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- **Privacy International
report on Discrimination
and Anti-Terror Policy
Across Europe**
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Discrimination in European Anti-Terrorism Policies and the Threat of Indiscriminate Policy

Race relations across European states are usually far from ideal. However in law, European countries appear to grant Europeans ideal protections against discrimination. There are mounting tensions with ethnic and minority communities in countless European countries, with particular suspicion and aggression pointed towards the Roma people, Travellers, Northern Africans, Turks, Jehovah's Witnesses, and people of Islamic and other faiths. Increasingly these groups are finding safe havens behind European laws.

With the rise of attention towards anti-terrorism policies,¹ there are mounting concerns that the tensions will only rise further. As a consequence, anti-terror laws are increasingly drafted to be non-discriminatory in response to fears voiced by ethnic and minority communities.

Yet even taking such a non-discriminatory approach will take us down a hazardous route. First, we fail to acknowledge that the principle of 'freedom from discrimination' is upheld for the most part in law but the political reality is that discrimination emerges nonetheless. Second, this conflict between principle and practice is only made worse by attempts to make generalised policies that are colour-blind and without regard to faiths. Attempts to develop non-discriminatory and indiscriminate policy are fraught with peril, and the chosen paths of reconciliation threaten European society as a whole.

1 For the activities of the European Commission alone, see "Commission Activities in the Fight against Terrorism", Reference: MEMO/05/272, Brussels, 29 July 2005, available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/05/272&format=HTML&aged=0&language=EN&guiLanguage=en>

1. The Ideal Protections in Law

After disastrous policies from European history that usually involved or led to wars, or renowned oppression, European states worked hard to eradicate the principle of discrimination. Many are now very sensitive to race issues in policing. In fact, they are so much so as Governments do not even study the issue for fear of diluting nationalism, invading privacy, raising tensions further, and finding out what they do not wish to know. For instance, France doesn't collect information regarding ethnicity to avoid any appearance of discrimination and the dilution of the French identity.

Arising from this sensitivity and harsh histories, Europe banded together on a number of occasions to come up with principled declarations, hoping that they would provide solutions. These 'occasions' led to the development of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and countless other such declarations. But a legally binding mechanism was missing.

1.1 The European Convention on Human Rights

The creation of the European Convention on Human Rights in 1950 was a watershed moment for human rights in Europe. The convention is ratified by each of the 46 member states of the Council of Europe. Based on the jurisprudence emerging from the European Court of Human Rights in Strasbourg, all individuals within Europe are protected from discrimination through a combination of rights enshrined in the Convention.

Article 5 protects the right to liberty and security, and ensures that you can not be arrested without suspicion. In the case of *Fox, Campbell, Hartley v. UK*, it was decided that the test of 'suspicion' prior to arrest is that an 'objective observer' should be satisfied of 'reasonable suspicion'.² This usually involves a warrant process and independent authorisation; though when this involves stop and search powers and detention without trial, there is greater uncertainty as to the standard.

Article 8 calls for respect for the private life of the individual. In the case of *Tsavachidis v Greece*, Tsavachidis was accused of having unlawfully opened a place of worship for Jehovah's Witnesses. He argued that the Government had interfered with his private life. He won his case after it was discovered that the Greek National Intelligence Service was reporting on the activities of Jehovah's Witnesses and other religious minorities. The Greek Government was forced to promise that it would cease to place any individual or group under surveillance on account of their religious beliefs.³

2 *Fox, Campbell, Hartley v. UK*, A182 (1990) 13 EHRR 157 ECHR.

3 Alastair Mowbray, *Case Materials on the European Convention on Human Rights*, Butterworths: London, 2001, p.361

Linked to Article 8 and the Tsavachidis case is Article 9, the freedom of thought, conscience and religion. A key case was *Kokkinakis v Greece*, where Mr Kokkinakis was arrested on over 60 occasions for proselytising. Under a Greek law,⁴ it was forbidden to “in any direct or indirect attempt to introduce on the religious beliefs of a person of a different religious persuasion, with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means of taking advantage of his inexperience, trust, need, low intellect or naivety”.⁵ That law was found to be unlawful because the State arrested individuals not for what they had done, but for what religion they were (in this case, Jehovah’s witness).

Finally, the most relevant right is enshrined in Article 14, the prohibition of discrimination. Jurisprudence has not interpreted every distinction or difference of treatment as discrimination; rather a difference of treatment is discriminatory if it ‘has no objective and reasonable justification’, it does not pursue a legitimate aim or there is not a ‘reasonable relationships of proportionality between the means employed and the aim sought to be realised’.⁶ Article 14 was strengthened by Protocol 12 to the Convention that added scope of protection to cases where an individual is discriminated against by a public authority in the exercise of discretionary power, or by any other act or omission by a public authority.

The right of freedom from discrimination has not seen much application to the area of policing however. Part of the problem is the heavy burden of proof placed on individuals to show that discrimination took place.⁷ It wasn’t until the UK passed its anti-terror law in response to the 2001 attacks in New York and Washington that we saw the principle of non-discrimination applied to State powers.

1.2 Testing Discriminatory Detention in Britain

Three months after the September 11 2001 attacks, the UK Parliament approved the Anti-Terrorism, Crime and Security Act. Amongst the many controversial components, in Part IV of the ATCS the Government created the power to detain foreign nationals suspected of terrorism. This power was then applied to seventeen foreign nationals who were resident in the UK: these individuals, though not charged with any crime, were to be detained in what the Government called a ‘three-walled prison’. That is, these individuals could return freely to their country of origin at any time, as some did.⁸ However, so long as they remained in the UK, they were to be detained without trial.

4 Law 1363/1938.

5 European Court of Human Rights, A260-A (1993) 17 EHRR 397

6 from *Abdulaziz, Cabales, and Balkandali v UK*, 1985.

