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An Ambiguous Ban on Ethnic Profiling

Reforming Immigration Law Enforcement at the Juncture of Non-Discrimination Norms and Migration Control

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Abstract
The article examines a reform of internal immigration policing in Finland. It discusses the public debate on ethnic profiling and the legal reform process of regulating immigration law enforcement by the Finnish government from 2013 to 2015 through an analysis of official documents and media coverage. The reform included elements of both criminalisation of migration and human rights protections. The Finnish government added a ban on ethnic profiling in the *Aliens Act*. At the same time, it gave the police and the border guard more powers to conduct identity checks on foreign citizens. The paper argues that regulation and practices of immigration policing are affected by power positions of different national actors and the nature of public debate. The presence of ethnic minorities and representatives of civil society during the policy process and public discussions on ethnic and racial profiling in Finland was negligible. Both immigration policing and immigration law enforcement policy-making risk repeating formally equal patterns that are, in practice, biased.

Keywords
Ethnic profiling, ethnic and racial discrimination, immigration control, policing, human rights

1. Introduction

Ethnic and racial discrimination is one of the central topics in the research literature on regulation of policing, law enforcement policies and policing reforms (Murray & Harkin, 2016; Reiner, 2010; Rowe, 2007; Shiner, 2015).[1] In Finland and other countries of continental Europe, suspected ethnic disproportionality of police stops and ethnic/racial discrimination related to policing is often discussed under the concept of "ethnic profiling".[2] Ethnic profiling can be defined as the use of generalisations grounded in ethnicity, race, national origin, or religion—rather than objective evidence or individual behaviour—as a basis for making law enforcement decisions about who has been or may be involved in criminal activ-

1. This article was funded by grants from the Kone Foundation and the Finnish Cultural Foundation.
2. In the Finnish and Nordic contexts, it is customary to talk about ethnic profiling instead of racial profiling, although the discussion often concerns racialised law enforcement practices such as immigration checks that are based on visible appearance such as a person's skin colour. Because in the data the concept of ethnic profiling appears exclusively, the concept of ethnic profiling is also used throughout this article.

ity such as possessing illegal drugs (OSJI, 2009, p. 19). Although there is no reliable comparative data on ethnic and racial discrimination by police forces in Europe, several studies point out that ethnic profiling by the police is a Europe-wide problem (FRA, 2009; OSJI, 2009). Recent research in the Nordic countries has shown that ethnic profiling by the police and private security is a significant social issue also in Finland, Norway and Sweden (Franko 2020; Himanen, 2019; Keskinen et al., 2018; Mulinari & Keskinen, 2020; Saarikkomäki & Alvesalo-Kuusi 2020). Researchers have connected it to several types of policing such as immigration law enforcement, border policing, public order policing, crime control, and terrorism prevention (Bowling & Phillips, 2007; Delsol & Shiner, 2015; FRA, 2009; Keskinen et al., 2018; OSJI, 2009; Van der Leun & Van der Woude, 2011; Weber & Bowling, 2012).

This paper examines a legal reform of internal immigration policing[3] conducted by the Finnish government from 2013 to 2015. In addition to the extension of police powers, it included a ban on ethnic profiling. The analysis concentrates on the policy process and the accompanying public debate. The main aim of the article is to show how, on the one hand, the different institutional factors such as the power relations between different actors, and on the other hand, the framing of the public debate, influenced the political and judicial reform process on internal immigration policing and ethnic profiling in Finland. Following the methodological approach of *phronetic* in-depth case-study, I focus on the dynamics of power relations and communication in the policy process (Flyvbjerg, 2001; Thomas, 2010). The process is analysed by looking at the inclusion and exclusion of different actors and their respective influence on the process and identifying the central themes and disagreements of the debate. Besides discussing the politics and regulation of policing, this article also contributes to the research of ethnic profiling and immigration law enforcement in Europe.

Scholars have examined political reforms of immigration law enforcement in Nordic countries, such as Norway (Gundhus, 2017), and immigration law changes in the context of racial discrimination (Stumpf, 2006). However, very little is known about how governments regulate immigration policing at the intersection of European border and non-discrimination policies. The multidisciplinary research on the proliferation of different kinds of immigration and border controls in the global North has raised concern about harms and effects to the realisation of fundamental rights produced by these policies and practices (e.g., Aas & Bosworth, 2013; Franko 2020; De Genova & Peutz, 2010; Pickering & Weber, 2006). At the same time, the European Union has enhanced regional non-discrimination legislation (Guiraudon, 2009). The court decisions of regional, international, and national courts; research and advocacy by NGOs; and statements by the European institutions point to the increasing significance of non-discrimination jurisprudence in policing and policymaking of policing (OSJI, 2013). Are these developments contradictory or complementary or both at the same time? The Finnish case is particularly interesting because it manifests these ambiguities and conflicts related to the regulation of immigration law enforcement.

