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Ethnic profiling in the Netherlands and England and Wales: Compliance with international and European standards.

Research Project B

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1. Introduction

1.1 Background

Since August 2014, when Michael Brown and Eric Garner, two unarmed black men, were killed by police officers[1], ethnic profiling has been a big issue in the United States. Ethnic profiling does not only occur in the US, however. It is a common belief that this practice is also taking place throughout Europe. 'Ethnic profiling' is the use by police of grounds such as race, ethnicity, religion or national origin – instead of individual behavior or objective evidence - as the basis for suspicion in investigation activities, without an objective justification.[2] Ethnic profiling usually occurs in police initiated actions, such as stop and searches and identity checks. It can arise as a result of police enforcement policies or as a result of the discretionary decision-making policy of an individual policeman. Ethnic profiling is considered to be violating the prohibition of discrimination, embedded in international and European treaties such as the ECHR, the TFEU and the ICCPR.[3] Many international and European human rights institutions, such as the European Commission against Racism and Intolerance and the Committee on the Elimination of Racial Discrimination, have expressed their disapproval of ethnic profiling and wrote recommendations for its prevention.

The only country that actually gathered a significant amount of quantitative data on police initiated actions and the possible ethnic profiling that takes place during is the United Kingdom.[4] As a reaction to this quantitative data, England and Wales have adopted policies to prevent and tackle ethnic profiling, such as mandatory monitoring of the ethnicity of people who are stopped and searched by the police.[5] In the Netherlands, only stop and searches which lead to a report or an arrest are monitored. As a result, quantitative data on ethnic profiling is hardly available.[6] However, qualitative research shows that policemen in the Netherlands do often base their decision to stop and search persons on their appearance, such as their skin color.[7]

1.2 Main research question

This research focuses on the situation with regard to ethnic profiling in the Netherlands. As mentioned above, international and European human rights bodies have written recommendation to the governments of states regarding this matter. These recommendations and other international and European standards will be used to evaluate the Dutch approach towards ethnic profiling. Furthermore,

[1] See e.g. Goldstein & Schweber 2014.
[2] Other, slightly different definitions of ethnic profiling can be found in ea: European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 11, Strasbourg: 2007; Case Digests, International Standards on Ethnic Profiling: Standards and Decisions from the European Systems, 2013.
[3] Amnesty International 2013; ENAR 2009.
[4] ENAR 2009.
[5] FRA 2010.
[6] Amnesty International 2013.
[7] Çankaya 2012.

the research focuses on England and Wales' situation with regard to ethnic profiling, as its extensive research, new policies and possibly better compliance with international standards could provide an example for the Netherlands. The main question this research tends to is:

To what extent can England and Wales' approach towards preventing and tackling ethnic profiling by the police provide an example for the Netherlands for better compliance with international and European standards regarding ethnic profiling?

1.3 Methodology

The research is of a comparative nature: it seeks to find a better solution to a societal problem in the approach taken in another country; the societal problem being ethnic profiling. The research is normative and thus seeks to answer how the approach towards ethnic profiling in the Netherlands *ought* to be. However, this question is answered using the objective yardstick of international and European standards. A functional approach is used to choose the objects of the research, in which the effects and functions are used as *tertium comparationis*.[8] The research compares objects – legal acts - in the Netherlands and England and Wales that have the effect of causing a risk of ethnic profiling. The choice of the legal acts in the Netherlands is based on previous research on acts that establish broad discretionary police powers which could cause a risk of ethnic profiling.[9] In England and Wales, the legal acts are chosen based on data on how frequently the broad discretionary powers provided for in those acts are used by the police.[10] Of course, the legal acts that are evaluated in this research are not the only ones worth comparing. However, the size of this research does not allow a comparison of all the legal acts that could possibly cause a risk of ethnic profiling. This research also compares objects that fulfill an equivalent function: the prevention and tackling of ethnic profiling.[11] Therefore, legislation, policies and case law of both countries on the subject of ethnic profiling are evaluated. Of course, international and European law, policies, case law and recommendations are also discussed, as they form the yardstick to the evaluation of the approach taken in both countries.

The choice for the legal systems in this comparative research is mainly based on the fact that England and Wales can function as a source of inspiration for the Netherlands.[12] Unlike the Netherlands, England and Wales have adopted several policies to prevent and tackle ethnic profiling. Furthermore, it is based on the practical reason that the language of the sources to be used are ones I am able to read. Of course, other countries could possibly also provide an example for the Netherlands, but the size of this research forces me to focus on just two systems.

[8] Oderkerk 2014, p. 23.
[9] See e.g. Amnesty International 2013.
[10] Bowling & Philips 2007, p. 937.
[11] Zweigert & Kötz 1992.
[12] Oderkerk 2014.

1.4 Structure

In this research, firstly the yardstick to which the situation in the Netherlands and England and Wales is tested is set out. In chapter two it is thus discussed what the international and European treaties and human rights bodies prohibit and recommend in order to prevent and tackle ethnic profiling. In the next two chapters, the situation with regard to ethnic profiling in subsequently the Netherlands and England and Wales is evaluated. Finally, the question which elements of England and Wales' approach the Netherlands could adopt to ensure better compliance with international and European standards on ethnic profiling is tended to.

2. International and European standards

2.1 Introduction

In this chapter, the international and European obligations and recommendations with regard to preventing and tackling ethnic profiling are discussed. Firstly, the prohibitions of discrimination that are posed by different Treaties, and the extent to which they are relevant for the topic of ethnic profiling, are set out. The prohibition of discrimination that the ECHR poses and the way that prohibition applies specifically to ethnic profiling is tended to more extensively. After that, the recommendations of different international and European bodies that see to preventing and tackling ethnic profiling specifically are examined. Of course, over the whole chapter the degree to which these prohibitions and recommendations are binding for both the Netherlands and England and Wales is discussed.

2.2 International law

Firstly, the Universal Declaration of Human Rights (hereafter: the UDHR), the International Covenant on Civil and Political Rights (hereafter: the ICCPR) and the International Covenant on Economic, Social and Cultural Rights (hereafter: the ICESCR), which together form the International Bill of Human Rights, all contain provisions on the prohibition of discrimination. Article 2 of both the UDHR and the ICESR state that the rights enlisted in the other articles prohibit discrimination on the ground of, amongst others, race, color and religion. Article 26 of the ICCPR poses a more general prohibition of discrimination, as that 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law' and all persons have the right to an effective protection against discrimination on grounds of e.g. race, color and religion. Both the ICCPR and the ICESR are ratified by the Netherlands and England and Wales, without any reservations that may be relevant with regard to ethnic profiling[13], and are legally binding. The UDHR is not legally binding, but serves as a source for many binding international human rights instruments and is thus regarded as authoritative.[14] The Netherlands also signed and ratified the Optional Protocol to the ICCPR, which allows individuals who claim to be a victim of a violation of one of the rights in the ICCPR to send a complaint to the United Nations Human Rights Committee (hereafter: the Committee). England and Wales have not signed nor ratified this protocol.

The Committee has expressed its view on ethnic profiling in the case *Rosalind Williams Lecraft v. Spain*. In this case, the applicant was stopped by a police officer at a train station for an identity check. The police officer told her that the Ministry of the Interior had ordered police officers to particularly ask persons 'of color' to identify themselves, because there was a bigger change of them being illegal immigrants. The Committee considered that: '…when the authorities carry out these checks, the physical

[13] List of ratifications and reservations per country available via: http://indicators.ohchr.org/.
[14] http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf.

or ethnic characteristics of the persons targeted should not be considered as indicative of their possibly illegal situation in the country. Nor should identity checks be carried out so that only people with certain physical characteristics or ethnic backgrounds are targeted.'[15]

Besides these general provisions and case law, international law also provides for more specific prohibitions on racial discrimination. The International Convention on the Elimination of all forms of Racial Discrimination (hereafter: the ICERD), signed and ratified by both the Netherlands and England and Wales and thus legally binding, gives a very broad definition of racial discrimination. Any distinction based on race, color, descent, or national or ethnic origin which has the purpose or effect of impairing the equal exercise of any human right or fundamental freedom is prohibited. The ICERD thus does not only prohibit direct discrimination, but, due to the word *effect*, also indirect discrimination. Article 2(1) of the ICERD states that States must adopt a policy to eliminate racial discrimination and that they must ensure that all public authorities and public institutions act in conformance with that policy. Furthermore, article 2(c) poses the obligation on States to review policies and amend any laws or regulations which have the effect of creating racial discrimination. Finally, article 4 states that States shall not permit public institutions to promote or incite racial discrimination.

