

**EXPANDING THE SCOPE OF DISCRIMINATION:
THE CASE OF ETHNIC PROFILING**

András L. Pap

OVERVIEW:

- I.
THE CONCEPT OF PROFILING
- II.
RECENT HUNGARIAN RESEARCH FINDINGS
- III.
ETHNO-RACIAL PROFILING AND ANTI-DISCRIMINATION LAW
- IV.
FURHTER OPTIONS FOR READJUSTNIG THE SCOPE OF
DISCRIMINATION: HATE SPEECH AS HARRASMENT

I.
THE CONCEPT OF PROFILING

HISTORICAL DEVELOPMENT OF PROFILING:

1. Crime profilers – post crime
2. Traffic control – pre-crime
3. Anti-terrorist measures
4. Marketing and customer management, risk management

DEFINITIONS OF PROFILING:

- 1) Harris
- 2) EU's Working Party
- 3) EU Network of Independent Experts on Fundamental Rights
- 4) European Commission
- 5) James Goldston
- 6) ECRI General Policy Recommendation N° 11

1)

David Harris, (2005). *Confronting ethnic profiling in the United States*.
New York: Open Society Justice Initiative, p. 67:

- “Racial or ethnic profiling, as the term has evolved in the United States, encompasses the use by police of racial or ethnic characteristics as one set of clues among others to decide whom to stop, question, search, or otherwise investigate for as-yet unknown criminal offences. In this definition, profiling involves the use of racial or ethnic characteristics to *predict* which persons among some group might be involved in criminal behaviour, even where there is no evidence yet of any particular crime, and no unique suspect.”

2)

EU's Working Party:

"... a set of physical, psychological, or behavioural variables, which have been identified as typical of persons involved in terrorist activities and which may have some predictive value in that respect."

3)

EU Network of Independent Experts on Fundamental Rights:

"... the practice of classifying individuals according to their 'race' or ethnic origin, their religion or their national origin, on a systematic basis, whether by automatic means or not, and of treating these individuals on the basis of such a classification."

4)

European Commission:

"...racial or ethnic profiling encompasses any behaviour or discriminatory practices by law enforcement officials and other relevant public actors, against individuals on the basis of their race, ethnicity, religion or national origin, as opposed to their individual behaviour or whether they match a particular 'suspect' description."

5)

James Goldston (OSI JI):

"... by ethnic profiling we mean the use of racial, ethnic or religious stereotypes in making law enforcement decisions to arrest, stop and search, check identification documents, mine databases, gather intelligence and other techniques."

6)

ECRI General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing:

“The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities”.

Profiling in the abstract sense refers to:

- identifying information (observation);
- making predictions (data mining);
- inference.

Racial/Ethnic Profiling:

- Race or ethnicity of the perpetrator serves as a useful tool for the detection of criminality;
- It seems like a rational assumption to stop someone on ethnic grounds (based on the high rate of criminality within the ethnic group, or its dominant / exclusive involvement in terrorism);
- Therefore, measures are applied not so much on the basis of the (suspicious) behavior of the individual, but on an aggregate reasoning;
- The goal is to make an efficient allocation of the limited amount of the available police and security resources.

II.

RECENT **HUNGARIAN RESEARCH FINDINGS**

STEPSS (2007-2008)

"Strategies for Effective Police Stop and Search"

Hungarian Helsinki Committee
Hungarian National Police
Hungarian Police College
Roma community representatives

Six months in three pilot sites

- Budapest's 6th District: busy city-center area and includes the capital's main railway station
- Szeged: a population of 200,000,; medium-sized district on the Romanian border
- Kaposvár: relatively rural police district with 120,000 inhabitants

Main findings:

- 1) Intensive and high-discretion control is inefficient
- 2) Roma are disproportionately targeted

The effectiveness of the stops

- The police use of ID checks is ineffective; large numbers of people are being inconvenienced with little result.
- Only 1% of ID checks led to an arrest,
- 2% led to a short term arrest, and
- 8% to petty offense procedures.

- If ID checks related to traffic offenses are removed:
- The remaining checks result in 2% arrest,
- 3% short-term arrest,
- 19% petty offense procedure and
- 76% no further action taken.
- In the UK nationally 10-13 % of stop and searches lead to arrest.

