

Dossier on the subject of ethnic profiling

Ethnic profiling has attracted increasing amounts of media attention in recent years. A case at the Administrative Court of Koblenz, in which the judge acknowledged ethnic profiling as an acceptable means of conducting police work, was greeted with incredulity by NGOs. In the following pages, the phenomenon of ethnic profiling and its effects on those targeted and on society will be explored. In this dossier, you will find information on the legal framework in Germany and the situation in other European countries, in addition to references to studies and links to further information on the subject.

Definition

Ethnic profiling is a form of institutional racism, whereby the police use ascribed characteristics (such as skin colour, ethnicity, religion, ancestry or language) in a discriminatory manner as the basis for arbitrary identity checks and searches.

Verdict of the Administrative Court of Koblenz

Since spring 2012, BUG has been supporting, through public relations work and networking, the lawsuit of a young black German man who underwent a stop-and-search police check.

The young man was subject to a check by the Federal Police in a regional train between Kassel and Frankfurt. The plaintiff was the only person that was asked to present his papers. This was not the first time that he had been the sole person in a train carriage chosen for such a check. Because of this, he refused to show his identification card. The police officers did not give a reason for the inspection, and repeatedly asked the young man to present his identification. At this point the plaintiff mentioned that this kind of demeanour reminded him of the methods of the SS. The young man was subsequently removed from the train and taken to the nearest police station. There, his backpack was searched and an identification document was found. One of the policemen felt insulted by the young man's comment and filed a lawsuit against him. In the first instance he was found guilty of defamation of a civil servant on duty, but acquitted in the second instance of the court case. During the court hearings it became obvious that the federal police had chosen to inspect the young man solely on the basis of his skin colour. This caused the

man, in turn, to press charges against the Federal Police and their stop-and-search tactics based ethnic profiling. The verdict (5 K 1026/11.KO) rejected the lawsuit against the Federal Police, because the judges felt the stop-and-search procedure was warranted. They noted that the police have the right to conduct these checks without grounds for suspicion. Therefore, according to the judgment, they are allowed to choose people based on appearances.

The verdict received attention throughout Germany, since this was the first court case regarding this practice.

Reactions to the verdict

After the verdict, Christine Lüders, the head of the Federal Anti-Discrimination Agency (ADS), warned about the stigmatisation of victims, referencing the possibility of citizens of good standing being associated with criminal behaviour. Furthermore, she called on those concerned to respect the Schengen Border Code and its non-discrimination requirement in all places, not only in border areas. Civil-society representatives also showed concern. *Initiative Schwarze Menschen in Deutschland* (ISD) and other NGOs held an online petition, which was handed over to the Bundestag. In several German cities (including Berlin, Frankfurt and Munich), ‘flashmobs’ were held, to attract attention to the issue of ethnic profiling.

The hearing at the Upper Administrative Court

On 29 October 2012, a five-hour court hearing at the Upper Administrative Court of Koblenz led to the police acknowledging the illegitimate stop-and-search procedure. The Federal Police formally apologised to the plaintiff. **Moreover the judges made it clear that stop and search based exclusively on ‘skin colour’ violates the principal of equal treatment (article 3, paragraph 3) of the German Basic Law.** The minutes of the court hearing can be accessed online.¹

The BUG has filed an *amicus curiae* brief (legal opinion of a third party) to the second-instance court in order to verify the constitutionality of the first-instance verdict. The German Institute for Human Rights has also filed an *amicus curiae* brief with the court.

¹ <http://www.anwaltskanzlei-adam.de/index.php?id=106,824,0,0,1,0>

What is ethnic profiling?

Criminal profiling as a part of police work

The creation of criminal profiles is generally a legitimate method of prevention and investigation used by the police. The physical appearance, or unchangeable characteristics, of a (possible) criminal, such as ancestry, language or skin colour, as well as changeable ones, such as behaviour, play a central role. Profiling, however, must be led by the principles of the presumption of innocence and of impartiality, in order to fulfil the demands placed by the rule of law. Consequently, the indicators used to create profiles of suspects and perpetrators must be based on evidence or other sufficient information related to a specific crime. If, however, profiling is not based on substantiated assumptions, but only on the use of unchangeable characteristics such as skin colour or an alleged immigrant background, it represents a form of discrimination. In such a scenario, the terms 'ethnic profiling' and 'racial profiling' are used, synonymously.

