



**MALMÖ UNIVERSITY**  
FACULTY OF CULTURE  
AND SOCIETY

# THE MISLEADING DEBATE

An examination of the internal controls of foreigners in  
Sweden

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## **Abstract**

In the year of 2013, Swedish media accused the Swedish police for the implementation of discriminatory internal controls of foreigners, in Malmö, Stockholm and other places across Sweden. The controls were soon to be linked to project REVA. In this thesis, I examine how the internal controls of foreigners measure up to the Swedish Aliens act and whether or not the accusations of discriminatory controls against individuals with a perceived foreign appearance, are correct. The examination includes a legal approach, where I use practical legal method to analyze the provisions of the Aliens act, as well as an evolving conceptual approach, where I evolve the concept of discrimination in order to apply it to the controls. I found that it is possible to link project REVA to the external work with the internal controls of foreigners, despite the denial from people involved. I also found that, because of unclear regulations regarding the implementation of the internal controls of foreigners, it is not possible to assess how the controls measure up to the Swedish Aliens act. Some of the controls, most probably, can be identified as directly and indirectly discriminatory. The problem with this statement is the difficulty to measure police officers decision-making in order to confirm the discriminatory behavior. However, I argue that it is possible to claim that the Aliens act might be indirectly discriminatory. The results of this thesis indicate that the Swedish police should review their practices regarding internal controls of foreigners.

Keywords: Swedish police, discrimination, direct discrimination, indirect discrimination, Swedish Aliens act, project REVA

Number of words: 16466

## **Preamble**

During the writing of this thesis, I encountered people who wondered why I question the claim that the internal controls of foreigners in Sweden are discriminatory. Some of them had their own experiences of, what they perceived to be, discriminatory controls.

One of the reasons I do not assume that the internal controls of foreigners in Sweden are discriminatory, is because the relevant authorities deny it. Accordingly, there exist two contradictory claims.

Therefore, I would like to emphasize that I don't mean to offend people who feel like they were exposed to a discriminatory control. I assume from a neutral position in order to examine the issue at hand.

## **Acronyms**

European Convention of Human Rights (ECHR)

European Union (EU)

Legally secure and efficient enforcement work (REVA)

Migration Board (MB)

National Police Board (NPB)

Parliamentary Ombudsman (JO)

Prison and probation service (PPS)

Schengen's Information System (SIS)

Swedish Radio (SR)

United Nations (UN)

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# 1. Introduction

In December 11, 2012, three youths, a girl and two boys, are stopped and questioned by two police officers in Stockholm's subway system. A man passing by, stops and asks the youths if they are Romani people. They nod in reply. Due to obvious language barriers between the police officers and the youngsters, the man offers to interpret the conversation. One of the police officer's asks if the man could enquire where the young people lives. They tell the man that they live in Ropsten (an area in Stockholm) but that they don't know the exact address. The policeman asks the youngsters if they have any money and the man interprets. They don't. Suddenly, one of the police officers takes out a document and the interpreting man recognizes that it is a document of confession. The police officer shakes the pen in front of one of the youths, declares that it will cost 1000 Swedish kronor and requests that one of the youths sign the document. The interpreting man becomes concerned and asks why the police want to fine the youngsters and if they think that the youngsters understand what they are signing. Without answering the question, the police officers ask the man to step aside. The man sees that the young people have Romanian identity documents and asks the police, one more time, what's going on. One of the police officers tell him that he must step aside in order to protect the youngsters' integrity or he will be removed from the site. Four more police officers are called to the location and they quickly decide to release the girl and bring the two boys with them. The interpreting man is left without further comments.

The story stated above is an actual police control, taking place in Stockholm's subway system and led to that the interpreting man reported the police officers course of action to the Swedish Parliamentary Ombudsman (JO).<sup>1</sup> A few months later, in the year of 2013, Swedish police and its internal control of foreigners got a lot of media attention. Journalists, authors, academics and regular citizens accused the police of conducting discriminatory identity checks on people with non-Swedish appearance in Stockholm's subway system, the square of Möllevången in Malmö and a lot of other places in Sweden.<sup>2</sup> It is argued that the internal controls of foreigners in

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<sup>1</sup> Taikon, Fred, "Nedlagd JO-anmälan" in *Google drive*, Online: [https://docs.google.com/folderview?usp=sharing&id=0B8\\_binaDRToqZjJxNVBqSlpnNk0&tid=0B8\\_binaDRToqTzIMYQFheGpDZOE](https://docs.google.com/folderview?usp=sharing&id=0B8_binaDRToqZjJxNVBqSlpnNk0&tid=0B8_binaDRToqTzIMYQFheGpDZOE), 2013-01-03 (Hereinafter referred to as, "Taikon 2013"); The source I refer to is presumably the report that was sent to JO. However, since I don't know who put the document online, I don't know if it's been altered. Still, it doesn't affect the reliability of the thesis since I just want to illustrate the possible problems of the internal controls of foreigners.

<sup>2</sup> Aasprong, Monica et al, "Polisstat i Sverige? Nej tack" in *Aftonbladet*, Online: <http://www.aftonbladet.se/kultur/article16293405.ab>, 2013-02-22; Hereinafter referred to as "Aftonbladet 2013".

Sweden are a part of project “Legally Secure and Efficient Enforcement Work” (REVA). REVA was introduced in the year of 2009 and is a cooperation between the Swedish police, the Swedish Prison & Probation Service (PPS) and the Swedish Migration Board (MB). The project has a stated objective to make more effective processes of executing deportation decisions, improve the rule of law and at the same time increase the number of deportations.<sup>3</sup>

## 1.1 Problematization

Since the year of 2001, Sweden is a part of the Schengen cooperation. This means, among other things, that the Swedish border controls towards people from other Schengen countries have ended.<sup>4</sup> In order to detect people that are illegally in Sweden, the Swedish police consider the internal controls of foreigners as an important compensatory measure to the abolition of the border controls.<sup>5</sup> However, at the same time as the Swedish government and the Swedish police have legal right to conduct these controls on individual X,<sup>6</sup> individual X has legal right not to be subjected to controls by public authorities, without justifiable reason.<sup>7</sup> Thus, on some level, the Swedish controls of foreigners give rise to conflicting interests – the state’s interest in controlling whether individual X has right to reside in the country vs. individual X’s interest in personal freedom and integrity.

In the Swedish Aliens act, it is regulated that an internal control of foreigners may be undertaken when there is a good reason to believe that a given person has no right to reside in the country.<sup>8</sup> Such good reasons to believe consist of an individual police officer’s observations, surveillance information or other reliable information.<sup>9</sup> Thus, it is up to the individual police officer to assess which observations s/he considers to be a justifiable reason to implement a control. According to the extensive media debate regarding the internal controls of foreigners, this has led to police

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<sup>3</sup> Fremnell, Jessica “Arbetet med REVA påbörjat” from *The police in the county of Stockholm*, Online: <http://polisen.se/Arkiv/Nyhetsarkiv/Stockholm/2012/Arbetet-med-REVA-paborjat-inom-granspolisavdelningen-Stockholm/>, 2013-02-19

<sup>4</sup> The Swedish police(1) “Resor inom Schengen” from *The Swedish Police*, Online: <http://polisen.se/Service/Pass-och-id-kort/Granskontroll-inom-Schengen/>, 2013-09-26; There will be a more detailed presentation of the Schengen cooperation in section 2.1 – *The Schengen cooperation – EU’s passport union*

<sup>5</sup> RPSFS 2011:4, 4 § Allmänna råd; Hereinafter referred to as “FAP 273-1”.

<sup>6</sup> E.g. European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8 Section 2; Swedish national legislation, 9 Ch. 9 § Aliens Act (2005:716)

<sup>7</sup> E.g. European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8 Section 1 and 2

<sup>8</sup> Swedish national legislation, 9 Ch. 9 § third section Aliens Act (2005:716)

<sup>9</sup> FAP 273-1, 5 § Allmänna råd

controls that discriminate against people based on their perceived foreign appearance. Tentatively, the concept of discrimination will be understood in the following way: someone is discriminated when s/he belongs to a socially salient group and, for that reason, is being treated disadvantageously and unjustifiably in comparison to a similar or equal comparison group in a similar or equal situation. The conceptual question will be addressed in more depth in section 5 - *The conceptual approach*. The possibility that the Swedish police would ignore the rights of individuals is obviously problematic, but the fact that they are getting accused of conducting controls that are based on ethnic profiling<sup>10</sup> are perhaps even more problematic. In addition to the media debate, Sophie Hydén<sup>11</sup> claims that there are problems related to ethnic profiling, not just in connection to the internal controls of foreigners, but also in the entire Swedish legal system.<sup>12</sup> This claim is supported by a report that was released by the Swedish crime prevention council in the year of 2008.<sup>13</sup> The fact that the Swedish state's executive power might be perceived as ethnically discriminatory, violating current legislation, is problematic, not least from a human rights perspective. Furthermore, according to researcher Patricia Warren,<sup>14</sup> citizens who lack trust in social institutions, such as the police, and see them as discriminatory, are likely to have the same view across all institutions,<sup>15</sup> thus, creating a lack of trust in society at large. Again, this highlights the importance of considering the relationship between the state's interest to conduct the controls and how the controls are implemented on the one hand, and individual X's rights in not being subject to discriminating controls, on the other.

## 1.2 Purpose and research questions

If the allegations concerning continuously discriminating controls are correct, it is a serious issue that must be addressed in order to understand why that is. According to Anna Bruce, the

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<sup>10</sup> Ethnic/racial profiling can be explained as the claim that police officers use an individual's ethnicity/race to determine when s/he is to intervene in a given situation (Engel, Robin S. (2008: 3) "A critique of the "outcome test" in Racial Profiling Research, *Justice Quarterly*, (25:1) pp.1-36); Hereinafter referred to as "Engel 2008".

<sup>11</sup> Sophie Hydén has a Ph.D. in ethnicity. Her field of research concerns, among other things, police work. (Santerus publishers 2014, Online: <http://www.santerus.se/200/201.asp?id=3272>, Accessed: 2014-05-15).

<sup>12</sup> Hydén, Sophie (2006: 143) "Diskriminering på köpet – etnisk profilering i polisarbete" in, Fransson, Ola and Fryklund, Björn (ed.), *Migration och professioner i förändring*, (Holmberg Printing Malmö) pp.135-154; Hereinafter referred to as "Hydén 2006".

<sup>13</sup> Brottsförebyggande Rådet (BRÅ) Report 2008:4, "Diskriminering i rättsprocessen – om missgynnande av personer med utländsk bakgrund"; Hereinafter referred to as "Report 2008:4".

<sup>14</sup> Patricia Warren has, among other things, a Ph.D. in sociology. She is an associate professor and a director of the undergraduate program at Florida State University. (Florida State University 2014, Online: <http://www.criminology.fsu.edu/p/faculty-patricia-warren.php>, (Accessed: 2014-05-15))

<sup>15</sup> Warren, Patricia Y. (2011: 357) "Perceptions of Police Disrespect During Vehicle Stops: A Race-Based Analysis", *Crime and Delinquency*, (57:3), pp.356-376; Hereinafter referred to as "Warren 2011".

idea of human rights has two basic premises. The first premise concerns the idea that human beings have fundamental needs that the social context should encourage or at least not prevent.<sup>16</sup> The second premise assumes that the fulfillment of these needs, apply to all people.<sup>17</sup> Thus, the underlying idea with these two premises is that (1) human life is inherently valuable and that (2) different life situations and/or differences between people, does not affect this value.<sup>18</sup> According to Bruce, the second part of this statement is where non-discrimination has its role in human rights.<sup>19</sup> Because the Swedish police are getting accused of discriminatory controls on the basis of perceived foreign appearance, the controls might violate these individuals' human rights in accordance with the statement of (2). Therefore, this thesis will examine the following two research questions:

- **How do the internal controls of foreigners in Sweden measure up to the Swedish Aliens act?**
- **Can the internal controls of foreigners in Sweden be considered discriminatory?**

For the purpose of answering the two questions, this thesis analysis will be divided into two main sections – a legal section and a conceptual section. The legal section allows me to examine if the internal controls of foreigners and the way that they are implemented in, can be considered to be in accordance with parts of the current Swedish legislation. I have chosen to examine the Aliens act because it is the legislation that the police refer to when they are implementing the controls. However, even if I find that the controls measure up to the legislation, individual X might still feel discriminated against when being subject to the internal controls of foreigners. Thus, problems such as distrust in the authorities, would still remain. Therefore, the conceptual section allows me to examine what the concept of discrimination implies and if the controls can be considered as discriminatory.

### **1.3 Method**

In this section, I will present the two approaches that I use to examine the internal controls of foreigners in Sweden.

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<sup>16</sup> Bruce, Anna (2010: 51) "Jämlikhet och icke-diskriminering" in Anna Lundberg (ed.) *Mänskliga rättigheter – juridiska perspektiv* (Liber: Malmö) pp.51-80; Hereinafter referred to as "Bruce 2010".