3. The official term in the Finnish law is *ulkomaalaisvalvonta* that can be translated as "control of foreign nationals" or "monitoring of aliens". Internal immigration policing (Leerkes et al., 2012) refers in this article to police stops and ID checks based on immigration regulations and policing operations targeting potential immigration law infringements by the police and other security authorities within the national territory, beyond the proper border zone. Internal immigration checks have a different legal base than the internal border checks at the Schengen borders between members states, which are allowed only in exceptional circumstances; they are also legally distinct from other immigration law enforcement measures such as detention or deportation, or from other forms of internal immigration controls conducted by civil agents such as social workers or private companies.

In the following, I will give an overview of the previous research on internal immigration policing and ethnic profiling, then present my data and methods. Before moving onto two analytical parts, I explain the social and legal context of the Finnish immigration policing reform. In the first analytical part, I examine the nature and the main conflict points of the public debate. In the second, I analyse the inclusion and exclusion of different actors, their policy positions and their relative power relations during the different stages of the policy reform around ethnic profiling and immigration law enforcement from 2013 to 2015, before presenting the conclusions of the study.

2. Studying policing between a regime of borders and a regime of fundamental rights

Identity checks and other kinds of police stops are a form of police power that is oriented toward the reproduction of social order (see Bradford, 2017; Dubber, 2005; Fassin, 2013). Policing practices such as stop and search/frisk test public trust in the police and contain a high risk of ethnic or racial discrimination (Bowling & Phillips, 2007; Bradford, 2017). Immigration law enforcement by the police often includes similar control practices such as stops, ID-checks and questionings. It is, therefore, not surprising that researchers have also suggested connections between immigration-based stops and racial discrimination (e.g., Fassin, 2013; Strumpf, 2006; Van der Woude & Van der Leun, 2017). According to critical migration and border research, we should study different practices of migration management—such as immigration checks by the police, removals and deportations, detention of foreign citizens or residence permit systems—as important social, political, and legal problems in themselves (De Genova & Peutz, 2010; Rigo, 2005). These practices have social implications that far exceed their mere administrative functionality. In many EU-countries, internal immigration and border controls, such as immigration stops and ID-checks, are often done by police patrols on the streets. Internal immigration policing reproduces border control practices inside of state territories: stop and checks in city spaces, immigration raids of workplaces, or immigration controls during traffic stops. These policies and practices of EU-states relocate borders from the territorial limits to the centre of the society (cf. Balibar, 2004).

Some researchers believe that a discourse, in which migration is increasingly seen in terms of risks, threats and security, reinforces control-oriented developments in migration policy (Huysmans, 2006). Within criminology, many scholars examine international state borders critically because of the increasing criminalisation of 'unauthorised' border crossings and irregular migration (Franko 2020; Gundhus & Franko, 2016; Pickering & Weber, 2006; Van der Woude & Van der Leun, 2017; Wonders 2017). Researchers have named the increased merger of crime control and immigration control as crimmigration (Aas, 2011; Barker, 2012; Weber & Bowling, 2008). Besides the direct intertwinement of criminal and migration law, criminalisation of migration means the tendency to use practices and approaches in migration control that are common in crime control such as internal immigration policing (Aas, 2011, p. 332; Van der Woude et al., 2014, pp. 562–563; Himanen, 2019, p. 163).

Immigration law enforcement is made possible by the institutional and judicial difference between citizenship and alienage. At the same time, a person's presence in the territory—in the jurisdiction of a state—gives also for a foreign national the ability to claim some rights: the mere territorial presence of migration gives any migrant at least some membership and access to citizenship rights as American legal scholar Linda Bosniak has argued (2006; 2007). This territorial logic includes, at least to some extent, also the undocumented migrants

(Bosniak, 2007). On the one hand, constitutional protections, international human rights agreements, and national and regional courts limit the state's power to control migration (Hollifield, 1992). These protections often include prohibitions of discrimination based on race or ethnicity. The actual scope of the fundamental rights—for example, in the case of irregular migration—depends on national legislation and administrative implementation (Bosniak, 2007, 397–398; Kmak, 2020). On the other hand, because these rights to a certain extent delimit a state's capacity to govern migration and decide on the conditions of membership for foreigners, they are often undermined via control policies such as the criminalisation of unauthorised residence, cuts in social security for foreign residents, or the use of temporary residence permits instead of continuous permits (Keskinen, 2016, p. 362–365; Pickering & Weber, 2006; Rigo, 2005). States use these status-based immigration policies to direct immigration by allocating the rights of migrants based on the strategic reasoning of the state (Bosniak, 2006). In the case of border policing and prevention of terrorism, there is a risk that these controls also go as far as undermining equal rights, legal protections for citizens, and the principle of non-discrimination (FRA, 2009; Ojanen, 2010; OSJI, 2009; Van der Woude & Van der Leun 2017).

