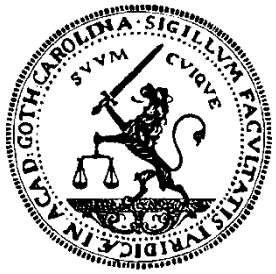

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Asylum Seekers and the Right to Work

- A comparative study between the Swedish and German legal system

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Contents

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Summary

Due to the current refugee crises, the question of asylum seekers' right to work has gained renewed relevance. This paper analyzes the Swedish regulations regarding asylum seekers' access to the labor market *de lege ferenda*. Due to the many similarities between Germany and Sweden, the German regulations are studied from a comparative perspective, with the aim of assessing whether some of the German regulations should serve as a source of inspiration for the Swedish legislation. Both legislations are also analyzed under ICESCR to see to what extent they comply with the Covenant.

The study shows that limitations on the right to work for asylum seekers are only justified if the discrimination is based on a reasonable and objective criterion, pursues a legitimate aim, and is strictly proportionate to that aim. The limitation of the right to work must also fulfill Article 4 ICESCR, which *inter alia* requires that the limitations are determined by law.

The paper finds that the current Swedish regulation is most likely not proportionate under the ICESCR. A vast majority of the asylum seekers are not granted an exemption from the work permit obligation due to the requirement of cooperation in the clarification of the identity. At the same time the desired effect of preventing economic migrants from applying for asylum on false premises is suspected to be small. It should therefore be considered if the Swedish regulation could be altered to become less restrictive. It must also be clarified what the requirement of cooperation actually means, in order to bring the Swedish legislation in compliance with Article 4 ICESCR.

Since the Swedish ambition is to enable asylum seekers to support themselves and thereby lower state costs, a definite work prohibition similar to the three-month work prohibition in Germany should not be introduced. It can however be considered if Sweden should introduce some type of surveillance to ensure that asylum seekers are not hired under more unfavorable conditions than those of a national worker. This

could prevent exploitation of the asylum seekers, as well as a lowering of the labor standards on the Swedish labor market.

Sammanfattning

Rätten till arbete för asylsökande har fått förnyad relevans till följd av den pågående migrationskrisen. Syftet med denna uppsats är därför att analysera den svenska regleringen av asylsökandes tillgång till arbetsmarknaden ur ett *de lege ferenda*-perspektiv. Eftersom Sverige och Tyskland liknar varandra i många hänseenden har Tyskland valts ut för en komparativ studie, som har till syfte att utvärdera huruvida den svenska regleringen angående asylsökandes rätt till arbete bör hämta inspiration från den tyska diton. Eftersom Sverige är part till ICESCR är vi skyldiga att uppfylla de förpliktelser angående rätten till arbete som konventionen ålägger oss. Uppsatsen genomför därför även en analys av huruvida den svenska och tyska regleringen uppfyller kraven enligt ICESCR.

Undersökningen visar att en begränsning av rätten till arbete för asylsökande endast kan rättfärdigas om den baseras på en förnuftig och objektiv grund, syftar till att uppnå ett legitimt mål och inte strider mot proportionalitetsprincipen. Vidare måste begränsningen vara angiven i lag enligt artikel 4 ICESCR.

Uppsatsen tyder på att den nuvarande svenska regleringen kan vara oproportionerlig. Kravet på medverkan för att klarlägga sin identitet resulterar i att en majoritet av de asylsökande inte undantas från kravet på arbetstillstånd. Samtidigt är det inte troligt att detta krav har någon större effekt vad gäller det eftersträvade målet att reducera antalet ekonomiska migranter som falskeligen utger sig för att vara asylsökande. Det bör därför övervägas om den svenska lagen ska ändras i mindre restriktiv riktning för att uppfylla kravet på proportionalitet. Dessutom torde innebörden av kravet på medverkan klargöras. I andra fall riskerar regleringen att strida också mot artikel 4 ICESCR.

Eftersom lagstiftaren klargjort att asylsökande ska ges möjligheten att försörja sig själv då detta skulle leda till reducerade statliga kostnader, vore det kontraproduktivt att införa ett definitivt arbetsförbud i stil med den tyska regleringen. Däremot kan det övervägas om någon form av kontroll av att asylsökande anställs på samma villkor

som motsvarande svenska arbetstagare ska införas. Detta skulle kunna motverka att asylsökande utnyttjas på arbetsmarknaden, samtidigt som det förhindrar att den inhemska arbetskraften trängs undan.

Translations

Application Unit	Ansökningsenheten
Deport	Avvisa
Examination Unit	Prövningsenheten
Expel	Utvisa
Federal Work Agency	Agentur für Arbeit
Foreigners' Registration Office	Ausländerbehörde
Swedish National Audit Office	Riksrevisionen
State	Bundesland

Abbreviations

Agreement with the Swiss Federation: Free movement of persons	Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons (Official Journal L 114 , 30/04/2002 P. 0006 - 0072)
AsylG	Asylgesetz vom 2 September 2008 (BGBl. I S. 1798)
AufenthG	Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet vom. 25 Februar 2008 (BGBl. I S. 162)
Asylverfahrensbeschleunigungsgesetz	Asylverfahrensbeschleunigungsgesetz vom 20 Oktober 2015 (BGBl. I S. 1722)
AT-UND	Exemption for asylum seekers from the obligation of obtaining a work permit
AÜG	Arbeitnehmerüberlassungsgsetz vom 3 Februar 1995 (BGBI I. S. 158)
BeschV	Beschäftigungsverordnung vom 6 juni 2013 (BGBl. I S. 1499)
BT-Drs.	Bundestag-Drucksache
BT-PlPr.	Bundestag-Plenarprotokoll
CESC	Committee on Economic, Social and Cultural Rights
Dublin II Regulation	Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national or a stateless person
ECHR	European Convention on Human Rights

ECOSOC	Economic and Social Council of the UN
FWA	Federal Work Agency (Bundesagentur für Arbeit)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
Prop.	Proposition
Refugee Convention	Convention Relating to the Status of Refugees
RiR	Riksrevisionens rapporter
SGB III	Sozialgesetzbuch Drittes Buch - Arbeitsförderung vom 24 März 1997 (BGBl. I S. 594)
SOU	Statens offentliga utredningar
UDHR	Universal Declaration of Human Rights
UtlF	Utlänningsförordning (2006:97)
UtlL	Utlänningslag (2005:716)

1. Introduction

1.1. Background

The current refugee crisis has brought the question of integration to a head. Countries with a generous immigration policy, such as Sweden and Germany, have been put under intense pressure. Unsurprisingly, one of the prominent topics of the public discussion has been the question of how to quickly integrate the refugees into the labor market.[1] Solving this issue is of paramount importance to enable a functioning integration and economic growth and for the countries' capability of handling the effects of mass immigration. Putting immigrants in a position where they can support themselves instead of being dependent on social welfare should be of crucial importance when it comes to determining which amount of refugees a country can sustain. Seeing that Europe now experiences a situation that in many ways is unparalleled in history, an investigation of the Swedish regulations concerning asylum seekers' access to the labor market is needed.

In order to evaluate Sweden's legislation concerning asylum seekers' right to work, this paper will conduct a comparative analysis with the corresponding legislation of Germany. Germany and Sweden have many factors in common aside from being traditional immigration countries. They are both members of the European Union, enjoy a strong national economy and have a similar law tradition. At the same time, these countries have had a somewhat different attitude when it comes to allowing asylum seekers to work. Whereas Germany has had a more restrictive policy, Sweden has been more liberal with granting asylum seekers the right to employment. On this basis, it is of interest to conduct a study on the motives for the different approach as to which extent asylum seekers should be guaranteed the right to work.

Further, both Germany and Sweden are parties to the ICESCR, which *inter alia* contains the right to work. When analyzing the regulations concerning asylum

[1] See for example Süddeutsche Zeitumg, 01-09-15; Der Tagesspiegel, 15-06-15 & 11-01-16; Svenska Dagbladet 02-03-15.

seekers' access to the labor market, it is thus also necessary to consider which restraints the obligations under the ICESCR put on the parties.

1.2. Purpose and Question

The purpose of this paper is to discuss the Swedish regulations concerning asylum seekers' access to the labor market *de lege ferenda*. The evaluation is based on two criteria: how well do the regulations reach their purpose and how well do they live up to the standards set by the ICESCR. In order to conduct this analysis, a comparative study is made with the corresponding German regulations. This study contains a description of the German and Swedish legal system as well as the motives behind the regulations. This is followed by an analysis examining how well the legal systems live up to the requirements under the ICESCR. Naturally, Sweden should not retain or implement regulations that threaten to violate the ICESCR. Should the study show that the German regulations fail to fulfill the obligations under the ICESCR, those regulations cannot serve as a source of inspiration for the Swedish regulations, regardless of how suitable they are considering the stated aims. Keeping those considerations in mind, this paper evaluates to what extent Sweden should be influenced by the German regulations.

The questions this paper aims to answer are consequently:

- Do the Swedish and German regulations regarding asylum seekers' right to work live up to the requirements under the ICESCR?
- Does the analysis of the ICESCR and the countries' regulations of asylum seekers' access to the labor market imply that Sweden should change its regulations?

1.3. Method

1.3.1. Legal Dogmatic Method

The purpose of the legal dogmatic method is often understood as finding the solution to a legal problem by the use of a legal norm. It can however also be used as a method for criticizing the existing law and suggesting alterations. It usually starts out from a clearly defined question and emphasis is laid upon correctness and relevance.[2] In accordance with the legal dogmatic method, this paper aspires to investigate whether the German and Swedish regulations are legitimate under the ICESCR, by comparing them to the requirements set by the Covenant. Further, it aims to conduct a critical analysis of the German and Swedish legal system by examining relevant material. The material on which the analysis is based consists of law, practice, preparatory works and legal literature, as is required by the legal dogmatic method.[3]

The evaluation of which arguments are relevant is also part of the legal dogmatic method. In this context it is of certain importance to define the basis of the discussion – is it an argument *de lege lata* or *de lege ferenda*? [4] The first question of this paper is whether Germany and Sweden are fulfilling their obligations under the ICESCR, that is, an argument *de lege lata*. This argumentation is based on the interpretation of the requirements of the covenant. The second question analyses whether Sweden should change its regulations concerning asylum seekers' right to work – an argument *de lege ferenda*. This analysis is based on the stated motives for the regulations and the result of the comparison of the Swedish and German legal systems, as well as the result of the analysis of how well the countries fulfill the requirements under the ICESCR. The key words in this respect are *transparency* and *completeness*, to ensure that the writers' analysis is not unduly clouded by personal objectives.[5]

[2] Kleineman 2013, p. 21 – 24.
[3] Ibid, p. 21.
[4] Ibid, p. 28, 36.
[5] Ibid, p. 43.

