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Detection, detention, deportation : criminal justice and migration control through the lens of crimmigration

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PART II

Crimmigration and intra-Schengen migration
policing

3 | At the border of immigration control Discretionary decision-making within the Mobile Security Monitor¹

3.1 INTRODUCTION

Acting as the ‘border (migration) police’, the Royal Netherlands Marechaussee (RNM) carries out, among other things, the Mobile Security Monitor (MSM). These are mobile identity checks which have been held in the border areas with Belgium and Germany since the entry into force of the Schengen Agreement in 1995. Since the outbreak of the refugee crisis, these checks have received increasing attention.² The MSM is part of the operational control of migrants as regulated in Article 50 of the Aliens Act 2000. Whereas initially this type of immigration checks was merely aimed at counteracting illegal stay, the official objective now also includes combatting human trafficking and identity fraud (Van der Woude, Dekkers, & Brouwer, 2015). This is a proactive form of policing, which means that people can be checked without the need of having a reasonable suspicion of illegal stay or criminal offence (Corstens & Borgers, 2014, p. 297). The RNM officers responsible for implementing the MSM thus have a great deal of discretionary decision power to decide who they will stop for a check and who they want to investigate further.

Traditionally, there has been a great deal of research interest in the discretionary decision-making of police officers (Brown, 1981; Maynard-Moody & Musheno, 2000; Mendias & Kehoe, 2006; Phillips, 2015; for recent Dutch studies, refer to: Çankaya, 2012; Kleijer-kool & Landman, 2016; Landman, 2015). At the same time, it is striking that so far relatively few studies have been published on the performance of actors in the area of immigration control (although see: Aas & Gundhus, 2015; Casella Colombeau, 2017; Pratt & Thompson, 2008; Weber, 2011). This is even more remarkable in the context of the crimmigration process, which refers to the increasing intertwinement of enforcement and control under criminal law and migration law (Staring, 2012; Stumpf, 2006; Van der Leun, 2010; Van der Woude, Van der Leun & Nijland, 2014). This process is visible at the level of the political and public

1 An earlier, Dutch, version of this chapter was published as: Brouwer, J., Van der Woude, M.A.H., & van der Leun, J.P. (2017). Op de grens van het vreemdelingtoezicht: discretionaire beslissingen binnen het Mobiel Toezicht Veiligheid. *Tijdschrift Voor Veiligheid*, 16(2), 73-89.

2 The fieldwork for this contribution was carried out before the refugee crisis actually started to dominate the news.

discourse, the level of legislation, but also at the level of implementation and has, among other things, as a consequence that both immigrants and criminals are equally recognised as threats that must be tackled with all available means (Stumpf, 2006; Van der Leun, 2010; Van der Leun & Van der Woude, 2012). Since enforcement under criminal law comes with considerably more procedural safeguards than administrative law, this can have negative consequences for the legal position of the legal persons involved (Chacón, 2012; Stumpf, 2006; Van der Leun, Van der Woude, & De Ridder, 2013).

Various authors consider the decisions of street-level officers (Lipsky, 1980) – and in particular the possibility of stopping persons for a check – as the most important factor in the crimmigration process (Motomura, 2011; Pratt, 2010; Stumpf, 2006). Recently, it has been emphasised repeatedly that there is a strong need for empirical research into the daily practices of officers operating as border or migration police (Cote-Boucher, Infantino, & Salter, 2014; Loftus, 2015). In this regard, Loftus (2015) advises to derive from the rich body of literature regarding regular police officers and to ascertain to what extent the central findings of this could apply to border police officers as well.

In this contribution, we will have a detailed look at the manner in which RNM officers, being involved in the implementation of the MSM, interpret their discretionary decision power. We hereby explicitly focus on the interaction between immigration control and criminal enforcement, and its consequences for procedural safeguards. It is precisely these safeguards that could be jeopardised when law enforcement officials can choose from different types of legislation at their own discretion (Sklansky, 2012; Van der Woude et al., 2015). As illustrated elsewhere, the MSM has a complex legal and policy-based foundation with regard to the precise objective of the instrument, involving the intertwining of immigration control and criminal enforcement (Van der Woude et al., 2015). This raises the question of how this ambiguity about the precise task and associated competences – fitting within the aforementioned process of crimmigration – is interpreted by the street-level officials and which consequences this has for the way in which they perform their tasks. The central question in this contribution therefore reads:

How do street-level RNM officers involved in the implementation of the Mobile Security Monitor see their own task, and to what extent and how does this influence the way in which they practically interpret the discretionary decision power they enjoy in this regard?