7 c.f. “Violence and Discrimination before the Strasbourg Court”, http://www.justiceinitiative.org/activities/ec/ec_russia/moscow_workshop/Grozev

8 One returned to France and another to Morocco.

The detainees challenged the lawfulness of their situation. They contended that their detention was inconsistent with the UK's obligations under the European Convention on Human Rights. Their case went to the highest court in the UK where it was heard by the Law Lords in the House of Lords.⁹ The detainees complained that in providing for the detention of suspected international terrorists who were not UK nationals but not for those who were UK nationals, the law unlawfully discriminated against them as non-UK nationals in breach of article 14 of the European Convention.

The lower courts had disagreed with the detainees, arguing that there was indeed an 'objective and reasonable justification' for the differential treatment. In a historical decision, the Law Lords decided against the Government. Among the many complexities in the case, the Lords argued that the ECHR guarantees the right to liberty and security of the person, and the convention in its entirety applies to everyone. The Law Lords argued that short of a warrant requiring arrest for the purpose of deportation, individuals could not be detained indefinitely merely because they were foreign nationals. That is, because contracting states must defend the right to liberty as under Article 5, the law permitting the detention of foreign nationals discriminates against the detainees in their enjoyment of liberty.

According to the decision written by Lord Justice Bingham, everyone must have equal protection of the law: "The foreign nationality of the appellants does not preclude them from claiming the protection of their Convention rights." Lord Bingham's opinion went on to refer to the Council of Europe's "Guidelines on human rights and the fight against terrorism":

"All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment ..."¹⁰

Lord Justice Bingham also quoted from the Council of Europe Commissioner for Human Rights,¹¹ who said, in direct reference to the ATCS 2001:

"In so far as these measures are applicable only to non-deportable foreigners, they might appear, moreover, to be ushering in a two-track justice, whereby different human rights standards apply to foreigners and nationals."

9 A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent); X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), Lords of Appeal, House of Lords, December 16, 2004.

10 Committee of Ministers of the Council of Europe, adopted on July 11 2002.

11 in Opinion 1/2002, August 28, 2002, paragraph 40.

The Court's entire judgment was rife with quotations from declarations and statements from countless international bodies prohibiting discrimination on race and nationality. These bodies included the Council of Europe's Commission against Racism and Intolerance, the General Assembly of the United Nations and its Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, the United Nations Human Rights Committee, the UN Commission on Human Rights, the UK Privy Counsellors, the International Law Association, the UK Parliament's Joint Committee on Human Rights. Most prominent was the Committee of the International Convention on the Elimination of All Forms of Racial Discrimination 1966, who Lord Justice Bingham quoted in full as they called for governments to:

"Ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping.

"Ensure that non-citizens detained or arrested in the fight against terrorism are properly protected by domestic law that complies with international human rights, refugee and humanitarian law."

Baroness Hale's concluded her supporting opinion stating that although

"no one has the right to be an international terrorist. But substitute "black", "disabled", "female", "gay", or any other similar adjective for "foreign" before "suspected international terrorist" and ask whether it would be justifiable to take power to lock up that group but not the "white", "able-bodied", "male" or "straight" suspected international terrorists. The answer is clear."

On grounds of unlawful discrimination, the Government was forced to abandon its power of detention without trial and was compelled to set upon other paths.

2. Reality's Distance from Ideal

Based on the above statements of European principle in law, and the interpretation of European law in the courts, one could draw the conclusion that the European state of affairs on discrimination is progressive. Such a conclusion would involve a leap of logic, however. The conflict between principle and practice becomes more apparent as we look at other powers established in the name of combating terrorism.

Laws, policies, and practices across Europe have transformed in recent years, and not only in reflection of the attacks of September 2001. Whether it is through direct interventions by the state, or through subtler interventions, the reality of discrimination and profiling in Europe is far from ideal.

2.1 Direct Interventions and Discrimination

Although a raft of anti-terror laws were introduced across Europe, very few contain policy language that calls for discriminatory policing practices. Rather, it is more common to see laws that increase State powers, generating more checkpoints throughout European societies. These checkpoints involve additional border controls, added data collection and data sharing points, increased verification involving background checks for employment or access to services, new identification requirements prior to admittance to access to public service, increased verification of immigration status, stop-and-search powers, amongst other interferences with the lives of individuals. Where there are checkpoints there are opportunities for discrimination and profiling.

But studying discrimination and policing in Europe is challenging. Because Europe is so sensitive to discrimination, whether due to policies on national identity or even policies on privacy of sensitive information, the collection of statistics and records on discrimination is prohibited for the most part. Even where it is not prohibited, when called upon to collect such records the UK Government even tried to argue that this would involve 'disproportionate costs'.¹²

This lack of data on discrimination is troubling. In a 1997 study from the University of Leicester's Scarman Centre,¹³ researchers had a hard time ascertaining whether minorities were stopped by the police more frequently because of disproportionate crime involvement or of disproportionate crime control directed at them. The Scarman Centre's experience in Germany was that the police would argue that minorities are also white, and consequently discrimination in ID checks was rare. The researchers got different answers from German civil rights groups: despite many migrants being white, there were visible differences between them and the native German population. The researchers accompanied German police for a period of time and observed that they were stopping higher numbers of ethnic minorities. The officers then backtracked by explaining that this was a necessary measure to combat illegal immigration.

Similar patterns affecting ethnic minorities emerged in studies conducted in the Netherlands. The Scarman Centre report contended that the use of identity cards for combating illegal immigration created 'obvious' potential for abuse. For instance, while the researchers were accompanying the Dutch police, a factory was investigated on the basis of a tip-off claiming that the employees were 'foreign looking'.

12 Quoting Home Secretary David Blunkett from Joint Committee on Human Rights, Review of Counter-terrorism Powers, Eighteenth Report of Session 2003-04, HL Paper 158 HC 713, August 4, 2004.

