

Has the Genie Been Let Out of the Bottle? Ethnic Profiling in the Netherlands

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Abstract

A range of political and social developments in the Netherlands suggest that ethnic profiling in political and social discourse is no longer seen as a taboo. Increasingly ethnic profiling is perceived as part of the solution to ‘the problem’ of terrorism, radicalisation, integration, violent crime, serious public nuisance or public safety. Although Dutch legislation and regulations do not explicitly prohibit ethnic or racial profiling, for law enforcement officials to use generalisations based on ethnicity, race, national origin or religion is at odds with national and international law. Nonetheless, there is a risk that police, security, immigration and customs officials exercise their general and special powers on the basis of generalisations or stereotypes to tackle pressing social needs.

Within the Dutch political arena and in public speech, ethnic profiling is increasingly perceived as part of the solution to ‘the problem’ of terrorism, radicalisation, integration, violent crime, serious public nuisance or public safety. The over-representation of non-Western ethnic minorities in registered crime statistics, for example, influences extreme political statements including the calls for the ‘deportation of convicted criminals with Moroccan nationality’ and ‘special stop and searches for Antillean youths in Rotterdam’.² Public policies targeted at minorities are not always necessary,

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² *Maasstad Pers* (2010), ‘Lapt Leefbaar Rotterdam de rechtsstaat aan de laars?’ (‘Does Leefbaar Rotterdam Respect the Rule of Law’), *Maasstad Pers*, 1 September 2010; RPW Jennissen (2009), *Criminaliteit, Leef tijd en Etniciteit: Over de afwijkende leeftijdsspecifieke criminaliteitscijfers van in Nederland verblijvende Marokanen en Antillianen* (‘Crime, age and ethnicity: on divergent age-specific crime figures for ethnic Moroccans and Antilleans living in the Netherlands’), Research and Documentation Centre (WODC), Research and Policy no. 277, Boom Legal Publishers/WODC: The Hague; House of Representatives of the States General, *Antwoorden van de minister en de staatssecretaris van Binnenlandse Zaken en Koninkrijksrelaties op vragen van het lid Fritsma (PVV) over kosten, die voortvloeien uit de aanwezigheid van (niet-westerse) allochtonen in Nederland* (‘Replies of the Minister and the State Secretary for the Interior and Kingdom Relations to questions from the MP Fritsma (Party for Freedom and Progress) regarding costs arising from the presence of (non-Western) ethnic minorities in the Netherlands’), submitted on 17 July 2009, 2009Z14076, Parliamentary Papers 2008-2009, no. 3692, 15 September 2009; H Moors, L Balogh, J van Donselaar and B de Graaff (2009), ‘Monitor: Polarisatie en Radicalisering in Nederland: Een verkenning van de stand van zaken in 2009’ (‘Monitor: Polarisation and

proportionate or effective. Since 9/11 counter-terrorism and deradicalisation policies have focused on Islamic youths yet their effect is not clear.³ Furthermore, as the supposed relationship between ethnicity and social problems has become a political issue, law enforcement is under pressure to profile on the basis of race, origin, nationality, religion, or residential status. The police, for instance, have been involved in the ‘stop and check’ of the identity of specific groups of aliens, such as West Africans, as well as extra alcohol controls for foreign drivers, especially from Poland.⁴ Even though studies suggest that the polarised political and public debate discourse does not reflect reality, minorities, such as the Muslim population, increasingly do feel discriminated against.⁵ Consequently, one wonders how these political developments relate to the Dutch legal framework. Does the political and public discourse on ethnic profiling affect legislation and regulations? How do law enforcement agencies respond?

Since Dutch legislation and regulations do not explicitly prohibit ethnic or racial profiling, this article refers mainly to national and international standards governing the principles of equality, non-discrimination, privacy, and the protection of personal data. Ethnic or racial profiling is often discussed in relation to the prohibition of discrimination, but it can also be viewed in the context of the protection of privacy and personal data. Furthermore, the relevant legislation and regulations will be reviewed, followed by a brief overview of the structure of the Dutch police, security, immigration and customs services. The tasks and powers of the diverse investigating officers and supervisory officials will be examined, with special attention to investigative and law enforcement powers in which a certain risk of ethnic profiling is inherent. Such powers include the authority to stop people and check their identity papers, as well as security searches, arrests and access to personal data. The discussion will also look at special administrative measures, compulsory identification, the instrument of preventive searches, the ban on public assembly that may be imposed in certain circumstances, and the use of (and linkage of) digital databases containing personal details. Finally, the article concludes that in the Netherlands, due to political and social developments including terrorism, radicalisation, integration, violent crime, serious public nuisance and public safety, the genie has been let out of the bottle and that ethnic profiling in political and social discourse is no longer considered a taboo.

Ethnic profiling

A recent non-binding resolution of the European Parliament addressed the problem of ethnic profiling and emphasised that all processing of personal data for law enforcement and anti-terrorist purposes should be based on published legal rules. The resolution underscored the need to establish a clear definition of legitimate versus illegal uses of sensitive personal data in the security field.⁶ However

Radicalisation in the Netherlands: Developments in 2009’), Tilburg: IVA beleidsonderzoek en advies.

³ B de Graaff (2008), ‘Hoe Breed?: Contraterrorisme-en radicaliseringsbeleid onder de loep’ (‘Counterterrorism-and radicalisation policy reviewed) pp 125-140. In J van Donselaar and PR Rodrigues (2008) (eds), *Monitor Racisme & Extremisme: Achtste rapportage*. Amsterdam/Leiden: Anne Frank Foundation / University of Leiden; F Demant, M Sloopman, F Buijs and J Tillie. (2008), ‘Teruggang en Uittreding: Processen van deradicalisering ontleed’ (‘Decrease and Withdraw: Reviewing processes of deradicalisation’), IMES: Amsterdam.

⁴ National Police Services Agency (KLPD) (2010), ‘Gerichte Alcohol Controles’ (‘Targeted alcohol controles’), 20 Augustus 2010, Police website (accessed 31 August 2010); National Ombudsman (2009). ‘Onderzoek inval vreemdelingenpolitie in Amsterdams café’ (‘Research on the raid of the Aliens police at a bar in Amsterdam’), Report 2009/170, 20 August 2009, The Hague.

⁵ H Moors, L Balogh, J van Donselaar and B de Graaff (2009), *Monitor: Polarisatie en Radicalisering in Nederland: Een verkenning van de stand van zaken in 2009* (‘Monitor: Polarisation and Radicalisation in the Netherlands: Developments in 2009’), Tilburg: IVA beleidsonderzoek en advies.

⁶ European Parliament (2009), ‘Problem of profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control’, EP 121-p3, INI/2008/2020, no.

there is as yet no consensus, either in the Netherlands or elsewhere, as to precisely what constitutes ‘ethnic profiling’ although a number of authoritative definitions exist.⁷ Under international law, ethnicity is regarded as a subcategory of race (Article 1, UN International Convention on the Elimination of All Forms of Racial Discrimination: ‘UN Race Convention’). In practice, however what constitutes ethnicity is often inferred by officials from self-definition or on the basis of diverse features such as nationality, religion, culture, language and country of origin of the person in question or parents.⁸ According to the Open Society Institute, ethnic profiling is ‘the use by the police, security, immigration or customs officials of generalisations based on race, ethnicity, religion or national origin – rather than individual behaviour or objective evidence – as the basis for suspicion in directing discretionary law enforcement actions. It can also include situations where law enforcement policies and practices, although not themselves defined either wholly or in part by reference to ethnicity, race, national origin or religion, nevertheless do have a disproportionate impact on such groups within the population and where this cannot otherwise be justified in terms of legitimate law enforcement objectives and outcomes.’⁹

Drawing up profiles is in itself a legitimate instrument and is a means frequently deployed with success by police, security, immigration and customs officials, for instance in maintaining public order, performing border controls, or preventing or investigating criminal offences. The question arises, however, as to whether the use of such instruments can pass specific scrutiny tests for there is a risk that certain people and groups may be stigmatised and consequently feel alienated from society.¹⁰ The Government is guilty of discrimination if the profiles are based on personal characteristics such as ethnicity, race, origin, language, culture and/or religion. This is in breach of international human rights and fundamental rights.

Reality or perception? Ethnic profiling in the Netherlands

Although little research has been done on profiling by law enforcement officials on the basis of ethnicity, religion, nationality or residence status in the Netherlands,¹¹ diverse actors within civil society suspect that it takes place. From a recent survey of perceptions of ethnic minorities within the European Union,¹² it appeared, for instance, that 25% of Dutch Muslims of Turkish origin interviewed

LIBE/6/58595.

⁷ ENAR (2009) Factsheet 40: ‘Ethnic Profiling’, Brussels: European Network Against Racism, p 3; JA Goldston (2005), ‘Toward a Europe without Ethnic Profiling’, *Justice Initiative*, June 2005, p 7.

⁸ A Terlouw (2009), ‘Etnische Registratie van Risicjongeren en het Verbod op Rassendiscriminatie’ (‘Ethnic registration of high-risk youth and the prohibition of racial discrimination’), *NJCM Bulletin*, Year 34, vol. 4 pp 608-622, at 610.

⁹ OSI (2009), *Defining Ethnic Profiling*, New York: Open Society Institute, 7 October 2009, p 2.

¹⁰ F Bovenkerk (2009), *Wie is de Terrorist: Zin en onzin van ethnic profiling* (‘Who is the Terrorist? Sense and nonsense of ethnic profiling’), Rotterdam: Ger Guijs, pp 45-46.

