

MODULE 5: DIVERSITY, EQUALITY AND NON-DISCRIMINATION

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Diversity, equality and non-discrimination

Introduction

This module opens with a focus on diversity in contemporary European Union (EU) societies, providing a springboard to critical issues of equality and non-discrimination – concepts that are at the heart of modern human rights-based societies and human rights-based policing.

This module introduces a non-discrimination analytical scheme, which provides an aid for analysing police practice, including the use of police powers, from a non-discrimination perspective. Like the analytical schemes of Module 3 on respecting and protecting human rights, the non-discrimination analytical scheme helps participants ask the right questions, rather than trying to provide them with ready-made answers. The scheme will help participants determine whether discrimination has occurred.

The module presents two case studies and a step-by-step analysis of the relevant aspects of each case in order to help develop the relevant policing skills.

To complement the case studies, the module outlines a role play which not only helps participants to better understand the subtleties of discrimination issues, in the form of sex and age discrimination, but also has the advantage of showing the issue of discrimination in police structures. Police officers can themselves be victims of discrimination, and approaching the topic from this perspective offers a powerful way of understanding what being discriminated against feels like.

In order to be able to treat this topic in a professional way, it is crucial to have a sound understanding of what discrimination is and how the analytical process works. Such an understanding is provided in the Briefing notes for trainers. The module also pays special attention to 'discriminatory ethnic profiling', given its sensitive nature and relevance to the policing context.

Activity 1 version 1: Left hand/right hand¹

Training tip: Bringing diversity front and centre

This exercise is particularly recommended if you are not an experienced diversity trainer. It introduces diversity and its consequences in an interactive way. If skilfully moderated, the main questions relevant to diverse societies can be dealt with effectively, including their human rights dimensions.

Purpose:

Diverse societies are a reality in today's EU. As a consequence of increased global contacts and interactions in all areas, and in particular migration, increasingly diverse lifestyles and cultural practices coexist within each EU Member State. In this exercise, participants will explore issues around conscious and unconscious biases and their impact in a safe learning environment.

Objectives:

Knowledge

- increase knowledge of the reality of diverse societies
- enhance understanding of the reasons for change in societies and how this change occurs (e.g. migration histories, labour needs such as in the healthcare sector)
- understand how emerging societal changes such as migration (e.g. rights of irregular migrants employed illegally in the labour sector) or demographic changes (e.g. rights of the elderly) and human rights are linked
- gain an understanding of cultural impact, such as language and access to information in the respective languages in the context of procedures and fair trials
- have a basic understanding of the relevance of human rights for meeting the challenge of policing in diverse/multicultural societies

Attitude

- enhance empathy towards others, in particular towards minority groups
- understand diversity as a reality in today's societies and accept the need to deal with it constructively

Skills

- reflect on their own conscious and unconscious biases
- discuss questions of diversity, identity and policing in a police environment

Requirements:

- time: 35–40 minutes
- materials:
 - flip chart
 - optional: power point presentations and projector
- space: plenary room plus two working group rooms
- group size: maximum 20–25 persons

1. Gamal Turawa, Promoting Difference Consultant and Trainer at the Metropolitan Police Service, London, developed this exercise.



Activity 1 version 1 description: Left hand/right hand

- 1 Write an approximately 10-word statement on the flipchart/board. Then ask participants to copy out the statement.
- 2 Then ask them to write it again, directing them just before they begin to use the other hand (always say 'other hand' to value both left- and right-handed persons). Take silent note of participants' reaction to the task, which may include laughter, sarcastic comments and in some cases complete dismissal.
- 3 When this is complete, explore the task from the following four perspectives and record the answers on a flipchart. (about 5 minutes)
 - How did you feel when you first copied out the statement?
 - What were your thoughts when you were asked to switch hands?
 - How did it feel when you wrote the statement the second time?
 - What would it take to make you use your other hand?
- 4 Exercise debriefing: suggested question/areas for discussion:
 - Ask the group to imagine a society dominated by right handers where all laws, norms, policies and culture reflect their needs alone. Would that be healthy?
 - If there was a small group of left handers in that society, how would they feel?
 - And if they pay taxes and contribute to a society and don't feel they belong or are valued, how would that feel?
 - What could be done to make the left handers feel included in the right handers' society?
 - Who is in the left-hander group/s in your society/country and why?
 - What about the human rights of the left-handed group? What rights are particularly relevant? Are these rights always respected or appreciated?
 - What would have to happen to ensure that the right-handed group took the needs and rights of the left-handed group into consideration?
 - How could the balance between both groups be addressed?
 - Have you ever been a left-handed person in a group or society?
 - Where do your images of left-handed people come from?
 - Does the right-handed group benefit from the left-handed group in anyway? (such as culture, music, food or fashion)

- ⑤ Some key messages to convey:
 - Illuminate attitudes and barriers to change; using, in particular, the answers from the first part of the exercise.
 - Highlight that the need for change can be difficult to understand, in particular if people fear negative consequences of change.
 - Biases are not always conscious or malicious. Sometimes conditioned behaviour and thoughts can be difficult to alter.
 - To bring about change, we have laws, including human rights law, court cases, lobby groups, committed citizens and, in the extreme, uprisings, riots and deaths.
- ⑥ Bring into the discussion some of the more general topics mentioned in the Briefing notes:
 - Consequences of diversity for policing and police organisations
 - Human rights as applicable standards in this context



Activity 1 version 2: Multiple identities²

Training tip: Focusing on identity

This activity is recommended for experienced diversity trainers. It focuses on identity and its construction, inviting participants to disclose quite personal issues and speak about their emotions. It thus requires a sense of security and comfort within the group. If it works well, it can serve as a very powerful tool of self-reflection and promote self-awareness.

Purpose:

This exercise raises important questions regarding the (self-) images and identities of individuals and groups in society and as well as the basic rules of coexistence in diverse societies. Discrimination may stem from a single-minded focus on just one aspect of a person's identity; this exercise illustrates clearly that we all have multiple facets to our identities.

Objectives:

Knowledge

- enhance knowledge of the reality of diverse societies and the relevance of identities
- learn how identities are linked to human needs and human rights
- gain a basic understanding of the relevance of human rights for meeting the challenge of policing in diverse/multicultural societies

Attitude

- increase self-awareness regarding one's own identity and how it impacts the way we see the world
- increase empathy towards others, in particular towards people from minority groups
- understand diversity as a reality in today's societies and accept the need to deal with it constructively

Skills

- reflect on their own affiliations/identities and the emotional relevance of these
- discuss questions of diversity, identity and policing in a police environment

Requirements:

- time: 40–60 minutes
- materials:
 - Handout 1 with diagramme
 - optional: power point presentation and projector
- space: plenary room plus two working group rooms
- group size: maximum 15–20 persons