13 'Policing the Community: The Impact of National Identity Cards in the European Union' by Adrian Beck and Kate Broadhurst (Scarman Centre for the Study of Public Order), Journal of European Migration Studies, 1998.

In France, the Scarman Centre researchers found similar results, with heightened tensions between ethnic minorities and the police. The Institute for Advanced Studies in Internal Security (IHESI) drew attention to the link between the French ID cards and tightening immigration law adding that: “although the card itself provided no threat to civil liberties, the police powers to check ID provided an ever growing intrusion.” Similarly, according to Mouloud Aounit, the secretary general of the French anti-racism group MRAP

“They aren’t in themselves a force for repression, but in the current climate of security hysteria they facilitate it... Young people of Algerian or Moroccan descent are being checked six times a day.”¹⁴

The French authorities refuse to study this phenomenon. According to French law, all French nationals are merely that: French. They have no other categorical breakdown. It would be considered illegal to collect information on the fact that someone is a French-Tunisian, for instance. This precludes understanding the nature of the problem, however.

This is a systemic problem in Europe. According to Yonko Grozev of the Bulgarian Helsinki Committee, in Bulgaria “the police would not keep reliable statistics on police violence and the statistics that are there do not take account of the ethnicity of the victim.”¹⁵

The United Kingdom is relatively unique in this case. Due to prior troubles and controversies, the UK police now record the ethnicity of those who are stopped by the police. A record of the search is completed by the officer, and must contain:

- the name of the person searched or if this is withheld a description;
- the person’s ethnic background;
- the date, time and place that the person was first detained and the date, time and place that the person was searched;
- the purpose of the search;
- the grounds for making it (or the authorization);
- the outcome and the identity of the police officer making the search.

To be fair, the fact that the UK actually collects this information is perhaps why the UN Committee on the Convention on the Elimination of all Forms of racial Discrimination (CERD) was particularly concerned with the disproportionate use of stop and search powers against ethnic minorities in Britain.¹⁶

14 ‘ID cards may cut queues but learn lessons of history, warn Europeans’, Amelia Gentleman, The Guardian, November 15, 2003.

15 Yonko Grozev, “Violence and Discrimination before the Strasbourg Court”, http://www.justiceinitiative.org/activities/ec/ec_russia/moscow_workshop/Grozev

16 Concluding Observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland, CERD/63/CO/11, 18 August 2003.

In the UK, stop-and-search powers are authorised under two separate regimes. First is the stop and search for criminal policing, under the Police and Criminal Evidence Act and its code of practice. According to these codes of practice¹⁷ unlawful discrimination is prohibited. Meanwhile, Section 60 of the Criminal Justice and Public Order Act gives a police officer in uniform a power to stop and search pedestrians, vehicles (and their drivers and passengers) for offensive weapons or dangerous instruments; whether or not the officer has any grounds for suspecting that the person or vehicle is carrying such articles. This is heavily used, with 50,800 such searches taking place in 2002/03, a rise of 31,900 from the previous year.¹⁸

The second regime is under s44 of the Terrorism Act. Police officers may stop and search for articles that could be used for terrorism, although an officer does not need grounds for suspecting the presence of such articles to use the powers. Prior authorisation to exercise the power within a given area must be sought by the relevant officer of rank for up to a period of 28 days. However, the authorisation may be renewed. The reality of the renewal process is that it becomes a permanent part of the landscape: London has been continuously designated as such a zone since February 2001.¹⁹

With the rise of concerns regarding terrorism, indicators of discrimination in policing have received renewed scrutiny, particularly due to rising tensions between the police and the black and Asian communities in Britain. UK Home Office research and reporting for 2002/2003 found that

- Black people are six times more likely to be searched by police than white people. There are almost twice as many searches of Asian people than white people.
- Stops and searches of black people under general policing powers went up by 38 per cent, Asians by 36 per cent, 'other' ethnic backgrounds by 47 per cent and white by 17 per cent.
- Stops and searches for Asians under anti-terrorism powers have risen by 302 per cent from 744 to 2,989.
- Numbers of arrests per 1,000 population were more than three times higher for black people than for others. Other ethnic minority groups are "slightly over-represented".²⁰

17 Code A, available in full at http://www.homeoffice.gov.uk/docs3/pacecode_a.pdf.

18 Table PB from Margaret Ayres, Liza Murray and Ransford Fiti, "Arrests for Notifiable offences under the Operation of Certain Police Powers under PACE in England and Wales", 2002/03, December 12, 2003, available at <http://www.homeoffice.gov.uk/rds/pdfs2/hosb1703.pdf>

19 'The Queen on the Application of Gillan and Anr v The Commissioner of Police for the Metropolis and Anr', Court of Appeal (Civil Division), 29th July 2004. Paragraph 13.

20 Home Office Press Releases, "Government and Police Must Engage Communities To Build A Fairer Criminal Justice System", Reference: 220/2004, July 2, 2004.

There are also increased uses of these powers.

Table 1 Numbers of Stop and Searches Under Terrorism Powers²¹

Year	Total Searches	Resultant arrests
1996/97	43,700	486
1997/98	15,400	316
1998/99	3,300	33
1999/00	1,900	18
2000/01	6,400	45
2001/02	10,200	189
2002/03	32,100	380
2003/04	29,407	n/a

The Islamic Human Rights Commission expressed concern that Muslims were subjected to a hugely disproportionate number of these.²² The Government defends this record saying that in 2003/2004 only 3,668 of those stopped were Asians. The Government also points out that three-quarters of all such stops and searches occur in London, where population of ethnic minority groups is higher.²³

These figures did lead to some introspection by the police and the UK Government. Much research followed because of Ministerial concerns that the powers' disproportionate use against black and minority ethnic communities "damaged police relations with many of these communities."²⁴ Following the Metropolitan Police Authority's (MPA) Stop and Search Scrutiny, the MPA was forced to conclude that "stop and search practices continue to be influenced by racial bias".²⁵ The Government responded with a new strategy: the 'Home Office Research, Development and Statistics Directorate' (RDS) would carry out an evaluation of recording stops, and would encourage officers to be more appreciative of issues surrounding ethnic origin. Simultaneously, however, the RDS revealed that there was evidence of under-recording: there had been a mixed or negative police response to the extra paperwork and even when openly observed by Home Office researchers, some police officers failed to record stops.

