



FACULTY OF LAW
Lund University

Elin Sjöberg

Ethnic profiling in Sweden

– can it be legalised through the
test of proportionality?

JURMO2 Graduate thesis

Graduate thesis, Master of Laws program
30 higher education credits

Supervisor: Alejandro Fuentes

Semester of graduation: Period 1, Fall semester 2019

TABLE OF CONTENT

SUMMARY	4
SAMMANFATTNING	5
PREFACE	6
ABBREVIATIONS	7
1 INTRODUCTION	8
1.1 General background	8
1.2 Purpose and research question(s)	9
1.3 Methodology and material	9
1.4 Scope and delimitations	11
1.5 Previous research	11
1.6 Terminology	12
1.7 Disposition	13
2 ETHNIC PROFILING	15
2.1 Introduction	15
2.2 Definition	16
2.2.1 International legislation	16
2.2.2 Legal doctrine	18
2.3 The controversiality of ethnic profiling	19
2.4 Is there a correlation between crime and ethnicity?	21
2.4.1 International studies	21
2.4.2 Swedish studies	24
2.4.3 Reading the statistics	28
2.5 Racism in Sweden	29
2.5.1 History of racism in Sweden	29
2.5.2 The Swedish legislator approach to ethnic discrimination	31
2.5.3 The REVA-project and controls in the subway in Stockholm	32
2.6 Conclusion	33
3 THE INTERNATIONAL LEGAL REGULATION	35
3.1 Introduction	35
3.2 United Nations	35
3.2.1 Ethnic discrimination	35
3.2.2 Ethnic profiling	36

3.3	European Union	37
3.3.1	Ethnic discrimination and its justification	38
3.3.2	Ethnic profiling	39
3.4	Council of Europe	41
3.4.1	Ethnic discrimination and its justification	42
3.4.2	Ethnic profiling	46
3.5	Conclusion	48
4	THE SWEDISH LEGAL REGULATION	50
4.1	Introduction	50
4.2	Ethnic discrimination	50
4.3	Ethnic profiling	52
4.4	Law enforcement	52
4.4.1	The registration of Roma people	54
4.5	Conclusion	56
5	CRITICAL ANALYSIS OF THE TEST OF PROPORTIONALITY AND ETHNIC PROFILING	58
5.1	Introduction	58
5.2	Effectiveness	58
5.2.1	Identifying criminals	59
5.3	Necessity	61
5.3.1	The “least intrusive”-test	61
5.4	Harm	63
5.4.1	Undue burden	63
5.4.2	Effects of ethnic profiling	64
5.5	Conclusion	66
6	CONCLUSION	67
7	BIBLIOGRAPHY	71

Summary

In the USA and the UK, terms such as “driving while black” are well known and the countries require their law enforcement to present statistics on the correlation between law enforcement and ethnicity. This is not the case in Sweden, where the term “ethnic profiling” is fairly new to the population. However, in 2013, it was revealed that a district of the Swedish law enforcement had processed personal information on around 4 000 individuals with Roma descent in a list called “*Travellers*”. During the proceedings in the Court of Appeal, the Chancellor of Justice agreed that the registration constituted a breach of the protection against discrimination in Article 14 of the European Convention of Human Rights and the Court concluded that the individuals had been registered because of their ethnicity.

There are arguments that ethnic profiling is not unlawful because the overrepresentation of people of colour in criminal statistics display reality, making the use of ethnic profiling a necessary evil. However, there are also arguments that criminal statistics is a result of the law enforcement’s prejudice, that people of colour are more regularly targeted by officers than whites. There is not a legal definition of ethnic profiling and the legal regulation of the practice is not clear, however the Council of Europe articulates that ethnic profiling constitutes ethnic discrimination.

The thesis analyses whether there are signs of institutional and structural discrimination in the Swedish law enforcement and if ethnic profiling can be legalised through the test of proportionality articulated in Article 14 of the European Convention of Human Rights or if the practice is unlawful.

Sammanfattning

I USA och Storbritannien är termer såsom "driving while black" (översatt ungefär till "vara mörkhyad och köra bil") välkända och båda länderna kräver att deras polismyndigheter samlar in data rörande polisens arbete och etnicitet. Detsamma går inte att säga gällande Sverige där termen "etnisk profilering" inte är lika välkänd. 2013 avslöjades det dock att polismyndigheten i Skåne haft ett register med cirka 4 000 romer kallat "*Kringresande*". Justitiekanslern medgav i hovrätten att registret innebar en överträdelse av diskrimineringsförbudet i Artikel 14 av Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna. Domstolen konstaterade att registret skapats med utgångspunkt i individernas etnicitet.

Det kan argumenteras att etnisk profilering inte är lagstridigt då överrepresentationen av "icke-vita" i kriminalstatistik visar verkligheten, vilket medför att etnisk profilering är ett nödvändigt ont. Det kan dock också argumenteras att statistiken är ett resultat av polisens fördomar och att polisen därför oftare kontrollerar "icke-vita" än "vita". Det finns ingen legal definition av etnisk profilering och den juridiska regleringen är inte tydlig. Europarådet har emellertid uttryckt att etnisk profilering utgör etnisk diskriminering.

Denna uppsats analyserar huruvida kriminalstatistiken visar tecken på institutionell och strukturell diskriminering inom polismyndigheten samt huruvida användning av etnisk profilering kan legaliseras genom proportionalitetstestet i Artikel 14 i Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna eller om utövandet är lagstridigt.

Preface

At last, my turn to finish law school has come. I don't know where to begin saying how much fun I've had and how much I've learned and experienced during these years. Every fun moment with ELSA in Sweden, Denmark and Ukraine and with Var Glad spexet. All the fun and hard work with Lundakarnevalen and finally, the exchange in Canada.

Lund has taught me how to ride a bike in every weather, that it's possible to study the day after Valborg and the best way to move. I cannot count all the times I've had to come up with costumes for a party, but my medals tell me how many balls I've been to.

It is with a feeling of confliction that I graduate. My life will never look the way it has during law school and going out on a Wednesday will not be quite as possible in the future. However, I do believe that it is time for me to take the next step.

A simple thank you doesn't seem enough but I'm extremely grateful for everyone who has been there throughout these years and those who I've met along the way. And a thank you to Lund, I'm going to miss you.

Lund, January 2020

Elin Sjöberg

Abbreviations

BRÅ	Brottsförebyggande Rådet (The Swedish National Council for Crime Prevention)
CJEU	Court of Justice of the European Union
CoE	Council of Europe
DA	Discrimination Act
ECHR	European Convention on Human Rights
ECRI	European Commission on Racism and Intolerance
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
ICERD	International Convention on the Elimination of All Racial Discrimination
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
USA	United States of America
PA	Police Act
PDA	Police Data Act
REVA	Rättsäkert och effektivt verkställighetsarbete

1 Introduction

1.1 General background

Terms such as “driving while black” and “flying while black” is well known in the United States of America and the United Kingdom. Both countries have extensive statistics on the matter that demonstrate that people of colour are statistically more likely to be arbitrarily stopped and searched than whites. The area is however scarcely researched regarding the Swedish law enforcement’s, as an institution or by each officer, potential use of ethnic profiling when executing its mandate provided to it by the government.¹ Ethnic discrimination executed by the employer is on the contrary well researched in Sweden due to the fact that protection against ethnic discrimination on the workplace is specifically mentioned in the Swedish Discrimination Act.²

In 2012 and 2013, a discussion on the Swedish law enforcement potential use of ethnic profiling was raised for two reasons. The first one was because the law enforcement executed internal border controls, mainly in the subway in Stockholm, which became associated to a project by the government, abbreviating to REVA.³ The law enforcement was accused of using ethnic profiling when officers stopped individuals suspected of being unlawfully in the country. Because of the great media attention, the internal border controls in the subway were cancelled.⁴ The second reason was the registration of Roma people by the law enforcement in Skåne. The file was discovered to include personal information regarding around 4 000 individuals, including children and deceased. The Equality Ombudsman articulated that the registration possibly constituted ethnic profiling. Some of the individuals filed a lawsuit against the government where the Swedish government agreed to have violated Article 14 of the European Convention on Human Rights,

¹ SOU 2005:56, p. 379; E.U. Network of Independent Experts on Fundamental Rights (2006), p. 50.

² SOU 2005:56, p. 379; Diskrimineringslag (2008:567).

³ Leander (2014), pp. 5–6; Stark, Det enda de pratar om är rädslan för polisen, Tidningen Republik.

⁴ Civil Rights Defenders (2017), p. 7; Edman, Wicklén, Gränspoliserna stoppar id-kontrollerna i t-banan, svt.se.

and the Court of Appeal concluded that the registration had been executed because of the ethnicity of the individuals.⁵

Protection against ethnic discrimination is regulated in both international and national Swedish legal instruments. A legal definition of ethnic profiling is however not present, neither is a protection against ethnic profiling. There is, therefore, a need to determine the legal situation regarding ethnic profiling and if ethnic profiling is, or can be, lawful.

1.2 Purpose and research question(s)

The overall purpose of the thesis is to provide an understanding of the legal regulation of ethnic profiling. More precise, the thesis aims at elucidating the possibility for Swedish law enforcement to use ethnicity as a reason for law enforcement action when executing its mandate provided by the Swedish government.

To reach the purpose, the following questions will be answered:

1. Is ethnic profiling used as a practice by Swedish law enforcement?
2. How is ethnic profiling regulated in Swedish and international legal instruments?
3. Can ethnic profiling be legalised through the test of proportionality in Article 14 of the ECHR?

1.3 Methodology and material

The thesis is built on a legal analytical method through which the current legal situation is analysed and criticised. The current legal situation, however, needs to be determined through a legal dogmatic method. The aim of the legal dogmatic method is to explain the current legal situation using legal resources. This implies determining and interpreting the legal sources and systemizing them.⁶ The legal sources constitutes laws and regulations,

⁵ T 6161–16, pp. 7 and 9–10.

⁶ Sandgren (2018), pp. 49–51.

jurisprudence, preparatory work and legal doctrine. Whilst the legal regulations and the jurisprudence have the authority, the legal doctrine can convince through argumentation.⁷ Contrary to the legal dogmatic method, every kind of source is allowed in the legal analytic method.⁸

Roughly, the thesis is divided into three parts. It starts with a conceptual chapter to ethnic profiling, aimed at providing an understanding of the subject and the necessity in discussing it. This chapter uses international legislation and legal doctrine to provide a definition of ethnic profiling. It further uses legal doctrine and preparatory work to understand studies on the relation between ethnicity and crime and the racial situation in Sweden. Following is two chapters on the current international and national legal situation on ethnic discrimination, ethnic profiling and, when appropriate, law enforcement. In the first of the two chapters, international legislation and soft law from the United Nations, the European Union and the Council of Europe are presented. In the second, Swedish legislation is presented using legislation and preparatory work. Following, a critical analysis on the legalisation of ethnic profiling is provided. This chapter is mainly based on the legal doctrine and soft law emanating from international legislation. Finally, a conclusion is given.

As understood, the thesis is written using both a *de lege lata* and a *de lege ferenda* argumentation, derived from the legal dogmatic method. It is through the *de lege lata* argumentation the current legal situation is determined whilst the *de lege ferenda* argumentation provide an analysis on the unsolved problem. It is difficult to criticise the situation through legal regulations and the jurisprudence which is why the legal doctrine provides that opportunity for a deeper understanding.⁹

⁷ Kleineman (2018), p. 28.

⁸ Sandgren (2018), p. 50.

⁹ Kleineman (2018), pp. 36–37.

1.4 Scope and delimitations

Due to the author's restriction in language, material, *inter alia* cases from the European Court of Human Rights and Court of Justice of the European Union, have been read in English. For the same reason, a summary of the case from the Federal Constitutional Court in Germany have been read in English instead of the complete decision in German¹⁰. Also, as a reason of the author's knowledge in language, certain material has been read in Swedish and Swedish material is used.

The scope of the thesis is not limited towards certain ethnic or societal groups. Instead all groups that can be subject to ethnic discrimination are included. Therefore, specific legislation regarding minorities are not presented. Due to time limitation and the general limitation of the thesis, other rights which ethnic profiling might affect besides the protection against ethnic discrimination are not presented.

It can be noted that a case currently at the Swedish Supreme Court concerns a private company possibly executing ethnic profiling at an airport. The Supreme Court has referred a question of the case to the Court of Justice of the European Union, which have yet to declare a decision. Pending the Court of Justice's decision, the Supreme Court might decide if the actions constituted ethnic profiling and the legality of the actions.¹¹ Since the case waits for an answer from the Court of Justice of the European Union, it will not be discussed in this thesis.

1.5 Previous research

Research regarding ethnic profiling is well developed in countries such as the United Kingdom and the United States of America since the 1960s.¹² There is however a lack of research on criminal and ethnic profiling, as well as on

¹⁰ The summary provided on the webpage of the German Federal Constitutional Court was written by the Constitutional Court.

¹¹ The Swedish Supreme Court, protocol 2018-12-18 in case Ö2343-16.

¹² Hydén and Lundberg (2004), p. 157.

general ethnic aspects within law enforcement, in Sweden and other Member States of the Council of Europe.¹³ The need for more extensive research in Sweden has been articulated in legal doctrine.¹⁴ The research that has been executed regarding Swedish law enforcement spans between 1999 and 2013 and includes: Carlström on the work by law enforcement, Granér on the culture within the law enforcement, Pettersson on ethnicity and law enforcement's checks for narcotics, Östlund on law enforcement's use of ethnicity, two governmental reports on discrimination in Sweden and reports from the Swedish National Council for Crime Prevention. To be noted is that the research mentioned have not focused on the use of ethnic profiling.

Regarding research executed outside of Sweden, some studies are particularly interesting. These are: the studies executed by Holmberg and Sollund, which are similar to Carlström's and Granér's studies but on Danish and Norwegian law enforcement, The Stephen Lawrence Inquiry in the UK and the EU–MIDIS II study on discrimination.

1.6 Terminology

In an attempt to make the thesis as easily read and coherent as possible, broader and more inclusive terms are used, including “law enforcement” instead of police. The term “people of colour” is used as an inclusive term to cover as much as possible. It therefore includes terms such as immigrants, individuals with one or two parents from another country and foreigners. Both “people of colour” and the term “white” is chosen in an attempt to avoid the enforcement of racial ideas of separating the human species into different races. If another term is used, for example regarding internal border controls, it is because the term is used in legislation or needs to be specified.

¹³ Hydén and Lundberg (2004), p. 157; Explanatory memorandum to ECRI General Policy Recommendation No. 11 on Combating Racism and Racial Discrimination in Policing, European Commission against Racism and Intolerance, Council of Europe, adopted 29 June 2007, p. 40.

¹⁴ Civil Rights Defenders (2017), p. 33.

In compliance with Swedish legislation¹⁵, the thesis uses the words ethnic and ethnicity instead of race, knowing that international legislation uses the word race. Race is however used when referring to certain international cases and legislation. In the doctrine there are arguments of a difference in terminology between ethnicity and race. While ethnicity refers to cultural differences between groups, race refers to people's difference in physical appearance.¹⁶ This has also been explained in jurisprudence of the European Court of Human Rights.¹⁷ In the thesis however, the two words are synonyms as argued by the Swedish legislator.

As articulated by Hydén and Lundberg, there is a slight difference between the terms “structural discrimination” and “institutional discrimination” even if the terms sometimes are used as synonyms. Structural discrimination is a more abstract term that explains structures in society. Institutional discrimination explains structures within institutions of societies, *inter alia*, law enforcement and the government. In some situations, the two different discriminations overlap.¹⁸ This is how the two terms will be used in the thesis.

1.7 Disposition

To provide a general understanding on the thesis's topic, it starts with a chapter including the definition of ethnic profiling, the controversy of the topic and criminal statistics regarding ethnic discrimination and ethnic profiling. The situation in Sweden, including its history of racism and a modern example of possible ethnic profiling is provided. Chapter two, and three presents the international and national legal situation. The chapters aim at providing the reader with an understanding of how ethnic profiling is viewed by the legislator and how far the mandate of the law enforcement reaches. Therefore, legislation on ethnic discrimination, ethnic profiling and law enforcement is provided. Thereafter, a critical analysis is presented,

¹⁵ See Chapter 2.5.2.

¹⁶ Waddington, Stenson and Don (2004), p. 892.

¹⁷ *Timishev v. Russia*, Nos. 55762/00 and 55974/00, ECtHR, 13 December 2005, para. 55; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, ECtHR, 22 December 2009, para. 43.

¹⁸ Hydén and Lundberg (2004), p. 168.

focusing on the possible legalisation of ethnic profiling through the test of proportionality and its components of effectiveness, necessity and harm articulated in international legislation. Here the views on ethnic profiling in the doctrine are presented. Finally, a conclusion on ethnic profiling is provided.