2. Adapted from the Anti-Defamation League, A World of Difference, Diversity Training.

Activity 1 version 2 description: Multiple identities

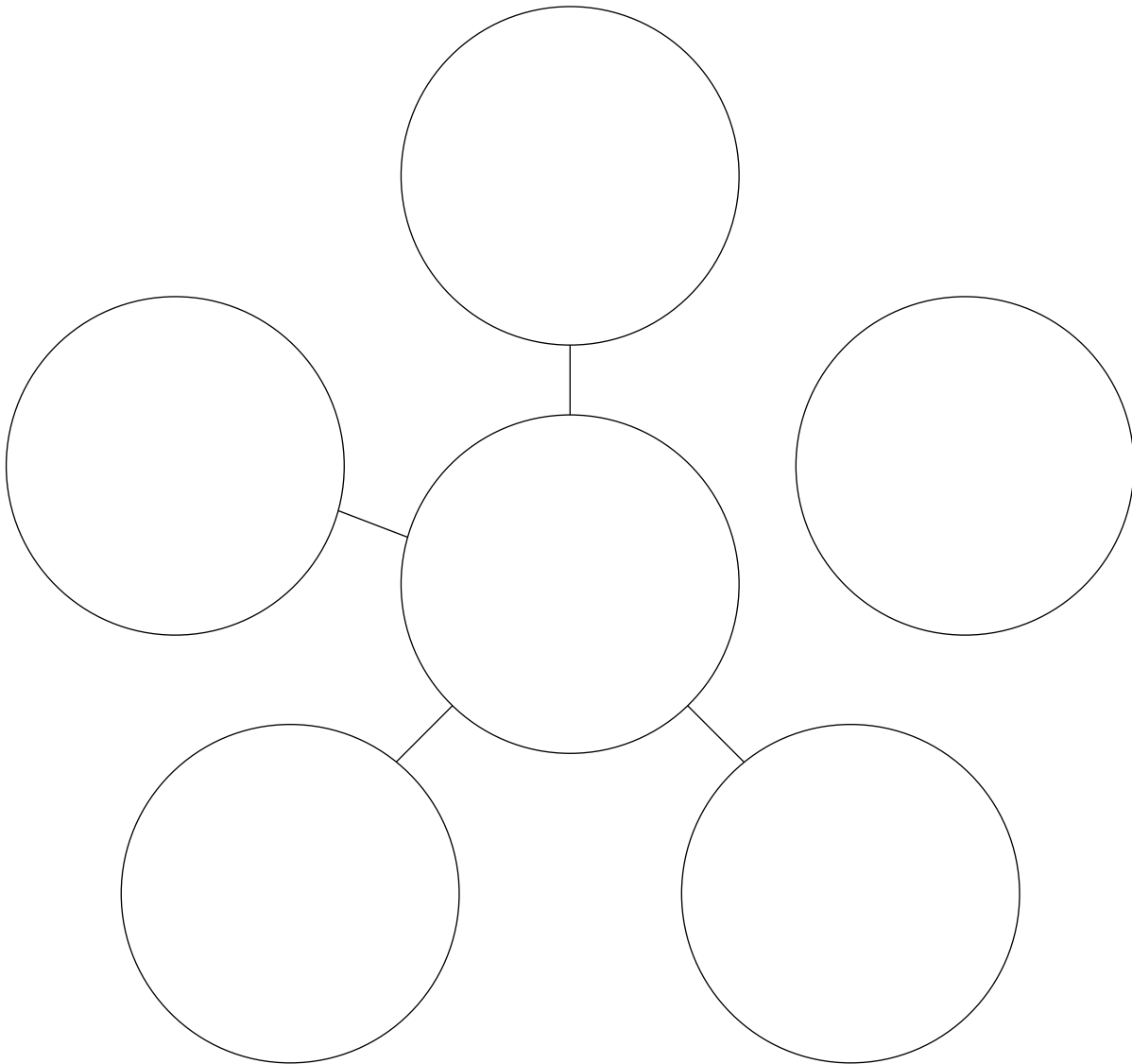
- 1 Distribute the handout. Mention that the responses should be quick and spontaneous. (about 5 minutes)
- 2 Ask them to underline the central group they currently identify with.
- 3 3-4 participants should form a group and discuss the results:
 - Was it difficult or easy to identify the five groups?
 - What does it feel like being a member of a group? Comforting? Challenging?
- 4 Read out different categories of identities and ask participants to stand up if they have noted down the category read out:

family	physical characteristics/ability
profession	political opinion/affiliation
sex	work as volunteer (NGOs)
sexual orientation	language
nationality/national origin	groups of friends
ethnic background	hobby/leisure time activity/sports
religion	social status/property
age	Any other group that was not mentioned? Which one?

- 5 Ask those standing which group mentioned was their central category. Those persons should continue standing, while the others sit back down.
- 6 Debrief the stand-up activity. Some relevant questions:
 - What was it like to stand up? Easy? Challenging?
 - What about standing up in a big group versus standing up alone?
 - Did you notice anything you want to share with the group?
- 7 Hold a general debriefing. Some relevant questions:
 - What was it like doing this exercise?
 - Was it difficult or challenging to identify the five groups?
 - Were there any new insights when doing this activity? Which ones?
 - What role do identities play in policing?
 - What is the relevance of identities in internal police structures?
 - Any other issue you would like to mention?
- 8 Bring into the discussion some of the more general topics mentioned in the Briefing notes:
 - Consequences of diversity for policing and police organisations
 - Human rights as applicable standards in this context



Handout – Activity 1 version 2: Multiple identities



Instructions:

1. Write your name in the central circle.
2. In the outer circles, write down five relevant social categories/ groups (in the broadest sense, e.g. group of chess players) you consider yourself to be part of or others see you as part of.
3. Underline the group you currently consider your central identification category.

Activity 2: Role play – job applications³

Purpose:

Given increased global contacts, interactions and, in particular, migration, increasingly diverse lifestyles and cultural practices coexist within each and every EU Member State. In this exercise participants will explore issues around discrimination in hiring.

Objectives:

Knowledge

- understand the fundamental importance and characteristics of the principle of equality and non-discrimination, as applicable to everyday situations
- understand the applicability of discrimination issues to internal structures
- understand the benefit of human rights and the principle of non-discrimination

Attitude

- feel what it is like when rights are denied or disrespected
- gain greater acceptance of others' human rights by acknowledging one's own rights;
- increase commitment to equality
- develop more understanding towards minority groups

Skills

- be able to apply discrimination analysis to organisational structures and practices

Requirements:

- time: 50–60 minutes
- materials:
 - Handout – role description
 - optional: power point presentations and projector
- space: plenary room plus two working group rooms
- group size: maximum 15–25 persons

3. Günther Berghofer, Austrian Police Commander, developed this activity.



Activity 2 description: Role play – job applications

- 1 Before the session starts choose two participants to assume the roles of applicants in a job interview. Assign them each a role, or give them those provided on the role play handout, and allow them some time to prepare their roles.

Training tip: Adapting role plays

Role play descriptions can be altered according to the challenges within the police organisation concerned (such as discrimination due to sexual orientation, ethnic/religious background or political commitment)

- 2 The two ‘applicants’ remain outside the classroom. The rest of the participants gather in class. Ask the participants to observe the scene and provide the following explanation: There is a vacancy in a police department and a number of police officers have applied for this post. An interview takes place in order to find the most suitable candidate.
- 3 Call in the first ‘applicant’ and role play the job application scenario. Start the interview in a fair manner, then gradually become discriminatory (depending on the casting of the roles, discriminate on such grounds as sex, age or sexual orientation). At the end of the interview ask the applicant to take a seat in the plenary.
- 4 Conduct the second interview in the same fashion.
 - a. Role play debriefing: Ask the ‘applicants’ about their impression of the interview. How did they feel when being discriminated against? What emotions did the discrimination bring forth? How could you respond in such situations?
 - b. Start a plenary discussion: How did the audience feel about these interviews? Would something like this be conceivable in reality? Why or why not? In which regard is this situation of relevance to human rights?
 - c. Take this experience as the starting point for further considerations of discrimination issues, on the basis of the Briefing notes.