2.3 European Convention on Human Rights

Article 14 of the European Convention on Human Rights (hereafter: the ECHR) states that the enjoyment of the rights and freedoms in the Convention must be secured without discrimination on any ground, e.g. race, color, religion or national or social origin. According to case law of the European Court of Human Rights (hereafter: the ECtHR), discrimination is not prohibited if it pursues a legitimate aim and the means to realize that aim are not disproportional.[16] Article 14 ECHR is not a general prohibition of discrimination: to file a complaint on the ground of discrimination at the European Court of Human Rights (hereafter: ECtHR), an individual has to designate which Convention right has been violated as a result of the discriminatory practice.[17] However, a general prohibition of discrimination is in force if a State has ratified Protocol 12 to the ECHR. Protocol 12 prohibits discrimination in the enjoyment of any right set forth by law. The Netherlands has signed and ratified this Protocol, but England and Wales have not.[18]

The ECtHR has not (yet) expressed its view on ethnic profiling specifically. However, a few ECtHR cases with regard to alleged violations of article 14 ECHR in combination with another article, give some indication of the court's view on this matter. Firstly, the ECtHR found a violation of article

[15] United Nations Human Rights Committee 27 July 2009, 1493/2006, *(Rosalind Williams Lecraft v. Spain)*, par. 7.2.
[16] See e.g. ECtHR 11 June 2002, 36042/97 (*Willis v. the United Kingdom*), par. 39.
[17] Bobis 2013, p. 18.
[18] List of ratifications of Protocol 12 ECHR via: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=&DF=&CL=ENG.

14 ECHR in conjunction with a violation of free movement[19] in the *Timishev* case.[20] The applicant was stopped at a checkpoint and refused entry to a region in Russia, because the region's Minister of the Interior had given an oral instruction not to let anyone with a Chechen ethnic origin pass. There was a difference in treatment and since Russia could not provide any justification for that, the court decided that this difference in treatment was racial discrimination and in violation with art. 14 ECHR (and art. 2 of Protocol no. 4).[21] Although ethnic profiling is usually not based on such a specific order of an official as in this case, and thus much harder to prove, the *Timishev* case does set a standard regarding a prohibition of enforcement decisions that are based on race. In its judgment on the *Gillan and Quinton* case, the ECtHR brings up the risks of ethnic profiling with regard stop and searches on its own initiative. The court noted that: 'there is a clear risk of arbitrariness in the grant of such a broad discretion to the police officer. While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration.'[22] This cases shows a strong indication of the ECtHR's concern with broad discretion in police initiated actions, which could lead to ethnic profiling. In the *Hugh Jordan* case, the ECtHR officially recognized indirect discrimination as a violation of article 14 ECHR. It decided that even if a policy measure is not directly aimed at a specific group, it may still be discriminatory if it has 'disproportionally prejudicial effects' on that group.[23] In a later case, the ECtHR decided that statistical evidence may be used to prove that a specific group is affected more by an on the outset neutrally formulated rule.[24] Finally, in the Nachova case, the ECtHR decided that failure to properly investigate alleged racist motives behind police behavior can constitute a violation of article 14 ECHR (in combination with another ECHR article) as well.[25]

The ECtHR cases discussed above each show an indication of the way ethnic profiling could be prohibited under article 14 ECHR. The court shows concern about the risk that broad discretion in police initiated actions could lead to ethnic profiling and it decided that statistics may be used to prove that a specific group is affected in a disproportionately large way by an in itself not discriminatory rule. Finally, the state also risks to violate article 14 ECHR if it does not properly investigate a possible case of ethnic profiling.

2.4 European Union law

European Union law also contains several provisions that prohibit discrimination on grounds such as race, nationality and ethnic origin. The Netherlands and England and Wales are both Member States of

[19] Article 2 of Protocol no. 4 to the ECHR.
[20] ECtHR 13 December 2005, 55762/00 and 55974/00 (*Timishev v. Russia*)
[21] Id., par. 57-59.
[22] ECtHR 12 January 2010, 4158/05 (*Gillan and Quinton v. the United Kingdom*), par. 85.
[23] ECtHR 4 May 2001, 24746/94 (*Hugh Jordan v. the United Kingdom*), par. 154.
[24] ECtHR 6 January 2005, 58641/00 (*Hoogendijk v. the Netherlands*), par. 77-78.
[25] ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova and Others v. Bulgaria*), par. 126.

the European Union, which makes European Union law, which is characterized by direct effect and primacy[26], binding on both countries. Both the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) include provisions that urge the state parties to combat discrimination.[27] Article 21 of the Charter of Fundamental Rights of the European Union also contains a prohibition of discrimination, although this provision only applies when states are implementing Union law.[28]

In 2000, the Racial Equality Directive was implemented.[29] This binding directive lays down a framework for tackling racial discrimination. It prohibits direct- and indirect discrimination and applies to private- as well as public bodies. Especially interesting is article 8, which states that if a citizen presents facts to a court from which it may be presumed that he or she has been a victim of direct- or indirect discrimination, the state has to prove that there was no violation of the principles in the Directive. This provision thus obliges states to reverse the burden of proof: the alleged victim of discrimination does not have to prove the discrimination, but only present facts from which discrimination may be presumed. Article 15 also requires states to enact and apply sanctions for the infringements of the principles laid down in the Directive. According to article 17, the Commission has to draw up a report for the European Parliament and Council every five years, taking into account the views of the European Union Agency for Fundamental Rights (hereafter: FRA), which is discussed in the next paragraph.

2.5 Advisory bodies and recommendations

Several international and European human rights bodies have drafted recommendations and country reports about preventing and tackling ethnic profiling. In this paragraph, firstly the different human rights bodies are introduced. After that, the general notions and recommendations that follow from these reports are discussed. As these notions and recommendations are highly similar to one another, they are discussed simultaneously. Several human rights bodies have also drawn reports that see to the situation with regard to ethnic profiling in the Netherlands and the United Kingdom specifically. These reports are discussed in chapter 3 and 4.

Except for the Committee on the Elimination of Racial Discrimination (hereafter: CERD), that is connected to the United Nations convention ICERD, all the human right bodies discussed in this paragraph are affiliated with the Council of Europe or the European Union. The following list shows the

[26] Craig & de Burca 2011, p. 330.
[27] E.g. article 3 TEU and article 18 and 19 TFEU.
[28] There is much debate on the question which acts of Member States can be regarded as 'implementing Union law'. Considering the scope of this paper, and the relevance of the question at hand, this is not a matter that is elaborated on in this paper.
[29] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000/43/EC).

European human rights bodies that have made relevant remarks and recommendations on the topic of ethnic profiling:

- European Parliament (EP)
- European Commission against Racism and Intolerance (ECRI)
- European Union Agency for Fundamental Rights (FRA)
- European Network against Racism (ENAR)
- Commissioner for Human Rights (Commissioner)
- EU Network of Independent Experts on Fundamental Rights (EU experts)
- High Commissioner on National Minorities (HCNM)

Furthermore, the European Code of Police Ethics[30] also contains a provision on the prevention and tackling of ethnic profiling. The reports and recommendations of all the above mentioned human rights bodies and the European Code of Police Ethics are not binding, but serve as guidelines for policy makers and public authorities in the Member States. The main message that is enshrined in all the reports is that states should take action to eliminate laws or policies that directly- or indirectly discriminate people of a certain ethnic origin. To decide whether ethnic profiling is legitimate or in violation with the prohibition of discrimination, states should test whether these practices are proportionate, effective and necessary.[31] On that account, several human rights bodies bring forward that ethnic profiling is not only discriminatory, but has also proven to be ineffective in fighting crime.[32]

The first recommendation that is brought forward by many different bodies is that states should monitor police activities and gather statistical data in order to identify ethnic profiling. These statistical data can be helpful in order to prove indirect discrimination as a result of certain police activities.[33] Most bodies also advice states to facilitate internal trainings for the police on the issue of ethnic profiling. These trainings may be helpful to raise awareness of prejudices and the consequences of discrimination.[34] Furthermore, to prevent ethnic profiling, states should make sure that police initiated actions can only be based on accumulated information and individual behavior, and not on external appearances.[35] In addition, some human rights bodies argue that a reasonable suspicion standard should be introduced for police initiated actions.[36] The FRA pleads for the introduction of stop and search forms, in order to force police officers to conduct well considered stops and to promote openness to the

[30] The European Code of Police ethics: Recommendation Rec(2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics (Adopted by the Committee of Ministers on 19 September 2001 at the 765th meeting of the Ministers' Deputies).
[31] ECRI 2007, p. 9; ENAR 2009, p.5.
[32] ENAR 2009, p. 12; FRA 2010, p. 33.
[33] ECRI 2007, p. 4; Commissioner 2012, p. 84; EP 2009; EU Experts 2006, p. 7.
[34] ECRI 2007, p. 4; FRA 2010, p. 48; European Code of Police Ethics 2001, p. 9.
[35] ECRI 2007, p. 8; FRA 2010, p. 58; EU Experts 2006, p. 8.
[36] ECRI 2007, p. 4; Commissioner 2009.

public.[37] Another generally shared opinion of the human rights bodies is that states should provide for an effective remedy for alleged victims of ethnic profiling and, in case ethnic profiling has been proven, for sanctions for the public authorities that were involved.[38] Finally, several bodies also argue that in order to prevent ethnic profiling, the police should recruit more people of various minority groups.[39]

2.6 Conclusions and yardstick for the research

In conclusion, both international and European law prohibit direct- and indirect discrimination. Case law of the UN Committee and the ECtHR indicates that different practices of ethnic profiling can be considered as a violation of the prohibition of discrimination. According to the ECtHR, broad discretion in police initiated action can lead to ethnic profiling and statistics can be used to prove that a certain group of people is affected more by certain police activities. Furthermore, different international and European advisory bodies have written non-binding reports with recommendations for the prevention and tackling of ethnic profiling. The advisory bodies recommend that states should monitor police initiated actions, the police should be trained on the issue of ethnic profiling, only objective information and individual behavior may be a basis for police action, there should be effective remedies for alleged ethnic profiling and more people of minority groups should be recruited by the police.