2 Ethnic profiling

2.1 Introduction

The use of criminal profiling by law enforcement emerged in the 1970s in United States of America¹⁹ with the focus of catching serial killers. The practise expanded in the 1980s to include finding possible drug dealers why African Americans and individuals from Latin America came under special scrutiny.²⁰ The difference between finding a serial killer and finding a drug dealer emanates from the fact that the serial killer has already committed a crime. Regarding drug dealing, criminal profiling is used as prevention of crime.²¹

Before the events on 11th of September 2001 in New York City, USA²², several American states had legislation regarding law enforcement's use of ethnic profiling and the population believed that it was not an acceptable practice for law enforcement.²³ The former American President Bill Clinton condemned the use of ethnic profiling and ordered a collection of data to get statistics of the use.²⁴ After 9/11, the former President George W Busch declared a "war on terrorism" and Arabs and Muslims were especially targeted because the act of terror was executed by Al Qaida.²⁵ The use of ethnic profiling increased in the USA and became more accepted by society after the events.²⁶ In Europe, Member State of the Council of Europe had a margin of appreciation through a test of proportionality before 9/11 in regard to terrorism. In 2009, the European Court of Human Rights²⁷ had not yet determined if the margin of appreciation were still present after 9/11.²⁸

¹⁹ Hereinafter USA.

²⁰ De Schutter and Ringelheim (2008), p. 361; Harris (2002), p. 11.

²¹ De Schutter and Ringelheim (2008), p. 361.

²² Hereinafter referred to as 9/11.

²³ Harris (2002), pp. 8–9.

²⁴ Weitzer and Tuch (2002), p. 435.

²⁵ Bonikowski (2005), p. 319.

²⁶ Harris (2002), p. 9.

²⁷ Hereinafter ECtHR.

²⁸ Neild (2009), pp. 27–28.

It has been argued that ethnic profiling is used as a practise by law enforcement within Europe, including Sweden. With only the United Kingdom²⁹ gathering data from law enforcement, there is a shortage of statistics of the actual use of ethnic profiling within Europe.³⁰ The practice can also occur when law enforcement decides to pay special attention to certain types of crimes or specific areas without realising what impact that the attention might have on the community.³¹

2.2 Definition

There is no universal definition of the term ethnic profiling, however definitions have been provided in both soft law³² and legal doctrine.³³

2.2.1 International legislation

Several bodies of the European Union³⁴ have articulated definitions of ethnic profiling. The definition provided by the European Parliament is:

“the practice of using “race” or ethnic origin, religion, or national origin, as either the sole factor, or one of several factors in law enforcement decisions, on a systematic basic, whether or not concerned individuals are identified by automatic means”³⁵

The European Union Network of Independent Experts in Fundamental Rights provides the following definition of in their report:

“The practice of classifying individuals according to their ‘race’ or ethnic origin, their religion or their national origin, on a

²⁹ Hereinafter UK.

³⁰ Neild (2009), pp. 32, 34 and 53.

³¹ Neild (2009), p. 22.

³² Soft law constitutes international guidelines which are not binding for States: See A Dictionary of Law, *soft law*.

³³ De Schutter and Ringelheim (2008), p. 363.

³⁴ Hereinafter EU.

³⁵ European Parliament recommendation to the Council of 24 April 2009 on the problem of profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control (2008/2020(INI)), at D; See also De Schutter and Ringelheim (2008), p. 363.

*systematic basis, whether by automatic means or not, and of treating these individuals on the basis of such a classification.”*³⁶

In its guide, the European Union Agency for Fundamental Rights³⁷ states that ethnic profiling is unlawful unless ethnicity serves as one of several factors of the profiling.³⁸ The FRA defines ethnic profiling as:

*“where a decision to exercise police powers is based only or mainly on that person’s race, ethnicity or religion”*³⁹

The Council of Europe⁴⁰ articulates a definition of ethnic profiling through the European Commission against Racism and Intolerance’s⁴¹ General Policy Recommendation No. 11, which is based on the definition of racial discrimination in ECRI’s General Policy Recommendation No. 7.⁴² It defines ethnic profiling as:

*“The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities.”*⁴³

It is rare that discrimination is executed based on merely one ground of discrimination. Therefore, the Explanatory Memorandum to ECRI Recommendation No. 7 articulates that definitions of discrimination that requires the discrimination to have been executed due to merely one ground of discrimination should be used restrictively.⁴⁴

³⁶ E.U. Network of Independent Experts on Fundamental Rights (2006), p. 9.

³⁷ Hereinafter FRA.

³⁸ FRA (2010a), pp. 13 and 18.

³⁹ Open Society Justice Initiative (2012), p. 19.

⁴⁰ Hereinafter CoE.

⁴¹ Hereinafter ECRI.

⁴² Explanatory Memorandum to ECRI General Policy Recommendation No 11, at 27.

⁴³ ECRI General Policy Recommendation No 11, at 1.

⁴⁴ Explanatory Memorandum to ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, European Commission against Racism and Intolerance, Council of Europe, adopted 13 December 2002, revised 7 December 2017, at 13.

2.2.2 Legal doctrine

The definition of ethnic profiling in the doctrine varies but is generally described as the law enforcement focusing on appearance and perceived ethnic origin instead of behaviour.⁴⁵ The main elements are that law enforcement decides to intervene towards an individual or a group based on ethnicity or national origin.⁴⁶ It is not necessary for ethnicity to have been used consciously.⁴⁷ The majority of definitions does not find it necessary for ethnicity to be the mere reason for why the individual was subject to actions by law enforcement.⁴⁸ There are scholars who argue that a narrow definition, where ethnicity is the only ground for action, does not serve its purpose of explaining which law enforcement practice constitutes ethnic profiling because multiple factors are included in decisions taken by the law enforcement.⁴⁹ Further, it has been argued that ethnic profiling is executed when law enforcement takes action towards an individual, not because of the individual's ethnicity per se, but because of the notion that the person is included in a certain group of people which is overrepresented in criminal statistics.⁵⁰

The doctrine is fairly conformed in that the definition of ethnic profiling includes if law enforcement stops every person of a certain ethnicity because of the notion that people with this ethnicity are more prone to commit crimes than the majority population.⁵¹ It is however discussed whether the definition includes the situation where law enforcement is searching for a specific suspect where ethnicity constitute a main element of the description after a crime has been committed.⁵² Law enforcement are in these situations not using the notion that a certain ethnic group is more prominent in criminal

⁴⁵ Risse and Zeckhauser (2004), p. 136; Neild (2009), p. 19; Ramirez, Hoopes and Quinlan (2003), pp. 1204–1205.

⁴⁶ It can be noted that religion sometimes is included in the list of grounds.

⁴⁷ Ramirez, Hoopes and Quinlan (2003), p. 1205.

⁴⁸ Risse and Zeckhauser (2004), p. 136; Neild (2009), p. 19; Ramirez, Hoopes and Quinlan (2003), pp. 1204–1205.

⁴⁹ Neild (2009), pp. 22 and 24; Ramirez, Hoopes and Quinlan (2003), p. 1204.

⁵⁰ Östlund (2013), p. 97.

⁵¹ Open Society Justice Initiative (2012), p. 17.

⁵² Open Society Justice Initiative (2012), p. 17; Ramirez, Hoops and Quinlan (2003), pp. 1205 and 1215–1216; Harris (2002), p. 11; Neild (2009), p. 20; FRA (2018a), p. 71.

statistics and therefore more interesting to law enforcement.⁵³ Stopping every individual who matches the suspect description does therefore not constitute discrimination.⁵⁴ However, it must be used during a short period of time and at a particular place and if the suspect description is vague and creates a wide pool of suspects, it constitutes unlawful ethnic profiling.⁵⁵ Some scholars argue that the mere knowledge of a suspect's ethnicity has too much influence on law enforcement actions that it should not be included in suspect profiles.⁵⁶ Regarding future crimes, crimes not yet committed, ethnic profiling has been argued only lawful when used on concrete information on a suspect.⁵⁷ Using ethnicity more general, as an indicator of who might be participating in crime, will be a waste of law enforcement's resources.⁵⁸

2.3 The controversiality of ethnic profiling

The objective of the law enforcement is to secure and not imperil fundamental rights and freedoms.⁵⁹ Law enforcement officers have been described as “*street-level bureaucrats*” who possess great power when implementing governmental policies to the public and room for discretion when implementing policies and regulations is necessary.⁶⁰ Criminal profiling and ethnic profiling are two separate practices. Criminal profiling is used before a crime has been committed as a prevention method or in the aftermath of a crime when trying to find the offender.⁶¹ When criminal profiling starts to include elements such as skin colour or national origin, the practice has developed into ethnic profiling.⁶² Whilst discretionary power can be used in a positive, more lenient, way towards the individual, eventual prejudice of the

⁵³ Open Society Justice Initiative (2012), p. 17; Ramirez, Hoops and Quinlan (2003), p. 1205.

⁵⁴ Open Society Justice Initiative (2012), p. 17.

⁵⁵ Ramirez, Hoops and Quinlan (2003), pp. 1215–1216; Neild (2009), p. 20.

⁵⁶ Neild (2009), p. 26.

⁵⁷ Ramirez, Hoops and Quinlan (2003), p. 1206.

⁵⁸ Harris (2002), p. 11.

⁵⁹ Open Society Justice Initiative (2005), p. 8.

⁶⁰ Meyers and Vorsanger (2003), pp. 245–246.

⁶¹ Open Society Justice Initiative (2012), p. 17; Hydén and Lundberg (2004), p. 160.

⁶² De Schutter and Ringelheim (2008), p. 362.

law enforcement officer can influence the use of the power in a discriminative way.⁶³

The issue with ethnic profiling is that it assumes a correlation between ethnicity and criminal behaviour and the law enforcement officer presumes the ethnicity of an individual.⁶⁴ The practice can occur every time an opportunity is presented for the law enforcement officer to execute a discretionary decision towards an individual, *inter alia* stop and searches, internal border controls and the prevention of terrorism.⁶⁵

Ethnic profiling has been argued and legitimised through different perspectives, one of them being a utilitarian perspective. The reasoning is that the possible harm that ethnic profiling has on the subjected individuals must be weighed against the public good that the practice results in, *inter alia* public security. If the scale is not tipped in favour of public good, then ethnic profiling is unlawful.⁶⁶ Further, there is the consensus perspective through which it is argued that the society is defined by the sharing of the same interests and values. The aim of the society is consensus⁶⁷ and the aim of the law enforcement is to maximize crime prevention. Therefore, people of colour should be checked more frequently than whites and the focus of the law enforcement should be on areas of the city where most crimes are committed. The consensus perspective results in different social groups being target differently by law enforcement. However, that is the result of law enforcement streamlining its work, not a result of discrimination. If discrimination would happen, the solution is a composition of the law enforcement that represents the society in terms of diversity.⁶⁸

Finally, is the conflict theory. This perspective argues that society is built around the notion of conflicting interests for different societal groups and that

⁶³ Meyers and Vorsanger (2003), p. 251.

⁶⁴ Open Society Initiative (2005), p. 7.

⁶⁵ See for example FRA (2010a), p. 12.

⁶⁶ Risse and Zeckhauser (2004), p. 132.

⁶⁷ Oxford Reference, *consensus theory*.

⁶⁸ Civil Rights Defenders (2017), p. 12.

every societal group wants its interest fulfilled. The strongest group is the one in charge and in control of the law enforcement and the legislator. This group's interests are inevitably the ones focused on and the power of the law enforcement is used to control threats from other groups. Threats from dangerous groups, *inter alia* minorities and poor, on interests of the majority are minimized.⁶⁹ Differences in ethnicity are therefore established and structural discrimination becomes a part of the governmental machinery. The consequence of focusing resources on "problem areas" is that inferior groups are criminalized and stopping a person of colour based on ethnicity is perceived as appropriate. The prevention work done towards people of colour result in self-fulfilling when stigmatization, not ethnicity, leads to crime.⁷⁰

2.4 Is there a correlation between crime and ethnicity?

The criminal statistics and studies executed regarding law enforcement and the potential use of ethnic profiling in Sweden is limited, which will be showed below. Therefore, there is a need to examine what research has been carried out internationally and the result of these.

2.4.1 International studies

In 1999, people of colour made out 25 % of the inhabitants of New York City. Between January 1998 and March 1999, 50 % of individuals stopped by law enforcement were people of colour.⁷¹ Despite the high number, more people of colour were found innocent compared to the whites stopped.⁷² People of colour in the USA are twice as likely to be stopped while driving a vehicle than whites.⁷³ The use of drugs in the USA is five times higher for whites than people of colour. Even so, 62,7 % of individuals convicted of drug related crimes are people of colour.⁷⁴ It has further been found that the reaction from

⁶⁹ Petrocelli, Piquero and Smith (2003), pp. 1–2.

⁷⁰ Civil Rights Defenders (2017), p. 13.

⁷¹ Petrocelli, Piquero and Smith (2003), p. 4; Hydén and Lundberg (2004), p. 170.

⁷² SOU 2005:56, pp. 388–389.

⁷³ Bonikowski (2005), p. 320.

⁷⁴ SOU 2005:56, p. 390.

law enforcement officers is dependent on which area they are in. A harsher response is expected in areas where the majority population is made out of people of colour or if a person of colour is in a “white area”.⁷⁵

The Stephen Lawrence Inquiry was published 1999 and exposed institutional racism present throughout the whole British law enforcement institution. The racism had been subtle throughout the criminal investigation and had sometimes been executed unconsciously by the law enforcement officers. No one higher up had discovered the racism because it resulted from ordinary practices by law enforcement. Before the Inquiry was published, the UK law enforcement argued that it did not use ethnic profiling and if it was executed, it was executed by a few bad officers.⁷⁶ A decade after the Inquiry, individuals with a darker skin colour in the UK were subject to stops and searches almost seven times more frequently than whites. Individuals descending from Asia were twice as likely to be stopped.⁷⁷ Ten years after the Stephen Lawrence Inquiry, ethnic discrimination was still present in the British law enforcement.⁷⁸

According to a Danish study where law enforcement officers out on patrol were followed, many of the stops were executed based on the individual’s behaviour and appearance because law enforcement officers had a limited amount of time to decide who to stop.⁷⁹ This resulted in the use of stereotypes and ethnicity was used as a main reason to subject an individual of action.⁸⁰ A later study determined that Danish law enforcement officers divided the population into three groups, “customers” which are known to the law enforcement, “clientele” which are individuals who could be criminals based on their appearance and the “good Danish citizens”.⁸¹ These categories were used in order for law enforcement to know how to act in different situations and because knowing who to stop is key. Whilst women were always

⁷⁵ Bonikowski (2005), p. 320.

⁷⁶ SOU 2005:56, pp. 380–381.

⁷⁷ Phillips and Bowling (2012), pp. 381–382.

⁷⁸ Phillips and Bowling (2012), p. 392.

⁷⁹ Holmberg (2000), pp. 180 and 183–184.

⁸⁰ Holmberg (2000), pp. 184 and 188–189.

⁸¹ Holmberg (2003), p. 50.

categorised as “good Danish citizens”, people of colour were persistently criminals.⁸²

A study funded by the European Commission showed that, at the time of the study, 1,4 % of the Spanish population was of Roma descent whilst 25 % of the female population in Spanish prisons were Roma.⁸³ Simultaneously, the government of the USA released statistics determining that 25 % of the American population was people of colour whereas people of colour made up 60 % of individuals in federal prisons. According to the American government, the overrepresentation had remained the same for over a decade.⁸⁴

A study regarding the relationship between the law enforcement and people of colour in Norway interviewed and observed the law enforcement officers.⁸⁵ It established that the officers used derogative language and legitimised the use with the arguments that it was used in a descriptive way and that they were right to use it.⁸⁶ The officers also used the word “foreigner” to describe individuals who did not look “Norwegian” and found it difficult to differentiate between a “good” and a “bad” person of colour.⁸⁷ Further, officers argued that people of colour had themselves to blame for being controlled if, *inter alia*, they drove an expensive car or was in the “wrong” neighbourhood.⁸⁸ The study argued that the use of derogative and vague descriptive language resulted in ethnic discrimination and concluded that there was a norm of loyalty between the officers which created a division of “us” and “them” towards the public.⁸⁹

The study EU-MIDIS II reviewed information given by first- and second-generation Muslim immigrants to Member States of the EU. The study

⁸² Holmberg (2003), pp. 57–58.

⁸³ Open Society Justice Initiative (2005), p. 20.

⁸⁴ Open Society Justice Initiative (2005), p. 45.

⁸⁵ Sollund (2006), pp. 265 and 269.

⁸⁶ Sollund (2006), pp. 275 and 279.

⁸⁷ Sollund (2006), pp. 279–280.

⁸⁸ Sollund (2006), p. 284.