Training tip: Conducting role plays with sensitivity

The interview must be conducted very carefully: You must be sensitive enough not to treat the ‘applicant’ too strongly in a discriminatory way so that he/she feels personally offended. On the other hand, you must be sufficiently explicit to make the inadequate behaviour visible.

Suggestions for the interviews:

Sex discrimination:

- Are you planning to have a family?
- When you are on maternity leave who do you think will take over your duties?

- After returning from maternity leave will you work part time only?
- Why should I pick a female police officer who will very soon be on leave?
- If you were in my shoes, wouldn't you do the same?
- I don't have anything against you personally, I think your record so far is good, but I honestly don't see that your private situation is in line with the job requirements.

Age discrimination:

- Older people are said not to be flexible enough to meet daily challenges. Why should I choose you over younger and perhaps more dynamic police officers?
- Why are you interested in this vacancy if you are already halfway towards retirement?
- Our police force is a modern and dynamic organisation. How would someone of your age fit into this picture?
- Why should I pick an older police officer who is less likely to quickly grasp the relevant requirements of this post?
- I don't have anything against you personally, I think your record so far is very good, but I honestly don't see your current age as suitable for the requirements of the post.



Handout – Activity 2: Role play – job applications

JOB APPLICATION 1

You are a young female police officer, aged 28. You have an excellent professional record and are applying for a vacant mid-management police post. You are married and plan to have children in the near future.

You may add additional details about your personal and professional background as long as you stick to the facts given above.

JOB APPLICATION 2

You are a police officer, aged 53. You have a good professional record and are applying for a vacant post in mid-management with the police. You have many years of experience as a police patrol officer. You are motivated to meet new challenges.

You may add additional details about your personal and professional background as long as you stick to the facts given above.

Activity 3: Human rights analysis – non-discrimination

Purpose:

The principle of equality and non-discrimination has a central place within the field of human rights. It is very relevant in the context of today's diverse European societies. A sound understanding of how to analyse situations from a non-discrimination perspective needs to be part of the core skills of police officers. Such an understanding will lead to more effective and efficient policing and help avoid bad practice and complaints.

Objectives:

Knowledge

- understand the fundamental importance and characteristics of the principle of equality and non-discrimination
- understand discriminatory ethnic profiling and its negative effects on minority groups and on effective policing

Attitude

- accept the need to deal with diversity and anti-discrimination issues constructively
- gain enhanced commitment to equality-sensitive policing
- deepen understanding of minorities

Skills

- be able to assess analytically when differential treatment is prohibited and when it is justified (referring to overall treatment)
- be able to distinguish discriminatory ethnic profiling from lawful police methods (referring specifically to profiling)

Requirements:

- time: 60–90 minutes
- materials:
 - . handouts
 - . optional: power point presentation and projector
- space: plenary room plus two working group rooms
- group setting: maximum 20–25 persons



Activity 3 description: **Human rights analysis – non-discrimination**

- ① Introduce the purpose and objectives of the activity.
- ② Distribute and briefly introduce the analytical scheme (Handout: Human rights analysis – non-discrimination), drawing on real-life situations of the participants or contributions relating to real-life situations from the facilitator. (about 15 minutes)
- ③ Divide participants into groups and distribute handouts with case studies. (about 25–to–35 minutes) Make sure that groups:
 - . have understood their task well;
 - . appoint a rapporteur to bring results back to the plenary.
- ④ Answer any questions that arise during group work.
- ⑤ Have the groups present their work in the plenary.
- ⑥ Hold a general discussion, reflecting on what has been learned.
- ⑦ Summarise major points and, if necessary, provide tailor-made input based on the Briefing notes, in particular regarding discriminatory ethnic profiling.

Handout – Activity 3: Human rights analysis – non-discrimination

Case study A: Turned back at checkpoint

Mr T, a State B citizen of minority ethnic origin, travelled with his driver by car from one province of State B to another. At a police checkpoint at the provincial borders, police stopped his car and turned Mr T back, while other cars passed the checkpoint without any problems. There are two different versions of the subsequent events.

Mr T's account: The officers of the Inspectorate for Road Safety refused him entry, referring to an oral instruction from the provincial authorities not to admit anyone of his ethnic origin.

The authorities' account: Mr T attempted to jump the queue of cars waiting to pass through the checkpoint and, after being refused priority treatment, turned back.

Discussion questions:

1. Is there any difference in how the police treat Mr T and the other drivers? If so, what does it consist of?
2. If there is a difference in treatment, is there also a link to any protected ground? Which one?
 - a. In Mr T's version
 - b. In the state's version
3. If there is differential treatment linked to a protected ground, can it be justified or is it discriminatory?



Handout – Activity 3: Human rights analysis – non-discrimination *(continued)*

Case study B: Identity check at train station

Ms W arrived at a railway station in Country E with her husband and son. After she got off the train, a police officer approached her and asked to see her National Identity Card. The police officer did not check the identity cards of anyone else who was on the platform at the time, including her husband and son. Ms W asked the police officer to explain the reasons for the identity check; the officer replied that he was obliged to check the identity of 'coloured people' like her, since many of them were illegal immigrants. Ms W's husband observed that that was racial discrimination, which the police officer denied, asserting that he had to carry out identity checks owing to the high number of illegal immigrants living in Country E. They asked the police officer to produce his own National Identity Card and police badge, whereupon he replied that if they did not change their attitude he would arrest them. He escorted them to an office in the railway station where he recorded their personal details, and at the same time showed them his identity badge. Ms W, who is originally from Country X, had acquired the nationality of Country E two decades earlier.

Discussion questions:

1. Is there any difference in treatment? If so, what does it consist of?
2. If there is a difference in treatment, is there also a link to any protected ground? Which one?
3. If there is differential treatment linked to a protected ground, can it be justified or is it discriminatory?

Handout – Activity 3: Human rights analysis – non-discrimination *(continued)*

Human rights analysis – non-discrimination

PART 1: EQUAL TREATMENT OR DIFFERENTIAL TREATMENT?

**1.1. Are there any indicators for differential treatment?
Are like situations treated in an unlike manner?
Are unlike situations treated alike?**

1.2. Is the differential treatment made on the basis of a protected ground?

Protected grounds: sex, 'race', colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership in a national minority, property, birth, disability, age or sexual orientation

PART 2: JUSTIFICATION OR DISCRIMINATION

2.1. Is the distinction based on reasonable and objective grounds?

- Does the differential treatment pursue a legitimate aim?
- Is it suitable? Is it necessary? Is it the least intrusive measure? Are there any alternatives?



Briefing notes

These Briefing notes provide useful information for the four activities included in this module, structured as follows:

1. Key concepts

- a. Diversity and identity
- b. Equality and non-discrimination: basic concepts
- c. Discrimination and profiling

2. Analytical scheme – Non-discrimination

- Activity 3: Case studies A and B

1. Key concepts

a. Diversity and identity

Diversity is currently a very important aspect of the EU. Demographic data suggest a clear trend towards even greater diversity. This reality confronts the EU with specific challenges as old parameters of social life that helped create social peace are seen to be vanishing, giving way to increased feelings of lack of control and insecurity. EU Member States must construct an integrative and inclusive society for all people living within their countries, adapting governmental structures as well as society at large to this reality.