[37] FRA 2010, p. 53.
[38] ECRI 2007, p. 10; CERD 2005, p. 5; EP 2009, p. 10; EU Experts 2006, p. 7.
[39] ECRI 2007, p. 19; CERD 2005, p. 5; HCNM 2006, p. 4.

3. Ethnic profiling in the Netherlands

3.1 Introduction

In this chapter, the approach that the Netherlands takes towards preventing and tackling ethnic profiling is set out. Firstly, a brief overview of the current state of - and attitude towards ethnic profiling in the Netherlands is given. After that, the different police initiated actions that may lead to ethnic profiling are considered. On that account, the conditions under which the police can initiate these actions and the degree of discretion of the police officers are discussed. Attention is also paid to Dutch case law that goes into the possible thread of ethnic profiling with regard to these specific police initiated actions. Furthermore, the research that has been conducted in the Netherlands with regard to ethnic profiling is briefly described. Finally, in this chapter it is considered to what extent the Dutch approach is in compliance with international and European standards. The Dutch practice is compared to the international and European standards and recommendations examined in the second chapter, and reports of human rights bodies that see specifically to the Netherlands' approach are discussed.

3.2 Ethnic profiling in the Netherlands

Different scholars have argued that ethnic profiling has become more problematic over the last two decades in the Netherlands. This has to do with, amongst other things, a changing political discourse, in which it is no longer taboo to address minority groups as 'dangerous others'.[40] Some even suggest that ethnic profiling is now seen as part of the solution in fighting certain types of crime.[41] Furthermore, there has been a policy shift towards a focus on the prevention of crime, as an answer to perceived increase in crime.[42] As a consequence of this shift towards a policy of preventing crime, the discretionary powers for the police have expended significantly, which in its turn has led to more risk of ethnic profiling.[43] In the Netherlands, there has been very little research about ethnic profiling. Only a few researches on the choices police officers make while exercising their discretionary powers have been conducted, and almost no quantitative data on police initiated actions are available. These actions are only registered if they lead to a report or an arrest.[44] Research on the police's choices and data on the ethnicity of the people who have been subject to police initiated actions could help to indicate patterns of ethnic profiling.

In the Netherlands, the prohibition of discrimination on the basis of sex, race, religion etc. is enshrined in article 1 of the Dutch Constitution. The Dutch policy towards tackling discrimination is general; special provision for combating certain types of discrimination are only deemed necessary if

[40] Van der Leun & Van der Woude 2011, p. 445.
[41] Eijkman 2010, p. 1.
[42] Van der Leun & Van der Woude 2011, p. 448.
[43] Amnesty International 2013, p. 17.
[44] Id., p. 45; Van der Leun & Van der Woude 2013, p. 123.

the general provisions fail.[45] Little special attention is paid to racial discrimination and ethnic profiling in particular.[46] In the internal police trainings that see to dealing with a multicultural society and combating discrimination,[47] no special attention is being paid to ethnic profiling either.[48]

3.3 Acts on broad discretionary police powers

In the last two decades, several laws have been enacted that broaden the discretionary police powers significantly, and could lead to a greater risk of ethnic profiling. These laws and their possible consequences for ethnic profiling are discussed individually. Attention is also paid to judicial decisions that could indicate under which conditions the exercise of the discretionary powers conferred on the police by these laws can be considered to lead to ethnic profiling and a violation of the prohibition of discrimination.

3.3.1 Wet op de uitgebreide identificatieplicht (WUID)

In 2005, a law that expanded the identification duty, the *Wet op de uigebreide identificatieplicht* (hereafter: WUID) was enacted. Following the enactment of the WUID, the police can order people over 14 years old to identify themselves with a valid ID card without a reasonable suspicion that that person has committed a crime. The only requirement for a police officer to exercise this power is that it must be reasonably necessary for the exercise of the general police tasks. [49] The general police tasks are executing criminal law, maintaining public order and helping those in need. Before 2005, police officers could only order people to show their ID card in their task of executing criminal law. Now, after the enactment of the WUID, police agents can also exercise that power in order to maintain public order and helping people in need.[50] Police officers thus have a very broad discretion in exercising this power: they can use it in a wide range of situations in which the public order could possibly be endangered.[51] In the Guide to the WUID, the legislator has named several situations in which the police power may be used, such as when a car drives near an industrial zone during the night or a group of youths causes nuisance.[52] Moreover, the legislator notes in the explanatory memoranda for the WUID that it does not deem it desirable that every exercise of this police power is registered. According to the legislator, registering citizen encounters is only necessary for the more extreme police powers.[53]

[45] CERD: Report of the Netherlands 2013, p. 3.
[46] Amnesty International 2013, p. 21.
[47] These trainings are given by the National Expertise Centrum for Diversity (Translated from Dutch: *Landelijk Expertise Centrum Diversiteit (LECD*)).
[48] Amnesty International 2013, p. 25.
[49] See article 8a of the Police Act 2012 (*Politiewet 2012*).
[50] Tweede Kamer 2003-2004, 29 218, Nr. 3, p. 11.
[51] Amnesty International 2013, p. 51.
[52] *De aanwijzing uitgebreide identificatieplicht*, *Stcrt.* 2004, 247.
[53] Tweede Kamer 2003-2004, 29 218, Nr. 3, p. 13.

Until today, the Supreme Court of the Netherlands has not yet made a judgment about cases in which the exercise of the WUID could lead to ethnic profiling. However, the Supreme Court does give more clarity about the situations in which exercise of the WUID is reasonably necessary for the exercise of the general police tasks. The Court stresses that the situations listed in the Guide to the WUID are not the only situations in which a police officer can order someone to show their ID card. In the case at hand, in which a person was sitting in a vehicle, parked at a gas station in the middle of the night, together with two other people who had antecedents, the police was allowed to exercise its powers under the WUID.[54] In another case before a lower court, the judges decided that the police had overstepped its competences by ordering a man that belonged to an ethnic minority to show his ID card. There were no indications that a criminal offence was going to take place, while the record of the stop showed that the order was based on that assumption. The police officer had based that assumption solely on the man's appearance, which is not enough according to the court.[55] In this case, the court does not address the question whether this situation leads to a violation of the prohibition of discrimination. It merely states that the evidence that was obtained with the stop was not admissible.

3.3.2 Weapons and Ammunition Act

According to article 50, 51 and 52 of the Weapons and Ammunition Act[56], police officers can obtain the competence to search for weapons and ammunition by examining packaging of goods and baggage, vehicles and clothing in a certain area and public buildings in that areas. They can obtain that competence from the Public Prosecutor when the mayor of a city or town designates a certain area as a risk area. The mayor has the competence to designate an area as a risk area on the ground of articles 151b and 174b of the Municipality Act[57] if there exists, or is a severe risk that there will exist, a disturbance of the public order due to weapons. He or she can designate a risk area for no longer than 12 hours straight. However, the Ordinance on the Investigation of Terrorist Crimes[58] also designates certain permanent risk areas, such as train stations in big cities and Schiphol airport, where police officers always have the competence to stop and search for weapons.

In the explanatory memoranda for the amendment of the Weapons and Ammunition Act and the Municipality Act, e.g. introducing article 174b of the Municipality Act, the legislator recognized that municipalities are sometimes reserved with using their competence to designate risk areas, because it may have a stigmatizing effect on the residents of that area.[59] Indeed, designating certain risk areas could lead to ethnic profiling and indirect discrimination: the measure is neutral in terms but could

[54] HR 31 May 2011, ECLI:NL:HR:2011:BQ1978.
[55] Rb. Rotterdam 26 June 2009, ECLI:NL:RBROT:2009:BJ1570.
[56] Translated from Dutch: *Wet Wapens en Munitie.*
[57] Translated from Dutch: *Gemeentewet.*
[58] Translated from Dutch: *Besluit Opsporing Terroristische Misdrijven (21 december 2006).*
[59] Tweede Kamer 2011-2012, 33112, Nr. 3, par. 4.2 .

disproportionally affect people of a minority group.[60] Furthermore, the selection of persons or vehicles to stop and search in a designated area could also lead to ethnic profiling. In principle, police officers have to stop and search everyone in a designated risk area over a certain time. If this is not possible, they should select people and vehicles at random. [61] However, there are no clear guidelines about how to select at random; the choices for selection are left up to the intuition of the individual police officers. As a consequence, the selection process is not transparent nor controllable, which leads to a risk of unlawful selection.[62]

As of yet, the Supreme Court of the Netherlands has not addressed the risk of ethnic profiling and indirect discrimination as a result of the above discussed police competence to stop and search. However, it has decided that the court should be reticent in judging the decision of a mayor to designate a certain area as a risk area. The court may only base its judgment about that decision on its legitimacy, its necessity and its reasonability. It may not test the decision against its effectivity or personal rights that might be violated with that decision.[63] The defendant has brought this case to the ECtHR, complaining about, amongst other things, a violation of article 8 and 14 of the ECHR. The ECHR did not find a violation of these articles in this case. According to the court, this particular infringement of article 8 was 'necessary in a democratic society'. The ECHR did not go into the complaint about a violation of article 14 ECHR, because the complainant had not brought this issue forward in earlier national proceedings and it was therefore inadmissible.[64]

3.3.3 Traffic Act (WVW)

Article 160 of the Traffic Act of 1994 (hereafter: WVW)[65] gives police officers the competence to stop and search vehicles and order the person driving the vehicle to show identification. This competence was designed for the monitoring of road safety. However, the Supreme Court of the Netherlands has decided that, although the competence may not be used exclusively for an investigative purpose, it may be used for a combination of monitoring road safety and investigation.[66] This could be problematic, as for the exercise of this competence, no reasonable suspicion is required.