⁸⁹ Sollund (2006), pp. 277 and 279–280.

focused on discrimination and crimes with racial motives.⁹⁰ 16 % of the interviewees had been stopped by law enforcement within the previous 12 months. 7 % of the individuals stopped believed it was because of their ethnicity. The study concluded that a young individual is more likely to be stopped than an older individual and a male is more likely to be stopped than a female.⁹¹ Immigrants who felt that they had been subject to discrimination did not have the same attachment to the new country as immigrants that had not been subject to discrimination.⁹² Compared to the majority population, it was the individuals stopped that had the most trust in law enforcement. However, the low report rate on hate crime could demonstrate individuals' low confidence that such crimes would be properly investigated.⁹³

2.4.2 Swedish studies

Carlström executed an ethnological study on the work of the Swedish law enforcement in 1999 where she, *inter alia*, interviewed law enforcement officers and chiefs.⁹⁴ The study concluded that the officers used descriptive, derogative words for people of colour and used ethnicity as a ground to subject individuals to law enforcement actions, especially if the individuals had the same ethnicity as the big networks of criminals known by the law enforcement⁹⁵.⁹⁶

In 2004, Granér executed a study where law enforcement officers were interviewed and followed to examine the culture within the Swedish law enforcement.⁹⁷ One part of the study focused on racism. The study concluded that characteristics such as clothes, age and skin colour were used as grounds for control and that the officers used prejudicial language regarding every societal group, including people of colour, when talking amongst each other. It was further concluded that this kind of categorization ultimately can lead

⁹⁰ FRA (2018b), p. 7.

⁹¹ FRA (2018b), p. 17.

⁹² FRA (2018b), p. 58.

⁹³ FRA (2018b), p. 18.

⁹⁴ Carlström (1999), p. 16.

⁹⁵ For example, the Italian mafia or Chinese triad.

⁹⁶ Carlström (1999), pp. 72 and 79.

⁹⁷ Granér (2004), pp. 22 and 27–28.

to racism and prejudice, thereby challenging the notion of equal value.⁹⁸ It was however not concluded that the derogative language reached the society because a derogative language was not used towards people of colour during the field study. The officers were reluctant to admit exercising racism and argued that it was only executed by a couple of bad officers.⁹⁹ Further, the officers argued a lack of necessary knowledge when differentiating between a legal and an illegal citizen when the individual is a person of colour and not of Swedish descent. Therefore, every person of colour was at risk of being controlled, which could constitute ethnic discrimination.¹⁰⁰

Pettersson completed a study in 2005 where she examined the possibility that the Swedish law enforcement, when searching for narcotics, more frequently stops people of colour. According to the study, people of colour are more likely to be frisked than people originating from Europe.¹⁰¹ Additionally, people of colour are stopped on more loose grounds compared to people originating from Europe, but are more rarely found actually carrying narcotics.¹⁰² Pettersson also concluded that men were more likely to be frisked for narcotics than women.¹⁰³

In 1997, the Stockholm law enforcement sent out a report to the other law enforcement districts in the country, urging the districts to keep an eye on individuals originating from Gambia. The report said that Gambians oversaw the heroin business in Stockholm. According to SOU 2005:56, the report demonstrated structural discrimination because the order was based on ethnicity.¹⁰⁴ SOU 2006:30 concluded that because people of colour are checked more often than whites, criminal actions done by people of colour are more frequently discovered than groups not being checked as often.¹⁰⁵ However, the fact that people of colour are subject to more intense scrutiny

⁹⁸ Granér (2004), pp. 248 and 250.

⁹⁹ Granér (2004), pp. 258–259.

¹⁰⁰ Granér (2004), p. 262.

¹⁰¹ Pettersson (2005a), p. 20.

¹⁰² Pettersson (2005a), p. 25.

¹⁰³ Pettersson (2005a), pp. 27–28.

¹⁰⁴ SOU 2005:56, p. 387.

¹⁰⁵ SOU 2006:30, p. 30.

by law enforcement demonstrate further signs of structural discrimination.¹⁰⁶ The governmental report further concludes that research demonstrates that investigations where the suspect is a person of colour are more likely to be dropped compared to investigations where the suspect is born in Sweden. Reasons for why the investigations are dropped is not provided in the report, however the report does discuss the possibility that it could be a result of discrimination.¹⁰⁷

In 2005, the Swedish National Council for Crime Prevention¹⁰⁸ released a study that examined the difference in individuals registered as suspect of crimes between individuals born in Sweden and individuals born overseas between 1997 and 2001.¹⁰⁹ The study showed that around 60 % of suspects of crimes were individuals with two parents born in Sweden. One fourth of the suspects were individuals born overseas and one fifth were individuals born in Sweden with one or both parents born overseas.¹¹⁰ When looking at all reported crimes, not solely those with a suspect, individuals who had both parents born in Sweden made out 55 %. Individuals who were not registered in Sweden made out 7 % of all reported crimes. 19 % of all reported crimes were committed by individuals born overseas and 5 % of these individuals were from Finland, Norway, Denmark and Island.¹¹¹ The report concluded that men stand more than 3,5 times a risk of being a suspect of a crime compared to women. Individuals receiving social security stand 6,5 times a risk than individuals who have not received social security. Individuals who have not finished high school stand 5,3 times a risk than individuals who have studied at university. Individuals born in Sweden with both parents born overseas stand 2 times a risk than individuals with both parents born in Sweden and individuals born overseas stand 2,5 times a risk than individuals with both parents born in Sweden.¹¹² The number of 2,5 raised from 2,1 in

¹⁰⁶ SOU 2005:56, p. 385.

¹⁰⁷ SOU 2006:30, pp. 81–82.

¹⁰⁸ Hereinafter the Swedish abbreviation BRÅ will be used.

¹⁰⁹ The study used the statistics of registered as suspects instead of registered as defenders of crimes because they argue that this statistic more accurately shows committed crimes.

¹¹⁰ BRÅ 2005:17, p. 29.

¹¹¹ BRÅ 2005:17, pp. 31 and 36.

¹¹² BRÅ 2005:17, pp. 34–35.

BRÅ's last study which was explained by BRÅ that the number of individuals born overseas living in Sweden had increased.¹¹³ It can be noted that the study concluded that, to some extent, the criminal statistics is incorrect because of selective attention from law enforcement toward minority groups.¹¹⁴

According to another report by BRÅ regarding discrimination in the legal process, research show that officers within the Swedish law enforcement use racial terminology amongst themselves and that the use of stereotypes does occur.¹¹⁵ The report further states that due to stereotypical prejudice, Swedish law enforcement fails to accurately understand what has happened in criminal situations. Victims of crimes have in the past been pointed out as the offender. The same effects do special focused actions executed towards areas where minorities live have towards younger people of colour or when internal border controls are executed. Further, the report concludes that crimes committed by minorities are more frequently reported by law enforcement officers compared to the majority population. People of colour are further more likely to be reported as suspect on reasonable grounds compared to whites.¹¹⁶ BRÅ further concluded, in a study regarding sexual violence published in 2019, that Sweden's large receiving of refugees in 2015 did not correspond with the increase of sexual abuse which happened at the same time.¹¹⁷

Östlund completed a study where six law enforcement officers were interviewed regarding their possible use of ethnic profiling and, if so, how the officers legitimised the use of ethnicity. The study found that ethnic profiling was used, even if it was not an official practice. However, when the word ethnic profiling was uttered by the interviewer, every officer reacted quite heavily, distancing themselves from the term.¹¹⁸ Östlund further argued that statistics from the USA and the UK cannot be fully applied to the Swedish situation. The difference between the countries is that the USA and the UK

¹¹³ BRÅ 2005:17, p. 37.

¹¹⁴ BRÅ 2005:17, p. 23.

¹¹⁵ BRÅ 2008:4, p. 28.

¹¹⁶ BRÅ 2008:4, pp. 29–30.

¹¹⁷ BRÅ 2019:5, p. 14.

¹¹⁸ Östlund (2013), pp. 97–98.

have a history of colonisation which has affected the politics and relationship between different societal groups. Sweden does not completely share this.¹¹⁹ However, Sweden does start to have the same ethnical composition as the USA and the UK and is multi-cultured.¹²⁰

2.4.3 Reading the statistics

How to read and understand the overrepresentation of people of colour in criminal statistics is discussed in the legal doctrine. The arguments can, according to S. Engel and Swartz, be divided into “*differential offending*” and “*differential processing*”.¹²¹ The “*differential offending*” argument claim that the overrepresentation of people of colour displays reality, that people of colour are more prone to commit crimes and portrait a more criminal behaviour compared to whites.¹²² Law enforcement officers do not discriminate, they base their actions on the statistics which show an overrepresentation.¹²³ However, because the actions are focused on certain groups and not the general population it is discriminatory, but a necessary evil.¹²⁴

The other argument, the “*differential processing*”, believe that criminal statistics are affected by the prejudice and stereotypes by law enforcement why minorities are, wrongfully, statistically overrepresented and that there is evidence of this in research.¹²⁵ Through decisions by law enforcement officers, people of colour are more frequently subjected to law enforcement actions, but does not commit more crimes. If overrepresentation of people of colour in criminal statistics is not the result of discrimination, then ethnic profiling should provide good result. Instead, it has worse results than the ordinary practises by law enforcement. An individual’s behaviour cannot be

¹¹⁹ Östlund (2013), p. 104.

¹²⁰ Hydén and Lundberg (2004), p. 157.

¹²¹ S. Engel and Swartz (2014), p. 146.

¹²² S. Engel and Swartz (2014), p. 146; Risse and Zeckhauser (2003), p. 132.

¹²³ Holmberg (2000), pp. 58 and 188–189.

¹²⁴ Holmberg (2003), pp. 63–64.

¹²⁵ S. Engel and Swartz (2014), pp. 145–146; BRÅ 2008:4, pp. 30–31; Phillips and Bowling (2012), p. 375; Ramirez, Hoopes and Quinlan (2003), p. 1211; Holmberg (2003), p. 150; Pettersson (2005b), p. 140.

determined through physical appearance such as ethnicity.¹²⁶ The overrepresentation is a result of institutional discrimination within law enforcement and leads to further preconceptions.¹²⁷

It has also been argued that the statistics do not demonstrate discrimination but is a result of people of colour usually belonging to a lower societal class and therefore commit more crime. However, this argument that lower-class individuals commit more crime makes it unnecessary to look at ethnicity.¹²⁸ It has also been argued that the statistics of overrepresentation cannot be compared to the overall composition of the population but the composition of people on the streets. Young men use public spaces more frequently than women and elderly.¹²⁹

2.5 Racism in Sweden

Sweden has a reputation for standing up for fundamental rights and freedoms, especially after the Second World War.¹³⁰ The country was, for example, vocal in the criticism against South Africa during the period of apartheid.¹³¹ The reputation has however resulted in a situation where the country, and the rest of the world, is incapable of accepting its history and realising the racial problems it faces. Sweden do in fact have a fairly long history of racism which has slowly turned into structural discrimination,¹³² effecting foreigners and minorities within the country¹³³.

2.5.1 History of racism in Sweden

Racism developed as a notion during the beginning of slave trades in the 16th hundreds. The African people were sold as slaves and were viewed as not

¹²⁶ Neild (2009), p. 51; Östlund (2013), p. 100; Phillips and Bowling (2012), p. 375; Harris (2002), p. 11.

¹²⁷ S. Engel and Swartz (2014), pp. 145–146; BRÅ 2008:4, pp. 30–31.

¹²⁸ Pettersson (2005b), p. 141.

¹²⁹ Waddington, Stenson and Don (2004), p. 890.

¹³⁰ SOU 2005:56, pp. 109 and 121.

¹³¹ SOU 2005:56, p. 109.

¹³² SOU 2005:56, pp. 109 and 121.

¹³³ SOU 2005:56, pp. 91 and 97.

being human.¹³⁴ Sweden had a small colony where slaves were bought and sold which, together with the fact that Sweden benefited from being a part of Europe, resulted in racism and its theories reaching Sweden. The teaching material in school described the inhabitants of Africa as savages and inferior creatures and did not evolve for over a hundred years after 1842.¹³⁵ In the 1600s, the government started claiming the land of the Swedish indigenous people and the Roma people were banished from entering Sweden until the final laws were removed in 1954.¹³⁶ They were seen as a threat to the country and were described by the State Church as dangerous pagans.¹³⁷

Sweden further played a big role in the creation of racial biology around the time of the European Enlightenment.¹³⁸ The natural scientist Carl von Linné, famous for organizing flora and fauna, created a system of hierarchy based on skin colour to divide the Homo Sapiens species into different races. Whites were placed on top of the hierarchy, especially individuals from the northern part of Europe. In 1920, the Racial Biology Institute was established which worked on Linné's notion of whites being the predominant race and started researching the matter through measuring peoples' skulls to further develop the hierarchy.¹³⁹

Swedish policy on foreigners has developed over time, from focusing on immigration to integration.¹⁴⁰ It was concluded that immigration politics expands the creation of us and them and the feeling of alienation.¹⁴¹ The government wanted a more equal society in the 1970s where the culture of immigrants were celebrated as an advantage rather than promoting "Swedishness" as the main goal for immigrants. By focusing on general welfare politics and integration, the government worked on achieving

¹³⁴ SOU 2005:56, pp. 92–93.

¹³⁵ SOU 2005:56, p. 95.

¹³⁶ SOU 2005:56, pp. 97–98 and 105–107.

¹³⁷ SOU 2005:56, p. 100; According to research, the Roma people is still experiencing discrimination in Sweden (SOU 2005:56, p. 108).

¹³⁸ SOU 2005:56, pp. 101–102; Phillips and Bowling (2012), p. 371.

¹³⁹ SOU 2005:56, pp. 101–102.

¹⁴⁰ Rönneling (2004), p. 70.

¹⁴¹ Regeringens skrivelse 2001/02:129, p. 7; Rönneling (2004), p. 72.

equality between immigrants and the general population.¹⁴² However, the 1990s saw a rise in racial ideas and a promotion of “Swedishness” as an objection to a multi-cultural society.¹⁴³

2.5.2 The Swedish legislator approach to ethnic discrimination

The word race is currently present in around twenty Swedish legislative instruments and in international law.¹⁴⁴ It is however not present in the definition of ethnic origin in the Discrimination Act¹⁴⁵, which replaced seven legislative instruments of discrimination, three of which included the word race in its definition of ethnic origin.¹⁴⁶ The legislator argued that the absence of race in the definition in the DA did not create a material difference between the current instruments but instead reflected societal norms present at the time of implementation of the law. The absence of the word was also done as a way to discourage prejudice and discrimination in society and to illustrate that the government does not legitimise racial ideas.¹⁴⁷ The legislator argues similar to the international legal instruments, that every human individual belong to the same human race and that there is no scientific or biological difference between people. It is therefore unnecessary to use the word and is a step towards abolishing racial discrimination. If an individual should be discriminated against because of race, the discrimination is covered by the words “*other similar circumstance*” in the definition.¹⁴⁸

The term ethnicity in the DA includes national or ethnic origin, colour or other similar characteristics and can be either presumed or actual or that the individual subject to discrimination is associated with someone connected to the protected ground. Whilst national origin refers to individuals with the

¹⁴² Rönneberg (2004), pp. 70–71.

¹⁴³ Rönneberg (2004), p. 130.

¹⁴⁴ Prop. 2007/08:95, p. 118; See chapter 3.

¹⁴⁵ Hereinafter DA.

¹⁴⁶ Diskrimineringslag (2008:567) chapter 1, para. 4; Prop. 2007/08:95, pp. 117–118.

¹⁴⁷ Prop. 2007/08:95, pp. 30, 119–120 and 496.

¹⁴⁸ Prop. 2007/08:95, pp. 119–120 and 496–497.

same national affinity, ethnic origin refers to individuals with the same culture.¹⁴⁹

2.5.3 The REVA-project and controls in the subway in Stockholm

In 2009, the REVA project¹⁵⁰ was launched by the Swedish government which aimed at streamlining the immigration authority's expulsion decisions of illegal immigrants. It involved the law enforcement, the immigration authority and the correctional system. Ultimately, the institutions would execute expulsions after asylum-seekers have received a negative decision and the project focused mainly on the administrative parts of the authorities. When an immigration case was completely investigated by the immigration authority and the immigration authority knew where the asylum-seeker resided, the case was handed over to law enforcement to execute the expulsion decision. Simultaneous as the REVA project, the law enforcement increased its numbers of executed internal border controls. The reason for this was, *inter alia*, an increased pressure from the Schengen collaboration to have control over who was located within the Schengen area.¹⁵¹

In 2012, an article was published regarding Swedish law enforcement executing internal border controls on individuals who gate-crashed the subway in Stockholm. According to the interviewed group manager of the law enforcement, gate-crashing constitutes a good reason to check the individual further since gate-crashing constitute a crime in Sweden. If the individual is a foreigner, the officers carries out an internal border control.¹⁵² Another article, also published in 2012, somewhat wrongly links the REVA project with internal border controls executed in Malmö and heavily critiques it.¹⁵³ In 2013, the critique of the internal border controls in the subway in

¹⁴⁹ Diskrimineringslag chapter 1, para. 4.

¹⁵⁰ The Swedish name for the project was "Rättsäkert och effektivt verkställighetsarbete" (translated to "Legal certainty and efficient execution service") which has the abbreviation REVA.

¹⁵¹ Leander (2014), pp. 5–6.

¹⁵² Svensson, Polisen jagar papperslösa plankare, svt.se.

¹⁵³ Stark, Det enda de pratar om är rädslan för polisen, Tidningen Republik; Leander (2014), pp. 5–6.

