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Crimmigration in Sweden?

A study of internal control of foreigners

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Summary

In 2006, Professor Juliet Stumpf at the Lewis and Clark Law School in Portland, Oregon coined the term “crimmigration”. In doing so, she gave a name to a legal development that had evolved in the United States since the mid-1980s. The term is a concatenation of ”criminal” and ”immigration”; suitable considering the legal field describes and highlights the merger of criminal and immigration law. To understand why this evolvment is remarkable you have to know the history of the two areas. Migration law used to be a primarily administrative civil process. Today, it is intertwined with criminal law, which is commonly thought of as an assigner of moral blame and with a particularly strong sanctioning regime as opposed to migration law that is primarily administrative.

This essay examines if the trend of crimmigration can be connected to internal control of foreigners in the Swedish legislation (ch. 9 sec. 9 of the Aliens Act). The essay starts off with a summary of the most important features of the crimmigration field, and then compares these to their counterparts in the Swedish legislation with connection to internal control of foreigners. The author has used the traditional legal method as well as surveying preparatory works, government reports and studies discussing internal control of foreigners.

The division between administrative law and criminal law is not as clear in the Swedish context as in the American context. However, one feature clearly separates the two fields: the view of the outcomes. Criminal punishment is regarded as repressive while administrative decisions, if materially correct, should be the ideal outcome for all parties. The law enforcement in the United States have historically not enforced immigration laws. In Sweden, the Police have always been active in migration control to various degrees. This is another difference between the two systems.

Unauthorized stay on the territory has been a criminal offense for 90 years in Sweden but prosecution of immigration violations are unusual. This is another difference between the American and Swedish system. However, the criminalization of immigration violations can engage the Police not only in order to control migration but also to fight crime. This is a clear crimmigration-feature of the Swedish system.

For the last 20 years, internal control of foreigners have increasingly been described and used as a tool to control migration. This has in large been attributed to the accession of the Schengen Agreement as a compensatory measure. It has also been underlined as an important tool to fight crime and illegal immigration.

There are aspects of the control that carry clear hallmarks of crimmigration. The fact that unauthorized presence is criminalized is one, opening up for the criminal sphere to intervene. Another hallmark is that the controls are meant to hinder both unauthorized immigration as well as crime. A third is that the

administrative nature of the controls lessens the scrutiny given to the tools used to carry out the controls, despite their clear resemblance with their investigative counterparts.

Sammanfattning

År 2006 myntade Professor Juliet Stumpf vid Lewis and Clark Law School i Oregon i USA begreppet ”crimmigration”. När hon gjorde det, döpte hon också en juridisk utveckling som startade i mitten av 1980-talet i USA. Begreppet är en sammanslagning av orden ”criminal” och ”immigration” vilket är passande eftersom begreppet beskriver och uppmärksammar sammanslagningen av straffrätt och migrationsrätt. För att förstå varför den här utvecklingen är uppseendeväckande behöver man känna till de två juridiska fältens historia. Migrationsrätt har alltid ansetts vara först och främst en förvaltningsrättslig process. Straffrätten å sin sida är intimt sammankopplat med uttryck för moralisk förkastlighet och en särskilt stark sanktionsregim. Idag är dock migrationsrätt och straffrätt allt mer sammanvävt.

Denna uppsats undersöker huruvida utvecklingen av ”crimmigration” kan kopplas till inre utlänningskontroll i den svenska lagstiftningen (9:9 Utlänningslagen). I det första kapitlet finns en genomgång av de viktigaste dragen i ”crimmigration”-forskningen, vilka sedan jämförs med motsvarigheterna i den svenska lagstiftningen som relaterar till inre utlänningskontroll. Författaren har använt sig av traditionell juridisk metod men även gått igenom förarbeten, SOU:er och studier som diskuterat inre utlänningskontroll.

Uppdelningen i svensk rätt mellan förvaltningsrätt och straffrätt inte varit lika tydlig som i det amerikanska systemet. Det finns dock en signifikant skillnad som skiljer systemen åt: hur man ser på effekten av de båda systemen. Straff anses i grunden vara repressivt. Beslut från förvaltningsrätten anses ”ideala” för båda parter om det materiellt riktiga beslutet fattats. Historiskt sett har polisen inte verkställt migrationsärenden i USA, medan polisen i Sverige alltid har varit aktiv på olika sätt i migrationskontrollen. Detta är ytterligare en skillnad mellan de två systemen.

Olovlig vistelse har varit ett brott i svensk lagstiftning i 90 år men åtal för brott mot utlänningslagen är ovanligt. Detta är ytterligare en skillnad mot det amerikanska systemet. Det ska dock noteras att kriminalisering av migrationsrättsöverträdelser tillåter att polisen arbetar brottsbekämpande mot dessa företeelser, och inte bara i migrationskontrollerande roll. Detta är ett tydligt ”crimmigration”-drag i det svenska systemet.

De senaste 20 åren har inre utlänningskontroll blivit allt mer politiskt uppmärksammat. Detta har i mångt och mycket förklarats med att Sverige tillträtt Schengenavtalet och det då har behövts som en kompensatorisk åtgärd. Inre utlänningskontroll har också förklarats vara ett viktigt verktyg för att bekämpa brott och illegal invandring.

Det finns aspekter av den inre utlänningskontrollen som bär kännetecknen av ”crimmigration”. Det faktum att olovlig vistelse är kriminaliserat är ett, vilket öppnar upp för att straffrättsligt agera mot migrationsrättsöverträdelser. Ett

annat kännetecken är att kontrollerna ska hindra både brott och invandring. Ett tredje kännetecken är att rättssäkerhet diskuteras i mindre utsträckning gällande de verktyg och tvångsmedel som används i samband med kontrollen på grund av kontrollens uppfattade förvaltningsrättsliga natur.

Preface

I want to thank my supervisor, Christoffer Wong, for all the hard work and valuable input throughout the semester.

I also want to thank Hanna who has been my companion since day one at the Law Faculty. I do not know what I would have done without you during this process.

Martina Båtelson

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Abbreviations

Ch.	Chapter
INS	Immigration and Naturalization Service
ICE	Immigration and Customs Enforcement
IoG	Instrument of Government (Regeringsformen) (SFS 1974:152)
ECHR	European Court of Human Rights
EU	European Union
FUK	Decree on Preliminary Investigations (<i>Förundersökningskungörelsen</i>) (SFS 1947:948)
JO	Parliamentary Ombudsman (<i>Justitieombudsman</i>)
NJA	Nytt Juridiskt Arkiv
Para.	Paragraph
Prop.	Proposition
RB	Code Of Judicial Procedure (<i>Rättegångsbalken</i>) (SFS 1942:740)
Sec.	Section
SFS	Svensk Författningssamling
SIV	The Immigration Authority (<i>Statens Invandrarverk</i>)
SOU	Statens Offentliga Utredningar

1 Introduction

1.1 Background

In 2006, professor Juliet Stumpf at the Lewis and Clark Law School in Portland, Oregon coined the term ‘cimmigration’¹. In doing so, she gave a name to a legal development that had evolved in the United States since the mid-1980s. The term is a concatenation of ”criminal” and ”immigration”; suitable considering the legal field describes and highlights the merger of criminal and immigration law. To understand why this evolvment is remarkable you have to know the history of the two areas. Migration law used to be a primarily administrative civil process.² Today, it is intertwined with criminal law, which is commonly thought of as an assigner of moral blame and with a particularly strong sanctioning regime as opposed to migration law that is primarily administrative.³

In her 2006 article, Stumpf pinpointed three areas of the law where this trend was particularly visible: “(1) the substance of the law where immigration law and criminal law increasingly overlaps, (2) immigration enforcement has come to resemble criminal law enforcement, and (3) the procedural aspects of prosecuting immigration have taken on many of the earmarks of criminal procedure”.⁴ This article was the first attempt of many in trying to survey, explain, and discuss the consequences of this development.

In a different part of the world, Sweden, in 2009 the Police Authority, The Migration Board and The Swedish Prison and Probation Service all received the same assignment in their respective appropriation directions (*regleringsbrev*): together they were to review the procedure for enforcement of removal decisions. When the review was done, they were to institute the necessary measures in order to increase the enforcement rate.⁵ One of the outcomes of this was “REVA”, (Rättssäkert och Effektivt Verkställighetsarbete), which stands for Legally Secure and Efficient Enforcement. REVA received a lot of media attention, and was, somewhat wrongfully, understood as internal control of foreigners^{6,7}.

¹ She did this in her article ”The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power” (2006).

² STUMPF 2006 p. 381.

³ STUMPF 2006 p. 411.

⁴ STUMPF 2006 p. 381.

⁵ ”Regleringsbrev för budgetåret 2009 avseende Migrationsverket” Ju2008/942/SIM ch. 3; ”Regleringsbrev för budgetåret 2009 avseende Rikspolisstyrelsen och övriga myndigheter inom polisorganisationen, Ju2008/8581/PO ch. 3; ”Regleringsbrev för budgetåret 2009 avseende Kriminalvården” Ju2008/10579/KRIM ch. 3.

⁶ *Inre utlänningskontroll* ch. 9, sec. 9 of The Aliens Act.

⁷ In the project description of REVA internal control of foreigners was never mentioned. Instead, REVA streamlined and laid down rules for co-operation between different authorities in order to enhance the number of enforced removals. However, in practice, an increase in the number of controls increases the number of apprehensions of immigrants facing removals, thus resulting in an upsurge of removals. The connection between REVA

The REVA-project received massive criticism, mainly for being discriminatory and for profiling people who looked foreign, despite being Swedish citizens.⁸ The Head of the National Police Board's Border Control Unit Sören Clemerton described how police officers were questioned when carrying out identity checks and that this was problematic: He further stated: "We have an obligation to perform controls. It has to do with crime fighting and internal security".⁹

Can crimmigration and REVA be part of the same trend?

1.2 Purpose

The purpose of this essay is not to answer a set legal question. It is instead intended to discuss, highlight and survey what the field of "crimmigration" can bring to the Swedish legal context, and more specifically, in relation to the practice of internal control of foreigners. I do not intend to answer the question whether or not the practices are discriminatory even though I will touch upon that. Instead: Through the lens of crimmigration I will look at the convergence of administrative law and criminal law in the field of internal migration control. How do the legal areas interact in the case of internal control of foreigners? Can crimmigration add something to the discussion concerning migration law and criminal law in Sweden? Is internal control of foreigners an example of this trend? Has it changed in the past 20 years?

In my work with this essay, piece by piece, I have aimed at piecing together a puzzle of the different parts of internal immigration control. With my crimmigration-glasses on, focus has been on the intersection of criminal and administrative law and how it is exemplified in the actors and the tools used to carry out the controls. I aim to look at the legal development to see if it resembles what American scholars have noted concerning relaxed procedural safeguards and administrative law connected to criminal law.

1.3 Research question

I have two main research questions:

- Is internal control of foreigners an example of the trend of "crimmigration"?
- What can the crimmigration-literature bring to the Swedish discussion on internal control of foreigners?

To answer these questions I will focus on the following aspects:

and internal control of foreigners is not explicit, but they are interlinked. See Peter Leander "Skyldig till motsatsen bevisats" Aréna Idé 2014.

⁸ CANTWELL 2014; HASSEN KHEMIRI 2013.

⁹ ORRE 2013.

- How has the legal evolvement been of internal control of foreigners for the past 20 years? What is the explanation for this development?
- How do criminal law and migration law interact when looking at internal control of foreigners?
- What actors and tools are used for internal control of foreigners? How are they to be understood in the criminal/administrative divide? Does enforcement of immigration law rely on the criminal justice system?
- How are procedural safeguards and legal principles affected depending on the legal area and how is this played out in relation to citizens and non-citizens?

I hope my essay deepens the conversation about internal control of foreigners, and instead of only focusing on the question of discrimination, place it in a continuum of migration control. I hope to review to what extent it relies on both on the administrative sphere and the criminal sphere. Specifically, I hope to survey how internal control of foreigners has adverse effects on undocumented immigrants and those perceived as “immigrants” both in the criminal sphere and the administrative. Furthermore, I hope the essay will

1.4 Method and theory

1.4.1 Method and material

1.4.1.1 The traditional legal method

To determine the content of the law I will use the *traditional legal method*. Sweden has a civil law legal system, even if elements of the common law tradition can be found as well. This is evident in the traditional legal method. This method interprets what is the valid law through categorization of legal sources. The legal sources of importance in the Swedish legal system are law, preparatory works, case law and doctrine.¹⁰ It generally follows this hierarchy. This means, that if case law and doctrine interpret the law differently, case law weighs greater. Case law from the European Court of Human Rights and European Court of Justice is also legally binding for the courts in Sweden.¹¹

1.4.1.2 Preparatory works and government reports

To understand how internal control of foreigners has been discussed and interpreted I have looked at preparatory works. I have gone through the 22 preparatory works that mention “internal control of foreigners” between 1971 and 2014. I shall not provide a systematic presentation of the preliminary works, instead relevant issues will be brought up in relation to the discussed phenomena. I have also looked at Government reports where internal control of foreigners has been discussed at length. This is done in order to see if there

¹⁰ KLEINEMAN 2013 p. 21.

¹¹ BERNITZ AND KJELLGREN pp. 147 – 150.

has been different understandings of the control, proposals for legislative change and how these have been received.

I have chosen preparatory works because they express the legislator's wish and also reflect the public discourse. Reading them offers a comprehensive understanding of the development of internal control of foreigners throughout the years as well as how they relate to relevant actors and tools. I also look at government reports that have touched on the subject of internal control of foreigners at slightly greater length. The government reports I focus on are SOU 1997:159 "An Enlarged European Union with freedom, security and justice"¹², SOU 1997:128 "Enforcement and control in alien cases"¹³, SOU 2004:110 "Border Control Act – a more efficient border control"¹⁴ and SOU 2002:69 "Human smuggling and victims of human trafficking".¹⁵

1.4.1.3 Other relevant documents for internal control of foreigners

In order to answer my research question on how immigration and criminal law interact when looking at internal control of foreigners, I have examined those documents that regulate the implementation of the controls. I have also looked at studies and reports concerning internal control of foreigners to see if there are "crimmigration"-aspects that are not captured just by using the traditional legal method.

In doing so there are four sources I refer to continuously. The first worth mentioning is the instructions on how internal control of foreigners are to be implemented from the National Police Board, RPSFS 2011:4 FAP 273-1.¹⁶ The second source is Sophia Hydén and Anna Lundberg's dissertation *Internal control of foreigners in Police work – between the rule of law and efficiency in Sweden's Schengen*¹⁷ (2004). The third source is the supervision report conducted by the the National Police Board on the internal control of foreigners in 2013. This resulted in Tillsynsrapport 2014:14¹⁸. The last one I will mention is a report from Aréna Idé, a progressive think tank, that looked at the practice and routine of the controls in "Guilty until the opposite is proven – an examination of the Police's internal control of foreigners"¹⁹.

¹² SOU 1997:159 "Ett utvidgat europeiskt område med FRIHET, SÄKERHET och RÄTTVISA".

¹³ SOU 1997:128 "Verkställighet och kontroll i utlänningsärenden".

¹⁴ SOU 2004:110 "Gränskontrollag – effektivare gränskontroll".

¹⁵ SOU 2002:69 "Människosmuggling och offer för människohandel".

¹⁶ This can be found in National Police Board Statutes Book. It replaced the instructions from 1986, RPSFS 1986:3, FAP 273-1.

¹⁷ *Inre utlänningskontroll i polisarbete: mellan rättsstatsideal och effektivitet i Schengens Sverige*, Malmö University Press

¹⁸ Tillsynsrapport 2014:14 "Inre Utlänningskontroll"

¹⁹ Peter Leander "Skyldig till motsatsen bevisats – En granskning av polisens inre utlänningskontroller" (2014) Aréna Idé.

1.4.1.4 Crimmigration literature

Juliet Stumpf coined the term “crimmigration” in 2006. However, there were earlier scholars who had noted the merger of migration law and criminal.²⁰ There are a number of certain texts in the crimmigration-literature commonly referred to that constitute the foundation of this research. I focus on the scholars who identify *crimmigration* or agree on the foundations of this system as a phenomenon worth highlighting and discussing, but I also discuss articles I deem particularly yielding for my topic. I do not intend to give a fully comprehensive picture of the field of crimmigration.

In this essay I have chosen to focus only on articles from American scholars.²¹ There are two main reasons for this decision.

The first reason is that I wish to go “back to basics” with this essay. Articles and books written on crimmigration in Europe are very interesting and they greatly contribute to the conversation surrounding migration policies in Europe. They have adapted crimmigration to a European setting. However, there is no previous literature concerning crimmigration in Sweden. Therefore I use the American literature, especially the early articles, to give the reader a background to Swedish law in order to understand the context correctly. Through this I hope to give the reader a basic understanding of both crimmigration as a field and crimmigration in Sweden.

The second reason is because I think the history of migration policy in the United States make the US system a relevant example to look at and learn from for Sweden. The United States has long been described as “a country of immigrants”. However, it also has a long history of excluding large amounts of people on racially charged grounds, which started in mid 1800s.²² Immigration has long been a highly debated topic with strong advocates speaking for undocumented migrants. In 2014, there were an estimated 11.4 million undocumented persons in the United States, of a population of around 300 million. Undocumented immigrants make up 5,1 % of the workforce. One example of the advocacy of migrant groups is that in 1986, Congress passed a law that legalized the status of 2,7 million migrants.²³ In Sweden, undocumented immigration historically has been very low compared to other developed countries.²⁴ However, Sweden is now facing a new reality with a growing number of asylum seekers and irregular migrants. In May 2014, the Swedish newspaper Dagens Nyheter publicized a number of stories on the growing number of unauthorized workers that is the new underclass in Swedish society.²⁵ The changes will put the Swedish migration policy to a test and change it drastically, and I hope the American legislative path can function as a warning clock for Swedish legislators as well.

²⁰ The most commonly referred author is Daniel Kanstroom “Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th: ”Pale of Law””

²¹ There are interesting work emerging on the subject from the European arena as well. See for example Ylva Kramo “The European Union’s response to Irregular Migration and The Problem of Criminalisation” [2014] 5 *New Journal of European Criminal Law* 26

²² GARCÍA p.1457.

²³ KROGSTAD and PASSEL 2015.

²⁴ HAMMAR p.187.

²⁵ ORRENIUS and SKÖLD 2015.

Therefore, I compare the American and Swedish systems. I go through the relevant aspects in the American system and compare this to the Swedish counterpart.

In chapter 2, my research chapter, I go through crimmigration at length.

1.5 Previous research

There has not been much written about internal control of foreigners in the Swedish context. The most important work is the dissertation by Sophia Hydén and Anna Lundberg: *Inre utlänningskontroll i polisarbete: mellan rättsstatsideal och effektivitet i Schengens Sverige* (2004). The dissertation deals with internal control of foreigner in light of Sweden joining the operational part of the Schengen agreement. It discusses how efficiency and the ideal of rule of law might conflict in the example of internal control of foreigners.

Crimmigration is a new field of research, so far mainly conducted in the United States. The major works are Juliet Stumpf “The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power” (2006), Daniel Kanstroom “Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th: ‘Pale of Law’” (2004), Ingrid Eagly, “Prosecuting Immigration” (2010) and Jennifer M Chacón, “Overcriminalizing Immigration”. (2012)

Maria João Guia, Maartje van der Woude, and Joanne van der Leun are the editors of the book *Social Control and Justice: Crimmigration in the Age of Fear* (2013). They have gathered a number of scholars that take a transnational approach to the crimmigration field. In the book, commonalities and dissimilarities are highlighted while the joining force of crimmigration is identified: the fear of the poorer and racially darker immigrant.

1.6 Delimitations

I will not go in to the creation of the “illegal” immigrant and the securitized development of Swedish migration. Not because it is not important, but because it has been discussed earlier.²⁶

I will not cover the control of foreigners in connection to shipping that is performed by the Swedish Coast Guard. I also will not go through special control of foreigners, regulated in Lag (1991:572) om särskild utlänningskontroll.

There is crimmigration-literature from the European setting. I have however chosen to focus on the literature from the United States; especially the early articles. Crimmigration has not been discussed before in Sweden, why I have limited this essay to the “original” understanding of crimmigration.

²⁶ See for example Elisabeth Abiri, “The Securitisation of Migration – Towards an Understanding of Migration Policy Changes in the 1990s The Case of Sweden” (2000) Department of Peace and Development Research at Göteborgs University.

In the crimmigration literature, much focus is devoted to 1) increased use of deportation as a criminal punishment, and 2) the increased use of detention. I do cover these parts in chapter 2. However, I do not discuss this in the Swedish legislation.²⁷ No matter how interesting, there is just not time or space enough to go through these aspects. Instead I have focused on internal control of foreigners and aspects more relevant to that.

1.7 Structure

In ch. 2 I explain the theory of crimmigration and highlight the most interesting aspects for my essay. In crimmigration, the understanding of a divide between administrative law and a criminal law is important, why I devote ch. 3 to establish whether or not there is a criminal/administrative divide as seen in the American legislation. I will then look at the actor in question, the Police Authority, and see if they have become more or less active in migration control then before in ch. 4. Following that, in chapter 5, I will go through what Stumpf call the “substance of the law”, and I will focus on criminalization of immigration violations. Crimmigration-scholars have noted how procedural safeguards are negatively affected by crimmigration, and I will spend some time on applicable legal principles chapter 6.

