



UNIVERSITY OF  
GOTHENBURG



## **Bare Life of Unaccompanied Children**

**A Critique on the Human Rights State-Centrism and the Right to Asylum in Sweden**

*by*

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## Declaration form

The work I have Submitted is my own effort. I clarify that all the material in the dissertation which is not my own work has been identified and acknowledged. No materials are included for which a degree has been previously conferred upon me.

Signed:

Date: 25 May 2018



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To Ahed Tamimi, Laila Khalid, and all Palestinians  
figures of conscious resistance against the State Sponsored Terrorism of Israel

To the martyrs Ghassan Kanafani and the 17 years old Lamees Najim  
who were assassinated by the MOSAD

To Anne Frank and residents of the Prinsengracht 263

To all my young Afghanistanian sisters and brothers  
who were and are born, displaced and forced to migrate  
but even under the interventions of the sovereigns have tried and try to live independently

To all the people  
who rebelled and rebel and resist even in the zone of indistinction  
by the simple fact of trying to be alive and live

To all contributions  
for Liberty, Equality, and Fraternity and against the sovereign

أيها الواقفون على العتبات ادخلوا،  
واشربوا معنا القهوة العربية  
-قد تشعرون بأنكم بشرٌ مثلنا-  
أيها الواقفون على عتبات البيوت  
أخرجوا من صباحاتنا  
-نطمئن إلى أننا بشرٌ مثلكم!-

محمود درويش، شاعر المقاومة الفلسطينية

You there, by the threshold of our door  
Come in, and sip with us our Arabic coffee  
-you may even feel that you are human, just as we are-  
You there, by the threshold of our door  
take your rockets away from our mornings  
We may then feel secure  
-and almost human, just as you are-  
Mahmoud Darwish- the Palestinian Resistance Poet

شما که ایستاده‌اید بر درگاه‌ها  
داخل شوید  
و با ما قهوه عربی بنوشید  
-شاید که دریابید شما نیز چون ما بشرید-  
شما که ایستاده‌اید بر آستانه خانه‌ها،  
سایه [راکت‌های]تان را از بامدادان ما دور کنید  
تا مطمئن شویم  
-ما نیز بشریم، چون شما-  
محمود درويش، شاعر مقاومت فلسطين

# Abstract:

The question of asylum seekers and refugee rights is one of the main examples which reveals the paradox of the citizen rights and human rights. This thesis aims to analyse the U-turn asylum policy of Sweden regarding unaccompanied minors from a critical perspective in this regard. Generally, studies in the area of asylum policies are mostly concerned about technical issues and the application of normative existing human rights norms and concepts such as Refugee Convention, UNHCR guidelines, the best interests of the child, etc. However, in this research, by application of “What is the Problem Represented to be?” to the policy (including the temporary amendment to Sweden’s Alien Act, its procedures and practices), I try to extract assumptions and problematic issues of the policy. Then, based on the Hanna Arendt’s and Giorgio Agamben’s analysis and critique on human rights, I discuss the policy, its practice and the role of the state as the sovereign which creates by its very nature the state of exception.

The results of the analysis suggest that the unaccompanied children as a group of asylum seekers are reduced and put by the U-turn policy and practices to their bare lives and the zone of indistinction. According to this, in conclusion, I provide some remarks on the issue and possibilities that this understanding of the issue would provide for changes.

**Keywords:** state-centrism, the right to asylum, Sweden’s U-turn asylum policy, rightlessness, zone of indistinction, bare life, the paradox of human rights, the sovereign, policy analysis, unaccompanied Afghanistanian children, bio-politics

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# 1- Introduction

## 1-1- State-centric Human Rights: Challenges

While International Human Rights Law have faced numerous challenges in the last decades, it is still the mainstream understanding of human rights. Since 1948, when the United Nation-States<sup>1</sup> General Assembly adopted the Universal Declaration of Human Rights, many human rights treaties have been adopted and signed by the states. Furthermore, innumerable pages have been published as general comments, resolutions, action plans, reports, etc. by different international, regional and national bodies, and various protection mechanisms such as tribunals and courts have emerged and prosecuted various cases. Even though non-state actors such as International Non-Governmental Organizations, NGOs, academics, journalists, corporations and reporters also have entered and been engaged in the field, states are still the main actors. Not only are they considered as the main parties of the human rights conventions, but also, as Hobsbawm (2012, p.19) notes, the nation is assumed to be “the body of citizens whose collective sovereignty constituted them a state [... as] their political expression”.

However, this conception of human rights has faced various challenges and critiques. Some of these challenges are relatively new such as the emergence of Transnational Corporations -as new economic powers which are not accountable to international human rights norms in the same way that states are<sup>2</sup>-, and globalisation (Richards and Gelleny, 2016, pp.219–20; Kinley, 2009, pp.23–36). Yet, there are some critiques and challenges that are as old as the adoption of the Universal Declaration of Human rights. Older criticisms include a variety of issues consisting the question of representativity of the state for all ethnic groups (Arendt, 1976, p.272), double standards, hierarchical international power relations , effectiveness and efficiency of human rights norms, the issue of resources needed for human rights promotion and protection (Bilder, 1969, pp.172&205–7), relativism and cultural issues (The Executive Board of American Anthropological Association, 1947). In the postcolonialist scholarship it is argued that human rights can be represented in favor

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<sup>1</sup> In the so-called United Nations, member parties are States. To emphasize on this “*semantic illusion*” (Hobsbawm, 2012, p.177), in this research *United Nation-States*, is used to refer to this organization.

<sup>2</sup> For example, innovations regarding the TNC’s accountability, such as the Global Compact, only has a voluntary, self-regulative and non-binding nature and thus, has faced critics (Sethi and Schepers, 2014) in terms of its usefulness and even providing grounds for blue washing (Berliner and Prakash, 2015, p.132)

of western liberal democratic racist states as the “companionate and caring states” (Orford, 2005 cited in Kapur, 2006, p.667) who investigate human rights violations of non-western states; “White men saving brown women from brown men” (Spivak, 1988, p.93)

One dimension of these fundamental critiques relating to state-centric discourse of human rights, has raised by Hannah Arendt (1949)<sup>3</sup>. While this discourse can be defined and articulated in different ways, in this research by the term state-centric approach to human rights, I mainly mean the existing political construction of human rights which is based on and formed in the system of nation-states where there is a distinction between citizen and non-citizen.

Concepts of nation and citizen play a crucial role in the determination of rights. The International Covenant on Economic, Social and Cultural Rights in article 2 notes that countries can determine to what extent non-national could enjoy noted rights and thus implicitly distinguishes nationals from non-nationals<sup>4</sup>. International Covenant on Civil and Political Rights does not have such a general distinction, but when it comes to the political participation (article 25), only citizens are entitled to the right to vote. One of the main distinctive features of the Convention on the Rights of the Child is that, according to article 2, it is applicable is to every person who is under 18, *who lives within the state jurisdiction*. However, this is also problematic because firstly, the state party can determine a lower age in “the law applicable to the child”. Secondly, determining the age by nature is a reduction of the childhood to a chronological matter, rather than a cultural, social and developmental concept. Thirdly, while the aim of the distinction between child and adult in the convention is to provide additional protection, as it will be discussed in Chapter 5, this categorization can be served as a basis to justify the inclusion-exclusion of right holders.

Looking at the political construction of the Human Rights, Arendt raises the issue of “the right to have rights” which is lacking in the case of asylum seekers and the stateless people, who are excluded or detached from their respective political community; meaning their State, which ought to protect their rights. However, while identification of this issue plays a crucial role in the question of asylum and human rights, the regulation and governance of refugees, asylum seekers, and

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<sup>3</sup> Arendt while wrote “The rights of man: what are they?” parallel to the adoption of the Universal Declaration of Human Rights (1948), she developed it as a section in the 9<sup>th</sup> chapter of the “The Origins of the Totalitarianism” which published in 1951, three years after the adoption of UDHR.

<sup>4</sup> This determination, of course, is considered for “developing countries”, however, it is problematic as not only there is no legal definition of the development, but also different theories have different approaches to its definition and even its use (Hirsch, 2017).

stateless people are more complex. Agamben's shift from *the right to have rights* to the issue of *the governance of the population* (1998, pp.126–9), can explain this point in a deeper and more detailed level. *Bare life of asylum seekers* is neither excluded nor included, but is placed in the “*zone of indistinction*” through the practice of sovereignty and the “state of exception.”

## **1-2- Sweden: Human Rights Elites Face the Paradox**

One of the recent examples which can be understood in the light of Arendt's and Agamben's critique is Sweden's policy regarding unaccompanied minors who entered Sweden in 2015, particularly those from Afghanistan. Afghanistanian<sup>5</sup> unaccompanied minors have a different condition because in addition to be affected by the general policy shift of Sweden, they are placed in a different category compared to other major groups such as Syrians and Iraqis. This latter difference is due to the assumption that in Afghanistan there is no ongoing war while in Syria and Iraq due to the establishment and operation of ISIS, conditions are considered as the state of war.

In recent years, Sweden has been one of the main destinations of people who migrate to seek asylum and refuge. With the wave of migration to EU In 2015, more than 162000 people migrated to Sweden seeking asylum and refuge. 43.2% of this population are children distributed in age groups of 0-6 (18,551), 7-12 (12,717) and 13-17 (39,116), and 35,369 of them are unaccompanied children. While only 312 individuals of the age group 0-6 years old are unaccompanied minors, the figure is higher for older age groups, 2251 and 32806 individuals respectively for 7-12 and 13-17 years old (migrationsverket, 2016a).

Most minor asylum seekers who entered Sweden in 2015 are from Afghanistan (30,080), Syria (17,596) and Iraq (6,103), however, the portion of unaccompanied minors in each nationality is different. While 17% and 21.4% of respectively Syrian and Iraqi children are unaccompanied, this figure is as much as 78% (23,480 individuals) in case of children from Afghanistan (migrationsverket, 2016a).

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<sup>5</sup> While it is common to name citizens of Afghanistan as “Afghan”, the use of this word is not accurate. Thus, I use “Afghanistanian” to refer to them. Afghans, who are also called Pashtuns are one ethnic group of the country. Other ethnic groups such as Hazara, Tajik, Uzbek, etc. according to this consider the use of Afghan as the nationality of all citizens problematic and exclusive because of imposing one ethnic identity over others (Bezhan, 2013). The issue of the use of Afghan is not recognized widely in western media and scholarship, but in recent years, the controversies over the use word Afghan as the nationality in new electronic ID documents is reflected on few western media.