- Significant variation in the rate of efficiency depending upon what ground was recorded as the basis for the check.
- Most: 37%, took place during the course of traffic controls.
- 19%, were based upon the suspicion of a petty offense,
- 8% intensive controls, and
- only 2% of checks were related to the suspicion of a criminal act.

- ID checks recorded under the “other” category make up a third of all stops:
- This rises to 50% when we remove traffic control stops from the data.
- The most frequently quoted grounds are the least efficient.
- Traffic control constitutes the largest reason for the ID checks, though in 84% of these cases no further action was taken.

The territorial distribution of the stops

- The majority of ID checks take place on public premises (streets, parks and roads account for 78%)
- Relatively few checks are performed in pubs, discos or similar places (6%).

Temporal distribution

- Relatively even:
- 21% occurring in the morning (from 6 a.m. till noon),
- 29% in the afternoon (from noon till 6 p.m.),
- 30% in the evening (from 6 p.m. to 10 p.m.),
- and the remaining 20% at night.

Gender and age distribution

- Police stop and check more men than women (75% and 25% respectively), and young people are more likely to be checked.
- Individuals belonging to the age group 14-29 represent 43% of all checks, whereas their ratio within the population is 22%.
- Police in Hungary are most likely to check young men between the ages 14-29.

The ethnic disproportionality of the stops

- Roma are disproportionately targeted for ID checks.
- 22% of all persons checked by were of Roma origin (according to the assessment of the officer performing the check),
- as opposed to 75% being identified as “white.”
- The remaining 3% were identified as “black”, “Asian”, “Arab” or other.

- The estimated proportion of Roma people within the total Hungarian population (of 10,045,000) is approximately 6.2% (census: 1,9%)
- Thus, Roma are more than three times (census: 10) more likely to be stopped than their percentage of the general population would indicate.

- Roma youth (between age 14 and 16) are especially likely to be targeted: significantly higher than the already high general representation of Roma within the sample (32% as opposed to 22%).

Efficacy of racial profiling

- ID checks of Roma are not more likely to yield results than measures enforced in relation to non-Roma. The hit rate shows no significant differences by ethnicity.
- On a national level, 78% of ID checks involving Roma were “unsuccessful” For non-Roma this ratio was 79%.
- The percentage of checks followed by a petty offense proceeding for Roma and non-Roma was 19% and 18%, respectively.
- Rates of arrests and short-term arrests are practically the same within the Roma and the non-Roma sample.

- In the country's capital, Budapest (20% of population): 80% of the checks of Roma did not require any further police action, whereas the same proportion for non-Roma was 59%.
- If we compare this with the fact that 33% of all the persons checked are of Roma origin (which is a serious over-representation relative to their proportion of 5-10% in Budapest), we can see that the problem is more acute in Budapest than in the other pilot sites.

Main findings:

- 1) Intensive and high-discretion control is inefficient
- 2) Roma are disproportionately targeted

1)

GENERAL INEFFICACY

(even if, due to prejudices, tolerated, expected and presumed efficient)

- 1% of ID checks led to an arrest
- 2% led to a short term arrest
- 18% to petty offense procedures

(UK: 10-13 % lead to arrest)

2)

ROMA* ARE DISPROPORTIONATELY SUBJECTED TO ID CHECKS

(yet no difference in the efficiency of checks targeting Roma and non-Roma)

	Roma	non-Roma
PROPORTION** OF ALL STOPS	22%	78%
UNSECCESFULL ID-CHECKS	78%	79%
CHECKS FOLLOWED BY A PETTY OFFENSE PROCEEDING	19%	18%
SHORT-TERM ARRESTS	cca. 50%	cca 50%
CHECKS FOLLOWED BY ANY FURTHER MEASURE	22%	21%

* According to the assessment of the officer performing the check.

** Proportion of the Roma within the population: 6-8% (official statistics app. 2%)

III.

ETHNO-RACIAL PROFILING AND ANTI-
DISCRMININATION LAW

1) "RACIAL TAX" -- DISCRIMINATION

2) RACIAL ESSENTIALISM

3) ALIENATION – COMMUNITY POLICING

4) PURE (PRACTICAL) EFFICIENCY:

– No significant, tangible difference between the proportional hit rates
(within the white population and the non-white population)

– False negatives and false positives
(both over-inclusive and under-inclusive)

BALANCING, PROPORTIONALITY

- Weighting how intrusive certain means are in comparison to the ends—provided of course, that the ends are legitimate.
- In order to assess the relationship between the means employed and the aims sought to be realized, one needs to assess three criteria: effectiveness, necessity, and the degree harm inflicted.