After the first five chapters I will direct my attention to internal control of foreigners. I will start in ch. 7 to cover the political explanation for the intensification of the controls that has happened for the last twenty years. In ch. 8 I go through the content of the law and how it has been interpreted. In ch. 9 I look at the tools used in connection to the controls. I finish the essay with a short summary where I try to answer my overarching research questions.

I will not have one separate analysis in the end, but instead analyze continuously throughout the essay, and comment on how different phenomenon relate to crimmigration.

1.7.1 Translation and language

Except for the Instrument of Government, there are no official translations of the Swedish statutes. I have translated the relevant provisions to the best of my ability and when there have been unofficial translations; I have used these unless they have been outdated. For the Swedish reader I have attached the original text in those instances where I think the choice of words is of greater importance. The names of authorities and statutes come from the ”Glossary for the Courts of Sweden” distributed by the Swedish National Courts Administration.²⁸

²⁷ For the interested reader there is a dissertation about deportation as punishment by Lisa Westfelt “Migration som straff?: Utvisning på grund av brott 1973 – 2003 med fokus på flyktingskydd” (2008) Stockholms Universitet.

²⁸ Domstolsverket (2014) available at <http://www.domstol.se/publikationer/ordlista/svensk-engelsk_ordlista.pdf>.

When legal Swedish terms are used the original term is in brackets directly after the term. The titles of preparatory works, books and reports are translated in the text in those instances when they are mentioned. The original is then added in a footnote. The essay is written in American English.

2 Crimmigration

In 2006, Juliet Stumpf published the article “The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power”. In this article she coined the term crimmigration as an umbrella term for the merger of criminal law and immigration law or, as she would say “the intertwining of crime control and migration control”.²⁹

Stumpf starts her article with an imagined letter to the future president of the United States dated January 2017. Her letter describes the many challenges facing the country, challenges that all can be attributed to the “crimmigration”-crisis. She writes that a dramatic increase in the prison population has led to prison riots. Non-citizens are being deported for any criminal conviction, no matter how minor offense. Border security is enhanced to the point where foreigners applying for VISA’s are drastically reduced.

The letter is not real. But the changes she describes up to that point is. From the 1980s on onwards, more and more immigrants have been deported for minor criminal offences in the United State. This includes legal permanent residents as well as undocumented migrants.³⁰ The majority of the cases in the federal justice system now enforce prosecution of immigration violations.³¹

2.1 Background

To understand why the intertwining of immigration law and criminal law has attracted so much attention and discussion amongst legal scholars in the United States, you have to understand the history.

In the United States, there are two broad categories of law: criminal law and civil law. Immigration proceedings have been regarded as a civil administrative matter. Admission or exclusion from the national territory has been seen as the power to bestow a benefit, thus making it an administrative matter.³² Furthermore, The US Supreme Court has said that deportation is not to be seen as a criminal punishment, thus belonging to civil law. This also meant that procedural safeguards guaranteed in criminal proceedings are not applicable in immigration proceedings about removal.³³ The only procedural

²⁹ GARCÍA p. 1457.

³⁰ STUMPF 2006 p. 408.

³¹ SKLANSKY p. 173.

³² For the rest of the essay I will only use the word *administrative* and not civil in order to not confuse the reader. In the Swedish legislation, civil law (*civilrätt*) and administrative law (*förvaltningsrätt*) are two separate areas of law. To read more on the criminal/civil divide immigration proceedings in the American legislation see Peter L. Markowitz “Straddling the Civil-Criminal Divide: a Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings” (2008) 43 *Harvard Civil Rights-Civil Liberties Law Review* 289.

³³ The first case to establish that deportation is not punishment was *Fong Yue Ting v. The United States*, 149 U.S. 698, (1893) and has since been confirmed multiple times. E.g. in *Neguisse v. Holder*, 555 U.S. 511, (2009) when the Supreme Court quoted *Fong Yue Ting*.

safeguard offered is due process, and only when you are inside the country's territory.³⁴

Not only have criminal law and immigration law been part of different realms of law. It has also been under the strict governance of the federal government. This is because immigration policy has been regarded as part of foreign policy.³⁵ The importance of acting as one sovereign country in the area of immigration has been motivated with concerns for international relations, thus tying it to the federal government.³⁶ This was confirmed and sustained by the plenary power doctrine, which meant that courts deferred to what Congress and the Executive had decided in the arena of immigration. This in turn led to jurisprudence from the Supreme Court prohibiting states from using both criminal and civil law that discriminated based on alienage.³⁷ The result was that only the federal government could distinguish between citizens and non-citizens and who had the power to decide who could enter and who were to be removed from the territory.

The result was a system where immigration policy has been an administrative federal matter. It invokes very few procedural safeguards as opposed to criminal law, which has been primarily a state matter, filled with constitutional protection.³⁸ This divide held sway for almost 100 years.³⁹

2.2 Crimmigration today

In Stumpf's article, she points to three areas of the law where the two fields have merged. First, the substance of immigration law and criminal law that increasingly overlaps. Second, in the area of enforcement where immigration enforcement is almost undistinguishable from criminal law enforcement. Third, the procedural aspects of prosecuting immigration violations have taken on many of the earmarks of criminal procedure.

Not all of the scholars following in her footsteps have adhered to this exact classification, but they all agree on the main points. After her article there has been a range of articles further exploring the subject. I will not have time to go into all of the aspects brought up but I will try to give an overview following Stumpf's division. In the essay I will cover the most important aspects relevant for my essay throughout the different chapters.

2.2.1 Substance of the law

The change in the substance of the law recognized in the crimmigration-literature consists of two types of legislative changes.⁴⁰ The first one is the expansion of criminal offences that render you removable if you are a non-citizen. As Legomsky calls it: "deportation as a tool of crime control".⁴¹ Since

³⁴ STUMPF 2008 p. 1572.

³⁵ STUMPF 2006 p. 379.

³⁶ STUMPF 2008 p. 1573.

³⁷ STUMPF 2008 p. 1574.

³⁸ STUMPF 2008 p. 1572, 1574, 1587.

³⁹ STUMPF 2008 p. 1581.

⁴⁰ See for example STUMPF 2006 pp. 381 – 86; GARCÍA p. 1468 – 1475; SKLANSKY pp. 164 – 181.

⁴¹ SKLANSKY p. 175.

the 1980's, crime-based removal has expanded drastically. Today a one-year sentence for a "crime of violence" or theft can leave you deportable.⁴² An estimated 20 % of the deportees due to criminal convictions have been lawful residents, some for over ten and twenty years.⁴³

The second change is the criminalization of immigration violations. As Stumpf puts it: "actions by immigrants that were previously civil violations have crossed the boundary to become criminal offences, or have become harsher criminal penalties with heightened enforcement".⁴⁴ Examples of violations that today are considered criminal offences are hiring undocumented workers or marrying to obtain legal status. To unlawfully re-enter the United States may give up to twenty years in prison.⁴⁵ The prosecution of people unlawfully entering the United States is a major part of what federal criminal justice system is dealing with today.⁴⁶ This was not the case in the United States earlier: in 1918, the Supreme Court said that the remedy for violating the immigration rules were deportation, not punishment.⁴⁷

In my essay, I focus on the latter of these changes in the Swedish context.

2.2.2 Law enforcement

The second change noted by Stumpf is the change of law enforcement. Sklansky writes "immigration enforcement has made growing use of the tools and techniques of criminal law enforcement".⁴⁸ One kind of "tool" is the agencies meant to enforce immigration law. A telling example of the evolvement is that of the Border Patrol. The Border Patrol used to only operate at the border and had no right to apprehend or arrest without a warrant.⁴⁹ Today, it is trained as any law enforcement agency with the right to detain, arrest and make stops.⁵⁰

Not only have immigration control agencies become more like law enforcement, but local and state law enforcements are now acting as immigration agencies as well. Historically, enforcement of immigration law has been a federal matter for federal agencies, such as the Immigration and Naturalization Service (INS).⁵¹ In 1996, Congress authorized state and local police to arrest and detain individuals in breach of certain immigration violations.⁵² In 2002, the Department of Justice stated that local and state law enforcement have the "inherent authority" to enforce both criminal and administrative federal immigration laws.⁵³ Even if this interpretation may be

⁴² STUMPF 2006 p. 384.

⁴³ MCLEOD pp. 107 - 108.

⁴⁴ STUMPF 2006 p. 384.

⁴⁵ STUMPF 2006 p. 384.

⁴⁶ SKLANSKY p. 173.

⁴⁷ EAGLY p. 1297.

⁴⁸ SKLANSKY p. 181.

⁴⁹ STUMPF 2006 p. 387.

⁵⁰ STUMPF 2006 p. 388.

⁵¹ WISHNIE p. 1087.

⁵² WISHNIE p. 1093.

⁵³ WISHNIE p. 1091.

incorrect (it is being contested by for example Michael Wishnie, professor at New York University⁵⁴), law enforcement agencies are now active players in migration control. Another noted feature is that law enforcement agencies now share information with immigration enforcement agencies in order to find those breaking immigration laws or who are undocumented.⁵⁵

This process started before the terrorist attacks of 2001, but it clearly accelerated thereafter. The terror attacks moved the issue of ‘national security’ from *outside* to *inside* of state territory. Immigration policy then went from being connected with foreign affairs to becoming a national problem.⁵⁶ Following this change, state and police forces were expected to join the fight against terrorism. The efforts were mainly directed at non-citizens, especially from Arab countries. With little political power it was an easy target.⁵⁷ Responsibility for immigration control was moved from the Department of Justice in 2002 to the Department of Homeland Security (DHS), which clearly illustrates how the perception of migration policy has changed.⁵⁸

Directive from the federal government has not been the only force driving the process of further state involvement. States have also, sometimes against the wishes of the federal government, created their own set of immigration laws. The most well known example is Arizona’s legislative proposal “SB 1070”⁵⁹. Arizona tried to target “illegal immigration” and adopted a number of measures. One of the most criticized was the requirement for all police officers to run immigration checks on everyone they stop if they have “reasonable suspicion” that the person lacks legal status.⁶⁰

One reason why policy proposals on breaking down on immigration have been criticized is the high number of undocumented immigrants living in the United States. An estimated 11,4 million of the inhabitants lack legal status, a high number considering that the United States have an estimated 300 million inhabitants.

Criticism towards allowing and requiring local police to enforce migration laws has been broad. It is said to deter undocumented migrants from reporting crime. Furthermore, it will divert local police’s resources.⁶¹ Pro-immigration organizations have stated that the effort will increase racial profiling and discourage noncitizens from accessing school, hospital and other local services.⁶² Allegra McLeod, Professor at Georgetown Law Center has criticized the development because it misguides crime control. A person will be approached by law enforcement not because he or she is of interest

⁵⁴ Wishnie, ”State and Local Police Enforcement of Immigration Laws” (2004).

⁵⁵ A majority of arrestees in the country have their identifying information checked against the Department of Homeland Security’s database to see if the arrestee is breaking immigration laws, Chacón p. 645; Garcia p. 1457; another example concerns the FBI’s database. INS (Immigration and Naturalization Service) started in 2001 to add immigration violators into the FBI database so the FBI could instruct and advise local law enforcement to conduct immigration arrests, Wishnie p. 1086.

⁵⁶ STUMPF 2008 p. 1594.

⁵⁷ KANSTROOM p. 642.

⁵⁸ STUMPF 2008 p. 1595.

⁵⁹ ”Support Our Law Enforcement and Safe Neighborhoods Act” Arizona Senate Bill 1070.

⁶⁰ SKLANSKY p.188; GARCÍA p. 1747.

⁶¹ WISHNIE p. 1087.

⁶² WISHNIE p.1088.

criminally, but because of a potential immigration interest. The Police officer then knows that he or she is to focus on immigrants because this is the way the state has resolved their migration control policy, not because the individual pose a danger to the public.⁶³

2.2.3 Procedural aspects

2.2.3.1 Immigration proceedings

Immigration law and procedure have become more punitive but procedural safeguards are not guaranteed in immigration proceedings as they are in criminal proceedings.⁶⁴ This is shown in crimmigration research. Criminal law contains multiple procedural safeguards in order to ensure that the accused has sufficient legal protection. Daniel Kanstroom, Professor of Law at Boston College Law School, exemplifies the difference for a non-citizen violating an immigration law in the example of arrest:

“As to the arrest, his rights will be minimal. He will be very unlikely to argue for suppression of evidence that may have been seized in violation the Fourth Amendment. He will not be read his *Miranda* rights. Indeed, he may not even be advised that he has the right to obtain a lawyer until *after* a government agent has interrogated him. He will never have the right to an appointed counsel. He will, of course, never have a right to a jury trial.”⁶⁵

The most obvious comparison that can be made to criminal law in the immigration sphere is the massive increase of the use of detention for immigrants. For example, the majority of the people deported are detained before removal.⁶⁶

Detention is acceptable both in criminal investigations and while an immigration case is pending. However, the use of criminal detention depends on the circumstances of the case and the defendant. In immigration cases mandatory detention is prescribed for a large number of immigration violations. The detention can also be indefinite.⁶⁷ In 2009, 95 % of the people guilty of immigration crimes were detained when arrested.⁶⁸

2.2.3.2 Criminal proceedings

Criminalizing of immigration violation is not merely a legislatively change, it is also carried out through prosecutions in the criminal system. The massive increase of prosecution of immigration violations is a key component of the crimmigration-nexus. Prosecution of immigration violations is more common than drug- and weapon prosecutions in the federal justice system.⁶⁹ McLeod

⁶³ MCLEOD pp. 147 – 150.

⁶⁴ LEGOMSKY p. 472

⁶⁵ KANSTROOM p. 650.

⁶⁶ GARCÍA p. 1480.

⁶⁷ LEGOMSKY pp. 490 – 492.

⁶⁸ CHACÓN p. 632.

⁶⁹ MCLEOD p. 114.

has criticized this trend, because prosecuting immigration violations is costly and unnecessary because most immigrants will be deported anyway.⁷⁰

Ingrid Eagly, professor of law at UCLA Law School, argues that the criminal system and its accompanying rights, procedure and systems have been affected by interaction with the civil system of immigration.⁷¹ One example of this is “Operation Streamline” launched in 2005. It is a federal initiative meant to streamline the large number of federal prosecutions of immigration violations. Despite the adjudication of criminal matters, the initiative allows the less rigid procedural safeguards used in immigration proceedings. The court can now settle “immigration cases en masse”; meaning that up to 100 defendants can show up in front of the judge at the same time and be rushed through the system. Often they share a legal counsel with many other immigrants and it is not clear if they understand what is happening.⁷²

Ingrid Eagly shows in her research how detention without bond, interrogation without Miranda and arrest without probable cause are other outcomes of the interaction of migration and criminal law.⁷³ She further elaborates on the effect crimmigration has had on the *exclusionary rule*.

“The exclusionary rule’s power to suppress evidence that is illegally obtained is considered to be one of the most important restraints n police behavior. However, in the immigration sphere, suppression based on the exclusionary rule becomes an available remedy only upon heightened showing of an “egregious” or “widespread” violation”.⁷⁴

The use of criminal techniques and tools without adequate procedural safeguards lead to consequences in the immigration sphere. Evidence that would have been dismissed in a criminal case is accepted in the immigration sphere.

2.2.4 A two-tiered system based on citizenship

All of these changes, in legislation, law enforcement and procedure have created a new branch of immigration law, and/or criminal law. The most apparent feature is that it is almost exclusively⁷⁵ applicable to non-citizens.⁷⁶ Law Professors Sharryn Aiken, David Lyon and Malcolm Thorburn summarized the situation this way:

“As a result, it is no great exaggeration to say that there are now two criminal laws at work: one for non-citizens (which includes a host of immigration offences that do not apply to citizens, as well as deportation as a further response to crime to which citizens are not

⁷⁰ MCLEOD pp. 147 – 150.

⁷¹ EAGLY p. 1284.

⁷² GARCÍA p. 1476.

⁷³ EAGLY p. 1288.

⁷⁴ EAGLY p. 1316.

⁷⁵ With the exception of criminal sanctions directed at e.g. employers of undocumented migrants or marrying a noncitizen to evade immigration laws.

⁷⁶ BECKETT and EVANS p. 246.

liable) and another for citizens (who are subject neither to these additional offences nor these additional responses to crime).”⁷⁷

2.3 Interesting aspects

In the section above I have tried at giving an overview of the field of “crimmigration”. I will now go into some aspects that are particularly interesting for my essay.

2.3.1 Criminal law

First, I will go through the special status criminal law has in crimmigration literature and in society. Historically, criminalization has had different objectives and functions. Scholars today generally agree that the *general prevention* is the overall aim of criminalization, but that it still includes *retaliation* in some form. The preventive effect is partly obtained through enforcement; if it is enforced regularly individuals will be deterred from committing a particular offense.⁷⁸ It also has a moral-forming and habit-forming function.⁷⁹ Furthermore, it has a declaratory and expressive function of the law; there is no more obvious way for the state to deem an act morally wrong than to criminalize it.⁸⁰ This view plays a big part in crimmigration literature. The principle *ultima ratio* is also important: criminal law as the last resort.⁸¹

In the crimmigration literature, criminal law is seen as something different from other areas of law. Stumpf attributes this view to “the expressive function of punishment”, meaning that criminalization is society’s way of morally condemning a certain behavior.⁸² In Ingrid Eagly’s piece “Prosecuting Immigration”, criminal law is distinguished “by virtue of its strength in law enforcement, severity in sanctioning regime, and imposition of moral blame”.⁸³

In an Issue Paper from the Council of Europe, the Human Rights Commissioner Thomas Hammarberg breaks criminal law into two different streams. Firstly, criminalizations of acts that harm another individual that therefore become victims. Secondly, the so-called “victimless crimes” that do harm to society at large but not to an individual. The commissioner argues that crimes of border crossing are victimless crimes because a person who is not authorized to stay on a country’s territory does not harm another person. The “harm” is merely done to the state’s sovereignty to control their borders. The commissioner furthermore argues that the most legitimate task of criminal law is that of criminalizing behavior hurting other individuals.⁸⁴

⁷⁷ “Crimmigration, Surveillance and Security Threats: A multidisciplinary dialogue: Introduction” (2014)

⁷⁸ ASHWORTH pp. 17 - 18.

⁷⁹ ASP, ULVÄNG and JAREBORG p. 35.

⁸⁰ ASP, ULVÄNG and JAREBORG p. 35.

⁸¹ ASHWORTH p. 33.

⁸² STUMPF 2006 p. 411.

⁸³ EAGLY p. 1296.

⁸⁴ HAMMARBERG p. 8.

Following this line of thought, Jennifer M. Chacón, Professor of Law at University of California, questions whether or not criminalizing migration is a fitting policy, especially considering that immigration ‘generally poses little of not threat to public safety or security’.⁸⁵ She says that states use criminal law in order to handle the issue of migration, “despite the fact that these laws are unlikely to have any positive public safety or security effects”.⁸⁶ I will come back to the use of criminal law as a migration control tool in the next section.

2.3.1.1 Why criminalization of immigration violations?

Considering this particular position of criminal law in our society, why is criminal law used? Chacón argues that the most obvious basis for why immigration violation is criminalized is because of the ‘myth of migrant criminality’, together with racism and nativism.⁸⁷ The American Professor of Law, David Alan Sklansky, has stated that part of the explanation is ‘cultural obsession with security’: addressing every possible problem through criminal law.⁸⁸ CC García Hernandez, Associate Professor at Capital University Law School, partly links crimmigration to the issue of long standing racial bias and racial animosity in the United States. He says that after the civil rights movement, law could no longer discriminate based on race. Instead, racist bias expressed itself in making crime the marker of undesirability. The tactics were seemingly “race-neutral”. In reality, the United States have been at war with its own underclass, which is predominantly made up of people of color.⁸⁹ Stumpf discusses how “membership theory” plays a role: both migration and criminal law mark the outsiders from the insiders.⁹⁰

All of these explanations contribute to the understanding of the overall picture. Understandably, there is not one single explanation for why these changes have occurred. Since my essay concerns internal control of foreigners I have looked more closely on the articles that discuss enforcement and criminal law as a tool for migration control.

2.3.2 Criminal law as an instrument for migration control

2.3.2.1 Ad-hoc instrumentalism

David Alan Sklansky has elaborated on an explanation as well as a feature of crimmigration in his article “Crime, Immigration, and Ad Hoc Instrumentalism”⁹¹. He acknowledges that even if many of the explanations already offered; nativism, overcriminalization and cultural obsession with security, do have bearing, there is a missing piece in the puzzle to explain

⁸⁵ CHACÓN pp. 616 – 620.

⁸⁶ CHACÓN p. 628.

⁸⁷ CHACÓN p. 629.

⁸⁸ SKLANSKY p. 196.

⁸⁹ GARCÍA pp. 1485-1496.

⁹⁰ STUMPF 2006 p. 377.

⁹¹ (2012) 15 New Criminal Law Review 157.

how crimmigration has won ground. He calls this “ad-hoc instrumentalism”. Not only can ad-hoc instrumentalism be used as an explanatory factor, it also has a descriptive value.⁹²

Sklansky argues that two “intellectual projects of the mid-twentieth-century’s judges and legal scholars proved unworkable”⁹³. The first one is the idea of a principled line between criminal law and civil law (as described earlier), and the second, the aim of making criminal law less discretionary.⁹⁴

The line between the two fields was brought on by an effort to “tie criminal law, in a rationalized and systematic way, to principles of moral philosophy”⁹⁵. This is no longer the case. Instead, Sklansky contends, both criminal law scholars and the public are more focused on ‘what works’. Law should be used pragmatically, not philosophically.⁹⁶ This is the ‘instrumentalism’ in the term.