Figures show that while there were some fluctuations, the overall number of asylum seekers increased from 2000 to 2015 and after that number of individuals seeking for asylum decreased dramatically in 2016 and 2017 (migrationsverket, 2018). Changes in Sweden's asylum policy have been considered as an important contributing factor in this decrease. In late 2015 the government announced the change in its asylum reception policy and in April 2016 it proposed a new bill (Regeringskansliet, 2016) including a series of temporary changes in Alien Act (Utlänningslag, 2005:716). Few months later in 21<sup>st</sup> of June, it proposed these changes as a bill passed by the parliament (Regeringskansliet, 2016; Riksdagsförvaltningen, 2016). This U-turn policy, aimed to reduce the number of asylum seekers entering Sweden (Ministry of Justice, 2018, p.1; Parusel, 2016, p.4; Fratzke, 2017, p.8), restricts issuing the residence permit and permanent permits, family reunion and permit extensions (Regeringskansliet, 2016). Other measures include border control in the main route of the entrance, Copenhagen-Malmö from November 2015 (Fratzke, 2017, p.8), as well as a proposal to cut the accommodation and allowance aid for people who got their final rejection decisions (migrationsverket, 2016b). While practices such as the increased control in the borders of the countries situated in the root of the journey contributed to this incline, these policies also make Sweden a less attractive destination for asylum seekers. More importantly, in the process of case assessment, Sweden started to use medical tests, MRI of Knee joints and X-ray of the wisdom teeth to determine the age of applicants who claim that they are minors but are not able to provide any document to prove their age (migrationsverket, 2017b; Rättsmedicinalverket, 2016, p.2; Svensson, 2016).

### **1-3- Research Question**

This study aims to explore and analyse Sweden's U-turn asylum policy and practice to identify and scrutinize critically how the policy of the right to asylum for unaccompanied children -who entered during the 2015 migration wave to Sweden- is shaped and problematized by the state-centric understanding of human rights. For this aim, I use "What is the Problem Represented to be" as a methodological tool to study the issue in the light of Arendt and Agamben's critique on human rights.

Following this aim, in this research I will answer these questions:

- 1- How the issue of the asylum wave and the right to asylum, particularly regarding unaccompanied children, is represented to be a problem and addressed through the U-turn policy?
- 2- What are the assumptions and justifications underlying this problem representation?
- 3- How and why the state-centric construction of human rights results in such U-turn policy and practices and creates the state of exception?

## **1-4- The Relevance of the Study**

The issue of asylum seekers and refugees is still a growing concern and a challenge facing human rights. This is due to two reasons: first, it is still the citizenship that determines individual rights, second in addition to war and insecure economic and social conditions, emerging issues such as climate change are also increasing the number of displaced and asylum seekers.

In recent years, even in the states, such as Sweden that comparing to the others had a more welcoming policy toward asylum seekers, there has been a shift. Asylum seekers' rights are not a simple question and therefore cannot be answered and addressed by international human rights law in isolation or by mere adjustments in technicalities of procedures. If we want to address the issue more accurately and more effectively, we need a more critical understanding which can deconstruct the core of the relation of nation-state system with the right to asylum and asylum seekers' rights as a human rights, or in other words deconstructing the issue of reducing inalienable rights to citizen rights in the existing political construction of rights.

## **1-5- Limitations and Delimitation**

The issue of asylum seekers and refugees and their rights could be analysed from a different perspective. With no doubt, all these perspectives can contribute to developments in the issue, from those arguing for grounds of protecting asylum rights in the existing system, to those who argue for supplementing the existing norms. However, this study specifically wants to look at the role of the nation-state based human rights discourse which despite all the claims about protecting asylum seekers rights, by its very nature fails to consider one of the core issues of the problem.

This research limits itself only to one country (Sweden), one policy (U-turn policy) and specifically one group (Afghanistanian unaccompanied children). This is not just a matter of feasibility and practicality of the research, but also it enables the study to find, exemplify and analyse deeply and concretely how specific procedure and practices driven by the state-centric conception of human rights and its core dilemma are raised and practised.

Taking this approach could be possible through different methods and theoretical frameworks. For example, participatory action research methods, particularly for children, could be a generative methodology which gives more voice to them to raise their issues more concretely (Kellett, 2011, pp.7–8; John Wilkinson, 2000, pp.4–5). However, this approach needs a considerable input of time and resources which was out of practical possibilities for this research<sup>6</sup>. Theoretical frameworks such as Weber's analysis of the rationality and bureaucracy, considerations of Bourdieu on the sociology of law or the analysis of the Althusser on ideological state apparatus also could shed light on the issue of this research. I considered to use to some extent such theoretical frameworks in the research process, but to make the analysis more clear and feasible, it was not possible to use all of them. As a result, I only chose Agamben's and Arendt's analysis. Not only because they deal with the core of the paradox of human rights directly and more explicitly, but also as their analysis, is more relevant and focused, as they engage with the bio-politics and relations of governance with nation-state.

## **1-6- Research Outline**

In this research, I start with a review of the mainstream literature not only to show how it is engaged mostly with professionalism and technicalities but also to place this research out this paradigm. In the third chapter, after a critical discussion on the common technical approaches to policy analysis and their shortcomings, I introduce the Bacchi's (2009) post-structuralist approach to the policy analysis and then explain the process of the research. Chapter 4, the theoretical basis of my research, explores Arendt's and Agamben's critique on the human rights; the paradox of rights and

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<sup>6</sup> This research at first intended to follow this methodological approach. But due to my time and resource limitation, and more importantly critical mental conditions of Afghanistanian children who mostly received their first or second rejection decisions, I found that conducting this approach is not feasible.

related concepts such as the right to have rights, sovereignty, the state of exception, bare life and the political construction of human right.

Chapter 5 as the main part of this research provides a comprehensive description on the Sweden's U-turn asylum policy and its materialisation for unaccompanied children, then uses WPR<sup>7</sup> to provide a basis which is used in the final section of this chapter for applying Arendt's and Agamben's theoretical viewpoint on the case. The final part of this research includes the conclusion of this thesis and reflections on how this critique can contribute to possible changes.

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<sup>7</sup> "What is the Problem Represented to be?"

## 2- Previous research

### 2-1- The Mainstream Literature

The scholarship in the field of asylum seekers, particularly unaccompanied minor asylum seekers, is mainly dominated by psychological, legal and administrative studies. This domination is a result of two points, firstly, because of the concerns about the prevalence of the asylum seekers' mental health problems derived from their experiences. Secondly, because the complex, multidimensional, bureaucratic and professionalised developments (not necessarily progressive) in the human rights normative framework on the issue of unaccompanied minors -which seems to have mostly an administrative, legal and social service-based approach- have encouraged researchers to face the problem as an administrative and legal matter.

It is common to study mental the health of asylum seekers and refugees based on their traumatic experiences. These experinces include *pre-immigration conditions* e.g. war or conflict, torture, violence and socio-economic or natural crisis (Sinnerbrink et al., 1997, pp.466–7; Hodes, 2003, p.58; Alemi, James and Montgomery, 2016, pp.638–9), *in the route of migration* e.g. being trafficked, dangerous travel routes and risk of death or drowning, being separated from their family members or the high risk of it, sexual abuse particularly for women and unaccompanied children, being arrested (Hodes, 2003, p.58; Donini, Monsutti and Scalettari, 2016, pp.14–5) and *post immigration conditions* e.g. stressful conditions, language barriers, loss of family, language barriers, stress of deportation, employment and financial issues, effects of pre-migration conditions of their lives, fear of not being able to meet expectation of their family in terms of sending money or to facilitate family union (Sinnerbrink et al., 1997, p.467; Alemi, James and Montgomery, 2016, pp.439–42; Donini, Monsutti and Scalettari, 2016, pp.15–6).

Unaccompanied children also have similar reasons to leave their country of origin or residence. Many studies (Thomas and Nafees, 2004, pp.116–8; Correa-Velez, Nardone and Knoetze, 2017, pp.147–9) note reasons such as persecution or death of parents, prosecution, experiencing or witnessing extreme violence, war, forced recruitment, discrimination and torture and in some cases economic issues contributing to migration of unaccompanied children. Furthermore, as the vulnerability of these children is not considered only due to their past experiences, many other



studies are interested in investigating new stressful conditions of these children in the host country such as considerable changes in everyday life, their need to deal with the new surroundings and the context in which they live with the stress of adapting themselves and the fear of deportation (Sedmak, Sauer and Gornik, 2017, pp.4–5; Enenajor, 2008, pp.5–6; Kohli, 2014, pp.86–87).

These issues and experiences, plus the vulnerability of children, specific protection gaps in the treatment of unaccompanied children such as a higher risk of being abused, detained, trafficked and sexually exploited, as well as the need to address the challenges faced by the states due to increasing number of unaccompanied minor asylum seekers have concerned human rights bodies. As a result, both UNHCR (1997, p.4) and Committee on the Rights of the Child (2005, p.5) have published relevant guidelines and general comments.

The UNHCR's Guideline (1997). Based on the vulnerability and special needs of these children and consideration of the best interests, as it is outlined in article 3 of the Convention on the Rights of the Child (1989), notes that the basis of the responses should be given to the issue by the states. This includes access to the territory and asylum procedure, identification and initial action based on child's rights standards and views of the child, refugee status determination and appeal, consideration of particular circumstances of unaccompanied children (e.g. development stage, limitation of his/her knowledge), identification and implementation of durable solution (including assessment and being assured about the protection and care in case of repatriation), and a comprehensive approach which needs cooperation and coordination of all agencies and individuals in interventions (UNHCR, 1997, pp.1-3).

Also, General Comment No.6 of the CRC notes regarding the obligations of the states, they are responsible for any child who is in their territory based on the Convention. It explores the rights of unaccompanied children through the ground provided by arts.2 (non-discrimination), 3 (best interests of the child), 6 (the rights to life, survival and development), 12 (the right to express views) and 16 (the right to privacy) of the CRC and the principle of non-refoulment (CRC, 2005, pp.8–11). Based on these principles, it provides a framework explaining special protection needed for unaccompanied children in all stages from the registration and initial assessment to the final case decision. Since the best interest of the child is one of the CRC foundations and principles in noted documents, there is an emphasis on it. In addition, to clarify the scope, aspects, and relevancy

of this principle, the Committee on the Rights of the Child has released a specific general comment regarding to this matter.

These human rights documents play a central role in the production of numerous studies in the field of unaccompanied children, their rights and best interests, administrative and judicial issues or procedures, etc. The systematic and almost comprehensive study of Celikaksoy and Wadensjo (2016) on the engagement of scholarship with the issue of unaccompanied children as well as their conclusions (2016, pp.38–42), shows these studies are mostly concerned about technicalities on the psychological and administrative issues. This seems to be problematic because it is likely to reduce the issue to bureaucratic procedures of norm applications.

Albeit, there are studies which start from different perspectives, but they lack the consideration of the notion of the nation-state based system critically. For example, Bhaba (2009) identifies numerous challenges, dilemmas, and problems such as the age assessment, legal obligations and provisions. However, it seems she has a narrow understanding of the Arendt's analysis of the state of rightlessness without considering the developments added to Arendt's key concepts, i.e. bio-politics and bare life, by Foucault and Agamben. Thus, all of the dilemmas and issues identified by her do not convince her to go further than prescribing advocacy for inclusion<sup>8</sup>. Similarly, while Gorkik (2017, pp.25–32) identifies the dilemmas of implementation of the Convention on the Rights of the Child to unaccompanied minors such as determination of the best interest, issue of agency, and even refers to the question of sovereign power and the state, still limits her critique to the lack of adoption of effective mechanisms.

