Protecting (im)migrants and ethnic minorities from discrimination in employment: Finnish and Swedish experiences

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Foreword

This is a paper of the ILO's Migration Branch. The objectives of the Branch are to contribute to (i) the evaluation, formulation and application of international migration policies suited to the economic and social aims of governments, employers' and workers' organizations, (ii) the increase of equality of opportunity and treatment of migrants and the protection of their rights and dignity. Its means of action are research, technical cooperation and advisory services, meetings and work concerned with international labour standards. The Branch also collects, analyses and disseminates relevant information and acts as the information source for ILO constituents, ILO units and other interested parties.

The ILO has a constitutional obligation to protect the 'interests of workers when employed in countries other than their own'. This has traditionally been effected through the elaboration, adoption and supervision on international labour standards, in particular the Migration for Employment Convention (Revised), 1949 (No. 97); the Discrimination (Employment and Occupation) Convention, 1958 (No. 111); the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143); and the non-binding Recommendations supplementing them. International legal instruments of this kind are designed to influence national legislation and regulations in each country which has ratified these Conventions; and in this way they aim at changing not only legislation but actual practices as well.

The key concern of ILO standards for migrant workers is non-discrimination or equality of opportunity and treatment. Many countries broadly adhere to this objective in the economic and social spheres. Some countries ratify ILO Conventions[1] and to their level best to fulfil the obligations deriving from them. One might expect, therefore, that discrimination would no longer be part of the legislation or practices of these countries. Unfortunately, a great deal of circumstantial evidence exists that this assumption does not hold in certain respects and especially not at the workplace in private or public enterprises; and such evidence also exists for countries not having ratified ILO Conventions.

Therefore, the ILO has launched a global programme to combat discrimination against migrant workers and ethnic minorities in the world of work. This programme, which focuses on industrialized migrant receiving countries, aims at tackling discrimination by informing policy makers, employers, workers and trainers engaged in anti-discrimination training on how legislative measures and training activities can be rendered more effective, based on an international comparison of the efficacy of such measures and activities. The programme covers four main components: (i) empirical documentation of the occurrence of discrimination; (ii) research to assess the scope and efficacy of legislative measures designed to combat discrimination; (iii) research to document and to evaluate training and education in anti-discrimination or equal treatment; (iv) seminars to disseminate and draw conclusions from the research findings.

In this paper, the legislative and other redress mechanisms in place in two Nordic countries, Finland and Sweden, are presented and assessed as regards their efficacy in protecting non-national workers from discrimination in employment. After a thorough analysis, in which the

[1]Forty in the case of Convention No. 97, one hundred and twelve in the case of Convention No. 111, and seventeen in the case of Convention No. 143.

author frequently refers to experiences gained in other countries, the paper concludes convincingly that the existing legal framework in these two countries falls short of effectively protecting migrant workers from discrimination and that the redress mechanisms are insufficient. In the final chapter, which is of relevance not just to the two countries covered in this report, suggestions are made concerning the issues that are indispensable for any type of anti-discrimination legislation to be really effective, i.e. to provide adequate protection and redress mechanisms against unlawful discrimination. As such, this paper provides useful guidance to legislators and policy makers in all countries with ethnic minority or migrant populations.

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1. Introduction[1]

Research carried out under the auspices of the ILO found that discrimination against migrant workers is widespread and pervasive in the labour markets of industrialized countries.[2] Some of the problems migrants and minorities[3] face in the labour market are connected with objective, factual handicaps such as inadequate language skills or training. But, in addition, minorities and migrants experience discrimination on grounds of their nationality, colour, religion, race or ethnic origin. Discrimination is common in such fields as access to jobs and training opportunities, work allocation and promotion within enterprises, as well as terms and conditions of employment (Zegers de Beijl, 1995, p. 23).

The discrimination[4] faced can be direct, meaning a less favourable differential treatment of workers on the basis of nationality, race, gender, or some other comparable ground. Probably more widespread, and definitely more difficult to combat, is indirect discrimination. Indirect discrimination occurs in apparently neutral situations when the same condition, treatment or criterion is applied to all job-applicants or employees, but which in their effects disadvantage persons belonging to a specific group (Ben-Israel, 1993, p. 230).

Discrimination is just one factor which operates amongst many- others being structural changes in the economy and the characteristics of migrants and minorities themselves - in the social inclusion or exclusion of minorities and migrants. Discrimination deserves, however, particular attention, because there is still a tendency to underplay the processes of exclusion of migrants and minorities through acts of discrimination in daily life and the consequences of these processes. In addition to emotional and socio-economic hardships individual victims of discrimination have to bear, discrimination in the field of work has also negative effects for the wider society. Integration policies to counter exclusion, such as re-training and regional policies as well as language initiatives, will all prove to be wasteful if discrimination is not simultaneously addressed. Furthermore, discrimination entails economic losses in the receiving countries' labour markets because labour's potential is not being fully used (Dex, 1992; Wrench, 1995, p.28).

[1] The author gratefully acknowledges the assistance given by the staff of the Finnish Ministry of Labour, International Employment Services and Migration Branch, and the Office of the Swedish Discrimination Ombudsman in providing information and thanks them for their reading of this paper.

[2] See Zegers de Beijl, 1990; Foster, Marshall and Williams, 1991; Raskin, 1993; Bovenkerk, Gras and Ramsoedh, 1995; Colectivo IOE, 1995; Goldberg, Mourinho and Kulke, 1995; Bendick, 1996.

[3] With respect to the question of terminology, it is important to note that there many different terms and definitions for the issue under discussion. As of yet, no common language exists, not even within Western Europe, for discussing the topics at issue: "immigrants", "foreigners", and "ethnic minorities" can refer to similar populations in some countries and completely different groups in others. In this paper the term (im)migrant is used in the broadest sense of the word referring not only to migrant workers but also to refugees and asylum seekers residing in Finland and Sweden. The terms foreigner and (im)migrant are used interchangeably. The term minority refers to well-defined groups that differ from the majority of the population in terms of some "ethnic characteristic", such as origin or skin colour. In the chapter treating Finland the term "national minority" is used in the specific Finnish context. This term refers to minority groups whose members are Finnish citizens and which compose a distinct and long-established group on the territory of Finland (Myntti, 1992, pp.1-2). Finnish national minorities are the Swedish-speaking population, the Sami, the Roma, the Jews and the Tatars.

[4] In the chapter on Sweden the term "ethnic discrimination" is used following the legal terminology in this country.

This paper looks into the scope and effects of anti-discrimination legislation in two Nordic countries, Finland and Sweden. The aim of the paper is to provide a description of the current legal and institutional frameworks aimed at countering the discrimination to which immigrants or ethnic minorities may be subjected in the labour market and to assess the effectiveness of these frameworks. The examination given for the two countries is not similar for two reasons. Firstly, this is the first ILO paper written on the Finnish legislation whereas Swedish legal provisions have already been examined in a previous ILO publication[1]. The chapter on Sweden provides an update of this publication. Secondly, Sweden is a relatively "old" European immigration country as opposed to Finland which is a newcomer in this respect. Thus, certain issues, such as general governmental bodies dealing with refugee and migrant issues, are looked at in more detail in the chapter on Finland, because of the novelty of these issues in the Finnish policy-making machinery.

This paper attempts to clarify the possibilities and the limitations of the different legal means to combat discriminatory treatment in the light of Finnish and Swedish experiences. The report does not intend to formulate a model for effective anti-discrimination legislation, but suggestions made at the end of the paper aim at providing general insights with respect to increasing the efficacy of anti-discrimination legislation.

2. Finland

2.1. Introduction

This chapter looks into the scope and effects of anti-discrimination legislation in Finland. The purpose of this chapter is to describe the Finnish legal framework on discrimination to which immigrants or minorities may be subjected in employment, as well as the public institutions involved in this area and to assess the effectiveness of this legal and administrative structure.

In Finland no empirical research on discrimination against migrants or national minorities in access to the labour market has been carried out. It can, however, be assumed that the situation in Finland is not different from situations in other Western European countries, where empirical data demonstrate the existence of discrimination.

Unemployment figures provide additional support for the assumption that the Finnish labour market is not free from discrimination. The position of immigrants in the labour market worsened rapidly between the years 1991 and 1993. According to the statistics, in 1994 the unemployment rate among foreigners was 52.8 per cent- for some groups as high as 92 per cent[2] - while the unemployment rate for the whole labour force was 20.6 per cent (Statistics Finland, 1996, p. 23). The high number of unemployed can partly be explained by the prevailing recession, especially because the main stock of foreign labour entered Finland precisely during the recession (Ekholm and Pitkänen, 1995, pp.15, 21). However, the extremely high unemployment rate cannot be

[1] See Zegers de Beijl, 1991.

[2] The employment statistics from 1994 show that 92 per cent of Somalis and 91 per cent of Iraqis were unemployed (Finland Statistics, 1996, p. 23).

completely explained by referring only to the recession and structural changes in the economy. Discrimination must have played a role. Another indication for assuming that discrimination takes place can be derived from social surveys examining the socio-economic position of the Roma.[1] Surveys demonstrate that the social position of the Roma, including their labour market situation, is less favourable than that of the rest of the population (Myntti, 1992, p. 4-5).

2.2. Migration in Finland

Finland has a long tradition as a country of emigration. More than one million of Finns have emigrated, with Canada, the United States and Sweden being the most important destinations. Immigration controls for non-Nordic nationals have always been strict in Finland[2] and foreign labour has not been actively recruited at any point. Merely former Finnish citizens, who emigrated in the late 1960s and the early 1970s, have been encouraged to return during a short period of labour shortage in the second half of the 1980s (Ornbrant and Peura, 1993, pp. 219-220).

During the 1980s a change in the migration flux took place and Finland changed rapidly from an emigration country into an immigration country. As late as 1987 there were only some 17,000 foreigners, but by the end of 1994 the figure stood at 61,876. The total number of foreigners more than tripled during the period. Finland is the European country with the highest increase in foreign population in such a short period of time. By the mid 1990s the flow of foreigners started to level off after the number of asylum-seekers dropped sharply in 1994. The number of foreigners, however, continues to grow. Yet, even after the phase of extremely rapid growth in migration, the share of migrants in the total population is only 1,2 per cent, the lowest in the European Union (Ekholm and Pitkänen, 1995, pp. 6-7, 13; Pakolais- ja siirtolaisuusasiain neuvottelukunnan mietintö, 1994, p. 7).

A big group of foreign citizens residing in Finland consists of former Finns. Both former Finns returning from Sweden, North America and Australia and so called ethnic Finns, the Ingrians, from the former Soviet Union fall into this category. Another large group of migrants comes from Estonia and Russia. A considerable part of foreigners has entered Finland under the refugee or humanitarian status or through family reunification. The largest groups in this category come from Vietnam, Somalia and the former Yugoslavia (Ekholm, Pitkänen, 1995, pp. 6-7).

2.3. International instruments binding on Finland

Finland does not have a long standing tradition of anti-discrimination legislation and until recently the status of the fundamental rights contained in the Constitution has been relatively weak. Finland

[1]The Roma came to the country already in 1500s. Nowadays the Roma enjoy permanent residence, speak Finnish as their mother tongue and - like the majority of the population - are members of the Finnish Lutheran Church. In certain aspects the Roma, however, follow their own traditional cultural habits (Myntti, 1992, p. 4-5).

[2]Denmark, Finland, Norway and Sweden have had a common labour market since 1954-55 which is much more liberal than that currently existing in the EU. The entering of Denmark, Sweden and Finland into to the EU has forced the Nordic countries to revise certain treaties concerning their common labour market in order to make it compatible with the EU regulations and the requirement of non-discrimination between Nordic and other EU citizens (Fisher, Straubhaar, 1996, pp. 121-122).

is, however, a party to major international human rights instruments, which embody the principle of non-discrimination and the promotion of equality between individuals and between groups of people. Because of the lack of a national tradition, the international instruments have had a major effect in throwing light on certain human rights issues, such as discrimination.

In order to become part of the Finnish national legal order, international treaties have to be incorporated into domestic law. Incorporation happens most frequently through an Act of Parliament or a decree in blanco. All incorporated treaties are legally binding and directly applicable before the courts and administrative authorities, and individuals can make use of these treaties in their dealings with authorities (Myntti, 1992, pp. 7-8; Scheinin, 1994, p. 83-85).

Human rights instruments can also have an indirect impact on the relations between private actors through the application and interpretation of national provisions. In this case, the rulings do not rest on articles of treaties as an independent legal norm, but the international obligations are taken into consideration in the interpretation of the national legislation.

2.3.1. Universal standards

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was ratified by Finland in 1970. Finland accepted the competence of the Committee on the Elimination of Racial Discrimination to receive and consider petitions from individuals or groups claiming to be victims of a violation of the Convention in 1994. Until now no such petition has been submitted. CERD outlaws racial discrimination mentioning race, colour, descent, or national or ethnic origin as prohibited grounds for unequal treatment. Nationality as a ground of discrimination is expressly excluded from the scope of this convention. CERD appears to aim to go beyond mere equality before the law and to call for special measures to ensure equality in fact. The issue of special measures for the protection of equal opportunities of minorities remains, however, controversial both in the international and the Finnish debate (Bloch, 1995, pp. 312-313; Myntti, 1992, p. 9-10).