This question will be answered based on extensive empirical research, including over 800 man-hours of observation during MSM inspections and focus group discussions with street-level RNM officers involved with the MSM. We will first elaborate on the theoretical foundation for this piece by further explaining the interdependence between the concepts of discretionary decision power and crimmigration. We then provide some background and context by describ-

ing the MSM's practice and the discretionary scope the RNM officers have in this aspect. After clarifying the methodology, we will start answering the central question. To this end, we will first show that the RNM officers state that they have to navigate between immigration control and criminal enforcement, thereafter identify two different styles among the RNM officers, and finally discuss how this practically translates into the decisions they make. The article ends with a conclusion and discussion.

3.2 DISCRETIONARY DECISION-MAKING AND CRIMMIGRATION

The RNM officers responsible for the implementation of the MSM resemble regular police officers in many respects. Not only do they represent the government in daily interactions with citizens, they also have a large degree of discretionary power to translate legal frameworks and formal policy into practice. They must apply the often abstract, multi-interpretable and sometimes even conflicting objectives, which are formulated at policy and organisational level, to specific situations (Lipsky, 1980; Van der Woude et al., 2015; Van Gestel & De Poot, 2014). In many cases, they have to interpret specific situations, set priorities and make decisions at their own discretion. Although wide discretionary powers for street-level officials can lead to more just decisions, as individual officials by not or differently applying the law can prevent certain undesirable consequences that the legislator had not foreseen (Schneider, 1992), it can also result in legal inequality and even unlawful decisions (Maynard-Moody & Musheno, 2000). In general, the more unclear the official policy goals are, the more liberty there is for civil servants to make decisions at their own discretion. For example, in a study on Spanish immigration policy, Bastien (2009) found that ambiguous objectives led to more discretion among the officials who had to implement this policy. Vague policy goals can therefore lead to personal convictions or individual professional views influencing the actions of street-level civil servants, and make it more challenging for those street-level officials to be accountable for their decisions.

In recent years there has been ample attention in police literature for the individual and situational factors that can influence the way in which police officers interpret their discretionary decision power during proactive inspections (for an overview, see: Dekkers & Van der Woude, 2014; Johnson & Morgan, 2013). This body of literature shows that discretionary decisions by police officers cannot be viewed separately from what Hawkins (2014) calls the decision field: the entirety of legal frameworks, policy choices and guidelines which form the contours within which professionals make discretionary decisions. So-called 'working rules', the internal culture of the police organisation and informal norms and values of individual agents also influence the decisions whether to stop someone or not (Alpert, Macdonald, & Dunham, 2005; Dunham, 2005; Quinton, 2011; Stroshine, Alpert, & Dunham, 2008). In

that respect, the various police styles that police officers have and the influence this has on their actions are also cited (De Maillard, Hunold, Roché, & Oberwittler, 2016; Kleijer-Kool, 2010; Van der Torre, 1999; Wilson, 1978). Terpstra and Schaap (2011) distinguish three different police styles in the Dutch context: order maintainer/service provider, crime fighter, and the professional working style. They also state that for the majority of Dutch police officers, action and tension are important attractive factors of their job, and that agents have a strong incentive to “guard society’s norms concerning good and evil and to protect the weak” (p. 188).

Halderen and Lasthuizen (2013) claim that this endeavor to achieve certain organisational goals or social interests regularly leads to a creative use of competences, especially when these competences are limited or legislation is unclear. This fits the claim of Maynard-Moody and Musheno (2000) that decisions by street-level officials are not particularly determined by rules, training and procedures, but mainly by the pursuit for justice. They argue that these officials do not quite use rules and procedures to make decisions, but rather first form a judgment about a citizen or client and then bend the rules and procedures to implement or rationalize their decision. Portillo and Rudes (2014, p. 323) therefore claim that more rules and procedures can paradoxically lead to even more discretion:

“With more rules in place, street-level bureaucrats have greater discretion to determine which rule(s) to apply in a given situation. More, and contradictory, rules leave more options available for application and less the ability to monitor their application.”