¹¹ F Bovenkerk and M San (1999), ‘De politie en de multiculturele samenleving’ (‘The police and the multicultural society’), in F Bovenkerk, M van San and S de Vries (eds), *Politiewerk in de Multiculturele Samenleving*, Apeldoorn: LSOP, pp. 3-78; B Rovers. (1999), ‘Dertig Jaar Onderzoek naar Klassenjustitie in Nederland: Wat zijn de resultaten en hoe nu verder?’ (‘Thirty years of research on class-based administration of justice in the Netherlands: The findings and the way forward’). Paper presented at the conference of the Dutch Association of Criminologists (NVK) ‘Vooruitzichten in de criminologie’ (‘Prospects in criminology’), Amsterdam, 17 June 1999; F Bovenkerk (1978), *Omdat Ze Anders Zijn: Patronen van rassendiscriminatie in Nederland* (‘Because they are different: Patterns of racial discrimination in the Netherlands’), Amsterdam: Boom Publishers.

¹² For the study in the Netherlands, 1.375 respondents were interviewed, mostly of Turkish, North African and Surinamese origin. These interviews took place in Amsterdam, The Hague, Rotterdam and Utrecht. The non-response rate was 23%. For more information, see EU Fundamental Rights Agency (2009), *European Union Minorities and Discrimination Survey* (EU-MIDIS), EU Fundamental Rights Agency, 18 June 2009, pp 8/ 34-

had been stopped by the police at least once in the 12 months prior to the survey, and that of these individuals, 25% had the impression that this was based on ethnicity. The corresponding figures for Dutch Muslims of North African origin were 26% and 39%, respectively.¹³ The National Ombudsman receives frequent complaints about discrimination by immigration officials at Schiphol airport¹⁴ and international human rights bodies are beginning to take notice. The United Nations Human Rights Committee is one of the bodies to have put questions to the Netherlands on ethnic profiling in its review of Dutch policy.¹⁵

Dutch legislation and regulations

There is no explicit prohibition of ethnic profiling in Dutch legislation or regulations, but since it is a form of direct discrimination, diverse statutory provisions will be discussed here. Discrimination between individuals on the basis of race, ethnicity, religion, sex, nationality, language etc is prohibited by international conventions that are directly applicable in the Kingdom of the Netherlands,¹⁶ as well as by the Dutch Constitution, the Equal Treatment Act, and a number of provisions of criminal and administrative law. Some of these statutory provisions relate to institutional policy and the actions of police, security, immigration and customs officials.

The right to equal treatment and the ban on discrimination are fundamental rights, and they are therefore both included in the first article of the Dutch Constitution. This states as follows:

All persons in the Netherlands shall be treated equally in equal circumstances.
Discrimination on the grounds of religion, belief, political opinion, race or sex
or on any other grounds whatsoever shall not be permitted.¹⁷

Like Article 26 of the United Nations (UN) International Covenant on Civil and Political Rights (ICCPR), Article 1 of the Dutch Constitution enshrines both a principle of universal equality and a ban on discrimination.¹⁸ The principle of equality means that everyone must be treated equally in equal circumstances and that even though opinion may be divided on this point, there is no justification for

35/80-82.

¹³ In total, 25% of the Muslims interviewed in the European Union had been stopped by the police at least once in the 12 months prior to the survey. Of these, 40% had the impression that ethnic profiling was involved. For the report dealing specifically with Muslims, see European Union Agency for Fundamental Rights (2009), 'Data in Focus Report: Muslims', in EU Fundamental Rights Agency (2009), *European Union Minorities and Discrimination Survey* (EU-MIDIS), No 2, 28 May 2009, pp 13-14.

¹⁴ CBG (2009), *Comments on the Seventeenth and Eighteenth Dutch Reports on the Implementation of the Convention on the Elimination of All Form of Racial Discrimination*, Equal Treatment Commission / The Ombudsman / Data Protection Authority, March 2009, pp 17-18.

¹⁵ United Nations Human Rights Committee (2008), *List of Issues to be Taken up in Connection with the Consideration of the Fourth Periodic Report of the Netherlands* (CCPR/C/NET/4; CCPR/C/NET/4/Add.1; CCPR/C/NET/4/Add.2) CCPR/C/NLD/Q/4, 25 November 2008, para 2, p 4; Council of Europe (2009), Report by the Commissioner for Human Rights, Thomas Hammerberg, on his visit to the Netherlands, CommDH (2009) 2, 11 March 2009.

¹⁶ The Netherlands adheres to a monistic system in which international conventions and the decisions of organisations established under international law are self-executing and do not have to be transposed into national legislation. See articles 93 and 94, Constitution of the Kingdom of the Netherlands, 12 September 1840 (Bulletin of Acts and Decrees 1840, 54).

¹⁷ Article 1, Constitution of the Kingdom of the Netherlands, 12 September 1840 (Bulletin of Acts and Decrees 1840, 54).

¹⁸ Other relevant articles of the ICCPR are Articles 2, 9 and 14.

making distinctions, even if this is done on reasonable and objective grounds.¹⁹ The Netherlands is also party to almost all UN human rights conventions, including the UN Race Convention.

In addition, as a state party and member of the European Union (EU) and the Council of Europe, the Netherlands has an obligation to adhere to international conventions and EU legislation: regulations, directives, and decisions. The most important of these are the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), especially Article 14,²⁰ the Twelfth Protocol to the ECHR,²¹ the EU Race Directive, especially Article 2, and the EU Anti-Discrimination Directive,²² the Privacy Directives,²³ the Lisbon Treaty, and the EU Charter of Fundamental Rights.²⁴ Where the ECHR is concerned, it should be noted that Article 14 provides protection from discrimination only in combination with one of the other rights, such as the right to liberty and security of person (Article 5 ECHR). This situation was remedied by the ratification of the Twelfth Protocol to the ECHR in 2005, since this Protocol provides for the general prohibition of discrimination in all *de facto* and *de jure* acts by the government (that is, including acts by law enforcement officials). It should also be added that the EU Race Directive, which seeks to curb discrimination on the basis of race or ethnic origin, deals solely with equal treatment in the supply of goods and services. Under the terms of Article 3, paragraph 2 of the EU Race Directive, the prohibition does not include difference of treatment based on nationality, and non-EU residents cannot derive any rights from it.²⁵

¹⁹ Senate / House of Representatives of the States General, Ratification of Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on 4 November 2000 (Dutch Treaties Series 2001, 18 and 173); Recommendations and additional report, Parliamentary Papers 2001-2002, 28100 (R1705), no. 129a/A, 5 November 2000.

²⁰ For more information, read Senate / House of Representatives of the States General, Ratification of Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on 4 November 2000 (Dutch Treaties Series 2001, 18 and 173); Recommendations and additional report, Parliamentary Papers 2001-2002, 28100 (R1705), no. 129a/A, 5 November 2000.

²¹ Article 1, paragraph 2 of the Twelfth Protocol to the ECHR prohibits discrimination by any public authority. The Netherlands ratified this Protocol on 1 April 2005 (Bulletin of Acts and Decrees 2004, 302.)

²² The EU Equal Treatment Directive (2008) on the Equal Treatment of Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation, no COM(2008)0426-C6-0291/2008-2008/0140 (CNS) supplements earlier directives, including the EU Race Directive (2000), Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, no 2000/43/EC, 29 June 2000. At the same time, Article 10 of the Lisbon Treaty states that 'in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. For more information, see J Goldston (2003), 'The European Union Race Directive', Moscow Workshop, 27-29 January 2003, New York: Open Society Institute.

²³ Data Protection Directive (1995), On the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data, no 1995/46/EC, and the EU Directive on Privacy and Electronic Communication (2002), Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, no 2002/58/EU, 12 July 2002. On 28 January 2010, EU Justice Commissioner Reding announced that she would be proposing amendments to modernise the EU privacy regulations on the basis of the Data Protection Directive and the specific rules applicable to telecommunication and the internet ([e-Privacy rules](#)).

²⁴ The Charter of Fundamental Rights of the European Union (7 December 2000, amended 12 December 2007 Strasbourg) is not part of the Lisbon Treaty (2007/C306/01), which modernised and reformed the Treaty on European Union and the Treaty establishing the European Community, but EU institutions and national states that implement EU legislation are obliged to observe these fundamental rights and the principle of subsidiarity applies to the obligations of the member states.

²⁵ Even in the Lisbon Treaty, which prohibits discrimination on the basis of nationality, this prohibition applies only to EU citizens (Article 18, Lisbon Treaty). In addition, the Council of the EU 'may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation', but not based on nationality (Article 19, Lisbon Treaty).

Views differ when it comes to the absolute protection of fundamental rights such as the principle of equality and the prohibition of discrimination in relation to ethnic profiling. Still, there is a consensus that it is legitimate to draw distinctions on the basis of specific scrutiny tests, including proportionality, effectiveness and necessity.²⁶ This is clear from the case law of the European Court of Human Rights and the Data Protection Convention of the Council of Europe.²⁷ In addition, Goldschmidt and Rodriques maintain, in an article on the use of ethnic and religious profiles in antiterrorism activities, that whenever there is a breach of fundamental rights, it is always essential to determine whether these breaches are proportional and necessary.²⁸ Thus, investigating officers must ask themselves whether the advantages of profiling outweigh the disadvantages, and whether the objective cannot be attained in some less extreme way.

Since it is widely held by jurists that Article 1 of the Dutch Constitution prohibits discrimination in a vertical sense – that is, between the state and its inhabitants – supplementary equal treatment legislation exists, which is applicable in a horizontal sense, among members of the public. Equal treatment legislation in the Netherlands derives from a variety of international conventions and from article 1 of the Dutch Constitution. The Equal Treatment Act (AWGB) prohibits discrimination on the basis of religion and belief, political opinions, race, sex, nationality, heterosexual or homosexual orientation, or marital status. This Act distinguishes between direct and indirect forms of discrimination, whereby some forms of indirect discrimination may be justified on objective or legal grounds (section 2, AWGB). The Act applies to public life and not to churches or other communities based on spiritual values. Complaints may be submitted to the Equal Treatment Commission, whose conclusions are authoritative but not binding.

