

# **ETHNIC PROFILING, POLICE AND CONSTRAINTS: FIGHTING DISCRIMINATION**

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## **Abstract**

The thesis debates the phenomenon of ethnic profiling which is one of the growing forms of modern racial and ethnic discrimination. Hidden behind security and safety arguments, this practice constantly stigmatizes minority groups putting them under more rigid surveillance or submitting them to less respectful treatments. This thesis argues that ethnic profiling by law enforcement officers must end. To reach this goal, the thesis discusses the existent legal framework assessing how they prevent or enable discrimination. Moreover, the thesis concludes that measures such as monitoring and recording police activities are fundamental to address the issue of ethnic profiling.

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## **List of Abbreviations**

CERD - Committee on the Elimination of Racial Discrimination

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

ECRI – European Commission against Racism and Intolerance

EU – European Union

FBI – Federal Bureau of Investigation

ICCPR – International Convention on Civil and Political Rights

NYPD – New York Police Department

OSCE – Organization for Security and Co-operation in Europe

PACE – The Police and Criminal Evidence Act 1984

UK – United Kingdom

UN – United Nations

US – United States of America

## Introduction

“No country is free from racial discrimination in the administration and functioning of the criminal justice system, regardless of the type of law applied or the judicial system in force, whether accusatorial, inquisitorial or mixed”.<sup>1</sup>

Ethnic profiling is a worldwide problem that manifests in different forms and shapes of discrimination in the different parts of the globe. Special Rapporteur Leïla Zerrougui pointed out the role of police in the discrimination practiced by the criminal justice systems by saying that “in considering human rights violations in general, and more particularly violations of the right to non-discrimination in the criminal justice system, it may be observed that it is within the security services and more particularly the police that the most serious, the most flagrant and the commonest violations occur”.<sup>2</sup>

The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mr. Doudou Diène, also called attention for the widespread practice of racial and religious profiling. He observed that this “appears as an alarming indicator of the rise of a racist and discriminatory culture and mentality in many societies” and pointed to the urgency of recognizing this practice and more importantly adopting measures - legislative, judicial and administrative measures - to ban and punish it.<sup>3</sup>

These first sentences of this thesis stress how urgent the topic of racial profiling is. Building on the assumptions above, this thesis discusses ethnic profiling by police with special

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<sup>1</sup> General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system . UN Committee on the Elimination of Racial Discrimination (CERD). 2005.

<sup>2</sup> Progress Report on Administration of Justice, Rule of Law and Democracy: Discrimination in the Criminal Justice system. Ms. Leïla Zerrougui, UN Special Rapporteur, 2005.

<sup>3</sup> Report on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, by the Special Rapporteur Mr. Doudou Diène, January 2004.. Pg 7.

focus on stop and search. It points out challenges to address ethnic profiling and explores the role of police collected data as well as the controversies surrounding ethnic data collection.

The choice of focusing on policing activities, specifically stop and search, is due to the perceived value of this particular action<sup>4</sup>, considered to be an important modern strategy of policing. Stop and search is primarily an investigative tool used by police to prevent and also repress crime. However, the fact that it is a police power designed to serve specific purposes does not mean that it cannot produce collateral effects. The thesis briefly debates other types of ethnic profiling as they serve both analytical and illustrative purposes.

Studies show that people's personal experiences shape their perception about what were exposed to.<sup>5</sup> Therefore, the experience of being stopped and searched is not only relevant from the police perspective but it also impacts on the society's evaluation of, and confidence and trust in the police. For this reason, in relation to police powers and their interaction with the community, the stop and search power is the most significant once it amounts to a direct interaction – sometimes the only type of interaction – between members of the community and the police.

Moreover, being stopped and searched means to be placed under state control which directly interferes in some basic rights such as the right to liberty, right to privacy and freedom of movement. This reach of stop and search powers is observed by the Supreme Court of the United States of America that stated that a stop happened when “taking into account all of the circumstances surrounding the encounter, the police conduct would ‘have communicated to a

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<sup>4</sup> According to the Home Office in England and Wales, only 29,407 searches in 2003/2004 were made under the Terrorism Act 2000 while 738,016 were made under the PACE (1984 Police and Criminal Evidence Act).

<sup>5</sup> Sunshine, Jason and Tom Tyler. The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing. *Law & Society Review*, Volume 37, Number 3 (2003). and Tyler, Tom R. Policing in Black and White: Ethnic group differences in trust and confidence in the Police. *Police Quarterly*, v.8, n.3, p.322-342, sep. 2005.

reasonable person that he was not at liberty to ignore the police presence and go about his business.””<sup>6</sup>

The thesis is divided into 4 chapters. Firstly ethnic profiling is conceptualized. Considering that ethnic profiling is a global and relatively new concept, the thesis draws upon international and country specific literature and reports made by the United Nations and others organizations. Then, chapter one briefly discusses the question of discrimination debating whether it is possible to justify ethnic profiling. The impacts of ethnic profiling are also presented in chapter one in order to reinforce all the harmful effects such practice can have.

Following the first considerations surrounding ethnic profiling, international legal standards are listed in order to examine how deep and wide is international law protection over the issue. This chapter gives special attention to the issue of discrimination once the provisions concerning discrimination are the substantially the one that support the most the fight against ethnic profiling. In chapter two, the discussion is illustrated by case law, mainly from the European Court of Human Rights, and is reinforced by some recommendations of how to address the ethnic profiling.

In chapter three, the question of discretionarily is debated in light of the notion of reasonable suspicion. ‘Reasonable suspicion’ is also addressed, since it is often the legal prerequisite for the exercise of police powers to stop and search. The discussion is conducted by the debate of cases. Special focus is given to European, American and British scenarios.

Although this thesis explores specific experiences and debates certain contexts, it seeks to examine those situations in order to illuminate a general problem - the difficulties faced in combating discriminatory ethnic profiling. Chapter four focusing on some of the

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<sup>6</sup> Floyd et al. vs. City of New York et al. United State District Court, Southern District of New York. Opinion and Order. 08 Civ. 1034 (SAS).



recommendations presented in Chapter 2 and discusses the monitoring and recording of police activities as essential measures to fight ethnic profiling. Special attention is given to the experience of profiling in England and Wales regarding the Stephen Lawrence Inquiry which offers an interesting historical approach to the recording system in place in the UK.

This thesis is conducted in a direction that points for a data oriented model of policing as a potential model to contribute to the end of police discriminatory behavior. Some of the issues faced by this proposition are also debated in Chapter four in the section about data protection.

The assumption guiding the present debate is that without qualified data, statistical and experienced based, there is no possibility of identifying ethnic profiling nor planning or implementing policies against ethnic and racial profiling. Even though each state faces particular difficulties, the thesis assumes that the specific experiences analyzed will provide arguments and tools that are able to shed light on other realities and can be used as a guide to orient their efforts to combat ethnic profiling.

## Chapter 1 - Conceptualizing Ethnic Profiling

Profiling is seen as “the most misunderstood and emotionally laden term in the modern vocabulary of law enforcement and politics”.<sup>7</sup> The term "profiling" does not indicate in itself a wrong doing. In the same way, the use of profiling can be valid if the profile was built based on objective factors and evidence of a specific case. Profiling can also have another meaning. From a behavioral science perspective, the concept of criminal profiling is a concept used as an investigative tool that allows the police to have a more clear psychological and social ‘profile’ of the offender besides contributing to a police assessment of the offender.

In conceptual terms, criminal profiling uses past experiences to predict possible future occurrences by “inferring the likely characteristics of an offender from analysis of criminal behaviour and other factors associated with a crime or series of crimes.”<sup>8</sup> This technique was developed and firstly applied to serial killers cases in the US and in the late 1970s it started to be used to fight drug offences. This extension in the application of criminal profiling represented a significant shift from descriptive and analytical profiles to proactive detection of crime based partially in prediction.<sup>9</sup>

This prediction feature represents a significant change to the debate on law enforcement strategies and for the rising of the debate on ethnic profiling.<sup>10</sup> The two notions – criminal profiling and ethnic profiling – are different concepts that do not share the same reasoning though they bring forth similar consequences, namely categorizing people in profiles. Ethnic

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<sup>7</sup> Alan Dershowitz’s words quoted in an article for the Harvard University Gazette, December 2001. Available at: <http://www.news.harvard.edu/gazette/2001/12.13/17-dershowitz.html>

<sup>8</sup> Professor Cunneen. Expert Opinion, Daniel Haile-Michael & ors v. Nick Konstantinidis & ors. File Number VID969/2010, Federal Court of Australia.

<sup>9</sup> Schutter, Oliviers De and Julie Ringelhein. Ethnic Profiling: A Rising Challenge for European Human Rights Law. *The Modern Law Review*, Oxford. (2008) 71(3) 358-384.

<sup>10</sup> In this thesis the term racial profiling and ethnic profiling will share the same meaning and will be used similarly.

profiling is “the practice of using ethnicity, race, national origin, or religion, as a basis for making law enforcement decisions about persons believed to be involved in criminal activity”.<sup>11</sup> Similarly, the European Commission against Racism and Intolerance (ECRI) presents another definition, according to which ethnic profiling happens when the police or other law enforcement officer use, with no objective and reasonable justification, race, colour, language, religion, nationality or national or ethnic origin as a ground for control, surveillance or investigation activities.<sup>12</sup>

These definitions look like the same but there a fundamental difference between them. The second definition adds important elements - objective and reasonable justification - which are core in the debate of what exactly constitutes ethnic profiling. According to Open Society’s definition, ethnic profiling is the use of such criteria as ground for decision making regardless justifications. Therefore, ethnic profiling by police is a form of discrimination.

ECRI’s definition, on the other hand, states that ethnic profiling depends on the existence or not of objective and reasonable justifications as provided by Recommendation 11. The Explanatory Memorandum of Recommendation 11, however, observes that ‘no objective and reasonable justification’ means not pursuing a legitimate aim or not having a reasonable relationship of proportionality between the means employed and the aim sought. ECRI, in my view, recognizes the risk of authorizing the reliance in racial or ethnic grounds when affirms that “even when, in abstract terms, a legitimate aim exists (for instance the prevention of disorder or crime), the use of these grounds in control, surveillance or investigation activities can hardly be

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<sup>11</sup> Reducing Ethnic Profiling in the European Union: A Handbook of Good Practices. Open Society Justice Initiative, 2012.

<sup>12</sup> ECRI General Policy Recommendation No. 11, on Combating Racism and Racial Discrimination in Policing Council of Europe, European Commission against Racism and Intolerance. June 29, 2007.

justified outside the case where the police act on the basis of a specific suspect description within the relevant time-limits”.<sup>13</sup>

Accordingly, the Recommendation 11 does not fully prohibit ethnic profiling but requires the introduction of ‘reasonable suspicion standard’, whereby law enforcement powers “can only be exercised on the basis of a suspicion that is founded on objective criteria”.<sup>14</sup>

This thesis adopts Open Society’s view considering ethnic profiling a discriminatory practice in its nature. In other words, ethnic profiling is the discriminatory use of ethnicity, race, national origin, or religion as the basis for making law enforcements decisions. Though this is my understanding, the concept of what constitutes ethnic profiling is far from being unanimous, therefore, the thesis will sometimes relinquish this view in the name of analyzing other cases instead of only trying to prove that what happened was ethnic profiling.

Returning to the question of prediction, which is straightly connected to ethnic profiling regarding the process that lead law enforcement officers to choose their criteria on which they will base their decisions, Bernard Harcourt indicates how unjust and inefficient it is to predict one’s behavior by looking into others that share the same physical feature – which in our discussion is race or ethnicity. Harcourt says prediction “has distorted our conception of just policing by emphasizing efficiency over crime minimization. Profiling has become second nature because of our natural tendency to favor economic efficiency.”<sup>15</sup>

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<sup>13</sup> Explanatory Memorandum of ECRI General Policy Recommendation No. 11, on Combating Racism and Racial Discrimination in Policing Council of Europe, European Commission against Racism and Intolerance. June 29, 2007.

<sup>14</sup> ECRI General Policy Recommendation No. 11, on Combating Racism and Racial Discrimination in Policing Council of Europe, European Commission against Racism and Intolerance. June 29, 2007.

<sup>15</sup> Peter Moskos. Book Review of Bernard Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age*. Chicago: University of Chicago Press, 2007; and Barnes, Katherine Y. Barnes. *Against Judgement*. Book Review of Bernard Harcourt. *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age*. Chicago: University of Chicago Press, 2007.

However, despite the official discourse claiming ethnic profiling as an efficient law enforcement tool, studies argue in opposite way.<sup>16</sup> A case brought before the German Federal Constitutional Court demonstrates how inefficient and problematic such practice is. The German police authorities conducted an investigation to find Islamic terrorist ‘sleepers’. The operation screened a huge amount of personal data – approximately 8 million persons - in property of public and private institutions in order to identify profiles that would match a certain profile they considered as a potential threat – being male, Muslim and native of some specific countries were among the characteristics. Around 32 thousand persons were identified but the operation did not lead to the finding of any suspect of terrorism.<sup>17</sup>

Racial profiling was first used in association with a strategy to interdict drug traffickers during the late 1970s in the United States of America. However, ethnic profiling had already been practiced before when President Franklin Roosevelt, in 1942, gave the Secretary of War the power to order over 110 thousand Japanese Americans (Executive Order 9066) to be deported to internment camps. Although the policy faced some criticism, at that point, ethnic profiling was not recognized as a wrong doing in the same way we now do.<sup>18</sup>

Ethnic profiling can be applied in many different circumstances. Accordingly, ethnic profiling can be practiced in cases such as stop and search by police, immigration control, provision of public services and for national security reasons – “war on terror” situations.

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<sup>16</sup> MVA and J. Miller, *Profiling Populations Available for Stop and Search*. Home Office Police Research Series Paper 131, London 2000; and Miller, Joel, Nick Bland and Paul Quinton. *A Challenge for Police-Community Relations: Rethinking stops and search in England and Wales*. *European Journal on Criminal Policy and Research* 9: 71–93, 2001.

<sup>17</sup> Schutter, Oliviers De and Julie Ringelhein. *Ethnic Profiling: A Rising Challenge for European Human Rights Law*. *The Modern Law Review*, Oxford. (2008) 71(3) 358-384.

<sup>18</sup> In 1988, the US Congress passed the Civil Liberties Act, which stated that a “grave injustice” was done to Japanese American citizens and resident aliens during World War II. It also established a fund that paid some \$1.6 billion in reparations to formerly interned Japanese Americans or their heirs. Executive Order 9066: Resulting in the Relocation of Japanese. Available at: <http://www.archives.gov/historical-docs/todays-doc/?dod-date=219>

Moreover it also can be done through different means. As described in the German case, data screening is a method of profiling using electronic data processing<sup>19</sup>. Other methods are the segregation of people, submitting people to identity checks, to stop and search powers, or to security checks.

David Harris uses a different vocabulary and qualifies ethnic profiling as formal and informal profiling. The first one would be based on “hard data, accumulated methodically over time”, and the profiles would be established by competent authorities.<sup>20</sup> Both mentioned cases – the German operation and the President Roosevelt act in 1942 – are examples of formal profiling.

Informal profiling consists in a “street sense” shaped out of “filtered experience and preexisting judgments” that can lead to a reflection of “preconceptions in the profiler rather than being accurate representations of who commits crime”. According to Jeffrey Goldberg’s understanding, “most racial profiling today is conducted by individual officers engaged in street-level policing; it is not generally a practice authorized by state statutes, local ordinances, or even police manuals or guidelines”.<sup>21</sup> This type of profiling is naturally harder to prove as there is no express order to apply ethnic profiling. Besides, in many countries, although ethnic profiling is present, the concept of ethnic profiling is not known and consequently the practice is maintained as a hidden police strategy.

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<sup>19</sup> Kett-Straub, Gabriele. Data Screening of Muslim Sleepers Unconstitutional. German Law Journal I. 07 No. 11. 967-975, 2006.

<sup>20</sup> David A. Harris, Profiles in Injustice: Why Racial Profiling Cannot Work, 20 (New York: New Press),pg. 26. In Peter Moskos. Book Review of Bernard Harcourt, Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age. Chicago: University of Chicago Press, 2007.

<sup>21</sup> Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES, June 20, 1999, § 6 (Magazine), at 5, in Wu, Steven. In The Secret Ambition of ethnic profiling. The Yale Law Journal. 115 Yale L.J. 491, 2005.

That is the case in Australia. A case brought before the Federal Court challenged profiling against the black community by Victoria police in Flemington, Kensington and North Melbourne areas. Six young men of African descent claimed they were regularly stopped, searched, questioned and sometimes even beaten by police just because they were black.<sup>22</sup> This was the first race discrimination related case to arrive in the Federal Court.

Professor Cunneen, an expert who gave his opinion in the case, studies discrimination focusing on indigenous people. In his Expert opinion, he highlighted the existence of profiling in Australia. He said that although the concept of racial profiling was not frequently used in Australia, a significant “body of both academic literature and the findings from various commissions of inquiry, royal commissions and parliamentary inquiries which have identified the adverse use of police discretion on the basis of the perceived race of an individual.”<sup>23</sup> This is very illustrative of what happen in many places around the world where not necessarily the vocabulary is been used, but the practice of ethnic profiling is present. In Australia, according to many finding, police actions were falling within the definition of racial profiling.

Regardless being formal or informal, as observed, the possibility of applying ethnic profiling in accordance with the law is a matter of discussion. One of the arguments is that the practice of using race as one of many factors orienting law enforcement decisions will not necessarily be discriminatory. The next section presents some cases and discussions concerning this question.

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<sup>22</sup> ABC News. Available at: <http://www.abc.net.au/news/2013-02-18/police-agree-to-new-procedures-to-combat-racism/4524770>

<sup>23</sup> Professor Cunneen. Expert Opinion, Daniel Haile-Michael & ors v. Nick Konstantinidis & ors. File Number VID969/2010, Federal Court of Australia.