Although this depends on the way in which those rules are implemented, this is nevertheless an interesting observation with regard to the aforementioned process of crimmigration. According to David Sklansky (2012), crimmigration cannot be viewed separately from a broader trend of what he calls ‘ad hoc instrumentalisation’. With this he means a way of thinking about the law and legal authorities in which formal distinction between legal domains is of secondary importance and government officials can simply choose the most effective instrument for solving a problem in each individual case. According to him, this way of thinking is strongly influenced by skepticism with regard to the necessity and possibility of limiting the discretionary decision power of street-level officials. In the last decades, the development towards a managerialist and instrumentalist criminal justice system is clearly perceptible in the Netherlands as well (Van der Leun et al., 2013; Van der Woude et al., 2014).

According to Sklansky, this instrumental approach to law is intrinsically linked to crimmigration. Due to the increasing intertwinement of criminal enforcement and immigration control, street-level officials have a broader spectrum of possibilities to stop or investigate a person, which increases their discretionary decision power. Sklansky mentions a toolbox of legal instruments that enforcers can use to deal with unwanted individuals, whether they are

criminals or migrants. Given the instrumental considerations and the emphasis on effectiveness, enforcement not only takes on a strong ad hoc character, but the procedural safeguards retire to the background as well. Furthermore, the many options available to enforcers can quickly lead to a lack of transparency, because “this way little or no insight is provided into the grounds on which individual civil servants base their choices and decisions” and these civil servants often face little accountability for their actions as long as no formal complaints are filed (Van der Leun et al., 2013, p. 227).

3.3 DISCRETIONARY POWER WITHIN THE MOBILE SECURITY MONITOR

The MSM was established in 1992 in response to growing concerns about illegal migration and cross-border crime following the disappearance of internal borders in the Schengen area. Nevertheless, the instrument was originally solely aimed at immigration checks, as is also apparent from the initial name: Mobile *Aliens* Monitor. As it quickly became clear that the RNM was regularly confronted with criminal offences during the execution of the MSM, it was decided in 2006 to expand the official objective to include combatting migration-related forms of human trafficking and identity fraud. Although the MSM remained primarily a form of immigration control, a name change took place in the years following this adjustment: instead of Mobile Aliens Monitor, Mobile Security Monitor has since been used, initially only in the policy discourse but meanwhile also in the law. This seems to at least symbolically shift the focus from immigration control to criminal enforcement (Van der Woude et al., 2015).

Although MSM checks are also carried out on international trains, at airports and on the water, this contribution focuses on the MSM as it is performed on the road. As described in Article 4.17a of the Aliens Decree, these inspections take place in an area of twenty kilometers within the national borders with Belgium and Germany. To prevent them from having the effect of border controls, checks may take place during a maximum of six hours a day and ninety hours a month per road.³ During a regular, ‘static’ MSM check, one or more motorcyclists observe the passing traffic right behind the border and select potentially interesting vehicles. The motorcyclist then accompanies these vehicles to the so-called ‘inspection location’ a little further inland, where other RNM officers carry out the actual check. In a few cases however, during so-called ‘dynamic’ checks, both selection and check are done by RNM officers who drive around in the border area by car.

3 According to Article 4.17b of the Aliens Decree 2000, this limit can be deviated from under exceptional circumstances. This also includes an increased influx of foreign nationals. The deployment of the MSM has therefore been intensified since November 2016.

The MSM possesses two important discretionary decision moments. The first moment is the decision to select a vehicle for a check, or the selection decision. A reasonable suspicion of illegal stay or criminal offence is not a prerequisite for selecting a vehicle. The Aliens Act solely states that the checks are carried out “based on information or experience-based evidence regarding illegal stay.”⁴ Apart from international and national non-discrimination principles, the circular does not provide any specific restrictions regarding the selection of a vehicle (Van der Woude, Brouwer, & Dekkers, 2016). RNM officers therefore have a lot of freedom to assess which persons and vehicles may be ‘interesting’ and should be checked. As construed elsewhere, they at least partly based themselves on external characteristics that could suggest that a passenger was an (unauthorised) migrant, making skin color an important factor (Brouwer, Van der Woude, & Van der Leun, 2017). Although the RNM officers were generally aware of the sensitivity of this profiling method, they felt that this was inevitable in view of their duties as enforcers under the alien law. Eastern European vehicles were also stopped a lot, as it was thought that they were often involved in certain forms of cross-border crime. However, these selection criteria are potentially problematic in view of the prohibition of discrimination and the right of EU citizens to free movement in the Schengen area.