Ethnic profiling in police work

The federal and regional (Land) police have the authority to perform identity checks, stop and search vehicles, perform multiple checks in a crowd, make arrests, perform targeted searches for data and carry out other surveillance measures. In the course of these activities, profiling methods are used in a targeted or preventative manner, which in some cases are based exclusively on ascribed ethnicity or religion and, as a result, affect a disproportional amount of minorities. This contradicts the legal framework for equal treatment. This type of ascription results in the creation of a specific criminal profile on the basis of existing unchangeable characteristics. This, in turn, leads to illegitimate stereotyping and generalisations, whereby an affinity to particular crimes is ascribed to people possessing these unchangeable characteristics. A lack of communication on the part of the police seems to exacerbate the problem. Those affected feel denounced, vulnerable and stigmatised as criminals. The feeling of marginalisation is especially present in cases where those involved are considered 'strangers' in their own country. This impedes co-operation in crime fighting between ethnic minorities and the police. It may also lead to a feeling of isolation amongst members of ethnic minorities with respect to the majority population.

Ethnic profiling also runs the risk of strengthening racist tendencies amongst the majority population, as the fact that members of minorities are subject to more frequent checks would suggest that they are more prone to crime. Moreover, excessive profiling in cases of crimes committed by foreign citizens can distract investigators, for several years even, from the possibility that the crime was racially motivated and perpetrated by right-wing extremists, as was the case with the NSU murders.

As previously mentioned, the legitimacy of profiling as a method is not usually called into question. A solid foundation and sufficient evidence must, however, exist for ethnic categorisation to be justified. Ethnic profiling for the purpose of crime-prevention represents an inappropriate means of conducting police work. To counter this, it is imperative that a person's ascribed ethnicity and/or religion not be employed as the sole, or decisive, criterion for a police check.

Ethnic profiling in Germany

The term 'ethnic profiling' originated in the United States in the 1990s, where 'non-white' drivers were being subjected to a disproportionate amount of road checks. In the course of the counter-terrorism measures taken after the attacks of 11 September, the criteria for ethnic profiling shifted from ethnicity to religious categorisation. This type of profiling has seen increased use in Europe since the attacks in Madrid and London.

The decision of the Administrative Court of Koblenz has caused the phenomenon of ethnic profiling to enter the public debate. Although German law recognises the general principle of equality and has specific legislation in place to protect against discrimination, these provisions do not yet offer protection from ethnic profiling. The Federal Police Act and the Schengen Code offer an instrument to protect against discrimination which should theoretically prevent ethnic profiling. Some *Länder* resort to so-called *Schleierfahndungen* ('veil searches'), stop-and-search police checks conducted regardless of suspicion, thereby circumventing the protection from discrimination guaranteed by the Schengen Code. Several cases in Germany have verified that ethnic profiling is indeed employed frequently.

Legal situation in Germany

In Germany, a multidimensional protection from discrimination is in place, which consists of international obligations, the Basic Law (constitution) and European directives and any resulting national legislation.

Article 3 of the German Basic Law, which guarantees the principle of equality, grants a general protection from discrimination. The constitutional protection from discrimination in article 3, paragraphs 2 and 3 is a principle of the rule of law which applies in all legislative areas. It applies vertically (between the state and individuals) as well as horizontally (between individuals).

Moreover, comprehensive protection is offered under the General Equal Treatment Act (AGG),² which was created to implement the European equality directives.

Article 3(3) of the German Basic Law

'No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.'

² <http://www.gesetze-im-internet.de/agg/>

Discrimination on the basis of ethnic background, religion, gender, age, disability or sexual orientation is prohibited. Ethnic profiling, however, is not specified.

For this reason BUG calls for the inclusion of ethnic profiling as a separate offence in s. 3 of the AGG, to create legal certainty.

The *European Community Code on the rules governing the movement of persons across borders*, better known as the *Schengen Borders Code*,³ is a regulation which defines when, where and how the external borders of the EU may be crossed. It also defines the conditions under which border controls can be reintroduced between member states of the Schengen area. It allows the police to perform identity checks in order to follow up on crimes. It grants member states the right to introduce, at their own discretion, a general obligation for residents and visitors to produce evidence of identity on demand, as long this obligation is in keeping with the principle of equality.