<sup>17</sup> Bruce 2010: 51

<sup>18</sup> Ibid

<sup>19</sup> Ibid

### 1.3.1 Legal approach

In the legal approach, I examine legislative texts such as the Swedish Aliens act as well as other sources of law. Therefore, legal method can be considered as an obvious choice of method to be used as a tool and a framework in the work process. More specifically, in the legal approach, I will use Bert Lehrberg's<sup>20</sup> *practical legal method* as a basis to guide my examination of the different sources of law. In his book, *Practical Legal Method [English translation]*,<sup>21</sup> Lehrberg describes a problem solving legal method of six steps, which is the method I will be using in the legal approach of this thesis. These six steps are described as follows:

1. Identify and structure the legal problem;
2. Find the correct legal rule;
3. Read and interpret legal sources;
4. Identify the prerequisite<sup>22</sup> of a legal rule;
5. Specify the meaning of the prerequisite, using the sources of law;
6. Independently assess, using balancing of purpose<sup>23</sup>

In this case, the legal problem mentioned in step one, can be identified as one of the research questions in this thesis.<sup>24</sup> In order to examine the legal research question presented in this paper, Lehrberg argues that one needs to find an applicable legal rule in the different sources of law. These sources are primarily law, legislative history,<sup>25</sup> case law,<sup>26</sup> precedent<sup>27</sup> and doctrine.<sup>28</sup> The interpretation procedure of the sources of law is ranked as follows:

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<sup>20</sup> Bert Lehrberg is a Doctor of Law with a focus on civil law. He has been a professor at Lunds University and has published a large number of books (Iusté AB 2014, Online: <http://bertlehrberg.se/>, Accessed: 2014-15-15)

<sup>21</sup> Praktisk Juridisk Metod

<sup>22</sup> The meaning of "prerequisite" will be explained below.

<sup>23</sup> Lehrberg, Bert (2010:29-37) *Praktisk Juridisk Metod*, 6th edition (Uppsala: Institutet för Bank- och Affärsjuridik AB) (Hereinafter referred to as "Lehrberg 2010"; With "balancing of purpose", Lehrberg means that one needs to assess if it is adequate that the provision is applied to a specific case (Lehrberg 2010: 36)

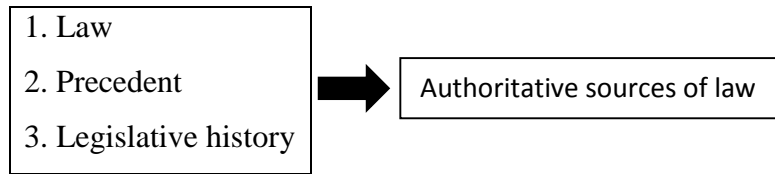
<sup>24</sup> Question 1: How do the internal controls of foreigners in Sweden measure up to the Swedish Aliens act.

<sup>25</sup> Legislative history is the documents that are part in the preparations for an enacted law (Sweden's Parliament "Lagstiftning och Förarbeten" from *Sweden's Parliament*, Online: <http://www.riksdagen.se/sv/Start/Bibliotek-startsida/Samlingar/Lagstiftning-och-forarbeten/>, 2014-05-03)

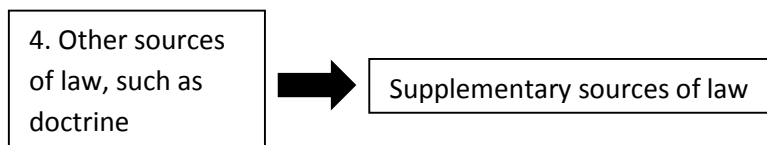
<sup>26</sup> Case law is earlier judgments of the higher courts and certain government agencies. If the case is settled in the highest court, the case is guiding the application of the law (Lagrummet "Rättspraxis" from *Lagrummet*, Online: <http://www.lagrummet.se/rattsinformation/rattspraxis/>, 2012-07-13)

<sup>27</sup> Related to case law, a case that is settled in the highest court, thereby guiding the application of the law, is a precedent (Lagrummet "Rättspraxis" from *Lagrummet*, Online: <http://www.lagrummet.se/rattsinformation/rattspraxis/>, 2012-07-13)

<sup>28</sup> Lehrberg 2010: 31; Doctrine is another word for legal literature (Lehrberg 2010: 31)



Authoritative sources of law are basically legal arguments that are bound by legal norms. Meaning, the courts legal application is more or less bound by legislation and the other sources of authoritative law.<sup>29</sup> A clear legal text has the highest dignity. This is followed by a judgment of the Supreme Court, thus creating a precedent, and finally, it is argued that preliminary work follows as the third highest dignity.<sup>30</sup>



Occasionally, other sources of law can gain importance as the basis of a court decision. They are not covered by the requirement of evidence and lack independent authority. Therefore, they are called supplementary sources of law.<sup>31</sup>

After one has examined the various sources of law, the prerequisites of the legal rule must be identified and specified. Prerequisites are the conditions that must be satisfied for the rule to be applicable.<sup>32</sup> Finally, in Lehrberg's sixth step, even though one has to rely on the legal sources found, one also has to independently assess if the provision is applicable or not.<sup>33</sup> In my case, this will be done in section 4 – *The legal approach*, when I examine the different sources of law.

### 1.3.2 Evolving conceptual approach

In combination with the legal approach, this thesis will also be based on an evolving conceptual approach. This means that, in the second part of the thesis, there will be a reasoning about discrimination and what the concept actually implies in relation to ethnic/racial profiling. One can think that such a discussion is pretty straightforward and that discrimination always is

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<sup>29</sup> Ibid: 87

<sup>30</sup> Ibid: 87-88

<sup>31</sup> Ibid: 88-89

<sup>32</sup> Ibid: 35

<sup>33</sup> Ibid: 36

morally wrong. However, there are a lot of questions that still are contested regarding discrimination. In fact, there is not even a universally accepted definition of discrimination.<sup>34</sup> By gradually applying the concept of discrimination to different illustrations and legal cases, I will develop and describe the concept and eventually apply it to the internal controls of foreigners in Sweden. Even though it is possible to examine the allegations of discriminatory behavior conducted by the Swedish police based on Swedish and/or European legislation, it creates a much wider knowledge and understanding by not only looking at the legal aspect, but also on the very concept that is the ground for the allegations. Therefore, I believe that this section will add greatly to my thesis.

## 1.4 Choice of materials

Because I don't have a comprehensive legal training, the legal section is based on comments from the book *The Aliens act, with comments* [English translation]<sup>35</sup>, written by Gerhard Wikrén and Håkan Sandesjö.<sup>36</sup> Their clarifications regarding the interpretation of the Swedish Aliens act have been very helpful. Wikrén is described by his publisher as the former head of the court of appeal and one of Sweden's leading experts on immigration law.<sup>37</sup> Sandesjö has, among other things, been the director general of the Aliens Appeals Board.<sup>38</sup> Both of them have years of experience in the legal affairs of immigration.

The conceptual approach is based on Andrew Altman's writing collected from the *Stanford Encyclopedia of Philosophy*. The encyclopedia organizes scholars from across the world in philosophy as well as related branches of science, to create and maintain an up-to-date database.<sup>39</sup> All entries and changes in the database are evaluated by an editorial board before they are made public.<sup>40</sup> Therefore, Altman's reasoning regarding the concept of discrimination is both examined and up-to-date, which is why I chose to base my conceptual approach on his

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<sup>34</sup> Vandenhole, Wouter (2005: 33) *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Oxford UK: Intersentia); Hereinafter referred to as "Vandenhole 2005".

<sup>35</sup> Utlänningslagen med kommentarer

<sup>36</sup> Wikrén, Gerhard and Sandesjö, Håkan (2013) *Utlänningslagen med kommentarer*, 9th edition (Stockholm: Norstedts Juridik AB); Hereinafter referred to as "Wikrén and Sandesjö 2013".

<sup>37</sup> Norstedts Juridik 2014(1), Online: [http://www.nj.se/personid/Gerhard-Wikr%C3%A9n%20\(A849F931458B10CFC12576550028FDAB\)](http://www.nj.se/personid/Gerhard-Wikr%C3%A9n%20(A849F931458B10CFC12576550028FDAB)), Accessed: 2014-05-15

<sup>38</sup> Norstedts Juridik 2014(2), Online: [http://www.nj.se/personid/H%C3%A5kan-Sandesj%C3%B6%20\(OCB52F65046C3AFDC1257540003C3557\)](http://www.nj.se/personid/H%C3%A5kan-Sandesj%C3%B6%20(OCB52F65046C3AFDC1257540003C3557)), Accessed: 2014-05-15

<sup>39</sup> Stanford Encyclopedia of Philosophy 2014(1), Online: <http://plato.stanford.edu/>, Accessed 2014-05-01

<sup>40</sup> Stanford Encyclopedia of Philosophy 2014(2), Online: <http://plato.stanford.edu/about.html>, Accessed: 2014-05-01

work. Andrew Altman is a University Professor at the department of philosophy at Georgia State University. His scholarly work is mainly in the areas of legal and political philosophy.<sup>41</sup> In combination with Altman's work, I also use court decisions, relevant examples, legal texts as well as other researchers' work in order to present the concept of discrimination.

### **1.5 Validity and reliability**

The goal with social research is to figure out how and why the social world operates. The aim of validity is reached when statements or conclusions concerning empirical reality are correct.<sup>42</sup> Causal validity refers to the assertion that A causes B. In this thesis, I argue that the accusations of discriminatory controls are caused by the Swedish Aliens act, A (the Aliens act) causes B (possible discriminatory controls). Reliability on the other hand, refers to a measurement procedure that creates consistent scores. Alternatively, the scores change only to reflect modification in the phenomenon that is measured.<sup>43</sup> Interobserver reliability is reached if observers use the same instrument to reach the same or similar conclusions.<sup>44</sup> By using the Stanford Encyclopedia of Philosophy as a basis to describe the concept of discrimination in combination with the 9 chap. 9 § of the Swedish Aliens act, I argue that my thesis create a consistent and repeatable conclusion to observers, if they were to try and repeat the same procedure. Thereby, achieving both validity and reliability.

### **1.6 Delimitations and limitations**

From a cosmopolitan view, because the Swedish Aliens act distinguishes between so called illegal immigrants and Swedish citizens, it is possible to argue that the Aliens act per se, is discriminatory against those immigrants. Although an interesting approach to examine, it is not the approach of this thesis. Instead, this thesis is concerned with the circumstances surrounding the accusations, that individuals with a perceived foreign appearance are getting focused by the Swedish police in connection to the internal controls of foreigners, and whether or not this outcome can be considered as discrimination or not.

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<sup>41</sup> Georgia State University 2014, Online: <http://www2.gsu.edu/~wwwphi/9560.html>, Accessed: 2014-05-15

<sup>42</sup> Chambliss, Daniel F. and Schutt, Russell K. (2013: 10) *Making Sense of the Social World – Methods of Investigation*, 4<sup>th</sup> edition (London: Sage Publications); Hereinafter referred to as "Chambliss and Schutt 2013".

<sup>43</sup> Chambliss and Schutt 2013: 77

<sup>44</sup> Ibid: 78

Although project REVA is a cooperation between the Swedish police, the Swedish PPS and the Swedish MB, my focus in this thesis is on the Swedish police and their work. The reason for that is that the accusations regarding ethnically discriminatory controls are directed towards the police.

In the legal section of this thesis, I only examine the 9 chap. 9 § of the Swedish Aliens act. The reason for this decision, is that it is this specific legislation that the Swedish police refer to when they are implementing the internal controls of foreigners. Therefore, the result of the analysis should be understood in the context of the Swedish Aliens act. If one were to include other legislations such as the Swedish Instrument of Government and the Swedish Police act, one might find different angles to address the issue from. However, it doesn't change the fact that there are issues with the Swedish Aliens act which might enable discriminatory controls, as will be demonstrated by this thesis.

I considered using Johan Galtung's theories of direct, structural and cultural violence as a framework to be applied to the controls. However, in relation to the two research questions of this thesis, I argue that the concepts of direct and indirect discrimination that are identified in this thesis, are more helpful when it comes to the examination of the two research questions. I also considered using conflict theory as a framework in the analysis. Conflict theory holds that law and mechanisms of its enforcements, such as the police, are used by dominant groups in society to minimize threats to their interests.<sup>45</sup> In my opinion, this is definitely an interesting theory to consider. However, I believe that other factors are behind the accusations of possible discriminatory internal controls of foreigners. Therefore, at this point in time, I don't believe that it is applicable to the Swedish government and the internal controls of foreigners. Then again, this statement might be questionable.

## **1.7 Disposition**

In section 1 *Introduction*, there is an introduction to the subject. Problematization, purpose and the research question is presented. Additionally, choice of method, materials, validity and

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<sup>45</sup> Petrocelli, Matthew, Piquero, Alex R. and Smith, Michael R. (2003: 1) "Conflict theory and racial profiling: An empirical analysis of police traffic stop data", *Journal of Criminal Justice*, (31), pp.1-11; Hereinafter referred to as "Petrocelli, Piquero and Smith 2003".

reliability are also presented. Finally, delimitations and limitations of the thesis as well as disposition, is stated.

Section 2 *Setting*, contains the setting to the internal controls of foreigners as well as the controls connection to project REVA.

In section 3 *Literature review*, a literature review regarding racial profiling is presented.

Section 4 *The legal approach*, consists of the legal approach, where there is an explanation of 9 chap. 9 § of the Swedish Aliens act as well as a discussion regarding the relevant paragraphs.

Section 5 *The conceptual approach*, contains a discussion of the concept of discrimination and why the practice of discrimination can be considered as wrong.

Section 6 *Analysis*, aims to find an answer to the two research questions by conducting an analysis which consists of a discussion and reasoning of the above stated sections.

Section 7 *Further research*, proposes further research to be done, based on the previous discussion in section 6.

Section 8 *Conclusion*, summarize and conclude the thesis. It also presents the answers to the two research questions.

Section 9 *Bibliography*, lists the different sources used in this thesis.

## 2. Setting

In this section, I present an explanation of the internal controls of foreigners in Sweden and sort out the actual link between project REVA and the internal control of foreigners. First, a brief introduction of the Schengen cooperation is presented.