In police studies, police reforms are often studied as means of modernising and solving problems such as institutional racism or racial profiling or disproportionality of police stops (Murray & Harkin, 2016; Reiner, 2010; Rowe, 2007; Shiner, 2015). One central question has been how to set clear legal limits on stop and search practices in the context of crime prevention, counterterrorism and immigration policing (Bridges, 2015). Although previous studies (e.g. Stumpf, 2006; Van der Woude & Van der Leun, 2017) have recognised the importance of the policy-level and legislation to misbehaviour and socially harmful action of different immigration law enforcement agents, there has not been much research related to police reforms in the context of internal immigration policing. Gundhus (2017) has pointed out how reforms aiming to increase professionalism in the police and modernise policing can contribute to crimmigration and expand the use of immigration law powers as tools for crime controls. Additionally, the local, national contexts can influence how regional policies and legislation is implemented (Guiraudon, 2009). It is, thus, important to understand which are the relevant power relations and positions of different national actors, and how these actors define the central themes of reform debates such as ethnic profiling or irregular immigration.

3. Data and methodology

The core of the data consists of public documents produced by the Finnish government and different Finnish authorities during the reform process from 2013 to 2015, culminating in the legal change concerning jurisdiction and non-discrimination in internal immigration policing. These documents include administrative memos, parliamentary protocols, committee statements, policy papers and statements from different authorities such as ministries and institutions of juridical supervision. I also use reports by the Ministry of the Interior concerning immigration controls and prevention of irregular migration; police instructions and reports; press releases; and guides to decisions concerning ethnic discrimination by supervisory authorities such as different Ombudsmen, produced from 2008 to 2015.[4] The most important of these documents is the draft bill that includes the proposed change of the

4. The data of official papers consists of 37 individual documents, altogether 86 401 words.

statutes, a description of the current legislative situation, a comparison with the legislation of other countries, and reasons and explanations for the proposed changes (HE 2014). This law draft was the basis for the first parliamentary debate that would substantially deal with ethnic and racial profiling in Finland. Also, in the Finnish legal system, the final version of an accepted legislative proposal guides the implementation of the new law. Data were either publicly obtained through searches in digital or paper public archives or have been specifically requested from the relevant authorities.

Besides this, newspaper articles from the same period provided additional data because some relevant comments from participants in the public debate and the reform are documented there. The media discussions also form the backdrop of the administrative and political debate about ethnic profiling and internal immigration policing. News articles were obtained by searching internet archives of the main national newspaper of Finland (*Helsingin Sanomat, HS*) and the national broadcasting company (*Yleisradio, YLE*) from 2008 until 2017 with the search terms "ethnic profiling" and/or "control of foreign nationals".[5]

The data provides information on the views of the five main types of actors: politicians, government officials from the security sector, officials responsible for legal supervision, NGOs, and members of racialised minorities. Different actors deliberated the reform of immigration law enforcement in three arenas: in media, in the parliament between different political parties, and inside the public administration between different officials and experts. Texts that were created during this policy process also contain information on how immigration policing and discrimination were framed and represented in these debates. The relative influence of different actors can be, to some extent, estimated by following the changes in the law text during the reform process. The data was coded with NVivo. The actors, the policy arenas, and the themes of the debate, such as ethnic discrimination and security, and the conflict points of the debate, such as accountability, were used as main codes.

The article aims to understand the political conflict concerning the legal limits of immigration policing through the analysis of power relations between different actors and substantive arguments raised during the political process. In recent years scholars working on critical policy analysis or public policy research have used various methods such as phronesis (Flyvbjerg, 2001), "What's the Problem Represented to Be?" (WPR) policy analysis approach by Carol Bacchi (2009) or critical discourse analysis (CDA) (Fairclough, 1992). The methodological choices in this article are guided by the phronetic in-depth case-study developed by Thomas Flyvbjerg (Flyvbjerg, 2001; Thomas, 2010). Flyvbjerg has demonstrated how different kinds of local power relations often influence deliberative policy processes (Flyvbjerg, 2001). Because the phronetic method emphasises pragmatics of the policy processes and power relations between the actors, it is a useful method for analysing a reform process. I will, on the one hand, make an institutional reading of the different actors during the reform process—who is allowed to take part in the process and whose voice is heard in the outcome; whose argument is taken into account, and whose is not. The description of the actual law reform process shows how the international and regional normative framework on policing was influenced by different power positions of the actors and political positions taken by the actors. I will, on the other hand, analyse the substantial argumentation generated within the debate. I ask the following questions regarding the data: what kind of dis-

5. Before the law was accepted, *Helsingin Sanomat* had published 18 relevant news articles between 1.1.2012 and 1.5.2015, and after the law was accepted 2018 52 articles. The National Broadcasting Company had published 35 relevant news articles between 1.1.2012 and first of May 2015, and 118 before 2018.

agreements, conflict points and controversies can be found in the texts? How are the aims of internal immigration policing defined? How are central concepts such as discrimination and the rights of foreigners defined and used in the debate? The aim of the analysis is also to identify the main conflict points of the debate, as well as the main arguments that different actors use either to give authorities more policing powers or to limit the power of the police during the reform process.

