers.⁷⁵

⁷² Dagens Nyheter (Newspaper) 16 APR 2014. <http://www.dn.se/nyheter/sverige/utanforskapet-skulle-minska-sa-har-blev-det/>

⁷³ Heda Saijeva. Segregation and Employment in Swedish Regions. Jönköping International Business School 2011. Jönköping University. Figure 1-2. P. 4

⁷⁴ MARKO VALENTA and NIHAD BUNAR. State Assisted Integration: Refugee Integration Policies in Scandinavian Welfare States. P. 467

⁷⁵ Id

3.2.1. Human Capital theory and the access to work

Human capital is one of the factors that contribute to the integration of refugees and immigrants into labour market. When we talk about human capital in this context we mean the individual characteristics particularly the language, level of education, working skills and knowledge about economic, social, cultural and political situation in the receiving country.⁷⁶

As J. Augusto Felicio, Eduardo Couto and Jorge Caiado point out in their study⁷⁷ the human capital is not only considered a crucial factor for success in terms of business or firm establishment but also in terms of creating social relations and informal contacts⁷⁸ which are necessary some times in accessing labour market. It has been argued that individuals with more specific human capital based on certain industry or business knowledge are usually taking greater advantage of labour market opportunities.⁷⁹

The possibility of transformation of the immigrants' skills from the country of origin to the receiving country plays an important role on increasing or decreasing the level of participation in the labour market and affects to a certain degree the immigrants' employment rate. In other words, as long as the human capital of the immigrant can meet the demand of the labour market in the receiving country the opportunity for him or her will be greater to success in labour market.⁸⁰

Barry R. Chiswick in his study argues that whether the immigrants are favorably selected or not by the receiving countries is very significant for better understanding of the economic consequences of immigration for both the sending and receiving countries and for the immigrant themselves.⁸¹ Chiswick explains that the highly favorably selected immigrants are more successful and better integrated in the receiving countries and accordingly they affect positively the economic growth in sending and receiving countries.⁸²

In her study, Maria Selvi also concluded that unlike refugee who are subjected to negative selective measure, the immigrants who are subjected to positive selective measures with large amount of human capital are more successful and being integrated easier into labour market of the receiving country.⁸³ The same study also points out that the length of time in the host country has its effect in increasing the access to labour market and it has been argued that the refugees or the immigrants who have been in the receiving country for many years are more able than the newcomers to succeed in the integration process and thus to access labour market⁸⁴ because the latter lacking skills that required in the receiving country.

⁷⁶ Maria Selvi. ECONOMIC INTEGRATION. A Comparative Study on the Somali and the former Yugoslavian immigrants' labour Market Attachment in Sweden and in the Netherlands. Malmö University. Department of IMER. Spring 2006. P. 29. <http://dspace.mah.se/bitstream/handle/2043/4291/Microsoft%20Word%20-%20Economic%20Integration.pdf?sequence=1> .

⁷⁷ J. Augusto Felicio, Eduardo Couto and Jorge Caiado. Interrelationships between human capital and social capital in small and medium sized firms: the effect of age and sector of activity. ISEG-School of Economics and Management, Technical University of Lisbon. <http://cemapre.iseg.ulisboa.pt/archive/preprints/396.pdf>

⁷⁸ Id. P. 6

⁷⁹ Id. PP. 6-7

⁸⁰ Maria Selvi. P. 29

⁸¹ Brettell and Hollifield. Migration Theory. Talking across Disciplines. Second edition. Taylor & Francis Group New York. ISBN 978-0-425-95426-6 (hardcover:alk.paper) P. 65

⁸² Id

⁸³ Maria Selvi. P. 29

⁸⁴ Id. P.30

It is also argued that newcomers and recent immigrants have less knowledge than the native born individuals, especially in terms of the customs and language relevant to jobs and information about job opportunities; and they have less specific training that required in receiving countries.⁸⁵

Per Lundborg in his study on the effects of years of immigration on relative employment he concludes that the employment differences remain for a long period of time and he indicates that after 11 years of immigration in Sweden the employment gap is 10% and after 17 years the gap is around 7-8% and after 30 years the employment gap decline further but it never fully closes.⁸⁶

Findings in a study conducted by B.R. Chiswick and P.W. Miller suggested that there is large degree of complementarity in the labour market between language skills and formal education which means it is difficult to improve a human capital through formal education unless one can speak the language relevant to jobs in the receiving country, and thus the language appears to be as a means of transformation of the previous human capital to match the specific skills in the receiving country.⁸⁷

John Wrench argues that there are different measure which contribute to the improvement of access of refugee and immigrants to labour market, and some of these measures relate to human capital interpretation of racial inequality which include among other things training of immigrants and minorities to improve their educational level and skills, training courses in language, making cultural allowance, challenging and combating discrimination, etc.⁸⁸

It has been observed that there are some immigrant groups integrated economically better than others because they have similar traditions, culture and religion as the receiving country and thus they possess more country skills than the other groups who have larger differences in tradition and culture to the receiving country.⁸⁹

⁸⁵ Barry R. Chiswick. The Effect of Americanization on the Earnings of Foreign-born Men. University of Illinois at Chicago Circle. *Journal of Political Economy*, 1978, Vol. 86, no .51. 1978. P. 899
<http://eds.b.ebscohost.com.ludwig.lub.lu.se/eds/pdfviewer/pdfviewer?vid=4&sid=e97d74cb-1cca-424c-a906-46d76b485a08@sessionmgr111&hid=102> .

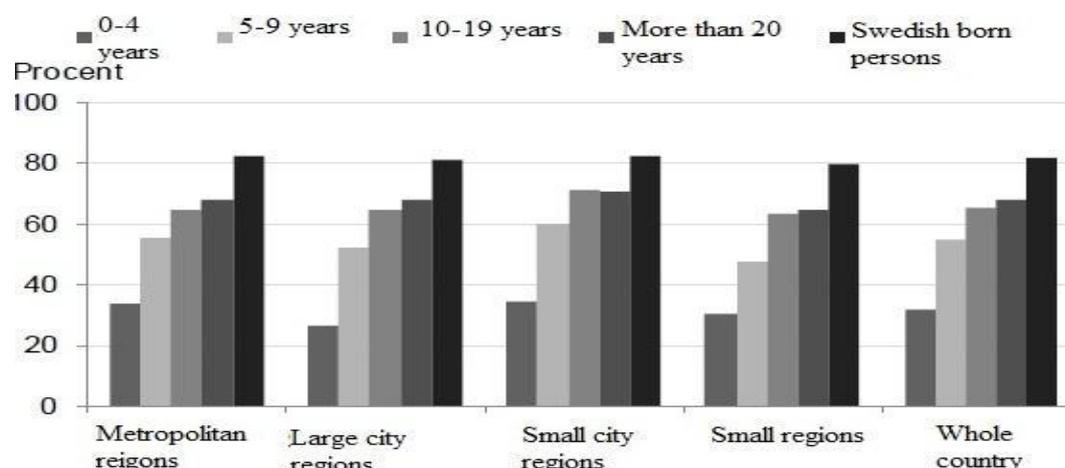
⁸⁶ Per Lundborg. Refugees' Employment Integration in Sweden: Cultural Distance and Labour Market Performance. *Review of International Economics*, 21(2), 291-232, 2013. DOI:10.1111/roie.12032. P. 225
<http://onlinelibrary.wiley.com.ludwig.lub.lu.se/doi/10.1111/roie.12032/pdf> .

⁸⁷ B.R. Chiswick and P.W. Miller. Immigrant earnings: Language skills, linguistic concentrations and business cycle. *Journal of Population Economics*. 2002. *J Popul Econ* (2002) 15: 31-57. P.40
<http://eds.b.ebscohost.com.ludwig.lub.lu.se/eds/pdfviewer/pdfviewer?vid=5&sid=de039dac-ead1-47c6-8f39-687a4a19a164@sessionmgr113&hid=102>.

⁸⁸ John Wrench. *Diversity Management and Discrimination. Immigrants and Ethnic Minorities in the EU*. Ashgate Publishing Limited England 2007. ISBN 13:978-0-7546-4890-1. PP. 45-51

⁸⁹ Id

The following figure No. 4 shows the employment by time in Sweden. Source: SCB (2010).⁹⁰
Figure 4



3.2.1.1. The impact of human capital on accessing work in Sweden: the case of Somalis

The choice of Somalis as a case study for the impact of human capital on the economic integration is not made arbitrary. I have chosen the Somali group because it is one of groups that have had the most difficulties to integrate into Swedish labour market. Because the Somalis represent the group that has the least human capital, it could be most likely that the application of human capital theory may explain the low rate of their participation in Swedish labour market.

From 1988 up to recent days Somalia has been suffering from civil war, and has been without functioning central government due to the situation of ‘statelessness’ since the fall of Siad Barre regime in 1991.⁹¹

As a result of the total collapse of state that followed by gross human rights violations and the mass atrocities, Somali people have been leaving their homeland and seeking asylum in Western Europe.⁹² Sweden has been one of the European countries that received a considerable number of those refugees; in 2012 there were more than 43966 Somali immigrants living in Sweden.⁹³

⁹⁰ Heda Saijeva. Figure 2-3. P. 10

⁹¹ Peter T. Leeson. Better off stateless: Somalia before and after government collapse. Journal of Comparative Economics 35 (2007) 689-710. . P.695. http://www.peterleeson.com/better_off_stateless.pdf

⁹² Fuad M. Sharif. Integration in perspective. AN ETHNIC-BASED ANALYSIS TOWARDS UNDERSTANDING THE INTEGRATION OF IMMIGRANTS IN SWEDEN. May 2013. Lund University. P. 5 <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=3789337&fileId=3813715> .

⁹³ Id

A number of studies relate to the economic integration of Somali refugees in Europe, refer to statistics which show that Somalis have a very low rate of participation in the labour market in comparison with the native population in the receiving countries.⁹⁴

The Somali refugees who arrived in Sweden during the 1990s suffer a lot to integrate into Swedish labour market and it appears to be more than any other immigrant groups; they show the weakest social ties with regard to employment and self-employment activities.⁹⁵

For instance some studies indicate that during the late 1990s there were only 10% of Somali immigrants are employed in Sweden. The Integration Board (Integrationsverket) argues that due to the lower level of education among the Somali immigrants compared to the rest of population and due to differences in economic structure between Somalia and Sweden, the Somalis have this low rate of participation in the labour market.⁹⁶

Maria Selvi points out in her study that employment rate for Somali immigrants in Sweden in 2000, all in all is 30,5% and she notes that the rate for women is even lower, for instance less than 20,9% of Somali women are employed while 38,2% of Somali men are employed in Sweden.⁹⁷ The rate of employment for Somali immigrants fell back to 30% in 2001-2002 and then fell again to lay between 25-30 % until 2009.⁹⁸

When it comes to the registered unemployment rate it would be important to highlight that in Sweden the registration of unemployment concerns those given unemployment compensation, and it is only persons that have been working for at least six months and being members of the Unemployment Compensation Union for at least one year, are entitled to this sort of compensations.⁹⁹ Accordingly, it is only 17% of Somali immigrants are registered as unemployed or seeking work in Sweden.¹⁰⁰ Nonetheless, more than 1000 Somali immigrants received social benefit sometime in 2010 which is 4% of the Somalis aged 20-64.¹⁰¹

Benny Clarson's study shows that the self-employment rate for Somali immigrants in Sweden in 2010 was only 0,6% and it was lower than 0,5% for the age range of 16-24 compared with 4.9% for the entire population.¹⁰²

Maria Selvi and Benny Carlson argue that education and years of immigration can explain the low rates of employment or participation in labour market in Sweden. Maria Selvi's study also shows that in 2000, only 33,1% of Somali immigrants in Sweden have Elementary school education where 26,2% are men and 43,6 % are women. 48,2 % of

⁹⁴ Charlotte Melander. Inom transnationella och lokala sociala världar: Om sociala stödutbyten och försörjningsstrategier bland svensksomalier. (Within transnational and local social worlds: on social support exchanges and livelihood strategies among Swedish Somalis) Göteborgs Universitet. (University of Gothenburg) Institutionen för socialt arbete 2009. ISBN 978-91-86796-73-0. P. 68
https://gupea.ub.gu.se/bitstream/2077/21237/1/gupea_2077_21237_1.pdf .

⁹⁵ BENNY CARLSON, KARIN MAGNUSSON & SOFIA RÖNNQVIST. Somalier på arbetsmarknaden - har Sverige något att lära? (Somalis in the labor market - has Sweden something to learn?) REGERINGSKANSLIET. Statsrådsberedningen. Tryckt av Elanders Sverige AB 2012. ISBN 978-91-38-23810-3. P. 21 <http://www.regeringen.se/content/1/c6/21/90/93/3bb29614.pdf>

⁹⁶ BENNY CARLSON, KARIN MAGNUSSON & SOFIA RÖNNQVIST. P.25

⁹⁷ Maria Selvi. P. 42

⁹⁸ BENNY CARLSON, KARIN MAGNUSSON & SOFIA RÖNNQVIST. P.26

⁹⁹ Maria Selvi. P. 45

¹⁰⁰ Id

¹⁰¹ BENNY CARLSON, KARIN MAGNUSSON & SOFIA RÖNNQVIST. P.26

¹⁰² Id. PP.27-29

the Somalis have at least Upper Secondary school education where 50,3 % are men and 45% are women. 18,7% of them have University or College education where 23,5 % are men and 11,4 % are women.¹⁰³

Maria Selvi also has studied the effect of education on the economic integration of Somalis in Sweden and she concludes that among the Somalis that only have finished elementary school more than 60% have no access to labour market at all while 13% are unemployed and only 26,1% are employed.¹⁰⁴ According to Maria Selvi the Somali immigrants that have finished upper secondary school have better access to labour market where 38% are employed.

Nonetheless, the rate of unemployment is higher for group of those who have upper secondary school education with 18%, and the rate of having no access at all to labour market is much smaller among this group with percentage of 43%. But, those who have finished University or College have the best access to employment where 40% are employed and 39% have no access to labour market at all.¹⁰⁵

Benny Carlson and others argue that the higher education and the longer years of immigration increase the possibility for the immigrants to have access to labour market.¹⁰⁶

Their study show that in 2010 more than 70% of Somali immigrants in Sweden have low or unknown education and 22 % have finished Upper secondary school education while only 9% have finished University education, accordingly the employment rate among this group of low education is very low and lies between 2 and 15%¹⁰⁷, and the rate among those who have finished the secondary school education is 24% while the rate among those who have finished the university education is 41% and thus the level of education can explain the low rate of participation in labour market.¹⁰⁸

Their study also shows that more than 70 % of Somali immigrants arrived in Sweden during 2000 and about 60% of them have arrived since 2006 and thus the years of immigration in Sweden for the Somalis as for others have a great effect in improving access to employment and can explain the low employment rates among this group.¹⁰⁹

With regard to the effect of years of immigration on accessibility to labour market, Maria Selvi argues that an immigrant who has been staying in the receiving country for longer period of time would have better opportunities to access labour market than an immigrant that newly arrived.¹¹⁰

According to Maria Selvi the Somali immigrants that arrived in Sweden in 1970s and 1990s have better employment rate than those arriving later. More than 50% of Somalis that immigrated to Sweden during that period are employed and only 23.8% have no access to labour market at all, while the rate of employment among those immigrating between 1990s and 2003 is 26.5% and 61% have no access to labour market at all.¹¹¹

¹⁰³ Maria Selvi. PP. 57-58

¹⁰⁴ Id. P. 60

¹⁰⁵ Id. PP. 61-62

¹⁰⁶ BENNY CARLSON, KARIN MAGNUSSON & SOFIA RÖNNQVIST. P.29

¹⁰⁷ Id. P.30

¹⁰⁸ Id. PP.30-31

¹⁰⁹ Id. P. 31

¹¹⁰ Maria Selvi. P. 63

¹¹¹ Id. P. 66

Charlotte Melander refers in her study to an interview with a small focus group of highly educated men and women from Somalia investigating the possible explanation for the low rate of participation in labour market among Somali immigrants in Sweden.¹¹² The interview study shows that the Somalis are a newcomer group and it usually takes time to be informed about the different dimensions of Sweden, and they spent long time in refugee camps waiting for determination of their refugee status beside it has taken considerable time to get through the language course of Swedish for Immigrants (SFI).¹¹³

Charlotte Melander also refers in her study to the fact that the immigrants whose language is not close to the Swedish language and who came to Sweden from countries that have different culture from the Swedish did not get access easily to the labour market; and according to this study the explanation is that there was structural change within the companies and this new development led to the change on the structure of the demand and thus the Swedish language became the most important skill for the demand of the labour market.¹¹⁴ Such changes and developments had affected- without doubt- the immigrants who lacked these skills and knowledge.

Charlotte Melander also points out in her study that education and Swedish education in particular would facilitate for immigrants to access labour market and to get a job in 1990s, but this was not the case in 1970s when the Swedish education was not of high significance to enable the immigrants to get employment.¹¹⁵

The following table No 1 shows the number of employees (20-64 years) by occupation, 2011 Source: SCB.¹¹⁶

Table 1

Occupation	Birth country	
	Somalia	Sweden
Unknown	997	114 501
Armed forces	-	14 257
Legislators, senior officials and managers	35	236 499
Professionals	502	665 815
Technicians and associate professionals	457	721 764
Clerks	429	296 113
Service workers and shop sales workers	2 455	690 185
Skilled agricultural and fishery workers	32	55 440
Craft and related trades workers	244	346 997
Plant and machine operators and assemblers	959	332 594
Elementary occupations	1 043	164 541
<i>Total</i>	<i>7 153</i>	<i>3 638 706</i>

¹¹² Charlotte Melander. P. 69

¹¹³ Id

¹¹⁴ Id. P. 66

¹¹⁵ Id. P.67

¹¹⁶ Statistics Sweden. Population Statistics. Department of Population and Wlfare. Örebro. <http://www.scb.se/>

The following table No. 2 shows the number of population and the rate of employment 2012 Source: SCB.¹¹⁷

Table 2

Birth country	Total population	20-64 years		
		Population	Employess	Employment rate
Somalia	43 966	30 837	8 167	26,5%
Sweden	8 082 637	4 460 831	3 653 081	81,9%

3.2.2. Discrimination and its impact on the access to work in Swedish labour market

3.2.2.1. Background

The question of discrimination and ethnic prejudice was not an issue of focus in the Swedish immigrant policies before late 1970s.¹¹⁸ The denial of ethnic discrimination by politicians, civil servants and employers was evident¹¹⁹ and it could be seen in the slow development of the discrimination legislations in Sweden.¹²⁰ Furthermore, the anti-discrimination laws in Sweden were less developed judicially in comparison with the experience of other countries in the region.¹²¹

Because the media started to report on cases of ethnic discrimination, a commission of inquiry composed of different experts was established in 1979 to investigate into the existence and forms of ethnic discrimination in Sweden and to propose measures to combat this practice.¹²²

The commission finished its mission in 1984 after they documented a number of cases of discrimination in different sectors, and accordingly the commission proposed a law against ethnic discrimination in the labour market.¹²³

The outbreak of racist trends that occurred openly and increased in 1980s coincided with new restrictive immigration and integration policies in Sweden.¹²⁴

¹¹⁷ Id

¹¹⁸ EVA LUNDBERG LITHMAN. Immigration and Immigrant Policy in Sweden. P. 51

¹¹⁹ European network against racism. Responding to racism in Sweden. OVERVIEW OF RACISM IN SWEDEN. P. 2 http://www.zakkeith.com/articles,blogs,forums/Sweden_EN.pdf.