### 2.1 The Schengen cooperation – EU’s passport union

One of EU’s fundamental principles is the free movement of people. The Schengen cooperation has been established to accelerate the collaboration around this principle.<sup>46</sup> The cooperation has resulted in, among other things that the person controls at the borders between the countries involved (internal borders) have been removed, and that people therefore can move freely within the Schengen area.<sup>47</sup> However, even if the passport controls have been abolished, in case of an identity check, the person who travels within the Schengen area must be able to demonstrate that s/he is allowed to reside in that given country. Furthermore, the regulations prohibit regularly conducted controls on persons that cross the internal borders but on special occasions, such as a suspicion that a wanted person will cross the border, there are exceptions to this regulation.<sup>48</sup>

At the same time as the person controls are removed at the internal borders, the controls against the borders of countries that not are a part of the cooperation (external borders) have been strengthened. In other words, when you travel from a country that is part of the Schengen cooperation, to a country that is not part of the cooperation, you pass the external borders. Thus, both land and sea borders, ports and airports can be considered as an external border.<sup>49</sup> When a given individual leaves or enters the Schengen area, that individual’s identity documents as well as traveling documents are controlled. Such controls might also include a search in Schengen’s Information System (SIS) which, among other things, is used between member states for information sharing regarding wanted persons, vehicles or persons that are registered on the

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<sup>46</sup> EU-upplysningen 2014 “Schengen och fri rörlighet för personer” Online: <http://www.eu-upplysningen.se/Om-EU/Vad-EU-gor/Schengen-och-fri-rorlighet-for-personer/>, 2014-01-17; Because this webpage has the Swedish parliament’s mandate to inform about EU, I consider it as a reliable source; Hereinafter referred to as “EU-upplysningen 2014”.

<sup>47</sup> EU-upplysningen 2014

<sup>48</sup> Ibid

<sup>49</sup> Ibid

blacklist.<sup>50</sup> The SIS controls are required for third-country nationals<sup>51</sup> and if they for instance, happen to be registered on the blacklist, they will be denied entry to the Schengen area. The Schengen cooperation consists of 22 EU countries, together with Iceland, Liechtenstein, Norway and Switzerland which are also a part of the cooperation through special agreements. Examples of countries that are not fully included in the cooperation are Great Britain and Croatia.<sup>52</sup> Since the year of 2001, Sweden is a full member of the Schengen cooperation.

## **2.2 Swedish police and the internal controls of foreigners**

The Swedish border police are divided into different counties with similar goals and working practices. The border police in Stockholm are divided into a border control unit and an investigative unit. The border control unit deals with passport controls and transnational crimes such as human trafficking. The investigative unit is concerned with investigations, reconnaissance and the inner controls in Sweden. They investigate any violations of the Swedish Aliens act and are responsible for executional matters of the MB, the police authority and any given court's decision of expulsion and dismissal decisions.<sup>53</sup> However, according to the National Police Board's (NPB) statute, the internal controls of foreigners are considered as a duty that *all* police officers in Sweden, not just the border police, should be able to implement and the controls are conducted throughout the country.<sup>54</sup>

Since the year of 2010, a national developmental project (REVA), has gradually been introduced to the Swedish police and other concerned authorities.<sup>55</sup> In correlation with the introduction of this project, a new approach to the administrative work was presented - the Lean-method. For the Swedish border police, the Lean-method, is about creating a standardized approach to the work process, streamline the planning and clarify the procedures in the handling of the executional matters.<sup>56</sup> Thus notably, the method is primarily supposed to change/improve the administrative aspects of the Swedish police work and *not* to involve changes in the external

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<sup>50</sup> Ibid

<sup>51</sup> In this case, third-country nationals refer to a person who is a citizen of a country outside of the EU.

<sup>52</sup> EU-upplysningen 2014

<sup>53</sup> The Swedish police(2) "Gränspolisavdelningen" from *the Swedish police*, Online: <http://polisen.se/Om-polisen/lan/St/op/Polisen-i-Stockholms-lan/Organisation/Gransen/>, 2014-04-15

<sup>54</sup> FAP 273-1, 4 § Allmänna råd

<sup>55</sup> The project is called REVA and is introduced in the section below.

<sup>56</sup> The Swedish Migration Board(1) "Projekt REVA" from *Swedish Migration Board*, Online: <http://www.migrationsverket.se/info/7176.html>, 2014-04-29; Hereinafter referred to as "The Swedish Migration Board(1)".

physical work with the internal controls of foreigners.<sup>57</sup> Thus, this is contradictory to the claims made by the Swedish media, linking REVA to the external work with the internal controls of foreigners. A discussion about the actual connection between REVA and the external work with the internal controls of foreigners is presented in the section 2.4 - *Internal controls of foreigners and REVA*.

### **2.3 Legally Secure and Efficient Enforcement Work (REVA)**

Project REVA is a national developmental cooperation between the Swedish MB, the Swedish NPB and the Swedish PPS. In the year of 2009, the three authorities were regulated by the Swedish government to conduct a review of the existing work on the execution of expulsion and dismissal decisions. Based on the review, the relevant authorities were directed to take necessary measures to increase the number of executorial matters.<sup>58</sup> Consequently, a preliminary study, partly financed by the European return fund, which examined the executorial process before departure, was implemented in the spring of 2010. Case priority, lead time, the working process standardization and consistency across the country were some of the factors that were identified to affect the executorial process in all three authorities.<sup>59</sup> Between autumn 2010 and spring 2011, a pilot project that was based on the review from the preliminary study was initiated. The police in Skåne<sup>60</sup> and the MB's administrative judicial procedure units in Malmö were chosen to try out the Lean-method, mentioned in the previous section, in order to improve the work regarding the executorial matters.<sup>61</sup> Using the Lean-method, the objective was to develop personnel practices when it comes to administration, documentation, flow and follow-ups.<sup>62</sup>

The third part of project Reva was introduced January 1<sup>st</sup> in the year of 2012 and will continue to June 30<sup>th</sup>, 2014. The purpose with the third part is to introduce and implement the Lean-method in the permanent work process to different units in the NPB, the MB and the PPS. In

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<sup>57</sup> The Swedish Migration Board(1)

<sup>58</sup> Regeringsbeslut I:16, 2008-12-18, Regleringsbrev för budgetåret 2009 avseende Rikspolisstyrelsen och övriga myndigheter inom polisorganisationen; Hereinafter referred to as "Regeringsbeslut I:16".

<sup>59</sup> The Swedish Migration Board(2) "Projekt medfinansierat av Europeiska återvändandefonden 2012" from *Swedish Migration Board*, Online: [http://www.migrationsverket.se/download/18.5e83388f141c129ba6312ab8/1381926423879/projekt\\_rf\\_2012.pdf](http://www.migrationsverket.se/download/18.5e83388f141c129ba6312ab8/1381926423879/projekt_rf_2012.pdf), 2012-05-24; Hereinafter referred to as "The Swedish Migration Office(2)".

<sup>60</sup> A county in the southernmost part of Sweden

<sup>61</sup> The Swedish Migration Board(2)

<sup>62</sup> The Swedish Migration Board(1)

addition, the purpose is also to develop and streamline the work process throughout the organization, in accordance with the review of the previous pilot study.<sup>63</sup>

## **2.4 Internal controls of foreigners and REVA**

In the last couple of years, Swedish media has often claimed that there is a link between the internal controls of foreigners and project REVA.<sup>64</sup> However, this claim is rejected by, for instance, the head of the border police in Skåne and the MB.<sup>65</sup> Because this thesis is based on the examination of the internal controls of foreigners in Sweden, I believe that it is important to sort out all the uncertainties that might exist surrounding the controls. Therefore, in this section, I will discuss the possible correlation between the controls and project REVA in order to clarify.

In the Swedish governmental letter of appropriation for the financial year of 2009 the NPB, the MB and the PPS are directed to take necessary measures to increase the number of executional matters.<sup>66</sup> Thus, the focus is on the outcome and not on the method to achieve that outcome. The result based reasoning continues in the letters of appropriation for the following years. For example, in the letter of appropriation for the financial year of 2014, the NPB, the MB and the PPS are regulated to cooperate and strengthen their efforts to significantly increase the executed decisions relating to persons that are enrolled in the MB's receiving unit.<sup>67</sup> However, it is not mentioned specifically how this regulation is going to be implemented. Again, the request for increased executed decisions appears more important than the method to get there. Furthermore, in some of the yearly released operational plans for the Swedish police departments, there are specific numbers of how many internal controls of foreigners that are going to be carried out every year. For instance, the police in the southern parts of Sweden shall implement 4.500 internal controls of foreigners in the year of 2014.<sup>68</sup> Different from the appropriation letters however, the way to achieve this objective is stated. Interesting to note though, the number of executed internal controls of foreigners is monitored every month, which again places the focus

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<sup>63</sup> The Swedish Migration Board(2)

<sup>64</sup> See for example section 1 - *Introduction*

<sup>65</sup> Landelius, Anna "Fler avvísningar med nytt polisprojekt" from *Sveriges Radio*, Online: <http://sverigesradio.se/sida/artikel.aspx?programid=83&artikel=5468255>, 2013-03-10 (Hereinafter referred to as "Landelius 2013"); The Swedish Migration Board(1)

<sup>66</sup> Regeringsbeslut I:16

<sup>67</sup> Regeringsbeslut I:8, 2014-02-18, Regleringsbrev för budgetåret 2014 avseende Rikspolisstyrelsen och övriga myndigheter inom polisorganisationen; Hereinafter referred to as "Regeringsbeslut I:8".

<sup>68</sup> Verksamhetsplan för polismyndigheten i Skåne 2014: 13; Hereinafter referred to as "Verksamhetsplan 2014"

on the quantity of the controls.<sup>69</sup> In Aftonbladet's<sup>70</sup> investigation of the Swedish police, it is evident that the focus on the number of executional matters is affecting the means of conducting internal controls of foreigners. In the autumn of 2011, the border police' was statistically behind in the number of implemented internal controls of foreigners. A request to adjust these numbers was sent by one of the managers to the employees. In the request, made by email, the manager urged the employees to "squeeze" in 200 more controls in order to catch up with the statistics. According to the manager, the controls had already been done but the registration of them had not. Because the controls weren't allowed to be registered all together, s/he suggested to the employees that they register a couple of them in connection with custom work until they had reached 200 controls. According to the employees, the 200 controls that the manager asked them to register, had not even been implemented.<sup>71</sup>

In accordance with NPB's statute 6 §, an internal control of foreigner shall be documented regarding the basis for the control, time, location, the person/s that are being controlled and the person that carried out the control.<sup>72</sup> Thus, the manager(s) has either, not acted in accordance with applicable rules regarding registration of the controls and then requested the employees to improperly adjust the registrations.<sup>73</sup> Alternatively, the controls were never implemented and the employees were urged to lie. Regardless of which of the two is correct, in this case, the focus on the quantity of controls and the attempts to keep up with the statistics has demonstrably affected the external work with the internal controls of foreigners. Therefore, in this case, it is possible to distinguish a connection between the governmental request to significantly increase the number of executed decisions<sup>74</sup> and the external work with the internal controls of foreigners.

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<sup>69</sup> Verksamhetsplan 2014: 13

<sup>70</sup> One of Sweden's biggest newspapers; Because it is a newspaper, one should be cautious with the statements that are made in the investigation. Since the reporters present strong evidence though, there are indications that the investigation is correct and truthful.

<sup>71</sup> Röstlund, Lisa and Ekelund, Martin "Dokumenten avslöjar: Så uppmanas polisen fuska" in *Aftonbladet*, Online: <http://bloggar.aftonbladet.se/polisgranskning/2012/03/dokumenten- visar-%E2%80%93-sa-uppmanas-polisen-fuska/>, 2012-03-22

<sup>72</sup> FAP 273-1, 6 §

<sup>73</sup> Being careless with the documentation regarding the internal controls of foreigners is by no means unusual within the police force, according to an investigative report that was released in February this year. See: Leander, Peter 2014: 14-15 "Skyldig tills Motsats Bevisats" from *Arena*, Online: <http://www.arenaide.se/wp-content/blogs.dir/4/files/2014/02/Rapport-%E2%80%93-Skyldig-tills-motsatsen-bevisats-webb2.pdf>, 2014-02-20

<sup>74</sup> Regeringsbeslut I:8

Kristina Hallander-Spångberg is head of the border police in Skåne. In the year of 2013, she admitted to the Swedish Radio (SR) that REVA might have had effects that affect the internal controls of foreigners. She claims that the review of the administrative work caused them to evaluate other operations, such as the internal controls of foreigners, and evaluate how they are being implemented and where they are being implemented. However, she considers the effects to be a consequence of REVA and not REVA itself.<sup>75</sup> She doesn't state what these effects might be, but as the case with the border police demonstrates, one can argue that the result-oriented regulations are one of those effects.

To clarify, the case of the border control's attempt to catch up with the statistics, as stated above, illustrates how it is possible to display a connection between project REVA's objective to create more effective administrative processes in order to increase the number of executional matters, and the possibility that the internal controls of foreigners are affected. By trying to achieve the set objectives in the results-oriented regulations, the head of the border police tried to press the employees to conduct unregulated internal controls of foreigners. However, important to note, in the media debate regarding REVA and the internal controls of foreigners, there seems to be a misunderstanding regarding the purpose of project REVA. REVA is supposed to concern the administrative aspects of the work surrounding the executional matters and, as Hallander-Spångberg states above, it seems to be the effects of project REVA that affects the internal controls of foreigners, not REVA itself. While most of the Swedish media claimed that there exists a direct link between project REVA and the external work with the internal controls of foreigners,<sup>76</sup> this does not seem to be the case. However, one can argue that, if the controls aren't conducted in a non-discriminatory fashion, it doesn't matter if it is the effects of REVA or if it is REVA itself that affects the controls.