Of particular relevance in this context is the question of (social) identity and how human beings see themselves and others. Identity is such a relevant concept because discrimination on various grounds, ethnic and racial violence, and many other human rights violations, are inextricably linked to identity issues.

From a psychological perspective, identity constitutes a basic human need. This 'sense of self' engenders a sense of belonging and functions as a source of self-esteem. "The need for a positive identity is the need to have a well-developed self and a positive conception of who we are and who we want to be".⁴

Identity needs are an important concept in peace and conflict research, and they form one of the four fundamental needs, along with survival, well-being and freedom.⁵ If one's identity is not valued, not recognised as legitimate or is considered inferior, then communication problems and societal conflicts arise, both in personal interactions and international relations. Identity-related societal conflict has, for example, been widespread in recent decades:

- The civil wars in former Yugoslavia in the 1990s had, in addition to broader power-related factors, a strong religious/ethnic dimension.
- Identity also played a major role in civil unrest in several EU Member States, for example in the Brixton riots in the United Kingdom.

"One of the central issues [regarding 'multiculturalism and freedom'] concerns how human beings are seen. Should they be categorized in terms of inherited traditions, particularly the inherited religion, of the community in which they happen to have been born, taking that unchosen identity to have automatic priority over other affiliations involving politics, profession, class, sex, language, literature, social involvements, and many other connections? Or should they be understood as persons with many affiliations and associations, whose relative priorities they must themselves choose (taking the responsibility that comes with reasoned choice)?"

Amartya Sen (2006), Identity and Violence, New York, London, Norton, p. 150

4. Staub, E. (2004), 'Basic Human Needs, Altruism, and Aggression', in Miller, A. (ed.), *The Social Psychology of Good and Evil*, New York, Guilford Press, p. 56.

5. Galtung, J. (2004), *Transcend and Transform, An Introduction to Conflict Work*, Boulder, Paradigm Publisher, p. 2.

Multiple identities

It is problematic to reduce a person's identity to only one or two elements, such as ethnic origin or religion, and to draw broad conclusions based on this characterisation – putting people, in other words, into an ethnic or religious 'box'. This reduction of people's identity to one main category is also visible in the broad categorisation of people by civilisation.⁶

A closer look reveals that we all have multiple affiliations or identities which together make up different parts of our identity. A person may be, for example, a French national, of Algerian ethnic background, a police officer, a triathlon athlete, single, religious and a good cook.

Both individual choice as well as social context is decisive in determining which affiliations/identities one regards as relevant, and how one ranks their importance. External factors and contexts can be particularly important for identity construction, in particular when these external elements form the basis of discriminatory treatment that frustrates recognition of an important part of one's identity.

Diversity and policing

The consequences of increasing diversity are far-reaching for state institutions as well as for society at large. The Rotterdam Charter is the first systematic effort to deal with diversity's impact on policing in the EU environment. The 1996 *Rotterdam Charter: Policing for a Multi-Ethnic Society*, an initiative of the Rotterdam Police, the Rotterdam City Council and Radar, an anti-discrimination organisation, contains specific guidelines on how to deal with this question.

"In this world of ethnic and cultural diversity, the role of the police is crucial. With their special responsibility for the maintenance of law and order in society, the police are essential guardians of our social framework. They are also the most visible of the agencies which perform a civic role. This has two major implications.

"First of all, the police must always act – and be seen to act – with unquestionable fairness towards all groups, and with clear respect for ethnic and cultural difference. Because of their high visibility, police must accept that they need to act as a 'role-model' for all public agencies in promoting fundamental rights.

"Secondly, if minorities are to overcome these threats [of being an object of oppressive and discriminatory treatment] and play their full part, the police must strive to use their special and unique powers in support of multi-ethnic ideals. They need to use the law to its fullest extent to combat acts motivated by racism and xenophobia. The police also need to work in a proactive manner to prevent such actions and to assist ethnic and social integration".

Robin Oakley (1997), an independent consultant on racial equality issues who helped develop the Rotterdam charter, in his Introduction for the Rotterdam Charter – policing in a multi-ethnic society, available at: [www.rotterdamcharter.nl/sites/charter/files/site49_20050603092740_Rotterdam_Charter_\(english\).pdf](http://www.rotterdamcharter.nl/sites/charter/files/site49_20050603092740_Rotterdam_Charter_(english).pdf)

An increasingly diverse society puts special demands on police organisations. To provide services that are equally applicable to, and accessible by, all citizens, a police organisation must adapt its:

- operational work, the quality of service and wider responsibilities to the needs of a continually changing population;
- organisational structures, including recruitment and retention, career paths and performance indicators, internal spaces for diversity (such as gay police associations);
- initial and in-service training and specific awareness activities

6. Sen, A. (2006), *Identity and Violence*, New York, London, Norton, pp. 40 and following.



as complementary measures (which cannot compensate for inaction at the operational and organisational level).

Training tip: Using Activities 1 and 2 to introduce key concepts

Activities 1 and 2 are useful tools for introducing participants to the module's key concepts if they are unfamiliar with them or need a refresher. The activities use easy-to-relate-to approaches to help participants understand the concepts. It is useful to have a good understanding of these basic ideas before tackling the more abstract issues found in Activities 3 and 4.

FRA ACTIVITY

Improving police-minority relations

Module 2 discussed the importance of a trusting relationship between the police and all parts of society, the key to which is treating everyone equally and in a non-discriminatory fashion. FRA research, the European Union Minorities and Discrimination Survey (EU-MIDIS, 2010), asked 23,500 members of immigrant and ethnic minority groups about their experiences of discrimination and criminal victimisation and uncovered an urgent need and ample room for improvement in police-minority relations. The research provided evidence about a number of issues including police stops, showing:

- the need to “improve minorities’ perceptions of the police as a public service that is able to address the needs of victims of crime and in particular the needs of victims of racist victimisation”.
- that “work needs to be done to address and improve minority relations” as a result of high rates of perceived discriminatory ethnic profiling.
- that persons from minority groups who perceive that police stopped them because of their ethnicity have a lower level of trust in the police. This has a damaging social effect, as it may undermine minorities’ trust in the police and in their assumptions of fair treatment. At the same time, it leads to underreporting of crimes by members of immigrant and ethnic minority groups.

For more information, see FRA (2010), EU MIDIS Data in Focus Report 4: Police Stops and Minorities, October 2010, pp. 14, 17, available at: <http://fra.europa.eu/en/publication/2010/eu-midis-data-focus-report-4-police-stops-and-minorities>

b. Equality and non-discrimination: basic concepts

Legal sources

The principle of equality and non-discrimination is of special importance in the field of human rights. The first two articles of the Universal Declaration of Human Rights (UDHR) stress the relevance of equality.

Universal Declaration of Human Rights

Article 1

All human beings are born free and equal in dignity and rights.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [...]

The basic idea of equality is easily understood: The simple fact that a person has specific characteristics, such as colour, sex or religion, must not lead to differential/less favourable treatment compared to others in a comparable situation. Applying this simple idea in concrete cases, however, is more difficult. As is the case with human rights in general, all relevant circumstances must be taken into account and weighed up against one another.

All human rights are to be guaranteed on a non-discriminatory basis. In legal language this so-called 'accessory' prohibition of discrimination is contained in all general human rights treaties, such as Article 14 of the ECHR. This means that the right to personal liberty and the right to privacy, for example, must not be interfered with in a discriminatory way, such as by systematically stopping and searching black people.