Another problematic feature of the WVW with regard to the risk of ethnic profiling is that it is used to detect so called 'unaccountable possession'[67]. Police officers may stop and search vehicles that they, for example, deem to be too expensive for the persons driving it. There are no clear guidelines for

[60] Amnesty International 2013, p. 66.
[61] Id., p. 69.
[62] Nationale Ombudsman 2011, p. 44.
[63] HR 20 February 2007, ECLI:NL:HR:2007:AZ2475.
[64] ECtHR 15 May 2012, 49458/06 (*Colon v. the Netherlands*).
[65] Translated from Dutch: *Wegenverkeerswet (abbreviation: WVW).*
[66] E.g. HR 21 November 2006, ECLI:NL:HR:2006:AY9670.
[67] Translated from Dutch: *onverklaarbaar bezit.*

the way in which this competence must be exercised; police officers have a lot of discretion.[68] As police officers may thus base their decision to stop and search a vehicle solely on appearances, the risk of ethnic profiling is significant.

So far, no case on the WVW and its risk for ethnic profiling has been brought before the Supreme Court of the Netherlands. As noted above, the Supreme Court has decided that article 160 of the WVW may also be used for investigative purposes. In 2011, the Court of Amsterdam did decide that exercising the competence under article 160 WVW solely to identify the persons in the vehicle is not valid. The court empathizes that this unauthorized action of the police officers was mainly problematic because there was not yet a reasonable suspicion against the persons in the vehicle, so they could not have been stopped on the ground of article 52 of the Criminal Code of Procedure.[69] The court did not get into the question whether the police officers would have been authorized to ask the identity of the persons driving the vehicle on the basis of the WUID.

3.3.4 Aliens Act

Article 50 of the Dutch Aliens Act 2000 gives police officers the competence to ask the identity of persons if there is a suspicion of illegal residence. This suspicion needs to be based on measurement of objective standards about the facts and circumstances of a case.[70] The Aliens Circular 2000 provides further guidelines on the way the competences in the Aliens Act should be exercised. Here it is noted that police officers should test their suspicion about a certain person on at least one of the following objective standards: 1) facts about the situation in which that person is stopped, 2) a lead about the person that is stopped, or 3) known facts about the neighborhood or facts derived from police experience.[71] Although the Aliens Act and the Aliens Circular do not explicitly prohibit the exercise of this competence on the basis of a person's appearance, the 'objective standards' test is likely to lower the risk of ethnic profiling. However, the Aliens Circular also points out that a reasonable suspicion can follow from an identity check carried out on the basis of the Police Tasks or on the basis of the stop and search of a vehicle.[72] As is discussed in the previous paragraphs, for these identity checks, police officers do not require a reasonable suspicion based on objective standards. It thus may be fairly easy for police officers to bypass the strict requirements of the Aliens Act and use another competence to check a person's identity. Data on 2010 show that 14% of the aliens that were stopped and asked for their identity were asked on the basis of the WUID. In only 56% of the stops, aliens were asked for their identity on the ground of article 50 of the Aliens Act.[73]

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[68] Amnesty International 2013, p. 63.
[69] Rb. Amsterdam 1 August 2011, ECLI:NL:RBAMS:2011:BR3803.
[70] In Dutch: '…*op grond van feiten en omstandigheden die, naar objectieve maatstaven gemeten, een redelijk vermoeden van illegaal verblijf opleveren*..'.
[71] Vreemdelingencirculaire 2000, A2.
[72] *Id.*
[73] Ministry of Security and Justice 2010.

The highest court of the Netherlands that decides on cases regarding the Aliens Act is the Council of State. The Council of State made several judgments about the objective standards against which a reasonable suspicion of illegal residence should be tested. Until today, it did not explicitly address the issue of ethnic profiling as a result of the exercise of the Aliens Act, but its judgments indicate a high standard for a reasonable suspicion. In a judgment in 2011, the Council of State decided that a large scale police operation, in which police officers used their competence under article 50 of the Aliens Act, was not justified because the conditions under which the persons were stopped could not count for a reasonable suspicion for illegal residence. The police operation was based on research results and allowed police officers to ask for the identity of persons with an African ethnicity who travelled by bus from Amsterdam to Kennemerland to perform cleaning work in rich neighborhoods. The Council of State decided that the research results did not provide enough cause to justify a reasonable suspicion against the persons who met the abovementioned criteria.[74]

Although the Council of State has adopted a high standard for requirement of a reasonable suspicion in the Aliens Act, it has proven to be reserved in making any judgment about police initiated actions to identify a person on other competences. The Council of State decided in several cases that it is not competent to judge the exercise of police competences that are not based on the Aliens Act. The Council of State can only attach consequences to an illegitimate police action if the illegitimacy of that action has been determined by a criminal law judge.[75] This means that police officers are free to stop and identify persons on the basis of other competences than those in the Aliens Act and, if that person turns out to be an alien, the Council of State cannot judge the legitimacy of the exercise of that competence. This gives police officers a lot of discretion.

3.4 Research on ethnic profiling

As has been mentioned above, little research on ethnic profiling has been conducted in the Netherlands. Quantitative data on the ethnicity of people that are subjected to police initiated actions are hardly available. However, some qualitative research that has been done indicate patterns of ethnic profiling. In 2012, Çankaya conducted a qualitative research on the thought process of police officers in police initiated actions in Amsterdam-Amstelland. He collected his data over two years using the methods of observations and interviews of police officers.[76] Çankaya concluded that police officers use their intuition in police initiated actions and this intuition is for a part based on the appearances of persons. Police officers have an idea of what is 'normal' and people showing deviant behavior or people with a deviant appearance raise their suspicion. One could conclude that police officers' idea of what is

[74] ABRvS 13 July 2011, LJN: BR2059, par. 2.1.4.
[75] ABRvS 29 June 2001, ECLI:NL:RVS:2001:AG9341; ABRvS 23 July 2001, nr. 200202662/1, r.o. 2.3.2; ABRvS 26 July 2001, nr. 200102650/1, r.o. 2.2.
[76] Çankaya 2012, pp. 31-25.

'normal' is based on the dominant group in the society, making ethnic minorities more likely to act and look deviant and thus raise more suspicion.[77]

3.5 Compliance with international and European standards

In this paragraph, it is evaluated to what extent the Netherlands' approach towards preventing and tackling ethnic profiling is in compliance with international and European standards. Concluding from the foregoing paragraphs; over the last decades, there has been a political and policing change towards a more preventive criminal law system. Several acts have given police officers more discretionary powers to initiate actions against citizens without a reasonable suspicion of a crime. In the case law of the Dutch Supreme Court, hardly any attention is paid to the risks this could create for indirect discrimination and ethnic profiling. There is almost no quantitative data available on the exercise of these discretionary powers. Qualitative data, however, indicates that police officers base their policing choices on intuition and this can lead to ethnic profiling. In this paragraph, firstly, the Dutch system is examined against the international and European standards with regard to ethnic profiling that are discussed in the previous chapter. After that, the ECRI report that sees specifically to the Netherlands is elaborated on.

As is outlined in the previous chapter, international and European treaties and conventions prohibit direct- and indirect discrimination. Different courts and committees, especially the ECtHR, have indicated that if a particular rule or policy affects a specific group disproportionally more than others, the prohibition of discrimination is violated. The ECtHR shows its concern with regard to broad discretionary powers for police initiated actions. Statistic data on the ethnicity of the people that are being subjected to these police initiated actions could help to prove indirect discrimination. As the Dutch government has introduced many discretionary police powers over the last decade and barely pays any attention to whether exercise of those powers could lead to ethnic minorities being disproportionally affected, it runs the risk of violating the prohibition of discrimination. Furthermore, the Netherlands does not have any quantitative data on the exercise of those powers that could be used to prove indirect discrimination in court. As international and European treaties and conventions also oblige states to have an effective system for alleged discrimination, this is also a problematic feature in the Dutch system.