## 1.1 Objective and reasonable justification?

When discussing ethnic profiling, one topic requires special attention due to its impact on the debate – the episode of September 11, 2001. After September 11 there was a shift that contributed to shape the new terms of the debate. Looking to the US context, before September 11 attack, racial profiling was a problem affecting African Americans or Hispanics. After the attack, Arabs and Islamic also started to be globally profiled.

In analytical terms, Gross and Livingston alert us to the fact that before September 11, the disputes was usually factual. They say that “critics would argue that the police acted on the basis of race, and the police would deny it. Now the differences are more likely to be definitional or frankly normative”.<sup>24</sup> The terms of the debate post 9-11, according to them, are driven by questions like: Does it constitute racial profiling? And if so, are the actions nevertheless justified?

These questions were posed by Gross and Livingston in a discussion about the US Justice Department’s actions concerning the program of interviewing men coming from countries with an Al Qaeda presence. The authors observe that even assuming that ethnicity was a central factor in the selection of the suspects it was not clear that the program consisted in ethnic profiling as it was not clear that the program worked under the assumption that those men coming from those places were more likely to commit terrorist acts. The Justice Department argued that those men were not suspects but they might be in the same circles or social groups and so they could help with information about the community what could lead to the terrorists.<sup>25</sup>

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<sup>24</sup> Gross, Samuel and Debra Livingston. Racial Profiling under Attack. Columbia Law Review, Vol.102:1413, 2002. Pg. 1414.

<sup>25</sup> Gross, Samuel and Debra Livingston. Racial Profiling under Attack (2002), pg. 1417.



The European Court of Human Rights case law also contributes to this debate. In *Cissé v. France*, the applicant alleged “that she had been discriminated against as the decisive criterion for determining whose identity would be checked was the skin colour of those present in the church”.<sup>26</sup> This case discussed the right to freedom of assembly and the police action which evacuated many immigrants from a church they had occupied. According to the description of the case all the white occupants of the church were stopped but the ‘whites were immediately released while the police assembled all the dark-skinned occupants’. The Court did not find a violation and held that regarding “Article 5 taken together with Article 14 of the Convention, the Court notes that the system set up at the church exit for checking identities was intended to ascertain the identity of persons suspecting of being illegal immigrants. In these circumstances, it cannot conclude that the applicant was subjected to discrimination based on race or colour”.<sup>27</sup>

It is possible to find decisions in both directions and the discriminatory components which infringe different treatments often are seen as neutral and objective. I believe, however, that ethnic profiling is not only a matter of purpose but it is essentially subjecting people on the basis of their race or ethnicity to different treatment. In the US Justice Department case, maybe there was not the subjective belief that those people were terrorists but because of their nationality they were treated differently. And in the ECtHR case, the Court debated more expressly the existence or not of ethnic profiling, concluding that it was not the case although dark-skinned people were assumed to be illegal immigrants and were treated differently on the basis of their skin color and nationality.

The previously cited German case also reinforces my view since the Constitutional Court recognized the legitimacy of the pursued aim – safeguarding national security –, however it

<sup>26</sup> *Cissé v. France*. European Court of Human Rights. Application no. 51346/99. Judgement on 9 April 2002.

<sup>27</sup> *Cissé v. France*. European Court of Human Rights. Application no. 51346/99. Judgement on 9 April 2002.

stated that the operation was disproportional because of the burden imposed on constitutional rights.

Professor Richard Banks disagrees with my stated view about purposes and means. Discussing the US Justice Department case, he does recognize the practice of ethnic profiling, however he considers it a less disturbing case because that policy does not affirm that such group has more propensity to crime, and instead it deals with an extreme situation where the government expects to receive a sort of collaboration from that group.

Gross and Livingston say that the authorized “use of race - which usually occurs when there is a racially specific description of the criminal - does not entail a global judgment about a racial or ethnic group as a whole.”<sup>28</sup> In fact, the use of race to search for an offender in one specific situation where it is known the race of the offender has nothing to do with police officers’ perceptions about racial or ethnic groups. This is instead what is called suspect profile.<sup>29</sup> However, even in this case, race cannot be the only hint police have yet the suspect description in itself does not necessarily entail any conclusion about that racial or ethnic groups.

In other words, the fact that one specific robber or drug dealer who is been searched is known to be white, Latino, Arab or black does not allow police to stop every person belonging to that race or ethnicity. Of course the notice about the offender’s feature will affect the police strategy designed to catch that offender, but if the strategy is not only race oriented and does not entail in a disproportional burden to a whole group of people, then it is not a discriminatory racial profiling case.

Gross and Livingston also state that if the police deliberately discriminate by, for instance, stopping all speeders but giving them different treatment such as giving tickets to black

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<sup>28</sup> Gross, Samuel and Debra Livingston. *Racial Profiling under Attack* (2002), pg. 1415.

<sup>29</sup> *Reducing Ethnic Profiling in the European Union: A Handbook of Good Practices*. Open Society Justice Initiative, 2012. Pg. 17 e 18.

drivers only, while whites receive just a warning, the police will be acting in violation of the Equal Protection Clause of the Fourteenth Amendment, but that will not be racial profiling. For Gross and Livingston, racial profiling is a matter of fact and so is more an evidentiary matter and would occur “whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person's racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating”.<sup>30</sup> Racial profiling, therefore, according to their understanding, is more than just applying different treatment; it is essentially subjective and based on a global judgment that a specific group is more prone than other racial or ethnic groups to commit crime, or to commit a particular type of crime.

An Israeli case brought before the Israeli Supreme Court is discussing this same issue in the context of profiling in the security checks at the airport.<sup>31</sup> The complaint focus on the discrimination committed against Israeli Arabs who are submitted to long security checks while Israeli Jews do not have to undergo through the same procedure. Citizenship and equality are in the center of the discussion. They ask the Court to recognize the discriminatory procedure and ask the State to cancel this procedure of racial profiling and to do equal security checks based on relevant and equal criteria. A study conduct about ethnic profiling in Airport Screening in Israel revealed that Israeli Arabs were required to additional searches four times more than Israeli Jews.<sup>32</sup>

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<sup>30</sup> Gross, Samuel and Debra Livingston. *Racial Profiling under Attack* (2002), pg. 1415.

<sup>31</sup> Information available on Association for Civil Rights in Israel website. Available at: <http://www.acri.org.il/en/2011/03/03/order-nisi-in-racial-profiling-petition/> and <http://www.acri.org.il/en/2011/03/03/order-nisi-in-racial-profiling-petition/>

<sup>32</sup> Hasisi, Badi and Yoram Margalioth. *Ethnic Profiling In Airport Screening: Lessons From Israel, 1968–2010*. Oxford University Press on behalf of the American Law and Economics Association, 2012.

Like Gross and Livingston understanding, the complaint also related the facts to an equality issue, however, the Israeli case also challenges their view by demonstrating that racial profiling is related to all decision making processes, the aim and the means. It does not matter if the consequence of the law enforcement officer's decision was a ticket or a longer security checks, if the decision was based on or motivated by race, ethnicity, religion, or national origin, it is a racial profiling case.

Gross and Livingston's position regarding the subjectivity of racial profiling is, in my view, somehow problematic once one of the main difficulties of addressing ethnic profiling is the basic step of proving its existence. Ethnic profiling would never be able to be effectively challenged judicially or administratively addressed if it was based only on the subjective perception of officers. This understanding poses an insuperable obstacle if it only attributes to the individual the responsibility for that discrimination practiced.

The same problem happens if the individual responsibility is excluded. It is important to address both the individual misconduct as the institution responsibility for that misconduct and potential violation of rights and freedoms. That was the approach taken by an inquiry conducted in the UK in the 1990s. The Inquiry Report – Macpherson report – concluded that the inquired situation was a result of institutional racism and defined institutional racism as “the collective failure of an organization to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin”.<sup>33</sup>

One of the challenges of this concept is the notion of unintentional racism. Naturally police officers do not self-define as racists, then what explains racist actions by the police as an institution. This paradox be explained by the notion of ‘unwitting racism’ which “can arise

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<sup>33</sup> The Inquiry into the matters arising from the death of Stephen Lawrence. The Stephen Lawrence Inquiry. Conducted by Sir William Macpherson of Cluny. 15 February 1999.

because of lack of understanding, ignorance or mistaken beliefs. It can arise from well-intentioned but patronizing words or actions. It can arise from unfamiliarity with the behaviour or cultural traditions of people or families from minority ethnic communities. It can arise from racist stereotyping of black people as potential criminals or troublemakers. Often this arises out of the uncritical understanding born out of an inflexible police ethos of the 'traditional' way of doing things.”<sup>34</sup>

Like it happens with the understanding of ethnic profiling as a subjective issue, the notion of institutional racism is not complete and if analyzed alone ignores the central role of accountability. It recognizes the discriminatory practice but it finds an explanation that sounds more like a justification and also reinforces the idea of a non-accountable situation as there is no clear cause and it is very hard to identify the responsible for this.

Moreover, the lack of understanding of probable causes and putting the fault on a racist institution are ways to keep race in a secondary position without challenging the hierarchical division of society. For this reason, although it is an useful tool to understand the power of racism that can overtake the whole functionality of an institution, institutional racism has not in itself a changing power but rather it reinforce the *status quo*.

Institutions should, in my view, observe three important issues if they want to prevent the occurrence of racial profiling: (a) is the legal framework sufficient to avoid ethnic profiling?; (b) to what extent is police discretionary power causing the problem?; and (c) if it is not a matter of formal ethnic profiling, what are means available to deal with misconduct of law enforcement officers?

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<sup>34</sup> The Inquiry into the matters arising from the death of Stephen Lawrence. The Stephen Lawrence Inquiry. Conducted by Sir William Macpherson of Cluny. 15 February 1999

Changing the focus to the use of race, ethnicity or national origin as objective criteria, a fundamental question is raised concerning the meaning and extension of what is considered to be objective. Statistical data are in no way absolutely neutral or reliable since in the processing of data other elements, as the methodology used, play important roles and they can also be oriented by prejudice.

In this context of controversial use of data, it is worth noting one of the basic principles of data protection that says that standards must be observed to ensure the collected data serve the right purpose. The EU Directive 95/46/EC that regulates the protection of personal data requires that such data shall be “processed fairly and lawfully, and collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes”.<sup>35</sup> Moreover, Article 17 of the UN International Covenant on Social and Political Rights prohibit the arbitrary or unlawful interference with his or her privacy which has to be protected.

It will be discussed further in this thesis the role of statistical data and official information to dismantle the practice of ethnic profiling. For now it is important to highlight that whether it is a subjective or objective matter, the only possible way of identifying the occurrence of informal ethnic profiling and learning its extension is through reliable data analysis. As observed by Schutter “the development of a strategy effectively tackling this phenomenon lies with the ability of public authorities to have sufficient information about how law enforcement officers use their powers on the ground vis-à-vis people belonging to different ethnic groups”.<sup>36</sup>

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<sup>35</sup> EU Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

<sup>36</sup> Schutter, Olivier De and Julie Ringelheim. *Ethnic Profiling: A Rising Challenge for European Human Rights Law*. The Modern Law Review, Oxford. (2008) 71(3) 358-384.

## 1.2 Impact of ethnic profiling on social and political life

It is important to bear in mind that the problem of ethnic profiling does not constitute only a form of unlawful discrimination, it also affects society in many different ways. Former MP in London, Bernie Grant, observed that “nothing has been more damaging to the relationship between the police and black community than the ill-judged use of stop and search powers.”<sup>37</sup> Indeed the misuse of such powers is not only a matter of illegality but it also has social and political consequences.

More importantly, the discrimination suffered is not limited to the victims’ feeling but it impacts on race relations, on the relationships between society and institutions, racial minority communities and the police, and between individuals, it reinforces stereotypes, changes perceptions and attitudes towards law enforcement agents and vice versa.<sup>38</sup>

The literature identifies and reveals some of the main problems raised by this practice. Ethnic profiling affects directly the relationship between police and ethnic minorities and indirectly it affects the relationship with the whole population. These relationships influence the credibility and the level of commitment that the local community will have to the local police force.

The already mentioned Macpherson report concluded that racial minority groups neither trusted nor had confidence in the police. But what exactly does it mean to say that people do not trust in the police? How does ethnic profiling affect this feeling of trust and confidence and why is it important that people trust in the police?

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<sup>37</sup>Shiner, Michael. National Implementation of the recording of police stops. Great Britain, Home Office, London, UK, 2006.

<sup>38</sup>Garrett, Brandon. Remedying Ethnic Profiling. 33 Columbia Human Rights Law Rev. 41, 2001-2002. Pg. 60.

Political science studies have another language to discuss trust and confidence. Studies about police are in general concerned with police performance analysis. To this extent research has focused on the notion of legitimacy of the institutions. According to these studies, the legitimacy of the police impacts on “people’s compliance with law, their willingness to cooperate with and assist the police, and whether the public will empower the police”.<sup>39</sup>

Investigating the source of legitimacy, the studies argue that the procedures and how the public perceive them to be – fair or unfair – are more influential than assessments of the effectiveness of police crime-control activities or judgments about the fairness of the police distribution of services.<sup>40</sup> Moreover the trust and confidence in the police is generally low and the studies suggest that this is related to the fairness of the procedures followed by the police when exercising their authority<sup>41</sup>. How they exercise their powers will influence peoples’ view of the police and also of profiling practices.<sup>42</sup>

Another study on legitimacy, focused on comparing the influence of people’s judgment about the procedural justice of the manner in which the police exercise their authority and the influence of people’s instrumental judgments – understood as the risk of being caught, police performance against crime and the fairness of the distribution of police services. The conclusion, based on a process-based policing model, was that legitimacy influences people’s reaction to the police and what precedes legitimacy is the fairness of the procedures.<sup>43</sup> This means that police will have a bigger public support according to people’s ethical judgments about how they exercise their obligation and responsibility.

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<sup>39</sup> Sunshine and Tyler. The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing. (2003). Pg. 534.

<sup>40</sup> Tyler, Tom R. Policing in Black and White: Ethnic group differences in trust and confidence in the Police. (2005)

<sup>41</sup> Tyler, Tom R. Policing in Black and White: Ethnic group differences in trust and confidence in the Police. (2005)

<sup>42</sup> Tyler, Tom and Cheryl Wakslak. Profiling and Police legitimacy. Criminology Volume 42 Number 2, 2004.

<sup>43</sup> Sunshine, Jason and Tom Tyler. The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing. (2003)



With this discussion, Sunshine and Tyler study complexifies the discussion on ethnic profiling adding a psychology analysis that opposes ‘the notion that if police are effectively fighting crime the police will inevitably alienate the public’.<sup>44</sup> This observation supports the argument that police should not adopt a crime-control model oriented only by crime reduction and catching criminals, but they also should care about safeguarding rights and freedoms by ensuring respect towards the public.

Thus from a policing perspective, these studies are greatly useful once they indicate that the police are primary responsible for their image among the community which shape their perception and beliefs about the police based on previous personal experiences. Sunshine and Tyler observe that “police have more control over how they treat people than they do over the crime rate.”<sup>45</sup> Many factors influence on incidence of crime and the police are unable to control them. However, the police can fully control how they treat people and so act in a procedurally fair manner and unbiased fashion.

Accordingly, biased policing, which entails arbitrary decision and leads to the discriminatory practice of ethnic profiling, will impact not only on people’s trust and confidence in the police but also on police legitimacy which in turn will impact on people’s compliance with the law. In other words, if the police are not trusted, the police legitimacy is low, consequently people’s cooperation<sup>46</sup> will be poor and eventually police efficiency will be affected.

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<sup>44</sup> Sunshine, Jason and Tom Tyler. *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*. (2004),Pg. 535.

<sup>45</sup> Sunshine, Jason and Tom Tyler. *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*. (2004),Pg. 536.

<sup>46</sup> The importance of voluntary cooperation with the police is described by Tyler: “public behavior motivated by trust is especially important and valuable to the legal system because it leads people to voluntarily cooperate with the police. Such voluntary cooperation is important because, to the extent that people help the police because of their own values, society need not put its resources into supporting agents of social control. Tyler (2001b) refers to a society in which people are internally motivated to obey the law as a law-abiding society, and this discussion extends that argument to a society in which members of the public voluntarily cooperate with the police.” In Tyler, Tom R. *Policing in Black and White: Ethnic group differences in trust and confidence in the Police*(2005). Pg. 338.

Similarly the policing model called distributive justice model, which focus on the fairness of the distribution of police services, also highlights the fundamental role of equality in police services delivery. This model explains low trust in the police by addressing the issue of discriminatory policing in the delivery of police services. From a social science perspective, “the distributive component of service delivery is central to public views of the police (Sarat, 1977), with equal treatment of all people and groups being the key to trust in the police”.<sup>47</sup>

Apart from the legitimacy perspective, ethnic profiling also impacts on people’s beliefs about public safety and the notion of risk and danger. If the police target specific groups – minorities – then the general public will perceive them as a threat just like the police do. The result of such a policy will be promotion and reinforcement of stereotypes which in turn generate a bigger insecurity feeling and harm the relations among citizens since the majority of the population will conceive minority groups as suspects and dangerous.

Analyzing the persistence of racism in the police culture we will see that it is also related to the previously mentioned findings that inform that trust is influenced by personal experiences of people. Shiner observes that “the legitimization of stop and search as a means of policing of dangerous populations means that predominantly white officers routinely meet members of black communities in confrontational situations, while rarely doing so outside of law-enforcement situations, which makes them particularly susceptible to stereotyping”.<sup>48</sup>

A study on subjective experiences of profiling discusses how people understand and explain profiling. The study demonstrates that both white and nonwhite groups recognize that the police engage in profiling and it has a negative impact on legitimacy for both groups. However,

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<sup>47</sup> Tyler, Tom R. Policing in Black and White: Ethnic group differences in trust and confidence in the Police (2005). Pg. 326.