1.3.2. Comparative Method

To study foreign countries' legal systems in order to make use of their experiences and hopefully obtain new insights and ideas about possible, beneficial solutions is part of the comparative method.[6] This method is considered to be a special form of the legal dogmatic method.[7] This type of analysis is considered to be especially beneficial when it comes to arguments *de lege ferenda.*[8] As mentioned above, part of the objective of this thesis is to conduct a comparative analysis between the Swedish and German legal systems, in order to discuss the regulations *de lege ferenda*.

A comparative analysis is meaningless if the compared regulations do not have the same ambition.[9] The objects of comparison must also have something in common, such as regulating the same situation.[10] This paper therefore examines the purposes behind the rules regarding asylum seekers' right to work in order to make an evaluation of which regulations are most fitting considering the stated political ambition.

1.3.3. Delimitations

This paper only discusses legal measurements limiting asylum seekers' right to work. The need for positive action in order to assure for example equality of opportunity, or the right to decline work will hence not be touched upon. This delimitation is based on the assumption that removing legal restrictions is a relatively easy and inexpensive measure that can still have a great impact regarding to what extent the right to work is realized.

Further, this paper only discusses asylum seekers' general access to the labor market as employees, since this is assumed to concern the majority of the asylum seekers. Consequently, it does not discuss asylum seekers' right to independent work, and does not go into depth with the regulations concerning specific work, specific groups

[6] Bogdan, 2003 p. 28; Kleienman, 2013 p. 40.
[7] Kleineman 2013, p. 40 f.
[8] Bogdan 2003, p. 28.
[9] Ibid, p. 74.
[10] Ibid p. 57 f.

of asylum seekers or asylum seekers residing in transit areas. However, in order to provide an adequate description of the legal systems, some of the more specific regulations are briefly touched upon. The paper also does not examine EU-regulations in the field, since it is concerned with the state perspective and the perspective of the ICESCR.

1.4. Sources

This paper mainly focuses on acknowledged sources of law, namely law text and preparatory works. As Germany's principle of publicity is more limited than Sweden's, German preparatory works are harder to obtain. Therefore it has in some instances been necessary to make use of secondary sources.

In the interpretation of the ICESCR, documents from the CESC constitute an important part of the material. Although the CESC cannot make legally binding comments, it is still an organ possessing in-depth knowledge of the Covenant, whose supervisory work can to some extent be considered demonstrating state practice.[11] Further, some secondary sources are used to gain information on the interpretation of the Covenant. These are elected mainly according to how frequently they are cited. Some newer and therefore not as frequently cited literature is also used in order to ensure that new development on the topic is not surpassed. As in some instances it has not been possible to obtain older UN documents, here also it has been necessary to rely on secondary sources.

1.5. Outline

Chapter one provides the introduction of the paper. This is followed by chapter two, which analyzes the requirements of the ICESCR. The third chapter describes the regulations concerning asylum seekers' right to work in Germany and Sweden *de lege lata*. This chapter also contains a description of the legislators' motives behind the regulations. Chapter four analyzes whether the German and Swedish regulations are

[11] Craven 1995, p. 91.

compatible with the requirements of the ICESCR. In this chapter a comparative analysis between the German and the Swedish system is also conducted, evaluating whether the implementation of any of the German regulations into the Swedish system should be considered. Lastly, in chapter five the paper concludes that Sweden could consider conducting some form of surveillance ensuring that asylum seekers are not hired under poorer working conditions than those of a national worker. It is also establishes that it is questionable if the Swedish regulation can be deemed proportionate under the ICESCR and that the restrictions threaten to not live up to the requirement of predictability under Article 4 ICESCR.

2. International Covenant on Economic Social and Cultural Rights and the Right to Work

This chapter discusses the requirements of the ICESCR and what obligations the Covenant lays on the states as duty bearers. The purpose of the chapter is to provide a legal basis for the discussion on whether the German and Swedish regulations, considering the right to work for asylum seekers, live up to the requirements of the ICESCR. In order to establish the relevance of the ICESCR to Swedish law, this chapter initially discusses the position of the ICESCR in Sweden. It then moves on to discuss the nature of the state obligations. This is followed by an investigation of whether asylum seekers can be considered right holders of the rights of the covenant, which is essential for the analysis of whether Sweden and Germany are violating the Covenant by restricting asylum seekers' right to work. In order to conduct this analysis the chapter also establishes what the right to work actually contains. The chapter finishes by discussing legitimate limitations under the Covenant.

2.1. The Position of the Covenant within the Swedish Legal System

Sweden is one of the few so-called dualistic states. [12] This means that the fact that Sweden is part of a convention does not mean that its regulations are directly applicable in Swedish national law. Instead, the treaty must be incorporated or transformed into Swedish law for it to be rendered effective. Nonetheless, since Sweden is party to the treaty, it has bound itself to respect the regulations of the ICESCR. A state can never refer to national law as a justification for violating international treaties, not even if such law is part of the constitution. [13]

[12] NJA 1973 p. 423, p. 438; see also Ds 2007:25 *Riktlinjer för handläggningen av ärenden om internationella överenskommelser*.
[13] Ehrenkrona 2015, p. 781 f.

The fact that Sweden is a dualistic system also means that it is not possible to appeal to domestic courts to assert one's right according to the Covenant, regardless of whether the national laws are at odds with the requirements of the Covenant or not.

2.2. Nature of State Obligations under Article 2(1)

This chapter investigates the requirements of Article 2(1) of the ICESCR, considering for example when the rights of the Covenant must be realized and the minimum requirements that states are obliged to fulfill.

2.2.1. Progressive versus Immediate Realization

Article 2(1) ICESCR prescribes that the each state party undertake "to take steps […] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights […]".

A literal interpretation of this article would suggest that the rights of the Covenant do not require immediate, but progressive realization. However, during the drafting of the Covenant, the majority of states agreed that this provision of progressive realization laid an obligation on the states to proceed with the implementation of the prescribed rights "without respite".[14] The full realization should thus be achieved "as quickly as possible".[15] It was also expressed, that unless impossible due to economic concerns, the States were under the requirement to guarantee the rights of the Covenant.[16] It has thus been argued that the states are under an obligation of immediate implementation of the rights, unless this is rendered impossible by for example economical circumstances. The provision of progressive realization is hence only relevant for states that lack the necessary resources. [17]

[14] Azmi (Egypt), UN Doc. E/CN.4/SR.233 (1951), p. 5.
[15] Craven 1995, p.131.
[16] (Yugoslavia), UN Doc. E/CN.4/SR.233 (1951), p. 5.
[17] Craven 1995, p. 132 f.

Also the CESC adheres to this interpretation, and has stated that the requirement of progressive realization does not mean that the states have the freedom of "depriving the obligations under the ICESCR of all meaningful content." Instead, the requirement "to take steps" means that the states are under a duty to move towards the aims of the covenant as rapidly and effectively as possible. This obligation has immediate effect. Consequently, it is not possible to refrain from taking action indefinitely, with reference to lacking recourses, since this would render the obligations useless. As the Committee has pointed out, progressive implementation signifies that measures towards the realization of the rights are to be taken rather swiftly after the point where the Covenant has entered into force. [18]

Whereas the Covenant as a whole only requires successive implementation, it can be argued that the duty of non-discrimination, which is found in Article 2(2) ICESCR, is of immediate effect. The fact that the obligation is separated from article 2(1) and that the wording prescribes a duty to "guarantee" non-discrimination would point in this direction. [19] This interpretation finds support both from the discussion during the drafting of the Covenant, where the majority was in favor of the expression "guarantee" instead of a suggested progressive implementation.[20] Furthermore, the committee has also confirmed that the duty of non-discrimination has immediate effect. [21]

2.2.2. Minimum Core Obligations and Resource Considerations

The requirement of progressive realization is not tied to the economic development of the country, but instead prescribes effective use of the available resources. As the CESC has pointed out, even in those cases where it is evident that the available resources are insufficient, the duty to ensure the "widest possible enjoyment of the relevant rights" prevails.[22]

[18] UN Doc. HRI/GEN/1/Rev.9 (2008), p. 7, § 2.
[19] Klerk 1987, p. 260 ff.
[20] Craven 1995 p. 181; The Limburg principles 1987, § 35.
[21] UN Doc. HRI/GEN/1/Rev.9 (2008), p. 7, § 1.
[22] UN Doc. HRI/GEN/1/Rev.9 (2008), p. 9 f., § 11.

Regardless of the limitation to the maximal available recourses, the states are still under an obligation to at the very least meet the so called "minimum core obligations".[23] Hence states are under the duty to fulfill the most essential parts of each right of the Covenant as soon as possible.[24] According to the Committee, cases where a significant number is deprived of those minimum standards are regarded as a *prima facie* violation of the Covenant, regardless of resource considerations. However, it also establishes that in order for the state to be able to justify a failure of satisfaction of the minimum core rights with reference to non-sufficient resources, it must show that all available resources have indeed been utilized in the effort of fulfilling these obligations. [25] As Craven points out, this must imply that the burden of proof lies with the state. Regardless of the prevailing economic situation, states are hence under a presumption of guilt when they fail to meet these minimum standards. Any other interpretation renders the suggestion of "minimum core obligations" pointless.[26]

2.3. The Scope of Human Rights under the Principle of Non-discrimination

Article 2(2) of the ICESCR states that the State Parties "undertake to guarantee that the rights […] will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

The very essence of International Human Rights Law is based on the principles of non-discrimination and equal treatment of all human beings.[27] Nevertheless, it has actually been argued that this article would exclude foreigners from the reach of the Covenant.[28] The basis of this argument is that citizenship is not mentioned as an

[23] UN Doc. HRI/GEN/1/Rev.9 (2008), p. 9, § 10.
[24] Craven 1995, p. 141.
[25] UN Doc. HRI/GEN/1/Rev.9 (2008), p. 9, § 10
[26] Craven 1995, p. 143.
[27] UN Doc. HRI/GEN/1/Rev.9 (2008), p. 195, § 1.
[28] Dohmes-Ockenfels 1998, p. 81.

illegal ground for discrimination. Some has understood the term "national origin" as not referring to the legal status of a person, but to her descent.[29] However, the article also refers to discrimination due to "other status", which would indicate that the list is not exhaustive.[30] Hence, also foreigners could be included under the scope of article 2(2) ICESCR.

