

**MISKOLCI EGYETEM
ÁLLAM- ÉS JOGTUDOMÁNYI KAR
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Ethnic Profiling in Crime Prevention and Criminal Investigation

(Abstract of PhD thesis)

Miskolc, 2011.

I. The subject and aim of the thesis

The aim of this thesis is to provide an overview of ethnic profiling in policing. The concept, as defined by the study, refers to any action initiated by the police or other person with official authority that relies on the race, ethnicity, or colour of skin when the action is carried out with using discretion and the person concerned is obliged to comply with the measure. The study only deals with police-initiated actions, because this is the field from where we have empirical data supporting and corroborating the conceptual and normative statements concerning ethnic profiling, but conclusions with reasonable adjustments can be applied to any other practice falling under our concept. The actions in question can be several kinds: ID checks, traffic stops, stop and frisks, questioning or searching individuals partly or solely because of their ethnicity or religion.

As it can be seen from the definition, the thesis examines discrimination in the field of crime prevention and criminal investigation on the ground of a certain range of protected characteristics. The concept itself is hardly known in Hungary, although the phenomenon it refers to, is easily identified or recognized by civilians and police officers as well. In light of the lack of familiarity with the concept it is not surprising that the practice it refers to is seriously under-reflected in professional discourse, in spite of the fact that the topic is very relevant currently. Numerous articles and studies are published every year in international academic literature. Perhaps nothing is more telling of the relevance of the subject than that the *Journal of Ethics* devoted a special issue to analysing ethnic profiling from a moral philosophical perspective in 2011, and a special issue of the *Policing and Society* is to be published on the topic in the same year. The latter journal will cover the examination of ethnic profiling all around the world from Japan, Australia, Republic of South Africa to India and the United States and the Hungarian research studies and their results described in this thesis will also be published in this issue.

Additionally to the fact that the topic received such an intensive academic interest internationally, it is also very important in Hungary. The recently increased ethnic tensions direct public attention to the particular problems of the biggest minority community, one aspect of which is the ethnic discrimination in the criminal justice system. It is not the task of this thesis to take a stance in this complex issue, thus it does not do so. However, its aim is to analyse one element of the complex problem, namely that discrimination at the “gate” of the

criminal justice system can result in ethnic disproportionality at the “exit” of the system, i.e. within penitentiary institutions. I would like to point out that although law enforcement powers providing great discretion are necessary to effective policing, they also pose a danger of abuse. It is also important to note that all kinds of law enforcement measures might have detrimental consequences even if the measure in question is “simply” an ID check or stop and search. This implies that supervision and amendment of these powers can be necessary anytime. The concluding part of Chapter VI contains detailed recommendations in this respect.

This study is only an introduction into the topic aimed at stimulating professional discourse. As no general overview on ethnic profiling has yet been published in Hungarian, it is timely that professional discourse began about it and this study might prove to be a useful starting point in this debate. With due respect to length limitation certain aspects of the issue are not covered. The study provides a conceptual analysis related to ethnic profiling (Chapter I), elaborates on justification difficulties (Chapter II), then it turns to the birth and carrier of the method developed in the United States from the 1970’s until today. This chapter describes some of the most important court decisions and assesses them, focusing on how effective the tools - Amendment IV and XIV to the US Constitution - are in challenging the illegitimate policing technique (Chapter III) before the courts. The next Chapter introduces international soft law on ethnic profiling (statements and recommendations), then provides a detailed analysis of the practice of the European Court of Human Rights concerning discrimination to establish whether ethnic profiling is compatible with Article 14 of the European Convention on Human Rights banning discrimination. On the basis of the conclusions drawn, the thesis recommends to codify ethnic profiling as a *sui generis* form of discrimination (Chapter IV). The next Chapter describes the methodology and the results of research studies carried out in different European countries (Great-Britain, France, Spain, Russia, Bulgaria - Chapter V), while the next one covers exclusively ethnic profiling in Hungary. At the end of the chapter recommendations as to the amendment of the Hungarian legal framework are formulated. The last chapter concentrates on the necessity and possibility of ethnic data collection. This issue is directly linked to that of ethnic profiling since combating this form of discrimination is almost impossible without ethnic data, and at the same time the Hungarian legal framework allows the processing of sensitive data to such a limited extent that is not enough to effectively challenge the practice. Therefore the final chapter focuses on the inter-related issues of data protection and combating discrimination and analyses the possible amendments of the Hungarian legal provisions.