<sup>48</sup> Shiner, Michael. Presentation about Organizational strategies for change and regulation. In Roundtable on Current Debates, Research Agendas and Strategies to Address Ethnic/Racial Profiling in the UK and USA. OSF/John Jay College of Criminal Justice, August, 2011.

white groups generally regard profiling as a neutral crime fighting strategy while nonwhite groups feel the police are acting out of prejudice.<sup>49</sup>

These findings support Banks discussion about the irrationality claim of profiling and the problems affecting all race relations. Considering the already existent social and economic disadvantages faced by racial minorities they also are subjected to different experiences with law enforcement officers, what increases the differences and the gap between these groups of society.

In this context, Banks talks about racial justice and suggests that the debate should focus on race-related consequences of the war on drugs<sup>50</sup> instead of focusing on racial profiling which burdens the innocent, 'middle-class people'. Moreover, according to his reading of the scenario, there is a problem in the debate on racial profiling. He argues that concerns with racial profiling are minimizing and reducing the complex and long term discussion about questions of race and policing.

He states that "while the studies' findings do not refute the existence of irrational profiling, they are also consistent with the possibility that the extensive investigation of racial minorities reflects their higher rates of criminal activity, along with officers' rational use of racial profiling".<sup>51</sup> Besides Banks says that even if there was no racial profiling, and if data could prove it, there would be no guarantee that problems associated with profiling – tension between minorities and police officers and the investigation and mistreatment of ethnic minorities – would disappear. I agree with Banks point, however, I believe ethnic profiling is a species of the

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<sup>49</sup> Tyler, Tom and Cheryl Wakslak. Profiling and Police legitimacy. (2004). Pg. 275.

<sup>50</sup> Banks talks about the specific context of war on drugs, but it can also be expanded to the general law enforcement scenario considering the extension of the drug problem and the impact of these crimes in the justice system (police actions and prison system). Banks, Richard. Beyond Profiling: Race, Policing, and the Drug War. Stanford Law Review, Vol. 56, No. 3, pp. 571-603, Dec., 2003.

<sup>51</sup> Banks, Richard. Beyond Profiling: Race, Policing, and the Drug War (2003), Pg. 572-573. Special Rapporteur Leïla Zerrougui also provoke this reflection in the Progress Report on Administration of Justice, Rule of Law and Democracy: Discrimination in the Criminal Justice system (2005).

big racial related problem and by focusing on this specific issue, we will be able to advance towards racial justice.

## **Chapter 2 - International Standards regarding discrimination**

Few studies debate the international legal status of ethnic profiling. This might be justified by the fact that ethnic profiling as a police strategy, explicitly or unwittingly, is a matter of domestic interest and thus national law will regulate and address the issue. However, although measures to ensure the combating of racism, discrimination and xenophobia should be created inside the national framework, it is important to bear in mind that international laws are often key in the process of increasing national standards and often contribute for the better regulation of domestic issues.

In this sense, this chapter intends to look at the international legal framework and to verify to what extent these instruments can contribute to combating ethnic profiling by police or to what extent they prevent ethnic profiling from happening. It is also analyzed if international legal framework provides for prohibition of discrimination in relation to law enforcement institutions and agents behaviors, and if it supports the necessity of monitoring police actions in order to prevent discriminatory conduct.

### **2.1 United Nations level**

Article 1(1) of the International Convention on the Elimination of all Forms of Racial Discrimination provides for its own definition of what is considered to be racial discrimination:

“Article 1

In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

The wide coverage of such definition presents both positive and negative aspects. It is positive because it comprises many discriminatory circumstances but at the same time it provides for little clarification.

The main international legal instrument, the International Covenant on Civil and Political Rights (ICCPR), calls for the States obligation to ensure people's rights without distinction of race, religion or national origin. Article 2(1) of the ICCPR provides a general equality rule regarding the enjoyment and exercise of the fundamental rights therein. It says:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Article 26 of the ICCPR broadens the coverage of Article 2, according to General Comment 18 of the Human Rights Committee. Article 26 states:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The Human Rights Committee, in General Comment 18, clarifies that Article 26 is not duplicating the guarantee of Article 2, of the ICCPR. Instead Article 26 provides an autonomous right that prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 demands that the States parties have the obligation to ensure that the legislation adopted by States parties comply with the requirement of article 26 that its content should not be discriminatory. In other words, “the application of the principle of non-

discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant<sup>52</sup> but they concern every law and its application.

These provisions supported a Spanish case brought before the United Nations Human Rights Committee. In the Rosalind Williams case ethnic profiling was practiced in the context of immigration control. The UN body recognized the irregularity of a police control based on physical and ethnic characteristics.

The case was submitted to the Human Rights Committee by Ms. Rosalind Williams<sup>53</sup> under the Optional Protocol to the ICCPR. Ms. Williams claimed to be victim of violation by Spain of article 12, paragraph 1 (right to liberty of movement) and article 26 (prohibition of discrimination), read in conjunction with article 2, of the ICCPR. She was approached by a police officer in a train station in Valladolid shortly after she got off the train. She was accompanied by her husband and son who were not stopped by the police. When she asked the officer why she was being checked, the officer said that the “National Police were under orders from the Ministry of the Interior to carry out identity checks of ‘coloured people’ in particular”.<sup>54</sup>

During the domestic procedures, the National High Court considered that the police officer’s behavior was supported by the legislation on foreigners. The law obliged officers to identify foreigners at the train station. The Constitutional Court also dismissed the application. They did not identify any racial prejudice in the discriminatory policy and stated: “the police took the criterion of race merely as indicating a greater probability that the person concerned was not Spanish. None of the circumstances (...) suggest that the National Police officer’s conduct

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<sup>52</sup> Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

<sup>53</sup> Views of the Human Rights Committee under Article 5, paragraph 4, of the Optional Protocol. Communication No. 1493/2006. CCPR/C/96/D/1493/2006.

Available at: [http://www.opensocietyfoundations.org/sites/default/files/decision-en\\_20090812.pdf](http://www.opensocietyfoundations.org/sites/default/files/decision-en_20090812.pdf)

<sup>54</sup> Views of the Human Rights Committee under Article 5, paragraph 4, of the Optional Protocol. Communication No. 1493/2006. CCPR/C/96/D/1493/2006.

was dictated by racial prejudice or any particular intolerance of members of a specific ethnic group”.<sup>55</sup>

The UN Human Rights Committee considered that targeting some people because of their physical characteristics amounts to a violation of dignity and also contributes to spread xenophobic attitudes:

“identity checks carried out for public security or crime prevention purposes in general, or to control illegal immigration, serve a legitimate purpose. However, when the authorities carry out such checks, the physical or ethnic characteristics of the persons subjected thereto should not by themselves be deemed indicative of their possible illegal presence in the country. Nor should they be carried out in such a way as to target only persons with specific physical or ethnic characteristics. To act otherwise would not only negatively affect the dignity of the persons concerned, but would also contribute to the spread of xenophobic attitudes in the public at large and would run counter to an effective policy aimed at combating racial discrimination.”<sup>56</sup>

Thus they concluded that Ms. Williams was singled out for the identity checks on the basis of her racial characteristics. The criteria of reasonableness and objectivity, generally used to assess the legitimacy of the differentiation of treatment were not met in the case.

This case raised an important question concerning the endorsement by the state of a discriminatory operation. When the National Court argued that race were only an indicator allowing officers to rely on race to make a decision, it is possible to see how rooted and deep ethnic profiling is in that state structure. In that case, Ms. Williams faced both formal and informal ethnic profiling considering that the profiling practice revealed to be a state policy.

The case can also be used to discuss the state obligation to guarantee protection against racial discrimination, and to produce data and make it available. In the referred case the litigants relied on data produced by human rights organizations to support their argument since there was

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<sup>55</sup> Views of the Human Rights Committee under Article 5, paragraph 4, of the Optional Protocol. Communication No. 1493/2006. CCPR/C/96/D/1493/2006. Pg. 4.

<sup>56</sup> Views of the Human Rights Committee under Article 5, paragraph 4, of the Optional Protocol. Communication No. 1493/2006. CCPR/C/96/D/1493/2006. Pg. 10.



no government data available in terms of racial and ethnic discrimination what made even harder to prove the alleged ethnic profiling.

The argument presented by the Spanish National High Court is illustrative of the traps presented by common sense arguments like that one. The color of people was used in a disengaged way and its use was mentioned as if it constituted a non-biased and objective law enforcement strategy which had no implication on race relations or consequences for racial minorities.

Articles 2 and 5 of the International Convention on the Elimination of all Forms of Racial Discrimination impose obligations to the states parties who undertake to prevent, eliminate and protect from racial discrimination. Recognizing the challenge faced by States Parties to effectively address the issue, the provisions state that States shall ‘undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races’. To achieve this, States shall not engage in act or practice of racial discrimination, and shall ‘take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists’.<sup>57</sup>

More importantly, Article 2, observes that the measure taken to prevent and ensure the adequate protection to racial groups, ‘shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved’.<sup>58</sup>

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<sup>57</sup> Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination. United Nations, adopted 21 December 1965. Entry into force 4 January 1966

<sup>58</sup> Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination. United Nations, adopted 21 December 1965. Entry into force 4 January 1969.

Article 5 also ensures the ‘right to equal treatment before the tribunals and all other organs administering justice, and the right to freedom of movement and residence within the border of the State’.<sup>59</sup>

Some of the general terms of the Conventions are discussed in a more detailed manner in the General Recommendations formulated by the Committee on the Elimination of Racial Discrimination. The General Recommendation XXXI provides for interpretation of articles 1, 5 and 6 of the Convention and addresses the issue of racial and ethnic discrimination in the administration and functioning of the criminal justice system.

Because of its nature, the general recommendation does not have the same binding force and power of the Convention. In fact, General Recommendation XXXI has no enforcement capacity. However, it is a very useful instrument and precise in pointing to the problems and proposing steps to be taken in order to eliminate the discrimination in the justice system and so in the police.

The General Recommendation XXXI, which will be further discussed, proposes: steps to be taken in order to better gauge the existence and extent of racial discrimination in the administration and functioning of the criminal justice system; the search for indicators attesting to such discrimination; strategies to be developed to prevent racial discrimination in the administration and functioning of the criminal justice system; steps to be taken to prevent racial discrimination with regard to victims of racism; reporting of incidents to the authorities competent for receiving complaints; and steps to be taken to prevent racial discrimination in regard to accused persons who are subject to judicial proceedings.<sup>60</sup>

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<sup>59</sup> Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination. United Nations, adopted 21 December 1965. Entry into force 4 January 1969.

<sup>60</sup> General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system. UN CERD, 2005.

Another relevant important instrument is the UN Code of Conduct for Law Enforcement Officials (1979). The Code provides that law enforcement officials shall protect human dignity and uphold human rights of all persons.<sup>61</sup> The Code also observes the need for a procedure in which officials can report to their superiors' eventual violation of people's rights.

The UN Human Rights Standards for Law Enforcement compiles the most important rules for law enforcement officials to follow to act within the limits of human rights. They provide for eight general rules related to non-discrimination, the most specific one being: "All persons are equal before the law, and are entitled, without discrimination, to equal protection of the law"; and in protecting and serving the community, "police shall not unlawfully discriminate on the basis of race, gender, religion, language, colour, political opinion, national origin, property, birth, or other status".<sup>62</sup>

## 2.2 European level

Before looking into the European legal framework regarding racial discrimination, it is worth noting that ethnic profiling is very under-reported in Europe. The EU Agency for Fundamental Rights even stated that "the UK has been addressing discriminatory ethnic profiling since the 1980s and, as a result, has built up a strong research basis as well as numerous policy responses to the issue. However, the recognition of discriminatory ethnic profiling practices has not been afforded as much attention in other EU member States".<sup>63</sup>

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<sup>61</sup> Code of Conduct for Law Enforcement Officials. Adopted by General Assembly resolution 34/169 of 17 December 1979. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>

<sup>62</sup> International Human Rights Standards for Law Enforcement - A Pocket Book on Human Rights for the Police. United Nations High Commissioner for Human Rights Centre for Human Rights.

<sup>63</sup> Towards More Effective Policing. Understanding and Preventing Discriminatory Ethnic Profiling: A Guide. European Union Agency for Fundamental Rights. Publications Office of the European Union, 2010.

Although ethnic profiling is under-reported in Europe, the fact that Europe has a strong Human Rights Court makes them an interesting continent to be studied. Regional instruments like the European Convention on Human Rights also provide for rules against discrimination. They are instruments with more advanced enforcement machinery<sup>64</sup>, if compared to the UN system, and so their provisions are essential for the improvement of discriminatory policing situations in the Member States. Case law from the European Court of Human Rights helps to identify the reach of the provision protecting rights and freedoms of the Convention.

The European Convention on Human Rights did not provide for a general prohibition of discrimination for a long time. Article 14 that expressly addresses the prohibition of discrimination is accessory of the other substantives guaranteed rights. Although the ECHR was formulated after the biggest discriminatory catastrophe of all times, it was only in 2000 that a prohibition of discrimination clause was introduced in the Convention through the Protocol 12.<sup>65</sup>

The Court observed that the notions of discrimination prohibited by Article 14 and by Article 1 of Protocol No. 12 are to be interpreted in the same manner.<sup>66</sup> According to the Explanatory Report on Protocol No. 12, Article 1 adds protection but do not change the meaning of discrimination established by Article 14 of the ECHR. Explanatory Report paragraph 18:

“The notion of discrimination has been interpreted consistently by the European Court of Human Rights in its case-law concerning Article 14 of the Convention. In particular, this case-law has made clear that **not every distinction or difference of treatment amounts to discrimination**. As the Court has stated, for example, in the judgment in

<sup>64</sup> Buergenthal, Thomas. The American and European Conventions on Human Rights: Similarities and Differences. American University Law Review. 30 Am. U. L. Rev. 155, 1980-1981.

<sup>65</sup> Article 14 of ECHR - Prohibition of discrimination: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

Article 1 of Protocol no. 12 - General prohibition of discrimination: “1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

<sup>66</sup> Sejdić and Finci v. Bosnia and Herzegovina [GC] - 27996/06 and 34836/06. Judgment 22.12.2009 [GC].

the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*: "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'" (judg. of 28 May 1985, Series A, No. 94, paragraph 72). The meaning of the term "discrimination" in Article 1 is intended to be identical to that in Article 14 of the Convention"<sup>67</sup>

Accordingly, the additional scope of protection includes discrimination committed by a public authority in the exercise of discretionary power, and by any other act or omission by a public authority.

Article 14 of the ECHR was discussed in conjunction Article 2 of Protocol No. 4 of the ECHR in *Timishev v. Russia*, where the Court concluded that "since the applicant's right to liberty of movement was restricted solely on the ground of his ethnic origin, that difference in treatment constituted racial discrimination within the meaning of Article 14 of the Convention".<sup>68</sup> The case challenged a Russian police policy of excluding Chechens from a particular area. The applicant alleged that he was barred from entering an administrative region because of his Chechen ethnicity which oriented the Russian police officer's action.

According to the Court's assessment, if there is no objective and reasonable justification to submit persons in a similar situation to different treatments then it constitutes discrimination. However, further in the decision, the Court enhances the standard and states that a decision that results in different treatment based on a person's ethnicity is not capable of being objectively justified:

"Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction (...) The Court considers that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being

<sup>67</sup> Explanatory Report on Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Council of Europe.

<sup>68</sup> *Timishev v. Russia*. European Court of Human Rights. Applications nos. 55762/00 and 55974/00. Judgement 13 December 2005.

objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.”<sup>69</sup>

The impossibility of using ethnic origin as ground to impose different treatment is, therefore, clearly stated by the Court. However, in terms of discrimination based on other grounds, the European case law is controversial. Although the ECHR seems to be sufficiently broad, the application of its provision not always gives protection against discriminatory acts. In *Abdulaziz and Others v. United Kingdom*<sup>70</sup>, decided in 1985, the Court assessed a potential violation of Article 14 combined with Article 8 of the Convention. As quoted in the Explanatory Report on Protocol No. 12, the European Court of Human Rights presented a more permissive view regarding the use of ethnicity and similar criteria. The Court stated that when giving different treatments the state should pursue legitimate aims or observes a reasonable relationship of proportionality between the means employed and the aim sought to be realized.

The court then recognized that “states enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law” but also observed that the Court should give the final ruling in this respect.

When assessing the immigration rules of that case, which purpose was to curtail "primary immigration", the Court observed that the rules did not impose restrictions on the grounds of race, colour or religion of the intending entrant but the state rather wanted to all "non-patrials". However, the Court showed no concern with the consequences of such rules and despite the fact that they “affected at the material time fewer white people than others”, the Court considered this to be “not a sufficient reason to consider them as racist in character”.<sup>71</sup>

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<sup>69</sup> *Timishev v. Russia*. European Court of Human Rights. Applications nos. 55762/00 and 55974/00. Judgement 13 December 2005.

<sup>70</sup> *Abdulaziz and Others v. United Kingdom*, European Court of Human Rights. Judgment of May 28, 1985.

<sup>71</sup> *Abdulaziz and Others v. United Kingdom*, European Court of Human Rights. Judgment of May 28, 1985.

Furthermore, recently, in the previously mentioned *Cissé v. France*, the Court dismissed the application concerning a potential violation of Article 14 practiced by an operation that filtered people based on the color of their skin because the checking of identities was intended to ascertain the identity of persons suspecting of being illegal immigrants. The Court found that the French authorities had reasonable ground for suspecting the applicant and, therefore, did not consider the application to be well founded. Obviously, in that case, ethnic profiling was practiced regarding the different treatment given to white and non-white people but the issue was not discussed as it goes beyond the individual case of the applicant *Cissé*.

It is important noting that the circumstances of the case in another core element to indicate the Court's view. In both *Abdulaziz and Others v. United Kingdom* and *Cissé v. France* the Court faced immigration situations what indicates that there might be a different standard applied for each situation. In these cases, the discussion was not about the legitimacy if the use of race or ethnic grounds, instead the Court assessed if the decisions taken by the states was based on race or ethnic ground. Once they affirmed that the state authorities did not rely on race and ethnic criteria, then the discrimination issue is set aside.