Some support for this interpretation can be found in the history of the Covenant. In the original draft covenant, any kind of distinction due to the mentioned factors was prohibited. [31] This was interpreted to mean that a different treatment of foreigners regarding the right to work would be prohibited under the principle of non-discrimination.[32] However, it was concluded that aliens in fact did not have the same access to the labor market as nationals in many of the countries, and thus, this phrasing could result in complications. [33] The majority however, did not view reducing the reach of the Covenant to nationals as an appropriate solution.[34] Instead, a midway was found: Developing countries were allowed to restrict the reach of the economic rights - in which the right to work is included - to nationals, as stated in Article 2(3) ICESCR. This limitation also serves to show that the discrimination of aliens is generally forbidden under the covenant.[35]

The word "distinction" was also replaced with "discrimination" to indicate that not every unequal treatment would result in a breach of the Covenant. Thus, also for the states that could not make use of Article 2(3) ICESCR, the reach of the non-discrimination article would not be disproportionate. [36] However, this also implies

[29] Kyrou (Greece), UN Doc. E/CN.4/SR.272.
[30] See for example *Refslund-Thomsen* (Denmark), UN Doc. A/C .3/SR.1183 (1962), § 24.
[31] UN Doc. A UN Doc. A/C.3/SR.709 (1955), p. 47.
[32] See Hoare (United Kingdom), UN Doc. A/C.3/SR.655 (1955), § 22.
[33] Cp. Elliot (United Kingdom), UN Doc. A/C.3/SR.562 (1954), § 6; Riphagen (Netherlands), UN Doc. A/C.3/SR.655 (1955), § 17; Ciselet (Belgium), UN Doc. A/C.3/SR.656 (1955), § 16; Bakthiar (Pakistan), UN Doc. A/C.3/SR.656 (1955), § 19; Azkoul (Lebanon), UN Doc. A/C.3/SR.657 (1955), § 14; Asiroglou (Turkey), UN Doc. A/C.3/SR.659 (1955), § 34.
[34] Cp. Jativa (Ecuador), UN Doc. A/C.3/SR.1202 (1962), § 32; Troclet (Belgium) UN Doc. A/C.3/SR.1203 (1962), § 4; Zuloaga (Venezuela), UN Doc A/C.3/SR.1203 (1962), § 23; Refslund Thomsen (Denmark), UN Doc. A/C.3/SR.1204 (1962), § 10; Mantzoulinos (Greece), UN Doc. A/C.3/SR.1204 (1962), § 12; Sharp (New Zeeland), UN Doc. A/C.3/SR.1204 (1962), §17; Albuquerque Mello (Brazil) UN Doc. A/C.3/SR.1204 (1962), § 39; Belaunde Moreyra (Peru), UN Doc. A/C.3/SR.1204 (1962), § 48; Tree (USA) UN Doc. A/C.3/SR.1204 (1962), § 50.
[35] Craven, 1995, p. 213.
[36] For the result of the voting considering this phrasing, see UN.Doc. A/C.3/SR.1206 (1962), § 40.

that unequal treatment is at odds with the rights and freedoms prescribed by the Covenant, and thus requires a well-founded justification.[37]

Additionally, the UN Human rights Committee has explicitly mentioned that asylum-seekers should not be discriminated against, because they would fall under the scope of the non-discrimination article contained in § 2(1) of the ICCPR.[38] This statement is of importance regarding the interpretation of the ICESCR, since the basic non-discrimination article of the conventions are viewed as being practically indistinguishable, apart from the exception made for developing countries in Article 2(3) ICESCR.[39]

The fact that asylum seekers are indeed covered by the principle of non-discrimination under the ICESCR has also been confirmed by the later practice of the CESC. In its concluding observations regarding Belgium's initial report on the Covenant, the committee urged Belgium to guarantee that people belonging to ethnic minorities, as well as refugees and asylum seekers would be protected from discriminatory laws or acts that regulated the housing sector. This was a requirement for fulfilling their obligations under Article 2(2) ICESCR. [40] In a later report, the CESC expressed its concern that Venezuela's practice of not issuing personal documentation for refugees and asylum seekers would be a serious obstacle that could prevent these groups from enjoying their rights to work, health and education.[41] This has been held as further evidence that discrimination on the grounds of nationality is prohibited under the Covenant, and that also non-nationals, including refugees and asylum seekers, enjoy the right to work.[42]

However, not all unequal treatment is discriminatory, but can be justified if it is based on a reasonable and objective criteria, pursues a legitimate aim, and due regard is taken to the principle of proportionality. [43] For a limitation to be seen as proportional

[37] Dohmes-Ockenfels 1998, p. 84.
[38] UN Doc. HRI/GEN/Rev. 9 (2008), p. 245, § 10.
[39] Hathaway 2005, p. 122.
[40] UN Doc. E.C.12/1994/7 (1994), p. 3 f.
[41] UN Doc. E/C.12/2001/17 (2002), § 84.
[42] Bhattacharjee 2013, p. 54; Edwards 2005, p. 325.
[43] See for example: Zwaan-de Vries v Netherlands, UN. Doc. CCPR/C/29/D/182/1984 (1987); Cholewinsky 2000, p. 716 f.

it must be suitable, necessary and reasonable for reaching the desired goal. However, it is often difficult to assess if a measure is "suitable" or "necessary" within the scope of the ICESCR. Many of the goals set up in the covenant can be reached in different ways, and whether a measurement is suitable or not, is therefore mainly a political question. Further, for a certain measurement to be necessary, one should not be able to obtain the same results by means of a smaller intervention. Since it is common that the effect of the measurements cannot be estimated, it is often impossible to decide if smaller intervention would have been as effective. Hence the rightfulness of said measurements often must be judged by whether they are reasonable. This is not the case if the positive effects that can be obtained do not outweigh the negative effects resulting from the limitations of the rights. [44]

To conclude, there is much evidence that shows that a general restriction of the rights under the covenant to state citizens would result in a violation of the principle of non-discrimination. Although not every unequal behavior necessarily amounts to discrimination, distinction between different groups requires well-founded justification.

2.4. Article 6 – Right to Work

2.4.1. Who Is Covered by the Right to Work

According to Article 6(1) of the ICESCR, "[…] the state parties 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."

Already the semantic phrasing indicates that this right encompasses everyone, without providing the opportunity of excluding certain groups. Further, the issue of granting

[44] Dohmes-Ockenfels 1998, p. 178 f.

certain rights and freedoms to all people, based solely on the common factor that we are all human can be said to be the core objective for the existence of the human rights. After all, one of the main aims of the UN is to work for "respect for the human rights and for fundamental freedoms *for all* (emphasis added) without distinction as to race sex, language or religion. [45] It has been clarified that Article 6 of the ICESCR reflects "the fundamental purposes and principles of the United Nations […]" as laid down in the mentioned article.[46] This means that the objective that Human Rights are inherently dedicated to all human beings is clearly endorsed by Article 6 ICESCR.

Nonetheless, it has been debated whether the right to work should indeed encompass all individuals, or if it should be limited to a certain group. During the drafting of the Covenant, Denmark suggested that the reach of the article should be limited to state nationals.[47] However, the majority of the state parties were not in favor of such a restriction, which is shown by the fact that the suggestion never made it to voting. In a similar manner, the suggestion to limit the reach to citizens of the state parties[48] did not find support among the signatories.[49] It can hence be concluded that Article 6 was intended to reach all people without limitations.

2.4.2. What Does the Right to Work Contain?

The right to work is divided into two main parts; the right to freely choose occupation (Article 6(1) ICESCR) and the positive duty for the parties of the Covenant to pursue a policy which aims at full employment (Article 6(2) ICESCR). This paper will however not investigate the latter, as discussed in 1.3.3 *Limitations*.

[45] Art 1(3), 1945 UN Charter. See also Arts. 55(c) and 56.
[46] UN Doc. HRI/GEN/1/Rev.9 (2008), p. 140, § 3.
[47] UN Doc. E/CN.4/542 (1951). The suggestion was supported by Egypt, UN Doc. E/CN 4/547 (1951); see also Santa Cruz (Chile), UN Doc. E/CN.4/SR.216 (1951), p. 10; UNCHR, UN Doc. E/CN 4/562 (1951).
[48] As was suggested by Yugoslavia, Un Doc. E/CN.4/609/Rev.1 (1951).
[49] The limitation to the nationals of the states was abolished already before the votation, see Jeremovic (Yugoslavia), UN Doc. E/CN.4/SR.233 (1951), p. 12; regarding the votation see UN Doc. E/CN.4/SR.233 (1951), p. 22; Alston & Quinn 1987, p. 225.

The right to work encompasses both employees and self-employed workers. [50] One of its main objectives is to enable people to support themselves. Apart from this, the right to work is also thought to include the right too freely develop one's personality through work. [51] The fact that Article 6 ICESCR is not limited to the economic aspect of work is conveyed by the expression "which includes […] the possibility to gain his living […]". The right to work hence also includes other aspects.[52] The fact that the right to work includes a personal characteristic can also be gathered from the right to freely choose an occupation (Article 6(1) ICESCR), seeing that this freedom of choice grants the possibility to choose a labor where a person's skills and interests can develop freely.[53]

The right to work hence forms the foundation for realizing other fundamental rights, such as life,[54] identity and social inclusion.[55] In this context it is important to note that the CESC has also established that the right to work "forms an inseparable and inherent part of human dignity".[56] The economic side of the right to work thus has a double purpose: Ensuring survival as well as the autonomy of individuals, the latter being of fundamental importance for human dignity. This consideration is also included in the preamble of the ICESCR, according to which: "these rights derive from the dignity of the human person".

The negative right to work prohibits states from preventing individuals from freely pursuing their choice of work.[57] Consequently, all efforts to hamper individuals or groups in choosing certain professions or in obtaining employment in general are covered by Article 6 ICESCR. This has been confirmed by the practice of the CESC. The committee has criticized Austria's limitations of access to the labor market for aliens, since this was said to tamper with the prohibition of discrimination.[58]

[50] Dohmes-Ockenfels 1998, p. 95.
[51] Craven 1995, p. 194.
[52] See for example Thierry (France), UN Doc. A/C.3/SR.709 (1956), § 37; Ahmed (Pakistan), UN Doc. A/C.3/SR.709 (1956), § 39.
[53]Dohmes-Ockenfels 1998, p. 95.
[54] De George 1984, p. 17.
[55] Mundlak 2007, p. 189.
[56] UN Doc. HRI/GEN/1/Rev. 9 (2008), p. 139, § 1.
[57] Pérez 2005, p. 218.
[58] UN Doc. E/C12/1994/20 (1994), §§ 253, 259.