An issue that could be dealt with in the study but was left out is that ethnic profiling is characterized by post-modern criminological tendencies (risk society, risk assessment and management, strengthening crime prevention – all which detaches law enforcement and criminal justice from individual responsibility), and this could provide a broader theoretical framework. The reason for not dealing with this aspect is twofold, practical and substantive, the practical one being length limitation. The substantive reason for omitting the broader perspective is that I believe that the assessment of actuarial criminal policy and criminal justice and that of ethnic profiling are not are not interconnected and not necessarily yield identical result because having and ethnic element in the risk assessment would raise serious concerns even if there were no problems with the new tendencies in criminal policy (moral and legal issues would prevail even if there were compelling reasons in favor of the new model).⁵

Due to the lack of necessary expertise the thesis does not deal with ethnic profiling from the aspect of critical discourse theory,⁶ nor does it cover the relation between postmodern society and ethnic profiling⁷ - these fields are worth researching for linguists, sociologists or philosophers. For a lawyer it would have been unwise to cover these issue in a scientific thesis.

⁵ For the relationship between the new trends in criminal policy and ethnic profiling see: BORBÍRÓ Andrea: *Kriminálpolitikai és bűnmegelőzés a késő-modernitásban*. (PhD thesis, manuscript), especially pp. 64-68.

⁶ GLOVER, Karen S.: *Police Discourse on racial Profiling*. Journal of Contemporary Criminal Justice 2007 23: 239 és SATZEWICH, R Vic és SHAFFIR, William: *Racism versus Professionalism: Claims and Counter-claims about Racial Profiling*, Canadian Journal of Criminology and Criminal Justice, 2009, April, 199-226. p

⁷ MILLER, Kirk: *Racial Profiling and Postmodern Society Police Responsiveness, Image Maintenance, and the Left Flank of Police Legitimacy*. Journal of Contemporary Criminal Justice 2007 23: 248

II. Method, conclusion and results of the thesis

1. Conceptual analysis

The first chapter provides a conceptual analysis of the practice, starting with methodological issues (the definition may not be “biased”, meaning that the none of the elements of the concept may determine the normative evaluation of the practice, and it must be one that describes a practice which is substantively different from other similar forms of discrimination) and introducing and evaluating the two models of concepts that are used in the professional debates (narrow and broad concepts), and argues for the plausibility of the broad definition that does not exclude those practices from the meaning that are only partly based on the concerned person’s ethnic or religious background.

Based on these inquiries the thesis defines ethnic profiling as any action initiated by the police or other person with official authority that relies on the race, ethnicity, or colour of skin when the action is carried out with using discretion and the person concerned is obliged to comply with the measure. For the purposes of the concept, the reason for applying the method is irrelevant (prejudice, presumed rationality), and it does not regard ethnic element as the only constituent of the profile. The formal description of the profile is not important either, i.e. the term covers cases when the targeted profile is not regulated by an official document. As it can be seen from the definition, profiling does not presuppose the processing of personal data either, because its essence is its discretionary selection. As it is a requirement against the term that it should be differentiated from other forms of discrimination, discretion is an indispensable part of it, since in case selection is prescribed by a rule of law it is simply a discriminatory legal rule. While it is not without precedent in the academic literature to regard discriminatory legal regulation to be a case of ethnic profiling,⁸ I do not find this approach plausible as I regard ethnic profiling essentially a “discretionary selection method”, since in the cases of discriminatory regulation or racist application of the law the emphasis is not on selection but on the differential treatment of people addressed by a rule of law of concerned by a given measure in comparable situation. This is nothing else but mere direct discrimination without profiling, discretion and selection by people vested with authority.

