

Challenging the Constitutionality of Ethnic Profiling in France

The random and unchecked identity checks carried out by French police are arbitrary, unnecessary, and discriminatory and are not necessary to achieve legitimate law enforcement aims. A coalition of advocates is challenging this discriminatory practice before the France's Constitutional Council, asking that the permissive legal framework which enables such ethnic profiling to take place be declared contrary to human rights standards.

Ethnic Profiling in France: A Proven Fact

The [ineffective, inefficient, and discriminatory practice of ethnic profiling](#) has been on the French public agenda since the 1980s. For decades, French residents of immigrant origin—both the recently-arrived and those whose families have been living in France for multiple generations—have complained that police target them for unfair, discriminatory, and unnecessary identity checks. Multiple reports issued by independent oversight bodies, civil society organizations, and academics lend credence to this complaint, establishing strong qualitative and quantitative proof of ethnic profiling in France.

A 2009 report published by the Open Society Justice Initiative, [Profiling Minorities: A Study of Stop-and-Search Practices in Paris](#), was the first to produce quantitative evidence of ethnic profiling in France. The study confirmed that police stops in Paris were principally based on the appearance of the person stopped, rather than on his or her behavior or actions. Blacks were anywhere from 3.3 to 11.5 times more likely than Whites to be stopped, and Arabs were anywhere from 1.8 to 14.8 times more likely to be stopped than Whites.

A Permissive Legal Framework

The permissive legal framework that regulates the

stop and search powers facilitates such discriminatory practices by granting the police broad discretion to use these powers without establishing firm parameters for suspicion.

[Article 78 of the French Code of Criminal Procedure](#) regulates preventive and investigative identity checks. Article 78-1 creates a general obligation for all persons in France to submit to police identity checks. Article 78-2 establishes that police officers can ask anyone to justify his or her identity when plausible reasons exist to suspect that the person has committed or has attempted to commit an offense, is preparing to commit an offense, is able to provide information useful for an inquiry into offense, or is the subject of a judicial investigation.

This same article gives police stop and search powers upon the written instruction of district attorneys to investigate and prosecute specific offenses.

They may also carry out identity checks when they believe there to be a risk to public order or safety of other persons and property, regardless of the behavior of the individual stopped and irrespective of whether the individual stopped is breaking any laws.

Police officers can carry out such identity checks in all areas open to international traffic, including rail stations, airports, seaports, highways and other locations as designated by ministerial decree, without needing to meet a suspicion threshold.

Foreigners in France are additionally subject to the [Code of Entry and Stay of Foreigner and of the Right to Asylum](#), which since 1945 has required all foreigners to carry with them at all times proof of their legal stay or right of transit through the country. Police can subject foreigners to identity checks at any time without having to meet any suspicion threshold.

Combined with the limited recording of stops and the absence of any monitoring of ethnic bias by the police, this has created the opportunity for these powers to be used in a disproportionate and discriminatory manner.

The Constitutional Challenge

In May 2011, a legal challenge to these permissive stop and search powers was filed before the French courts, utilizing a newly approved process known as Question Prioritaire de Constitutionnalité (“priority constitutional question”, or QPC). Implemented in 2010, this legal remedy allows common jurisdiction courts to refer to the French Constitutional Council challenges to existing laws filed by aggrieved individuals.

These cases, brought by a coalition of French lawyers with the technical assistance of the Open Society Justice Initiative, argue that Article 78 of the French Criminal Code of Procedure allows arbitrary policing, deprivation of personal liberty, and discrimination that is neither objective nor justified.

Specifically, this legal framework violates the following rights:

- **the right to legal certainty, accessibility, and transparency of the law**, as the stop and search powers it affords police officers

are sufficiently broad and discretionary so as to undermine the right to legal certainty under which everyone must be able to know when, where, and why they are being subjected to an identity check

- **the right to personal liberty**, as persons stopped must submit to an identity check or risk being detained, remanded to a police station, and charged with criminal offenses
- **the right to freedom of movement**, as the persons being arbitrarily stopped are not free to go anywhere until the procedure is complete
- **the right to equality before the law**, as ethnic minorities are being treated differently without any objective and reasonable justification

Plaintiffs for this legal challenge are individuals whose identity checks escalated from simple identity checks to criminal prosecution for resisting arrest or immigration proceedings for unlawful stay in France. They have first filed their cases in criminal and immigration tribunals, which will work their way up through the Cassation Court or the Council of State. Both of the latter tribunals will be asked to refer the cases to the Constitutional Council under the QPC scheme.

The Constitutional Council will be asked to declare the legal framework for stops and searches established in the Code of Criminal Procedure as being contrary to human rights standards, opening the door to reform of these provisions and less discriminatory policing in France.

Contact:

- Lanna Hollo (Paris)
Email: hollo_1@yahoo.com

For more information, see the Open Society Justice Initiative website: <http://www.justiceinitiative.org>