¹²⁰ Id. P. 5

¹²¹ Ronald Craig. Systematic Discrimination in Employment and the Promotion of Ethnic Equality 2007. Koninklijke Brill NV. The Netherlands. ISBN 10:9004 154620. ISBN 13: 9789004154629. P. 9

¹²² EVA LUNDBERG LITHMAN. Immigration and Immigrant Policy in Sweden. P. 51

¹²³ Id

¹²⁴ SARAH SCUZZARELLO. National Security versus Moral Responsibility: An Analysis of Integration Programs in Malmö, Sweden. Oxford University Press 2008. Doi:10.1093/sp/jxn002. . P. 6 <http://sp.oxfordjournals.org.ludwig.lub.lu.se/content/15/1/5.full.pdf+html>

The transition from generous to restrictive policies in Sweden was initially introduced through the proposal of 1991 Government Bill in 1990s. However, that Bill took six years to be finally entered into force in 1997, although there was a mutual understanding between the two biggest parties in Sweden-the Moderate and the Social Democrats-over the policy reform. The reason behind this delay was arguably due to the sudden appearance of the ‘New Democracy Party’ in the political arena during the 1991 elections, which led to a remarkable turn in the political expectations of the two big parties to the extent that they suspended the changes that they were planning.¹²⁵

This new party found its support among the anti-immigrationists and it was supported by a considerable number of people at that time; and the question of refugees and immigrants topped the lists of the official debates prior to 1991 elections. Hence, as the ‘New Democracy Party’ was part of the official debates, the main problem for the two big parties was how to make the immigration policy more restrictive without being considered as racist or anti-immigrationist parties like the ‘New Democracy Party’.¹²⁶

Anyway, much water had flowed under the bridge and the New Democracy Party did not manage to get into the Parliament, beside there were many restrictive changes had been made between 1991 and 1994, and the Social Democratic Party succeeded in forming a new government, and accordingly its Government Bill with a great support of the Moderates and the Center Party was passed in the Parliament in 1996, and the proposal for change became effective in January 1997.¹²⁷

3.2.2.2. Economic discrimination in Swedish labour market

According to Wadensjö, Eskil the examination of whether discrimination exists in a certain area could be conducted in different ways, for instance it could be done by going out and ask the parties concerned, for example by asking the Swedes if they discriminate against immigrants in certain ways, and by asking the immigrants if they are discriminated against.¹²⁸

Wadensjö argues that such method has many shortcomings, because at the one hand those who discriminate are hardly likely to admit or acknowledge such practice. On the other hand the immigrants who are discriminated against have hardly the same motive to conceal possible discrimination and it may be difficult for them to determine if discrimination exists or not.¹²⁹

¹²⁵ ELISABETH ABIRI. The Changing Praxis of ‘Generosity’: Swedish Refugee policy during the 1990s. *Journal of Refugee Studies* Vol.13. No 1. 2000. Oxford University press 2000. PP. 17-18
<http://eds.a.ebscohost.com.ludwig.lub.lu.se/eds/pdfviewer/pdfviewer?sid=59648e73-7a6a-4af8-83b8-bfdb8c16a7c3%40sessionmgr4002&vid=2&hid=4110> .

¹²⁶ Id. PP. 18-19

¹²⁷ Id. P. 24

¹²⁸ Wadensjö, Eskil. *Immigration och samhällsekonomi*. 1973. Lund: Studentlitteratur. ISBN 91-44-09901-0. P.

213

¹²⁹ Id

Another method is the experimental test which allows two people an immigrant and a Swedish who are equally qualified to apply for the same jobs, and then comparing the results.¹³⁰

The experimental method has been used widely by researchers and by the ILO; therefore, in this section we will rely on earlier studies that used such methods to demonstrate the existence of ethnic discrimination in Swedish labour market.

We have seen earlier in the previous sections that one of the main challenges for Sweden is to provide native and immigrants with equal opportunities in the labour market. However, the unemployment rate for the immigrants is much higher than for the native population. We have also seen some scholars argue and explain the ethnic inequality by referring to differences in human capital.

Most of the researchers agree that the full explanation for the systematic differences and inequality that exists in the labour market has not been explored yet, and it is not enough to study only the characteristics (human capital) of the individuals who are not employed but it seems important to study the people who employ and decide on employment as well¹³¹.

This section will try to argue for discrimination by employers as one of the explanations for the differences in employment rates between natives and immigrants in Swedish labour market by presenting some of the previous experimental studies that demonstrate the existence of such practice. This, we can examine later whether or not Sweden has complied with its positive obligation regarding the principle of non-discrimination.

Magnus Carlson and Dan-Olof Rooth conducted the first study examining the ethnic discrimination in Sweden using correspondence testing. Their study was carried out between May 2005 and February 2006 by having two equally productive individuals who belong to different ethnic groups. The applicants applied for jobs with Swedish sounding names and with Middle Eastern/Arabic sounding names. The applicants sent 3,228 written job applications to 1,614 employers in job openings in 13 different occupations in Stockholm and Gothenburg. They received call-backs for interview by e-mail, telephone and ordinary post.¹³²

The result of their study shows that in 1087 cases neither the applicant with Swedish sounding name nor the applicant with Arabic sounding name was invited to interview. In 240 cases both were being contacted for interview, in 221 cases only applicant with Swedish sounding name was invited to interview and in 66 cases only applicants with Arabic sounding names were invited. Accordingly, the study concludes that the net discrimination against the minority with Arabic sounding name is 155 cases which mean that 29% of employers that identified in Carlson's study have discriminated against the individuals with Arabic sounding names.¹³³

This study also shows that the level of discrimination is higher in low skilled occupations than in high skilled ones.¹³⁴

¹³⁰ Wadensjö, Eskil. *Immigration och samhällsekonomi*. 1973. P. 213

¹³¹ Moa Bursell. What's in a name. A field experiment test for the existence of ethnic discrimination in the hiring process. 2007. The Stockholm University Linnaeus Center for Integration Studies (SULCIS) .ISSN 1654-1189. P. 2. http://www.socant.su.se/polopoly_fs/1.55389.1321514449!/SULCISWP2007_7.pdf .

¹³² Magnus Carlson and Dan-Olof Rooth. Evidence of Ethnic Discrimination in the Swedish Labor Market Using Experimental Data. September 2006. IZA Discussion Paper No. 2281. 2006. PP.1-5. <http://ftp.iza.org/dp2281.pdf> .

¹³³ Id. P.7

¹³⁴ P. 16

A similar experimental test study was conducted by Karin Attström for the ILO in Sweden in January 2006, where two female and two male pairs of applicants (testers) one majority and one minority with a Middle Eastern origin applied for the same job in cities of Stockholm, Gothenburg and Malmö. The testers have been born in Sweden, undergone the same schooling and acquired the same language level.¹³⁵

In this study 175 tests per gender were carried out in each of the three cities with a total of 350 tests in each city. The tests also targeted the low-skilled and semi-skilled occupations and sectors where both native and immigrants usually apply for jobs such as hotel and restaurant, retail and trade, office and clerical, healthcare services, transportation and warehousing and manufacturing.¹³⁶

The results of Karin Attström's study shows that there were inequality in the labour market in Sweden with regard to access to employment for persons with immigrant origin and foreign sounding name. The study shows in particular the difference in the number of times-for each applicant (tester) from the majority and the minority-that they need to apply in order to receive a call-back or response from the employer.¹³⁷

For instance a female (minority) with Arabic sounding name needs to apply 26 times before she receive a call-back from the employer in Gothenburg, while a female (majority) with a Swedish sounding name needs to apply only 4 times to get a response from the same place with difference of 22 tries. For the male in the same city the applicant from (minority) needs to apply 7 times before he receive a response from the employer, while the applicant from (majority) needs to apply only 3 times, with difference of 4 tries.¹³⁸

The differences in number of tries between the applicant from the majority and the applicant from the minority groups to get a response was 7 tries for female and 13 tries for male in Malmö, while in Stockholm the difference was 4 tries for female and 7 tries for male.¹³⁹

When it comes to the invitation to an interview Attström's study shows that the results produced a differential outcome of the applicants' applications with a rate of net discrimination of 12 % for women and 10% for men. The study found that by exclusion of all cases where no call-back was given the rate of the net discrimination increase to 29% for women and 21% for men. But, if the analysis is limited to cases in which a response was given the overall cumulative net discrimination rate increase to 34% for women and 32% for men.¹⁴⁰

The study notes that in other countries where testing has been carried out the discriminatory behavior appeared much at the first stage (telephone call) but in Sweden the discrimination appears much clearly during the invitation to interview.¹⁴¹

¹³⁵ Karin Attström. Discrimination against Native Swedes of Immigrant Origin in Access to Employment. A research study on DStockholm, Malmö and Gothenburg, utilizing the ILO discrimination practice testing approach. International Labour Office. Geneva 2007 . ISBN 978-92-2-120102-1. P. 18
http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_201428.pdf .

¹³⁶ Id. PP. 19-20

¹³⁷ Id. P. 29

¹³⁸ Id

¹³⁹ Id

¹⁴⁰ Id. P. 45

¹⁴¹ Id. PP. 37-38

Moa Bursell also conducted an experimental study testing the ethnic discrimination in Sweden which is considered the first study that approved by the “Regional Ethical Vetting Board” in February 2006.¹⁴²

Bursell’s study shows that about 3552 job applications for 15 job categories were sent to job openings in Stockholm which were announced on the main employment website between March 2006 and September 2007. She has chosen the occupational categories to create a sample that includes private and public; and requires education on different levels.

In addition to the ethnic testing, Brusell made sure that other individual characteristics such sex and social background and level of qualification were being tested, for instance she made a reference to the ethnicity by assigning each pair of job applications one Swedish sounding name and one Arabic sounding name or a name from the Horn of Africa and concealing the information on whether the applicant is a native or a foreign born. She also made sure that each pair of job applications has been prepared in a manner that show great similarity in all relevant aspects, for example the level of education, the work experience and so on, the only difference was the ethnic background which is indicated by the names of the applicants.¹⁴³

The results of Buesell’s test show that there was a large difference in call-backs between Swedish sounding name and Arab/African sounding name in the labour market. The net rate of discrimination was 40.3% and the rate of the relative call-back was 1.8. By giving all occupations the same weight the test show that the rate of the net discrimination increased to 41.3 and the rate of the relative call-back increased to 2.1. The interpretation of these figures means that a person with a Swedish sounding name needs to apply for only 10 jobs before he or she receives a contact from the employer while a person with an Arabic/African sounding name needs to apply for 21 jobs before being contacted by the same employers.¹⁴⁴

The test also shows that the rate of discrimination differ between the different jobs, for example the rate is very high for jobs such as cleaners and nurses where the rate of net discrimination was 54.8 for cleaners and 67.3 for assistant nurse. But the rate was relatively low for jobs such as high school teachers where the rate was 14.7. The test shows that a person with a Swedish sounding name needs to send only 10 applications for a job as assistant nurse before being contacted by the employer, while a person with Arabic/African sounding name needs to send 36 applications before being contacted.¹⁴⁵

This result-in my view- may counter the argument the relies on human capital especially language skills and education as the major factor for the low rates of immigrants participation in Swedish labour market, because the rate of discrimination is very high among jobs that not required language skills such as cleaners and assistant nurse, while the rate of discrimination is low among jobs that require high skilled applicants with fluency in Swedish language.

¹⁴² I Moa Bursell. What’s in a name. A field experiment test for the existence of ethnic discrimination in the hiring process. 2007. The Stockholm University Linnaeus Center for Integration Studies (SULCIS) .ISSN 1654-1189. P. 9. http://www.socant.su.se/polopoly_fs/1.55389.1321514449!/SULCISWP2007_7.pdf .

¹⁴³ Id. PP. 10 -12

¹⁴⁴ Id. P.14

¹⁴⁵ Id. PP. 14-15

The international human rights bodies also noted the discrimination in Sweden, for instance during the interactive dialogue on the review of Sweden (Universal Periodic Review UPR) which was held on 7 May 2010, the Russian Federation made a statement and expressed its concern regarding the existence of discrimination based on ethnicity and gender in Sweden¹⁴⁶. Qatar also expressed its concern and inquired about the measures that have been taken by Sweden to prevent discrimination against immigrants and refugees¹⁴⁷. India and Iran observed the persistent discrimination against minorities.¹⁴⁸ Iran and Cuba expressed their deep concern about the increasing numbers of racially motivated hate crimes and the continued discrimination against immigrants, refugees and minority women.¹⁴⁹

3.3. Measures taken by Sweden to improve access to employment for refugees and immigrants

3.3.1. Recognition of right to work for refugee immigrants in Swedish law

The asylum application in Sweden is regulated by the Reception of Asylum Seekers and Others Act 1994 which is applied by the Migration Board.¹⁵⁰

The rule in asylum application is that the asylum seeker submits his/her application at the border before entering the Swedish territory, but the exception to this rule is that the application may also be submitted inside the country. However, more than 70 percent of the asylum applications are submitted inside Sweden¹⁵¹.

The asylum procedures often start with an investigation into the applicant's possible reasons for residence, and this investigation is usually conducted by one of the officers of the Migration Board.¹⁵²

When the investigation is over, and if it has been decided that the applicant has adequate reasons for asylum or residence permit on other grounds for others in need of protection, the applicant will receive a permanent residence permit, but if the applicant does not have reasons for asylum or residence a decision by refusal his/her entry will be issued. In this case the applicant either leaves the country or lodges an appeal against that decision before the Aliens Appeals Board.¹⁵³

Once the asylum seeker applied for asylum and registered before the Migration Board he or she can be exempted from a work permit and thus can start to seek employment. That means

¹⁴⁶ Human Rights Council. Report of the Working Group on the Universal Periodic Review- Sweden. A/HRC/15/11. General 16 June 2010. Para. 32

¹⁴⁷ Id. Para. 34

¹⁴⁸ Id. Para. 36

¹⁴⁹ Id. Paras. 37 and 43

¹⁵⁰ AIDA Asylum Information Database. National Country Report Sweden. Up-to-date as of May 2013. P. 10 <http://www.ecre.org/component/downloads/downloads/762.html> .

¹⁵¹ Ministry for Foreign Affairs, Department of Migration and Asylum Policy. Sweden in 2000. P. 44

¹⁵² Id

¹⁵³ Id. PP. 45 and 46

the authorities in Sweden do not grant the asylum seekers work permits although they can be allowed to access labour market. This permission to a large degree depends on the ability of the asylum seekers to establish their identity by providing original or authorized IDs, but if they failed to establish their identity they will be allowed to work for short period of time, just to gain some work experience and not necessarily to be paid.¹⁵⁴

The asylum seeker can enjoy the right to work in Sweden until the authorities make their final decision in his/her application, and this permission can be extended—in case of negative result—beyond the final decision if the he/she cooperates with the authorities and chooses to leave the country voluntarily otherwise the asylum seeker will be denied the right to work.¹⁵⁵

But, if the asylum seeker has been granted a permanent residence permit, and as we have noted earlier he or she does not need to have a work permit in order to access the labour market in Sweden.¹⁵⁶

As I have mentioned before, the asylum seekers who managed to obtain employment are not only can improve their financial situations but also they can be able to transform from being merely asylum seeker to an immigrant worker if they managed to work at least 6 months before a final negative decision is made against them.¹⁵⁷

But, if the asylum seeker demonstrates that he/she is a qualified employee and the employer is convinced to offer at least a one year contract, the asylum seeker in this case would have the right to apply for work permit within two weeks from the date of the final negative decision; and after four years of having an employment with a temporary work and residence permit he/she will be entitled to apply for a permanent residence permit.¹⁵⁸

According to some recent studies there are at least 50,000 undocumented immigrants live in Sweden.¹⁵⁹ In order to have access to social provision such as social benefits, health care or employment, the Swedish law requires a personal civil number ‘personnummer’ which is provided by the Tax Department to all registered immigrants.¹⁶⁰

As noted above, the regulations for asylum seekers differ from other groups of immigrants with regard to the requirement of personal civil number, because they are provided by special kind of ‘identity card’ that authorizes them to reside and work in Sweden¹⁶¹ while waiting the determination on their refugee status.

The requirement of civil personal number is always applied to the Third-Country Nationals outside the EU who are obliged to apply for residence permit in order to immigrate to

¹⁵⁴ AIDA Asylum Information Database . National Country Report Sweden. P. 39

¹⁵⁵ Id

¹⁵⁶ Aliens Act (2005: 716) Chapter 2. Section 8

¹⁵⁷ AIDA Asylum Information Database . National Country Report Sweden. P. 39

¹⁵⁸ Id

¹⁵⁹ Maria Knutsson and Karin Rudberg. Papperlösas tillgång till hälso –och sjukvård.Uppsala Universitete. 2010. Available at <http://www.diva-portal.org/smash/get/diva2:384659/FULLTEXT01.pdf> . P. 1

¹⁶⁰ Tetyana Zhyla. Strategies of undocumented immigrants pursuing work and the working conditions: The case of Gothenburg. Göteborgs universitet. Department of social work. Available at https://gupea.ub.gu.se/bitstream/2077/28504/1/gupea_2077_28504_1.pdf . 2001. P. 6

¹⁶¹ Id. P. 7

Sweden, taking into account that the lack of residence permit is a strong reason for expulsion of Third-Country nationals.¹⁶²

The status of undocumented immigrant could be attributed to several reasons such as working without work permit, overstaying visas without renewal and staying in the country after the application of the asylum seeker has been rejected by the Migration Court.¹⁶³

Most of the undocumented immigrants in Sweden are being involved in dangerous and degrading works; they suffer from gross violation of their right to fair working conditions including the right to remunerations, acceptable working environment and working hours.¹⁶⁴

3.3.2. The adoption of Anti-discrimination Law in Sweden

Before 1974 and according to the Swedish labour law the State was neutral with regard to the labour market conditions and the disputes between the employers and workers' union¹⁶⁵. This neutrality can be explained as argued by Laura Carlson by the absence of provisions that regulate and solve such issues and disputes, because the terms and conditions of employment historically were regulated by collective agreements in Sweden.¹⁶⁶

When it comes to discrimination at work, the Parliament passed the Act No (1945:844) on prohibition of employment termination on the basis of marital status or pregnancy in 21 December 1945, and then after three years and namely in 1948 the government adopted the regulations No (1948:436) on equal pay for equal work in public sector. In 1973 the government adopted the regulation No (1973:279) on the prohibition of discrimination on the basis of sex or age in employment in 1973.¹⁶⁷

The period of mid 1970s witnessed a considerable development in respect to employment and labour law, for instance the Act No (1974:12) on employment protection was adopted in 1974. During the same year of 1974, the Act No (1974:358) on trade union representative was adopted. The Act No (1974: 981) which guaranteed the right to a leave of employment for education purposes was passed in 1974. In terms of employment disputes the Act No (1974:371) was also adopted in the year 1974. Two years later the abovementioned acts were followed by the Act No 1976:580 on employment.¹⁶⁸

The second half of 1970s also witnessed a remarkable development with regard to discrimination legislations especially the unlawful employment discrimination on basis of exercising parental leave, sex or race. For instance the Act No 1976:280 on the right to parental leave from employment to take care of children was adopted in 1976.¹⁶⁹ A legislative Bill on equal treatment between men and women was submitted to the Parliament in 1979 and

¹⁶² Aliens Act (2005: 716) Chapter 6, 7 and 8

¹⁶³ Tetyana Zhyla. P.7

¹⁶⁴ Id

¹⁶⁵ Laura Carlson. The Metamorphosis of Swedish Discrimination Law 2010. Vänbok till Ronnie Eklund.