A report on ethnic profiling in the European Union produced by Open Society Justice Initiative compiles European case law standards and presents the scrutiny tests imposed by the Court to allow ethnic profiling which are based in a legitimate different of treatment. These tests suggests that the ECtHR does not fully prohibit the practice of ethnic profiling, but instead it believes that not all forms of ethnic profiling are discriminatory or not justifiable and privileges the assessment of case by case. Accordingly, there are three tests: effectiveness, proportionality and necessity.<sup>72</sup>

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<sup>72</sup> Reducing Ethnic profiling in the European Union: A handbook of good practices. Open Society Justice Initiative. 2002

Effectiveness values objective statistical information that can build a link “between the ethnic criteria employed and the probability that persons captured by the profile committed or planned to commit the offense in question”. The proportionality test requires an assessment of the “benefits derived from using ethnic criteria in terms of increasing law enforcement efficiency outweigh the harm done through the real or perceived discriminatory impacts of the profile on the targeted individuals or groups”.<sup>73</sup> And necessity requires that the results achieved by ethnic profiling could not have been achieved by using another means or a non-differentiating approach.

Apart from the ECHR, there is an EU Directive on principle of equal treatment between persons irrespective of racial or ethnic origin<sup>74</sup> which reinforces the existing law on racial discrimination. This EU Directive purpose is to “lay down a framework for combating discrimination on the grounds of racial or ethnic origin”.<sup>75</sup> Nevertheless, the EU Directive focus on social protection and does not address equality of treatment in law enforcement or administration of justice situations.

The Council of Europe provided for guidance to the police which addressed discrimination issues. In 1979, a resolution on the Declaration of the Police was published by the Parliamentary Assembly of the Council of Europe. The Declaration required legislation to “provide for a system of legal guarantees and remedies against any damage resulting from police activities” and also stated that “a police officer shall receive thorough general training,

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<sup>73</sup> Reducing Ethnic profiling in the European Union: A handbook of good practices. Open Society Justice Initiative. 2002. Pg. 193.

<sup>74</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

<sup>75</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Article 1: “the purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment”.



professional training and in-service training, as well as appropriate instruction in social problems, democratic freedoms, human rights and in particular the European Convention on Human Rights”.<sup>76</sup>

Moreover, in 2001, the Committee of Ministers of the Council of Europe adopted the European Code of Police Ethics<sup>77</sup> which established principles for police practices and codes of conducts guided by principles of impartiality and non-discriminations in the State Members. This Code of Police Ethnic also highlights the need for accountability mechanisms and states that police shall be subject to external control. State control of the police shall be divided between the legislative, the executive and the judicial powers.

The Code, however, does not address the fundamental issue of data gathering like the International Human Rights Standards for Law Enforcement and the General Recommendation XXXI of CERD do. The Code, instead, makes sure to reinforce the need to observe international data protection principles to collect, storage and use of personal data but it does not make any remark concerning the need to have comprehensive and precise information about police work and this includes the collection and storage of personal data.

## 2.3 Recommendations to address ethnic profiling

As far as ethnic profiling by police is concerned, the UN CERD General Recommendation XXXI provides many recommendations that encompass several aspects of the

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<sup>76</sup> Declaration of the Police. Resolution 690,1979. Parliamentary Assembly of the Council of Europe. See at: <http://assembly.coe.int/Documents/AdoptedText/ta79/ERES690.htm>

<sup>77</sup> European Code of Ethics. Recommendation Rec(2001)10 of the Committee of Ministers. Council of Europe. Relevant points: “26. Police training, which shall be based on the fundamental values of democracy, the rule of law and the protection of human rights, shall be developed in accordance with the objectives of the police; 40. The police shall carry out their tasks in a fair manner, guided, in particular, by the principles of impartiality and non-discrimination; 42. The collection, storage, and use of personal data by the police shall be carried out in accordance with international data protection principles and, in particular, be limited to the extent necessary for the performance of lawful, legitimate and specific purposes.”

problem. Point 1 proposes the use of indicators of racial discrimination. These would be able to indicate the extension of the problem by exposing the reality through the analysis of data and processed information. The recommendation suggests that the state should pay attention to (a) the percentage of persons affected by discriminatory conduct, (b) the number of complaints, keeping in mind that this information in itself does not provide any conclusion considering that a small number can reveal the people's lack of information concerning their rights, fear of reprisals, lack of trust in the public institutions, (c) information regarding police officers and minorities groups behaviors, (d) diversity among the public agents, the ranks of the police should have a significant representation of persons belonging to ethnic minorities groups.<sup>78</sup>

I believe these indicators are key for planning of a policy that aims to combat ethnic profiling. The recommendations on the use of indicators of racial profiling bring implied with their elements the necessity of gathering and producing data as observed by the Committee on the Elimination of Racial Discrimination when reporting on Spain.

If we confront the mentioned indicators with the Spanish situation after the UN Human Rights Committee decision in the Williams case, we see that the old scenario has not changed. In 2011, the Committee on the Elimination of Racial Discrimination verified that the same issue is still in practice in Spain. They stated that “los controles de identificación o redadas policiales, basados en perfiles étnicos y raciales, realizados en lugares públicos y barrios donde hay una alta concentración de extranjeros”<sup>79</sup>. They also highlighted the lack of statistical data about ethnic and

<sup>78</sup> General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system. UN CERD, 2005.

<sup>79</sup> The identity checks or police stops and searches based on ethnic and racial profiles happen in public places and neighborhoods where there is a high concentration of foreigners (my translation). Concluding Observations of the Committee on the Elimination of Racial discrimination. CERD/C/ESP/CO/18-20, March 2011. See at: [http://www2.ohchr.org/english/bodies/cerd/docs/co/Spain\\_AUV\\_sp.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/co/Spain_AUV_sp.pdf)

racial composition of the population and foreigner like recommended by the General Recommendation 24.<sup>80</sup> According to the Committee the lack of statistical data contributes to discriminatory actions.

Furthermore, in 2013, the UN Special Rapporteur identified ethnic profiling still as a challenge to be overcome. The report indicated that in 2011 the Spanish Ombudsperson received a high number of complains concerning the abusive use of identify checks against foreign nationals. He observed that the law governing the issue are not enough and do not provide for sufficient safeguards to prevent it from happening.<sup>81</sup>

Some progress was observed though. An important difference from Williams case is observed in the government's attitude towards ethnic profiling. According to the Special Rapporteur, the governments acknowledge it as a problem. He was informed that there are ongoing training programmes "to sensitize the police on discrimination, and the development of good practices related to police/community relations and ethnic profiling reduction in some parts of Spain".<sup>82</sup>

Another important recommendation addresses the need for adequate legislation which will provide a legal framework that will give support to initiatives that aim to eliminate ethnic profiling practices. General Recommendation XXXI, point 4, a, and General Recommendation 35 are concerned with the criminalization of racism.<sup>83</sup> It is important to notice, however, as previously stated, that racial profiling has many roots and although its practice might be

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<sup>80</sup> General Recommendation 24, Information on the demographic composition of the population. UN Committee on the Elimination of Racial Discrimination, 1999.

<sup>81</sup> Organic Law 1/1992 on the protection of public safety of 21 February 1992. Organic Law 4/2000 on the rights and freedoms of foreigners in Spain and their social integration also contains provisions on identity controls. Criticism is also addressed to the instrument regulating police practices: Circular 2/2012 of the General Directorate of Police adopted on 20 May 2012.

<sup>82</sup> Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, by the Special Rapporteur Mutuma Ruteere. Visit to Spain. (2013)

<sup>83</sup> General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system. UN CERD, 2005, and General recommendation No. 35 on Combating racist hate speech, CERD/C/GC/35, 2013.

explained by the presence of racism, it is possible that such practice is not based on racism. For this reason, as far as ethnic profiling by police is concerned, an efficient accountability system in conjunction with rules precisely tight might be better in terms of results than criminalizing acts of racism.<sup>84</sup>

In relation to prevention of racial discrimination, the general recommendation observes the need for “education programmes, training in respect for human rights, tolerance and friendship among racial or ethnic groups, as well as sensibilization to intercultural relations, for law enforcement officials” and fosters dialogue between the police and the groups that are discriminated against.<sup>85</sup>

Two other important aspects of the General Recommendation XXXI deal with, first, the obligation of the states to provide an effective remedy for the victims of discriminatory acts and also to facilitate their access to justice and, secondly, with the rights and autonomy of police officials who have to be in a position that allows them to refuse to obey illegal and discriminatory orders or instructions.

One specific recommendation made by the CERD in the occasion of the General Recommendation XXXI sums everything that is needed for a successful strategy to eliminate structural racial discrimination that is the case of profiling by police. Point 5 (i) says:

“To implement national strategies or plans of action aimed at the elimination of structural racial discrimination. These long-term strategies should include specific objectives and actions as well as indicators against which progress can be measured. They should include, in particular, guidelines for prevention, recording, investigation and prosecution of racist or xenophobic incidents, assessment of the level of satisfaction among all communities concerning their relations with the police and the system of

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<sup>84</sup> It is worth noting that I am not denying the importance and signification of the criminalization of racist actions. However, with regards to the elimination of ethnic profiling and considering how hard it is to prove such practice, the crime of racism is of little help. Its biggest contribution would be to affirm the wrongness of a racist act.

<sup>85</sup> General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system. UN CERD, 2005.Recommendation 5, b and c.

justice, and recruitment and promotion in the judicial system of persons belonging to various racial or ethnic groups.”<sup>86</sup>

The Programme of Action that resulted from the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance that took place in Durban in 2001 is the only documents to expressly mention racial profiling. Many of the actions proposed are relevant for the elimination of ethnic profiling.

Although the Programme of Action addresses expressly racial profiling, it is questionable if it does in a satisfactory way since it covers only criminal justice situation - investigatory activities or for determining whether an individual is engaged in criminal activity. While point 70 enunciates the need for ‘constitutional, legislative and administrative measures to foster equality among individuals and groups of individuals who are victims of racism, racial discrimination, xenophobia and related intolerance’<sup>87</sup>, and point 71 points out the necessity of implementation of accountability systems ‘for misconduct by police officers and other law enforcement personnel which is motivated by racism, racial discrimination, xenophobia and related intolerance, and to prosecute perpetrators of such misconduct’; point 72 reduces the concept of racial profiling when it states:

“Urges States to design, implement and enforce effective measures to eliminate the phenomenon popularly known as “racial profiling” and comprising the practice of police and other law enforcement officers relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity”.<sup>88</sup>

In the above quoted point, the Programme of Action calls States to react on “racial profiling” practices but presents a problematic and inconclusive definition of racial profiling

<sup>86</sup> General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system. UN CERD, 2005.

<sup>87</sup> Point 70. Programme of Action. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. Durban, 2001.

<sup>88</sup> Programme of Action. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. Durban, 2001.

when it relates the term to the reliance, to any degree, on race, colour, descent or national or ethnic origin as the basis for specific purposes - to investigatory activities or for determining whether an individual is engaged in criminal activity. For instance, according to this definition, immigration cases like the Spanish case, above explored, would not consist of racial profiling.

In the European level, two main instruments provide for recommendations concerning police activities – Recommendations on Policing in Multi-Ethnic Societies from the Organization for Security and Co-operation in Europe and General Policy Recommendation No. 11 on Combating Racism and Racial Discrimination in Policing from the European Commission against Racism and Intolerance.<sup>89</sup> Both instruments expressly confront the problem of racial profiling.

Paragraph 1 of OSCE recommendations highlights the importance of recognizing that policing affects inter-ethnic relations and calls States to adopt policies “to promote the integration of minorities at national and local levels”.<sup>90</sup> And in, paragraph 16, OSCE recommends measure such as codes of conduct regulating operational practices to be taken in order to prevent from discriminatory policing.

Though OSCE recommendations do not expressly propose a data gathering system or a recording of police activities, Explanatory Notes of paragraph 16 indicates, in accordance with State’s obligation under the European Convention on Human Rights and the International Convention on the Elimination of Racial Discrimination, the need for an “ethnic monitoring of the outcomes of police operations in order to identify whether or not discrimination is taking

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<sup>89</sup> OSCE Recommendations on Policing in Multi-Ethnic Societies. Organization for Security and Co-operation in Europe. February 2006, and ECRI General Policy Recommendation No. 11, on Combating Racism and Racial Discrimination in Policing Council of Europe, European Commission against Racism and Intolerance. June 29, 2007.

<sup>90</sup> OSCE Recommendations on Policing in Multi-Ethnic Societies. Organization for Security and Co-operation in Europe. February 2006, paragraph 1.

place” and whether or not ‘stop and search’ impact fairly and proportionately on different ethnic groups.<sup>91</sup>

The ECRI Recommendation 11 is more precise regarding the monitoring activity. Point 2 recommends States to “carry out research on racial profiling and monitor police activities in order to identify racial profiling practices, including by collecting data broken down by grounds such as national or ethnic origin, language, religion and nationality in respect of relevant police activities”<sup>92</sup>, and point 12 is even more explicit to state the need for the establishment and operation of a system for recording and monitoring racist incidents.

Duly, Recommendation 11 also provides for recommendations in many other topics such as “measures to make the police aware of the fact that acts of racial discrimination and racially-motivated misconduct by the police will not be tolerated”; “mechanisms for victims of racial discrimination or racially-motivated misconduct by the police”; ensuring “effective investigations into alleged cases of racial discrimination”, and the recruitment of members of under-represented minority groups in the police.<sup>93</sup>

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<sup>91</sup> OSCE Recommendations on Policing in Multi-Ethnic Societies. Organization for Security and Co-operation in Europe. February 2006

<sup>92</sup> ECRI General Policy Recommendation No. 11, on Combating Racism and Racial Discrimination in Policing Council of Europe, European Commission against Racism and Intolerance. June 29, 2007.

<sup>93</sup> ECRI General Policy Recommendation No. 11, on Combating Racism and Racial Discrimination in Policing Council of Europe, European Commission against Racism and Intolerance. June 29, 2007. Points 7, 8,9, 17.

## Chapter 3 - Limiting Police Discretion

As seen, there is an extensive international legal framework regarding the prohibition of discrimination. However, as far as ethnic profiling is concerned alongside with anti-discrimination norms it requires that states take measures to ensure the respect for those law. In this regard, another important element – discretionary police powers – has to be regulated in order to balance police work in terms of achieving their aims – maintenance of public order and peace, and crime control – while ensuring respect for human rights.

When exercising their functions police can decide whom to stop and search or ask for identification. For this reason, there is a direct relation between this discretionary power and ethnic profiling since the former happens when the discretionary power is misused. Of course if we deal with formal ethnic profiling and a state planned operation, the debate will not mainly be around the discretionary power once the police officers are obeying superior order. Nevertheless every informal ethnic profiling situation involves police abusive use of discretion.

The police are responsible for the selection of who will be stopped, sanctioned, arrested or ignored, thereby their actions are the ones that define the profile of the people subjugated to the criminal justice system. Some would even argue that society has trusted to the police the biggest part of social control functions and so police decisions impact on the political field,<sup>94</sup> considering the political power police have when interacting with the community.

Assuming that effective law enforcement activities require discretionary decision-making powers – it is even argued that stop and search is a fundamental investigative police tool – the

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<sup>94</sup> ‘J. Empey, American Delinquency. Its Meaning and Construction. The Dorsey Press, 1978’. In Dias, Jorge de Figueiredo e Manuel da Costa Andrade. *Criminologia: O homem delinquent e a sociedade criminógena*, Coimbra Editora. 1997. Pg. 443.



question raised then concerns constraints and how we can ensure that this discretionary power will be fairly and correctly used.

The question posed is challenging because it requires technical knowledge in different areas as the discretionary power does not only concern stop and search powers or ethnic profiling practices but it is related to the notion of policing and the nature of some state function. In fact, it is the nature of police work to “make a choice among possible courses of action or inaction”.<sup>95</sup> Thus it is not possible to reduce some functions that involve decision making to a Cartesian exercise.

Furthermore, it is unthinkable to write down in law a list of every single possibility in which police officers can act and how they should act. Besides it is also doubtful that society would want to have a police that cannot assess risk, make judgments, and independently take decision. Therefore there must be legal, general but precise enough standards to limit police powers and specially stop and search powers.

Accordingly, the Canadian Supreme Court even states that “a system that attempted to eliminate discretion would be unworkably complex and rigid”.<sup>96</sup> Moreover, discretion is necessary because resources are scarce and so the police need to establish priorities. For this reason the discussion cannot be polarized putting in one side the no discretion at all and in the other limitless discretion.

This power is essential to see why the argument presented by some of those who argued in favor of ethnic profiling is so fragile. Those who believe that the disproportion of the use of police powers among different ethnic or racial groups can be rationally justified often rely on the

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<sup>95</sup> Definition of discretion by David KC (In Discretionary Justice: A Preliminary Inquiry) quoted in Bronitt, Simon and Philip Stenning. Understanding discretion in modern policing. Criminal Law Journal 35 Crim LJ 319. 2011.

<sup>96</sup> R v. Beare [1998] 2 SCR 387, Canadian Supreme Court in Bronitt, Simon and Philip Stenning. Understanding discretion in modern policing (2011).

disproportionality existent in crime and convictions rates between those groups. The problem with this understanding is that they ignore how influential police decisions are and the data are not themselves impartial. The police are the one deciding who they will stop or arrest, where and when they will patrol.<sup>97</sup> It is worth noting that this fact does not advocate for the futility of those rates and data produced, instead it reinforces the argument that to address ethnic profiling, state, policy and society should be aware of how police behave as well as they should know well how and over who police are exercising their powers.

Therefore, as expected, those against ethnic profiling address the supposedly excessive police discretion as a way of combating the practice. I believe it is important to distinguish the sociological approach to discretion which can be summarized in the police freedom to act coercively and so eventually commit abuses and the legal and political approach that sees discretion as an inherent aspect of police powers and encourages states to legally regulate and create accountability mechanisms to address the so called freedom to act coercively.

