Securitizing asylum seeking in speech and practice in Finland

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Europe is witnessing numerous incidents of pushing back asylum seekers at its borders and suspending the right to seek asylum altogether (e.g., in Poland). This is connected to the discussion on the well-established international law principle of non-refoulement; whether or not it can be considered a peremptory (*jus cogens*) norm allowing no derogation or balancing. Push backs at the border and derogations based on a terrorist threat are seen as a state practice undermining the *jus cogens* status of the non-refoulement principle. Evidently, the right to seek asylum is under threat and this, we believe, is connected to the securitization of asylum seeking.

The idea of securitization implies speech acts that label something as a security issue without proper justification. There is already a wealth of literature on the securitization and criminalization of migration law, policy and practice, to which we have contributed by describing the developments in Finland. We found evidence of a strong security paradigm in migration law, policy and court practice, which, as our historical approach showed, was not a new phenomenon. However, what has become more prevalent in Finland recently is the securitization of asylum seeking. We argue that in the aftermath of the 9/11 terrorist attacks in the United States (USA), not only were increasing connections made between border security and terrorism in Finnish policy making, but also between border security and asylum seeking.

For a long time, this speech has not turned into practice. The parliamentary debates and policy talks have not affected the law and court practice in an alarming way. Based on our sample, Finnish courts seem to respect the non-refoulement principle and apply balancing between the security interests of the state and human security of the individual. It is challenging to assess the fairness of such balancing since information on possible security threats is usually not disclosed. Notably, outside the law and courts, the discourse is shifting. Likewise, as recent parliamentary debates on limiting the right to seek asylum have shown, the securitizing debates from the past 20 years may be put into law and practice, in response to the migration influx after 2015 and in the Belarussian context, and thus have severe legal consequences for asylum seekers and their possibility to seek protection.

Security in migration debates before 9/11

Already when drafting the first Aliens Act of 1983, several members of the Finnish parliament (MP) suggested that the Aliens Act should be well balanced between protecting the rights of individual migrants and protecting the national security interests of Finland, a statement that is repeated five times at different points in the debate. Security was seen as having two opposite dimensions: that of the individual migrant and that of the state. Mastering this conflict and ensuring the humane treatment of immigrants was a central challenge. Even MP Vennamo from the Finnish Rural Party (the predecessor to the Finns Party), who took an anti-immigration stance in the debates overall, stated the following: “The law should protect the country, but when implementing the law, there should be common sense and humanity and understanding of the current situation. Foreigners are not a threat to Finland. They are, on the contrary, in need of protection” (MP Vennamo, HE 196/1981, 2 k, January 27, 1981).

We found references to terrorism and to protecting the country from threatening immigrants already in those early debates then, but only as single mentions, not as a dominating discourse. “In addition

to the refugee question, immigration legislation is facing new challenges, such as preventing international terrorism and ever more mobile criminality" (MP Muroma, HE 186/1981, October 29, 1981). Overall, four MPs linked immigration to terrorism and security when drafting Finland's first Aliens Act. The bill stated that authorities should be able to respond effectively to threats posed by increased mobility, and that the national interest is a central frame to addressing complicated issues. The draft also includes a mandate for the government to alter rules in the times of crisis, such as war, terrorism, or other threat to national security.

In the 1990s, political debates evolved around what constituted a safe country, and asylum seeking as such was not presented as a threat to national security. Also during the 1990s, the understanding that Finland's legal responsibilities were restricted to its own citizens started to be challenged. Finland had in 1989 become a member of the European Council and signed the Human Rights Convention, which required legislators to reconsider the treatment of foreigners in relation to immigration control. The rapid internationalization of Finland, both in terms of the mobility of people, as well as in terms of international human rights engagement, was a major motivation behind replacing the previous Aliens Act. The objectives of the renewal of the act were two-fold: to enhance the processual rights of immigrants, while at the same time preserving the capability of authorities to prevent terrorism and crime.