4. The legal and political context of the reform

The main rationale of internal immigration policing is detecting those foreign citizens who have not been given a right to remain in Finland (HE, 2014). Finnish law requires neither a Finnish citizen nor a foreigner to carry identity documents. Nevertheless, according to the *Aliens Act* (UL, 2004) at the request of the police, an alien must present his or her travel document or prove his or her identity in another way. Immigration control is not a police investigation and need not imply suspicion of a crime defined by the criminal code; it is a supervisory measure. Police also have a duty to explain the reason for the check during the inspection. Immigration checks occur, for example, in city spaces during larger operations or as part of other police work, such as general public control activities or traffic controls (HE, 2014).

Between 2013 and 2015, a law change project to regulate the control of foreign nationals created two new sections in the *Aliens Act*, defining legal limits to police checks of immigration status. The immediate causes of the reform included a public debate on ethnic profiling and a legal decision. Ethnic profiling can hardly be seen as a recent phenomenon in Finland. For example, members of the Finnish Roma community say that they have been targeted by the police unjustly for several decades (Grönfors, 1979; Keskinen et al., 2018). However, a public debate concerning ethnic profiling–i.e., a debate concerning racialised policing that uses the explicit concept of 'ethnic profiling'–began in Finland relatively recently. Between 2008 and 2013, there were a few public outcries accompanied by interventions by both national and international human rights and non-discrimination bodies that questioned the legitimacy and legality of immigration operations carried out by the police. In 2008, the Minority Ombudsman[6] responded to a public debate concerning internal immigration controls made by police in city spaces in Helsinki and Vantaa by stating that 'this kind of action is close to the concept of ethnic profiling' (HS, 2008). The ultimate reason for the legal change was the decision of the Parliamentary Ombudsman of Finland (EOA, 2011) stating that the police and border guard do not have the authority to enter a private space (such as a workplace) to control foreign nationals. This decision of the Ombudsman started a process in the Ministry of the Interior to reform the *Aliens Act*, for police to get jurisdiction to enter private spaces such as restaurants and workspaces (SM, 2012, p. 26). The European Commission against Racism and Intolerance (ECRI, 2013), a Council of Europe body, expressed its concern about Finland's immigration control procedures in its report by stating that the *Aliens Act* contains discriminatory provisions, in particular in the section which states that a foreigner must present his or her documents at the request of the police. The Minority Ombudsman criticised the police again in 2012 (YLE, 2012a), and the Ministry of the Interior also decided that she should be consulted already during the preliminary phase of the law change process before the round of statements (SM, 2013).

6. Until the reform of the Non-discrimination Act in 2015, the Finnish Non-Discrimination Ombudsman was called the Minority Ombudsman.

The government aimed to give the administrative practice of control of foreign nationals a modern legal form and set legal limits to the exercise of the controls. According to the Ministry of the Interior, "*the better regulation of the controls*" would also help make the practice more "*acceptable*" to the public (SM, 2013, p. 1). At the same time, the reform increased policing powers by giving police officers and border guards the right to conduct immigration checks also in private spaces such as workplaces. Reform embedded the practice of immigration-based identity checks to the Finnish immigration legislation. It also included a ban on ethnic discrimination during immigration stops and checks—the current law prohibits ethnic profiling:

> The control of foreign nationals must be based on general knowledge and experience about illegal entry and residence. Monitoring actions must be based on observation or tips or analytical information. Monitoring actions should not be motivated solely or mainly by virtue of a person's real or assumed ethnic origin (UL, 2004, 129 a §).

It also states that control actions must be reasonable and proportionate. Besides this, a second new section gave police and border guard the right to conduct searches at workplaces and business premises based on the *Aliens Act.* Although both the Minority Ombudsman (VV, 2014) and the Parliamentary Ombudsman (EOA, 2014) had recommended that police should register both the stop and the reason for the ID-check on a specific individual, no such requirement was included in the final law. Thus, it is also impossible, in practice, for the public to evaluate the extent of the immigration checks since even those statistics, that the police are currently collecting, are not publicised annually (Keskinen et al., 2018). Also, for this same reason, it is not possible to evaluate how successful the reform was on basis of quantitative data.[7] Public acceptance was a major goal of the reform. However, the public debate concerning ethnic profiling grew more heated after the reform, especially during 2016, as can be seen from the frequency of mentions of ethnic profiling and internal immigration policing in the media data (see note 4). Also, the only judicial decision against the police concerning ethnic profiling occurred in 2018 (YVTlk, 2018). In sum, although, legal regulation of internal immigration policing was increased, many of the concerns raised by legal supervisors and international bodies, related to the reasonableness of the stops and checks of foreign citizens, police accountability and efficiency of the immigration controls, were not followed through.