In addition, the right to equality and non-discrimination is guaranteed as a separate and independent right, guaranteeing more comprehensive protection against discrimination, such as in Articles 20 and 21 of the EU Charter of Fundamental Rights, Additional Protocol 12 of the ECHR and Article 26 of the UN International Covenant on Civil and Political Rights.

Specific legislation at the international and EU levels provides a detailed framework for fighting discrimination through a broad range of measures.

UN level:

- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- International Convention on the Elimination of All Forms of Discrimination against Women (1979)
- International Convention on the Rights of Persons with Disabilities (2006)

EU level:

- *Gender Equality Directive on Social Security*: Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security (19 December 1978)
- *Racial Equality Directive*: Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (29 June 2000)
- *Employment Equality Directive*: Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (27 November 2000)
- *Gender Equality Directive on Goods and Services*: Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services (13 December 2004)
- *Gender Equality Directive (Recast)*: Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (5 July 2006)
- *Framework Decision on Racism*: Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law

Protected grounds

The most comprehensive current list of protected grounds is found in Article 21 of the Charter of Fundamental Rights of the European Union. It contains the following grounds: "sex, race, colour, ethnic or



social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation”.

Obligations flowing from the principle of non-discrimination

States have the following obligations under non-discrimination law to:

- respect equality (equality before the law): this means that the executive and judicial powers must apply the law in a non-discriminatory manner.
- protect against discrimination at the legislative level (equal protection of the law).
- take administrative and policy measures for effective protection against discrimination, including:
 - . protecting against discrimination between private persons, such as access to employment and at the workplace, and access to and supply of goods and services, including housing. The EU Racial Equality Directive, for example, provides such protections.
 - . prohibiting by law any public incitement to violence or hatred directed against (groups of) persons on the basis of their ‘race’, colour, religion, descent or national or ethnic origin. The EU Framework Decision on Racism, for example, provides for such prohibitions.
 - . introducing special or specific measures to overcome past disadvantages, or to compensate for or prevent current disadvantages, and to accelerate progress towards equality of particular groups. Adopting and maintaining such ‘specific measures’ – which might come under the rubric of ‘positive discrimination’, ‘affirmative action’ or ‘preferential treatment’ – are explicitly permitted in human rights law and do not *per se* constitute discrimination. Adopting special measures to address long-standing discriminatory patterns affecting women is an example. However, they should be temporary in nature and must not go beyond what is necessary to address the inequality in question. The proportionality principle is again vital here.

In the policing context, the principle of equality before the law is of particular importance. Equally, the human rights obligation to take effective action to protect against discrimination, such as taking action against hate crime, is increasingly seen as crucial in the fight against discrimination. The Framework Decision on Racism of 2008 reflects the heightened awareness of the need to take positive action.

“The police shall carry out their tasks in a fair manner, guided, in particular, by the principles of impartiality and non-discrimination.”

European Code of Police Ethics, Council of Europe, Committee of Ministers Rec(2001)10

“The Court has established in its case-law that in order for an issue to arise under Article 14 [prohibition of discrimination on certain grounds] there must be a difference in the treatment of persons in relevantly similar situations [...] Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.”

ECtHR, Burden v. United Kingdom, No. 13378/05, 29 April 2008, paragraph 60

Discrimination definitions⁷

Discrimination can be seen as:

- a difference in treatment of persons who are in a similar situation;
- differential treatment is linked to a ‘protected’ ground;
- there is no objective and reasonable justification for this differential treatment.

EU law makes a distinction between direct and indirect discrimination:

Direct discrimination: “shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin”.

Indirect discrimination: “shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.

Source: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive), Article 2 (2), available at: <http://eur-lex.europa.eu/en/index.htm>

The European Court of Human Rights (ECtHR) defines direct discrimination as a difference in treatment of persons in similar situations, where the principles of legitimate aim and proportionality are not duly respected. Indirect discrimination focuses on: neutral rules, criteria or practices and then asks whether these have a negative effect on groups defined by a ‘protected ground’. This concept of indirect discrimination is now also found in the jurisprudence of the ECtHR.⁸

FRA ACTIVITY

Charting multiple discrimination

Multiple discrimination is discrimination based on more than one protected ground, such as being discriminated against for being a woman and for being Roma. Most EU courts deal with only one ground of discrimination per case of direct or indirect discrimination. Introducing the concept of ‘multiple discrimination’ into legislation could help better match the law to peoples’ experiences of discrimination, FRA research shows.

For more information on multiple discrimination, see the ‘Supplementary material’ section of this module and FRA (2013), Inequalities and multiple discrimination in access to and quality of healthcare, Luxembourg, Publications Office, available at: <http://fra.europa.eu/en/publication/2013/inequalities-discrimination-healthcare>

Justification/defence of less favourable treatment – different, yet similar approaches in ECHR and EU law

The following ECtHR quote contains a general defence or justification phrase for all types of discrimination: “if [the differential treatment] has no objective and reasonable justification”. In other words, differential treatment is discriminatory if there is no objective and reasonable justification for it. EU law, in contrast, applies this general defence approach only to indirect discrimination. For direct discrimination, specific and limited defences alone are to be taken into account.

Although formulated in different ways, the approaches are quite similar in substance: the specific defences under EU law can be placed

7. Based on FRA and Council of Europe (2011), *Handbook on European non-discrimination law*, Luxembourg, Publications Office of the European Union (Publications Office), pp. 21–55, available at: <http://fra.europa.eu/en/publication/2011/handbook-european-non-discrimination-law>.

8. ECtHR, *D.H. and Others v. Czech Republic*, No. 57325/05, 13 November 2007.

within the broader context of the general defences, as developed by the case law of the ECtHR. In other words, the specific defences under the non-discrimination directives are particular aspects of the general defence.⁹

Therefore, the following analytical scheme with regard to non-discrimination builds on the ‘general defence’ approach.

Training tip: Using Activities 3 and 4 to explore non-discrimination

Activity 3 and 4 are good tools for helping participants become familiar with the ideas of non-discrimination and fair treatment. It gives them a chance to see interactively examples of how discrimination can occur and how to address the issues related to this topic.

c. Discrimination and profiling

State institutions, including police, must respect equality when exercising their functions. A highly relevant issue in this regard is the question of police profiling along ethnic lines and other criteria.

What is profiling?

- At a general level, profiling involves categorising individuals according to their characteristics, whether these are ‘unchangeable’ (such as sex, age, ethnicity, height) or ‘changeable’ (such as habits, preferences and other elements of behaviour).
- Although in and of itself a valuable tool, profiling may lead to mistakes when connecting certain characteristics to certain preferences or behaviours.
- Social psychology research has shown people tend to apply stereotypes to ‘others’ and – on this basis – to jump to rapid and inaccurate conclusions.¹⁰

Profiling in police work

Profiling can be a legitimate tool for the apprehension of suspected offenders once a crime has been committed. Similarly, profiling can be based on educated assumptions derived from experience and training, with a focus on behaviour rather than racial, ethnic or religious characteristics. For instance, officers may work with profiles that instruct them to look for individuals who repeatedly visit particular locations, who meet and swap bags before separating, who behave erratically or nervously or who repeatedly make large purchases using only cash.