The International Covenant on Civil and Political Rights (ICCPR), which was ratified by Finland in 1976, under Article 2(1)a obliges States party to this Covenant "... to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized ... without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Article 26 contains a specific non-discrimination clause. It prohibits discrimination on "any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". "Other status" has been interpreted to include nationality, which is demonstrated by the case of Gueye et al. v. France in which the Human Rights Committee found a violation of Article 26 because of discrimination on the ground of nationality (Communication No. 196/1985). Finland has ratified the Optional Protocol to the Covenant recognizing the competence of the Human Rights Committee to consider communications from individuals claiming to be victims of a breach of the rights under the Covenant (Myntti, 1992, pp. 8-9; Scheinin, 1995, p. 45).

The ILO's Discrimination (Employment and Occupation) Convention, 1958 (No. 111) is an instrument specifically concerning discrimination in respect of employment, occupation, employment policy and vocational training. It was ratified by Finland in 1970. The Convention is of a general nature and does not exclude any kind of employment or categories of workers from its scope. It aims at equality of opportunity and treatment in both public and private employment and applies to national and foreign workers equally. Whereas foreign workers are not protected

against discrimination on the basis of their nationality, they are protected against discrimination on the basis of race, colour, sex, religion, political opinion, national extraction or social origin as enlisted in Article 1(1)(a).

Convention No. 111 defines discrimination as any distinction, exclusion or preference based on the prohibited grounds mentioned in article 1(1) (a) which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. The definition contains three elements: the existence of a distinction, exclusion or preference constituting a difference in treatment, a ground on which the difference in treatment is based and the discriminatory outcome of this difference in treatment. In contrast to the complaints procedures under other international instruments, ILO procedures are not open to individuals claiming to be victims of violations, nor are they aimed at the settlement of individual cases (Samson, 1994, pp. 135-136). However, directly concerned non-governmental organizations, such as trade unions, can submit representations and States can lodge complaints with the ILO vis- à- vis another State in respect of ratified ILO Conventions.

The international instruments mentioned above do not include nationality as a prohibited ground of discrimination. Finland is not a party to the three main standards specifically designed to ensure non-discrimination between national and non-national workers. These instruments are the ILO's Migration for Employment Convention (Revised), 1949, (No. 97), the Migrant Workers (Supplementary Provisions) Convention, 1975, (No. 143) and the United Nations ' International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. It is obvious that instruments which explicitly include nationality among the grounds on which discrimination is not permitted offer more specific opportunities for protecting the rights of non-national workers vis-a-vis national workers without interfering in states' prerogative to make a distinction between its citizens and others (Zegers de Beijl, 1995, p. 25).

2.3.2. European standards

In 1990 Finland ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Council of Europe's most important legal instrument, which in Article 14 prohibits discrimination on grounds "such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Finland has also adopted the enforcement mechanism of the Convention by recognizing the competence of the European Human Rights Commission to receive petitions from any person or group claiming to be a victim of a violation of the Convention (Myntti, 1992, p. 9). The Commission or a State party may bring the case before the European Court. The significance of this system is highlighted by the mandate of the Court to render binding decisions including the award of damages to victims of violations.

In 1991 Finland ratified the European Social Charter (ESC), which state in Part 1, paragraph 2 that all workers have the right to equality in working conditions and refers in particular to conditions of employment, pay, trade union membership and accommodation in paragraph 19(4). The ESC was incorporated through an Act of Parliament. The intention behind this implementation method was to make the provisions of the ESC, which on the international level may appear "softly" worded, justiciable rights within the domestic legal sphere (Scheinin, 1994, pp. 84-85). The effect of these European Councils' human rights instruments is, however, limited by the condition of reciprocity in these instruments. This means that the instruments are only applicable to citizens of countries that are also parties to the instruments.

Finland became a member of the European Union in 1995. The EU has achieved much to guarantee equal treatment of Union citizens who take up a gainful activity in another member State and, to a lesser degree, of workers from non-Union countries. The protection of migrant workers in the European Union is mainly based on preferential treatment of workers with nationalities of the member States, since Union workers are entitled to free movement. The rights of third-country nationals vary depending on whether the European Union has concluded a separate agreement with the State in question (Niessen, 1995, pp. 328, 332-333).

2.4. National regulations against discrimination

Finland has a special law covering gender discrimination, the Equality Act, but not a comprehensive, general anti-discrimination law. The absence of a comprehensive anti-discrimination law can partly be attributed to the fact that Finland became an immigration country only recently. It has not been considered necessary to promulgate an anti-discrimination law covering nationals and non-nationals, let alone to develop a general statute covering all groups in need of protection against potential unequal treatment. The existing provisions granting protection against discrimination are scattered in the Finnish legislation.

The following extracts give an overview of the regulations against discrimination in the field of work which can be found in Finnish law. Furthermore, indications of the conditions required for submitting claims before the courts are presented. Regulations relating to social security - a crucial area in the context of equal treatment and opportunities - are not examined, since the question of social security falls outside the scope of this paper.

2.4.1. Constitution

Instead of having one single Constitution, Finland has a number of Acts which have constitutional status. In the context of discrimination, one of the most important legislative changes during the recent years was a revision of the fundamental rights contained in chapter 2 of the Constitution Act.

One aim of the constitutional amendment was to clarify and enforce the relation between fundamental rights and human rights instruments. The amendment incorporates to the Constitution Act the principle that the rights enshrined in human rights treaties apply to all persons residing within the jurisdiction of Finland, irrespective of their nationality. The amended fundamental rights refer either to "everyone" or "every human being" as the subject of constitutional rights and freedoms. Previously the Constitution Act guaranteed the fundamental rights solely to Finnish citizens (Government Bill, HE 309/ 1993).

An ultimate source of protection against discrimination by an organ of the state is laid down in section 5 of the Constitution Act. It reads: " Everyone is equal in relation to the law. No one may without a justifiable reason be given a different status based on sex, age, origin, language, religion, conviction, opinion, state of health, handicap or any other reason which refers to his person." Section 5 also declares that equality between sexes in societal activities and in employment shall be promoted.

Section 14, on the linguistic and cultural rights of minorities, declares both Swedish and Finnish to be the national languages and guarantees "the right of the Sami, the Roma and the other groups to preserve and develop their language and culture". The purpose of the provision is to "protect

the preservation of linguistic and national minorities and their original culture" (Government Bill, HE 309/1993).

The new fundamental rights provisions underline the duty of the public authorities to promote all constitutional and international human rights. The general promotional duty clause in section 16 reads: "The public authorities shall ensure the respect for fundamental rights and freedoms."

The fundamental rights extend their effect to the interpretation of all legislation and give guidance for action by authorities. The previous fundamental right provisions included in Chapter II of the Constitution Act were rarely directly applied by the Finnish courts or administrative authorities (Myntti, 1992, pp. 11-12). During the 1980s direct reference to fundamental rights became more common in the practice of the Supreme Court and a conception of a more direct applicability of the Constitution was expressed in the Government Bill for the new fundamental rights. The amendments are intended to strengthen the possibility of an individual to refer directly to the fundamental rights provisions in support of his or her rights (Government Bill, HE 309/1993).

It has been suggested that the new fundamental rights provisions do not only define the constitutional basis of the relations between the state and the individual but partly extend the effect to relations between individuals as well (Viljanen, 1994, p. 48, 59). The Government Bill reflects this idea by stating that the fundamental rights express the generally accepted values of the society. Therefore, it would not seem to be sufficient if their effects covered only the relation between the state and the individual. In practice, the effect of the fundamental rights to the relation between individuals comes mainly through the interpretations given for specific provisions in court rulings. The impact of the fundamental rights provisions to the court practices and rulings is yet to be seen since the amendments only came into force in 1995.

The supervision of the observance of human and fundamental rights in the use of public authority falls within the competence of the Parliamentary Ombudsman, in accordance with section 49 of the Constitution Act. The Parliamentary Ombudsman has been the first Finnish authority to use systematically international human rights treaties in decision-making.

The Ombudsman's powers embrace both civil and military state administration as well as the administration of the municipalities. The Ombudsman can investigate, either on the basis of a complaint or upon his own initiative, the activities of individual public authorities and determine whether offences or errors have been committed. If administrative decisions are found to be illegal the matter can be brought before the court by the Ombudsman. On the basis of unreasonable or unfair practice the Ombudsman can initiate disciplinary measures or express his criticism. The effect of such criticism reaches far beyond the actual legal powers of the Ombudsman.

An individual claiming that his or her human or fundamental rights have been violated by the authorities or civil servants may appeal to the civil court. The person may also turn to the Parliamentary Ombudsman and lodge a complaint about the conduct of the public authorities or institutions concerned. The Ombudsman is obliged to investigate the matter under section 7 of the Regulations concerning the Parliamentary Ombudsman. Section 7 also stipulates that criminal proceedings can be brought against the civil servant suspected of a violation of the human or fundamental rights by the Ombudsman or the public prosecutor. The injured party is entitled to demand payment of damages in the court proceedings according to the principles of the Act on Compensation for Damages.

2.4.2. Penal Code

Sections 6, 7 and 8 of Chapter 11 of the Penal Code enact as punishable genocide, preparation of genocide and incitement against a population group when any national, racial, ethnic or religious group or any population group comparable to these groups is the object of certain activities. In a suspected case of incitement against a specific group of people an order from the Ministry of Justice is needed before the prosecutor can proceed.

In 1996 the Committee on the Elimination of Racial Discrimination criticised the Finnish authorities for understating racist violence in the country. Linked to the same subject, a proposal for including racial motives as an aggravating factor in criminal cases has been put forward in public debate by Mr. Scheinin, assistant professor of constitutional law. In Sweden, racial motives have been regarded as an aggravating factor in criminal cases since 1994. So far neither the Finnish Parliament nor the Government have responded to this proposition.

A general provision on discrimination is laid down in section 9 of Chapter 11. The provision prohibits discrimination in business activities, exercising a trade, public services, official functions or other public activities, or when organizing public events or general meetings.

The Penal Code was comprehensively amended in 1995 and in this connection a new provision on employment- related discrimination was added to the Penal Code. The new provision, section 3, chapter 47 of the Penal Code, applies to discrimination in employment both at the stage of recruitment and during the employment relationship. The provision proscribes discrimination on grounds of race, national or ethnic origin, colour, language, sex, age, family status, sexual orientation, state of health, religion, social opinion, political or union activity or other comparable circumstances.

An employer or his representative found guilty of discrimination at work is to be sentenced to a fine or a maximum of six months' imprisonment. The provision stipulates a sentence for "an employer or his representative, who, when advertising a vacancy, selecting an employee or during an employment relationship places a job seeker or an employee in a position of disadvantage, without due and justifiable reasons". The intent to discriminate as such is not a condition for punishability. It has to be objectively established that a person has been treated in a discriminatory way with regard to other job seekers or employees, before the condition for punishability has been fulfilled. However, the Ministry of Labour interprets the provision as follows: "An employer might state, when advertising a vacancy, conditions for example for age or nationality of an employee. In those cases employment authorities shall make certain that due and justifiable reasons for doing so exist. (...) Essential elements for discrimination in employment can in certain cases be fulfilled by mere discriminatory advertisement before resulting in actual discrimination" (Työministeriö, 6644/000/95 TM).

Before the Penal Code reform, the sanctions for the most serious offences concerning working life were prescribed in the Employment Contracts Act in the Civil Code. In the context of the reform this provision was transferred to the Penal Code. The penal sanctions relating to discrimination at work in the Penal Code are stricter than the previous ones in the Employment Contracts Act.

Individuals claiming to be discriminated against may lodge a complaint with the police, who is under a duty to investigate the complaint before sending it on the Public Prosecutor's Department.

The responsibility for instituting proceedings under the Penal Code rests with the public prosecutor.

2.4.3. Labour Law

The Finnish labour legislation, of which the Employment Contracts Act is part, applies to all persons at work in Finland, regardless of their nationality. Consequently, general legislation aimed at preventing arbitrariness, unfairness or lack of objectivity is also applicable to employment relationships of non-nationals. An employer is further obliged to pay all insurances and social security contributions according to relevant regulations both for Finnish and foreign employees (Ekholm and Pitkänen, 1995, p.37).

The Employment Contracts Act regulates the contracts concluded individually between private sector employers and employees. The scope of application of the Employment Contracts Act is defined through the concept of an employment relationship. Section 1 of the Employment Contracts Act defines the employment relationship as a relationship in which one party, under a contract and for remuneration, or against some other payment, performs work for the other party. If it is not evident in the circumstances that the work is to be made without payment, the work has to be remunerated and the Employment Contracts Act has to be applied, even when a payment has not been explicitly determined.