In consonance with the UN Race Convention, discrimination is a criminal offence in the Netherlands. Article 90 quater of the Criminal Code gives the following definition:

Discrimination shall be defined as any form of distinction, any exclusion, restriction or preference, the purpose or effect of which is to nullify or infringe upon the recognition, enjoyment or exercise on an equal footing of human rights and fundamental freedoms in the political, economic, social or cultural fields or any other field of public life.

²⁶ Senate / House of Representatives of the States General, *Wijziging van de Wet op de jeugdzorg in verband met de introductie van een verwijzindex om vroegtijdige en onderling afgestemde verlening van hulp, zorg of bijsturing ten behoeve van jeugdigen die bepaalde risico's lopen te bevorderen (verwijzindex risico's jeugdigen); Advies en nader rapport*, ('Amendment of the Youth Care Act, introducing a reference index to promote the timely and coordinated provision of assistance, care or guidance for certain at-risk young people; Recommendations and additional report'); Parliamentary Papers 2008-2009, 31855, no 4, 12 February 2009, p 12/13; ENAR (2009) 'Factsheet 40: Ethnic Profiling', Brussels: European Network Against Racism (ENAR), p 5; ECRI (2007). *General Policy Recommendation no 11 On Combating Racism and Racial Discrimination in Policing*, European Commission against Racism and Intolerance (ECRI), CRI / Council of Europe no 2007/39, 29 June 2007, p 9.

²⁷ European Court of Human Rights, *Timishev v Russia*, Application nos 55762/00, 55974/00, Judgment of 13 December 2005, sections 56-58; Council of Europe (1981), Data Protection Convention, 28 January 1981.

²⁸ JE Goldschmidt and PR Rodriques (2006), 'Het Gebruik van Etnische en Religieuze Profielen bij het Voorkomen en Opsporen van Strafbare Feiten die een Bedreiging Vormen voor de Openbare Orde en Veiligheid' ('The Use of Ethnic and Religious Profiles in Preventing and Investigating Criminal Offences that pose a Threat to Public Order and Security'), pp 40-60. In J van Donselaar and PR Rodriques (2006) (eds), *Monitor Racisme & Extremisme: Zevende rapportage*, Amsterdam / Leiden: Anne Frank Foundation / University of Leiden, p 40.

In addition, specific forms of discrimination are regarded as criminal offences in the Netherlands. Aside from offences with a discriminatory element, such as intimidation, incitement, dissemination, and support in relation to activities geared towards discrimination, discrimination in the exercise of public office and in one's occupation or business activities is also a criminal offence (see articles 137c-f and 429s quater, Criminal Code).

There is also a Police Code of Conduct: the General Discrimination Directive 2007,²⁹ which relates to passing on information, pre-investigation, investigation and prosecution of those charged with discrimination. Special public prosecutors attached to eleven regional public prosecutor's offices and liaison officers in the police service are responsible for bringing offenders to justice.³⁰ The basic point of departure is that the police are obliged to send official reports to the Public Prosecution Service.

The Dutch public authorities are obliged to adhere to the above-mentioned prohibitions on discrimination and the principle of equality. According to the definition used by the Ombudsman,³¹ these are requirements of good governance (based on fundamental rights and substantive good governance), which must be observed by municipal authorities and other administrative authorities.³² Administrative courts are involved in maintaining public order, supervisory officials monitor compliance with regulations under administrative law, and administrative bodies impose sanctions; all these activities may unintentionally foster ethnic profiling (see the section on special powers below).³³ In a general sense, administrative courts rule on the basis of the General Administrative Law Act. In addition, there is legislation governing specific areas of administrative law, such as the Aliens Act 2000. Neither the Aliens Act nor the Aliens Act Implementation Guidelines 2000 refers explicitly to the prohibition of discrimination. However, the Aliens Act does include a guarantee of non-discrimination in the control of aliens. Aliens services are under an obligation to perform 'stop and check' activities in a non-discriminatory way. Law enforcement officials responsible for border controls and aliens control are not permitted to stop someone unless there is good reason to suspect, on the basis of objective facts and circumstances, that the person is an illegal resident (section 50, Aliens Act). Even so, the evaluation of the Aliens Act 2000 revealed inconsistencies in practice.³⁴ In 2004, for instance, it was shown that many police officers (including those who serve as assistant public prosecutors) are insufficiently well informed regarding this criterion. It should be added that a residence permit may be denied or revoked if the alien concerned is regarded as posing a threat to national security or public order (section 14, Aliens Act / chapter 4.4, Aliens Act Implementation Guidelines 2000). Specific grounds must be present for this conclusion.

Besides focusing on the prohibition of discrimination, one can also approach this issue in relation to the fundamental right of privacy and the protection of personal data. One reason why this approach too merits attention is that information-gathering and 'data-mining', that is, gathering information or

²⁹ Board of Procurators-General, General Discrimination Directive, no 2007A010, 12 October 2009.

³⁰ They are supported by two national expertise centres: the National Discrimination Expertise Centre (LECD Public Prosecution Service) and the National Diversity Expertise Centre (LECD Police).

³¹ The National Ombudsman examines the government's actions for adherence to the principles of good governance.

³² National Ombudsman (2009), *De Behoorlijkheidswijzer* ('Indicators for good governance'), The Hague: National Ombudsman.

³³ FAM Michiels (2006), *Houdbaar Handhavingsrecht* ('Sustainable Enforcement Law') (inaugural address, University of Tilburg), Deventer: Kluwer, p141.

³⁴ PFM Boekhoorn (2004), *Evaluatie Operationeel Toezicht Vreemdelingendiensten: Vreemdelingenwet 2000*, ('Evaluation of the Operational Control of Aliens; Aliens Act 2000'), Research and Documentation Centre (WODC), The Hague: Boom Publishers. This evaluation is part of the advisory report issued by the Aliens Act 2000 Evaluation Committee.

searching digital databases on the basis of profiles in order to store, structure, link and/or summarise conclusions, plays an ever greater role in society. Databases are rapidly proliferating at national and European level. These include European databases for security and immigration policy such as Eurodac (fingerprints for the identification of asylum seekers), the ECRIS system (enabling EU countries to access each other's national criminal records databases) and the Schengen Information System (with data on aliens who have been declared 'undesirable'), which is primarily intended for tracking down suspects and convicted criminals but is also used to restrict immigration.³⁵ In the Netherlands, digital personal data are stored on a large scale. The average Dutch national is registered in some 250 to 500 databases, and since data are regularly linked, it is sometimes impossible to say where personal details have been retained and why.³⁶ In addition, there is still a substantial margin of error, not to mention the risk of identity fraud.³⁷

The prohibition of ethnic profiling in relation to information-gathering and data-mining is enforced on the basis of the fundamental right of privacy and in particular the protection of personal data. The right to privacy and the right to the protection of personal data are enshrined in diverse national and international laws and regulations, including the Data Protection Convention of the Council of Europe, Article 8 of the ECHR, Articles 7 and 8 of the EU Charter of Fundamental Rights, and article 8 of the Dutch Constitution. There can be no interference with the exercise of the right to private life other than in the circumstances described in Article 8, paragraph 2 of the ECHR:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In the Netherlands, the most important act of parliament providing for the criteria 'necessary and in accordance with the law' is the Personal Data Protection Act (WBP).³⁸ This act states that personal data may only be gathered for specific purposes. It further prohibits the processing of specific personal data, including race, other than for purposes of identification or in response to an application for a temporary exemption in order to reverse structural disadvantages among ethnic or cultural minorities (sections 16 and 18, Personal Data Protection Act).

That information-gathering and data-mining are vulnerable to the risk of ethnic profiling is clear from the following example. In 2006, the Data Protection Authority granted a temporary exemption for the registration of young Antillean delinquents in 21 municipalities classified as high-risk (section 23,

³⁵ ENAR (2009), *Factsheet no 40: Ethnic Profiling*, Brussels: European Network Against Racism (ENAR); E Brouwer (2008), *Digital Border and Real Rights: Effective Remedies for Third-Country Nationals in the Schengen Information System*. Leiden / Boston: Martinus Nijhoff Publications.

³⁶ A Roessel (2009), 'Trek Op Die Muur' ('Build that wall'), *Groene Amsterdammer*, no 42, 14 October 2009; B Schermer and T Wagemans (2009), 'Onze Digitale Schaduw. Een verkennend onderzoek naar het aantal databases waarin de gemiddelde Nederlander geregistreerd staat' ('Our digital shadow. An exploratory study of the number of databases in which the average Dutch person is registered'), Study commissioned by the Data Protection Authority, Amsterdam: Considerati, 23 January 2009.

³⁷ National Ombudsman (2008). 'De Burger in de Ketens: Verslag van de Nationale Ombudsman over 2008' ('Citizens in Chains: Report of the National Ombudsman for 2008'), The Hague: National Ombudsman.

³⁸ The EU Privacy Directive is implemented in the Personal Data Protection Act (WBP), Bulletin of Acts and Decrees 2000, 302, 1 September 2001.

subsection 1(e), Personal Data Protection Act).³⁹ The subsequent bill to introduce an Antillean Reference Index provoked so much public opposition that that government withdrew it. A few years later, it should be added, it emerged that the projected figures on the number of Antillean delinquents in the Netherlands had been greatly overestimated.⁴⁰ Instead of adopting an Antillean Reference Index, the Dutch Parliament recently passed the Reference Index for At-Risk Youth Act. This Act enables care organisations to exchange (through digital channels) personal warnings of risks associated with individual young delinquents. One of the risks identified as a possible impediment to a healthy and safe development to adulthood is that ‘the young person is exposed to risks that occur with disproportionate frequency in specific ethnic groups’ (Section 2 J, part 1, Reference Index for At-Risk Youth Act).⁴¹ So although there is no explicit registration of ethnicity, such distinctions are lurking in the wings. In practice, carers often make notes (sometimes in digital form) that lead to ethnic registration.⁴² A motion presented to the Senate of the States General, seeking to postpone the ethnic registration of at-risk youth pending a fundamental debate on the desirability of registration of ethnic origin in general was rejected.⁴³ This means that the principle of ‘non-registration, unless there are objectively justifiable grounds for doing so’ has been abandoned. In addition, such practices are probably incompatible with the above-mentioned prohibition of non-discrimination and the legislation on the protection of personal data.