The second moment of decision happens after a vehicle has been selected for a check and regards to the decision to further investigate a selected vehicle or person. During the check, the passengers are verified for identity, nationality, and legal residence in the Netherlands.⁵ If they can confirm these three elements through valid documents, the check is complete and they may continue. However, if one or more passengers do not have valid documents, the RNM officers may further investigate the car and any person in the vehicle, aiming to determine the nationality and identity of that person in some way (for example by finding documents).⁶ In addition, the RNM officers acting as general investigating officials are permitted, through the so-called ‘continued application of powers’ (Corstens & Borgers, 2014), to switch from immigration control to criminal investigation if they spontaneously encounter a specific suspicion of a criminal offence during the performance of a MSM check. In such situations, the relevant RNM officer changes his ‘migration law cap’ to a ‘criminal law cap’ (Van der Woude et al., 2015).

In many respects, the MSM therefore clearly fits in with the previously described trend of crimmigration. It is performed by RNM officers who have a great deal of discretion and generally do not have to account for the decisions made. In addition, the instrument has a complex legal foundation, which

4 Article 4.17a, para. 2 Aliens Decree 2000.

5 Article 50, para. 1 Aliens Act.

6 Article 50, para. 1 Aliens Act *juncto* Article 50, para. 5 Aliens Act *juncto* Article A2/3 Aliens Circular 2013.

reveals a slightly ambiguous objective aimed at both immigration control and (limited) criminal enforcement. Then, there is also the name change in official policy documents. All these elements seem to increase the discretionary scope of the street-level RNM officers and give them the freedom to develop their own professional views and act accordingly. Before we address the question to what extent this actually is the case, we will first provide a description of the research methodology.

3.4 METHODOLOGY

This contribution utilizes data collected through various research methods between October 2013 and November 2015 in the context of the larger research project 'Decision-making in Border Areas' (Van der Woude et al., 2016).⁷ During this period, researchers participated in 57 MSM controls, resulting in more than 800 man-hours of observation. Observational research was chosen because it is a method ideally suited to study the behaviour of police officers and other street-level officials in a 'natural' setting, and thereby gain insight into their actions and decisions and the way in which they must be interpreted (Ley, 1988; Reiss, 1971). The disadvantage of this research method is that it influences the obtained results (Spano, 2005). For example, it cannot be ruled out that the presence of the researchers facilitated that the RNM officers were more likely to act according to the rules. An attempt was made to eliminate this by joining at least six shifts with each brigade,⁸ which means many RNM officers were very regularly seen and spoken and a certain degree of trust emerged. Moreover, this reduced the chance they would consistently display 'unnatural' behaviour for a long time. Nevertheless, a certain amount of observer effect cannot be excluded.

The research team always consisted of two people who attended the entire shift. The number of RNM officers per shift varied greatly, ranging from shifts with only four RNM officers to large shifts with more than ten RNM officers and on one occasion several other law enforcement agencies. A shift normally lasted six to eight hours and always started with a briefing. The researchers made use of this moment to introduce themselves, to briefly explain the research and to offer the possibility to ask questions. During the shift, an observation form was used, which systematically recorded the characteristics

7 The data collected for this project consists of 800 man-hours of observation, thirteen focus group discussions with RNM officers involved in the operational implementation of the MSM, 167 surveys conducted among persons who were checked within the framework of the MSM and eighteen in-depth interviews with staff members, policy staff and government officials working at the Royal Netherlands Marechaussee, the Ministry of Defense and the Ministry of Security and Justice. Only the observation data and the focus group discussions were used for this contribution.

8 Five brigades of varying sizes are involved in the MSM on the road.

of the selected vehicle, the events taking place during the check, the interaction between the RNM officers and the people being checked, and the outcome of the check. On this form, the researchers also noted the reasons RNM officers gave for the various decisions they made.