As the Finnish labour market is largely based on a centralized income policy system and collective agreements, the regulation of employment and labour relations is affected through voluntary agreements. About 80 per cent of the labour force in Finland is unionised and the degree of employers' organisation is equally high. Procedures and relations between the social parties are provided in the Collective Agreement Act (Bronstein and Thomas, 1995, p. 6).

Collective agreements regulate the terms of employment in a detailed manner. If a generally binding collective agreement exists[1], its terms are to be applied as minimum conditions by all employers in that field irrespective of whether they belong to the employer association which has concluded the agreement. The collective labour agreements generally provide better terms and conditions for employees than the legislation. For example, no minimum wage or salary provision is contained in the Labour Law whereas some collective agreements include such provisions (Johnson and O'Culachain, 1991, p. 75, 78-79).

Apart from the conditions laid down in nationally binding collective agreements, the employer and employee are in principle free to agree on the terms of their relationship. Many provisions of the Employment Contracts Act are optional and applicable only as far as the parties have not agreed otherwise. The Act contains, however, some mandatory provisions. Terms of an employment contract that conflict with mandatory provisions laid down in the Employment Contracts Act are null and void.

The general anti-discrimination provision laid down under section 17 of the Employment Contracts Act is such a mandatory provision. Section 17(1) lays down that an employer must observe terms of remuneration and other conditions of employment in accordance with the valid collective agreements or practices, and section 17(3) states that "an employer must treat

[1]The specific conditions and regulations under which a collective contract is binding or generally binding are laid down in the Collective Agreements Act.

employees equally so that no one will groundlessly be placed in a different position compared to other employees on grounds of descent, religion, age, political or trade union activities, or any other comparable factor." Sex was removed from the prohibited grounds for discrimination enlisted in 17(3) after the Act on Equality between Women and Men (the Equality Act), a specific act prohibiting sex discrimination which came into force in 1986 (Tossavainen, 1994, p. 26).

In order to take recourse to section 17(3) three factors have to exist: an employer's awareness of a characteristic of an employee, discrimination on a prohibited ground, and discriminatory effects of measures taken by the employer. A causal link between the employer's awareness of the characteristics of the employee and measures taken by the employer has to be established (Tossavainen, 1994, pp.12-13).

After the coming into force of the introduction by the Equality Act of a restriction on employers' right to appoint employees freely, subsection 4 was added to section 17 of the Employment Contracts Act. Section 17(4) stipulates that prohibition of discrimination laid down in section 17 (3) shall also apply when hiring a worker and when selecting employees, for example, for training.

Following the established interpretation relating to a similar provision in the Equality Act, the applicant alleging to be passed over on discriminatory grounds cannot appeal to the provision 17(4) before a formal hiring decision has been taken by an employer. Section 17(4) is, however, infringed if an employer, acting on any of the prohibited grounds, gives false information, for example announcing the post already filled, and a job applicant renounces his application on basis of this wrong information. An infringement of section 17(4) also takes place if the employer, basing the decision on the prohibited grounds, does not fill the post in order to avoid hiring the most qualified applicant (Tossavainen, 1994, p. 24- 26).

Claims by individuals who believe themselves to be discriminated against can be submitted to the civil courts. The procedure applied to the complaint is the procedure normally applied to a civil dispute. In the cases under section 17(3) of the Employment Contracts Act the distribution of the burden of proof has as its starting point section 17(1) of the Rules of Procedure which places the burden of proof on the plaintiff. If the plaintiff can put forth probable causes to support his claim that certain measures by an employer were based on discriminatory grounds, the employer has to provide evidence to the contrary and justify the acceptability of his measures taken (Tossavainen, 1995, p. 67). Section 51 of the Employment Contract Act or, in certain cases of an unlawful termination of employment (section 47(f) of the Act), stipulate the liability of the employer to compensate damages. Consequently, in alleged cases of unlawful discrimination a plaintiff can put forward claims for damages.

Exceptionally for a civil law provision, a punitive sanction results from an infringement of section 17(3). In connection with the reform of the Penal Code in 1995 penal provisions on offences concerning working life were abolished from the Employment Contracts Act. Section 54(1) of that Act stipulates that a sanction for an infringement of 17(3) is prescribed in section 3 of chapter 47 in Penal Code. Penal responsibility follows only from the infringement of the prohibition of discrimination on the grounds enlisted, not if the matter in question is about other forms of non-equitable treatment. If there are probable grounds for suspecting that the general prohibition of discrimination provided in section 17(3) has been violated, the public prosecutor is obliged to proceed with a criminal charge irrespective whether the individual who has been discriminated against has submitted such a request (Tossavainen, 1994, p. 48).

The termination of an employment contract is regulated by specific provisions. According to the Employment Contracts Act, sections 37 and 43, giving a notice of termination requires "especially good reasons" and an annulment of a contract requires "an important reason". The provisions list examples of the prohibited grounds for a termination of employment. If the termination of employment is based on the prohibited grounds laid down in section 17(3), this constitutes not only an unlawful dismissal but also an infringement of the prohibition of discrimination. Sufficient reasons for terminating an employment contract may be connected either with the capacity or conduct of the employee or with operational needs of the employer. The law contains detailed provisions about the procedures for the settlement of a dispute when an employee asserts unfair dismissal. Section 47(f) stipulates the compensation for an unfair dismissal. The amount of the compensation varies between three and 24 months' salary (Johnson and O'Culachain, 1991, p. 78; Tossavainen, 1994, p.42).

Section 55 of the Employment Contracts Act stipulates that the Act is under the supervision of labour inspector authorities and those employers' associations and trade unions whose nationwide binding contracts are valid for the employment sector in question. When conducting their duties, labour inspector authorities are ordained to work in close cooperation with the social partners. Consequently, the labour inspector authorities are under the obligation to monitor the implementation of the regulations of the Labour Law. Labour inspectors can also bring cases to the attention of the public prosecutor.

The civil service is regulated by the Civil Servants Act. Public sector employers are allowed to discriminate against non-nationals in a limited number of cases. Under section 7 of the Civil Servants Act a person has to be a Finnish citizen to qualify for certain high offices in the judiciary, the military forces, the police, the diplomatic service and positions involving state security. According to section 11 of the Act, civil servants shall be treated impartially in their employment relationship and must not be discriminated against on grounds of descent, nationality, sex, religion, age, political or union activities or any other comparable reason. Section 6 prohibits discrimination in the stage of recruitment. Anyone who considers himself as incorrectly passed over in a decision on a state appointment can appeal this decision in compliance with existing administrative regulations.

A civil servant who acts contrary to these sections can be punished by disciplinary punishment for violating his official duties. Penalties are written reprimands, dismissal from office for 1-6 months or a removal from office. So far, there have not been cases in which expressly sections 11 or 6 of the Civil Servants Act would have been considered as violated.

Prohibition of discrimination can also be found in the Merchant Shipping Act section 15 (3), which lays down prohibitions of discrimination on the grounds of descent, religion, sex, age, political opinion or trade union activities in connection with recruitment and during the employment of maritime personnel.

2.4.4. Legal expenses and legal aid

District courts serve as the court of first instance both for civil and criminal proceedings. Each individual has the right to institute civil proceedings. As a general rule under section 1 of chapter 1 of the Act on Legal Proceedings, a plaintiff who loses a lawsuit has to pay the legal expenses of the opposing party.

Section 1 of the Act on Cost free Proceedings states that both Finnish citizens and foreigners are entitled to Cost free proceedings *inter alia* in civil and criminal cases brought before the ordinary district courts, provided their income is below certain limits. In criminal cases, cost-free proceedings can be granted already in preliminary investigation procedures irrespective of whether or not the case will eventually be brought before the court. Section 12 of the Act on Legal Aid stipulates that general legal aid can be given to a person whose domicile is not in Finland, if the case for which the legal aid is asked is connected with Finland and if granting legal aid is justified taken into consideration the financial circumstances of the petitioner.

As both the accused in penal cases and the plaintiff and defendant in civil cases are entitled to receive means tested legal aid there are no financial barriers to access to court proceedings.

2.5. Governmental bodies

There are numerous governmental bodies dealing with refugee- and migrant issues and with the related questions of racism, xenophobia and tolerance. Some of the bodies have a permanent status whereas others are established only for a limited period of time or to carry out a specific task.

2.5.1. The Office of the Ombudsman for Aliens

The Office of the Ombudsman for Aliens was instituted in 1991. It is linked to the Ministry of Social Affairs and Health. Under section 1 of the Act on the Ombudsman for Aliens, the mandate of the Ombudsman covers monitoring the status of foreigners, safeguarding their rights and promoting the collaboration between foreigners, authorities and non-governmental organizations. The Ombudsman issues written statements on individual asylum applications and proposals for deportation to the Ministry of the Interior. The Office gives advice to anyone with respect to questions of legal protection and the status of foreigners.

Section 4 of the Act on the Ombudsman for Aliens prescribes that the Ombudsman shall, when perceiving discrimination against foreigners, attain to counteract such discrimination by giving advice and directions to parties involved. Other public authorities are obliged to give the information needed by the Ombudsman for carrying out this task.

The Ombudsman for Aliens has been active in cases concerning discrimination in business activities, such as restaurants discriminating against would-be clients from ethnic minority groups. No cases concerning discrimination in the labour market have been brought to the attention of the Ombudsman. In the 1994 annual report the Ombudsman sets forth that providing sufficient evidence in employment-related discrimination cases is too difficult and, hence, the victims of discrimination hesitate to take action (Seppälä, 1995, p. 4).

During the first years of its existence, the Office of the Ombudsman has dealt with matters concerning refusal of residence and work permits, deportation decisions, decisions on refusal of entry to Finland, negative decisions on requests for family reunification, asylum seekers' applications and issues related to social security. In general, the Ombudsman does not assist foreigners in their actual court proceedings but refers the cases to specialized barristers and legal advisors. In a limited number of cases related to the issuing of residence permits and the granting of asylum the Ombudsman has appeared as a proxy for foreigners appealing to the Administrative Court and to the Supreme Administrative Court.

2.5.2. The Advisory Board for Refugee and Migrant Affairs

The Advisory Board for Refugee and Migrant Affairs was founded in 1992 by the Council of State. The Advisory Board works in connection with the Ministry of Labour and is chaired by the highest-ranking civil servant in the Ministry of Social Affairs and Health. The Advisory Board is a policy-making organ and charged with assisting the Government in the administration of immigration and refugee issues. The Board can take initiatives in developing, planning and evaluating migration and refugee policies. The Advisory Board also monitors developments in the socio-economic situation of migrants, coordinates governmental information services and promotes research. As a policy-making organ concentrating exclusively on migrant and refugee issues, the Advisory Board qualifies as a special measure to promote equality of opportunity. The Board does not, however, provide assistance in individual cases and it has no law enforcement function whatsoever.

In 1992, the Advisory Board for Refugee and Migrant Affairs adopted a programme of action against racism and xenophobia. The measures proposed addressed such questions as the need for a revision of existing legislation, reorganizing of the administrative structure dealing with immigration issues, monitoring of racism and discrimination and the compilation of statistics on these phenomena.

In 1994, the Board published a report entitled "Principles of Finnish refugee and migration policy" providing the first comprehensive review of refugee and migration policy issues in Finland. In this report, the importance of bilateral cooperation with countries from which there is immigration to Finland or to which Finns emigrate was emphasized. A multicultural section of the Board functions as a link between the authorities and migrants' and refugees' organisations. The section has brought to light the specific needs of religious minority groups, the insufficiency of mother tongue instruction, and the situation of migrants in the labour market. The section has also proposed that an Ombudsman against Discrimination be established (Ekholm and Pitkänen, 1995, p. 30).

2.5.3. The National Delegation Against Racism, Xenophobia and Anti-Semitism

The Council of State appointed the members of the Delegation and its chairperson in 1994 for a two year period. The purpose of the Delegation is to monitor racism, xenophobia and anti-semitism and to develop policy statements as an independent and critical body. The Delegation's task is to raise the awareness and sensitivity among citizens and decision-makers on the importance of combatting these phenomena. The Delegation is entitled to give statements on all issues it considers to be of major importance. The Delegation will also consider recommendations of suitable preventive measures in its field of activity. However, the resources afforded to the Delegation are small and it has been working on voluntary basis.

2.5.4. The Committee to Outline a Refugee and Immigration Programme

In 1995, the Finnish government appointed a committee with the assignment to prepare a programme for a refugee and immigration policy. The task includes outlining the Finnish contribution to the abolition of so-called "involuntary emigration", defining the criteria required for entering Finland and proposing integration measures. The procedures relating to residence permits, asylum and the granting of the Finnish nationality as well as procedures on refusal of entry and deportation are examined by the committee. Appeals procedures and enforcement of decisions are also evaluated.