BALANCING

- *Proportionality test between the means employed and the aims sought:*
 - 1) *legitimate aim*
 - 2) *objective and reasonable justification*

- 1. *effectiveness criterion*: the ability of the concrete measure to achieve the ends for which it was conceived
- 2. *necessity criterion*: are there less invasive, measures in order to achieve the same aim
- 3. *harm criterion*: extent to which it affects other rights

“SWEEPING RHETORIC OF WAR ON...

- CRIME (DRUGS)
- TERRORISM
- IMMIGRATION
- 1. social risks are not weighted against the potential benefits
- 2. open-ended activity (intrinsically impossible to define victory and end to it: if no terrorist attack happens: due to these preventive commitments; if incidents do take place, even more a reason.)
- 3. institutions charged with carrying out the ‘war’ emerge as powerful bureaucracies with own corporate agendas (often eclipsing from parliamentary oversight)

SECURITIZATION INDUSTRY

- Example: biometric industry, profiling and data mining: ATS, Automated Targeting System
- Data mining: marketing and customer management (moving from mass marketing to genuinely personalised strategic marketing; identifying high-risk customers, clickstream, cable digital TV)
- computerised method involving data mining from data warehouses, behavioural analysis

CEE peculiarity

- Can social prejudice redefine efficiency?

- Racial profiling MAY constitute a specific form of *racial discrimination*.

EU Race Directive

(Council Directive 2000/43/EC)

- Article 2
- (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;
- (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The importance of efficacy: The differential treatment has no objective and reasonable justification:

- 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.

E.U Network of Independent Experts on Fundamental Rights Opinion 2006/4 on ethnic profiling

- *„ the use of ‘racial’ or ethnic characteristics as part of a set of factors that are systematically associated with particular offences and used as a basis for making law enforcement decisions is clearly discriminatory, not only because of the absence of any proven statistically significant correlation between indicators linked to race or ethnicity, religion or national origin, on the one hand, and propensity to commit certain criminal offences, on the other hand, but also because the principle of non-discrimination requires that only in exceptional circumstances should the race or ethnicity, the religion or the nationality of a person, influence the decision about how to treat or not to treat that person.”*

- „The consequences of treating individuals similarly situated differently according to their supposed ‘race’ or to their ethnicity has so far-reaching consequences in creating divisiveness and resentment, in feeding into stereotypes, and in leading to over-criminalization of certain categories of persons in turn reinforcing such stereotypical associations between crime and ethnicity, that differential treatment on this ground should in principle be considered unlawful under any circumstances.”

Baroness Hale of Richmond (House of Lords)

- *“The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping. Even if, for example, most women are less strong than most men, it must not be assumed that the individual woman who has applied for the job does not have the strength to do it. Nor, for that matter, should it be assumed that an individual man does have that strength. If strength is a qualification, all applicants should be required to demonstrate that they qualify.”*

ECHR Article 14

- *‘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’*
- *Timishev v. Russia* (judgment of 13 December 2005)
- “*very weighty reasons*” are required in order for differential treatment to be justified”
- *Gaygusuz v. Austria* (16 September 1996)

International Convention for the Elimination of All Forms of Racial Discrimination

- Article 1(1) racial discrimination: ‘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’.

Committee on the Elimination of Racial Discrimination

- *Concluding Observations: Canada*
- General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system (2005):
- ‘States parties should take the necessary steps to prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person’s colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion’

- 2000, the Programme of Action at the UN World Conference against Racism urged “States to design, implement and enforce effective measures to eliminate the phenomenon popularly known as ‘racial profiling’”.

- ECRI General Policy Recommendation No. 8 on Combating Racism While Fighting Terrorism
- ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination

Uneven European case-law

- *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport*, [2004] UKHL 55, 9 December 2004
- *Tribunal Constitucional, Sala Segunda, Sentencia 13/2001 de 29*
- Austrian Constitutional Court

IV.

FURHTER OPTIONS FOR READJUSTNIG
THE SCOPE OF DISCRIMINATION: HATE
SPEECH AS HARRASMENT

EU Race Directive

(Council Directive 2000/43/EC)

- Article 2
- 3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

András László Pap:

papa@ceu.hu