Intensified securitization after 9/11

The number of references to security has increased in the Finnish legislation over time, and the change after 9/11 terrorist attacks in the USA is significant. When drafting the new Aliens Act of 2004, mentions of asylum seeking as a potential threat to national security grew in parliamentary debates. In particular, the then Minister of Internal Affairs Rajamäki (Social Democratic Party) fostered a discourse which very much questioned the motives of those who seek refuge. He used expressions such as "asylum tourism" or "asylum shopping" as well as "anchor children", and very much dominated the parliamentary debate (e.g., HE 28/2003, lk, June 16, 2003). Security became thus emphasized in the then new Finnish Aliens Act as a general criterion for obtaining residence permits. Despite a clear security turn in legislation, we also found some improvements to the security of asylum seekers. In the 1990s, threats to national security were included as reasons to not grant protection to asylum seekers, but in the Aliens Act of 2004, national security as a reason to refuse international protection was omitted from the law.

A strong proof of securitization has been the appearance of the concept of the irregular (illegal) entry of asylum seekers in Finnish security policy documents. While there are some mentions in reports from the 1990s, the increase in later reports is significant. In the security and defense report published in 2004, immigration is mentioned a few times, and a separate chapter is dedicated to immigration management. Later, in 2016, in a report on internal security, the Finnish government mentions immigration forty times and asylum seekers fifty-two times. Also, several references to terrorism and illegal entry were made, connecting the large inflow of asylum seekers to public order and security. We can thus see the problematization of immigration and asylum seeking starting after 9/11 and intensifying after the larger inflow of asylum seekers to Europe and Finland in 2015.

The current legislation from 2004 allows the consideration of general and national security aspects both through general provisions and specific provisions concerning entry, residence, detention and deportation. Importantly, there are also requirements for the overall assessment and balancing of different aspects in cases of rejection and deportation, although not explicitly applying in situations of national security. EU-citizens face more lenient requirements in terms of security concerns, emphasizing personal connections instead of generalized threats, which would ideally be the proper threshold for all foreigners. This development emphasizing security aspects and allowing discretion in the application of security conditions increases the potential of securitization if the legislation is not applied reasonably. Juxtaposing

and balancing different security interests is challenging, but there needs to be a principled proportionality assessment for fair and transparent deliberation.

Courts as the guardians of proportionality

The Supreme Administrative Court of Finland is the highest court of appeals for issues concerning migration administration. We have analyzed all relevant cases that are electronically available in the Finlex Data Bank. The database includes significant cases published in the Court Yearbook since 2001, as well as short summaries of important court decisions from the 1980s and 1990s. Our data is collected up to the year 2017. The total number of analyzed cases is sixty-five, giving a comprehensive picture of the development of court practice in the interpretation of migration law. The term security appears in three different contexts characterized by the type of decision: international protection (twenty-two cases), deportation (twenty-four cases), and family reunification (nineteen cases).

As mentioned above, the legislation allows for balancing in difficult cases, which courts have applied. Balancing is a proportionality test where the importance of different factors is assessed and weighted against each other to find out if the measure used is proportionate to the aim sought. An analysis of the court cases does not seem to reveal any issues raising concerns of unreasonable use of security arguments. Although it is possible to argue that in some specific cases the court should have placed more weight to the interests of the migrant, or it should have justified the decision better, all in all, both national security and the personal security of the applicant are considered in cases related to immigration. We noticed that after 9/11 especially, in cases connected to deportation, the security concerns of the state often prevailed. In one case, the court noticed the Greek asylum system facing serious problems, but the personal security of the asylum seeker was not seen to be threatened to the extent of triggering the *non-refoulement* principle. However, in another case the court recognized systemic faults in Hungary, preventing the return of an asylum seeker.