The committee published an interim report in April 1996 and its final report is due by the end of 1996. In its interim report the committee pointed out that the existing legislation concerning discrimination has been described as inadequate by some commentators in Finnish debate. The importance of an unambiguous and all-encompassing anti-discrimination legislation and effective law enforcement mechanisms was emphasized in the report. Such anti-discrimination legislation was seen as important both as providing a redress mechanism for the victims of discrimination but also as a moral signal to society as a whole. The committee put forth a proposal to appoint a Discrimination Ombudsman by building on the already existing institutions of the Equality Ombudsman and the Ombudsman for Aliens. The committee suggested a redefinition and broadening of tasks and mandates of both Ombudsmen so that all kinds of discrimination, not only gender-based acts, would be covered. In the report attention was also drawn to the lack of data-collection concerning racist incidents and discrimination. The committee suggested that an independent mechanism should be created to collect information on discrimination cases and measures taken by authorities in those cases (Maahanmuutto- ja pakolaispoliittinen toimikunta, 1996, pp. 21-22).

2.6. Evaluating the effectiveness of the legislative and institutional framework

In Finland, the constitutional right to equal treatment has been elaborated in specific instruments outlawing incitement to racial hatred and prohibiting discrimination in the provision of goods and services and in the labour market. These are, however, scattered through the Penal and Civil Codes and this results in unclear and inaccessible legislation.

Judging by the very limited number of cases brought forward, the utility of the legal protection offered seems to be limited, irrespective of whether this protection is based on penal or civil law provisions. In other words, although there are provisions which could protect workers from discrimination in employment these are little used in practice by the groups in question.

In the following paragraphs the effectiveness of the different provisions concerning discrimination contained in the Finnish law is examined. In addition to this, general problems related to protection against discrimination as provided by law are discussed.

2.6.1. Problems concerning the terminology

One weakness found in the Finnish legislation is imprecise terminology concerning the prohibited grounds of discrimination. The grounds enumerated in different provisions vary considerably. Section 5 of the fundamental rights of the Constitution Act lists "sex, age, origin, language, religion, conviction, opinion, state of health, handicap or any other reason which refers to his person"; section 3 of the chapter 43 of the Penal Code "race, national or ethnic origin, colour, language, sex, age, family status, sexual orientation, state of health, religion, social opinion, political or union activities or any other comparable circumstances"; section 17(3) of the Employment Contracts Act "descent, religion, age, political or trade union activities or other comparable circumstances", and section 11 of the Civil Servants Act "descent, nationality, religion, age, political or trade union activities or other comparable factor".

A major shortcoming is the lack of precision about discrimination on the grounds of nationality. Discrimination on the grounds of nationality is explicitly prohibited only in the discrimination provision contained in the Civil Servants Act. The grounds for discrimination in the Employment Contracts Act, section 17(3) have been adapted from the grounds enlisted in the ILO convention

111. The Employment Contracts Act Committee, which prepared the Government Bill for the Employment Contracts Act, stated in its report that "descent" includes race, colour of skin, national and social origin and also nationality (Tossavainen, 1994, p.14). The wording itself is not, however, explicit and remains ambiguous.

The Employment Contracts Act lays down that it applies to everyone in an employment relationship in the private sector. Consequently the Act covers everyone who has a wage-earning relationship, without entering into any distinction as to whether the worker is a national or not. Explicit listing of nationality as a prohibited ground for discrimination in all provisions would, however, clarify the scope of protection and strengthen the protection provided for non-nationals.

2.6.2. Effectiveness of the Penal Code provisions

Finnish legislation includes a penal code provision on labour market discrimination in the context of the Penal Code revision in 1995. It is too early to draw conclusions on the implementation of the new provision and as yet, there have been no cases brought under the new provision. In light of previous information it can, however, be stated that cases under discrimination provisions are rare.

The statistics compiled between 1988 and 1994 from court rulings indicate that each year between one and eighteen sentences were delivered under the section 6 of chapter 13 (section 9 of chapter 11 since 1995 revision of the Penal Code) prohibiting discrimination in business activities, exercising trade etc. There are no statistics from which it could be seen how many charges are filed under the different discrimination provisions in the Penal Code. According to Statistics Finland, a new method for registering complaints is to be adopted by the police during the year 1996. After the new method is introduced statistics indicating the ratio of complaints filed to sentences delivered can be compiled.

Anti-discrimination provisions in the Penal Code are doubtless needed to give weight to the prohibition of discrimination and as a last resort or safeguard. The Penal Code provisions have a deterrent effect, which should not be overlooked, but this function has its limitations, and as can be seen from above, penal actions are rare. There are several reasons why the use of criminal sanctions is limited and why criminal provisions should not be the only way to attempt to prevent discrimination.

A central problem concerning Penal Code provisions is that a judgement in a criminal action requires a significantly higher degree of proof than does that of a civil action. The standard of proof can rarely be met and consequently, it is significantly more difficult for the injured party to win a criminal action than to win a civil action. Studies in European countries with comprehensive penal regulations have shown that each year only a very small proportion of criminal actions have been pursued and, in most cases, they proved unsuccessful due to the high degree of proof required (Kulke, 1996, p. 79).

In order to be effective, the Penal Code provisions must be backed up by an active prosecution policy. Experiences gained in other countries with Penal Code provisions on discrimination show that among the reasons why judicial proceedings are rarely instituted one can find the inadequate reaction of police authorities to complaints, the lack of experience on the part of lawyers or the public prosecutions department or the judiciary (Zegers de Beijl, 1991, p. 21; Zegers de Beijl, 1995, p. 38).

A further problem with Penal Code provisions is that population groups most vulnerable to discrimination, such as migrants, are unfamiliar with legal procedures and might not trust the impartiality and fairness of the authorities. Consequently, they refrain from reporting the matter to the police for further investigations. Sometimes aggrieved individuals approaching the police find cause to complain about their treatment at the hands of the police, usually on the basis that the complaint is not taken seriously, or that they are subject to harassment. The Finnish representatives of national minority groups have reported indifferent attitudes of the police and other authorities, which, it is alleged, make it difficult or impossible for a person who has suffered discrimination to rely on criminal charges. An effective implementation of the Penal Code provisions requires an adequate level of awareness among the police authorities and the judiciary (Zegers de Beijl, 1991, p. 21; Zegers de Beijl 1995, p. 38; CERD/C/240/Add.2).

In order to observe the situation concerning discrimination on the labour market and evaluate the effectiveness of the Penal Code provisions and the courts in their dealings, a regular monitoring system is necessary. As mentioned before, there are no statistics at the moment from which it could be seen how many charges are filed under the different discrimination provisions in the Penal Code. After the new method of registering the crimes reported is introduced, statistics containing the ratio of complaints filed to sentences delivered can be compiled. This kind of information is necessary for monitoring the use and effectiveness of discrimination provisions in the Penal Code.

2.6.3. Effectiveness of the Employment Contracts Act

Because of the problems related to providing sufficient evidence and proof in discrimination cases, especially in the context of indirect discrimination, civil law recourse is considered more effective and given preference over penal action in discrimination charges by many experts. Furthermore, the injured parties expect from a court action primarily a real settlement and compensation for the discrimination they have suffered and not general punishment for the accused/defendant (Kulke, 1996, p. 79; Thomas, 1995, p. 63).

Section 17(3) of the Employments Contracts Act provides a civil law recourse; yet it is a problematic mixture of a penal and civil provision. Section 17(3) has rarely been applied in the courts, and the same holds true for the anti-discrimination provisions in the Civil Servant and the Merchant Shipping Act. The specific issue of employment-related discrimination on grounds of nationality, descent or other comparable ground has not come up before the courts. Consequently, it is impossible to follow up on jurisprudence on the subject. There are no related cases from which established interpretations could be drawn. Having said that, it must be kept in mind that Finland is a country applying almost exclusively a civil-law system. Thus, the precedents of the courts have not traditionally had the same importance in Finland as in States applying a case-law system. Yet, the European Convention on Human Rights, as well as the legal system of the EU, which is mainly based on case-law, are expected to have an effect on the Finnish legal system (Orasmaa, 1995, p. 17).

Hereunder, only section 17(3) of the Employments Contracts Act is examined closer, but most of the difficulties referred to in this context can be used also in explaining the lack of cases under the other anti-discrimination provisions contained in Civil Code. The Equality Act will be used as a point of reference in the evaluation of section 17(3) of the Employment Contracts Act.

Courts have made judgements based on section 17(3) in a few cases, but section 17(3) is seldom explicitly referred to in the rulings. Section 17(3) has been treated scantily in Finnish

jurisprudential literature. Partial explanation for the non-interest in the literature and the paucity of cases may be that discrimination and equality have been traditionally seen as a question of public, not civil, law. Proceedings under section 17(3) have occurred during the 1970s relating to the termination of the employment on the ground of trade union activities. In the cases where the employer was found to be guilty both damages and punitive sanctions were handed down by the courts (Tossavainen, 1994, pp.11, 46, 48).

In the Finnish literature the distribution of the burden of proof has been considered as constituting a major problem in bringing discrimination cases before the courts. Under the burden of proof rule for civil actions, a person who alleges to have been subjected to discrimination has to provide proof of the discriminatory ground of the treatment to which he objects (Tossavainen, 1995, pp. 65-66). However, in case of discrimination, this proof is difficult to demonstrate since the person perpetrating the discrimination will rarely express his true motives and the evidence for discrimination is usually within that person's realm of control. Consequently, discrimination can be derived only from circumstantial evidence.

Thus, providing sufficient evidence is difficult if the burden of proof lies on the plaintiff until a causal connection between the less favourable treatment and discriminatory causes has been proven to the full conviction of the court. It has been emphasized in the legal literature that in relation to section 17(3) of the Employment Contracts Act a formalistic approach to the burden of proof should not be followed. Different aspects of the case should be taken into consideration during the proceedings when deciding on the distribution of the burden of proof (Tossavainen, 1995, p. 66).[1] What this could mean in practice is impossible to say since there are no cases from which the model could be constructed.

In relation to the burden of proof it should be kept in mind that the infringement of the general prohibition of discrimination results in punitive sanctions. If a punitive sanction is demanded against the employer, the process in question is a criminal process. In a criminal process the burden of proof is on the prosecutor and the degree of proof required for conviction is higher than in civil action.

One suitable solution for the distribution of the burden of proof in civil cases can be found in the procedures laid down in the Equality Act. On the basis of this model[2], distribution of the burden of proof in cases of discrimination should be structured in such a way that in the event of grievance, the plaintiff only has to demonstrate the less favourable differential treatment by the employer. After the less favourable treatment has been demonstrated, a situation which is called a presumption of discrimination prevails. After a presumption of discrimination is established the

[1] It can be argued that the burden of proving a case, in its true legal sense, never shifts. For example, the Court of Appeal in the United Kingdom, when considering this point, found it unhelpful to use such expressions as "shifting the burden of proof". The Court of Appeal emphasized the difference between a "prima facie case", which means providing sufficient evidence to render it likely that a discriminatory treatment occurred, after which the defendant will need to provide evidence to the contrary, and the ultimate and true burden of proving a case on the whole of the evidence (Thomas, 1995, p. 62). In this paper the question is addressed by speaking about the distribution of the burden of proof. The distribution of the burden of proof refers to the issue of what has to be proven, and with what kind of evidence, by the complainant before the defendant will need to provide evidence to the contrary or prove that there were factual reasons justifying the alleged discriminatory treatment.

[2] A slightly different model for the distribution of the burden of proof is discussed in sections 3.6.1 and 4.1.

employer bears the burden of proving that there were objective, factual reasons justifying the treatment claimed to be discriminatory (Tossavainen, 1994, pp.66-67).

Experiences relating to discrimination on the grounds of sex have shown that it was not until the introduction of the Equality Act that cases began to be brought before the courts. The "victim-friendly" distribution of the burden of proof contained in the Equality Act contributed greatly to this development. Without special stipulations on the burden of proof, victims of discrimination start out from the assumption that, due to the existing rules on the burden of proof, it is not possible to prove that a treatment was discriminatory. Consequently, victims prefer not to call for assistance before the courts and therefore do not submit the claims. On account of the existing distribution of the burden of proof in the Employment Contracts Act, there is scarcely any guarantee as to the success of a discrimination claim.

It is also difficult for an employee to obtain accurate information on which evidence of differential treatment could be based. Accurate information is especially relevant in wage discrimination cases or cases of discrimination during the hiring process. Under section 11 of the United Action Act an employer is under a duty to supply statistics on remuneration for representatives of different personnel groups. The duty of an employer to provide information is in addition regulated by nationally binding collective agreements. The information that needs to be provided, however, is not specific enough for drawing conclusions in individual cases (Tossavainen, 1994, p.67).

Furthermore, not all employers are within the scope of section 11 of the United Action Act, and there might not be a binding collective agreement on the specific labour market sector concerned. If this is the case, an employer is under no duty to surrender information to a representative of employees. When alleging sex discrimination, under section 10 of the Equality Act, the employer is obliged to provide an employee with a report on the wage scales and criteria used for assessing employees' wages as well as other necessary information on the basis of which it can be assessed whether the prohibition on wage discrimination has been observed (Tossavainen, 1994, p.67).