Profiling may become problematic when a protected ground, such as ethnicity, ‘race’ or religious affiliation, for example, is the sole or main reason to put an officer on alert. The officer may be instructed to target specific groups or may consider one of these attributes when taking action, but these types of protected grounds should not be the primary motivation for police action. Police action must be based on other factors, which are determined by national law. A starting point is usually based on determining ‘reasonable grounds’ to form a ‘suspicion’, such as those based on suspicious or unusual behaviour in a given context. Otherwise, actions taken through profiling based on specific protected grounds, like ethnicity, can be discriminatory.

What is discriminatory ethnic profiling?

Ethnic profiling has become a prominent topic since the terrorist attacks in New York, Pennsylvania, and Washington D.C. (2001), Madrid (2004) and London (2005). International organisations, such

9. For more on this, see FRA and Council of Europe (2011), *Handbook on European non-discrimination law*, Luxembourg, Publications Office, pp. 43 and following, available at: <http://fra.europa.eu/en/publication/2011/handbook-european-non-discrimination-law>.

10. Hogg, M. and Vaughan, G. (2011), *Social Psychology*, 6th ed., Essex, Pearson Education Limited, pp. 356 and following.

as the UN, the Council of Europe and the EU, as well as NGOs have raised concerns about it and, as a result, participants may be particularly curious about it. It is therefore useful to be familiar with this particular type of profiling.

The FRA publication on *Understanding and preventing discriminatory ethnic profiling: A guide* addresses this topic and contains the following terminology:

“Discriminatory ethnic profiling involves:

treating an individual less favourably than others who are in a similar situation (in other words ‘discriminating’), for example, by exercising police powers such as stop and search; where a decision to exercise police powers is based only or mainly on that person’s race, ethnicity or religion.”

Source: FRA (2010), *Understanding and preventing discriminatory ethnic profiling: A guide*, Publications Office, October 2010, p. 15, available at: <http://fra.europa.eu/en/publication/2012/understanding-and-preventing-discriminatory-ethnic-profiling-guide>

2. Analytical scheme – Non-discrimination¹¹

Let us now turn to the question of how to analyse whether a specific situation represents discrimination.

As is the case with the human rights analysis in Module 3, a two-step approach is helpful. The steps of the analysis differ from those encountered in Module 3 regarding the obligations to respect and protect. However, there are also similarities with regard to the principle of proportionality.

Part 1: Is there unequal treatment linked to a specific characteristic of a person?

Part 2: Are there any objective or reasonable grounds for this unequal treatment?

This analysis is geared toward completing Activity 4 and Handout 3. However, the information can be useful for all of the activities found in this module.

Analytical process

PART 1: EQUAL TREATMENT OR DIFFERENTIAL TREATMENT?

1.1. Are there any indicators for differential treatment?
Are like situations treated in an unlike manner?
Are unlike situations treated alike?

Answering these questions helps to uncover similarities and differences in treatment. Seeing how these attributes overlap and diverge makes it easier to focus the analysis on those elements that may be involved in discriminatory treatment.

1.2. Is the differential treatment made on the basis of a protected ground?

The protected grounds are: sex, ‘race’, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other

11. Based on Suntinger, W. (2005), *Menschenrechte und Polizei, Handbuch für TrainerInnen*, Vienna, Bundesministerium für Inneres, pp. 84-88.



opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

PART 2: JUSTIFIED DIFFERENTIAL TREATMENT OR DISCRIMINATION

If differential treatment linked to a protected ground is identified in Part 1 of the analysis, then Part 2 can be used to identify the reasoning behind differential treatment and whether that treatment is justified. According to international human rights law, a difference in treatment can only be justified if there are reasonable and objective reasons for it. Answering the following questions can help to determine this:

- All questions answered '**YES**': the differential treatment is justified.
- One or more questions answered '**NO**': the differential treatment is not justified and is considered discrimination.

2.1. Is the distinction based on reasonable and objective grounds?

- Does the differential treatment pursue a legitimate aim?
- Is it suitable? Is it necessary? Is it the least intrusive measure? Are there any alternatives?

Handout – Activity 3: Human rights analysis – non-discrimination

Case study A: Turned back at checkpoint

This analysis is based on the ECtHR judgment in *Timishev v. Russia* case, Nos. 55762/00 and 55974/00, from 13 December 2005.

This case is a good illustration of...

...the factors that turn differential treatment into discrimination

...that it is legitimate to treat people differently based on reasonable and objective grounds, such as behaviour, but that it is discriminatory to treat people differently based on protected grounds, such as ethnic origin

Analysis

PART 1: EQUAL TREATMENT OR DIFFERENTIAL TREATMENT?

- 1.1. Are there any indicators for differential treatment?
Are like situations treated in an unlike manner?
Are unlike situations treated alike?**

Mr T was refused entry into Ka-Ba, a province of State B, whereas other drivers – persons in the same situation – were allowed to cross the administrative border into Ka-Ba.

- 1.2. Is the differential treatment made on the basis of a protected ground?**

The question of whether the differential treatment was due to a protected ground is disputed in this case. Mr T linked the refusal of entry to his ethnic background, a protected ground with ethnic origin overlapping with 'race'. The authorities maintained that the difference in treatment was not linked to such a ground, but rather that Mr T's conduct provoked it.

The ECtHR gave credence to the applicant's version of events, which was corroborated by independent inquiries carried out by the prosecution and police authorities. (*Ibid.*, paragraph 44)

"Turning to the circumstances of the present case, the Court notes that the [Ka-Ba] senior police officer ordered traffic police officers not to admit ['Ethnicity X']. As, in the Government's submission, a person's ethnic origin is not listed anywhere in [State B] identity documents, the order barred the passage not only of any person who actually was of [X] ethnicity, but also of those who were merely perceived as belonging to that ethnic group. It has not been claimed that representatives of other ethnic groups were subject to similar restrictions [...] In the Court's view, this represented a clear inequality of treatment in the enjoyment of the right to liberty of movement on account of one's ethnic origin." (*Ibid.*, paragraph 54)



PART 2: JUSTIFIED DIFFERENTIAL TREATMENT OR DISCRIMINATION**2.1. Is the distinction based on reasonable and objective grounds?**

If it is established that there was differential treatment linked to a protected ground, it is up to the state to show that this difference can be justified. In other words, the state must show good reasons that can be considered reasonable and objective.

In this case, the *“Government did not offer any justification for the difference in treatment between persons of [X] and non-[X] ethnic origin in the enjoyment of their right to liberty of movement. In any event, the Court considers that no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.”* (Ibid., paragraph 58)

Accordingly, the difference in treatment was found to constitute discrimination.

Case study B: Identity check at train station

The analysis is based on the proceedings of the United Nations' Human Rights Committee in *Williams v. Spain*, No. 1493/2006, from 17 August 2009.

This case is a good illustration of...

...the main characteristics of prohibited ethnic profiling by police: acting only or mainly on a person's 'race', ethnicity or religion.[...]

...ethnic profiling as a violation of the human dignity of the persons concerned.

Additional case details

Ms W brought proceedings against her treatment by the police to the Country E courts, which found the selective identity check by the police to be legal, as it could be justified by the legitimate objective of controlling illegal immigration. Ms W filed a complaint with the UN Human Rights Committee which monitors implementation of the International Covenant on Civil and Political Rights. She argued that Country E had violated Article 26 of the ICCPR which prohibits discrimination.

Analysis

PART 1: EQUAL TREATMENT OR DIFFERENTIAL TREATMENT?

1.1. Are there any indicators for differential treatment? Are like situations treated in an unlike manner? Are unlike situations treated alike?