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- 21 Table PC, from Margaret Ayres, Liza Murray and Ransford Fiti, "Arrests for Notifiable offences under the Operation of Certain Police Powers under PACE in England and Wales", 2002/03, December 12, 2003, available at <http://www.homeoffice.gov.uk/rds/pdfs2/hosb1703.pdf>
- 22 Muslims: we are the new victims of stop and search, The Guardian, Rosie Cowan and Alan Travis, Monday March 29, 2004.
- 23 Letter dated 8 March 2005, from Hazel Blears MP, Home Office, "Terrorism and Community Relations", Written Evidence to the Select Committee on Home Affairs, <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmhaff/165/165we18.htm>
- 24 The Home Office, Stop and Search Manual, April 2005.
- 25 'MPA Stop and Search Scrutiny - Far reaching report published', 38/04, Metropolitan Police Authority, May 20 2004, available at www.mpa.gov.uk/news/press/2004/04-038.htm
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Despite this mounting evidence of discriminatory practices, the Government was adamant that the powers were strictly necessary. A Government minister went so far as to claim that these practices would increase. The Minister of State for Policing, Security and Community Safety, Hazel Blears, told Parliament that:

“Dealing with the terrorist threat and the fact that at the moment the threat is most likely to come from those people associated with an extreme form of Islam, or falsely hiding behind Islam, if you like, in terms of justifying their activities, inevitably means that some of our counter-terrorist powers will be disproportionately experienced by people in the Muslim community. That is the reality of the situation, we should acknowledge that reality and then try to have as open, as honest and as transparent a debate with the community as we can. There is no getting away from the fact that if you are trying to counter the threat, because the threat at the moment is in a particular place, then your activity is going to be targeted in that way.”²⁶

The Minister admitted that they had no data at the time on the religious backgrounds of those who were stopped, but was now keen to begin recording such data.²⁷

The issue of stop-and-search again rose to the top of the public agenda after the London bombings in July 2005. Shortly after the bombings on the transport network, the head of the British Transport Police was quoted as saying that “we should not waste time searching old white ladies.” The Minister of State for Policing, Security and Community Safety stepped forward to support that approach, if it was based on intelligence:

“That’s absolutely the right thing for the police to do. What it means is if your intelligence in a particular area tells you that you’re looking for somebody of a particular description, perhaps with particular clothing on, then clearly you’re going to exercise that power in that way. (...) I think most ordinary decent people will entirely accept that in terms of their own safety and security. (...) Clearly if we are looking for people and being operationally efficient, we have got to target the people who we think are maybe involved. (...) It is going to be disproportionate. It is going to be young men, not exclusively, but it may be disproportionate when it comes to ethnic groups. We are very sensitive to the effects that that can have and it isn’t an attack on particular communities.”²⁸

26 Evidence to Home Affairs Committee, 1 March 2005, Hazel Blears MP, Q474

27 response to Q480, <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmhaff/165/5030103.htm>

28 “Searches to target ethnic groups”, BBC Online, July 31, 2007.

She later cleared up her statement. Blears argued that officers needed to explain to communities that controversial stop-and-search operations were intelligence-led; racial profiling, she said, was something she had “never, ever” endorsed.²⁹ If used in an intelligence-led manner, she argued that the power would be “used proportionally, fairly, and in a non-discriminatory way.”³⁰

Despite these great fumbles and disproportionate use of powers, it is again important to highlight that the UK is not necessarily the most discriminatory country in Europe. There are certainly other countries where community tensions are rising due to policing practices. For instance, according to reports, France is pursuing ethnic profiling more overtly.³¹ According to a report for the French interior ministry, the French intelligence community has had suspected extremists and radical mosques under surveillance since 1995. The report says it is now “vital” to monitor France’s 35,000-40,000-strong Pakistani community, so as to avoid an attack. According to the report, written in light of the July 2005 bombings in London:

“France is not immune from these violent groupings, when you realise the close links (family, trade or through associations) between the Pakistani community in Britain and many of their compatriots in France.”³²

Other European countries are likely to discriminate to the same level as the UK, if not more so; but the UK is relatively unique in that it actually studies this practice, records its occurrence, and is seeking to address it.

In the UK there have even been calls to extend the practice of data collection on police powers. The UK Parliament’s Joint Committee on Human Rights called for urgent comprehensive monitoring of the impact of anti-terrorism powers on Muslim communities through the collection of race and faith data for instances of stop and search, arrests, convictions leading from all arrests connected with anti-terrorism legislation, detentions and certifications, and releases without charge.³³ It is alarming that other countries don’t collect even basic information so that we can better understand the hazards and dangers.

29 Blears backs away from racial profiling, Mark Oliver and agencies, Tuesday August 2, 2005, Guardian Unlimited.

30 “Blears says Muslims should not fear racial profiling”, Daily Telegraph, August 2, 2005.

31 “French Push Limits in Fight On Terrorism Wide Prosecutorial Powers Draw Scant Public Dissent”, Craig Whitlock, November 2, 2004, page A01, <http://www.washingtonpost.com/wp-dyn/articles/A17082-2004Nov1.html>.

32 “France and Saudis knew of plans to attack UK”, Jon Henley and Duncan Campbell, August 9, 2005, <http://www.guardian.co.uk/attackonlondon/story/0,16132,1545168,00.html>

33 Joint Committee on Human Rights, Review of Counter-terrorism Powers, Eighteenth Report of Session 2003-04, HL Paper 158 HC 713, August 4, 2004.