Uppsala: Iustus. – 978-91-7678-744-1; S. 85-110. P. 93. <http://su.diva-portal.org/smash/get/diva2:305771/FULLTEXT01.pdf> .

¹⁶⁶ Id

¹⁶⁷ Id. PP.93 - 94

¹⁶⁸ Id : 97

¹⁶⁹ Id. P. 98

it was passed by only one vote and thus became the first act (Act No SFS 1979:1118) that prohibits unequal treatment of women and men at work.¹⁷⁰

The Act No 1986:442 on the prohibition of discrimination on the basis of ethnic origin is considered the first Act dealing with ethnic discrimination at work in Sweden, and it was passed in 1986.¹⁷¹ This act was contained only seven sections which prohibited discrimination on grounds of race, colour, nationality, ethnic origin or religion.¹⁷² This Act was followed by The Act on Measures against Ethnic Discrimination in Working Life 1999¹⁷³ which was preceded by Act 1994:134.

A new anti-discrimination act on the prohibition of unlawful discrimination was also adopted and entered into force on 1 January 2009. This Act No 2008: 567 aims at combating discrimination on grounds of sex, transgender identity or expression, ethnic origin, religion or other belief, disability, sexual orientation and age.¹⁷⁴

The new discrimination act of 2008 replaces seven previous acts on discrimination to become one Act. It replaces the following legislations:¹⁷⁵

- The Equal Opportunities Act No 1991:433
- The Act No 1999:130 on Measures against Discrimination in Working life on Grounds of Ethnic Origin, Religion or Other Religious Faith
- The Prohibition of Discrimination on Working life on Grounds of Disability Act No 1999:132
- The Prohibition of Discrimination on Working life on Grounds of Sexual Orientation Act No 1999:133
- The Equal treatment of Students at Universities Act No 2001:1286
- The Prohibition of Discrimination Act No 2003:307
- The Act Prohibiting Discrimination and Other Degrading Treatment of Children and School Students 2006:67

The new discrimination act of 2009 provides protection in a broader manner to cover not only discrimination in employment but also educational activities, labour market policy, services not under public contract, starting or running business, professional recognition, membership of certain organizations, goods, services and housing, health and medical care, social services, social insurance, unemployment insurance, financial support for students, national military service and civilian service and finally the public employment.¹⁷⁶

Under Chapter 2 of the Discrimination Act 2008 the provisions of Section 1 prohibit discrimination in working life by an employer against a person who is an employee with the employer, or enquiring about or applying for a job; or a traineeship or a person who is available to perform work or performing work as temporary labour.¹⁷⁷

¹⁷⁰ Dr. Laura Carlson. Sweden's Experience in Combating Employment Discrimination 2007. P.8.
<http://www.diva-portal.org/smash/get/diva2:305807/FULLTEXT01.pdf> .

¹⁷¹ Id. P. 102

¹⁷² Id

¹⁷³ 1999 Act Against Ethnic Discrimination in Working Life.

¹⁷⁴ Ministry of Integration and Gender Equality. New anti-discrimination legislation and a new agency, the Equality Ombudsman. Fact sheet. 2009. Government Office of Sweden. P. 1
<http://www.government.se/content/1/c6/11/80/18/884944c1.pdf> .

¹⁷⁵ Id

¹⁷⁶ Id. P.2

¹⁷⁷ Discrimination Act 2008. SFS 2008:567. Issued on 5 June 2008. Chapter 2, Section 1

Section 3 imposes obligation upon the employer to investigate allegations on harassment at work and to take measures that can prevent harassment in the future.¹⁷⁸ The applicant who has not been employed or selected for an interview has a right according to Section 4 to receive information from the employer about the qualifications of the person who was employed or selected for the job interview.¹⁷⁹

Section 9 prohibits discrimination against job applicants or employees with respect to activities relate to labour market policy and also regarding employment services outside public contract.¹⁸⁰ Discrimination is also prohibited under Section 10 of the Discrimination Act 2008 with regard to arrangements or requirements that are necessary for a person to run a business such as financial support, business permit, registration, etc.¹⁸¹ Section 11 prohibits discrimination with respect to the membership or participation of the employee or the employer in an organization related to their employment.¹⁸² Finally, in terms of discrimination at work Section 17 prohibits discrimination in cases other than those mentioned above when persons who are subject to the public employment assist the public or have other types of contact with the public in the course of their employment.¹⁸³

It is obvious that the Discrimination Act 2008 grants protection to all types of workers regardless of their status whether they are employed due to permanent contract, fixed-term contract or trainee; this, in addition to the fact that the Act is extended beyond the classical sectors to cover discrimination in the public service.

The Discrimination Act 2008 also prohibits unlawful discrimination in a very broad sense to include direct and indirect discrimination, harassment, sexual harassment and instruction to discriminate.¹⁸⁴

Nevertheless, and as noted by the European Commission against Racism and Intolerance (ECRI) in its monitoring report on Sweden, the Discrimination Act 2008 does not prohibit explicitly discrimination on grounds of nationality and language.¹⁸⁵ Although this Act does not recognize discrimination on the foresaid grounds we can observe that there are two new additional discrimination grounds which are age and transgender identity or expression and thus the Act covers these two new criteria plus the five grounds mentioned earlier in this section.¹⁸⁶

Although the anti-discrimination law in Sweden does not include a ground relates to nationality it is has been argued that nationality is an aspect of ethnicity and even the stateless person has an ethnic origin and thus there would not be an overlap.¹⁸⁷

¹⁷⁸ Id. Section 3

¹⁷⁹ Id. Section 4

¹⁸⁰ Id. Section 9

¹⁸¹ Id. Section 10

¹⁸² Id. Section 11

¹⁸³ Id. Section 17

¹⁸⁴ LAURA CARLSON. Judicial Interpretation: The Achilles Heel of Social work 2009. RETFAERD ÅRGANG 32 2009 NR. 4/127. P. 57. http://www.retfaerd.org/gamle_pdf/2009/4/Retfaerd_127_2009_4.pdf.

¹⁸⁵ European Commission against Racism and Intolerance (ECRI). P.20. Para. 46 <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/sweden/SWE-CbC-IV-2012-046-ENG.pdf>.

¹⁸⁶ LAURA CARLSON. Judicial Interpretation: The Achilles Heel of Social work 2009. RETFAERD ÅRGANG 32 2009 NR. 4/127. P. 57

¹⁸⁷ REPORT ON MEASURES TO COMBAT DISCRIMINATION. Directives 2000/43/EC and 2000/78/EC. COUNTRY REPORT 2012. SWEDEN. Drafted by Per Norberg to the European network of legal experts in the non-discrimination field. P. 91. <http://www.non-discrimination.net/countries/sweden>.

It could be argued that the term ‘national origin’ can be interpreted in a wide sense and thus may allow the criterion of ‘nationality’ to be considered as one of the grounds.¹⁸⁸ This, the third paragraph of Section 5 under Chapter 1 of the Discrimination Act 2008 defines the concept ethnicity as ‘national or ethnic origin, skin colour or other similar circumstance’¹⁸⁹

However, it has been argued by Per Norberg and Ann Numhauser in the report study into measures to combat discrimination in the EU Member States with regard to Sweden’s report of 2008, that the criteria ‘race’ and ‘religion’ fall within the scope of similar circumstances under the concept ‘ethnicity’ because the delimitation between acts that are an expression of ethnic belonging and acts that are an expression of religious is unclear and thus by considering them as one ground would eliminate the need for making that distinction.¹⁹⁰

The same argument has been raised by Per Norberg again in Sweden Country Report for 2012 with an emphasis that the most correct way is to perceive religion and ethnicity as separate grounds although there is an overlap between the two grounds.¹⁹¹

However, the Sweden Country Report 2012 makes an explicit reference to the importance of considering discrimination against refugees, foreigners, immigrants or any other mixed group as ethnic discrimination and that ethnicity and nationality need not refer to specific origin.¹⁹²

3.3.3. Recognition of Positive action in Swedish law

In his report on the affirmative action to the Sub-Commission on the Promotion and Protection of Human Rights, Marc Bossuyt the Special Rapporteur defines the affirmative action as follows:

*‘Affirmative action is a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality.’*¹⁹³

Such measures are usually taken to promote the *de facto* equality between different categories of people by granting specific treatment to the vulnerable categories in an attempt to compensate for an existing inequality or to combat its effect.¹⁹⁴

¹⁸⁸ European Commission against Racism and Intolerance (ECRI) . P.20. Para.54

¹⁸⁹ Discrimination Act 2008. Chapter 1 Section 5 (3)

¹⁹⁰ REPORT ON MEASURES TO COMBAT DISCRIMINATION. Directives 2000/43/EC and 2000/78/EC. COUNTRY REPORT 2008. SWEDEN. Drafted by Per Norberg to the European network of legal experts in the non-discrimination field. P. 29. <http://www.non-discrimination.net/content/media/2008-SE-Country%20Report%20final.pdf> .

¹⁹¹ REPORT ON MEASURES TO COMBAT DISCRIMINATION. Directives 2000/43/EC and 2000/78/EC. COUNTRY REPORT 2012. SWEDEN. Drafted by Per Norberg to the European network of legal experts in the non-discrimination field. PP. 29-30. <http://www.non-discrimination.net/countries/sweden> .

¹⁹² Id. P. 33

¹⁹³ Commission on Human Rights. Sub-Commission on the Promotion and Protection of Human Rights. Final report submitted by Mr. Marc Bossuyt, Special Rapporteur. E/CN.4/Sub.2/2002/21. 17 June 2002. Para. 6

¹⁹⁴ Oliver De Schutter. International Human Rights Law 2012. 3rd printing. Cambridge University Press. UK ISBN 978- 0-521-76487-2. P. 645

The Committee on Economic, Social and Cultural Rights in its general comment No. 20, also notes that States parties have an obligation to adopt special measures ‘*to attenuate or suppress conditions that perpetuate discrimination*’¹⁹⁵.

The committee also emphasizes that such measures are only allowed under certain circumstances and for legitimate purpose and must be limited in time and scope, in particular such measures should ‘*represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature,*’¹⁹⁶.

The Swedish Discrimination Act 2008 allows positive action in relation to some categories of persons especially persons with disabilities. In other areas of employment law and areas of labour market policy regulations there are a considerable number of special measures regarding persons with disabilities in working life.¹⁹⁷

In particular Section 3 under Chapter 3 contains provisions that stimulate the employers to ‘*conduct goal-oriented work to actively promote equal rights and opportunities in working life regardless of sex, ethnicity, religion or other belief*’¹⁹⁸

The European Commission against Racism and Intolerance (ECRI) in its report on Sweden in 2012 notes that the positive action is not generally accepted with regard to ethnicity and religion under the Discrimination Act 2008.¹⁹⁹

Ethnicity has an exemption from the prohibition of discrimination regarding labour market policy for instance Section 9 under Chapter 2 of the Discrimination Act 2008 stipulates that the prohibition of discrimination does not prevent ‘*measures that contribute to efforts to promote equality between women and men or equal rights and opportunities regardless of ethnicity,*’²⁰⁰

The ECRI however, adds that the only provisions in this regard in the Discrimination Act 2008 contain general measures and cover groups not individuals, and according to these provisions the employers are required in a more general meaning to take all necessary measures to make the workplace more inclusive.²⁰¹

The ECRI also argues that although the active measures are extended to make the workplace more inclusive in terms of sex, ethnic origins and religions, other grounds of racial discrimination such as nationality and language are still excluded.²⁰²

¹⁹⁵ General Comment No. 20. The Committee on Economic, Social and Cultural Rights.. Para. 9

¹⁹⁶ Id

¹⁹⁷ REPORT ON MEASURES TO COMBAT DISCRIMINATION. Directives 2000/43/EC and 2000/78/EC. COUNTRY REPORT 2008. SWEDEN. Drafted by Per Norberg to the European network of legal experts in the non-discrimination field. P.68

¹⁹⁸ Discrimination Act 2008. Chapter 3, Section 3

¹⁹⁹ European Commission against Racism and Intolerance (ECRI) P.21. Para. 51

²⁰⁰ Discrimination Act 2008. Chapter 2 Section 9 (1)

²⁰¹ European Commission against Racism and Intolerance (ECRI) P.21. Para. 51

²⁰² Id. Para. 52

Moreover, the measures for positive action in Sweden are often decided by individual employers and the national law does not recognize a quota system for the disadvantaged persons.²⁰³

When it comes to immigrants and refugees, the Discrimination Act does not refer explicitly to them but Section 7 of the law No 2010:197 on introduction activities for certain newly arrived immigrants urges municipalities in collaboration with the authorities, companies and organizations to adopt special measures for the newly arrived refugees aim at integrating the new immigrants into labour market. These measures include education on Swedish language, information about the society and activities relate to labour market.²⁰⁴

3.3.4. The establishment of the Office of Equality Ombudsman

As we have noted earlier the first Act dealing with ethnic discrimination at work in Sweden was passed in 1986. The same year of the Anti-discrimination law of 1986 the office of the Ombudsman against ethnic discrimination was established with a mandate to work towards the prevention of ethnic discrimination in all areas of society including working life in Sweden.²⁰⁵

The Ombudsman was bound by law to conduct investigations into cases of ethnic discrimination reported by the victims, and to take cases to the courts of law; in addition to its task on monitoring the implementation of ethnic diversity at workplace.²⁰⁶

Before the Discrimination Act 2008 has been passed by the Parliament, there were four Ombudsmen: the Equal Opportunities Ombudsman, the Ombudsman against Ethnic Discrimination, the Disability Ombudsman and the Ombudsman against Discrimination based on Sexual Orientation.²⁰⁷

On 1 January 2009 the four previous anti-discrimination Ombudsmen were merged into the Office of the Equality Ombudsman (DO) in accordance with the provisions of the Discrimination Act 2008.²⁰⁸

The overall objective of the Equality Ombudsman is to combat discrimination on the aforesaid grounds and promote equal rights for everyone.²⁰⁹ Section 1 under Chapter 4 of the Discrimination Act 2008 identifies the duties of Equality Ombudsman which include among other things the supervision of the compliance with the Discrimination Act²¹⁰ and representation of individuals by taking cases to the courts on behalf of the victims as stated by section 2 under Chapter 4 and section 2 under Chapter 6 of the Discrimination Act 2008.²¹¹

²⁰³ REPORT ON MEASURES TO COMBAT DISCRIMINATION. Directives 2000/43/EC and 2000/78/EC. COUNTRY REPORT 2012. SWEDEN. PP. 102-103

²⁰⁴ Law on Introduction activities for certain newly arrived immigrants No 2010:197, Section 7

²⁰⁵ Paraply Projektet. Ethnic Discrimination. <http://www.paraplyprojektet.se/reports-and-publications/ethnic-discrimination/>

²⁰⁶ Id

²⁰⁷ Diskriminerings ombudsmannen.(Equality Ombudsman). <http://www.do.se/en/About-the-Equality-Ombudsman/>

²⁰⁸ Id. Diskriminerings ombudsmannen.(Equality Ombudsman).

²⁰⁹ Id

²¹⁰ Discrimination Act 2008. Section 1, Chapter 4

²¹¹ Id. Section 2, Chapter 4

According to its Annual Report of 2013, the Equality Ombudsman received 294 complaints from individuals alleging discrimination based on ethnicity in working life compared with 95 complaints in areas of goods, services and housing, 60 complaints in areas of education, 25 complaints in social service, 23 complaints in health care, 22 complaints in public employment and 8 complaints in areas of social security.²¹² This report shows that working life is the area of society that witnessed most complaints of ethnic discrimination compared with other areas.

When it comes to the complaints received by the Equality Ombudsman divided by grounds of discrimination, the report of 2013 shows that ethnicity is the discrimination ground that causes most complaints in different areas of society such as employment, education, ect. According to the report complaints of discrimination based on ethnicity represented 752 cases compared with discrimination based on sex which represented 492, discrimination based on disability 401, discrimination based on religion 108 and discrimination based on sexual orientation 28.²¹³

With regard to the grounds of discrimination in working life in particular, the report of 2013 shows that the highest number of complaints was the discrimination based on ethnicity with 294 complaints compared with discrimination based on sex 239, discrimination based on age 117, discrimination based on disability 85 and discrimination based on religion 39 complaints.²¹⁴

The number of cases that has been taken to the labour court or settled was relatively small compared with the number of the complaints that submitted to the Equality Ombudsman in 2013. There were only 17 cases have been taken to the court, 7 cases has been settled before or after the lawsuit, 7 judgments were issued including 4 by Labour Court and there were 15 pending cases including 4 before the labour Court.²¹⁵

The Annual reports of the Equality Ombudsman for the years 2012, 2011, 2010 and 2009 show that among the complaints that submitted by the individuals, the discrimination on the ground of ethnicity represented the highest number of complaints in different areas of society in Sweden.

For instance there were 514 complaints based on ethnicity compared with 485 complaints of discrimination based on disability and 256 discrimination based on sex in the year 2012.²¹⁶ The report of 2011 shows that there were 694 complaints of discrimination based on ethnicity compared with 563 complaints of discrimination based on disability and 348 complaints of discrimination based on sex.²¹⁷

The 2010 annual report shows that there were 761 complaints of discrimination on grounds of ethnicity compared with 965 complaints of discrimination based on disability and 386

²¹² Årsredovisning (Annual Report) 2013. Equality Ombudsman. P. 20

<http://www.do.se/Documents/arsredovisningar/%c3%85rsredovisning%202013%20DO.pdf>

²¹³ Id. P. 14

²¹⁴ Id. PP. 17-27

²¹⁵ Id. P. 15

²¹⁶ Årsredovisning (Annual Report) 2012. Equality Ombudsman. P. 15

<http://www.do.se/Documents/arsredovisningar/DO-arsredovisning-2012.pdf>.

²¹⁷ Årsredovisning (Annual Report) 2011. Equality Ombudsman. P. 14. <http://www.do.se/Documents/om-do/DOs%20%c3%a5rsredovisning%202011.pdf> .

complaints of discrimination based on sex.²¹⁸ The report of 2009 indicates that the Equality Ombudsman received 766 complaints of discrimination based on ethnicity compared with 900 complaints of discrimination based on disability and 389 complaints of discrimination based on sex.²¹⁹

Moreover, the working life during the abovementioned years represented the area of society that witnessed the highest number of complaints.

The annual reports indicate that the number of complaints of different discrimination in working life was 507 complaints in 2012²²⁰, 731 in 2011²²¹, 763 in 2010²²² and 738 in 2009.²²³

The report also indicates that in 2012, the Equality Ombudsman took action by referring 15 cases to the court in which 6 cases have been settled before law suit²²⁴. In the same year there were 14 pending cases in courts where 7 cases before the Labour Court and the other 7 before the Public Court²²⁵. In these cases 3 judgments were issued where one judgment before the Labour Court and the other 2 before the General Court.²²⁶

According to the report of 2011 there were 13 judgments in cases that have been referred to the court by the Equality Ombudsman where 7 judgments before the Labour Court and 6 judgments before the General Court of which 4 of them have become final.²²⁷

In 2010 the courts announced 15 judgments where 3 judgments issued by the Labour Court and 12 issued by the General Court of which 6 have become final²²⁸. Equality Ombudsman won 3 judgments before the General Court and 1 judgment before the Labour Court.²²⁹

The report of 2009 shows that there were 7 judgments issued by the Labour Court, and 20 cases have been settled²³⁰. Among the 7 judgments 3 cases were about ethnic discrimination.²³¹

To conclude the annual reports from 2009-2013 show explicitly that the highest number of complaints were the complaints of discrimination based on ethnicity while the working life represented the area of society that witnessed the highest number of complaints.