It was not disputed that Ms W was the only passenger the police officer stopped and whose identity he checked. She was thus treated differently from the other passengers who were not checked.

1.2. Is the differential treatment made on the basis of a protected ground?

What were the reasons for this differential treatment of Ms W?

In the domestic proceedings it became clear that the police officer stopped and checked her because of her skin colour. The police officer openly acknowledged this. This fact was not disputed before the domestic courts. What remained unclear was whether the police officer had acted on a written order. Even had this been the case, it would not have altered the key issue: the clear link between skin colour and the police officer's treatment of Ms W.

The Human Rights Committee said:

"In the present case, it can be inferred from the file that the identity check in question was of a general nature. The author alleges that no one else in her immediate vicinity had their identity checked and that the police officer who stopped and questioned her referred to her physical features in order to explain why she, and no one else in the vicinity, was being asked to show her identity papers. These claims were not refuted by the administrative and judicial bodies before which the author submitted her case, or in the proceedings before the Committee."

United Nations, Human Rights Committee, No. 1493/2006, Williams v. Spain, 17 August 2009, paragraph 7.4



“A State’s international responsibility for violating the International Covenant on Civil and Political Rights is to be judged objectively and may arise from actions or omissions by any of its organs of authority. In the present case, although there does not appear to have been any written order in [Country E] expressly requiring identity checks to be carried out by police officers based on the criterion of skin colour, it appears that the police officer considered himself to be acting in accordance with that criterion, a criterion considered justified by the courts which heard the case.” (Ibid., paragraph 7.3)

“In the circumstances, the Committee can only conclude that the author was singled out for the identity check in question solely on the ground of her racial characteristics and that these characteristics were the decisive factor in her being suspected of unlawful conduct.” (Ibid., paragraph 7.4)

PART 2: JUSTIFIED DIFFERENTIAL TREATMENT OR DISCRIMINATION

If differential treatment is indeed linked to a protected ground, there still remains the question of a possible justification for this differential treatment. According to international human rights law, a difference in treatment can only be justified if there are reasonable and objective reasons for it.

The Human Rights Committee: *“[...] recalls its jurisprudence that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”*

2.1. Is the distinction based on reasonable and objective grounds?

The Country E authorities argued that carrying out the identity check in this case was perfectly lawful and that it pursued the legitimate aim of controlling illegal immigration. If one accepts that this aim is legitimate, one must also accept, in their view, that *“police checks carried out for that purpose, with due respect and a necessary sense of proportion, may take into consideration certain physical or ethnic characteristics as being a reasonable indication of a person’s non-[Country E] origin.” (Ibid., paragraph 4.3)*

While the committee agreed with the government on the legitimacy of the purpose of controlling illegal immigration, it disagreed on the point of police action triggered solely by physical and ethnic characteristics.

“In the case under consideration, the Committee is of the view that the criteria of reasonableness and objectivity were not met. Moreover, the author has been offered no satisfaction, for example, by way of apology as a remedy.” (Ibid.)

This finding of a lack of reasonableness and objectivity was taken against the backdrop of the known effects of such treatment: *“To act otherwise [targeting only persons with specific characteristics] would not only negatively affect the dignity of the persons concerned, but would also contribute to the spread of xenophobic attitudes in the public at large and would run counter to an effective policy aimed at combating racial discrimination.” (Ibid., paragraph 7.2)*

Training tip: Taking participants concerns seriously

Some participants might object, saying police need to use external characteristics to do their job. They might wonder whether this ruling means that they cannot ever use skin colour or other physical features as relevant policing criteria. Others might ask where to draw the line between using external characteristics appropriately and prohibited profiling.

These comments clearly express why it is so difficult to address ethnic profiling in a police training setting as it is seen as challenging some of the most basic assumptions about what good policing is. And this might cause a feeling of insecurity to which participants react, often very emotionally.

It is therefore of crucial importance in a training situation to be able to step into the shoes of participants and to take their fears seriously.



Supplementary material

Protected grounds – ‘Classical’ and ‘new’ ones

In a historical European perspective, the principle of equality was primarily directed at privileges associated with certain groups within society, such as men, persons of higher birth status or persons with property. Constitutional law provisions in many EU Member States reflect this history.

These grounds can be seen as the ‘classical’ ones. The 20th century has witnessed an important expansion of the list of prohibited grounds of distinctions. The most comprehensive current list is found in Article 21 of the Charter of Fundamental Rights of the European Union which contains the following grounds: “sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation”. Disability, age, sexual orientation or genetic features, are not included explicitly in Article 14 of the ECHR, a text that was drafted in 1950. But one needs to remember that the lists of prohibited grounds in most human rights instruments are not exhaustive, a fact which enables their expansion through case law.

Why is this expansion of the list of grounds worth highlighting? It is an interesting reflection of two interrelated issues:

- social perceptions and values are in a constant flux and this is reflected in the dynamic nature of human rights development,
- social forces or movements have driven this expansion. They take up the human rights language to strengthen their demands: as the women’s rights movement did, and, more recently, the Lesbian, Gay, Bisexual and Transgender persons movement.

Training tip: Expanding the list

Police culture tends to be characterised by a certain conservative outlook when it comes to changing social perceptions. ‘Gut resistance’ is frequently encountered when discussing these issues. Experience shows that discussing this expanding list of grounds can be a useful way of showing the broader picture. It helps to deal with this difficult topic in a constructive way.

Multiple discrimination

People belonging to ‘visible’ minorities, such as Roma or people of African origin, are more likely than other minorities to suffer multiple discrimination – that is, discrimination on more than one ground. Socio-economic factors, such as low income, may also make people more vulnerable to multiple discrimination.

As mentioned in the Briefing notes, most EU courts deal with only one ground of discrimination per case. This means that victims of multiple discrimination find it harder to present their case in court and be compensated for all the different types of discrimination suffered. Introducing the concept of ‘multiple discrimination’ into legislation could help to better align the law with the complex experiences of discrimination people actually face.

FRA ACTIVITY

Finding evidence of discrimination

The FRA European Union Minorities and Discrimination Survey (EU-MIDIS, 2010), which asked 23,500 members of immigrant and ethnic minority groups about their experiences of discrimination and criminal victimisation, found that one in four ethnic minority or immigrant respondents in the EU felt discriminated against on two or more grounds during the 12 months preceding the survey. Their responses classified ethnic or immigrant origin as the most significant ground for experiencing discrimination. The grounds of discrimination surveyed were: ethnic or immigrant origin, sex, sexual orientation, age, religion or belief, disability and other reasons relevant to the respondent.

For more information, see FRA (2011), EU-MIDIS Data in Focus 5: Multiple Discrimination, Luxembourg, Publications Office, available at: <http://fra.europa.eu/en/publication/2011/eu-midis-data-focus-report-5-multiple-discrimination>

Profiling: definitions and potential effects

Ethnic profiling

FRA ACTIVITY

Avoiding discriminatory ethnic profiling

Discriminatory ethnic profiling is a practice that is generally underreported and little understood. The FRA publication *Understanding and preventing discriminatory ethnic profiling: a guide* looks at profiling as a practice in the context of law enforcement and explains how profiling that uses race, ethnicity or religion is considered discriminatory and therefore unlawful.