2.5. Legitimate Limitations on the Right to Work considering Article 4 & 5

Article 4 of the ICESCR regulates when a limitation of any right under the Covenant can be considered legitimate. According to this article, limitations are only allowed if they are determined by law, compatible with the nature of the rights, and serve the purpose of promoting the general welfare in a democratic society.

During the drafting of article 4 ICESCR it was emphasized that the term "law" indicated the entire applicable legal system. [59] Hence, not only written laws decided by the parliament are regarded as laws, but also law-based decrees and regulations.[60] The law must also have certain characteristics, such as being accessible and foreseeable. Within this scope, the administration is granted a margin of discretion in their work, as long as their decisions are verifiable.[61]

The welfare in a society can be defined as the state concern for the health, peace, moral and security of its citizens.[62] It has also been defined as "furthering the well-being of the people as a whole".[63] During the drafting of the Covenant some concern was expressed that this limitation may be too broad. However, the limitation should be interpreted restrictively to protect the rights established by the Covenant.[64]

The reference to a *democratic* society is supposed to be still more restricting regarding the right of the parties to introduce limitations. The burden of proof lies with the state that has to show that the limitation in question does not obstruct the functioning of a democratic society.[65] However, the opinion on what is to be considered as a principle of a democratic state varies between the states. A minimum consensus could be the protection of the human rights.[66] This however threatens to

[59] Cassin, Frankreich, UN Doc E/CN.4/SR.236 (1951), p.8.
[60] Alston & Quinn 1987, p. 199.
[61] Alston & Quinn 1987, p. 200.
[62] "The Public's health, peace, moral and safety" Black's law dictionary 2009, "General Welfare" p. 1732.
[63] The Limburg Principles 1987, § 52.
[64] Eustathiades, Griechenland, UN Doc. E/CN.4/SR.235 (1951) p. 11; Alston & Quinn 1987, p. 202.
[65] The Limburg principles 1987, §§ 53-54.
[66] The Limburg Principles 1987, § 55.

lead to a circle argumentation, because the purpose of the analysis of whether a limitation is justified is to investigate if the state has violated the human rights.[67]

Moreover, according to Article 4, a limitation is only allowed if it is compatible with the nature of the rights in the Covenant. This phrasing sets forward a minimum requirement, since no limitation that threatens to bring the essence of the right to nothing can ever be deemed legitimate.[68] Moreover, as it is in the interest of all freedoms and rights to be granted with as little restrictions as possible, states can only undertake such limitations that are deemed necessary after balancing the state interest against the human right.[69] A more far-reaching limitation than is absolutely necessary would otherwise be in conflict with the nature of the right. Lastly, the CESC has commented that Article 4 "is primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the state".[70]

Further, according to Article 5 "Nothing in the present Covenant may be interpreted as implying for any State […] to perform any act aimed at the destruction of any of the rights or freedoms recognized herein […]" The purpose of this is to prevent states from introducing limitations of the rights and freedoms that may be possible considering the phrasing of some of the articles in the Covenant, but are still undoubtedly in conflict with the purpose of the Covenant. Article 5 is applicable on all levels of the implementation of the rights, and guarantees that the effects of the rights prescribed in the Covenant are not nullified. Article 5 thus prohibits measures that result in completely preventing individuals from enjoying their rights.[71] This provision of Article 5 corresponds with the obligation of Article 4 to only introduce such limitations that are compatible with the nature of the rights.

[67] Dohmes-Ockenfels 1998, p. 205.
[68] The Limburg Principles 1987, § 46.
[69] Dohmes-Ockenfels 1998, p. 205.
[70] UN doc. HRI/GEN/1/Rev.9 (2008), p. 71, § 42.
[71] Dohmes-Ockenfels 1998, p. 179 f.

3. Comparison between Sweden and Germany

This chapter provides an overview of the Swedish and German regulations considering asylum seekers' access to the labor market. First, the legal measurements are described. This is followed by an examination of the legislator's motives for the regulations. The purpose of this is to enable an analysis in chapter four of whether those regulations live up to the requirements of the ICESCR, discussed above. It also forms the foundation for the comparative analysis, which investigates whether the German regulations should serve as a source of inspiration for alterations within the Swedish legal system. For the latter analysis it is important to investigate the goals of the regulations. Only if the legislations have the same purpose is it possible to evaluate which regulation is better designed to reach that goal.

3.1. Germany

Sweden and Germany do not have entirely corresponding regulations. The German system is based on a requirement for asylum seekers to obtain a work permit. The conditions for obtaining this work permit are therefore discussed below. The regulations that in certain cases prohibit asylum seekers from working will also be discussed, as this is another important measure that affects the asylum seekers' access to the labor market. This part is followed by an investigation of the motives for the discussed regulations.

3.1.1. Work permit

According to § 4(2 and 3) AufenthG, a foreigner is only permitted to work if the residence permit assigned to them allows this, or they have a work permit that the FWA has consented to or this is prescribed in law. According to § 10 (1) AufenthG, foreigners that have applied for asylum are in general not entitled to a residence permit before the end of the asylum procedure. Usually, asylum seekers are instead

granted a so-called permission to remain, which guarantees the right to stay in the country for the duration of the asylum procedure (§ 55(1) AsylG). This permission is spatially limited to the area of the foreigner's registration office in which the relevant reception center is located (§ 56(1) AsylG,). The permission to remain, that the asylum seekers are given according to § 55 AsylG, does not in itself grant a permission to work. Asylum seekers therefore need to apply for a work permit at the Foreigners' Registration Office.[72] This office then usually needs to obtain consent from the FWA in order to issue a work permit (§ 61(2) AsylG).

Asylum seekers are obliged to live in reception centers for the first six weeks as a minimum. This obligation can be extended up to six months (§ 47(1) AsylG). The termination of the obligation to live in the reception center is regulated in §§ 48-49 AsylG. Asylum seekers from safe countries (see § 29a AsylG) are however under the duty live in the reception centers for the entire duration of the asylum process or until they leave the country (§ 47(1)(a) AsylG). As a general rule, asylum seekers who are obliged to live in reception centers are not allowed to work (§ 61(1) AsylG). Additionally, asylum seekers are in all cases prohibited to work during the first three months of the legal stay (§ 61(2) AsylG).

3.1.2. Consent from the Federal Work Agency

As mentioned above, the Foreigners' Registration Office mostly needs to obtain consent from the FWA in order to issue a work permit (§ 61(2) AsylG). This consent is dependent on certain requirements. The hiring of the asylum seeker cannot have a negative effect on the labor market, and no prioritized worker should be available. Further, the asylum seeker cannot be hired under worse working conditions than those of a comparable German employee (§ 61(2) AsylG and § 39 AufenthG). If there are no such considerations, the work permit is issued for the duration of the employment or for a maximum of three years (§ 34(2) BeschV).

[72] Neundorf, AsylG § 61, Rn. 7, as viewed in 19-05-15.

3.1.2.1. Labor Market Analysis and Privileged Workers

According to § 39(1)(2)(1)(a) AufenthG, an asylum seeker can be granted a work permit if this does not have a negative impact on the labor market. This is the case if there for example is a distinct excess of job offers within a certain field compared to the number of unemployed workers. [73]

Further, the asylum seeker cannot be given a work permit if a privileged worker can be hired in his stead (§ 39(2)(1)(b) AufenthG). The privileged workers consist of:

- Germans
- EU or EEA citizens (cp. § 284(4) SGB III)
- Swiss citizens (cp. Agreement with the Swiss Federation: free movement of persons)
- Third state citizens with unlimited access to the labor market [74]

It falls upon the employer to show that no privileged workers are accessible that would fit the requirements of the position. The employer must have been unable to find a privileged worker within a reasonable amount of time. Upon this, the FWA must also have failed to appoint a worker.[75] Consent from the FWA cannot be obtained if the employer rejects a privileged worker simply because he would prefer to hire the asylum seeker. Similarly, consent from the FWA cannot be obtained if a privileged worker is not hired due to objectively non-justified requirements, such as exaggerated qualification or language skills requirements.[76] However, permission can be granted if the employment of the asylum seeker can be justified by special, objective circumstances that are in line with the business interest. Although, this still requires that a privileged worker would not have been hired even if no work permit for the asylum seeker had been issued.[77]

3.1.2.2. Working Conditions

The consent of the FWA is also dependent on that the asylum seeker is not engaged under poorer working conditions than those of a comparable German worker (§

[73] Bundesagentur für Arbeit 2014 *Durchführungsanweisungen zur Ausländerbeschäftigung*, p. 37 f.
[74] Breidenbach, AufenthG § 39, Rn. 6, as viewed in 19-05-16.
[75] Ibid, Rn 10, as viewed in 19-05-16.
[76] Bundesagentur für Arbeit 2014, p. 38.
[77] Ibid, p. 38.

39(2)(2) AufenthG). When it comes to comparing the working conditions, the salary is of special importance. In case the employer is bound by a collective agreement, or a collective agreement is declared to be generally binding within the area of work, the employer is obliged to pay salaries according to its standards. If this is not the case, the employer shall instead pay a salary that is regarded as customary, considering the area and the field of work. The salary cannot fall below the legal minimum wage. [78]

Other work conditions that are considered include working hours, tasks, holidays and overtime regulations. As indicated above, the comparison is made with regard to the business situation but also considers legal and collective agreements regulations.[79]

3.1.2.3. Facilitated Access to the Labor Market

According to § 39(2)(2) AufenthG, the FWA can rule that the employment of asylum seekers within certain types of jobs or economic sectors will not have a negative impact on the labor market and is advisable from an integration political perspective. For those types of jobs an evaluation of the impact on the labor market as well as the requirement of hiring a prioritized worker according to § 39(2) AufenthG is hence not necessary. This group permission can be administered when there has been a shortage of labor in a certain field for a longer period of time.[80]

The evaluation of the labor market and the obligation of hiring a prioritized worker are also not required when the asylum seeker has legally resided in Germany for a minimum of 15 months (cp. above and § 32(5)(2) BeschV) and for a special group of occupations, such as highly qualified labor and apprenticeships (see §§ 32(5)(1), 2(2), 6 and 8 BeschV). Within those types of work asylum seekers can also be employed as temporary agency workers, which is otherwise forbidden (§ 32(3,4 and 5) BeschV and §1(1) AÜG). Although, even in those cases the FWA still needs to assess whether the working conditions are worse than those of a comparable German worker (§ 39 (2)(2) AufenthG).