Section 17(4) applies to discrimination taking place in the hiring process. There seems to be a certain unclarity concerning the width of application of section 17(4)[1]. In the literature it has been suggested that section 17(4) can be infringed in cases where an employer, acting on the prohibited grounds, causes a job applicant to renounce his application. If the established interpretation relating to a similar provision in the Equality Act is followed, section 17(4) is not applicable until an employer has completed the process of hiring. Several cases brought before the courts under section 17(4) would be needed before a consistent interpretation of the section could be established.

Besides the problems related to the width of application, the protection provided by section 17(4) is weak because of questions of obtaining relevant information. Once more, the Equality Act provides a model how to tackle discrimination in the hiring phase more effectively. Section 10 of the Equality Act obliges the employer to provide information about the selection criteria and the merits of the person chosen. The Employment Contract Act does not include such an obligation, which means that the possibilities for an applicant to bring a case before the court based on section 17(4) of the Employment Act are extremely slender (Tossavainen, 1994, p. 26).

[1] A further discussion on the protection, width of application etc., that should be provided at the pre-employment stage follows in sections 3.4.3.2 and 4.1.

In general, employees tend to take proceedings against employers only after termination of an employment contract although, for example, section 17(3) applies to the employment contract and to the conditions of the contract. One explanation for paucity of the lawsuits in discrimination cases is the employees' fear of getting branded. Thus, the anti-discrimination provisions should provide adequate protection against victimisation of individuals who bring a complaint of discrimination or give information in proceedings brought by another person (Wrench, 1995, pp. 108, 111, 127). The efficacy of the civil law protection against employment related discrimination is considerably lessened if legal proceedings are taken only after the termination of the employment contract.

The Equality Act also provides an example of how to remedy the problem of victimisation. The Act seeks protection against an employer's retaliation by stipulating in section 8 that "the actions of an employer shall be deemed to constitute discrimination prohibited...if the employer...(5) weakens the working conditions or the terms of employment of an employee after the employee has appealed to the rights and obligations stipulated in the Equality Act...".

Adequate compensation and low expenses for legal proceedings are also a prerequisite for making it possible for an individual to claim his right to equal treatment through court proceedings. Under section 17(3) and 17(4) of the Employment Contracts Act the affected person is only entitled to claim compensation under the Damages Act, except in certain cases of termination of employment when special compensation is stipulated. The Equality Act provides special regulations on damages. Section 11 of the Act stipulates that an employer who has violated the prohibition on discrimination is liable to pay compensation to the affected person and that under the normal circumstances the compensation payable shall be between FIM 15,000 and 50,000[1]. Section 13 states that claiming compensation for discrimination on the basis of sex does not prevent the affected person from also claiming compensation under the Damages Act.

One shortcoming of section 17(3) of the Employment Contracts Act is related to the definitions given. Section 17(3) states that "an employer must treat employees equally so that no one will groundlessly be placed in a different position compared with other employees on account of descent, religion, age, political or trade union activities, or any other comparable factor". Being vaguely worded it is difficult to interpret what kind of differential treatment is prohibited and what is permitted. Also, it is not discernible from the wording of the section whether the prohibition of discrimination applies only to direct discrimination or whether it also covers indirect discrimination.

The Equality Act covers both direct and indirect discrimination explicitly. Section 7 reads: "direct or indirect discrimination on the basis of sex is prohibited. For the purposes of this Act, discrimination on the basis of sex means: 1) treating men and women differently on the basis of sex; 2) treating women differently for reasons of pregnancy or childbirth; or 3) treating men and women differently on the basis of parenthood, family responsibilities or for some other reason related to sex. Discrimination is also involved in any procedure whereby people are *de facto* assigned a different status in relation to each other for the reasons mentioned above". Section 9 lists a limited set of exceptions, in which a differential treatment on grounds of sex is not deemed to constitute discrimination.

[1]Section 23 of the Equality Act states that the amounts of compensation stipulates in section 11 shall be revised by decree every three years in accordance with any changes in the Finnish Markka's purchasing power.

From the above examination of the problems and ambiguities contained in section 17(3) of the Employment Contracts Act and from the paucity of cases brought before the courts under this section, it can be concluded that the protection against discrimination on the labour market provided by the Civil Code is inadequate. A source of inspiration for a more effective anti-discrimination legislation can, however, be found in the Equality Act.

2.6.4. Governmental bodies

With respect to instruments for law enforcement no actual statutory enforcement body in the field of labour discrimination, sex discrimination excluded, is established. The Ombudsman for Aliens gives legal advice and assists in complaints concerning the issuing of residence and work permits, but no governmental body has powers to assist individual complaints in litigation or to conduct investigations into discriminatory practices of employers. The existing bodies operate mainly on a policy-advising level, bringing suggestions and opinions to the general discussion.

The idea of establishing the post of an Ombudsperson against Ethnic Discrimination, modelled on the Swedish example, has been discussed in Finland. A suggestion to this effect has been made by the Advisory Board for Romany Affairs and by the Committee for Immigration and Refugee policy (CERD/C/240/Add.2). As yet the discussion has not led to concrete actions.

Under section 55 of the Employment Contracts Act the labour protection authorities are given the duty to supervise compliance with the Act. This suggests that, in addition to a specific enforcement body, the labour protection authorities could be in a position to operate more actively in the area of concern. In practice the labour protection authorities provide guidance and advise on the labour protection rules and regulations and how these should be applied. Since discrimination in the labour market, apart from gender discrimination, is a relatively new issue on the Finnish agenda, it can be assumed that the awareness of the labour inspectors has yet to be increased before they can provide efficient guidance on preventing discrimination at the work place. Haphazard inspections are not a sufficient mean to combat discriminatory situations on the work floor.

A problem of a more general nature within the Finnish central administration concerning migrant and refugee matters is the lack of unity. Foreigners' matters are handled through various ministries and this results in both unnecessary overlaps and gaps. The Ombudsman for Aliens has expressed his concern about the lack of coordination and signs of incompetence in aliens' issues within the administration. The Ombudsman has also stated that in case of an erroneous decision the existing procedures for seeking redress through administrative proceedings are too slow and rigid (Seppälä, 1995, pp. 11, 20-21).

This lack of unity within the administration may have two kinds of effects in relation to action taken by foreigners in possible discrimination cases. Difficulties in dealings with authorities and slow and arduous appeals processes may reinforce the distrust some groups hold towards the administration and prevent them from bringing their cases forward. On the other hand, authorities' lack of accurate information lessens its possibilities to assist and give advice to foreigners in protecting their rights.

2.7. Conclusions

The Finnish statute book provides some protection against discrimination and possibilities to seek redress in cases of proven discrimination, but the protection can be argued to be inadequate in view of the fact that there are scarcely any cases in which the victims have sought assistance from the courts. Consequently, further measures solidly anchored in the law are necessary. In the following conclusions of the examination presented in the previous paragraphs are drawn and proposals for improving the situation are made. Lessons learned in other European countries facing the same problems provide the basis for the proposals put forth.

After the amendments in 1995, the Penal Code provides, in theory, a wide protection against discrimination. However, as discussed above, the Penal Code provisions are difficult to put into effective use in connection with discrimination and should provide a last resort. In order to achieve this effect the existing Penal provisions must be backed up by a policy of active prosecution.

Experience from other European countries suggests that complaints are often not dealt with seriously enough by the police or the public prosecutor (Wrench, 1995, p. 111). Thus, adequate training for the police, judges and other public authorities is needed in order to secure an effective implementation of the Penal Code provisions. Compiling statistics on the number of charges filed under discrimination provisions and the number of cases that are brought before the courts after pre-investigations is a prerequisite for monitoring the implementation of discrimination provisions.

Finnish legislation lacks a comprehensive civil legislation on discrimination, including procedures for obtaining remedies and compensation. The experience of, for example, the Netherlands has shown that scattered anti-discrimination regulations in various legal instruments incur uncertainty in the application of law, i.e. only a limited guarantee of legal protection. As a result of these experiences, a specific and comprehensive anti-discrimination act was promulgated in the Netherlands in 1994 (Kulke, 1996, p. 83).

A comprehensive and detailed codification of foreigners' and minorities' right to equal treatment is needed in Finland, if the aim is to combat labour-related discrimination effectively. An *anti-discrimination act* would create a clear, uniform standard on discrimination and significantly facilitate the application of the provisions by the judiciary in the administration of justice. The promulgation of an *anti-discrimination act* would also be desirable from the point of view of a uniform European standard, since several countries in the European Community have already enforced such a piece of legislation.

Anti-discrimination legislation cannot be effective without a range of law enforcement mechanisms. The existence of an *agency* backed by law and the central government which would undertake *both advisory and litigatory functions* could be seen as an indicator of a commitment to and progress in dealing with discrimination. This agency could initiate legal action and/or help individual litigants. According to findings of the Committee for Racial Equality in the United Kingdom it is virtually impossible for an individual to set in motion and pursue action before the courts in discrimination cases without specialized advice and support (Zegers de Beijl, 1992, P. 21; Wrench, 1995, p. 130).

An enforcement *agency* may in addition to advisory and litigatory functions be authorised to prepare *codes of good practice*. A labour market-related code of practice should be prepared in

conjunction with employers and trade union representatives.[1] Such a code of practice should cover the full range of employment issues, such as recruitment and selection procedures, opportunities for training and promotion and take account of particular cultural or religious needs. It would also be advisable to grant such an enforcement body the authority to undertake investigations into possible discriminatory practices of named organizations on its own initiative, i.e. without having received a complaint to this effect (Wrench, 1995, p. 130).

The appointment of an *anti-discrimination Ombudsman* backed up by adequate government funding and an enforcement authority is a possibility that has already been brought up in Finnish debate. The proposal put forward by the Committee for Migration and Refugee Policy suggesting an amendment to the mandates of the Equality Ombudsman and the Ombudsman for Aliens, and granting financial and other resources needed, merits further consideration.

Also, the role and activities of the *labour inspector authorities* and the social partners in the field of discrimination could be enforced. The labour inspector authorities are under the obligation to monitor the implementation of the regulations of the Labour Law. They are ordained to work in close cooperation with the social partners. The labour inspector authorities could put more emphasis on discrimination issues in carrying out their duties and use more effectively their right to bring cases to the attention of the public prosecutor.

3. Sweden

3.1. Introduction

This chapter looks into the scope and effects of anti-discrimination legislation in Sweden. The purpose of this chapter is to describe the Swedish legal framework on combatting discrimination to which migrants and minorities may be subjected in employment, as well as the public institutions that have evolved in this area and to assess the effectiveness of this legal and administrative structure.

In Sweden the debate on immigration, integration, minority rights, xenophobia and discrimination has been intensive for years. No empirical research on discrimination against migrants or minorities in access to the Swedish labour market has been carried out, but it can be assumed that the situation in Sweden is not much different from situations in other industrialized countries, on which there is empirical data demonstrating the existence of discrimination[2]. Also, a parliamentary committee scrutinizing the Swedish immigration policy in 1992, stated that although Sweden had made relatively good headway towards the aim of equality, the differences between immigrants and other citizens, with regard to economic and social status, were substantial. The committee pointed out that developments in recent years suggested that equality was diminishing, especially in the labour market (Ministry of Labour of Sweden, report on ILO Convention No. 111, 1994).

[1] In preparing such a Code of Practice, effect would be given to one of the Recommendations contained in the Joint Declaration on the prevention of racial discrimination and xenophobia and promotion of equal treatment at the workplace, adopted by the European Social Summit in Florence, 21 October 1995.

[2] See Zegers de Beijl, 1990; Foster, Marshall and Williams, 1991; Raskin, 1993; Bovenkerk, Gras and Ramsoedh, 1995; Colectivo IOE, 1995; Goldberg, Mourinho, Kulke, 1995; Bendick, 1996.

Unemployment statistics demonstrate that the employment situation of migrants has worsened drastically during the last decade. In 1985, the unemployment rate among foreigners was 5,2 per cent while the unemployment of the Swedish population was 2,7 percent. Ten years later, in 1995, the corresponding figures were 22,8 per cent and 7,7 per cent. When examining the situation of naturalized as opposed to foreign citizens it can be seen that the unemployment figures for naturalized workers are lower. For example, in 1995, the unemployment rate for foreign citizens coming from Europe (outside Nordic countries) was 36 per cent whereas the unemployment rate for naturalized from the same origin was 24 per cent. The unemployment rates among non-European immigrants are considerably higher than the average unemployment rate for foreigners (Statens Invandrarverk, 1995, p. 4).

The deteriorating labour market situation of migrants is a result of several factors. A major explanation are the structural changes taking place in the labour market. An additional explanation is the change in the composition of the immigration influx. The previous migrants came specifically to look for a job; their residence and work permits were issued on the ground of them having found employment in Sweden. At present, most migrants enter the country under refugee or humanitarian status and, consequently, the labour market situation is not a consideration when deciding upon the entry to Sweden.