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<sup>75</sup> Landelius 2013

<sup>76</sup> Aftonbladet 2013

### 3. Literature review – racial profiling by the police

Because REVA is a recent and ongoing project, there doesn't exist a lot of research regarding its intended work process and outcome. However, there is an emerging research on discriminatory behavior by the police in relation to race and racial profiling.<sup>77</sup> The concept of *racial profiling*, which is most often used in the American and the British debate, is somewhat overlapping and related to *ethnic profiling*, which is the concept mostly used in the Swedish debate.<sup>78</sup> Both of the concepts are value laden and problematic, as they divide people into groups based on external attributes. However, to make it easier for the reader, I will still use the concepts to describe the existing research in this thesis. Despite the fact that the research is mainly American, I believe that a review of the research regarding discriminatory behavior by the police, will add greatly to my thesis because much of the knowledge that has been created by the research can be related to the Swedish internal controls of foreigners as well as police and human behavior in general. This will help me to problematize the current situation surrounding the controls. Therefore, the research regarding discriminatory behavior by the police is presented below.

In a journal article, Robin S. Engel,<sup>79</sup> identifies and summarizes four different academic perspectives regarding racial profiling research – *legalistic*, *criminological*, *economic and normative*.<sup>80</sup>

#### 3.1 The legalistic perspective

The first perspective, identified by Engel, is the *legalistic perspective*. Followers of the legalistic perspective are primarily focused on procedural equity in police-citizen encounters.<sup>81</sup> They believe that searches conducted by the police should be equally distributed across racial/ethnic groups. Possible differences in the search rates across these groups are for that reason considered as discrimination. An underlying assumption is that there doesn't exist a

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<sup>77</sup> Racial profiling can be explained as the claim that police officers use an individual's race/ethnicity to determine when s/he is to intervene in a given situation (Engel 2008: 3).

<sup>78</sup> Hydén 2006: 143

<sup>79</sup> Robin S. Engel is, among other things, an Associate Professor of Criminal Justice at the University of Cincinnati and Director of the University of Cincinnati Policing Institute (Engel 2008:1)

<sup>80</sup> Engel 2008

<sup>81</sup> E.g. Rudovsky, David (2001) "Law enforcement by stereotypes and serendipity: Racial profiling and stops and searches without cause", *University of Pennsylvania Journal of Constitutional Law*, (3:1), pp. 296-366; Weatherspoon, Floyd D. (2004) "Racial profiling of African-American males: Stopped, searched, and stripped of constitutional protection", *John Marshall Law Review*, (38), pp.439-468.

differential criminal behavior across the ethnic/racial groups. Consequently, according to the legalistic followers, one can examine ethnic and racial disparities in police stops by conducting statistical analyses on search and stop rates.<sup>82</sup> Initially, the legalistic perspective was the dominant approach to racial profiling research but Engel claims that it now has lost some of its legitimacy due to inappropriate conclusions.<sup>83</sup> This is supported by several American court decisions which ruled that stop and/or search rates are insufficient for the determination of discriminatory purpose and/or effect.<sup>84</sup>

### 3.2 The criminological perspective

The second academic perspective that Engel identifies is called the *criminological perspective*. Followers of the criminological perspective focus primarily on the understanding of police decision-making, independent of legal involvement.<sup>85</sup> They believe that one needs to consider more than race/ethnicity in order to get a better understanding of why police officers decide to stop and search a given citizen.<sup>86</sup> Vehicle type, geographic area, time of travel and driving behavior are all examples of factors that can affect the risk of being stopped by the police. One of the more noticeable differences from the legalistic perspective is the belief that there exists different criminal behavior across different ethnic/racial groups. According to the followers of the criminological perspective, this belief is considered to be a legitimate and non-discriminatory reason for differences in the rates of police stops across different ethnic/racial groups.<sup>87</sup> The problem with this type of research is the inability to measure all of the variables that might influence the police in their decision-making. Robin S. Engel even argues that research based on the criminological perspective create incomplete and incorrect results due to the lack of knowledge of all the factors that may influence the decision-making in police stops.<sup>88</sup> This statement is somewhat supported by research from the field of social psychology. Social psychologists suggest that it is not always possible to assess if a given situation, such as a police

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<sup>82</sup> Engel 2008: 7

<sup>83</sup> Ibid: 8; More recent research has shown that there might be other factors than just race that affect the decision to stop an individual, thereof the claim of "inappropriate conclusions".

<sup>84</sup> E.g. Anderson v. Cornejo, 2004; US v. Alcaraz-Arellano, 2004

<sup>85</sup> E.g. Alpert, Geoffrey P, MacDonald, John M. and Dunham Roger G. (2005) "Police suspicion and discretionary decision making during citizen stops", *Criminology*, (43:2), pp.407-434; Rojek, Jeff, Rosenfeld, Richard and Decker, Scott (2012) "Policing race: the racial stratifications of searches in police traffic stops", *Criminology*, (50:4), pp.993-1024 (Hereinafter referred to as "Rojek, Rosenfeld and Decker 2012")

<sup>86</sup> Engel 2008: 9

<sup>87</sup> Ibid: 6

<sup>88</sup> Ibid: 10-11

stop, is based on discriminatory behavior.<sup>89</sup> Even though a police officer wants to act in a non-discriminate manner, that police officer might still act discriminatory on the grounds of implicit bias. This means that a given police officer, with non-racist intentions, might act in a discriminatory manner without the ability to control or even identify that behavior.<sup>90</sup> This claim, made by social psychologists, regarding human behavior, highlights the difficulties of measuring human decision-making and thereby also police officers decision-making.

### 3.3 The economic perspective

The third perspective that Engel identifies is called the *economic perspective*. Scholars that support the economic perspective focus on the equality of outcomes of the police controls, rather than the equality of the controls per se.<sup>91</sup> They argue that one can measure if a police officer's decision to stop and search a person was successful based on the possible seizure of contraband.<sup>92</sup> If one racial/ethnic group was involved more in criminal activity than the other, according to followers of the economic perspective, the police should focus on members of that group in order to maximize police resources and increase the number of confiscated contraband. Thus, the difference in search rates across ethnic/racial groups is considered as legitimate if the seizure of contraband is statistically equivalent.<sup>93</sup> However, one can argue that there is at least one problem with this kind of approach. The economic approach assumes that every individual police officer conducts the citizen searches in order to maximize their search success rates. This assumption seems to be challenged by current research.<sup>94</sup> Rather, police officers tend to differ in their desire to conduct searches based on the type and quantity of contraband they are seeking to discover. While some officers search every single vehicle or person that they deem

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<sup>89</sup> E.g. Krieger, Linda H and Fiske, Susan T (2006) "Behavioral realism in employment discrimination law: Implicit bias and disparate treatment", *California Law Review*, (9), pp. 997-1062; Rooth, Dan-Olof (2010) "Automatic associations and discrimination in hiring: Real world evidence", *Labour Economics*, (17), pp.523-534; Nier, Jason A, Gaertner, Samuel L, Nier Charles L and Dovidio, John F. (2012) "Can racial profiling be avoided under Arizona immigration law? Lessons learned from subtle bias research and anti-discrimination law", *Analyses of Social Issues and Public Policy*, (12:1), pp.5-20 (Hereinafter referred to as J. Nier, Gaertner, C. Nier and Dovidio 2012)

<sup>90</sup> J. Nier, Gaertner, C. Nier & Dovidio 2012: 8

<sup>91</sup> E.g Persico, Nicola & Castleman, David A. (2005) "Detecting Bias: Using Statistical Evidence to Establish Intentional Discrimination in Racial Profiling Cases", in *University of Chicago's Legal Forum* 217, Online: <http://nicolapersico.com/files/Persico%20Proof.pdf> (Accessed: 2014-05-01); Persico, Nicola and Todd, Petra (2006) "Generalising the hit rates test for racial bias in law enforcement, with an application to vehicle searches in Wichita", *The Economic Journal*, (116:515), pp.F351-F367

<sup>92</sup> Engel 2008: 14

<sup>93</sup> Ibid: 14

<sup>94</sup> Johnson, Richard and Engel, Robin S (2006) "Toward a better understanding of racial and ethnic disparities in search and seizure rates", *Journal of Criminal Justice*, (34), pp.605-617

suspicious, others only search those that they think will lead to a big find.<sup>95</sup> If this is the case, there is a risk that research based on the economic approach leads to wrong conclusions due to incorrect assumptions of police behavior.

### **3.4 The normative perspective**

The fourth and last academic approach to racial profiling research is called the *normative perspective*. Similar to the criminological perspective, scholars dedicated to the normative perspective argue that there are differences in criminality across different racial/ethnic groups. However, this is still not considered to be a legitimate reason for differences in the stop and search rates across these groups. Instead, followers of the normative perspective argue that police controls should be equally distributed between innocent people regardless of race/ethnicity.<sup>96</sup> Meaning, if one would imagine that white people are more likely than black people to be involved in criminal activity, the stop and search controls conducted by the police should still be equally distributed across innocent black people and innocent white people. Followers of the normative perspective argue that different types of analyses are important in order to reach the correct conclusions of the research concerning discriminatory behavior by the police. Just as the economists, the normative perspective suggests comparisons of search success rates as an analytical technique.<sup>97</sup> The difference between the two perspectives is the interpretation of the findings. Scholars supporting the normative perspective suggest that the burdens of law enforcement should be equally distributed across society no matter what racial/ethnic group that is most involved in criminal activity. A differentiation in the burden of law enforcement across different groups of people is seen as a form of inequity by the followers of the normative perspective, and should not be tolerated.<sup>98</sup> Economists however, would suggest that statistical differentiations regarding the searches, which are based on different criminal behavior across racial/ethnic groups, are legitimate.<sup>99</sup> The normative perspective claims that the research on whether or not police officers intervene in a given situation based on race/ethnicity

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<sup>95</sup> Engel 2008: 25

<sup>96</sup> Harcourt, Bernard E. (2004) "Rethinking racial profiling: A critique of the economics, civil liberties, and constitutional literature, and of criminal profiling more generally, *University of Chicago Law Review*, (71), pp. 1275-1381; Tomaskovic-Devey, Donald, Mason, Marcinda and Zingraff, Matthew (2004) "Looking for the driving while black phenomena: Conceptualizing racial bias processes and their associated distributions, *Police Quarterly*, (7:1), pp.3-29 (Hereinafter referred to as Tomaskovic-Devey, Mason, Zingraff 2004)

<sup>97</sup> Engel 2008: 13

<sup>98</sup> Ibid

<sup>99</sup> Ibid

is an incomplete analysis of racial equality.<sup>100</sup> Even though race/ethnicity doesn't affect police officers in their decision to stop a given individual, discrimination might still occur. Because of the fact that more crimes generally take place in minority neighborhoods, people who live in these areas are subject to high levels of suspicion and high levels of stops and searches.<sup>101</sup> Furthermore, the police targeting of minority neighborhoods (more police presence in these areas), vehicle types (older vehicles and/or registration violation) and citizen characteristics (specific types of clothes) can somewhat be indirectly associated with race/ethnicity.<sup>102</sup> So, even though a given police officer acts in a color-blind manner, equal risk of being searched, regardless of ethnicity/race, cannot be guaranteed. This outcome is considered to be discriminatory and is not tolerated by the followers of the normative perspective. Again, the problem with this is the inability to measure police decision-making in a correct manner.

### 3.5 Additional perspective

While the four academic approaches mentioned above focus on the police and their work, recently, others suggest that researchers need to look at discrimination in all of society in order to understand the police-citizen relation.<sup>103</sup> As an example, Juha Kääriäinen and Jenni Niemi suggest that experiences of personal harassment and discrimination from other events than police stops (e.g. housing and schools) affect the exposed individuals perception of their police encounters.<sup>104</sup> This means that the exposed individuals might experience their police encounter as discriminatory, while this might actually not always be the case. In other words, if an individual has had a bad experience with social institutions in general, it is more likely that this individual perceives him/herself as ill-treated by the police. This suggests that researchers need to extend beyond the four academic approaches identified by Engel and also focus on discrimination in all of society in order to understand the police-citizen relation.

To summarize and conclude the literature review, the early research regarding discriminatory behavior by the police consisted primarily of statistical studies on police stops in relation to

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<sup>100</sup> Ibid: 12

<sup>101</sup> Tomaskovic-Devey, Mason and Zingraff 2004: 19

<sup>102</sup> Engel 2008: 12

<sup>103</sup> Brunson, Rod K. (2007) "Police Don't Like Black People": African-American Young Men's Accumulated Police Experiences", in *Criminology & Public Policy*, (6:1), pp.71-102; Warren 2011; Kääriäinen, Juha & Niemi, Jenni (2014) "Distrust of the police in a Nordic Welfare State: Victimization, Discrimination, and Trust in the Police by Russian and Somali Minorities in Helsinki", in *Journal of Ethnicity in Criminal Justice* (12), pp.4-24 (Hereinafter referred to as "Kääriäinen and Niemi 2014").

<sup>104</sup> Kääriäinen and Niemi 2014: 17

citizen race. Even though this type of research still exists, recently, researchers have begun to include psychological factors as well as discriminatory factors from all of society in their research, in order to try and get more accurate results. Something that most scholars seem to agree upon, regardless of what perspective they focus on, is the claim that there needs to be more research in the field of discrimination by the police in order to arrive to the more accurate conclusions.<sup>105</sup> Because of the fact that there exist so many, known and possible unknown factors that might affect police behavior and decision-making, the researchers are reluctant to draw any big conclusions of their research.