[78] Bundesagentur für Arbeit 2014, p. 39 f.
[79] Ibid, p. 39.
[80] Bundesagentur für Arbeit 2011 *Durchführungsanweisungen zur Ausländerbeschäftigung*, p. 42.

However, some types of work do not require the consent of the FWA, which means that they are freely accessible to asylum seekers. This includes internships with the purpose of further education or voluntary work for the army (cp §. 32(2)(1-4) and §32(4) BeschV). Lastly, the consent of the FWA is no longer required when the asylum seeker has legally resided within the country for four years (cp. § 32(2)(5) and § 32(4) BeschV). Should the refugee status still not be decided after four years, the asylum seeker will then at least have free access to the labor market. The legal basis for the discussed regulations in the BeschV is found in § 42 AufenthG. According to this paragraph, the Federal Ministry for Labor and Social Affairs can decide when a work permit can be issued without the consent of the FWA, as well as the conditions for this consent.

3.1.3. Motives

The purpose of the obligation to stay in the reception center is to ensure that the asylum seeker is always easily reachable for authorities and courts (cp. § 47(3) AsylG). For example, it guarantees that the asylum seeker can appear before his personal hearing (§ 25 AsylG) on a short notice. As a result, the asylum process can be carried out swiftly and effectively. It is of heightened importance that the asylum seeker is easily reachable during times of increased levels of applications.[81]

The three-month work prohibition, as well as the work prohibition during the obligation to stay in the reception center, have the purpose of preventing asylum seekers to develop stronger bonds to Germany. This is not desired before the right of residence has been finally decided. These regulations also serve the purpose of counteracting possible pull effects on asylum seekers that in reality are economic migrants.[82]

The three-month work prohibition was introduced in 2014. Before this amendment asylum seekers suffered under a nine-month work prohibition. (cp. Gesetz zur Einstufung weiterer Staaten als sichere Herkunftsstaaten und zur Erleichterung des Arbeitsmarktszugangs für Asylbewerber und geduldete Ausländer vom 31 Oktober

[81] Heusch, AsylG § 47, Rn. 1, as viewed in 19-05-16.
[82] Neundorf, AsylG § 61, Rn. 2, as viewed in 19-05-16.

2014 (BGBl. I S. 1649)) According to the preparatory works, the reason for limiting the work prohibition is to enable asylum seekers to support themselves, thus rendering them independent of social welfare.[83] This is expected to affect the economies of the municipalities and states positively.[84] The former regulation was introduced partly with consideration to the high unemployment levels during that time. As the situation of the labor market has since then developed towards a greater need for labor, asylum seekers are granted access to the labor market. [85] The amendment was also introduced in hopes that this would facilitate integration and raise the acceptance of the asylum seekers. [86]

§ 47(1)(a) AsylG, which obliges asylum seekers from safe states to live in the reception centers for the entire duration of the asylum process, was introduced in 2015 as a reaction to the drastically increased number of asylum seekers (cp. Asylverfahrensbeschleunigungsgesetz).[87] The purpose of this law is to accelerate the asylum process for asylum seekers without need for protection from a refugee legal point of view. Their residence within Germany shall thereby swiftly be brought to an end.[88] Moreover, the rule is also meant to facilitate the deportation of the asylum seeker in case of an obviously unfounded application. (cp. § 29a(1) AsylG).[89]

The purpose of the evaluation of the impact on the labor market and the requirement of hiring prioritized workers is to protect the labor market[90] and control the unemployment levels (cp. § 18(1) AufenthG). The goal of the regulation concerning comparable working conditions is twofold: On the one hand the asylum seekers are to be protected from exploitation. On the other hand a situation is to be avoided where the working conditions are lowered, hence putting Germans, or anyone unwilling to work under those conditions, in an unfavorable position. [91]

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[83] BT-Drs. 18/1528, *Entwurf eines Gesetzes zur Einstufung weiterer Staaten als sichere Heerkunftstaaten und zur Erleichterung des Arbeitsmarktszugang für Asylbewerber und geduldete Ausländer*, p. 1.
[84] BT-Drs. 18/1528, p. 10 f.
[85] Thomas de Maizière BT-PlPr 18/40, p. 3491
[86] Uli Grötsch: BT-PlPr.18/46, p. 4181.
[87] BT-Drs. 18/6185 *Entwurf eines Asylverfahrensbeschleunigungsgesetzes* p. 1.
[88] BT-Drs. 18/6185 p. 34.
[89] Neundorf, AsylG § 61, Rn. 3, as viewed in 19-05-16.
[90] Bundesagentur für Arbeit 2014, p. 37.
[91] Bundesagentur fur Arbeit 2014, p. 39.

3.2. Sweden

Contrary to Germany, the Swedish regulation is based on asylum seekers acquiring an exemption from the obligation of a work permit. The requirements for this exemption are thus discussed below. Unlike Germany, Sweden does not execute any type of definite work prohibition. When the legislator's motives of the regulations are discussed a somewhat broader scope is used, where the general motives behind controlling foreigners' access to the labor market are investigated, as well as the motives behind the regulations concerning asylum seekers. The purpose of this is to show that Sweden and Germany share many values and ideas regarding the inflow of foreign workers and the impact on the national labor market.

3.2.1. Work permit

Foreigners are as a general rule required to have a work permit in order to be allowed to work in Sweden (Ch. 2 § 7 UtlL). However, according to Ch. 2 § 9 UtlL, the Swedish Government can prescribe that certain groups are exempted from the obligation of obtaining a work permit. In the case of asylum seekers, the Swedish Government has made use of this mandate, and asylum seekers are hence not required to have a work permit (cp. Ch. 4 §§ 1, 2 and 2a UtlL and Ch. 5 § 4 UtlF). However, this exemption does not apply in the following cases:

- For asylum seekers that do not have any identification papers, unless they cooperate in the elucidation of their identity.
- If it is probable that the asylum seeker will be transferred due to the Dublin II Regulation.
- If it is probable that the asylum seeker will be deported with immediate effect according to ch. 8 § 19 UtlL. According to this paragraph, the Swedish Migration Agency can decide that the decision to deny an asylum application shall be put into effect immediately even if it has not gained legal force, in case the asylum application was obviously unfounded and residence permit should also not be issued on any other grounds.

In clear cases, The Application Unit makes the decision regarding the AT-UND. A case is considered clear if identification papers have been provided where the authenticity is not questioned, and it is clear that the asylum seeker should not be transferred due to the Dublin II Regulation or deported immediately (cp. above). Otherwise the case is transmitted to the Examination Unit that reconsiders the question of issuing an AT-UND every time there is a change regarding the asylum seeker's identity status.[92]

The asylum seeker is not required to apply for work or provide a job offer in order to be exempted from the obligation of a work permit. The Swedish Migration Agency does not make an administrative legal decision in a strict sense, but merely issues a proof that shows that the applicant is not obligated to possess a work permit (Ch. 5 § 4(3) UtlF). [93] The exemption expires when the foreigner leaves the country or when the decision to grant him or her a resident permit has gained legal force. However, the exemption ceases to be valid if the foreigner does not cooperate with the authorities regarding the execution of a decision of expulsion or deportation (Ch. 5 § 4(2) UtlF). Asylum seekers that will be immediately deported or transferred according to the Dublin II Regulation will not reside in Sweden for a longer period of time. This paper will therefore in the following concentrate on the requirement of cooperation.

3.2.1.1. Definition of the Term "Cooperation"

When it comes to the cooperation, the point of departure must be that the same standard of proof should be reached as with residence permits. The general rule in those cases is that the identity should be proven. However, in cases concerning asylum, the standard of proof is lowered to "probable". Therefore, if an asylum seeker provides identification papers and thus meets the requirement of probable proof, he shall be granted an AT-UND. To deny an asylum seeker an AT-UND because he fails to prove his identity is considered unreasonable by the Swedish Migration Agency. [94]

[92] Migrationsverket 2015 *Handbok i Migrationsärenden*, p. 787.
[93] SOU 2006:87 *Arbetskraftsinvandring till Sverige – förslag och konsekvenser*, p. 191.
[94] Migrationsverket 2015, p. 799

If the asylum seeker initially cannot provide identification papers, he must cooperate in the clarification of his identity. However, the preparatory works do not give any clear guidance regarding the interpretation of this demand.[95] The Swedish Migration Agency has interpreted the regulation as a requirement for the asylum seeker to make use of the existing possibilities to provide identification papers. What is considered to be reasonable in this context is decided in each individual case. In any case, it is not enough for the asylum seeker to simply express a wish to cooperate. Even though it cannot be mandatory to provide identification papers, there should be clear documentation on how the asylum seeker has cooperated. A sufficient effort on the side of the asylum seeker could be that he has given a reasonable explanation as to why identification papers cannot be provided and simultaneously has made efforts to obtain other relevant proof, such as school reports, work diplomas or testimonies from close relatives residing in Sweden. [96]

The above discussed factors has been considered to imply that the Swedish Migration Agency has interpreted the regulation as meaning that only those that have proven their identity or cooperated in the clarification of the identity to the point where it can be considered confirmed should be granted the exemption from the work permit obligation. Jansson states that there seems to be a level of uncertainty as to how the requirement of cooperation should be applied. [97]

3.2.2. Motives

3.2.2.1. Access to the Labor Market for Foreigners

Sweden has attempted to control the inflow of foreign workers for a long period of time. The motivation for this is in many ways similar to Germany's objectives. From a Swedish point of view, it is the responsibility of the society to, in the first place, provide work for its citizens. The national work force should not be pushed aside by foreign workers, and thus a regulation of the inflow of foreign workers is required.

[95] Cp. Prop. 2007/08:147 *Nya regler för arbetskraftsinvandring*, p. 45.
[96] Migrationsverket 2015, p. 799 f.
[97] Borg Jansson 2015, p. 349.