The above listed explanations do not, however, fully explain the marked difference between the unemployment figures between migrants and the Swedish population. In 1993 the Discrimination Ombudsman (the DO) published a survey concerning immigrants' experiences of discrimination in various fields. The survey showed that prejudices and discrimination played an important part in difficulties encountered by immigrants in the labour market. The office of the DO actually receives complaints about ethnic harassment and failures to get higher skilled jobs where migrant job applicants feel they have been unfairly treated in the recruitment process (Soininen and Graham, 1995, p. 15; Ministry of Labour, Sweden, 1995).

The most incontestable evidence of the existence of ethnic discrimination became known in the spring of 1996. Journalists of *Svenska Dagbladet* found out that an alarming number of employment centres were willing to discriminate against immigrants. Of the 24 job centres which were contacted with a request to scan out possible job candidates, 14 agreed to list potential employees excluding any immigrant job seekers (*Svenska Dagbladet*, 07.01.1996).

3.2. Migration and immigration policies

Sweden was the first Nordic country to become a country of net immigration and, in 1993, the share of foreign population in the country was 5.8 per cent of the total population. During the 1950s and 1960s the migration flow consisted mainly of migrant workers and the migrants' situation on the labour market was similar to the rest of the population. Restrictions on immigrant labour were virtually non-existent, and anyone finding a job automatically received residence and work permits. In 1968, Sweden adopted a more restrictive immigration policy. Since then, non-Nordics can only obtain a work permit after a complicated procedure has shown that a specific vacancy cannot be filled by residents. Only a couple of hundred new work permits are granted each year, mostly to experts and senior management of international business. Among all migrants entering Sweden during 1989-1993 only 0,3 per cent were admitted as "labourers". The influx of migrants is dominated by refugees and asylum seekers. Another considerable group enter through the family reunification procedure. In 1993, almost 40 per cent of the immigration flow, excluding

Nordic citizens, was in this category (Council of Europe, 1996, p. 107-109; SOPEMI, 1995, p. 27).

Immigrants come from a relatively large number of countries. Finns account for roughly 25 per cent of all foreigners. Other Nordic nationals account for another 14 per cent. However, during the early 1990s, those of European origin became proportionally less than those from countries outside of Europe in the influx of migrants. This development was reversed in 1993 due to the large number of persons coming from former Yugoslavia, most of whom were granted a temporary refugee status (SOPEMI, 1995, p. 119-120; Fassmann and Münz, 1994 p.23).

3.3. International instruments binding on Sweden

Sweden is a party to major international human rights instruments which embody the principle of non-discrimination and the promotion of equality between individuals and human rights. In order to become part of the Swedish national legal order, international treaties have to be incorporated into domestic law. Only incorporated treaties are directly applicable before the courts. Among the human rights instruments the European Convention on Human Rights is the only one that has been incorporated into the national legal order and thus the only one to which individuals can directly appeal in their dealings with authorities. Still, the obligation and recommendations following from the international instruments have been playing a role in a development of the Swedish national legislation. For example, in the context of the possible need for a new legislation concerning ethnic discrimination in the labour market, the international instruments ratified by Sweden were frequently referred to (SOU, 1992:96).

3.3.1. Universal standards

The International Convention on the Elimination of All Forms of Racial Discrimination was ratified by Sweden in 1971. CERD outlaws racial discrimination mentioning race, colour, descent, or national or ethnic origin as prohibited grounds for unequal treatment. Sweden has accepted the competence of the Committee on the Elimination of Racial Discrimination to receive and consider petitions from individuals or groups claiming to be victims of a violation of the Convention provided under article 14 of the Convention. The International Covenant on Civil and Political Rights was also ratified by Sweden in 1971.[1]

Sweden ratified the ILO's Discrimination (Employment and Occupation) Convention, 1958 (No. 111). The Convention No. 111 is of a general nature and does not exclude any kind of employment or categories of workers from its scope. It aims at equality of opportunity and treatment in both public and private employment. Whereas foreign workers are not protected against discrimination on the basis of their nationality, they are protected against discrimination on the basis of race, colour, sex, religion, political opinion, national extraction or social origin as enlisted in Article 1(1)(a).

Sweden has also ratified the ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143). This convention applies to all migrant workers irrespective of their country of origin and whether or not sending countries have ratified the Convention. Part II of Convention No. 143 obliges states parties to pursue a national policy aimed at guaranteeing equality of opportunity and

[1]These instruments are described in more detail in section 2.3.1..

treatment in respect of employment and occupation, social security and trade unions. The convention promotes policies of equal treatment which take into account the special needs of migrants, i.e. positive action is explicitly allowed.

3.3.2. European standards

Sweden ratified the European Convention for the Protection of Human Rights in 1952 and the European Social Charter in 1962.[1] The most important European instrument concerning the migrants, the European Convention on the Legal Status of Migrant Workers, was ratified by Sweden in 1978. Equality of treatment with regard to conditions of work and the right to organise is clearly provided in articles 16, 21, 24 and 28 of the Convention. Article 9 lays down the right of migrant workers who are involuntarily unemployed to remain in the receiving country for a certain period of time to look for another job.

3.4. National regulations against discrimination

While nearly all countries have constitutional clauses specifying equality before law, a far smaller number have actually enacted anti-discrimination legislation. Sweden is among the European countries which have sought to strengthen the legislative framework to combat discrimination by enacting a specific civil legislation. The following concentrates on examining the Act Against Ethnic Discrimination and the role of the Discrimination Ombudsman in the field of discrimination in employment. Furthermore the Swedish constitution and relevant provisions in the Penal Code are briefly referred to.

3.4.1. Constitution

Instead of having one single Constitution, Sweden has four Acts which have a constitutional status. Section 2 of chapter 1 in the Instrument of Government, one of the constitutional Acts, postulates the principle that all human beings are of equal value. Section 15 of chapter 2, which concerns fundamental rights, provides that no statute or regulation may result in unfair treatment of a citizen on the grounds of his or her sex or belonging to a minority on account of his or her race, colour or ethnic origin.

Section 20 of chapter 2 states the right of ethnic, language and religious groups to retain and develop their own culture. Legislation may not be passed which discriminates on the basis of race, skin colour, ethnic origin, or membership of a minority group. The regulations allow positive special treatment of ethnic minorities or similar groups. Foreigners lawfully resident in Sweden are entitled to the same rights and freedoms as those accorded to Swedish citizens, with a few limited exceptions. Foreigners are subjected to immigration laws and they are excluded from employment in the higher ranks of central government, the armed forces, the judiciary and posts related to national security.

The Freedom of the Press Act, also having a constitutional status, covers liability for all offences relating to printed publications. Under section 4.11 of chapter 7, agitation against an ethnic group is considered an offence against which legal action can be taken. Apart from penalties to which the author, the responsible editor, the publisher and the printer are subject, offences against the Freedom of the Press Act may result in the confiscation of the publication in question and the

[1] These instruments are described in more detail in section 2.3.2.

awarding of damages. Offences committed in the broadcasting media are covered by a similar system (Zegers de Beijl, 1991, p. 25).

Section 6 of chapter 2 in the Instrument of Government enacts that the Parliament elects one or more Ombudsmen for the purpose of supervising the application of laws and other statutes by the public service. The Parliamentary Ombudsman can investigate, either on the basis of a complaint or upon his own initiative, the activities of public authorities and determine whether offences or errors have been committed. The Parliamentary Ombudsman may initiate legal proceedings under the Penal Code against a civil servant, if administrative decisions are found to be illegal. In case the Ombudsman finds that there are grounds for criticism but not for legal action he can confine himself to a critical statement.

Any citizen claiming that authorities or civil servants have acted in an illegal or unfair manner may turn to the Parliamentary Ombudsman and lodge a complaint. By addressing himself or herself directly to the Ombudsman a citizen can have a question examined relatively quickly.

3.4.2. Penal Code

In the Swedish Penal Code two forms of ethnic discrimination are explicitly made punishable. Under section 8 of chapter 16, incitement to racial or ethnic hatred - described as the threatening of or expressing contempt for an ethnic or other similar group of persons referring to race, colour, national or ethnic origin or religious creed - is penalised. Section 9 of chapter 16 prescribes discrimination on grounds of race, colour, national or ethnic origin, religious creed or homosexuality in the provision of goods and services.

Cases under these provisions are brought before district courts according to the normal rules in criminal cases through police investigations and public prosecutor. Under section 3 of chapter 1, and section 1 of chapter 5 of the Act on Damages, a victim of insulting conduct or of illegal discrimination can, apart from compensation for economic loss, be awarded damages for the mental suffering to which he or she has been subjected as a result of the offence.

The upsurge in violence against foreigners and minorities in many countries in recent years has facilitated efforts to bolster or add racist and xenophobic offences to national penal codes. Sweden, having concluded that its Penal Code did not sufficiently cover acts of violent racism, modified the Code in 1994, to include racist motivation in its list of aggravating circumstances (Council of Europe, 1995, p. 26).

3.4.3. Anti-discrimination legislation

Before looking at the anti-discrimination act in detail it should be noted that the Swedish labour law applies equally to all persons. The Employment Protection Act (LAS) provides employees with protection against discriminatory notice and dismissal. Notice of dismissal contrary to the LAS may in certain cases be declared invalid. All violations of the rules set out in the LAS constitute grounds for compensation. As a result of precedents established in the Labour Court, a general legal principle has developed, implying that employers' free right of management may not be utilized in an improper or arbitrary manner. It is established practice that acceptable reasons are required for decisions to transfer personnel which have far-reaching consequences for the individual. In the area regulated by collective agreements, a requirement that the employer shall exercise the right of management in a manner which is not contrary to law or good practice is considered to be included as an unwritten clause in collective agreements. Breaches are thus grounds for entitlement to general compensation (SOU, 1992:96, p. 23).

Public sector employers are bound by the principle laid down in the Constitution which provides that when a public sector post is to be filled, only objective grounds such as merit and skill shall be taken into consideration. Any person who considers he has been incorrectly passed over in connection with a decision on a public sector appointment can appeal in accordance with administrative regulations. Local government lacks general rules for employing personnel, including prohibition of discrimination, apart from the general requirement of objectivity, laid down in chapter 1, section 9 of the Instrument of Government (SOU, 1992:96, p. 23).

The Swedish labour market is to a considerable extent under the direction of the social partners and the Swedish government has been reluctant to interfere in the relationship between employers and employees. To combat discrimination, the government relied for a long time on non-legislative measures. It was only after a number of voluntary schemes and activities of the social partners were found to be ineffective in preventing discrimination in the work place that legislative measures were taken into a consideration (Soininen and Graham, 1995, p. 19; SOU 1992:96 p.125).

In 1994, the Swedish Parliament passed the Act against Ethnic Discrimination, prohibiting discriminatory treatment in hiring, working, and termination of employees. This Act replaced the 1986 Act Against Ethnic Discrimination. In the following paragraph a short summary of the 1986 Act is presented. After that the proposals leading to the new legislation are examined and finally the new legislation is presented.

3.4.3.1. The 1986 Act Against Ethnic Discrimination

The predecessor of the 1994 Act was the Act Against Ethnic Discrimination which was adopted by Parliament in 1986. Under section 1 of that Act, ethnic discrimination was defined as unfair, unjust or insulting treatment of a person or a group of persons in relation to others because of race, colour, national or ethnic origin or religious creed. The Act did not contain any prohibitions as such.

Pursuant to section 2 of the Act, the Discrimination Ombudsman was appointed with the task of counteracting ethnic discrimination in working life and other areas of society. According to section 3, the DO's duty was to give advice and information to individuals who considered themselves victims of discrimination in order to safeguard their rights, to initiate measures to counteract discrimination by means of discussions with authorities, employers and other organizations as well as through exerting influence on the public opinion. The DO did not have the status of a supervisory authority as such, nor was he authorised to institute legal proceedings.

Section 6 of the Act obliged employers - under the threat of a fine - to attend discussions with the Ombudsman and to submit any information required. The DO, and the Advisory Committee on Questions Concerning Ethnic Discrimination, which was set up pursuant to section 5 of the Act, were authorised to submit proposals to the Government regarding legislative measures to combat ethnic discrimination (Zegers de Beijl, 1991, p. 26).

3.4.3.2. Proposals for a new anti-discrimination legislation

The Special Commission Against Racism and Xenophobia was appointed to investigate what additional measures could be taken to combat racism and xenophobia. In its final report, delivered in 1989, the Commission proposed, *inter alia*, that a specific law against ethnic discrimination in working life should be considered. The reason for this proposal was that even after the establishment of the DO immigrants perceived themselves to be subjected to negative treatment

in the labour market. In the light of this report and criticism levelled at Sweden for failing to fulfill the provisions of the Convention on the Elimination of All Forms of Racial Discrimination and of ILO Convention No. 111, a new Committee of Inquiry was appointed to investigate the need for, and the formulation of, legislation to counteract ethnic discrimination in working life (Soininen and Graham, 1995, pp. 19-20).

During the discussion on the need for legislation to counteract ethnic discrimination in working life, both the DO and the Committee presented proposals for an *anti-discrimination act*. In the following the main points of the two proposals are summarized in order to get a clearer picture of the considerations presented in the Swedish debate.