This could be read as a strong indicator of the growing phenomenon of discrimination based on ethnicity in labour market, especially if we take into account the huge difference between the number of complaints regarding discrimination in working life and other areas such as

²¹⁸ Årsredovisning(Annual Report) 2010. Equality Ombudsman. P. 17 .
<http://www.do.se/Documents/arsredovisningar/arsredovisningdo2010.pdf>.

²¹⁹ Årsredovisning (Annual Report) 2009. Equality Ombudsman. P.31
<http://www.do.se/Documents/arsredovisningar/arsredovisningdo2009.pdf>

²²⁰ Årsredovisning (Annual Report) 2012. Equality Ombudsman. P. 17

²²¹ Årsredovisning (Annual Report) 2011. Equality Ombudsman. P. 19

²²² Årsredovisning (Annual Report) 2010. Equality Ombudsman. P. 18

²²³ Årsredovisning (Annual Report) 2009. Equality Ombudsman. P. 32

²²⁴ Årsredovisning (Annual Report) 2012. Equality Ombudsman. P. 22

²²⁵ Id

²²⁶ Id. P. 24

²²⁷ Årsredovisning (Annual Report) 2011. Equality Ombudsman. P. 24

²²⁸ Årsredovisning (Annual Report) 2010. Equality Ombudsman. P. 20

²²⁹ Id

²³⁰ Årsredovisning (Annual Report) 2009. Equality Ombudsman. PP. 34-35

²³¹ Id. P. 35

goods, services and housing, education, social service, health care and in public, and if we take also into account the difference between the number of complaints on ground of ethnicity and other grounds such as sex, disability, etc.

Moreover, the reports also show that the anti-discrimination law in Sweden is not developed judicially because the number of cases and judgments before either the Labour Court or the General Court are very few in relation to the number of complaints that have been submitted to the Equality Ombudsman. When it comes to the judgments in cases relate to ethnic discrimination in working life it is virtually zero.

3.3.5. Case law No. (AD nr 128/02) in ethnic discrimination in Sweden

According to the Country Report on Sweden 2012, there was only one case law in which the Labour Court in Sweden found discrimination on grounds of ethnicity based on evidence in 2002, taking into account that there was a similar finding in a judgment by default issued by the labour Court in 2001 regarding the case No. 2001 nr 52.²³²

The facts of the case No. AD nr 128/02 before the Labour Court can be summarized as follows:

In May 2001 a foreign-born woman of Bosnian origin and a Swedish resident since she was ten years old, applied for a job as a telephone interviewer with a telemarketing company. After she did recruitment interviews a member of the company staff informed her by phone that she had a slight foreign accent and thus she was denied the job.²³³

The Court found that it was justified in an objective manner for a company working in market evaluation through telephone interviews to demand that its interviewers possess good Swedish language skills. Nevertheless, the company in the applicant's case used a demand for language that was higher than necessary, and by taking the applicant's ethnic background into account such criteria was unfavorable to her. Accordingly, the Court found that there was no direct discrimination rather indirect discrimination against the applicant and according to the rules she was entitled to a payment of 40,000 SEK as redress.²³⁴

3.3.6. Increasing human capital of refugees and newcomers

During the period of free labor immigration 1945-1960s the state's efforts to develop the human capital of the immigrant were limited and the authorities relied to a large extent on the spontaneous and automatic integration of immigrants into Swedish society through the labor market, because the employment would facilitate the integration in other respects. It could be argued that the adoption of such attitude was probably due to the fact that the majority of the immigrants during the 1940s and 1950s came from Scandinavian countries.²³⁵

During this period the employment and housing were arranged for immigrant workers upon arrival in Sweden although the immigrants and their families due to their foreign citizenship

²³² REPORT ON MEASURES TO COMBAT DISCRIMINATION. Directives 2000/43/EC and 2000/78/EC. COUNTRY REPORT 2012. SWEDEN. P. 144

²³³ Annika Berg. Judgment issued in first ethnic discrimination case 2003. European industrial relations observatory on-line.. <http://www.eurofound.europa.eu/eiro/2003/03/feature/se0303103f.htm> .

²³⁴ Id

²³⁵ Christer Lundh. Invandring till Sverige . (Immigration to Sweden) SNS Förlag, Stockholm 2005. Norhaven A/S, Danmark 2010. ISBN 978-91-86203-68-9. P. 53

were not allowed to carry on the business activities or hold governmental jobs in Sweden. It is true that they did not enjoy any political rights but they were entitled to right to education and health care and social insurance in an equal footing with the Swedes.²³⁶

The second part of integration policy period from the mid of 1960s to the mid of 1980s was characterized by best efforts from the side of the Swedish authorities to provide an organized labor market integration. In early 1960s large groups of newly arrived workers from Yugoslavia, Greece and Finland who did not speak Swedish and lacked work experience appeared at Swedish labour market.²³⁷

In order to develop the human capital of the newcomers, the government decided to introduce free Swedish language courses and work related training for immigrants in 1965. These courses were introduced – in the beginning- during the free time of the workers, and then in 1970, following an agreement between LO and SAF, the courses in Swedish language for immigrants were conducted on paid work time. In later developments, particularly in 1973 the immigrant workers were entitled to a paid leave up to 240 hours in order to participate in Swedish language courses.²³⁸

In 1986 the municipalities became responsible for the reception of refugees and the introduction of Swedish language for immigrants (SFI).²³⁹ A new system also was initiated in 1986 under which every newcomer has a right to a basic Swedish language course containing 400 - 500 hours, and those who are engaged in employment have a statutory right to be on leave from their work to attend the basic Swedish language course²⁴⁰. The new immigrants were entitled to a study allowance and its amount was dependent on the employment, level of income and number of hours in attendance.²⁴¹

Moreover, the immigrants were entitled to 700 hours of tuition, and they have a right to continue their education by choosing either an education of general character or a vocational education with a possibility to study Swedish as a second language under adult education programme.²⁴²

From mid 1990s there was an increased awareness of integration difficulties and how to facilitate the integration of immigrants in Swedish labour market .Accordingly, and based on what has been shown in academic researches and reports from governmental agencies and investigations since the early 1990s, the authorities decided that refugees would be integrated in a combined language training and vocational training (internships) at workplace.²⁴³ This, since the 1990s the employment services require that a refugee should first completed (SFI) before he or she became a candidate for job or a job seeker.²⁴⁴

Since December 2010 a reform to the ‘‘Introduction Programme’’ has been initiated by the Swedish authorities, and accordingly the newcomers have to meet an introduction officer at

²³⁶ Id

²³⁷ Id. 54

²³⁸ Id

²³⁹ Id. P. 55

²⁴⁰ EVA LUNDBERG LITHMAN. Immigration and Immigrant Policy in Sweden. P. 32

²⁴¹ P. 33

²⁴² Id

²⁴³ Christer Lundh. Invandring till Sverige . P. 57

²⁴⁴ Id. P. 58

Employment and Introduction Center (AIC) in order to draft jointly an individual introduction plan through which the refugee's educational and professional background will be assessed and the expectations that they have for the introduction period also will be addressed.²⁴⁵

At the Employment and Introduction Center the new refugees engage in an extensive course on social orientation through which they receive – in their own languages- different information on Swedish culture, traditions, laws, politic, labour market, etc.²⁴⁶

The introduction period for the newcomers is limited to 3 years during which the refugee is supposed to achieve the goals of the programme and become self-sustaining otherwise the refugee will continue to plan job seeking at the Employment and Introduction Center and thus he or she would not be entitled to introduction allowance but to social benefits instead.²⁴⁷

Since the introduction reforms became effective in December 2010, a refugee with introduction plan who did not attend the SFI classes without legitimate reason his or her introduction allowance could be reduced or suspended by the Employment and Introduction Center.²⁴⁸

Since 2000 the vocational training and other measure relate to employment which aim at facilitating the integration of the refugees have also been considered as important parts of the introduction programme.²⁴⁹ During the period of 2003-2005 the Swedish Labour Market Board initiated a labour market programme for refugees and immigrants called ‘‘Work place Introduction’’ aims at increasing their work experience in Sweden, and in doing so the programme helps the job seekers to find employers that interested in them and providing assistance during their first six months at work place with an expectation that they would be paid by the employers.²⁵⁰

The integration policy reform of 2010 introduced two new employment measures which are the ‘‘step-in jobs’’ and ‘‘Swedish language courses’’ that offered to unemployed new arriving refugees, this, beside the provision of information on where their skills are demanded in order to harmonize the individual skills with the needs of the labour market and the potential training supply.²⁵¹

The other employment related measures are those which target the refugees and immigrants who have been employed in a work for which they are over-qualified, and thus these measures aim at bringing them into positions that matches their qualification through means of supplementary education.²⁵²

²⁴⁵ Gunnar Myrberg. Where are newcomers going to live? Perspectives on Swedish and Danish refugee settlement policies from Malmö and Århus. Institute for Future Studies 2012. PP. 24-25.
http://www.iffs.se/en/wp-content/uploads-en/2012/12/wherearenewcomers_2012_3.pdf .

²⁴⁶ Id. P. 25

²⁴⁷ Id. P. 26

²⁴⁸ Id. P. 27

²⁴⁹ Anja Wiesbrock. The Integration of Immigrants in Sweden. A Model for European Union. University of Oslo, Department of Private Law. International Migration. IOM 2011. P. 53
<http://eds.b.ebscohost.com.ludwig.lub.lu.se/eds/pdfviewer/pdfviewer?vid=4&sid=68366769-9be2-4439-80bc-d1278b8fdb2e@sessionmgr115&hid=105> .

²⁵⁰ Id. PP. 53-54

²⁵¹ Id. P. 54

²⁵² Id

4. THE NORMATIVE CONTENT OF THE RIGHT TO WORK IN INTERNATIONAL LAW

4.1. The normative content of the right to work in international human rights instruments

4.1.1. Right to work in United Nations Charter

The United Nations (UN) Charter is a legally binding treaty, and its articles have the force of positive international law and thus the Member States must undertake to fulfill their obligations under the UN Charter in good faith.²⁵³

The third paragraph of Article 1, lays down the objectives and purposes of the United Nations which among other things is to ‘‘ achieve international cooperation in solving international problems of economic, social, cultural and humanitarian character, ... ’’²⁵⁴

The UN Charter also goes further to determine clearly the duty of States to promote higher standards of living and to enhance and provide employment. Article 55 of the UN Charter stipulates explicitly that in order to create conditions of well-being which are necessary for peaceful relations among nations, the United Nations shall work towards the promotion of ‘ ‘ higher standards of living, full employment, . . . ’ ’²⁵⁵

Furthermore, the UN Charter in Article 56 imposes obligation on all Members to take actions to realize and achieve the full employment by stating that ‘ ‘All Members pledge themselves to take joint and separate action[...] for the achievement of the purposes set forth in Article 55.’ ’²⁵⁶

Nevertheless, it could be argued that Article 56 of the UN Charter does not refer explicitly to a legal or normative right to work because the concept of ‘ ‘full employment’ ’ set forth in the provisions of Article 56 could be interpreted as a State’s duty rather than an individual human right to employment²⁵⁷, and the scholars who support this argument rely on the fact that the UN Charter does not include detailed definitions of human rights.²⁵⁸

According to Philip L. Harvey the concept of full employment or combating unemployment could be seen from three perspectives.²⁵⁹ Firstly, the doctrine of the *New Dealers* interprets

²⁵³ The United Nations. <https://www.un.org/cyberschoolbus/humanrights/about/history.asp>.

²⁵⁴ Charter of the United Nations. Signed on 26 June 1945 in San Francisco at the conclusion of the United Nations Conference on International Organization. Came into force on 24 October 1945.

²⁵⁵ Charter of the United Nations. Article 55

²⁵⁶ Id. Article 56

²⁵⁷ Saurabh Bhattacharjee. SITUATING THE RIGHT TO WORK IN INTERNATIONAL HUMAN RIGHTS LAW: AN AGENDA FOR THE PROTECTION OF REFUGEES AND ASYLUM – SEEKERS. NUJS LAW REVIEW. 6 NUJS . Rev. 41 (2013) P. 50. http://www.nujslawreview.org/pdf/articles/2013_1/saurabh.pdf.

²⁵⁸ Id. P. 51

²⁵⁹ Philip L. Harvey. Liberal Strategies for Combating Joblessness in the Twentieth Century. JOURNAL OF ECONOMIC ISSUES. Vol. XXXIII No.2 June 1999. . P. 499

this concept as an effort to ensure the availability of employment for every individual who wants or seeks work, in other words it could be seen as a commitment to securing the right to employment.²⁶⁰ Secondly, it also could be argued from the liberal *Keynesianism* perspective that the concept of full employment does not necessarily mean a complete elimination of unemployment because the breadth of achievement of full employment depends to a large degree on how this concept is interpreted and defined.²⁶¹ Thirdly, and from the *Structuralist* perspective the full employment could be understood as the achievement of equal employment opportunities.²⁶²

The different definitions and understanding of the concept “full employment” set forth in the UN Charter remain controversial, but the definition that gains legal approval at the international level and among scholars is the definition that generally accepted in 1940s which was presented by William Beveridge and others.²⁶³

According to William Beveridge the concept of “full employment” does not mean that everyone in the country who is fit and free for work is employed because there will be situations and seasons when certain types of work are impossible or difficult.²⁶⁴ In other words the full employment does not mean that there is absolutely no unemployment, and some margin of unemployment is of course needed.²⁶⁵ However, the size of that margin and the measures of minimum unemployment were not agreed upon or clear even for Beveridge although he suggested in his report that those measures might be found by looking at the rate of unemployment reached at the top of the “cyclical fluctuation” in the parts of Britain that witnessed economic growth at that time of 1930s.²⁶⁶

However, for the purposes of interpretation of the concept “full employment” set forth in Articles 55 and 56 of the UN Charter, a group of economists working for the UN under the leadership of John Maurice Clark defined this concept in late 1940s, as “*a situation in which unemployment does not exceed the minimum allowances that must be made for the effects of frictional and seasonal factors*”²⁶⁷

This definition has been opposed by some economists in recent years who tend to use the concept of full employment only “*to a level of unemployment seen as necessary to keep inflation in check.*”²⁶⁸ That means the concept is used only to a level that keep the rate of inflation low and stable, but I think there is no a uniform level or percentage of unemployment that can keep the inflation in check because it varies from a country to another and it depends to a large degree on the rate of the economic growth.

<http://eds.b.ebscohost.com/ludwig.lub.lu.se/eds/pdfviewer/pdfviewer?vid=4&sid=8fe88b07-d6b2-440a-a6dd-8e431795d62b@sessionmgr115&hid=106>

²⁶⁰ Id

²⁶¹ Philip L. Harvey. Liberal Strategies for Combating Joblessness in the Twentieth Century. JOURNAL OF ECONOMIC ISSUES. Vol. XXXIII No.2 June 1999. P. 499

²⁶² Id

²⁶³ Id

²⁶⁴ WILLIAM H. BEVERIDGE. FULL EMPLOYMENT IN A FREE SOCIETY. UNWIN BROTHERS LIMITED. THIRD IMPRESSION FEBRUARY 1945. P. 18

²⁶⁵ Id. P. 126

²⁶⁶ Id

²⁶⁷ Id

²⁶⁸ Saurabh Bhattacharjee. P. 51

4.1.2. Right to work in Universal Declaration of Human Rights

As we have noted above the concept of full employment as a human right concept which Member States of the UN Charter undertake to promote according to Articles 55 and 56 is not defined in the provisions of Charter.

However, the gap in the Charter with regard to the definition of the human rights including the right to work was filled to a large extent by the Universal Declaration of Human Rights (UDHR), the instrument that adopted by the General Assembly due to the national and international pressure for such a bill throughout the Second World War.²⁶⁹

The UDHR recognizes explicitly the right to work, for instance the provisions of Article 23 (1) stipulate that ‘ ‘[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and protection against unemployment.’ ’²⁷⁰. It is obvious from the wording of these provisions that the UDHR not only aims to protect the right at work but also aims to protect the right to work and to impose obligations upon States to protect people against unemployment.²⁷¹

Unlike the UN Charter, the UDHR is not a treaty; therefore it is not legally binding per se upon the members of the UN²⁷² but, however, the UDHR together with the UN Charter is considered to have the status of a rule of Customary International Law and accordingly it becomes legally binding upon Member States of the UN.²⁷³

4.1.3. Right to work in International Covenant on Economic, Social and Cultural Rights

As we have seen above the UDHR is not legally binding per se as a document, therefore the UN immediately after the adoption of the UDHR in 1948 were challenged by a pressing need for creation of binding international human rights instruments.²⁷⁴

However, it took almost two decades for the United Nations to adopt the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol.²⁷⁵

²⁶⁹ JOHANNES MORSINK. *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*. University of Pennsylvania Press 1999. ISBN 0-8122-3474-X(cloth); ISBN 0-8122-1747-0(pbk). PP.1-2

²⁷⁰ Universal Declaration of Human Rights. Adopted and proclaimed by General Assembly resolution 217 A(III) of 10 December 1948

²⁷¹ Saurabh Bhattacharjee. P. 51

²⁷² BENJAMIN V. COHEN. HUMAN RIGHTS UNDER THE UNITED NATIONS CHARTER. An address given before the American Law Institute on May 20, 1949. P. 432

<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2417&context=lcp>

²⁷³ Saurabh Bhattacharjee. P. 51

²⁷⁴ Elsa Stamatopoulou. THE IMPORTANCE OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS IN THE PAST AND FUTURE OF THE UNITED NATIONS'S HUMAN RIGHTS EFFORTS. *ILSA Journal of International & Comparative Law* Vol. 5:281. P. 282

<http://heinonline.org.ludwig.lub.lu.se/HOL/Print?collection=journals&handle=hein.journals/ilsaic5&id=327>

The Committee on Economic, Social and Cultural Rights in its General Comment No. 18 recognizes that the right to work is one of the fundamental human rights because it plays a crucial role in realizing other essential rights and contributes to a large degree to the survival of the individuals and their families.²⁷⁶ Therefore the right to work has been recognized in a number of international human rights binding treaties, especially the ICESCR which deals with this right in more depth and comprehensiveness than the other human rights instruments.

For instance the first paragraph of Article 6 stipulates that ‘[t]he State Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.’²⁷⁷

In the second paragraph of the same article the Covenant speaks about the steps that to be taken by States in order to realize the right to work; and this paragraph also provides that ‘...this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve [.....] full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.’²⁷⁸

It is argued that although the right to work, freedom to work and labour rights appear together in the ICESCR, they can be distinguished from each other.²⁷⁹ According to Jose Luis Rey Perez²⁸⁰ the freedom to work means the prohibition of slavery and forced labour and it also includes the right to choose an employment freely without interference from State and thus it imposes negative obligation on States, bearing in mind that some liberal scholars argue that the right to work means nothing more than freedom to work.²⁸¹

Jose also argues that the right to work is something different from freedom to work because if the right to work is being limited to merely right to choose work freely it would not be a social right.²⁸² Moreover, he claims that right to work differs from labour rights or rights at work because the right to work must be established prior to the entitlement to rights at work or the labour rights.²⁸³

Historically, the idea of including Article 6 of the ICESCR - the right to work- in the draft of the Covenant was subjected to hard discussions and debates in the General Assembly in

²⁷⁵ Id. P. 283

²⁷⁶ General Comment No. 18. E/C. 12/GC/18. Adopted on 24 November 2005. COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS.... Para. 1

²⁷⁷ International Covenant on Economic, Social and Cultural Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXXI) of 16 December 1966. Entry into force 3 January 1976, in accordance with article 27.