Observations took place in different ways. In most cases the researchers were at the inspection location, where they had a good view of the selected vehicles brought in and the course of the inspection. During dynamic checks, the researchers were usually in the back of the car. Due to practical reasons, in those cases less use was made of the observation form. During observations, a lot of conversations took place with the RNM officers present. Thus, insight has been gained into RNM officers' actual decisions as well as their interpretations. Considering there were often several officials present at the control location, many different RNM officers were interviewed. These conversations happened in a fairly informal nature, without a prearranged topic list. Moreover, as this type of conversations took place in an environment familiar to the RNM officers, the chance of socially desirable answers was reduced. The researchers kept field notes in the form of short notes and catchwords, which were further elaborated into fieldnote reports after each shift.

In addition to the observations, thirteen focus group discussions were held with eight to ten RNM officers of various ages and years of service who were involved in the operational implementation of the MSM. Focus groups can provide insight in complex or unclear phenomena – such as the manner in which RNM officers interpret their discretionary decision power – as well as the influence of and dynamics within the researched group (Finch, Lewis, & Turley, 2013; Krueger & Casey, 2014). This research method is not suitable for finding out individual opinions about the discussion topics and the group process can influence the mutual discussion. The goal of the focus groups, however, was to obtain data that offers a good insight into the collective views of the RNM officers. At most brigades we held two focus group discussions, at one brigade we held one and at one larger brigade we held four. These discussions took place after the majority of the observations had already been carried out, hence the subjects and preliminary findings that emerged during the observations could be submitted to the participants for reflection. This ensured enrichment and amplification of the data. In this sense, during these discussions, the perceptions of the RNM officers were extensively discussed with regard to their own tasks and the corresponding authorities.

The focus group discussions were recorded and transcribed verbatim. All field notes and transcripts were then coded and analysed using Atlas-Ti. A list of codes was prepared in advance by the researchers, which was supplemented and – in mutual consultation – adjusted during the coding itself.

3.5 BETWEEN IMMIGRATION CONTROL AND CRIMINAL ENFORCEMENT

During the fieldwork, it became clear that street-level RNM officers had different visions on what their own tasks consisted of. Almost all RNM officers indicated that the MSM is primarily an instrument for immigration control and cited the fight against illegal migration as an important or the most important objective. At the same time, according to Article 141 of the Code of Criminal Procedure, RNM officers are also general investigating officials; hence they are authorised to criminal enforcement if during a check they, in accordance with the aforementioned doctrine of continued application, *spontaneously* encounter a punishable fact other than human smuggling or identity fraud. Many respondents explicitly saw themselves as more than solely enforcers in the context of the Aliens Act and considered other forms of crime important, in addition to human trafficking and identity fraud: drug crime, money laundering, and possession of weapons were often mentioned. Some of these respondents felt supported in this view by the name change of the MSM. Despite the fact that this change was not accompanied by actual changes in the aim of the MSM or the tasks of the RNM officers, some of the respondents nevertheless felt that it was more than just a semantic change.

“Within that 20 km zone you are no longer specifically concerned with foreigners, you are also concerned with safety. There is a different name to that (...) You also have things like money laundering you pay attention to.”

Respondents indicated that they saw an important role for themselves in protecting the Dutch state against all kinds of danger. For example, one of the RNM officers stated that they attempted not to select too many drug runners, but that was sometimes difficult because all RNM officers had “blue blood” in them. In addition, it was regularly articulated at the start of a shift that today they would try to “catch criminals” again. In that sense, there seems to be little difference between RNM officers and regular police officers, who consider “catching criminals” as their most important task (Kleijer-kool & Landman, 2016; Landman, 2015). A logical consequence of positioning oneself so explicitly as a crime-fighter was that the tasks were interpreted broadly. As one of the RNM officers indicated during a focus group discussion:

“The police are meant for the security on the street and the RNM for the security of the state. This also includes catching people who have been reported as being armed and dangerous, flight hazards or connected with drug crimes.”