Looking at the data on the use of wider anti-terrorism powers in the UK is also informative. Of the 562 people arrested in the UK in the period between September 2001 and August 2004, only 97 were charged and 14 were convicted of a terrorist crime. The UK Home Office rejects any criticism on this point, arguing that the statistics are misleading, that cases take a long time to come to court. Also, the Home Office admitted that many people, arrested under Terrorism Act powers, are then convicted under other related laws.³⁴ The Government defends its record by contending that another way of interpreting these figures is that 280 of the 562 arrested under anti-terrorism powers have been released without charge; and 152 were charged under other legislation or released into the custody of the immigration service.³⁵

Yet the high-profile nature of these arrests adds to the controversies and confusion. The stories of arrests are plenty, but the stories of the eventual release of these individuals are not as well covered.

- In November 2002 the police announced the arrest of Karim Kadouri for plotting to poison the London Underground; the charges against him were dropped, though he was jailed for four months for having a fake passport.
- In December 2002 nine men were arrested for plotting an attack on the Hogmanay Party in Edinburgh; all were later released, though one was later re-arrested on immigration charges.³⁶
- The Institute for Race Relations in the UK has found that many who were first arrested under terrorism powers are then released and then re-arrested for immigration offences.³⁷

These have led to claims from the Muslim community leaders and groups in Britain of ‘demonization’, anger, alienation,³⁸ and harassment.³⁹ It also appears that anti-terrorism powers are being used to then apply immigration powers. Due to the discriminatory application of anti-terrorism powers, this means that specific ethnic communities are likely to receive disproportionate amounts of attention from the immigration authorities. This results in an uneven application of the law, which again is a form of discrimination.

34 “Innocent victims of Britain’s fight against terrorism”, Muslims accuse ‘heavy-handed’ police as nearly everyone arrested is freed, Antony Barnett and Martin Bright Sunday December 7, 2003 The Observer.

35 “Low number of convictions does not tell the whole story, insist police”, Alan Travis, The Guardian, August 5, 2004.

36 “Anger over terror suspect cases”, BBC Online, August 17, 2004

37 Institute for Race Relations, “Arrests under anti-terrorist legislation since 11 September 2001”, March 2003.

38 “8 Terror Suspects Arrested in England”, Patrick E. Tyler, The New York Times, March 30, 2004

39 “Police search powers scrutinised”, BBC Online, July 2, 2004.

A similar picture is emerging from Italy. In response to the July 2005 bombings, Italian authorities arrested over 140 people under counter-terrorism powers. However according to a government official, the most were illegal immigrants and many were charged with theft or possession of drugs, and later played down suggestions that any of those arrested were linked specifically to terrorism. From September 2001 to January 2003, more than one hundred were arrested, leading to seventeen convictions.⁴⁰ In 2003 alone there were over 70 anti-terror arrests, and these figures were heralded by the Interior Minister, Giuseppe Pisanu as “evidence of the commitment of Italian police forces in the face of Muslim terrorism.”⁴¹ High profile arrests include:

- In February 2003, 28 Pakistani immigrants were arrested amidst accusations of being a ‘sleeper cell’ and police claims of having seized explosives during the raid.⁴² They were released weeks later by a Judge who announced that “preliminary checks of each individual arrested can only lead to the considerable reduction of the seriousness of the charges against them.” The Pakistani Government complained to the Italian Government of a ‘conspiracy’ against the suspects.⁴³
- In August of 2002, fifteen Pakistani men were arrested in a joint operation between Italian police and US naval intelligence; only to see the charges dropped in August 2003, though they were then moved into a centre for illegal immigrants for deportation.⁴⁴
- In April 2004 a court simultaneously acquitted nine Moroccans of plotting an attack on the U.S. Embassy in Rome; and a Pakistani, Tunisian and Algerian of forming a terrorist cell.⁴⁵

In the period between July 2003 and March 2005, the authorities arrested 75 people in connection with terrorism investigations, though cases continue to collapse for lack of evidence.⁴⁶

40 “Italy police raid ‘terror cell’”, Alessio Vinci, CNN, January 31, 2003.

41 “TERRORISM: PISANU, 71 ARRESTS FROM THE BEGINNING OF THE YEAR”, AGI, December 1, 2003

42 “Italy police raid ‘terror cell’”, Alessio Vinci, CNN, January 31, 2003.

43 “Italy frees Pakistani terror suspects”, BBC Online, February 12 2003.

44 “Italy drops terrorism charges against Pakistanis”, Australian Broadcasting Corporation News Online, June 27, 2003, available at <http://www.abc.net.au/news/newsitems/200306/s889756.htm>.

45 “9 Acquitted in U.S. Embassy Attack Plot”, Aidan Lewis, AP, April 28, 2004.

46 “Italian crime crackdown reflects terror fears”, Adrian Michaels, the Financial Times, July 10, 2005.

According to reports, France is pursuing ethnic profiling more overtly, alongside other strategies of pre-emptive arrests and domestic intelligence-gathering.⁴⁷ For many years French politicians have been threatening Muslim fundamentalists with expulsion.⁴⁸ According to the French intelligence chief Pierre de Bouquet de Florian, in the two years after September 2001, French authorities have arrested 120 suspects and convicted half of them.⁴⁹ According to another report, over the past decade, anti-terror judges have ordered the arrests of more than 500 people on suspicion of “conspiracy in relation to terrorism,” a broad charge that allows authorities to lock up suspects while they carries out investigations. One French anti-terror judge estimated a personal 90 percent conviction rate, once indicted. Critics respond by arguing that most people arrested never face terror-related charges and eventually are freed.⁵⁰ Again, official statistics are not readily available. Without vital statistics and concerted efforts to understand the problem, there is little hope of stopping the discriminatory application of these greatest powers of the state.