The second intellectual project was to make criminal law less discretionary. According to Legomsky, legal scholars and judges wanted to limit the discretion contained in the criminal process. The effort covered everything from police officers to judges. Sentences were given according to fixed terms that were mandatory for judges to follow and new rules were meant to reign in police discretion. However, by the end of the twentieth century, criminal justice scholar started doubting the project. The discretion just moved elsewhere in the system, for example to the prosecutors.⁹⁷ Scholars have then called for more discretion back to the judges.⁹⁸ The lost fight against reigning in discretion is the ‘ad-hoc’ in the term.

These two failed projects have led to what Sklansky calls Ad hoc-instrumentalism. The boundary between criminal law and civil law is now seen as random historical coincidence and discretion is now accepted and almost wanted.⁹⁹ Therefore, it is not strange that ground-level officials should be able to use whatever possible tool to fight a dangerous individual. Ad hoc instrumentalism therefore ‘empowers a wider range of front-line officials, including but not limited to prosecutors, to view all substantive laws and enforcement regimes, criminal and civil, as tools to be employed strategically, as the circumstances demand’.¹⁰⁰

⁹² SKLANSKY p. 161.

⁹³ SKLANSKY p. 197.

⁹⁴ SKLANSKY p. 197.

⁹⁵ SKLANSKY p. 197.

⁹⁶ SKLANSKY p. 198.

⁹⁷ SKLANSKY pp. 199 – 202.

⁹⁸ This can be seen in the crimmigration literature. In the crimmigration literature decreased discretion for immigration judges and officers have been described as part of the crimmigration “problem”, where judges have no room for prosecution remission and therefore avoid deportation. Sklansky underlines that prosecutorial discretion is part of the “discretion”-problem, which crimmigration scholars do not go into.

⁹⁹ SKLANSKY p. 200.

¹⁰⁰ SKLANSKY p. 201.

2.3.2.2 Broadening the law for more efficient enforcement

Ingrid Eagly has also noticed the “instrumentality” of criminal law in migration control and how the two areas affect each other. Her article from 2010 examines the actual outcomes in the criminal justice system. I find her discussion on the incentives of broadening immigration and criminal law especially interesting and valuable for my essay.

A broadening of the criminal code can have other aims than purely being preventive or deterring. It can also enable intervention by the Police at an “earlier stage” (before something more serious takes place) or to intervene against minor conduct.¹⁰¹ Another effect of a broad criminal code noted by criminal law scholars is that it opens the possibility to intervene on other grounds than what is really the suspected crime. Eagly describes the example of a broken taillight being used as an excuse to detain a person, where the real aim is to investigate a murder.

Immigration scholars have also noted this “broadening –effect”. A broader immigration code gives immigration authorities greater discretion in enforcing admission and removal. Eagly wants to direct the attention to the interaction of the two systems and look at how a change in the content of the law on one side of the divide will affect the procedural outcomes on the other.¹⁰² It is generally thought that this effect only goes one way: from the criminal side to the immigration side. This is because the police have greater powers in the criminal system than in the immigration system. Eagly notes however, that practices that would not be allowed in the criminal sphere are accepted in the migration sphere.¹⁰³ A police officer that stops a person on the street without probable cause is excused if it is done for migration purposes, thus lowering the threshold for police intervention.¹⁰⁴ This is one of the examples where Eagly notes that the two spheres of law have their own distinct set of advantages.

2.3.2.3 The loss of the rule of law and accountability

Eagly and Sklansky describe a similar picture: enforcement is the aim and to achieve migration control, the enforcer can pick the most advantageous enforcement regime. Sklansky argues that there are two main problems with this, what he calls ‘ad hoc instrumentalism’: the loss of the rule of law and the loss of accountability. I will focus on the loss of rule of law. Sklansky notes that “rule of law” is a quite an imprecise concept but that one of the ideas is “that government power should be exercised according to rules rather than official whim”, in order to ensure foreseeability of the use of the states’ coercive powers and the individual’s possibility to plan her actions accordingly.¹⁰⁵ Sklansky says that ad hoc instrumentalism seems to threaten this ideal. Furthermore, it is “troublingly close to the concerns expressed by

¹⁰¹ ASHWORTH p. 25.

¹⁰² EAGLY p. 1339.

¹⁰³ EAGLY p. 1340.

¹⁰⁴ EAGLY p. 1340.

¹⁰⁵ SKLANSKY p. 209.

Justice Robert Jackson”¹⁰⁶ who have written on the dangers of abuse of prosecutorial power:

“Jackson was worried, in particular, about prosecution becoming ‘personal’: he was worried about situations where ‘the real crime becomes that of being unpopular with the dominant or governing group, being attached to the wrong political views or being personally obnoxious to or in the way of the prosecutor himself.’”¹⁰⁷

Jackson was referring to the choice between invoking enforcement at all, or avoiding it, which Sklansky says is very troublesome. However, it is not *as* troublesome to, after enforcement has been invoked, choose between two applicable systems: the immigration system or the criminal system. Sklansky still maintains that there is something worrying about giving this much discretion to low-level officials to both detect “troublemakers” and then decide the most advantageous enforcement. Focus should instead lie on the nature of the offense.¹⁰⁸

Nevertheless, it is hard to build extensive criticism towards this system based on the notion of rule of law. Discretion is part of every prosecutor’s and police officers daily job.¹⁰⁹ Furthermore, it is a pragmatic system that can tailor enforcement solutions for every situation.¹¹⁰

Sklansky further argues that accountability is lost. This is because there are different actors and officials in the two systems. Overlapping responsibilities makes it difficult to hold someone accountable through public oversight and political pressure.¹¹¹ It is especially worrisome because crimmigration-law only applies to non-citizens, a particularly vulnerable group.

The ad-hoc instrumentalism goes hand in hand with what scholars have pointed at: criminal law as tool for migration objectives. They argue that the criminal justice system has been restructured to “allow for agency control and promotion of immigration objectives within the criminal prosecution”.¹¹²

2.4 Concluding remarks

Because of the perceived difference between criminal law and migration law procedural rules and constitutional protection have been applied differently. Crimmigration does not only turn its attention to the merger of these two areas. It also offers a new set of “glasses” which scholars can use in trying to detect this development as well as chart the effects of it. The detection have lead to criticism and questioning of this trend, that I think are both valuable and useful. In this essay, I will use these new “glasses” when looking at the Swedish law.

¹⁰⁶ An Associate Judge at the US Supreme Court between 1941-1954.

¹⁰⁷ SKLANSKY p. 210.

¹⁰⁸ SKLANSKY p. 210.

¹⁰⁹ SKLANSKY p. 211.

¹¹⁰ SKLANSKY p. 209.

¹¹¹ SKLANSKY p. 214

¹¹² EAGLY p. 1288.

3 Criminal and administrative divide in the Swedish context

For “crimmigration” to be an interesting concept, it presupposes a division between administrative and criminal law. In this chapter, I examine if there is such a division in the Swedish law. This chapter is not a comprehensive summary and there are many other similarities and differences that could be discussed. However, there is one significant difference between the two areas that I go into, namely the view of the outcomes. I also look at the procedural rules and the court system in order to give the reader an understanding of the two legal areas.

3.1 Public law

As outlined earlier, the strict separation of criminal law and migration law in the United States has relied on the perceived administrative nature of deportation as well as the division of powers between the states and the federal government.¹¹³ In the Swedish context criminal law and administrative law (*förvaltningsrätt*) has not been as clearly separated. Administrative law is part of the branch of “public law” (*offentlig rätt*). Today, public law has two different meanings. In the legal education it is used in a restrictive way, referring to administrative law and constitutional law. In the scientific arena it has a broader meaning; in addition to administrative and constitutional law it also encapsulates tax, criminal and procedural law. Public law is simply the opposite of private law.¹¹⁴ Public law regulates the relationship between the state and the individual, which is true for both criminal and administrative law.¹¹⁵ However, there are still some important differences that I discuss in the next section.

3.1.1 The nature of the outcomes

The state tries to affect the citizens and their behavior through various means of social control that is formal in its nature. Examples would be offered benefits, advice and encouragement, education, information or propaganda, offering or requiring permits for certain activities, physical obstacles in public spheres; as well as threat of coercive interventions and enforcement of the same. Coercive interventions can also range between taxation and care for dangerous individuals to criminal punishment. Criminalization is therefore only one of many ways to achieve social control.¹¹⁶ In this range of measures, criminalization is separated from the others. Criminalization is often seen as the last resort, the principle of *ultima ratio*. This is because punishment generally is thought of as something negative. Other coercive interventions by the state have some kind of reparative function, *inter alia* if someone needs

¹¹³ Chapter 2.2.

¹¹⁴ STRÖMBERG och LUNDELL p. 13.

¹¹⁵ ASP, ULVÄNG and JAREBORG p. 17.

¹¹⁶ ASP, ULVÄNG and JAREBORG p. 33.

health care for a contagious disease etc.¹¹⁷ The punishment is at its core repressive.¹¹⁸

A defining part of administrative law is that in the matters containing an individual against the state, the ideal outcome would mean reaching a materially correct decision. This means that there is no perceived conflict of interest between the state and the individual. In this line of thinking, an applicant who fulfills the criteria set out in the law will receive refugee status.¹¹⁹ Compare this to criminal law where there are two perceived opposing interests: the search for the materially “correct” truth competes with concern for legal security-issues. As Herbert Packer would label it: crime control and due process are two opposites.¹²⁰ Even if the two may not be inherently incompatible (in a perfect world all criminals would be punished and nobody innocent would be convicted) the conflict between the individual’s interest for legal security and society’s interest in crime control is acknowledged.¹²¹

In American legal history the administrative nature of deportation¹²² has played a big part in the view of migration law. In Sweden deportation due to crime is not regarded as a punishment in the legal sense. This follows from ch.1 sec. 3 of the Penal Code (SFS 1962:700). This paragraph prescribes that there is only two types of punishments in Swedish criminal law: fine and imprisonment. Deportation due to a criminal offence is neither considered a criminal sanction; it is regarded as a special legal effect. This means that the judge should take the effects of deportation into account when conducting meting out of punishment. If deportation causes injury to the defendant, the punishment can sometimes be reduced.¹²³ Deportation on basis of being unauthorized is also an administrative matter, regulated in the Aliens Act. Decision on deportation is taken in connection to the process of residence permit.¹²⁴

3.1.2 Procedure and courts

While criminal sanctions are negative, applying for a residence permit for *any* reason is a permit case.¹²⁵ This implies that the outcome is positive. The general rule for a permit case is that the applicant has the burden of proof to prove that he or she is entitled to the benefit. However, The Migration Court of Appeal has recognized the special nature of asylum applications. Because of the great impact on the individual’s life and liberty the outcome has and how difficult it is to prove the circumstances for the applicant, the authority

¹¹⁷ ASP, ULVÄNG and JAREBORG p. 33.

¹¹⁸ ASP, ULVÄNG and JAREBORG p. 34.

¹¹⁹ DIESEN and OTHERS p. 157.

¹²⁰ PACKER 1964.

¹²¹ LINDBLOM pp. 617-622.

¹²² In the Swedish as well as the American context there is a difference between expulsion (*avvisning*) and deportation (*utvisning*). In my essay I do not differentiate between the two, and I use the term ”removal” and ”deportation” interchangeable. For more information about the difference in the Swedish law see Diesen and others pp. 69-74.

¹²³ WESTFELT p. 19.

¹²⁴ Ch. 8 sec. 16 of the Aliens Act.

¹²⁵ MIG 2006:1.

and the court and the applicant share the burden of investigation (*utredningsbörda*).¹²⁶

In criminal cases, the burden of proof is firmly placed on the prosecutor. The prosecutor has to prove the facts while the defendant can stay completely passive. The defendant can be passive throughout the entire proceeding.¹²⁷

In criminal matters the defendant/applicant has the right to a public counsel.¹²⁸ For immigration matters, a public counsel is provided unless it can be assumed that there is no need for one. There is however, a presumption for the need of a counsel.¹²⁹

Criminal law is adjudicated in a general court in contrast with other types of public law, they are adjudicated in administrative courts.¹³⁰ In immigration proceedings, the first instance is the Migration Board. Under *officialprincipen*, the Migration Board has to investigate the matter to the extent that it is necessary. It is also the authority that has the main responsibility for the investigation. In this instance, the authority is both the adjudicator and the investigator.¹³¹ Since 2006, an applicant can appeal the decision to the Migration Court, which is part of the Administrative Courts. Administrative decisions and court decisions used to be easily separable. Through the establishment of administrative courts and increased focus on due process and legal security issues in the administrative process as a whole, this difference in character is less apparent.¹³²

3.2 Summary

This chapter is meant to give a brief overview of the differences and similarities of criminal law and immigration law as part of public law in the Swedish context. The difference in the perception of the outcome of criminal law and immigration law is the defining feature of the separation of the two procedures. This influences the burden of proof. It also influences the perceived need for procedural safeguards and legal security which I return to in chapter 6. However, they both regulate the relationship between the state and the individual, and they are both partly adjudicated in a court. In the next chapter I will go through how the main actor, the Police Authority, function in both of these spheres.

¹²⁶ MIG 2006:1 was the first case to establish this now general principle.

¹²⁷ DIESEN and OTHERS p. 202.

¹²⁸ Ch. 21 sec. 3a in the Code of Judicial Procedure (*Rättegångsbalken*) (RB) (SFS 1940:740)

¹²⁹ DIESEN and OTHERS pp. 294 – 295.

¹³⁰ ASP, JAREBORG and ULVÄNG p. 17.

¹³¹ CARLSON p. 188.

¹³² DIESEN and OTHERS p. 200.

4 The Actor

One of my research questions is: “What actors and tools are used for internal control of foreigners? How are they to be understood in the criminal/administrative divide?” In this section, I will focus on the Police who are the major actor in internal control of foreigners. Because one of the overarching research questions is if internal control of foreigners is part of the crimmigration-trend, meaning if it is a new phenomenon, I will start this chapter with giving the reader a short historic background. In the next section I cover the applicable legal framework that regulate the Police Authority’s aims and duties. I will end this chapter by trying to answer on which side of the divide internal control of foreigners belong when looking at the rules I discuss in this chapter. There perceived nature of the controls are important in order to establish what procedural rules apply, which I return to in ch. 6.

This review is in no way comprehensive. The aim is merely to show the reader that the Police have been involved in migration control to a various degree since the first Aliens Act from 1927. After I covered some brief history, I move onto today’s regulation of the Police, and their aims and duties. This is in order to present under what mandate they operate in relation to internal control of foreigners.

4.1 History

In the crimmigration literature, the intertwinement of migration agencies and law enforcement agencies is recognized as one part of the “crimmigration-trend”.¹³³

The first migration control agency that was established in Sweden was a section of the Stockholm Police department in 1937, under the National Board of Social Affairs (*Socialstyrelsen*). The Aliens Board, an independent authority, later replaced the bureau. Both of these institutions were temporary. It was not until 1969 that a permanent state agency was established: the Immigration Authority (*Statens Invandrarverk (SIV)*).¹³⁴ Despite the fact that these control agencies have had the majority of the responsibility for migration control, the Police have been active to various degrees throughout the years as well. In the Alien Acts from 1927 and 1937¹³⁵ it is stated that a foreigner arriving to the country has to report his presence to the nearest police station (sec. 3). In 1937, it was the Police that decided on the matter of expulsion of aliens unless they had fled from another country for political reasons; in these cases the matter was handed over to the National Board of Social Affairs (*Socialstyrelsen*).¹³⁶ The importance of the Police as a key factor in ensuring speedy and legally secure investigations in asylum claims has been underlined in preparatory works from both the 1970s and the

¹³³ Ch 2.2.3.

¹³⁴ HAMMAR pp. 172 - 173.

¹³⁵ SFS 1927:333 Lag om utlännings rätt att här i riket vistas, SFS 1937:344 Lag om utlännings rätt att här i riket vistas (utlänningslag).

¹³⁶ Sec. 20 SFS 1937:344.

1980s.¹³⁷ These are just a few examples of how the Police have played in role in migration control in Sweden.

In the 1990s however, this was partly changed when a more strict separation of responsibilities was implemented. In 1992, all applications and investigations for asylum were transferred to SIV from the Police and in 1996, residence permit applications were moved as well. 1997, SIV took over the responsibility of fingerprint collection¹³⁸ and the responsibility and the running of detention centers.¹³⁹

This change was part of a bigger trend that affected all state authorities who where to focus on their core activities and build their efforts around that. Since the Police's main objective was to maintain order and security in society, some tasks that traditionally had lied with the Police were now deemed outside of the scope of these "core activities".¹⁴⁰

When rearranging the division of responsibility, three main tasks stayed with the Police: internal control of foreigners, passport control and enforcement of removal decisions. They were all deemed to be inside the scope of the Police's main objective: to maintain order and security in society. It is not mentioned if it is thought of as a crime preventing strategy or a migration control strategy.

4.1.1 Summary

Unlike the United States, law enforcement in Sweden historically has had a prominent role in everything from implementing to adjudicating migration decisions. The separation of powers at law enforcement-level has been motivated with regard to practical matters more than legislative and philosophical. There is no sudden or emerging intertwinement of migration control agencies and law enforcement agencies in the way that is described by crimmigration-literature.

4.2 The Police Authority's Aims and Duties

The Swedish Police Authority is a state authority, placed under the governance of the Government. The Police Authority replaced the National Police Board in 2015¹⁴¹ in order to streamline and simplify the control of the authority.¹⁴² The new organization separated the Swedish Security Service from the Police Authority but did not lead to any changes regarding the separation of powers.¹⁴³ The main governing body for police work is the Police Act (SFS 1984:387). I will go through sec. 1 and 2 of the Police Act in the following sections.

¹³⁷ Prop. 1988/89:105 p. 6; Prop. 1977/78:90 pp. 63 - 65.

¹³⁸ Prop. 1996/1997:25 p. 134-136.

¹³⁹ Prop. 1996/97:147 p. 1.

¹⁴⁰ Prop. 1996/97:147 pp. 134-136.

¹⁴¹ Prop. 2013/14:110 p. 407.

¹⁴² Prop. 2013/14:110 p. 3.

¹⁴³ Prop. 2013/14:110 p. 477.

4.2.1 The Police Authorities Aims sec. 1

The first section of the Police Act lays down the aims of Police work. The second article enumerates the duties of the Police: how this aim should be reached. The work of the police is not regulated in detail in fear of making the regulation too stale. Instead, the Police should be able to adapt to the changing conditions of society when planning their work.¹⁴⁴

The first section in the Police Act states that police work shall aim at maintaining public order and security, as well as providing protection and assistance to the public. There is no clear definition of “public order and security”. In the comment to the Police Act it is said that the Police have an obligation and authority to prevent, stop and take measures against criminalized acts of all kinds as long as the act fall under public prosecution. This is not their only task. They should also try to achieve conditions for a safe and secure coexistence. This means that they have the authority to intervene against other nuisances than just criminalized acts.¹⁴⁵ To mention one example, the police have the right to detain a person who is a threat to the public order according to sec. 13 in the Police Act.

4.2.2 The Police Authorities Duties sec. 2

The duties of the Police Authority are regulated in the second article of the Police Act. The wording of the provision was partly changed in 2014 but there was no substantive amendment.¹⁴⁶ The section is made up of five subsections. Of particular interest for this essay is subsection 2, 3 and 5.

The second subsection declares that it is the duty of the police to maintain and supervise the public order and safety and take action when such disturbances occur. The subsection refers to the Police Authority’s “supervisory work” (*övervakningsverksamhet*)¹⁴⁷. This “supervision” is separated into general supervision and traffic supervision.¹⁴⁸ Internal control of foreigners is an example of general supervision.¹⁴⁹

The third subsection refers to criminal investigations and surveillance. It says that the Police Authority should carry out investigations and surveillance of indictable offences. If a crime is made known to a police officer, the officer has to report this under sec. 9 the Police Act. When it is considered a crime to be on the territory without documents (I will go through the Swedish legislation in this part in ch. 5), migration control can be exercised under this duty as well.

I shall also mention subsection five. It refers to other duties of the Police Authority stemming from administrative regulations and regulations in

¹⁴⁴ BERGGREN and MUNCK p. 22.

¹⁴⁵ BERGGREN and MUNCK p. 29.

¹⁴⁶ Prop. 2013/14:110 p. 577.

¹⁴⁷ Own translation. In a commentary published by the National Police Board from 1990 this duty is labelled “public order duties” (p. 11). Translation from The Swedish National Police Board, Stefan Mann ‘The Police Act with Commentary’ November 1999
<<http://www.legislationline.org/documents/id/3709>>

accessed: 20 July 2015.

¹⁴⁸ BERGGREN and MUNCK p. 34.