This broader interpretation of the aim of the MSM seemed to stem partly from the idea that if one only focused on the offences prescribed by law, this would result in an unnecessary restriction on the presence of the RNM officers in the border areas. Many RNM officers opined that it would be a waste of capacity to use the MSM only for the control of migrants.

“We are general investigating officials and we are stationed there anyway [in the border areas, JB]. We are there and I think, let’s get the most out of the six hours that we are allowed to stand there instead of shutting our eyes.”

In accordance with the expectations based on the theoretical literature, there were substantial differences between the RNM officers in the way they saw precise scope of the MSM’s aim and the way in which they interpreted their task. Similar to the different police styles that have been identified with regular police (Terpstra & Schaap, 2011), a distinction was sometimes made in this context between ‘immigration officers’ and ‘police officers’. This refers to the fact that some RNM officers were mainly focused on cases related to immigration law, while others were more interested in fighting crime. Simultaneously, there were also many RNM officers who made little distinction and indicated that they saw both as an important part of their task. As a result, criminals and foreigners were sometimes mentioned in one breath and a clear distinction was not always made.

“You have people, I am one of them myself, I grab everything that comes to my attention. I don’t care if it’s a foreigner, or Article 8 [Road Traffic Act, JB] or a weapon, or an uninsured car, I don’t care. Look, I just want to catch a crook and whether that is a foreigner or something else, I don’t care.”

The younger RNM officers in particular seemed to find ‘catching criminals’ more exciting than checking out potentially unauthorised migrants. It was regularly indicated that the highest satisfaction was achieved by encountering criminal cases. After one of the RNM officers had checked a car thinking the occupants were Albanians, he said he believed that Albanians are often involved in crime and that he would rather deal with such types than an “illegal African”. The fact that many RNM officers were particularly keen to go for the criminal cases was repeatedly demonstrated during the observed controls. It often happened that a vehicle was selected that, according to the RNM officers, was not particularly interesting in terms of aliens law, but whose passengers might still have outstanding fines or simply had “the face of a crook”. For many RNM officers, catching a criminal was the part that made the work worthwhile and stories about an arrested criminal were told frequently. This is in line with the findings of research into regular police officers, which shows that catching ‘crooks’ is a crucial factor in their job satisfaction (Kleijer-kool & Landman, 2016). In addition, the RNM officers were often visibly enthusiastic if a car was checked whose occupants had criminal antecedents or were signalled for crimes.

A specific case can illustrate this. During one of the checks, a taxi was checked with two young boys of about twelve years old sitting on the back seat. They had no identity documents with them, but said they were German and Croatian. They claimed to be on their way to their grandmother to pay

a hospital bill and that they received money for it from their mother. The RNM officers present indicated that they had little faith in the story and decided to search the trunk. When a transparent bag of golden jewellery was found in a large loaf, there clearly was a slight euphoria among the RNM officers about this, which expressed itself through mutual congratulations and 'fist bumps'. In the weeks that followed, the matter was regularly brought up again at this brigade.

3.6 DECISION-MAKING IN AN AMBIGUOUS CONTEXT

As stopped a vehicle within the MSM framework, unlike in the case of domestic immigration control, is not required to be based on a reasonable suspicion of illegal stay, individual RNM officers have substantial freedom to decide who they will select for a check. During the fieldwork it became clear that RNM officers not only have a great deal of discretion in their decisions to stop vehicles, but also to decide whether a stopped vehicle or person will be further investigated. If someone does not have the correct papers, it must be decided whether or not to investigate this person and whether or not the car will be searched. Sometimes this decision is based on an estimate of the chance that someone will be staying in the country illegally. This was the case, for example, when two German boys with a North African appearance were checked and did not carry a passport. The supervising RNM officers decided fairly quickly to let them continue because they did not speak "immigrant German" and one of them did have the German passport of his brother. Often the decision was based on the possibility of finding any incriminating facts. When a car with four Eastern European young men was searched because one of them did not have a passport with him, one of the RNM officers present indicated that this would not happen if it concerned an older couple or a decent family, because in that case after all, the chance of finding something punishable would be considerably smaller. Another time, a vehicle with a Dutch license plate and three Dutch-speaking men was fully searched after the driver could only present a Dutch driver's licence (which is not a valid cross-border document), because the men lived in a nearby caravan camp and were known to the RNM officers for past criminal facts.