The Schengen Convention, which entered into force in 1993, has the goal of creating a common area of security and justice by abolishing internal border controls. Article 6 paragraph 2 of the agreement requires that border guards respect the principle of equality while carrying out identity checks.

At the federal level, the Federal Police Act (*Bundespolizeigesetz*)⁴ regulates the functions and legal position of the Federal Police. According to s. 22 and 23, the Federal Police are authorised to perform checks without reason for suspicion in airports, railway stations, trains and near (up to 30 km away from) the frontiers, as a means of impeding illegal entry. In response to a minor interpellation (17/6778)⁵ from the Green party in August 2011, the federal government stated that the unequal treatment of people is not consistent with the understanding of police work in a democratic state under the rule of law, thereby declaring opposition towards ethnic profiling in Federal Police investigations. After the verdict of the Administrative Court of Koblenz, the Green party made another minor interpellation (17/10007),⁶ in which the federal government qualified its previous statement. It now endorses the Federal Police's right to call on their experience and their knowledge of current potential dangers whilst exercising their powers. In making this statement, the federal government fall into line with the argument of the judges in Koblenz that identity checks on the basis of external characteristics are permissible.

'Veil searches' and ethnic profiling

The term 'veil search' (*Schleierfahndung*) denotes police checks conducted by the regional (*Land*) police without a catalysing event or reason for suspicion. After the Schengen Agreement came into force, veil searches were introduced at the regional level to compensate for the absence of border controls. In 1995, Bavaria became the first *Land* to employ veil searches. This investigation tactic continues to be used wilfully in many

³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R0562:EN:NOT>

⁴ http://www.gesetze-im-internet.de/bgsg_1994/BJNR297900994.html

⁵ <http://dipbt.bundestag.de/dip21/btd/17/067/1706778>

⁶ <http://dipbt.bundestag.de/dip21/btd/17/100/1710007.pdf>

Länder to combat ‘crimes committed by foreigners’ (illegal immigration, violations of asylum provisions) and drug-smuggling in border areas.

Veil searches make indirect use of ethnic profiling, as considerable leeway is given by the individual police assessment of a suspect without there having to be specific grounds for suspicion.

Cases of ethnic profiling in Germany

So far, there have hardly been any court cases related to ethnic profiling in Germany. The case of a young black German man, who was subject to an identity check on a train on the basis of his skin colour (Koblenz case – see above), is the first case in which the phenomenon of ethnic profiling has been discussed as such.

A verdict of the Administrative Court of Augsburg shows that ethnic profiling is used in identity checks conducted in the course of ‘veil searches’, without reason for suspicion.

After the 11 September attacks, the regional (*Land*) police authorities re-introduced dragnet investigations in co-operation with the Federal Criminal Police Office. These investigations use ethnic profiling to search for Muslim men in a targeted manner.

Verdict of the Administrative Court of Augsburg

A case of the Administrative Court of Augsburg documents the use of racial profiling in the course of veil searches. The case was ruled on the basis of a verdict⁷ of the Bavarian Constitutional Court. The plaintiff, an accredited lawyer, was subjected to a police check without grounds for suspicion. His older car and his hairstyle appear to have been the reason for the search. The police officers demanded his driving licence and registration papers, and then proceeded to search the interior of the vehicle without the plaintiff’s permission. Despite knowing that the man was a lawyer, they did not end the search, but extended it to his briefcase. The Administrative Court of Augsburg ruled that once the plaintiff’s occupation was known, there was no legitimate reason to assume that an increased abstract danger was present.

Verdict on dragnet searches

In response to the attacks of 11 September, the German police performed dragnet searches as part of their counter-terrorism programme to uncover so-called ‘sleepers’. These search methods used electronic data processing to compare data automatically. Between 2001 and 2003 alone, the personal data of 200,000 to 300,000 people were stored and analysed. About 32,000 Muslim men came into consideration as suspects according to the new profile created by the police. It consisted of the following criteria: male, aged 18 to 40, (former) student, Islamic religious affiliation and country of birth. A student of

[...] a dragnet search conducted according to specific criteria [can, if it becomes known,] reproduce prejudices and stigmatise the segments of the population affected.’