1. Normative (justification) issues

⁸ pl. STOKES, Larry D.: *Legislative and Court Decisions that Promulgated Racial Profiling: A Sociohistorical Perspective*. In: *Journal of Contemporary Criminal Justice* 2007, 23:263-275

The second chapter focuses on the normative questions related to the practice defined by ethnic profiling, i.e. it critically evaluates the most important arguments, most of them coming from the field of moral philosophy, pro and contra related to the use of ethnic origin in the police decision making process. The chapter dissects the typical arguments in favour of ethnic profiling (correlation argument, hit rate argument, deterrence effect argument), and pays special attention to the possible justification of the practice under fair conditions (which is the adjusted application of the Rawlsian neo-contractualist strategy to ethnic profiling). The chapter devotes attention to the perhaps most commented line of consequentialist and non-consequentialist arguments in the field elaborated by Risse and Zeckhauser. It concludes that since ethnic profiling is extremely rarely proven to be effective but at the same time is a form of discrimination, which has particularly disadvantageous impacts as well (alienating complete minorities from the police, exacerbating tension between the targeted minorities and the majority population, etc.) taking into consideration someone's ethnic belonging in the police decision making on whom to stop, search or question is only justified if reliable crime or perpetrator-specific information related to a serious crime is at the disposal of the police. Therefore ethnic profiling based on generalizations, in case of preventive actions and measures aimed at fighting against victimless crimes, are all illegitimate. The chapter also argues - based on concerns raised by Richard Banks - that even if the techniques were effective, there are extremely strong arguments against it as it has numerous negative social consequences that altogether might be weightier than the advantages achieved by a more efficient crime prevention or detection.

3. Ethnic profiling in the United States: Empirical and legal inquiries

The third chapter describes how the technique evolved in the United States in the 1970-80s and how widespread it has become by today. As a starting point, the study provides an overview of actual ethnic profiling patterns in the US and illustrates the social and political attitude towards the practice. The chapter then describes the legal practice challenging ethnic profiling in the US, discussing cases decided under Amendments IV and XIV of the US Constitution focusing on how effective tools these Amendments are in challenging the illegitimate policing technique before the courts. This part of the study elaborates the issue of pretextual stops and the landmark case of *Whren v United States* in this regard, then it introduces some important ethnic profiling cases decided under the equal treatment clause.

The chapter concludes with the introduction into the problem of overbroad suspect descriptions which is similar to some aspects of ethnic profiling as the latter can be interpreted as generalization just like other broad categories used as suspect descriptions (of course the two cases are also different from an important point of view: it is conceptually impossible to use overbroad suspect descriptions in the course of preventive measures). The conclusion of this section is that in spite of many attacks and challenges ethnic profiling is still present and widespread in the United States. Although the number of legal procedures initiated because of the method in question is constantly decreasing, empirical studies do not show any improvement. In terms of legal practice it can be established that Amendment IV became a lot weaker tool against ethnic profiling following the case of *Whren*, however, even in light of the rather inconsequential legal practice it can be established that apart from extreme cases ethnic affiliation may not be a lawful basis of reasonable suspicion or probable cause necessary to restrict freedom. At the same time Amendment XIV is still a workable protection tool but its successful evocation requires extensive data collection and in-depth research.

It is also worth mentioning that the public attitude, the widespread despise of ethnic profiling by the vast majority of citizens changed radically following September 11, 2001, and although it is being condemned by highest level politicians like president Barack Obama, ethnic-based selection in fighting against terrorism became a tolerated or supported practice by the majority. Irrespective of what future will bring, the failures of past practice caused incurable social harms in the United States, since ethnic profiling applied in the war on drugs resulted in an unprecedented scale of criminalization and incarceration of members of the Black community and the war was not won by state either. Ethnic profiling applied in the new war, the war on terrorism, targets another group, the Muslim population. It seems that by not having learned the lessons of past mistakes the US will “manage” to alienate this minority groups as well and collectively label the whole community as suspicious.