## **2-2- Constructing an Alternative Analysis**

Regarding Sweden's U-turn asylum policy, it seems that such policies are problematic both in terms of their justification and consequences which are not compatible with the best interests of the child and the UNHCR guidelines. This approach can contribute to some practical developments and adjustments, and might be necessary. But it is likely that it does not go further than technicalities since instead of considering and challenging how the paradox of citizenship and human right and nation state-centric approach constructs, or at least contributes to the migration

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<sup>8</sup> In the theoretical framework chapter, it will be discussed why despite its usefulness in the identification of the problem, Arendt's understanding of the rightlessness cannot highlight all aspects of the paradox of state-centric human rights completely.

policies, it assumes that the problem is limited within the policy and shortcomings in functions and procedures, and issues could be solved if international human rights are given priority or if they develop more sufficiently.

However, policy analysis approaches such as “What is the problem represented to be?” (Bacchi, 2009) help us to identify the relation of the U-turn policy components and procedures and the language in the state-centric discourse of human right and understand how this discourse is not capable of protecting human rights of unaccompanied minors and even it is part of the problem by itself.

# 3- Methodology

## 3-1- Policy Analysis: A Technical or a Discursive Matter?

In both critical and technocratic/positivist scholarship on the policy analysis (Fischer, 2007, pp.223–4), it is widely accepted that within the policy-making practices, explicitly or implicitly, there is a notion that a problem or issue does exist and could be improved or solved. The policy is a response to that issue by defining and analyzing it, and suggesting a series of actions as solutions through technical and professional methods (Bardach and Patashnik, 2015, pp.xv–xvii; Weimer and Vining, 2015, pp.23–4; Bacchi, 2009, p.ix). Also to some extent, there is a consensus on the social and political nature of the public policy as it can be raised by or carry different social and political aims, interests and motivations (Caputo, 2013, p.44) reflected in the rhetoric of the problem definition (Bardach and Patashnik, 2015, p.5).

However, it seems that the technocratic approaches in policy analysis, as a part of what is called “The Rationality Project” by Stone (2012, pp.9&12–3), fail to go further than these simple appreciations since they perceive the policy-making as a rational and professional “assembly line” in which bodies of the state has a defined role in the process, from the identification and definition of the problem to introducing solutions or laws and implementing policies. A short review of some of the literature on how policy-making should be done and how policies should be analysed illustrates this critical point. Post-positivist approaches, which are introduced below, acknowledge the relation of facts and values and thus the complexity of the problem identification. However, as Bacchi (2000, pp.106–7) notes, similar to positivists, they tend to remain in the paradigm which understands the process of policy-making as a discovery of the problem and a response to the problem.

In their eightfold model, Bardach and Patashnik (2015) present a technical process for policy-making and policy analysis. While when it comes to problem identification and definition they are sensitive about the rhetoric of information on the topic, which is provided by different resources and might be used within the process of policy-making (Bardach and Patashnik, 2015, pp.4–5), they do not show any interest in considering the discursive nature of problem formulation in analyzing policies.

Richard Caputo (2013, pp.50–2), who comes from the social work field, explicitly recognises the political nature of policy and some of the fundamental dichotomies within the policy analysis such as Rationality vs. Democratic Politics, or Consensual vs. Contentious analysis. However, he echoes the Popperian criterion for the scientific hypothesis, *the falsifiability* (Popper, 1992, pp.64–67). Therefore, Caputo considers critical and emancipatory approaches in social science less capable of being “useful” in the field of public policy as they “cannot be truly tested” (Caputo, 2013, p.200). As a result, he optimistically takes policy goals for granted if they are based on observations of the past practices outcomes and professional values (Caputo, 2013, p.51). He reduces the evaluation of *policy proposals* or *policy products* to the assessment of whether they comply with effectiveness (goal achievement), efficiency (maximisation of policy benefits), equity (fairness of policy costs for beneficiaries) and such or not (Caputo, 2013, pp.60–2)<sup>9</sup>.

Knoepfel et al. (2007, p.xi) in their policy analysis method from a structuralist point of view, approach to the policy not as only a single and internal matter of management but as a consideration of “structure and bureaucratic procedures” in the light of the “overall management of policies”. They identify three main approaches toward policy analyses, two of them, concerned with the state, trying to explain the “actual essence of public actions” and the “*operational* modes and logic of public action” and one is concerned about “effects of public actions”(Knoepfel et al., 2007, pp.3–10). These two points enable them to construct a comprehensive model which considers both actors and the institutional dimension of policies. In their model, they point out the issue of social construction of problems and its importance. They suggest that a problem is defined by actors through a process in which a problematic private situation, transforms to a social problem through mobilisation. In the second phase the social problem becomes publicly recognised and, finally, leads to the last phase which is the adoption of the public policy. Within this process, various actors with different approaches and interests interact, e.g. political bodies and parties, unions, media, beneficiaries, etc. (Knoepfel et al., 2007, pp.127–8&131). However, it seems that they undermine the importance of this matter as their appreciation of the politics of differences in the problem definition is based on assuming the rational choice of actors and does not lead them

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<sup>9</sup> Albeit he considers policies as *performances* and *processes*, but similarly he applies the same epistemological approach and rarely refers to critical perspectives in social science even as a point of departure to raise critical questions.

to consider critically *the origins of*, and *underlying assumptions associated with* a particular problem definition within their model.

### **3-2- Placing Discourse Analysis in Understanding of the Policy**

Fischer (2007, pp.232–4) puts policy analysis levels or approaches in 4 discursive categories which construct the policy science. The first discourse, namely *the technical-analytical*, mostly emphasises on the evaluation of the objectives fulfilment and its only critical point is the comparative assessment of alternative programmes which might have same results. Thus, it is concerned with methods and technics to assess the success and the efficiency. The second discourse, *the contextual*, comparing objectives with the situational context in which the problem exists, goes further to consider the situational relevance of the policy. *The systems discourse*, as the third level of policy analysis, expands its scope from the narrow situational context to the societal context, considering the relation of the policy with “the society as a whole”. It evaluates the compatibility of the policy goals with the values and the accepted social order of the society. However, it does not challenge existing social values. Despite these three discourses, the fourth, which is the *ideological discourse*, turns the inquiry to the ideological assumptions and ideas which not only organise the social order but also legitimise it.

Fischer’s multidimensional understanding and categorisation of policy analysis provides a basis to encompass a policy analysis systematically. Here, there is a distinction between three discourses which are concerned with technicalities of the issue of the governance -whether they look at context, values, and aims or not- and the level which alternatively assesses the underlying ideological assumptions. One of the recent systematic frameworks for the alternative understanding of the policy is constructed by Carol Bacchi.

### **3-3- A Post-structuralist theoretical base of Policy Analysis: How to Face the Policy**

Bacchi starts from the notion that the existence of a policy, as a propose of action, means something is assumed to be problematic, thus needs to be changed (Bacchi, 2012, p.21). However, instead of dealing with the reductionism of the technical trap in policy analysis or the complexities of the

structure and bureaucracy, she goes further to evaluate assumptions and the logic of the policy through its problematization, and reveals the discursive essence of policies (Bacchi, 2000, p.48). In other words, this approach identifies and deconstructs the policy since it considers the policy as a phenomenon which not only is a social construction, but also is based on assumptions which are constructed as well.

She proposes three theoretical points on the policy. Echoing Foucault and the regime of truth (Foucault, 1980, p.131), She firstly points out the way that individuals and society are governed is based on the problematizations of issues and the construction of the regime of truth. However, this regime does not have a narrow definition which might result in reducing the issue of governance to the state as the “primary site of study”, but in case of governance, it consists of all experts and actors contributing to the knowledge which shape “govern-mentalities” or “mentalities of the rule” (Bacchi, 2009, p.26).

In her second proposition (2009, pp.32–4), she makes clear that despite other approaches which emphasis on the study of the problem, her approach explores the representation of the problem or the way in which the issue is described as a problem, and thus, is the object of governance. Her approach, in one sense, is similar to the constructivist approach as both deny that the policy is only a simple a reaction of the government to an ‘existing problem’ because the policy-makers conceptual framework affects how the problem is conceived (Bacchi, 2009, p.33). However, she goes further to highlight that the state’s version of the problem has a privilege and does exist in reality, since the state prescribes, enforces and implements a particular way of life and social reality through legislation, technologies, knowledge formation and action plans.

The last but not least proposition of Bacchi (2009, pp.39–40) is the consideration of the effects and the operation of the problem representation. A particular representation generates three distinctive but interrelated effects a) *discursive effects* which determine the scope of thinking about the solution, *subjectification effects* or the effect of the way of constituting subjects in the policy and *lived effects* of the impact of the policy on life and the body of the people (Bacchi, 2009, p.63).

### **The Challenge of Normativity**

As it is noted in the theoretical bases of “What is the problem Represented to be?” approach, any problem representation or problematization is based on the regimes of truth and, is a part of a

particular discourse. Also, regimes of truth and discourses are relative. Thus, from a pure post-structuralist point of view, discourses could not be evaluated by a normative framework or a system of values because any normative system itself is based on a regime of truth and has a discursive nature. Therefore, any critical analysis of the policy based on the WPR and the post-structuralist approach seems to be problematic. It can describe critically any problematization and reveal the political essence of that problematization, but it cannot make any judgment about the truth<sup>10</sup>.

However, Bacchi claims that the WPR has a “normative agenda” (2009, pp.44–6) firstly by challenging representations which “benefit [...] some groups at the expense of others” and thus helps to identify places for intervention, secondly by opening a space for reflexivity which calls people who are engaged in policy-making to reflect on their views and agendas, and, thirdly by providing the opportunity to understand “how resistance [against dominant discourses and their policies] occurs”<sup>11</sup>.

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<sup>10</sup> This issue also is one of the criticisms that Foucault received. Discussion on this matter goes beyond the scope of this study, but to provide some preliminary knowledge for the reader, I briefly discuss the issue. Habermas raises the inquiry on the paradoxical ontology and epistemology of the Foucault. According to Habermas, Foucault replaced Marxian concepts of *repression* and *emancipation* in his analysis of power with the *competition of discourses* which could not be normatively validated (Habermas and Levin, 1982, p.29). In addition, the lack of any commitment to a right side (Lévy, 1977, p.158) or any truth as well as ‘totalizing the critique’, because any truth regime is shaped by a discourse competing with others by and for the power, will turn the critique against itself (Fraser, 1985, pp.165–6). Bacchi to some extent is aware that this critique may be raised, thus she recalls what Habermas noted, but instead of Marx, she refers to Deleuze’s concept of “the right to problem” (Bacchi, 2009, p.49). According to Deleuze (1994, pp.158–9), the right to problem, which is a) challenging the idea that problems are “ready-made”, b) questioning that problems disappear with solutions and c) participation in defining the problem, emancipates people who are enslaved through the practice of the power and problematization.

This issue remains problematic because the use of the Deleuzian concept of the participation still could be challenged. If the policy is also a practice of power, participation in problematization itself could not provide a ground for us as it is not an abstract concept but it is the matter of practice. We can ask about the subject, conditions, the process and more importantly the result of participation that are all engaged in power relations as well. Furthermore, since the power is something which could be found in all aspects of the social and political life, then what provides normative justification of preference in case of conflicting interests, even if we assure the participation?