Police structure and powers

³⁹ The ethnic registration of personal data at the municipal level is prohibited (Section 34, Municipal Database (Personal Records) Act of 8 March 2006, Bulletin of Acts and Decrees 9 June 1994, 494). See also Personal Data Protection Act.

⁴⁰ A significant indicator was the number of unregistered Antillean delinquents without a fixed place of residence. It later emerged that certain premises were incorrect: for instance, the arrest statistics recorded by the Royal Netherlands Marechaussee at Schiphol Airport had been included. See House of Representatives of the States General, *Actualisatieonderzoek schatting aantal in Nederland verblijvende Antilliaanse Nederlanders die niet ingeschreven zijn in de GBA: Een ‘capture-recapture’-analyse in opdracht van het Ministerie van VROM* (‘Update of the study on the estimate of the number of Dutch nationals of Antillean origin who are not registered in the Municipal Personal Records Database: A “capture-recapture” analysis commissioned by the Ministry of Housing, Spatial Planning and the Environment’), Parliamentary Papers 2009-2010, 26 283, no 53, 30 November 2009.

⁴¹ Senate / House of Representatives of the States General, *Wijziging van de Wet op de jeugdzorg in verband met de introductie van een verwijzindex om vroegtijdige en onderling afgestemde verlening van hulp, zorg of bijsturing ten behoeve van jeugdigen die bepaalde risico's lopen te bevorderen (verwijzindex risico's jeugdigen); Advies en nader rapport*, (‘Amendment of the Youth Care Act, introducing a reference index to promote the timely and coordinated provision of assistance, care or guidance for certain at-risk young people; Recommendations and additional report’) Parliamentary Papers 2008-2009, 31855, no 4, 12 February 2009, p 12/13; Data Protection Authority, *Besluit inzake het ontheffingsverzoek Verwijzindex Antillianen en de gemeentelijke casuoverleggen Antillianen* (‘Decision on request for exemption for an Antillean Reference Index and municipal consultations on cases involving Antilleans’) Decision Z2006-00036, 11 December 2006; OCAN (2009), ‘Ingezonden Brief. Etnische Registratie: What Works?’ (‘Letter to the editor. Ethnic registration: what works?’), Caribbean Dutch Nationals Consultative Body (OCAN), 29 April 2009.

⁴²C Prins (2010), ‘Discriminatiesignalen’ (‘Signs of discrimination’), NJB 02/10 <http://njblog.nl/2010/01/11/discriminatiesignalen/#more-799> (accessed 5 February 2010).

⁴³ Senate of the States General, *Wijziging van de Wet op de jeugdzorg in verband met de introductie van een verwijzindex om vroegtijdige en onderling afgestemde verlening van hulp, zorg of bijsturing ten behoeve van risicojongeren die bepaalde risico's lopen te bevorderen (verwijzindex risicojongeren); Motie om de meldingsgrond 'onevenredige risico's die samenhangen met etniciteit' niet toe te passen*, (‘Amendment of the Youth Care Act, introducing a reference index to promote the timely and coordinated provision of assistance, care or guidance for certain at-risk young people; motion to omit as grounds for registration “disproportionate risks related to ethnicity”’), Parliamentary Papers 2009-2010, 31 855, H, 28 January 2010.

Security is safeguarded in the Netherlands by the police, the Royal Netherlands Marechaussee (KMar), intelligence and security services and a number of inspectorates, special investigative services (BODs) and supervisory officials with specific tasks and responsibilities. In addition, countless private security agents are involved in public tasks such as law enforcement and investigation.

The core responsibilities of the police are to maintain public order and to protect the legal order, to investigate, provide assistance, and to report warning signals and/or to make recommendations, on the basis of the applicable laws and operating under the aegis of the competent authorities (section 2, Police Act). The Netherlands has 25 police regions and a single National Police Services Agency (KLPD). The Minister of the Interior and Kingdom Relations bears political responsibility for the police, but the regional police service is under the management of the regional board presided over by the Regional Police Force Manager – one of the mayors in the region. The rest of the board consists of the mayors of the other municipalities and the chief public prosecutor (sections 22, 23, 30 and 31 Police Act). The Regional Police Force Manager is assisted by the chief of police, who is responsible for the executive management of the police. In matters relating to maintaining public order, the police operate under the authority and decision-making powers of the mayor of the municipality; when it comes to upholding the legal order on the basis of the criminal law, they operate under the authority of the public prosecutor (sections 2, 12 and 13 Police Act; sections 172-175 Municipalities Act; article 148, Code of Criminal Procedure). In 2008 there were 52,322 police officers working in the Netherlands.⁴⁴

The Royal Netherlands Marechaussee (KMar) is part of the armed forces and therefore operates under the political responsibility of the Minister of Defence. Traditionally, the KMar is responsible for military policing, the control of aliens, border controls at Schiphol Airport, other airports and seaports, and providing security for members of the Royal House (section 6, Police Act). It takes part in peace missions, provides security for Dutch embassies, and is represented in the Netherlands' overseas territories. There is a growing trend, partly in the context of counterterrorism activities, for the KMar or other units of the armed forces to be deployed for policing duties.⁴⁵ In 2008, there were 6,600 members of the armed forces employed within the KMar in the Netherlands.⁴⁶

The primary intelligence and security services in the Netherlands are the General Intelligence and Security Service (AIVD), the Military Intelligence and Security Service (MIVD), and the Regional Intelligence Services of the police force (RID). The AIVD gathers and supplies information and personal data on, conducts research on, and prepares threat and risk analyses in relation to, individuals, groups and organisations, to help other government bodies to protect national security,⁴⁷ while the MIVD does so for the benefit of the armed forces (sections 6, 6a, 7 and 7a, Intelligence and Security Services Act 2002). The AIVD operates under the political responsibility of the Minister of the Interior and Kingdom Relations, while the MIVD is answerable to the Minister of Defence. AIVD and MIVD officials are not classified as law enforcement officers with investigative powers (section 9,

⁴⁴ Annual police report (2008). <http://www.jaarverslagpolitie.nl/> (accessed 4 January 2010).

⁴⁵ L Gunther Moor and CD van der Vijver (2004), 'Politie en Krijgsmacht' ('Police and Armed Forces') in CJCF Fijnaut, ER Muller, U Rosenthal and J van der Torre (2004), *Politie: Studies over haar werking en organisatie*, Deventer: Kluwer, pp 1101-1116 and 1107-1109.

⁴⁶ Ministry of Defence (2010). Website Ministry of Defence <http://www.defensie.nl/marechaussee/personeel/> (accessed 4 January 2010).

⁴⁷ National security includes 'both security breaches caused by intentional human action ("security") and threats to security caused by disasters, breakdowns in systems or procedures, human error, or natural anomalies such as extreme weather conditions ("safety")'. See National Security Strategy (2007), Council of Ministers, 14 May 2007. Website of the Ministry of the Interior and Kingdom Relations <http://www.minbzk.nl/@105745/strategie-nationale> (accessed 30 March 2010).

Intelligence and Security Services Act). They provide information about possible threats and risks relating to state security to other bodies such as the police, which in turn take security measures. Every regional police force has a RID, which performs some of its responsibilities for the AIVD (section 60, Intelligence and Security Services Act).

Inspectorates and special investigative services (BODs) operate in specific areas of public enforcement (eg environment, fiscal crime etc) and are accountable to line ministries (Special Investigative Services Act, 2006). For instance, the Fiscal Information and Investigation Service-Economic Investigation Service ('FIOD-ECD') falls under the Ministry of Finance and conducts supervisory and investigative activities in the financial and economic realm and on goods that enter the Netherlands through customs. If public enforcement does not work, it may be appropriate, under certain conditions, for BODs to apply the criminal law, with powers deriving from article 141 of the Code of Criminal Procedure.

Private security companies are hired by the government to perform a variety of ancillary public tasks, such as guarding persons who have been arrested, supervising those in aliens detention, and performing municipal supervisory and enforcement duties in the public space.⁴⁸ Private security officers are also involved in joint public-private activities such as airport and seaport security and event safety and security. In some cases, private security officers act as special investigative officers ('BOAs') (sections 5 and 11, Private Security Organisations and Detective Agencies Act).⁴⁹ The Minister of Justice decides who is eligible to become a BOA. He or she also decides whether a particular BOA can exercise certain police powers such as stopping persons, checking their ID, security searches, and coercive measures (the power to arrest suspects and take them to the police station). In other words, not all BOAs have the same powers (article 447e, Criminal Code; article 142, Code of Criminal Procedure; section 3a, Weapons and Munitions Act; Special Investigative Officials Act; Police Act; Code of Conduct for the police, the Royal Netherlands Marechaussee and special investigative officials, Weapons and Munitions Regulations). The regional police and the KMar are responsible for licensing private security companies and detective agencies, as well as issuing permits to individuals, and the enforcement and supervision of the Private Security Organisations and Detective Agencies Act. In 2008 there were 31,000 private security officers working in the Netherlands, employed by some 250 to 400 commercial companies.⁵⁰

The general and special powers of the police, the KMar, the intelligence and security services, inspectorates, BOAs, supervisory officials and private security officers are all different. The following sections clarify these powers, inasmuch as they are relevant to the subject of ethnic profiling. In the exercise of discretionary powers, investigation or maintaining public order, there is a risk that such activities may be carried out (in part) on the basis of generalisations relating to race, ethnicity, religion or nationality instead of on the basis of individual behaviour and/or objective evidence. This may be expressed directly or indirectly in the decisions of supervisory and/or investigative officials, regarding matters such as who they detain for identity checks, interrogation, security searches and sometimes

⁴⁸ These activities are based on administrative law.