5. The main controversies: irregular migration, fundamental rights and ethnic discrimination

The main themes of the reform debate—which were repeated across the data, in media news, parliamentary protocols, and expert comments—were (1) security including the prevention of irregular migration; (2) the rights of the foreign nationals; (3) ethnic discrimination including ethnic profiling. The themes constitute the two sides of the debate about the legitimacy of internal immigration policing in Finland: one concerned with security and crime, the other with fundamental rights and non-discrimination.

7. However, a study concluded that although Finnish police officers conducting immigration checks are aware that ethnic profiling is not allowed, they described control practices that were outright discriminatory or included high risk of direct and/or indirect discrimination (Keskinen et al., 2018, p. 86–104).

Firstly, the government states that the main aim of internal immigration policing is the prevention of irregular immigration. In the media interviews and main documents, the security authorities situated the phenomena of irregularity to two contexts: crime and protection of the borders of Schengen-Europe. The documents contextualise irregular migration as a part of a wider continuum of crimes that include "*smuggling, human trafficking, labour exploitation, and procuring*" (HE, 2014, p. 9). The documents, however, do not reveal how common these crimes are or how frequently police or border guards detect them during immigration raids. The way the government defines illegality is interesting: the government proposal states that officials detect more than 3 000 illegal immigrants yearly—it leaves out the fact that most of them were asylum seekers who had made an asylum claim at police stations inside of Finland (HE, 2014, p. 9; cf. SM, 2012, p. 19). Although the reform did not penalise any new immigration misdemeanours, it increased policing powers in immigration matters and legitimised the institutionalisation of internal immigration policing with criminalising rhetoric (cf. Aas, 2011; Himanen, 2019; van der Woude et al., 2014).

Interestingly, the low number of irregular migrants—compared to many other Schengen-countries—was used as an argument for the increase of immigration policing powers by the internal minister Päivi Räsänen. In an interview by the National Broadcasting Company, she responded to criticism concerning the possible discriminatory effects of the control of foreign nationals:

> Actually, Finland is rather efficient concerning illegal entry, and this efficiency should not be weakened, because it is also our special strength, it is an area in which we set an example for other Schengen countries (YLE, 2012b).

As the comment above indicates, the Finnish administrative practice of the control of foreign nationals also has European institutional foundations. According to the Ministry of the Interior, because of the Schengen Agreement, and the abolishing of the border controls, it is necessary to compensate for this loss of control by enhancing internal immigration controls (HE, 2014, p. 3; SM, 2012, p. 5).

The second major theme of the reform debate concerned the necessity to restrict the rights of foreigners compared to the rights of citizens. In the ensuing debate, some participants saw the practice of the control of foreign nationals as archaic. For example, a Green MP asked, "are these kinds of immigration controls, which police conducts in the public space, necessary and in any way beneficial in a modern society?" (PTK, 2014, p. 6). This viewpoint introduced a temporal difference: it can be interpreted that she was referring to the fact that in a contemporary multi-ethnic Finnish society, with a significant foreign population, the idea of organising controls based on the mere status of a person was problematic. Also, the government officials gave comments that manifested this same tension between a multi-ethnic society and the idea of the control of foreign citizens during the debate (OM, 2014). Finnish immigration legislation incorporates a principle that the rights of foreigners should not be restricted any more than necessary. Any differential treatment is legal only if it would be reasonable and proportional when compared with the goals of the controls; and would not contradict international human rights obligations of the Finnish state (OM, 2014, p. 1). Although human rights, fundamental rights, and the rights of foreign citizens were discussed in the debate, the rights of the undocumented migrants were not mentioned in any of the documents or newspaper articles.

The third major theme of the discussion was concerned with ethnic discrimination. In the data analysed, some, mainly right-wing parliamentarians defended the practice of

ethnic profiling. During the debate concerning the law change, parliamentarians from the anti-immigration party True Finns employed what they perceived as 'common sense' arguments: when the police are looking for a suspect, they should be able to use all available tips and descriptions, without the fear of being accused of ethnic profiling (PTK, 2014, p. 3). Also, a member of parliament from the governing Conservative party expressed an opinion, which denied that ethnic profiling would necessarily be discriminatory:

> it makes sense, from the point of view of the efficiency of the police work, that control of foreign nationals is directed towards those humans, who look like foreigners based on external marks (PTK, 2014, p. 4).

This racialised expression *of "those who look like foreigners"*, which the MP introduced to the discussion, was also used in the media debate by the police and activists and can be understood to mean non-white Finnish persons (Keskinen et al., 70). This racializing targeting of foreigners was at the core of the public debate, but the connection between whiteness and nationality was not articulated explicitly during the debate. Connecting Finnish national identity to whiteness is common also in other contexts (Alemanji 2016; Keskinen 2014).
It was typical for the reform debate that the participants discussed only direct discrimination and not indirect discrimination. For example, a decision from the Parliamentary Ombudsman stated that

> because the amount of people, who differ in their appearance from the majority of the population, is larger in the foreign population, it is understandable that external appearance can, to some extent, affect the likelihood that a person will be controlled (AOA, 2004).