With regard to the reports and recommendations of the international and European human rights bodies, the Dutch approach towards ethnic profiling could also be problematic. These reports strongly urge states to make sure police initiated actions may only be based on objective information and behavior. As indicated in paragraph two of this chapter, this is often not the case in the Netherlands. For example, the exercise of the police competence to stop and search people in a designated area is not based on objective information; the selection process is left to the intuition of the individual police

[77] *Id*., pp. 182-185.

officer. Also, the ECRI mentions that: 'It is also important to assess the extent to which certain groups are stigmatised as a result of decisions to concentrate police efforts on specific crimes or in certain geographical areas.'[78] Furthermore, these police initiated actions are not monitored, as most human rights bodies recommend states to do in order to trace practices of ethnic profiling. Finally, human rights bodies plead for police trainings on the issue of ethnic profiling. In the Dutch police training, no specific attention is being paid to ethnic profiling. Of course, the reports and recommendations drawn up by human rights bodies are not binding on states. However, the Netherlands does not seem to follow through on any recommendation that is being made, which could be precarious.

In its fourth and most recent monitoring cycle, the ECRI stipulated several problematic features with regard to ethnic profiling in the Netherlands. It welcomed the research that has been done on the effects of broad discretionary police powers, such as the stop and search, but also indicated some worrisome data[79] on ethnic minorities being subjected to these powers in a disproportionate manner. Amongst other things, the ECRI recommended that the Dutch government should enact clear guidelines for the exercise of police initiated actions and that the police should register 'every stop and preventive body search'.[80]

On a positive note, the *Colon* judgment of the ECtHR indicates that the stop and searches on the basis of designating risk areas in the Netherlands does in general not lead to a violation of article 8 ECHR. This was different in the *Gillan and Quinton* judgment, which was discussed in the previous chapter. In that case, the ECtHR did condemn the stop and search power in the United Kingdom and warned for the risk of ethnic profiling with regard to that power.[81] This case and its consequences are discussed further in the next chapter.

[78] ECRI 2007, p. 9.
[79] In 2008, the FRA conducted a survey in the Netherlands, which e.g. led to the conclusion that: 'Ten per cent of all respondents with North African background in the Netherlands stated they had been stopped in the previous 12 months because – as they had perceived it - of their ethnicity/religion/immigration background'.
[80] ECRI on the Netherlands 2013, p. 62.
[81] ECtHR 12 January 2010, 4158/05 (*Gillan and Quinton v. the United Kingdom*), par. 85.

4. Ethnic profiling in England and Wales

4.1 Introduction

This chapter gives an overview of the approach England and Wales take towards preventing and tackling ethnic profiling. Firstly, a brief description of the attitude towards ethnic profiling in England and Wales is given. After that, different discretionary police powers that may extend the risk of ethnic profiling are discussed. Special attention is paid to the stop and search power and the Code of Practice that sees to this power. Furthermore, research that has been done and the initiatives to prevent and tackle ethnic profiling are set out. Finally, the extent to which the approach of England and Wales is in compliance with international and European standards is discussed. Attention is also paid to the ECRI report that sees specifically to the situation in England and Wales.

4.2 Ethnic profiling in England and Wales

As in the Netherlands, the criminal law system in England and Wales is also partly dedicated to the prevention of crimes. In recent years, in politics there has been a lot of attention to tackle 'anti-social behavior', which in practice is mostly used to take on troublesome youths.[82] Also, similar to the situation in the Netherlands, debates about problems relating to ethnic minorities are no taboo in political discourse.[83] However, since the 1980s lots of attention has been paid to stop and search powers in relation to their possible discriminatory effects. Around the turn of the millennium, it became a very controversial issue.[84] This controversy has especially been brought about by the *Stephen Lawrence inquiry*, an inquiry that was originally about the failed police investigation of the murder of a man called Stephen Lawrence, but also revealed fundamental flaws in investigation mechanisms and issues with regard to ethnic minorities in England.[85] Since this inquiry, lots of researchers on stop and search powers with regard to ethnic profiling have been conducted by, amongst others, the Home Office. More attention to these researchers is paid in paragraph 4.5. Furthermore, there is also much debate in public and political discourse on ethnic profiling as a possible result of police powers exercised in relation to the Terrorism Act 2000.[86]

In England and Wales, the prohibition of discrimination finds its basis in the Human Rights Act 1998. This Act gives further guidelines for the effects of the European Convention on Human Rights in England and Wales. It follows from article 3 of the Human Rights Act that legislation must be interpreted in accordance with the rights and freedoms under the ECHR. Following from article 6 of the Human Rights Acts, public authorities, including police officers may not act in a way incompatible with ECHR

[82] Crawford 2009, p. 5.
[83] ECRI on the United Kingdom, p. 37.
[84] Bowling & Philips 2007, p. 936.
[85] Foster et al. 2005, p. 1.
[86] See e.g. Palmar 2011.

rights. The prohibition of discrimination can also be found in the Equality Act 2010, which prohibits direct- and indirect discrimination on the basis of, amongst other things, race.

4.3 Acts on broad discretionary police powers

Several acts in England and Wales give police officers the competence to stop and search persons. Police officers enjoy a considerable amount of discretion in exercising these competences. As powers to stop and search can be found in a lot of different acts that sometimes see to the protection of very specific, and for the purpose of this paper not that relevant, goods[87], only a selection is considered in this paragraph. Successively, the stop and search powers in the Police and Criminal Evidence Act 1984, the Criminal Justice and Public Order Act 1994 and the Terrorism Act 2000 are discussed. The stop and search powers attributed by these acts are the ones most used in practice.[88] Furthermore, attention is paid to the dispersal powers in the Anti-social Behaviour Act 2003.[89] Finally, the Code of Practice for the Police and Criminal Evidence Act 1984, that sees to the exercise of police officers of statutory powers of stop and search is discussed.

4.3.1 Police and Criminal Evidence Act 1984

Under section 1 of the Police and Criminal Evidence Act 1983 (hereafter: the PACE), police officers have the competence to stop and search persons and vehicles, if they have a reasonable suspicion that they will find stolen or prohibited articles, fireworks, or an article with a point or a blade.[90] Section 2 of the PACE states that police officers who are contemplating a search under section 1 must first bring to the attention of that person, amongst other things, the object of and the grounds for the proposed search. Furthermore, following subsections 3(7) and 3(8) the police officers must also notify that person that he or she can get a copy of the record of the search if he or she asks for it within a period of 12 months.

4.3.2 Criminal Justice and Public Order Act 1994

Section 60 of the Criminal Justice and Public Order Act 1994 (hereafter: the Act 1994) gives police officers of or above the rank of inspector the competence to authorize stop and searches of persons and vehicles in their police area. The police officer of or above the rank of inspector may authorize this if there is a risk of serious violence or persons carrying dangerous instruments. The authorization is valid for a maximum of 24 hours, but can be extended for another 24 hours by a police officer of or above the rank of superintendent. Unlike for stop and searches under section 1 of the PACE, no suspicion in individual cases is needed to authorize the stop and searches under section 60 of the Act 1994.[91] Also

[87] See for example the Deer Act 1991, the Crossbows Act 1987 and the Wildlife and Countryside Act 1981.
[88] Bowling & Philips 2007, p. 937.
[89] Interestingly, the issue of ethnic profiling gets much attention in academic literature and political discourse, but no complaints regarding discriminatory effects of police initiated actions have been brought before the Supreme Court of the United Kingdom.
[90] Following subsection 8(A) and section 139 of the Criminal Justice Act 1988.
[91] ENAR Fact Sheet 40 2009, p. 8.

interesting in this regard is paragraph 5 of section 60 of the Act 1994, which states that a police officer may stop and search any person or vehicle in the designated area 'whether or not he has any grounds for suspecting that the person or vehicle is carrying weapons or articles of that kind.' Following section 25 of the Crime and Disorder Act 1998, in the above discussed situations, police officers are also competent to require persons to remove items of which they believe it is used to conceal that person's identity.

4.3.3 Terrorism Act 2000

Under section 44 of the Terrorism Act 2000, a police officer of a high rank[92] has the competence to authorize police officers to stop and search persons and vehicles in an area for no longer than 28 days, if he or she considers it to be expedient for the prevention of terrorism. Section 45 of the Terrorism Act 2000 states that police officers may exercise the powers conferred to them under section 44 to search for articles that may be used in connection to terrorism. However, to exercise the power to stop and search for such articles, it is not necessary that the police officers has grounds for suspecting the presence of such articles. A Person who is stopped and searched may apply for a written statement that he or she has been stopped and searched within a period of 12 months after he or she has been stopped. The fact that neither for the authorization of stop and searches powers, nor for the exercise of the stop and search powers under the Terrorism Act 2000, reasonable suspicion is necessary, is a controversial issue. It gives police officers a wide discretion and may lead to ethnic profiling.[93] Also, the ECtHR has found that the exercise of these stop and search powers can lead to a violation of article 8 of the ECHR, which is discussed in paragraph 4.6.