⁴⁹ For more information, see http://www.justitie.nl/onderwerpen/opsparing_en_handhaving/boa/index.aspx (accessed 6 January 2010).

⁵⁰ House of Representatives of the States General, *Rechtsstaat en Rechtsorde; Brief Algemene Rekenkamer over particuliere beveiliging* ('The rule of law and legal order: Letter from the Netherlands Court of Audit on private security companies'), Parliamentary Papers 2009-2010, 29279, no 95, 13 October 2009; T Jones, R van Steden, and H Boutellier (2009), 'Pluralisation of Policing in England and Wales and the Netherlands: Exploring similarity and difference', *Policing and Society*, vol 19, no 3, pp 282-299 at 285.

arrest.⁵¹ It also emerges in relation to special powers such as administrative measures, information-gathering and data-mining, as well as in surveillance, in high-risk security areas, in border controls, and in some parts of government policies on terrorism, radicalisation and aliens.

The powers and responsibilities of the police are based on diverse legislation and regulations. The power to perform police duties and hence to breach fundamental rights is based on the principle of legality, which means that the actions of all public servants must have a specific statutory basis (article 15 of the Dutch Constitution; article 1 of the Code of Criminal Procedure). The Police Act defines the tasks of the police, which are further elaborated in the Police Code of Conduct,⁵² which also applies to the KMar and BOAs. The primary task of the police is enforcing the criminal law (under the authority of the public prosecutor), maintaining public order (under the authority of the mayor), providing assistance, and enforcing special Acts of Parliament (see sections 2, 12 and 13, Police Act). The Aliens Act is an example of a special Act of Parliament stating that aliens resident in the Netherlands are the responsibility of the police. Since it is difficult to regulate all the actions that may be taken by police officers, less emphasis is placed on the principle of legality if there is little or no breach of human rights.⁵³

Where investigation and maintaining public order are concerned, police officers, and in some cases military personnel of the KMar, BOAs and supervisory officials, have a number of specific powers. These range from investigative activities such as the identification of individuals to the use of coercive measures, including arrest, as regulated by the Code of Criminal Procedure and a number of special Acts of Parliament such as the Weapons and Munitions Act, the Economic Offences Act and the Aliens Act. In practice, police officers possess the discretionary power to exercise their judgment, in a reasoned and measured way and in due proportion to the objective at hand, in deciding who to arrest or subject to a security search, for instance (section 8, Police Act). Since the parliamentary enquiry conducted by the Van Traa Commission in the 1990s, special investigative activities such as phone tapping to combat organised crime have been regulated by an amendment to the Code of Criminal Procedure introduced by the Special Investigative Powers Act (articles 126g to 126ui, Code of Criminal Procedure).⁵⁴ The same happened in 2006 in relation to investigations of crimes of terrorism with the Expansion of Scope for the Investigation and Prosecution of Crimes of Terrorism Act

⁵¹ OSI (2009), *Ethnic Profiling in the European Union: Pervasive, ineffective and discriminatory*, 26 May 2009, New York: Open Society Institute, p 10.

⁵² Police Code of Conduct (1994), *Decision of 8 April 1994, containing rules for a new code of conduct for the police, the Royal Netherlands Marechaussee, personnel with specific powers of inspection, and the measures to which those deprived of their liberty by law may be subjected*.

⁵³ Y Buruma (2004), 'Formele Bevoegdheden' ('Formal powers'), in CJCF Fijnaut, ER Muller, U Rosenthal and J van der Torre (2004), *Politie: Studies over haar werking en organisatie*, Deventer: Kluwer, pp 525-559.

⁵⁴ For more information, see M Krommendijk, J Terpstra and PH van Kempen (2009), *De Wet BOB: Titels IVa en V in de praktijk. Besluitvorming over bijzondere opsporingsbevoegdheden in de aanpak van georganiseerde criminaliteit*, ('Decision-making on special investigative powers in the fight against organised crime; Titles IVa and V of the Special Investigative Powers Act in Practice'); Research and Documentation Centre (WODC) / Radboud University of Nijmegen, no 1531, The Hague: Boom Legal Publishers.

(126zao 126zs, Code of Criminal Procedure).⁵⁵ A bill is currently being prepared to expand the powers of the Aliens Police and the KMar to establish the identity and nationality of aliens.⁵⁶

The following observations apply to the KMar. Besides its general powers, the KMar also possesses a number of special powers (section 6, Police Act). Under the Aliens Act, it is responsible *inter alia* for the initial reception of asylum seekers and the deportation of aliens who have exhausted all legal remedies. In addition, it may assist the police both in maintaining public order and in investigative activities. From the treatment meted out to those suspected of drugs smuggling at Schiphol Airport, it is clear that the KMar's methods are not always unchallenged. By way of illustration, since 2003 the customs authorities at Schiphol have subjected travellers from certain countries, including Suriname, the Netherlands Antilles, Aruba and Venezuela to what are known as 100% checks, that is, a body search. After persistent public criticism of both body searches and the treatment of persons suspected of drugs smuggling during investigation by the KMar, and a Supreme Court ruling that these selective checks can only be performed on persons suspected of an offence and that they constitute breaches of human and fundamental rights, this measure was abolished in 2007 (section 17, Customs Act; article 27, Code of Criminal Procedure; articles 10 and 11 of the Dutch Constitution, and article 8, ECHR).⁵⁷ The KMar is now somewhat improving its treatment of suspects. A body-scan apparatus is now used at Schiphol, enabling those suspected of drug offences to demonstrate their innocence on a voluntary basis. Despite the fact that demonstrating one's innocence is antithetical to the presumption of innocence, it is an improvement to the previous practice. Despite these minor improvements, it remains difficult for the KMar, in the exercise of a substantial proportion of its tasks, not to focus too heavily on the nationality or ethnicity of individuals.

The powers of the intelligence and security services are geared towards gathering information relating to national security. The AIVD and MIVD derive permission for the use of special powers for information-gathering from the responsible Minister,⁵⁸ or the chief of the intelligence service, who in practice delegates this power in writing to officials operating under his or her authority (section 19, Intelligence and Security Services Act). This means that special powers such as the power to tap telephones and non-cable telecommunications, searches of private places, keeping individuals under surveillance and following them cannot be undertaken lightly, and can be deployed only for set periods of time (sections 17-33, Intelligence and Security Services Act). The Intelligence and Security Services Supervisory Committee ('the Committee') supervises the exercise of these powers

⁵⁵ B van Gestel, CJ de Poot, RJ Bokhorst and RF Kouwenberg (2009), *Signalen van Terrorisme en de Opsporingspraktijk: De Wet opsporing en vervolging terroristische misdrijven twee jaar in werking* ('Indications of Terrorism and Investigation in Practice: Two years' experience with the Crimes of Terrorism Investigation and Prosecution Act'); Research and Documentation Centre (WODC), Cahiers 2009-10, no 1880, The Hague: Boom Legal Publishers; CJ de Poot, RJ Bokhorst, WH Smeenk and RF Kouwenberg (2008), *De Opsporing Verruimd: De Wet opsporing en vervolging terroristische misdrijven een jaar in werking*, ('Scope for Investigation Expanded: One year's experience with the Crimes of Terrorism Investigation and Prosecution Act'), WODC, Cahiers 2008-09, no 1629, The Hague: Boom Legal Publishers / WODC.

⁵⁶ One of these proposals, for instance, is that if an alien is apprehended in a dwelling that the police has entered lawfully, the police may search the dwelling for his ID papers in the course of their investigation to establish identity without the alien's consent (section 53, Aliens Act). See House of Representatives of the States General, Letter from the State Secretary for Justice on the expansion of the powers that may be exercised in the control of aliens, Parliamentary Papers 2008-2009, 19637, no 1260, 27 March 2009.

⁵⁷ Judgment no (LJN) AZ8795, [Supreme Court](http://www.art1.nl/Article/7752-100-controles_in_het_nieuws), 01567/06, 29 May 2007; Art 1 (2007); *Dossier: 100%-controles*, Website Art 1 http://www.art1.nl/Article/7752-100-controles_in_het_nieuws; National Ombudsman (2006), *Dossier 100%-controles Schiphol; Over bollejtesslikkers en onschuldige slikverdachten*, ('On drugs swallows and innocent persons suspected of swallowing'), no 2007/125 2006/230 -001, The Hague: National Ombudsman.

⁵⁸ They are the Ministers of Justice, Defence, and the Interior and Kingdom Relations.

retrospectively. For instance, a report issued by the Committee concludes that the AIVD exercises restraint in relation to the tapping of telephones and non-cable telecommunication.⁵⁹ This is a striking conclusion, since the Dutch justice department uses this instrument extremely often, certainly in comparison with other countries.⁶⁰ It is hard for members of the public to ascertain how frequently the AIVD and MIVD avail themselves of special powers. In general, this information is provided only to the Committee. In a highly unusual disclosure, the fact was released into the public domain, in response to a motion on the floor of the House of Representatives of the States General, that in 2009 the AIVD had used a total of 1078 taps and MIVD 53.⁶¹

Private security work is governed by the Private Security Organisations and Detective Agencies Act (WPBR). Where private security officers are deployed for public tasks, additional skills and training are required under the terms of this Act, but the actual exercise of such tasks is not governed by the WPBR (section 1, subsection 2 (b), WPBR). In such cases, the general laws and regulations apply. For instance, if private security officers act as BOAs, they do so in the framework of criminal law enforcement. Private security officers generally support municipal authorities and the police or the KMar in specific enforcement or investigatory duties.⁶² Examples include municipal street patrols, youth workers in neighbourhoods where large numbers of young people ‘hang out’ in the streets, and security officers at Schiphol Airport.