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<sup>105</sup> E.g. Engel 2008: 29; Rojek, Rosenfeld & Decker 2012: 1016

## 4. The legal approach

In this section I have used the practical legal method, stated by Bert Lehrberg, to examine the legislation concerning the internal controls of foreigners. In accordance with the six steps of the method, I have (1) identified and structured the legal problem, illustrated by research question 1; (2) found the correct legal rule, as illustrated by section 4.1 - *The Aliens Act*; (3) read and interpreted the legal sources used; (4-5) identified and specified the prerequisites of the legal rule by using the sources of law, as illustrated by the section 4.1.2 - *Paragraph 3 of the Swedish Aliens act*; (6) independently assessed if the provision is applicable, as illustrated by section 4.2 – *Discussion of the paragraphs*.

### 4.1 The Swedish Aliens act

The current Swedish Aliens act (2005:716) was adopted March 31<sup>st</sup> 2006. It replaced the Aliens act from 1989 (1989:529). The act contains, among other things, regulations regarding residence permit, expulsion and citizenship. It was preceded by over ten years of deliberations by the MB and the Aliens Appeal Board.<sup>106</sup> This section focus on 9 chap. 9 § of the Alien act which contains regulations regarding controls of foreigners that have entered Sweden. More specifically, this section focus on paragraph 1 regarding internal controls of foreigners and paragraph 3 which regulates the circumstances of a control as well as the reasons for a control to be implemented. 9 chap. 9 § is the article that the Swedish police refer to when they implement an internal control of foreigners.<sup>107</sup> Thereby, in order to analyze the work with the internal controls of foreigners in Sweden, I would argue that I am examining the correct legal rule in accordance with step 2 of the legal approach of this thesis.

#### 4.1.1 9 chap. 9 § 1 paragraph of the Swedish Aliens act

Internal controls of foreigners in Sweden are intended to do two things; (1) aim to ensure that foreigners not reside in Sweden without the necessary permits and (2) search for foreigners that are to leave the country, following the decision of expulsion.<sup>108</sup> The first paragraph's regulations of 9 chap. 9 § are taken from the 1980 and 1989 Aliens Act.<sup>109</sup> It reads;

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<sup>106</sup> Wikrén and Sandesjö 2013: 29

<sup>107</sup> FAP 273-1, 1 §

<sup>108</sup> Gov. bill. 1999/2000:64, pp.67; According to FAP 273-1, 1 § Allmänna råd, a foreigner is considered to be a person who is not a Swedish citizen

<sup>109</sup> Wikrén and Sandesjö 2013: 468

*It is the duty of an alien staying in Sweden, when requested to do so by a police officer, to present 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 to provide information about his or her stay in this country. If the alien does not do so he or she may be collected by the police authority. If, in view of an alien's personal circumstances 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.<sup>110</sup>*

The current wording of 9:9 Aliens act came into force 1 July 2011 by SFS 2011:709.<sup>111</sup> It only contains minor linguistic changes from the previous versions.

Despite the regulations, the motives to the first section states that foreigners are not required to carry passports during their stay in Sweden.<sup>112</sup> As a part of the internal controls of foreigners, the first section prescribes that a foreigner, after being notified, is obliged to report to the MB or the police to submit information on their stay in Sweden. If the foreigner doesn't, s/he might be retrieved by the police.

The foreigner may be retrieved by the police without prior notice if s/he, because of personal circumstances or any other reason may be assumed to not follow the notification. In the motives, one can read that a foreigner may be retrieved, without a summoning, when it can be assumed that s/he won't comply with the notification or when the notification instead makes the foreigner stay away.<sup>113</sup> An assessment may be based on the foreigner's personal circumstance, such as how s/he has established her/himself here, but also on other circumstances.<sup>114</sup> However, this provision is intended to be applied strictly. According to the legislative history, it's under no circumstances allowed to, in a routine fashion, retrieve foreigners without previous notification. It is only allowed when it is thought to be necessary in accordance with the provision.<sup>115</sup>

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<sup>110</sup> 9 chap. 9 § 1 para. Aliens act (2005:716); The translation is collected at the Swedish governments website, Online: <http://www.government.se/content/1/c6/06/61/22/bfb61014.pdf>, 2005-09-29

<sup>111</sup> SFS 2011:709 Act amending the aliens act (2005:716)

<sup>112</sup> Gov. bill. 1988/89:86 pp. 172

<sup>113</sup> Gov. bill. 1981/82:146 pp. 66

<sup>114</sup> Ibid

<sup>115</sup> Ibid

#### 4.1.2 9 chap. 9 § 3 paragraph of the Swedish Aliens act

In accordance with step 4 and 5 of the legal approach of this paper, paragraph 3 contains the prerequisites for the legal rule to be applicable. Below I will present the meaning of the prerequisites further.

The third paragraph of 9 chap. 9 § reads as follows;

*Controls under the first and second paragraphs may only be undertaken if there is good reason to assume that the alien lacks the right to remain in this country or there is otherwise special cause for controls.<sup>116</sup>*

As noted, it is not possible to understand when and how the controls are to be implemented by looking exclusively at the legislative text. In order to understand the meaning of the legislation, one has to turn to the NPB statute. In the statute, there are general advices on the understanding of the prerequisites. According to the statute, the prerequisite “good reason to assume” should be understood as follows; an internal control of foreigners shall be conducted only after an overall assessment of the present objective circumstances based on the individual officer’s observations, reconnaissance information, intelligence spreads, tips or other reliable information.<sup>117</sup> Furthermore, the foreigner’s behavior and interaction may be a factor which in some cases can provide reasons to believe that s/he is not entitled to reside in the country.<sup>118</sup> Additionally, criminal intelligence or other information can form the basis for police to compile informed profiles. These profiles may, alone or together with other factors, justify the control of a foreigner, provided that they give a good reason to assume that the foreigner has no right to reside in the country.<sup>119</sup>

When it comes to the prerequisite “otherwise special cause for controls”, the statute claims that the prerequisite should be able to be applied when there is reason to verify the identity of a foreigner, for example at an arrest or a criminal investigation.<sup>120</sup> Furthermore, the statute claims that an internal control of foreigners can be implemented in connection with vehicle and driver controls, when the identity of the driver and his/her right to drive the vehicle are checked. In addition, according to the statute, if there are passengers in the vehicle, they should also be

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<sup>116</sup> 9 chap. 9 § 3 para. Aliens act (2005:716), The translation is collected at the Swedish governments website, Online: <http://www.government.se/content/1/c6/06/61/22/bfb61014.pdf>, 2005-09-29

<sup>117</sup> FAP 273-1, 5 § Allmänna råd

<sup>118</sup> Ibid

<sup>119</sup> Ibid

<sup>120</sup> Ibid

subject to an internal control of foreigners, if there are objective circumstances that provide good reasons for a control.<sup>121</sup>

#### 4.1.3 Further regulations

In the year of 1980 and 1981, the JO of that time, Anders Wigelius, conducted an examination that dealt with the conditions and the procedures of the internal controls of foreigners.<sup>122</sup> In connection to the examination, Wigelius made a statement regarding the implementation of the controls. The statement is cited by Wikrén and Sandesjö in *The Aliens act with comments*, and NPB's statute contains both similar and identical comments regarding how the police officers are to act when they are implementing the controls. Therefore, Wigelius statement may play an important role in how 9 chap. 9 § 3 para. of the Aliens act is to be applied. The statement is quite extensive, I will therefore get straight to the point of how Wigelius claims that the police should act when they are implementing an internal control of foreigners. He reasons:

*[...]Thus, the police officer shall behave in a way that infuses confidence and esteem. He shall act politely, considerately and with firmness [...] Furthermore, he may not, to enforce official measure, use stricter means than the conditions require. [...] I mean that it is of utmost importance that the police, at foreigner controls, seek to, in a calm and respectful manner, clearly explain what the issue is about. This is especially important if it can be expected to arise misunderstandings of a linguistic nature or for some other reason, which for instance have anything to do with the foreigner's experiences of contact with police in countries with different political climate. [English translation]<sup>123</sup>*

This reasoning is comparable to the directives of NPB's statute where the police officers are requested to, among other things, behave calm, polite, considerate and proportionate.<sup>124</sup> Noteworthy, Anders Wigelius as well as the preliminary works and NPB's statute, emphasize that an internal control of foreigners may not be implemented exclusively on the basis of language, appearance or name.<sup>125</sup>

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<sup>121</sup> Ibid

<sup>122</sup> Dnr. 762-1980 and 1377-1981, See: Wikrén and Sandesjö 2013: 470

<sup>123</sup> Wikrén and Sandesjö 2013: 470; "Således ska polisman uppträda på ett sätt som inger förtroende och aktning. Han ska uppträda hövligt, hänsynsfullt och med fasthet [...] Vidare får han för att verkställa tjänsteåtgärd ej använda strängare medel än förhållandena kräver [...] Jag menar, att det är av utomordentlig vikt att polisen vid utlänningskontroll eftersträvar att på ett lugnt och hänsynsfullt sätt tydligt förklara vad saken gäller. Detta är särskilt viktigt om det kan befaras uppstå missförstånd av språklig art eller av andra skäl, som t.ex. kan ha att göra med utlännings erfarenheter av kontakt med polis i länder med annat politiskt klimat."

<sup>124</sup> FAP 273-1, 2 § Allmänna råd

<sup>125</sup> Wikrén and Sandesjö 2013: 470-471; E.g. Gov. bill. 1999/2000:64; FAP 273-1, 5 § Allmänna råd

The observant reader has noticed that 9 chap. 9 § of the Alien act only refer to foreigners. Obviously, in most cases, police officers cannot assess in advance whether or not a given individual is from Sweden or if s/he is from somewhere else. Therefore, according to Wikrén and Sandesjö, the regulation is applicable to every person that the police authority and/or the individual police officer assume to be a foreigner.<sup>126</sup> This is also evident if one again is to look at the intentions with the internal controls of foreigners; (1) aim to ensure that foreigners not reside in Sweden without the necessary permits and (2) search for foreigners that are to leave the country, following the decision of expulsion.

#### **4.2 Discussion of the two paragraphs**

Based on the above stated explanation of article 9 of the Swedish Aliens act, an internal control of foreigners may be undertaken based on the individual officer's observations, reconnaissance information, intelligence spreads, tips, other reliable information or when there is a reason to verify an identity. It is possible to argue that this provision increases the risk for discriminatory controls. As the literature review in this thesis has illustrated, research shows that it is difficult, if not impossible, to determine which factors a police officer includes in his decision-making process when s/he is to decide when to implement a control. Sometimes it is not even possible for the police officer to recognize that s/he is basing a control on discriminatory grounds, as claimed by social psychologists. Therefore, the possibility for an individual police officer to decide when to implement a control might enable discriminatory controls in more than one way – deliberate and implicit. If one is to consider the report of the crime prevention council which showed that there exists degrading racial rhetoric regarding groups of minority people among some of the police officers in Sweden, it is not difficult to imagine that some of the internal controls of foreigners have been implemented for the wrong reasons. Prejudiced people exists everywhere, so why wouldn't there be prejudiced people among the Swedish police force? One can argue that those kind of discriminatory controls are unlawful and refer to the regulation that prohibits controls that are based on non-Swedish appearance and language. It is also possible to refer to a number of other legal sources that prohibits these kind of discriminatory behavior.<sup>127</sup> The fact still remains though, because it is so difficult to determine which factors that affect the implementation of a given internal control of foreigners, and because the control

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<sup>126</sup> Wikrén and Sandesjö 2013: 471

<sup>127</sup> E.g. Article 14 of European Convention for the Protection of Human Rights and Fundamental Freedoms

may be implemented on such wide range of reasons,<sup>128</sup> the deliberate discriminatory police officer does not need to be particularly creative to implement a discriminatory control and get away with it. In addition, even though the police officer not deliberately is looking to discriminate the individual s/he wants to implement a control on, the literature review in this thesis has shown that the individual still might be subjected to implicit bias where the police officer might not even recognize the discriminatory behavior.

One problem with this possible outcome, except that people might get discriminated against, is that the predictability regarding how and why the controls are implemented, deteriorates. According to Anna Lundberg and Sophie Hydén, a clear legislation creates confidence in the legal system.<sup>129</sup> If individual X can anticipate how and why an internal control of foreigners is to be implemented, it creates trust in the state and in the police. Lundberg and Hydén argued already by the year of 2004, that the Swedish legislation regarding the internal controls of foreigners, is unclear and sometimes even contradictory.<sup>130</sup> Ten years later, I am willing to argue that the regulations concerning the controls are still quite unclear. How will individual X be able to anticipate an internal control of foreigners when the police officer might refer to “individual observations” or “tips”? How will a police officer be able to assess which observations s/he might use to implement an internal control of foreigners? If individual X begins to lose trust in the police due to unpredictable controls, s/he might also lose trust in other institutions such as schools, as argued by Patricia Warren.<sup>131</sup> Thereby, creating a vicious circle where individual X eventually loses trust in all of society.

To get a better understanding of the accusations regarding discriminatory controls, in the next part of the thesis, there will be a reasoning concerning the concept of discrimination.

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<sup>128</sup> E.g. An individual officer’s observations, reconnaissance information, intelligence spreads, tips or other reliable information

<sup>129</sup> Lundberg, Anna and Hydén, Sophie (2004: 269) “Inre utlänningskontroll i polisarbete – mellan rättsideal och effektivitet i Schengens Sverige” (Malmö: Prinfo Team Offset & Media); Hereinafter referred to as “Lundberg and Hydén 2004”.