¹⁴⁹ SOU 2013:42 p. 142.

force prior to the introduction of the Police Act.¹⁵⁰ It is under this last duty that the Police assist the Migration Board with removal and deportation of foreigners.¹⁵¹

The duties often overlap and there is no strict division between the different tasks. Instead, the preparatory work states that the aim is to have a comprehensive notion of the duties and the work at large.¹⁵² It is therefore no strict separation of migration law and criminal law when looking at the police work. There are also those duties that are not exemplified in the law. These duties often stem from custom or tradition in Police work.¹⁵³ This general idea of authority is often made use of in the area of traffic control.¹⁵⁴

4.2.3 Internal control of foreigners – an administrative task?

Considering that the Police have multiple duties, where does internal control of foreigners belong in this administrative/criminal divide? Internal control of foreigners has two purposes. The first is to control that foreigners without authorization are not residing inside the country. The second is to detect foreigners facing removal.¹⁵⁵ This aim has not changed over the years. There is no mentioning of the controls as crime fighting tools. In a preparatory work from 1977 the Government conclude that the Police play an important role in administrative matters relating to aliens. They then exemplify this with passport control and internal control of foreigners.¹⁵⁶ So far, I think most people would argue that the control is administrative. In chapter 7 – 9, I go through how the control also can be and has been perceived as belonging to the criminal sphere.

4.2.4 Concluding remarks

In the example of internal control of foreigners, there are two dimensions of social control: to search for people without authorization staying in the country *and* to prevent crime committed by these people.¹⁵⁷ The first dimension is thought of as an administrative task under subsection 2 and 5: to find unauthorized individuals and enforce removal decisions. The second dimension clearly belongs in the criminal sphere, and is dealt with under subsection 3. The crimmigration literature has shown the conflation of these duties when the mere presence of undocumented immigrants is criminalized. In the next chapter I will go through the legislative aspect of criminalization in the Swedish context.

¹⁵⁰ BERGGREN and MUNCK p. 39.

¹⁵¹ SOU 2004:110 p. 92.

¹⁵² BERGGREN and MUNCK p. 33.

¹⁵³ BERGGREN and MUNCK p. 33.

¹⁵⁴ BERGGREN and MUNCK p. 61.

¹⁵⁵ SOU 2002:69 p. 73; Prop. 1999/2000:64, p. 67; Sec. 3 RPSFS 2011:4 FAP 273-1.

¹⁵⁶ Prop. 1977/78:90 Om ändring i utlänningslagen pp. 63 – 64.

¹⁵⁷ HYDÉN and LUNDBERG p. 125.

5 Criminalization of immigration violations in the Aliens Act

Crimmigration-literature has identified criminal law as a tool for migration control. For this to be possible, immigration violations need to be criminalized. Another factor acknowledged in the crimmigration-literature is the high prosecution rate of immigration violations. In this chapter I therefore review the relevant criminal provisions found in the Aliens Act as well as cover the prosecution statistics for these crimes.

Criminalizing per se is not the focus of this essay; rather I want to highlight how criminalizing migration offers a criminal law-route into migration control. This together with the (more common) administrative-route creates a migration control-system over multiple legal arenas, with different procedural safeguards. Kanstroom argues that when the mere presence of an undocumented migrant is criminalized this indicates “a nearly complete merger between the criminal and civil immigration control system”.¹⁵⁸

5.1 Criminal provisions in the Aliens Act

The Alien Act contains nine key criminal provisions criminalizing immigration violations. They can be found in the 20th chapter sec. 1 - 9. I will not go through criminalization of human smuggling found in sec. 8 – 9 and facilitation of unauthorized residence for financial gains in sec. 7. I disregard these provisions for two reasons. Firstly: because both Swedish citizens and non-citizens can be guilty of these crimes. Secondly, which is intimately linked to the first reason, the criminalized acts of interests are acts that the immigrant is guilty of based on the mere fact that he or she is an undocumented immigrant; because he or she has to work as an undocumented immigrant; because the immigrant entered the country without authorization something many immigrants do. Human smuggling, organization of human smuggling and facilitation of unauthorized residence is an act outside of this, not connected to the lack of legal status.

There are other criminal regulations of interest, in particular document fraud in order to reach the territory. I will not cover this due to time- and space constraints.

5.1.1 Unauthorized presence

Unauthorized stay on the territory is criminalized through ch. 20 sec. 1 and sec. 2 in the Aliens Act. Both provisions are in no way new: comparable rules can be found in earlier versions of the Aliens Act as far back as 1927¹⁵⁹ and 1937.¹⁶⁰

¹⁵⁸ KANSTROOM p. 656.

¹⁵⁹ In the 41 § of the Aliens Act of 1927 (SFS 1927:333). Prison up to 6 months was the prescribed sentence for entering the territory in breach of an entry ban.

¹⁶⁰ SANDESJÖ and WIKRÉN p. 752.

The first section in the 20th chapter criminalizes unauthorized residence. If a person is apprehended on the territory this is punishable with a fine. The committee that wrote the government report¹⁶¹ suggested that prison for six months should be the maximum sentence, but the Government did not agree. The motivation was that undocumented migrants in a majority of the cases can be deported instead and imprisonment was therefore deemed unnecessary.¹⁶² The choice to resort to deportation instead of imprisonment is further motivated by reducing procedural costs.¹⁶³ In cases where the migrant does have a principled right to a residence permit, e.g. if the person is married to a person with a residence permit or if their residence permit has expired, there may be grounds for prosecution. According to the preparatory works there is a public interest of not allowing foreigners to reside in the country without authorization and a criminal sanction could therefore be needed.¹⁶⁴

Ch. 20 sec. 2 prohibits entry and residence in breach of an entry ban. This means that if someone (who is? What is correct?) subject to a removal decision is apprehended on the territory because he or she never left or because the person returned despite having an entry ban, the migrant can be punished with prison for up to a year. It has to have happened knowingly. If it is considered a minor offence, they may be fined instead (ch. 20 sec. 2 para. 1). In the preparatory works from 1954, it is said that if the alien is apprehended at the border he or she should be deported directly and not be prosecuted.¹⁶⁵ Asylum seekers and other beneficiary's of subsidiary protection¹⁶⁶ are directly exempt from this provision, which is stated in ch. 20 sec. 2 para. 2. If the crime is a minor offense the person should not be prosecuted unless it is motivated from a public position¹⁶⁷ meaning that it is covered by special consideration of charges (*särskild åtalsprövning*) (ch. 20, sec. 2, para. 3). This last paragraph was added in 1980. The reasoning behind this was that the prosecutor should be able to give discretionary relief for social and humanitarian reasons, at the time mainly to Finnish people living close to the border. The scenarios described in the preparatory works are narrow, inter alia, visiting a sick relative or another urgent need for a temporary visit. However, the importance of prosecution was still underlined in order to maintain the respect for removal decisions.¹⁶⁸

As long as the immigrant is deportable, the legislator prefers enforcement of deportation rather than prosecution of immigration violations. This is justified using economical reasons as well as being the more practical solution: to prosecute somebody who is being deported anyway is considered unnecessary. The unwillingness to prosecute immigration violations is the very opposite of the development in the United States, where prosecution of these crimes are at an all time high.¹⁶⁹ It can be discussed whether a

¹⁶¹ Anhörigkommittén, SOU 2002:69.

¹⁶² Prop. 2003/04:35 p. 46.

¹⁶³ Prop. 2003/04:35 p. 45.

¹⁶⁴ Prop. 2003/04:35 p. 45.

¹⁶⁵ SANDESJÖ and WIKRÉN p. 755.

¹⁶⁶ Found in ch. 4 sec. 1, 2, and 2 a in the Aliens Act.

¹⁶⁷ Own translation: "motiverat från allmän synpunkt".

¹⁶⁸ SANDESJÖ and WIKRÉN p. 755 – 758.

¹⁶⁹ EAGLY p. 1281.

criminalization of the minor offences is necessary at all when it is rarely carried out.

The exception to this rule is when a foreigner has a legitimate claim to a residence permit. It is stated that there might be a need to punish a foreigner who is residing in the country without applying for authorization because it is against the public interest. I question why this public interest only covers those who are not easily deportable. One suggestion could be what Sklansky calls ad-hoc instrumentalism.¹⁷⁰ In these cases, discretion is left to the prosecutor to decide what legal sphere should be invoked and what legal tools should be used in order to reach the policy objective: managed migration. It is what Sklansky would call “tailored enforcement”.¹⁷¹

5.1.2 Unauthorized work

Both employees working without work authorization and employers hiring undocumented immigrants may face punishment in the Swedish legislation. The employer can also be bound to pay a special fee regardless of an actual criminal conviction and there are other special legal effects meant to deter people from hiring undocumented migrants, e.g. ineligibility for state benefits.¹⁷²

Ch. 20 sec. 3 regulates the worker. A fine may be imposed if a person is found working without a work permit or conducting business that requires a permit. Sec. 5 in the same chapter regulates the employer sanction. The punishment for the employer is either a fine or, if it's a serious offense, prison up to one year. In the Aliens Act from 1927, both the employer and the employee would face pecuniary penalty if an immigrant worked without a work permit.¹⁷³ The punishment for an employer who hired an alien without a work permit harshened in 1976. The importance of combating illegal employment was underlined.¹⁷⁴

5.1.3 Crossing of an external border

Crossing of an external border is criminalized in ch. 20 sec. 4 of the Aliens Act. Since entering the Schengen Agreement, all internal borders are abolished. However, the external borders still remain and are more heavily guarded than before.

If a person crosses the border without permission the punishment is a fine or imprisonment up to one year. Before entering into the Schengen Agreement in 2001, unlawful entry was not considered a crime in the Swedish legislation.¹⁷⁵ The obligation for all member states to criminalize

¹⁷⁰ Ch. 2.3.2.1.

¹⁷¹ SKLANSKY p. 209.

¹⁷² These are found in ch. 20 sec. 12, 12 a, 15, 16, 17 of the Aliens Act.

¹⁷³ Sec. 38 SFS 1927:333.

¹⁷⁴ SANDESJÖ and WIKRÉN p. 758.

¹⁷⁵ Prop. 2003/04:35 p. 52. However, note that unauthorized stay have been a crime since 1937, see ch. 4.1.

unlawful entry can be found in 4.3 of the Schengen Borders Code¹⁷⁶. The sanction should be “effective, proportionate and dissuasive”.

The Government has stated that the provision should not stop anyone from seeking asylum. Article 31 of the 1951 Geneva Convention relating to Refugees requires that an asylum seeker without delay notify the authorities and show acceptable reasons for their unlawful entry. This, the Government concluded was enough to protect the right to seek asylum. No exception to the rule for refugees was therefore added to the provision.¹⁷⁷

5.1.4 Failure to notify etc.

Section 6 criminalizes the failure to notify in accordance with what is prescribed by law and ordinances issued under the Aliens Act. It furthermore criminalizes when a person gives false information or consciously withhold important facts in a permit case or claim under the Aliens Act. Since the obligation to notify authorities when hiring a foreigner was abolished in 1989 this provision has little practical meaning.¹⁷⁸ The provision has existed since 1927 and in 1937 the maximum sentence was increased: six months imprisonment for a serious crime.¹⁷⁹ In NJA 1990 s. 761 two foreigners were convicted to a pecuniary penalty for giving the authorities false information in their asylum application.

5.1.5 Summary

Criminalization of immigration violations relating to a lack of legal status is not a new phenomenon in the Swedish legislation. The majority of the criminal provisions in the Aliens Act I went through have been criminalized since the first Aliens Act in 1927. The only relatively new provision is found in section 4, crossing of an external border. Crimmigration literature does however not only focus on criminalization per se, but to what extent criminalization leads to procedural effects.¹⁸⁰ In the next section I therefore go through the data of prosecution for immigration violations.

5.2 Prosecution rate today

Considering how many internal controls are carried out every year and how many of these lead to different enforcement: very few are actually prosecuted. The statistics from the Swedish National Council of Crime Prevention (*Brottsförebyggande rådet, BRÅ*) does not specify which of the provisions in the Aliens Act that rendered criminal responsibility. Table 1 shows reported crime. As can be seen when compared to table 2, not all of them were solved or lead to legal proceedings. Human smuggling has its own separate data while the others are counted together. Note that sec. 1, unauthorized

¹⁷⁶ Regulation (EC) 562/2006 of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders [2006] OJ L 105, 13.4.2006, p. 1–32 (Schengen Borders Code).

¹⁷⁷ Prop. 2003/04:35 p. 53.

¹⁷⁸ WIKRÉN and SANDESJÖ p. 760.

¹⁷⁹ NJA 1990 s. 761.

¹⁸⁰ Ch. 2.2.3.2.

residence, and sec. 3 or 5, unauthorized work, are not included in the statistics. There is no explanation for this in the report.

Table 1:

Reported crimes	2004¹⁸¹	2012¹⁸²	2013¹⁸³
Human smuggling (sec. 8)	26	217	242
Organizing of human smuggling (sec. 9)	37	104	69
Other crimes against the Aliens Act (sec. 2, 4, 6, 7)	672	1211	1271
In total	735	1532	1582

Table 2 shows data for crimes against the Aliens Act and the number of legal proceedings. The statistics just show data for “crimes against the Aliens Act”. It also contains information of the number of prosecution remissions¹⁸⁴ (*åtalsunderlåtelse*), order of summary punishment¹⁸⁵ (*strafföreläggande*) and number of judgements by the court.

Table 2:

	Abstention from prosecution:	Order of summary punishment:	Judgement by the court:	Total number of legal proceeding decisions:	Of which were sentenced to prison:
2013¹⁸⁶	9	130	181	320	65
2012¹⁸⁷	28	183	159	370	44
2004¹⁸⁸	16	203	112	383	41

Despite the more than twofold increase of reported crimes, there is no real increase in the number of legal proceedings. There was no possible explanation to this offered in the report. The increased number could be explained by the increase in the efforts from law enforcement in the case of internal control of foreigners that we will see later.

The number of reported crimes is relatively low compared to how many internal controls are performed¹⁸⁹ and the number of controls that lead to further actions. In 2012, around 8 000 controls led to other interventions

¹⁸¹ Kriminalstatistik 2004 p. 46.

¹⁸² Kriminalstatistik 2012 p. 52

¹⁸³ Kriminalstatistik 2013 p. 52.

¹⁸⁴ Abstention from prosecution: when the prosecutor decides not to prosecute even if the person is thought to be guilty of the crime. This can be the case if it's a minor offence, if the perpetrator is young or if he or she is to be committed for another crime. The person normally has to have admitted to committing the crime for this to happen, EKELÖF, EDELSTAM and PAULI (2006) pp. 155 – 165.

¹⁸⁵ Order of summary punishment: When a criminal investigation does not lead to a prosecution and a trial even if the prosecutor assesses that there is enough evidence for a conviction. It is voluntarily and the suspect has to admit to the crime and accept the punishment. EKELÖF, EDELSTAM and PAULI (2006) pp. 283 – 286.

¹⁸⁶ Kriminalstatistik 2013 pp. 196 - 198.

¹⁸⁷ Kriminalstatistik 2012 pp. 200 - 202.

¹⁸⁸ Kriminalstatistik 2004 pp. 156-158.

¹⁸⁹ I go through this data in ch. 8.

from the Police.¹⁹⁰ Only 370 people however were subject to legal proceedings relating to crimes against the Aliens Act. It is not clear if ch. 20 sec. 1 is included in the statistics on table 2, but it can be assumed that the majority of the cases under sec. 1 does not lead to any legal proceedings.

5.3 Concluding remarks

In the case of prosecution of immigration violations, the development does not mirror the development in the United States. McLeod have criticized the American development of enforcing prosecution for immigration violations because they are an unnecessary cost when the immigrant may be deported either way.¹⁹¹ In this instance, McLeod and the Swedish legislator seems to agree with each other. However, the far-reaching criminalization of the mere status of being undocumented still opens up for criminal law enforcement if the police official or prosecutor deems it is necessary. In the next chapter I will review what legal rules apply in those cases.

¹⁹⁰ This data can be found in ch. 5.

¹⁹¹ MCLEOD pp. 107 - 108.

6 Procedural safeguards and legal principles

Another research question in this essay is the following: How are procedural safeguards and legal principles affected depending on the legal area and how is this played out in relation to citizens and non-citizens? The crimmigration-literature, has noted how different rules in the different arenas affected the procedural outcome in both.¹⁹²

To be able to answer if the same tendencies can be discerned in the Swedish system, I need to review what principles are applicable. I will start with the fundamental right to establish if and how the law can discriminate based on citizenship. I will then move onto legal principle applicable to Police work, criminal investigations and coercive measures. The idea is to have this both as a backdrop and a measure in the discussion on Police work in relation to internal control of foreigners.

In the case of the Police there is a difference between police work relating to a preliminary investigation in a criminal case and police work outside of this. Police work outside of this is e.g. internal control of foreigners and enforcement of removal decisions, duties of more administrative nature.¹⁹³ The latter is in large parts completely unregulated.¹⁹⁴ The majority of the rules for criminal investigations can be found in the Code of Judicial Procedure (RB) (SFS 1942:740). I will review the applicable principles for both instances in this section. I will then move onto the role of preliminary investigation and the use of coercive measure in criminal investigations. The use of coercive measures in the case of internal control of foreigners will be discussed in chapter 9.

6.1 Fundamental rights

6.1.1 The European Convention on Human Rights

The European Convention of Human Rights (ECHR) is directly applicable as Swedish law.¹⁹⁵ 2:19 of the Instrument of Government prescribes that no act of law or other provision may be adopted which contravenes Sweden's undertakings under the ECHR. Because the Convention is part of Swedish law, jurisprudence from the European Court of Human Rights is of importance as well.¹⁹⁶ The Contracting Parties have to ensure the rights and freedoms defined in the first section to everyone within their jurisdiction; it

¹⁹² Ch. 2.3.2.

¹⁹³ Ch. 3.2 and 3.3.

¹⁹⁴ BERGGREN and MUNCK p. 37.

¹⁹⁵ See "Lagen (1994:1219) om den Europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna".

¹⁹⁶ LINDBERG p. 13.

therefore covers both citizens and non-citizens.¹⁹⁷ However, the rights of greatest interest for internal control of foreigners are not absolute and can be limited, as we will see below.

6.1.2 The Instrument of Government

Fundamental freedoms and rights are regulated in the Instrument of Government (IoG) (SFS 1974:152). The general rule is that the fundamental rights in the IoG apply to all Swedish citizens. However, many of the rights are also granted to foreigners. There are three different “steps” regarding the protection granted to non-citizens. The first is where the same protection is granted to citizens as well as non-citizens. That is when the provision states “everyone” or “no one”. The second step is when limitations of the protection can be made in law (ch. 2 sec. 25 IoG). The third step is when the provision does not cover foreigners at all. Then it is stated directly in the provision.

In ch. 2 sec. 20 IoG the rights that may be limited in law for Swedish citizens are enumerated. Limitations of these rights are only accepted if they live up to provision 21 – 25 in the same chapter. In sec. 21 it is stated that the limitation must satisfy a purpose acceptable in a democratic society, and it must never go beyond what is necessary and it may never constitute a threat against the opinion formation fundamental in a democratic society.

6.1.3 Fundamental rights and internal control of foreigners

There are some fundamental rights more relevant than others in the case of internal control of foreigners. One of them is the right to family and private life (art. 8 of the ECHR) and the “integrity”-provision in the rights catalogue in the second chapter of IoF (ch. 2 sec. 6 last para.).

The protection stemming from article 8 is not absolute, but interference is only allowed if it (i) has a legal basis; (ii) serves a legitimate purpose; and (iii) is necessary in a democratic society. Retention of fingerprints are common in internal control of foreigners¹⁹⁸, and this constitutes an interference with private life according to the ECtHR¹⁹⁹. When the data is automatically processed the need for safeguards is even greater, especially if it is used for police purposes. The storage also has to be proportionate: it has to be “relevant and not excessive in relation to the purposes for which they are stored”.²⁰⁰

Another right that could be violated in connection to internal control of foreigners is the freedom of movement. The protection of freedom of movement can be found in the additional protocol no. 4 art. 2 of ECHR.²⁰¹ Art 2(1) reads “everyone lawfully within the territory of a State shall, within

¹⁹⁷ Art. 1 of the European Convention of Human Rights.

¹⁹⁸ I go through this at length in ch. 9.2.

¹⁹⁹ *S and Marper v. The United Kingdom* App no 30562/04 and 30566/04 (ECtHR, 4 December 2008) para 78 - 86.

²⁰⁰ *M.K. v. France* App no 19522/09 (ECtHR 18 April 2013) para 35.

²⁰¹ Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereof [1963] COETS 4 (16 September 1963).

that territory, have the right to liberty of movement and freedom to choose his residence”. Therefore, an undocumented immigrant is outside of the protection of this article. However, the Court has stated that “deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance”.²⁰² Protection against the deprivation of liberty can be found in art. 5.1 of ECHR and it apply to all persons inside the state’s territory. However, this right is not absolute and can therefore be restricted if the restriction fulfills the aforementioned requirements.

Freedom of movement is protected in IoG as well. However, the rule specifically states: “all Swedish citizens shall also in other respects be guaranteed freedom of movement within the realm”, thus leaving foreigners outside of the protection (ch. 2 sec. 8 second sentence IoG). Deprivation of liberty is protected in the same provision, which covers both citizens and non-citizens. This can be limited in law for both groups according to ch. 2 sec. 20(3) and ch. 2 sec. 25(4) IoG.

Internal control of foreigners has been criticized mainly for being discriminatory and profiling people who looked foreign, despite being Swedish citizens.²⁰³ The protection against this kind of discrimination (because of belonging to a minority group, such as ethnic origin) is found in sec. 12. This does not mean that you can be discriminated against based on alienage.