Although the Ombudsman added that a person's appearance shouldn't act as the primary criteria for the controls, he did not problematise the possible ethnic disproportionality of the checks. This meant that the debate excluded a major question concerning ethnic profiling and racial/ethnic discrimination in policing (cf. Bowling & Phillips 2007). Finnish experts and politicians were able to discuss discrimination and ID-checks only as events and acts: the question for them was if ethnicity is used as the main criteria for the check or not. They did not ask if the frequent use of the practice of internal immigration policing would lead to structural racism.

To conclude, a thematic analysis of the debate revealed, first, that the law was simultaneously a compromise between security-oriented rationality and thinking based on non-discrimination norms. The reform of the internal immigration policing was an attempt to give a legitimate form to the internal immigration controls in Finland. On the one hand, legitimacy was based on the effectiveness of controlling crime and borders. However, this efficacy was largely symbolic, as shown above, the evidence was thin, and as there was no substantial debate about the effectiveness of the control practices. On the other hand, as discussed in more detail below, legitimacy would be created through a more thorough implementation of regulatory norms. The themes that the actors mentioned during the Finnish debate are typical for modern deliberations on police legitimacy: rule of law, non-discrimination, and efficiency of the police (see Reiner, 2010, pp. 109–119). At the same time, during the reform debate, the participants did not discuss much the relationship between the police and ethnic minorities or systemic racial or ethnic discrimination. The discussions on ethnic profiling in media, between the authorities and in the parliament concerned almost exclusively immigration controls and direct discrimination. Thus, the debate

remained very specific and excluded or marginalised other contexts that are common in similar debates in other countries, such as police-ethnic minority relations or regulation of police behaviour, institutional racism, harms caused by police stops and ID checks (cf. Murray & Harkin, 2016; Reiner, 2010; Rowe, 2007; Shiner, 2015).

6. Participation and power: the role of different actors during the reform debate

In the following, four *institutional factors* that influenced the reform process will be identified: (1) the de facto exclusion of some actors from the debate and decision-making arenas, (2) the significant and, at the same time, limited role of the international and regional human rights agents, (3) the relative lack of public scrutiny and (4) the relatively strong influence of the security actors.

In a formal sense, the reform process was conducted as any other legal reform in Finland. The reform occurred in three institutional arenas: *the public debate* as reported by media before and during the political and administrative process; *administrative procedure of legislative drafting* in which a committee of government officials prepared a draft of the actual law proposal in the direction of the Ministry of the Interior; *and legislation at the Parliament* in which the MPs debated the proposal. Different participants had a presence in different arenas (see Table 1). However, the only civil society organisations which gave comments during the legislative drafting were the Finnish Red Cross and three labour market organisations. No major human rights organisation took part in the process or debate at any stage—usually, when the government makes changes with major human rights implications to the Finnish *Aliens Act* NGOs have a stronger presence in the consultation process. Also, remarkably no immigrant or ethnic minority organisations participated in the process. The participants of the debate that came across in the media data were mostly white Finnish citizens working for the government (for a rare exception cf. YLE, 2013). The Minority Ombudsman made most of the critical comments towards police conduct during the public debate (for example, HS, 2008; YLE, 2012a). The members of ethnic or racialised minorities were present in the debate mostly as anonymous plaintiffs in the decisions of legal supervisory bodies that were mentioned in the parliamentary deliberations (EOA, 2004; EOA, 2011). Also, the undocumented migrants were not included in the debate, and the human rights concerns of this group were not represented by any NGO or mentioned by the legal supervisors. This omission is significant because so-called irregular or illegal migrants were the main targets of the policing practices that the law change was about in the first place.

Table 1. Presence of different actors at different arenas of the reform process

Actors / arenas	Media debate	Legislative drafting	Legislation at the Parliament
Politicians and political parties	X	-	X
Security officials	X	X	X
Legal supervisors	X	X	X
Other officials	-	X	-
NGOs	-	X	-
Representatives of ethnic or racial minorities	X	-	-