Based on this challenge, one may say instead of building the theoretical bases for WPR on the Foucauldian discourse analysis and providing a normative basis for it by Deleuze, we can consider the approach of radical practitioners such as Paolo Freire (Freire, 1970, chap.1) or Augusto Boal. They use the Marxian understanding of power, but in a more flexible way, to extract the relation between power, knowledge and governance (what they call oppression) to construct a base for participatory, emancipatory and collective Praxis (see Boal, Chatterjee and Schechner, 1998)

While the issue of the normative basis and the important contribution of the Freirean analysis on knowledge and power can have some implementations for the WPR tool, but they need to be developed and dealt more deeply which goes beyond the scope of this research.

<sup>11</sup> Again, here we see what she specifies as a normative agenda and unique opportunity that WPR provides, are so similar as *dialogics* in the Pedagogy of the Oppressed (see Freire, 1970, chap.3), and *protagonic role* of the actor-spectator in the Theater of the Oppressed (Boal, 2008, pp.98–102). It seems that while she tries to take a normative position, at the same time, she wants to preserve the poststructuralist appearance of her arguments.



### **3-4- “What is the Problem Represented to be?” as a Policy Analysis Tool**

This policy analysis approach assesses policies with six main questions:

- 1- What is the problem [...] represented to be in a specific policy?
  - 2- What prepositions or assumptions underlie this representation of the problem?
  - 3- How this representation of the problem come about?
  - 4- What left unproblematic in this problem representation? Where are the silences? Can't the problem be thought about differently?
  - 5- What effects are produced [or reproduced] by this representation of the problem?
  - 6- How/where has this representation of the problem been produced, disseminated and defended? How could it be questioned disrupted or replaced?
- (Bacchi, 2009, p.2)

Bacchi (2009, pp.21&155) notes that these questions could be applied to policies in order, or in an integrated way. She notes that the conduction of the analysis needs a process of returns and considering other parts of analysis in each step. Based on this, and as policies on migration and asylum are complex, in this study, I will use the integrated approach. It would be more efficient to show the interrelated and complicated relations of meanings, associations, and materiality of the policy as a network of bio-political assumptions and practices, which in case of presenting the analysis in the order of questions, its complexity might be reduced.

While all questions are relevant to the case, I mainly focus on the first, the second and the fourth one to identify the construction of the policy's rationality and its manifestation in the law and procedures, and to problematize its rationality. This is because the aim of applying this tool is to provide a critical understanding of Sweden's asylum policy and its assumptions. This understanding enables us to place the policy in the Arendt's and Agamben's analysis of the paradox of rights within the nation-state system and the state of exception.

According to the first question, a description of the policy should be provided in the first stage of the study. This description includes not only what is the policy and its justifications, but also how it is considered and represented as a problem implicitly (Bacchi, 2009, p.2).

Bacchi and Goodwin (2009, pp.7–9; 2016, p.21) suggest that identifying concepts, binaries and categories within the representations and the meanings carried by or constructed around them can provide a reliable point of departure to the second question since these meanings and categorisations implicitly include assumptions that the WPR looks for.

The fourth question of the WPR problematizes the problematization of the issue (Bacchi, 2009, pp.12–3). This task is guided by considering what is not included in the problem representation (Bacchi and Goodwin, 2016, p.22). The use of concepts, binaries, and categorisations in policies to some extent tend to reduce the complexity of the issue. Also, any problem representation excludes or ignores some related issues or aspects which can challenge it. Thus, to identify limitations of the problematization, it is useful to go back to consider the critical points of those meanings network as well as the emergence of that particular problematization.

### **3-5- Going Back to the Post-Structural Paradox: The Need for a Normative Theory**

While the Bacchi's normative agenda, introduced in this chapter is useful to consider the discursive nature of policy and its politics, this study still lacks a normative understanding. Only a normative framework can enable us radically to illustrate and analyse the relation of the state-centric conception of human rights and Sweden's asylum policy shift and to suggest alternatives.

If we understand how knowledge and meanings about an issue are constructed, we can identify how they justify and shape policies, procedures, and actions. This deconstructing only if supplemented by a normative theory which suggests an alternative knowledge and understandings, can help to reconstruct alternative approaches and actions (Burr, 2003, p.4). In this research, I use Arendt's and Agamben's analysis as a theoretical input to WPR analysis, which enables me to build on the results of the study, my concluding discussion.

### 3-6- Data Collection

To apply the WPR and the theory in this research, I conducted two main phases: Data gathering and data analysis. In the first step, official documents regulating or presenting Sweden's asylum and migration policy regarding unaccompanied minors are gathered. These sources are:

- 1- Act (2016:752) Concerning temporary restrictions on the possibility of Obtaining a Residence Permit in Sweden<sup>12</sup>
- 2- Alien Act (2005:71)<sup>13</sup> – with consideration of permanent or temporary changes of the later amendments
- 3- Act Amending the Aliens Act<sup>14</sup> (2009:1542)
- 4- Aliens Ordinance (2006:97)<sup>15</sup>
- 5- Medical Age Assessment -this is how it is done (Rättsmedicinalverket, 2016)<sup>16</sup>
- 6- How to apply for asylum: For Children Who are Applying for Asylum Without a Parent
- 7- Information on the Migration Agency<sup>17</sup> web page, section Protection and Asylum

Then according to the relevant sections of the legal documents (mainly Alien Act and its temporary amendment) and a manual published by the Swedish Migration agency, relevant parts on the eligibility for asylum, case assessment criteria, procedures and requirements and services for unaccompanied children were extracted.

At the second stage, to provide materials which can help to extract assumptions and justifications of the U-turn policy, I searched official's statements and speeches. Since this consist materials repeating similar content, after exploring them and extracting data, I choose three of them, which include content of others in terms of the problematization of the issue of asylum and migration wave and the approach to governing it: the official announcement of the U-turn policy in a media conference, the speech of the Sweden Prime minister in the EU parliament and Sweden's asylum

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<sup>12</sup> In Swedish: Lag (2016:752) om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige

<sup>13</sup> Utlänningslag (2005:716)

<sup>14</sup> Lag (2009:1542) om ändring i utlänningslagen

<sup>15</sup> Utlänningsförordning

<sup>16</sup> Swedish National Board of Forensic Medicine

<sup>17</sup> migrationsverket

Policy Factsheet. For the third stage, I articulated gathered and chosen material of first and second step to provide a comprehensive description of the policy and its materialisation in law and procedures.

For the analysis, the second phase, by application of the WPR I found the relation of explicit and implicit justifications and assumptions in official's statements with the legal material and the policy and their relevant procedures (problem representation and its assumptions). Then I problematized their problem representation. Finally, I applied my theoretical framework and concepts, Arendt's' and Agamben's critique of human right, to the result of WPR analysis and the findings of the first phase.

### **3-7- Source Criticism**

To ensure that materials used for this research are official policies and law, not interpretations, or unreliable secondary sources, all documents such as laws, factsheet, procedures, statistics, manuals, etc. used in this research are gathered from Sweden Parliament and the state offices of Sweden such as Migration Agency, Swedish National Board of Forensic Center and the Department of Justice, etc. or official media releases. Also, additional official sources have been considered, i.e. the procedure of appealing decisions from the website of the Sweden's Supreme Court.<sup>18</sup>

As policies and laws are subject to time and change, they should be evaluated before being used. Because the Migration Agency's website information is updated and based on the temporary law which is valid until July 2019, the time validity was not a significant issue. However, to ensure that the right information in terms of the time applicability is being used, I compared them with the temporary act and two recent research (Fratzke, 2017; Parusel, 2016) on the Sweden's U-turn asylum policy.

Among all documents, there were only two sources without an available English version. One of them is the media conference the prime minister and his deputy on the temporary act, and the other is the temporary act itself. For both, a Swedish Human Rights student and Asylum Rights activist, translated the content. However, to avoid any mistake or misunderstanding, translations were

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<sup>18</sup> Förvaltningsrätten i Stockholm

compared with the English summary of the temporary act, published on the Government Offices of Sweden's webpage, information on the Migration Agency webpage and its manual for unaccompanied minors and media release of the conference by the media.

For other amendments as well as the Alien Act, Sweden's Ministry of Justice has published English translations, but it states that these translations do not have any legal status and also might not be necessarily updated (Justitiedepartementet-Regeringskansliet, 2015). For the question of being updated, a Swedish Human Right student helped to check the updated comprehensive Swedish text of the Alien Act on the parliament website. In this text after each section of the law, the relevant changes made by newer acts are provided. Thus, it makes it possible to check updates and in case of changes conduct translation. This check, however, showed only one relevant change which is applied to the gathered materials. About the authenticity of the translations, while the official translation of the law is not the law, they seem to be reliable for the aim of this research. During the research process, no contradiction was found between them and the other English official publications such as manuals and information on the Migration Agency webpage, or researches on the Swedens migration policy by Swedish native or proficient speaker experts (i.e. Schoultz, 2017; Parusel, 2016).

### **3-8- Validity and Reliability**

One of the challenges of case studies using qualitative methods is the issue of validity and reliability as not only there are controversies on the use of these concepts in qualitative methods and its complexity, but also generalizing results driven from a case study is problematic because of "dependence on inductive logic", "assumption of determinism", and the validity and reliability of result in different chronological or geographical context (Gomm et al., 2000, pp.39–31).

Yin (2014, p.46) however, provides tactics to test both validity and reliability in the process of the case study. Based on his suggestion on the "construct validity" in the level of data collection, in the first steps of data collection and understanding the policy, I talked and discussed the policy details and procedures with a human rights graduate working with unaccompanied children in municipal level.

Yin explains that analytic or conceptual generalisation illustrates "how and why" an initiative "produced results" or why the study's events occurred. This study does not intend to generalise its

findings in the sense that the results of investigating and analysing Sweden's policy regarding unaccompanied minors would be the same in other countries or other times. However, based on the understanding that Yin suggests, it tries to use Sweden as an example of explanation and conceptualisation of Arendt and Agamben on the paradox of the state-centric approach. In this sense, if we bear in mind that the state-centric approach to human rights is a constructed system with a paradox, then the study of a country such as Sweden can help to see why the paradox within this system does exist and how it operates.

### **3-9- Research Ethics**

In addition to considerations on the validity, reliability and the question of generalisation, neutrality is one of this research considerations. My work experience is mainly in the field of Afghanistanian refugee and asylum seeker children. Thus, their issues have been my concern during last ten years. Therefore, one might argue that the research could not be free from bias.

To prevent misinterpreting policy documents, the official translation of the law, and procedures, I relied on the consultation about the policy from a Swedish practitioner, whom I noted before, and reviewing my findings and analysis for the second time to restrict my interpretation and make it more objective.

However, I acknowledge that my problematization of Sweden's U-turn policy, is also one possible representation, which is based on a particular theoretical framework, and any problematization has its own precondition and perceptions about the social and political phenomena.

## 4- Theoretical framework

In this chapter, I will explore and discuss Arendt's and Agamben's critiques on the human rights as the theoretical basis of this research. The appropriateness of these critiques lies in their analysis of the fundamental tension between the political construction of rights and the notion of inalienability of rights. Arendt starts from the stateless/refugee people to grasp the paradox of human right and Agamben by developing Arendt's arguments, goes further to point out that the sovereign power, by its very nature, generates the state of exception and the zone of indistinction where asylum seekers who should be subjects of right are reduced to their bare life and governed as subjects of humanitarian aid.