4.3.4 Anti-Social Behaviour Act 2003

Section 30 of the Anti-Social Behaviour Act 2003 (hereafter: the Act 2003) allocates to superintendents the competence to designate a certain area as a 'dispersal zone' for up to 6 months. In this 'dispersal zone', police officers have the power to require persons belonging to a group of two or more to disperse, or, if the persons do not reside in the locality, to require them to leave the locality and to exclude them from that locality for no longer than 24 hours. Police officers may exercise this power if they have reasonable grounds to believe that the presence or behavior of the group of persons has resulted or may result in 'members of the public being intimidated, harassed, alarmed or distressed'. As Crawford notes, whether police officers believe that such a situation is at hand, is very subjective and context-specific.[94] Furthermore, the fact that the reasonable suspicion may also be based on the *presence* of a group, and thus not only on the behavior of the individuals in that group, makes that suspicion even

[92] The rank of the police officer competent to give such an authorization depends on the area. If the area is part of a general police area, the competent constable must at least have the rank of assistant chief constable (subsection 4(a)).
[93] Parmar 2011, p. 370.
[94] Crawford 2009, p. 5.

more subjective.[95] The effects of the dispersal powers can be severe, as, following section 32 of the Act 2003, persons who contravene a direction are committing a criminal offence. Police officers also have the competence to take a person to their place of residence, if they have reasonable grounds to believe that that person is under the age of 16 and is not under the control of a parent. These dispersal powers are deemed controversial, because of the large police discretion they accord. Also, not much is known about the differential impact the dispersal powers have on ethnic minorities.[96] Therefore, these powers bring about a considerable risk of ethnic profiling.

Following section 34 of the Act 2003, the Secretary of State may issue a code of practice for the exercise of the powers under section 30 of that Act. Until now, that has not been done yet.

4.4 PACE Code of Practice

Code of Practice A to the PACE for the exercise of police officers of statutory powers to stop and search (hereafter: Code of Practice) needs to be respected by police officers while exercising their stop and search powers under, amongst others, the section 1 of the PACE, section 60 of the Act 1994 and section 44 of the Terrorism Act 2000.[97] The Code of Practice gives a lot of guidelines for policing, of which only a few relevant provisions are discussed in this paragraph. The Code of Practice was revised in 2003, incorporating the recommendations made in the *Stephen Lawrence Inquiry* in 1997.[98]

The Code of Practice makes a distinction between searches for which a reasonable suspicion is needed, searches under section 60 of the Act 1994 and searches exercised under section 44 of the Terrorism Act 2000. According to article 2.2 a reasonable suspicion can never be based on personal factors. It must rely on intelligence or personal behavior and may never be based on stereotypical assumptions about groups of people more likely to commit criminal offences. Article 2.14A states that police officers exercising their powers under section 60 of the Act 1994 must be careful not to discriminate against anyone on the grounds mentioned in the Equality Act 2010, including race. As for the stop and search powers under section 44 of the Terrorism Act 2000, the Code of Practice provides for an extra requirement of reasonable suspicion. Following the ruling of the ECtHR, which will be discussed in a later paragraph, that the stop and search powers under section 44 were incompatible with article 8 of the ECHR, the Home Secretary in the House of Commons announced further guidelines. Therefore, in contrast to section 45 of the Terrorism Act 2000, it is now required that in order to search a vehicle, there must be a reasonable suspicion that an article that may be used in connection to terrorism is present in that vehicle.[99]

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[95] Crawford and Lister 2007, p. 4.
[96] *Id.*, p. 1-5.
[97] See Annex A of the Code of Practice for a not-definite list of stop and search powers to which this Code of Practice sees.
[98] See paragraph 4.2 and Miller 2010, p. 956.
[99] See article 2.18A(ii) of the Code of Practice.

Furthermore, section 4 of the Code of Practice states that a record must be made for all stop and searches that do not lead to an arrest. The record of the search must include a 'note of the self-defined ethnicity' of the person searched.[100] In the explanatory notes to the Code of Practice, it is explained that this part of the record is meant to improve ethnic monitoring and tackle discriminatory police practices. If a reasonable suspicion is required for the exercise of the stop and search power, the grounds for that suspicion must also be recorded. According to section 6 of the Code of Practice, the use of stop and search powers must be monitored by supervising officers, who must in particular consider indications that they are exercised on the basis of inappropriate generalizations.

4.5 Research and reforms reducing ethnic profiling as a result of police initiated actions

The biggest amount of research on the topic of ethnic profiling in Europe is available in England and Wales.[101] Indeed, since 1980 and especially after the above mentioned *Stephen Lawrence inquiry* in 1997, a lot of attention has been paid to the risk of ethnic profiling as a result of discretionary police powers. The size of this research does not allow for an extensive overview of all the researches that have been conducted on this topic in England and Wales. The researches focused on the different stop and search powers discussed above, such as section 60 of the Act 1994, section 44 of the Terrorism Act 2000 and the Act 2004[102]. Furthermore, England and Wales are the only countries in Europe that systematically gather data on stop and searches.[103] These data usually show inequality in the amount of people of different ethnic groups being stopped. Official data of the Ministry of Justice over 2007 and 2008 for example show that black people were 7.4 times more likely to be stopped by the police than white people.[104]

The *Stephen Lawrence Inquiry* in 1997 and the revision of the Code of Practice in 2003 led to a lot of reforms with the aim to reduce the risk of ethnic profiling as a result of stop and searches. Besides the reforms deriving from the Code of Practice, such as the introduction of stop and search forms and the obligation of high officers to monitor stop and searches, the government also installed a Stop and Search Action Team (SSAT) to raise awareness and confidence amongst ethnic minorities.[105] In a research in 2010, it was shown that these reforms have not reduced ethnic profiling in police initiated actions in the urban areas such as London and Manchester. However, disproportionality with regard to

[100] Annex B to the Code of Practice gives provides for 'self-defined ethnic classification categories' that must be used in the records of stop and searches.
[101] FRA 2010, p. 37.
[102] See ea. Bowling and Philips 2007; Pantazis and Pemberton 2009; Delson and Shiner 2006; Parnar 2011; Crawford and Lister 2007.
[103] ENAR 2009, p. 6.
[104] Ministry of Justice 2007/08.
[105] Miller 2010, p. 958.

ethnic profiles of people stop and searched outside these urban areas have decreased over the last decade.[106]

4.6 Compliance with international and European standards

This paragraph focuses on the question to what extent the approach of England and Wales towards preventing and tackling ethnic profiling is in compliance with international and European standards. From the previous paragraphs it can be concluded that there is a lot of attention for ethnic profiling as a possible result of police initiated actions in England and Wales. There are several stop and search powers that give police officers extensive discretionary powers and there is plenty of research that shows that these police powers affect ethnic minorities in a disproportionate way. However, a lot of government reforms, such as stop and search forms and extensive quantitative data gathering, have been introduced in England and Wales. In this paragraph, firstly the approach of England and Wales is examined against the international and European standards that are discussed in chapter two. Special attention is paid to the ECtHR case *Gillan and Quinton v. the UK*. After that, the ECRI report that sees specifically to the United Kingdom is discussed.

As brought forward in the previous chapters, international and European conventions prohibit direct- and indirect discrimination. The ECtHR has voiced its concern about broad discretionary police powers and the risk of indirect discrimination it brings about. Especially section 60 of the Act 1994 and section 44 of the Terrorism Act 2000 may be risky in this regard, since no reasonable suspicion for a stop and search is needed under these sections. In the *Gillan and Quinton* judgement, the ECtHR explicitly warned for the risk of ethnic profiling as a result of the powers under section 44 of the Terrorism Act 2000. In this case, the ECtHR found a violation of article 8 ECHR, the right to private life, because the stop and search powers in the Terrorism Act 2000 were not 'in accordance with the law' as they were not sufficiently delineated.[107] The ECtHR decided that: '… The law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.'[108] No claim for a violation of the prohibition of discrimination under article 14 ECHR was made, but the ECtHR nevertheless warned for the risk of discriminatory use of the stop and search powers in question. It based this warning on available statistics indicating some ethnic groups being disproportionally affected and the wide use of the stop and search powers.[109] As mentioned above, as a reaction to this judgement, the Home Secretary in the House of Commons announced further guidelines. In contrast to section 45 of the Terrorism Act 2000, it is now required that in order to search

[106] Miller 2010, p. 968.
[107] ECtHR 12 January 2010, 4158/05 (*Gillan and Quinton v. the United Kingdom*), par. 87.
[108] *Id.*, par. 77.
[109] *Id*., par. 83-44.

a vehicle, there must be a reasonable suspicion that an article that may be used in connection to terrorism is present in that vehicle.[110]

As mentioned in chapter two, the United Kingdom did not sign or ratify the optional protocol to the ICCPR. This means that British nationals cannot complain before United Nations Human Rights Committee if, for example, they are an alleged victim of discrimination by police officers. Furthermore, the United Kingdom did not sign Protocol 12 to the ECtHR. A British national will thus always have to make a complaint on the ground of article 14 ECHR in conjunction with another ECHR right.