<sup>130</sup> Lundberg and Hydén 2004: 267

<sup>131</sup> Warren 2011: 357

## 5. The evolving conceptual approach

In this section, with Andrew Altman's writing as a basis, I develop and identify the concept of discrimination and gradually apply the concept to different illustrations and legal cases. Finally, I apply the concept to the internal controls of foreigners in Sweden.

### 5.1 The concept of discrimination

A large part of the legal, political and philosophical discussion regarding discrimination, assume that it is morally wrong. Thereby, most of the world's states have regulations that prohibit discrimination in different forms.<sup>132</sup> Despite this almost global consensus regarding the problem that is discrimination, there is no universally accepted definition of the concept.<sup>133</sup> According to Altman, the core human rights documents fail to specify what discrimination implies, just listing on what grounds discrimination is to be outlawed.<sup>134</sup> As an example, article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, concerns discrimination. The article declares:

*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

As noted from the article, the concept of discrimination is not further explained or defined. However, in order for individual X to be discriminated against, it seems apparent that s/he needs to belong to a certain type of group based on specific types of attributes such as language or race. The discrimination, then, is directed at individual X based on the membership of a specific group. The relevant groups that are exposed to discrimination can generally be regarded as socially salient groups which are important to the structure of social interactions across a wide range of social contexts.<sup>135</sup> Therefore, membership of groups based on ethnicity/race qualifies as potential grounds for discrimination, while being part of a group of people that, for instance, are into comics, generally do not. Let's consider the example with the Romani people presented

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<sup>132</sup> Altman, Andrew "Discrimination" in *Stanford Encyclopedia of Philosophy*, Online: <http://plato.stanford.edu/entries/discrimination/>, 2011-02-01; Hereinafter referred to as "Altman 2011"

<sup>133</sup> Vandenhole 2005: 33

<sup>134</sup> Altman 2011

<sup>135</sup> Lippert-Rasmussen, Kasper. 2006. "The Badness of Discrimination" *Ethical Theory and Moral Practice*, (9), pp.167–185.

in section 1 - *introduction*. The notification regarding the control of the Romani people was sent to JO because the person who reported it believed that the Romani people were treated differently than a person with a perceived Swedish appearance would have been.<sup>136</sup> Thus, the person who reported the event believed that the Romani people were discriminated because they were members of a specific group and therefore, treated differently. In relation to the concept of discrimination, this argument is rather limited. In the discussion regarding discrimination, it is important to note that it is problematic to perceive discrimination as a concept of differentiation. To put it in a different context, Jews in Nazi-Germany were treated differently in comparison to SS-officers. This means that SS-officers also were treated differently in comparison to Jews. However, in relation to the Jews, it is unreasonable to hold that the SS-officers were discriminated against because of that. This indicates that one need to recognize a different factor than differential treatment in order to identify the concept of discrimination.

According to Andrew Altman, it is better to think of discrimination as disadvantageous treatment rather than differential treatment. Altman claims that discrimination imposes disadvantages on certain individuals in relation to others. This means that those who are treated advantageously, are not to be seen as victims of discrimination.<sup>137</sup> In order to determine if an action can be considered as disadvantageous, there has to be a comparison group which one can compare that action with. In accordance with Altman's claims, the control of the Romani people in Stockholm's subway system would be discriminatory if it imposes a disadvantage on the Romani people in relation to another group of people. It is important though, that the individuals (or groups) in which the controls of the Romani people are compared to, are in a similar situation.<sup>138</sup> As an example, in the European Court of Human Rights (ECHR) and the case of *Timishev v. Russia*, the applicant alleged that he had not been allowed to enter the autonomous republic Kabardino-Balkaria because of his Chechen ethnic origin.<sup>139</sup> A senior police officer had allegedly ordered other officers not to admit Chechens through the controls. However, in Russian identity documents, there are no notes of ethnic origin. Therefore, not only persons of Chechen ethnic origin were stopped, also persons that were perceived as Chechen were stopped.

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<sup>136</sup> Taikon 2013

<sup>137</sup> Altman 2011

<sup>138</sup> Danelius, Hans (2012:519) *Mänskliga rättigheter i europeisk praxis*, 4th edition (Stockholm: Norstedts Juridik AB) (Hereinafter referred to as "Danelius 2012"; Altman 2011

<sup>139</sup> Case "Timishev v. Russia" in *The European Court of Human Rights*, Application nr. 55762/00 and 55974/00 (2005-13-12); Hereinafter referred to as "Timishev v. Russia".

Because no other ethnic group was exposed to the same treatment at the controls, in the court's view, there appeared to be a clear inequality in the enjoyment of the right to liberty of movement.<sup>140</sup> So, the court processed the accusation on the basis of ethnic comparison groups and found that "A differential treatment of persons in relevantly similar situations [...] constitutes discrimination".<sup>141</sup> Interestingly, the court refers to differential treatment instead of disadvantageous but I have already discussed what this might imply. In this case, the comparison group(s) is people of other ethnic origin that were exposed to the same controls. Altman claims that the comparisons group that one are to compare a given action with, should be part of the same society as the disadvantaged group or at least governed by the same overarching political structure.<sup>142</sup> This implies that the controls of the Romani people in Stockholm's subway system are to be compared to the same or similar controls implemented on other ethnic groups of people in Sweden.

In the same case, *Timishev v. Russia*, the ECHR states that it is up to the respondent to show that the disadvantageous treatment was justified on objective and reasonable grounds, once the applicant has demonstrated that s/he's been treated differently. Because the Russian government couldn't offer any justification for the disadvantageous treatment of Chechens, the court found that the treatment was in violation of current legislation. Thus, at least from a legal point of view, in order for a specific action to be considered as discriminatory, it is important to consider whether or not the action can be justified, for instance by invoking national security. According to the ECHR, states and governments often face problems that call for legal solutions. Some of the legal solutions results in judicial differences while the actual differences are equalized.<sup>143</sup> Thereby, according to Hans Danelius, the states and authorities have great liberties to determine the legal measures they consider appropriate in a given issue.<sup>144</sup> However, there is a case to be made here regarding the moralized sense of discrimination. Even though a given state has a justifiable reason to treat an individual discriminatory, the act might still be disadvantageous for the individual. For instance, let's assume that a given state has got information that a Christian individual is planning a terrorist attack on a sporting event. The state decides to implement controls outside of the stadium that are directed towards people that

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<sup>140</sup> *Timishev v. Russia*

<sup>141</sup> *Ibid*

<sup>142</sup> Altman 2011

<sup>143</sup> Case "Relating to certain aspects of the laws on the use of languages in education in Belgium v. Belgium (Merits)" in *The European Court of Human Rights*, Application nr. 474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64 (1968-23-07)

<sup>144</sup> Danelius 2012: 520

are wearing cross or others that are generally perceived to be Christian. From a legal point of view, the disadvantageous action might be justifiable on the grounds of national security. However, every controlled Christian person is being treated disadvantageously in comparison to other religious groups. So, from a legal point of view, a specific act can be seen as non-discriminatory because there exists a justifiable reason, while the same act can be seen as discriminatory by the person being exposed to the act. Just because the legislation say that an action not is discriminatory doesn't mean that the individual who are being subject to the act, feels the same. In relation to the internal controls of foreigners in Sweden, this implies that the controls might be regarded as legitimate on the basis of legislation, but still be considered as discriminatory by the people being exposed to them. So from a moral point of view, there are some, though perhaps not conclusive, reasons to object to the action.

To summarize, the above stated reasoning indicates that, in order to be discriminated against, one needs to belong to a socially salient group that are, unjustifiably being treated disadvantageously in comparison to a similar or equal comparison group in a similar or equal situation. From a moral point of view though, despite justification of the discriminatory action, it might still be considered as discriminatory. However, in order to understand the concept of discrimination, one must recognize that there are different kinds of discrimination. The two main categories will be presented below.

## **5.2 Direct discrimination**

To explain what direct discrimination implies, one can consider the case of *Timishev v. Russia* once again. The Chechens were deprived of their right to enter Kabardino-Balkaria because the police officers denied them entry on the grounds of ethnic belonging. According to Altman, there are two things that characterize direct discrimination - explicitness and intention. More specifically, acts of direct discrimination can be explained by acts where a legal entity aims to impose disadvantage on individuals because they are members of a social salient group.<sup>145</sup> In the case of *Timishev v. Russia*, the police officers explicitly and intentionally picked out the Chechens for disadvantageous treatment, thereby subjecting them to direct discrimination.

In some cases, the discriminator might adopt a policy where there is no reference to the group s/he is trying to disadvantage. Instead, the policy employs a hidden agenda which still

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<sup>145</sup> Altman 2011

disadvantage the group, in accordance with the discriminators aim.<sup>146</sup> For instance, if all Chechens wore a red hat that they always had with them, the discriminator, consciously of that, would adopt a policy where persons with red hats would be prohibited to enter Kabardino-Balkaria. Thus, the aim of the prohibition would be to exclude Chechens even though the policy made no direct reference to ethnicity. However, the secret motive of the policy would be to explicitly disadvantage Chechens. Accordingly, direct discrimination is intentional discrimination. Without the intent to disadvantage individuals on the basis of group belonging, there is no direct discrimination.<sup>147</sup>

### 5.3 Indirect discrimination

In contrast to direct discrimination, there are acts and/or policies that are not aimed at individuals for being members of a certain social group but still the acts and/or policies have the effect of disadvantaging the members of a certain social group.<sup>148</sup> According to many legal systems, including the Swedish legislation, such acts can count as indirect discrimination.<sup>149</sup> However, according to the Swedish legislation, a provision, criterion or practice cannot be considered as indirectly discriminatory if it “[...] has a legitimate aim and the means used are appropriate and necessary to achieve the purpose” [English translation].<sup>150</sup> Although it is expressed in different ways in different forms of legislation, the criterion for indirect discrimination has a common thought behind it: a disproportionate and disadvantageous impact on a social salient group must not be dismissed or rejected as irrelevant, it rather need some sort of justification.<sup>151</sup> This implies that indirect discrimination can be described as an act/policy (or acts/policies) that not is aimed at a specific group of socially salient people, but still has a disadvantageous and disproportionate impact on that group. The act/policy can then be considered as morally wrong and/or legally prohibited if it cannot meet a standard of justification.<sup>152</sup>

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<sup>146</sup> Ibid

<sup>147</sup> Ibid

<sup>148</sup> Ibid

<sup>149</sup> 1:4 2 para. Swedish Discrimination Act (2008:567)

<sup>150</sup> 1:4 2 para. Swedish Discrimination Act (2008:567) “[...] har ett berättigat syfte och de medel som används är lämpliga och nödvändiga för att uppnå syftet”

<sup>151</sup> Altman 2011

<sup>152</sup> Ibid

In order to illustrate indirect discrimination, let's return to the case of *Timishev v. Russia*. If one can imagine that Russian legislators would create a legislation that required everyone who crossed the border to Kabardino-Balkaria to be right-handed, without knowing that most Chechens are left-handed (for the purpose of this illustration), the legislation would have to be justified in order to avoid being convicted for indirect discrimination. The legislation was not directed towards a salient social group, but still disadvantageous towards the Chechens. What one does is to question the underlying motivation or intention behind the legislation. Contrary to what is claimed, the argument here is that the legislation in fact targets a socially salient group in a disadvantageous way.

#### **5.4 Why discrimination is wrong**

As stated in the beginning of the conceptual section, a large part of the legal, political and philosophical discussion regarding discrimination, assume that it is morally wrong. Still, according to Altman, it has proven to be a controversial and difficult task to determine why it is wrong.<sup>153</sup> A popular view is that direct discrimination is wrong because the discriminator treats persons on the grounds of traits that are unchangeable and uncontrollable. However, there are some issues with this view. If a blind individual would be denied a driver's license it would probably not be considered as unjust. Nevertheless, s/he has an unchangeable trait and s/he is being treated disadvantageously in comparison to people with vision.<sup>154</sup> Furthermore, an individual's religion is not an unchangeable trait even though it is possible for a person to be discriminated against on the grounds of religion.<sup>155</sup> Therefore, the view that direct discrimination is wrong due to unchangeable traits that the person being discriminated possess, is problematic.

Instead, Deborah Hellman, Andrew Altman and Patrick Shin seem to find it more appealing to think about direct discrimination as wrongfully because of its connection to prejudice.<sup>156</sup> In this context, prejudice is understood as an attitude that regards the members of a social salient group as not entitled to the same respect and concern in comparison to members of another group.<sup>157</sup>

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<sup>153</sup> *Ibid*

<sup>154</sup> *Ibid*

<sup>155</sup> *Ibid*

<sup>156</sup> Hellman, Deborah (2008) *Why is Discrimination Wrong?* (Cambridge, MA: Harvard University Press) (Hereinafter referred to as "Hellman 2008"); Shin, Patrick (2009) "The Substantive Principle of Equal Treatment," *Legal Theory*, (15) pp.149–172 (Hereinafter referred to as "Shin 2009"); Altman 2011

<sup>157</sup> Altman 2011

In relation to the internal controls of foreigners in Sweden, this is obviously problematic. In accordance with the Swedish crime prevention council's report and Sophie Hydén's claims, there are individuals within the Swedish police that possess degrading stereotypes of minority people. If a given police officer were to think of a specific ethnic group as not entitled to the same respect as some other comparison group and at the same time have legal right to decide when s/he is to implement a control, there is an impending risk that wrongful and degrading controls based on prejudice will occur.