2.2 Subtle Interventions and Surveillance

While the Italians responded to the London bombings of July 2005 with mass arrests, the French Interior Minister announced plans for

“an increase in funds for video surveillance, an acceleration in techniques for gathering telephone material and data storage and a reinforcement of early monitoring of radical elements.”⁵¹

French officials spoke at length about ‘intelligence-led’ approaches to combating domestic terrorism. Countries across have Europe worked together to increase their powers of surveillance.

‘Intelligence-led profiling’ is often presented as an alternative to a discriminatory-profiling, a ‘softer-touch’ form of profiling. Through the accumulation and sharing of vast amounts of information, Governments can analyse this information to identify specific profiles of interest, amongst a myriad of other uses.

47 “French Push Limits in Fight On Terrorism Wide Prosecutorial Powers Draw Scant Public Dissent”, Craig Whitlock, November 2, 2004, page A01, <http://www.washingtonpost.com/wp-dyn/articles/A17082-2004Nov1.html>.

48 “France threatens to expel extremist Islamic leaders”, AP, April 16, 2003

49 “French intelligence arrested 120 terror suspects”, AP, November 27, 2003.

50 “French Push Limits in Fight On Terrorism Wide Prosecutorial Powers Draw Scant Public Dissent”, Craig Whitlock, November 2, 2004, page A01, <http://www.washingtonpost.com/wp-dyn/articles/A17082-2004Nov1.html>

51 “Italy and France boost security”, Reuters, July 22, 2005.

One strategy pursued by the European Union has been to develop computer-assisted profiling. Its purpose:

“is to facilitate targeted searches for would-be terrorists (...). It is closely connected to the German initiative on computer-aided preventive searches carried out by individual Member States on the basis of coordinated offender profiles (Europe-wide electronic profile searches). Such searches are essential to the success of security service operations. (...)”

“On the basis of this profile each Member State searches the relevant national data bases (e.g. registers of residents, registers of foreigners, universities etc.) subject to the provisions of national law, for persons who need to be vetted more closely by the security authorities. The more detailed the offender profile, the smaller the group of persons covered by the search.”⁵²

The policy calls for increased data-sharing between EU member states and with the European Police Office, Europol. In cooperation with Europol, they would identify specific areas where the development of targeted terrorist profiles may assist the identification of terrorists.

“Developing terrorist profiles means putting together 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. It may therefore be necessary to develop the profiles in such a way that individual profiles cover a well-defined and specialised category of persons who fulfil a particular function within a closely defined area of terrorism. It will also be necessary to update the profiles as often as necessary so that they always give a correct picture of the particular characteristics of the category of persons in question.”⁵³

52 Council of the European Union, Memo from German Delegation to the Article 36 Committee, Subject: Note on computer-aided preventive searches carried out by individual Member States on the basis of coordinated offender profiles (Europe-wide electronic profile searches), Brussels, October 31, 2002, 13626/02, LIMITE ENFOPOL 130.

53 Council of the European Union, Draft Council Recommendation on the development of terrorist profiles, Brussels, 14 October 2002 11858/1/02, REV 1 LIMITE ENFOPOL 117

The EU identifies a number of 'elements' for these terrorist profiles, including nationality, travel document, method and means of travel, age, sex, physical distinguishing features (e.g. battle scars), education, choice of cover identity, use of techniques to prevent discovery or counter questioning, places of stay, methods of communication, place of birth psycho-sociological features, family situation, expertise in advanced technologies, skills at using non-conventional weapons (CBRN), attendance at training courses in paramilitary, flying and other specialist techniques.⁵⁴ They would then search through national databases hoping to identify equivalent elements in order to then presumably pinpoint terrorists.

This policy generated concern from the EU Network of Independent Experts in Fundamental Rights (CFR-CDF). In its first report from May 2003, the network argued:

"The development of terrorist profiles on basis the characteristics such as nationality, age education, birthplace, psycho-sociological characteristics, or family situation - all these elements appear in the recommendation on developing terrorist profiles - in order to identify terrorists before the execution of terrorist acts and cooperation with the immigration services and the police to prevent or reveal the presence of terrorists on the territory of Member States, presents a major risk of discrimination. The development of these profiles for operational purposes can only be accepted in the presence of a fair, statistically significant demonstration of the relations between these characteristics and the risk of terrorism, a demonstration that has not been made at this time."⁵⁵

In July 2003, the UK Government announced its participation in a pilot group comprising experts from a number of EU Member States to get this project off the ground.⁵⁶

This is by no means the only approach to data-sharing and analysis. Another European policy initiative involves the accumulation of 'passenger name records' from carriers. This policy originally started with a request from the United States to gain access to the reservation systems of EU carriers in order to get personal information of travellers to the U.S. This information was going to be used by the Americans for automated profiling and pre-screening. Hearing of the American idea, EU clamoured to adopt its own policy to ensure access to this same information. Some of the information on these reservations systems is classified as 'sensitive' by EU privacy law, particularly as these records may reveal the passenger's racial or ethnic origin, political opinion, religion, health status or sexual preference.⁵⁷

54 Council of the European Union, Draft Council Recommendation on the development of terrorist profiles, Brussels, 14 October 2002 11858/1/02, REV 1 LIMITE ENFOPOL 117.

55 "EU network of independent experts in fundamental rights" (CFR-CDF), First Report, May 2003.

56 WRITTEN QUESTION P-3694/03 by Sarah LUDFORD (ELDR) to the Council, Subject: Terrorist profiling.

57 Frequently Asked Questions Regarding Customs and Border Protection Receipt of Passenger Name Records Related to Flights between the European Union and the United States, Information Notices adopted by The Article 29 Working Party, 11733/04/EN WP 97, Opinion 8/2004 on the information for passengers concerning the transfer of PNR data on flights between the European Union and the United States of America, Adopted on 30th September 2004.

The EU ensured that the U.S. would delete this information once received, but has not yet made a similar promise on the use of this information by European Union member states.