²⁷⁸ Id. Article 6 (2)

²⁷⁹ Jose Luis Rey Perez. THE RIGHT TO WORK REASSESSED: HOW WE CAN UNDERSTAND AND MAKE EFFECTIVE THE RIGHT TO WORK. Rutger Journal of Law & Urban Policy. Vol 2. Fall 2005. No.1. P. 218.

<http://heinonline.org.ludwig.lub.lu.se/HOL/Page?handle=hein.journals/rutjulp2&page=217&collection=journals#217>.

²⁸⁰ Jose Luis Rey Perez is a researcher at the University of Pontificia Comillas of Madrid, Spain

²⁸¹ Jose Luis Rey Perez. THE RIGHT TO WORK REASSESSED: HOW WE CAN UNDERSTAND AND MAKE EFFECTIVE THE RIGHT TO WORK. PP. 218-219

²⁸² Id. P. 219

²⁸³ Id. P. 220

1950.²⁸⁴ Unlike the Western States who required the promotion of the conditions under which the right to work might be realized, the socialist States advocated for the inclusion of the right to work; and they argued that this right formed one of the most fundamental rights in modern society because it gave other rights the foundation in reality and it is essential to secure the right to life.²⁸⁵

Despite the fact that the proposals for a guarantee of the right to work were rejected by the drafters, there remained a considerable number of supporters for the inclusion of reference to ‘full employment’ in the draft Article 6.²⁸⁶ It was argued among the drafters that it would be better to stipulate the right to work in the Covenant in general terms leaving the details of the implementation to the ILO.²⁸⁷ Accordingly, the proposed reference to full employment instead of the right to work as such was supported by the majority of the members and became self-evident.²⁸⁸

4.2. The normative content of the right to work in International Labour Organization’s standards

The International Labour Organization (ILO) Constitution 1919 makes reference to the prevention of unemployment as one of the most important conditions whose improvement is urgently required to address injustice. In particular, the Preamble to the Constitution provides that ‘*whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required as [...] the prevention of unemployment...*’²⁸⁹

The same year of 1919 the Unemployment Convention, 1919 No 2 was adopted by the first International Labour Conference. The Convention urges Members States to report to the International labour Office on measures taken or contemplated to combat unemployment²⁹⁰ and to establish a system of free public employment agencies.²⁹¹

However, there was no recognition of the right to work as such in ILO standards before the adoption of Recommendation No. 169 by the General Conference of the International Labour Organization in 1984. The Recommendation in its general principles of the employment policy emphasizes that ‘*the promotion of full, productive and freely chosen employment[...]*

²⁸⁴ Matthew C.R. Craven. The International Covenant On Economic, Social and Cultural Rights: A perspective on its Development 1998. Clarendon Press. ISBN 0198267886, 9780198267881. P. 194

²⁸⁵ Id. PP. 194-195

²⁸⁶ Id. P. 199

²⁸⁷ Id

²⁸⁸ Id

²⁸⁹ ILO Constitution 1919. Has been modified by the amendment of 1922 which entered into force on 4 June 1934; the Instrument of Amendment of 1945 which entered into force on 26 September 1946 ; the Instrument of Amendment of 1946 which entered into force on 20 April 1948; the Instrument of Amendment of 1953 which entered into force on 20 May 1954; the Instrument of Amendment of 1962 which entered into force on 22 May 1963; and the Instrument of Amendment of 1972 which entered into force on 1 November 1974.

²⁹⁰ ILO. C002- Unemployment Convention, 1919 (No.2). Article 1

²⁹¹ Id. Article 2

should be regarded as the means of achieving in practice the realization of the right to work,²⁹²

The Recommendation also affirms that the full recognition of the right to work by Member States should be linked with the implementation of the economic policies that aim at promoting the full, productive and freely chosen employment²⁹³, and that the full, productive and freely chosen employment should be a priority in these policies.²⁹⁴

In order to encourage and stimulate the economic growth and to overcome unemployment and under employment, the ILO Convention No. 122 in the provisions of Article 1(1) and (2) imposes obligation on Member States to declare an active policy as a main objective which aims at promoting ‘*full, productive and freely chosen employment*’²⁹⁵
This policy according to the Convention shall aim at ensuring that ‘*there is work for all who are available for and seeking work*’²⁹⁶

The report of the Committee of Experts on the application of the Conventions and Recommendations, regarding the Employment Policy Convention No.122 points out that the promotion of the full, productive and freely chosen employment in the context of the employment policy should be considered as an essential part of the economic and social policies.²⁹⁷

Paragraph (a) of Article 2 of the Convention 122 affirms that each State Party shall keep under review the measures to be adopted for achieving the full, productive and freely chosen employment within the framework of the economic and social policies.²⁹⁸

The promotion of productive employment has always been an essential part of the ILO’s policies and strategies.

For instance, since the World Monetary and Economic Conference 1933 the ILO has been advocating for a coordinated international action on public work that aim at achieving both economic and social goals²⁹⁹.

As pointed out by Gerry Rodgers, Eddy Lee, Lee Swepston and Jasmien Van Daele in their book *The International Labour Organization and the quest for social justice*, during the period of 1930s the work of the ILO on employment was at forefront of progressive thought on economic and social policy.³⁰⁰ This progressive thought opposed the disastrous ‘*laissez-faire*’ economic thinking in the USA which had led to the Great Depression and had been replaced

²⁹² Employment Policy (Supplementary Provisions) Recommendation, 1984 (No.169). R 169- . Para. 1

²⁹³ Id. Para 2

²⁹⁴ Id. Para 3

²⁹⁵ ILO Convention No. 122. Employment Policy Convention, 1964. Entry into force 15 July 1966. Adopted in Geneva, 48th ILO session 9 July 1964. Article 1 (1)

²⁹⁶ Id. Article 1 (2) (a)

²⁹⁷ ILO. International Labour Conference. Report III (Part 1B) Confrep/III(1B)/2004-02-0151-1.doc. Promoting employment. Policies, skills, enterprises. Geneva. First Edition 2004. ISBN 92-2-113034-7. . P. 23. Para. 71
<http://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/rep-iii-1b.pdf>

²⁹⁸ ILO Convention No. 122. Article 2 (a)

²⁹⁹ Gerry Rodgers, Eddy Lee, Lee Swepston, Jasmien Van Daele. *The International Labour Organization and the quest for social justice, 1919-2009* . International Labour Organization Geneva 2009. ISBN 978-0-8014-4849-2 and ISBN 978-92-2-121955-2 (Paperback) . P. 175.

http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_104643.pdf.

³⁰⁰ Id

by Roosevelt's New Deal, beside the emergence of the Keynesian economic discipline as well during the same period.³⁰¹

The ILO also played a central role in respect of promotion of employment and combating poverty in developing countries by launching the World Employment Programme (WEP) in 1969.³⁰²

In 1970s, and with regard to the WEP, the ILO witnessed the production of several comprehensive employment policy reports such as the report on Colombia in 1970³⁰³ which was followed by a report on Sri Lanka in 1971³⁰⁴ and concluded by the third report on Kenya in 1972.³⁰⁵

These three reports identified the major issues that were addressed in the WEP's research work such as technology and employment, manpower planning and labour market information systems, rural employments and other areas³⁰⁶.

This, the Global Employment Agenda has also placed the employment at the central part of the social policies and development.³⁰⁷ The ILO also during its participation in the Poverty Reduction Strategy Paper (PRSP) in Cambodia, Honduras, Mali, Nepal and Tanzania in 1999 emphasized that employment plays a central role for the reduction of poverty and thus it should be placed at the center of the policies that relate to macroeconomic and social developments.³⁰⁸

As noted above the Convention No.122 sets out the objective of full, productive and freely chosen employment, at the same time there are other standards that aim at putting forward strategies for achieving that objective. Among the ILO instruments on employment promotion we can refer to some instruments such as the Employment Service Convention, 1984 (No.88), the Private Employment Agencies Convention, 1997 (No.181), the Employment Relationship Recommendation, 2006(No.198) and other relevant instruments.³⁰⁹

³⁰¹ Id

³⁰² Gerry Rodgers, Eddy Lee, Lee Swepston, Jasmien Van Daele. P. 185

³⁰³ Id. P. 187

³⁰⁴ Id. P. 188

³⁰⁵ Id. P. 189

³⁰⁶ Id. P. 191

³⁰⁷ ILO. International Labour Conference. Promoting employment. Policies, skills, enterprises. P. 24. Para. 71

³⁰⁸ Id. Box 1.3. The ILO, PRSP and employment. P. 24

³⁰⁹ ILO website. <http://ilo.org/global/standards/subjects-covered-by-international-labour-standards/employment-promotion/lang--en/index.htm> .

4.3. The normative content of the right to work in European Convention on Human Rights

While the European Convention on Human Rights (ECHR)³¹⁰ remains silent on the right to work the European Social Charter lays down this right in Article 1 of the Charter.³¹¹

The Social Charter in its Part I urges the Parties to pursue by all appropriate means the attainment of the conditions in which the right to freely chosen occupation may be realised. The first Section under Part I provides that “ *[e]veryone shall have the opportunity to earn his [her] living in an occupation freely entered upon* ”³¹².

Article 1 of the Charter under Part II which aims to ensure the effective exercise of the right to work, also urges the Parties to undertake to accept as primary aims the “ *achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment* ”³¹³

Although the ECHR does not set forth the right to access employment as such the European Court of Human Rights (ECtHR) in the case law of *Sidabras and Dziautas v. Lithuania* found that this right falls within the scope and ambit of Article 8 of the ECHR as long as denying access to employment affects the ability of the individuals to develop relationships with others and since this denial creates serious difficulties for them to earn their living.³¹⁴

Moreover the ECtHR in the case law of *Niemietz v. Germany* establishes that the respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings, and it is in work place and through the work that most of the people have the greatest opportunity to establish and strengthen their relationships with others.³¹⁵

The Court also establishes that the term private life in Article 8 of the ECHR should be interpreted in a broad sense to include the professional life. The Court states that:

*“More generally, to interpret the words "private life" and "home" as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8 (art. 8), namely to protect the individual against arbitrary interference by the public authorities[....]”*³¹⁶.

³¹⁰ European Convention on Human Rights. As amended by Protocols Nos. 11 and 14 and supplemented by Protocols Nos. 1,4,6,7,12 and 13. Entered into force 1 June 2010.

³¹¹ European Social Charter. Adopted by the Council of Europe in 1961 and ratified by all Member States of Council of Europe; it was revised in 1996.

³¹² Id. Part I, Section 1

³¹³ Id. Part II, Article 1 (1)

³¹⁴ CASE OF SIDABRAS AND DZIAUTAS v LITHUANIA. Application nos. 55480/00 and 59330/00. Paras. 47-50

³¹⁵ CASE OF NIEMIETZ v GERMANY. Application no 13710/88. Para. 29

³¹⁶ Id. Para. 31

Article 8 arguably lays down the right of everyone to have the opportunity to earn his/her living and accordingly any denial to this right would constitute a breach to the obligation of the State Member under the Convention.

5. THE NATURE AND SCOPE OF SWEDEN'S OBLIGATION TO REALIZE THE RIGHT TO WORK OF REFUGEE IMMIGRANTS

5.1. Sweden's obligation under the Refugee Convention 1951

Sweden signed the Convention Relating to the Status of Refugees in 28 July 1951 and ratified it in 26 October 1954, and the Convention entered into force on 24 January 1955.³¹⁷

Generally speaking we can argue that it is common practice in developing and least developed countries that refugees and 'asylum seekers' are excluded from participation in the labour market, and most of these countries argue that they deny the refugees the right to work because they are concerned about the negative impact of the large numbers of refugees on their economy which fall short in meeting the demands and needs of its own citizens.³¹⁸

The exclusion of refugees is not only in developing countries but also in some developed countries that impose restrictions on refugees' right to work.³¹⁹ In spite of the efforts that have been made by some European countries to help refugees to find jobs by offering them vocational training there are still more efforts need to be shown because only small number of refugees have taken the advantage of such possibility.³²⁰

It is true that most of the EU Member States grant the refugees the right to work but we have to take into account that refugees need not only the legal permission to work but also to be able to exercise this right and that can be possible by reducing the practical barriers to the participation in the labour market.³²¹

Access to employment or work is an issue of high significance for refugees to gain social and economic independence and helping to reduce or minimise the dependence and reliance of refugees on social benefits and thus they will contribute to the tax and the economic growth in receiving countries.³²² This right also plays an important role to develop knowledge and skills of the refugees.³²³

³¹⁷Mänskligarättigheter (Human Rights)

http://www.manskligarattigheter.se/dm3/file_archive/040414/ecd61c0c53d47f6f5eefca12b20a7012/konventioner_komplett_eng.pdf

³¹⁸ ALICE EDWARDS. Human Rights, Refugees, and The Right 'To Enjoy' Asylum. Oxford University Press 2005. P.320 . <http://ijrl.oxfordjournals.org.ludwig.lub.lu.se/content/17/2/293.full.pdf+html> .

³¹⁹ Id

³²⁰ Helene Lambert. Seeking Asylum: Comparative Law and Practice in Selected European Countries. Kulwer Academic Publisher Group 1995. ISBN 0-7923-3152-4. P. 171

³²¹ Report of the Committee on Migration, Refugees and Displaced Persons to the Parliamentary Assembly of the Council of Europe 2014. Doc. 13462 Report. P. 1. <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20569&lang=en>.

³²² UNHCR. Refugee Resettlement: An International Handbook to Guide Reception and Integration.2002. Chapter 2.9 Building Bridges to Economic Self-Sufficiency: Employment and Training P. 173

³²³ Id. Chapter 1.3. Laying the Foundations for Integration: Planning Goals. P. 19

In his report on refugees and right to work which was submitted to the Parliamentary Assembly of the Council of Europe (PACE) in 24 March 2014, Mr Christopher the Rapporteur of the Committee on Migration, Refugee and Displaced Persons pointed out that the lack of economic integration of refugees may force them to seek employment in unregulated, dangerous and exploitative conditions.³²⁴ Mr. Christopher also added that many studies have shown that the employment of refugees is not only enhancing their dignity and self-respect³²⁵ but also will prevent them from depending on public finances and thus benefits the economies of the host societies.³²⁶

Moreover, in its General Conclusion on International Protection, the Executive Committee of the UNHCR recognized that promotion and enhancement of economic and social rights including the employment are very important for refugees in order to achieve self-sufficiency and family security and also important for them to re-establish their dignity.³²⁷

Article 17 (1) of the Refugee Convention 1951 is the starting point for the refugees' right to employment because it imposes obligation on Contracting States to promote access to employment of refugees.

Helene Lambert claims that Article 17 of the Refugee Convention 1951 is the most important article in the Convention because without the right to work all other provisions would lose their practical meaning.³²⁸

Article 17 (1) of the Refugee Convention 1951 imposes obligation on Contracting States to ‘accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of foreign country in the same circumstances, as regards the right to engage in wage-earning employment.’³²⁹

Article 6 of the Refugee Convention interprets the term ‘in the same circumstances’ referred to in Article 17 (1) by stating that refugees must fulfil any requirements for the enjoyment of the right to engage in a wage-earning employment which a most favoured foreigner would have to meet in order to enjoy that right Article 6 read as follows:

‘For the purpose of this Convention, the term ‘in the same circumstances’ implies that any requirements [...] which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him,...’³³⁰

With regard to the term ‘in the same circumstances’ the Michigan Guidelines on the Right to Work³³¹ explains that in countries that have treaties establishing right to employment for the

³²⁴ Report of the Committee on Migration, Refugees and Displaced Persons to the Parliamentary Assembly of the Council of Europe 2014. P.5. Para. 2

³²⁵ Id. Para. 7

³²⁶ Id. Para. 5

³²⁷ UNHCR. General Conclusion on International Protection. EXCOM Conclusion No 50 (XXXXIX)-1988. Para. J.

³²⁸ Helene Lambert. P. 170

³²⁹ 1951 Convention Relating to the Status of Refugees. Adopted on 28 July 1951 by the United Nations Conference of Participation on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429(V) of 14 December 1950. Entry into force 22 April 1954, in accordance with article 3. Article 17 (1)

³³⁰ Id. Article 6

most favoured foreigners in economic communities or common markets such as EU, the refugees must be entitled to the same right to employment as non-nationals covered by these treaties.³³²

The provisions of the third paragraph of Article 17 grant the refugees the right to engage in a wage-earning employment in an equal footing with the citizens, this paragraph in particular requires States Parties to give “*sympathetic consideration to assimilating the right of all refugees with regard to wage-earning employment to those of nationals ...*”³³³

According to Article 17 (2) the refugees who completed three years of residence or those whose spouse or one of their children possess the nationality of the country cannot be subjected to restriction in exercising the right to engage in a wage-earning employment even if the State Party aims at protecting the national labour market.³³⁴

Article 18 of the Refugee Convention uses the same wording and conditions under which the refugee enjoys the right to engage on his/her own account in agriculture, industry, commerce, etc and the only one requirement is that he or she need to be legally or “*lawfully in*” the respective State.³³⁵

Whenever a refugee who stays legally or lawfully in the country is being granted the right to work in the State Party he or she shall be entitled to equal protection of the labour rights. This protection of labour rights is guaranteed by the provisions of Article 24 of the Refugee Convention.³³⁶

There is no doubt that the right to work under the Refugee Convention is limited to a refugee lawfully staying in the receiving country, and the extension of this right beyond the refugee to the asylum seekers is controversial.

It is generally argued that the asylum seekers fall outside the scope of Article 17 because the interpretation of these provisions refers only to refugees and thus they cannot rely on this article to claim right to work before their refugee status is determined by the host country.³³⁷

It has also been argued that not all rights are applicable to refugees who have been granted the refugee status, but to a certain degree it depends on the form or the type of the presence whether it is a lawful presence, lawful residence or habitual residence.³³⁸

There are some provisions in the Refugee Convention apply to refugee lawfully staying in the receiving country and some apply to those lawfully in the territory of such country while other

³³¹ THE MICHIGAN GUIDELINES ON THE RIGHT TO WORK, 16 March 2010. Adopted during the fifth Colloquium on Challenges in International Refugee Law convened in November 2009 at the University of Michigan Law School.