6.1.4 Accessing human rights

The question of human rights and fundamental rights applying to non-citizens is not merely one of applicability or limitations accepted in law. There is also the issue of accessing these rights. Law Professor Gregor Noll has questioned the claimed universality of human rights because of the issue of undocumented migrants in his article “Why Human Rights Fail to Protect Undocumented Migrants”²⁰⁴. Because access to human rights presupposes contact with the state that wishes to enforce their removal, undocumented migrants are unable to access them.²⁰⁵ This picture is confirmed in for example ECtHR case law, where the right to family life has been applied less favorably in the case of undocumented migrants.²⁰⁶

In the United States, the intertwinement of law enforcement agencies and immigration agencies have been criticized because undocumented immigrants no longer will be able to report crimes or acquire assistance from the state.²⁰⁷ In the preparatory works I have studied this kind of discussion

²⁰² Gillan and Quinton v. The United Kingdom App no 4158/05 (ECtHR, 20 July 2004) para 56.

²⁰³ CANTWELL 2014; HASSEN KHEMIRI 2013.

²⁰⁴ Noll argues that the right to human rights are not determined by de facto presence on the territory (“within a state’s jurisdiction”). Instead, it is connected to being a part of the political community. Stumpf (2006) has a similar argument concerning “membership theory” and the lack of political rights for both convicts and undocumented migrants.

²⁰⁵ NOLL p. 243.

²⁰⁶ NOLL p. 258.

²⁰⁷ WISHNIE p. 1087.

have been almost absent, with one exception: children's right to education^{208 209}.

6.2 Public power principles

There are other principles of interest when exercising public power but I have limited myself to the four most important principles in relation to Police work and coercive measures. These are:

- *Principle of legality*
- *Principle of proportionality*
- *Principle of purpose*
- *Principle of necessity*²¹⁰

All public power is exercised under the law according to ch. 1 sec. 3rd para. IoG which is the codification of the principle of legality. This includes all Police work. A police officer needs to have legislative support for an intervention or "official duty" as the provision states. However, it does not mean that a police officer needs explicit legal basis for every measure that needs to be taken in order to fulfill fundamental obligations. If a measure with consideration to the next two principles: necessity and proportionality, is both necessary and proportionate and also does not limit the freedom and rights guaranteed in the Instrument of Government, it is deemed part of police authority.²¹¹

Section 8 of the Police Act codified the principles of proportionality and necessity.²¹² The principle of necessity means that an intervention only may occur when it is necessary to prevent or halt the danger or disturbance. Proportionality means "the danger or inconvenience that may be caused to an opposing interest must not be disproportionate to the purpose of the intervention".²¹³ This "future" proportionality should not be confused with retrospective proportionality determining the sanction based on the severity of a crime.²¹⁴ According to the preparatory works these principles apply to all police work.²¹⁵

The principle of purpose is also regulated in section 8. It refers to the use of coercive powers and I will go through this under Ch. 6.3.1.2, when I review for what purposes coercive powers may be used.

²⁰⁸ Noll elaborates on the view of children in the aforementioned article. Children are not thought of as decision makers and can therefore not be blamed for their irregular status, this could be one way of understanding this exception.

²⁰⁹ Ch. 7.3.1.

²¹⁰ *Legalitetsprincipen, Ändamålsprincipen, Behovsprincipen, Proportionalitetsprincipen*

²¹¹ BERGGREN and MUNCK p. 60.

²¹² BERGGREN and MUNCK p. 59.

²¹³ MANN p. 22.

²¹⁴ ASP, ULVÄNG and JAREBORG p. 242.

²¹⁵ HELMIUS p. 90.

6.3 Preliminary investigation

Preliminary investigations are a fundamental part of the Police's criminal work. A preliminary investigation results in a number of legal effects. The 23rd chapter of The Code of Judicial Procedure (RB) is applicable as well as the Decree on Preliminary Investigations (FUK) (SFS 1947:948). Furthermore, the use of coercive powers is regulated in ch. 23 – 28 in RB. Preliminary investigations have three purposes. The first is to establish if a crime has been committed, who can be justifiably suspected and to obtain enough information to press charges. The second purpose is to prepare the case so it can be presented at a hearing in court. These two are mentioned in ch. 23 sec. 2 in the Code of Judicial Procedure. There is also a third purpose, not mentioned in the law. It is to make the suspect aware of the investigation material so he or she can add or adjust material.²¹⁶

A preliminary investigation "shall be initiated as soon as due to a report or for other reason there is reason to assume that an offence subject to public prosecution has been committed"²¹⁷ (ch. 23 sec. 1 RB). It is sufficient that there is suspicion of an actual crime and that this is based on an evidentiary fact.²¹⁸ JO has stated that the threshold for initiating a preliminary investigation is very low.²¹⁹ "Reason to assume" is said to be the lowest of all requirements for evidence in procedural law.²²⁰

Even if the law states that a preliminary investigation *shall* be initiated, there are exceptions to this rule. These can be found in ch. 23 sec. 1 2nd para. RB and ch. 23 sec. 4 a in RB. Simplified, they take into consideration the cost of investigating the crime in proportion to the seriousness of the crime.²²¹

In the Police's crime investigating function there are stages coming before the preliminary investigation as well. Generally, this is police work without substantial suspicion of a crime (under sec. 2 of the Police Act) or when there is vague information about criminal activity that needs to be investigated further in order to properly assess whether a preliminary investigation should be initiated.²²²

Under the preliminary investigation there are a number of rules regulating how the investigation should be carried out. For example, evidence and information obtained during an interrogation of a suspect without a legal counsel present might not be legal ground for a conviction.²²³ A questioning or interrogation should be thoroughly documented (sec. 22 FUK). The person who is justifiably suspected (*skäligen misstänkt*) has the right to continuously take part of what has figured in the investigation (ch. 23 sec. 18 RB).

²¹⁶ Prop 2004/05:143 p. 14; EKELÖF, EDELSTAM and PAULI p. 105.

²¹⁷ Translation from, The Code of Judicial Procedure Updated to SFS 1998:605, not an official translation.

²¹⁸ EKELÖF, EDELSTAM and PAULI p. 109.

²¹⁹ HYDÈN and LUNDBERG p. 91.

²²⁰ HYDÈN and LUNDBERG p. 93.

²²¹ LINDBERG p. 7.

²²² EKELÖF, EDELSTAM and PAULI p. 110.

²²³ EKELÖF, EDELSTAM and PAULI p. 141.

6.3.1 Coercive measures

In the Swedish legislation, so-called “coercive measures” or “coercive powers” (*tvångsåtgärder*) hold a unique position. Coercive powers are separated into two kinds: coercive measures implemented outside criminal investigations: administrative coercive measures; and coercive measures used to solve a crime: investigative coercive measures (*straffprocessuella tvångsåtgärder*). The difference between the two is the *purpose* of the measure.²²⁴ Investigative measures are used in criminal proceedings to obtain and secure evidence or a criminal conviction. Administrative coercive measures are used without connection to a criminal investigation and usually in exercise of public authority.²²⁵ When a coercive measure is used against somebody, this constitutes an encroachment of somebody’s rights sphere, personal freedom and integrity or in his or her right of disposition. This is true for both administrative and investigative coercive measures.²²⁶

Later in my essay I will return to administrative coercive powers used in connection to internal control of foreigner. In the next section I will discuss investigative coercive powers.

6.3.1.1 Investigative coercive measures

6.3.1.1.1 What is a coercive measure?

There is no clear definition of coercive powers. The Police Law Report (*Polisrättsutredningen*) defined coercive measures as follows: “the expression coercive measure should be reserved for those direct interventions against a person or property that is carried out as an exercise of public authority and which constitutes some sort of encroachment in another person’s right’s sphere”²²⁷. Furthermore, the individual needs to be protected against the intervention according to the Instrument of Governance or it must be considered a violation of the human rights set out in European Charter of Human Rights.²²⁸

The investigative coercive measures are regulated mostly in the Code of Judicial Procedure (RB) but can also be found in special law (*speciallagstiftning*). A measure can be considered a coercive measure even if there is no coercion involved. If the individual’s integrity is violated by the measure it can also be considered a coercive measure.²²⁹ Bylund argues that despite the fact that the term “coercive measure” might be inappropriate for a certain measure, it does not automatically mean that the measure should not receive the same protection as other coercive measures.²³⁰ One example is remote computer search (*hemlig teleövervakning*). If a measure is regulated in the law as a coercive measure, the question of whether or not it is a coercive

²²⁴ EKELÖF, BYLUND and EDELSTAM p. 40.

²²⁵ SOU 2004:110 p. 91.

²²⁶ EKELÖF, BYLUND and EDELSTAM p. 40.

²²⁷ My own translation. The original is: ”*Begreppet tvångsmedel reserveras för sådana direkta ingripande mot person eller egendom som företas i myndighetsutövning och som utgör någon form av intrång i en persons rättssfär*”.

²²⁸ SOU 1995:45 pp. 137-141.

²²⁹ EKELÖF, BYLUND and EDELSTAM p. 43

²³⁰ EKELÖF, BYLUND and EDELSTAM p. 43.

measure is resolved. Thus, there are interventions that do violate integrity but are not considered investigate coercive measures because they are not classified as such legally.²³¹

6.3.1.1.2 When can investigative coercive measures be used?

For coercive measures to be used, a preliminary investigation has to have been initiated. If it is not, the decision to carry out a coercive power is regarded as a decision to initiate a preliminary investigation.²³² The right to use investigative coercive measures is reserved for the Police, prosecutor and the general court in connection to criminal proceedings.²³³

6.3.1.2 Purpose of the use of coercive measures

Coercive powers cannot be used for other or wider purposes than what is stated in the law: to simplify the preliminary investigation or the trial, or to ensure enforcement of criminal convictions.²³⁴ Because of this there are some general limitations to the use of coercive powers. Coercive powers cannot be used:

- To prevent crime²³⁵
- To expose potential criminal activity before suspicion has reached the level required to initiate a preliminary investigation
- To gather ‘excess information’ (*överskottsinformation*) about another crime
- Strictly to simplify the Police’s checks to detect suspected persons
- As leverage against the suspect or another person.²³⁶

A fundamental principle governing the use of coercive measures is the “principle of purpose” (*ändamålsprincipen*). It is derived from the principle of legality. It means that a coercive measure is only to be used for the purpose stated in the law, and when such measure is taken, it cannot be used for any other purpose than what was originally decided in that specific case.²³⁷ This means that the main purpose of an intervention cannot be to obtain evidence on another crime than the crime that constitutes the grounds for the coercive measure. As an example, a house raid cannot be used as a “general control measure” to investigate whether the suspect is guilty of other, more extensive criminal activity.²³⁸ However, if a house search is conducted in order to search for a person and the person conducting the search has the authority to decide over such a coercive measure, he or she can immediately expand the

²³¹ EKELÖF, BYLUND and EDELSTAM p. 42.

²³² LINDBERG p. 7.

²³³ In certain situations, amongst other, the Swedish Customs and the Swedish Coast Guard also have the right to use investigative coercive measures; SOU 2004:110, p. 91.

²³⁴ LINDBERG p. 9.

²³⁵ There is however exceptions when it comes to intelligence work mainly carried out by the Swedish Security Service, LINDBERG p. 8.

²³⁶ LINDBERG pp. 9 – 11.

²³⁷ JO 1990/91 s. 66.

²³⁸ JO 1988/89 s. 67.

house search to include search for objects.²³⁹ This does require a formal decision to be lawful.

The prohibition of coercive powers in order to find “excess information” should not be confused with the situation when a coercive measure is being carried out, for example a house search, and information regarding other crimes is accidentally found.²⁴⁰ Generally, the use of this kind of “excess information” has been accepted in the Swedish legislation.²⁴¹

6.3.1.3 Rules applicable to the use of coercive measures

There is nothing regulated in the law about the duty to notify the person subject to a coercive measure except the rules on deprivation of liberty. The individual will most likely be aware of the coercive power against him or her.²⁴² For the coercive power to have effect it must be decided by somebody with proper authority.²⁴³ A general principle is that the more intrusive a measure is, the higher must the competence be of the decision-making officer.²⁴⁴

The rules on documentation of a coercive measure are neither comprehensive nor consistent.²⁴⁵ However, there are some minimum requirements: what coercive measure has been decided upon, the crime that is the ground for the measure, the decision maker, and the purpose of the measure.²⁴⁶ There is no strict form prescribed by law and each kind of coercive measure is regulated separately. A decision taken by a prosecutor is often in written form while an intervention by a police officer in the field is often oral.²⁴⁷ Another documentation requirement is that the preliminary enquiry report needs to contain information about performed coercive measures.²⁴⁸ Today, the rules on documentation in the preliminary enquiry report is based on what kind of sentence might follow, if it can be expected that a pecuniary penalty will be the outcome, no report has to be established.²⁴⁹

6.3.2 Concluding remarks

The right for the legislator to distinguish between citizens and non-citizens are broad. However, human rights should still apply to everyone inside the state’s territory, even if this rarely is the reality.

²³⁹ LINDBERG p. 24.

²⁴⁰ LINDBERG p. 11.

²⁴¹ LINDBERG p. 488. However, note that excess information found during secret coercive measures such as wiretapping are now regulated in the law. For more information, LINDBERG pp. 810 – 823.

²⁴² LINDBERG p. 86.

²⁴³ LINDBERG p. 66.

²⁴⁴ LINDBERG p. 67.

²⁴⁵ LINDBERG p. 81.

²⁴⁶ LINDBERG p. 83.

²⁴⁷ LINDBERG p. 68-69.

²⁴⁸ The obligation to keep an enquiry report is laid down in ch. 23 sec. 21 RB, more specifically what it has to contain are found in in sec. 20 – 22 in FUK.

²⁴⁹ LINDBERG p. 79.

Public power principles apply to all forms of police work. However, they are general principles and it is up to each officer to consider these before making a decision about how to act. In comparison, the Code of Judicial Procedure regulate in police work in detail.

The fact that police work outside of preliminary investigations is predominantly unregulated, while police work inside of preliminary investigations are heavily regulated, indicates that criminal law and administrative law are viewed differently. As discussed in chapter 3, criminal sanctions are seen as inherently negative and repressive, why legal safeguards are guaranteed to a higher degree than in administrative matters.

The use of coercive measure put the prosecution in a much more powerful position than the defense. This unequal position has been justified with the importance task at hand for prosecutors and the police: to fight crime. Coercive measures are deemed necessary in order to achieve this.²⁵⁰ However, this recognized unequal position also means that the use of coercive powers is regulated and limitations are in place. In chapter 9 I will review what coercive powers may be used in relation to internal control of foreigners and compare this to the their regulation in the Code of Judicial Procedure.

²⁵⁰ EKELÖF, BYLUND and EDELSTAM, p. 38.

7 Internal control of foreigners in the spotlight

One of my overarching research questions is if internal control of foreigners is an example of the crimmigration-trend. In this chapter I will therefore cover the historical background of the controls.

Internal control of foreigners has been allowed since the first Aliens Act was adopted in 1927.²⁵¹ The provision on internal control of foreigners has not changed substantially since 1989.²⁵² Traditionally, it has not been a prioritized task for the police. However, from the beginning of the 21st century, internal control of foreigners has been a priority for the Police and a discussed political issue.²⁵³ In this chapter, I aim at answering the question how and why this is and explain what has happened in the political discourse for the past 20 years. Firstly, I consider the available statistics relating to the number of controls to see if they have increased recently. Secondly, I look at government reports and preparatory works that discuss internal control of foreigners. I am interested in rationales used justify the increasing number of controls. After this I try to establish if these offered political rationales have a connection to crimmigration-thinking.

7.1 Statistics

There are no statistics on the number of controls before 2007. 2007 was when the National Police Board instructed all Police departments to document the reports. Therefore there is no proof that there was an actual increase of the number of controls compared to earlier years.

According to Fredrik Sundberg at the National Operative Unit at the Border Police Section, the gradual increase from 2007 until 2009 is partly explained by the fact that it took a while for the new routine to be implemented.²⁵⁴ According to the report from Arena Idé other offered explanations have been the appropriation direction that expressed a desired increase in the number of enforced removals, improved training of police officers and the fact that the controls got its own code: R209, which simplified gathering of statistics.²⁵⁵

²⁵¹ Ch 2 sec 4 – 6 SFS 1927:333.

²⁵² With the exception of the change in 2011 when the law was changed from “show” the passport to “submit” passport.

²⁵³ HYDÉN and LUNDBERG p. 13.

²⁵⁴ Statistics on Internal Control of Foreigners 2007 – 2014.

²⁵⁵ LEANDER p. 8.

Table 1: Controls per year by respective police unit²⁵⁶

	2007	2008	2009	2010	2011	2012	2013	2014
Total:	10 202	17 185	28 092	33 630	36640	42 467	28 930	26 428
Aliens unit²⁵⁷	7 490	11 281	18 308	21 254	21 254	24 868	15 840	12 229
Traffic unit	177	591	979	1244	2 502	2552	1 837	1662
Criminal unit	229	500	466	695	333	269	428	853
Other unit	2 352	4 812	830	10 416	12 551	14 778	10 825	11 684

The aliens department performs more controls than the Traffic Department.

In table 2 we see the total number of control and then whatever action has been taken following it. The numbers in the first columns between 2007-2010 do not match in table 1 and table 2, but there were no explanation for this in connection to the statistics.

Table 2: Outcome of control

	2007	2008	2009	2010	2011	2012	2013	2014
Result in total:	5 301	16 272	27 517	32 865	36 640	42 467	28 930	26 428
No further action	4 644	13 243	21 129	27 177	29 694	34 342	23140	21 818
Enforcement/ Removal	209	747	1 662	1 478	1 368	1 213	1 099	1 272
To Migration Board		529	785	775	682	670	831	1 169
Other action	448	2 151	3 941	3 463	4 896	6 242	3 860	2 169

The majority of the checks do not lead to any further action. It can be discussed how efficient the controls are in relation to the cost of the controls, a question of proportionality.

If an officer finds an alien without authorization, but without a pending removal decision or any other requested action according to SIS, they are meant to ensure that they apply for authorization with the Migration Board.²⁵⁸ Since 1981 it has not been possible to apply for a residence permit when you are inside the country. As a general rule, the same goes for work permits (ch. 6 sec. 4 of the Aliens Act). If you are already inside the country unauthorized, the main legal option you have to legalize your status is to seek asylum or subsidiary protection.

²⁵⁶ Statistics on Internal Control of Foreigners 2007 – 2014.

²⁵⁷ Utlänningsenhet.

²⁵⁸ SOU 2002:69 p. 75.

7.2 Intensified internal control – how and why?

7.2.1 Background

Up until around 1996, migration control policy was mostly reactive. Migration policies were considered first after the arrival of large immigrant groups.²⁵⁹ It was also pragmatic, meaning that when something didn't work, it was changed. The change happened in practice first and afterwards it was legally regulated.²⁶⁰ In 1996, the discussion changed. Immigration policy was no longer to be thought of as an isolated phenomenon. Instead it was to be considered inside a framework of “foreign policy, security policy, trade policy and development policy” and it was supposed to be active.²⁶¹ The same tendencies can be seen in the example of internal control of foreigners.

The perceived necessity of increased controls is in large attributed to Sweden's accession to the Schengen Agreement. I will therefore in short explain the background of the Schengen cooperation. After, I will go through relevant government reports and preparatory work that discuss the use of internal control of foreigners and how the use is justified.

7.2.2 Schengen was born

In 1985, Germany, France, Belgium, the Netherlands, and Luxembourg made an intergovernmental agreement to phase out border controls and develop police and legal co-operation. In 1990, the Schengen Implementation Agreement was signed. It contained practical measures for realization of the Convention, such as abolition of border controls and other co-operation measures. Sweden joined in 1996²⁶², but it was not until 2001 Sweden became an operative member.²⁶³ This was because Sweden agreed with the majority interpretation of art. 7(a) of the Schengen Convention, that compensatory measure was necessary in order to abolish the internal borders.²⁶⁴ The legislative changes needed in the Swedish law to fulfill this obligation started in 1996 and was not finished until 2000.

With the Amsterdam Treaty the Schengen cooperation became part of EU-law.²⁶⁵ This also meant that questions of border control, free movement of persons, immigration policy and refugee policy were moved to the “first pillar” of EU-law. However, criminal law and police cooperation aimed at fighting crime stayed within the third pillar.²⁶⁶

²⁵⁹ HAMMAR p. 193.

²⁶⁰ HAMMAR p. 194.

²⁶¹ HAMMAR p. 193.

²⁶² Prop. 2014/15:32 p. 11.

²⁶³ SOU 2006:9 p. 131.

²⁶⁴ Prop. 1996/97:25 under chapter 8.2. Svensk migrationspolitik i globalt perspektiv.

²⁶⁵ Prop. 1999/2000:64 p. 34.

²⁶⁶ Prop. 1997/98:159 pp. 18-19.

Today, 22 of the 28 European countries have joined the Schengen Agreement. Furthermore, Norway, Iceland, Switzerland and Liechtenstein have acceded the treaty without being EU-members.²⁶⁷

7.2.3 Free movement and crime fighting

The Schengen cooperation has two basic ideas that are tightly linked. The first is the free movement of people. This means that all internal borders inside the Schengen Area should be abolished. The second idea is that this should not increase the likelihood of and opportunities for transnational crime and “illegal” immigration.²⁶⁸ To attain the second objective, certain “compensatory measures” should be implemented. One of them is the Schengen Information System (SIS).²⁶⁹ Another compensatory measure is increased police and legal cooperation between the countries.²⁷⁰ I will go through the Schengen Information System in the next chapter and outline its importance from a crimmigration standpoint.