This travel information can also be used for immigration and border management purposes. After the London attacks of July 2005, the UK Government sought access to flight records from the period before the bombings to analyse for anyone who may fit the profile of an organiser of the attacks fleeing the country.⁵⁸ Access to this information was proposed to Parliament in May 2005, for use in combating terrorism but also in immigration administration. According to the Government,

“During the investigation following a terrorist incident the ability to historically track the movements of the suspected perpetrators or indeed attempt to identify them by reference to their travel is a vital investigative tool. As the terrorists may have entered the country a considerable time before the incident the retention of the data for a reasonable time is therefore necessary. In addition, for immigration control purposes the ability to refer to an audit trail of movements is key to risk assessing passengers. An audit trail of movements which illustrates a passenger’s compliance will weigh in that passenger’s favour while evidence of non-compliance will clearly attract closer examination by an immigration officer. We see these as fundamental building blocks for enhancing border security.”⁵⁹

The UK Government promises that it will ignore racial and religious information. Rather this information will be used to compare the names of travellers against lists and databases of suspects. This profiling is also for long-term analysis, however. According to the Government:

“Through a combination of operational experience, specific intelligence and historical analysis, the Police build up pictures of suspect passengers or patterns of travel behaviour. These pictures and patterns typically share common indicators which are developed into profiles. Access to comprehensive passenger, crew and freight data in advance of a vessel’s arrival or departure in the United Kingdom will allow officers to assess the risk presented by the people or goods carried and to mount a proportionate response. Where this involves stopping or monitoring a person or goods through the port the use of advance traveller or freight data combined with existing intelligence systems will allow a targeted intervention, with an improved likelihood of a positive outcome.”⁶⁰

58 “Rucksack gang filmed at King’s Cross ‘looked like the infantry going to war’”, John Steele, Daily Telegraph, July 13, 2005.

59 The UK Home Office, Partial Regulatory Impact Assessment Data Capture And Sharing Powers For The Border Agencies, May 2005.

60 The UK Home Office, Partial Regulatory Impact Assessment Data Capture And Sharing Powers For The Border Agencies, May 2005.

The use of this information for border management purposes has previously raised concerns, particularly when the U.S. moved to establish its own system of passenger and immigrant profiling.

As the EU moves towards harmonising border management practices through its Visa Information System and the Schengen Information System, European privacy authorities have warned that additional data collection and profiling “may actually give rise to unlawful discrimination between applicants”.⁶¹ Data collection will be expanded under the proposed ‘Schengen III’ treaty, where it is proposed that countries start sharing fingerprints and DNA profiles on a regular basis, as well as provide equivalent access to other databases and registers.⁶²

The collection and sharing of DNA is part of a larger scheme to increase the collection of ‘biometrics’ of individuals. These are part of renewed national identity schemes to ensure national databases of relatively unique personal characteristics. Some biometrics can be sifted for racial characteristics. According to European privacy officials, DNA is particularly worrisome, because

“while genetic information is unique and distinguishes an individual from other individuals, it may also at the same time reveal information about and have implications for that individual’s blood relatives (biological family) including those in succeeding and preceding generations, Furthermore, genetic data can characterise a group of persons (e.g. ethnic communities). (...) Considering the extremely singular characteristics of genetic data and their link to information that may reveal the health condition or the ethnic origin, they should be treated as particularly sensitive data.”⁶³

Others have argued that facial recognition can also identify the ethnicity of individuals photos held in databases.

61 Article 29 Working Party, 1022/05/EN, WP 110, Opinion on the Proposal for a Regulation of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short stay-visas (COM (2004) 835 final), Adopted on 23 June 2005.

62 “Some remarks on Schengen III”, July 2005, available at <http://www.statewatch.org/news/2005/jul/17schengen-III.htm>.

63 ARTICLE 29 Data Protection Working Party, 12178/03/EN WP 91, Working Document on Genetic Data, Adopted on 17 March 2004.

There are also adverse reactions to the technologies of biometrics. A study from the United Kingdom found that many feel criminalised by the taking of fingerprints, and some believe it is an overly intrusive process. Before interfacing with the technology, trial subgroups of '18-34yr olds', 'Black and Minority Ethnic', 'Other Religion' already showed great concern compared with the average scores. Though the level of concern later fell as they became more familiar with the technologies, it was still elevated. When later asked whether biometrics are an infringement of civil liberties, 55% within the 'Black and Minority Ethnic' subgroup tended to agree or agreed strongly, as did 53% of those designated as 'other religion', and 42% within the 18-34 subgroup.

The collection and sharing of all these types of information has raised significant concerns of discriminatory profiling. When the UK Government proposed to create a national identity registry, containing information on all residents including iris scans, face scans, and fingerprints, and to issue an identity card at the same time, faith and minority groups were particularly concerned. The Faith Community Consultation (FCC) consortium, which comprises representatives from the country's Christian, Muslim, Sikh, Jewish, Hindu, Zoroastrian and Bahai religions were particularly concerned of the use of cards for ethnic profiling. According to one report, the FCC stated:

"The reality is that the laws which empower intrusion into private life are being used disproportionately against members of the Muslim community... We believe that conferring additional powers on the state over citizens would compound the sense and reality of discrimination in the current climate."⁶⁴

The UK Government has long-argued that residents and citizens will not be asked for ethnic and religious information. Regardless it is felt that a national registry of names, addresses, ages, and nationalities will be sufficient to enable discrimination.

Profiling is not limited to direct collection of information on one's faith. For instance until 2000, Greece included religion on their national ID card, but has since abandoned that strategy; though it is not likely that immediately relationships amongst communities in Greece improved.

One expert on the issue, Arun Kundnani of the Institute of Race Relations expressed concern that an identity scheme could lead to "disproportionate suspicion falling on Black and Minority Ethnic communities, who would be more likely to be asked to prove their eligibility." Kundnani argued that the mere creation of data stores will likely lead to abuse of data along discriminatory lines.

64 "Faith groups' fears add to ID card trouble", Jamie Doward, The Observer, August 7, 2005.