Stockholm, connected with the REVA project, increased mainly because the officers had the discretionary power to decide who did not look “Swedish”.¹⁵⁴ Testimonies from individuals subject to controls stated that they were checked because of their skin colour or appearance. The law enforcement was accused of using ethnic profiling.¹⁵⁵ The media attention caused the law enforcement to stop the internal border controls because the debate and criticism drew focus away from the work of the law enforcement.¹⁵⁶

It can be noted that the Parliamentary Ombudsmen received nine claims regarding the internal border controls in the subway in Stockholm. The Parliamentary Ombudsmen decided not to proceed with any of the charges because none of the individuals pressing charges were personally subject to a control.¹⁵⁷

2.6 Conclusion

The lack of a legal definition of ethnic profiling keeps the debate on how it is defined ongoing. However, the main elements remain similar throughout, even if there are arguments for a narrow definition. In this thesis, the wide interpretation of the definition articulated by the ECRI will be used.

The research, both international and national, demonstrate that people of colour does not represent the majority of individuals who commit crimes, however they are overrepresented for being suspect of crimes and subject to law enforcement actions but more frequently found innocent compared to whites subjected. The debate regarding REVA demonstrate that there is controversy of ethnic profiling and that there are different ways of understanding both the overrepresentation in criminal statistics and ethnic profiling as a practice.

¹⁵⁴ Edman and Wicklén, Gränspoliserna stoppar id-kontrollerna i t-banan, svt.se.

¹⁵⁵ Civil Rights Defenders (2017), p. 7.

¹⁵⁶ Edman and Wicklén, Gränspoliserna stoppar id-kontrollerna i t-banan, svt.se.

¹⁵⁷ JO utreder inte REVA, Justitieombudsmannen.

Sweden needs to reconcile with its history and see the possibility of structural discrimination being present in society, and institutional discrimination in law enforcement. Only through doing that can the possible issue of Swedish law enforcement using ethnic profiling be dealt with.

3 The international legal regulation

3.1 Introduction

Following an understanding of ethnic profiling, the knowledge that there is an issue of derogative language and ethnic profiling within the Swedish law enforcement and criminal statistics, it is necessary to examine the legal context of ethnic profiling before discussing a possible legalisation of the practice. Therefore, the legal regulation on ethnic discrimination, ethnic profiling and, when deemed necessary, the mandate of the law enforcement in international legislation will be presented.

3.2 United Nations

The Universal Declaration of Human Rights¹⁵⁸ regulates universal human rights which are to be enjoyed by everyone without discrimination based on race, colour, national or social origin.¹⁵⁹ All human beings are born to enjoy the same dignity and rights. Different species of the human race does not exist and there is therefore no hierarchy between different racial groups.¹⁶⁰ The law enforcement is required to respect fundamental rights and freedoms when executing its mandate according the Code of Conduct for Law Enforcement Officials, including non-discrimination.¹⁶¹

3.2.1 Ethnic discrimination

The United Nations Declaration on the Elimination of All Forms of Racial Discrimination argues that ethnic discrimination should be condemned because of the impact it has on fundamental rights and freedoms in the

¹⁵⁸ Hereinafter UDHR.

¹⁵⁹ The Universal Declaration of Human Rights, United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A).

¹⁶⁰ Declaration on Race and Racial Prejudice (E/CN.4/Sub.2/1982/2/Add.1, annex V, 1982), Adopted and proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization p. its twentieth session, on 27 November 1978, Article 1–2.

¹⁶¹ Code of Conduct for Law Enforcement Officials Adopted by General Assembly resolution 34/169 of 17 December 1979, Article 2.

UDHR.¹⁶² Further, it articulates that ethnic discrimination is not to be executed by the State or its institutions, including law enforcement, and legislative instruments through which ethnic discrimination is possible to execute should be revised.¹⁶³

The International Convention on the Elimination of All Forms of Racial Discrimination¹⁶⁴ aims to eliminate and condemn racial discrimination executed by the state, public authorities and public institutions, both nationally and locally within the Member States.¹⁶⁵ It defines ethnic discriminations as:

“Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”¹⁶⁶

3.2.2 Ethnic profiling

The ICERD has established that ethnic profiling can constitute unlawful discrimination.¹⁶⁷ The former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, discussed the use of ethnic profiling while finding terrorists. He argued that ethnic profiling constitutes unlawful discrimination if it fails to meet the test of proportionality and that it is ineffective as a measure for finding potential terrorists.¹⁶⁸ Ethnic profiling regarding

¹⁶² Resolutions adopted by the General Assembly 1904 (XVIII). United Nations Declaration on the Elimination of All Forms of Racial Discrimination, A/RES/18/1904, 20 November 1963, Article 1.

¹⁶³ Declaration on the Elimination of All Forms of Racial Discrimination, Article 2 and 4.

¹⁶⁴ Hereinafter ICERD.

¹⁶⁵ International Convention on the Elimination of All Forms of Racial Discrimination, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19.

¹⁶⁶ ICERD, Article 1.

¹⁶⁷ E.U. Network of Independent Experts on Fundamental Rights (2006), p. 15.

¹⁶⁸ Report on the Committee on the Elimination of Racial Discrimination (2001), p. 24.

terrorism can, according Scheinin, be justified and compatible with equal treatment if used regarding a crime already committed and there are reasonable grounds to believe that a suspect fits the descriptive profile. The same is true when special intelligence, and only the special intelligence, have information on a future terrorist crime.¹⁶⁹ After 9/11, the Office of the High Commissioner of Human Rights released a statement saying that practices regarding counter-terrorism that impacts individuals with a certain ethnicity will breach fundamental rights and freedoms. It concluded that such practice could result in a rise of racial ideas and discrimination.¹⁷⁰

A decision from the Human Rights Committee involved a woman who was the only one in a Spanish train station asked to produce an identification card by law enforcement officers. The Committee concluded that the woman had been subject to ethnic profiling because the officers had been ordered to deal with the country's situation of unlawful immigrants and told the woman that she looked like one. The committee argued that law enforcement should refrain from using physical characteristics as a ground for actions because of the negative effect that ethnic profiling has on the individual and because the practice legitimises racial ideas to society.¹⁷¹

3.3 European Union

According to the FRA, criminal profiling occurs when law enforcement supports its actions towards individuals on indicators such as behaviour or appearance and is a vital practice for law enforcement after an offence has been committed.¹⁷² The EU has, through the European Parliament recommendation on the problem of profiling, concluded that a protection against ethnic profiling is not present in international legislation¹⁷³ and the Racial Equality Directive explains that ideas of separate human races are to

¹⁶⁹ Report on the Committee on the Elimination of Racial Discrimination (2001), p. 16; De Schutter and Ringelheim (2008), p. 365.

¹⁷⁰ Neild (2009), p. 27.

¹⁷¹ Communication no. 1493/2006: Human Rights Committee, at 4 and 9.

¹⁷² FRA (2010a), p. 12.

¹⁷³ European Parliament Recommendation on the Problem of Profiling, at Z.

be rejected¹⁷⁴. The use of the word race has been argued as tricky because the human species cannot be divided into different races. However, racism is the ideology that races within the human species do exist and the use of the term “racial origin” in EU legislative instruments does not imply acceptance of such ideas.¹⁷⁵

3.3.1 Ethnic discrimination and its justification

A protection against direct and indirect discrimination on grounds of race, colour, ethnic or social origin or membership of a national minority is articulated in the Charter of Fundamental Rights of the European Union, which is legally binding for Member States when implementing EU legislation.¹⁷⁶ Through the Racial Equality Directive and the Framework on Combating Racism and Xenophobia, frameworks are provided for Member States to combat racial violence and discrimination based on racial or ethnic origin in areas of employment, welfare system and goods and service.¹⁷⁷ Additionally, Member States are bound by the human rights articulated in the European Convention of Human Rights¹⁷⁸, including the protection against discrimination.¹⁷⁹ However, the protection against discrimination within the EU applies to citizens within Member States and not third-country nationals.¹⁸⁰

Direct ethnic discrimination is present when an individual experiences a different treatment based on racial or ethnic origin compared to an individual in a similar situation. Indirect ethnic discrimination is when a rule or

¹⁷⁴ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive), preamble No. 6; FRA (2010b), p. 14.

¹⁷⁵ E.U. Network of Independent Experts on Fundamental Rights (2006), p. 12; Racial Equality Directive, preamble No. 6;

¹⁷⁶ Charter of Fundamental Rights of the European Union, (2000/C 364/01), Article 21; FRA (2010b), p. 15.

¹⁷⁷ Racial Equality Directive, preamble No. 5 and 13; FRA (2010b), p. 64; A definition of “racial or ethnic origin” is not given in the Racial Equality Directive.

¹⁷⁸ Hereinafter ECHR.

¹⁷⁹ Treaty on European Union, signed at Maastricht on 7 February 1992, No C 191/5, Article F.2.

¹⁸⁰ FRA (2010b), p. 58; The situations when third-country nationals are protected under non-discrimination directives is regulated in the Third-Country National Directive: See FRA (2010b), p. 59.

regulation, which might appear neutral, creates a particular disadvantage towards individuals based on racial or ethnic origin. The justification for direct and indirect discrimination is different within the EU legislation. Justification for indirect discrimination is present when the practice can be objectively justified through a legitimate aim and the different treatment is appropriate and necessary for achieving the aim.¹⁸¹ According to the jurisprudence of the Court of Justice of the European Union¹⁸² discrimination can be justified if the measure is needed for the part who has executed it and if the practice is appropriate and necessary for achieving the aim of the measure.¹⁸³ The test of necessity is a test of which practice is least intrusive.¹⁸⁴ Justification of direct discrimination can only be done in accordance with particular aims stated in the directives in the context of employment.¹⁸⁵ The Racial Equality Directive articulates that direct discrimination is lawful when the nature of the characteristic make it impossible to execute the duties of the employment, for example individuals of Chinese origin working in a Chinese restaurant.¹⁸⁶

3.3.2 Ethnic profiling

According to the EU, there is no statistical correlation between ethnicity and crime and there are negative effects emanating from ethnic profiling, such as the creation of stereotypes.¹⁸⁷ Therefore, ethnic profiling can constitute ethnic discrimination and is unlawful because of the effects the practice has on human dignity. When individuals are subjected to ethnic profiling it harms relationships between societal groups, creating distrust and frustration, which can lead to more crimes being committed.¹⁸⁸ Regarding law enforcement, the EU has articulated that the officers are required to respect fundamental rights and freedoms, when executing its mandate, including border controls and

¹⁸¹ Racial Equality Directive, Article 2.1.a and 2.1.b.

¹⁸² Hereinafter CJEU.

¹⁸³ ECJ, *Bilka-Kaufhaus GmbH v. Weber Von Hartz*, Case 170/84 [1986] ECR 1607, 13 May 1986, para. 36.

¹⁸⁴ Gerards (2013), p. 482.

¹⁸⁵ FRA (2010b), pp. 43 and 45.

¹⁸⁶ Racial Equality Directive, Article 4.1; FRA (2010b), p. 47.

¹⁸⁷ E.U. Network of Independent Experts on Fundamental Rights (2006), pp. 10–11.

¹⁸⁸ FRA (2010a), pp. 17–19.

internal border controls.¹⁸⁹ If personal data is collected and processed, it requires a legitimate purpose and must be executed in a lawful manner.¹⁹⁰ Ordering officers to stop every individual with a certain ethnicity after a crime has been committed constitute unlawful ethnic profiling because ethnicity cannot be the sole reason for stopping an individual.¹⁹¹ The more details the suspect description includes, the less focus is needed on components such as ethnicity. Profiling is lawful when law enforcement focuses on behaviour instead of ethnicity in regard to crimes not yet committed.¹⁹²

The FRA argues that a stop and search is lawful if there are reasonable and objective grounds for law enforcement actions and it is not solely based on discriminatory grounds.¹⁹³ Objective grounds can constitute, *inter alia*, intelligence of behaviour or information on an individual. If a ground of discrimination is to be used as an objective element for actions, the ground needs to be regulated by law, proportionate and necessary. It further needs to be executed based on a justifiable reason.¹⁹⁴ The European Parliament recommendation, together with the ICERD, ECRI and the jurisprudence of the ECtHR, states that profiling based on recent and detailed information can be legal if it is proportionate, necessary and effective. If the test is not fulfilled, and no necessary safeguards are present, then profiling might constitute ethnic discrimination.¹⁹⁵ To avoid arbitrary actions when executing investigations an objective criterion is needed and the law enforcement must have a reasonable suspicion of a future or already committed crime.¹⁹⁶ When law enforcement investigations use prejudicial profiling based on stereotypes instead of the prerequisite of minimum reasonable suspicion in accordance

¹⁸⁹ The European Profiling Recommendation on the Problem of Profiling, at J; Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), at 1, 4 and 7.

¹⁹⁰ The European Code of Police Ethics Recommendation Rec (2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and Explanatory memorandum, at 42.

¹⁹¹ FRA (2010a), pp. 20 and 22.

¹⁹² FRA (2010a), p. 12.

¹⁹³ FRA (2018a), p. 59.

¹⁹⁴ FRA (2018a), p. 70.

¹⁹⁵ European Parliament Recommendation on the Problem of Profiling, at L, W and Z.

¹⁹⁶ The European Code of Police Ethics, at 47 and 61.

with the European Code of Police Ethics, discrimination is a possible outcome.¹⁹⁷ Ethnic profiling that is not executed lawfully can demonstrate to the public that the government accepts racism and xenophobia.¹⁹⁸

It is lawful for law enforcement, when executing *inter alia* stop and searches, to use ethnicity as one of the reasons for stopping an individual. Law enforcement officers can also be ordered to search individuals who match a certain description that includes ethnicity, height and weight without it probably being deemed unlawful ethnic profiling. Likewise, if there is knowledge that a crime will be committed by individuals with a certain ethnicity and an officer sees an individual with that ethnicity behaving different or suspicious, stopping that individual will be lawful because ethnicity did not constitute the main reason for the stop.¹⁹⁹

3.4 Council of Europe

The European Code of Police Ethics states that the function of law enforcement is ultimately to safeguard the fundamental rights and freedoms explained in the ECHR and the public's trust in law enforcement is dependent on the demeanour of the officers and their respect for fundamental human rights. To demonstrate to the public that the law enforcement is regulated by the rule of law, its actions should not be discriminative.²⁰⁰ According to the ECtHR, violence with racial motives especially affect human dignity and obligates law enforcement to act seriously and diligently.²⁰¹ Because of the damage that racial violence has on fundamental rights, the law enforcement is required to investigate possible racial motives of an incident in a reasonable manner, even if racial motives to violent incidents are difficult to prove.²⁰² Investigating possible racial motives demonstrate to the public that the state

¹⁹⁷ European Parliament Recommendation on the Problem of Profiling, at M.

¹⁹⁸ European Parliament Recommendation on the Problem of Profiling, at X.

¹⁹⁹ FRA (2010a), pp. 20–22.

²⁰⁰ The European Code of Police Ethics, at 1 and 6, 30, 40 and 43.

²⁰¹ ECtHR, *Nachova and Others v. Bulgaria* [GC] (Nop. 43577/98 and 43579/98) 6 July 2005, para. 145; *Stoica v. Romania*, No. 42722/02, 4 March 2008, para. 117.

²⁰² *Balázs v. Hungary*, No. 15529/12, 20 October 2015 para. 52; *Stoica v. Romania*, para. 119; *Škorjanec v. Croatia*, No. 25536/14, 28 March 2017 para. 53–54; *Nachova and Others v. Bulgaria*, para. 160.

condemns racism and that the law enforcement protects vulnerable groups.²⁰³ If not properly investigated, the investigation itself can constitute discrimination.²⁰⁴ Because of this, the training of law enforcement should include the challenges of racism and xenophobia and focus on racially motivated crimes as well as racial attitudes within the law enforcement organisation.²⁰⁵

3.4.1 Ethnic discrimination and its justification

Together with its protocols, the ECHR articulates fundamental rights and freedoms which applies to every individual within the jurisdiction of the Member State.²⁰⁶ The prohibition of direct and indirect ethnic discrimination is articulated in Article 14 of the ECHR and has been explained through jurisprudence of the ECtHR and legal doctrine.²⁰⁷ Through its wording, Article 14 does not stand on its own but relies on the other rights and freedoms articulated in the ECHR. In other words, Article 14 is not violated without any of the other articles in the ECHR or its Protocols being violated as well.²⁰⁸ Direct discrimination is defined as less favourable different treatment based on race or ethnic origin that cannot be objectively and reasonably justified and indirect discrimination is defined as rules and regulations which appear to be neutral but instead creates a particular disadvantage towards individuals based on race or ethnic origin.²⁰⁹ Article 14 can also be violated if Member

²⁰³ Balázs v. Hungary, para. 52.

²⁰⁴ Balázs v. Hungary, para. 52; Stoica v. Romania, para. 119; Škorjanec v. Croatia, para. 53; Nachova and Others v. Bulgaria, para. 160.

²⁰⁵ The European Code of Police Ethics Recommendation, at 30 and 49.

²⁰⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950, Article 1.