7.2.4 New threats

In 1997, Cyprus, seven Central- and Eastern European countries and the Baltic States had applied for admission into the EU.²⁷¹ With the new candidate countries and no internal borders came new challenges. These issues were partly addressed in the government reports SOU 1997:159 “An Enlarged European Union with Freedom, Security and Justice”²⁷² and SOU 1997:128 “Enforcement and Control in Alien Matters”²⁷³. Two “threats” were recognized: a majority of the new countries were transit countries for “illegal immigration”²⁷⁴ and organized crime was widespread.²⁷⁵ It was estimated that there were around 2 million “illegal aliens” residing in the EU at the time. Since border control was abolished, internal control of foreigners had to be intensified.²⁷⁶

Prop. 1997/98:42, “The Schengen Cooperation” followed up on the worries discussed in the two reports. Regarding internal control of foreigners, The National Police Board underlined the need for an intensified internal control considering the amount of “illegal aliens” residing inside the European Union.²⁷⁷ The government agreed with this. The government concluded that a functioning internal control was a condition for open borders.²⁷⁸

²⁶⁷ Prop. 2014/15:32 p. 11.

²⁶⁸ Prop. 1999/2000:64 p. 38.

²⁶⁹ Prop. 1999/2000:64 p. 38.

²⁷⁰ Prop. 1999/2000:64 p. 40.

²⁷¹ The countries all joined the European Union in 2004.

²⁷² SOU 1997:159 Ett utvidgat europeiskt område med FRIHET, SÄKERHET och RÄTTVISA.

²⁷³ SOU 1997:128 Verkställighet och kontroll i utlänningsärenden.

²⁷⁴ SOU 1997:159 p. 17.

²⁷⁵ SOU 1997:159 p. 20.

²⁷⁶ SOU 1997:159 p. 14.

²⁷⁷ Prop. 1997/98:42 p. 49.

²⁷⁸ Prop. 1997/98:42 pp. 49-50.

7.2.5 A compensatory measure

The importance of compensatory measures instead of internal frontiers is underlined in the Schengen legislation. In many of the preparatory works and government reports internal control of foreigners are described as a “compensatory measure”, just like the Schengen Information System (SIS) and the cooperation between the police.²⁷⁹ However, there is no obligation in the Schengen Borders Code for states to perform internal control of foreigners on the territory, instead it is designed as a right. In the Schengen Borders Code art. 21, checks within the territory are regulated. It says that the abolition of internal borders shall not affect exercise of police powers in relation to and away from the border as long as they do not have border control as the objective. For interventions from the police to be allowed, it has to combat cross-border crime, the interventions cannot be systematic and they have to be designed as spot check. The article wishes to clarify that the abolition of internal borders does not mean that all police work has to stop in connection to the borders as long as it is performed as “normal” police work.

Despite the fact that internal control of foreigners is not a requirement in the Schengen Border Code, Sweden have other obligations. The Schengen Convention, art. 23, required member states to expel “illegal aliens” from their territory. This provision was replaced by the Returns Directive²⁸⁰ that regulates the return, voluntarily or forced, of unauthorized third-country nationals. In art. 8 of the directive it is stated “member states shall take all necessary measures to enforce the return decision”. The directive also regulates the use of detention to avoid absconding.²⁸¹ The directive is a result of the European Council’s calls “for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity”²⁸². The directive does not mention internal control of foreigners but an efficient return policy requires that undocumented migrants be found. In practice, internal control of foreigners often take place for the purpose of finding people facing removal decision in order to enforce these.²⁸³

7.2.6 Summary

The Schengen Agreement is meant to ensure free movement inside of the Schengen Area. The abolition of internal borders has been followed by a fear of increased crime and increased “illegal” immigration. Internal control of foreigners has been one of the Swedish government’s responses to this perceived threat. Furthermore, all member states have an obligation to expel

²⁷⁹ See e.g. prop. 2003/04:35 p. 24; SOU 2010:63, p. 315; sec. 4 in RPSFS 2011:4, FAP 273-1; SOU 2010:5 p. 94.

²⁸⁰ Art. 21 in Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008 (The Returns Directive).

²⁸¹ Art. 15(1) The Returns Directive.

²⁸² Preamble (2) The Returns Directive.

²⁸³ Prop. 2004:110 p.124.

foreigners who are residing on the territory unauthorized. The controls are also described as a “compensatory measure” meant to replace borders.

7.3 Increased importance of efficient implementation

As concluded above, the accession of the Schengen Agreement led to political discussions regarding border control, migration and crime fighting. There was a perceived need for intensified internal control of foreigners. In prop. 1999/2000:64 there was a discussion regarding a suggested lowering of the threshold for controls in order to ensure efficiency, and before this there had been multiple official documents²⁸⁴ calling for an intensified internal control.

SOU 2004:110 “Border Control Act – a more efficient border control”²⁸⁵ was one of government reports and preparatory works meant to evaluate border control in the new reality of Schengen. The report found that the internal control of foreigners was inadequate. Almost exclusively were controls performed by those local departments that had a separate “aliens unit” (*utlänningsenhet*).²⁸⁶ In other police departments, enforcement of removal decisions was the only prioritized task and no other general controls were performed.²⁸⁷ The report suggested that all the relevant rules concerning border control were to be brought together in a new act called the Border Control Act. The proposal did not lead to a proposition regarding a new law.

Neither prop. 1999/2000:64 or SOU 2004:110 led to any legal changes.²⁸⁸ But there were still a perceived need for intensified control. The executive branch now stepped in.

In September 2006, the National Police Board initiated a project group meant to develop a national strategy for internal control of foreigners. The reason was that another nine countries were about to join the European Union before 2008, many of them Eastern European countries.²⁸⁹ In 2007, the National Police Board decided that all internal controls were to be documented.²⁹⁰

In 2009, in Sweden, the Police Authority, the Migration Board and the Swedish Prison and Probation Service all received the same assignment in their respective appropriation directions²⁹¹: together they were to review the procedure for enforcement of removal decisions. When this was done, they were to institute the necessary measures to increase the enforcement rate.²⁹²

²⁸⁴ SOU 1997:128; SOU 1997:159; Prop. 1997/98:42.

²⁸⁵ SOU 2004:110 Gränskontrolllag – effektivare gränskontroll.

²⁸⁶ SOU 2004:110 p. 421.

²⁸⁷ SOU 2004:110 p. 422.

²⁸⁸ I return to the discussion of a lowered threshold in prop. 1999/2000:64 in ch. 8.5, and the discussion in SOU 2004:110 in the next section.

²⁸⁹ ASK 2006/07:528.

²⁹⁰ Statistics on Internal Control of Foreigners 2007 – 2014.

²⁹¹ *Regleringsbrev*.

²⁹² ”Regleringsbrev för budgetåret 2009 avseende Migrationsverket” Ju2008/942/SIM ch. 3; ”Regleringsbrev för budgetåret 2009 avseende Rikspolisstyrelsen och övriga myndigheter inom polisorganisationen, Ju2008/8581/PO ch. 3; ”Regleringsbrev för budgetåret 2009 avseende Kriminalvården” Ju2008/10579/KRIM ch. 3.

One of the outcomes of this was “REVA”, (Rättssäkert och Effektivt Verkställighetsarbete). Translated it stands for Legally Secure and Efficient Enforcement. REVA gained a lot of media attention, and were, somewhat wrongfully, understood as internal control of foreigners.

In the project description of REVA internal control of foreigners was never mentioned. Instead, REVA streamlined and laid down rules for co-operation between different authorities in order to enhance the number of enforced removals. However, in practice, an increase in the number of controls increases the number of apprehensions of immigrants facing removals, thus resulting in an upsurge of removals. The connection between REVA and internal control of foreigners is not explicit, but they are interlinked.²⁹³

Before the appropriation letter and REVA, there was a small group inside the Police that worked with internal control of foreigners and enforcement of removal decisions. Now, all police officers in all branches of the Police were to conduct internal control of foreigners in connection to other police interventions.²⁹⁴ This practice itself was not something new, it was prescribed in the earlier police instructions as well,²⁹⁵ but it was rarely carried out. The new requirement also meant that all police officers should receive necessary training on how to perform the controls.²⁹⁶

In the instructions from the National Police Board, the importance of controls as a compensatory measure since the abolition of border control is underlined. The controls are necessary to maintain the free movement of people inside the Schengen Area.²⁹⁷

7.3.1 Children’s right to education

Despite political calls for strengthening of internal control there has been one change in domestic legislation that has run counter to this development.

In 2012 the Government proposed to change the rules concerning education for children staying in the country unauthorized. They were to have the same right to education, both primary and secondary school, as Swedish children.²⁹⁸ At the same time, the authorities subject to the reporting obligation (*anmälningsskyldighet*) according to 7 ch. 1 sec. of The Aliens Ordinance (2006:97) were decreased. Except the Tax Agency and the Swedish Employment Center, the obligation used to cover schools and Social Welfare Committee as well. The obligation meant that the concerned authorities had to report to the police when in contact with an alien without authorization. The school and Social service were now to be exempt from this requirement.²⁹⁹

²⁹³ See LEANDER.

²⁹⁴ LEANDER p. 8; para 4 RPSFS 2011:4, FAP 273-1.

²⁹⁵ RPSFS 1986:3, FAP 273-1

²⁹⁶ Leander, p. 8; 4 § RPSFS 2011:4, FAP 273-1.

²⁹⁷ Para 4 RPSFS 2011:4, FAP 273-1.

²⁹⁸ Prop. 2012/13:58 p.1.

²⁹⁹ Prop. 2012/13:58 p. 28a.

The government concluded that this change did lead to a weakening of the internal control of foreigners. However, this was weighed against the interest of the child's right to education, which weighed greater.³⁰⁰

7.3.2 Summary

The new challenges and obligations brought on by Sweden's accession of the Schengen Agreement had to be addressed and solved. One solution was that internal control of foreigners had to be strengthened. However, proposed legislative changes were turned down. Instead, the government and the National Police Board changed the implementation of the controls. Controls were to happen in connection to all police interventions and were to be carried out by all police units. Despite the strong need for an intensified control, children's right to education weighed greater than the controls.

7.4 Crime-fighting tool

In the previous sections I have gone through the official documents that describe the controls as a sort of replacement of internal borders. There is however another way of looking at internal control of foreigners that has been brought up in preparatory works and government reports. That is to regard internal control of foreigners as a crime-fighting tool, just like any other investigative tool, such as coercive measures or preliminary investigations. The tools can then be used interchangeable regardless of the purpose of the measure. This is what Sklansky would call ad-hoc instrumentalism: adopting the most fitting enforcement instrument in each situation from different areas of law.³⁰¹ This way of thinking of controls can be justified by the fact that unauthorized stay in the country is considered a crime.³⁰² Now, I do not refer to the fact that the immigrant is "illegal", this notion is presupposed in almost all preparatory works I have read. The "illegality" refers to the status of the immigrant.³⁰³ I refer to the fact the presence of a person without legal status is deemed a criminal offense.

In my study of preparatory works and government reports I have found three examples of official documents that underline how internal control should put in relation to the Police's overall duty to fight crime.³⁰⁴

SOU 2002:69 "Human smuggling and victims of human trafficking"³⁰⁵ clearly linked internal control of foreigners to other kinds of police duties. The report stated that a variety of laws and measures, for

³⁰⁰ Prop. 2012/13:58 p. 30.

³⁰¹ Sklansky p. 200; I have also gone through ad-hoc instrumentalism in ch. 2.3.2.1.

³⁰² Ch. 5.1.1.

³⁰³ One could argue that mentioning "illegal immigration" and "organized crime" in the same sentence (see e.g. SOU 1997:156) implicates immigration in a crime-narrative. While this may be true, this is not what I have looked for.

³⁰⁴ There are two preparatory works in the beginning of the 1970s (prop.1973:37 and prop. 1975/76:18) that link internal control of foreigners to combatting terrorism. My focus is on the legal development over the last 20 years and I have left those out. Furthermore, the terrorist legislation was moved out of the Aliens Act in 1989 because it was deemed outside of the scope of immigration law (Prop. 1988/89:86 p. 50).

³⁰⁵ SOU 2002:69 Människosmuggling och offer för människohandel.

example the Criminal Code and the Police Act, coercive measures and investigative rules, and special rules about police control such as the Road Traffic Law³⁰⁶ open up for a variety of available measures to fight illegal immigration and human smuggling. The following quote exemplify how the report understood the laws as instruments used to reach the overarching objective:

“For example, the Criminal Code and the Police Act support a request for identification on justifiable grounds, the Code of Judicial Procedure give the option to carry out a body search, the Aliens Act support investigation of an alien’s identity and the Road Traffic Law can motivate control of vehicles on the grounds of traffic security reasons and the driver, e.g. is asked for identification. Internal control of foreigner may not only be carried out separately, but also as a part of the total, crime preventive work.”³⁰⁷

This section has clear similarities to Sklansky’s notion of ad-hoc instrumentalism. Sklansky argues that this view is accepted because the focus lies on what works in order to the most important aim: fighting crime.³⁰⁸

SOU 2004:110 connects internal control of foreigners to crime control instead of merely mentioning it as a way of controlling migration or as an enforcement tool. Because a number of immigration violations are criminalized, the report suggested that these violations should be handled as such. If this view of immigration violations were adopted, other measures accepted in preliminary investigations should be used more regularly.³⁰⁹ The report suggested that the law should require suspicion of a crime against the Aliens Act or human smuggling for the control to be carried out. This would clarify when controls could be carried out. The change would not lead to an actual change of the threshold for initiating control; “reason to assume” is the threshold for both initiating preliminary investigations and controls. This would also make sure that crimes against the Aliens Act were not investigated or dealt with any differently than other crimes.³¹⁰ The proposal did not lead to any legislative changes.

Prop. 2012/13:125 implemented the Sanctions Directive³¹¹ in Swedish law. In the proposition internal control is closely linked to criminalization of unauthorized work in ch. 20 sec. 3 and 5 of the Aliens Act. Because these crimes fall under public prosecution, it is the police’s job to observe, to carry out surveillance and to investigate suspected criminal offences. If the Police in their work find a person who they have reason to assume is staying in the country illegally, they should initiate an investigation. The Government then says that after an investigation is initiated

³⁰⁶ *Vägförordning*.

³⁰⁷ SOU 2002:69 p. 212.

³⁰⁸ SKLANSKY p. 200.

³⁰⁹ SOU 2004:110 p. 426.

³¹⁰ SOU 2004:110 p. 426.

³¹¹ Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals OJ L 168 30.6.2008 (Sanctions Directive).

control- and coercive measures regulated in the Swedish Code of Judicial Procedure may be used.³¹²

7.4.1 Summary

SOU 2002:69 and prop. 2012/13:125 both dealt with criminal issues: human smuggling and employer sanctions against unauthorized work. The controls are then underlined as an extra tool that may be used to combat this particular type of crime. When a person is deemed “dangerous” or criminal, the tools should be used interchangeably regardless if the aim is administrative or investigative. SOU 2004:110 is different, because its aim was to look at border control at large, with clear instructions to take into account both the crime preventive perspective and the migration perspective.³¹³ SOU 2004:110 underlined the need to investigate the crimes according to the Code of Judicial Procedure and the importance of rule of law.³¹⁴ This line of thinking is absent in SOU 2002:69 and prop. 2012/13:125, maybe because an act deemed a criminal offense justifies the use of public power where all measures are allowed.

7.5 Concluding remarks

In this chapter I have gone through the political development and the political discourse that have led to and affected the current implementation of the controls.

Sweden’s accession to the Schengen Agreement has been the main official motivation for intensification of the controls. There are two rationales used in this reasoning. First, controls are seen as a compensatory measure and due to international obligations Sweden has to perform controls. The second rationale is the limitation of border control, which has created new kinds of threats and challenges. Those threats are partly increased illegal immigration and partly increased transnational crime. Increasing internal control is necessary in order to have open borders. Here, the controls are used to replace the internal border. I have also described how the lack of legal changes has led the intensification of the controls to take place mainly in the implementation. Controls should now take place by all police officers in their everyday work. The third way of describing and justifying the controls is to describe them as a crime-fighting tool like any other.

The question is if any of these or all rationales can be described as part of a crimmigration-trend? If we look at the presumption that is the fundament of the Schengen area: free movement and increased police and judicial cooperation to combat crime, this tightly links immigration control with crime control. This framing of the problem description fosters a solution that relies on a combination of the administrative-criminal sphere rather than strict application of administrative rules and administrative actors. Furthermore,

³¹² Prop. 2012/13:125 p. 113.

³¹³ SOU 2004:110 p. 47.

³¹⁴ SOU 2004:110 p. 426.

internal control of foreigners is directly described as one of the weapons of choice used to fight crime and illegal aliens. It is not explained why this is, it is just underlined as an important corner stone in maintaining the Schengen area.

The police's involvement and implementation of controls has not legislatively been part of a "trend" since internal control of foreigners is not new, but the increased attention to controls is something new. The Schengen Cooperation directly relies on furthered police and judicial cooperation to fight transnational crime and illegal aliens, so it can be expected that police presence in immigration control will only increase.

The clearest connection to crimmigration is however when the controls are described as a crime-fighting tool. This is what Sklansky would refer to as ad-hoc instrumentalism. The controls are clearly linked to the criminal sphere.

8 Legal scope of the controls

In the previous chapter I looked at the development of the controls from a political point of view. In this chapter I look at the actual provision and the established law that regulate internal control of foreigners: ch. 9 sec. 9 in the Aliens Act. The main question I try to answer is how and when a control can be performed. I go through who can be subject to the control, grounds for a control and documentation requirement for the controls. I will start by presenting the section³¹⁵ governing internal control of foreigners.

In this chapter I continuously refer to a number of sources. The first worth mentioning is the instructions on how internal control of foreigners is to be implemented from 2011 from the National Police Board, RPSFS 2011:4 FAP 273-1.³¹⁶ The second source is Sophia Hydén and Anna Lundberg's dissertation "Internal control of foreigners in Policework – between the rule of law and efficiency in Sweden's Schengen"³¹⁷ (2004). The third source is the supervision report conducted by the The National Police Board on the internal control of foreigners in 2013. This resulted in Tillsynsrapport 2014:14³¹⁸. The last one I will mention is a report from Aréna Idé, a progressive think tank, that looked at the practice and routine of the controls in "Guilty until the opposite is proven – an examination of the Police's internal control of foreigners"³¹⁹.

8.1 Established legislation

Chapter 9 section 9 in the Swedish Aliens Act (2005:751) prescribes:

"It is the duty of an alien staying in Sweden, when requested to do so by a police officer, to submit a passport or other documents showing that he or she has the right to remain in Sweden. It is also the duty of the alien, when summoned by the Swedish Migration Board or the police authority, to visit the Board or the authority and provide information about his or her stay in this country. If the alien does not do so the policy authority may collect him or her. If, in view of an alien's personal circumstance or for some other reason, it can be assumed that the alien will not obey the summons, he or she may be collected without prior summons.
[...]

³¹⁵ I do not mention the second paragraph of the section that refers to the Coastal Guards responsibility for the controls since this outside of the scope of this essay.

³¹⁶ This can be found in their Statutes book. It replaced the instructions from 1986, RPSFS 1986:3, FAP 273-1.

³¹⁷ *Inre utlänningskontroll i polisarbete: mellan rättsstatsideal och effektivitet i Schengens Sverige.*

³¹⁸ Tillsynsrapport 2014:14 "Inre Utlänningskontroll".

³¹⁹ LEANDER.

*Controls under the first and second paragraphs may only be undertaken if there is well-founded reason to assume that the foreigner lacks the right to remain in this country or there is otherwise special cause for control.*³²⁰

8.1.1 Who can be subject to the control?

The provision states that the duty to submit passport or documents to support the individual's right to stay in the country applies to aliens. I use the term alien and foreigner interchangeably throughout this essay. A foreigner is any person who is not a Swedish citizen. However, in the immigration law special rules apply to citizens of member states in the European Union, in the European Economic Association (EEA) and Schengen States. As an example, the requirement to carry a passport when entering Sweden does not apply to citizens of Schengen states if they travel directly from another Schengen state (ch. 2 sec. 8 of the Aliens Act). Citizens of EEA-states have the right to residence in a number of situations according to ch. 3 a sec. 3 of the Aliens Act. This means that in practice, "foreigner" often refers to what EU-law labels a "third-country national". A third country national is any person who is not a citizen of the European Union within the meaning of art. 17(1) of the Treaty Establishing the European Community³²¹ and who is not a person enjoying the Community right of free movement, as defined in art. 2(5) of the Schengen Borders Code.