“The British security services will have access to this database and, as a result, will have the opportunity to use it as the basis for new kinds of ‘profiling’ of suspected terrorists. In Germany, a law was introduced after September 11 which placed a duty on public and private institutions to hand over to police authorities computer data on individuals whose personal profile corresponded to specific criteria that the police believed to be associated with terrorists. For example, if you were a Muslim studying engineering and the police decided that this meant you fitted the profile of a terrorist, then the university would be forced to hand over all its data about you.”⁶⁵

Through the subtler powers of surveillance, the ability to discriminate and profile is enhanced whether it is on the face of the policy or not.

3. The Danger of In-discriminate Policies

It is a practical inevitability that in direct response to a terrorist attack, governments will offer new policy proposals, such as the registration and monitoring of places of worship,⁶⁶ the creation of deportation powers⁶⁷ and even the stripping of citizenship, or greater stop and search, identification, and detention powers. Our natural responses to such initiatives tend to vary from relief, satisfaction, concern, and outright alarm.

Those of us who are concerned with all the new powers that have been introduced over the years tend to focus on the issue of discrimination. In an open society we always fear that the arm of the law will swipe harder at those who look and sound like those who perpetrated terrorist attacks, i.e. ‘those who fit the profile’. So we debate with government officials, generate protests, speak with the media; and we warn everyone that these laws will be used against some unfairly. We use the word ‘profiling’ with the expectation that it will generate shudders in the spines of our audiences.

We protest too little. Profiling may be overtly racist (e.g. ‘search database for all ethnic names’), but in quieter moments, it is subtly so (e.g. ‘why is this foreigner studying engineering?’). Indeed, Europe lives in the shadow of its history, and in turn developed legal ideals like the European Convention on Human Rights. And so Europe’s Governments are not overly fond of proposing policies that are overtly discriminatory. This is why the UK Government lost its ability to detain foreign nationals, this is why there is so much attention to stop and search powers.

65 ID cards: implications for Black, Minority Ethnic, migrant and refugee communities, By Arun Kundnani. 26 May 2005, Institute of Race Relations, available at <http://www.irr.org.uk/2005/may/ak000010.html>.

66 e.g. Spain Weighs Muslim Rights and Concerns About Safety, Dale Fuchs, The New York Times, May 23, 2004.

67 “10 face deportation after raids on Islamist extremists”, John Steele and Andrew Sparrow, the Daily Telegraph, August 12, 2005.

Our arguments must not stop there with cries of ‘discrimination’. Worryingly, Governments are instead proposing ‘indiscriminate’ policies. In response to the High Court finding the detention of foreign nationals to be discriminatory, the UK Government introduced powers equivalent to house arrest, but applied the powers equally to British citizens and foreign nationals. Interestingly, the Government was warned about the prior power of a ‘three-wall detention’ as being discriminatory, and was called on by the Privy Counsellors to introduce ‘new legislation should apply equally to all nationalities including British citizens’.⁶⁸

At the time the Government answered:

“The Government believes it is defensible to distinguish between foreign nationals and our own citizens and reflects their different rights and responsibilities. Immigration powers and the possibility of deportation could not apply to British citizens. While it would be possible to seek other powers to detain British citizens who may be involved in international terrorism it would be a very grave step. The Government believes that such draconian powers would be difficult to justify. Experience has demonstrated the dangers of such an approach and the damage it can do to community cohesion and thus to the support from all parts of the public that is so essential to countering the terrorist threat.”⁶⁹

When the power to detain foreign nationals was struck down the next year, Lord Justice Bingham explained:

“Any discriminatory measure inevitably affects a smaller rather than a larger group, but cannot be justified on the ground that more people would be adversely affected if the measure were applied generally. What has to be justified is not the measure in issue but the difference in treatment between one person or group and another. What cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another.”

So two months later the Government proposed house arrest for all. The High Court never explicitly said that detention without trial was illegal, merely that it was discriminatory. The UK Government managed to do an end-run around the constitution and the European Convention on Human Rights by removing the discriminatory aspect of the practice.

68 This was Lord Newton’s Committee, but the quotation comes from the Government’s response to the Privy Counsellor Review Committee’s “Anti-terrorism, Crime and Security Act 2001 Review”, December 18, 2003.

69 The Home Office, “COUNTER-TERRORISM POWERS: Reconciling Security and Liberty in an Open Society: A Discussion Paper”, February 2004.

That is the logic of indiscriminate policy: for fear of discrimination, we must take away police powers that were previously applied to the few and instead extend them to the many. The UK Government defends the increase in Asian stop-and-searches by saying that the police are increasingly using stop and search powers across the board. The logic is perverse, but it is logical.

We must also remember that once these indiscriminate laws are implemented in practice, they are likely to be applied to discriminate. This is the separation between the ideal and the practice. The ideal of non-discrimination leads to policies that indiscriminate, but then are applied in discriminatory fashion. Databases are generated containing information on everyone for fear of discrimination, and this data is then used for profiling purposes, as proposed by the EU and countless other governments.

At some point, as we have already seen in some countries, ethnic minority groups have expressed concerns regarding increased data collection practices, and surveillance methods such as ID cards because they may fuel further erroneous arrests, stops and searches, and discriminatory practices. When we do begin to notice these massive data-grabs and increased indiscriminate surveillance, I hope that claims of 'discrimination' will not be the only weapon in our arsenals. That is, we must not only argue that the practices are problematic because they'll be used against ethnic minorities. We must argue that we do not want such laws because we do not want to live in a world where the lives of the innocent are constantly under the ever-watching eye, and scrutiny, of the State.

It's not just that we shouldn't treat an ethnic community as though they are all terrorists; it's that we should not treat everyone as a suspect. As we continue to build additional checkpoints into European societies, we can not risk forgetting that lesson. Just because a bad policy is no longer discriminatory, this does not make it good.

About the Author

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