Knowing that the detailed information is crucial for assessing the fair balance between different interests, secrecy, especially in cases related to national security make the analysis challenging. An important case from 2007 in the Supreme Administrative Court concerning family reunification sets procedural guarantees on access to information on national security for the judges. However, as a newer case from 2020 related to asylum seeking restates, the information cannot be disclosed to the applicant. Although the empirical study is difficult, researchers can theoretically approximate how the balancing should be done in cases concerning security issues. As Aharon Barak has explained, decision-makers should evaluate the probability and extent of the added security that a restrictive measure is claimed to achieve. The probability of a security threat should thus determine the weight given to that factor. It implies that the security threat needs to be real and probable in order to outweigh the right or interest of an individual.

Trend of securitization continues

Research published after our article shows how, in response to the rise in numbers of asylum seekers to Europe in 2015, many restrictions were added to Finnish migration law. Another article argues that even the application of the law on international protection was applied more restrictive than before. The possibilities for receiving international protection were narrowed by removing a national category of humanitarian protection. However, the minimum obligations of international law were respected and mentioned in the preliminary works. During that time, the human security of migrants was also improved, and legal protection added to victims of domestic violence by allowing them to apply for extension of residence permit despite a rupture in family ties. On the other side, restrictions to family reunification of people receiving international protection weakened human security. A high-income requirement was placed on all categories of international protection, with an exception for refugees whose family members applied within three months. Although this restriction did not have a direct connection to securitization, it

did underline the erosion of the favourable treatment of people receiving international protection, as well as the economic approach to migration management. It is also a prime example of the race to the bottom in migration policy.

The situation in Polish-Belarussian border in 2021 is significantly different from the situation in many borders of European countries in 2014–2016. The hybrid character of the situation brings forth new security issues. It is strongly questioned in public discourse, whether the responses should follow international law obligations and take the asylum seekers' human security into account. In the Finnish parliamentary debates, alarming suggestions on suspending asylum seeking have been put forward. Not only by the traditional anti-immigration party, the Finns, but also by the most popular (according to recent polls) party, the liberal-conservative National Coalition. Using the state of emergency and revisiting the legislation on exceptional situations has been suggested by politicians and security professionals. Fair balancing and probability assessments are thus crucially needed in the legislative phase, if new legislation is the way forward. The law should also leave room for balancing in the application phase, especially if there is a doubt on the compliance with international norms.

What is at stake?

We noticed that securitization happens in connection to border security when discussing mass migration and illegal entry of asylum seekers, especially in security reports. The securitization of migration is a rhetorical move used to justify tight and sometimes even extreme political measures, which rarely deal with questions of the fleeing individuals' security. Recently, this type of securitizing speech acts have dominated in the parliamentary discussions on the Polish-Belarussian conflict, which may lead to law and court practice threatening the right to seek asylum and the protection from *non-refoulement*.

When discussing asylum seeking only in connection to the potential threat that this poses to national security, several things tend to be forgotten. First, those who seek refuge usually flee conditions that are dangerous to both themselves and their families. Thus, when debating forced migration and implementing laws and policies related to the topic, our first and foremost concern should be the security risk that people face – both in the country from which they left and in transit countries on their way to Europe and Finland. It is asylum seekers' lives that are at risk when they are forced to leave their homes and resort to irregular pathways, or when they drown in the Mediterranean Sea due to a lack of safe routes to asylum. In addition to natural forces, the people on the move face threats of abuse and trafficking, even by state actors as seen in the case of Belarus today.

Second, discussions dominated by security push aside other issues that are much more relevant to the arrival and settlement of newcomers. Migration could be debated from the perspective of social justice and inclusion, from the perspective of education, in relation to racism and racialized structures in societies, or from the perspective of demographic challenges of ageing societies. At the same time, as concerns over attracting more people to Finland are growing, politicians are seemingly trying to make Finland as unattractive as possible for potential asylum seekers.

The history of a strong security paradigm in migration law and the securitization of asylum seeking, which has intensified after 9/11, has paved the way for the current debate questioning human rights principles and obligations protecting asylum seekers. Finnish politicians are in the crossroad of choosing between a humane or securitized approach to asylum seeking. If the right to seek asylum is compromised, the courts will face challenging cases requiring balancing between national and human security, where hopefully the rule of (international) law prevails and only proportionate security concerns are acknowledged.

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