8.1.2 Duties of the foreigner

The paragraph refers only to foreigners; therefore only foreigners are bound by this obligation. The general rule is that an alien entering or staying in Sweden must have a passport (Ch. 2 sec. 1 of the Aliens Act). As stated earlier, there are exceptions to this general rule. Citizens of a Schengen-state that travels directly from another Schengen state do not need to carry a passport. (Ch. 2 sec. 1 Aliens Ordinance). Neither does a foreigner with a permanent residence permit need a passport while remaining in the country (Ch. 2 sec. 1 of the Aliens Ordinance). A foreigner exempt from the passport requirement need to show that this exemption applies to him or her and therefore has to identify him or herself when entering or staying in the country (Ch. 2 sec. 3 of the Aliens Ordinance). The preparatory works have stated that the foreigner is not required to always carry around his passport.³²²

³²⁰ My own translation. The original section reads: *"En utlänning som vistas i Sverige är skyldig att på begäran av en polisman överlämna pass eller andra handlingar som visar att han eller hon har rätt att uppehålla sig i Sverige. Utlänningen är också skyldig att efter kallelse av Migrationsverket eller Polismyndigheten komma till verket eller myndigheten och lämna uppgifter om sin vistelse här i landet. Om utlänningen inte gör det, får han eller hon hämtas genom Polismyndighetens försorg. Om det på grund av en utlännings personliga förhållanden eller av någon annan anledning kan antas att utlänningen inte skulle följa kallelsen, får han eller hon hämtas utan föregående kallelse.*

[...]

Kontroll enligt första och andra styckena får vidtas endast om det finns grundad anledning att anta att utlänningen saknar rätt att uppehålla sig här i landet eller om det annars finns särskild anledning till kontroll. Lag (2014:655)."

³²¹ Treaty establishing the European Community, OJ C 325, 24.12.2002, p. 33–184.

³²² Prop. 1988/89:86 p. 172.

In reality, a person who is found without identification is escorted by the police officers to the place where those documents can be found. This means that in practice everyone staying in the country has a duty to show documents supporting this right.³²³

8.1.3 Implementation of the controls

To be able to assess the full nature of the controls I not only look at the established law, but also at how the controls are being carried out. In the chapter before I described how controls are to be carried out in all branches of the Police Authority's work. This meant that police officers shall carry out controls when intervening for example in theft, shoplifting or assault matters.³²⁴ In the report from Aréna Idé, the controls are described like this:

”When a police carry out an internal control of foreigners they ask for identification documents. If the person who is being controlled does not have this, the officer asks for the personal number that is checked against the register of births, marriages and deaths (*folkbokföringsregistret*). The Police also have access to a centralized record that all members of Schengen can search in, Schengen Information System (SIS). In SIS there is information on people who are not allowed to remain in Schengen. The police can also search in the Migration Board's case management system.”³²⁵

Tillsynsrapport 2014:14 found that both border units and officers in external duty perform controls. They also found that the majority of the controls done by officers in external duty are done in connection to traffic controls,³²⁶ even if this does not reflect the statistics.³²⁷ In one of the districts the Police authority said that the majority of controlled people are not aware that they are being checked.³²⁸ This is because it might start as a driver check and then transcend into a control without the person being notified. Tillsynsrapport concluded that the violation of integrity was “minimal” because it only contained a search in SIS, and if there were no further actions taken, that was it.³²⁹

The Parliamentary Ombudsman (*Justitieombudsmannen*) (JO) has stated that the Police shall behave in a respectful and dignified way when performing the controls. The officer should also aim at thoroughly explaining the matter in a calm and considerate manner. The officer also has to take the applicable principles into account: the principle of proportionality and necessity.³³⁰

In the following section I will discuss the grounds for the control and how this has been interpreted and criticized in legislative documents.

³²³ HYDÉN and LUNDBERG p. 100.

³²⁴ LEANDER p. 7.

³²⁵ LEANDER p. 11.

³²⁶ Tillsynsrapport 2014:14 p. 23.

³²⁷ See ch.7.1.

³²⁸ Tillsynsrapport 2014:14 p. 18.

³²⁹ Tillsynsrapport 2014:14 p. 23.

³³⁰ JO dnr 762 - 1980.

8.1.4 Grounds for control

There are two different grounds for control set out in the provision in sec. 9 ch. 9 in the Aliens Act. The first is "well founded reason to assume" that a person is staying on the territory unauthorized and the second is "special cause for control". In the following sections I will cover the established legislation, the implementation, and the criticism the legislation has received.

8.1.4.1 Interpreting "well-founded reason to assume"

It is not explained how "well-founded reason to assume" should be interpreted in the preparatory works. However, "reason to assume" is the same threshold as the threshold for initiating preliminary investigations so some guidance could probably be gathered from that. It is the lowest threshold in procedural law.³³¹

In prop. 2012/13:125 that implemented the Sanctions Directive in the Swedish legislation, internal controls of foreigners were mentioned. The government stated that if there is not enough suspicion of a crime to initiate an investigation, but there is reason to assume that an alien is staying unauthorized on the territory, the police may carry out an internal control.³³² Considering that the threshold for initiating a criminal investigation and the threshold for the control is the same, this conclusion is an incorrect interpretation of the law. It is troubling that the Government expresses this kind of interpretation because it significantly lowers the threshold for controls. SOU 2004:110 suggested that the provision should be changed so a control could only be performed when there was a suspicion of a crime against the Aliens Act. This would not change the law, just clarify that these crimes should not be investigated differently than other crimes.³³³ The interpretation of the law in prop. 2012/13:125 sadly implicates that the concern expressed by SOU 2004:110 could have bearing.

Hydén and Lundberg found that the police officers carrying out internal control of foreigners set the threshold for intervention very low, or at least they did not offer any explanation for their interventions when documenting the control.³³⁴

In the preparatory work from 1989, it is said that the foreigner's conduct or company sometimes may give reason to believe that he or she doesn't have the right to stay in the country. A control measure might then be performed.³³⁵ In the Instructions from the National Police Board in sec. 5, "reason to assume" is commented on. Under "general advice" it is stated that "well-founded reason to assume" means that a control only may take place after a comprehensive assessment of the objective circumstances founded on the police officer's individual observation, investigation, obtained intelligence, and other reliable information. However, the control may not happen solely because someone has an appearance that might be perceived as

³³¹ Ch. 6.3.

³³² Prop. 2012/13:125 p. 113.

³³³ SOU 2004:110 p. 426.

³³⁴ HYDÉN and LUNDBERG p. 94.

³³⁵ Prop. 1988/89:86 p. 173.

“foreign”, or because of somebody’s language or name. JO has underlined that controls cannot take place solely because someone has an appearance that is perceived as “foreign”.³³⁶

In Hydén and Lundberg’s dissertation Police officers express that a control cannot take place based on appearance, but that appearance, language, nervousness together can constitute basis for control. One officer explained that if they see a dark skinned person, they might initiate a conversation with the person. If he then speaks English, it can be reason enough to conduct a control.³³⁷

In the instruction it is further stated that criminal intelligence or other information may be used to put together well-founded profiles. Such profiles, alone or together with other information, can be used as grounds for a control.

In Tillsynsrapport 2014:14 they found that *well-grounded reason to assume* is problematic. It is mainly the border police units that carry out this type of control. It can be initiated based on information and tip-offs from the public. When there is concrete information the police can make their own assessment. However, when there is no information, it is almost impossible for the police officer to tell a foreigner from a citizen only based on language, clothes or appearance. This they said opens up a strong risk for discrimination. Therefore, the report suggested that FAP 273-1 is changed to underline that language, appearance, and name are not enough grounds for control.³³⁸

Hydén and Lundberg noted that when the Police officers tried to describe how they selected people for controls, their answers were very vague. Often officers referred to gut feeling and intuition.³³⁹ Compare this with suspicion of a crime and the threshold for initiating a preliminary investigation. For a preliminary investigation to be initiated there has to be some evidentiary fact of a substantial crime.³⁴⁰ It is highly unlikely that gut feeling or intuition would constitute enough reason to initiate a preliminary investigation. A gut feeling would instead probably lead to further surveillance or another stage before the investigation is started.³⁴¹ However, the requirement for carrying out a control is still “reason to assume”, thus it cannot be used for surveillance purposes.

8.1.4.2 Interpreting “otherwise special cause for control”

In the instructions from the National Police Board they also comment on “otherwise special cause for controls”. This, they say, “ought to”/“should”³⁴² be applicable when there is grounds for a control in connection with a criminal investigation or deprivation of liberty. It can also be used when there

³³⁶ JO dnr 762 – 1980.

³³⁷ HYDÉN and LUNDBERG p. 99.

³³⁸ Tillsynsrapport 2014:14 p. 25a.

³³⁹ HYDÉN and LUNDBERG p. 99.

³⁴⁰ Ch. 6.3.

³⁴¹ Ch. 6.3.

³⁴² Translation from ”bör”, which means something should be the case, even if they might not be certain.

is a control of vehicles or drivers. When performing such a control, a passenger should be controlled as well if there are objective grounds for it.³⁴³ This kind of implementation of the law have distinct similarities to the enforcement practices of law enforcement agencies in the United States where they prescribe mandatory checks against immigration registers for all detained or stopped people.³⁴⁴

It is noticeable that they use the word “ought to” instead of “can”. This gives the impression that they are not quite sure if this is the case or not. They also specify that the passenger should be controlled as well when performing a driver check, if there is reason to do so. Why this has to be specified I am not sure. If there are objective grounds, a control should be allowed anywhere. This could instead be a reminder to police officers to take the opportunity to perform a control.

Tillsynsrapport 2014:14 found that most of the controls are performed based on the second prerequisite, “*otherwise special cause for control*”. They said that because of the way the regulations are formulated there is a small risk of racial or ethnic profiling based on appearance, language and name. It is used when there is another reason for checking somebody’s identity (regardless of the person being a foreigner), because the control is initiated for some other reason.³⁴⁵

SOU 2002:69 said that controls based on information on common routes used for illegal immigration in Europe could constitute grounds under the prerequisite “other special cause for control”. This, it was said, would mean that controls would happen based on well-grounded, put-together profiles and those who match this profile or other information in connection with the profile.³⁴⁶ It is hard to not see that this suggestion follows a “crime fighting” way of thinking where traditional law enforcement tactics are used against unauthorized immigration. The following preparatory work (prop. 2003/04:35) did not comment on this or any other opinion expressed by the report in relation to internal control of foreigners.

8.1.5 Questioning the legal basis for performing controls

As I mentioned in ch. 7.3 the threshold for the controls was discussed in prop. 1999/2000:64. The discussion stemmed from a suggestion by the government report leading up to the preparatory work: SOU 1997:128 “Enforcement and Control in Alien Matters”³⁴⁷. The report pushed for a legislative change of the internal controls. They had found that the controls mainly occurred in connection to other Police interventions, and they questioned if all controls really took place because it could be assumed that the person lacked the right to stay in the country (the first prerequisite). The report was also hesitant concerning what legal basis the implementation had in the second

³⁴³ Sec. 5 RPSFS 2011:4 FAP 273-1.

³⁴⁴ Ch. 2.2.2.

³⁴⁵ Tillsynsrapport 2014:14 p. 25a.

³⁴⁶ SOU 2002:69 p. 259.

³⁴⁷ SOU 1997:128 Verkställighet och kontroll i utlänningsärenden.

prerequisite, *otherwise special cause for control*, since it was unclear how it was to be interpreted.³⁴⁸

Accompanying the concern for legal security, the report stressed the importance of an efficient internal control. They wanted the implementation of the controls to still be the same. Their solution was therefore to change the second prerequisite so the threshold for controls would not be set as high.³⁴⁹ They wanted to change it to “or if it for some other reasons appears justified to control him³⁵⁰”,³⁵¹ The report also argued that controls in connection with other actions are less of an encroachment on a person’s integrity than if you just stop somebody on the street.³⁵²

The proposal from SOU 1997:128 received criticism from both JO and other consultative bodies (*Remissinstansers*³⁵³) for its lack of clarity and the risk for violation of integrity. The Legislative Council (*Lagrådet*³⁵⁴) had extensive criticism. They said that even if the proposal gives the impression that the control would take place because there is an actual reason for it (another reason than assumed non-authorized stay, whatever that might be, they asked themselves); this is not the intention. Instead, The Legislative Council argued that the proposal’s real intention was for controls to take place routinely, almost without restriction. A more honest version, according the Legislative Council, would be to implement controls whenever it is “not unjustified” to do so. The result would be a system resembling the French one, where foreigners need to carry their “papers” around everywhere.

It is interesting to note that the Legislative Council attributed this proposed tactic to the proposal in SOU 1997:128, whilst the report claimed to adjust itself after reality. Lagrådet did not comment on the report’s conclusion that the current implementation did not have legal basis.

The Legislative Council then went on to discuss how the proposed change responded to the non-discrimination principle in the Instrument of Government in ch. 2 sec. 12. This provision also applies to foreigners according to ch. 2 sec. 25 IoG. They said that even if the wording of the law is neutral and non-discriminatory on its face, in practice it would be in breach of the non-discrimination principle. Because nationality cannot be distinguished by somebody’s ID or drivers license, the Legislative Council argued that controls often would take place because of a person’s race, ethnicity, skin color, or foreign name. The proposal would therefore, even if not formally, in practice be in breach of the non-discrimination clause of the IoG.³⁵⁵

³⁴⁸ SOU 1997:128 p. 118.

³⁴⁹ SOU 1997:128 p. 118.

³⁵⁰ Own translation, original: ”*eller om det annars framstår som befogat att kontrollera honom*”.

³⁵¹ SOU 1997:128 p. 16.

³⁵² SOU 1997:128 p. 118.

³⁵³ Body to which a proposed measure is referred (submitted) for consideration, which is always done with law proposals in Sweden.

³⁵⁴ The Legislative Council perform so called ”judicial preview” on law proposals.

Specifically they look at the legal security of the proposal and if it is in breach of any of the fundamental rights in the Instrument of Government.

³⁵⁵ Prop. 1999/2000:64 p. 252.

The government agreed with the proposal that the invasion of integrity is less when the control is performed with other activities, without further explaining why. However, they understood the concerns expressed by the Legislative Council. Therefore, the government kept the provision unchanged.³⁵⁶

In this instance, it may seem like the non-discrimination principle won over efficiency in migration control. However, the concerns expressed in the report were never addressed. If the implementation did not have legal basis then it is hard to see that it does today. Furthermore, the Legislative Council did say that routine checks in all part of police work would mean there would be no restrictions and a system like the French one. Considering FAP 273-1 that prescribes that controls should happen in connection to other activities without further specifying exactly how to assess when there is *cause* for a control, the provision opens up large room of discretion given to the police.

SOU 2002:69 later stated that the objections from Lagrådet probably had more to do with the choice of words than the rationale of the need for more controls.³⁵⁷

8.1.6 Documentation of the control

The 6th section of the Police Instructions regulates documentation of the control. The documentation should contain the grounds for the control, the time of the control, who was controlled, and who performed the control. The documentation should be arranged so it is easy to access it afterwards. If new information is gathered at the control, this information should be noted on the document.³⁵⁸

In 2007 the National Police Board decided that all controls should be documented. This is done in an event report with the code R209. Both Tillsynsrapport 2014:14 and the Aréna Idé report found that documentation does not live up to the standards set up in FAP 273-1. The grounds for the control are rarely declared and neither is the identity of the person checked.³⁵⁹ For a person who has been controlled, the possibility to challenge this after or understand why he or she was being singled out is therefore very slim.

8.2 Concluding remarks

The legislation has multiple grey areas. One of them is the definition of an alien. In Sweden an alien is anyone who is not a Swedish citizen, and in the Schengen area it is referred to as a “third-country national”.³⁶⁰

Another grey area is the unclear interpretation of what constitutes grounds for control. The last time the threshold was mentioned in a preparatory work, in prop. 2013/14:125, it was interpreted as being set below the threshold for initiating a preliminary investigation. This amount of

³⁵⁶ Prop 1999/2000:64 p. 69.

³⁵⁷ SOU 2002:69 p. 258.

³⁵⁸ RPSFS 2011:4 FAP 273-1.p. 3.

³⁵⁹ Tillsynsrapport 2014:14 p. 24.

³⁶⁰ Ch. 8.1.1.

uncertainty leaves a great deal of discretion to the law enforcement officials. I have two comments regarding this. The first is that I doubt that the same amount of uncertainty would have been allowed if internal control of foreigners had been perceived strictly as a practice adopted for criminal matters. SOU 1997:128 and SOU 2004:1110 have both pushed for legislative changes in order to ensure that the interventions shall have legal basis.³⁶¹ Their concerns have not been addressed.

My second comment refers to what I discussed in the previous chapter. The importance of controls has been highlighted in numerous official documents. It has also been discussed as a general crime-fighting tool. The Police authority is put under political pressure to increase the number of removals, thus increasing the number of controls. Tillsynsrapport 2014:14 even argued that there should be set goal for the number of controls that should be carried out.³⁶² The political pressure together with the large amount of discretion given to officers opens up for interventions that value efficiency above the rule of law.

³⁶¹ SOU 1997:128 p. 118 discussed in ch. 8.1.5; SOU 2004:110 p. 426 discussed in ch. 7.4.

³⁶² Tillsynsrapport 2014:14 p. 27.

9 Criminal law as an instrument for immigration control

One of my research questions is if the immigration enforcement relies on the criminal justice system. In chapter 4 I looked at criminalization of immigration violations, which is one way the criminal justice system can be used. In this section I have a broader understanding of the “criminal justice system”. This means that I look at traditionally “criminal” tools such as the right to detain, retention of biometric identifiers and large-scale technological databases, and how they are utilized in the control. I will also look at the legal basis for carrying out control in connection to other police interventions and how this can be understood in the crimmigration narrative.

9.1 Coercive measures in order to carry out the control

In ch. 1 sec. 8 of the Aliens Act it is stated that the law should be applied in a manner that ensures that the freedom of foreigners is not limited to a greater extent than what is necessary in each individual case. A control is not considered a coercive measure in the Swedish sense, it is not regulated as such in the law. The 9th chapter of the Aliens Act is named “control- and coercive measures” indicating that these two measures are distinct. I start with reviewing the right for the Police to detain a person, a coercive measure, used in connection to internal control of foreigners. I will compare how these rules correspond to the rules of coercive measures implemented for investigative purposes. I then look at the usage of biometric identifiers in migration control. Biometric identifiers have commonly been used in criminal investigations but are now also used in migration control.

9.1.1 Right to detain

The first paragraph of the section on internal control of foreigners confers power to the Police to summon a person for an investigation, with or without prior summons. In the preparatory works it is said that bringing someone in without prior notice under the power of the Aliens Act should be used restrictively. It is the personal circumstances of the individual that should be considered when deciding if it’s appropriate or not.³⁶³

When a person cannot identify him- or herself they are often forced to allow the police officer to follow them home and show them the relevant documents.³⁶⁴ This could potentially be considered a restriction of liberty according art. 5(1) of the ECHR.³⁶⁵ In the Police Act, an unidentified person may be taken into preventive detention if there is special reason to assume that the individual is wanted or with support from law should be deprived of

³⁶³ Prop. 1981/82:146 p. 66.

³⁶⁴ HYDÉN and LUNDBERG.p. 100.

³⁶⁵ See discussion in Gillan and Quinton v. The United Kingdom, para 56 - 57.

his or her freedom of movement (sec. 14). “Special reason to assume” should according to the comment on the police act indicate that the officer has to be able to account for the reason for his or her suspicion.³⁶⁶ However, the officer do not have the recognize the wanted person, a conversation with the individual may lead the officer to suspect that he or she should be detained.³⁶⁷ The provision refers to both criminal and administrative measures. In prop. 1996/97:175 it was said that this rule has to be interpreted in a way that oblige all persons asked by the Police to identify themselves to comply. This principle was therefore not codified.³⁶⁸

If a person does not cooperate in establishing the right to stay in the country the person may be detained.³⁶⁹ He or she may be detained for up to six hours according to ch. 9 sec. 11 of the Aliens Act. This corresponds with the rules in the Code of Judicial Procedure. A person who is suspected of a crime can be detained for 12 hours, while non-suspects only can be detained for six (ch. 23 sec. 9 RB).

As to the police’s right to detain an unknown person for identification purposes the right to use coercive powers are significant both when it is done for administrative and criminal purposes. Rules for holding a person in detention also corresponds when comparing the Aliens Act to the Code of Judicial Procedure. Legislatively the rules are equal. However, if the threshold for intervention is lower in migration matters than criminal matters as it could be due to uncertainty discussed in the previous chapter,³⁷⁰ the rules might be unequally applied in practice.

9.2 Biometric identifiers and technological databases

During the last ten years a range of technological resources has increasingly supported internal control of foreigners. They in turn often rely on biometric identifiers to identify and control third-country nationals inside the Schengen Area. In this section I will go through the relevant tools used in internal control of foreigners.

Ch. 9 Sec. 8 b in the Aliens Act regulates collection of biometric identifiers in connection to an internal control. Biometric identifiers are fingerprints and a photograph. In the residence permit there is a storage medium containing the holders’ fingerprints and photograph. This can then be crosschecked right at the spot to control the authenticity of the document. After the control, the collected information should be destroyed.

This section was added in 2011. The residence permits now have to be uniform in the European Union and the provision was adopted after the implementation of the Council Regulation on uniform standards for residence permits³⁷¹ in Swedish law. However, the Council Regulation does not require

³⁶⁶ BERGGREN and MUNCK p. 127.

³⁶⁷ BERGGREN and MUNCK p. 124 - 125.

³⁶⁸ BERGGREN and MUNCK p. 127.

³⁶⁹ Prop. 1988/89:86 p. 18.

³⁷⁰ Ch. 8.2.

³⁷¹ EU Council Regulation (EC) No 380/2008 of 18 April 2008 amending regulation (EC) No 1030/2002 laying down a uniform format for residence permits for third-country nationals OJ L 115, 29.4.2008 p. 1 – 7.

this kind of control, it is a domestic initiative.³⁷² This change represented a clear strengthening of the internal control. It is not enough to just have the residence permit, the police can instantly control if the person is who he claims to be. There is no discussion in the preparatory work on whether or not this will be perceived as a violation of integrity for the individual.