An important factor that influences the way in which RNM officers fill in their discretionary decision power is the way in which they see their own tasks. As explained above, despite the name change, the MSM is still essentially an instrument that is primarily aimed at immigration control, which is reflected in the competences of the RNM officers. According to Article 50 of the Aliens Act, they have no authority to search a vehicle if all passengers can present valid identity documents. This limitation with regard to searching a vehicle regularly caused frustration when RNM officers felt that something was wrong

but according to their competences were not allowed to open the trunk for example.

“That is the only disadvantage, that we are based on the Aliens Act. If we have the documents, our task is done and you should not look in the car anymore. Or he happens to be reported with regard to drugs or possession of weapons and then you can turn the whole car inside out, other than that you have no real reason to actually open the trunk.”

Despite this kind of frustration, some RNM officers indicated that they had no choice but to simply accept this. However, this was viewed differently by respondents who felt they had a broader competence, or at least should have. RNM officers regularly indicated that they could not agree with the limitations of the aliens law, because the competences were inadequate to effectively monitor security.

“I don’t understand why they are so difficult about those trunks, why don’t they just adjust it. Let us just have a look in it, because after all it’s just about safety.”

To overcome this limitation, several respondents indicated that they had to be ‘creative’ with their competences. It is crucial to mention that RNM officers expressed they did not necessarily violate the rules or abuse their powers; instead, they stated that they were merely making the best use of the possibilities offered by the various forms of legislation. This can be well illustrated with a specific case. Towards the end of a dynamic check, a station wagon was stopped in a residential area with a fairly young boy behind the wheel, without a clear specific cause (which was confirmed by the RNM officers at a later inquiry). During the check it appeared that he still had a number of outstanding fines and he was taken to the brigade for a further check. On the way, the boy asked one of the RNM officers why they had stopped him, to which he replied that he had been stopped because he had not turned on his traffic indicator. Later at the brigade, the RNM officer explained that he was always looking for a loophole, no matter how small, and that in this case they would base the check on traffic law.

The RNM is of course not unique in this creative use of competences and diverse legislation, as this also surfaces in research with the police (Halderen & Lasthuizen, 2013). Nevertheless, the combination of immigration law and criminal law competences offers the RNM officers extra possibilities. Frequently, the RNM officers explicitly referred to the possibility of using different forms of legislation.

“Well, when I check a car I first have a look at the documents, but automatically you are also looking directly into the vehicle. If you smell something, you open that whole car in the context of drugs. When you look in the door frame, maybe you see a weapon and if they don’t have any documents, then you turn the whole

car inside out. So you have to play a little bit with the legislation and that is how you also come across the fun parts.”

As indicated in the theoretical part, more rules and laws can paradoxically lead to more discretion. Many RNM officers indeed appeared to see opportunities in combining the benefits of immigration control and criminal enforcement. The question of whether the legislation was always used in a just manner did not seem to be of central importance. In accordance with the concept of ad hoc instrumentalism, they made use of the legislation that was most effective in a given situation. However, enforcement through criminal law is covered with considerably more legal safeguards than enforcement through administrative law. The Aliens Act makes it possible to stop a vehicle within the framework of the MSM and to check all passengers without a reasonable doubt of illegal stay or a criminal offence. Then, based on either the lack of the correct documents or the suspicion of a criminal offence, it can be decided to investigate a person or vehicle in more detail. As one of the respondents explained:

“We are civil servants in charge of border control and that is regulated in the administrative law and then we merely exercise oversight. The great thing about immigration law is of course that you can check everyone, because otherwise it is only the driver. (...) And if someone does not have papers with him, you can also search the vehicle as stipulated in article 50 [Aliens Act, JB] and then of course you will bump into something, for example marijuana, and then you put on your police cap. Continue applying your powers and then you suddenly change from being a supervisor to an investigating officer.”

At the same time, there were clear differences in this area between brigades and even between individual RNM officers per brigade. These differences were sometimes prompted by a lack of clarity about the aim of the MSM and the extent of their own competences. During one of the observed services, for example, the team leader opened a trunk due to the presence of long rolling paper (a piece of paper with a sticky edge that is often used for joints) in the car. One of the RNM officers present then asked a more experienced colleague whether the presence of long rolling paper was indeed sufficient reason to search the trunk, on which he made clear that this was not the case. Especially if there was no weed smell or the driver had no red eyes, this was not sufficient, because long rolling paper itself is not prohibited. The younger RNM officer indicated that this was his opinion as well, but that he had his doubts after he saw the team leader do this.