Special Reporteur Leila Zerrougui stated that the discrimination ascribed to the police derives from various factors and among them she includes among the factors: “the range of powers given the police to combat crime and ensure order and security, the inadequate means put at their disposal, the type of supervision under which the police operate and the existence or absence of efficient remedies and positive measures to prevent and punish violations of the rights

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<sup>97</sup> David Harris argues in this direction in relation to the racial breakdown of those involved in drug crimes: “African-Americans are just 12% of the population and 13% of the drug users, but they are about 38% of all those arrested for drug offenses, 59% of all those convicted of drug offenses, and 63% of all those convicted for drug trafficking.’ While only 33% of whites who are convicted are sent to prison, 50% of convicted blacks are jailed(...) the racial composition of prisons and jail populations or the racial breakdown of sentences for these crimes only measures the actions of those institutions and individuals in charge; it tells us nothing about drug activity itself.” Harris, David. *The Stories, the Statistics and the Law: Why “Driving While Black” Matters*. Minnesota Law Review. 84 Minn. L. Rev. 265, 1999-2000. Pg. 295.

of the most vulnerable.”<sup>98</sup> But, more importantly, she complements the list by explaining that if the police have broad discretionary powers and are the only authority responsible for investigating their violations and abuses, most probably the result will be assured impunity.

I agree with the external accountability claim, though I do not agree with the critique on ‘the range of powers’ which relates to police discretionary powers. The problem is not about the powers police have but it is about how they use their powers and what means are available to ensure they will act in accordance with the law and use their power in a reasonable manner.

Bronitt and Stenning suggest, as the modern view tends to indicate, that the exercise of discretion has to be structured and so they propose administrative public guidelines just like the UN Committee on the Elimination of Racial Discrimination<sup>99</sup>. The authors quote Galligan and state that guidelines play important roles. They can be (a) a “yardstick for testing decisions”, what will reduce the reliance on improper, arbitrary or discriminatory factors, and (b) a way of incentive to police officers to think more carefully and critically about their work, objectives and goals.<sup>100</sup>

The next section explores this notion of a structuration of the exercise of police discretionary powers. European cases, judged by the European Court of Human Rights, and national experiences – in the United States and the United Kingdom – are discussed and revealed how the law – and the Courts and inquiries - contributed to the limitation of discretionary powers.

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<sup>98</sup> Progress Report on Administration of Justice, Rule of Law and Democracy: Discrimination in the Criminal Justice system. Ms. Leïla Zerrougui, UN Special Rapporteur (2005). Pg. 14.

<sup>99</sup> General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system. UN CERD, 2005. Paragraph 5.

<sup>100</sup> Bronitt, Simon and Philip Stenning. Understanding discretion in modern policing (2011).

### 3.1 European cases

As observed, the Council of Europe enacted both the Declaration of the Police<sup>101</sup> and the European Code of Police Ethics.<sup>102</sup> These both documents do not expressly impose rules or specific restrictions to police powers, though they affirm the need to act in accordance with the law, to have police training and to provide for accountability and control systems against damages resulting from police activities.

Another instruments providing for some guidance is the Manual for Police Trainers issued by the European Agency for Fundamental Rights.<sup>103</sup> This document discusses policing from a human rights perspective but does not provide for a sharp structure to guide police conduct.

The mentioned instruments provide for some orientation regarding the use of police powers but they do not clearly underline the reach and limits of those powers which are constantly in conflict with other interests, and sometimes, rights and freedoms. Nevertheless in my view, the case law of the European Court of Human Rights is a more fruitful source of that type of guidance.

Imagine a scenario where there is no requirement of reasonable suspicion limiting stop and search powers. In fact such scenario exists and raises concerns regarding the misuse of such powers. *Malik v. the UK* and *Gillian v. the UK* are cases brought before the European Court of Human Rights to challenge counter-terrorism laws (Section 44 and Schedule 7) that authorize public officers to stop people without having reasonable suspicion. The cases discuss in some extension the role of reasonable suspicion requirements.

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<sup>101</sup> Declaration of the Police. Resolution 690,1979. Parliamentary Assembly of the Council of Europe.

<sup>102</sup> European Code of Ethics. Recommendation Rec(2001)10 of the Committee of Ministers. Council of Europe.

<sup>103</sup> Fundamental rights-based police training. A Manual for Police Trainers. European Union Agency for Fundamental Rights, 2013

In *Malik v. the UK*, which has not been decided yet, the applicant challenges Schedule 7 to the Terrorist Act 2000. According to its paragraph 2, examining officers can stop or detain a person to question without having grounds for suspicion. A Code of Practice has been issued and Paragraph 10 says that “examining officers should therefore make every reasonable effort to exercise the power in such a way as to minimize causing embarrassment or offence to a person who is being questioned”.<sup>104</sup>

This provision contorts the notion of reasonableness that should guide law enforcement officers conduct and be an stimulator to reasonable behavior. It is interesting to note that although the law allows officers to act without reasonable suspicion, the state recognizes the risk of discriminatory use of those powers. The Notes for guidance on paragraph 10 highlights:

“The powers must be used proportionately, reasonably, with respect and without unlawful discrimination. All persons being stopped and questioned by examining officers must be treated in a respectful and courteous manner. Examining officers must take particular care to ensure that the selection of persons for examination is not solely based on their perceived ethnic background or religion. The powers must be exercised in a manner that does not unfairly discriminate against anyone on the grounds of age, race, colour, religion, creed, gender or sexual orientation.”

Unfortunately, the Court has not yet pronounced about the merits of this particular case, and declared the application admissible. However, a study report produced by the Equality and Human Rights Commission shows that the guidance is not enough to prevent ethnic profiling once data analysis indicates race disproportionality in the use of powers under Schedule 7.

“In 2010/11, 46.6 per cent of total examinations were of people of Asian or other ethnicity, as were 65.2 per cent of over the hour examinations and detentions. At airports, 63.9 per cent of total examinations were of people of Asian or other ethnicity.

The experimental analysis of race disproportionality suggests that both black and Asian or other ethnic groups experienced high race disproportionality in 2010/11, which was

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<sup>104</sup> *Malik v. the United Kingdom*, European Court of Human Rights. Application no. 32968/11. Admissibility decision. 2/05/2013.

higher for examinations at airports than for those at all ports. Overall, race disproportionality was high for total examinations, higher for over the hour examinations and highest for detentions.”<sup>105</sup>

This suggests that guidance if not supported by law will not contribute effectively to the prevention of discrimination. Another similar case was already judged by the European Court of Human Rights and gives us a hint of what can happen in Malik case. In *Gillan and Quinton v. the UK*, the Court assessed the alleged violation of Article 8 by the section 44 of the Terrorism Act 2000. This legal provision allowed a uniformed police officer to stop any person within the geographical area covered by the authorization of a senior officer, and physically search the person and anything he or she carried. Firstly, the Court had to state that it “considers that the use of the coercive powers conferred by the legislation to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life”.<sup>106</sup>

Then the Court discussed if the interference with the applicants right of private life was in accordance with the law and observed that if, in matters affecting fundamental rights, legal discretion is granted to the police in ‘terms of unfettered power’ this will be contrary to the rule of law and the ECHR.

Accordingly, the law must precisely indicate the ‘scope of any such discretion conferred on the competent authorities and the manner of its exercise’. The Court recognized that the Code of Practice sets out guidance and dictates how the constable must carry out the search. However, in the Court's view, “the safeguards provided by domestic law have not been demonstrated to

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<sup>105</sup> Hurrell, Karen. An Experimental Analysis of Examinations and Detentions under Schedule 7 of the Terrorism Act 2000. Briefing Paper 8. Equality and Human Rights Commission, 2013.

<sup>106</sup> *Gillan and Quinton v. the United Kingdom*. European Court of Human Rights. Application No. 4158/05. Judgment 10 January 2010.

constitute a real curb on the wide powers afforded to the executive so as to offer the individual adequate protection against arbitrary interference”.<sup>107</sup>

The Court added that there is no requirement that the stop and search power be considered “necessary” and consequently no requirement of assessment of the proportionality of the measure. The Court concluded by alerting to the fact that none of the thousands searches under section 44 were related to a terrorist offence what indicates the “clear risk of arbitrariness in the grant of such a broad discretion to the police officer”.<sup>108</sup>

In *Gillan and other v. the UK*, the Court made clear the rule according to which states are obliged to provide for sufficient safeguards in law against the possible arbitrary use of police powers, and to offer adequate protection to the rights and freedoms guaranteed in the Convention. However, the Court in that case did not debate what consist in sufficient safeguards what was done in 1990 in *Fox, Campbell and Hartley v. The United Kingdom*<sup>109</sup>.

In this case the Court discussed if there was a breach of Article 5 § 1 (art. 5-1) concerning the arrest of the applicants under suspicion of being terrorists. In this case, the domestic law also did not require reasonable suspicion but set a lower threshold consisting in ‘honest suspicion’. According to the House of Lords, the honest suspicion was a subjective test that required officers to honestly believe that there was suspicion.

The Court first established that “‘reasonable suspicion’ presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may

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<sup>107</sup> *Gillan and Quinton v. the United Kingdom*. European Court of Human Rights. Application No. 4158/05. Judgment 10 January 2010.

<sup>108</sup> *Gillan and Quinton v. the United Kingdom*. European Court of Human Rights. Application No. 4158/05. Judgment 10 January 2010.

<sup>109</sup> *Fox, Campbell and Hartley v. the United Kingdom*. European Court of Human Rights. Applications 12244/86, 12245/86, 12383/86. Judgment 30 August 1990.

have committed the offence. What may be regarded as ‘reasonable’ will however depend upon all the circumstances”.<sup>110</sup>

The Court, then, assessed if the safeguard afforded by Article 5 § 1<sup>111</sup> has been secured and concluded that it has not. According to the Court, the genuine suspicion held by the arresting officers is not enough to satisfy the requirement of reasonable suspicion. In this sense, the Courts stated that the arrests were based on a ‘bona fide suspicion’ – subjective believe of suspicion. However the information held by the Government (applicants’ previous convictions) cannot satisfy an objective observer that the applicants could be involved in the new facts and so did not pass the objective test required.

### 3.2 National cases

The choice of cases was based in the work both the UK and the US have been doing in relation to the issues of ethnic profiling and police discretion. Although both countries face problems concerning ethnic profiling, there is a difference on how they address them. While in the US regulation chose a conflict model where litigation is common place and redress through courts is the way of making police forces accountable, the UK opted for a consensus model in which regulation is a result of policy and political debate.

Besides, as pointed out by Michael Shiner “the disproportionate use of police powers against black and minority ethnic populations is one of the major fault-lines in police-community relations in Britain and the USA”.<sup>112</sup> Despite the attempts and the failures, I consider the UK and

<sup>110</sup> Fox, Campbell and Hartley v. the United Kingdom. European Court of Human Rights. Applications 12244/86, 12245/86, 12383/86. Judgment 30 August 1990.

<sup>111</sup> ECHR, Article 5 § 1 (c): the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

<sup>112</sup> Shiner, Michael. Presentation about Organizational strategies for change and regulation. In Roundtable on Current Debates, Research Agendas and Strategies to Address Ethnic/Racial Profiling in the UK and USA (2011). Pg.1.



US good experiences to be observed considering the academic and governmental attention to these issues. Moreover, “both models raise important questions about the ability of organizations to critically reflect on their own practice, to acknowledge their capacity for wrong-doing and to act on such acknowledgement”<sup>113</sup> what I consider to be the first basic step for the understanding and planning for any action plan to end ethnic profiling.

### 3.2.1 The United States of America

In the United States, opposition to ethnic profiling became apparent in the 1980s and 1990s. However it was only in the 1990s that the notion of racial and ethnic discriminatory profiling was crystalized in the context of “war on drugs”.<sup>114</sup>

In our time, the US call the world’s attention with the serious ethnic profiling issue the country is facing in relation to the fight against terrorism and to immigration control. What is not internationally debated, however, is the racial profiling practiced by US polices within its territory and against its own citizens. In 2001, even President Bush addressed the issue of racial profiling announcing that “it’s wrong and we will end it in America”.<sup>115</sup>

As we know, the US Supreme Court has a central role in establishing legal standards. Its biggest impact on race related issue goes back to 1954 with *Brown vs. Board of Education*<sup>116</sup> when the Court upheld the “separate but equal” doctrine stating that it was inherently unequal and that racial segregation had a detrimental effect on racial minority children.

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<sup>113</sup> Shiner, Michael. Presentation about Organizational strategies for change and regulation. In Roundtable on Current Debates, Research Agendas and Strategies to Address Ethnic/Racial Profiling in the UK and USA (2011). Pg.1.

<sup>114</sup> Ethnic Profiling in the Moscow Metro. Open Society Justice Initiative (2006).

<sup>115</sup> George W. Bush, President, United States of America, Address of the President to the Joint Session of Congress (Feb. 27, 2001). quoting U.S. Dep’t of Justice, Fact Sheet: Racial Profiling 1 (2003). Available at [www.usdoj.gov/opa/pr/2003/June/racial\\_profiling\\_fact\\_sheet.pdf](http://www.usdoj.gov/opa/pr/2003/June/racial_profiling_fact_sheet.pdf)

<sup>116</sup> *Brown vs. Board of Education*. 347 U.S. 483 (1954).

In 1976, a decision by the US Supreme Court in *Washington v. Davis*<sup>117</sup> assessed the recruitment procedures of the District of Columbia Police Department which measured verbal ability and reading comprehension. As a result, more black applicants failed the test. The Supreme Court held that discriminatory impact if not intended did not configure violation of the Equal Protection Clause.

In 1996, a landmark decision<sup>118</sup> determined that the New Jersey State Police was engaging in unlawfully racial profiling in violation to the Fourth Amendment<sup>119</sup>. According to the arguments of the defendants in the case, they were arrested illegally once the police act based on discriminatory enforcement of traffic law. A statistical study revealed that in June of 1993 37.4% of all drivers stopped involved racial minorities while in observed randomly-selected times only 13.5% were African Americans.

Although the Court played an important role in some situations, scholars argue they are also responsible for the slowness in which things are changing. Kevin Johnson affirmed that “since at least 1970, the Court has consistently refused to interfere with aggressive police practices in fighting crime and has steadily expanded the discretion afforded police officers”<sup>120</sup> what results in a permissible racial profiling practice.

Also in 1996, in *Whren v. United States*, the Supreme Court assessed the reasons that led to a traffic stop. They looked into the possibility of search and seizure without probable cause under the defendant’s argument that the stop of two black young men was done based on racial profiling. The Court ruled that the Constitution prohibits selective enforcement of the law based

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<sup>117</sup> *Washington v. Davis*. 426 U.S. 229, 235–36, 248 (1976).

<sup>118</sup> *State v. Soto*, 734 A.2d 350 (1996).

<sup>119</sup> US Constitution Fourth Amendment declares that “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”

<sup>120</sup> Johnson, Kennedy. *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*. The Georgetown Law Journal. Vol. 98:1005, 2010. Pg. 1048.

on considerations such as race but this conclusion was provided without a remedy, as Kevin Johnson observes. He argues that the decision did not send the right message and “affirmatively contributed to the predominance of racial profiling in law enforcement in modern America”<sup>121</sup> when it recognized that intentionally discriminatory application of laws would be violation of the Equal Protection Clause<sup>122</sup> yet the case was not judged under a race-based law enforcement conduct. The Court instead held that as long there is a reasonable cause that a traffic violation occurred, the police may stop a vehicle.

The United States Constitution requires reasonableness in the exhaustively discussed Fourth Amendment which protects people against “unreasonable searches and seizures”. Accordingly, the US Supreme Court jurisprudence held that for a police stop to comply with the Fourth Amendment rule it has to be based on reasonable suspicion of a criminal activity considering that reasonable suspicion is an objective standard, meaning that subjective reasons are irrelevant. In their words, the police can stop a suspect when the officer is “able to articulate something more than an inchoate and unparticularized suspicion or hunch”, this would indicate the existence of objective reasons.

The ‘articulable something’ are specific facts that the police must be able to describe together with “rational inferences from those facts, reasonably warrant [the] intrusion [on a citizen’s liberty interest]”<sup>123</sup>, independently of the irrelevant subjective thought the police officer might have.

Though the standards were settled a long ago, the US still faces problems with the requirement of the ‘articulable something’. A report of the special rapporteurs on contemporary

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<sup>121</sup>Johnson, Kennedy. *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*. (2010).

<sup>122</sup> Fourteenth Amendment’s Equal Protection Clause declares that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

<sup>123</sup> *Terry v. Ohio* (1968) 392 U.S. 1, 27.

forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, recommended that the US government “clarify to law enforcement officials the obligation of equal treatment and, in particular, the prohibition of racial profiling”.<sup>124</sup>

He also pointed that “approximately 32 million people in the United States report having been victims of this practice” and criticized the *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* issued by the Department of Justice because of how inaccurate profiling was regulated. He observed that it “does not cover profiling based on religion, religious appearance or national origin; does not apply to local law enforcement agencies; does not include any enforcement mechanism; does not require data collection; does not specify any punishment for federal officers who disregard it; contains a blanket exception for cases of ‘threat to national security and other catastrophic events’ and ‘in enforcing laws and protecting the integrity of the Nations’ borders’.”<sup>125</sup>

Recently the New York City Department was sued in a case about the “tension between liberty and public safety in the use of a proactive policing tool called ‘stop and frisk’”<sup>126</sup>. According to data, between January 2004 and June 2012, the police of NY made 4.4 million stops. Over 80% of these stops were of black and Hispanics. In the decision the judge looked into various elements among them the existence of a discriminatory pattern, whether the City had notice of the allegation of ethnic profiling and what was done in terms of monitoring the situation and training.

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<sup>124</sup> Report on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, by the Special Rapporteur Doudou Diène. Mission to the United States of America (2009).

<sup>125</sup> Report on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, by the Special Rapporteur Doudou Diène. Mission to the United States of America (2009).

<sup>126</sup> Floyd et al. vs. City of New York et al. United State District Court, Southern District of New York. Opinion and Order. 08 Civ. 1034 (SAS).