### 4-1- Hannah Arendt

Many people in Europe due to the political changes during the interwar and post-WWI period became stateless. Hannah Arendt identifies a process of disintegration which manifests itself mainly as denationalisation of Jews and minorities within these periods (Arendt, 1976, pp.268–9&287). From her preceptive because the concept of rights, despite the claim of the Universal Declaration of Human Rights, is constituted as citizen's rights. If people, due to political decisions or war, lose their citizenship, they lose their rights as well. Based on this, she argues what distinguishes stateless individuals from citizens of the nation-states is the protection, or in other words *the right to have rights*, provided for citizens by *the state*, their *political community* (Arendt, 1976, p.296).

In her analysis, Arendt identifies two losses of stateless people. First, they lose their home, the “social texture” in which they are born, and established social ties. But beyond its surface, the point here is that they are not able to find another home, not because of the *overpopulation* of the new territory but due to the political organization of the society. Since the human beings are considered “under the image of family of nations”, thus, being detached and excluded from a nation means being “thrown out of the family of nations” (Arendt, 1976, pp.293–4). Secondly, while stateless and asylum seekers lose the protection of the state, they will experience the loss of the political and legal status by which they could have been recognised by other states as a citizen of a state.

In contrast to the classic and historical norm of being considered as a refugee, which is political and religious -or more generally ideological- she explains, the phenomenon of denationalized or detached people seeking asylum is not the result of persecution, but it is the result of being “born in to the wrong kind of race [...], class or drafted by the wrong government (Arendt, 1976, p.294).

The Arendt’s critique on the human rights is focused on the concept of the rights which is based on natural rights. The construction of inalienable rights and dignity that one human being has, originates in the natural rights concept which is abstract, since in reality, it is the political attachment of the people which determines their rights. Arendt argues that the naked human being, a biological species without political life, who has rights because only s/he is a human- what is called *zoē* in Greek philosophy-, is abstract. Thus, she recalls Edmund Burke’s critique: “‘inalienable’ rights only confirm the ‘rights of the naked savage’”. Therefore, as the rightlessness is the consequence of denationalization, and as being detached from the political community reduces the political life of humans to their biological naked life or *zoē*<sup>19</sup>, then to restore the problem, a right to have rights should be constructed. She notes this is only possible through the establishment of a political community as a basis for the political life or *bios* (Arendt, 1976, p.299; Lechte and Newman, 2012, p.525). In other words, the human rights reduces the humanity to its nonpolitical life, but the practice of rights by nature is political. Thus the only solution is to repoliticize the human with the right to have rights.

Albeit the analysis of Arendt is generative and accurate, it results in a problematic positioning. For example, Lefort against the conservative approach of Burke argues that Arendt’s position and recalling Burke still confit “rights to the gates of the *city*”<sup>20</sup> (Birmingham, 2006, p.45). Birmingham tries to question Lefort criticism by interpreting Arendt’s position as a call for a political institution for human rights. However, to show the feasibility of her suggestion, Arendt explicitly has introduced Israel “as the recent example” (1976, p.229). She ignores to consider how the establishment of the State-sponsored terrorism of Israel became possible by denationalisation of Palestinians after the dissolution Ottoman empire, and how Britain as a colonialist state, governing the Palestinian territories after the WWI, facilitated this process. This point shows us that while Arendt identifies the problem, the central argument of her project -which is that the

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<sup>19</sup> Arendt in *Origins of Totalitarianism*, nor used *bios* neither *zoē*. However, through her analysis of slavery (1976, p.297), she refers to them respectively as naked life and political life.

<sup>20</sup> The emphasis is added.



totalitarianism results in the paradox- should be turned back to stay on its head. Here, Agamben's viewpoint will help us to understand that it is the sovereign nation-state which at the end of the day results in totalitarianism.

## **4-2- Giorgio Agamben**

The issue which is raised by Arendt provides a progressive base for understanding the paradox of the human rights. Giorgio Agamben uses this point of departure, but he goes beyond it to formulate the issue in a new way. According to him, while it is true that rights in declarations are based on the natural rights, and its assumption of the inherent dignity of the human being, but the natural life, the *zoē*, is inscribed within the “juridico-political order of the nation-state”(Agamben, 1998, p.127). Governance, in its very nature in the modern era as Foucault argues, includes administration of the biological life of the population. It has the notion of measuring and categorising. However, Agamben also goes further than Foucault to argue that the issue is not merely the inclusion of *zoē*, the bare life, in the politics of the modern era, but it is an expansion of the state of exception.

### **4-2-1- The state of exception, Sovereignty and the Nation-State**

To understand the nature of modern governance, it is crucial to consider the concept of sovereignty. Agamben, instead of using the Weberian understanding of sovereignty which is the practice of legitimate violence, refines Carl Schmit's (2005, pp.5–7) definition of sovereignty: the power to make decision about the exception (Owens, 2009, p.570; Agamben, 1998, pp.16–7).

This exception, however, does not mean a complete detachment from the law and bio-politics, since the exclusion also means being included “in the form of exclusion” (Agamben, 1998, p.8) or in other words, being excluded from the category of citizens, means also being included in the category of *excludedes*: non-citizens.

The sovereign nation-state system constructs itself based on the nativity, deciding about *exception of those who do not belong to the nation from the citizenship* (Agamben, 1995, p.116). This is a crucial point raised by him as he notes the common rule determining the citizenship and nativity is the Roman tradition of referring to “*ius sol* (birth in a certain territory) and *ius sanguinis* (birth from citizen parents)” which were also the criteria of Germaneness for the Nazi state (Agamben,

1998, p.129). One of Agamben's considerations in Arendt's work is that she fails to closely investigate the historical emergence of bio-politics, which results in understanding the process inversely (see section 4-1-). It is not the totalitarian state which resulted in transforming of politics into the bare life and administration of all aspects of human life, but it is this transformation which gives rise to the totalitarian state:

“[T]he rights won by individuals in their conflicts with central powers [...] prepared a tacit but increasing inscription of individuals' lives within the state order, thus offering a [...] foundation for the very sovereign power from which they wanted to liberate themselves.” (Agamben, 1998, pp.120–1)

#### **4-2-2- BareLife, the Camp and the Figure of Asylum Seeker/Refugee**

Referring to the *zoē* (natural/naked life of a human being)-*bios* (political life of a human being) dichotomy in the Greek political philosophy, Agamben (1998, p.1) constructs the concept of the *Homo Sacer*, a human being who is reduced to his/her bare life<sup>21</sup>, who is excluded from the political life.

However, in nation-state order and democracies, bare life is not excepted merely, but it is governed. This inclusion-exclusion reduces human beings to their bare life as particularly of those who are stateless or asylum seeker. This point illustrates the nature of the sovereign nation-state which categorises the population to be included or excluded, to be governed differently. For him, not only the practices of Nazi Germany but also Belgium's in 1922, Turkey's after the Ottoman dissolution, Post-Soviet Russia's, France's in 1915 and fascist Italy's denationalisation practices are examples of this exclusion (Agamben, 1995, p.115).

Agamben (1998, p.128), to clarify this issue, points out a transformation from “divinely authorised sovereignty” to “national sovereignty” in early declarations of rights in which rights as a political construction are associated with birth, the pure natural body. As the political community is based on the relation of the citizen and the state, the preserving of rights becomes limited to citizens, members of the nation. Here the concept of *right holder* acts as a catalyst which transforms the

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<sup>21</sup> Construction of this concept is engaged in a complicated and complex historical and philosophical issues which should not be reduced or simplified. However, in this study, I focus on the issue of inclusion and exclusion of asylum seekers and their relation to the sovereignty and state of exception.

bare life to political life but exempts those who are not accepted as members of the nation or the political community.

To be more explicit, when it comes to human rights, and asylum seekers or the stateless individuals, the issue is not only the exclusion from the political community, namely the state, but also is being included “in the form of its exclusion”. The subject of the right has rights because of the inherent dignity of her/his bare life, but as in the context of nation-state, rights are meaningful and implemented only within a legal and political order based on the sovereignty of the nation-state, human rights for asylum seekers subjectivate them, as a population needed to be regulated but in the state of exception (Lechte and Newman, 2012, p.523). It is claimed that they have inalienable rights, but they do not have rights if they are not “characterized” as citizens of a state (Agamben, 1995, p.116).

In “We Refugees” (1995, p.116)<sup>22</sup>, the article he wrote with the same name of an article by Arendt, he notes that the status of the refugee is considered temporary in the nation-state based formation of the political. They should be either integrated and naturalised or repatriated to the country that they come from. This consideration reveals that “a permanent status of man in himself is inconceivable for the law of nation-state”. They are placed in the “zone of indistinction” where on the one hand, they are excluded because they do not belong to a sovereign nation-state, and on the other hand, they are included as bare lives to be administered and regulated (Agamben, 1998, pp.109–11).

While the image of camp, as the zone of indistinction, mostly associated with the historical image of concentration camps of the Nazi Germany, it could be considered as a political paradigm (Agamben, 2000, p.41), “a hidden matrix [...] of the political space in which we live” (Agamben, 2000, p.36). In concentration camps, *the order* of the sovereign, who decides about exclusion-inclusion and judicial matters, is localised and territorialized to a specific space where excluded individuals are gathered. However, as the political system, the state, expands itself to administrating the bare life, it “dislocate[s] the localization” of the order (Agamben, 2000, pp.43–4) or in other words, the order of the sovereign virtually exceeds to natural life: the birth and development of bio-politics.

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<sup>22</sup> This article later has been published as a chapter named Beyond Human Rights in Means without ends (Agamben, 2000)

It is not surprising to see that two institutions are mostly engaged with issues of asylum seekers, firstly migrations agencies, police or security bodies which control the internal security and regulate decisions on the entrance of outsiders to the territory and secondly, humanitarian organizations or bodies, which fulfil the basic need of the bare life (Agamben, 1995, pp.115–116). Noting the nature of the issue of refugee as a “humanitarian and social” matter in the preamble of the 1951 Refugee Convention makes Agamben argue that the issue explicitly is considered out of the realm of the politics<sup>23</sup> (1998, p.133). The question of the asylum is the issue of a considerable population, but the Convention excludes them from the political realm and places their issue in the realm of humanitarian affairs. This illustrates implicitly that the claim of the inalienable human rights in the nation-state based system is a fiction.

Agamben considers the issue of “the separation between humanitarianism and politics” within the nation-state order as “the extreme phase of separation of the rights of [hu]man from the rights of the citizen”. Humanitarian organizations claim that they conduct their activities based on inalienable right, but in the best scenario, they can only “grasp the human life in the figure of bare life” which reduces the life to the object of aid, while maintaining a “secret solidarity with the [...] power which they ought to fight” (Agamben, 1998, p.133)

The figure of asylum seeker and refugee thus, reveals that the holy “trinity of State/Nation/Territory” -and its assumptions such as *the birth means nativity* or *the human means citizen-* which are taken for granted as the *truth*, are fictional (Agamben, 1998, p.134, 1995, p.117). Based on this, the figure of asylum seeker and refugee for him is a radical figure which makes it possible to see beyond the fiction of the nation-state to construct a new politics in which the bare lives is not “excepted or separated in human rights”.