Based on the above stated reasoning, even though the academic debate regarding why direct discrimination is wrong, is still ongoing, many scholars argue that the acts of direct discrimination seems to be wrong because they violate the equal moral status of individuals by treating them as individuals with degraded moral status, as argued by Hellman, Altman and Shin.<sup>158</sup> According to Altman, this is similar to the wrongs of indirect discrimination. He argues that one can understand the wrongs of indirect discrimination as process-based wrongs. By this he means that there are social processes that consistently but avoidably turn the membership of a socially salient group into a relative disadvantage.<sup>159</sup> Altman considers this process as morally wrong. It is wrong, Altman argues, for society's major institutions to distinguish between two similar groups of social salient people and, without justifiable reasons, impose disadvantages on members of one of these groups. A second wrong, in connection to the previous one, is placing the members in a vulnerable position, making them exposed to exploitation and domination because they were put in a disadvantageous situation.<sup>160</sup> He thereby draws a parallel to the wrongs of direct discrimination where there is a reasoning process, in which individual(s) of a social salient group are considered to be morally degraded. Thus, according to Altman, the wrongs of indirect and direct discrimination can both be regarded as process based wrongs where the disadvantageous individual(s) are treated with degraded moral status.<sup>161</sup>

In the next section, in order to find an answer to this thesis' two research questions, there will be an analysis which examines and develop the outcome of the two approaches above – 4. *The legal approach* and 5. *The evolving conceptual approach*

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<sup>158</sup> Hellman 2008; Altman 2011; Shin 2009

<sup>159</sup> Altman 2011

<sup>160</sup> Ibid

<sup>161</sup> Ibid

## 6. Analysis

If a given internal control of foreigners is to be considered as discriminatory, based on the above stated reasoning about discrimination, the person being subject to the control must be treated disadvantageously in comparison to a member of another socially salient group of people. Furthermore, at least from a legal point of view, the disadvantageous action must be considered as unjustifiable. If problems that are related to ethnic profiling are present in connection with the internal controls of foreigners and also in the entire Swedish legal system, as stated by Sophie Hydén, it is difficult to claim that the controls are conducted without the dangers of discriminatory behavior. If the statement is true, that parts of the Swedish legal system is ethnically discriminatory, it is important to not only examine the actual controls, but also the whole system surrounding them. According to a report that was released by the Swedish crime prevention council, it is well documented that there are stereotypes regarding minority groups' criminality rate, within the Swedish police force. The report also identified racist rhetoric regarding certain groups of foreigners.<sup>162</sup> This indicates that some police officers might treat specific groups of people disadvantageously on the basis of their ethnicity. If police officers base their actions on stereotypes that distinguish between people based on their ethnic belonging, it is a clear case of direct discrimination because of its intention to put a disadvantage on a salient social group. Of course, this does not include all police officers in Sweden, but the fact that racist rhetoric exists in the Swedish police force, indicates that there is a genuine risk of discriminatory controls. One can argue that the controls are controlled by legislation but the fact that an individual police officer's observations, surveillance information or other reliable information are considered to be sufficient to implement a control, enables the discriminatory police officers to abuse the procedure. According to the ECHR, no difference in treatment which is based on a person's ethnic origin is capable of being objectively justified.<sup>163</sup> Therefore, controls that are based on the stereotypes of an individual's ethnic origin can never be justified, thereby ruling that out.

### 6.1 Direct discrimination and the internal controls of foreigners

As stated above, direct discrimination can be defined as acts where a legal entity aims to impose disadvantage on individuals because they are members of a salient social group. Thus, one can

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<sup>162</sup> Report 2008:4

<sup>163</sup> *Timishev v. Russia*

distinguish between directly discriminatory laws and directly discriminatory acts, implemented by the police towards the exposed individuals.

One can argue that the Swedish Aliens act is consciously intended to put disadvantages on so called illegal immigrants, thereby being directly discriminatory. However, as already mentioned, this is not the approach of this thesis. This thesis is concerned with the circumstances surrounding the accusations that individuals with a perceived foreign appearance are getting focused by the Swedish police in connection to the internal controls of foreigners. Because the Swedish Aliens act prohibit controls that only are based on foreign appearance, language or name, the legislation is lacking the two characteristics that Altman claims distinguish direct discrimination – explicitness and intention. That is, there is no intention or explicitness to specifically target individuals with a perceived foreign appearance. Therefore, I would argue that the legislation in itself cannot be considered as directly discriminatory. However, the actual controls that are implemented by the police based on the legislation, might be another story.

The Swedish police officers are not allowed to control a person just on the grounds of a perceived non-Swedish appearance. Still, this is exactly what the police are getting accused of.<sup>164</sup> That is, implementing controls that target individuals just because they are perceived to be foreigners. Regardless if the accusations are correct or not, depending on which academic approach one assumes from, this outcome does not have to be considered as directly discriminatory. If the controls are implemented exclusively on the basis of non-Swedish appearance, followers of the legalistic approach would probably consider the controls as directly discriminatory because they claim that a difference in search rates across different groups of people should be considered as discriminatory. As already stated, this approach has lost some of its legitimacy due to inappropriate conclusions and one could therefore argue that it should be disregarded. On the contrary, followers of the criminological approach would probably say that a difference in the search rate of perceived non-Swedish people and perceived Swedish people, would be a legitimate and non-discriminatory outcome. Because the aim with the controls is to find people that are not entitled to reside in Sweden and because the police might find more people by focusing on the group of perceived non-Swedish people,<sup>165</sup> a difference in police controls across the two groups would therefore be considered as legitimate

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<sup>164</sup> Khemiri, Hassen Jonas "Bästa Beatrice Ask" in *Dagens Nyheter*, Online: <http://www.dn.se/kultur-noje/basta-beatrice-ask/>, 2013-03-13

<sup>165</sup> This claim is not proven in any way.

and non-discriminatory. Important to note is that the criminological approach is independent of legal involvement. This implies that an action that is considered to be direct discrimination by any given legislation, might not be considered as discriminatory by the criminological approach. So, based on this approach, controls that are directed towards perceived non-Swedish people might be considered as valid by the followers but illegal by the legislation. Furthermore, followers of the economic approach would probably argue in a similar manner as followers of the criminological approach. Even though the aim with the controls is not to seize contraband, the economic approach argues that one is to focus on the outcomes of the police controls, rather than the police controls per se. This implies that controls, which detect non-Swedish people that are here illegally, are to be seen as successful non-discriminatory controls. Discriminatory controls are therefore measured by statistical comparison across the two target groups of people. The final approach, the normative, argues that police controls should be equally distributed across different groups of innocent people. This applies even if there are less people in the perceived non-Swedish group that have right to reside in Sweden. Thus, if the police focus on perceived non-Swedish people because they believe that the group holds more individuals who do not have a legal right to be in Sweden, this is considered as directly discriminatory.

In summary, the assessment of the internal controls of foreigners as direct discrimination, assuming that some of the controls are based on non-Swedish appearance, differs depending on the approach one proceed from. While the criminological approach might see directed controls as non-discriminatory, the normative approach might not. The problem with the different approaches, as mentioned in the literature review, is the inability to measure all of the factors that affect the police decision-making, thus making it hard to determine what factors a police officer might base any given search on. This means that the different approaches have different views on what constitutes a direct discriminatory control, but they all have problem to prove when the controls are discriminatory and when they are not, based on any specific approach.

If one is to look at the internal controls of foreigners from a legal point of view, the controls that are solely based on a foreign approach, name or language, are prohibited. Similar to the evolving conceptual understanding of discrimination presented above, the Swedish Discrimination act refers to direct discrimination as when someone “[...] is disadvantaged by being treated less favorably than another is, has been or would be treated in a comparable

situation, if such treatment is associated with [...] ethnicity [...]” [English translation].<sup>166</sup> In accordance with the legislation, this means that one has to recognize when a given control is based on ethnicity to be able to determine when a control can be considered as directly discriminatory on the grounds of ethnicity. Again, the inability to measure police officers possible discriminatory decision-making, conscious or unconscious, is making it problematic. Additionally, if one is to use the criminological approach as a starting point, it gets even more problematic due to the disregard for legal involvement when it comes to decide which controls are discriminatory and which are not. However, it might be problematic and not always appropriate to use legislation when one is to determine which actions that constitute discrimination against individual X. These problems will be discussed below.

## **6.2 Problems with the legislation as a standard**

As it stands now, individual X is not considered to be discriminated against if any given court of justice, based on legislation, judge that s/he was not discriminated against. In the case of *Timishev v. Russia*, it was not established that the Chechens were discriminated before the court ruled in their favor. In that sense, it is the current legislation and the judges interpreting the legislation that decides when a given action shall be considered as discriminatory. Thus, it is also the legislation that decides if a socially salient group of people is discriminated in comparison to an equal group of people. Thereby, the legislation can be seen as a norm which one is to use to consider what is supposed to be discriminatory. To illustrate, owning a slave of African origin was considered acceptable in America during slavery. Therefore, it was hard for the slaves to claim discriminatory behavior against their owners because the practice was considered as standard. Because the legislation didn't prohibit the slave trade, it was not considered as discriminatory. This illustrates that the legislation can be considered as the starting point which one is to assess if a group was disadvantageously treated in comparison to another group.

However, in relation to the internal controls of foreigners in Sweden, one can detect at least three problems with the law as the standard to examine what is supposed to be disadvantageous. First, if a given control is considered to be in accordance with the law, it is also considered as

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<sup>166</sup> 1 chap. 4 § 1 para. Swedish Discrimination Act (2008:567) “[...] missgynnas genom att behandlas sämre än någon annan behandlas, har behandlats eller skulle ha behandlats i en jämförbar situation, om missgynnandet har samband med [...] etnisk tillhörighet [...]”.

adequately implemented. However, if individual X was exposed to a control and felt like s/he was discriminated against, one can argue that the control still was disadvantageous on the basis of perception. In the eyes of the court and the legislation, the controls might be legal and non-discriminatory, but the person who was exposed to the control might still feel like s/he was discriminated. As section 3 - *literature review* in this thesis has demonstrated, it is often difficult to determine all of the factors in the decision-making process of the police officers. This implies that it also is hard for the court to rule if an internal control of foreigners was implemented in a non-discriminatory way. Consider for instance the arguments of the *normative* perspective of racial profiling. People living in minority neighborhoods, experience a higher level of suspicion and high levels of stop and searches.<sup>167</sup> In the eyes of the court and the legislation this might be reasonable, but the citizens of the neighborhood might perceive that they are being discriminated against, in comparison to other salient social groups of people. As mentioned in the *problematization* section, according to previous research, citizens that lack trust in the police and see them as discriminatory, are likely to have the same view across all institutions of society.<sup>168</sup> Thereby, creating a problem of trust in society at large. This illustrates that the perception of being discriminated against, plays a major role in an individual's inclusion/exclusion of a society.

Second, as mentioned previously, the current Swedish legislation allows for an individual police officer to decide when s/he is to conduct an internal control of foreigners based on his/her observations.<sup>169</sup> The problem with this, in accordance with social psychologist research presented in section 3 - *literature review*, is that a given police officer might act on the grounds of implicit bias. Meaning, that a police officer with non-racist intentions, might act in a discriminatory manner without the ability to control or even identify that behavior.<sup>170</sup> This implies that a police officer who decides to implement an internal control of foreigners on individual X, might be unable to identify the discriminatory grounds for the control. S/he might believe that it was implemented on non-discriminatory grounds in accordance with the law, when it actually was not. Therefore, the law might enable disadvantageous controls instead of being the standard that one is to compare the disadvantageous actions with. However, in the case of the internal controls of foreigners, one can also argue that it isn't the usage of law as a tool of comparison that is the problem, rather how the Aliens act is designed. If the law was to

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<sup>167</sup> Tomaskovic-Devey, Mason and Zingraff, 2004: 19

<sup>168</sup> Warren 2011: 357

<sup>169</sup> PAF 273-1, 5 § Allmänna råd

<sup>170</sup> J. Nier, Gaertner, C. Nier & Dovidio 2012: 8

be designed in a way that doesn't allow police officers to implement controls based on individual observations, and thus increasing the risk for implicit bias, then the law could be used as a norm which assesses the possible discriminatory act. For instance, if it were required that two or three officers confirmed the observations, it would minimize the risk for discriminatory controls based on implicit bias, assuming they all want to avoid discriminatory controls. As it stands now, it is sufficient with a single police officer's observations,<sup>171</sup> thereby increasing the risk of implicit bias playing a role.

Third, what if a particular law is deliberately designed to discriminate or even encourage the discriminatory behavior against a specific group of people? Take for example Uganda's Anti-Homosexuality Bill, which according to the United Nations (UN) Secretary-General, Ban Ki-moon and others, can be considered as a discriminatory legislation. Ki-moon claims that the legislation violates and even endangers lesbians, gay, bisexual and transgender people in Uganda.<sup>172</sup> If the law is to be considered as a standard to what is supposed to be disadvantageous and/or harmful, it goes without saying that the law can't be deliberately designed to discriminate people. The Swedish legislation regarding the internal controls of foreigners has regulations that prohibit controls that only are based on appearance, language or name.<sup>173</sup> Therefore, I would not argue that it deliberately target a specific group of people like the Anti-Homosexuality Bill in Uganda. However, I would argue that the Ugandan Bill illustrate why it can be problematic to use legislation as a norm to determine what is supposed to be disadvantageous and/or harmful. If the legislation approve and even encourage disadvantageous/harmful actions, it can't be used as the norm which one is supposed to compare a given discriminatory action with. Even though the Swedish regulation regarding the internal controls of foreigners isn't deliberately designed to discriminate, people might still feel discriminated against on the basis of perception and/or implicit bias.