In principle, the powers of private security personnel such as supervisory officers, BOAs or stewards who are deployed for public tasks are the same as those of any member of the public. In practice, however, the situation is more complex. Under certain conditions, private security personnel have the power to request access to suspects’ names and records of interrogations, to stop and check people, and in the event of a misdemeanour, to draw up an official report and/or to impose a minor fine (article 447^e, Criminal Code). In addition, the use of force, breaches of physical integrity, and handling privacy-sensitive personal information (in aliens detention centres for instance) are not exceptional.⁶³ In the context of public-private cooperation, private security officers often derive their extra powers from internal rules and conditions of entry, with which passengers or visitors implicitly consent to undergo checks on their personal property, body searches, security scans or any other form of control.

⁵⁹ CTIVD (2009), *Toezichtsrapport inzake de toepassing door de AIVD van Artikel 25 WIV 2002 (aftappen) en Artikel 27 WIV 2002 (selectie van ongericht ontvangen niet-kabelgebonden telecommunicatie)*, (‘Supervisory report on the application by the AIVD of section 25, Intelligence and Security Services Act 2002 (phone taps) and section 27, Intelligence and Security Services Act 2002 (selection of non-directional interception of non-cable telecommunication’), no 19, The Hague: Intelligence and Security Services Supervisory Committee.

⁶⁰ In 2008 a total of 26,425 telephone numbers were tapped by the police, while the corresponding figure in Britain was 1,881. See House of Representatives of the States General, Annual Report and Final Account for 2009 of the Minister of Justice, Parliamentary Papers 2009-2010, 32360 VI, no 1, 19 May 2009, p 56-57; *NRC Handelsblad* (2009), ‘Nederland scoort hoog in tapranglijst’ (‘The Netherlands scores high on phone tapping league table’), *NRC Handelsblad*, 2 September 2009; United Nations Human Rights Committee (2009), *Concluding Observations of the Human Rights Committee: the Netherlands*. CCPR/C/NLD/CO/4, 25 August 2009, p 4

⁶¹ The number of persons concerned is lower, since many have more than one telephone number. See Letter from the Minister of the Interior and Kingdom Relations, *Tapstatistieken van de Algemene Inlichtingen- en Veiligheidsdienst en de Militaire Inlichtingen- en Veiligheidsdienst* (‘Phone tapping statistics of the AIVD and MIVD’), no 4334682/01, 19 April 2010.

⁶² These activities are based on the criminal law. House of Representatives of the States General, *Rechtsstaat en Rechtsorde; Brief Algemene Rekenkamer over particuliere beveiliging*, ‘The rule of law and the legal order: Letter from the Netherlands Court of Audit on private security companies’) Parliamentary Papers 2009-2010, 29279, no 95, 13 October 2009, pp 2-4.

⁶³ House of Representatives of the States General, *Rechtsstaat en Rechtsorde; Brief Algemene Rekenkamer over particuliere beveiliging*, (‘The rule of law and legal order: Letter from the Netherlands Court of Audit on private security companies’), Parliamentary Papers 2009-2010, 29279, no 95, 13 October 2009, p 6.

Ethnic profiling in practice

Over the past few years, several specific powers have been developed in the areas of maintaining public order and criminal law enforcement which, as exercised by police officers, and in some cases by BOAs, KMar military personnel or supervisory officials, may have repercussions in the area of ethnic profiling. Under pressure from feelings of ‘unsafety’ in the community, nuisance factors, and the fight against terrorism and crime, the government is increasingly giving more priority to the security of the community and less to individual rights. Administrative court orders and decisions by administrative bodies such as exclusion orders (forbidding persons from entering a particular area), restraining orders (forbidding them from going near a particular person), a requirement to report to the police at set times (*meldingsplicht*), compulsory identification, preventive body searches and the gathering and linking of digital personal details have made checks on people easier and more frequent. With these specific powers, local authorities and security services are adopting a strongly preventive, problem-oriented approach. This may have repercussions for the treatment of vulnerable groups, including ethnic minorities and aliens.

ID-checks

In 2005 the legal obligation to carry ID was introduced as a preventive measure, which automatically abolished the requirement that no one could be asked to produce ID unless suspected of a specific offence. Since then, everyone aged 14 and older has been required to show a valid identity document if a police officer, a BOA, or an officer of the KMar deems it necessary in the reasonable exercise of his or her duties (section 1, Compulsory Identification Act; section 8a, subsection 1, Police Act; section 2, Special Investigative Services Act). This is also compulsory at the request of a supervisory official (section 5:16a, General Administrative Law Act).⁶⁴ Anyone who refuses to comply is guilty of a minor offence and may be liable to payment of a fine (article 447e, Criminal Code). During the parliamentary debate on the Compulsory Identification Act, the possible discriminatory application of this Act was discussed. According to the Minister of Justice, the condition of acting in accordance with the ‘reasonable exercise of one’s duties’ constituted a sufficient safeguard.⁶⁵

An evaluation has shown that compulsory identification is relatively ineffective as an instrument to combat crime, that it was initially applied too widely, and that contrary to what had been feared within civil society, there is no evidence of an increase in discrimination.⁶⁶ It should be noted, however, that this latter conclusion was substantiated using information from investigating officers and supervisory officials.⁶⁷ Whether this presents a true picture is therefore open to question, especially given that research has shown that minorities such as Muslims, North Africans and Surinamese people in the

⁶⁴ Public Prosecution Service, *Aanwijzing uitbreiding identificatieplicht* (‘Directive on the expansion of compulsory identification’), 1 January 2010 to 31 December 2013.

⁶⁵ House of Representatives of the States General, ‘Amendment and supplement to the Compulsory Identification Act, the Criminal Code, the General Administrative Law Act, the Police Act 1993 and a number of other acts of parliament in relation to the introduction of compulsory identification for members of the public in relation to officers appointed by the police to perform police duties and supervisory officials (Compulsory Identification (Extended Scope) Act); List of questions and answers on the scope of the evaluation study to be performed by the Research and Documentation Centre (WODC)’. Parliamentary Papers 2004-2005, 29218, no 23, 10 May 2005.

⁶⁶ H Everwijn, W Jongebreur and P Lolkema (2009), *Het Functioneren van de WUID in de Praktijk: Evaluatie van de Wet op de uitgebreide identificatieplicht* (‘Evaluation of the Functioning of the Compulsory Identification (Extended Scope) Act in Practice’) Research and Documentation Centre (WODC), no 1646, Barneveld / The Hague: Significant / WODC, pp 43-44 and 148.

Netherlands, as elsewhere in Europe, commonly do not submit complaints about alleged discrimination.⁶⁸ Researchers too draw attention to the risk of prejudice.⁶⁹ Another consequence of compulsory identification is that the increased checks on aliens are impeded by the absence of valid identity documents or residence permits (section 9, Aliens Act).⁷⁰

Preventative searches

Anyone within a designated ‘security risk zone’ during a set period of time may be subjected to a ‘preventive search’ by police officers. This instrument was introduced at municipal level in 2002 as an additional means of maintaining public order or searching for weapons (section 151b, Municipalities Act). These powers are vested in the mayor by means of a by-law,⁷¹ which is passed by the municipal council after consultations between the mayor and the public prosecutor. When these rules apply, the police are empowered, by authority of the public prosecutor, to search any individual as well as goods and vehicles, without having any grounds for suspicion (section 14, Police Act, articles 126 zq and 141, Criminal Code, and section 50(3), 51(3) and 52, Weapons and Munitions Act). Those affected have six weeks to submit a written objection and/or request a judicial review of this decision on the basis of the General Administrative Law Act. A number of permanent security risk zones have been designated by order in council, to facilitate investigations relating to crimes of terrorism:⁷² the Houses of Parliament (Binnenhof), all airports, the train stations of the four major cities, the Media Park in Hilversum, and the nuclear power station in Borssele (Investigation of Crimes of Terrorism Decree, 21 December 2006; articles 126 zq-zs, Code of Criminal Procedure). The instrument of preventive searches has serious implications for the presumption of innocence and the right to privacy, and may lead to ethnic profiling.

Up to a point, the instrument of preventive searches enjoys political and public support in the Netherlands. The political debate about public safety, and about preventive searches in particular, takes place mainly in the sphere of municipal politics. However, the theme is gradually starting to make itself felt in national politics. The People’s Party for Freedom and Democracy (VVD) and the Party for Freedom and Progress (PVV) advocate the expansion or permanent institution of preventive searches in the Netherlands, whereas the Green Left Alliance is critical of the instrument.⁷³ In addition,

⁶⁷ It emerges from the interviews that supervisory officials and special investigative officials are often accused of discrimination, but that this is not necessarily attributable to compulsory identification; see H Everwijn, W Jongebreur and P Lolkema (2009), *Het Functioneren van de WUID in de Praktijk: Evaluatie van de Wet op de uitgebreide identificatieplicht* (‘Evaluation of the Functioning of the Compulsory Identification (Extended Scope) Act in Practice’), WODC, no 1646, Barneveld / The Hague: Significant / WODC, pp 43-44 and 148.

⁶⁸ EU Fundamental Rights Agency (2009), *European Union Minorities and Discrimination Survey* (EU-MIDIS), Vienna: EU Fundamental Rights Agency, 18 June 2009, pp 50-51.

⁶⁹ K Meerschaut and P de Hert (2007), *Identiteitscontroles in Rechtsvergelijkend Perspectief: Moet controle op kleur worden gemeten?* (‘Identity checks in the perspective of comparative law. Should checks on colour be measured?’) in *De orde van de dag*, issue 40 December 2007.