Referring to a group of Palestinians who live in a territory between Israel and Lebanon, Agamben suggests that we can consider them as those who constitute “*the vanguard of their people*”. Their intention is not to establish a state, what is a problem and not a solution, but to make holes in the fiction, in this case, in the State-sponsored terrorism of Israel. They constructed “no-[hu]man’s land”, an extraterritorial space in which the political survival of humankind could be imagined

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<sup>23</sup> Albeit in the preamble, it is noted that the issue of refugees might raise political conflict, but it is not the political conflict which refugees and states are engaged in, but is the one that might happen between states.

since the citizen in it will recognize him/her self is also a refugee, the one without a state, but at the same time belongs to an alternative political community (Agamben, 1995, pp.118–9).

Since the problem of rights and citizenship originates in the very nature of the sovereign and the constituent power, the core of the political tradition, Agamben (2000, p.111) argues for abandoning these concepts, -which are constructed in the paradigm of *means with ends*, because the problem is in ends or desirable conditions whatever they are- or at least reconsidering them critically. The idea of ends implicitly in itself has the idea of governance and administration, which leads to bureaucracy and emergence of bio-politics.

### **4-3- Making the Theoretical Framework Operational**

Arendt's argument helps this research to understand how unaccompanied minor asylum seekers, as persons detached from their political community (the state) and migrated to another state, in the existing political construction of human rights lack to have the right to have rights. While this point is crucial, it is not sufficient as it seems Arendt undermines the importance and dynamism of the bio-politics and the sovereign. Agamben's argument by developing the concepts of bio-politics and the sovereign enables us to understand the Swedish asylum policy as one of the examples of constructing human rights based on the nation-state system which results in conditionalizing rights. It also helps us to understand how the asylum policy and procedures, such as age assessment or the criteria for the asylum case assessment as exceptional rules, govern bare lives of unaccompanied minor asylum seekers and put them in the zone of indistinction.

# 5- Findings and Analysis

In this chapter firstly, a descriptive study of the U-turn policy is provided to show how the issue of unaccompanied minors is regulated and governed. This is followed by a WPR analysis of the policy to identify the discourse which the policy is based on and how this discourse is materialised within the processes of regulating and governing minor unaccompanied asylum seeker. Then based on Arendt's and Agamben's viewpoint, I will illustrate and argue why the state-centric discourse is not capable of providing protection for the right to asylum for unaccompanied Afghanistanian children in the case of Sweden, and also how this policy contributes to reducing them to bare human beings by its assumptions, policy, and practices regarding the right to asylum.

## 5-1- Policy Description

Responding to the migration wave in 2015, Sweden conducted a series of changes in its asylum policy aimed to reduce the number of individuals seeking asylum in Sweden. Firstly, a temporary amendment was added to the Alien Act which removed the concept of *persons otherwise in need of protection* and restricted issuance of permanent residence permits and secondly, identity check and entrance control were introduced to the routes by which asylum seekers enter Sweden (Fratzke, 2017, pp.9–10).

Sweden has four main arguments for this change. It is argued that, firstly, the country and its welfare system has not the capacity of such population, secondly, there is a need for equal distribution of asylum seekers in EU (Ministry of Justice, 2018, p.2; Löfven, 2016), thirdly, to protect children rights and for economic reasons it is necessary to make sure about the age of applicants (Regeringskansliet, 2017) and finally, not all of the applicants have “grounds for protection or other grounds to stay (Ministry of Justice, 2018, p.1).

In this chapter, after a brief exploration of the political origins of the temporary law, main changes introduced by this law will be described. To some extent, these changes have been described in the literature, however, the existing literature descriptions seem to be so general (i.e. see Fratzke, 2017; Parusel, 2016) and there is a lack of a close look at how changes relate to unaccompanied children. This closer look can provide us sufficient data to consider how issues such as age assessment, investigation, repatriation etc. are problematic. Then, I explore the procedure of

asylum application for unaccompanied children based on manuals, the temporary law and other documents published by the respective authorities.

The methodological approach of this research, WPR, which is concerned about problem representation, is not merely the matter of language and relation of concepts but also considers the complex and multidimensional materialisation of the policy. Thus, it is crucial to provide a comprehensive policy description.

### **5-1-1- Legal Provisions**

In May 2015, the Moderate Party<sup>24</sup> presented a proposal restricting issuance of permanent residence permits for asylum seekers in Sweden (The Local, 2015a) which was similar to the one presented before by the Cristian Democrats (The Local, 2014), and a few months later the ruling coalition of Social Democrats and the Green party as well as four other parties of the parliament agreed to introduce a new temporary law restricting issuance of permanent residence permits (The Local, 2015b). The proposal was announced by the prime minister and his deputy in a press conference, where the deputy cried and in response to the question about why they do not leave the government to show their disagreement with this decision said “then more decisions could have been made” (SVT, 2015).

A brief look at three central legal concepts concerning asylum seekers in Sweden is needed to understand these changes. Swedish Alien Act categorises asylum seekers who could be granted residence permit (Utlänningslag, 2005:716, chaps5, §1) in 3 groups: *refugees*, *a person otherwise in need of protection* and *a person in need of subsidiary protection*<sup>25</sup>(Utlänningslag, 2005:716, chaps4, §§1,2&2b). Refugees are those who are considered as individuals outside their country due to fear of being persecuted on grounds such as race, religion, etc. and are unable to place themselves under the protection of their state (Utlänningslag, 2005:716, chaps4, §1). The individual *otherwise in need of protection* and a person *in need of subsidiary protection* before the 2014’s amendment to the Alien Act (Lag 2014:1400 om ändring i utlänningslagen) were not

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<sup>24</sup> A Swedish conservative center right-wing party

<sup>25</sup> There are separated definitions for all three categories in the Alien Act, however, these definitions are overlapping i.e. the fear of persecution is one of the criteria for being considered as a refugee while being subjected to the corporal punishment and the death penalty are noted in the criteria for the latter category.

distinguished separately. According to that amendment, a person in need of subsidiary protection is the one who has not the criteria of being a refugee but in case of return to her/his country, s/he

“would be at risk of death penalty or [...] being] subjected to bodily punishment, torture or other inhuman or degrading treatment [...] or as a civilian at risk of a serious and personal risk of injury due to indiscriminate violence due to an external or internal armed conflict, and [...] Unable to [...] to avail himself of the protection of the home country” (Utlänningslag, 2005:716, chaps4, §2)

The person otherwise in need of protection is the one who is considered nor refugee neither in need of subsidiary protection but still has reasons such as the need for protection due to conflict and risk of severe abuse or those who cannot return due to natural disasters (Utlänningslag, 2005:716, chaps4, §2a).

According to the new law passed by the Swedish parliament on June 2016 (Riksdagsförvaltningen, 2016), not only the provisions enumerated in the sections related to *person otherwise in need of protection* no longer apply to cases (Lag 2016:752 om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige), but also according to sections 5 and 12, the permits for other categories will become limited to 1 to 3or4 years and the extension, which is also time-limited, will be issued based on reassessing whether they still need protection/shelter or not. Also, these individuals, need to apply for other types of residence permits to extend their stay, such as work, study, family permits to extend their residence permit (migrationsverket, 2018c; b).

The most relevant type of these other permits for unaccompanied children is upper secondary studies permit. Its regulations apply to individuals who are between 17 and 25 years old who study fulltime at this level. However, being covered by this legislation depends on factors, such as whether they are unaccompanied children or more than 18 years old, either they study on the national program or introductory<sup>26</sup> and the date they applied for asylum (migrationsverket, 2018a).

This law applis to any decision made after 20 July 2016 (Lag 2016:752 om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige). However, in case of unaccompanied children and families with children, if the application date is on or before the 24<sup>th</sup> of November 2015,

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<sup>26</sup> Studying in the national program requires some minimums in grades and those who do not fulfil this has to go to the introductory program at first.



provisions of the Alien Act, and not the temporary act, shall apply to them. In other words, they can get a permanent residence permit, no matter when the Migration Agency makes the decision. Nevertheless, this exemption practically is problematic, as it only applies to those who at the time of the decision, and not application, are under 18. In addition, in the case of appealing to Migration Court<sup>27</sup> or Migration Court of Appeal<sup>28</sup>, which is also time taking procedures to make decisions, the age at the time of the final decisions would be considered.

Between August 2015 and July 2016, more than 143,343 applications have been made in Migration Agency, however, during the same period 82,124 decisions have been made and the case handling time has increased to 317 days (migrationsverket, 2016a; b, 2017a; b). After the introduction of the document check-in the Swedish-Danish border in early January 2016 (The Local, 2016), all asylum seekers were being registered, as the first step of asylum application on the border. However, before that, asylum seekers have entered Sweden without registration. As a consequence and because the new legislation was not introduced until June of the next year (Riksdagsförvaltningen, 2016), those of the latter group who entered before the 24<sup>th</sup> of November, might not have registered their application before the indicated time.

### **5-1-2- Procedure for Unaccompanied Children: Registration and Case Assessment**

For every child, the asylum application consists of a series of information collection including biometric data (fingerprint for those who are more than 6 years old and photography) and personal details. This information not only is used for the issuance of LMA Kort<sup>29</sup> or asylum card, but also some of them such as names and fingerprints are stored in Sweden Migration Agency's database, Eurodac<sup>30</sup> database for the aim of Dublin regulation III, and VIS<sup>31</sup>.

After the registration at Migration Agency, the child would be registered in a reception unit in which s/he will be asked to answer questions about his/her feeling, family, him/herself, etc. This unit is responsible for providing help for minors to be integrated into the educational system and

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<sup>27</sup> Migrationsdomstol

<sup>28</sup> Migrationsöverdomstolen

<sup>29</sup> An ID card which is issued according to Lagen om mottagande av asylsökande (the Act on reception of asylum seekers)

<sup>30</sup> European Dactyloscopy

<sup>31</sup> European Visa Information System

enjoy their rights to health as well as formal issues related to Migration Agency (migrationsverket, 2017d, p.12).

To be eligible for additional protections noted in the law, an unaccompanied child after registration should attend an asylum investigation session. This means that through a 2-3 hours session, in which the child, his/her appointed guardian and a public counsel will attend, the migration officer(s) will ask questions about reasons of the minor's travel, why s/he could not return and consequences of returns, as well as questions about identity, age, family. (migrationsverket, 2017d, p.14)

The child is deemed responsible to prove his/her age. For this aim, the child should provide documents such as birth certificate, ID or other reliable documents indicating his/her identity and age. However, if such documents are not available, the child should go through a process of age assessment including two medical tests, knee joint MRI and wisdom teeth X-ray, by which the Migration Agency estimates the age of the applicant (migrationsverket, 2017b; Rättsmedicinalverket, 2016, pp.2–4). In documents which are published for minors as manuals, this test is noted as voluntary and one possibility of proving their age (Rättsmedicinalverket, 2016, p.3; migrationsverket, 2017d, p.9), however, since the age assessment is a crucial component of the procedure, other possibilities or alternatives are not clear and noted.