The information of the 4.4 million stops were produced based on the NYPD database which is fed by forms filled out by police officers after each stops. Some methodological errors influenced the quality of the information yet those data informed that at least 200,000 stops from were made without reasonable suspicion.<sup>127</sup>

Among the findings the judge extracted from the expert testimony the following observations: “(1) The NYPD carries out more stops where there are more black and Hispanic residents, even when other relevant variables are held constant. The racial composition of a precinct or census tract predicts the stop rate above and beyond the crime rate; (2) Blacks and Hispanics are more likely than whites to be stopped within precincts and census tracts, even after controlling for other relevant variables”<sup>128</sup>.

The plaintiffs in this case argued violation of the Fourth Amendment Clause and of the Equal Protection Clause of the Fourteenth Amendment both of the US Constitutions. The first protects people against unreasonable stops, searches and seizures. This means, according to a US Supreme Court decision, that the police can only “stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot,’ even if the officer lacks probable cause”<sup>129</sup>.

The Fourteenth Amendment is related to people’s equality before the law and protects all individuals against intentional discrimination based on race. As mentioned before, ethnic profiling is very hard to be demonstrated and so the discrimination is hard to be proved however

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<sup>127</sup> Executive Summanry, Document 373. Floyd et al. vs. City of New York et al. United State District Court, Southern District of New York. Opinion and Order. 08 Civ. 1034 (SAS).

<sup>128</sup> Floyd et al. vs. City of New York et al. United State District Court, Southern District of New York. Opinion and Order. 08 Civ. 1034 (SAS).

<sup>129</sup> United States v. Swindle, 407 F.3d 562, 566 (2d Cir. 2005) (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989)) (some quotation marks omitted) in Floyd et al. vs. City of New York et al. United State District Court, Southern District of New York. Opinion and Order. 08 Civ. 1034 (SAS).

the circumstantial evidence of the intent is considered to be enough, this means that the plaintiffs must prove that “a discriminatory purpose has been *a* motivating factor”.<sup>130</sup>

The conclusion after the examination of all the information above was that the “NYPD has an unwritten policy of targeting “the right people” for stops. In practice, the policy encourages the targeting of young black and Hispanic men based on their prevalence in local crime complaints. This is a form of racial profiling”.<sup>131</sup> Therefore the judge ruled that the NYPD violated both the Fourth Amendment Clause and the Equal Protection Clause.

Another important issue raised in the decision concerns another aspect of the Fourth Amendment, which imposes “responsibility that constrains state actors, requiring them to discharge their powers of investigation in a manner that keeps with the public trust”.<sup>132</sup> Moving from the ‘rights’ language, the decision concluded that there was an inadequate monitoring and supervision of the unconstitutional stops. The supervisors would review officers’ productivity but no one looked into the constitutionality and quality of the officers’ conduct. The proper recording of the stops emerged as a problem that was never detected by the supervisors.

The poor training of officers also appeared as a problem that needs to be addressed. The officers’ testimonies evidenced that there is a distorted comprehension of what “furtive movements” as a reasonable suspicion would be. They used examples fully based on stereotypes to describe what would configure a “furtive movement” situation. As previously discussed in this thesis, the stereotyping is one of the causes and consequences of racial profiling.

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<sup>130</sup> Accord *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 277 (1979). (“Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the [governmental action] or it is not.”) in *Floyd et al. vs. City of New York et al.* United State District Court, Southern District of New York. Opinion and Order. 08 Civ. 1034 (SAS).

<sup>131</sup> *Floyd et al. vs. City of New York et al.* United State District Court, Southern District of New York. Opinion and Order. 08 Civ. 1034 (SAS).

<sup>132</sup> Citron, Eric F. Rights and Responsibility in Fourth Amendment Jurisprudence: The Problem with Pretext. *Yale Law Journal*. 116 YALE L.J. 1072 (2007)

### 3.2.2 United Kingdom

As we saw in the report about Schedule 7<sup>133</sup>, the limits to the discretionary police power must be set in law in order to effectively provide for safeguards against arbitrary use of police powers.

Since the 1970s the relations between the police and black community in the UK were deteriorating.<sup>134</sup> One of the main reasons for this deterioration was the lack of an adequate legal framework and the lack of an accountability system that would address bad and miscarriage conducts. Consequently this poor relation resulted in less confidence in the police what increased gradually the level of mistrust.

In this context and under the legacy of colonialism<sup>135</sup>, the Brixton riots happened in 1981. During two days in April, 1981, many people – police and public – were injured, vehicles were burned and buildings were damaged in one of the most remarkable crowd reaction to the police action. At that time, Britain faced a national recession and in Brixton there was a serious tension as the economic situation in the neighborhood was deteriorating with high unemployment rate, poor housing, high crimes rate and suspicion of racial-motivated actions against black people.

The lack of regulation on police powers is also essential to understand the tension existing between black communities and the police. In a time when there was no precise and

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<sup>133</sup> Hurrell, Karen. An Experimental Analysis of Examinations and Detentions under Schedule 7 of the Terrorism Act 2000. Briefing Paper 8. Equality and Human Rights Commission, 2013.

<sup>134</sup> Reiner, R. The politics of the Police. In Delsol, Rebekah. Institutional Racism, the Police and Stop and Search: A Comparative Study of Stop and Search in the UK and USA. PHD Thesis submitted to the Department of Sociology of University of Warwick, 2006.

<sup>135</sup> The Durban Declaration recognized the role of colonialism in the development of racial discriminatory culture. It states: “colonialism has led to racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, and people of Asian descent and indigenous peoples were victims of colonialism and continue to be victims of its consequences. We acknowledge the suffering caused by colonialism and affirm that, wherever and whenever it occurred, it must be condemned and its reoccurrence prevented. We further regret that the effects and persistence of these structures and practices have been among the factors contributing to lasting social and economic inequalities in many parts of the world today.” (World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, September, 2001, note 14)

adequate national legislation to regulate stop and search, the police carried out the so called Operation Swamp 81 that consisted in a mass stop and search of primarily black people with the intention to cut street crime in Brixton,<sup>136</sup> more than one hundreds police officers were in the streets patrolling a specific area with the instruction to stop and question people with ‘suspicious look’.<sup>137</sup> At that time, PACE (Police and Criminal Evidence Act 1984) did not exist.

After the terrible consequences of the riots - over 300 people were injured, 83 premises and 23 vehicles were damaged<sup>138</sup> - an inquiry was installed to investigate what some would call the “temporary collapse of law and order” in Brixton.<sup>139</sup> An inquiry was ordered by the then Home Secretary and resulted in the Scarman Report which looked into the confrontation between the Metropolitan Police and protesters whom happen to be mostly black youths and brought into light the “racial disadvantage that is a fact of British life”.<sup>140</sup>

Although the Scarman Report rejected the idea of organizational and institutional racism, it went far in evidencing the disproportionate use of police powers – stop and search – against black people. The report exposed the existence of discrimination but without using heavy terms such as racist actions. According to the report, public bodies and individuals might unwittingly have discriminated against black people. It was only 18 years later that Britain would face another inquiry that would bring this issue again into the public debate.

The above mentioned denial may have impaired the efforts to address what we now call ethnic profiling, however, the Scarman Report had good impacts and had an important role to

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<sup>136</sup> Bridges, Lee. Police-Initiated stop practices in the United Kingdom – Where are we now? Paper for Roundtable on Current Debates, Research Agenda and Strategies to Address Racial Disparities in Police-Initiated Stops in the UK and USA. John Jay College of Criminal Justice, New York, August 2011..

<sup>137</sup> Shiner, Michael. National Implementation of the recording of police stops (2006). Pg. 7.

<sup>138</sup> 1981: Brixton riots report blames racial tension.

See at BBC News: [http://news.bbc.co.uk/onthisday/hi/dates/stories/november/25/newsid\\_2546000/2546233.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/november/25/newsid_2546000/2546233.stm)

<sup>139</sup> Facing Ugly Facts. The Guardian, February 1999.

See at: <http://www.theguardian.com/uk/1999/feb/17/lawrence.ukcrime1>

<sup>140</sup> 1981: Brixton riots report blames racial tension.

See at BBC News: [http://news.bbc.co.uk/onthisday/hi/dates/stories/november/25/newsid\\_2546000/2546233.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/november/25/newsid_2546000/2546233.stm)



raise awareness to the existing racial tension. The report concluded that "complex political, social and economic factors" created a "disposition towards violent protest".<sup>141</sup> Lord Scarman pointed out that it was necessary to recruit more ethnic minorities into the police force, and changes in training and law enforcement and the problems of racial disadvantage were highlighted.

What the Scarman Report did not do was to call for a curtailment in the police's legal powers in respect to stop and search.<sup>142</sup> However in the same year, the Royal Commission of Criminal Procedure, established to look into early miscarriages of justice in the mid-1970s, issued a report that formed the basis for the codification of police powers, the PACE (Police and Criminal Evidence Act 1984).<sup>143</sup> Michael Zander said that the "Act was the result of the report in 1981 of the Royal Commission on Criminal Procedure chaired by Sir Cyril Philips".<sup>144</sup>

According to professor Zander, the PACE was intended to restore "the legitimacy of urban policing, which had suffered a critical loss in public confidence as a result of both miscarriage of justice cases and the recent history of violent confrontations between the police and inner city communities".<sup>145</sup> As described in the UK government website, PACE "sets out to strike the right balance between the powers of the police and the rights and freedoms of the public".<sup>146</sup>

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<sup>141</sup> The Scarman report, BBC News. See at [http://news.bbc.co.uk/2/hi/programmes/bbc\\_parliament/3631579.stm](http://news.bbc.co.uk/2/hi/programmes/bbc_parliament/3631579.stm)

<sup>142</sup> Bridges, Lee. Police-Initiated stop practices in the United Kingdom – Where are we now? Paper for Roundtable on Current Debates, Research Agenda and Strategies to Address Racial Disparities in Police-Initiated Stops in the UK and USA (2011).

<sup>143</sup> Consultation on revised PACE codes of practice 2013.

Available at: <https://www.gov.uk/government/consultations/consultation-on-revised-pace-codes-of-practice-2013>

<sup>144</sup> Zander, Michael. PACE (The Police and Criminal Evidence Act 1984): Past, Present, and Future. LSE Law, Society and Economy Working Papers 1/2012. London School of Economics and Political Science, Law Department, 2012.

<sup>145</sup> Zander, Michael. PACE (The Police and Criminal Evidence Act 1984): Past, Present, and Future (2012).Pg.2

<sup>146</sup> PACE – Code of Practices. See at: <https://www.gov.uk/police-and-criminal-evidence-act-1984-pace-codes-of-practice>

In relation to the theme discussed in this thesis, PACE biggest contribution was the imposition of formal “administrative/bureaucratic controls”<sup>147</sup> over the exercise of police powers. The Act established a general and broad power to stop and search, however in conjunction with it, the Act “ushered in a period of unprecedented transparency and scrutiny of the police through empirical research and the collection of routine data on a whole range of police operations and practices, including stop and search”<sup>148</sup>, establishing requirements such as the maintenance of administrative records relating to a wide range of police activities. All this gave a whole new dynamic to police conduct.

In the UK, under the PACE (Police and Criminal Evidence Act 1984), reasonable suspicion is required as a ground for stop and search in most of the cases. PACE provides that powers to stop and search ‘require reasonable grounds for suspicion’ and ‘must be used fairly, responsibly, with respect for people being searched and without unlawful discrimination’. The PACE defines better what is understood as reasonable grounds and states that it depends on some objective circumstances such as ‘suspicion based on facts, information, and/or intelligence which are relevant to the likelihood of finding an article of a certain kind or, in the case of searches under section 43 of the Terrorism Act 2000, to the likelihood that the person is a terrorist’, moreover ‘reasonable suspicion can never be supported on the basis of personal factors’.<sup>149</sup>

<sup>147</sup> Zander, Michael. PACE (The Police and Criminal Evidence Act 1984): Past, Present, and Future (2012).Pg.3

<sup>148</sup> Zander, Michael. PACE (The Police and Criminal Evidence Act 1984): Past, Present, and Future (2012).Pg.3.

<sup>149</sup> PACE (Police and Criminal Evidence Act 1984), *Codes of practice – Code A Exercise by police officers of statutory powers of stop and search*: “Principles governing stop and search

1.1 Powers to stop and search must be used fairly, responsibly, with respect for people being searched and without unlawful discrimination (...) When police forces are carrying out their functions they also have a duty to have regard to the need to eliminate unlawful discrimination, harassment and victimisation and to take steps to foster good relations

1.4 The primary purpose of stop and search powers is to enable officers to allay or confirm suspicions about individuals without exercising their power of arrest. Officers may be required to justify the use or authorisation of such powers, in relation both to individual searches and the overall pattern of their activity in this regard, to their supervisory officers or in court. Any misuse of the powers is likely to be harmful to policing and lead to mistrust of the police. Officers must also be able to explain their actions to the member of the public searched. The misuse of these powers can lead to disciplinary action.

The PACE Codes of Practice also provide the basic rule to limit police discretionary power according to which “there is no power to stop or detain a person in order to find grounds for a search”. They establish that reasonable suspicion “cannot be based on generalizations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity” but may in some cases “exist without specific information or intelligence and on the basis of the behavior of a person”.<sup>150</sup>

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2.1 This code applies to powers of stop and search as follows:

- (a) powers which require reasonable grounds for suspicion, before they may be exercised; that articles unlawfully obtained or possessed are being carried, or under Section 43 of the Terrorism Act 2000 that a person is a terrorist;
  - (b) authorised under section 60 of the Criminal Justice and Public Order Act 1994, based upon a reasonable belief that incidents involving serious violence may take place or that people are carrying dangerous instruments or offensive weapons within any locality in the police area or that it is expedient to use the powers to find such instruments or weapons that have been used in incidents of serious violence;
- Searches requiring reasonable grounds for suspicion”

<sup>150</sup> PACE (Police and Criminal Evidence Act 1984), *Codes of practice – Code A Exercise by police officers of statutory powers of stop and search*: “Principles governing stop and search

2.2 Reasonable grounds for suspicion depend on the circumstances in each case. There must be an objective basis for that suspicion based on facts, information, and/or intelligence which are relevant to the likelihood of finding an article of a certain kind or, in the case of searches under section 43 of the Terrorism Act 2000, to the likelihood that the person is a terrorist. Reasonable suspicion can never be supported on the basis of personal factors. It must rely on intelligence or information about, or some specific behaviour by, the person concerned. For example, unless the police have a description of a suspect, a person’s physical appearance (including any of the ‘protected characteristics’ set out in the Equality Act 2010 (see paragraph 1.1), or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other, or in combination with any other factor, as the reason for searching that person. Reasonable suspicion cannot be based on generalisations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity.

2.3 Reasonable suspicion may also exist without specific information or intelligence and on the basis of the behaviour of a person. For example, if an officer encounters someone on the street at night who is obviously trying to hide something, the officer may (depending on the other surrounding circumstances) base such suspicion on the fact that this kind of behaviour is often linked to stolen or prohibited articles being carried. Similarly, for the purposes of section 43 of the Terrorism Act 2000, suspicion that a person is a terrorist may arise from the person’s behaviour at or near a location which has been identified as a potential target for terrorists.

2.4 However, reasonable suspicion should normally be linked to accurate and current intelligence or information, such as information describing an article being carried, a suspected offender, or a person who has been seen carrying a type of article known to have been stolen recently from premises in the area. Searches based on accurate and current intelligence or information are more likely to be effective. Targeting searches in a particular area at specified crime problems increases their effectiveness and minimises inconvenience to law-abiding members of the public. It also helps in justifying the use of searches both to those who are searched and to the public. This does not however prevent stop and search powers being exercised in other locations where such powers may be exercised and reasonable suspicion exists.

2.11 There is no power to stop or detain a person in order to find grounds for a search.”

Just like the discussion on Malik case, in the UK, there are other instruments that dispense the need of the criterion of reasonable suspicion and allow police to act with a much wider discretion.

That is the case of section 44 of the Terrorism Act 2000 and Section 60 of the Criminal Justice and Public Order Act 1994. Both cases were judicially challenged. As seen, section 44 of the Terrorism Act was even brought before the European Court of Human Rights which found a violation of Article 8. Section 60 of Act 1994 was, until now, only challenged domestically.

Section 60 of the Act 1994 is called ‘Powers to stop and search in anticipation of violence’. It states that:

“if a police officer of or above the rank of inspector reasonably believes that incidents involving serious violence may take place in any locality in his police area, and that it is expedient to give an authorisation under this section to prevent their occurrence, or that persons are carrying dangerous instruments or offensive weapons in any locality in his police area without good reason, he may give an authorisation that the powers conferred by this section are to be exercisable at any place within that locality for a specified period not exceeding 24 hours”.<sup>151</sup>

The claimant, in *R. v The Commissioner of the Metropolitan Police* sought a declaration that the Section 60 of Act 1994 was incompatible with the European Convention on Human Rights Article 5 and Article 8. The High Court concluded that the arbitrary nature of the power should be assessed in the context of Article 8. Making a big effort to point out all the differences between section 44 of the Terrorism Act 2000 and Section 60 of the Criminal Justice and Public Order Act 1994, the Court decided in the same way as it did in the *Gillan* case but in this occasion they argued that “the power conferred by s.60 to give authorization was not unfettered”

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<sup>151</sup> Criminal Justice and Public Order Act 1994.

because “it is circumscribed by the provisions of s.60 and Code A, and subject to the control of the courts”.<sup>152</sup>

Moreover the High Court refused to look into the potential risk of discriminatory use of the powers at stake because this issue did not arise in this case. Accordingly, the Court stated that the alleged potential discrimination gave rise to a many material and debate in the instant case, “it was suggested that statistics demonstrated that searches were targeted explicitly on the basis of racial characteristics. (...)But it is essential to appreciate that that issue does not arise in the instant case”.<sup>153</sup>

In my view, when the Court makes such statement, it excluded the state responsibility to provide in advance for mechanisms, legal or not, capable of preventing and disabling the discriminatory use of police powers. Taking this case in comparison with the Floyd case in the US, while the UK High Court did not assess the potential discriminatory impact of section 60, in Floyd case, the US District Court ruled beyond the discriminatory impact of the unconstitutional use of police power and called for the state responsibility to monitor and overview police officers’ conduct.