*Federal Constitutional Court
- 1 BvR 518/02 -*

⁷ http://www.bug-ev.org/fileadmin/user_upload/VerfGH-Muenchen_69-VI-04.pdf

Moroccan origin filed a constitutional complaint against preventative police dragnet searches. He doubted the presence of a concrete danger that could have justified the dragnet search, and perceived the search as a massive infringement of his fundamental right to informational self-determination. The Federal Constitutional Court found in favour of the complainant and ruled⁸ that dragnet searches could only be used in the event of a concrete danger to high-ranking legally protected rights, that is, rights necessary for the continued existence or the security of the state or of a region (*Land*), or for the life, limb and freedom of a person. The Court ruled that dragnet searches are only legitimate if, in a specific case, there is a reasonable likelihood that damage would result to these high-ranking legally protected rights.

Ethnic profiling in the EU

Ethnic profiling is a phenomenon which is present in other European countries. As there are no statistics on the amount of police checks conducted on the basis of ascribed ethnicity, the scope of the phenomenon is hard to ascertain. The United Kingdom is the only country which systematically collects information regarding the reason for police checks. Discriminatory police checks are also carried out in France. Spain expanded its use of police checks in the wake of the terrorist attacks in Madrid, and employs ethnic profiling as the primary means of preventing illegal entry into the country.

United Kingdom

Out of all twenty-eight EU member states, the United Kingdom is, so far, the only country in which data have been systematically collected on the ethnicity, or ascribed ethnicity, of those targeted by police checks. Section 60 of the Criminal Justice and Public Order Act, 1994,⁹ allows the police to carry out so-called stop-and-search measures. The London Metropolitan Police explain their approach to stop-and-search checks on their website.¹⁰ Police officers are permitted to stop suspects at any time and search through their clothing and the belongings they are carrying with them. Stop-and-search police checks can be conducted in any public place, or anywhere where the police suspect that the suspect may be involved in a crime.

In the meantime, those affected by stop and search have been granted the right to have their self-identified ethnicity placed on record. This has made it more difficult to determine how many checks are carried out on the basis of ethnicity as ascribed by the police. Officially, the powers of the police to perform stop and search are supposed to be guided by the principles of equality and non-discrimination. Probable cause may never be justified on the basis of external characteristics (such as skin colour, age, clothing etc. –

⁸ Verdict: http://www.bverfg.de/entscheidungen/rs20060404_1bvr051802.html
Press release: <http://www.bverfg.de/pressemitteilungen/bvg06-040.html>

⁹ <http://www.legislation.gov.uk/ukpga/1994/33/contents>

¹⁰ http://www.met.police.uk/stopandsearch/what_is.htm

cf. Police and Criminal Evidence Act¹¹); however, stop and search is still not free of ethnic profiling.

The use of ethnic profiling in stop-and-search identity checks has a negative effect on those targeted. It was one of the triggers of the civil disturbances in England in the summer of 2011. In their report¹² investigating the causes of the riots, the *Riots, Communities and Victims Panel*, an independent enquiry commission, came to the conclusion that the stop-and-search checks routinely practised on youth on the basis of ascribed ethnicity, were (and still are) a large source of discontent, as well as a motive for police brutality.

France

In October 2005, two young French citizens hid in an electrical distribution substation while running from a police check, and died of electrocution. Subsequent to this incident, there were violent riots in the suburbs of Paris and in other French cities. The riots were provoked not only by the social exclusion of French youth of migrant origin, but also by visible structural racism, such as the disproportionate amount of identity checks performed on black or Arab youth.

In France, identity checks based only or primarily on external characteristics are prohibited by the French police code.¹³ Nevertheless, identity checks involving young French men ascribed as belonging to an ethnic minority are an everyday occurrence. A study¹⁴ by the Open Society Justice Initiative in co-operation with the French National Centre for Scientific Research shows that, in Paris railway stations and transport hubs, youth with an Arab background are 7.5 times more likely, and black French citizens 6 times more likely, than white French, to be subject to an identity check. More and more children, mostly boys, no older than thirteen, are being affected by these police checks. A Human Rights Watch study¹⁵ demonstrates that those affected are denounced in full public view and associated with criminal behaviour. Sometimes, they are also subject to racist insults. Networking between victims has resulted in increased public awareness of the issue. There is a website¹⁶ where those affected can share their experiences and register their cases.