The DO presented a proposal to the Government for legislation against ethnic discrimination in working life in 1989. Discrimination was defined to mean any special treatment of a person to her or his detriment or disadvantage, on grounds of race, colour, nationality or ethnic origin. It was proposed that both direct and indirect discrimination against employees and job applicants should be prohibited. As regards job applicants, protection under the proposal covered not only the final appointment decision but also discrimination during the recruitment process, for example, cases in which suitable applicants were not even called to an interview. The DO wanted to emphasize the problem of ethnic discrimination in job application procedures, because according to his previous experiences, once a person had entered employment, he had a better chance of being assessed as an individual instead of with reference to his or her ethnic origin (SOU, 1992:96, pp. 21, 25-26).

The proposal included also a provision concerning the evidence required which aimed to achieve an allocated burden of proof. The sanctions proposed were invalidity of the contract and compensation. The proposal contained no requirements for positive action and no litigating role for the DO was suggested (SOU, 1992:96, pp. 21, 25-26).

The Committee came up with a proposal which differed from the DO's proposal in many respects. The Committee defined discrimination as negative treatment on ethnic grounds. The Committee emphasized that in order to apply the provision the so called "ethnic factor" must have been an indispensable element in explaining the employer's action. As opposed to the DO's proposal, the Committee came to the conclusion that the prohibition should not cover indirect discrimination. The Committee stated that "the purpose of the law is to provide protection against such cases of ethnic discrimination in working life which are directly offensive to public conceptions of justice and where the discriminatory element plays a prominent part". The Committee argued that if only direct discrimination would be covered, a stronger normative effect could be achieved (SOU 1992:96 pp. 28-30, 128).

The Committee agreed with the DO's proposal that job applicants should be protected against discrimination. The Committee suggested, however, a more limited coverage of the hiring process. According to the Committee's proposal, a discriminatory offence could only occur in connection with the final appointment decision. Discriminatory treatment during the recruitment procedure would not be covered by the prohibition (SOU, 1992:96, p. 28).

A division of the burden of proof was considered necessary to achieve materially correct results, but no express provisions on the burden of proof were included. It was assumed that the distribution of burden of proof modelled on the Right of Association Act would be used in courts when dealing with cases of ethnic discrimination. The Committee argued that it should be left in

the hands of the courts to decide in individual cases what kind of distribution of burden of proof would be suitable and what degree of proof would be needed. The Committee pointed out, however, that some kind of alleviation of the burden of proof would be necessary in order to make the anti-discrimination legislation applicable in practice because it was next to impossible for a plaintiff to give full proof of the discriminatory motivation of measures taken by an employer (SOU 1992:96, p. 149-151).

The Committee proposed also that the main sanction against breaches of the discrimination prohibition should be compensation and the invalidation of the contract, the latter corresponding the provisions laid down in the Equal Opportunities Act. The procedural rules proposed corresponded closely to the Equal Opportunities Act. The Industrial Litigation Act should be applicable and the Labour Court the main forum. Employers should be liable to furnish information at the request of a person who suspected having been subjected to discriminatory treatment. It was proposed that the DO should have a litigating role corresponding to that of the Equal Opportunities Ombudsman. According to the proposal the DO should also be given the possibility of calling in an attorney to deal with discrimination cases. An amendment was proposed regarding the DO's possibilities of requesting information, under penalty of a fine, in order to give the DO a better opportunity to assist private individuals who would require information, for example about another applicant who had been appointed (SOU 1992:96, pp. 29-30).

3.4.3.3. The 1994 Act Against Ethnic Discrimination

The Act Against Ethnic Discrimination prohibiting discriminatory treatment in hiring, working, and termination of employees, which became effective 1 July 1994, follows more the proposals put forward by the Committee than the suggestions of the DO.

The Act applies to the whole of the working life and prohibits direct discriminatory treatment of job seekers and employees. The protection the law affords covers all those employed by both public and private employers. Section 1 of The Act Against Ethnic Discrimination lays down the following definition of discrimination: "Ethnic discrimination occurs when a person or a group of persons is treated unfavourably in relation to others or is subjected in any other way to unjust or insulting treatment because of race, colour, national or ethnic origin or religious creed."

Section 6 lays down the obligations of an employer. An employer is required to attend meetings and supply any information pertaining to job applicants and employees which is required by the DO. Section 10 states that a job applicant or employee is entitled, on request, to receive written information from the employer on the qualifications of the person who received the job or training position in question. Section 6 stipulates that the employer is required to furnish information referred to in section 10 when the DO supports a request from an individual job applicant or employee. The employer must not be unnecessarily burdened by this duty and is not required to furnish information if there are special reasons for not doing so. The DO may prescribe a default fine under section 7, if an employer fails to comply with the DO's request to provide information. An appeal against the DO's decision under section 7 may be lodged with the Board against Ethnic Discrimination. There is no appeal possible against a Board decision. Any action to require payment of a default fine has to be brought to the district court by the DO.

Section 8 and 9 prohibit improper special treatment of job applicants and employees. An employer may not subject a job applicant to improper special treatment by disregarding that applicant because of his or her race, colour, national or ethnic origin or religious creed. It is also prohibited to apply unfavourable terms of employment or other working conditions, direct and assign work

in a way which is clearly unfavourable to the employee or give notice, dismiss, lay-off or take any other comparable action against the employee. The prohibition of unlawful discrimination of job applicants targets cases where an employer has hired another person instead of the person alleging to have been discriminated against. The infringement occurs only after the employer has taken the decision to hire another person.

Section 11 declares a contract invalid insofar as it prescribes or permits special treatment prohibited under section 8 or section 9. The rules of invalidity laid down in section 11 mean, for example, that a discriminatory contract can be modified or declared invalid. Section 13 lays down that, if a job applicant is subjected to discrimination prohibited under section 8, the employer shall pay damages to the discriminated person. In other words, only general compensation can be awarded to a job applicant. If several job applicants or employees institute actions for damages against the same employer, the compensation shall be determined as though only one of them had been discriminated against and shall be divided equally among them. An employee is entitled to both financial damages and general compensation. Section 14 stipulates that if an employee is subjected to discrimination, the employer shall pay damages for the loss incurred and for the infringement the discrimination represents. Section 15 lays down that damages under sections 13 and 14 may be reduced or lapsed entirely, if this is considered reasonable.

3.4.4. Legal expenses and legal aid

The provisions on legal expenses in civil cases apply also to labour law cases, such as discrimination cases. The main principle in civil cases is that a party losing a lawsuit pays legal expenses of both parties. In labour law cases there is, however, an exception to the principle and the court can order that both parties pay their own expenses, if the party that lost the case had a reasonable cause, arising from the character of the case, to get the dispute tried in the court. This rule can be applied in a discrimination case if, for example, the outcome of the case hung on facts or circumstances that from the beginning were unknown to a job-applicant.

If the DO institutes proceedings on behalf of a job-applicant or an employee, these are not responsible for their own legal expenses. Neither do they run the risk to end up paying the expenses of the opponent. In cases in which the DO institutes proceedings, he or she bears the responsibility for all expenses. The same applies if a trade union institutes proceedings. If the plaintiff himself or herself brings the case before the court, the normal regulations on legal aid are applicable.

3.5. Enforcement mechanism

The enforcement mechanism for the anti-discrimination legislation is the office of the DO, established in 1986. The activities of the office were first regulated by the 1986 Act Against Ethnic Discrimination and are now regulated by the new law. The DO's mandate covers all areas of society. The mandate of the DO is provided in sections 2, 3 and 4. The DO shall assist anyone subjected to ethnic discrimination with advice and in other ways. The DO can initiate measures against ethnic discrimination by means of consultations with authorities, companies and organizations and by influencing public opinion. Through an amendment to the National Authorities (Responsibility for Immigrants and Others) Ordinance, national authorities are required to take part in discussions under the 1994 Act Against Ethnic Discrimination when required by the DO.

Section 5 stipulates that the Board Against Ethnic Discrimination gives the DO advice on important issues of principle concerning the application of the Act Against Ethnic Discrimination and can propose legislative changes or other measures aimed at counteracting ethnic discrimination. The Board also determines appeal cases under section 7 of the Act.

Section 17 lays down that the DO is entitled to bring cases concerning unfair treatment of job applicants and employees before the Labour Court. The DO is entitled to bring a case for an individual employee or job applicant if the individual so permits and if the DO deems that a judgment in the dispute is important for the application of the law or if there are other special reasons for doing so. It is possible for the individual to present other claims in the same proceedings. Section 8 of the Act enacts that the DO shall not institute proceedings where a trade union has the right to institute proceedings on behalf of an individual, in accordance with section 5 of Chapter 4 of Act No. 371 respecting the judicial procedure to be followed in labour disputes, unless the trade union fails to do so.

The procedural rules laid down in the Act are closely related to the corresponding provisions of the Equal Opportunities Act. The DO has a procedural role corresponding to that of the Equal Opportunity Ombudsman. To prevent the DO's other activities from suffering on account of this new litigatory ask, the DO has the possibility of calling in an attorney in discrimination disputes.

3.6. Evaluating the effectiveness of the legislative and institutional framework

In Sweden, the constitutional right to equal treatment has been elaborated in the Act Against Ethnic Discrimination. Swedish statutes also include provisions outlawing incitement to racial hatred and prohibiting discrimination in the provision of goods and services. Since the 1994 Act Against Ethnic Discrimination concerns discrimination in the labour market directly, the following concentrates on this Act.

3.6.1. Effectiveness of the 1994 Act Against Ethnic Discrimination

By August 1995 no proceedings had as yet been filed under the Act. In other words, during the first year that the new law was in effect, neither the DO nor the trade unions were able to bring charges and to have a case tried in the Labour Court. The fact that a year after the Act came into force still no cases had been brought before the courts has given rise to questions about the effectiveness of the new Act (Soininen and Graham, 1995 pp. 25). This paragraph looks into possible explanations why bringing charges under the new Act is difficult.

The DO is of the opinion that the law is unnecessarily restricted in its application. Given the way the Act is formulated, it is extremely difficult to find cases that could be taken up before the Labour Court. To begin with the Act requires that negative treatment is *only* based on the ethnic factor. In reality, this is seldom the case as the alleged discriminatory situation is usually comprised of several factors. The DO also points out that section 9 of the Act, which states "an employer may not subject workers to improper special treatment because of their race, colour, national or ethnic origin or religious beliefs by: (...) b) directing or allocating the work so that a worker is clearly treated less favourably", can be interpreted as saying that negative special treatment is allowed and even acceptable according to the law as long as it is not too "obvious"

(Soininen and Graham, 1995, pp.24-25). It should also be noted that nationality is not among the prohibited grounds for discrimination.[1]

According to the DO, the protection provided for job applicants is insufficient because persons are assessed with reference to ethnic origin especially before entering an employment relationship. The fact that the Act is not applicable until an employer has completed the process of hiring and has rejected an applicant or applicants on the basis of the ethnic factor is also considered to be limiting the possibilities to bring cases before the court (Soininen and Graham, 1995, pp. 24-25).

The existing legislation does not provide protection against victimisation. Instituting court proceedings against one's employer is not an easy matter. In cases of both success or failure the relationship between an employee and his or her employer are disturbed and the employee's prospects for finding other employment might be severely hampered. For these reasons individuals who institute complaints or give information in proceedings brought by another person should be protected by the Act. A provision protecting individuals against victimisation would facilitate the process of taking legal action.

The difficulty of proving ethnic discrimination has often been noted.[2] In order to apply the Act Against Ethnic Discrimination, the causal connection between the "ethnic factor" and the employer's course of action must be established. A full proof of this link is extremely difficult to provide on the part of the plaintiff. The Act does not provide any explicit regulation on a distribution or alleviation of the burden and/or degree of proof required in discrimination cases. It is, however, assumed that this alleviation will take place in the court's practice. In discrimination cases it would then be sufficient if the plaintiff could establish that there are likely causes that an employee acted on the basis on the "ethnic factor". After sufficient evidence for this assumption would have been provided, the employer would then bear the burden of proving that there were other objective, factual reasons justifying the alleged discriminatory treatment (SOU, 1992, pp.149-151). So far there is not, however, an established legal praxis from which it could be constructed what this alleviation of the burden of proof would mean in practice.

The government emphasized that in individual cases it is the task of the court to decide whether or not the demands for proof have been met. The existence of specific regulations would not, however, prevent the court from carrying out this decision. Even with certain specific, explicit provisions on the distribution of the burden of proof the courts could take the specific facts and circumstances of each individual case into consideration when giving the final ruling in the case concerned. Without special stipulations on the burden of proof, victims of discrimination will start out from the assumption that it is not possible to prove a discriminatory treatment. An effective anti-discrimination act should explicitly stipulate the distribution of the burden of proof along the lines that the party discriminated against has only to make credible the less favourable treatment suffered and give likely causes that the "ethnic factor" was responsible for this treatment, whereas once this credibility has been achieved it is the employer who is required to bear the burden of proving that the treatment is not attributable to "ethnic factors" but that it is justified an factual grounds.