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<sup>152</sup> The Queen on the Application of Ann Juliette Roberts v The Commissioner of the Metropolitan Police v The Secretary of State for the Home Department. Case No: CO/12660/2010. High Court of Justice Queen's Bench Division Administrative Court. 17 July 2012. [2012] EWHC 1977 (Admin) 2012 WL 2500818.

<sup>153</sup> The Queen on the Application of Ann Juliette Roberts v The Commissioner of the Metropolitan Police v The Secretary of State for the Home Department. Case No: CO/12660/2010. High Court of Justice Queen's Bench Division Administrative Court. 17 July 2012. [2012] EWHC 1977 (Admin) 2012 WL 2500818

## Chapter 4 - Monitoring and recording police actions

In chapter 2, focus was given to legal standards and provisions concerning the prohibition of discrimination. As observed many instruments address the issue of discrimination but none of them expressly refer to ethnic profiling, though it is a widespread problem. In the same chapter 2, some relevant recommendations proposed by international bodies concerning discrimination in the context of law enforcement were also listed. Those recommendations are particularly relevant in this chapter that aims to debate the need to implement mechanism other than the legal framework to contribute with the elimination of ethnic profiling and any type of discriminatory policing.

The mentioned recommendations included (i) the proposal of indicators of racial profiling that would allow learning the extent of racial and ethnic discrimination by observing, among other thing, the number of persons affected by discriminatory conducts and information about police behavior; (ii) the enactment of adequate law governing the issue; (iii) the establishment of training and educational programmes in line with the respect for human rights; (iv) fostering dialogue between police and minorities groups; (v) effective accountability system providing for effective investigatory mechanisms to clarify discrimination incidents and, for effective remedies to victims; (vi) the use of guidelines and codes of conduct to regulate police activities and behavior; (vii) ethnic monitoring of police operations and outcomes; and (viii) researches specifically on racial profiling, including data broken down by ethnicity, race, religion and national origin.

From all this recommendation I believe monitoring police activities and extracting every possible information about their operations is the best way to improve the fight against ethnic profiling. ECRI's assumptions coincides with the view presented in this study according to

which ethnic data collection is fundamental for the realization of any policy that aims to combat ethnic discrimination.<sup>154</sup> The conclusion is that data is essential to provide baseline information over which policy makers, scholars, judges, the police themselves can draw the lines of their work. Alongside with the importance of these data to enable work to be started, the data is also necessary to assess the effectiveness and impacts of policies. In the same way, many of the reported cases also show the importance of having data and information on police activities.

In the previously mentioned Floyd case that challenged the NY Police Department, statistical data had a core role in Floyd case. The judge would not be able to understand the extension of the NYPD policy of racial profiling if there were no reliable data available. All the studies previously produced plus the information from the police database<sup>155</sup> were able to present the full picture of the discriminatory policy applied what led to the judge concluding that the NYPD adopted a policy of targeting racially defined groups based on the local crime suspect data.

Professor Fagan, the expert who analyzed NYPD database, looked into the data to assess both the argument on 4<sup>th</sup> and 14<sup>th</sup> Amend. He was able to show that a lot of stops were made without reasonable suspicion; checks of boxes in the form were not true and that police were making it up; discrimination in relation to blacks and Latinos; dissociation of crime rate and stops of these minorities; mistreatment of people stopped (use of force).

In addition, the recording of stops and the proper recording manner were discussed not only in light of the content they produced but also from the state obligation of producing fair and good quality information.

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<sup>154</sup> Simon, Patrick. "Ethnic" Statistics and data protection in the Council of Europe Countries. Institut National d'Etudes Démographiques. Council of Europe. Strasbourg, 2007.

<sup>155</sup> In NY the police have to fill out a form - US250 form with name, age, race, data of birth, where and time of stop, plus check of reasons why they stopped the person.

The same importance to data was given in *Gillan and Quinton v. the United Kingdom* in which the European Court could assess the extensive use of the powers of stop and search under section 44 of the Terrorism Act. The Ministry of Justice provided for information showing the increase of the use of such power and recorded a total of 33,177 searches in 2004/5, 44,545 in 2005/6, 37,000 in 2006/7 and 117,278 in 2007/8. Besides data could reveal the “poor and unnecessary use of section 44 abounded, there being evidence of cases where the person stopped was so obviously far from any known terrorism profile that, realistically, there was not the slightest possibility of him/her being a terrorist, and no other feature to justify the stop”.<sup>156</sup>

Even President Clinton, when speaking in a conference, in 1999, made very clear what should be done to address racial profiling:

“Federal agencies should collect more data at all levels of law enforcement to better define the scope of the problem. The systematic collection of statistics and information regarding Federal law enforcement activities can increase the fairness of our law enforcement practices. Tracking the race, ethnicity, and gender of those who are stopped or searched by law enforcement will help to determine where problems exist, and guide the development of solutions.”<sup>157</sup>

In 2000 the US Department of Justice funded a study about promising practices and lessons learned about racial profiling data collection. The Guide on Racial Profiling Data Collection Systems compiles information of some experiences of different states and highlights the importance of data collection not only to serve a monitoring purpose but also as a strong message given to the community. The Guide points out how such system could influence not only the community view but many other procedures – like training, education – within the police entity. By collecting statistics information, it is possible to move to a more rational dialogue that will be based in credible information that will support criticism and also “ascertain

<sup>156</sup> *Gillan and Quinton v. the United Kingdom*. European Court of Human Rights. Application No. 4158/05. Judgment 10 January 2010.

<sup>157</sup> Memorandum for the Secretary of the Treasury, the Attorney General, the Secretary of the Interior. June, 1999. Available at: <http://www.aele.org/fedprof.html>



the scope and magnitude of the problem”.<sup>158</sup> Interestingly the Guide does not mention the issue of data protection or privacy.

I believe it is not wrong to say that in terms of combating ethnic profiling, it is indispensable to collect ethnic data of those affected by police actions in order to know well the extension and the full scenario of police actions. That was the approach taken in the UK after Macpherson report was launched. The experience which appears to have been successful is debated in the following section and provides an interesting overview on how police misconduct was addressed.

#### **4.1 The Stephen Lawrence Inquiry - MacPherson Report**

In April 1993 a black youth called Stephen Lawrence was stabbed to death by five white young men. The case became well known because of the ineffective investigation into Lawrence’s death and the racially motivated crime. It was only in 1997 that an inquiry was established to examine “matters arising from the death” of Stephen Lawrence and to “identify the lessons to be learned for the investigation and prosecution of racially motivated-crimes”<sup>159</sup>. In 1999, when the report<sup>160</sup> was released, Britain was shamed with the declaration of the existence of institutional racism.<sup>161</sup>

The report formulated after the inquiry is known as Macpherson Report, because the inquiry was conducted by Sir William Macpherson. The report had a core role in the development of the British police. The declaration of institutional racism installed a delicate but

<sup>158</sup> Ramirez, Deborah, Jack McDevitt and Amy Farrell. A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned. US Department of Justice. Northeastern University, 2000.

<sup>159</sup> Storry, Kirsten. The Implications of the Macpherson Report Into the Death of Stephen Lawrence. Kirsten Storry. 12 Current Issues Crim. Just. 106, 2000-2001.

<sup>160</sup> The Inquiry into the matters arising from the death pf Stephen Lawrence.. The Stephen Lawrence Inquiry. Conducted by Sir William Macpherson of Cluny. 15 February 1999.

<sup>161</sup> Neal, Sarah (2003). The Scarman Report, the Macpherson Report and the Media: how newspapers respond to race-centred social policy interventions. Journal of Social Policy, 32(1), pp. 55–74.

promising debate about racism inside the police and its effects on policing. In addition to the racism issue, the inquiry also identified professional incompetence disclosed by the “lack of direction and documentation in the initial response, the lack of information and sympathy provided by way of family liaison, the inadequate supervision and perpetration of errors and assumptions by the superior officers, the poor planning and carrying out of surveillance” among other factors.<sup>162</sup> Whilst the inquiry focused on the procedural and management problems and errors, academic studies indicated that the incompetence could be better explained in terms of “interaction between the social and political context of police work and the institutionalized perceptions, values, strategies and schemas”<sup>163</sup>.

The report focused on different aspects of Stephen Lawrence’s case and presented several recommendations. After analyzing the failures and identifying some of the problems involving the event, the report presented a list of recommendations addressing topics such as: confidence in policing amongst minority ethnic communities what could be done by increasing prevention measures, investigation and prosecution of racist incidents; guidelines and policy directives regulating stop and search procedures and their outcomes; promoting cultural and ethnic mix between the communities and authorities; reporting and recording of racist incidents and crimes; training officers in order to raise racism awareness and to transmit the value of cultural diversity; police accountability; training and changing the culture in the police force; recruitment rules among other things.

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<sup>162</sup> Storry, Kirsten. *The Implications of the Macpherson Report Into the Death of Stephen Lawrence*. Kirsten Storry (2000-2001).

<sup>163</sup> Storry, Kirsten. *The Implications of the Macpherson Report Into the Death of Stephen Lawrence*. Kirsten Storry (2000-2001).

The report amounted in the “most extensive programme of reform in the history of the relationship between the police and ethnic minority communities”<sup>164</sup> in Britain. Concerning ethnic profiling and the need to improve police credibility and have an effective accountability system, the most relevant recommendations are as follows:

“60. That the powers of the police under current legislation are required for the prevention and detection of crime and should remain unchanged.

61. That the Home Secretary, in consultation with police services, should ensure that a record is made by police officers of all "stops" and "stops and searches" made under any legislative provision (not just the Police and Criminal Evidence Act). Non-statutory or so called "voluntary" stops must also be recorded. The record to include the reason for the stop, the outcome, and the self-defined ethnic identity of the person stopped. A copy of the record shall be given to the person stopped.

62. That these records should be monitored and analyzed by police services and police authorities, and reviewed by HMIC on inspections. The information and analysis should be published.

63. That police authorities be given the duty to undertake publicity campaigns to ensure that the public is aware of "stop and search" provisions and the right to receive a record in all circumstances.”<sup>165</sup>

The UK government accepted all recommendations and it is important to state that, according to a study of the Equality and Human Rights Commission looking at the 10 years after Stephen Lawrence’s inquiry, there was some progress found in the use of stop and search against ethnic minorities. However, the disproportionate impact of stop and search on black people is still revealed by data analysis.<sup>166</sup>

Specifically Recommendation 61 and 61 raised resistance from the police forces and some challenges to be met before the recording could be successfully applied. Professor Shiner argues that one strong criticism made by police regarding the recommendations is their feeling of

<sup>164</sup> Bowling, B. and Phillips, C. (2002) *Racism, Crime and Justice* quoted in Shiner, Michael. National Implementation of the recording of police stops (2006).

<sup>165</sup> Lawrence: Key recommendations, BBC News at [http://news.bbc.co.uk/2/hi/uk\\_news/285537.stm](http://news.bbc.co.uk/2/hi/uk_news/285537.stm)

<sup>166</sup> Bennetto, Jason. Police and racism: what has been achieved 10 years after the Stephen Lawrence Inquiry report? Equality and Human Rights Commission. 2009.

little ownership of the requirements.<sup>167</sup> The implementation of the recording of police stops happened in a period of five years.<sup>168</sup> This gave rise to a duality regarding the new requirement, police forces were required to implement a new internal instrument but, at the same time, the instrument was not fully internal as it was introduced by external forces. As Shiner tells us, “there was a clear sense in which the new recording requirement was seen as being part of an externally imposed agenda.”<sup>169</sup>

Two groups oversaw the extension of the recording, the Stop and Search Sub Group of the Lawrence Steering Group (LSG) and the Home Office Stop and Search Action Team (SSAT). According to the LSG the aim of recording was “to promote trust and confidence in the police by providing transparency and accountability on the spot at a strategic level, for police initiated non-statutory encounters”.<sup>170</sup>

This aim would be achieved by: (i) providing those stopped with documented and credible reasons for being stopped; (ii) providing data from which monitoring can be carried out by the police, police authorities and partners for accountability purposes; (iii) providing means to supervisors to enable them to scrutinize officers activities; (iv) developing a true statistical picture of all police encounters; (v) informing understanding about the nature and extent of stops; (vi) raising officers’ awareness of the impact of their actions through documenting the reasons and outcomes of their action; (vii) comparing ethnically the area of police activity against other statistical data.

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<sup>167</sup> Shiner, Michael. Presentation about Organizational strategies for change and regulation. In Roundtable Current Debates, Research Agendas and Strategies to Address Ethnic/Racial Profiling in the UK and USA (2011).

<sup>168</sup> Professor Shiner informed that Staffordshire Police was the first among the cases he studied to introduced the new recording requirement. It started on January 1 2004.

<sup>169</sup> Shiner, Michael. National Implementation of the recording of police stops (2006).

<sup>170</sup> Shiner, Michael. National Implementation of the recording of police stops (2006). Pg. 9.

Michael Shiner, who wrote an extensive report on the implementation of the recording of police stops based on case studies and surveys of police forces, observed that the best received guidance were the one with a tangible and practical characteristic. He identified the value of practical support and a clear demand for a national template.

Shiner examined the impact officers expected recording stops to have. Although many were skeptical about the extent of the achievements, the survey showed some good expectations. The survey demonstrated that there was a low expectation of impact of recording stops on the fight against crime and there was a negative expected impact on officer's confidence in stopping people and on officer's work-load. On the other hand, there was a high expectation in relation to providing credible reasons to those stopped (what would eventually increase police credibility), and to guaranteeing fairness in street intervention by the police and accountability of the police. Although there was some resistance in relation to the recordings the fact is that the survey revealed that they believe on the recording as an instrument to achieve the proposed aims.

From the community point of view, the records were felt as invasive and might bring forth a negative community reaction. The information collected made some people feel uncomfortable and express reservations about providing information for intelligence purpose (names, addresses). The community argued that stop records should be limited to management purposes.

This last point raises a central debate about data collection and especially personal data collection. It is important to bear in mind that although the demand for more data might suggest full control and monitoring of law enforcement activities, the idea of full surveillance has to be carefully managed considering the issues involving the collection, processing, use and storage of

data. The importance of data is undeniable but some considerations concerning data protection must be made.

## 4.2 Ethnic data protection

This last section does not intent to be an exhaustive analysis of issues concerning ethnic data protection. I will briefly explore some issues related to data protection that cannot be ignore in designing and planning a fair, just and effective police monitoring system.

According to Article 17 of the ICCPR, “no one shall be subjected to arbitrarily or unlawful interference with his privacy”. The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of the Council of Europe states that “personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions”.<sup>171</sup>

Countries present different standards and concerns regarding data protection. In some places, the need and the benefits of ethnic data collection are strongly questioned and as a consequence a lot of resistance is showed whenever there is an attempt to regulate the issue.

That is the case in Europe where many states do not even provide for data disaggregated according to race or ethnicity what impedes to properly monitor the effectiveness of antidiscrimination policies.<sup>172</sup>

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<sup>171</sup> Article 6 – Special Categories of data of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of the Council of Europe

<sup>172</sup> Hermanin, Costanza and Eefje de Kroon. The Race Equality Directive: a Shadow Report: Lessons learnt from the implementation in nine EU member states. Open Society European Policy Institute. July, 2013; and Simon, Patrick. “Ethnic” Statistics and data protection in the Council of Europe Countries. ECRI (2007).

The OSCE Recommendations on Policing in Multi-Ethnic Societies proposes the monitoring of the outcomes of police operations and it expressly express concern with data protection stating that the monitoring should be done with due regard to confidentiality, and the data anonymized and aggregated in statistical form, the rights of individuals.<sup>173</sup>

Moreover, the EU Directive on the protection of individuals with regard to the processing of personal data also call states to observe some norms regarding personal data is:

- “(a) processed fairly and lawfully;
- (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;
- (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
- (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;
- (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.”<sup>174</sup>

With this in mind, I say that there are three main questions that pose obstacles to the realization of data collection and management for the purpose of monitoring: privacy rights and principles of data protection; guarantee of non-discrimination once the data is available, legal and administrative safeguards must be observed; the need for competent and good mechanism and instruments to neutrally collect data.

Through these three questions and observing the instruments mentioned above, it is possible to identify a clear cut concerning the protection of ethnic and minority groups against

<sup>173</sup> OSCE Recommendations on Policing in Multi-Ethnic Societies. Organization for Security and Co-operation in Europe. February 2006.

<sup>174</sup> EU Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

the abuse and misuse of the data. Accordingly, as history shows, ethnicity very often is a tool for stigmatization. An ECRI's study report reveals that members States associate "ethnic data" with some risks such as reinforcement of racism and discrimination; make visible division instead of achieving cohesion; and data used for persecution purposes.<sup>175</sup> Besides as discussed by Michael Shiner when he analyzed the implementation of Recommendation 61 of the Stephen Lawrence report, the community did feel uncomfortable when giving some personal information to the police.

In England and Wales, however, the Data Protection Act 1998 provides that racial or ethnic origin of the data subject is, among other such as political opinions, sexual life, what international law of freedom of information and data protection call "sensitive personal data". According to the explanatory report on Convention ETS 108, the special treatment provided for some data is legitimized not in the methods used to collect the data but essentially in the potential significance and so it states that "even if their processing respects all the normal criteria of lawfulness, proportionality, confidentiality, etc., the fact still remains that these data, because of their capacity to reveal potentially discriminatory information, carry special risks".<sup>176</sup>

It is possible to conclude that there is a culture of concern. As it happen with other rights, states must provide for safeguards and the breach of law shall be brought to justice. The stigmatizing potential of ethnic data must be taken into account and there is no ambiguity in balancing both sides of the discussion. If in one hand, the individual, qualitative or statistical data have stigmatizing potential – for instance criminal data can reveal that there are more people

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<sup>175</sup> Simon, Patrick. "Ethnic" Statistics and data protection in the Council of Europe Countries. ECRI (2007).