The Migration Agency will assess cases according to the all gathered information and makes the decision: approval, refusal/rejection or transfer to the first country of registration for the cases subjected to the Dublin Regulation III. In case of transfer decision, which is mostly based on checking biometric data on Eurodac, the minor, according to Section II, Article 21 paragraph 5 of the Dublin Regulation III, will be sent to the Dublin Regulation III member country. If an appeal is made by the minor, migration court will reassess the case, but the primary decision of transfer will not be suspended,- and the child will be transferred to the Dublin Regulation member country where the application for asylum will be assessed-, until a new, different decision is made (migrationsverket, 2017d, p.11).

In case of refusal/rejection, the minor and the guardian can request a reassessment through a written disagreement. If the Migration Agency reassesses the case, but upholds the decision, the Migration Court will reconsider the case through another appeal request. The minor can request a verbal negotiation which means that s/he can attend the court to explain more about his/her case.

However, it is the court that decides if verbal negotiation is needed or not. If the court decides to issue a refusal statement, the minor can decide about another appeal in the Migration Court of Appeal. However, this court does not accept all cases. If they grant “leave to appeal” for a case, they reconsider the case (migrationsverket, 2017d, pp.17–20; Förvaltningsrätten i Stockholm, 2006).

If the case is approved according to the type of the protection (as a refugee or as a person in need of additional protection), the minor will be granted 1 to 3-4 years residence permit.

According to the data provided in the migration website and its publications, cases would be rejected due to these reasons:

- 1- The result of age assessment shows that the person is more than 18 years old
- 2- The minor has protection or reception (family or state protection)
- 3- Conditions of the home country and the region that the child comes from is not considered extraordinary
- 4- The upper-secondary studies of the minor or the person do not fulfil the specific conditions for study residence permit, i.e. studying in a part-time or in as the introductory program
- 5- While s/he is waiting for decision or results of the appeal, s/he becomes adult, and thus applicable rules do change.

If the child receives a refusal which cannot be appealed anymore, the Migration Agency will start a program for repatriation. This program includes a series of conversation sessions to coordinate issues relating to repatriation. However, if the child does not want or do not show signs of cooperating, the Migration Agency will send an enforcement decision to the police who is allowed to use “coercive methods”. If the minor become aware of the enforcement, s/he might disappear. Therefore the police usually plan for enforcement with the collaboration of social workers to arrest the minor when s/he is at accommodation (Sundqvist, 2017, p.11).

Repatriation is a professionalised practice engaged with different regulations. It engages social workers, police, legal guardian, the staff at Care Home and the staff at Migration Agency. The EU Return Directive as the European obligation of Sweden has integrated into the Alien Act. Also the Convention on the Rights of the Child has been transformed to the related Swedish legislation and

even the Migration Agency and the police signed for “distribution of responsibility” on the issue (Sundqvist, 2017, p.17).

### **Turning to 18 Years Old:**

When a minor turns to 18, the case will be reassessed, and rules regarding adults will be applied to it. According to this reception by the family or protection in the home country, exemption from the temporary act for those unaccompanied minors registered before 24 November 2015 will not be relevant any more. In addition, the person will lose his/her rights to daily allowance and accommodation conditions will change which means s/he is not entitled to childcare or municipal accommodation and have to move to Migration Agency accommodation which might not be in the same city or neighborhood and can break social ties that the individual has made before turning to 18. In the case that the person needs help with accommodation, s/he might be placed to one of Migration Agency accommodations (migrationsverket, 2017d, p.22) which might be in another city where the person may not have any social ties.

## **5-2- Policy Analysis:**

### **5-2-1- Problem Representation, Its Assumptions and the Construction of the Policy:**

The overall aim of the U-turn policy is to *limit the number of asylum seekers to ensure a sustainable migration policy and safeguard the right to asylum* (Ministry of Justice, 2018). These issues are claimed by officials to be related to *the Swedish welfare system and the issue of system breakdown* (Stenberg, 2015 cited in Scarpa and Schierup, 2018, p.200), and *unequal distribution of asylum seekers* (Ministry of Justice, 2018, p.2; Löfven, 2016).

Regarding the issue of asylum seekers, Sweden’s prime minister gave a speech in the European Parliament (Löfven, 2016). He started the speech on threats to the democracy and the need for protection of “our external border”. He noted the economic benefits of Schengen mobility which might be affected because those who receive more asylum seekers might “act unilaterally”. Then he moves to the Brexit, the issue of complaints of citizens and the need to show citizens that they are valuable. This narrative includes threats that the EU may face, mainly the loss of Schengen which will have significant economic consequences. Then he calls the situation as chaos which

should be addressed by controlling external borders, cooperation with Turkey which is the main transit country to Greece (an EU member), fighting human traffickers and using foreign policies to prevent the causes of the refugee crisis. As a concert suggestion, he proposes the need to replace the Dublin regulation III for the sake of equal distribution and managing the population of asylum seekers.

Such claims, particularly those related to the economy and system collapse, will appear more rational in cases when the population of asylum seekers is considerable. The bureaucracy and the welfare system should accommodate people within themselves while carrying the economic costs of the services, but due to their limited capacity, the welfare and services need to become more expensive or shrink. The collapse of the system not only threatens citizens but also affects asylum seekers, the issue of asylum, and the services they will receive. Such a notion, however, needs to be evaluated critically.

Scarpa and Schierup (2018, pp.203–205) in contrast, challenge this claim. They note that before the migration wave, from the 1990s, Sweden has been conducting a “new fiscal framework” as an economic austerity agenda resulted in a “strong consolidated state”. One of the components of this policy has been cuts in the public budget resulted in an increasing surplus budget yearly, which became more than doubled in 2016 (the year after the migration year) to 2.5 billion Euros comparing to 2015. In addition, they argue that the new population has had demographic benefits for some municipalities to maintain their services which were about to close. Hansen (2018, p.133) also formulated the issue in a similar way saying that the new policy is not due to the lack of budget, but it is because the Swedish state has realised that if it accepts refugees, the limits on public expenditure have to be changed.

The core of these assumptions is that the state is responsible for governing the life of the population and their rights, what Foucault identifies as bio-politics. Both citizens living in, and “others” entering the territory should be subjectified. The notion of safeguarding the right to asylum, by restricting and suspecting asylum seekers, is another key assumption that should be problematized. The speech of the prime minister implies that the main threat to the asylum rights and sustainable asylum policy, is not racist and xenophobic movements, structural discrimination, war, political disagreement, neither new asylum restrictions which are practised, rather it is those who seek asylum. Sweden’s prime minister after the refugee topic jumps to climate change, which is a

growing concern among European citizens and then concludes that the EU needs to stand against external threats. The association of the migrants and the climate change, which is considered by 92% of the EU citizens as “serious” (TNS Opinion & Social, 2017, p.73), and talking on threats shows, to a considerable extent, asylum seekers and refugees rhetorically are considered as external threats. On the policy factsheet, we have a similar narrative. While it describes the restrictions in the policy, it introduces the policy as a measure to ensure and protect the rights to asylum.

The effect of such understanding of the issue manifests itself in practices regarding the unaccompanied minors. However, first we need to evaluate the concept of unaccompanied minors to understand this. Inside this concept, as a category of population, two binaries exist: adult/child and accompanied/unaccompanied. Both binaries in their human rights meaning are constructed to emphasize the need to more assistance, special care, special needs and vulnerability, protection gaps, and risks (Convention on the Rights of the Child 1989, chap.Preamble; UNHCR, 1997, p.4; CRC, 2005, paras1–3). However, binaries also construct exclusion and categorisations. The law here, acts as a mediator by which the policy is materialised for different categories.

Unaccompanied children, as a category in need of special protection, seem to cause trouble for the state which implements a restrictive asylum policy. But the binary and categorization also provide solutions for that which are the time pass and migrant status transformation.

The new law which has been applied to all decisions made after 20 July 2016, exempts unaccompanied children if they had registered their application before 24<sup>th</sup> November 2015. However, there are two points here. Firstly, in 2015 neither the border check had been introduced, nor had the temporary act been finalized and passed. As a result, those unaccompanied children who entered the country before the 24<sup>th</sup> and not registered themselves will be excluded from the exemption. Secondly, considering the fact that most of these children are between 13-17, since the age of the applicant at the decision time will be considered, and since the average handling time was about 300 days for the applications submitted in 2016 and late 2015, many will become adults by the time of the decision. Thus, even they submitted their cases before 24 November, the exemption from the temporary law will not apply to them and they will not be eligible for the permanent permit and regulations regarding the *person otherwise in need of protection*. In addition, even if they do not have any reception in their home country, they will be deported.

Those who remain under 18, if they are granted a temporary permit and if they have registered after 24 of November, need to extend their permit later. This means that their case will be reassessed, but if they pass 18 while the second decision is being made, they will be considered as adults.

For those who turn 18 or get a rejection decision, the law still provides an opportunity. These individuals, who pass 18 years old, and those who are rejected to be considered as the person in need of protection can use the secondary study permit. While this seems to be a good alternative, it changes the nature of their status legally. In this case, they are not anymore one of those who are displaced because of the conditions of their home country and have a claim for asylum, which is a *right*, but they are foreigners benefiting from an advantage of the non-primary education. In other words, this transforms them from being an asylum seeker who was unaccompanied in a crucial period of childhood, to students.

The age assessment plays a critical role in this policy. Unaccompanied children should go through a medical age assessment, which is controversial in terms of both ethical issues and its validity. The main ethical issue, in addition to exposing children to radiation with a non-therapeutic reason but only for age assessment, is the forced nature of the procedure. If the child has no document, the only way would be the medical assessment, thus despite the claim of the National Forensic Board Centre and Migration Agency, it is not voluntary (Hjern, Brendler-Lindqvist and Norredam, 2011, p.6) and puts the burden of the proof on the shoulder of minors (Sutalo, 2017, p.10).

Test validity is also problematic for three reasons: there might be up to 5 years of difference between the skeletal and chronological age (AIDA, 2015, p.5), the data provided by the test are compared to average charts of fully grown skeleton and thus are not accurate for every individual. Finally, the results of the tests are facing the complications in the information communication between the medical and legal field because in the legal field terms such as the "*applicant might be over 18*", which are used by medical practitioners in assessment reports, are understood and used in a different way (Sutalo, 2017, p.9). Here there is a paradox in the assessment. As the data of the test are compared with the *average of the population, as a norm for a biological category*, then it becomes clear that the claim that asylum cases are assessed on a case-by-case basis is nothing more than a fiction.

Considering the transfer cases and those who turn 18 also illustrates how minor unaccompanied children are perceived. In both cases, new social and emotional ties made by the minor are not considered as important issues, but the presence and registration in another country or a chronological matter determine where the person should be, respectively in the country of the first application or the Migration Agency accommodation. The fact that the suspension of the transfer decision will not happen even temporarily until the new decision is made *after the child's appeal*, and only happens *after the court makes a different decision*, is the extreme manifestation of conceiving unaccompanied minors as individuals who can recover themselves, no matter how many times they lose social ties they have made.