4. International standards and the practice of the European Court of Human Rights

Chapter IV outlines the international soft-law about ethnic profiling citing numerous legal instruments (recommendations and standards), then it focuses on the practice of the European Court of Human Rights (ECtHR). The ECtHR has not yet decided a case providing direct and clear standards for the legal evaluation of ethnic profiling therefore the role of this part of the study is there to “prognose” how the Court would act and argue for how it should decide in such a case. The analysis concludes that ethnic profiling is a form of discrimination in light of

the ECtHR standards and ID checks (or stop and searches) are police measures that restrict rights that fall within the ambit of other Conventional rights (Article 5 and Article 8 can be evoked), therefore Article 14 of the Convention applies to these measures. The author holds that according to European standards and assessed in light of the proportionality test used by the ECtHR, ethnic profiling by police cannot be justified and is consequently unlawful. At the end of the chapter the author argues for the necessity of regulating ethnic as a *sui generis* discriminatory action in the Hungarian and EU laws, because in individual cases it is almost impossible to prove ethnic profiling due to the high level of discretion in most of such cases, and concepts in the field of anti-discrimination referring to practice and not individual action (indirect discrimination, harassment) cannot be applied to ethnic profiling. Therefore, the need for effective legal protection justifies the necessity of an autonomous ethnic profiling definition.

5. Empirical data from some European countries

Chapter V considers empirical research studies carried out in different European countries into police practice: The countries covered are the United Kingdom, France, Spain, Bulgaria and Russia. Almost all of the research studies described prove the presence of ethnic profiling in the given country's police practice, and point out that in none of the states researched was the method proven to be effective – in fact the results show to the contrary that ethnic profiling is ineffective everywhere.

6. Ethnic profiling in Hungary – observations and recommendations

Chapter VI deals exclusively with ethnic profiling in Hungary. It outlines three research studies carried out during the past ten years into this subject, outlines the results and conclusion of the qualitative and quantitative research studies which are completely the same as those experienced in the US and the European countries covered by Chapter V. Based on the three research studies described it can be established without reasonable doubt that ethnic profiling is present in the ID check practice of the Hungarian police. Despite the fact, that no measures were taken by the Hungarian police or the Ministry of Interior to face the problem, although the STEPSS research report of 2009 detailed in the study, contained several recommendations, some of them are repeated in the thesis as well:

a) Amendment of Police Act

Although the amended legal definition of an ID check that came into effect on 1 January 2008 is more detailed than the previous one, the current regulation still confers almost unrestricted power on police officers to stop and ID check whomever they want. Reference to the still rather abstract possible reasons listed in Article 29 of the Police Act (e.g. crime prevention) does not adequately explain why it was necessary to establish an individual's identity. In short, the amendment does not truly restrict the power of the police to ID check citizens.

One possible solution would be to oblige police officers to communicate to the person subject to an ID check what the specific, legally permitted basis is for the establishment of that person's identity and on what concrete factual ground he/she thought that the legally permitted basis is actually in place in that particular case. In addition at the citizen's request, the officer would have to provide him/her with a written certificate about the ID check which contains the justification for the measure. In case the officer refuses to give a concrete reason for the ID check (for example, by referring to the needs of public security, which the Police Act allows), a certificate evidencing the action taken should be given to the ID checked person, regardless of whether that individual requests one. The provision of a certificate should also be obligatory if the ID check is followed by a search. A search is such a deep intrusion of privacy that it justifies the introduction of extra legal obligations.

b) Ethnic data collection

See the next Chapter of the thesis.

c) Institutionalized relationship and discourse between local communities and the police

Beyond these amendments to the law, it is also of key importance to establish communication between local minority groups and the police in a regular and institutionalized manner. It is important that the representatives of the community know the professional background of police measures, that they inform the local citizens about the reasons or explanations of the possibly disproportionate ID check practice. Should there be no reasonable explanation for the unbalanced patterns, the Police is to change their own practice.

d) Training of police officers

Combating discrimination and changing the practice of an institution with several tens of thousands of employees certainly requires training. The training needs to be introduced at two

different levels of the officers' educational process: 1) a training integrated into the standard curriculum of police colleges and police secondary schools, and 2) a special in-service training for officers who have already completed their studies. In order to be most effective, it is essential that the training be adapted to the needs of the different officer ranks. Supervisors need practical training on how to identify and address discrimination among the officers that they supervise, whereas patrol officers need specific practical training on how to conduct police work in a non-discriminatory manner. It is advisable to include members of the Roma community into the trainings.

e) Improving the performance assessment of police officers

As interviews with higher ranking police officers suggest, the number of ID checks is often used in assessing police officers' efficiency. To improve the quality of ID checks, the value placed on the quantity needs to be "repositioned", i.e. regarded as merely one factor in data management, rather than as a finite measure of police efficiency.