<sup>176</sup> Simon, Patrick. "Ethnic" Statistics and data protection in the Council of Europe Countries (2007). Pg. 17



from one ethnic group committing crime than people from other group<sup>177</sup>; or in case of political, religious or ethnical persecutions – on the other hand, combating these stigmatizations require reliable information concerning how minorities groups are being discriminated against.

Moreover, some assumptions held by law enforcement officers and social perceptions can be elucidated by data that present a counter-argument to them. Besides data analysis can, for instance, indicates causes and correlations that can clarify how ineffective and wrong those assumptions are.

In this regard, a controversy was faced by the US when the FBI Domestic Investigations and Operations Guide<sup>178</sup> was issued in 2008. Among other powers, the FBI was able to ethnically map communities. In 2010, the American Civil Liberties Union filed a request to uncover the records of FBI's collection and use of racial and ethnic data.<sup>179</sup>

The episode calls attention because of the racial and ethnic data misuse in a country that has solid democratic principles. The FBI operation guide gave their agents the power to collect ethnic data and information on people's behaviors, lifestyle characteristics and cultural traditions, and to map "ethnic-oriented" businesses. Their aim of mapping local communities using raced-based criteria was clearly for profiling purposes that resulted in putting ethnic groups under unequal surveillance.

The issue of purpose and means are central in this discussion. Obviously this policy aimed to guarantee the FBI's domain over that information and has intelligence purposes. As

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<sup>177</sup> Richard Banks states: "It does no good to pretend that blacks and whites are similarly situated with respect to either rates of perpetration or rates of victimization. They are not. A dramatic crime gap separates them". In Banks, Richard. *Beyond Profiling: Race, Policing, and the Drug War* (2003)

<sup>178</sup> FBI Domestic Investigations and Operations Guide. December 16, 2008.

<sup>179</sup> ACLU Seeks Records About FBI Collection Of Racial And Ethnic Data In 29 States And D.C. July 2010. See at: <https://www.aclu.org/national-security/aclu-seeks-records-about-fbi-collection-racial-and-ethnic-data-29-states-and-dc>.

proposed by the EU Directive above mentioned the purpose of personal data collection must be specified, explicit and legitimate. The way data was collected plus the purposes they served constitute ethnic profiling instead of combating ethnic profiling. If the German reported in Chapter one – that consisted in data screening of a huge amount of personal data in order to find terrorists ‘sleepers’<sup>180</sup> – constitutes ethnic profiling, so does this power provided to the FBI, which consist in targeting and persecuting people from racial minorities.

Apparently this example would not have anything in common with our proposed monitoring system; however, this case shows how hard it is to control all the interests at stake, technological possibilities, and the access and use of data that have already been collected and processed.

The perverse use of ethnic and racial data must be avoided by non-bias oriented data collection and management. Intelligence purpose is naturally a bias strategy as it focuses on increasing police effectiveness. Safeguards must be put in place to guarantee equality not only in examining the data but also in collecting it.

Because statistical data and other information need to be contextualize, the selection of what data will be processed is as important as the data produced. If examined out of context or with no regard to the methodological notes, the data might contribute to distortions, suggest something that is not necessary fully true or induce mistakes.

In sum, if ethnic data can reinforce stigmas, it can also strengthen the fight against discrimination and racism. Ethnic data define an ethnic group and its extension and can also contribute for this group’s fight for their rights. Regarding the recommendations listed in this

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<sup>180</sup> Kett-Straub, Gabriele. Data Screening of Muslim Sleepers Unconstitutional. German Law Journal l. 07 No. 11. 967-975, 2006; and <sup>180</sup> Schutter, Oliviers De and Julie Ringelhein. Ethnic Profiling: A Rising Challenge for European Human Rights Law. The Modern Law Review, Oxford. (2008) 71(3) 358-384.

thesis, it appears to have a consensus from the human rights community that the second should prevail over the first, otherwise discriminations committed by public agents will probably be hidden from the public. For instance, during the Nazi regime Roma people were judged as an inferior race just like the Jews, however, the lack of knowledge about the extension of the Roma persecuted and killed has probably affected the course of history as it was only in 1979 that the West German Federal Parliament identified the Nazi persecution of Roma as being racially motivated.<sup>181</sup>

In my view, in relation to monitoring police activities, two main points must be observed. First the nature and type of data collected. Second the data must be disclosed what will allow also the public to control both the information collected and its use.

Regarding the nature and type of data, recording system like the one recommended by the Macpherson report is a good way to conceal the issues at stake. The data collection can be made in format of a form and without making people identifiable by providing only for statistical data. Accordingly, as René Padieu observed, “statistics are based on data on individuals, but are not interested in individuals.”<sup>182</sup> Their sole purpose is to describe situations in global terms.

Therefore, even collecting personal data, statistical data are meant to be impersonal. What cannot be impersonal, however, is the identity of the police officers recording his or her action, which is a way to provide for statistical data about who is being stop and also information about the officer’s decision that guided his or her action.

Ah then if there is any real danger of manipulation or if collecting data presents any threat, mechanisms should be put in place to safeguard people’s right to privacy.

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<sup>181</sup> For more information see: <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005219> and <http://fcit.usf.edu/holocaust/people/victroma.htm>.

<sup>182</sup> René Padieu (2000), Mobiliser les données existantes : enjeux et conditions, in Simon, Patrick. “Ethnic” statistics and data protection in the Council of Europe countries. ECRI (2007). Pg. 12.

## Conclusion

As showed though out this thesis, law enforcement agents practicing ethnic profiling is a globalized phenomenon. The word universal, that so hardly can be applied, does represent the generalized problem of discriminatory policing. Despite the global incidence of the problem and the many forms that ethnic profiling can assume, one of the most important aspect of this discussion are the consequences that racial and ethnic profiling can have.

Ethnic profiling by police creates a vicious circle in which the practice is nurtured by racist convictions and oriented by stereotypes that in turn brings forth aversion to the police and distances communities from the police. This practice impacts negatively in many ways raising the racial distance within a society and undermining people's trust and confidence in the police. Therefore, besides being legally unacceptable due to the discriminatory and unequal application of the law, ethnic profiling is also morally unbearable and social and politically inadequate. Thus measures need to be taken in order to address and eliminate such practice.

The thesis debated the discriminatory aspect of such practice which in some situations is understood by national states as justifiable. The European Court of Human Rights, which case law was analyzed, considers that legitimate aims and reasonable relationship of proportionality between the means employed and the aim sought to be realized are the test imposed to states if they want to apply different treatments without violating Article 14 of the Convention. However, when the ground for impose different treatment is race or ethnicity, the Court was clear to affirm 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>183</sup>

As Gross and Livingston observed, the dispute around ethnic profiling is now normative. Although there is a certain consensus that ethnic profiling is wrong and unlawful, state dispute whether the use of race or ethnicity in specific cases constitute ethnic profiling. The cases discussed in Chapter two show that the core point of the debate surrounds the discussion of whether race or ethnicity was the ground under which the state acted. In very few cases, according to the legal framework and jurisprudence, the use of race and ethnicity will be justifiable what forces states to move the debate that frequently will be replaced under the dispute of relying or not on race and ethnic grounds.

Moving forward in the analysis, the thesis discussed themes that can in some level contribute to the elimination of ethnic profiling. Limiting police discretion and implementing monitoring systems are, as this thesis argued, the most important measures to compel police to act in accordance with the law and human rights principles.

The debate on limitation of police discretion was legal based. In different moments, the thesis observed how experts support the use of guidelines and codes of conduct to orient police activities and behavior. However, the conclusion is that those are not enough and discretion must be constrained by law, mostly because of the enforcement power that legal framework provides. Chapter three discussed mainly the notion of reasonable suspicion and its objective character. The law must provide for safeguards against the arbitrary use of police powers and for that reason, ‘reasonable suspicion’ is expected to serve as the guardian of privacy rights, procedural rights and equality in the application of law.

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<sup>183</sup> Timishev v. Russia. European Court of Human Rights. Applications nos. 55762/00 and 55974/00. Judgement 13 December 2005.

The thesis posed monitoring and recording police activities as the first step needed to satisfactorily address ethnic profiling. Such system has both prevention and repressive character considering its potential to highlight errors and to point them out, allowing disciplinary measure to be taken by superior authorities. The monitoring system requires systematic collection of relevant data by establishing the duty to record stops and collect data what makes police officers automatically aware of the fact that they are been watched, observed, monitored and assessed.

The collection of data, and especially ethnic data, brings up another issue: the question of data protection. The thesis did not focused on legal issues concerning data protection, instead it only highlighted the existent resistance of some countries to establish ethnic data collection. Obviously, this resistance impacts on the assessment of anti-discrimination policies once there is no reliable information to support any evaluation. Naturally, it also makes harder to analyze the exercise of ethnic profiling practices.

Official data on the ethnic composition of the population and police, and on police activities are also important for litigation purposes. As observed, in many places, litigation is used as a form of addressing ethnic profiling cases. Naturally what is claimed in litigation case provide a different result compared to what is expected from accountability and monitoring mechanism, however, this strategy is equally powerful since it brings the debate to another sphere of power – judiciary power – which is often more devoted to the rule of law.

However, considering that a judicial decision can have small political influence in the police because it consists in an external order, I suggest that together with strong legal standards, the focus of combating ethnic profiling should be on preventive mechanism that implies the need to constantly revise and rethink police actions and policies. This mechanism – which includes

monitoring and recording police activities – seems to me to be more effective, promising, enlightening and broaden than repressive measures, which has a more reduced scope and impac.

## Bibliography

Banks, Richard. Beyond Profiling: Race, Policing, and the Drug War. *Stanford Law Review*, Vol. 56, No. 3, pp. 571-603, Dec., 2003.

Barnes, Katherine Y. Barnes. Against Judgement. Book Review of Bernard Harcourt. *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age*. Chicago: University of Chicago Press, 2007.

Bennetto, Jason. Police and racism: what has been achieved 10 years after the Stephen Lawrence Inquiry report? Equality and Human Rights Commission. 2009.

Bronitt, Simon and Philip Stenning. Understanding discretion in modern policing. *Criminal Law Journal* 35 Crim LJ 319. 2011.

Bridges, Lee. Police-Initiated stop practices in the United Kingdom – Where are we now? Paper for Roundtable on Current Debates, Research Agenda and Strategies to Address Racial Disparities in Police-Initiated Stops in the UK and USA. John Jay College of Criminal Justice, New York, August 2011.

Buergenthal, Thomas. The American and European Conventions on Human Rights: Similarities and Differences. *American University Law Review*. 30 Am. U. L. Rev. 155, 1980-1981.

“Carry on Recording” Why police stops should still be recorded. *Stopwatch*, May 2011.

Citron, Eric F. Rights and Responsibility in Fourth Amendment Jurisprudence: The Problem with Pretext. *Yale Law Journal*. 116 YALE L.J. 1072 (2007)

Delsol, Rebekah. Institutional Racism, the Police and Stop and Search: A Comparative Study of Stop and Search in the UK and USA. PHD Thesis submitted to the Department of Sociology of University of Warwick, 2006.

Delsol, Rebekah and Michael Shiner. Regulating stop and search: A challenge for police and community relations in England and Wales. *Critical Criminology* 14: 241–263, 2006.



Dias, Jorge de Figueiredo e Manuel da Costa Andrade. *Criminologia: O homem delinquent e a sociedade criminógena*, Coimbra Editora. 1997

Ethnic profiling in the Moscow Metro. Open Society Justice Initiative (2006).

Ferguson, Andrew. Predictive Policing and Reasonable Suspicion. *Emory Law Journal*. Vol. 62:259, 2012.

Fundamental rights-based police training. A Manual for Police Trainers. European Union Agency for Fundamental Rights, 2013.

Hasisi, Badi and Yoram Margalioth. *Ethnic Profiling In Airport Screening: Lessons From Israel, 1968–2010*. Oxford University Press on behalf of the American Law and Economics Association, 2012.

Harris, David. The Stories, the Statistics and the Law: Why “Driving While Black” Matters. *Minnesota Law Review*. 84 Minn. L. Rev. 265, 1999-2000.

Hermanin, Costanza and Eefje de Kroon. *The Race Equality Directive: a Shadow Report: Lessons learnt from the implementation in nine EU member states*. Open Society European Policy Institute. July, 2013.

Hurrel, Karen. An Experimental Analysis of Examinations and Detentions under Schedule 7 of the Terrorism Act 2000. Briefing Paper 8. Equality and Human Rights Commission, 2013.

International Human Rights Standards for Law Enforcement - A Pocket Book on Human Rights for the Police. United Nations High Commissioner for Human Rights Centre for Human Rights.

Garrett, Brandon. Remedying Ethnic Profiling. 33 *Columbia Human Rights Law Rev.* 41, 2001-2002.

Gross, Samuel and Debra Livingston. Racial Profiling under Attack. *Columbia Law Review*, Vol.102:1413, 2002.

Johnson, Kennedy. How Racial Profiling in America Became the Law of the Land: *United States v. Brignoni-Ponce* and *Whren v. United States* and the Need for Truly Rebellious Lawyering. *The Georgetown Law Journal*. Vol. 98:1005, 2010.

Kushnick, Louis. (1999) "'Over Policed and Under Protected": Stephen Lawrence, Institutional and Police Practices'. *Sociological Research Online*, vol. 4, no. 1.

Macpherson Report—Ten Years On. UK Home Affairs Committee. July 2009. Available at: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/427/42703.htm#note39>

Miller, Joel, Nick Bland and Paul Quinton. A Challenge for Police-Community Relations: Rethinking stops and search in England and Wales. *European Journal on Criminal Policy and Research* 9: 71–93, 2001.

MVA and J Miller, Profiling Populations Available for Stop and Search. Home Office Police Research Series Paper 131, London 2000.

Neal, Sarah (2003). The Scarman Report, the Macpherson Report and the Media: how newspapers respond to race-centred social policy interventions. *Journal of Social Policy*, 32(1), pp. 55–74.

Palmer, Suzella. 'Dutty Babylon': policing Black communities and the politics of resistance, *Criminal Justice Matters*, 87:1, 26-27, 2012.

Programme of Action. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. Durban, 2001.

Reducing Ethnic profiling in the European Union: A handbook of good practices. Open Society Justice Initiative. 2002.

Redmayne, Mike. Book Review. Profiles, Probabilities, and Stereotypes by Frederick Schauer. *Journal of Law and Society*, Vol. 32, No. 2, Jun., 2005, pp. 333-339.

Schutter, Oliviers De and Julie Ringelhein. Ethnic Profiling: A Rising Challenge for European Human Rights Law. *The Modern Law Review*, Oxford. (2008) 71(3) 358-384.

Shiner, Michael. National Implementation of the recording of police stops. Great Britain, Home Office, London, UK, 2006.

Shiner, Michael. Presentation about Organizational strategies for change and regulation. In Roundtable on Current Debates, Research Agendas and Strategies to Address Ethnic/Racial Profiling in the UK and USA. OSF/John Jay College of Criminal Justice, August, 2011.

Simon, Patrick. "Ethnic" Statistics and data protection in the Council of Europe Countries. Institut National d'Etudes Démographiques. Council of Europe. Strasbourg, 2007.

Ramirez, Deborah, Jack McDevitt and Amy Farrell. A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned. US Department of Justice. Northeastern University, 2000.

Stop and Search Powers: Are the police using them effectively and fairly? Majesty's Inspectorate of Constabulary, Inspecting Policing in the Public Interest Report. 2013.

Storry, Kirsten. The Implications of the Macpherson Report Into the Death of Stephen Lawrence. Kirsten Storry. 12 Current Issues Crim. Just. 106, 2000-2001.

Sunshine, Jason and Tom Tyler. The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing. *Law & Society Review*, Volume 37, Number 3 (2003).

The Inquiry into the matters arising from the death of Stephen Lawrence. The Stephen Lawrence Inquiry. Conducted by Sir William Macpherson of Cluny. 15 February 1999.

Towards More Effective Policing. Understanding and Preventing Discriminatory Ethnic Profiling: A Guide. European Union Agency for Fundamental Rights. Publications Office of the European Union, 2010.

Tyler, Tom and Cheryl Wakslak. Profiling and Police legitimacy. *Criminology* Volume 42 Number 2, 2004.

Tyler, Tom R. Policing in Black and White: Ethnic group differences in trust and confidence in the Police. *Police Quarterly*, v.8, n.3, p.322-342, sep.2005.

Peter Moskos. Book Review of Bernard Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age*. Chicago: University of Chicago Press, 2007.

Zander, Michael. PACE (The Police and Criminal Evidence Act 1984): Past, Present, and Future. LSE Law, Society and Economy Working Papers 1/2012. London School of Economics and Political Science, Law Department, 2012.

Wu, Steven. In The Secret Ambition of ethnic profiling. *The Yale Law Journal*. 115 Yale L.J. 491, 2005.

Report on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, by the Special Rapporteur Mr. Doudou Diène. E/CN.4/2004/18, January 2004.

Progress Report on Administration of Justice, Rule of Law and Democracy: Discrimination in the Criminal Justice system, by the UN Special Rapporteur Ms. Leïla Zerrougui. E/CN.4/Sub.2/2005/7, 2005.

Report on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, by the Special Rapporteur Doudou Diène. Mission to the United States of America. A/HRC/11/36/Add.3. April 2009.

Report on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, by the Special Rapporteur Mutuma Ruteere. A/HRC/20/33, May 2012.

Report on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, by the Special Rapporteur Mutuma Ruteere. A/HRC/23/56, April 2013.

Report on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, by the Special Rapporteur Mutuma Ruteere. A/HRC/23/56 Add.3, May 2013.

Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, by the Special Rapporteur Mutuma Ruteere. Visit to Spain. A/HRC/23/56. June, 2013