3.7 CONCLUSION AND DISCUSSION

In this contribution we looked at the way in which street-level RNM officers carrying out the MSM give substance to their discretionary decision power. These RNM officers have a lot of discretion to convert the official policy goals into action. At the same time, these policy goals are somewhat ambiguous: the MSM has a complex legal framework in which immigration control overlaps with criminal enforcement, which is reinforced by the name change from Mobile Aliens Monitor to Mobile Security Monitor. Within the context of the crimmigration process and ad hoc instrumentalism, this increases the discretionary decision power of the street-level RNM officers and allows their own professional views and beliefs to play a role in decisions.

The results show that in practice, RNM officers do indeed navigate between immigration control and criminal enforcement. They try to find their own way in this, with each having their own accents. As with regular police officers, there are therefore different styles among the RNM officers who carry out the MSM: some mainly focuses on immigration control, while others seem more focused on combatting crime and are strongly driven by the desire to increase the security of the Dutch state. RNM officers in the latter group find ‘catching criminals’ more exciting and get more satisfaction from it than from monitoring potential unauthorised migrants, which seems to fit the concept of striving for justice.

One’s own professional opinion has specific consequences for the way in which the discretionary decision power and the corresponding competences are handled. As explained in the theoretical part, more rules and laws can lead to more discretion, considering street-level officials simply have more options to choose from. In the context of the MSM, even the *assumption* of more rules, combined with an ambiguous objective, already resulted in more discretionary space. Since the MSM is still primarily an instrument for immigration control, the RNM officers identified as ‘police officers’ in particular opined that the existing competences sometimes offer insufficient possibilities. To nonetheless achieve these goals, they regularly made creative use of their powers, ‘playing’ with the various areas of the law.⁹ This fits with the ideas of crimmigration and ad hoc instrumentalism: both unwanted migrants and criminals are tackled by the most effective means available, regardless of the legal area.

⁹ On November 1, 2016, the Supreme Court ruled on the creative handling of competences by the National Police. In the context of dynamic traffic controls, there was no misuse of powers – a malicious creative use of powers – according to the Supreme Court, since it could not be established that the supervisory powers were used solely for investigation purposes (Supreme Court 1 November 2016, ECLI:NL:HR:2016:2454). This ruling by the Supreme Court requires nuance about the – legal – objectionability with regard to the perceived creative use of powers by the Royal Netherlands Marechaussee in the context of the MSM.

Thus, the actions of the RNM officers contribute to the further fading of the boundaries between immigration control and criminal enforcement.

Both the emphasis on 'catching criminals' and the creative use of competences are also apparent from research that took place at the police (Halderen & Lasthuizen, 2013; Kleijer-kool & Landman, 2016). What distinguishes the RNM officers from the regular police, however, is the combination of immigration control and criminal enforcement within the context of the MSM. As a result of the intertwining of immigration control and criminal enforcement, they have a more extensive toolbox with various instruments which can be used during a check, with competences arising from both administrative law and criminal law. RNM officers thus have a multitude of tools for stopping and searching a vehicle. In line with Sklansky's (2012) ad hoc instrumentalism and the claims of Maynard-Moody and Musheno (2000), they can first form an opinion about a vehicle or person and then use one of the options in the extensive toolbox they have at their disposal to justify their decisions. This means that it is not always transparent on which grounds a certain decision is made, especially for the persons being checked. Moreover, enforcement through criminal law is covered with considerably more procedural safeguards than supervision on the basis of administrative law.

Although the present article was mainly aimed at an empirical study of implementation decisions, the normative question arises as to whether this combination of different competences – so typical of the crimmigration process – is desirable in view of equal treatment of the persons checked and the protection of legal certainty and if so, to what extent sufficient safeguards have been built in. Where discretionary decision power may be required for street-level actors to translate abstract rules into specific situations, such fundamental considerations should not be left to the level of implementation.