With the above mentioned government reforms to reduce ethnic profiling in police initiated actions, England and Wales seem to incorporate many of the recommendations made by international and European human rights bodies. There is a lot of research and official data on discretionary police powers and a stop and search form has been introduced, which helps to monitor these stop and searches and their possible discriminatory effect. Furthermore, the grounds for a reasonable suspicion are specified further in the Code of Practice. All these efforts can be deemed positive and have not gone unnoticed by human rights bodies.[111] However, research shows that ethnic profiling is still an issue in policing in England and Wales and there are still discretionary police powers, such as section 60 of the Act 1994, that may be exercised without a reasonable suspicion.

In its fourth monitoring cycle, the ECRI drew a report on the situation in the United Kingdom. In this report, it recommended the United Kingdom to pursue to collect data on stop and searches and intensify the monitoring of the possible discriminatory effects of these stop and searches.[112] Furthermore, the ECRI applauded the efforts that have been made to recruit more persons of an ethnic minority in the police forces and recommended the United Kingdom to continue their efforts and pay special attention to recruitment of ethnic minorities in higher ranks.[113] Finally, it welcomes the establishment of the Independent Police Complaints Commission (IPCC), which promotes racial equality and pays special attention to complaints that are made about racial discrimination.[114]

[110] See article 2.18A(ii) of the Code of Practice.
[111] FRA 2010, p. 45.
[112] ECRI on the United Kingdom 2010, p. 56.
[113] *Id.*, p. 57.
[114] *Id.*, p. 57.

5. Comparison in compliance with international and European standards

5.1 Introduction

In the last two chapters, the situations with regard to ethnic profiling in the Netherlands and England and Wales were discussed. As has become clear, in England and Wales, much more attention is paid to the topic of ethnic profiling. After the *Stephen Lawrence Inquiry* in 1997 and the *Gillan and Quinton* judgement by the ECtHR in 2010, a lot of research on ethnic profiling has been conducted and the PACE Code of Practice has been introduced and altered. In the Netherlands, some research about ethnic profiling has been done, but internal evaluations on police competences for example show that no special attention is paid to the possible risk of ethnic profiling. In this chapter, the similarities and differences in the way both countries comply with international and European standards regarding ethnic profiling are set out. After that, some features of the English approach towards preventing and tackling ethnic profiling that could be adopted by the Netherlands are discussed.

5.2 Compliance with the prohibition of discrimination

Both the Netherlands and England and Wales are party to the major treaties and conventions prohibiting discrimination, such as the ICCPR, the ECHR and the TFEU. Both countries also signed and ratified the ICERD, that sees specifically to the prohibition of racial discrimination. The abovementioned conventions and treaties also prohibit indirect discrimination: legislation or state practice that on the outset seems neutral, but disproportionally affects a specific group. According to the ECtHR, statistics may help to prove indirect discrimination. The ECtHR warns for the risk of ethnic profiling as a result of broad discretionary police powers. In light of that, in the *Gillan and Quinton v. the UK* case the ECtHR condemned the stop and search powers in the Terrorism Act 2000. As of yet, the ECtHR has not yet condemned broad discretionary powers in the Netherlands. However, as has been discussed in chapter three, Dutch legislation comprises several broad discretionary police competences. The stop and search powers under the Dutch Weapons and Ammunition Act are, for instance, quite similar to the stop and search powers in the English Criminal Justice and Public Order Act. Both police powers can be exercised without a reasonable suspicion in individual cases. Furthermore, research in the Netherlands as well as in England and Wales shows that ethnic profiling as a result of these discretionary police powers does occur. Although the *Colon* judgment of the ECtHR indicates that the stop and searches on the basis of designating risk areas in the Netherlands does in general not lead to a violation of article 8 ECHR, it has not yet voiced its opinion on the possibility of a violation of article 14 ECHR. As the effectiveness of ethnic profiling for fighting crime and creating a save environment has never been proven[115], it is likely that ethnic profiling as a result of broad discretionary powers in the Netherlands would also not survive the proportionality test of the ECtHR. In both England and Wales and in the

[115] Çankaya 2012.

Netherlands, broad discretionary police competence could thus be in violation with the prohibition of discrimination.

5.3 Compliance with recommendations of human rights bodies

In chapter two, the recommendations of several international and European human rights bodies were discussed. The recommendations of these bodies were in general quite similar to one another. Almost all human rights bodies recommend states to gather quantitative data in order to possibly identify ethnic profiling. The United Kingdom is one of the only countries in Europe that gathers statistical data about stop and searches. In the Netherlands, reports on stop and searches are only drawn up if the search leads to a record or an arrest. In its country report on the Netherlands, the ECRI urges the Netherlands to register every stop and search. Furthermore, the human rights bodies recommend states to introduce a reasonable suspicion standard in order to decrease the broadness of discretionary powers. England and Wales have, to a certain extent, introduced a reasonable suspicion standard in the Code of Practice to the PACE. The directions for policing in this Code of Practice should give police officers more guidance and thus less discretion in exercising their powers to stop and search. In the Netherlands, such guidelines rarely exist. Under the Dutch Weapons and Ammunition Act, police officers are not given more guidance than to select people to stop and search at random. In its recommendation on the topic of ethnic profiling, the FRA also pleaded for the introduction of stop and search forms. These stop and search forms have been introduced in England and Wales, but not in the Netherlands.

Finally, the different human rights bodies urge states to provide an effective remedy to alleged victims of ethnic profiling. In both the Netherlands and England and Wales, it is not clear whether this is the case, as a complaint on the ground of ethnic profiling has never been brought before a court. It is thus not yet clear how judges would react to such a complaint and whether effective remedies are offered to the victim. However, England and Wales have not signed and ratified the optional protocol to the ICCPR nor protocol 12 to the ECHR. As a result, British nationals do not have the protection of a general prohibition of the ECHR and cannot file a complaint to the UN human rights committee.[116]

5.4 England and Wales as an example for the Netherlands

From the previous paragraphs it can be concluded that in both England and Wales and the Netherlands, a risk of ethnic profiling as a result of broad discretionary police competences exists. However, England and Wales have taken more precautions to prevent and tackle ethnic profiling in line with the recommendations of international and European human rights bodies than the Netherlands. In order to comply better with these recommendations, the Netherlands could start collecting data on stop and searches and other police initiated actions, possibly using stop and search forms. Doing this, the possible

[116] However, usually a complaint on the ground of ethnic profiling will also include an alleged infringement of another ECHR provision, such as article 8 ECHR. The fact that the UK has not signed and ratified protocol 12 will thus not make a big difference in ethnic profiling cases.

ethnic profiling can be monitored and the statistical data could be used to prove indirect discrimination in court. Furthermore, a document similar to the PACE Code of Practice could be introduced in the Netherlands. Especially for the stop and search power under the Weapons and Ammunition Act - for which no reasonable suspicion is required - further guidelines for the exercise of this power could be useful in preventing ethnic profiling.

As discussed in chapter two, a qualitative research on police initiated actions in the Netherlands conducted by Çankaya has shown that police officers often base their decisions on intuition, which is based on appearances. Monitoring police initiated actions and introducing more extensive guidelines for discretionary police competences could increase awareness of the risk of ethnic profiling and help police officers to base their decisions on objective factors. In this manner the risk of indirect discrimination could thus be decreased and the Netherlands would better comply with international and European prohibitions and obligations.

6. Conclusion

'Ethnic profiling' is the use by police of grounds such as race, ethnicity, religion or national origin – instead of individual behavior or objective evidence - as the basis for suspicion in investigation activities, without an objective justification. Ethnic profiling is prohibited under several international and European treaties and conventions, such as the ICCPR and the ECHR, as it is considered to fall under the prohibition of discrimination. Furthermore, different international and European human rights bodies have recommended states to, amongst other things, gather data on the use of stop and search powers in order to detect practices of ethnic profiling and make sure only objective information and behavior is used as a basis for police initiated action in order to prevent and tackle ethnic profiling.

In the Netherlands, several acts introducing broad discretionary police powers have been enacted over the last two decades. Under some of these acts, such as the Weapons and Ammunition Act, police officers are not required to have a reasonable suspicion in order to stop and search persons or vehicles. Furthermore, sometimes competences that can be exercised with more discretion are used to bypass the strict requirements of the Aliens Act. Research has shown that these broad discretionary powers, and a lack of further guidelines, can lead to ethnic profiling. Furthermore, only police initiated actions that lead to a record or an arrest are recorded in the Netherlands, so there is hardly any quantitative data available to detect practices of ethnic profiling.

In England and Wales several acts that allocate broad discretionary powers to police officers are in place. In order to exercise the stop and search powers under the Criminal Justice and Public Order Act 1994 and the Terrorism Act 2000 police officers do not need a reasonable suspicion. Several qualitative and quantitative researches have shown that the police competences under these acts cause a risk of ethnic profiling. In order to prevent and tackle this problem, data on police initiated actions is now being gathered and monitored and guidelines for the use of stop and searches have been introduced by the PACE Code of Practice.