After the unequal participation, a second important aspect of the reform process was the role of the regional and international agencies and fundamental rights legislation. As the discussion above on the themes of the debate pointed out: it was these agreements and laws that made the ban on ethnic profiling possible in the first place. The source for the formulation of the ban on ethnic profiling, which states that immigration stops should not be based solely or to a decisive extent on a person's ethnic origin, was the landmark decision of the European Court of Human Rights from 2005 (*Timishev v. Russia*) (ECHR, 2006, p. 15; HE, p. 2014; OM, 2014, p. 2). The European Commission against Racism and Intolerance had also criticised Finland's immigration control legislation (ECRI, 2013). These developments empowered the Minority Ombudsman to criticise questionable policing practices publicly and provided the necessary vocabulary for this (including the concept of ethnic profiling) (YLE, 2012a). Other actors, such as the Ministry of Justice, used the previous decisions from the UN and the EHRC in their argumentation (OM, 2014). At the same time, a central feature of the process was that it was not an example of compulsory implementation of the EU law. Apart from the ECRI-report (2013) mentioned above, the communication between Finnish and international legal bodies was indirect. For example, no legal case in the ECHR concerning Finnish police and ethnic profiling exists. The law draft did not refer to any European guidelines concerning police stops and non-discrimination, only to a Schengen-codex that does not discuss the issue (see HE, 2014). Some authors have argued that the European legislation regulating immigration policing and border controls in the Schengen Area is too lenient and undefined regarding non-discrimination (see Van der Woude & Van der Leun, 2017). Also, as pointed out by Guirdaron (2009) the member states have much power and discretion when implementing European non-discrimination law.

Third, the law process did not gather much attention in the Finnish media. Some public discussions concerning possible ethnic profiling by police did occur before the reform process and during the process. Most of the public discussion concerned illegal immigration and internal immigration policing. The articles published by the biggest Finnish newspaper or by the Finnish national broadcasting company included mostly short statements from the different authorities (see HS, 2008; YLE, 2012a, 2012b). A more heated debate concerning ethnic profiling happened only after the reform, during 2016, as can be seen from the frequency of mentions of ethnic profiling and internal immigration policing in the media data (see note 4). The reform occurred in a political climate that could be described as semi-heated (cf. Murray & Harkin, 2016). The semi-heatedness of the public debate was reflected in the legislative process at the Parliament in the relatively short discussions. The bigger political parties did not show much interest in the topic. Most of the comments during the two sessions came from the members of the right-wing populist Finns Party (PTK, 2014). Murray and Harkin suggest that a 'cool' political climate can contribute to an extension of police power (2016, p. 899). They argue that a more heated debate concerning policing tactics in Scotland led to a significant reduction of mass stop-and-search and increased accountability (Murray & Harkin, 2016, pp. 897–900). In Finland, the police have not suffered a legitimacy crisis and politicisation of policing has not resulted in a clamour for stronger measures (cf. Reiner, 2010, pp. 78–96). On the contrary, the lack of politicisation of policing has likely contributed to the lack of proper public scrutiny of possibly discriminatory policing practices as was the case in Scotland. Scholars have pointed out that the relationship between a heated, hard-line media discourse on punishment and penal reforms can be complex in the context of penal politics (Green, 2009; Loader & Sparks, 2011). Bosworth, Franko, & Pickering describe how the immigration context adds an extra dimension to these criminal policy debates as it is often highly politicised (2018). In the Finnish case, on the one

hand, there was nothing in the data to indicate that the government would have been under severe pressure to take stronger measures against irregular migration. On the other hand, the Ministry of the Interior answered the criticism of discriminatory policing practices by immediately moving the discussion to the prevention of irregular migration—as discussed above. Although the government perceived migration as a policing issue during the reform debate, the law change was not an example of populist politics, but a very technical debate in which the main protagonists were public officials.

Finally, at the preparatory phase of the reform, all the members of the project group were from policing organisations such as the National Police Board or the Finnish Border Guard, or immigration officials (SM, 2013). The Ministry of the Interior was governing the process and is responsible for both policing and immigration. The text of the law proposal was amended between the first phase (the first law draft) and the second phase (the actual government law proposal) but not anymore after the third phase during the parliamentary process. The state officials led the process instead of the politicians. The Minority Ombudsman had criticised the police publicly again in 2012 about possible ethnic profiling during immigration raids in Helsinki, and she was heard in several stages of the process (SM, 2013; SM, 2014). In their statements, the Minority Ombudsman (VV, 2014) and the Parliamentary Ombudsman (EOA, 2014) recommended that police should register the stops and ID checks including the reason why the check was done:

> Both the instructions and the practices [of internal immigration controls] should be developed so that it would be possible afterwards to identify the legal grounds of each action. When the police measures are logged in the register, also the reasoning behind the selection of the targets [of stops and ID-checks] should be included. (VV, 2014, p. 2).

However, no such requirement was included in the final law or the text of the government proposal. Also, suggestions that the legal grounds for the stop should be clarified in the text (OK, 2014) and that immigration checks should only be conducted as part of other police work, not as separate measures (OM, 2014, p. 3) were not accepted by the Ministry of the Interior. In the end, the actual law text was very similar to the guidelines from the National Police Board that were implemented already in 2013 (Poha, 2013). Thus, the government did not create a mechanism that would have made it possible to follow the implementation of the reform. It is also possible that the de facto exclusion of the civil society and the affected minority groups from the policy process and public debate, and rather low-level of public scrutiny, increased the influence of the security officials.