In order to achieve this goal new and reformed performance assessment tools should be introduced. Evaluation of effective policing should not rely on any one factor, such as the number of perpetrators caught, the number of fines imposed for committing a petty offence, or the number of ID checks conducted. The assessments, however, should take into account the citizens' satisfaction with local police work. Citizen input provides an incentive for under-performing police units to focus on community relations rather than, as in the current system, on data manipulation. Finally, the effectiveness of ID checks should be systematically monitored and the results need to be incorporated into operational practice.

f) Review and improve supervision structures

Patrol officers have too much autonomy. Supervisors need to be trained on how to supervise street patrols best and supervisory mechanisms need to be put in place so that discrimination can be not only be recognized, but also acted upon. The efficiency of ID checks need to be regularly monitored and the experiences need to be used in developing institutional practices.

7. The possibility and necessity of ethnic data collection

The last chapter focuses on the necessity and possibility of introducing ethnic data collection in Hungary. Ethnic data collection is strictly prohibited in Hungary for good reasons:

However, there are several considerations calling for the introduction of ethnic data collection in policing to make combating ethnic profiling realistic and viable. The chapter concludes that anonymous ethnic data collection does not restrict one's right to human dignity or informational self-determination, however data protection concerns are valid even in the case of processing perceived ethnic data: Therefore processing perceived ethnic data could be rendered lawful with due respect for strict data protection rules. This means that whenever it is possible for the purposes of the data collection, it must be done in an anonymous way, should such method not suffice, the protection rules applying to sensitive data must be abided by. If this is true, then providing for objective criteria in determining perceived ethnicity does not violate the right to self-determination, but the opposite might be true: objective criteria might guide perception. Since objective criteria do not change personal identity, they do not even restrict its free choice.

The author's publications in topics relevant for the thesis

1. 70/A. §. [*A diszkrimináció tilalma*] (Ban on Discrimination) in.: Az Alkotmány kommentárja (Commentary to the Constitution) (szerk./ed. Jakab András),. Budapest, Századvég Kiadó, 2009. (co-author)
2. *Diszkrimináció az igazoltatási gyakorlatban – egy empirikus kutatás eredményei* (Discrimination in the ID Check Practice – Result of an Empirical Research) (co-authored with András Kristóffal Kádár and András Lászlóval Pap). Rendészeti Szemle 2009/9 pp.50-67
3. *Etnikai profilalkotás a bűnüldözésben.* (Ethnic profiling in policing) In: BUKSZ, 22. évf. 2010. 4. 353.
4. *Etnikai profilalkotás a magyar rendőrség igazoltatási gyakorlatában* (Ethnic profiling in the ID Check Practice of the Hungarian Police co-author). In: Majtényi Balázs (szerk.) *Lejtős pálya – Az antidiszkriminációs és esélyegyenlőségi szabályozásról*, Föld-Rész könyvek. Budapest: L'Harmattan, 2009, pp. 111–134.
5. Kádár András Kristóf - Moldova Zsófia - M. Tóth Balázs - Pap András László: *Igazolt igazoltatás* (Justified ID Checks), Belügyi Szemle, 2008. évi 5. sz., 106-132. o.
6. *Percepció alapú etnikai adatok és önrendelkezési jog.* (Perceived Ethnic Data and the Right to Self-determination) in: Föld-Rész könyvek. Budapest: L'Harmattan, Föld-rész, II. évfolyam, 3-4. szám, 147–157. pp.
7. *Police Ethnic Profiling in Hungary*, Police Science and Research Bulletin, 2009/2.
8. *Szigorúan ellenőrzött iratok* (published also in English with title: *Control(led) Group*), Hungarian Helsinki Committee, 2008 (co-author)
9. *Ethnic Profiling in ID Checks by the Hungarian Police* (co-author), Policing and Society (forthcoming in December 2011)
10. *Az etnikai profilalkotás és az antidiszkriminációs jog.* (Ethnic Profiling and Anti-discrimination Law) Föld-Rész könyvek (forthcoming)