⁷⁰ National Ombudsman (2007), *Bewijs Maar Wie je Bent: De afgifte van identiteitsdocumenten (W-2 documenten) door de Immigratie- en Naturalisatiedienst* (‘Prove who you are: the issuing of W-2 identity documents by the Immigration and Naturalisation Service’), no 2007/060, 28 March 2007.

⁷¹ Municipal bye-laws lay down the rules that apply to everyone within a municipality. For more information, see Bureau Jansen and Jansen (2010), *Preventief fouilleren* (‘Preventive searches’), <http://www.preventiefouilleren.nl/> (accessed 1 February 2010).

⁷² A government decision to the effect that statutory regulations may be elaborated further.

⁷³ F Teeven (2010), ‘VVD wil Preventief Fouilleren Altijd Toestaan’ (‘VVD wants preventive searches to be allowed in all circumstances’), 1 March 2010. VVD website <http://www.vvd.nl/actueel/711/vvd-wil-preventief-fouilleren-altijd-toestaan> (accessed 1 April 2010); PVV (2010). *De Agenda van Hoop en Optimisme: Een tijd om te kiezen, PVV 2010-2015*, (‘Agenda of Hope and Optimism: A Time for Choice, PVV 2010-2015, Election Programme, Party for Freedom and Progress’), April 2010, p 13; Privacy Barometer (2010). *Preventief*

while there is public support for preventive searches, various groups, including many young people, consider that the instrument is applied selectively. It should also be noted that people who live, or enjoy the nightlife, in areas where weapons are a relatively serious problem are confronted by such searches more than others. For instance, a small majority of persons subjected to such searches in Southeast Amsterdam (the Bijlmer district),⁷⁴ some parts of which have been designated almost permanently as ‘security risk zones’, consider it unfair that such searches are not conducted more frequently in other boroughs. In this context it should be noted that research has shown that the vast majority of the people who are subjected to preventive searches display sympathy for these actions, support them up to a point, and do not experience them as infringements of privacy, but that preventive searches are not a demonstrably effective instrument of investigation and enforcement.⁷⁵ Although various evaluations in Rotterdam and Amsterdam have shown that results have been achieved in terms of the seizure of illicit weapons, it is questionable whether these results are commensurate with the numbers of people checked, the number of police hours or lower crime figures, including incidents involving weapons.⁷⁶ It is striking that the local authorities and the police are aware, up to a point, of the importance of non-selective searches, and appreciate that how a search is conducted influences the way in which people experience it.⁷⁷ At the same time, it is possible that an institutional form of ethnic profiling exists, given that preventive searches are conducted more frequently in disadvantaged neighbourhoods with high crime figures, whose populations include relatively large proportions of ethnic minorities and migrants.

Fouilleren (‘Preventive searches’), 2 March 2010, Website Privacy Barometer 2010 (accessed 5 April 2010).

⁷⁴ Amsterdam-Amstelland Police Force (2010), *Preventief Fouilleren* (‘Preventive searches’). Website of Amsterdam-Amstelland police force, <http://www.politie-amsterdam-amstelland.nl/get.cfm?id=209> (accessed 5 April 2010); Municipality of Amsterdam (2010), ‘Beleidsdocumenten Preventief Fouilleren’ (‘Policy documents on the preventive search instrument’), website ‘Een Veilig Amsterdam’ (‘A safe Amsterdam’). http://www.eenveiligamsterdam.nl/thema's/thema's/toezicht_handhaving/preventief/beleidsdocumenten (accessed 5 March 2010); COT (2006), *Evaluatie Preventief Fouilleren in Amsterdam: De stand van zaken* (‘Evaluation of the preventive search instrument in Amsterdam: the present state of affairs’), The Hague: Institute for Safety, Security and Crisis Management (COT), p 45.

⁷⁵ M Bruinsma (2010), *Evaluatie Preventief Fouilleren Gemeente Amsterdam* (‘Evaluation of the preventive search instrument in Amsterdam: the present state of affairs’) Tilburg; Security Accreditation Authority (IVA) policy research and advisory report; COT (2009/2003), *Evaluatie Preventief Fouilleren Gemeente Amsterdam* (‘Evaluation of the preventive search instrument in Amsterdam: the present state of affairs’), The Hague: Institute for Safety, Security and Crisis Management (COT); Bureau Jansen and Jansen (2009), ‘Amsterdam: De zoveelste rond preventief fouilleren: knockout’ (‘Preventive searches in Amsterdam, the umpteenth round: Knockout’), website of Bureau Jansen and Jansen http://www.burojansen.nl/Articleen_item.php?id=411 (accessed on 5 April 2010); E Muller, L Rogier, H Kummeling, R Dammen, RP Bron, AJT Woltjer and VC Kalkhoven (2008), *Bestuur, Recht en Veiligheid: Bestuursrechterlijke bevoegdheden voor openbare ordehandhaving en terrorismebestrijding* (‘Administrative authorities, law, and security: The administrative court’s powers in maintaining public order and in combating terrorism’), The Hague: Boom Legal Publishers; COT (2007), *Preventief Fouilleren in Rotterdam; Maatschappelijk draagvlak, opbrengsten en effecten* (‘The preventive search instrument in Rotterdam: Public support, results and effects’), The Hague: Institute for Safety, Security and Crisis Management (COT); EJ van der Torre and HB Ferwerda (2005), *Preventief Fouilleren: Een analyse van het proces en de externe effecten in tien gemeenten* (‘The preventive search instrument: An analysis of the process and the external effect in ten municipalities’), Zeist: Kerkebosch Publishers; MY Bruinsma and H Moors (2005), *Illegale Vuurwapens: Gebruik, bezit en handel in Nederland 2001-2003* (‘Illicit firearms: Use, possession and trade in the Netherlands 2001-2003’), Tilburg: Security Accreditation Authority (IVA) policy research and advisory report.

⁷⁶ A fall in registered crime figures, including those for illegal ownership of weapons or robberies in security risk zones, may be attributable to preventive search activities, but this is not necessarily the case. It is difficult to demonstrate a causal relationship.

⁷⁷ In practice, a kind of selection has been shown to be more effective from a policing perspective. See EJ van der Torre and HB Ferwerda (2005), *Preventief Fouilleren: Een analyse van het proces en de externe effecten in tien gemeenten* (‘The preventive search instrument: An analysis of the process and the external effect in ten municipalities’), Zeist: Kerkebosch Publishers, pp 126-131.

Administrative powers

Little systematic information is available on the impact of administrative court rulings or measures taken by administrative bodies, but certain general observations can be made. Measures such as exclusion and restraining orders and compulsory reporting to the police are seen as extra instruments for maintaining public order or the legal order. An exclusion order may be imposed under private or administrative law. For instance, someone's freedom may be curtailed by denying him or her access to private or public places for a certain period of time. Local authorities apply such orders *inter alia* in 'travel bans', which forbid those found guilty of committing a public nuisance from boarding buses, trams, trains or metro for a set period of time.⁷⁸ Private individuals take similar measures, sometimes with the cooperation of the police. For instance, shopkeepers may collectively bar someone who has displayed undesirable behaviour from entering a shopping or entertainment area. In The Hague city centre, such measures were imposed 1671 times in a three-year period, with 79 individuals being prosecuted for trespassing when they failed to keep to the terms of the ban.⁷⁹

Exclusion and restraining orders, and the requirement to report to the police, are also included in the Measures for the Prevention of Football Vandalism and Serious Public Nuisance Act,⁸⁰ and in a Bill introducing National Security Administrative Measures.⁸¹ These two Bills create numerous new preventive powers enabling the authorities to take temporary measures in relation to natural persons to combat serious public nuisance or in the interests of national security. Under these new provisions, where two conditions are fulfilled (necessity and a person's behaviour), individuals may be subjected by order of the mayor or the public prosecutor (in the case of serious nuisance or football vandalism), or by order of the Minister of the Interior and Kingdom Relations in consultation with the Minister of Justice (where national security is involved), for a limited period of time (up to a maximum of three months), to an exclusion or restraining order, or required to report to the police station at set times. In addition, licenses, exemptions or authorisations may be denied or revoked. Although national security is governed by a divergent regime, those concerned may apply for a judicial review of such a decision under the terms of the General Administrative Law Act or appeal the decision before a criminal court (see section 509hh (Code of Criminal Procedure) of the Measures for the Prevention of Football

⁷⁸ *Parool* (2010), 'Boetes en celstraf bij ov-verbod' ('Fines and custodial sentences in public transport bans'), *Parool*, 28 May 2010; The Minister of Transport, Public Works and Water Management has undertaken to amend the Passenger Transport Act 2000 to this end.

⁷⁹ M Schuilenberg (2009), 'Verboden Toegang; Onderzoek Gebiedsverboden' ('No entrance: A study of orders banning persons from entering certain areas (*gebiedsverboden*)'), *NRC Handelsblad*, 19 September 2009, p 5.

⁸⁰ House of Representatives of the States General, 'Amendment of the Municipalities Act, the Code of Criminal Procedure and the Criminal Code regulating the power of the mayor and the power of the public prosecutor to take measures to combat football hooliganism, severe public nuisance or serious damaging behaviour in relation to persons or goods (measures to combat football hooliganism and serious public nuisance); Motion giving an analysis of the range and effectiveness of the current instruments for maintaining public order', Parliamentary Papers 2008-2009, 31467, no 20, 20 March 2009.