²⁰⁷ ECHR Article 14; *D.H. and Others v. The Czech Republic* [GC], No. 57325/00, 13 November 2007, para. 175; *Nachova and Others v. Bulgaria*, para. 145; *Fredin v. Sweden* (No. 1), No. 12033/86, 18 February 1991, para. 60; *Biao v. Denmark* [GC], No. 38590/10, 24 May 2016, para. 89; Gerards (2013), p. 469.

²⁰⁸ *Willis v. The United Kingdom*, No. 36042/97, 11 June 2012, para. 29; *Biao v. Denmark* para. 88; *Timishev v. Russia*, para. 53.

²⁰⁹ ECRI General Policy Recommendation No. 7, at 1.1.b and I.1.c; *D.H. and Others v. The Czech Republic*, para. 175; *Nachova and Others v. Bulgaria*, para. 145; *Fredin v. Sweden*, para. 60; *Biao v. Denmark*, para. 89; The definitions are very similar to the definitions in the EU legislation (See FRA 2010b, at 22).

States do not try to overcome inequalities through the use objective and reasonable justified different treatment.²¹⁰

It can be noted that the protection of discrimination present in Protocol 12 of the ECHR has a wider scope than Article 14.²¹¹ Protocol 12 determines that no public authority is to discriminate people they encounter and includes discrimination based on race or colour executed in regard of rights present in the national legislation of the Member States.²¹² However, Sweden has not ratified Protocol no. 12.²¹³

Both direct and indirect discrimination can be justified if the practice that results in different treatment pursues a legitimate aim and there is proportionality between the practice and its aim.²¹⁴ The difference between legitimate aim and test of proportionality is not always clear and if the differential treatment constitute indirect discrimination, the ECtHR does not need to distinguish between them.²¹⁵ There is further no exhausted list of aims that are considered acceptable²¹⁶ or what is proportionate.²¹⁷ However, the test of proportionality can be divided into three parts: effectiveness, necessity and “*proportionality in the strict sense*”. Whilst effectiveness and necessity relate to the interaction between the practice and the aim of the practice, the strict sensed proportionality relate to the interaction between the practice and the interest harmed by it.²¹⁸

Through the nature of the governmental machinery, there is a range of solutions to fulfil an aim. The nature of the government also entails using the

²¹⁰ *Sejdić and Finci v. Bosnia and Herzegovina* [GC], Nos. 27996/06 and 34836/06, ECtHR, 22 December 2009, para. 44; *D.H. and Others v. The Czech Republic*, para. 175.

²¹¹ FRA (2010b), p. 63.

²¹² Protocol No. 12 to the Convention for Protection of Human Rights and Fundamental Freedoms.

²¹³ Cameron (2018), p. 168.

²¹⁴ ECRI General Policy Recommendation No. 7, at I.1.b and I.1.c; *Willis v. The United Kingdom*, para. 39; *Biao v. Denmark*, para. 90; *Sejdić and Finci v. Bosnia and Herzegovina*, para. 42; *Timishev v. Russia*, para. 56.

²¹⁵ Grabenwarter (2014), p. 352; Schabas (2015), p. 566.

²¹⁶ This is contrary to for example Article 8 and 11 of the ECHR.

²¹⁷ Grabenwarter (2014), pp. 349–350 and 352.

²¹⁸ Gerards (2013), p. 469.

most economical solution with the best result. However, the elements of effectiveness and necessity of the test of proportionality result in a more limited selection of solutions for the government to use because the solution's impact on individuals' rights and freedoms need to be considered.²¹⁹ The element of effectiveness require that the chosen practice constitute a realistic way of reaching the aim of the practice²²⁰ however, the jurisprudence of the ECtHR is not specific on how effectiveness is to be measured. Requiring an absolute effectiveness is not possible. On the other hand, measuring effectiveness through ineffectiveness would not be reaching high enough. Instead, the circumstances and the affected protected interest in the situation should be used when determining the required level of effectiveness.²²¹ If the ground for discrimination is based on characteristics personal to the individual, which can make the individual a member of a “*vulnerable group in society*”, such as race or ethnicity²²² and the justification is rigorous²²³. According to the ECtHR, differential treatment cannot be justified if the sole ground is ethnicity.²²⁴ Further, it has not been specified when the effectiveness of a practice should be examined. Is it the result of the practice or the prognosis of the practice's effectiveness when chosen? Effectiveness is also affected by the aim of the practice; however, this is rarely stated, and the ECtHR has accepted broad and conceptual aims, *inter alia* public security.²²⁵

Regarding the element of necessity, the ECtHR has articulated that a practice executed by the State, which intrudes on fundamental rights and freedoms, must be “*necessary in a democratic society*” where there is a “*pressing social need*” for the practice.²²⁶ This is more general than the test of necessity used in the CJEU.²²⁷ Only letting citizens receive pensions for work executed

²¹⁹ Gerards (2013), p. 470.

²²⁰ Gerards (2013), p. 473.

²²¹ Gerards (2013), p. 475; Grabenwarter (2014), p. 352; Arnardóttir (2014), pp. 649–650 and 653.

²²² Grabenwarter (2014), p. 352; Arnardóttir (2014), pp. 649–650 and 653.

²²³ Sejdić and Finci v. Bosnia and Herzegovina, para. 44.

²²⁴ Biao v. Denmark, para. 94; Timishev v. Russia, para. 58.

²²⁵ Gerards (2013), pp. 476–479.

²²⁶ Gerards (2013), pp. 480–481.

²²⁷ Gerards (2013), p. 483.

overseas, and not stateless individuals who live in the country, has been deemed not proportionate. Neither was refusing individuals of certain ethnicities the chance to run for president in the country.²²⁸

If evidence such as statistics demonstrate the insufficiency or superfluously of a practice, ECtHR does not need to analyse the harm that the practice has on fundamental rights.²²⁹ However, the ECtHR has stated that it must determine the element of harm when examining the test of proportionality regarding a practice.²³⁰ The element of harm can include, for example, determining whether the individual had suffered an undue burden and if that burden can be economically compensated or the intrusion of the protected interest can be restricted in time.²³¹

The Member States enjoy a margin of appreciation in regard to the objective and reasonable justification.²³² Therefore, Member States are free to apply the articles of the ECHR with consideration of their domestic situation²³³ and to some extent decide what constitute a justified difference in treatment in similar situations²³⁴. The margin of appreciation changes over time due to the constant movement of the society as well as the evolvement of the unanimity between the Member States.²³⁵ The ultimate decision however lays with the ECtHR.²³⁶ It has been argued that the margin of appreciation has been created by the ECtHR in an attempt to not decide on the element of harm.²³⁷ Through the elements of proportionality, the width of the margin of appreciation varies, however it is generally larger regarding economic or social policies.²³⁸ Regarding ethnic discrimination, the margin of appreciation is narrow.²³⁹

²²⁸ Schabas (2015), pp. 565–566.

²²⁹ Gerards (2013), p. 472.

²³⁰ Sporrang and Lönnroth v. Sweden 52 Eur. Ct. H.R. (ser. A), (1982), para. 69.

²³¹ Sporrang and Lönnroth v. Sweden, para. 73.

²³² Grabenwarter (2014), pp. 349–350 and 352.

²³³ Danelius (2015), p. 56; Schabas (2015), p. 567.

²³⁴ Biao v. Denmark, para. 93; Sejdić and Finci v. Bosnia and Herzegovina, para. 42.

²³⁵ Danelius (2015), p. 56; Schabas (2015), p. 567.

²³⁶ Biao v. Denmark, para. 93; Sejdić and Finci v. Bosnia and Herzegovina, para. 42.

²³⁷ Gerards (2013), p. 472.

²³⁸ Biao v. Denmark, para. 93; Sejdić and Finci v. Bosnia and Herzegovina, para. 42.

²³⁹ Grabenwarter (2014), p. 352; Arnardóttir (2014), pp. 649–650 and 653.

3.4.2 Ethnic profiling

The ECRI has published 16 General Policy Recommendations on ethnic discrimination serving as guidelines for Member States.²⁴⁰ The Explanatory Memorandum to ECRI General Policy Recommendation No. 11 articulates that because the practice of ethnic profiling derives from law enforcement using the notion that individuals with certain ethnicities are more prone to commit crimes, it constitutes ethnic discrimination. The justification of ethnic discrimination should be strict and the test of proportionality for ethnic profiling includes, according to the Explanatory Memorandum, the same elements as for ethnic discrimination. However, the ECRI argues that necessity is determined through the “least intrusive”-test.²⁴¹ Only when law enforcement has a particular lead on a suspect of a crime and the information is used fairly quickly is ethnic profiling lawful.²⁴²

Recommendation No. 7 argues that the respective constitutions of the Member States should articulate a protection against ethnic discrimination which public authorities, including law enforcement must obey when executing public functions.²⁴³ Member States should also provide a definition and protection against ethnic profiling because the practice breaches human rights and legalised ethnic discrimination to the public. It affects the public’s trust in law enforcement, reducing the effectiveness of the practice.²⁴⁴ Additionally, it has negative effects on the individuals subject to ethnic profiling, including humiliation and stigmatisation. Focus of the law enforcement should be on behaviour instead of physical appearance.²⁴⁵ Member States should conduct research on reported racial offences, the frequency of prosecution of the reported offences and its national law

²⁴⁰ Leaflet ECRI, European Commission against Racism and Intolerance.

²⁴¹ ECRI General Policy Recommendation No 11, at 30-34.

²⁴² Explanatory memorandum to ECRI General Policy Recommendation No. 11, at 27, 29-34 and 37.

²⁴³ ECRI General Policy Recommendation No. 7, Articles 2.2, 3.4, 3.7 and 3.8; ECRI General Policy Recommendation No. 1 on Combating racism, xenophobia, antisemitism and intolerance, adopted 4 October 1996, at A and B.

²⁴⁴ ECRI General Policy Recommendation No. 11, Article 1.1; Explanatory memorandum to ECRI General Policy Recommendation No. 11, at 25.

²⁴⁵ Explanatory memorandum to ECRI General Policy Recommendation No. 11, at 27, 29 and 34.

enforcement's use of ethnic profiling.²⁴⁶ That way the government targets racism and demonstrates to the public that diversity is not viewed as a threat but instead that there is strength in diversity.²⁴⁷

In the case of *Timishev v. Russia*, a Chechen born man, who had been forced to live in Russia, was denied entry into Kabardino-Balkaria which is a part of Russia.²⁴⁸ The applicant argued in the ECtHR that this was because of his Chechen origin and that Article 14 of the ECHR had been breached.²⁴⁹ The ECtHR concluded that a senior law enforcement officer had banned individuals with Chechen origin to enter, creating a situation where officers stopped individuals with a perceived as Chechen origin.²⁵⁰ This constituted racial discrimination and a violation of Article 14 of the ECHR in conjunction with Article 2 of Protocol No. 4.²⁵¹

The case of *Lingurar v. Romania*, decided in 2019, constitute the first time that the ECtHR used the term ethnic profiling. The case surrounded 84 law enforcement officers along with a forest ranger who executed a raid against the home and village of the applicants, who are of Roma descent. The applicants lodged a criminal complaint against the law enforcement, claiming they had been beaten and had other violations done towards them.²⁵² After bringing the case to national court, it was decided by the ECtHR regarding, *inter alia*, a violation of Article 14 of the ECHR.²⁵³ The applicants argued that racial stereotypes and bias were present throughout the whole national legal process, starting with the police intervention of the village to the Court of Appeal's decision. It was further argued that the law enforcement actions were only executed because the community was Roma.²⁵⁴ The ECtHR

²⁴⁶ ECRI General Policy Recommendation No. 1, at A and B; ECRI General Policy Recommendation No. 11, at 1.2.

²⁴⁷ *Stoica v. Romania*, para. 117; *Nackova and Others v. Bulgaria*, para. 145; *Sejdić and Finci v. Bosnia and Herzegovina*, para. 43; *D.H and Others v. The Czech Republic*, para. 176; *Timishev v. Russia*, para. 56.

²⁴⁸ *Timishev v. Russia*, para. 9–10 and 12.

²⁴⁹ *Timishev v. Russia*, para. 34, 36 and 50.

²⁵⁰ *Timishev v. Russia*, para. 54.

²⁵¹ *Timishev v. Russia*, para. 56 and 59.

²⁵² *Lingurar v. Romania*, No. 48474/14, 16 April 2019, para. 22.

²⁵³ *Lingurar v. Romania*, para. 30–34, 42–44 and 48.

²⁵⁴ *Lingurar v. Romania*, para. 51–57.

explained that the principles of Article 14 of the ECHR constitute whether the discriminatory practice can be objectively and reasonably justified, including the test of proportionality. If the practice is concluded to constitute ethnic discrimination, a narrow justification is to be applied.²⁵⁵ The law enforcement had used its public authority in a discriminative way because the actions had been based on the notion that the applicants' ethnicity made them criminal. The ECtHR established that the applicants had been subject to racial stereotyping and that ethnic profiling had been executed. The actions were found to be discriminatory and Article 14 of the ECHR had been violated in conjunction with Article 3.²⁵⁶

3.5 Conclusion

There is an extensive protection against direct and indirect ethnic discrimination throughout international legislation, which is to be respected and upheld by Member States and their law enforcement. Only through justification can ethnic discrimination be used. For justification of indirect discrimination, the practice needs to have a legitimate aim and there needs to be proportionality between the aim and the practice to reach that aim. The justification of direct discrimination differs between EU legislation and CoE legislation. Whilst the protection against ethnic discrimination in the CoE legislation is general and applies to every situation, the protection against ethnic discrimination in the EU legislation does not apply to ethnic profiling executed by law enforcement.²⁵⁷ Additionally, Member States of the EU are to follow the ECHR as well. Therefore, the CoE legislation is more appropriate to use going forward in this thesis.²⁵⁸

A specific protection against ethnic profiling is not present in international law. However, through jurisprudence from the ECtHR and soft law from international legislative bodies, it has been articulated that ethnic profiling

²⁵⁵ *Lingurar v. Romania*, para. 68.

²⁵⁶ *Lingurar v. Romania*, para. 76 and 78.

²⁵⁷ See for example De Schutter and Ringelheim (2008), p. 370.

²⁵⁸ As will be clear below, the Swedish case regarding the Roma Registration partly included Article 14 of the ECHR, and not EU legislation.

constitutes ethnic discrimination in certain situations. The lawful situations typically constitute situations where the law enforcement uses ethnicity as one of many reasons to subject an individual of action, either before or after a crime has been committed. However, the information needs to be acted upon in a fairly quick manner. Regarding unlawful ethnic profiling, it is possible to objectively and reasonably justify it through Article 14 of the ECHR. The practice needs to have a legitimate aim and there needs to be proportionality between the legitimate aim and the use of the practice. Since the goal of the law enforcement is to uphold security and general order in the country, partly through the prevention and detention of crime, the aim of ethnic profiling can be deemed legitimate. However, it has not been clarified how ethnic profiling can be justified through the components of effectiveness, necessity and harm in the test of proportionality.

4 The Swedish legal regulation

4.1 Introduction

Following an understanding that the protection against discrimination is widely covered through international legislation but that the protection against ethnic profiling leave more to be desired, it is necessary to examine the Swedish legal situation.

Swedish legislation on protection against discrimination has had a slow development and the government's reluctance to accept the need for change in the legislative area has been argued to constitute a form of structural discrimination. In comparison to Swedish legislation on equality, there is a noticeable difference between the development rates. Whilst the Equality Act came into force simultaneously as the ratification of the United Nations Convention of Gender Discrimination, the same development regarding ethnic discrimination has not happened.²⁵⁹

4.2 Ethnic discrimination

The protection against discrimination is present in several Swedish legislative instruments. The Instrument of Government, one of Sweden's four constitutional laws, regulates the rule of law and articulates a protection against discrimination. No legislation is to result in unfair treatment of minorities based on ethnicity, skin colour or other similar circumstances.²⁶⁰ The most prominent legal instrument is the DA, however, as will be demonstrated, it is not clear whether the DA includes the work of the law enforcement.

The DA replaced seven other legislative instruments that regulated discrimination in different situations when it was implemented in 2008.²⁶¹ The aim was to create a more comprehensive and effective protection against

²⁵⁹ SOU 2005:56, pp. 121–122.

²⁶⁰ Regeringsformen (1974:15) chapter 1, para. 9 and chapter 2, para. 12.

²⁶¹ Prop. 2007/08:95, p. 1.

discrimination and the protection applies to certain stated areas in society, including education, employment and the well-fare system. The DA does not apply to all areas of the public sector, however chapter 2, paragraph 17 articulates a protection against discrimination when governmental employees offer advice and guidance or in other ways are in contact with members of the public.²⁶² The treatment from the public authorities towards an individual falls within the provision however, public authorities' decisions and rulings does not.²⁶³ Law enforcement constitute the kind of administrative authority which interacts with the public and therefore is included in the DA. Other interactions with the public than advice should be included in the DA, according to the preparatory work. However, actions of law enforcement which are in line with its mandate is not included in the DA.²⁶⁴

The DA states that direct ethnic discrimination is present when an individual is treated less favourable compared to individuals in similar situations and indirect when neutral actions disfavours the individual. The justification of indirect discrimination includes legitimate and objectively justification or if there is no other way of reaching the objective without the discriminative neutral actions.²⁶⁵ This includes a test of proportionality.²⁶⁶ A justification for direct discrimination is not expressed in the Swedish legislation. Instead, the exceptions in connection with the different prohibition grounds are to be used together with the rule on burden of proof, which constitutes a rule of presumption. If the plaintiff shows evidence of discrimination, the defendant must demonstrate that discrimination has not happened. This could for example be that one of the exceptions is present or that one of the seven grounds for discrimination did not serve as the reason for the different treatment.²⁶⁷ It has however been argued that the burden of proof regarding "similar situation" does not apply to chapter 2, paragraph 17 of the DA

²⁶² Prop. 2007/08:95, pp. 80 and 83; Diskrimineringslag, chapter 2, para. 17.