In my review of preparatory works, internal control of foreigners was also mentioned in prop. 2014/2015:82 “Crime fighting authorities access to the Visa Information System (VIS)”³⁷³. VIS is the common European system for visa information. One of the objectives of VIS is to simplify facilitation of internal control of foreigners. VIS also gathers biometric identifiers of all visa applicants.³⁷⁴ VIS is not yet used in internal control of foreigners³⁷⁵, but there are huge amounts of information gathered on all visa applicant, that is ready to be utilized when it is deemed necessary.

9.2.1 SIS II – an investigative system?

A search in SIS is conducted whenever a person is suspected to be alien lacking the right to stay in the country.³⁷⁶ It is therefore of great importance of the internal control of foreigners. The purpose of SIS II is “to ensure a high level of security within the area of freedom, security and justice of the European Union including the maintenance of public security and public policy and the safeguarding of security in the territories of the Member States”. It should also ensure free movement of people, services and capital using information communicated via this system (Art 1(2) SIS II Regulation³⁷⁷). When the idea of a common European information system was proposed in 1987, it was meant to register persons and goods that should be refused entry to the Schengen area.³⁷⁸ In 2001, the Council declared “the idea of using the SIS data for other purposes than those initially foreseen and specially for police information purposes in a broad sense, is now widely agreed upon”.³⁷⁹ Today, the scope of SIS has substantially expanded with no sign of stopping.³⁸⁰ In 2010, SIS contained over thirty one million records.³⁸¹

Today there are two different legal instruments that regulate SIS (Schengen Information System): the SIS II Regulation and the SIS II Council

³⁷² Prop. 2010/11:123 p. 20.

³⁷³ Prop. 2014/2015:82 Brottsbekämpande myndigheters tillgång till informationssystemet för viseringar (VIS).

³⁷⁴ Prop. 2014/15:82 p. 17.

³⁷⁵ Prop. 2014/15:82 p. 18.

³⁷⁶ LEANDER p. 11.

³⁷⁷ Regulation (EC) 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) OJ L381/4 (SIS II Regulation).

³⁷⁸ BESTERS and BROM p. 457.

³⁷⁹ BALZACQ p. 85.

³⁸⁰ For more information read ”Greedy Information Technology: The Digitalization of the European Migration Police” by Besters and Brom, arguing that the European Information Systems information technology is ’greedy’. This means that the technical possibilities will determine the political goals instead of the other way around.

³⁸¹ BESTERS and BROM p. 458.

Decision³⁸². The former establishes the conditions and procedures for SIS II for migration purposes and the latter govern judicial and police cooperation in criminal matters. Despite being two separate instruments, SIS II should be seen as one information system operating as such.³⁸³

SIS II functions as a “hit/not hit”-system. You search for a person or an object in the database, and if there is a match, a “command” shows up. It can range from “apprehend this individual” or “stop this vehicle”.³⁸⁴ If there is a hit in SIS, the authority moves on to the database SIRENE (Supplementary Information Request at the National Entry).³⁸⁵ SIS would not function without SIRENE, which facilitates additional information, meaning exchange of “softer” data such as criminal intelligence information.³⁸⁶

The police and customs check have the right to search in the alert-database directly of SIS II according to art. 40 in the SIS II Regulation. The categories of data that can be entered into SIS II are regulated in article 20 of the SIS II Regulation. Persons and missing objects can be added. The information on persons includes, inter alia, name, place of birth, fingerprint, nationality, reason for the alert, authority issuing the alert and action to be taken.

9.2.2 Connection to crimmigration

The involvement and use of technological databases containing biometric information has been a noted feature of the crimmigration trend.³⁸⁷ It is understood as part of crimmigration because it connects two historically separate systems in the databases. Law enforcement agencies share their information with immigration enforcement agencies in order to find those breaking immigration laws or who are undocumented.³⁸⁸

The changed character of immigration enforcement and law enforcement is facilitated through the help of technology in the American situation. Just like here, the process of identifying if a person should be apprehended or not takes just a few minutes after the first contact with law enforcement.³⁸⁹ SIS II has multiple “crimmigration”-features that overlap administrative law and criminal law.

One example is the argument made by Thierry Balzacq, Professor in Politics and International Relations. He argues that the fight against terrorism has transformed SIS from a “reporting tool” to an “investigative system”. Today, it holds information both of third-country nationals as well as persons

³⁸² Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) J L 205, 7.8.2007, p. 63–84 (SIS II Council Decision).

³⁸³ SIS II Council Decision preamble (4).

³⁸⁴ BROEDERS p. 79.

³⁸⁵ BALZACQ p. 84.

³⁸⁶ BROEDERS p. 79.

³⁸⁷ MCLEOD p. 123.

³⁸⁸ A majority of arrestees in the country have their identifying information checked against the Department of Homeland Security’s database to see if the person is breaking immigration laws, CHACÓN, p. 645; GARCÍA, p. 1457; another example concerns the FBI’s database. INS (Immigration and Naturalization Service) started in 2001 to add immigration violators into the FBI database so the FBI could instruct and advise local law enforcement to conduct immigration arrests, WISHNIE, p. 1086.

³⁸⁹ MCLEOD p. 123.

wanted for criminal matters.³⁹⁰ Furthermore, SIS II has the capacity to hold information on biometric identifiers. So far, biometric identifiers can only be used to establish somebody's identity after a numerical search has been carried out in SIS (art. 22 of the SIS II Council Decision).

Additionally, the European Police Office (Europol) and Eurojust³⁹¹ both have access to SIS II. Their aims clearly belong to the criminal sphere more than to the migration sphere. It is also possible to issue alerts for "discreet checks" on persons or object. This is done in order to gather intelligence for criminal prosecution, without the registered person's knowledge.³⁹²

Another aspect of the digital information sharing in the area of migration control nexus of databases set up to control migration. As discussed above, VIS is one. Another is Eurodac, a system purposed to register asylum application in order to detect "asylum"-shopping. Eurodac and VIS both are equipped with fingerprint identification.³⁹³ Add to this the uniform residence permits that include both photographs and fingerprints for identification purposes.³⁹⁴ The idea of one shared information system where all of these features are combined is for now abandoned, but the European Union realize this ambition "by fostering synergy between the existing and future information systems: SIS, Eurodac, and EES"^{395 396}.

In criminal law, retention of fingerprints and photographs is regulated in Code of Judicial Procedure and therefore usually considered an investigative coercive measure. The ECHR has further stated that it is considered a violation of art. 8.³⁹⁷ In ch. 28 sec. 14 it says that the person who is arrested or detained may have his or her fingerprints taken. The provision also applies to others if the measure is necessary for the investigation of a crime with prison in the range of punishment. If the preliminary investigation is closed without pressing charges, the Police are obliged to excise the information of the suspect out of the register containing information of suspects on good grounds (*misstankeregister*). However, this is not the case if suspicion of good grounds still remains despite the absence of prosecution.³⁹⁸ This can be compared to SIS where records can be deleted *earliest* one year after they have been added and are taken routinely.³⁹⁹

³⁹⁰ Alerts on individuals for judicial and police cooperation can be persons wanted for arrest and extradition purposes, (art. 26) missing persons (art. 32), persons sought to assist with judicial procedure (art. 34) and alerts on persons and objects for discreet checks or specific checks (Art. 36 – 37). All of this is regulated in the SIS II Regulation.

³⁹¹ Eurojust is a European Union body established in 2002 to stimulate and improve the co-ordination of investigations and prosecutions among the competent judicial authorities of the European Union Member States when they deal with serious cross-border and organised crime.

³⁹² Art. 36 SIS II Council Decision.

³⁹³ BESTERS and BROM p. 456.

³⁹⁴ Ch. 9.2.

³⁹⁵ EES stands for "Entry and Exit System", meant to detect 'overstayers'. More information see BESTERS and BROM p. 468.

³⁹⁶ BESTERS and BROM p. 469.

³⁹⁷ Ch. 6.1.3.

³⁹⁸ EKELÖF, BYLUND, EDELSTAM p. 153.

³⁹⁹ Art. 18(3) SIS II Council Decision.

9.2.3 Outcomes in both spheres

Considering how SIS II conflates both migration/administrative law and criminal law, it is noteworthy that the search in SIS is not regulated in domestic law or any legal document, nor is the proportionality of its usage discussed. A search in SIS as part of an internal control of a foreigner is seen instead as a solely administrative matter. This does not take into account the nature of alerts in SIS, which are both administrative and criminal, as well as the criminalized aspect of immigration violations. A search in SIS can therefore have outcomes both in the criminal sphere as well as the administrative. In Tillsynsrapport 2014:14 SIS is discussed only in relation to violation of integrity, which is deemed to be minimal when no action follows.

9.3 Controls in connection to other police interventions

The Police shall carry out internal control of foreigners in all branches of their work.⁴⁰⁰ One common practice is to carry out controls in connection to traffic controls. The right for the police to stop a car or another vehicle is regulated in sec. 22 of the Police Act. The Police may stop the car either because there is reason to assume that it is carrying someone who has committed an offense (subsection 1) or because it is necessary in order to control traffic or to perform a check of the driver of the vehicle in accordance with what is prescribed thereto (subsection 4). It is under subsection 4 that Police perform more regular controls and that internal control of foreigners are performed.⁴⁰¹ The right to stop somebody in order to perform an internal control is not regulated in this section. The question is then whether or not this is lawful? SOU 2004:110 has stated that the right to control a person in connection to a routine control seems unclear,⁴⁰² and as stated above, RPSFS 2011:4 says it “ought to” be lawful. The legal position seems unclear.

The right for the police to stop a car was not codified earlier, instead it was just an agreed on principle.⁴⁰³ One reason why it was codified was because when a car is stopped, the stopping restricts the freedom of movement for everyone in the car.⁴⁰⁴ When the provision was codified it was discussed if the Police should have the authority to stop a car for intelligence- and surveillance purposes only, without suspicion of a committed crime. It was decided against it because it was deemed to go too far to allow the use of coercive powers at such an early stage.⁴⁰⁵ Coercive powers cannot be used for any other purpose than what is stated in the law. However, excess information found through a lawful intervention has been accepted in the Swedish system.⁴⁰⁶

⁴⁰⁰ Sec 4. RPSFS 2011:4 FAP 273-1.

⁴⁰¹ SOU 2004:110 p. 145.

⁴⁰² SOU 2004:110 p. 126.

⁴⁰³ ”*I sakens natur.*

⁴⁰⁴ BERGGREN and MUNCK p. 169.

⁴⁰⁵ BERGGREN and MUNCK p. 169.

⁴⁰⁶ Chapter 6.3.1.2

Justitieombudsmannen has not critiqued the practice of carrying out controls in connection to other police interventions for investigative purposes. JO dealt with a matter concerning internal control of foreigners in 1981. An internal control was initiated during a house search of a club because of suspicion of criminal activity. The instructions from the Police Board (then RPS 1981:6 FAP 273-1) stated that when performing traffic controls and controls of clubs with suspected criminal activity, an internal control should be conducted as well. JO said that he had nothing to object to conducting an internal control of foreigners together with a house search in accordance with the instructions.⁴⁰⁷ No further measures were taken in the matter.

9.3.1 Principle of purpose

Should the practice of performing controls in relation to traffic controls be understood as violation the principle of purpose? If a control is carried out because the driver is driving carelessly and the Police then discover that they have reason to assume that he or she lacks the right to stay in the country, this would probably be allowed. However, it can be questioned if it would be a violation of the principle of purpose if an officer's target a specific driver because they have a foreign appearance. The problem is that we cannot know what comes first. Furthermore, there is no discussion relating to if this implementation is legally correct or not. Probably because the outcomes belong to the administrative sphere and not the criminal.

9.4 Concluding remarks

One of my research questions is if enforcement of immigration law relies on the criminal justice system. I would say that the migration control system make use of traditionally "criminal" tools and techniques, such as detention, biometric identifiers, house searches and databases with automatic processing. Internal control of foreigner also makes use of the Police's authority on other areas to enable interventions. Because these measures are considered to be only administrative there is however little discussion regarding their legality.

⁴⁰⁷ Justitieombudsmannen dnr. 477-1982.

10 Final Conclusion

10.1 Is internal control of foreigners part of the crimmigration-trend?

In order for a merger of two areas of law to be significant, they have to be seen as distinct at some point. Therefore, I looked at the potential criminal/administrative divide in Swedish law in chapter three. Despite the fact that the divide is not as clear as it has been in the American legal setting, there is a difference between the two areas. The distinguishing feature is that the outcomes are viewed so differently. Criminal punishment is seen as repressive, while administrative decisions that are materially correct represents the “ideal outcome”. This view also affects the procedural rules in each area.

Kanstroom argues that when the mere presence of an undocumented migrant is criminalized this indicates “a nearly complete merger between the criminal and civil immigration control system”.⁴⁰⁸ This is the reality of the Swedish system and has been for almost 90 years. In this instance, the Swedish legal system shows clear signs of crimmigration. Internal control of foreigners can then be understood either as a criminal investigation tool or as an administrative measure. Traditionally, it has been understood as an administrative measure. This has effects on the rules relevant for the actors enforcing the controls and what tools can be used.

In this essay I have looked at the controls through various angles and tried to discern a possible crimmigration-connection. One of the relevant angles is the prosecution rate. In contrast to the United States, the prosecution rate regarding immigration violations are very low. If the prosecution rate would increase, I would argue that it would change the character of the controls, because a control is a condition for a discovery of an unauthorized immigrant. If the outcomes of the controls predominantly end up in the criminal sphere there are substantial reasons to start rethinking the control’s place in the administrative/criminal divide. With this, procedural safeguards and clearer legislation should follow. So far, this is not the case.

The intertwinement of law enforcement agencies and immigration enforcement agencies are one feature of the crimmigration trend. In the fourth chapter I discussed how the main actor, the Police, always have been active in migration control. Furthermore, the Police Authority’s duty is to carry out both migration control in the form of internal control of foreigners and to prevent crime. In this regard the Actor, the Police, belongs in both spheres and has done so for quite some time.

What is a new phenomenon however, is the increased importance and intensification of the controls that I described in chapter seven. This increased need for controls is in large attributed to Sweden’s accession of the Schengen Agreement. The fundamental principles of the Schengen Agreement consist

⁴⁰⁸ KANSTROOM p. 656.

of a combination of crime control and immigration control. One could imagine that if the premises for the Schengen Agreement were different, the adopted technique to battle “illegal immigration” would look different. Instead of turning to the criminal system for help with migration control, some other actor in society might have been engaged. In this regard, I would argue that there are signs of crimmigration.

A clearer sign of crimmigration is the reasoning found in SOU 2002:69, SOU 2004:110 and prop. 2012/13:125 where internal control of foreigners are distinctly linked to crime control. Neither SOU 2002:69 nor SOU 2004:110 led to any legal changes and it can be discussed what legal relevance these documents have. Prop. 2012/13:125 however both lowered the threshold for controls as well as underlined the controls importance in fighting unauthorized work. If this is telling for the legal development that is to come, it is very troubling from a crimmigration standpoint.

Crimmigration-literature specifically emphasizes two divisions as the most relevant in the making of crimmigration. The first is the citizen/non-citizen divide, and the second is the administrative/criminal divide. In Sweden, these two divisions influence the potential legislation and implementation. As I discussed in the sixth chapter, there is a far reaching right for the legislator to distinguish between citizens and non-citizens. Internal control of foreigners only applies to non-citizens. This means that non-citizens are the only ones who can be subject to it and the accompanying control-and coercive measures.

There are also more rules governing police work in relation for investigative duties than it is for administrative. For example, coercive powers put the prosecution at a much more powerful position than the defense, but procedural safeguards try to balance this inequality. The use of coercive measures in the migration sphere does not invoke the same amount of discussion on legal security. Especially when it comes to the use of biometric identifiers it is clear that the controls are seen as administrative measures and not investigative. In this regard it is obvious that the need for enforcement is so grand, that far-reaching surveillance is accepted, despite the fact that it can be argued that it violates the protection of integrity in art. 8 ECHR and ch. 2 sec. 6 of the IoG. Furthermore, seeing these checks as purely administrative does not acknowledge how these databases store both criminal information as well as migration information. This considered, there are clear signs of crimmigration tendencies relating to relaxed procedural safeguards because of the measures perceived administrative nature.

Another example of this is the practice of carrying out controls in connection to other police interventions. The example I have discussed mostly in this essay is in connection to traffic control, but I also touched upon the usage of controls in connection to house searches with investigative purposes. The principle of purpose is not discussed in legal instruments or JO-decisions. I would argue that a partial explanation for this is the administrative nature of the controls.

Internal control of foreigners per se is not part of the crimmigration-trend. It has been part of the migration control policy for a long time, always carried out by the Police. However, there are aspects of the control that carry clear

hallmarks of crimmigration. The fact that unauthorized presence is criminalized is one, opening up for the criminal sphere to intervene. Another hallmark is that the controls are meant to hinder both unauthorized immigration as well as crime. A third is that the administrative nature of the controls lessens the scrutiny given to tools used to carry out the controls, despite their clear resemblance with investigative counterparts.

10.2 What can the crimmigration-literature bring to the Swedish discussion on internal control of foreigners?

The most significant contribution is how crimmigration highlights how administrative law and criminal law are seen as two distinct areas of law, and how this in turn affects the rules in the two areas. This is very apparent in my essay, where I have focused on this divide and the results of it from start to finish. I think that this is a new way of looking at the legislation that captures aspects that are rarely highlighted. In the next sections I will comment on some specific details that I find interesting.

10.2.1 Criminal law as a migration control tool

One aspect of "crimmigration" is how criminal law is used as a migration control tool. This can be achieved through criminalizing immigration violations and prosecute these crimes. In the Swedish context, the prosecution rate is relatively low to the number of controls that are performed. Another way to use criminal law as a tool for migration control is to adopt migration control in all Police interventions, which has been done. The crimmigration-literature has critiqued this development on mainly two grounds. Firstly, it will deter undocumented immigrants from reporting crime and co-operating with local police. This is probably not perceived as problem in Sweden today because undocumented immigrants still hold a very secluded position in society. A second critique is that it misguides crime control, as expressed by McLeod. Law enforcement will focus less on who is actually a dangerous individual and implement the dual objectives of crime control and migration control in their daily work. Furthermore, it drastically increases the risk of racial profiling. In Texas, where ICE implemented immigration screening as part of law enforcement discretionary, arrests of Latinos for minor crimes increased drastically.⁴⁰⁹ This kind of policies lead to adverse impact on people perceived as foreigners regardless of their actual legal status. The two concerns addressed by crimmigration-scholars deserve to be acknowledged by Swedish legislators as well.

10.2.2 Ad-hoc instrumentalism

The prosecutor is left with the discretion whether or not to prosecute in relation to crimes against unauthorized stay, ch. 1 sec. 1 of the Aliens Act. The prosecutor may then invoke whatever legal sphere he or she deems most

⁴⁰⁹ MCLEOD p. 146.

advantageous. The same is true when the controls are regarded as a crime-fighting tool and can be deployed as such when it is “suitable”. This is what Sklansky would call “tailored enforcement”,⁴¹⁰ connected to ad-hoc instrumentalism. Ad-hoc instrumentalism is made possible through the vague shaping of the provision that regulates internal control of foreigners. This leaves room for major discretion for front line officials, such as prosecutors and law enforcement officials. The legislator has accepted this vagueness, and I would even argue that it has been utilized. The most obvious example is prop. 2012/13:125 that lowered the threshold for controls. Because there is no real discussion on how “reason to assume” and “otherwise special control” should be interpreted it is hard to argue that this interpretation is completely incorrect.

This vagueness and possible lowering of the threshold can be connected to what Eagly describes as broadening of the law. The broadening of the substance in immigration law and criminal law affect the outcomes in both. When the threshold for interventions is set lower in the immigration sphere, it can be utilized in the immigration sphere. As Sklansky notes, it may undermine the rule of law.

10.3 Personal reflections

I will end with some remarks that are a little bit outside of the purpose of my essay. I think one reason why the United States have chosen this path of immigration control is because undocumented immigrants have a relatively strong position in the United States. Their contribution to the economy is at large recognized. To justify immigration control, they have turned to criminal law to designate who is an outsider, and who is an insider. When I studied at University of California, Berkeley, I had a good friend who was undocumented. She attended one of the nation’s top schools, without legal status. The Swedish environment is different. Undocumented immigrants are not a part of society as they are in the United States, at least not yet. A personal number is still required to take part in society at large.

A comparison between the two countries can be made in regard to the recent decision to ensure all undocumented children in Sweden K-12 education. This was done in the United States in 1982 through the Supreme Court decision *Plyler v. Doe*. Furthermore, in the United States, it is recognized that you form ties to a country if you are there long enough regardless of your legal status. In Sweden, time you spent in the country irregularly is not taken into account when linkage to the country is assessed. These are some examples of the differences and the view of undocumented immigrants.

Swedish migration policy will change during the next years. In large, it will have to because we will see new forms of migration, with new labor migration policies and the European Union, migrants outside and in the outskirts of society will increase. The question is how Sweden will handle this change. I very much hope that it will not turn to criminal law, and that the United States can be a warning example.

⁴¹⁰ SKLANSKY p. 209.

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