## **5-2-2- State-centrism and the Bare Life of Unaccompanied Children**

### **- To Have Rights Without the Right to Have Rights**

As Arendt argues the issue of asylum is not merely the issue of prosecution, but it is the issue of being born in a wrong context, in the case of Aghanistanian unaccompanied minors, we can see that they are detached not because of persecution, but because of insecure condition of their country, which is not only the war or conflict but also economic and social result of a near 50 years of war and conflict (Clements and Adamec, 2003, pp.xxi–xxxii).

Unaccompanied children in Sweden despite the difficulties regarding the asylum process, seem to be able to enjoy their rights. However, we need to critically assess this point as it seems that they have rights, but, without the right to have rights.

As I discussed before, the law conditionalizes their right to asylum, by categorizing the subject of the right to asylum to *the person in need of subsidiary protection and the person otherwise in need of protection*, then deprives the latter from the right to asylum.

While they are entitled to their rights such as health care, accommodation, and education, these rights are conditionalized right and temporary, not inalienable. This means that they have these rights until they receive the decision. If the decision is negative, they lose these rights and should be deported, in a process directly engaging two social security administration institutions which are the police and the social service. If the decision is favorable, they still have those rights but in



a temporary scope: until they turn to 18 or until they continue to study, which is the transformation of their asylum seeker status to a student in an upper secondary study level who fulfills particular requirements, i.e. studying fulltime in a national programme and not in an introductory or part-time program unless there is an acceptable reason for that.

Here the bio-politics could be identified. The whole process is practiced through the categorization based on *chronological age determination* -a medical practice-, *when they are registered* -not when they entered-, *which country they come from* -as the Migration Agency considers Syrian as where the war condition officially is accepted, differently from the Afghanistan where the general insecure condition is not acknowledged by the Swedish state<sup>32</sup>-, *it there is reception for them or not*, etc.

### - **The State of Exception and the Bare Life**

The Arendt's analysis helped us to identify the paradox in the case of Afghanistationian unaccompanied children, however, as it is discussed, to turn the relation of the state-nation and human rights on its head, it is needed to go farther.

The Agamben's understanding of the sovereign, the one who decides about the exception, illustrates why nor in the international level, neither in the national level, here Sweden, none of these documents and the discourse they represent are based on inclusion *in the form of inclusion*.

The issue of asylum seekers and refugees has been one of the main human rights problems, at least since the Balkan war and the dissolution of the Eastern Block. However, the Geneva Convention, as the main international treaty on the refugee law, reduces the issue to "humanitarian and social" matters places it out of the realm the politics, which is the relation between the individual and the state and is based on the citizenship and the political belonging.

When it comes to other national and international documents, we can still consider them as part of the problem. In addition to the 1951 Refugee Convention and its protocols, different international bodies have drafted and published various documents.

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<sup>32</sup> Here there is a surprising issue, while Sweden warns its citizens to not go to Afghanistan due to security reasons (Utrikesdepartementet, 2018), it deports asylum seekers claiming that the issue of insecurity is not applicable to all parts of Afghanistan (migrationsverket, 2018).

In case of unaccompanied children, there are three main documents; the CRC General Comment No.6 Treatment of Unaccompanied and Separated Children Outside their Country of Origin, UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, and CRC General Comment No.14 on the Right of the Child to Have His or Her Best Interests Taken as A Primary Consideration. In national realm, countries have also adopted procedures, regulations, laws, and policy which in case of Sweden mainly manifests itself in the Alien Act and its amendments and other documents published based on them.

These documents, as they appear, could be understood as developments and achievements of decades of efforts by activists, academics, and even officials to protect rights of one of the most vulnerable groups of children. Even if we agree with this completely, from the Agamben's perspective, we can find them as a part of the problem, albeit not because they might have internal shortcomings, contradiction or gaps. According to him, these developments as the *win* of individuals in the struggle with power could also be understood as providing the ground for the sovereign to inscribe life of individuals more: the bureaucracy expands, the so-called democratic state occupies more spaces and subjects to rule, regulates more (Agamben, 1998, p.121). It is the bureaucracy, the "invisible hand" which is expanding, no matter instead of basing itself on the theological divine governance it constructs and expands in the form of the democratic nation-state (Agamben, 2011, pp.286–7).

In case of Sweden, the unaccompanied minors have been put in the zone of indistinction. In any nation-state, no matter how much its policy about asylum seekers is welcoming, at the first stage all asylum seekers including unaccompanied minors are placed in the state of exception, the state of not being a citizen. They need to be registered and their biometric data, mere natural features, are collected and stored in the Archives. Through regulations governing the issue, they can acquire citizenship (to be integrated), or be rejected, and if they do not leave the country voluntarily, then they will be arrested and deported (repatriated). They are assumed to be a threat, not only for the welfare, economy and the bureaucracy of the country because of its limitation, but also for the welcoming, sustainable asylum policy. Sweden's prime minister stated concerns about the sustainable asylum policy and protecting external borders of the EU and Sweden's asylum policy factsheet justifies restrictions for asylum as measures to ensure sustainable asylum policy. These

argumentations, using the Foucauldian terminology (1994, 3:719 cited in Agamben, 1998, p.3)also could be understood as bestialization.

Thus, the zone of indistinction, the camp, which appears to be humanised by human rights norms, becomes tightened: the state introduces the temporary law. Now we can see how the totalitarianism which Agamben says is in the heart of democratic states can manifest itself. The sovereign who determined the exception on the basis of citizenship, expands its practice to make decisions based on two matters which even degrade the bare life to a breathless object for the sake of categorization: firstly, with an inaccurate medical procedure to compare the individual with the norm/average to determine chronological age, the very biology of a person -but the most important factor by which legislators understand the life situation (Hedlund and Cederborg, 2015, p.248)- and secondly by taking into account the registration date of the unaccompanied child.

*All solid norms which ought to protect human rights, melt into the air.* The last resort is to resign from being an unaccompanied minor asylum seeker and then become a student. However, not any kind of student, but only the one who has good grades in particular principals and have learnt the language well, the one who is eligible for the upper secondary national programme, the one who seems to be more capable of being a future citizen. But this student, the former resigned unaccompanied minor still remains at the margin. S/he now even is not any more the subject of the humanitarianism, but s/he is the subject of the migration regulations.

# 6- Conclusion

## 6-1- Analysis Conclusion

Despite the claim on the inalienability of human rights, the dominant political formation of societies as nation-states and the notion of citizenship -belonging to a nation-state-, raises a fundamental problem in human rights. The distinction between the citizen and non-citizen, depriving those who lack belonging to a state, from their rights, and as Arendt argues, they do not have the right to have rights.

This point, while as the first step of our analysis highlights that the formation of human rights within the nation-state discourse is problematic, needs to be developed. Thus, Agamben by using the Foucaultian concept of bio-politics, the distinction between *zoē* (natural life) and *bios* (political life), and the Schmitt's definition of the sovereign-the one who decides what should be excepted from the regular law-, constructs the idea of Homo Sacer, the human being who is, by the sovereign has been put in the state of exception and the zone of indistinction, and thus, reduced to his/her bare life. The concept of bio-politics within the nation-state system plays a central role in this formulation as it shows, even in case of progress in human rights such as development and ratification of more treaties, what is achieved also expands the bureaucracy and administration to more aspects of life: totalitarianism.

As the analysis of Sweden's asylum policy problem representation illustrates, asylum seekers are considered as threats, not only to the sovereign state and its economy but also to the asylum rights. Thus, the state of exception even happens within the state of exception by introducing a temporary amendment to the main asylum law to restrict both asylum types and the asylum period (temporary asylum). They are considered as objects of the policy and needed to be categorised by the age and date of registration.

Application of this understanding to the question of asylum seekers, -Afghan unaccompanied children in our case- enabled us to understand the Sweden's asylum policy as an example of reducing unaccompanied children to their bare life through the determination of their right to asylum based on mere biological and chronological matters: age, which is determined on the basis

of inaccurate and faulty generalized medical assessment, and date of registration in the Migration Agency.

## **6-2- Reflections and Final Remarks**

In the analysis of Agamben, the figure of asylum seeker/refugee, who is put in the zone of indistinction, illustrates that the human rights discourse, which I referred to it as state-centric, by the reduction of the asylum seeker to his/her bare life, reduces human rights to humanitarianism. But this figure is a radical figure which opens new perspectives.

They can be part of constructing a new community, a sort of prefigurative practice where regardless of the citizen status, all residents could participate not to reach ends by means, but, in contrast, to merge and align means and ends (Leach, 2013). This political construction, which is out of the sovereign's realm, according to Agamben, makes holes in the state and its administration and bureaucracy as it has no objective as the end but is based on the experience of what Karl Marx (1973, p.706) names General Intellect. This communication makes possible the Praxis of means such as self-governance, collectivity and direct action, which also could be traced in political practices such as Commune de Paris, the Democratic Federation of Rojava, the canton of Kubani, Zapatista movement and Blockupy movement.

One might doubt these practices. For example, the issue of violation of rights in these political formations can also happen, thus, for accountability, there should be regulations, procedures and responsible bodies which leads to the bureaucracy and the birth of bio-politics as well.

However, such doubts do not make the critique of state-centrism irrelevant, invalid or useless in practice. Understanding this critique helps human rights practitioners, mainly those who work with/for asylum seekers as activists or those who are engaged in policy-making or application of the policy procedures. It helps them to understand how their actions and decisions are related to the state-centric construction of human rights. This provides grounds for what Bacchi (Bacchi, 2009, p.45) calls reflexivity and Burr (2003, p.5) notes as the change in knowledge, which will be followed by practice. This new perspective gives human rights activists an insight toward asylum seekers participation to avoid reducing them to objects of humanitarian aid. While the human rights system reduces them to their bare life, activists can facilitate construction of asylum seekers's local political communities.

This point would be productive not only in practices but also in the development of the normative framework for the question of asylum. The increasing risk of being displaced due to climate change and the remaining problems, some as old as the Universal Declaration of Human Right and Refugee Convention such as the question of Palestine, illustrate that there is a fundamental need for change in the normative framework of the right to asylum. As the political demand and need for this development increase, activist, human rights scholars and asylum seekers will have more opportunity to impose more progressive agenda on the table of the human rights.

During my research, I found that some of the asylum seekers including unaccompanied minors due to the fear of being deported before or after the final rejection decision hide or even commit suicide. The only solution for these issues is a change in Sweden's asylum policy. Some human rights organisation and Afghanistanian unaccompanied children in Sweden advocate for it, but there is a need to reflection on the strengths and weaknesses of this campaign to make it more effective and efficient.

### **6-3- Further Research**

The analysis of this study shows that how the state-centric conception of rights raises the paradox in a concrete case, here the Afghanistanian unaccompanied children in Sweden. While in the level of the human rights system, this case provides an understanding on how the system can result in reducing rights, but the application of Agamben's analysis to other contexts in further studies can help to develop a more comprehensive insight to the paradox of human right.

One of the issues which was my first and main intention of doing research in this area was to contribute as a student in facilitating the participation of unaccompanied children in researching about their issues and to have a louder voice. Unfortunately, I was not able to do this. But, I recommend that, in the case of more flexible formalities and available resources, participatory action research would be an effective way to develop more concrete knowledge and also to make change.

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