²⁶³ Fransson and Stüber (2015), p. 372.

²⁶⁴ Prop. 2007/08:95, p. 286.

²⁶⁵ Diskrimineringslag, chapter 1, para. 4.

²⁶⁶ Fransson and Stüber (2015), pp. 532–535 and 538.

²⁶⁷ Fransson and Stüber (2015), pp. 532–535.

because every member of the public should be treated the same by public authorities.²⁶⁸

4.3 Ethnic profiling

The government needs to set the precedent regarding discrimination and show the public that the government take revulsion against discrimination. In doing so, the trust in the government strengthens.²⁶⁹ On the webpage of the Swedish Equality Ombudsman, ethnic profiling is explained as when a prejudicial individual uses that prejudice as a criterion for taking actions towards another individual.²⁷⁰ BRÅ defines ethnic profiling as when law enforcement bases physical attributes such as appearance on minorities who are chosen for action.²⁷¹ Ethnic profiling is not prohibited in Swedish legislation and the Equality Ombudsman concludes that Sweden lacks the necessary legislation to prohibit ethnic profiling.²⁷²

4.4 Law enforcement

The main task of the Swedish law enforcement is to discover, prevent and avert criminal activity and its mandate is mainly regulated through the Police Act²⁷³.²⁷⁴ The work also entails securing that the general order and security is intact.²⁷⁵ When executing an action towards an individual, the individual's fundamental rights and freedoms are not to be confined by the law enforcement without legislative support.²⁷⁶

Actions by law enforcement need to be proportionate and it is unlawful to stretch proportionality to legalise an action. Further, paragraph 8 of the PA articulates a principle of necessity which entails that law enforcement actions can only take place if deemed necessary in regard to danger or disorder. The

²⁶⁸ Fransson and Stüber (2015), pp. 532–535 and 538.

²⁶⁹ Prop. 2007/08:95, p. 283.

²⁷⁰ Etnisk tillhörighet som diskrimineringsgrund, Diskrimineringsombudsmannen.

²⁷¹ BRÅ 2008:4, p. 29.

²⁷² Etnisk Profilering, Diskrimineringsombudsmannen.

²⁷³ Hereinafter PA.

²⁷⁴ Polislag (1984:387), para. 2.

²⁷⁵ Prop. 1983/84:111, p. 73; Hydén (2006), p. 137.

²⁷⁶ Polislag, para. 8.

test of proportionality in paragraph 8 of the PA aims at regulating law enforcement actions and determine whether the intrusion and damage that an action causes is in proportion with the goal of the action. The intrusion of the individual's interest cannot be greater than the danger to safety and public order which the action is aimed at regulating. The test of proportionality includes examining how the actions were executed as well as the duration of the action.²⁷⁷ SOU 1979:6 argues that intrusion of personal freedom and integrity is greater than intrusion towards property or economic interests. It also specifies that when deciding the damage that has been done, indirect damage done towards a third person should be included.²⁷⁸

An individual, for which the Swedish law enforcement has a “valid reason”²⁷⁹ to suspect of being an illegal immigrant or if there is otherwise reason for control, is required to produce an identification document to demonstrate that he or she is entitled to stay in the country in internal border controls.²⁸⁰ The Swedish National Police Board has articulated that paragraph 8 of the PA applies to internal border controls, why the controls need be executed in line with human dignity.²⁸¹ The mandate of action regarding internal border controls is wide and discretionary, which ultimately can lead to arbitration and ethnic discrimination.²⁸² The controls can however only be executed when the law enforcement have reliable information on the individual which can include the individual's friends, family and behaviour. It can never be executed merely because of the individual's looks, name or language. If there is another reason, beside name or appearance, *inter alia* crime investigation and vehicle control, then an internal border control is lawful. The internal border controls can also be executed in connection to cases regarding shop lifting and abuse.²⁸³ It has been argued that the wording of “valid reason”, which constitute the lowest bar of suspicion in Swedish legislation, is too

²⁷⁷ Prop. 1983/84:111, pp. 73 and 79.

²⁷⁸ SOU 1979:6, pp. 294–295.

²⁷⁹ My translation.

²⁸⁰ Utlänningslag (2005:716), chapter 9, para. 9.

²⁸¹ Rikspolisstyrelsens föreskrifter och allmänna råd om Polisens inre utlänningskontroll, RPSFS 2011:4 FAP 273–1, pp. 1–2.

²⁸² Hydén and Lundberg (2004), p. 156.

²⁸³ RPSFS 2011:4 FAP 273–1, pp. 1–2; Leander (2014), p. 7; Hydén and Lundberg (2004), p. 160.

vague and because of the wording, ethnic discrimination will inevitably happen.²⁸⁴ The criteria for profiling in regard to internal border control might cause institutional discrimination on how the provision conforms to Swedish nationals with a foreign background.²⁸⁵

According to the chapter 2 paragraph 11 of the Criminal Data Act, personal information including ethnic origin is not allowed to be processed by the government. The legal commentary to the provision states that information regarding nationality can be processed if it does not expose information on ethnic origin. Further, law enforcement cannot register people based solely on their ethnic origin.²⁸⁶

4.4.1 The registration of Roma people

In 2013, it was discovered that the Swedish law enforcement in Skåne had a database that contained personal information such as name, address, family relations and social security number on 4 673 Roma individuals in the area. 1 089 of the individuals registered were children and 220 individuals were diseased. The database was called “*Travellers*”²⁸⁷ and originated from another database called “*Conflict, Staffanstorp Roma people*”²⁸⁸. Through the database, it was possible to create family trees. The database was originally created as part of an investigation following information on a rising conflict between four Roma families and was expanded when the criminal activities by some members of the families continued.²⁸⁹

The Equality Ombudsman investigated the database and because the Ombudsman could not rule out that the database was not a result of ethnic profiling, it recommended to the Swedish law enforcement to investigate if ethnic profiling was used within the organisation. The Equality Ombudsman

²⁸⁴ Hydén and Lundberg (2004), p. 165; Hydén (2006), p. 147.

²⁸⁵ Hydén and Lundberg (2004), pp. 167–168.

²⁸⁶ Lindblom, Brottsdatalog (2018:1177), chapter 2 para. 11, JUNO, updated 1 July 2019.

²⁸⁷ My translation.

²⁸⁸ My translation.

²⁸⁹ T 2978–15 m.fl., Stockholm District Court, 2016–06–10, pp. 4–5; Tillsyn av polismyndigheten, 20 februari 2014, Ärende GRA 2013/617 handling 34, Diskrimineringsombudsmannen, pp. 2 and 5.

stated that the names of the databases suggested that the individuals had been registered because of their ethnicity and concluded that if ethnic profiling had been used, it would breach chapter 2, paragraph 17 of the DA regarding work towards the public.²⁹⁰

In the Court of Appeal, the Swedish government admitted that the database violated Article 14 of the ECHR but argued that the registration of the individuals did not breach chapter 2, paragraph 10 of the Police Data Act²⁹¹ because Article 14 of the ECHR was wider in its wording compared to the PDA.²⁹² The Court of Appeal concluded that the prohibition of processing personal information, articulated in chapter 2, paragraph 10 of the PDA, included situations where ethnicity was the sole reason for why the information was being processed. It further concluded that the name “*Travellers*” did refer to Roma people, the absence of information on ethnicity did not make a difference. The Court of Appeal arrived at the conclusion that the database was created with the sole purpose of registering individuals’ ethnicity and the database did violate chapter 2, paragraph 10 of the PDA.²⁹³

Similarly, in 2006, a case involving the German law enforcement processing electronic data and comparing this with data collected by the Federal Criminal Police Office to find possible Islamic extremist terrorists was decided by the Federal Constitutional Court. It was determined that the use of electronic data profiling did not comply with German legislation because it did not “*avert a present danger to the existence or the safety of the federation or a state or to life, limb or freedom of a person*”.²⁹⁴

²⁹⁰ Diskrimineringsombudsmannen (2014), p. 1.

²⁹¹ Hereinafter PDA. The PDA was later replaced by the Criminal Data Act and chapter 2, para. 10 of the PDA corresponds with chapter 2, para 11 of the Criminal Data Act.

²⁹² T 6161–16, p. 4.

²⁹³ T 6161–16, pp. 7, 9 and 10.

²⁹⁴ Abstract of the German Federal Constitutional Court’s Order of 4 April 2006, 1 BvR 518/02, accessed 3 November 2019.

4.5 Conclusion

As has been demonstrated,²⁹⁵ there is evidence in research on Swedish law enforcement that ethnicity is used as a ground for action without people of colour being overrepresented in the actual commitment of criminal actions. Instead, there is an overrepresentation of people of colour being stopped by law enforcement. However, the use of ethnic profiling has consistently been denied by the Swedish law enforcement. If it has been executed, it has been done so by a few bad law enforcement officers.²⁹⁶ It can be noted that the Cabinet Minister at the Department of Justice was asked by a Member of Parliament in 2019 whether actions were planned to be taken within the legal system to deal with the issue of ethnic profiling. With sweeping arguments on the law enforcement's recruitment of employees and questions regarding discrimination being a part of the officers' education, the minister did not find any arguments for further actions.²⁹⁷ However, the ECRI urges in its report on Sweden that measures need to be taken regarding legislation on law enforcement to prevent incidents such as the Roma database and the internal border controls in the subway in Stockholm in the future.²⁹⁸

The mandate of the Swedish law enforcement is wide and the protection against discrimination executed by law enforcement is not clear. It is ambiguous if the actions taken by law enforcement falls within the provision in the DA, even if it is unlawful for the law enforcement to discriminate according to paragraph 8 of the PA. Officers cannot intrude on individuals' rights and freedoms expressed in the Instrument of Government without legislative mandate. Paragraph 8 of the PA further articulates that the test of proportionality regarding law enforcement includes the components of necessity and harm. It does not include the same components of effectiveness as the CoE; however, duration and execution should be examined. This leaves a gap in the Swedish legislation which leaves room for ethnic profiling. As has been demonstrated, the Swedish legislation in parts reflect the

²⁹⁵ See chapter 2.4.

²⁹⁶ Civil Rights Defenders (2017), p. 27; SOU 2005:56, p. 380.

²⁹⁷ Rasmässig eller etnisk profilering inom rättsväsendet, Sveriges Riksdag.

²⁹⁸ ECRI Report on Sweden (2017), at 72–74.

international legislation on discrimination. However, it does not include a test of proportionality for direct discrimination as the international legislation does. Nonetheless, since the government accepted that the Roma registration did constitute a breach of Article 14 of the ECHR, it is demonstrated the Swedish law enforcement is bound by Article 14 of the ECHR. Therefore, their action must be in line with the ECHR, including a possible use of ethnic profiling. And if ethnic profiling is executed, it can only be lawful if objectively and reasonably justified.

5 Critical analysis of the test of proportionality and ethnic profiling

5.1 Introduction

As has been determined, a specific protection against ethnic profiling does not exist in international nor national legislation, it has however been expressed as unlawful ethnic discrimination in certain situations. If the practice constitute discrimination, it can be objectively and reasonably justified through the test of proportionality in Article 14 of the ECHR.

The ECRI articulated, with jurisprudence of the ECtHR, that the test of proportionality regarding ethnic profiling includes the elements of effectiveness, harm and necessity, which has been discussed in the legal doctrine.²⁹⁹ To bear in mind is that the ECtHR has concluded that the justification for using ethnicity as grounds for law enforcement actions is narrow.³⁰⁰ It has not been determined how these three elements are fulfilled regarding ethnic profiling and because of that, the discussion in doctrine is used in this chapter. It can be mentioned that the three elements are interconnected, making the separation of the discussion somewhat difficult.

5.2 Effectiveness

The component of effectiveness includes, as determined above,³⁰¹ determination if the practice constitute a realistic way of reaching the aim and if the practice is effective. Further, it is concluded that regarding fundamental rights and freedoms, the justification through effectiveness is narrow.³⁰² The ECRI provides some examples of what could be examined regarding the effectiveness of ethnic profiling: How well does ethnic profiling help identify criminals? Does it affect the relationship between law enforcement and people of colour so that people of colour are reluctant to help law

²⁹⁹ ECRI General Policy Recommendation No. 11, at 30–34; Ramirez, Hoops and Quinlan (2003), p. 1205; Risse and Zeckhauser (2004), p. 154.

³⁰⁰ Open Society Justice Initiative (2012), p. 46.

³⁰¹ See chapter 3.4.1.

³⁰² Gerards (2013), pp. 473 and 475; Grabenwarter (2014), p. 352.

enforcement? Does it prevent more than it helps law enforcement to find the “real” criminals?³⁰³

5.2.1 Identifying criminals

Knowing who to stop for control is a necessary knowledge for law enforcement officers, which the law enforcement refers to as “gut feeling”.³⁰⁴ This “gut feeling” has in doctrine been described as “*silent knowledge*” because the officers cannot explain how they know who to stop and because the knowledge is not present in any documentation. The issue with silent knowledge is that it is hard to verbalise and could thereby include elements such as stereotypes and bias.³⁰⁵ Because of the complexity of the mandate of the law enforcement, officers categorises the population into “us” and “them”, “Swedes” and “villains”, “good” and “bad”.³⁰⁶ The villains are seen as potential security risks and are therefore more strictly supervised than Swedes.³⁰⁷ It is the Swedes that the law enforcement protects and the goal is ultimately a society without villains. How that goal is achieved is irrelevant, regardless if the actions towards the villains are lawful or not.³⁰⁸ Quick and discretionary decisions, which officers are required to make, have been argued to create a necessity to use stereotypes.³⁰⁹

The ultimate difference between the “*differential offending*” and the “*differential processing*” groups is that the “*differential offending*” group believes that ethnic profiling is an effective practice whilst the “*differential processing*” group does not believe it to be effective and that the financial resources should be allocated elsewhere in the law enforcement.³¹⁰ The group believes that law enforcement’s categorization of the population and use of derogatory language increases the division of “us and them” and result in

³⁰³ ECRI General Policy Recommendation No. 11, at 32.

³⁰⁴ Östlund (2013), pp. 102 and 107.

³⁰⁵ Hydén (2006), p. 150.

³⁰⁶ Ekman (1999), p. 182; Carlström (2006), p. 149.

³⁰⁷ Ekman (1999), p. 188.

³⁰⁸ Ekman (1999), pp. 184–185.

³⁰⁹ Sollund (2006), pp. 281–282.

³¹⁰ Risse and Zeckhauser (2004), p. 162; FRA (2018a), pp. 38–39; Harris (2002), p. 11; See chapter 2.4.3.

prejudice and stereotypes.³¹¹ These prejudicial stereotypes affect the next interaction between law enforcement and individuals³¹² because into a new situation, people bring their knowledge of previous similar situations. Officers who stop an individual, with what the officers believe is the same ethnic origin as an individual previously stopped, approaches the situation with the previous knowledge and believes they know what will happen.³¹³ However, categorization that emanates from ethnic profiling increases the number of suspects which leads to a heavier workload for law enforcement.³¹⁴ The use of ethnic profiling thereby greatly increases the pool of suspects.³¹⁵ Additionally, ethnic profiling result in a feeling of distrust and humiliation³¹⁶ which ultimately result in a reduction of efficiency for law enforcement which depends on the cooperation of the public to discover crime and execute investigations.³¹⁷

It has been argued that one of the main goals for law enforcement is the population experiencing a feeling of safety in their community, which can be reached through the presence of law enforcement officers on the streets and law enforcement turning up when called. When the society experiences security, less of society's focus is put on efficiency. However, when the feeling of security diminishes, the discussion on efficiency rises. Further, the feeling of efficiency of law enforcement works deterrently on crime. If society would learn that a large part of law enforcement's investigations is dropped due to a lack of evidence, the crime rate would rise. The Swedish notion that crimes do not pay is thereby inaccurate.³¹⁸ Regarding ethnic profiling when executing internal border controls, it has been argued that law enforcement gains legitimacy because executing internal border controls demonstrates that the "situation" with immigrants is managed. However, the

³¹¹ Sollund (2007), p. 84; Hydén (2006), p. 149; Sollund (2006), pp. 281–282.

³¹² Hydén and Lundberg (2004), p. 178.

³¹³ Martinez, Hollis and Stowell (2018), p. 335.

³¹⁴ Bonikowski (2005), p. 322.

³¹⁵ Harris (2002), p. 11.

³¹⁶ This will be expanded in chapter 5.4.

³¹⁷ Nield (2009), pp. 48–50.