In sum, the analysis of the institutional reform process revealed that members of the white majority in expert positions dominated the proceedings. Those communities that were directly affected by ethnic profiling were in practice excluded from the policymaking. Thematic analyses in the previous section showed that on the one hand, some of the debate participants connected whiteness and Finnish nationality, and, on the other hand, foreign nationality was associated with potential irregular residency. It was very likely significant for the outcome of the reform and the nature of the debate that none of these groups—non-white ethnic minorities, foreign nationals, or undocumented immigrants—were represented in the process. Also, the international actors such as the United Nations or the ECHR were present at the debate only indirectly except for the ECRI. Third, the public debate on police stops during the reform process was relatively low key and did not start a substantial public discussion concerning the relationship between policing and racialised minorities in Finland. The factors above made it more likely that the actors from

the internal security sector, such as the National Police Board and officials from the Ministry of the Interior, were able to set the limits to the scope of the reform.

7. Conclusions

In this article, I have argued that building national regulative frameworks for immigration law enforcement in a Schengen state can produce ambivalent outcomes. The reform—although, it banned ethnic profiling and set limits to immigration policing powers—gave the police and the border guard also more powers, anchored the practice of internal immigration policing to the *Aliens Act*, and did not include any monitoring measures. In Finland, the ban on ethnic profiling did not mark a profound debate between civil society actors and the government about the limits of police power or discriminatory policing. Instead, the result was a rather technical debate between those actors whose responsibility was the legal supervision of the police and between security officials. In this sense, the reform was a missed opportunity to discuss ethnic profiling in Finnish society.

The case of the immigration law enforcement reform in Finland should be understood as a conflict between a policy based on the European fundamental rights jurisprudence and criminalising immigration policy. I argue in this paper, that national social and political factors have a central role in determining how Schengen states regulate immigration law enforcement such as inclusiveness and nature of public debates around policing and immigration. The exclusive and narrow public debate may lead to superficial regulation in which ethnic profiling is banned only nominally without proper accountability mechanisms.

Researchers have argued that a high level of discretion is one factor that leads to ethnic/racial profiling and abuse of powers during immigration and/or border checks in the EU (Brouwer et al., 2018; Van der Woude & Van der Leun, 2017). Scholars have pointed out that incomplete international and regional legal regimes give states flexible means of social control through law enforcement (Moffette, 2020; Van der Woude, 2020; Wonders, 2017). My analysis of the Finnish case is in the lines of the earlier literature as the role of the regional human rights law in the actual reform process was mostly indirect. The Schengen system presupposes that member states control irregular migration in their jurisdiction. Although ethnic discrimination is illegal, no such legal EU-wide governance structure or legislation exists that would ensure that these two aims do not contradict each other. This leaves member states a lot of discretion to decide how immigration law enforcement is conducted and supervised as can be seen from the Finnish case. At the same time, the development of regional human right norms and the non-discrimination policy of the European Union give national actors resources to enact change. Their ability to use these resources, however, depends on several factors including the importance of the policy question in the national agenda and inclusiveness of the debate and policy process. Ethnic minorities, immigrant organisation and civil society were not present in the legal reform process in Finland.

Criminologists have often stated that politicisation of criminal policy and policing leads to harsher penalties and giving more powers to the police (Pratt, 2007; Reiner, 2010). However, also lack of public scrutiny may protect problematic policing practices as was the case in Scotland about stop & search (Murray & Harkin, 2016, p. 897–900). The discussion around police stops in Finland was not very intensive. The reform debate occurred mostly between authorities and between two political and administrative demands of governing irregular migration and implementation of anti-discrimination norms. During the reform process and public debate concerning ethnic profiling, members, or representatives of ethnic minorities were not present, and the role of civil society in the debate was very limited in

general. The debate was conducted almost exclusively between government officials. It is not possible to say if this lack of intensity in the debate was a direct result of the fact that there was no space for minority voices, but it seems plausible. Immigration policing and immigration policymaking repeated similar, possibly institutionally discriminatory, patterns that are formally equal but in practice discriminatory.

Recent research and national and regional court cases have shown that immigration law enforcement poses significant challenges to human rights in Europe (Aas & Bosworth 2013; FRA, 2010; OSJI, 2013). It is because of this that the Finnish state decided to include the ban of ethnic profiling in the *Aliens Act* in the first place although racial and ethnic discrimination was not legally allowed in policing to start with. At the same time, especially because of the control-oriented migration policies and criminalisation of migration, solving these challenges through better regulation is difficult. The Finnish debate remained very technical and excluded or marginalised other contexts such as police-ethnic minority relations, regulation of police behaviour, or institutional racism. The human rights of undocumented migrants were not discussed at all. The Finnish case shows how transnational human rights and non-discrimination norms do not transpose spontaneously to effective regulations governing police conduct. Without effective accountability and inclusive civic participation, banning ethnic profiling gives immigration law enforcement a "fundamental rights wash" without proper legitimacy.

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