In both the Netherlands and England and Wales, broad discretionary police powers can lead to ethnic profiling and may thus be an infringement to the prohibition of discrimination. The ECtHR has warned for the risk of ethnic profiling as a result of the powers under the British Terrorism Act 2000. As the effectiveness of ethnic profiling for fighting crime has never been proven, such practices are not likely to pass the proportionality test of the ECtHR. Although the result of police initiated actions are at risk to infringe the prohibition of discrimination in both countries, England and Wales have taken more precautions to prevent and tackle ethnic profiling. By gathering data on stop and searches, introducing stop and search forms and introducing further guidelines for police officers, England and Wales are acting in line with the recommendations made by international and European human rights bodies. The Netherlands could adopt these precautions in order to better comply with international and European standards.

7. Literature

Books

- **Çankaya 2012**
  S. Çankaya, *De controle van marsmannetjes en andere schorriemorrie. Het beslissingsproces tijdens proactief politiewerk*, Den Haag: Boom Lemma Uitgevers, 2012.
- **Craig & de Burca 2011**
  P. Craig & G. de Burca, *EU Law. Texts, Cases and Material*, Oxford: Oxford University Press 2011.
- **Zweigert & Kötz 1992**
  K. Zweigert & H. Kötz, *An introduction to comparative law*, 2d ed., Oxford: Clarendon, 1992.

Articles

- **Amnesty International 2013**
  Amnesty International, 'Proactief politieoptreden vormt risico voor mensenrechten. Etnisch profileren onderkennen en aanpakken', Amnesty International: 2013.
- **Bobis 2013**
  Z. Bobis, 'Case Digests. International Standards on Ethnic Profiling: Standards and Decisions from the European Systems', *Open Society Justice Initiative*, 2013.
- **Bowling & Philips 2007**
  B. Bowling and C. Philips, 'Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search', The Modern Law Review, 2007 (70)6, pp. 936-961
- **Crawford 2009**
  Crawford, 'Criminalizing Sociability through Anti-social Behaviour Legislation: Dispersal Powers, Young People and the Police', *The National Association for Youth Justice (Published by SAGE Publications)*, 2009 (9), p. 5-28
- **Crawford & Lister 2007**
  Crawford and S. Lister, 'The use and impact of dispersal orders', *Joseph Rowntree Foundation* 2007, available via: www.jrf.org.uk
- **Delsol & Shiner 2006**
  R. Delsol & M. Shiner, 'Regulating Stop and Search: a Challenge for Police and Community Relations in England and Wales', *Critical Criminology*, 2006 (14)3, pp. 241-263
- **Eijkman 2010**
  Q. Eijkman, 'Has the Genie Been Let out of the Bottle? Ethnic Profiling in the Netherlands' *Public Space: the Journal of Law and Social Justice*, 2010 (5), pp. 1-21.

- **Foster et al. 2005**

  J. Foster, T. Newburn, A. Souhami, 'Home Office Research Study 294: Assessing the impact of the Stephen Lawrence Inquiry', *Home Office Research, Development and Statistics Directorate*, 2005.

- **Goldstein & Schweber 2014**

  J. Goldstein & N. Schweber, 'Man's Death After Chokehold Raises Old Issue for the Police', New York Times, 19 July 2014

- **Van der Leun & Van der Woude 2011**

  J.P. van der Leun & M.A.H. van der Woude, 'Ethnic Profiling in the Netherlands? A Reflection on Expending Preventive Powers, 'Ethnic Profiling and a Changing Social and Political Context', *Policing and Society: an International Journal of Research and Policy*, 2011 (21), pp. 444-455.

- **Van der Leun & Van der Woude 2013**

  J.P. van der Leun & M.A.H. van der Woude, 'De Nederlandse Veiligheidscultuur als Katalysator voor Etnisch Profileren?', *Tijdschrift over Cultuur en Criminaliteit*, 2013 (3), pp. 123-136

- **Miller 2010**

  J. Miller, 'Stop and Search in England. A Reformed Tactic or Business as Usual?', *The British Journal of Criminology*, 2010(50), pp. 954-974

- **Ministry of Justice 2009**

  Ministry of Justice, 'Statistics on Race and the Criminal Justice System – 2007/8,' (London: Ministry of Justice, 2009,)

- **Nationale Ombudsman 2011**

  Nationale Ombudsman: Waarborgen bij preventief fouilleren. Over de spanning tussen veiligheid, privacy en selectie, Rapportnummers: 2011/252 en RA111171, 15 september 2011

- **Oderkerk 2014**

  M. Oderkerk, 'The need for a Methodological Framework for Comparative Legal Research: Sense and Nonsense of 'Methodological Pluralism' in Comparative Law', Centre for the Study of European Contract Law Working Paper Series, no. 2014-04

- **Pantazis & Pemberton 2009**

  C. Pantazis & S. Pemberton, 'From the 'Old' to the 'New' Suspect Community Examining the Impacts of Recent UK Counter-Terrorist Legislation', *The British Journal of Criminology*, 2009(49)5, pp. 646-666

- **Parnar 2011**

  Parnar, 'Stop and search in London: counter-terrorist or counter-productive?', *Policing and Society: An International Journal of Research and Policy*, 2011 (21), pp. 369-382

Recommendations

- **CERD 2005**

  CERD General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, 2005.

- **CERD on the Netherlands 2013**

  CERD: 2013 Report of the Kingdom of the Netherlands, Aruba, Curaçao and St Maarten to the United Nations Committee on the Elimination of Racial Discrimination (CERD), 1 July 2013.

- **Commissioner 2009**

  Council of Europe Commissioner for Human Rights. "Stop and searches on ethnic and religious grounds are not effective" (viewpoint), July 20, 2009.

- **Commissioner 2012**

  Council of Europe Commissioner of Human Rights. Human Rights of Roma and Travellers in Europe, Strasbourg: Council of Europe Publishing, February 2012.

- **ECRI 2007**

  ECRI General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing, adopted on 29 June 2007.

- **ECRI on the Netherlands 2014**

  ECRI Report on the Netherlands (fourth monitoring cycle), 15 October 2014, available via: www.coe.int/ecri.

- **ECRI on the United Kingdom 2009**

  ECRI Report on the United Kingdom (fourth monitoring cycle), 17 December 2009, available via: www.coe.int/ecri.

- **ENAR 2009**

  European Network Against Racism (ENAR), Fact sheet 40: Ethnic Profiling, June 2009.

- **EU Experts 2006**

  EU Network of Independent Experts on Fundamental Rights. "Ethnic Profiling," CFR-CDF.Opinion4.2006, December 200.

- **European Code of Police Ethics**

  The European Code of Police ethics: Recommendation Rec(2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics (Adopted by the Committee of Ministers on 19 September 2001 at the 765th meeting of the Ministers' Deputies)

- **FRA 2010**

  European Agency for Fundamental Rights (EU FRA), Towards more Effective Policing, Discriminatory Ethnic Profiling: a Guide, 2010.

- **HCNM 2006**

High Commissioner on National Minorities (HCNM) as part of the Organization for Security and Co-operation in Europe (OSCE), Recommendations on Policing in Multi-Ethnic Societies, February 2006.

Case law and legislation

- ABRvS 29 June 2001, ECLI:NL:RVS:2001:AG9341
- ABRvS 23 July 2001, nr. 200202662/1
- ABRvS 26 July 2001, nr. 200102650/
- ABRvS 13 July 2011, LJN: BR2059, par. 2.1.4
- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000/43/EC).
- ECtHR 15 May 2012, 49458/06 (*Colon v. the Netherlands*)
- ECtHR 12 January 2010, 4158/05 (*Gillan and Quinton v. the United Kingdom*)
- ECtHR 4 May 2001, 24746/94 (*Hugh Jordan v. the United Kingdom*)
- ECtHR 6 January 2005, 58641/00 (*Hoogendijk v. the Netherlands*)
- ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova and Others v. Bulgaria*)
- ECtHR 13 December 2005, 55762/00 and 55974/00 (*Timishev v. Russia*)
- ECtHR 11 June 2002, 36042/97 (*Willis v. the United Kingdom*)
- HR 21 November 2006, ECLI:NL:HR:2006:AY9670
- HR 20 February 2007, ECLI:NL:HR:2007:AZ2475
- HR 31 May 2011, ECLI:NL:HR:2011:BQ1978
- HR 13 May 2014, ECLI:NL:HR:2014:1101
- PACE 1984 - Code of Practice for the exercise by: police officers of statutory powers of stop and search and police officers and police staff of requirements to record public encounters.
- Rb. Rotterdam 26 June 2009, ECLI:NL:RBROT:2009:BJ1570
- Rb. Amsterdam 1 August 2011, ECLI:NL:RBAMS:2011:BR3803
- Tweede Kamer 2003-2004, 29 218, Nr. 3.
- Tweede Kamer 2011-2012, 33112, Nr. 3.
- United Nations Human Rights Committee 27 July 2009, 1493/2006, *(Rosalind Williams Lecraft v. Spain)*.
- Wet van 13 juli 2002 tot wijziging van de Gemeentewet en de Wet wapens en munitie in verband met de bestrijding van wapengeweld, Stb. 420, in werking getreden op 15 september 2002.