³¹⁸ Granér (2004), pp. 57–59.

law enforcement needs the trust of the immigrant to do their work properly. Who's trust to prioritise must be determined.³¹⁹

The resentment and frustration derived from ethnic profiling could be avoided if law enforcement officers inform the individual of why the check is executed.³²⁰ Further, if law enforcement were to inform certain social groups of when, and if, law enforcement is keeping an extra eye on them, and the reason for this, then the information would work as a crime deterrent for the members of the groups.³²¹ If information is not provided by the law enforcement, the relationship between the individuals and the law enforcement could decline.³²²

5.3 Necessity

The component of necessity includes, as determined above³²³, deciding if the practice is “*necessary in a democratic society*” and if it meets a “*pressing social need*”.³²⁴ However, the ECRI articulates that necessity regarding ethnic profiling is determined through a “*least intrusive*”-test, if there is another way for law enforcement to achieve the same result as ethnic profiling which does not affect individuals as much.³²⁵ The ECRI's recommendation is based on the jurisprudence of the ECtHR.³²⁶ The use of the “*least intrusive*”-test have also been articulated in the Swedish PA. Since the ECRI constitute a body of the CoE and have articulated how proportionality is determined regarding ethnic profiling, this is the test that will be used in the thesis.

5.3.1 The “*least intrusive*”-test

As been discussed,³²⁷ there is a division in the legal doctrine on how to understand the overrepresentation of people of colour in criminal statistics,

³¹⁹ Hydén (2006), p. 140.

³²⁰ Risse and Zeckhauser (2004), footnote 18 p. 138 and p. 145.

³²¹ Risse and Zeckhauser (2004), p. 163.

³²² Östlund (2013), p. 102.

³²³ See chapter 3.4.1.

³²⁴ Gerards (2013), pp. 480–481.

³²⁵ ECRI General Policy Recommendation No. 11, at 33.

³²⁶ ECRI General Policy Recommendation No. 11, preamble.

³²⁷ See chapter 2.4.3.

the “*differential offending*” group and the “*differential processing*” group.³²⁸ The “*differential offending*” group argue that criminal statistics display reality and that categorisation of the population³²⁹ is necessary for law enforcement to understand how to act in different situations.³³⁰ Using ethnicity as a reason for law enforcement actions are the most cost-effective practice and it reduces the workload for officers³³¹ because the alternative is not for law enforcement to stop every individual³³².

The main argument for an alternative less intrusive practice than ethnic profiling, emanating from the “*differential processing*” group and which has been demonstrated in research, is law enforcement focusing on suspicious behaviour rather than using stereotypes and prejudice regarding religion and ethnicity.³³³ The forecast for crime is best decided through focusing on behaviour.³³⁴ Since the actions of the law enforcement are legalised through laws and regulations,³³⁵ the way to achieve a shift from ethnicity to behaviour is to reduce the possibility of discretion in provisions regarding law enforcement actions,³³⁶ taking in regard that laws and regulations needs to be open for interpretation for officers to act according with current norms and values³³⁷. The mandate of the Swedish law enforcement to act towards individuals is too broad and officers currently have extensive discretion, especially when taking instantaneous and quick decisions, leaving less possibility for public insight and transparency.³³⁸ Research has demonstrated that discrimination increases when law enforcement officers can arbitrarily stop individuals³³⁹ and the ECtHR has concluded that provisions on stop and searches must include specific conditions for when stopping someone is

³²⁸ S. Engel and Swartz (2014), pp. 145–146; Holmberg (2003), pp. 63–64 and 150; Harris (2002), p. 11.

³²⁹ See chapter 5.2.1.

³³⁰ Ekman (1999), p. 182; Carlström (2006), p. 149.

³³¹ Kennedy (1999), p. 30.

³³² Granér (2004), p. 248.

³³³ Neild (2009), pp. 53 and 122–123; Bonikowski (2005), p. 322.

³³⁴ Bonikowski (2005), p. 322.

³³⁵ Ekman (1999), pp. 191–192.

³³⁶ Neild (2009), p. 54.

³³⁷ Ekman (1999), pp. 191–192.

³³⁸ Pettersson (2005a), p. 1; E.U. Network of Independent Experts on Fundamental Rights (2006), p. 20; Östlund (2013), pp. 102 and 107.

³³⁹ Open Society Justice Initiative (2012), p. 38.

lawful³⁴⁰. The officers should be required to articulate why the actions are taken³⁴¹ because arbitrariness does little for transparency and predictability³⁴². Regarding internal border controls, however, it has been argued that ethnic profiling is more vital because law enforcement, through intuition and “gut feeling”, must use physical appearance to categorise the population.³⁴³ However, especially internal border controls invites officers to use ethnicity as a basis for control.³⁴⁴

5.4 Harm

The component of necessity includes, as determined above,³⁴⁵ for example, examining if the practice has led to an undue burden for the individual and if the individual have had compensation or if the practice lasted only a restricted period of time.³⁴⁶ The ECRI has articulated that the elements to focus on is: What impact does ethnic profiling have on the individuals and their rights and freedoms? Does it legitimise ethnic discrimination to the public and result in institutional bias and prejudice? How does the officers conduct themselves during controls? Are they being polite and informing the individuals why they were stopped?³⁴⁷

5.4.1 Undue burden

It has been argued that a functional society relies on different groups of people carrying differently heavier burden of societal responsibility, for example a patient with tuberculosis placed in quarantine to stop the disease from spreading. By accepting the quarantine, the patient carries a heavier burden towards society than the rest of the population.³⁴⁸ In the criminal context, law enforcement needs to decide who might be a criminal or, regarding internal border controls, who is a foreigner present in the country without

³⁴⁰ Open Society Justice Initiative (2012), p. 23.

³⁴¹ Nield (2009), p. 54.

³⁴² Östlund (2013), p. 108.

³⁴³ Hydén and Lundberg (2004), p. 156; Nield (2009), at 55.

³⁴⁴ SOU 2005:56 p. 394; See chapter 5.4.1 regarding “looking European”.

³⁴⁵ See chapter 3.4.1.

³⁴⁶ *Sporrong and Lönnroth v. Sweden*, para. 69 and 73.

³⁴⁷ ECRI General Policy Recommendation No. 11, at 34.

³⁴⁸ Risse and Zeckhauser (2004), p. 157.

permission.³⁴⁹ Because of the diversification of Europe, it is becoming increasingly more inappropriate to use ethnic profiling in the immigration context. The more Europe, and Sweden, becomes multi-ethnic, the harder it is for officers to decide who has a “European look”.³⁵⁰ The use of ethnic profiling in an immigration context can therefore create a disproportionately heavier burden on citizens belonging to minority groups when more often subjected of immigration controls.³⁵¹ Crime prevention and immigration control are sometimes wrongfully linked when criminal statistics are presented without distinction between the two areas. By not being clear, a false picture spreads to the society that immigrants are more prone to commit crimes.³⁵² However, some scholars argue that ethnic profiling is better used in an immigration context than in a criminal one.³⁵³

5.4.2 Effects of ethnic profiling

What the law enforcement officer believes to be a routine check might be significant for the individual. It is possible that the individual is subject to these routine checks on a regular basis, leaving the individual to conclude that the checks are executed because of his or her ethnicity.³⁵⁴ Ethnic profiling creates stigmatization and segregation towards societal minority groups and governmental, prejudicial statements legitimises ethnic discrimination.³⁵⁵ Studies show that ethnic profiling, or perceived ethnic profiling, creates a feeling of distrust, exclusivity and hostility towards the government and law enforcement with the individuals who has been subjected because the government is not respecting fundamental rights.³⁵⁶ Frequent use of ethnic profiling can agitate situations between officers and individuals, making

³⁴⁹ Hydén (2006), p. 148.

³⁵⁰ Open Society Justice Initiative (2012), p. 21; Holmberg (2003), p. 155.

³⁵¹ Neild (2009), p. 55.

³⁵² Neild (2009), p. 48.

³⁵³ Neild (2009), p. 55.

³⁵⁴ Neild (2009), p. 48; Harris (2002), p. 12.

³⁵⁵ Neild (2009), pp. 48, 109 and 112; Committee on the Elimination of Racial Discrimination, 2001, para. 375.

³⁵⁶ Neild (2009), p. 49, footnote no. 210; Bonikowski (2005), p. 319; De Shutter and Ringelheim (2008), p. 366; Ramirez, Hoopes and Quinlan (2003), p. 1200; FRA (2018a), p. 42; Harris (2002), p. 12; Phillips and Bowling (2012), p. 383; Holmberg (2000), pp. 184 and 189.

safety an issue.³⁵⁷ The negative effects can further spread to friends and family of the individual subjected to ethnic profiling and research has shown that individuals subjected to unlawful discrimination do not take advantage of other public authorities, such as health and employment.³⁵⁸ Ethnic profiling therefore estranges individuals from society.³⁵⁹

The frustration and distrust which derives from ethnic profiling impacts the efficiency of law enforcement and therefore the safety of the people.³⁶⁰ The reluctance of the law enforcement to hear arguments of discrimination or racism being present within the force is dangerous because of the tension it creates between the law enforcement and the group targeted, which ultimately could lead to danger.³⁶¹ Through its mandate, the law enforcement impacts and changes people's lives while simultaneously assures legal security. A suspicion that law enforcement is using ethnic discrimination therefore becomes extra aggravating because the suspicion affects the legal security and trust on the law enforcement.³⁶² The trust of the population is needed to execute criminal investigations for example as victims or witnesses of crime.³⁶³ Using discrimination as basis for law enforcement actions could result in people falsely being suspects.³⁶⁴ If it is believed that law enforcement through the use of ethnic profiling breaches its mandate without legal legitimacy, the needed acquiescence and respect from society will be lost. If the involuntary spreads to an entire group, disruption of social order is possible.³⁶⁵

The EU Network of Independent Experts in Fundamental Rights argued that the solely way of understanding the ECtHR's reasoning on ethnic profiling in *Timishev v. Russia*, is that the ECtHR decides that the practice "... *be considered unlawful under any circumstances*" because creating a connection

³⁵⁷ Neild (2009), pp. 49–50; FRA (2018a), p. 42.

³⁵⁸ Neild (2009), p. 49, footnote no. 210; FRA (2018a), p. 42.

³⁵⁹ Bonikowski (2005), p. 322.

³⁶⁰ Neild (2009), pp. 49–50 and footnote No. 210; FRA (2018a), pp. 38–39.

³⁶¹ Holmberg (2003), p. 155.

³⁶² SOU 2005:56 p. 379.

³⁶³ SOU 2005:56 p. 395.

³⁶⁴ FRA (2018a), p. 38.

³⁶⁵ Martinez, Hollis and Stowell (2018), p. 333.

between ethnicity and crime generates frustration, stereotypes and stigmatizing.³⁶⁶

5.5 Conclusion

The use of ethnic profiling by law enforcement in a manner that breaches Article 14 of the ECHR can be objectively and reasonably justified through a test of proportionality that includes the elements of effectiveness, necessity and harm. Further, it has been articulated that the justification of ethnic discrimination, and thereby ethnic profiling, has a narrow justification.

The effectiveness of ethnic profiling can be determined through criminal statistics and executed studies, even if the statistical situation leave a great deal to be desired. The Swedish government has not officially decided that law enforcement is to execute ethnic profiling. Therefore, if it happens, it is the result of structural and institutional prejudice,³⁶⁷ making transparency key.³⁶⁸ The division on how to understand the statistics creates a division in seeing ethnic profiling as effective and necessary or not. Discrimination emanating from law enforcement's categorization of the population is a necessary evil unlikely to be avoided because the distinction process constitutes a necessary tool for law enforcement.³⁶⁹ Further, ethnic profiling has been argued to be an effective and necessary practise for law enforcement to achieve its goals.³⁷⁰ However, even if the law enforcement officers are statistically right about a certain individual stopped, the practice does not constitute the needed reasonable grounds when based on ethnic profiling.³⁷¹ Further, ethnic profiling have great effects on both individuals and the society. Feelings of distrust, alienation, frustration and humiliation derives from ethnic profiling for the individual and the society can collectively lose trust in the law enforcement, thereby increasing the crime rate.

³⁶⁶ EU Network of Independent Experts in Fundamental Rights (2006), at 11.

³⁶⁷ Hydén and Lundberg (2004), p. 186; Civil Rights Defenders (2017), p. 8; FRA (2018a), p. 60; Open Society Justice Initiative (2012), pp. 17–18.

³⁶⁸ FRA (2018a), p. 60.

³⁶⁹ Holmberg (2000), pp. 192–193; Holmberg (2003), pp. 63–64.

³⁷⁰ Pettersson (2005a), p. 5; Holmberg (2003), pp. 63–64; Neild (2009), p. 23; Civil Rights Defenders (2017), p. 8.

³⁷¹ Holmberg (2003), p. 110.

6 Conclusion

For decades, the practice of law enforcement using ethnic profiling has been discussed in the USA and the UK and goes under the name “driving while black”. The same is not possible to say regarding Sweden. There are no official statistics and the research executed has not focused on ethnic discrimination or ethnic profiling. Some of the research has encountered the issue and briefly examined it. There is however evidence in the doctrine and the provided examples on Swedish law enforcement officers using ethnic profiling. Both national and international research establishes that people of colour are overrepresented in statistics regarding frequency of controls, being suspects of crimes and conviction rates. In addition, research on the Nordic countries demonstrate that law enforcement officers use a derogative language amongst themselves and use ethnicity as a reason for law enforcement actions in the field. Even if there are differences between the Nordic countries and the USA and the UK regarding racial history, applying their research on the Swedish situation is possible to some extent since the Swedish history is not without racial controversy.

Since the research on Sweden was executed, Sweden has become more multi-cultural and it is possible to believe that the law enforcement does have a smaller problem with ethnic discrimination than before. However, the two presented examples of the use of ethnic profiling in Sweden, the Roma register and the internal border controls in the subway in Stockholm, demonstrate that an issue with ethnic discrimination is still present with the law enforcement. Further, the evolvement into a more multi-cultural country result in difficulties to describe the looks of a Swede.

The general goal of the Swedish law enforcement is to protect the security and general order of the country through the prevention and aversion of criminal activity. A part of that is to do controls on individuals and execute internal border controls, without breaching fundamental rights and freedoms, including ethnic discrimination. The mandate for controls is wide and it is possible that the officers need the wide mandate to execute their tasks.

However, it does facilitate discretionary decisions for which transparency is difficult. Law enforcement officers possess a silent knowledge of who to stop through which they divide the population into different categories and into “us” and “them”, “good” and “bad”. Even if this might be a necessary practice for law enforcement, it can lead to further prejudice and ethnic profiling.

Protection against ethnic discrimination is present in national and international legal instruments. The specific regulation on ethnic profiling is, however, non-existent. Only through soft law and jurisprudence from the ECtHR has it been articulated that ethnic profiling constitutes unlawful ethnic discrimination. The practice is condemned by the international instruments due to the impacts it has on fundamental rights and freedoms. The classic unlawful example of ethnic profiling is when merely an individual’s ethnicity serves as a reason for law enforcement action. If ethnicity, however, is used as one of several reasons for taking law enforcement actions towards an individual, the practice is generally not considered unlawful. If ethnic profiling is determined unlawful because it breached Article 14 of the ECHR, the practice must be objectively and reasonably justified to not be unlawful. To achieve justification, a test of proportionality including effectiveness, necessity and harm, is applied.

As part of the component of determining effectiveness and necessity, criminal statistics must be examined. The two different ways of reading the criminal statistics, “*differential processing*” and “*differential offending*”, lead to two different results. The “*differential processing*” argument creates a Catch-22 situation. The group believes that law enforcement officers let their prejudice steer who to stop and which areas to focus on, leading to criminal statistics that demonstrate an overrepresentation for people of colour instead of reality. However, the officers believe that the overrepresentation does display reality, why they believe it is legitimised to focus their actions on people of colour which then leads to overrepresentation. The cycle goes on and on. Instead of ethnicity, the officers should focus on individuals’ behaviour. Additionally,

there is evidence in research, for example Petterson's regarding narcotics³⁷², that the rate of productivity is greater when officers use suspicious behaviour as a ground for actions in regard to whites than ethnicity in regard to people of colour. The "*different offending*" argument argues that statistics demonstrate the real situation why ethnic profiling is effective. The overrepresentation lead officers to, naturally, use categorisation bearing in mind that if disclination occurs, this is merely an accepted and necessary evil.

Regarding harm, undue burden and effects of ethnic profiling is discussed. The argument of undue burden is an expression of the utilitarian perspective, that people of colour must accept being subject to ethnic profiling because of the good that ethnic profiling leads to. Generally, this argument is brought forward by the "*different offending*" group. However, if the statistics represent reality, the argument does not explain results in research that prejudice, stereotypes and derogative language is present in law enforcement of several countries. It has been determined that ethnic profiling affect the subjected individuals and changes their view on society. The subjected individuals did not feel as attached to their country as individuals who believed they had not been subject to ethnic profiling. It leads to alienation and frustration and it has been argued that the individuals are not taking advantage of help offered by other public authorities. The use of ethnic profiling can also lead to the next altercation between officer and individual being violent, making security an issue. If law enforcement would explain why an individual has been stopped before proceeding to act, the feeling of arbitration, discretion and frustration would not be as strong, instead there might be an understanding of the situation. Stop-and-searches and internal border controls are inherently more arbitrary compared to stops after committed crimes.