³³² THE MICHIGAN GUIDELINES ON THE RIGHT TO WORK, 16 March 2010. . P. 299. Para. 11 <http://www.refworld.org/docid/4bbaf1242.html>

³³³ 1951 Convention Relating to the Status of Refugees. Article 17(3)

³³⁴ Id. Article 17 (2)

³³⁵ ALICE EDWARDS. P. 321

³³⁶ 1951 Convention Relating to the Status of Refugees. Article 24(1), (2), (3) and (4)

³³⁷ Saurabh Bhattacharjee. PP.46-47

³³⁸ ALICE EDWARDS. P. 321

provisions apply to refugees whether lawfully or unlawfully present in the receiving country.³³⁹

Goodwin-Gill emphasizes that the lawful presence must be distinguished from lawful residence because the former implies admission for temporary purpose such as students, visitors, etc while the latter refers to those who are enjoying asylum in the sense of residence and permanent protection.³⁴⁰

According to Alice Edwards, for a refugee to engage in a wage-earning employment on most-favoured –workers basis he or she must be ‘*lawfully staying*’ in the territory of the country party to the Convention while the engagement of refugees in self-employment activities requires only that the refugee must be ‘*lawfully in*’ the territory of the country³⁴¹; and the difference is quite clear in the provisions of Articles 17 and 18 of the Refugee Convention. The literal interpretation of the two Articles may remove the contradiction between them although the interpretation of these provisions in light of purpose and object of the Refugee Convention would end up to the fact that the right to work should be enjoyed by refugees upon recognition of their status.³⁴²

Those who argue for the extension of the right to work to the asylum seekers such as James Hathaway claim that it cannot be a reasonable conclusion³⁴³ that refugees who submit asylum application are not lawfully present in a country and thus the refugees entitled to work if their presence officially sanctioned.³⁴⁴

However, we argue that the Refugee Convention must be interpreted in a sense that grants the best protection for the individual rights, for instance Article 5 of the Convention stipulates that ‘*[n]othing in this Convention shall be deemed to impair any rights and benefits by a Contracting State to refugees apart from this Convention*’.³⁴⁵

The Michigan Guidelines on the Right to Work explain this clause by stating that in cases where the receiving States are party to other relevant treaties and these treaties contain different obligations the refugee benefits from the most generous provisions, but whenever there are limitations or restrictions on human rights the provisions should be interpreted in a narrow sense.³⁴⁶

According to the Michigan Guidelines any limitations to the right to work must be justified by the state in accordance with the requirements of necessity, legality and proportionality and must pursue legitimate aim.³⁴⁷

This, the concept of ‘*lawful*’ should be interpreted in a good faith and in light of the object and purpose of the Refugee convention as required by the Vienna Convention on the Law of

³³⁹ Guys S. Goodwin-Gill and Jane McAdam. *The Refugee in International Law*. third addition. Oxford University press 2007. ISBN 978-0-19-928130-5 (alk.paper) – ISBN 978-0-19-920763-3 (alk.paper). P. 524

³⁴⁰ Guys S. Goodwin-Gill. *The Refugee in International Law*. Second addition. Oxford University press 1996. ISBN 0-19-826019-9, ISBN 0-19-826020-2 (pbk) PP. 307-308

³⁴¹ Id

³⁴² Id

³⁴³ Id. P. 322

³⁴⁴ Saurabh Bhattacharjee. P. 47

³⁴⁵ 1951 Convention Relating to the Status of Refugees . Article 5

³⁴⁶ THE MICHIGAN GUIDELINES ON THE RIGHT TO WORK. Para. 4

³⁴⁷ Id

Treaties (VCLT).³⁴⁸ This interpretation also could arguably be in the light of human rights treaties that protect rights on the basis of physical presence and the principle of equality, and accordingly whatever the type of the refugee's presence, it must be regarded as lawful for the purpose of the Refugee Convention.³⁴⁹

Moreover, the Refugee Convention in its first paragraph of Article 33 imposes obligation upon Contracting States to refrain from expelling a refugee under any situation whatsoever to a place where his or her life would be threatened.³⁵⁰

Michael Ramsden and Luke Marsh argues that the refugee who is unable to secure a job may be compelled by the pressing economic needs to return to his place of origin and being at risk of persecution once again, and such situation may arguably constitutes an explosion and thus gives rise to a breach of the obligation of *non-refoulement*.³⁵¹

5.2. Sweden's obligation under the UN Migrant Workers Convention (ICRMW)

5.2.1. The transition from refugee and migrant worker

Many immigrants migrate for economic reasons or due to the poverty that prevails in their countries³⁵² but there is a considerable number of immigrants flee political unrest, war, armed conflicts or violation of human rights.³⁵³ Some of those fleeing political situations are recognized as refugees immediately in neighboring countries while others have to seek asylum in other countries in order to be granted the status of refugee, and both of them are not entitled to work in many receiving countries.³⁵⁴

However, the distinction between migrant workers and refugees is not always an easy task because there is an overlap between the causes of immigration. For instance an asylum seeker may flee an economic situation rather than political unrest while a migrant worker may present her/himself as asylum seeker in order to enter the territory of a State.³⁵⁵

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) applies mainly to migrant workers and to some degree

³⁴⁸ Vienna Convention on the Law of treaties. Concluded at Vienna on 23 May 1969. Article 31(1)

³⁴⁹ THE MICHIGAN GUIDELINES ON THE RIGHT TO WORK. Para. 7

³⁵⁰ 1951 Convention Relating to the Status of Refugees. Article 33 (1)

³⁵¹ MICHAEL RAMSDEN & LUKE MARSH. The 'Right to Work' of Refugees in Hong Kong: MA v Director of Immigration. International Journal of Refugee Law Vol. 25 No. 3 PP. 574-596. Oxford University Press 2013. P.586. <http://ijrl.oxfordjournals.org/>

³⁵² United Nations Educational, Scientific and Cultural Organization. United Nations Convention on Migrants' Rights. Information kids. UNESCO 2005 France. P. 16
<http://unesdoc.unesco.org/images/0014/001435/143557e.pdf> .

³⁵³ Id. P. 17

³⁵⁴ Id

³⁵⁵ Id. PP. 17-18

it is applied to refugees whose situation is subjected primary to the Refugee Convention 1951 and its Protocol of 1967.³⁵⁶

The ICRMW defines the migrant worker in Article 2 (1) as ‘ ‘ *a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national* ’ ’.³⁵⁷

Although the Convention does not apply to refugees Article 3 (d) gives some exceptions to the rule by providing that the convention shall not apply to refugees and stateless persons ‘ ‘ *unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned* ’ ’.³⁵⁸

It is obvious that the transition from of status of refugee to a migrant worker requires acknowledgement from national legislature by granting the refugee the right to work or recognition by international instrument in force such as the Refugee Convention 1951.

The Swedish Aliens Act 2005 allows the refugee to work in Sweden, for instance the second Chapter organizes the conditions on which the immigrant may stay and work in Sweden. The provisions of Section 8 under Chapter 2 read as follows:

*‘ ‘ The passport, visa, residence permit and work permit requirements [...] for entry, stay and work do not apply to nationals of Denmark, Finland, Iceland or Norway. The residence permit and work permit requirements do not apply to EEA nationals and their family members who have a right of residence. The work permit requirement does not apply to an alien who has a permanent residence permit ’ ’.*³⁵⁹

Section 1 under Chapter 6 also exempts refugees from the requirement of work permit. It provides that ‘ ‘ *[w]ork permits shall be granted for a certain period. They may refer to a certain type of work and other necessary conditions may be attached* ’ ’. Section 1 continues to stress that ‘ ‘ *an alien who has a permanent residence permit does not need to have a work permit.* ’ ’³⁶⁰

A refugee with a temporary protection can be entitled to work permit as well. Section 3 under Chapter 6 provides that ‘ ‘ *[a] work permit may be granted to an alien who has a temporary residence permit unless reasons pertaining to the purpose of the residence permit indicate otherwise.* ’ ’³⁶¹

Article 3 (d) of the ICRMW makes reference to the recognition of this right by international instruments in force as an exception to the application of the Convention to refugees. Accordingly, as long as Sweden signed the Convention Relating to the Status of Refugees in

³⁵⁶ Id

³⁵⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Adopted by General Assembly resolution 45/158 of 18 December 1990. Article 2(1)

³⁵⁸ Id. Article 3 (d)

³⁵⁹ Aliens Act (2005:716) issued 29 September 2005 with amendments up to and including Swedish Code of Statutes 2009:16. Enters into force 31 March 2006. Chapter 2, Section 8

³⁶⁰ Id. Chapter 6, Section 1

³⁶¹ Id. Section 3

28 July 1951 and ratified it in 26 October 1954, and that the Convention entered into force in 24 January 1955³⁶², Sweden becomes legally bound by this instrument.

As we have seen earlier Article 17 (1) of the Refugee Convention 1951 speaks about wage-earning employment and emphasizes that States Parties shall accord to refugees the most favourable treatment accorded to nationals of foreign country in the same circumstances.³⁶³

Article 18 also speaks about self-employment and it provides that ‘*[t]he Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry,*’³⁶⁴
..

The practice in Sweden shows that the asylum seekers who managed to obtain employments are not only can be able to improve their financial situations but also they can be able to transform from being merely asylum seeker to an immigrant worker if they managed to work at least 6 months before a final negative decision is made against them or after their appeal is refused by the appeal Court.³⁶⁵

After one year contract or longer they can apply for a work permit in Sweden but he or she must have a valid passport in order to be granted a temporary work permit of two years- it can become permanent permit after four years- and this temporary permit allows for family reunification and the right of the spouse to engage in work.³⁶⁶

This facilitation in shifting from an asylum seeker to a migrant worker was introduced by the government not only as part of its immigration policy to develop labour immigration of third country nationals to Sweden but also to use the skills of the rejected asylum seekers and whose qualifications are needed in Sweden.³⁶⁷

Based on the foregoing national and international instruments we can argue that the refugee immigrants in Sweden fall within the ambit and scope of Articles 2 and 3 of the ICRMW and thus the Convention applies to refugees.

³⁶²Mänskligarättigheter (Human Rights)

http://www.manskligarattigheter.se/dm3/file_archive/040414/ecd61c0c53d47f6f5eefca12b20a7012/konventioner_komplett_eng.pdf

³⁶³ 1951 Convention Relating to the Status of Refugees. Article 17 (1)

³⁶⁴ Id. Article 18

³⁶⁵ AIDA Asylum Information Database. National Country Report Sweden. Up-to-date as of May 2013. P. 39
<http://www.ecre.org/component/downloads/downloads/762.html> .

³⁶⁶ Id

³⁶⁷ Id. P. 40

5.2.2. Sweden and the ratification of the Migrant Workers Convention

Europe is considered the most important destination for many immigrants, and it hosts about 70 million international immigrants, representing 9.5% of the population in Europe.³⁶⁸

Like all core international human rights conventions and treaties the ICRMW recognizes the fundamental rights and freedoms set forth in the UDHR and develops range of principles which are considered very significant for the migrant workers and their families.³⁶⁹ The convention also features the rights that have been recognized in the ICCPR and ICESCR and provides special protection to the migrant workers and their families because they represent a group of disadvantaged and vulnerable persons.³⁷⁰

When it comes to the promotion of the right to work Article 25 (1) of the ICRMW emphasizes that ‘ ‘ *[m]igrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration* ’ ’.³⁷¹

It is true that the provisions of Article 25 do not refer explicitly to right to work as such but it could be argued that this article goes in the direction of the right to work because the right to equal payment or remuneration cannot be granted prior to the establishment of the right to employment.

The enjoyment of equal treatment referred to in Article 25 extends to other conditions of decent work such as safety, health, hours of work, etc.³⁷² It also extends to other terms of employment such as minimum age of employment and any other restrictions on matters which are considered a term of employment according to the national law.³⁷³

Despite of the significance of this Convention, none of the European Union (EU) Member States has ratified the Convention.³⁷⁴ The main arguments for this refrain are that their national laws, the European law and the core human rights treaties that they have ratified, already guarantee the protection of the migrant workers and their family.³⁷⁵ The EU Member States bring more arguments by claiming that the Convention includes some phrases which are in contradiction with their national legislations.³⁷⁶ In addition to these arguments and as a final plea some States argue that there is no ratification by any national governments in the EU.³⁷⁷

³⁶⁸ United Nations Human Rights. Office of the High Commissioner. Europe Regional Office. RIGHTS OF MIGRANT WORKERS IN Europe. . P. 8.

http://europe.ohchr.org/Documents/Publications/Migrant_Workers.pdf

³⁶⁹ Id. P.10

³⁷⁰ Id. P. 11

³⁷¹ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Adopted by General Assembly resolution 45/158 of 18 December 1990. Article 25

³⁷² Id. Article 25 (1) (a)

³⁷³ Id. Article 25 (1) (b)

³⁷⁴ Amandine Guilbert and Rene Plaetevoet. The U.N. Migrant Workers Convention: Steps Towards Ratification in Europe. European Platform for Migrant Workers' Right, Belgium. .P. 4. <http://www.epim.info/wp-content/uploads/2011/02/The-UN-Migrant-Workers-Convention-steps-towards-ratification-in-Europe.pdf>

³⁷⁵ Id. P. 7

³⁷⁶ Id. P.8

³⁷⁷ Id. P. 9

However, it is obvious that the real explanation for this refusal and refrain is that the EU's governments are worried that by granting undocumented immigrants some rights such steps will encourage them and others to choose the European countries as destinations. For that reason, they insist that they would not be able to commit themselves to a unilateral ratification arguing that the European Union Treaty defines the immigration as an issue of common interest rather than individual interest for each single government.³⁷⁸

Like other EU Member States, Sweden has not ratified the ICRMW, and according to a statement made by the Minister of Integration and Gender Equality in 30 June 2010 Sweden did not intend to ratify this Convention.³⁷⁹ The same position was presented by the Swedish Parliament in the National Action Plan for Human Rights 2006 arguing that the rights provided for by the Migrant Workers Convention comply with the rights that already set forth in other human rights treaties and thus, the government considers ratifying this Convention not an issue of importance or necessity.³⁸⁰

In its response to the comments on Sweden's position towards the ICRMW during the Universal Periodic Review (UPR) 2010, the Sweden's representative stated that *“ [t]hrough its implementation of the provisions of the six core human rights instruments, Sweden had already fulfilled most of the principles set out in ICRMW. ”*³⁸¹

Sweden also affirms that migrant workers enjoy human right in an equal footing with citizens in all important aspects, and this emphasis appears in the response of the government during the UPR 2010 by providing that *“ Migrant workers already enjoyed equal rights with citizens. ”*³⁸²

Furthermore, in defending its position the government argues that it has introduced a number of measures that are compatible with the object and purpose of the Migrant Workers Convention, in particular Sweden argues that it has introduced a new legislation in 2008 includes rules for labour migration to Sweden from countries other than EU States.³⁸³

In the statement made by the Minister of Integration and Gender Equality in 2010, the Minister emphasized that Sweden is of the opinion that the ratification of the Migrant Workers Convention lies within the EU Member States' national competence.³⁸⁴

It is true that the new rules for labour migration that entered into force on 15 December 2008 are considered as a new approach to migration in Sweden³⁸⁵ because- according to the Swedish government- these rules look at the migration from constructive perspective by acknowledging the role of immigrants in the labour market and the economy.³⁸⁶

³⁷⁸ Id. P.10

³⁷⁹ Rene Plaetevoet and Marika Sidti. Ratification of the UN Migrant Workers Convention in the European Union: Survey on the Position of Governments and Civil Society Actors. Published by December 18 and EPMWR 2010. P. 84

³⁸⁰ Id

³⁸¹ UN Human Rights Council, Report of the Working Group on the Universal Periodic Review, Sweden, 16 June 2010. A/HRC/15/11. P. 9. Para. 64

³⁸² Id.

³⁸³ Rene Plaetevoet and Marika Sidti. Ratification of the UN Migrant Workers Convention in the European Union: Survey on the Position of Governments and Civil Society Actors. P. 84

³⁸⁴ Id. P. 85

³⁸⁵ United Nations Human Rights. Office of the High Commissioner. Europe Regional Office. MIGRANT WORKERS RIGHT IN Europe. P. 62

³⁸⁶ Id

In a statement made by the Minister for Migration and Asylum Policy, he said that *‘Migration is a positive force in our increasingly globalised world. In order to[...] make use of the knowledge and experience of labour immigrants, it is time to change our perspective.’*³⁸⁷

However, this remarkable development in immigration approach cannot be accepted as a justification from Sweden for not ratifying the Convention.

Despite the fact that Sweden is not a party to the Migrant Workers Convention (ICRMW) it still bound by the other international human rights treaties including those of the ILO to protect the refugees as migrant workers in Sweden.

Accordingly, the next section will examine Sweden’s obligations under other international law instruments.

5.3. Sweden’s obligation under International Covenant on Economic, Social and Cultural Rights

5.3.1. The typology of obligations (to respect, to protect, to fulfil) under ICESCR

The typology of obligations to respect, to protect and to fulfil can be applied to assess the conduct of a State with regard to the economic, social and cultural rights³⁸⁸, and the failure to comply with any one of these obligations constitutes a violation of the specific right.³⁸⁹

The obligation to respect means a duty to respect not to deprive people of the guaranteed right, and the obligation to protect means not allow others to deprive people of the guaranteed right; while the obligation to fulfill means to work to establish political, economic and social systems and infrastructure that provide access to the guaranteed right.³⁹⁰

The Committee on Economic, Social and Cultural Rights in its General Comment No. 18 points out that there is a legal obligation on State parties to respect the right to work by number of measures including among other things refraining from denying or limiting equal access to work for all persons particularly the vulnerable and marginalized individuals and groups, and to take measures to combat discrimination and to promote and enhance equal opportunity to work.³⁹¹

When it comes to obligations of States to protect the right to work the Committee emphasizes that States have duty to adopt laws and legislation or to take other appropriate measures to

³⁸⁷ Government Office of Sweden. New rules for labour immigration. Ministry of Justice. Danagårds February 2009 Stockholm. P.1 . <http://www.government.se/content/1/c6/10/72/00/2a13eb93.pdf> .

³⁸⁸ Fons Coomans. Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organizations. Max Planck UNYB 11 (2007). . P. 380
http://www.mpil.de/files/pdf1/mpunyb_14_coomans_11.pdf

³⁸⁹ Maastricht Guidelines. Guideline. 6

³⁹⁰ Maria Green. What We Talk About When We talk About Indicators: Current Approaches to Human Rights Measurement. Johns Hopkins University Press DOI: 10.1353/hrg.2001.0054. PP. 1071-1072
http://muse.jhu.edu.ludwig.lub.lu.se/journals/human_rights_quarterly/v023/23.4green.pdf.

³⁹¹ General Comment No. 18. E/C/12/GC/18. Para. 23

promote equal access to work and training, in addition to their responsibility to ensure that privatization measures do not undermine the right of the workers.³⁹²

The Committee also specifies that States Parties to the Covenant have an obligation to fulfil or have a duty to provide the right to work when members of the population as individuals or groups are unable to secure work themselves. This duty includes among other things the duty of the State to recognize the right to work in the legal system by adopting the relevant legislation; and to adopt national policies and detailed plans on how the State realizing the right to work.³⁹³

With regard to the employment policies the Committee emphasizes that the right to work requires that the formulation and the implementation of these policies must be compatible with a view to ‘ *stimulating economic growth and development, [...] and overcoming the unemployment and underemployment* ’.³⁹⁴

The Committee also goes further and affirms that States have a duty to pay special attention to the vulnerable groups by taking effective measures to ‘ *increase the resources allocated to reducing the unemployment rate, in particular among women , the disadvantaged and marginalized* ’.³⁹⁵ Generally, States parties have obligation under the Covenant to implement plans aiming at counter and combating unemployment.³⁹⁶

The obligation of States to fulfil the right to work also encompasses obligation to facilitate by taking positive measures to assist the individuals through implementation of educational plans aim at improving access to employment.³⁹⁷ These, beside the duty of the State to promote this right though the provision of information to raise the awareness on the right to work among the population.³⁹⁸

5.3.2. The scope of Sweden’s obligation under the International Covenant on Economic, Social and Cultural Rights

Sweden is legally bound to comply with its obligations under the ICESCR because it signed the Covenant on 29 September 1967 and ratified it on 6 December 1971.³⁹⁹

The obligation of States to promote the right to work has a legal basis in the Preamble to ICESCR which makes reference to States’ obligations under the UN Charter to ‘ *promote universal respect for, and observance of, human rights and freedoms* ’.⁴⁰⁰

³⁹² Id. Para. 25

³⁹³ Id. P.7. Para. 26

³⁹⁴ Id. P. 8. Para. 26

³⁹⁵ General Comment No. 18. P. 8. Para. 26

³⁹⁶ Id

³⁹⁷ Id. Para. 27

³⁹⁸ Id. Para. 28

³⁹⁹ United Nations Treaty Collection.