For more information, see FRA (2010), *Understanding and preventing discriminatory ethnic profiling: a guide*, Luxembourg, Publications Office, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1133-Guide-ethnic-profiling_EN.pdf

As mentioned in the Briefing notes, the FRA guide provides terminology for ‘ethnic profiling’. This is based on definitions and explanations provided by various bodies such as the:

- European Commission against Racism and Intolerance (ECRI) adopted a General Policy Recommendation No. 11 on *Combating racism and racial discrimination in policing* that defines ‘racial profiling’ as:¹⁴
“The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities”.
- ECtHR made the following statement on this issue in a leading judgment:
“[...] no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.”¹⁵
- UN Human Rights Committee has provided the following passage on this topic:
“[...] When the authorities carry out such [identity] checks, the physical or ethnic characteristics of the persons subjected thereto should not by

14. Council of Europe, European Commission against Racism and Intolerance (2007), *Combating racism and racial discrimination in policing*, CRI(2007)39, Strasbourg, Council of Europe, 29 June 2007.

15. ECtHR, *Timishev v. Russia*, Nos. 55762/00 and 55974/00, 13 December 2005, para. 58.

themselves be deemed indicative of their possible illegal presence in the country. Nor should they be carried out in such a way as to target only persons with specific physical or ethnic characteristics. To act otherwise would not only negatively affect the dignity of the persons concerned, but would also contribute to the spread of xenophobic attitudes in the public at large and would run counter to an effective policy aimed at combating racial discrimination.”¹⁶

Three types of police profiling:

- **Profiles based on specific intelligence regarding a suspected offender:** Profiling is most obviously a legitimate tool for the apprehension of suspected offenders once a crime has been committed. Using a profile that lists the characteristics belonging to specific suspects as a tool to assist in their apprehension is typically seen as a ‘common sense’ approach to policing. It is based on evidence gathered in relation to a particular event or chain of events.
- **Profiles not based on specific intelligence:** Profiling can also be a legitimate and useful tool in identifying individuals who may be committing an offence in a ‘hidden’ manner, such as concealing prohibited items, or are likely to commit an offence in future, such as being en route to a robbery. Profiles that are heavily based on types of behaviour are less likely to be found to discriminate on the basis of ‘race’, ethnicity and religion.
- **Profiling based on generalisations:** This may occur as a consequence of organisational policy, for example, where explicit written or oral instructions are issued to target particular groups. It may also occur at an operational level, where individual officers may apply stereotypes or generalisations based on ‘race’, ethnicity or religion. This may be consciously motivated by personal prejudices, or it may be that officers are not conscious of the degree to which they are applying generalisations and stereotypes.

The distinction between permissible profiling and discriminatory ethnic profiling

Where officers stop individuals and this choice is based solely or mainly on the individual’s ‘race’, ethnicity or religion, this amounts to direct discrimination and is unlawful. What is meant by ‘main reason’ is that the officer would not have stopped the individual were it not for their ‘race’, ethnicity or religion. Although it is acceptable for ‘race’, ethnicity or religion to be one of the factors that the officer takes into account, it cannot be the sole or main reason for the stop.¹⁷

An example from the FRA publication *Understanding and preventing discriminatory ethnic profiling: a guide*: “Following a series of brutal robberies in Austria’s capital city Vienna, allegedly committed by two dark-skinned male perpetrators, law enforcement officials were ordered to stop all black men seen in groups for identity checks. After a public outcry, the order was refocused on ‘black Africans, about 25 years old and 170 cm tall, slim figure, wearing [...] light down jackets’. In one day, the police stopped and searched 136 black men but none of them were found to have any connection with the robberies. Stopping individuals on the basis of the original suspect description is likely to be considered an example of direct discrimination, whereas using the second profile would probably not be. Obviously, the ethnicity of the suspect is important to

16. United Nations, Human Rights Committee, No. 1493/2006, *Williams v. Spain*, 17 August 2009, para. 7.2.
17. http://fra.europa.eu/sites/default/files/fra_uploads/1133-Guide-ethnic-profiling_EN.pdf.

identify them. However, it cannot be the only basis for law enforcement measures against a person. What emerges from the above cases is that police 'suspicion' should be raised by an individual's behaviour or similar factor that singles him or her out rather than by characteristics such as 'race', ethnicity or religion. (Ibid., p. 22)

Intentional discrimination – Discriminatory effect

In discussions about ethnic profiling you might encounter objections, contending that ethnic profiling cannot be discriminatory because there was no intent to discriminate. Two points should be made in response:

- International human rights law makes clear that discrimination covers not only cases in which a person is treated less favourably on purpose but also those situations where the less favourable treatment is simply the effect of certain actions, without any 'bad intention'.
- Equality-sensitive police must therefore consider how their counterpart perceives and experiences their actions.

Why discriminatory ethnic profiling is harmful and counter-productive¹⁸

- **Negative effects at individual level:** It is harmful to human dignity and may humiliate or even traumatise individuals. Broad profiling ignores that unique individuality of each of us. The law requires that each person be treated as an individual. While it may be true that Islamic extremist terrorists associated with the threat in question tend to be of Muslim and Asian appearance, this cannot give rise to an assumption that all those who are Muslim or are of Asian appearance are terrorists.
- **Negative effects at community level:** For similar reasons, discriminatory ethnic profiling can also be considered counter-productive. If action is taken on the basis of unlawful profiling, it can increase racial tensions, fuelling minority groups' resentment of the police and the majority population. The sum of these 'individual experiences may translate into negative group effects'. Where a racial, ethnic or religious profile is applied, the minority group may develop a negative perception of itself internally and, externally, the wider community may develop a negative perception of that community. The minority group may become a 'suspect community', which the public associates with criminality. This may result in additional negative consequences, such as increasing racial prejudice. Police may spend a disproportionate amount of resources supervising the minority group, which, in turn, is likely to lead to higher numbers of arrests, creating a self-fulfilling relationship between intensive policing and higher arrest rates.

Negative effects on effective policing: Two issues point to the negative effects of discriminatory ethnic profiling on police effectiveness:

- Ethnic profiling may lower the rate of detections and arrests of policing. Some evidence from research undertaken on drug couriers shows that removing 'race' or ethnicity from a general criminal profile, rather than a specific suspect profile, and requiring officers to look at specified non-ethnic criteria can help improve the efficiency or the rate of detections and arrests of policing while avoiding discriminatory treatment. Profiles are both predictable and evadable. Over-reliance on a stereotyping profile may actually increase the overall offending rate for that crime over time for two reasons:

18. Based on *Ibid.* pp. 37 and following.



- . First, groups that are not associated with certain crimes may be able to commit these crimes while police attention remains focused on another group. Thus, even as law enforcement may achieve a certain rate of detections and arrests among minorities, the offending rate in the majority population may increase precisely because its members are not targeted and thus are less likely to be caught.
- . Secondly, groups of people who are criminally targeted may live up to that stereotype – a process that has been explained by sociologists and criminologists via theories such as ‘labelling’.
- Ethnic profiling may lead to a lack of cooperation which may lower police efficacy: policing is profoundly dependent on the general public’s cooperation; if confidence and trust in the police is damaged, then cooperation becomes less likely. Law enforcement authorities rely on the public not only as witnesses for the investigation of crimes but also for the prevention and detection of incidents. Without public cooperation, law enforcement officers rarely identify or apprehend suspects, or obtain convictions. Research in the United Kingdom and the United States shows that when members of the public feel unhappy about encounters with the police this undermines public confidence in and cooperation with enforcement authorities. This is because individuals concerned may share their experience with family members, friends and associates.