Another Swedish principle that has prevailed throughout the years is that foreigners should be hired under working conditions comparable to those of a Swedish worker. Labor immigration should not make it easier for employers to engage labor under unfavorable conditions.[98] As a result of those considerations, foreigners are as a general rule required to have a work permit in order to be allowed to work in Sweden (Ch. 2 § 7 UtlL).

3.2.2.2. Motives for granting asylum seekers access to the labor market

However, asylum seekers are exempted from the work permit obligation. According to the preparatory works this is because they – such as everyone else – should have the possibility to support themselves. Granting asylum seekers the right to work also means increased tax revenues for the state and facilitates the integration process. Hereby the asylum seekers gain the opportunity to establish relations with their coworkers, thus acquiring knowledge about the Swedish culture and language. [99] The system is also assumed to result in reduced state expenses, seeing that the right to economic support for the asylum seeker is reduced when he or she has an income.[100] Additionally, it is assumed that the public would have a more positive opinion regarding the asylum seekers in case they would support themselves.[101]

However, granting asylum seekers the right to work could also have some negative aspects. Asylum seekers can be assumed to be more acceptable of working conditions below the standard, as every income that exceeds the daily compensation from the Swedish Migration Agency is a desirable alternative. They can also be assumed to know less about their labor rights and are in a worse negotiation position. As a result, other groups of workers may be pushed aside. Yet the latter is not a serious concern. As the group of asylum seeking workers is small, these effects can largely be neglected.[102]

[98] Prop. 2007/08:147, p. 27.
[99] Ibid, p. 44.
[100] SOU 2006:87, p. 201.
[101] Prop. 2007/08:147, p. 44.
[102] SOU 2006:87, p. 201 f.

Allowing asylum seekers to work can also have a negative effect on employers. This is the case when they have invested resources in the education of an employee who is ultimately not allowed to stay in Sweden.[103] An asylum seeker might experience the rejection of the asylum application as more negative in case he has already established himself in the country's labor market. However, the ability to work should still have had a possible influence on the mental and physical health. As a whole the legislator considers the positive aspects of granting asylum seekers the right to work to outweigh the negative.[104]

3.2.2.3. Purpose of the Duty of Cooperation Regarding the Clarification of the Identity

According to the preparatory works, the possibility to work during the asylum process could be a contributing factor to the increased asylum influx. The problem with missing identification papers has grown more common, which results in longer administration times. Additionally, an increase in the number of denied asylum seekers has been observed. This could be because the number of persons applying for asylum without having asylum grounds has increased. Yet it could also be explained by a changed praxis on the side of the authorities or an increased number of people with weak asylum grounds. Either way, an unfavorable treatment of asylum seekers who do not cooperate in order to clarify their identity is seen as an important deterrent signal.[105] Therefore, asylum seekers who do not contribute to clarifying their identity are not exempted from the obligation of having a work permit.[106]

[103] SOU 2006:87, p. 202.
[104] Prop. 2007/08:147, p. 44.
[105] SOU 2006/87, p. 205 f.
[106] Prop. 2007/08:147, p. 45. See also SOU 2006:87, p. 195 f.

4. Analysis

In this chapter, an analysis is conducted to compare the legal systems of Sweden and Germany with the requirements set by International Covenant on Economic, Social and Cultural Rights. By doing so it draws from the previous two chapters that have focused on describing the two legal systems and the requirements set by the Covenant.

The analysis does not only provide insight on how compatible the two legislations are with the ICESCR but also on how well they fulfill their purpose. Should it be shown that the German regulations are more effective in achieving a common goal, and simultaneously comply with the requirements of the ICESCR, those regulations can serve as an inspiration for the Swedish regulation.

4.1. Compatibility with the international Covenant on Economic, Social and Cultural Rights

4.1.1. Progressive Realization under Article 2(1)

The provision of progressive realization of the ICESCR is based on the presumption that the full realization of the goals is costly and that this realization hence cannot be achieved immediately. However, abolishing *de jure* discrimination, which is what this paper discusses, is regarded to be inexpensive. This was shown in the assessment of whether a Zairian law that prevented women from working unless they had their husband's permission was a case of discrimination. Here, it was deemed superfluous to consider the economic development.[107]. Thus, a reference to failing resources or progressive realization does not justify legal provisions preventing asylum seekers from enjoying their right to work.

[107] Craven 1995, p. 181.

4.1.2. The Requirement of Non-Discrimination under Article 2(2)

As discussed earlier, Article 2(2) ICESCR prohibits discriminatory unequal treatment. An unequal treatment occurs when an individual or group is treated worse or better than others regarding a certain right. A discriminatory intention on behalf of the state is not necessary in order for the unequal treatment to amount to discrimination.[108] As we have seen earlier, it is laid out in law both in Sweden and in Germany that asylum seekers' access to the labor market is more restricted than that of other groups. It can thus be concluded that an unequal treatment occurs.

However, not all unequal treatment is discriminatory, but can be justified if it is based on a reasonable and objective criteria, pursues a legitimate aim, and due regard is taken to the principle of proportionality.[109] For a limitation to be seen as proportional it must be suitable, necessary and reasonable for reaching the desired goal.[110]

In chapter 3 of this paper, four reasons for limiting asylum seekers' right to work are distinguished above others: 1) Limiting the immigration, 2) Ensuring the departure of rejected asylum seekers, 3) Protecting the labor market, 4) Ensuring a swift asylum process. Thus, this part of the analysis focuses on evaluating the legitimacy of these goals as well as whether the means of pursuing them can be deemed necessary, suitable and reasonable.

4.1.2.1. Legitimate Aim

This chapter discusses whether Sweden's and Germany's stated goals for limiting the access to the labor market for asylum seekers can be seen as legitimate goals under international law.

[108] Dohmes-Ockenfels 1998, p. 175.
[109] See for example: Zwaan-de Vries v Netherlands, UN. Doc. CCPR/C/29/D/182/1984 (1987); Cholewinsky 2000, p. 716 f.
[110] Moeckli 2010, p. 201 f.

4.1.2.1.1. Limiting the Immigration and Protecting the Labor Market

One of the goals with restricting the rights for asylum seekers is to limit the pull factor on economic migrants without asylum grounds. Since all states enjoy the sovereign right to decide on the immigration of foreigners, this is seen as a legitimate purpose from the viewpoint of international law. [111]

According to the European Court of Human Rights, also the protection of the labor market constitutes a legitimate goal.[112] However, this goal requires an especially careful assessment of proportionality, since such safeguarding of the labor market may have positive effects for the full employment of some groups, but simultaneously considerably obstructs the possibility for full employment among asylum seekers. [113]

4.1.2.1.2. Ensuring the departure of rejected asylum seekers and a swift asylum process

The limitation on the right to work can also serve the purpose of facilitating the deportation of rejected asylum seekers. Asylum seekers are assumed to be more likely to leave the country voluntarily if they have not become integrated and established themselves in the country. By means of denying them the right to work, asylum seekers shall thus be prevented from forming a stronger connection to the country until their refugee status has been decided on. Preventing asylum seekers from working also guarantees that they are easily reachable by the authorities, which facilitates a swift asylum process.

Foreigners' right of residence falls under the scope of state sovereignty. Hence, ensuring the departure of unwanted foreigners as well as a swift asylum process can be classified as a legitimate goal. Although the principle of non-refoulement does prescribe a right of residence, this does not concern the right to work for asylum seekers. When it has been established that an asylum seeker cannot be deported due to

[111] Dohmes-Ockenfels 1998, p. 187 f.
[112] Abdulaziz, Cabales und Balkandali v. The United Kingdom, Series A, No. 94 (1985), § 78.
[113] Dohmes-Ockenfels 1998, p. 189.

those conventions, they obtain a residence permit that does not fall under the regulations concerning asylum seekers. [114]

4.1.2.2. Suitable and Necessary

This chapter discusses whether the regulations introduced by Sweden and Germany can be seen as suitable and necessary under the ICESCR in terms of reaching the stated goals of the regulations. For a certain measurement to be necessary, it should not be possible to obtain the same results by means of a smaller intervention.

4.1.2.2.1. Limiting the Immigration

Any type of regulation that make it more difficult for asylum seekers to work is likely to reduce the number of economic migrants applying for asylum on false premises. The Swedish requirement of clarification of the identity as well as the different German work prohibitions can therefore be seen as suitable. It is however extremely difficult to estimate how strict the regulations must be in order to have the desired effect. It is also not certain to which extent "false" asylum applications actually constitute a problem. However, the evaluation of the effects of the law must be conducted *ex ante* and it can also not be excluded that they would have the desired effect.[115] It can therefore not be decided that the discussed regulations would not be necessary.

4.1.2.2.2. Protection of the labor market

It is unclear if the regulations have a noticeable effect regarding the protection of the labor market. The German evaluation of the impact on the labor market and the obligation of hiring prioritized workers before asylum seekers effectively prevent many asylum seekers from obtaining employment. However, it is improbable that the asylum seekers would have been able to compete with the national work force on a larger scale, should there not have been any limitations at all. Asylum seekers are in an unfavorable position from start. They mostly do not speak the language and an

[114] Dohmes-Ockenfels 1998, p. 188.
[115] Ibid.

employer would always have to count on that they might need to leave the country, just to mention a few factors. It is however possible that an allowing regulation could lead to employment of an asylum seeker over a prioritized worker. Yet it is not possible to assess to which extent the regulations succeed in preventing this. It can therefore not be excluded that they could be suitable and necessary.

4.1.2.2.3. Ensuring the Departure of Rejected Asylum Seekers and a Swift Asylum Process

It is reasonable to assume that a limitation of the right to work somewhat obstructs the integration process. It is however doubtful whether a work prohibition such as the three-month work prohibition or the prohibition to work during the asylum process is indeed the best method to ensure that rejected asylum seekers leave voluntarily. In Germany the recent high influx of asylum seekers has resulted in prolonged asylum processes – waiting periods of 16 months have occurred.[116] It is probable that an extended stay would give the asylum seeker the possibility to adapt regardless of an initial work prohibition. Further, also in those cases where a swifter asylum process is carried out, it is likely that an asylum seeker's willingness to leave voluntarily is highly dependent on the reason he left his former country in the first place.

Yet it is still possible that an asylum seeker who already has obtained a work place would be more inclined to go under ground, since he would then have a way of supporting himself. In this case it is not impossible that the limitation of the right to work could have some effect. It can thus not be decided with certainty if the regulations are suitable and necessary considering the aim.