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en

⁴⁰⁰ International Covenant on Economic, Social and Cultural Rights.

Nonetheless, the scope of this obligation and the actual enforceability of the right to work remain questionable.⁴⁰¹ Like all other rights set forth in the ICESCR, the right to work raises questions such as whether it requires only progressive realization as appeared in Article 22 or full and immediate implementation as argued by some positivists.⁴⁰²

It could be argued that the right to work can generally be understood -from political and economic perspectives - as a right to a job and it is identified within the goal of achieving full employment which guarantees the right to work.⁴⁰³

But from a legal perspective, the understanding of the right to work as the right to a job can be interpreted in different senses. According to Jose Luis Rey Perez this right could be interpreted as either a rule or as a principle. The right to work as a principle means that there are guidelines which lead States to take steps to achieve the content of the right according to their available resources and options. In other words it means that it is a right to certain level of steps taken by States in order to make the employment available and reduce unemployment.⁴⁰⁴ whereas, if the right to work is interpreted as a rule that means it is of immediate implementation, and thus it could be justiciable by going to the court to claim the right to work in case of unemployment.⁴⁰⁵

However, we can argue that like most economic and social rights, the right to work cannot be enforced in the same manner as the civil and political rights are enforced, in other words the right to work cannot be justiciable; and we can argue in particular that unlike other social and economic rights such as education and health the right to work is different in its kind and thus it could not be considered as a guaranteed right.⁴⁰⁶

5.3.3. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights and the realization of the right to work

Article 2 (1) of the ICESCR imposes obligation upon Member States to realize the right set forth in Article 6.⁴⁰⁷ The provisions of this Article require Member States to undertake to take steps separately or in cooperation with international community to ‘*the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of the legislative measures.*’⁴⁰⁸

⁴⁰¹ Saurabh Bhattacharjee. P. 53

⁴⁰² Id. P. 52

⁴⁰³ Id

⁴⁰⁴ Id. PP. 220-221

⁴⁰⁵ Saurabh Bhattacharjee. P. 221

⁴⁰⁶ Guy MUNDLAK. The right to work: Linking human rights and employment policy. International Labour Review, Vol. 146 (2007), No. 3-4. P. 194

<http://eds.b.ebscohost.com.ludwig.lub.lu.se/eds/pdfviewer/pdfviewer?sid=14a488ae-4289-44bf-9c79-bd9321f0e713%40sessionmgr112&vid=2&hid=105> .

⁴⁰⁷ Id. Article 2(1)

⁴⁰⁸ Id

The provisions of Article 2 (1) are of special significance because they describe the nature of the obligations that imposed on State parties to the ICESCR; in particular, they refer to both obligations of conduct and obligations of result.⁴⁰⁹

As pointed out by Maria Green the distinction between the two obligations has been described by Asbjorn Eide in a very clear manner by providing that “ *[a]n obligation of conduct (active or passive) points to behavior which the duty holder should follow or abstain from. An obligation of result is less concerned with the choice of the line of action taken, but more concerned with the results which the duty-holder should achieve or avoid*”,⁴¹⁰

The Committee on Economic, Social and Cultural rights and some commentators also indicate that while the Covenant in Article 2(1) provides obligations of a progressive achievement for some economic and social rights, it also impose obligations which are of immediate effects in respect of other rights.⁴¹¹

We can observe that the Committee lists certain provisions of the Covenant as capable of immediate application by judicial and other organs in many national legal systems. These provisions include among other articles, Article 2(2) non-discrimination, and Article 10(3) protection of children and young person from economic and social exploitation.⁴¹²

Furthermore, the International Law Commission in its commentary on the draft articles on state responsibility has pointed out that while Article 2(1) constitutes an obligation of result, Article 10(3) constitutes an obligation of conduct.⁴¹³

It is true to some extent, and as suggested by Mary Dowell-Jones, that the obligations which are imposed on governments in ICESCR are too vague, and that States can rely on the wording of Article 2(1) such as “taking steps” and “available resources” to counter the implementation or the enforcement of the socio-economic rights.⁴¹⁴

The compliance with the obligation “to take steps” under Article 2(1) requires the use of all “appropriate means” particularly the legislative measures as the most important means for protecting human rights in general, and for that reason it appears that the Committee focuses much on the legal steps.⁴¹⁵

For instance the Committee on Economic, Social and Cultural Rights recognizes that “ *in many instances legislation is highly desirable [...] For example, it may be difficult to combat*

⁴⁰⁹ General Comment No. 3. U.N. Doc. E/1991/23. Committee on Economic, Social and Cultural Rights.. Para. 1

⁴¹⁰ Maria Green. What We Talk About When We talk About Indicators: Current Approaches to Human Rights Measurement. Johns Hopkins University Press DOI: 10.1353/hrg.2001.0054. P. 1075

⁴¹¹ Mary Dowell-Jones. Contextualizing the International Covenant of Economic, Social and Cultural Rights: Assessing the Economic Deficit. MARTINUS NIJHOFF PUBLISHERS LEIDEN/BOSTON 2004. ISBN 9004139087. P. 19

⁴¹² Mary Dowell-Jones. Contextualizing the International Covenant of Economic, Social and Cultural Rights: Assessing the Economic Deficit. P.20

⁴¹³ Id

⁴¹⁴ Id. 39

⁴¹⁵ Id. P. 41

discrimination effectively in the absence of a sound legislative foundation for the necessary measure,⁴¹⁶

The Committee also refers to the provision of judicial remedies with respect to rights that could be justiciable according to the national legal system such as rights which are enjoyable without discrimination.⁴¹⁷

Among the measures which are considered appropriate, the Committee makes reference to the administrative, financial, educational and social measures.⁴¹⁸

We can observe with this regard that the Committee pays much attention to the legal and judicial measures and less attention to the administrative, financial and educational measures, because we can see three paragraphs in the General Comment No. 3 speak about the legal measures while only one sentence refers to the administrative and financial measures.⁴¹⁹

At first glance, the obligation in Article 2(1) to take steps towards “achieving progressively” the full realization of the rights recognized in ICESCR is seen as if these rights would not be able to be achieved in a short period of time; but that is not true because the Committee affirms that this phrase should not be misinterpreted as depriving the obligation of all meaningful content.⁴²⁰

In other words the obligation “to take step” under Article 2 (1) should be interpreted as of immediate effect.⁴²¹ This article imposes an obligation on States “to begin immediately to take steps towards full realization of the contained in the Covenant”,⁴²² Furthermore, the Limburg Principles emphasize that the phrase “to achieve progressively the full realization of the rights” shall not be interpreted as implying for States the right “to defer indefinitely efforts to ensure full realization”.⁴²³

The Maastricht Guidelines also note that implementation of the rights set forth in ICESCR progressively does not exempt the State from its obligations to take certain steps immediately or as soon as possible with regard to some rights therefore the Guidelines emphasize that “the burden is on the State to demonstrate that it is making measurable progress towards the full realization of the rights in question”.⁴²⁴

The Committee has neither provided in details how the progressive implementation should be nor delimited the full realization. However, the Committee pointed out that any deliberately retrogressive measures must be taken carefully and should be fully justified by reference to the rights provided for in the ICESCR and in the context of the full use of the maximum available resources⁴²⁵. This, the Maastricht Guideline consider as a violation of the ICESCR the “adoption of any deliberately retrogressive measures that reduce the extent to which any such right is guaranteed”,⁴²⁶

⁴¹⁶ General Comment No. 3. Committee on Economic, Social and Cultural Rights.. Para. 3

⁴¹⁷ Id. Para. 5

⁴¹⁸ Id. Para. 7

⁴¹⁹ Mary Dowell-Jones. P. 42

⁴²⁰ General Comment No. 3. Committee on Economic, Social and Cultural Rights.. Para. 9

⁴²¹ Id.p.21

⁴²² Limburg Principles. UN Document E/CN.4/1987/17. Para . 16

⁴²³ Id. Para . 21

⁴²⁴ Maastricht Guidelines on Violations of the Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997. Para. 8

⁴²⁵ General Comment No. 3. Committee on Economic, Social and Cultural Rights.. Para. 9

⁴²⁶ Id. Para. 14 (e)

Furthermore, what ‘‘available resources’’ are, and what constitutes or considers a ‘‘full use’’ for the purpose of the ICESCR have not been identified by the provisions of Article 2(1), and there are no certain criteria for interpretation as well.⁴²⁷

The phrase ‘‘to the maximum of its available resources’’ is considered to be the most problematic clause in Article 2(1). However, according to Mary Dowell-Jones the interpretation of the phrase maximum available resources must be based on the fact that there is no presumption that the State itself is bound to provide or to guarantee the economic and social rights directly, but there is wide range of means and measures that aim at protecting the socioeconomic rights can be implemented.⁴²⁸

The Committee also affirmed that even where the available resources are inadequate the obligation remains for States to take all necessary measures to ensure the enjoyment of the rights in question under the prevailing circumstances.⁴²⁹

6. THE NATURE AND SCOPE OF SWEDEN’S OBLIGATION NOT TO DISCRIMINATE UNDER INTERNATIONAL LAW

The principle of non-discrimination is recognized in a number of human rights treaties. The general provisions on non-discrimination appear in International Bill of Rights instruments, including among other provisions Article 2 and 7 of the UDHR⁴³⁰, Articles 2(1) and 26 of ICCPR⁴³¹ and Article 2(2) of ICESCR.⁴³² Article 14 ECHR also contains provisions on non-discrimination.⁴³³ Article 2 of the ILO Convention No. 111 also contains similar provisions.⁴³⁴

6.1. Sweden’s obligation under Article 2(2) of the International Covenant on Economic, Social and Cultural Rights

We have examined in the previous sections the right to work as a norm of international human rights law and its application to the citizens and aliens in contracting States. In this section we would like to make an argument that the right to work set forth in the ICESCR is not limited to Swedish citizens but extends to refugees and represents an additional protection beside the Refugee Convention and other refugee related instruments.

⁴²⁷ Mary Dowell-Jones. P.45

⁴²⁸ Id. P. 51

⁴²⁹ General Comment No. 3. Committee on Economic, Social and Cultural Rights.. Para. 11

⁴³⁰ Universal Declaration of Human Rights. Articles 2 and 7

⁴³¹ International Covenant on Civil and Political Rights. Articles 2 and 26

⁴³² International Covenant on Economic, Social and Cultural Rights. Article 2(2)

⁴³³ European Convention Human Rights . Article 14

⁴³⁴ ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Entry into force 15 June 1960. Adopted in Geneva 24th ILC session 25 June 1958. Article 2

This argument relies on the principle of non-discrimination set forth in Article 2 (2) of ICESCR which is read as follows:

*“The State Parties to the present Covenant undertake to guarantee that the right enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*⁴³⁵

The Committee on Economic, Social and Cultural Rights in its General Comment No. 20 defines discrimination as ‘any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights’⁴³⁶

The provisions of Article 2(2) of ICESCR could be differentiated from those of Article 2 of the UDHR and Article 2(1) of the ICCPR in two ways⁴³⁷. On the one hand Article 2(2) of ICESCR uses the word discrimination while the UDHR and ICCPR use the word distinction. On the other hand the listing of grounds of discrimination in ICESCR uses the word ‘as to’ while the UDHR and ICCPR use the word ‘Such as’⁴³⁸.

The Limburg Principles explains that the grounds of discrimination mentioned in Article 2(2) are not exhaustive⁴³⁹ and thus it uses the word ‘as to’.

When it comes to discrimination at work Article 2(2) is read together with Article 6(1) of the ICESCR which provides that-as we have seen earlier-a State party to the Convention shall recognize the right to work to everyone⁴⁴⁰ including non-citizens and refugees.

It is true that, at first glance the literal interpretation of Article 2(2) exclude the refugees and non-national from the scope of this article because ‘nationality’ is not one of the grounds of discrimination that has been prohibited under the ICESCR. But, that is not true because the prohibited grounds are open-ended and that is quite obvious from the wording of the phrase ‘other status’⁴⁴¹.

The Committee on Economic, Social and Cultural Rights in its General Comment No.20 affirms that ‘the ground of nationality should not bar access to Covenant rights [...]. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum seekers,’⁴⁴²

The Committee on Economic, Social and Cultural Rights adopts the same interpretation that the phrase ‘other status’ may refer to nationality. In particular the Committee recommends

⁴³⁵ International Covenant on Economic, Social and Cultural Rights. Article 2(2)

⁴³⁶ General Comment No. 20. E/C.12/GC/20. The Committee on Economic, Social and Cultural Rights. 10 June 2009. Para. 7

⁴³⁷ Yvonne Klerk. Working Paper on Article 2(2) and Article 3 of the International Covenant on Economic, Social and Cultural Rights. Human Rights Quarterly 9 (1987) 250-273. The John Hopkins University Press 1987. . P.251 <http://www.jstor.org.ludwig.lub.lu.se/stable/762297?origin=crossref>

⁴³⁸ Id

⁴³⁹ Limburg Principles. Para. 36

⁴⁴⁰ International Covenant on Economic, Social and Cultural Rights. Article 6 (1)

⁴⁴¹ Saurabh Bhattacharjee. P. 53

⁴⁴² General Comment No. 20. E/C.12/GC/20. The Committee on Economic, Social and Cultural Rights.. 10 June 2009. Para. 30

in its Concluding Observation that Belgian authorities take necessary measures to promote the construction of low-cost rental housing and that the non-discrimination clause contained in Article 2(2) should be applied by the government to ‘*fully ensure that persons belonging to ethnic minorities, refugees and asylum seekers are fully protected from any acts or laws which in any way result in discriminatory treatment within the housing sector.*’⁴⁴³

Furthermore in its report on the 25th, 26th and 27th sessions of the Committee on Economic, Social and Cultural Rights, the Committee expressed its deep concern with regard to the failure of Venezuela to issue documents to refugees to access services. In particular the Committee was concerned that the ‘*non-issuance of personal documentation to refugees and asylum-seekers by State party’s authorities seriously hinders their enjoyment of economic, social and cultural rights, including the right to work...*’⁴⁴⁴

The application of the principle of non-discrimination in right to work as such has also been addressed by the Committee in its General Comment No.18 on the right to work.

The Committee emphasizes that the labour market must be accessible and open to everyone under the jurisdiction of the States parties to the Convention.⁴⁴⁵

Furthermore, the Committee affirms that the ICESCR in its Articles 2(2) and 3 prohibits any discrimination in access to employment on the grounds of ‘*race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status(including HIV/AIDS), sexual orientation, or civil, political, social or other status, which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality.*’⁴⁴⁶

The principle of prohibition of discrimination against refugees and asylum seekers in terms of the enjoyment of economic and social rights has also been invoked to grant them the right to social security. the Committee in its General Comment No. 19 on the right to social security emphasizes that State parties should remove the *de facto* discrimination on the prohibited grounds where individuals are unable to access social security.⁴⁴⁷ In particular, the Committee affirms that State must give special attention to the vulnerable individuals who traditionally face difficulties in accessing and exercising the right to social insurance particularly ‘*women, the unemployed, workers inadequately protected by social security, persons working in informal economy, sick or injured workers, people with disabilities,[...] minority groups, refugees, asylum seekers...*’⁴⁴⁸

The Committee on the Elimination of Racial Discrimination has also made its contribution to the interpretation of the prohibition of discrimination on grounds of nationality. In its General Recommendation No 30 the Committee affirms that State parties have an obligation to prohibit racial discrimination in the enjoyment of the civil, political, economic, social and cultural rights, and the Committee indicates that although some political rights are limited to the citizens of the State parties, human rights are in principle to be enjoyed by all persons, and

⁴⁴³ Concluding observations of the committee on Economic, Social and Cultural Rights: Belgium. 1994-05-31. E/C.12/1994/7. (Concluding Observation/Comments) PP.3-4. Para. 14

⁴⁴⁴ Committee on Economic, Social and Cultural Rights. Report on the twenty-fifth twenty-sixth and twenty-seventh sessions. (23 April-11 May 2001, 13-31 August 2001, 12-30 November 2001) Economic and Social Council. Official Records, 2002. Supplement No. 2. P. 30. Para.84

⁴⁴⁵ General Comment No. 18. E/C.12/GC/18. Committee on Economic, Social and Cultural Rights.. February 6, 2006. Para. 12(b)

⁴⁴⁶ General Comment No. 18. Para. 12(b) (i)

⁴⁴⁷ General Comment No. 19. E/C.12/GC/19. Committee on Economic, Social and Cultural Rights.. 4February 2008. Para. 30

⁴⁴⁸ Id. Para. 31

State parties have obligation to ‘ ‘*guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law;*’ ’⁴⁴⁹

The Human Right Committee, in the case of Ibrahima Gueys and others v. France, found France had violated its obligation under the ICCPR after retired soldiers of Senegalese nationality who served in the French Army before the independence of Senegal in 1960 were denied the right to pension which the French nationals in the same situation were benefiting from. The Committee considered that differences of treatment on grounds of nationality could be prohibited by Article 26 especially under the phrase ‘ ‘other status’ ’.⁴⁵⁰

Article 2 (2) not only obliges States to refrain from practicing discrimination but also imposes obligations on them to prohibit private persons and bodies from this practice in any field of public life.⁴⁵¹

The question regarding the nature and scope of the States’ obligation under Article 2(2) is a very pressing one because the identification of the scope of this obligations and whether States are bound by the Covenant to eliminate the discrimination immediately or progressively is very crucial.⁴⁵²

Unlike the provisions of Article 2(1) of ICESCR which oblige States -as I have noted earlier- to take steps to implement the right set forth in the Covenant progressively and to the maximum of its resources, Article 2 (2) is of a nature of immediate implementations.

Yvonne Klerk argues that the word ‘ ‘guarantee’ ’ in the second paragraph of Article 2 seems to imply a more immediate obligation, because the drafting history of this article shows that the Lebanese amendment to the draft Article 1 (2) (later became article 2(2)) proposed that States undertake to ‘ ‘guarantee’ ’ and it had been opposed by the French sub-amendment which proposed that States undertake to ‘ ‘ensure’ ’ but at the end of the discussion the Lebanese amendment was adopted by ten to seven votes in the Commission on Human Rights and thus it could be discerned that the Commission wished the immediate implementation of the principle of non-discrimination.⁴⁵³

The Committee on Economic, Social and Culture Rights in its General Comment No.20 on non-discrimination in economic, social and cultural Rights confirms that the principle of non-discrimination is ‘ ‘*an immediate and cross-cutting obligation in the Covenant*’ ’.⁴⁵⁴ The Committee adds that Article 2(2) requires State parties to guarantee this principle in the exercise of each of the rights set forth in the ICESCR.⁴⁵⁵

The other important issue that could be raised in this regard is that the full enjoyment of the right to equality cannot be achieved merely by States refraining from discriminating against persons but it requires that the States undertake to take affirmative action to empower the

⁴⁴⁹ Office of the High Commissioner for Human Rights. General Recommendation No. 30: Discrimination Against Non Citizens: . 2004-10-01. Gen. Rec. No. 30. (General Comment) Para. 3

⁴⁵⁰ Case of Ibrahima Gueys et al. v. France, Communication No. 196/1985, U.N. Doc. CCPR/C/35/D/196/1985 (1989). Paras. 9.4 - 9.5.