[1]For a more detailed discussion on the discrimination grounds see section 2.6.1.

[2]For a more detailed discussion on the problems related to the burden of proof see section 4.1 and footnote 9.

The Act states that the DO's primary goal is to reach a settlement between the parties in a dispute. It is only after such an attempt has failed that the DO is to employ other measures. A pre-court settlement in discrimination cases is not in itself questionable. As stated before, the injured party seeks primarily a real settlement and compensation for the discrimination and in certain cases this might be reached without court proceedings. The aim for a settlement of the dispute should not, however, be used as a pretext for the fact that the injured party is forced to accept a nominal compensation during the pre-court settlement process because legal provisions do not provide sufficient protection and possibilities to try a case before the court.

While preparing the Act, the government particularly stressed the norm-setting function of the law and the effects it could have on public attitudes. According to the government, it is the long-term impact of the new Act on practices in the labour market which is of greatest importance. For this reason the government aimed for a statute that would be clear and concrete. When formulating the Act, ease of comprehension was preferred over width of application (Reg. Prop. 193/94:101). However, the mere existence of a provision in the statute book is not sufficient. In order to be truly effective, the Act Against Ethnic Discrimination should provide victims of discrimination with a real possibility to obtain compensation through court proceedings. A number of cases brought before the courts are needed before a coherent legal praxis will be established, and it is only through this legal praxis that a strong norm-setting message can be achieved.

3.6.2. Effectiveness of the enforcement mechanism

During the year 1994-95 the DO received 75 written complaints alleging ethnic discrimination at work. This was a considerable increase over the number recorded in the preceding years. The complaints, as well as requests for information, originated with both job applicants and employees in the public and the private sector. The individual cases fell into three main categories, viz 1) discrimination of job applicants, 2) discrimination of employees in matters of promotion, 3) discrimination of employees in the sense that they alleged harassment or victimization at work. There have also been cases concerning job advertisements requiring Swedish citizenship and Swedish as a mother tongue. According to the DO's office, few official complaints are made compared with all forms of contact by individuals who feel that they have been discriminated against on ethnic grounds (Ministry of Labour, Sweden, 1995).

Some of the cases have been closed after an initial investigation has revealed a lack of evidence of ethnic discrimination. In some cases the DO has referred the complainant to a trade union, whereupon the DO has followed the union's processing of the matter and served the union in an advisory capacity. Certain cases have been closed after it was established that the employer's action was not prompted by ethnic considerations. In some cases this has been preceded by the request of information under section 10 of the Act. In a few cases the complainant and the employer, with assistance from the DO, have reached an agreement which has made it possible to close the matter. A final group of cases had to be closed after investigation, with a note to the effect that the DO has not been in a position to take any further useful action (Soininen and Graham, 1995, p. 23-24).

One of the reasons why the DO was given the possibility to institute court proceedings in discrimination cases was the assumption that the DO would attract media attention and thereby have the opportunity to influence public opinion. This litigatory role is not, however, without problems. For the individual complainant the DO is a safety-valve in cases where a trade union does not wish to represent his or her interests. There is a risk that perceptions of the DO's status as an authority will become distorted so that the DO is seen as an Ombudsman specifically for

immigrants, when the DO's actual role is to work against ethnic discrimination in society as a whole. Another problem associated with this litigatory role is that responsibility for failing to bring charges might be seen as the fault of the DO rather than as a problem integral to the law itself (Soininen and Graham, 1995, p. 25).

Judging from the above it seems that problems in implementing the new Act do not rise from the inefficiency of the enforcement mechanism as such, but rather from the gaps remaining in the coverage of the legislation.

3.7. Positive action

The Swedish government has started to consider measures along the lines of positive action. Professional codes of conduct have been established among authorities and private organizations serving as a voluntary self-regulating mechanism. An interim report of the Immigrant Policy Committee in 1995 introduced the subject of more interventionist measures along the lines of positive action in the labour market. The Committee argued that positive action is not only justified, but also necessary, because if a large proportion of immigrants remain unemployed, this will create an ethnically based class society. It suggested that quotas for immigrants, *inter alia* in professions such as teaching and journalism, is an option which ought to be brought up in the public debate. If set in motion, such measures would have constituted a significant shift in Sweden's primary emphasis on achieving equal access within the framework of general labour policies (Council of Europe, 1995, p. 16, 27; SOU 1995:76). Yet, in the governmental Bill on Employment Policies, which was presented to Parliament in June 1996, none of the positive action measures proposed by the Committee was included.

The Swedish government has also taken a number of steps in the last few years to provide immigrants with skills needed to gain access to the labour market. In 1994, it introduced a new programme, entitled Immigrant Training, to provide immigrants with vocational education designed to give them experience with Swedish working life in their own trades. It is estimated that 5,000 persons monthly could be trained under this scheme, which was incorporated into the general programme known as Workplace Induction. One of the additional aims of Sweden's vocational training scheme is to increase immigrant's access to employment in the public sector through temporary public employment schemes (Council of Europe, 1995, p. 16).

A central principle of the National Labour Market Board (AMS) has been that immigrants are to be introduced into the labour market as far as possible with the help of regular labour market policy measures. The level of priority given to immigrants in the labour market has varied from year to year. In 1994 the AMS drew up a special plan of action "Working for Work for Immigrants", which located the problems immigrants face in the structural changes that have taken place. The aim of the plan of action is to promote contacts at the local level between migrants and public and private employers as well as local authorities. Local authorities' measures in the form of Swedish language instruction and employment schemes for migrants are foreseen to be linked to the general labour market policy measures. Greater support and advice to migrant entrepreneurs will be provided through specific vocational counselling (AMS, 1994).

3.8. Conclusions

The 1994 Act Against Ethnic Discrimination is a step towards more comprehensive protection against discrimination in the Swedish labour market. Judging from the fact that no cases have been brought before the courts under the Act and from the criticism directed towards its effectiveness, it can be concluded that the new legislation is not without problems.

The Government was of the opinion that discrimination in the labour market was of such complexity that detailed regulation was an impossibility because of "the risk of a miscarriage of justice" and "because of the risk that irritation would be created which could adversely affect those to be protected" (Reg.Prop: 1993/4:101). This fear of causing irritation has perhaps caused some of the weak formulations of the law. In the face of demands for a tougher law, the Government has argued that the law must be given time to establish itself and then be evaluated before the possibility of new legislation could be considered. Considering the problems contained in the provisions of the Act it looks, however, as though even with time it will be difficult to develop a legal praxis that could send a strong norm-setting message to the society and provide an effective source of protection for victims of discrimination.

4. Suggestions

Anti-discrimination legislation alone, whether laid down in constitutions or in special provisions, is not enough to combat discrimination. Legislation must be accompanied by activities in the area of education and training as well as systematic efforts to heighten public awareness. Members of the judiciary, lawyers and the administration must be trained. The general public, especially the groups most likely to face discrimination, must be adequately informed of the protection against discrimination provided by the existing legislation. In the context of sex discrimination it has been pointed out that the attitudes of court staff and judges may not be sympathetic to claimants, which may result in inquisitorial and adversarial hearings (Thomas, 1995, p. 62). In this regard, judges could benefit from improving their understanding of issues involved in discrimination cases. A genuine policy to promote equality of treatment and opportunity in employment as well as general policy and preventive measures are necessary to address the social situations which trigger discrimination. Nevertheless, adequate and effective protection against discrimination by legislation is the foundation on which all action towards the eradication of discrimination should be based.

4.1. Anti-discrimination legislation

Civil legislation[1] aiming to guarantee equality of treatment and to prohibit discrimination in employment and other fields should include at least the following components. Firstly, an *anti-discrimination act* should give a specific and clear definition on factual misconduct which may give rise to discrimination. Also, the exceptions to the principle that justify any deviation from the non-discrimination principle should be specified. These exceptions to the general rule of non-discrimination can derive from *bona fide* occupational requirements, i.e. requirements objectively

[1] Problems related to the protection provided by Penal Code provisions are discussed in section 2.6.2.

necessary for the carrying out of a particular job. The specific prohibited grounds of discrimination should be explicitly stated. In order to provide a comprehensive protection covering also non-nationals, nationality should be included to the list of prohibited grounds of discrimination (Ben-Israel, 1993, pp. 231, 247; Zegers de Beijl, 1995).

The field of the application of the legislation should be clarified. Legislation should render it unlawful to discriminate at all stages of recruitment and make it unlawful to discriminate against employees, once recruited, with regard to their terms of employment or opportunities for training or promotion. Racist insults, harassing, threatening and bullying by other employees should also be made unlawful. Statutory action is also needed in relation to employment offers in advertisements and other media. Publication in the press of a discriminatory offer of employment, or the announcement of such an offer by the employer, should be prohibited. It should be rendered unlawful to use or distribute forms of application for employment, or to publish an advertisement, that contains or implies restrictions, conditions or preferences reflecting discriminatory attitudes. A legal requirement that offers of employment be drafted in the most neutral terms contributes also to the prevention of indirect discrimination. It should equally be clearly indicated in the *anti-discrimination act* how it will be implemented, including the procedural and substantive remedies available (Ben-Israel, 1993, p. 241; Wrench, 1995, pp. 126-127).

The problems in connection to the burden of proof are central to discrimination cases. Consequently, provisions laying down a *"victim friendly" distribution of the burden of proof* are necessary. Distribution of the burden of proof should be structured in such a way that, in the event of a grievance, the connection between the less favourable treatment and "ethnic" considerations by the employer, has to be proven by the plaintiff only in a plausible manner. This type of ruling on the burden of proof in the form of "prima facie" evidence is indispensable for the effective enforcement of anti-discrimination legislation. Related to the questions of proof, it is also necessary to include provisions that oblige the employer to provide information relevant to establishing a case, such as information on remuneration and selection criteria.

It has further been suggested that courts should be more open to the use of statistical data or surveys that seem to indicate *prima facie* evidence of discrimination. Use of statistics of this kind could have the effect of creating a presumption of discrimination. *Monitoring* of the workforce and *reporting* of decisions made at the point of recruitment, selection, promotion and redundancy has an important contribution to make in providing data that can be used as evidence. Such evidence gathered through *monitoring* has a role in cases of both direct and indirect discrimination. *Monitoring* entails the collection of statistics on the ethnic origin of all employees and trainees to compare the position and progress of the minority staff with that of majority staff. Such statistics can reveal unintentional discriminatory outcomes and allow employers to deal with problem areas by reviewing standard practice and providing specific training to increase awareness and introduce new techniques to ensure fairer outcomes (Wrench, 1995, pp. 110- 130).

One of the obstacles which the fight against discrimination runs up against is that the victims do not dare to speak up. Legal proceedings are often inconclusive; and a fear of being viewed as over-sensitive, a fear of retaliation at work or financial risks involved with failed court proceedings deter victims from going to court. Consequently, the anti-discrimination provisions should provide adequate *protection against victimisation* for individuals bringing a complaint before the court or giving information in proceedings brought by another person (Wrench, 1995, pp. 108, 111, 127).

Adequate *compensation* and *low expenses for legal proceedings* are also a prerequisite for making it possible for an individual to claim his right to equal treatment through court proceedings. Compensation should cover both material and immaterial damages. To ensure that damage compensation is not just of a symbolic nature, the employer should be required to make a tangible sacrifice by establishing a minimum sum for compensation for immaterial damage (Kulke, 1996, p.86).

Anti-discrimination legislation alone is not enough to combat discrimination. An enforcement mechanism is necessary for implementing and monitoring the effects of anti-discrimination measures. Such an *agency* could also initiate legal action and/or help individual litigants (Wrench, 1995, p. 128).

A truly effective, comprehensive anti-discrimination legislation would also entice employers to adopt *voluntary measures*, or *positive action*, with respect to promoting equal opportunities. *Positive action* in employment refers to the promotion of minority interests and chances within existing procedures for distributing and allocating jobs and training. Measures which fall under the category of *positive action* are (a) targeting a certain number of available vacancies for designated group members, without lowering the level of qualifications required, (b) ethnic monitoring of job applicants and employees, (c) equality targets for recruitment, (d) training for recruiters on avoiding discrimination and (e) measures to stimulate minority group applications. *Positive action* should not be confused with positive discrimination, which involves overriding existing allocation practices by allowing a degree of absolute preference for minority group members (Wrench, 1995, pp. 112, 129-130; Zegers de Beijl, 1995, pp. 29-30).

It is difficult to find the most effective balance between voluntarism and compulsion to secure equal opportunity by means of *positive action* measures. While it is true that there can be identifiable advantages for an employer in the introduction of *positive action* measures, and that sometimes individual employers embrace them willingly, it is also true that without further encouragement by legal measures their widespread adoption is unlikely (Wrench, 1995, p. 136). An effective civil anti-discrimination legislation is indispensable not only for providing protection and redress mechanisms for victims of discrimination but also for imposing a duty on employers to work actively towards equality in daily working life. The existing legislative framework in both Finland and Sweden falls short of these aims.

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