Concerning the swift asylum process, it is reasonable to assume that preventing asylum seekers from having a job when they are under the obligation to live in the asylum center would make them more accessible for the authorities. Still, one cannot assume that asylum seekers will always stay in the reception centers and thus will be reachable at all times even if they are not allowed to work. Yet preventing asylum seekers from working would reduce the risk of appointments with the authorities

[116] Deutschlandfunk, 14-10-15.

conflicting with scheduled work. The regulation can therefore be deemed suitable. It is difficult to suggest a less intrusive measure that would render the asylum seekers accessible on the same level, and it could therefore be considered necessary.

4.1.2.3. Reasonability

As we have seen above, it is often hard to estimate whether limitations can be considered suitable or necessary under the ICESCR. The assessment of whether the measurements are proportionate must therefore be decided based on whether they can be deemed reasonable, which is to be analysed in the following chapter.

When conducting the analysis of whether the measurements are reasonable, one must keep in mind that the enjoying the full benefits of the right to work often requires a certain length of occupation. Even though temporary works also fall under the scope of Article 6 ICESCR, both the possibility to support oneself and to develop one's personality usually requires a more long-term occupation. Thus limitations concerning foreigners that have not yet established themselves within the country can be considered more defendable than limitations that have a long-term effect.[117]

It has been argued that since the state guarantees the livelihood of the asylum seekers through social welfare, the right to "gain one's living" is not affected by the work prohibition. The prohibition would instead only affect the right of self-realization contained in the right to work.[118] However, as this paper has shown, the economic aspect does not only include the right to support oneself, but also to be autonomous, which is crucial for the dignity of the human person. This aspect of the right to work, as well as the right to enable one's personality, would be violated if an asylum seeker were denied the right to work for a longer period of time.

4.1.2.3.1. Limiting the Immigration

It is uncertain to what extent the German three-month work prohibition or the prohibition to work during the obligation to live in a reception center would actually result in less unfounded asylum applications. Yet the possibilities for asylum seekers

[117] Dohmes-Ockenfels 1998, p. 191.
[118] Ibid, p. 194.

to obtain a work place within the first few months are probably low. As mentioned above, enjoying the benefits of the right to work often also requires a certain length of the occupation. The obligation to stay in the reception center can however be extended to six months, during which time it is not impossible that many asylum seekers would have managed to find proper work. Also, asylum seekers from safe countries are obliged to stay in the reception centers for the entire duration of the asylum process, which means that the work prohibit can be dependent on the length of the asylum process. Yet one must keep in mind that the asylum process for asylum seekers from safe countries has been sped up, which means that the work prohibit will mostly not endure for a prolonged period of time.

Considering the factors mentioned above, it is likely that the three-month work prohibition could be deemed proportionate. The legitimacy of the work prohibition during the obligation to stay in the reception center is somewhat dependent on the length of this obligation.

The most relevant part of the Swedish regulation consists of the requirement of providing identification papers or cooperating in the clarification of the identity. As has been discussed above, it is unclear to what extent misuse of the right of asylum in order to gain access to the labor market is actually a problem, as well as how effective the regulation would be in preventing this. While it seems reasonable to require that an asylum seeker would provide documentation if obtainable, the restrictive application of this regulation has lead to a majority of the asylum seekers not being granted the opportunity to work. During 2011, only about 19 percent (5461 persons) fulfilled those requirements and were given an AT-UND.[119] The amount of asylum seekers that were given the AT-UND rose drastically in 2014, and continued to increase in 2015, when 27 253 persons were granted the AT-UND. However, according to the Swedish Migration Agency, both the drastic increase in 2014 as well as the overall increase during the past three years can probably be explained by the increase of asylum seekers from Syria. This is because Syrian asylum seekers usually can provide identification papers. [120]

[119] Migrationsverket 2011, *Migrationsverkets årsredovisning 2011*, p. 23.
[120] Migrationsverket 2015, *Migrationsverkets årsredovisning 2015* p. 40.

It can thus be established that in practice the requirement of cooperation is interpreted restrictively by the Swedish Migration Agency and that few people are able to meet the requirement. This leads to the majority of the asylum seekers not being granted the possibility to work throughout the entire duration of the asylum process. Simultaneously, preparatory works from 2009 have established that the new Swedish regulations concerning third-country nationals' access to the labor market are relatively generous, and that the risk of immigrants applying for asylum under false identity in order to gain access to the labor market consequently should be lower.[121] This means that the benefits of the regulation are most uncertain at the same time as it constitutes a major intrusion on the right to work. It is therefore probable that this regulation cannot be deemed proportionate.

4.1.2.3.2. Protection of the Labor Market

The German evaluation of the impact on the labor market and the obligation to assure that no prioritized worker is set aside, can in many cases function as an effective work prohibition that can extend up to 15 months. It has been shown that the number of denied applications for hiring non-privileged workers has risen drastically since the AufenthG came into effect.[122] The consent from the FWA to hire a non-privileged worker is thus to be seen as an exception rather than a rule. [123] During the time of this review, asylum seekers can in many cases be said to suffer under a practical work prohibition, albeit not a legal one.

Guaranteeing work for the state citizens is indeed an important goal, but as discussed in 4.1.2.2.2. *Protection of the Labor Market*, it is not likely that this regulation would be an effective way of reaching that goal, since asylum seekers do not constitute any bigger threat to the national workers. It is therefore doubtful if this provision could pass as reasonable.

Similarly, it is questionable if the requirement of comparable working conditions has a larger effect on preventing German workers from being pushed aside. However, it is

[121] SOU 2009:19 *Aktiv väntan – Asylsökande i Sverige,* p. 102.
[122] Feldgen 2006, p. 174.
[123] Breidenbach AufenthG § 39, Rn. 10.

possible that this regulation protects asylum seekers from unjust working conditions, The limitation of the right to work in this case could also be considered as rather minor. What however is problematic in this case is that this evaluation prevails for four years, which could be considered a disproportionate amount of time.

4.1.2.3.3. Ensuring the Departure of Rejected Asylum Seekers and a Swift Asylum Process

The general objective in Germany is that asylum seekers should not be granted the right to work before the residence permit has been finally decided. Thus, rejected asylum seekers would be more inclined to leave the country. As mentioned previously, it is doubtful if refusing asylum seekers the right to work would actually lead to them being more willing to leave the country voluntarily. The considerations regarding the length of the work prohibition, as discussed in 4.1.2.3.1. *Limiting the immigration*, find a corresponding application here. One should however also keep in mind that the longer the asylum process extends, the greater is the probability that the asylum seeker will integrate, regardless of employment status. If the assumption that a more integrated asylum seeker is less willing to leave the country is true, then this regulation also becomes less effective with time. Consequently, only shorter work prohibitions would be proportionate considering this goal. Considering this, it is especially questionable if the work prohibition during the obligation to stay in reception centers, which can be extended to six months, would be proportionate. It is more likely that the three-month work prohibition would pass the test.

A swift asylum process on the other hand, is of great importance to the state, and can be beneficial to both parties. After all, a swift asylum process guarantees that the restrictive regulations for asylum seekers are brought to an end, as the right to work is granted without restrictions for those with a refugee status. It is therefore possible that the work prohibition during the obligation to stay in the reception centers can be deemed proportionate to this aim.

4.1.3. Determined by Law, Article 4

As discussed above, limitations to the Rights of the Covenant must be laid out in law or law-based decrees. They must also fulfill certain requirements, such as being accessible and foreseeable. Both the Swedish and the German regulations are either prescribed by law or by law-based decrees (cp. BeschV and UtlF).

The most important factor when it comes to deciding whether an asylum seeker shall be exempted from the work permit obligation in Sweden is to provide identification papers or to cooperate in the clarification of the identity. However, the Swedish preparatory works do not give any directives regarding what the requirement of cooperation contains.[124] Similarly, the directives by the Swedish Migration Agency can be considered unclear regarding how the term "cooperation" should be applied in practice (cp. above). Although it is natural that it is not possible to provide clear guidance for every case, there seems to be some confusion considering how those directives should be interpreted. This was shown in a survey made by The Swedish National Audit Office in 2012, which established that there was some uncertainty (within the reception centers) as to what the requirement of cooperation actually meant.[125] This means that the Swedish regulation threatens to not be predictable enough to fulfill the requirements of Article 4 ICESCR.

As a comparison, the German three-month work prohibition and the prohibition to work during the mandatory stay in the reception center are definite and do not require much interpretation. FWA gives its consent to the work permit if the FWA are themselves unable to provide a prioritized worker or the work takes place in one of the exempted branches and the work conditions abide by laws and collective agreements. Thus the German law does not seem to pose any problems regarding the requirements of Article 4.

[124] Cp. Prop. 2007/08:147, p. 45.
[125] RiR 2012:23 *Början på något nytt – Etableringsförberedande insatser för asylsökande*, p. 41.

4.1.4. The Purpose of Promoting the Welfare in a Democratic Society, Article 4

It has been argued that a swift asylum process and reducing the unemployment levels ultimately has the aim of reducing the costs for the state. Reducing costs for the state would thereby be regarded as a legitimate way of promoting the general welfare.[126] It does seem reasonable to assume that reducing state costs could be deemed a legitimate measure in order to protect the general welfare. However, it is not evident that restricting asylum seekers' right to work would ultimately lead to more resources being invested in other areas. According to some economic theories, an increase in state expenses boosts the economy, which would in its turn result in increased tax revenue and thus actually have positive implications for the general welfare.[127]

As previously discussed in this paper, granting asylum seekers the right to work could also have a positive effect on the state finances in terms of decreased economic dependency and the increased tax revenue generated by the work conducted by asylum seekers. Granting them access to the labor market would also protect their dignity and could help in building a better understanding towards these groups, and thereby promote the general welfare.[128] It can thus not automatically be assumed that restricting the right to work would be beneficial for the state and thus justified under Article 4 ICESCR.

4.1.5. Compatibility with the Nature of the Rights and the Prohibition of Destruction of the Rights, Article 4 & 5

As discussed above, the requirement of compatibility with the nature of the rights in Article 4 and the prohibition of destruction of the rights in Article 5 mean that no limitation that threatens to bring the essence of the right to nothing can ever be deemed legitimate. States can also only undertake such limitations that are deemed necessary after balancing the state interest against the human right.

[126] Dohmes-Ockenfels 1998, p. 209.
[127] Blinder 2008.
[128] Edwards 2005, p. 327.