Spain

In 2009, the UN Human Rights Committee decided in the case *Rosalind Williams Lecraft v Spain*¹⁷ that ethnic profiling is not permissible as a means of conducting police work.

¹¹ <http://www.legislation.gov.uk/ukpga/1984/60/contents>

¹² <http://riotspanel.independent.gov.uk/wp-content/uploads/2012/04/Interim-report-5-Days-in-August.pdf>

¹³ http://www.interieur.gouv.fr/misill/sections/a_1_interieur/la_police_nationale/deontologie/code_deontologie/

¹⁴ http://www.opensocietyfoundations.org/sites/default/files/search_20090630.Web.pdf

¹⁵ <http://www.hrw.org/sites/default/files/reports/france0112ForUpload.pdf>

¹⁶ <http://stoplecontroleaufacies.fr/slcaf/>

¹⁷ http://www.bug-ev.org/fileadmin/user_upload/Lecraft_v_Spain_Human_Rights_Committee.pdf

The case came about as early as 1992, when a black Spanish woman, Rosalind Williams Lecraft, was stopped by police officers at a railway station and, on the basis of her skin colour, was subject to an identity check. Lecraft felt discriminated against and publicly denounced. She decided to put up a fight against the actions of the police. Her journey through the Spanish court system had taken nine years, when in 2001, the Constitutional Court ruled that the police were indeed permitted to make reference to physical and ethnic characteristics whilst exercising their powers. In so doing, it drew the conclusion that that 'non-white' people were more likely to be 'not Spanish', that is, foreigners. With the help of NGOs, Williams filed a complaint with the UN Human Rights Committee, making reference to, amongst other things, a violation of the International Covenant on Civil and Political Rights. In 2009, the Human Rights Committee agreed with the complainant and rejected Spain's argument. It ruled that an illegal residence status cannot be deduced from physical and ethnic characteristics. The Human Rights Committee did confirm that identity checks can indeed be a lawful means of protecting public safety and preventing and controlling illegal immigration; however, it stressed that forms of ethnic profiling are unlawful and incompatible with fight the against ethnic discrimination and racism. The Committee instructed Spain to change its laws to the effect that police officers would not carry out discriminatory identity checks. It mandated the country to issue a public apology to the victim. As a result, Rosalind Williams Lecraft received an apology in the name of the Spanish state in a face-to-face meeting with the foreign minister, and a further written apology from the interior minister; however, an appropriate public apology remains to take place. This case is noteworthy, as it is the first time that the Human Rights Committee has made a statement regarding ethnic profiling, thereby creating an international legal precedent.

A study¹⁸ published by Amnesty International in 2001 demonstrates that the Spanish police still perform discriminatory identity checks. A paradigm change has yet to take place.

Studies on the subject of ethnic profiling

Articles and opinions regarding the verdict of the Administrative Court of Koblenz:

- Federal Anti-Discrimination Agency: 'Polizeikontrolle nach der Hautfarbe: Antidiskriminierungsstelle des Bundes warnt vor Stigmatisierung', http://www.antidiskriminierungsstelle.de/SharedDocs/Pressemitteilungen/DE/2012/Racial%20Profiling_20120404.html (German)

¹⁸ <http://www.amnesty.ch/de/laender/europa-zentralasien/spanien/dok/2011/diskriminierung-polizei/bericht-stop-racism-not-people.-racial-profiling-and-immigration-control-in-spain.-14.-dezember-2011.-45-seiten>