⁴⁵¹ Limburg Principles.Para. 40

⁴⁵² Yvonne Klerk. P. 260

⁴⁵³ Id, PP. 260-261

⁴⁵⁴ General Comment No. 20. E/C.12/GC/20. The Committee on Economic, Social and Cultural Rights.. 10 June 2009. Para. 7

⁴⁵⁵ Id

disadvantaged and the vulnerable groups.⁴⁵⁶ However, the affirmative action or the positive measures should not be understood as protective measures, because positive measures are taken to achieve the realization of the right to equality for the socially disadvantaged group rather than to protect them against discrimination.⁴⁵⁷

6.2. Sweden's obligation under ILO Conventions

Sweden has ratified the ILO Convention No. 111 in 20 June 1962⁴⁵⁸, and the Convention entered into force in 20 June 1963.⁴⁵⁹

The Convention No. 111 could be read together with the Convention No 122 particularly its Article 1 (2) (C) to ensure the promotion of full, productive and freely chosen employment without discrimination.

The subparagraph (C) of Article 1 of the Convention No.122 provides that the employment policy shall aim to ensure that *“ there is a freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, [...] a job for which he [or she] is well suited , irrespective of race, colour, sex, religion, political opinion, national extraction or social origin. ”*⁴⁶⁰

Article 2 of the ILO Convention No. 111 urges Member States to undertake to declare and pursue national policies aim at promoting *“ equality of opportunity and treatment in respect of employment and occupation, with a view of to eliminating any discrimination in respect thereof. ”*⁴⁶¹

The employment policy should not only aim to ensure equal opportunity and elimination of discrimination in work but also in training.⁴⁶² Discrimination has been defined in Article 1 (1) (a) of the Convention No.111 as *“any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation ”*⁴⁶³. Here, the paragraph (1) (b) of Article 1 leaves room for State parties to determine other criteria and grounds for the prohibition of discrimination at employment.⁴⁶⁴

⁴⁵⁶ Id. P. 260

⁴⁵⁷ Id. P. 264

⁴⁵⁸ International Labour Organization. Ratifications for Sweden.

http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102854

⁴⁵⁹ Mänskligarättigheter (Human Rights)

[.http://www.manskligarattigheter.se/dm3/file_archive/040414/ecd61c0c53d47f6f5eefca12b20a7012/konventioner_komplett_eng.pdf](http://www.manskligarattigheter.se/dm3/file_archive/040414/ecd61c0c53d47f6f5eefca12b20a7012/konventioner_komplett_eng.pdf)

⁴⁶⁰ ILO Convention No. 122. Employment Policy Convention, 1964. Article 1 (2) (C)

⁴⁶¹ ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Entry into force 15 June 1960. Adopted in Geneva 24nd ILC session 25 June 1958.

⁴⁶² Genral Survey concerning the Employment Policy Convention, 1964 (No. 122). 2004. Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22, and 35 of the Constitution) . Promoting employment. Policies, skills, enterprises . International Labour Organization. International Labour Conference.. Geneva. First Edition 2004. ISBN 92-2-113034-7. P.38. Para. 107

<http://www.ilo.org/public/english/standards/reim/ilc/ilc92/pdf/rep-iii-1b.pdf>

⁴⁶³ ILO Convention 111. Discrimination in Respect of Employment and Occupation 1958. Article 1(1) (a)

⁴⁶⁴ Id. Article 1 (1) (b)

Although Article 1 (C) of the Convention No. 122 and Article 1 (1) (a) of the Convention No. 111 refer explicitly to the prohibition of discrimination on ground of nationality, the Committee of Experts in 2012 in its report regarding the General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for Fair Globalization, 2008, it stated that nationality is not a prohibited ground under the Convention No. 111.

In particular, the report of the Committee of Experts points out that the Committee has in many cases examined the grounds of race, colour and national extraction together, and the Committee argued that it has done so because the distinction between these grounds is not an easy task due to the multiple discrimination.⁴⁶⁵ However, for the Committee the most obvious way out would be alleging that any discrimination is actually based on other grounds such as race or ethnicity⁴⁶⁶.

It is true that the ILO Committee of Experts in its comment on the Convention No. 111 for Sweden mentioned that the Swedish Discrimination Act 2008 does not include some grounds of discrimination enumerated in Article 1 (1) (a) of the Convention No. 111 namely the political opinion and social origin, and it omitted to make reference to ‘nationality’,⁴⁶⁷ but it did not intent to exclude totally the nationality as a ground for discrimination. Because the Committee itself emphasized that the concept of national extraction can be interpreted in a broad manner to cover basis such as place of birth, foreign origin or language⁴⁶⁸.

State parties to the Convention undertake to declare policies aim at eliminating all sorts of discrimination at work and occupation including access to vocational training; and they ensure that there are mechanisms for the observance of these policies.⁴⁶⁹

In this regard the Committee of Experts on the Application of Conventions and Recommendations emphasized that it is important that each country to introduce legislations to promote the freedom of choice of employment and equality in accessing training, education and employment.⁴⁷⁰ The Committee also pointed out that ending discrimination in the labour market is one of most important principles underlying the Global Employment Agenda.⁴⁷¹

⁴⁶⁵ General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for Fair Globalization, 2008. Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22, and 35 of the Constitution) 2012. Giving globalization a human face. International Labour Conference.. Geneva. Para. 764.
http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_174846.pdf.

⁴⁶⁶ Id

⁴⁶⁷ ILO. Direct Request (CEACR)- adopted 2011, published 101st LIC session (2012) Convention No. 111. Sweden.
http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101_COMMENT_ID:2699402

⁴⁶⁸ General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for Fair Globalization, 2008. Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22, and 35 of the Constitution) 2012. Giving globalization a human face. International Labour Conference.. Geneva. Para. 764

⁴⁶⁹ Genral Survey concerning the Employment Policy Convention, 1964 (No. 122). 2004. Promoting employment. Policies, skills, enterprises . International Labour Organization. International Labour Conference. - P.38. Para. 109

⁴⁷⁰ Id. P.39. Para. 112

⁴⁷¹ Id. Para. 115

6.3. Sweden's obligation under European Convention on Human Rights

Sweden signed the European Convention on Human Rights on 28 November 1950 and ratified it on 2 April 1952, the Convention entered into force on 3 September 1953.⁴⁷²

Articles 1 and 14 of the ECHR state that everyone within the jurisdiction of the Member States must enjoy the rights and freedoms set forth in the convention without discrimination on any of the grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status

Article 1 of the ECHR read as follows:

'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention',⁴⁷³

Article 14 stipulates that *'[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'*,⁴⁷⁴

In considering a violation of Article 14, the allegation of such violation is not taken alone but it is done in conjunction with a substantive right or a right guaranteed by the Convention.⁴⁷⁵

However, in applying Article 14 the scope of the rights guaranteed by the Convention should be interpreted in a broad sense and thus the scope could be extended beyond the actual letter of these rights.⁴⁷⁶

Although the European Convention does not contain a right to work as such, Article 8 as we have seen earlier has been interpreted as covering the employment. Accordingly Article 14 could be taken in conjunction with Article 8 to ensure the protection against discrimination in the context of employment.⁴⁷⁷

Thus, it could be argued that Member States have a positive obligation to guarantee the enjoyment of the refugee immigrants within its jurisdiction right to access employment in an equal footing with others, even if there is no right as such guaranteed explicitly within the scope of the ECHR.

⁴⁷²Mänskligarättigheter.(Human Rights)

http://www.manskligarattigheter.se/dm3/file_archive/040414/ecd61c0c53d47f6f5eefca12b20a7012/konventioner_komplett_eng.pdf

⁴⁷³ European Convention on Human Rights Article 1

⁴⁷⁴ Id. Article 14

⁴⁷⁵ Handbook on European non-discrimination law. European Union Agency for Fundamental Rights, 2010. Council of Europe. http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf . P. 60

⁴⁷⁶ Id. P. 61

⁴⁷⁷ Id. P. 68

7. CONCLUSION AND RECOMMENDATIONS

This study has explored the access of refugee immigrants to work in Sweden and the scope of Sweden's obligation to promote the access to employment of refugee immigrants.

The study has traced and analysed the trends in immigration in Sweden in different eras. It shows that the period of 1940s was characterized by refugee flows from countries around Sweden and most of those refugee immigrants were employed during this period.

It also shows that the period between 1949 and 1972 was characterized by labour immigration and free immigration policies because there was a large demand for workers in Swedish labour market to meet the shortage in manpower due to the growing numbers of development and industrial projects in Sweden.

The period after 1972 on, witnessed a radical shift in the immigration trends. During this period the number of immigrant workers had declined due to the restrictive labour immigration policies which have been imposed under the trade unions pressure and the oil crisis in early 1970s. This period is characterized by flow of asylum seekers and refugees from Asia, Middle East, Africa and Latin America. By the end of 1980s 50% of the immigrants in Sweden were refugees and 25% were immigrants from Nordic countries and 25% came to Sweden on grounds of family reunification.

The period of 1990 also witnessed mass movements of tens of thousands of refugees from Eastern Europe to Sweden following the political unrest and the post-cold war transitions therefore Sweden started to impose more restrictions on immigration and at the same time it kept a margin of generosity in its refugee policies.

This study has also analysed and examined in depth the participation of refugee immigrants in Swedish labour market. It shows that the immigrants who came to Sweden between 1940s and early 1970s were integrated into labour market better than those who come later. The rate of employment was higher for immigrants than for the Swedes during this period and Karl-Olov Arnstberg points out that many of them engaged in two jobs. The explanation for this high rate of participation is that the immigration during that period was consisted of immigrant workers and the general economic situation in Sweden was good.

However, the rate of employment for refugees has declined and the number of the unemployed refugees has increased dramatically since 1970s. Jan Ekberg and Lars Anderson found that the one of the explanations for this transition is that Sweden has changed the character of immigration with groups of refugees that have modest human capital.

This study has also examined in depth the impact of the human capital on the level and rate of the participation of refugees in Swedish labour market in recent years.

It makes reference to some studies which found that the human capital and the possibility of transformation of the refugees' skills from their countries to the receiving country would facilitate the improvement of access to employment, and the language is considered the main tool that realize the transformation of the previous human capital to match the specific skills in the receiving country. J. Auguto Felicio is among those who reached the same findings with this regard.

The case of Somali immigrants in Sweden is one of the strong examples that can explain the impact of modest human capital on the economic integration. The Somalis have modest human capital particularly in terms education therefore they show the weakest employment attachment and the highest rate of unemployment in Sweden as has been found by Maria Selvi in her study.

When it comes to the discrimination this study shows that Sweden started to focus on the discrimination question after 1970s and the development of anti-discrimination legislation was very slow. The outbreak of racist trends occurred openly and increased rapidly in 1980s, however it was not before 1984 that the Swedish authorities acknowledged the existence of discrimination, in particular after the Commission of Inquiry into the allegations of discrimination submitted its report later that year.

This study finds that discrimination is one of the explanations for the low rate of participation of immigrants in the labour market in recent years. It presents and analyses three earlier experimental studies that have been conducted between 2005 and 2007 in some Swedish big cities. The three studies were carried out by having two equally productive individuals who belong to different ethnic groups and applied for jobs by using a Swedish sounding name and an Arabic or/and African name.

The study shows that there are high rates of ethnic discrimination in Swedish labour market, for instance Magnus Carlson found that the net discrimination in Swedish labour market was 29%, and Karin Attström found that the rate of discrimination was 34%, while Buesell found that the rate of discrimination was 40, 3 %. These earlier studies also found that the level of discrimination is higher in low skilled occupations than in high skilled ones. Thus the reliance on human capital and language skills as the only factor for the unemployment in Sweden may be highly questionable.

This study has acknowledged that Sweden has taken administrative, financial and educational measures as required by Article 2(1) of the International Covenant on Economic, Social and Cultural Rights to increase human capital of refugees. It has also acknowledged that Sweden has taken legislative and administrative steps in accordance with the relevant provisions of the International Law to combat discrimination in labour market, particularly in accordance with the provisions of Article 2(2) of the International Covenant on Economic, Social and Cultural Rights. Nevertheless, these measures and steps show a very little impact on increasing access to employment.

For instance the Swedish law exempts refugees from work permit because the Aliens Act 2005 in its Section 8 under chapter 8 states that if the asylum seeker has been granted a permanent residence permit, he or she does not need to have a work permit in order to access the labour market in Sweden, but the refugees still have difficulties in accessing employment.

When it comes to the elimination of ethnic discrimination Sweden was very slow in taking legislative measures with this regard because the law on the prohibition of discrimination on basis of ethnic origin was adopted for the first time in 1986 and that through the Act No. 1986:442. However, a new discrimination Act replaces seven previous acts was adopted and entered into force in 1 January 2009. Although this new discrimination Act does not prohibit discrimination on grounds of nationality and language it recognizes two new additional grounds namely age and transgender identity or expression.

This study also shows that the Discrimination Act 2008 allows positive action in relation to some categories of persons but nevertheless the ethnic groups are not among these categories according to Section 9 under Chapter 2. Moreover, the new law does not recognize the quota system and it provides that the positive action should be decided by individual employers as stated by the provisions of this Act.

This study has acknowledged that Sweden has taken administrative steps by establishing the Office of Equality Ombudsman to prevent discrimination in all areas of society by different measures including investigation into cases of discrimination and litigation before courts of law.

The annual reports of the office of Equality Ombudsman from 2009-2013 Show that the highest numbers of complaints before the Equality Ombudsman were the discrimination based on ethnicity while the working life represented the area of society that witnessed the highest number of complaints. Nevertheless, this study shows that the anti-discrimination law in Sweden is not developed judicially because the number of cases and judgments before either the Labour Court or the General Court are very few in relation to the number of complaints that have been submitted to the Equality Ombudsman.

This study shows that Sweden has taken educational measures to increase the human capital of the refugees especially language skills courses since 1960s when large groups of workers from Yugoslavia, Greece and Finland who did not speak Swedish appeared at labour market.

The municipalities were the responsible bodies for the reception and the introduction of Swedish language courses for the newcomers. Since 2010 and in order to overcome the integration difficulties the Employment and Introduction Center started to provide the newcomers –beside language courses- with extensive courses on social orientation, Swedish culture, laws, politic and information on labour market.

In its second part this study has explored the normative content of the right to work under the UN Charter, the Universal Declaration of Human Rights, and the International Covenant on Economic, Social and Cultural Rights, International Labour Organization and the European Convention on Human Rights. In this regard this study acknowledges that the right to work does not mean a guaranteed right to a job because the drafting history shows that the proposals for a guarantee of the right to work were rejected by the drafters, but there remained a considerable number of supporters for the inclusion of reference to ‘full employment’ in the draft Article 6. However, William Beveridge emphasizes that the concept of ‘full employment’ does not mean that everyone in the country who is fit and free for work is employed because there will be situations where certain types of work are impossible or difficult.

This study points out that the promotion of access to employment is not only helping the refugees to gain social and economic independence but also helping the receiving country by reducing or minimizing the reliance on the social benefits and thus contributes to the economic growth.

Although the right to work of refugees is not a right to a guaranteed job Sweden has obligation under the Refugee Convention 1951 to promote access to employment because the provisions of Article 17 and 18 grant the refugees the right to engage in a wage-earning

employment in an equal footing with the citizens. Furthermore, the Michigan Guidelines on the Right to Work explains that in countries that have treaties establishing right to employment for the most favoured foreigners in common markets such as the EU, the refugees must be entitled to the same right to employment as non-nationals covered by these treaties.

In addition, a refugee who is deprived of the right to work may be compelled by the situation of unemployment to return to his place of origin and facing the risk of persecution once again, and thus it may give rise to a breach of the obligation of *non-refoulement* under Article 33 of the Refugee Convention 1951.

Based on the Swedish law and practice, and the provisions of the Refugee Convention 1951 this study finds that the refugee immigrants in Sweden fall within the ambit and scope of Articles 2 and 3 of the Migrant Workers Convention (ICRMW) and thus the Convention applies to them. Nevertheless, Sweden has not ratified the ICRMW and it argues that through its implementation of the provisions of the six core human rights instruments, it had already fulfilled most of the principles set out in the Convention.

This study acknowledges that Sweden is obliged under Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights to take steps to implement the right to work progressively and to the maximum of its resources but it argued that the progressive achievement of the full realization of the right to work should not be interpreted as exemption from the obligation to achieve this right in a short period of time because the obligation to take step is of immediate effect, and this interpretation is confirmed by the Committee on Economic, Social and Cultural Rights in its General Comment No. 3.

This study has also pointed out that the principle of non-discrimination set forth in different human rights treaties and ILO Standards could be used to grant refugee immigrants the right to access employment in an equal footing with the natives, and that the omission of the grounds of nationality would not derogate the right of refugees not to be discriminated against.

In particular the provisions of article 2 (2) of the International Covenant on Economic, Social and Cultural Rights, Article 1(2) (c) of the ILO Convention No 122, Article 1 (1) (a) and Article 2 of the ILO Convention No111 and Articles 1 and 14 of the European Convention on Human Rights impose obligation upon Sweden not to discriminate against refugee immigrants in the labour market .

To sum up, this study finds that there is gap between the legal right of refugees to work which is recognized by the relevant international law treaties and by the Swedish law; and the practice of this right in the labour market.

On the one hand, although Sweden has taken the measures to increase the human capital of immigrants the rate of participation in labour market still very low, in other words there is a gap between the measures and its impact on improving the access to employment. This gap could be attributed either to the failure of these measure to meet the needs of the target groups or to the ability of the refugee immigrants to absorb the integration programmes-probably-due to mental or psychosocial factors. Accordingly, a revision and evaluation of these measures are highly recommended by this study in order to overcome the obstacles.

As this study shows weak attachment to self-employment activities it recommends that Sweden can take measures to encourage small business and income generating activities among refugee immigrants by providing concessional loans to these groups.

On the other hand, although Sweden has taken legislative and administrative measures to combat discrimination, the practice of discrimination still exists in labour market.

Discrimination on grounds of nationality and language are omitted in the Swedish anti-discrimination law. Even though the prohibition of discrimination on grounds of nationality is controversial, the jurisprudence of the Human Rights Committee and the General Comments of numbers of treaty bodies emphasize that discrimination on this ground is prohibited. Therefore this study recommends that the ground of nationality or national origin should be dealt with as a separate ground and to be excluded from the concept of ethnicity as appears in the Discrimination Act 2008. This distinction is necessary in order to bring this ground of discrimination into conformity with Article 14 of the European Convention on Human Rights and the other related provisions of the international law.

Because the positive action is not obligatory according to the Swedish law, most of the individual employers would not enthruse to engage in positive action individually, therefore this study can recommend a sort of cooperation between the Government, workers' organization and employers organizations to bring positive action by a large number of enterprises in order to accommodate a large number of refugee immigrants.

In order to make this positive action more effective the employment projects could be placed in areas with higher level of unemployed immigrants and it can also target specific skills and experiences that can be found among the immigrants and to announce these specific skills as requirements for the targeted jobs. The quota system or the positive discrimination by recruiting refugee immigrants even in situations where there are other applicants qualify for these jobs are also could be recommended-with some reservations-by this study.

Finally, as this study shows that in spite of the large number of discrimination complaints before the office of the Equality Ombudsman, there are few cases have been taken to the court and only one case law in which the Labour Court found indirect discrimination on grounds of ethnicity. Therefore this study recommends that the human rights NGOs can engage in 'strategic litigation' as an advocacy tool to use the courts to create social changes for those who are vulnerable to discrimination such as refugee immigrants.

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