Considering this, one could argue that any kind of work prohibition would not be compatible with the nature of the rights according to Article 4 or the provision laid out in Article 5 ICESCR. Since a person suffering under a work prohibition is completely deprived of the right to work this would compromise the very essence of the right. However as discussed above, it is possible that one must be able to execute the right to work for an extended period of time to be able to obtain the benefits from the right in question. Thus, a prolonged denial of the right to work would in any case nullify the essence of the right to work. A shorter work prohibition on the other hand, may be legitimate. The considerations brought up in the evaluation of whether the discrimination could be deemed proportionate under Article 2(2) find a corresponding application here.

4.2. Implications to the Swedish Law

This chapter discusses whether the Swedish law should implement any part of the German regulations or change the regulations regarding asylum seekers' right to work on any other ground. The analysis is based on the motives that Sweden and Germany have both expressed and how fitting the regulations are in order to fulfill these motives. In this analysis it is also considered whether the regulations are compatible with the ICESCR.

4.2.1. Work prohibition contra the Requirement of Cooperation

Both the Swedish demand for identification papers or cooperation in the clarification of the identity and the German work prohibitions aim at preventing unwanted asylum applications. Sweden does not obligate asylum seekers to live in reception centers (cp. 3 § Lag (1994:137) om mottagande av asylsökande m fl.) so a corresponding work-prohibition cannot be discussed. However, it would be possible to replace the Swedish requirement of providing identification papers or cooperation in the clarification of the identity with a general work prohibition, which could be three months as in Germany, or shorter.

The benefits of a definite work prohibition are that it would be limited in time and provide a clear regulation. It could also have a positive effect when it comes to limiting the immigration of economic migrants. Although, as previously discussed, the problem with immigrants applying for asylum on false premises in Sweden can be assumed to be low. It is therefore questionable if a definite work prohibition is truly necessary in this aspect. One must also keep in mind that the Swedish ambition is that asylum seekers should be granted the possibility to work in order to lower state costs. Introducing a general work prohibition would of course be at odds with this ambition. Thus a general work prohibition should not be introduced.

Considering that only a minority of the Swedish asylum seekers are granted an exemption from the work permit obligation it is questionable if the current Swedish regulations, or their application in practice, are in harmony with the objectives of the legislation.[129] As discussed above, it is also likely that the Swedish demand for identification papers or cooperation would be considered disproportionate under the ICESCR. Whereas it is rational to require asylum seekers' cooperation, it seems necessary to change the law in a less strict direction. As many asylum seekers cannot provide identification papers, it must be the point of departure that an exemption from the obligation of a work permit should be granted also in those cases as long as the asylum seeker has made reasonable efforts in order to obtain identification papers. It could even be argued that the requirement of identification papers is not necessary at all, considering the small benefits that can be obtained in regards of sending a deterrent signal to economic migrants.

However, as it is still not impossible that some groups in this case would take advantage of the asylum rights in terms of gaining access to the labor market, it seems reasonable to maintain some kind of restriction. A modified requirement of cooperation, where asylum seekers as a general rule are exempted from the obligation of having a work permit and are not granted this exemption only in cases where it can be shown that they have not taken the required measures to obtain identification papers, could be one solution. Whereas this seems similar to the existing regulation, the important difference would be that the exemption from the work permit obligation

[129] See also Borg Jansson 2015, p. 351.

would be the rule rather than the exception, since the requirements for what would be considered cooperation would be lowered. It also seems reasonable that the Swedish Migration Agency would be obligated to suggest measures in those cases where it is considered that the asylum seeker has not done enough to fulfill the requirement of cooperation. Only if the asylum seeker fails to adequately take the suggested measures should he be denied the work permit exemption. In order to live up to the requirements of a foreseeable law, it would also be necessary to provide clearer guidelines considering what can be required under different circumstances. However, it should be noticed that in case the requirement of cooperation is maintained, there will always be a problem regarding the clarity of the law, seeing that each case will inevitably be different. Still, it should not be impossible to set a standard on what is required under this regulation, and leave the rest to the margin of appreciation granted to the administrative authorities.

The regulations prescribing that those asylum seekers who probably will be deported immediately or transferred due to the Dublin II Regulation are not exempted from the work permit obligation concern asylum seekers that will only briefly reside in Sweden and do therefore not raise any concerns.

4.2.2. Protection of the Labour Market

Both Sweden and Germany adhere to the principle that a country should in the first place provide work for its own citizens. While as a general rule, every job that is offered an asylum seeker in Germany must pass an in-depth investigation assuring that no privileged worker could have been hired, Sweden executes no such restrictions. As has been discussed above, the weak position of the asylum seekers on the labor market means that they will hardly be able to compete with the national working force. Even though the level of asylum seekers has increased greatly over the past few years, it is still improbable that they pose a considerable threat to the national working force as they are in an unfavorable position, as discussed above. The German requirements for the consent of the FWA in many cases results in a practical work prohibition, whereas the Swedish ambition is to enable asylum seekers to work. Considering these factors, an assessment of the negative impact on the labor market

and an obligation to grant jobs to prioritized workers should not be introduced in Sweden.

Within the evaluation of the FWA it is ensured that the asylum seeker is not hired under unfavorable grounds. This has the positive effect on both preventing the exploitation of asylum seekers and ensuring that the standards of the labor market are not lowered. At the same time, it only offers a minor intrusion on the right to work, as long as it is not carried out for an unreasonable amount of time. The effects of this regulation must however be weighed against the enhanced administrative costs resulting from this evaluation as well as the importance of the possible benefits. As discussed above, the risk for that the standards would actually be lowered due to the asylum seekers is not considerable, seeing that asylum seekers only constitute a small percentage of the working force. However, it is still possible that some negative effects of this kind can be traced and simultaneously it is possible that the asylum seekers as a group could also somewhat benefit from supervision in this regard. It should therefore be considered if a similar regulation could be introduced in Sweden.

5. Conclusion

The earlier chapters of this paper examine the German and Swedish legislation concerning asylum seekers' access to the labor market and compare them with the standards set by the ICESCR. The Swedish regulation is also discussed from a *de lege ferenda* perspective, where it is evaluated whether the requirements of the ICESCR as well as the goals set by the Swedish legislator motivate any law amendments. In this context it is also discussed whether Sweden should introduce any of the German regulations into its legal system.

Abolishing legal regulations preventing asylum seekers from enjoying the right to work is not costly. The progressive nature of the convention can hence not be used as a justification for not granting asylum seekers the right to work. Further, it has been shown that asylum seekers fall victim to an unequal treatment, seeing that the restrictive regulations are aimed directly at asylum seekers. This can only be justified if the discrimination is based on a reasonable and objective criterion, pursues a legitimate aim, and is strictly proportionate to that aim.

The German assessment of the impact on the labor market and the obligation to hire prioritized workers could result in a practical work prohibition of 15 months. Simultaneously it is questionable how effective those measures are in protecting the labor market, considering that asylum seekers already are in such an unfavorable position. Thus, these regulations cannot be considered proportionate under the ICESCR. Although it is unsure to what extent the three-month work prohibition ensures the departure of rejected asylum seekers as well as prevents unfounded asylum applications, it is possible that the regulation is proportionate. The likelihood that asylum seekers find work during the first three months is probably low. Furthermore, to fully enjoy the right to work a certain length of the occupation is often needed. The work prohibition during the obligation to stay in the reception center on the other hand, can extend up to six months. Due to the reasons discussed above, it is unlikely that a longer work prohibition is proportionate to the goals of ensuring rejected asylum seekers departure and preventing unfounded asylum

applications. Yet the obligation to live in the reception center also ensures a swiftly conducted asylum process. As this is of great importance both to the state as well as for the asylum seeker, it is possible that the regulation is proportionate to this goal.

The Swedish requirement of cooperation in the clarification of the identity is interpreted strictly, which leads to a majority of asylum seekers not obtaining an exemption from the work permit. The purpose of the regulation is to send a deterrent signal to prevent people from applying for asylum on false premises. However, as has been shown in this paper the risk of this is not considerable, yet the regulation still leads to that a great majority of the asylum seekers are denied the possibility to work. This cannot be considered proportionate under the ICESCR. It is also questionable if the current Swedish regulation complies with Article 4 ICESCR, which requires that limitations on the rights of the Covenant must be determined by law. The preparatory works do not specify what the requirement of cooperation contains and the guidelines of the Swedish Migration Agency can be considered unclear, which had led to uncertainty regarding how this requirement should be applied in practice.

Since it is possible that the current Swedish regulation does not live up to the ICESCR, an amendment could be considered. If some form of requirement of cooperation in the clarification of the identity is maintained in order to prevent pull effects on economic migrants, it ought to be designed in less restrictive way than the current legislation. In order to live up to the ICESCR it would be advisable to prescribe that the main rule is that all asylum seekers should be exempted from the work permit obligation and that a denial based on failing cooperation is thought to serve as an exemption. The requirement of cooperation should not signify that the asylum seekers in most cases need to confirm their identity, but simply that they take the measures that can be regarded as reasonable considering their possibilities. In this regard, it would be advisable to obligate the Swedish Migration Agency to suggest measures in those cases where they consider that there has been a lack of cooperation. Only if those requests are not sufficiently fulfilled, should it be possible to not grant an exemption from the work permit. If the regulation is altered in this way it should fulfill the requirement of proportionality under the ICESCR. One must however bear in mind that this kind of regulation always threatens to be unclear, since the circumstances will differ from case to case. It is therefore necessary to provide clear

guidelines and set a standard for which measurements are usually required in order for the regulation to comply with Article 4 ICESCR.

As the Swedish ambition is to enable asylum seekers to provide for themselves and thereby lowering state costs, it would not be advisable to introduce a work prohibition similar to the German three-month work prohibition. The German priority review threatens to be illegitimate under the ICESCR and should not be introduced in Sweden already on this ground. Moreover, Sweden rightly considers the risk of the national work force being pushed aside as negligible. This contributes to the conclusion that a Swedish priority review should not be considered. As with Germany, one of the Swedish objectives is that foreigners should be hired on similar conditions to those of national worker's. Therefore, Sweden could consider executing some type of surveillance on asylum seekers' working conditions, especially seeing that this would result in only a minor intrusion on the right to work, especially if it is limited in time.

To conclude, Sweden should consider changing its present regulation in a way that grants bigger parts of the asylum seekers access to the labor market. Since asylum seekers suffer the risk of being exploited and since such exploitation could somewhat contribute to lowering the standards on the labor market, it could be considered whether some form of surveillance should be introduced to ensure that the working conditions are comparable to those of a national worker.

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