The above stated reasoning is indicating that it might be problematic to use the Swedish legislation and legal system to determine if individual X is discriminated against when exposed to an internal control of foreigners. Because of factors such as perception and implicit bias, it is difficult for the legislation to really establish if the controls were based on discriminatory behavior or if they were implemented on non-discriminatory grounds. Furthermore, because

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<sup>171</sup> Ibid

<sup>172</sup> United Nations 2014, "Ban urges Uganda to repeal anti-homosexuality law" in *Un News Centre*, Online: <http://www.un.org/apps/news/story.asp?Cr=&Cr1=&NewsID=47223#.U1pUhvl47IA><http://www.un.org/apps/news/story.asp?Cr=&Cr1=&NewsID=47223#.U1pUhvl47IA>, 2014-25-02

<sup>173</sup> FAP 273-1, 5 § Allmänna råd

the legislation enables an individual police officer to determine when s/he is to conduct an internal control of foreigners in combination with the proven prejudiced behavior within parts of the Swedish police force, it is not difficult to imagine that some of the controls have been implemented on discriminatory grounds. Especially not since an internal control of foreigners is supposed to be a task that every police officer is supposed to be able to carry out.<sup>174</sup>

### **6.3 An alternative approach**

Despite the above stated section, I would argue that one can't ignore the legal aspect of discrimination and only focus on other approaches. As stated in the literature review, individuals who experience that they are being mistreated by society, are more likely to perceive him/herself as ill-treated by the police even though this doesn't have to be the case. For that reason, if the legal aspect would be disregarded completely, the police would probably not be able to move out of the police house before getting accused of discrimination against someone. One option would be to consider both the legal aspect as well as individuals' perception of discrimination. If the legislators, to the maximum extent possible, consider how a legislation can be designed to avoid making people feel discriminated against, not just from a legal point of view, it might improve the police-citizen relations. Not only making it more difficult for deliberately discriminatory police officers to implement controls, but also hamper the presence of implicit bias. There is always someone who is going to feel discriminated against, but by obstructing the enabling of the actual discriminatory controls as much as possible, it might improve the trust in the police and the legal system. According to Malin Wimelius,<sup>175</sup> the police are often an expression of the government's power and the state's monopoly on violence, thereby illustrating the state's respect or lack of respect for human rights.<sup>176</sup> It is therefore important that the police, in their work, have public trust and behave in a way that has a basis in human rights.<sup>177</sup> As already been stated, an individual might lose trust in the police on the basis of perception, even though the police act in accordance with legislation. Therefore, it is also important to minimize the individual's perception of discrimination in order to increase or keep the trust between the individual and the police. This reasoning is similar to Anna Lundberg

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<sup>174</sup> FAP 273-1, 4 § Almäna råd

<sup>175</sup> Malin Wimelius works as a senior lecturer at the department of political science at the University of Umeå.

<sup>176</sup> Wimelius, Malin (2013: 57) "Mänskliga rättigheter, svenska myndigheter och svensk polis" in Eklund, Niklas and Landström, Lena (ed.) *Polisen – verksamhet och arbete* (Malmö: Liber AB); Hereinafter referred to as "Wimelius 2013"

<sup>177</sup> Wimelius 2013: 57

and Sophie Hydéns claim regarding anticipation. Lundberg and Hydén argue that anticipation of how and why an internal control of foreigners is to be implemented, creates trust in the state and in the police. Even though the legislators already thought along these lines, as it stands now, I would argue that the legislation currently decreases trust in the police. By allowing individual officers to implement controls on the basis of their own observations, it is problematic to use the legislation as a standard which one is to compare a possible discriminatory action with. However, if the legislation would be modified, making the actual controls more resistant to implicit bias and conscious discrimination, the problematic outcome might not be that certain.

#### **6.4 Indirect discrimination and the internal controls of foreigners**

To remind the reader, indirect discrimination can be explained as acts and/or policies that are not aimed at individuals for being members of a certain social group but still, the acts and/or policies have the effect of disadvantaging the members of a social salient group. Again, it is possible to distinguish between indirectly discriminatory legislation and indirectly discriminatory acts, implemented by the police towards the exposed individuals.

As this thesis has illustrated, the legislation regarding the internal controls of foreigners in Sweden, can probably not be considered as direct discrimination because there is no explicitness or intention to put a disadvantage on individuals with a perceived foreign appearance. However, one can argue that the legislation might enable controls that are unconsciously disadvantageous against perceived non-Swedish people, with the result that certain ethnic groups are treated disadvantageously in comparison to others. Because the Swedish Aliens act enables controls based on a single person's observations, without a specification of what these observations may be, there is an eminent risk that perceived non-Swedish individuals are targeted, consciously or unconsciously. However, as stated above, if the legislation can be justifiable, it might not be considered as indirect discrimination, at least not from a legal point of view. It is possible to argue that legislation of the internal controls of foreigners in Sweden can be justified on the basis of a number of reasons. Two of the justifications can be seen as the stated aim of the controls; to ensure that foreigners not reside in Sweden without the necessary permits and the importance to search for foreigners that are to leave the country, following the decision of expulsion. One can also think in economic terms, which a specific party in Sweden's parliament often is happy to point out. However, if one is to consider ECHR's statement in connection to

the case of *Timishev v. Russia*, this is questionable. The court states that “no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.”<sup>178</sup> Therefore, because the legislation might enable controls that target people who are perceived as non-Swedish, it is possible to argue that the justification of the controls is invalid. Even though the legislation doesn't target a specific ethnic group, the 9 chap. 9 § of the Swedish Aliens act might be disadvantageous to certain ethnic groups in comparison to other ethnic groups. So, because the controls might be disadvantageous on certain ethnic groups of people, and because the justification of the internal controls of foreigners might be invalid, in accordance with ECHR ruling, it is possible to argue that the 9 chap. 9 § of the Swedish Aliens act is indirectly discriminatory.

When it comes to the actual controls, because it is quite unclear what observations an individual police officer might implement a control on, there is a possibility that some of the internal controls of foreigners put unconscious disadvantages on people with a perceived foreign appearance. For example, observations of individuals with certain types of clothes, such as traditional Romani clothes, might trigger a police officer, on the basis of implicit bias, to implement a control. As stated before, the police officer might not recognize the actual reason for the control, experiencing it as valid, while it in fact put unconscious disadvantages on the Romani individual for a reason that can be derived to perceived foreign appearance. Again, the problem here is to prove and measure the control in order to recognize it as indirectly discriminatory.

Additionally, even though the controls would be considered as non-discriminatory on the basis of legislation, the media debate has illustrated that individuals perceive it as they are being subject to the controls on the basis of their appearance. One of the newspaper articles that have been written regarding the controls, even states that the police are involved in structural racism against individuals with a perceived non-Swedish appearance.<sup>179</sup> Regardless of the correctness of this statement, it contributes to the public view of the Swedish police as discriminatory and prejudiced and thereby reducing the public trust in the police. Therefore, it is important for the police and the legislators not only to acknowledge the legal aspect of discrimination, but also the perception of the public. If the individuals that are being subject to the controls perceive

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<sup>178</sup> *Timishev v. Russia*

<sup>179</sup> *Aftonbladet* 2013

that they are being discriminated against, this might have implications for the perception of the entire police force. So when the Swedish Aliens act enables controls that lack anticipation regarding how and why an internal control of foreigners is to be implemented, it creates a perception of indirect as well as direct discrimination which thereby increases lack of trust in the police as a whole.

## 7. Conclusion

To summarize and conclude, in this thesis, I have shown that there exists a misunderstanding in the debate of the internal controls of foreigners in Sweden. Project REVA is intended to improve the administrative work surrounding the controls and not intended to affect the external work with the internal controls of foreigners which most of the media statements have claimed. However, as this thesis displays, despite denial from the Swedish police, it is still possible to show a connection between project REVA and the external controls. Furthermore, I argue that the Swedish Aliens might enable conscious as well as unconscious discriminatory controls because of the vagueness of the legislation. In the evolving conceptual approach, I have concluded that, in order to be discriminated against, one needs to belong to a socially salient group that are, unjustifiably being treated disadvantageously in comparison to a similar or equal comparison group in a similar or equal situation. From a moral point of view though, despite justification of the discriminatory action, it might still be considered as discriminatory.

In accordance with the analysis of this thesis, the Aliens act that regulates the controls cannot be considered as direct discrimination because it lacks explicitness and intention to put disadvantageous actions on individuals with a perceived foreign appearance. Because of the problems of identifying a police officer's decision-making when it comes to the implementation of the controls, it is neither possible to claim that the actual controls are direct discrimination. The same reasoning goes for the actual controls and indirect discrimination, because of the problems to measure and identify a police officer's decision-making, one cannot prove that the actual controls are indirectly discriminatory. However, there are indications that the Swedish Aliens act can be considered as indirect discrimination. Because of the probability of invalid justification and disadvantageous outcomes for individuals who are perceived as non-Swedish, one can argue that the regulations of the Swedish Aliens act are indirectly discriminatory.

As I have argued in this thesis, it is also important to consider society's perception of discrimination and the internal controls of foreigners. The media debate illustrates that there are people who feel discriminated against, because they perceive it as the internal controls of foreigners are based on the exposed individuals' foreign appearance. If an individual feel discriminated against, it might be an unfounded feeling or it might be a case of real discrimination, regardless of which, the perception of discrimination might create a lack of trust in the police and by extension, a lack of trust in society at large.

Below I will answer the two research questions stated in the beginning. The answers are stated below each question. The first question of the two reads as follows:

**How do the internal controls of foreigners in Sweden measure up to the Swedish Aliens act?**

Because the Swedish Aliens act contains such unclear regulations regarding when an internal control of foreigners is allowed to be implemented, it is difficult to say on what grounds an officer might decide to carry one out. Therefore, it is also difficult to evaluate how the controls actually measure up to the Aliens act. This outcome can be regarded as a finding in itself. Because there is a proven imminent risk of ethnically discriminatory controls that are enabled through the legislation, it is noteworthy that it is difficult to assess how an actual control measure up to the legislation. Thereby, it is also difficult to assess if a control is implemented on discriminatory grounds. As mentioned in section 2.4 – *Internal controls of foreigners and REVA* of this thesis, in accordance with NPB's statute 6 §, an internal control of foreigner shall be documented regarding the basis for the control, time, location, the person/s that are being controlled and the person that carried out the control. This should be able to provide some protection from discriminatory controls but as the example stated in section 2.4 – *Internal controls of foreigners and REVA* illustrates, many of the reported documentations regarding the controls are not implemented in a correct manner. This might indicate and somewhat strengthen the claim that some of the controls are implemented for the wrong reason.

The second of the two research questions stated in the beginning reads as follows:

**Can the internal controls of foreigners in Sweden be considered as discriminatory?**

As already mentioned, there is no proof that some of the actual controls are directly or indirectly discriminatory (even though there are strong indications that both categories are being implemented). Nor can the Swedish Aliens act, that regulates the controls, be considered as direct discrimination. However, one can argue that 9 chap. 9 § of the Swedish Aliens act is indirectly discriminatory against people with a perceived foreign appearance, on the basis of the above stated discussion. Because of the fact that many individuals feel discriminated against in combination with a legislation that might be unjustifiable, there is also indications that the internal controls of foreigners in Sweden, and the way they are carried out at the time of writing, might be considered as discriminatory on a moral basis. However, there needs to be a more thorough examination of this statement if one is to consider it as correct.

## 8. Further research

When it comes to the internal controls of foreigners, there is a case that was processed by the ECHR in the year of 2010.<sup>180</sup> Briefly, the case is about the British police' powers to stop and search individuals in the hunt for objects, which can be linked to and prevent terrorism, without any reasonable suspicion of a crime.<sup>181</sup> The ECHR held that the British regulations, among other things, lacked provisions on abuse of arbitrary interference and that the police interventions therefore, not were in accordance with the law.<sup>182</sup> Because this case has some similarities as well as differences to the Swedish internal controls of foreigners, I argue that it would be interesting for a legally trained individual to apply the ECHR judgment to the Swedish internal controls of foreigners and thereby examine if they are in accordance with the courts assessments. This could possibly help to clarify if the controls, and the way they are implemented, are justifiable. This applies both to the legal and the moral point of view.

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<sup>180</sup> Case of Gillan and Quinton v. United Kingdom in *The European Court of Human Rights*, Application nr. 4158/05 (2010-12-01)

<sup>181</sup> *Ibid*

<sup>182</sup> *Ibid*

## 9. Lessons learned

In this thesis, I argue that there exist a problem with the internal controls of foreigners and the legislation surrounding the controls. My suggestions to improve the existing problems would be the following:

- Redesign 9 chap. 9 § of the Swedish Aliens act to make it more clear and transparent. For instance, regarding when and how a control is allowed to be implemented.
- Make it a standard that two, or more, police officers must confirm any given observation before they decide to implement a control. This helps to avoid both implicit and conscious bias.
- Related to the suggestion above, because some situations demand quick decisions, make it possible for a police officer to call off an ongoing internal control of foreigners if s/he or another police determine that the decision was rushed.
- Improve the practice regarding the documentation of the controls, which has proven to be inadequate on many occasions.
- A number of police departments have implemented initiatives to increase knowledge and expertise on cultural diversity and tolerance, which is good. However, this initiative needs to be introduced in police departments across the country. An internal control of foreigners are supposed to be a duty that every police officer is supposed to be able to implement, this is also why every police officer needs proper education regarding prejudices and tolerance.

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