After examining the elements of the test of proportionality regarding ethnic profiling, there is still uncertainty as to how the ECtHR would determine the practice. The different viewpoints of effectiveness and necessity, together

³⁷² See chapter 2.4.2.

with the lack of statistics, creates a situation where individual opinions are observed and considered. However, the jurisprudence, especially *Lingurar v. Romania*, is more extensive regarding the harm of ethnic profiling and racial violence are condemned by the ECtHR due to the impact it has on fundamental rights and freedoms. The ECtHR has also concluded that the justification for ethnic discrimination is narrow. Further, the legal doctrine is cohesive on the negative effects ethnic profiling has on the individual and the society. It is therefore possible to argue that, if not unlawful through the elements of effectiveness and necessity, ethnic profiling cannot be determined as justified with the occurrence of ethnic discrimination and because of the harm it has on fundamental rights and freedoms, and therefore is unlawful.

As a final conclusion, it can be said that ethnic discrimination and ethnic profiling are complex because it is the result of subjective human decisions which can never be completely understood. However, the different ways to understand and explain the overrepresentation of people of colour in criminal statistics demonstrate the need for a larger study where criminal statistics are compared to, *inter alia*, the composition of the population and the composition of people in public spaces at time for controls. There is further a need for Swedish law enforcement to collect data on interactions between law enforcement and individuals of the public to receive statistics on ethnic profiling. Only when the Swedish government and law enforcement through factual evidence understand the issue and realise that violations of individuals human rights occur in Sweden can change happen.

7 Bibliography

Swedish Official Print

Governmental public reports

SOU 1979:6 Polisen.

SOU 2005:56 Det blågula glashuset: strukturell diskriminering i Sverige: betänkande.

SOU 2006:30 Är rättvisan rättvis? Tio perspektiv på diskriminering av etniska och religiösa minoriteter inom rättssystemet.

Preparatory work and Governmental writings

Prop. 2007/08:95 Ett starkare skydd mot diskriminering.

Prop. 1983/84:111 med förslag till polislagen m.m.

Regeringens skrivelse 2001/02:129, Integrationspolitik för 2000-talet.

Other sources from Parliament

Rikspolisstyrelsens föreskrifter och allmänna råd: *Polisens inre utlänningskontroll*; RPSFS 2011:4, FAP 273–1.

Diskrimineringsombudsmannen: *Tillsyn av polismyndigheten*, 20 februari 2014, Ärende GRA 2013/617 handling 34.

Swedish Administrative Authorities' reports

Brottsförebyggande rådet (BRÅ), Rapport 2005:17, *Brottslighet bland personer födda i Sverige och i utlandet*,

<<https://www.bra.se/publikationer/arkiv/publikationer/2005-12-14-brottslighet-bland-personer-fodda-i-sverige-och-i-utlandet.html>>.

Brottsförebyggande rådet (BRÅ), Rapport 2008:4, *Diskriminering i rättsprocessen: om missgynnande av personer med utländsk bakgrund*,

<<https://search-ebsochost-com.ludwig.lub.lu.se/login.aspx?direct=true&db=cat07147a&AN=lub.1763084&site=eds-live&scope=site>>.

Brottsförebyggande rådet (BRÅ), Rapport 2019:5, *Indikatorer på sexualbrottsutvecklingen 2005–2017*,

<<https://www.bra.se/publikationer/arkiv/publikationer/2019-05-28-indikatorer-pa-sexualbrotts--utvecklingen-2005-2017.html?lang=sv>>.

United Nations Official Prints

Report on the Committee on the Elimination of Racial Discrimination, A/56/18, General Assembly, 2001.

European Union Official Prints

European Union Agency for Fundamental Rights (FRA), *Towards more effective policing, understanding and preventing discriminatory ethnic profiling: a guide*, 2010. (2010a)

European Union Agency for Fundamental Rights (FRA), *Handbook on European non-discrimination law*, 2010. (2010b)

European Union Agency for Fundamental Rights (FRA), *Preventing unlawful profiling today and in the future: a guide*, 2018. (2018a)

European Union Agency for Fundamental Rights (FRA), *Second European Union Minorities and Discrimination Survey, Being Black in the EU, EU–MIDIS II*, 2018. (2018b)

E.U. Network of Independent Experts on Fundamental Rights, *Ethnic Profiling*, Cfr-Cdf.Opinion4.2006, 2006.

European Commission against Racism and Intolerance, *Leaflet ECRI*, available at <<https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/about>>.

Council of Europe Official Prints

European Commission against Racism and Intolerance (ECRI), Report on Sweden, fifth monitoring cycle, adopted 5 December 2017.

Literature

Arnardóttir, Oddny Mjoll, *The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights*, Human Rights Law Review, 14(4), pp. 647–670, 2014.

Bonikowski, Bart, *Flying While Arab (Or Was It Muslim? Or Middle Eastern?): A Theoretical Analysis of Racial Profiling After September 11th*, *Discourse of Sociological Practice*, 7(1/2), pp. 315–327, 2005.

Cameron, Iain, *An introduction to the European Convention on Human Rights*. Iustus, Uppsala, 2018.

Carlström, Ann Kristin, *På spaning i Stockholm: en etnologisk studie av polisarbete*, Diss. Stockholm Univ., 1999.

Civil Rights Defenders, *Slumpvis utvald, Ras-/etnisk profilering i Sverige*, Kriminologiska institutionen, Stockholms universitet, 2017.

Danelius, Hans, *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna*, 5 uppl., Norstedts juridik, Stockholm, 2015.

De Schutter, Olivier, Ringelheim, Julie, *Ethnic Profiling: A Rising Challenge for European Human Rights Law*, *The Modern Law Review*, 71(3), p. 358, 2008.

Ekman, Gunnar, *Från text till batong: om poliser, busar och svennar*, Ekonomiska forskningsinstitutet vid Handelshögsk, Stockholm, 1999.

Fransson, Susanne, Stüber, Eberhard, *Diskrimineringslagen: en kommentar*, 2 uppl., Norstedts juridik (Norstedts gula bibliotek), Stockholm, 2015.

Grabenwarter, Christoph, *European Convention on Human Rights: commentary*, München: Beck; Oxford: Hart; Baden-Baden: Nomos, 2014.

Granér, Rolf, *Patrullerande polisens yrkeskultur*. Diss., Socialhögsk., Univ., Lund, 2004.

Gerards, Janneke, *How to improve the necessity test of the European Court of Human Rights*, *International Journal of Constitutional Law*, Vol. 11, Issue 2 (April 2013), pp. 466-490, 2013.

Harris, David, *Flying While Arab: Lessons from the Racial Profiling Controversy*, *Civil Rights Journal*, p. 8, 2002.

Holmberg, Lars, *Discretionary Leniency and Typological Guilt*, *Journal of Scandinavian Studies in Criminology and Crime Prevention*, ISSN 1404-3858 Vol 1, pp 179–194, 2000.

Holmberg, Lars, *Policing stereotypes: a qualitative study of police work in Denmark*, Galda und Wilch Vlg, Glienicke/Berlin, 2003.

Hydén, Sofia, ”Diskriminering på köpet – etnisk profilering i polisarbete”, in: Fransson, Ola, Fryklund, Björn (red.), *Migration och professioner i förändring*, Malmö högskola, Institutet för flervetenskaplig forskning, Malmö, 2006.

Hydén, Sofia, Lundberg, Anna, *Inre utlänningskontroll i polisarbete: mellan rättsstatsideal och effektivitet i Schengens Sverige*, Malmö Univ. Press, Malmö, 2004.

Kennedy, Randall, *Suspect Policy: Racial Profiling Usually Isn't Racist. It Can Help Stop Crime. And It Should be Abolished*, The New Republic: September 13 & 20, 1999.

Kleineman, Jan, ”Rättsdogmatisk metod” in: Nääv, Maria, Zamboni Mauro (red.), *Juridisk metodlära*, Studentlitteratur, Lund, 2018.

Leander, Peter, *Skyldig tills motsatsen bevisats? En granskning av polisens inre utlänningskontroller*, Arena idé, 2014.

Martinez, Ramiro, E. Hollis, Meghan, Stowell, Jacob I., *The handbook of race, ethnicity, crime and justice*, Wiley Blackwell, Hoboken, 2018.

Meyers, Marcia K., Vorsanger, Susan, ”Street-Level Bureaucrats and the Implementation of Public Policy”, in: Peters, Guy B, Pierre, Jon (red), *Handbook of Public Administration*, Sage Publications, London 2003.

Neild, Rachel, *Ethnic profiling in the European Union: pervasive, ineffective, and discriminatory*, Open Society Justice Institute, 2009.

Open Society Justice Initiative, *Ethnic Profiling by Police in Europe*, Open Society Foundations, 2005.

Open Society Justice Initiative, *Reducing Ethnic Profiling in the European Union: A Handbook of Good Practices*, Open Society Foundations, 2012.

Petrocelli, Matthew, Piquero, Alex R. and Smith, Michael R., *Conflict theory and racial profiling: An empirical analysis of police traffic stop data*, Journal of Criminal Justice, 31(1), pp. 1–11, 2003.

Pettersson, Tove, *Polisingripanden vid eget bruk av narkotika: särbehandlas personer med utländsk bakgrund? Kriminologiska institutionen*, Stockholms universitet, Stockholm, 2005. (2005a)

Pettersson, Tove, "Kriminologiskt perspektiv – Diskrimineras personer med utländsk bakgrund av rättsväsendet?" in: Diesen, Christian, *Likhet inför lagen*. Natur och kultur, Stockholm, 2005. (2005b)

Phillips, Coretta, Bowling, Ben, "Ethnicities, racism, crime and criminal justice", in: Morgan, Rodney, *The Oxford handbook of criminology*. Oxford University Press, Oxford, 2012.

Ramirez, Deborah A., Hoopes, Jennifer, Quinlan, Tara Lai, *Defining Racial Profiling in a Post-September 11 World*, American Criminal Law Review, (Issue 3), p. 1195, 2003.

Risse, Mathias, Zeckhauser, Richard, *Racial Profiling*, Blackwell Publishing, Inc. Philosophy & Public Affairs 32, no. 2, 2004.

Rönneling, Anita, *Berättelser från en välfärdsstat: om förståelse av marginalisering*, Kriminologiska institutionen, Stockholm University, Stockholm, 2004.

S. Engel, Robin, Swartz, Kristin, "Race, crime and policing" in: Tonry, Michael H., *The Oxford Handbook of Ethnicity, Crime, and Immigration*, Oxford University Press, Oxford, 2014.

Sandgren, Claes, *Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation*, Norstedts Juridik, Stockholm, 2018.

Schabas, William A., *The European Convention on Human Rights: a commentary*, Oxford University Press, Oxford, 2015.

Sollund, Ranghild. *Racialisation in police stop and search practice – the Norwegian case*, Critical Criminology, 14(3), pp. 265–292, 2006.

Sollund, Ranghild, *Canteen Banter or Racism: is there a Relationship between Oslo Police's Use of Derogatory Terms and their Attitudes and Conduct towards Ethnic Minorities?* Journal of Scandinavian Studies in Criminology & Crime Prevention, Vol. 8 Issue 1, p. 77–96, 2007.

Waddington, P. A. J., Stenson, Kevin and Don, David, *In Proportion: Race, and Police Stop and Search*, British Journal of Criminology, (Issue 6), p. 889, 2004.

Weitzer, Ronald, Tuch, Steven A., *Perceptions of Racial Profiling: Race, Class, and Personal Experience*, Criminology, (Issue 2), p. 435, 2002.

Östlund, Emil, "Polisens sökarljus. Etnicitet som urskilningsfaktor i det operativa polisarbetet och hur den legitimeras", in: Åkerström, Malin, *Den*

sorterande ordningsmakten: studier av etnicitet och polisiär kontroll,
Bokbox, Lund, 2013.

Websites

National legal bodies

Diskrimineringsombudsmannen: "*Etnisk tillhörighet som diskrimineringsgrund*", <<https://www.do.se/om-diskriminering/skyddade-diskrimineringsgrunder/etnisk-tillhorighet-som-diskrimineringsgrund>>, accessed 25 November 2019.

Diskrimineringsombudsmannen: "*Etnisk Profilering*", <<https://www.do.se/om-diskriminering/skyddade-diskrimineringsgrunder/etnisk-tillhorighet-som-diskrimineringsgrund/etnisk-profilering/>>, accessed 25 November 2019.

Sveriges Riksdag: "*Rasmässig eller etnisk profilering inom rättsväsendet*", <https://www.riksdagen.se/sv/dokument-lagar/dokument/skriftlig-fraga/rasmassig-eller-etnisk-profilering-inom_H61169>, accessed 25 November 2019.

Justitieombudsmannen: "*JO utreder inte REVA*", <<https://web.archive.org/web/20141028024605/http://www.jo.se/sv/Om-JO/Press1/Presskatalog/JO-utreder-inte-REVA-anmalningar/>>, accessed 25 November 2019.

International legal bodies

European Commission against Racism and Intolerance: "*About the European Commission against Racism and intolerance*" (ECRI)", <<https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/about>>, accessed 20 November 2019.

Swedish articles

Linda Stark: "*Det enda de pratar om är rädslan för polisen*", Tidningen Republik, published 2012-12-17, updated 2014-03-05 and 2018-03-08, <<https://www.tidningenrepublik.se/reportage/det-enda-de-pratar-om-ar-radslan-for-polisen>>, accessed 29 September 2019.

Anna H Svensson: ”*Polisen jagar papperslösa plankare*”, svt.se, published 12 december 2012, <<https://www.svt.se/nyheter/inrikes/polisen-jagar-papperslosa-plankare>>, accessed 29 September 2019.

Nils Edman and Johan Wicklén: ”*Gränspolisen stoppar id-kontrollerna i t-banan*”, svt.se, published 8 March 2013, <<https://www.svt.se/nyheter/lokalt/stockholm/polisen-stoppar-id-kontrollerna-i-t-banan>>, accessed 29 September 2019.

Dictionary

A Dictionary of Law, searched word: *soft law*, Jonathan Law and Elizabeth A. Martin, Oxford University Press, published 2009, current version 2014, <<https://www.oxfordreference.com/view/10.1093/acref/9780199551248.001.0001/acref-9780199551248-e-3685?rskey=or9lm3&result=3881>>, accessed 12 December 2019.

A Dictionary of Sports Studies, searched word: *consensus theory*, Alan Tomlinsson, Oxford University Press, published 2010, <<https://www.oxfordreference.com.ludwig.lub.lu.se/view/10.1093/acref/9780199213818.001.0001/acref-9780199213818-e-287?rskey=MikV77&result=270>>, accessed 12 December 2019.

Other

Legal commentary

Lindblom, Brottsdatalog (2018:1177), chapter 2 para. 11, JUNO, updated 1 July 2019.

Cases

European Court of Human Rights

Balázs v. Hungary, No. 15529/12, 20 October 2015.

Biao v. Denmark [GC], No. 38590/10, 24 May 2016.

D.H. and Others v. The Czech Republic [GC], No. 57325/00, 13 November 2007.

Fredin v. Sweden (No. 1), No. 12033/86, 18 February 1991.

Lingurar v. Romania, No. 48474/14, 16 April 2019.

Nachova and Others v. Bulgaria [GC], Nos. 43577/98 and 43579/98, ECtHR, 6 July 2005.

Rasmussen v. Denmark, No. 8777/79, 28 November 1984.

Sejdić and Finci v. Bosnia and Herzegovina [GC], Nos. 27996/06 and 34836/06, ECtHR, 22 December 2009.

Škorjanec v. Croatia, No. 25536/14, 28 March 2017.

Sporrong and Lönnroth v. Sweden, 52 Eur. Ct. H.R. (ser. A) § 69 (1982).

Stoica v. Romania, No. 42722/02, 4 March 2008.

Timishev v. Russia, Nos. 55762/00 and 55974/00, ECtHR, 13 December 2005.

Willis v. The United Kingdom, No. 36042/97, 11 June 2012.

Court of Justice of the European Union

ECJ, *Bilka-Kaufhaus GmbH v. Weber Von Hartz*, Case 170/84 [1986] ECR 1607, 13 May 1986.

Human Rights Committee

Communication no. 1493/2006: Human Rights Committee, 96th session, 13–31 July 2009: views, CCPR/C/96/D/1493/2006.

Swedish Supreme Court

The Swedish Supreme Court, Ö2343–16, protocol 2018–12–18.

Other Swedish Courts

Swedish Court of Appeal, T 6161–16, 2017–04–28.

Stockholm District Court, T 2978–15 m.fl., 2016–06–10.

German Federal Constitutional Court

Abstract of the German Federal Constitutional Court's Order of 4 April 2006, 1 BvR 518/02,

<https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2006/04/rs20060404_1bvr051802en.html>, accessed 3 November 2019.