- Spiegel Online ‚Reisende dürfen wegen ihrer Hautfarbe kontrolliert werden‘, <http://www.spiegel.de/panorama/justiz/bundespolizei-darf-reisende-wegen-auslaendischen-aussehens-kontrollieren-a-824066.html> (German)
- Deutsche Welle article by Alexander Klose: ‚Fahndung nach Hautfarbe?‘, <http://www.dw.de/fahndung-nach-hautfarbe/a-15845923-1> (German)
- Joint press release by MRBB and KOP-Berlin ‚Racial Profiling‘ von Koblenzer Gericht als rechtmäßig erklärt‘, http://www.migrationsrat.de/index.php?option=com_content&view=article&id=197:kampagne-fuer-opfer-rassistischer-polizeigewalt&catid=4:pressemittelungen&Itemid=4 (German)
- ISD – Initiative Schwarze Menschen in Deutschland: ‚Pressemitteilung: Racial Profiling‘, http://www.bug-ev.org/fileadmin/user_upload/racial-profiling.pdf (German)
- Upper Administrative Court of Rhineland-Palatinate: Press release: Identitätsfeststellung eines Zugreisenden, <http://www.mjv.rlp.de/icc/justiz/nav/613/broker.jsp?uMen=613ee689-b59c-11d4-a73a-0050045687ab&uCon=8f40ae69-1515-6317-84b1-f84077fe9e30&uTem=aaaaaaaa-aaaa-aaaa-000000000042> (German)
- TAZ.de: ‚Polizeiliche Kontrolle in Zügen: Verdächtige Hautfarbe‘, <http://taz.de/Polizeiliche-Kontrollen-in-Zuegen/!90431/> (German)

Links to further information on the subject of ethnic profiling:

- Kampagne für Opfer rassistischer Polizeigewalt (KOP): ‚Rassistische Wirklichkeit: VG Koblenz erlaubt polizeiliche Kontrollen nach Hautfarbe‘, <http://kop-berlin.de/beitrag/rassistische-wirklichkeit-vg-koblenz-erlaubt-polizeiliche-personenkontrollen-nach-hautfarbe> (German)
- ‚Racial Profiling‘ im Rahmen des institutionalisiertem Rassismus‘, <http://kop-berlin.de/beitrag/racial-profiling-im-rahmen-von-institutionellem-rassismus-in-deutschland> (German)
- ‚The colour of guilt and innocence - Racial Profiling im Rahmen polizeilicher Personen Kontrolle‘, <http://kop-berlin.de/beitrag/the-colour-of-guilt-and-innocence-racial-profiling-im-rahmen-polizeilicher-personenkontrollen> (German)
- James A Goldstone, The Guardian, ‚Ethnic profiling tarnishes the EU‘, <http://www.guardian.co.uk/commentisfree/libertycentral/2009/jun/29/ethnic-profiling-police-europe>

Studies on the subject of ethnic profiling:

- Open Society Justice Initiative, ‚The problem of Ethnic Profiling in Europe‘, <http://www.opensocietyfoundations.org/sites/default/files/ethnic-profiling-europe-20110505.pdf>
- Open Society Justice Initiative, ‚Profiling Minorities - a Study of Stop-and-Search Practices in Paris‘, http://www.opensocietyfoundations.org/sites/default/files/search_20090630.Web.pdf

- Midis Studie Agentur der Europäischen Union für Grundrechte 'Für eine effektivere Polizeiarbeit Diskriminierendes 'Ethnic Profiling' erkennen und vermeiden: ein Handbuch', http://fra.europa.eu/sites/default/files/fra_uploads/1133-Guide-ethnic-profiling_DE.pdf
- ENAR, Facsheet 40 – Ethnic Profiling, http://cms.horus.be/files/99935/MediaArchive/publications/ENAR_OSJI%20factsheet%20ethnic%20profiling%20Oct09.pdf
- Human Rights Watch, 'The Root of Humiliation – Abusive Identity Checks in France', <http://www.hrw.org/sites/default/files/reports/france0112ForUpload.pdf>
- Amnesty International, 'Stop Racism not People – Racial profiling and Immigration Control in Spain', <http://www.amnesty.ch/de/laender/europazentralasien/spanien/dok/2011/diskriminierung-polizei/bericht-stop-racism-not-people.-racial-profiling-and-immigration-control-in-spain.-14.-dezember-2011.-45-seiten>
- Riots Communities and Victims Panel, '5 Days in August - an Interim Report on the 2011 English Riots', <http://riotspanel.independent.gov.uk/wp-content/uploads/2012/04/Interim-report-5-Days-in-August.pdf>

Further information on the subject can be found on these websites:

- Kampagne für Opfer rassistischer Polizeigewalt (KOP), <http://kop-berlin.de/>
- Reach Out, <http://www.reachoutberlin.de/>
- Initiative Schwarze Menschen in Deutschland (ISD), <http://neu.isdonline.de/>