⁸¹ Senate of the States General, 'Rules governing the imposition of restrictive measures on persons with a view to protecting national security and governing the refusal to grant or reversal of administrative decisions with a view to protecting national security (National Security Administrative Measures Act); Amended bill,' Parliamentary Papers 2006-2007, 30556, no. A, 20 March 2007. This Bill has since been held back pending the completion of the government's (additional) evaluation study of the cohesiveness, legitimacy and effectiveness or administrative and criminal-law counterterrorism measures, in response to the findings of the Suyver Commission (Report of the Suyver Commission (2009). *Naar een Integrale Evaluatie van Antiterrorismemaatregelen* ('Towards an Integrated Evaluation of Counterterrorism Measures'), Report of the Commission for the Evaluation of Counterterrorism Policy, May 2009). See House of Representatives of the States General, *Bijlage; Rapport van de Commissie Suyver Naar een integrale evaluatie van antiterrorismemaatregelen*, Parliamentary Papers 2008-2009, 29754, no 164, 17 July 2009.

Vandalism and Serious Public Nuisance Act; section 4 of the National Security Administrative Measures Bill). Intentional failure to comply with such an order is a criminal offence punishable by a term of imprisonment not exceeding one year or a fine (see section 181a (Criminal Code) of the Measures for the Prevention of Football Vandalism and Serious Public Nuisance Act; section 7 of the National Security Administrative Measures Bill). Administrative measures such as exclusion and restraining orders and compulsory reporting to the police are infringements of the right to freedom of movement.

At local level, there is scope for other special measures besides those already mentioned, such as curfews, CCTV surveillance, bans on assembly, safety coordinators and acceptable behaviour contracts, which are geared towards curbing observed problems such as persistent public nuisance, residents feeling 'unsafe', and/or high crime figures. It is sometimes suggested that these problems are related to poor integration of particular ethnic minorities into Dutch society. Since 2002, Rotterdam has had safety coordinators (*stadsmariniers* or 'urban marines'),⁸² who are appointed to tackle persistent safety problems at neighbourhood level.⁸³

Ethnicity data

In information-gathering as well as data-mining, personal data are used, processed, shared with other agencies and retained by security services. For the police, information-gathering, data-mining and data retention are important instruments in investigations and in maintaining public order.⁸⁴ For them, these activities are regulated by the Police Data Act,⁸⁵ the Police Data Decree, the Act Amending Powers to Request Data, a number of articles from the Code of Criminal Procedure, and some sections of the Telecom Act and the Economic Offences Act (articles 125i to 126 uh and 552a to 592, Code of Criminal Procedure).⁸⁶ For the AIVD and MIVD the key legislation is the Intelligence and Security Services Act (sections 26 to 33). Section 5 of the Police Data Act defines the way in which sensitive data including ethnicity must be handled:

⁸² These are special officials who collaborate with the police, housing associations, tax authorities, social services, municipal health services, youth care services and other institutions in problem neighbourhoods of Rotterdam, or in exceptional cases in relation to individuals.

⁸³ PW Tops, B Hoogenboom, W Spijker and E van der Torre, E (2009), *Van Urgentie naar Noodzaak: Positie en Perspectief van Stadsmariniers in Rotterdam* ('From Urgency to Necessity: The Position and Perspective of Safety Coordinators in Rotterdam'), June 2009, Apeldoorn/ Tilburg: Website <http://www.rotterdamveilig.nl/Media/pdf/rapport%20stadsmariniers%202009.pdf> (accessed 1 May 2010).

⁸⁴ R Sietsma (2006), *Gegevensverwerking in het Kader van de Opsporing: Toepassing van Data-mining ten behoeve van de Opsporingstaak: Afweging tussen het opsporingsbelang en het recht op privacy* ('Data processing in relation to investigation. Use of data-mining: weighing the interests of an investigation against the right to privacy'), Schiedam: SDU Publishers; L Stevens, BJ Koops and P Wiemans (2004), 'Een Strafvorderlijke Gegevensvergaring Nieuwe Stijl' ('Data gathering new style in the law of criminal procedure'), *Nederlands Juristenblad* vol 79, no 32, pp 1680-1686; Mevis Commission (2001), *Strafvorderlijke Gegevensverzameling in de Informatiemaatschappij* ('Data gathering in the law of criminal procedure in the information society') Mevis Commission, no z2001-0735, 18 October 2001, p 5 and p 67.

⁸⁵ This act replaced the Data Protection (Police Files) Act on 1 January 2008. Under section 43 of the Personal Data Protection Act, an exception exists in relation to the principle of specified purpose, since the personal data have not been supplied voluntarily.

⁸⁶ The Telecom Act and the Economic Offences Act were amended in 2009 with the implementation of EU Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (Telecommunications Data Retention Act). See Bulletin of Acts and Decrees 2009, no 333, 18 July 2005; Act amending the Code of Criminal Procedure and certain other legislation regulating powers for requesting data (Powers to Request Data), Bulletin of Acts and Decrees 2005, no 390, 6 December 2005.

Police data relating to a person's religion or beliefs, race, political opinions, health, or sex life, as well as personal information concerning trade union membership, shall be processed solely to supplement the processing of other police data, and only to the extent that it is unavoidable for the objective pursued in processing the data.

Under certain specified conditions, information may be supplied on the basis of the Police Data Act to BOAs, public prosecutors, mayors, municipal officials, regional police force managers, government ministers, intelligence services, foreign investigating officers or third parties (sections 15-17, Police Data Act). Since ethnic registration is prohibited in the Netherlands, bodies wishing to process personal data regarding ethnicity must apply for exemption to the Data Protection Authority (section 23, Personal Data Protection Act; section 34, Municipal Database (Personal Records) Act of 8 March 2006, Bulletin of Acts and Decrees, 9 June 1994, 494).

Even so, police as well as other government organisations do in fact collect data on the basis of ethnicity (although it cannot be traced to individual persons).⁸⁷ Such data are used *inter alia* as an aid in policy-making. In 2009, for instance, the National Police Services Agency published an analysis of the population of ethnically Moroccan offenders in municipalities in the Netherlands, at the request of the Minister of the Interior and Kingdom Relations.⁸⁸ This analysis shows, for each municipality, how many persons of Moroccan descent had committed at least one crime in 2007, according to police records (the numbers recorded those who were suspected of a crime, not those convicted). In addition, the municipalities were ranked in order of the seriousness of the problem, based on absolute numbers of ethnically Moroccan offenders and the percentage in relation to the total population aged twelve and older. The National Police Services Agency compiled this list by linking police data with the Municipal Database. The list was compiled as a tool to facilitate policy-making to tackle this problem; it would also be used as a basis for deciding how much extra money should be allocated to specific municipalities to tackle crime and public nuisance among ethnic Moroccans. That the use and collecting of such data is vulnerable to over-interpretation is clear from the political and public debate, in which there is an ever-growing tendency to posit the existence of a causal relationship between ethnicity and disruptive behaviour.

Conclusion

A range of political and social developments, including the problem of terrorism, radicalisation, integration, violent crime, serious public nuisance and public safety, suggests that in the Netherlands the genie has been let out of the bottle, so to speak, and that ethnic profiling in political and social discourse is no longer seen as a taboo. Although Dutch legislation and regulations do not explicitly prohibit ethnic or racial profiling, for the police, security, immigration or customs officials to use generalisations based on ethnicity, race, national origin or religion is at odds with national and international legislation and regulations. In principle, individual behaviour and/or objective evidence must be the basis for all policy and any action by the government. However, in the climate of the current political and public debate, there is no longer an absolute taboo on racial and ethnic profiling.

⁸⁷ Crime figures are collected by the various police forces and passed on to Statistics Netherlands (CBS), which keeps records on general police statistics.

⁸⁸ WAC van Tilburg (2009), *Analyse van Marokkaanse daderpopulaties van gemeenten in Nederland* ('Analysis of Moroccan populations of offenders in municipalities in the Netherlands'), Driebergen, National Police Services Agency, 13 January 2009.

It is becoming increasingly common for politicians and administrators to posit a connection between ethnicity and criminal or disruptive behaviour. In certain cases there may appear to be some basis for this supposition. Thus, some ethnic minorities account for a disproportionate percentage of certain registered crime figures. But these disproportionate figures do not have any predictive value for the behaviour of any individual person. Furthermore, there is an element of the chicken or the egg - politicians and administrators may make a connection that misconstrues cause and effect. Such actions not only ignore the presumption of innocence but international research has shown that ethnic profiling is not demonstrably effective: it undermines the legitimacy of the government and alienates ethnic minorities.⁸⁹ Nonetheless, it is starting to be accepted that preventive checks on individuals, administrative court orders, measures taken by administrative bodies and policy-making may sometimes be based in part on race or ethnicity.

As a result of the trends outlined above, there is a risk that police, security, immigration and customs officials may exercise their general and special powers on the basis of generalisations or stereotypes to tackle pressing social problems such as terrorism or serious public nuisance. Even if they do so on the basis of acts of parliament and regulations, which are in themselves largely neutral and possess democratic legitimacy, such actions are in breach of national and international standards.

In principle, investigative and supervisory officials use their general powers – including stop and check, security searches, arrests, and accessing personal data – in good faith, in the interests of maintaining public order and enforcing the law, but in some cases, ethnicity or race plays a role. Certainly when it comes to the application of special administrative measures such as compulsory identification, preventive searches, and the use and linking of digital personal data, it is possible that police, security, immigration and customs officials will increasingly come to regard ethnic profiling as one way of achieving a higher objective – namely, that of reducing terrorism, radicalisation, crime and public nuisance.

⁸⁹ OSI (2009), *Profiling Minorities: A Study of Stop-and-Search Practices in Paris*, New York: Open Society Institute; OSI (2009), *Ethnic Profiling in the European Union: Pervasive, Ineffective and Discriminatory*, New York: Open Society Institute; OSI (2009), *Addressing Ethnic Profiling by the Police: A Report on the Strategies for Effective Police Stop and Search Project*, New York: Open Society Institute; OSI (2006), *I Can Stop and Search Whoever I Want: Ethnic Profiling by Police in Bulgaria, Hungary and Spain*, New York: Open Society Institute.